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A theory of international strategic judicial dialogue: Convergence and Divergence between the Court of Justice of the European Union and the European Court of Human Rights

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Summary

The proliferation of International Courts (ICs) with overlapping jurisdictions presents two potential outcomes for the international legal order: greater coherence and integration, or increased fragmentation. However, the direction in which International Law is evolving is diverse, with no single trend across all courts. This dissertation aims to explore the different patterns of convergence and divergence between overlapping International Courts, investigating the factors that contribute to these variations.

Convergence occurs when one IC enhances the degree of similarity of its case-law with that of the other Court. This similarity is evaluated based on the answer it provides to the legal question(s) it is confronted with, the tests and standards used, as well as the presence, absence, and use of cross-references to the case-law of the other Court. On the other hand, divergence means an evolution of the case-law towards dissimilarity with that of the other Court. As a result, what is conceptualised as 'convergence' is a dynamic leading to integration and coherence of regional and International Law; whereas 'divergence' contributes to their fragmentation.

The dissertation presents a theory of strategic convergence between ICs. It proposes that overlapping independent ICs are likely to exhibit divergences in their case-law, for a given issue area. Indeed, free of threat or constraints, they can focus on their preferred policy preferences (integration, human rights, conflict resolution or trade liberalisation, for example). But when faced with challenges to their authority, ICs can deploy various strategies, some of which seek to enhance the legitimacy of the Court in the eye of the actors at the origin of said challenge. Convergence with the overlapping IC, while potentially costly in terms of policy preferences, is a strong signal that there is coherence at the regional or international level, making it more reputationally costly for an actor in its constituency to maintain the challenge.

This theory is tested using qualitative methods to analyse the case-law of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). To explore sub-regional patterns of divergence and convergence, the research design includes three longitudinal

qualitative within-case studies of jurisprudential sagas: the right of companies to the protection of their business premises as part of their right to privacy (case-study 1); fundamental-rights based refusal to execute European Arrest Warrants (case-study 2); the right of transgender persons to Legal Gender Recognition (case-study 3). To ensure the comparability of what is conceived as 'convergence' and 'divergence' across case-studies, this project develops and uses a new index of Convergence and Divergence, which is used in each case-study to both confirm the pattern of convergence or divergence of each court, and disaggregate how it does so, based on the three components of 'convergence' and 'divergence' presented above. Each case-study, therefore, draws from diverse data sources, including 16 interviews conducted with current and former European Judges, Advocate Generals, Référendaires and other members of the services of each Court.

The case-studies confirm that each Court is keenly aware of the impact that the co-existence with its neighbour has, both as a potential source of threat and a potential source of legitimacy from which to draw. Both the CJEU and the ECtHR at some point, exhibit convergence or divergence with the other, in response to challenges from other actors – the clearer and more numerous the challenges, the stronger the convergence. The research reveals, inductively rather than deductively, that not all International Courts converge through identical means: while they both converge and diverge with each other at some point in time, the CJEU and the ECtHR do not necessarily do so in the same manner, with the ECtHR converging more substantially while the CJEU relies more on explicit cross references.

These findings present significant implications for our understanding of the contribution of ICs to the very structure of the international legal order. While it focuses on the European context, similar overlaps already exist in other fields of International Law and the Index can be adapted to explore convergence and divergence in other regional legal orders. Additionally, it invites further research on the impact of the pre-judicial phase and the strategic litigation opportunities. In a context where the international legal order is highly contested at the domestic level, non-state actors can make

use of ICs that are more and more open to them to gain agency in the fragmentation or coherence of the international legal order.

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INTRODUCTION
Who is afraid of international (judicial) fragmentation?

This "intermingling" of legal regimes is in fact going on all around us. The intellectual debate began with expressed concerns about fragmentation arising from the now many judicial institutions, and what the less reverent may have perceived as "judicial turf wars". But really, the issue is not only who decides*? and, if there are overlapping subject-matter jurisdictions,* whose view prevails*? It is also how does any given court decide which of the many norms now developed are applicable? What happens if different tribunals see things differently? Can these bodies function in isolation from each other? Are there good solutions to problems that may be engendered by the multiplying of institutions and the deepening of International Law?*[1]

Twenty-three years ago, then President of the International Court of Justice (ICJ) Gilbert Guillaume was echoing the voices of a growing number of academics, warning against the negative consequences that the unchecked multiplication of International Courts of the previous decades would bring. This multiplication came from the fast-paced judicialisation of International Relations since the end of the Second World War, picking up in intensity at the end of the Cold War[2]. More and more regimes and treaty systems across all areas of cooperation saw the adjunction of an International Court to solve disputes arising from this system. However, the lack of coordination between these regimes themselves resulted in a patchwork of international adjudicative bodies overlapping with each other, without formal coordination mechanisms to ensure coherence in their case-law.

In this uncharted legal and political territory, International Courts can exercise their agency through judicial decision-making. The power of a court is a double-edged sword, limited in their opportunity to fully make use of this agency, and yet granting to its decision a type of judicial legitimacy other

[1] Rosalyn Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench*' (2006) 55 International & Comparative Law Quarterly 791.
[2] Pierre-Marie Dupuy and Jorge E Viñuales, 'The Challenge of "Proliferation": An Anatomy of the Debate' [2013] The Oxford Handbook of International Adjudication; Gilbert Guillaume, 'The Proliferation of International Judicial Bodies : The Outlook for International Legal Order' (Speech to the Sixth Committee of the General Assembly of the United Nations, 27 October 2000).

actors cannot claim. But to this must be added the international nature of these jurisdictions, with the conundrum of being above States and yet dependent on them at the very least for the implementation of their rulings[3]. International judges now navigate a complex web of litigants, lawyers, States, domestic courts, civil society at large, and co-existence with judges of other International Courts, which can lead to them having different degrees of embeddedness[4].

The more traditional angle at which the embeddedness of an International Court is analysed is a *vertical* one: how enmeshed with domestic institutions and domestic legal orders the Court is, with definitions of embeddedness often linked to the *effectiveness* of said Court. As such, Keohane, Moravcsik and Slaughter early on defined embeddedness as 'the extent to which dispute resolution decisions can be implemented without governments having to take actions to do so'[5]. This also explains why much of the research explicitly or implicitly exploring the embeddedness of International Courts looked vertically, at national and subnational actors that the Courts interact with and create strong formal and informal relationships with[6]. A helpful illustration of this approach is provided by Helfer's 2014 review of the literature on 'embeddedness effectiveness', where he includes works on procedural links with domestic courts, or success in attracting specific litigants for the International Courts in Europe and Central America, and the struggles to develop similar embeddedness in African States[7].

But International Courts all exist in a common space: the International Legal Order, and this research therefore departs from the older definitions of embeddedness in two ways. First, it takes a

[3] Karen J Alter, 'Agents or Trustees? International Courts in Their Political Context' (2008) 14 European Journal of International Relations 33.
[4] Mikael Rask Madsen, Fernanda Nicola and Antoine Vauchez (eds), *Researching the European Court of Justice: Methodological Shifts and Law's Embeddedness* (Cambridge University Press 2022).
[5] Robert O Keohane, Andrew Moravcsik and Anne-Marie Slaughter, 'Legalized Dispute Resolution: Interstate and Transnational' (2000) 54 International Organization 457, 458.
[6] For a few illustrative examples: Alexandra Huneeus, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights' (2011) 44 Cornell International Law Journal 493; Jonas Tallberg, 'Paths to Compliance: Enforcement, Management, and the European Union' (2002) 56 International Organization 609; Tommaso Pavone, *The Ghostwriters: Lawyers and the Politics behind the Judicial Construction of Europe* (Cambridge University Press 2022); Abdelsalam A Mohamed, 'Individual and NGO Participation in Human Rights Litigation before the African Court of Human and Peoples' Rights: Lessons from the European and Inter-American Courts of Human Rights' (1999) 43 Journal of African Law 201.
[7] Laurence Helfer, 'The Effectiveness of International Adjudicators' in Cesare PR Romano, Karen J Alter and Yuval Shany (eds), *Oxford Handbook of International Adjudication* (OUP 2013).

broader, more sociological understanding of the concept[8], less focused on effectiveness and more on the *existence* of links, interactions, and processes – likely to lead indeed to more effectiveness and allies when seeking compliance with rulings, but without it being part of the definition. This approach is the one used by Gonzales-Ocantos and Sandholtz, who define embeddedness as 'how an IC has entrenched itself in other institutions or network (…) [E]mbeddedness shapes the interests of actors who are structurally connected to the Court, and hence their willingness to mobilize to protect those interests'[9]. 'Shaping' is neutral, rather than placing actors in the Court's network as necessarily willing to support it. The second difference is in this vertical outlook on embeddedness that Gonzales-Ocantos and Sandholtz kept in their research, despite it being absent from their definition. When they looked into six different sources of embeddedness, all were related to national or sub-national actors. Yet, their definition, which this research subscribes to, allows for the inclusion of *horizontal* embeddedness as well. International Courts can entrench themselves in other international institutions and other international networks, including other International Courts. This embeddedness is developed and then navigated, through practices which can be specific to (International) Courts, as they share a legal and political space, especially when overlapping with each other.

When they answer the same questions, talk to the same litigants, interpret the same treaties, trying to understand how *one* of them approaches the potential fragmentation of International Law is missing the forest for the trees. This is an inherently collective (although not necessarily coordinated) exercise for these courts, shaped by their reciprocal embeddedness with each other. When international judges talk about each other, *with* each other, *to* each other, we must change the angle at which we observe this complex web, to make the *horizontal* International Court/International Court relationship front and centre.

This dissertation adopts such a lens, to investigate how International Courts with overlapping spheres of competences, over the same States, co-exist in a common legal space. Are

[8] Madsen, Nicola and Vauchez (n 4).
[9] Ezequiel Gonzalez-Ocantos and Wayne Sandholtz, 'The Sources of Resilience of International Human Rights Courts: The Case of the Inter-American System' [2021] Law & Social Inquiry 1, 98.

they vectors of harmony and coherence in International Law, or on the contrary, do they contribute to its fragmentation? This work, therefore, attempts to offer a nuanced answer to Judge Higgins*: whose view prevails?* The solution is more complex than designating an International Court who, in this interconnected international legal system, would be better armed to lead all others with which it overlaps. Overlapping Courts bounce off each other's jurisprudence, seeking a balance between preferences and authority. Their coexistence ends up complexifying their vertical relationship with their constituencies and offer both new threats and new opportunities to bolster their own authority. As shown through the example of the Court of Justice of the European Union (CJEU)[10] and the European Court of Human Rights (ECtHR), rarely does a single Court unequivocally prevail, bringing another to its side. The outcome is sometimes a compromise on one side, sometimes a compromise on both sides, leading to coherence; and sometimes, there is no compromise: there is fragmentation. This dissertation explores which situations are conducive to the former, and which are conducive to the latter.

1. International Courts: actors of convergence and divergence in International Law

Why International Courts to begin with? This is question worth considering, before offering a theory centring these actors. Why *would* International Courts be the decision-makers to focus on, when, historically, the key players in international relations and International Law have been States? This research argues that the role that International Courts can play today in the fragmentation or coherence of International Law has been vastly underestimated. This section will explain why these courts are the actors which must have the attention of the scholarship today: not only because of what they are uniquely placed to accomplish, but because the upcoming years are likely to present

[10] The name of this Court changed from European Court of Justice (ECJ) to Court of Justice of the European Union (CJEU) with the Treaty of Maastricht (1992) creating the European Union. For simplicity and ease of reading, the dissertation will refer to it as the CJEU throughout, regardless of whether the events took place before or after 1992. Some interviewees, as well as pre-1992 scholarship used in this work, will still use the older name.

them - and other State and non-state actors - with unique challenge and opportunities to leverage the overlap the potential fragmentation or integration of International Law.

1.1. International Courts: multiplication, proliferation, or growth?

International Law is developed in legal anarchy. The lack of inherent order at the supranational level means that while jurists often speak of 'the' international legal order, it may be more appropriate to talk of a group of binding acts (treaties, conventions, customs, pacts, and variously named instruments) concluded by States themselves, all falling under the term of "International Law", but without forming a legal *order*[11]. They share the common attribute of sitting somewhere *above* the State, but as there is no unique, centralised source of International Law or any central International Law-making mechanism, the reality is closer to an international legal *dis*order.

This disorder results in the overlap of multiple international legal instruments over the head of every single State. Global, regional, bilateral instruments on trade, on the environment, on nuclear weapons, on investment, all overlap with national (and sometimes sub-national) laws. This situation is one of 'legal pluralism', whereby 'in any one geographical space defined by the conventional boundaries of a nation state, there is more than one "law" or legal system"'[12]. Legal pluralism can sometimes be understood broadly, to include the overlap of legal and non-legal norms (for example: religious rules, professional rules, and legal rules). But this research is focused on what Griffith called 'strong legal pluralism'[13], which 'reflects the empirical incommensurability of normative orders'[14], all giving normative injunctions without coordination built into them. While not necessarily *ant*agonistic, they are at least agnostic towards each other.

In this context, as will be further developed in Chapter 1, another interesting trend has been observed: the *rise* of International Courts. International Courts carry with them the legal disorder

[11] HLA Hart, *The Concept of Law* (Oxford University Press 1961).
[12] Margaret Davies, 'Legal Pluralism' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 805.
[13] John Griffiths, 'What Is Legal Pluralism?' (1986) 18 The Journal of Legal Pluralism and Unofficial Law 1.
[14] Davies, 'Legal Pluralism' (n 13) 818–819.

in which they were created: separately, individually, with their own goal and missions. Historically limited to inter-State adjudication[15] (for who else could have anything to do with International Law but States, at first?) their competences grew as International Law gained new legal ground to cover. Additionally, the second half of the 20th century, and especially its very last decade, saw an absolute explosion in the number of International Courts, from 6 permanent courts in 1989 to 24 in activity in 2019[16]. They became political courts, major actors of mega-politics[17], tasked with human rights protection, investment settlements, territorial disputes, and regional integration. Major international relations issues are brought to International Courts, tasked with offering solutions States could not provide alone, while staying in the boundaries that the same States set for them[18].

At this point, International Courts becomes highly idiosyncratic actors regarding the international legal *dis*order for two main reasons.

First, faced with legal pluralism, with the overlap not only of different rules of International Law, but also other International Courts, international judges are 'gap-fillers', or in the words of two interviewees,

> As a student you can say, "There's these arguments for solution A and they're these for B, and now I'm very exhausted and I wanna go home". You can do that, but then the grade will be accordingly quite substantially lower because we are supposed to reach a solution. But we, we don't have that option to go home with a bad grade. We have to give an answer to the national court and, and say "we believe it should be interpreted like this".[19]

> Oftentimes one finds that there are in, in a case that you'll have one side of the argument and the other side of the argument. So it's possible to go either way

[15] Mary Ellen O'Connell and Lenore VanderZee, 'The History of International Adjudication' in Cesare PR Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2013).
[16] Karen J Alter, Emilie M Hafner-Burton and Laurence R Helfer, 'Theorizing the Judicialization of International Relations' (2019) 63 International Studies Quarterly 449; Karen J Alter, 'The Multiplication of International Courts and Tribunals After the End of the Cold War' [2013] The Oxford Handbook of International Adjudication 64.
[17] Ran Hirschl, 'The Judicialization of Mega-Politics and the Rise of Political Courts' (2008) 11 Annual Review of Political Science 93.
[18] Alter, 'Agents or Trustees?' (n 3).
[19] Interview 4, CJEU Judge, 12/12/2022.

> reasonably, and the court has to make the decision. Somebody has to make decisions of that kind, because otherwise the whole system would seize up.[20]

Of course, there can be a strategic posture, adopted by the Court to deny any intent to become a politically influential actor: a plausible deniability of politicisation, presented as a Court's duty to prevent any denial of justice. Multiple interviewees recognised that, especially in the European Union system, Brussels-based institutions like the Council and the Commission 'kick (…) the ball from Brussels to Luxembourg'[21] – sometimes to then be unhappy with the result[22]. But even if this is the case, the result is empirically the same: International Courts can (decide to) be placed in a position where they must solve an issue involving overlapping international rules.

Relatedly, any answer which an International Court provides, as long as it retains sufficient legal finesse, can benefit from Burley and Mattli's famous 'mask and shield' character[23]. Governments' decisions are easily open to political criticism; but, because of their very nature as courts, using legal arguments and presenting any outcome reached as a legal certainty[24], International Courts are less open to such criticism. Moreover, especially for democratic States embracing the rule of law, going against the decisions of an International Court can have very high reputational cost. Courts are at least partially shielded from a kind of criticism which other actors must take into account. The more well-established, high-reputation the International Court, and the more rule-of-law-compliant and democratic the constituencies, the less the International Court is likely to find itself meaningfully challenged[25]. This means International Courts are actors with the opportunity to organise - or disorganise - the International Legal Order, but also an ability to exercise agency in an effective manner.

[20] Interview 7, CJEU Advocate General, 08/03/2022.
[21] Interview 4, CJEU Judge, 12/12/2022.
[22] Interview 3, Former CJEU AG, 07/12/2022.
[23] Anne-Marie Burley and Walter Mattli, 'Europe before the Court: A Political Theory of Legal Integration' (1993) 47 International Organization 41.
[24] Martin Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press 1986).
[25] Although of course, pushback can happen, but is a normal part of the day-to-day existence of a Court. Backlash is much more rare, as demonstrated by Mikael Rask Madsen, Pola Cebulak and Micha Wiebusch, 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts' (2018) 14 International Journal of Law in Context 197.

This becomes even more evident when focusing on the question of coherence in this potentially fragmented International Legal disorder. On principle, it can be up to States to adopt norms of International Law[26] to decide how to best avoid disorder, or simply make sure treaties and conventions never potentially contradict each other. However, this requires States to all agree on and adopt new instruments of International Law, an extremely heavy political process which can require a very large number of States to coordinate. This is a decision that is to be taken by unanimity, due to State sovereignty. In other words, when it comes to States trying to avoid fragmentation of International Law, every single State has a veto power. Meanwhile, International Courts decide their cases with a majority of their judges, not unanimity, of an already reduced quorum of participants. When it was on the ECtHR to decide how to organise this overlap, even in its most solemn Grand Chamber formation, a grand total of 9 people (half of the 17 judges) had to be in agreement for a solution to be adopted – and therefore a solution was found by the ECtHR 2006[27], on which will be explored at length in this dissertation.

For the same reason, it is rare for International Courts to be overruled – as this would also require unanimity. The exception to this is, of course, the European Union (EU), where in many areas, decisions are now taken by qualified majority. Nevertheless, consensus is still the *informal* rule at the Council of the EU, while the European Council still operates on unanimity rule. More than any other International Court, the CJEU could, in principle, be overruled, and yet empirical scholarship shows that this is a very unlikely scenario[28].

[26] Nico Krisch, Francesco Corradini and Lucy Lu Reimers, 'Order at the Margins: The Legal Construction of Interface Conflicts over Time' (2020) 9 Global Constitutionalism 343; Nico Krisch, 'The Open Architecture of European Human Rights Law' (2008) 71 The Modern Law Review 183; Tom Flynn, *The Triangular Constitution: Constitutional Pluralism in Ireland, the EU and the ECHR* (Hart Publishing 2018).
[27] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* (2006) 42 EHRR 1.
[28] Susanne K Schmidt, *The European Court of Justice and the Policy Process: The Shadow of Case Law* (Oxford University Press 2018); Michael Blauberger and Susanne K Schmidt, 'The European Court of Justice and Its Political Impact' (2017) 40 West European Politics 907; Alec Stone Sweet and Thomas L Brunell, 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community' (1998) 92 The American Political Science Review 63. Although this does not necessarily prevent the CJEU from *fearing* override, see Olof Larsson and Daniel Naurin, 'Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU' (2016) 70 International Organization 377.

1.2. Consequences: fragmentation, integration, or dialogue?

The combination of this understated and therefore underestimated role of International Courts with their proliferation gives them a new array of tools to use. For example, international judges can decide to explicitly, or implicitly, align themselves with another International Court by adopting similar rulings in comparable cases. They can decide to cite extensively, or simply cross reference quickly, another international jurisdiction; or they can decide to thoroughly analyse this external case-law in their own ruling. While they are independent from each other, and therefore not bound by each other's decisions, there can be advantages to relying on the precedent of another court, the way domestic courts sometimes do already[29]. International judges physically meet each other, organising visits, conferences, workshops, dialogues, and releasing joint statements. To an extent, the 'international judiciary' itself becomes a relevant sociological category according to an interviewee[30], as jurists specialise in being international *judges*, going from one court to the other, forming a coherent global sociological network with its own capital and habitus[31].

Yet it also means that Courts are on each other's 'turf'. When ask a specific legal question, 'whose view prevails' becomes, once again, the key issue for two Courts equally competent to answer it. International Courts are not neutral, impartial observers of the potential fragmentation of International Law. They are often born from this fragmentation – if not, there would not be overlap in two different courts in the first place. They have a specific mandate which shapes the Court's priorities, preferences, and objectives. International Courts are not naturally cooperative with one other, just as domestic and International Courts are not naturally cooperative. The higher the number of International Courts in existence, the higher the probability of differing interpretations of similar legal norms; but at the same time, Courts compete to be the one giving the authoritative answer as to what the 'right' interpretation is.

[29] David S Law, 'Judicial Comparativism and Judicial Diplomacy' (2015) 163 University of Pennsylania Law Review 927.
[30] Interview 10, Former ECtHR Judge, 14/03/2023. See also: Karen J Alter, 'The Evolving International Judiciary' (2011) 7 Annual Review of Law and Social Science 387.
[31] Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field Essay' (1986) 38 Hastings Law Journal 805.

Too much convergence with each other and Courts might accidentally be straying away from their mandate or become unattractive to their potential pool of litigants; or lose agency as they trap themselves in a deferential attitude towards another Court[32]; or be the target of criticism for not developing their own take on the question. Too much divergence and they lose the benefit of the apparent neutrality of law; or they enter a logic of competition with another court; or litigants and States play courts against each other. International Judges walk a very careful line between legitimacy and agency, using all tools at their disposal to continue the balancing act. This research provides the first causal theory explaining what makes them readjust where they stand on this line and how they readjust their position as a reflection of external pressure. What makes them decide to alter their current position towards more convergence? And on the other hand, why are they sometimes able to maintain a diverging position?

2. International Courts: a new theory for new actors

Having established that International Courts are uniquely placed to both face and handle the potential incoherence of International Law, a question they actually have a vested interest in, it is essential to narrow down exactly what the focus of this research will be. The variable of interest for this dissertation will be the 'distance' between two overlapping courts on a concrete issue area, asking: *What explains varying trends of convergence and divergence in the case-law between overlapping International Courts?* The goal will not be to take stock of the general relationship between two overlapping courts, or even to give an estimation of this degree of similarity or dissimilarity between two courts *overall*. Rather, the objective is to zoom in on specific issues and questions that have filled two overlapping courts' dockets and jurisprudences, and explain their behaviour towards each other at this scale.

[32] Frank Schimmelfennig, 'Competition and Community: Constitutional Courts, Rhetorical Action, and the Institutionalization of Human Rights in the European Union' (2006) 13 Journal of European Public Policy 1247.

2.1.Beyond the non-commensurability of International Courts

One of the first challenges in any research on International Courts, rather than one International Court, is the sheer diversity of these jurisdictions. Theorisation is an exercise in simplification, but the degree of simplification must never go so far as to lose its tether to empirical reality. One of the interviewees, who had been active in both the Courts that will be studied in this dissertation, emphatically stated:

> I think we completely misunderstand that the two courts are built differently and I believe that the academic writings do not appreciate fully that the competencies are simply different. (…)I mean, you know, do they really match? Do they match what the actual competencies legally speaking? Okay. So yes, there are extremely different competencies.[33]

This interviewee was worried about the validity of any theory that would somehow expect two International Courts to behave similarly, when they do not have the same competencies under their own respective systems. And there are other challenges in expecting different Courts to behave similarly. The compositions of the benches are different: some Courts have full time judges with academic backgrounds in their field of expertise; others have part time judges well versed in the practice of law. The procedure before different International Courts vary widely. They do not have similar resources. They do not have the same litigants. How is one to explain the behaviour of the International Tribunal on the Law of the Sea (ITLOS) and that of the African Court of Human and People's Rights (ACtHPR) with the same theory?

This dissertation will not contradict this assessment. The vast diversity of International Courts is, and probably always will be, an obstacle to a fully generalisable theory of the behaviour of International Courts if one does not factor in at least some of the idiosyncrasies of each individual court. However, the theory presented in this research is not similarly impeded by this diversity for two reasons.

[33] Interview 10, Former ECtHR Judge, 14/03/2023.

First, the theoretical framework will not seek to explain judicial behaviour in general. While it is a theory of strategic decision-making, it is interested less in the individual decisions that a Court takes, and more in the evolution of how a Court situates itself *vis-à-vis* another Court. The theory does not pretend to explain why the CJEU ruled in a specific way in cases involving human rights, nor does it hope to predict future behaviour. It only provides an explanation as to how the Court navigates, with each relevant case, and organises its co-existence with another Court.

Second, the theoretical framework includes, at its core, some individualising elements of each International Court, in particular what their preferred outcome on a given issue area is likely to be. This ensures that, while the general decision-making logics of each Court are comparable, they do not tend towards the same goal. The determination of these preferences is based on their place within their respective legal system, as well as the competences that they have been legally attributed and are bound by. The theory, therefore, does not expect Courts to behave the same way, reaching for the same goal; it embraces that different Courts do have different rules, different goals, and that there can, therefore, be irreconcilable differences between them.

2.2.Motivation: empirical assessment before normative solutions

There are many normative concerns and worries about the multiplication of International Courts, their rise in power and how they relate to each other, including whether they should converge or diverge with each other. However, an empirical assessment, taking stock of the issue, could benefit from this line of inquiry as a concrete starting point. As Llewellyn argued, 'no judgement of what ought to be done in the future with respect to any part of law can be effectively made without knowing objectively, as far as possible, what that part of law is now doing'.[34]As such, this research is particularly interested in what has been coined the (potential) fragmentation of International Law, and will therefore refer to Abrusci's recently updated definition of the international judicial fragmentation in particular: 'the situation where two judicial or quasi-judicial

[34] Karl N Llewellyn, 'Some Realism about Realism: Responding to Dean Pound' (1931) 44 Harvard Law Review 1222.

bodies, seized of the same or similar matter, issue contrasting judgements'.[35] One must note that while Abrusci's approach does not require the two judicial or quasi-judicial bodies to overlap, if this was indeed to occur for Courts in the situation of the CJEU and the ECtHR, this would only make the fragmentation even more drastic and noteworthy.[36] If there is no concrete fragmentation, or if it occurs to a very limited degree, then some of these concerns would be unwarranted. On the other hand, if some of the feared phenomena of fragmentation or divergence are indeed confirmed empirically, then understanding *why* International Courts behave this way, and which conditions are more conducive to the preferred outcome (either more convergence, or more divergence) will feed into policy decisions to reform (or not reform) specific rules.

From a practice-oriented perspective, understanding why overlapping Courts, open to the same litigants are more or less open to converging with each other, or when, can be of interest to litigants, whether State or non-state. On the background of the multiplication of International Courts, forum-shopping practices have appeared, whereby litigants look for the most favourable litigation avenue. In a similar vein, strategic litigants looking to use Courts to further policy changes would benefit from knowing how to potentially leverage the overlap between International Courts.

2.3.Goals and contributions

This research therefore has three goals, reflective of its inherent interdisciplinarity and goal of contributing to a still young field of empirical legal studies of CJEU-ECtHR interactions, with findings potentially contributing to our understanding of overlapping International Courts generally.

The first goal is methodological. As will be covered in the next two chapters, one of the key challenges of researching the potential fragmentation of International Law -or even European law- and probably one of the reasons why empirical research has been limited, is that there is no agreed-upon tool to measure it. There can be disagreement in whether there is or is not a divergence

[35] Elena Abrusci, *Judicial Convergence and Fragmentation in International Human Rights Law: The Regional Systems and the United Nations Human Rights Committee* (Cambridge University Press 2023) 28.
[36] While a more thorough definition of convergence and divergence between International Courts will be provided in later chapters, it must here be mentioned that Abrusci is more interested in the outcome than the reasoning when it comes to assessing whether there is a 'contrast'. However, this dissertation approaches the reasoning *and* the outcome as both potentially contributing to convergence or divergence.

or convergence or how significant of a divergence there is, because these challenges exist when comparing only two rulings at one point in time. This has led to rich, but often partial, accounts of the state of the relationship between the CJEU and the ECtHR's relationship and case-law. As will be shown in each case-study, the literature has often focused on high-saliency decisions marking a clear departure towards or away from each other for International Courts, overlooking the more mundane cases each Court has delivered which contribute just as much to consolidating any convergence or divergence. The focus of scholarly contributions is also usually circumscribed to a specific issue-area (asylum, competition, criminal law, digital privacy and so on), making it difficult to grasp what the state of potential fragmentation of the overall European Legal Order actually *is* at any given point in time. Following the evolution of the CJEU and the ECtHR over time and using multiple successive rulings to try to compare them with one another in order to identify a trend is an exercise which has not been undertaken yet. Therefore, one of the goals of this research is to fully develop an index that can be used to compare two rulings at one point in time, and can then be used repeatedly to reliably capture the divergence and convergence of these European Courts (and as will be explained, potentially other International Courts) over time.

Second, by reconceptualising the fragmentation/integration dichotomy as a multifaceted process leading to convergence and divergence between International Courts, this research will also go beyond partial accounts based on the mere existence of cross citations. It will avoid false negatives (whereby there are no explicit references to a Court, but an influence is clearly present) and false positives (whereby a reference to another Court is made, but does not bear substantial convergence for the International Courts' jurisprudence[37], or even when the external reference is used as a counter-example to be rebutted[38]). While this index will be used on three issue areas specifically for case studies involving the overlap between the CJEU and the ECtHR, the goal is to develop this

[37] So-called 'by-the-way' references by Jasper Krommendijk, 'The Use of ECtHR Case Law by the Court of Justice after Lisbon: The View of Luxembourg Insiders' (2015) 22 Maastricht Journal of European and Comparative Law 812; decorative citations by Erik Voeten, 'Borrowing and Nonborrowing among International Courts' (2010) 39 The Journal of Legal Studies 547; or even 'ornamental references' by Michal Bobek, *Comparative Reasoning in European Supreme Courts* (OUP Oxford 2013).
[38] Abrusci, *Judicial Convergence and Fragmentation in International Human Rights Law* (n 36) 107.

index in a way where minimum alteration will be required for it to be used in a similar manner for two other overlapping courts.

Finally, this thesis also makes a series of theoretical contributions.

First, this research adds to the current state of knowledge on strategic *legal reasoning* of European Courts. Indeed, International Courts are strategic actors, and one of the tools at their disposal to achieve their goals is the reasoning put forward to support their decision. A 'strategic reasoning', as opposed to a traditional legal reasoning, is one that is at least partially aimed at a goal that is not merely the sound legal resolution of the conflict presented to the Court – including reasoning *crafted to support* a specific outcome for said conflict. European Courts in particular are known strategic actors: the most famous model of EU integration by law hinges on the CJEU carefully deploying a reasoning that is purely legal and entirely devoid of any policy or politics (the so-called 'law as mask and shield')[39]; and the rise of the ECtHR as the most prominent Human Rights Court is attributed to its politically savvy judges in the first decades of its existence[40]. There is an acknowledgement the literature on domestic courts that the decision to refer to external/foreign sources is a strategic one, when national judges attempt to resist democratic backsliding, cover policy considerations or signal commitment to specific values to an international audience[41]. But while authors have noted that International Courts similarly engage in a selective dialogue with each other, their nature as International Courts demands specific attention, especially for overlapping Courts such as the CJEU and the ECtHR: these Courts, as explained previously, *share* a legal space, a constituency. This is a radically different situation from one national supreme court citing another country's supreme jurisdiction. How does their international nature and overlap

[39] Burley and Mattli (n 24).
[40] Mikael Rask Madsen, 'The Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence' in Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights between Law and Politics* (Oxford University Press 2011).
[41] Taavi Annus, 'Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Arguments Essay' (2004) 14 Duke Journal of Comparative & International Law 301; Eyal Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 American Journal of International Law 241; Brian Flanagan and Sinéad Ahern, 'Judicial Decision-Making and Translational Law: A Survey of Common Law Supreme Court Judges.' (2011) 60 International & Comparative Law Quarterly 1.

impact their willingness to cross-reference each other? Would International Courts be more or less willing to cross-reference each other? Would these external citations be a sign of cooperation, or of competition? Additionally, despite the now significant body of work noting *how much (or* how little) European (and International) Courts borrow from each other,[42] there is little research done more specifically on how these references are embedded in the reasoning that these Courts use in these cases. Are Courts actually altering their case-law in light of another Court's decisions, or are these references here as well ornamental? If both practices exist, then what makes a Court lean toward one more than toward another in a given ruling, or on a given issue-area?

Therefore, the goal is not simply to establish a causal theory showing what factors impact the behaviour of the CJEU and ECtHR regarding the potential fragmentation of European Law, but also understand how they react in regard to which why they are altering their reasoning. How are they changing their position through the only medium that they have full control over - their decisions?

3. The road ahead

The first chapter will provide a review of the literature across both law and political science. These will include different assessments of the fragmentation of International Law, as well as of the role that International Courts have played in this potential fragmentation thus far. It will also cover a few empirical works that have been exploring the state of International Law across different courts, many of them published only in the last few years. This will allow the rest of the chapter to fill in the gap that has been left by the literature, and present the new theory, which will be tested throughout the dissertation.

[42] Gerald Neuman, 'The External Reception of Inter-American Human Rights Law' [2011] Revue québécoise de droit international / Quebec Journal of International Law / Revista quebequense de derecho internacional 99; Voeten (n 38); Abrusci, *Judicial Convergence and Fragmentation in International Human Rights Law* (n 36) 103–124; Krommendijk (n 38); Erik Voeten, 'Why Cite External Legal Sources? Theory and Evidence from the European Court of Human Rights' in Clara Giorgetti and Mark A Pollack (eds), *Beyond Fragmentation: Cross-Fertilization, Cooperation, and Competition among International Courts* (Cambridge University Press 2022); Wayne Sandholtz, 'Human Rights Courts and Global Constitutionalism: Coordination through Judicial Dialogue' (2020) 10 Global Constitutionalism 1.

This theory argues that two overlapping International Courts with different mandates, leading to different sets of preferred outcomes regarding the interpretation of legal norms, are not likely to spontaneously converge with each other in the absence of external pressures to do so. However, the existence of another International Court sharing at least partially a constituency can also be a way for a given international jurisdiction to bolster the legitimacy of its own reasoning by borrowing legal arguments from that second court. The chapter sets out various hypotheses regarding when Courts are likely to adopt such behaviour, focusing on challenges to their authorities and the complexity of an International Court's relationship with another similar court as both a source of threat and a source of heightened legitimacy. The general expectation is that the more an International Court is challenged in its authority by the potential non-implementation of its rulings, the stronger the convergence with another overlapping International Court; therefore, three potential sources of challenges, which are the actors best placed to undermine or refuse the implementation of the Court's jurisprudence, have been identified: domestic courts, Governments, and the other overlapping International Court itself.

The second chapter then sets out the methodological road map of the dissertation. It justifies different methodological choices that have been made regarding the use of qualitative methods, the case selection strategy, and the operationalisation of different variables. The chapter also provides a substantive overview of the general evolution of the relationship between the ECHR and the CJEU since their creation as this has been a fairly complex process to which all case studies will often refer. This chapter ends by developing how the index was created, once again justifying specific choices that have been made, and laying down how it has been used with some illustrative examples drawn from the case studies that will follow.

The next three chapters are dedicated to the three within-case longitudinal studies on which the theory is deductively tested. These three case studies focus on the right to companies to have protection of their business premises in the name of privacy, the potential exceptions to the execution of a European Arrest Warrant based on fundamental right violations, and the right of transgender persons to legal gender recognitions. These three case studies cover multiple decades

and very diverse fields. These different case studies have seen both the CJEU and the ECtHR adopt various behaviours over the years *vis-à-vis* each other impacting the state of the fragmentation or integration of the European Legal Order. While the first two case studies find the strongest support for the theoretical framework, the third one explores what happens when some alternative explanations can be verified, and why, in particular, it finds some support for possible convergence without the expected level of threat, but only when the natural preferences of both Courts exceptionally coincide rather than differ.

The conclusion sums up deductive insights gained through the case studies, contrasting them with each other, as well as concluding on the alternative explanations which will be set out in Chapter 1. It also brings together the multiple inductive findings, which will be noted throughout the case studies in order to both refine the theoretical framework and shape out future research agenda for the field of empirical scholarship on International Courts.

CHAPTER 1
Overlapping International Courts and a theory of strategic judicial dialogue

'I would say (…) the legitimacy of a court as an institution comes from, not only defining the standards, but also following a rigorous judicial process.

Applying ***principles that are- that are well established*** *and which are well grounded in the common legal order of the European countries of the Council of Europe (…) A court (…) cannot be at the forefront. (…) And* ***predictability, stability****, being in line with a general trend within- within the countries is one of the factors that that has to be taken into account.*

It is quite often clarity. ***Clarity*** *of the judgment is also something that is brought up by our counterparts at the national level. And this is also something that we have to take into account when we apply the Convention, and the ability, the* ***effectiveness****, which is also the ability of the national system to accept and apply the standards that we are setting is also something quite important and something that we pay attention when, when we apply the Convention*[43]

'[We] go in on a Wednesday afternoon and we spend two hours discussing and refining that, that judgment, you know, [we are] so very conscious that (…) ultimately we're judged on the quality of our decisions, but also the quality of our reasoning. You know? [So] I would say the soundness and practicality and coherence of our decisions. But I think the quality of the reasoning is, is fundamental as well. And I think everyone in the court is, is conscious of that, you know?[44]

The debate on the fragmentation of International Law did not, for the longest time, account for International Courts. Instead, academic interest in these courts looked into their decision-making process, their rise (and sometimes fall), and their communications with each other. While initially prevalent in the context of the European Communities to explain the interactions between the CJEU and domestic courts, 'judicial dialogue' became a ubiquitous notion. International Courts, overlapping or not, did not ignore each other: they talked, formally and informally; judges met; they kept up with each other's case-law; they cited each other's rulings. But the phenomenon was such a sprawling and fuzzy one that 'dialogue' became a catch-all term for all interactions between

[43] Interview 16, ECtHR Judge, 20/04/2023.
[44] Interview 2, CJEU Judge, 02/12/2022.

International Courts, leading to confusion in the literature over its prevalence and its consequences. Meanwhile, the CJEU and ECtHR stood out as having the most intense *dialogue* between International Courts, regardless of how one defined it. But even then, how this knowledge fed back into the potential fragmentation of European law was subject to an implicit dissensus in the literature, torn between general assessment of a cooperative, integrated legal space, and that of a competitive, fragmented one on specific questions.

This project offers a new explanation to the role that International Courts can play in the potential fragmentation of International Law. It offers a nuanced take on how to conceptualise convergence and divergence when it comes to International Law, in particular international case-law. Rejecting a binary approach, this work embraces a spectrum of divergence-convergence, and its inherent embeddedness and evolution in time. Building on previous research on International Courts, this dissertation draws a model of strategic decision-making, framing international judges as rational but with imperfect information, constrained yet emancipated by the *law*, and engaged in both competitive and cooperative interactions with States and non-state actors.

According to the theoretical framework that will be presented, overlapping International Courts can be agents of both fragmentation and integration of International Law, depending on the pressure they are under regarding their own authority. While they are likely to diverge with each other under normal circumstances, partial or even full convergence can be a strategic choice for one or both Courts to rhetorically enhance their legal reasoning, and therefore their perceived legitimacy as legal, neutral, apolitical actors guided purely by International Law. However, borrowing from another International Court is a double-edged sword. While this does reinforce the apparent neutrality and soundness of legal reasoning and makes refusal to implement a Court's ruling more costly in terms of reputation for States, and therefore less likely to occur, the Court itself must compromise some of its policy preferences. By borrowing from a neighbouring Court purely rhetorically, without actually altering the outcome it reaches, an International Court would shatter the illusion of coherence of legal reasoning. In order to effectively benefit from the legitimacy of another Court, it must give some ground as well, leading to convergence with this other Court.

This is an expensive strategy for an International Court, and therefore one that it would only resort to when its authority, the proper implementation of its rulings, is truly challenged by the actors with the power to do so. This includes the ones traditionally identified by the literature, such as the Governments and the domestic courts under its jurisdiction. But this model adds a new factor: the very neighbouring Court that an International Court can borrow from. Indeed, this neighbouring, overlapping Court is also able to undermine the implementation of the first's rulings, as similar or even identical cases can be brought before both jurisdictions. Overlapping International Courts' interactions with each other are highly dynamic and complex: inherently drawn away from each other due to differences in their goals and mandate, they can both be sources of reciprocal challenges and reciprocal support; somehow both problem and solution. These layers of complexity move asynchronously: an International Court can be a pure source of challenge at one time, a pure source of support at another, and both simultaneously later on. This is the unique position that international adjudicative bodies, steeped in law, yet pressured by international and domestic politics, find themselves in.

1. Literature review: the multiplication of International Courts in a fragmented legal landscape

If one is to try and assess how International Courts have handled the multiplication of sources of International Law and the proliferation of other *loci* of international adjudication, two paths are available. The first is the literature looking at the process by which these Courts engage with each other; the second is the scholarship focused on what should be the outcome of this process, the fragmentation of integration of the international legal order. There is an inherent limit to what can be learnt through them individually, due to the lack of communication between both branches, and the fact that each covers a wider field of questioning: interactions between International Courts covers both legal, socio-legal, or even diplomatic interactions, and the work on the potential fragmentation of International Law approaches Courts as simply one of many potentially relevant actors, not always worth accounting for.

Yet, a remarkable sum of knowledge has been produced by both legal and socio-legal scholars over recent decades. This literature review will show that the near-apocalyptic prophecy of fragmentation, including judicial fragmentation, sometimes devised by the most worried branch of the literature did not come true, despite the multiplication of International Courts. However, no wide-scale, systemic divergences between these Courts does not mean full integration or convergence among them. Instead, authors have recently identified that fragmentation-or-integration is not only a spectrum, but might also happen at a smaller scale (local or regional rather than global), or be confined to specific issue areas of International Law. Moreover, it is a dynamic process, evolving in time, with the input of different actors constantly engaging in International Law-making, among which International Courts are to be found.

Regarding interactions between these International Courts, the scholarship has mostly framed their engagement with each as 'judicial dialogue', and ongoing sociological processes through which judges of (international) courts meet each other, refer to each other in their rulings without being compelled to, and overall are in formal and informal communication with each other. While anecdotal evidence is clearly present and backed by empirical data at least when it comes to cross-referencing between Courts, it is much more challenging to establish the scope or the consequences of this phenomenon. Specifically, the links between judicial dialogue, especially the cross-referencing aspects, and its consequence on judicial output and the convergence or divergence between International Courts citing or not citing each other has yet to be explored.

Already much can be learnt by simply bridging the gap between both branches of the literature, which sometimes overlap in the phenomenon they look into but with a different vocable – the literature on fragmentation being more the domain of legal scholars and lawyers, the one on judicial dialogue more influenced by socio-legal scholars and political scientists. But by bringing both these branches together, the gaps that they have left open will be identified, ensuring that the new theoretical framework later presented is both relevant to both scholarships and explains a phenomenon so far un(der)explored.

1.1.International Courts and Schrödinger's fragmentation of International Law

The fragmentation of International Law is a constant paradox in the International Law and global governance literature: somehow both pervasive and non-existent, an existential threat and academic bogeyman, a long-disproven prophecy and an upcoming challenge.

Part of this discordant choir of academic voice likely stems from a certain lack of clarity regarding the definition of 'fragmentation of International Law' in the first place. In 1953, 'conflicts of law-making treaties' was worrying scholars, as: '[a] conflict in the strict sense of direct incompatibility arises (…) where a party to the two treaties cannot simultaneously comply with its obligations under both treaties'[45], with the following illustration:

> A number of Conventions on the reduction of hours of work were adopted during the 1930's without revision of the basic Conventions on the regulation of hours of work adopted during the preceding decade. The scope of these new Conventions and the exceptions and methods of calculating hours for which they provide are not identical with those of the earlier Conventions. The Social Security (Minimum Standards) Convention, 1952, covers in a comprehensive manner branches of social security which are also regulated by earlier Conventions laying down more detailed rules in respect of particular branches of insurance.[46]

'Fragmentation' takes this original worry about specific conflicts between different treaties of International Law, and considers that these situations are likely to multiply, to the point where they become systemic and pervasive. It refers to a general phenomenon, both a process and the outcome of this process[47], whereby International Law has become so un-integrated that it

[45] C Wilfred Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 British Year Book of International Law 401, 426.
[46] Jenks (n 50) 419.
[47] Anne Peters, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization' (2017) 15 International Journal of Constitutional Law 671, 672.

> consists of erratic blocks and elements; different partial systems; and universal, regional, or even bilateral subsystems and sub-subsystems of different levels of legal integration. All these parts interacting with one another create what may paradoxically be called an "unorganized system " full of intra-systematic tensions, contradictions and frictions.[48]

Yet, the empirical reality of this fragmentation of International Law, pulling it apart through centrifugal force, has never reached consensus in the academic literature, whether legal, sociological or political, and neither has the role that International Courts would have if this was the background they were operating against.

1.1.1. On the (potential) fragmentation of International Law

'Is there a fragmentation of International Law?' has historically yielded three types of answer: *yes*, *no*, and *potentially*.

For the first strand of the literature, fragmentation is not even in question: it is occurring as a logical consequence of the lack of order in International Law. As mentioned above, as soon as 1953 scholars looked at the multiplication of treaties of International Law, they concluded that conflicts were bound to happen between them, at one point or another, without empirical research truly exploring the reality of this phenomenon, its scale, or more concrete factors causing or staving it off. The anxiety of fragmentation rose again with the end of the Cold War. Indeed, this context saw not only a rise in the number of multilateral treaties but was also marked by the end of a bilateral world order; instead, the 'New World Order' rose, and the growth of the new, associated international legal order became a centrifugal force that seemed pull this legal order in different directions.

Fragmentation appeared unavoidable in light of the polycentrism of this new world order[49] and lack of meta-rule States could agree on to ensure its coherence. While not necessarily empirically proven to be a systematic issue, the fragmented state of the international legal order became taken for

[48] Gerhard Hafner, 'Pros and Cons Ensuing from Fragmentation of International Law' (2004) 25 Michigan Journal of International Law 849, 850.
[49] Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2005).

granted, with a shift to the consequences of the fragmentation, or strategies to mitigate the damage[50]. This literature concludes, with a quasi-nihilistic tone, that

> any aspirations to a normative unity of global law are thus doomed from the outset. A meta-level at which conflicts might be solved is wholly elusive both in global law and in global society. Instead, we might expect intensified legal fragmentation.[51]

The main pushback against this first assessment was kickstarted through the 2006 International Law Commission report '*Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law'*[52],finding that

> the fragmentation of the substance of International Law – the object of this study - does not pose any very serious danger to legal practice. It is as normal a part of legal reasoning to link rules and rule-systems to each other, as it is to separate them and to establish relations of priority and hierarchy among them. The emergence of new branches of the law, novel types of treaties or clusters of treaties is a feature of the social complexity of a globalizing world. If lawyers feel unable to deal with this complexity, this is not a reflection of problems in their "tool-box" but in their imagination about how to use it.[53]

This branch of the literature is highly doubtful of the empirical reality of the fragmentation of the International Legal Order, qualifying it as 'postmodern anxiety'[54]. These scholarly voices embrace a more sceptical view regarding the very existence of the fragmentation of International Law as a relevant, or even existent, phenomenon. With a more empirical and descriptive approach, trying to survey multiple areas of International Law at their time of writing, these authors concluded that claims of a fragmented legal order had been largely exaggerated[55]. Contrary to expectations, they

[50] See for example: Hafner (n 53).
[51] Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 Michigan Journal of International Law 999, 1004.
[52] Report of the ILC, 'Conclusions of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (2006) A/61/10.
[53] Report of the ILC (n 57) para 222.
[54] Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 Leiden Journal of International Law 553.
[55] Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015).

found that convergence and coherence in various treaties and their enforcements outweighed any potential incoherence.

As an illustration, Miles looked into the regime of interim measures, orders which can be given by most International Courts to one or both parties, before the Court delivers its final decision on a dispute – and for which the question has long been whether they are as binding as the final ruling or not. Miles notes that:

> It may therefore be hypothesized that a uniform law of provisional measures is emerging or has emerged within International Law and that the tribunals discussed here are purporting to pronounce on its content. As such, the risk of substantive fragmentation in the event of inconsistent statements of law is evident.
>
> This risk, however, has not as yet materialized – at least insofar as the tribunals considered are concerned. An examination of the substantive preconditions for the award of provisional measures – largely unwritten within the relevant treaty provisions – demonstrates uniformity in the jurisprudence. All of the tribunals considered have incorporated requirements of, inter alia, limited purpose, urgency and irreparability and binding force into their jurisprudence, even where such requirements are not specifically forced upon them. All but one has adopted a further limitation of requiring proof of prima facie jurisdiction as a prerequisite to relief. Any deviations tend to be based on the exigencies of the constitutive instrument or the particular jurisdiction of the tribunal.[56]

A last strand of literature has a more in-between answer to the question of whether there is, or is not, a fragmentation problem: there may have *been* a fragmentation which had simply been 'solved' when concretely brought up, rather than being non-existent from the beginning. A second degree of nuance once we factor that conceptually, 'fragmentation' is a type of 'legal reductionism', which conceptually 'both oversimplifies the manner in which norm conflicts are understood, and which narrows the possible range of their solution'[57]. In other words:

[56] Cameron A Miles, 'The Influence of the International Court of Justice on the Law of Provisional Measures' in Eirik Bjorge and Mads Andenas (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015) 268.
[57] Fischer-Lescano and Teubner (n 56) 1002.

> [t]wo law-making treaties with a number of common parties may deal with the same subject from different points of view or be applicable in different circumstances, or one of the treaties may embody obligations more far-reaching than, but not inconsistent with, those of the other.[58]

Picking up on these nuances, Webb instead switched from a fragmentation/integration dichotomy to a continuum covering genuine integration, apparent integration, apparent fragmentation and genuine fragmentation, where the middle-ground situation is one where the fragmentation exists but has no empirical bearing, no consequences[59]. This last strand of literature is the most compelling, accepting the potential of fragmentation as a logical consequence of the multiplication of un-organised sources of International Law and international obligations, but empirically showing that the realisation of this phenomenon for treaties is at best non-existent, at worst inconsequent. This analysis, however, is fairly static: it holds true as long as said international obligations are stable enough, vague enough, and provide limited opportunity for any interested actor to activate the conflict[60]. In this context, International Courts have been identified by the literature as very particular and pertinent actors.

1.1.2. On the (potential) role of International Courts

The judicialisation of International Law and well-established proliferation of International Courts[61] means that treaties were no longer static instruments: their constant interpretation and re-interpretation by adjudicative bodies exponentially multiplied the opportunities for fragmentation (apparent or genuine). This rekindled scholarly fears about fragmentation, this time fuelled by International Courts:

> We can distinguish between fragmentation in lawmaking and fragmentation in law-application. As just mentioned, the political process of developing international (treaty) law results in fragmented law, either for lack of political agreement on inter-regime relations, or due to the hegemonic interest of

[58] Jenks (n 50) 426.
[59] Philippa Webb, *International Judicial Integration and Fragmentation* (Oxford University Press 2013) 59.
[60] Christian Kreuder-Sonnen and Michael Zürn, 'After Fragmentation: Norm Collisions, Interface Conflicts, and Conflict Management' (2020) 9 Global Constitutionalism 241.
[61] Alter, 'The Multiplication of International Courts and Tribunals After the End of the Cold War' (n 17); Dupuy and Viñuales (n 2).

> powerful lawmaking states (…) But even if fragmentation were avoided in lawmaking, the law could be (further) fragmented by the autonomous law-appliers" The adoption of overarching, multi-issue treaties (in the form of "linkages" of different subject matters, e.g., trade and labor) would not necessarily eliminate conflicts in law-application, because there are often no strict incompatibilities of different broad objectives (such as promoting free trade and promoting laborers' welfare), but rather merely tensions arising from the prioritization of different objectives. Actual conflicts normally only arise in the concrete case at hand, i.e., in law-application and dispute resolution.[62]

Two Presidents of the ICJ, in Gilbert Guillaume and Rosalyn Higgins each delivered a speech calling attention the consequences of the multiplication of International Courts on the fragmentation of International Law, respectively in 2000 and 2002. The latter wondered:

> Could the move from the half century monopoly of the International Court over these matters, through the easy and unproblematic co-existence of the three International Courts in Europe, to the present co-existence of larger numbers of judicial bodies, lead to contradictory jurisprudence, with all the negative implications that would imply? Even those of us who have perceived the new judicial map of the last 20 years as generally healthy, reflecting a desirable trend to resolve disputes by peaceful means, must recognize that the question is a real one. However understandable the reasons for the arrival of the new tribunals on the international scene, and however true it is that in large part they do what the International Court, because of its Statute and nature cannot do, the potential for divergent jurisprudence is real. is because, in these various judicial bodies, in the varying and different ways I have tried to describe, the very same legal question can come up before them in the application and interpretation of International Law.[63]

And yet, for a long time, there was a lack of empirical focus on International Courts and the role they could play in the fragmentation process. But once again, this was mostly dismissed as

[62] Peters (n 52) 676.

[63] Rosalyn Higgins Dbe Qc, 'The ICJ, the ECJ, and the Integrity of International Law1: 2002 Lord Slynn European Law Foundation Lecture 10 Apr 2002', *Themes and Theories* (Oxford University Press 2009). The three Courts referred to in this context are the CJEU, the ECtHR and the International Court of Justice (ICJ).

inconsequent, since Courts seemed to have, broadly speaking, the same interpretations of multiple doctrines of International Law such as State responsibility or exhaustion of domestic remedies[64].

A first transition into more thorough empirical research and the development of an analytical framework of empirical findings would reach a conclusion of a distinction between different types of fragmentation: substantive fragmentation, ('different regimes or disciplines laying claim to autonomy and being self-contained fragmented regime' [65]), institutional fragmentation (or simply institutional proliferation, in particular of Courts) and methodological fragmentation (where each regime has its own idiosyncrasies, which would lead to different rules of interpretations of treaties). Additionally, the second innovation of Adenas and Bjorge's project is its scale: the sheer number of contributions means the literature finally had a wider, bird's-eye view of the situation – although with a focus on the ICJ, rather than claims based on the latest relevant ruling to be published by an International Court. Contributors were able to analyse how the ICJ was able to overall interpret both humanitarian law and human rights law to avoid clashes between both fields; how the ECtHR relied on the ICJ's case-law when relevant; how common rules or standards existed across different Courts in the area of interim measures or State immunities.

However, while this was a significant empirical work seeking to identify broad trends, it did not have a clear method applied across all contributions. It has a definition of different forms of fragmentation, but not clear indicators on how to assess them. For example, when evaluating the convergence between the ECtHR's and the ICJ's case-law, there are not rules or explanation as to why or how the cases discussed have been selected[66]. In a sense, where the issue was before a lack of empirical analysis, or a hyperfocus on one specific case, this edited volume places now offers

[64] Jonathan Charney, 'Is International Law Threatened by Multiple International Tribunals ? (Volume 271)', *Collected Courses of the Hague Academy of International Law* (Brill 1998); Jonathan Charney, 'The Impact on the International Legal System of the Growth of International Courts and Tribunals Symposium Issue: The Proliferation of International Tribunals: Piecing Together the Puzzle' (1998) 31 New York University Journal of International Law and Politics 697.
[65] Andenas and Bjorge (n 60) 4.
[66] Dean Spielmann, 'Fragmentation or Partnership? The Reception of ICJ Case-Law by the European Court of Human Rights' in Eirik Bjorge and Mads Andenas (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015).

an extremely broad overview – it is highly convincing, but the lack of transparent methodology leaves it open to counter examples and counter arguments.

Lastly, more recent literature finds yet another conclusion regarding the presence or absence of substantive fragmentation, by conducting research at the scale of one issue-area at a time, rendering both rigorous methodology and in-depth analysis possible.

Elena Abrusci's 2023 *Judicial convergence and fragmentation in international human rights law* conducted an empirical analysis of the potential convergence/divergence between the UN Treaty Body systems and regional human rights systems, on very specific questions and standards of law. Trying to go beyond what appeared at first to be judicial convergence between the United Nations Human Rights Council (UNHCR), the ECtHR, the ACtHPR and associated African Commission on Human and People's Rights, AComHPR) and the Inter-American Court of Human Rights (IACtHR), she systematically reviewed the case-law and literature on twelve different rights, including the right to fair trial, the protection against torture and degrading/inhumane treatment, and freedom of expression, thought and religion. This is done by comparison of sufficiently similar cases presented before each court – although the lack of commensurability of cases sometimes limits the possibility to draw conclusions, which the author recognises. There is fragmentation for some specific rights/questions, and not necessarily others, with no general trend across the board[67]. Fragmentation through the decisions of International Courts is, therefore, possible but is an issue-by-issue question: while there is strong convergence regarding the right to life, the freedom of religion is characterised by a manifest fragmentation between the ECtHR and the UN Human Rights Council (UNHRC), despite the similarities in their textual basis:

> The phenomenon cannot be considered as a sporadic conflicting decision of the two bodies, but it is more a systematic divergent interpretation of the almost identical letter of Article 9 ECHR and Article18 ICCPR. Indeed, the text of the

[67] Elena Abrusci, 'Judicial Fragmentation on Indigenous Property Rights: Causes, Consequences and Solutions' (2017) 21 The International Journal of Human Rights 550.

> two articles could certainly not be invoked as a justification for such a conflicting application. [68]

On the other hand, when it comes to freedom of expression in general, for example,

> convergence dominates (…) in the practice of the five bodies under analysis. When called to assess restrictions to this right, despite the presence of controversial elements such as national security and public morals, all the bodies under analysis managed to maintain convergence of interpretation by wisely adopting broad definitions and flexibly applying the principles of judicial review, such as necessity and proportionality, or deferential tools.[69]

While Webb's contribution is a work of theory-building first and foremost, she was already identifying the type of fragmentation Abrusci would later hone in on. In particular, she noted that part of the regime of genocide, as decided on by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) clearly fragmented regarding the questions of intent[70], and of complicity of genocide[71], characterising them as 'genuine fragmentation'. Indeed, the ICTY adopted a 'purpose-based' approach to genocidal intent, which 'requires proof that the accused personally bore the criminal intent to destroy a national, ethnical, racial, or religious group as such; he or she consciously desired the prohibited acts committed to result in the destruction of the protected group'[72]. On the other hand, the ICTR adopted a 'knowledge-based' approach, where 'it must be proven that a genocidal plan characterized by the specific criminal intent existed, and that the accused participated. The perpetrator acted in furtherance of a campaign targeting members of a protected group and knew that the goal of the campaign was that group's destruction, in whole or in part'[73]; but a personal, individualised intent to carry out the victimised group's destruction is not necessary.

Empirical work, while limited, has therefore established that first, there is no overall trend of either judicial fragmentation or integration, but rather that any pertinent analysis would

[68] Abrusci, *Judicial Convergence and Fragmentation in International Human Rights Law* (n 36) 74.
[69] Abrusci, *Judicial Convergence and Fragmentation in International Human Rights Law* (n 36) 56.
[70] Webb (n 64) 25.
[71] Webb (n 64) 56.
[72] Webb (n 64) 25.
[73] Webb (n 64) 26.

disaggregate the data at issue-level. Second, that any variation identified is not binary, but instead fits on a scale going from integration to fragmentation, which can also be seen as convergence or divergence, between International Courts. However, one of the limits of this literature has been its focus on identifying fragmentation between the decisions of various International Courts as an *outcome*, rather than explaining the *process* which might lead to, or help avoiding, this outcome. This requires a switch from International Courts as objects of study to subjects, accounting for their agency and reasoning as international (judicial) decision-makers. This is particularly relevant as International Courts are becoming more and more aware of each other and each other's case-law.

1.2. Judicial dialogue as a catalyst for judicial convergence?

When trying to map the relationship between different co-existing International Courts, scholarly works have been focusing on judicial dialogue, rather than fragmentation. In a sense, fragmentation was the domain of traditional International Law scholars, when International Courts and their multiplication gathered more interest from International Relations academics, political scientists, and sociolegal scholars. As will be seen, this is highly regrettable: both strands of the literature are complementary, virtually exploring the same phenomenon, only with a difference in focus, and often in methods.

1.2.1. From fragmentation to dialogue and back again

Few concepts have known as massive a rise as that of 'judicial dialogue', both by its proponents and its sceptics, academics and practitioners alike. As 'fragmentation' before it, this probably stems from a definitional blurriness. What *is* judicial dialogue in different fields deserves to be carefully assessed, if one is to piece together where there is consensus, dissensus and finally, uncertainty.

The narrowest definitions see 'judicial dialogue' as cross-references between different Courts, independent from each other, whether between domestic and International Courts, International

Courts, or domestic courts[74]. A slightly thicker definition is provided by Allard and Garapon: 'the exchange of arguments, interpretations, and judicial solutions between magistrates, especially in decision-making, through the jurisprudence or relying on cooperation between jurisdictions'[75], going both beyond referencing to mention the exchange of solutions, although still limiting it to purely judicial activities.

Thick definitions of judicial dialogue make it a wholly socio-legal phenomenon, going much beyond the decision-making of courts, 'covering all forms of practices linking national and international judges alike, from formal and informal meetings to conferences to cross-citations'[76]. The widest is provided by Webb:

> judicial dialogue is, in a sense, a more flexible sense of horizontal precedent. It involves the citation, discussion, application, or interpretation oof case-law from other courts, but it can also encompass informal exchanges of information, inter-court conference and the transfer of personnel and parties among courts.[77]

1.2.2. Judicial dialogue(s) of International Courts: debates on driving factors

This wide range of conceptualisation then led to much controversy regarding whether this phenomenon was actually taking place, and if so: how much, among which actor, and with what consequences regarding fragmentation and coherence of International Law?

- Identity and network effects

How much raises the question of how often, exactly, does this dialogue take place? How normalised is the exchange of argument, formally and informally, through explicit cross-citation or

[74] Some authors have also approached judicial dialogue being exchanges of arguments formally and informally if *one* of the actors involved is a court. For example, Conant considers that the famous Cassis de Dijon case of the CJEU (1979) involved judicial dialogue between the CJEU and EU institutions Lisa J Conant, *Justice Contained: Law and Politics in the European Union* (Illustrated edition, Cornell University Press 2002).
[75] Original in French : « l'échange d'arguments, d'interprétations et de solutions juridiques entre magistrats, notamment dans le délibéré, a travers la jurisprudence ou par le biais de la coopération entre les juridictions »Julie Allard and Antoine Garapon, Les juges dans la mondialisation, La nouvelle révolution du droit (Seuil 2005) 77.
[76] Monica Claes and Maartje de Visser, 'Are You Networked Yet? On Dialogues in European Judicial Networks' (2012) 8 Utrecht Law Review 100.
[77] Webb (n 64).

implicit inspiration, in domestic and international judges? Claes and Visser do consider it to be an important aspect of international justice today[78], and Slaughter's liberal theory of judges in International Law and judicial dialogue similarly argues that this phenomenon is related to the existence of a 'Global Community of courts and law', especially in human rights, where judges in democratic systems consistently take inspiration from each other[79]. According to Slaughter, this naturally leads to more coherence and convergence in Courts' rulings.

While this is not an absolute – disagreements between Courts are part of the process – the outcome is a more integrated International Law, as judges are broadly driven by the same motivation: 'respect for their legitimacy, care and quality by judges worldwide engaged in a common enterprise of protecting human rights'[80]. This assessment of both the use and goal of these formal and informal interactions between judges of different jurisdictions is reflected in the practice of US the Supreme Court Justices O'Connor and Bader Ginsburg, finding that foreign case-law can be a source of inspiration to tackle challenges that foreign courts have already faced.

- Institutional factors

But other authors have found that judicial dialogue might not be as wide and common phenomenon as Slaughter initially argued. Recently, Abrusci found that the not all Courts, and in each Courts, not all judges, engage in this dialogue with the same intensity. She finds that it might be a matter of judges' education: some Courts like the ECtHR have judges who stayed within their own continent and did not study abroad, making them less likely to actively search judicial dialogue and converge, leading to fragmentation. On the other hand, judges of the Inter-American Court of Human Rights have often studied abroad, outside of their continent, and therefore are much more

[78] Claes and Visser (n 81).
[79] Keohane, Moravcsik and Slaughter (n 6); Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 University of Richmond Law Review 99; Anne-Marie Slaughter, 'Court to Court' (1998) 92 American Journal of International Law 708; Slaughter, *A New World Order* (n 54).
[80] Slaughter, *A New World Order* (n 54) 81.

likely to engage with other Courts. She does find, however, that when this dialogue does take place, the natural outcome is indeed convergence[81].

Webb's contribution lies in an attempt to *explain* 'decisional fragmentation', defined as a situation where 'two courts seised with the same issue (legal or factual) render contradictory decisions'[82]. She inductively deduces which factors can lead to this situation, and which ones could mitigate or even prevent it. The first category are institutional factors: ad hoc courts are more likely to cause fragmentation compared to permanent courts, as they reason in a vacuum. A unified treaty, on the other hand, is not a sufficient to lead to integration/coherence. Then comes the institutional context itself: the 'relationship between the court and other international organizations or bodies (such as the UN) as well as the relationship between court and states or individuals, expressed through its jurisdictional arrangements'[83]: in other words, whether the links with other decisions makers and other courts are properly organised and rationalised, and who are the litigants that can (potentially easily) come before the court. Webb also identifies the procedural rules of the courts, and their mandates, their goals, their abilities, as potentially leading to fragmentation, in particular when a court oversteps its functions.

- Strategic decision-making?

But other authors have been much more doubtful about whether this dialogue is actually happening at all, and how meaningful it is to judicial decision-making. Strikingly, Law and Chang, for example, have found that higher domestic courts citing either foreign courts or International Courts is still a very minor phenomenon with little impact on the actual decision-making of said Court. Focusing their empirical research on the Taiwanese Constitutional Court, they combined a statistical analysis of citation of foreign law by the Court with interviews with court personal. They acknowledged that the type of training received by sitting judges is also likely to impact how willing they are to engage in comparative research, explaining why the US Supreme Court refers to foreign

[81] Elena Abrusci, 'The European Court of Human Rights and Its Contribution to Judicial Fragmentation in International Human Rights Law' (2019) 113 Proceedings of the ASIL Annual Meeting 92.
[82] Webb (n 64) 6.
[83] Webb (n 64) 159.

decisions less often than, indeed, the Taiwanese Constitutional Court[84].Their conclusion is, therefore, that rather than dialogue, there is simply comparative research, done in a limited manner, by some courts, with limited impact – but genuine comparative research by benches willing to engage in it, nonetheless. Additionally, Law finds that there can be a component of judicial diplomacy to this practice, a way for one Court to signal its willingness to engage with others, its independence, or its ambition to promote the rule of law – addressing a foreign audience rather than the ones under its jurisdiction[85].

A neighbouring branch of the literature has reached an even starker conclusion, questioning whether there is any method at all in the way judges engage with foreign decisions. Looking specifically at the case of the CJEU, Krommedijk conducted interviews with twenty people (former and sitting judges, AGs, and Référendaires) to probe at the reasons and ways they engage with the case-law of the ECtHR. He found that there is no specific methodology used across judges to decide whether and how to refer to – or not refer to – ECtHR rulings[86], especially with the addition of the Charter of Fundamental Right to the roster of constitutional text the CJEU can refer to, gaining its own 'bill of rights'[87]. Krommedijk finds that citation of ECtHR cases by the CJEU can be what he coins 'by-the-way references', similar to what others have called 'ornamental references'[88]. That is not to say that these ornamental references do not matter, especially once it comes to convince the audience of the quality of the ruling.

Yet a step further is the idea that any judicial dialogue is, in and of itself, selective and therefore strategic. This calls back to US Justices Scalia and Thomas, who not only questioned the legitimacy of incorporating foreign influence into domestic constitutional decision-making[89], but also found that references to foreign decisions are due to insufficient support for the desired outcome *in* the

[84] David Law and Wen-Chen Chang, 'The Limits of Global Judicial Dialogue' (2011) 86 Washington Law Review 523.
[85] Law (n 30).
[86] Krommendijk (n 38).
[87] Koen Lenaerts and Eddy De Smijter, 'A Bill of Rights for the European Union' (2001) 38 Common Market Law Review.
[88] Bobek (n 38).
[89] US v Prinz dissent

domestic legal order[90]. On the example of the abortion cases before the US Supreme Court, Scalia famously criticised the cherry-picking which accompanied references to foreign decisions:

> [States that] the U.N. classified in 2001 as not allowing abortion on demand were the United Kingdom, Finland, Iceland, India, Ireland, Japan, Luxemburg, Mexico, New Zealand, Portugal, Spain, Switzerland and virtually all of South America. But the Court has generally ignored the foreign law in its abortion cases. *Casey* does not mention it at all. *Roe* discusses only modern British law, which in any event is more restrictive than what *Roe* held. I will become a believer in the ingenuousness, […] of the Court's newfound respect for the wisdom of foreign minds when it applies that wisdom in the abortion cases.[91]

For him, it is not that a judge is a genuine legal comparatist[92] looking outward to find an appropriate solution, but rather that the judge has a particular outcome in mind to begin with and seeks a foreign judicial decision to grant it weight and legitimacy.

1.2.3. Tracing the shape of the gap: what is left unanswered

The previous review of the existing literature leads to the following conclusions, which will be then taken for granted to build the next chapters. First, the fragmentation/integration of International Law is a spectrum, rather than a binary. It is also disaggregated by areas of International Law, rather than being one sweeping movement: some areas have seen more fragmentation, others more integration. Second, International Courts are in a situation where they *can*, potentially, alter the fragmentation or integration of International Law, through their case-law. Like their domestic counterparts, International Courts have the *possibility* to cross-reference other foreign and international case-law. The phenomenon is empirically verified, but some Courts are clearly more likely to do so than others. This means International Courts can influence where they place their judicial outcome on this fragmentation-integration, or divergence-convergence continuum. Third, International Courts can engage with each other's case-law without making it

[90] Knight v Florida 1999
[91] Hendrianto Stefanus, 'On the Legacy of Justice Scalia in Dobbs: The Lack of Comparative Analysis' (I.CONnect, 3 August 2022) <http://www.iconnectblog.com/on-the-legacy-of-justice-scalia-in-dobbs-the-lack-of-comparative-analysis/> accessed 10 April 2023.
[92] Basil Markesinis and Jorg Fedtke, 'The Judge as Comparatist' (2005) 80 Tulane Law Review 11; Christos L Rozakis, 'The European Judge as Comparatist' (2005) 80 Tulane Law Review 257.

explicit in the final decision; and there are *different ways* a Court can make use of foreign case-law, from having a purely ornamental reference to genuinely engaging with its legal reasoning and even altering its own case-law to align with it.

However, the previous section has also shown that there are areas with contradictory conclusions, which means that the following questions remain without any certain answer:

First, *how much* are International Courts referencing each other, and why do they sometimes do so overtly, sometimes more implicitly, and sometimes not at all?

Second, what *motivates* judges to engage in such actions, and therefore to place themselves at a specific point on the convergence-divergence spectrum? Can these motivations change over time?

Third, what are the *consequences* of this dialogue for law under the jurisdiction of (a) given court(s)?

These, of course, are related questions. If the convergence, regardless of how it is defined, does not happen, then there is no proper motivation to be identified and no consequences to it. Yet, there is a certain fallacy to this reasoning: since it is established, for example, that at least minimal cross-referencing *can* take place, then the refusal for a court to engage in it is, in itself, a valuable insight, and motivation can be probed; refusal to intellectually interact with other courts can still have consequences for the fragmentation of International Law. In other word, this dissertation takes up the challenge offered by Dupuy and Viñuales when, in 2013, they concluded that

> although there is no rule of precedent in International Law, some consideration for the decisions of other tribunals could help avoid conflicting decisions (…). What seems to be more challenging is the determination of the conditions under which such deference is (…) given.[93]

[93] Dupuy and Viñuales (n 2) 146.

Lastly, we must ponder why, despite such a rich literature on the topic, these questions have not been answered. It appears here that both literature on fragmentation of International Law and literature on judicial dialogue have faced the same challenges which should now be addressed:

First, and most strikingly: the lack of unified conceptualisation, and therefore operationalisation, across the scholarship, on what judicial fragmentation, judicial convergence and judicial divergence are, leading to contradictory empirical results. Where Slaughter has broad, sociological conceptualisation, resulting in a multifaceted operationalisation identifying many actions and behaviours as 'judicial dialogue' leading to coherence of international law, Law has a narrow conceptualisation, focusing almost only on 'cross-references' as a sign of dialogue and of convergence.

Relatedly, any conceptualisation will have to avoid false negatives and false positives, accounting for the complexity of international (case) law as a medium. Having only a binary assessment (reference/no-reference, fragmentation/integration) risks missing out on nuanced iterations such as ornamental references, partial fragmentation, or apparent integration. For example, Law and Chang note that a judge can engage in comparative research, look into foreign law, and even have it potentially influence them, without this ever appearing explicitly in its case-law[94].

Second, there is a lack of *more* systematic empirical studies to take stock of this phenomenon. In particular in proponent of a more liberal, global constitutionalist assessment of trans judicial dialogue, there is a selection bias leading to a hyperfocus on examples of this dialogue taking place, without saying whether these are representative examples or not. Similarly, much of the literature on the fragmentation/integration debate has taken a global look at the phenomenon, when there is a need to have an analysis more grounded in the *details* of International Law. The empirical work cited previously, such as Webb's, Abrusci's or Krommedijk's, have provided a more grounded insight into either the day-to-day reality of decision-making, or offering tools for a very concrete

[94] Law and Chang (n 89).

assessment of the fragmentation of specific areas of International Law, an endeavour which needs to be continued.

Third, the literature tends to treat International Courts and domestic courts similarly. This leads to attributing the same motivation to domestic courts and International Courts indifferently and overlooks the special position of International Courts when it comes to playing an active role in the coherence or incoherence of International Law. There is a lack of systemic, empirical research fully embracing the idiosyncrasies of International Courts when it comes to both the decision to engage in judicial dialogue, the shape that this dialogue take in its case-law, and the consequences this has at the international level.

2. Theoretical framework and the road ahead

Building on the previous literature's knowledge and the gaps it left, this section will present the new theoretical framework which will be used for the rest of the dissertation. Moreover, alternative explanations can easily be inferred from previous analysis and explanations for cross-citations between these Courts, drawn from the previous section, will be developed. This project will therefore not only test the new framework, but also compare it to these existing explanations. Therefore, specific hypotheses to be tested will be drawn from them as well.

2.1. The new theory: competing preferences and costly self-legitimation

The goal of the theory put forward in this dissertation is to explain, causally, under which conditions an International Court is more likely to contribute to the integration of International Law by convergence with another overlapping Court; and when it is more susceptible to divergence, maintain a diverging status quo, and therefore contribute to the fragmentation of International Law. As a result, the constitutive elements of the theory will be presented in succession, in the same order as they have been developed during the theory building phase. The next chapter, more focused on the methodology, will then further detail the operationalisation of both explanatory and outcome variables, as well as of each step of the causal mechanism.

The first section will lay down the scope conditions, specifying which International Courts the theory will be applicable to – this mainly means detailing what 'overlapping International Courts' refers to. From there, the second section discussed the mechanism which is envisioned as convergence or divergence: a need to self-legitimise to bolster the authority of the International Court, even at the cost of their policy preferences. Following on with a cause-of-effects approach to theory building[95], at the end of this reverse causal chain the third section identifies the causal factors, or independent/explanatory variables: the intensity of the challenge to the authority of a given court, and here takes yet another step to identify which actors, exactly, can voice such challenge, and how. From there, different hypotheses are generated, which the next methodological Chapter will build on in turn.

2.1.1. Scope conditions: Overlapping Courts, quid?

The framework put forward in this dissertation is not, and cannot be, encompassing of all International Courts, at all times. While contributing to the knowledge and understanding of International Courts in general, the particular theory explored here is relevant to two International Courts with at least partially overlapping jurisdictions in term of constituencies and issue-areas[96]; indeed, both Courts do not have to have competence of the exact same *treaty*, but rather over the same *field* of International Law. For example, the European Court of Human Rights and the Inter-American Court of Human Rights would be considered to *overlap* regarding their issue area: that they both deal with Human Rights adjudication, often on a different textual basis. On the other hand, the World Trade Organisation Appellate Body (WTO-AB) and the International Court of Justice (ICJ) would be said to overlap in terms of constituency *and* issue area, as the vast majority of States that fall under the jurisdiction of the ICJ also fall under the WTO-AB's, and the ICJ has a general competence for international inter-state disputes, whether they are trade-related or not.

[95] Gary Goertz and James Mahoney, *A Tale of Two Cultures – Qualitative and Quantitative Research in the Social Sciences* (2014) 42.
[96] What jurists call competence *rationae materiae* and competence *rationae territoriae/personae*.

This type of double overlap (constituency and issue-area) is common when it comes to a body with a global jurisdiction co-existing with a regional adjudicative system. All three regional human rights systems, in that sense, co-exist with the UN Treaty bodies, quasi-judicial bodies with their own case-law and a global competence. Similar overlaps for two regional Courts are rarer, but notable examples exist. For example, the Economic Community of West African States (ECOWAS) Court has developed a jurisdiction for African Human rights, therefore overlapping both in its substantial competences and membership base with African Court of Human and People's Rights. Similarly, for trade-based organisations, there is substantial overlap between the Court of Justices of the Organisation pour l'Harmonisation en Afrique du droit des affaires (OHADA), the East African Community Treaty (EACT) and the ECOWAS. This is the situation that the CJEU and the ECtHR are indeed in as well.

Limiting the scope conditions[97] of this theory to this double overlap does not mean that no knowledge can be gained regarding Courts with less overlap through this framework. Indeed, the reasons for these scope conditions are twofold. First, because it relies on one Court seeking to convince actors within its jurisdiction of the soundness of its reasoning by borrowing from another Court, this strategy is most likely if the second Court is a credible source of authority for said actors to begin with. In other word, there is more weight to borrowing from a Court which these actors also fall under, rather than a Court that is fully foreign to them. Second, and relatedly, the very existence of this double overlap means that this second Court is also in the position of potential challenger of the authority of the first Court, and this is worked into the very mechanism that will be explored. A Court which does not share this overlap cannot be as relevant a challenge to the authority of the first one.

The second scope condition is one that seems to, *de facto*, always be fulfilled, but is worth explicitly mentioning in case the evolution of international judicial politics provides a counterexample at some point. This theory hinges on two overlapping International Courts having

[97] Gerardo L Munck, 'Tools for Qualitative Research' in Henry E Brady and David Collier (eds), *Rethinking Social Inquiry: Diverse Tools, Shared Standards* (Rownman & Littlefield Publishers 2004) 110.Tools for qualitative research,

differing *policy preferences*. This is sometimes also framed as differences in *goals*, or *mandates*, and is inherent to a given Court being tied to, and created for, a given treaty system. This is likely to always be a fulfilled conditions in cases where the previous scope condition, regarding the double overlap, is already met, because it seems unlikely that two courts would be created by at least partially the same Member States, to cover the same question. On the contrary: the proliferation of international adjudicative bodies stems from the adjunction of these bodies to functionally different and independent, yet overlapping, treaty systems. The overlap, as a result, is not planned from the beginning by the parties to the treaty. Rather, it can come from one Court expanding its jurisdiction beyond its original mandate, such as the CJEU adding fundamental rights to EU Law, or the ECOWAS doing the same.

With these scope conditions made explicit, we can now develop a new theory of convergence and divergence between overlapping International Courts which fulfil these conditions.

2.1.2. Convergence as an International Court's self-legitimising strategy

International Courts need to strike a careful balance between different goals, in order to protect their judicial interests, since when these goals are contradictory, they can be led to make compromises[98]. Such can be the case with the *authority*, *legitimacy*, and *specific policy goals* of an International Court.

The **authority** of an International Court will here be understood narrowly, as an ability to have the rulings implemented and truly effect changes in the constituency[99]. This requires implementation by the actors who have the ability to stand in the way of this compliance (for example, various State authorities, government branches, domestic courts). The main threat to this authority will, therefore, be *non-compliance* from them.

[98] Yuval Shany, 'Assessing the Effectiveness of International Courts : A Goal-Based Approach' (2012) 106 The American Journal of International Law 225, 262.

[99] Other conceptions of authority can be broader, to encompass all the indirect and diffuse influence an (International) Court may have on the actors in (and out) of its jurisdiction see for example : Karen J Alter, Laurence R Helfer and Mikael Rask Madsen (eds), *International Court Authority* (OUP 2018).

Legitimacy, on the other hand is one of the core challenges of International Courts. Defined as the 'belief (…) within a given constituency (…) that a political institution's exercise of authority is appropriate', legitimacy is closer to the idea of 'diffuse support'[100]. It is a quality attached to the Court as an institution, rather than the specific decisions and rulings it hands out, it 'command[s] acceptance and support from the community so as to render force unnecessary'[101]. Distinct from (although related to) trust or public support[102], legitimacy ensures acceptance of the decision by the constituency of this institution, rendering force unnecessary for compliance, regardless of the actual content of the decision[103].

Legitimacy

> provides courts authority; it allows them the latitude necessary to make decisions contrary to the perceived immediate interests of their constituents. Since courts typically have neither the power of the 'purse nor the sword,' this moral authority is essential to judicial effectiveness.[104]

Therefore, one way for an International Court to enhance its authority is therefore to enhance its legitimacy[105].

The main leverage for a court, including (perhaps especially) an International Court is to lean into what Scheb and Lyon have called the 'myth of legality' of adjudication, the belief that 'cases are decided by application of legal rules formulated and applied through a politically and philosophically neutral process of legal reasoning'[106]. A Court's legitimacy is, in particular,

[100] Yonatan Lupu, 'International Judicial Legitimacy: Lessons from National Courts' (2013) 14 Theoretical Inquiries in Law 437.
[101] Archibald Cox, *The Role of the Supreme Court in American Government* (OUP 1977) 102.
[102] Patricia Popelier and others, 'A Research Agenda for Trust and Distrust in a Multilevel Judicial System' (2022) 29 Maastricht Journal of European and Comparative Law 351.
[103] Cox (n 106); Shai Dothan, 'How International Courts Enhance Their Legitimacy' (2013) 14 Theoretical Inquiries in Law 455.
[104] Gregory A Caldeira and James L Gibson, 'The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support' (1995) 89 American Political Science Review 356, 460; see also Lee J Epstein and Jack Knight, *The Choices Justices Make* (CQ Press 1997) 12–13.
[105] Dothan, 'How International Courts Enhance Their Legitimacy' (n 108) 459; Laurence R Helfer and Karen J Alter, 'Legitimacy and Lawmaking: A Tale of Three International Courts' (2013) 14 Theoretical Inquiries in Law 479, 498.
[106] John M Scheb and William Lyons, 'The Myth of Legality and Public Evaluation of the Supreme Court' (2000) 81 Social Science Quarterly 928, 928–929.

associated with its impartiality, being a 'neutral servant (…) of the law'[107]. Consequently, legitimacy is improved when a judge can present its reasoning as being objective, reaching an incontestable truth about what the law should be and indeed *is*, rather than reflecting policy preferences or any other subjective value. What can provide support for this appearance of neutrality and constraint is what enhances the legitimacy of a court[108].

One way to appear more constrained is to make an appeal to external sources, with a persuasive value rather than authoritative one. In other word, an International Court can appear more constrained in its reasoning if it frames its decision as being aligned with, or even influenced by, the decision of a valuable, legitimate third party. This appeal to the symbolic authority of an external citation has proven to be very relevant in judicial decision-making[109]. A Court therefore needs to pick its external references carefully for the symbolic authority to hold value over its jurisdiction. Ideally, therefore, it would refer to another Court that shares much of its State-membership base, or has a sufficiently well-established reputation/legitimacy, in order for it to be worth co-opting.

The legitimisation relies therefore on both the inherent legitimacy of legal reasoning and the persuasive authority that another jurisdiction's case-law can have when used by another Court. When it converges with another International Court, a Court strengthens its own legal reasoning, gives it external validity, and co-opts the legitimacy of the second Court in turn. This convergence can take different forms: citing the other Court's rulings, using the same legal standards, and/or adopting the same outcomes.

However, this strategy is a costly one.

First, this is, of course, a fine line to walk, both because the Court might put itself in a position of hierarchical underlying *vis-à-vis* this external source, but also because exceedingly relying on sources close to, but still outside of its own legal order, can end up undermining its legitimacy rather than enhancing it.

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[107] Martin Shapiro and Alec Stone-Sweet, *On Law, Politics, and Judicialization* (OUP 2002) 3; Alec Stone-Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP 2000) ch 1.

[108] Shai Dothan, *Reputation and Judicial Tactics: A Theory of National and International Courts* (Cambridge University Press 2014) 26, 124.

[109] Frederick Schauer, 'The Politics and Incentives of Legal Transplantation' (2000) 44 CID Working Paper Series.

Second, and more importantly: if manifesting legitimacy out of the void was this easy, International Courts would constantly resort to it – yet, the phenomenon is common, but not ubiquitous. That is because the more it is used, the higher its price tag – namely, the policy cost. By converging with another International Court, a Court may gain in legitimacy, but it limits its ability to pursue its own **policy preferences**. Indeed, relying on the precedent of another Court while keeping the coherence of legal reasoning intact means reaching an outcome at least partly closer to the preference of this second Court. This is how simple external reference can turn into substantial convergence: the necessary coherence of legal reasoning means that borrowing rhetorically from an external source will often mean substantially altering the outcome reached. Courts must preserve the appearance of a coherent legal reasoning to maintain the mask of law and neutrality[110]: 'Courts cannot escape the logic of legal arguments'[111].

The problem is that if one International Court looks for another International Court to rely on as an external source to enhance its legitimacy, and looks for one with a similar membership base, this second Court is likely to have different policy references, a different mandate, different goals. It is very unlikely that a group of States would have created two Courts, with the same mandate, to rule on disputes involving them. Here, the CJEU and the ECtHR provide a striking example. As will be further explained in Chapter 2, the CJEU holds the autonomy and supremacy of EU Law, and the upholding of EU policies – many of them primarily economic – as its main policy preferences[112]. The ECtHR, on the other hand, has the protection of fundamental rights and the rule of law as its preferences. When one converges with the other, it will have to accept a trade-off between its enhanced legitimacy and its ability to fully pursue its preferences in a given issue-area.

Therefore, convergence with another International Court is a strategy a Court will engage with only when it is compelled to do so, when the threat to its authority is perceived as sufficiently

[110] Burley and Mattli (n 24); Stone-Sweet (n 112).
[111] Schimmelfennig (n 33) 1250. Confirmed in Interview 12, Former ECtHR Judge, 28/03/2023
[112] CJEU President Skouris himself opened a speech in 2014 by noting that "*The Court of Justice is not a human rights court; it is the Supreme Court of the European Union*" 'The CJEU as the European "Supreme Court": Setting Aside Citizens' Rights for EU Law Supremacy' (*Verfassungsblog*) <https://verfassungsblog.de/CJEU-european-supreme-court-setting-aside-citizens-rights-eu-law-supremacy/> accessed 28 September 2021.

credible and serious, warranting this trade-off between its preferred outcome and its authority, through self-legitimisation (Figure 1).

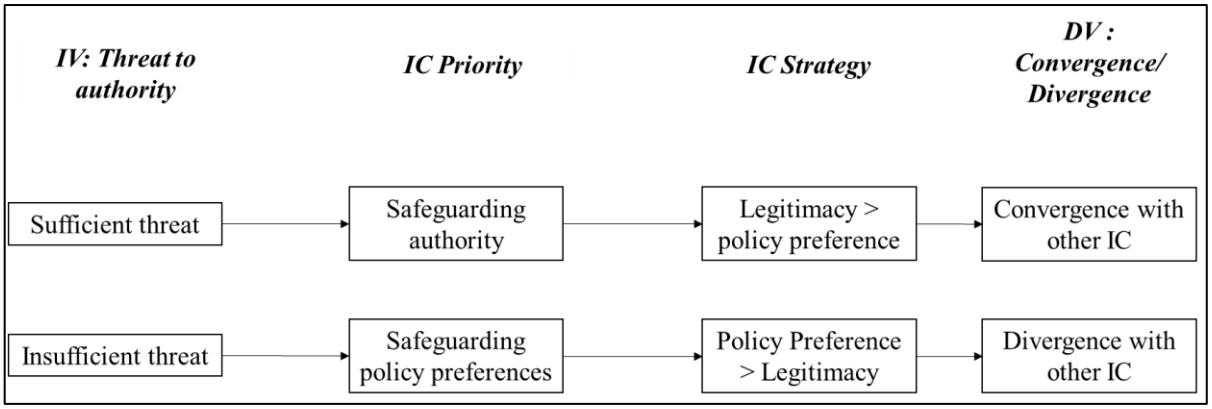

Figure 1: Causal chain hypothesised

2.1.3. Sufficient and insufficient threat to an International Court's authority

International Courts therefore react to 'threats to authority' but threats *from whom*? The constituency of an International Court would include its Member States, National Judiciaries, litigants, and the legal field, in a sociological sense[113]. Arguably, in the case of the CJEU, this constituency could even include other EU institutions. Figure 2, however, indicates that for European Courts, the main threat comes from those actors that *implement* their rulings, i.e., **domestic courts**, **Governments** of their Member States (understood broadly as all state authorities), and the **other European Court**. Immediately, however, one must remember that International Courts do not have perfect information, nor infinite information-processing capacities. They deal with constituencies which can have a wide array of preferences, and are susceptible to take decisions which, in the end, did not properly anticipate the reactions to follow from their constituencies[114]. Additionally, in the case of domestic courts and Governments, there needs to be a sufficient number of actors across all the Court's constituency expressing a challenge for the Court to take it seriously. As explained by a Judge of the ECtHR:

> one of the factors, the many factors that an International Court has to take into account is whether the same issue provokes any, any reaction in other

[113] R Daniel Kelemen, 'The Court of Justice of the European Union in the Twenty-First Century' (2016) 79 Law and Contemporary Problems 117.
[114] Dothan, *Reputation and Judicial Tactics* (n 113) 24; Lupu (n 105) 438.

jurisdictions, in other countries, whether there is [sic] other national courts that are indicating that this is difficult to follow and apply whether the principle is established in a, in a way that did not provoke any discussion within, within the ECHR itself. (…) All these factors could play into defining what the reaction in such a dialogue with national courts might, might in the end be.[115]

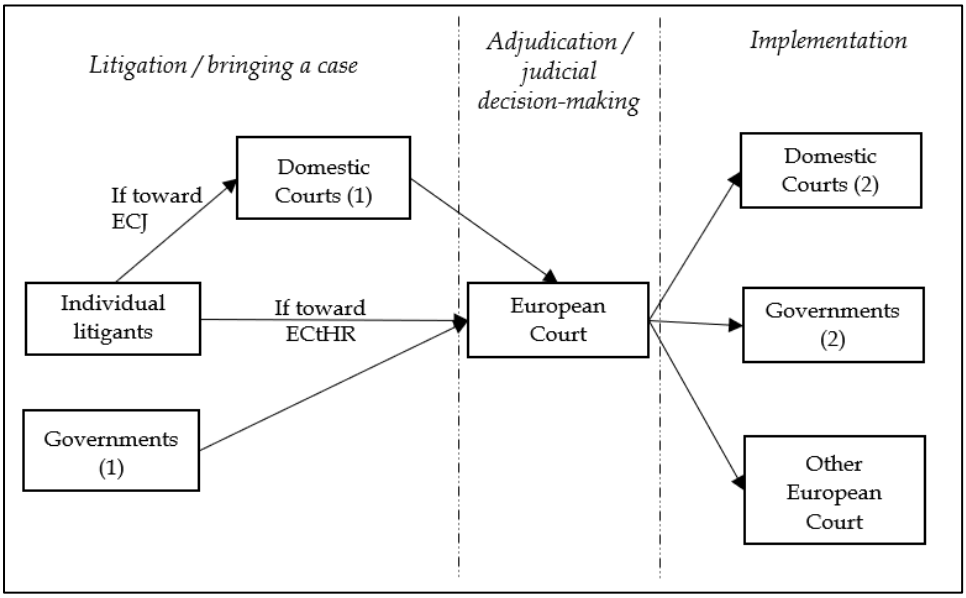

Figure 2: Adjudication procedure before European Courts

Since a 'challenge' to the authority of an International Court is, for the purpose of this research, understood narrowly as a threat to the implementation of its decisions, such challenge can stem from the following actors:

- **Domestic courts of the Member States:** especially from high-reputation Courts, or Courts from across a majority of Member States
- **Governments of the Member States:** at least a majority, but not necessarily, and unanimous or similarly expressed challenge from all Member States.
- **The other International Court**: by refusing (explicitly or implicitly) to implement the ruling of the parallel European Court, one European Court is undermining the authority of the other.

[115] Interview 16, ECtHR Judge, 20/04/2023.

It must be noted that divergence by one European Court, in itself, is not necessarily a threat to the authority of the other Court. A threat would require a persistent divergence and a *targeting* of the other Court: an explicit refusal to follow, a possibly systematic refusal of the other Court, or the negation of the other International Court's autonomy, for example. In the same sense, any expression of disapproval by State authorities or domestic court is not necessarily a threat: a degree of *saliency* of the issue is required, for a disagreement to be considered a threat by a European Court Additionally, for any of these actors, non-compliance need not be a 'blunt rejection of the court's orders. Instead, it may constitute long delays, partial compliance, or undertaking steps that do not really answer the concerns voiced in the court's judgments'[116], or a threat to do so in the future.

2.1.4. Hypotheses

These different sources of threat form 'insufficient but necessary part[s] of a condition which is itself unnecessary but sufficient for the result' or INUS condition[117]. In other words, various constellations of threat/non-threat are expected to have different impacts on the behaviour of one International Court towards the other, because different combinations can reach the same level of 'sufficient threat'. *Table 1* sums up the different hypotheses drawn from this theoretical framework, formulated with the goal falsifiability, and concrete empirical evaluation[118].

[116] Shai Dothan, 'International Adjudication as Governance' [2019] Max Planck Encyclopedias of International Law.
[117] JL Mackie, *The Cement of the Universe: A Study of Causation* (Oxford University Press 1980); James Mahoney and Rachel Sweet Vanderpoel, 'Set Diagrams and Qualitative Research' (2015) 48 Comparative Political Studies 65.
[118] Gary King, Robert O Keohane and Sidney Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research* (1st Edition edition, Princeton University Press 1994) 99–114.

Threat to authority (domestic courts, Governments, other International Court)	**International Court reaction**
No threat from any actor	H1: Divergence/status quo
Threat from **one out of three**	H2: Divergence/Status quo
Threat from **two out of three actors**	H3: Weak convergence
Threat from **three out of three actors**	H4: Strong convergence

Table 1 : Overview of hypotheses

This table shows that what are the sources of threat does not matter: different combinations might lead to similar outcome – in the words of Ragin, the cases to which this theory applies are likely to be 'causally lumpy'[119]. We can put the different hypotheses in Boolean terms[120], requiring different equations since our dependant variable here is not binary. With *C/c* for threat/non-threat from domestic courts, *G/g* for threat/non-threat from Governments, and *I/i* for threat/non-threat from the other International Court:

$$No\ convergence/Divergence = cgi + Cgi + cGi + cgI$$

$$Weak\ convergence = CGi + DgI + dGI$$

$$Strong\ Convergence = DGI$$

2.2. Alternative explanations: good faith convergence and bad faith references

From the literature review, we can identify two alternative explanations. First, is the one broadly based on Slaughter's liberal theory, defending the existence of a 'Global Community of

[119] Charles Ragin, 'Turning the Tables: How Case-Oriented Research Challenges Variable-Oriented Research' in Henry E Brady and David Collier (eds), *Rethinking social inquiry: diverse tools, shared standards* (Rownman & Littlefield Publishers 2004) 124.
[120] Charles C Ragin, Susan E Mayer and Kriss A Drass, 'Assessing Discrimination: A Boolean Approach' (1984) 49 American Sociological Review 221.

Courts'[121]. Encompassing both national and International Courts dealing with transnational adjudication, this community of courts

> is constituted above all by the self-awareness of the national and international judges who play a part. They are coming together in all sorts of ways. Literally, they meet much more frequently in a variety of settings, from seminars to training sessions and judicial organizations. Figuratively, they read and cite each other's opinions, which are now available in these various meetings, on the Internet, through clerks, and through the medium of international tribunals that draw on domestic case law and then cross-fertilize to other national courts.[122]

International and national judges, according to this theory, have a shared identity and recognize each other as participants in 'a common judicial enterprise.'[123].

The combination of access to information and genuine sense of common purpose and identity in the international judiciary is supposed to result in cross-fertilisation in case-law of formally independent courts. Courts are willing to buy into the persuasive authority of the case-law of another court. When Judge Higgins was asking 'who decides', this theory answers 'all courts, collectively'.

Fundamentally, this theory must not be oversimplified: it does not expect strict uniformity across all Courts, national or international: what is expected to occur is dialogue[124], through cross reference and consideration of other Courts' case-law, with 'debate and reasoned divergence over adherence'[125]. Yet, this theory is devoid of worry about fragmentation or long-lasting divergence, and it is not a longshot to assume a constant dialogue would necessarily lead to some convergence between the courts involved; if not, then *what* is the dialogue, really. If the outcome is indeed a 'global constitutional jurisprudence', then it must have some sort of unity; if not, then is simply different courts developing their own jurisprudence.

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[121] Anne-Marie Slaughter, 'A Global Community of Courts Focus: Emerging Fora for International Litigation (Part 2)' (2003) 44 Harvard International Law Journal 191.
[122] Slaughter, 'A Global Community of Courts Focus' (n 126) 192.
[123] Slaughter, 'A Global Community of Courts Focus' (n 126) 193.
[124] Claire L'Heureux-Dube, 'The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court' (1998) 34 Tulsa Law Review 15.
[125] Slaughter, *A New World Order* (n 54) 103.

This theory is therefore not specific to International Courts; and when establishing a full typology of judicial dialogue, Slaughter initially did not include a supranational horizontal dialogue (International Court/International Court), only a vertical one (International/national court) and a horizontal transnational one (national court/national court)[126]. However, the ECtHR has been a topic of study for proponents of this theory already. Indeed, it is argued to hold the most persuasive authority regarding human rights courts at large (national and international) which are formally independent, from the Israeli High Court to the Inter-American Court of Human Rights[127]. Interestingly, the CJEU is not included in this analysis, but as another Constitutional (albeit international) Court, it would be expected to behave the same way, engaging in a dialogue with the ECtHR and acknowledging its strong persuasive authority in the field of human rights. The outcome of this theory would fit the general, albeit non-causal analysis from leading legal scholars who have explored the CJEU-ECtHR dialogue: the CJEU naturally follows the ECtHR's lead, without lasting divergences[128]. From here, the following hypotheses can be drawn to fit the CJEU-ECtHR dialogue.

H5: Only the Court with the lower standard of protection borrows from the one with a higher standard, whenever there is pertinent case-law from that second Court.

H5bis: Divergences between two Courts are always resolved with convergence of the towards the one with a higher standard of protection.

Building on the strategic explanations for cross-referencing stated previously, the second alternative explanation comes from the critics of this theory, which often are similarly not tailored to International Courts, but any Courts engaging in transnational judicial dialogue. There are multiple explanations as to *why* general convergence would not be expected, from 'problems in

[126] Slaughter, 'A Typology of Transjudicial Communication' (n 84); Slaughter, 'A Global Community of Courts Focus' (n 126) 215.
[127] Slaughter, *A New World Order* (n 54) 81.
[128] Sionaidh Douglas-Scott, 'A Tale of Two Courts : Luxembourg, Strasbourg and the Growing European Human Rights Acquis' (2006) 43 Common Market Law Review 629; Rick A Lawson, 'Confusion and Conflict? Diverging Interpretations of the European Con-ven-tion on Human Rights in Strasbourg and Luxembourg' in Rick A Lawson (ed), *The Dynamics of the Protection of Human Rights in Europe*, vol III (Kluwer Academic Publications 1994); Tobias Lock, *The European Court of Justice and International Courts* (OUP 2015).

achieving communication and agreement between judges with different traditions and values'[129] to foreign citation delegitimising a Court, due to the incompatibility of the practice with the idiosyncratic democratic bargain which might have been struck in their specific constituency. But more relevantly for the situation of the ECtHR and the CJEU is how the 'strategic use of foreign and International Law characterizes interjudicial cooperation that seeks to review and shape government policies'[130]. This might initially appear similar to the main theoretical framework described in the previous section, but the key difference is that the reference to an external ruling here is not a costly strategy at all: the Court doing so does not compromise between its own preferences and that of the court it borrows from. This is closer to the criticism carried by US Supreme Scalia for borrowing between National and International Courts: a cherry-picked, opportunistic vision of judicial dialogue, where one court never influences the other, but rather relies on its neighbour only when it is convenient.

As a result, convergence is expected to occur only of the goals of both Courts are aligned; or in other words, reference will be made to another Court only if both Courts already have the same legal answer, rather than having any substantial impact on one's decision.

> *H6: Cross-citation occurs only when both Courts already have agreed of the answer to legal sub-questions.*

[129] Alex Mills and Tim Stephens, 'Challenging the Role of Judges in Slaughter's Liberal Theory of International Law' (2005) 18 Leiden Journal of International Law 1, 21.
[130] Benvenisti (n 45) 252.

CHAPTER 2
Research Design and the challenge of capturing nuance in legal reasoning

But then of course we come also to the very tricky question of what is a lower and what is a higher standard. That's, not at all easy. And then, then also to what extent you should take (…) other fundamental rights into- into question and balance. So it becomes a question of balance in between two or maybe even three or four fundamental rights.[131]

One of the challenges of empirical research on both the fragmentation of International Law and the impact of judicial dialogue between International Courts has been the conceptual fuzziness and subsequent lack of clarity of the operationalisation of these concepts. In socio-legal studies, empiricism can often face a limit, confronted with the inherent (and sometimes intentional) vagueness of legal concepts. This section details how the reconceptualisation of different notions in this research project has led innovative methods and tools for how socio-legal studies approaches the International Courts.

The first section of this chapter details the research design of this research at large, from the decision to rely on qualitative, rather than quantitative methods and the associated tools, the case selection strategy, and the operationalisation of most variables. Then, a separate section will be dedicated to the thorny question of the defining and operationalising notions of convergence and divergence between International Courts. This section details each step of the construction of the development of a new Index that can be used for this purpose, greatly facilitating the assessment of convergence and divergence between these jurisdictions over time and on different issue-areas.

1. General methodological framework

Going from the broader decisions made to construct the research design, towards the specific methodological tools that have been deployed, this section starts by explaining the choice to rely on qualitative, rather than quantitative methods. Specifically, this dissertation leverages a

[131] Interview 11, Former CJEU Judge, 01/02/23.

particular type of case study and case selection strategy in order to deductively test the theoretical framework: within-case longitudinal analysis. In line with empirical social science research standards, the chapter then details the operationalisation of key variables and causal steps. This will ensure the reliable and consistent coding of data in each separate case-study, limiting any potential bias or error.

1.1.Qualitative methods and longitudinal case studies

1.1.1. Qualitative tools: researching legal reasoning

The use of qualitative research methods for this project is justified for multiple reasons. First, it is particularly appropriate for social legal studies. Indeed, social legal research relies on variables that cannot always be strictly quantified, such as legal concepts and legal standards. For example, it is possible to conduct statistical analysis to count how many times over the years a given Court has used the concept of 'human dignity'. But what cannot be quantified is the *meaning* the Court attributed to this concept, whether its *content* changed over time, whether the interpretation was very broad or very narrow, and whether it is embedded in a specific legal doctrine or not. One can count how many times the ECtHR mentioned the 'principle of subsidiarity' and note that the CJEU uses the 'principle of subsidiarity'; and yet miss entirely that the logic, reasoning and content of both principles is different between both Courts[132].

Moreover, for a project that relies particularly on Courts and their reasoning, qualitative methods provide the flexibility required to explore such reasoning. Additionally, qualitative methods are particularly appropriate for the theoretical framework tested in this project. Indeed, they are useful for theories with multiple conjectural causations; the logic of INUS conditions would lead to statistical challenges in quantitative methods, where researchers would need

> a very large number of diverse cases and (2) an investigator willing to contend with a difficult massive multicollinearity (…). [But] when Ns are small to

[132] Interview 9, Judge of the CJEU, 13/03/2023.

> moderate, causal complexity is more apparent, more salient, and easier to identify and interpret.[133]

The 'language of logics'[134], which is used by qualitative scholars, is inherently better suited for theoretical frameworks exploring questions of necessity and sufficiency of their variables.

Moreover, qualitative methods provide useful tools to check and explore the mechanism at hand. This project will, therefore, make use of the tool of process tracing, as causal inference would be difficult to establish through quantitative methods in this project. More will be provided in later sections, but process tracing can for now be defined as a series of small causal claims which are 'so uncontroversial that they operate essentially as primitive terms'[135].

1.1.2. Case selection strategy: case study and study of case(-law)

The case selection required for this project is twofold. First, it is essential to identify which two Courts and their dialogue will be explored. But also, which series of cases between these two courts will then constitute the actual case studies?

First, regarding the two courts to be used: the potential universe of cases is composed of pairs of International Courts overlapping with each other in a manner described in the theoretical framework[136]: all Member States of the EU, by virtue of their EU membership, are under the jurisdiction of the CJEU; and all EU Member States are also members of the Council of Europe and therefore under the jurisdiction of the ECtHR. This constituency overlap of both courts is doubled with an issue-area overlap, as EU law now includes EU Fundamental Rights (see Section 2 of this chapter), and the ECtHR has competence for all human rights issues in its constituency. This means the material overlap between both Courts covers EU Fundamental Rights, specifically.

[133] Ragin (n 124) 134.
[134] Goertz and Mahoney (n 100).
[135] Timothy J McKeown, 'Case Stdies and the Limits of the Quantitative Worldview' (1999) 53 International Organization 161.
[136] Munck (n 102) 110–111.

The CJEU and the ECtHR provide the benefit of having been in existence for a particularly long time compared to other International Courts, and therefore they potentially provide the largest amount of case-law through which the theory will be tested across time.

The second step of the case selection process is then to decide on the series of cases that will constitute the longitudinal case studies of the project. Within-case studies operate on a different logic than comparative case studies. Indeed, they are focused on *within-case analysis* which

> privileges evidence about causal mechanisms, pushing researchers to ask whether change in the independent variable in fact preceded change in the dependent variable and, more significantly, by what process change in the independent variable produced the outcome.[137]

While multiple within-case studies can still be compared or contrasted with each other to yield more insights[138], this is not their primary goal: within-case studies leverage information drawn for each individual case, rather than from a comparison between cases. Successive longitudinal case studies also enable checking to what degree the mechanism theorised is actually causing the change, rather than any other potential factor. In other words, within-case analysis checks for the causal direction and potential spuriousness or omitted factors – for example, any external phenomenon that both challenges the authority of the court and independently leads to the convergence of two courts with one another.

For this project, each individual case study on which within case analysis will be conducted will be a particular jurisprudential saga in order word, a series of cases on the same topics where the CJEU and the ECtHR interacted with one another over the years. Deciding on which jurisprudential saga to focus results from multiple compromises in the selection. First, is the requirement that there be variation in the dependent variable within the case itself and across cases. In other words, within a

[137] Munck (n 102) 112.
[138] Uwe Flick, 'Design and Process in Qualitative Research' in Uwe Flick, Ernst von Kardoff and Ines Steinke (eds), *A Companion to Qualitative Research* (SAGE Publications 2004) 147.

single jurisprudential saga, the relative position of each court towards one another must have changed, and, ideally, different patterns of changes should exist across different case studies. Compared to quantitative methods, the lack of variation in the dependent variable is not necessarily an issue here. Especially when using process tracing, both variation and non-variation in the dependent variable can yield insight[139]. However, a selection purely on the dependent variable can be inappropriate for case study or qualitative research in general[140], and therefore both variation in the explanatory and dependent variable will serve as a guide for case selection.

This leads to a selection process that can be considered as *case oriented approach* rather than a *variable oriented approach*[141], drawing from the literature on *diverse case* selection method[142] where the researcher tries to ensure that there is a full range of variation in both the explanatory *and* the dependent variable. In this research, this means different constellations of explanatory variables, the level of threat to the authority each court was submitted to, as well as the actors from which these threats originated and the actual outcome[143]:

> [W]here multiple variables are under consideration, the logic of diverse-case analysis rests upon the logic of typological theorizing – where different combinations of variables are assumed to have effects on and outcome that vary across types.[144]

In the end, the potential issue-areas with relevant jurisprudential sagas between the CJEU and the ECtHR that have been considered were the following questions, which all have seen a rich jurisprudence from both Courts:

[139] Jack S Levy, 'Case Studies: Types, Designs, and Logics of Inference' (2008) 25 Conflict Management and Peace Science 1.
[140] Goertz and Mahoney (n 100) 178.
[141] Ragin (n 124).
[142] John Gerring, *Social Science Methodology: A Unified Framework* (2 edition, Cambridge University Press 2011) 647.
[143] King, Keohane and Verba (n 123) 140.
[144] John Gerring, 'Case Selection for Case-Study Analysis: Qualitative and Quantitative Techniques' in Janet M Box-Steffensmeier, Henry E Brady and David Collier (eds), *The Oxford Handbook of Political Methodology* (OUP 2008) 651.

- Right to privacy of moral persons: do companies benefit from a fundamental right to privacy which would include their business premises?
- Right to Data Privacy: Which data is covered by the right to data privacy and what are the resulting obligation for States and other private parties?
- Right to strike: how to balance the right to strike with other fundamental rights?
- Exceptions to the European Arrest Warrant (EAW): What are the fundamental-rights-based exceptions to the mandatory execution of a European Arrest Warrant?
- Exceptions to the Dublin Regulations: What are the fundamental rights-based exceptions to the asylum rules laid down in the Dublin Regulation?
- Protection against *ne bis in idem*: when is it possible for a person to be targeted by multiple procedures (eg: administrative *and* criminal, or in two different States) for the same act?
- Right to Legal Gender Recognition (LGR): do transgender persons have a right to obtain a change of their gender marker on identity documents?

The challenge then becomes one of identifying a number of case-studies with the potential to tackle potential causal heterogeneity while still being manageable within the scope of this research, and ensuring that the issue-areas selected meet the aforementioned requirements of a case-oriented selection strategy. The EAW and Dublin cases dealt with similar questions on exceptions to the principle of mutual trust in the EU, it was therefore logical to select only one of the two. The first has received less scholarly attention, yet seemed substantially more relevant today, especially with the further development of EU criminal law and judicial cooperation with the rule of law crisis in Hungary and Poland as background[145].

[145] Petra Bárd, 'In Courts We Trust, or Should We? Judicial Independence as the Precondition for the Effectiveness of EU Law' (2021) 27 European Law Journal 185; Elaine Mak, Niels Graaf and Erin Jackson, 'The Framework for Judicial Cooperation in the European Union: Unpacking the Ethical, Legal and Institutional Dimensions of Judicial Culture Research Article' (2018) 34 Utrecht Journal of International and European Law 24.

To contrast with these very recent, high-saliency issues, the more technical, low-saliency issue of companies' right to privacy was selected. It falls under the purview of competition law, and would ensure that this research would cover different compositions of the Courts over time.

This left for the third case study either Data Privacy, the Right to Strike, *Ne Bis in Idem* and the right to LGR. As the *ne bis in idem* is related to the field of criminal law, which was also addressed in the context of the EAW, this was omitted in light of the case selection strategy which prioritised maximising the diversity of contexts across cases. In the case of data [privacy] and the right to strike, there was already a substantial scholarly literature[146].. By contrast, there was indeed a surprising lack of literature covering the back and forth between both Courts when it came to the rights of trans persons[147], despite ECJ case *P v S* about the protection of trans persons against discrimination, very famously the first Luxembourg case the ECtHR ever cited, in its own *Goodwin* landmark ruling on trans rights.[148] It seemed there was an opportunity here to make a relevant contribution on the substantial questions of trans rights at European level as well.

1.2.Operationalising: from conceptualisation to observable implications

More than quantitative ones, qualitative research projects are susceptible to being overwhelmed by the 'cacophony of potential and actual observations about the real world'[149]. As a

[146] On digital privacy: Juliane Kokott and Christoph Sobotta, 'The Distinction between Privacy and Data Protection in the Jurisprudence of the CJEU and the ECtHR' (2013) 3 International Data Privacy Law 222; Síofra O'Leary, 'Balancing Rights in a Digital Age' (2018) 59 Irish Jurist 59; Paul De Hert and Gianclaudio Malgieri, 'Article 8 ECHR Compliant and Foreseeable Surveillance: The ECTHR's Expanded Legality Requirement Copied by the CJEU. A Discussion of European Surveillance Case Law' (2020) Brussels Privacy Hub Working Paper, 2020, 6 (21) Article 8 ECHR compliant and foreseeable surveillance: the ECTHR's expanded legality requirement copied by the CJEU. A discussion of European surveillance case law; Christopher Docksey and Hielke Hijmans, 'The Court of Justice as a Key Player in Privacy and Data Protection': (2019) 5 European Data Protection Law Review 300; On the right to strike: Albertine Veldman, 'Protection of the Fundamental Right to Strike within the Context of the European Internal Market: Implications of the Forthcoming Accession of the EU to the ECHR' (2013) 9 Utrecht Law Review 104; Amy Ludlow, 'The Right to Strike: A Jurisprudential Gulf Between the CJEU and ECtHR' in Theodore Konstadinides and others (eds), *Human Rights Law in Europe - The Influence, Overlaps and Contradictions of the EU and the ECHR* (Routledge 2014); Vilija Velyvyte, 'The Right to Strike in the European Union after Accession to the European Convention on Human Rights: Identifying Conflict and Achieving Coherence' (2015) 15 Human Rights Law Review 73.

[147] See the literature review conducted on the topic in Chapter 5.

[148] *Christine Goodwin v United Kingdom* (2002) 35 EHRR 18. The ECtHR was citing *Case C-13/94 P v S and Cornwall County Council* (1996) ECR I-2143.

[149] King, Keohane and Verba (n 123) 46.

result, focusing extensively on the process of simplification of the empirical world[150] through the detailing of observable implications drawn from theory and the hypothesis is essential.

The section will distinguish the operationalisation of the dependent variable – convergence and divergence between International Courts – from the operationalisation of all other relevant concepts and notions, including the independent variable and various causal process observations. Indeed, there is no absolute consensus on how to even define notions of convergence or divergence between international jurisdictions. As a result, this will require more a extensive concept building definition and more clear operationalisation than any other notion used in the theoretical framework.

1.2.1. Independent variables: identifying threats to the authority of an International Court

As explained in the previous chapter, three potential sources of challenges for International Courts have been identified and will be explored in this project: domestic courts, Governments, and the other overlapping International Court itself. Before detailing how a threat can manifest differently in each of these actors, we must acknowledge some common ground for the three of them.

First, any criticism as such is not to be treated or interpreted as a challenge to the authority of the International Court. Indeed, healthy dialogue and disagreements between an international jurisdiction and the public authorities within its constituencies are part of the process of international adjudication, and can feed into an organic (and often necessary) evolution of its case-law, as confirmed by an ECtHR judge:

> [w]e also have the understanding that there is a dialogue between our court and the national courts. And sometimes we, we might have to listen carefully when, when national courts, out of legitimate concerns take the position that [a] certain interpretation of the Convention might not work precisely in, in a specific context. And a better, a better result, a better solution might be somewhat different from the one that, that we have undertaken.

[150] King, Keohane and Verba (n 123) 42.

> This is not common. Usually national courts are cooperative and, and they do they do follow the, the case law of our Court. They, they do in good faith, implement the, the, the caseload that, that has been established by our Court, but sometimes, some feedback is possible, and it is something that we would, we would listen to.[151]

An example of this kind of more honest disagreements or misunderstandings brought up by interviewees are the *Tarrico* preliminary rulings[152], a case which was sent twice to the CJEU by the Italian *Corte Costituzionale* (Constitutional Court):

> There can be different reasons why nationals, Supreme Court, constitutional Courts react negatively or critically. I mean, of course one is allowed. I mean, it's not that our rulings are above criticism. Of course, whenever you are criticised, you hope that, that it's a critique which is constructive and a little bit friendly (…). Take one example. Our ruling in the case *Tarrico I* don't know if you're familiar with it? But there is a second [referring to *Tarrico II]*, then. What I think was a particularly constructive approach taken by the Italian Constitutional Court was to say: "there's something in this ruling that we can't fully-, and maybe you are not fully aware. So there it is, we have these worries when reading your judgments and these uncertainties, which is why we now make a second order for reference. In a way we refer another case with a similar issue at stake and ask you, "did you [see] elements that were in the first case, but which we fear that you may not have given the proper attention, or [we] think it was little bit like this?"".[153]

On the other hand, a challenge towards the authority of an International Court is characterised by a concrete threat to not implement its decisions. This distinction was made clear by interviewees, with the typical example of such challenge being the German *Bundesverfassungsgericht* (BVerfG, Constitutional Court) stating that in 2018 the CJEU had acted beyond its own competence[154]:

> [After talking about the *Tarricco* cases] Whereas what you saw, the German Constitutional called the Bundesvergassungsgericht, did? They said in the second ruling on the ECB [European Central Bank] that we, we made on, on

[151] Interview 16, ECtHR Judge, 20/04/2023.
[152] *Case C-42/17 MAS and MB* ECLI:EU:C:2017:936; *Case C-105/14 Ivo Tarrico e.a* EU:C:2015:555.
[153] Interview 4, CJEU Judge, 12/1/22022.
[154] 2 BvR 859/15, BVerfGE ; referring to Case C-493/17, *Henri Weiss and others*, ECLI:EU:C:2018:1000.

> their request the *Weiss* judgment, they said "this is-it's a badly written judgment. And it is incomprehensible. And we think that you have exceeded the competence we have given to you Oh, that the German state has given to you, which is why we now exercised the competence that- that we didn't give to you, plus the competence that we gave to you. We do it ourselves".[155]
>
> The question is, if the Court of Justice says, "Well, we've been to fulfilled conditions A, B, and C". Can the German constitutional court say, "Sorry, you haven't, we're the judges of that and you haven't, you've only done A and B"? See, that's where the *conflict* is.[156]

Another former AG made a parallel with similar challenges which could come from the ECtHR to the CJEU:

> Where the problem would come is where the ECHR was to say that there had been a clear breach of the convention by the EU-27 Members States. Now, that would be a, a real problem, unless it was some technical breach of something or other. But if there was some major EU program that was held in substance to be a violation of the convention by Strasbourg. You know, it's, you know, that would be another type of- it would be kind of like the *Weiss* case in reverse[157].

Second, said challenge of one of these actors towards the International Court can be either issue specific or generalised. An issue specific challenge is limited to the outcome of the specific ruling or a specific issue-area (for example, a domestic court refusing to follow or implement a European court's ruling on a specific case or matter). On the other hand, a systemic challenge is one that relates to the very existence or the authority of the court at large, and for example, questions the place of the International Court's legal order above the domestic legal order.

Lastly, challenges to the authority can be either explicit or implicit, as long as legal analysis reveals the potential of a non-implementation in the future, if the same line of reasoning was to be kept by the actors carrying it. A press release by a Minister criticising the outcome of a case and stating that they are looking into potential ways to avoid implementation would be considered an explicit threat

[155] Interview 4, CJEU Judge, 12/12/2022
[156] Interview 1, Former CJEU AG, 01/11/2022.
[157] Interview 1, Former CJEU AG, 01/11/2022.

to the authority of that court. On the other hand, the executive refusing to kickstart or support the required legislative reforms to align the legislation with the standard set by the International Court, despite clearly being aware of these standards, is an implicit challenge to the authority of the court.

This being stated, different actors, due to their roles in the domestic and international legal systems and the rules and constraints to which they are subject, are likely to express challenges to an International Courts in different manners. Domestic courts, as stated previously, can refuse to implement a specific ruling, or adopt a different solution in a case similar to the one on which an International Court has ruled. They can also challenge the primacy of the legal order of the court over the national legal order, either by explicitly placing the domestic legal order, and mainly the constitution, above any decision of the International Court, or by threatening to effectively conduct a judicial review of the International Court's decision *vis-a-vis* domestic rules to establish whether or not it is to be implemented in the domestic legal order. All these behaviours can originate from low courts, higher courts such as Supreme Courts, or even Constitutional Courts. But the higher the court from which the challenge comes, the most seriously it is likely to be taken by the international jurisdiction.

Governments can also announce refusals to comply with a specific ruling if implementation was up to the executive rather than the judicial branch. They can also announce refusal to adapt legislation if this is what would be required for compliance with the ruling. This can be done through press releases, through any official public announcements or speeches for example, or through sustained inactions for a more implicit challenge.

Lastly, the challenge, if it comes from the other overlapping International Court, can also be in the form of non-implementation or threats to use judicial review before deciding whether to follow it or not. Additionally, divergence in and of itself is not considered a threat to the authority of the other court; but constant, or increasing divergence over the years, despite clear knowledge of the case-law of the other court will be considered a challenge, as this can undermine the authority of the neighbouring court. Moreover, it potentially offers additional rhetorical ammunition for the other actors to use in order to not comply and challenge the authority of the court in turn.

Methodologically, this raises the question of potential endogeneity. Indeed, what this means is the divergence of one International Court – a dependent variable – potentially feeding back into the theoretical process as an *explanatory variable*. Here, this research follows Munck's advice to 'focus explicitly on the reciprocal interactions among relevant variables and make inferences about several causal links involves', which can be used to study 'dynamic interactions'[158]. In other words, the research design does not skirt the problem of endogeneity, but rather embraces that the theoretical mechanism as a reflection of reality is likely to at least partially present a positive or negative feedback loop at some point. Qualitative tools, in particular process tracing, will help untangle how strong this feedback loop, which can also be framed as a path dependent process, is at any point.

As detailed by *Table 2*, the position of each actor will be defined as broadly binary 'threat/non-threat' with observable implications for each category.

There is, of course, an inherent fuzziness to these categories: reality rarely matches an ideal-type[159]. For example, in a given ruling, a Constitutional Court can both express some form of challenge to the authority of an International Court, while also showing reassurances that it does not plan on concretely exercising any judicial review of that Court's case-law. Additionally, there can also be differences between what different States express or what different courts across different States express. In this situation, it will be considered that challenges that are too scattered across the constituency, lack coherence in their criticism and therefore do not build a coherent threat that can be coded as such. When these situations come up, they will always transparently be discussed explicitly in the case studies.

In light of this approach to operationalisation and coding of the explanatory variable, one challenge that appears is that of data sources and data collection. While more will be said in the section on data sources, it can already be noted that this research did not require a systematic review of the CJEU and ECtHR's constituencies' (Member States and domestic courts) throughout the entire time

[158] Munck (n 102) 112.
[159] Goertz and Mahoney (n 100) 133.

period under study for each case-study. Beyond the fact that this would not be tractable in a project that spans almost 50 States in total, it is important to acknowledge that judges themselves do not have access to perfect information and are limited in the information they can actually collect and process, something which was confirmed multiple times during interviews. The theory itself accounts for European judges not having access to perfect information themselves. The sources that this research will rely on to gather and generate data are also largely the ones that International Courts can reasonably have access to before making a strategic decision themselves.

GOVERNMENT'S POSITIONS	**NON-THREAT:** • Expresses support for the case-law of a specific ruling in an issue-area • Has supported a legal reasoning, test, standard or outcome similar to the one adopted by the Court • Does not intervene as a third party before the CJEU, third-party observations before the ECtHR or otherwise publicly comment on a case it is not party to.
	THREAT: • Expresses criticism for the case-law of a specific ruling in an issue-area • Has supported a legal reasoning, test, standard or outcome different from the one adopted by the Court • Intervenes before the CJEU, submits third-party observations before the ECtHR or publicly comment even on a case it is not party to
DOMESTIC COURTS' POSITIONS	**NON-THREAT:** •Enforces/complies with the European Court's ruling •Possibly with explicit confirmation/reference to the European Court in question
	THREAT: • Refusal to implement jurisprudence (issue-specific or systematic) of the European Court or refer to its jurisprudence when relevant. • Threat of non-implementation or judicial review (issue-specific or systematic) if the given European Court does not change its position • Raises the legal question of the case-study directly to the Court (through preliminary reference[160])

[160] A preliminary reference procedure now exists for the ECtHR as well, since the entry into force of Protocol 16 in August 2018.

OTHER EUROPEAN COURT'S POSITION	**NON -THREAT:** •Reference to the autonomy/independence of the other Court or its legal order • Reliance on concepts of 'equivalent protection', left unquestioned or with a very lax control only.
	THREAT: • Jurisprudential divergence in the previous rulings AND • Explicit control and possibly full rebuttal of the presumption of equivalent protection

Table 2: Indicators of Explanatory Variables

1.2.2. Causal mechanism: process tracing

Process tracing is 'the analysis of evidence on processes, sequences, and conjectures of events within a case for the purposes of either developing or testing hypotheses about the causal mechanisms that might causally explain the case'[161]. This project will use process tracing for hypothesis testing, rather than hypothesis generation[162], and embraces a set theoretic approach to process tracing rather than a probabilistic one. Indeed, this tool is particularly well suited to explore INUS conditions, to understand mechanism(s) even in case of potential equifinality. Rather than seeking to quantify the impact that the prisons or absence of an explanatory variable can have on each step of the process, set theoretic process tracing explores the causal consequences of various combinations of explanatory variables[163].

This project will use process tracing to examine the hypotheses and the causal mechanism through Causal Process Observations (CPOs), specific observable implications of each step of the mechanism, re-stated in *Figure 3*. CPOs are 'specific pieces of information gathered from within cases that allow researchers to assess whether a given causal factor exerts the causal role assigned to it by a hypothesis or theory'[164]. To go from the theoretical mechanism to the causal process observations that can be verified empirically, this research builds on best practices established in the literature. It will stick close to the mechanism in order to establish causal inference with as much

[161] Andrew Bennett and Jeffrey T Checkel (eds), *Process Tracing: From Metaphor to Analytic Tool* (Cambridge University Press 2014) 7.
[162] Bennett and Checkel (n 167); James Mahoney, 'The Logic of Process Tracing Tests in the Social Sciences' (2012) 41 Sociological Methods & Research 570.
[163] Mahoney and Vanderpoel (n 122) 15–18.
[164] Goertz and Mahoney (n 100) 90.

certainty as possible[165] as well as to draw observable implications deductively from this causal process to avoid 'storytelling' an explanation *a posteriori*[166]. Lastly, it will maximise the number of potential observations and observable implications[167].

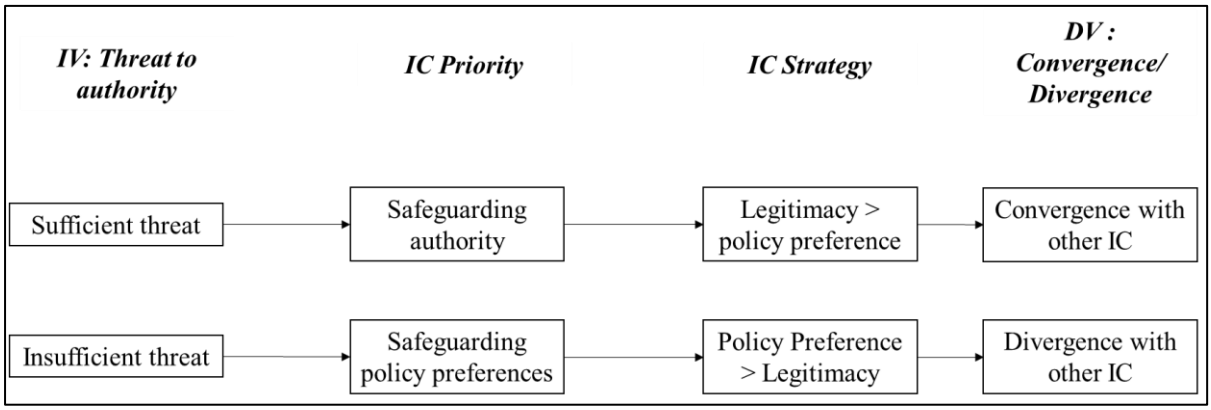

Figure 3: Causal chain hypothesised

As a result, the following table lists the observable empirical implications for each of the two extremes in the explanatory variables: threat, or lack of threat. The goal will, therefore, be to trace this process empirically, step by step. This has the advantage of not only strengthening the causal claim of the theory itself, but also potentially identify, in cases where the theoretical framework is not verified empirically, *at which stage* exactly the behaviour of the International Court departs from what was expected.

[165] Henry E Brady, 'Causation and Explanation in Social Science' in Janet M Box-Steffensmeier, Henry E Brady and David Collier (eds), *The Oxford Handbook of Political Methodology* (OUP 2008) 245.
[166] Frank Schimmelfennig, 'Efficient Process Tracing: Analyzing the Causal Mechanisms of European Integration' [2015] Process Tracing: From Metaphor to Analytic Tool 98, 106.
[167] King, Keohane and Verba (n 123) 24. Although King, Keohane and Verba give this advice for dependant and independent variable, this can be extended to all observable implications in qualitative methods, and therefore to CPOs.

Mechanism step	Observable implication for convergence	Observable implication for divergence
Sufficient threat to authority of European Court?	- European Court is aware of challenge - European Court recognises the challenge as actually being a threat to authority	- Court is not aware of challenge - OR Court does not conceptualise challenge as threat
Change of priorities?	- Awareness of trade-off between authority and policy preferences - Court focus on authority, importance of implementation - Less focus on policy preferences	- Court focus on policy goals exclusively
Court seek self-legitimisation?	- Use of other Court's jurisprudence argumentatively - Court downplays any persisting dissimilarities with the other Court - Framing of the other Court as an ally/agreeing	- No argumentation reliance on other Court - Court ignores or engages critically with other European Court and its dissimilarities

Table 3: Observable implications of CPOs

1.3.Data sources

In line with best practices, this project will embrace transparency regarding the reporting of the data generation process[168]. This section will distinguish between primary sources, made of written documents and interviews, and secondary sources.

The primary sources are first and foremost the European-level rulings used for each case study. Once the issue-area had been identified, the challenge was indeed to ensure that all relevant cases, and only them, would be collected. Therefore, a keywords-based search was conducted in the database of each European Court[169], in both French and English. All the cases retrieved were then read and any case they themselves refer to which had not been collected was added to the list and checked in turn. A last check was conducted by reading the legal commentary relevance to that particular issue-area. This yielded a list of 20 to 50 cases for each case study, which were all individually read to identify which ones *specifically* focused on the question relevant to the case

[168] King, Keohane and Verba (n 123) 23.
[169] https://curia.europa.eu for the ECJ, and https://hudoc.echr.coe.int for the ECtHR.

study. For example, Case study 1 focuses on whether companies have a right to protection of their business premises under the heading of the right to privacy. This means that when reading through the list of potentially relevant cases that was collected, the ones that dealt with the rights to privacy of correspondence and emails and the rights of privacy of employees in the business premises were excluded. For Case Study 3 on the right of transgender persons to Legal Gender Recognition, cases that dealt solely with the right to protection against discrimination, for example were also excluded.

This yielded a total of 12 to 14 rulings per case study, as presented in Table 4.

Case study 1: Right to privacy			Case-study 2: European Arrest Warrant			Case Study 3: Legal Gender Recognition		
Court	**Date**	**Case**	**Court**	**Date**	**Case Name**	**Court**	**Date**	**Case**
CJEU	21/09/1989	*Hoechst*[1]	CJEU	29/01/2013	*Radu*	ECtHR	17/10/1986	*Rees v UK*
ECtHR	16/07/2002	*Colas Est*	CJEU	26/02/2013	*Melloni*	ECtHR	27/09/1990	*Cossey v UK*
CJEU	15/11/2002	*Limburgsee*	CJEU	30/05/2013	*Jeremy F*	ECtHR	25/03/1992	*B v. France*
CJEU	22/11/2002	*Roquettes Feres*	CJEU	05/04/2016	*Aranyosi and Caldararu*	ECtHR	30/07/1998	*Sheffield and Horsham v UK*
ECtHR	15/07/2003	*Ernst*	ECtHR	17/04/2018	*Pirozzi v Belgium*	ECtHR	11/07/2002	*Goodwin v UK/ I v UK*
ECtHR	16/10/2007	*Wieser*	CJEU	25/07/2018	*Generalstaatsantwaltschaft*	CJEU	07/01/2004	*KB*
CJEU	14/02/2008	*Varec*	CJEU	25/07/2018	*LM / Celmer*	CJEU	27/04/2006	*Richards*
ECtHR	21/12/2010	*Canal Plus*	CJEU	19/09/2018	*RO*	ECtHR	23/05/2006	*Grant v UK*
ECtHR	20/11/2012	*Debut*	ECtHR	09/07/2019	*Romeo Castano v. Belgium*	ECtHR	16/07/2014	*Hamalainen v Finland*
ECtHR	14/03/2013	*Bernh Larsen*	CJEU	15/10/2019	*Dorobantu*	ECtHR	06/04/2017	*AP, Garçon and Nicot v France*
ECtHR	02/10/2014	*Delta Perkany*	CJEU	17/12/2020	*Openbaar Ministerie*	CJEU	26/06/2018	*MB*
ECtHR	02/04/2015	*Vinci*	ECtHR	25/03/2021	*Bivolaru and Moldovan v France*			
CJEU	18/06/2015	*Deutsche Bahn*						
CJEU	17/12/2015	*Webmindlicence*						

Table 4: List of European rulings for each case-study

Other written sources used for both the independent variables and causal process observations are case-law from domestic courts in Europe, from which different elements are

extracted, such as the outcome of the case, the reasoning and as much as possible, the content of third party observations submitted by Civil Society Organisations (CSOs) or observations submitted by Member States or the European Commission. Indeed, observations from States and the Commission are not public, while the observations by said by CSOs can be public, but are not systematically made available by said organisations.

Additional sources include: the systematic collection of conclusions submitted by the Advocate Generals of the European Court of Justice, legislation or regulations, press releases and official statements of States, judges, or sometimes domestic courts, and speeches, writings, and publications from judges themselves.

A second set of data was collected later on in the research process as it emerged during the interviews. These are report summaries, documents, and informational notes that are typically circulated within the courts, but can be, for some of them, available publicly. This includes, for example, documents named *Flash News* (and its predecessor *Reflets*), whereby the CJEU keeps tracks of the activities of domestic courts and of the ECtHR; or *Research Notes* by the *Direction Recherche et Documentation* (DRD) of the CJEU.

Secondary data sources are mostly legal commentary published in specialised academic journals at the time of the release of the particular ruling. They also include reports from domestic or European institutions or civil society organisations, which give a broader understanding of the current European legal landscape on a particular question, to identify broad trends rather than surveying all individual legislation one by one.

Additionally, I conducted multiple interviews with current and former Judges and Advocate Generals, Référendaires and jurists working within Directorates or legal services of each Court. Interviews are indeed particularly adapted to this type of social legal research. As stated by Rathburn, ‘interviewing is often the most productive approach when influence over the outcome of

interest was restricted to a few select decision-makers, creating a bottleneck of political power that increases the importance of agency in the story' [170]

There was a total of 16 interviews conducted between October 2022 and April 2023, with details listed in Appendices 1 and 2. Each was about 45 minutes to an hour (usually shorter with non-judges). All but two took place on Zoom, all but one agreed to be recorded, and they were all anonymised. They were particularly useful to establish what the preferences and motivations of the judges, and potentially the Court of which they are part, were[171], as well as which information these agents had at their disposal to begin with[172]. Conducting 16 interviews was a way to avoid any potential bias and embrace the potential diversity of explanations and insights that judges might have. Indeed, judges within a given International Court are not a monolithic bloc, and might sometimes hold conflicting goals and motivations. The aim of the interviews was, therefore, also to identify what could be characterised as 'the court's' goals above the objectives that individual judges may hold. The detailed interview schedule is attached in Appendix 1, although as these were semi-structured interviews, it became rapidly evident that the schedule helped guide the conversation through different topics but was never followed exactly. More insight was gained by letting the interviewee guide the conversation, rather than confining my interlocutors to specifically worded questions.

Overall, the interview process was smooth one, 'getting through the door'[173] being the main challenge for the very first interviewees. Additionally, getting access to judges from the ECtHR proved to be more challenging that with the CJEU, and I therefore interviewed more jurists from the ECtHR's Jursiconsult to obtain relevant information. Interviewees were overall willing to talk

[170] Brian C Rathburn, 'Interviewing and Qualitative Field Methods: Pragmatism and Practicalities' in Janet M Box-Steffensmeier, Henry E Brady and David Collier (eds), *Oxford Handbook of Political Methdology* (OUP 2008) 690.
[171] Rathburn (n 176) 690.
[172] Andrew Bennett and Jeffrey T Checkel, 'Process Tracing From Philosophical Roots to Best Practices' in Andrew Bennett and Jeffrey T Checkel (eds), *Process Tracing From Metaphor to Analytic Tool* (CUP 2015) 32. This is similar to what Korkea-aho and Leino-Sadberg have called "systematizing interviews" 'Interviewing Lawyers : A Critical Self-Reflection on Expert Interviews as a Method of EU Legal Research: Network of Legal Empirical Scholars Special Issue 2019' (2019) 12 European Journal of Legal Studies 17.
[173] Kenneth Goldstein, 'Getting in the Door: Sampling and Completing Elite Interviews' (2002) 35 PS: Political Science & Politics 669.

fairly candidly and transparently, although sometimes still making distinctions between on record and off-record conversations.

Still, as an inherently interactive and interpersonal method, reflecting over the interview process and the dynamic within every single interview is fundamental before any use can be made of the interview transcript. Because of the very nature of adjudication and the fiction of the full neutrality of law and lack of personal agency of judges[174], my interviewees were often the prime example of 'agents who have instrumental motives to convince observers that some explanations are stronger than others'[175]. This was particularly true for the topic of my research, the relationship between two European courts, as this was a 'high valence' issue[176]. My interviewees often had strong opinions about the relations between both courts, descriptively and normatively, in particular since negotiations regarding the accession of the European Union to the European Convention of Human Rights were at their peak while the interviews were being conducted. But these positions and opinions were always presented as being based on a neutral appreciation of the legal context, rather than being built on policy preferences. In truth, many interviewees were put off by the very concept of 'preferences', and I switched most of the time to the notions of 'goals' or 'objectives' to be accomplished by their Court.

Due to the nature of elite interviewees, it is difficult to have real commensurability across all interviews. Rather than being strict with my questions and timing, I often let the conversation flow and go in the direction my interviewee wanted to take it; and therefore, some topics were mentioned in some interviews while they were fully absent from others, purely because it was not the direction the interview went towards. Instead, the contents of the interviews were used as an additional source of information for process tracing, and to gain insight in the formal and informal rules organising the inner working of each court. Once the interviews were conducted, the analysis was mainly based

[174] Martin Shapiro, 'Judges As Liars Judicial' (1994) 17 Harvard Journal of Law & Public Policy 155.
[175] Bennett and Checkel (n 178) 24.
[176] Rathburn (n 176).

on the transcript. Indeed, many of them took place over Zoom with potential interruptions, making it difficult to explore non-verbal and behavioural cues.

Overall, most of the methodological challenges of this research project mainly stemmed from the complexity of navigating an ocean of potentially relevant data and data sources, as well as decisions regarding the rules of coding various observations in a way that would be replicable consistently across case studies. This is because most of the methodological choices in that section had to do with operationalisation of concepts which, in the end, were either binary themselves or could simply be evaluated through a list of potential empirical observations.

2. European human rights: the 'tale of two courts'[177]

To present a new explanation regarding both the causes and consequences of the horizontal supranational judicial dialogue taking place between International Courts, this dissertation will focus on the European continent, home to two of the most productive and successful International Courts on the planet: the CJEU and the ECtHR, respectively nicknamed by metonymy the Luxembourg Court and the Strasbourg Court.

The goal of this section is not to retrace the full history of each of these individual Courts and their attached organisations. Instead, it will set the general historical and institutional background of their creation, and how their relationship has broadly evolved over the last seventy years. This will bring to light the elements that make these two courts pertinent subjects for a case-study on international judicial dialogue. Parallel Courts and 'frenemies': the complex history of European supranational Courts.

The CJEU and the ECtHR were never destined to collide with each other. The Court of the Justice of the European Coal and Steel Community made its appearance as an institution of the European Coal and Steel Community (ECSC) in 1951, and the ECtHR, under the umbrella of the Council of Europe, opened its door in 1959.

[177] Douglas-Scott, S. (2006). A tale of two courts: Luxembourg, Strasbourg and the growing European human rights acquis. Common Market Law Review, 43(3), 629–665.

2.1.The CJEU as a human rights court (1970-1992)

The CJEU famously established the cornerstone of European Community law throughout the 60s: no retaliation between Member States[178], no unilateral safeguards[179], primacy of European law over all national law[180], including constitutional law[181], and direct effect demanding that domestic courts disapply national law themselves if it is contradiction with European law[182]. Meanwhile, it had initially refused to include human rights under its jurisdiction[183].

While a spectacular *tour de force* that Member States broadly accepted despite the sovereignty costs [184], this had sparked the worried interest of some domestic courts. Phelan notes that already in 1965, the Italian *Corte Costituzionale* affirmed that the existence of the ECSC could not affect the fundamental rights guaranteed by the Italian Constitution or the European Convention of Human Rights [185]. The German *BverfG*, around the same time, raised the question of basic rights (i.e., German Constitution-based fundamental rights) and European Community regulations, leaving open the question of

> whether and to what extent the institutions of the European Communities might be subject to a system of basic rights in the Federal Republic of Germany or to what extent the Federal Republic could exempt Community institutions from being subject to a system of basic rights.[186]

Pushback from these two courts would escalate in the *Frontini* case for the Italian Constitutional Court[187], and in *Solange I* for the BVerfG[188].

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[178] *Cases 90 & 91/63 Commission v Luxembourg & Belgium (Dairy Product)* [1964] ECR 625.
[179] *Case C-7/61 Commission v Italy (Pork Products)* [1961] ECR 317.
[180] *Case 6/64 Costa v Enel* [1964] ECR 585.
[181] *Case 11/70 Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.
[182] *Case 26-62 Van Gend en Loos v Nederlandse Administratie der Belastigen* [1963] ECR 1.
[183] *Case 1/58 Stork v High Authority* [1959] ECR 17.
[184] Burley and Mattli (n 24).
[185] William Phelan, 'The Role of the German and Italian Constitutional Courts in the Rise of EU Human Rights Jurisprudence: A Response to Delledonne and Fabbrini' [2021] European law review 175.
[186] Bundesverfassungsgericht (German Federal Constitutional Court 1st Senate), 18 October 1967, 1 BvR 248/63 and 216/67.
[187] *Frontini v Minister delle Finanze* [1974] 2 CMLR 372.
[188] *Internationale Handelsgesellchaft mbH v Einfuhr- & Vorratsstelle fur Getreide & Futtermittel (Solange I)* [1974] 2 CMLR 540.

The place of *Solange I* in the institutional development of European-wide human rights cannot be understated, the German judges bluntly announcing that

> in the hypothetical case of a conflict between Community law and a part of national constitutional law or, more precisely, of the guarantees of fundamental rights in the Basic Law, there arises the question of which system of law takes precedence, that is, ousts the other. In this conflict of norms, the guarantee of fundamental rights in the Basic Law prevails as long as the competent organs of the Community have not removed the conflict of norms in accordance with the Treaty mechanism.[189]

Problem: the European Communities did not have its own catalogue of rights[190]; it would be a blind spot in the protection of its human rights, as long as there was no human rights-based judicial review possible of European Community law. The decision to add such a bill of rights at European level would have been up to the States. The CJEU, therefore, would have make its own judge-made Bill of Rights, if it was to convince domestic courts to continue accepting the supremacy and direct effect of Community Law[191].

Scheeck reports how the Luxembourg Court gradually developed what would be the European Communities' own catalogue of human rights, borrowing both from the inside (domestic legal orders and their constitutional courts) and the outside (from the European Convention system)[192]. In 1969, the CJEU delivered the *Stauder* case, where it confirmed that fundamental rights were 'General principles of community Law and protected by the Court'[193]. The very next year, the *Handelsgesellschaft* ruling stated that

> *respect for fundamental rights forms an integral part of the general principles of law protected by the court of justice. The protection of such rights, whilst inspired by the* ***constitutional traditions common to the Member States****, must*

[189] *Solange I* (n 194), para 4.For further explorations of the role of the BVerG: Bill Davies, *Resisting the European Court of Justice: West Germany's Confrontation with European Law, 1949-1979 by Bill Davies* (Cambridge University Press 2012).
[190] Joseph Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403.
[191] Bruno De Witte, 'The Role of the ECJ in Human Rights' in Philip Alston (ed), *The EU and Human Rights* (Oxford University Press 1999).
[192] Laurent Scheeck, 'Solving Europe's Binary Human Rights Puzzle. The Interaction between Supranational Courts as a Parameter of European Governance' (2005) 15 Questions de Recherche, Sciences Po.
[193] *Case 29/29 Stauder v City of Ulm* [1969] ECR 419 [7].

be ensured within the framework of the structure and objectives of the community.[194]

2.2.Institutionalising the EU-ECHR relationship: a 30-years wait (1993-2023)

With the increasing commons intrusions of both Courts in each other's legal systems, properly institutionalising their relationship appeared on the European agenda. Following *Solange I*, multiple European Communities institutions adopted resolutions or memorandums stating their support for the accession of the European Communities to the ECHR[195]. Negotiations were slow, and it is only in the early 90s that a proper accession agreement was ready; meanwhile, the Treaty of Maastricht now included a provision that 'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms'[196]. However, once the Accession Agreement was ready, it received a negative opinion from the CJEU: *Opinion 2/94* stated that European treaties, in their current form, did not allow such an accession: they did not provide a legal basis for the EU to conclude a human rights Treaty. Yet, all that would be required, for the CJEU, was that the European Treaties be amended to allow for this accession[197].

At this point, the idea of an EU-specific, treaty-level Bill of Rights was also gaining traction, which led to the adoption of the EU Charter of Fundamental Rights – first without binding value in the Nice Treaty, in 2002; and then fully binding with the entry into force of the Lisbon Treaty. At long last, the EU had its own catalogue of rights, broadly similar to the ECHR, with the addition of social rights.

A few years – and European Treaties – later, the European Communities had become the European Union, and the Lisbon Treaty now explicitly ordered that 'The Union shall accede to the European

[194] *Internationale Handelsgesellschaft* (n 187) [4]. Emphasis added by the author.
[195] European Parliament, Resolution of 27 April 1979, Doc 80/79 ; Commission (EC), Memorandum of 2 May 1979 by the Commission of the European Communities, concerning their accession to the European Convention on Human Rights EC Bull.Sup.2/79. See: Kim Economides and Joseph HH Weiler, 'Accession of the Communities to the European Convention on Human Rights: Commission Memorandum' (1979) 42 The Modern Law Review 683.
[196] Treaty on the European Union [1992] , OJ C 325/5, Article F.
[197] *Opinion 2/94 Accession to the ECHR* [1996] ECR I-01759.

Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties'[198]. A new Accession Agreement was drafted and sent to the CJEU, who delivered in December 2014 its now famous *Opinion 2/13*[199]. The Opinion was not only negative, but also strongly defensive of the competences and specificity of the EU and EU Law, in a way which made it difficult to envision any accession would ever actually be possible, as will be explained in the next section.

2.3. Legal consequences: the uncertain state of European human rights coherence

What this meant is that the organisation of the CJEU-ECHR relationship is not to be found by looking into Treaties and agreements. Judges in each court had no choice but to decide, when such a question was brought up by litigants, and judges answered in their own language: case-law. Judges themselves organised, one case at a time, the 'open architecture of European human rights'. The evolution of this architecture can be broken down into different phases, distinguishing the behaviour of the CJEU towards the ECtHR, and of the ECtHR towards the CJEU.

2.3.1. A judicially organised European legal space: the phases of the CJEU-ECtHR relationship

From the ECtHR towards the CJEU, the first yet easiest question was that of the responsibility of the EU itself in case of violation of human rights by EU Law or its implementation by Member States. In the *CFDT* case, the ECtHR concludes that, since the European Communities were not a party to the ECHR, they could not be called as a defendant before the Strasbourg Court[200]. However, more challenging was the issue of Member States implementing EU law, and potentially being in violation of the Convention in this context. EU Member States were responsible before the Court of any violation of the Convention, but they were also bound by their obligations before the EU. Early on, the Strasbourg court had made it clear that membership to the European Communities

[198] TEU, Art 6-2.
[199] *Opinion 2/13 Accession to the ECHR* ECR I-000.
[200] *Confédération Française Démocratique du Travail (CFDT) v European Communities* 78 DR 13.

did not make Member States any less responsible for the safeguarding of human rights[201]. In 1984's *Tete* case, the ECtHR reiterated this, although finding no violation by France in the end[202].

But the ECtHR softened its approach as the European Communities developed their own human rights case-law; in 1990, the *M&Co* case[203] introduced the concept of *equivalent protection*: States cannot see their responsibility questioned before the Strasbourg court if their decision was taken as a consequence of their compliance with an international organisation to which they had transferred sovereignty, on the condition that this sovereignty provides a protection human rights of 'equivalent protection' to the Convention System. This, however, only applied if the State had no margin of appreciation: it confirmed a few years later, in the *Cantoni* case[204], that if the State had a margin of appreciation in applying EU law, then it remained fully responsible before the ECtHR. Moreover, while in the *Cantoni* case, France was not found in violation of the Convention in the end, that was not the case for 1999's *Matthews v UK*: in application of standing EU law, the United Kingdom had not granted to its residents in Gibraltar the right to vote for European elections. The Strasbourg Court found, in this particular case, that the CJEU would not have been in a position to review the UK decision, and therefore, there was no equivalent protection protecting shielding the UK from its responsibility under the Convention[205]. During this time, meetings between the judges of both Courts started, and continued at a rhythm of at least once a year[206].

The landmark case bringing this entire line of jurisprudence as one coherent whole is universally acknowledged as being *Bosphorus*[207]. The 2004 case established the definitive rules organising the overlap of the CJEU with the ECtHR on EU human rights, when the application of EU law by Member States come under scrutiny before Strasbourg. First, it noted that

[201] *X v Federal Republic of Germany* Application No. 10565/83 (Commission Decision, 10th June 1958).
[202] *Etienne Tête v France* (1987) 54 DR 52 Tête.
[203] *M & Co v Federal Republic of Germany* (1990) 65 DR 138.
[204] *Cantoni v France* ECHR 1997-V 1614.
[205] *Matthews v United Kingdom* (1999) 28 EHRR 361.
[206] Laurent Scheeck, *Competition, Conflict and Cooperation between European Courts and the Diplomacy of Supranational Judicial Networks*, vol GARNET Working Paper (2011).Confirmed by Interview 3 and Interview 5.
[207] *Bosphorus* (n 28).

> The Court considers it evident from its finding (…) that the general interest pursued [by Ireland] was compliance with legal obligations flowing from the Irish State's membership of the European Community.
>
> It is, moreover, a legitimate interest of considerable weight. The Convention has to be interpreted in the light of any relevant rules and principles of International Law applicable in relations between the Contracting Parties (…) The Court has also long recognised the growing importance of international cooperation and of the consequent need to secure the proper functioning of international organisations (…) Such considerations are critical for a supranational organisation such as the European Community (…). This Court has accordingly accepted that compliance with Community law by a Contracting Party constitutes a legitimate general-interest (…).[208]

Then:

> State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides (…) By "equivalent" the Court means "comparable"; any requirement that the organisation's protection be "identical" could run counter to the interest of international cooperation pursued.[209]

And then that:

> If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.
>
> However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient.[210]

[208] *Bosphorus* (n 28) [150].
[209] *Bosphorus* (n 28) [155].
[210] *Bosphorus* (n 28) [156].

Therefore, the ECtHR organised the overlap with the CJEU through a two-step test (*Figure 4*). This approach is very deferential to the CJEU and the EU system[211], especially since for almost two decades after this ruling, the ECtHR consistently found that the EU legal system did provide equivalent protection, and never then rebutted this by finding that it had been manifestly deficient.

There is a consensus in the literature to consider that this was a very deferential approach towards the CJEU, and respectful of its autonomy, especially since in the following years the ECtHR would never in fact rebut the presumption. According to Lock, 'as a rebuttal of the presumption is unlikely to occur in practice, the key implication is that it results in immunity from review for the CJEU'[212].

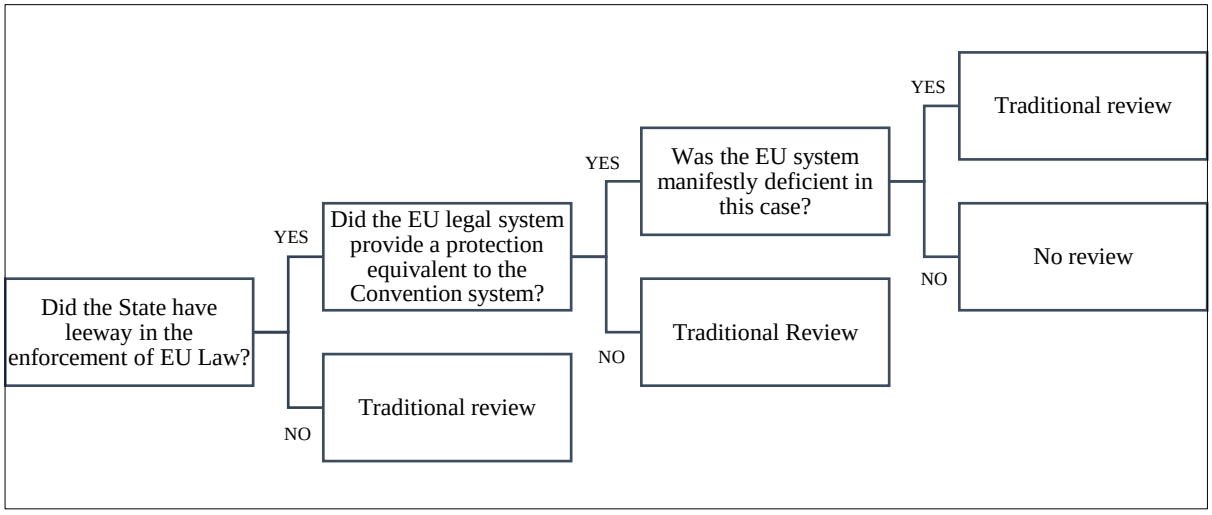

Figure 4: Visualisation of the Bosphorus rule

At least until *Opinion 2/13*, the ECtHR was therefore very deferential and unchallenging of the CJEU's authority.

Post-*Opinion 2/13*, which will be discussed below, it is more difficult to evaluate where the ECtHR was standing. The initial reaction was one of clear frustration, one interviewee mentioning 'I am not telling you any secrets when I tell you that Strasbourg was absolutely livid at that (…) I cannot

[211] Cathryn Costello, 'The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe' (2006) 6 Human Rights Law Review 87; Kathrin Kuhnert, 'Bosphorus Double Standards in European Human Rights Protection?' (2006) 2 Utrecht Law Review 177.
[212] Lock (n 133) 196; Lize R Glas and Jasper Krommendijk, 'From Opinion 2/13 to Avotiņš: Recent Developments in the Relationship between the Luxembourg and Strasbourg Courts' (2017) 17 Human Rights Law Review 567.

describe to you how furious they were. I mean, you know, they… you know, just, boy- were they furious'[213], with a judge of the ECtHR confirming it had 'quite a dramatic impact'[214]. Both Courts immediately stopped their annual visits to each other[215], with no official contacts or meetings between the two Courts throughout the entire year of 2015[216]. Guido Raimondi, then President of the ECtHR, of the latter indeed publicly declared the following year:

> Let us not forget, however, that the principal victims will be those citizens whom this opinion (no. 2/13) deprives of the right to have acts of the European Union subjected to the same external scrutiny as regards respect for human rights as that which applies to each member State. More than ever, therefore, **the onus will be on the Strasbourg Court to do what it can in cases before it to protect citizens from the negative effects of this situation.**[217]

A few months later, the next ECtHR President Dean Spielman added that EU law had to clearly submit to ECtHR and ensure coherence of Fundamental rights in Europe[218].

However, following the immediate aftermath, and still with the background of very chilled relationship between both jurisdictions, the ECtHR maintained the same approach in the *Avotins v Lithuania* case of 2014[219], and still did not find any reason to rebut this presumption of equivalent protection in the following year[220]. This is despite the tensions between the both Courts in major lines of case-law during the immigration crisis that the EU failed to address in the 2010s, and regarding the European Arrest Warrant (see Chapter 4). The ECtHR, until 2021, remained

[213] Interview 3, Former CJEU AG, 07/12/2022.
[214] Interview 11, Former ECtHR Judge, 28/03/2023.
[215] Interview 3, Former CJEU AG, 07/12/2022, Interview 11, Former ECtHR Judge, 28/03/2023.
[216] 'While the EU Court was seized of the question of the Accession Agreement, we considered it appropriate to adjourn our annual meetings, out of respect for the principle of impartiality. We have yet to resume our official contacts' Dean Spielmann, 'Whither Judicial Dialogue?' (Sir Thomas More Lecture, Lincoln's Inn, 12 October 2015) <https://www.echr.coe.int/documents/speech_20151012_spielmann_sir_thomas_more_lecture.pdf>.
[217] European Court of Human Rights, Annual Report 2015 (Strasbourg, 2016). Emphasis added by the author.
[218] Dean Spielmann, 'Opinion 2/13 and Other Matters' (Public Lecture of the Faculty of Law, University of Cambridge, 14 March 2015).
[219] *Avotiņš v Latvia* (2017) 64 EHRR 2.
[220] Paul Gragl, 'An Olive Branch from Strasbourg: Interpreting the European Court of Human Rights' Resurrection of Bosphorus and Reaction to Opinion 2/13 in the Avotins Case: ECtHR 23 May 2016, Case No. 17502/07, Avotins v. Latvia Case Notes' (2017) 13 European Constitutional Law Review 551.

deferential to the CJEU; official meetings and visits between both Courts would start again in March 2016 under the impulsion of their respective new Presidents[221], with the Strasbourg Court seemingly having a very positive outlook on this renewal[222] with President Guido Raimondi noting that the meeting had been 'particularly useful and warm'[223]. That is not to say that the ECtHR had given up all intents to try to influence the CJEU's case-law. Indeed, in the very same January 2017 speech, President Raimondi followed:

> Laurence Burgorgue-Larsen, the renowned observer of our respective case-laws, is correct in pointing out that "[t]he necessary requirement of maintaining coherence between the two European systems leads the [Strasbourg] Court to ally itself with European Union law by drawing attention to possible shortcomings in EU law, particularly in the judgments of the [Court of Justice]".[224]

He also commented on the *Avotins* ruling by reminding the audience, among whom CJEU President Koen Lenaerts was to be found, that:

> For [the] application of the presumption of equivalent protection [to be] met, it must satisfy itself that "the mutual-recognition mechanisms do not leave any gap or particular situation which would render the protection of the human rights guaranteed by the Convention manifestly deficient.[225]

This, however, would stop in 2021, with the *Bivolaru and Moldovan v France* case.[226] The case involved Gregorian Bivolaru, who had been convicted in Romania for human trafficking, but had fled the country during the investigation. Targeted by a European Arrest Warrant, he was arrested by French authorities who sought to surrender him to Romania – but Bivolaru argued that this would submit him to inhumane and degrading treatment due to the state of Romanian prisons. Despite this,

[221] European Court of Human Rights, 2016 Annual Report, 2017, p6; Court of Justice of the European Union, 2016 Annual Review, 2017, p8.
[222] 'The meeting, attended by many judges from each court, was a sign of the desire shared by both institutions to continue to develop mutual relations.' European Court of Human Rights, 2016 Annual Report, 2017.
[223] European Court of Human Rights, 2017 Annual report, 2018, p17.
[224] European Court of Human Rights, 2017 Annual report, 2018, p17.
[225] European Court of Human Rights, 2017 Annual report, 2018, p17.
[226] *Bivolaru and Moldovan v France* Apps nos 40324/16 and 12623/17 (ECtHR, 25 March 2021).

French domestic courts decided in favour of the surrender, and the case reached the Strasbourg Court. For the first time, the ECtHR did identify that the EU legal system (here, a European Arrest Warrant) as applied by a Member State had been manifestly deficient. The consequence of this was the condemnation of France for violation of Article 3 of the Convention (torture, inhumane and degrading treatments) despite acting strictly in line with its obligations under EU Law. This marked the first time that the Strasbourg Court was willing to indirectly review EU Law, to ensure that there would be no blind spots in European human rights [227].

Today, interviewees of the Strasbourg Court described the ECtHR's goal and role with a lot of simplicity: the ECtHR defines itself as 'the highest court in Europe in the field of human rights (…). The standard-setting judicial institutional in Europe, in the field of human rights'[228], 'providing guide, guidance and principles on, on interpreting basic human rights for the, the whole legal system of the, of the countries of the Council of Europe'[229]. While it is aware that it fulfils this goal through individual cases, decided after the fact, it still considers that individual cases are not the end goal: 'it does also render justice in, in individual cases, but this role of the court is- is more limited.' It is willing to have flexibility when developing its jurisprudence, while still maintaining 'red lines'[230] that it will not cross and basic standards it will not go under.

Interviewees from the ECtHR brought up multiple times their awareness of the specificity and complexity of the EU legal system, and of the position that domestic courts specifically could be put in when they apply EU law [231]. An interviewee mentioned they could see a level of complementarity between both systems[232], although the general answer seemed more towards

[227] Sébastien Platon, 'La Présomption Bosphorus Après l'arrêt Bivolaru et Moldovan de La Cour Européenne Des Droits de l'homme : Un Bouclier de Papier ?' (2022) 2022 Revue Trimestrielle des Droits de l'Homme 91.
[228] Interview 11, Former ECtHR Judge, 28/03/2023, with the notion of "standard setting mechanism" also used in Interview 16, ECtHR Judge, 20/04/2023.
[229] Interview 16, ECtHR Judge, 20/04/2023.
[230] Interview 11, Former ECtHR Judge, 28/03/2023.
[231] Interview 16, ECtHR Judge, 20/04/2023.
[232] Interview 16, ECtHR Judge, 20/04/2023.

sincere acceptance as long as EU law is not a 'Trump card'[233] against the proper protection of ECtHR standards.

The CJEU saw more evolution and changes in its behaviour towards the ECtHR. Initially without any human rights instrument of its own, it had to show deference to the Strasbourg Court. The first reference to the ECHR itself being in 1974's *Nold* case[234], and further cases referring to specific articles of the ECHR in *Rutili, Johnston* and *Heylens* among others[235]. Finally, the CJEU even referred to specific case-law of the ECtHR in 1989[236], giving it a 'particular significance' in 1996 [237]. The number of references would only rise to become commonplace until the mid-2000s. While the Charter was first officially announced at the Biarritz European Council of 2000, it would not officially be enforced as primary law for a few more years, leading the CJEU to continue relying on and deferring to the ECtHR's jurisprudence instead. ECtHR President Iglesias confirmed in 2002 that the CJEU 'had engaged with national jurisdictions and with the European Court of Human Rights a dialectic relationship which turned out to be very fruitful'[238]. Even with the CJEU refusing the first attempt to have the EU become a party to the ECHR, President Iglesias had explicitly expressed a positive attitude towards the accession of the EU to the ECHR:

> I would like to highlight that this Opinion [2/94] did not constitute, in any way, the expression of a negative attitude from the Court toward such an accession on principle. It was even less the manifestation of reluctance to occupy a position subordinated vis-à-vis this Strasbourg Court [239].

[233] Interview 11, Former ECtHR Judge, 28/03/2023.
[234] *Case 4/73 Nold v Commission* [1974] ECR 491.
[235] *Case C-36/75 Roland Rutili v Ministre de l'intérieur* [1975] ECR 1219; *Case 222/84 Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651; *Case 222/86 Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others* [1987] ECR 4097.
[236] *Joined cases 46/87 and 227/88 Hoechst AG v Commission* [1989] ECR 2859.
[237] *P v S* (n 154).
[238] Speech by Gil Carlos Rodríguez Iglesias (Luxembourg), 4 December 2002 (original in French, translation by the author)
[239] Speech by Gil Carlos Rodríguez Iglesias (Strasbourg), 31 January 2002 (original in French, translation by the author).

This very cooperative, unthreatening behaviour started to change with the official adoption of the EU Charter of Fundamental Rights, following which the CJEU started to make less and less reference to the ECHR and the ECtHR's case-law[240]. Multiple interviewees stressed the fundamental impact the Charter had on the CJEU's approach to fundamental rights, with the notion of the Charter truly being the EU's "own instrument"[241]. The Charter would not prevent a convergence of the CJEU with the ECtHR at all; *a priori*, it could even have been more encouraged. Indeed, Art. 52-3 of the Charter states:

> In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.

This could have been interpreted as being akin to a mandated correspondence, but the CJEU clearly tried to gain more independence from the ECtHR, no longer making systematic references to ECtHR case-law, and adopting different positions than the Strasbourg Court on different issues[242]. Instead of being an instrument of harmony, the CFR became a way for the CJEU to emancipate itself from the confines of the ECHR and its interpretation by the ECtHR. In a 2018 speech delivered at the ECtHR itself, President Koen Lenaerts notes that yes, the ECHR had influenced EU law, but also that 'the Charter of Fundamental Rights of the European Union ("the Charter"), despite its relative youth, has, in turn, influenced the interpretation of the Convention', framing both Courts as having a 'mutual influence'[243] on each other, rather than the CJEU being bound by the ECtHR's case-law. To this day, the CJEU is careful to never explicitly say that the ECHR or its case-law has any *binding authority* for EU law or for the Luxembourg Court. Interviewees from the CJEU showed a lot of care in their wording when asked about it. They recognised it was 'perhaps not in itself directly binding, but an important source of inspiration'[244], 'some precedent value, like any

[240] Gráinne de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 Maastricht Journal of European and Comparative Law 168, 74–76.
[241] Interview 9, CJEU Judge, 13/03/2023; Interview 3, former CJEU AG, 07/12/2022.
[242] Sébastien Platon, 'CJUE et Cour EDH : la dialectique du maître et de l'esclave?' [2020] Revue québécoise de droit international. more
[243] European Court of Human Rights, 2018 Annual Report, 2019.
[244] Interview 4, CJEU Judge, 12/12/2022.

case-law'[245], 'very important and persuasive'[246]. In parallel, the same interviewees often stressed the place of the Charter for EU law instead:

> now we have the charter and the charter largely takes over and implement[s] a number of articles of the convention. So when you have your parallel provisions that at least give the same protection, sometimes more, sometimes identical protection in what is a constitutional text of your own legal order, well, It's a little bit like if the directive suffices to give the full answer, you just examine the directive and you give that answer'[247]

The last straw would come from the CJEU in 2014. As mentioned before, the two Courts had been engaged in negotiations that were appearing fruitful in order for the EU to become signatory to the ECHR itself, which would also have clarified the relationship between both Courts once and for all. However, these negotiations came to a full stop following the CJEU's *Opinion 2/13* in 2013. Indeed, the CJEU had been asked to provide, officially, a legal Opinion regarding the draft Accession agreement, to evaluate its compatibility with the EU Treaties. The Opinion, against all expectations, turned out to be a negative one. Legal commentary on this decision called it a sign of 'autarky'[248] from the CJEU, expecting the 'caveat' raised by the CJEU to turn into 'locks'[249]. Interviews reveal that the CJEU's Judges were keenly aware of the criticism, one of them commenting: 'it seemed to be the viewpoint of many scholars at the time, that it's these two groups of angry old men and a few younger, perhaps less or more angry women, who are in a power struggle of some kind'[250].

This is due to the arguments used by the CJEU to justify this negative opinion, the main one being the autonomy and specificity of EU law[251], thereby refusing to formally grant any authority to the ECtHR over the EU legal order. This decision had a notoriously chilling effect on the relationship

[245] Interview 9, CJEU Judge, 13/03/2023.
[246] Interview 3, Former CJEU AG, 07/12/2022.
[247] Interview 4, CJEU Judge, 12/12/2022.
[248] Piet Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky' (2015) 38 Fordham International Law Journal 955.
[249] Adam Łazowski and Ramses A Wessel, 'When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR' (2015) 16 German Law Journal 179.
[250] Interview 4, CJEU Judge, 12/12/2022
[251] Opinion pursuant to Article 218(11) TFEU (Opinion 2/13), 18 December 2014

between the two Courts[252], one which definitely confirms that the CJEU was threatening the authority of the ECtHR more than ever before.

Interviews with current Judges and Advocate Generals clearly establish that the CJEU's priorities are uniformed interpretation of EU law, uniform application of EU law, and monopoly as a constitutional court.

'The core essence of the Court of Justice of the European Union is to ensure the uniform, interpretation, application, and enforcement of all rules and principles of union law' is the quasi-verbatim answer of all CJEU judges and AGs interviewed[253]. In this sense, it sees itself as a Supreme Court, and in interviews, multiple members compared it to a traditional domestic Supreme Court[254]. It is very aware of the challenge of dealing with 27 different legal orders, having this uniformity across all Member States.

Second, while it does have a role in the field of EU human rights, the CJEU emphatically does not define itself as a human rights court; multiple interviewees were very forthcoming in the CJEU being 'radically different from the human rights court'. Instead, the CJEU is not only a supreme court, but a constitutional one:

> we deal with fundamental rights in exactly the same way as the supreme and constitutional law, Supreme administrative courts in all our Member States. For us, it is a standard of interpretation of law. It is sort of a, a standard of judicial review. Of acts, which are contested on their compatibility. But this court does that. Like any domestic supreme or constitutional court would do it, general Supreme Court, administrative, Supreme Court or constitutional court. They all work with fundamental rights as part of the domestic legal system.[255]

[252] Eeckhout (n 254) 13; Daniel Halberstam, '"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) 16 German Law Journal 105, 13.
[253] Exact sentence here from Interview 9, CJEU Judge, 13/03/2023, but confirmed by Interview 4 (CJEU Judge), Interview 7 (CJEU AG), Interview 2 (CJEU Judge), and Interview 3 (Former CJEU AG).
[254] Comparison were drawn with the French Conseil d'Etat and Cour de Cassation, the German Constitutional Court, the Irish Supreme Court, the Belgian Curia, the Supreme Court of the US.
[255] Interview 9, CJEU Judge, 13/03/2023; interviewee was stating that EU Law is, in a sense, the CJEU's own domestic law.

Instead, it is sees itself as broadly 'in favour of the European Union'[256] interpreting a 'constitutional or quasi-constitutional document'[257] (EU treaties). The CJEU, especially since the Lisbon Treaty, sees itself as the Constitutional Court of EU law[258], dubious of what might 'cut across its monopoly'[259]. As such, it must have 'the last word' on any matter concerning EU law, including fundamental rights, even when it leads to tensions with the ECtHR. As bluntly put by a current AG: 'I don't think Strasburg has the last word, because what, at the moment, the court- as far as the Court of Justice is concerned, the last word is the word of the Court [of Justice]. The EU is not- is not- is not signatory to the convention'.[260]

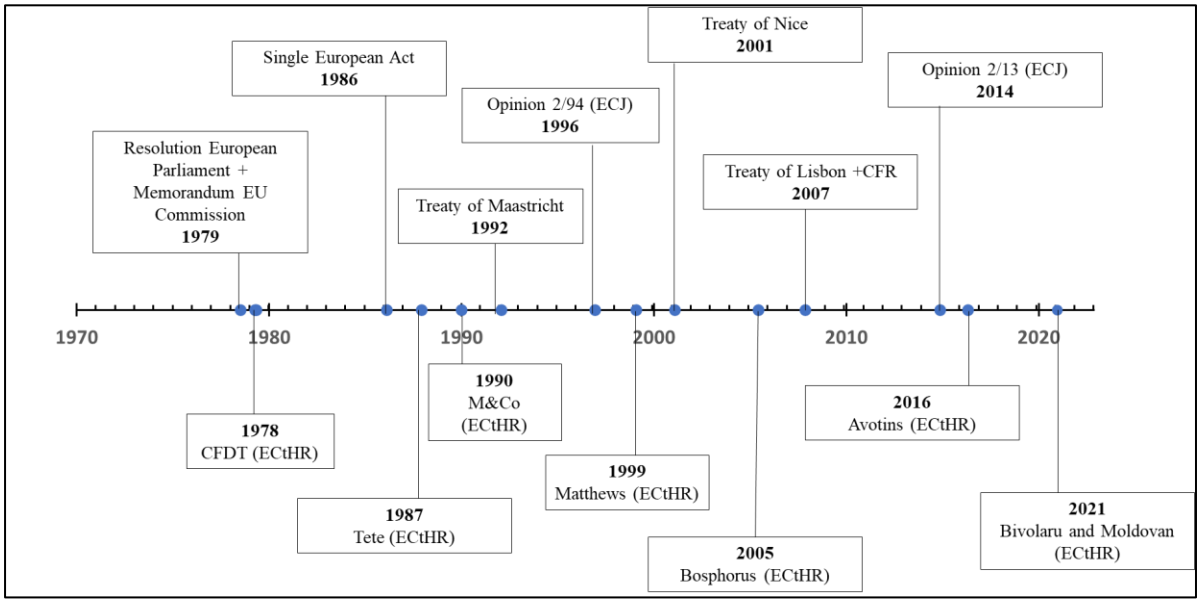

Figure 5: Timeline of key events regarding CJEU-ECtHR interactions.

2.3.2. State of knowledge: the many analyses of the CJEU-ECtHR relationship

This overview of the evolution of the European human rights legal and institutional order, as summed up in Figure 5, shows how in Europe, perhaps more than anywhere else, the

[256] Interview 7, CJEU AG, 08/03/2023.
[257] Interview 7, CJEU AG, 08/03/2023.
[258] Interview 9, CJEU Judge, 13/03/2023.
[259] Interview 4, CJEU Judge, 12/12/2022.
[260] Interview 7, CJEU AG, 08/03/2023, confirmed explicitly by Interview 3, Former CJEU AG : 'it's absolutely true that for questions of EU law, it is the Supreme Court. It is the final authority, the final arbiter.(…) It's important in terms of questions of EU law. It is quite simply the ultimate authority, right? Because it's what it says the law means is, what the law means.'

International Courts would be the likely catalyst of either fragmentation or integration in International Law. The CJEU and the ECtHR overlap over the implementation of EU human rights, and over all EU Member States.

Yet, these potential consequences have been largely overlooked by the literature. Few works of political science have attempted to explore the evolving relationship between both Courts, the most relevant being from Scheeck and Schimmelfennig. Scheeck, however, was more interested in general patterns of cooperation and competition between both Courts and, writing in the mid-2000s, focused more on retracing the history of their interactions. The in-depth insight he provided, in particular through interviews with judges in both Courts active during the 90s, retraces the sociological reality of the evolving relationship between Luxembourg and Strasbourg. This research project is greatly indebted to his work, in particular regarding the origins of the collisions between both courts, and the identification of different dynamics and goals for each of them[261]. However, the European case-law covered in his research is the one mentioned in the previous section, organising the relationship between both systems, culminating in the *Bosphorus* ruling. Scheeck did not look into the legal consequences this would have substantively for European human rights, and therefore could not conclude on the coherence of this area of law in light of the varying arrangements regarding the overlap.

Second, Schimmelfennig[262] has also given insight on the interactions between the EU and the ECHR, in particular to explain the original competition-cooperation dynamic that Scheeck explored. For Schimmelfennig, the constant push-and-pull between both Courts centres around the CJEU. Trapped into including human rights in its case-law under the pressure of Member States' constitutional courts, the CJEU in return has rhetorically entrapped itself in recognising the authority of the ECtHR. However, the more it does so, the more it loses autonomy in the area of human rights:

[261] Scheeck (n 198); Scheeck (n 212).
[262] (n 33).

> benefiting from the Convention's legitimacy without accepting its supremacy meant walking a very line and planting the seeds of rhetorical self-entrapment. Yet, benefiting from the Convention's legitimacy without accepting its supremacy meant walking a very fine line and planting the seeds of rhetorical self-entrapment.[263]

Thus, Schimmelfennig explains the adoption of *Opinion 2/94*, since the CJEU could not accept the quasi-absolute loss of authority that would have resulted from an accession of the EU to the ECHR. Despite writing seven years before it was delivered, this argument resonates especially in light of the more recent *Opinion 2/13.*

Yet, Schimmelfennig's research, similarly to Scheeck, stops one step before actually assessing how much the CJEU had bound itself to the ECtHR, in its substantial human rights jurisprudence. Yes, the Luxembourg Court gives 'particular significance'[264] to the ECHR, and the jurisprudence of the ECtHR, but was this reflected in the outcome of the cases decided? How far did the CJEU take its rhetorical use of the ECHR? The present research will therefore build on the very convincing theoretical mechanism put forward by Schimmelfennig, but look one step further, into the concrete human rights case-law of the CJEU. Moreover, one must note that Schimmelfennig puts the CJEU's agency and decisions at the heart of the institutionalisation of European human rights across both organisations; yet he does not account for the fact that the ECtHR was reciprocating. If rhetorical action in light of the threat to its autonomy by the German Constitutional Court was the cause of the CJEU's reliance on the ECtHR, what of the reliance of the ECtHR on the CJEU's case-law? Scheeck had demonstrated that this was a bilateral process, where both Courts were equally involved – but this was absent of Schimmelfennig's explanation.

The examination of the consequences of the overlap on the substantial protection of European human rights was conducted by a few successive works, usefully scattered across time as if to regularly try to update the general knowledge on the state of European human rights: Lawson[265],

[263] Schimmelfennig (n 33) 1258.
[264] Schimmelfennig (n 33) 1252 citing the CJCE's Hoechst case (1989).
[265] (n 133).

Simon[266], Douglas-Scott[267], Harpaz[268], and Lock[269]. Interestingly, these successive works overall reach the same conclusion: the CJEU and the ECtHR's case-law broadly align with each other, due to the CJEU following the lead of the Strasbourg Court regarding human rights.

First, in 1994, Lawson considered that while there was no wilful divergence from the ECtHR by the CJEU, the very (co-)existence of two Courts with identical jurisdictions created the possibility for this divergence. Such divergence had occurred but had previously been solved[270]. A few years later, Simon concludes that the CJEU now largely follows the ECtHR's case-law, and the ECtHR returned the favour[271]. Yet, Simon notices that the *risks* of divergence have not been addressed since the two Courts were still functionally independent from one another.

In 2006, Douglas-Scott confirms that the ECtHR has started (somewhat reluctantly) to refer more to the CJEU's case-law, but that these references are still few and far between in terms of number, which he attributes to the lack of relevance of the CJEU's jurisprudence for the Strasbourg Court. He however concludes that 'where it does cite Luxembourg, Strasbourg has generally done so approvingly, borrowing concepts which it has found useful, although it has also shown itself not completely deferential to the CJEU as an autonomous court'[272]. In 2015, Lock reaches an identical conclusion: '[both Courts] are generally willing to base their reasoning on the scope and limits of the fundamental rights guaranteed as general principles of EU law on the ECHR and the case-law of the Strasbourg court '[273]. Overall, this scholarship is well exemplified by the following:

> The CJEU tends to follow precedents set by the ECtHR on the fundamental rights guaranteed in the Charter, which correspond to the rights guaranteed in

[266] 'Des influences réciproques entre CJCE et CEDH : « je t'aime, moi non plus » ?' (2001) n° 96 Pouvoirs 31.
[267] (n 133).
[268] 'European Court of Justice and Its Relations with the European Court of Human Rights: The Quest for Enhanced Reliance, Coherence and Legitimacy, The' (2009) 46 Common Market Law Review 105.
[269] Lock (n 133).
[270] Lawson (n 133) 251.
[271] Simon (n 272) 43–44.
[272] Douglas-Scott (n 133) 664.
[273] Lock (n 133) 176.

> the Convention. (. . .) By bringing its own case law in line with that of the ECtHR, the CJEU tries to avoid conflicts that may lead to litigation in the ECtHR.[274]

Lock takes it a step further and consider that '[t]he two courts have (…) created a system of checks and balances'[275] , agreeing with Advocate General Sharpston that they 'keep each other on [their] toes'[276].

However, this assessment is in stark contrast with the issue-specific literature on the judicial dialogue. This literature is more detail oriented, and it documents the specific legal differences and similarities arising from the jurisprudence of the two courts, without, however, necessarily seeking to explain or justify them. Each new European ruling generates multiple articles and in the recent years, countless entries in influential blogs[277]. However, the overall tone of this literature is starkly different from the previous ones, being highly critical of the many differences between courts one can find when studying the European jurisprudence in detail. It is possible to mention some of the issue-areas that have garnered the most attention thus far:

On labour rights, Ludlow notes that both Courts have acknowledged the existence of specific labour rights such as the right to strike, but that the Courts afford it different levels of protection: the CJEU offering a lower level of protection than the ECtHR to this day. Ludlow went as far as to qualify these differences in the case-law of both courts as 'fundamentally irreconcilable'[278].

The European Arrest Warrant has also been the topic of a vigorous jurisprudential exchange between the Courts, with issues relating to the right to a fair trial. Mitsilegas, when reviewing the

[274] Kanstantsin Dzehtsiarou and others (eds), *Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and the ECHR* (Routledge 2014).
[275] Lock (n 133) 217.
[276] Eleonore Sharpston, 'Keeping Each Other on Our Toes – a Circle of Mutual Encouragement towards Setting High Standards for Fundamental Rights Protection' in Ineta Ziemele (ed), *The Role of Constitutional Courts In The Globalised World Of The 21st Century* (Constitutional Court of the Republic of Latvia, 2019).
[277] Steve Peers, 'EU Law Analysis: The Dublin System: The ECJ Squares the Circle Between Mutual Trust and Human Rights Protection' (*EU Law Analysis*, 20 February 2017) <http://eulawanalysis.blogspot.com/2017/02/the-dublin-system-ecj-squares-circle.html> accessed 15 August 2022.
[278] Ludlow (n 151).

case-law in detail in 2015, noted 'a fundamental philosophical and substantive difference in the protection of fundamental rights between the Luxembourg and Strasbourg Courts'[279]. However, recent CJEU cases could have reduced the differences between the two jurisprudences[280].

On the issue of the European Asylum system, Ippolito and Velluti found that CJEU

> case law appears to be mostly confirmatory of a fundamental right or principle, determined through an autonomous interpretation of EU law. In particular, this has been the case when, according to the CJEU, the content of the right in the EU legal order did not correspond exactly to the one established by the ECHR.[281]

A few years – and rulings – later, Pergantis concludes that on this issue, there has only been a 'mirage of jurisprudential convergence' [282].

Even for very recent case-law, it seems that no clear pattern can be identified: judicial appointment in the context of the rule of law crisis in Hungary and Poland, Smulders note that the case-law of the CJEU and the ECtHR has actually been very coherent with each other[283].

Eeckhout identifies the main issue being the CJEU being so protective of its autonomy. As a result, the current informal dialogue between the Courts – upon which the fragile and relative coherence of the system currently rests – might not go on very much longer[284]. Indeed, for Kuijer:

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[279] Valsamis Mitsilegas, 'The Symbiotic Relationship between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice' (2015) 6 New Journal of European Criminal Law 457, 172.
[280] Szilárd Gáspár-Szilágyi, 'Joined Cases Aranyosi and Căldăraru. Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant' (2016) 24 European Journal of Crime, Criminal Law and Criminal Justice 197.
[281] Samantha Velluti and Francesca Ippolito, 'The Relationship between the ECJ and the ECtHR: The Case of Asylum' in Kanstantsin Dzehtsiarou and others (eds), *Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and ECHR* (Routledge 2014) 164; see also: Giulia Vicini, 'The Dublin Regulation between Strasbourg and Luxembourg: Reshaping Non-Refoulement in the Name of Mutual Trust' (2015) 8 European Journal of Legal Studies 50, 65.
[282] Vassilis Pergantis, 'The "Sovereignty Clause" of the Dublin Regulations in the Case-Law of the ECtHR and the CJEU: The Mirage of a Jurisprudential Convergence?' in Giovanni Carlo Bruno, Fulvio Maria Palumbino and Adriana Di Stefano (eds), *Migration Issues before International Courts and Tribunals* (CNR Edizioni 2019).
[283] Ben Smulders, 'Increasing Convergence between the European Court of Human Rights and the Court of Justice of the European Union in Their Recent Case Law on Judicial Independence: The Case of Irregular Judicial Appointments' (2022) 59 Common Market Law Review.
[284] (n 254).

> there [is] a real risk that the two main European legal systems drift apart. The risks of diverging interpretations of fundamental rights by the CJEU and the Strasbourg Court would in turn undermine the coherence of the European legal space. That risk of fragmentation of the European legal space in the field of Human Rights protection would pose a major challenge to the credibility, authority and long-term future of the Convention system.[285]

There is, therefore, a contradiction between the image of smooth-sailing relationships leading to an obvious coherence under the lead of the ECtHR, as presented by the general literature, and the idiosyncrasies of specific issue-areas, where different patterns emerge, not all leading to a better integration of European human rights under the oversight of both Courts. Quite the contrary, it seems that both Courts can, as envisioned in the first section of the present chapter, be catalysts of either integration or fragmentation of International Law. This takes place on a question-by-question basis, requiring a desegregated analysis of their relationship rather than a purely bird's-eye view spanning all their case-law. The causes of this differentiated dynamic, based on which issue-areas both courts are discussing, is what the next section will start to explain.

3. The new index: (re)conceptualising judicial convergence and divergence

'For qualitative researchers, the failure of indicators to represent well all defining attributes of a concept raise concerns. For these researchers, the attributes of a concept are obligatory features that literally are the concept. Each much therefore be measured'[286]. It is therefore essential for this research to ensure the strict alignment of the definition of judicial convergence and divergence with their operationalisation: in qualitative methods, the measurement *is* the concept, and vice versa[287]. As a result, what follows is discussion on how to define in detail what is convergence and what is divergence between International Courts for the purpose of the study.

Broadly speaking, this was a two-step process. First, was an exploration of what it means to compare two cases of two different courts, and on what grounds it can be argued that two cases are

[285] 'The Challenging Relationship between the European Convention on Human Rights and the EU Legal Order: Consequences of a Delayed Accession' (2018) 24 The International Journal of Human Rights 1.
[286] Goertz and Mahoney (n 100) 130.
[287] Goertz and Mahoney (n 100) 130.

similar or dissimilar. From there was developed an index which accounts for what has been decided as valid grounds of comparison between two cases and can be used on *any* two cases of two courts to establish that degree of similarity or dissimilarity. Then, the goal was to move from a static comparison to a dynamic one, which would allow for the evaluation of the behaviour of each court across time for a given issue-area. The second section will therefore detail how to go from the static similarity/dissimilarity assessments to the dynamic Convergence/Divergence assessment.

3.1. Similarity and dissimilarity

When crafting sets of concepts or redefining pre-existing ones, it is important to consider whether one concept of the set actually negates the other: if they are 'conceptual opposite', 'mutually exclusive'[288]. In other words, is this a binary? When comparing two cases and trying to establish whether they are similar or dissimilar, is the answer necessarily one or the other? The answer, of course, is no, not necessarily. Two cases, when compared can have some similarities and some differences regarding the outcome and the various aspects of the reasoning. One possibility is to try to synthesise these various components to reach a general conclusion regarding these two cases. But still, the synthesising process needs to account for the fact that if two cases A and B can be *somehow* similar, while two others C and D can be *very* similar, this nuance needs to appear in the final assessment. If not, one runs the risk of considering that the situation cases A and B present is the exact same as the situation cases C and D present. The conceptualisation of similarity and dissimilarity therefore needs to embrace its nature as a continuum rather than a strict binary, and one that is multifaceted, due to the many grounds on which a comparison of two cases can be done.

This research project has settled on three aspects on which two cases can be compared to try to establish how similar they are to each other: 1) the answer to the legal question being asked, 2) the legal standards and tests being used, and 3) the presence, absence and manner in which cross references are or are not used. The first two correspond to what traditional legal scholarship is used to analyse at the scale of two cases, especially when trying to identify whether this is an instance of

[288] Goertz and Mahoney (n 100) 161.

judicial fragmentation or not – it is indeed what lots of recent scholarship on judicial fragmentation have focused on to virtually 'measure' the degree of fragmentation in a particular area[289]. Cross-reference, on the other hand, tends to be how empirical, and often quantitatively oriented works characterised either convergence or judicial dialogue[290], although often accounting for the presence or absence of citation, but not their use within each ruling.

- **Answer to legal question being asked:**

The exact legal question is the tool that has been used to select the caseload that would be studied for each individual case study. This is the easiest point of comparison, as well as the most intuitive. What did the court decide in each case? Once this is identified, one can easily answer did they decide the same way, or did they reach a different conclusion? The question, of course, is not the one regarding the factual situation being brought before the judge, as these can always differ from one case to the next. The question this project is focused on is that of the legal principle at hand, and when relevant, the sub-legal questions that can either flow from it or be subcomponents.

For example, in Chapter 3, the legal question is *whether companies had a right to privacy which guaranteed them the protection of their business premises*. This, in and of itself is a yes/no question: either companies have these rights or do not have these rights. Additionally, if they do have these rights, a subsequent question that was constantly argued is whether this right was to be protected to the same degree the right to privacy covering natural person's home.

On this particular question, two courts could agree on both aspects or could agree on the principle of companies having a right to protection, but disagree on the level of protection, with one considering that individuals and companies should receive the same standards of protection and the other thinking that individuals should benefit from a higher level of protection of this fundamental

[289] Webb (n 64); Abrusci, *Judicial Convergence and Fragmentation in International Human Rights Law* (n 36).
[290] For example: Law and Chang (n 89); Voeten (n 46); Martin Gelter and Mathias Siems, 'Citations to Foreign Courts - Illegitimate and Superfluous, or Unavoidable? Evidence from Europe' (2014) 62 American Journal of Comparative Law 35.

right. These different levels of agreement and disagreement need to be reflected in the way similarity and dissimilarity between the two Courts are assessed.

- **Legal standards and legal tests**

Legal standards and legal tests are fictions that allow practitioners and judges to argue in which legal category a factual situation should fall. A classic example is that of the reasonable person in U.S. law. to determine whether a person is to be held responsible for some damage that they may have caused: when they were causing the damage, were they behaving the way a reasonable person should have? If yes, then they may have indeed committed the act causing damage, but may not necessarily be liable for it – if this is the appropriate standard to use in this circumstance.

Taking once again the example of Chapter 3: once it was determined that that companies did benefit from the protection of their business premises against violations by the State, the question was: *where is the line between a justified infringement and a violation of this right?* Would this be an absolute right where there could not be a justified infringement, as is the case for the protection of an individual's right to dignity? Or can the State have some leeway, for example to implement its policies on money laundering, prohibition of criminal activities or even workplace safety? One of the commonly used standards here was that of *proportionality*. In other words, were the actions of the administration proportional to the goal that they were trying to reach? In the words of Lord Diplock, 'you must not use a steam hammer to crack a nut if a nutcracker would do'. One would expect the administration to not use the same tools to intervene in a case of potential human trafficking victims requiring immediate rescue as they would for a simple workplace inspection where no sign pointed towards any forceful intervention being required.

Similarly to the previous section, once the legal standard or test used by each of the Courts to assess whether there has been a violation of a right or not has been identified, it is easy to compare whether these standards are the same, whether they partially overlap, or whether they have nothing to do with each other, one providing in the end greater protection than the other.

- **<u>Cross-citations and cross-references</u>**:

Trying to include the existence or absence of cross citations and cross references on the assessment of similarity and dissimilarity is more complex than the two previous grounds of comparison in many cases. Intuitively, it would at first seem that any cross citation is a sign of convergence, and this is often how the literature has interpreted it. However, the reality is more complex. The reference to one particular ruling of another court can be cherry picked. The reference can be implicit when clearly there is inspiration being taken from another ruling, but no explicit mention of the case that served as said inspiration. Or additionally, a case could be cited by a court but be contradicted by the outcome that this Court reached.

Building on the existing literature and their different assessments of the presence, absence, and use of these cross-citations, this research project identifies 3 clusters in the typology of potential citations[291]:

- <u>Genuine citation:</u> the case cited is the most pertinent (most recent/current applicable precedent), used more or less explicitly in reasoning, and the outcome the judge reaches is in line with the case being cited. This aligns with the notion of the judge as a comparative to using genuine legal methods to weigh into his reasoning[292].
- <u>Cherry picked/result-oriented citation:</u> This refers to situations where instead of using the most relevant or currently standing precedents of another Court, the judge went out of their way to use a case that fits the outcome he wanted in his own decision[293].
- <u>Contradicted citation:</u> Very underestimated by the current literature, this refers to a situation where a judge went out of their way to cite on a case from an external court and yet reaches

[291] This is not the only existing typology, and other authors have put forward extremely insightful classification of these references. One category that does not appear in my typology are the "by-the-way" or "ornamental" references, as defined by Jasper Krommendijk, 'The Use of ECtHR Case Law by the Court of Justice after Lisbon' (2015) 22 Maastricht Journal of European and Comparative Law 812. And Gelter and Siems (n 296). This is a useful category if one is to assess the depth of the engagement of a court with the cases it refers to; but it does not yield sufficient insight in the degree of similarity or dissimilarity between case-laws on its own, and therefore is not used here.
[292] Rozakis (n 97); Markesinis and Fedtke (n 97).
[293] Gelter and Siems (n 296).

a different outcome. This will be interpreted as sign of particularly strong dissimilarity. External citation being deliberate and optional act for a judge, this means a court went out of its way to cite another court, for the purpose of contradicting it (explicitly or implicitly).

The different types and uses of cross-citations reveal different degrees of similarity or dissimilarity between the ruling that uses them and the ruling that is invoked. The |Index, therefore, accounts for these different uses by adding more or less points depending on the actual use of the foreign reference. The highest degree of similarity is associated with genuine citations, whereas contradicted citations, since they reveal a degree of dissimilarity bordering on antagonism, were indicators of dissimilarity. Cherry picked citations fall somewhere in the middle, as they can mean a genuine use of an external decision that ends up being agreed with, but show that the decision to use this ruling was a purely strategic one, rather than a truly comparative one. From these considerations, an Index attributing points has been created, and presented in Table 5.

Category		Answer (Score associated)		Maximum /Minimum score	
		Dissimilarity	Similarity		
Test/legal standard used by the Court	An identical test is…		Used (0) Mentioned but not used /partly used (0.5)	Min: 0 Max: 2.5	Max: 2.5 Min: 0
	A different test is…	Used (2) Mentioned but not used /partly used (1.5) None (1)		Min: 0 Max: 2.5	
Outcome of the case	On protection of business premises for legal person:	Dissimilar (1.5), Uncertain (1)	Identical (0)	Max: 1.5 Min: 0	Max: 3 Min: 0
	On the possible difference between the protection of legal and natural persons	Dissimilar (1.5) Uncertain (1)	Identical (0)	Max: 1.5 Min: 0	
References to the other Court's case-law	Some pertinent case-law of the other Court is mentioned	No (2)	Yes (0) Mentions the other Court without specific case-law (0.5)	Max: 2 Min: 0	Max: 2 Min 0
	If YES, the case-law is cherry-picked/irrelevant	YES (0.5)	No (0)	Max: 0.5 Min: 0	
	If NOT cherry-picked, the Court	Explicitly does not follow (1.5) Implicitly does not follow (1) Implicitly follows (0.5) Explicitly follows (0)		Max: 1.5 Min: 0	
Similarity/Dissimilarity Score				**Maximum: 7.5** **Minimum: 0**	

Table 5: Index of Convergence and Divergence for Case Study 1 (Right to privacy of business premises)

The highest number of points means a higher degree of dissimilarity, whereas a score closer to 0 means a high degree of similarity between the two rulings compared. As part of the index needs to be customised and tailored to the topic with which the rulings deal with the version, the version that is presented in this chapter is the one which was used for the first case study on the right of privacy of business premises.

With each new ruling from either the CJEU or the ECtHR, the index can be used once again, comparing that new link with the current standing president of the other Court. As a result, a ruling is attributed its own score, an 'S/D score', which captures how each court is standing with that *vis-à-vis* the other at that point in time, and how dissimilar or similar they are on that issue. This also

means that the successive score can be plotted in order to visualise the evolution of the Courts relationship on that particular issue. *Figure 6* presents such plot for the first case study on the right to privacy of business premises showing that, as time went on, the general trend was towards a lower score, and therefore a higher degree of similarity between the CJEU and the ECtHR.

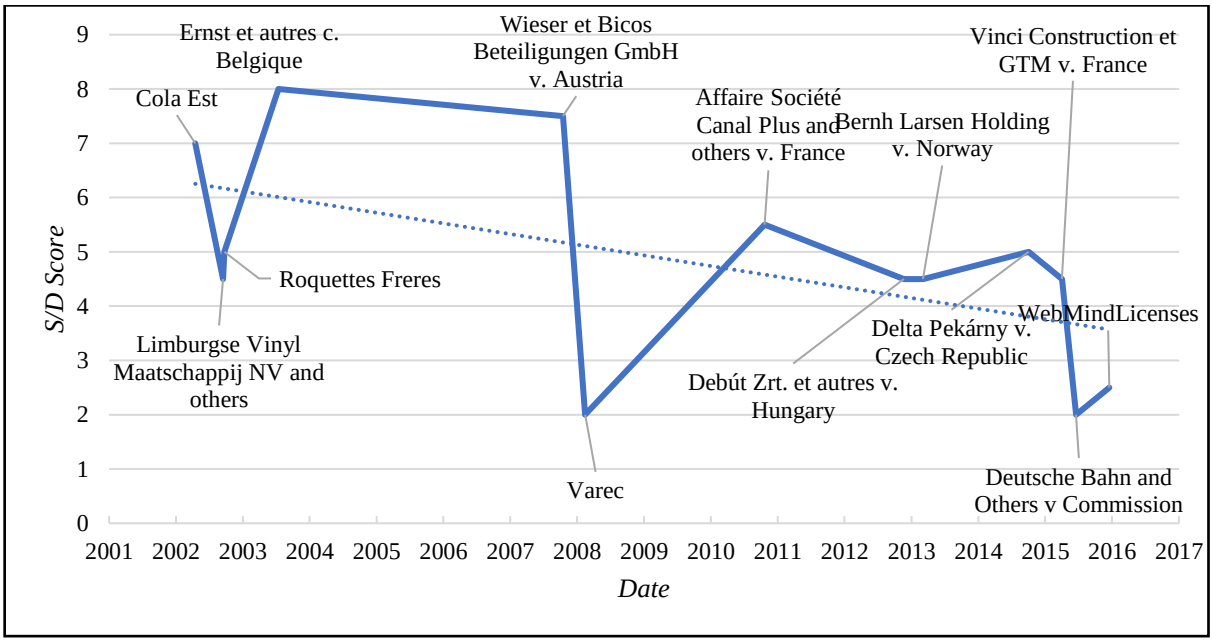

Figure 6: Evolution of S/D Score for Case study 1 (Right to Privacy of companies)

3.2. Convergence and Divergence

How to go from static model to dynamic evolution? The S/D score does not say much regarding which Court was the one *causing* the divergence, and which one was the one *resolving* it and converging with the other. The S/D score is a snapshot of the degree of similitude or dissimilitude at a given time but does not say which Court is the one who led to this given degree of (dis)similitude. To remedy this, each ruling is assigned a second score, a Convergence/Divergence Score (C/D Score). It is obtained by subtracting the S/D Score of the most recent ruling to the S/D score obtained by this new ruling. A positive Convergence/Divergence Score will mean that the International Court *moved towards* the other International Court, with *more similarity* than before (Convergence); whereas a negative score will mean that the International Court *moved away*, with *less similarity* than before (Divergence). In other word, while the S/D score captures the state of the relationship between the *two* Courts at a given time, the C/D score captures

the action of *one* Court in a given ruling: converging or diverging with the other. This more detailed overview of the dependent variable is presented in *Figure 7*, showing that both Courts evolved significantly, sometimes converging and sometimes diverging (with ECtHR cases in dark blue, CJEU cases in light blue). This Convergence/Divergence score will be the true dependent variable explored, the one impacted by the theoretical mechanism tested.

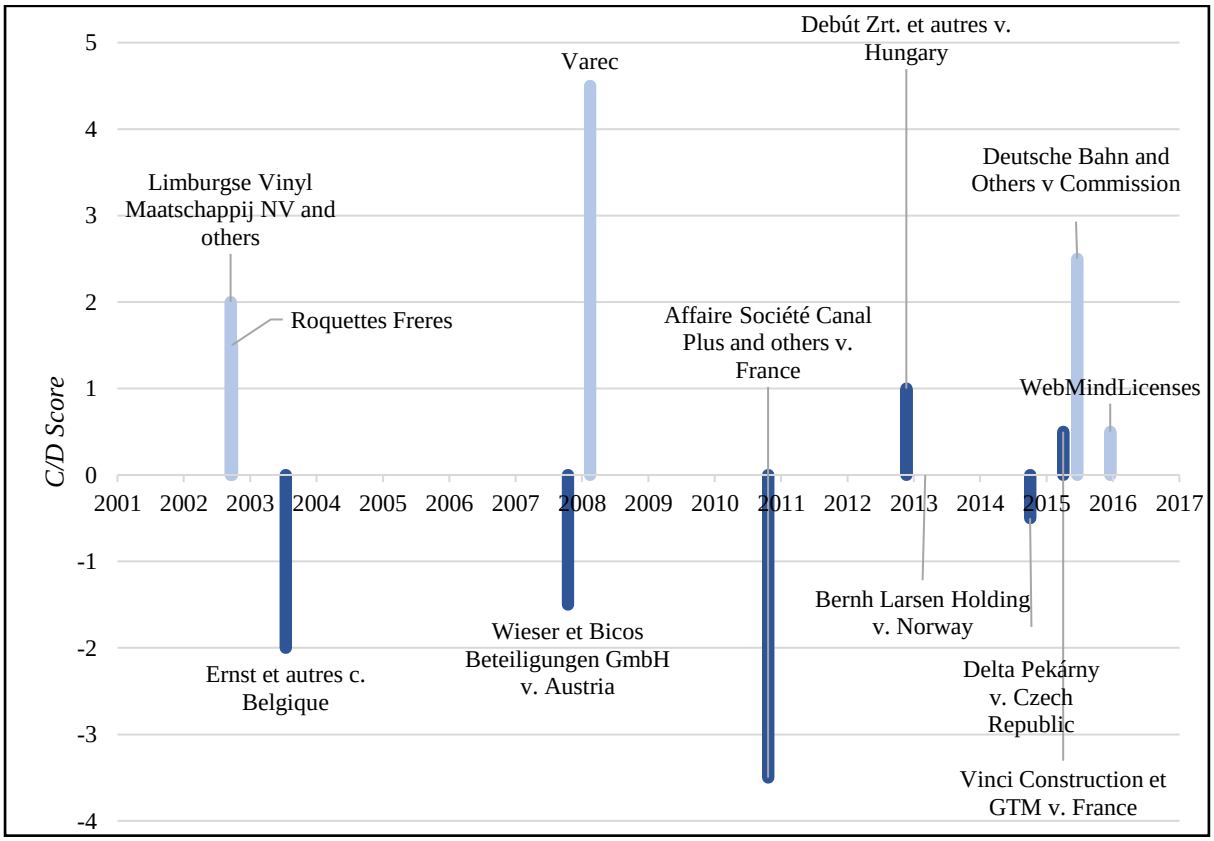

Figure 7: Evolution of C/D Score for Case Study 1 (Right to Privacy of companies)

Both the S/D Score and the C/D score are, strictly speaking, ratio level measurements, rather than simply being categorical or ordinal. The more extreme the score, the more extreme the similitude or dissimilitude, the convergence or divergence, and a step in the S/D score from 2 to 3 is the same as a step from an S/D score from 5 to 6, as required of an interval measurement. A step from 0 to -1 on the C/D Score is half as big as a step from -3 to -5. However, in addition to this, both the C/D scale and the S/D scale have a meaningful true 0, which indicate absolute similarity for the latter, and lack of movement from the former. This truly renders both ratio level scales[294].

[294] Gerring (n 147) 68.

It also allows for a comparison across case studies, as long as the tailoring of the index to the case-study does not change the minimal and maximal of the S/D Score. For all case-studies of this research project, there were two legal sub-questions, usually a Yes/No question on the protection of a given right in a given situation, followed by one specifying additional conditions or other related rights. For example, the index for LGR used in Chapter 5 (Appendix 5) contained a first question on whether there exists a right to LGR, and a second relating to what States may require for accessing an LGR procedure (medical diagnosis, surgery, waiting time…). As all case-studies had similarly two sub-questions, all three the S/D Score went from 0 to 7.5. If a different number of sub-questions was identified on another issue area (for example, on Digital privacy), a way to still ensure comparability could be to maintain the cap on the number of points for sub-legal questions at 2, and divide the attributable points across the sub-questions, either equally, or by weighing them according to which sub-questions the researcher considered more significant.

3.3.Conclusion: Limit and possibilities

Developing this new index to measure similarity and dissimilarity, then convergence and divergence between two International Courts presents with the opportunity to conduct innovative and rigorous empirical exploration of this phenomenon. Additionally, as the index is transparently composed of different sub-labels (legal standards, cross citations….), it allows for a disaggregation of what makes two courts more similar or dissimilar at a given point. In other words, rather than simply giving a score that is to be taken for granted, the research can explore *how* courts converge or diverge, Is it mainly through citations? Or through substantial convergence which avoids explicit citation? The index yields more insight than a brute measure of virtual distance between two courts.

However, such an approach is not without its limits, which will be summarised here as a conclusion for this Chapter. First, in order to be properly deployed, there needs to be a list of cases that are sufficiently comparable and that deal with very similar legal questions. The index is appropriate to explore patterns and dynamics in jurisprudential sagas that span multiple cases among many years, sometimes decades, where one question was left unanswered or had evolving answers.

Moreover, case-law is rarely that black and white, and rarely is the exact same question word for word asked for a judge to decide. Facts differ, argumentation strategies differ, questions are sometimes avoided or framed differently by the litigants, or by the judge, on purpose or accidentally. To be used, the index relies on the researcher having sufficient legal expertise, to evaluate when a case actually falls within the pool of relevant cases, and when it does not.

Additionally, the coding of any legal content is particularly challenging. Recent academic exchanges have shown that various experts in a given field can code rulings very differently[295]. Therefore, not only does the use of the index itself require a legal expertise from the researcher, but it does leave a certain amount of room for appreciation in the coding process. In order to mitigate the risk of bias, the research presented in this dissertation opted for full transparency: the coding of every single case, and the exact sections of the rulings which are used to justify it, will be presented in the Online Appendices[296]. The gold standard for these procedures would be cross-validation by another expert/researcher, but this would require more extensive resources.

Lastly, because of the interpretation of legal vocabulary in this coding process, this is not a task that can be automated and done through Quantitative Text Analysis methods. Therefore, it cannot be systematised at large scale, and will always have to rely on human coders, limiting the range of any research that relies on this Index.

But this is not a tool that has been developed to be used at a large scale, or that is meant to yield scores that can then be relied on for quantitative assessment of any kind. Indeed, the scores attributed are more of a way to ensure comparability of different case studies to identify different and potentially contradicting patterns, even between the same two courts (here, the CJEU and the ECtHR), depending on the topic, and to offer clear visualisations of these trends. In that sense, the imperfect nature of the coding and quantification of divergence and convergence is not problematic

[295] Laurence R Helfer and Erik Voeten, 'Walking Back Human Rights in Europe?' (2020) 31 European Journal of International Law 797; Alec Stone Sweet, Wayne Sandholtz and Mads Andenas, 'Dissenting Opinions and Rights Protection in the European Court: A Reply to Laurence Helfer and Erik Voeten' (2021) 32 European Journal of International Law 897.

[296] Online Appendices available at https://drive.google.com/drive/folders/1zRGqe7JtzWmOtUFLbuoLZKjIvnixoVgF?usp=sharing

for the purpose of this research, as it only takes these scores as indicators of particular trends, rather than absolute measurements that have any real meaning at the scale of one ruling. Attributing a score, and, in a sense, quantifying the concept does not mean that it needs to live up to the standard of large-scale quantitative method – *quantifying* does not necessarily mean *quantitative*.

To conclude, the methodological choices made throughout the building of the research design for this project stem from the evaluation of various trade-offs that exist with any methodological tool. This research project embraces qualitative methods as being overall more appropriate for this empirical social legal project, knowing that this means it is potentially trading breadth for depth. Still, both because of the type of causal explanation provided by the theoretical framework (deterministic, set-theoretic) and the type of data (legal and legal-adjacent) that is likely to be available to test this theoretical framework, in-depth qualitative case-studies are the method that will yield the most insight over the course of the next three chapters.

CHAPTER 3
Challenging the traditional narrative: A slow convergence on the protection of companies' business premises

AP: How do you interpret this evolution between the Hoechst case and I think it's 2002 – was it the Roquette Freres case? – where it kind of evolved?

Former CJEU Judge: And where it referred *also explicitly to the fact that, that in the meantime [there] has been divergent case-law and so it sort of recognised this need to adjust its own its own case-law! No, I- I don't think that the Court of Justice [of the EU], at least generally speaking, would like to see itself being criticised for setting a sort of the lower standard than Strasbourg.*[297]

In a witty quip from the 19th century, British legal scholar Thurlow was capturing the limits of legal anthropomorphism by famously wondering 'Did you ever expect a corporation to have a conscience; when it has no soul to be damned and no body to be kicked?'[298]. At his time of writing, Thurlow's concern was regarding the responsibility of companies, their (in)ability to be deterred to act illegally or criminally by reasons that might convince an individual. However, for the same reasons, the potential *rights* of companies would become a problem in turn. While rights, in particular fundamental rights, tend to be understood first and foremost as *human* rights, companies (as 'legal persons' or 'moral persons') can also benefit from some these rights[299]. In the silence of the European treaties, the presence of a multitude of legal traditions and the growth of antitrust and competition law, the – potential – fundamental rights of companies was ripe to be the topic of a vigorous judicial dialogue Europe from the 1980s onward.

[297] Interview 11, Former CJEU Judge.
[298] Edward, first Baron Thurlow (1731–1806).
[299] Manon Julicher and others, 'Protection of the EU Charter for Private Legal Entities and Public Authorities? The Personal Scope of Fundamental Rights within Europe Compared' (2019) 15 Utrecht Law Review 1; Peter J Oliver, *The Fundamental Rights of Companies: EU, US and International Law Compared* (Hart Publishing 2019).

It is on the right to the *protection of companies' business premises* against the interference of the State, and the conditions in which searches and seizures can be conducted in this context, that this case study will focus. In the silence of the Treaty of Rome (and later of the EU CFR), and of the ECHR, it fell on these Courts to decide whether businesses could claim a right to the protection of their home, and whether this protection would be as extensive as the one from which individuals benefit.

This case study truly exemplifies how each Court tried to hang onto their own preferred outcome, and any convergence had to be forced out of them by external factors. The stream of relevant cases starts in 1989, in the *Hoechst* ruling[300], where the CJEU refuses to protect business premises. With this approach, the CJEU made it easier for authorities to conduct inspections to enforce EU competition policy and decisions, by, for example, not requiring the obtention of a warrant before administrative inspections. But in 2002, the ECtHR adopted a radically different solution in its *Colas Est* ruling, explicitly extending the protection of the homes to companies, encompassing their undertakings in its ambit[301]. From there until 2013, the CJEU very slowly, gradually, gave some ground, while still never openly acknowledging a proper EU fundamental right for companies; all the while, the ECtHR stood its ground and did not alter its *Colas Est* jurisprudence. However, starting in 2013, the dynamic shifts: while the CJEU continues to gradually converge with the Strasbourg Court, while the ECtHR starts in turn to implicitly converge with the Luxembourg Court, until both were fully aligned in 2016.

Why this unbalanced, asymmetrical progression in the behaviour of both Courts? Why would the CJEU converge while the ECtHR was not doing the same, and why would the ECtHR change its approach after 2013? This chapter will show how the changes in the behaviour of both Courts can be attributed to changes in exogenous factors, in particular the threat both Courts were under at different periods, as summed up in *Table 6*.

[300] *Hoechst AG* (n 242).
[301] *Colas Est and others v France* (2002) 39 EHRR 17.

Period	**2002-2013**		**2013-2016**	
Court / ***Outcome*** / **Challenge source:**	**CJEU:** ***Convergence***	**ECtHR:** ***Status quo***	**CJEU:** ***Convergence***	**ECtHR:** ***Convergence***
Domestic courts	YES (High reputation courts)	NO	Divided	YES (including litigants exploiting remaining divergence)
Governments	NO (low salience)	NO (low salience)	NO (low salience)	NO (low salience)
CJEU		NO		YES
ECtHR	YES (non-systemic)		YES	

Table 6: Overview of the explanatory factors and outcomes for Case Study 1

Indeed, the first period is marked by the challenges of domestic courts towards the CJEU's restrictive approach. Multiple superior courts, particularly in Western Europe, preferred to align themselves with the ECtHR, and the CJEU could find no support for its position from the ECtHR, or from EU Governments, for whom the topic simply lacked any saliency. Faced with a real, but substantively limited threat to its authority, the CJEU converged with the ECtHR, mainly by performatively referring to the ECtHR's rulings, while still staying as close to its own preferences as possible, leading to a partial convergence only. For the same reasons, the ECtHR, therefore, was faced with no threat during this period, and simply stood its ground.

But in the second period, the situation changes in two aspects. First, domestic courts were showing less enthusiasm for the idea of an extensive protection of business premises for companies based on the ECHR, removing the challenges towards the CJEU to instead add pressure to the ECtHR. Second, both European Courts were entering a new phase in their relationship, marked with more tensions rather than cooperation. The CJEU was therefore still slowly converging, but this time due to challenges from the ECtHR. The ECtHR, for its part, was under pressure from the CJEU, as well other actors (mainly domestic courts) seeking to take advantage of the continuing discrepancy

between both Courts. As a result, the ECtHR was the one taking the final step towards the CJEU, but doing so less for self-legitimisation, and more to close this avenue of litigation and therefore avoiding the legal weaponisation of the CJEU's jurisprudence against Strasbourg's case-law.

1. Businesses premises and their right to privacy: European Courts between competition policy and the protection of rights

To understand the initial answers of both the CJEU and the ECtHR to the question of the potential protection of companies' rights to privacy of their business premises, it is essential to take a step back and assess what the right to privacy entails in the first place. Far from being an abstract question, or one only of principle or of philosophy of rights, the existence of a right ensures that the right-holder can obtain protection from actions of the State which would interfere with or infringe on this particular right. This explains both why companies could benefit from it, but also why Courts with very different mandates, like the CJEU and the ECtHR, would for decades provide assessments in tension with each other.

1.1. Understanding the issue: to protect, or not to protect a company's 'home'

Intuitively, fundamental rights are understood as *human* rights, attached to human nature. Legally, this means that fundamental rights are granted to 'natural persons', or in non-legal terms: flesh-and-blood humans. However, these rights can extend to another category of legal persons: the 'moral', or 'juristic persons'[302]. These are companies, associations, societies, and NGOs with an independent existence recognised by the law, despite being man-made. It is a useful oversimplification, allowing a company, a charity, and association, to engage in legal actions in its own name – a *fiction juridique*[303], created by the law. However, should these brick-and-paper persons benefit from similar fundamental rights (human rights?) as their physical, 'natural'

[302] Jens David Ohlin, 'Is the Concept of the Person Necessary for Human Rights?' (2005) 105 Columbia Law Review 209.
[303]'Artifice of legal technique (…) consisting in "acting as if", assuming a fact contrary to reality, in order to produce an effect of the law' Gérard Cornu, Vocabulaire juridique (14th edn, PUF 2022). Translation from the author.

counterparts?[304] One of these rights in question is the right to the protection of the home, part of the right to privacy.

1.1.1. From human rights to companies' rights

Individuals undoubtedly benefit from a protection of their dwelling against undue action, or 'interference' from the State. These are not abstract, purely theoretical legal questions. In the words of Scolnicov, the right to privacy entails

> the requirement that the executive not act in use of arbitrary powers, and not enter private premises except by powers given by law, thus protecting citizens from discretionary, non-judicially-authorized searches by authorities.[305]

This manifests itself as a need to first obtain a court-sanctioned warrant before conducting search and seizures in their home, and the possibility to challenge the validity of this warrant, for example. But what about a company? Even if it was recognised a right to privacy, would this include its 'home'? What would this be, exactly: its address of registration? Its offices? Its warehouses? And even if such protection was granted, would this protection be the *same* as for individuals, or should companies be afforded a lower level of protection, by reason of not requiring the same protection as a genuine human being? In other words, would the State also require a court warrant, with the same limits on when a search and seizure can be conducted, the possibility to challenge the warrant before a court, and potentially the mandatory presence of witnesses? Or could the protection be lower, by not requiring a warrant but ensuring the decision to conduct the search and seizure can be challenged *ex post*?

A fundamental right could be absolute, such as the right to protection against torture (Article 3 ECHR, Article 4 CFR), placing the entity benefitting from it outside the control of the

[304] The debate on whether legal persons, and companies in particular, should enjoy the protection of fundamental rights, is a legal and philosophical one, and a normative question on which this article does not attempt to provide an answer ; see Peter Oliver, 'Companies and Their Fundamental Rights : A Comparative Perspective' (2015) 64 International & Comparative Law Quarterly 661; Anna Grear, *Redirecting Human Rights* (Palgrave Macmillan UK 2010); Anat Scolnicov, 'Lifelike and Lifeless in Law: Do Corporations Have Human Rights?' [2013] University of Cambridge Faculty of Law Research Paper No.13/2013.
[305] Scolnicov (n 310) 13.

State for this practical aspect of its existence. The right to privacy is not an absolute right but can be qualified. However, it has typically enjoyed a high standard of protection through judicial review of any State activity or decision encroaching on this right; it is also the reason why warrants are indeed required before searching the home of an individual in most civil, administrative or criminal proceedings.

A company not benefitting from this right will have less recourses when it comes to searches and raids carried out by the State authorities in the course of criminal or competition investigations. In other words, there is trade-off between the scope and level of rights afforded to companies, and the effectivity and speed with which a State can implement trade and competition-related policies.

Let us take a look at what this would mean for a common practice: dawn raids, unannounced inspections often used in the context of competition and antitrust laws[306], with a situation that did make it all the way to the ECtHR.

On a morning of November in 1985, fifty-six French construction firms found themselves with agents from the French Department for Competition, Consumer Affairs and Fraud Prevention (DGCCRF) simultaneously knocking at their door, unannounced, without a warrant. These agents proceeded to seize thousands upon thousands of documents without any authorisation from a judge[307]. These documents demonstrated that the companies had indeed engaged in unlawful business practices, and they were fined up to 18 Million Francs (approximately €4.3 Millions today)[308].

Under French law at this time, businesses did *not* benefit from the protection of the premises as a fundamental right. If it had, what would have been the difference?

Mainly, a judicial ordinance (French equivalent of a warrant) would have been necessary, which would mean requiring a *judge* to allow the administration to enter the premises, and justifying this

[306] Imran Aslam and Michael Ramsden, 'EC Dawn Raids: A Human Rights Violation?' (2008) 5 The Competition Law Review 61.
[307] *Colas Est* (n 307).
[308] Décision n° 89-D-34 du Conseil de la concurrence relative à des pratiques d'entente relevées dans le secteur des travaux routiers, (B.O. November 8th 1989)

claim sufficiently in court. The judge could have afforded companies the *same level of protection afforded to individuals and their homes*, requiring concrete elements regarding the illegal practices suspected and the involvement of the company in these specific activities, justifying the raid. This judicial ordinance would have had to indicate, very specifically, what sort of documents the authorities were allowed to seize, and which areas of the premises could be searched. As a result, not only would the procedure have been much longer, it would also have constrained the powers of the DGCCRF much more in terms of which documents they would have been allowed to seize. Moreover, different legal pathways would have potentially prevented this procedure from ever leading to the fine: the judicial authority could have refused to grant the judicial ordinance allowing the dawn raid. *Ex post*, the companies could have appealed the judicial ordinance, or argued that the agents of the State had acted beyond the remit of the warrant, first before the Court of Appeal and then before the *Cour de Cassation*. This could be done regardless of how well-founded the actual antitrust investigation was, but if the ordinance of the judge is overturned by a superior court, any document thus illegally obtained by the administration would have been tainted by the illegality and could not have been used anymore in the antitrust investigation[309].

Whether or not the right to privacy is officially recognised as a fundamental right for companies has genuine consequences for the procedural safeguards companies are able to invoke before the Courts, radically altering how many hoops State authorities have to jump through to conduct investigations of companies. In the words of Lawson, 'What really matters is the level of protection actually offered'[310].

1.1.2. The emergence of the question in Europe

The question was therefore bound to end up before national Courts in Europe, one way or another. But how did this end up being the subject of a heavily commented back and forth between

[309] As an example: in 1991, the Cour de Cassation annulled a judicial ordonnance which had allowed the search and seizure which had targeted a total of twenty seven building companies suspected of anti-competitive behaviour – although this only benefited the one company which lodged the request (Cassation, 6 April 1993, 91-17.835)
[310] Lawson (n 133) 244–245.

the world's two most influential International Courts? To understand this, we first need to explain how the broad goals and mandates of each Court explained in Chapter 2 translate into more concrete preferences in this specific issue area.

With articles 85 and 86 of the Treaty of Rome giving competences to the European Community to regulate competition at the European level, the European Commission was granted 'relatively wide powers in order to supervise compliance with the rules of competition law '[311] as early as 1962[312]. The Regulation currently in application[313] grants broad powers to the EU Commission to decide to, or order national authorities to, conduct various investigations in the context of the EU competition policy.

To this day, the EU Commission can adopt a Decision to conduct 'dawn raids', inspections conducted on the premises of an undertaking without prior warning[314]. These raids can be conducted through the Commission's own agents on business premises of companies targeted, without any judicial authorisation required[315]. Alternatively, the EU Commission can ask the national competition authorities to carry out the investigation, according to their own domestic procedural rule, which may require a judicial authorisation from a domestic court[316]. This is without prejudice to any procedure that the domestic competition authorities would want to carry out, on their own, implementing EU competition law on their own jurisdiction. These raids allow public authorities to collect relevant evidence in the context of an investigation when the entities targeted are suspected of behaviour going against competition rules. By not having to warn the targeted companies in advance, competition authorities therefore maximise the chances of collecting relevant evidence, which companies would otherwise have an incentive to conceal. Therefore, a

[311] Lawson (n 133).
[312] Council Regulation No 17 (EEC) First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ Spec Ed Series I Volume 1959-1962
[313] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2002] OJ L 1/205
[314] The term 'dawn raid' is sometimes also used to encompass all the investigative powers the Commission has under Chapter V of Regulation 17 (n 16) and later the 2003 Council Regulation (n17) ; see Aslam and Ramsden (n 312).
[315] Council Regulation (EC) No 1/2003 (n 17) Art.20
[316] Council Regulation (EC) No 1/2003 (n 17) Art.20

company targeted by a dawn raid in the EU, wanting to question the legality of the investigation after the fact, can find itself able to reach European Courts in a few different ways (Figure 8).

The CJEU can be reached either through an action in annulment of the Commission's decision, where the company will ask for judicial review 'on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers'[317], or through domestic courts asking the CJEU a preliminary question[318]. As confirmed by an interviewee, at least until the end of the 90s, 'the development of the single market was still the predominant objective (…) [D]eveloping a reasoning, which would further the ends of the singular market, was predominant objective at that time'[319], one where Community Competition policy was properly enforced. While it is well understood that this manifested through a jurisprudence favourable to the freedom of goods, persons and services, this Single Market also relied on its second leg – the regulation of competition at the European level. It is therefore coherent that the CJEU, faced with the trade-off between broad investigative powers and potential breach of privacy for companies, would choose the option which would ensure proper enforcement of EU law – and therefore prefer to eschew the recognition of fundamental rights to privacy of companies' premises.

[317] TFUE Article 263.
[318] TFUE Article 267.
[319] Interview 5, Former ECJ Advocate General and Former ECJ Judge.

Indeed, the implementation and effectiveness of the EU competition policy and Commission's decisions was one of the CJEU's concerns throughout its decisions[320]; granting the protection of Article 8 ECHR to business adds a risk of discrepancies between different legal orders, where domestic courts would have different appreciations of that right, of the possible exceptions, of the requirement to still conduct investigations, etc...[321] The policy preferences of the Court would have been either no application of Article 8 to business premises, or lower safeguards. This is why in 1989, when the Advocate General had concluded his observations by advising that 'it should be expressly accepted that there is at Community level a fundamental right to the inviolability of business premises'[322], the CJEU immediately and explicitly decided against it.

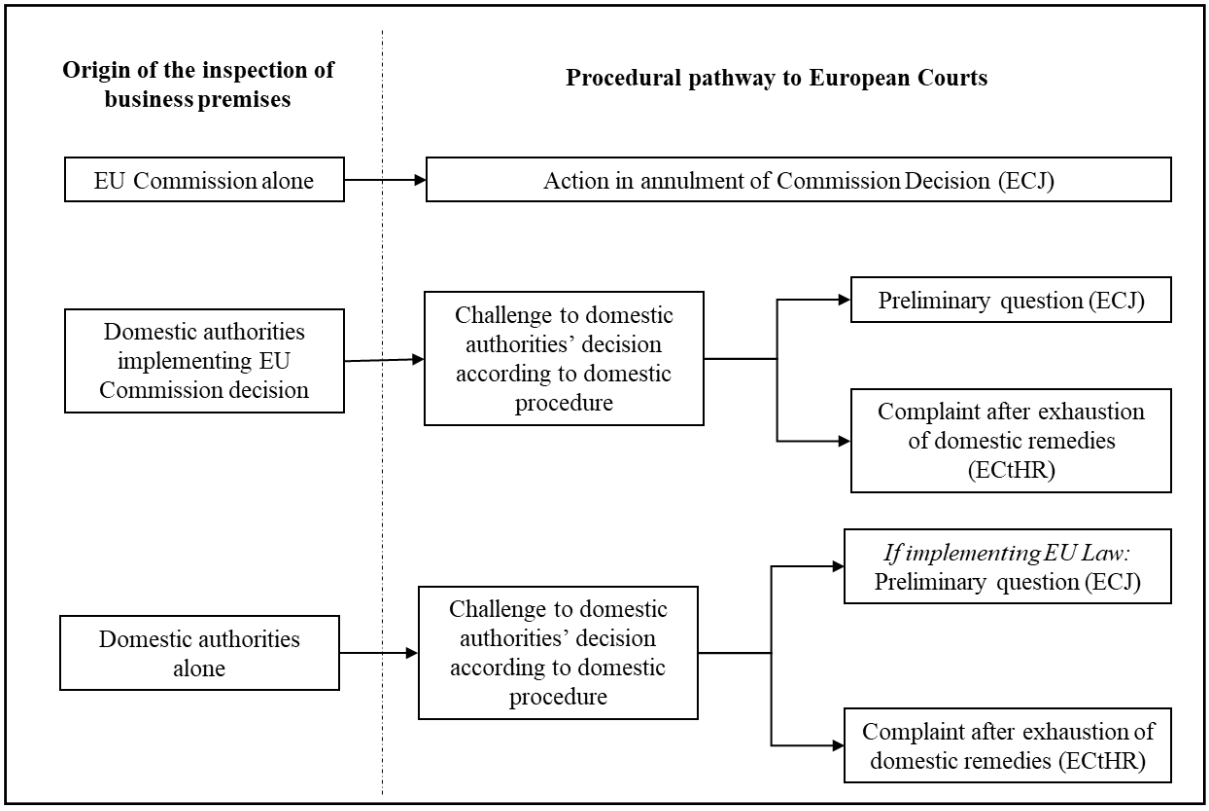

Figure 8: Procedural pathways to European Courts

On the other hand, bringing a case to the ECtHR required the exhaustion of domestic remedies, if the domestic authorities were involved. This means that for the ECtHR, the question

[320] *Case 31/59, Acciaieria e Tubificio di Brescia v High Authority of the European Coal and Steel Community* [1960] ECR 71.
[321] 'There are not inconsiderable divergences between the legal systems of the Member States in regard to the nature and degree of protection afforded to business premises against intervention by the public authorities' *Hoechst AG* (n 242) [17]. See also Opinion of Advocate General Mischo, *Cases C-94/00 Roquettes Freres SA v DGCCRF and Commission of the European Communities* [2001] ECR I-9011 [91].
[322] Opinion of the Advocate General Mischo, *Hoechst AG* (n 242).

would be brought up not under the framing of competition policy, but classically as an issue of human rights, and of interference of a State with that right. As it understands the need for a State to have the power to follow legitimate policy goals, the Strasbourg Court does not inherently have concerns regarding the proper investigation of anti-competitive behaviour, and, at that time, it had indeed already kickstarted its trend of granting more and more fundamental rights to moral persons at the beginning of this jurisprudential saga [323]. In the words of a former ECtHR judge:

> It's not our business - the court's business, the Strasbourg court's business- to deal with EU law. But when it comes to the implementation of human rights protections within the EU, the Strasbourg court views itself as the court that has the final say on the minimum guarantees within the European legal space.[324]

The preference of the ECtHR would therefore be purely human rights-based, responsive to social concerns and evolving understanding of human (and companies') rights.

The problem was that contrary to the Inter-American Convention on Human Rights (which limits rights to natural persons[325]), neither EU Treaties nor the ECHR actually *state* whether moral persons, companies, actually have a right to privacy, even less a right to the protection of the business premises. Article 8 of the ECHR states:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[323] Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (OUP 2006).
[324] Interview 12, Former ECtHR Judge, 28/03/2023.
[325] Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, Article 1(2) ; see Scolnicov (n 310).

Article 7 of the CFR, also only holds that '[e]veryone has the right to respect for his or her private and family life, home and communications'.

None of these instruments has a separate provision planning whether these rights could be held by legal persons or not. It was therefore up to each Court to decide, with the knowledge that their neighbouring Court would be asked the very same question.

1.2. The answer of European Courts: evolving jurisprudence, diverging and converging solutions

Before the issue really became prevalent, both Courts had had the possibility to cut their teeth on whether business premises owned *by individuals* would be protected. Both concurred that in such a case, such protection should be granted - in 1960 for the CJEU[326], and in 1989 for the ECtHR)[327]. However, no case regarding the applicability of this right for companies had reached either of them. The matter had been discussed by the Advocate General Roemer of the CJEU in *Brescia* (1960)[328], and by the Court itself in the *National Panasonic* (1980)[329], where it seemed to have left this door open by noting: [i]t is necessary to point out that article 8(2) of the European Convention, in so far as it applies to legal persons, whilst stating the principle that public authorities should not interfere with the exercise of the rights referred to in article 8(1), acknowledges that such interference is permissible'[330].

Yet, the CJEU would prove to be more conservative on this issue, while the ECtHR would be the first to extend the protection of Article 8 to moral persons.

1.2.1. Overview of the evolution of the jurisprudence

When the CJEU properly answered this question for the first time, it took a different approach. In January 1987 the Commission had taken a decision ordering investigation to be carried

[326] *Brescia* (n 326).
[327] *Chappell v United Kingdom* (1989) 12 EHRR I; *Niemietz v Germany* (1993) 16 EHRR 97.
[328] Conclusion of Advocate General Roemer, *Brescia* (n 27) 26 June 1959.
[329] *Case 136/79 National Panasonic (UK) Limited v Commission of the European Communities* [1980] ECR 2033.
[330] *National Panasonic* (n 335) [19].

out in different PVC and polyurethan manufacturing companies, suspecting concerted practices regarding price fixing[331]. Among them, Frankfurt-based company Hoechst AG refused to grant access to its premises resulting in a periodic penalty payment imposed by the Commission until Hoechst complied. After some back and forth among domestic courts, and a first preliminary question to the CJEU, Hoechst AG brought the case to the CJEU a second time, asking for the annulment of three of the Commission's decision targeting the company, including the decision to conduct the dawn raid in the first place. Among the various arguments put forward by Hoechst's legal team was the claim that the decision to investigate was a violation of Hoechst's fundamental right to the inviolability of the home as protected under Article 8 ECHR on privacy. It argued that *the very decision* of allowing the inspection was a violation of its right to privacy, rather than contesting *the manner* in which the search had been conducted. In response, the CJEU delivered the 1989 *Hoechst AG* ruling, where it very bluntly stated: 'The protective scope of that article is concerned with the development of man's personal freedom and may not therefore be extended to business premises'[332].

Thus started a line of cases from both the CJEU and the ECtHR, whereby both Courts would engage in a sometimes obvious, sometimes more subtle push-and-pull, until they aligned both their jurisprudence as of 2016. These cases are sometimes cases for annulment of Commission decisions brought to the CJEU, sometimes cases which are purely domestic brought to the ECtHR, sometimes preliminary rulings of the CJEU following a question asked by a domestic court, and a few before the ECtHR even involved EU law, although as implemented by national authorities. No case amounting to asking the ECtHR to review the power given to the EU Commission or a specific Commission decision exist – either none were brought to the ECtHR, the parties reached an out-of-Court settlement, or the cases did not make it past the filter mechanism of the Court in the first place – impossible to know. The case ending this series after 27 years would eventually be 2016's *WebMindLicences*, where the CJEU confirmed that it was now fully in line with the ECtHR, and

[331] Commission of the European Communities, decision K(87) 19/5 of 15th January 1987.
[332] *Hoechst AG* (n 242) [18].

Case	Date	Court	S/D Score	C/D Score	Overview of the issue
Hoechst AG[334]	21/09/1989	CJEU	0	N/A	Inspection ordered by European Commission – no warrant
Colas Est v France	16/07/2002	ECtHR	6.5	N/A	Competition investigation – no warrant
Limburgsee	15/11/2002	CJEU	4.5	2	Inspection ordered by European Commission – no warrant
Roquettes Feres	22/11/2002	CJEU	5	1.5	Competition investigation – no warrant
Ernst v Belgium	15/07/2003	ECtHR	7	-2	Competition investigation – very broadly-defined warrant
Wieser v Austria	16/10/2007	ECtHR	6.5	-1.5	Criminal investigation – investigation with a warrant, potentially no way to challenge ex post
Varec	14/02/2008	CJEU	2	4.5	Contract award dispute – disclosure of tender
Canal Plus v France	21/12/2010	ECtHR	5.5	-3.5	Competition investigation - Warrant potentially without true control of the judge
Debut v Hungary	20/11/2012	ECtHR	4.5	1	Competition investigation – warrant
Bernh Larsen v Norway	14/03/2013	ECtHR	4.5	0	Tax investigation – no warrant
Delta Perkany v Czech Republic	02/10/2014	ECtHR	5	-0.5	Competition investigation – no warrant
Vinci v France	02/04/2015	ECtHR	4.5	0.5	Competition investigation – broad warrant
Deutsche Bahn	18/06/2015	CJEU	2	2.5	Inspection ordered by European Commission – no warrant
WebMindLicences	17/12/2015	CJEU	2.5	0.5	Tax investigation – no warrant

Table 7: List of cases collected for Case-Study 1

acknowledged the fundamental right of business to see their premises protected as part of their privacy[333].

1.2.2. Assessing convergence and divergence between the Courts: General trends

In order to assess whether, and if so how and when, the CJEU and the ECtHR converged and diverged with each other, the relevant cases have been collected and are presented in Table 7**Error! Reference source not found.**.

Then, the Index presented in Chapter 2 was adapted to the legal question at hand. This means that the index (detailed in APPENDIX 1) accounted for the following aspects of possible similitude or dissimilitude between both Courts at any given time:

- Whether the used the same legal standard: With the CJEU typically asking whether the interference of the State was 'arbitrary and disproportionate'[335], and the ECtHR controlling whether the interference was 'in accordance with the law', with a 'legitimate aim' and 'necessary in democratic society'/'proportionate'[336]. While the latter test is drawn specifically from the ECHR's textual basis in Article 8 ECHR, the CJEU has the possibility to draw from Article 52 CFR, which holds that limitations to rights are 'Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union'.

- Whether they cross-referenced each other's case and to what end

- How they answered the legal questions at hand:

    - 'Are the business premises of moral persons protected under their fundamental right to privacy?'

    - 'Is the level of protection the same as for natural person's dwellings?'

With all the pertinent cases from both Courts collected, we can already start to identify what the trends in terms of (dis)similitude and convergence have been over the years by plotting the evolution of both scores through time (*Figure 6* and *Figure 7*).

[333] *C-419/14 WebMindLicenses Kft v Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság* EU:C:2015:832.
[334] On the same day, two other cases on the same issue were delivered, with virtually the same content as *Hoechst*, therefore they do not appear here (*Case 85/87 Dow Benelux NV v Commission of the European Communities* (1989) ECR 03137; *Joined cases 97/87, 98/87 and 99/87 Dow Chemical Ibérica, SA, and others v Commission of the European Communities* 1989 ECR 3165.).
[335] *Roquettes Freres* (n 327) [94].
[336] *Canal Plus v France* App no 29408/08 (ECtHR 21 December 2010) [53] - [54].

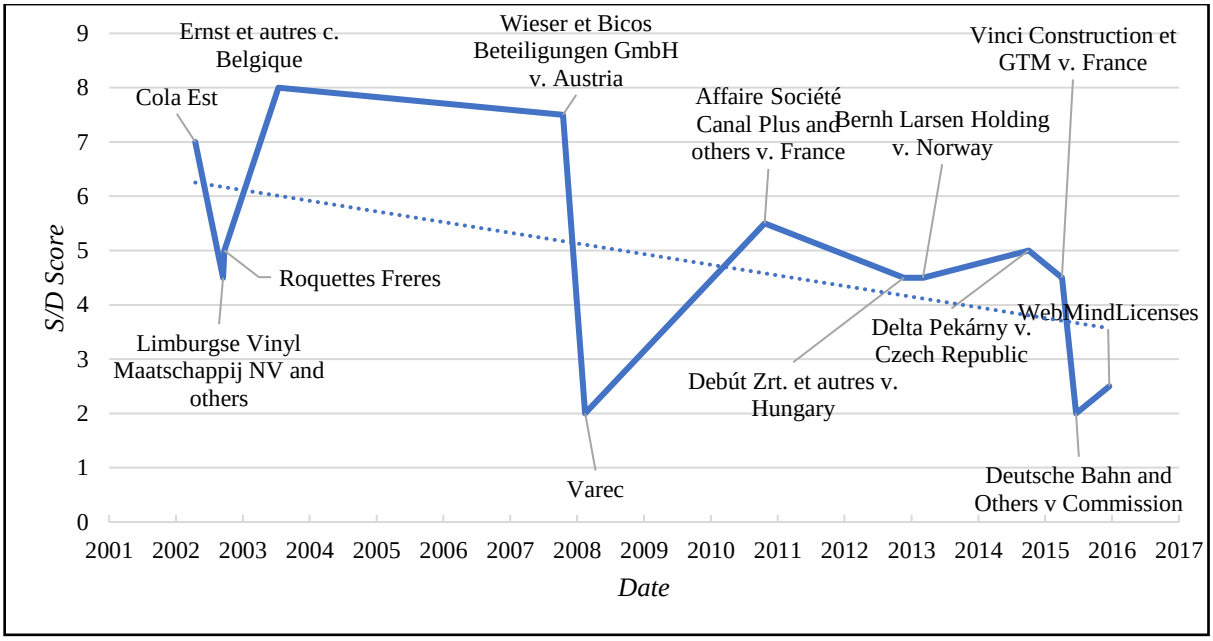

Figure 6: Evolution of S/D Score for Case study 1 (Right to Privacy of companies)[337]

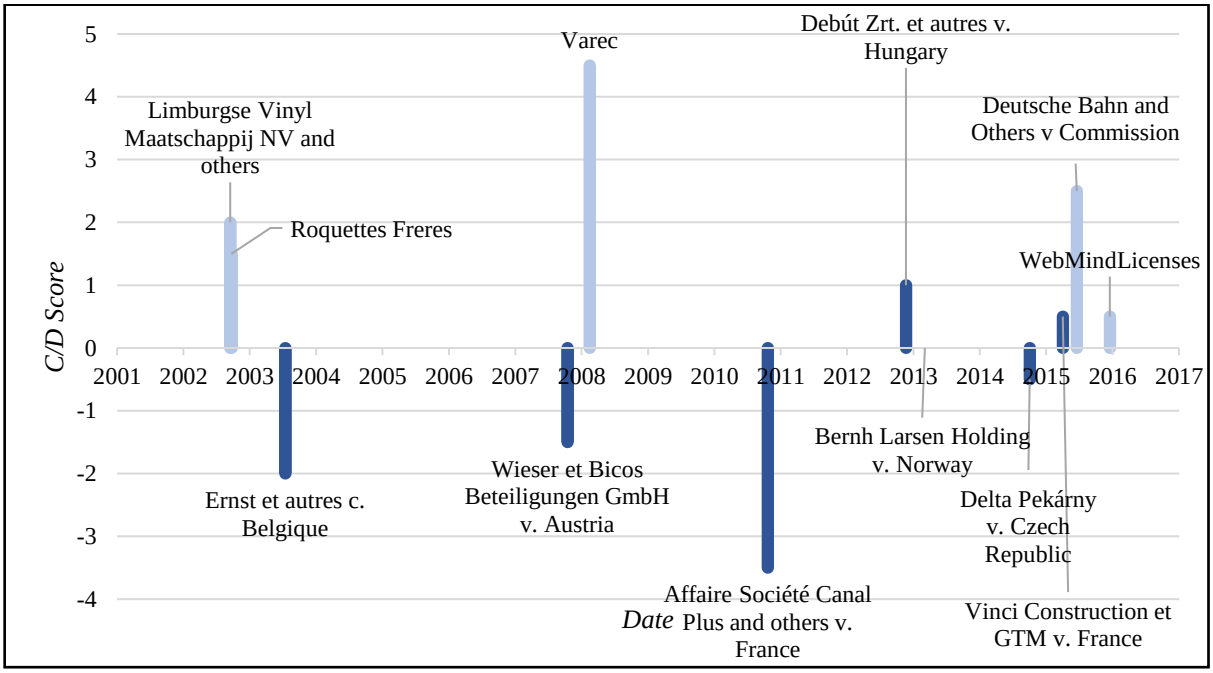

Figure 7: Evolution of C/D Score for Case Study 1 (Right to Privacy of companies)[338]

[337] *Hoechst AG* absent due to being the first case, and therefore not having a S/D score (See *Table 7*)
[338] *Hoechst AG* and *Colas Est* absent, as a C/D score can only be attributed after the second case of a given Court. (See Table 7)

How to interpret these findings? First, while there was initially a high degree of dissimilitude between both Courts, the general trend was towards less and less disagreements overall, and therefore more coherence at the European level.

Second, there was an asymmetry regarding where this progressive convergence came from: the CJEU was the one constantly going towards the ECtHR, when the latter only recently gave in some ground. This allows us to break the analysis into two different periods: 1989-2013 (from *Hoechst* to *Debut*) where the CJEU slowly converges but the ECtHR diverges, and 2013-2016 (from *Debut* to *WebMindLicences*) where the CJEU maintains the progressive convergence and the ECtHR changes its dynamic to do so as well.

1.2.3. A deeper look at the cases: from open conflict to subtle compromises

The case that grabbed the attention of judges and legal doctrine alike appeared in 2002. Picking up from the CJEU's *Hoechst* in 1989 – where, as explained above, the EU judges had refused to grant a protection to companies' business premises in the name of their right to privacy, the next case brings us back to the fifty-six companies in trouble with the French Competition authorities mentioned earlier, fined millions of Francs based on proof collected during dawn raids. This case was a purely domestic one: no involvement of the EU Commission was to be found. Not finding satisfaction after bringing the matter up to the French *Cour de Cassation*, companies Colas Est, Colas Sud-Ouest and Sacer lodged a complaint against France to the ECtHR, arguing that their fundamental right to privacy, and the protection of their home, had been violated. Virtually, this was the same situation the CJEU had faced back in 1989. But contrary to the CJEU's judgment in 1989, in *Colas Est* the ECtHR decides to grant this protection with resounding clarity:

> The Court reiterates that the Convention is a living instrument which must be interpreted in the light of present-day conditions (…) Building on its dynamic interpretation of the Convention, the Court considers that the time has come to hold that in certain circumstances the rights guaranteed by Article 8 of the

> Convention may be construed as including the right to respect for a company's registered office, branches or other business premises (…)[339]

Additionally, the ECtHR did not endorse a difference level of protection for moral persons, compared to natural persons, with only a non-committal '**even supposing that** the entitlement to interfere may be more far-reaching where the business premises of a juristic person are concerned'[340]. As a result, the ECtHR found that the 'wide powers' French authorities had in this case, combined with the lack of *ex ante* judicial oversight or warrant, was a violation of the company's right to privacy. It must be noted that this does not make the obtention of a court-granted warrant necessary to avoid a violation, as in theory, the absence of warrant can be offset by the availability of appropriate remedies *ex post*. However, in the cases covered in this case-study, the ECtHR has always concluded that the *ex post* remedies were not satisfactory alternatives, leading to a strong correlation between lack of warrant and violation of right to privacy.

From there on, the CJEU could stand its ground, or give in to the ECtHR position. In the end, it slowly converged: starting with *Roquettes Freres* (2002), the CJEU gave the appearance of deference to the ECtHR's new case-law. In short, the CJEU referred often to the ECtHR's cases, with nonetheless multiple differences with Strasbourg's case-law. For example, in *Colas Est*, it stated openly:

> [R]egard must be had to the case-law of the European Court of Human Rights subsequent to the judgment in Hoechst. According to that case-law, first, the protection of the home provided for in Article 8 of the ECHR may in certain circumstances be extended to cover such premises (see, in particular, the judgment of 16 April 2002 in Colas Est and Others v. France, not yet published in the Reports of Judgments and Decisions, § 41)[341]

Yet, in the case and in the following ones, the CJEU never held that the privacy of business premises was a 'fundamental right', only a 'general principle' of EU law[342]. The distinction warrants analysis.

[339] *Colas Est* (n 307) [41].
[340] *Colas Est* (n 307) [49]. Emphasis added by the author.
[341] *Roquettes Freres* (n 327) para 29.
[342] *Roquettes Freres* (n 327) [27].

An important impact of the introduction of the CF in the European Legal Order is that it gave textual basis to Fundamental Rights in the EU, with Article 6 TEU giving to the CFR the same place in the legal order as Treaties. Before this, due to a lack of explicit textual basis, the CJEU gave them the status of 'General Principles of Community Law', above general EU law but below Treaties[343]. With the Charter becoming legally binding in 2009, despite being proclaimed in 2000, it seems initially that the CJEU simply had its hands tied in 2002 and could not actually grant the protection of privacy of business premises a treaty-level status of fundamental rights. Instead, it could only give in the status of "general principle", a step below. Indeed, the CJEU did not even mention the CFR in *Roquettes Freres*. The first mention would come later. Yet while this is legally sound, this was not the only option. Not only had the General Court already started to refer to the Charter at that time[344], but the Court of Justice would later change its position and recognise this right to privacy as a Charter-protected, Treaty-level fundamental right in 2008's *Varec*, still before the Charter became legally binding.

The CJEU also initially argued that if there was such a general principle, the exceptions the State can rely on would anyway be 'more far reaching' in the case of companies than for individuals[345]. In other words, the standard of protection would be lower for companies, making it easier for the State and the Commission to find exceptions. As a result, the CJEU never required a warrant, and simply allowed the State to require one as per their national legislation, when they were the one implementing EU law and/or a Commission decision. Contrary to the ECtHR, the CJEU in *Deutsche Bahn* found the lack of prior warrant unproblematic, and the existence of *ex post* review of the decision sufficient[346]. Additionally, when a court-granted warrant was necessary according to this domestic law, the CJEU granted very limited leeway to the domestic judge, who was not

[343] Takis Tridimas, 'Fundamental Rights, General Principles of EU Law, and the Charter' (2014) 16 Cambridge Yearbook of European Legal Studies 361.
[344] John Morjin, 'Judicial Reference to the EU Fundamental Rights Charter: First. Experiences and Possible Prospects' [2002] EMA Working Paper.
[345] *Roquettes Freres* (n 327) [29]. Basing itself on the ECtHR's *Niemietz* case, which did not involve legal persons, but the business premises of an individual.
[346] *Case C-583/13 P Deutsche Bahn AG and others v Commission* EU:C:2015:404 [22]-[23].

allowed to review the decision of the Commission to conduct the inspection or ask for more information to ensure that there were sufficient evidence hinting at anti-competitive behaviours.

On the other hand, the ECtHR stood its ground during these first years, and did not change anything to its jurisprudence, with very few references the CJEU. It maintains that the companies can benefit from this *right*, and that the standard of protection was the same as individuals[347]. The turning point arises with a decision of the ECtHR: 2013's *Delta Perkány*[348]. With this ruling, the ECtHR started to move towards the CJEU in turn, slowly changing its attitude, principally by admitting that the standards of protection to which the dwelling of individuals are held could be higher than those of companies' premises.

The CJEU, for itself continued its slow progress, referring almost systematically to the case-law of the ECtHR and presenting its own as being in accordance with Strasbourg's jurisprudence. The last case is CJEU's *WebMindLicences* (2015)[349], at which point the jurisprudence of both Courts is quasi fully aligned: they agreed on a fundamental right of legal persons to the protection of business premises, although with a less extensive protection than for individuals, and frequently refer to each other.

They still differ regarding the exact test used to assess whether there can be an exception or not, but these are fairly limited, and could only be solved by the CJEU. Indeed, the ECtHR's test is escribed in its textual basis in article 8 ECHR. The CJEU, on the other hand, through Article 52 CFR and the principle of proportionality it enshrines, could probably move on closer to a proportionality test expressly similar to the ECtHR's. But even then, its "non arbitrary or disproportionate test" partially overlaps with the ECtHR's already, hence the minimal divergence only.

[347] The ECtHR was sometimes more vague than this, stating that the right of interference of the State regarding companies' business premises 'may be more far-reaching", using expressions such as 'even if the right of interference was more far-reaching', but never actually used it to conclude to a non-violation of Article 8 for companies.
[348] *Affaire DELTA PEKÁRNY a.s c République Tchèque* (2014) ECHR 279.
[349] *WebMindLicenses* (n 339).

With this overview in mind, one can only wonder *why it took so long for judges to agree with each other*? If as demonstrated before, the Charter was not the main cause of this change, then why wait until 2015 when the matter could have been a non-issue, and have been solved in 2002?

The next section will provide an explanation for this pattern, tracing each Court's reactions to varying threat level from different actors, threats which were targeting Luxembourg and Strasbourg judges' authority differently.

2. Explaining the convergences and divergences between European Courts

The back and forth between both Courts had been noticed and was the source of much legal commentary. This scholarship's common interpretation of this jurisprudential saga has been that of a one-sided convergence of the CJEU with the ECtHR in the course of only one case: the 2002 *Roquettes Frères* decision. However, it does not explain why both Courts behaved as they did; an overview of the new theory as applied to this particular case will therefore come after.

2.1. State of knowledge and possible explanations

Existing scholarship had identified the question of the right to privacy of business premises as one where both Courts had different approaches. However, most of the interest died down after the 2002 *Roquettes Frères* ruling, where it seemed that the CJEU had simply decided to follow the ECtHR. The consequences of this are twofold. First, this limited the pool of relevant cases, making it more difficult to offer an explanation as to the behaviour of each Court. Second, it missed the subsequent developments in the case-law of both jurisdictions. By challenging the general consensus that the convergence between both courts ended one-sidedly in 2002, this chapter can then build on more cases throughout the years, where more complex explanations contribute to our understanding of both Court's behaviours, up to 2002 but also after.

2.1.1. Existing scholarship: Legal commentary

Four main publications that have described the relation between both Courts over decades (see Chapter 1) have noted the difference in the case-law of the CJEU and the ECtHR regarding the protection of business premises. The most common assessment is that there was a discrepancy

between the two Courts. Lawson, in 1994, dedicates a section to this line of cases under the heading 'Diverging Interpretations? Recent Case-law Examined'[350]. At this time, the last relevant case was only *Hoechst*, and Lawson noted that the CJEU may have already been disregarding potentially relevant precedent from the ECtHR (the *Chappell* and *Niemietz* cases). Still a few years later, Simon cites this divergence as an example of the autonomous interpretation that the CJEU has for the ECHR itself, noting that after the court of Justice, it is the General Court of the CJEU that maintained the initial divergence[351], one of the few areas where there had not been, at this point, convergence between both Courts.

But a few rulings later, the interpretation of the doctrine becomes more divided. On one hand, in 2015, Lock concludes

> [w]hen the CJEU was asked in Roquette Frères to reconsider its decision in Hoechst, it explicitly stated that regard had to be had to decisions that came after Hoechst. The CJEU adapted its stance and brought it in line with Strasbourg's interpretation. This readiness to remove a divergence arising subsequently to the CJEU's original decision confirms that the CJEU is willing to follow Strasbourg case law[352]

And he is not alone in this assessment: Emberland reaches the same conclusion[353]. Yet, in 2006, Douglas-Scott offered a different view:

> in Niemietz, and Colas Est (…) the case law of the ECJ was actually at odds with the Court of Human Rights (on the issue of whether there is a right to privacy of business premises under Art. 8 ECHR) (…) Luxembourg has been unwilling to apply Strasbourg case law on the right to (…) privacy of business premises directly in the context of competition law cases.[354]

[350] Lawson (n 133) 234.
[351] Simon (n 272) 42. The case is *T-305/94 - LVM / Commission*, which is not included as a dataset observation for this chapter, due to not being from the General Court; but will be used as process tracing observations.
[352] Lock (n 133).
[353] Emberland (n 13) 109–110.
[354] Sionaidh Douglas-Scott, 'Autonomy and Fundamental Rights: The ECJ's Opinion 2/13 on Accession of the EU to the ECHR' [2016] Swedish European Law Journal) 29, 643.

In other words, for Lock, as for most of the doctrine, the story ends in 2002, with the CJEU yielding to the ECtHR. But the results presented above are more in line with Douglas-Scott's assessment: the convergence in 2002 was only partial. The dissimilarity continued all the way until 2015, where the gap was almost fully closed.

The first takeaway of this overview of the literature is the following: it is generally accepted that if convergence occurred it was purely from the CJEU (Lock and Emberland). This is because much of this literature was published up to, or shortly after, 2002's *Colas Est* and *Roquettes Freres*. Moreover, they were interested in a more general assessment of the interactions between both Courts, rather than focusing on this one specific area. In reality, since the gap was not closed in 2002, there are subsequent cases to analyse, where, as demonstrated above, the ECtHR at some point started to also converge.

Second, while the literature does accept the evolution of the positions of the Courts, it does not provide an explanation for these changes. This is not a criticism of the aforementioned authors; it was not their goal to provide a causal theory. This chapter builds on their work, going beyond the descriptive to the causal, to seek a fuller understanding of the dynamics at play.

2.1.2. Explaining asymmetric judicial behaviour: from low saliency to slow convergence

How can the new theory of judicial decision-making in the context of overlapping International Courts explain the asymmetrical trends of the CJEU and the ECtHR regarding the allocation of the right to privacy to business premises?

According to the theoretical framework put forward previously, the evolution of the case-law of both Courts and of the jurisprudential distance between them can from there be explained as follows.

In the first period, either no, or only one group of actors, was disagreeing with the ECtHR and challenging its jurisprudence. This was not a sufficient threat to its authority. Therefore, it did not have to move from its original preferences: a high level of protection of a fundamental right of companies to see their business premises protected, as much as individuals their home.

On the other hand, if the CJEU did give some ground and had to depart from its preferences, which would have been to not grant a fundamental right to privacy to businesses, it was because it was forced into converging with the ECtHR. This movement would be explained by the presence of sufficient threat to its authority, generally, or on this specific question, from two actors among the following: from domestic courts, from Governments, or even from the ECtHR. This forced the CJEU into partially self-legitimising by co-opting the authority and reputation of the ECtHR. This asymmetry of threat, on top of dissimilar initial preferences, is what I expect to have led to the asymmetric trend of the CJEU and the ECtHR in the first period. Building on Table 1, and distinguishing between whether these hypotheses are applied to the CJEU or the ECtHR, the first period would therefore correspond to the following:

> *H[2a]: The CJEU choses partial convergence with the ECtHR when there are two sources of threat to its authority, or one source of threat from high reputation actors.*
>
> *H[1a]: The ECtHR maintains the status quo/diverges from the CJEU when there is no threat or only one threat to its authority.*

The changes in trend in the second period, in particular for the ECtHR, are expected to result from a change in the constellation of threats to the authority of Strasbourg judges, compared to the previous period. We can expect the situation to have remained the same for the CJEU, with a moderate threat to its authority leading to its continued partial convergence. This might come from the same actors as before, or be a different actor this time. In contrast, we should now expect sources of threat to also exist towards the authority of the ECtHR, which had to partly compromise and give up some of its preferences through a partial convergence with the CJEU. This corresponds to the following hypotheses, which will also be tested in this case study:

> *H[2a]: The CJEU choses on partial convergence with the ECtHR when there are two sources of threat to its authority.*
>
> *H[2b]: The ECtHR choses on partial convergence with the CJEU when there are two sources of threat to its authority from two EU actors.*

2.2. 2002 - 2013: The one-sided convergence of the CJEU

The asymmetric behaviour of the CJEU and the ECtHR during this period can be explained by the varying challenges both Courts faced. Where the ECtHR was not faced with any threat to the implementation of its preferences – not even real challenges from the CJEU – at this time, the CJEU had to contend with domestic courts favouring the ECtHR's approach, and repeatedly pointing out the discrepancies between the two jurisprudences. As a results, it had to performatively align with the ECtHR, borrowing its case-law for the sake of cross-citation, but only reluctantly granting actual protection to companies' business premises.

2.2.1. Overview of the constellation of challenges to authority of the Courts

This first period saw different actors granting varying levels of attention to the matter of fundamental rights for companies. For Member States' Governments, the issue lacked a level of saliency required to really constitute a threat to either Luxembourg or Strasbourg, even though their preferences tended to align more with the ECtHR's. Moreover, while both Courts were adopting a different approach and were contradicting each other then, there is much more evidence for a cordial, even cooperative relationship between the Courts at this time. The only threat to be found, really, was from domestic courts, many of which voiced their displeasure with the CJEU.

It is telling that no Government submitted any third-party observation for any relevant ECtHR case during this period; and only a handful used their right to intervene in proceedings and submit conclusions to the CJEU during the same time (Table 8). When asked about the significance of Member State observations as a proxy for the saliency of the issue, a judge of the CJEU illustrated that is true in 'cases where you have 15, 17 out of 27 member states coming'[355], at least half the total number of Member States. Even *Roquettes Frères*, which had the highest number of interventions from Member States, only caught the attention of five Governments (and Norway), out of fifteen Member States at this point. While there is a possibility that Member States simply did not realise the importance of a case that could come to outcome they might disagree with, but with the absence of any observation from non-party States, it is more likely there was no strong interest in this question.

Case	Date	Member States submitting observations
Hoechst / Dow Benelux / Dow Iberica	1989	None
Limburgse Vinyl Maatschappij NV and other	2002	None
Roquettes Freres	2002	France Germany Greece Italy United Kingdom [Norway]
Varec	2008	Belgium Austria

Table 8: Overview of State Observations submitted to the CJEU for the First Period

Member State Observations are not made public – although they are sometimes described in the ruling or in the AG's conclusions – but by looking at the legislation of European States at this point regarding the possibility for companies to benefit from a fundamental right to privacy, we can infer whether States would have expressed at least a preference for a specific outcome.

It must be noted that indeed, two very influential Governments – Germany and the UK – had very protective domestic laws. However, not only are these only two Member States in the EU, on a low-

[355] Interview 4, ECJ Judge; confirmed by Interview 3, Former ECJ Advocate General.

saliency issue, but both at least partly were siding with the Commission in the *Roquettes Freres* case, where they submitted their observations.

State	No protection	Some protection (*requirement for judicial authorisation)*	Full Protection *(fundamental right granted to legal persons)*
France		X[356]	
Germany		X	X
Greece		X	
Italy		X	
UK		X	X
Norway		X	?
Belgium		X	
Austria		X	?

Table 9: Protection of business premises against state interference for States submitting observations between 2002-2011

That is not say, of course, that there were no Governments that had a more restrictive approach and refused to grant this protection to companies in their legislation. For example, Turkey and Russia, both under the jurisdiction of the ECtHR at that time (but importantly, never of the CJEU), did not require a warrant or a judicial authorisation for an inspection of business premises belonging to a company to be conducted, let alone grant them any fundamental right to privacy[357].

The situation was very different when it came to the domestic courts, perhaps because the issue of requiring or not a warrant for an inspection inherently involves the judicial power more than the legislative one on a day-to-day basis. Multiple Higher Courts in the EU had made their preference on that specific question very clear in the previous years: the Spanish *Tribunal Constitucional* (Constitutional Tribunal)[358] and the French *Conseil Constitutionnel* (Constitutional Council)[359] had both decided in the 80s that business premises for companies were protected by a

[356] In 2002's *Colas Est* case before the ECtHR, France did not even argue against the protection of legal persons' business premises under article 8, only that 'while juristic persons could enjoy similar rights under the Convention to those afforded to natural persons, they could not claim a right to the protection of their professional or business premises with as much force as an individual could in relation to his professional or business address' (*Colas Est and others v. France* (2002) 39 E.H.R.R. 17)

[357] *Law of the RSFSR No. 948-I of March 22 of 1991 on Competition and Restriction of Monopolistic Activity in Commodity Markets* (March, 22nd 1991), Art. 13 ; *Act 4054, on the Protection of Competition* (December 7th 1994) Art. 14-15

[358] S.T.S Oct.17, 1985 (No. 288) (Tribunal Constitucional, Spain).

[359] Cons. Const., 29 Dec 1983, n° 83-164 DC (Conseil Constitutionnel, France).

right to privacy. But two more specific rulings deserve our attention: the domestic cases that would lead to the *Roquettes Freres* and *Varec* cases respectively.

In 1998, the European Commission ordered an inspection of chemical company Roquettes Freres, and to do so, requested the help of French authorities. This required them to obtain a judicial authorisation to carry the inspection, which they did get. Two years later, the matter was brought before the French *Cour de Cassation*, with Roquettes Freres arguing that its right to privacy had been violated. This was a problem as, at this point, the standing precedent for the EU is 1989's *Hoechst*, refusing this right to protection of business premises to companies. The *Cour de Cassation* therefore sends a question to the CJEU, gingerly asking what to do when

> the information or evidence presented (…) in the Commission's decision ordering an investigation is not sufficient to authorise such a measure [especially when] in the present case, no information or evidence has been put before [the national judge]. [360]

The French High Court even highlighted risks to fundamental rights when

> [the] Commission's decision does not state sufficient reasons and does not enable it to verify, in the specific circumstances, whether the application before it is justified, thereby making it impossible for it to carry out the review required by its **national constitutional law**[361].

It is difficult to not see the preferred outcome of the Court as it speaks directly to the CJEU, especially with references to the Constitutional law. A contemporary case note on the reference confirms this interpretation:

> Community law thus appearing less protective, we can understand the hesitance of the judge to fully grant to companies the guarantees enshrined in its own texts, since what is at stake is the enforcement of community law (…). By interjecting the ECJ through a preliminary question and explicitly referring to fundamental guarantees [ie rights], the Cour de Cassation may be pushing for a better

[360] Cassation, 7 March 2000, 98-30.389, translation by the ECJ. Emphasis by the author.
[361] Cassation, 7 March 2000, 98-30.389, translation by the ECJ. Emphasis by the author.

> accounting of the latter by the ECJ. We await with baited breath the answer to the preliminary question asked. [362]

Another commentator even noted:

> The ECJ is very likely to answer that it is within the powers of the national judge to refuse to grant the requested search and seizures, when they consider that the elements which are presented are insufficient, or when, as was the case here, no information was communicated.[363]

Or even more succinctly:

> Reading the ruling of the Cour de Cassation, we can feel it wishes that the Luxembourg Court answers with the affirmative [to whether the national can decide to not grant the warrant], and we can understand it.[364]

The second case worthy of attention comes from a neighbouring francophone Court. In 2006, the Belgian *Conseil d'Etat* (Council of State, highest administrative court) finds itself faced with two different potential military contractors, and the Belgian State itself. A dispute regarding one contractor (Varec) being selected over the other (Diehl) by the Ministry of Defence to supply material had devolved into a dispute over whether Diehl was obliged to disclose the tender it had submitted during the public procurement procedure, or whether forcing it to do so would be a breach of privacy. According to the CJEU, what happened next is the *Conseil d'Etat* stayed the procedure, and referred the question to the Luxembourg Court[365]. But the *Conseil d'Etat* sent two questions within the same ruling: one to the CJEU, and one to its Constitutional Court (at this point named

[362] 'Le droit communautaire apparaissant ainsi moins protecteur, on comprend l'hésitation du juge à appliquer pleinement aux entreprises les garanties posées par ses propres textes dès lors qu'est en cause l'application du droit communautaire(….) En interpellant la CJCE par l'intermédiaire d'une question préjudicielle et en faisant explicitement référence aux garanties fondamentales, la Cour de cassation oeuvre peut-être pour une meilleure prise en compte de celles-ci par la Cour de justice. On attend avec impatience la réponse à la question préjudicielle posée' Emmanuelle Claudel, 'Enquêtes de l'article 56 bis' [2000] RTDCom 629. Translation by the author.

[363] Albane Marmontel, 'Vérification Du Bien-Fondé de La Demande d'autorisation Des Visites et Saisies Par Le Juge National' [2000] Recueil Le Dalloz 180. Translation by the author.

[364] 'A la lecture de l'arrêt de la Cour de cassation, on sent qu'elle souhaite que la Cour de Luxembourg réponde par l'affirmative à ces deux questions, et on la comprend.' Louis Boré, 'Les Visites Domiciliaires à l'épreuve Du Droit Européen' [2000] Recueil Le Dalloz 491.

[365] C.A., 24th Oct. 2006, n° 164.028 (Conseil d'Etat, Belgium)

Cour d'Arbitrage). When the *Cour d'Arbitrage* gave its decision before the CJEU's AG had even written her conclusions, it was to state that article 8 of the ECHR was fully applicable to moral persons[366], meaning the tender did not have to be disclosed in practice. This ruling may not have been mentioned by the CJEU, but it was explicitly covered by the AG[367], ensuring the Luxembourg judges knew a ruling on the very case on which they were about to deliberate had already partially been provided with an answer, from a Court who knew very well that the CJEU's turn would come after them.

One last piece of evidence from domestic courts deserves attention: the more general politico-legal context in the background of this jurisprudential saga, especially in the 2000s. If the German *BVerfG* did not have a jurisprudence specifically on the question of the right to privacy for businesses[368], it was still engaged in a tense dialogue with the CJEU at a systemic level. Moving forward, in 2005, the German Constitutional Court expressed serious doubt in the fundamental rights standards set by EU law in its Third Pillar (as well as a ruling of the CJEU on this issue), and confirmed that it was willing to review EU Acts in light of its own standards when necessary[369] . Authors such as Wind and Bobek have also identified broader trends during the 2000s whereby national Courts in Denmark, Sweden, and then-new Eastern European Members of the EU were very reluctant to engage with the CJEU's *de facto* power of judicial review[370]. The CJEU had to worry about maintaining its authority over domestic courts disagreeing with its positions both on the specific issue of privacy for companies, and for fundamental rights in general.

Fortunately, it did not have to deal with this sort of threat from the ECtHR, neither issue-specific nor systemic. Before 2002, there was no compelling, definitive, and explicit jurisprudence from Strasbourg on the matter of business premises for companies. The closest cases were *Chappell*,

[366] C.C., 19 Sept 2007, n° 118/2007, A 2.2 (Cour Constitutionnelle, Belgium)
[367] Opinion of Advocate General Sharpston, *Case C-450/06 Varec SA v Belgian State* [2008] ECR I-581.
[368] Although AG Mischo noted that there as a consensus in the legal scholarship that this right, constitutionally protected, would be applicable to moral persons anyway (Conclusions of Advocate General Mischo, *Brescia* (n 326).)
[369] BVerG, Order of 18 July 200, 2 BvR 2236/04 ; see Kelemen (n 118) 135.
[370] Marlene Wind, 'The Nordics, the EU and the Reluctance Towards Supranational Judicial Review' (2010) 48 Journal of Common Market Studies 1039; Michal Bobek, 'Learning to Talk; Preliminary Rulings; the Courts of the New Member States and the Court of Justice' (2008) 45 Common Market Law Review 1611.

and then *Niemietz*[371], which left the door open to multiple interpretations[372]. This changed once the ECtHR decided on a higher protection for companies, in 2002, and then firmly stood its ground for the next 10 years; but this was on the background of a very productive, respectful, and even cooperative relationship between both Courts at this point.

Indeed, as explained in Chapter 2, both Courts were at this point in a cooperative dynamic. The *Bosphorus* doctrine, decided in a 2004 case, placed EU law, and therefore the CJEU, in relative safety *vis-à-vis* the ECtHR, with the Strasbourg court granting it a presumption of equivalent protection. The CJEU therefore had the benefit of the doubt working in its favour, and it would be up to the litigants to argue against it before the ECtHR if they wanted to – an unlikely scenario at that time. For its part, the CJEU was also fairly deferential, normalising references to the ECtHR's case-law – the first one in the *Hoechst* case. The Luxembourg Court would not give full legal value to the CFR until 2010, so in the meantime it had to continue relying on the ECtHR, making starkly diverging interpretations unlikely. Negotiations on the accession of the EU to the ECHR were progressing, and judges from both Court were regularly meeting with each other.

2.2.2. Convincing domestic courts: the forced partial convergence of the CJEU

The CJEU was therefore faced with threats from domestic courts, a more moderate one from the ECtHR, and a lack of concrete signal from States, which had legislation more aligned with the ECtHR and an incentive to not heighten the level of protection of business premises if they wanted to effectively implement competition policies and conduct investigation as easily as possible.

Litigants had identified the discrepancy between the CJEU and the ECtHR: company Hoechst AG even went before the CJEU in two different cases for that very question, and in both, the differences in the case-law of the CJEU and the ECtHR was invoked, as litigants were trying to find the best outcome for themselves. As mentioned previously, it was brought up indirectly before

[371] *Chappell* (n 333); *Niemietz* (n 333).
[372] Lawson (n 133) 241.

the *Conseil d'Etat* in *Varec*, and was a main point of contention before the French *Cour de Cassation* in *Colas Est*. The French case notes on the *Cour de Cassation*'s decision show that the doctrine had identified this issue:

> The [Cassation] decision is interesting in that the Cour de Cassation notes implicitly the diverging analysis between the European Court of Justice and the European Court of Human Rights. The latter had indeed considered, in the Niemietz ruling (…) that Article 8 of the European Convention on Human Rights and Fundamental Freedom was applicable to companies, and that the words "privacy" and "home" included some commercial or professional undertakings or activities. Community law remains here much more restrictive, since in the aforementioned Hoechst case, the Court of Justice considered that the right to protection of the home was not applicable to companies.[373]

In *Varec*, the question of Article 8's applicability was raised only in the question sent to the Belgian *Cour d'Arbitrage*, not the one to the CJEU; yet both AG Sharpston and the CJEU decided to rule on that basis, as if to ensure that the matter would remain in their hands. The CJEU knew this issue would come up again and again, and that domestic courts would not be their ally for that fight. In other words, the challenges from the ECtHR and from domestic courts were not only individually important, but they interacted with each other: domestic courts' challenges at least partly stemmed from the knowledge that they also had to comply with the ECtHR.

This is where it must be highlighted that the CJEU did not lean into the discrepancy and any point. It did not even try to maintain the dissimilarity, and instead converged quickly… but covertly, pretending that the discrepancy never existed in the first place. The CJEU never fully acknowledged any potential divergence with the ECtHR, and instead downplayed it whenever it could. The *Colas Est* ruling from the ECtHR is universally interpreted by the legal scholarship as a departure from

[373] 'L'arrêt est intéressant en ce que la Cour de cassation relève implicitement la divergence d'analyse entre la Cour de justice et la Cour européenne des droits de l'homme. Cette dernière a en effet considéré, dans un arrêt Nimietz (sic) (…) que l'article 8 de la convention européenne de sauvegarde des droits de l'Homme et des libertés fondamentales s'appliquait aux entreprises, et que les mots « vie privée » et « domicile » incluaient certains locaux ou activités professionnels ou commerciaux. Le droit communautaire reste en la matière beaucoup plus restrictif, puisque dans l'arrêt Hoescht précité, la Cour de justice a posé que le principe d'inviolabilité du domicile ne s'applique pas aux entreprises' Claudel (n 368) Transaltion by the author; See also: Boré (n 370).

the CJEU's approach, a frank recognition of the right of business premises to be protected as a home, when the CJEU had explicitly refused to do so in *Hoechst* previously. Yet, the Advocate General for the *Limburgsee* case considered that this new ruling by the ECtHR did not have to be considered a real contradiction with the CJEU's previously standing *Hoechst* case. The AG argued that, after all, the CJEU still provided some form of protection[374], and that the two tests used by the Courts were similar[375] – which was not the way most legal scholars had interpreted *Colas Est*[376]! Commenting on this particular line of case and the situation in which the CJEU was finding itself, a former judge of the CJEU who was at the Court during this period observed that 'the Court of Justice, at least generally speaking, would [not] like to see itself being criticised for setting a sort of the lower standard than Strasbourg'[377]. The issue was not only the existence of divergence between the Courts, but also the optics of this divergence for the CJEU at this time.

In the *Archers Daniels* case, the General Court even avoided the question rather than really deciding on it: when litigants claimed that Article 8 would be applied to legal persons, TEU judges answered purely on the basis that there existed

> a general principle of Community law ensuring protection against intervention by the public authorities in the sphere of the private activities of any person, whether natural or legal, which is disproportionate or arbitrary.[378]

The CJEU judges (from both the Court of Justice and the General Court) went out of its way to constantly frame the ECtHR as agreeing with them, co-opting its authority and legitimacy on that particular issue.

2.2.3. Wait and see: the status quo of the ECtHR

When the CJEU was forced into a reluctant convergence, why was the ECtHR not doing the same? In 2002's *Colas Est*, the Strasbourg Court declared that that companies' business

[374] Opinion of Advocate General Mischo, *Roquettes Freres* (n 327) [256].
[375] Opinion of Advocate General Mischo, *Roquettes Freres* (n 327) [260].
[376] For example: Lawson (n 133) 245.
[377] Interview 11, Former ECJ Judge.
[378] *Case T-224/00 Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission* [2003] II-02597 [340].

premises were protected by Article 8, without endorsing a different level of protection compared to natural persons. In the next rulings, it fully stood its ground. Was it simply unaware of the CJEU's different approach? Much evidence shows that this was not the case. On the contrary: the ECtHR was aware of the discrepancy between its jurisprudence and the CJEU's, but was not in a situation where it had to compromise on its own preferences for such a high degree of protection: compared to their Luxembourg counterparts, Strasbourg judges were not facing a threat to their authority requiring them to converge with another court.

First, the same domestic courts that were exercising pressure on the CJEU for higher standards were *de facto* aligning themselves with the ECtHR's approach – as in the case of the Belgian *Cour d'Arbitrage* in 2007, explicitly citing the 2002 *Colas Est* ruling.

But what about the signs from the CJEU? One possibility indeed is that the ECtHR did not diverge willingly from the CJEU, did not make a strategic choice, and indeed simply was not aware or did not account for this jurisprudence. But in *Colas Est*, the ECtHR proved particularly knowledgeable about the state of the CJEU's current case-law: it makes explicit reference to the relevant precedent, by extensively citing cases *Hoechst, Dow Benelux, Dow Iberica*, and the subsequent case *AKZO*[379], which confirmed them. Impressively, it goes as far as citing a case from the General Court, a case that had been decided barely months before the ECtHR's decision itself, proof that Strasbourg was attentively keeping up with the activities of the CJEU on that matter. If the ECtHR does not cite the CJEU in its later cases (*Enrst* and *Wieser*), it also cannot be assumed to be because the judges were somehow not aware of the more recent cases, for the CJEU's 2002 *Roquette Freres* case had been very widely commented on by the scholarship: the ECtHR simply decided to ignore it.

The *way* the ECtHR used the previous Luxembourg case-law in its 2002 case also deserves attention. It could be assumed that, by cross-referencing the CJEU thoroughly, Strasbourg judges were showing deference and respect to these rulings, taking it into account. Indeed, this is typically how cross-referencing is interpreted by the scholarship on judicial dialogue. This is particularly true

[379] *Case C-62/86 AKZO Chemie BV v Commission of the European Communities* (1991) ECR I-03359.

when we consider that in the *Colas Est* case, reference to EU law was not *necessary*. *Colas Est* was not a case of implementation of an EU decision or EU policies – it was a purely domestic French case. Could such reference therefore be a way for the ECtHR to seek support of its own reasoning, much in the way the South African Constitutional Court cites the ECtHR, or the Australian Supreme Court cites the US Supreme Court? Quite the opposite. The ECtHR did not include the CJEU case-law in the 'Relevant domestic law and practice' section, but in a separate 'Case-law of the Court of Justice of the European Communities and of the Court of First Instance' section. While on its own, the importance of adopting this structure should not be overstated, the ECtHR went out of its way to let its constituency and the CJEU know it was aware of the CJEUs refusal to grant the right to privacy to business premises for companies, when it did not have to do so. Then in the very same ruling it put forward its own preferences very explicitly, stating 'that the Convention is a living instrument which must be interpreted in the light of present-day conditions' with a 'dynamic interpretation'[380], to conclude in a way that is openly the opposite of the CJEU's. That *Colas Est* would be a departure from the CJEU's case-law was not missed by Strasbourg judges: it was the goal.

The CJEU and the ECtHR were, therefore, in different positions; one faced with threat to its authority to which it had to react ; while the other had much more leeway to lean into its own preferences. The CJEU had to reluctantly feign agreement with the ECtHR, framing it as an ally, while it was actually changing its case-law in 2002 to move closer to the Strasbourg Court. The latter did the exact opposite: it went out of its way to single out the CJEU's jurisprudence when it did not have to and highlighted the discrepancy it had created itself. This, however, would not last in the following years.

2.3. 2013-2016: Forced compromises on both sides of the border

The second period is the one that reveals nuances so far particularly underestimated in the literature, both regarding the persisting differences in the case-law of both Courts and the actual

[380] *Colas Est* (n 307).

slow convergence of the ECtHR, mirroring the CJEU's. This is due to a change in circumstances for both Courts: their own relationship with each other was more tense during this time, and domestic courts also appeared less supportive of the ECtHR than they had been before.

2.3.1. Overview of the constellation to challenges to the authority of the Courts

As could be expected, the very narrow question of the right to privacy of companies was still not at the forefront of European Governments' preoccupations, even after 2007. Once again, no State presented third party observations to the ECtHR. As for the CJEU, very few EU Member States intervened in the proceedings (*Table 10*).

Case	Date	Member States submitting observations
Deutsche Bahn and Others	18/06/2015	Spain
WebMindLicenses	17/12/2015	Hungary Portugal

Table 10: Overview of the Submission of Member States before the CJEU (2013-2016)

Once again, it is difficult to evaluate what position the various observations and conclusions submitted by the States would endorse. However, even without access to the exact observations submitted, the *Deutsche Bahn* ruling shows that Spain's submission was in support of the Commission and against the arguments put forward by the Deutsche Bahn company[381], who was complaining that its rights had been violated due to the inspection carried out on its premises not having been subject to *a priori* judicial authorisation[382]. The *WebMindLicences* ruling does not give information on the content of the Hungarian and Portuguese observations, unfortunately, but the Hungarian Constitution and the Portuguese Constitution themselves guarantees fundamental rights to 'legal entities' or 'bodies corporate'[383] – similar to the Spanish Constitution[384].

[381] *Deutsche Bahn* (n 352).
[382] *Deutsche Bahn* (n 352).
[383] Hungarian Constitution, Article 1-4 ; Portuguese Constitution ; Article 12-2.
[384] Spanish Constitution, Article 162-1 B ; see Julicher and others (n 305) 167.

Looking at submissions to the ECtHR by States who were involved in proceedings before the Strasbourg Court, however, yields a different insight, through the *Bernh Larsen* case. The origins of the dispute here was a tax audit of Norwegian company Bernh Larsen Holding, for which the State authorities required a copy of the server where information on their activities was stored. However, other companies were also using the same server to store their own information – and neither Bernh Larsen nor the other companies were keen on sharing the entirety of the server with the Norwegian authorities. A few years (and many procedural steps) later, Bernh Larsen Holding and two other companies who had their information stored in said server ended up bringing the matter to the ECtHR, arguing that there had been a violation of their rights to privacy, as companies, framing it as an issue of 'private life, correspondence… and home', within the meaning of Article 8 ECHR[385]. In its response, the Norwegian Government does its utmost to lower the standard of protection afforded to companies here:

> The Government further disputed that the applicant companies could claim a right to respect for their "home" under Article 8. It followed from Société Colas Est and Others (cited above) that that right applied only to legal persons "in certain circumstances" that did not exist in the instant case. Unlike the former case, the present case did not concern searches or seizures, nor had the measure under scrutiny been carried out in a similar context.[386]

Such an assessment would have excluded from the protection of the home all data and purely digital information, as retrieving them would not be a 'search or seizure' in the traditional sense. The Czech Government also expressed a preference for a lower standard of protection, this time not by excluding part of the investigation from the protection of the home, but by leaning into a preference for a 'more far reaching' right of interference of the State when it comes to companies, compared to the individuals[387], trying to defend the lack requirement of a judicial authorisation to conduct this sort of search. This argument must be placed in perspective: it is the one the CJEU was still pushing

[385] *DELTA PEKÁRNY* (n 354).
[386] *Bernh Larsen Holding AS and Others v Norway* App No 24117/08 (ECtHR 4 March 2013) [98]-[102].
[387] 'l'ingérence dans le droit à la protection des locaux commerciaux d'une personne morale peut aller beaucoup plus loin que dans le cas du « domicile » stricto sensu' *DELTA PEKÁRNY* (n 354). Translation by the author.

at this point, as seen in 2008's *Varec* case[388]. While the CJEU had acknowledged that yes, companies had this fundamental right to the protection of the home, it had constantly maintained that this standard of protection was lower than for individuals, something the ECtHR was, at best, very ambivalent about. Just a few years before, in the *Canal Plus* ruling, the ECtHR had even removed any reference to a different standard between flesh-and-bone persons, and brick-and-paper persons, when it treated both type of defendants in the same case similarly[389]. The Czech Government, through its submission, favoured the CJEU's more conservative approach to the ECtHR's ambitious protection of companies' rights.

Overall, while the issue is still fairly non-salient, States were more in favour of a right to privacy for companies, but one with a lower standard than for individuals. While this may not have reached the level of a 'threat' to the authority of the ECtHR in particular, the fact that two States in a row argued this way before Strasbourg judges must be kept in mind.

Domestic courts also present at this point an interesting picture, different from the previous period, 'no fundamental right to privacy for companies' was out of the picture, and there was no ground-breaking ruling from influential courts in the matter, which would have radically changed the context. Nonetheless, where the previous period was characterised by a real push in favour of the protection of these companies against Government interferences, national courts were now more reluctant to engage with the question. This is proven by looking at the decision of domestic courts for cases arising before the ECtHR during this period. The Strasbourg Court ended up agreeing with domestic courts involved in the cases brought before it only in *Debut*, a case where the Hungarian Supreme Court dismissed the motion for review of litigants, concluding there was no violation of Article 8[390], in a situation where there had indeed been prior judicial authorisation and the possibility to ask for review *a posteriori*. The three other cases demonstrate a starker contrast with higher domestic courts:

[388] *Varec* (n 373).
[389] *Canal Plus* (n 342)..
[390] *DEBÚT Zrt and Others v Hungary* App no 24851/10 (ECtHR 20 November 2012)..

- *In Bernh Larsen*: the Norwegian Supreme Court did not even consider the applicability of Article 8 in its reasoning, when the litigants brought it up, in a case where no prior judicial authorisation had been granted to conduct the search[391].

- *In Delta Perkány:* in a case where there had been no prior warrant and where the existence of a real control *ex post* was being debated by the parties[392], the Czech Constitutional Court did rule on the matter of the conformity of the domestic procedure with Article 8. However, not only did it consider that the situation they were presented with differed from the one in the *Colas Est* case[393] – something which the ECtHR would disagree on, finding a violation of Article 8 – but the Czech judges attempted to rely on the CJEU's 1989 *Hoechst* ruling to argumentatively support their position, which was the older precedent by which the CJEU had fully refused to grant the protection to company's business premises.

- *In Vinci*, the French *Cour de Cassation* avoided explicitly ruling on the conformity of the State's actions with Article 8, despite the matter being raised multiple times by the litigants, as a warrant had been delivered but the companies argued that they could not subsequently challenge it through judicial review[394].s

Therefore, from the perspective of the ECtHR in particular, domestic courts seemed to either avoid the matter (a downgrade in terms of support for the ECtHR compared to the previous period), or, for the first time, sided with the CJEU rather than the ECtHR – in *Delta Perkany* more than ever before. It is possible to conclude the existence of a light challenge to the authority of the ECtHR, but one specifically fuelled by the divergences between the CJEU and the ECtHR on that issue. This situation being problematic for domestic courts is well known within the Courts, as noted by an ECtHR judge:

> We are fully aware that for the national courts, both- both the ECJ and the EC[t]HR are Courts that provide guidance on how certain international norms

[391] *Bernh Larsen* (n 392).
[392] *DELTA PEKÁRNY* (n 354) [86].
[393] *DELTA PEKÁRNY* (n 354).
[394] Cass. Crim. *Arret No. 08-87.415*, 8 April 2010 (Cour de Cassation, France)

> within the European system should be interpreted, and that that guidance should be in harmony. We simply cannot allow a situation where the domestic courts are faced with contradictory approach in applying certain rules, certain principles on the same issues coming out of the two of the two European courts. There is a clear understanding that this should be avoided at all costs… And for this system to work, we have to be careful to avoid situations where the national courts are facing contradictory requirements from the two highest Courts.[395]

The third – and clearest – change compared to the previous period was actually in the relationship between the CJEU and the ECtHR themselves. If the previous years had seen a cooperative, positive, commentary relationship, this period sees their relationship become colder and close to a point of rupture across multiple issue-areas, including this one.

On the particular question of companies' rights to privacy, while the difference between the two Courts existed – in particular the CJEU initially still refused to acknowledge a 'fundamental right' to privacy for companies, only accepting a 'general principal of EU Law' in that sense – sustained dissimilarity in itself is not sufficient to establish a threat, especially when the vast majority of the time, none of the Court went out of their way to antagonise or cast the other in a negative light in their own rulings. The only notable exception to this trend comes from the ECtHR in *Delta Perkány*. The Court reviewed the recent development of the CJEU in a subsection of the 'Relevant EU law and practices', noting the convergence done by the CJEU in 2002's *Roquettes Freres*. However, this reference is very ambivalent: while the case did have an element of EU law to it, the ECtHR did not need to review EU law and practices, nor the CJEU's case-law, to solve the dispute. Indeed, it does not to refer to either of them in its own argumentation. Strasbourg judges went out of their way, perhaps to show that they were still paying attention to the CJEU on this question – although it is difficult to truly conclude. Still, it is reminiscent of the first time the ECtHR did this sort of *aparte* in a ruling on this question, back in 2002, where it reviewed the CJEU's caselaw, to implicitly highlight that it was adopting a contradictory decision.

[395] Interview 17, Current ECtHR Judge.

Building on what was established in Chapter 2, we can affirm that the general relationship between both Courts had vastly changed. The ECtHR had to wrestle with the CJEU now being able to rely on its own human rights instruments, the CFR; thus relying less and less on the ECHR and the ECtHR. Furthermore,the *Opinion 2/13*, of course, marked the peak of the CJEU's velleity of independence from the ECtHR. The ECtHR, for its part, may not have been as confrontational, but *Opinion 2/13* was badly received, and judges of both Courts stopped seeing each other. This is also a time marked by more and more issue-areas from the EU's Area of Freedom, Security and Justice (such as immigration, civil procedure, and criminal law) being heavily scrutinised by the ECtHR. While the Strasbourg Court continued to grant to the EU the presumption of equivalent protection, the evidence presented Chapter 2 shows that the dynamic was also less cooperative from Strasbourg to Luxembourg.

Overall, the situation for both Courts for this second period was as follows: The CJEU was finding itself with a clear threat from the ECtHR (albeit reduced post-*Roquettes Frères*), but with less threat to its authority from domestic courts and the Governments at this point. On the other hand, the ECtHR now had to worry in turn about the CJEU challenging its authority, but also a lack of support from domestic courts and Governments for its ambitious preferences regarding the standards of protection for companies. While it is difficult to talk of threat from States at this point, domestic courts, for their parts, were expressing a preference for the CJEU's standards, and a willingness of follow these rather than the ECtHR's.

2.3.2. Convincing the Strasbourg Court: the CJEU's strategic references to the ECtHR

Empirical evidence shows that the CJEU, threatened in its authority mainly by the ECtHR, accepted giving some ground, compromising on its policy preferences to instead bolster the

legitimacy of its ruling and secure authority over its constituency – and keep it safe from the Strasbourg Court.

The CJEU, very aware of the ECtHR's more than chilled attitude towards Luxembourg after *Opinion 2/13*[396], was also keeping track of the case-law of the ECtHR on the rights of businesses specifically. As mentioned before, the main not-so-gentle nudge of the Strasbourg Court to its Luxembourg counterpart was in the *Delta Perkány* case, when it went out of its way to review EU law that would not be used to solve the case.

This did not go unnoticed by the CJEU, as displayed by the *Deutsche Bahn* case. This case deals with seven German freight and passenger transport and railway companies – among them *Deutsche Bahn* – that were targeted in 2011 by the European Commission, under suspicions of violation of European competition rules, with three different decisions ordering inspections[397]. The inspections were conducted by German and Commission officials, and while the lack of warrant or other judicial authorisation was not raised as an issue on the day of the inspection, this later became once again a point of contention. The companies sought the annulment of the Commission's decision, and the case first went to the General Court of the EU, which ruled in 2013 against the companies. The appeal was lodged, and interestingly, Advocate General Wahl, in his conclusions, relied on multiple ECtHR rulings including *Delta Perkány*, which had in the meantime been published, to defend 'the lack of a prior judicial warrant may be compensated by effective *ex post* judicial review, dealing with all issues of law and fact'[398]. The CJEU then included the ECtHR ruling in its own judgement[399].

This is interesting on three different aspects. First, this means the CJEU was aware of *Delta Perkány*, and the content of the ruling. Second, it means that the jurisprudence of the ECtHR was considered important enough that the AG would go out of his way and build an argument on this case, as that case had not been raised by the litigants, and the CJEU agreed to do so as well. Lastly, the CJEU

[396] See *Chapter 2*.
[397] Decision C(2011) 1774 of 14 March 2011
[398] Opinion of Advocate General Wahl *Deutsche Bahn* (n 352) [38].
[399] *Deutsche Bahn* (n 352).

truly engaged with *Delta Perkány*, instead of simply mentioning it without analysing it. It protects the decision of the Commission by confronting it with *Delta Perkány*'s rules:

> the presence of a post-inspection judicial review is considered by the ECtHR as capable of offsetting the lack of prior judicial authorisation and thus capable of constituting a fundamental guarantee in order to ensure the compatibility of the inspection measure in question with Article 8 of the ECHR (see inter alia ECtHR, judgment in Delta Pekárny a.s. v. the Czech Republic, no. 97/11, paragraphs 83, 87 and 92, 2 October 2014).

That is precisely the case under the system put in place in the European Union, as Article 20(8) of Regulation No 1/2003 states expressly that the lawfulness of the Commission decision is to be subject to review by the Court of Justice.[400]

This was not a required reference. A few paragraphs before, the CJEU itself noted, referring to the ECtHR' 2002 *Colas Est*, that a warrant is not always necessary to conduct such inspections in respect of Article 8[401]. That was the way the Tribunal of the EU had justified its decision, and according to the CJEU 'the General Court did not err in law in holding in paragraph 67 of the judgment under appeal that, in the light of the ECtHR's case-law, the lack of prior judicial authorisation was not capable of rendering the inspection measure unlawful'. This was enough, yet it still went out of its way to update its argument with the most recent ECtHR case at this date.

Krommendijk's interviews with individuals working at the CJEU (including Judges and Advocate Generals), conducted in December 2014, provide more insight on the reason that may have pushed the CJEU to refer to the ECtHR's case-law at this time. By adding references to the ECtHR's case-law, the Court was 'reassure[ing] national (constitutional) courts and secur[ing] compliance with a Court of Justice judgment, because it makes it more difficult for national courts to object'[402], despite knowing that citing this Court too frequently would be tantamount to acknowledging that the CJEU on its own did not have sufficient authority[403]. This is confirmed by

[400] *DELTA PEKÁRNY* (n 354).
[401] Opinion of Advocate General Wahl, *Deutsche Bahn* (n 352) [22].
[402] Krommendijk (n 38) 825.
[403] Krommendijk (n 38) 832.

a member of the CJEU's DRD interviewed for this dissertation, who observed that, especially after the entry into force of the Charter, 'the main reference will be the charter, and then there will be a reference to the European Convention of Human Rights as sort of comforting the reference to the charter'[404]. Indeed, the AG in *Deutsche Bahn* does not quickly dismiss the plaintiff's ground of appeal based on the General Court potentially disregarding the ECtHR's jurisprudence. Instead, AG Wahl carefully evaluated the compatibility between the CJEU's ruling and the ECtHR's case-law, in particular *Colas Est, Canal Plus* and *Liotard Freres*[405], and even went further than what the plaintiffs argued, since he also accounted for *Berhn Larssen* and *Delta Perkány*[406].

2.3.3. Closing the door to strategic litigation: the final convergence of the ECtHR

Why would the ECtHR, which had so far managed to maintain its original jurisprudence, start to partially converge with the CJEU? Different elements support the theory that threats from the CJEU and some domestic courts caused this convergence, but that these challenges were mild enough to cause only a partial convergence with Luxembourg. Indeed, the ECtHR ended up accepting a different standard of protection for companies and for individuals, but still made only limited cross-references to the CJEU's jurisprudence.

The first real sign of convergence from the CJEU comes from 2012's *Debut*. It therefore comes out before the real break in the relationship between the CJEU and the ECtHR; however, it was decided already on a background of rising and then sustained tensions between the Courts regarding criminal law[407], asylum[408], and social rights[409]. Even on the right to privacy of business premises, the CJEU seemed to be intent on not aligning with the ECtHR on one specific matter: companies having the same standard of protection as individuals. With this background, the Hungarian court that had dealt

[404] Interview 6, Member of the ECtHR's Jurisconsult.
[405] Opinion of Advocate General Wahl, *Deutsche Bahn* (n 352) [32]-[33].
[406] Opinion of Advocate General Wahl, *Deutsche Bahn* (n 352) [37]-[38].
[407] Alexandros-Ioannis Kargopoulos, 'The Presumption of Equivalent Protection Rebutted: The Right to a Fair Trial in Criminal Proceedings in the ECHR and EU Law' in Kanstantsin Dzehtsiarou and others (eds), *Human Rights Law in Europe: The influence, overlaps and contradictions of the EU and the ECHR* (Routledge 2014).
[408] Vicini (n 287); Cathryn Costello, 'Dublin-Case NS/ME: Finally, an End to Blind Trust across the EU?' (2012) 2 Asiel en Migrantenrecht 83; Pergantis (n 288).
[409] Ludlow (n 151).

with the case originally dismissed rapidly any possibility of violation of Article 8 for the companies in this case – something the ECtHR would not agree with in the end. Faced with this, the ECtHR for the first time makes a small concession:

> [c]ontrary to private dwellings, corporate business premises do not necessarily serve the enjoyment of private and family life or personal development of individuals as is the case with private dwellings, which serves as one of the fundamental reasons for the specific protection granted to people's home. Such corporate premises are not prima facie related to a profession or business that may well be conducted from a person's private residence (…) and thus the corporate owners' expectations of respect is not necessarily the same as is due to private dwellings or to premises related to the above professional and business activities of private persons. [410]

Before that, the ECtHR had always maintained that the protection was identical, had sidestepped the question[411], or had left open the 'possibility' that the power of the state may be 'more far-reaching' for corporate business premises, but never actually made use of this. However, the threat the ECtHR felt at this point might have been too low for this solution to be sustained: in 2013's *Berhn Larsen,* a different section of the ECtHR was back to stating that 'entitlement **might** well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case'[412]. But when faced with the third case in a row where domestic courts had either dismissed the applicability of Article 8 and/or expressed explicit preference for (the CJEU's) lower level of protection, the ECtHR relented and confirmed that for companies 'the right of interference of state **can be** more far-reaching'[413].

After this first move, was when the CJEU delivered *Opinion 2/13* with its declaration of independence and autonomy from the ECtHR. What could the ECtHR do in response to the heightened pressure of the CJEU combined with a lack of real support from any other actor?

[410] *DEBÚT* (n 396) [3].
[411] Emberland (n 329) 174.
[412] *Bernh Larsen* (n 392).
[413] 'le droit d'ingérence des Etats **peut** cependant aller plus loin' *DELTA PEKÁRNY* (n 354) [77]. (Translation by the author).

Through a purely textual analysis, nothing appeared to have changed. With the exception of *Delta Perkány* – explained previously – there is not a single reference to the Luxembourg case-law from the ECtHR in the second period of this study. The challenge of actually keeping up with all the CJEU's case-law, for the ECtHR, was raised multiple times by an interviewee working at the ECtHR's jurisconsult[414], and at first, it seems that may be what happened here: the Strasbourg Court had simply not kept up with the Luxembourg Court's case-law on businesses' right to privacy.

However, the ECtHR actually started to refer more often to the test typically used by the CJEU ('is the inspection an ***abusive and arbitrary*** decision?') much more than it had before, while never really engaging with it in detail; when it had never referred to it in any of the decisions under study before the CJEU delivered *Opinion 2/13* (*Table 11*). Similarly, it never went back on its decision to indeed give a lower level of protection to companies compared to individual, but when the French Government (mistakenly?) did not try to use this line of argument in 2015 case *Vinci*, the ECtHR was careful to not raise it at all either, allowing it to find a violation of article 8. In other words, the way the ECtHR converges is different from the CJEU. Where the CJEU refers to ECtHR cases to then not fully follow them, or frame them argumentatively to make them appear as if supporting its own jurisprudence, the ECtHR gives some ground substantially, but avoids explicit reference to the CJEU.

[414] Interview 17, Jurist of the ECtHR's Jurisconsult, 21/04/2023.

Case	Reference to Abuse/Arbitrariness ?	Period
Colas Est	None (except when citing verbatim the CJEU)	Period 1 *(2002-2013)*
Ernst	None	
Wieser	None	
Canal Plus	None	
Debut	Mentions the *'lack of arbitrariness'* at [3]	*Period 2 (2013-2016)*
Bernh Larsen	Mentions *'The risk of abuse and arbitrariness'* at [144]	
Delta Perkany	Mentions that the decision could *'arbitrary'* at [82], [84], [93]	
Vinci	Mentions that the decision could be *'abusive et arbitrary'* at [64]	

Table 11: Evolution of the references of the ECtHR to the CJEU's test

3. Conclusion

This case-study has demonstrated that the current narrative regarding the interactions of both European Courts regarding businesses' right to privacy was so far incomplete. The CJEU did, indeed, converge with the ECtHR, most strikingly in 2002's *Roquettes Frères*. However, there was more to the matter than initially met the eye: the convergence was partial, and the ECtHR did not stay passive. Instead, by extending the timeframe of the case-law one looks at, we can find a more nuanced evolution which can be used, deductively, to offer support for this dissertation's broad theoretical framework – while additional inductive insights must be noted.

3.1.Fit of the theory

This chapter has first demonstrated that while the jurisprudence of two International Courts may sometimes look to have converged, a deeper assessment of their case-law can reveal unforeseen evolution after the debate was thought to be settled. Here, when most of the scholarship thought the issue solved in 2002, both the CJEU and the ECtHR actually took much longer to fully align with each other. But the ways in which they maintained or ended some remaining discrepancies was more subtle than can appear at first glance.

Second, the theoretical framework, as far as the hypotheses tested here are concerned, is well supported by empirical evidence for the CJEU. Constellations of threats identified do match the

general movement of the Luxembourg Court towards convergence and divergence at different times. The different causal observations and manners in which the CJEU consistently converged with the ECtHR is also coherent with the general theoretical framework.

Overall, the theory is also supported for the ECtHR, albeit with a few caveats: for the second period, the convergence of the ECtHR seems motivated by a threat to its authority from the CJEU, and only indirectly from domestic courts. Indeed, the issue seemed to have been more that, since both Courts did not have the exact same standard yet at this time, litigants were pointing out the difference before the different Courts in the hope of getting their preferred standard applied. This was placing the ECtHR in a difficult position, as a fully open confrontation with the CJEU is undesirable. Since the CJEU had already quasi-fully converged with the ECtHR, the Strasbourg Court did not have to make an excessive compromise, by closing the remaining gap and accepting the possibility of the CJEU's slightly lower standard of protection. But this does not seem to have been a self-legitimising decision: on the contrary; the ECtHR did not signal that it was converging by citing the CJEU, it converged *implicitly*. The mechanism is overall the same, but the goal of the convergence seems to have been different here than for the CJEU.

3.2. Fit of alternative explanations

The alternative explanations offered previously do not find support in the empirical evidence. First, the behaviour expected from a "Community of Courts" approach would have been for the CJEU to be the only one converging towards the ECtHR, with the ECtHR having no incentive to do so in turn. However, the use of the index to empirically evaluate the movements of both Courts showed that this was not the case: the ECtHR also converged with the CJEU, making a compromise between its authority and its preferences in doing so. Moreover, the convergence was not always through an explicit reference to the CJEU, something that Slaughter does not expect under her framework. Since jurisprudential convergence is supposed to be positive and a sign of cross-fertilisation between jurisdictions and among a global community of judges, there would have been no reason for the ECtHR not to refer to the CJEU when it was aligning with its jurisprudence.

There is no real support for purely utilitarian explanations of judicial dialogue and cross-referencing either. Indeed, these theories expected references to an external Court to be made only to support a pre-selected outcome. In other words, a Court does not compromise on its preferences: it maintains its preferences, and refers to another court supporting them to bolster its legal argumentation. However, this is not reflected here; for example, in the first period, the CJEU did the opposite, performatively referring to the ECtHR while hanging on to its preferences. Similarly, when the ECtHR was converging with the CJEU, it also had to accept a trade-off in the end, rather than stick to its preferences and ignore the Luxembourg Court. However, it must be noticed that this theory is not necessarily fully dismissed by the case-study. It is possible that international judges engage in cherry-picking and sometimes look for other rulings to support their own position; but this chapter has demonstrated that such a theory leaves unexplained many instances of cross-references, as well as the more subtle ways International Courts interacts with each other in their jurisprudence.

This chapter, therefore, broadly offers support for a theory of judicial convergence serving the self-legitimisation of International Courts. However, this first case study can only offer a partial test: most obviously, only some hypotheses have been tested. But additionally, the issue itself was one of low saliency, academically, socially and politically; in other words, low risk, low reward, for both European Courts. Moreover, the ECtHR potentially converging in a manner different than the CJEU has been raised inductively, and whether this is an idiosyncrasy of this case-study or a pattern that holds across issue-areas will be checked in the two following chapters.

CHAPTER 4
Raising the stakes: The European Arrest Warrant and human rights in the European Union

CJEU Judge: We have noted where we have to be conscious of not being out of line and that if (…) there's information that other member did not have the right prison conditions to detain somebody or whatever…. We can't just always assume that's okay. You know? So that was, that was tak[ing], you know, real account of the exceptions created by the, by the Court of Human Rights of Strasbourg.'

[a few minutes later:]

'[The ECJ is] just very conscious that, you know, you don't want the European Arrest Warrant framework to be pulled apart. Because it is the key instrument in the area of criminal law and criminal law cooperation and criminal law. So if you have exceptions all over the place, then it'll become ineffective[415]

In the 18th century, writing his landmark treaty on criminal law and procedure, Italian jurist Cesare Beccaria was already laying down one of the most challenging dilemmas still occurring commonly in criminal law: should a request for extradition always be honoured, regardless of the potential consequences for the individual concerned? Beccaria had the luxury of 'not pretending to determine this question'[416], but judges in the European Union (EU) today cannot do the same. When such a question is brought before them, they must decide, lest they commit a denial of justice.

While extradition has historically been a political process, then one guided by traditional International Law Treaties, the EU has adopted an instrument rendering it a judicial one: the European Arrest Warrant (EAW) is a simplified procedure involving the judicial authorities of the requesting and executing States. Much more effective than traditional extradition, it is one of the instruments based on the mutual trust that EU Member States are required to have in each other,

[415] Interview 2, ECJ Judge, 02/12/22.

[416] 'Whether it be useful that nations should mutually deliver up their criminals? Although the certainty of there being no part of the earth where crimes are not punished, may be a means of preventing them, I shall not pretend to determine this question, until, laws more conformable to the necessities and rights of humanity, and until milder punishments, and the abolition of the arbitrary power of opinion, shall afford security to virtue and innocence when oppressed' Cesare Beccaria, *On Crimes and Punishments* (1863) ch XXXV On Sanctuaries.

regarding the quality of their legal systems, and fundamental rights. In other words, the dilemma presented by Beccaria would simply not arise in the EU: all Member States have 'laws more conformable to the necessities and rights of humanity', 'milder punishments', 'abolition of the arbitrary power of opinion' and 'security to the virtue and innocence when oppressed', as Beccaria had hoped, therefore a fast, quasi-automatic procedure is acceptable. The CJEU early on supported this reasoning in cases involving other EU legal mechanisms based on mutual trust and did the same once it came to the EAW.

However, what should have been the efficient and simplified model of a well-known procedure to lighten the workload of domestic authorities gave rise to one of the most discussed jurisprudential sagas of the last decades in Europe. For the ECtHR, Beccaria's dilemma had *not* been solved, because respect for fundamental rights by States should never be taken for granted. Two very different logics were facing each other: the CJEU's approach is drawn from its goal of ensuring both the effective free movement of persons between EU Member States and the viability of the Area of Freedom, Security and Justice (AFSJ), which effective extraditions and lack of impunity when one is crossing a border became an important part of. Indeed, in the words of an interviewee:

> [Y]ou must be able to move not only freely, but also securely and securely means that the open borders will not be abused by criminals who flee their criminal responsibility in the member state where they have committed an offence by going to another member state, for instance, the one whose national they are, and then are scot-free and, and enjoying impunity.[417]

In contrast, the ECtHR embraces its role as a watchdog for human rights endangered by dire detention conditions and the rule of law crisis.

This jurisprudential saga occurred on a background of ebbs and flows in the tensions between both Courts, Member States worrying about the complexification of a procedure meant to simplify and

[417] Interview 9, ECJ judge, 13/03/2023.

depoliticise extradition, and domestic courts torn between adding more to their workload and remaining effective guardians of constitutionally guaranteed rights in their own State.

Contrary to the issue covered in Chapter 3, this situation did not lead to a progressive alignment of both Courts. Not only did the CJEU compromise only once, in 2016, by accepting some exceptions to mutual trust to allow judges to refuse the execution of the EAW[418], but where it did, such exceptions were extremely strict and limited. The ECtHR, for its part, did not even change its stance, affording better protection for fundamental rights, and managing to stay impervious to the CJEU's pressure even at the height of the tensions between both Courts.

Why would the outcome of the European judicial dialogue in this case be so different from the previous one? It will be argued that this is due to the differences in politico-legal context underlying the issue of the EAW, from 2012 to 2021. Both Courts were facing threats to their authority, yes, but these threats were not grave enough that they would push them to converge with one another as a strategic move. Save for the CJEU between 2012 and 2016, each Court was able to withstand the pressure of other actors, and therefore kept a case-law that was in line with their respective preferences. This culminated in the very last case of this period: the ECtHR's *Bivolaru and Moldovan* case (2021), where the ECtHR, for the first time, found that the EAW procedure, as implemented by France, presented manifest deficiencies, and in this case identified a violation of the right to protection against torture, inhuman and degrading treatments (ECHR Article 3)[419]. This demonstrates the divergence between both Courts so starkly that it is likely to mark the entry into a new era of judicial dialogue between the CJEU and the ECtHR.

[418] *Joined Cases C-404/15 and C-659/15 PPU Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECLI:EU:C:2016:198; Gáspár-Szilágyi (n 286).
[419] *Bivolaru and Moldovan* (n 232); Platon (n 233); Loïc Robert, 'La Présomption Bosphorus à l'épreuve Du Mandat d'arrêt Européen. Commentaire de Cour EDH, 25 Mars 2021, Bivolaru et Moldovan c/ France, N° 40324/16 et N° 12623/17' [2021] Revue de l'Union Européenne.

1. The European Arrest Warrant: the challenges of a trust-based extradition in the EU

The European Arrest Warrant was developed within the EU as a mechanism that would simplify international extradition, in the context of free movement, the AFSJ, and States with common traditions regarding procedural safeguards and substantial protection for fundamental rights[420]. However, the use of this new tool by EU Member States in the 2000s, 2010s and 2020s raised new challenges that the original framework had not planned for, in particular in the context of inadequate protections of the right to a fair trial, or detention conditions amounting to degrading and inhuman treatments. With the execution of a European Arrest Warrant being in the hand of national judiciaries, it fell to domestic and European Courts to decide when it was, or was not, appropriate to execute an EAW when doubts were raised regarding the human rights standards of the requesting State. The exact scope of these exceptions to the execution of an EAW would lead to the emergence of a long jurisprudential saga between the Strasbourg Court and the Luxembourg Court.

1.1. Understanding the tensions between EAW and Fundamental Rights

The tensions between fundamental rights and extraditions are inherent to the procedure being part of criminal law. The traditional model of international extradition deals with this issue either by making it a politicised process, to be evaluated on a case-by-case basis by the requested authorities, or by bilateral and multilateral international treaties which leave a lot of leeway to States regarding potential non-executions. But this model is slow and unpredictable for all parties involved, and turns States refusing to extradite into safe heavens, for better and for worse. This became an issue in the EU: with the development of the Area of Freedom, Security and Justice and the free movement of persons within the Schengen Area (and beyond, as it included the United Kingdom pre-Brexit, and still includes Ireland) it was considered essential that no EU Member State potentially be such a haven for individuals fleeing prosecution or execution of their criminal

[420] Valsamis Mitsilegas, *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe* (Bloomsbury Publishing 2018).

sentence. The adoption of a simplified procedure was meant to solve this issue, but it rested on the assumption that within the EU, States could always trust the quality of each other's legal system.

1.1.1. The basic model of international extradition

In International Law, there is no general principle of extradition, either as a duty for the executing state or as a right to the requesting state[421]. This is due to the sovereignty of the executing State, which cannot be forced to extradite an individual on its territory. Extraditions were, therefore, historically dealt with on a case-by-case basis, making it a highly politicised process. One way to simplify the process has thus been to develop a framework of international extradition through International Law, with bilateral and then multilateral treaties on this question being developed from the 18th century onwards[422].

These treaties circumvent the issue of sovereignty by having States willingly commit to the obligations they contain, regarding when and how they are to comply with an extradition request. They typically lay down the exact procedure to be followed and contain a list of various grounds on which each signatory State still reserves the right to refuse the extradition. For example, the United States-France extradition agreement currently in force requires the offence involved to be punished by at least one year of imprisonment in the law of both the US and France[423] (Article 1) and allows refusal of the extradition in case of a 'political offense' (Article 4) among others. These are very common provisions that attempt to strike a balance between State Sovereignty of the non-sheltering of potential criminals.

Two other common exceptions in these treaties require attention:

First is the extradition of a State's own national. Many States have legal principles, often enshrined at a constitutional level, whereby they refuse to extradite one of their own nationals towards another

[421] M Cherif Bassiouni and Edward Martin Wise, *Aut Dedere Aut Judicare: The Duty to Extradite Or Prosecute in International Law* (Martinus Nijhoff Publishers 1995).
[422] Valerie Epps, 'The Development of the Conceptual Framework Supporting International Extradition' (2002) 25 Loyola of Los Angeles International and Comparative Law Review 369.
[423] Extradition Treaty between the United States of America and France (Adopted 23 April 1996, entered into force 1 February 2022) 2179 UNTS 341 (US-France Extradition Treaty).

requesting State. These are often civil law States, such as France, Germany, Japan or Brazil, as opposed to common law States which often lack this type of provision[424]. Therefore, due to the highly sensitive nature of the topic, and to accommodate the diversity of domestic rules on the question, extradition treaties often include a provision allowing States to refuse the extradition of one of their own citizens. Going back to the same US-France extradition treaty, the United States do not have a ban on the extradition of their own nationals, whereas France does. Therefore, as a middle ground, Article 3 specifies that:

> There is no obligation upon the Requested State to grant the extradition of a person who is a national of the Requested State, but the executive authority of the United States shall have the power to surrender a national of the United States if, in its discretion, it deems it proper to do so. (…) If extradition is refused solely on the basis of the nationality of the person sought, the Requested State shall, at the request of the Requesting State, submit the case to its authorities for prosecution.[425]

The second important exception is related not to the person or the offence but the legal system of the requesting State. Indeed, the executing State could consider that the procedure that has led to the conviction of the individual has not been fair, that the guarantees regarding due process that they could receive are not sufficient, or that the punishment is unacceptable. The coercive nature of criminal law makes it highly sensitive to issues of fundamental rights and rule of law, and the values and (constitutional) identity of a given State. The most common exceptions of this type in extradition treaties relate to potential risks of death penalty if the individual is extradited. Here as well, the US-France Extradition Treaty provides an example in Article 7, where the Requested State can refuse the execution if the offence is punishable by the death penalty in the Requesting State but not the Requested one[426]. Article 6 also provides for more general exceptions,

[424] Epps (n 428) 378.
[425] US France Extradition Treaty art 3.
[426] 'When the offense for which extradition is sought is punishable by death under the laws of the Requesting State and is not punishable by death under the law in the Requested State, the Requested State may refuse extradition unless the Requesting State provides the assurance that the death penalty will not be imposed or, if imposed, will not be carried out' US France Extradition Treaty art 7.

on ‘humanitarian grounds’, such as the old age or the health of the individual[427]. The common denominator to both these exceptions is the value that a state can give to human dignity and, in a sense, fundamental rights. As a result, the procedure laid down in the convention includes guarantees regarding the right to fair trial, such as free legal assistance and representation (Article 22).

Lack of fundamental rights can also be the cause for refusing to enter into an extradition treaty with another State, or to denounce this treaty subsequently. For example, the United States suspended the US-China extradition treaty in August 2020 following the Hong Kong revolt, citing ‘deep concern regarding Beijing’s decision to impose the National Security Law, which has crushed the freedoms of the people of Hong Kong’[428].

An example of extradition in Europe before the European Arrest Warrant: France, Italy and the Mitterrand Doctrine:

Following political unrest in Italy during the Years of Lead in the 70s, thousands of political opponents to the regime in power had been prosecuted and condemned for offences of a political nature (or adjacent thereof). Many fled to France, either escaping from prison, fleeing beforehand, or having been granted probation; about 150 of them (up to 300 in 1980), many from the so-called Red Brigades, established themselves in France[429]. Following this, the Italian Government requested their extradition to Italy. This placed France in an uncomfortable situation, as doubts had been raised regarding the fairness of the procedures these nationals would face in their own country, and many actually applied for asylum in France, claiming persecution. But France could not grant them asylum without this being an open condemnation of Italy, an important ally. As a result, then President Mitterrand developed the ‘Mitterrand Doctrine’: taking advantage of the decision to

[427] US France Extradition Treaty art 6.
[428] US Department of State, ‘Suspension or Termination of Three Bilateral Agreements With Hong Kong, Press Statement’ (19 August 2020) <https://web.archive.org/web/20200820022757/https://www.state.gov/suspension-or-termination-of-three-bilateral-agreements-with-hong-kong/> accessed 15 July 2023.
[429] Maria Grazia Sangalli, ‘L’extradition des réfugiés italiens indique-t-elle un abandon du principe d’amnistie en France ?’ (2006) 159 L’Homme & la Société 131.

accept or refuse extradition being discretionary, Italians settled in France who had been involved violent actions in Italy during this time, but had settled in France without engaging in criminal activities, would not be extradited in Italy, but they would not be officially granted asylum either.

1.1.2. The need for an EU-specific instrument: the European Arrest Warrant

With this background, we can return to the early years of the European Economic Community. In 1957 already, the Treaty of Rome guaranteed, at least on paper, the free movements of workers across borders of the Member States (Title III, Chapter 1). After the creation of European citizenship[430] in the 1992 Treaty of Maastricht, this right was extended to all nationals of member States (Article 8A).

This led to the question of extradition. Attempts to develop a European instrument for extradition had died down after a first feeble attempt in the 1980s due to a lack of enthusiasm from most Member States at the time[431]. By the end of the 1980s, new instruments were adopted to simplify the transfer of prisoners and the actual procedure to request an extradition[432], but due to very low ratification, the instrument of reference remained the 1957 European Convention on Extradition (ECE), which had not even been adopted in the context of the EEC, but of the Council of Europe[433]. It was only in 1995 that a first major step was taken through the adoption of the European Convention on Simplified Extradition Procedure; but a simplified extradition procedure is an extradition procedure nonetheless, and still a heavy instrument to wield for national authorities. It established an obligation to extradite for offences punishable by deprivation of liberty under both States involved, a condition called 'double criminality' in International Law (Article 2), while still maintaining the possibility to refuse to extradite a State's own nationals (Article 6). Moreover, the

[430] Peo Hansen and Sandy Brian Hager, *The Politics of European Citizenship: Deepening Contradictions in Social Rights and Migration Policy* (Reprint édition, Berghahn Books 2012).
[431] Gert Vermeulen, 'A. EU conventions enhancing and updating traditional mechanisms for judicial cooperation in criminal matters' (2006) 77 Revue internationale de droit pénal 59.
[432] See for example : Convention on the Transfer of Sentenced Persons (adopted 21/03/1983, entry into force 01/07/1985), ETS 112.
[433] European Convention on Extradition (adopted 13/12/1957, entry into force 18/04/1960), ETS 24.

request had to go through 'the diplomatic channel' (Article 12), rather than any properly established procedure with clear points of contact, making it an even slower, cumbersome system.

Therefore the 1999 Council of Tampere went even further, when it considered that

> [t]he formal extradition procedure should be abolished among the Member States as far as persons are concerned who are fleeing from justice after having been finally sentenced, and replaced by a simple transfer of such persons, in compliance with Article 6 TEU. Consideration should also be given to fast track extradition procedures, without prejudice to the principle of fair trial.[434]

The references to Article 6 TEU (on fundamental rights and values of the EU) and the principle of fair trial show already the inherent human rights concerns related to this procedure. Eventually, in 2002, the Council finally adopted the 2002/584/JHA: Council Framework Decision of 13 June 2002[435] on the European arrest warrant and the surrender procedures between Member States, or FDEAW, then updated in 2009.

This instrument's main innovation was based on mutual trust between Member States of the EU regarding their standards of due process, fair trial, and fundamental rights generally. The mutual trust existing between Member States would allow the removal of most checks and safeguards typically required in a traditional extradition. The procedure is entirely depoliticised: the judicial authority of the Requesting State gets directly in touch with the relevant judicial authority of the Executing State, who will decide whether to extradite or not, without any requirement of double criminality as had been maintained in the ECE. There are grounds for refusals (*Table 12*), based on which the executing judicial authority could refuse to extradite, but very few compared to a traditional multilateral extradition convention.

In addition to these actionable grounds for non-execution, two other dispositions of the FDEAW must be highlighted. First, Recital 12 holds that

[434] Tampere European Council (15-16 October 1999), Presidency Conclusions. [35].
[435] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1.

> [the FDEAW] respects fundamental rights and observes the principles recognised by Article [TEU] and reflected in the [CFR] (…) This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.[436]

This is confirmed by the general provision of Article 1(3): 'This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.'[437]

[436] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1 (n 441) Recital 12.
[437] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1 (n 441) Article 1(3).

Optional grounds for non-execution (Article 4)	Mandatory grounds for non-execution (Article 3)
• Offences not explicitly covered by the FDEAW, if no double-criminality. • Act already being prosecuted in the executing State. • Judicial authorities of the executing Member (or of third State) have decided not to prosecute, halted proceedings, or already adopted final judgement for the offence. • Offence statute-barred according to the law of the executing Member State AND falls within the jurisdiction of executing Member State. • Executing state decided to carry out imprisonment itself. • Offences committed on territory of executing State. • Offences committed outside the territory of issuing State and would not be prosecuted by executing state in same situation. • Additional guarantees can be requested for (Article 5): o Condemnation *in abstentia* o EAW targeting a national/resident of the executing State o Potential life sentence at stake	• Offence covered by amnesty in the executing State, AND falls within the jurisdiction of executing Member State. • Judicial authorities of another Member State have decided not to prosecute, halted proceedings, or already adopted final judgement for the offence. • The person who is the subject of the European arrest warrant not criminally responsible age-wise for the act in executing State.

Table 12: Ground for refusal of European Arrest Warrant as per 2002/584/JHA

However, this creates an inherent tension between mutual trust — the 'cornerstone of the European legal order'[438] — and fundamental rights. 'Mutual trust' in EU law, is not symbolic: it is a legal concept related to mutual recognition, upon which the entirety of the Single Market was built[439]. It is now the very basis of many instruments of the AFSJ simplifying traditional

[438] *Opinion 2/13* (n 205).
[439] *Case 120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*; Guillemine Taupiac-Nouvel, 'The Principle of Mutual Recognition in Criminal Matters: A New Model of Judicial Cooperation within the European Union' (2012) 2 European Criminal Law Review 236, 240.

International Law – it is today the defining feature of EU law and the grease of the two main EU policies: the AFSJ and the Single Market. And contrary to Reagan's famous quip, the point of trust in the EU is very much to *not* verify[440], since the goal is the simplification of procedures. *Not verifying*, in an issue so sensitive to fundamental rights, was bound to create tensions, started with the CJEU and the ECtHR's different approaches to the question.

Indeed, we can now start to understand how each Court's mandate would influence their preference when it came to cases involving the execution of an EAW. For the ECtHR, as a human rights court first and foremost, a 'standard-setting mechanism'[441] for human rights in Europe through individual cases, its focus would be on whether the execution of an EAW would lead to violating the rights of the person targeted. In the words of a former ECtHR judge, the Strasbourg Court considers itself as the highest court when it comes to the '*implementation* of human rights in the EU'[442]. As a Court that comes after the fact, rather than during the procedure – a difference with the CJEU highlighted multiple times by interviewees of both Courts – the ECtHR is bound to assess the situation concretely, to either identify or deny the existence of a violation in one specific instance.

The CJEU, as has been established in Chapter 2, is not a human rights courts, or at least does not see itself exclusively as such – if anything, it identifies as a Constitutional Court. More than in any other case study in this dissertation, this role as a constitutional jurisdiction here is fundamental. Interviewees from the CJEU were extremely clear regarding what the main worry of their Court is when it comes to the EAW: that adding fundamental rights exceptions to the execution of a mutual trust-based EU instrument would not only be problematic for the effective free movement of persons (as mentioned previously), but that it would start unravelling all mutual trust-based instruments. For example,

> [t]here are people (…) who prefer, I think, to maintain the European Arrest Warrant structure. Even if they risk- even if there is a risk of loss of fundamental

[440] Reagan often used the expression 'Trust, but verify', originally a Russian proverb, for Soviet-US arms control negotiation: Sarah B Snyder, '"No Crowing": Reagan, Trust, and Human Rights' in Martin Klimke, Reinhild Kreis and Christian F Ostermann (eds), *Trust, but Verify* (1st edn, Stanford University Press 2016).
[441] Interview 16, ECtHR Judge 20/04/23; Interview 12, Former ECtHR Judge, 28/03/23.
[442] Interview 12, Former ECtHR Judge, 28/03/23. Emphasis added by the author.

> rights. (…) Of course, they wouldn't admit it, but 'cause I think [there is] a fear of if you start to put up the thing, it will all fall down.[443]

Another interviewee mentioned the Brussels Regulations, a set of EU instruments simplifying the execution of judgments from one state by the authorities of another:

> I mean, [the CJEU] certainly is encouraging the national courts to be concerned about what's happening in Poland. But I- [stammer] but it can't, in a sense, go further and say, "Well, there should be no extradition, no surrender to Poland under present conditions". (…) Because I mean, if you can't do- if you can't surrender, if an Irish Court can't surrender under an EAW, why should a French court surrender under the EAW? Right. And if you can't surrender to Poland under the EAW, why I should say an Austrian court give effect to a Polish judgment under the Brussels Regulation system?[444]

Another interviewee also linked the Single Market, itself based on mutual recognition across Member States[445], to mutual trust, showing that unravelling mutual trust as a principle could have massive ramification even beyond the AFSJ, into the Single Market. Moreover, adding fundamental rights-based exceptions to the EAW means having to define which fundamental rights would be covered and what would constitute sufficient indication that a right is likely to be violated in case of execution. These are elements for which national courts may have different appreciations, undermining the uniform application and interpretation of EU law – uniformity that is very much a goal of the CJEU in and of itself, as presented in Chapter 2.

Therefore, the CJEU was always bound to have a reluctant approach to any exception to the EAW that was not in the initial FDEAW – including any fundamental right-based exception.

The *Celmer case*[446] – also known as the *LM case*, on which more will be said later in this chapter – embodies these tensions between both Courts that indeed came to be. A Polish national had been investigated for multiple drug trafficking related offences in Poland, but he had fled before

[443] Interview 7, Advocate General of the CJEU, 08/03/22.
[444] Interview 1, Former CJEU Advocate General, 01/11/22.
[445] Interview 2, CJEU Judge, 02/12/22.
[446] *Case C-216/18 PPU Minister for Justice and Equality (LM/Celmer)* [2018] ECLI:EU:C:2018:586; Michal Dorociak, 'A Check Move for the Principle of Mutual Trust from Dublin: The Celmer Case' (2018) 3 European Papers 857.

being effectively prosecuted. Three different European Arrest Warrants had been emitted by lower Polish courts between 2012 and 2013, and the man was eventually arrested in Ireland in 2017. However, in the meantime, Poland had experienced a major democratic backsliding, and constitutional reforms by the Government had greatly diminished judicial independence, after the capture of the Constitutional Tribunal through the appointment of new judges by the ruling party PiS, the possibility for the President of Poland to make the appointment of the President of the Tribunal, and the refusal of the Prime Minister to publish some decisions of the Tribunal as a way to deny their validity[447]. The man targeted by the EAW therefore argued that sending him back to Poland in this context would result in a violation of his fundamental rights. Specifically, the situation was problematic in light of Article 47 CFR (corresponding to Article 6 ECHR) on the right to fair trial.

This left Irish authorities in a legally uncomfortable situation: there is no textual ground for refusal of execution of an EAW in the FDEAW based on potential violation of fundamental rights, since Member States are supposed to trust each other to respect these rights. Refusing the execute the EAW anyway would be a violation of EU law, while executing it could mean a violation of fundamental rights. How to make the round peg of fundamental rights fit into the square hole of the EAW? The CJEU and the ECtHR, throughout the years, gave successive rulings trying to 'square the circle'[448]. The issue is even more pressing today with the very serious threat to the rule of law in Poland and Hungary[449], which endangers the right to a fair trial.

[447] See Venice Commission, Poland – Opinion on the Act on the Constitutional Tribunal, 108th Plenary session, CDL-AD(2016)026-e, Venice, 14–15 October 2016. Wojciech Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler' (2019) 11 Hague Journal on the Rule of Law 63.
[448] Peers (n 283).
[449] Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 Cambridge Yearbook of European Legal Studies 3; but for a different perspective on potential contagion to other States see: Elisabeth Bakke and Nick Sitter, 'The EU's Enfants Terribles: Democratic Backsliding in Central Europe since 2010' (2022) 20 Perspectives on Politics 22.

1.2. The answer of European Courts: from small concessions to irreconcilable differences

Cases brought by individuals arguing against the execution of the EAW targeting them reached both the CJEU and the ECtHR, including multiple cases focusing specifically on what weight the principle of mutual trust in the EU should hold, and when and how to rebut it. Some degree of divergence, and some degree of convergence, can be seen in their jurisprudence on this matter – but it is difficult, simply by legal analysis of individual cases, to truly grasp what the role of each Court was in this dynamic, and to pinpoint the points of similarity and dissimilarity in their respective rulings. Here, the use of the index truly shows the role each court played, shining a light on a partial convergence of the CJEU with the ECtHR, followed by years of status quo from both Courts.

1.2.1. Overview of the evolution of the jurisprudence

A total of twelve cases have been retrieved from the database of the CJEU and the ECtHR; they are the ones revolving specifically around the question: *can there be fundamental rights-based exceptions to mutual trust to avoid the execution of a European Arrest Warrant?* Seven cases came from the CJEU, and 3 from the ECtHR, all between 2013 and 2021.

Court	Case Name	Date	S/D Score	C/D Score
CJEU	*Radu*	29/1/13	0	
CJEU	*Melloni*	26/2/13	0	
CJEU	*Jeremy F*	30/5/13	0	
CJEU	*Aranyosi and Căldăraru*	5/4/16	0	
ECtHR	*Pirozzi v Belgium*	17/4/18	5.5	
CJEU	*Generalstaatsantwaltschaft*	25/7/18	5.5	0
CJEU	*LM / Celmer*	25/7/18	6.5	-1
CJEU	*RO*	19/9/18	4.5	1
ECtHR	*Romeo Castaño v Belgium*	9/7/19	3	1.5
CJEU	*Dorobantu*	15/10/19	5	2
CJEU	*Openbaar Ministerie*	17/12/20	6.5	3.5
ECtHR	*Bivolaru and Moldovan v France*	25/3/21	4.5	1.5

Table 13: List of collected cases for Case Study 2

The lack of cases pre-2013 is initially surprising, since the FDEAW was adopted in 2002. But first, the ECtHR did have its own case-law on extradition at large (with its leading case

Soering[450]), just not on the EAW specifically. Second, other issues related to the EAW had come to the CJEU by 2013, but these were not about fundamental rights themselves. Rather, they were on the validity of the FDEAW, which some constitutional courts had seemed to challenge[451]. Lastly, this belated litigation on human rights is because both the opportunity for fundamental rights-based litigation in the field and the expertise to bring it up to the level of European Courts took time. According to an interviewee,

> I think that changed over time to some extent, but at the beginning, I don't think there was any hesitation. Like, yeah, you say you're not going to- you're going to be in a cell in Lithuania. Well, like, you're from Lithuania, so fuck off [sic]. That's putting it very crudely. But eventually I think the defence lawyers became more sophisticated, came up better argument[s], had more information. People got used to addressing requests to the authorities in the Member States, and then starting to get answers.[452]

The first wave of cases was exclusively brought before the CJEU, between 2013 and 2016: *Radu*, *Melloni*, *Jeremy F* and *Aranyosi*. An overview of each presented in *Table 14.*

In this first phase, the CJEU was very reluctant to accept any exception to mutual trust, even for fundamental rights[453]. Non-execution of an EU instrument, outside of what this instrument itself plans for, would undermine the authority and supremacy of EU law, which was the priority of the CJEU. Moreover, the CJEU was placed in a difficult position, where adding that which did not have a textual basis in the FDEAW could be seen as a violation of the separation of powers, with a court arrogating itself legislative powers.

[450] *Soering v United Kingdom* (1989) 11 EHRR 439.
[451] *case C-303/05 Advocaten voor de Wereld* [2007] I-03633; Nial Fennelly, 'The European Arrest Warrant: Recent Developments' (2007) 8 ERA Forum 519.
[452] Interview 7, ECJ Advocate General, 08/03/22.
[453] *Case C-396/11 Ciprian Vasile Radu* [2013] ECR I-0000; Alex Tinsley, 'The Reference in Case C-396/11 Radu: When Does the Protection of Fundamental Rights Require Non-Execution of a European Arrest Warrant Varia' (2012) 2 European Criminal Law Review 338.

Case	Requesting State	Executing State	Offence	Right(s) potentially violated
Radu	Germany	Romania	Robbery	Right to a fair trial and effective remedy Right to presumption of innocence, right to defence Right to privacy
Melloni	Spain	Italy	Bankruptcy fraud	Right to a fair trial Right to defence
Jeremy F	United Kingdom	France	Child abduction Sexual activity with a child under 16	Right to an effective remedy Right to liberty and security
Aranyosi Căldăraru	Hungary Romania	Germany	Robbery Driving without licence	Prohibition of torture, inhumane or degrading treatments Right to dignity Right to security Right to presumption of innocence, right to defence

Table 14: Overview of the criminal charges and fundamental rights involved (2013 – 2016)

The most heavily commented case may very well have been *Melloni*, which exemplifies the trend of the CJEU's case-law[454]. In 1996, Mr Melloni was living in Spain, but the Italian authorities sought his return to Ferrerra, Italy, in order to be tried there: he was accused of bankruptcy fraud. The Spanish authorities agreed to extradite him, but he promptly disappeared beforehand. He was therefore tried in his absence – *in abstentia* – in Italy in 2000 and sentenced to 10 years in prison. Although Melloni was still missing, the Italian authorities emitted a European Arrest Warrant for him to be sent back to Italy to serve the remainder of his sentence. A few years later, in 2008, Melloni was yet again arrested in Spain, and as the EAW was still extant, he was about to be sent back to Italy. However, by this time, he argued that, since he had been tried *in abstentia* and would not be able to appeal this judgement under Italian law, sending him back to Italy would be a violation of his fundamental rights of fair trial, as protected under the *Spanish*

[454] *Case C-399/11 Stefano Melloni v Ministerio Fiscal* [2013] ECR I-0000; Aida Torres Pérez, 'Melloni in Three Acts: From Dialogue to Monologue' (2014) 10 European Constitutional Law Review 308; Nik de Boer, 'Addressing Rights Divergences under the Charter: Melloni Case Law: A. Court of Justice' (2013) 50 Common Market Law Review 1083; Maartje de Visser, 'Dealing with Divergences in Fundamental Rights Standards - Case C-399/11 Stefano Melloni v. Ministerio Fiscal, Judgement (Grand Chamber) of 26 February 2013, Not Yet Reported Case Notes' (2013) 20 Maastricht Journal of European and Comparative Law 576.

Constitution. Melloni brought the question to the Spanish *Tribunal Constitucional*, who, in turn, sent the question to the CJEU: can judicial authorities refuse to execute an EAW to safeguard fundamental rights to defence as protected in the national Constitution?

The CJEU's answer was to stick to the text of the FDEAW. As mentioned before, the instrument provided a list of grounds on which the execution could be refused, including in cases of trial *in abstentia*. However, there are additional conditions for this to be valid refusal grounds set out in the FDEAW, and Melloni did not meet them; therefore, the EAW had to be executed. The CJEU emphasised, as it often would, that the goal was for the procedure to be simplified, effective, and that

> the solution which the EU legislature found, consisting in providing an **exhaustive list of the circumstances** in which the execution of [an EAW] must be regarded as not infringing the rights of the defence, **is incompatible with any retention of the possibility for the executing judicial authority to make that execution conditional** on the conviction in question being open to review in order to guarantee the rights of defence of the person concerned.[455]

In other words: the legislator of the EU already accounted for potential exceptions, to which none can be added by domestic judges – even the constitutional requirements.

One would have to wait for the *Aranyosi* case in 2016 to see an inflexion of this strict textualism.

However, before getting there, it must be noted that the ECtHR was not silent on the question of potential exceptions to mutual trust. Indeed, the question had been brought up for another EU instrument: the Dublin Regulation[456], which had caused another jurisprudential saga between both Courts[457]. More will be said in the results section, but in short, the ECtHR had already

[455] *Melloni* (n 460) [44].
[456] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (Dublin Regulation).
[457] Costello (n 414); Vicini (n 287).

expressed disapproval of any mechanism requiring a so-called 'blind trust'[458] when it came to human rights between EU Member States, and had pushed for the establishment of human-rights based exceptions to mutual trust.

Aranyosi and Căldăraru marks a real turning point, both for the CJEU itself and for its interactions with the ECtHR on this particular line of jurisprudence. Both Mr Aranyosi and Mr Căldăraru were in Bremen, Germany, where the District Court was considering sending them back to Hungary and Romania respectively, on foot of EAWs. But this time, the risk to their fundamental rights, in case of execution, came from the detention conditions to which they would be subjected, which concerned the High Regional Court of Bremen. Indeed, multiple pieces of evidence showed that Hungarian and Romanian prisons were overcrowded and unsanitary, and that the applicants' right to protection against torture, degrading and inhuman treatments would likely be violated. Therefore, this Court sent virtually the same question to the CJEU as the Spanish Court had in *Melloni*: could it refuse to execute the EAW, due to threats to fundamental rights, especially since this was a risk of violation of the protection against torture and inhuman and degrading treatment (ECHR Article 3), the only absolute right suffering no exception whatsoever according to the ECtHR?

The CJEU, this time, gave a different answer. While reiterating that the goal of the EAW was speed and simplicity, it accepted that in 'exceptional circumstances', due to the absolute prohibition of inhuman and degrading treatment, the EAW could be *suspended*. This, however, required proof of 'systemic or general deficiencies' in the Requesting State, as well as an individualised 'specific and precise risk' for the person targeted by the EAW.

With this background, the ECtHR gave its first ruling of this series, *Pirozzi*. It will be followed by *Romeo Castaño*, and *Bivolaru and Moldovan*, for the ECtHR; and *Celmer*, *Generalstaadtantwaldschaft*, *RO* and *Openbaar Ministrie* for the CJEU (Table 15).

[458] Costello (n 414).

In this second period, the ECtHR required that there be exceptions to mutual trust, that the EAW not be executed whenever there were manifest shortcomings regarding the rights protected by the Convention[459], and that national authorities were not allowed to simply invoke the supremacy of EU law and its implementation to forgo fundamental rights checks. The ECtHR therefore encouraged, and even required, exceptions to mutual trust for EAW, and kept it all the way to the last case in 2021, *Bivolaru and Moldovan*.

Court	***Case***	**Requesting State**	**Executing State**	**Offence**	**Right(s) potentially violated**
ECtHR	*Pirozzi*	Italy	Belgium	Drug Trafficking	Right to liberty and security Right to a fair trial
CJEU	*Generalstaatsanwaltschaft/ML*	Hungary	Germany	Bodily harm, damage, fraud and burglary	Prohibition of torture, inhumane or degrading treatments
CJEU	*LM / Celmer*	Poland	Ireland	Drug trafficking	Right to an effective remedy and to a fair trial Presumption of innocence and rights to defence
CJEU	*RO*	United Kingdom	Ireland	Murder Arson Rape	Prohibition of torture, inhumane or degrading treatments
ECtHR	*Romeo Castaño v. Belgium*	Spain	Belgium	Murder	Prohibition of torture, inhumane or degrading treatments[460]
CJEU	*Dorobantu*	Romania	Germany	Offences relating to property Forgery or the use of forged documents	Prohibition of torture, inhumane or degrading treatments
CJEU	*Openbaar Ministerie*	Poland	Netherlands	Threatening behaviour and ill-treatment	Fair trial
ECtHR	*Bivolaru and Moldovan v. France*	Romania	France	Sexual relations with a minor Sexual perversion Corruption of a minor Human trafficking Illegal border crossing/human trafficking	Prohibition of torture, inhumane or degrading treatments

Table 15: Overview of the criminal charges and fundamental rights involved (2017 – 2021)

[459] *Pirozzi v Belgium* [2018] ECHR 337.

[460] Special case: the applicants were actually the children of the murder victim, complaining that their rights were violated because the EAW was *not* executed – which Belgium had refused due to the potential violation of the rights of the accused if she was sent back to Spain.

The CJEU, interestingly, was barely making any concessions. After the jump that was the *Aranyosi and Căldăraru* case, where the CJEU started to accept some narrow human rights-based exceptions to the execution of an EAW, the Luxembourg Court did not go beyond their very strict test. Even once the rule of law crisis in Poland had reached a point where the Commission had started infringement proceedings against this Member State, the CJEU maintained that the existence of systemic deficiencies did not automatically mean it would affect all individuals and still required national judges to check whether there was an additional risk for the particular individual targeted by the EAW.

The last case of interest is very notable. The *Bivolaru and Moldovan* case is the first one in the history of both Courts' relations that the ECtHR considered the protection offered by EU law too low, and essentially condemned EU law[461]. This marks how important and salient the divergence between both Courts was at this point.

1.2.2. Beyond the appearances: leveraging the index to identify underlying dynamics

Using the Index developed in Chapter 2, we can visualise how the case-law of both Courts evolved when it came to their degree of similarity or dissimilarity over time (*Figure 9*).

[461] Audrey M Plan, 'Bosphorus as a Broken Sword of Damocles: On the Need to Institutionalise the EU-ECHR Relationship' 2021 European Human Rights Law Review 540; Platon (n 233).

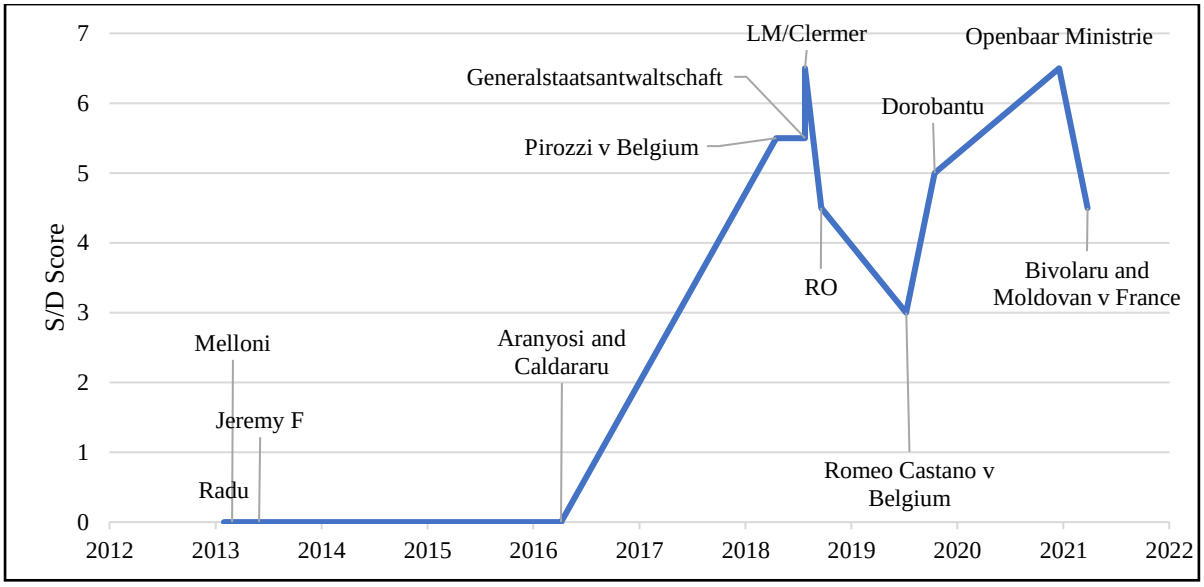

Figure 9: Evolution of the S/D Score for Case study 2 (Exceptions to execution of an EAW)

As mentioned previously, the first period only has rulings from the CJEU, and a proper score can therefore not be attributed to these rulings. However, the ECtHR did offer some references to the CJEU when it came to its position on the refuting of mutual trust in EU instruments. It had already, at this time, delivered multiple rulings on exceptions to the Dublin Regulation. The two issues did not present the same substantial questions and are two different lines of case-law, which means that the index itself cannot be used by taking this pre-existing case-law of the ECtHR as a reference to obtain a proper score. However, it can still be used to paint a picture of what the ECtHR's case-law would be likely to be if it was ever provided with the opportunity to give a ruling on an EAW. While this is a limit of the Index itself, the theoretical framework is for its part still applicable.

In short, the Dublin Regulation determined which EU Member State was responsible to handle the asylum claim of a third country national lodging said claim on EU territory. At the height of the influx of immigration in the late 2000s, early 2010s, the mechanisms of this regulation led to some EU States such as Greece and Italy being overburdened and logistically ill-equipped to handle this number of asylum seekers. This led, in turn, to a massive human rights crisis in these States, with lack of access to decent living conditions, food, health, and the development of unsanitary camps endangering the lives of the people forced to live there. This included refugees forced to live

in rundown buildings or under old train carriages[462], detention in asylum centres for months without proper access to legal representation or interpreters to challenge this detention[463], unsanitary living conditions and overcrowding[464]. The execution of the Dublin Regulation by the national authorities of a State, to send an asylum seeker back to Greece for example, could therefore have led to a violation of their human rights.

The ECtHR's leading case at that point was *MSS v Belgium*[465], which will serve as a point of reference to briefly assess how similar or dissimilar the first few CJEU rulings on the EAW were. In *MSS*, Belgium had, in accordance with the Dublin Regulation, sent an asylum seeker back to Greece, *trusting* that Greece would respect the principle of non-refoulement (preventing a State from deporting an individual to a place where they would face persecution, inhuman and degrading treatment, or other human rights violations, often from the country they are originally fleeing) and the human rights of asylum seekers. However, according to the Strasbourg Court, this was a mistake:

> While considering that this is in principle the most normal course of action under the Convention system (…) the Court considers that at the time of the applicant's expulsion the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities.[466]

And moreover, the ECtHR disagreed with the exclusive focus on a strongly individualised and specific assessment, refuting Belgium's argument going in that sense with the following:

> The fact that a large number of asylum-seekers in Greece find themselves in the same situation as the applicant *does not make the risk concerned any less individual where it is sufficiently real and probable*.[467]

[462] UNHCR Observations on Greece as a Country of Asylum
[463] https://www.amnesty.org/en/documents/eur25/002/2010/en/
[464] https://www.hrw.org/news/2009/10/12/greece-unsafe-and-unwelcoming-shores
[465] *MSS v Belgium and Greece* App No 30696/09 (ECtHR, 21 January 2011).
[466] *MSS* (n 471) [357].
[467] *MSS* (n 471) [359]. Emphasis added by the author.

Lastly, the ECtHR asked not that the transfer of the individual to Greece be suspended, but truly ended, as it required the Belgian authorities to process the asylum claim themselves, instead of waiting for the situation in Greece to improve, for example.

Therefore, it can be concluded that the ECtHR was in favour of a mutual trust:

- Rebuttable in fundamental rights grounds
- Individualised to the applicant, but with large-scale violations of human rights rendering violation probable being sufficient to rebut it.
- Resulting in the end of the procedure if indeed rebutted.

The CJEU, during the first few rulings studied, initially had a very different approach: it refused to provide any exception to mutual trust at all, regardless of whether this would lead to a violation of fundamental rights. This strong initial dissimilarity however paved the way to the *Aranyosi and Căldăraru* ruling, where the CJEU actually accepted exceptions to mutual trust in case of a risk for fundamental rights, referring to the ECtHR as it was doing so. But this step by Strasbourg was limited: Luxembourg judges placed a very high bar to actually refuse to execute the EAW, requiring both systemic deficiencies *and* individual risk of violation[468]. Moreover, the CJEU only required that the EAW be suspended, rather than its execution be dropped entirely.

In the second phase, *Figure 9* shows a high and sustained level of dissimilarity between both Courts. This is particularly interesting contrast to the previous case study, where the trend had been towards a generally higher degree of similarity, with Courts aligning with each other as time went on. A look at the Convergence/Divergence score from each Court (*Figure 10*) shows that is due to a *status quo* from *both Courts* standing their ground.

[468] *Aranyosi and Căldăraru* (n 424).

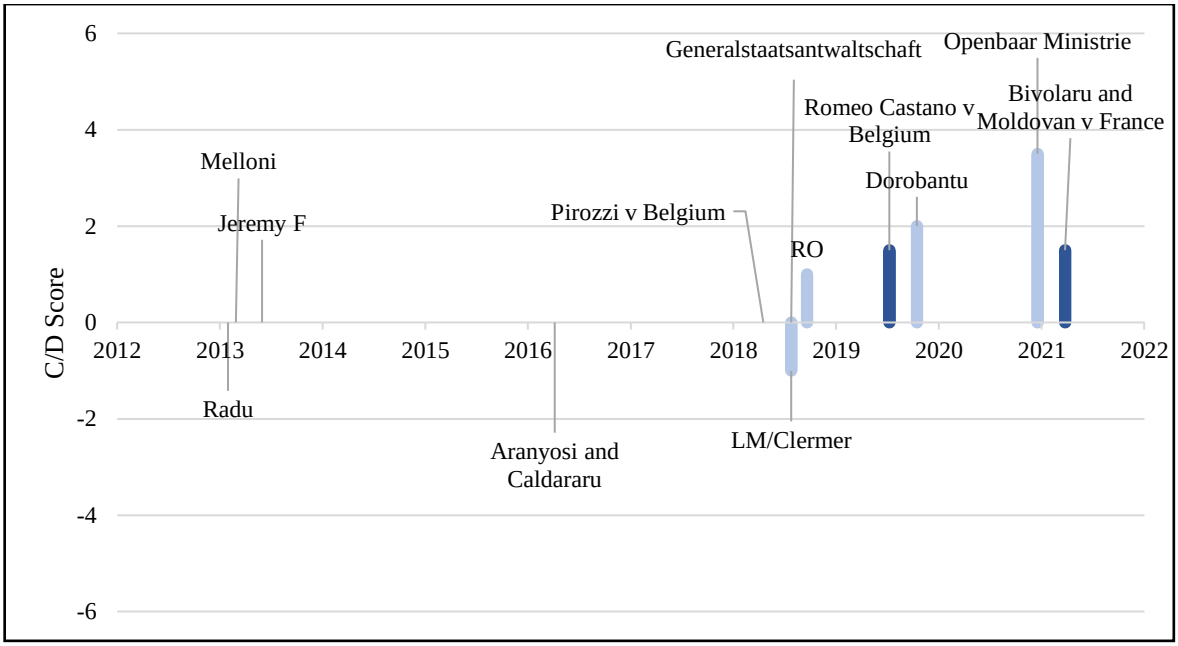

Figure 10: Evolution of the C/D Score for Case study 2 (Exceptions to execution of an EAW)

They both show a slight divergence towards the end. In *Openbaar Ministrie / LP*[469], with the CJEU not only maintaining its position regarding the high standard it set to refuse the execution, but also lacking any reference to the ECtHR's case-law. On the other hand, in *Bivolaru and Moldovan*[470], the ECtHR does refer to the CJEU, but ends up considering that the level of protection offered by EU law as enforced in a Member State is so low that it had 'manifest deficiencies', and that by following it, France was in violation of the ECHR.

Overall, it appears that the CJEU was initially willing to make minimum concessions, before refusing to change its position any further and even diverging after 2016. The ECtHR, for its part, never made any concession towards the CJEU, and ended up opposing any system based on trust without sufficient fundamental rights checks more openly in 2021. There are, therefore, two elements to explore: why would the CJEU switch from a seemingly more conciliatory stance to a static one after 2016, and why was the ECtHR able to remain non-conciliatory the whole time?

[469] *C-354/20 PPU Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)* ECLI:EU:C:2020:1033.
[470] *Bivolaru and Moldovan* (n 232).

2. Explaining convergence and divergence between the European Courts: untangling the European EAW case-law

The scholarship on the jurisprudential saga on mutual trust and the EAW between European Courts is particularly rich, proof of the very high level of attention this issue has received since it appeared. Most of it has, however, revolved on trying to provide a legal definition of what exactly mutual trust *is*, as it was created by the CJEU rather than by the EU legislature, and what its consequences would be for EU law exactly[471]. These studies tend to be more descriptive, trying to explain how mutual trust came to be as a CJEU-made concept, as well as its consequences for EU criminal law[472]. Identifying both the strengths and limitations of this wealth of knowledge, this section will then offer a causal explanation by drawing from the dissertation's general theoretical framework as presented in Chapter 1.

2.1. State of knowledge and competing explanations

Legal research has long identified where exactly the tension between the mutual trust and fundamental rights laid when it came to the implementation of EU law[473], and the ongoing dialogue between the CJEU and the ECtHR on the matter, following the development of the exceptions by each Court[474] and the importance of their reciprocal interactions[475]. This scholarship has also noted

[471] Francesco Maiani and Andrea Miglionico, 'One Principle to Rule Them All? Anatomy of Mutual Trust in the Law of the Area of Freedom, Security and Justice' (2020) 57 Common Market Law Review.
[472] Auke Willems, *The Principle of Mutual Trust in EU Criminal Law* (1st edition, Hart Publishing 2021).
[473] Mitsilegas, 'The Symbiotic Relationship between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice' (n 285); Tony Marguery, 'Confiance mutuelle, reconnaissance mutuelle et crise de valeurs: la difficile équation entre justice pénale européenne et diversité nationale' (2021) 2020 5 European Papers 1271.
[474] Ermioni Xanthopoulou, 'Mutual Trust and Rights in EU Criminal and Asylum Law: Three Phases of Evolution and the Uncharted Territory beyond Blind Trust' (2018) 55 Common Market Law Review; Auke Willems, 'The Court of Justice of the European Union's Mutual Trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal' (2019) 20 German Law Journal 468.
[475] Jasper Krommendijk and Guus de Vries, 'Do Luxembourg and Strasbourg Trust Each Other? The Interaction Between the Court of Justice and the European Court of Human Rights in Cases Concerning Mutual Trust' [2022] European Journal of Human Rights.

the importance of domestic courts both as recipient of European Courts' jurisprudence[476] and as potential actors shaping said European rulings[477].

Recently, Popelier *et al* have noted the very limited amount of more interdisciplinary research on the question of mutual trust between European authorities in this context[478]. Indeed, mutual trust and its exceptions have largely remained the domain of legal doctrine and legal commentary. A few notable works, however, have been looking at the implementation of mutual trust-based instruments, noting a discrepancy between what the concept is *meant* to be according to the CJEU and what the reality on the ground is[479]. Most of this empirical research, building on the psychosocial understanding of what trust is, has been more about assessing whether this mutual trust *exists* between the relevant European judicial authorities, or how it can be generated[480]. While particularly useful for policy-making purposes or critical analysis of European Courts' decisions, this research does not seek to explain the CJEU and ECtHR's decisions themselves, despite being the main actors in this domain.

2.1.1. Current scholarship: the what, the why, but not the how

While providing much insight on the origin, evolution, use, and limits of mutual trust – much of it will be relied on later in this case-study – the current state of research still leaves multiple blind spots which this case study will attempt to remedy.

First, while the legal scholarship has offered a very comprehensive analysis of the development of mutual trust in the case-law of European Courts, there are still diverging

[476] Scott Siegel, 'Courts and Compliance in the European Union: The European Arrest Warrant in National Constitutional Courts' [2008] Jean Monnet Working Paper 05/08.
[477] Evelien Brouwer and Damiens Gerards, 'Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law (MWP 2016/13)' [2016] EUI Working Paper 37.
[478] Patricia Popelier, Giulia Gentile and Esther van Zimmeren, 'Bridging the Gap between Facts and Norms: Mutual Trust, the European Arrest Warrant and the Rule of Law in an Interdisciplinary Context' n/a European Law Journal.
[479] Tony Marguery (ed), *Mutual Trust under Pressure, the Transferring of Sentenced Persons in the EU: Transfer of Judgments of Conviction in the European Union and the Respect for Individual's Fundamental Rights* (Wolf Legal Publishers 2018).
[480] Suzanne Andrea Bloks and Ton van den Brink, 'The Impact on National Sovereignty of Mutual Recognition in the AFSJ. Case-Study of the European Arrest Warrant' (2021) 22 German Law Journal 45; Asif Efrat, 'Assessing Mutual Trust among EU Members: Evidence from the European Arrest Warrant' (2019) 26 Journal of European Public Policy 656.

assessments of what the actual outcome of this case-law for the potential (in)coherence of European human rights is. For example, Gáspár-Szilágyi considers that after the 2016 *Aranyosi and Căldăraru* case, there had been 'converging human rights standards' between the CJEU and the ECtHR; but CJEU judge Jean Claude Bonichot, commenting on the same case, was noting that it still left domestic courts 'navigating between the Scylla and the Charybdis'[481]. Where in 2012 Costello wonders if we were witnessing 'the end to blind trust across the EU in the jurisprudence of European Courts[482], CJEU Judge and President Koen Lenaerts writing extra-judicially was 'exploring the principle of mutual (yet not blind) trust'[483], and a year later, Marguery suspects that the mutual trust period actually ended in 2013[484]. There seems to be a disconnect between the scholarship's assessment of the jurisprudence and the intentions of European judges.

Second, there is a tendency to analyse and study the principle of mutual trust as a single, coherent principle throughout EU law, due to it being present in various EU instruments; in particular, 'mutual trust' tends to be seen as one single concept whose evolution in the case-law of European and domestic courts can be examined regardless of the EU instrument involved in the case. This created a common scholarly discourse to examine mutual trust in the Dublin system, and mutual trust in the EAW. This is compounded by the CJEU often referring to one strand of case-law in rulings actually belonging to the other. For example, in a 2020 case about the removal of a refugee from Germany to Italy, the CJEU cited both the *Celmer/LM* case and the *Aranyosi and Căldăraru* case.

> EU law is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the European Union is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the

[481] Jean-Claude Bonichot, Michel Aubert and Luxembourg, 'Les limites du principe de confiance mutuelle dans la jurisprudence de la Cour de justice de l'Union européenne : comment naviguer entre Charybde et Scylla' (2016) 22 Revue universelle des droits de l'homme 1.
[482] Costello (n 414).
[483] Koen Lenaerts, 'La Vie Apres l'avis: Exploring the Principle of Mutual (yet Not Blind) Trust' (2017) 54 Common Market Law Review.
[484] Marguery (n 479).

> EU law that implements them will be respected (judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU(…)), and that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised by the Charter, particularly Articles 1 and 4 thereof, which enshrine one of the fundamental values of the Union and its Member States (see, to that effect, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU(…).[485]

However, the *evolution* of mutual trust and its exceptions in both instruments has been not only asynchronous, but independent, as identified by Xanthopoulou[486]. Not making a difference between both muddies the analysis and renders its empirical assessment more difficult, which is probably why empirical work on this matter has focused on national authorities, rather than the European Courts themselves.

Lastly, as in the previous case-study, the legal scholarship has focused on specific aspects of the convergence and divergence between the CJEU and the ECtHR while missing others, and never doing a systematic comparison of each ruling over time. Gáspár-Szilágyi, in 2016, noted that the CJEU had a new ground for 'postponement' of the EAW, but does not identify that this is different from the ECtHR's approach for mutual trust at this point, instead concluding that this is an overall convergence with the ECtHR. There has also been less interest in more recent case-law of both the CJEU and the ECtHR, despite the constant divergence of both Courts being just as puzzling as the partial convergence of the CJEU around 2016.

[485] Jawo [80]

[486] Xanthopoulou identifies three phases that both series of cases follow: 'These refer to both the FDEAW and the Dublin III Regulation, yet do not coincide chronologically. (…) The first phase refers to what is identified by the literature as "blind trust". This is a long phase as far as the FDEAW is concerned, and ended in 2016, with the judgment in Aranyosi; in the context of the Dublin system, however, it had already ended in 2013, with the judgment in N.S. and Others. The second phase therefore started with these judgments. Limits to trust under strict conditions, though, are endemic to this second phase. The third phase of case law is the one moving towards an individual assessment, where trust is challenged in specific cases, but not necessarily because systemic deficiencies exist in the prison or reception conditions of a Member State. This nascent phase, which began with C.K. and Others, has arguably not started yet for the FDEAW' Xanthopoulou (n 480) 492–493.

2.1.2. A new explanation: Court preferences and the absence of forced compromise

A theory of strategic interaction between the CJEU and the ECtHR explains the initial convergence of the CJEU and then following status quo from both Court by the various levels of threat to their authority that both Courts faced (and continue to face) on this issue.

As established before, the initial period covering only CJEU rulings can be interpreted as the CJEU pre-emptively converging with the ECtHR, finding potential exceptions to mutual trust between EU Member States and the execution of EAWs. The CJEU could have, legally speaking, stayed true to the letter of the FDEAW, as it did initially in *Melloni*[487] for example. But it went out of its way to make a concession in *Aranyosi and Căldăraru*. This is a significant, although still partial, convergence, which according to Chapter 1 is expected due to a threat to the authority of the CJEU by two different actors. This corresponds to

> *H3: The CJEU choses partial convergence with the ECtHR when there are two sources of threat to its authority.*

This means that one of the following combinations of sources of threat of non-implementation would be expected*:*

- ECtHR and domestic courts
- ECtHR and Governments
- Domestic courts and Government

Because any of these combinations would sufficiently threaten the authority of the CJEU, it would lead Luxembourg judges to give some ground and self-legitimise by borrowing from the ECtHR, even in the absence of immediately relevant ECtHR case-law dedicated to this issue.

However, the behaviour of the CJEU changes after the *Aranyosi* case. The CJEU stopped converging, a different trend compared to the previous period. This means there must have been a change in the constellation of threats, making them insufficient to force the CJEU into convergence

[487] *Melloni* (n 460); de Visser (n 460).

with the ECtHR: it did not have to give more ground, and could maintain the status quo. In line with the theoretical expectations set out in Chapter 1 this corresponds to:

> H0/H1: *The CJEU maintains the status quo/diverges from the ECtHR when there is no threat or only one threat to its authority.*

Additionally, the ECtHR made no concessions, refusing any convergence with the CJEU. Following the theory laid out previously, this means that it was able to focus on its own policy preferences, rather than being required to self-legitimate in order to safeguard its authority. This means there must have been a low level of threat, or none at all:

> H0/H1: *The ECtHR maintains the status quo/diverges from the CJEU when there is no threat or only one threat to its authority.*

This case-study therefore gives the opportunity to test Hypotheses 1, 2 (for both CJEU and ECtHR), and 3 (for the CJEU).

It can be noted already that there being no threat at all is unlikely to be the explanation why either of the Courts stuck to the status quo. Not only was the issue particularly salient due to risk of fundamental rights – which historically has mobilised at least domestic courts in the EU – but the CJEU had been forced into convergence a few years before. More likely, both Courts were under one source of threat – an interesting situation, as it means one type of actor was aligning more with the CJEU and threatening the ECtHR, and another was doing the opposite, creating a type of equilibrium and allowing the persistent status quo to this day.

2.2. First period [2013– 2016]: The CJEU blinks first on mutual trust

Between the 2013 and 2016, the CJEU delivered cases *Radu*[488], *Melloni*[489], *Jeremy F*[490] and *Aranyosi and Căldăraru*[491], where, as demonstrated above, it anticipated the preferences of the ECtHR and ended up converging with it, especially in *Aranyosi and Căldăraru*. Luxembourg

[488] *Radu* (n 459); see Vermeulen (n 437).
[489] *Melloni* (n 460).
[490] *Case C-168/13 PPU Jeremy F contre Premier Ministre* [2013] ECR I-0000.
[491] *Aranyosi and Căldăraru* (n 424).

judges accepted that mutual trust could not be *blind* trust, and that there could be exceptions in cases where the requesting state suffered from systemic deficiencies and the individual involved would suffer inhuman or degrading treatment in case of the execution of the EAW – a high bar, but a compromise with its original understanding of the EAW nonetheless.

1.2.3. Data: a common threat from domestic courts and the ECtHR

While fundamental rights themselves were not meant to be a ground for refusal of execution of the EAW due to the principle of mutual trust, very early on domestic courts started to ground their refusal to execute on Article 1(3) of the FDEAW: 'This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.'

Early statistics are difficult to interpret, as not all countries responded to the questionnaire sent by the Council of the EU regarding the issuing and execution of EAWs in each country. Moreover, while the questionnaire does ask what the grounds for refusal of the execution were, there was no 'fundamental rights' category. The earliest explicit mention of court refusing the execution of the EAW due to fundamental rights in these reports is only from 2012, where the Lithuanian authorities mention that, in three cases 'the surrender was refused as it would have violated the fundamental human rights and freedoms'[492]. Then, in 2014, many courts from Germany, France, Poland, Austria, and Sweden cited 'Fundamental Rights' as official grounds for some refusals of the EAW they had received, although each reporting only one or two occurrences[493]. In 2015, this number rises to 13 for Germany alone, 4 in France and 4 in Austria, and added 2 refusals from Ireland questioning the quality of 'independent judicial power of the emitting entity'[494]. In 2016, when the *Aranyosi and*

[492] Council of the European Union, Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2012, COPEN 97 EJN 32 EUROJUST 39.
[493] Council of the European Union, Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2014, SWD(2017) 319 final, p26.
[494] Council of the European Union, Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2015, SWD(2017) 320 final.

Căldăraru ruling was given by the CJEU, the number had risen to 40 for Germany, and three other countries noting they did not have the information available[495].

Taken on their own, these numbers do not endanger the EAW system. Taking Germany as an example, the number of EAWs executed constantly rose (

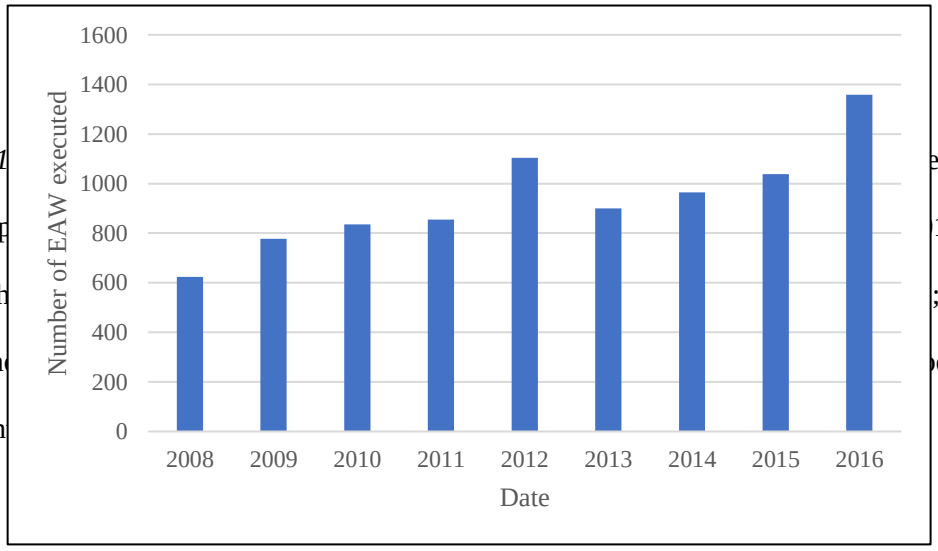

Figure 1

ecution has seen a sp 14, 1/34 in 2016. Th ; and while it was n becoming a prevalen

[495] Council of the European Union, Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2016, SWD(2019) 194.

Figure 11: Number of EAW executed in Germany (2008-2016)[496]

Additionally, to truly capture the pressure domestic courts were exercising on the CJEU at this point, we will examine some of these cases.

Initially, some domestic courts were willing to be cooperative. For example, in two rulings from 2007 and 2011, the *Corte de Cassazione* of Italy considered that even if the guarantees of the issuing State are less satisfactory, this was not an obstacle to the execution of the EAW[497], and it was particularly rare for the Italian *Corte de Cassazione* to consider violations of Article 3 due to prison conditions, for example, and even more rare to refuse the execution[498].

However, there seemed to have been challenges from other domestic courts – lower and superior – already at this time. This includes multiple rulings from lower Dutch courts between 2010 and 2013. For example, in a ruling from October 2010, the District Court of Amsterdam, while in the end authorising the surrender of the person concerned, affirmed that

> [i]t is primarily the responsibility of the issuing State to ensure that the requested person is not subjected to torture or inhuman or degrading treatment or punishment. In addition, in view of established case law of the ECtHR, as a surrendering state and as a member of the EU and a party to the ECHR, the executing state has its own responsibility to prevent that a decision on a person within its jurisdiction (in this case the decision to surrender) leads to a violation of fundamental human rights as protected by Article 3 of the ECHR.[499]

[496] Council of the European Union, replies to questionnaires on quantitative information on the practical operation of the European Arrest Warrant, Year 2016, SWD(2019) 194.
[497] Daniela Cavallini, 'National Report. Italy' in Tony Marguery (ed), *Mutual trust under pressure, the transferring of sentenced persons in the EU.* (Wolf Legal Publishers 2018).
[498] 'The ground forbidding to surrender the requested person in the case s/he can liable to the death penalty, torture or other inhuman or degrading treatment176 has been poorly referred to by national authorities. As a matter of fact, a few cases claiming the violation of such a provision could be found in the official database of the Court of Cassation and even less those of refusal'.Cavallini (n 503) 40.
[499] Rb Amsterdam, 22 October 2010, ECLI:NL:RBAMS:2010:BO1448, translation by the authors; see also other rulings in the same sense: Rb Amsterdam, 1 March 2013, , ECLI:NL:RBAMS:2013:BZ3240.; Rb Amsterdam, 22 February 2011 ECLI:NL:RBAMS:2011:BP5390; Joske Graat and others, 'National Report, The Netherlands' in Tony Marguery (ed), *Mutual Trust under Pressure, the Transferring of Prisoners in the EU* (Wolf Legal Publishers 2018).

But finally, very influential Constitutional Courts also expressed their preferences for a rebuttable mutual trust, and the possibility to at least sometimes refuse to execute the EAW.

First, in the *Melloni* case, the Spanish *Tribunal Constitucional* in Plenary Chamber (2011) made use of the preliminary reference procedure for the very first time in its history, explicitly asking for the possibility to

> [g]rant (...) these rights [to defence] a higher level of protection than that derived from the Law of the European Union, in order to avoid a limiting or harmful interpretation of a fundamental right recognized by the Constitution of that Member State[500].

Second, in *Jeremy F* (2013), the French *Conseil Constitutionnel* made its first use of the preliminary reference procedure as well, asking for the possibility to add an appeal procedure in order to guarantee the constitutionally protected right to defence, although the *Conseil* was in this occasion simply asking for a postponement of the EAW, not a definitive right to refuse[501].

Lastly, in 2015, the German *BVerfG* issued a ruling in the case of a constitutional appeal against an EAW in light of the German constitutional identity, which could potentially violate the principle of human dignity[502]. The *BVerfG* noted that:

> In particular within Europe, the principle of mutual trust applies in extradition proceedings. However, this trust can be shaken. The principles that govern extraditions based on international agreements (…) can be applied by analogy to extraditions executing the Framework Decision on the European arrest warrant to the extent at issue in this case (…)[503]

The gist of the 'constitutional identity' argument, while varying from one court to the other in Member States, is that a Supreme Court in an EU Member State argues that, while EU law is supposed to have primacy over domestic law, domestic courts must still ensure that the

[500] Tribunal Constitucional, 9 June 2011, Resolucion AUTO 86/2011, Recurso de amparo 6922-2008.
[501] Cons. Const., 4 April 2014, n° 2013-314 QPC.
[502] Bundesverfassungsgericht (German Federal Constitutional Court 2nd Senate), 15 December 2015, 2 BvR 2735/14, BVerfGE 140 [50]
[503] Bundesverfassungsgericht (German Federal Constitutional Court 2nd Senate), 15 December 2015, 2 BvR 2735/14, BVerfGE [67]

'constitutional identity' of their state is respected above all – including over EU law[504]. It is a potentially very impactful argument, which is less explicitly presented in the *Solange I* and *II* rulings[505], and the Italian Constitutional Court's *Frontini* ruling[506] in the 60s and 70s – a sign that the FDEAW and mutual trust were re-kindling constitutional fears for the state of fundamental rights in Germany's highest jurisdiction. However, this was in a different context: contrary to the EU legal framework of *Solange I* and *II* where the EU did not have its own Bill of Rights, the EU now has its own CFR.

By the time of the *Aranyosi and Căldăraru* cases, the German Court which referred the preliminary question framed its interrogation not in terms of whether to execute the EAW or not, but only asking *how* it should refuse to execute it. The challenges to the authority of the CJEU by domestic courts is therefore particularly clear.

National Governments, for their part, were the ones at the origin of the development of mutual trust-based EU instruments in EU judicial cooperation, with the important role of the previously mentioned 1999 Council of Tampere and its conclusions[507]. This contrasts with other instruments which originated more from the Commission. If the Commission has the initiative of the legislative procedure in the EU, the European Council is the one that decides on the general policies and orientations to be prioritised and is more traditionally intergovernmental than other institutions – particularly than the Commission[508]. States had an interest in the smooth communication of judicial authorities and transfer of prosecuted or convicted individuals with a lighter procedure than the traditional extradition. The adoption of the FDEAW in 2002 is also

[504] For a recent analysis of the Constitutional Identity argument in a European context, see Julian Scholtes, 'Abusing Constitutional Identity' (2021) 22 German Law Journal 534.
[505] *Solange I* (n 194); *Re: Wünsche Handelsgesellschaft (Solange II)* [1987] 3 CMLR 225.
[506] *Frontini* (n 193).
[507] Tampere European Council (15-16 October 1999), Presidency Conclusions. (n 440).
[508] See in this sense : Sergio Fabbrini, 'Intergovernmentalism in the European Union. A Comparative Federalism Perspective', *Federal Challenges and Challenges to Federalism* (Routledge 2018); Edoardo Bressanelli and Nicola Chelotti, 'The Shadow of the European Council. Understanding Legislation on Economic Governance' (2016) 38 Journal of European Integration 511.

heavily related to EU Member States' wish for heightened cooperation in criminal and in particular terrorist matters in the wake of 9/11[509].

For all cases covered in this period, the CJEU received a high number of Observations submitted by member States: a minimum of 5 in *Jeremy F* and 11 in the *Aranyosi and Căldăraru* case – a

Case	State submitting observations
Radu	Romania Czech Republic Germany Lithuania Austria Poland United Kingdom
Melloni	Spain Belgium Germany Italy Netherlands Austria Poland Portugal United Kingdom
Jeremy F	France Czech Republic Germany Ireland Netherlands
Aranyosi and Căldăraru	Germany Czech Republic Ireland Spain France Lithuania Hungary Netherlands Austria Romania United Kingdom

Table 16: Submission of Observations by Member States for CJEU cases (2012-2016)

stark contrast with the previous case in study Chapter 3 (*Table 16*).

[509] Jane O'Mahony, '"Bringing Process Back in": Investigating the Formulation, Negotiation and Implementation of the European Arrest Warrant from a Policy Analysis Perspective' [2007] EUSA 10th Biennial Conference, Montréal, Canada.

This shows a high level of interest from Member States in the cases, and a will to make sure their preferences are heard by the Court[510]. Unfortunately, these Observations are not publicly available, and neither are the AG Conclusions nor do the decisions themselves give information as to their content; it is therefore not possible to use them to establish what the position of the States were.

However, this lets us know that the issue was at the very least salient for States, rather than one on which they were indifferent as in the previous chapter. Various elements can, however, help to fill in the gaps and hint towards which position the majority of States took.

First, the FDEAW saw a swift transposition into domestic law throughout Member States, after being adopted in Jun 2002. As of November 2004, less than two years after the adoption of the FDEAW, all Member States except Italy had implemented the relevant domestic legislative changes; all had transposed it by April 2005[511]. Of the three who experienced the most delays, two were due to their Constitutional Court blocking the process, rather than their Governments (Poland, Germany). When there were issues of inappropriate implementation, only four States had actually enacted fundamental rights-based grounds for refusal of execution which fell outside the limits of the FDEAW (the Netherlands[512], Ireland and Italy making references to the ECHR, Greece mentioning 'discriminatory or politically motivated prosecution or punishment'). Multiple States even enacted changes to their own Constitution which were required for the transposition of the FDEAW[513], such as France, Germany, Cyprus and Poland.

[510] This may also reflect not simply individual concerns from Member States, but also be the result of more informal networks and communications where one Member State flags a particular case to the others as being a common concern. The result, for the theory presented here, is the same – but the process by which States become aware of a relevant issue may not always be an individualised one.
[511] Commission of the European Communities, 'Report of the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States' COM(2006)8 final, 21 January 2006.
[512] V. Glerum, H. Kijlstra, 'The EAW: the Dutch experience' Improve EAW Research Project, 20 October 2021; for the Nerthlands, see Overleveringswet (Law on surrender) of 29 April 2004, Stb. 2004, No 195, Article 11. For Italy: Law 22 Aprol 2005, n. 69, Article 8
[513] Commission of the European Communities, 'Report of the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States' COM(2006)8 final, 21/01/2006

Moreover, in some States, this was not attributable to Governments. As an illustration, in the Netherlands, the 2004 law implementing the FDEAW had been criticised in parliamentary debate regarding the lack of fundamental rights protections and the heavy reliance on mutual trust[514]. It is during these debates that Article 11 was added to the bill, according to which there must be no surrender if it may constitute flagrant break of fundamental rights[515]. This addition of another ground to refuse execution of the EAW was not in the initial bill presented the Government, and the Dutch Minister of Justice considered the criticism by the legislature 'relatively harsh'[516], defending the initial bill[517].

It must be noted that the FDEAW was amended in 2009, in order to include a new ground of non-execution of an EAW, but this new ground only covered some trials *in abstentia*[518]. This means that there was an opportunity for States to change the FDEAW if it did not suit their preferences in 2009, but no issue based on fundamental rights was addressed then.

We can therefore conclude that Governments did have a high degree of interest in the instrument and the case-law related to it, but that they supported the EAW as it was initially, without exceptions to the execution. This meant that they were not threatening the authority of the CJEU on this issue – at least not at this time.

Assessing the existence of a potential threat from the ECtHR to the authority of the CJEU is less straightforward, but in the end yields a clear answer: while the ECtHR was not challenging the CJEU in general at this time (as demonstrated in Chapter 2), it was willing to do so on any matter regarding mutual trust.

First, on the topic of mutual trust in particular, as mentioned before the cases came from the *Dublin* line of jurisprudence. The landmark cases of the ECtHR on this topic are 2011's *MSS* and 2013's *Tarakhel*. In *MSS*, the ECtHR considered that the Belgian authorities should have used the

[514] Graat and others (n 505).
[515] Overleveringswet (Law on surrender) of 29 April 2004, Stb. 2004, No 195, Article 11.
[516] Graat and others (n 505) 205–206.
[517] Although eventually had to compromise and accept Article 11.
[518] Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA [2009] OJ L 81/24.

'sovereignty clause' of the Dublin Regulation when they were faced with the knowledge that there were deficiencies in the protection of human rights in Greece, in particular with regards to Article 3 ECHR[519]. Although the mutual trust meant to exist between Member States when they use the Dublin Regulation was not explicitly mentioned in this ruling, it is generally acknowledged that *MSS* represented a real threat to mutual trust at it was understood and used under EU law[520]. The ECtHR confirmed this in *Tarakhel*:

> It is also clear from the M.S.S. judgment that the presumption that a State participating in the "Dublin" system will respect the fundamental rights laid down by the Convention is not irrebuttable.[521]

The CJEU ended up following *MSS* by changing its case-law regarding the Dublin Regulation, in the *NS* ruling, as confirmed by a current CJEU Judge:

> we simply followed the [Strasbourg] court because, you know, we have no interest of being out of with the Court of Human Rights, you know. The NS Case, this case, you know, this is following, you know, on the-the exactly the MSS, the lines adopted by the by the court of, by the Court of Human Rights, you know, so yeah. (…) We have- *we have noted where we have to be conscious of not being out of line.*[522]

The relevance of this line of jurisprudence for the EAW cases was confirmed during an interview: '[a]nd of course you had the *NS* case on the refugee side, which sort of set up precedent. I think it came before it came before *Căldăraru and Aranyosi* [case] you know, so that- that really was the, the precedent. And that was very much following on the ECHR judgment'[523].

The threat of the ECtHR towards the CJEU when it came to mutual trust-based instruments was therefore moderate and non-systematic. Strasbourg judges insistently pointed out the divergences, rather than systematically threatening the overall autonomy of the EU legal order or

[519] *MSS* (n 471).
[520] Costello (n 414); Vicini (n 287).
[521] *Tarakhel v Switzerland* [2014] ECHR 1185 [103].
[522] Interview 2, ECJ Judge, 02/12/2022.
[523] Interview 2, ECJ Judge, 02/12/2022.

the EAW regime as such, and were willing to accept the concept of mutual trust, as long as it was not a blind, irrebuttable trust.

1.2.4. Analysis and process tracing for CJEU: a pre-emptive partial convergence

At this point, a correlation can be observed between, on the one hand, the challenges to the authority of the CJEU from both multiple, high-deputation domestic courts, and the ECtHR, and, on the other hand, the concessions the CJEU made to move towards the ECtHR in anticipation of its future case-law on the EAW. In order to further support the explanation that these two elements are causally linked, multiple Process Tracing Observations can be identified.

First, multiple elements show that the CJEU was aware of these two sources of threat.

Two of the cases brought before the CJEU during this period came from Constitutional Courts, and for both, the matter was important enough that this was their very first use of the preliminary reference procedure: the Spanish *Tribunal Constitucional* in *Melloni*, and the French *Conseil Constitutionnel* in *Jeremy F*. Moreover, while the aforementioned 2015 *BverfG* ruling was not sent for a preliminary ruling, this decision was very widely commented on by the legal doctrine[524]. The writings of the judges show that there is a clear interest in how these Courts were then receiving the CJEU's jurisprudence. In a 2014 article, then CJEU Judge (and future President of the Court when the *Aranyosi and Căldăraru* case was decided) Koen Lenaerts analysed how the *Tribunal Constitucional* received the *Melloni* preliminary ruling noting that it 'followed a reasoning grounded in the methods of interpretation provided for by the Spanish Constitution, rather than in the EU principle of primacy'[525].

But the CJEU was also kept informed of the positions of lower courts through internal publications. One of the vectors of information within the Luxembourg Court is a newsletter originally called

[524] See for example: Mathias Hong, 'Human Dignity, Identity Review of the European Arrest Warrant and the Court of Justice as a Listener in the Dialogue of Courts: Solange-III and Aranyosi' (2016) 12 European Constitutional Law Review 549; Alexander Thiele, 'Die Integrationsidentität des Art. 23 Abs. 1 GG als (einzige) Grenze des Vorrangs des Europarechts' (2017) 52 Europarecht (EuR) 367.
[525] Koen Lenaerts, 'EU Values and Constitutional Pluralism: The EU System of Fundamental Rights Protection' (2015) XXXIV Polish Yearbook of European Law 2014 135. p151

Reflets, edited by the DRD between 1999 and 2016[526]. This publication had information on new cases from both domestic courts dealing with EU law and relevant decisions from International Courts, often the ECtHR. In this quarterly publication, there had been substantial coverage of the implementation of the FDEAW by domestic courts from as early as 2005, on a *Cour of Cassation* ruling reviewing a decision of a Court of Appeal refusing to execute a EAW targeting a French national prosecuted by Spanish authorities for terrorism[527]. The EAW featured in Reflets every single year, sometimes in multiple issues from the same year – sometimes multiple times in the same issue, as in 2006, where it featured refusal of execution in cases from Cyprus, Greece, and Poland. The CJEU was also, this way, keeping track of the implementation of some cases (for example, the *Melloni* case by the Spanish Constitutional Tribunal[528]), and high-stakes cases that did not make it all the way to the CJEU, such as the previously mentioned 2015 Decision from the *BVerfG*, where the writers of the newsletter commented

> [t]he exact scope of that decision remains uncertain, but it could be a step towards a "Solange 3" doctrine insofar as it can be interpreted in the sense that the Bundesverfassungsgericht ensured a (European) level of protection of fundamental rights alongside the Court of Justice and the ECtHR confirming that this case would indeed be interpreted as a major challenge by the ECJ.[529]

Moreover, the Luxembourg Court was aware of, if not following attentively, the case-law of the ECtHR on the question of mutual trust in Dublin cases, since it was by then engaging in a judicial back and forth on the matter. But it also knew of the heavy similarity between the Dublin Regulation and the FDEAW regarding mutual trust. Interviews reveal that contact with the academic legal community in particular played an important role:

> I remember being asked at a number of conferences or talks with judges or academics after the Strasbourg Court gave the *MSS* judgment – very quickly

[526] Interview 6, Jurist of the Documentation and Research Directorate, 20/12/2022.
[527] CJEU, Documentation and Research Directorate, 'Reflets' 2/2005 (2005).
[528] CJEU, Documentation and Research Directorate, 'Reflets' 1/2014 (2014).
[529] CJEU, Documentation and Research Directorate, 'Reflets' 1/2016, p 12 (2016). Some of the scholarship did indeed back the analysis of this ruling as being potentially a 'Solange III' from the BVerfG ; see Elisa Uría Gavilán, 'Solange III? The German Federal Constitutional Court Strikes Again' (2016) 2016 1 European Papers - A Journal on Law and Integration 367.

> taken over by the Court of Justice in the NS (…). And there was a lot of, of scholars who said "But this is all in the field of- of immigration, of asylum law, and we understand this, and we under also see that you take over one to one essentially what the Strasbourg court said. But could one imagine that something similar would be applicable, say on the European Arrest Warrant?"[530]

There was such a deep understanding of the prevalence of the debate in academic literature that in a 2008 edition of Reflets, the section on 'Doctrinal echoes' was entirely dedicated to the scholarship debating the constitutional challenges that the FDEAW had faced, in particular from Constitutional Courts engaged in an unprecedented 'mutiny'[531].

The parallel was drawn by the AG in the *Radu* case[532], and even more in the *Aranyosi and Căldăraru* case[533]. Lenaerts himself, writing extrajudicially, notes that the decision to *not* fully follow the logic of *NS* was a deliberate choice of the CJEU[534].

This was not the first time that criticism from domestic courts would be seen as a credible threat to the authority of the Court[535]. Still, in order to show that once again, the CJEU judges could not ignore that domestic courts were clearly challenging the authority of the Court and of the EU legal system, one can rely on the AG's conclusions in the *Melloni* case, criticising the position of the *Tribunal Constitucional*:

> That interpretation infringes the principle of the primacy of European Union law inasmuch as it would mean, in each case, giving priority to the legal rule affording the highest level of protection to the fundamental right at issue. In some cases, national constitutions would therefore be given primacy over European Union law [and] would also prejudice the uniform and effective application of European Union law within the Member States.[536]

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[530] Interview 4, ECJ Judge, 12/12/2022.
[531] CJEU, Documentation and Research Directorate, 'Reflets' 09/2013 (2013).
[532] Opinion of the Advocate General,*Radu* (n 459).)
[533]*Aranyosi and Căldăraru* (n 424).)
[534] Koen Lenaerts and José A Gutiérrez-Fons, 'The European Court of Justice and Fundamental Rights in the Field of Criminal Law' [2016] Research Handbook on EU Criminal Law 7, 21.
[535] Bill Davies, 'Pushing Back: What Happens When Member States Resist the European Court of Justice? A Multi-Modal Approach to the History of European Law' (2012) 21 Contemporary European History 417; Karen J Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2003); Schimmelfennig (n 33); Phelan (n 191).
[536] Opinion of the Advocate General, *Melloni* (n 460). Emphasis added by the author.

With this being established, *was the CJEU aware of the trade-off between authority and policy preferences*? The trade-off between, on the one hand, an effective and simplified extradition system based on mutual trust, and, on the other, exceptions based on fundamental rights, is intuitive. Compared to the previous case-study, there would here be a very direct impact in a major EU policy, potentially trickling down to a multitude of other instruments, if the strength of mutual trust was weakened. For example, in the *Radu* case, Advocate General Sharpston noted in her conclusions:

> The Court has, no doubt having regard to this consideration, held that 'the principle of mutual recognition, which underpins the Framework Decision, means that (…) the Member States are in principle obliged to act upon a European arrest warrant'.(…) That must plainly be correct, since**, if the position were otherwise, the objectives underlying the decision would risk being seriously undermined**.[537]

This was an assessment shared by Advocate General Bot in *Aranyosi and Căldăraru*:

> In view of the number of Member States faced with a malfunctioning prison system, and in particular a problem of generalised prison overcrowding, **that interpretation would have the effect, as we have seen, of introducing a systematic exception to the execution of European arrest warrants issued by those States, which would lead to the paralysis of the European arrest warrant mechanism**.[538]

The CJEU itself, in the *Melloni* case, when it was still refusing to give any exception to the execution of the EAW, noted that '[t]hat interpretation [by the constitutional court] of Article 53 of the Charter would undermine the principle of the primacy of EU law' and that it would undermine the effectiveness of EU law on the territory of that State[539].

The switch in priorities operated by the CJEU can be better identified by comparing the first ruling of this period, *Radu*, with the last, *Aranyosi and Căldăraru*.

[537] Opinion of the Advocate General,*Radu* (n 459). Although the AG in the end disagreed with this assessment.
[538] Opinion of the Advocate General *Aranyosi and Căldăraru* (n 424). Emphasis added by the author.
[539]*Melloni* (n 460) [56] - [59].

In *Radu*, the CJEU refers quasi-exclusively to the FDEAW, listing the grounds that the EU legislature has accepted for non-execution, and the conditions in which they can be invoked. The potential role of fundamental rights, raised by the litigant as concerns about fair trial, are vaguely discarded after references to the CFR only, and no specific case-law is cited to support the Court's argumentation[540].

In *Aranyosi and Căldăraru*, while reiterating how important the simplification of the extradition procedure is to the AFSJ and how, in principle, judicial authorities must execute the EAW – making this ruling fairly similar to *Radu* up to paragraph 81 of the judgement – the CJEU then immediately tacks on two small paragraphs:

> [h]owever, first, the Court has recognised that limitations of the principles of mutual recognition and mutual trust between Member States can be made 'in exceptional circumstances' (see, to that effect, Opinion 2/13, EU:C:2014:2454, paragraph 191).
>
> Second, as is stated in Article 1(3) thereof, the Framework Decision is not to have the effect of modifying the obligation to respect fundamental rights as enshrined in, inter alia, the Charter.[541]

before laying down the exact conditions in which fundamental rights can be grounds for non-execution of an EAW despite not being in the list of accepted exceptions planned by the EU legislature. However, Article 1(3) could have been used in this exact way in *Radu*, and it had not been – in an interview, a current CJEU judge confirmed that the *Aranyosi* case is where the change took place[542]. The CJEU reiterated its own preferences, maintaining an appearance of coherence with its own precedent, but added exceptions while giving them textual basis only in EU law to also give it an appearance of internal coherence despite the obvious change.

[540] *Radu* (n 459) [39].
[541] *Aranyosi and Căldăraru* (n 424) [92] - [93].
[542] Commenting on the Aranyosi and Căldăraru case: '[I]t was somewhat automatic in our approach until Căldăraru and Aranyosi and [redacted for anonymity] it was there that we, you know, create a, an exception.' Interview 2, ECJ Judge, 02/12/2022.

The way in which the CJEU relies on the ECtHR's case-law and convergences with Strasbourg is also in line with the theoretical expectations. It is a strategic, sometimes even purely rhetorical use of Strasbourg rulings.

Multiple times, it relied on the ECtHR's case-law on detention, as a way to provide information on actual detention conditions of a Member State, rather than engaging on the terrain of the ECtHR's jurisprudence on the Dublin Regulation and mutual trust[543]. Another example of these strategic choices can be found in the *Aranyosi* ruling: the CJEU referred to the ECtHR only when the litigants were arguing that allowing the extradition after a trial *in abstentia* was a violation of the right to fair trial. The CJEU then invoked the case-law of the ECtHR regarding trials *in abstentia* and fair trial to confirm that this section of the FDEAW was in line with the ECtHR's case-law. However, when it came to mutual trust, there was no mention of potentially relevant Strasbourg rulings.

Even in the *Aranyosi* ruling, which is where the CJEU carried out the most concessions, the use of the ECHR and the ECtHR is particularly interesting. First, the CJEU re-state the principle according to which the EAW must be executed, then moves on to potential exceptions. To justify the existence of these exceptions in abstract, it relies on Article 4 of the CFR (para 86), immediately stating that it fully mirrors Article 3 of the ECtHR, both being about prohibition of torture, inhuman and degrading treatments (para 86), and cites two EctHR rulings specifying concretely what would be considered a violation of this right (para 87 and 90). After paragraph 90, the CJEU actually lays down its very strict two-part test, and in that section, only makes reference to the CFR and to its own case-law. This very delicate line of argumentation that progressively drops the ECtHR from its assessment allows the CJEU to *claim* full alignment with the ECtHR, while actually setting a different standard. Indeed, commenting on the two-step test that the CJEU developed, a former ECtHR judge who was still part of the Strasbourg Court at this time comments: 'it remains to be seen whether- whether the, the EAW mutual recognition two-step test in the rule of law area will

[543] *Case C-128/18 Dumitru-Tudor Dorobantu* [2019] ECLI:EU:C:2019:85`[74] - [77].

be considered Convention-compliant. I mean, that's- that's not a- it's not a foregone conclusion.'[544]. This might have been too apparent if the CJEU had explicitly cited either Strasbourg's *MSS* case or its own *NS* case, which was made abundantly clear by then, were very relevant to this case; and therefore, the CJEU made the choice to *not* refer to them here.

This validates Hypothesis 3, according to which two sources of threat would push the CJEU in a partial, incomplete convergence with the ECtHR. However, this leaves much room for further movement: both for the CJEU and the ECtHR. The ECtHR could move even further away from the CJEU, by more explicitly stating that it disagrees with the standard set by Luxembourg, or it could move closer, by changing its own standards or by giving a seal of validation to the CJEU. On the other hand, the CJEU itself could very well go back to a stricter interpretation of the principle of mutual trust and refuse any exceptions once again – or it could fully yield to the ECtHR.

The second time-period would show an interesting story over the course of five years: both Courts stopped in their tracks to keep the *status quo* rather than resolving the remaining differences. They even ended up both moving away from each other. Why, when the initial years had left commentators fairly optimistic about the relationship between both Courts on that issue[545]?

2.3. 2016 – 2021: Deadlocks and dead ends

The second period, starting after the CJEU's *Aranyosi and Căldăraru*, sees the ECtHR develop its own case-law on the topic, with the cases of *Pirozzi*, *Romeo Castaño* and *Bivolaru and Moldovan*[546]. The CJEU, for its part, delivered rulings in *Generalstaatsantwaltschaft*, *LM, Dorobantu* and *Openbaar Minsitrie/LP*[547].

[544] Interview 12, former ECtHR Judge.
[545] For example Hong (n 530).
[546] *Pirozzi* (n 465); *Romeo Castaño v Belgium* App No 8351/17 (ECtHR, 9 July 2019); *Bivolaru and Moldovan* (n 232).
[547] *Case C-220/18 PPU Generalstaatsanwaltschaft (Conditions of detention in Hungary)* [2018] ECLI:EU:C:2018:589; *LM/Celmer* (n 452); *Dorobantu* (n 549); Michael Plachta, 'EU Court of Justice Rules on Prison Conditions as Pre-Requirement of an Execution of the European Arrest Warrant' (2019) 35 International Enforcement Law Reporter 411; *C-354/20 PPU Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)* (n 475).

Contrary to the earlier time period, and the previous case-study, there was no convergence of one Court with the other. On the contrary, both Courts maintained the *status quo* for the most part, and both even diverged from each other in different ways towards the very end. This section will demonstrate that this is attributable to a different constellation of threats to the authority of the Courts compared to what has been seen so far. Indeed, domestic courts were expressing disagreements with both Courts, although the CJEU was more directly at risk of facing a real challenge; Governments were in favour of the status quo without indicating preferences for one Court or the other; and while the CJEU was trying to gain more autonomy and independence from the ECtHR, the latter did not present a challenge until 2021 with the *Bivolaru and Moldovan* decision. This means that the CJEU had to face challenges from domestic courts, and the ECtHR from the CJEU – insufficient threats to cause convergence. But both also had very limited support, making it difficult for each to push back and kickstart a divergence: Governments were overall non-committal, and domestic courts were not truly siding with the ECtHR.

The outcome is a tense deadlock, where no Court is truly satisfied with the current compromise, but each is unable to strike a different balance between its authority and its preferences.

2.3.1. Data: Fragmented threats, insufficient challenges

For domestic courts, at this point, the main point of contention seems to be the test that a judicial authority should rely on when deciding on the potential non-execution of a EAW, keeping in mind that the CJEU asks for an *in abstracto* and *in concreto* test, whereas the ECtHR is satisfied with an *in concreto* test, understood quite flexibly: deficiencies systemic enough, on their own, had been considered before to be sufficient[548]. Where in the previous period, there was a clear opposition between these domestic courts and the CJEU, after the *Aranyosi* case this opposition was not as clear. There was still a fairly high number of non-executions of EAW due to risks to fundamental rights: in 2017, 109 EAWs were not executed in 7 different EU States on the grounds of risk of violation of fundamental rights[549]; 82 were refused on these grounds in

[548] *MSS* (n 471).
[549] Council of the European Union, Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2017, SWD(2017) 320 final.

2018[550], 81 in 2019[551], 108 in 2020, 86 in 2021[552], with Germany making up more than half of these non-executions on its own for 2020 and 2021. According to the Commission, in these last two years, refusal on the grounds of fundamental rights make up to 8 to 10% of all refusals. While these are not numbers so high that they would endanger the entire system of the EAW, this represents a steady rise in the non-execution of EAW on this ground – a significant proportion, for a ground that was not originally supposed to exist in the first place.

Additionally, with the new cases from the ECtHR, domestic courts could also position themselves *vis-à-vis* the Strasbourg case-law. Overall, three different groups of domestic courts can be identified: those that initially agreed with the CJEU's two-step tests, those that expressed a preference to a purely *in abstracto* test (in particular in light of the worsening of the rule of law crisis in Poland and Hungary), and those that expressed preferences for *in concreto* test only.

Initially, a broad group of domestic courts followed the CJEU's test as laid out in the *Aranyosi* case, as strict as it was. Just a month after the *Aranyosi* case was delivered, a Swedish lower Court relied on the two-step test to refuse the execution of an EAW, a decision which was then confirmed by the Court of Appeal[553]. The Dutch Court, which had been very critical of the CJEU's initial approach, also delivered multiple rulings in 2016 where they specifically used the *Aranyosi* test, referring to it explicitly and following it rigorously[554]. These cases can be found throughout the period, for example with cases from the Court of Amsterdam relying on this test in September 2020 and again in February 2021[555].

[550] Council of the European Union, Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2018, SWD(2020) 127 final.
[551] Council of the European Union, Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2019, SWD(2021) 227 final.
[552] The Commission reports unfortunately do not survey the exact reasons for non-execution, and we therefore cannot know whether domestic courts were refusing the execution with a two-step test, as per instructed by the CJEU, or not. Given the way preliminary questions that reached the CJEU were showing how challenging fulfilling this two-step test was, it is likely that most of these refusals were not going through this test. Nonetheless, given the impossibility to ascertain it, this is not taken for granted in the analysis.
[553] Solna District Court, 03 May 2016, B 2768-16; Svea Appeal Court 19/09/2016; Marguery (n 485) 397.Mutual trust under pressure p 397
[554] Rb Amsterdam: 24 May 2016; Rb Amsterdam 5 July 2016, Rb Amsterdam 28 April 2016
[555] Rb Amsterdam 10 February 2021 ECLI:NL:RBAMS:2021:420; Rb Amsterdam 3 December 2020, ECLI:NL:RBAMS:2021:420

The second ground is exemplified by the Irish courts in the *Celmer/LM* case, where the Irish High Court's preliminary question to the CJEU was initially identified as 'A Check Move for the Principle of Mutual Trust from Dublin'[556]. In this case, Polish citizen Artur Celmer had been the subject of an EAW issued by Polish authorities in order to be prosecuted for offences related to drug trafficking and organised crime. Celmer was arrested in Ireland in May 2017, and he argued that sending him back to Poland would result in a violation of his fundamental rights. He specifically contended that:

> his surrender would expose him to a real risk of a flagrant denial of justice in contravention of Article 6 of the ECHR. In this connection, he contends, in particular, that the recent legislative reforms of the system of justice in the Republic of Poland deny him his right to a fair trial. In his submission, those changes fundamentally undermine the basis of the mutual trust between the authority issuing the European arrest warrant and the executing authority, calling the operation of the European arrest warrant mechanism into question.[557]

If the High Court followed the test of the CJEU, it would have to first establish whether there were systemic deficiencies in the judicial system in Poland, and then seek whether there is proof that Celmer, specifically, would see his fundamental right to a fair trial affected by these deficiencies. But the Irish Court was basically suggesting that the Polish judicial system is so endemically fraught that the second step would be not only unnecessary, but also 'unrealistic'[558]:

> there is such a fundamental defect in a system of justice that the rule of law in the member state has been threatened, it is difficult to see how the principles of mutual trust and mutual recognition may operate (…) [I]t is difficult to see how individual guarantees can be given by the issuing judicial authority as to fair trial when it is the system of justice itself that is no longer operating under the rule of law.[559]

But despite this daring question, when the CJEU answered that the two-step test still stood, the Irish High Court complied with it and ended up following it, as did the Supreme Court on appeal.

[556] Dorociak (n 452).
[557] *LM/Celmer* (n 452) [16].
[558] High Court, [2018] IEHC 119 (Celmer No. 1).
[559] High Court, [2018] IEHC 119, (Celmer No. 1), [141] – [142].

In November 2018, Artur Celmer was sent back to Poland in execution of the EAW. But the ruling in which this was decided shows that acceptance out of deferral to the primacy of EU law over domestic law does not mean approval from domestic judges. Indeed, Irish Supreme Court's O'Donnell J. expressed strong dissatisfaction with the CJEU's approach in this very ruling:

> It should be said that the test posited in the judgment of the C.J.E.U. is not one that is easy to apply. Normally, it might be said that where systemic deficiencies of any kind are identified, it becomes unnecessary to identify the possibility of those deficiencies taking effect in an individual case. This is particularly so where the value concerns one that is essential to the functioning of the system of mutual trust. Indeed, it was this difficulty that led the trial judge to make the reference to the C.J.E.U. in the first place. It may also be questioned, at least in the abstract, whether once such systemic deficiencies have been found there is then room or need for further inquiry. It is not, however, for the national court to interrogate the logic of the reasoning of the C.J.E.U.[560]

Following this ruling, still in 2018, the High Court of Justice of England and Wales delivered the *Lis, Lange and Chmielewski* ruling, where the individuals targeted by the EAW issued by Polish authorities were adopting the same line of argument as the Irish Court initially had. In return, this High Court conducted a long analysis of the CJEU's *Celmer* ruling and concluded that individuals could not rely only on an *in abstracto* assessment: they still needed to prove that they, individually, would be affected, as per the CJEU's ruling[561].

This type of Poland-related challenge, however, would continue appearing, with more and more domestic courts expressing a preference for a purely *in abstracto* test following the worsening of the rule of law crisis in Poland, and a growing distrust towards its judicial system[562]. For example, while the Norwegian Supreme Court[563] initially accepted to follow the two-step tests[564], a District

[560] High Court, Minister for Justice and Equality v Celmer, [2019] IESC 80, [81].
[561] High Court of Justice, *Lis, Lange and Chmielewski v Regional Court in Warsaw, Zielona Gora Circuit Court and Regional Court in Radom* [2018] EWHC 2848.
[562] Popelier, Gentile and van Zimmeren (n 484).
[563] While the EAW is an EU instrument, Iceland and Norway entered into an agreement with the EU to also take part to the mechanism, starting 2019. Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway [2006] OJ L 292/2.
[564] 'Much would need to happen for the extradition cause a breach of Article 6 of the ECHR. It is not sufficient that there is a risk that the proceedings in the state that requested extradition will not fully satisfy the

Court asked for the test to be adapted given the quick development of the situation in Poland in 2021 to allow for a more general suspension of the EAW on the grounds of systemic deficiencies alone[565]. This was also the position adopted by a Dutch lower court in its referral to the CJEU in 2020[566], and of the Belgian court which had refused to execute the EAW in the *Romeo Castaño* case before the ECtHR[567]. Lastly, the Higher Regional Court of Karlsruhe has, in 2020 came close to ignoring the CJEU entirely: after identifying the systemic deficiencies in Poland, it did ask for further information from the Polish authorities to check whether the individual targeted would run concrete risks of violation of their right to fair trial… But did not wait for an answer before releasing the person they had in custody. Indeed, according to the German Court, the systemic deficiencies are so grossly obvious and endemic that an individual's rights before Polish Courts are very likely to be violated[568].

Lastly, we must acknowledge that outside of EAW issues by Polish authorities, some courts showed a preference for an *in concreto* case only, as establishing the existence of systemic deficiencies can be a very high bar. This was the case for both German Courts in *Generalstaadtantwaltschaft* (2018) and *Dorabantu* (2019), and seemingly of the Italian *Corte de Cassazione* in two rulings of 2016[569].

In conclusion, domestic courts were overall dissatisfied with the CJEU's approach, which seemed less and less workable to deal with EAWs issued by Polish authorities, or any other States where domestic courts have high probability of violations of fundamental rights, such as Romania[570] or

requirements of Article 6 of the ECHR. There must be a real risk for violation of the core content of the right to a fair trial. This has also been the basis of the EU Court of Justice for the application of [FDEAW], which in practice corresponds to the Arrest Warrant Act's provisions on extradition to EU countries' Norwegian Supreme Court's Appeal Committee, HR-2020-553-U [10]-[11]. Translation by the author.

[565] Vestfold District Court, TVES-2021-144871. See Eirik Holmøyvik, 'No Surrender to Poland: A Norwegian court suggests surrender to Poland under the EAW should be suspended in general' (*Verfassungsblog*, 2 November 2021) <https://verfassungsblog.de/no-surrender-to-poland/> accessed 15 July 2023.

[566] Rb Amsterdam, 31 July 2020, ECLI:NL:RBAMS:2020:3776; and Rb Amsterdam, 3 September 2020, ECLI:NL:RBAMS:2020:4328.

[567] *Romeo Castaño* (n 552) [12].

[568] Maximilian Steinbeis, 'So this is what the European Way of Life looks like, huh?' (*Verfassungsblog*, März 2020) <https://verfassungsblog.de/so-this-is-what-the-european-way-of-life-looks-like-huh/> accessed 15 July 2023.

[569] Cavallini (n 503).

[570] For example: High Court, Minister for Justice and Equality v Pitulan Angel [2020] IEHC 699.

Hungary[571]. While the ECtHR itself does not explicitly favour a purely *in abstracto* test as preferred by some of these domestic jurisdictions, it has before accepted that systemic deficiencies rendering highly probable the possibility of violation of the rights of the individual at hand were sufficient to rebut mutual trust[572]. Therefore, the authority of the CJEU only was truly threatened by domestic courts.

Member States' preferences are, as in the previous period, difficult to establish with certainty, but indirect evidence can still give some indications. The number of Observations submitted to the CJEU is still high for this period: a minimum of two in *RO*, to a maximum of nine in the *Dorobantu* case (*Table 17*).

This still demonstrates a high level of saliency for the issue, although not necessarily indicating preferences[573]. The States were however very aware of the importance of the *Aranyosi and Căldăraru* ruling and the change in standards it carried; indeed, barely a few months after the ruling was delivered, Germany brought up the ruling to the EU Council, to ask for a new evaluation process of detention conditions, citing this very ruling as a motivation[574].

[571] *Aranyosi and Căldăraru* (n 424).
[572] *MSS* (n 471).
[573] Here as well, neither the rulings nor the Conclusions of the Advocate General gave more information regarding the content of the Observations submitted.
[574] Council of the European Union 'Orientation debate on the eight round of mutual evaluations - Further discussion on possible topics'13404/16, 19 October 2016, p 24.

Case	Member State Submitting observations
Generalstaatsantwaltschaft/ML	Germany Belgium Denmark Ireland Spain Hungary Netherlands Romania
LM/Celmer	Spain Hungary Netherlands Poland
RO	Romania United Kingdom
Dorobantu	Germany Belgium Denmark Ireland Spain Italy Hungary Netherlands Poland Romania
Openbaar Ministerie	Netherlands Belgium Ireland Poland

Table 17: Observations Submitted by Member States (2017-2021)

It can be inferred that States did have a preference for an effective and simplified extradition procedure through the EAW, which would have made them more amenable towards the CJEU's approach, with limited exceptions and a higher standard (two-step test) for non-execution. Just a few months after the ruling was delivered, a roundtable was organised by the Commission with most EU States and other relevant institutions and structures (Eurojust, the EU Agency for Fundamental Rights, different civil society organisations, representants of the LIBE Commission of the EU Parliament among others), where States were invited to express their position[575].

There, it appears that the Governments themselves were not refusing the *Aranyosi* ruling, and simply wondered how to effectively make information about detention conditions in EU States

[575] Council of the European Union 'Orientation debate on the eight round of mutual evaluations - Further discussion on possible topics'13404/16, 19 October 2016.

available to domestic courts, such as Germany[576]; but some, like the Netherlands, even considered that there was enough factual information available from institutions such as the Committee against Torture[577]. Others, like Italy, wondered more about what the threshold for 'degrading or inhuman treatment' should be, when it came to detention conditions, but once again, did not question the ruling itself. A minority of States, such as Hungary or Poland, highlighted that the very existence of exceptions to the EAW could lead to individuals targeted by EAW to be detained in better conditions than other prisoners. However, the only State apparently truly opposed the CJEU's ruling is Poland, who argued that:

> [t]he CJEU seems to prioritise material detention conditions rather than observing the deadlines imposed under the EAW.
>
> This is problematic because the aim of the EAW was indeed to accelerate the procedure because extradition procedures before were very formalistic and took a long time. In Poland's view, the CJEU does not seem to respect the initial objectives of the EAW.[578]

A few years later, in November 2020, observations from Member States submitted during the drafting of the Conclusions of the Council on the European Arrest Warrants, States mostly appeared to have accepted the CJEU's approach, with France even pushing for the CJEU's rule of rebutting mutual trust only in 'exceptional circumstances' with an '*in concreto'* assessment[579], and Bulgaria asking that the Commission's handbook on the EAW is regularly kept up to date with the latest CJEU's case-law[580]. On the other hand, absolutely no State submitting observations on this occasion even mentioned the ECtHR, even less one of its cases, or brought it up as a potentially relevant standard-setter.

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[576] Council of the European Union, 'Annexes, Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Comments and questions by the Commission on recent case law' 10429/17, 16 June 2017, p9.
[577] Graat and others (n 505).
[578] Council of the European Union, 'Annexes, Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Comments and questions by the Commission on recent case law', 10429/17, 16 June 2017, p 17.
[579] Draft Council conclusions 'The European arrest warrant – current challenges and the way forward' - Compilation of written observations by Member States, 3 November 2020 12480/20.
[580] Draft Council conclusions 'The European arrest warrant – current challenges and the way forward' - Compilation of written observations by Member States, 3 November 2020 12480/20, p 14.

It seems States were, therefore, at the very least, satisfied with the CJEU's ruling, or unwilling to go against it for the majority. This is supported by the lack of attempt to revise the EAW – even though the European Parliament asked for the Commission to start a reform of the process in 2014 and 2015[581] – as well as by the 2018 conclusions of the Council of the EU on mutual recognition in criminal matter stated a clear support for the CJEU's approach:

> The Member States are reminded that in accordance with the case-law of the Court of Justice of the European Union, a refusal to execute a decision or judgment that has been issued on the basis of a mutual recognition instrument can only be justified in exceptional circumstances (…). As a consequence, any case for non-execution based on an infringement of fundamental rights should be applied restrictively, **following the approach developed by the CJEU in its case law.**[582]

Similarly, in 2020, multiple rulings of the CJEU later, the European Council continued to focus on how to support national authorities complying with the CJEU's test, including on how to conduct a fully individualised assessment of fair trial or of detention conditions[583].

But while Governments favour the CJEU's approach, it must be noted that this does not translate into a threat to the authority of the ECtHR, despite Strasbourg's less favourable approach. References to the ECtHR's case-law are actually conspicuously absent from all discussions of the EU Council[584]. Either because of the reputational cost of entering into conflict with a human rights court on such a sensitive issue, or because the ECtHR is not exceedingly impeding the effectivity of the EAW, there is no empirical observation of an actual challenge of the ECtHR from States.

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[581] European Parliament resolution of 8 September 2015 on the situation of fundamental rights in the European Union (2013-2014) (2014/2254(INI) [2017] JO C 316/2 [155]

[582] Council conclusions on mutual recognition in criminal matters — 'Promoting mutual recognition by enhancing mutual trust' [2018] OJ C 449/6 para 4. Emphasis added by the author.

[583] Council of the European Union, 'Council conclusions 'The European arrest warrant and extradition procedures - current challenges and the way forward' - Text as approved by the Council', 13684/20, 4 December 2020 paras 18-34

[584] As they are from any available draft available earlier than the December 2020 Conclusions. See: Draft Council conclusions 'The European arrest warrant – current challenges and the way forward' - Compilation of written observations by Member States, 3 November 2020 12480/20; Council conclusions 'The European arrest warrant and extradition procedures - current challenges and the way forward'- Text as agreed at technical level, 13214/20, 23 November 2020; Council of the European Union, 'Council conclusions 'The European arrest warrant and extradition procedures - current challenges and the way forward' - Text as approved by the Council', 13684/20, 4 December 2020

Lastly, the fact that the CJEU maintained the divergence with the ECtHR for multiple years, and so clearly this time, is, in itself, a threat to the authority of the ECtHR. According to Mitseligas, '[t]he ECJ approach in Melloni (…) has been perceived as a challenge to fundamental rights review by … the European Court of Human Rights'[585]. Even after the progress made in *Aranyosi*, the CJEU still had a very different approach from the ECtHR's. Moreover, CJEU President Koen Lenaerts, still writing extrajudicially, has expressed in a 2017 publication a strong support for the *Aranyosi*-style solution, with its two-step test and its preference for the postponement of the EAW rather than ending the procedure[586]. While not openly challenging the ECtHR in doing so (as he argues that the two approaches are actually compatible), this solidifies the intent of the CJEU to maintain its stance in the years to come.

This issue-specific challenge is underpinned by a systemic challenge of the CJEU to the ECtHR, as demonstrated in Chapter 2. As was explained there, *Opinion 2/13* spectacularly displays the CJEU's intent to defend the EU legal order's autonomy from the ECtHR. But specifically for this case-study, it must be pointed out that the CJEU very heavily linked this autonomy with the principle of mutual trust, explicitly citing the *Melloni* case[587], and stating that

> [i]n so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties (…) in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law.[588]

In other words, the CJEU saw the principle of mutual trust as so essential to the very nature of the EU that it considered that the ECtHR could not be allowed to alter it and its functioning whatsoever.

[585] Valsamis Mitsilegas, 'Judicial Dialogue, Legal Pluralism and Mutual Trust in Europe's Area of Criminal Justice' (2021) 46 European Law Review 579.)
[586] Lenaerts, 'La Vie Après l'avis' (n 489).
[587] *Opinion 2/13* (n 205) [191].
[588] *Opinion 2/13* (n 205) [194].

The pressure that the ECtHR was in turn exercising on the CJEU was less systemic and more focused on specific issue-areas. Indeed, while Opinion 2/13 had largely frozen the interinstitutional relationship between the two Courts, the ECtHR still upheld the *Bosphorus* doctrine in its 2016 *Avotins* ruling[589] (see Chapter 2). This means EU law was still benefitting from a presumption of equivalent protection – although this could still be rebutted, and EU law was still safe from the ECtHR's review as long as it did not suffer from 'manifest deficiencies'.

From a perspective more specific to the EAW, not only did the ECtHR maintain the divergence without changing its position once, but it was also very keen on not having its jurisprudence misinterpreted as support for the CJEU's legal reasoning. In the *Romeo Castaño* case, Strasbourg judges ended up finding that the non-execution of the EAW has actually been a violation of the rights of the victims of the person targeted by the warrant. But even as it was concluding that Belgium had not sufficiently motivated their decision to refuse to execute the EAW in this particular case, it added:

> [t]he current ruling shall not be interpreted as reducing the obligation of State to not extradite an individual toward a state asking for their extradition when there are serious reasons to believe that the individual, if extradites toward this state, could run a real risk to be submitted to a treatment violating Article 3 [on the protection against torture and inhumane or degrading treatments].[590]

In the end, after Spanish authorities emitted another EAW, the Belgian Court 'evaluated that the guarantees provided by the Spanish authorities were sufficient to consider that there was no real risk (…) of inhuman and degrading treatment (art.3)' and ended up surrendering the person targeted[591].

[589] This was not a given: in 2015, a few months after Opinion 2/13, ECtHR President Dean Spielmann had mused 'Will Bosphorus always remain good law?', noting that the presumption was not an 'automatic conclusion', not a simple 'certificat de confirmité [sic]'. Spielmann, 'Opinion 2/13 and Other Matters' (n 224).

[590] '[l]e présent arrêt ne saurait être interprété comme réduisant l'obligation des États de ne pas extrader une personne vers un pays qui demande son extradition lorsqu'il y a des motifs sérieux de croire que l'intéressé, si on l'extrade vers ce pays, y courra un risque réel d'être soumis à un traitement contraire à l'article 3' *Romeo Castaño* (n 552) [92]. Translation by the author.

[591] 'a estimé que les garanties avancées par les autorités espagnoles étaient suffisantes pour considérer qu'il n'y avait pas de risque réel (…) de traitements inhumains et dégradants (art. 3)' Council of Europe, Committee

But, tying issue-specific and systemic challenges together in an interesting twist for this case-study, the very last ruling of the dataset, *Bivolaru and Moldovan*, saw the very first time that the Strasbourg Court actually found the system-wide presumption of equivalent protection first established in *Bosphorus* to rebutted[592]. This is the clearest of threats to the authority, autonomy and independence of EU law and the CJEU, but no new case from the CJEU has responded to it so far. As noted by a former ECtHR Judge who was still at the Court at this time:

> *Moldovan versus Romania* is exactly that type of case where the, the protections afforded by France, in that case, on the basis of EU law, were manifestly deficient, and therefore the *Bosphorus* presumption was rebutted. And I think it does demonstrate that national courts, in implementing EU law, they have to be aware that EU law is not a trump card.

Until mid-2021, the ECtHR had a welcome stance towards the CJEU in general, but less so regarding the EAW in particular – the relationship of both Courts after *Bivolaru and Moldovan* goes beyond the scope of this research, but the importance of this ruling cannot be overestimated; it might mark the start of a new phase of both systemic and specific challenges of the ECtHR to the CJEU. This change could affect the CJEU's jurisprudence on the EAW in turn.

2.3.2. Analysis and process tracing for CJEU: domestic courts as the only concern

Different elements show that the CJEU was aware of the challenges to its authority coming from domestic courts, and identified it as such.

First, this was clear from the preliminary rulings themselves, where the domestic courts were making their preferences known. For example, in the *LM* case, the Irish Court was strongly influenced by the ECtHR's approach, and explicitly asked for the possibility to only perform the *in abstracto* test, rather than the one mandated by the CJEU[593], a move which brought an interviewee to spontaneously mention this case when prompted on domestic courts challenging the CJEU.[594]

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of Ministers, 'Bilan d'Action - Exécution de l'arrêt de la Cour européenne des droits de l'Homme Romeo Castaño et autres c. Belgique', DH-DD(2023)655, 24 May 2023. Translation by the author.

[592] *Bivolaru and Moldovan* (n 232) [126].

[593] *LM/Celmer* (n 452) [25].

[594] Interview 2, ECJ Judge, 02/12/22.

But the CJEU itself noted that this preference of the Irish High Court amounted to an automatic refusal of execution of any EAW if it originated from Poland[595]. This is confirmed by President of the CJEU Koen Lenaerts, still writing extrajudicially, who notes that 'limiting the assessment to the first step (thereby foregoing the second step) would amount to suspending the implementation of the entire European Arrest Warrant mechanism in respect of the issuing Member State'[596].

Another insight from the writings of President Lenaerts is that CJEU judges also kept track of rulings from domestic courts which did not make it to the CJEU as preliminary rulings but were still relevant to this topic. In 2017, for example, he commented a decision of the *BverfG* as follows:

> [In] Mr C. v. Order of the Kammergericht, the German Constitutional Court held that the Basic Law did not preclude the execution of an EAW issued by a UK court, despite the fact that the right to remain silent is not protected in the same way in the UK as in Germany. (…) In that regard, the German Constitutional Court ruled that only where the core (the so-called "Kerngehalt") of the accused's right to remain silent (as provided for in Art. 1(1) of the Basic Law, a constitutional provision protecting human dignity as part of Germany's constitutional identity) is adversely affected will German courts refuse to execute an EAW.[597]

On the other hand, the CJEU overall very rarely mentions the ECtHR in this second set of rulings, and despite its President's prolific writing on the matter of mutual trust in the AFSJ and the case-law of the CJEU on the matter, President Lenaerts also very rarely mentions the Strasbourg Court [598]. Moreover, this was after *Opinion 2/13* and the cooling of the relationship between both Courts, when judges had stopped their formal meetings. It is more difficult to know how aware of

[595] *LM/Celmer* (n 452) [72].
[596] Koen Lenaerts, 'The Court of Justice of the European Union as the Guardian of the Authority of EU Law: A Networking Exercise' in Wolfgang Heusel and Jean-Philippe Rageade (eds), *The Authority of EU Law: Do We Still Believe in It?* (Springer 2019).
[597] Lenaerts, 'La Vie Après l'avis' (n 489).; although President Lenaerts does not seem to consider this ruling to necessarily be opposed to the CJEU's approach or authority as, in the end, the *BverfG* still ordered the execution of the EAW.
[598] For example: Koen Lenaerts, 'Limits on Limitations: The Essence of Fundamental Rights in the EU' (2019) 20 German Law Journal 779; Koen Lenaerts, 'Upholding the Rule of Law through Judicial Dialogue' (2019) 38 Yearbook of European Law 3.

the ECtHR's case-law the CJEU was, and whether it perceived this as an actual threat to its authority, but multiple clues point in this direction.

After 2016, the quarterly publication Reflets was turned into three different newsletters called 'Flash News': 'Flash News Suivi' following-up on preliminary rulings outcome in domestic court's case-law, 'Flash News National Decisions', sharing important domestic court cases the way Reflets was doing previously, and 'Flash News ECHR' focusing specifically on ECttHR cases of relevance for the EU[599]. In the latter, the CJEU's DRD shared multiple ECtHR rulings on the EAW such as *Pirozzi*[600] and *Romeo Castaño*[601].

Additionally, in *LM*, the Advocate General referred to the ECtHR's *Romeo Castaño* case, even if the CJEU did not[602]; but the CJEU ended up referring to this case in *Dorobantu*. Even if it was not citing the ECtHR's case-law on the EAW often, it did rely on its jurisprudence on the conditions of detention, or judicial independence. More likely than not, avoiding references to *Pirozzi* and *Romeo Castaño* was deliberate. Lastly, the Court was aware of the 2016 *Avotins* ruling, where the ECtHR maintained the *Bosphorus* presumption of equivalent protection of EU law, and this was interpreted as a sufficiently reassuring sign and the ECtHR being 'willing to recognize more generally the importance of the principle of mutual trust'[603]. It seems that as far as the ECtHR goes, the CJEU was aware of the differences and disagreement, but did not necessarily conceptualise its position as a threat.

As for domestic courts, Flash News National Decisions continued to supply the CJEU with information on how judges on the ground handled the EAW and fundamental rights related claims: a refusal of the Karlsruhe High Court to execute an EAW despite explicitly not failing the two-step test in 2019[604]; or an interlocutory judgement from the Court of First Instance of Amsterdam regarding an extradition to Poland, asking for parties to 'take a position on recent developments

[599] Interview 6, Jurist at the ECJ's Directorate of the Research and Documentation, 20/12/2022.
[600] CJEU, Documentation and Research Directorate, Flash News ECHR, 8/2018.
[601] CJEU, Documentation and Research Directorate, Flash News ECHR, 11/2019
[602] Opinion of the Advocate General *LM/Celmer* (n 452).
[603] Lenaerts, 'La Vie Après l'avis' (n 489).
[604] CJEU, Documentation and Research Directorate, Flash News National decisions, 2/2019.

relating to the rule of law in Poland and on the possible consequences to be drawn from them in the light of the [*LM* case]'[605]. It was also kept informed of the aftermath of some of its preliminary rulings, especially the *LM* case in Ireland, first when the High Court invited parties to provide more information regarding potential violations of fundamental rights following the execution of the EAW[606], and then when its decision to order the execution was the subject of an appeal[607].

The CJEU was, therefore, left with the more definite threat from domestic courts, and only from them; it very much still repeated the importance of the goals of the AFSJ and the facilitated extradition procedure. The focus on policy goals is particularly strong as even when the CJEU started to allow more and more exceptions to the execution of an EAW, it initially tried to maintain that the EAW should be postponed and not fully refused, in order for the goals to be fulfilled later:

> [L]imitations on that principle must remain exceptional and, where applicable, must operate with a view to restoring trust in the future, instead of destroying it forever. That is why the ECJ opted in that judgment for postponing execution rather than denying it from the outset. [608]

And the Court knew this went against the preferences of domestic courts. On the *LM* case, an Advocate General of the CJEU commented: 'insofar as- as you have exceptions [to the EAW], they've got to be clearly made out. And I mean the court still sticks to two-stage test. And the onus is on the applicant [contesting the execution]. And I, I know the Irish courts sort of may not be so happy about that, but that's sort of the way it is'[609].

Later on, the CJEU accepted that the judicial authority simply 'bring the surrender procedure (to an) end'[610] to the EAW in the *Dorobantu* case, but even then this was not repeated in the following ruling (*LP*), which remained much more vague on what the outcome should be if fundamental rights were indeed threatened. This means that even on this more minor point, the CJEU was not willing

[605]CJEU, Documentation and Research Directorate, Flash News National Decisions of Interest to the EU, 2/2020.
[606] CJEU, Documentation and Research Directorate, Flash News Suivi, 3/2018
[607] CJEU, Documentation and Research Directorate, Flash News Suivi, 1/2019
[608] Lenaerts, 'La Vie Après l'avis' (n 489).
[609] Interview 7, CJEU Advocate General, 08/03/22.
[610] *Dorobantu* (n 549) [50].

to de-prioritise the policy goal of a smooth procedure between judicial authorities by definitely admitting an 'end' to the procedure.

Then, according to the theoretical mechanism explored, if the threat is sufficient, the CJEU is expected to engage in self-legitimisation by relying, even sometimes artificially or purely rhetorically, on the ECtHR's case-law. This step of the mechanism is particularly interesting here. The CJEU very rarely explicitly relies on the ECtHR's ruling as self-legitimisation. But interestingly, the Court brought new elements to its legal reasoning. The first one is the objective of the EAW to avoid impunity or create safe havens for individuals criminally suspected or convicted; it only appeared in the *Generalstaatsanwaltschaft* case (2018), and was then mentioned again in the *Dorobantu* case (2019), and in the *Openbaar Ministrie* case (2020), while it had never been before. Second, the CJEU brings forward a new reason for the two-step test required to refuse the execution of the EAW in *Openbaar Ministrie*: only the European Council can fully suspend the use of an EAW for an entire country, according to the FDEAW[611]. Using only an *in abstracto* test and refusing all EAWs from this Member State amounts to taking this decision on behalf of the European Council. This is a new argument, which was not present in the *Aranyosi* case where the CJEU introduced this test.

It is interesting to note that even beyond the case-law, in its communication efforts, the CJEU was targeting domestic courts more than the ECtHR. In a press conference of May 2017, CJEU President Lenaerts went back on the *Aranyosi and Căldăraru* ruling, and made no mention of the ECtHR whatsoever; instead, he explained that the CJEU based its decision on the balance between mutual trust and fundamental rights on its own *Opinion 2/13*[612], and commented:

> I must say that we fell very largely in line with the case law of the *Bundesverfassungsgerricht* [German Constitutional Court] on that level, which is of course being taken into account also by us, because we work out the fundamental rights of European Union as Article 6 of the Treaty on the

[611] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1 (n 441) Recital 10.
[612] Which, paradoxically, makes the current relationship of the CJEU and ECtHR the entire background on which the CJEU's President addresses domestic courts.

> European Union sets it, in accordance with the constitutional tradition of Member States… so that's a good example of that. [613]

This is omitting a key part of said Article 6, which states: 'Fundamental rights, **as guaranteed by the European Convention on Human Rights and Fundamental Freedoms** and as they result from the constitutional traditions common to the Member States'[614].

What seems to appear is that the CJEU is aware that it is being challenged by domestic courts and sees a need to bolster the legitimacy of its reasoning. However, it does not decide to do so by converging with the ECtHR (which would be too costly for this level of challenge); instead, it uses other argumentative methods, which allows it to limit its own legal-rhetorical entrapment[615], and avoid giving ground on policy preferences. An interesting phrasing was used on this context by a former CJEU judge interviewed:

> If one really requires that the required state, the state that will- should send over the person to another state, must do a full kind of a human right assessment of the other member state, then then forget about the arrest warrant. It wouldn't- it wouldn't work. *And* it would also lead to impunity (…). So it's not it's not- it's not a problem-free area, but, but I think, I think the Luxembourg Court basically **wanted to avoid giving the impression** that it was somehow not giving fundamental rights the proper place in- in union law.[616]

Lastly, as could be expected in a phase of *status quo*, more than active divergence, the CJEU does not openly or critically engage with the ECtHR: instead, it mainly ignores or downplays Strasbourg's case-law. It has been mentioned above that references to the ECtHR's case-law in the CJEU's jurisprudence in this second period are fairly rare, but when it does so in *Dorobantu*, it does not note any potential contradiction between the two Courts[617]. Moreover, the CJEU encouraged domestic courts to rely on the ECtHR's jurisprudence when it came to finding proof of systemic deficiencies in the legal system, for example. Indeed, it if was really

[613] *Speech by Koen Lenaerts, President of the Court of Justice* (EU's Annual Report Press Conference, Brussels 2017).
[614] Consolidated Version of the Treaty on European Union [2008] OJ C115/13 art 6. Emphasis by the author.
[615] Schimmelfennig (n 33).
[616] Interview 11, Former CJEU Judge.
[617] *Dorobantu* (n 549) [57].

unthreatened, or did not consider itself particularly challenged, the CJEU could either avoid any reference whatsoever to the ECtHR's jurisprudence or identify the divergences clearly in order to ask for actors implementing EU law to follow its approach only. But has been seen that the ECtHR was not really seen as the real threat to the authority: the targeted audiences of this self-legitimisation are actually domestic courts.

2.3.3. Analysis and process tracing for the ECtHR: withstanding pressure from the CJEU

The ECtHR was challenged in its authority on the issue at hand by the CJEU, but different elements show this was not sufficient to push it towards self-legitimisation strategies.

The ECtHR was clearly very aware of the CJEU's evolving case-law. First, it constantly made references to the Luxembourg Court in the three rulings included in its period. These references were extensive, and included not only the most commented upon rulings, but also the most recent ones; Robert Spano, President of the ECtHR, commented on the *Openbaar Ministrie* case[618], and in the *Bivolaru and Moldovan case*, the ECtHR made reference not only to the *LM* and *ML* case, but also *Openbaar Ministrie* and *Dorobantu*[619]. These references are thorough, and clearly identify the two-step test of the CJEU. When the ECtHR found that Belgian judges' refusal to execute an EAW was a violation of Article 2 ECHR, Judges Spano and Pavili went out of their way to add a separate opinion, neither really dissenting nor concurring, but instead hammering down the point that the ECtHR had already stated in its own decision: 'As is clearly shown by the constant jurisprudence of the Court, the prohibition stated in Article 3 of the convention is absolute. Nothing in the current decision shall be interpreted in different way (paragraph 92 of the decision)'[620]. Additionally, interviews with ECtHR judges[621], and publications from judges in academic

[618] Robert Spano, 'The Rule of Law as the Lodestar of the European Convention on Human Rights: The Strasbourg Court and the Independence of the Judiciary' [2021] European Law Journal 1.
[619] *Bivolaru and Moldovan* (n 232) [49] - [55].
[620] 'Ainsi qu'il ressort clairement de la jurisprudence constante de la Cour, l'interdiction posée par l'article 3 de la Convention est absolue. Rien dans le présent arrêt ne devrait être interprété dans un autre sens (paragraphe 92 de l'arrêt) ' *Romeo Castaño* (n 552). Concurring Opinion of Judge Spano, joined by Judge Pavli. Translation by the author.
[621] Interview 16, ECtHR Judge, 20/04/2023.

journals[622] show that like their Luxembourg colleagues, they do keep track of academic discussions, where the jurisprudence of both Courts was constantly compared.

The ECtHR was clearly aware of the threat of the CJEU to its authority regarding this matter, but did not react to it, as it was not a sufficient one.

The ECtHR not only did *not* alter its own outcome or reasoning, but also it did not include the CJEU's case-law in its own argument to give even the appearance of consensus. Instead, references to the Luxembourg case-law are typically done in the section on the 'relevant applicable law', but no further mention of them is made once the part on the 'Appreciation of the Court' is reached. According to an ECtHR judge interviewed, this is usually to signal to external readers that the ECtHR did account for it in its decision-making process:

> AP: [Talking about ECtHR rulings in general] There's just this mention that there *is* existing caseload [from the CJEU], but nothing is really being "done" with that. And I've always been curious as to what that means. How did these references come to be in the ruling somehow?
>
> ECtHR Judge: Well (…) for us, including, including in the descriptive part of a judgment - not our own reasoning, but the facts and, and the applicable national law and European Union law - is a way to signal that all these factors have been taken into account. If they are in the judgment, obviously we have read them, obviously we have considered them. Their relevance, whether they are decisive for, for our own analysis, that's a bit more difficult to, to put in words… But, but it is a clear sign that we are aware that the European court of justice is- is taking a particular line on- on- on some issue and that we are fully aware of that and we have taken it into account.[623]

Moreover, in contrast to the CJEU, the ECtHR does not shy away so much from noting divergences. As mentioned above, it states what the jurisprudence of the CJEU is at the time, but then openly adopts a totally different test in *Pirozzi, Romeo Castaño* and *Bivolaru and Moldovan*. When the

[622] Spielmann, 'Whither Judicial Dialogue?' (n 222).
[623] Interview 16, ECtHR Judge,20/04/2023.

CJEU seems to consider that the ECtHR already agrees with its approach in *Dorobantu*, President Robert Spano has a very different take on the question:

> The Strasbourg Court has not yet taken a position on whether the two-step test, adopted by the CJEU within the context of the EAW in cases related to judicial independence, conforms to Article 6 § 1 of the Convention.[624]

The ECtHR therefore did not feel forced into any convergence with the ECtHR on this issue. In the *Bivolaru and Moldovan* ruling, it is unclear if the ECtHR fully condemned the CJEU's approach or not. After all, the ECtHR can only rule on the implementation of EU law by French authorities, and from the ruling, it does not seem to fully condemn the entire EAW regime; but it does find the regime detailed by the CJEU, as implemented by French courts, was deficient. For the first time, it revoked the presumption of equivalent protection, due to the domestic court involved not conducting a sufficiently thorough assessment of the detention conditions that this individual targeted by the EAW would be subjected to in Romania[625]; in a sense, since the French court theoretically failed to properly conduct the *in concreto* test, it was in line neither with the CJEU nor with the ECtHR. But this also reinforces that the Strasbourg Court strongly opposes the two-step test request by the CJEU by focusing on the *individual* situation of the applicant, and does so openly. It is interesting to note that representatives from the Council of Europe brought up the *Bivolaru and Moldovan* ruling themselves to the table of negotiation of the EU to the ECHR[626], certainly due to the pressure they knew it would place on the EU side.

3. Conclusion

Framing the case-law of the CJEU and the ECtHR on the EAW as one example of jurisprudential exchange between both Courts shows that the divergences maintained to this today were not the only possible outcome. As Chapter 3 has shown, both European Courts have previously been able to start with diverging jurisprudences and converge with time. The degree to which this

[624] Spano (n 624).
[625] *Bivolaru and Moldovan* (n 232).
[626] Council of Europe, Meeting Report, 9th Meeting of the CDDH ad hoc negotiation group ("47+1") on the accession of the European Union to the European Convention on Human Rights, para 10.

has not been the case here confirms that there is much variation that has remained unexplored in their 'jurisprudential dialogue'.

3.1. Fit of the theory

Somehow, it could have been expected that in an issue-area as sensitive and much debated as EAWs, both Courts would have preferred to find a common ground, to avoid reciprocally undermining the legitimacy of the overall system or give rhetorical ammunitions to actors seeking to undermine it. Instead, it seems both Courts were not affected by the saliency of the issue per se. If there ever was an impact, it was indirect: an issue that was so close to absolute human rights (the protection against torture for the ECHR and judicial independence as the essence of the right to fair trial for the CJEU) means that domestic courts had stronger preferences. The role of the EAW as a key instrument of the AFSJ also meant that States were more proactive when making their own preferences known. The tensions regarding the negotiations of the EU accession to the ECHR also reached its peak during that time, making the EAW a topic where the CJEU and the ECtHR were particularly attuned to the arithmetic of legitimacy, and whether they could afford to stand their ground or not.

It is indeed the presence of varying preferences from Governments, domestic courts and European Courts that allowed them to find a balance and mainly keep to their preferred outcome. The CJEU, in the first period, had to yield and accept that the principle of mutual trust could not be absolute, regardless of its constitutional value for the EU, as the common threat from both the ECtHR and domestic courts was too high a risk for its authority. Once a partial convergence with the ECtHR had been accomplished, the ECtHR entered a new phase where it was willing to lighten the pressure on the CJEU. This left the Luxembourg Court facing only domestic courts as a threat, who themselves were often dissatisfied but were not presenting a unified front. Added to the unwillingness and/or inability of Governments to recast the FDEAW to overrule the CJEU, Luxembourg judges maintained their current case-law, in spite of the differences with the ECtHR's jurisprudence. Interestingly, because the one threat coming from domestic courts was so salient, an analysis of the case-law of the CJEU, as well as the various causal process observations, show that

the Luxembourg Court may have indeed adopted a legitimation strategy, but one whose target was only domestic courts. This may very well be due to the level of threat being low enough, and a convergence with the ECtHR as an answer being too unfavourable, that it required a compromise of these judges with domestic courts only. Nonetheless, this remains a possibility the exploration of that goes outside the bound of this work, as this dissertation seeks to explain convergence and divergence between International Courts, and not other legitimising behaviours International Courts may adopt.

Strasbourg judges, on the other hand, were never faced with strong threats to their authority on this matter. Only the Luxembourg Court was expressing real disagreement, both on this issue and systematically, which was not enough to make the ECtHR move to converge. It initially could count on stronger support from domestic courts, and Governments did not seem willing to openly state a preference for the CJEU, which otherwise could have undermined the ECtHR. In the absence of significant challenges to its authority, the ECtHR could also stand by its preferred outcome, regardless of what the CJEU's position was.

These movements of both Courts fit the expectations drawn from the wider theoretical framework. It is because of the different categories of actors relevant for this arithmetic of challenges that two Courts can end up holding their position: they find different allies and are faced with different sources of threat. If two International Courts find themselves both threatened in their authority by actors with different preferences, but insufficiently so, then they will maintain their divergence. This yields many potential interesting consequences: International Courts with fragmented politico-legal constituencies, with multiple categories of actors having very different incentives that do not align, and with different initial preferred outcomes would be more likely to diverge from each other, as they each share a threat insufficient to make them move. On the other hand, if there was to be more homogeneity in the preferences of actors within their constituencies, then convergence would be more likely, as different actors would be coherent regarding which Court's authority would be undermined.

3.2. Fit of alternative explanations

There has not been a convergence towards a higher standards of protection, or even towards the same one. In *Aranyosi and Căldăraru*[627], the CJEU did accept adding exceptions to the execution of an EAW which were not present in the FDEAW or in its earlier case-law, and in doing so it did move closer to the ECtHR's case-law. However, the standards set by both Courts remained very different after that. The CJEU used a two-step test, which is indeed moving it closer to Strasbourg[628], but is a much higher bar to pass for anyone seeking the non-execution of an EAW. The CJEU requires both an *in abstracto* test and an in *concreto test*, in this order.

To give an example, according to the CJEU, Aranyosi first had to demonstrate that the Hungarian prisons were suffering from systemic and manifest deficiencies regarding detention conditions, to the point that violation of the protection against torture, inhuman and degrading treatment were commonplace in the carceral system. Once this was done, Aranyosi had to prove that his particular circumstances meant that *he* would indeed see this right violated, even though these violations had been proven to be systemic in the first place. The judge had to request from Hungarian authorities where exactly Aranyosi would be detained and obtain information specific to this prison. If detention conditions there were not falling below the bar of degrading or inhuman treatment, then the EAW had to be executed regardless of the systemic or generalised deficiencies. If Aranyosi could not prove that the deficiencies were systemic or generalised, then he did not even get the opportunity to argue that in the specific prison where he would be sent, his rights would indeed be violated.

In comparison, the ECtHR has a much more flexible standard throughout: it asks that the EAW be executed, except in case of 'manifest deficiencies'[629] which would cause a violation of human rights. These deficiencies do not have to be systemic, as long as there is 'sufficient factual

[627] *Aranyosi and Căldăraru* (n 424).
[628] Gáspár-Szilágyi (n 286).
[629] *Pirozzi* (n 465) [63].

basis'[630] and they are individualised enough to show that there is a 'concrete and real risk'[631] of violation of fundamental rights. For example, in the *Pirozzi* case, the Court concluded:

> [T]he applicant had been officially informed of the date and place of the trial before the Brescia Court of Appeal. He had moreover been assisted before the Court of Appeal and represented by a lawyer which he had chosen himself and who had also defended him during the first trial and whose defence was, additionally, effective since it had led to a diminution of the sentence (…).
>
> These elements suffice for the Court to find that, in this case, the execution of the EAW by the Belgian courts was not marred by a manifest deficiency able to rebut the presumption of equivalent protection that the EAW system as defined by- the Framework Decision and specified by the case-law of the CJEU, and its enforcement by the Belgian law and in the particular case of the applicant, benefit from.[632]

This differences between both remained, since after the *Aranyosi* case, both Courts entered a status quo – contradicting the expectations that International Courts would naturally converge towards coherence.

As for alternative explanation seeing cross citation as cherry-picking, it is contradicted in two different ways.

First, the CJEU, in *Aranyosi* mainly, did have a partial *substantive* alignment with the ECtHR. It cited the ECtHR, which had a different approach, instead of finding other external sources to bolster its pre-existing reasoning. Referring to the ECtHR here forces the CJEU to indeed shift away from its previous jurisprudence (no fundamental rights exceptions to the execution of the EAW) to move closer to the ECtHR's (some fundamental rights exceptions to the execution of the EAW).

Second, the expectation for the ECtHR would have been similar: either no mention of the CJEU and standing its ground, or mention of the CJEU when it was aligning with its own preferences. The ECtHR however had a different approach: it did refer to the CJEU's case-law... but never using

[630] *Romeo Castaño* (n 552) [86].
[631] *Romeo Castaño* (n 552) [89].
[632] *Pirozzi* (n 465) [72] - [73]. Translation by the author.

it as a way to enhance or legitimise its own reasoning. Quite the opposite: when it mentions an CJEU ruling, it either refers to it in passing, as being potentially relevant, or mentions it to disagree[633]. Once again, this goes against the expectations of the cherry-picking theory: a Court should not highlight its divergence with another one, if it is looking for cherry-picked external judicial sources to support it.

It appears, therefore, that when referring to rulings of other International Jurisdictions there must be other goals that International Courts seek than spontaneously converging to improve the quality of their decision, or to artificially bolster their reasoning through cherry-picked references. This dissertation's theory of forced self-legitimisation through convergence therefore finds more support here.

This case study differs starkly from the previous chapter on multiple accounts, starting with the very high degree of saliency of the issue for domestic courts, and how it cut to the core of the constitutionalising of EU law. But these differences offer the opportunity to draw additional conclusions for the theoretical framework, beyond the deductive assessment of the validity of the hypotheses.

First, in the previous case-study, the problem of domestic courts being placed in a situation where they could have two different approaches provided by both European Courts was repeatedly identified as something both Strasbourg and Luxembourg were keeping in mind, and playing a role in their attempt to move towards convergence, and limit any divergence. Yet, here, this was not sufficient to force either of them towards the other. Domestic courts are, to this day, in a precarious situation where they attempt to balance following the CJEU's two-step test without falling short of the ECtHR's requirement. Why this held less weight in the decision-making process of judges is open to different explanations, but from discussions with judges, the underlying impression was that, contrary to the previous case-study, this was *not* an issue any European Court could compromise on. The issue ended up being too close to the core mandate of each Court – the legal

[633] For the former, see *Pirozzi* (n 465). For the latter, see *Bivolaru and Moldovan* (n 232).

and political integration and constitutionalisation of EU law and the rise of the CJEU as a European Constitutional Court, facing the role of the ECtHR as a concrete and real safeguard against the right most often invoked in these cases: the protection against torture, inhuman and degrading treatment.

This might be an example of a situation where two overlapping International Courts can only converge so far if their very core mandate and preferences inherently push them in different directions. The next case-study will therefore be an opportunity to further explore this situation, once again pitting two very different understandings of an issue that has garnered substantial public interest in the last decade: trans rights of legal gender recognition.

CHAPTER 5
Convergence without challenge, challenge without convergence: Legal Gender Recognition for transgender persons and the evolving preferences of International Courts

I mean, sometimes it's in, you have ECHR case-law in a neighbouring area (…) not in itself directly binding, but an important source of inspiration because we assume then that probably they would arrive at the same result in this area once they get a case. (…)it's not that we give it a full ex officio *examination,* ***it's also a little bit what the parties brings to us***.[634]

In the last decades, laws on trans* rights[635] have abounded in European States, from antidiscrimination laws and policies explicitly protecting trans persons[636] to the recognition of neutral/non-binary genders in civil registries[637]. But in the 1980s, when such laws were quasi non-existent, individuals took to courts to put trans* rights on the legal map in Europe. Less than a decade after the 1969 Stonewall Riots in the United States, transgender man Daniel Van Oosterwijck took to the ECtHR, to ask that Belgium allows him to update his gender as male on a civil state certificate – the first case of its kind for the Strasbourg Court[638].

This was followed by a series of cases on the right to Legal Gender Recognition (LGR) before the CJEU and the ECtHR, which will here go up to and including the *Y T v Bulgaria* (2020)[639]. A majority of the cases were brought before the ECtHR, and often involved the United Kingdom. This case-study displays a surprising pattern, where the CJEU was initially more protective of trans rights, particularly on the grounds of protection against discrimination in the implementation of EU

[634] Interview 5, former CJEU Judge, 28/11/2022.
[635] As explained later in this chapter, the focus of this case study is on the legal recognition of binary trans identities; *trans** refers more widely to all trans identities, including nonbinary genders for example.
[636] Lei N° 28/2015 de 14 de Abril 2015 [Act no. 28/2015 of 14 April 2015] (Portugal) ; Act X of 2014 - Constitution of Malta (Amendment) Act, 2014 (Malta).
[637] Lov om ændring af lov om Det Centrale Personregister no. 752 [Act amending the Act on the Central Personal Register] of 25/06/2014 (Denmark); Act XI of 2015 - Gender Identity, Gender Expression and Sex Characteristics Act, 2015 (Malta).
[638] *Van Oosterwijck v Belgium* (1980) 3 EHRR 557.
[639] *Y T v Bulgaria* App N°41701/16 (ECtHR 09 July 2020).

law, and the ECtHR was the one closing the gap and changing its case-law throughout the 90s and 00s to by converging with the CJEU. However, after the initial phase, the ECtHR and the CJEU both settled in their respective case-law, maintaining a *status quo* despite multiple remaining dissimilarities or grey areas. For example, the ECtHR looks unfavourably on any surgical pre-requirement to access LGR, while the CJEU only extends its protection towards transgender persons intending on going forward with a medical transition.

This chapter argues that some form of convergence can occur despite a lack of sufficient challenge to the authority of a given International Court if there is a sufficient alignment of preferences that makes this strategy non-costly in term of preferred outcome for this Court. This alternative path to convergence does partially follow the same mechanism regarding the need for a strengthened legal reasoning. However, this leads to a much shallower and short-lasting convergence. This explains why the first period is marked by the ECtHR relying on the CJEU's adjacent case-law on the protection of transgender persons against discrimination to better protect access to LGR. Contrary to the two previous case studies, there was no sufficient threat to force the Strasbourg Court to converge with the CJEU.

On the other hand, the second time-period covered in this case-study shows what happens when the threat to the authority of an International Court only exists in theory, meaning that no litigation actually turns these potential challenges into reality for the International Court potentially at risk. Courts can maintain divergence because they are not faced with a real need to start prioritising their authority over their preferred outcome, as long as no party or litigants render an existing challenge tangible for the International Court.

The second period is also marked by a shift: the preferences of the ECtHR, as will be shown, endogenously shifted to favour a higher, truly *human* rights-based protection of transgender persons' access to LGR, and the CJEU was the one favouring a less ambitious approach, as it continued to pursue a market-based approach to fundamental rights. Therefore, two factors led to the stand-still in the convergence/divergence between these courts today: the challenges each were facing are bordering on sufficient for them to seek self-legitimation by convergence, but in reality no case has

been brought that would have made it necessary for them to do so. If the status quo in Chapter 4 was enabled by the challenges of each Courts balancing each other, here it is the lack of litigation truly confronting European Courts with the remaining dissimilarities in their case-law that likely enables them simply to ignore each other (also perhaps due to the CJEU's more limited competence in this area in particular).

Period	**1980 - 2002**		**2002/2019**	
Court / ***Outcome*** / **Challenging source:**	**CJEU [no relevant case in this period]**	**ECtHR:** ***Convergence***	**CJEU:** ***Divergence/status quo***	**ECtHR:** ***Divergence/Status quo***
Domestic Courts		NO	NO	NO
Governments		NO (UK only)	Fragmented	Fragmented
CJEU		NO		YES (Systemic)
ECtHR			YES (issue specific)	

Table 18: Overview of the explanatory factors and outcomes for the case-study

1. Legal gender recognition before European Courts: an overview

The cases that make up the stream of litigation before European Courts considered for this chapter are the ones where either the parties, or the Court, raised the potential obligation for States to provide LGR procedures, directly or indirectly, for binary transgender persons. This choice a methodological one: LGR for nonbinary identities can mean the creation of a new gender marker in identification documents and public records, raising more different questions than allowing an individual to update their gender marker to another, already existing one. This explains why some landmark cases regarding trans* rights at large, are not included in the dataset, such as the CJEU's *P v S* case, which purely dealt with discrimination from an employer, the ECtHR's *Schlumpf* case on the reimbursement of a medical transition[640], or the *S V* case which dealt with a change of name rather than gender recognition[641]. However, to understand why both Courts came to develop a case-

[640] *Schlumpf v Switzerland* App No 29022/06 (ECtHR, 9 January 2009).
[641] *S V v Italy* App N° 55216/08 (ECtHR, 11 October 2018); see also: Damien Gonzalez-Salzberg, 'The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights' (2014) 19 American Unviersity International Law Review 797.

law specifically on LGR, rather than discrimination at large, it is essential to re-situate the right to LGR in its legal context, domestically, before moving on to the answers provided in European Courts.

1.1. Understanding the issue: transgender persons and long road towards Legal Gender Recognition

LGR is the process by which an individual can have their legal gender updated in order for it to match their gender identity. Under the 2006 Yogyakarta Principles, the right to LGR is a fundamental right particularly relevant for all trans* people[642], an umbrella term which includes a diversity of trans identities: for example transgender, non-binary and agender identities[643]. However, this case study covers case-law involving transgender persons seeking LGR as either *man* or *woman*, sometimes referred to as *binary transgender*. Therefore, the rest of this chapter will use the term 'transgender', narrower than trans*, as a more accurate reflection of the rights that were challenged in the cases covered in this case study[644].

1.1.1. The challenges in changing gender in civil registries

Transgender persons have a gender identity differing from the one they were assigned at birth, which often leads them to *socially transition* into their self-identified gender. This means presenting themselves as someone of their preferred gender, and constructing a professional, personal and social life on this basis. This may or may not be accompanied with a medical transition, which can range from hormonal treatment to various types of gender affirming surgery[645].

Building a social life based on a specific gender presentation and identity can create a 'gap' when this gender does not match the one recorded as a matter of public records. This gap can manifest

[642] International Commission of Jurists (ICJ), Y*ogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*. March 2007, Principle 3. The Yogyakarta Principles have been adopted by civil society human rights groups, building on International Human Rights Law to articulate the rights pertaining to sexual orientation and gender identity.
[643] Lauri Sivonen, 'Gender Identity Discrimination in European Judicial Discourse' (2011) 7 The Equal Rights Review 11, 14.
[644] For distinction between trans, transgender, transexual, see Stephen Whittle, *Respect and Equality: Transsexual and Transgender Rights* (1st edition, Routledge 2002) xxii–iii.
[645] Sometimes referred to as sex reassignment surgery or gender reassignment surgery, terminologies which have been used by European Courts.

itself as difficulties in navigating everyday life where an Identity Document (ID) is required, being forced to disclose their trans identity, not having access to gender specific care and rights, or creating discrepancies between different ID documents, some matching their gender and others not. As a result, they may seek to remove this discrepancy through LGR, 'including change of name, gender marker and other gender-related information such as social security number in public registries and key documents'[646]. In the case of binary transgender persons, this mean changing a male marker to a female marker, or a female marker to a male marker.

However, this conflicts with the inherent stability that civil registries are often built on. Civil registries can take different forms, but usually include birth certificates where the gender assigned at birth, the name, as well as marital status and parentage are recorded. States usually hold this information for administrative classification[647], and therefore, this information is usually meant to be stable. French law, for example, goes as far as having a principle of *immutabilité de l'état civil des personnes* (immutability of the people's civil records), which prohibits any changes to the information recorded on civil registries, save for the very narrow exceptions the legislation allows for (for example, in case of a child's name following a plenary adoption[648]).

Moreover, a change in the gender on the civil registry often needs to be reflected in other documents: national identity or social security numbers can be based on the gender assigned at birth, and a new gender would mean a new number. Such is the case for the French Social Security number (starting with a 1 for men, and a 2 for women[649]) or the Czech Identity Number (where the number associated with the month of birth is 1 to 12 for men, 61 to 72 for women[650]). Not changing this number is tantamount to disclosing the person's trans identity with each interaction where this number is used, which negates the very point of LGR. But changing this number can be logistically

[646] Parliamentary Assembly of the Council of Europe, *Report on Discrimination against transgender people in Europe,* Doc 13742, 02 April 2015.
[647] Anna James Neuman Wippler, 'Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents' (2016) 39 Harvard Journal of Law and Gender 491.
[648] C.Civ, Art.357 Al1 (France).
[649] Décret n°82-103 du 22 janvier 1982 relatif au répertoire national d'identification des personnes physiques, Art 4 (France).
[650] Law of 12 October. April 2000 about the registration of inhabitants and social security numbers and amending some laws (Law on Population register), Article 13 (Czech Republic).

challenging for the administration. Additionally, a change of gender raises the question of gender-specific rights, unemployment benefits, retirement age, or even conscription.

Relatedly comes the question of how LGR would impact marital status: in States that do not allow same-sex marriage, what happens if one spouse seeks LGR? Must the marriage be ended first, making transgender persons choose between a right to a civil identity and a right to marriage? And even in States that have legalised same-sex marriage, would LGR require the consent of the other spouse, who originally married someone registered under a different gender?

European States have progressively developed LGR procedures, but the requirements to avail of them vary from on legal system to the next. They are often challenging to meet, and potentially costly[651]. A European tour of these procedures would include requirements as diverse as: a simple declaration (Belgium), divorce (Greece), a request before a tribunal (France), a mandatory waiting period where the applicant is openly living as their self-identified gender (United Kingdom), medical and/or psychiatric diagnosis (Austria), medical treatment without surgery (Ukraine), gender affirming surgery amounting to full sterilisation (Czech Republic) or even no legislation whatsoever (Albania). In Europe, this led to litigation not only on the very principle of having access to LGR, but on the conditions that States could require transgender persons to fulfil to access LGR.

An illustration: the *Christine Goodwin* case[652]

Christine Goodwin was a trans woman, who transitioned both socially and medically throughout the 80s, including a gender affirming surgery in 1990. However, the United Kingdom did not have an LGR procedure, and therefore she was still registered as a man with the Department of Social Security. This had consequences on multiple aspects of her life, despite having obtained a Passport with her name and self-identified gender: her National Insurance Number (NIN)

[651] Lena Holzer, 'Legal Gender Recognition in Times of Change at the European Court of Human Rights' (2022) 23 ERA Forum 165. See also: 'A particular challenge for transsexuals is the legal recognition of preferred gender, which may involve complicated administrative and medical procedures. The frequent requirement of infertility, i.e. sterilisation, is a case in point. The fact that trans persons are often subjected to medical diagnoses, and need trans-specific healthcare highlights healthcare as the context of potential discrimination'. Sivonen (n 649) 11–12.

[652] *Goodwin* (n 154). Beate Rudolf, 'European Court of Human Rights: Legal Status of Postoperative Transsexuals Constitutional Developments' (2003) 1 International Journal of Constitutional Law 716.

remained unchanged, meaning that her employer could trace back her pre-transition identity, *de facto* disclosing her trans identity against her will[653]. She avoided interactions with the police when she was victim of a theft out of fear that she would have to disclose her NIN, which would have similarly shown her trans identity[654]. She did not benefit from car insurance rates supposed to be more favourable for women than for men[655]. Her files at the Department of Social Security could only be handled by certain agents, turning normally simple procedures into complex processes requiring special appointments, and in correspondences, she was still addressed with male pronouns[656]. Moreover, she was informed that she would be required to work until the age of 65 to be eligible to a full pension – the age of retirement of men, instead of 60 for women[657].

In 1997, the United Kingdom had started a legislative reform to open LGR procedures to transgender persons, but this was slow-moving, and therefore the standing reference in British law was still the 1971 *Corbett v Corbett* case[658], which took a purely biological (specifically, chromosomal, genital and gonadal) approach to sex, preventing any update to the legal gender registered. It is the latter situation that led Christine Goodwin to lodge an application to the ECtHR, arguing that the lack of LGR led to a violation of her right to privacy (Article 8), which the Strasbourg Court agreed with in a judgement in 2002. Specifically, the ECtHR found that a balance had to be struck between the stability and historical nature of the birth register system, and the rights of individuals, and to that end, the Contracting Parties do have a certain margin of appreciation. However, there was not just a duty for the State to *abstain* from any interference with the private life of trans persons, but also a *positive obligation* to actually provide an LGR procedure in order to protect the right to privacy. In the words of the Court:

> (…) the Court finds that the respondent Government can no longer claim that the matter falls within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right protected under the

[653] *Goodwin* (n 154) [16].
[654] *Goodwin* (n 154) [19].
[655] *Goodwin* (n 154) [19].
[656] *Goodwin* (n 154) [18].
[657] *Goodwin* (n 154) [17].
[658] *Corbett v Corbett* [1970] 2 All ER 33.

> Convention. Since there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender reassignment, it reaches the conclusion that the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant. There has, accordingly, been a failure to respect her right to private life in breach of Article 8 of the Convention.[659]

Following this ruling, the United Kingdom adopted the Gender Recognition Act 2004, which entered into force in 2005, and provided a procedure, for transgender persons meeting specific standards, to obtain a Gender Recognition Certificate and a new birth certificate with their affirmed gender. However, this came with no change to their NIN, as it does not carry a gender identifier in and of itself (contrary to the French social security number, for example) and the ECtHR had not found it problematic in the *Goodwin* case.

1.1.2. The emergence of the question in Europe

Both European Courts are potentially relevant avenues for litigation regarding trans rights, including the right to LGR, although with differences in the rights and legal arguments parties could use, for reasons which will now be explained.

Cases before the ECtHR historically pertained more to a lack of legislation allowing LGR[660], with the first case reaching the docket of the Court being *X v Federal Republic of Germany*[661], which the European Commission of Human Rights found admissible in 1977; however, the case was settled before the Commission reached a decision. Then the ECtHR found another case, *Van Oosterwijck* (mentioned in the Introduction) inadmissible in 1980[662]. The first ruling on the substance of a potential violation was therefore *Rees v UK*, dating from 1986. Cases up to 2002's *Goodwin* mainly dealt with the existence (or more often the *in*existence) of a right to LGR; after *Goodwin*, the question tended to focus more on the potentially excessive requirements States could impose to

[659] *Goodwin* (n 154) [93].
[660] *Rees v United Kingdom* (1987) 9 EHRR 56; *Cossey v United Kingdom* (1991) 13 EHRR 622; *B v France* [1992] ECHR 40; *X v Former Yougoslav Republic of Macedonia* App No 29683/16 (ECtHR, 17 January 2019).
[661] *X v Federal Republic of Germany* (1979) 17 DR 21.
[662] *Van Oosterwijck* (n 644).

avail of this procedure. States indeed have a margin of appreciation, but the Court is the one setting, and often moving, the goal posts of what can, and cannot be, within this margin of appreciation[663].

As a human rights treaty, the ECHR presents multiple pertinent articles that could be invoked: Article 3 on torture and inhuman or degrading treatment could be used when it came to legislation requiring surgery and/or sterilisation as a condition to LGR[664]; Article 6 on the right to fair trial when domestic systems simply did not react or follow on a request for LGR[665]; Article 8 on the right to privacy and family life, as seen in the *Goodwin* case for example[666]; Article 12 on the right to marry, and found a family, as a transgender person can be prevented from entering even a heterosexual marriage without LGR[667]; Article 14 on the protection against discrimination (although States are rarely found in violation of this particular right when it comes to trans rights, as noted by Sivonen[668]).

Yet, the ECHR was written at a time when queer rights were not at the forefront of preoccupations, and the text could even be seen as somehow conservative regarding gender and gender roles. Article 12, after all, reads: 'Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.', which has been interpreted as a protection of heterosexual marriage only. However, the wording of each article is still broad enough that it gives leeway for the Strasbourg Court to make it a 'living instrument'[669], even for trans rights, opening the door to litigation.

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[663] Helfer and Voeten find that especially on LGBT rights, the ECtHR has shown a 'high degree of judicial discretion or agency'; Laurence R Helfer and Erik Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe' (2014) 68 International Organization 77.
[664] Holzer (n 657); Matteo E Bassetti, 'Human Rights Bodies' Adjudication of Trans People's Rights : Shifting the Narrative from the Right to Private Life to Cruel and Inhuman or Degrading Treatment' (2020) 12 291. Although this never argued by parties themselves.
[665] *X v Former Yougoslav Republic of Macedonia* (n 666).
[666] *Goodwin* (n 154); but also all the way to the recent *X and Y v Romania* Apps Nos 2145/16 and 20607/16 (ECtHR, 12/01/2021).
[667] *Goodwin* (n 154); *Hämäläinen v Finland* (Dissent).
[668] Sivonen (n 649).
[669] George Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy' in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2013); and more specifically on Family Rights Carmen Draghici, *The Legitimacy of Family Rights in Strasbourg Case Law: 'Living Instrument' or Extinguished Sovereignty?* (Hart Publishing 2017).

The ECtHR's natural preferences are therefore complex to assess. Indeed, compared to the previous case studies, it appears these preferences shifted, endogenously, over the years. This might have to do with the very sensitive nature of trans identities, and the extraordinary evolution of the social, legal, and cultural discourse surrounding them, challenging the ECtHR and its historically more conservative roots[670]. This can be confirmed by looking at individual, separate opinions of judges for the cases of the first few decades under study. Before the 2000s, the Strasbourg Court judges, individually, showed a real reluctance to grant any protection to trans persons. In the very first case brough to the Court, decided in 1980, a concurring opinion noted:

> [a] person's status is inalienable. Questions of public policy are involved. It is inconceivable that a question of status (…) is set in motion by no more than a petition and does not even have to be contentious in form. Status is not negotiable or a matter for personal determination. It is personal to the individual and he cannot dispose of or modify it by agreement.[671]

In the case of *B v France* (1992), Judge Matscher bemoaned in a dissenting opinion 'the initiative taken by B. - lightly, as it seems - of having an operation without the medical guarantees which such surgery ought to be subject to'[672]. Judge Farinha, dissenting in the same ruling, argued as follow:

> The Convention does not guarantee the right to change sex, nor the right to amendment of civil status documents, nor, unlike the International Covenant on Civil and Political Rights (Article 24), that of a public civil status register. How can a specific course of action in this matter be imposed on States in the name of the Convention? Surgical operations do not change the individual's real sex, but only the outward signs and morphology of sex. As for the applicant (whom I will not refer to in the feminine, as I do not know the concept of social sex and I do not recognise the right of a person to change sex at will), he is not a true transsexual. (…) [What if] [a]n illegitimate child wishes to start proceedings in respect of paternity, but after his birth the man who begot him has had a sex change operation and his civil status has been rectified; he is asking for a woman t*o be acknowledged as his father*![673]

[670] Samuel Moyn, *Christian Human Rights* (University of Pennsylvania Press 2015).
[671] *Van Oosterwijck* (n 644). Partly concurring opinion of Judge Ganshof Van Der Meersch [19].
[672] *B v France* (n 666). Dissenting Opinion of Judge Matscher.
[673] *B v France* (n 666). Dissenting Opinion of Judge Pinheiro Farinha.

Even up to 1998, dissenting opinions could read:

> Situations which depart from the normal and natural order of things must not give rise to aberrations in the field of fundamental rights (…). Common sense must be sufficient. (…) As matters stand at present, a sex change "does not result in the acquisition of all the biological characteristics of the other sex". While it removes the organs and functions specific to the "former sex", it creates, at most, only the appearance of the "new sex". There is therefore nothing unreasonable or arbitrary in not recognising in law that post-operative transsexuals are of this "new sex" and, since marriage implies the union of a man and a woman, in refusing transsexuals the right to marry a person of their "former" sex.[674]

Multiple times, ECtHR referred to the idea of 'true transexuals', often understood as transgender persons experiencing acute dysphoria, distress, *requiring* a gender confirming surgery[675]; any less than a harrowing experience of gender distress would result in judges wondering whether the applicant was even 'a true transexual'[676]. The literature has noted that the dichotomy of 'pre-operative' and 'post-operative' often used by the Court reveals an assumption that 'true transexuals' *must at least* seek to undergo gender conforming surgery. That is not to say that the court was unanimous in this approach; already in the *Rees* case (1986), for example, some judges noted that it should at least be possible 'to mention a development in the person's status due to changes in his apparent sex - what we have called his sexual identity - and to give him the opportunity to obtain a short certificate which does not disclose his previous status.'[677]. But it can be concluded that initially, the preference of the ECtHR was for a very modest protection of some sort of gender recognition, specifically for binary transgender persons experiencing acute gender distress and having undergone full transition, including gender confirmation surgery and its sterilising consequences.

[674] *Sheffield and Horsham v United Kingdom* (1990) 13 EHRR 622. Joint Concurring Opinion of Judges De Meyer, Valticos and Morenilla.
[675] Gonzalez-Salzberg (n 647); Pieter Cannoot, 'The Pathologisation of Trans* Persons in the ECtHR's Case Law on Legal Gender Recognition' (2019) 37 Netherlands Quarterly of Human Rights 14.
[676] *B v France* (n 666). Dissenting Opinion of Judge Pinheiro Farinha; Dissenting Opinion of Judge Pettiti; Dissenting Opinion of Judge Morenilla.
[677] *Rees* (n 666).dissent

These voices asking for more protection from within the Court rose more and more, without obtaining a majority, until *Goodwin*. While one cannot pinpoint a specific year, at least after the Christine Goodwin case the majority of judges were more in favour of the protection of LGR for trans persons, at least in principle, once again confirmed by their separate opinions. Judges who had expressed the most conservative views had retired from the Court, when others who had expressed a willingness to be more progressive, such as Spielman[678], Palm, Pekkaner[679], Wildhaber[680] or Martens[681] were still on the bench. Moreover, the Council of Europe overall, and at least some Contracting Parties themselves began to show much more interest in the rights of trans* persons and gender identity[682].

The CJEU, however, approached the question of trans rights from a very different perspective. As explained in Chapter 2, 'For many years the European Economic Community was primarily focused on the creation of a common market […]. [T]he legacy of the EEC's roots in the common market project retains its significance since, despite the EU's constantly changing nature and the recognition of human rights as part of its law and policy, the EU's dominant focus today remains economic'[683]. Not only was the EU not endowed with a human rights catalogue, but EU law itself initially had no reason to impact civil registries, as they remained the domain of Member States.

The lack of competence of the EU over matters of civil registries meant that there was no primary or secondary EU legislation to be reviewed by the CJEU, and no domestic law which could be directly challenged for potentially being in violation of EU law on this topic. As a result, the CJEU

[678] *Cossey* (n 666). Join Partly Dissenting Opinion of Judges MacDonald and Spielmann.
[679] *Cossey* (n 666). Join Partly Dissenting Opinion of Judges Palm; Foighel and Pekkanen.
[680] *Sheffield and Horsham* (n 680). Joint partly Dissenting Opinion of Judges Bernhardt, Thór Vilhjálmsson, Spielmann, Palm, Wildhaber, Makarczyk and Voicu.
[681] *Cossey* (n 666). Dissenting Opinion of Judge Martens.
[682] For example: Council of Europe, Committee of Ministers, *Recommendation CM/Rec(2010) of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity* (31 March 2010), or the 2015 Resolution 2048 (2015) on discrimination against transgender people in Europe . Council of Europe, Committee of Ministers, 'Recommendation CM/Rec(2010) of the Committee of Ministers to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity' (2010); Parliamentary Assembly of the Council of Europe, 'Resolution 2048 (2015) Discrimination against Transgender People in Europe' (2015).
[683] Paul Craig and others, *EU Law: Text, Cases, and Materials* (Seventh Edition, Seventh Edition, Oxford University Press 2020) 1048.

was not required to address directly issues of LGR as an issue of personal/civil status as such. However, the role of EU law in LGR matters arose in a more roundabout way: if a specific domestic legislation (or lack thereof) on LGR applicable to a person ended up preventing said person from benefitting from EU-derived rights they are entitled to. And indeed, the CJEU argued in *KB* that

> 'Article 141 EC, in principle, precludes legislation, such as that at issue before the national court, which, in breach of the ECHR, prevents a couple such as K.B. and R. from fulfilling the marriage requirement which must be met for one of them to be able to benefit from part of the pay of the other.' [684]

What prevented this marriage was the lack of LGR under UK law. Therefore, to comply, the UK would have to find a way to let KB and R fulfil the marriage requirement, which means letting trans persons such as R access LGR. As such, these situations lead to what Osella called a '(proto)recognition (for EU law purposes)', where 'the Court prescribed that gender recognition should be granted to avoid discriminatory treatments in the enjoyment of the specified EU rights'[685]. In other words, the only way to comply with the CJEU's jurisprudence was, not *de jure* but *de facto,* to offer LGR procedures.

But this would still require litigants to prove that domestic law was discriminatory by preventing them from accessing EU-derived rights that they considered themselves entitled to. However, there was no protection against discrimination specific to trans persons under EU law. Why would the CJEU even be a pertinent litigation avenue, then? Because there were provisions regarding gender equality within EU law, which litigants used to identify discrimination towards queer persons, in particular in the field of employment law and social security[686].

Later, of course, EU law added a catalogue of rights to its legal order, and multiple articles of the CFR, legally binding since 2009, are relevant for transgender rights to LGR: Article 1 on the right to dignity, Article 3 the right to integrity (for potential surgery requirements), Article 4 on the

[684] *Case C-117/01 KB v NHS Pensions Agency* [2004] ECR 541 [34].
[685] Stefano Osella, 'The Court of Justice and Gender Recognition: A Possibility for an Expansive Interpretation?' (2021) 87 Women's Studies International Forum 102493, 4.
[686] Nico J Beger, 'Queer Readings of Europe: Gender Identity, Sexual Orientation and the (Im)Potency of Rights Politics at the European Court of Justice' (2000) 9 Social & Legal Studies 249.

prohibition of torture and inhuman/degrading treatment (idem), Article 7 on the protection private and family life, Article 9 on right to marry and found a family (here without reference to men and women specifically), and Article 21 on non-discrimination. However, to this day, there is still no express protection against discrimination specific to trans* persons, as confirmed by a 2018 Research Note established by the CJEU's DRD[687].

Nonetheless, as the Charter only became binding in 2009, and is only applicable when a situation falls under the scope of EU law, this explains why the present chapter has a lower number of cases from the CJEU compared to the ECtHR: the range of situations covered is narrower, and the legal argumentation itself was historically not as straightforward as it was before the Strasbourg Court. The first case of note is the *P v S* case, dealing only with discrimination in labour law; then, from the 2000s onward, the Court had to rule on cases where the absence of, or the conditions required to access LGR, could constitute discrimination or otherwise impede the proper implementation of EU rules.

Following from its mandate and preferences as a Court of EU integration first and foremost (Chapter 2), the CJEU can be expected to have a preference for the protection of the right to LGR, only to the extent that it fits with the objectives of EU Law and EU integration, among which are the equal treatment of persons, and non-discrimination[688]. This likely results from a combination of factors: its institutional position as in effect a constitutional court for the EU rather than a human rights court, the lack of competence under EU Law resulting in non-discrimination instruments being the only one under which the question of LGR could be raised, and the fact that the Court had a strong and long-established non-discrimination case-law, especially regarding on sex-based discrimination. This is confirmed when one looks at how the CJEU handled *P v S:* not only was it indeed presented and argued as a case of sex-based discrimination, but, as Bell notes, the reasoning

[687] ECJ, DRD, 'Egalité, Non Discrimination et Genre' (2018).
[688] The author is particularly grateful to Mark Bell and Courtney Hillbrecht for their suggestions and expertise regarding this paragraph, especially on the major role of the principle of non-discrimination in the jurisprudence of the CJUE, which previous versions of this chapter had overlooked.

of the Luxembourg Court in this case is very similar to the one used in the *Dekker* case – a case of discrimination against a pregnant woman[689].

However, making the issue of trans rights fit in the frame of sex-based discriminations also limited what the position the CJEU would be willing to take when it comes to the specific features of domestic LGR procedures. The CJEU's approach is not one specific to the trans experience, and instead is more rooted in the gender binary and heteronormativity. This assessment is also reinforced by the relative lack of protection for discrimination based on sexual orientation from the CJEU as well: the CJEU's progressive stance on LGR does not stem from a general willingness to protect LGBT persons. In the words of Mulder:

> 'The gender performance of transsexuals, at least after a brief period of passing, often corresponds with the hetero-normative ideal of sex, gender, and sexual orientation which are continued to be framed as binary opposites. The CJEU was, therefore, able to employ its comparator approach [from sex discrimination cases] with only a few alterations. Consequently, while transsexuals deconstruct the strict connection between sex and gender, the hetero-normative ideal is not always challenged'[690]

It can be expected to place limits regarding the conditions States can place on granting LGR when these conditions have to do with marital status (e.g. impossibility to require a divorce) or the absence of children: these are not elements challenging a binary and heteronormative approach to identity, rights and family. This also means that the CJEU is less likely to protect against requirements for LGR regarding the medicalisation of the procedure, requirement for surgery, sterilisation, medical diagnosis, etc… The CJEU's binary approach to gender questions, and lack of a broader human rights-based approach, makes it less accommodating of trans experiences which do not fit this binary, typically by not having yet, or not wanting, a medical transition[691].

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[689] Mark Bell, 'Shifting Conceptions of Sexual Discrimination at the Court of Justice: From P v S to Grant v SWT' (1999) 5 European Law Journal 63.

[690] Jule Mulder, 'Some More Equal than Others: Matrimonial Benefits and the CJEU's Case Law on Discrimination on the Grounds of Sexual Orientation' (2012) 19 Maastricht Journal of European and Comparative Law 505, 516.

[691] On the CJEU's binary and heteronormative approach, see Pieter Cannoot and Sarah Ganty, 'Protecting Trans, Non-Binary and Intersex Persons against Discrimination in EU Law' (2022) 2022 European Equality

This chapter will later show how this discrimination-based line of argumentation has led to indirectly requesting Member States to have LGR procedures and requirements.

1.2. The answer of European Courts: from Luxembourg lead to polite stand-off

The case-law of the CJEU and the ECtHR on the right to LGR have never been compared in the long run. Yet, a thorough comparison reveals a trend that is unusual, especially when compared to the previous case studies: the ECtHR was the one with an initially less protective stance on transgender rights at large, compared to the CJEU's willingness to include trans persons in its protection against discrimination. There was a short middle-phase, in the 2000s, where it seemed the jurisprudence of both Courts could be very harmonious; but they then moved away from each other once again, as they now have different expectations regarding what limits States can adopt to access to LGR.

1.2.1. Overview of the evolution of the jurisprudence

The first case to be brought to a European Court was the *Van Oosterwijck* case, which the ECtHR sidestepped by considering it inadmissible[692]. This was followed a series of cases with fairly negative outcomes for transgender applicants, as the ECtHR consistently found it was up to each Contracting Party to decide whether or not to offer LGR procedures, as this fell within their margin of appreciation. This trend softened with the *B v France* case, where the Court did find France in violation of the applicant's right of privacy because of France's refusal to let her change her gender on all documents including her birth certificate (but highlighting that this was due to France's idiosyncratic approach to birth certificates specifically)[693]. The real breakthrough was with the *I v UK* and *Goodwin v UK* cases, decided on the same date in 2002, where Strasbourg explicitly acknowledged a right to LGR for binary transgender persons. From there, the ECtHR gradually adopted a case-law more protective of trans rights, in particular their dignity and physical integrity,

Law Review 37; Anna Lorenzetti, 'The European Courts and Transsexuals. The Binary Distinction and the Pattern of Family' in González Pascual Maribel and Torres Pérez Aida (eds), *The Right to Family Life in the European Union* (Routledge 2018).

[692] *Van Oosterwijck* (n 644).

[693] *B v France* (n 666).

and even considered in 2019 that States could not impose gender reassignment surgery as a condition for access to LGR. However, it still allows States to impose a divorce requirement if they have not legalised same-sex marriage.

On the other hand, the first relevant case of the CJEU for this specific question dates from 2004[694]. The CJEU initially had a fairly protective case-law, including for the right to LGR: for example, it considered that States could not request a divorce in order to grant LGR, despite this *de facto* leading to a same-sex marriage that legislation did not allow[695]. However, the CJEU has only offered this protection to transgender persons who had undergone gender affirming surgery – something which no preliminary question has challenged so far.

The next step will therefore be to go from assessing these two streams of cases individually to comparing and see where they converged and where they diverged with each other over time.

1.2.2. Assessing convergence and divergence between the Courts: General trends

As shown in Chapter 2, the Index is built around three categories: the legal test/standards, the answer to the legal sub-questions and the existence or absence of references to the other court's case. As for the previous case-studies, further explanations will be given for the first two clusters.

The standard used by the Courts for this case-study is one of the three following:

- no right to LGR at all.
- negative obligation – which comes with a wide margin of appreciation – meaning non-interference with the rights of transgender person (for example, letting them express their gender identity in their daily life without interference).
- positive obligation to establish an LGR procedure.

[694] *Case C-117/01 KB v NHS Pensions Agency* [2004] ECR 541. See Margi Joshi, 'K.B. v. National Health Service Pensions Agency and the Secretary of State for Health: The Influence of Human Rights Law in Protecting Transsexuals from Employment Discrimination Case Notes' (2004) 13 Law & Sexuality: A Review of Lesbian, Gay, Bisexual and Transgender Legal Issues 739.
[695] *Case C-451/16 MB v Secretary of State for Work and Pensions* ECLI:EU:C:2018:492. See Anne Pieter van der Mei, 'Overview of Recent Cases before the Court of Justice of the European Union (January − June 2018)' (2018) 20 European Journal of Social Security 272.

As for the answer to the underlying legal questions, there are two: first, on principle, *do trans people have a right to LGR*; second, *if so, what are the conditions that States can impose onto transgender persons to have access to this LGR?* This framework is built around the benchmark established by the Council of Europe, for which LGR procedures should not only exist, but also be accessible and not submitted to excessive conditions[696]. The Index accounts for the acceptance or refusal by European courts of different requirements:

- Divorce (for States not allowing same-sex marriage)
- Gender Affirming Surgery/sterilisation[697]
- Medical diagnosis

Other requirements exist in the legislation of various European States, such as age requirements, waiting a set time after social transition, or judicialisation of the procedure (as opposed to an administrative procedure, often lighter and quicker). However, these requirements were never challenged before the CJEU and the ECtHR, and therefore they never ruled on them. As a result, they were not included in the Index used in this chapter.

The collection of all relevant cases, followed by their readings and filtering to keep only the ones specifically pertinent to the question of transgender rights to LGR yielded a total of 15 cases, the majority of which originating from the ECtHR (*Table 19*).

Plotting the S/D score confirms that the index cannot be used when it comes to the first period, due to the absence of CJEU case-law. As with the previous chapter, this does not undermine the theoretical framework's viability, and only limits the use of the Index in the first period. During this second period, far from aligning with each other, the case-law of both Courts became fairly dissimilar (Figure 12).

[696] Council of Europe, Steering Committee on Anti-discrimination, Diversity and Inclusion (CDADI), *Thematic report on Legal gender Recognition in Europe*, 2022, p18.
[697] Requirement or non-requirement of surgery and/or sterilisation correspond to the issue of (de)pathologisation or (de)medicalisation of trans identities.

Case	Date	Court	S/D Score	C/D Score
Rees v UK	17/10/1986	ECtHR	N/A	N/A
Cossey v UK	27/09/1990	ECtHR	0	N/A
B v. France	25/03/1992	ECtHR	0	N/A
Sheffield and Horsham v UK	30/07/1998	ECtHR	0	N/A
Goodwin v UK / I v UK[698]	11/07/2002	ECtHR	0	N/A
KB	7/01/2004	CJEU	1.5	N/A
Richards	27/04/2006	CJEU	3.5	-2
Grant v UK	23/05/2006	ECtHR	4	-0.5
Hämäläinen v Finland	16/07/2014	ECtHR	5.5	-1
AP, Garçon and Nicot v France	06/04/2017	ECtHR	6	-0.5
MB	26/06/2018	CJEU	4	2
X. v FYRM	17/01/2019	ECtHR	5	-1
YT v Bulgaria	09/07/2020	ECtHR	5	0

Table 19: List of all cases collected for Case Study 3

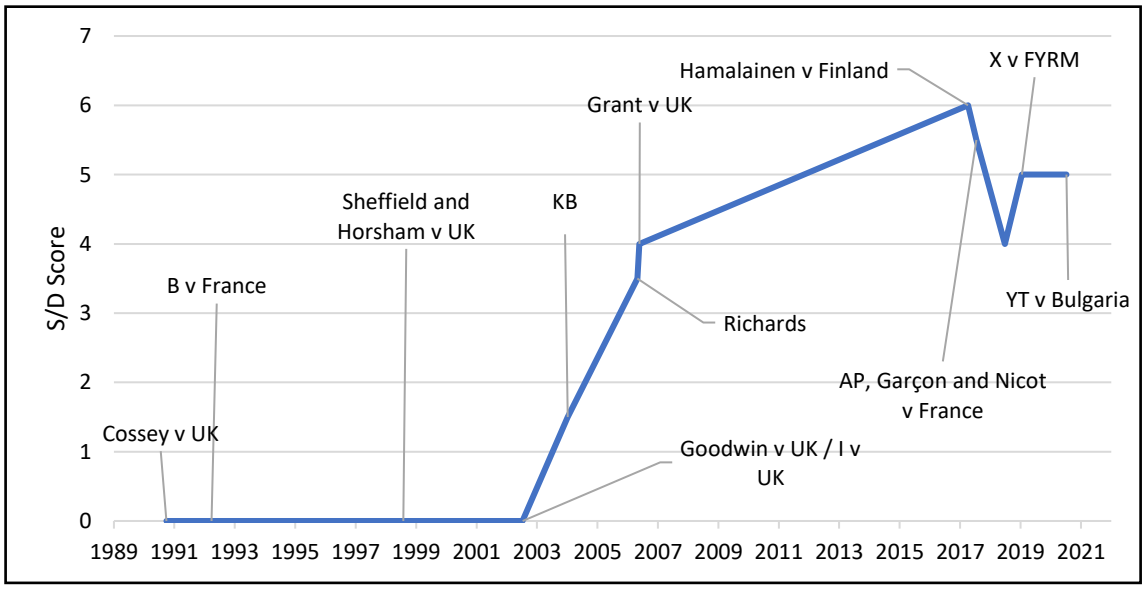

Figure 12: Evolution of S/D Score for Case study 3 (transgender right to LGR)

To understand what happened during the first phase, as in the second case study on the European Arrest Warrant, it is necessary to have a more in-depth reading of the case-law of the ECtHR. *Goodwin v UK* and *I v UK* are usually and rightfully considered to be the cases where the

[698] Both cases were delivered the same day, and virtually cover the same issue, with the same outcome. Therefore, they are counted as only one observation.

ECtHR truly changed its approach to the right to LGR, the 'explicit deviation from the previous jurisprudence'[699]. But these cases came only a few years after the *P v S* case, where the CJEU had an ambitious reading of the principle of non-discrimination on gender, and included transgender persons who had socially and medically transitioned within its scope. Therefore, in the *Goodwin* and *I* cases, the ECtHR increased the level protection it offered to transgender persons and in doing so, moved closer to the CJEU, despite the cases then not being a one-to-one comparison.

But to understand what happened in the second phase, the C/D is more helpful. *Figure* 13 shows the evolution of the C/D score for each Court. Indeed, the differences between the case-law of both Courts cannot be attributed to only one of them: they are simply in a standstill, where any movement towards or away from each other is small to the point of insignificance, never more than two points for an Index where it could reach eight. After a phase where the ECtHR one-sidedly moved closer to the CJEU, similar to what the CJEU had done towards the ECtHR in the case of exceptions to the execution of European Arrest Warrants (Chapter 4), both are now a standstill, where they mainly ignore each other's case-law, and so far, no litigants has forced them to confront the remaining differences that exist. Of course, the highly dynamic nature of the socio-legal discourse around trans rights and trans identities at the national level is likely to push European Courts to change their position in the near future, as new litigation reaches them.

As mentioned before, these differences mostly lie in the conditions that transgender persons can be asked to fulfil to have access to LGR: the CJEU has only offered protection to those who have medically transitioned (previously called 'post-operative') but is opposed to a requirement of divorce[700]. The ECtHR, on the other hand, has so far accepted a requirement of divorce to avoid a *de facto* same-sex marriage that is not allowed under domestic law, but has, since 2019, been

[699] Alexander Morawa, 'The 'Common European Approach', 'International Trends', and the Evolution of Human Rights Law. A Comment on Goodwin and I v. the United Kingdom' (2002) 3 German Law Journal.
[700] Confirmed by ECJ, DRD (n 693) para 53.

opposed to the requirement of sterilisation (a position differing from the CJEU) – a medical diagnosis, however, can still be requested by Member States.

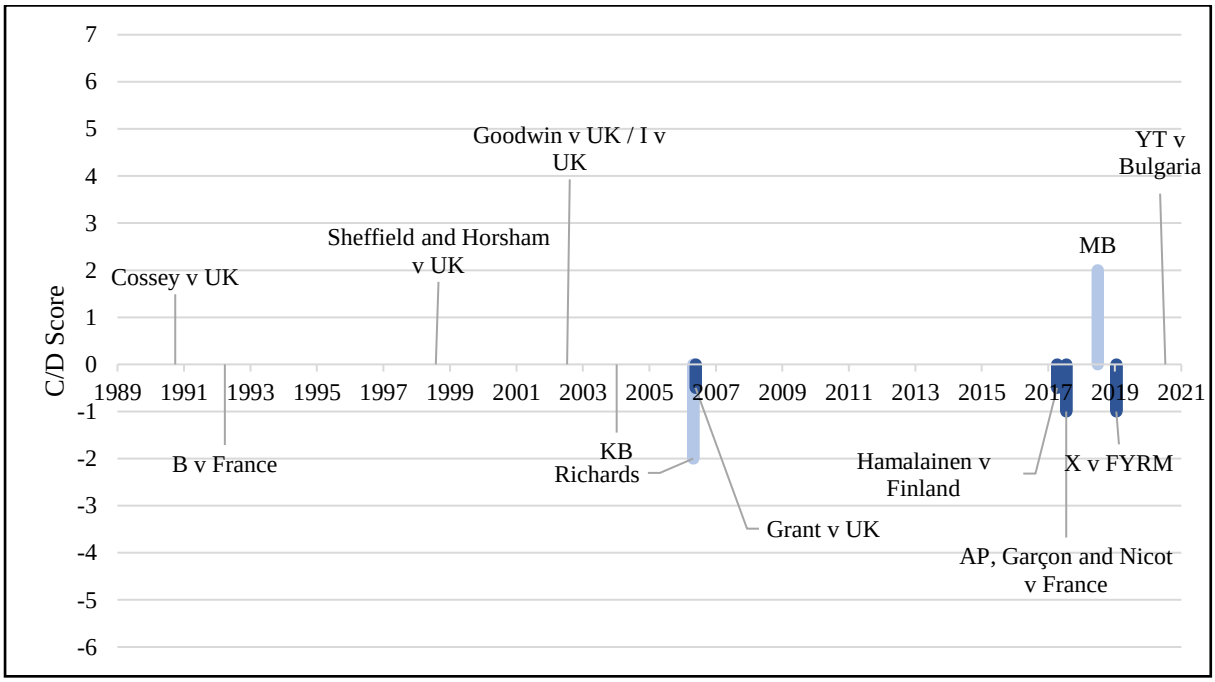

Figure 13: Evolution of C/D Score for Case study 3 (transgender right to LGR)

What remains is understanding *why* these are the trends that appeared, especially since they are puzzling on two counts: first, the ECtHR is the one that altered its case-law, potentially following the CJEU. But at this time, the Luxembourg Court had not yet really established itself as a human rights court, only an equality/non-discrimination one[701]. This is doubly surprising when compared with Chapter 4, where the exact opposite happened. Second, the ECtHR has had two successive phases where it displayed different behaviours: a willingness to follow the CJEU, and then a standstill. Why this change over time?

2. Explaining the convergences and divergences between European Courts

2.1. Existing scholarship: Legal commentary

Existing literature on trans rights, in particular transgender right to LGR, has so far mostly focused on the ECtHR's case-law, very likely due to the relatively higher number of cases on the

[701] Elise Muir, *EU Equality Law: The First Fundamental Rights Policy of the EU* (Oxford University Press 2018).

topic compared to the CJEU. A surge of interest came on the heels of the *Goodwin and I* cases, given how important these cases were substantially, and how sudden the change was[702], but also how significant it was as an example of the 'living instrument' doctrine that allows the Strasbourg Court to have an 'evolutive interpretation' of the ECHR over the years[703]. *Goodwin* has less often been placed in its jurisprudential context, but Sivonen still noted that it came after the less well-known *B v France* case of 1992, where the ECtHR had already adopted a more progressive stance on trans rights and legal recognition[704], and others have identified the CJEU's *P v S* being 'a source of inspiration' for the ECtHR[705], without giving much more information as to the how, or indeed the *why*.

The second element of note from the legal literature is the identification of the strong degree to which the ECtHR has historically medicalised/pathologised trans identities, including in the *Christine Goodwin* case itself[706], having a very paternalistic and gender-stereotypical approach to trans identities. Changes to this approach date only back to 2017:

> Whilst the Goodwin case served for a long time as the standard on legal gender recognition set by the European Court of Human Rights, recent cases have overruled some of the decisions reached in Goodwin. In fact, the genitocentrism that was represented in the Goodwin case is no longer reflected as such in the Court's current interpretation of the ECHR. Instead, the Court's judgments outlawed the requirement to undergo gender affirmation treatment as a precondition for accessing gender recognition in Council of Europe member states in A.P., Garçon and Nicot v. France (2017) and X and Y v. Romania (2021).[707]

[702] Sivonen (n 649).
[703] Angus Campbell and Heather Lardy, 'Transsexuals - The ECHR in Transition' (2003) 54 Northern Ireland Legal Quarterly 209; Morawa (n 706). The Case Law of the European Court of Human Rights on Sexual Orientation and Gender Identity
[704] Sivonen (n 649).
[705] Campbell and Lardy (n 710). Morawa (n 706). , The Case Law of the European Court of Human Rights on Sexual Orientation and Gender Identity
[706] Gonzalez-Salzberg (n 647); Sivonen (n 649).)
[707] Holzer (n 657). However, queer legal theorists remain sceptical of how much progress this truly amounts to; see Cannoot (n 681); Beger (n 692).

For example, we can see the high degree of focus on gender affirming surgery first as proof that gender is immutable in Sheffield:

> The Court would add that (…) gender reassignment surgery does not result in the acquisition of all the biological characteristics of the other sex despite the increased scientific advances in the handling of gender reassignment procedures.[708]

and the 'genitocentrism'[709] where a transgender identity is validated by the commitment to undergo gender affirming surgery:

> given the numerous and painful interventions involved in such surgery and the level of commitment and conviction required to achieve a change in social gender role, can it be suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender re-assignment.[710]

But in a more recent case, 2017's *AP, Garçon and Nicot*, the Court moves away from this focus on primary and secondary sexual characteristics as proof of validation of a trans identity:

> The first issue that arises (…) is whether, by requiring transgender persons seeking recognition of their gender identity to demonstrate the "irreversible nature of the change in appearance", French [law] made such recognition conditional on surgery or treatment resulting in sterilisation. The Court observes at the outset the ambiguity of the terms used. The reference to "appearance" suggests superficial change, whereas the notion of irreversibility reflects a radical transformation which, in the context of a change in the legal identity of transgender persons, in turn raises the notion of sterility. The Court considers this ambiguity to be problematic where individuals' physical integrity is at stake.[711]
>
> [the requirements] meant in all probability that they had to be sterilised. However, not all transgender persons wish to – or can – undergo treatment or surgery leading to such consequences (…). [S]ome people who did not wish to have recourse to such treatment or operations nevertheless agreed to this

[708] *Sheffield and Horsham* (n 680) [56].
[709] Holzer (n 657).
[710] *Goodwin* (n 154) [81].
[711] *AP, Garçon and Nicot v France* Apps Nos 79885/12, 52471/13, 52596/13 (ECtHR, 6 April 2017) [116]-[117].

> constraint in the hope of securing a successful outcome in the proceedings concerning the amendment of their civil status (…) Medical treatments and operations of this kind go to an individual's physical integrity (…).[712]

Beyond this literature, the question of trans rights before the ECtHR in particular has tended to be overshadowed by other LGBT rights litigation before Strasbourg, especially in more empirical and/or systematic studies. This is because trans rights followed a different trend or pattern in European case-law compared to other queer rights, such as the protection against discrimination of homosexuals, or the right to same-sex marriage[713]. Helfer and Voeten have researched the impact that the ECtHR has had on LGBT rights, and indeed found that a distinction had to be made between rights associated with sexual orientation (LGB) and rights associated with gender identity (T), with the former benefitting from more protection than the latter – but they did not disaggregate between both categories in their findings, making it impossible to conclude on trans rights specifically[714]. Dothan finds similar results, when conducting a case study on the judicial reputation of domestic and International Courts. He notes 'a trend toward greater protection of the rights of homosexuals and transsexuals'[715] but also more recently, for transgender persons, 'a clear pattern toward incrementally increasing protection of their rights'. Dothan attributes this evolution to the ECtHR always wanting to be more progressive on this issue, but only recently gaining both the support of a majority of States, along with the reputation to actually go through with it.

Interestingly, the scholarship more focused on the litigation of LGBT rights before the CJEU has noted the opposite trend there, especially in the early years: while the distinction between sexual rights and gender identity rights is still pertinent, the CJEU was more ambitious regarding trans rights than it was for the rights of sexual minorities. De Waele contrasted in 2010 that 'the Court

[712] *Garçon and Nicot* (n 718) [126]-[127].
[713] Gabriel N Toggenburg, 'Diversity Before the European Court of Justice: The Case of Lesbian, Gay, Bisexual, and Transgender Rights' in Elisabeth Prügl and Markus Thiel (eds), *Diversity in the European Union* (Palgrave Macmillan US 2009); Laurence R Helfer and Claire Ryan, 'LGBT Rights as Mega-Politics: Litigating Before the ECTHR' (2022) 84 Law and Contemporary Problems 59.
[714] Helfer and Voeten (n 669).
[715] Dothan, *Reputation and Judicial Tactics* (n 113) 320.

has boldly forged ahead and enhanced the rights of transsexual citizens', finding it an act of judicial activism; but that 'the story is slightly more complicated with regard to lesbian and gay rights'[716]. Overall, when it comes to trans rights at the CJEU, there has been a strong focus on the fundamental place of the *P v S* and the use of non-discrimination principles to advance trans rights.

This leaves the state of knowledge on the evolution of a trans right to LGR with two blind spots: first, a focus on the ECtHR's case-law which has overshadowed the existence of less numerous, but still relevant cases from the CJEU. Researchers have developed very robust analysis of the ECtHR's case-law, but have less often put this in perspective with the CJEU's case-law, and even less considered this as moving parts of a coherent whole[717]. Second, the legal approach has often been either through traditional doctrinal work or queer legal theories, but not through empirical legal studies seeking to understand *why* the ECtHR's case-law evolved in the first place, at the pace it did, and what the place of the CJEU was in this legal discourse, both as a standard setter in its own right and as an influence on the ECtHR even post-*P v S.*

2.2. A new theory for the judicial evolution of trans right to LGR in Europe

The initially conservative ECtHR moved towards a more protective case-law, converging with the CJEU partially: it ended up agreeing in 2002 on the existence of a right to LGR, in the aforementioned *Christine Goodwin* case. In the framework presented in Chapter 1, this would correspond to:

H3: The ECtHR choses partial convergence with the CJEU when there are two sources of threat to its authority.

But in the second phase, it continued to develop this more protective case-law, this time keeping up with its new preferences even if this meant maintaining a divergence with the CJEU, corresponding to one of two situations expected:

[716] Henry de Waele and Anna van der Vleuten, 'Judicial Activism in the European Court of Justice - The Case of LGBT Rights' (2010) 19 Michigan State University College of Law Journal of International Law 639.
[717] For example: Cannoot (n 681) focuses on the ECtHR, then has ap art on "Council of Europe and European Union" but does not include ECJ's case law at all.

H0/H1: *The ECtHR maintains the status quo/diverges from the CJEU when there is no threat or only one threat to its authority.*

Hypotheses for the CJEU cover only the second period, due to the lack of relevant case-law in the first. The CJEU maintained a fairly free-movement based protection of trans right to LGR. This does not mean a *lack* of protection, but rather that protection was indeed focused on protecting LGR less based on factors such as dignity or bodily integrity, and more non-discrimination, and effective access to EU law. It kept up with these preferences in its case-law, even at the cost of maintaining the small differences with the ECtHR:

> H0/H1: *The ECtHR maintains the status quo/diverges from the CJEU when there is no threat or only one threat to its authority.*

The case study will, therefore, in each phase, establish what the sources of challenges to the authority of European Courts were, and empirically trace whether they indeed were the causes of the Court's convergences or divergences with each other.

3. Strategic judicial dialogue and the right to LGR: explaining unexpected outcomes

3.1.1980-2002: Two Courts on the road to collision

This first period covers only ECtHR cases, starting with the very first case that made it all the way to a Court decision: *Van Oosterwijck* (1980, where the Court did not actually decide on the merits). It was followed by *Rees v UK* (1986), *Cossey v UK* (1990), *B v France* (1992), *Sheffield and Horscham v UK* (1998) and *Goodwin and I v UK* (2002).

3.1.1. Overview of potential challenges towards the ECtHR

The first cases brought to the ECtHR were during a very different context for the Strasbourg Court: notably much fewer Contracting Parties than today, since many Eastern European States did not join until the mid-1990s, making compliance of each State even more important, as non-compliance would immediately be salient. But additionally, it also means that at least until the mid-

1990s, it was likely easier for the ECtHR to conduct reviews of domestic legislation and relevant case-laws within Member States.

The ECtHR was at least informed of the laws of Contracting Parties and their evolutions through the submission of London-based NGO Liberty as a third-party intervener in *Sheffield* and *Goodwin*. This provided the ECtHR with successive snapshots of the legislative landscape on the matter in Europe, whereby States were overall more and more open to providing LGR to transgender persons. However, there was seemingly no such survey available for the three cases before these ones. The ECtHR does conduct reviews of domestic laws internally, but this is a time- and effort-intensive process. This might explain why the Strasbourg Court did not dwell at all on the details of the policies and legislations that were in place in its Contracting Parties at this time[718]. For example, in *Rees* (1986):

> Several States have, through *legislation* or by means of legal interpretation or by administrative practice, given transsexuals the option of changing their personal status to fit their newly-gained identity. They have, however, made this option subject to conditions of varying strictness and retained a number of express reservations (for example, as to previously incurred obligations). In other States, such an option does not - or does not yet - exist.[719]

Then in *Cossey*:

> There have been certain developments since 1986 in the law of some of the member States of the Council of Europe. However, the reports accompanying the resolution adopted by the European Parliament on 12 September 1989 (…) and Recommendation 1117 (1989) adopted by the Parliamentary Assembly of the Council of Europe on 29 September 1989 - both of which seek to encourage the harmonisation of laws and practices in this field - reveal, as the Government pointed out, the same diversity of practice as obtained at the time of the Rees judgment. Accordingly this is still, having regard to the existence of little

[718] In addition, many Contracting Parties at this time still did not have any legal frameworks dedicated to LGR anyway.
[719] *Rees* (n 666) [37].

> common ground between the Contracting States, an area in which they enjoy a wide margin of appreciation. [720]

Then finally, more detailed in *Sheffield*, explicitly thanks to Liberty's submission:

> As to legal developments in this area, the Court has examined the comparative study which has been submitted by Liberty (…) However, the Court is not fully satisfied that the legislative trends outlined by amicus suffice to establish the existence of any common European approach to the problems created by the recognition in law of post-operative gender status. In particular, the survey does not indicate that there is as yet any common approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law such as marriage, filiation, privacy or data protection, or the circumstances in which a transsexual may be compelled by law to reveal his or her pre-operative gender. [721]

It is important here to note that what the Court was observing was a very slow, progressive trend towards some form of LGR in its Member States. However, this ultimately constituted a *higher* degree of protection that what the ECtHR was providing at this time, which, contrary to issues that have historically arisen with EU fundamental rights[722], is not a problem under the Convention's framework. This was repeatedly stressed by interviewees from both the CJEU and the ECtHR. From CJEU interviewees: 'We know that case-law and, and that case-law is in a way unproblematic for us. It's a starting point. But it's a minimum.'[723], and from an ECtHR interviewee:

> We might have situations where we have reached different solutions without this necessarily creating a problem for the national courts. It is perfectly possible that (…) when defining the *effective* protection, the level of protection of a certain right, one court might raise that protection a bit higher than the other. And this is okay, this is not creating a conflict, simply because for the national courts it would be relatively easy to follow the higher standard without this

[720] *Cossey* (n 666) [40].
[721] *Sheffield and Horsham* (n 680) [57].
[722] Under the EUCFR, States can, theoretically, offer higher standard of protection of EU fundamental rights. However, this must not clash with their obligation to comply with EU law its principle of primacy. As seen in Chapter 4, this can indeed be an issue.
[723] Interview 9, ECJ Judge, 13/03/2023.

> getting into conflict with any of the requirements it has to meet under European law.[724]

As a result, none of the improvements in LGR in domestic legislation can be framed as challenges or threats to the authority of the Court, as a higher degree of protection does not constitute non-implementation of the Convention or of the Court's rulings. The issue might have been different if LGR legislations required a balance of rights[725], a trade-off between the rights of trans persons and the rights of others – but it was only an issue of individual rights to be balanced with a specific public interest (stability of public records), which does not infringe on anyone else's rights. As a result, the State is free to establish LGR procedures if it wants to, without it being a challenge to the ECtHR at that point. It is not lowering the protection or infringing on the rights of others in doing so. The optics of it may not be favourable to the Strasbourg Court if it becomes disconnected from what the actual European consensus is, and thus it might open itself to political and legal criticism, but it does not constitute a threat to its authority.

However, it is worth looking more specifically at UK legislation. This is because out of the six cases brought to the ECtHR during this period, five were lodged against the United Kingdom. As a result, the Strasbourg Court would have been particularly attuned to the (lack of) change in its legislative framework. It must be noted that while it did not grant a right to LGR, the Strasbourg Court slowly encouraged the United Kingdom to amend its legislation in order to provide proper relief to trans persons:

> it would appear that the respondent State has not taken any steps to do so. The fact that a transsexual is able to record his or her new sexual identity on a driving licence or passport or to change a first name are not innovative facilities. They obtained even at the time of the Rees case. Even if there have been no significant scientific developments since the date of the Cossey judgment which make it possible to reach a firm conclusion on the aetiology of transsexualism, it is nevertheless the case that there is an increased social acceptance of

[724] Interview 16, ECtHR Judge, 20/04/2023.
[725] Interview 16, ECtHR Judge: 'The risk is, and, and, and the real risk is where we have conflicting rights. And, and this is as, as human rights law is developing we, we are more and more facing situations where we have to balance between two conflicting basic rights. Mm-hmm. Where the balance and the way one of the courts prescribes that this balance should be reached, differs from, from the other.'.

> transsexualism and an increased recognition of the problems which post-operative transsexuals encounter. Even if it finds no breach of Article 8 in this case, the Court reiterates that this area needs to be kept under review by Contracting States.[726]

Therefore, the UK was the one Member State in a position to potentially challenge the ECtHR by *not* following its strongly worded advice to at least make some accommodation to its legislation.

When the cases first started to come to the ECtHR, the UK did not allow changes to gender markers on birth certificates[727]. Following the first three cases successively brought against the United Kingdom before the ECtHR, an Interdepartmental Working Group on Transsexual People was set up by the State Secretary for the Home Department in April 1999, but this was already more than 10 years after the first case that the ECtHR adjudicated on (*Rees*, in 1986[728]). Even then, progress was particularly slow-going: the Working Group produced a report in April 2000[729], after which any reform process was once again halted. In 2002, the UK Government presented a Bill that would open a proper LGR procedure allowing for birth certificates to be amended[730], but nothing was done about it before the *Goodwin* and *I* cases in 2002.

Therefore, the main challenge to the preference of the ECtHR at that time came from the UK specifically. Governments were in discordance regarding the existence of LGR procedures. There was a general trend towards including this procedure in domestic laws[731], which, while being a point of discordance with the ECtHR, would not have placed them in violation of its case-law. The reluctance of one single State to comply, while important in light of the reduced number of Member States at this time and the saliency of the issue in this State, does not characterise a challenge to Court authority either. As established in Chapter 2, there would need to be at least multiple States

[726] *Sheffield and Horsham* (n 680) [60].
[727] *Rees* (n 666) [23].
[728] Where the Court, despite finding no violation on the part of the UK, concluded 'However, the Court is conscious of the seriousness of the problems affecting these persons and the distress they suffer. The Convention has always to be interpreted and applied in the light of current circumstances (…). The need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and societal developments.' *Rees* (n 666) [47].
[729] Home Office, Report of the Interdepartmental Working Group on Transsexual People (April 2000).
[730] Office for National Statistics, White paper, *Civil Registration: Vital Change (Birth, Marriage and Death Registration in the 21st Century)*, CM 5355.
[731] Noted by both the ECtHR and the EComHR (see for example *Sheffield and Horsham* (n 680) [50].)

expressing a similar stance – but crucially, no State submitted any observations during any of these cases brought to the ECtHR. This is a sharp contrast with the previous case study, and shows that the issue was not a particularly salient one, or one that was salient enough to share any concerns they might have with the Strasbourg Court. It is difficult to know whether this can be attributed to any true agreement of the Governments, or if they were side-stepping a legally and socially contentious matter. But the results, for the theoretical framework of this dissertation, is the same: they were not ready to enter in any confrontation with the ECtHR on this question.

Domestic courts were particularly divided on the issue of LGR, especially given the initial lack of real legal framework to be found in domestic laws. For example, in France, the *Cour de Cassation* refused over multiple cases from the 1970s to 1990s to offer any possibility to change the gender marker on the register of the birth certificate, because 'it did not result from the observations of the challenged decision [that] the existence of the change of sex [was] due to a cause foreign to the will of the interested party'[732]. But the situation for first- and second-level courts was less homogenous. The ECtHR itself, conducting a review for the *B v France* case, noted:

> A large number of French *tribunaux de grande instance* (T.G.I.) [First Instance Tribunals] and courts of appeal (C.A.) have granted applications for amendment of entries in civil status registers relating to sex and forenames [cites 24 cases]. The great majority of them have become final and binding, the prosecutor's office not having exercised its right to appeal. Contrary rulings have, however, been given by other courts [cites 14 cases]).

But, on the other hand, the *BVerfG* early on framed the question in terms of human dignity and right to self-determination, in a strongly worded 1978 decision:

> Article 1, paragraph 1 GG protects human dignity, the perception and awareness of human's own individuality. This includes that humans can command and shape their own lives. Article 2 paragraph 1 GG, in connection with article 1 paragraph 1 GG, ensures unrestricted development of humans' skills and abilities. Human dignity and the basic right to free personal development

[732] 1 March 1987, D. 1987, 445, note P. Jourdain; see also 16 December 1975, D. 1976, 397; 30 November 1983, D. 1984, 165; 3 March 1987 and 31 March 1987, D. 1987, 445 J.C.P. 1990, II, 21588.

> therefore demand the attribution of human's personhood to the gender to which they belong according to their physical and mental constitution.[733]

In this ruling, a transwoman had sought to have her gender marker changed, following a hormonal treatment and surgical operation. The Court considered that she had to be granted this possibility, although taking a pathologising approach, as what was recognised was the consequence of the operation itself, which had been 'medically indicated'[734]. This was, therefore, particularly close to the approach subsequently adopted by the ECtHR in *Goodwin*. This decision of the *BVerfG* would lead to the adoption of what has been termed 'The Transexual Law' in 1980[735] to set up a proper LGR procedure in Germany.

But overall, domestic courts were then in the same situation as Governments *vis-à-vis* the ECtHR: a refusal to allow LGR would be in line with the ECtHR's case-law. And on the other hand, as explained in the previous section, considering that there is a right to LGR would simply mean that the domestic standards of protection are higher than the ECtHR's, which is not a challenge.

Yet here as well, due to its very unique place in the litigation of trans right before the ECtHR, it is worth having a deeper look at the case-law of UK courts. As there was no definition of sex/gender in the UK legislation, it fell to the courts to determine which criteria was to be used, which was later adopted in practice by the General Registrar. The standing precedent was the *Corbett v Corbett* case[736], which established that sex was to be determined by chromosomes, gonads and genitals[737]. This approach was followed by UK lower courts[738] and extended to criminal law in

[733] BVerfG 49, 286 – Transsexuelle I. Note that sex and gender is not differentiated in German.
[734] Gregory A Knott, 'Transsexual Law Unconstitutional: German Federal Constitutional Court Demands Reformation of Law Because of Fundamental Rights Conflict' [2010] Saint Louis University Law Journal 997.
[735] Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen [Transsexuellengesetz—TSG] ('Law on the Changing of First Names and the Establishment of Sex Status in Special Cases') Sept. 10, 1980, BGBl.
[736] That is despite the Judge himself noting that 'The question then becomes what is meant by the word 'woman' in the context of a marriage, for I am not concerned to determine the 'legal sex' of the respondent at large.'
[737] *Corbett v Corbett* (n 664).
[738] *Rees* (n 666) [29].

the *R v Tan* case[739]. While this would not have been particularly conducive to encouraging the LGR reform required, it did not necessarily prevent such reforms either. More clarity would be brought through the 2001 *Bellinger v Bellinger* case[740], where the House of Lords confirmed that there was not a right to LGR in the United Kingdom, but acknowledged that this ran contrary to the requirements stemming from the ECHR, and therefore made a declaration of incompatibility – the most it could do under the 1998 Human Rights Act[741].

Therefore, we cannot conclude that there was any significant threat or challenges from domestic courts; even from UK courts, which appeared, in the end, willing to adapt if necessary.

Lastly, as presented in Chapters 1 and 2, challenges coming from the CJEU can be distinguished between specific and systemic challenges. This first phase, spanning from 1980 to 2002, was one of cooperation between both Courts, as per Chapter 2: at that time, the CJEU relied on the ECHR as its source to develop EU fundamental rights, and started to refer to the ECtHR's case-law as well. The number of references of the Luxembourg Court to Strasbourg case-law was also growing as the EU CFR had not yet been adopted. Moreover, in the 1990s, judges of the CJEU and of the ECtHR started meeting more regularly, with the institution of yearly meetings.

While this was a cooperative time for both Courts in general, the CJEU had started to develop its case-law on LGBT rights at large, which displayed an interesting trend at that time; as noted by Toggenbrund 'the [CJEU] has proved to be more ready to accommodate the needs of transgender persons than of gay and lesbian persons'[742]. For gay and lesbian rights, the cases of reference at that time were *Grant* and *D & Kingdom of Sweden v Council*[743], both cases in which the CJEU was

[739] 'In our judgment, both common sense and the desirability of certainty and consistency demand that the decision in Corbett v Corbett should apply for the purpose, not only of marriage, but also for a charge under s 30 of the Sexual Offences Act 1956 or s 5 of the Sexual Offences Act 1967.'
[740] *Bellinger v Bellinger* [3002] UKHL 21.
[741] Human Rights Act 1998 Section (4). According to this Section, '[i]f the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility'. However, this does not affect the continued existence of the protection of domestic law in the UK legal order, and only Parliament can engage in legislative reform to address the incompatibility. See Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (1st edition, Cambridge University Press 2009).
[742] Toggenburg (n 720) 136.
[743] *Case C-249/96 Lisa Jacqueline Grant v South-West Trains Ltd* [1998] ECR I-621; *Joined cases C-122/99 P and C-125/99 P D & Kingdom of Sweden v Council* [2001] ECR I-4319.

asked whether the difference in treatment between same-sex couples and heterosexual couples under domestic law, preventing the same-sex couple from benefitting from EU law applicable to married couples, was discriminatory. The answer of the Court was negative, a fairly significant blow to sexual minorities in Europe, as denoted by the literature[744].

This is why the contrast with the CJEU's position on the *P v S* case is so stark, where 'In all three cases that have been decided so far [*P v S*, and the later *KB* and *Richards* cases] the Court has boldly forged ahead and enhanced the rights of transsexual citizens'[745]. In *P v S* (1996), the applicant was a British trans woman who had been dismissed from a place of work right after starting to medically transition and alleged a discrimination on the basis of her trans identity before UK courts[746]. These courts asked the CJEU if this could be a case of gender-based discrimination, falling under a 1976 directive on discrimination[747], and the Luxembourg Court agreed. This was all the more surprising since even the Commission had sided with the British Government in arguing that this situation was not covered by the Directive[748]. Yet, in an ambitious yet rigorous reasoning, the CJEU considered that the basis of the dismissal was the gender of the applicant; that since she was a woman, her treatment needed to be equal to that of a man in the same situation, and that since it was her status as a women, as opposed to being a man, which led to her dismissal, this was a case of discrimination that falls under the scope of the 1976 Directive:

> [T]he scope of the directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned.

[744] Toggenburg (n 720); Helfer and Voeten (n 669). But for a different assessment, see also :de Waele and van der Vleuten (n 723).
[745] de Waele and van der Vleuten (n 723) 17.
[746] *P v S* (n 154).
[747] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976]OJ L 39/50.
[748] Although unfortunately the Observations of the Commission are not public, and the ECJ only noted that 'The United Kingdom and the Commission submit that to dismiss a person because he or she is a transsexual or because he or she has undergone a gender reassignment operation does not constitute sex discrimination for the purposes of the directive' *P v S* (n 154) [14].

> Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.[749]

A notable caveat, however, was that the CJEU only included under the protection those who have or plan on undergoing a gender affirming surgery, something which would remain constant in its future case-law.

Why the CJEU had such an original (and ambitious for the time) approach to trans right compared to non-discrimination of sexual minorities has been puzzling[750]. A legalist interpretation would be that the CJEU was actually able to bring discrimination against transgender persons under the umbrella of *gender-based* discrimination, for which it did have a textual basis (as opposed to discrimination based on sexual orientation). However, this explains that this was indeed a possibility, but it does not answer *why it did*, at a time where trans identities were much less accepted.

An explanation advanced by De Wael is that a protection of transgender person would have been less disruptive of domestic laws and policies, compared to a similar protection for sexual minorities, purely owing to the smaller number of transgender persons compared to gay and lesbian persons in Europe[751]. Additionally, according to an AG of the Court at the time, the priority of the CJEU was still the development of the single market[752]. Regardless, the particular protection of trans persons offered by the CJEU was noticed; the case did not have a direct impact on access to LGR, but still marked a strong willingness of the CJEU to establish a case-law looking favourably on trans identity, on the basis of the protection against gender-based discrimination. Framing it *as* a gender-based discrimination inscribed this decision in the very well-established case-law of the CJEU on the topic,

[749] *P v S* (n 154) [21].
[750] With Helfer noting 'If the drafters' intent to bar discrimination between men and women did not deter the Court in P v. S from invoking the Community's goals of promoting equality and eradicating gender stereotyping as a justification for extending the EC's sex discrimination ban to transsexuals, then those same objectives justified a decision in favor of Lisa Grant, notwithstanding the drafters' failure to provide express legal protections for lesbians and gay men' Helfer and Voeten (n 669).
[751] de Waele and van der Vleuten (n 723).
[752] Interview 5, Former ECJ AG, 28/11/2022.

with other foundational cases such as *Defrenne II*[753], which the Luxembourg Court actually quotes in *P v S*[754], and shows that this would be a stable jurisprudence rather than a one-off decision imputable to a particular or very idiosyncratic situation. While not directly in opposition with the initial case-law of the ECtHR, it still marked that both Courts were on the course towards a potential collision if a relevant case was to be raised before the CJEU. And interestingly, in 2000, a UK tribunal stayed proceedings in order to ask the CJEU another question about the LGR and the requirements that can be imposed in order to access it[755].

But just as with legislation and domestic courts' decisions, the fact that the CJEU was on track to grant a higher level of protection to binary transgender persons and their right to LGR compared to the ECtHR would not have been an issue for the Strasbourg Court. If the CJEU decides on higher standards, this would need to be implemented by Member States, which as established previously does not constitute a challenge to the ECtHR.

3.1.2. Making sense of the ECtHR: a convergence of convenience with the CJEU

One immediate alternative explanation for the evolution of the ECtHR's case-law from *Rees* to *Goodwin* in the absence of any substantial challenge to its authority is that the evolution of the case-law of the ECtHR over this first period was, in a sense, organic: that it was not a reaction to anything other than the presence or absence of a consensus within Member States. This would explain the change in *Christine Goodwin and I:* by that time, laws in Contracting Parties had sufficiently evolved and settled that there was, now, a European consensus that the Strasbourg Court could rely on. This explanation, however, can be dismissed on two different counts.

First, the presence or absence of a consensus was never clear cut. From the beginning, the ECtHR was ill-at-ease with this particular question. In *Van Osterwijck*, it refused to address the substance of the claim, instead dismissing it on the ground that the applicant had not exhausted all domestic

[753] *Case 43-75 Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* (1976] ECH 455.
[754] *P v S* (n 154) [19].
[755] This would become the ECJ's 2002 *KB* case, sent by enthe Court of Appeal (England and Wales) (Civil Division) on 14 December 2000.

remedies, a very questionable argument that was criticised by the separate Opinions[756]. In *Rees*, the Commission of Human Rights had concluded that there had been a violation of Article 8[757], showing that finding such violation would not be outlandish. Already in *Cossey*, dissenting Judges Macdonald and Spielman argued that

> since 1986 there have been, in the law of many of the member States of the Council of Europe, not "certain developments" but clear developments. We are therefore of the opinion that, although the principle of the States' "wide margin of appreciation" was at a pinch acceptable in the Rees case, this is no longer true today.[758]

Second, when it decided to overrule its standing case-law in *Goodwin and I*, the ECtHR did *not* actually rely on the existence of a consensus, and instead looked at an 'international trend':

> While this would appear to remain the case, the lack of such a common approach among forty-three Contracting States with widely diverse legal systems and traditions is hardly surprising. (…) The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.[759]

The second explanation could be attributed to an endogenous change of preferences within the bench of the ECtHR, but as demonstrated previously, this change would not be substantial enough until at least after *Goodwin*, and would not explain the first evolution in the *B v France* case in 1992.

To understand the logic of the Court, it is therefore useful to retrace the steps of the mechanism presented in cases of convergence in Chapter 1. This appears at first glance to be a case

[756] *Van Oosterwijck* (n 644). Concurring Opinion of Judge Thór Vilhjálmsson; Partly Concurring Opinion of Judge Ganshof Van Der Meersch; Joint Dissenting Opinion of Judges Evrigenis, Liesch, Gölcüklü And Matscher
[757] *Rees v United Kingdom* (1984) 31 DR 89.
[758] *Cossey* (n 666). Joint partly dissenting opinion of Judge Macdonald and Judge Spielmann.
[759] *Goodwin* (n 154).

of convergence without sufficient challenge to the authority of the ECtHR, and therefore breaking down each step will help to establish what actually happened.

First, the Strasbourg Court was aware of the consistent refusal of the UK to implement any change. While it is more difficult to know how much the Court knew about the evolution of domestic legal frameworks and the case-law of domestic courts before Liberty and other Civil Society Organisations (CSOs) started to submit observations, it is certain that the Strasbourg Court was becoming more and more familiar with the UK authorities' constant refusal to alter their legislation on LGR. Each successive case included a review of the UK legislation and of the steps that had been taken (or not been taken) by British authorities to start providing a procedure for LGR; the Strasbourg Court even tracked down the 1997 UK case complying with the CJEU's ruling[760].

But according to interviewees, if the ECtHR is receptive to the views of domestic courts, in particular constitutional Courts, seeing itself as working in collaboration with them[761], it is also attuned to whether a resistance to its case-law is generalised or localised:

> In some cases where there has been disagreements with national courts (…) one of the factors, the many factors that an International Court has to take into account is whether the same issue provokes any, any reaction in other jurisdictions, in other countries, whether there is [sic] other national courts that are indicating that this is difficult to follow and apply whether the principle is established in a way that did not provoke any discussion within, within the ECHR itself[762].

Here, the ECtHR would have therefore been able the identify the resistance and non-compliance as being limited to the UK, rather than being a Europe-wide issue – especially with the lack of cases coming from other jurisdictions, and the lack of observations submitted by Member States.

The next step of the mechanism, once a challenge has been identified, would have been to check that there was a trade-off between a forced convergence with the CJEU and the preferred outcome

[760] *Sheffield and Horsham* (n 680) [33] - [34].
[761] Interview 12, Former ECtHR Judge, 28/03/2023; Interview 11, former ECtHR Judge 14/03/2023.
[762] Interview 16, ECtHR Judge 20/04.2023.

of the ECtHR. However, this is where a distinction must be made between the previous chapters and this case-study, at this particular time. There was no such trade-off at this point: the preference of the ECtHR, as shown in its successive rulings, was towards some form of access to LGR for binary trans persons, at least after full medical transition, as it kept on nudging the UK towards. A convergence with the CJEU was not a shift away from its preferences, but towards it. This is where we can see that rather than being pressured towards convergence, the ECtHR here took advantage of the evolution of the CJEU's contemporary case-law to push back against the UK's resistance.

The timing is here fundamental, with two key evolutions from the EU legal order that would matter: the *P v S* ruling from 1996, which has already been covered previously, and the EU Charter of Fundamental Rights.

On the *P v S* ruling, one additional piece of information that must here be mentioned up is that the UK complied with this CJEU decision, when it had not done so with the previous ECtHR decisions under study.

Regarding the Charter: it was proclaimed officially in 2000[763], and promised a wider scope of protection, accounting for economic and social rights, which were notoriously absent from the ECHR. In particular regarding family-related rights and sexual/gender minorities, the Charter would be more progressive. In 2001, McGlynn noted:

> [i]s the Charter likely to herald a new approach and provide "more extensive" protection? The first question here is whether the right to marry can be extended to transsexuals and secondly whether an extension to gay and lesbian couples is also possible. It seems that movement in relation to the rights of transsexuals is the more likely in the Union context[764].

Indeed, while the ECHR had Article 12 protecting the right to marry for 'men and women of marriable age', which had been interpreted by Judge Farinha as protecting heterosexual marriage

[763] Fontaine Nicole, President of the European Parliament, 'Speech to the Heads of State and Government of the European Union' (European Council, Biarritz, 13 October 2000)
[764] 'Families and the European Charter of Fundamental Rights: Progressive Change or Entrenching the Status Quo?' (2001) 26 European Law Review 582.

only[765], the upcoming CFR distinguished the right to marry from the right to found a family in its Article 9, which promised a new protection for non-traditional families not based upon marriage[766]. This is something the Court itself mentioned in *Goodwin and I*: 'The Court would also note that Article 9 of the recently adopted Charter of Fundamental Rights of the European Union departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women'.

The goal of the ECtHR *vis-à-vis* the UK and the CJEU appears clearer when one looks at the actual content of the Goodwin ruling. In particular, the Strasbourg court went out of its way to rely on the Charter in its argumentation; the CFR, at that point, had been proclaimed but would not be legally binding until 2009. Yet it was mentioned in *Goodwin and I* as an 'International Text', the only one of its category in this ruling, when the ECtHR did not mention, for example, the 1981 PACE Recommendation on the Council of Europe. For Campbell and Lardy:

> This use of the Charter could be described as appropriate as a makeweight in a particular context. But it is also possible that it is a very deliberate – and perhaps questionable – attempt to "modernise" the ECHR and allow its use in other cases where an "evolutive" approach is attractive" (…) The use of the EU Charter in particular, even just as an "inspiration", is curious because of its legal status (…). Further, the Charter is not just another international instrument, being regarded from one point of view as a more up-to-date, "transitioning", ECHR, yet not officially accepted as such.[767]

Moreover, the literature has sometimes found intriguing similarities in the language used by the ECtHR and the CJEU. For example, it stated in *Goodwin* that 'the very essence of the Convention is respect for human dignity and human freedom'[768] something it had never said before, when, interestingly, the ECHR does not guarantee a right to human dignity (contrary to the CFR, which

[765] *B v France* (n 666). Dissenting Opinion of Judge Pinheiro Farinha [9].
[766] Giorgio Sacerdoti, 'The European Charter of Fundamental Rights: From a Nation-State Europe to a Citizens' Europe' (2002) 8 Columbia Journal of European Law 37, 45.
[767] Campbell and Lardy (n 710).
[768] *Goodwin* (n 154) [90].

does so in its very first article!). Since then, this expression has only been used 16 other times[769]. However, this is similar to the way the CJEU had argued its *P v S* decision: 'To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard'[770].

However, the question is therefore whether this was a case of spontaneous convergence, with one Court fully convinced by the other's higher-level protection, or whether it was the ECtHR cherry-picking a case externally supporting its views. The first element needed to answer this question is that the *P v S* ruling was delivered in 1996, which means that the argumentation and use of the CJEU's case-law in 2002's *Goodwin* could actually have been done in 1998's *Horsham and Sheffield*. Instead, the CJEU's case-law was only mentioned in 'other relevant material' – along with the 1997 Decision of the Employment Appeal Tribunal implementing this ruling – but the ECtHR did not come back to it, and in the end returned to its traditional outcome regarding the lack of right to LGR. In other words, the reference to the CJEU was not *integrated* into its reasoning at all. It is only in *Christine Goodwin*, four years later, that the ECtHR actually referred to *P v S* within the ruling itself[771]. A spontaneous, non-strategic convergence would have seen the ECtHR rally to the CJEU in *Horsham and Sheffield*, not five years later in Goodwin.

This convergence is, therefore, not genuine. The use of the CJEU's jurisprudence, as a legitimacy-enhancing argument, has the veneer of dialogue while actually being a strategic use of the EU's evolving human rights framework, which, this time, worked in the favour of the ECtHR, but this convergence is one of *convenience*. This provides an example of convergence with a mechanism different to the one being tested in this dissertation: the conclusion of this chapter will offer explanations as to why this ended up being the case.

[769] As per a search on the HUDOC Database, last consulted on 29/07/2023 (https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22\%22the%20very%20essence%20of%20the%20Convention%20is%20respect%20for\nhuman%20dignity%20and%20human%20freedom\%22%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22]})
[770] Campbell and Lardy (n 710).
[771] *Goodwin* (n 154) [92].

This convergence of the ECtHR towards the CJEU, however, would slow down and reach an end after the *Goodwin* case. We can now turn to this second phase, where shifting relationships between the Courts, and shifting preferences of the ECtHR, led to a standstill that has so far been left untouched despite the remaining divergences.

3.2. 2002-2019: The delicate art of avoiding judicial conflict

The second phase sees the development of the CJEU's case-law, with cases *KB* (2004), *Richards* (2006) and *MB* (2018). As for the ECtHR, the relevant cases of this period are *Grant v UK* (2006), *Hämäläinen v Finland* (2014), *AP, Garçon and Nicot v France* (2017), *X v Former Yugoslav Republic of Macedonia* (2019) *and YT v Bulgaria* (2020).

3.2.1. Overview of the challenges

With the ECtHR now protecting the principle of a right to LGR, the distinction on what does or does not constitute a challenge to the authority of one of the Courts often came down to the conditions that could limit access to LGR. In this section, the overview of the position of Governments, domestic courts and each European Court will therefore account for these particular elements.

The trend of European legislative reforms establishing LGR procedures for trans people continued in this second period, but seemed to reach a plateau, whereby some States showed little willingness to kickstart such reforms. The United Kingdom did adopt the Gender Recognition Act in 2004 to comply with the *Christine Goodwin* ruling; but two resolutions of the PACE, in 2010 and 2015[772], offer successive snapshots of the legislative landscape in Europe, which are not as encouraging. The Parliamentary report on which the 2010 Resolution was based on notes that

> Apart from respect for their rights to life and security, **changing name and gender** is the key in transgender people's lives. However, this "entry" into society does not exist, or is made very difficult, in many Council of Europe member states, which violate the European Convention on Human Rights (right

[772] Parliamentary Assembly of the Council of Europe, 'Resolution 1728 (2010) Discrimination on the Basis of Sexual Orientation and Gender Identity' (2010); Parliamentary Assembly of the Council of Europe (n 688).

> to privacy, Article 8, see case of B. v. France (1992)). Without **name and gender recognition**, transpeople are marked as transgender (this concerns ID cards, credit and bank cards, school and university degrees, etc.) which leads to stigmatisation in every aspect of life and makes participation in social life, travelling or finding a job virtually impossible.[773]

And in 2015, a new PACE report identifies that 'only 34 countries [out of 47] in Europe have legal provisions to recognise a trans person's gender identity. Transgender people's existence is hence de facto not recognised in a quarter of the Council of Europe member States'[774].

But the distribution of Contracting Parties with and without LGR procedures was not random across Europe. In 2014, the Strasbourg Court noted that twenty-four members states of the ECHR 'have no clear legal framework for legal gender recognition or no legal provisions that specifically deal with the status of married person who have undergone gender reassignment'[775]. But among those, only four were members of the EU with no LGR at all in principle, and Greece and Luxembourg established them in in 2017 and 2018 respectively. This means that by 2018, Bulgaria[776] and Cyprus were the only EU States that still did not provide any administrative, legal or judicial basis for LGR; while Albania, Andorra, Liechtenstein, Monaco, San Marino and the Former Yugoslav Republic of North Macedonia still did not have a procedure at all[777], and other States, such as Russia, were retreating regarding the protection of gender and sexual minorities.

However, there clearly was less consensus regarding the conditions and restrictions that States could impose for an individual to actually make use of an LGR procedure. These can be broken down in three categories that came up before the ECtHR at some point: requirement of

[773] PACE, Committee on Legal Affairs and Human Rights, 'Discrimination on the Basis of Sexual Orientation and Gender Identity, Report Doc. 12185' (2010) para 22. Emphasis added by the author.
[774] PACE Committee on Equality and Non-Discrimination, 'Discrimination against Transgender People in Europe Report Doc. 13742' (2015).
[775] *Hämäläinen* (n 673).
[776] Bulgaria originally provided a LGR procedure, but a 2018 ruling from its Constitutional Court blocked the possibility to make use of it.
[777] *Garçon and Nicot* (n 718).

divorce/automatic transformation of the marriage into civil partnership; medical diagnosis; surgery/sterilisation[778].

- On the divorce requirement:

The issue presented itself in States that did not allow same-sex marriage, and therefore a trans person who had entered what was, on paper, a heterosexual marriage, after the LGR, would be of the same gender as their spouse. Most of the States that did not allow for same-sex marriage did require the end of the marriage. For example, in Finland, the Transsexuals (Confirmation of Gender) Act required the 'conversion' of marriage, which would become same-sex marriage into 'civil partnerships'[779].

The requirement of divorce was often a grey area in domestic laws, which sometimes simply had no specific provisions. The situation is captured by a report of the CoE's Steering Committee for Human Rights:

> One member State indicated not requiring divorce but did not specify which measures are in place to protect a couple's decision to remain married. Another indicated that a court may annul the marriage in the absence of same-sex marriage in the country, but does not refer to any legal provisions regulating the annulment[780].

Overall, only three States without legislation opening marriage to same-sex couples had legislative provisions that did allow a transgender person to remain married to the same person: Austria, Germany, and Switzerland[781]. By 2019, however, almost of all EU Member States would go on to open marriage to same sex couples, rendering this question moot. However, no member State of the CoE outside of EU Member States have introduced this right in their legislation, making it a much more prevalent issue. Added to the high saliency of the question (the amendment of the 2015

[778] As noted previously, other conditions or requirements exist (e.g.: age, or mandatory waiting period) but were never litigated before either the ECJ or the ECtHR.
[779] 563/2002 Act on legal recognition of the gender of transsexuals, Section 2, Art. 2.
[780] Council of Europe, CDDH, 'Report on the Implementation of Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity, CM(2020)4-Final' (2020).
[781] *Hämäläinen* (n 673).

PACE resolution was exactly on this issue), **it can be concluded that on this specific aspect of LGR, CoE-only States would be likely to face difficulties or be unwilling to comply with a ruling striking down the divorce requirement for LGR procedures.** *Figure 14* provides an overview of the proportion of States in the EU and in the CoE having established (or not established) a legal framework for LGR as of 2019, as well as the requirements to access it.

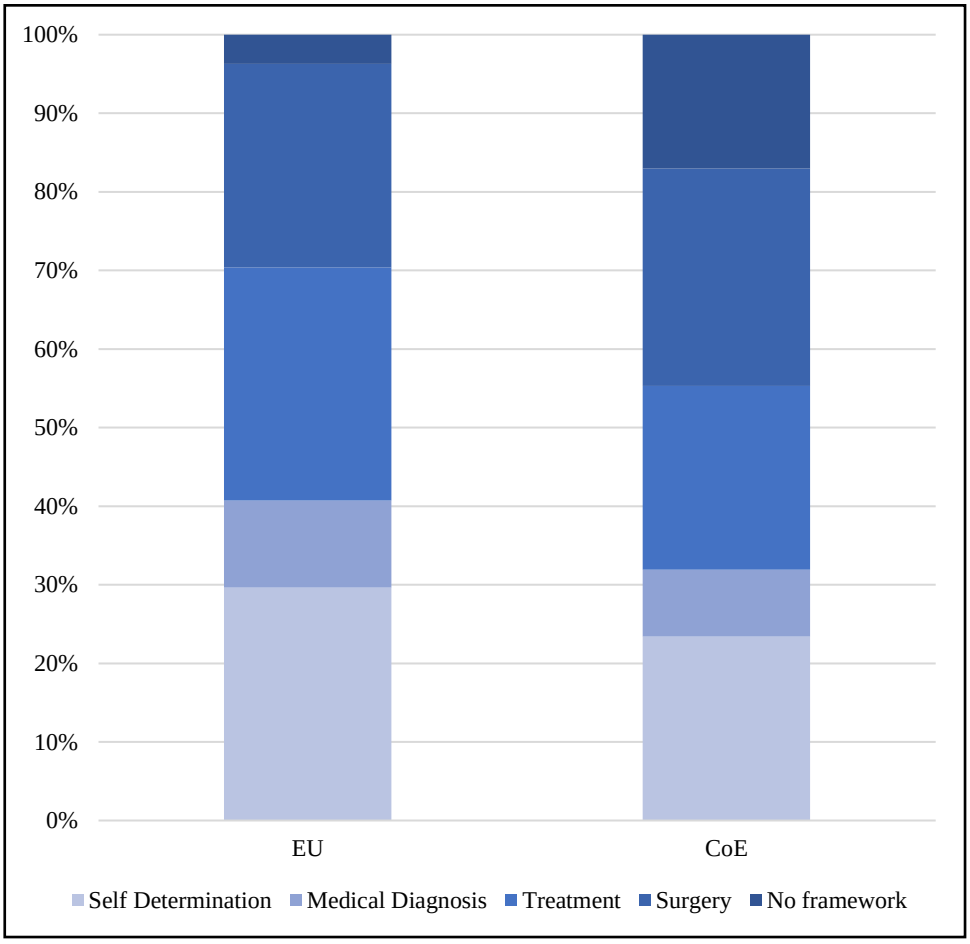

Figure 14: Conditions of access to LGR in EU and CoE Member States (2019)

- <u>On the requirement of surgery:</u>

Similarly, successive cases and reports provide a snapshot of the evolution of the legislation on this requirement. The data is summed up in **Error! Reference source not found.** and is drawn f rom both CoE and EU reports, and more extensively presented in the Appendix of the dissertation.

There was a trend towards removing the requirement for full gender affirming surgery, as it amounted to requiring the sterilisation of the person seeking LGR. At the European level, in 2017, twenty-four European States still required a surgery to be performed before LGR[782]; versus thirteen in 2019, among which only eight were EU Member States[783]. On the other hand, the number of States that clearly did *not* make it a requirement grew from sixteen[784] to twenty-seven in that same period[785]. The trend is, however, not necessarily differentiated between EU Member States and CoE non-EU Member States. Seven EU Member States still have this requirement, with five others having an unclear, case-by-case approach where surgery may or may not be required[786].

If we add the *requirement to have some medical or expert diagnosis* to support the LGR request, the number rises to 18 EU Members States. The trend towards full de-medicalisation of trans identities, albeit slow, does exist, as illustrated by the French reform, where in 2016, the Law on the Modernisation of Justice in the XXIst Century and the associated 2017 Decree removed the requirement for any medical proof in order to obtain the change of gender on birth certificate[787]. However, as of 2019, 27 States still required at least a medical diagnosis, among which 19 EU Member States – enough to make removing this requirement particularly unlikely to be met with success for either European Court.

In summary, *within the EU*, Governments were unlikely to collectively challenge a European Court striking down a divorce requirement. However, while there was a trend towards de-pathologising trans identity, a majority of States still require at least a medical diagnosis, and the requirement of surgery is still commonplace in at least half Member States.

When including CoE Members instead of only EU Members, the main difference is in the requirement of divorce being more difficult to challenge, as many CoE-only Members do not allow

[782] *Garçon and Nicot* (n 718).
[783]Council of Europe, CDDH (n 787)..
[784] *Garçon and Nicot* (n 718).
[785] Council of Europe, CDDH (n 787)..
[786] European Commission, *Legal gender recognition in the EU The journeys of trans people towards full equality*, June 2020.
[787] *L. n° 2016-1547 du 18 Novembre 2016 de modernisation de la justice du XXIe siècle* and *D. n° 2017-450 du 29 mars 2017 relatif aux procédures de changement de prénom et de modification de la mention du sexe à l'état civil.*

same-sex marriage. The only additional differentiation between the CoE and the EU is the handful of CoE-only States that had still not established an official LGR legislation. But for other requirements, there is no clearly differentiated trends between EU Member States and CoE-only Member States: the majority of States in each organisation at least ask for a medical diagnosis, and some form of non-surgical medical treatment such as hormonal therapy, although full sterilising surgery seems less of a prevalent requirement.

As previously stated, a difference does not necessarily mean a challenge, but EU Member States cannot have higher standards of protection than the ones set by EU law, for matters falling under EU law. This means that if an EU Member imposed its own higher standard of protection of trans persons, this would be problematic for EU law.

It can be added that this issue was also becoming more salient for States (both their for courts and their Governments) who were taking it to the European level, making it more difficult for European Courts to be dismissive of their preferences. Multiple Member States were being more vocal regarding the ECtHR, and overall the Council of Europe (CoE)'s push towards LGR. The 2015 PACE resolution was more heavily discussed than the 2010 one, and representatives at the PACE from Moldova, Serbia, Hungary, Lithuania, Romania, and North Macedonia submitted 12 amendments seeking to limit the scope of protection that the resolution was encouraging[788]. This included trying to remove a sentence criticising the classification of trans identities as a medical disease, arguing that '[m]edical classification is a matter of science, not of politics. It is dangerous for democracy when politicians decide on what should or should not be classified as a mental disease. The same is true for every disease. People with cancer or HIV also encounter obstacles to social inclusion.' (Amendment 1, see also Amendment 12), or denying the existence of a right to legal gender identity in Europe as only 3 countries have a self-determination approach to LGR (Amendments 2 and 3). These amendments were all voted down, proof that the majority of State representatives were still at least favourable to a protection of trans rights in principle. But this

[788] Parliamentary Assembly of the Council of Europe, *Discrimination against transgender people in Europe - compendium of written amendments* [Doc 13742].

shows that the debate was becoming much more salient, and that decision-makers broadly speaking were aware of its importance at the European level, rather than only at domestic level the way it had been in the previous phase.

With legislative evolutions opening the door to LGR after 2002, the room to manoeuvre for domestic courts was greatly reduced and limited to the grey areas regarding the conditions and requirements of the procedures. This greatly diminished their potential impact.

The situation in France provides a useful example. French Courts historically had had a very pathologising approach of trans identities. The C*our de Cassation*, in particular, had initially held in 1992 that among the five conditions to be fulfilled in order to access LGR, four had to do purely with physical appearance, surgery and diagnosis[789]. Twenty years later, the *Cassation* adopted a more vague standard with only two conditions, still heavily pathologising: 'that he or she actually suffers from the gender identity disorder' and 'that the change in his or her appearance is irreversible'[790]. In the *AP, Garçon, et Nicot* case, a Court of Appeal that initially denied the request for LGR in 2010 ruled that 'in the light of the documents submitted by the first applicant, it was not established that he no longer possesse[d] all the characteristics of the male sex'[791], a decision that was supported by the *Cour de Cassation*[792]. However, any leeway courts may have had to express these preferences was obliterated by the 2016 law, which laid down specifically what could and could not be requested for an LGR. The only court that could have opposed this by then was the *Conseil Constitutionnel*, who, when carrying a judicial review of the law, found it constitutional[793].

The same situation can be seen with the potential divorce requirement, this time taking the situation in Germany as an example. The *BVerfG* was asked, in 2008, to review the constitutionality

[789] 11 December 1992 (n°. 91-11.900 and 91-12.373; Bulletin 1992 AP no. 13),
[790] 7 June 2012 (Bulletin 2012, I, nos. 123 and 124),
[791] As cited in *Garçon and Nicot* (n 718) [23].
[792] 7 June 2012 (n° 10-26.947 and 11-22.490; Bulletin 2012 FP-P+B+I)
[793] Decision no. 2016-739 DC.

of the LGR Law (*Transsexuellengesetz*[794]), in particular its requirement for the applicant to be unmarried, which not only created a breach of equality between married and unmarried transgender persons, but also required a transgender person to divorce their spouse in order to have access to LGR. The *BverfG* argues that this requirement was excessive, although the legislature was at liberty to maintain that marriage was to be between opposite gender:

> (…) the legislature could provide for the conversion of the marriage into a registered partnership, effective from the date of legal recognition of the changed gender status of the transsexual spouse. The legislature must however take care to ensure that the couple retains the rights and obligations conferred by marriage, and that these rights and obligations remain undiminished under the subsequent registered partnership. To this end, the legislature may create a "sui generis" form of legally secured life partnership, which ensures that the couple's rights and obligations acquired by marriage are safeguarded. The marriage can be allowed to continue in this other form with effect from the legal recognition of the changed gender of the transsexual spouse.[795]

However, this would increasingly become a moot point, since more and more States had been opening marriage to same-sex couples, or at least were offering what the *BverfG* was requesting, *i.e.* a civil partnership virtually equal to marriage, but open to same-sex couples. This, for example, was the case of Finland, in the *Hämäläinen* case, where the Government argued that:

> According to [the *BVerfG*], a marriage could be transformed into a registered civil partnership or a legally secured civil partnership *sui generis* but the rights acquired by the couple and the duties imposed on them by the marriage had to remain intact. The Finnish provisions were thus in line with the said judgment of the Federal Constitutional Court of Germany.[796]

Therefore, Courts were not able to truly have an independent impact, as more and more legislation on the topic was adopted.

[794] Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen, BGBl. I S. 2787 20.07.2017
[795] 1 BvL 10/05, Federal Constitutional Court of Germany (27 May 2008)
[796] *Hämäläinen* (n 673).

Entering the 2000s, as established in Chapter 2, the CJEU began to challenge the authority of the ECtHR more systematically, although this would only kick into higher gear from the 2010s. Still, throughout this period, the CJEU made less and less references to the ECHR and the Strasbourg case-law, preferring to develop a jurisprudence based on its own CFR. Tensions between both courts rose with the rise of controversial cases regarding the Dublin Regulation, the European Arrest Warrant, and overall the question of mutual trust in key EU instruments. In addition, starting from 2013, and *Opinion 2/13*, judges from both Courts stopped their regular meetings, and the relationship truly froze.

However, it is more difficult to identify whether the CJEU was presenting a challenge to the authority of the ECtHR specifically on transgender rights to LGR. There are only 3 cases immediately relevant to the case study from the CJEU. In *KB*, the CJEU judgement was virtually in full accordance with the ECtHR, fully embracing the *Goodwin* ruling to hold that:

> Legislation, such as that at issue in the main proceedings, which, in breach of the ECHR, prevents a couple such as K.B. and R. from fulfilling the marriage requirement which must be met for one of them to be able to benefit from part of the pay of the other must be regarded as being, in principle, incompatible with the requirements of Article 141 EC.[797]

'A couple such as KB and R' meant, here, a heterosexual couple, where one partner was a transgender person who had not been offered any possibility to change their gender marker, and was not recognised as able to enter a heterosexual marriage under UK law. The CJEU was therefore limiting the protection to a transgender individual who had medically transitioned, a condition that the ECtHR was not opposed to at that point[798].

The two other cases are more difficult to evaluate. In *Richards* (2006) the CJEU doubled down on the requirement to treat a trans woman as 'a woman as a matter of national law'[799], in order for her to benefit from rights derived from EU law. However, this was even more explicitly restricted than

[797] *KB* (n 690) [34].
[798] Toggenburg (n 720).
[799] *Sarah Margaret Richards v Secretary of State for Work and Pensions* [2006] ECR I-3585.

before to 'a person who, in accordance with the conditions laid down by national law, has undergone male-to-female gender reassignment', making surgery a requirement for a transgender person to fall under the protective scope of EU law[800], something which was maintained in 2018's MB[801]. But the ECtHR found a violation of the rights of trans persons in the surgery requirement to access to LGR until 2017's *AP, Garçon and Nicot*, making the position of the CJEU problematic. The requirement to have a surgery is, according to the ECtHR, a *lower* standard of protection, low enough to be a violation of human rights – this is different from the previous phase, where the CJEU was diverging from the ECtHR by offering a *higher* standard of protection.

In almost a mirror image, the CJEU in *MB* was asked about the divorce requirement and concluded that a requirement for a transgender person to first divorce in order to have access to LGR was discriminatory, compared to a trans person who transitioned before getting married[802]. This is more likely to be interpreted as a challenge to the ECtHR, as it did come on the heels of the *Hämäläinen v Finland* case, where the Strasbourg judges had accepted the requirement for a divorce before LGR. Nevertheless, the CJEU showed an abundance of caution so as *not* to appear antagonistic towards its Strasbourg neighbour:

> That interpretation is not invalidated by the case-law of the European Court of Human Rights, to which the United Kingdom Government also refers in order to contest the comparability of the situation of those persons. As the Advocate General stated in point 44 of his Opinion, the European Court of Human Rights (…) assessed whether or not the situation of a person who had undergone gender reassignment surgery after marrying was comparable to the situation of a married person who had not changed gender, in the light of the subject matter of the national legislation at issue, which concerned the legal recognition of a change of gender with regard to civil status. By contrast, as has been noted in paragraph 27 of the present judgment, what is at issue in the present case is the comparability of the situations of the persons concerned in the light of

[800] *Richards* (n 806) [38].
[801] *MB* (n 702) [35].
[802] *MB* (n 702) [47].

> legislation the subject matter of which is specifically entitlement to a State retirement pension.[803]

The soundness of the reasoning is open to criticism, and the denial fairly transparent, but this still could show at least good intent from the CJEU not to enter into an open conflict with the ECtHR on the question of the divorce requirement. Moreover, would the refusal to make divorce a condition to access LGR amount to lower standard of protection, likely to be problematic in the eyes of the ECtHR? It could be argued that the CJEU is actually offering a higher standard of protection to the trans person seeking LGR. According to the ECtHR in *Hämäläinen*, the requirement of divorce fell within the margin of appreciation of States to balance individual rights with the relevant public interest. States are, therefore, free to provide a higher degree of protection by *not* requiring divorce. As a result, by adopting this stance, the CJEU was not challenging the ECtHR, as much as it was placing the Strasbourg Court in the position of providing a lower standard of protection itself.

But the situation was different for the requirement of surgery, as demonstrated before. Moreover, the CJEU did not use the same care regarding the surgical requirement; there was no reference to *AP, Garçon and Nicot* the way there was one to *Hamalainen*. Therefore, if there was a challenge from the CJEU towards the ECtHR at this period, it was systemic, but more ambiguous regarding this issue specifically.

The ECtHR was in a very different situation: it had the opportunity to deliver more rulings than the CJEU, and it clearly took a human rights-oriented approach which saw trans rights as an end in and of themselves, compared to the CJEU which approached them as a mean to an end (the effective enjoyment of *other* EU rights). This is true of the rulings that are included in this case study, but also of adjacent rulings on trans rights that do not directly focus on LGR. There was an evolution, in particular, regarding the place of gender affirming surgery. After confirming that the protection of *Goodwin* was awarded to 'post-operative' transgender persons in *Grant v UK* (2006), and then upholding the requirement to have a hormone-surgical treatment to access LGR in *Nunez*

[803] *MB* (n 702) [47].

*v France (*2007*)*, the ECtHR had to rule on case dealing with legal provisions on this surgery and its reimbursement[804]. The applicants did reach a positive outcome, as noted by Canoot:

> the Court found a violation of Article 8 ECHR in *L. v. Lithuania* because of the authorities' persistent failure to adopt legislation enabling sex reassignment surgery, even though the Civil Code provided for a right to legal gender recognition on the basis of sex reassignment. It found that the limited legislative gap regarding sex reassignment therapy left the individual transsexual person in a situation of distressing uncertainty with regard to the private life and the recognition of one's true identity.[805]

And starting with *YY v Turkey* (2015), the ECtHR moved away from this pathologising approach. Canoot similarly observes that 'the Court held that the requirement of sterilisation to have access to sex reassignment therapy violated Article 8 of the Convention. Interestingly, it made use of arguments that related more to legal gender recognition than to access to medical sex reassignment' [806]. This was paving the way for the more radical *AP, Garçon and Nicot v France* ruling, where, in 2017, the ECtHR clearly prohibited surgical requirements to access to LGR:

> Making the recognition of transgender persons' gender identity conditional on sterilisation surgery or treatment – or surgery or treatment very likely to result in sterilisation – which they do not wish to undergo therefore amounts to making the full exercise of their right to respect for their private life under Article 8 of the Convention conditional on their relinquishing full exercise of their right to respect for their physical integrity as protected by that provision and also by Article 3 of the Convention.

LGR was, therefore, to be extended even to transgender persons who had not undergone, and were not planning tr undergo, a medical transition. Was this to be interpreted as a challenge to the CJEU, which explicitly had a different approach? Under our theoretical and methodological framework, simple divergence is not to be considered a challenge to the authority of the other Court. Moreover, the ECtHR was not making any reference to the CJEU, instead ignoring it rather than challenging

[804]*L v Lithuania* [2007] ECHR 725; *Schlumpf* (n 646).
[805] Cannoot (n 681).
[806] Cannoot (n 681).

it[807]. But this is compounded by the second difference with the CJEU's case-law: in *Hämäläinen*, the Strasbourg Court actually upheld the possibility for States to first require a divorce before obtaining LGR, considering that it still fell within the margin of appreciation of States.

If an applicant had approached the CJEU with a preliminary ruling raising the question of accessing LGR without surgery, using the ECtHR in its argumentation, the Luxembourg Court would have been placed in a difficult situation. But here, the issue is the lack of relevant case coming before the ECtHR. There is not case where the CJEU's situation was raised explicitly before the ECtHR, making it difficult for the Strasbourg to express a challenge to the position of the CJEU in a way that would be characterised as such under the current theoretical and methodological framework. This is compounded by the lack of systemic threat of the ECtHR towards the CJEU at this point (with the reaffirmation of the *Bosphorus* principle in the *Avotins* case, and before the 2021 *Bivolaru* case, as per Chapter 2).

3.2.2. The CJEU's standstill: insufficient threat and insufficient cases

The CJEU was presented with a complex situation: first from Governments, then from the ECtHR, with the background knowledge that the CJEU's preferences were based on EU law objectives, such as protection against sex-based discrimination, with a binary and heteronormative lens. This did not negate the interest the CJEU may have in developing EU fundamental rights, but they fit within broader considerations of EU objectives, rather than standing on their own as an ultimate and superior objective. The Luxembourg Court was interested in removing the requirement of divorce, but not necessarily that of medical diagnosis or surgery. However, the majority of EU Member States, as of 2019, only asked for a medical diagnosis, and not another sort of treatment, even less a sterilising surgery. Moreover, this was an approach backed by the ECtHR. If States were to use these standards when enforcing EU law, this would mean applying higher standards of protection than the one required by EU law – a situation that the CJEU does not allow[808]. As will

[807] The only exception being the *Hämäläinen* case, to mention that one party had tried to bring the case up to the ECJ initially.
[808] *Melloni* (n 460). Interpretation emphatically confirmed by Interview 9 with one of the CJEU Judges who decided this case.

be seen, the EU was aware of this risk of clash – but no case actually brought it up, leaving the CJEU free to continue to diverge from the ECtHR.

To better understand the causal path, we can once again break it down to its successive steps.

First, the CJEU was keeping track of trans* rights in general from both the ECtHR and domestic courts and legislation. The status of trans persons and evolution in LGR legislations across Member States was also carefully monitored by the DRD, through *Reflets* and *Flash News*, the two internal publications it edited. These publications keep track of cases that would be noteworthy for the CJEU[809], and included cases such as *Goodwin*, *Grant v UK* and *YT v Bulgaria* (respectively in Reflet 2002/3, Reflet 2006/2 and Flash News ECHR 7/20). The DRD also kept track of the domestic legislation and case-law on the topic, as in Germany (decision of the *BVerfG* on LGR reforms reported in Reflets 2007/1 and Flash News National Decisions, 4/17) or Swedish legislative reforms removing the surgery requiring to access LGR (Reflets 2013/3).

The CJEU also kept under review the progressive legalisation of same-sex marriage across the EU, which would allow it to know when the divorce requirement for LGR would be something it could rule against without significant resistance. Indeed, multiple iterations of *Flash News* and *Reflets* feature this question from 2002 onward. This included key domestic rulings, such as the UK's *Bellinger* case (Reflets 2002/3), or other legislative evolutions regarding same sex civil partnership and marriage. An analysis of the differences between the jurisprudence of the CJEU and the ECtHR on the right to marriage was even published in Reflets 2013/1, including an in-depth analysis of the *ECtHR's Christine Goodwin* case in this context. Taken together, the question of same-sex marriage or LGR was reported in *Reflets* or in an edition of *Flash News* at least twenty-six times since their creation.

The CJEU was aware of the Strasbourg rulings regarding trans rights, as they were brought up by both parties and the Advocate Generals, multiple times. To argue that they should have been

[809] Interview 3, Former ECJ AG, 07/12/2022; Interview 2, ECJ Judge, 02/12/2022; Interview 6, Jurist of the DRD, 20/12/22.

allowed access to LGR, the applicants in *KB* relied on *Goodwin and I*, and United Kingdom tried to rely on *Parry v UK* and *R and F v UK*. Even the Commission, during that same case, also relied on the ECtHR's *Grant* case to argue that

> the European Court of Human Rights has held that the barrier to marriage arising from the fact that English law does not allow a transsexual who has undergone gender reassignment to amend his or her birth certificate does not constitute an infringement of Articles 8, 12 or 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (…)[810]

This trend continued, as an Advocate General also did a thorough review of the ECtHR's case-law for *Richards*, for example, and even explicitly referred to the *Hämäläinen* case in *MB*. Yet, in the *Richards* case, the CJEU in its ruling did not actually mention any case from the ECtHR – despite not having any open disagreement at this point. Additionally, for all its careful wording, it still diverged from the Strasbourg case-law in *MB*, when it considered that a divorce requirement was excessive. It is likely that the CJEU did not consider that this was a real challenge to its authority from the ECtHR: the first important divergence actually came *from the CJEU*, in *MB*. Before this, the ECtHR's *AP, Garçon and Nicot* had extended the right to LGR to all transgender persons rather than those planning on a medical transition, but while the CJEU only protected this right for the latter, the question had not *specifically* been raised before. As a result, this 2014 case from Strasbourg was likely to be seen as ambitious, but far from having anything to do with the CJEU… as long as no litigant explicitly raised it.

As a result, the CJEU in its case-law regarding transgender persons' right to LGR truly embraced what could be called a 'market-based approach to fundamental rights', with the protection of certain rights being framed constantly as a problem of discrimination, resulting in the improper or non-application of EU law. Even when it dealt with questions of fundamental rights, the CJEU acts 'exactly the same way as the supreme and constitutional law, Supreme administrative courts in all our Member States. For us, it is a standard of interpretation of law. It is sort of a, a standard of

[810] *Grant v United Kingdom* App No 32570/03 (ECtHR, 23 May 2006) [24].

judicial review. Of acts, which are contested on their compatibility"[811], in the words of a current judge of the CJEU; or, according to another judge: 'certainly not as an International Court, and not as a human rights court either'[812].

Perhaps because it knew that the question was a highly sensitive one, with family law, civil status and the attribution of social benefits still being matters up to Member States rather than EU law, the CJEU held for example that:

> it is enough to remember that, according to settled case-law, Community law does not affect the power of the Member States to organise their social security systems, and that in the absence of harmonisation at Community level it is therefore for the legislation of each Member State to determine, first, the conditions governing the right or duty to be insured with a social security scheme and, second, the conditions for entitlement to benefits. **Nevertheless, the Member States must comply with Community law when exercising that power.**[813]

Similarly, the Luxembourg Court was very defensive in *MB*, the more ambitious decision refusing the divorce requirement for LGR:

> As a preliminary point, it must be noted that the case in the main proceedings and the question referred to the Court concern only the conditions for entitlement to the State retirement pension at issue in the main proceedings. Accordingly, the Court is not being asked to consider, generally, whether the legal recognition of a change of gender may be conditional on the annulment of a marriage entered into before that change of gender.
>
> (…) In that regard, it must be noted that, although EU law does not detract from the competence of the Member States in matters of civil status and legal recognition of the change of a person's gender, **Member States must, when exercising that competence, comply with EU law and, in particular, with the provisions relating to the principle of non-discrimination.**[814]

[811] Interview 9, CJEU Judge, 13/03/2023.
[812] Interview 11, Former CJEU 01/02/2023.
[813] *Richards* (n 806) [33].
[814] *MB* (n 702) [26] - [28]. (Emphasis added by the author.)

And while a legalist explanation could be put forward, to argue that all this means is that the CJEU was constrained by EU law and EU Treaties, the literature has noted that the CJEU was being fairly activist in this line of jurisprudence:

> Much of the Court's reasoning – its reference to changed social attitudes, its simple assertion of the denial of the essence of the right to marry, the separation of the right to marry and the right to found a family, and the abandonment of the idea of reproduction, is peremptory, and its reference to the Charter – is questionable in the light of the apparently clear intent behind Article 12. It suggests a strong predisposition by the Court to reach a desired conclusion.[815]

The CJEU engaged with the ECtHR's case-law as little as it could, despite being kept up-to-date on it, as demonstrated previously. Only in *KB* (2004) did it rely on *Goodwin and I* extensively, to reach the same conclusion. But it is interesting to note that in the *Richards* case, two years later, the CJEU did not even mention the *Goodwin* case, although it would have been just as appropriate, given the outcome of the case. From there on, the CJEU only relied in its own precedent, citing *KB* in *Richards*, and then *KB* and *Richards* in *MB*[816]. The only exception to this trend is the mention of *Hämäläinen* in *MB*, as will be seen below.

Overall, the CJEU was therefore willingly ignoring the ECtHR's case-law and any existing dissimilarities, or the ones being created by its own case-law. The *MB* case represents an interesting example of this trend, where the CJEU was side-stepping any potential disagreement with the ECtHR. In the *MB* case, the applicant was a transgender woman, who had been married to a woman at the time of her transition. But UK law then required the dissolution the marriage in order to obtain recognition of her gender. As she and her wife wished to remain married, she did not go through the LGR process, and therefore was not able to benefit from the social security and retirement benefits attributed to women.

[815] Campbell and Lardy (n 710) 229.
[816] *MB* (n 702).

This was similar enough to the situation that the ECtHR had been confronted with in the *Hämäläinen* case a few years before, to the point that the UK argued:

> the European Court of Human Rights has recognised that Member States may make recognition of a change of gender conditional on the annulment of that person's marriage (ECtHR, 16 July 2014, Hämäläinen v.Finland, […]). (…) Although the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, requires States that are party to it to recognise the acquired gender of transsexual persons, it does not require them to allow marriages between same-sex couples. Indeed, the objective of maintaining the traditional concept of marriage as being a union between a man and a woman could, it was argued, justify making recognition of a change of gender subject to such a condition.[817]

Neither the CJEU nor the AG could avoid engaging with the ECtHR's case-law here. Both, however, went out of their way to neither confront nor downplay the difference: they simply argued that the comparison was not relevant. For the AG,

> it is not necessary to enter into the debate of whether the EU law standard is more protective than that of the Convention, or whether the broad margin of discretion left by the ECtHR in the face of the 'lack of a European consensus' in the wider Europe regarding same-sex marriage is fully transposable in the context of the EU.[818]

And the CJEU in its own judgement appeared to double down:

> [The ECtHR] assessed whether or not the situation of a person who had undergone gender reassignment surgery after marrying was comparable to the situation of a married person who had not changed gender, in the light of the subject matter of the national legislation at issue, which concerned the legal recognition of a change of gender with regard to civil status. By contrast, as has been noted in paragraph 27 of the present judgment, what is at issue in the present case is the comparability of the situations of the persons concerned in

[817] *MB* (n 702) [24].
[818] *MB* (n 702). Opinion of Advocate General Bobek.

> the light of legislation the subject matter of which is specifically entitlement to a State retirement pension.[819]

This is different from instances where the CJEU had tried to frame its own decision as being in line with the ECtHR's case-law even when this was doubtful (see Chapter 3). This time, the CJEU simply denied any comparability between both cases, engaging with the ECtHR just enough to avoid any open conflict or obvious divergence.

3.1.1. The ECtHR's standstill: no case but no ally

During this phase, the ECtHR was under an increasing threat from the CJEU systemically, but not on this particular question. Moreover, it was facing a challenge regarding the right to LGR from States that were either not ready to comply with the *Goodwin* jurisprudence at all, or wanted to maintain an obligation to divorce – more than surgery, which was less and less common anyway. Yet it did not converge with the CJEU, quite the opposite: it fully adopted a non-pathologising approach of trans identities, and maintained the possibility for States to require a divorce. In other words, it was able to focus on its own preferences (although it is unclear where the Court's true preference would lie in terms of divorce requirement) and avoid being forced to converge with the CJEU. Once again, the lack of cases explicitly raising the contradictions between both Courts allowed for this.

First, it is established that the ECtHR was fully aware of the case-law of the CJEU that was challenging its authority; while communications between both Courts halted after *Opinion 2/13*[820], the ECtHR interacted with the case-law of the CJEU when it came to European Arrest Warrant cases or Dublin cases, as seen in Chapter 4. It is clear that this was recognised as a challenge.

However, in this particular issue-area, and contrary to what has been seen in the case of the EAW, the CJEU was not presenting any topic-specific challenge. The Strasbourg Court was aware of the case-law of the CJEU in this field. Even if it was not citing it in its reasoning, the parties in *Hämäläinen* had attempted the refer a question to the CJEU[821], making it clear that the Luxembourg

[819] *MB* (n 702) [47].
[820] Interview 3, Former CJEU Advocate General, 07/12/2022.
[821] *Hämäläinen* (n 673) [17] - [18].

Court could have potentially developed relevant case-law. But this was about the divorce requirement, and as previously explained, even if the CJEU was placing higher standards of protection, for example by refusing that States impose a divorce to access to LGR, when the ECtHR had not, this did not necessarily go *against* the ECtHR. The EU legal order having *higher* a standard of protection does not undermine the authority of the ECtHR, just as States doing so in the first phase did not undermine the authority of the Strasbourg Court either. It did place it in a difficult position, and might have challenged its role as *the* human rights court in Europe, but not the compliance with its rulings. The situation would have been different if litigants had attempted to raise the divergence regarding the requirement of sterilising surgery, but they did not do so.

As for the potential challenge from Governments disgruntled at the ECtHR's protective jurisprudence regarding access to LGR, the Court was keeping track of legislative evolutions in Europe; the *Hämäläinen* case, for example, dedicates an entire section to 'Comparative Law', reviewing which States allowed LGR, which States still did not have legal framework, which requested a divorce[822]. This could have come from the submissions of Transgender Europe[823] or potentially the ECtHR's own Jurisconsult[824]. Moreover, the Court has referred explicitly to various Council of Europe documents, giving an overview of the evolution of the relevant legislation in Europe, at multiple occasions, in the 2010 Resolution on discrimination on the basis of sexual orientation and gender identity[825] and Resolution 1945 (2013), entitled 'Putting an end to coerced sterilisations and castrations'[826], as well as Recommendation CM/Rec(2010)5 of the Committee of Ministers[827].

A legalist reading of these references to CoE documents in particular could support the interpretation of the ECtHR not having much leeway, and simply being tied by these recommendations. However, these documents are not binding, neither for States nor for the Court;

[822] *Hämäläinen* (n 673) [32] - [34].
[823] *Garçon and Nicot* but especially *Hämäläinen* where it submitted a full comparative study.
[824] Interview 14, Jurist of the ECtHR Juristconsult, 13/04/2023.
[825] *Garçon and Nicot* (n 718) [75]; *YY v Turkey* [2015] IHRL 3944.
[826] *Garçon and Nicot* (n 718) [76].
[827] *YY v Turkey* (n 832); *Garçon and Nicot* (n 718). Also mentioned in Transgender Europe's submissions.

they are purely soft law. While the Strasbourg Court refers to them, as well as its comparative legal analysis of domestic legislation, to identify a 'consensus' across parties, this is something it had already moved away from in the *Goodwin* case. In a separate Opinion on *AP, Garçon and Nicot v France* Judge Ranzoni expressed his view that:

> To my mind, this argument is insufficient to justify the application of a very narrow margin of appreciation or the finding that there is a clear European trend. It is true that the Commissioner for Human Rights of the Council of Europe adopted a stance in 2009 against making legal recognition of transgender identity subject to irreversible sterilisation surgery (see paragraph 73 of the judgment), and that the Parliamentary Assembly noted in a 2013 Resolution that "[n]either forced nor coerced sterilisations or castrations can be legitimated in any way in the 21st century" (see paragraph 76 of the judgment). However, I note, while acknowledging the great importance of the institutions and organisations listed in paragraph 125 of the judgment, that they are for the most part involved in the "promotion" of human rights. The majority's assessment is not based on European or international human rights "protection" institutions, or on binding international conventions or settled case-law within the member States.[828]

The ECtHR was actually at a crossroad, where it could maintain the *status quo* or continue the increasing protection of transgender rights to LGR. In order to pursue the latter, the Court strongly embedded the legal discourse in its case-law not only around the protection against discrimination or the right to family life/right to marry, but of its own motion, the ECtHR brought up Article 3 of the Convention, on the prohibition of torture and degrading or inhumane treatment – which the applicant had not actually done! – in order to strike down the requirement to have a surgery:

> Making the recognition of transgender persons' gender identity conditional on sterilisation surgery or treatment – or surgery or treatment very likely to result in sterilisation – which they do not wish to undergo therefore amounts to making the full exercise of their right to respect for their private life under Article 8 of the Convention conditional on their relinquishing full exercise of their right to

[828] *Garçon and Nicot* (n 718). Dissenting Opinion of Judge Ranzoni [15].

> respect for their physical integrity as protected by that provision and also by Article 3 of the Convention.[829]

During the second period, the ECtHR displays a remarkable lack of engagement with the CJEU's case-law – absolutely none of the ECtHR cases of time actually mention a CJEU case, not even *P v S* anymore. On the one hand, recent CJEU rulings by then did not provide additional arguments towards the outcome the ECtHR was vying for: no CJEU ruling had ruled out the requirement for surgery. But when identifying the general trend in Europe and internationally, it would not be unusual at all for the Strasbourg Court to include the CJEU's adjacent rulings on trans rights in general. This is because, contrary to the previous phase, the CJEU does not offer any case-law that would align with the ECtHR's preferred outcome, and would be useful for cherry-picking. Instead, the Strasbourg Court referred to a European Committee of Social Rights case, as it provided it with an argumentation closer to what it would actually use in *AP, Garçon and Nicot*:

> The Committee considers that surgical gender reassignment surgery as required for a change of gender identity is not necessary for the protection of health. Obliging an individual to undergo such serious surgery which could in fact be harmful to health cannot be considered as being consistent with the obligation that the State refrain from interfering **with the enjoyment of the right to health and in such cases States must eliminate the interference. Any kind of medical treatment which is not necessary can be considered as contrary to Article 11, if obtaining access to another right is contingent upon undergoing it.**[830]

Even when it comes to relying on soft law, the ECtHR limited itself to documents originating from Council of Europe institutions, but without the Council of the EU's conclusions on LGBTI equality[831].

In the end, the ECtHR, after the *Goodwin* case, simply ignored the work of the CJEU. Indeed, since the litigants did not bring up the relevant differences, and there was no advantage in

[829] *Garçon and Nicot* (n 718) [131].
[830] *Transgender Europe and ILGA-Europe v the Czech Republic* Complaint No 117/2015 (European Committee of Social Rights, 15 May 2018) [80]. Emphasis added by the author.
[831] Council of the EU, *Council Conclusions on LGBTI Equality*, 16 June 2016 (https://www.consilium.europa.eu/en/press/press-releases/2016/06/16/epsco-conclusions-lgbti-equality/)

leaning into Luxembourg's case-law argumentatively either, the ECtHR could rely purely on its own case-law, and the work of its own organisation (the Council of Europe). Referring to the CJEU's case-law, even in passing, would only undermine its reasoning at this point. But it must be noted that on the other hand, the ECtHR is not willing to point out remaining differences, which is why for example it avoided mentioning EU case-law in *AP, Garçon and Nicot.* Mentioning it would have been, in turn, equal to challenging the CJEU on this question. Both Courts are currently at a standstill, which may continue as long as no case really bringing up those differences is decided on by the ECtHR, or is referred to the CJEU.

4. Conclusion

It is impossible to fully remove any question related to trans* right from the unprecedented evolution of the legal, social, cultural and even political discourse of these issues over the last few decades. Domestic laws in Europe went from barely acknowledging the existence of transgender persons to putting in place simplified procedures breathing life to the right to Legal Gender Recognition. This case study works with this evolving context, which is likely to explain, for example, the change in the ECtHR's preferences, along with with the changes in the composition of its Bench over time. But this dissertation does not take the socio-legal context and discourse as an explanation of the Court's behaviour on its own. Rather, to explain specifically the convergence and divergence of European Courts (and not their decisions on their own), the theoretical framework considers this context inasmuch as it trickled into courts' preferences (domestic and European), legislation and compliance or non-compliance with European rulings.

While the case selection strategy of this dissertation was not specifically targeting crucial cases at large, if it had been, this third case study would constitute a deviant case. The theoretical framework of this project is one linking challenge to authority and convergence of International Courts, while the question of binary transgender persons' right to LGR has provided examples or convergence without sufficient challenge, and challenge without subsequent convergence. Yet, the methodological tools uses throughout, including the diversity of data sources and the step-by-step

process tracing, leveraged this case study to pinpoint why and where exactly the behaviour of the CJEU and the ECtHR diverged from expectations.

4.1. Fit of the theory

Because the main theory is one that causally links threat to authority to convergence between International Courts, the general theoretical framework is not verified here. H3 expected that the early convergence of the ECtHR would be due to the existence of sufficient challenges to its authority, but this was not the case. However, it appears that a major part of the mechanism does hold: in the absence of sufficient threat, the ECtHR was able to focus on its own preferences, and therefore did not need to engage in any trade-off to self-legitimise to enhance its authority. Nonetheless, it was still facing the reluctance of the UK mainly to follow through with the changes suggested. The behaviour of the ECtHR diverges from expectations at this specific point: while not facing a challenge strong enough to *push it* into what would be a pre-emptive convergence with the CJEU, it can simply decide to leverage relevant CJEU case-law to bolster its reasoning. It can do so because this is *not* a costly mechanism, as at this point, the CJEU's case-law does fit Strasbourg's preferences.

As for H0 and H1, which had expected the *status quo*/partial divergence of both Courts to be due to insufficient threat, while there is no support for this hypothesis, there is for part of the mechanism once again. Starting with the existence of what should be sufficient challenges – although of different types – for both Courts, the very first step is where their behaviours are different from the theoretical expectations. Instead of having to make the trade-off between authority and preferences, both Courts continue to prioritise their preferences. Therefore, they do not need to enter into a costly self-legitimisation strategy, and are not forced into convergence. The mechanism actually fits what we would expect of diverging for the most part, with only the first step not fitting: the existence of challenges instead of their absence.

4.2. Fit of alternative explanations

The findings presented above are insightful in two fundamental and complementary aspects. First, they help to better define the scope and limits of the theory; second, they show how alternative explanations presented before, and that have found some support in existing literature but seemed to be the object of sometimes contradictory findings, can be articulated with the theoretical framework put forward in this work.

First, this Chapter underlines the fundamental roles of *litigants*. Courts that are not presented with the 'right' cases and argumentation cannot be pushed into convergence, as they do not develop case-law specifically on the problematic area. If they can avoid making preference-costly decisions, they will. The amount of litigation (strategic, in all likelihood) coming from the UK in this case study is striking, and was without a doubt one of the reasons why the ECtHR was able to keep track of the UK's reforms, and of the trends in the legislation and case-law across Europe. Why the UK was such a hotspot of litigation is beyond the scope of this research, but clearly, sufficient litigation has emerged as another scope condition for the theoretical framework to be verified.

Similarly, and although this was already presented as a scope condition in Chapter 1, the theoretical framework is applicable to situations where Courts have different preferences – which is, in the case of the CJEU and the ECtHR in the field of human rights, more often the case than not. But this case study shows what happens if both Courts happen to have overlapping preferences at some point: they are able to *cherry-pick* the cases of the other that they would like to rely on. This cherry-picking logic of convergence, as presented in Chapter 1's Hypothesis H6, which is empirically observed as a non-forced convergence, is possible only in this situation. This is distinguished from the expectations of Chapter 1's Hypothesis H5a by being a surface-level convergence, which does not last in time and does not show an in-depth engagement with the case-law of the other court. This is why the mechanism of this alternative explanation is verified to be actually fairly similar to the one presented in the general theoretical framework: it is still a self-legitimising strategy, but one that, exceptionally, is not costly.

CONCLUSION
International Courts between individual goals and common ground

AP: Is the ECJ also one of the courts that is expected to take ownership of the ECHR and develop it? The way domestic courts are expected to do?

Former ECtHR Judge: [very long pause] That is an absolutely great question [Long pause] (…) I think my answer would rather be that I would expect the ECJ to be a, a solid partner and not go [at] it alone in these areas, but- but work with us, rather than create sort of its own jurisprudence.[832]

Coming full circle, we can now try to answer Judge Higgins' original question: *Who decides?*[833] When two International Courts overlap, it turns out this an unanswerable question: there is no single Court taking the lead across all issue-areas. There is a distinction to be made between what Courts would *want*, and what they actually *do*. Courts like the CJEU or the ECtHR want to have the last word on every potential dispute that falls under their jurisdiction, fulfilling their mandate and adopting rulings that fits their perception of good decision-making for their own legal order. But this must be weighed against the reality of another Court existing with a similar jurisdiction – but a different mandate, different preferences, and different views of what the right way to solve a particular legal conundrum is. What judges do, in facing this, is weigh whether and when to compromise.

Depending on the contextual factors, their current relationship with their constituency and with each other, one Court is sometimes better placed to stand its ground and wait for the other to follow. But in another context, when two international jurisdictions can both afford to maintain their position, there is no spontaneous convergence – *both decide.* And it turns out that when litigants in turn do not present these courts with cases and arguments that would effectively put International Courts under pressure – *no one* decides.

[832] Interview 12, Former ECtHR Judge, 28/03/2023.
[833] Higgins (n 1).

1. Deductive findings: judicial convergence between compromise and convenience

The general framework presented in Chapter 1 is supported by the findings in Chapter 3 and Chapter 4. Both are characterised by the CJEU and the ECtHR having very different sets of preferences regarding their ideal outcomes on the question at hand. They prove that convergence between overlapping International Courts *can* be forced out of them by threatening their authorities and putting them in a position where they are required to bolster their legitimacy in order to feed into this authority, as it did in the case of businesses' right to privacy. But on the other hand, when there is no sufficient challenge to be found, fragmentation is the result, as is currently the case for the European Arrest Warrant. While the same framework is not verified in the third case study, leveraging process tracing methods shows that this is due to the scope conditions of the theory not being fulfilled; therefore, this case study shows that in specific contexts, it is possible to witness judicial convergence without the pre-required challenge to International courts, and divergence *despite* the presence of these challenges.

1.1. Judicial convergence as a strategic self-legitimisation

On the right to privacy of companies regarding their business premises, in particular the Court of Justice of the European Union had strong incentive to limit this protection of companies in order to see effective inspections in the context of European competition policy enforcement. On the other hand, the ECtHR was more in favour of a progressive extension of the protection of the right to privacy for companies. In this first case, the CJEU was the one that was sufficiently challenged by domestic courts and Governments to give some ground by way of convergence with the ECtHR and maintain its authority in the face of these challenges. However, once these challenges subsided, the CJEU did not have to compromise with its preference anymore. In turn, it was actually the Strasbourg court that was facing sufficient challenge and needed to converge with the CJEU, in particular as after the mid 2010s the CJEU was gradually exercising more and more systemic pressure on the Strasbourg Court. In this case, while the bulk of the convergence was conducted by the CJEU, as has been rightfully identified by most of the literature, the ECtHR was

the one that actually closed the gap in the second period. In this first situation, Courts were agents of organisation of the European legal order, helping to reach a common ground.

The second case study, on an issue with substantially higher stakes and receiving more scholarly attention, shows an initially similar picture: the CJEU was favouring EU law and its effectiveness through very few limitations to the execution of an EU instrument, the European Arrest Warrant. On the other hand, the ECtHR, as a human right court, was clearly more favourable to higher standards of protection of fundamental right throughout Europe, even at the cost of the effectiveness of the European Arrest Warrant – EU law should not trump Human Rights. Here as well, the initial pattern was one of sufficient challenges to the authority of the CJEU, to the point where it had to make an ally of the ECtHR in 2016 in the *Aranyosi* case[834]. However, contrary to the first case study, this did not yield a full convergence in the end. Because of a lack of sufficient challenge facing either court after the *Aranyosi* case, neither were forced into converging with the other and were therefore allowed to maintain their different case-law. While the ECtHR was under pressure from the CJEU, the latter was similarly pressured by domestic courts; but neither Court was challenge to the point of having to compromise more, despite being very aware of each other's jurisprudence. In this second case study, International Courts were therefore actors of fragmentation. European human rights did not align spontaneously and are not likely to do so without a change in the pressures that other actors exercise on them.

Beyond the correlation of challenges to International Courts and their convergence with each other, the general mechanism, is also validated. International Courts with overlapping jurisdictions such as the CJEU and the ECtHR keep track of each other's case-law. Whether this is done in a very systematised manner, as with the CJEU and the publications of its Directorate of Research and Documentation, or through jurists more informally keeping an eye on the case-law of Luxembourg and following its development, interviews confirm that Courts know each other's case-law sufficiently well that fragmentation could not be attributed to ignorance of the other's decisions. Additionally, the decision to refer or not refer to another International Court is clearly

[834] *Aranyosi and Căldăraru* (n 424).

one that International Judges give a lot of thought to. Interviews have revealed that the wording of a ruling is known to have a lot of impact on the constituency that the decision to mention another ruling, particularly one from another Court, is never taken lightly. The refusal to grant any authoritative value to the precedent set by another court, both in interviews and in rulings, is striking: International Courts do want to maintain their place as the highest deciders in their own legal orders.

1.2. Judicial convergence as a convenient legal argument

Of the two alternative explanations stated in Chapter 1, only one here finds empirical support: the cherry-picking of external references that already fit the preferred outcome of the Court.

The liberal theory of international adjudication finds some support, but only partially. Empirically, judges of the CJEU and the ECtHR *do* meet each other regularly[835], and the existence of databasees *do* make it easier for them to keep track of each other's case-law. Even more, some interviews did mention explicitly that they saw a certain kinship with the work of the other Court, from simply seeing each other as complementary ('there is also an understanding that we are, we are in a situation where there is a certain level of complementarity between the two, between the two courts'[836]) to fully being driven by a common view and belief in the importance of the rule of law and putting limits to the power of Governments:

> I think the real dialectics, because there is dialectics of course that sort of moves legal thinking forward. The dialectics is between on the one hand, as you rightly said, sort of a kind of an inbuilt in European lawyer. I hope so. Certainly in a judge. Sort of the inbuilt drive towards, you know, a higher protection of European values. All of them rule of law human rights the ones mentioned in article two. It's sort of really inbuilt in us looking at all of the judges that I have worked with.[837]

[835] Interview 5, Former CJEU AG, 28/11/2022; Interview 2, CJEU Judge, 02/12/2022; Interview 16, ECtHR Judge, 20/04/2023.
[836] Interview 16, ECtHR Judge, 20/04/2023.
[837] Interview 10, Former ECtHR Judge, 14/03/2023

This last interviewee even mentioned their belief in a growing "European judiciary" that they saw themselves as part of[838]. There is, clearly, some form of "Community of Courts"[839] that judges are willing to be a part of.

Yet, the theory of genuine spontaneous convergence in the case-law of International Courts has not only found limited empirical support, it has been outright rejected by multiple interviewees, sometimes because of difference in the role that Courts have in their own legal systems, but also because of the push-and-pull between two overlapping institutions sharing a legal space being simply a fact of life:

> What you have is a situation in which you have two courts exercising concurrent jurisdiction in an area, both of which tend to be supreme of their own fields. The idea is there wouldn't be some tension between them, is simply nonsense. If it had the same, if you say if I, I can guarantee you that if (…) some genius decided one day we needed the Constitutional Court [in a State currently without a stand-alone Constitutional court], do you not think there'd be tension between the Supreme Court and the Constitutional Court about what was in the constitution? There'd be always some topic, there'd always be some issue. There'd always be some divergence.[840]

In two of the three case studies, both the CJEU and the ECtHR did not end up closing the gap in their case-law, maintaining a divergence that cannot be only attributed to their difference in competencies, in textual basis, or procedure. There has been a dialogue between both Courts, virtually and literally, but this dialogue on its own did not impact the actual jurisprudence Courts produce. This was not an issue of incommensurability of International Courts, at least not in the sense where they would have been *prevented* from converging with each other – but it *is* attributable to differences in preferences, to which their mandate might predispose them, but did not force them to follow. Interviewees have highlighted similarities, such as a genuine support for the rule of law, and the conviction that Courts are an essential part of an effective legal order. But in the end, CJEU

[838] Interview 10, Former ECtHR Judge, 14/03/2023
[839] Slaughter, 'A Global Community of Courts Focus' (n 126).
[840] Interview 7, CJEU AG, 08/03/2023.

took the path of a constitutional court, whereas the ECtHR is still a traditional international human right court. For every time an interviewee was mentioning that both Courts could – should – work together, there were twice as many mentions of their Court needing to have the last word, being the highest in its own legal order, and having different priorities. This aligns with Mills and Stephen's criticism of the liberal theory of transjudicial dialogue: 'an implicit, unwritten, unacknowledged 'consensus' on procedural norms makes a flimsy foundation for a transnational community'[841].

Moreover, fully undermining any support for both Hypothesis 5 and Hypothesis 5bis, when the interaction between the CJEU and the ECtHR did result in some convergence, fully or partially, this was not always to the benefit of the ECtHR, the human rights court expected to have the highest degree of persuasive authority. This pattern of race to the top holds for the first part of Case Study 1, where the CJEU decided to extend the protection of the right to privacy to business premises after the ECtHR did the same, but not for the second period of the same case study, where the ECtHR was the one giving some ground.

On the other hand, the idea of cherry-picked citations from another Court to reach an outcome that the deciding court is already favourable to did find some support in the third case study, on the right to Legal Gender Recognition, thus supporting Hypothesis 6. The outcome is a convergence that relies mainly on cross-citation – although it can be substantial as well – but in the short term and only when convenient for the court doing the citing. This is only possible when both courts are in a situation where their preferences actually align, making them allies of convenience. In the early 2000s, both the CJEU and the ECtHR were favourable to a higher protection of trans rights to LGR, albeit for different reasons. The ECtHR was, therefore, able to leverage the rulings that the CJEU had had the occasion to deliver earlier on a related issue (discrimination against transgender persons[842]) to give the appearance of international (or at least European) support behind the very ambitious *Christine Goodwin* case in 2002[843]. When their preferences align, Courts are able to cross-refer to each other to bolster their own argumentation, but do so to support a conclusion

[841] Mills and Stephens (n 134) 20.
[842] *P v S* (n 154).
[843] *Goodwin* (n 154).

that they wanted to reach in the first place. As a result, these patterns of cross-citations and substantial alteration towards convergence are not long lasting; as was explained in Chapter 1, it is indeed unlikely that two independently created International Courts with overlap in their constituencies would somehow also have the exact same objectives. And the moment where their preferences evolved away from each other, those cross-citation disappeared from their respective case-law.

This does not contradict the general theoretical framework of the dissertation as much as it shows that patterns of convergence and divergence can also exist outside of this framework, and part of their mechanism can even overlap. Interestingly, process tracing has revealed that there parts of the mechanisms are this present in those alternative explanations (see below in *Figure 15*). However, as they do not fit the scope conditions of the theory, they cannot be fully verified with the case studies conducted here.

2. Inductive findings: from refined theory to re-thinking the European Legal Order

2.1. *Additional scope conditions and Courts-specific patterns*

Different findings were inductively revealed following the empirical analysis of the case studies. They are applicable to their relationship between the CJEU and the ECTHR, but it is uncertain whether they could be generalisable to all overlapping International Courts the way that the general theoretical framework is. However, as will be shown in this section, it is likely that some elements would carry over with any other overlapping International Court.

First, the manner in which both could converge with each other and when they do is often different, as established by the Similarity-Dissimilarity Index itself, and there are different ways for one International Court to converge with the other, from using similar standards to explicitly referring to the case-law of the other Court. The CJEU's pattern was often to cross reference explicitly by naming one or multiple cases of the ECtHR, but actually having limited convergence substantially.

On the other hand, when the ECtHR converged with the CJEU, it was often less through overt references to the case-law of the Luxembourg Court, and more by aligning substantially with it, regarding the answer to the legal question at hand or the standards or tests used. This was seen in Chapter 3, where the ECtHR ended up accepting that businesses and natural persons have a different degree of protection of their home: this had long been the preference of the CJEU, but when the ECtHR ended up converging, it did not even cite the Luxembourg Court.

Some explanations for these differences can be put forward, although all would require additional testing. The main one would be that the CJEU leans more into the self-legitimisation aspect of the theory, seeking to overtly signal that it is lining with the other International Court. On the other hand, the ECtHR seeks to close the gap by way of bolstering its reasoning itself without necessarily having to indicate that it relies on another Court to do so. The advantage of the second approach is that it closes any gap that litigants might try to use to play courts against each other. This is a strategy that is even more costly preference wise, since it does entail a substantial evolution of the jurisprudence rather than a symbolic one. Moreover, it also ensures that the Strasbourg Court limits any potential rhetorical entrapment that it would place itself in by signalling its readiness to explicitly to follow another International Court, something the CJEU more often finds itself trapped in[844].

Second, the role of Governments ended up being far more minor than expected in the theoretical framework. The source of challenges to the authority of International Courts were assumed to be of equal importance, since a challenge is a challenge, whether it comes from domestic courts, Governments or the other International Courts. Contrary to some of the literature's expectations[845], International Judges are much more concerned about domestic courts undermining their authority than Governments overruling them. Both the interviews and the actual case studies reveal that International Courts show less concern about governments themselves. This can be attributed to different reasons.

[844] Schimmelfennig (n 33).
[845] Larsson and Naurin (n 29).

One is that Courts are simply in less dialogue with Governments than they are with other judicial actors, whether this is domestic courts or other International Courts. When asked about the potential challenges to their authority, interviewees very rarely brought up Governments and always brought up domestic courts instead, followed by the other European Courts. It could have been assumed that Courts might be incorrectly estimating how much Governments could undermine their authority. But from interviews, it would seem that in the CJEU especially, they are aware of the sheer difficulty of overruling them; negotiations in the Council of the EU are slow, complex and considered unlikely to yield meaningful outcomes – the very reason why significant decision-making ends up being left to the CJEU:

> CJEU Judge: [When we pass a judgment] you have Members States saying, 'Ah, who do they think they are?' They- they are sitting there in Luxembourg. Why don't they leave this delicate political endeavour to Brussels (….) But then they forget that five years ago when they passed the unclear directive they had the ball. They could have cla- well, probably they couldn't because they couldn't get the qualified majority.
>
> Having spent quite some time in, in council meeting rooms and council, working groups over at least a full decade. I know how difficult it is. So, so it's, it's not, it's not a criticism, but there is this, (…) 'We could have done it, we should have done it, but we failed because the system is constructed in such a way to secure minority positions'. And it's, it's a whole system of checks and balances. But one of the, in a sense, a little bit perverse effects is that you will pressure the court to take decisions in order to get to some kind of result, which in a better world, would've been taken with a qualified majority in, in Brussels.[846]

Another possibility is that a lot of issues discussed at the level of European Courts inherently involve domestic courts more than legislatures. In Chapter 3, domestic judges are the ones delivering warrants or reviewing them; in Chapter 4, they are the ones deciding to execute the European Arrest Warrant or not. This is a credible explanation, especially when compared with Chapter 5: LGR was largely a matter of the presence, absence, or conditions of legal frameworks

[846] Interview 4, CJEU Judge, 12/12/2022

at the domestic level. The more these legal frameworks existed, the less leeway domestic courts had to be an independent actor weighing in on the decision-making process of European Courts.

Thirdly, the impact of litigation and litigants is one that should not be underestimated. It is one of the inherent limits of any judicial institution that it can only act when a case is brought before it[847]. In the case of this theoretical framework, it means that evolution in either convergence or divergence between International Court prerequires that relevant cases are brought before the Courts, and relevant arguments be also presented to these courts, to both provide them with additional information[848], but also materialise challenges concretely. In the case study on rights to LGR, the level of threats should have been sufficient to push both the CJEU and the ECHR towards each other, but this did not come to be, due to the lack of litigation honing in on the divergences between the Courts and the actual challenges that were present for each Court. Convergence with another Court is a costly mechanism, and if Courts are given the possibility to avoid resorting to these mechanisms, then they will do so. In a sense, this is an additional scope condition to the theory: sufficient litigation on a particular issue area must be presented before a Court in order for these Courts to meaningfully converge with another one.

Figure 15 presents an overview of the original theoretical mechanism, which was hypothesised in Chapter 1, with the added pathways drawn from certain inductive findings regarding this mechanism. In cases of insufficient litigation, the sufficient threat does not actually lead to a need to seek authority, meaning the Court can revert back to a focus on its policy preferences and does not need to bolster its legitimacy. On the other hand, when there is insufficient threat, but alignment of preferences between both International Courts, then, despite the lack of threats, one court will still seek to improve its authority by showing that another Court is already in agreement with it. However, this is not leading an International Court to prioritising legitimacy over preferences. The outcome, however, is still a *de facto* convergence with the other International

[847] Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2007).
[848] Interview 5, Former CJEU AG, 28/11/2022.

Court, but one that, as shown in the first period of case study 3 on Legal Gender Recognition, is not likely to be long-lasting.

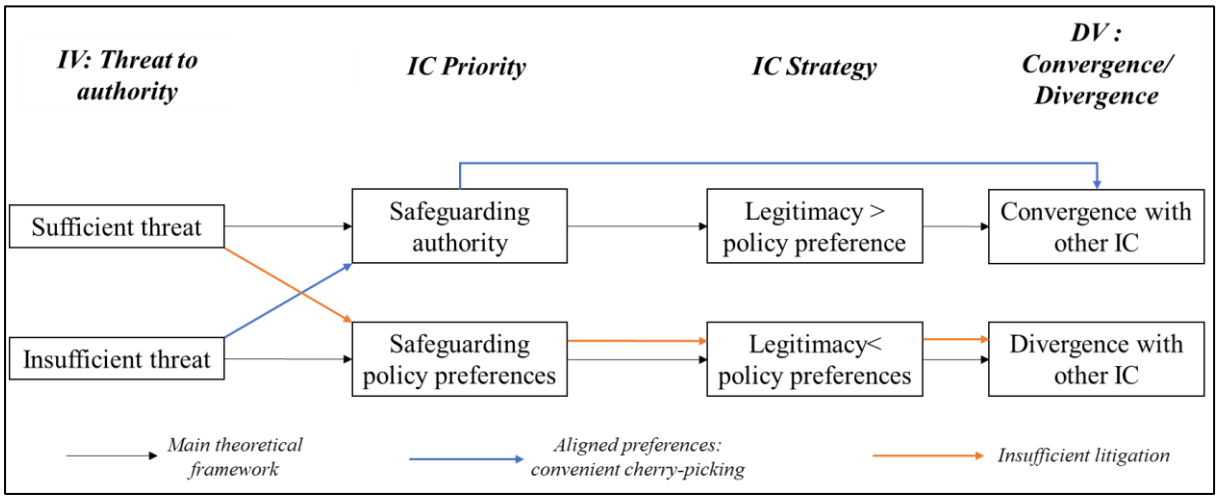

Figure 15: Causal mechanisms identified

2.2.*Normative considerations for the European Legal order*

This research has so far been agnostic regarding the desirability of the accession of the EU to the ECHR. Yet, throughout all phases of this work, the question was unavoidable, to the point where the ebbs and flows of these negotiations throughout the decades were a prominent feature of the degree of threat the CJEU and the ECtHR were under or contributed to. There were few interviews where at one point or another, the question of EU accession was not raised. It seems therefore essential to at least attempt to draw some normative considerations from this research, to contribute to the ongoing academic discussion.

One of the difficulties in building from this work, is avoiding the pitfall of generalizing the *empirical* findings. Three case studies do not allow one to draw conclusions on the state of all human rights in Europe, especially when the case selection strategy was not random and representative, but purposive and deliberate. These three case studies do not stand for all potential issue-areas; they stand for a diversity of political and legal contexts European Courts contend with. The theoretical findings, the manner in which the main theoretical framework was supported, is what the normative considerations can build on.

These findings are first that neither convergence nor divergence is a given, and the CJEU and the ECtHR are not inherently cooperative or competitive with each other. Challenges and even potentially crisis can serve as push-factors toward each other, forcing a convergence that may not be spontaneous, but exists nonetheless, as seen in Chapters 3 and 4. Convergence, more rarely, might even occur without it being a self-legitimizing strategy, as seen in Chapter 5. However, Chapters 4 and 5 also show that in the context of limited litigation, divided national judiciaries and/or sufficient support from national Governements from one court or the other, long-lasting divergence, including on highly sensitive issues, is not only possible but very likely. Additionally, more recent years have seen more and more of these situations, with complex human right questions without consensus in national European judiciaries, on high-stakes issues regarding vulnerable populations such as queer people, religious minorities, or migrant populations. These populations, and NGOs supporting them, do not always have the necessary resources to bring up a case to European Courts, strategically or not. As such litigation has been found to be one of the necessary conditions to push a Court into converging with another, European Courts are more likely to maintain a divergent *statu quo* in these contexts if any dissimilarities arise. Judicial solutions to these European puzzles, such as the *Bosphorus* doctrine or reliance on Article 52-3 of the CFR, have not been enough to prevent these situations, and are unlikely to be in the future either.

When one wonders about the desirability of EU accession to the ECHR, then, one of the key questions is whether this accession is useful, to begin with – and useful to whom, exactly. Is it necessary to prevent divergence in the jurisprudence of both courts, or not? Dissensions between European Courts are useful if they are fruitful, and arguably, if they lead to an improvement in the judicial protection of human rights. As this has not been the case, and is now not likely to be the case for the years to come, new institutional mechanisms catalysing convergence toward higher standards across European Human Rights, at the very least, should be welcome.

This is particularly important in the light of the multiple challenges to human rights and, relatedly, to the rule of law, which have appeared in the last few years. The inability of the EU to address the influx of migrants in the 2000s, leading to a catastrophic humanitarian crisis on European soil was

the first of these crises, but more recent years have seen the rise of illiberal democracies in EU Member States, the Russian military invasion of Ukraine (when both were members of the Council of Europe and parties to the ECHR), or the Covid-19 pandemic. These are situations where cross-institutional coherence on human rights standards is essential, as they put human rights, and each court individually, under stress. If this convergence around higher and effective standards of protection of human rights is not one European Courts naturally gravitate towards, then strict institutional mechanisms to ensure such standards are required – and this may, indeed, include the EU's accession the ECHR. Such accession raises many other theoretical and practical questions, but as far as its desirability to avoid the fragmentation of the European Legal Order goes, *a* solution is required, and more strictly organizing the overlap between the CJEU and the ECtHR qualifies as such.

3. Future research avenues

3.1.Extension of the theoretical framework to other International Courts

This research has shed light on the dynamic and multi-layered relationship between the CJEU and the ECtHR, through three case-studies on their common issues arising in their respective case-law. Yet, the methodological approach of this project was still deductive in nature, using the situation of both European Courts as a way to test a theory which could potentially be applied to any two overlapping Courts fulfilling the scope conditions. This section will therefore draw tentative conclusions on the applicability of the theoretical and methodological frameworks to other International Courts.

First, the scope conditions of the theory must be re-stated. As explained in Chapter 1, what is required is an overlap in competence *rationae materiae*, and *rationae personae* or *ratione territoriae*. While in this study the focus was on Human Rights, this could in principle be extended to any other area of International Law, including International Criminal Law, International Humanitarian Law, International Environmental Law, Trade Law or even territorial disputes. The overlap in terms of constituency can exist between two regional courts (e.g. the African Court of Human and People's Rights and the ECOWAS Court), but also between a global body and a

regional court (e.g. the WTO-AB and other ISDS mechanisms). This framework is also flexible enough to allow for quasi-judicial bodies, such as UN Treaty Bodies, to be one of the institutions included in the assessment (e.g. the UN Human Rights Commission and the Inter-American Court of Human and People's Rights). International judicial or quasi-judicial bodies without such overlap may contribute to the fragmentation or coherence of International Law[849]; but these situations are not covered by the theoretical framework. The index is technically usable in these situations, but can likely be improved and better tailored to non-overlapping bodies – something which falls outside the scope of this research.

The second theoretical scope condition is the identification of a difference in the preferences of both bodies being compared. As stated in Chapter 1, this is likely to be the case most of the time, as the creation of two identically mandated Courts with a similar area of competences is unlikely to occur in practice. The creation of other forums of litigation is more likely to result in a form of regime shifting, where the new institution was created with at least partially different sets of aspirations [or responsibilities?]. Regional Courts may have a stronger focus on a region-specific approach to the issue area at hand, particularly for issues of human rights and humanitarian law; other courts may have gained jurisdiction in respect of a particular issue-area even if this was not their main focus initially (not dissimilar to the CJEU, or even the ECOWAS's trajectory).

The multiplication of International Courts, especially at the regional level, makes these overlapping situations of Courts belonging to different institutional systems or even legal orders more and more common. While the CJEU and the ECtHR had the advantage of being older (and more well-established), and therefore provide this research with sufficient case-law for the testing of the theory, the deductive rather than inductive approach of this research allows for a tentative generalization of the theoretical framework, as long as the bodies in question fall into the strictly established scope conditions.

[849] Webb (n 64); Abrusci, *Judicial Convergence and Fragmentation in International Human Rights Law* (n 36).

3.2.Towards a sociological approach of international judicial dialogue

Contrary to what could have been expected, individual judges, including successive Presidents of each Court, have not impacted the general trends of their bench to convert or diverge with the other European Court. Interviewees that had been present in their respective courts for multiple years and had seen successive Presidents, only hinted that the identity of the President might impact the more informal interactions between both Courts. This is confirmed by the theoretical framework being agnostic to the identity of the judges themselves and having been tested on case studies spanning multiple decades, and therefore without a stable bench composition in either the CJEU or the ECtHR.

This might be surprising at first, especially in the context of an enormous body of research on the judicial biography of US Supreme Court Justices[850], and the rise of a similar biography on early influential CJEU Judges and AGs[851]. Perhaps this is because of the sheer number of judges now in each Court (27 in the CJEU General Court only, 47 in the ECtHR), diminishing the relative impact each could individually have today, compared to the early years of each Court, or the SCOTUS itself.

Yet, despite saying there was no particular change or trend attributable to individual judges or Presidents, interviewees also highlighted multiple times that there were differences between how each judge approached their own role, including how they position themselves *vis-à-vis* the otherCcourt, as exemplified by the following excerpt:

> It's very difficult to sort of think that that might be right because after all, you are talking about big tectonic plates moving. Okay? But you are also talking about human beings. You are talking about Skouris followed by Lenaerts. You

[850] Bruce Allen Murphy, *Scalia: A Court of One* (Simon and Schuster 2014); Mark V Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961* (Oxford University Press 1994); Jane Sherron de Hart, *Ruth Bader Ginsburg: A Life* (First Edition, Knopf 2018). Or even for a quasi-autobiographical approach: Ruth Bader Ginsburg, Mary Hartnett and Wendy W Williams, *My Own Words* (First Edition, Simon & Schuster 2016).

[851] Although to this day still more focused on the CJEU rather than the ECtHR: Vera Fritz, 'Activism on and off the Bench: Pierre Pescatore and the Law of Integration' (2020) 57 Common Market Law Review 475; Vera Fritz, *Juges Et Avocats Generaux de la Cour de Justice de l'Union Europeenne* (2018th edition, Verlag Vittorio Klostermann 2018); William Phelan, 'The Revolutionary Doctrines of European Law and the Legal Philosophy of Robert Lecourt' (2016) Working Paper.

> are talking about Costa, followed by Spano now, followed by – wonderfully- by Siofra O'Leary, right? (…) you know, she is somebody who knows the EU system inside out. She worked as a Référendaire there for ages. She was research and documentation. She was in Cambridge research before that, in the Centre for European Legal Studies. This is where she and I first came across each other. And then she goes to Strasbourg as the Irish judge, and she's now the president. Yeah. Mm-hmm. Put together that track record, put together that *curriculum vitae* and ask how Strasbourg and Luxembourg are going to interact.[852]

Additionally, when asked whether a review of the case-law of the other Court was systematic or on a case-by-case basis, and how they were even keeping track of this case-law, interviewees mentioned that this might change from one judge to the next. Some judges are more interested in the comparative legal method, more or less likely to ask for the inclusion of foreign sources in research notes, and more or less likely to want to mention them explicitly in a ruling.

This opens the way to two potential areas of research that would require a different methodology than the one used in this dissertation.

First, judicial biographies of individual judges, AG or litigants might be better leveraged to explore the ins and outs of a specific ruling, or very limited number of rulings. Where this research has been focused on one narrow aspect of each Court's case-law (their 'distance' from each other), over many years and many issue-areas, information regarding the background of judges, the exact information they had access to, the timing of the case and how it made its way through the docket of the Court are all likely to give better leverage for an in-depth understanding on key case. For example, when it comes to the *Aranyosi and Caldararu* case, this research was focused on one narrow aspect of it (whether it represented convergence or divergence with the ECtHR, and what impacted this aspect of the ruling)m but if one was to explain the decision as a whole, including the consequences that it had on the European legal order at large and, more narrowly, on the field of EU judicial cooperation, interviews make it clear that both the context and the sociological identity of judges will be essential to account for. This might be even more the case for the series of case-

[852] Interview 3, Former CJEU AG, 07/122022.

law presented in Chapter 2, which organised the systemic relationship between both Court – with how much interest in EU law varied from one judge to the next according to interviewees, it would be difficult to understand this ruling without looking at it at the scale of a judge deciding on the case, instead of that of an entire Court.

This feeds into the second, and potentially even more important, avenue of research for the upcoming years: the potential impact of the rising *European judiciary*. As mentioned by an interviewee in the previous court, since January 2023, the President of the ECtHR is Siofra O'Leary, an Irish judge who previously worked at the CJEU as a Référendaire On the other hand, former ECtHR Judge Ineta Ziemele is currently a Judge at the General Court of the CJEU, and former ECtHR President Dean Spielmann is a Judge at the CJEU's Court of First Instance. Multiple interviewees also mentioned that a lower-level dialogue, among jurists of both courts, was taking place: if judges met once a year, a jurist of the ECtHR's jurisconsult explained that

> until, let's say four or five years ago the, the DRD used to send like a delegation to our Court for two, three days. And like every year, basically! So, So they were, they were coming here, I don't know, with a, with a team of 10, 15 people. And they would basically have a whole program of meeting several people at the court registry, judges, things like that.[853]

This rise in both the number and the influence of judges with a mixed background is still a recent phenomenon, and therefore may be why it has not played a role in the case-studies of this dissertation. Whereas in the previous paragraph, I explained how the background of a judge can help understand specific rulings but not necessarily a general trend, this particular factor (interactions of both courts in the background of multiple judges) may very well end up impacting the larger trend towards convergence or divergence of both Courts.

But the notion of a 'European judiciary', which is not without being reminiscent of a stronger version of Slaughter's 'Community of Courts', is still being built and developed. What this common identity means is not very clear, even subjectively for the interviewees:

[853] Interview 17, Jurist of the ECtHR Jurisconsult, 21/04/2023.

> But once you have you have been in a way lucky to be elected because it, it is an election process and it's a difficult election process. (…). Once you've had the honour and the luck I would say (….) you probably shape sort of the, your own real purpose in, in what you are doing, you say, because before that you can't know. You simply know, okay, I have the credentials. You know, I, I think I can be good at that. That's one story, the story of before.
>
> But once you enter what I call - I have given a name actually, 'European judiciary', (…). So once you, you have become part of it then I suppose each judge would see his or her role slightly differently.[854]

This interviewee, whose background happened to include both Courts as well, was the clearest of all when it came to wording a sense of common European judiciary across Strasbourg or Luxembourg, and yet immediately noted that within this common sociological field, each judge had a different view of their own role as an International Judge.

The scholarship on International Courts has recently gained an interest in the International Judiciary[855], whether such a sociological category exists in the first place, and if so, what the consequences are likely to be. Just as the CJEU-ECtHR co-existence was an advanced example of what happens when two International Courts have overlapping jurisdiction, the European judiciary could be an advanced example of what an International Judiciary could become and what it could accomplish in the decades to come – not only for the coherence of international human rights, but for International Law at large.

[854] Interview 10, Former ECtHR Judge, 14/03/2023.

[855] And on the impact of the multiplication of Courts for this new judiciary: Arthur Eyffinger, 'Towards an International Judiciary: "An Areopagus of Jurists"', *T.M.C. Asser (1838-1913) (2 vols.)* (Brill Nijhoff 2019) accessed 10 August 2023; Mikael Rask Madsen, 'Who Rules the World: The Educational Capital of the International Judiciary' (2018) 3 UC Irvine Journal of International, Transnational, and Comparative Law 97; Mikael R Madsen, 'The International Judiciary as Transnational Power Elite' (2014) 8 International Political Sociology 332.

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Appendix 1: Interview Schedule

Renewed introduction: Thank you again for agreeing to take part in this research project. As previously mentioned, I am Audrey Plan, PhD Researcher from Trinity College Dublin, and I conduct research on International Courts with overlapping jurisdictions, in particular the European Court of Justice and the European Court of Human Rights.

You are free to refuse to answer any question, and your answers will be fully anonymised. They will not be shared with anyone else, and used only for academic research purposes.

First, would you consent to have the interview recording? The recording would not be shared, and used purely by myself in the analysis and writing process.

[yes / no]

Self-introduction

For context and record-keeping:

1. **Can you introduce yourself, and your role in the Court?**
2. **How would you present the role of your Court in its own institutional system, and in Europe?**

Thank you for this. I would like to ask you more questions regarding the Court, its overall activity, and its relationship with other actors in Europe.

On the Court

On the goals and preferences of the Court:

International Courts can have different objectives, different goals, depending on why they were created, what the strive for, who the judges are. That is true of both European supranational Courts as well. Of course, they are tasked with implementing their respective treaties, but this can take many different forms.

3. **What would you say is the main practical goal, or priority, of your Court, in its case-law?**
3. **Bis Are there other goals which the Court keeps in mind when engaging in decision-making?**

Thank you very much.

Moving one to the obstacles that Courts can face when seeking to pursue these goals, my research investigates the reactions that International Courts can have when faced with challenges, or even threats, to their authority. These challenges can take different forms, but I focus especially on non-implementation, or threats of non-implementation, refusal of the authority of the Court.

On threats to goals:

These challenges can come from different actors in Europe, and I would like to ask for your perspective on these.

4. **Who, do you think, are the type of actors who can challenge or shake the authority of the Court, in Europe? What do these threats look like, depending on the actor?**

Thank you very much. I would like to focus some more on particular sources of challenges that you have mentioned.

5. **How does the Court keep up with potential challenges to the implementation of its rulings, and how does it decide whether and how to react, when these challenges come … [*pick only the ones mentioned by interviewee before]***
    - **5.1. …From the Domestic courts?**
    - **5.2. …From Governments?**
    - **5.3. …From the other Court (ECJ or ECtHR)?**

Thank you. There are other actors which the literature has identified as a possible threat to the goals and authority of the Court, which you have not mentioned.

6. **Do you think there cannot be a real challenge coming [pick only the one(s) not mentioned so far]:**
    - **6.1. …From the Domestic courts?**
    - **6.2. …From Governments?**
    - **6.3. …From the other Court (ECJ or ECtHR)?**

(Possible nudge:) The relationship between the ECJ and the ECtHR, competence-wise is currently mainly organised by the 2004 Bosphorus ruling; this precedent has been reiterated in a few cases, most recently in the Bivolaru case where the presumption of equivalent protection was overruled.

7. ***How is the line of jurisprudence perceived by your Court? Is it ever conceptualised as a type of challenge to authority?***

On reactions to threats:

We know from the literature that there are many different ways the Court can try to convince a given actor to comply, when it is being challenged. I am interested in the way an International Court can react through its rulings, its decision-making, as an international judicial institution.

8. **How can a Court be more convincing in its own rulings, to respond to challenges? In terms of both outcomes and legal argumentation. Do they have drawbacks which might make the Court hesitant to use them?**

I would like to focus a bit more on the co-existence between the ECJ and the ECtHR, when it comes to this kind of threat, as it is so unique. It is established in the literature that both Courts do not always spontaneously agree with each other on a given issue, and have a very dynamic relationship. One way to conceptualise this relationship is a cooperative one, where both Courts work together face challenges; the other is more competitive, with both Courts existing as alternative sources of European Human Rights, where each Court itself is a challenge to the other.

9. **Do you think one is more accurate than the other, or are both happening at the same time? If so, can you give examples of when the relationship is more competitive, and when it is more cooperative?**

On specific cases:

I would like to ask you questions which relate to more specific jurisprudential sagas and cases, to better understand how the different elements we discussed so far can come together once the Court is faced with a particular case or question.

- If interviewee is part of Case Study 1:

In this matter, the ECJ initially refused to acknowledge that moral persons benefited from the fundamental right to protection of their business premises, as their home. The ECtHR then disagreed in 2002. The ECJ rectified, although only slowly converged with the ECJ.

⇨ If interviewee from ECJ:

In 2002, the ECtHR adopted the Roquettes ruling which strongly differed from the ECJ's precedent at this time. It was widely commented up by the literature.

10. How was this ruling received by the ECJ?

The ECJ then slowly changed its jurisprudence to converge with the ECtHR approach, and recognised that companies could be granted protection of the "home", or business premises. This, however, was a slow convergence, with the ECJ avoiding the term of "fundamental rights", and then considering that the protection would be different than the one individuals enjoyed.

11. How do you explain that the ECJ changed its position, but that it only did so gradually, even when it had the opportunity to do so in earlier cases? Preeminent Supreme Courts of Member States aligned more the ECtHR's approach, do you think this has been taken in consideration by the ECJ?

12. The ECJ sometimes referred to ECtHR rulings, and sometimes not. What motivates this decision?

⇨ If interviewee from ECtHR

In 2002, the ECtHR adopted the *Roquettes* ruling which strongly differed from the ECJ's precedent at this time. It was widely commented up by the literature.

13. When the ECtHR delivered the 2002 ruling, how much consideration was given to the fact that this would a markedly different solution that the one the ECJ had so far?

14. **The ECJ is the only who, overall, converged with the ECtHR on this matter. Why do you think this happened, rather than the ECtHR being the one converging, or both Courts meeting each other halfway**?

15. In this jurisprudential saga in particular, the ECtHR sometimes refers to the ECJ's case-law, and sometimes not. What motivates this decision? Would it ever refer to the ECJ's case-law, simply from a comparative perspective, when it comes to ruling on a case?

- If interviewee is part of Case Study 2:

I would like to talk about the rich jurisprudence of both Courts on the question of the European Arrest Warrants. Specifically, I am interested in the issue of whether a State can, and should refuse to execute a EAW based on concerns regarding the fundamental rights of the individual.

⇨ If interviewee from ECJ

It is well established that the ECJ's jurisprudence evolved on this matter. Even before any significant ECtHR case on the European Arrest Warrant, the ECJ changed its approach between cases *Melloni* and *Aranyosi-Caldararu*. The literature tends to qualify this as a switch from "bling trust" do "rebuttable trust".

16. **Why did this evolution take place, when this time the ECtHR did not have a jurisprudence on this specific matter yet?**

Another evolution took place between the *LM/Celmer* case and the *RO* case, were the Court switched from a two-part test requiring both *in concreto* and *in abstracto* threat to a purely *in concreto* test.

17. **Why did the Court initially prefer this two-tier test but then switched to a more direct, *in concreto* one? Can this be attributed to the ECtHR pushing for this approach in its own jurisprudence?**

⇨ If interviewee from ECtHR

The ECtHR gave three important rulings on the matter of mutual trust and European Arrest Warrant. I would like to ask you about them. First, with the *Pirozzi* ruling, the Court took a different approach to the ECJ when it came to assessing whether to execute or not such warrant, using an *in concreto* approach where the ECJ had a two-part, *in abstracto* and *in concreto* approach.

18. **How did the ECtHR see itself, in that context? What did it anticipate the consequences of creating such divergences to be?**

➢ If interviewee is part of Case Study 3:

I would like to talk about the jurisprudence on the protection of the rights of transgender people's, in particular regarding the requirements and potential discrimination when it comes to a transgender individual asking to change its recorded gender in civil records.

⇨ If interviewee from ECJ

The first time the ECJ referred to a ruling of the ECtHR rather than simply the ECHR, was in the P v. S case, in 1996.

19. **Why suddenly rely more on the jurisprudence, when this sets a precedent which constrains more the ECJ?**

The ECJ was able to have the more progressive jurisprudence regarding human rights on this issue-area, which is particularly notable.

20. **Why do you think that is, in this specific issue area?**

⇨ If interviewee from ECtHR

Most of the literature agrees that that the ECtHR typically has a more progressive jurisprudence when it comes to human rights, and has lead the way for the ECJ in most questions. But regarding the protection of trans rights, the ECJ is considered to have the most progressive jurisprudence, and the ECtHR to be the one following.

21. **Why do you think this happened?**

Appendix 2: List of Interviews

Interview Number	**Court**	**Title**	**Date**	***Notes***
1	CJEU	Former Advocate General	01/11/2022	*In person*
2	CJEU	Judge	02/12/2022	
3	CJEU	Former Advocate General	07/12/2022	
4	CJEU	Judge	12/12/2022	
5	CJEU	Former Advocate General	28/11/2022	*In person*
6	CJEU	Jurist of the Research and Documentation Directorate	20/12/2022	
7	CJEU	Advocate General	08/03/2022	
9	CJEU	Judge	12/02/2023	
10	ECtHR	Former Judge	14/03/2023	
11	CJEU	Former Judge	01/02/2023	
12	ECtHR	Former Judge	28/03/2023	
13	CJEU	Judge (General Court)	31/03/2023	
14	ECtHR	Jurist of the Jurisconsult	13/04/2023	
15	ECtHR	Jurist of the Jurisconsult	19/04/2023	*Not recorded*
16	ECtHR	Judge	20/04/2023	
17	ECtHR	Jurist of the Jurisconsult	21/04/2023	

Appendix 3: Index for Chapter 3 (Business Right to Privacy)

Category		Answer (Score associated)		Maximum /Minimum score	
		Divergence	**Convergence**		
Test/legal standard used by the Court	An identical test is…		Used (0) Mentioned but not used /partly used (0.5)	Min: 0 Max: 2.5	Max: 2.5 Min: 0
	A different test is…	Used (2) Mentioned but not used /partly used (1.5) None (1)			
Outcome of the case:	On protection of business premises for legal person:	Dissimilar (1.5), Uncertain (1)	Identical (0),	Max: 1.5 Min: 0	Max: 3 Min: 0
	On the possible difference between the protection of legal and natural persons	Dissimilar (1.5) Uncertain (1)	Identical (0)	Max: 1.5 Min: 0	
References to the other Court's case-law	Some pertinent case-law of the other Court is mentioned	No (2)	Yes (0) Mentions the other Court without specific case-law (+0.5)	Max: 2 Min: 0	Max: 2 Min 0
	If YES, the case-law is cherry-picked/irrelevant	YES (0.5)	No (0)	Max: 0.5 Min: 0	
	If NOT cherry-picked, the Court	Explicitly does not follow (1)	Explicitly follows (0) Implicitly does not follow (0.5)	Max: 1 Min: 0	
				Maximum: 7.5 Minimum: 0	

Appendix 4: Index for Chapter 4 (European Arrest Warrant)

Category		Answer (Score associated)		Maximum /Minimum score	
		Dissimilarity	Similarity		
Test/legal standard used by the Court	An identical test is…		Used (0) Mentioned but not used /partly used (0.5)	Min: 0 Max: 2.5	Max: 2.5 Min: 0
	A different test is…	Used (2) Mentioned but not used /partly used (1.5) None (1)		Min: 0 Max: 2.5	
Outcome of the case	On the possible rebuttal of mutual trust (Y/N)	Dissimilar (1.5), Uncertain (1)	Identical (0)	Max: 1.5 Min: 0	Max: 3 Min: 0
	On the test to extradite nonetheless	Dissimilar (1.5) Uncertain (1)	Identical (0)	Max: 1.5 Min: 0	
References to the other Court's case-law	Some pertinent case-law of the other Court is mentioned	No (2)	Yes (0) Mentions the other Court without specific case-law (+0.5)	Max: 2 Min: 0	Max: 2 Min 0
	If YES, the case-law is cherry-picked/irrelevant	YES (0.5)	No (0)	Max: 0.5 Min: 0	
	If NOT cherry-picked, the Court	Explicitly does not follow (1)	Explicitly follows (0) Implicitly does not follow (0.5)	Max: 1 Min: 0	
Similarity/Dissimilarity Score				Maximum: 7.5 Minimum: 0	

Appendix 5: Index for Chapter 5 (Right to LGR)

		Answer (Score associated)		Maximum /Minimum score	
Category		**Divergence**	**Convergence**		
Test/legal standard used by the Court	An identical test is…		Used (0) Mentioned but not used /partly used (0.5)	Min: 0 Max: 2.5	Max: 2.5 Min: 0
	A different test is…	Used (2) Mentioned but not used /partly used (1.5) None (1)		Min: 0 Max: 2.5	
Outcome of the case	On right to have legal gender changed on principle (Y/N)	Dissimilar (1.5), Uncertain (1)	Identical (0),	Max: 1.5 Min: 0	Max: 3 Min: 0
	On acceptable requirement from State: medical check, surgery, end of marriage	Dissimilar (1.5) Uncertain (1)	Identical (0)	Max: 1.5 Min: 0	
References to the other Court's case-law	Some pertinent case-law of the other Court is mentioned	No (2)	Yes (0) Mentions the other Court without specific case-law (+0.5)	Max: 2 Min: 0	Max: 2 Min: 0
	If YES, the case-law is cherry-picked/irrelevant	YES (0.5)	No (0)	Max: 0.5 Min: 0	
	If NOT cherry-picked, the Court	Explicitly does not follow (1.5) Implicitly does not follow (1)	Explicitly follows (0) Implicitly follow (0.5)	Max: 1 Min: 0	
Similarity/Dissimilarity Score				Maximum: 7.5 Minimum: 0	

Appendix 6: Access conditions to LGR in Europe (2019)

	EU	CoE
Self Determination	Belgium Denmark Ireland Luxembourg Malta Portugal France (judicial) Greece (judicial)	Belgium Denmark Ireland, Luxembourg, Malta, Portugal, France (judicial) Greece (judicial) Norway Iceland Switzerland
Medical Diagnosis	Austria, Germany Netherlands	Austria Germany Moldova Netherlands
Medical Diagnosis + Treatment	Croatia Estonia Italy Lithuania Poland Spain Slovenia Sweden	Croatia Estonia Italy Lithuania Poland Russian Federation Slovenia Spain Ukraine United Kingdom Sweden
Medical Diagnosis + Treatment + Sterilising surgery	Bulgaria, Czech Republic Finland Latvia Romania Slovakia Cyprus	Bosnia and Herzegovina Bulgaria Cyprus Czech Republic Finland Georgia Latvia Liechtenstein Montenegro Romania Serbia Slovakia Turkey
No procedure	Hungary (after 2020)	Albania Andorra Armenia Azerbaijan Hungary (after 2020) Monaco, North Macedonia San Marino