SOMEONE TO TALK TO? THE NON-USE OF THE US SUPREME COURT PRECEDENTS IN THE CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

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Sommario

Abstract

This article deals with cross-fertilization as the use made by courts of foreign and international legal sources. More specifically, it focuses on the use of the US Supreme Court precedents made by the Court of Justice of the European Union. By scrutinizing the latter's case law and proving that, as a general rule, it has referred to the US Supreme Court decisions in a merely ornamental fashion, it provides reasons to believe that, as far as the relation between the US Supreme Court and the Court of Justice of the European Union, cross-fertilization is just an illusion or, on a more positive note, a mere aspiration that has not been achieved yet.

Suggerimento di citazione

A. ROSANÒ, Someone to Talk to? *The Non-Use of the US Supreme Court Precedents in the Case Law of the Court of Justice of the European Union*, in *Osservatorio sulle fonti*, n. 1/2019. Disponibile in: http://www.osservatoriosullefonti.it

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L'Autore desidera ringraziare il Professor Alberto Oddenino e il dottor Stefano Montaldo per i preziosi consigli. Ogni errore od omissione rimane di sua esclusiva responsabilità.

Registrazione presso il Tribunale di Firenze n. 5626 del 24 dicembre 2007
Rivista inclusa nella classe A delle Riviste scientifiche di Area 12 – Direttore Prof. Paolo Caretti
ISSN 2038-5633

1. Introduction

Cross-fertilization or judicial dialogue or comparative law method1 as the use made by courts of foreign and international legal sources has been the object of a major debate in the last twenty years, both in the US and Europe.[2]

In the US, those in favor of that practice have said that citing to foreign law and practices may prove useful to determine the scope of US constitutional rights,[3] stating that similar problems might be solved through similar solutions.[4] Those opposing that practice have argued that foreign and international law material lack democratic legitimacy,[5] especially when courts do not provide a clear and consistent motivation for referring to foreign sources[6] or when they use those materials to attack a domestic practice that is deemed contrary to a predominant conception of morality.[7] American exceptionalism has also been taken into account as a reason to reject foreign practices.[8]

[1] The terms used to describe the recourse to foreign and international law by judges are various: conversation (see for instance M. CLAES ET AL., *Introduction: On Constitutional Conversations*, in M. CLAES ET AL. (eds), *Constitutional Conversations in Europe: Actors, Topic and Procedure*, Intersentia, Cambridge, 2012, 1), dialogue (G. CANIVET, *Trans-Judicial Dialogue in a Global World*, in S. MULLER, S. RICHARDS (eds), *Highest Courts and Globalisation*, Hague Academic Press, The Hague, 2010, 21), engagement (V.C. JACKSON, *Constitutional Engagement in a Transnational Era*, Oxford University Press, Oxford, 2013), and migration (S. CHOUDRY (ed), *The Migration of Constitutional Ideas*, Cambridge University Press, Cambridge, 2006), just to name a few.

[2] For a general overview and introduction to the topic, see V.C. JACKSON, M. TUSHNET, *Comparative Constitutional Law*, Foundation Press, Eagan, 1999, 153-189, A.-M. SLAUGHTER, *A Global Community of Courts*, in *Harvard International Law Journal*, 2003, 191-219. More generally speaking, see M. GRAZIADEI, *Comparative Law as the Study of Transplants and Receptions*, in M. REIMANN, R. ZIMMERMANN (eds), *The Oxford Handbook of Comparative Law*, Oxford University Press, Oxford, 2006, 441-475.

[3] See for instance V.C. JACKSON, *Constitutional Comparisons: Convergence, Resistance, Engagement*, in *Harvard Law Review*, 2005, 109-112, S.G. CALABRESI, *"A Shining City on a Hill": American Exceptionalism and the Supreme Court Practice of Relying on Foreign Law*, in *Boston University Law Review*, 2006, 1337-1416.

[4] D.M. BODANSKY, *The Use of International Sources in Constitutional Opinion*, in *Georgia Journal of International & Comparative Law*, 2004, 421-428, H.H. KOH, *International Law as Part of Our Law*, in *American Journal of International Law*, 2004, 43-57.

[5] J.O. MCGINNIS, *Foreign to Our Constitution*, in *Northwestern University Law Review*, 2006, 303-351.

[6] J.L. LARSEN, *Importing Constitutional Norms from a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, in *Ohio State Law Journal*, 2004, 1283-1327.

[7] See E.A. YOUNG, *Foreign Law and the Denominator Problem*, in *Harvard Law Review*, 2005, 148-167 who also considered the divergence between the values and culture of European countries and the American ones, the US constitutional structure regarding foreign affairs, and the likelihood of misunderstanding foreign law as reasons against the use of foreign sources.

[8] For a starting point, see G.B. LUCAS, *Structural Exceptionalism and Comparative Constitutional Law*, in *Virginia Law Review*, 2010, 1965-2010. Besides the articles cited above, for a survey on the US Supreme Court practice see S.G. CALABRESI, S.D. ZIMDAHL, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, in *William & Mary Law Review*, 2005, 743-909, S.H. CLEVELAND, *Our International Constitution*, in *Yale Journal*

In Europe, the legitimacy of judicial comparison has never been considered a problem[9] and European legal scholars seem to have focused more on how make use of foreign legal material rather than the reasons in favor or against that.[10]

Considering the Court of Justice of the European Union (CJEU),[11] it has been said that the comparative law method is "typically associated with the examination of the laws of the Member States, that is to say, national norms that are 'internal' to the Union legal order that inform and nourish the interpretation and formulation of EU law."[12]

The purpose of this Article is to analyze the case law of the CJEU in order to understand whether the US Supreme Court rulings have had an impact on its development.[13] Thus, in paragraph 2, it deals with the CJEU precedents and take into account both the judgments passed by the Court and the Opinions delivered by the Advocates General (AGs). Paragraph 3 is devoted to some final remarks in order to prove that the CJEU has not considered the US Supreme Court case law although the AGs advanced the idea to do so by basing a significant part of their reasoning on the US Supreme Court precedents.[14]

of International Law, 2006, 1-125.

[9] As it is confirmed by C. MCCRUDDEN, *Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights*, in *Oxford Journal of Legal Studies*, 2000, 503, where the Author defines that as a topic "relatively ignored in the theoretical literature."

[10] See L.C. BACKER, *Harmonizing Law in an Era of Globalization: Convergence, Divergence, and Resistance*, Carolina Academic Press, Durham, 2007 and B.N. MAMLYUK, U. MATTEI, *Comparative International Law*, in *Brooklyn Journal of International Law*, 2011, 385-452.

[11] On the CJEU, see generally A. ROSAS, E. LEVITS, Y. BOT (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law*, Springer, Berlin, 2013, S. SANKARI, *European Court of Justice Legal Reasoning in Context*, Europa Law Publishing, Amsterdam, 2013, G. BECK, *The Legal Reasoning of the Court of Justice of the EU*, Oxford University Press, Oxford, 2012, A. ARNULL, *The European Union and Its Court of Justice*, II ed., Oxford University Press, Oxford, 2006.

[12] K. LENAERTS, K. GUTMAN, *The Comparative Law Method and the Court of Justice of the European Union: Interlocking Legal Orders Revisited,* in M. ANDENAS, D. FAIRGRIEVE (eds), *Courts and Comparative Law,* Oxford University Press, Oxford, p. 141. On the use of the comparative method made by the CJEU, F.G. JACOBS, *Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice,* in *Texas International Law Journal,* 2003, 547-556, A. ROSAS, *The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue,* in *European Journal of Legal Studies,* 2007, 121-136, G. DE BÚRCA, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?,* in *Maastricht Journal of European and Comparative Law,* 2013, 168-184.

[13] The topic has been the object of some studies in the past. See P. HERZOG, *United States Supreme Court Cases in the Court of Justice of the European Communities*, in *Hastings International & Comparative Law Review,* 1998, 903-919, C. BAUDENBACHER, *Judicial Globalization: New Development or Old Wine in New Bottles?*, in *Texas International Law Journal*, 2003, 505-526, L.F. PEOPLES, *The Use of Foreign Law by the Advocates General of the Court of Justice of the European Communities*, in *Syracuse Journal of International Law & Commerce*, 2008, 218-273.

[14] One should remember that it is settled case-law that in interpreting a provision of EU law it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part (see for instance CJEU, judgment of 20 December 2017, joined

2.1 The Use of the US Supreme Court precedents in the CJEU case law: The CJEU and the GC judgments

In the CJEU case law, some US Supreme Court precedents are explicitly recalled twice only and in both cases, it is just by way of a mere reference to the fact that one of the parties recalled those precedents.[15] Thus, the CJEU has never expressly referred to the judgments passed by the US Supreme Court as a possible basis for its legal reasoning. Nevertheless, one should be aware that the solution provided by the CJEU in one of these cases is consistent with the idea expressed by the Supreme Court.

With regard to the application of the principle of equality, the CJEU ruled that a difference in pay between full-time workers and part-time workers does not amount to discrimination prohibited by Article 119 of the former Treaty establishing the European Economic Community (EEC)[16] "unless it is in reality merely an indirect way of reducing the pay of part-time workers on the ground that that group of workers is composed exclusively or predominantly of women".[17] In *Griggs v Duke Power*, which was recalled by the employee, the US Supreme Court ruled that when it comes to discrimination, what must be prohibited are not merely practices which are intended to discriminate, but equally those which are discriminatory in their effect, irrespective of the intentions of their authors.[18]

For what concerns the GC case law, one may find five explicit references to the US Supreme Court case law. While in one case that is the mere acknowledgement of the fact that one of the parties recalled some judgments passed by the Supreme Court,[19] and in another one the GC excluded the relevance of the Supreme Court ruling without providing a specific reason,[20] in the other cases the views expressed by the Supreme Court were taken into deeper consideration.

In a case concerning anticompetitive practices of the shipping conferences operating on routes between Europe and West Africa, which abused their dominant positions,[21] one of the issues at stake concerned an agreement between Zaïre and a shipping conference which conferred exclusive rights

cases C-397/16 and C-435/16, *Acacia*, para 31).

[15] See for instance CJEU, judgment of 25 October 1977, case 26/76, *Metro v. Commission*.

[16] In light of the reform made by the Treaty of Lisbon, see Article 157 of the Treaty on the Functioning of the European Union (TFEU).

[17] CJEU, judgment of 31 March 1980, case 96/80, *Jenkins v. Kingsgate*.

[18] *Griggs v. Duke Power Co*, 401 U.S. 424 (1971).

[19] GC, judgment of 10 March 1992, case T-14/89, *Montedipe v. Commission*.

[20] GC, judgment of 29 March 2012, case T-398/07, *Spain v. Commission*.

[21] GC, judgment of 8 October 1996, joined cases T-24/93, T-25/93, T-26/93 and T-28/93, *Compagnie Maritime Belge Transports and others v. Commission*.

regarding importation and exportation of goods from and to Northern Europe to the shipping conference. In this regard, the shipping conference submitted that the mere inducement of government action could not constitute an infringement of competition law and referred to US case law.[22] More specifically, they recalled the 'Act of State' doctrine, according to which an undertaking cannot be condemned for having induced a government to adopt an act even if such act restricts competition.[23] They also recalled the 'Noerr-Pennington' doctrine, which highlights that transmitting information to government authorities with a view to influencing their conduct is not affected by antitrust laws.[24] The European Commission contested those references, arguing that the act at stake was not an act of State, which would have required legislation and administrative provisions for the grant of the rights, but a freely-negotiated cooperation agreement between the shipping conference and the national authority in charge of the management of maritime traffic which did not imply any sovereign act.[25]

According to the GC, the applicants' argument that encouraging a government to take action does not constitute an abuse was irrelevant, since no charge of that kind of practice had been made in that case.[26]

In *AstraZeneca*, the GC faced *inter alia* a practice consisting in misleading representations made by two pharmaceutical companies before the patent offices of several European countries.[27] The applicants stressed that under US law, an antitrust action is justified where the patent was procured by knowingly and willfully misrepresenting facts to the patent office. Thus, neither gross negligence nor recklessness nor the existence of inequitable conduct are sufficient, proof of fraud being required. Willful misrepresentation amounting to intentional fraud is therefore an essential requirement for liability to be incurred. Further, they underlined that in US law, mere acquisition of a patent is insufficient for application of the antitrust rules, actual enforcement of the patent being necessary. In fact, the immediate cause of the anticompetitive effect must be the conduct of the patent owner and not the action of the public agency.[28]

As far as these assertions were concerned, the European Commission largely relied on US law and US case law, stating that:

[22] *ivi*, para 88.

[23] *ivi.* The reference was made to *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

[24] See GC, *Compagnie Maritime Belge Transports*, cit., para 88. The shipping conference recalled *Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 US 657 (1965).

[25] See GC, *Compagnie Maritime Belge Transports*, cit., para 97.

[26] *ivi*, para 110.

[27] GC, judgment of I July 2010, case T-321/05, *AstraZeneca v. Commission*.

[28] *ivi*, para 316, 317.

> There exists, in United States law, a 'Noerr-Pennington' doctrine, according to which misrepresentations in a lobbying campaign in the political context are not subject to Sherman Act liability. However, […] the United States Supreme Court held that, when made in the adjudicatory process, such misrepresentations were not eligible for protection under that doctrine and could be subject to Sherman Act liability and, more specifically, that the enforcement of a patent procured by fraud on the Patent Office might be contrary to Section 2 of the Sherman Act. Moreover, many decisions of United States courts have recognised that misrepresentations may be caught by the Sherman Act. The Commission notes that that case-law also covers material omissions. In one of its judgments, the Federal Circuit even used the words 'inappropriate attempt to procure a patent' in place of 'fraudulent procurement' and stated that fraud involved the 'intent to deceive', or at the very least a state of mind so reckless as to the consequences that it is held to be the equivalent of intent. Thus, contrary to the applicants' assertions, United States law does not require, for the purpose of establishing fraud, that the information is false. The Commission acknowledges that certain courts have accepted that antitrust liability requires that measures are taken to enforce the patent. It points out, however, that other courts have held that the furnishing of false information is enough.[29]

The GC's finding on this topic was quite concise and swift: the position adopted by US law and US courts cannot take precedence over that adopted by EU law.[30]

Finally, in *Versalis and ENI*,[31] a case that regarded anticompetitive agreements in the chloroprene rubber market, the imputability of the unlawful conduct of a subsidiary company to the parent one was scrutinized. In this regard, both the applicants recalled the US case law and, more specifically, the 'veil piercing' doctrine. This doctrine highlights the importance of the principle of

[29] *ivi.*, para 340, 341.
[30] *ivi.*, para 368.
[31] GC, judgment of 13 December 2012, case T-103/08, *Versalis and ENI v. Commission*.

limited liability in order to determine the alleged liability of the parent company for the unlawful conduct of the subsidiary. This implies that, in order to determine such liability, a number of elements should be examined that go beyond the mere owner's control and that would allow to conclude that the parent company has used its subsidiary as a simple means of avoiding responsibility for the illegal conduct.[32]

The GC confirmed the settled interpretation provided by the judicial bodies of the EU by stressing that in the context of EU competition law one of the key concepts is that of undertaking which must be understood as designating an economic unit even if in law the economic unit consists of several persons, natural or legal. In light of that, the conduct of a subsidiary may be imputed to the parent company where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out the instructions given to it by the parent company. In that case, the parent company and its subsidiary form a single economic unit, thus a single undertaking, and are both responsible for the infringement of EU competition law. In this regard, the GC underlined that the reasons relating to the rules of American corporate and antitrust law were irrelevant, since the case concerned the application of EU law.[33]

2.2 The AGs Opinions in the antitrust-law field

Over time, the AGs have recalled the US Supreme Court precedents in the field of antitrust law many times. In some cases, that is just a reference to the fact that one of the parties quoted the Supreme Court case law in order to bolster their claim[34] or the AG merely recalled the case without further analysis.[35] In many other cases, their analysis went deeper.

[32] *ivi*, para 51.

[33] *ivi*, para 77. The GC recalled CJEU, judgment of 12 July 1984, case 170/83, *Hydroterm Gerätebau*, CJEU, judgment of 10 September 2009, case C-97/08 P, *Akzo Nobel and others v. Commission*; GC, judgment of 15 September 2005, case T-325/01, *Daimler Chrysler v. Commission*.

[34] See for instance Opinion of AG Roemer in CJEU, judgment of 21 February 1973, case 6/72, *Europemballage Corporation and Continental Can Company v. Commission*, Opinion of AG Reischl in CJEU, judgment of 25 October 1977, case 26/76, *Metro v. Commission*, Opinion of AG Fennelly in CJEU, judgment of 16 March 2000, joined cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge Transports and others v. Commission* and Opinion of AG Ruiz-Jarabo Colomer in CJEU, judgment of 14 November 1996, case C-333/94 P, *Tetra Pak v. Commission*.

[35] See for instance Opinion of AG Cosmas in CJEU, judgment of 8 July 1999, case C-49/92 P, *Commission v. Anic Partecipazioni*, Opinion of AG Jacobs in CJEU, judgment of 26 November 1998, case C-7/97, *Bronner*, Opinion of AG Mischo in CJEU, judgment of 20 November 2001, case C-453/99, *Courage and Crehan*, Opinion of AG Jacobs in CJEU, judgment of 31 May 2005, case C-53/03, *Syfait and others*, Opinion of AG Geelhoed in CJEU, judgment of 29 June 2006, case C-301/04 P, *Commission v. SGL Carbon AG*, Opinion of AG Ruiz-Jarabo Colomer in CJEU, judgment of 16 September 2008, joined cases C-468/06 to C-478/06, *Sot. Lélos kai Sia* and Opinion of AG Kokott in CJEU, judgment of 14 September 2010, case C-550/07 P, *Akzo Nobel Chemicals and Akcros Chemical*

In *Boehringer Mannheim*, a company was fined by the European Commission for being member of the international quinine cartel. Before that happened, a criminal proceedings for violation of US antitrust legislation had been brought against the same company that had been fined likewise. In light of that, the company requested the CJEU to annul the decision of the European Commission or alternatively to reduce the sanction by an amount equal to the fine paid in the US. The core of the company's legal reasoning was that both fines arose out of the same facts so the amount of the fine paid in the US should have been deduced from the amount of the fine it should have paid in Europe. Thus, the issue at stake concerned the applicability of the double jeopardy clause to facts which were anticompetitive in nature and had taken place both in Europe and outside. There was no doubt that in the legal system of the Member States the *ne bis in idem*, which is a consequence of *res judicata*, was regarded as a general principle prohibiting cumulation of penalties and preventing any further criminal proceedings in respect of the same action. However, should the European Commission, first, and the Court take into any account any proceedings that was brought outside the EU legal framework and its outcome?

In the Opinion he delivered,[36] AG Mayras provided a number of reasons to prove that the principle of *ne bis in idem* only applies within a given legal system and does not apply to different ones. In this regard, he recalled that in the US parallel proceedings based on State legislation and on federal legislation may lead to a cumulation of penalties in spite of the Fifth Amendment. That is because the same conduct must be regarded as being an infringement of the law in two different legal systems: thus, two different offences have been committed. Therefore, the AG quoted *Bartkus v. Illinois*, where the US Supreme Court found that

> Every citizen of the United States is also a citizen of a State or territory. He therefore owes allegiance to two sovereign States, and is liable to punishment for an offence against the laws of either State. The same act may be an offence against the laws of both. There is no doubt that either or both States may, if they see fit, punish such an offender. Yet it cannot be stated that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable. He

v. Commission.

[36] Opinion of AG Mayras in CJEU, judgment of 14 December 1972, case 7/72, *Boehringer Mannheim v. Commission*.

> may not therefore plead the punishment by one in bar to a conviction in respect of the other offence.[37]

The AG also recalled *U.S. v. Lanza*[38] and, in light of the elements provided, concluded that the application should have been dismissed. The CJEU confirmed that outcome in its ruling, even though the Supreme Court case law was not recalled.[39]

In a case concerning concerted practices between undertakings established in non-EU States affecting selling prices to purchasers established in the EU, the conundrum was whether EU competition rules could apply to undertakings established outside the EU when the conduct outside the EU had an effect in the EU. Focusing on the concept of jurisdiction, AG Darmon[40] considered the peculiar relation between that concept and the one of territoriality and analyzed *inter alia* the evolution of the American case law on the topic. First, he quoted what Justice Oliver Wendell Holmes wrote in *American Banana*: "All legislation is *prima facie* territorial",[41] meaning that exclusively the law of the State within whose territory the act is done determines whether an act is legal or illegal. Thus, undertakings established abroad should be penalized only on account of their conduct within the State. After that, he referred to *Alcoa*[42] and *Swiss Watchmakers*[43] cases, where the courts relied on the so-called effects doctrine and upheld the jurisdiction of US authorities over the defendant, which was established abroad, since their conduct had a substantial and direct effect in the US. In addition, he referred to *Timberlane Lumber*[44] and *Mannigton Mills*,[45] where the American courts held that, in certain cases, the interests of the US are too weak and the need to preserve harmony in international relations too strong to justify an assertion of extraterritorial jurisdiction. Finally, he underlined that in *Laker Airways*[46] Judge Wilkey criticized the approach based on the balance of interests as it would require national courts to question their own jurisdiction and to choose between a domestic law whose aim is to protect domestic interests, and a foreign law which is designed to hinder the application of the domestic law which may threaten foreign interests.

[37] *Moore v. People*, 55 U.S. 13 (1852).
[38] *United States v. Lanza*, 260 U.S. 377 (1922).
[39] See CJEU, *Boehringer Mannheim / Commission*, cit.
[40] Opinion of AG Darmon in CJEU, judgment of 27 September 1988, joined cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, *Ahlström v. Commission*.
[41] See note 23.
[42] *United States v. Alcoa*, 148 F.2d 416 (2d Cir. 1945).
[43] *United States v. Watchmakers of Switzerland Information Center, Inc.*, 244 F. Supp. 70 (1955).
[44] *Timberlane Lumber Co. et al. v. Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Circ. 1976).
[45] *Mannington Mills, Inc. v. Congoleum Petroleum*, F.2d 1287 (3rd Cir. 1979).
[46] *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (1984).

In light of that, AG Darmon pointed out that the American case law provided food for thought and yet could not lead to an ultimate solution. Thus, relying on the Opinion of another AG,[47] his conclusion was that extraterritorial jurisdiction should be asserted only in presence of a direct and immediate, reasonably foreseeable and substantial effect.

The CJEU, for its part, rejected the applicants' submissions relating to jurisdiction, focusing on the effects spreading from their conduct.[48]

Other cases concerned the relation between the French copyright management society and some French discotheque owners who did not want to comply with the national copyright legislation. Pursuant to that legislation, discotheque owners needed a global licence to perform publicly the works belonging to the repertory of the French copyright management society and were required to pay a royalty in the form of a percentage of the total gross receipts of their establishments. In light of that, some questions were referred to the CJEU in order to assess whether the national provisions had infringed the principle of fair competition by way of establishing a *de facto* monopoly.

One of the issues at stake regarded the global licence as a possible violation of competition law as the discotheque owners had to pay a single fee to access the whole repertory belonging to the copyright management society while the type or number of musical works actually used by the discotheques were not taken into any account. Dealing with this problem, AG Jacobs[49] underlined that at that time, the CJEU had not yet had the chance to rule on the compatibility with competition law of such a practice, while American courts had already faced antitrust challenges concerning that kind of situation (so-called blanket licensing). He recalled *Broadcast Music v. Columbia Broadcasting System*[50] where the Supreme Court ruled that blanket licensing cannot be considered as a violation in itself of the Sherman Act but must be evaluated in terms of a rule-of-reason analysis. That means that a court has to weigh up the procompetitive effects of a practice against its anti-competitive effects to determine whether the practice unreasonably restrains trade in the relevant market.

Then, in light of the rule of reason provided by the Supreme Court, AG Jacobs wrote that it was up to national courts to find a balance between the benefits and disadvantages of the global licence, considering its convenience and flexibility as well as the existence of a viable alternative to it. Therefore, he responded to the question referred stating that the global licence practice could be considered an infringement of competition law if its imposition exceeded what was necessary for the effective management of copyright.

[47] See Opinion of AG Mayras in CJEU, judgment of 14 July 1972, case 48/69, *ICI v. Commission*.
[48] See CJEU, *Ahlström v. Commissione*, cit.
[49] Opinion of AG Jacobs in CJEU, judgment of 13 July 1989, case C-395/87, *Tournier*.
[50] *Broadcast Music v. Columbia Broadcasting System*, 441 U.S. 1 (1979).

Though without mentioning the Supreme Court case law, the CJEU agreed with AG Jacobs on that issue, underlying the need that national courts assessed whether that practice exceeded the limit of what was necessary for the safeguard of the rights and interests of artists.[51]

In a case concerning whether shareholders in an undertaking had *locus standi* to bring actions against European Commission decisions regarding merger control, AG Lenz[52] based his reasoning on the US Supreme Court case law concerning § 4 and § 26 of the Clayton Act.[53] He wrote that that case law requires the plaintiff to have suffered an antitrust injury or to be threatened by such injury and added:

> In its decision in the *Brunswick* case the Supreme Court defined that as 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful'. That case concerned an action brought by various bowling centres for damages under § 4 of the Clayton Act as a result of the takeover of certain bowling centres by a competitor. The plaintiffs claimed that, without the takeover, the bowling centres acquired would have gone bankrupt and they would then have been in a position to acquire at least some of the customers of those centres. The Supreme Court found that the plaintiffs' 'damage' was not the kind of damage which the antitrust rules were intended to prevent. In its judgment in the *Cargill* case the Supreme Court applied that case-law to actions under § 16 of the Clayton Act.[54]

After recalling some lower courts judgments and another US Supreme Court ruling,[55] he pointed out that under US law, the action brought by the appellants would be inadmissible. Thus, in the actual case, the result should be

[51] See CJEU, *Tournier*, cit., para 31.

[52] Opinion of AG Lenz in CJEU, judgment of 11 January 1996, case C-480/93 P, *Zunis Holding and others v. Commission*, para 39.

[53] 15 U.S.C. §§ 15, 26 (2012).

[54] *ivi.* The decisions AG Lenz referred to are *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) and *Cargill v. Monfort*, 479 U.S. 104 (1986).

[55] See *Associated General Contractors of California, Inc. v. California Stale Council of Carpenters*, 459 U. S. 519 (1983); *Loeb v. Eastman Kodak Co.*, 183 F. 704 (3rd Cir. 1910); *Southwest Suburban Board of Realtors, Inc. v. Beverly Area Planning Association*, 830 F.2d 1374 (7th Cir. 1987).

the same. In the fact, the legal positions the shareholders had acquired were merely derivative since they were not individually concerned.[56]

In *Albany*, the CJEU was asked to rule on the compatibility of a system of compulsory affiliation to sectoral pension funds with competition law. Since the Court had not had any occasion to rule on such a topic before, AG Jacobs deemed helpful to provide a comparative overview, focusing on the antitrust systems of several EU Member States and the US.[57] As far as US law was concerned, he considered that trade union activities were in principle sheltered from the prohibition of cartels contained in the Sherman Act through a statutory and a non-statutory labour exemption. With regard to the former, he recalled *United States v. Hutcheson*,[58] where the Supreme Court found that three conditions are needed for the statutory exception to apply: a) there must be a labor dispute; b) the trade union must act in its self-interest; and c) the union must not combine with non-labor groups, such as employers. With regard to the latter, he underlined that the Supreme Court recognized its existence, albeit limiting its application to agreements between unions and employers on wages and working conditions. In this regard, he recalled *Connell*,[59] *United Mine Workers of America v. Pennington*,[60] *Meat Cutters v. Jewel Tea Co.*,[61] and *Brown v. Pro Football*.[62]

In light of the comparative analysis he conducted, AG Jacobs stated that in all the systems he took into account collective agreements between management and labor were to some extent sheltered from the prohibition of anticompetitive cartels, although the immunity was not unlimited and its legal sources differed. It does not come as a surprise then that he stated that an *ipso facto* immunity could apply to that kind of agreements where they complied with some conditions: they need to be collective agreements between management and labor, concluded in good faith on core subjects of collective bargaining such as wages and working conditions, which do not directly affect third markets and third parties.

The CJEU found that agreements which are the outcome of collective negotiations between organizations representing employers and workers and whose purpose is to guarantee a certain level of pension for all those who work in a given sector contribute directly to improving one of their working

[56] The CJEU dismissed the application for other reasons and did not consider the *locus standi* issue (see CJEU, *Zunis Holding and others v. Commission*)

[57] Opinion of AG Jacobs in CJEU, judgment of 21 September 1999, case C-67/96, *Albany*, para 80-112.

[58] *United States v. Hutcheson*, 312 U.S. 219 (1941).

[59] *Connell Constr. Co., Inc. v. Plumbers & Steamfitters*, 421 U.S. 616 (1975).

[60] *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

[61] *Meat Cutters v. Jewel Tea*, 381 U.S. 676 (1965).

[62] *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996).

conditions, that is to say their remuneration. Thus, because of their nature and purpose, they are not prohibited under competition law.[63]

The rule of reason was also considered in a case concerning the application of EU competition law to a regulation adopted by the Netherlands Bar Association and prohibiting lawyers practising in the Netherlands from entering into multi-disciplinary partnerships with members of the professional category of accountants. Trying to understand whether that regulation had as its effect the prevention, restriction or distortion of competition, AG Léger first recalled that in the US, section 1 of the Sherman Act[64] prohibits all obstacles to competition without distinction as to degree or motive,[65] and then added:

> Faced with the rigidity of that provision, the United States courts swiftly found it necessary to interpret the Sherman Act in a more 'reasonable' way. In the first place, they developed the theory called 'ancillary restrictions': they held that restrictions of competition necessary to the performance of an agreement lawful in itself fell outside the prohibition laid down in section 1 of the Sherman Act. Then, the Supreme Court of the United States of America changed its point of view and adopted what might be called the 'competition balance-sheet method'. That method is defined as being: 'An analytical method intended to draw up, for every agreement in its own context, the balance-sheet of its anti- and pro-competitive effects. If it shows a positive balance, because the agreement stimulates competition more than it restricts it, section 1 of the Sherman Act will not apply.'[66]

After underlying that the rule of reason was applied in the EU competition legal framework too and it was interpreted as a rule providing for a purely competitive balance-sheet of the effects of the agreement,[67] he considered that by entering into multi-disciplinary partnerships with each others, both lawyers

[63] See CJEU, *Albany*, para 62-65.

[64] 15 U.S.C. § 1.

[65] Opinion of AG Léger in CJEU, judgment of 19 February 2002, case C-309/99, *Wouters and others*, para 101.

[66] *ivi*. In this case, AG Léger did not mention a specific Supreme Court ruling, but simply recalled some scholars works, such as R. KOVAR, *Le droit communautaire de la concurrence et la "règle de raison"*, in *Revue trimestrielle de droit européen*, 1987, n. 2, 238, D. FASQUELLE, *Droit américain et droit communautaire des ententes. Étude de la règle de raison*, Issy-les-Molineaux, 1993, p. 25.

[67] On the topic, see CJEU, judgment of 25 October 1983, case 107/82, *AEG v. Commission*, para 33-36.

and accountants would improve the quality and quantity of their services. Thus, he concluded that the regulation passed by the Netherlands Bar Association had the effect to limit or control production, markets, technical development or investment, and was anticompetitive in nature.

The CJEU disagreed with the AG and ruled that the Netherlands Bar Association could reasonably have considered that the regulation, despite its anticompetitive effects, was necessary for the proper practice of the legal profession in the Netherlands, so it was not prohibited under EU competition law.[68]

In a case where the compatibility of the Italian legislation concerning the fixing of lawyers' fees with competition rules was at stake, one of the conundrums was whether competition law could apply to measures taken not by undertakings but by States. Dealing with that, AG Poiares Maduro[69] referred to the so-called State action doctrine and wrote that it originated in *Parker v. Brown*,[70] which excluded application of the Sherman Act to measures taken by States under their sovereign powers. Then, he acknowledged that there had been an evolution in the decisions and practices of competition authorities over time which had led to exclude legislative measures from the scope of antitrust law if they meet two cumulative conditions: a) it is clearly stated that the contested measure causing a restriction on competition is a State measure; and b) its implementation is supervised by the State.[71] In light of that and the CJEU case law,[72] he suggested that the Court should declare that EU competition law did not preclude a national measure fixing a scale of lawyers' fees, provided the measure had been subject to effective supervision by the State and where the power of the national courts to derogate from the amounts fixed by the scale is interpreted in accordance with EU law and limiting the measure's anticompetitive effect.

The Court considered that EU competition law is infringed "where a Member State requires or encourages the adoption of agreements, decisions or concerted practices contrary to Article 81 EC or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere".[73] Because in that case it did not look like Italy had waived its powers "by delegating to private economic operators responsibility for taking

[68] See CJEU, *Wouters and others*, cit.

[69] Opinion of AG Poiares Maduro in CJEU, judgment of 5 December 2006, joined cases C-94/04 and C-202/94, *Cipolla and others*, para 36.

[70] *Parker v. Brown*, 317 U.S. 341 (1943).

[71] In this regard, AG Poiares Maduro recalled J.T. DELACOURT, T.J. ZYWICKI, *The FTC and State Action: Evolving views on the proper role of government*, in *Antitrust Law Journal*, 2005, n. 3, pp. 1075-1090.

[72] CJEU, judgment of 19 February 2002, case C-35/99, *Arduino*.

[73] See CJEU, *Cipolla and others*, para 46.

decisions affecting the economic sphere, which would have the effect of depriving the provisions at issue in the main proceedings of the character of legislation",[74] the Court ruled that EU competition law did not preclude a Member State from adopting that kind of legislative measures.

In a case similar to *Albany* which regarded whether collective agreements regulating the professional relationship between self-employed persons and their customers or client were excluded by the application of competition law, AG Wahl excluded that the reasoning made by the Court in that case could apply to that kind of situation.[75] As already mentioned, in *Albany* the CJEU had ruled that collective agreements do not fall within the scope of competition law when two cumulative conditions are met: a) they are entered into in the framework of collective bargaining between employers and employees; and b) they contribute directly to improving the employment and working conditions of workers. According to AG Wahl, in that case both conditions were not met. With regard to the first condition, one should consider that the agreements had been concluded by trade unions acting on behalf of self-employed persons, and not workers, which should be regarded as professional organizations or associations of undertakings, thus not representing labor, rather than associations of employees. With regard to the second condition, AG Wahl stressed that the agreements must regard the working conditions of workers, meaning of employees, not of self-employed persons.

However, he also highlighted that that topic could be tackled from the opposite point of view, that of social dumping. The protection of current and future employment opportunities of workers could certainly be regarded as a direct improvement of employment and working conditions. If it were convenient for the employers to replace workers with self-employed persons, many workers might lose their job, or become marginalized over time, and they would find it very difficult to get any salary increase. That led him to believe that provisions such as those of the agreements at issue should be unconditionally accepted, despite their anticompetitive effects, if it can be proved that they actually are necessary to prevent social dumping. Otherwise, they would weaken competition between self-employed persons while providing little or no benefit to workers, falling within the scope of the *Albany* conditions. In this regard, AG Wahl wrote that the interpretation of EU competition rules he was proposing was broadly consistent with some rulings issued by the US Supreme Court on the applicability of the Sherman Act in the context of labor disputes.

[74] *ivi*, para 52.

[75] Opinion of AG Wahl in CJEU, judgment of 4 December 2014, case C-413/13, *FNV Kunsten Informatie en Media*, para 23.

He recalled *AFM v Carroll*,[76] *Allen Bradley Co. v Local Union no. 3*,[77] and *United Mine Workers v Pennington*,[78] that these decisions support the view that the notion of direct improvement of the employment and working conditions of employees must not be too narrowly construed and suggest a cautious approach when reviewing the conduct of trade unions.[79]

Therefore, according to AG Wahl, provisions in a collective agreement concluded between an association of employers and trade unions representing employees and self-employed persons fall outside the scope of EU competition law if they are entered into in the interests of and on behalf of employees, whose employment and working conditions they directly improve, and it is for national courts to ascertain that. Otherwise, they fall within the scope of those rules and are prohibited.

The CJEU basically agreed with AG Wahl, ruling that when self-employed persons who are members of one of the contracting employees' organizations and perform for an employer the same activity as that employer's employed workers, a provision of a collective labor agreement which sets minimum fees for those self-employed persons, does not fall within the scope of EU competition rules, and it is up to national courts to ascertain that.[80]

2.3 The AGs Opinions in the trademark-law field

For what concerns trademarks and their protection, one may mention two cases: *Libertel* and *Google France*.[81]

In *Libertel*, the CJEU was asked whether a color not having any shape or contour could constitute a trademark *per se*. According to AG Léger, a trademark must form the object of a graphic representation which must be clear and precise in order that one may know beyond any possible doubt what it is that is being given the benefit of exclusive rights.[82] In addition, it must be intelligible to anyone wishing to inspect the trademarks register. Then, a color *per se* does not meet those conditions. In fact, the reproduction or designation of a color does not provide any means of determining what sign the applicant intends to use to distinguish their goods and services and, given the fact that a color is always the attribute of something else, it would not be possible to

[76] *American Fed'n of Musicians v. Carroll*, 391 U.S. 99 (1968).

[77] *Allen Bradley Co. et al. v. Local Union no. 3, International Brotherhoof of Electrical Workers et al.*, 325 U.S. 797 (1945).

[78] See note 60.

[79] Opinion of AG Wahl in CJEU, *FNV Kunsten Informatie en Media*, cit., para 99.

[80] See CJEU, *FNV Kunsten Informatie en Media*, cit.

[81] A mere reference can be found in Opinion of AG Mengozzi in CJEU, judgment of 14 September 2010, case C-48/09 P, *Lego Juris v. OHIM* e Opinion of AG Jääskinen in CJEU, judgment of 22 September 2011, case C-323/09, *Interflora and Interflora British Unit*.

[82] Opinion of AG Léger in CJEU, judgment of 6 May 2003, case C-104/01, *Libertel*, para 64.

determine how the color would appear on the goods in relation to which the application for registration was made. Since a color cannot be clearly defined, it does not have the ability to distinguish the goods and services of one undertaking from those of other undertakings. Therefore, dealing with the issue of a trademark distinctive character, AG Léger referred to *Qualitex*,[83] where the Supreme Court held that "a color cannot be registered as a trade mark unless it is established that it has acquired over time a secondary meaning, that is to say that consumers recognise it as indicating a product's origin."[84] In light of all those elements, AG Léger concluded that a color *per se*, without shape or contour, could not constitute a sign capable of being represented graphically and distinguishing the goods or services of one undertaking from those of other undertakings.

The CJEU did not agree with that solution. According to the Court, a color *per se*, not spatially delimited, may, in respect of certain goods and services, have a distinctive character provided that it may be represented graphically in a way that is clear, precise, self-contained, easily accessible, intelligible, durable, and objective. More specifically, a color *per se* may be found to possess distinctive character provided that, as regards the perception of the relevant public, the mark is capable of identifying the product or service for which registration is sought as originating from a particular undertaking and distinguishing that product or service from those of other undertakings. With regard to this second part of the Court's reasoning, it seems that the CJEU adhered to the solution provided by the Supreme Court in *Qualitex*, although that ruling is not expressly mentioned.[85]

In *Google France*, the proprietors of some famous trademarks tried to prevent the display by search engine providers of advertisements in response to keywords corresponding to their registered trademarks, as that could lead to sites for rival or even counterfeit products being displayed. Then the main question was, to what extent keywords corresponding to trademarks could be used by search engine? Alternatively, which is the same, what are the results that can be given by a search engine when those keywords are typed? According to the proprietors of the trademarks, the uses of the keywords made by Google could potentially lead to infringements by third parties. Therefore, those uses should have been treated as infringements too. Basically, the proprietors of the trademarks proposed to adopt the approach followed by the US Supreme Court with regard to those violations of a trademark that, not

[83] *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159 (1995).

[84] AG Léger also recalled *Wal-Mart Stores Inc. v. Samara Brothers, Inc.*, 529 U.S. 2005 (2000), where the Supreme Court confirmed its position.

[85] See CJEU, *Libertel*, cit.

constituting a constituting infringements, must be regarded as contributory infringement.[86]

In this regard, AG Poiares Maduro considered *Inwood Laboratories*[87] and *Sony Corp. of America*.[88] However, he disagreed with that reasoning since that would prevent Google from using potentially any word in that it could relate to a trademark and give rise to an infringement. Instead of being able to prevent, through trademark protection, any possible use of the trademark, trademark proprietors would have to point to specific instances giving rise to Google's liability in the context of illegal damage to their trademarks.[89] Thus, AG Poiares Maduro did not subscribe to the US Supreme Court approach and confirmed an interpretation of the issue, which was consistent with the solution provided under the laws of the EU Member States.

For its part, the CJEU held that a service provider cannot be held liable for the data which it has stored at the request of an advertiser, unless, having obtained knowledge of the unlawful nature of those data or of that advertiser's activities, it failed to act expeditiously to remove or to disable access to the data concerned.[90]

2.4 The AGs Opinions in other branches of law

With regard to other law fields, as already done with regard to the Opinions analyzed so far, the focus will be on those documents where the reference to the US Supreme Court case law led to an assessment of that case law and provided the basis–or part of the basis–for the AGs legal reasoning. The cases where the reference ended up being a merely stylistic feature of the Opinion are not taken into account.[91]

[86] Opinion of AG Poiares Maduro in CJEU, judgment of 23 March 2010, joined cases C-236/08 and C-238/08, *Google France and Google*, para 117.

[87] See *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982).

[88] *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

[89] Opinion of AG Poiares Maduro in CJEU, *Google France and Google* cit., para 123.

[90] CJEU, *Google France and Google*, cit., para 120.

[91] Some of the cases are listed here, the topics put in brackets. See Opinion of AG Darmon in CJEU, judgment of 27 September 1988, case C-65/86, *Bayer v. Süllhöfer* (industrial property rights), Opinion of AG Jacobs in CJEU, judgment of 9 February 1995, case C-412/93, *Leclerc-Siplec v. TF1 and M6* (televised advertising); Opinion of AG Jacobs in CJEU, judgment of 9 July 1997, case C-316/95, *Generics v. Smith Kline & French Laboratories* (patent law and medical products); Opinion of AG Fennelly in CJEU, judgment of 5 October 2000, case C-376/98, *Germany v. Parliament and Council* (tobacco products); Opinion of AG Geelhoed in CJEU, judgment of 10 December 2002, case C-491/01, *British American Tobacco (Investments) and Imperial Tobacco* (tobacco products); Opinion of AG Poiares Maduro in CJEU, judgment of 16 November 2004, case C-327/02, *Panayotova and Others* (EU external relations); Opinion of AG Sharpston in CJEU, judgment of 28 September 2006, case C-467/04, *Gasparini and Others* (double jeopardy clause); Opinion of AG Kokott in CJEU, judgment of 3 June 2008, case C-308/06, *Intertanko and Others* (ship-source pollution); Opinion of AG Ruiz-Jarabo Colomer in CJEU, judgment of 7 May 2009, case C-553/07, *Rijkeboer* (protection of personal data); Opinion of AG Sharpston in CJEU, judgment of 8 March 2011, case 34/09, *Ruiz Zambrano*

In *Maclaine Watson*, an action for damages that was brought by an English company against the Council and the Commission led AG Darmon to think over the admissibility of that kind of action when EU's external relations are at stake.[92] The topic was paramount, thus the AG deemed proper to examine the solutions adopted by several national legal systems to that kind of issue. After taking into consideration the law of the Member States, he recalled US law too and the interpretation of the so-called act of State doctrine and the doctrine of 'political questions' provided by US courts as follows:

> Courts 'abstain' in cases between private individuals in which the conduct of third States is put in issue. Such decisions are expressly based on the exclusive power of the executive in the area of external relations. The doctrine does not apply if the State Department has expressly indicated that its application to the case in point would not serve the foreign policy interests of the United States. Reference may also usefully be made here to the American doctrine of 'political questions', which can lead to the court's abstention when dealing with a case to which it believes there is no legal solution.[93]

In this regard, AG Darmon quoted *Underhill v. Hernandez*,[94] *First National City Bank*,[95] and *Baker v. Carr*.[96] In light of the overall comparative material he listed and analysed, he came to the conclusion that, as far as the Member States were concerned, the inadmissibility of actions for damages in respect of acts by States in the field of international relations could not be regarded as a principle common to the their laws, as he identified too many differences. Nevertheless, he underlined that the path of judicial control in that area was extremely narrow and that constituted the thread with regard to Member States.[97]

(right of residence and EU citizenship); Opinion of AG Jääskinen in CJEU, judgment of 6 September 2011, case C-163/10, *Patriciello* (freedom of expression and privileges of the members of the European Parliament).

[92] Opinion of AG Darmon in CJEU, judgment of 10 May 1990, case C-241/87, *Maclaine Watson v. Council and Commission*.

[93] *ivi*, para 77-78.

[94] See *Underhill v. Hernandez*, 168 U.S. 250 (1897).

[95] *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972).

[96] *Baker v. Carr*, 369 U.S. 186 (1962).

[97] The CJEU did not rule since an agreement was reached in settlement of the dispute (CJEU, *Maclaine Watson v. Council and Commission*).

The US Supreme Court precedents were recalled in a number of cases concerning nondiscrimination issues,[98] but mainly one should focus on just two. In *Neath* and *Coloroll*, the question was raised whether it was compatible with Article 119 of the EEC Treaty for payments made under a pension scheme to be calculated on the basis of actuarial calculation factors, in particular actuarial assumptions about the different life expectancy of men and women. As reported by AG van Gerven, at that time there was no EU case law on the relation between actuarial calculation factors and the principle of nondiscrimination.[99] Nevertheless, he considered this:

> It is true that women as a group prove to live longer than men. It is, however, equally true that not all individual men and women exhibit the average characteristics of their sex: many women live for a shorter time than the average man and many men live longer than the average woman. The key question, therefore, is whether discrimination, within the meaning of Article 119, exists when men and women are treated, not as individuals, but as a group and unequal treatment for individual men or women arises as a result. In my view, the answer must be in the affirmative: although Article 119 - *unlike its American counterpart, the Civil Rights Act 1964*, which is expressly orientated towards equal treatment of the individual, distinct from the sex group to which the individual belongs - prescribes in general terms the application of the principle of equal pay for 'men and women', this provision also reflects the aspiration to treat the worker as an individual with regard to the worker's right to equal pay for equal work, and not simply as a member of one particular sex group. […] The mere fact that, in general, women live on average longer than men cannot, therefore, be a sufficient reason to provide for different treatment

[98] See for instance Opinion of AG Warner in CJEU, *Jenkins v. Kingsgate* cit., Opinion of AG Tesauro in CJEU, judgment of 17 October 1995, case C-450/93, *Kalanke v. Freie Hansestadt Bremen*, Opinion of AG Sharpston in CJEU, judgment of 23 September 2008, case C-427/06, *Bartsch*, Opinion of AG Kokott in CJEU, judgment of I March 2011, case C-236/09, *Association Belge de Consommateurs Test-Achats and Others*.

[99] Opinion of AG van Gerven in CJEU, judgment of 6 October 1993, case C-109/91, *Ten Oever v. Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf*, para 30. Since several cases were connected, AG van Gerven only delivered one Opinion in *Ten Oever* to cover all the issues at stake in all the cases.

> in the matter of contributions and benefits under occupational pension schemes.[100]

Thus, AG van Gerven recalled the Civil Rights Act 1964[101] and, after that, he recalled that the US Supreme Court had already ruled at that time that the use of actuarial factors varying according to sex for the calculation of contributions to pension schemes is contrary to the Act.[102] Therefore, according to him, the use of actuarial calculation factors varying according to sex in an occupational pension scheme was prohibited under Article 119 of the EEC Treaty.[103]

Lindorfer was the case of an Austrian national who had worked and contributed to a pension scheme in Austria for thirteen years and three months and then joined the EU Council's staff as an official. She filed a request for the transfer of her Austrian pension entitlement to the EU scheme and was credited with five years, five months, and eight days. That decision was based *inter alia* on the use of actuarial values which were higher for women, allegedly giving rise to discrimination on the basis of sex. Dealing with that topic, AG Jacobs considered that discrimination involved the ascription to individuals of the average characteristics of the sex to which they belong, which is not a criterion that can be objectively used to calculate pensions.[104] In this regard, he recalled *Manhart* where the US Supreme Court found that women, as a class, live longer than men but that does not mean that all women share the features that differentiates the average class representatives.[105] Then he concluded that there had been discrimination based on sex.[106]

The above-mentioned doctrine of political questions also came into consideration in *Kadi*, one of the most important cases brought before the CJEU in recent years as it concerned the implementation of United Nations sanctions in the EU legal framework.[107] The conundrum was what room could be left to

[100] *ivi*, para 35 (italics added).

[101] 78 Stat. 241.

[102] AG van Gerven quoted *City of Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978), and referred to *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983) and *Florida v. Long*, 487 U.S. 223 (1988).

[103] The CJEU followed another interpretative path and ruled that the use of actuarial factors did not fall within the scope of Article 119 (see CJEU, judgment of 22 December 1993, case C-152/91, *Neath v. Steeper* and CJEU, judgment of 28 September 1994, case C-200/91, *Coloroll Pension Trustee v. Russell and Others*).

[104] CJEU, judgment of 11 September 2007, case C-227/04, *Lindorfer v. Council*.

[105] *ivi,* para 57-58.

[106] The CJEU confirmed that finding in Case C-227/04, Lindorfer v. Council, 2007 E.C.R. I-6817.

[107] For an introduction to *Kadi*, see T. TRIDIMAS, J.A. GUTIERREZ-FONS, *EU Law, International Law and Economic Sanctions against Terrorism: The Judiciary in Distress?*, in *Fordham International Law Journal*, 2009, 660-730, G. DE BÚRCA, *The European Court of Justice and the International Legal Order after Kadi*, in *Harvard International Law Journal*, 2010, 1-49.

the protection of fundamental rights when issues such as international peace and security against terrorism are at stake. In order to deny that these issues concerned a political question and with the view to reaffirm the need of a judicial review in a case were conflicting values clashed, AG Poiares Maduro quoted Justice Murphy and the dissenting opinion he delivered in *Korematsu*.[108] In that case, he wrote that:

> Like other claims conflicting with the asserted constitutional rights of the individual, [that] claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled. What are the allowable limits of [discretion], and whether or not they have been overstepped in a particular case, are judicial questions.[109]

3. Concluding Remarks

Cross-fertilization should be regarded as a tool jurists can use to advance the reasons of law in a dark world:[110] in fact, this form of reason-borrowing makes it possible for the rule of law to develop further and for the fight against arbitrariness all over the world to be fought properly.[111] In truth, the comparison between different legal solutions to the same problem may lead to confirm one's own vision and criticize the foreign ones. Anyway, that seems to be the most adequate way to create a global community of lawyers who can communicate with each other: this can make it possible to pursue the aim of soft harmonization and provide an alternative to legislative harmonization.[112]

Thus, the comparative approach is beneficial and should be used more and more all over the world. Yet, in light of the analysis that provided in this article

[108] Opinion of AG Poiares Maduro in CJEU, judgment of 3 September 2008, joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, para 34.

[109] *Korematsu v. United States*, 323 U.S. 214, 233-34 (1944) (Murphy, J., dissenting).

[110] See in this regard C. LAHEUREUX-DUBÉ, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court,* in *Tulsa Law Review,* 1998, 28 and E. STEIN, T. SANDALOW, *On the Two Systems: An Overview,* in E. STEIN, T. SANDALOW (eds), *Courts and Free Markets: Perspectives from the United States and Europe*, Clarendon Press, Oxford, 1982, 1.

[111] S. BREYER, T*he Court and the World. American Law and the New Global Reality*, Knopf, New York, 249, 280. More generally speaking, one should consider that "industrialisation, urbanisation, and the development of communications have greatly reduced the environmental obstacles to legal transplantation-and nothing has contributed more to this than the greater ease with which people move from place to place" (see O. KAHN-FREUND, *On Uses and Misuses of Comparative Law,* in *The Modern Law Review*, 1974, 9 and, more generally, E. STEIN, *Uses, Misuses--and Nonuses of Comparative Law,* in *Northwestern University Law Review,* 1977, 198-216.

[112] T.K. GRAZIANO, *Is It Legitimate and Beneficial for Judges to Compare?,* in M. ANDENAS, D. FAIRGRIEVE (eds), *Courts and Comparative Law,* cit., 52.

and as far as the CJEU case law is concerned, one cannot say that significant results have been achieved. In fact, while the AGs have recalled the US Supreme Court case law frequently over time, the CJEU has never expressly referred to any US Supreme Court precedents as the basis of its reasoning, even in the cases where the solution provided by the CJEU was consistent with the one provided by the Supreme Court: on the contrary, the CJEU has always preferred to make use of its own case law and not to compare.

It is not easy task to say why the CJEU - that has constantly referred to the European Court of Human Rights' case law in a not merely ornamental fashion[113] - does not do the same with the US Supreme Court case law. It is quite likely though that this is a way to preserve its independence and autonomy. Regardless of what the reason is, the outcome is not a positive one.

Therefore, one may say that, with regard to the relationship between the US Supreme Court and the CJEU, cross-fertilization is still an illusion or, at best, a challenging target that is far away from being attained.

[113] See C. MCCRUDDEN, *Using Comparative Reasoning in Human Rights Adjudication: The Court of Justice of the European Union and the European Court of Human Rights Compared*, in *Cambridge Yearbook of European Legal Studies,* 2012-2013, 383. In this regard, one should remember that "in the absence of any express treaty reference the Court [of Justice of the European Union] has […] sought to anchor the protection of fundamental rights in the national constitutional law of its Member States and international human rights instruments, especially the ECHR." However, "apart from human rights law […] the Court of Justice has generally been reluctant to draw comparisons with concepts, their definitions, or doctrinal argumentation in other legal systems […]. In human rights cases the Court of Justice informally accepts the ECHR as the benchmark of the EU legal order although the EU is not a signatory to the Convention" (G. BECK, *The Legal Reasoning of the Court of Justice of the EU,* cit., 216-217).