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Meditating the Different Concepts of Corporate Criminal Liability in England and Germany

By Susanne Beck*

A. Introduction

Today’s world has been deeply affected by globalization. Different cultures have deepened their knowledge of each other and are forced to create common solutions to worldwide problems. This has led to an increasing interest in comparing different nations’ approaches to common problems.

One area which has been neglected, at least in German jurisprudence, is the theory of comparative law, especially of comparative criminal law.¹ The discipline is affected by many unanswered questions: “What do lawyers do when they say that they engage in comparisons? What methods and approaches do they adopt? Does comparison (have to) focus on similarity or difference?”² In Germany, only a few attempts to find answers have been undertaken so far: Twenty-five years ago, Frankenberg published his “Critical Comparisons” which will be discussed later. Since then, theorists in other countries, especially Anglo-American legal theorists, have engaged in a detailed debate about “better” comparative law, influenced by postmodernism, postcolonialism, and poststructuralism.³ They argue that the aims of comparative law are unclear, criticise the legocentrism and eurocentrism of traditional comparisons, and remind the reader of the cultural or social conditions that create different legal solutions in different countries. This theoretical debate has not yet reached the German discussion and most of practical comparative law. Many practical comparisons still use traditional or functional methods and do not question the objectivity of their intention, viewpoints or evaluation criteria.

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¹ University of Wuerzburg, email: s.beck@jura.uni-wuerzburg.de.


³ Reimann, supra note 1, at v et seq.

The following article analyses this gap between theoretical discourse and practical undertaking, between the Anglo-American and German debate, based on the assumption, that one possible reason is the lack of dialogue between theorists and practitioners or between theorists of different countries. Some of the aspects of the theoretical debate might not be new for Anglo-American readers but are for German jurisprudence. Besides, as many practical comparisons suggest: even in other countries theoretical remarks about comparison are not as influential in practice as they should be.

To strengthen the dialogue between theory and practice, the flaws and possible improvements of comparative law will be discussed not just in theory, but on the practical example of the debate around corporate criminal liability (CCL). CCL serves as good example for practical and theoretical reasons. Practical reasons are the increasing importance of CCL on national, European, and international levels. For example, the question of how to proceed if a German firm with offices in Britain violates British criminal law needs to be answered. On a theoretical level, CCL is an appropriate example for exploring theoretical aspects of comparative law: numerous traditional comparisons on the topic provide a solid base for demonstrating the limitations of those comparisons. The topic is, furthermore, closely connected to cultural, social, economic and philosophical concepts, allowing an interesting engagement in the background of legal solutions and in possible ways for comparatists to embrace these differences between cultures and their laws.

The aim of this analysis is neither to elaborate on a completely new method nor to select the best method, as the best way to compare might be to follow different paths depending on the objective or audience of a certain comparison. It also does not attempt to give the only possible comparison of CCL, but instead is primarily aimed at highlighting some comparative facets that cannot be included in more theoretically oriented comparisons. Its main purpose is to strengthen the not yet sufficient dialogue between theory and practice. Therefore, this article will first discuss some of the failures of traditional comparative law, which will be clarified by using comparisons of CCL. In the second part, the transition towards a new comparative law will be shown from a theoretical perspective. Finally, the insights will be exemplified by sketches about the cultural background of CCL in England and Germany.

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5 See infra Part I.2.
B. Traditions: Pragmatic Comparisons

Comparative law shares the aims, methods, and difficulties of all comparative disciplines. Many comparisons are biased, the methods are vague and evaluation criteria are subjective.

I. Traditions in Comparative Law

In its beginnings, the possibility and usefulness of comparative law were undoubted; it even was argued that profound insight depends on comparison. Comparison intended to broaden knowledge, to improve or to harmonise legal systems. Methodology was simple: "Black letter laws" were described and evaluated. This approach claimed to be objective while the choice of targets of comparison, classifications and the assumption of the likeness of problems were necessarily subjective. Most traditional comparisons thus either overrated the solutions of their own law or were overwhelmed by the law of the other. This method also suffered from legocentrism: “The implied adequacy of law to solve what appear to be universal and perennial problems of life in society betrays and underscores . . . how their [Western culture] notion of law is itself privileged.” Traditional comparisons often lacked adequate consideration of the cultural, political, social conditions of the countries whose laws they compared.

II. Traditional Comparative Analyses Regarding Corporate Criminal Liability

The following comparisons of CCL show the subjectivism of traditional comparison and indicate that in practice, the theoretical debate, which has criticised these points for over twenty years, is almost irrelevant. CCL is a legal construct for prosecuting and convicting collective entities under criminal law. By now, it has been implemented into the criminal laws of many countries, including Austria, France, and England. Other countries, such as

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7 See G. Frankenberg, Critical Comparisons: Re-thinking Comparative Law, 26 HARV. INT’L L.J. 411, 416 et seq. (1985); P. Legrand, European Legal Systems are not Converging, 45 INT’L & COMP. L.Q. 52 (1996). This also might have been a reason for its continuing neglect, already diagnosed. See HAROLD Cooke GUTTERIDGE, COMPARATIVE LAW—AN INTRODUCTION TO THE COMPARATIVE METHOD OF LEGAL STUDY AND RESEARCH (1946) (diagnosing the continuing neglect).

8 See P. Zimbansen, Comparative Law’s Coming of Age?, 6 GERMAN LAW JOURNAL 1073, 1075 (2005).

9 Frankenberg, supra note 7, at 433.
Germany, refuse its implementation. For corporations acting on international level, the resolution to this problem can no longer be decided by a single nation.

Searching for the best international solution to corporate misbehaviour has led to numerous publications comparing the different legal solutions on this topic; some examples will be discussed later. As a starting point for comparison, one can simply state: in England, corporations can be convicted for different crimes, even if intent is required. In Germany, only individuals are criminally liable and collectives can only be fined for violations of administrative law, which excludes moral blame.

In the original analyses in comparative law, these findings would have been the base for comparison, often followed by vague evaluation. In some recent comparisons on CCL this has not changed: Khanna merely summarizes the legal situation of CCL in the U.S., the UK, and Germany. He observes, even before his comparative inquiry, that the “analysis indicates that corporate criminal liability in the United States is far more extensive and less restrictive than corporate criminal liability frameworks in other countries and raises the question of why these differences have developed.” As he claims to refrain from CCL, this comment seems to categorize his argument into the “the others do not do it as well” type. This overlooks that the solutions of the others could also be wrong or that all solutions

10 See A. Ashworth, Principles of Criminal Law 113 et seq. (5th ed. 2006).
13 See A. Norrie, The Limits of Justice: Finding the Fault in the Criminal Law, 59 Mod. L. Rev. 540, 543 (1996); (connecting this to the liberal “conception of the individual as an abstract, universal subject endowed with rational action, autonomy and self-determination.”). Norrie continues by stating “[t]he individual is a unified, centred being who acts as the basis for legitimating the state, law and punishment. . . . The rational subject receives just deserts’ from the state through law. The ‘penal equation’—crime plus responsibility equals punishment—is founded on liberal bedrock.” Norrie refers to Kant and Hegel.
14 See W. Mitsch, Recht der Ordnungswidrigkeiten 41 (2005); Case No. 2 BvL 2/69, 16 July 1969, BVerfGE 27, 18 (33).
16 Id. at 1488.
could be right—in their individual culture. Without further analysis, the enumeration of facts is hollow and can speak neither for nor against any legal alternatives.

Stessens’ analysis starts with subjective intent: “This article aims to examine the question of how to punish corporate criminality in a comparative perspective.” He assumes that corporate criminality should exist and strives towards harmonization. “It [comparing national systems] also creates a ‘supranational,’ European perspective: by highlighting the differences between the respective national solutions to the same question (i.e. how to punish corporate criminality), it may give some hints towards a (European) harmonisation of the legal solutions.” This disregards that there could be good reasons to refuse CCL. His evaluation criteria are unclear. “Comparing national law systems... enables us to get a clearer view of the advantages and disadvantages of corporate criminal liability,” presupposes one worldwide normative system. His main normative criterion is efficacy, ignoring that several legal systems—like Germany—emphasise other, non-utilitarian evaluation criteria. Consequently his conclusion, “[t]he only effective way to combat corporate crime is to direct punitive sanctions against corporations,” is biased.

Slightly more progressive is Beale’s and Safwat’s examination, contrasting the growing enactment of CCL-laws in Western Europe with the United States’ increasing opposition. They admit: “We acknowledge that there are also other significant factors our article does not discuss—including differences in the history, traditions, and social conditions of the various Western European countries.” Despite this awareness, the analysis of German law remains subjective: the heading of the section is “Movement Toward Corporate Criminal Liability in Germany” which shows that the German position is only seen in the light of a movement towards this right solution—and is a clear misinterpretation of Germany’s legal reality. The authors state that Germany has not “overcome” its opposition to the imposition of criminal liability on artificial entities. The administrative fines imposed by the German government are called “quasi-criminal,” a term that some German scholars would oppose, and the consideration of opposing arguments does not represent their influence in the German debate. The German concern about the “purity” of “blame” and


18 Id. at 493 (emphasis added).

19 Id.

20 Id. at 518.

21 Beale & Safwat, supra note 4, at 162.

22 Id. at 122 (emphasis added).

“fault” in criminal law and the German law’s emphasis on classifications are mentioned, but not adequately discussed. The study argues that it is “questionable whether the hold-outs will continue to rely on civil or quasi-criminal sanctions.” As comparison should be used to learn from the other’s, here the European, approach it should have given greater emphasis to the opponents.

A study by Wagner concludes, after describing legal situations in different countries, including Germany and England, that

the field of corporate criminal liability is a multi-faceted issue. There are no simple solutions to the problem. . . . Another question is whether corporate liability should be criminal in nature, or whether the unique circumstances of punishing a corporate entity merits different approaches. . . . [I]t also seems to be clear that a singular approach will not be sufficient to deal with either the conviction of corporations, or the sanctioning of corporations.

It is unclear how he reaches this conclusion: the fact that there are divergent conceptions in different countries could also mean that all of them are right in each country. Even if he means that there is not one right approach on international level—why does he conclude this from national situations?

All these comparisons show that theoretical concerns about questionable aims, subjectivism, methodology, integration of cultural and social background, problems of translation, etc., do not have a visible impact on practical comparisons. Instead, they make evaluation of different concepts, harmonising, and finding of common solutions more difficult. Of course, on the first view, the best way to evaluate a legal solution like CCL and finding common ground seems to be such a traditional comparison as undertaken by the researchers above. But can these writings really lead to finding the best solution? Can they really convince Germany to give up its position? If CCL were to be imposed on Germany, would this really solve the social conflict underneath or would it always be a foreign, unsuitable legal concept? These questions show that comparative law needs to be revised methodologically. A less biased way must be found in order to truly compare.

24 See Beale & Safwat, supra note 4, at 122 (referring to M. Pieth, Commentary on: National and International Developments: An Overview, in CRIMINAL RESPONSIBILITY OF LEGAL AND COLLECTIVE ENTITIES, 113, 116 (A. Eser & G. Heine & B. Huber eds., 1999) (“[T]he fear of German scholars is that [the] essential safeguard of both substantive and procedural law would be put at risk from derogations of the ‘principle of personal guilt or blameworthiness.’”)

25 Id. at 139.

26 Wagner, supra note 11, at 10.
C. Transitions

The above-analysed flaws of traditional comparative law have led to the movement of Critical Comparisons, criticising, inter alia, monopolisation of certain types of rationality and universalism.  

I. Critical Comparisons

Using tools of critical theory, feminism, literary or postcolonial theory, Critical Comparisons state that reasoning, language and judgement are determined by cultural, moral, epistemic, linguistic frameworks. In the first article, Frankenberg argues that “because of comparative legal scholarship’s faith in an objectivity that allows culturally biased perspectives to be represented as ‘neutral’ the practice of comparative law is inconsistent with the discipline’s high principles and goals.” Comparison can provide a platform for learning only if one is prepared to become aware of one’s assumptions. Frankenberg also addresses practical implementations of the “dialectical exchange between the self and the other.” The impossibility of comparison is dissolved by reference to dialecticism. Over the next 25 years, various points of criticisms as well as possible new approaches of comparison have been refined. The main focus of the “Utah Group” was to “change the project of comparative law from a naive epistemological project . . . to a critical and interventionist project.” Practice-oriented Legrand emphasises commitment to

27 See e.g. Peters & Schwenke, supra note 3, at 802; T. Flessas, Aphorisms, Objects, Culture, in NIETZSCHE AND LEGAL THEORY, HALF-WRITTEN LAWS 105, 108 (P. Goodrich & M. Valverde eds., 2005) (“The emphasis on knowledge is intimately connected with the definition of ‘culture’ in modernity.”)

28 See Peters & Schwenke, supra note 3, at 802.

29 On early methodology, see Gutteridge, supra note 7; O. Kahn-Freund, On Uses and Misuses of Comparative Law, 37 MOD. L. REV. 1 (1974) (reminding that in case of “transplantation” of laws to a foreign system questions about adjustment and rejection have to be asked and the context taken into account).

30 Frankenberg, supra note 7, at 411.

31 The dialecticism of continental philosophy was heavily criticised by Popper (1937) for accommodating contradiction. This seems to be one of the crucial points: Is a contradiction resolvable or does the “aporia” have to be accepted?

32 Named after the publications on this topic in the Utah Law Review (1997).


34 See P. Legrand, Comparative Legal Studies and Commitment to Theory, 58 MOD. L. REV. 262 (1995) (stating the observation that, following his claims will “naturally take the comparatist away from the traditional approaches to comparative legal studies which . . . do not accept the need for theory and obstinately pursue similarity and consensus as if confined to a groove” does not help to enter a constructive dialogue with practical comparatists).
interdisciplinarity. He questions how academics can forget the significance of theoretical concerns, and claims that the difficulty of comparative law is not an excuse to espouse credulity.\textsuperscript{35} Comparatists should focus on difference, remain critical, open up the definition of law, and maintain distance.

The main counter-argument against Critical Comparisons is its impracticability. One cannot always deeply engage with “the history, economy, sociology, psychology and politics of law”\textsuperscript{36} if one wants to find pragmatic solutions. The above-criticized comparisons mainly intend to improve the practical legal situation and the study of Beale and Safwat even admits the absence of a framework discussion. To argue that evaluative comparison is impossible and one should find other ways to improve law is unrealistic. Humans never fully understand the reasons and frameworks of their actions, and cannot know all the consequences,\textsuperscript{37} but still they have to find solutions. But this does not justify to claim inherently subjective analyses being neutral, to evaluate on biased criteria, to reduce the understanding of the other’s legal culture instead of broadening knowledge. There is a need for an increase of studies concerned with deepening knowledge, exploring legal cultures and normative frameworks. Additionally, more practice-oriented studies should at least be open about their limitations and minimize subjectivity.

II. Dialogue Between Theory and Practice

To answer the question “[h]ow could a radically different comparative law look like,”\textsuperscript{38} the gap between theory and practice has to be approached. One has to concern oneself with the motivations, limitations, and playing fields of the other side. The different participants have to enter into a discourse.\textsuperscript{39} As previously mentioned, it is not the aim of this article to provide a perfect method of comparison—different methods should be used with knowledge of their limitations. But following different paths of comparisons only is useful if a close connection to theoretical discussions is kept.

One reason for the gap between theory and practice could be that in the theoretical debate the starting point is often assumed to be clear to everyone. Practicing lawyers, on the other hand, are mostly unaware of these philosophical debates. Therefore, a reminder of the basis of this discourse, of rethinking knowledge, understanding, perceptions, and

\begin{footnotesize}
\textsuperscript{35} See id.
\textsuperscript{36} Frankenberg, supra note 7, at 439.
\textsuperscript{37} See J. Habermas, The Philosophical Discourse of Modernity 92 et seq. (1990) (discussing Nietzsche’s and Derrida’s refusal of metaphysics).
\textsuperscript{38} J. Stramignoni, Meditating Comparisons or the Question of Comparative Law, 4 SAN DIEGO INT’L J. 57, 77 (2003).
\textsuperscript{39} J. Derrida, Writing and Difference 360 (2006).
\end{footnotesize}
bias, could be a first step of entering the dialogue. This will be undertaken in the next section, by using Nietzsche, the first Western philosopher who exposed and criticised traditional, Enlightenment thinking, which practicing lawyers often still are educated in. Nietzsche’s critique of knowledge can allow the practitioner to understand the base of the debate and to be aware of his own limits. Another way to enter dialogue, which will be taken in the third part of this analysis, is to show an example of another approach to comparisons.

III. Nietzsche—Breaking the Ground

To summarise Nietzsche’s philosophy would miss the point, as Nietzsche has developed his opinions over time, sometimes apparently contradictory.\(^{40}\) With the awareness that one will only represent a glimpse of his own thoughts, some ideas about “knowledge”\(^ {41}\) can be gained, as Nietzsche is specifically concerned with its limits.\(^ {42}\) He opposes the Enlightenment, its claim of a universal truth and values and the ability of human beings to understand reality. By stating that there is always a “will to power” to convince others about one’s own value system, Nietzsche questions the base of science and philosophy and thus helps to improve the distant, critical reading of ideas or “neutral” scientific results.

Nietzsche questions not only the neutrality of the aim, but also the possibility of gaining objective knowledge. “There is only a perspective seeing, only a perspective ‘knowing’ and the more affects we allow to speak about one thing, the more complete will our ‘concept’ of this thing, our ‘objectivity’ be.”\(^ {43}\) This statement is made in the context of the On the Genealogy of Morals (GM), an examination which starts with “We are unknown to ourselves.”\(^ {44}\) That we cannot know ourselves, because we have not searched ourselves, is, according to Nietzsche, the basis of our false knowledge. Only by questioning ourselves we will broaden our understanding. GM is dedicated to an in-depth analysis of what we know, how we know, and how we perceive to know. The above stated relativism is not to be interpreted as claimed in relation to knowledge in general, as GM is primarily an

\(^{40}\) See generally Tanner (1994).

\(^{41}\) See Flessas, supra note 27, at 109 (stating that Nietzsche sees the “ground(s) of knowledge as flawed exactly because, instead of deriving self-knowledge through experiencing our own, individual lives, the space of knowledge is extra-life.”).

\(^{42}\) See F. NIEZSCHE, BEYOND GOOD AND EVIL, aphorism 464 (1898) (“He who fights monsters should look into it that he himself does not become a monster. When you gaze long into the Abyss, the Abyss also gazes into you.”).


\(^{44}\) NIEZSCHE, supra note 43, at ON THE GENEALOGY OF MORALS I, 1.
examination of moral values, their “origin” and the interpretation of reality on which they are based. If these thoughts are transferable to other areas of reality is, for this article concerned with the value-based concept “law,” irrelevant. Especially important in that context is the notion of “opposite values.” He argues that morality is merely a prejudice and categories such as “good and evil,” “true and untrue,” and “just and unjust” are created by humans and are bound to a certain cultural background. Nietzsche, as many others, also understands language as limit and framework of knowledge and recognition. Language is power, it disturbs and splits us as much as it organizes us.

This is not a nihilist view of the world. Nietzsche clears the way for a philosophy from the “perspective of life,” recognizing the will to power, rebuilding morality on life’s exuberance. Even if one does not agree with his moral claims, Nietzsche has broken ground for a new way to think about knowledge and understanding: a relativistic view, aware of one’s determination, skeptical about general truths, realizing the conditions of language, culture, genealogies, and will. We have to overcome our anxiety and explore, with open eyes, our origins, as well as our future.

Returning to comparisons: they normally start with biased intention. A comparatist necessarily has a subjective, conditioned viewpoint he cannot leave. Before he can start understanding the “Other,” he has to explore this viewpoint. To explore the “Other,” it is not enough to analyse the actual legal situation; the conditions of his situation also have to be included. It has to be realised that the opposition set by engaging in comparison, the values used to find the “better” solution, are man-made and thus never neutral. All these aspects are premised in the debate around Critical Comparisons. To enter the dialogue with practitioners one has to open them up and allow understanding. The insights into

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45 This is not in a strictly historical sense, as Nietzsche considers normal historians not to be concerned about history—what is relevant for him is the “real origin,” the ahistorical but thus even more true narrative.

46 NIETZSCHE, supra note 43, at ON THE GENEALOGY OF MORALS III, 27. “All great things bring about their own destruction through an act of self-overcoming in the nature of, life – the lawgiver himself eventually receives the call: Submit to the law you yourself proposed.” Id.


48 See J. Yovel, Gay Science as Law: An Outline for a Nietzschen Jurisprudence, in NIETZSCHE AND LEGAL THEORY, HALF-WRITTEN LAWS 23, 25 (Peter Goodrich & Mariana Valverde eds., 2005) (“Nietzsche’s prophecies, we must keep in mind, are untimely meditations. He is ‘pregnant with future’ [reference to GM II 16, not from the author].”).

49 See Cross Cultural Perspectivism, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (showing that it can rightly be questioned if cross-cultural perspectivism is an empirical fact or merely a plausible assumption), available at http://plato.stanford.edu/entries/relativism/supplement1.html#crosscultperception.

50 One facet of a Nietzschean view onto the world is exploring the genealogy of concepts, truths, and realities. See D. Owen, NIETZSCHE, Re-evaluation and the Turn to Genealogy, 11 EUR. J. OF PHILO. 249 (2003) (providing the reasons for his genealogical approach).
Nietzsche’s thoughts about knowledge and thought are not meant to lead to definite instructions for comparative law in the sense of telling practical comparatists what to do, how to compare or how to find the best legal solution to either improve or harmonise the law. They are meant to provide awareness, allow the practitioners to understand their biases and reconstruct practical comparisons in this awareness. This is the first step to opening the dialogue between theory and practice, to enter into a discourse about “how a radically different comparative law looks like.”

D. Transformations

The last section attempts to specify a possible dialogue between theoretical and practical comparatists. It does not aim at presenting the only possible way to compare the concepts of CCL in England and Germany. It merely clarifies that, although all social, legal, economic influences onto corporate criminal liability can never be discussed, some factors can clarify the reasons for differences between the legal solutions of England and Germany. The approach is consciously not a legal one, but includes sketches from different disciplines. The most plausible way to compare the legal solutions of different countries is to combine different methods and different viewpoints of law in various articles and analyses. Law does have a certain independence from culture, which should be recognised by distancing legal cultures and solutions from the melange of cultural specifics. On the other hand it still is in some ways a representation of its society and thus culture. These aspects can be included in one analysis, but can also be done by seeking the truth through combination of different viewpoints. Still, in the following, the focus lies on the background factors to exemplify their relevance to the practitioners. Therefore, information on the premises, including cultural and economic facets of Germany and England, is given.

I. The Background

1. Society: Some Basic Facts On Germany and England

After the Nazi era, Germany established a federal, egalitarian political system, based on a constitution. Its boom in the 50’s and the social market economy guaranteed a certain social harmony. England has, in the recent history, not experienced any dictatorship. Its

51 Stramignoni, supra note 38, at 77.
53 See M. Albert, Capitalism Against Capitalism 124 (1993) (“They are, first and foremost, egalitarian societies.”).
55 See Albert, supra note 53, at 110, 124.
liberal capitalism is influenced by the industrial revolution, and still shows economically-based class structures.

2. Philosophy: An Often Neglected Background Factor

To exercise comparative law one has to include philosophy. A society is, inter alia, characterised by its philosophical, especially ethical, background. England is influenced by utilitarianism, a philosophy evaluating actions on consequences, on contribution to the utility of society. German society, on the other hand, is shaped by deontological philosophy, primarily concerned with the fulfillment of values and restricting the relevance of consequences for the judgment of an action by these values themselves. An example of the influence of this philosophy is Article 1 of the German Constitution: “Human dignity is inviolable.” This also leads to a different relevance of “rights”, as in England there is no set collection of rights, they are less important than in continental Europe.

Also relevant for the discussed example are the philosophical debates on conceptions like “person,” “autonomy,” and “responsibility”: The essence of a person is a clue to understanding perceptions and treatment of corporations. Personhood has been debated for centuries, metaphysically, normatively, conceptually, with often recurring criteria: self-awareness, rationality and identity. In Germany, personhood is generally seen as a basic condition for moral and criminal “responsibility.” Kant and Hegel, inter alia, have discussed these concepts extensively. For Kant, autonomy is the expression of human...

57 See ALBERT, supra note 53, at 100.
62 See I. KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS (Thomas Kingsmill Abbott trans., 2007) (showing the Kantian interpretation of human dignity)
63 Legrand, supra note 7, at 70 et seq.
66 See Habermas, supra note 37, at 294 (calling the Kantian philosophy the “philosophy of the subject”).
dignity, and thus of moral and legal responsibility.  

English, utilitarian thinking necessarily leads to another concept of personhood. Without stating that this is the representation of all utilitarian perceptions of “person,” one could look at the example of Singer’s concept: he does not start from certain a priori, but from the consequences of defining a ‘person’ and follows Lock in separating the concept of “person” from “human.” As personhood includes certain responsibilities and rights, it should only be used in the case that the conditions for being responsible or having this right, and being able to claim it, are given. While Kant starts with an a priori conception of humans as persons, being responsible and having rights, Singer starts with the person, to which society subscribes rights and duties, and decides from this conception about possession of personhood.

II. Civil and Common Law: A Few Thoughts

1. Descriptive Overview

A German lawyer confronted with the common law system experiences scepticism: a judge who searches mystic sources for the “common law,” judgments more concerned with facts than with logic, neutral argumentation, and lay persons deciding about the fate of offenders. All this seems mysterious, inexact. This strangeness is caused by a divergent legal mentalité: common law has not left the inductive phase of methodological development and thus defies systematization. English lawyers regard being illogical as a virtue and logic as an eccentric continental habit. Systemizing is regarded as useless theoretical exercise; the real scope of legal work is searching for the most convincing pragmatic solution. Law is facts oriented and develops through analogies. Civil law, on the contrary, is based on a system of institution which allows discussion independently of factual immediacies. The ways the legal systems approach conflicts diverge: while civil law attempts to solve them beforehand through hierarchic organized norms, common law reacts to the conflict. Coherence in a legal system is relevant for the question of

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69 See id. at 90 et seq.
70 See J. Hymers, Not a Modest Proposal: Peter Singer and the Definition of Person, 6 ETHICAL PERSP. 126 (1999).
71 See Legrand, supra note 7, at 56.
72 See id. at 65 (stating that Simpson said “the common law mind . . . is repelled by brevity, lucidity and system.”).
73 See id. at 67 (stating that Lord Macmillan said “the life of law has not been logic; it has been experience.”).
74 See id. (stating that Copper said “[t]he instinct of the civilian is to systematize. The working rule of the common lawyer is solvitur ambulando.”).
corporate criminal law, particularly from the German perspective that this concept is incoherent with the system of criminal law is very important.

2. Connecting with the Background

To overcome some of the strangeness one has to connect these different legal mentalités to the findings above, being aware that these explanations can only be rough and shallow here: the more stable, traditional English society allows reliance on former judgments and traditions, the inner stability allows more tolerance of unsystematic law. Utilitarian influences lead to more emphasis on practicable solutions of each case over coherence and structure. The stricter class system could be one reason for giving judges more power. Germany’s reliance on coherence, on its constitution and maintaining a structured and powerful legal system are not just caused by its deontological mindset, but are also based on the terrifying experiences with extremism and uncontrolled state power in the Third Reich.

III. Approaching Corporate Criminal Liability

Building upon this, the structures behind CCL will be looked at: criminal law and corporations.


Criminal law is the state’s means to forbid certain actions and punish the citizens who break these prohibitions. In both Germany and the United Kingdom there has been a long debate about the question of whether criminal law fulfills a retributive or a consequentialist function.\(^{75}\) is the punishment retribution for the offender’s morally wrong action, or does it intend to prevent from future crimes?

Although the retributive function has influenced the English debate, in public opinion and in the legislature, deterrence and rehabilitation were always the main reasons to enact criminal laws. In Germany, there is a strong academic opposition against purely consequentialist criminal laws,\(^{76}\) and the German Supreme Court connects criminal law to the guilt and moral responsibility of the offender.\(^{77}\) This connection is related to the German legal specialty of using “administrative sanction law” (Ordnungswidrigkeitenrecht)

\(^{75}\) See N. Lacey, State Punishment: Political Principles and Community Values 16 et seq. (1988).

\(^{76}\) This is connected with Kant and Hegel defending a retribution theory. Also notable is also Feuerbach, who partly created German criminal law and follows an absolute justification of punishment, similar to Kant’s. See O. Rosbach, Strafrecht und Gesellschaft bei Anselm von Feuerbach, Forum Historia Iuris, 1 Dec. 2000, http://www.forhistiur.de/index_de.htm.

\(^{77}\) See Lagodny, supra note 23, at 279, 282 et seq. (providing the meaning of “criminalization” in German law).
to sanction actions that do violate certain regulations without being “morally wrong.”

Criminal law, on the other hand, expresses a moral judgment over the action of the offender. From a consequentialist view, this German difference is hard to understand and only becomes clear if one takes the discussed importance of deontology with its great emphasis on retribution, morality, and guilt into account. This indicates that criminal responsibility in Germany is closer connected to moral responsibility, personhood, and human dignity than the English concept.

This traditional view of criminal law is complemented by Nietzsche’s thoughts on punishment: he states that criminal law can maybe “tame” man, but not make him better. Also to be considered is the theory about criminal laws, prosecutions, convictions, being expressions of the power structures of society, and oppressions to secure the power of the dominating class.78

2. The Corporation

Below, German and English corporations will be analysed. A corporation is a form of business organization, an entity separate from its owners, with its own legal rights and duties.79

2.1 Ordinary Language

The ordinary language approach allows insights onto the perception of corporations by the English and German societies and legal cultures. The English “corporation” is derived from the Latin word “corpus” (body).81 In Germany, ordinarily the word Unternehmen is used, which has the literal meaning “undertaking.” This difference irradiates divergent views: while the English emphasize the entity, the Germans focus on “activity.”

82 See Wells, supra note 11 (stating that the debate in Germany is about Unternehmenstrafbarkeit and not about juristische Personen); H. J. Hirsch, Strafrechtliche Verantwortlichkeit von Unternehmen, 107 Zeitschrift für die Gesamte Strafrechtswissenschaft, 285 (1995) (describing the debate in Germany about Unternehmenstrafbarkeit instead of juristische Personen).
2.2 Structures

The German and English economies and corporation structures differ significantly. Germany, as an example of the “other capitalism” represents a different vision of economic organisation. Its characteristic features produce a stable, dynamic system. In contrast to the English, German society has a tendency to avoid controversial issues and stick to consensus. Democracy and prosperity are too recent not to be fragile, therefore social discipline is important. This view, the search for social consensus is expressed in lesser differences between the highest and lowest wages than in England, direct taxes, and high taxes on capital. This leads to financial stability and long-term development.

The economic environment does have influence on the structure of corporations: in Germany, all parties of a corporation participate in decision-making (Mitbestimmung) and this industrial democracy is describable as “confictual partnership,” leading to a “company spirit” and loyalty. The salaries are high, as is the duration of the jobs within a certain company. The Anglo-American model is based on maximising profit by high competitiveness between employees; there is less participation, less connection to the employer, less sense of regarding the corporation as a community.

Corporations in the UK and U.S. have an independent structure or a personality character. A traditional view of this personality character is mirrored in the debate of “nominalism” against “realism”. Is the construction of a legal person based on its real personality in society or only an abbreviated way of writing their names together for legal transitions? As Iwai rightly argues, this depends on what the law has created—and that it creates a more independent, economic powerful structure in the more utilitarian, less egalitarian English society, seems to be plausible. Thus it seems that in Germany corporations are transparent associations, communities of individuals, while in England corporations are created as independent, powerful structures standing more outside of civil society than being integrated into it.

2.3 History and Genealogy

This theory is complemented by a genealogical view. In the 16th and 17th centuries, CCL was unthinkable, because the juristic fiction of a corporate personality and its blameworthiness was opposed. Later the concept of the legal fiction of a “corporation” of

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83 See ALBERT, supra note 53.


85 See Iwai, supra note 64.

86 Thus this situation in England was the case before Bentham and his utilitarianism became influential.
an entity with own rights and duties became recognized\textsuperscript{87} in both countries, although their structures evolved differently, as shown above.\textsuperscript{88} Then, U.S. and English courts developed the concept of CCL, first for public nuisance by municipalities, later for actions of commercial corporations or crimes requiring intent.\textsuperscript{89} In Germany, this conception was discussed but, as mentioned, never realized. A genealogical point of view clarifies that the “origin” of corporations lies in consciously limiting the liability of the powerful owners and managers. The more independent from the acting individuals this entity is, the less liable are these individuals. Corporations were funded to allow more people to associate for the fulfillment of greater undertakings, and the developing of an independent structure of these associations allowed them to restrict their liability. Although, as Midgley argues, it is wrong that “[o]bviously, any legal guarantee is directly at the services of economic interests to a very large extent,” and in the case of restricted liability of corporations one can, according to Midgley, still argue: “When everyone is responsible, then no one is responsible, and the ethic of responsibility itself is imperiled.”\textsuperscript{90}

This genealogical interpretation is especially relevant for the criminal liability of corporations. No argument other than the argument that corporations comfort the powerful individuals behind them can really justify criminally punishing a corporation.\textsuperscript{91} CCL is said to prevent harmful acts of the independent entities, “corporations,” from polluting the environment, exploiting workers and third-world countries, and fooling shareholders. It is said to allow expressing the mixed feelings towards these economic giants whose structure seem uncontrollable by individual decisions, to blame them for their actions.\textsuperscript{92} But these arguments are, in fact, wrong because the deterrent or rehabilitative effects are low,\textsuperscript{93} inter alia because of the high standard of proof required in criminal law cases\textsuperscript{94} and the typically low sanctions. Also the blaming effect is


\textsuperscript{88} There are wrong understandings of civil law. See T. J. Bernard, \textit{The Historical Development of Corporate Criminal Liability}, 22 CRIMINOLOGY 3 (1984). He states that they never developed the concept of juristic persons. This does not mirror reality. Albert, \textit{supra} note 53, at 103 (“In the neo-American model, a company is a negotiable good like any other, whereas for the Rhine economies it is not just a commodity, but a community.”).

\textsuperscript{89} See Khanna, \textit{supra} note 15, at 1482 et seq.

\textsuperscript{90} Midgley, \textit{supra} note 60, at 154 (quoting Weber).

\textsuperscript{91} See Bernard, \textit{supra} note 88 (stating that CCL evolved, even though judges did not regard it as useful). This is a naïve view onto judgments. If the concept would be unwanted, judges could have argued otherwise.

\textsuperscript{92} See Wells, \textit{supra} note 11, at 45 et seq.


\textsuperscript{94} See Khanna, \textit{supra} note 15, at 1512, 1533 (showing that CCL does not lower this standard).
questionable, as messages about corporate behaviour can be sent in other ways95 and the moral blameworthiness of corporations does not exist, as they balance “harms produced, costs imposed, and economic activities foregone.”96 Thus, it can be concluded that the real reasons for the existence of CCL could in fact lie in the power structures behind corporations. By punishing corporations one can prevent the shareholders, owners and managers from having to go to prison and receiving moral blame, as society has found someone else to be blamed—the entity of a corporation.

4. Pulling the Strings Together: Understanding Some Differences

These findings indicate why CCL has emerged in England, but not in Germany. These findings, of course, have to be further developed in future research on comparison of the situation in both countries, especially if it is intended to find a compromise on European level. But still, these findings make it easier to understand the “Other”: as Parker observes, the blame of criminal law traditionally was an answer to individual fault.97 Why these obstacles were easier to overcome by English than by German law becomes clear if one sums up the interpretations of England and Germany. As has been shown, CCL is an expression of the public skepticism towards the more and more uncontrollable corporate structures, but also is a shield for the acting individuals behind corporations.

The invention of a new legal concept, incoherent with the existing system, is easier in the English traditional society than in the German, more recent one. The English common law system, based on a utilitarian mindset, allows instant solution of the problem of corporations acting harmful, without the need for strict coherence.98 Lesser dependency on written law, a decreased feeling of threat by the concepts of a powerful state and powerful judges, is the result of most citizens not experiencing a dictatorship or abuses of strength by the state in their lifetime.99 This is particularly the case for criminal law, which is generally regarded as dangerous in Germany, while in England it is a welcome solution for social problems. The emphasis on egalitarianism, rights, deontological values in German criminal law is strongly built on a concept of personhood, human dignity, moral guilt, Rechtssicherheit (security of the law) and equality. From this emerges the need for coherence, for basing judgments onto existing laws, and for basing criminal convictions on moral responsibility. This last aspect is relevant for understanding the contrasting English

96 POUNDER, supra note 56, at 1.
97 See Parker, supra note 95.
98 See Bernard, supra note 88 (observing that the concept grew because of the judicial interpretation of common law).
99 See POUNDER, supra note 56, at 1.
approach, starting from the problem of corporations causing harm, and the public wanting to blame them, and in a utilitarian way constructs the personhood from the rights and the duties of the entity. Thus blaming and treating corporations as persons can partly be understood based on the philosophical background.

Also the economic differences, the more egalitarian, socially harmonic, integrating approach of Germany in contrast to the more liberal, utilitarian approach of English capitalism, explains the structures of corporations as more powerful in England, more restrained and community-oriented in Germany. Already expressed in the name (corporation/Unternehmen) in Germany, the focus lies on economic action, on business activity, while in England corporations are an independent entity in a broader sense. This also has the consequence that the public perception could differ, as German workers and clients are more personally connected to corporations, and might not experience them as uncontrollable, blameworthy entities. Corporations are already restricted, by preventive, administrative laws, by the investing banks, and by the concept of Mitbestimmung, while Anglo-Saxon corporations are, although also controlled by the state, more focused on their shareholders and thus mainly controlled on the outcome, on the profit, less on the way to achieve this profit. Thus, not just the perception of corporations as threatening and independent differs, but also the feeling of their controllability and the need for the usage of criminal law.

The meaning of CCL for the powerful individuals behind the corporations also can be connected to the cultural background in England and Germany. In Germany, the power-relations in corporations are differently diversified, and the economy is in itself more egalitarian, the base for such a concept that distracts the criminal blame from acting individuals onto a structure, is less given. The class structure, the power relations are not as clear as in England, also not in the corporations.

These only are a few aspects of CCL, some short sketches on its background, its genealogy, and its structure. But already from these sketches a deeper understanding of the “Other” and thus oneself is possible. One has to be aware that these sketches are drawn from a German perspective, therefore are subjective and cannot give a “neutral” picture—if such a thing exists. They are more a cubistic painting of the situation than a scientific drawing, but they still give a picture. They allow understanding of the English solution from the German perspective and perhaps even the German solution from an English perspective, and give new light to the English solution for an English lawyer.

E. Conclusion

This analysis has engaged in answering the question: how can a new comparative law look like?100 This question has already been discussed in theoretical comparative law, which is

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100 See Stramignoni, supra note 38, at 77.
why here the focus was directed on the aspect of practical comparisons that still follow traditional methodology. Thus, the precise question is: how could a new comparative law in practice look like?

The transfer of theoretical insights into practice should be approached by opening a dialogue between theory and practice. This article provides a first step. Theorists and practitioners have to understand the backgrounds, premises, aims, as well as the crucial arguments of the other. Here the dialogue is entered from the viewpoint of a theorist, thus the focus lies on the clarification of the philosophical roots and the actual theoretical debate of comparative law for the practitioner, using a practical example, and thus transferring theoretical insights into practice.

After demonstrating the failures of traditional comparative law, the development of Critical Comparison was clarified by discussing its philosophical background. By referring to Nietzsche’s philosophy the theoretical debate of comparative law was clarified for the practitioner. Possible ways of engaging in comparison become clear: the relativism of knowledge and values, and the relevance of genealogies for understanding the man-made world are crucial beginnings of less biased comparison. To engage in a productive dialogue of a new comparative law, which can be transferred into practice, one has to enable a fresh view onto the ongoing theoretical debate. In the future, practitioners will have to provide an insight of their aims, backgrounds, and premises as well.

From the analysis of the chosen example, one can draw the conclusion that a broader approach does provide deeper understanding of both one’s own and the “Other’s” legal system: the English concept of CCL can, for example, be explained with the more traditional and more class-oriented structure, utilitarian background of English society, and the problem-solving design of common law systems. Because of this background, criminal law in England is enacted more on the base of its possible consequences and is less dependent on concepts such as moral responsibility or personhood. Corporations are perceived differently in the Anglo-Saxon, liberal capitalism in contrast to the social market economy of Germany. The English concept of CCL is an expression of public skepticism towards the powerful, uncontrollable identities that have developed their own character. It is an expression of a strong belief in criminal law. But it also is a measure to secure power, the power of the acting and deciding individuals, as their liability is limited by this concept. From a consequence-oriented viewpoint it is understandable to limit the criminal liability of individuals that invest and decide in big corporations because the acting individuals will be prepared to take more risks to create high economic profits.

This allows practical comparatists to base their undertaking on a deeper understanding of the differences and of their standpoint towards these differences. This analysis, for example, is written from a German viewpoint, and the analyst has necessarily, at the beginning of the comparison, a better understanding for the German way and the German society, while the English structures and origins remain strange. But by engaging in the
differences, one begins to understand the reasons for these differences, as well as one’s own reasons for a certain evaluation of them.

The dialogue between theorists and practitioners can lead to a new comparative law. The practitioner has to accept that only by engaging in a broader undertaking than just comparing black-letter law, he will be able to truly compare. Such an approach does not exclude evaluation or harmonisation. On the contrary, it is thinkable that Germany at some point will adopt corporate criminal liability. But how this change is to be evaluated, can only be discussed if the roots for the refusal are clear, if the possible disadvantages (incoherence of criminal law, for example) are known, and if the reasons are convincing in the value system of Germany. It also is thinkable that England at some points abandons this concept, and this process as well becomes more transparent if all relevant aspects are included. A broad analysis can help find international solutions, because one can discuss every premise, every assumption, and every background condition in which one differs.

Comparative law today faces an enormous challenge, as internationality of conflicts, economic crises and social problems require international solutions. Divergent legal systems have to engage with each other. In the context of CCL, one has to find solutions how to deal with crimes committed by international corporations or international crimes committed by national corporations. Comparative law cannot face this challenge if theorists cannot convince practitioners of the need to consider their concerns, and practitioners cannot find theoretical answers that are realizable in practice. Thus, what is needed in an international community is dialogue between theorists and practitioners of comparison as well as between national legal systems. In order to fulfill this task, this dialogue first has to deconstruct—the background, the structures, the premises, and the values. Only then, a way to reconstruct, based on a deeper understanding of each other, can be found.

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101 Recently Austria (Verbandsverantwortlichkeitsgesetz, since 2006) and France. See Hartan, supra note 11, at 96 et seq.

102 See Peters & Schwenke, supra note 3 (discussing the growing U.S. skepticism).

103 See Reimann & Zimmermann, supra note 1, at v.

104 See Hartan, supra note 11, at 12.
What Principles Drive (or Should Drive) European Criminal Law?

By Ester Herlin-Karnell

A. Introduction

The entry into force of the Lisbon Treaty has changed the framework and possibilities of the development of European Union (EU) criminal law. Gone is the long-lived and awkward cross-pillar character of EU criminal law, as mainly a third pillar EU ‘intergovernmental’ issue but also partly a first (EC) pillar question. The Lisbon Treaty marks a new era for the criminal law as it brings it within the core of the EU law project. Nevertheless, Article 10 of the transitional protocol as attached to the Lisbon Treaty stipulates a five-year transition period before former third pillar instruments will be treated in the same way as EU acts. This paper will focus on two issues in particular. The first question that will be addressed concerns what EU law principles drive or decide the EU’s involvement in criminal law. After having identified these principles the second question is whether they should drive it and if so what implications will it have for the criminal law in the future.

There are many axioms that are crucial in criminal law such as the notion of fair trial (the presumption of innocence, etc.) in a broad meaning, the establishment of actus reus (the objective element of a crime) and mens rea (the subjective element of a crime), proportionality of sanctions and so on. The assumption is that the criminal law is hugely sensitive as it concerns the right to punish and the governing of dangerous behaviour. After all, the German Constitutional Court (BVerfG) has recently stated that criminal law (or the right to ‘punish’) is in principle not amenable to EU integration. It also stated that

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1 Assistant Professor in EU law, Department of Transnational Legal Studies and Faculty of Law, VU University Amsterdam. This is a slightly amended version of a conference paper presented at the Nordic workshop in EU criminal law at Bergen University Norway on 5-6 November 2009. I wish to thank the participants, in particular Prof Kimmo Nuotio and Dr Ola Zetterquist, for helpful comments on this piece. I am also grateful to the reviewer of this journal for very useful suggestions on this paper. The usual disclaimer applies. Email: e.herlinkarnell@vu.nl.


the principle of guilt or the subjective element of an offence is not reconcilable with a
supranational legislator. Nonetheless, the entry into force of the Lisbon Treaty and the
supranationalization of the criminal law in Title V of the Treaty of the Functioning of the
European Union (TFEU) confirms the rapid development and furthering of the criminal law
at the EU level. It also confirms the need for, if not common principles, at the very least a
common understanding of these principles. For this reason, as noted, I will try to identify
what principles drive or should drive the development of EU criminal law. The purpose of
doing so is to examine to what extent the same principles are applicable in EU law and
criminal law respectively.

This paper will examine four principles that are reflected, and albeit sometimes contested,
in EU law and criminal law. More specifically, the principles in question are
legality/attribution of powers, the principle of effectiveness, subsidiarity (and
proportionality) and the principle of non-discrimination. It will be shown that each of
these principles play an important role in EU law and criminal law doctrine respectively. It
will also be shown that in spite of their importance they are sometimes undermined by
other concerns and trends such as a strong focus on efficiency and risk prevention in law
making.

B. European Criminal Law: Before and After the Lisbon Treaty

Today it seems natural to speak about EU criminal law as a subject as good as any other EU
law topic. This has not always been the case. After all, and to give a short recap, criminal law
as a European topic entered the EU scene as part of the creation of the third pillar in
connection with the entry into force of the Maastricht Treaty in 1993. Subsequently, the
Amsterdam Treaty in 1999 clarified the Union’s objectives in the Justice and Home Affairs area
and created the concept of freedom, security and justice. In addition, the important Justice
and Home Affairs Tampere Council of 1999 and the subsequent Hague programme took the
notion of European criminal law one step further by leading to the adoption of the established
internal market formula of mutual recognition and mutual trust of judicial decisions and
judgements in criminal law matters. This concept has remained the main engine of
development. However, in principle, EU criminal law has been a matter of judicial cooperation
within the third pillar (EU Treaty). Consequently, the Lisbon Treaty has dramatically
‘supranationalized’ the criminal law by abolishing the pillar structure and thereby ‘constitutionalized’ the criminal law. The recent Stockholm programme could be added here as advancing the EU’s mission for the future in the AFSJ sphere further by stipulating a justice and home affairs agenda for the next few years.\footnote{See Council Note, The Stockholm Programme (2009) at http://www.se2009.eu/polopoly_fs/1.26419!menu/standard/file/Klar_Stockholsprogram.pdf.} This means not only that the European Court of Justice will now have jurisdiction to review this area\footnote{The Court of Justice was largely excluded from this prior to the entry into force of the Lisbon Treaty. Article 35 TEU (which is now abolished) was based on a voluntary declaration by the Member States to confer such jurisdiction in the former third pillar.} but also that there is a new dimension for the fight against crime at the EU level. Hence, EU criminal law now forms part of Title V of the Area of Freedom, Security and Justice (AFSJ) chapter in the TFEU with particularly Articles 82 and 83 TFEU setting out the agenda of the EU’s crime fighting mission road.

While Article 82 TFEU deals with procedural criminal law and stipulates that judicial cooperation in criminal matters shall be based on the principle of mutual recognition, Article 83(1) TFEU deals with substantive criminal law. Therefore, Article 83 TFEU puts an end to the previous dispute of whether there was a competence in the former first pillar, the EC, to legislate in criminal law in the absence of an explicit mandate in the Treaty. More specifically, this provision stipulates that the European Parliament and the Council may establish minimum rules concerning the definition of criminal law offences and sanctions in the area of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. Furthermore, Article 83 TFEU sets out a list of crimes in which the EU shall have legislative competence such as terrorism, organized crime and money laundering. Accordingly, it also states that the Council may identify other possible areas of crime, which meet the cross-border and seriousness criteria. Moreover, and interestingly, paragraph 2 of this article provides that the possibility exists for approximation if that proves essential to ensure the effective implementation of a Union policy in an area which has already been subject to harmonization measures.

In any case, a major innovation of the Lisbon Treaty is the emergency brakes procedures. More specifically, Articles 82(2) and 83(1) and (2) also provide in their respective third paragraph for the possibility of applying a so-called emergency brake if the law in question would affect fundamental aspects of a Member State’s criminal justice system.\footnote{If such an emergency brake scenario occurs, a Member State may request that the measure be referred to the European Council. In that case, the ordinary legislative procedure is suspended, and after discussion and ‘… in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure. . . .’} Plainly, the notion of an emergency brake looks attractive to Member States with a strong relationship between the criminal law and the nation state, and hence remedies Member
State anxiety about the loss of their national sovereignty in criminal law matters. Nevertheless, as argued elsewhere by the author, one could also readily make the statement that the emergency brake is too much of a smooth solution as remaining Member States can move on regardless of the emergency brake by establishing enhanced cooperation. Specifically, Articles 82 and 83 TFEU of Lisbon respectively state:

In case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329 of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

This means that, despite the emergency brake provisions as provided for in the Lisbon Treaty, there will be a possibility for remaining Member States to move forward without showing the last resort requirement as provided in Article 20 (2) TEU. Therefore, the question arises whether there are any common principles in EU criminal law which are readily reflected in EU law and criminal law? This appears particularly important as regards the prospect and feasibility of developing an EU criminal law space. More to the point, it will be argued there is an acute need to identify these principles for the emergence of EU criminal law regardless of whether such development takes place within the approximation possibilities granted by Articles 82-83 TFEU or through mutual recognition or via the framework of enhanced cooperation. In other words, the contention is that there is a need to identify the relevant framework for the development of European criminal law.

C. Basic Principles: the EU and Criminal Law Perspective

I am going to start this section by discussing the principle of attribution of powers in EU law and how it is reflected in the axiom of legality in criminal law. Thereafter, I will endeavour to explore how the Court of Justice has manipulated the conferred powers of the Union by an extensive reading of the principle of effectiveness. I will contrast this with the notion of effectiveness in criminal law as a principle of criminalization. In addition, I will explore why the principle of subsidiarity ought to be reflected in a minimalistic approach to criminalization. I will also briefly consider the impact of proportionality as regards the function of penalties in this regard. Finally, I will look at the recent Wolzenburg

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case\textsuperscript{12} and the principle of non-discrimination in EU criminal law and more specifically in the context of the European Arrest Warrant (EAW). In doing so, I will also examine the phenomenon of citizenship in the AFSJ.\textsuperscript{13}

I. The Attribution of Powers and Legality

The principle of legality is a \textit{sine qua non} for any discussions of European criminal law.\textsuperscript{14} Moreover, the principle of legality also forms the basis for the question of whether the EU could legislate at all. Therefore, it also forms part of the rule of law.\textsuperscript{15} This is because the Union has only the powers that are allocated to it. This is stipulated in Articles 4 and 5 TEU and 7 TFEU, and in the principle of conferred powers. Furthermore, this principle is reflected in the axiom of legality in criminal law, that any punishment requires prior codification and thus that retroactive use of criminal law is prohibited. This is also reaffirmed by Article 49 of the Charter of Fundamental Rights, which has now become legally binding because of the entry into force of the Lisbon Treaty.

Nevertheless, looking at the history of EU competence allocation, provisions such as Articles 114 TFEU (formerly Article 95 EC, concerning the establishment and functioning of the market) and 352 TFEU (formerly 308 EC, concerning the operation of the common market) have shown that there may be very good reason to think that there are no limits to broad use of EU legislative powers.\textsuperscript{16} As pointed out by Weatherill, “Any slippage in EU activity beyond the terms of the mandate that is found in the Treaties is illegitimate in the sense that it is devoid of the authorisation rooted in national ratification of the original Treaties and the subsequent amending texts . . . . The principle of conferral, then is tied to legality”.\textsuperscript{17} In this way, it becomes evident that legality is also connected to the deeper question of the authority of EU powers, broadly speaking.

\textsuperscript{12} See Case C-123/08, Wolzenburg (2009) (not yet reported).

\textsuperscript{13} See 2002 O.J. (L 190/1) (on the EAW).

\textsuperscript{14} \textit{E.g.} ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW (2006).

\textsuperscript{15} \textit{E.g.} Armin von Bogdandy, \textit{Founding Principles, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW} 11 (Armin Von Bogdandy & Jorgen Bast eds., 2010).


Thus, the principle of legality is a general principle of EU law and as such codified in Article 2 TEU, Article 21 TEU and in Article 49 of the Charter of Fundamental Rights. One of the first and most influential cases at the EU level was *Kent Kirk*.19 concerning the retroactive application of a regulation. The Court’s message in this case was clear:

The principle that penal provisions may not have retroactive effect is one which is common to all the legal orders of the member states and is enshrined in article 7 of the European Convention for the protection of human rights and fundamental freedoms as a fundamental right; it takes its place among the general principles of law whose observance is ensured by the Court of Justice.

Consequently, the principle of legality as a general principle of EU law and criminal law helps to control the institutions and the legislator.

Yet in the context of criminal law, the principle of legality is more complex than a simple prohibition of retroactive criminal law, as it is a conjunction of intertwined principles. The principles in brief are as follows: no crime without written law, no retroactive criminal law, maximum certainty and no crime by analogy.21 There is no doubt that the principle of legality is of great relevance for the individual at the European level, as in the context of unclear regulations or unimplemented directives, because it could operate as a basis for avoiding criminal liability. A fifth principle is often added to the four axioms of legality as stated above. This principle is the possibility to rely on a more lenient provision at the time of sentencing. This principle is common in many European legal traditions and is proclaimed in Article 49 of the Charter.22

In sum, the principle of legality forms the cornerstone of modern criminal law. In the context of EU legislative competence, legality interacts not only with the conferral of powers but, as

19 Case C-63/83, Kent Kirk, 1984 E.C.R. 2689.
examined below, also with subsidiarity and proportionality. Furthermore, as mentioned, legality enhances trust in the Union project and remedies the accusation of competence creep (the shift of power from the individual Member States to the EU). The question of the authority of the Union action goes clearly far beyond the legislative sphere in that it also concerns the overall legality of the legal architecture of the Union where also the judiciary is included.

The principle of legality is therefore of utmost importance in both EU law and criminal law and runs through all aspects of EU law. Turning once again to the notion of EU criminal law more specifically, how does the Court’s case law on environmental criminal law (for example, C-176/03, Commission v. Council23) fit the pattern of attributed powers and legality? In order to understand this issue, it is necessary to investigate the principle of effectiveness as crystallized within the European legal context.

II. The Magic World of Effectiveness

The principle of effectiveness has always been high on the agenda in European law and increasingly so in recent years. Since the early days, effectiveness has played a significant role in how the EU has expanded.24 The principle of effectiveness is often held to stem from the more general loyalty obligation, Article 4(3) TEU (formerly 10 EC), and has played a crucial role in shaping the contours of the effectiveness of EU law.25 For example, it has given birth to the doctrine of indirect effect.26 Accordingly, ‘effectiveness’ as referred to by the Court is an umbrella label which requires, generally speaking, that national remedies and procedural rules must not render the enjoyment of Community rights by their beneficiaries virtually impossible or excessively difficult in practice. However, effectiveness can also constitute a governing principle for deciding whether Community action in a given area is justified at all.27

Again, EU criminal law serves as a test case here. There have been a couple of important cases where ‘effectiveness’ has constituted an important parameter in the decision on

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competence at the EU level. For example in the judgment of C-176/03, *Commission v. Council*\(^\text{28}\), the Court adopted a new approach towards effectiveness by stating that the EU has the power to impose criminal law in the name of the full effectiveness of EC law when pursuing the protection of the environment. In this way, the effectiveness principle is used as a constitutional concept for the justification of legislation at the EU level. Yet the fundamentals of legality/attribution of powers as discussed above may lead to complexities, or tensions, in the context of the principle of effectiveness. Although the delimitation of competences between the pillars belongs to legal history by now, the principal question of legality and the limits of effectiveness will not go away. The reason for this is that Article 83(2) TFEU provides for a highly ambiguous competence to harmonize when necessary for the effective implementation of a Union policy that has already been subject to harmonization. This seems like a rather broadly defined competence. In conclusion, the principle of effectiveness constitutes one of the main drives of EU integration and has played, and continues to play, a particularly important role in the development of EU criminal law.

1. **“Effectiveness” in Criminal Law is Tricky**

The principle of effectiveness in criminal law is a matter with deep philosophical underpinnings.\(^\text{29}\) It encompasses a restrictive policy stating that the criminal law should not be used if it cannot be effective in controlling conduct, and an expansive policy stating that the criminal law should be used if it is the most efficient and cost-effective means of controlling conduct.\(^\text{30}\) Generally, effectiveness is discussed in terms of positive or negative legitimacy. In this way, effectiveness is viewed as a presumed filter where the limiter claims that no criminalization can be justified if it cannot be expected to be effective.\(^\text{31}\) Nevertheless, the very notion of effectiveness as a template for criminalization is generally considered as a difficult parameter when justifying legislation. First, and in extremely general terms, it is often stated that an ineffective provision would undermine the respect for the criminal law system as the prevention in question would lose much of its function. Secondly, if a criminal law is too severe, as noted, it would render itself ineffective as the citizens would find it unfair (fair labelling). \(^\text{32}\) Another argument is of course the symbolically influenced idea of the state itself (in the era of secularization): criminalizing certain conduct demonstrates what ought to be

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\(^{30}\) See, e.g., JONATHAN SCHONSCHEK, ON CRIMINALISATION (1994).

\(^{31}\) See id.

regarded as morally wrong.\textsuperscript{33} More importantly, the present paper submits that the EU is not yet sufficiently fully formed to take on this symbolic mission because the definition and use of the criminal law—the issue of competence aside—is a role of another calibre than, for example, the creation of citizenship. In other words, there is an apparent ‘light’ approach by the EU legislator here, evident in Court of Justice cases such as C-176/03, \textit{Commission v Council}, which simply assume that the imposition of criminal law guarantees its effectiveness when investigating the real meaning of ‘effectiveness’. This probably stems from the fact that there is a real deficit in the knowledge of these questions at the EU level. Put differently, there is an over-reliance on the magic of the criminal law.\textsuperscript{34}

In conclusion, the principle of effectiveness drives the development of EU criminal law but such an exercise in effectiveness is highly ambiguous as it is far from clear what the EU is aiming for. There is a danger when applying the effectiveness criteria as part of the attribution of powers test. Yet, as noted, the new Article 83(2) grants a competence for a more general harmonization if it would be necessary for the effective implementation of a Union policy. It seems clear that this is a very blurry threshold to be crossed by the legislature. Nonetheless, as all students in EU law know, there are two other hurdles to pass here: subsidiarity and proportionality.

This paper will focus next on the subsidiarity principle as being especially relevant to criminal law.

\textit{III. The Principle of Subsidiarity Should be Reflected in Criminal Law as the Ultima Ratio}

The intention here is not to embark on any grand tour of subsidiarity, as this principle has already been extremely well dissected in the legal doctrine.\textsuperscript{35} Suffice it to note that it is generally considered that the principle of subsidiarity ought to play a bigger role in the EU legislative process and hence that it should be considered more often in the EU’s institutions.\textsuperscript{36} The Lisbon Treaty embraces this by imposing a number of obligations. Most significantly, the Lisbon Treaty increases the national parliaments’ participation in the monitoring process of subsidiarity in imposing an obligation to consult widely before proposing legislative acts (Article 2 of the Protocol on subsidiarity and proportionality). Moreover, the Commission must send all legislative proposals to the national parliaments

\textsuperscript{34} See Case C-440/05, \textit{Commission v Council}, Opinion of AG Mazak (2007) [a more nuanced approach].
at the same time as to the Union institutions and the time limit for doing so has been increased from six to eight weeks (Art 4). In addition, Article 5 TEU refers to the Protocol on subsidiarity and proportionality as attached to this Treaty.

The need for delegation away from centralization appears particularly important in the sensitive area of criminal law. After all, criminal law has its own principle of subsidiarity embedded in the *ultima ratio* concept. Briefly, this means that criminal law should be the last resort as means of control. Although it is true that the notion of *ultima ratio* is more of an ethical principle than a constitutional principle, the basic idea is that criminal law should be reserved for the most serious invasion of interests since less serious misconduct is more appropriately dealt with by civil law or by administrative regulation. Accordingly, when discussing criminalization one has to ask whether there is an intelligible reason to undertake action; that is, whether the consequences of legislative action in the area in question are sufficiently clear, effective and precise.

Nevertheless, the Lisbon Treaty appears unclear as regards a minimalism approach to the use of criminal law (as an *ultima ratio*). On the one hand, it intensifies the national parliaments’ participation in the monitoring process of subsidiarity. Moreover, Article 69 TFEU stipulates that the National Parliaments shall ensure that subsidiarity and proportionality are respected when proposing legislation in the criminal law area. It also imposes an obligation on the Commission to consult widely before proposing legislative acts (Article 2 of the Protocol) and to send all legislative proposals to the national parliaments at the same time as to the Union institutions, and the time limit for doing so has been increased from six to eight weeks (Article 4). On the other hand, such emphasis on subsidiarity appears less clear, in the context of the enhanced cooperation mechanisms. According to the Lisbon Treaty framework, nine Member States can move ‘forward’ by establishing cooperation regardless of whether a Member State has pulled the emergency brake as mentioned above. In such a case, the authorisation to proceed with enhanced

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40 See id.
cooperation (there is no need to obtain the Commission’s support or the approval of the European Parliament referred to in Article 20(2) TEU and Article 329 TFEU) shall be deemed to be granted. It seems as if the new mechanisms in the Lisbon Treaty pose as many questions as it tries to answer. In other words, there is a tension between eagerness to move forward in EU criminal law cooperation and the criminal law as the last resort. In other words, the problem is that even if a competence could be established it seems as if the will to exercise that competence is bigger than the will to restrain action at the EU level. Admittedly, this is not a problem unique to the EU as the debate on criminal law as an ultima ratio is readily transferable to the national level. Interestingly though, the Commission’s recent communication on the Stockholm programme, which sets up goals to be achieved within the next five years within the AFSJ, stresses the need to respect subsidiarity. More specifically, the Commission states that criminal cooperation should be pursued in close cooperation with European Parliament, national parliaments and the Council, and acknowledges that the focus will remain primarily on mutual recognition and the harmonization of offences and sanctions will be pursued for selected cases. Arguably, this is a slightly more nuanced approach in an area otherwise characterized by rushed legislation in the aftermath of September 11th, 2001. It is to be welcome because it recognizes the sensitive nature of the criminal law.

IV. Proportionate Sentencing

If the principle of subsidiarity was made more visible thanks to the Protocol on the National Parliaments, their participation in the monitoring process (proportionality even if left out of this protocol) has been made a little more visible in the Treaty text as such. Article 5(4) TEU refers to the obligation for the EU’s institutions to apply the principle of proportionality as stipulated in the Protocol on Subsidiarity and Proportionality.

The principle of proportionality has a multifaceted function of similar complexity to subsidiarity. Although this principle has been suggested as a better legal tool than the abstract notion of subsidiarity, the Court has been criticized for not understanding what proportionality means in the framework of lawmaking. More concretely, the argument is

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43 Jareborg, supra note 38.


that while proportionality is about the balancing of interests, jurisdictional concerns are about assessing the means/ends relationship which must be distinguished from the context of fundamental rights and the issue of a substantive policy concerns. Regardless, it is often suggested that the principle of proportionality should be regarded as a wider principle than subsidiarity, even if there is a clear overlap between them. As such, proportionality is a much broader principle because it concerns not only legality of Union action but also legality of Member States action. This is the famous and extremely well documented multifaceted function of proportionality, that the principle not only balances Union action but also supervises Member State behaviour. After all, this principle has a huge impact in the free movement law as Member State action may never be, tautologically put, ‘unduly’ disproportionate.

When it comes to sentencing, as such, it is the principle of proportionality which is of greatest importance in this area. In this sense, proportionality means that the punishment for an offence ought to be proportionate to the seriousness of the offence, taking into account the harm, wrongdoing and culpability involved. In this way, the principle of proportionality connects with the issue of a fair trial because it insists that the appropriate legal safeguards have been respected.

As observed by Ashworth, the European Convention of Human Rights (ECHR) poses few constraints in this regard, except the general Article 7 ECHR and the ban on retroactive criminal law. Article 49 of the Charter of Fundamental Rights, makes it clear that the severity of a penalty must not be disproportionate to the criminal offence. Although the Charter, as stipulated in Article 51, addresses the EU institutions and the Member States when they are implementing Union law, there is good reason to believe that the Charter will have a wider impact in the area of EU criminal law as a source of inspiration. This also lies in the nature of proportionality as a general principle of EU law.

The final principle I want to investigate in the present paper is that of non-discrimination, which is one of the fundamental principles of European law and more lately has owned recognition also in the context of the European Arrest Warrant (EAW).

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49 See, e.g., CRAIG, supra note 45.

50 See Andrew Ashworth, Criminal Law, Human Rights and Preventive Justice, in REGULATING DEVIANCE (Alan Norrie, et. al., 2009)


52 See 2002 OJ (L 190/1) (on the EAW).
V. The Principle of Non-Discrimination

The principle of non-discrimination is crucial for any understanding of European law as one of the basic objectives of the Union. As the Court has frequently pointed out, the principle of non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.\(^5^3\) For example, Article 2 TEU stipulates that the Union is founded on the values of respect for human rights which are common to the Member States in a society in which non-discrimination prevails. Clearly, the EU principle of non-discrimination is too well documented for any reiteration here,\(^5^4\) and it is the most fundamental principle of Union law for it accounts for the very authority of supranational law.\(^5^5\) It is in many ways the driving force of European law. This principle is codified in what is now Article 18 TFEU (formerly Article 12 EC) and reaffirmed in Article 21 of the Charter. It is quite obvious that the notion of non-discrimination is of utmost importance also in criminal law as forming part of the broad concept of a fair trial. In this way, it is also connected to proportionality and the notion of fairness (and fair trial) broadly speaking.

More generally at issue here, however, is the meaning of the concept of European criminal law cooperation based on mutual recognition.\(^5^6\) The question is whether it is currently feasible to adopt the mutual recognition principle to criminal law cooperation matters based on the internal market model at all while refusing to apply general principles of EU law such as non-discrimination. It is true that the Lisbon Treaty has removed all doubt of whether former first pillar principles such as non-discrimination apply to the former third pillar by merging the pillars. But as mentioned at the outset of this paper, the five-year transition period also means that the old Treaty pillar structure, with limited jurisdiction of the Court of Justice to review old third pillar instruments, will continue to apply to existing third pillar measures unless amended, repealed or annulled.

In any case, the Lisbon Treaty makes it clear that non-discrimination is now explicitly applicable in the AFSJ. Although the Pre-Lisbon Treaty era witnessed a certain “depillarization” trend (which is to say, EC law based reasoning in the third pillar) the non-discrimination principles were, in principle, a principle of the first (EC) pillar. The recent ruling in Wolzenburg serves as an illustrating case here.\(^5^7\) This case concerned the EAW

\(^{5^3}\) See, e.g., Case C-303/05, Advocaten voor de Wereld, 2007 E.C.R. I-3633.


\(^{5^5}\) ALEXANDER SOMEK, INDIVIDUALISM 215 (2008).


\(^{5^7}\) Case C-123/08, Wolzenburg, (Oct. 6, 2009).
and the possibility of the Member States for refusal to surrender under Article 4(6) EAW. More specifically, there are mandatory and optional non-execution conditions in the EAW. Article 3 EAW provides a list for mandatory refusal, such as where there are granted amnesties, where there is a *ne bis in idem* (double jeopardy) situation or where the person in question is deemed too old to stand trial. Article 4 EAW on the other hand lists a number of so-called optional grounds for refusing to surrender. For example, there are possibilities to refuse to surrender a person where the crime in question is statute barred or does not constitute a crime in the executing state or if the EAW has been issued for the purposes of execution of a custodial sentence or a detention order and the person in question is resident in the executing state and that state undertakes to execute the sentence or detention order in accordance with its domestic law. The present case concerned Article 4 and the possibility of serving a custodial suspended sentence in the executing host state.

More specifically, in *Wolzenburg* the Netherlands had made a voluntary opt-out under Article 4(6) EAW. This means that if an arrest warrant has been issued for the purposes of executing a custodial sentence or detention order, where the requested person is staying in or is a national or a resident of the executing Member State, that State undertakes to execute the sentence or detention order in accordance with its domestic law. The question arose as to whether it constituted discrimination to distinguish between a state’s own nationals and non-nationals in this regard. In other words, the core question was whether the required period of residence of the person requested for surrendering in the executing state counted as “staying” or “residing” so as to be treated in the same way as nationals. Secondly, the question presents itself as to whether an additional administrative burden—such as a residence permit—was in line with the axiom of non-discrimination in EU law.

The Court of Justice made it clear that the non-discrimination axiom was applicable in the (now former) third pillar area as there is a clear free movement dimension to the EAW. In the context of the EAW, this has important implications from the perspective of rehabilitation issues and the possibilities of integrating into society. However, the Court somewhat limited the full the impact of non-discrimination and citizenship by applying the five-year residence requirement as stipulated in the Citizenship Directive 2004/38 before non-nationals can fully benefit from the host state. One could of course question this and ask why the Directive should have such a limiting effect at all. Regarding of the answer to the question posed, it should be stressed that the recognition of non-discrimination in

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58 See Case C-123/08, Wolzenburg, Opinion of AG Bot (March 24, 2009).

59 See 2004 O.J. (L 158/77).

the area of mutual recognition and criminal law constituted an important step for the creation of a true AFSJ space.

D. Conclusion

This paper has argued that the principles of attribution of powers/legality, effectiveness, subsidiarity/ultima ratio and the principles of non-discrimination are reflected in both EU law and criminal law. More critically, however, this paper aimed to demonstrate that these principles do not necessarily mean the same thing in EU law and criminal law, which makes it even more complex when applying it in the framework of European criminal law.

Particularly, this paper stressed the need to pay sufficient attention to the notion of legality or conferred powers in EU law. This paper pointed at the ambiguous concept of effectiveness and how it is used to drive the Unions activities in this area. This poses difficulties because effectiveness is a very slippery concept which becomes a very tricky parameter when deciding on criminalization. The next step in monitoring the competences of the EU is the principle of subsidiarity. Here, there is not sufficient attention in the EU’s institutions. This is a mistake because the phenomenon of over-criminalization is not in line with the criminal law as the ultima ratio. The paper also stressed the importance of proportionality when deciding penalties. After all, Article 49 of the Charter of Fundamental Rights stipulates that the severity of a penalty must not be disproportionate to the criminal offence.

Thereafter, this paper looked at the notion of non-discrimination and argued that this principle should also be applicable to the former third pillar instruments (still existing law during the five years transitional period). It is simply wrong to treat a state’s own nationals more favourably than non-nationals, even in the context of third pillar law. The Lisbon Treaty has removed any doubts of whether this is the case by bringing the former third pillar area into the core the Union project. Regardless, there are important decision ahead of the Union in regard to the development of an AFSJ and EU criminal law.

Thus, the main argument is that the development of European criminal law deserves critical attention, particularly with reference to how poor the EU system has been at restraining the emerging drift of EU criminal law at the supranational level. There may be important principles once recognized within the nation state that are lost in such a shift. Therefore, it is necessary to identify the general framework of EU criminal law by recognizing basic principles of EU and criminal law. The good news is that the Lisbon Treaty provides at least for a basic theoretical skeleton – in title V of TFEU – for such identification.
Obligation to Contract and the German General Act on Equal Treatment (Allgemeines Gleichbehandlungsgesetz)

By Joachim Wiemann

A. Introduction

The German General Act on Equal Treatment (Allgemeines Gleichbehandlungsgesetz, AGG)\(^1\) has been in force for four years now. Academic discussion has so far mainly focused on the scope of anti-discrimination provisions for non-state actors, i.e. on whether there should be private anti-discrimination legislation, what conduct the statute should prohibit, and what exceptions it should allow.\(^2\) In order to fully understand the effects and relevance of anti-discrimination provisions in a legal system, their remedies and sanctions have to be taken into account as well. This article focuses on the remedies provided for in the AGG and, more specifically, on obligations to contract. The issue of whether there is

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\(^1\) Joachim Wiemann completed his legal education in Germany and holds an LL.M. degree from Harvard Law School. He is currently a doctoral student at the University of Passau and a visiting researcher at Harvard Law School. He is writing his dissertation on “Remedies and Sanctions for the Violation of Anti-discrimination Statutes by Private Defendants: A Comparison of German and U.S. Law.” This paper is based on a guest lecture held at Washington and Lee University School of Law, Lexington, VA, on 19 March 2010, sponsored by the German Law Journal, German Academic Exchange Service (DAAD), and Washington and Lee University School of Law. The author would like to thank Professor Christopher Bruner, Professor Russell Miller, and the audience of the lecture for their valuable comments. Email: jwiemann@mail.law.harvard.edu.


and whether there should be an obligation to contract has – as regards remedies – been the most controversial issue in the academic discussion so far.3

The article will answer the following question: Is there an obligation to contract as a remedy when the conclusion of a contract has been denied based on one of the prohibited grounds of discrimination under the AGG? After a brief description of the AGG and its European background (B.), the article will start with an analysis of the text, the legislative history, and the implications of the EU directives on which the German law is based (C.). The analysis shows that the AGG should be interpreted as comprising an obligation to contract.

This will be followed by a more abstract analysis which will address the fundamental question of whether an obligation to contract constitutes an appropriate remedy (D.). The article will highlight fundamental principles for the assessment and focus on a variety of assessment criteria. As regards the assessment of remedies, this article argues that there are two separate and distinguishable levels when anti-discrimination provisions are designed. This excludes certain arguments from the assessment of the remedial provisions. The article also addresses the question of the objective of the AGG, providing convincing evidence from the German and EU legislative materials showing the intention is not merely to protect the victims’ dignity.

Finally, the article will address the implications of German constitutional law (E.). It identifies the constitutional framework of the issue and highlights the importance of the findings on the appropriateness of an obligation to contract for the balancing test as part of the proportionality requirement.

B. The AGG and its European Background in a Nutshell

The AGG entered into force on 1 August 2006. It prohibits discrimination on grounds of race, ethnic origin, sex, religion, disability, age, and sexual orientation. Unlike the equal protection clauses in the German Grundgesetz (Basic Law), the AGG does not require state or government action but applies to private conduct. The AGG draws a basic distinction between protection against discrimination in the field of employment (§§ 6-18 AGG) and “Under Civil Law” (§§ 19-21 AGG), i.e. general civil law provisions that apply to non-employment contracts. This paper addresses obligations to contract for non-employment contracts only; for employment contracts, § 15 (6) AGG explicitly states that there is no

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obligation to contract. §§ 19-21 AGG do not cover all private contracts but only apply in certain situations, the most important being “bulk business,” i.e. contracts which “typically arise without regard of person in a large number of cases under comparable conditions” (§ 19 (1) No 1 AGG). As regards the prohibited grounds of discrimination, the prohibition is the strictest and the scope of application is the largest for discrimination based on race or ethnic origin.⁴

The adoption of the AGG has been highly controversial both in the political discussion and in legal academic analysis. A large number of legal academic contributions have addressed the question of whether anti-discrimination legislation for non-state actors is appropriate.⁵ This academic discussion was strongly influenced by traditional German legal thinking distinguishing between private law and public law and their leading principles: equal protection as regards state action and freedom of contract for private actors.⁶

The AGG is based on four European Community directives, two of which are relevant for the general civil law part: Directive 2000/43/EC⁷ covering discrimination based on race and ethnic origin, and Directive 2004/113/EC⁸ on gender based discrimination. These directives constitute legislative acts of the European Community (now the European Union)⁹ that are binding on the Member States as to the result to be achieved but leave the choice of form and method to the Member States when the Member States transpose them into national law. Under Directive 2000/43/EC, there “shall be no direct or indirect discrimination based on racial or ethnic origin” (Art. 2) in specifically enumerated fields (Art. 3), such as healthcare, education, and “access to and supply of goods and services which are available to the public, including housing.” Directive 2004/113/EC

⁴ The scope of application is extended for discrimination based on race or ethnic origin (§ 19 (2) AGG) and—unlike for the other grounds—the AGG does not provide for justifications under § 20 (1) AGG.

⁵ See, inter alia, supra note 3. For the assumptions made for this article as regards prohibitions of discrimination, see below D. I. 1.

⁶ See also the arguments for different treatment of state and non-state action in Matthias Mahlmann, Die Ethik des Gleichbehandlungsrechts, in GLEICHBEHANDLUNGSRECHT 33, 48 (Beate Rudolf & Matthias Mahlmann eds., 2007).


⁹ The European Union replaced and succeeded the European Community with the entry into force of the Treaty of Lisbon (Art. 1 (3) (3) Treaty on European Union (TEU)). This contribution therefore uses the term “EU Directive.”

¹⁰ See Art. 288 (3) Treaty on the Functioning of the European Union (TFEU).
covers gender-based discrimination in the provision of goods and services available to the public.\textsuperscript{11}

C. Obligation to Contract—Interpretation of the AGG

I. Text of the AGG

In the German original, § 21 (1) (1) AGG reads: “Der Benachteiligte kann bei einem Verstoß gegen das Benachteiligungsverbot […] die Beseitigung der Beeinträchtigung verlangen.” This has been translated as “Where a breach of the prohibition of discrimination occurs, the disadvantaged person may […] demand that the discriminatory conduct be stopped.”\textsuperscript{12} The AGG does not explicitly state that there is an obligation to contract. If the discrimination consists of the refusal to conclude a contract, however, the discriminatory conduct can only be stopped by concluding this contract,\textsuperscript{13} so that there is a strong textual argument in favor of an obligation to contract.

In academic writing, there has been little focus so far on permanent preventive injunctions for future possible breaches (\textit{Unterlassungsanspruch}, § 21 (1) (2) AGG). However, they can serve as a legal basis for an obligation to contract in future situations. A case in point is a civil action by a person who was refused entry to a restaurant and who has the intention to return in the future. It remains unclear what else could be the content of a preventive injunction if not that the owner has to serve the respective person, which constitutes an obligation to contract.

II. Legislative History

It has been argued that the legislative procedure shows that an obligation to contract was not intended.\textsuperscript{14} The first draft of the Act contained a provision addressing an obligation to contract\textsuperscript{15} that was deleted later. However, the above-mentioned section only contained certain restrictions as to when there is an obligation to contract. Those arguing in favor of an obligation to contract have always derived this obligation from the provision

\textsuperscript{11} See below C. III. for the requirements of the directives for remedies under national law.

\textsuperscript{12} Translation of the Antidiskriminierungsstelle des Bundes (see supra, note 1).

\textsuperscript{13} Sonja Haberl, \textit{Antidiskriminierungsgesetz und Sanktionensystem: Die Konkretisierung gemeinschaftsrechtlicher Mindestvorgaben}, 6 \textsc{Zeitschrift für Gemeinschaftsprivatrecht} (GPR) 202, 205 (2009); Schiek, supra note 3, § 21, margin number 9.

\textsuperscript{14} See Gregor Bachmann, \textit{Kontrahierungspflicht im privaten Bankrecht}, 18 \textsc{Zeitschrift für Bankrecht und Bankwirtschaft} (ZBB) 257, 266 (2006).

\textsuperscript{15} § 22 (2) ADG-E, BT-Drucks 15/4538.
corresponding to § 21 (1) (1) AGG, not from the deleted paragraph. The legislative materials to the draft also support this interpretation. The deletion of the provision containing restrictions as to obligation to contract therefore does not imply that an obligation to contract was no longer intended.

This article argues that the legislative history is, in fact, undetermined and does not provide a clear result. This can be explained by the fact that the legislation was highly controversial and that the parties wanted to agree on a compromise and therefore left controversial issues open. This is a phenomenon that can be seen regularly in all kinds of negotiations; the parties avoid addressing controversial issues because they want the negotiations to be successful. Moreover, one has to be very careful when interpreting legislative history, in particular when legislation is discussed controversially. It can easily happen that statements of individual persons in the legislative process are misinterpreted as statements of the legislative institutions. As regards the AGG, it has even been argued that statements of politicians outside of the legislative process would show that an obligation to contract was not intended. However, these are only singular opinions and not the general opinion of the legislature.

III. EU Directives

As outlined above (B.), the AGG has a European background and is based on several EU directives, which are binding for all EU Member States, as to the result to be achieved, and which had to be transposed into national law. If there is no strong indication to the contrary, it can be assumed that the German parliament did not intend to breach its obligation under public international law. This is why the directives have to be considered for the interpretation of § 21 (1) (1) AGG. In addition, the principle of sincere

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16 § 22 (1) ADG-E, BT-Drucks 15/4538.
17 BT-Drucks 15/4538, 43; Florian Stork, Das Gesetz zum Schutz vor Diskriminierungen im Zivilrecht, 8 ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN (ZEUS) 49 (2005).
18 See Thüsing & Hoff, supra note 3, at 22; see also Schiek, supra note 3, § 21, margin number 8.
19 See Christian Armbrüster, Der allgemein-zivilrechtliche Teil des Allgemeinen Gleichbehandlungsgesetzes, in Gleichbehandlungsmrnecht 257, 316 (Beate Rudolf & Matthias Mahlmann eds., 2007).
20 Id. at 315.
21 See Bachmann, supra note 14, at 266.
22 Gregor Thüsing, § 19 AGG, in MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, margin number 22 (Franz Jürgen Säcker & Roland Rixecker eds., 2007).
cooperation between the Member States and the European Union (Art. 4 (3) TEU) requires the Member States to interpret national law implementing European law in conformity with EU law.24

However, the two relevant directives are rather open. The core provisions as to remedies in both Directive 2000/43/EC (Art. 15 (2)) and Directive 2004/113/EC (Art. 14 (2)) state that the sanctions shall be “effective, proportionate and dissuasive.”25

One could think of placing a lot of weight on every aspect of this provision and interpreting the directives in a way that they require the Member States to provide specific sanction. An example of this could be that “dissuasive” requires the Member States to provide punitive damages.26 As regards fault requirements for damages, the European Court of Justice’s case law in interpreting directives on equal treatment in the field of employment has indeed been relatively strict.27 However, the directives are generally interpreted as leaving the Member States a great deal of discretion—in particular as regards an obligation to contract—and the opportunity to provide sanctions that fit well into the national system of remedies.28 This interpretation of the directives is convincing because it takes into account the differences in the legal systems of the Member States. Given this diversity, the EU institutions would have had to use unambiguous language if they had intended to require specific sanctions. In conclusion, it can be said that the EU directives do not set strict requirements with regard to remedies and, therefore, do not provide much guidance for the interpretation of the AGG.29

IV. Systematic Comparison: The Explicit Exclusion of an Obligation to Contract in Employment Law

From a systematic point of view, § 21 (1) (1) AGG can be contrasted with the remedial provisions for employment law. § 15 (6) AGG states explicitly that there is no obligation to contract as far as employment contracts are concerned.30 If the German parliament states

24 See also ECJ, Case C-397/01, Bernhard Pfeiffer et al. v. Deutsches Rotes Kreuz, 2004 E.C.R. I-8835, para. 114.
25 The EU legislative materials also do not address obligations to contract.
26 The German federal government, in the legislative materials, interprets the directives as not to require punitive damages. BT-Drucks 16/1780, 46.
28 See Armbrüster, supra note 3, at 1494 (arguing that there is general agreement that the EU directives leave it to the Member States whether to provide an obligation to contract).
29 See, inter alia, Thüsing & Hoff, supra note 3, at 22.
30 A similar explicit statement could be found in former § 611a (2) Bürgerliches Gesetzbuch [Civil Code - BGB].
explicitly that there is no obligation to contract in one field of law and it does not state the same for the other fields of law, it intends different legal consequences.  

V. The Obligation to Contract under the AGG and Specific Performance

As regards text, legislative history, European background, and systematic comparison, the arguments in favor of an obligation to contract outweigh the arguments against an obligation to contract. Therefore, the AGG should be interpreted as comprising an obligation to contract. This does not only mean that the person discriminated against can bring a suit for the conclusion of a contract. It also means that he or she can then, in the case of a breach of the contract, bring a suit for specific performance because specific performance is available for breach of contract as a default remedy under German law.

D. The Appropriateness of an Obligation to Contract

This part of the contribution takes the argumentation to a more abstract level: Does an obligation to contract make sense as a remedy for violation of anti-discrimination provisions?

1. Fundamental Aspects

1. The Relevant Assessment Criteria to Assess an Obligation to Contract—Assumptions for a Remedy-focused Analysis

This article argues that the assessment criteria for the appropriateness of an obligation to contract as a remedy are criteria that specifically assess remedies. This means that there are two separate and distinguishable levels when anti-discrimination provisions are designed. On the first level, the question is: Should there be a prohibition of a certain kind of discrimination? If this question is answered in the affirmative, the question on the second level is: What should the remedies be for a violation? This article does not focus on the first level; it assumes that there are prohibitions of discrimination. It solely focuses on the second level and tries to assess the appropriateness of a specific remedy for given prohibitions of discrimination. Admittedly, there exists interdependence between the two levels, but the analysis becomes much clearer if the two levels are distinguished. In academic writing, this separation has not been emphasized sufficiently.

31 See Christian Armbrüster, Bedeutung des Allgemeinen Gleichbehandlungsgesetzes für private Versicherungsverträge, 57 Versicherungsrecht (VERS) 1297, 1303 (2006); Thüising & Hoff, supra note 3, at 22.

32 See Richard Posner, Economic Analysis of Law 566 (7th ed., 2007) (discussing the possibility of a compromise in the legislative proceedings where opponents might have had enough influence to limit the remedies in a statute to a less than optimal level).
For its analysis, this paper makes a second assumption. It does not only assume that there is a statute that prohibits specific types of discrimination, it also assumes that this prohibition is appropriate and constitutional. This means, in particular, that the prohibitions are justified limitations of freedom of contract. The reason for this second assumption is that the question of how unconstitutional or inappropriate legislation should best be enforced would ultimately be irrelevant.

From the above follows that there has to be a very strong argument—and an argument that specifically applies to the obligation to contract as a remedy— as to why an obligation to contract should not be appropriate or should not be constitutional because the second assumption implies that freedom of contract does not go so far as to include the refusal of the conclusion of a contract based on certain grounds. The second assumption precludes the mere reference to the principle of freedom to contract as an argument against an obligation to contract because this principle has already been taken into account in the decision made on the first level that there should be prohibitions of specific types of discrimination.

2. What is the Objective of the AGG?

The determination of the objective of the AGG plays an important role for the assessment of its remedies. The fundamental debate is whether the AGG only protects a person’s dignity or, in addition, also intends to guarantee that a person has access to certain goods and services. It has often been argued that the AGG protects only the first interest. However, the second interest has been expressly mentioned, and supported by examples, in the legislative materials of the AGG. Moreover, the European Commission, in its proposal for Directive 2000/43/EC, stated that “the exclusion of individuals from access to the goods or services of their choice is at best damaging to their self-esteem and may lead in the worst cases to compounding social exclusion.” This is convincing because

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33 The situation for the violation of anti-discrimination provisions is not identical to the situation of a breach of contract, but there are some similarities. To a certain extent, therefore, the argumentation in this paper relies on the principle under German law that specific performance is available for breach of contract as a default remedy and that the plaintiff is not generally restricted to damages only.

34 See note 3, § 21, margin number 9 appears to go in the same direction.

35 See Beate Rudolf, Gleichbehandlungsrecht und Öffentliches Recht, in Gleichbehandlungsrecht 186, 192 (Beate Rudolf & Matthias Mahlmann eds., 2007). Some scholars have also seen the primary objective in the protection of dignity and the access to goods and services only as a less important, secondary, objective. See Thüsing & Hoff, supra note 3, at 22 (with reference to the legislative materials, BT-Drucks 16/1780, 20, 33, and 46).

36 See Armbrüster, supra note 3, at 1494; Neuner, supra note 3, at 64.

37 BT-Drucks 16/1780, 23-25.

examples like race discrimination in education facilities in the U.S.\textsuperscript{30} or discrimination in the field of employment\textsuperscript{40} clearly show that discrimination does not exclusively affect a person’s dignity. In these fields, discrimination clearly affects opportunities in life in the form of lack of access to jobs or university education.\textsuperscript{41} Thus, both the German and the EU legislator have expressed their intentions to guarantee access to goods and services. The AGG therefore—at least in some circumstances—also protects this interest.

3. Why some Violations do not Trigger Sanctions, and the Implication for the Selection of Remedies

All remedies under the AGG require that the victim of the discrimination brings a legal action. It is obvious that not all violations of the AGG lead to a law suit (or to a settlement in order to avoid a law suit). In many instances violations of the AGG therefore do not have any consequences because victims do not bring a law suit for a variety of reasons (legal costs, lack of time, lack of knowledge, inconvenience, etc.). If the AGG provided for public enforcement, not all instances of discrimination would trigger sanctions either. Many instances of discriminatory conduct would go undetected and the available resources of enforcement authorities naturally would restrict the authority’s enforcement activity. It also appears probable that in the field of anti-discrimination laws, victims are less likely to bring suits, because victims often belong to socially disadvantaged groups that lack the knowledge, the resources, and the confidence to assert their rights.\textsuperscript{42}

All this has so far received relatively little attention by academic discussions on appropriate sanctions. The most important implication is that sanctions have to be designed in a way that takes into account the fact that they will not be triggered by every single violation of the provision. Lack of enforcement of the law in some instances is, in essence, a strong argument for powerful sanctions.\textsuperscript{43} This can be exemplified by looking at compensatory damages from an individual and from an aggregate perspective. Compensatory damages do compensate the individual plaintiff for his or her individual harm. However, they are not paid for every violation. The consequence is that aggregate harm done to all individuals is much higher than aggregate compensatory damages paid by violators.\textsuperscript{44}


\textsuperscript{40} BT-Drucks 16/1780, 24.

\textsuperscript{41} For housing discrimination and its results (segregation, lack of educational opportunities, etc.), see Werner Hirsch, \textit{Law and Economics} 334 (3rd ed., 1999).

\textsuperscript{42} BT-Drucks 16/1780, 23.


\textsuperscript{44} For the effect on incentives, see Shavell, \textit{supra} note 43, at 244.
II. Individual Assessment Criteria

1. Compliance: The Incentive to Comply with the Anti-discrimination Provisions

An important assessment criterion is to what degree the remedies constitute an incentive for people to comply with the anti-discrimination statute, i.e. not to discriminate. This criterion, which focuses on influencing behavior, is emphasized by economic analysis of law, but it is also taken into account in traditional legal analysis. Obviously, sanctions need a certain power in order to achieve compliance with the provisions. This is true in particular because of the fact that sanctions are not always applied because it lowers the expected costs of non-compliance.

One argument is that violators pay a fair price for discrimination if they pay damages that compensate the victim for the harm done. If they make the victim whole and value discrimination high enough to pay damages, why should they be forced into a contract? The reason is that there is a substantial lack of sanctions or enforcement of sanctions—in many instances, the violators do not have to pay, so a large percentage of victims go uncompensated.

Creating an incentive to comply with the anti-discrimination provisions is not a formal argument for an obligation to contract. Analyzing the incentives does show, however, that there is great danger in having too little incentive to comply, and that powerful remedies are necessary to achieve the desired result. Therefore, the risk of noncompliance supports the appropriateness of an obligation to contract as an additional remedy to other given remedies.

2. Compensation of the Victim

From the point of view of compensation of the victim, it has often been argued that compensatory damages to make the victim whole are as good as an obligation to contract, or even better. Compensatory damages are available under § 21 (2) AGG and are

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45 See Posner, supra note 32, at 25; for an analysis of anti-discrimination provisions in private law and reasons for discrimination see Engert, supra note 2.

46 See, e.g., the case law of the Bundesgerichtshof [Federal Court of Justice - BGH] on the relevance of preventive aspects for the determination of the amount of damages available for violations of the victim's personality rights [Allgemeines Persönlichkeitsrecht], BGH NJW 1995, 861.


48 On this argument and on the fact that even the optimal level of deterrence is characterized by under-deterrence so that the fair market price argument does not apply see Shavell, supra note 43, at 488.

49 See Armbrüster, supra note 3, at 1496.
generally the alternative to an obligation to contract, which the German discussion focuses on.\footnote{There is remarkably little discussion about the appropriateness of public enforcement in German academic discussion (e.g. civil penalties like in the U.S. Americans With Disabilities Act, Title III, 42 U.S.C. § 12188 (b) (2) (C)).} However, from the victim’s perspective, having the choice between damages and the obligation to contract is preferable.\footnote{See Haberl, supra note 13, at 205.} Admittedly, there might be more situations in which damages are superior, preferred by the victim, and sought by the victim in court,\footnote{See Jan Busche, Effektive Rechtsdurchsetzung und Sanktionen bei Verletzung richtliniendeterminierter Diskriminierungssverbote, in: Diskriminierungsschutz durch Privatrecht, 159, 174 (Stefan Leible & Monika Schlachter eds., 2006); Haberl, supra note 13, at 205.} but this does not show why the victim should not have the choice between a contract and damages. It is evident that there may be situations where a contract is a better form of compensation.

If, for example, the magnitude of harm done is hard to establish, damages cannot make the victim whole and the victim might prefer an obligation to contract. The argument for an obligation to contract is stronger when the objective of the respective statute is seen not only as the protection of dignity,\footnote{The argument that damages are more appropriate than an obligation to contract is often based on the interpretation that the AGG only protects the victim’s dignity and that the insult cannot be compensated for by the conclusion of the contract. See Thüsing, supra note 22, § 21, margin number 34.} but also as a guarantee that a person receive certain goods or services. Damages are limited to providing the victim with the money equivalent, and are not a real equivalent for lost goods or services.

3. Proportionality

Proportionality as an assessment criterion plays a role in several respects. On the one hand, proportionality can serve as a principle for the relation between the harm done to the victim and his compensation. On the other hand, proportionality can be a principle for the relation between harm done and the sanction for the violator. The basic conflict between the criterion of proportionality and the criterion of optimal compliance incentive is caused by the fact that sanctions are not applied for every violation. Since this lowers the expected sanction for a violator, the principle of proportionality calls for lower sanctions than would be necessary to create an optimal compliance incentive.\footnote{See SHAVELL, supra note 43, at 483.}

Proportionality would only constitute an argument against an obligation to contract if the obligation to contract subjected the violator to a sanction so severe that it could not be outweighed by the objectives of the statute. This argument has been made based on the
abstract value of freedom of contract. However, this article argues that the abstract value of freedom of contract stands against the abstract value of equality and non-discrimination and that the legislator balanced those two interests when designing the anti-discrimination provisions (level I decision). Therefore, an argument against an obligation to contract as a remedy (level II decision) would require evidence of concrete and distinct hardship for the violator, not the mere reference of the value of freedom of contract.

4. Certainty

Legal uncertainty is an argument often brought against an obligation to contract. Specific terms of the contract, it goes, are often difficult to determine. However, in some instances, the amount of damages can also be extremely difficult to calculate, whereas contractual terms might be easy to ascertain (e.g. if a company uses general terms and conditions and always offers the same type of contract to the public).

This paper argues that it is not possible to claim that either damages or contractual terms are easier to determine in all cases because this issue depends on the individual circumstances of each situation. Because the general civil law part of the AGG covers very different types of contracts, there is a huge variety in possible contractual situations, and this heterogeneity makes a generalization impossible.

5. Practical Problems: Complications of Forced Contracts?

It has been argued that a forced contract will most probably lead to complications. Whether this is true or not depends on individual circumstances, and it is clear that contractual situations vary considerably. It makes a huge difference whether a highly emotional confrontation is involved or whether the situation concerned is rather anonymous. If an insurance company, e.g., is required not to decline the conclusion of a contract based on certain grounds and is forced into a contract, it might try to make the most out of the business relationship. It might be in the insurance company’s interest to avoid conflicts during the duration of the contract instead of discriminating against the person whenever it has the opportunity. Therefore, a general statement that damages are always superior as regards practical problems cannot be made. One should not forget that

55 See, inter alia, Armbrüster, supra note 3, at 1496.
56 On the two level model see supra D. I. 1.
57 See the examples in BT-Drucks 15/4538, 44; Busche supra note 52, at 173.
58 See Thüsing, supra note 22, § 21, margin number 29 and 30.
59 See Busche, supra note 52, at 174.
awarding damages can also be highly problematic. In particular the assessment of damages can be extremely difficult and can produce high litigation costs.

E. Obligation to Contract and German Constitutional Law

I. Policy Arguments, the Constitutional Framework, and the Assumptions for a Remedy-focused Analysis

Constitutional texts tend to be very broad and leave considerable room for policy arguments. This is particularly true of fundamental rights issues under the German Grundgesetz, which most often (and also for the obligation to contract) come down to a balancing test as part of the proportionality analysis. All arguments discussed above have to be taken into account in the balancing test. In order to emphasize and make explicit the crucial importance of the balancing test, this article has concentrated on the arguments before identifying the constitutional framework.

As a general rule, EU legislation—and, as a consequence, national law transposing an EU directive—is not subject to German constitutional law restrictions.60 Instead, EU legislation has to conform to the fundamental rights that the European Court of Justice has recognized as part of the general principles of the Union’s law (Art. 6 (3) TEU) and, since the entry into force of the Treaty of Lisbon, to the Charter of Fundamental Rights of the European Union (Art. 6 (1) TEU). Because the EU directives do not require the national legislator to provide for an obligation to contract,61 however, this sanction is not based on the EU directives and is therefore subject to German constitutional requirements.62

There are two common constitutional arguments regarding the obligation to contract: (1) the argument that an obligation to contract is unconstitutional;63 and (2) the argument that the Grundgesetz favors an interpretation of the AGG so that it does not contain an obligation to contract.64 As described above (D. 1. 1.), one of the underlying assumptions of the remedy-focused analysis in this paper is that the anti-discrimination prohibitions as such are constitutional. This implies, as also shown above, that the restrictions of the


61 See supra C. III.

62 See Stork, supra note 17, at 50.


64 See Armbrüster, supra note 3, at 1497.
freedom of contract that necessarily accompany the anti-discrimination prohibitions are constitutional as well.

II. Constitutional Rights Involved and the Protective Function of Constitutional Rights

The person who refuses to conclude the contract can invoke his freedom of contract. Freedom of contract is a constitutionally protected right under Art. 2 (1) of the Grundgesetz, which contains the principle of general freedom to pursue any lawful activity (Allgemeine Handlungsfreiheit). Freedom of contract includes the right not to conclude a contract.65 As regards certain types of contracts, freedom of contract can also be guaranteed by more specific fundamental rights provisions.66

In regard to the person who wants to conclude the contract, the situation is more complicated. The legislative materials focus on the state’s duty to protect (Schutzpflicht).67 Under the Grundgesetz, the state has—under certain circumstances—a duty to protect fundamental rights against private interference (protective function of fundamental rights).68

As to the specific fundamental rights that protect the interest of those willing to enter into a contract, one is the freedom of contract of those willing to enter into contracts.69 The existence of this fundamental right, in conjunction with the protective function, is also an argument that the AGG probably also has the objective to provide access to goods and services. The focus on this right, however, is problematic if the persons discriminated against can obtain the goods or services from a different provider.70

The anti-discrimination provisions in the Grundgesetz, in particular Art. 3 (2) and (3), are a second option. The Bundesverfassungsgericht held that they can create a duty to protect for the state.71 This approach easily captures situations that only involve the victim’s dignity. What is problematic about this approach—as well as about the concept of a state’s duty to protect in general—is that, in principle, these provisions apply only to the

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65 See Thüsing & von Hoff, supra note 3, at 25.
66 See the examples in the legislative materials, BT-Drucks 16/1780, 39.
67 BT-Drucks 16/1780, 40.
68 Bundesverfassungsgericht, Case No. 1 BvR 409/90, 6 May 1997, BVerfGE 96, 56, 64; Case No. 1 BvF 1,2,3,4,5,6/74, 25 February 1975, BVerfGE 39, 1, 45.
69 See Bundesverfassungsgericht, Case No. 1 BvR 26/84, 7 February 1990, BVerfGE 81, 242.
70 See von Koppenfels, supra note 63, at 1492.
71 Bundesverfassungsgericht, Case No. 1 BvR 258/86, 16 November 1993, BVerfGE 89, 276, 285.
state, not to private actors (Art. 1 (3) of the Grundgesetz). The relationship between state action doctrine and duty to protect is, in large part, an unsolved fundamental legal problem.

III. Legitimate State Interest and Balancing Test

Whether there is a duty to protect, however, is not the crucial point. Under German constitutional law, the state can restrict most fundamental rights and in particular Art. 2 (1) if, in essence, (1) the restriction is provided for by a statute, (2) it pursues a legitimate interest, and (3) it is proportional. The legitimate interest requirement means that there has to be a right to protect—a constitutional duty to protect is not required although, admittedly, it makes the case stronger. Prevention of discrimination based on the grounds prohibited by the AGG is generally regarded as a legitimate interest.

In regard to the balancing test that forms part of the proportionality analysis, all the arguments from the analysis above regarding the appropriateness of an obligation to contract as a remedy must be taken into account. It is clear that the arguments in favor of an obligation to contract prevail.

F. Conclusion and Perspectives

This article has shown that § 21 (1) (1) AGG should be interpreted as comprising an obligation to contract as a remedy. It has also been demonstrated that an obligation to contract is an appropriate remedy in the light of the objective of the AGG and of the EU directives to make goods and services available to individuals, to protect opportunities, and to prevent social exclusion. Given the framework under German constitutional law—where the ultimate decision comes down to a balancing test—and given the appropriateness of an obligation to contract as a remedy, there is no convincing argument why an obligation to contract should be unconstitutional.

As has been shown, the assessment of an obligation to contract as a remedy becomes much clearer if two decision-making levels are distinguished and assumptions are made as to the existence, the appropriateness, and the constitutionality of the prohibitions of discrimination (level I decision). In particular, this approach makes clear that the mere reference to the principle of freedom of contract cannot serve as an argument against an obligation to contract because freedom of contract has already been taken into account in the decision that there should be prohibitions of specific types of discrimination.

72 See Olaf Deinert, § 21, in ALLGEMEINES GLEICHBEHANDLUNGSGESETZ, margin number 81 (Wolfgang Däubler & Martin Bertzbach eds., 2nd ed., 2008).

73 This aspect is often seen as self-evident and not even expressly mentioned in many publications. For the EU legal order see also Art. 3 (3) (2) TEU and Art. 8 and 10 TFEU.
While the focus of this article lies exclusively on the obligation to contract under the AGG, it is apparent that a remedy-focused analysis can be conducted for other remedies as well. The fact that EU Member States have adopted a variety of different implementation measures of the EU directives provides for interesting opportunities to compare legislative approaches to the fight against discrimination. In regard to constitutional law analyses in the field of anti-discrimination law, the questions of how the constitutions of the various Member States and how the EU’s new fundamental rights regime74 address both prohibitions of discrimination and remedies for their breach remain fascinating inquiries.

74 See Art. 6 TEU and the Charter of Fundamental Rights of the European Union.
Developments

Case Note—Judgment of the Landgericht Frankfurt (Oder) (Regional Court) of 22 June 2010: Hotelier’s Right to Ban Persons from Hotel Premises

By Jule Mulder* and Andrea Gideon**

A. Introduction

On 22 June 2010, the Landgericht Frankfurt (Oder) (Regional Court) ruled on whether a hotel was entitled to deny a member of a nationalist party entrance to its establishment because of the individual’s political beliefs or whether such discriminatory conduct constituted an illegal violation of the personality right of that person which would constitute a tort under § 823 of the Bürgerliches Gesetzbuch (German Civil Code, “BGB”).1 In making its decision, the Court balanced a property owner’s freedom of autonomy, specifically the owner’s right to ban a customer from his or her establishment, against the customer’s personal rights. Furthermore, the Court considered whether a hotel owner’s decision to ban a customer based on his or her political beliefs violated the Allgemeines Gleichbehandlungsgesetz (General Equal Treatment Law, “AGG”). Considering the fundamental question of balancing competing interests, of the personal right of the customer and the right of the property owner, and the national public debate concerning the right of members of nationalistic parties to be treated equally, the case goes beyond the interests of the parties involved and is of general importance.

The Court’s decision is interesting for several reasons. First, the decision is a good example of how different interests are balanced within tort law once a unilateral action invades another person’s personality right, such as the right to self-determination. Second, the decision addresses whether people can be discriminated against on the basis of their political opinion, and if so, to what degree. Third, the case evaluates whether the AGG or EU law offers any kind of protection against such discrimination. Fourth, the Court’s decision confirms that the general constitutional equality principle is incapable of adequately protecting people. This fourth issue goes beyond the question of whether the

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* Jule Mulder is a PhD candidate at the University of Leeds (England), currently conducting research on European Non-discrimination Law and its application within the national courts. Email: lwjm@leeds.ac.uk.

** Andrea Gideon is a PhD candidate at the University of Leeds (England), currently conducting research on EU law effects on higher education institution. Email: a.k.gideon@leeds.ac.uk.

1 See Landgericht Frankfurt [Oder] [Regional Court], Reference No. 12 O 17/10, 22 June 2010.
Claimant in this particular case should be protected, as the Court’s assessment could have led to similar results in other situations, including situations where a person is discriminated against because of his or her sexual orientation, race, or religion. Therefore, the Court’s decision shows the importance of horizontal non-discrimination law—non-discrimination law that binds two private parties—in sufficiently protecting people from unequal treatment.

In the following section, we will summarize the factual background of the case. After that, we will discuss the parties’ arguments. Then, we will present the Court’s findings. Lastly, we will discuss the key aspects of the case: the balancing of the different interests and the relevance of the AGG to these kinds of actions.

B. Factual Background

The Claimant is one of the leaders of the National Democratic Party of Germany (NPD), a radical right-wing fascist party. In September 2009, the Claimant’s wife booked a four-day holiday for her and her husband via a travel agency. The holiday was supposed to take place in December 2009. At the end of November 2009, the hotel that the couple had planned to stay in (hereinafter the Defendant) informed the Claimant by letter that he was banned from the hotel’s premises. According to the letter, the ban also applied to situations where the Claimant booked a room via third parties and under a different name.

After the Claimant demanded an explanation for the ban, the hotel management stated that the Claimant’s political beliefs were not in-line with the hotel’s aim to guarantee an enjoyable holiday experience for all guests. In response to the ban, the Claimant sued the hotel and sought a judgment that would force the Defendant to lift the ban. It was also noted, that a hotel association, of which the Defendant was a member, had earlier requested its members not to accommodate members of extremist right-wing parties, such as the NPD.

C. Argument of the Claimant and the Defendant

Based on §§ 903 and 1004 of the BGB, the Claimant demanded that the Defendant repealed the ban. In addition, the Claimant insisted that the Defendant would be convicted for vilifying the Claimant and ordered to pay €7,500 in damages based on §§ 823 and 826 of the BGB. The Claimant argued that the ban constituted discrimination and violated his personal right (Persönlichkeitsrecht) and the general principle of equal treatment, both of which are protected by the Grundgesetz (German Constitution, “GG”). The Claimant argued that these constitutional principles prevented private companies from excluding others from their services when these services were open to the general public. Furthermore, the Claimant argued that his personal political beliefs did not justify the ban because he did not intend to express any political ideas during his stay.
The Defendant, on the other hand, argued that the ban was protected by the right to freedom of contract also protected by the GG. Additionally, the Defendant asserted that the ban did not impair the Claimant’s general right to personal freedom since there were many other hotels in the region where the Claimant could enjoy similar services. Furthermore, the Defendant argued that his aim to ensure an excellent holiday experience for all guests, which motivated the ban, constituted an objective justification. Therefore, the ban could not be considered arbitrary.

The Defendant further argued that the NPD, although not illegal, polarizes the German society to an extent which made it impossible for the hotel to accommodate members of that party while preserving a non-political image. Considering the sensibilities of their targeted customers, it is important for hotels to be apolitical and the Claimant, although not convicted, has been and still is subject of various investigations regarding sedition and denigration of state trappings, which could upset potential customers.

D. Judgment of the Landgericht Frankfurt (Oder)

The Court emphasized that the right of the property owner to impose house bans is not automatically limited because the owner’s property is generally open to the public. An owner or occupant of property does not lose all rights as owner or occupant simply because he or she offers services to the general public. The fact that a business is offering services to the public simply means that the occupier or owner of the premises intends to provide services to the public. It does not constitute an obligation to provide those services to every individual.²

However, the right of the occupant or owner can be limited in special circumstances and the occupant or owner can be obligated to conclude a contract. Unlike gas and energy companies, the postal service, and certain insurance companies, there is no direct legal obligation for hotels to enter into contracts with potential customers. Consequently, an owner or occupant’s right can only be limited through an indirect obligation to contract.

The indirect obligation to enter into a contract follows from tort law. If an individual’s refusal to enter into a contract constitutes a tortious act under § 823 of the BGB, it imposes an indirect obligation to conclude the contract. While § 823 of the BGB offers a list of what constitutes a tortuous act, the list is non-exhaustive. The personal freedom as a constitutional personal right derives from the right to human dignity (Article 1 GG) and the right to free personal development (Article 2 GG). However, the Court emphasized that the infringement of the Claimant’s personal freedom has to be balanced against the rights of the Defendant, also protected by Article 2 GG (freedom of contract). The Court, after

² See, e.g., Bundesgerichtshof [BGH] [Federal Court of Justice], Neue Juristische Wochenschrift [NJW] 188–89 (1994) ("Market Store Case").
weighing the competing interests, recognized the motives of the defendant to be objectively justified and denied an illegal action although it recognized a limitation of the Claimant’s rights. It pointed out, in particular, that there was no inconsistency between the pursued aim of the Defendant and the measures taken, since the Defendant intended to ensure the well-being of all guests. Even though some guests might not be disturbed by the Claimant’s presence, it was conceivable that others might be offended.

In addition, the Court examined whether the appeal of the ban could result from horizontal equal treatment legislation. Generally, the AGG prohibits discrimination based on race, gender, religion and belief, disability, age, and sexual orientation. According to the Court, discrimination based on belief might include a political opinion, but §§ 19 et seq. provide for certain limitations. Specifically, discrimination on the basis of belief is excluded from protection as regards access to goods and services. The AGG’s legislative history explains that this exclusion was specifically based on the fear that right-wing extremists could abuse the law in order to achieve entrance to establishments which would have otherwise been denied to them on grounds worthy of protection. The Court also emphasized that the Defendant’s ban does not constitute an infringement of EU law because Directive 2004/113 only prohibits discrimination based on gender when the discrimination relates to access to goods and services.

The Landgericht Frankfurt (Oder) held that there was neither a basis for the claim to remove the house ban nor was there a basis for compensation for the alleged personal vilification of the Claimant. It denied the claim that the house ban constituted an unjustified violation of the Claimant’s rights, which would have required the Defendant to accept the limitation of his property right5 and to pay immaterial damages based on tort law or the AGG.5 Instead, the Court upheld the right of the property owner to deny a potential customer access to his property. In addition, the Court emphasized that the property owner is, as a basic principle, free to dispose of his or her property however he or she likes.6

E. Comments

The Court’s decision, despite the welcomed result in the current case, reveals the impotence of constitutional principles to ensure equal treatment on a horizontal level. This weakness leaves not only leaders of fascist parties unprotected but also other

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5 See Deutscher Bundestag: Drucksachen [BT] 16/2022 no. 4(a).
6 See Bürgerliches Gesetzbuch [BGB] [Civil Code], 18 August 1896, §§ 903, 1004.
5 See id. §§ 823, 826.
6 See id. §§ 856, 858, 903, & 1004; see also Bundesgerichtshof [BGH] [Federal Court of Justice], Neue Juristische Wochenschrift [NJW] 1054–55 (2006) ("Airport Case").
individuals who face discrimination because of their personal characteristics, (i.e. religion, ethnic origin, or sexual orientation). The decision can also be criticized because the Court’s definition of “belief” in the AGG seems questionable. These issues will be discussed further in the next section.

I. Balancing Personal Freedom (Persönlichkeitsrecht) and Private Autonomy

The Court’s main task was to balance the invasion of the Claimant’s general personal freedom and the Defendant’s right to autonomy and freedom of contract, both of which are protected by Articles 1(2) and 2 of the GG.

1. The Legal Framework

Since there is no direct obligation to enter a contract in the hotel sector, the Court focused on a possible indirect obligation (mittelbarer Kontrahierungszwang), which is generally implied in consumer contracts if the offer includes essential goods and there is no alternative offer at one’s disposal. Hence, as the house ban results in a de facto refusal to enter a contract, there might be an indirect obligation to enter a contract if the house ban is an illegal act under § 823 of the BGB. The Court did not deal directly with contract law, but instead, it determined whether the house ban could be considered a tort, which then would lead to an indirect obligation to enter a contract.

According to § 823 of the BGB, a person can claim damages if one of his or her protected rights is illegally violated. The right to personal freedom itself is not mentioned in § 823 of the BGB. However, the sweeping character of the clause, by including other rights, enables the courts to imply rights that are in line with the constitutional requirements. Therefore, and according to established case law, the general personal freedom is considered one of the other rights mentioned in § 823 of the BGB. Before a violation of an individual’s general personal freedom can occur, a protected sphere must be invaded. The protected sphere in this case is the right to self determination, which is included in the general personal freedom protected by Article 2 of the GG.

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8 See Bürgerliches Gesetzbuch [BGB] [Civil Code], 18 Aug. 1896, § 823 (“Wer vorsätzlich oder fahrlässig das Leben, den Körper, die Gesundheit, die Freiheit, das Eigentum oder ein sonstiges Recht eines anderen widerrechtlich verletzt, ist dem anderen zum Ersatz des daraus entstehenden Schadens verpflichtet.”).

The illegality of the action is, however, not established if the action can be justified.\(^1\) Therefore, the justification for the hotel’s ban in this case was relevant. Since the general personal right is an open right, the Court must balance the competing interests to determine the justification and legality of the hotel’s action.\(^2\) In the present case, the Defendant’s action could possibly be justified by the right to personal autonomy, which is protected by Article 2 of the GG. However, if the Court determined that the Defendant’s action was not justified under Article 2 of the GG, the Defendant would not be allowed to discriminate on the basis of the Claimant’s political opinion and the general equality principle would prevail.

### 2. The Court’s Approach

In a rather short and somewhat superficial discussion, the Court argued that the aim of the Defendant was legitimate and that the action taken was suitable and appropriate. The Court pointed out that other guests could be disturbed by the Claimant’s presence because he is a leader of an extreme right-wing party, which, although legal, is very controversial within German society. Furthermore, the Court emphasized that the number of guests that would be bothered by the Claimant’s presence did not matter so long as it was plausible that some guests would be offended.

Consequently, the Court accepted the aim of the defendant and considered neither the ban unsuitable to achieve that aim nor that it was disproportionate. The Court found that the Defendant’s fear that he would lose customers due to the polarizing effect of the NPD outweighed the personal freedom of the right-wing extremist to spend his holiday in the Defendant’s hotel. However, the Court did not point out what kind of actions would have been disproportionate. It also failed to provide a deeper analysis of the obvious tension between the right not to be discriminated against, on the one hand, and the right of personal autonomy and freedom of contract, on the other. A more detailed discussion of this controversial area of law, which goes beyond a simple conclusion that the action is justifiable, would have been appreciated, especially because the Court seemed to employ a very succinct test which failed to present the relevant issues clearly and would have provoked much controversy if the discriminated person had not been a right-wing politician.

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\(^{1}\) See Renate Schaub, § 823, in KOMMENTAR ZUM BGB (Hanns Prütting, Gerhard Wegen & Gerd Weinreich eds., 2nd ed., 2007); margin number 13; Sprau, supra note 9, at margin number 24.

\(^{2}\) See Prütting, supra note 9, at margin number 37; Gerald Spindler, § 823, in KOMMENTAR ZUM BGB margin number 17 (Hanns Prütting, Gerhard Wegen & Gerd Weinreich eds., 2nd ed., 2007); Sprau, supra note 9, at margin number 24.
3. Discussion

Before the German legislator implemented the AGG, the question of how the right to enter a contract freely should be balanced with the right to personal freedom and equal treatment was hotly debated. The critics of horizontal non-discrimination law employed a liberal and doctrinal view on contract law. They argued that the right to contract freely ensured the fundamental personal freedom, as protected under Article 2(1) of the GG. Consequently, the State should not force its citizens to behave morally or give direct horizontally binding effect to constitutional equality principles which legal effect should prevail between the State and citizens only, as this would limit the citizens’ individual freedom. In contrast, the supporters of horizontal non-discrimination law pointed out that the liberal understanding of freedom of contract only ensured the freedom of the stronger party and that the state had the duty to ensure that all citizens can live freely. Individuals should not be held back based on their personal characteristics (i.e. gender, race or sexual orientation), which neither are, nor should be, relevant to the contractual relationships in question.

While the former view focuses on formal equality and individual freedom, the latter view focuses more on the substantive equality of chances and opportunities, the educational

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effect of legislation, and the legal reality of many disadvantaged groups. Thus, the debate focused on the question of whether formal individual freedom or substantive equality of opportunities should prevail.

Following the implementation of the AGG, much of the debate abated. However, the issues are still relevant in areas which are not covered by the AGG and where the impotence of the constitutional equality principle becomes obvious. This is not to say that we disagree with the Court’s result in this case, or that we think that hotels should not be allowed to ban persons from their premises because of their political opinion. However, the case reveals, on a more fundamental level, why horizontal non-discrimination law is needed to protect minorities from diminishing discrimination, particularly when the reason for the discrimination is a characteristic worthy of protection.

The indirect effect of the constitutional equality principles, which affects the relationship between private parties through the sweeping clauses of the BGB, does not ensure equal treatment of individuals within private relations. The Court in the case in question argued that the Defendant’s action was not an illegal infringement of the personal rights of the Claimant because it was plausible that the Defendant’s presence would disturb other guests. This is basically an economic argument because the hotel’s desire not to disturb its customers is economically motivated. While such an approach might be welcomed in this particular case, it raises the question of what the Court would have done if the banned person was not a known leader of a fascist party but a homosexual or member of a religious minority. After all, hotel guests also might be disturbed by people who have a different sexual orientation or religious beliefs than they do. If we follow the Court’s reasoning, hotels could also ban those minorities from their premises, if the AGG would not prevent the hotels from doing so. Because of this ambiguity, a more detailed discussion of the balance between the conflicting constitutional interests would have been welcomed.

The problem with the balancing of interests with regard to contractual relationships has been obvious in the past, particularly in employment contracts. In a headscarf case from 2002, the German Federal Labor Court was asked to decide whether it was illegal to dismiss an employee because she was wearing a headscarf or whether the dismissal was justified on the ground that the headscarf disturbed customers and led to an economic loss for the employer. While the Court denied that the employer had proven that a substantiated loss of profit would occur, and possibly employed a very strict burden of proof to avoid deciding in favor of the employer, it did not dismiss the argument itself as

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14 There have been several cases where people were denied entrance to pubs, bars and restaurants based on their ethnic origin or race. See, e.g., Amtsgericht Oldenburg [Local Court], Case no. E2 C 2126/07, 23 July 2008, NdsRpfl 398–99 (2009).
irrelevant once the employee’s right to freedom of religion was infringed. Therefore, under constitutional principles, a substantiated economic loss can justify unequal treatment even if such treatment is based on the other person’s use of their human rights. This explains why horizontal non-discrimination law is still necessary to ensure, or at least promote, equal treatment of people whose personal characteristics, which should be protected in a democratic society, put them in a vulnerable position.

II. The Meaning of Weltanschauung (Belief) under the AGG

1. Legal Framework

According to § 21 of the AGG, a person who is suffering from any discrimination cannot only claim damages, but he or she can also ask for the removal of the disadvantage. Consequently, the Court considered whether § 20 in conjunction with § 19 of the AGG could constitute a legal basis for the claim to remove the house ban. § 1 of the AGG prohibits discrimination based on “belief” (Weltanschauung). However, §§ 19–20 of the AGG provide an exception in the field of access to and supply of goods and services, and does not apply to the ground of “belief.”

2. The Court’s Approach

Thus, while the Court considered the Claimant’s characteristic as a leader of a fascist political party to be protected under the AGG in general, it denied his protection in this particular case because the AGG does not apply in a case where a hotel bans a person from its premises because of the person’s political belief because this case concerns access to goods and services.

Furthermore, the Court emphasized that it was the legislator’s expressed intent to avoid situations where members of fascist parties would be protected in the area of supply and access to goods and services as explicitly expressed in parliamentary debate and the printed paper of the Bundestag (Lower House of German Parliament).

The Court also explained that the limitation of the scope of the AGG is not contrary to European law because EU law does not provide protection on the ground of belief in the

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15 See Bundesarbeitsgericht [BAG] [Federal Labor Court], Case no. AZR 472/01, 10 October 2002, NJW 1685 (2003); see also Ute Sackosky, Religion and Equality in Germany: The Headscarf Debate from a Constitutional Perspective, in EUROPEAN UNION NON-DISCRIMINATION LAW 353, 358 (Dagmar Schiek & Victoria Chege eds., 2008).

16 Deutscher Bundestag: Drucksachen [BT] 16/2022 no. 4(a).
area of goods and services. Directive 2004/113/EC\textsuperscript{17} only provides a framework for combating discrimination based on sex in access to and supply of goods and services.

3. Discussion

In the current situation, neither EU law nor the AGG protects people from discrimination based on belief within the area of supply or access to goods and services. However, it should be emphasized that EU law prohibits discrimination in the area of goods and services that is not only based on sex but also race and ethnic origin.\textsuperscript{18}

The Court’s argumentation, despite, in our view, reaching the correct result, is nonetheless misleading. The Court seems to suggest that the Claimant would have been protected if the AGG did not limit its scope with regard to access to and supply of goods and services. The Court seems to consider a fascist political opinion to be a “belief” under the AGG and EU law. This means, firstly, that people with a fascist political opinion are protected in other areas where the AGG applies, such as within employment relationships, and secondly, that once the EU broadens the scope of its legislation, suppliers of goods and services will not be able to deny a customer services based on his or her political opinion. Such an interpretation of EU law is especially problematic because the European Commission already proposed extending the scope of the EU non-discrimination law by also prohibiting discrimination in the area of supply and access to goods and services based on religion or belief, age, disability or sexual orientation.\textsuperscript{19} Consequently, if the Landgericht’s interpretation of “belief” is correct, and the Directive is enacted, people of certain political opinions can no longer be denied access to goods and services by private actors.

We argue, however, that the term “belief” must be interpreted in a narrower sense and that it does not cover political opinion per se. Therefore, the AGG does not cover political opinions. However, this does not mean that employees do not enjoy some type of protection against discrimination on the ground of their political opinion, but only that they do not automatically enjoy protection from the AGG. In order to ascertain the correct


meaning of “belief” within the AGG, the legislation must be interpreted in light of the European Directives, as well as the other international treaties, such as the European Convention of Human Rights (ECHR).

The national Court seems to be influenced by the apparently broad term Weltanschauung (which can also be translated as worldview) as used in the German version. This is surprising as the German Constitution foresees a narrow definition of the term. This inconsistency seems to suggest that the meaning of the term within the AGG, if interpreted in line with the European Directives, would somehow include a different meaning. The Court’s broad interpretation fails to acknowledge the connection between “belief and religion” in the Framework Directive and Article 19 of the Treaty on the Functioning of the European Union (“TFEU” (ex Article 13 Treaty Establishing the European Community)), and it does not resolve any uncertainty around the term “belief.”

Although Article 19 of the TFEU and the Framework Directive do not provide a definition of the term “belief,” they do mention it in connection with religion, as they grant protection to “religion or belief.” Therefore, although it is clear that there must be a meaningful difference between “religion” and “belief” that justifies mentioning both terms, most Member States interpret the legislation to suggest a very limited distinction. Following the Court of Justice’s approach to interpretation, a teleological interpretation of the term in light of all the different interpretations of the different language versions is decisive. Additionally, the understanding of the European Court of Human Rights (ECtHR) can be helpful, as all Member States are also members of the ECHR and the ECtHR’s decisions heavily influence the interpretation of EU legislation.

In Campell and Cosans, the ECtHR draws a distinction between belief (or conviction), as protected by Article 9 of the ECHR, and freedom of expression, as protected by Article 10 of the ECHR. The ECtHR points out that Article 9 requires a “certain level of cogency,


21 See Janneke Gerards, Discrimination Grounds, in CASES, MATERIALS AND TEXTS ON NATIONAL, SUPERNATIONAL AND INTERNATIONAL NON-DISCRIMINATION LAW 33, 102 (Dagmar Schiek, Lisa Waddington & Mark Bell eds., 2007).

22 See id. at 33, 117, 120 (providing examples from different Member States).

23 See Dagmar Schiek, Einleitung, in ALLGEMEINES GLEICHBEHANDLUNGSGESETZ EIN KOMMENTAR AUS EUROPÄISCHER PERSPEKTIVE margin number 72 (Dagmar Schiek ed., 2007). For an overview on the different language versions, see Wolfgang Däubler, § 1, in NOMOS KOMMENTAR ZUM ALLGEMEINES GLEICHBEHANDLUNGSGESETZ 58–71 (Wolfgang Däubler & Marin Bertzach eds., 2nd ed., 2008).

24 See Dagmar Schiek, § 1, in ALLGEMEINES GLEICHBEHANDLUNGSGESETZ EIN KOMMENTAR AUS EUROPÄISCHER PERSPEKTIVE margin number 23 (Dagmar Schiek ed., 2007).

cohesion and importance.\textsuperscript{26} Similarly, English law stipulates that a non-religious belief also needs to be philosophical.\textsuperscript{27} Accordingly, belief should be understood as a “coherent set of fundamental ideas and attitudes to human life and human existence, without the necessity of reference being made to a higher being.”\textsuperscript{28}

Such a definition also corresponds with the constitutional meaning of secular belief or philosophical creed (\textit{weltanschaulichen Bekenntnisses}), which is protected in Article 4 of the GG.\textsuperscript{29} Furthermore, the need for coherent internal consistency requires people to distinguish “belief” from pure political opinion.\textsuperscript{30} Therefore, not every political opinion is automatically covered under the ground “belief.”\textsuperscript{31} and the term more likely focuses on fundamental ideas or attitudes, such as atheism, agnosticism, rationalism or pacifism. The distinction between political opinion and “belief” is admittedly not always easy to draw. As Lerner noted, certain political creeds, such as Communism and Nazism, expected their members to identify with the group in a religious manner, despite their anti-religious attitude. This made it difficult to clearly distinguish political opinion and “belief.”\textsuperscript{32}

Here, however, ECHR case law could be considered.\textsuperscript{33} Case law suggests that personal convictions are only protected under Article 9 of the ECHR if they are worthy of respect in a democratic society and compatible with human dignity.\textsuperscript{34} This additional limitation places Nazism, right-wing radicals, and other totalitarian beliefs outside of the scope of “belief” and further supports the difference between political opinion and “belief.”

\textsuperscript{26} See id. at para. 36.


\textsuperscript{28} See Gerards, supra note 21, at 117–18.

\textsuperscript{29} See Juliane Kokett, \textsc{Art. 4, in Kommentar Zum Grundgesetz} (Michael Sachs ed., 3rd ed., 2003), margin number 20; see also Bundesarbeitsgericht [BAG] [Federal Labor Court], Case No. 5 AZB 21/94, 22 March 1995, NZA 823, 827 (1995) (“Scientology Case”).

\textsuperscript{30} See Schiek, supra note 24, at margin number 24 (providing further references).

\textsuperscript{31} See \textsc{Deutscher Bundestag: Drucksachen [BT] 16/2012 no. 4(a) (indicating that the term belief (Weltanschauung) should be interpreted narrowly and does not include political opinion). But see \textsc{Jürgen Ellenberger, § 1, in Bürgerliches Gesetzbuch} (Otto Palandt ed., 69th ed., 2010), margin number 5 (providing a dissenting opinion and arguing that the correct meaning of belief also includes political opinions). However, Ellenberger comes to the same result, as he considers political opinions which threaten the democratic and free state to be outside of the meaning of belief. See also Däubler, supra note 23, at margin number 71.

\textsuperscript{32} \textsc{Natan Lerner, Group Rights and Discrimination in International Law} 78 (2nd ed., 2003).


\textsuperscript{34} See id. at para. 36.
Unfortunately, the case law on this subject is somewhat ambiguous. In earlier cases, the Court declined to address the question of whether Nazism could be classified as “belief” by turning directly to the question of justification.\footnote{See, e.g., X v. Austria, Application No. 1747/62, 13 December 1963, 6 Y.B. Eur. Conv. H.R. 424 (1963); see also Gerards, supra note 21, at 33, 120 (for further discussion).}

F. Conclusion

In our opinion, the Court’s decision is problematic. Although the Court reached the proper result in this case, it left many important questions unanswered and missed the chance to engage in further discussion of unclear terms in the AGG.
The G8 Summit in Germany, the Bundeswehr and the German Bundestag

By Dieter Wiefelspütz*

A. Introduction

From 6–8 June 2007, the summit meeting of the Group of Eight (G8) leading industrialized nations was held in Heiligendamm, Mecklenburg-Western Pomerania, under Germany’s presidency. In advance of the summit, the federal state (Land) Mecklenburg-Western Pomerania and the federal authorities agreed that the task of providing adequate security for the Summit would overstretch Mecklenburg-Western Pomerania’s capacities unless assistance were provided by the Federal Government and other federal states.

Based on intelligence from the police, the security services anticipated that protesters would attempt to block the roads leading to Heiligendamm and Rostock-Laage Airport, build earth depots for tools and blockading equipment, and cause damage to the road system by digging or hollowing out the foundations. A decision was therefore taken to deploy reconnaissance systems on board Tornado aircraft in order to detect changes in soil conditions from the air. Between 3 May and 5 June 2007, Tornado aircraft carried out a total of seven flights and took photographs, although according to the Federal Government, the images were unsuitable as a means of identifying individual persons. During one flight over Camp Reddelich, where a great many protesters had congregated, the aircraft briefly flew lower than the minimum safe flight altitude of 500 feet. The Tornados’ onboard cannons were not armed during any of the flights.

Nine Fennek spy systems were also deployed, each consisting of one armoured vehicle for ground reconnaissance. Their task was to monitor specific areas, roads and the approach routes of flights bringing delegates to the Summit. They were also to carry out reconnaissance and pass intelligence to the police.

In addition, three North Atlantic Treaty Organization (NATO) Airborne Warning and Control System (AWACS) aircraft were deployed to provide airspace security and produce an air situation picture. Before and during the Summit the German Air Force (Luftwaffe) also kept four Eurofighter and eight Phantom aircraft on standby, which ended up spending approximately twenty-three hours in the air.

* Member of the German Bundestag. Email: dieter.wiefelspuetz@bundestag.de.
Furthermore, in order to safeguard the provision of emergency medical services during the Summit, the German armed forces, the Bundeswehr, set up a mobile field hospital in Bad Doberan. Areas of the Bad Doberan hospital site were therefore placed under the armed forces’ jurisdiction. German military police were deployed to provide protection for army medical staff and exercise authority in the relevant areas of the site.

During this time an intense public debate ensued focusing on the question of whether the use of the Bundeswehr to protect the G8 Summit constituted a form of internal deployment of the armed forces, which would violate Germany’s Basic Law.

The Alliance 90/The Greens parliamentary group in the German Bundestag initiated Organstreit proceedings (i.e. proceedings on a dispute between supreme federal bodies), arguing that the Federal Government had violated the rights of the German Bundestag under Article 87a, para. 2 of the Basic Law. They argued the Federal Government had violated this law because, prior to the deployment of the Bundeswehr at the G8 Summit, it had not submitted the issue of such deployment of the armed forces to the Bundestag.

In its decision on 4 May 2010, the Second Senate of the Constitutional Court dismissed the application on the grounds that it was manifestly unfounded.¹


The constitutional provisions on the armed forces, which are becoming increasingly significant in the context of Germany’s international policy, are made up of, not only the small number of relevant norms contained in the Basic Law, but also the Federal Constitutional Court’s crucial ruling of 12 July 1994 on deployment of the German armed forces “out of area.”² With this ruling the Federal Constitutional Court finally provided clear and binding clarification of the key constitutional requirements governing the participation of the Bundeswehr in major military operations abroad.³ It could be argued that this clarification should have been provided by policy-makers and/or the architects of the constitution.

Since then it generally has been accepted that Article 24, para. 2 of the Basic Law allows the Federation to enter into a system of mutual collective security such as the United Nations and NATO and, in doing so, to consent to limitations upon its sovereign powers.

² 90 BVerfGE 286.
³ Otto Depenheuer, Art. 87(a), in G RUNDGESETZ, m.n. 57 (Theodor Maunz & Günter Dürrig, eds., 53rd ed. 2008).
This Article also provides the constitutional basis for assuming the typical tasks associated with such membership and, hence, for the deployment of the Bundeswehr in operations taking place within the framework of and in accordance with the rules of such a system.\(^4\)

However, the Federal Constitutional Court also introduced the requirement for parliamentary approval under the defence provisions of the Basic Law. In doing so it established the general principle that the constitutive participation of the German Bundestag is required before German armed forces can be deployed abroad. Suddenly, the Bundeswehr had become “a parliamentary army,”\(^5\) much to the surprise of, and not in the least, Parliament itself. This not only means that the armed forces are fully integrated into the Federal Republic’s constitutional system, but it also means that there is a requirement for the constitutive participation of the German Bundestag in decisions concerning the external deployment of the armed forces. As a result, the German Bundestag has acquired decisive influence over the deployment of German troops abroad.

C. A Right of Participation for the Bundestag Does Not Remedy Allegedly Unconstitutional Deployment

The Alliance 90/The Greens parliamentary group in the German Bundestag, as the applicant in the Organstreit proceedings, contended that the subject of the application was an omission by the Federal Government, as it had failed to involve the German Bundestag. The applicant argued that due to the nature of the Bundeswehr as a parliamentary army, and on account of the provisions of Article 87a, para. 2 in conjunction with Article 35 of the Basic Law—which state that apart from defence, the armed forces may be employed only to the extent expressly permitted by the Basic Law—the participation of the German Bundestag is a constitutional imperative.

However, the requirement of parliamentary approval under the defence provisions of the Basic Law does not arise if the Bundeswehr is deployed under circumstances that (allegedly) violate the constitution. Conversely, a decision approving deployment does not remedy any deployment of the Bundeswehr that has taken place in breach of the constitution. The Heiligendamm decision states:

> If in the present case it is assumed—as the applicant does—that a violation of Article 87a, para. 2 of the Basic Law occurred due to the armed forces having been deployed for purposes other than defence within the meaning of this provision and without such deployment being expressly permitted by the Basic

\(^4\) 90 BVerfGE 286.

\(^5\) Id. at para. 382.
D. The Requirement of Parliamentary Approval Under the Defence Provisions of the Basic Law Applies Only to Operations Abroad

Since the “invention”\(^7\) of the requirement of parliamentary approval under the defence provisions of the Basic Law, it has been accepted that under the constitution, an (unwritten) general requirement of parliamentary consent applies, but only to an external, not internal, deployment of the Bundestag’s rights of participation under the defence provisions of constitutional law).

\[^{6}\text{90 BVerfGE 286, para. 2.}\]

\[^{7}\text{See Markus Heinzen, Lecture: Bezüge des Staatsrechts zum Völker- und Europarecht (Dec. 6, 2001), available at http://www.jura.fu-berlin.de/einrichtungen/we3/professoren/ls_heinzen/veranstaltungen/archiv/0102ws/v_bezuege_des_GG_heinzen/Die_Wehr_und_Notstandsverfassung.pdf; Dieter Wiefelspütz, Der Einsatz bewaffneter Deutscher Streitkräfte und der konstitutive Parlamentsvorbereitung 27 (2003); Dieter Wiefelspütz, Das Parlamentsheer 198 (2005); Dieter Wiefelspütz, Der Auslandseinsatz der Bundeswehr und das Parlamentsbeteiligungsgesetz (2008); Udo Di Fabio, Verfassungsstaat, in II Handbuch des Staatsrechts der Bundesrepublik Deutschland 647 (Josef Isensee & Paul Kirchhof eds., 3rd ed. 2004) (§ 27 fn. 152 insists that the requirement of parliamentary approval under the defence provisions of the Basic Law was not “invented” but “arrived at,” as part of the further development of the German Bundestag’s rights of participation under the defence provisions of constitutional law).}\]
author of the Parliamentary Participation Act (*Parlamentsbeteiligungsgesetz—ParlBG*).\(^9\) Article 1, para. 2 of this Act merely states, “the deployment of armed German military forces outside the area of application of the Basic Law requires the consent of the *Bundestag*.” The hypothetical argument that the *Bundestag*’s consent could also be required for the internal deployment of the armed forces for the purpose of defence need not concern us here. This would be the case, for example, if, in exercise of its defence mandate under Article 87a, para. 1, first sentence of the Basic Law, the *Bundeswehr* were to avert a military attack within the area of application of the Basic Law, without a “state of defence” having first been declared.\(^10\)

It is more likely that a “state of defence” would not be declared in the case of a small, limited attack on the Federal Republic of Germany. In the literature only a few unconvincing arguments are presented in favour of the German *Bundestag*’s constitutive right of participation in respect of internal deployments of the *Bundeswehr*.\(^11\)

The Federal Constitutional Court’s ruling of 12 July 1994 states:

> To the extent that during a state of defence the Armed Forces may be granted the power or authority to protect civilian property and to perform traffic control


\(^10\) WIEFELSPÜTZ, DER EINSATZ BEWÄFFNETER DEUTSCHER STREITKRÄFTE UND DER KONSTITUTIVE PARLAMENTSVOORBEHALT, *supra* note 7, at 23; Dieter Wiefelspütz, *Der Einsatz bewaffneter deutscher Streitkräfte und der Bundestag. Ein erster Gesetzentwurf, 40 RECHT UND POLITIK 101, 102 (2004); Dieter Wiefelspütz, *Das Parlamentsbeteiligungsgesetz vom 18.03.2005* 24 NVwZ 496 (2005); Ferdinand Kirchhof, *Art. 87(a), in IV HANDBUCH DES STAATSRECHTS DER BUNDESPREUß DEUTSCHLAND, AUFGABEN DES STAATES* 84, m.n. 49 (Josef Isensee & Paul Kirchhof eds., 3rd ed. 2006); Kokott, *supra* note 8, at m.n. 21. Christian Lutze, *Der Parlamentsvorrang beim Einsatz bewaffneter Streitkräfte*, 56 DÖV, 972, 976 (2003) (this is under a misapprehension; his view, opposite though it may be, is not new).

functions (Art. 87 a, para. 3 of the Basic Law), the participation of the legislative bodies follows from the prior determination of a state of defence made by the Bundestag with the consent of the Bundesrat under Article 115 a, para. 1 of the Basic Law. Possible employment of the armed forces in protecting civilian property and in combating organized armed insurgents under Article 87 a, para. 4, first sentence of the Basic Law must be discontinued if the Bundestag or the Bundesrat so demands (second sentence). The deployment of units of the armed forces to support the police in a natural disaster or accident which endangers the territory of more than one Land is considered by the Basic Law to be primarily an issue for the Federal Government; such deployment must be rescinded at any time at the demand of the Bundesrat (Article 35, para. 3, second sentence of the Basic Law).\footnote{90 BVerfGE 286, at para. 386.}

In view of the different modes of participation expressly ascribed to the German Bundestag and the Bundesrat, in relation to internal deployments of the Bundeswehr under Article 35, paras. 2 and 3 of the Basic Law and Article 87a, paras. 3 and 4 of the Basic Law, it is not possible to derive a general unwritten requirement of parliamentary approval for internal deployments of the Bundeswehr.

Without any detailed discussion of the literature, the Federal Constitutional Court’s Heiligendamm decision now explicitly refers to the Senate’s ruling of 12 July 1994:

A general constitutional right of consent for the German Bundestag in relation to specific internal deployments, whether armed or unarmed, of the Bundeswehr does not follow from the Senate’s decision. This applies irrespective of whether or not a state of defence or state of tension has been determined, for Article 87 a, para. 3 of the Basic Law also does not state that the German Bundestag’s consent is required for operational deployment of the Bundeswehr.

bb) According to the thinking behind the Federal Constitutional Court’s Decision 121, 135 (BVerfGE 121,
too, the requirement of parliamentary approval under the defence provisions of the Basic Law is treated simply as an effective method of granting the German Bundestag a co-decision right in matters relating to foreign relations. Here, the Senate pointed out that the Basic Law grants the German Bundestag the right to decide on matters of war and peace in relation not only to the determination of a state of defence and a state of tension, but also to the deployment of armed forces in systems of mutual collective security within the meaning of Article 24, para. 2 of the Basic Law (cf. BVerfGE 121, 135 <153 f.>).

E. No Rights of Participation for the German Bundestag Under Article 87(a), Para. 2 of the Basic Law

Article 87a, para. 2 of the Basic Law is one of those constitutional provisions concerning defence that continue to pose a conundrum. The main point of dispute is whether Article 87a, para. 2 of the Basic Law applies only to the internal deployment of the Bundeswehr, or whether this constitutional norm applies to external deployments as well. However,

13 Id. at para. 54.

14 Günter Dürig, Art.87(a), in Grundgesetz m.n. 32 (Theodor Maunz & Günter Dürig eds., 1971); Kokott, supra note 8, at m.n. 10 ("According to this, Art. 87 a II should be viewed solely as a norm governing the division of responsibilities between the police authorities of the Länder (federal states) and that which applies in an internal emergency."); Ferdinand Kirchhof, Art. 87(a), in IV Handbuch des Staatsrechts der Bundesrepublik Deutschland, Aufgaben des Staates § 84 m.n. 57 (Josef Isensee & Paul Kirchhof eds., 3rd ed., 2006); Andreas Thomsen, Der Parlamentsvorbehalt für den Einsatz der Streitkräfte zur Verteidigung 9 (dissertation, University of Bonn, 1988); Torsten Stein, Die verfassungsrechtliche Zulässigkeit einer Beteiligung der Bundesrepublik Deutschland an Friedenstruppen der Vereinten Nationen, in Rechtliche Aspekte einer Beteiligung der Bundesrepublik Deutschland an Friedenstruppen der Vereinten Nationen 17, 22 (Jochem Frowein & Torsten Stein eds., 1990); Torsten Stein & Holger Kröniger, Die aktuelle Entscheidung: Bundeswehreinsatz im Rahmen von NATO-, WEU- bzw. VN-Militäraktionen, 17 JURA, 254, 255 (1995); Albrecht Randelzhofer, Art. 24 II, in Grundgesetz m.n. 63 (Theodor Maunz & Günter Dürig eds.); Josef Isensee, in Frieden ohne Macht 210, 215 (Dieter Wellershoff ed., 1991); Martin Limpert, Auslandseinsatz der Bundeswehr 21 (2002); Ingo von Münch, Staatsrecht I m.n. 866 (6th ed., 2000); Volker Röben, Der Einsatz der Streitkräfte nach dem Grundgesetz, 63 ZAÖRV 585, 591 (2003); Heike Krieger, Streitkräfte im demokratischen Verfassungsstaat (dissertation, University of Göttingen 2004); Wiebelspütz, Das Parlamentsheer, supra note 7, at 71; Peter Badura, Der Verfassungsauftrag der Streitkräfte im Grundgesetz , 5 Zeitschrift für Staats- und Europawissenschaften (ZSE) 358, 359 (2007); Manuel Ladiges, Reichweite des Verteidigungsbegriffs bei terroristischen Angriffen, 13 Humboldt-Forum Recht (HFR) 19, 28 (2009).

15 Klaus Stern, Das Staatsrecht der Bundesrepublik Deutschland 1477 (1980); Wolfgang Speth, Rechtsfragen des Einsatzes der Bundeswehrunter besonderer Berücksichtigung sekundärer Verwendungen 13 (1985); Christian Tomuschat, Art. 24, in Bonner Kommentar m.n. 185 (Rudolf Dolzer & Hans Jürgen Abraham eds., 50th ed. 1985); Norbert Karl Riedel, Der Einsatz deutscher Streitkräfte im Ausland — Verfassungs- und Völkerrechtliche Schranken 222 (1989); Joachim Wieland, Verfassungsrechtliche Grundlagen und Grenzen für einen Einsatz der Bundeswehr ,
in its decision of 12 July 1994, the Federal Constitutional Court did not answer the question of whether one purpose of Article 87 a, para. 2 of the Basic Law is to protect powers, and whether it establishes a right of participation for the German Bundestag. The academic literature in the field of legal studies has not yet addressed this particular issue either. The Federal Constitutional Court has now provided authoritative clarification:

a) It does not follow from the text of this norm that a right is conferred on the German Bundestag within the meaning of Article 64, para. 1 of the Federal Constitutional Court Act [Bundesverfassungsgerichtsgesetz—BverfGG] here. Unlike Article 59, para. 2, first sentence of the Basic Law, for example, which makes explicit reference to the consent or participation of the bodies responsible in such a case for the enactment of federal law, Article 87 a, para. 2 of the Basic Law makes no reference to the German Bundestag.

b) Contrary to the applicant’s view, the genesis and objectives of Article 87 a, para. 2 of the Basic Law also do not imply that in addition to the objective content of the norm, it may be assumed to have an effect in protecting the powers of the German Bundestag. Article 143 of the Basic Law as amended in 1956 (cf. Act to Amend the Basic Law of 19 March 1956, Federal Law Gazette I p. 111), which was the precursor norm to Article 87 a, para. 2 of the Basic Law, stated the

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16 90 BVerfGE 286, at para. 356.
following: “The conditions in which it shall be permissible to deploy the armed forces in the event of an internal emergency shall be regulated by a law which must be compatible with the principles set out in Article 79.” This text also makes no reference to the establishment of rights for the German Bundestag. While it is certainly the case that the purpose of the second defence amendment in 1956 was to create an army “which is embedded in the state as a whole and in the democratic liberal order” (cf. speech by Dr. Arndt, Member of the Bundestag [SPD], German Bundestag, 2nd electoral term, 132nd session, 6 March 1956, p. 6825 B), the intention was to avoid any abuse of the Bundeswehr as an instrument of internal political power (cf. Dürg, in: Maunz/Dürg, GG, Art. 87 a, marginal note 28 [August 1971]). This was and is served by the constitutional proviso contained in Article 143 of the Basic Law as amended in 1956, as well as Article 87 a, para. 2 of the current version of the Basic Law, which does not allow the armed forces to be deployed, at least internally, without a constitutional basis. Nonetheless, this circumstance does not imply that the content of the norm has an effect in protecting the powers of the German Bundestag such that in Organstreit proceedings before the Federal Constitutional Court, the Bundestag could claim that a violation of this norm had occurred.\footnote{2 BvE 5/07, supra, note 1, at para. 65.}

Additional reasoning presented by the Federal Constitutional Court centres on the various potential risks associated with Bundeswehr operations:

Although under Article 59 a, para. 1 of the Basic Law as amended in 1956 and under Article 115 a, para. 1, first sentence in the currently valid version, it is the Bundestag which determines a state of defence, and under Article 80 a, para. 1, first sentence of the Basic Law, it is the Bundestag which determines that a state of tension exists, it does not follow that the content of Article 87 a, para. 2 of the Basic Law is intended to protect powers. Nor can any such conclusion can be
drawn from the Bundestag’s right to discontinue the employment of the armed forces under Article 87 a, para. 4, second sentence of the Basic Law. As already . . . explained, the aforementioned provisions cannot be generalized further in such a way as to imply that internal deployments of the Bundeswehr, such as those which are the subject of these proceedings and which were associated with far less potential risk, shall require the consent of the German Bundestag. Secondly, it does not follow that the possible absence of a constitutional basis for the deployment of the Bundeswehr which is the subject of these proceedings is a matter which can be brought to the attention of the Federal Constitutional Court by the Bundestag in Organstreit proceedings, especially not if—as is the case here—the deployment obviously did not take place in a situation analogous to any of the circumstances envisaged in the aforementioned provisions.18

The Federal Constitutional Court concludes by aptly summing up the problem at the heart of the matter. Organstreit proceedings are unsuitable as a means of providing judicial clarification of the complaints at hand:

Particularly in view of the circumstances described, it is apparent that the present complaint—namely that in the context of the G8 Summit, the armed forces were deployed under Article 87 a, para. 2 of the Basic Law without the requisite constitutional basis—is primarily intended to draw attention to violations of basic rights that may have occurred. The applicant’s main priority is to establish that the flights by Bundeswehr Tornado aircraft over the protesters’ camps, the aerial photography and the monitoring by Fennek spy systems violated the fundamental rights of protestors and summit opponents.19

18 Id. at para. 66.

19 Id. at para. 67.
F. Summary

The Federal Constitutional Court’s Heiligendamm decision is convincing. However, as the grounds for the Organstreit proceedings were manifestly unfounded, it was very easy for the Court to dismiss the applications.

In consequence, there is relatively little to be gained from the decision as regards to the constitutional provisions concerning defence. It is self-evident that an allegedly unconstitutional internal deployment of the Bundeswehr does not create a requirement of parliamentary approval under the defence provisions of the Basic Law. Such a requirement applies only to external, not internal, deployments of the Bundeswehr. This has never really been a contentious issue. Nor has it ever really been a matter of controversy that Article 87a, para. 2 of the Basic Law does not protect powers. The question that continues to be relevant—did the deployment of the Bundeswehr to protect the G8 Summit at Heiligendamm violate the Basic Law?—cannot be resolved in Organstreit proceedings.
Developments

The Second SWIFT Agreement Between the European Union and the United States of America – An Overview

By Valentin Pfisterer*

A. Introduction

The United States and other nations have taken numerous military, police and intelligence measures in order to counter terrorists’ threats in response to the September 11 attacks on the World Trade Center in New York City and the Pentagon in Virginia as well as the attempted attack on a target in Washington, D. C.

Among these measures, the Terrorist Finance Tracking Program (TFTP) stands out.¹ The US Treasury Department launched this ambitious program aimed at tracking terrorist finance shortly after the September 11 attacks. It included the issuance of administrative subpoenas to access data bases of financial service providers.² In 2006, serious tensions between the United States and the EU as well as certain EU Member States arose when it became generally known that US authorities, in the course of the program, had approached SWIFT.³ The United States and the EU took advantage of the tense situation and began to examine the opportunities for a broader cooperation in this context.⁴ For

¹ The program is also known as “SWIFT Program.” See Patrick Connorton, Tracking Terrorist Finance through SWIFT: When U.S. Subpoenas and Foreign Privacy Law Collide, 76 FORDHAM L. REV. 283 (2007); as to the details of the program, see id., 288; furthermore, see U.S. Treasury Department, TFTP Fact Sheet, available at: http://www.ustreas.gov/offices/enforcement/tftp.shtml (last visited Oct. 24, 2010).

² See Connorton, supra, note 1, at 283, 288.

³ See id. at 284, 291.

⁴ The first result of this cooperation was a compromise of June 27, 2007. See id. at 294. Then, in 2009, the (first) SWIFT Agreement was concluded: Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program, 2010 O.J. (L 8) 11.
now, the most advanced result of this cooperation is the second so-called SWIFT-
Agreement (hereinafter SWIFT-II Agreement).3

This contribution will outline the SWIFT saga focusing on the process of the creations of
the two SWIFT Agreements and cursorily presenting the contents of both.

Hence, this paper will depict the specific political conditions while introducing the involved
institutions and characterizing the difficulties that arose during the process leading to the
conclusion of both of the Agreements. Subsequently, the contribution will outline the
contents of the first SWIFT Agreement (hereinafter SWIFT-I Agreement) to further highlight
the innovations of the SWIFT-II Agreement on this basis. The innovations will, finally, be
summarized and briefly evaluated.

B. Political Process and Institutional Framework

I. General Political Background

The general political background of the process is determined by the phenomenon of
international terrorism which reached its climax with regard to its public effect, at least
preliminarily, by the September 11 attacks in 2001. The anti-terrorism measures taken by
many governments in the wake of those events moved the fundamental political, legal and
philosophical debate about the tension between liberty and security once more to the
center of many contemporary controversies.6 This situation has gained additional
explosiveness for the fact that, during the last few years, an increased awareness of issues
such as legal protection against (erroneous) actions of counter-terrorism7 and data

3 (Second) Agreement between the European Union and the United States of America on the processing and
transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist
Finance Tracking Program, 2010 O.J. (L 195) 5.

6 From a (German) jurisdictional perspective, the following cases recently decided by the
Bundesverfassungsgericht (Federal Constitutional Court) are paradigmatic: Air Security Law Case,
Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 357/05, Feb. 15, 2006, 115
BVerfGE 118 (on the constitutionality of a law authorizing the destruction of a hijacked airplane); Data Retention
Case, BVerfG, Case No. 1 BvR 256/08, 1 BvR 263/08 and 1 BvR 586/08, March 2, 2010, 2010 NJW 833 (on the
constitutionality of a law obliging telecommunication service providers to store customer data).

7 From a (European) jurisdictional perspective, the different Kadi cases decided recently by the General Court
(formerly Court of First Instance) and the European Court of Justice respectively give a stunning insight into this
issue: Case T-315/01, Kadi v. Council and Commission, 2005 E.C.R. II-03649 on the legality of the EU practice of
listing in accordance to a UN Security Council Resolution; set aside by Case C-402/05 P and C-415/05 P, Kadi et al.
II. Relevant Institutions and Political Process Towards the First SWIFT Agreement

Subject matter of the SWIFT-I Agreement was the international financial services cooperative SWIFT. The major institutions involved in the political process leading to the conclusion of the Agreement were, for the United States, the US Department of the Treasury and, for the European Union, the Council and the Commission.

1. SWIFT

The acronym SWIFT stands for Society for Worldwide Interbank Financial Telecommunication. SWIFT is a member-owned Belgium-based international cooperative of financial institutions. Linking more than 9,000 financial institutions, it is in charge of their telecommunications and allows for the automated and standardized execution of financial transactions. For the turn of the year 2009/10, SWIFT planned to transfer a central server concerned with wire transfers in Europe from the United States to the Netherlands. Thus, the cooperative would have eluded the jurisdiction of the United States making it necessary for US authorities to attain access to its data via complex procedures of international legal assistance in the future. This expectation provided for the impetus for the conclusion of the SWIFT-I Agreement between the United States and the European Union in 2009. As SWIFT finally realized the transfer, the United States and the European Union were prepared accordingly (see below).

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8 See the current controversy in Germany about so-called web mapping services such as Google Street View and so-called social networks such as Facebook and the related privacy concerns; see, furthermore, some prominent recent decisions in the very same area, among these are: Online Search Case, BVerfG, Case No. 1 BvR 370/07 and 1 BvR 595/07, 120 BVerfGE 274 in which the Court develops the basic right to the guarantee of confidentiality and the integrity of information technological systems as well as the Data Retention Case, supra, note 6.

9 As to detailed background information about SWIFT, see Connorton supra note 1, at 283, 287; furthermore, see the official website of SWIFT (www.swift.com); anyway, the SWIFT-Code should be commonly known in the context of, at least international, wire transfers.

10 See, e. g., Agreement on Mutual Legal Assistance Between the European Union and the United States of America, 2003 O.J. (L 181) 34.

11 For a brief outline of this part of the SWIFT saga, see the article EU-Parlament kippt SWIFT-Abkommen, Spiegel online, Feb. 11, 2010, available at: http://www.spiegel.de/politik/ausland/0,1518,677232,00.html (last visited Oct. 24, 2010).
2. US Department of the Treasury, the Terrorist Tracking Finance Program and EU-US Controversies

In response to the September 11 attacks in 2001, the US Department of the Treasury, under the then Secretary of the Treasury Paul O'Neill, introduced the Terrorist Finance Tracking Program (TFTP).\(^\text{12}\) The program is based on statutory mandates and Executive Orders.\(^\text{13}\) Among the latter is the Executive Order 13224 of 23 September 2001 on measures to combat terrorist financing issued by the then US President George W. Bush.\(^\text{14}\) The Order directs all United States government agencies, under the guidance of the Treasury, to take all appropriate measures to implement the arrangement established by the Order.\(^\text{15}\) The goal of the TFTP is to collect data on financial flows, to analyze them and to cull those financial transactions intended to finance terrorist activities thereby enabling US authorities to identify, to track and to pursue potential terrorists and their supporters.\(^\text{16}\) To this end, financial service providers residing or active in the United States can be required to submit relevant data to the Treasury through administrative subpoenas.\(^\text{17}\) In cases that lack the mentioned link to the United States, US authorities, however, cannot apply this method without help. They rather have to initiate the much more complicated and protracted process provided for by agreements of international legal assistance.\(^\text{18}\) SWIFT, though, was based in Europe and active in the United States at the same time. Hence, the cooperative was subject to the obligations generated by the administrative subpoenas issued by US authorities as well as European laws, especially privacy laws. Therefore, it ended up in an unenviable position in the midst of conflicting obligations.\(^\text{19}\) The controversy arising between the United States and the European Union in this respect\(^\text{20}\), finally, not only led to a compromise on the concrete subject matter\(^\text{21}\) but also led to a broader cooperation between both parties. They entered into negotiations on

\(^{12}\) For general information about the TFTP, see Connorton, supra, note 1, 288 as well as the corresponding TFTP Fact Sheet, supra, note 1.

\(^{13}\) TFTP Fact Sheet, supra, note 1.


\(^{15}\) Id. at Section 7.

\(^{16}\) TFTP Fact Sheet, supra, note 1.

\(^{17}\) Id.; see also Connorton, supra, note 1, 283, 288.

\(^{18}\) See, e. g., Mutual Assistance Agreement, supra, note 10.

\(^{19}\) Connorton, supra, note 1, at 284.

\(^{20}\) For an outline of this part of the SWIFT saga, see id. at 290.

\(^{21}\) See, supra, note 4.
an international agreement when they learned the cooperative’s plans that implied the transfer of the central server.

3. EU Institutions and Inter-Institutional Controversies

By means of exchange of information, the EU Member States had benefited a lot from the TFTP’s investigation results. Accordingly, the European Union had a specific interest in the continuation of a close cooperation with US authorities, even once SWIFT had moved its data processing activities from the United States to Europe. Hence, it was no surprise that the European Union welcomed negotiations on a special agreement on the issue of data collection, transmission and analysis related to the activities of SWIFT in 2009. To this end, the Council authorized the Presidency on 27 July 2009 to engage in negotiations, assisted by the Commission, on an “Agreement on the processing and messaging of financial data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program” pursuant to Articles 24 (1)[1] and 38 TEU. Negotiations were completed not later than in November 2009, so that the Agreement could be concluded on 30 November 2009, only one day before the coming into effect of the Treaty of Lisbon. The procedure established by the then effective Treaty of Nice only presupposed the approval of the Council for the conclusion of such agreements whereas the consent of the European Parliament was not required. The Parliament, on its part, had always been critical about the Agreement, its concrete arrangements and the procedure of the Agreement’s adoption. The Parliament criticized, amongst others, the lack of sensitivity to aspects of data protection and data security; furthermore, the procedure was conceived as dishonorable vis-à-vis the Parliament, first and foremost, because of the approval of the Agreement by the Council only one day before the coming into effect of the Treaty of Lisbon which would have required the consent of the Parliament (see Article 218 (6)[2]a)

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22 SWIFT-I Agreement, supra, note 4.

23 The corresponding authorization of the Department of the Treasury can be found in Executive Order 13224, supra, note 14, Section 6.

24 Explicitly acknowledged by the Preambles of both Agreements; see id., paragraphs 4 and 5 respectively.


26 Id.

TFEU). Nevertheless, on 11 February 2010 the Parliament had the opportunity to vote on the Agreement. In the course of this vote, the Parliament rejected the Agreement by 378 to 196 votes (31 abstentions). The vote could be conceived as evidence of a rising self-confidence of the Parliament under the Treaty of Lisbon. As a result, the SWIFT-I Agreement was suspended.

III. Political Process Towards the SWIFT-II Agreement

After the failure of the SWIFT-I Agreement due to its rejection by the Parliament, its members, on 5 May 2010, agreed on a resolution officially communicating their concerns and preferences to the other EU organs involved. Six days later, the Council authorized the Commission to engage in new negotiations with the competent organs of the United States. In this respect, it shall be noted that under the Lisbon Treaty it is the Commission that is in charge of the negotiation process rather than the Presidency of the Council that was competent under the Treaty of Nice (see Article 218 (2) and (3) TFEU). When negotiations finished in mid-June, a draft Council Decision was provided for as initial legislative document on 22 June 2010. Six days later, the Agreement was signed and, on 8 July 2010, approved by the Parliament following the recommendation of the

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28 A valuable overview of the concerns and the related criticism is provided by the European Parliament Resolution of 5 May 2010 on the Recommendation from the Commission to the Council to authorize the opening of negotiations for an Agreement between the European Union and the United States of America to make available to the United States Treasury Department financial messaging data to prevent and combat terrorism and terrorist financing, EUR. PARL. DOC. 0129 (2010), available at: http://www.europarl.europa.eu.

29 Id.


32 Council Decision on the signing, on behalf of the Union, of the Agreement between the European Union and the United States of America on the processing and transfer of financial messaging data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program, 2010 O.J. (L 195) 1.


34 Recommendation of the Committee on Civil Liberties, Justice and Home Affairs on the draft Council Decision on the conclusion of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the
Committee on Civil Liberties, Justice and Home Affairs. By means of a Council Decision, the Agreement was approved on 13 July 2010 (see Article 218 (2) and (6)[1] TFEU). On 1 August 2010, it came into effect pursuant to the first paragraph of its Article 23.

C. The SWIFT-I Agreement

The SWIFT-II Agreement can be traced back to the preceding Agreement of November 2009 (see above). It is, therefore, particularly instructive to analyze the contents of the SWIFT-II Agreement by way of comparison with the contents of the SWIFT-I Agreement. Accordingly, the contents of the SWIFT-I Agreement will be presented shortly.

I. Legal Basis

The SWIFT-I Agreement was an international agreement between the European Union and the United States regulating US authorities’ access to SWIFT financial transaction data. The material competence of the European Union resulted from the provisions on police cooperation and Europol, in particular on measures such as the “collection, storage, processing, analysis and exchange of relevant information” (Article 30 (1)b) TEU). With respect to the procedure of concluding the Agreement, the provisions of Articles 24 (1) and 38 TEU provided the necessary rules. Accordingly, the Council could conclude agreements with one or more States or international organizations in the area of implementation of the Title on Police and Judicial Cooperation (title six TEU).

II. Objective

The objective of the Agreement was discussed in the first Article of the Agreement. According to this provision, the Agreement should ensure that “(a) financial payment messaging and related data stored in the territory of the European Union by providers of international financial payment messaging services (...) are made available upon request by the U.S. Treasury Department for the purpose of the prevention, investigation, detection, or prosecution of terrorism or terrorist financing; and (b) relevant information obtained through the TFTP is made available to law enforcement, public security, or counter terrorism authorities of Member States, or Europol or Eurojust, for the purpose of the prevention, investigation, detection, or prosecution of terrorism or terrorist financing.” The corresponding data “may include identifying information about the originator and/or recipient of the transaction, including name, account number, address, national
identification number, and other personal data related to financial messages" (Article 4 (2) SWIFT-I).

III. Outline of the Contents

The Agreement consisted of a preamble and 15 articles. A separate declaration was attached according to which the Member States obliged themselves to apply the Agreement temporarily as from 1 February 2010 until its definitive coming into effect (also see Article 15 (2) SWIFT-I).37

1. Preamble

The preamble made reference to the TFTP and the joint efforts of the two parties in the struggle against terrorism and alluded to the UN Security Council Resolution 1373 (2001) on the financing of terrorism.38 It explicitly recognized the importance of the relevant fundamental rights enshrined in the Charter of Fundamental Rights of the European Union, the European Convention on the Protection of Human Rights and Fundamental Freedoms as well as other applicable human rights provisions and necessary procedures of legal protection.39

2. Operative Part

In its operative part, the Agreement established a complex system of mutual messaging between EU Member States and the United States (Articles 4, 7 and 8 SWIFT-I). The system was built on the already existing mechanisms of the Agreement on Mutual Legal Assistance between the European Union and the United States of America of 25 June 200340 and the related bilateral mutual legal assistance instruments between the EU Member States and the United States (see Article 4 (1) SWIFT-I). Notwithstanding certain simplifications, the procedure envisaged in the SWIFT-I Agreement worked as follows:

Pursuant to Article 4 (1) SWIFT-I, the process was to be initiated by means of an official request issued by the Treasury according to Article 8 of the Mutual Legal Assistance Agreement. The request had to be directed to a central authority in the EU Member State in which the financial service provider concerned (so-called “Designated Providers”) was either based or where it stored the requested data. The central authority, then, was to verify the accordance of the request with both the SWIFT-I Agreement and the

37 Furthermore, see id., Article 3.

38 SWIFT-I Agreement, supra, note 4, Preamble, paras. 3, 4, 5.

39 Id. at para. 6.

40 See Mutual Assistance Agreement, supra, note 10.
requirements of the applicable bilateral mutual legal assistance instrument. Once the accordance was confirmed, the request was to be transmitted to the competent authority of the same Member State for execution. As soon as provided for by the Designated Providers, the competent authority was to transfer the relevant data to the United States (Article 4 (3), (5) and (7) SWIFT-I).

The Agreement contained multiple guarantees and safeguard mechanisms to ensure the interests and the legal status of the citizens. Among those, the following formal and material requirements and restrictions stand out:

First, the elements of those actions labeled terrorism financing by the Agreement, the permissible purposes of data collection and processing as well as the type of data concerned were precisely defined (Article 2, Articles 1 (1) and 5 (2)a) as well as Article 4 (2) SWIFT-I). Second, a request was to be based upon “pre-existing information or evidence which demonstrates a reason to believe that the subject of the search has a nexus to terrorism or its financing” (Article 5 (2)b) SWIFT-I), it was to be substantiated correspondingly and, in any case, to be “tailored as narrowly as possible” (Article 4 (2) and Article 5 (2)c) SWIFT-I). Third, each search was to be logged (Article 5 (2)c) SWIFT-I). Fourth, there were several explicit prohibitions such as the ban on data mining, copying and editing of the data (Article 5 (2) and (2)f) and g) SWIFT-I). Furthermore, the data had to be maintained in a secure physical environment and protected from unauthorized access; it was, in fact, to be made available to a narrowly defined group of experts only (Article 5 (2) d) and e) SWIFT-I). Finally, the Agreement established precise requirements concerning the deletion and its logging (Article 5 (2)i) to l) SWIFT-I).

The compliance with the above mentioned guarantees and safeguard mechanisms were subject to a joint review which was to be carried out no later than after a period of six months. In this context, “a proportionality assessment of the Provided Data, based on the value of such data for the investigation, prevention, detection, or prosecution of terrorism or its financing” was to be realized (Article 10 (1) [1] and [2] SWIFT-I).

Finally, concerned citizens were given right to “obtain (...) confirmation from his or her data protection authority whether all necessary verifications have taken place within the European Union to ensure that his or her data protection rights have been respected in compliance with this Agreement, and, in particular, whether any processing of his or her personal data has taken place in breach of this Agreement. Such right may be subject to necessary and proportionate measures applicable under national law, including for the protection of public security or national security or to avoid prejudicing the prevention, detection, investigation, or prosecution of criminal offences, with due regard for the legitimate interest of the person concerned” (Article 11 (1) SWIFT-I). Moreover, a citizen was “entitled to seek effective administrative and judicial redress in accordance with the laws of the European Union, its Member States, and the United States, respectively” in
case he or she considered “his or her personal data to have been processed in breach of this Agreement” (Article 11 (3) SWIFT-I).

3. Criticism

The criticism of the Agreement covered several aspects. Among other things, it was alleged that the requested data might lack any reference to the United States and a messaging, therefore, would not be justified. Furthermore, it was pointed to the large amount of data that could possibly be requested and consequently transferred. Lastly, there were complaints about the data being withdrawn from any EU influence and its high standards of data protection once transferred to the United States. 41

D. The SWIFT-II Agreement

The SWIFT-II Agreement has been binding the institutions of the EU and its Member States since 1 August 2010 as obligatory law (Article 216 (2) TFEU). It can be traced back to the SWIFT-I Agreement and substitutes it. At the same time, it contains numerous changes in detail intended to accommodate SWIFT-I’s criticisms.

I. Legal Basis

Just like the SWIFT-I Agreement, the SWIFT-II Agreement is an international agreement between the European Union and the United States. The material competence of the Union can be found in the provisions of Articles 87 and 88 TFEU on measures concerning the collection, storage, processing, analysis and exchange of information by Member State police authorities (Article 87 (2a) TFEU) and on Europol (Article 88 (2) TFEU). The rules on the procedure follow from the provision of Article 218 TFEU in conjunction with the substantive provisions in the area of police cooperation. 42 In the very case, the Counsel had to adopt its decision on the conclusion of the Agreement on a proposal by the negotiator and after obtaining the consent of the Parliament (Article 218 (5) and (6)[2]a) TFEU).

II. Objective

The objective of the Agreement, determined in its first Article, is virtually identical to the first Agreement’s objective as only minor conceptual changes can be found.

41 For a valuable overview on the relevant concerns and criticism, see Recommendation of the Committee on Civil Liberties, Justice and Home Affairs, supra, note 27; furthermore, see European Parliament Resolution, supra, note 28.

42 See Council Decision, supra, note 30, Preamble.
III. Outline of the Contents

The SWIFT-II Agreement consists of a preamble and 23 articles. Pursuant to paragraphs five and six of the preamble of the Council Decision and due to Protocols 21 and 22 to the TEU and the TFEU as introduced by the Treaty of Lisbon, the Agreement does, at least for the time being, not apply to Ireland and Denmark.43 The SWIFT-II Agreement no longer provides for provisional application as was the case in the SWIFT-I Agreement (see Article 15 (2) SWIFT-I); rather it was to come into effect on the first day of the month after the date on which the Parties have exchanged the necessary notifications (Article 23 (1) SWIFT-II).

1. Preamble

The preamble of the SWIFT-II Agreement is longer and more elaborate than that of the SWIFT-I Agreement. The importance and the achievements of the TFTP are being recognized more extensively as well as the important role of data protection and security and the corresponding procedures and safeguard mechanisms.44 Furthermore, it is noteworthy that paragraph six of the Preamble makes elaborate reference to data protection related to human rights provisions such as “the right to privacy with regard to the processing of personal data as stipulated in Article 16 of the Treaty on the Functioning of the European Union, the principles of proportionality and necessity concerning the right to private and family life, the respect for privacy, and the protection of personal data under Article 8 (2) of the European Convention on the Protection of Human Rights and Fundamental Freedoms, the Council of Europe Convention No. 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data, and Articles 7 and 8 of the Charter of Fundamental Rights of the European Union”.45 The referral to Article 6 (2) TEU made in the same paragraph, however, appears to be a wrong citation. The cited provision, as amended by the Treaty of Lisbon, authorizes the European Union to accede to the European Convention on the Protection of Human Rights and Fundamental Freedoms whereas the first and the third paragraph of the very provision address substantive questions of human rights.

43 Id. at paras. 6 and 7.

44 SWIFT-II Agreement, supra, note 5, Preamble, para. 3.

45 Id. at para. 6.
2. Operative Part

In its operative part, the Agreement establishes – just as its predecessor did – a system of mutual messaging between EU Member States and the United States (Article 4, 9 and 10 SWIFT-II).

An examination in detail, however, quarries many differences between the SWIFT-I and SWIFT-II Agreement including the procedural structure and the legal technique, the guarantees and safeguard mechanisms, the rules on the onward transfer of data as well as, finally, the issues of transparency and legal protection.

First, the procedural structure (request and corresponding data transfer) has been completely altered. In this context, an absolutely different legal technique has been applied concerning the obligation of the Designated Provider to provide the relevant data. Notwithstanding certain simplifications, the procedure envisaged in the SWIFT-II Agreement works as follows:

Just like in the SWIFT-I Agreement, the process is to be initiated by means of an official request issued by the US Department of the Treasury (Article 4 (1) SWIFT-II). Unlike the SWIFT-I Agreement, however, the request is to be served directly upon the Designated Provider. Only a copy is to be provided to Europol, none to any EU Member State authority. Europol, then, verifies the accordance of the request with certain requirements established in the Agreement and, in case of a successful verification, notifies the Designated Provider. As a consequence, the Designated Provider is “authorized and required to provide the data to the U.S. Treasury Department” (Article 4 (1), (3), (4) and (5) SWIFT-II).

There are several issues that are striking about the newly established procedural structure: First, the linkage between the Agreement at hand and the Agreement on Mutual Legal Assistance of 2003 is abandoned (see Article 4 (1) SWIFT-I); instead, a separate structure is implemented. Second, the U.S. Department of the Treasury is granted the competence to approach the Designated Providers directly and, thus, without having to make a detour to EU or Member State authorities (see Article 4 (1) SWIFT-II compared to 4 (1) SWIFT-I); in this way, the national authorities have almost lost their role in the messaging process in favor of Europol. Third, the legal obligation of the Designated Provider contains an interesting particularity. Stating that the request “shall have binding legal effect as provided under U.S. law, within the European Union as well as the United States”, the provision of Article 4 (5) SWIFT-II grants US law full applicability within the territory of the European Union. This novelty is accompanied by a corresponding provision concerning the legal protection against the request: according to the provision of Article 4 (8) SWIFT-II, the Designated Provider “shall have all administrative and judicial redress available under U.S. law to recipients of Treasury Department Requests.”

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46 See, supra, note 10.
Second, the guarantees and safeguard mechanisms of the SWIFT-II Agreement go far beyond what was laid down in the SWIFT-I Agreement.

In this respect, virtually all guarantees and safeguard mechanisms of the SWIFT-I Agreement are contained in the SWIFT-II Agreement – mostly extended and strengthened; among those provisions are the precise definition of the elements of those actions labeled as terrorism financing by the Agreement, the type of data concerned and the permissible purposes of data collection and processing, the requirement of a “cause for suspicion” and a corresponding substantiation of the request, logging requirements, explicit prohibitions such as the ban on data mining, copying or editing of the data, physical security requirements, the protection from unauthorized access as well as, finally, deletion requirements and deadlines (see above). In addition, the SWIFT-II Agreement has introduced the requirement of a precise request also with regard to the data category (Article 4 (2)a) SWIFT-II). Furthermore, data relating to the Single European Payment Area has been excluded from the scope of the data to be requested by or produced to the Treasury, and the interconnection of relevant data with other databases has been explicitly prohibited (Article 4 (2)d) and Article 5 (4)b) SWIFT-II). Moreover, the deletion requirements and deadlines have been rendered more stringent (Article 6 SWIFT-II). Finally, the requirements of necessity and proportionality of data collection and processing have been highlighted more articulately and the principle of non-discrimination with respect to nationality and country of residence as well as other distinctive features has been introduced as an additional safeguard mechanism (Article 5 (1), (5), (6) and (7) SWIFT-II).

Third, the monitoring of the above mentioned guarantees and safeguard mechanisms and the joint review play a more significant role in the Agreement.

Thus, the Agreement establishes, first, a permanent oversight mechanism whose subject is the “strict counter terrorism purpose limitation and the other safeguards set out in Articles 5 and 6” (Article 12 (1)[1] SWIFT-II). In this context, independent overseers, including a person appointed by the European Commission, are being assigned to verify the compliance of the above mentioned guarantees and safeguard mechanisms. According to the provision of Article 12 (2) SWIFT-II, this oversight mechanism including its independency is itself subject of regular monitoring as envisaged by the provision of Article 13 SWIFT-II. This provision establishes a joint review mechanism for the entirety of the safeguards, controls, and reciprocity provisions envisaged in the Agreement.

Fourth, the onward transfer of data by the Treasury is subject of a separate article in the SWIFT-II Agreement (Article 7 SWIFT-II, see Article 5 (2)h) SWIFT-I) and, thus, set out in more detail.
The safeguard clause contained in the SWIFT-I Agreement ("Only terrorist leads obtained through the TFTP under this Agreement shall be shared with (...) third States to be used for the purpose of the investigation, detection, prevention, or prosecution of terrorism or its financing", Article 5 (2)h) SWIFT-I) has basically been transposed, complemented by additional guarantees and restructured (Article 7 a) to f) SWIFT-II). Among these changes are the categorical requirement of the prior consent of the relevant Member State in cases involving EU citizens or residents (Article 7 d) SWIFT-II), the obligation of the United States to request that the information be deleted by the third State when no longer required (Article 7 e) SWIFT-II), as well as a logging requirement (Article 7 f) SWIFT-II).

Fifth, the SWIFT-II Agreement places particular emphasis on the issues of transparency and legal protection (Articles 14 to 18 SWIFT-II). These issues obviously constitute a major priority of the Agreement.

With regard to the issue of transparency, the provision of Article 14 requires that the Treasury provides detailed information about the TFTP and its purposes as well as the procedures available for the exercise of the rights set out in the Agreement on its public website.

These above mentioned rights and procedures are contained in the Articles 15 to 18 SWIFT-II that arrange for a legal protection mechanism completely different to that of the SWIFT-I Agreement. Thus, the right to information (Article 15 (1) SWIFT-II, see Article 11 (1) SWIFT-I) has been complemented by a corresponding administrative procedure in due form (Article 15 (3) SWIFT-II). Another novelty is the right to rectification, erasure, or blocking in Article 16 (1) SWIFT-II. It is, just like the right to information, supplemented by a corresponding administrative procedure in due form (Article 16 (2) SWIFT-II). These subjective rights are to be conceived together with or in the light of the provision of Article 17 SWIFT-II (see Article 11 (2) SWIFT-I). This provision establishes an objective obligation of the parties to take all appropriate measures including supplementation, deletion, or correction of inaccurate or unreliable data in case one of them becomes aware of such a deficiency. The second paragraph of the provision ensures that corresponding indications are being shared between the parties. In addition, the provision of Article 18 (2) SWIFT-II entitles "any person who considers his or her personal data to have been processed in breach of this Agreement (...) to seek effective administrative and judicial redress in accordance with the laws of the European Union, its Member States, and the United States, respectively."

Finally, the Agreement offers some minor changes in addition to the major changes mentioned above. Among these are the introduction of an additional element of an action labeled as terrorism financing by the Agreement expanding, thus, the scope of application of the Agreement (Article 2 c) SWIFT-II). Moreover, unlike the SWIFT-I Agreement, the SWIFT-II Agreement contains an Annex which concretely identifies the Designated Providers being subject to the arrangements of the Agreement; this Annex currently
includes no other entity than SWIFT. The Annex, however, may be updated by the exchange of diplomatic notes. The update, thereafter, has to be duly published in the Official Journal of the European Union.

E. Brief Evaluation

I. General Remarks

Without any doubt, the SWIFT-II Agreement constitutes a substantial development compared to the SWIFT-I Agreement. The demands of the Parliament and other actors have obviously been given serious consideration and have, at least partly, found their way into the text of the Agreement.

In general, the SWIFT-II Agreement is characterized by a more cooperative style which conceives of messaging rather as a cooperation of coequal nature than as a service of the European Union and its Member States to the United States. Furthermore, it enhances coherence, clarity, and comprehensibility by means of its clear and stringent language and structure.

With regard to the contents, the SWIFT-II Agreement contains major developments in comparison to the SWIFT-I Agreement: The Treasury is granted direct access to the Designated Providers, thus, increasing the pace of the messaging procedure as well as its efficiency – both, of course, in favor of Europol and at the expense of the EU Member State authorities. The protection of the interests and the legal status of the citizens go far beyond what was set out in the SWIFT-I Agreement. Not only have the existing guarantees and safeguard mechanisms, the rules on the joint review as well as the rules on the onward transfer of data been amplified, advanced and restructured; they have also been complemented by detailed rules on transparency, legal protection and redress. Legal protection and redress, especially, have been strongly enhanced.

Some issues, however, remain unclear, problematic or dissatisfactory, at least from a European citizen’s point of view.

Among these, the bold legal technique applied with regard to the legal effects of the request stands out. The fact that US law is to govern the legal effects of the request in the United States as well as in the European Union (Article 4 (5) SWIFT-II) might provoke serious questions and uncertainties concerning the relation between EU and EU Member State law on the one hand and US law on the other hand. These concerns might be aggravated by the fact that the corresponding administrative and legal redress is also dependent on US law (Article 4 (8) SWIFT-II). At least from a European perspective, this dominance of US law might be dissatisfactory as well as the mere fact that, under the newly established regime, EU citizens might (still) have to appeal to US courts in most cases.
Further questions and uncertainties could arise in view of the equal-treatment clause in Article 18 (2) SWIFT-II. It cannot be assured that this provision will stand up to the US Privacy Act which determines that US citizenship or permanent residence in the United States is a prerequisite for a request for information.

Finally, it is not clear whether the significantly expanded citizen’s rights in the second Agreement will really be made available to the citizens at the end of the day. The provision of Article 20 (1) SWIFT-II (also see Article 13 SWIFT-I), stating that the Agreement “shall not create or confer any right or benefit on any person or entity, private or public”, at least provokes doubts in this regard.

II. Focusing Data Protection

At this point, it cannot be determined whether the Agreement meets the substantive requirements of the basic rights enshrined in the Charter of the Fundamental Rights of the European Union (Article 6 (1) TEU) and those constituting general principles of EU law according to Article 6 (3) TEU.

Possible violations of Articles 7 and 8 CFREU in conjunction with Article 6 (1) TEU as well as of Article 8 ECHR in conjunction with Article 6 TEU (3) TEU as well as other possible violations will, at any rate, be subject of further discussion. As often, as the decisive question might turn out the question whether the provisions laid down in the Agreement meet the requirements of the proportionality test applied in human rights matters. 47 And once more, the European Court of Justice might have the ultimate say here. 48

From a German point of view, the question arises if the provisions laid down in the Agreement meet the requirements of the German Basic Law. Once again, a detailed analysis cannot be provided at this point. At any rate, it will be necessary to approach this question with due regard to the decision of the Federal Constitutional Court on data retention of 2 March 2010. 49 Herein, the Court holds that “the principle of proportionality requires that the legal arrangement of such data storage has to duly accommodate the specific intensity of the interference associated with the storage. There shall be sufficiently sophisticated and clear regulations regarding data protection, use of the data,

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48 The reaction of the European Court of Justice to Léger’s proposal can be seen, among others, in Case C-402/05 P and C-415/05 P, supra, note 7, where the Court basically rejects this conception.

49 Data Retention Case, supra, note 6.
transparency and legal protection.50 Given the strict and detailed requirements the Court sets out in its decision and assuming their transferability, there is serious reason to fear—or hope?—that the SWIFT-II Agreement does not meet these requirements.

50 Id. at 833.