

CHAPTER 3 Stronger modes of reception of exogenic norms in the EU legal order

A Accession of the EU to conventions (mode 1)

1. General

81 After EU accession, conventions are an integral part of EU law

EU accession to conventions is the highway via which exogenic norms enter the EU legal order. International agreements which the EU concludes or to which the EU accedes, become binding upon the EU institutions and the Member States by virtue of Article 216(2) TFEU, and therefore are an integral part of EU law.⁶¹⁴ The ECJ can answer preliminary questions on interpretation and on validity.⁶¹⁵ In the hierarchy of norms, international agreements concluded by the EU rank below primary law and above secondary law. Pursuant to primary law, they must respect fundamental rights⁶¹⁶ and ‘cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal order, observance of which is ensured by the Court’.⁶¹⁷ Even on the highway (and especially there), the red line is thus protected. International agreements concluded by the EU prevail over secondary law and may affect the validity of acts of the institutions, subject to certain conditions. *As far as possible, consistent interpretation is sought. As is well-known, individuals can rely on the provisions*

614 EU Accession to the ECHR *Opinion 2/13* ECLI:EU:C:2014:2454, paras 179–180, with case law.

615 See Art 218 TFEU (procedure for the conclusion of international agreements by the Council); and Case 181-73 *Haegeman* ECLI:EU:C:1974:41, para 5; Case C-533/08 *TNT Express Nederland* ECLI:EU:C:2010:243, para 59.

616 Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission v Kadi* ECLI:EU:C:2013:518, para 22.

617 EU Accession to the ECHR *Opinion 2/13* ECLI:EU:C:2014:2454, para 201, see conditions in paras 160–162. Art 6(2) TEU (‘Such accession shall not affect the Union’s competences as defined in the Treaties’); Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms [2012] OJ C326/273, Art 1 and 2. See also Joined Cases C-402/05 P and C-415/05 P *Kadi* ECLI:EU:C:2008:461, para 282. Further AG Kokott on *Opinion 2/13*, para 201.

of an international agreement concluded by the EU if those provisions have direct effect (clear, precise, and unconditional) and if this is compatible with the spirit and general scheme of the agreement.⁶¹⁸

82 Few examples

The highway is quite empty. To the disappointment of various authors, the EU has not been very active in pursuing accession to conventions drafted within the ambit of the Council of Europe.⁶¹⁹ Even where the Treaty provides that the EU ‘shall accede’ to the ECHR (Article 6(2) TEU), the process appears to be complex, with clear concerns not to cross the red line.⁶²⁰

Two cases illustrate the legal effects of exogenic standards resulting from conventions.

In 1978, the EEC acceded to 1976 European Convention on the Protection of Animals kept for Farming Purposes.⁶²¹ In *Compassion in World Farming*, the ECJ confirmed that this Convention had become an integral part of the Community legal order and tested the validity of an EU directive for consistency with its provisions.⁶²² It is interesting that in so doing the Court also took into account a recommendation adopted by a body

618 I.a. Joined Cases 21 to 24-72 *International Fruit Company* ECLI:EU:C:1972:115, para 20; Case 12/86 *Demirel* ECLI:EU:C:1987:400, para 14; Case C-280/93 *Germany v Council* ECLI:EU:C:1994:367, para 105; Case C-354/13 *FOA (Fag og Arbejde)* ECLI:EU:C:2014:2463, para 53. Lenaerts and Van Nuffel, *European Union Law*, 864; J Klabbers, ‘Straddling the Fence: The EU and International Law’ in D Chalmers and A Arnulf (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015).

619 Joris and Vandenberghe, ‘The Council of Europe and the European Union: Natural Partners or Uneasy Bedfellows’, 31–33 (out of 46 conventions allowing for accession, 11 were ratified by the EC in 2008); see also Cornu, ‘The impact of Council of Europe Standards on the European Union’. On 15 October 2019, within the list of the 225 CoE treaties, 55 treaties allowed the EU to accede (source in n 121). Some were signed by the EU, i.a. the CoE Convention on preventing and combating violence against women and domestic violence (Istanbul); also treaties in the field of crime and terrorism, broadcasting by satellite, or animal protection (see <ec.europa.eu/world/agreements/default.home.do>).

620 EU Accession to the ECHR *Opinion 2/13* ECLI:EU:C:2014:2454, widely commented by scholars.

621 European Convention on the Protection of Animals kept for Farming Purposes (adopted on 10 March 1976 within the ambit of the CoE), approved by Council Decision 78/923/EEC of 19 June 1978 [1978] OJ L323/12. All Member States had become parties.

622 Case C-1/96 *Compassion in World Farming* ECLI:EU:C:1998:113, para 31 (about Directive 91/629). See also Case C-189/01 *Jippes* ECLI:EU:C:2001:420, on stan-

established under the Convention to ensure the implementation of the Convention principles.⁶²³ In the mode of EU accession to international agreements, non-binding instruments, such as the recommendations of specific bodies set up under these agreements, acquire legal status in EU law.⁶²⁴

In 1994, the EU ratified the 1964 Convention on the Elaboration of a *European Pharmacopoeia*.⁶²⁵ The *European Pharmacopoeia* is a reference work of pharmaceutical standards drawn up under the auspices of the Council of Europe. EU directives made the *European Pharmacopoeia* texts legally binding for the issuing of marketing authorisations, including in their regularly updated form ('dynamic reference', necessary for the quality control of medicines).⁶²⁶ In *Novartis Pharmaceuticals*, the ECJ used these standards in a preliminary ruling to interpret concepts.⁶²⁷

dards of the International Office of Epizootics (IOE) and the International Animal Health Code (ninth edition, 2000).

623 Case C-1/96 *Compassion in World Farming* ECLI:EU:C:1998:113, paras 6, 35–36, on recommendations of the Standing Committee.

624 Case C-188/91 *Deutsche Schell* ECLI:EU:C:1993:24, para 17: 'Since measures emanating from bodies which have been established by an international agreement of that type, and which have been entrusted with responsibility for its implementation, are directly linked to the agreement which they implement, they form part of the Community legal order'; Opinion of AG Van Gerven, para 10: not the binding force of the act is decisive, but the direct connection between the act and the international agreement concluded by the Community. See also Opinion of AG Léger in Case C-1/96 *Compassion in World Farming* ECLI:EU:C:1998:113, para 128.

625 Convention on the Elaboration of a European Pharmacopoeia, ETS No 50 (22 July 1964) and Protocol ETS No 134; Council Decision of 16 June 1994 accepting, on behalf of the European Community, the Convention on the elaboration of a European Pharmacopoeia [1994] OJ L158/17.

626 9th edition in 2016.

627 Dir 2001/82–83/EC; Case C-106/01 *Novartis Pharmaceuticals* ECLI:EU:C:2004:245, paras 36–39. Before the EU in 1994 acceded to the 1964 Convention on the Elaboration of a European Pharmacopoeia, directives of the European Commission already referred to the *European Pharmacopoeia* by title (mode 3, below). The ECJ interpreted concepts in EU legislation accordingly.

2. Indirect relevance of accession to conventions for Education for Democratic Citizenship

83 UN conventions

The first mode of reception of exogenic norms into the EU legal order has limited direct relevance for EDC standards, which are—at present—not drawn up in conventions. However, some indirect effects may be deduced by analogy with convention effects.

At UN level, international agreements containing important norms on education have been signed and ratified by all the EU Member States, but not by the EU: the 1960 Convention Against Discrimination in Education (CADE), the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), and the 1989 Convention on the Rights of the Child (CRC).⁶²⁸ The European Parliament has called on the Commission to explore ways for the EU to accede to the CRC.⁶²⁹

It is worth noting the conclusion by the European Community of the 2006 UN Convention on the Rights of Persons with Disabilities.⁶³⁰ In Article 24(1) of this Convention, States Parties recognise the right of persons with disabilities to education. With a view to realising this right without discrimination and based on equal opportunity, States ‘shall’ ensure an inclusive education system directed to ... ‘[e]nabling persons with disabilities to participate effectively in a free society’ (Article 24(1)(c)). As a result of the conclusion of this convention, this provision has become an integral part of EU law. However restricted this provision may seem in terms of its scope, its meaning for education in general is important when seen in the broader context of international agreements binding on Member States. The wording of Article 24(1) of the Convention on the Rights of Persons

628 See n 443. The new Member States which acceded in 2004, 2007 and 2013 are also bound by these conventions. State parties at <indicators.ohchr.org/>. For indirect legal effects, see *Intertanko*, § 100.

629 European Parliament Resolution of 27 November 2014 on the 25th anniversary of the UN Convention on the Rights of the Child [2016] OJ C289/57, para 38.

630 Convention on the Rights of Persons with Disabilities (adopted 13 December 2006 A/RES/61/106, entry into force 3 May 2008); Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities [2010] OJ L23/35. To note, the EU has concluded some international agreements in the education field, but without specific consequences for citizenship education, e.g. Agreement between the European Community and the United States of America renewing a programme of cooperation in higher education and vocational education and training [2006] OJ L346/34.

with Disabilities on the right to education replicates the terms used with regard to the right to education in Article 13 of the 1966 ICESCR (Covenant ratified by all Member States, not by the EU). Both Article 24 of the Convention and Article 13 of the Covenant include an obligation for States Parties: they shall ensure an education system ‘directed to’ (i.a.) enabling ‘to participate effectively in a free society’. Given the similarity in the wording, it can be indirectly inferred from the EU’s conclusion of the Convention on the Rights of Persons with Disabilities that the EU adheres to the basic aims of education as expressed in the Article 13 of the ICESCR.⁶³¹ If it is part of EU law that the right to education includes the right for children with disabilities to an education directed to enabling effective participation in a free society, this must also be true for children without disabilities. This confirms the importance of the third anchor point of the study. Recognising a right to education directed to effective participation in a free society will have consequences when applied to the situation of the EU citizen.⁶³²

84 European conventions

At European level, several conventions laying down educational standards have not been acceded to by the EU.

The 2005 Council of Europe Convention on the Prevention of Terrorism is indirectly relevant, as it contains an obligation for Member States to take ‘appropriate measures’ in the field of education to prevent terrorist offences. If this provision is interpreted by taking account of other Council of Europe instruments, EDC and HRE are a necessary part of such measures.⁶³³ However, while all EU Member States signed this Convention, not all ratified it. The EU signed the Convention, without ratifying it.⁶³⁴ Thus it is not a part of EU law which Member States have to respect.

631 The ‘programmatic’ nature of provisions in the Convention on the Rights of Persons with Disabilities (Case C-363/12 Z ECLI:EU:C:2014:159, para 88) does not detract from this conclusion.

632 Parts three and four.

633 CoE Convention on the Prevention of Terrorism CETS No 196 (Warsaw, opened 16 May 2005, entered into force 1 June 2007), Art 3(1): ‘Each Party shall take appropriate measures, particularly in the field of training of law enforcement authorities and other bodies, and in the fields of education, culture, information, media and public awareness raising, with a view to preventing terrorist offences and their negative effects while respecting human rights obligations’; explanatory memorandum paras 58. CoE action to take into account, see § 37.

634 No ratification by BE, EL, IA, UK. Signature by the EU on 22 October 2015; Council Decision (EU) 2015/1913 of 18 September 2015 on the signing, on

The European Social Charter (ESC) is the convention on economic and social rights complementing the ECHR (which provides for civil and political rights). It is acknowledged to be the social constitution for Europe.⁶³⁵ Neither the ESC (1961), nor the Revised ESC (1996) are open for signature by the EU. The Revised ESC was signed but not ratified by all Member States.⁶³⁶

The European Convention on the Exercise of Children's Rights was not signed or ratified by all Member States; it is open to the EU but has not been signed.⁶³⁷ The 1997 Convention on the Recognition of Qualifications concerning Higher Education in the European Region, concluded in the ambit of the Council of Europe and jointly drafted with UNESCO, was signed and ratified by all EU Member States, except for Greece. Although it is open for signature by the EU, the EU has not become a party to it.⁶³⁸

It can be concluded that the first mode of reception of Council of Europe norms into the EU legal order is not directly relevant to the EDC issue. Yet, in the future this may change. The opinion has been voiced within the Council of Europe that the Recommendation on the Charter

behalf of the European Union, of the Council of Europe Convention on the Prevention of Terrorism (CETS No 196) [2015] OJ L280/22.

635 CoE Secretary General, State of democracy, human rights and the rule of law—a security imperative for Europe. Report 2016, 84.

636 European Social Charter ETS No 35 (Turin, opening 18 October 1961, entry into force 26 February 1965); European Social Charter (revised) ETS No 163 (Strasbourg, opening 3 May 1996, entry into force 1 July 1999), not ratified by CZ, DE, DK, ES, HR, LU, PL, and UK. See also Opinion of the Secretary General of the Council of Europe on the European Union initiative to establish a European Pillar of Social Rights (Strasbourg, 2 December 2016), 7: all EU Member States acceded to the treaty system of the CoE ESC, ratifying either the 1961 ESC or the 1996 revised ESC, yet with differing degrees of commitment. More in CoE European Committee of Social Rights, *The relationship between European Union law and the European Social Charter* (Working Document, 2014), appendix 1, for acceptance of specific provisions of the revised ESC by Member States ('à la carte' ratification system: States may choose the provisions they accept as binding international legal obligations).

637 European Convention on the Exercise of Children's Rights ETS No 160 (Strasbourg, opening 25 January 1996, entry into force 1 July 2000).

638 Convention on the Recognition of Qualifications concerning Higher Education in the European Region ETS No 165 (Lisbon, opening 11 April 1997, entry into force 1 February 1999), jointly drafted by the CoE and UNESCO, aiming replace six earlier conventions. Compare, e.g., European Agreement on the Instruction and Education of Nurses ETS No 59 (Strasbourg, opening 25 October 1967, entry into force 7 August 1969), not signed by all Member States, not open to the EU.

on EDC/HRE should become a convention. If this happens, the question which arises is whether the EU will be invited and willing to accede. However, it seems unlikely that any such steps will be taken soon, given the significance of education as an expression of Member State sovereignty.

B General principles of EU law (mode 2)

1. General

85 Genesis of general principles

Another strong mode of reception of exogenic norms are the general principles of EU law. They provide an attractive expressway in the legal landscape but are only recommended in the absence of other roads and for courageous drivers.

For a long time, the ECJ has fed the fundamental rights of the ECHR into the EU legal order as general principles of EU law, case law which is codified in Article 6(3) TEU.⁶³⁹ Occasionally, the ECJ has also drawn on other exogenic human rights instruments to find (construct) general principles, such as the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the (Revised) ESC, or International Labour Organisation Conventions.⁶⁴⁰ The question then arises as to what extent the ECJ is ready to draw inspiration from non-binding exogenic instruments, such as recommendations of the Council of Europe. Case law reveals two formulae: the ECJ draws inspiration from the guidelines supplied 'by international *treaties* for the protection of human rights'⁶⁴¹ (first formula) or 'by international *instruments* for the protection

639 Case 29-69 *Erich Stauder v City of Ulm - Sozialamt* ECLI:EU:C:1969:57, para 7; Case 11-70 *Internationale Handelsgesellschaft* ECLI:EU:C:1970:114, para 4; Case 4-73 *Nold* ECLI:EU:C:1974:51, para 13; Joined Cases C-402/05 P and C-415/05 P *Kadi* ECLI:EU:C:2008:461, para 283; EU Accession to the ECHR *Opinion 2/13* ECLI:EU:C:2014:2454, para 37.

640 E.g. Case 149/77 *Defrenne III* ECLI:EU:C:1978:130, paras 26–28; Case C-540/03 *Parliament v Council* ECLI:EU:C:2006:429, paras 37, 57. Indirectly, Case C-144/04 *Mangold* ECLI:EU:C:2005:709, paras 74–75 (refers to the preamble of Dir 2000/78 establishing a general framework for equal treatment in employment and occupation, which itself refers in recital 4 to, i.a., the UDHR and the ICESCR. See Craig and de Búrca, *EU Law: Text, Cases, and Materials* 386.

641 Case C-260/89 *ERT* ECLI:EU:C:1991:254, para 41; Case C-274/99 P *Connolly* ECLI:EU:C:2001:127, paras 37–38; Case C-94/00 *Roquette Frères* ECLI:EU:C:2002:603, para 23; Case C-112/00 *Schmidberger* ECLI:EU:C:2003:333, para 71;

of human rights on which the Member States have collaborated or to which they are signatories⁶⁴² (second formula). The ECJ did, for example, rely on the CFR before it became binding on 1 December 2009.⁶⁴³ The ECJ also draws inspiration from the constitutional traditions common to the Member States in order to establish general principles.

86 Significant legal effects

The legal effects of general principles of EU law are significant. In the hierarchy of norms, they are generally recognised as having constitutional status.⁶⁴⁴ They are part of ‘the law’ of which the ECJ ensures observance (Article 19 TEU). EU law and national law falling within the scope of EU law are to be interpreted consistently with general principles. The infringement of general principles may result in the annulment or invalidity of EU measures. Within the substantive scope of EU law, Member State measures which fail to respect general principles must be set aside, as national courts must ensure the full effectiveness of EU law. Liability in damages may arise in some cases.⁶⁴⁵

Case C-36/02 *Omega Spielhallen* ECLI:EU:C:2004:614, para 33; EU Accession to the ECHR *Opinion 2/13* ECLI:EU:C:2014:2454, para 37.

642 Case C-540/03 *Parliament v Council* ECLI:EU:C:2006:429, paras 35–7 (the Court confirms that the ICESCR and the CRC are ‘international instruments for the protection of human rights of which it takes account in applying the general principles of Community law’); Case C-244/06 *Dynamic Medien* ECLI:EU:C:2008:85, paras 39–40 (on CRC); Case C-305/05 *Ordre des barreaux francophones et germanophone et autres* ECLI:EU:C:2007:383, para 29 (on ECHR); Case C-229/05 *P PPK and KNK* ECLI:EU:C:2007:32, para 76 (on ECHR); Joined Cases C-402/05 *P* and C-415/05 *P Kadi* ECLI:EU:C:2008:461, para 283 (referring to UN Charter and Resolutions).

643 Case C-244/06 *Dynamic Medien* ECLI:EU:C:2008:85, para 41. Further HCH Hofmann and BC Mihaescu, ‘The Relation between the Charter’s Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case’ (2013) 9 *European Constitutional Law Review* 73.

644 T Tridimas, *The General Principles of EU Law* (Oxford University Press 2006), 6; Lenaerts and Van Nuffel, *European Union Law* 853 (on Treaty principles as sincere cooperation, conferral, subsidiarity, proportionality, or non-discrimination); Case C-282/10 *Dominguez* ECLI:EU:C:2012:33, Opinion of AG Trstenjak, para 95.

645 Arts 263 and 267 TFEU. For legal effects, see i.a. Case C-144/04 *Mangold* ECLI:EU:C:2005:709, paras 77–78; Case C-555/07 *Kücükdeveci* ECLI:EU:C:2010:21, paras 51–54, with cited case law. Further Tridimas, *The General Principles of EU Law* 29 ff; K Lenaerts and JA Gutiérrez-Fons, ‘The constitutional allocation of powers and general principles of EU law’ (2010) 47 *CMLRev* 1629, 1636 (consistent interpretation), 1650 (damages); Lenaerts and Van Nuffel, *European*

2. The bold proposition of a general principle on Education for Democratic Citizenship

Arguments in favour

87 *Common fundamental principles*

To consider EDC standards to be general principles of EU law is a bold proposition.⁶⁴⁶ Several arguments militate in favour of this proposition and will first be explained (a). However, because there are strong counter-arguments, to be explained afterwards, the proposition will not be adopted (b).

EDC standards do not satisfy the definition of general principles as ‘unwritten principles, recognised by the European Court of Justice, that have the status of higher law by the fact that they may be invoked as a standard for the review of Community acts’.⁶⁴⁷ Neither ‘education for democratic citizenship’ nor ‘citizenship education’ appear in ECJ case law.⁶⁴⁸ Yet, EDC standards could be labelled ‘general principles’ defined as ‘the fundamental provisions of unwritten primary EU law which are inherent in the legal order of the European Union itself or are common to the legal orders of the Member States’.⁶⁴⁹ EDC standards display several of the attributes which Tridimas describes as necessary for the elevation of a standard to the status of ‘a general principle’, inter alia ‘to enjoy a degree of wide acceptance, i.e. represent “conventional morality”’.⁶⁵⁰ The broad European consensus on EDC standards—standards moreover of great weight linked with the values of democracy, rule of law and human rights—is demonstrated in Part one. Throughout the four phases of the EDC project, instruments in the Council of Europe legal order show that EDC

Union Law 851; C Semmelmann, ‘General Principles in EU Law between a Compensatory Role and an Intrinsic Value’ (2013) 19 *ELJ* 457, 459: ‘the well-known trouble with general principles as creatures *intra ius* yet *extra legem*’.

646 Cf Opinion of AG Mazák in Case C-411/05 *Palacios de la Villa* ECLI:EU:C:2007:604, para 89: considering the principle of non-discrimination on grounds of age as a general principle of EU law is ‘a bold proposition’.

647 B de Witte, ‘Institutional Principles: A Special Category of General Principles of EC Law’ in U Bernitz and J Nergelius (eds), *General Principles of European Community Law* (Kluwer Law International 2000) 143.

648 Search on 15 October 2019.

649 M Schweitzer, W Hummer and W Obwexer, *Europarecht: das Recht der Europäischen Union* (Manz 2007) 65.

650 Tridimas, *The General Principles of EU Law* 26.

standards are accepted by member states as general principles with applications in diverse fields.⁶⁵¹

88 *Guidelines supplied by international treaties and instruments for the protection of human rights*

Inspiration can be drawn from the guidelines supplied by international *treaties* for the protection of human rights (first formula in ECJ case law) and certainly from international *instruments* for the protection of human rights (second formula).⁶⁵²

As to the first formula, several treaties are relevant. Inspiration for a general principle of EDC can be found in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and in the Convention on the Rights of the Child (CRC). Based on the UDHR (Article 26(2)), the provisions on the right to education in the ICESCR (Article 13(1)) and the CRC (Article 29(1)) stipulate that education ‘shall be directed to’ internationally agreed aims.⁶⁵³ Education shall, i.a., enable all persons to participate effectively in a free society, develop respect for human rights and fundamental freedoms, and prepare for responsible life in a free society. EDC and HRE are direct responses to these compulsory educational aims. This is also evidenced by their expression and their development in UN instruments on education for democracy and human rights education.⁶⁵⁴ EDC and HRE are crucial, in one form or another (in accordance with State priorities and constitutions), to the achievement of these educational aims. At the core of a general principle on EDC would be the need for EDC and HRE to reflect the compulsory educational aims of the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child, and the core components of EDC and HRE which, by consensus, develop these aims (such as in paragraph 2 of the Charter on EDC/HRE). It is to this core of EDC standards that I am referring when I use the expression ‘a general principle of EDC’. As explained

651 Text to n 222 ff, 228 ff, 247 ff, 266 ff, 278 ff.

652 Formulas in text to nn 641-642.

653 See n 81-82. The 1996 Revised European Social Charter echoes some of them in Art 17: ‘the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities’; further Art 7 and 10. See also the aims in the UN Convention on the Rights of Persons with Disabilities, text to n 630.

654 §§ 285 294 .

above, the use in this study of the term ‘EDC’ automatically implies HRE as well.⁶⁵⁵

As to the second case law formula on general principles, inspiration can be drawn from ‘the guidelines supplied by international *instruments* for the protection of human rights on which the Member States have collaborated or to which they are signatories’, in this case the Recommendation on the Charter on EDC/HRE.⁶⁵⁶ One of the requirements established in case law for general principles is their fundamental importance.⁶⁵⁷ Against the backdrop of the dramatic consequences of education under totalitarian regimes and two World Wars, the authors of the provisions in international agreements on the right to education adopted compulsory educational aims which they considered pivotal for all human rights and society at large. Given their fundamental importance, the international (UN) and regional (Council of Europe) instruments which develop these aims further to include education for democracy and human rights education, arguably supply guidelines for a general principle of EDC/HRE in the EU legal order. In addition to the Charter on EDC/HRE—used as a reference instrument—the many other legal instruments described in the normative context in Part one provide further support.

89 *Constitutional traditions common to the Member States*

Alongside international guidelines, the common constitutional traditions of the Member States (Article 6(3) TEU) arguably also constitute a source for a general principle of EDC. An exhaustive analysis of constitutional law in all the Member States (including historical understanding, constitutional practice and case law) is impossible in the framework of this study. However, for the purposes of this study, sufficient indications can be drawn from the text of the constitutions.⁶⁵⁸

655 Text to n 181 ff.

656 See normative context (§ 85 ff) and participation in all organs (§ 162).

657 Case C-282/10 *Dominguez* ECLI:EU:C:2012:33, Opinion of AG Trstenjak, para 99.

658 More in P Häberle, *Verfassungslehre als Kulturwissenschaft* (2nd edn, Duncker und Humblot 1998); A Tschentscher, ‘Comparing Constitutions and International Constitutional Law: A Primer’ (10 February 2011) ; LFM Besselink and others (eds), *Constitutional Law of the EU Member States* (Kluwer 2014).

Provisions on democracy are to be found in all Member State constitutions, expressed in various terms.⁶⁵⁹ They should be interlinked with standards on democracy, including the EDC standards to which all Member States are committed in the international context. A common constitu-

659 Some fragments of Member State constitutions (non-exhaustive; English translations as provided in database <www.refworld.org> or <www.unesco.org>): *Austria* Art 1 'Austria is a democratic republic. Its law emanates from the people'; *Czech Republic* Art. 1(1) 'The Czech Republic is a sovereign, unitary and democratic, law-abiding State, based on respect for the rights and freedoms of man and citizen'; Art 2(1) 'The people are the source of all power in the State; they exercise it through bodies of legislative, executive and judiciary powers.'; *CZ Charter of Fundamental Rights and Basic Freedoms* (part of the constitutional system, see Art 112 Constitution) Art 2(1) 'Democratic values constitute the foundation of the state, so that it may not be bound either to an exclusive ideology or to a particular religious faith'; *Finland* Section 2 Democracy and the rule of law: 'The powers of the State in Finland are vested in the people, who are represented by the Parliament. Democracy entails the right of the individual to participate in and influence the development of society and his or her living conditions'; *France* Art 1 'La France est une République indivisible, laïque, démocratique et sociale'; Art 2 'La devise de la République est « Liberté, Égalité, Fraternité ». Son principe est : gouvernement du peuple, par le peuple et pour le peuple'; Art 3 'La souveraineté nationale appartient au peuple qui l'exerce par ses représentants et par la voie du référendum'; *Germany* Art 20 '(1) The Federal Republic of Germany is a democratic and social federal state. (2) All state authority is derived from the people.; *Greece* Art 1 '2. Popular sovereignty is the foundation of government. 3. All powers derive from the People and exist for the People and the Nation'; Art 120(2) 'Respect towards the Constitution and the law concurrent thereto, and devotion to the Fatherland and to Democracy constitute a fundamental duty of all Greeks'; *Hungary* Article B (1) 'Hungary shall be an independent, democratic rule-of-law State'; (3) 'The source of public power shall be the people.' (4) 'The power shall be exercised by the people through elected representatives or, in exceptional cases, directly'; *Latvia* Art 1 'Latvia is an independent democratic republic'; Art 2 'The sovereign power of the State of Latvia is vested in the people of Latvia'; *Poland* Art 2 'The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice'; *Romania* Art 1 (3) 'Romania is a democratic and social State governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values and shall be guaranteed'; Art 2(1) 'National sovereignty resides with the Romanian people, who shall exercise it through its representative bodies and by referendum'; *Sweden* Instrument of Government Art 1 'All public power in Sweden proceeds from the people. Swedish democracy is founded on the free formation of opinion and on universal and equal suffrage. It is realised through a representative and parliamentary form of government and through local self-government'.

tional tradition in respect of education can be deduced from a comparative analysis of provisions on the right to education in national constitutions, displaying ‘a great uniformity’.⁶⁶⁰ Several elements of the right to education in international agreements (ICESCR and CRC) recur, such as a right dimension and a freedom dimension; equal access for all, free of charge and compulsory up to a certain level; guarantees for the rights of parents; or some state supervision.⁶⁶¹ Importantly, several national constitutions encompass and develop the aims of education provided for in international agreements, and here *direct congruency* can be observed with EDC standards. The Portuguese Constitution adds with regard to the right to education that ‘[t]he state shall promote the democratisation of education ... to contribute to ... the development of the personality and the spirit of tolerance, mutual understanding, solidarity and responsibility, to social progress and to *democratic participation in collective life*’.⁶⁶² The Spanish Constitution specifies that ‘[e]ducation shall aim at the full development of human personality with due respect for the democratic principles of coexistence and for basic rights and freedoms’.⁶⁶³ The Greek Constitution states that ‘[e]ducation constitutes a basic mission for the State and shall aim at ...their formation as free and responsible citizens’.⁶⁶⁴ The Latvian Constitution provides in the chapter on ‘fundamental human rights’ that

660 G Gori, *Towards an EU Right to Education* (European Monographs 28, Kluwer Law International 2001) 321. See also G Gori, ‘Article 14: Right to Education’ in S Peers and others (eds), *The EU Charter of Fundamental Rights: a Commentary* (Hart 2014) 413.

661 See elements of the right to education i.a. in Constitution of Bulgaria Arts 23 and 53; Croatia Arts 64, 66–68; Cyprus Art 20; CZ Charter of Fundamental Rights and Basic Freedoms Art 33; Denmark § 76; Estonia § 37–38; Finland Section 16; Germany Art 7, also Art 5; Hungary Arts X–XI (i.a. X(3) ‘Higher education institutions shall be autonomous in terms of the content and the methods of research and teaching’); Italy Art 33–34; Lithuania Arts 40–42; Luxembourg Art 23 (Constitution under revision); Malta Art 9–11; Poland Arts 33 and 70; Romania Art 32; Slovakia Art 42; Sweden Art 18. See also constitutions mentioned in other footnotes.

662 Art 73(2). See also Art 70 (1) and (2) on the aim ‘to ensure the effective fulfilment of their economic, social and cultural rights’ and ‘effective integration into the active life, ... and a sense of community service’, and Art 77(1) on democratic participation in education.

663 Art 27(2); see also (5) on participation of all parties (as in Charter on EDC/HRE).

664 Art 16(2): ‘Education constitutes a basic mission for the State and shall aim at the moral, intellectual, professional and physical training of Greeks, the development of national and religious consciousness and at their formation as free and responsible citizens.’

'[e]veryone has the right to know about his or her rights'⁶⁶⁵, which is like HRE and the concept of EDC in component (c-3). In the Austrian constitution '[d]emocracy, humanity, solidarity, peace and justice as well as openness and tolerance towards people are the elementary values of the school'. In addition to values, the aim is to develop independent judgement, social understanding, and attitudes of openness, as well as ensuring citizens are 'capable to participate in the cultural and economic life of Austria, Europe and the world and participate in the common tasks of mankind, in love for freedom and peace'⁶⁶⁶, all of which is comparable to the EDC aim of empowering citizens to value diversity and to participate (parameters c-2–3). None of the constitutions which contain provisions directly related to citizenship education, deviate from EDC standards. The constitutional provisions on the promotion of the ideals of democracy⁶⁶⁷,

665 Latvian Constitution Arts 112 and 90.

666 Constitution of Austria Art 14(5a) 'Democracy, humanity, solidarity, peace and justice as well as openness and tolerance towards people are the elementary values of the school (...) let them become healthy, self-confident, happy, performance-oriented, dutiful, talented and creative humans capable to take over responsibility for themselves, fellow human beings, environment and following generations, oriented in social, religious and moral values. Any juvenile shall in accordance with his development and educational course be led to independent judgement and social understanding, be open to political, religious and ideological thinking of others and become capable to participate in the cultural and economic life of Austria, Europe and the world and participate in the common tasks of mankind, in love for freedom and peace'; also Art 14(6). On values, see Belgium Art 24 (3–4) on moral education and equality; Romania, new Art 32 on access to culture (2) 'A person's freedom to develop his/her spirituality and to get access to the values of national and universal culture shall not be limited'; and Luxembourg proposal for new constitution (tr) Art 33 (1) Every person has the right to education, (3) Freedom of education shall be exercised respecting the values of democratic society founded on fundamental rights and public freedoms.

667 Sweden Instrument of Government Art 2 'the public institutions shall secure the right to employment, housing and education (...) The public institutions shall promote the ideals of democracy as guidelines in all sectors of society ... The public institutions shall promote the opportunity for all to attain participation and equality in society and for the rights of the child to be safeguarded'. See also France, preamble to the Constitution of 1946 (actual constitutional value), para 18: Faithful to its traditional mission, France desires to guide the peoples under its responsibility towards the freedom to administer themselves and to manage their own affairs democratically.

the common good⁶⁶⁸, or quality education⁶⁶⁹ are *indirectly congruent* with EDC standards.

In general, the implementation of EDC standards by Member States is closely linked to their constitutions, as constitutions provide for learning content (basic values, organisation of the State's institutions, fundamental rights, etc.)⁶⁷⁰ and frame the way in which this learning is provided, for instance, the relationship between the right to education and State control, on the one hand, and the freedom of education and freedom of expression, on the other hand. According to the German and the Greek constitutions, freedom of education shall not release any person from the duty of allegiance to the constitution.⁶⁷¹ The requirement that freedom of education must respect constitutional provisions will have consequences with regard to EU primary law, interconnected with national constitutions.⁶⁷²

To sum up, common constitutional traditions exist with regard to education for democracy. Moreover, the trend for national practices implementing EDC is growing, as evidenced in the second review cycle of the Charter on EDC/HRE and in the 2017 Eurydice report on citizenship edu-

668 Constitution of Ireland Art 42(3-2) 'The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social); see also Article 40 (6-1-i).

669 Cyprus Art 20(1); the Netherlands Art 23 ('eisen van deugdelijkheid'), Portugal Art 76(2); Slovakia Art 57 ('a proper education').

670 E.g. Beschluss der Kultusministerkonferenz vom 06.03.2009 'Stärkung der Demokratieerziehung', 4 ('erstärkte Vermittlung von Kenntnissen des Grundgesetzes und der Länderverfassungen' ('improving knowledge of the Basic Law and Land Constitutions'); Beschluss der Kultusministerkonferenz vom 06.03.2009 i. d. F. vom 11.10.2018, 'Demokratie als Ziel, Gegenstand und Praxis —historisch-politischer Bildung und Erziehung in der Schule' ('Das pädagogische Handeln in Schulen ist von demokratischen Werten und Haltungen getragen, die sich aus den Grundrechten des Grundgesetzes und aus den Menschenrechten ableiten lassen'). See for Austria <www.unsereverfassung.at/?lang=en>. Further § 165.

671 Germany Art 5(3) Basic law '[t]he freedom of teaching shall not release any person from allegiance to the constitution'; see also Art 7(1) 'The entire school system shall be under the supervision of the state'; Greece Art 16(1) 'Academic freedom and freedom of teaching shall not exempt anyone from his duty of allegiance to the Constitution'; Cyprus Art 20(1) 'respect for the constitutional order'; see also Lithuania Art 28 (for all rights and freedoms).

672 See i.a. § 167. A constitutional core is to be respected, with room for balancing; see § 251 and text to n 2453.

cation.⁶⁷³ In this respect constitutional traditions are converging. The greater the degree of convergence in national legal orders, the more inclined the ECJ will be to follow the national legal orders.⁶⁷⁴ Besides, the ECJ rarely carries out a mathematical analysis to identify the lowest common denominator in national constitutional traditions, but adopts ‘an evaluative approach’, incorporating ‘the solution provided for by the national legal orders that fits better or is in line with the objectives and structure of the Treaty’.⁶⁷⁵ EDC standards fully fit in with this approach: they are in line with the objectives and structure of the Treaties (as will be argued below).⁶⁷⁶ Responding to the absence of clear majority support in the national legal (and constitutional) systems for a principle of non-discrimination on grounds of age, Advocate General Kokott pointed to consistency with a specific task incumbent on the EU, to specific expression by the EU legislator, and to the mirroring of a more recent trend in the protection of fundamental rights.⁶⁷⁷ A hypothetical general principle of EDC satisfies each of these terms. As abstract programmatic norms, EDC standards have been given specific expression by EU law (in modes 4 and 5, as will be analysed) and are thus codified to some extent.⁶⁷⁸ Recognising a general principle of EDC would mirror a trend towards increased protection of democratic and human rights values in response to societal changes (radicalisation).

673 See n 478; CoE, *Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe*; Commission/EACEA/Eurydice, *Citizenship Education at School in Europe* (2017), 10 (several Member States recently have put citizenship education in the spotlight).

674 K Lenaerts and JA Gutiérrez-Fons, ‘The Role of General Principles of EU Law’ in A Arnall and others (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart 2011) 181.

675 Ibid, 183.

676 Analysis in text to n 934 ff.

677 Case C-550/07 P *Akzo Nobel Chemicals* ECLI:EU:C:2010:512, Opinion of AG Kokott, para 96. See also approach of AG Léger in Hautala (text to n 708); further Lenaerts and Gutiérrez-Fons, ‘The Role of General Principles of EU Law’, 183 (only the Finnish and the Portuguese constitutions); K Lenaerts and JA Gutiérrez-Fons, ‘To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice’ (2014) 20 *Columbia Journal of European Law* 3, 51.

678 Just as Dir 2000/78 gave specific expression to the underlying general principle of non-discrimination on the grounds of nationality. See Case C-555/07 *Kücükdeveci* ECLI:EU:C:2010:21, para 21; Case C-144/04 *Mangold* ECLI:EU:C:2005:709, para 75; by analogy with Case 43/75 *Defrenne II* ECLI:EU:C:1976:56, para 54.

It is true that a general principle of EDC would put flesh on the bones of the Treaties and exercise a gap-filling function.⁶⁷⁹

Counterarguments

90 *A precarious path*

However, on a closer analysis, the arguments against considering EDC standards to be general principles of EU law in this study are strong.

Firstly, in general, giving effects to exogenic norms via general principles is a precarious path to take, prone to barriers and resistance. General principles are controversial, their genesis the subject of critical comment in legal literature, and so are, to an even greater degree, their wide-reaching legal effects.⁶⁸⁰ Advocate General Mazák writes: ‘it lies in the nature of general principles of law, which are to be sought rather in the Platonic heaven of law than in the law books, that both their existence and their substantive content are marked by uncertainty’.⁶⁸¹ The interface of general principles with provisions at constitutional and legislative level is the subject of debate.⁶⁸² Non-discrimination on grounds of age is an example of a general

679 On general principles putting flesh on the bones of the Treaties: Lenaerts and Gutiérrez-Fons, ‘The constitutional allocation of powers and general principles of EU law’, 1667; Case C-411/05 *Palacios de la Villa* ECLI:EU:C:2007:604, Opinion of AG Mazák, para 85. On the gap-filling function: Tridimas, *The General Principles of EU Law* 17.

680 Numerous comments on *Mangold*, i.a. D Martin, ‘L’arrêt Mangold: Vers une hiérarchie inversée du droit à l’égalité en droit communautaire?’ [2006] *Journal des tribunaux du travail* 941 (‘motivation discutable’); J Mazák and M Moser, ‘Adjudication by reference to general principles of EU law: a second look at the Mangold case law’ in M Adams and others (eds), *Judging Europe’s judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart 2013); and Case C-411/05 *Palacios de la Villa* ECLI:EU:C:2007:604, Opinion of AG Mazák, paras 83, 88–89. For caution on general principles, see, i.a. M Herdegen, ‘General Principles of EU Law: The Methodological Challenge’ in U Bernitz and J Nergelius (eds), *General Principles of European Community Law* (European Monographs 25, Kluwer 2000); Lenaerts and Gutiérrez-Fons, ‘The Role of General Principles of EU Law’; S Prechal, ‘Competence creep and general principles of law’ (2010) 3 *Review of European administrative law* 1.

681 Case C-411/05 *Palacios de la Villa* ECLI:EU:C:2007:604, Opinion of AG Mazák, para 86.

682 See three options in Semmelmann, ‘General Principles in EU Law between a Compensatory Role and an Intrinsic Value’, 464.

principle which has been criticised.⁶⁸³ Recently, the ECJ has been reluctant to recognise or to use general principles. I think EDC standards are too important to jeopardise by taking a precarious path.

91 *Doubts about genesis*

Secondly, in particular with regard to a hypothetical general principle of EDC, the arguments relating to both the genesis and the legal effects are weak and problematic.

The doubts about the genesis of the principle concern the inspiration drawn from the ECHR (first formula in ECJ case law), from international instruments (second formula) and from common constitutional traditions.

92 *Doubts about the ECHR providing guidelines for EDC*

Can inspiration be drawn from the guidelines supplied by the ECHR, a treaty with ‘special significance’ to establish a general principle according to ECJ case law (first formula), treaty now mentioned as a direct source in Article 6(3) TEU? The answer is not straightforward. While the right to education in the ECHR does not militate against a potential EDC general principle, it does not, either, directly supply guidelines to conclude to the existence of a general principle of EDC. Article 2 of Protocol 1 to the ECHR essentially provides that ‘[n]o person shall be denied the right to education’ (first and main sentence). Grafted onto this right to education are the rights of parents: in the exercise of the functions it assumes related to education and teaching, the State shall respect the rights of parents to education for their children in conformity with their religious and philosophical convictions (second sentence). If guidance is found, it is indirectly, based on settled case law in which the ECtHR interprets the right to education in a range of major principles.⁶⁸⁴ Applying these interpretative principles to the EDC question provides some inspiration.

At first sight, the right to education does not give any indications as to EDC. The ECHR right to education primarily aims to guarantee a right of

683 *Mangold*, see text to n 680 ff.

684 I.a. *Kjeldsen, Busk Madsen and Pedersen v Denmark* no 5095/71 (ECtHR 7 December 1976), paras 50–54; *Campbell and Cosans v UK* no 7511/76 et al (ECtHR 23 March 1983), paras 36–37; *Valsamis v Greece* no 21787/93 (ECtHR 18 December 1996), paras 25–28; *Folgerø and Others v Norway* no 15472/02 (ECtHR 29 June 2007), para 84; *Hasan and Eylem Zengin v Turkey* no 1448/04 (ECtHR 9 October 2007), paras 47–55; *Lautsi and Others v Italy* no 30814/06 (ECtHR 18 March 2011), paras 59–62; *Catan and Others v Moldova and Russia* no 43370/04 et al (ECtHR 19 October 2012), paras 136–140; short referral in *Mansur Yalçın and Others v Turkey* no 21163/11 (ECtHR 16 September 2014), para 63.

equal access to the *existing* educational facilities.⁶⁸⁵ It does not require States to establish any particular type or level of education at their own expense or to subsidise it.⁶⁸⁶ The ECtHR repeatedly states that the setting and planning of the school curriculum in principle falls within the competence of the Contracting States and that it is not for the Court to rule on the questions of expediency, whose solution may legitimately vary according to the country and the era.⁶⁸⁷ States enjoy a wide margin of appreciation with regard to the organisation and contents of their education systems. This is, by the way, consistent with Article 165 TFEU, which requires that the responsibility of Member States for the content of teaching be fully respected.

Upon a closer look, however, the ECHR right to education involves several aspects relevant to EDC. First, it includes more than a right of equal access.⁶⁸⁸ A right to education would be illusory without a minimum degree of educational provision by the State. Positive obligations arise from ECtHR case law.⁶⁸⁹ The right to education would, for instance, be meaningless if it did not imply the right to be educated in the national language or in one of the national languages.⁶⁹⁰ The right to education ‘by its

685 Emphasis added. See *Belgian Linguistic Cases* no 1474/62 et al (ECtHR 23 July 1968), para 4; *Kjeldsen, Busk Madsen and Pedersen v Denmark* no 5095/71 (ECtHR 7 December 1976), para 52; *Folgerø and Others v Norway* no 15472/02 (ECtHR 29 June 2007), para 84 (d); *Mehmet Reşit Arslan and Orhan Bingöl v Turkey* no 47121/06 et al (ECtHR 18 June 2019), para 51. See also L Veny, *Rechtsbescherming in het onderwijs* (Die Keure 1990) 30; B Vermeulen, ‘The right to education (Article 2 of Protocol No. 1)’ in P Van Dijk and others (eds), *Theory and practice of the European Convention on human rights* (4th edn, Intersentia 2006) 896; L Veny, *Onderwijsrecht 1: Dragende beginselen van het onderwijsbestel* (Die Keure 2010) § 191; LM Veny, ‘The right to education according to the case-law of the European court of human rights’ in EM Fodor (ed), *Education and law : interferences* (Pro Universitaria 2016).

686 *Belgian Linguistic Cases* no 1474/62 et al (ECtHR 23 July 1968), para 3; *Lautsi and Others v Italy* no 30814/06 (ECtHR 18 March 2011), para 61; Vermeulen, ‘The right to education (Article 2 of Protocol No. 1)’ 899.

687 *Valsamis v Greece* no 21787/93 (ECtHR 18 December 1996), para 28; *Folgerø and Others v Norway* no 15472/02 (ECtHR 29 June 2007), para 84 (g).

688 *Belgian Linguistic Cases* no 1474/62 et al (ECtHR 23 July 1968), para 4.

689 *Campbell and Cosans v UK* no 7511/76 et al (ECtHR 23 March 1983), para 37; *Valsamis v Greece* no 21787/93 (ECtHR 18 December 1996), para 27; *Mansur Yalçın and Others v Turkey* no 21163/11 (ECtHR 16 September 2014), para 72.

690 *Belgian Linguistic Cases* no 1474/62 et al (ECtHR 23 July 1968), para 3; *Catan and Others v Moldova and Russia* no 43370/04 et al (ECtHR 19 October 2012), para 137. On positive obligations, see Grabenwarter, *European Convention on Human*

very nature calls for regulation by the State'.⁶⁹¹ In *Campbell*, the ECtHR considered that 'the education of children is the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young, whereas teaching or instruction refers in particular to the transmission of knowledge and to intellectual development.'⁶⁹² To that end, the State has the right to establish compulsory schooling and to verify and enforce educational standards. The State is responsible for the quality of education.⁶⁹³ The ECtHR considers that in a democratic society, the right to education is indispensable to the furtherance of human rights and plays a fundamental role.⁶⁹⁴

A second inspirational element in case law is that the margin of discretion of States is limited by the obligation to respect parents' religious and philosophical convictions with the explicit aim of safeguarding the possibility of pluralism in education. This is essential for the preservation of the 'democratic society' as conceived by the Convention. This aim must primarily be achieved by means of State teaching.⁶⁹⁵ An interpretative principle of crucial importance for EDC is that:

the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions.⁶⁹⁶

Rights: Commentary 394, especially in the knowledge-based society, 398; Vermeulen, 'The right to education (Article 2 of Protocol No. 1)' 901.

691 *Belgian Linguistic Cases* no 1474/62 et al (ECtHR 23 July 1968), para 5.

692 Para 33.

693 *Family H v UK* no 10233/83 (Commission, 6 march 1984) 37 DR 105; Vermeulen, 'The right to education (Article 2 of Protocol No. 1)' 901.

694 *Leyla Şahin v Turkey* no 44774/98 (ECtHR 10 November 2005), para 137 (also text to n 201); *Ponomaryovi v Bulgaria* no 5335/05 (ECtHR 21 June 2011), para 55; *Velyo Velyo v Bulgaria* no 16032/07 (ECtHR 27 May 2014), para 33.

695 *Folgerø*, para 84(b); *Kjeldsen*, para 50.

696 *Folgerø and Others v Norway* no 15472/02 (ECtHR 29 June 2007) para 84 (h); emphasis added. Principle repeated in settled case law: see also *Kjeldsen, Busk Madsen and Pedersen v Denmark* no 5095/71 (ECtHR 7 December 1976), para 53; *Lautsi and Others v Italy* no 30814/06 (ECtHR 18 March 2011), para 62; *Osmanoglu and Kocabas v Switzerland* no 29086/12 (ECtHR 10 January 2017), para 91. On 'a certain margin of appreciation' and final decision resting with the ECtHR, see *Cölgeçen and Others v Turkey* no 50124/07 et al (ECtHR 12 Decem-

This constraint on the State must be understood in the historical context of the adoption of the ECHR: freedom of education is stressed throughout the preparatory works as a reaction to the education system enforced by the Nazi regime and with the aim of protecting the individual against State interference.⁶⁹⁷

Competing interests are at work: the State must guarantee a right to education for all and at the same time preserve freedom in education. A necessary balance is to be struck between the general interests of the community and individual rights and freedoms.⁶⁹⁸ In *Valsamis*, parents brought a case on non-formal citizenship education in Greece before the ECtHR. Their daughter Victoria (in the first years of secondary school) had refused to take part in the school parade on the Greek National Day (28 October)⁶⁹⁹ and had been punished with one day's suspension from school. Her parents, Jehovah's Witnesses, were opposed to extolling patriotic ideals in a school parade (with a military presence) and alleged a breach of their parental right to respect for their religious convictions. The ECtHR, without ruling on the State's school curriculum decisions, was 'surprised' about the compulsory attendance precincts on a holiday on pain of suspension from school. However, the Court discerned no offence to the parents' pacifist convictions: 'such commemoration of national events serve, in their way, both pacifist objectives and the public interest.' The parents were, moreover, not deprived of the right to enlighten their

ber 2017), para 48, *Leyla Şahin v Turkey* no 44774/98 (ECtHR 10 November 2005), para 154.

697 'We must not forget that Europe, at the time when the Convention was adopted, had just gone through years of suppression of the freedom of the peoples, where governments used all sorts of means and pressure to nazify the youth, especially through the schools and youth organisations. It was an important aim of the Convention that this should not be repeated and that the freedom of education should be protected', in partly dissenting opinion of Judge Terje Wold, in *Kjeldsen, Busk Madsen and Pedersen v Denmark* no 5095/71 (ECtHR 7 December 1976), arguing against positive claims against the State. See Preparatory work on Article 2 of the Protocol to the Convention (Strasbourg 9 May 1967),

<www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-P1-2-CDH%2867%292-BIL2292567.pdf>.

698 *Belgian Linguistic Cases* no 1474/62 et al (ECtHR 23 July 1968), para 13; *Folgerø*, paras 84(f), and 96; and *Valsamis*, para 27; *Lautsi and Others v Italy* no 30814/06 (ECtHR 18 March 2011), para 61; Vermeulen, 'The right to education (Article 2 of Protocol No. 1)' 897.

699 School and military parades in nearly all towns and villages commemorate the outbreak of war between Greece and Fascist Italy on 28 October 1940.

children as educators and the imposed sanction was of limited duration.⁷⁰⁰ The ECtHR concluded that there was no breach of Article 2 of Protocol 1.

The State is ‘the ultimate guarantor of pluralism’.⁷⁰¹ The interpretative principles of the ECtHR on the right to education are consistent with the two sentences of Article 2 Protocol 1, with the Convention as a whole and ‘with the general spirit of the Convention itself, an instrument designed to maintain and promote the ideals and values of a democratic society’.⁷⁰²

It can be concluded that the aims expressed in ECtHR case law with regard to the right to education match the EDC paradigm.⁷⁰³ True, the Convention right to education does not directly imply an obligation to organise EDC, nor does the text contain indications as to content or aims of education, contrary to the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child. Yet, ECHR provisions must be interpreted in the light of these international agreements and international human rights standards, in line with Article 53 ECHR and case law. Even if Article 2 of Protocol 1 itself does not set out educational aims, when it is interpreted in the light of Article 13 of the ICESCR and Article 29 of the CRC, it does not countenance just any form of education. The ECtHR frequently restates that in interpreting and applying Article 2 of Protocol 1, ‘account must also be taken of any relevant rules and principles of international law applicable in relations between the Contracting Parties and that the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part’.⁷⁰⁴ Moreover, as argued in Part one, the Charter on EDC/HRE must also be taken into account in the interpretation of Article 2 (in line with *Demir, Tănase, Mosley* and others) as a standard of great weight or considerable importance.⁷⁰⁵ Furthermore, ‘the Court emphasises that the object and purpose of the Convention, as an instrument for the

700 *Valsamis*, para 31.

701 *Mansur Yalçın and Others v Turkey* no 21163/11 (ECtHR 16 September 2014), para 70.

702 *Kjeldsen*, para 53. As a whole: *Folgerø*, para 84(a), *Lautsi*, para 54. I.a. in the light of Art 10 on the right to freedom of expression (including freedom to hold opinions and to receive and impart information and ideas without interference by public authority).

703 Also to value diversity, see *Folgerø*, para 84(f).

704 E.g. *Çam v Turkey* no 51500/08 (ECtHR 23 February 2016), para 53; *Catan and Others v Moldova and Russia* no 43370/04 et al (ECtHR 19 October 2012), para 136.

705 § 43.

protection of individual human beings, requires that its provisions be interpreted and applied so as to make its safeguards practical and effective'.⁷⁰⁶

The conclusion must thus be nuanced. Taking all aspects of the analysis together, the right to education in Article 2 of Protocol 1 to the ECHR supplies guidelines, to a certain extent, for acknowledgement of a general principle of EDC in EU law. Admittedly, it is not the text itself of Article 2 Protocol 1 ECHR on the right to education which supplies guidelines, but rather—as opponents might argue—a broad interpretation based on ECtHR case law. At the very least, the Convention right to education as interpreted by the ECtHR matches the EDC paradigm. To say that it inevitably leads to the recognition of EDC standards as general principles of EU law would be a bold step.

93 *Doubts about international instruments*

As to genesis based on international *instruments* for the protection of human rights, as in the second formula, the ECJ does not seem very interested in recommendations of the Committee of Ministers of the Council of Europe. In *Hautala*, advocating a general principle of access to documents and a right to information, Advocate General Léger drew attention to various recommendations of the Committee of Ministers.⁷⁰⁷ They were part of the 'numerous unambiguous declarations' indicating the trend even before binding legislation was drafted. He found that '[i]t may suffice that Member States have a common approach to the right in question demonstrating the same desire to provide protection, even where the level of that protection and the procedure for affording it are provided for differently in the various Member States.'⁷⁰⁸ The ECJ did not pursue this idea. In *Parliament v Council*, the European Parliament sought the annulment of provisions regarding third country nationals in a Directive on the right to family reunification.⁷⁰⁹ The Parliament contended that the provisions did

706 *Leyla Şahin v Turkey* no 44774/98 (ECtHR 10 November 2005), para 136. Also text to n 357.

707 Case C-353/99 P *Hautala* ECLI:EU:C:2001:661, Opinion of AG Léger, para 59.

708 *Ibid*, para 62, reference i.a. to recommendations of the Committee of Ministers of the Council of Europe: No R (81) 19 on the access to information held by public authorities and No R (91) 10 on the communication to third parties of personal data held by public bodies.

709 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L251/12, recital 2: measures of family reunification should be adopted in conformity with the obligation to respect the family and

not respect the right to family life, referring to the ECHR, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, as well as to some recommendations of the Committee of Ministers.⁷¹⁰ The ECJ reasoned by reference to the ECHR and the Convention on the Rights of the Child, and considered that ‘the remaining international instruments invoked by the Parliament do not in any event appear to contain provisions affording greater protection of rights of the child than those contained in the instruments already referred to’.⁷¹¹ Case law on social rights also reveals the reticence of the ECJ. In *Dominguez*, Advocate General Trstenjak suggested to the Court that the entitlement of every worker to paid annual leave should be considered to be a general principle of EU law. This entitlement, she argued, has ‘long numbered amongst internationally recognised social fundamental rights’. Citing many provisions of international public law, including various conventions, she found it ‘unequivocally included among workers’ fundamental rights’.⁷¹² The ECJ was unmoved. The Court stated that the entitlement of every worker to paid annual leave must be regarded as ‘a particularly important principle of European Union social law’, without using the expression ‘general principle of EU law’.⁷¹³ The ECJ has been criticised for failing, in its interpretation of CFR provisions, to recognise the persuasive authority of international human rights instruments other than the ECHR.⁷¹⁴ If even rights established in a panoply of conventions have not changed the mind of the Court, it can be presumed that EDC standards set out in recommendations will not be capable of doing so.

94 *Doubts about common constitutional traditions*

With regard to the genesis of a general principle on EDC based on the common constitutional traditions of the Member States,⁷¹⁵ a counterargument is that only a minority of constitutions contain explicit provisions on citizenship education which are directly congruent with EDC standards.

family life enshrined in many instruments of international law (in particular the ECHR and CFR).

710 Para 33.

711 Para 39.

712 Case C-282/10 *Dominguez* ECLI:EU:C:2012:33, Opinion of AG Trstenjak, paras 103–105, 114. Also Joined Cases C-569/16 and C-570/16 *Bauer* ECLI:EU:C:2018:871, para 38.

713 Case C-282/10 *Dominguez* ECLI:EU:C:2012:33, para 16.

714 Craig and de Búrca, *EU Law: Text, Cases, and Materials* 387.

715 Arguments in favour in § 89.

Most constitutions provide for a right to education without reference to the content or educational aims.⁷¹⁶ EDC may then be seen as part of constitutional *practice*.

95 *Doubts about legal effects*

The legal effects of a hypothetical general principle of EDC are even more problematic. While it is conceivable that doubts as to genesis might be overcome—an issue which anyway has been selectively considered in ECJ case law—the main concern is that such a principle could have far-reaching legal effects, which would probably be hard to reconcile with respect for the constitutional allocation of powers in the Treaties, horizontally and vertically.⁷¹⁷ Construed as a general principle, EDC could become *un enfant terrible*, as described by Tridimas:

the general principles of law are children of national law but, as brought up by the Court, they become enfants terribles: they are extended, narrowed, restated, transformed by a creative and eclectic judicial process.⁷¹⁸

Horizontally, respect for the institutional balance and the separation of powers requires the ECJ not to encroach on the powers of the EU legislature. The establishment of general principles must respect legislative competence.⁷¹⁹ If more precision is needed than inherently implied in a general principle and legislative choices have to be made, the ECJ holds back. In *Audiolux*, the ECJ did not recognise a general principle of equal treatment of minority shareholders, because the general principle of equality could not determine the choice between various conceivable means of protection for minority shareholders. The protection of their interests required an element of detail in measures of secondary law.⁷²⁰ A commonly accepted precondition for recognising a general principle is that it has ‘a minimum ascertainable legally binding substance’.⁷²¹ Tridimas cites

716 E.g. Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, Hungary, Italy, Malta, the Netherlands, Poland, Romania, Slovakia (cp n 661).

717 Lenaerts and Gutiérrez-Fons, ‘The constitutional allocation of powers and general principles of EU law’.

718 Tridimas, *The General Principles of EU Law* 6.

719 Lenaerts and Gutiérrez-Fons, ‘The constitutional allocation of powers and general principles of EU law’; Prechal, ‘Competence creep and general principles of law’.

720 Case C-101/08 *Audiolux* ECLI:EU:C:2009:626, paras 61–63.

721 Tridimas, *The General Principles of EU Law* 26. See also Case C-282/10 *Dominguez* ECLI:EU:C:2012:33, Opinion of AG Trstenjak, para 113.

the example of fairness, which is too vague to be a general principle. What is fair for one person, may appear unfair for the other. General principles must include an autonomous normative concept, an objective determination.⁷²² In this respect, a general principle of EDC falls short. What is perceived as an ‘education for democratic citizenship’ by some, will not qualify as such in the view of others. A hypothetical general principle of EDC leaves open a number of choices, to be made by the legislator. As observed in Part one, one of the weaknesses of the Charter on EDC/HRE is that it does not excel in content precision, which diminishes its normative claims. EDC is a quite abstract principle, akin to the principle of democracy, which the ECJ did not call a general principle of EU law either, but simply ‘a principle’.⁷²³ By contrast, the general principle of non-discrimination on grounds of age has autonomous content as a negative norm excluding provisions leading to unequal treatment based on the forbidden ground. In *Küçükdeveci*, this general principle was sufficient in itself to confer rights on individuals.⁷²⁴ True, the components in the concept of EDC in paragraph 2 of the Charter on EDC/HRE contain quite precise elements, but the content of this paragraph is presumably more precise than that of a general principle of EDC. It is hard for a general principle of EDC to satisfy the criterion of self-sufficiency, for instance, for the ECJ to assess validity, or for national judges to give it full effectiveness as part of EU law.

Vertically, in construing a general principle of EU law, the ECJ must respect the principle of conferral. Recognition of a general principle of EU law on EDC, with the significant legal effects linked to the constitutional status, could be perceived as EU competence creep, encroaching on Member States powers in the field of education. Article 165(1) TFEU unambiguously states that the Union shall fully respect the responsibility of the Member States for the content of teaching.

96 Interpretative function

If, as Tridimas writes, judicial recourse to a general principle of EU law is essentially justified by its function in the EU legal order, making it possible to develop a notion of the rule of law appropriate for the EU polity while ensuring continuity with Member States’ legal orders,⁷²⁵ then there

722 Tridimas, *The General Principles of EU Law* 28, on the example of fairness.

723 Text to nn 954 ff.

724 About *Küçükdeveci*, see Case C-176/12 *Association de médiation sociale* ECLI:EU:C:2014:2, paras 46–49.

725 Tridimas, *The General Principles of EU Law* 20.

is probably no need to qualify EDC as a general principle. Semmelman considers:

the soundest interpretation assigns general principles the role of an entry point for morality and values in legal determinations that reflect societal consensus, may change over time and substantiate more straightforwardly drafted provisions.⁷²⁶

For this role, an adequate and more direct entry point for EDC standards is to be found, inter alia, in Articles 2, 3, and Title II TEU, and their normative implications in terms of EDC standards. Rather than construing EDC as a general principle of EU law, EDC standards may operate as a tool for the interpretation of the relevant provisions of EU law, as will be argued in mode 6.

To conclude, weighing the arguments pro and contra, the second mode of reception is an unsafe path for the Charter on EDC/HRE. General principles of EU law are a complex option when other EU legal sources are silent.⁷²⁷ In the case of EDC standards, the other EU legal sources are not silent.

C Incorporation of the title of exogenic instruments in EU law (mode 3)

1. General

97 Reference to exogenic instruments

In the legal landscape, a comfortable and safe secondary road bringing exogenic norms into the EU legal order is mentioning the title of an exogenic instrument in the corpus of EU law (not just in the preamble). This mode of direct entry can occur in both primary and secondary law and there are illustrations in many fields. The legal effects are not uniform but depend on the normative incorporation. The ECJ interprets EU law consistently with the incorporated exogenic norm but taking the autonomy of the EU legal order into account.

726 Semmelmann, 'General Principles in EU Law between a Compensatory Role and an Intrinsic Value', 487.

727 See, in general, *ibid*, 487.

Primary law incorporation of the title of an exogenic instrument

98 *The ECHR and indirect effects of Council of Europe recommendations*

The Treaties mention various exogenic instruments expressly, with different legal effects. Articles 6(3) TEU and 52(3) CFR refer to the ECHR. The fact that fundamental rights as guaranteed by the ECHR constitute general principles of EU law (Article 6(3) TEU) indirectly secures a way for Council of Europe recommendations to enter the EU legal order, i.e. to the extent that the ECtHR takes these recommendations into account to interpret provisions of the ECHR (*Tănase and Demir*⁷²⁸). This may actually happen with the EDC standards of the Charter on EDC/HRE as standards of great weight or considerable importance. The Recommendation on the Charter on EDC/HRE may thus have a cascading normative influence if taken into account by the ECtHR with a view to interpreting the ECHR and that ECHR interpretation is then incorporated into the general principles of EU law. Since the CFR has become EU primary law, the reception of ECtHR case law mainly occurs via the obligation of consistent interpretation in Article 52(3) CFR.⁷²⁹ It is worth noting that the obligation of consistent interpretation ‘shall not prevent Union law providing more extensive protection’.⁷³⁰ Applying this last sentence of Article 52(3) CFR, the Recommendation on the Charter on EDC/HRE is therefore to be seen as a minimum, a starting point for a possibly further-reaching EU development.

Another example of an exogenic instrument to which EU primary law expressly refers by title is the *Geneva Convention relating to the status of refugees*, made binding in EU asylum policy by Article 78 TFEU. Secondary law regularly refers to the Geneva Convention, i.a. to determine who qualifies for refugee status and for the implications of that status.⁷³¹ The ECJ

728 See § 42, i.a. *Tănase v Moldova* no 7/08 (ECtHR 24 April 2010), paras 176–77; *Demir and Baykara v Turkey* no 34503/97 (ECtHR 12 November 2008), paras 74–76, 85–86. For such an indirect reception through application of Article 52(3) CFR with regard to the right to vote, see however text to n 2294 ff.

729 The ECJ regularly refers to ECtHR case law, e.g. Case C-274/99 P *Connolly* ECLI:EU:C:2001:127, para 39 (same interpretation of freedom of expression as in *Handyside v UK* no 5493/72 (ECtHR 7 Dec 1976), para 33).

730 For cases going beyond or diverging from the ECHR, see Craig and de Búrca, *EU Law: Text, Cases, and Materials* 386.

731 Convention Relating to the Status of Refugees (Geneva, signed 28 July 1951, UNGA resolution 429 (V) of 14 December 1950, entered into force 22 April 1954) UNTS, Vol 189, p 150, No 2545 (1954); Protocol Relating to the Status of

interprets provisions of such secondary law ‘in the light of its general scheme and purpose, while respecting the Geneva Convention’.⁷³² The *European Social Charter* does not enjoy this binding status in primary law, but has ‘having in mind’ status: Article 151 TFEU lists the objectives of the social policy of the EU and the Member States, having in mind fundamental social rights such as those set out in the ESC.⁷³³ As to the *United Nations Charter*, several Treaty provisions require respect for its principles in the external action of the Union and in the common security and defence policy.⁷³⁴

Secondary law incorporation of the title of an exogenic instrument

99 *Exogenic standards incorporated into EU legislation in various fields*

In various fields the EU legislator chooses to incorporate standards originating outside the EU legal order. The intention is to avoid lagging behind and to adapt to evolving standards accepted in the international community. To this end, exogenic norms are often incorporated by a ‘dynamic reference’ to the title of the instrument, accepting future normative changes

Refugees (New York, 31 January 1967, entered into force 4 October 1967) (Geneva Convention). Secondary legislation, e.g. Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L251/12, Art 2(b); Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L337/9; Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2016] OJ L77/1, see Art 4, requiring full compliance.

732 Joined Cases C-443/14 and C-444/14 *Alo and Osso* ECLI:EU:C:2016:127, paras 28–37, 44, 51; Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla and Others* ECLI:EU:C:2010:105, para 53 (preliminary ruling on interpretation). Also preliminary rulings on the validity of secondary legislation in the light of the Geneva Convention, e.g. Case C-180/99 *Addou* ECLI:EU:C:2001:532.

733 See also preamble and Explanations to CFR.

734 Arts 3(5), 21(1), and 42 TEU; also Arts 208(2), 217(7) and 220 TFEU. See Case C-104/16 P *Council v Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario)* ECLI:EU:C:2016:973, paras 88, 90, 91, 93, referring to UN Charter and UN GA resolutions (concerning the Western Sahara).

in advance.⁷³⁵ Some recommendations of the Committee of Ministers are also expressly mentioned in EU legal instruments. Case law amplifies the effect of normative reception by title. I will now briefly mention five examples. The purpose is to provide an insight into this mode of normative reception in order to assess to what extent the examples may serve as precedents for EDC standards (next section⁷³⁶). The first two examples, marine pollution and quality of wine, do not concern Council of Europe standards, yet they hint at the non-negligible effects of exogenic standards—binding or non-binding—in the EU legal order.⁷³⁷ The last three examples highlight the effects of Council of Europe standards.

100 Standards for the discharge of polluting substances from ships

The International Convention for the Prevention of Pollution from Ships (Marpol 73/78) establishes standards to combat pollution of the marine environment.⁷³⁸ These standards were received into the EU legal order by Directive 2005/35 of the European Parliament and of the Council, which refers to the Marpol Convention by title in Article 2.⁷³⁹ In *Intertanko*, the ECJ held that the EU was not bound by the Marpol Convention and refused to assess the validity of the EU Directive in that light (even though the Directive had the objective of incorporating certain rules of the Marpol

735 Text to n 626.

736 Further §§ 105–106.

737 Other example in Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation [2006] OJ L378/41, e.g. Art 31: ‘Tenderers who have been awarded contracts shall respect internationally agreed core labour standards, e.g. the ILO core labour standards’. See also the *Codex Alimentarius* (updated) published by the WHO and the FAO, containing standards for food safety in the form of -non-binding- recommendations. Legislation in many member states is based on it. For the EU, see i.a. Regulation (EC) No 1831/2003 of the European Parliament and of the Council of 17 September 2003 laying down requirements for feed hygiene [2003] OJ L268/1, referring to the title of the *Codex Alimentarius*, taking it into account, but with sufficient flexibility (recital 15, Arts 21–22). Legal effects, e.g. Case C-236/01 *Monsanto Agricoltura Italia* ECLI:EU:C:2003:43, para 79 (defining a concept by referring to the *Codex Alimentarius*).

738 International Convention for the Prevention of Pollution from Ships (London, signed 2 November 1973); Protocol (17 February 1978) (Marpol 73/78).

739 Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements [2005] OJ L255/11.

Convention into EU law).⁷⁴⁰ But the fact that the Marpol Convention was binding on all Member States had consequences for the interpretation of provisions of secondary law which are within the scope of application of the Marpol Convention. The Court took account of the standards in the Marpol Convention in the interpretation of EU law ‘in view of the customary principle of good faith, which forms part of general international law’ and of the principle of sincere cooperation (now Article 4(3) TEU).⁷⁴¹ This *Intertanko* principle of ‘taking account of’ will be recalled in mode 6.⁷⁴² It is highly relevant for various exogenic instruments in the field of education, such as the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child. Like the Marpol Convention, these international agreements have been ratified by all the Member States, but not by the EU.⁷⁴³

101 Standards on quality of wine

A notable instance of effects in EU law are wine standards. An EU common agricultural policy Regulation refers in its corpus to recommendations of the International Organisation of Vine and Wine (OIV). In *Germany v Council*, the ECJ considered these recommendations to have been incorporated into EU law and attributed legal effects to them for the purpose of Article 218(9) TFEU.⁷⁴⁴

In 2001, an Agreement to which many Member States are parties but not the EU, establishes the International Organisation of Vine and Wine (OIV), an intergovernmental organisation of a scientific and technical nature. To attain its objectives, the OIV draws up recommendations. In 2007, Council Regulation 1234/2007 refers in several specific provisions to OIV recommendations, e.g. stating that the methods of analysis concerning the composition of products in the wine sector and rules concerning authorised oenological practices ‘shall be those recommended and published by the OIV’.⁷⁴⁵ In an action for annul-

740 Case C-308/06 *Intertanko* ECLI:EU:C:2008:312, paras 49–52.

741 Para 52.

742 Text to n 981.

743 On the CRC, see further *Teixeira* Case C-480/08 ECLI:EU:C:2010:83.

744 *Germany v Council* Case C-399/12 ECLI:EU:C:2014:2258.

745 Art 120g of Council Reg 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) [2007] OJ 2007 L299/1 (as amended by Reg 1234/2010 of the European Parliament and of the Council of 15 December 2010 [2010] OJ 2010 L346/11). Several other references to OIV recommen-

ment of a Council Decision, the ECJ has to ascertain whether the OIV recommendations constitute ‘acts having legal effects’ as provided in Article 218(9) TFEU.⁷⁴⁶ Germany claims that these acts only concern acts of international law binding on the EU.⁷⁴⁷ Having regard to several specific provisions in the EU Regulation, the Court states that ‘within the framework of the common organisation of the wine markets, the EU legislature *incorporates those recommendations into the legislation* adopted in that regard’.⁷⁴⁸ The recommendations are ‘capable of decisively influencing the content of the legislation adopted by the EU legislature in the area of the common organisation of the wine markets’.⁷⁴⁹ The Court finds that the EU, while not a party to the OIV Agreement, was ‘entitled to establish a position to be adopted on its behalf with regard to those recommendations, in view of their direct impact on the European Union’s *acquis* in that area’.⁷⁵⁰

102 *Council of Europe standards on data protection and standards on safety*

An example of EU legislation incorporating a Council of Europe recommendation by title is the Regulation of the European Parliament and the Council on Europol. It provides that Europol ‘shall take account of’ and ‘shall observe’ the principles of the 1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (not acceded to by the EU) and of Recommendation No R (87)15 of the Committee of Ministers to the member states on regulating the use of personal data in the police sector.⁷⁵¹ The preamble clarifies the aim that the data protection rules of Europol ‘should be autonomous

dations, e.g. in Arts 120f(a), 120g and 158a(1)(2) of Reg 1234/2007 and Art 9 of Reg 606/2009 (para 36).

746 Para 56.

747 Paras 35–36.

748 Para 61 (emphasis added), with regard to the cited articles (Arts 120f(a), 120g and 158a(1)(2) of Reg 1234/2007 and Art 9 of Reg 606/2009).

749 Paras 62–63.

750 Para 64. The common position was not annulled. Germany, which had voted against the proposal of the Commission on a common position, had to accept the position on behalf of the EU.

751 Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA [2016] OJ L135/53, Art 27. It concerns CoE Recommendation No R(87)15 of the Committee of Ministers to the member States ‘on regulating the use of personal data in the police sector’ (17 September 1987). See Convention for the Protection of

while at the same time consistent with other relevant data protection instruments applicable in the area of police cooperation in the Union', including the two Council of Europe instruments cited.⁷⁵²

Another EU instrument directly referring to the title of Council of Europe recommendations is the Council Resolution concerning police cooperation to prevent violence at football matches. To minimise risks, a Council of Europe checklist can be used. The list includes 11 Council of Europe recommendations.⁷⁵³

103 Council of Europe language education standards

The European reference standard for language education, the Common European Framework of Reference for Languages (CEFR), is a prominent example of a Council of Europe standard which has been received into the EU legal order in mode 3, i.e. by express reference to the title of the instrument. The Framework, use of which is recommended by the Committee of Ministers⁷⁵⁴, 'provides a common basis for the elaboration of language syl-

Individuals with regard to Automatic Processing of Personal Data ETS No 108 (Strasbourg, opened 28 January 1981, entered into force 1 October 1985), which has been ratified by all EU Member States, but is as such not open to the EU. For opening to the EU, see Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows No 181 (Strasbourg, opened 8 November 2001, entered into force 1 July 2004). This last instrument is not ratified by BE, EL, IT, MT, nor UK, not signed by SI, nor by the EU.

752 Recital 40.

753 Council Resolution of 3 June 2010 concerning an updated handbook with recommendations for international police cooperation and measures to prevent and control violence and disturbances in connection with football matches with an international dimension, in which at least one Member State is involved [2010] OJ C165/1. See section 2 in chapter nine, i.a. Rec (2001) 6 of the Committee of Ministers to member states on the prevention of racism, xenophobia and racial intolerance in sport. To note, the EU intends to accede to the CoE Convention on the Manipulation of Sports Competitions CETS No 215 (Maastricht, 18 September 2014) (signed by several Member States, not yet the EU), see COM/2015/086 final and COM/2017/0387 final.

754 CoE Recommendation CM/Rec(2008)7 of the Committee of Ministers to member states on the use of the Council of Europe's Common European Framework of Reference for Languages (CEFR) and the promotion of plurilingualism (2 July 2008): the Committee of Ministers recommends that governments of member states 'use every available means in accordance with their constitution, their national, regional or local circumstances and their education system to implement the measures set out in appendix 1 to this recommendation with respect

labuses, curriculum guidelines, examinations, textbooks, etc. across Europe.⁷⁵⁵ It serves as a reference tool for member states to develop and to implement consistent and transparent language education policies, inviting them to fully include language instruction in core educational aims.⁷⁵⁶ Several EU secondary law instruments refer to the CEFR, e.g. in order to indicate required language levels.⁷⁵⁷ Moreover, the European Commission has used the CEFR as a reference instrument for the European Qualifications Framework, Europass and the European Indicator of Language Competence.⁷⁵⁸ Europass, the ‘single Community framework for the transparency of qualifications and competences’, has been set up, i.a. to include the European Language Portfolio, which the Council of Europe developed on the basis of the CEFR.⁷⁵⁹ The European Indicator of Language Compe-

to the development of their language education policies’. The appendix details the ‘Measures to be implemented concerning the use of the Council of Europe’s Common European Framework of Reference for Languages (CEFR) and the promotion of plurilingualism’. See earlier CoE Recommendation R(98)6 of the Committee of Ministers to member states concerning modern languages (17 March 1998). Compare the less proactive action of the Committee of Ministers with regard to the RFCDC.

755 Council of Europe (2001) Common European framework of reference for languages: learning, teaching, assessment (CEFR), 1. Definition of six levels of foreign language proficiency: A1-A2, B1-B2, C1-C2, and three ‘plus’ levels, A2+, B1+, B2+.

756 Appendix 1, B(4).

757 E.g. Regulation (EU) No 1214/2011 of the European Parliament and of the Council of 16 November 2011 on the professional cross-border transport of euro cash by road between euro-area Member States [2011] OJ L316/1, Art 1(r) and Annex; Commission Directive (EU) 2016/882 of 1 June 2016 amending Directive 2007/59/EC of the European Parliament and of the Council as regards language requirements C/2016/3213 [2016] OJ L146/22, Annex; Council Recommendation of 22 May 2019 on a comprehensive approach to the teaching and learning of languages [2019] OJ C189/15, Art 4(g), Art 9(a).

758 CoE Recommendation CM/Rec(2008)7 of the Committee of Ministers to member states on the use of the Council of Europe’s Common European Framework of Reference for Languages (CEFR) and the promotion of plurilingualism (2 July 2008), recital.

759 Decision 2241/2004 of the European Parliament and of the Council of 15 December 2004 on a single Community framework for the transparency of qualifications and competences (Europass) [2004] OJ L390/6, see recital 4, Art 8, and Annex V, with reference to the CoE (‘The Europass-Language Portfolio (LP), developed by the Council of Europe, is a document in which language learners can record their language learning and cultural experiences and competences’). Europass includes also the Europass-CV.

tence was established in cooperation with the Council of Europe.⁷⁶⁰ Various EU instruments recognise the CEFR and the European Language Portfolio as tools, i.a. to enhance the European dimension, or in the European strategy for multilingualism.⁷⁶¹ Further action has been undertaken to create a Europass framework, modernised and adapted to the EU context, providing a strategy for the coordination of services offered in Member States.⁷⁶²

It is promising that the RFCDC, developing EDC/HRE further, took the CEFR as a source of inspiration. By the same token, it is possible that RFCDC standards will enter the EU legal order just as the CEFR did, once they are the subject of a recommendation from the Committee of Ministers. At present, the RFCDC is only a reference document.⁷⁶³

104 Council of Europe standards on the rule of law

A crucial and thought-provoking example of exogenic norms received into the EU legal order in mode 3 are the rule of law standards of the Council of Europe. Initially, these standards were used as a foundation to fill a gap in the EU legal order, i.e. to address systemic threats to the rule of law without activating Article 7 TEU. Since December 2017, they constitute essential elements underpinning the grounds to activate Article 7 TEU for the first time in EU legal history—no mean legal effect for an exogenic

760 See, i.a., Commission Communication ‘The European Indicator of Language Competence’ COM(2005) 356 final; Commission staff working document, Language competences for employability, mobility and growth Accompanying the document Communication From the Commission Rethinking Education: Investing in skills for better socio-economic outcomes SWD(2010) 372 final.

761 I.a. Council Resolution of 19 December 2002 on the promotion of enhanced European cooperation in vocational education and training [2003] OJ C13/2; Council Resolution of 21 November 2008 on a European strategy for multilingualism [2008] OJ C320/1. On EU language policy: A Van Bossuyt, ‘Is there an effective European legal framework for the protection of minority languages? The European Union and the Council of Europe screened’ (2007) 32 ELRev 860; S van der Jeught, ‘Conflicting Language Policies in the European Union and its Member States’ (Proefschrift, Vrije Universiteit Brussel 2015). See also Commission/EACEA/Eurydice, The teaching of regional and minority languages in schools in Europe (2019).

762 Decision (EU) 2018/646 of the European Parliament and of the Council of 18 April 2018 on a common framework for the provision of better services for skills and qualifications (Europass) and repealing Decision No 2241/2004/EC [2018] OJ L112/42.

763 CoE Reference Framework of Competences for Democratic Culture, Vol 1: Context, concepts and model (2018), p 19. See on the RFCDC, § 106.

standard in the EU legal order. Confronted with Polish rules indicating undesirable political interference with regard to the Polish Constitutional Tribunal, the Commission adopted the Framework to strengthen the Rule of Law. The Framework refers to principles defining the core meaning of the rule of law as a common value of the EU in accordance with Article 2 TEU based inter alia on Council of Europe standards and building on the expertise of the European Commission for Democracy through Law (Venice Commission).⁷⁶⁴ In two 2016 Recommendations (based on Article 292 TFEU), the Commission reiterated the reference to Council of Europe standards and recommended that the Polish authorities take the opinion of the Venice Commission fully into account.⁷⁶⁵ In a third and a fourth Recommendation in 2017, the Commission relied even more heavily on Council of Europe standards on the rule of law, referring to well established European standards, inter alia the 2010 Recommendation of the Committee of Ministers of the Council of Europe on judges: independence, efficiency and responsibilities.⁷⁶⁶ The Commission stated that the new Polish law conflicts with Council of Europe standards, in particular ‘the principle of irremovability of judges as a key element of the independence of judges as enshrined in the 2010 Council of Europe Recommendation’.⁷⁶⁷ The Polish authorities are recommended to ‘ensure that any jus-

764 Commission Communication 'A new EU Framework to strengthen the Rule of Law' COM(2014) 0158 final, 3, 4, 6, 9.

765 Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland [2016] OJ L217/53, recital 5 and para 74(c); Commission Recommendation (EU) 2017/146 of 21 December 2016 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374 [2017] OJ L22/65, recital 4 and para 65(c).

766 Commission Recommendation (EU) 2017/1520 of 26 July 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374 and (EU) 2017/146 [2017] OJ L228/19, para 25, and fnn 15, 21, 23, referring to CoE Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe on judges: independence, efficiency and responsibilities (17 November 2010), also to the CoE Plan of Action on Strengthening Judicial Independence and Impartiality (13 April 2016) (CM(2016)36 final), and various opinions of the Venice Commission. The same line is continued in Commission Recommendation of 20 December 2017 regarding the rule of law in Poland complementary to Commission Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520 [2018] OJ L17/50, see i.a. para 6 (‘independence of judges as enshrined in the case law of the Court of Justice and of the European Court of Human Rights, and in European standards’, referring to the 2010 CM Recommendation), and fnn 20, 25, 30, 34, 35, 36, 77.

767 Ibid, fn 34, also fn 23.

tice reform upholds the rule of law and complies with EU law and the European standards on judicial independence'.⁷⁶⁸ In December 2017, the Commission drafted a proposal for a 'Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law' in accordance with Article 7(1) TEU.⁷⁶⁹ The explanatory memorandum continued to rely on European standards and the Recommendation of the Committee of Ministers cited above.⁷⁷⁰ Several non-EU actors were cited, not only the Council of Europe Committee of Ministers, but also the Parliamentary Assembly, the Venice Commission, the Commissioner for Human Rights, and of course, the ECtHR,⁷⁷¹ illustrating the impact of a wide European and international consensus at crucial moments of EU action to protect the rule of law.

Other EU institutions also refer to the Council of Europe standards on the rule of law. The European Parliament urged the Polish Parliament and Government 'to implement fully all recommendations of the Commission and the Venice Commission'.⁷⁷² In *Yanukovych*, the EU General Court interpreted and applied the value of the rule of law in Article 2 TEU by

768 Commission Recommendation (EU) 2017/1520 of 26 July 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374 and (EU) 2017/146 [2017] OJ L228/19, para 53(e); Commission Recommendation of 20 December 2017 regarding the rule of law in Poland complementary to Commission Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520 [2018] OJ L17/50, para 47(g). Infringement procedures have been started (Art 258 TFEU).

769 Commission Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law COM(2017) 835 final (Reasoned proposal in accordance with Art 7(1) TEU). See recital 7, referring to CoE actors; and explanatory memorandum, referring to CoE instruments.

770 See e.g. paras 116 and 124, fn 54, 59, 64, 68, 69, 70, 111, 118, and 134. See also Commission Communication 'The 2019 EU Justice Scoreboard' COM(2019)198 final.

771 Proposal recital 7 and para 183. See CoE Parliamentary Assembly Resolution 2188(2017) 'New threats to the rule of law in Council of Europe member States: selected examples' (11 October 2017); Opinion 904/2017 CDL(2017)035 of the Venice Commission on the draft act amending the Act on the National Council of the Judiciary, on the draft act amending the Act on the Supreme Court proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts (CDL(2017)035), and Opinion 892/2017 CDL(2017)037 of the Venice Commission on the Act on the Public Prosecutor's Office as amended (CDL(2017)037).

772 European Parliament Resolution of 15 November 2017 on the situation of the rule of law and democracy in Poland (2017/2931(RSP)), para 7.

reference to the rule of law checklist adopted by the Venice Commission on 11–12 March 2016.⁷⁷³ In *Commission v Poland* (2019), Advocate General Tanchev referred to various guidelines on judicial independence adopted by European and international bodies, inter alia the European Charter on the statute of judges. He noted that ‘such guidelines are so-called “soft law” or non-binding norms, yet they embody a “normative consensus” of rules and principles shared by the Member States (and other jurisdictions) which provide a useful reference for the Court’.⁷⁷⁴ In line with this finding, the ECJ referred in its judgment to an Opinion of the Venice Commission and gave effect to European and international standards on judicial independence and irremovability of judges. The Court held that Poland had failed to fulfil its obligations under the Article 19(1) TEU.⁷⁷⁵

In short, the title of exogenic Council of Europe standards on the rule of law—including the title of a recommendation of the Committee of Ministers—appears in several EU legal acts. Council of Europe standards, also referred to in ECJ case law, are essential elements for EU action protecting the rule of law in Member States. To what extent can the effects of the Council of Europe standards on the rule of law be seen as a precedent for Council of Europe standards on EDC?

2. Occasional reception of EDC standards by incorporation of the title

105 Reference to EDC standards

So far the Charter on EDC/HRE has not been mentioned by title in EU legislation (legal acts adopted by legislative procedure, Art 289(3) TFEU).⁷⁷⁶ While EU legal acts in the education field repeatedly refer to

773 Case T-348/14 *Yanukovych* ECLI:EU:T:2016:508, para 99 (Case C-599/16P ECLI:EU:C:2017:785, appeal dismissed).

774 Case C-619/18 *Commission v Poland* ECLI:EU:C:2019:531, Opinion of AG Tanchev, para 72. See also W Hoffmann-Riem, ‘The Venice Commission of the Council of Europe - Standards and Impact’ (2014) 25 *European Journal of International Law* 579.

775 Case C-619/18 *Commission v Poland* ECLI:EU:C:2019:531, para 82. See Case C-64/16 *Juizes Portugueses* ECLI:EU:C:2018:117, paras 30–32 (for judicial independence in a Member State, no reference to the CoE, yet reference to Art 2 and Art 19 TEU). For a critical assessment, see S O’Leary, ‘Europe and the Rule of Law’ (Keynote speech, ESCB Annual Legal Conference, Frankfurt 6 September 2018). Further *Commission v Poland* Case C-192/18 pending.

776 No results in EUR-Lex (15 October 2019).

cooperation with the Council of Europe, they generally do not mention Council of Europe instruments or EDC standards in particular.⁷⁷⁷ An exception is a 2018 Council recommendation on promoting common values, stating that Member States should ‘make effective use of existing tools to promote citizenship education, such as the Council of Europe’s Competences for Democratic Culture framework’⁷⁷⁸ (which is intended to operationalise the Charter on EDC/HRE). Some policy documents and EU preparatory acts refer to the titles of Council of Europe instruments on EDC. In a resolution of 2016, the European Parliament calls on Member States to draw up national action plans for fundamental rights education and to implement the Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education.⁷⁷⁹ In the 2016 Council conclusions on developing media literacy and critical thinking through education and training, the Council expressly refers to the Council of Europe Framework of Competences of Democratic Culture. This can be categorised as a mode 3 reception of exogenic norms, albeit a watered-down version. The reference is not incorporated in a legislative act and the legal effects are minimal, as Member States are only invited to ‘consider using’ the Framework.⁷⁸⁰ In 2018 the Council referred to the Charter on EDC/HRE in its conclusions on ‘the role of young people in building a secure, cohesive and harmonious society in Europe’ and invites the Member States and the Commission to

777 In youth policy, some recommendations of the Committee of Ministers have been recalled with regard to information, see Conclusions of the Council and the Ministers for Youth meeting within the Council of 30 November 1994 on the promotion of voluntary service periods for young people [1994] OJ C348/2, or Council Resolution of 31 March 1995 on cooperation in the field of youth information and studies concerning youth [1995] OJ C207/5. For mentioning of EDC standards in the preamble, see i.a. n 858.

778 Council Recommendation of 22 May 2018 on promoting common values, inclusive education, and the European dimension of teaching [2018] OJ C195/1, para 3.

779 European Parliament Resolution of 13 December 2016 on the situation of fundamental rights in the European Union in 2015 (2016/C 238/01). See also European Parliament resolution of 12 June 2018 on modernisation of education in the EU (2017/2224(INI)), recital.

780 Council Conclusions of 30 May 2016 on developing media literacy and critical thinking through education and training [2016] OJ C212/5, para 3 (‘Invites the Member States’). See also Commission Communication supporting the prevention of radicalisation leading to violent extremism COM(2016) 379 final, 11.

consider promoting and reinforcing, when and where relevant, the concept of 'Education for democratic citizenship and human rights education', which could be implemented in formal and non-formal learning environments and the peer-to-peer approach, respecting subsidiarity and freedom of education.⁷⁸¹

Other instruments which expressly refer to the title of the Charter on EDC/HRE are joint programmes of the Council of Europe and the Commission. These programmes, though, only require that one EU Member State takes part besides other (non-EU) member states of the Council of Europe. They can thus hardly be seen as EU orientated.⁷⁸² It should be noted that the Committee of the Regions and the EESC also refer to EDC standards in their Opinions.⁷⁸³

While the reference to the Council of Europe instruments on EDC in the examples given may have only minor legal effects, they nevertheless show that EDC standards have been received into the EU legal order in mode 3 and are not considered alien to that legal order.

106 *Attractive de lege ferenda*

If in various fields EU legislation refers to standards originating outside the EU legal order by their title, the same pathway could be followed for EDC standards. If it was possible to use the third mode of reception for recommendations of the Committee of Ministers on data protection, safety, language education, and the rule of law, comparable normative value might be attributed to the Recommendation on the Charter on EDC/HRE in the EU legal order. From the perspective of legislative technique, there is no obstacle to referring to the title of this Recommendation, provided that there is a legal basis in the Treaties (examined in Chapter nine). Moreover, from the perspective of the Memorandum of Understanding, the EU

781 Council Conclusions on the role of young people in building a secure, cohesive and harmonious society in Europe [2018] OJ C195/13, para 35 (emphasis added), see also paras 16 and 34 and fn 3.

782 See map on <pjp-eu.coe.int/en/web/charter-edc-hre-pilot-projects/home>. Not involved in the Joint Programme 'Human Rights and Democracy in Action' (2013–2016) were, i.a., BE, DE, DK, IT, LU, NL, PT. See also text to n 898.

783 Opinion of the Committee of the Regions on the 'EU Citizenship Report 2010' [2011] OJ C166/3, para 12 (citing the 2002 Recommendation on EDC); Opinion of the European Economic and Social Committee on 'Education about the European Union' SOC/612 (21 March 2019), para 1.16 (referral to RFCDC). See also Commission/EACEA/Eurydice, Citizenship Education at School in Europe (2005), p 17. Text to n 35.

would be honouring its commitment that ‘the relevant Council of Europe norms will be cited as a reference in European Union documents’.⁷⁸⁴ In the field of education, the Charter on EDC/HRE certainly belongs to the category of ‘relevant Council of Europe norms’. EDC is even considered to be a shared priority.

De lege ferenda EDC standards could conceivably be received into the EU legal order in a comparable way to standards on language learning. The Committee of Ministers sees the CEFR as a flexible tool which does not offer ready-made solutions, but which ‘must always be adapted to the requirements of particular contexts’. This is true for EDC standards too. Moreover, language learning is not unrelated to citizenship objectives. The Committee of Ministers considers CEFR to be ‘a tool for coherent, transparent and effective plurilingual education in such a way as to promote democratic citizenship, social cohesion and intercultural dialogue’.⁷⁸⁵

The precedent created by incorporating rule of law standards in EU legal acts on the basis of their title is appealing (though preferably without having to wait for dramatic non-compliance by a Member State). If institutions like the Commission, Parliament, and the ECJ (General Court) can enhance the capacity of the EU to ensure effective and fair protection of the *rule of law* in Member States by referring to the title of Council of Europe standards, including a recommendation of the Committee of Ministers, they could, equally, enhance the capacity of the EU to ensure effective democracy and respect for human rights, the other main values mentioned in Article 2 TEU, in Member States by referring to Council of Europe standards on EDC/HRE by title. Member States enjoy wide discretion in organising their judicial systems just as they do in relation to their educational systems. However, in exercising that discretion, they must respect the values of Article 2 TEU, in relation to which the European stan-

784 Para 17.

785 CoE Recommendation CM/Rec(2008)7 of the Committee of Ministers to member states on the use of the Council of Europe’s Common European Framework of Reference for Languages (CEFR) and the promotion of plurilingualism (2 July 2008), appendix 1, A, 1. See also A Osler and H Starkey, *Citizenship and Language Learning: international perspectives* (Trentham Books 2005); and CoE Recommendation CM/Rec(2014)5 of the Committee of Ministers to member States on the importance of competences in the language(s) of schooling for equity and quality in education and for educational success (2 April 2014), appendix 6(d): ‘all languages are conducive to the success of school learning processes as much as to individual fulfilment and preparation for active life and the exercise of citizenship’.

dards supported by a broad international consensus are relevant, as appears from the instruments of the EU institutions. The Commission underlines ‘that where a constitutional justice system has been established, its effectiveness is a key component of the rule of law’.⁷⁸⁶

There is an understanding that the principles of the rule of law include:

legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws ... Both the Court of Justice and the European Court of Human Rights confirmed that those principles are not purely formal and procedural requirements.⁷⁸⁷

Just like the rule of law, democracy is a value, expressed in terms of principles which ‘are not purely formal and procedural requirements’. Substantive democracy needs EDC.⁷⁸⁸ Compared to the quality of wine—important for the internal market—the quality of democracy and of respect for human rights is significantly more important, because it is the very foundation of life in society. Just as the EU cannot afford to lag behind internationally recognised standards on wine, it cannot—a fortiori—afford to fall behind internationally recognised standards on EDC/HRE, at least not in a Union which ‘places the individual at the heart of its activities’ (recital CFR), or a Union ‘in which decisions are taken as openly as possible and as closely as possible to the citizen’ (intention in Article 1 TEU).

786 Explanatory memorandum to Commission Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law COM(2017) 835 final, para 91.

787 Commission Communication ‘A new EU Framework to strengthen the Rule of Law’ COM(2014) 0158 final, p 4.

788 Text to n 1684.