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LEVEL PLAYING FIELD – THE MEANINGS OF A DISCOURSE JUSTIFYING THE ACTION OF THE EUROPEAN UNION

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Although the 'level playing field' argument has been used for a long time, it is now being exploited to a greater extent in a context of geopolitical recomposition. It accompanies a two-pronged approach to public action in the market economy promoted by the European Union. Internally, it is intended to justify corrective action in the internal market, whether in terms of respecting the competitive order or promoting positive integration. Externally, the 'level playing field' aims to protect the internal market by exploiting the Brussels effect to re-establish a balance between European and non-European enterprises.

The 'level playing field' expression is trendy. It has unquestionably become one of the refrains of the European Union in the 2020s. One may consider this is a consequence of Brexit, since the 'level playing field' has been mentioned several times to guide the relations between the Union and the United Kingdom after the latter's withdrawal.[1] What is obvious in particular is a 'Brussels effect', which expresses the European Union's normative will to power in its relation to the rest of the world – '*How the European Union Rules the World*', as Anu Bradford sums up in her legal bestseller.[2]

That the expression 'level playing field' is an English one is not insignificant. It is usually translated into French by '*conditions équitables de concurrence*' or '*conditions de concurrence équitables*' (equitable competition conditions). It commonly means, according to the *Cambridge dictionnary*, '*a situation in which everyone has the same chance of succeeding*'. Far from being limited to the legal field, this expression encompasses all the spheres of the economic, social and political life when players are in a competition relation. Thus, 'level playing field' is applicable to sports rules,[3] the fight against social inequality,[4] or even the virtues of a democratic regime.[5] However, it is unquestionably in the economic field that it

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1. E. Ares, D. Carver, S. Fella *et al.*, 'The EU-UK Trade and Cooperation Agreement: Level Playing Field', House of Commons Library, Briefing Paper N° 9190, 20 May 2021.
2. A. Bradford, *The Brussels Effect. How the European Union rules the World* (OUP 2020).
3. L. Francis, 'The Metaphor of a "Level Playing Field" in Games and Sports Get access Arrow' in T. Hurka, Games (ed.), *Sports, and Play: Philosophical Essays* (OUP 2019) 137-54.
4. S. Baum and M. McPherson, *Can College Level the Playing Field?: Higher Education in an Unequal Society* (Princeton University Press 2022).
5. S. Levitsky, L. Ahmad, 'Way Democracy's Past and Future: Why Democracy Needs a Level Playing Field', (2010) vol. 21, 1, Journal of Democracy 57-68.

is most used. It is true that competition between economic operators is consubstantial with the market economy. The English language maintains the confusion as '*competition*' refers in French to both '*compétition*' (competition) and '*concurrence*' (rivalry), but it will not be necessary here to distinguish between the two words. The 'level playing field' brings us from economics to the law since legal rules are necessary to guarantee the competitive operation of the market. There has been an increasing number of occurrences of the 'level playing field' in a series of Union legal acts, one of the most emblematic of which is the regulation on foreign subsidies because the latter may 'distort the internal market and undermine the level playing field for various economic activities in the Union'.[6] It is only one text among others which all lead to one question: to what extent does the 'level playing field' contribute to shape the Union legal rules?

Pursuant to Article 119 TFEU, the Union and Member States must respect the principle of the open market economy where competition is free. Upsetting words have been uttered. That principle supposedly induces an ideological bias of the Union and, because it is linked to a competitive market economy, the 'level playing field' would supposedly 'illustrate the foggy neoliberal vocabulary which is currently flooding the legal discourse, especially that which is produced by the Union'.[7] However, concluding that the discourse referring to the 'level playing field' is of a purely neoliberal nature – which must still be defined – is reductive. While that discourse has an affinity with competition rules, it does not quite coincide with them, at least in Union law. The French translation of 'level playing field' is quite revealing in that respect. What is most often at stake is equitable competition conditions, which refers in English to '*fairness*'. The notion then gets blurred, so endless are the debates – which will be carefully avoided here – that fairness raises in law and economics. What should be considered to be fair? The answer, in our sense, can only be a political one. Thus the 'level playing field' nurtures an eminently political discourse the aim of which is to found public action in a market economy designed to guarantee or restore the conditions in which the actors of the market compete so that that competition is fair.

Conducting some research in the Community acquis as consolidated in Eur-Lex is quite enlightening. Though the expression is rather old, its use significantly developed from the 2010-2020s onwards. Its first occurrences in Community law date back to the 1970s. It was initially used in a few free-trade agreements concluded by the European Economic Community and third countries. For example, the agreement entered into with the Swiss Confederation provides in its preamble that it aims to 'ensure, with due regard for fair conditions of competition, the harmonious development of their commerce for the purpose of contributing to the work of constructing Europe'.[8] Article 1 stipulates that it purports to 'provide fair conditions of competition for trade between the Contracting Parties'.[9] Fair competition

6. European Parliament and Council Regulation (EU) 2022/2560 of 14 December 2022 on foreign subsidies distorting the internal market [2002] OJ L 330, 1, Rec. 4.
7. N. Pigeon, 'Extraterritorialité et level playing field' in A. Hervé, C. Rapoport (dir.), *L'Union européenne et l'extraterritorialité, Acteurs, fonctions, réactions* (Presses universitaires de Rennes 2023) 213.
8. Agreement between the European Economic Community and the Swiss Confederation [1972] OJ L 300, 189.
9. ibid for the same wording: Agreement between the European Economic Community and the Republic of Austria [1972] OJ L 301, 2; Agreement between the European Economic Community and the Kingdom of Sweden [1972] OJ L 300, 97; Agreement between the European Economic Community and the Republic of Portugal [1972] OJ L 301, 165; Agreement between the European Economic Community and the Republic of Finland [1973] OJ L 328, 2.

conditions have also occasionally been mentioned in transport[10] and agricultural[11] common policies. For example, a series of regulations on the common organisation of the market in wine were driven by the necessity to establish or restore fair conditions of competition between national and imported wines.[12] In 1977, the 'level playing field' was mentioned for the first time in a harmonised directive accompanying the realisation of the common market in the banking sector. Indeed, the first banking directive aimed at drawing closer national legislations on the exercise of the banking activity in the common market to ensure 'fair conditions of competition between credit institutions'.[13] Banking and finance law later became a chosen land for the 'level playing field'.

Despite the realisation of a single market becoming an internal one, there was no development of a discourse on the level playing field in the 1980s. It was only in the 1990s that the fair conditions of competition were mentioned again as the foundation of Community action. That can be explained both by the perspective of the enlargement of the Union to Eastern and Central Europe and the implementation of the World Trade Organisation. Thus, in its Action plan for 1995, the European Commission stated it wanted to ensure a

> level playing field by taking action against restrictive agreements, concerted practices, abuse of dominant positions and mergers which are incompatible with the common market, government subsidies and exclusive rights. It will take account of the competitive challenges facing European businesses from the world market so as to keep the single market competitive and maintain competitive markets and thereby promote industrial efficiency in Europe through the free operation of market mechanisms.[14]

This shows a double dimension of the level playing field, which is at the same time internal – as it accompanies the realisation of an internal market, and external – insofar as its objective is the European Union's relations with the rest of the world.

10. Council Proposal of decision on the establishment of a common price system for the use of transport infrastructures [1971] OJ C 62, 15; Intermediary report of the Commission to the Council on the price for use of transport infrastructures COM/1975/0493.
11. Council Proposal for a Regulation (EEC) on Community rules applicable in the matter of agricultural products to the Channel Islands and the Isle of Man (submitted to the Council by the Commission); Commission Decision of 23 March 1977 authorizing Ireland to take protective measures in respect of certain processed agricultural products under Article 135 of the Act of Accession (77/289/EEC) [1977] OJ L 97, 29.
12. Council Regulation (EEC) 2680/72 of 12 December 1972 amending Regulation (EEC) 816/70 laying down additional provisions for the common organisation of the market in wine and Regulation (EEC) 817/70 laying down special provisions relating to quality wines produced in specified regions [1979] OJ C 52; Council Regulation (EEC) 1990/80 of 22 July 1980 amending Regulation (EEC) 337/79 to take account of resinated wine (retsina) [1980] OJ L 195, 6; Council Regulation (EEC) 459/80 of 18 February 1980 amending Regulation (EEC) 337/79 on the common organization of the market in wine and Regulation (EEC) 338/79 laying down special provisions for quality wines produced in specified regions [1980] OJ L 57, 32; Council Regulation (EEC) 460/80 of 18 February 1980 amending Regulation (EEC) 352/79 authorizing the coupage of German red wines with imported red wines [1980] OJ L 57, 35. See Case C-244/80 *Pasquale Foglia v Mariella Novello* [1981], Opinion of AG Sir Gordon Slynn, *Rec*., 3076. Council Regulation (EC) 1493/1999 of 17 May 1999 on the common organisation of the market in wine, [1999] OJ L 179, 1.
13. Council First Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions [1977] OJ L 322, 30.
14. Commission, Work programme for 1995, COM (95) 26, 10. Commission, Action programme and timetable for the implementation of the initiatives announced in its communication of 14 September 1994 entitled 'Industrial competitiveness policy for the European Union', COM (95) 87, Appendix B/12.

That double dimension is present first in the decision-making process of the Commission which refers to the notion of fair conditions of competition not only, and mainly, in anti-dumping law, but also, though to a lesser extent, in State-aid law. Then, and that is where the evolutions have been the most interesting, depending on the fields of Community action, the level playing field has been used to justify the measures of positive integration that were adopted in accordance with common policies – agriculture, fishing and transport – and the harmonisation necessary to the realisation of the common market (banking and financial services, free movement of workers, consumer protection, etc.), which insisted more on the external dimension in some policies (fishing and transport) and on the internal one in others, especially those relying on harmonising directives. For example, the harmonising directives on excise duties were sometimes presented as purporting to 'prevent distortions of competition, and thus also to bring about a level playing field in sectors of economic activity where excise duties are levied'.[15] In the transport sector, the expression 'level playing field' was used in particular in the 1990s and 2000s, especially in external relations.[16] The Commission for example stated that the policy in the transport sector was 'based on the free market and fair conditions of competition'[17] while the Council agreed that 'the European transport system [developed] under fair conditions of competition'.[18] Starting from the 2000s, the discourse on the level playing field accompanied the opening up to competition of some sectors, like that of energy since '[to improve] the functioning of the market remain, notably concrete provisions are needed to ensure a level playing field'.[19] Indeed, as the Commission underlined, '[t]he liberalisation of markets in general and the establishment of a level playing field between various operators may have positive effects for competition within the European Union'.[20]

It was only at the end of the 2010s that the use of 'level playing field' significantly increased in the legal acts of the Union. Thus, there is a reference to the conditions of fair competition in a recital of some texts adopted in the mid-2010 without it having any special

15. Case C-240/01 *Commission v Germany* [2003] ECR I-4733, Opinion of AG Geelhoed, para 53.
16. European Parliament and Council Regulation (EC) N° 785/2004 of 21 April 2004 on insurance requirements for air carriers and aircraft operators [2004] OJ L 138, 1, Rec. 3: 'Common action is necessary to ensure that these requirements also apply to air carriers from third countries in order to ensure a level playing field with Community air carriers.' See also Multilateral Agreement between the European Community and its Member States, the Republic of Albania, Bosnia and Herzegovina, the Republic of Bulgaria, the Republic of Croatia, the former Yugoslav Republic of Macedonia, the Republic of Iceland, the Republic of Montenegro, the Kingdom of Norway, Romania, the Republic of Serbia and the United Nations Interim Administration Mission in Kosovo on the establishment of a European Common Aviation Area [2006] OJ L 285, 3: 'Recognising the integrated character of international civil aviation and desiring to create a European Common Aviation Area (ECAA) based on mutual market access to the air transport markets of the Contracting Parties and freedom of establishment, with equal conditions of competition, and respect of the same rules – including in the areas of safety, security, air traffic management, social harmonisation and environment'. Euro-Mediterranean aviation agreement between the European Community and its Member States, of the one part and the Kingdom of Morocco, of the other part [2006] OJ L 386, 57: 'desiring to ensure a level playing field for air carriers'.
17. Commission Resolution on communication 'Towards a new maritime strategy' COM (96)0081 [1997] OJ C 150, 52(B).
18. Council Resolution of 19 June 1995 on the development of rail transport and combined transport, [1995] OJ C, 1.
19. European Parliament and Council Directive 2003/55/EC of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC [2003] OJ, 57, Rec. 2.
20. State aid N° C 16/2005 (ex N232/2004) Envisaged sale of the Tote to the Racing Trust Invitation to submit comments pursuant to Article 88(2) of the EC Treaty [2005], OJ C 168, 41 para 62. See also Council Resolution of 7 February 1994 on the development of Community postal services [1994], OJ C 48, 3, on the fair competition conditions ensured among universal service providers and other operators.

meaning.[21] To give a rough estimate, in the 2020-2022 period, there were thirty legislative acts (regulations and directives), two decisions on the signature of international agreements, two decisions in the field of the CFSP, two decisions of the CBE and four recommendations of the European Systemic Risk Board. One should add fourteen delegated regulations and three implementing regulations of the Commission.[22]

Should this be considered as a stepping up of the discourse on the level playing field or a simple fad, or, on the contrary, is it possible to see it as a real evolution of the action of the Union? That discourse could reveal a paradigm shift in the conception, in Union law, of the open market economy where competition is free. On the one hand, the level playing field is being sought in the internal market in order to establish fair competition conditions between the economic actors, which means that the only play of competition rules is not enough and that public intervention on the market is therefore necessary. On the other hand, time for blind or even naive faith in the virtues of global free trade is over, and there is now a will to guarantee a level playing field among European and third-country companies.

This contribution offers to study the discourse on the level playing field produced by the institutions of the Union, which reveals justifying virtues. Far from meaning a market economy spontaneously producing a competition code, the level playing field is mainly referred to to justify public action in a market economy which, depending on the perspective, purports to correct (I) or protect (II) the internal market.

I. Corrective action in the internal market

Intuitively, a first type of discourse anchors the level playing field in internal market law.[23] One may reasonably understand that a space without internal borders where goods, people, services and capital move freely according to a fair competition regime presupposes a level playing field among economic actors. Quite strangely, there is almost no discourse on the level playing field when freedom of movement is mentioned. There is at most one instance in a document where it was presented by the Commission as retrospectively explaining the

21. See for example Commission Regulation (EU) N° 1137/2014 of 27 October 2014 amending Annex III of Regulation (EC) N° 853/2004 of the European Parliament and of the Council as regards the handling of certain offal from animals intended for human consumption [2014] OJ L 307, 28, Rec. 6: 'To promote better regulation and competitiveness a high level of food safety must be maintained, while offering a level-playing field for operators, which is also sustainable for small and medium-size slaughterhouses'. European Parliament and Council Regulation (EU) 2018/848 of 30 May 2018 on organic production and labelling of organic products and repealing Council Regulation (EC) N° 834/2007 [2018] OJ L 150, 1, Rec. 85: 'Small farmers and operators that produce algae or aquaculture animals in the Union individually face relatively high inspection costs and administrative burdens linked to organic certification. A system of group certification should be allowed in order to reduce the inspection and certification costs and the associated administrative burdens, strengthen local networks, contribute to better market outlets and ensure a level playing field with operators in third countries.'
22. Decisions on State aid and implementing regulations on anti-dumping are not taken into account.
23. European Parliament and Council Directive (EU) 2018/957 of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2018] *OJ* L 173, 16, Rec. 1 'The freedom of movement for workers, freedom of establishment and freedom to provide services are fundamental principles of the internal market enshrined in the Treaty on the Functioning of the European Union (TFEU). The implementation and enforcement of those principles are further developed by the Union and aim to guarantee a level playing field for businesses and respect for the rights of workers'.

'new approach to technical harmonisation and standards' for the free movement of goods.[24] There are many more mentions of the level playing field, on the contrary, in competition law (A) or when a normative action of the Union is to be founded (B).

A. An ambiguous relation with competition law

If one understands level playing field as meaning fair competition conditions, it necessarily has special affinity with competition law. There are two types of discourse according to that reading.

A competition doctrine of the level playing field. A first perspective consists in retaining a consubstantial relation between competition law and the level playing field. It is obvious in a whole series of opinions of Advocate General Kokott who suggests a real competition doctrine of the level playing field. The latter indeed takes on an ontological meaning in the opinions of the advocate general who does not hesitate to call it 'The fundamental aim of uniform conditions of competition for all undertakings operating in the internal market'.[25] Her opinion also insists on 'the fundamental objective of European competition law, which is to create framework conditions that are as uniform as possible for all undertakings active on the internal market ("level playing field")'[26] and refers to her conclusion in which she makes a list of references to the principle, which is described on different levels.

On the substantial level, 'One of the basic conditions for the development of effective competition on a market is the ensuring of fair conditions of competition as between the various operators'[27] and 'European competition law must rather be interpreted and applied in such a way that, as a result of a uniform legal framework, equivalent conditions of competition apply to all undertakings operating in the internal market ("level playing field")'.[28] The 'substantive law of unfair competition' should be implemented along uniform criteria in order for 'uniform conditions in respect of EU substantive competition law [to] apply to all undertakings operating in the internal market'.[29] Thus,

> as a central element of the competition rules necessary for the functioning of the internal market, the notion of undertaking must be given a uniform interpretation and application throughout the European Union and cannot depend on the particularities of the Member States' national company law. Otherwise it would not be possible to ensure a uniform legal framework ('level playing field') for undertakings active on the internal market.[30]

Article 101 TFEU is therefore presented as supporting 'the fundamental objective of European competition law, which is to create framework conditions that are as uniform as

24. Commission Interim Report from the Commission to the Stockholm European Council – Improving and simplifying the regulatory environment COM (2001) 0130 final, Sheet I.
25. Case C-73/11 P *Frucona Košice a. s. v European Commission* [2012], Opinion of AG Kokott, para 55.
26. Case C-557/12 *Kone AG & Ors* [2014], Opinion of AG Kokott, para 29.
27. Case C 431/07 P *Bouygues SA and Bouygues Télécom SA v Commission of the European Communities* [2008], Opinion of AG Trstenjak, para 125.
28. Case C-275/10 *Residex Capital IV CV v Gemeente Rotterdam* [2011], Opinion of AG Kokott, para 67.
29. Case C-681/11 Bundeswettbewerbsbehörde and Bundeskartellanwalt v Schenker & Co. AG & Ors [2013], Opinion of AG Kokott, para 48.
30. Case C-501/11 P *Schindler Holding Ltd & Ors v European Commission*, [2019], Opinion of AG Kokott, para 76.

possible ("*level playing field"*) on the internal market for all undertakings active in it'.[31] Similarly, the requirements of Article 102 TFEU 'must be administered uniformly throughout the European Union so as to ensure that all undertakings active on the internal market operate within framework conditions for the rules of competition which are as uniform as possible ("level playing field")'.[32] The assertion is also true for the *de minimis* rules in antitrust practices in that they '[support] the creation of equal competition conditions ('level playing field') (35) in the internal market and also [enhance] legal certainty for the undertakings concerned'.[33]

On the institutional level, Advocate General Kokott explains that the choice of establishing the 'Commission [as] the supranational competition authority was to subject all undertakings in the European Union to uniform rules in the field of competition law and to create equal conditions of competition (a "level playing field") for them in the internal market'.[34]

On the jurisdictional level, the opinion of the advocate general insists on the necessity for national courts to apply Article 101 TFEU uniformly when they assess the civil liability of the parties to an agreement under review. Indeed, if the conditions of the implementation of that responsibility were different among Member States, that would challenge 'the fundamental objective of European competition law, which is to create framework conditions that are as uniform as possible ('*level playing field*') on the internal market for all undertakings active in it'.[35]

Lastly, on the procedural level, the principle *non bis in idem* 'in the field of competition law (…) helps to improve and facilitate the business activities of undertakings in the internal market and, ultimately, to create uniform conditions of competition (a "level playing field") throughout the EEA'.[36]

The level playing field thus seems to be a favourite argument of Advocate General Kokott to establish the foundations of competition law in the internal market. It allows to justify a double characteristic of that law. First, the latter purports to ensure equality among the economic operators. Then, this implies a uniform application of competition rules in the internal market.

In any way, one should not be mistaken as to the level playing field. As the Commission asserted in its directives on the application of Article 81(3) of the Treaty,[37] 'Any claim that restrictive agreements are justified because they aim at ensuring fair conditions of competition on the market is by nature unfounded and must be discarded'.[38] Indeed, while 'The purpose of Article [101 TFEU] is to protect effective competition by ensuring that markets remain open and competitive [, t]he protection of fair conditions of competition is a task for the legislator in compliance with EEA law obligations and not for undertakings to regulate themselves'.[39] One may conclude that the level playing field cannot be an argument

31. Case C-435/18 *Otis GmbH & Ors v Land Oberösterreich & Ors* [2019], Opinion of AG Kokott, para 55.
32. Case C-23/14 *Post Danmark A/S v Konkurrencerådet* [2015], Opinion of AG Kokott, para 77.
33. Case C-226/11 *Expedia Inc. v Autorité de la concurrence & Ors* [2012], Opinion of AG Kokott, para 37.
34. Case C-550/07 P Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission [2010], Opinion of AG Kokott, para 169.
35. Case C-435/18 *Otis GmbH & Ors v Land Oberösterreich & Ors* [2019], Opinion of AG Kokott, para 55.
36. Case C-17/10 Toshiba Corporation and others v Úřad pro ochranu hospodářské soutěže [2011], Opinion of AG Kokott, para 118.
37. Commission Communication, Notice Guidelines on the application of Article 81(3) of the Treaty, [2004] OJ, 97, para 47. Guidelines on the application of Article 53(3) of the EEA Agreement [2007] OJ C 208, 1, para 47.
38. ibid.
39. ibid.

that would in itself allow to exempt an agreement under Article 101(3) TFEU. In other words, it is not for companies to adopt anti-trust behaviour to restore fair competition conditions. That mission is the mission of competition authorities or courts via the application of anti-trust practice law.

However, in the decision-making practice of the Commission, the level playing field is seldom mentioned in the decisions adopted under Articles 101 and 102 TFEU.[40] What it reveals is rather that the relaxing of competition rules may be a means of supporting European companies against third-country companies which are subject to lower requirements from their State of origin. In the control of concentrations, there is a paragraph in a decision in which the European Commission considers that the commitments of railway operators as to the pricing of services in the stations and in the maintenance centres allow to 'create a level playing field'.[41]

The correlation with State aid law. The argument of the level playing field is used in very few decisions of the Commission on State aid.

First, all State-aid law is founded on the idea of the level playing field, even though it remains almost completely implicit. Indeed, only Advocate General Wathelet has stated that 'the State's intervention [is] simply to ensure a level playing field (in other words, to ensure that undertakings can compete on equal terms)'.[42] This assertion sums up the substantial link that exists between State aid and fair competition conditions. Far from letting the market have its way, the level playing field implies that the State intervenes, which constitutes an advantage as per Article 107(1) TFEU, the compatibility of which will depend on its capacity to restore equality among economic operators, unless the difference in treatment is justified on the ground of a general interest.

Then the level playing field has been taken into consideration in the assessment of the compatibility of State aid with the market. It is especially the case in a series of decisions on the financing of civil servants' pensions. Thus, the Commission stated that the assessment of how compatible State aid to the French company La Poste about the pension scheme is must be 'carried out with regard to the establishment of a level playing field for social security contributions and tax payments between La Poste and its competitors in the mail/parcels and financial services sectors, which make up the bulk of La Poste's activities'.[43] In a decision on the financing of the pensions of civil servants working for France Télécom, the Commission indicated that in its previous decision, 'it created a genuine playing field between La Poste and its competitors' before adding that 'that reform, precisely by creating such a level playing field, was an important step in the adaptation of La Poste to the progressive liberalisation of the postal market, which is an important Community objective and plays a significant role within the framework of the Lisbon strategy for growth and employment'.[44] The Commission however concluded that, here, 'the rate of contribution in

40. See however Case C-286/13 P *Dole Food Company Inc. et Dole Fresh Fruit Europe v European Commission* [2014], Opinion of AG Kokott, paras 119 and 120.
41. Commission Decision of 13 May 2015 declaring a concentration compatible with the common market (Case N COMP/M.7449 – *Sncf Mobilities v Eurostar international limited*) based on Regulation (EC) N 139/2004 of the Council).
42. Case C-677/11 *Doux Élevage SNC* [2013], Opinion of AG Wathelet, para 65.
43. Commission Decision of 10 October 2007 on the State aid implemented by France in connection with the reform of the arrangements for financing the retirement pensions of civil servants working for La Poste (notified under document number C(2007) 4545), [2008] OJ, para 158.
44. State Aid – France State aid C 25/08 (ex NN 23/08) – Reform of the method of financing the pensions of public-service employees working for France Télécom Invitation to submit comments pursuant to Article 88(2) of the EC Treaty [2008], OJ, 11.

full discharge of liabilities applying to France Télécom since 1996 cannot ensure a level play field between that company and its competitors'.[45] Similarly, the compatibility of the aid that the financing of the RATP pension scheme constituted was 'assessed in relation to the creation of a level playing field in terms of mandatory social contributions between RATP and its current, potential and future competitors'.[46] This shows again that the level playing field aims to ensure equality among operators and, more precisely, among public operators, pursuant to Article 106(1) TFEU, and private operators.

Other decisions also refer to the level playing field without it being possible to draw general conclusions from it. For example, a decision on Irish fishing aid indicates that 'the Commission is promoting the respect of a level playing field between Member States that apply a Tonnage Tax'.[47] On an *ad hoc* basis, the level playing field has for instance been taken into consideration by the Commission when a State has modified its aid project that was initially amended.[48] Advocate General Kokott also refers to that objective to justify that the margin of appreciation left to national authorities which grant State aid should be limited, for 'There would be a serious risk that the effectiveness of the State aid control exercised by the Commission would be undermined and that the uniform interpretation and application of the European competition rules would be adversely affected. The fundamental aim of uniform conditions of competition for all undertakings operating in the internal market ("level playing field") would thus be significantly jeopardised.'[49] The argument of the level playing field may operate to temper an objective of general interest. For example, even though such an objective, like the environment objective which aims to prevent carbon dioxide emissions, has been acknowledged, the effects of competition distortion of aid measures must absolutely be limited to maintain fair competition conditions for all the actors of the internal market.[50]

The expression is used to promote the uniform application of State aid rules. Thus, the discretionary power of national courts to consider that the guarantee is null and void because it violates Article 108 (3)(3) TFEU is excluded, since that would be

> Different rights and obligations for undertakings operating in the internal market according to the Member State and competent national court concerned must not follow from EU competition law. European competition law must rather be interpreted and applied in such a way that, as a result of a uniform legal framework, equivalent conditions of competition apply to all undertakings operating in the internal market ('level playing field').[51]

Moreover, the argument of the level playing field does not allow a Member State to thwart a decision of the Commission. The latter has indeed considered that 'The existence

45. ibid.
46. Commission Decision of 13 July 2009 concerning the reform of the method by which the RATP pension scheme is financed (State aid C 42/07 (ex N 428/06)) which France is planning to implement in respect of RATP (notified under document C(2009) 5505) [2009], OJ, para 122.
47. State Aid – Ireland State aid C 2/08 (ex N 572/07) – Modification of tonnage tax Invitation to submit comments pursuant to Article 88(2) of the EC Treaty [2008], OJ C 117, para 12.
48. Commission Decision (EU) 2015/120 of 29 October 2014 on the aid scheme SA.27317 (C 25/09) (ex N 673/08) which Italy is planning to implement for digital projection equipment (notified under document C(2014) 7888) [2015], OJ L 25, paras 21 et 69.
49. Case C-73/11 P *Frucona Košice a.s. v Commission* [2012], Opinion of AG Kokott, para 55.
50. Commission Decision (EU) 2016/695 of 17 July 2013 on the aid scheme SA.30068 C 33/2010 (ex N 700/2009) – Aid to non-ferrous metal producers for CO_2 costs of electricity (notified under document C(2013) 4420), [2016], OJ L 120, para 112.
51. Case C-275/10 *Residex Capital IV CV v Gemeente Rotterdam* [2011], Opinion of AG Kokott para 67.

of similar exemptions for public undertakings in other Member States or the absence of a level playing field at European level does not justify a failure to implement the Commission decision proposing appropriate measures'.[52]

Last, according to the decisions of the Commission and a 2000 case, the recovery of illegal and incompatible aid has been deemed necessary to 'restore the "fair conditions of competition" which existed before the aid was granted'.[53] However, the expression disappeared afterwards, without the principle and logic of the recovery of State aid being questioned.

Crisis law. It is interesting to note that the authorities of the European Competition Network referred to the level playing field in public releases about the Covid-19 crisis and war in Ukraine. They stated that

> the different EU/EEA competition instruments have mechanisms to take into account, where appropriate and necessary, market and economic developments. Competition rules ensure a level playing field between companies. This objective remains relevant also in a period when companies and the economy as a whole suffer from crisis conditions.[54]

This confirms the reading according to which the level playing field is the motivation of public action designed to correct market malfunctions as may happen in times of crisis. Supervision of State aid is presented as allowing to ensure that fair competition conditions are maintained, which implies avoiding 'harmful subsidy races, where Member States with deeper pockets can outspend neighbours to the detriment of cohesion within the Union'.[55]

B. Intermittent instrumentalisation in positive integration

There are very few instances of the level playing field in legal acts adopted by Union institutions on the actions and policies related to the third part of the TFEU. It is not easy to draw general conclusions from those instances. It may even be fallacious to consider they produce legal effects. The level playing field seems to be more a supplementary argument supporting

52. Decision (EU) 2016/634 of 21 January 2016 on aid measure SA.25338 (2014/C) (ex E 3/2008 and ex CP 115/2004) implemented by the Netherlands – Corporate tax exemption for public undertakings, para 81.
53. Case T-288/97 *Regione Friuli Venezia Giulia v Commission* [2001], para 110; Case T-55/99 *Confederación Española de Transporte de Mercancías (CETM)* [2000], para 173; Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta Mauro and others v Commission* [2000], para 176; Case T-288/97 *Regione autonoma Friuli Venezia Giulia v Commission* [1999], para 110; Case C-372/97 *Italian Republic v Commission* [2004], para 102; Commission Decision of 22 October 1996 on a tax credit scheme introduced by Italy for professional road hauliers (C 45/95 ex NN 48/95) [1997], OJ L 106, 22; Commission Decision of 30 July 1997 concerning aid granted by the Friuli-Venezia Giulia Region (Italy) to road haulage companies in the Region [1998] OJ L 66, 18; Commission Decision of 1 July 1998 concerning the Spanish Plan Renove Industrial system of aid for the purchase of commercial vehicles (August 1994-December 1996), [1998] OJ L 329, 2.
54. European Competition Network, Message to companies about the Covid-19 crisis published on 23 March 2020. Antitrust: Joint statement by the European Competition Network (ECN) on the application of competition law in the context of the war in Ukraine, 24 February 2022: 'As stated in our joint statement on the application of competition law during the Covid crisis, the different EU/EEA competition instruments have mechanisms to take into account, where appropriate and necessary, market and economic developments. Competition rules ensure a level playing field between companies. This objective remains relevant also in a period when companies and the economy as a whole suffer from crisis conditions'.
55. Commission Communication from the Commission Temporary Framework for State aid measures to support the economy in the current Covid-19 outbreak [2020], OJ C 91I, 1, para 10.

the justification of an action which could, in any case, be founded on other elements. Thus, searching for the level playing field argument will be better assessed using an archaeological method. This refers to the hypotheses it is possible to establish based on regularities found in a discourse. It appears indeed that the references to the level playing field correspond more to a justificatory approach than to a foundational one. The Union institutions essentially refer to it in order to add another argument to justify a measure of the Union.

General invocation – in the course of a recital. In many texts, fair competition conditions are invoked in a very general manner to support action, without this being decisive. At best it means that the legislator of the Union or the Commission adds a justificatory element for the adoption of a measure. The domain of financial services is representative of such an approach which mainly consists in mentioning fair competition conditions in the course of a recital. That is especially the case in banking directives, and has been so since the 2000s.[56] The level playing field then accompanied the institutional evolutions of financial regulation. Thus, it was invoked to set up the European Committees of Banking Supervisors, of Securities Regulators and of European Insurance and Occupational Pensions which were replaced in 2010 respectively by the European Banking Authority, the European Securities and Markets Authority and the European Insurance and Occupational Pensions Authority.[57] Later on, the Capital Requirements Regulation (CRR) on prudential requirements for credit institutions stated that those requirements 'are necessary to ensure similar safeguards for savers and fair conditions of competition between comparable groups of institutions'.[58] More generally, in the regulation establishing the single dispute mechanism, the legislator underlined that Ensuring effective and uniform resolution rules and equal conditions of resolution financing across Member States is in the best interests not only of the Member States in which banks operate but also of all Member States in general as a means of ensuring a level competitive playing field and improving the functioning of the internal market.[59]

56. Commission First Commission report to the European Parliament and the Council on the implementation of the own funds Directive (89/299/EEC): 'The Own Funds Directive is part of a wider effort to harmonise minimum prudential standards for financial institutions in the EU with the dual aim of safeguarding the safety and soundness of the financial system and to establish a level playing field for financial institutions competing in the single market'. See also European Parliament and Council Directive 2000/46/EC of 18 September 2000 on the taking up, pursuit of and prudential supervision of the business of electronic money institutions [2000], OJ L 275, 39, Rec. 12; European Parliament and Council Directive 2000/12/EC of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions, [2000], OJ, 1, Rec. 8.
57. The expression 'level playing field' is translated as '*conditions réellement égales*' ('really equal conditions'). European Parliament and Council, Recitals 2 of Regulation (EU) N° 1093/2010 of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision N° 716/2009/EC and repealing Commission Decision 2009/78/EC [2010], OJ L 331, 12; Regulation (EU) N° 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision N° 716/2009/EC and repealing Commission Decision 2009/79/EC [2010], OJ L 331, 48; Regulation (EU) N° 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision N° 716/2009/EC and repealing Commission Decision 2009/77/EC [2010], OJ L 331, 84.
58. European Parliament and Council Regulation (EU) N° 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) N° 648/2012 [2013] OJ L 176, 1, Rec. 33.
59. European Parliament and Council Regulation (EU) N° 806/2014 of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) N° 1093/2010 [2014], OJ L 225, 1, Rec. 12. See also Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency [2014], OJ L74, 65, para 7.

The Commission had expressly set as a strategic objective the '[Strengthening of] the internal market for banking services while maintaining a level playing field'.[60] Conversely, the level playing field is completely left aside in the draft regulation aiming to establish the single supervision mechanism, which shows there is no legal rationality in the legislator's references to that notion. Last, still about financial matters, the level playing field argument is found in a few regulations supporting a very specific system.[61] The occasional presence of the argument in the motivation of the act can be found in other fields of action of the Union, such as agriculture (at least in wine matters),[62] fishing,[63] transport,[64] the environment[65] or the digital technology.[66]

Another type of occurrence is revealing of the temporality of the argument of the level playing field. It is sometimes retrospectively that fair competition regulations have justificatory virtues. For example, the Union legislator has estimated that the Communication of the Commission of 10 January 2007 entitled 'An Energy Policy for Europe' 'highlighted the importance of completing the internal market in electricity and of creating a level playing

60. European Parliament and Council Proposal for a Regulation establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Bank Resolution Fund and amending Regulation (EU) Nº 1093/2010 of the European Parliament and of the Council, COM/2013/0520, Legislative financial statement, para 1.4.1.
61. Commission Delegated Regulation (EU) 2017/208 of 31 October 2016 supplementing Regulation (EU) Nº 575/2013 of the European Parliament and of the Council with regard to regulatory technical standards for additional liquidity outflows corresponding to collateral needs resulting from the impact of an adverse market scenario on an institution's derivatives transactions [2017], OJ L 33, 14, Rec. 3 (on the calculation of the additional collateral outflows for institutions and derivative markets); Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 supplementing European Parliament and Council Directive 2014/59/EU with regard to ex ante contributions to resolution financing arrangements [2015], OJ L 11, 44, Rec. 8 (on the calculation of contributions in banking groups).
62. European Parliament and Council Regulation (EU) Nº 1308/2013 of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) Nº 922/72, (EEC) Nº 234/79, (EC) Nº 1037/2001 and (EC) Nº 1234/2007 [2013], OJ L 347, 671; Commission Regulation (EC) Nº 607/2009 of 14 July 2009 laying down certain detailed rules for the implementation of Council Regulation (EC) Nº 479/2008 as regards protected designations of origin and geographical indications, traditional terms, labelling and presentation of certain wine sector products [2009], OJ L 193, 60; Council Regulation (EC) Nº 1493/1999 of 17 May 1999 on the common organisation of the market in wine, [1999], OJ L 179, 1.
63. European Parliament and Council Regulation (EU) 2018/973 of 4 July 2018 establishing a multiannual plan for demersal stocks in the North Sea and the fisheries exploiting those stocks, specifying details of the implementation of the landing obligation in the North Sea and repealing Council Regulations (EC) Nº 676/2007 and (EC) Nº 1342/2008 [2018], OJ L 179, 1; European Parliament and Council Regulation (EU) Nº 1380/2013 of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) Nº 1954/2003 and (EC) Nº 1224/2009 and repealing Council Regulations (EC) Nº 2371/2002 and (EC) Nº 639/2004 and Council Decision 2004/585/EC [2013], OJ L 354, 22.
64. European Parliament and Council Regulation (EC) Nº 1370/2007 of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nºs 1191/69 and 1107/70 [2007], OJ L 315, 1, Rec. 8; European Parliament and Council Directive 2006/22/EC of 15 March 2006 on minimum conditions for the implementation of Council Regulations (EEC) Nº 3820/85 and (EEC) Nº 3821/85 concerning social legislation relating to road transport activities and repealing Council Directive 88/599/EEC [2006], OJ L 102, 35, Rec. 5.
65. European Parliament and Council Directive 2009/29/EC of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community [2009], OJ L 140, 63, Rec. 28.
66. European Parliament and Council Regulation (EU) 2018/1971 of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) Nº 1211/2009 Text with EEA relevance [2018], OJ L 321, 1, Rec. 9.
European Parliament and Council Directive (EU) 2018/1972 of 11 December 2018 establishing the European Electronic Communications Code (Recast) [2018], OJ L 321, 36, Rec. 3.

field for all electricity undertakings established in the Community."[67] Similarly, even though there has been no mention of the level playing field in the directives that have been adopted since the 1980s, it has been asserted that the public procurement rules allow to guarantee competition conditions to all the economic operators.[68]

Those few instances, which remain very rare compared to the normative inflation of secondary law in the legal acts of the Union, do not provide a lot of information. The internal market and common policies, the most important like the most technical legislative acts, are all affected. It is therefore reasonable to think that the mention of the level playing field is due to chance or at least to legislative contingencies. It is part of the mystery shrouding the making of secondary legislation, from the draft act elaborated by the Commission until its adoption by the European Parliament and the Council. Then, from a legal point of view, the level playing field is nothing more than a decisive argument on which the normative action of the Union can be based.

The level playing field discourse is nonetheless quite informative as it provides information as to the type of action of the Union that is being considered.

Normative action. In its general guidelines about the application of Article 81(3) of the Treaty, the Commission underlines that while '[t]he purpose of Article [101 TFEU] is to protect effective competition by ensuring that markets remain open and competitive [, t]he protection of fair conditions of competition is a task for the legislator in compliance with Community law obligations (66) and not for undertakings to regulate themselves'.[69] This supports the idea that the level playing field is an argument which purports to justify a normative action of the European Union compensating for the shortcomings of the market. The Union legislator thus stated that '[to improve] the functioning of the market (…) notably concrete provisions are needed to ensure a level playing field'.[70] In other words, if it is the legislator which has to adopt measures to defend fair competition conditions, it is because it is a political choice.

However, in the areas of shared competence the legislative action must conform to the subsidiarity principle. Quite surprisingly, the argument of the level playing field is seldom used even though it could allow to assert that the objectives of the act 'cannot be sufficiently achieved by the Member States but can rather, due to the need to overcome market fragmentation and ensure a level-playing field in the Union, be better achieved at Union level'.[71]

The level playing field can also guide which type of legal act should be chosen. Unsurprisingly, it is generally regulations which contain a reference to the fair competition conditions, and directives of complete harmonisation may be concerned, though more rarely.

67. European Parliament and Council Directive 2009/72/EC of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009], OJ L 211, 55, Rec. 7. Commission Communication to the European Council and the European Parliament – An energy policy for Europe, COM/2007/0001.
68. Case T 384/10 *Kingdom of Spain v Commission* [2013], para 116. Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives [2006], OJ C 179, 2.
69. Commission Communication – Notice – Guidelines on the application of Article 81(3) of the Treaty [2004], OJ C 101, 97, para 47. The Guidelines on the application of Article 53(3) of the EEA Agreement [2007], OJ C 208, 1, para 47.
70. European Parliament and Council Directive 2003/55/EC of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC [2003], OJ L 176, 57, Rec. 2.
71. European Parliament and Council Directive 2014/92/EU of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features [2014], OJ L 257, 214, Rec. 65.

Quite explicitly, the legislator has decided to invoke those conditions to justify resorting to the regulation in that the latter 'is the best possible guarantee for a level playing field, uniform conditions of competition and the common appropriate standard of investor protection'.[72] Establishing fair competition conditions at a global level for sea transport has justified delegating to the Commission the power to adopt acts in accordance with Article 290 TFEU.[73] For example, in order to set the *ex ante* contributions by banking institutions to the Single Resolution Fund, the Council has adopted an implementing regulation and decided that 'the same methodology for the calculation of annual contributions in all Member States should preserve a level playing field among participating Member States and a strong internal market'.[74]

Fair competition conditions thus call for uniformity in the application of Union law. They are also mentioned to justify the uniform interpretation of Union law provisions. That is, for example, the case of the directives aiming to 'prevent competition distortions and therefore ensure there is a level playing field in the economic sectors subject to excise duties'.[75] Generally, 'a systematic judicial review of compliance with that obligation contributes to ensuring a level playing field for creditors'.[76]

A flexible notion, the level playing field has also been invoked to support, in business law, arguments in favour of harmonisation, as in the Payment Services Directive,[77] the Directive on Reassurance,[78] the Directive on take-over bids,[79] or the Consumer Credit Directive.[80] It is obvious that it is necessary that national legislations be brought closer when their differences may be detrimental to fair or homogeneous competition conditions.

Equality among actors in the market. The argument of the level playing field is essentially designed to support normative action aiming to re-establish equality among market players.

In a first set of assumptions, relations among private actors are involved. For example, in transport, the will to promote the establishment of fair competition conditions among modes

72. Commission Delegated Regulation (EU) 2016/438 of 17 December 2015 supplementing Directive 2009/65/EC of the European Parliament and of the Council with regard to obligations of depositaries [2016], OJ L 78, 11, Rec. 1. Commission Delegated Regulation (EU) N° 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision [2013], OJ L 83, 1, Rec. 1.
73. European Parliament and Council Directive 2013/38/EU of 12 August 2013 amending Directive 2009/16/EC on port State control [2013], OJ L 218, 1, Rec. 21.
74. Council Implementing Regulation (EU) 2015/81 of 19 December 2014 specifying uniform conditions of application of Regulation (EU) N° 806/2014 of the European Parliament and of the Council with regard to ex ante contributions to the Single Resolution Fund [2015], OJ L 15, 1, Rec. 10.
75. Case C-240/01 *Commission / Germany* [2003] Opinion of AG Geelhoed, para 53.
76. Cases C-679/18 and C-616/18 *Cofidis SA* [2019] Opinion of AG Kokott, para 52.
77. Commission Communication to the Council and the European Parliament on the Prevention of and the Fight against Terrorist Financing through measures to improve the exchange of information, to strengthen transparency and enhance the traceability of financial transactions, COM/2004/0700, para 1.7. Draft Directive on a New Legal Framework for Payments in the Internal Market. The Commission is working on the above draft proposal which will ensure the harmonised implementation of Special Recommendation VI of the Financial Action Task Force into Community law and thereby guarantee a level playing field for all providers.
78. European Parliament and Council Proposal for a Directive on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC and Directives 98/78/EC and 2002/83/EC {SEC(2004)443}: 'Reinsurance is an insurance activity and therefore direct insurance rules should apply, and not specific reinsurance regulations. Different rules between insurance and reinsurance could make it increasingly difficult to create a level playing-field'.
79. European Parliament and Council Proposal for a Directive on takeover bids [2003], OJ C 45E, 1.
80. European Parliament and Council Proposal for a Directive on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers [2002], OJ C 331E, 200.

of transport[81] or companies belonging to a same sector[82] has been asserted. In other areas, the legislator has also mentioned the creation or setting up of fair competition conditions among insurance intermediaries,[83] 'financial institutions competing in the single market'[84] or in the domain of recycling.[85] The normative intervention thus purports to restore equality among market players in order to ensure 'fair competition'.[86] However, the argument of fair competition conditions appears flexible, as it is invoked for equality among market actors,[87] or even among all the consumers,[88] as well as operators in 'comparable groups',[89] among products,[90]

81. Protocol on the implementation of the 1991 Alpine Convention in the field of transport – Transport protocol [2007] OJ L 323, 15, Art. 1(e). Commission Communication to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions – Air transport and the environment Towards meeting the challenges of sustainable development COM/99/0640, para 31.
82. Commission Implementing Regulation (EU) 2015/171 of 4 February 2015 on certain aspects of the procedure of licensing railway undertakings [2015], OJ L 29, 3, Rec. 10. Council Decision of 7 June 2007 authorising Member States to ratify, in the interests of the European Community, the Maritime Labour Convention, 2006, of the International Labour Organisation [2007], OJ L 161, 63, Rec. 4.
83. European Parliament and Council Directive (EU) 2016/97 of 20 January 2016 on insurance distribution (recast) [2016], OJ L 26, 19, Rec. 16.
84. Commission First Commission report to the European Parliament and the Council on the implementation of the own funds Directive (89/299/EEC), COM/2000/0074.
85. European Parliament and Council Regulation (EC) N° 1013/2006 of 14 June 2006 on shipments of waste [2006], OJ L 190, 1, Rec. 22.
86. European Parliament and Council Directive 2000/46/EC of 18 September 2000 on the taking up, pursuit of and prudential supervision of the business of electronic money institutions [2000], OJ L 275, 39, Rec. 12. On the level playing field between electronic money institutions and other credit institutions issuing electronic money.
'(12) However, it is necessary to preserve a level playing field between electronic money institutions and other credit institutions issuing electronic money and, thus, to ensure fair competition among a wider range of institutions to the benefit of bearers'.
87. European Parliament and Council Directive (EU) 2018/1972 of 11 December 2018 establishing the European Electronic Communications Code (Recast) [2018], OJ L 321, 36, Rec. 3. Commission Delegated Regulation (EU) N° 2015/2446 of 28 July 2015 supplementing Regulation (EU) N° 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code [2015], OJ L 343, 1, Rec. 27.
European Parliament and Council Regulation (EU) 2018/973 of 4 July 2018 establishing a multiannual plan for demersal stocks in the North Sea and the fisheries exploiting those stocks, specifying details of the implementation of the landing obligation in the North Sea and repealing Council Regulations (EC) N° 676/2007 and (EC) N° 1342/2008 [2018], OJ L 179, 1, Rec. 13.
88. Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency [2014], OJ L 74, 65, Rec. 7.
89. European Parliament and Council Directive 2000/12/EC of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions [2000], OJ L 126, 1, Rec. 8. European Parliament and Council Regulation (EU) N° 575/2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) N° 648/2012 [2013], OJ L 176, 1, Rec. 33.
Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to *ex ante* contributions to resolution financing arrangements [2015], OJ L 11, 44, Rec. 9.
90. European Parliament and Council Regulation (EU) N° 1380/2013 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) N° 1954/2003 and (EC) N° 1224/2009 and repealing Council Regulations (EC) N° 2371/2002 and (EC) N° 639/2004 and Council Decision 2004/585/EC [2013], OJ L 354, Article 2(5)(g).

within one business sector,[91] or even on a same market.[92] The opening to competition of some markets may also explain the use of the notion of fair competition conditions. That was the case for telecommunications: an advocate general interpreted the provisions of a directive of liberalisation of the licences of operators in light of those conditions. In that respect, the tender for licence candidacies was not capable of guaranteeing fair competition conditions among operators.[93] Indeed, 'the starting point for ensuring fair conditions of competition between operators on an emerging market is first to guarantee equal conditions for all operators'.[94]

In a second set of assumptions, the aim is to ensure equality among public and private operators.[95] For example, fair competition conditions are invoked in the Regulation on 'Public Service Obligations' (PSO) to strictly regulate the capacity of a local or national authority to provide public transport services for passengers on its territory or to entrust them to an internal operator without fair competitive procedures.[96] That is especially true in markets open to competition which are characterised by the presence of dominant historical operators. Thus, an advocate general underlined that 'The aim of EU energy policy is the opening up of markets, increase [*sic*] competition and the create [*sic*] a level playing field by no longer giving preferential treatment to former monopolies. (28) The principle of equal access is crucial in achieving this aim.'[97] The legislator may also, in order to ensure fair competition conditions, exclude from the field of application some public companies because they provide a type of limited services.[98] More generally, the Council has underlined that 'in the public sector, structural reform has to be carried further so as to improve the efficiency of the public sector and to ensure transparent and fair competition between private and public enterprises'.[99] Within the context of the enlargement, the Commission called for ensuring both that the public radio broadcast service plays its role as a public service for all the communities and creates fair competition conditions among private and public media.[100]

The instruments to guarantee such equality still remain to be determined. Secondary law does not say a lot in that respect. In short, the argument of the level playing field occa-

91. European Parliament and Council Regulation (EU) N° 648/2012 of 4 July 2012 on OTC derivatives, central counterparties and trade repositories [2012], OJ L 201, 1, Rec. 42.
92. European Parliament and Council Directive 2001/107/EC of 21 January 2002 amending Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) with a view to regulating management companies and simplified prospectuses [2002], OJ L 41, 20, Rec. 13. On market for harmonised collective investment undertakings.
93. Case C-431/07 P *Bouygues SA and Bouygues Télécom SA v Commission* [2008], Opinion of AG Trstenjak, Rec. p. I-2665, para 125.
94. ibid, para 126.
95. OCDE, Competitive Neutrality: maintaining a level playing field between public and private business, 2012, <https://www.oecd.org/corporate/50302961.pdf>.
96. European Parliament and Council Regulation (EC) N° 1370/2007 of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) N°s 1191/69 and 1107/70 [2007], OJ L 315, 1, Rec. 8.
97. Case C-264/09 *European Commission v Slovak Republic* [2011], Opinion of AG Jääskinen, para 50.
98. European Parliament and Council Directive 2014/65/EU of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast) [2014], OJ L 173, 349, Rec. 29. On undertakings held jointly by local State-owned firms, in the energy sector.
99. Council Decision of 29 July 1991 adopting the annual economic report 1990/91 on the economic situation in the Community and the economic policy orientation for the Community in 1991 [1991], OJ L 252, 17.
100. Council Decision of 30 January 2006 on the principles, priorities and conditions contained in the European Partnership with Serbia and Montenegro including Kosovo as defined by the United Nations Security Council Resolution 1244 of 10 June 1999 and repealing Decision 2004/520/EC [2006], OJ L 35, 32.

sionally serves to justify either obligations or actions. For example, 'In order to ensure a level playing field, novel tobacco products, that are tobacco products as defined in this Directive [on tobacco products], should comply with the requirements of this Directive'.[101] Similarly, the obligation for any credit institution to join a deposit guarantee scheme was justified by the necessity to ensure a 'level playing field between credit institutions'.[102] Another example is the fact that the Commission has set eco-design requirements applicable to decentralised solid fuel heating systems to 'create a level playing field in the market'.[103]

In other texts, procedural rules are established to ensure fair competition conditions among economic operators.[104] A few texts link the creation of fair competition conditions to the action of regulatory authorities. For example, the Court has underlined that the directive on the internal market in natural gas 'purported to give a central role to national regulatory authorities that contribute to the development of an internal gas market and the creation of fair competition conditions by transparently cooperating among them and with the Commission'.[105]

Moreover, fair competition conditions are invoked to justify implementing supervision of market players.[106] Thus Article 65 of the directive on the internal market in electricity lists the measures that the Member States may adopt to guarantee fair competition conditions.[107] Essentially, those measures are constraints which may nonetheless be justified on grounds of general interest and the implementation of which is subject to notification to the Commission for the latter to approve.

It would however be useless to believe that the sole mentioning of the level playing field can be enough to intervene to restore equality. This question is eminently domain-dependent. Fiscal matters are revealing of the indecisive nature of the argument of fair competition conditions. Admittedly, the latter are presented as being at the heart of the general debate on the harmful tax policy,[108] especially the reduction of tax distortion and fight against aggressive tax,[109] and of the harmonisation of indirect taxes.[110] Concretely speaking though, nothing is being considered because, as an advocate general underlines, in inter-

101. European Parliament and Council Directive 2014/40/EU of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC [2014], OJ L 127, 1, Rec. 35.
102. European Parliament and Council Directive 2014/49/EU of 16 April 2014 on deposit guarantee schemes (recast) [2014], OJ L 173, 149, Rec. 13.
103. Commission Regulation (EU) 2015/1185 of 24 April 2015 implementing Directive 2009/125/EC of the European Parliament and of the Council with regard to ecodesign requirements for solid fuel local space heaters, [2015] OJ L 193, 1, Rec. 13.
104. Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) N° 952/2013 of the European Parliament and of the Council laying down the Union Customs Code [2015], OJ L 343, 558, Rec. 27.
105. Case T-317/09 *Concord Power Nordal GmbH* [2010], para 45.
106. European Parliament and Council Regulation (EU) N° 910/2014 of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC [2014], OJ L 257, 73, Rec. 36.
107. European Parliament and Council Directive (EU) 2019/944 of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast) [2019], OJ L 158, 125, Rec. 21.
108. Joined Cases C106/09 P and C107/09 P, *European Commission* (C-106/09 P), *Kingdom of Spain* (C-107/09 P) *v Government of Gibraltar and United Kingdom*, [2011], Opinion of AG Jääskinen, para 129.
109. Council Recommendation of 14 May 2018 on the economic policy of the euro area [2018], OJ C 179, Rec. 2.
110. Case C-240/01, Commission of the European Communities v Federal Republic of Germany [2003], Opinion of AG Geelhoed, para 53.

national tax matters, the identification of a level playing field lacks clarity and calls for a much more complex analysis.[111]

More rarely, how fair competition conditions may be guaranteed is specified. First, the aim is to guarantee access to the network of operators which is tightly linked to the level playing field.[112] For example, the regulations establishing network codes setting the requirements for the connection to the infrastructure grid are justified by the objective of guaranteeing fair competition conditions. Thus, the electricity grid managers are imposed obligations to ensure that 'system operators make appropriate use of the power-generating facilities' capabilities in a transparent and non-discriminatory manner to provide a level playing field throughout the Union'.[113] It is the same for the requirements for connection to high-voltage direct current systems,[114] facilities for consumption connected to a transportation network, facilities of a distribution network connected to a transportation system or distribution networks, including closed distribution networks.[115] It is more an argument allowing to define the spirit of the enacted measures. In a first approach, the level playing field is invoked in advance to justify the adoption of legal acts allowing access to the market for some players using specific technologies.[116] In the broadband sector, the Commission has for example recommended the use of a 'concept' (Equivalence of Input, EoI) which 'is in principle the surest way to achieve effective protection from discrimination as access seekers will be able to compete with the downstream business of the vertically integrated SMP [Significant Market Power] operator using exactly the same set of regulated wholesale products, at the same prices and using the same transactional processes' because that concept allows to 'deliver transparency and address the problem of information asymmetries' [recital 13] in order to '[ensure] a level playing field between the SMP operator's downstream businesses, for example, its retail arm, and third-party access seekers, and [promote] competition [para 7]'.[117]

From that study of Union law, a conclusion may be drawn: the level playing field is an argument of the discourse that Union institutions use in order to justify an action, which is essentially normative, designed to correct market malfunctions when actors are not in a situation of equality. Lato sensu, all the internal market law is therefore permeated with a logic of level playing field when equality among market players must be ensured. Stricto sensu, only the acts of secondary law aiming to restore that equality are justified by fair competition conditions. However, the latter are not an element of justification which would in itself allow to found an action of the Union. They rather play in a way that is as supplementary as it is occasional, in very limited cases, to provide a reason for measures that are

111. Case C-240/01 *Commission v Germany* [2003], Opinion of AG Geelhoed, para 129.
112. Case C 556/12 *TDC, A/S v Teleklagenævnet* [2014], Opinion of AG Cruz Villalón, para 32.
113. Commission Regulation (EU) 2016/631 of 14 April 2016 establishing a network code on requirements for grid connection of generators [2016], OJ L 112, Article 1.
114. Commission Regulation (EU) 2016/1447 of 26 August 2016 establishing a network code on requirements for grid connection of high voltage direct current systems and direct current-connected power park modules [2016], OJ L 241, Article 1.
115. Commission Regulation (EU) 2016/1388 of 17 August 2016 establishing a Network Code on Demand Connection [2016], OJ L 223, 10, Article 1.
116. Commission Regulation (EU) 2015/1185 of 24 April 2015 implementing Directive 2009/125/EC of the European Parliament and of the Council with regard to ecodesign requirements for solid fuel local space heaters [2015], OJ L 193, 1.
117. Commission Recommendation 2013/466/EU of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment [2013] OJ L 251, Rec. 13 and para 7.

adopted in Union law and found the latter's corrective public action in a market economy. The level playing field justifies another form of action in the relations of the European Union with the rest of the world.

II. The protective regulation of the internal market

The level playing field is at the heart of an external action of the Union, or, to be more precise, a new form of external action. The Union's vision of free trade is no longer naive. The principle according to which the opening of the internal market allows access of European companies to the markets of third countries by reason only of reciprocity is outmoded. Admittedly, the common trade policy still has its virtues in the context of the crisis of multilateralism, which explains why the Union favours the conclusion of bi- or multilateral free-trade agreements. It now reflects a renewed vision of free trade that is guided by the will to guarantee the European Union's 'open strategic autonomy'[118] in which to the economic approach expressing faith in the global market is added a geopolitical reading that reveals realism in international relations. The trade policy, and with it all the Union's external relations, has three objectives: 'supporting the recovery and fundamental transformation of the EU economy in line with its green and digital objectives'; 'shaping global rules for a more sustainable and fairer globalisation'; 'increasing the EU's capacity to pursue its interests and enforce its rights, including autonomously where needed'.[119] In order to reinforce the role of the Union as a global actor, the Union institutions work for fair competition conditions by ensuring 'our capacity to react to unfair practices and a lack of reciprocity'[120] and promoting 'international trade rules that are properly enforced and provide for a level playing field'.[121] Within that logic, the level playing field is the discourse that justifies at the same time an extended territoriality of Union law (A) and equality restored by Union law (B).

A. The extended territoriality of the geopolitical legislation of the Union

The 2020s have been marked by the renewal of the theme of extraterritoriality, one of the most prominent signs of which is the 'Brussels effect'. On the scientific level, research has

118. Commission 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Empty *Trade Policy Review – An Open, Sustainable And Assertive Trade Policy*' [2021], COM(2021) 66.
119. ibid, 10-11.
120. European Parliament Council of the European Union and European Commission, Joint Conclusions on Policy Objectives and Priorities for 2020-2024 [2021], OJ C 18I, 5, para 7; European Parliament, Council of the European Union and European Commission, Joint Conclusions on Policy Objectives and Priorities for 2020-2024, [2020], OJ C 451I, para 7.
121. ibid, para 4.

shown the hackneyed character of the expression 'extraterritoriality'.[122] That of territoriality should be preferred, as it is legally more accurate and politically more realistic. In Union law, territoriality shows a geopolitical turn. A clarification on the legal basis of legislative action is needed first. Answering to the argument of the EU Council according to which a convention used the 'establishment of the internal market because, by reducing disparities between the national legal orders, it helps to create uniform legal conditions ("level playing field")',[123] Advocate General Kokott stated that

> Under Article 114 TFEU, harmonisation measures with the aim of reducing legal disparities between the Member States may be taken if those disparities are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market. (31) However, the purpose must always be to reduce legal disparities *between the Member States* of the European Union, and not to reduce legal disparities between the Member States of the European Union and third countries. In the present case, as has already been mentioned, the Convention does not contribute, first and foremost, to internal harmonisation, but primarily to external harmonisation.[124]

That means that Article 114 TFEU is not the right legal basis to conclude an international agreement aiming for the level playing field. However, that provision is relevant to adopt Union legislative acts the application of which is extended to subjects of third countries in order to restore the level playing field. This is therefore the object of a discourse of a 'geopolitical' European Commission which uses the territoriality of Union law and the attractiveness of the internal market.

The 'geopolitical' European Commission and the territoriality of Union law. 'My Commission will be a geopolitical Commission committed to sustainable policies'.[125] Ursula Von der Leyen clearly took a stance in favour of a geopolitical Commission when she was sworn in. Then the discourse is that of the European power, which one knows may not be military. The war of Russia against Ukraine has shown the limits of the European Union and the persisting ascendency of NATO. The common security and defence policy is still in its infancy. Louis-François Duchêne's intuition according to which Europe is a 'civil power' is quite remarkably modern.[126] Mandeville's tale of bees or Montesquieu's *doux commerce*, the trick of the functionalist reason of the common market has produced its pacifying effects on the European continent. Since the origins, the relations of the European Union with the rest of the world have been built on the free-trade doctrine. The Community and later the Union have always favoured a common trade policy which aimed at liberalising trade within the GATT and WTO's multilateral framework. The loss of impetus of multilateral-

122. See among others H.L. Buxbaum and T. Fleury Graff, *Extraterritoriality / L'extraterritorialité* (vol. 23, Centre for Studies and Research in International Law and International Relations Series, Brill 2022); E. Dubout, F. Martucci, F. Picod (dir.), *L'extraterritorialité en droit de l'Union européenne* (Bruylant 2021); A. Miron, B. Taxil (dir.), *Extraterritorialité et droit international* (Pedone 2020); J. Scott, "Extraterritoriality and Territorial Extension in EU Law", (2014) vol. 62, N° 1, *The American Journal of Comparative Law*, 87-125; J. Scott, "The New EU Extrateritoriality", (2014) vol. 51, N° 5, *CML Rev.*, 1343-80; M. Cremona, J. Scott (eds), *EU Law Beyond EU Borders. The Extraterritorial Reach of EU Law* (OUP 2019).

123. Case C-137/12 *Commission v Council* [2013] Opinion of AG Kokott, para 59.

124. ibid, para 60.

125. Commission, 'The von der Leyen Commission: for a Union that Strives for More', 10 September 2019, Press release.

126. L.-F. Duchêne, 'Europe's Role in World Peace' in R. Mayne (ed.), *Europe tomorrow: sixteen Europeans look ahead* (Fontana 1972).

ism has been compensated for by negotiation and the conclusion of bi- and multilateral free trade agreements.

That the communication on the re-examination of the trade policy insists on the common strategic autonomy is revealing of a turning point of the European Union.[127] Gone are the days of a somewhat naive vision of free trade replacing the lifelessness of the common foreign and security policy.

> President von der Leyen's 'geopolitical Commission' aims to boost the role of the European Union (EU) on the world stage. The geopolitical context has shifted over the past decades, and there have been major technological and societal changes. The global economy is increasingly multipolar and the short-term pursuit of unilateral interests by specific actors can undermine effective multilateral cooperation.[128]

The Union must be more offensive in a multipolar world where the balance of power with foreign powers is being renewed.[129] To all appearances, the paradox is that of a Union ontologically based on peace which wants to take on a geopolitical dimension carrying a vision of the world founded on the defence of national interests via a civil and military instrumentalising of the territory. In his reference book, Floran Louis notes the desire for power of a 'non-bellicose geopolitical' power.[130] The virtues of the 'normative power' of Europe are then rediscovered[131] – an old discourse which has been renewed by the Brussels Effect.[132] The Union is no longer 'the norm without strength' according to Zaki Laïdi's idea.[133] On the contrary, it has become the norm-based power. The Union's geopolitics is that of the law. Classically, geopolitics refers to how politics 'acts on and with space', which becomes a territory as soon as it is claimed by man.[134] Lacking sovereignty, and therefore a territory, the Union nonetheless spreads out on a space that its law claims via territoriality.

It is legally false to talk of the territory of the Union. As Lydia Lebon has shown,

> The expression 'European Union's territoriality' has the advantage of inevitably implying an 'intermediation' by the territory of the Member State, since the Union cannot be thought of without its components. The emergence of a 'territoriality of the European Union' leads to the rebuilding of a link with the national territory, within the integrated framework of the Union. There is, in a way, a remodelling of the relations between the State, the individuals and the territory.[135]

Union law has a field of application, which is determined in Articles 52 and 355 TFEU, the instrumentation of which leads to territoriality. The latter is generally considered introspectively via integration law: it is the sign of the instrumentation of the exercise via Member States of its power on its territory to found the application and execution of Union law

127. Commission, *Trade Policy Review* (n 117) 66.
128. Commission, European economic and financial system: fostering openness, strength and resilience, COM/2021/32, 1.
129. See special issue: Les chemins de la puissance européenne (2021) N° 3 Revue européenne du droit.
130. F. Louis, 'Quatre problèmes géopolitiques de la Commission géopolitique', Le Grand Continent, 8 September 2020. See F. Louis, *Qu'est-ce que la géopolitique* (PUF 2022).
131. I. Manners, 'Normative Power Europe: A Contradiction in Terms?', (2002) 40, Journal of common market studies, 235-58. A. Niemann, G. Junne, 'Europa als normative Macht?' in G. Simonis, H. Elbers (eds), *Externe EU Governance* (Springer VS 2011) 103-31.
132. P. Moscovici, 'Penser et construire l'Europe puissance' (2021) N° 3 Revue européenne du droit, 71-74.
133. Z. Laïdi, *La norme sans la force, L'énigme de la puissance européenne* (Presses de Sciences Po 2008).
134. F. Louis, Qu'est-ce que la géopolitique, *op. cit.*, 45 and 51.
135. L. Lebon, 'Territoire(s) de l'Union européenne', *Répertoire de droit européen*, 2019, para 187.

on the territory of each Member State. On the one hand, the provisions of Union law are applied on the territory of Member States (*juridictio*); on the other, they are executed by national authorities and courts on the territory of each Member State (*imperium*) in keeping with 'executive federalism' or indirect administration, in the integrated legal order. That instrumentation, based on sincere cooperation which is consecrated in Article 4(3) TEU, compensates for the lack of public power of the Union.[136]

The geopolitical evolution comes from the projection of territoriality which is conceived as a means to attract, within the spectrum of Union law, rights holders which are attached to the territory of third countries. This is a debate on the so-called extraterritoriality of Union law which is not one. As Joanne Scott has shown, Union law does not practice extra-territoriality in the sense of a measure applied thanks to an non-territorial connection with the State ('The application of a measure triggered by something other than a territorial connection with the regulating state').[137] It favours a 'territorial extension' in the sense that the provision of Union law governs a situation which is outside the Union but has a territorial connection with the latter ('The application of a measure is triggered by a territorial connection but in applying the measure the regulator is required, as a matter of law, to take into account conduct or circumstances abroad').[138] Reading through the prism of territoriality then allows to avoid the pitfall of public international law which Union law must respect according to the Court of Justice.[139] Since in public international law 'the theory of competences is not enough to understand today's practices of extraterritoriality', it is necessary to base the title of competence on a connecting link.[140] In Union law, it is therefore necessary to found the applicability of a provision to the subject of a third country on a 'sufficient connecting link' or a 'tight link' to the territory of a Member State, in accordance with the fundamental principle of territoriality which derives from public international law.[141] As we have written, in Union law, a 'situational approach' has been chosen,[142] which is understood as founding the applicability of the provision via the link of a fact situation, which is subjective – for it is that of a right holder – and can be tailored, to the integrated legal order of the Union.[143] For lack of connection, the situation is purely external if none of its elements can be linked to a Member State.

Attractiveness of the internal market. All the strength of the Brussels Effect is in the Union law's capacity to use the internal market to found a connection to the Union's legal order. As underlined by Anu Bradford, 'The EU has become a global regulator not only because of the size of its internal market, but also because it has built an institutional architecture that has converted its market size into a tangible regulatory influence'.[144] *De facto*, the internal market produces an attractive effect on economic actors which would like to access it

136. M. Blanquet, *Droit général de l'Union européenne* (11th edn, Sirey 2018) 610ff.
137. J. Scott, 'Extraterritoriality and Territorial Extension in EU Law' (n 122) 90. See also J. Scott, 'The New EU Extrateritoriality' (n 122); M. Cremona, J. Scott (eds) *EU Law Beyond EU Borders* (n 122).
138. J. Scott, 'Extraterritoriality and Territorial Extension in EU Law' (n 122) 90.
139. Case C-286/90 *Poulsen et Diva Navigation Corp* [1992], *Rec*. p. I-6019, para 9.
140. A. Miron, B. Taxil, 'Les extraterritorialités, entre unilatéralisme et multilatéralisme, l'*imperium* sans le *dominium*' in A. Miron, B. Taxil (dir.), *Extraterritorialité et droit international* (Pedone 2020) 27.
141. Case C-413/14 P *Intel Corporation Inc*. [2017], Opinion of AG Wahl, para 284. See also Case C-366/10 *Air Transport Association of America* [2011], Opinion of AG Kokott, paras 148-149.
142. ibid.
143. See F. Martucci, 'Dans quelle mesure un acte de droit dérivé de l'Union est-il applicable aux entreprises de pays tiers? Quelques précisions juridiques sur le "Brussels effect"' in E. Dubout, F. Martucci, F. Picod (dir.), *L'extraterritorialité en droit de l'Union européenne* (Bruylant 2021).
144. A. Bradford (n 2), 25.

as an outlet for their activities; *de jure*, the exercise of an economic activity producing an effect on the internal market is understood by Union law as a connecting element. That the issue is linked to the internal market is determining since the objective is to ensure a level playing field among European economic actors and those of third countries. Concretely speaking, by escaping the constraints weighing on European companies because of the law of the internal market, the companies of third countries have a competitive advantage. That is why submitting all the companies to the same rules allows to restore fair competition conditions.

It is no coincidence that competition law was one of the first domains in which applicability to the businesses of third countries has been chosen. Pursuant to *Béguelin*, *ICI Matières colorantes*, *Continental Can* and *Pâtes de bois*, as specified in the *InnoLux Corp.* and *Intel* decisions,[145] Articles 101 and 102 TFEU on anticompetitive practices apply to the businesses of third countries when two alternative criteria are met: 1) the criterion of the implementation implies the implementation of the practice on the territory of one or several Member States; 2) the criterion of the qualified impact means production, by the practices, of foreseeable, immediate and substantial effects in the internal market.[146]

Connecting link. The requirement of a connecting link in order to extend the applicability of European rules is found in other branches of Union law, which, like tax matters,[147] the transport sector,[148] or protection of personal data,[149] are characterised by a transnational projection of the activities in question. Thus, the challenge is to identify the connecting link to the internal market which reveals the attractiveness of the latter for the companies of third countries. Advocate General Léger has already asserted that the existence of a territorial link is characterised 'either through the actual presence of one of the economic operators in the territory of a Member State, or through the pursuit of an economic activity in that territory'.[150]

The tight link with the internal market is characterised when the operator is present on the territory of a Member State, a case that we have called an active economic activity on the territory of Member States.[151] First, the unity may be found within a group of companies. The provisions of secondary law apply in the companies of third countries which are established through the creation of subsidiaries in the Union. For example, pursuant to its Article 1, Directive MiFid II '[applies] to investment firms, market operators, data reporting services providers, and third-country firms providing investment services or performing investment activities through the establishment of a branch in the Union'.[152] Similarly, the CSRD has submitted the subsidiary established on their territory the mother company of which is governed by the law of a third country to the requirement of sustainability reports

145. Case 22/71 Béguelin Import [1971], para 11; Case 48-69 *Imperial Chemical Industries Ltd. v Commission of the European Communities* [1972], Opinion of AG Mayras, para 11; Case 6-72 Europemballage Corporation and Continental Can Company Inc. v Commission, [1973], Rec., 215; Joined Cases 104, 114, 116, 117 and 125-129/85 A. Ahlström Osakeyhtiö e. a. v Commission, [1988], Rec., para 16; Case C-231/14 P InnoLux Corp. v Commission [2015]; Case C-413/14 P (n 140).
146. To be precise, in competition law, the effect is assessed in the Union and the European Economic Area.
147. Case C-482/18 *Google Ireland Ltd* [2020], Opinion of AG Kokott, paras 44-45.
148. Case C-366/10 (n 140), para 124.
149. Case C-131/12, *Google Spain SL* [2014], para 54.
150. Case C-381/98, *Ingmar GB Ltd* [2000], Opinion of AG Léger, para 37.
151. F. Martucci (n 143).
152. European Parliament and Council Directive 2014/65/EU (n 97), Article 1. See P. Davies, 'Financial Stability and the Global Infuence of EU Law' in M. Cremona, J. Scott (eds) (n 121), 174-95.

at the level of the group of the ultimate mother company of the third country.[153] In the *Google Spain* case, the Court of Justice has estimated that Directive 95/46/CE on the protection of individuals with regard to the processing of personal data and on the free movement of such data applied to the American company Google Search, the main part of the commercial activity of which is constituted by the promotion and sale of advertising space, managed here by Google Spain. Then, the processing of the data in question was conducted 'within the framework of the activities' of the Google group so that the connection was indeed established.[154] Similarly, in a case that did not lead to a decision of the Court of Justice, the United Kingdom challenged the violation of the principle of territoriality by CRD IV[155] on the ground that it applies to entities at 'group, parent company and subsidiary' levels, including those established in offshore financial centres established outside the Union as a whole. The advocate general had set aside that means, considering that 'Such universal jurisdiction is not sought by the relevant provisions of the CRD IV Directive but only subjection of foreign group companies of EU financial institutions to the EU regulatory framework'.[156] Second, economic unity may be characterised by contractual relations. The most fully developed illustration of this is to be found in the *Ingmar* case: the Court of Justice has considered that a directive on independent commercial agents applies to a principal established in a third country the commercial agent of which exercises its activity inside the Union, since said directive aims to protect, through the category of commercial agents, the freedom of establishment and the play of a fair competition in the internal market.[157] Indeed, it is excluded that, thanks to a contractual stipulation, two operators escape the field of application of an act of secondary legislation by submitting themselves to the law of a third country, as in the *Ingmar* case in which a British company had concluded a contract with an American one stipulating their submission to Californian law.[158] It is interesting to note that a reference was already incidentally made to the level playing field. Third, the legislator of the Union may induce the creation of a connecting link from a third-country company by requesting that an intermediary be located in the Union. It is what happens when companies from third countries must designate a legal representative acting as a point of contact in the Union as is seen in the *Digital Services Act*.[159]

The Union legislator has consecrated another connecting criterion characterised by the presence, on the territory of a Member State of the Union, of customers of the third-country company. For example, Directive 2012/19/EU applies to waste electrical and electronic equipment which has been sold especially 'by means of distance communication directly to private households or to users other than private households in a Member State', by any

153. European Parliament and Council Directive (EU) 2022/2464 of 14 December 2022 amending Regulation (EU) N° 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting [2022], OJ L 322, Article 40 *bis*.

154. Case C-131/12 *Google Spain SL* [2014], para 55: 'The processing of personal data for the purposes of the service of a search engine such as Google Search, which is operated by an undertaking that has its seat in a third State but has an establishment in a Member State, is carried out 'in the context of the activities' of that establishment if the latter is intended to promote and sell, in that Member State, advertising space offered by the search engine which serves to make the service offered by that engine profitable.'

155. European Parliament and Council Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC [2013], OJ L 176, 338.

156. Case C-507/13 *United Kingdom v European Parliament and Council*, Opinion of AG Jääskinen, para 39.

157. Case C-381/98 Ingmar GB Ltd v Eaton Leonard Technologies Inc [2000], paras 24-25.

158. *Ingmar* (n 156).

159. European Parliament and Council Regulation (EU) 2022/2065 of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022], OJ L 277, 1, Art. 11.

natural or moral person 'established in another Member State or in a third country'.[160] Similarly, the Alternative Investment Funds Directive on alternative investment funds not only applies to 'EU AIFMs which manage one or more AIFs irrespective of whether such AIFs are EU AIFs or non-EU AIFs' but also to 'non-EU AIFMs which manage one or more EU AIFs' or even to 'non-EU AIFMs which market one or more AIFs in the Union irrespective of whether such AIFs are EU AIFs or non-EU AIFs'.[161] The legislator no longer hesitates to base the criterion of the connection on the location of the beneficiary of a service in the Union in order to apply an act to the operators established in third countries. Thus, the *Digital Services Act* '[applies] to intermediary services offered to recipients of the service that have their place of establishment or are located in the Union, irrespective of where the providers of those intermediary services have their place of establishment'.[162] The service is offered in the Union if it allows people in one or several Member State(s) to 'use the services of a provider of intermediary services that has a substantial connection to the Union', the latter being established if there is a connection of 'a provider of intermediary services with the Union resulting either from its establishment in the Union or from specific factual criteria, such as: – a significant number of recipients of the service in one or more Member States in relation to its or their population; or – the targeting of activities towards one or more Member States'.[163] Taking that logic further, the legislator also draws from the solicitation action of a third country a substantial link while excluding that link in case of passive attitude, ie, when the company is solicited by the client. Thus, Directive Mifid II applies '[if] a third-country firm solicits clients or potential clients in the Union or promotes or advertises investment services or activities together with ancillary services in the Union, it should not be deemed as a service provided at the own exclusive initiative of the client'.[164] The most efficient means to characterise the connecting link with the internal market is still the turnover of the companies in question. The substantial link indeed results from a logic according to which the higher the turnover in the Union the more significant the environmental and social impact of the activities of the third country on the internal market. Provided for in the regulation on the control of concentrations to establish the Community character of the operation in question, that criterion is present in other legislative acts. That is especially the case of the draft directive on the duty of due diligence, one provision of which should provide for its application to companies that have been constituted in compliance with the legislation of a third country and which fulfil a condition related to the realisation of a turnover of a certain amount in the Union.[165]

On the contrary, though they may be legally possible, other links should be set aside for opportuneness reasons. That is the case in particular for the use of a currency to support a transaction realised by persons established outside the territory where it is issued. The circumstance that a transaction is written in Euros should not allow to characterise a connecting link with the integrated legal order of the Union. Admittedly, the United States has used the Dollar as a connecting element, especially to sanction European banks, on the ground

160. European Parliament and Council Directive 2012/19/EU of 4 July 2012 on waste electrical and electronic equipment (WEEE) (recast) [2012], OJ L 197, Art. 3(1)(f).
161. European Parliament and Council Directive 2011/61/EU of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) N° 1060/2009 and (EU) N° 1095/2010 [2011], OJ L 174, 1.
162. Regulation (EU) 2022/2065 (n 158), Art. 2.
163. ibid Art. 3(e).
164. Directive 2014/65/EU (n 97), Rec. 111.
165. European Parliament and Council Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM/2022/71, Article 2(5).

that the payment operations passed through payment systems on the American soil.[166] Not only does this raise issues regarding public international law,[167] but it may harm the Euro as an international currency.[168] Indeed, companies may renounce using the Euro in their international transactions, thus harming the international role of the European currency. The criterion of the number of employees employed in the Union should also be excluded. First, such a criterion is ill-adapted to connect to the internal-market companies the activities of which only require a very limited number of employees in Member States, given the digital nature of the services provided and the intermediation provided by independent operators. Second, that criterion has a perverse effect since the multinational may avoid employing people in the Union. Last, though the language criterion has been considered by Advocate General Kokott,[169] it is not relevant either to found a substantial link given the generalised use of the English language.

The projection of values. Behind the discourse of the level playing field and beyond the economic aspects of restoration of competition conditions among European and third-party companies, there is a political will. The idea is to use Union law to spread European values at a global scale. In other words, the objective is to force third-country companies to respect non-economic rules which give tangible form to the values of Article 2 TEU.

The most characteristic example is that of Regulation (EU) 2020/1998 on restrictive measures against serious human rights violations and abuses which applies, pursuant to Article 19, to 'any legal person, entity or body in respect of any business done in whole or in part within the Union'.[170] That regulation allows the Council to impose restrictive measures on any entity, including companies, which commits serious violations of fundamental rights outside the territory of Member States. However, only the most serious violations such as genocide, crimes against humanity, torture, slavery, etc. are included, as well as systematic violations and those having a particular serious character like human trafficking, sexual and gender-based violence, violation of the freedom of peaceful assembly and association, freedom of thought and expression or freedom of religion or belief. That regulation is therefore only meant to apply in exceptional circumstances.

The Union's will to promote its values at a global scale is especially obvious in the discourse about supply chains. That notion, with which economists are familiar, is making progress among jurists. The preparatory work started by the European Commission in 2020 about the revision of the CSRD,[171] the proposal for an initiative on sustainable corporate governance,[172] or the draft legislative act on due diligence are quite revealing in this

166. R. Bismuth, 'Au-delà de l'extraterritorialité, une compétence économique' in A. Miron, B. Taxil (n 122) 120-21. See also E. Breen, 'La compétence américaine fondée sur le dollar: réalité juridique ou construction politique?' (2020) N° 1 Revue européenne du droit, 55-61.
167. R. Bismuth (n 166), 120.
168. Banque de France, 'Le rôle international de l'euro', Bulletin de la Banque de France N° 229, 2020; ECB, *The International Role of the Euro*, June 2020.
169. Case C-482/18 *Google Ireland Limited* [2020], Opinion of AG Kokott, paras 48ff.
170. Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuse [2020], OJ L 410I, 1.
171. European Parliament and Council Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014], OJ L 330, 1.
172. Consultation document, Proposed Initiative on sustainable corporate governance, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/public-consultation/>

regard.[173] In that respect, the European Parliament underlined in 2020 all the paradox of globalisation:

> The growth of international supply chains has undoubtedly brought enormous benefits to developing countries, but at the same time it has had certain negative impacts, relating for instance to violations of human and labour rights, including forced labour and child labour, environmental damage, land grabbing, and corruption.[174]

The rhetoric of the supply chain is therefore tightly linked to the level playing field. The objective is to counter the strategies of multinational companies which exploit the weakness of the legal systems of developing countries.[175] The companies, which are established in third countries, delocalise their production to other States which do not belong to the Union and where the environmental, social, tax rules etc. are less stringent in order to offer their goods and services on the internal market. Then the legislator of the Union intends to restore the fair competition conditions by making access to the internal market conditional on those multinational businesses respecting the European rules. One of the revealing examples of that approach to Union law is given in the directive on due diligence which consecrates the notion of 'value chain' understood as 'activities related to the production of goods or the provision of services by a company, including the development of the product or the service and the use and disposal of the product as well as the related activities of upstream and downstream established business relationships of the company'. The Commission has indicated in the explanatory memorandum that

> Union legislation on corporate due diligence would advance respect for human rights and environmental protection, create a level playing field for companies within the Union and avoid fragmentation resulting from Member States acting on their own. It would also include third-country companies operating in the Union market, based on a similar turnover criterion.[176]

Another example could be the regulation on 'deforestation',[177] the adopted version of which does not mention the level playing field. However, in its draft, the Commission has indicated it intends 'to ensure a level playing field and a common understanding of deforestation free supply chains, in order to increase supply chain transparency and minimise the risk of deforestation and forest degradation associated with commodity imports in the EU'.[178] Indeed, supply chains of wood products are, as the Commission underlines, 'inter-

173. Commissioner Reynders, Speech in RDC webinar on due diligence, April 30, 2020, <https://responsiblebusinessconduct.eu/wp/2020/04/30/speech-by-commissioner-reynders-in-rbc-webinar-on-due-diligence/>
174. European Parliamentary Research Service, Towards a mandatory EU system of due diligence for supply chains, October 2020: 'The growth of international supply chains has undoubtedly brought enormous benefits to developing countries, but at the same time it has had certain negative impacts, relating for instance to violations of human and labour rights, including forced labour and child labour, environmental damage, land grabbing, and corruption'.
175. ibid.
176. European Parliament and Council (n 164).
177. European Parliament and Council Regulation (EU) 2023/1115 of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) N° 995/2010 [2023], OJ L 150, 206.
178. European Parliament and Council Proposal for a Regulation on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) N° 995/2010, COM/2021/706.

national and very often global' so that 'it is instrumental to ensure a level playing field for operators in terms of requirements to be met before placing products (commodities and derived products) on the EU market for the first time'.[179]

While the extended territoriality of some provisions of Union law is purported to promote the values of the Union, it is part of the approach aiming to restore fairness in the internal market.

B. The restored fairness in the internal market via split public action

When it is used, the expression 'level playing field' regularly refers to the idea of fairness. It is always risky to try and give a definition of fairness since the notion generally extends beyond the the law, taking on an opportunistic hue. However, when it is associated with the discourse on the level playing field, couldn't fairness be a notion on its own, its formation being visible in Union law? The idea is that in order to restore fair competition conditions, the Union must act in a way which corrects the disruption of the internal market resulting from the offers of third countries which it is perceivable are not made in normal market conditions. That action mainly takes the form of trade defence instruments. However, the arsenal of the Union and Member States is being enriched with new instruments, which make the 'level playing field' meaningful.

Anti-dumping. Anti-dumping law has been one of the first domains in which a Community action has been justified on the ground of trade defence. Dumping is characterised by a third-party company's export into a Member State of a good at a lower price than the normal value of the good on the internal market. If an investigation determines that third-country importers have practised dumping harming the industry of the importing Member State, anti-dumping measures may be adopted, such as the application of an *ad valorem* duty based on the transaction value, specific duties established per specific amount of the good or even the exporter's anti-dumping minimal price undertakings. Anti-dumping law, though it is linked to competition law, is different from it, as Damien Reymond has shown in his PhD. He states that that law belongs to a logic of fight against unfair competition, of which he distinguishes two meanings: according to an 'ethical or moral' conception, fairness concerns contractual relations, while a 'fair or even egalitarian [conception] (…) implies some homogeneousness of competition conditions, which is expressed in the English expression *level playing field*'.[180]

This is how the expression of fair competition conditions is used in some regulations on antidumping. The aim is indeed to 'restore the level playing field'[181] in the internal market

179. ibid.

180. D. Reymond, *Action antidumping et droit de la concurrence dans l'Union européenne*, Préface L. Idot (Bruylant 2015) 102.

181. Commission Implementing Regulation (EU) 2022/191 of 16 February 2022 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China [2022], OJ L 36, 1, para 500; Council Regulation (EC) N° 238/2008 of 10 March 2008 terminating the partial interim review pursuant to Article 11(3) of Regulation (EC) N° 384/96 of the anti-dumping duty on imports of solutions of urea and ammonium nitrate originating in Russia [2008], OJ L 75, 14, para 16. See also Council Regulation (EC) N° 1987/2005 of 2 December 2005 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of granular polytetrafluoroethylene (PTFE) originating in Russia and the People's Republic of China [2005], OJ L 320, 1, para 141; Commission Implementing Regulation (EU) 2015/1559 of 18 September 2015 imposing a ➤

because it has 'been distorted by the unfair trade practises of (…) exporters'.[182] Anti-dumping measures have then been justified by the will to 'eliminate the impact of distorted market conditions arising from the presence of dumped imports'[183] or 'combat the unfair trade practices and to remedy to some extent the distorting effects of dumped imports'.[184] As an instrument of trade defence, anti-dumping law is therefore not designed to 'close the Community market from third country imports'[185] nor to 'prohibit imports nor to hamper the activities of the importers in the Community'.[186] The re-establishment of fair competition conditions rather purports to protect the economic actors established in the internal market. An objective could be to 'ensure the viability of these producers, while encouraging the emergence of new ones',[187] to help not only Union producers but also other supply sources which are not dumped benefit from it.[188] More generally, anti-dumping measures allow Union producers to increase their sales in order to enhance the profitability of the Union industry and prevent job losses.[189] The aim is to restore fair competition conditions in the Union market and allow the Union industry to improve by increasing its profitability.[190]

Anti-dumping law then has an ambiguous relation with competition law. Their relations belong more to a logic of intersection than articulation. Ensuring fair competition conditions does not necessarily mean ensuring competition order. In particular, anti-dumping measures may lead to an increase in the price that is necessary to the restoration of fair competition conditions:[191] for example, it was decided to 'restore prices to a non-subsidised level in order to allow all producers to operate on the Union market under fair trading

provisional anti-dumping duty on imports of tubes and pipes of ductile cast iron (also known as spheroidal graphite cast iron), originating in India [2015], OJ L 244, 25, para 115. Commission Implementing Regulation (EU) N° 1195/2014 of 29 October 2014 imposing a provisional countervailing duty on imports of certain rainbow trout originating in Turkey [2014], OJ L 319, 1, para 202. Commission Regulation (EC) N° 1827/2001 of 17 September 2001 imposing a provisional anti-dumping duty on imports of certain zinc oxides originating in the People's Republic of China [2001], OJ L 248, 17, para 124.

182. Commission Regulation (EC) N° 1009/2004 of 19 May 2004 imposing a provisional anti-dumping duty on imports of certain graphite electrode systems originating in India [2004], OJ L 183, 61, para 105.
183. ibid.
184. Council Regulation (EC) N° 716/2006 of 5 May 2006 imposing a definitive anti-dumping duty on imports of dead-burned (sintered) magnesia originating in the People's Republic of China [2006], OJ L 125, 1, para 115.
185. ibid Council Regulation (EC) N° 238/2008 (n 180), para 16.
186. Council Regulation (EC) N° 258/2005 of 14 February 2005 amending the anti-dumping measures imposed by Regulation (EC) N° 348/2000 on imports of certain seamless pipes and tubes of iron or non-alloy steel originating in Croatia and Ukraine [2005], OJ L 46, 7, para 117.
187. Council Regulation (EC) N° 368/98 of 16 February 1998 imposing a definitive anti-dumping duty on imports of glyphosate originating in the People's Republic of China and collecting definitively the provisional duty imposed, [1998], OJ L 47, 1, Rec. 53.
188. Commission Regulation (EC) N° 1009/2004 of 19 May 2004 imposing a provisional anti-dumping duty on imports of certain graphite electrode systems originating in India [2004], OJ L 183, 61, Rec. 105.
189. Commission Implementing Regulation (EU) 2015/1559 of 18 September 2015 imposing a provisional anti-dumping duty on imports of tubes and pipes of ductile cast iron (also known as spheroidal graphite cast iron), originating in India [2015], OJ L 244, 25, Rec. 115.
190. Commission Implementing Regulation (EU) 2017/1795 of 5 October 2017 imposing a definitive anti-dumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Brazil, Iran, Russia and Ukraine and terminating the investigation on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Serbia [2017], OJ L 258, 24, para 423.
191. Commission Implementing Regulation (EU) 2022/433 of 15 March 2022 imposing definitive countervailing duties on imports of stainless steel cold-rolled flat products originating in India and Indonesia and amending Implementing Regulation (EU) 2021/2012 imposing a definitive anti-dumping duty and definitively collecting the provisional duty imposed on imports of stainless steel cold-rolled flat products originating in India and Indonesia [2022], OJ L 88, 24, para 874.

conditions'.[192] The Court for example considers that reference to the establishment of fair conditions with third-country competitors does not mean 'Community producers are vulnerable because of their cost structure' but '[refers] to the abnormally low prices charged by the third-country exporting producers'.[193] The autonomy of anti-dumping law vis-à-vis competition law may also be seen when the Commission declares that the fact that the Union industry has resorted to cartelisation does result in depriving it of the right to get compensation for unfair trade practices.[194] At the same time, 'Ensuring a level playing field for the Community industry (…) also guarantees a higher degree of competition between various suppliers (…) market'.[195] This leads to avoiding the evictions, at a European level, of operators from the market: the Council has for example considered that

> should the Community industry of TCS disappear as a consequence of the elimination of the anti-dumping measures in force, this would undoubtedly lead to a reduction in competition and to the dependence of Community TCS users on Japanese technology. The latter aspect is particularly important as producers of TCS can play an important role in setting future broadcasting standards. The Community would undoubtedly be in a disadvantageous situation should it not have a sufficiently strong producer of this product.[196]

It is in general to establish the Union industry's interest in anti-dumping measures that the restoration of fair competition conditions is invoked. These measures indeed allow to compensate for the harm suffered by the industry of the European Union and the establishment of fair price.[197] Similarly, commitments may be refused on the ground that they may not restore fair competition conditions in the internal market by eliminating dumping and its harmful effects.[198]

Subsidies. Among the instruments of trade defence, there is also Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European

192. Commission Implementing Regulation (EU) 2022/433 of 15 March 2022 imposing definitive countervailing duties on imports of stainless steel cold-rolled flat products originating in India and Indonesia and amending Implementing Regulation (EU) 2021/2012 imposing a definitive anti-dumping duty and definitively collecting the provisional duty imposed on imports of stainless steel cold-rolled flat products originating in India and Indonesia, [2022], OJ L 88, 24, para 1046.
193. Case T-192/08 Transnational Company 'Kazchrome' AO and ENRC Marketing AG v Council [2011], para 143.
194. Commission Regulation (EC) N° 1009/2004 of 19 May 2004 imposing a provisional anti-dumping duty on imports of certain graphite electrode systems originating in India [2004], OJ L 183, 61, para 105.
195. Council Regulation (EC) N° 716/2006 of 5 May 2006 imposing a definitive anti-dumping duty on imports of dead-burned (sintered) magnesia originating in the People's Republic of China, [2006], OJ L 125, 1, para 115.
196. Council Regulation (EC) N° 1910/2006 of 19 December 2006 imposing a definitive anti-dumping duty on imports of television camera systems originating in Japan following an expiry review pursuant to Article 11(2) of Council Regulation (EC) N° 384/96 [2006], OJ L 365, 7.
197. Council Regulation (EC) N° 771/98 of 7 April 1998 imposing a definitive anti-dumping duty on imports of tungsten carbide and fused tungsten carbide originating in the People's Republic of China, [1998], OJ L 111, 1, para 64.
198. Commission Regulation (EEC) N° 129/91 of 11 January 1991 imposing a provisional anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the people's Republic of China, [1991], OJ L 14, 31, para 58. Council Regulation (EEC) N° 1048/90 of 25 April 1990 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in the Republic of Korea and collecting definitively the provisional duty [1990], OJ L 107, para 40.

Union.[199] It is designed to integrate into Union law the rules that have been provided for in the agreement on subsidies concluded within the framework of the WTO. Thus, in compliance with international rules, the Union can impose 'countervailing duty (…) to offset any subsidy granted, directly or indirectly, for the manufacture, production, export or transport of any product whose release for free circulation in the Union causes injury'.[200] The subsidy is composed of a financial contribution of the public authorities of the country of origin or export and may thus be subject to compensatory measures when it has a character that is specific to a company or an industry. What needs to be calculated next is the compensatory duty which corresponds to the advantage granted to the beneficiary company or industry. The regulation then is designed to restore equality among third-country and State operators. However, it does not contain the expression 'fair competition conditions'. At best, Article 12 provides that the measures must be taken if 'the Union interest calls for' them and that therefore what will be appraised is 'all the various interests taken as a whole, including the interests of the domestic industry and users and consumer (…), the need to eliminate the trade-distorting effects of injurious subsidisation and to restore effective competition shall be given special consideration'.[201]

It is however interesting to note that there is an instance of the fair competition conditions in the implementing decisions adopted starting from 2019. The Commission refers to them to justify the interest in compensatory measures of the Union industry,[202] independent

199. European Parliament and Council Regulation (EU) 2016/1037 of 8 June 2016 on protection against subsidised imports from countries not members of the European Union [2016], OJ L 176, 55.

200. ibid, Art. 1, para 1.

201. ibid, Art. 31.

202. Commission Implementing Regulation (EU) 2019/72 of 17 January 2019 imposing a definitive countervailing duty on imports of electric bicycles originating in the People's Republic of China [2019], OJ L 16, 5, para 728: 'The Commission expects that the imposition of a countervailing duty will allow all producers to operate under conditions of fair trade on the Union market. In the absence of measures, a further deterioration of the Union industry's economic and financial situation is very likely'. Commission Implementing Regulation (EU) 2019/688 of 2 May 2019 imposing a definitive countervailing duty on imports of certain organic coated steel products originating in the People's Republic of China following an expiry review pursuant to Article 18 of the Regulation (EU) 2016/1037 of the European Parliament and of the Council [2019], OJ L 116, 39, para 273: 'The continuation of measures would allow the Union industry to further exploiting its potential on a Union market that is a level-playing field'. Commission Implementing Regulation (EU) 2017/969 of 8 June 2017 imposing definitive countervailing duties on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in the People's Republic of China and amending Commission Implementing Regulation (EU) 2017/649 imposing a definitive anti-dumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in the People's Republic of China [2017], OJ L 146, 17, para 598: 'the imposition of definitive countervailing duties will restore fair trade conditions on the Union market, enabling the Union industry to further recover. (…) It is therefore important that prices be restored to a non-subsidised or a non-injurious level in order to allow all various producers to operate on the Union market under fair trade circumstances'.
(599) The Commission therefore concluded that imposing definitive countervailing duties would be in the interest of the Union.

exporters[203] or Union users and importers.[204] In other decisions the Commission notes that, in accordance with the 'trade-distorting effects of injurious subsidisation' and '[restoration of] effective competition' within the meaning of Article 31(1) of Regulation (EU) 2016/1037, the subsidies in question deprive the Union industry of fair competition conditions.[205] The latter are also taken into consideration in the calculation of the injury elimination duty. For example, the Commission has considered that the amount of duty 'should allow the Union industry to cover its costs of production and obtain a profit before tax that could be reasonably achieved by an industry of this type in the sector under normal conditions of competition, ie, in the absence of subsidised imports, on sales of the like product in the Union'.[206] Last, and more generally, the Commission has relied on the fair competition conditions to decide the harm suffered in the Union. Thus, it has accepted the argument of '[restoring] prices to a non-subsidised level in order to allow all producers to operate on the Union market under fair trading conditions'[207] or even that according to which the Union industry prices have diminished while 'under conditions of fair competition, they would have been expected to increase at a ratio comparable to rise of the cost of production'.[208] It is thus

203. Commission Implementing Regulation (EU) 2022/72 of 18 January 2022 imposing definitive countervailing duties on imports of optical fibre cables originating in the People's Republic of China and amending Implementing Regulation (EU) 2021/2011 imposing a definitive anti-dumping duty on imports of optical fibre cables originating in the People's Republic of China [2022], OJ L 12, 34, para 741: 'In any event, the investigation has shown that one of the important facets of injury in this case is precisely the fact that, due to Chinese dumped imports, Union industry could not achieve the level of profits that would enable it to continue to invest *inter alia* in further capacity to meet the growing demand on the expanding Union market. The expected impact of measures is precisely to restore a level playing field and allow for such profits, investment and expansion of capacity to take place'.
204. Commission Implementing Regulation (EU) 2018/1690 of 9 November 2018 imposing definitive countervailing duties on imports of certain pneumatic tyres, new or retreaded, of rubber, of a kind used for buses or lorries and with a load index exceeding 121 originating in the People's Republic of China and amending Commission Implementing Regulation (EU) 2018/1579 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain pneumatic tyres, new or retreaded, of rubber, of a kind used for buses or lorries, with a load index exceeding 121 originating in the People's Republic of China and repealing Implementing Regulation (EU) 2018/163 [2018], OJ L 283, 1, para 884: 'The Commission considered that there was sufficient overall capacity in the Union to supply the internal market (…) Moreover, there are many producers located in third countries (Turkey, South Korea, Japan, Russia, Thailand, and many other countries) who are already selling to the Union market. Their combined sales volumes during the period considered were relatively stable, with a market share of around 12%. The Commission recalled that the Chinese prices were well below the prices of all other major importing countries, according to Eurostat the average import price from China was 128,8 EUR/item, while the import prices from all other countries were 189 EUR/item in the investigation period. Therefore, it can be reasonably expected that once the level playing field is restored in the Union market, imports from all countries will provide for the necessary supply'.
205. Commission Implementing Regulation (EU) 2020/379 of 5 March 2020 imposing a provisional countervailing duty on imports of continuous filament glass fibre products originating in Egypt [2020], OJ L 69, 14, para 209; Commission Implementing Regulation (EU) 2019/1344 of 12 August 2019 imposing a provisional countervailing duty on imports of biodiesel originating in Indonesia [2019], OJ L 212, 1, para 393.
206. Commission Implementing Regulation (EU) 2019/244 of 11 February 2019 imposing a definitive countervailing duty on imports of biodiesel originating in Argentina [2019], OJ L 40, 1, para 495.
207. Commission Implementing Regulation (EU) 2022/433 of 15 March 2022 imposing definitive countervailing duties on imports of stainless-steel cold-rolled flat products originating in India and Indonesia and amending Implementing Regulation (EU) 2021/2012 imposing a definitive anti-dumping duty and definitively collecting the provisional duty imposed on imports of stainless-steel cold-rolled flat products originating in India and Indonesia [2022], OJ L 88, 24, para 1046.
208. Commission Implementing Regulation (EU) 2022/433 of 15 March 2022 imposing definitive countervailing duties on imports of stainless steel cold-rolled flat products originating in India and Indonesia and amending Implementing Regulation (EU) 2021/2012 imposing a definitive anti-dumping duty and definitively collecting the provisional duty imposed on imports of stainless steel cold-rolled flat products originating in India and Indonesia [2022], OJ L 88, 162, para 1005.

patent that there is a link between trade distortion, unfair competition advantage and fair competition conditions in the implementation of Regulation (EU) 2016/1036. To sum up, the Commission has underlined that

> Subsidisation by third countries is an increasing concern and it is important to show that where such practices cause harm to Union producers, they are tackled robustly. By imposing countervailing measures at a level that fully reflects the amounts of subsidisation, the EU shows that it addresses the serious damaging effects of this unfair trade practice rigorously, and also ensures adequate protection of the EU industry and level playing field.[209]

Though it is at the service of fair competition conditions, Regulation (EU) 2016/1036 is however ineffective when foreign subsidiaries take the form of subsidised investments or when financial services and flows are involved. As to the WTO agreement on subsidies and compensatory measures, not only does it only apply to agricultural products and industrial goods, but dispute resolution between States is neutralised for political reasons. That is why a 'new tool to effectively deal with distortions in the internal market caused by foreign subsidies in order to ensure a level playing field'[210] has been created. The legislator expressly states that that instrument has been designed to restore the level playing field among European and third-country companies since the former have to comply with competition law – in particular to State-aid law – while the latter are not subject to the same rules. The regulation on 'foreign subsidies' is much more ambitious than Regulation (EU) 2016/1036. The double legal basis which links the instrument to the internal market (Article 114 TFEU) as well as to trade common policy (Article 217 TFEU) is quite significant in that respect. The extended territoriality of Union law plays its full role since the regulation applies to third-country companies when they conduct an economic activity in the internal market. The 'anti-subsidies' regulation is quite remarkable as it gives the Commission the power to impose concrete corrective measures to restore fair competition conditions. To this end, it is necessary to establish that a financial contribution granted by a third country to a company causes competition distortions. Though the notion of foreign subsidy is classic, the regulation has the advantage of consecrating gradual presumptions of competition distortion. It sets the indicators with regard to which the subsidy is assessed: the amount, its nature and purpose, the situation of the company in relation to the market in question or the level and evolution of the economic activity of the company in the internal market.[211] A gradation of the amount is provided for and allows to set aside the subsidies which do not involve distortions or are little likely to distort the internal market.[212] Conversely, the categories of foreign subsidies which are most likely to distort the market are identified.[213] The

209. Commission Communication to the European Parliament and the Council on the revised lesser duty rule in anti-dumping and anti-subsidy investigations in the EU A review and evaluation of the application of Articles 7(2a), 8(1) and 9(4) of Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 and of the third and fourth subparagraphs of Article 12(1), the third and fourth subparagraphs of Article 13(1), and of the third and fourth subparagraphs of Article 15(1) of Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016, COM/2023/294.

210. European Parliament and Council Regulation (EU) 2022/2560 (n 6), Rec. 6.

211. Regulation (EU) 2022/2560 (n 6), Art. 4(1).

212. Regulation (EU) 2022/2560 (n 6), Art. 4(2).

213. Regulation (EU) 2022/2560 (n 6), Art. 5(1): 'A foreign subsidy: (a) [is] granted to an ailing undertaking, (…) (b) (…) in the form of an unlimited guarantee for the debts or liabilities of the undertaking, (…); (c) an export financing measure that is not in line with the OECD Arrangement on officially supported export credits; (d) (…) directly facilitating a concentration; (e) (…) enabling an undertaking to submit an unduly advantageous tender on the basis of which the undertaking could be awarded the relevant contract'.

logic is not purely economic however. Indeed, Article 6 of Regulation (EU) 2022/2560 specifies that it is for the Commission to balance the negative and positive effects of a foreign subsidy. The negative effects are those which result from the implementation of the presumptions of Articles 4 and 5 of the Regulation. The positive effects come from both the impact of the development of the subsidised economic activity on the internal market and of the pursued relevant strategic interests. The aim is to entrust the Commission with a broad power of appreciation to determine whether a foreign subsidy involves a competition distortion which allows to reconcile economic requirements and political interests. If that is the case, the companies may present commitments that the Commission may accept, in accordance with Article 7 of the Regulation. Compliance with commitments is then monitored by the Commission. If the company does not offer commitments or if they are not accepted by the Commission, the latter may impose compensatory measures. They and the commitments are explained in an open list set by Article 7 (4) of the Regulation according to which what is to be imposed is access to essential infrastructures (access on fair, reasonable and non-discriminatory conditions to infrastructures obtained thanks to foreign subsidies or the granting of licences on fair, reasonable and non-discriminatory terms for the assets obtained or developed thanks to foreign subsidies), requirement of the reduction of capacities or presence on the market, including via a temporary reduction of the commercial activity, prohibition of some investments, etc. Two specific controls are added to the rules of the internal market. For the companies benefiting from foreign subsidies implying competition distortions, the regulation provides for, on the one hand, the supervision of the specific concentrations and, on the other, conditional access to public markets in the European Union.[214] Without giving a detailed analysis of the system of the regulation on 'foreign subsidies', it is interesting to note its hybrid nature. On the one hand, it clearly borrows from competition law instruments with regard to commitments and compensatory measures as well as the conducted proceedings. On the other, it is not limited to a purely competitive or even economic logic but shows political or even geopolitical priorities. This translates into a sort of division of the supervision of concentrations and public procurement.

Concentrations. While the monitoring of concentrations is an instrument of competition law, it may take on a geopolitical meaning. Admittedly, the Commission is competent to assess the operations of concentration which involve third-country companies on the condition they have a 'Community dimension' which is determined based on turnover thresholds.[215] Thus, the Court of First Instance of the European Communities has interpreted the previous regulation on concentrations as not excluding from its field of application the 'concentrations which, while relating to mining and/or production activities outside the Community, have the effect of creating or strengthening a dominant position as a result of which effective competition in the common market is significantly impeded'.[216] However, for the regulation to respect the principle of territoriality, in the sense of public international law, the Court has required that the three criteria of the immediate, substantial and foreseeable effect be present in the case at hand.[217] Article 2 of Regulation (CE) N° 139/2004 nevertheless limits the assessment of accountability to considerations of pure competition

214. See infra.
215. Council Regulation (EC) N° 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004], OJ L 24, 1.
216. Case T-102/96 *Gencor Ltd v Commission* [1999], *Rec.* p. II-753, para 82; D. Berlin, 'Concentrations: chronique d'actualité', *RTD eur.*, 2001, para 68.
217. Case T-102/96 (n 215), para 92.

and the assertion of a theory of *efficiencies* does not solve the recurrent debate on the extension of the supervision of concentration to public interest grounds. The monitoring of foreign subsidies is therefore especially significant when operations of concentrations are involved. That explains why a *lex specialis* has been consecrated in Chapter 3 of the regulation on foreign subsidies distorting the internal market in the context of concentrations. The *ex ante* supervision as provided for in Regulation (CE) N° 139/2004 is copied, with a few adaptations. The main difference lies in the thresholds which, for foreign subsidies, are different from Article 1 of Regulation (EC) N° 139/2004.[218] Pursuant to the regulation on foreign subsidies, the companies in question must notify the Commission of the operation of concentration, the control of that operation taking full consideration of the granting of foreign subsidies involving a distortion of competition. The companies may offer commitments to the Commission to compensate for it, and if the latter does not accept them, it may impose corrective measures.

Public procurement. Though it is rarely mentioned, public procurement law is guided by a level playing field logic. Subjecting the conclusion of public procurement and concessions to harmonised rules in order to guarantee transparency and competition aims to ensure fair competition conditions among the economic operators established in the Member States. Public procurement law involves a form of reverse discrimination to the detriment of the European Union which benefits third-country businesses. Pursuant to Article 25 of Regulation 2014/24/EU on public procurement, third-country economic operators must receive a less favourable treatment than that of Union economic operators insofar as the external agreements concluded by the Union provide for it. The European Union is party to the WTO-based Agreement on public procurement concluded in 2012 and is therefore linked to 19 other third countries which are also parties to that agreement.[219] Within a bilateral framework, some free-trade agreements, like those concluded with Canada, Japan or the United Kingdom, also include stipulations on public procurement. Thus, Union law provides for an opening of public procurement within the European Union to offers of foreign operators. There is therefore a risk that some economic operators which have benefited from foreign subsidies bid for public procurement and concessions organised in the Member States of the European Union, so that they may present offers at lower prices than those of the European companies. That is why the Union legislator has adopted two instruments allowing to restore the level playing field.

First, the Regulation on the International Procurement Instrument sets the proceedings allowing the Commission to investigate claims of measures or practices of third countries against Union economic operators of goods and services and to start a dialogue with the

218. Regulation (EU) 2022/2560 (n 6): 'At least one of the merging undertakings, the acquired undertaking or the joint venture is established in the Union and generates an aggregate turnover in the Union of at least EUR 500 million; and (b) the following undertakings were granted combined aggregate financial contributions of more than EUR 50 million from third countries in the three years preceding the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest: (i) in the case of an acquisition, the acquirer or acquirers and the acquired undertaking; (ii) in the case of a merger, the merging undertakings; (iii) in the case of a joint venture, the undertakings creating a joint venture and the joint venture'.

219. Are parties: Armenia; Australia; Canada; South Korea; the United States; Hong Kong, China; Iceland; Israel; Japan; Liechtenstein; Moldavia; Montenegro; Norway; New Zealand; The Netherlands for Aruba; the United Kingdom; Singapore; Switzerland; Chinese Taipei; Ukraine.

third countries in question.[220] Then and above all, Chapter 4 of the regulation on foreign subsidies is dedicated to public procurement or concession proceedings. An obligation to give prior notice of foreign financial contributions or to declare them weighs on the third-country operators benefiting from foreign subsidies which intend to bid for public procurement or concessions (above some thresholds). Pursuant to Article 27 of the regulation, a foreign subsidy involving a competition distortion is considered as allowing a third-country operator to make an unduly advantageous offer for the work, supply or services in question. In such a case, the Commission adopts either a decision not to object, or a decision with commitments, or, when there are no commitments or they are neither appropriate nor enough to compensate for the distortion, a decision prohibiting that the procurement or the concession be awarded.

Access to the equivalence-dependent market. In order to re-establish the level playing field, a logic of equivalence is sometimes developed. While the notion of equivalence is well-known in Union law, it is rather its meaning in financial law that is used here. Indeed, the Union legislator has inserted provisions that allow third-country operators to access the internal market to offer a specific service or good in a few acts. Those provisions authorise the Commission to adopt an implementing act acknowledging that the legal framework and surveillance system of a third country ensures compliance by third-country operators with legally constraining requirements which are equivalent to the requirements provided for in Union law. For example, in accordance with Article 25(6) of Regulation (EU) N° 648/2012, the Commission has adopted a decision on the equivalence of the regulation framework of the United States for central counterparts which are approved and monitored by the Securities and Exchange Commission of the United States with the requirement of Regulation (EU) N° 648/2012.[221]

Isn't it also a logic of equivalence that is to be found in the carbon border adjustment mechanism (CBAM)? It is at least a split equivalence, being at the same time regulatory and financial. The CBAM regulation indeed completes the system of greenhouse gas emissions trading in the Union established in the context of Directive 2003/87/EC 'by applying an equivalent set of rules to imports into the customs territory of the Union of the goods referred to in Article 2 of this Regulation'.[222] In short, the aim is to require that the Union importers of some goods (cement, iron and steel, fertiliser etc.) buy carbon certificates corresponding to the price at which the carbon would have been bought if the goods had been produced in compliance with the Union rules in terms of carbon price scale. However, if a third-country producer establishes that he has already paid the price for the carbon used in the production of the goods imported into a third country, the corresponding price may be completely deducted for the Union importer. The idea is to reduce the risk of carbon leak

220. European Parliament and Council Regulation (EU) 2022/1031 of 23 June 2022 on the access of third-country economic operators, goods and services to the Union's public procurement and concession markets and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement and concession markets of third countries (International Procurement Instrument – IPI) [2022], OJ L 173, 1.

221. Commission Implementing Decision (EU) 2022/551 of 4 April 2022 amending Implementing Decision (EU) 2021/85 on the equivalence to the requirements of Regulation (EU) N° 648/2012 of the European Parliament and of the Council of the regulatory framework of the United States of America for central counterparties that are authorised and supervised by the U.S. Securities and Exchange Commission [2022], OJ L 107, 82; European Parliament and Council Regulation (EU) N° 648/2012 of 4 July 2012 on OTC derivatives, central counterparties and trade repositories [2012], OJ L 201, 1.

222. European Parliament and Council Regulation (EU) 2023/956 of 10 May 2023 establishing a carbon border adjustment mechanism [2023], OJ L 130, 52, Article 1(2).

and encourage third-country operators to resort to production processes that are more climate friendly. In so doing, as the Commission indicates, the CBAM contributes to restore fair competition conditions.[223]

As a discourse, doesn't the level playing field lead to justifying the preference given to a unilateral action of the Union rather than to the conclusion of international agreements? Indeed, the best way to guarantee fair competition conditions is to ensure the reciprocity that is inherent in the conclusion of international conventions. When it comes down to it, free-trade agreements have referred in their preamble to the fulfilment of fair competition conditions.[224] The Commission itself seems to acknowledge that the conventional path would be more adapted than unilateral action to promote an equivalence guaranteeing fair competition conditions. A revealing analysis has been made in a recital of a minor act in which the Commission has underlined that

> The ongoing review of the legal framework of the organic production sector has revealed shortcomings in the current scheme of recognition of third countries for the purpose of equivalence. Most of the equivalence arrangements signed by the Commission and third countries have been unilaterally applied by the European Commission which has not been conducive to the promotion of a level playing field. It was found that equivalence recognition with third countries should be established through international agreements. Therefore, the current scheme of recognition of third countries for the purpose of equivalence based on equivalence arrangements should shift to a scheme based on balanced international agreements with a view to promoting a level playing field, transparency and legal certainty.[225]

The return of the conventional path appears in a new technique called that of 'mirror clauses'. The idea was launched during the French presidency of the Council of the European Union in the first semester of 2022. President Emmanuel Macron thus stated that 'our trade policy must include mirror clauses on climate and biodiversity'.[226] The aim is to introduce into free-trade agreements clauses through which access to the internal market of goods, or even services, would be dependent on the third country's compliance with environmental social and other norms, equivalent to those consecrated in Union law. That has generated lively discussions even within the Union.

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This analysis reveals that the level playing field is a living discourse in Union law, the occurrence of which increased at the beginning of the 2020s. It has two meanings. The first is internal to the European Union and can be considered as consubstantial with the objective of integration into the internal market. The latter supposes equality among economic operators in the market which must be promoted by the rules of the internal market. Then, legally speaking, the level playing field is redundant in that it is induced by existing rules. Politically speaking, it has an interest as, for us, it founds public action in a market economy, which is not classic interventionism, but more about adopting measures that will allow to

223. Commission, Carbon Border Adjustment Mechanism: Q&A, 14 July 2021.
224. Agreement between the European Economic Community and the Swiss Confederation of 22 July [1972], OJ L 300, 188.
225. Commission Implementing Regulation (EU) N° 442/2014 of 30 April 2014 amending Regulation (EC) N° 1235/2008 as regards requests for inclusion in the list of third countries recognised for the purpose of equivalence in relation to the import of organic products [2014], OJ L 130, 39, Rec. 3.
226. Statement of French President Emmanuel Macron on the preservation of biodiversity, forests and oceans, Marseille 3 September 2021.

correct market failures. The second meaning is external and allows to compensate for the limits of the Union's economic action on an international scale. Its meaning is much more political since the level playing field then founds an action of the Union which is not limited to opening the internal market to the rest of the world, but to guarantee that third countries' access happens in conditions that are fair for European companies. In doing so, the action thus conducted includes considerations which go far beyond the sole questioning of the optimal operation of the market. The aim is to diffuse the values of the European Union and Member States globally, in a renewed geopolitical context. The internal market then becomes more an instrument serving a political cause, and neo-idealism, which carries an ideal market economy, takes on a shade of neo-liberalism.