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The More Favourable Provision Clause in EU Migration Law. Expanding Fundamental Rights Through National Discretion?

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Abstract

Interaction between different levels of fundamental rights protection is a widely debated topic in EU scholarship, which has long dealt with situations in which national legislation lowered legal standards in the EU. Less explored, however, is the opposite case: when Member State regulations set standards higher than those enshrined at EU level. This can occur through application of the more favourable provision (MFP) clause – commonly enshrined in EU directives dealing with (but not limited to) immigration and asylum. Under it, Member States can apply more favourable standards insofar as they comply with EU legislation. Though seldom discussed in existing literature, the MFP clause is a critical issue of EU migration law and illustrative of challenges facing the EU constitutional order, for it highlights the relationship between fundamental rights protection in the multi-layered EU system and general principles of EU law. Against this backdrop, this paper will investigate the features of the MFP clause in EU migration law and analyse the CJEU's adjudication in immigration and asylum cases, exploring its reasoning in testing application of MFP clause against EU law.

Keywords

More favourable provisions – return directive – qualification directive – fundamental rights

1 Introduction

Since the EU's assumption of competences in immigration and asylum,[1] protection of migrants, asylum seekers and refugees' fundamental rights have generated continuous tension among Member States as well as between these and the EU, as exemplified by long-lasting and ongoing quarrels around the (ill)functioning of the Schengen and Dublin "systems". [2] Legal scholars have analysed such antagonism in migration-related issues[3] extensively and the Court of Justice of the European Union has often been asked to adjudicate on whether national standards in protecting third-country nationals' fundamental rights are consistent with EU law.[4] But whereas most of the literature and jurisprudence have engaged with situations in which national legislation weakens protection of fundamental rights provided for at EU level,[5] this paper focuses on the opposite case: what happens when Member State regulations set higher standards than those enshrined at EU level?

[1] See S. Peers, *EU Justice and Home Affairs* (Oxford: OUP, 2011), p. 307; K. Hailbronner and D. Thym, 'Constitutional Framework and Principles of Interpretation', in: K. Hailbronner & D. Thym (eds), *EU Immigration and Asylum Law. A Commentary* (München: Beck, 2nd edition, 2016), p. 1-3.
[2] C-643/15 and C-647/15 *Slovakia and Hungary v Council* EU:C:2017:631 para 302.
[3] G. Cornelisse, 'What's Wrong with Schengen? Border Disputes and the Nature of Integration in the Area Without Internal Borders', 51 CMLR, 2014, p. 741-770; A. Farahat and N. Markard, 'Forced Migration Governance: In Search of Sovereignty', 17 German Law Journal, p. 923-948.
[4] See, among others, C-411/10 *N.S.* EU:C:2011:865.
[5] See D. Acosta and J. Martire, 'Trapped in the Lobby: Europe's Revolving Doors and the Other as Xenos' 39 *E.L.Rev*. 2014, p. 362-379. The magnitude of this weakening effect wrought by national legislation, for instance particularly evident in reception conditions of asylum seekers, has triggered a well-known case law of the ECtHR (see Application No 30696/09 *M.S.S. v. Belgium and Greece* Judgment of 21 January 2011 and Application No. 29217/12 *Tarakhel v.*

To answer that question, we will explore the potential entailed by more favourable provision (MFP) clauses, which, under EU law, enable adoption of more generous standards. These make it possible for Member States, by applying either own legislation or international treaties to which they are bound, to maintain or introduce more favourable rules than those provided for in EU law. The main roots and features of the MFP clause can be found in international law, where a number of treaties include it, typically, though not exclusively, in human rights.[6]

MFP clauses enable Member States to interact with EU fundamental rights, enhancing the level of protection ensured at EU level and preserving national specificities. The clauses are commonly enshrined in either EU primary or secondary law, and especially, although not exclusively, in directives on immigration and asylum.[7] The ways in which these clauses have been adopted and interpreted in these areas therefore serve as a case study capable of developing future research into various areas of EU law.

The relevance of the MFP clause is twofold, for it touches on crosscutting issues around fundamental rights protection within the EU constitutional order while also involving problems more specifically concerned with regulating migration and asylum law in a multi-layered system. On the one hand, in terms of its implications for wider constitutional debates of EU law, the MFP clause figures among the array of legislative techniques allowing Member States to deviate from EU law.[8] Hence, it hits at the heart of fundamental rights challenges that national judges and the CJEU have tackled throughout European integration, as it directly involves the tension between the scope of EU law in non-fully harmonised directives and discretionary powers left to Member States, and engages with landmark judgments in EU constitutional law concerning how EU law is implemented.[9]

In particular, one current point of controversy is whether, when a Member State adopts higher standards in its national domain pursuant to an MFP clause explicitly enshrined in a directive, it is actually implementing EU law. In a recent judgment, the Advocate General stated that "a national measure adopted in application of a provision of a directive that authorises enhanced national protection is closely linked to that directive and must therefore be regarded as implementing EU law".[10] But the CJEU has rejected this conclusion, holding that, when a Directive enables Member States to grant a more favourable standard, it "merely recognises the power which [Member States] have to provide for such more favourable provisions in national law, *outside* the framework of the regime established by that directive" (emphasis added).[11]

On the other hand, the more favourable provision is intertwined with the controversial process of harmonising regulations of immigration and asylum. Some critics note that a common set of rules has led to downward harmonisation, and several studies have shown that *worst practices rather than best ones* are often included in EU legislation, so that EU rules are frequently characterised by a sort of "lowest common denominator".[12] But the establishment of a common EU immigration and asylum

Switzerland Judgment of 4 November 2014) and the Court of Justice of the European Union (see again C-643/15 and C-647/15 *Slovakia and Hungary v Council* EU:C:2017:631).

[6] See E. Alkema, 'The Enigmatic No-Pretext Clause: Article 60 of the European Convention on Human Rights', in J. Klabbers and R. Lefeber (eds), *Essays on the Law of Treaties, in Honour of Bert Vierdag* (The Hague: Martinus Nijhoff, 1988), p. 41-56, and A. Rachovitsa 'Treaty Clauses and Fragmentation of International Law: Applying the More Favourable Protection Clause in Human Rights Treaties', 16 *Human Rights Law Review*, 2016, p. 77-101.

[7] Without prejudice of further sectors to be involved, three areas are specifically relevant in this regard: worker conditions (see Art.153(4) indent 2 TFEU), consumer law (see Art.169(4) TFEU) and environmental law (see Art. 193 TFEU).

[8] See T. Van den Brink, 'Refining the Division of Competences in the EU: National Discretion in EU Legislation', in: S. Garben & I. Govaere (eds), *The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future* (London: Hart, 2017), p. 251 and 256, for a "typology of national discretion".

[9] See C-617/10 *Åkerberg Fransson* EU :C :2013 :105 para 29.

[10] AG Bot in *TSN* (C-609/17 and 610/17) EU:C:2019:459 para 90.

[11] C-609/17 and 610/17 *TSN* EU:C:2019:981 para 49.

[12] P. Boeles et al (eds) *European Migration Law* (Cambridge: Intersentia, 2014), p. 246.

system has enhanced protection of migrants and refugees' fundamental rights in a number of areas,[13] and MFP clauses can be seen as a *race to the top* achieved or, at least, pursued by Member States to better protect migrants' rights.[14]

In sum, the more favourable provision stands at the crossroads between general problems of EU constitutional law and harmonisation of EU migration and asylum law.

This paper will investigate CJEU case law in both areas, hence the reference to EU migration law in the title.[15] Despite conceptual differences and variance in the applicable legal framework, joint analysis of these two fields is justified by the paper's focus: the extent to which, under EU law, Member States' higher standards can bolster the rights of third-country nationals, irrespective of different migration status. To this end, we will discuss the relevance and regulation of the MFP clause in immigration and asylum law, presenting a possible categorisation of the same that can be inferred from the wording used in immigration and asylum directives. Next, the paper will ponder the CJEU's coherence and standards applied in testing the more favourable provisions against EU law, focusing on cases dealing with the Qualification and Return Directives. These are chosen based on the prominence of the MFP clause in the CJEU's adjudication, as its interpretation under such legislative instruments has been decisive on several occasions, triggering academic and jurisprudential debates. That the Qualification and Return Directives regulate, respectively, the condition of asylum seekers and undocumented migrants, (neatly defined as "migrants with a precarious legal status"), and that these conditions may be closely entangled,[16] also makes them prime subjects to common analysis.[17] Finally, the paper will outline the main reasoning of CJEU case law, arguing that the immigration and asylum cases examined reveal a common pattern, in that CJEU interpretation has mainly limited application of higher national standards to the detriment of the rights of third-country nationals.

2 MFP Clause and Harmonisation in Immigration and Asylum

The concept and function of the more favourable provision in immigration and asylum must be understood against the backdrop of evolving EU action in those areas, for it is interconnected with the harmonisation process and the objectives paving the way for Europeanisation of the same. The clause well epitomises the longstanding tension between aspirations to harmonise rules on immigration and asylum and the Member States' will to preserve their national discretion.

Throughout this evolution, the EU has employed an array of techniques in endeavouring to accommodate such tension. Some have cast the preference for directives over regulations as proof of

[13] See the debate on interpretation of Directive 2008/115, initially criticised for its limited consideration of fundamental rights, and subsequently reconsidered given the enhancement of safeguards for undocumented migrants, which its practical implementation in several Member States brought about. See C. Hörich, *Abschiebungen nach europäischen Vorgaben. Die Auswirkungen der Rückführungsrichtlinie auf das deutsche Aufenthaltsrecht* (Baden-Baden, Nomos, 2015), p. 305-306.

[14] Other prominent examples show that sometimes the level of protection ensured at national level can be higher than that ensured at the EU level. Suffice to recall here the national and European case law on the ill-functioning of the Dublin system, which has led some Member States to activate the sovereignty clause (provided for in art.17(1) of the Regulation 604/2013 [2013] OJ 180/31) preventing the transfer of asylum seekers towards certain EU countries.

[15] See for the adoption of the term migration law as a field embracing both voluntary and forced migration, Boeles (n 12), C. Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford: OUP, 2016), p. 1-3, and D. Thym, *European Migration Law* (Oxford: OUP, 2023), p. 3-4. Although these authors refer to European Migration Law, to incorporate within their scope of analysis the European Convention of Human Rights, the paper's title relates to EU migration law being focused on EU law.

[16] For example, whereas third-country nationals do not qualify for international protection they may be subject to a return decision (if considered to be irregularly staying in the country), but pursuant to the safeguards set out in the Return Directive, and the (potential) more favourable rules that a Member States have set out (see C-562/13 *Abdida* EU:C:2014:2453). Likewise, a return decision will not prevent its addressees from applying for international protection whereby they fall under the scope of application of the Qualification Directive (see C-544/11, *Arslan*, ECLI:EU:C:2013:343 and C-601/15 *PPU JN* ECLI:EU:C:2016:84).

[17] J. Bast, F. von Harbou and J. Wessels, Human Rights Challenges to European Migration Policy. The REMAP Study (Baden-Baden, Nomos, 2023), p. 20.

an increasingly wide room to manoeuvre entrusted to Member States.[18] What is more, by virtue of optional and safeguard clauses and references to national legislation allowing Member States to maintain or develop their own internal discipline (e.g., to ensure public order or internal security), such directives make possible a number of national deviations from EU law.[19] Adoption of the MFP clause fits within this legislative context and is closely embedded with the minimum standards approach.[20]

Insofar as the MFP clause promotes more beneficial treatment for its addressees, i.e., third-country nationals,[21] it differs from legislative techniques like "may" clauses enabling national discrepancies. The idea of higher national standards fits with construction of a protection-oriented approach to migration law in the EU legal order, which aligns with the human rights' commitment put forward by the Lisbon Treaty.[22] Arguing that national deviations hinder harmonisation in these areas, academics have nonetheless advocated "a cautious approach towards national deviations", insisting that "in cases of doubt it should be assumed that the legislation supports a pan-European standard from which Member States cannot deviate".[23] But more than an end in itself, harmonisation is an instrument to realise treaty objectives. To the extent that Member States' use of this clause is consistent with EU law, this overarching prudence seems questionable. As it has been rightly pointed out "[i]n light of the overall human rights context and the continued references to minimum standards in the legislation, it is submitted that in case of any uncertainty … the doubt should be resolved in favour of Member States" ability to set higher standards".[24] Under certain instances national standards may sometimes be *higher* than EU secondary legislation and better aligned to EU and Member States' international commitments (i.e., those arising from the Geneva Convention); such is the case of those Member States that, in line with UNHCR guidelines,[25] transposed the notion of a particular social group following what is known as the alternative approach.[26]

Other observers have questioned whether more generous conditions might act as a pull factor, particularly considering that the Commission's efforts toward a "further approximation of rules in order to limit secondary movements" may be at odds with the very concept of the MFP clause.[27] But

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[18] S. Peers, 'Institutional Framework', in: S. Peers et al (eds), *EU Immigration and Asylum Law* (Leiden: Brill Nijhoff, 2nd ed., 2015), p.10.

[19] V. Chetail, 'The Common European Asylum System: Bric-à-brac or System?', in: V. Chetail et al (eds) *Reforming the Common European Asylum System, The New European Refugee Law* (Leiden: Brill Nijhoff, 2016), p.28.

[20] C. Costello (n 15), p.29.

[21] As regards EU citizens – whose analysis falls outside the scope of this article – more favourable provisions are enshrined in several secondary law acts, starting from Directive 2004/38, article 37. See in this regard C-424/10, *Ziolkowski* ECLI:EU:C:2011:866. Further examples in free movement of EU workers include Directive 2014/50, article 7 and Directive 2014/54, article 7.

[22] See recently for this approach Bast et al (n 17), p. 19-22.

[23] Hailbronner and Thym (n 1), p. 15-16.

[24] Peers (n 1), p. 309. See also V. Moreno-Lax and M. Garlick, 'Qualification: Refugee Status and Subsidiary Protection', in S. Peers et al (n 18), p. 79.

[25] UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 2: Membership of a Particular Social Group Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, 7 May 2002*). For a comparative overview of Member States' transposition of Article 10(1)(d) of Directive 2011/95 see European Commission, Directorate-General for Migration and Home Affairs, Evaluation of the application of the recast Qualification Directive (2011/95/EU), Final report, Publications Office, 2019, https://data.europa.eu/doi/10.2837/59251, p. 11-12. The alternative approach can be identified, for instance, in Italian Legislation, see Legislative Decree, 251/2007 art.8(d).

[26] Art.10(1)(d) of the Directive 2011/95 on qualification for international protection [2011] OJ L337/9, adopts the so-called cumulative approach, whereby refugee status is granted under the particular social group clause if the two conditions set out in that article are met. On the unclarity of that provision and the CJEU's interpretation see M. den Heijer, 'Persecution for reason of sexual orientation: X, Y and Z', 51 CMLR, p. 1217-1234, 1223 and N. Frei, K. Hinterberger and C. Hruschka, Art. 1, in: C. Hruschka (ed) *Genfer Flüchtlingskonvention* (Baden-Baden: Nomos, 2022), p. 92-95.

[27] K. Hailbronner and S. Alt, 'Council Directive 2004/83/EC of 29 April 2004', in K. Hailbronner (ed) *EU Immigration and Asylum Law: commentary on EU regulation and directives* (Baden-Baden: Nomos, 2010), p. 1021. See also K.

different standards of protection are only one of the factors influencing asylum seekers' destination country, and probably not the most important. Other factors, such as family and social ties, are likely much more relevant.[28] Thus, a restrictive stance on more favourable clauses in EU legislation based on the potential increase of secondary movements is unsubstantiated and, as recently suggested, has little "empirical basis".[29]

And what of the nexus between the MFP clause and primary and secondary law? If the minimum standards approach envisaged in the Treaty of Amsterdam (art.63 TEC) aligned with the MFP clause, some observers doubt whether the same alignment exists with the wording adopted in the Treaty of Lisbon, where the "minimum standards" expression is replaced by the goal of a "common policy" on immigration and asylum (arts 79 and 78 TFEU). But while a common policy may clash with more generous provisions established at national level, the fact that all directives approved after entry into force of the Treaty of Lisbon have kept the MFP clauses reveals that EU policymakers prefer to maintain this feature in secondary legislation. In fact, the objective of a common policy in immigration and asylum can coexist with discrepancies at national level. Indeed, the ultimate objective of the common policy in immigration and asylum enshrined in arts 78 and 79 TFEU is to promote "a closer union", not impose it,[30] which fits neatly with the fact that these are areas of shared competence between Member States and the EU. The choice between a full, partial or minimum harmonisation of directive is thus the subject of political negotiations.[31]

As for more favourable provisions under secondary legislation, it bears mentioning that only directives provide them; regulations, which narrow the margin of discretion left to Member States to various situations, do not.[32] It follows that in EU immigration and asylum law, the MFP clause is only relevant in those areas where the legislative acts adopted are directives (legal and irregular migration and asylum), not regulations (visa and border control and Dublin *acquis*).[33]

Moreover, throughout the evolution of EU migration law, the wording of the provisions enshrining more favourable standards in directives has varied from one text to another, so national legislatures' margin of manoeuvre has varied depending on the specific legislative text at issue. Admittedly, the wording of the MFP clause in directives on immigration and asylum has evolved over time. Using and developing Thym's classification, MFP clause wording follows three models that change according to two main variables: the period of adoption and the area regulated.[34]

Hailbronner, 'Introduction', *ibidem*, p. 2, stating that "[i]t would only seem logical that the concept of the more favourable treatment may easily lead to an incompatibility with the achievement of the purpose to avoid a benefit-driven immigration in a Common European Asylum System based upon a mutual recognition of decisions".

[28] See E. Thielemann, 'The effectiveness of governments' attempts to control unwanted migration', in: C. Parson and T. Smeeding (eds) *Immigration and the Transformation of Europe* (Cambridge: Cambridge University Press, 2002), p. 442.

[29] E. Tsourdi and C. Costello, 'The evolution of EU law on refugees and asylum', in: Paul Craig & G. De Búrca (eds) *The Evolution of EU Law* (Oxford: OUP, 2022), p. 808.

[30] Peers (n 18), p. 12 and Peers (n 1), p. 308. On secondary movements see D. Thym in 'Secondary Movements: Improving Compliance and Building Trust among the Member States', in: D. Thym (ed) *Reforming the Common European Asylum System* (Baden-Baden: Nomos, 2022), p.129.

[31] It must be underlined, however, that full harmonisation is excluded from the specific areas of measures concerning integration of third-country nationals under Art. 79(4) as well as their admission to Member States' territory for reasons of work, as set out in art.79(5). On the unclear nature of both provisions and their possible interpretation see K. Hinterberger, *Regularisations of Irregularly Staying Migrants in the EU. A Comparative Legal Analysis of Austria, Germany, and Spain* (Baden-Baden: Nomos, 2023), p. 122-123.

[32] D. Thym, 'Constitutional Framework and Principles for Interpretation', in D. Thym & K. Hailbronner (eds) *EU Immigration and Asylum Law* (München: Beck, 2022), p. 22-23.

[33] However, lack of a specific MFP clause in regulations does not prevent Member States from granting higher standards invoking other discretionary clauses. Such is the case of the "sovereignty clause" set out now in art.17.1 of Regulation 604/2013 (Dublin Regulation): see judgments C-411/10 *N.S.* EU:C:2011:865; C-578/16, *CK* ECLI:EU:C:2017:127.

[34] See Thym (n 32), p. 21, who also classifies directives on three groups: those setting out a requisite of compatibility, those indicating that Member States may deviate from specific provisions, and others establishing that Member States may adopt more favourable standards. Yet, the classification proposed here takes a historical account, arguing that the wording of the clause indicates that the margin of discretion has been progressively constrained. See also AG Hogan,

The first model involves directives from phase one of EU immigration policy (Family Reunification, Long Term Residence Permit, Students and Researcher Directives)[35] and the Temporary Protection Directive.[36] These were all limited so that Member States could enact more favourable provisions without further conditions, leaving national legislatures with considerable room to manoeuvre.

Directives on international protection (Reception Conditions, Qualification and Asylum Procedures)[37] adopted between 2003 and 2005, as well as others on immigration, such as the Return Directive,[38] constitute a second model according to which more favourable conditions are admitted insofar as they are compatible with the directive. This compatibility requirement arguably heightened the constraint on Member States while leaving them free to adopt higher national standards to every provision of the directive, as will be discussed below.[39]

A subsequent third model introduced a condition that was stricter still, narrowing the possibility of enacting higher national standards to specific provisions explicitly set out in the MFP clause.[40] This model has been used since 2009, but only involves specific areas of legal migration.

Asylum directives recast in 2011 (Qualification) and 2013 (Reception Conditions and Procedures) have maintained the wording of the second model. This is significant given how it interacts with one interpretative issue debated among legal scholars, namely: do more favourable treatment clauses apply to the whole text of the directive in question, or, on the contrary, are there some provisions that do not admit deviation at national level? The Legal Service of the Council of the European Union raised the issue in its opinion on the draft Qualification Directive (QD). Therein, the service argued that given their fundamental character to harmonise EU law, a number of provisions cannot tolerate national deviations, for these "would be incompatible with the objective of harmonising the content of [certain] notions".[41]

This reading touched off an interesting debate between Hailbronner[42] and Peers,[43] the former defending the position of the Council legal service and the latter challenging the position and insisting that Member States were "free to establish or maintain higher standards as regards any other facet of asylum law".[44] That some directives now expressly indicate which provisions can be derogated by virtue of an MFP clause makes the case for Peers' view, which is shared here. In particular, it strengthens the argument that provisions which admit a deviation from the directives can be inferred

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Opinion procedure 1/19 (ECLI:EU:C:2021:198), where he proposes the following scheme: "certain directives, mainly those referred to as 'first-generation directives', mention that these only set out minimum rules. Admittedly, the more recent directives specify that Member States may introduce or retain more favourable standards only 'insofar as those standards are compatible with [those] Directive[s]', which might suggest that more favourable standards in regards to certain provisions might not be adopted".

[35] Directive 2003/86 on the right of family reunification [2003] L251/12, art.3; Directive 2003/109 on the status of third-country nationals who are long-term residents [2003] OJ L16/44, art.13; Directive 2004/114 on the right of residence for students [2004] OJ L375/12, art.4 and Directive 2005/71 on the right of residence for researchers [2005] OJ L289/15, art.4.

[36] Directive 2001/55 on temporary protection [2001] OJ L 212/12, art.3(5).

[37] Directive 2003/9 on reception of asylum seekers [2003] OJ L31/18, art. 4 (the same wording has been maintained in the recast Directive 2013/33, L 180/96, art.4); Directive 2004/83 on qualification for international protection [2004] OJ L304/12, art.3 (the same wording has been maintained in the recast Directive 2011/95, art. 3); Directive 2005/85 [2005] L326/13, art.5 (the same wording has been maintained in the recast Directive 2013/32 [2013] OJ L180/60, art.3).

[38] Directive 2008/115 on returns [2008] OJ L348/98, art.3.

[39] Peers (n 18), p. 21 and Peers (n 1), p. 309.

[40] Directive 2009/50 on the right of residence for highly skilled workers [2009] OJ L155/17, art.4; Directive 2014/66 on intra-corporate transfer [2014] OJ L157/1, art.4; Directive 2014/36 on the right of residence of seasonal workers [2014] L, art. 4; Directive 2016/801 [2014] OJ L94/375, art.4. Regarding this Directive note that the former Directive 2004/114 and 2005/71 belonged to the first model (see above n 25).

[41] European Council, Legal Service, 15 November 2001, EU Doc. 14348/02, *https://data.consilium.europa.eu/doc/document/ST-14348-2002-INIT/en/pdf,* p.2.

[42] Hailbronner, 'Introduction', (n 27), p. 27.

[43] Peers (n 18), p. 19.

[44] *Ibid*.

by the objective of harmonising the content of certain provisions. Indeed, when the EU legislature opts to limit the MFP clause to specific provisions of a directive, its wording in doing so is explicit. Hence, directives belonging to the second model can in their entirety, where not otherwise stated, potentially admit more favourable provisions.[45]

Lastly, the MFP clause will be affected by reforms of immigration and asylum policy triggered in 2016 and still afoot today. The main change will no doubt involve common procedures and qualification for international protection, as the Regulations[46] put forward to replace the current Directives lack the MFP clause, in line with the decision to designate regulations as legislative instruments. Still, the change will not affect Member States' obligations arising under the 1951 Convention and other human rights treaties. Consequently, to comply with their international obligations, Member States will still be able to adopt standards higher than those set out under the next legislative framework.[47] Importantly, the proposed recasting of the Long-Term Residence Directive maintains Member States' leeway to adopt national long-term residence permits, but removes from the recital, heading and text of the corresponding article any reference to "more favourable treatment". This is because during implementation of the 2003/109 Directive, Member States maintained parallel long-term residence permits whose actual more favourable nature was debated.[48] Nevertheless, dropping the reference to higher standards for national residence permits might constitute an incentive to weakening third-country nationals' rights and conditions recognised at national level.

The ambition for further harmonisation that drives reforms of EU immigration and asylum law will also limit Member States' discretion to adopt national schemes. Even still, this will not impede maintaining the clause and, notwithstanding the above, the trend seems to be to keep the current model for each of the instruments now in force. And so, requisites of compatibility with the Directive that existed previously are maintained in the current recast proposals, as the proposed recasting of the Reception Conditions,[49] Return[50] and Single Permit Directives[51] illustrate. Likewise, texts that limited the scope of the more favourable provision to specific articles, e.g., the proposed recasting of the Blue Card Directive[52], will maintain wording similar to that currently in force, while reducing the provisions to which it will apply.

In sum, this section aimed to put the MFP clause in perspective with the evolution of EU migration law, delving into primary law as well as the regulation of directives – whose wording led us to propose a three-pronged categorisation – and exploring how the ongoing reform process will affect it. In particular, we contextualized the MFP clause within the tension between EU harmonisation and Member States' national discretion, upholding its understanding as an instrument that fosters a

[45] Peers (n 1), p. 496.

[46] Amended proposal for a Regulation establishing a common procedure for international protection in the Union, (COM/2020/611 final) and Proposal for a Regulation on standards for the qualification of third-country nationals (COM/2016/0466 final).

[47] See in support of this conclusion V. Moreno-Lax and M. Garlick (n 24), p. 78 and H. Battjes, European Asylum Law and International Law (Leiden: Brill-Nijhoff, 2006), p. 167.

[48] See the Commission Staff Working Document, Impact Assessment Report SWD(2022) 651 final, stating that "the coexistence [between national and EU long-term residence status] does not necessarily result in more favourable provisions being applied to third-country nationals, due to the difficulty to compare advantages and disadvantages respectively granted by the two kinds of permits", p.10.

[49] Proposal for a Directive on standards for the reception of applicants for international protection (COM/2016/0465 final), art.4. Interestingly, this proposal states that "[a]ll stakeholders agreed that Member States need to be allowed to grant more favourable conditions to applicants than those provided for under the Reception Conditions Directive".

[50] Proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (COM/2018/634 final).

[51] Proposal for a Directive on a single application procedure for a single permit for third-country nationals (COM/2022/655 final).

[52] Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment (COM/2016/0378 final).

human-rights based approach to EU migration law. Having considered the foregoing, we are left to analyse the CJEU's stance on interpretation of the MFP clause, which is the matter of the next section.

3. Adjudicating MFP Clauses: the CJEU's Interpretation in EU Immigration and Asylum Cases

To date, the CJEU has interpreted MFP clauses in a limited number of cases. This section will shed light on the canon and standards adopted in related CJEU case law, while highlighting, where appropriate, CJEU judgments in other areas of EU law. Analysis here will focus on the CJEU's approach to MFP clauses by selecting the most relevant judgments, i.e., when interpretation of the clauses has played a major role in case adjudication, the literature and jurisprudential debate. We shall evaluate CJEU judgments dealing with the interpretation of the Qualification Directive (cases *B and D*; *M'Bodj, Ahmedbekova, LW*) and the Return Directive (cases *Zaizoune, MO, UN*), examining them separately, despite the interconnections between them.[53] In both areas, analysis will show that the CJEU has tested the legitimacy of national deviations with strict scrutiny and reluctance to recognise the compatibility of Member States' more favourable standards.

3.1 Qualification Directive

In terms of case law on the Qualification Directive (QD), interpretation of the MFP clause was pivotal in *M'Bodj* and, subsequently, *Ahmedbekova* and *LW*. But to grasp the CJEU's stance on the extent to which higher standards were applicable, it bears mentioning, if only briefly, its first related ruling: – *B and D*[54]. In it, the CJEU recognised that based on Germany's constitutional law, the country was allowed to grant the right of asylum to persons excluded from refugee status under art.12(2) of the Directive 2004/83 (now Directive 2011/95, recast). However, this is possible insofar as such national protection "does not entail a risk of confusion with refugee status".[55] In that respect, criticism has rightly been levelled at the CJEU's limited indication as to which legal aspects enable Member States to avoid such "risk of confusion" between protection under their national legislation or pursuant to the Directive, and if they relate to the requisite to access such protection or the rights attached to it.[56]

While establishing that Germany could legitimately apply the protection on a national constitutional level, the CJEU held that the MFP clause, which only applies to situations not excluded by the Directive, could not be invoked in the case at hand Hence, the CJEU acknowledged that the State could indeed ensure more favourable treatment of individuals, but not by applying art.3 QD. Rather, a State might grant more favourable treatment, but by virtue of art.2(g) of Directive 2004/83, which allows individuals to apply for domestic protection outside the Directive's scope.[57] Simply put, this constitutes purely internal application of national law and bears no relation to EU law, and may therefore be considered a case of an *external* more favourable treatment, as the more generous conditions are granted *outside* the scope of the Directive, not as a consequence of its application.

A different and more restrictive approach to higher national standards can be found in *M'Bodj*[58], a case involving a third-country national whose applications for asylum and leave to reside on medical grounds were both rejected. As the victim of an assault in Belgium, the individual suffered serious and certified healthcare problems and applied for (and received) a second leave to reside for medical reasons (art.9ter Law of 15 December 1980), but his subsequent application for social allowances was rejected on the grounds that the benefits provided for by law were restricted to refugees, inter alia (art.4, Law of 27 February 1987). Prior to the CJEU judgment in *M'Bodj*, the Belgian legislature

[53] See *supra* (n 16).
[54] See C-57/09 and C-101/09 *B and D* EU:C:2010:661.
[55] C-57/09 and C-101/09 *B and D* EU:C:2010:661, para 121.
[56] Moreno-Lax and Garlick (n 24), p. 79.
[57] C-57/09 and C-101/09 *B and D* EU:C:2010:661 para 115.
[58] See C-542/13*M'Bodj* EU:C:2014:2452, confirmed in C-353/16 *MP* EU:C:2018:276.

and judiciary intended for residence permits issued on medical grounds to represent a form of international protection *sub specie* of subsidiary protection.[59] Thus, Belgium's Constitutional Court was challenged by a lower court to assess whether exclusion from social allowances constituted a violation of the non-discrimination principle under arts 10 and 11 of the Belgian Constitution, read in conjunction with art.28(2) QD. Nevertheless, to resolve the first issue, the Constitutional Court referred the case to the CJEU to determine whether subsidiary protection can apply to third-country nationals residing with a "medical" residence permit. The Constitutional Court's preliminary reference relied upon correct interpretation of the MFP clause under art. 3 of the QD.

The CJEU focused its reasoning on art.15(b) QD, holding that a person suffering from a serious illness cannot be eligible for subsidiary protection. The CJEU grounded its conclusion on three assumptions: first, art.15(b) limits the conditions of eligibility to inhumane treatment in the applicant's country of origin (healthcare problems occurring in the destination country, i.e., Belgium, should therefore not be covered by the QD). Second, the CJEU relied on the "actors of serious harm", identified in art.6 of the QD, to support the idea that serious harm – the requisite to granting subsidiary protection – must be intended as the "conduct on the part of a third party, and that it cannot therefore simply be the result of general shortcomings in the health system of the country of origin" (para. 35). Accordingly, the CJEU stated that third-country nationals suffering from serious illness may be granted subsidiary protection only if that they are intentionally deprived of healthcare in their country of origin (para. 41). Failing that, such protection will be granted on a discretionary basis on compassionate or humanitarian grounds (para. 46). Third, the CJEU considered whether the MFP clause set out in art.3 QD enables Member States to grant subsidiary protection in medical cases. Using the same arguments developed above – namely the need to identify an actor responsible for the serious harm inflicted – the CJEU stated that recognising subsidiary protection in medical cases "would be contrary to the general schemes and objectives" of the QD since such a situation "has no connection with the rationale of international protection" (para. 44). However, not only will the CJEU's conclusion in *M'Bodj* not only will allow Member States to adopt another kind of protection outside the scope of the QD, pursuant to the previous *B and D* case, but also, following *Abdida* (a ruling adopted the same day as *M'Bodj*), under certain instances Member States must postpone removals in the case of third-country nationals requiring emergency healthcare and essential treatment of illness.[60]

Legal scholars[61] have criticised the CJEU's restrictive interpretation and challenged its approach to the country-of-origin limitation and the intentionality of the agent of serious harm. The CJEU's reading of the MFP clause is problematic to say the least. Indeed, whereas the CJEU explains that art.15(b) does not cover medical cases, it does not clarify *why* that provision prohibits Member States from granting by virtue of the MFP clause under art.3 QD subsidiary protection in case of serious illnesses.[62]

Finding higher standards legislation like that in Belgium incompatible with the QD, the CJEU underscored the importance of identifying an actor whose intentional conduct causes serious harm. Yet it seems debatable that such intentionality was an essential component of the QD, and that the absence of such intentionality runs counter to "the objective and scope of the Directive". In its 2001 proposal on the first QD, in comments on the inclusion of a subparagraph related to "torture, inhumane or degrading treatment or punishment", the current art.15(b), the EU Commission stated that "[i]n establishing whether an applicant qualifies according to this criteria, Member States should

[59] See the preliminary ruling in *M'Bodj*, Constitutional Court of Belgium, Judgment n. 124/2013, 26 September 2013.
[60] C-562/13 *Abdida* EU:C:2014:2453.
[61] Costello (n 15), C. Bauloz, 'Foreigners: Wanted Dead or Alive: Medical Cases before European Courts and the Need for an Integrated Approach to Non-Refoulement' 18 *E.J.M.L.*, 2016, p. 409-441. See also the critical remarks of V. Moreno-Lax, Accessing Asylum in Europe (Oxford: Oxford University Press, 2017), p. 232, stating that the ruling "constitutes a misconstruction by the CJEU of Strasbourg case law". See the dissenting opinion of judge Pinto de Albuquerque in the judgment of the ECtHR, Application No 70055/10 *S.J. v. Belgium* Judgment of 19 March 2015, defining the Court's ruling an "extremely restrictive approach".
[62] Costello (n 15) stating that the "QD is being treated as a ceiling rather than a floor of rights", p. 31.

not apply a greater threshold of severity than is required by the ECHR".[63] *M'Bodj* would appear to be just such a case. It is doubtful that intentionality truly figured among the QD's essential elements, and that, consequently, Member State legislation lacking it should be pre-empted. In addition, a number of authors have recalled that art.6 of the QD abandoned the accountability approach (according to which persecution must perpetrated by the State) in favour of a protection-oriented approach, which deems the source of persecution irrelevant.[64] Moreover, a host of authors have shown that to conclude from art.6 that this provision was meant to present an exhaustive list of actors of serious harm is less straightforward than the CJEU deemed.[65]

Furthermore, the claim that medical cases have no connection with the rationale of the QD seems unsubstantiated. As Costello remarks in *Elgafaji*,[66] the CJEU held that art.15 (b) was "in essence" art.3 of the European Convention of Human Rights.[67] Interestingly, the Belgian legislature sought to highlight this connection, as is apparent from the explanatory statement of the Belgian law:

> *Based on the case law of the European Court of Human Rights*, foreign nationals are covered by art.15 of Directive 2004/83/CE if they suffer from an illness that represents a real danger to their life or physical integrity or, when suitable treatment is non-existent in their country of origin or the countries where they can travel, inhumane or degrading treatment.[68]

In national case law, exceptional circumstances arising from situations in which basic needs are not guaranteed have justified recognition of subsidiary protection for persons suffering from illnesses which would carry a real risk of inhumane or degrading treatment in case of refoulement.[69] In national practice, the nexus between intentionality and subsidiary protection is sometimes blurred, with serious shortcomings in healthcare considered a consequence of choices of political economy attributable to the state. This lays the groundwork for the final argument, that is, if an element of intentionality must be demonstrated, the lack of intentionality around general shortcomings in the healthcare national system where third-country nationals would be refouled must be, at a minimum, nuanced. One might argue that "systemic deficiencies" (*N.S.*) rendering access to basic needs an undue hardship are a consequence of the state's conduct or, in exceptional circumstances, a grave omission, something that the national legislature and decision-making authority should, rather than have their hands tied, be able to appraise on a case by case basis. This might also apply beyond

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[63] Proposal for a Directive on minimum standards for the qualification and status of third-country nationals quoted in M. Oepen-Mathley, *Internationaler Schutz im Falle extremer Armut. Schutberechtigung oder Rückführung* (2021), p. 279. For this interpretation see also C. Hruschka and C. Lindner, "Der internationale Schutz nach Art. 15b und c Qualifikationsrichtlinie im Lichte der Maßstäbe von Art. 3 EMRK und § 60 VII AufenthG" (2007) 6 *Neue Zeitschrift für Verwaltungsrecht* 645-650, p. 646.

[64] D. Ginés, 'In Limbo: Divergent Conceptualisations of Ill-treatment by European Courts and the Creation of Non-removable migrants' 6 *European Papers*, 2021, p. 1173-1192.

[65] Bauloz (n 61), p. 433. See again Ginés (n 64), p. 1185. As it was highlighted by the Commission in its proposal for the 2011 recast of the Directive, "[w]here the Directive establishes indicative lists, it uses terms such as 'include' or 'inter alia'; therefore, the absence of such terms in Article 7 is already an indication of the exhaustive character of the list". Hence, the Directive offers an exhaustive list of actors of protection, but not of actors of persecution or serious harm. Nor does it mention that the risk needs to be posed by an actor at all.

[66] *Elgafaji* (C-465/07) EU:C:2009:94.

[67] Costello (n 15), p. 217. See also H. Battjes, 'Piecemeal Engineering. The Recast of the Rules on Qualification for International Protection', in: V. Chetail et al (n 19), p.232.

[68] Doc. parl., Chambre, 2005-2006, DOC 51-2478/001, at 9, (emphasis added; author's translation).

[69] See the Administrative Tribunal of Sigmaringen in Germany (*Verwaltungsgericht*), judgment of 27 January 2017, A2 K2571/16: "Due to the determination of the prohibition of deportation according to section 60 (5) of the Residence Act in the decision of the defendant, the applicants fulfil the requirements of section 4 (1) sentence 2 no. 2 of the Asylum Act. The defendant correctly assumes an imminent danger of degrading treatment because of the current humanitarian conditions in Afghanistan. [...] The requirements of § 4 para. 1 sentence 2 no. 2 AsylG are already fulfilled for this reason" [author's translation]. The judgment is quoted in Oepen-Mathey (n 63), p. 280.

medical cases, namely in environmental disasters,[70] and it has recently been argued that the same reasoning should apply in cases of vulnerable migrants returning to countries where they face extremely poor living conditions.[71]

Moreover, the CJEU argument that eligibility for subsidiary protection is predicated on applicants' having suffered, inter alia, inhumane treatment "in the country of origin", is misleading: that qualification was added to disengage Member States from their obligations, but its use to prevent them from extending the scope of protection to harm occurring outside the country of origin is questionable. Had the QD prevented such extensions of treatment at national level, it would have meant full harmonisation, which is not its purpose. That some Member States have not territorially restricted the scope of the QD in their implementing legislation lends strength to that argument. Following *M'Bodj*, is such legislation inconsistent with the QD? It seems not. Rather, it applies more favourable treatment within the scope of the QD.

An additional argument based on a similar rationale – and highlighting the vulnerability of migrants affected by serious illness – might further challenge the CJEU's interpretation. Indeed, people in need of healthcare treatment that cannot be provided for in the country of origin are in a condition of vulnerability and therefore require proper protection. In particular, art.3 ECHR represents a temporary and arguably weak form of protection, as it only impedes removal of the foreigner due to healthcare shortcomings in the country of origin.[72] This line of reasoning has been applied with regard to interpretation of the more favourable treatment in another context of EU law, namely consumer law. Here, the CJEU has often built its case law on the premise that consumers represent a weak and vulnerable category, which justifies national deviation from EU law to ensure higher standards. This was first recognised in *Buet*, concerning a French ban on canvassing at private homes for sales of educational material.[73] More recently, in *Caja de Ahorros*,[74] the CJEU stated that "the system of protection introduced by the Directive is based on the idea that *the consumer is in a weak position vis-à-vis the seller or supplier*, as regards both his bargaining power and his level of knowledge" (para 27). It concluded that "Member States cannot be prevented from adopting or retaining, throughout the area covered by the Directive (…) rules which are more stringent than those provided for by the Directive itself, *on condition that they are designed to afford consumers a higher level of protection*" (para 40, emphasis added). Hence, *mutatis mutandis*, one could argue that, considering the vulnerability of people in need of healthcare, Member States willing to apply "a higher level of protection" and therefore subsume this category under art.15(b) QD cannot be prevented from doing so.

After *M'Bodj* the CJEU was asked again to pronounce on art.3 of the QD in two cases[75] involving the possibility for Member States to provide in their national legislation for a "derivative refugee status", i.e., to family members of a recognised refugee. These can be examined together because the interpretative issue on which the CJEU adjudicated was in essence the same.[76] Foreseen in neither the Geneva Convention nor EU Directives on international protection, this derivative refugee status has long been advocated by UNHCR in a number of documents and particularly in its commentary

[70] C. Scissa, 'The Climate Changes, Should EU Migration Law Change as Well? Insights from Italy' 14 *European Journal of Legal Studies*, 2022, p. 5-23.
[71] Oepen-Mathey (n 63).
[72] Peers (n 18).
[73] See C-382/87 *Buet* EU:C:1989:198.
[74] See C-484/08 *Caja de Ahorros* EU:C:2010:309.
[75] See C-652/16 *Ahmedbekova* EU:C:2018:801 and C-91/20 *LW* EU:C:2021:898.
[76] In the case of *Ahmedbekova*, the Court dealt with Bulgarian law on migration and refugees that recognises as refugees family members of one who has been granted refugee status insofar as this is compatible with their personal status and the exclusion clause set out in art.12 QD. In the case of *LW*, the Court considered German asylum law pursuant to which, on request, it is possible to recognise refugee status of the unmarried child of a third-country national who has been recognised as a refugee. Again, the national provision prevents recognising this derivative status where an exclusion clause set out in art.12 QD applies.

on the first QD of 2003.[77] Provided that certain limits are respected,[78] in both judgments (*Ahmedbekova* and *LW*) the CJEU acknowledged that the MFP clause enables national legislation to recognise a derivative status for family members of a recognised refugee because in those cases there is a connection with the rationale of international protection. This allows the CJEU to distinguish those cases from *M'Bodj*, where such a connection was deemed to be lacking[79]. The CJEU's conclusion is supported by two considerations: first, the protection of the refugee's family is recommended in a number of soft law documents of the UN; and second, art.23(1) of the QD establishes Member States' obligation to protect the family unity of beneficiaries of international protection.[80] Therefore, the connection with the rationale of international protection is the pivotal argument to allow Member States' application of national schemes invoking art.3 of the QD.

To sum up, since the *B and D* judgment ruled out invocation of art.3, and in *M'Bodj* the CJEU established that Member States cannot subsume medical cases under subsidiary protection relying on that provision, *Ahmedbekova* and *LW* are the first cases in which the CJEU gives leeway to Member States to ensure higher standards because of the MFP clause. In particular, it bears highlighting the CJEU's argument that the connection between the national more generous legislation at hand and the rationale of international protection is confirmed by the international framework, represented by the reference to UN non-binding documents. This is significant for two reasons. First, the interpretation of the QD recognises a circle of protection binding the state domain with the international level by virtue of the MFP clause. Moreover, this circle of protection might be used in future cases to justify national deviations (consistent with the rationale of international protection) expanding the scope of international protection beyond the provisions of the QD.

3.2 Return Directive

With the Return Directive (RD), interpretation of the MFP clause was crucial in the case of *Zaizoune* and the case law that followed.[81] In that judgment, the CJEU was asked to rule on Spanish legislation under which a third-country nationals in an irregular situation can be sanctioned with either a fine and obligation to voluntarily leave the country or removal (*expulsión*), the latter only being possible provided aggravating circumstances beyond the mere condition of staying irregularly in the country. This fine-or-removal alternative enshrined in the Spanish legislation represents more beneficial treatment for third-country nationals in an irregular position, since the RD establishes, as a general rule, that Member States shall issue a return decision to any third-country national staying on their territory illegally (Article 6). The Spanish legislation must be read in conjunction with the existence of a permanent mechanism of regularisation (*arraigo*) potentially allowing third-country nationals sanctioned with a fine and the attendant obligation to leave the country to obtain a residence permit if they pay that fine and meet permit requisites.[82] The CJEU held that a fine as an alternative to removal was inconsistent with the RD as it delayed the removal of third-country nationals in an irregular situation and, in so doing, undermined the effectiveness of the RD (para. 40). As in previous

[77] See the documents cited in the AG Mengozzi in *Ahmedbekova* (C-652/16) EU:C:2018:514 para 51 and *LW* (C-91/20) para 42. See also the UNHCR's definition of family unity as "[a] principle that gives effect to the protection of the family as the natural and fundamental group unit of society, *as described in Art 16 of the Universal Declaration of Human Rights*" (emphasis added). Under this principle, refugee status may be granted to the spouse and dependents of a person who meets the refugee criteria. When spouses and dependents acquire refugee status by application of the family unity principle, they are said to enjoy "derivative status". UN High Commissioner for Refugees (UNHCR), UNHCR Master Glossary of Terms, June 2006, Rev. 1, *https://www.refworld.org/docid/42ce7d444.html*.

[78] The derivative status cannot be granted to the family members of a beneficiary of international protection if they incur in a ground of exclusion pursuant to art.12 QD or they are entitled to a better treatment than that resulting from the extension of the derivative status. See C-652/16 *Ahmedbekova*, para 74 and C-91/20 *LW*, para 62.

[79] See C-652/16 *Ahmedbekova* EU:C:2018:801, par. 71.

[80] See C-91/20 *LW* EU:C:2021:898, para 40-43.

[81] See C-38/14 *Zaizoune* EU:C:2015:260.

[82] In Spain there are three different types of *arraigo,* which is issued for social, labour or family reasons. See Hinterberger (n 31), p. 206-222.

cases, the CJEU confirmed its restrictive approach by interpreting the Directive literally where any national provisions not leading to actual removals of third-country nationals are inconsistent with its *effet utile*.[83]

The CJEU's reasoning is succinct and lacks any reference to the principle of proportionality that, according to the RD, must be followed throughout every stage of the expulsion procedure (*El Dridi*). This is not to say that by applying the principle the CJEU would have reached a different conclusion. On the contrary, examining whether Spanish legislation was proportionate would have enhanced the legal force of its reasoning. As highlighted previously in *M'Bodj*, the *Zaizoune* case also makes it possible to compare CJEU judgments interpreting the MFP clauses adopted in other areas of EU law. National deviations from the EU discipline are tested against the principle of proportionality particularly in environmental law. As the CJEU stated in one of the cases on more stringent measures in environmental law, such national measures indeed cannot "exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question".[84] In *Zaizoune*, the CJEU sidesteps any such test, deeming straightforwardly that the Spanish legislation violated the compatibility requirement. However, for the reasons that follow, the CJEU might have issued a different interpretation had it examined whether such more favourable legislation pursues appropriate and proportional objectives.

The CJEU could have tested the proportionality of Spanish legislation against the RD's objective, i.e., termination of irregular stays through removal or regularisation. Assuming that the Spanish system can terminate irregular stays through individual regularisations, the CJEU could have stated that the national more favourable measure deviating from EU law is proportionate to the extent that it reaches that objective of the RD, a finding which national authorities must nevertheless examine on a case-by-case basis. The CJEU could then have adopted a more nuanced interpretation by finding Spanish law inconsistent with the RD where persons concerned would be unable to regularise their status. Put more simply, Spain must remove irregular migrants unless they meet the criteria in Spanish legislation making it possible to regularise the irregular stay.

Another judgment, *Celaj*,[85] is illustrative of the CJEU's questionable approach. In that case, the CJEU found Italian legislation applying prison sentences to violators of removal orders to be consistent with the RD. In so doing, the CJEU applied a "distinguishing" from its previous case law (*El Dridi*, etc.) and *de facto* allowed Italy to apply a *more restrictive measure* obstructing the RD's *effet utile* since, under its ruling, migrants detained for re-entering the country after a first removal will be removed to their country of origin only after serving a prison sentence. In sum, the CJEU seems more prone to make exceptions to the effectiveness when security-based concerns are at stake, whereas scrutiny against deviation from the RD is much stricter when human-rights concerns are involved.

Application of the *Zaizoune* judgment in Spain generated a controversial and divergent national case law[86] in which the Spanish Supreme Court ultimately issued a judgment stating that, per *Zaizoune*, and barring aggravating circumstances, fines may no longer be imposed and the only applicable sanction is therefore the removal of undocumented third-country nationals.[87] Given the tortuous national case law, that further preliminary references were requested of the CJEU was unsurprising. Related judgments were delivered respectively in 2020[88] and 2022.[89] The first, *MO,* dealt with the preclusion of a Directive to impose obligations on an individual and how this applied to the *Zaizoune* judgment. The CJEU noted that, according to its established case law, the addressees

[83] C-61/11 *El Dridi* ECLI:EU:C:2011:268.
[84] C-2/10 *Azienda Agro-Zootecnica Franchini e Eolica di Altamura* EU:C:2011:502 para 73.
[85] C-290/14 *Celaj* EU:C:2015:640.
[86] See C. Gortazár, 'Returns Decisions and Domestic Judicial Practices: Is Spain Different?', in: M. Moraru et al (eds) *Law and Judicial Dialogue on the Returns of Irregular Migrants from the European Union* (Cheltenham: Edward Elgar, 2020), p. 63.
[87] Judgment of the Supreme Court of Spain, 980/2018 of 12 June 2018.
[88] C-568/19 *MO* EU:C:2020:807.
[89] C-409/20*UN* EU:C:2022:148.

of the Directive are Member States, not individuals, and the former cannot invoke the provisions of a Directive against the latter (para. 35). Thus, since Spain cannot use a Directive provision to the detriment of an individual, in the absence of aggravating circumstances, no removal order could be issued.

The second judgment, *UN*, marked a turning point with respect to the former two cases, as it ultimately found the Spanish legislation consistent with the RD. At the outset, the judgment sought to underscore the difference between the case at hand and *Zaizoune*, seeing as the orders for reference were framed differently in both judgments. In this regard, the CJEU observed that the preliminary question in *Zaizoune* implied that the alternative to removal provided for in Spanish legislation was merely an economic sanction. However, the CJEU noted that, in *UN*, the referring judge had clarified that the fine was accompanied by an obligation to leave the country (para. 36). Having clarified a "distinguishing" which renders *UN* different from *Zaizoune*, the CJEU highlighted its previous case law according to which imposition of a fine does not prevent implementation of a return decision[90] and remarked that under Spanish legislation a fine is always accompanied by an obligation to leave the country within a certain period. Under art.7(1), the period for voluntary departure is between seven and 30 days, while Spanish legislation sets it at 15 days. Importantly, the CJEU stressed that the preferred compliance with obligations to leave the country under the RD is voluntary departure (art.3(8)), whereas forced removal must be an instrument of last resort (para. 50). If the period within which voluntary departure must take place is ordinarily conceived to allow third-country nationals to comply with their obligation to return, "no provision of that directive precludes [a] third-country national from being able to seek to have his or her stay regularised throughout that period" (para. 51). In other words, a prescribed period to leave the country may serve the function of enabling individuals to obtain a residence permit, which is consistent with the wording and rationale of art.6(4) RD.

Nevertheless, the CJEU's crucial contribution in *UN* is its interpretation of art.7(2), which stipulates that it is possible to extend the voluntary departure period based on specific circumstances of individual cases. This provision allows Member States "to postpone the enforcement of a third-country national's obligation to return when he or she seeks, due to circumstances specific to his or her situation, to regularise his or her residence, inter alia for family reasons" (para. 56). Hence, the CJEU considers that Member States may extend the voluntary departure period in order to allow third-country nationals to complete regularisation of their status (para. 58). In addition, the ruling clarifies that assessing extension of the voluntary departure period is left to the Member State, which must verify that such extensions respect two requisites: they are "appropriate" and "necessary [considering] the specific circumstances of each case" (para. 62). This cutting-edge outcome ultimately allows the permanent Spanish regularisation system and RD to coexist, a matter that had engaged scholars and jurisprudence of different levels in a long-lasting debate. While the judgment skirts this aspect, the *UN* judgment's practical consequence is that the Spanish more favourable treatment in terms of the type of sanctions linked to the irregular stay of a third-country national is compatible with the effectiveness of the RD.

So why did the CJEU not reach the conclusion it delivered in *UN* in the first judgment in *Zaizoune*? In 2015 the Spanish Bar Association argued that the question referred to the CJEU through the first preliminary ruling was incomplete,[91] for it omitted the fact that fines issued by the Spanish administration in lieu of removal were accompanied by an obligation to leave the country. Arguably, this explanation would now seem inferable by the *UN* judgment, which states that it is not for the CJEU to challenge the national court's interpretation of the law, rather to address exclusively the question which has been referred to it.[92]

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[90] C-430/11 *Sagor* EU:C:2012:777.

[91] See Consejo General de la Abogacía Española, "Argumentario a la sentencia de 23 de abril 2015 del 2015", *https://www.abogacia.es/actualidad/noticias/la-subcomision-de-extranjeria-elabora-un-argumentario-para-orientar-ante-la-stjue-de-23-de-abril-2015/*. See Gortazár (n 86), p. 76.

[92] C-409/20 *UN* EU:C:2022:148 para 37.

As a domino effect, the preliminary ruling therefore generated confusion in both the CJEU judgment and its subsequent application at national level.[93] Had the CJEU adopted a more proactive and cautious analysis, this result could arguably have been reached in the first *Zaizoune* case, avoiding seven years of improper application of the RD in Spain. The CJEU perhaps could have considered the Spanish legislation to constitute application of the more favourable clause and affirmed that national legislation enabling individuals to regularise their status aligns with the RD in that it leads to termination of the irregular stay, which is its objective.

Still, against the backdrop of CJEU case law on the controversial RD, the last episode of the *Zaizoune* saga is a milestone in that it finally clarifies that, albeit under specific circumstances, imposing a fine and departure from the country is consistent with the RD. This has entailed remarkable practical consequences in Spain, where it is now clear that administrative and judicial authorities will impose a fine and voluntary departure from the country on migrants in an irregular situation where no aggravating circumstance applies.

Scholars have long disputed whether the RD set out an obligation to regularise irregular migrants.[94] Some take the view that because third-country nationals' conditions of residence fall outside the RD's scope, such an obligation cannot be inferred.[95] But a different reading is that, under specific circumstances, Member States are required to regularise migrants in an irregular condition.[96] In particular, it has recently been argued that these specific circumstances are met if return decisions are unenforceable,[97] since when removal is unviable Member States alone can regularise the status of migrants in an irregular situation. The CJEU judgment may constitute a strong argument for the second position, since in *UN* it clearly assumes that, under the RD, Member States must end the irregular condition of third-country nationals through removal or regularisation. Prior to this judgment, the question of whether Member States had such margin of manoeuvre was the subject of confusion, which, in a way, the EU Commission compounded by ambiguously failing to endorse this alternative solution, i.e., removal/regularisation as a possible and rightful implementation of the RD.[98] But whereas the *UN* judgment supports regularisation processes taking place at national level as valid means of implementing the RD, in future, Member States may use it as a clear doctrine to introduce regularisation mechanisms within their legal system. More generally, this outcome may therefore support the idea that maintaining a higher standard in implementing EU law at national level may encourage its potential adoption in other countries, allowing enhanced protection of fundamental rights beyond the minimum harmonisation reached by EU legislation.

4 Conclusion

The foregoing considerations on CJEU case law around application of the more favourable provision clause in immigration and asylum cases illustrate that the CJEU's overarching rationale seems to be that of ensuring the utmost unity of EU legislation. National deviations from EU law are interpreted narrowly in both areas examined. However, the CJEU's criteria would appear too imprecise to provide guidance to Member States when they are willing to introduce or maintain higher national standards. Indeed, as a result of criticism around *B and D,* the case law appears to follow a casuistic or contingent approach from which it is hard to extrapolate a canon of interpretation concerning application of the MFP clause. This appears even clearer in the difference between adjudication of

[93] See again Gortazár (n 86).

[94] For an overview of such positions see K. Hinterberger, 'An EU Regularization Directive. An effective solution to the enforcement deficit in returning irregularly staying migrants' 26 *Maastricht Journal of European and Comparative Law*, 2019, p. 736-769.

[95] F. Lutz, 'Non-removable Returnees under Union Law: Status Quo and Possible Developments' 20 *E.J.M.L.* 2018, p. 28-52, p. 52.

[96] Acosta and Martire (n 5), p. 15-18.

[97] Hinterberger (n 94). See recently Bast et al (n 17), p. 201-202, and 205-207.

[98] COM/2014/0199 final.

the clause in *M'Bodj* and *MP* and its interpretation in *Ahmedbekova* and *LW*, and also considering the opposing views in *Zaizoune* and *UN*.

Although one could argue that CJEU case law aims to reduce discrepancies among Member States' legislation in areas requiring common standards, the approach does not necessarily benefit EU legislation. On the one hand, the national contribution to set higher standards is coherent with the wide array of social and structural contexts among EU countries and it can enrich rather than jeopardise the validity of EU legislation, enhancing the protection of fundamental rights in laws of Member States and the EU. The national provisions scrutinised in the above cases related to the QD and RD, can be framed under this perspective. Indeed, the attempt to frame medical cases within subsidiary protection under the QD's in Belgium or the alternative system of sanctions for the irregular stays linked to the existence of a permanent instrument of regularisation (*arraigo*) in Spain with respect to the RD can be deemed as meaningful examples of this. Naturally, such national deviations will require proper justification and application of the principle of proportionality. This is something that the CJEU must assess, clarifying the conditions or criteria that render a higher national standard admissible under EU law. On the other hand, as underlined by legal scholars, a more sensitive approach towards higher internal standards would meet the human rights rationale of EU law.[99] This law would also be coherent with a cooperative understanding of the interaction between constitutional and EU order and strengthen the legitimacy of EU legislation.[100] However, as *Melloni* and the preceding case law illustrate,[101] CJEU resistance to derogation from the primacy, unity and effectiveness shows that EU integration may indeed undermine rights protection at national level. The consequence is a reduction of national authorities' interpretative discretion around more protective standards and the progressive affirmation of the CJEU as the guardian of the standards of protection within the EU.

Some years ago, while examining the jurisprudence on labour law, Syrpis and Novitz stated that: "in each case the Courts' interpretation of EU law, be that the relevant Directive, the relevant Treaty article, or indeed the Charter, operates so as to restrict the freedom of Member States to go beyond minimum standards, under the Directive in question; or to put this another way, to restrict national autonomy to set high labour standards".[102] Although the comment focused on a different area of EU law, it is not difficult to see how it applies to the cases on immigration and asylum adjudicated by the CJEU.

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[99] See above S. Peers (n 1).
[100] Van Den Brink (n 8), p. 269.
[101] C-399/11 *Melloni* ECLI:EU:C:2013:107.
[102] P. Syrpis and T. Novitz, 'The EU Internal Market and Domestic Labour Law: Looking Beyond Autonomy', in A. Bogg et al (eds), *The Autonomy of Labour Law* (Oxford: Hart, 2015), p. 302.