Chapter 4
Philosophical Lens (The Normative Theories, etc. Continued)

Ethical conduct must be based on spiritual values that are core to all religions and that are also part of a secular approach to values.

René Smits, The Invisible Core of Values in the European Integration Project (Smits 2018, 224).

4.1 Ethical Approach Identified in EU Legal Documents

While objectives 1–3 have been dealt with in the chapters so far, this chapter is dedicated to objective 4. That is to say, whether we can identify a certain common horizontal (or rather a specific) pattern in referring to these terms of ethics and morality, and whether we can thus identify an ethical spirit based on an analysis of these legal texts; or whether we have to ascertain a gap, which has to be filled by other means?

First, we have to shed some light on the notion of 'spirit', a term that can have manifold meanings. According to the Collins Birmingham dictionary, the spirit of a legal provision "is the way that it was intended to be interpreted or applied",[1] and according to the Oxford dictionary "the real meaning as opposed to lip service or verbal expression (*the spirit of law*)".[2] Often this intention of the authors of a legal provision can be contrasted to the literal meaning, the mere wording. A famous example for this opposition of "wording vs. spirit" can be found in William Shakespeare's "*The Merchant of Venice*",[3] where the promise to give a "pound of flesh" in case a loan cannot be repaid, in the end is solved as follows. As the agreement did not mention blood, hence, there would only be a right to have this "pound of flesh", if no blood would be shed.[4]

[1] Krishnamurthy (1993, p. 948).

[2] Allen et al. (1990, pp. 1173–1174); no emphasis added.

[3] The Hamlyn Publishing Group (1970, pp. 184–208).

[4] Act IV, Scene I. Venice. A Court of Justice; The Hamlyn Publishing Group (1970, p. 204).

M. Frischhut, *The Ethical Spirit of EU Law*,
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However, this book is based on an understanding, where the notion of 'spirit' surpasses the mere 'intention' of a legal provision in various ways. First, this book refers to "the ethical spirit of EU law", hence, a legal system and not only a single legal provision. Second, for the author, 'spirit' is more than just the intention. It is the holistic coming together of different elements, or as Montesquieu called it, the "relations [which] together constitute what I call the Spirit of Laws".[5] When analysing "[h]ow values come to matter at the European Commission", Jim Dratwa has referred to a 'lattice', a "set of bodies and texts, of products and processes".[6] While the author of this book fully acknowledges the difficulty in defining the notion of 'spirit', this book is based on the following understanding:

> the *intention* of the *authors* of a *legal system*, which is reflected in a *lattice* of various different provisions.

In a metaphorical sense, this 'spirit'[7] can be described as a ghost that maybe cannot be seen, but which is nevertheless present in terms of this lattice; or, as mentioned above, the discovery of a common approach which can serve as a basis of understanding of the underlying philosophy of EU law.[8] The reason, why this definition includes "the authors of a legal system" (plural) and not "the legislator" is simply because we have seen several authors in Sects. 3.1–3.3.4. From the MS as "Masters of the Treaties", the EP and the Council (i.e. the ordinary legislative procedure), the CJEU (case-law), and finally to the MS in implementing directives, to name but the most important ones. The spirit of a legal system obviously can change over time. The spirit of EU law in its infancy was different at the beginning (starting with coal and steel, spilling over to the general economic field), compared to what it is today (also comprising the political field and entailing human rights and values). It is also relative to those different provisions and processes. This relativity is reminiscent of the 'relation' aspect, which has also been stressed by Montesquieu. In his famous book, the 'spirit of laws' ('*De L'esprit des Loix*'[9]), he wrote that the spirit of laws "consists in the various *relations* which the laws may have to different objects".[10] In that regard he mentioned the "nature and principle of each government", "the climate of each country", the "relation to the degree of liberty which the constitution will bear, to the religion of the inhabitants, to their inclinations, riches, numbers,

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[5]This quotation has been retrieved from "The Complete Works of M. de Montesquieu (London: T. Evans, 1777), 4 vols. Vol. 1. 27.8.2018", http://oll.libertyfund.org/titles/837#Montesquieu_0171-01_115; book I, 'chapter III, of positive laws'.

[6]Dratwa (2014, 113 et passim).

[7]See also Brännmark (2017, p. 176), who points out that "a reasonable foundational story does at the same time add something more to a framework than just a philosophical basis; it also adds a spirit in which the rules or principles of the framework can be interpreted and implemented".

[8]*Supra* Sect. 1.4.

[9]Montesquieu, Charles de Secondat, Baron de (1927).

[10]This quotation has been retrieved from "The Complete Works of M. de Montesquieu (London: T. Evans, 1777), 4 vols. Vol. 1. 27.8.2018", http://oll.libertyfund.org/titles/837#Montesquieu_0171-01_115; book I, 'chapter III, of positive laws'; emphasis added.

Table 4.1 Contribution of 'categories of determination' to identification of 'ethical spirit'

Useful	Less useful	Not possible, because determination of content takes place elsewhere
[2.] References only as a supportive argument for a certain legal solution	[1.] References only as an argument against interference from the EU	[4.] Determination via ethics committees, at EU or at national level; exception EGE
[5.] Determination via codes of conduct, at EU or at national level (*in case some principles are mentioned*)	[3.] References in order to create a parallel ethical assessment (beside the legal one)	[5.] Determination via codes of conduct, at EU or at national level (*in case NO principles are mentioned*)
[7.] Determination in document itself (some hints with regard to the content or understanding of ethics)	[8.] No determination at all	[6.] Determination via references to other (international) documents

commerce, manners, and customs".[11] In addition, he continues: "These relations I shall examine, since all these together constitute what I call the Spirit of Laws".[12] These relations[13] add up to this lattice that reflects this spirit, in our case, 'the ethical spirit of EU law'.

To begin with, some introductory remarks. In the context of the above-mentioned determination of the substance of ethics, some categories are more useful to extract this ethical spirit, others less so. The most fruitful categories were those where ethics was used as a supportive argument [2.], or where the determination took place via codes of conduct [5.], especially if these codes of conduct entailed certain principles, as well as if the content of ethics was determined in the relevant legal document itself [7.]. If ethics was only used as an argument against interference from the EU [1.], if 'only' a parallel ethical assessment (besides the legal one) was opened [3.], or if substance wise ethics has not been determined at all [8.], then these categories obviously are less rewarding. Obviously, we cannot harvest any useful 'ethics fruits', if the determination takes place elsewhere, i.e. in case of ethics committees [4.] and in reference to other documents [6.]. The same holds true if in case of codes of conduct [5.], these documents, in the future, will be drafted at a different level (e.g. by MS or companies). The respective contribution of these categories to our quest for the ethical spirit of EU law can be displayed as follows (see Table 4.1).

Hence, in the following, the findings of Chap. 3 will be contrasted with the practical philosophical basics, as covered in Chap. 2. The questions to be answered are the following:

[11] Ibid.

[12] Ibid.

[13] In CJEU *Achmea*, C-284/16, paras 33–34, in the context of the autonomy of EU law and the EU's common values, the Court referred to "a structured network of principles, rules and mutually interdependent legal relations".

- Question No 1: In EU law's references to ethics, can we identify any philosophical theory at all?
- Question No 2: If yes, would this comprise one or more philosophical theories?
- Question No 3: If yes, should this be understood as an unconditional reference to one or more philosophical theories, or only as pointing towards a certain idea?

Without wishing to broach fundamental philosophical issues, it should be emphasised that these three normative theories presented in Chapt. 2 can also overlap. As mentioned earlier, deontology rather focuses on an act, consequentialism on its consequences, and the virtue ethics puts an emphasis on the agent itself.[14] Hence, the peculiarity of these three theories is the way in which "good behaviour" is argued. Of course, these three theories arguing in a different way, in the end can come to the same solution. For example, it can be considered good to help children, e.g. to cross a dangerous street. This can be considered intrinsically good (deontology), one can also argue this as in line with consequentialism (the outcome that a child that has not been endangered in this situation), but one can also see it as a positive trait to help children, whereby this inner attitude also manifests itself in the outside (virtue ethics). While a division into these three normative ethical theories is prevailing in literature, one can question if this sharp distinction is the best approach possible. However, as it is not the objective of this book, this question can be left aside.[15]

When now, hereinafter, certain examples will be assigned to the three normative theories, the following has to be emphasized: As far as this can be judged on the basis of the research conducted, the various 'authors' of the EU's legal system have never explicitly referred to one of these normative theories. Hence, question No 1 (identification of any philosophical theory) can only be answered with regard to implicit references. Therefore, the following 'disclaimer' has to be stressed. The following examples can be interpreted as pointing into a certain direction, but it is not the case that sometimes other interpretations would not be possible.

As mentioned above, according to deontology actions are intrinsically right or wrong, irrespective of their consequences.

- In the field of patentability of biotechnological inventions, we seem to have such a deontological approach, when it is stated that "there is a consensus within the [EU] that interventions in the human germ line and the cloning of human beings offends against *ordre public* and morality".[16] This consensus seems to refer to what is intrinsically wrong. As it is against morality, (a) processes for cloning human beings, (b) processes for modifying the germ line genetic identity of human beings, as well as (c) uses of human embryos for industrial or commercial purposes, "shall be considered unpatentable".[17] Especially this stance against commodification of human beings *in statu nascendi* can also be seen as a deontological approach, reminiscent of the concept of human dignity. This is in line with the EP statement

[14] Cf. Louden (2012, p. 504).

[15] On this question, see Parfit (2011).

[16] Directive Biotech, recital 40; no emphasis added.

[17] Directive Biotech, Art 6(2)(a)–(c); (d) refers to animals.

we have seen on surrogacy. According to this statement, surrogacy "undermines the human dignity of the woman since her body and its reproductive functions are used as a commodity".[18]

- A similar deontological and anti-commodification approach can also be found with regard to animals, when the killing of seals "for commercial reasons" is seen as intrinsically wrong due to "public moral concerns", whereas this is not the case for seal hunts traditionally conducted by Inuit and other indigenous communities.[19] Hence, to some extent also a consequentialist approach.
- Another noteworthy example concerns supply chain due diligence obligations and the import of tin, tantalum and tungsten, their ores, and gold, which shall not be imported from conflict-affected or high-risk areas, in particular in the African Great Lakes Region, as this would contravene "ethical mining".[20]
- However, the most important example in this regard is the one that "[a]nimals have an *intrinsic* value which must be respected".[21] This deontological attitude corresponds with what we have seen in the context of animal transports[22] and animal experiments, i.e. the statement that "man has a *moral obligation* to respect all animals and to have due consideration for their capacity for suffering and memory".[23] In addition, we have seen similar approaches with regard to animals in the context of mass slaughtering.[24]
- In addition, the statement on an ethical accountability of researchers "towards society as a whole"[25] can be interpreted as a deontological approach.
- From the CJEU's case-law we have seen so far, we can add the cases on human dignity, where the Court in *Omega* (Oct. 2004) accepted the German notion of human dignity, which has a clear deontological bedrock.[26] In a similar way as Germany has brought forward this national constitutional concept of human dignity, in *Brüstle* (Oct. 2011) the Court had to deal with human dignity as it was mentioned in the 1998 'Directive Biotech'. The Court's approach of opting for a wide interpretation of the notion of 'human embryo' based on human dignity also points into this deontological direction. The entry into force of the Lisbon Treaty (Dec. 2009), enshrining the EU's common values clearly strengthens this approach.

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[18] EP report human rights, para 115.

[19] Regulation seal products, recitals 1 and 2.

[20] Regulation supply chain, recital 23.

[21] Directive animals, recital 12; emphasis added.

[22] Convention animal transport, recital 2; "every person has a moral obligation to respect all animals and to have due consideration for their capacity for suffering".

[23] Convention animal experiments, recital 2; emphasis added.

[24] *Supra* Sect. 3.3.3.3.

[25] EC Charter researchers, Annex, Section 1.

[26] BVerfG *Shooting down terror plane*, 1 BvR 357/05.

All these examples point towards a deontological understanding and are, as we have seen, closely related to human dignity, or the intrinsic dignity of animals.[27]

As mentioned above, according to consequentialism actions are morally right or wrong depending on the quality of the consequences of action.

- The request "to ensure the ethics of transplantation by adopting measures to eliminate 'transplant tourism'"[28] could be interpreted as a consequentialist approach, as the ethical quality of the action of the addressed states is based on the outcome of their action, i.e. the elimination of transplant tourism.
- In addition, the Korea agreement defines 'ethical business practices' (i.e. the title of this provision) with regard to the pharma industry by its outcome, according to which the contracting parties "shall adopt or maintain appropriate measures to prohibit improper inducements by manufacturers and suppliers of pharmaceutical products or medical devices to health care professionals or institutions".[29]
- The outcome is also the basis for the following example, here to reduce ethical concerns. Moreover, it is an example of the consideration of animal welfare with a consequentialist approach. The outcome in the field of novel food is, where possible, the avoidance of the duplication of animal testing, as "[p]ursuing this goal could reduce possible animal welfare and ethical concerns with regard to novel food applications".[30]

While these examples display a consequentialist approach in order to determine moral correctness and falseness of action, we also have consequentialist examples elsewhere in EU law.

- The effectiveness of EU law, often even in other language versions referred to as "*effet utile*", has become of paramount importance in the case-law of the CJEU. In essence, it states that the provisions of EU law must be interpreted and applied in such a way that they fulfil their practical purpose and have practical effect. On this basis, the requirement of the practical effectiveness of EU law serves the CJEU as an explanatory element with regard to practically all institutes of EU law and in this respect runs like a red thread through the case-law of the Court.[31] In this case-law, the key interpretative approach of the Court is the *outcome*, the assertion of EU law. Although, this '*effet utile*' approach finds its limitations, as there has to be an "appropriate balance between Member State autonomy and the '*effet utile*' of EU law".[32] When analysing the explicitly mentioned "*effet utile*", Advocate General (AG) Kokott referred to "the *spirit* and *purpose* of" the relevant provisions of

[27] For various ethical approaches concerning animals, see the various contributions in Beauchamp and Frey (2014).

[28] Resolution tourism, pt. 33.

[29] Agreement Korea, Annex 2-D, Art 4(1).

[30] Regulation novel foods, recital 32.

[31] See, also for further examples, Ranacher and Frischhut (2009, pp. 68–70).

[32] AG Sharpston opinion of 30 September 2010, *Ruiz Zambrano*, C-34/09, EU:C:2010:560, para 148.

EU law.[33] As mentioned above, this '*effet utile*' case-law is not directly related to ethics and morality. As we have seen above,[34] the Court tackles 'sensitive issues of ethical nature' with a purely legal methodology, which, nevertheless, still renders a decision on this ethical topic. Hence, the '*effet utile*' case-law can also be of indirect relevance for our topic.

- Apart from this supreme 'tool of interpretation', another (non-ethical/moral) consequentialist approach of EU law can be found in case of impact assessments. Impact assessments have already been mentioned as one example indicated in literature in the context of consequentialism.[35] According to Birnbacher, they are not required to assess the outcome of any possible action, but are limited to decisions with far-reaching consequences, as in case of national or supranational legislators.[36] In EU law, impact assessment is one of the "tools for better law-making", in order to "reach well-informed decisions", respecting, amongst others, fundamental rights and "based on accurate, objective and complete information".[37] In essence, an impact shall "cover the existence, scale and *consequences* of a problem".[38] Such an impact assessment can also be required in the context of the precautionary principle, for instance when approving active substances resulting in losses of honeybee colonies.[39]

All these examples point towards a consequentialist approach, both relating to ethics and morality, but also elsewhere in EU law (*effet utile*, impact assessments).

Virtue ethics, sometimes understood rather as a supplement than a basis of normative ethics,[40] puts an emphasis not on the intrinsic quality of the action or its consequences, but on the agent itself. 'Virtues' are character traits, which must also be reflected in corresponding behaviour.[41] As mentioned above, sometimes virtue ethics cannot avoid establishing principles for its part (e.g. the virtue of justice may require principles of justice).[42] 'Integrity' has been described as "an important personal characteristic in ethical systems based on virtue and moral character".[43]

- In the Georgia agreement, we have seen one example for the close link of ethics (precisely, the 'Blueprint on Customs ethics') and "the highest standards of integrity".[44]

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[33] AG Kokott opinion of 17 July 2014, *UK versus Council*, C-81/13, EU:C:2014:2114, paras 114–117; emphases added.

[34] Section 3.3.1.1.

[35] Section 2.2.

[36] Birnbacher (2013, pp. 194–195).

[37] IIA Better Law-Making, pt. 12–18 (12).

[38] Ibid., emphasis added.

[39] GC judgment of 17 May 2018, *BASF Agro*, T-584/13, EU:T:2018:279, paras 170–171 (because of the principle of proportionality).

[40] Birnbacher (2013, p. 305).

[41] Birnbacher (2013, p. 295).

[42] Birnbacher (2013, p. 304).

[43] Forrest (2002, p. 441).

[44] See at note 52.

- The most important examples referring to integrity can be found in the field of lobbying.[45] Integrity was mentioned for several 'targets' of lobbying, such as the EP, the EC,[46] EU staff, and even for the CJEU, as well as for experts ("ensure the highest level of integrity of experts").[47] However, it has not been addressed for the 'actors' of lobbying.[48]
- Other terms we have seen in the context of lobbying, have been as follows: accountability, dignity, diligence, discretion, disinterest, honesty, impartiality, independence, loyalty, objectivity, openness, responsibility, and transparency. Some of these terms rather fall in the category of legal principles (accountability, diligence, impartiality, independence, objectivity, responsibility, transparency), while (human) dignity is a value[49] and discretion, disinterest, openness, honesty, integrity and loyalty could also qualify as virtues.[50]
- Furthermore, Horizon 2020 addresses "research integrity",[51] as well as Directive statutory audits, which requires statutory auditors to adhere to "the highest ethical standards".[52]
- In the context of the EU 'ethics directives', 'integrity', besides ethics, was the most important key term, mainly occurring in the field of 'accounting & finance', followed by the 'health' field.[53]
- As already mentioned earlier, the three notions of 'values', 'principles' and 'virtues' "can and do overlap".[54] While Art 2 TEU explicitly addresses values, the second sentence of this provision refers to "a society [in the MS,] in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail". For instance, tolerance and solidarity could also be virtues, where justice is even a cardinal virtue.[55]

All these examples can be seen to point towards virtue ethics, if they are also reflected in the corresponding behaviour. Consequently, we have seen examples pointing into the direction of all three normative theories, which answer the above-mentioned three questions. However, as this book follows an inductive approach, likewise, in the following, examples referring to minimal ethics, principlism and communitarianism will be addressed.

Minimal ethics only defines moral norms for a core, while this claim does not exist for the periphery.

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[45] *Supra* Sect. 3.3.2.

[46] Art 245(2) TFEU.

[47] See Sect. 3.3.2.2 at note 203.

[48] The code of conduct (Sect. 3.3.2.2 note 205) does not mention 'integrity'.

[49] Art 2, 1st sentence TEU.

[50] Keeping in mind the 'moral excellence of behaviour and character', etc., mentioned *supra* in Sect. 2.3.

[51] See Chap. 3 at note 326.

[52] See at note 339.

[53] See Chap. 3 at note 339.

[54] Williams (2010, p. 257).

[55] See at note 105.

- The most prominent example, in this regard, is the field of patentability of biotechnological inventions, a much-contested issue, which we have already seen at various times throughout this book. This has been solved in the following way: Art 6 of this directive defines a core in para 2, where MS and the EP where able to reach a compromise; in the words of AG Cruz Villalón: "a minimum, Union-wide consensus for all Member States".[56] This compromise defined at EU level comprises cloning of humans, modification of the germ line genetic identity of humans, uses of human embryos for commercial purposes, as well as modification of the genetic identity of animals. Obviously, there was no consensus concerning other equally sensitive issues, hence, para 1 of this provision delegates the question of answering the unpatentability to the national level, where the commercial exploitation of inventions has to be assessed against the notions of "*ordre public* or morality". This approach of a minimal ethics at EU level for a core, capable of consensus, and a possible divergent national approach at the periphery, could serve as a role model for other fields.
- This minimum consensus of this 1998 directive has been adopted, in identical terms, in the 2014 agreement with Ukraine.[57] A similar approach is adopted in Horizon 2020, where, under the heading of 'ethical principles', research fields reminiscent of, however not identical to, Art 6(2) Directive Biotech shall not be financed.[58]
- A minimum approach, however of a different kind, can be seen in a resolution, which states that in case sanctions cannot "bring about a change of regime in a particular country, or at least a major change in the policy of that country's government, their imposition may also serve *simply* as an expression of moral condemnation".[59] This is not a true minimum approach which achieves consensus in a core and leaves open questions at the periphery, rather the primary objective (i.e. change of regime) has failed, that is why only moral condemnation remains.

All these examples display a 'minimal ethics' approach. Such an approach might be suitable for areas, where a consensus amongst MS (and the EP) can only be achieved in a (united) core, while the periphery is left to potentially diverse solutions in the MS.

Principlism determines ethics in a substantive way (cf. in the field of medical ethics, Beauchamp and Childress), where ethics is defined based on a certain number of moral principles (e.g. autonomy, beneficence, nonmaleficence, and justice). As mentioned earlier,[60] we can distinguish a legal and a philosophical understanding of 'principles'.

- Against the background of the heated debates on investment protection, Art 8.30 CETA (entitled 'ethics') covers the following principles for the members of the

[56] AG Cruz Villalón opinion of 17 July 2014, *ISC*, C-364/13, EU:C:2014:2104, para 42.

[57] Agreement Ukraine, Art 221(5).

[58] Regulation establishing Horizon 2020, Art 19(3).

[59] Resolution embargoes, pt. 2; emphasis added.

[60] See Chap. 1 at note 92.

multilateral investment tribunal. The independence of its members, as well as the avoidance of both a direct or indirect conflict of interest.[61] The 'Joint Interpretative Instrument' stresses "*independence* and *impartiality*, the *absence of conflict of interest, bias* or *appearance of* bias".[62]

- Likewise, the Korea agreement also refers to the following principles in order to achieve "ethical practices by manufacturers and suppliers of pharmaceutical products and medical devices and by health care providers on a global basis": openness, transparency, accountability and non-discrimination in health care decision-making.[63]
- These principles overlap with those which have been qualified as legal principles above in the context of lobbying: accountability, diligence, impartiality, independence, objectivity, responsibility, transparency. Again, the question of distinguishing virtues from legal as well as philosophical principles remains a challenge.
- One of the most comprehensive examples can be found in the field of nanosciences. The annex of this code of conduct, which is "based on a set of general principles", mentions the following ones.[64] *Meaning* (which comprises comprehensibility for the public, respect for fundamental rights, as well as acting in the interest of the well-being of individuals and society); *sustainability* (referring to the United Nation's Millennium Development Goals, as well as avoidance of harm or creation of "biological, physical or moral threat to people, animals, plants or the environment, at present or in the future"); *precaution* (basically referring to the EU's precautionary principle[65]); *inclusiveness* (principles of openness to all stakeholders, transparency, access to information, as well as stakeholder participation in decision-making); *excellence* (also comprising "integrity of research"); *innovation*; as well as *accountability* (with regard to "social, environmental and human health impacts […] on present and future generations"). These "general principles" address both the legal as well as the ethical sphere, without providing a clear distinction.
- As we have already seen elsewhere, in the field of biotechnology, reference is made to the national level of MS within the context of "ethical principles",[66] while in the same directive we find an undetermined reference to "basic ethical principles"[67] for the question when the EGE can be consulted.

All these examples can be attributed to principlism. From a theoretical perspective, one could criticize the fact that it is left open whether these principles are purely legal ones, purely philosophical ones, or a combination of both. Yet, from a pragmatic

[61] It is worth mentioning that apart from these substantive principles in para 1; paras 2–4 provide procedural safeguards in this respect.

[62] OJ 2017 L11/3 (4); emphases added. See also the Statement by the Commission and the Council on investment protection and the Investment Court System ('ICS'), on p. 20.

[63] Agreement Korea, Annex 2-D, Art 1(e).

[64] EC recommendation nanosciences, Annex, pt. 3.

[65] Recently: GC *BASF Agro*, T-584/13; for further details, see Frischhut and Greer (2017, 331–333).

[66] Directive Biotech, recital 39: "ethical or moral principles recognised in a Member State".

[67] Directive Biotech, recital 44.

perspective, this approach has to be welcomed, as the content of ethics is more clearly determined.

In summary, it can be said that in EU law's references to ethics, we can identify normative theories (question No 1), although only implicit and no explicit ones, covering all three proponents (question No 2). All the examples we have seen cannot be understood as unconditional references, but only as pointing towards these normative theories (question No 3). Can we identify a certain common horizontal (or rather a specific) pattern in referring to these terms of ethics and morality? We have seen different approaches referring to the normative theories of deontology (putting an emphasis on human dignity), consequentialism (with examples in the field of ethics and morality, but also elsewhere in EU law, such as *effet utile* and impact assessments), and virtue ethics (especially, but not only in lobbying), as well as minimal ethics (Directive Biotech, etc.), and principlism (lobbying and nanosciences). There is clearly no horizontal, but a specific approach in addressing different needs in different fields, from independence of members of investment tribunals to research integrity in nanosciences. Hence, we can address both an ethical spirit in the sense of the intention of the various authors of EU law, which is reflected in a lattice of various different provisions, as well as a gap that still needs to be filled. So far, the examples covered those authors authorized to issue binding and non-binding legal provisions, not specifically tasked to deal with ethics. Accordingly, we will now turn to an entity that, while 'only' having an advisory function, is specifically tasked to deal with ethics.

4.2 EGE Opinions

The practical impact of EGE opinions can, amongst others,[68] be seen from the EU's research funding programme Horizon 2020, where the relevant regulation states that "[t]he opinions of the [EGE] should be taken into account".[69,70] In the field of patentability of biotechnological inventions, the already widely covered directive states that the EGE "evaluates all [sic!] ethical aspects of biotechnology".[71] This directive dates from 1998, hence, the year after the EGE's establishment.

[68] In addition, several other regulations and directives, as well as courts, e.g. the CJEU and the European Court of Human Rights (ECtHR), as well as AG at the CJEU have referred to EGE opinions; for further details, see Pirs (2017, p. 32). This chapter has been drafted at the same time as the following paper; hence, certain parts can overlap: Pirs and Frischhut (2019, forthcoming).

[69] Regulation establishing Horizon 2020, recital 29.

[70] Similar in Regulation Horizon 2020 Euratom, recital 18.

[71] Recital 44 and Art 7.

4.2.1 EGE History, Institutional Structure and Opinions

Due to rapid scientific developments in biotechnology and genetic engineering in the late 1980s and early 1990s, there was need for an institutionalized framework facilitating debate and addressing public concern as to ethical implications.[72] Hence, in April 1991 the EC stated that there is a need for a "consultative structure on ethics and biotechnology".[73] The Group of Advisers on the Ethical Implications of Biotechnology (GAEIB) was created on 20 November 1991. After the first mandate of two years, the EC addressed the necessity "to clarify further value laden issues in relation to some applications of biotechnology", hence to "reinforce the role of the [GAEIB]".[74] After the mandate had expired on 31 July 1997[75] and the legislative process leading to 'Directive Biotech' was in full swing,[76] the EC on 16 December 1997 decided to replace the GAEIB by the EGE, "extending the Group's mandate to cover all areas of the application of science and technology".[77,78] The EGE was then established in December 1997.[79] As of 2000,[80] the EGE was part of the 'Bureau of European Policy Advisers (BEPA), a Directorate General (DG) of the EC, reporting directly to the EC president.[81] Nowadays, the EGE is docked with DG Research and innovation.[82] While it clearly makes sense to link the EGE to the field of research and innovation, it could also be seen as a downgrading of the EGE, as there is no

[72] Plomer (2008, p. 840).

[73] EC 'Promouvoir les conditions de la compétitivité des activités industrielles basées sur la biotechnologie dans la Communauté', SEC(91) 629 final 19.4.1991, p. 18: "*Il est souhaitable que la Communauté dispose d'une structure consultative sur l'éthique et la biotechnologie capable de traiter les questions d'éthique qui se posent dans le cadre des activités communautaires. Cette structure devrait permettre l'ouverture d'un dialogue où seraient débattus ouvertement les problèmes éthiques dont les Etats membres ou d'autres parties intéressées jugeraient la solution nécessaire. Elle permettrait également à des experts délégués par les groupes concernés de contribuer à l'orientation du processus législatif. La Commission estime que cette démarche serait un pas positif en vue d'une meilleure acceptation de la biotechnologie et de la réalisation du marché unique pour les produits Issus de cette technologie.*".

[74] European Commission (1993, p. 103).

[75] EP resolution of 13 June 1997 on the mandate of the Group of Advisers on the Ethical Implications of Biotechnology to the EC (B4-0484/97), OJ 1997 C 200/258 [EP resolution GAEIB], recital A.

[76] On 29 August 1997, the EC had adopted an amended proposal: COM(97)446 final 29.08.1997.

[77] EC decision (EU) 2016/835 of 25 May 2016 on the renewal of the mandate of the European Group on Ethics in Science and New Technologies, OJ 2016 L 140/21 [EGE mandate V 2016], recital 3. This current mandate started on 28.5.2016 and lasts until 27.5.2019.

[78] It seems that the EGE follows a broad understanding of technology.

[79] EC *communication de M. le PRESIDENT, en accord avec M. BANGEMANN, M. FLYNN, Mme CRESSON, Mme BJERREGAARD, M. MONTI, M. FISCHLER et Mme BONINO: Création d'un groupe Européen d'éthique des sciences et des nouvelles technologies*, SEC(97)2404 final 12.12.1997 [EGE mandate I 1997].

[80] That is to say, as of the second mandate (see Table 4.2), Mohr et al. (2012, p. 107).

[81] Plomer (2008, p. 841).

[82] The EGE's website can be accessed via http://ec.europa.eu/research/ege/index.cfm.

direct and regular access to the EC president (Juncker).[83] For an overview of the EGE's development, see Table 4.2.

Moreover due to the increasing role of 'good governance',[84] the already mentioned horizontal rules on the creation and operation of EC expert groups also apply to the EGE; as already mentioned, these rules strive for a balanced composition of expert groups and also comprise rules on conflict of interest, in order to "ensure the highest level of integrity of experts".[85] Likewise, as for all expert groups giving advice to the EC, the core principles of 'quality, openness, and effectiveness' apply to the EGE.[86]

Under the current mandate, the EGE is tasked "to advise the Commission on ethical questions relating to sciences and new technologies and the wider societal implications of advances in these fields".[87] The members are appointed by the EC president, based on a proposal from the Commissioner for research, etc.[88] The EGE, which "shall be independent, pluralist and multidisciplinary", is composed of 15 members serving in personal capacity, and demonstrating "a high level of expertise and pluralism"; furthermore, the mandate strives to establish a geographical balance, as well as a balanced representation of relevant know-how and areas of interest".[89] In its 1997 resolution concerning the GAEIB, the EP had criticized that so far, "too much attention has been paid to the interests of research and not enough to the possible effects on society".[90] Today, besides a balance of qualities, gender and geographical distribution, the current mandate requires "independent advice of the highest quality", "combining wisdom and foresight", as well as "internationally recognised experts, with a track record of excellence and experience at the European

[83] Compared to former president Barroso, president Juncker also took a different approach in another field, by "scrapping" the role of the Chief Scientific Adviser (CSA); see Panichi (2015). Nowadays, see the EC's Scientific Advice Mechanism (SAM), also comprising the Group of Chief Scientific Advisors; EC decision on the setting up of the High Level Group of Scientific Advisors, C(2015) 6946 final 16.10.2015, as amended by Decision amending Decision C(2015)6946 on the setting up of the High Level Group of Scientific Advisers, C(2018) 1919 final 5.4.2018.

[84] EC 'European governance—A white paper', COM(2001) 428 final, OJ 2001 C 287/1; addressing principles of openness, participation, accountability, effectiveness, and coherence.

[85] EC decision experts, recital 3, Art 2(4), Art 11.

[86] EC communication on the collection and use of expertise by the Commission: principles and guidelines—"Improving the knowledge base for better policies", COM(2002) 713 final 11.12.2002, p. 1.

[87] EGE mandate V 2016, Art 2.

[88] EGE mandate V 2016, Art 4(3). Since 'EGE mandate III 2005' (see Table 4.2), the EC president has officially appointed the members. However, since the creation of the EGE in 1997, "the President of the Commission has been authorised by the Commission to appoint the EGE members", hence 'EGE mandate III 2005' "has therefore [only] formalised this situation". Source: response of former EC president Barroso on a parliamentary request ('Criteria and methods for the selection of the members of the [EGE]', P6_RE(2006)0430, answer from 17.3.2006); see also EGE mandate I 1997, p. 4. Besides this, the selection process shall be overseen by a new 'Identification Committee'; EGE mandate V 2016, Art 4(3) and (4).

[89] EGE mandate V 2016, Art 4(1), (2) and (4).

[90] EP resolution GAEIB, pt. 3.

Table 4.2 Overview EGE

Term		Time frame	Established by	Number of members | term of years	Opinions (total number)	Chairperson; additional information
GAEIB		1991–1997	EC	6 pers.; 9 pers. as of 1994; | 2 years	1–10 (10)	Marcelino Oreja; followed by Noëlle Lenoir
EGE	1st mandate	1998–2000	(SEC(97) 2404[a]	12 pers. | 3 years	11–15 (5)	Noëlle Lenoir
	2nd mandate	2000–2005	(C(2001) 691[b]	12 pers. | 4 years	16–20 (5)	Göran Hermerén ('president') | New: part of BEPA
	3rd mandate	2005–2010	EC Decision 2005/383/EC[c]	15 pers. | 4 years	21–25 (5)	Göran Hermerén | New: appointed by EC president
	4th mandate	2010–2015	EC Decision 2010/1/EU[d]	15 pers. | 5 years	26–29 (4)	Julian Kinderlerer
	5th mandate	2016–2019	EC Decision (EU) 2016/835[e]	15 pers. | 2.5 years	30 (1)[f]	Christiane Woopen | New: proposal from Commissioner for research, etc., 'Identification Committee'; part of DG Research and Innovation

[a]EGE mandate I 1997

[b]EC *note pour les membres de la Commission* '*Groupe européen d'éthique des sciences et des nouvelles technologies (GEE)—modification du mandat*', C(2001) 691 final 26.3.2001 [EGE mandate II 2001]

[c]EC decision 2005/383/EC of 11 May 2005 on the renewal of the mandate of the European Group on Ethics in Science and New Technologies, OJ 2005 L 127/17 [EGE mandate III 2005]; EC decision 2009/757/EC of 14 October 2009 on the extension of the mandate of the European Group on Ethics in Science and New Technologies and of the period of appointment of its members, OJ 2009 L 270/18 [EGE extension of mandate III 2009]

[d]EC decision 2010/1/EU of 23 December 2009 on the renewal of the mandate of the European Group on Ethics in Science and New Technologies, OJ 2010 L 1/8 [EGE mandate IV 2010]

[e]EGE mandate V 2016

[f]This opinion No 30 was published in December 2018, hence after the manuscript of this book was finished. For further details, see Pirs and Frischhut (2019, forthcoming)

and global level".[91] Furthermore, one of the criteria mentioned is membership in national ethics councils,[92] in order to establish this vertical link between the EGE and national ethics committees.[93] This networking is also related to the international level, in particular the World Health Organisation (WHO), the United Nations Educational, Scientific and Cultural Organisation (UNESCO), and the Council of Europe. This networking is important in terms of exchange of best practice (in either direction). Most important in terms of qualification, the mandate requires the following[94]:

> The Members shall reflect the broad *cross-disciplinary scope* of the group's mandate, embracing *philosophy and ethics*; *natural and social sciences*; and the *law*. However, they shall *not* [!] perceive themselves as *representatives* of a particular discipline, worldview, or line of research; they shall have a *broad vision* which collectively reflects an understanding of important ongoing and emerging *developments*, including inter-, trans-, and multi-disciplinary perspectives, and the need for ethical advice at the European level.

This requirement, more precisely, this rejection of the possibility of sending representatives of a certain political or ideological direction must also be seen in the light of the criticism that in 2005, many members were too closely linked to the Catholic church.[95]

In terms of the inter-institutional role, before the transition from the GAEIB to the EGE, the EP had called for an increasing role on the composition of the new members.[96] These tensions must be seen against the background of fundamental questions about the role of morality in EU law, precisely "the content of any putative European moral norms and the institutional mechanisms through which morally charged EU policy should be decided", as well as the EP's veto against the first draft of 'Directive Biotech'.[97] However, as mentioned above, the EGE's task is to advise one institution, namely the EC.[98] The EP and the Council of the EU only have an 'indirect access' to the EGE, as "the Commission may draw the Group's attention to issues considered by the Parliament and the Council to be of major ethical

[91] EGE mandate V 2016, Art 4(6)(a) and (b).

[92] EGE mandate V 2016, Art 4(6)(e).

[93] In 2005, EGE also began formally to network with national ethics committees; Mohr et al. (2012, p. 107). See, for instance, the above-mentioned (preface) 'Meeting of the National Ethics Councils (NEC) Forum and the [EGE]' on 17 & 18 September 2018 in Vienna, organised under the Austrian Presidency of the Council of the EU.

[94] EGE mandate V 2016, Art 4(6)(c); emphases added.

[95] Plomer (2008, p. 844).

[96] EP resolution GAEIB, pt. 4.

[97] Plomer (2008, p. 842).

[98] Quoting former EC president Jacques Santer, in literature (Mohr et al. 2012, p. 107) the EGE was referred to as "the servant of 'European decision-makers', not solely the Commission"; however, in formal terms it is clearly attached to the EC.

importance".[99] Once an opinion has been adopted, besides the general publication, the opinion has to be transmitted to the EP and the Council.[100]

In terms of the intra-institutional role, the current mandate states "the EGE *shall* establish close links with Commission departments concerned by issues the Group is working on",[101] hence, a more prescriptive and less aspirational ('may') language, as this was the case earlier.[102] Links with external representatives have to be agreed with the Commission's representative,[103] while previously this was a prerogative of the EGE itself.[104,105] Finally, as Plomer has emphasized,[106] the EGE does not have a 'president', but a 'chairperson' only; while the first mandate had referred to a chairperson, the second mandate 'upgraded' this job to an EGE 'president', with mandates No 3 to 5 again only referring to a chairperson.[107] While legally speaking this might not change a lot, one should never underestimate the symbolic meaning of such wording.[108]

The EGE develops their opinions and standpoints in a collaborative way, seeking consensus amongst its members, while leaving open the possibility of dissenting opinions,[109] whereas the discussions are confidential.[110] So far, the EGE has deliv-

[99]EGE mandate V 2016, Art 3. However, the EGE has also accepted requests by other institutions (especially in case of a political standstill), followed by an official request of the EC (e.g. in case of EGE opinion No 27, on energy).

[100]EGE mandate V 2016, Art 5(8).

[101]EGE mandate V 2016, Art 5(7); emphasis added. Having access also to other DGs can be important in terms of the impact of the EGE's activities.

[102]Plomer (2008, p. 846).

[103]EGE mandate V 2016, Art 5(7).

[104]See Footnote 102.

[105]However, it seems that the EGE faces no problem in establishing these links, if so desired.

[106]See Footnote 102.

[107]EGE mandate I 1997, pt. 7; EGE mandate II 2001, pt. 7; EGE mandate III 2005, Art 4(1); EGE mandate IV 2010, Art 4(1); EGE mandate V 2016, Art 5(2).

[108]It seems that the EGE has always enjoyed sufficient independence in its work. Göran Hermerén, past president and chairperson of the EGE "[does] not recollect any attempt from BEPA or the Commission to interfere with our work, nor to suggest or put pressure on us to change something in a draft EGE report" (personal communication).

[109]EGE mandate V 2016, Art 5(6) and (8), "as a 'minority opinion'". See for instance the dissenting opinion of Günter Virt on the controversial issue of patenting of human embryonic stem cells, in EGE opinion No 16 (European Group on Ethics in Science and New Technologies (2002, p. 19)).

[110]EGE mandate V 2016, Art 5(10). These internal EGE documents cannot be accessed, "even from within the Commission"; Mohr et al. (2012, p. 109).

ered 30 opinions, as well as statements[111] and reports.[112] EGE opinions[113] have been mentioned in several EU legal documents.[114] They shall include a set of recommendations and shall be based on an overview of the state of the art of sciences and technologies concerned, as well as a thorough analysis of the ethical issues at stake.[115]

The opinions are usually structured in the following three parts[116]: the first part consists of recitals of the reference texts, which form the starting point (e.g. request by EC president, relevant EU law, relevant international law, primary scientific texts, relevant previous EGE opinions, expert reports and roundtable hearings). The second part consists of three sections, which provide the scientific, legal and ethical backgrounds to the opinion, and the third part presents the opinion with recommendations.[117] Since the beginning, EGE opinions have increased in both scope (from bioethics to sciences and new technologies) and size (from six pages to typically around 100 pages).[118] While some argue that theoretically the EGE is not formally bound to the CFR,[119] there are various references in EGE opinions to this key human rights document, as we will also see in the following.

4.2.2 Key Findings

As it is the EGE's specific task "to advise […] on ethical questions", it remains to be seen how many of the gaps concerning the EU's ethical spirit within the lattice identified so far can be filled based on the findings from the EGE's opinions. Thus, in a similar way as Sect. 4.1, this chapter is dedicated to objective 4, which is to say to answer the question whether the EGE substantiates its ethical reasoning on one of the three normative theories.

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[111] Statements or other forms of analyses can be produced, if operational circumstances require that advice on a particular subject should be given more quickly than in case of the adoption of an opinion (this should be followed, if necessary, by a fuller analysis in the form of an opinion); EGE mandate V 2016, Art 5(9).

[112] According to Busby et al. (2008, p. 840), the EGE was asked to give an opinion on the CFR, however declined to do so and, instead, gave the following report: European Group on Ethics in Science and New Technologies (2000).

[113] For a detailed analysis of their impact on the legislative procedure, see Busby et al. (2008) (concerning opinions 2, 3, 8, 11, 12, 15, 19 and 22) and Mohr et al. (2012) (concerning opinion 19).

[114] E.g. Directive Biotech, recital 19 (GAEIB); EC recommendation nanosciences, recital 6; Regulation advanced therapy, recital 28; Directive tissues and cells, recital 33.

[115] EGE mandate V 2016, Art 5(5).

[116] European Group on Ethics in Science and New Technologies (2005, p. 10).

[117] There are strong indications that, not very surprisingly, lawyers draft the legal parts, philosophers the ethical ones, and scientists the scientific ones.

[118] Cf. Pirs (2017, 27, A7).

[119] Wilms (2013, p. 293).

This chapter is based on a research project, where the research design has been developed by the author, the research itself conducted as well as the research design further specified by Matthias Pirs,[120] and his Master thesis having been supervised within the 'Integrity Research Group' by Lorenzo Pasculli (now: Coventry University) and the author.

With regard to the methodology,[121] this project also took an inductive approach, coding[122] the 1205 pages of the 29 EGE opinions with the aim of deriving 'rules of prediction' in an explorative way.[123] The categories were formed based on a latent analysis, the 'interpretative reading' of the text, so to speak. The opinions where then screened, using the MAXQDA software, which moreover allows to eliminate code redundancies.[124]

As mentioned above, for the first time, the third mandate of the EGE (2005–2010) was based on a formal decision, hence increasing EGE's legitimacy. The research has revealed that starting from the second half of this mandate, the EGE refers to our three normative theories, that is to say mainly since opinion No 23 (issued on 16.01.2008), until opinion No 29 (issued on 13.10.2015).[125] Besides the new (and formally strengthened) mandate, the EGE left its initial turf of biotechnology and bioethics, and moved on to new fields of technological developments in agriculture, energy, information and communication technologies (ICT), security and surveillance, and citizen participation in new health technologies.[126]

In quantitative terms,[127] the total references to deontology prevail (37), followed by virtue ethics (12) and consequentialism (10), with EGE opinions No 25 on 'synthetic biology' and No 28 on 'security and surveillance technologies' exhibiting the largest accumulation of hints to one or more of these three normative theories, 18

[120] Pirs (2017).

[121] For further details on the methodology and the limitations, see Pirs (2017, pp. 40–45). Concerning these opinions (in EN), this project applied a qualitative content analysis (QCA) and took a mixed qualitative (assigning code categories in the relevant materials) and quantitative (analysing and interpreting category frequencies) approach. Concerning the footnote references to potential schools of thought, the QCA mainly considered those, "which were primarily referred to in the main line of reasoning (in-text citation or direct references) in the opinions". In other words, the QCA excluded standalone footnote references, if they could not be related to one of the normative theories; Pirs (2017, p. 44).

[122] The coding process contained the following steps: reading opinions, inductive coding, lexical search, refining categories, classification, and finally narrowing down to the results, presented in the following; for further details, see Pirs (2017, pp. 43–44).

[123] The author would like to thank Nils-Eric Sahlin for pointing to the fact that an inductive method cannot lead to a theory.

[124] Pirs (2017, p. 42). As mentioned above (Table 4.2), for opinion No 30 see Pirs and Frischhut (2019, forthcoming).

[125] Opinion No 30 is on the 'future of work'.

[126] Pirs (2017, p. 49).

[127] It has to be emphasized that sometimes it could be the case that, for instance, three hits occur on the same page of the same opinion, while in other cases three hits occur in different parts of the same opinion, or in total three hits in three different opinions. That is why these numbers shall not be overestimated.

and 16 respectively (see Table 4.3). In terms of philosophers, John Rawls accounts for most hits (10[128]), followed by Hugo Grotius (7), Thomas Hobbes and Hans Jonas with 5 each, Hannah Arendt (4), Jeremy Waldron, Jeremy Bentham, John Stuart Mill, Peter Singer, Michel Foucault and Aristotle with 3 each, John Locke with 2, as well as Immanuel Kant and Jean-Jacques Rousseau with one each, to name but a few.[129]

Overall,[130] the qualitative content analysis (QCA) revealed that thinkers in a deontological tradition of thought dominate the reasoning in the EGE (see Table 4.3).[131]

In its opinion (No 24) on 'ethics of modern developments in agriculture technologies', the EGE referred to justice, as the "institutional dimension of ethics".[132] When broaching issues of global as well as intergenerational justice, the EGE referred to Harvard philosopher John Rawls (1921–2002)[133] and his 'original position', where everyone decides questions of justice from behind a 'veil of ignorance; hence, one would adopt "a 'maximin' strategy which would maximise the position of the least well-off".[134] For the global justice discourse, the EGE refers to this question of distributive justice, which deals with the question of which goods a society or a collective group shall distribute among its individual members. This geographical dimension addresses similar questions as along the timeline (i.e. 'justice between generations'), where "*future* or *past* generations can be viewed as holding legitimate claims or *rights* against present generations, who in turn bear correlative *duties* to future or past generations".[135] It is worth mentioning that this involves not only the perspective of rights, but also of duties, similar to the discussion on human rights and human rights obligations.[136]

As we have seen earlier, conflict of interest is a key issue in ethics. Likewise, in this context, by again referring to Rawls, the EGE emphasizes that "if there is an intergenerational *conflict of interests*, considerations of *justice* could place an *obligation* on *present* generations not to pursue policies that create benefits for themselves but at the expense of those who will live in the future".[137] One year later (in 2009), the EGE picked up the same ideas of Rawls on justice in its opinion on 'synthetic biology'.[138]

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[128]Five in EGE opinion No 24 ('agricultural technologies') and five in EGE opinion No 25 ('synthetic biology').

[129]For a detailed overview, see Pirs (2017, p. 50).

[130]In the following, some key findings will be presented; for further details see Pirs (2017, pp. 52–64), respectively the above-mentioned opinions, and Pirs and Frischhut (2019, forthcoming).

[131]As far as possible, the different philosophers have been categorized according to the three normative theories.

[132]EGE opinion No 24, p. 48.

[133]Rawls (1971).

[134]EGE opinion No 24, pp. 51–52.

[135]EGE opinion No 24, p. 52; emphases added.

[136]See Weß (2010, pp. 258–259); Assmann (2018).

[137]EGE opinion No 24, p. 52; emphases added.

[138]EGE opinion No 25, p. 45.

Table 4.3 EGE opinions normative theories (quantitative analysis)[a]

EGE opinions/normative theories	No 23 animal cloning 1/2008[b]	No 24 agriculture 12/2008[c]	No 25 synthetic biology 11/2009[d]	No 26 ICT 2/2012[e]	No 27 energy 1/2013[f]	No 28 security and surveillance technologies 5/2014[g]	No 29 health technologies and citizen participation 10/2015[h]	In total
Deontology	0	5	17	0	3	12	0	37
Consequentialism	7	1	0	0	0	2	0	10
Virtue ethics, and related[i]	0	0	1	4	0	2	5	12
In total	7	6	18	4	3	16	5	59

[a]This table does not mention references that cannot be assigned to one of the three normative theories. In the following, opinions will be cited as follows: EGE opinion [No], [page]. Source and further details: Pirs (2017, p. 48); for opinion No 30, see Pirs and Frischhut (2019, forthcoming)
[b]European Group on Ethics in Science and New Technologies (2008a)
[c]European Group on Ethics in Science and New Technologies (2008b)
[d]European Group on Ethics in Science and New Technologies (2009)
[e]European Group on Ethics in Science and New Technologies (2012)
[f]European Group on Ethics in Science and New Technologies (2013)
[g]European Group on Ethics in Science and New Technologies (2014)
[h]European Group on Ethics in Science and New Technologies (2015)
[i]While their classification to a normative theory is debated in literature and clearly challenging, Foucault and Arendt are covered here in 'virtue ethics, and related'. The author would like to thank Johan Brännmark for addressing the fact that Foucault is more about social theory than normative theory; the reason why he was addressed by the EGE in the field of surveillance might be that he is a relevant source because of his work on disciplining and governmentality

Hans Jonas (1903–1993), a philosopher focussing on relationship of man to nature and his handling of technology, has also highlighted this responsibility towards future generations. Based on Kant's 'categorical imperative',[139] in his 1979 book "*Das Prinzip Verantwortung*", he developed an 'ecological imperative', which states as follows: "Act so that the effects of your action are compatible with the permanence of real human life on earth".[140] The development of this deontological concept has to be seen against the historical background, where he saw the need to develop a new concept of ethics, since in the past technology did not have such ranges of action in space and time. In opinion No 27 on energy, the EGE has referred to Jonas, stating that his approach "is echoed in part in the implementation of the 'precautionary principle' in the legal EU framework, which reverses the burden of proof—the argument for the greater overall benefit of an action—in cases of expected harms or risk of envisioned technologies".[141] Likewise, the EGE links Jonas' ideas of obligations towards future generations to the 'principle of sustainability' with respect to the impact of present actions on future generations.[142] In this regard, the EGE refers to the values of human dignity (and human rights), justice (including distributive, social, political, and intergenerational justice), as well as solidarity (the shared responsibility and concern for EU and global welfare). These overarching rights and values shall "guide the development of an ethics framework oriented at a responsible design of the EU energy policy".[143]

The aforementioned value of human dignity is another deontological concept, which the EGE in its opinion on 'synthetic biology' sees as "the *core* of the ethics framework for synthetic biology".[144] Although the EGE only refers to it as "[o]ne such attempt" to define human dignity, it quotes the following definition of medical expert William P. Cheshire[145]:

> The exalted *moral status* which *every* being of human origin uniquely possesses. Human dignity is a given reality, *intrinsic* to human substance, and *not contingent upon* any functional capacities which vary in degree. […] The possession of human dignity carries certain *immutable moral obligations*. These include, concerning the treatment of all other human beings, the duty to preserve life, liberty, and the security of persons, and concerning animals and nature, responsibilities of stewardship.

This deontological concept of the 'intrinsic value' comprises, according to the "Kantian understanding of human dignity [which] emphasises moral responsibility", a prohibition of "treating human beings as mere 'objects' of the interests of others".[146] According to the EGE, this is especially important in case of vulnera-

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[139] See *supra*, Sect. 2.1.

[140] Jonas (1979, p. 36); translated with DeepL. This book is also quoted in EGE opinion No 25, p. 16.

[141] EGE opinion No 27, p. 49.

[142] See Footnote 141.

[143] EGE opinion No 27, p. 50.

[144] EGE opinion No 25, p. 39; emphasis added.

[145] Cheshire (2002, p. 10); emphases added.

[146] EGE opinion No 25, p. 39.

ble human beings,[147] referring to an idea addressed by Beyleveld & Brownsword in their seminal work 'Human Dignity in Bioethics and Biolaw'. Based on "the notion of dignity as a virtue", the idea of responsible behaviour, according to them, should be taken seriously; in that regard, the responsibility that underlies the notion of dignity, is a "responsibility that goes to questions of character as much as to the appearance".[148] Then they continue with the part that was (partially) quoted by the EGE[149]: "Specifically, it is the idea of dignity as a particular practical attitude to be cultivated in the face of human finitude and vulnerability (and, concomitantly, the natural and social adversity that characterizes the human condition)".[150] Hence, for the EGE, dignity "is the *basis* for more specific principles, *rights and obligations*, and is closely connected to the principle of *justice* and *solidarity*".[151] This corresponds to human dignity enshrined in Art 1 CFR and Art 2 TEU (EU's common values), as well as the above-mentioned emphasis not only on rights, but also on obligations.

With regard to patentability of biotechnological inventions, the EGE addresses the danger of commercial exploitation ('commodification'), which can offend human dignity, thus proposing three types of categories of inventions. First, that "which is common to all *humankind*, and should not be patentable or directly exploited for commercial gain", second, that "which, for a variety of reasons, should be placed in the *public domain* for all to use and exploit (the 'commons')", and finally, inventions that can be protected "at the inventor's discretion".[152] In summary, it can be said that based on the EGE's emphasis on human dignity, deontology plays an important role in bioethics.[153]

Also in the field of 'security and surveillance technologies', the EGE emphasized that human dignity "is at the heart of ethics and is also of crucial importance regarding the debate" in this field.[154] Against the background of debates of increasing security by limiting freedom, the EGE makes a clear statement: "Human dignity is the *core* principle of the European moral framework, and as such it cannot be 'traded off'".[155] However, according to the EGE, "dignity is intimately associated with freedom and responsibility", and here a balance needs to be struck between those two.[156] In this context, the EGE draws on Jeremy Waldron (1953–), a New Zealand professor of law and philosophy, who uses the respect for the dignity of citizens as an argument

[147] See Footnote 146.

[148] Beyleveld and Brownsword (2001, p. 2).

[149] See Footnote 146.

[150] See Footnote 148.

[151] EGE opinion No 25, p. 39; emphases added.

[152] EGE opinion No 25, pp. 45–46; emphases added. For further details on the notion of 'common heritage' and Grotius, see Pirs (2017, pp. 57–59).

[153] Cf. also Pirs (2017, p. 56) with further details.

[154] EGE opinion No 28, p. 71.

[155] EGE opinion No 28, p. 77; emphasis added.

[156] EGE opinion No 28, p. 77.

for a moral entitlement to "transparency or the reasons why [the citizens] should apply certain laws".[157]

This relationship of citizens and the state (rulers and the ruled) is also broadly addressed in terms of 'social contract theories'.[158,159] Starting from famous philosophers such as Thomas Hobbes (1588–1679) and the like,[160] the EGE reflects on security and "the moral justification of the absolute power of the state and of the citizens' limitation of freedom",[161] based on Hobbes' 1651 book 'Leviathan'.[162] While theoretically the elected representatives are bound by the 'people's will' (and can be held accountable), "this has turned out to be a challenge under the new security policies".[163] Pirs argues that in this field of security and surveillance technologies, the EGE applies "a more subtle approach towards a deontological understanding of human dignity", where rights are balanced based on the principles of proportionality and effectiveness.[164]

According to the above-mentioned qualitative content analysis, there were clearly fewer references in EGE opinions to consequentialism (see Table 4.3).[165]

This normative theory plays a role when assessing the consequences that arise from developments in the field of science and new technologies, i.e. the EGE's turf. In the context of risk assessment, these consequences relate to possible benefits versus possible risks. Anthropocentric approaches, placing humans in the centre of the universe, focus "on *consequential* considerations and issues related to potential consequences from the use of *synthetic biology* for human beings (risk assessment and management and hazard considerations […])".[166] The analysis of risk comprises the three elements of risk assessment, risk management and risk communication, where the already mentioned precautionary principle[167] is particularly relevant for risk management.[168] Such risk assessment is emphasized by the EGE "in order to protect

[157]EGE opinion No 28, p. 78.

[158]The EGE provides the following definition: "social (or political) contract arguments classically posit that individuals have consented, either explicitly or tacitly, to surrender some of their freedoms and submit to the authority of the sovereign (or to the decision of a majority) in exchange for protection of their remaining rights". These theories can be distinguished between some that are concerned with the origin of the state, while others focus on "the contract—the modus vivendi—between the ruler(s) and the ruled"; EGE opinion No 28, p. 62.

[159]EGE opinion No 28, pp. 61–68.

[160]John Locke (1632–1704), mentioned twice, and Jean-Jacques Rousseau (1712–1778) mentioned once (in EGE opinion No 28, pp. 61, 64).

[161]EGE opinion No 28, p. 61.

[162]Cf. Hobbes (2008).

[163]EGE opinion No 28, p. 66.

[164]Pirs (2017, p. 60).

[165]The author would like to thank Göran Hermerén for addressing the fact that, where a consequentialist approach was (also) called for, the EGE often discussed proportionality; on the latter, see Hermerén (2012).

[166]EGE opinion No 25, p. 42; emphases added.

[167]See *supra* at note 141.

[168]EC 'On the precautionary principle', COM(2000) 1 final 2.2.2000, p. 2.

human dignity and the autonomy of persons", in a similar way as the importance of the precautionary principle.[169] Hence, linking this consequentialist approach to human dignity, as mentioned above in the context of deontology.

Moreover, a consequentialist approach is applied by the EGE in the context of 'animal cloning for food supply'. Here, the EGE takes a more bio-centric attitude,[170] comprising ethical concerns for the cloned animals, for humans, for the environment, as well as for society.[171] Jeremy Bentham (1748–1832) is considered as the founder of modern utilitarianism, the most prominent form of consequentialism. As already mentioned, utilitarianism is egalitarian (as the well-being of each person is of equal value), and even the feelings of animals can be taken into account.[172] That is why Bentham is often regarded as one of the earliest proponents of animal rights. The EGE refers to Bentham, John Stuart Mill (1806–1876) and Peter Singer (1946–), etc., in order to argue 'the moral status of animals', as "actions causing *pain* in *sentient* animals are morally unacceptable, since animals are considered *moral subjects*".[173] At the same time, the EGE also refers to a deontological line of argumentation, based on the 'intrinsic value argument', referring especially to literature focusing on animals' intrinsic value[174] and integrity.[175] In summary, the EGE concludes that it "has doubts as to whether cloning for food is justified", and "does not see convincing arguments to justify the production of food from clones and their offspring".[176]

Accounting for slightly more hints than consequentialism (i.e. 10), the research of Pirs identified 12 references in EGE opinions to [3.] virtue ethics (see Table 4.3), which has been defined as "[a]n approach to both understanding and living the *good life* that is *based on virtue*".[177] What does this concept of 'human flourishing' imply for today's potential dangers arising from the corroding of privacy due to the introduction of new ICT tools? This 'good life' is addressed in the opinion on ethics of ICT in the sense that "giving up privacy would determine the flourishing of a personal and social virtue […] based on people's freedom to introduce and share whatever data on their own lives they desire".[178] In the end, the EGE calls for building "a stronger and more coherent data protection framework".[179] In this context, the EGE also refers to Hannah Arendt (1906–1975), one of the most important philosophers

[169] EGE opinion No 25, p. 42.

[170] It is worth mentioning that from the perspective of Art 37 CFR ('environmental protection'), we shall apply a broad understanding, as according to Rudolf (2014, 558–559, 562), the notion of 'environment' comprises air, soil, water, flora and fauna, humans and the environment created and shaped by humans and animals (but no pets).

[171] EGE opinion No 23, p. 32.

[172] *Supra* Sect. 2.2.

[173] EGE opinion No 23, p. 33; emphases added.

[174] Dol et al. (1999).

[175] Dol et al. (1997).

[176] EGE opinion No 23, p. 45.

[177] Chara (2002, p. 915); emphases added.

[178] EGE opinion No 26, p. 45; similar in EGE opinion No 28, p. 73.

[179] Ibid. This opinion was delivered four years before the adoption of Regulation GDP.

of the 20th century, as "one of the first scholars to observe the political importance of privacy". The EGE states that "Arendt's defence of the importance of the private sphere warns about dangers arising from the erosion of the private, a situation which some consider as deriving from the use of ICT as communication tools".[180] Also in the context of new health technologies and citizen participation, the EGE refers to Arendt[181] when addressing the danger of "downgrading of individual rights in pursuit of the collective good".[182]

A famous representative of virtue ethics, Aristotle (384–322 B.C.), is mentioned in the context of ethics in ICT, where the EGE reflects on his "friendship as mutual care between equals" against the background of the "ethically important change" in the way in which social networks shape the concept of friendship and community.[183] Hence, we can see various examples of old concepts being applied to current as well as future challenges. However, despite these examples, it is important to emphasize that the EGE "does not clearly stipulate any normative ethical guidance on the basis of virtue ethics in this regar[d]".[184] One exception can be found in 'security and surveillance technologies'. There, the EGE refers to 'virtuous behaviour' in the context of the tension between privacy and new technologies, which has been addressed with regard to four instruments: technology, education, self-regulation and the law; in terms of the third one, according to the EGE, "[s]elf-regulatory governance works to promote (virtuous) behaviour by involving stakeholders and establishing bottom-up soft regulations".[185]

As mentioned above, based on the first formal mandate (in 2005), since 2008 (i.e. Opinion No 23) the EGE has started to refer to normative theories, especially via their proponents. In this regard, it is fascinating to see a similar development in the legal sphere. As of Opinion No 16 (patenting of human stem cells inventions, May 2002), which falls in the 2nd mandate,[186] the EGE has also increasingly (9 hits) started to refer to EU and international documents, mainly in the field of human rights (see Fig. 4.1).

The number became double-digit (14 hits) with Opinion No 17 (clinical research in developing countries, February 2003), 54 hits in Opinion No 25 (synthetic biology, November 2009), with a maximum of 80 hits in Opinion No 28 (security and surveillance technologies, May 2014). From these documents, the CFR ranks first with 142 hits, followed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) with 79 hits, the Oviedo convention (61

[180] The EGE refers to the first edition in 1958; see nowadays: Arendt et al. (2018).

[181] Arendt (1951).

[182] EGE opinion No 29, p. 41. In this context, the EGE also refers to Michel Foucault (1926–1984); p. 40.

[183] EGE opinion No 26, p. 42; Aristotle was also mentioned in EGE opinion No 25, p. 11, and EGE opinion No 28, p. 64.

[184] Pirs (2017, p. 63).

[185] EGE opinion No 28, p. 59.

[186] 2000–2005; here, the EGE became part of BEPA.

International Ethical Framework - main references												
	Charter of Fundamental Rights (CFR)	European Convention on Human Rights (ECHR)	Convention on Human Rights and Biomedicine (Oviedo)	Universal Declaration on the Human Genome and Human Rights	International Covenant on Economic, Social and Cultural Rights (ICESC)	WMA Declaration of Helsinki	Universal Declaration on Bioethics and Human Rights	Convention for the Protection of Automatic Processing	Universal Declaration of Human Rights 1948	International Declaration on Human Genetic Data	International Covenant on Civil and Political Rights (ICCPR)	SUM
ss	0	0	0	0	0	0	0	0	0	0	0	**0**
Opinion no. 02 human blood or human plasma products	0	0	0	0	0	0	0	0	0	0	0	**0**
Opinion no. 03 biotechnology directive	0	1	0	0	0	0	0	0	0	0	0	**1**
Opinion no. 04 gene therapy	0	0	0	0	0	0	0	0	0	0	0	**0**
Opinion no. 05 food labelling modern biotechnology	0	0	0	0	0	0	0	0	0	0	0	**0**
Opinion no. 06 prenatal diagnosis	0	0	0	0	0	0	0	0	0	0	0	**0**
Opinion no. 07 genetic modification of animals	0	0	0	0	0	0	0	0	0	0	0	**0**
Opinion no. 08 patenting human origin inventions	0	0	0	0	0	0	0	0	0	0	0	**0**
Opinion no. 09 cloning techniques	0	0	0	1	0	0	0	0	0	0	0	**1**
Opinion no. 10 5th research framework programme	0	0	1	1	0	1	0	0	0	0	0	**3**
Opinion no. 11 human tissue banking	0	0	1	1	0	0	0	0	0	0	0	**2**
Opinion no. 12 human embryo FP5 research	0	0	3	1	0	0	0	0	0	0	0	**4**
Opinion no. 13 healthcare in the information society	0	2	1	1	0	0	0	3	0	0	0	**7**
Opinion no. 14 doping in sport	0	0	0	1	0	0	0	0	0	0	0	**1**
Opinion no. 15 human stem cell research and use	3	0	2	1	0	0	0	0	0	0	0	**6**
Opinion no. 16 patenting human stem cells inventions	5	1	1	2	0	0	0	0	0	0	0	**9**
Opinion no. 17 clinical research in developing countries	2	1	2	0	0	9	0	0	0	0	0	**14**
Opinion no. 18 genetic testing in the workplace	1	0	1	0	0	0	0	0	0	0	0	**2**
Opinion no. 19 umbilical cord blood banking	1	0	3	1	0	0	0	0	0	0	0	**5**
Opinion no. 20 ICT implants in the human body	15	0	5	4	0	1	1	1	1	0	0	**28**
Opinion no. 21 nanomedicine 2007	12	3	9	8	0	2	4	1	0	1	0	**40**
Opinion no. 22 hESC FP7 research projects	2	0	13	2	0	1	2	2	0	2	0	**24**
Opinion no. 23 animal cloning for food supply	2	0	0	0	0	0	0	0	0	0	0	**2**
Opinion no. 24 modern agricultural technologies	7	0	0	0	3	0	0	0	2	0	0	**12**
Opinion no. 25 synthetic biology	16	2	11	16	0	5	3	0	0	1	0	**54**
Opinion no. 26 information and communication technologies	19	0	1	1	0	0	1	1	0	1	0	**24**
Opinion no. 27 research, production and use of energy	24	2	0	0	6	0	0	0	0	0	0	**32**
Opinion no. 28 security and surveillance technologies	28	44	1	0	2	0	0	0	3	0	2	**80**
Opinion no. 29 NHT and citizen participation	5	23	6	0	17	2	1	0	1	0	1	**56**
SUM	***142***	***79***	***61***	***41***	***28***	***21***	***12***	***8***	***7***	***5***	***3***	**407**

Fig. 4.1 EGE references to key documents. *Source* Pirs (2017, A37); N.B: this overview of Pirs continues with seven other documents on page A38; for opinion No 30, see Pirs and Frischhut (2019, forthcoming)

hits), the Universal Declaration on the Human Genome and Human Rights[187] with 41 hits, the International Covenant on Economic Social and Cultural Rights (ICESC) with 28 hits, and the Helsinki declaration with 21 hits.[188] This tendency goes hand in hand with the increase in number of pages, around 20 pages until Opinion No 19 (March 2004), to around 100 starting with Opinion No 21 (January 2007).[189]

Overall, we can observe an extension not only in pages, in references to normative theories as well as to these EU and international documents, but also in scope, as the group has moved from purely bioethics also to broader principles of human rights, as well as an increase in group members. There has also been an increase of the duration of the mandates, except for the last one.[190] As we know from the job of the president of the European Council, newly created by the Lisbon Treaty,[191] an appointment for two times 2.5 years allows for more control, compared to an appointment for five years. Apart from the normative theories covered in this chapter and based on the terminological delimitation,[192] the EGE has referred to values (human dignity, justice, freedom, solidarity, etc.), to human rights, as well as to principles (privacy, informed consent, non-discrimination, equity, precaution, sustainability, etc.).

4.3 Conclusion

It is evident, that both in EU legal documents (Sect. 4.1) as well as in case of the EGE (Sect. 4.2), ethics enters the scene in sensitive areas. This was the case with CETA (investment protection and the fear that big companies can 'buy justice'), as well as the Korea agreement (inappropriate influence of the pharma industry). In addition we can name the saving of Islandic banks in the context of EFTA (taxpayers' money and moral hazard), scepticism with regard to (regulation of) the financial world in general (cf. ethics committees in the field of ECB and EIB), and lobbying (the fear that big companies can 'buy law'), to name but a few. In case of the EGE, one reason for its establishment was also to address public concern on the new challenges raised by new (bio-)technologies.[193]

In the following, the questions mentioned at the beginning[194] will be answered in more detail, as the results of Sect. 4.2 on the EGE will supplement those of Sect. 4.1.

With regard to the possible identification of normative theories (i.e. question No 1), we have seen implicit references in EU legal documents, implicit as well as explicit ones in EGE opinions. The latter have mainly referred to several proponents of

[187] Dating from 11.11.1997.

[188] Source: Pirs (2017, A37); mentioning twelve other documents in descending order.

[189] Pirs (2017, A7).

[190] See *supra* Table 4.2.

[191] Art 15(5) TEU.

[192] See *supra* Sect. 1.5.

[193] Cf. Plomer (2008, p. 840).

[194] See *supra* Sect. 1.2 (objectives).

these normative theories, but have also explicitly addressed these normative theories. Implicit references in EGE opinions especially addressed deontological ideas via the EU value of human dignity.

Question No 2 can clearly be answered in terms of addressing several normative theories, although these three theories are not equally represented. In EGE opinions, deontology clearly prevails, and we find less examples of virtue ethics.[195] However, it is important to emphasize that often the EGE refers to one normative theory, by emphasizing the consequences if the decision-makers opt for this theory, besides pointing to another normative theory, also emphasizing the consequences for this other theory. Hence, while there are most references to deontology, this disclaimer has to be kept in mind.

It was also remarkable to see justice as the "institutional dimension of ethics".[196] Justice occurred both in terms of distributive justice (Rawls), as well as with regard to future generations (Jonas). Human dignity, in Waldron's interpretation, also has an institutional component, in terms of citizens' entitlement to transparency in the decision-making process.

In both EU legal documents, as well as in EGE opinions, human dignity plays a paramount role. It was addressed to be at the 'core' of synthetic biology, at the 'heart' of ethics in the field of security and surveillance technologies, and was even addressed as the "core principle of the European moral framework".[197] This EU value clearly has a deontological connotation, when referring to the *intrinsic* value of humans, with similar ideas expressed with regard to animals. Throughout EU law, human dignity has been an argument against 'commodification' of the human body, based on the Kantian idea of not treating humans as mere objects. For the same reason, it has been emphasized that there can be no trade-offs.[198] Human dignity has been emphasized especially in case of vulnerable groups, which also links it to solidarity. This 'core principle', in more correct terms one would have to speak of 'core value', is the basis for further rights, principles and obligations, as we can also observe it in the CFR.[199]

Consequentialism has been addressed by the EGE in the context of risk assessment. Apart from ethics, in EU law in general we have seen that impact assessment plays an important role in EU decision-making, as well as the '*effet utile*' principle in CJEU case-law, both of which also have a consequentialist connotation. Utilitarian philosophers have been addressed when taking a more bio-centric approach, in particular with regard to animals. It is worth mentioning that the EGE both in case of risk assessment and with regard to animals has also taken a deontological approach,

[195]Given the information available, it remains unfortunately a challenge to address the question "why and when" a certain approach has been applied.

[196]EGE opinion No 24, p. 48.

[197]EGE opinion No 28, p. 77.

[198]However, this was possible in case of freedom and responsibility.

[199]The 'Explanations relating to the Charter of Fundamental Rights', OJ 2007 C 303/17, state as follows: "The dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights.".

as it has emphasized the importance to protect human dignity and the autonomy of persons (in case of risk assessment), and has also referred to the intrinsic value of animals, as mentioned above.

Social contract theories have been addressed in terms of security and surveillance technologies. Although drafted during the age of enlightenment to legitimate the authority of the state, this concept is still of relevance and was applied to these new challenges.

Both for EU legal documents, as well as for the EGE opinions, all the examples we have seen cannot be understood as unconditional references to one or more normative theory(ies), but only as pointing towards them (question No 3). The EGE often refers to several views, for instance to deontology and to consequentialism,[200] without explicitly favouring the one, or rejecting the other view. In other words, in case of explicit references to normative theories, the EGE contrasts different philosophical views; hence, it is not possible to assign the EGE exclusively to one of these three normative theories.

Another question was, whether we can identify a certain common horizontal (or rather a specific) pattern, when referring to these terms of ethics and morality in EU legal documents (Sect. 4.1), respectively when addressing these normative theories (Sect. 4.2). As we have seen above with regard to EU legal documents, there is clearly no horizontal, but a specific approach in addressing different normative theories in different fields. Deontology plays a role in order to refer to general principles of morality, consequentialism to address effects of the ethical challenge at hand, and virtue ethics is addressed in the context of 'pursuing a good life'.[201] Against the background of the diverse topics of the 30 opinions so far, the EU's values with their corner stone of human dignity, a deontological concept, can be seen as the most horizontal approach in this regard.

Having now analysed the different 'layers' (in the sense of the hierarchy) and the different 'areas' (in the sense of the 'separation of powers') of EU law, the final question (i.e. objective 4), as to whether we can identify an ethical spirit of EU law, can be answered as follows. As stated above, in this book, the notion of spirit is understood as "the intention of the authors of a legal system, which is reflected in a lattice of various different provisions". In Sect. 4.1 with regard to EU legal documents, we have already identified both an ethical spirit, as well as a gap that still needs to be filled. The findings of Sect. 4.2 point in a similar direction, further emphasizing the predominant role of the EU's common values and the corner stone of human dignity. Apart from explicitly referring to these concepts from a legal angle as the values enshrined in Art 2 TEU, the deontological normative arguments addressed in the EGE's opinions also point in the same direction, hence further closing the gap addressed earlier. Having identified this 'lattice' of ethics in the different layers and areas, both binding legal provisions and soft-law, including the EGE's opinion, this does not mean that we have reached a final position. This analysis is valid as of 2018, might however be different in the future, and was clearly less elaborated in the past.

[200] EGE opinion No 12, p. 8.

[201] Lucivero (2016, p. 15).

One example in this regard is Opinion No 12, on ethical aspects of research involving the use of human embryo in the context of the fifth framework programme, from November 1998. The EGE appropriately states that the EU has no proper competence in medicine, hence such protection falls within national competence. Nonetheless (i.e. first limitation), EU authorities "should be concerned with ethical questions resulting from medical practice or research dealing with early human development".[202] However, (limitation to the first limitation), in doing so, EU authorities have to take into account "the *moral and philosophical* differences, reflected by the extreme *diversity* of legal rules applicable to human embryo research", as "because of lack of consensus, it would be inappropriate to impose one exclusive *moral* code".[203] The question remains, if this diversity stipulated in 1998 with regard to embryo-related questions is still valid today, having in mind the growing importance of EU values, especially since 2009. To sum up, this ethical spirit is *in statu nascendi*, as we can also see from the 'united in diversity' approach we have seen in case of EU primary law.

Addressing these elements of constant development on a time line, it is worth mentioning that also the status quo, as viewed from today, has addressed retrospective elements (the historical responsibility for climate change and the moral obligation to assist ACP countries),[204] as well as the obligations with regard to future generations (nanosciences, Hans Jonas, etc.).

The ethical spirit of EU law identified in this book is subject to the following limitation. It only applies to EU law. Hence, this does not cover all the examples where reference is made to the national or local level (e.g. "compliance with local codes of ethics"[205]). In those situations, the ethical spirit of EU law can only have an indirect influence, especially via the EU's common values. This is similar to 'morality' being determined by the different MS, but constrained by the EU's proportionality principle (especially the requirement of 'coherence'), as well as the prohibition of double morality, etc., as stated in the CJEU's case-law.

One final word about the just addressed difference in terminology, i.e. ethics versus morality. The reason why this book has not coined the term of the 'moral spirit of EU law' is primarily due to the reason that the notion of 'public morality' has essentially been used as a protection shield, in EU primary law (called 'reason of justification'), in international agreements (called 'exception clause'), as well as in EU secondary law.[206] Besides this, 'public morality' is a legal term while ethics is a term of practical philosophy. In terms of morality, 'public morality' is a collective term, while we have also seen a lot of variations of morality: 'moral

[202] EGE opinion No 12, p. 10.

[203] Ibid.; emphases added.

[204] *Supra* Sect. 3.2.1 (at note 74).

[205] *Supra* Sect. 3.2.1 (at note 56).

[206] One exception to this statement is the "competence of Member States as regards ethical issues", we have seen in the context of GMOs; *supra* Sect. 3.3.3.3.

support',[207] 'moral condemnation',[208] 'moral development',[209] a 'high moral standing',[210] 'moral safety',[211] 'moral responsibility',[212] as well as the economic term of 'moral hazard'.[213] The notion of 'ethics',[214] on the other hand, has not been used in such a collective way.[215] It has the advantages of not being a legal term (although used in legal texts) and it has not been used as a 'protection shield'.[216] Now that we have examined the 'ethical spirit of EU law' from a philosophical point of view, we turn to the legal perspective.

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[207] *Supra* Sect. 3.2.1, at note 78 (to the Burundian people), and at note 93 (EFTA States' obligation to provide moral support in the context of EU enlargement).

[208] *Supra* Sect. 3.2.1, at note 79.

[209] *Supra* Sect. 3.2.1, at note 80.

[210] *Supra* Sect. 3.2.1, at note 81.

[211] *Supra* Sect. 3.2.1, at note 82.

[212] *Supra* Sect. 3.3.3.3, at note 264.

[213] *Supra* Sect. 3.2.1, at note 89.

[214] As mentioned above, ethics has not been mentioned in EU primary law. Apart from this, ethics also remains untouched by the CJEU (judicial self-restraint).

[215] On communitarianism, see *infra* Chap. 6.

[216] Apart from the Polish GMO case, where, by the way, the Polish line of argumentation was not successful.

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