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Articles

Future-proof Regulation and Enforcement for the Digitalised Age

edited by Gavin Robinson, Sybe de Vries *and* Bram Duivenvoorde

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THE EXTERNALISATION OF EU MIGRATION POLICIES IN LIGHT OF EU CONSTITUTIONAL PRINCIPLES AND VALUES

edited by Juan Santos Vara, Paula García Andrade *and* Tamás Molnár

EUROPEAN FORUM

ARTICLES

The Value of Democracy in EU Law and Its Enforcement: A Legal Analysis

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ABSTRACT: This *Article* analyses several ways in which democracy as a core value of the European Union can be enforced against member States violating democratic principles. Following the crisis of democratic backsliding in several Member States, no legal action has been taken on the basis of a breach of democracy or democratic principles. A possible explanation is that violations of art. 2 TEU are subject to a specific enforcement procedure (laid down in art. 7 TEU), which is notoriously hard to trigger. Furthermore, since art. 2 TEU refers to abstract values, it is frequently asserted that values such as "democracy" cannot be legally enforced. This *Article*, however, claims that the value of democracy has a sufficiently clear core legal meaning in EU law to be legally enforceable. Secondly, this *Article* claims that EU law includes numerous other centralized (at EU level) and decentralized (at Member State level) enforcement mechanisms beyond art. 7 TEU that can be used to enforce democratic principles. The current absence of enforcement action against such Member States, therefore, is largely a political choice instead of a legal requirement.

KEYWORDS: EU law – democracy – enforcement – judicial protection – fundamental rights – art. 2 TEU.

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I. Introduction

The EU is founded on the values enshrined in art. 2 TEU. These values include respect for human dignity, freedom, democracy, equality, as well as respect for human rights, including those of persons belonging to minorities. Both Hungary and Poland stand accused of breaching such rights, with Hungary increasingly restricting free media,[1] violating the freedom of academic institutions[2] and public education,[3] harassing and criminalising the homeless[4] and using the Covid-19 pandemic as an excuse to pass a law that makes it impossible for transgender persons to change their sex legally.[5] Poland stands accused of restricting the freedom of expression, media freedom, academic freedom and threatening women's rights by attempting (but failing) to criminalise abortion and restricting access to emergency contraceptive pills,[6] as well as compromising judicial independence.[7] As a result, both Member States have found themselves at the very centre of a conflict with the European Union spanning several years. This conflict has culminated in Poland and Hungary blocking and, according to some, holding hostage the EUR 1.8 trillion budget and Covid-19 recovery fund that included a clause aimed at the protection of the rule of law, leading to the new rule of law conditionality regulation.[8] The Court of Justice of the European Union (CJEU) has since dismissed the subsequent legal actions brought forward by Poland and Hungary against the conditionality mechanism.[9]

Enshrined in art. 2 TEU, and at least as important as the rule of law, is the value of democracy. Several legal reforms in Poland and Hungary have been criticised for violating this value.[10] No legal action has been taken against Poland and Hungary, however, on the basis of a breach of democracy. Furthermore, although much has been written about a potential

[1] European Parliament, 'Briefing: Media Freedom Under Attack in Poland, Hungary and Slovenia' (2021) 2021/2560(RSP).

[2] *Ibid*.

[3] *Ibid*.

[4] *Ibid*.

[5] S Walker, 'Hungary Seeks to End Legal Recognition of Trans People Amid Covid-10 Crisis' (2 April 2020) The Guardian www.theguardian.com.

[6] *Ibid*.

[7] See for example in joined cases C-748/19 to C-754/19 *Prokuratura Rejonowa w Mińsku Mazowieckim v WB and Others* ECLI:EU:C:2021:403, opinion of AG Bobek.

[8] H von der Burchard, 'Hungary and Poland Escalate Budget Fight Over Rule of Law' (26 November 2020) Politico www.politico.eu; Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

[9] Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97 and case C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98.

[10] See *e.g.* A Holesch and A Kyriazi, 'Democratic Backsliding in the European Union: The Role of the Hungarian-Polish Coalition' (2022) Eastern European Politics 1.

democratic deficit within the Union,[11] not much has been said about what democracy means substantively within the framework of European Union law, nor about whether and how it could be enforced against Member States as binding EU law. In this context, this *Article* analyses the substantive content of the value of democracy in EU law and the ways in which this content can be enforced. The rule of law as such remains outside of the scope of this *Article*.

While the rule of law is important, it is in my opinion imperative for the value of democracy to be analysed separately. Although the values of democracy and the rule of law are interlinked, the former does have a separate content and should be analysed as an independent value in art. 2 TEU. Armin von Bogdandy and Michael Ioannidis point out that – even though there is a widespread debate about different understandings of the rule of law,[12] "[i]n any event, under all understandings, the rule of law requires as a minimum that the law actually *rules*".[13] According to most scholars, however, the requirements of the rule of law go beyond a mere obligation that the law is enforced.[14] While this substantive or "thick" understanding of the rule of law comes in many variations, most scholars agree that it would include at least respect for the fundamental values and principles upon which the law is based including, especially, democracy.[15] It could therefore be argued that the value of the rule of law essentially assumes that and depends on respect for all of the other values enshrined in art. 2 TEU, which includes the value of

[11] See *e.g.* J-P Bonde, 'The European Union's Democratic Deficit: How to Fix It' (2011) The Brown Journal of World Affairs 147; P Kratochvíl, 'The End of Democracy in the EU? The Eurozone Crisis and the EU's Democratic Deficit' (2018) Journal of European Integration 169; R Bellamy, 'The Inevitability of a Democratic Deficit' in H Zimmermann and A Dür (eds), *Key Controversies in European Integration* (Palgrave Macmillan 2012).

[12] Various understandings of the Rule of Law are outlined in *e.g.* A Magen, 'Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU' (2016) JComMarSt 1050; L Pech, 'The Rule of Law as a Constitutional Principle of the European Union' (Jean Monnet Working Paper 04/09 2009); P Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) PublL 467.

[13] A von Bogdandy and M Ioannidis, 'Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done' (2014) CMLRev 59.

[14] *E.g. Ibid.*; D Kochenov, 'EU Law Without the Rule of Law: Is the Veneration of Autonomy Worth It?' (2015) Yearbook of European Law 74; C Grewe and H Ruiz-Fabri, *Droits constitutionnels européens* (PUF 1995); R Fallon, 'The "Rule of Law" as a Concept in Constitutional Discourse' (1997) ColumLRev 1. Cf. J Raz, 'The Rule of Law and its Virtue' in J Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979), who argues against a conflation of the rule of law and the substantive content of the law.

[15] *E.g.* Magen, 'Cracks in the Foundations' cit. Magen also refers to the European Commission, which asserts that the Rule of Law "is intrinsically linked to respect for democracy and for fundamental rights" in Communication COM(2014) 158 final from the Commission to the European Parliament and the Council of 11 March 2014, 'A new EU Framework to strengthen the Rule of Law', 4. See also Venice Commission, *Rule of Law Checklist* (Council of Europe 2016) www.venice.coe.int 16. For an overview of different understandings of a "thick" rule of law, see B Tamanaha, 'A Concise Guide to the Rule of Law' in G Palombella and N Walker (eds), *Relocating the Rule of Law* (Hart Publishing 2008); and P Rijpkema, 'The Rule of Law Beyond Thick and Thin' (2013) Law and Philosophy 793.

democracy.[16] Consequently, a "thick" understanding of the rule of law, which includes the supremacy of all law including the other values in art. 2 TEU,[17] at least partly explains why EU value enforcement has been so focused on the rule of law.[18] Nevertheless, the excessive focus on rule of law backsliding in art. 7 procedures may make for rather unfocused and more complex enforcement procedures.

Therefore, the objective of this *Article* is to provide a comprehensive legal analysis of the substantive content of democracy as a of EU law, based on applicable binding law and case law, as well as the objective enforcement actions which may be used to enforce this value. Accordingly, this *Article* does not aim to contribute to the discussion about the political or moral merits of democracy or other values of EU law, nor does it aim to scrutinise whether Member States such as Poland and Hungary have violated the value of democracy. Instead, this *Article* takes the claim that the value of democracy is being breached by certain Member States as a starting point, in order to provide an in-depth analysis of how the value of democracy takes shape in EU law and, if this value is being breached, what enforcement options are available.

Accordingly, section II of this *Article* explores democracy as a value enshrined in art. 2 TEU, uncovering its substantive meaning in the Treaties and the European Charter of Fundamental Rights (the Charter). To this end, section II first analyses the meaning of the value of democracy as such in EU law on the basis of its origin, the current text of art. 2 and the Copenhagen criteria (sub-sections II.1. and II.2.). Section III observes the value of democracy in EU law, but outside of art. 2 TEU. Section IV analyses the possibility of enforcing (aspects of) the value of democracy through different enforcement mechanisms. As such, section IV starts by recapping the problems surrounding the effectiveness of art. 7 TEU (section IV.1.). Subsequently, section IV distinguishes between centralised enforcement directly before the CJEU, using the procedures laid down in arts 258–260 and 263 TFEU (section IV.2.), and decentralised enforcement at Member States level based on the doctrines of direct and indirect effect and the preliminary reference procedure (section IV.3.). Section V concludes.

[16] According to the Venice Commission, the rule of law refers, among others, to the supremacy of the law in general. See Venice Commission, *Rule of Law Checklist* cit. 16. The rule of law furthermore includes, according to the Venice Commission, institutional balance, judicial review, fundamental rights protection and the principles of equality and proportionality (*ibid*.).

[17] *Ibid*. 16; KL Scheppele, D Kochenov and B Grabowska-Moroz, 'EU Values Are Law, after All: Enforcing EU Values Through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2020) Yearbook of European Law 3.

[18] See *e.g*. L Pech and KL Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) CYELS 3; K Lenaerts, 'New Horizons for the Rule of Law within the EU' (2020) German Law Journal 29; D Kochenov and L Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) European Constitutional Law Review 512. Some scholars have written about the enforcement of democracy within the EU, but often in conjunction with the rule of law, see *e.g*. B Bugarič, 'Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge' (2014) LSE 'Europe in Question' Discussion Paper Series 2014.

II. Democracy as a value of EU law

"There can be no democracy where the people of a State, even by a majority decision, waive their legislative and judicial powers in favour of an entity which is not responsible to the people it governs, whether it is secular or religious".[19]

There has been little attention to the enforcement of the value of democracy in EU law. As noted in the introduction of this *Article*, most discussion regarding democracy centres on the democratic credentials of the EU itself, and the tension between the desire to guarantee the full effect of EU law and the fact that this may entail the disapplication of democratically legitimate national laws.[20] While national laws may infringe on substantive EU law, one could be of the opinion that insofar as they are democratically enacted on the basis of national constitutional law, there cannot be a breach of the value of democracy. As a result, laws enacted at Member State level through majority voting are democratic, even if these measures have anti-liberal consequences.

That conclusion, however, would be too simple. Decisions made through majority voting, but in a State that limits democratic debate may not be so democratic after all. And even when a decision was made through majority voting without any limitation of democratic debate, it may still be an undemocratic decision if this decision destroys democracy as such,[21] or violates core aspects of a well-functioning democracy such as a free press. For example, in its 2020 report, the Commission noted "major problems" in some Member States, "when judicial independence is under pressure, when systems have not proven sufficiently resilient to corruption, when threats to media freedom and pluralism endanger democratic accountability, or when there have been challenges to the checks and balances essential to an effective system".[22]

Accordingly, a more substantive understanding of the value of democracy would not only refer to majority voting, but would also include the necessary pre-conditions for a well-functioning democracy. This section will first discuss the development of democracy as a value of EU law, before turning to art. 2 TEU and the substantive content of this provision drawing from the Commission's applications of the Copenhagen Criteria.

[19] ECtHR *Refah Partisi (the Welfare Party) and Others v Turkey* App n. 41340/98, 41342/98, 41343/98 and 41344/98 [13 February 2003] para. 43.

[20] On the tension between the effectiveness of EU internal market law and the democratically legitimate value choices of Member States, see *e.g.* G Davies, 'Internal Market Adjudication and the Quality of Life in Europe' (2015) Columbia Journal of European Law 289.

[21] J Linz and A Stepan (eds), *The Breakdown of Democratic Regimes: Crisis, Breakdown and Reequilibration. An Introduction* (Johns Hopkins University Press 1978); S Issacharoff, 'Fragile Democracies' (2007) HarvLRev 1405; S Choudhry, 'Resisting Democratic Backsliding: An Essay on Weimar, Self-enforcing Constitutions, and the Frankfurt School' (2018) Global Constitutionalism 54.

[22] Communication COM(2020) 580 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 30 September 2020, 'Rule of Law Report the Rule of Law situation in the European Union'.

II.1. The development of the value of democracy in the European Union

The EU (then European Economic Community)[23] was not originally established with the intention of forging a European democracy watchdog. At the time of founding, EU goals were more economic than political.[24] However, the Union's aim to ensure and maintain peace on the European continent may have been an early sign of the possible existence of a democratic requirement for EU membership.[25]

Even still, the earliest two enlargements of the EU did not know any democratic conditionality.[26] There were simply no economic, nor legal and political criteria to join the Union at that time.[27] During the first enlargement, which included Denmark, Ireland and the United Kingdom, such criteria were not considered necessary, because the political regimes of these then-newfound Member States – especially with regards to democracy – were similar in nature to those of the founding states.[28]

The ensuing southern enlargement process offered the EU a greater opportunity to prove its prioritisation of democratisation.[29] This enlargement, which included Greece, Spain and Portugal, made for some new developments in the relationship between the principle of democracy and the Union. The case of the Spanish accession, for example, shows the EU's first explicit affirmation of its attachment to democracy.[30] The Greek case showcases a symbolic association between the Union and the principle of democracy.[31] It was in this case that Greek Prime Minister Karamanlis announced his belief that full EU membership would protect the longevity of his country's democratic institutions.[32]

[23] In favour of simplicity, this *Article* refers throughout to "the EU" also in respect of the European Economic Community (EEC) and the European Communities (EC) Treaties.

[24] Democratic Progress Institute, *The Role of European Union Accession in Democratisation Processes* (Democratic Progress Institute 2016) 9.

[25] *Ibid*.

[26] With regard to the accession of new countries, the Rome Treaties merely stated that accession terms were to be negotiated between the Member States and applicant countries, see *e.g*. art. 237 EEC. See also Democratic Progress Institute, *The Role of European Union Accession in Democratisation Processes* cit. 11; European Parliamentary Research Service, 'The European Parliament and Greece's Accession to the European Community' (2021) www.europarl.europa.eu 2.

[27] Democratic Progress Institute, *The Role of European Union Accession in Democratisation Processes* cit. 12.

[28] *Ibid*.

[29] See *e.g*. European Parliamentary Research Service, 'The European Parliament and Greece's Accession to the European Community' cit. 5.

[30] D Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer Law International 2008).

[31] European Parliamentary Research Service, 'The European Parliament and Greece's Accession to the European Community' cit. 2.

[32] E Karamouzi, 'The Greek Paradox' in L Brunet (ed.), *The Crisis of EU Enlargement* (LSE Ideas 2013). It is interesting to note that Walter Hallstein, the first President of the Commission was over the moon with the Greeks joining the Union. He stated that "the cradle of European democracy, the Greek spirit that had made Europe great, wanted to come and be a member", see Luxembourg Centre for Contemporary and

The democratisation processes and the integration of Greece, Spain and Portugal within the EU ultimately worked out.[33] However, due to an increased amount of applications to join the Union from northern and eastern European countries, triggered by the collapse of the Soviet Union, the EU found that its attachment to the principle of democracy was to be enshrined in its constitutional fabric.[34] To that end, the EU began to incorporate the principle of democracy into the political component of the Copenhagen criteria for EU accession.[35]

The EU further established its commitment to the adherence of the principle of democracy in 1999 with the entry into force of the Treaty of Amsterdam, which affirmed the European principles upon which the EU was founded. Art. F(1) now decided that the Union was "founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles with are common to the Member States". Art. J(1) furthermore referred to the development and consolidation of democracy with regard to EU external policy.[36]

The Treaty of Amsterdam has since been replaced with the current Treaty of Lisbon, which states that "[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".[37]

At first glance, the Treaty of Lisbon seems a step up from the Treaty of Amsterdam as it seems to expand more on the common values of the EU. Interesting in this regard is that the Treaty of Amsterdam speaks of 'principles', which the Treaty of Lisbon replaces with "values". Oddly, democracy is still dubbed a "principle" in both the preamble of the Charter and in art. 21 TEU.[38] According to Laurent Pech, it is doubtful that the ones responsible for the terminological variation between "values" and "principles" intended to weave a type of theoretical distinction into the Treaties.[39] Therefore, the text of the Treaty

Digital History, 'Interview with Hans-August Lücker: The Association Agreement between Greece and the EEC' (15 May 2006) www.cvce.eu.

[33] Democratic Progress Institute, *The Role of European Union Accession in Democratisation Processes* cit. 15.

[34] *Ibid*.

[35] The Copenhagen criteria are referred to when evaluating whether a candidate State meets the criteria that must be met in order to become an EU Member State.

[36] See for more on the role of the value of democracy in EU external policy, section III.3.

[37] Art. 2 TEU.

[38] The preamble of the Charter also refers to the rule of law as a "principle". See also to this extent See also L Pech, 'The Rule of Law as a Constitutional Principle of the European Union' cit. 20.

[39] *Ibid*.

of Lisbon did not introduce any major developments regarding the meaning of democracy in the framework of EU law. Although perhaps unintended, a distinction can still be drawn between the more indeterminate "value" and the more defined "principle".[40]

It is possible that Member States did not view the change in terminology as pressing or important and accepted it without much thought. On the other hand, if Member States would consider "principle" and "values" as synonymous, the change in terminology would not have been necessary in the first place.[41] A logical explanation for the variation in terminology might be that the constitutional "principles" of the EU are not defined anywhere in the Treaties.[42] The notion of "values" as common ideals, makes sense in that regard. For the sake of clarity and consistency, this *Article* uses the terminology of "value" throughout.

The fact that the concept of democracy is not properly defined anywhere in the Treaties, makes pinpointing the value's exact substantive meaning a precarious exercise.[43] The meaning of democracy in EU law must be inferred from the Treaty text and the Charter, as well as the relevant case law. The remainder of this section will focus on art. 2 TEU and the related Copenhagen criteria.

II.2. The value of democracy in art. 2 TEU and the Copenhagen criteria

a) Art. 2 TEU: an introduction

Art. 2 TEU prescribes that it is expected and even required for all Member States to nourish and maintain a democratic constitutional system, which abides by the rule of law. Art. 2 enshrines two types of values. On the one hand, the provision seeks to protect institutional and structural values such as democracy and the rule of law. On the other hand, it attempts to safeguard fundamental rights.[44] It is easily assumed that institutional and structural values such as the protection of democracy and the rule of law *are* fundamental rights and that their meaning is therefore to be found in the Charter. This assumption is flawed. Although the Charter touches upon certain dimensions of democracy, it does

[40] See *e.g.* J Daci, 'Legal Principles, Legal Values and Legal Norms: Are They the Same or Different?' (2010) Academicus 109, 114–115. Daci considers that values are universal and that they therefore have the same value in all legal systems. It is possible that this is the reason that the Treaty changed its terminology from "principles" to "values". In my opinion, this seems somewhat at odds with the notion that the EU is an autonomous legal order. This is, however, material for a different paper.

[41] See also L Pech, 'The Rule of Law as a Constitutional Principle of the European Union' cit. 21.

[42] *Ibid*.

[43] It should be noted in this regard that Title II of the TEU discusses certain aspects of democracy, such as that the functioning of the Union is founded on representative democracy, but that the TEU does not properly explain what exactly democracy means in the context of the EU more generally, and more specifically which conditions must be met in order for a Member State to comply with the value of democracy.

[44] Note the manner in which art. 2 TEU is phrased: "democracy, [...] the rule of law *and* respect for human rights" (emphasis added). See also to this regard LD Spieker, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis' (2018) German Law Journal 1182, 1187.

not cover the value in its entirety.[45] Surely then, art. 2 TEU must have something to add – something that is not found anywhere else in EU law. Even still, while art. 2 clarifies the importance of democracy in a community such as the EU, it fails to clearly establish the substantive content of the value of democracy within the Union.

The lack of clarity in art. 2 TEU has shaped ongoing academic discourse about the meaning and nature of EU values.[46] Vague values may indeed allow for a wider margin of appreciation.[47] Some scholars furthermore allege that the values enshrined in art. 2 were never meant to impose values on Member States. These values were rather designed to show off Europe's great level of sophistication to the rest of the world.[48]

However, even if it were true that art. 2 was never intended to impose values on Member States, the logical error here is that the popular interpretation of EU principles is prone to change over time. For example, where autonomy was once introduced as a means to establish the direct effect of Treaty provisions, it now entails that the Court will not allow for any inside or outside scrutiny on matters of EU law.[49]

The EU values enshrined in art. 2 TEU have been clarified by several EU institutions over the years and are now much more than the mere "skeleton" that is found in the

[45] *Ibid*. 1188.

[46] For a comprehensive overview, see *e.g*. KL Scheppele, D Kochenov and B Grabowska-Moroz, 'EU Values Are Law, after All' cit. 18, with further references.

[47] See *e.g*. L Solum, 'Legal Theory Lexicon: Rules, Standards and Principles' (29 September 2019) Legal Theory Blog lsolum.typepad.com; F Schauer, 'The Convergence of Rules and Standards' (2003) New Zealand Law Review 303, 306. Note, however, that this may not always be the case. Although standards generally offer a wider margin of appreciation, it may be the CJEU, and therefore not the Member States enjoys this wider margin of appreciation. Furthermore, according to Frederick Schauer, due to what he calls the "convergence" of rules and standards, the choice between rules and standards and thus between specific and vague provisions may not make as much of a difference as is generally presumed.

[48] See *e.g*. D Kochenov, 'On Policing Article 2 TEU Compliance – Reverse *Solange* and Systemic Infringements Analyzed' (2014) Polish Yearbook of International Law 145, 149-150; S Lucarelli, 'Introduction: Values, Principles, Identity and European Union Foreign Policy' in S Lucarelli and I Manners (eds), *Values and Principles in European Union Foreign Policy* (Routledge 2006) 1. This argument makes sense when read in conjunction with the European external policy that relates to democracy. The EU for example publishes an annual report on Human Rights and Democracy in the World, in which the Union reports how well third countries are doing with regard to their democratic systems. See e.g. L Pech and J Grogan, 'EU External Human Rights Policy' in RA Wessel and J Larik (eds), *EU External Relations Law: Text, Cases and Materials* (Hart Publishing 2020) 351. See section III.2. of this *Article* for more on the external dimension of democracy.

[49] This follows from an analysis of CJEU case law, see case C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* ECLI:EU:C:1963:1; case C-6/64 *Flaminio Costa v ENEL* ECLI:EU:C:1964:66; case C-284/16 *Slowakische Republik v Achmea BV* ECLI:EU:C:2018:158. See furthermore Opinion 2/13 *on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* ECLI:EU:C:2014:2454. See for an in-depth analysis *e.g*. P Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?' (2015) FordhamIntLJ 955; E Spaventa, 'A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13' (2015) Maastricht Journal of European and Comparative Law 35.

Treaties.[50] In order to understand the current character and possible enforcement of the value of democracy within the EU, a review of the Treaties, the case law of the CJEU and the Opinions and Communications of other EU institutions is necessary.[51]

b) Article 2 TEU and the Copenhagen criteria

Part of the substantive meaning of democracy in the EU can be inferred from practical applications of art. 2 TEU. One of the main applications of art. 2 is found in the assessment procedure for candidate countries, the so-called Copenhagen criteria. The starting point for accession procedures is formed by art. 49 TEU, which claims that "[a]ny European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union".[52]

In its Opinions on the accession of several applicant States, the Commission indeed refers to art. 2 TEU. When contemplating whether Serbia met the preconditions to join the Union, the Commission immediately recalled said provision.[53] In the same document, however, the Commission claimed that "[t]he present assessment is based on the Copenhagen criteria relating to the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, as well as on the conditionality of the Stabilisation and Association Process". However, in the rest of its assessment, the Commission never refers to art. 2 TEU again.[54]

It is obvious that the Commission takes democracy seriously in its accession assessments, but it seems as if it is not art. 2 TEU that is generally relied upon, but rather the Copenhagen criteria. A similar structure is found in the 2016 report on Turkey's possible accession to the Union, where the Commission explicitly mentions values such as democracy and the rule of law, but does not make any mention of fundamental rights.[55]

Due to the Commission's lack of attention for some of the values enshrined in art. 2 TEU, some authors conclude that the Commission mentions the provision, but never actually applies it.[56] In a way, the Commission's mention of art. 2 appears to be almost arbitrary. It is my opinion, however, that the Commission's approach to democracy in its

[50] See further section III of this *Article*.

[51] J Wouters, 'Revisiting Art. 2 TEU: A True Union of Values?' (2020) European Papers www.europeanpapers.eu 255, 262.

[52] Art. 49 TEU.

[53] Communication COM(2011) 668 final from the Commission to the European Parliament and the Council of 12 October 2011, 'Commission Opinion on Serbia's application for membership of the European Union', 2.

[54] *Ibid*. 5.

[55] Communication COM(2016) 715 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 9 November 2016, '2016 Communication on EU Enlargement Policy', 17. Commission Staff Working Document SWD(2016) 366 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 9 November 2016, 'Turkey 2016 Report', 7.

[56] See *e.g.* J Wouters, 'Revisiting Art. 2 TEU' cit. 264.

accession opinions should be interpreted as meaning that democracy in the sense of art. 2 and democracy in the sense of the Copenhagen criteria overlap.

Such an interpretation makes sense when reminding oneself that the Copenhagen criteria are in essence an elaboration on art. 2.[57] After all, both test the applicant State's suitability to join the Union on the basis of the value of democracy. This is seemingly recognised by the CJEU, as recent case law saw the Court connecting art. 2 TEU and the Copenhagen criteria for the first time.[58] Therefore, the Copenhagen criteria may offer a good place to start when uncovering the meaning of art. 2 TEU.

c) Copenhagen criteria: substantive elements

The Copenhagen criteria are conditions set by the Copenhagen European Council in 1993[59] and later confirmed by the Madrid European Council.[60] All candidate countries to the EU must satisfy these criteria in order to join the Union.[61] The Copenhagen criteria consist of political criteria, economic criteria and administrative criteria and require of applicant states the institutional capacity to implement effectively the European *acquis* and the ability to take on the obligations that come with EU membership.[62] The political criteria require of candidate countries a stable institution that guarantees democracy and adherence to the rule of law.[63] In a similar fashion to art. 2 TEU, the Copenhagen criteria as such do not offer any further explanation on the substantive elements of democracy. Therefore, in order to understand the substantive meaning of the Copenhagen criteria, their practical application must be assessed.

[57] It should also be noted that the Commission does assess adherence to human rights and respect for and protection of minorities in its Opinion on the accession of Montenegro. The Commission concludes that certain ethnic groups, as well as persons with disabilities and LGBT persons are still subject to discrimination, see Commission Staff Working Document COM(2010) 670 final Analytical Report of 9 November 2010 accompanying the Communication from the Commission to the European Parliament and the Council, 'Opinion on Montenegro's Application for Membership of the European Union', 6. It is therefore a possibility that the Commission did consider human rights adherence in its Opinion on Serbia's application for membership, but that it did not find anything notable and thus decided not to include it. This is also apparent in the Commission's 2020 Albania report where it considers that although Albanian legislation prohibits discrimination against the LGBTI community, the country should still do more to protect LGBTI persons from discrimination, see Commission Staff Working Document SWD(2020) 354 final of 6 October 2020 accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Albania 2020 Report', 36.

[58] Case C-896/19 *Repubblika v Il-Prim Ministru* ECLI:EU:C:2021:311 para. 62.

[59] European Council in Copenhagen of 21-22 June 1993, 'Conclusions of the Presidency' www.consilium.europa.eu 13.

[60] European Council in Madrid of 15-16 December 1995, 'Presidency Conclusions' www.europarl.europa.eu 18.

[61] European Commission, *Accession criteria* neighbourhood-enlargement.ec.europa.eu.

[62] European Council in Copenhagen of 21-22 June 1993, 'Conclusions of the Presidency' cit. 13.

[63] As well as respect for human rights and minorities.

All of the Commission Opinions and Communications on the potential accession of new Member States are structured in roughly the same way. Each Opinion presents a paragraph on democracy. Every time, the Commission first assesses the basic constitutional framework of each candidate State. Second, Commission delves into the legal and factual aspects of the respective system, which relate to democracy and that do not meet EU standards. These aspects can be roughly divided into three categories, namely *i)* general constitutional framework; *ii) trias politica* and checks and balances; and *iii)* electoral systems.

When it comes to its assessment of the general constitutional framework of applicant countries, the Commission seems to be most concerned with systems of government. All applicant States considered are parliamentary democracies, which the Commission considers generally in line with European principles and standards.[64] This is unsurprising, as the Union is a parliamentary democracy in line with art. 10 TEU.[65]

In relation to the division of powers and checks and balances in an applicant country, the mere fact that an applicant country can legally be considered a parliamentary democracy does, however, not mean that a prospecting Member State meets the Copenhagen definition criterion of democracy. In its several accession Opinions and Communications, the Commission analyses the manner in which States have organised their democratic institutions, as well as to what extent the powers of those institutions are separated sufficiently in law and in practice. An analysis of the Commission opinions on Serbia and Montenegro shows that democracy in the sense of the Copenhagen criteria[66] requires that the legislative and the executive branch are properly separated. More specifically, proper separation requires at least a legislative process which implements sufficient preparation within the legislative process (such as preparation of draft legislation and amendments),[67] as well as consultation of stakeholders[68] and capacity for parliamentary oversight.[69] Furthermore, there must be sufficient governmental policy planning, coordination, and implementation.[70] The exact extent of "sufficient", remains somewhat equiv-

[64] In its Opinion on the accession of Serbia, the Commission considers what makes up the "democratic fabric" of Serbia, stating that the country is a parliamentary democracy and that "[i]ts constitutional and legislative framework is largely in line with European principles and standards", see Communication COM(2011) 668 final cit. 5. The Commission decides in the same vein in its Opinion on the accession of Montenegro that the institutional framework of the country was mostly in line with European values, see Commission Staff Working Document COM(2010) 670 final cit. 5. Note again the inconsistent use of terminology. "Principles" and "values" are used by the Commission interchangeably.

[65] For more on art. 10 TEU in conjunction with the value of democracy, see section III.1 of this *Article*.

[66] And, therefore, in the sense of art. 2 TEU.

[67] Commission Staff Working Document COM(2010) 670 final cit. 5; Communication COM(2011) 668 final cit. 6. The Commission never properly explains what exactly should be prepared and in what way that should be.

[68] *Ibid*. 6.

[69] Commission Staff Working Document COM(2010) 670 final cit. 5.

[70] Communication COM(2011) 668 final cit. 6.

ocal. Finally, parliamentary immunity remains a cornerstone when safeguarding the independence of the legislative branch.[71] Although lifting of the immunity of members of parliament may be justified, this may only occur in extraordinary situations.[72] The Commission furthermore underlines the importance of an independent judiciary.[73] This means on a most basic level that the judiciary cannot be politicised.[74] Politicisation may, after all, lead to corruption.[75] Corruption must furthermore be discouraged through an effective system of checks and balances[76] and anti-corruption legislation.[77]

When it comes to electoral systems of candidate countries, elections play a vital role in ensuring democracy within the Union, both at Union level[78] and at Member State level. The Copenhagen criteria focus on elections and referenda at Member State level. The EU approach to the safeguarding of fair elections is strict regarding the safeguarding of fair elections. In its Opinion on the accession of Serbia, the Commission for example considers that Serbian elections have been consistently conducted in accordance with international standards ever since 2001.[79] However, according to the Commission, the Serbian electoral process was only recently brought in line with EU standards.[80] This means that democracy in the sense of art. 2 TEU requires of a future Member State an electoral process of an even higher standard than what is generally accepted internationally. First and foremost, this standard for elections requires proper codification and harmonisation of an electoral regulatory framework in national law.[81] Moreover, this higher standard means that the appointment of MPs must follow the order of the list presented to the

[71] Communication COM(2016) 715 final cit. 5.

[72] *Ibid*.

[73] See *e.g*. Commission Staff Working Document COM(2010) 670 final cit. 5.

[74] *Ibid*. International standards have basis in several international (universal and regional) treaties, international customary law, political commitments, and internationally agreed principles of good practice which are adopted by governmental organisations and NGO's. These standards include the right and opportunity to vote, the right and opportunity to participate in public affairs, prevention of corruption, the right and opportunity to be allected and the freedom of assembly and association. See *e.g*. The Charter Center, *Election Standards* eos.cartercenter.org.

[75] Commission Staff Working Document COM(2010) 670 final cit. 5.

[76] *Ibid*.

[77] *Ibid*. Such legislation must be effective on paper, as well as effectively enforced. In the Montenegrin example, this meant that incomplete anti-corruption legislation was to be supplemented and that more authority, legal powers and capacity was to be given to supervisory authorities in order to ensure effective application of the law, see *ibid*. 6.

[78] See *e.g*. art. 10(1) and (2) TEU.

[79] Communication COM(2011) 668 final cit. 6.

[80] *Ibid*.

[81] *Ibid*.; Commission Staff Working Document COM(2010) 670 final cit. 5; Office for Democratic Institutions and Human Rights, 'Republic of North Macedonia Early Parliamentary Elections 15 July 2020: ODIHR Special Election Assessment Mission Final Report' (2020) OSCE www.osce.org.

voters,[82] that an inclusive political dialogue must be ensured, that measures are in place to eliminate the misuse of State resources in election campaigns, that safeguards exist to ensure independence, that there is impartiality of the Central Election Commission and the judiciary and finally, that alleged electoral violations are investigated in a transparent manner.[83]

In the context of the electoral system at European level, Regulation 1141/2014 laid down limited standards on the functioning of political parties and their funding.[84] Although these standards have not been incorporated in the Copenhagen criteria, such incorporation may be possible in the future as to provide even stricter standards for national electoral systems.[85]

d) Applicability of the Copenhagen criteria after EU accession

From the previous, it is clear that the Copenhagen criteria are not merely an empty shell. Numerous Commission Opinions and Communications draw up a whole set of substantive criteria which are much easier to apply than the general value of democracy. This is proven by the fact that many candidate countries have overhauled their institutions in order to meet the Copenhagen criteria and to ultimately be granted EU membership.[86]

Although strictly applied during accession procedures, enforcement of the Copenhagen criteria seems to go out of the window once a Member State has joined the Union.[87]

[82] See Communication COM(2011) 668 final cit. 6. This puts an end to the practice of "blank resignations" by which MPs were tendering resignation letters to their parties at the beginning of their mandate.

[83] In its Opinion on the accession of Albania, the Commission follows mainly some recommendations that were made by the Organization for Security and Co-operation in Europe's Office for Democratic Institutions and Human Rights (OSCE/ODIHR), see Commission Staff Working Document SWD(2020) 354 final cit. 9. See for the original and more extensive OSCE/ODIHR report, Office for Democratic Institutions and Human Rights, 'Montenegro Parliamentary Elections 30 August 2020: ODIHR Limited Election Observation Mission Final Report' (2020) OSCE www.osce.org. Similar recommendations are found in the OSCE/ODIHR report on the North Macedonian elections, see Office for Democratic Institutions and Human Rights, 'Republic of North Macedonia Early Parliamentary Elections 15 July 2020' cit.

[84] Regulation (EU, Euratom) No 1141/2014 of the European Parliament and of the Council of 22 October 2014 on the statute and funding of European political parties and European political foundations, as amended by Regulation (EU, Euratom) 2018/673 of the European Parliament and of the Council of 3 May 2018 amending Regulation (EU, Euratom) No 1141/2014 on the statute and funding of European political parties and European political foundations.

[85] For the substantive context of the Regulation, see section III.1 of this *Article*.

[86] See *e.g.* the development of Croatia between 2004 and 2011. Croatia had strengthened, for example, the independence of the judiciary and adopted adequate measures to improve the efficiency of the judiciary. The country furthermore adopted and implemented anti-corruption legislation, see Communication COM(2004) 257 final from the Commission of 20 April 2004, 'Opinion on Croatia's Application for Membership of the European Union'; Commission Staff Working Paper SEC(2011) 1200 final of 12 October 2011, 'Croatia 2011 Progress Report' accompanying the document Communication from the Commission to the European Parliament and the Council 'Enlargement Strategy and Main Challenges 2011-2012', 5-8. This shows that the substantive elements of the Copenhagen criteria are clear enough to be implemented directly.

[87] See *e.g.* L Pech and KL Scheppele, 'Illiberalism Within' cit.

Pre-accession democracy conditionality does, therefore, not eliminate the potential for and the reality of post-accession backlash.[88] An explanation for this phenomenon is easily found in the fact that the Copenhagen criteria are merely accession criteria and, in that sense, simply do no longer apply once a country has joined the Union. Even the website of the Commission notes that "[t]he accession criteria, or Copenhagen criteria [...] are the essential conditions all candidate countries *must satisfy to become a member state*".[89]

Although it is true that the Copenhagen criteria are designed as accession criteria, they also offer an elaboration on the meaning of the value of democracy. What the Commission considers to be criteria for democracy for candidate countries are therefore the same for the Member States. Democracy is democracy after all. The only difference in applicability is, in my opinion, that candidate countries are liable to comply with art. 2 via art. 49, whilst Member States must answer to art. 2 directly.

III. The value of democracy beyond art. 2 TEU

Art. 2 TEU and the Copenhagen criteria offer a basic insight into the value of democracy in EU law. Democracy is, however, woven into the constitutional framework of the Union in many different places. The following section analyses the other provisions of EU law that are relevant to the substance of democracy, starting with the right to vote and to stand as a candidate. This section furthermore discusses art. 10 TEU, art. 21 TEU, the Charter and the Commission's European Democracy Action Plan.[90]

III.1. Right to vote and to stand as a candidate

Suffrage is, of course, the cornerstone of any democracy. Art. 223 TFEU requires that the European Parliament shall be elected by direct universal suffrage. Art. 20(2)(b) TFEU and arts 39 and 40 of the Charter enshrine the right of every citizen of the Union to vote and to stand as a candidate at elections to the European Parliament and at municipal elections. Furthermore, arts 20(2)(b) and 22(1) TFEU grant citizens the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right has been further concretised in Directive 94/80/EC, which provides detailed arrangements.[91]

[88] See *e.g.* P Levitz and G Pop-Eleches, 'Why No Backsliding? The EU's Impact on Democracy and Governance Before and After Accession' (2010) Comparative Political Studies 457.

[89] European Commission, *Accession criteria* cit. (emphasis added).

[90] It should be noted that many more provisions within the Treaties provide some sort of insight into the meaning of the value of democracy under EU law. However, keeping in mind the scope of this *Article* and limitations in terms of word count, I have made a selection of which provisions I believe give most insight into the extent of the value of democracy in EU law. Other provisions remain material for another article.

[91] Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals.

The right to vote or to stand as a candidate can be enjoyed by citizens in the Member State in which they reside, under the same conditions as nationals of that State. This means that, although this right is extended to "every citizen of the Union", the right is still subject to Member State rules. In accordance with my analysis under section II.2., however, Member States are likely at least to some extent subject to EU law with regards to the organisation of regional and national elections. Member State electoral law must therefore be in line with EU standards. The exact extent of these standards in relation to suffrage is, as noted in the previous section, not specified in any of the Commission's reports on the accession of new Member States, although at least some restrictions are clear. These include that the system of choice must be a form of proportional representation, more specifically either the party list or the single transferable vote system.[92] The electoral area may furthermore be subdivided unless subdivision generally affects the proportional nature of the electoral system.[93]

Council Directive 93/109/EC furthermore lays down some "detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals".[94] Art. 5 of the Directive extends the right to vote or to stand for election to citizens that do not have the right to vote or stand for election because they have not resided in their host Member State for long enough, but have spent the required time in one or multiple different Member States.[95]

In 2018, the Commission adopted its Election package, consisting of a Communication and a Recommendation which encourage Member State to set up national election networks that deploy national authorities with competence for electoral matters and authorities to monitor and enforce rules related to online activities relevant to elections. The aim of this package, according to the Commission, is to ensure "free and fair European elections".[96]

In its Communication, the Commission recognises that the European institutions do not run elections. Nevertheless, the Commission asserts that elections still have an obvious EU dimension.[97] The Communication aims to provide specific guidance regarding the processing of personal data in the electoral context. This is an elaboration on the General Data Protection Regulation, which in itself addresses instances of unlawful use of personal data

[92] Art. 1 of the Act concerning the election of the members of the European Parliament by direct suffrage of October 1976.

[93] *Ibid*. art. 2.

[94] Directive 93/109/EC of the Council of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals.

[95] Note that art. 14(1) of Directive 93/109/EC restricts this right to some extent.

[96] Communication COM(2018) 637 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 12 September 2018, 'Securing free and fair European Elections'.

[97] *Ibid*.

in the electoral context at Member State level.[98] The Communication furthermore sets recommendations on how risks from disinformation and cyberattacks and the promotion of online transparency and accountability in the EU should be addressed.[99] Recommendations are also made on the enhancement of cooperation between competent authorities, as well as on the tools that allow these authorities to intervene when necessary to safeguard the integrity of the electoral process.[100] Moreover, the Communication addresses situations in which political parties or associated foundations may benefit from practices that infringe data protection rules.[101] Finally, the notion of "free and fair elections" as recited by the Commission in its Communication cannot exist without free media. Accordingly, it is not just the Charter which touches upon the protection of free and fair media, but according to some, also the Treaties themselves.[102] This means that the Commission may launch infringement proceedings to protect free media on the basis of the Treaties.[103]

In 2021, the Commission subsequently launched the European Democracy Action Pack, partly because there was evidence that the rules adopted in the Commission's 2018 Election Package were easily circumvented.[104] One of the three pillars of the newer Democracy Action Pack is the promotion of free and fair elections.[105] In this light, a Regulation on the transparency and targeting of political advertising was proposed,[106] as well as a revision of the Regulation on the funding of European political parties.[107]

III.2. Art. 10 TEU

Art. 10 TEU prescribes that the European Union itself shall be a representative democracy. It provides that citizens are directly represented at Union level in the European Parliament. To ensure another dimension of democracy, art. 10(2) decides that "Member States are

[98] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), preamble, recital 56. See also Communication COM(2018) 637 final cit.

[99] Communication COM(2018) 637 final cit.

[100] *Ibid*.

[101] *Ibid*.

[102] Insofar as unfree and unfair media coincide with unfree and unfair elections, see A Bodnar and J Morijn, 'How Europe Can Protect Independent Media in Hungary and Poland: Press Freedom is a Prerequisite for Free and Fair Elections' (18 May 2021) Politico www.politico.eu. No reference to any Treaty provision is made in this specific article, but the authors likely rely on provisions protecting free and fair elections such as arts 20, 22 and 223 TFEU.

[103] A Bodnar and J Morijn, 'How Europe Can Protect Independent Media in Hungary and Poland' cit.

[104] Communication COM(2020) 790 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 3 December 2020 on the European democracy action plan.

[105] *Ibid*. The other two pillars being strengthening media freedom and countering disinformation.

[106] *Ibid*.

[107] *Ibid*.

represented in the European Council by their Head of State or Government and in the Council by their governments, themselves democratically accountable either to their national parliaments, or to their citizens". Art. 10(3) furthermore decides that "[e]very citizen shall have the right to participate in the democratic life of the Union". Finally, art. 10(4) proclaims that political parties active at European level must contribute to forming European political awareness and to expressing the will of citizens of the Union.

Although art. 10 TEU seems rather straightforward and general at first glance, some scholars allege that this provision may have a far more specific meaning. John Cotter, for example, suggests that art. 10 TEU may provide a basis for the exclusion of Hungarian representatives from the European Council and the Council.[108] His argument is largely based on a literal interpretation of the first two paragraphs of art. 10, emphasising art. 10(2), and consists of three basic steps: *i)* the Union is founded on a representative democracy; *ii)* according to art. 10(2), the organs of the Union must be democratically legitimised; *iii)* governments in the European Council and Council must be democratically legitimised on a national level on a representative basis.[109]

According to Cotter, it could be argued that the text of art. 10(2) merely provides that both institutions must be composed of representatives of all Member States. Cotter subsequently refers to art. 16(2) TEU on the composition of the Council which appears to state exactly that. Cotter's response is simple, yet effective: his interpretation of art. 10(2) and art. 16(2) TEU are not mutually exclusive. Both may co-exist. In *Junqueras Vies*, the CJEU acknowledged that art. 10 TEU gives "concrete form" to the value of democracy as enshrined in art. 2 TEU.[110]

Such an interpretation of art. 10(2) does, however, have its pragmatic complications. First, art. 10 does not present a basis upon which the European Council or Council could decide to exclude government representatives from a Member State which is no longer democratically accountable.[111] According to Cotter, this means that individuals litigating the matter rely on art. 263 TFEU, on the basis of which the CJEU may review the legality of a reviewable act.[112] In such a case, an individual must allege that such a reviewable act was not taken in accordance with EU law, as the government representation of a non-democratic Member State were partaking unlawfully.[113] Alternatively, the same result can

[108] J Cotter, 'The Last Chance Saloon: Hungarian Representatives May be Excluded from the European Council and the Council' (19 May 2020) Verfassungsblog verfassungsblog.de. See similarly D Krappitz and N Kirst, 'Op-Ed: "An Infringement of Democracy in the EU Legal Order"' (29 May 2020) EU Law Live eulawlive.com.

[109] J Cotter, 'The Last Chance Saloon' cit.

[110] Case C-502/19 *Oriol Junqueras Vies* ECLI:EU:C:2019:1115 para. 63.

[111] *Ibid*.

[112] *Ibid*.

[113] *Ibid*.

be achieved through the preliminary ruling procedure.[114] While this approach could in theory be effective, it knows at least two major problems.

The first of those problems is identified by Kieran Bradley. In direct response to Cotter, Bradley argues that there would most likely be no political advantage gained by banning representatives of Member States from the European Council or Council.[115] Bradley argues that a Union functions through its Member States, and that preventing a Member State from voting is the quickest way to ensure that the Member State in question will no longer respect or implement any European Council or Council decisions.[116] On a more legal note, Bradley argues that removing a Member State's voting rights under art. 10 TEU would "simply airbrush out of the picture [the Member State's] rights".[117] It is true that the removal of a Member State's right to vote is one of the possible outcomes of an art. 7 procedure for which high safeguards exist for a reason. Bypassing entirely this system of safeguards is likely to be questionable in terms of legality.

On the other hand, following art. 19(1) TEU, the CJEU is tasked to ensure that in the interpretation and application of the Treaties, the law is observed. Both Cotter and Bradley mention this fact, reiterating that the Court could potentially interpret art. 10(2) in conjunction with art. 2 TEU, especially when considering that EU institutions such as the CJEU must aim to promote Union values.[118] However, both fail to mention that interpreting art. 10(2) in conjunction with art. 7 TEU may potentially lead to the conclusion that art. 10 cannot be considered a legal basis for the banning of Member State delegations from EU institutions. In my opinion, this is a potential second major problem with Cotter's theory. Cotter, however, argues that the automatic exclusion of representatives of a democratically unaccountable Member State from the Council under art. 10(2) TEU cannot be regarded as a sanction, but rather as a natural and automatic effect of the law.[119] As such, there can be no interference of the enforcement of art. 10 TEU with the *lex specialis* nature of art. 7 TEU. While this holds up in theory, the outcome is *de facto* still the same. As such, exclusion of certain Member State representatives from the Council still has a punitive character by effect. Moreover, Cotter argues that art. 7 TEU is not the only provision that

[114] In the sense of art. 267 TFEU.

[115] K Bradley, 'Showdown at the Last Chance Saloon: Why Ostracising the Representatives of a Member State Government is Not the Solution to the Article 7 TEU Impasse' (23 May 2020) Verfassungsblog verfassungsblog.de.

[116] *Ibid*.

[117] *Ibid*.

[118] J Cotter, 'The Last Chance Saloon' cit. In his subsequent journal article on the operability of art. 10 TEU, Cotter furthermore argues that the *lex specialis* reading of art. 7 is inconsistent with the role of the CJEU as laid down in art. 19(1) TEU and with the notion that the EU is built upon the rule of law, see J Cotter, 'To Everything There is a Season: Instrumentalising Article 10 TEU to Exclude Undemocratic Member State Representatives from the European Council and the Council' (2022) ELR 69, 79-80. However, I would argue that it is not any more in line with the rule of law to simply bypass a *lex specialis* on mere moral grounds.

[119] J Cotter, 'To Everything There is a Season' cit. 79.

allows for enforcement of the values enshrined in art. 2 TEU. This has been well-established in the case law of the CJEU and, accordingly, in this *Article*. Still, I remain of the opinion that excluding Member State representatives from voting in the Council or the European Council is of a highly political nature and would be better enforced through art. 7 TEU, due to this provision's politicised nature.

Nevertheless, there are definite benefits to an annulment procedure under art. 263 TFEU in conjunction with art. 10 TEU. As Cotter writes, it would be up to the Court to be clear about when exactly the European Council or the Council had stopped acting in compliance with art. 10 TEU. A prerequisite for such a judgment is that the Court describes what democratic accountability in the sense of art. 10 TEU means, and that the Court develops a legal test under which to judge democratic accountability.[120] While it is not within the Court's jurisdiction to indicate which measures should be taken in order for the Council or European Council to comply with its judgment, the Court may still provide guidance on this matter.[121] This guidance would contribute significantly to the finding of a definition of the value of democracy under EU law.

In a similar but different vein, Krappitz and Kirst argue that art. 10 TEU can be operationalised through infringement proceedings.[122] In such a case, there must be a specific breach or multiple specific breaches of art. 10 TEU.[123] While such an approach may help the Commission operationalise art. 10 TEU and, therefore, enforce the value of democracy, some tension with the *lex specialis* nature of art. 7 TEU may still exist.

Finally, according to art. 224 TFEU, the European Parliament and the Council may adopt secondary legislation regarding political parties at European level referred to in art. 10(4) TEU. An example of such legislation is Regulation 1141/2014, which provides rules on the statute and funding of European political parties and European political foundations.[124] This Regulation was presented and perceived to tackle populist illiberal politics on an EU level.[125] Regulation 1141/2014, however, does not regulate political parties or democracy at Member State level, and may therefore seem of little use for this *Article*. To this extent, it should first be noted that political parties that are active on the European

[120] *Ibid*. 75.

[121] *Ibid*. 75; K Lenaerts, I Maselis and K Gutman, *EU Procedural Law* (Oxford University Press 2014) 415. See also case T-300/10 *Internationaler Hilfsfonds v Commission* ECLI:EU:T:2012:247 para. 151.

[122] D Krappitz and N Kirst, 'The Primacy of EU Law Does Not Depend on the Existence of a Legislative Competence: Debunking the Flawed Analysis of the Polish Constitutional Court' (20 October 2021) EU Law Live eulawlive.com.

[123] See also section IV.2. of this *Article*.

[124] Regulation No 1141/2014 cit.

[125] For a comprehensive analysis of the Regulation, its development and its application at EU level, see J Morijn, 'Responding to "Populist" Politics at EU Level: Regulation 1141/2014 and Beyond' (2019) ICON 617. See also section III.3. of this *Article* for the place of illiberalism in the context of democracy.

level, are often the same parties that run in national elections.[126] This Regulation could, therefore, influence national political parties as these may not receive funding at a European level so long as they portray seriously illiberal practices.

Furthermore, although not directly addressed at Member States, Regulation 1141/2014 may also be interpreted as to better understand the value of democracy in the sense of art. 2 TEU. For example, Regulation 1141/2014 aims to enhance transparency and "strengthen the scrutiny and the democratic accountability of European political parties and European political foundations".[127] While, as noted above,[128] Regulation 1141/2014 only refers to political parties at European level, it emphasises that, for instance, transparency and scrutiny of funding, as well as democratic accountability, are important aspects of the value of democracy in EU law. The implementation of art. 10 TEU through Regulation 1141/2014 can be used as interpretative guidance of art. 2 TEU as applied to Member States. For example, if the parliamentary system of a Member State fails to comply with the transparency requirements under Regulation 1141/2014, this could be seen as a violation of art. 2 TEU interpreted in light of the concrete expression of democracy in EU law.[129] This means that the values introduced by Regulation 1141/2014 could potentially be enforced at Member State level through the application of art. 2 TEU.[130]

III.3. Art. 21 TEU

Art. 21 TEU decides that the Union's action in the field of external relations shall be guided by the principles that inspired its own creation, including democracy. Art. 21 has evolved to be more than merely symbolic. There are several ways in which the EU aims to promote democracy and human rights that relate to democracy in third countries.

The position of High Representative for Foreign and Security Policy was introduced in the Lisbon Treaty. As part of an early initiative of the High Representative, the EU Strategic Framework and Action Plan on Human Rights and Democracy was introduced.[131] Although considered an improvement on the pre-Lisbon situation, both the Strategic

[126] Albeit in a different formation. For example, Hungarian political party Fidesz took part in European elections as part of the European People's Party (EPP) group, before it resigned membership after the EPP voted for the exclusion of Fidesz from its party. See for example M de la Baume, 'Orbán's Fidesz Quits EPP Group in European Parliament: Move Comes After MEPs Changed Rules to Pave Way for Suspension or Expulsion' (3 March 2021) Politico www.politico.eu.

[127] Regulation (EU, Euratom) No 1141/2014 cit. preamble recital 33.

[128] See section II.2. of this *Article*.

[129] This is particularly the case, because transparency is a foundational value in EU law, see for instance arts 10(3) and 11(2) TEU, art. 15 TFEU and art. 42 of the Charter.

[130] For more on the enforcement of Regulation 1141/2014 cit., see section IV.2. of this *Article*.

[131] L Pech and J Grogan, 'EU External Human Rights Policy' cit. 344.

Framework and the Action Plan were all but comprehensive at first.[132] This improved significantly with the 2015-2019 Action Plan on Human Rights and Democracy, which decided that the EEAS and Council were expected to ensure that human rights and democracy considerations form part of the overall bilateral strategy of the Union.[133]

The EU Annual Report on Human Rights and Democracy in the World is furthermore part of EU external policy.[134] While the better part of the 2020 report focuses on human rights, the report also notes that counter terrorism and prevention and countering of violent extremism policy may not be used as a pretext to restrict democracy.[135] The report also states that in order to tackle democratic backsliding around the world, the EU strives to support independent media and journalists and to strengthen parliaments. The EU furthermore aims to monitor elections around the globe.[136]

Finally, the value of democracy is prevalent in the European Neighbourhood Policy (ENP).[137] ENP is focused on creating a stable and prosperous neighbourhood in order to secure a safe Union.[138] The Union's objectives of ensuring stability and prosperity are heavily inspired by the EU's pre-accession policy.[139] In order to achieve its goal, the EU "offers its neighbours a privileged relationship, building on a mutual commitment to common values" such as democracy.[140] Following the 2011 developments in the Arab world, the EU reviewed its ENP. This led to a strengthened focus on the promotion of deep and sustainable democracy.[141] According to the EP, deep and sustainable democracy includes "in particular free and fair elections, efforts to combat corruption, judicial independence, democratic control over the armed forces and the freedoms of expression, assembly and association".[142]

The relevance of democracy in EU external relations law reiterates, therefore, that the value of democracy in EU law is not limited to democratic elections. It also includes

[132] C Churruca Muguruza, 'Human Rights and Democracy at the Heart of the EU's Foreign Policy? An Assessment of the EU's Comprehensive Approach to Human Rights and Democratization' in F Gómez Isa, C Churruca Muguruza and J Wouters (eds), *EU Human Rights and Democratization Policies: Achievements and Challenges* (Routledge 2018) 60-62.

[133] Council of the EU, 'Action Plan on Human Rights and Democracy' (December 2015) 7. See also L Pech and J Grogan, 'EU External Human Rights Policy' cit. 346.

[134] See also L Pech and J Grogan, 'EU External Human Rights Policy' cit. 351.

[135] 'EU Annual Report on Human Rights and Democracy in the World 2020' (2021) eeas.europa.eu 108.

[136] *Ibid*. 121.

[137] The ENP applies to Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Lybia, Moldova, Morocco, Palestine, Syria, Tunisia and Ukraine. See *e.g*. European Parliament, 'Factsheet on the European Union: The European Neighbourhood Policy' (2021) www.europarl.europa.eu 1.

[138] See *e.g*. also L Pech and J Grogan, 'EU External Human Rights Policy' cit. 447. See also N Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU: A Legal Analysis* (Hart Publishing 2014).

[139] Which in turn heavily relies on the Copenhagen criteria as explored earlier in this *Article*.

[140] European Parliament, 'Factsheet on the European Union' cit. 1.

[141] *Ibid*.

[142] *Ibid*.

respect for certain fundamental rights that are deemed indispensable for a properly functioning democracy, including in particular the freedom of expression, assembly and association. For this reason, the relationship between democracy and the Charter will be discussed in the following section.

III.4. The Charter of fundamental rights of the EU

As previously noted, the preamble of the Charter reiterates that the EU "is based on the principles of democracy and the rule of law". It is, however, not just the Charter's preamble that echoes the importance of democracy. The Charter contains several provisions that link directly to this value. Such provisions include, in particular, art. 11 on the freedom of expression and information, Article 10 on the freedom of thought, conscience and religion, art. 12 on the freedom of assembly and of association and art. 39 on the right to vote and to stand as a candidate for elections to the European Parliament.[143] A lack of protection of these freedoms would prevent open political debate and exclude citizens from the ability to cast an informed vote in elections. The following section will discuss these provisions and their relation to the value of democracy in more detail.

It should be noted that although the European Court of Human Rights (hereinafter ECtHR) is not in fact part of the EU legal order, in explaining the rights enshrined in the Charter and their connection to the value of democracy, I still refer to ECtHR case law. This is because art. 52(3) of the Charter refers to the ECHR as a minimum standard.[144] Therefore, the protection of the provisions of both charters overlaps. The Charter, however, offers extended substantive protection in some regards insofar as the specific case falls within the scope of EU law.[145]

a) Freedom of expression and information

Freedom of expression is an essential component of any democracy. Without the ability to read, hear or otherwise receive the political views of others, citizens are unable to cast an informed vote in national or local elections.[146] Without informed voting, democracy becomes dysfunctional.

The freedom of expression and information is enshrined in art. 11 of the Charter of Fundamental Rights (hereinafter: Charter) which corresponds with art. 10 of the European Convention on Human Rights (hereinafter ECHR). The freedom of expression has

[143] These freedoms are highlighted in the European Neighbourhood Policy as being integral aspects of a functional democracy. This is why I consider these as being the most important Charter provisions in relation to democracy.

[144] It is furthermore reiterated by the Court that the rights contained in the Charter which correspond to rights guaranteed under the ECHR, should be given the same meaning and scope as those laid down by the ECHR. See *e.g.* case C-617/10 *Åklagaren v Hans Åkerberg Fransson* ECLI:EU:C:2013:105 para. 44. See also case C-399/11 *Stefano Melloni v Ministerio Fiscal* ECLI:EU:C:2013:107 para. 50.

[145] Art. 52(3) of the Charter.

[146] KW Saunders, *Free Expression and Democracy: A Comparative Study* (Cambridge University Press 2017) 1.

furthermore been enshrined by the CJEU as a "general principle of law, the observance of which is ensured by the Court".[147] Art. 11(2) of the Charter introduces possible limitations of the freedom of expression insofar as those limitations are prescribed by law and necessary in a democratic society.

A balance must thus be struck between freedom of expression and the rights of other individuals. Each case must therefore be assessed on an individual basis. Freedom of expression of elected politicians is considered especially vital. The ECtHR decided in *Jerusalem v Austria* that "[w]hile freedom of expression is important for everybody, it is especially so for an elected representative of the people. Her or she represents the electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition Member of Parliament [...] call for the closest scrutiny on the part of the Court".[148]

But there are two sides to this coin. The ECtHR proceeds stating that "[t]he limits of acceptable criticism are wider with regard to politicians acting in their public capacity than in relation to private individuals".[149] This is because, according to the ECtHR, politicians knowingly choose to lay themselves bare to close scrutiny by both journalists and the public.[150] It should be noted in this regard that both journalists and members of the public are required to display a greater degree of tolerance when active in public debate.[151]

b) Freedom of thought, conscience and religion

Art. 10 of the Charter enshrines the freedom of thought, conscience and religion. The importance of the freedom of thought, conscience and religion in a democratic society is emphasised by the ECtHR in its judgment in the case of *Kokkinakis v Greece*. The Court held that the freedom of thought, conscience and religion

> "is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been clearly won over the centuries, depends on it".[152]

It should be noted that the freedom of thought, conscience and religion rightly does not protect every single act that is carried out in the name of religion. The ECtHR notes in

[147] See *e.g.* case C-260/89 *Iliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and Others* ECLI:EU:C:1991:254 para. 44.

[148] ECtHR *Jerusalem v Austria* App n. 26958/95 [27 February 2001] para. 36.

[149] *Ibid*. para. 38.

[150] *Ibid*.

[151] *Ibid*. paras 38–39.

[152] ECtHR *Kokkinakis v Greece* App n. 14307/88 [25 May 1993] para. 31.

Kalaç v Turkey that an individual may need to take into account his or her specific situation when exercising their freedom to manifest religion.[153]

c) Freedom of assembly and association

The freedom of assembly and of association is important for obvious reasons. In its judgment in *United Communist Party of Turkey*, the ECtHR explains these reasons rather well. After reaffirming that "democracy is without doubt a fundamental feature of the 'European public order'",[154] the Court considered that one of the essential characteristics of democracy is "the possibility it offers of resolving a Country's problems through dialogue, without recourse to violence, even when they are irksome".[155] Such dialogue is provided for particularly by the freedom of assembly and association.

It should be noted that only peaceful assemblies are protected under the freedom of assembly.[156] States must ensure that assemblies are enjoyed by everyone equally. Of course, states may regulate the freedom of assembly to a certain extent, but they must adopt a strict policy of non-discrimination.[157] Restrictions of content are allowed, but only when such restrictions meet a high threshold.[158] Restrictions should furthermore only be imposed when there is an imminent threat of violence.[159]

The most important aspect of the freedom of association on the other hand is that persons are able to "act collectively in pursuit of common interests, which may be those of the members themselves, of the public at large or of certain sectors of the public".[160] The right to freedom of association can be enjoyed by a singular individual or by an association itself.[161] The freedom of association applies to every type of association, including political parties.[162] Freedom of association regarding political parties is especially important in relation to democracy. Political parties should therefore only be dissolved in extreme cases.[163] Only political parties with objectives or activities, which are a tangible

[153] ECtHR *Kalaç v Turkey* App n. 20704/92 [1 July 1997] para. 27.

[154] ECtHR *United Communist Party of Turkey and Others v Turkey* App n. 19392/92 [30 January 1998] para. 45.

[155] *Ibid*. para. 46.

[156] OSCE/ODIHR, 'Guidelines on Freedom of Peaceful Assembly' (2nd edn ODIHR 2010) 15.

[157] *Ibid*. 16.

[158] *Ibid*. 17.

[159] *Ibid*.

[160] ODIHR, 'Guidelines on Freedom of Association' (ODIHR 2015) 17; *United Communist Party of Turkey and Others v Turkey* cit.; *Refah Partisi* cit.; ECtHR *Partidul Comunistilor (Nepeceristi) and Ungureanu v Romania* App n. 46626/99 [3 February 2005]. See also Council of Europe Recommendation CM/Rec(2007) 14 of the Committee for Ministers to Member States on the Legal Status of Non-Governmental Organisations in Europe, para. 11.

[161] ODIHR, 'Guidelines on Freedom of Association' cit. 17.

[162] OSCE/ODIHR and Venice Commission, 'Guidelines on Political Party Regulation' (ODIHR 2011) para. 9.

[163] *Ibid*. 89-96.

and immediate threat to democracy, have been considered to constitute such an "extreme case" in which the termination of a political party was considered just.[164]

d) Right to vote and to stand as a candidate at elections

Art. 39 of the Charter enshrines the right to vote and to stand as a candidate at elections to the European Parliament. Due to the right to vote appearing in the EU Treaties, suffrage was previously discussed in section III.1. of this *Article*. However, recent case law surrounding art. 39 of the Charter warrant that the right to vote and to stand as a candidate is also discussed in the present section, focusing not on the application of the Treaties, but rather on that of the Charter.

In *Delvigne*, a case concerning a French citizen that was stripped of his voting rights after committing a serious crime, the Court found that the case at hand fell under the scope of EU law on the basis of art. 14(3) TEU read in conjunction with the 1976 Act on the elections to the European Parliament, which require that elections to the European Parliament should be universal and direct.[165] As such, the Court considered that art. 39 of the Charter, read in combination with art. 14(3) TEU, establishes a universal right for EU citizens to vote in elections to the European Parliament. Member States may limit this right, and France did so in an apparently proportionate way.[166] The approach taken by the Court is somewhat similar to that of the ECtHR in the 2005 *Hirst* case.[167] In *Hirst*, the ECtHR found that a complete ban on voting for prisoners was in breach of art. 3 of Protocol 1 of the ECHR. It should be noted, however, that the CJEU does not directly refer to *Hirst* in its judgment. While art. 39 did not help recover Mr Delvigne's right to vote, the *Delvigne* judgment paves the way for art. 39 to be applied in the case similar but less proportionate Member State measures limiting the right to vote.

IV. Enforcing democracy beyond art. 7

Scholarly debate on the enforcement of EU values against Member States has focused heavily on art. 7 TEU. Beyond the specific procedure in art. 7 TEU, however, several enforcement mechanisms exist to ensure that Member States adhere to EU law. These mechanisms can be used to enforce the value of democracy, or certain aspects thereof. These additional enforcement mechanisms are particularly important because of the ineffectiveness of art. 7 TEU. Some of these additional enforcement mechanisms are of a centralised nature and

[164] ECtHR *Refah Partisi (the Welfare Party) and Others v Turkey* App n. 41340/98, 41342/98, 41343/98 and 41344/98 [13 February 2003] paras 126-135; and ECtHR *Herri Batasuna and Batasuna v Spain* App n. 25803/04 and 25817/04 [30 June 2009].

[165] Case C-650/13 *Thierry Delvigne v Commune de Lesparre Médoc and Préfet de la Gironde* ECLI:EU:C:2015:648 paras 32-34. See also S Coutts, 'Case C-650/13 Delvigne – A Political Citizenship?' (21 October 2015) European Law Blog europeanlawblog.eu.

[166] *Thierry Delvigne v Commune de Lesparre Médoc and Préfet de la Gironde* cit. para. 58.

[167] ECtHR *Hirst v United Kingdom* App n. 74025/01 [6 October 2005].

relate to direct proceedings before the CJEU, whilst other mechanisms are decentralised and are enforced at national level together with the preliminary reference procedure.

This section will start with a brief analysis of the deficiencies of art. 7 TEU, and will subsequently analyse centralised (section IV.2.) and decentralised enforcement (section IV.3.) of the value of democracy beyond art. 7. Each section will focus on the possibility to enforce the various aspects of the value of democracy – discussed in section II – using the available procedures.

IV.1. Problematising art. 7

As noted, the possibility and reality of breaches of EU common values by Member States have grown ever more evident over the past seven or eight years.[168] Art. 7 TEU was once designed to counteract such breaches and to recover peace among Member States. The provision establishes three different procedures that may be deployed in order to safeguard the common European values as laid down in art. 2.[169] This means in principle that art. 7 TEU is *lex specialis* and, therefore, that art. 2 TEU as such can only be enforced through the procedures of art. 7. However, recently, the Commission has launched legal action against Hungary and Poland for the infringement of LGBTQ+ rights, using art. 2 TEU as a self-standing provision.[170] This is understandable, as art. 7 TEU has proven to be largely inoperable. Some even go as far as titling the provision a "dead letter".[171] Although art. 7(1)[172] was triggered several times, this has not once led to the triggering of art. 7(3) and thus not once to any sanctions being imposed on a Member State in breach. This is mostly due to the high requirements that must be met in order to trigger art. 7(2),

[168] See *e.g.* L Pech and KL Scheppele, 'Poland and the European Commission, Part I: A Dialogue of the Deaf?' (3 January 2017) Verfassungsblog verfassungsblog.de; L Pech and KL Scheppele, 'Poland and the European Commission, Part II: Hearing the Siren Song of the Rule of Law' (6 January 2017) Verfassungsblog verfassungsblog.de; L Pech and KL Scheppele, 'Poland and the European Commission, Part III: Requiem for the Rule of Law' (3 March 2017) Verfassungsblog verfassungsblog.de; L Pech and KL Scheppele, 'Illiberalism Within' cit.; TT Koncewicz, 'Of Institutions, Democracy, Constitutional Self-Defence and the Rule of Law: The Judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and Beyond' (2016) CMLRev 1753; A Gora and P de Wilde, 'The Essence of Democratic Backsliding in the European Union: Deliberation and Rule of Law' (2020) Journal of European Public Policy 1.

[169] For the exact extent of art. 2 TEU, see section II.2. of this *Article*.

[170] European Commission, 'EU Founding Values: Commission Starts Legal Action Against Hungary and Poland for Violations of Fundamental Rights of LGBTIQ People' (15 July 2021) ec.europa.eu.

[171] S Greer and A Williams, 'Human Rights in the Council of Europe and the EU: Towards "Individual", "Constitutional" or "Institutional" Justice?' (2009) ELJ 462.

[172] See *e.g.* European Parliament, 'Rule of Law in Hungary: Parliament Calls on the EU to Act' (12 September 2018) www.europarl.europa.eu; Commission Recommendation (EU) 2018/103 of 20 December 2017 regarding the Rule of Law in Poland Complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520.

make the stating of the existence of a serious breach and thus the effectiveness of the provision very difficult procedurally.[173]

IV.2. Centralised enforcement

As noted, the values in art. 2 TEU, as such, can, in principle, only be enforced using art. 7 TEU. However, this does not necessarily mean that certain aspects of the value of democracy cannot be enforced using other enforcement mechanisms. This sub-section discusses the possibility for enforcement of the value of democracy and its components through the centralised enforcement mechanisms of EU law: arts 258-260 TFEU and art. 263 TFEU.

a) Arts 258–260 TFEU

The procedure laid down in art. 258 TFEU is more generally known as the regular infringement procedure and consists of two consequential stages. Art. 258 TFEU has already been used in the current backsliding crisis in order to tackle the Polish judiciary reforms, to the extent that they introduce gender discrimination and violate secondary law, as well as arts 157 TFEU and 19(1) TEU in conjunction with art. 47 of the Charter.[174] Similarly, the Commission deployed art. 258 TFEU in order to tackle certain rule of law breaches in Hungary.[175] Some scholars view the infringement proceedings of art. 258 as "far too specific" and for that reason cumbersome when dealing with situations in which a Member State has gone rogue entirely.[176] Other authors have, however, found a solution in art. 258. Although every specific breach must be painstakingly fought separately under art. 258, these authors allege that the provision is still more effective than art. 7 TEU.[177] This is confirmed by the fact that, of the infringement cases brought before the CJEU between 2002 and 2018, 1285 out of 1418 were decided in the Commission's favour.[178] Kim Lane Scheppele, Dimitry Kochenov and Barbara Grabowska-Moroz furthermore raise the possibility of bundling a set of specific breaches of EU law into a single general infringement action.[179] This would make, of course, for more efficient enforcement of EU values. As noted, the Commission has recently

[173] See *e.g.* D Kochenov, 'Busting the Myths Nuclear: A Commentary on Article 7 TEU' (LAW 2017/10 EUI Working Paper 2017) 9; M Coli, 'Article 7 TEU: From a Dormant Provision to an Active Enforcement Tool?' (2018) Perspectives on Federalism 272, 291.

[174] European Commission, 'European Commission Launches Infringement Against Poland over Measures Affecting the Judiciary' (29 July 2017) ec.europa.eu. See also M Schmidt and P Bogdanowicz, 'The Infringement Procedure in the Rule of Law Crisis: How to Make Effective Use of Article 258 TFEU' (2018) CMLRev 1061, 1062.

[175] Case C-286/12 *Commission v Hungary* ECLI:EU:C:2012:687; M Schmidt and P Bogdanowicz, 'The Infringement Procedure in the Rule of Law Crisis' cit. 1063.

[176] See A von Bogdandy and M Ioannidis, 'Systemic Deficiency in the Rule of Law' cit. 61; M Schmidt and P Bogdanowicz, 'The Infringement Procedure in the Rule of Law Crisis' cit. 1064.

[177] M Schmidt and P Bogdanowicz, 'The Infringement Procedure in the Rule of Law Crisis' cit. 1064.

[178] P Nicolaides, '"Member State v Member State" and Other Peculiarities of EU Law' (24 June 2019) Maastricht University blog www.maastrichtuniversity.nl.

[179] KL Scheppele, D Kochenov and B Grabowska-Moroz, 'EU Values Are Law, after All' cit.

brought a claim against Poland and Hungary in an art. 258 TFEU procedure based on art. 2 TEU. In this context, it is clear that the Commission is also of the conviction that art. 258 may be effective in cases surrounding the rule of law and democracy in the EU.[180] Whether the Court will accept this approach is yet to be seen.

Regardless, in order to prevent circumvention of the procedural safeguards of art. 7 TEU by using art. 258 TFEU, it is necessary to interpret art. 7 as being a *lex specialis*.[181] Interpreting the provision as *lex specialis* means that art. 258 is partly inapplicable to breaches of art. 2 TEU.

This does not mean that the content of the values enshrined in art. 2 TEU cannot be enforced through the application of art. 258 TFEU. Infringement procedures on the basis of art. 258 TFEU can, however, not be based on art. 2 itself. This is, for example, illustrated by the infringement procedure against Poland of July 2017.[182] This procedure surrounded the Polish introduction of a provision that entitled the Minister of Justice to prolong the mandates of judges at his discretion. The Commission based its case on art. 19 TEU in conjunction with art. 2 TEU, and not on art. 2 TEU by itself. Again, this does not mean that the factual situation of the case was not a breach of the value of democracy in the sense of art. 2 TEU.

An example of the enforcement of art. 2 TEU values through art. 258 TFEU and a foundation for the possibility thereof, is found in the *Repubblika v Il-Prim Ministru* case.[183] In this case, the Court decided that

> "[i]t follows that compliance by a Member State with the values enshrined in Article 2 TEU is a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State. A Member State cannot therefore amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU".[184]

In other words, in light of the rule of law, the Court decided that Member States may not infringe upon the rights enshrined in art. 2 TEU, where these rights have been given concrete expression elsewhere. By analogy, where the value of democracy has been given concrete expression elsewhere, the value may be enforced through art. 258 TFEU.

Accordingly, insofar as it is not the abstract value of democracy that is enforced, art. 258 TFEU could still be used to enforce certain aspects that bear on the content of democracy. The fundamental rights enshrined in the Charter, for instance, can all be enforced by the Commission. What is necessary, in this regard, is a more specific manifestation of the value of democracy, especially if the claim of the Commission based on art.

[180] European Commission, 'EU Founding Values' cit.

[181] P Jaworek, 'Upholding the Rule of Law in Times of Crisis: (Ineffective) Procedures Under Article 7 TEU and Possible Solutions' (16 February 2018) KSLR EU Law Blog blogs.kcl.ac.uk.

[182] European Commission, 'European Commission Launches Infringement Against Poland over Measures Affecting the Judiciary' (29 July 2017) ec.europa.eu.

[183] *Repubblika v Il-Prim Ministru* cit.

[184] *Ibid*.

2 as a standalone article is rejected. As discussed in section III above, these manifestations can mainly be found in the Charter. Measures of Member States that encroach upon democracy by interfering with the freedom of expression, the freedom of thought or the freedom of assembly and association can therefore unequivocally be challenged under art. 258 TFEU.

As regards the other components expressed by the Copenhagen criteria, the applicability of art. 258 TFEU is somewhat more difficult because they mostly cannot be linked to specific provisions in the EU Treaties. For example, enforcement of the rule of law can, as noted above, be linked to the obligation for Member States to ensure effective judicial protection in art. 19 TEU. As regards the Copenhagen criteria's requirements of democracy and democratic accountability, a relevant provision is art. 10 TEU, which prescribes that governments of the Member States must be "democratically accountable either to their national Parliaments, or to their citizens".[185] It could be argued that this provides a specific obligation for Member States to have a democratically accountable government and an accompanying electoral system. Since art. 10 TEU is a concrete manifestation of the value of democracy in art. 2 TEU, it can be enforced through art. 258 TFEU instead of art. 7 TEU. The same goes for the protection of free media by the Treaties.

Similarly, the standards enshrined in Regulation 1141/2014 can also be seen as a specific manifestation of the meaning of democracy in EU law which, by analogy, also applies to the manner in which Member States must organise their parliamentary system and the functioning of political parties. This could mean that these standards – as concrete expressions of the value of democracy – could be enforced through art. 258 TFEU. A significant problem with this argument, however, is that the standards of Regulation 1141/2014 do not themselves apply to national parliamentary systems. Unlike, for instance, art. 19 TEU, these rules can only be used as an interpretative guide to art. 2 TEU. Such an interpretative guide may not be sufficiently precise for use of art. 258 TFEU.

If a Member State fails to comply with a judgment of the CJEU, the Commission may take further action against the respective Member State on the basis of art. 260 TFEU. The latter part of art. 260 TFEU has been introduced fairly recently and allows the Commission to request for the Court to impose a financial penalty already in its first judgment under art. 258 TFEU, but only where the case concerns failure to notify implementing legislation for a Directive within the set deadline.

It should be noted in this regard that the EU can only harmonise areas of law in which it has competence. On the basis of arts 2 to 6 TFEU, the Union does not have competences in the area of democracy or human rights. The protection of democratic values could, however, be incorporated into secondary legislation adopted on the basis of another competence, for instance the competence to harmonise the internal market pursuant

[185] Art. 21 TEU, discussed in section III of this *Article*, is relevant for the meaning of the value of democracy in EU law, but it does not provide any specific democratic obligations for Member States.

art. 114 TFEU. For example, if the EU were to adopt harmonisation that includes a prohibition for Member States not to ban LGBT+ content and if Hungary would not change its current legislation,[186] financial penalties may be imposed by the Court directly under art. 260(3) TFEU in the Court's first judgment under art. 258 TFEU.

Examples of harmonisation measures that include specific safeguards for the value of democracy already exist. An example of harmonisation of EU values can be found in art. 9 of the Audiovisual Media Services Directive, on the basis of which the Commission is launching an infringement procedure against Hungary and its recent anti-LGBT legislation.[187] The provision requires of Member States to ensure that audiovisual commercial communications provided by media service providers under their jurisdiction comply with several requirements. Requirements include *e.g.* that audiovisual commercial communications shall not "include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation".[188]

The introduction of such a clause with a focus on democracy related values such as freedom of speech would, therefore, introduce a possibility for direct enforcement through art. 258 TFEU in combination with an immediate financial penalty under art. 260(3) TFEU. In its announcement of its infringement procedure, the Commission furthermore expressly states it believes that the Hungarian anti-LGBT law does not only infringe upon the right not to be discriminated against, but also upon the freedom of expression and information and art. 2 TEU.[189] This is all the more proof that clauses similar in nature to art. 9(1)(c)(ii) of the Audiovisual Media Services Directive could be an effective remedy to protect against specific breaches of the value of democracy by Member States.

Finally, even if art. 260(3) TFEU is not applicable because, for instance, such safeguards for democracy are not included in a Directive but in a Regulation, art. 260(2) TFEU would still allow for the imposing of financial penalties for violations of EU law. This would, however, be more burdensome because it requires a second procedure to be activated after the Court has established a violation of EU law under art. 258 TFEU.

b) Art. 263 TFEU

Art. 263 TFEU contains the action for annulment, which can be used to challenge the legality of legislative acts and other legal acts of EU institutions. Since art. 263 TFEU cannot be used

[186] Hungarian Act no 79/2021 of 15 June 2021 on Stricter Charges Against Paedophile Criminals and the Modification of Acts on Protection of Children. See also J Rankin, 'Hungary Passes Law Banning LGBT Content in Schools or Kids' TV: New Legislation Outlaws Sharing Information Seen as Promoting Homosexuality with Under-18s' (15 June 2021) The Guardian www.theguardian.com.

[187] European Commission, 'EU Founding Values' cit.

[188] Art. 9(1)(c)(ii) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services.

[189] European Commission, 'EU Founding Values' cit.

to challenge acts of Member States. this procedure seems an unlikely candidate for enforcing the value of democracy against Member States. It is, however, relevant for the purpose of enforcing a specific interpretation of art. 10 TEU. As analysed in section III.2. above, under Cotter's interpretation of art. 10 TEU, acts of EU law that have been adopted with the consent of the European Council or the Council, including the government representative of a non-democratic government, violate EU law. In such a case, the act was adopted by an unlawful composition of the (European) Council. While this interpretation is not unproblematic,[190] it may indeed be invoked in an action for annulment against the relevant EU act.

Individual litigants rarely meet the criteria for starting a procedure under art. 263 TFEU, as the act that they seek to challenge must be of direct and individual concern to them, unless the act is a regulatory act which does not entail implementing measures and which is of direct concern to them. Since *Plaumann*,[191] the CJEU has interpreted the criterion of individual concern very strictly, which makes it almost impossible for individuals to directly challenge generally applicable EU legislation.[192] Individuals could challenge the legality of such acts at national level, however, by challenging a national implementing measure before a national court and asking the national court to refer the matter to the CJEU. This possibility will be discussed further in section IV.3. below.

On the other hand, the Member States, the European Parliament, the Council and the Commission may always bring an action for annulment. The easiest way to test Cotter's interpretation of art. 10 TEU, therefore, would be for the European Parliament, the Commission, or even another Member State to challenge the legality of an act that has been adopted with the consent of the (European) Council, arguing that the (European) Council is not lawfully composed if any of its members represents a non-democratic Member State.

The problem with this procedure, even if Cotter's problematic interpretation of art. 10 TEU is right, is of course that it does not address the undemocratic nature of the Member State concerned, nor can it change any specific violations of the value of democracy by a Member State. In fact, if successful, the procedure could create more chaos by possibly disrupting all legislative and non-legislative decision-making in the (European) Council. At best, the enforcement of art. 10 TEU could put more legal and political pressure on undemocratic Member States to reform their national law.

[190] See further section III.2. of this *Article*.

[191] Case C-25/62 *Plaumann & Co. v Commission of the European Economic Community* ECLI:EU:C:1963:17.

[192] Case C-263/02 *Commission of the European Communities v Jégo-Quéré & Cie SA* ECLI:EU:2004:210; case C-50/00 *Unión de Pequeños Agricultores v Council of the European Union* ECLI:EU:C:2002:462. For critical analysis, see *e.g.* in case C-50/00 *Unión de Pequeños Agricultores v Council of the European Union* ECLI:EU:C:2002:197, Opinion of AG Jacobs; T Tridimas and S Poli, 'Locus Standi of Individuals under Article 230(4): The Return of Euridice?' in A Arnull, P Eeckhout and T Tridimas (eds), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford University Press 2009); LW Gormley, 'Judicial Review: Advice for the Deaf?' (2005) Fordham International Law Journal 655.

IV.3. Decentralised enforcement

Apart from at a centralised level, EU law can furthermore be enforced at a decentralised or national level. The following section will discuss the possibility for enforcement of the value of democracy through direct effect and indirect effect. Finally, this section will discuss the general pitfalls of decentralised enforcement when dealing with undemocratic Member States.

a) Direct effect

Direct effect entails that a provision of EU law becomes the immediate source of law before a national court.[193] As is well-known, the principle of EU law was first introduced in the *Van Gend en Loos* judgment, which decided that Treaty provisions may have direct effect if they are *i)* sufficiently clear and precise; and *ii)* unconditional. In *Marshall*, the CJEU introduced a third criterion, applicable to directives, namely that there can be direct effect if the respective Member State failed to implement a directive or failed to implement the directive correctly.[194] Direct effect may create a new rule, which did not exist in national law yet or, alternatively, exclude the application of an existing national rule.[195] Case law subsequent to *Van Gend en Loos* has expanded the scope of direct effect to other sources of Union law, such as Treaty and Charter provisions.[196] The next sections discuss which substantive parts of the value of democracy may be enforced by national courts through the direct effect of Union law, starting with art. 2 TEU.

[193] M Bobek, 'The Effects of EU Law in the National Legal Systems' in C Barnard and S Peers (eds), *European Union Law* (3rd edn, Oxford University Press 2020) 157; B de Witte, 'Direct Effect, Primacy and the Nature of the Legal Order' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (2nd edn Oxford University Press 2011); R Schütze, 'Direct Effects and Indirect Effects of Union Law' in R Schütze and T Tridimas (eds), *Oxford Principles of European Union Law: Volume 1: The European Union Legal Order* (Oxford University Press 2018).

[194] Case C-26-62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* ECLI:EU:C:1963:1; case C-152/84 *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority* ECLI:EU:C:1986:84.

[195] M Bobek, 'The Effects of EU Law in the National Legal Systems' cit. 160.

[196] See *e.g.* case C-2/74 *Jean Reyners v Belgian State* ECLI:C:1974:68 para. 14; case C-43/75 *Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena* ECLI:EU:C:1976:56 paras 21-24; case C-93/71 *Orsolina Leonesio v Ministero dell'agricoltura e foreste* ECLI:EU:C:1972:39; case C-9/70 *Franz Grad v Finanzamt Traunstein* ECLI:EU:C:1970:78; case C-41/74 *Yvonne van Duyn v Home Office* ECLI:EU:C:1974:133 para. 12; see *e.g.* case C-414/16 *Egenberger* ECLI:EU:C:2018:257; case C-68/17 *IR* ECLI:EU:C:2018:696; case C-193/17 *Cresco Investigation* ECLI:EU:C:2019:43; case C-537/16 *Garlsson Real Estate and Others* ECLI:EU:C:2019:193. See also L Squintani and J Lindeboom, 'The Normative Impact of Invoking Directives: Casting Light on Direct Effect and the Elusive Distinction between Obligations and Mere Adverse Repercussions' (2019) Yearbook of European Law 18, 22.

b) Direct effect of Article 2 TEU

At face value, art. 2 TEU does not appear to be sufficiently clear. After all, art. 2 TEU provides a set of abstract values of which the exact content is not immediately clear. For this reason, the values in art. 2 TEU are as such most likely not justiciable.[197]

However, as previously discussed, some of the core aspects of the value of democracy are concretised in the Copenhagen criteria.[198] Although the Copenhagen criteria do not determine the content of art. 2 TEU, they do provide authoritative guidelines on what constitutes the essence of democracy.[199] In this light, it can be argued that art. 2 TEU is sufficiently clear and unconditional when it comes to the *essence* of democracy, such as the existence of fair elections. This is similar to the Court's approach in *Defrenne*, where the Court held that although art. 157 TFEU as such is not unconditional, it did provide for an unconditional and justiciable right not to be *directly* discriminated against on the basis of sex.[200]

Therefore, applying *Defrenne* by analogy would mean that art. 2 TEU is directly effective if it is invoked against a national law that clearly violates the essence of democracy. An example of a violation of the essence of democracy could be a clear violation of the key aspects of the Copenhagen criteria, such as the *trias politica* and a democratic electoral system. One might imagine that abolishing or indefinitely postponing parliamentary elections, or obstructing elections by gerrymandering, is such a clear violation of the essence of democracy that art. 2 TEU could be invoked directly against this violation. As the Court held in *Repubblika v Il-Prim Ministru*, Member States have a legal obligation not to reduce the protection of the values of art. 2 TEU.[201] In the context of the value of the rule of law, the Court held that this value is given justiciable concrete expression in art. 19 TEU.[202] Insofar as there is a concrete essence of the value of democracy, such as parliamentary elections, one could argue that this concrete essence can also be directly enforced against Member States at national level. It can be argued in this context that art. 2 TEU does not necessarily engender a subjective right to democracy for individuals. However, in case law surrounding mainly environmental law, this requirement has taken a back seat.[203] As such, I argue that this requirement does not stand in the way of the direct effect of art. 2 TEU.

[197] In the meaning of P Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law' (2015) ELR 135. This is a republication, as the piece was originally published in (1983) 8 ELR 155. See, however, KL Scheppele, D Kochenov and B Grabowska-Moroz, 'EU Values Are Law, after All' cit.

[198] See section II.2. of this *Article*.

[199] See the analysis in sections II.2. of this *Article*.

[200] *Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena* cit.

[201] *Repubblika v Il-Prim Ministru* cit. para. 63.

[202] *Ibid*.

[203] See *e.g.* case C-72/95 *Kraaijeveld and Others* ECLI:EU:C:1996:404; case C-244/12 *Salzburger Flughafen* ECLI:EU:C:2013:203; case C-51/76 *VNO* ECLI:EU:C:1977:12.

In such a case, art. 2 TEU will require the national court to disapply the relevant national law or decision. It is of course somewhat doubtful whether a Member State in which parliamentary elections are abolished, or the essence of democracy is otherwise violated, would still have a sufficiently independent judiciary that would be willing to disapply such acts.

c) Direct effect of art.10 TEU

Whether art. 10 TEU has direct effect is more difficult to establish. On the one hand, art. 10 in the reading of Cotter[204] is rather clear and unconditional: governments representing a Member State in the European Council and Council must be democratically legitimised based on a national level on a representative basis for acts adopted by these institutions to be valid.[205]

As discussed above, this interpretation would allow for an action for annulment against any EU act that has been adopted with the consent of the European Council or the Council. In light of the *Plaumann* criteria related to individual concern, individual litigants are unlikely to have standing under art. 263 TFEU. These individuals could, however, challenge the legality of the EU act by challenging a national implementing act before a national court. This does require the existence of an implementing act that can in fact be challenged under national administrative or private law.

Since art. 10 TEU is, in Cotter's reading, sufficiently clear about the requirements of a lawful composition of the European Council and of the Council, art. 10 TEU could then be directly relied upon in a challenge against a national implementing act. National courts are, however, not allowed to declare EU acts invalid.[206] If a court doubts the validity of the respective EU act, it must refer a preliminary question to the CJEU.[207] This would allow the CJEU to rule on the proper interpretation of art. 10 TEU and whether the EU act concerned is invalid.

An advantage of this decentralised route is that it is not required that the EU act is challenged in an undemocratic Member State. Any individual in any Member State could challenge the validity of national measures implementing the EU act adopted with the consent of the (European) Council, creating virtually unlimited opportunities to address the undemocratic nature of a Member State through its representation in the European Council or the Council. As noted in section IV.2. above as well, however, even if Cotter's interpretation of art. 10 TEU will prove to be correct, this will not directly address a violation of the value of democracy. It will merely put additional pressure on the Member State concerned by effectively blocking all EU action that requires the consent of the European Council or the Council.

Furthermore, art. 10 TEU may also be directly invoked against a Member State whose government is not democratically accountable, as discussed above in the context of art. 258 TFEU. The same approach could possibly be used by individual litigants, who could

[204] J Cotter, 'The Last Chance Saloon' cit.
[205] See section III.1 of this *Article*.
[206] Case C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* ECLI:EU:C:1987:452 paras 15-18.
[207] *Ibid*.

invoke art. 10 TEU directly before a national court against any measure of an allegedly non-democratically accountable government. This would however require a possibility under national procedural law to challenge such a measure.[208] Since art. 10 TEU quite clearly stipulates that the governments of the Member States are democratically accountable, however, it seems that this provision provides a sufficiently clear and unconditional obligation for Member States.

As to Regulation 1141/2014, which has been discussed above as a specific implementation of art. 10(4) TEU, this Regulation is directly applicable in the Member States. It can therefore be directly invoked against national political parties – including majority parties associated with undemocratic or illiberal governments – which want to be active in European Parliamentary elections and which violate any of the provisions of Regulation 1141/2014.[209]

d) Direct effect and democracy in the Charter

As discussed above, applicable rights in the Charter may have direct effect when they are sufficiently clear and unconditional. Assessing whether a right is sufficiently clear and unconditional should be done on a right-by-right basis. We know that art. 27 of the Charter does not have direct effect as it is not considered sufficiently clear and unconditional. In *AMS*, the CJEU held that art. 27 "by itself does not suffice to confer on individuals a right which they may invoke as such".[210] Ultimately, the Court rules that for art. 27 of the Charter to have full effect, it must be given more specific expression in EU or national law.[211]

The provisions in the Charter that relate to democracy do not leave as much open for interpretation. For example, art. 11 on the freedom of expression and information does not contain any ambiguous or open-ended norms similar to those we see in art. 27 of the Charter. The provision is clear and precise and much closer in nature to, for example, art. 21, which was previously confirmed by the Court to have direct effect.[212] After all, arts 11 and 21 are absolute in the same manner. Where art. 11 claims that *everyone has the right* to freedom of expression, art. 21 deals with *any discrimination*. Similarly, art. 11 decides that the freedom and pluralism of the media *shall be respected*, whilst art. 21 reiterates that any discrimination on grounds of nationality *shall be prohibited*. Neither of the aforementioned provisions make mention of any "appropriate level" or some indistinct time constraint.

The same is applicable to art. 10, which decides that *everyone has the right* to freedom of thought, conscience and religion, and art. 12 which provides that *everyone has the right* to freedom of peaceful assembly and to freedom of association. Considering the above, arts 10, 11 and 12 are arguably all sufficiently clear and precise and therefore have direct effect.

[208] On possible problems related to national procedural autonomy, see section IV.3.f below.

[209] See for a comprehensive analysis of Regulation 1141/2014 J Morijn, 'Responding to "Populist" Politics' cit. 617. See also Regulation No 1141/2014 cit. Preamble, recital 12.

[210] Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT and Others* ECLI:EU:C:2014:2 para. 49 (*AMS* hereafter).

[211] *Ibid*. cit.

[212] See *e.g*. *Egenberger* cit.; *IR* cit.; *Cresco Investigation* cit.

This does, however, not mean that arts 10, 11 and 12 are always applicable. After all, the Charter only applies to national measures implementing EU law,[213] which means national measures that are within the scope of EU law.[214] This brings with it some inevitable limitations to the applicability of direct effect, ultimately reducing the possibility to enforce Charter provisions that are associated with the value of democracy. For a national measure to fall within the scope of EU law, required is either a cross-border effect[215] or relevant EU harmonisation that regulates the subject-matter of the national measure.[216] For instance, the recent Hungarian anti-LGBTIQ law, according to the Commission, falls within the scope of EU law because it affects the free movement of goods and services.[217] Therefore, the Charter is applicable. The freedom of expression, the freedom of thought and the freedom of assembly and association could likewise be enforced against all measures which hinder any of the fundamental freedoms, also by individual litigants before national courts.

e) Indirect effect

Apart from direct effect, indirect effect may also be effective for enforcing EU law. This section analyses the possibility for indirect effect in light of art. 2 TEU, art. 10 TEU and the Charter. Indirect effect or consistent interpretation requires that national institutions interpret national law in a manner that is consistent with EU law.[218] This stands even when the non-conforming national norm was adopted a long time before the relevant EU law came into force.[219] Indirect effect is mostly known and used in the context of directives, but applies to all EU law: national courts are obliged to interpret all of their national law, as much as possible, in conformity with all of EU law.[220]

However, indirect effect is only possible within the scope of the interpretative methods recognised by national law.[221] Second, indirect effect may be limited by general principles of law, such as legal certainty, legitimate expectation and non-retroactivity.[222] Such

[213] Art. 51(1) of the Charter.

[214] *Åklagaren v Hans Åkerberg Fransson* cit.; case C-206/13 *Cruciano Siragusa v Regione Sicilia*, ECLI:EU:C:2014:126.

[215] *E.g.* case C-368/95 *Familiapress v Bauer Verlag* ECLI:EU:1997:325; case C-201/15 *AGET Iraklis* ECLI:EU:C:2016:972.

[216] *E.g. Åklagaren v Hans Åkerberg Fransson* cit.

[217] European Commission, 'EU Founding Values' cit.

[218] M Bobek, 'The Effects of EU Law in the National Legal Systems' cit. 168. See also case C-14/83 *von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* ECLI:EU:C:1984:153, for the first application of indirect effect in the case law of the CJEU.

[219] Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* ECLI:EU:C:1990:395.

[220] Joined cases C-397/01 to C-403/01 *Bernhard Pfeiffer and Others v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* ECLI:EU:C:2004:584 para. 114.

[221] M Bobek, 'The Effects of EU Law in the National Legal Systems' cit. 172.

[222] See *e.g.* case C-105/14 *Taricco and Others* ECLI:EU:C:2015:555; case C-42/17 *Criminal proceedings against M.A.S. and M.B.* ECLI:EU:C:2017:936. See also for a more detailed analysis see case C-574/15 *Criminal proceedings against Mauro Scialdone* ECLI:EU:C:2017:553, opinion of AG Bobek, paras 137–181.

principles may weigh heavily in cases in which consistent interpretation would be to the detriment of an individual in horizontal relationships, as well as in reverse vertical relationships.[223] In particular, consistent interpretation may not lead to or increase criminal liability.[224] Third, a provision of national law may not be interpreted *contra legem* or "against the law".[225] This means that national law may not be bend and twisted into something that it is clearly not. In the words of former Advocate General Sharpston, "an artificial or strained interpretation of national law" is to be avoided."[226]

Member States must always consider the values of art. 2 TEU. This is drawn from the "retained powers formula", which holds that whilst the Union may not infringe upon the competences of the Member States, Member States must exercise their powers in compliance with EU law.[227] It is difficult to establish whether a Member State acts in compliance with Union law when said provision of Union law is vague. However, based on my earlier *Defrenne* analogy, the value of democracy may have a core or an "essence" that can and should be taken into account by national courts in their interpretation of national laws.[228] Current president of the CJEU Koen Lenaerts takes it even further, alleging that national courts should apply a "respect-for-the-essence test" before carrying out a proportionality assessment.[229]

Art. 2 TEU may therefore be relevant through indirect effect, insofar as national courts are obliged to interpret all their national laws as much as possible in light of the value of democracy. Since it is mainly the "core" or "essence" of democracy that would be sufficiently clear to be of interpretive guidance to national courts, it is however doubtful whether, in practice, indirect effect can remedy violations of democracy. If the essence of democracy is harmed, it is quite likely that an attempt to interpret national law in conformity with the value of democracy leads to a *contra legem* interpretation. However, it

[223] M Bobek, 'The Effects of EU Law in the National Legal Systems' cit. 173.

[224] Case C-80/86 *Criminal proceedings against Kolpinghuis Nijmegen BV* ECLI:EU:1987:431.

[225] See *e.g. Egenberger* cit. para. 73. An example of *contra legem* interpretation can be found in the *Impact* case. In this case, an Irish law could be interpreted to be in conformity with EU law if applicated retrospectively. A different Irish law, however, precluded the retrospective application of legislation unless there was a clear and unambiguous indication to the contrary, see case C-268/06 *Impact v Minister for Agriculture and Food and Others* ECLI:EU:C:2008:223 para. 103.

[226] Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* ECLI:EU:C:2006:755, opinion of AG Sharpston.

[227] L Azoulai, 'The "Retained Powers" Formula in the Case Law of the European Court of Justice: EU Law as Total Law?' (2011) European Journal of Legal Studies 192. See also J Lindeboom, 'Why EU Law Claims Supremacy' (2018) Oxford Journal of Legal Studies 328.

[228] Similarly, art. 52(1) of the Charter prescribes for fundamental rights to have an "essence" that cannot be derived from. See to this extent *e.g.* M Brkan, 'The Essence of the Fundamental Rights to Privacy and Data Protection: Finding the Way Through the Maze of the CJEU's Constitutional Reasoning' (2019) German Law Journal 864; K Lenaerts, 'Limits of Limitations: The Essence of Fundamental Rights in the EU' (2019) German Law Journal 779.

[229] K Lenaerts, 'Limits of Limitations' cit. 787-788.

cannot be excluded that national measures that possibly create a tension with the value of democracy could be interpreted in such a way that this tension is minimised. An example can be found in national laws related to judicial institutional reform, the *trias politica*, and checks and balances.[230] In such a situation, indirect effect of art. 2 TEU could direct national courts to respect the value of democracy as much as possible.

With regard to Cotter's interpretation of art. 10 TEU, on the other hand, no possibility for indirect effect exists. This is due to the fact that a decision made by the Council, or the European Council are EU decisions. In Cotter's interpretation of art. 10, a decision of the Council or the European Council in which a non-democratic national government took part, and which is therefore not democratically legitimised, would be invalid. No national act that can be contested in front of a national court therefore exists which makes indirect effect impossible.

Finally, the Charter may have indirect effect. The CJEU decided in *Egenberger* that national courts must interpret national law, as much as possible, in conformity with the Charter.[231] Still, for the possible applicability of indirect effect, the specific case must fall within the scope of EU law. As mentioned above, such a situation may present itself when there is applicable harmonisation which relates to the Charter. Additionally, the Charter applies when a Member State introduces a measure that derogates from the fundamental freedoms. For example, when a Member State introduces a measure that infringes upon the freedom of services and said Member State would want to justify said measure, said measure must be in in line with the Charter, as well as interpreted and applied in conformity with the Charter.[232]

A further challenge is posed by the limit of *contra legem* interpretation. National courts may be able to "interpret away" minor infringements of the value of democracy, for instance national laws that could encroach upon the freedom of expression if they are too broadly interpreted. It is unlikely, however, that national courts could interpret serious infringements in such a way that they are in line with Union law. Clear and serious violations of the value of democracy, including serious infringements of the Charter, can therefore unlikely be remedied using the doctrine of indirect effect. Direct effect of the relevant Charter provision would then be the only viable option.

f) General pitfalls of decentralised enforcement

Decentralised enforcement inevitably comes with its pitfalls. The first difficulty, especially with regard to direct effect, is the vagueness of the content of the value of democracy. This argument seems counterintuitive when read in conjunction with the rest of this *Article*. I have, after all, previously demonstrated that the value of democracy has been elaborated upon and pinpointed in a plethora of Treaty provisions, Charter provisions and official documents. There is, however, a somewhat unavoidable difference in willingness to apply the value of democracy between Member States and EU institutions.

[230] On the relevance of *trias politica* and checks and balances for democracy, see section II.2. of this *Article*.
[231] *Egenberger* cit. paras 74-76, 79.
[232] *Familiapress v Bauer Verlag* cit.; *AGET Iraklis* cit.

EU institutions, such as the Commission, ultimately want to protect fundamental values such as democracy. For them, appreciating that the value of democracy is much clearer than it has been given credit for is something positive and they will want to employ the value of democracy in their battle against breaches of fundamental values by Member States.[233] It is therefore likely that the clear aspects of the value of democracy will be used in centralised enforcement. Member States which fail to comply with the value of democracy, on the other hand, will not be keen to adhere to all of the aspects of democracy that I have previously detailed. These Member States will most likely allege that the value of democracy is too vague to have direct effect. Since direct effect is only relevant to decentralised enforcement before national courts, this may be problematic. Individual litigants will have to demonstrate that the provision(s) they are invoking have direct effect or that national courts should interpret their national laws in conformity with these provisions through the doctrine of indirect effect. It may be that national courts remain unconvinced that, for example, art. 2 TEU or art. 10 TEU are directly effective, or that they provide interpretive guidance which national courts must take into account in their interpretation of national law. Since there is no case law on the (in)direct effect of arts 2 and 10 TEU, preliminary reference procedures may be necessary.

This leads to the second pitfall of decentralised enforcement, namely the potential unwillingness of national courts to engage with the CJEU via the preliminary question procedure of art. 267 TFEU. National courts may not be willing to apply European values such as democracy or consider it binding law.[234] Such extreme unwillingness was, for example, portrayed in the Polish constitutional court's decision to disapply EU law, because allegedly Polish constitutional law has supremacy over European law.[235] Although the CJEU's case law has been very clear about the supremacy of EU law,[236] when national courts of Member States fail to acknowledge EU law supremacy, decentralised enforcement will be ineffective.

[233] This was recently illustrated by the already mentioned Commission's action against Hungary's anti-LGBTIQ law, see European Commission, 'EU Founding Values' cit.

[234] For an extensive discussion on whether EU values are binding law, see KL Scheppele, D Kochenov and B Grabowska-Moroz, 'EU Values Are Law, after All' cit. with further references.

[235] See Polish Constitutional Tribunal No K 3/21. The German *Bundesverfassungsgericht* decided similarly in the 1986 *Solange II* case, see BVerfGE 73, 339 [1987] 3 CMLR 225. However, it must be noted that the German court in the Solange II case ruled in favour of fundamental rights protection, whilst the Polish court effectively ruled against. The Polish case is therefore even more problematic compared to the Solange II case, which was already considered problematic at the time and not in line with the European legal order. This is emphasised by the Commission's response to the decision by the Polish constitutional court, see European Commission, 'Statement by the European Commission on the Decision of the Polish Constitutional Tribunal of 14 July' (STATEMENT/21/3726).

[236] See *e.g. Costa v ENEL* cit.; case C-11/70 *Internationale Handelsgeschellschaft mbH v Einfuhr- und Vorratsstelle für Getreide hund Futtermittel* ECLI:EU:C:1970:114; case C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* ECLI:EU:C:1978:49; case C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and Others* ECLI:EU:C:1990:257. For a more recent example, see *e.g. Stefano Melloni v Ministerio Fiscal* cit.

This is further accentuated by the lack of judicial independence in certain Member States, especially in combination with the doctrine of national procedural autonomy. When a government requires of judges to always rule in its favour, an environment is created in which judicial independence is no longer ensured. According to AG Bobek, this mirrors the current situation in Poland.[237] When there is no judicial independence and therefore no proper separation of powers, it is highly unlikely that breaches of the value of democracy by the government will be corrected by the judiciary.[238]

These challenges to the decentralised enforcement of the value of democracy are further reinforced by the doctrine of national procedural autonomy. The principle of procedural autonomy was first introduced the case of *Rewe-Zentralfinanz* and entails that Member States themselves have the autonomy to "determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law".[239] Therefore, the effectivity of decentralised enforcement depends on the procedural rules of individual Member States. Stricter procedural rules make it harder for citizens to appear in front of national courts and to demand their rights derived from the (in)direct effect of Union law to be respected.

Nonetheless, there are limits to Member State procedural autonomy in the form of two principles, already preluded in the *Rewe-Zentralfinanz* judgment.[240] First, the principle of equivalence requires that procedures involving the rights of individuals provided for by EU law cannot be less favourable than those involving similar procedures based merely on national law.[241] Second, the principle of effectiveness demands that the conditions laid down by domestic rules may not make it impossible in practice for individuals to have their rights derived from EU law protected before national courts.[242] The principles of equivalence and effectiveness could, in theory, address the problem of procedural hurdles preventing the effective enforcement of EU values. If the limits to procedural autonomy are invoked by individuals challenging national legislation, this still requires the national court

[237] *Prokuratura Rejonowa w Mińsku Mazowieckim v WB and Others*, opinion of AG Bobek cit.

[238] This is, once again, portrayed by the Polish constitutional course in its recent judgment on the supremacy of Polish constitutional law, see Erlanger and M Pronczuk, 'Poland Escalates Fight with Europe Over the Rule of Law: Hungary and Poland are Fighting with Brussels over Values and Rule of Law. So, After a Fashion, is Germany' (15 July 2021) The New York Times www.nytimes.com.

[239] Case C-33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* ECLI:EU:C:1976:188. See for a more recent example of the same doctrine, case C-3/16 *Lucio Cesare Aquino v Belgische Staat* ECLI:EU:C:2017:209 para. 48.

[240] *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* cit.

[241] *Ibid*. See also case C-326/96 *B.S. Levez v T.H. Jennings (Harlow Pools) Ltd* ECLI:EU:C:1998:577 para. 39-41. Note, however, para. 42, which states that the principle of equivalence may not be interpreted as an obligation for Member States to extend their most favourable national procedural rules to all actions based on EU law.

[242] *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* cit.: "[t]he position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect". See also case C-199/82 *Amministrazione delle Finanze dello Stato v SpA San Giorgio* ECLI:EU:C:1983:318 para. 14.

to disapply the procedural rules in question, or at least refer preliminary questions on this matter to the CJEU. As can be seen in Poland, however, judges can be actively discouraged from referring preliminary questions. Centralised enforcement against excessively burdensome procedural rules, using art. 258 or 259 TFEU, can also be cumbersome and time-consuming. Moreover, even if successful, such enforcement by itself does not address violations of the value of democracy. At best, it would lower the procedural hurdles to the enforcement the value of democracy at the national level.

Finally, there are some pitfalls even when a national court is willing and able to protect the value of democracy in a specific case in the form of longwinded procedures due to the necessity of a preliminary reference.[243]

V. Conclusion

It is difficult to enforce art. 2 TEU as such, given the fact that art. 7, *lex specialis* in respect of enforcement of art. 2, is notoriously hard to trigger. Furthermore, since art. 2 TEU refers to abstract values, it is unclear what these values mean exactly. This means that values such as "democracy" may not be justiciable as such.

The core of art. 2 TEU has, however, been further concretised in the Copenhagen criteria. It is often thought that the Copenhagen criteria cannot be enforced against States once they have joined the Union. It is true that the Copenhagen criteria cannot be directly imposed. However, due to the nature of the Copenhagen criteria as an explanation of the principle of democracy in EU law, the Copenhagen criteria may be imposed on Member States through art. 2 TEU. This means that the "core" content of the value of democracy could be identified and includes in particular the existence of a parliamentary democracy, checks and balances, and a robust electoral system. This *Article* has demonstrated that the Copenhagen criteria have clarified the content of the value of democracy to a significant extent, which helps to identify possible ways to enforce democracy.

With regard to enforcement, a distinction should be made between centralised and decentralised enforcement. The abovementioned "core" or "essence" of art. 2 TEU could have direct effect in the same way that the abolition of discrimination between men and women in art. 157 TFEU has an essence that can be directly enforced. Thus, applying *Defrenne* by analogy, the core of the value of democracy could possibly be enforced at a national level. Certain core aspects of the value of democracy, especially if they have been concretised in other Treaty provisions or secondary legislation, could also be enforced through arts 258–260 TFEU. As this *Article* showed, art. 2 TEU is concretised in several other Treaty provisions, including in particular art. 10 TEU, art. 21 TEU and several Charter provisions. Most of these provisions can be enforced at an EU level. Several of them,

[243] In 2018, the average duration of a preliminary reference procedure was 16 months. See CJEU, 'Judicial Statistics 2018: the Court of Justice and the General Court Establish Record Productivity with 1,769 Cases Completed' (25 March 2019) curia.europa.eu.

moreover, are sufficiently precise and unconditional so that they may be enforced at national level, as well. This applies in any case to the freedom of expression, freedom of thought and the freedom of assembly and association, and perhaps also to the core of art. 10 TEU. These Charter provisions can also be enforced at central level through arts 258–260 TFEU. The unique nature of art. 10 TEU entails that it may even be enforced by challenging an EU act using the action for annulment in art. 263 TFEU.

Most of enforcement mechanism apply to specific manifestations of the value of democracy or the "core" of that value as identified by the Copenhagen criteria. The value of democracy as such remains subject to the specific procedure in art. 7 TEU. While enforcing democracy as such is unlikely to be successful due to the procedural difficulties of art. 7 TEU, multiple centralised and decentralised options remain available. Ultimately, enforcement of the principle of democracy within the EU requires a brick-by-brick approach, through which the value of democracy is enforced using small steps and in a variety of ways. This may not immediately solve the problem of undemocratic Member States, but it will ensure that Member States remain under pressure to adhere to the democratic obligations of EU membership.

This brick-by-brick approach to the enforcement of the value of democracy also applies to the enforcement of the other values of art. 2 TEU, including the rule of law. Two recent examples show that the brick-by-brick approach may be effective. The first example is the fact that the Commission in its enforcement of the rule of law against Poland not only triggered Article 7 TEU, but also started infringement proceedings on the basis of art. 19 TEU. The second example is the recent action of the Commission against the anti-LGBTIQ+ legislation in Hungary, which relied on democracy related aspects of the audiovisual media services Directive. Democracy and the rule of law are no longer merely abstract values enshrined in art. 2 TEU; they also appear at several other instances in the Treaties and are concretised in primary law, secondary legislation, and case law. As this *Article* has attempted to show, enforcement of all the aspects of the value of democracy is neither quick nor easy. Effective enforcement is, however, nonetheless necessary to uphold the value of democracy in the EU.

ARTICLES

THE *NE BIS IN IDEM* PRINCIPLE IN THE AGE OF BALANCING

GIORGIO ARDIZZONE*

TABLE OF CONTENTS: I. Dual-track proceedings and the current scope of protection. – II. The need for a clear notion of "idem". – III. The "sufficiently close connection in substance and time": ECtHR case-law post *A and B v Norway*. – IV. The "sufficiently close connection in substance and time": the unspoken balancing act engaged in by the ECtHR and an alternative criterion to assess whether there was a duplication of proceedings. – V. *Lis pendens* and *ne bis in idem*. – VI. Conclusion.

ABSTRACT: This *Article* analyses the issue of the compatibility with the *ne bis in idem* principle of the double-track sanctioning systems present in various European legal orders in the light of the case-law of the European Court of Human Rights and the Court of Justice of the European Union. In particular, after a reconstruction of the most significant case-law after the famous ruling *A and B v. Norway*, three main critical points are brought into focus: the divergences between the national and European case-law on the interpretation of the notion of *idem factum*, the difficult practical application of the close connection test between proceedings developed by the European Court of Human Rights, which can be seen as the precipitate of an unsatisfactory balancing act of opposing interests, and the possible extension of the *ne bis in idem* principle also to cases of *lis pendens*.

KEYWORDS: *ne bis in idem* – double-track enforcement systems – proportionality – tax – market abuse – *lis pendens*.

I. DUAL-TRACK PROCEEDINGS AND THE CURRENT SCOPE OF PROTECTION

In the legal systems of several European States, what are often referred to as "dual track" or "double-track" enforcement systems are still quite common. The combining of administrative and criminal sanctions for the same act is often used in national law as a device to strongly tackle business crimes deemed as particularly harmful, so as to ensure the immediate effectiveness of protection against the offences involved. Often by means of administrative sanctions, which are generally imposed more quickly than criminal ones[1] and without forgoing

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[1] For an overview of the use of administrative enforcement for business crime, see in the Italian literature CE Paliero, "La sanzione amministrativa come moderno strumento di lotta alla criminalità economica" (1993)

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the severity and stigma associated with criminal law. Indeed, such dual-track mechanisms are conceived as integrated sanctioning systems, further to which the State coordinates the two branches of enforcement with the precise intention of creating a unitary mechanism to eradicate the offences involved.[2] Currently such systems exist, for the most part, in tax matters[3] and in the field of market abuse,[4] both of which, incidentally, are areas of particular concern

Rivista trimestrale di diritto penale dell'economia 1021 and, within the European legal framework, M Luchtman, J Vervaele, 'Enforcing the Market Abuse Regime: Towards an Integrated Model of Criminal and Administrative Law Enforcement in the European Union?' (2014) New Journal of European Criminal Law 192.

[2] With regards to the Italian situation, for a complete overview of existing dual-track systems, see AF Tripodi, Ne bis in idem *europeo e doppi binari punitive: Profili di sostenibilità del cumulo sanzionatorio nel quadro dell'ordinamento multilivello* (Giappichelli 2023) 59 ff. More specifically, the author distinguishes between "cumulative" or "alternative" double-track systems depending on whether or not the persons against whom dual proceedings have been brought have a double penalty imposed on them, referring back to his earlier work: AF Tripodi, 'Cumuli punitivi, *Ne bis in idem* e proporzionalità' (2017) Rivista italiana di diritto e procedura penale 1055 ff. The distinction has recently been echoed by JI Escobar Veas, Ne bis in idem *and Multiple Sanctioning Systems* (Springer 2023) 162 ff., who talks about a "subsidiary" and "complementary" model. On this issue, see also A Weyembergh and N Joncheray, 'Punitive Administrative Sanctions and Procedural Safeguards: A Blurred Picture That Needs to Be Addressed' (2016) New Journal of European Criminal Law 190; H Satzger, 'Application Problems Relating to *ne bis in idem* as Guaranteed under art. 50 CFR/54 CISA and art. 4 Prot. no. 7 ECHR' (2020) Eucrim 213 ff.; M Kärner, 'Interplay between European Union Criminal Law and Administrative Sanctions: Constituent Elements of Transposing Punitive Administrative Sanctions into National Law' (2022) New Journal of European Criminal Law 42.

[3] In Italy, the main tax offences are sanctioned both administratively and criminally, and although the law provides for coordination mechanisms between the two branches of enforcement that should in theory ensure that procedural duplication does not lead to the imposition of a double penalty, in practice these are essentially disapplied by national courts. Cf. Supreme Court (Combined Criminal Divisions) judgments of 28 March 2013 n. 37424 and 37425. For a critique on this issue, cf. A Vallini, 'Il principio di specialità' in A Giovannini, A Di Martino and E Marzaduri (eds), *Trattato di diritto sanzionatorio tributario* (Giuffrè 2016) 291 ff. and, if I may be permitted, G Ardizzone, 'Il "volto attuale" del *ne bis in idem* nel sistema penal-tributario' (2022) Diritto penale contemporaneo – Rivista trimestrale, 213 ff. In France, on the contrary, the taxation system has adopted a double-track approach right from its very inception and has recently been deemed constitutional by the Conseil constitutionel – as opposed to that in financial matters – according to the "*réserve d'interprétation*" technique. In short, the mechanism does not contravene the French Constitution as long as one of the two authorities does not exclude on the merits the existence of the fact, the combination of penalties is applied only in cases of greater seriousness and, above all, the principle of proportionality of penalties is observed in the case of a joint sanctioning response. Compare with arts 1729 and 1741 *Code Général des Impôts* and Conseil constitutionnel Decision of 24 June 2016 n. 2016-545 QPC *M. Alec W. and others*. For a comment, see C Mascala, 'Cumul de poursuites et cumul de sanctions en matières boursière et fiscale: deux poids, deux mesures pour le Conseil constitutionnel' (2016) Recueil Dalloz 1839 ff.; V Peltier, 'Fraude fiscal: Non-cumul de sanctions' (2016) Les Nouveaux Cahiers du Conseil Constitutionel 132 ff.; F Stasiak, 'Cumul de poursuites: le Conseil constitutionel n'aurait pas dû statuer deux fois sur les mêmes faits' (2016) Revue de science criminelle et de droit pénal comparé 293 ff. Likewise, similar sanctioning systems in tax matters exist in many Nordic countries, like Iceland, Norway and Finland. For other considerations regarding this issue in the tax field, see also PJ Wattel, '*Ne bis in idem* and Tax Offences in EU Law and ECHR Law' in B Van Bockel (ed.), Ne bis in idem *in EU Law* (Cambridge University Press 2016) 167 ff.

[4] Compare with arts 184 ff. TUF (Legislative Decree 58/1998) and F D'Alessandro, *Regolatori del mercato*, enforcement *e sistema penale* (Giappichelli 2014) 101 ff. and, for the most recent amendments, F Mucciarelli, 'Gli abusi di mercato riformati e le persistenti criticità di una tormentata disciplina' (2018) Diritto

to the European Union, which has always taken great care to ensure high standards of protection of its financial interests, unquestionably affected by the wrongdoing in question. Indeed, it is certainly no coincidence that although art. 50 of the Charter of Fundamental Rights of the European Union (CFREU) codifies the *ne bis in idem* principle (which is also of intra-EU application), Directive 2003/6/EC allowed a double-track system regarding market abuse offences in order to better protect the stability of the European internal market. While the regulatory framework evolved for both market abuse and VAT fraud, the attention paid by the European Court of Justice (CJEU) to the effective protection of the interests safeguarded by dual-track systems is discernible right from the first decision in the matter in which it held that art. 50 CFREU was infringed by the combining of criminal and administrative sanctions when the latter are of a substantially criminal nature in the light of the Engel criteria but only where the penalties in the first set of proceedings are in and of themselves already effective, proportionate and dissuasive.[5]

It must be borne in mind that at the root of the doubts as to the lawfulness of such a system of penalties is the well-known concept of "criminal matter" developed by the European Court of Human Rights (ECtHR) starting with the famous leading case of *Engel v Netherlands*,[6] based on the equally famous three criteria – which are alternative and not cumulative[7] – aimed at verifying whether an offence is criminal in nature within the meaning of the European Convention on Human Rights (ECHR): *i)* the legal classification of the offence under national law, which is not decisive but constitutes, by the Court's own admission, a

penale contemporaneo 1 ff. As is well known, Italy was found to have breached the ECHR on that basis: cf. ECtHR *Grande Stevens v Italy* App n. 18640/10 [4 March 2014], more about which see more in detail section I. In France, a dual-track system similar to the Italian one remained in force for a long time but was declared unconstitutional by the *Conseil Constitutionel* and recently reformed so that today the administrative authority and the public prosecutor coordinate by choosing which one of them will alone prosecute the offence. Compare with Conseil Constitutionel Decision of 18 March 2015 n. 2014-453/454 QPC and 2015-462 QPC, *M John L. et a.* and art. 465(3)(6) of Code Monétaire et Financier (CMF). Moreover, on the basis of previous legislation, France was also found to have breached the ECHR for violation of the *ne bis in idem* principle with regard to the punishment of breaches of financial laws: cf. ECtHR *Nodet v France* App n. 47342/14 [6 June 2019], more about which see, more in detail, section III.

[5] Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105 para. 36. As for the legislative acts mentioned above, cf. Directive 1371/2017/EU of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law (whose recital 28 actually admonished Member States to respect fundamental rights, among which the *ne bis in idem* principle, in protecting European financial interests). For market abuse, Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse and Regulation EU 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC. See also J Tomkin, 'Sub art. 50' in S Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Bloomsbury Publishing 2021).

[6] ECtHR *Engel v Netherlands* App n. 5100/71 [8 June 1976].

[7] See *Grande Stevens v Italy* cit. para. 94 ff.

starting point;[8] *ii)* the intrinsic nature of the offence;[9] *iii)* the nature and degree of severity of the penalty.[10] In fact, once administrative offences are classified as substantially criminal on the basis of those factors, it is necessary to extend to them the guarantees enshrined in the ECHR, including *ne bis in idem*.

Alongside these integrated sanctioning systems, conceived from the very beginning at national level as a complementary response, it is possible that in some jurisdictions the same conduct is incidentally punished both under criminal and administrative law. This is the case, for example, for drink-driving resulting in a traffic accident[11] or of fighting in a public place for which a fine is envisioned for disturbing the peace, except that the persons involved are also liable to criminal prosecution for the injuries caused on the same occasion.[12] Unlike true dual-track mechanisms, in such cases the double prosecution originates from a mere contingency and is not the result of a criminal policy preordained to establish dual proceedings.

Nevertheless, in both cases, for the same material fact, the alleged offender is tried twice, thus generating particular tensions with the *ne bis in idem* principle. Indeed, it is well known how the extensive effect of the broad notion of "criminal matter"[13] and an

[8] *Engel v Netherlands* cit. para. 82.

[9] This second criterion takes into account numerous factors, such as how worthy of formal criminal protection the legal interest covered by the offence is, the general scope of the rule and the nature of the authority responsible for establishing the offence. With different emphases, cf. ECtHR *Bendenoun v France* App n. 12547/1986 [24 February 1994] para. 47; ECtHR, *Benham v United Kingdom* App n. 19380/92 [10 June 1996] para. 56; ECtHR *Jussila v Finland* App n. 73053/01 [23 November 2006] para. 38.

[10] This is the most relevant criterion used to date: for the relevant bibliography, see F Mazzacuva, *Le pene nascoste. Topografia delle sanzioni punitive e modulaizone dello statuto garantitico* (Giappichelli 2017) 26 ff.

[11] Such a situation is currently possible in various European countries like Italy, Austria and Croatia.

[12] Such an enforcement system exists, among others, in Croatia and, before the 2017 amendments, in Bulgaria: cf. art. 129(1) of the Criminal Code and art. 22(2) of the Administrative Offences and Penalties Act of 1969. The Bulgarian legislation was actually changed after a case brought before the ECtHR: cf. ECtHR *Tsonyo Tsonev v Bulgaria (No. 2)* App n. 2376/03 [14 January 2010] and, again, ECtHR, *Tsonyo Tsonev v Bulgaria (No. 4)* App n. 35623/11 [6 April 2021]. For a comment, see G Zaharova, 'The Influence of the Judgment of the European Court of Human Rights in the Case of Tsonyo Tsonev v Bulgaria' (2020) Eucrim 344.

[13] See *Engel v Netherlands* cit. To date, at least since *Öztürk v Germany*, it seems however that the purpose of the sanction is the decisive criterion: if it has a punitive aim exceeding what is necessary to merely make good the damage, the offence falls within the notion of criminal matter and the guarantees enshrined in the ECHR are applicable to the defendant. See ECtHR *Öztürk v Germany* App n. 8544/79 [21 February 1984] para. 53 ff. By way of example, in *Nykänen v Finland*, a tax surcharge of only EUR 1,700 was recognised as criminal in nature despite the small amount of the penalty due to its predominant punitive purpose. See ECtHR *Nykänen v Finland* App n. 11828/11 [20 May 2014] para. 40 ff. For the scope of the notion, cf. M Delmas-Marty (ed.), 'La "matière pénale" au sens de la Convention Européenne des droit de l'homme, flou du droit penal' (1987) Revue de sciences criminelle et de droit pénal comparé 819 ff.; F Mazzacuva, *Le pene nascoste* cit. 26 ff. Authors who agree about the expansive effect of the notion are, recently, Z Buric, '*Ne bis in idem* in European criminal law: moving in circles' (2019) European and Comparative Law Issues and Challenges 508; M Gómez, "*Non bis in idem* en los casos de dualidad de procedimientos penal y administrativo. Especial consideración de la jurisprudencia del TEDH' (2020) Revista para el Análisis del Derecho 429; JI Escobar Veas, Ne bis in idem *and Multiple Sanctioning Systems* cit. 3 ff.

approach to assessing the *idem factum*[14] based on the material fact have led to a gradual erosion of the lawfulness of such enforcement systems, culminating in the *Grande Stevens v Italy*[15] judgment, in which the ECtHR found art. 4 of Protocol No 7 ECHR to be violated by the double prosecution that the applicant had faced for a market abuse offence. It is no secret that for quite some time now both the ECtHR and the CJEU have downgraded the scope of the principle with reference to its application to double-track proceedings. Since the case of *A and B v Norway*,[16] the ECtHR has recognised a violation of *ne bis in idem* only if the two proceedings cannot be regarded as complementary. This complementary relationship would mean, in other words, that there is no "duplication" in a strict sense, but rather a single integrated set of proceedings.

To this end, the Court has developed a close connection test, which consists of a two-fold assessment, namely, a verification of the connection in time between the two proceedings and an analysis of the connection in substance between them on the basis of four factors: *i)* the foreseeability of the duality of proceedings; *ii)* the complementary nature of the purposes pursued by the two proceedings so that it is possible to consider that each of them is aimed at sanctioning different aspects of the social misconduct involved; *iii)* the coordination between the two proceedings aimed at avoiding, as far as possible, duplication in the gathering and assessment of evidence; *iv)* "above all", the overall proportionality of the integrated sanction, which should be ensured by means of an offsetting mechanism enabling the court in the second set of proceedings to take into account the sanction imposed at the end of the first ones.[17]

[14] As will be discussed in more detail below, the supranational courts have adopted a defendant-friendly approach in assessing the *idem* element that looks only at the concrete events without any regard for the legal classification of the act. Compare with C-436/04 *Van Esbroek* ECLI:EU:C:2006:165 para. 33 ff. for the CJEU and ECtHR *Zoluthukin v Russia* App n. 14939/03 [10 February 2009] para. 82 ff.

[15] *Grande Stevens v Italy* cit. commented on by AF Tripodi, 'Uno più uno (a Strasburgo) fa due: L'Italia condannata per violazione del ne bis in idem in tema di manipolazione di mercato' (9 March 2014) Diritto Penale Contemporaneo archiviodpc.dirittopenaleuomo.org.

[16] ECtHR *A and B v Norway* App n. 24130/11 and n. 29758/11 [15 November 2016] para. 132 ff. commented, among others, by F Viganò, 'La Grande Camera della Corte di Strasburgo su ne bis in idem e doppio binario sanzionatorio' (18 November 2016) Diritto Penale Contemporaneo archiviodpc.dirittopenaleuomo.org.

[17] *A and B v Norway* cit. para. 132. To be precise, the close connection test originated with reference to certain road traffic cases in which revocation of the driving licence was envisaged as an automatic sanction following particularly serious traffic offences. Cf. ECtHR *R.T. v Switzerland* App n. 31982/96 [30 May 2000]; ECtHR *Nilsson v Sweden* App n. 73661/01 [13 December 2005]. Subsequently, the test also came to be applied in certain cases in tax matters, where however a breach of *ne bis in idem* was always found with the exception of two situations relating to the automatic nature of the administrative penalty (ECtHR *Boman v Finland* App. n. 41604/11 [17 February 2015] para. 43) and the failure to appeal against the decision establishing the violation (ECtHR *Häkkä v Finland* App n. 758/11 [20 May 2014] para. 50 ff.). Compare with *Nykänen v Finland* cit.; ECtHR *Glantz v Finland* App n. 37394/11 [20 May 2014]; *Häkkä v Finland* cit.; ECtHR *Lucky Dev v Sweden* App n. 7356/10 [27 November 2014]; ECtHR *Rinas v Finland* App n. 17039/13 [27 January 2015]; ECtHR *Österlund v Finland* App n. 53197/13 [10 February 2015]; ECtHR *Kiiveri v Finland* App n. 53573/2012 [10 February 2015]; *Boman v Finland* cit. For a complete overview of the origin and affirmation of the close connection test, see *A and B v Norway* cit. para. 112 ff. and, among scholars, L Bin, 'Anatomia del *ne bis in idem*: da principio unitario a trasformatore

Leaving aside the issues posed by each individual parameter,[18] the factors "contaminate", so to speak, the *ne bis in idem* principle with various elements that are have nothing to do with the purely procedural logic of the principle[19] – such as compliance with the chronological factor and the overall proportionality of the penalty – and are difficult to apply in practice from the perspective of the predictability of decisions.[20] Nevertheless, the "sufficiently closely connected in substance and time" test now represents the standard of protection in ECtHR case-law,[21] and for its part the CJEU has also adopted a substantially homogeneous approach in ascertaining breach of the principle.[22] Indeed, the

neutro di principi in regole' (2020) Diritto Penale Contemporaneo 104 ff.; JI Escobar Veas, Ne bis in idem *and Multiple Sanctioning Systems* cit. 102 ff.

[18] For a general critique, see the dissenting opinion of Judge Pinto de Albuquerque in *A and B v Norway* cit. para. 40 ff. and, in the Italian literature, AF Tripodi, 'Cumuli punitivi, *ne bis in idem* e proporzionalità' cit. 1064 ff. and 1073; F Mazzacuva, '*Ne bis in idem* e diritto penale dell'economia: profili sostanziali e processuali' (2020) Discrimen 23; N Madia, Ne bis in idem *europeo e giustizia penale* (Cedam 2020) 174 ff.; F Consulich, 'Il prisma del *ne bis in idem* nelle mani del giudice eurounitario' (2018) Diritto penale e processo 955 ff. Furthermore, various criticism were voiced by AG Campos Sánchez-Bordona in his Opinion in the *Menci* case; see C-524/15 *Menci* ECLI:EU:C:2017:667, opinion of AG Sánchez-Bordona, para. 53 ff.

[19] It is well known that the same *nomen iuris* is used to indicate two guarantees: that of not being punished twice for the same act, including within the same trial (substantive *ne bis in idem*) and that of not being tried twice for the same offence, even if both proceedings end with an acquittal (procedural *ne bis in idem*). The guarantee codified internationally refers only to the procedural aspect of the principle: in that vein, for the ECHR, see Council of Europe, Guide on Article 4 of Protocol no. 7 to the European Convention on Human Rights, 31 August 2022, www.echr.coe.int and Council of Europe, Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 22 November 1984, rm.coe.int in which it is stated: "the aim of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings"; as for the CFREU, see case C-617/17 *Powszechny Zakład Ubezpieczeń na Życie* ECLI:EU:C:2019:283 in which the CJEU denied that art. 50 CFREU could be invoked in the case of double penalties for the same act imposed in a single set of proceedings. It is clear then that posing the proportionality of the sanction as a condition to be compliant with *ne bis in idem* confuses the two aspects of the guarantee. In the same vein, JI Escobar Veas, Ne bis in idem *and Multiple Sanctioning Systems* cit. 135 and, for the distinction between the two, 171 ff. In the Italian literature, see C Silva, *Sistema punitivo e concorso apparente di illeciti* (Giappichelli 2018) 94 ff.; G Ranaldi and F Gaito, 'Introduzione allo studio dei rapporti tra ne bis in idem sostanziale e processuale' (2017) Archivio penale 1.

[20] Compare with the dissenting opinion of Judge Pinto de Albuquerque in *A and B v Norway* cit. paras 46 and 73 and see also section IV.

[21] It has been applied in every decision since *A and B v Norway* except for the ECtHR's judgment in *Šimkus v Lithuania* App n. 41788/11 [13 June 2017]. For an overview of the subsequent case-law about the close connection test, see section III.

[22] Compare with case C-524/15 *Menci* ECLI:EU:2018:197; case C-537/16 *Garlsson Real Estate and Others* ECLI:EU:2018:193; joined cases C-596/16 and C-597/16 *Di Puma and Zecca* ECLI:EU:2018:192 commented on by A Galluccio, 'La Grande Sezione della Corte di Giustizia si pronuncia sulle attese questioni pregiudiziali in materia di bis in idem' (2018) Diritto penale contemporaneo 286 ff.; A Turmo, '*Ne bis in idem* in European Law: A Difficult Exercise in Constitutional Pluralism' (2020) European Papers www.europeanpapers.eu 1341 ff.; M Vetzo, 'The Past, Present and Future of the ne bis in idem Dialogue between the Court of Justice of European Union and the European Court of Human Rights: The Cases of Menci, Garlsson and Di Puma' (2018) Review of European Administrative Law 76 ff.; JI Escobar Veas, Ne bis in idem *and Multiple Sanctioning Systems* cit. 125 ff.

CJEU's approach, while not perfectly overlapping with that of the ECtHR, is nevertheless compatible with the teachings of the latter. It is true that in the CJEU's decisions the temporal factor is not taken into consideration and the various elements of the test are emphasised by means of the well-known horizontal clause in art. 52 CFREU in order to hold that the compression of the fundamental right is legitimate. Nevertheless, the different arguments employed in the reasoning adopted, although moving along parallel tracks, come to the same conclusions and complement each other, thus making it difficult to maintain that they are incompatible.

In this way, in contrast to a defendant-friendly interpretation of the *idem* criterion, which has proved capable of overstretching the scope of the principle, national courts have been able to restore the repressive effectiveness of double-track systems by leveraging the *bis* assessment, often considering lawful some multiple sanctioning systems that by contrast the ECtHR has been particularly strict in evaluating.[23]

The purpose of this *Article* is to propose solutions to the current interpretive conundrums that complicate the European case-law in the field, caused both by integrated sanctioning systems and other forms of combinations of sanctions that, although not designed by the legislature as complementary parts of a single enforcement mechanism, *de facto* give rise to double proceedings against the alleged offender. The *Article* will then deal with three main issues: *i)* the notion of *idem factum*, which is still the subject matter of discrepancies between supranational and national jurisprudence; *ii)* the superseding of the criterion of close connection in substance and time which, as will be seen, currently encompasses different yardsticks of assessment depending on the court that is performing the test; *iii) lis pendens* as a situation capable of triggering the preclusion of *ne bis in idem*.

In order to do so, for each of the issues mentioned above, the relevant case-law of the supranational courts will be analysed first, so as to offer a state-of-the-art overview regarding these topics. Subsequently, having thus shed light on the major problems of interpretation, recommendations will be formulated in order to fill the gaps and provide a modern version of *ne bis in idem* capable of offering adequate protection to citizens without leaving particularly important legal interests unprotected. Of course, in doing so,

[23] In Iceland, see Supreme Court of Ireland of 21 September 2017, *Bragi Gudmundur Kristjánsson*. In Italy, regarding only recent tax proceedings, compare with Supreme Court (Criminal Division III) judgment of 14 January 2021 n. 4439, commented by L Troyer, '*Ne bis in idem* e reati tributari: la Corte di Cassazione valuta concretamente legittimo il doppio binario sanzionatorio in tema di dichiarazione infedele' (2021) Rivista dei dottori commercialisti 272 ff., and Supreme Court (Criminal Division III) judgment of 20 January 2021 n. 2245. Even the Consitutional Court recognises such an approach: judgment of 24 October 2019 n. 222, commented on by M Scoletta, 'Legittimità in astratto e illegittimità in concreto del doppio binario punitivo in materia tributaria al cospetto del *ne bis in idem* europeo' (2019) Giurisprudenza commerciale 2649C ff. Also in competition law, the CJEU makes up for the effectiveness lost thanks to a defendant-friendly interpretation of the *idem* element through such an interpretation of the bis criterion: see case C-117/20 *Bpost* ECLI:EU:2022:202 and case C-151/20 *Nordzucker* ECLI:EU:2022:203 with comment by P Van Cleynenbreugel, '*Bpost* and *Nordzucker*: searching for the essence of *Ne bis in idem* in European Union Law' (2022) EuConst 357.

the pros and cons of the proposed solutions will also be analysed. Regarding issue *ii)*, in view of its particular relevance and the fact that it constitutes today the real "heart" of the balancing-of-rights test, it will first be necessary to analyse the different conclusions reached by the courts using the close connection test, also in order to highlight the contradictions. For this reason, the third and fourth section will both explore the issue and its possible solution.

On a final note, it is well known that the *ne bis in idem* principle is codified at supranational level by both art. 4 of Protocol No 7 ECHR and art. 50 CFREU. However, if the ECtHR looks only at the national dimension of the principle, the CFREU has a wider scope of application, encompassing also its transnational application between Member States.[24] This *Article* will not deal with the issues posed by the cross-border dimension of the principle, if not to briefly highlight the differences in its application within the borders of the same country, but instead will focus only on the challenges posed by double-track systems within the same jurisdiction. Consequently, the references to art. 50 CFREU and CJEU case-law must be read in this light.

II. The need for a clear notion of "*idem*"

It is common ground that the guarantee enshrined in art. 4 of Protocol No 7 ECHR can be triggered only if the two proceedings concern the same fact.[25] European case-law has long adopted an extensive approach in the definition of *idem factum*. More precisely, at least since the *Zoluthukin v Russia* judgment,[26] in order to assess the *idem* element the ECtHR verifies whether "the facts are the same or substantially the same" or "inextricably linked in time and space".[27] As does the CJEU, which has also recently extended that same

[24] J Tomkin, 'Sub art. 50' in S Peers and others (eds), *The EU Charter of Fundamental Rights* cit. 1404.

[25] Of the view that the idem element is the most difficult aspect to assess, see B Van Bockel, 'The European *ne bis in idem* Principle: Substance, Sources and Scope' in B Van Bockel (ed.), Ne bis in idem *in EU Law* (Cambridge University Press 2016) 47; art. 4 of Protocol No 7 ECHR and art. 50 CFREU both use the expression "offence". As will be seen, both the ECtHR and the CJEU focus today on the facts themselves despite the term actually used by the Convention and the Charter. Actually, among the supranational sources of law, only art. 20 of the Statute of the International Criminal Court (ICC) uses the word "conduct" to describe the *idem* element, for more about which see RS Aitala, *Diritto internazionale penale* (Mondadori 2021) 218 ff.

[26] *Zoluthukin v Russia* cit. para. 82 ff. For a comment on the notion of idem used ever since by the ECtHR, see P Whelan, *The criminalization of European Cartel Enforcement: Theoretical, Legal and Practical Challenges* (Oxford University Press 2014) 161; MÓ Floinn, 'The Concept of *idem* in the European Courts: Extricating the Inextricable Link in European Double Jeopardy Law' (2017) Columbian Journal of European Law 76 ff.; JI Escobar Veas, Ne bis in idem *and Multiple Sanctioning Systems* cit. 99 ff.

[27] Quotation from *Zoluthukin v Russia* cit. paras 82 and 84. Actually, before this decision, the Court's case-law was mixed: in some road traffic decisions, it had used the idem crimen approach or a hybrid criterion, examining whether the two proceedings concerned facts that had the same essential elements in common; cf. respectively, ECtHR *Oliveira v Switzerland* App n. 25711/9430 [30 July 1998] and ECtHR *Franz Fischer v Austria* App n. 37950/97 [29 May 2001]. See also L Bin, 'Anatomia del ne bis in idem' cit. 101 ff.; JI Escobar Veas, Ne bis

notion focusing on the material facts to competition law, where identity of the legal interests protected by the law imposing the sanctions has long been required.[28]

The wording used by the courts, however, has a congenital defect: it is too broad and abstract, and does not by itself make it possible to arrive at a notion of *idem factum* based on the material facts that can be applied homogeneously by national States.[29] Indeed, this lack of clarity is not without its repercussions. One can infer from the case-law of the ECtHR that the assessment of the identity of the facts must regard only the conduct of the agent[30] but, as will be seen, this is not the solution consistently adopted also by the national courts.

Nonetheless, the choice of focusing solely on the conduct of the agent is also the option that guarantees the maximum protection afforded by the *ne bis in idem* principle: citizen know that, once a judgement has been delivered on their action or omission, they cannot be called to answer again for the same behaviour even if classified differently from a legal point of view or if it has caused new natural events after a certain time.

Thus, by way of example, in the case of injuries caused by a person prosecuted for breach of the peace, the act has always been found to be the same even if the bodily harm caused to others was not considered in the first proceedings.[31] Again, the identity

in idem *and Multiple Sanctioning Systems* cit. 98 ff.; S Allegrezza, 'sub art. 4 Prot. 7' in R Bartoli, G Conforti and V Zagrebelsky (eds), *Commentario breve alla Convenzione europea dei diritti dell'uomo* (Cedam 2012) 894 ff.; A Procaccino, *I* bis in idem *tra diritti individuali e discrezionalità dell'apparato* (Cedam 2022) 38 ff.

[28] For the first decision in that sense, see *Van Esbroek* cit. para. 33 ff. For a general overview of the *idem* element in CJEU case-law, see JI Escobar Veas, Ne bis in idem *and Multiple Sanctioning Systems* cit. 122 ff. As for competition law, cf. *Bpost* cit. para. 31 ff.; *Nordzucker* cit. para. 36 ff. with comment by P Van Cleynenbreugel, '*Bpost* and *Nordzucker*' cit. 357 ff. Before those rulings, the CJEU actually required the identity of protected legal interests in competition law, thus giving rise to unequal treatment in the assessment of that criterion, which, solely with reference to anti-competitive conduct, was not concerned only with the concrete event: cf. case C-204/00 *Aalborg Portland A/S and Others v Commission* ECLI:EU:C:2004:6; case C-205/00 *Irish Cement v Commission* ECLI:EU:C:2002:333 para. 338 ff.; case C-17/10 *Toshiba Corporation* ECLI:EU:C:2012:72 para. 97. For a more complete examination of the development of the *idem factum* criterion in competition matters, see G Lasagni, 'La Corte di Giustizia e la definizione di *idem* nel diritto della concorrenza: verso la creazione di una nozione uniforme?' (2020) Giurisprudenza commerciale 11 ff.; S Schiavone, 'La nozione di "*idem*" nel dialogo tra le Corti: un unico criterio per una tutela effettiva, anche in materia di concorrenza' (2022) Cassazione penale 2826.

[29] For a general critique of the formula, see N Neagu, 'The *ne bis in idem* principle in the Interpretation of European Courts: Towards Uniform Interpretation' (2012) LJIL 955 and 971; MÓ Floinn, 'The Concept of *idem* in the European Courts' cit. 93 ff.

[30] Although the provision refers to the same "offence", the expression found in the case-law of the Court is that of "same conduct" or "même comportament": by way of example, see *Tsonyo Tsonev v Bulgaria (No. 2)* cit. para. 56; *A and B v Norway* cit. para. 145; ECtHR *Goulandris and Vardinogiannis v Greece* App n. 1735/13 [16 June 2022] para. 80; ECtHR *Milenković v Serbia* App n. 50124/13 [1 March 2016] para. 48; ECtHR *Muslija v Bosnia-Erzegovina* App n. 32042/11 [14 January 2014] para. 34; ECtHR *Butnaru and Bejan-Piser v Romania* App n. 8516/07 [23 June 2015] para. 36; *contra*, AF Tripodi, Ne bis in idem *europeo e doppi binari punitivi* cit. 127 who does not consider it to be a definite stance.

[31] Cf. ECtHR *Maresti v Croazia* App n. 55759/07 [25 June 2009] para. 62 ff.; *Tsonyo Tsonev v Bulgaria (No. 2)* cit. para. 51 ff.; *Milenković v Serbia* cit. para. 38 ff.; ECtHR *Igor Tarasov v Ukraine* App n. 44396/05 [16 June 206] para. 26 ff.; *Muslija v Bosnia-Erzegovina* cit. para. 32 ff.

of the fact has been found to exist in the case of two persons convicted of battery on foot of a final judgment and then re-tried for robbery, even though it is clear that the *actus reus* of each of the two offences does not overlap perfectly.[32] The same can be said, in tax matters, for the conduct of filing an incorrect tax return and altering bookkeeping entries, in which the ECtHR found again the facts to be the same.[33] Lastly, in a case of drink-driving followed by vehicular homicide, the ECtHR held that the first administrative proceedings, while not taking into account in any way the event of death caused by the offender, covered the same facts as the criminal proceedings.[34]

Yet, this approach, enshrined in the elastic formula used by the ECtHR, has not been able to penetrate fully into the minds of national courts. The situation in Italy is emblematic of the difficulty of circumscribing the notion of *idem* to conduct alone: the Constitutional Court, called upon in 2016 to rule on the issue as a result of a prevailing interpretation still rooted to the criterion of *idem crimen*,[35] concluded that the fact would be identical only whenever the "classification of the offence, considered with reference to all of its constituent elements (conduct, event, causal link) and with regard to the circumstances pertaining to the time, place and individual involved" fully coincide.[36] Moreover, the Court took the

[32] *Butnaru and Bejan-Piser v Romania* cit. para. 36.

[33] *Lucky Dev v Sweden* cit. para. 52 ff.

[34] See ECtHR *Bajcic v Croatiae* App n. 67334/13 [8 October 2020] in which the Court actually found no breach of the principle in consideration of the bis assessment: see infra. It is true that in some cases the ECtHR relies on pre-Zoluthukin case-law to legitimise an approach based on the *idem crimen* criterion, but this is rather infrequent: see ECtHR *Pirttmäki v Finland* App n. 35232/11 [20 May 2014] para. 51; an assessment of the idem element based not only on the conduct was also used by the ECtHR in *Trebalsi v Belgium* App n. 140/10 [4 September 2014] paras 31 and 37. However, that case regarded the transnational dimension of the principle which not only does not fall within the scope of the ECHR but also enjoys a lower standard of protection even within the European Union. The same happened with the *Kossowski* case: cf. C-486/14 *Kossowski* ECLI:EU:C:2016:483, which concerned a Member State wishing to prosecute an individual for aggravated battery committed with the intention of glorifying Nazism even if another State had already convicted the same individual for battery but without taking into consideration the hatred motives. It is clear that in the two above-mentioned cases the notion of *idem* is more restricted because the *ne bis in idem* principle has a very different scope depending on whether it has to be applied within the same jurisdiction or not. See also MÓ Floinn, "The Concept of *idem* in the European Courts' cit. 92.

[35] Before the 2016 ruling of the Constitutional Court, Italian case-law firmly adhered to the *idem crimen* criterion: cf. Supreme Court (Criminal Division II) judgment of 21 March 2013 n. 18376 and judgment of 28 November 2016 n. 51127, Supreme Court (Criminal Division I) judgment of 29 January 2014 n. 12943 and Supreme Court (Criminal Division V) judgment of 20 January 2016 n. 11918. For critiques on such an approach see, amongst many, A Pagliaro, voce "Fatto", *Enciclopedia del diritto, vol. XVI* (Giuffrè 1967) 954; C Bellora, '*Ne bis in idem* e reato progressivo: un pericoloso orientamento giurisprudenziale' (1990) Rivista italiana di diritto e procedura penale 1641 ff.; F Cordero, *Procedura penale* (Giuffrè 2012) 1206; D Pulitanò, 'La Corte costituzionale sul ne bis in idem' (2017) Cassazione penale 73 ff.; N Galantini, 'Il fatto nella prospettiva del divieto di doppio giudizio' (2015) Rivista italiana di diritto e procedura penale 1205 ff.; E Scaroina, 'Ancora sul caso Eternit: la "giustizia" e il sacrificio dei diritti' (2015) Archivio penale 897 ff.; *contra*, see P Rivello, 'La nozione di "fatto" ai sensi dell'art. 649 c.p.p. e le perduranti incertezze interpretative ricollegabili al principio del *ne bis in idem*' (2014) Rivista italiana di diritto e procedura penale 1422 ff.

[36] Constitutional Court judgment of 31 May 2016 n. 200 para. 8.

Zoluthukin judgment as a reference, and stated that no argument in favour of reducing the fact to conduct alone could be inferred from the elastic formula used.

The fallout of such an approach has led to numerous instances in which the ECtHR would certainly have deemed the *idem* element to be satisfied, while the Italian Supreme Court has invariably denied that the two proceedings involved concerned the same fact, with results that are not always satisfying in terms of protection of fundamental rights. For instance, in the case of a person who on foot of a final judgment had already been convicted of theft for having illegally connected to the electricity grid, a second trial was not held to be precluded for the burning down of the building caused by the same conduct, even though that event could have been attributed to the defendant at the first trial.[37] Likewise, it was not considered unlawful to hold a new trial for illegally altering land against two persons who had built two sections of a dirt road in the absence of authorisations and who, on foot of a final judgment, had already been judged for certain town planning and environmental offences.[38] Lastly, it was not considered that the material fact was identical either in the case of an anaesthetist already tried for grave personal injuries and then prosecuted again for manslaughter caused by the same act following the death of the patient[39] or in the case of a person already convicted on foot of a final judgment for bodily harm and then tried again for third degree murder for the same conduct.[40]

This is, on closer analysis, an excessive dilatation of the concept of *idem factum* which has not merely marginal repercussions on the subjection of individuals to the punitive power of the State. In the cases in question, the core is the same and is rooted in the offender's conduct: putting a citizen on trial for a second time for the same action or omission excessively reduces the scope of the guarantee enshrined in art. 4 of Protocol No 7 ECHR and art. 50 CFREU. It is also undoubtedly contrary to the principles of law expressed by supranational case-law. However, lacking a clear indication in that sense, national courts cling to the elastic formula used by ECtHR and CJEU to legitimise such overkill, so to speak. It would therefore be advisable for the ECtHR, guardian of the "minimum standard" of protection of fundamental rights, to better delimit this notion, circumscribing it to conduct alone.[41]

It is true that, in so doing, at least two problems would remain. From the point of view of harmonisation with the CJEU, the interpretative solution could generate friction on the aspect of the transnational application of *ne bis in idem*: the CJEU is concerned with the European dimension of the principle, which, as is well known, tends to have a lesser scope of protection.[42] For example, in the *Nordzucker* case, the CJEU clarified that the notion of

[37] Supreme Court (Criminal Division IV) judgment of 24 October 2017 n. 54986.
[38] Supreme Court (Criminal Division II) judgment of 31 October 2018 n. 52606.
[39] Supreme Court (Criminal Division IV) judgment of 2 March 2021 n. 10152.
[40] Supreme Court (Criminal Division V) judgment of 25 October 2021 n. 1363.
[41] Contra, see for all MÓ Floinn, "The Concept of *idem* in the European Courts' cit. 99 ff.
[42] As for the *idem* element, see *Kossowski* cit.

idem does not extend to the effects of the agent's conduct when they consist in distorting the interplay of competition in a market of a Member State other than the one in which the alleged offender was tried, thus not focusing only on the agent's conduct but also on its effects.[43] Essentially, the preclusion of double proceedings would not operate, due to the lack of identity of the facts, if a second Member State were to judge again the same conduct with reference to the effects produced within its own market that were not covered in the first set of proceedings. Nonetheless, if such a limitation can be justified on the basis that the same conduct is addressed in different jurisdictions, at least with regard to national *ne bis in idem* it would appear preferable to arrive at a solution that examines only the agent's act or omission.

Naturally the transnational scope of the guarantee is inevitably less extensive than the national one, affected as it is by the trust between the different States that would like to exercise jurisdiction. Limitations in this sense of the principle are numerous: suffice it to think of the *Kossowski* and *Trebalsi* cases[44] or the case-law of the CJEU on art. 54 of the Convention implementing the Schengen Agreement (CISA),[45] not to mention its application outside the EU.[46] Therefore, it does not seem that such an interpretative stance of the supranational courts can affect the domestic scope of *ne bis in idem*, which, on the other hand, must be further extended when it comes to guaranteeing the protection of citizens from repeated prosecution by the same State.

[43] *Nordzucker* cit. para. 41.

[44] For both, see *Kossowski* cit. and *Trebalsi v Belgium* cit. paras 31 and 37.

[45] Art. 54 CISA requires the execution of the sentence in case of conviction, thus having a narrower scope of protection than art. 50 CFREU. Nonetheless, such a limitation has always been held to be lawful by the CJEU: cf. case C-129/14 *Spasic* ECLI:EU:C:2014:586 para. 51 ff. On the transnational scope of the principle with regard to EU Law, see: J Vervaele, 'The Transnational *ne bis in idem* Principle in the EU: Mutual Recognition and Equivalent Protection of Human Rights' (2005) Utrecht Law Review 100; J Vervaele, '*Ne bis in idem:* Towards a Transnational Constitutional Principle in EU Law?' (2013) Utrecht Law Review 211; N Recchia, 'Il principio europeo del *ne bis in idem* tra dimensione interna e internazionale' (2015) Diritto penale contemporaneo 71; J Vervaele, 'Schengen and Charter-related *ne bis in idem* Protection in the Area of Freedom, Security and Justice: *M and Zoran Spasic*' (2015) CMLRev 1339; L Bin, 'Anatomia del ne bis in idem' cit. 108; H Satzger, 'Application Problems Relating to ne bis in idem as Guaranteed under art. 50 CFR/54 CISA and art. 4 Prot. no. 7 ECHR' cit. 213 ff.

[46] On an international level, other than the already mentioned art. 20 ICC Statute that regards conflicts of jurisdiction between the ICC and the national criminal courts, the ne bis in idem principle is recognised also in art. 14(7) of the International Covenant on Civil and Political Rights (ICCPR) but it does not actually bind another State to respect the outcomes of criminal proceedings in another country: in this vein, A Colangelo, 'Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory' (2009) Washington University Law Review 806 ff.; MÓ Floinn, 'The concept of *idem* in the European Courts' cit. 79. For more considerations on the transnational scope of the principle, cf. J Lelieur, '"Transnationalising" *Ne Bis In Idem*: How the Rule of *Ne Bis In Idem* Reveals the Principle of Personal Legal Certainty' (2013) Utrecht Law Review 198; N Galantini, 'Il *ne bis in idem* internazionale e i limiti alla sua applicazione' (2020) Processo penale e giustizia 537; V Mongillo, 'The Jurisdictional Reach of Corporate Criminal Offences in a Globalised Economy: Effectiveness and Guarantees "Taken Seriously"' in MÓ Floinn and others (eds), *Trasformations in Criminal Jurisdiction: Extraterritoriality and Enforcement* (Hart 2023) 85.

In this regard, the second problem that might arise concerns the excessive dilation of the principle that might result from the approach focused solely on the conduct, especially with reference to its infra-systemic application. For instance, criminal proceedings for vehicular homicide considered precluded by the imposition of an administrative penalty for drink-driving.[47] The challenge that the European courts are called upon to address concerns precisely such problems: how to provide adequate protection to situations that deserve to be brought under the application of the guarantee, such as the cases of injury-murder referred to above, without however neutralising criminal protection where necessary to protect legal interests of primary importance.

On this issue, a choice must be made: either the fact is identified with the conduct alone and an attempt is made to avoid the application of *ne bis in idem* in such cases by using the *bis* criterion or, as was actually done before *Zolothukin v Russia*,[48] different criteria are adopted such as *idem crimen* or a wider notion of material fact – including also the event and thus permitting the alleged offender to stand trial twice for the same conduct – but then seeking to ensure a sanctioning response proportionate to the offence. The first solution, I believe, is of greater merit: it would avoid the injustice of being subjected indefinitely to a web of criminal proceedings, without neutralising the necessary protection for legal interests such as life and physical integrity that the State has an obligation to protect. Unpersuasive on the other hand is the proposal, albeit put forward by authoritative scholars,[49] to circumscribe the notion of identity of the fact to just its legal classification: in order to evade the application of *ne bis in idem*, it would suffice that the law has legally classified the same act in different ways thereby legitimising *a priori* double-track repressive systems which, on the contrary, often find no justification but merely the useless duplication of costs borne by the individual when a single trial alone is capable of satisfying the system's need for retribution. In any case, it is necessary for the supranational courts to further clarify the notion of *idem* so as to avoid giving rise to divergences with national case-law that would be difficult to remedy.

[47] On this issue, MÓ Floinn, 'The Concept of *idem* in the European Courts' cit. 100, talks about "overprotection", criticising the ECtHR's judgment in *Franz Fischer v Austria* cit. The same need is felt overseas: cf. US Supreme Court, 1990, 495 U.S. 508, Grady v. Corbyn where the *idem crimen* approach was adopted. See AR Amar, 'Double Jeopardy Law made simple' (1997) Yale Law Review 1807. As for the current approach of the U.S. Supreme Court on this matter, see R Delfino, 'Prohibition on Successive Prosecutions for the Same Offence – In Search of the "Goldilocks Zone": The California Approach to a National Conundrum' (2017) American Criminal Law Review 423 ff.; JI Escobar Veas, Ne bis in idem *and Multiple Sanctioning Systems* cit. 11 ff.

[48] See *Oliveira v Switzerland* cit.

[49] See MÓ Floinn, 'The Concept of *idem* in the European Courts' cit. 101 ff., who suggests using an idem crimen approach and then utilising art. 6 ECHR to balance the narrowness of protection. See also B Van Bockel, *The ne bis in idem Principle in EU Law* (Kluwer Law International 2010) 231, who proposes a hybrid approach: while the criterion based on the material facts cannot be said to be overall incorrect, the legal classification of the act remains of paramount importance to shape the idem notion.

III. The "sufficiently close connection in substance and time": ECtHR case-law post *A and B v Norway*

It has been mentioned, after all, that the test of how closely connected the dual proceedings are has become the definitive standard of protection in ECtHR case-law precisely in order to contain the overwhelming effect that the extensive interpretation of the concept of *idem factum* has had.[50] In order not to systematically bring down all the double-track systems in force in the Council of Europe Member States, the ECtHR has resorted to a legal fiction, maintaining that it can assess whether or not there has been a double trial. In other words, the close connection in substance and time analysed above would allow the two proceedings to be classified as one, thus ruling out any violation of the guarantee. The same solution, but from a different perspective, has also been reached by the CJEU,[51] which however has conceded that in such cases there is a duplication of proceedings but has held that it is a legitimate limitation of the right enshrined in art. 50 CFREU on the basis of the well-known limitation of rights clause in art. 52 of that same Charter.[52]

Having thus defined the current scope of the guarantee, which cannot disregard the close connection test,[53] it is however interesting to note that, despite the various criticisms levelled at the new interpretative approach inaugurated with the judgment in *A and B v Norway*,[54] the ECtHR has shown itself to be particularly strict in verifying compliance with each element of the test, finding a breach of *ne bis in idem* within the various dual-

[50] It is no coincidence that in the *A and B v Norway* ruling several Member States of the Council of Europe intervened: see *A and B v Norway* cit. para. 87 ff.

[51] Cf. with *Menci* cit.; *Garlsson Real Estate and others* cit.; *Di Puma and Zecca* cit.

[52] Art. 52(1) CFREU reads as follows: "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others". For the use of this clause referring to the ne bis in idem principle and dual-track proceedings, see T Lock, 'Articles 48-50' in M Kellerbauer, M Klamert and J Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A commentary* (Oxford University Press 2019) 2239 ff.; JI Escobar Veas, Ne bis in idem *and Multiple Sanctioning Systems* cit. 125 ff. In particular, it was highlighted that, at the very least, while the ECtHR relies on a legal fiction considering two distinct sets of proceedings to be one, the CJEU actually recognises the limitation of the principle: see M Luchtman, 'The ECJ's Recent Case-Law on *ne bis in idem*: Implications for Law Enforcement in a Shared Legal Order' (2018) CMLRev 1748; G Lo Schiavo, 'The Principle of *ne bis in idem* and the Application of Criminal Sanctions: of Scope and Restrictions' (2018) EuConst 663; M Scoletta, 'Il principio del *ne bis in idem* e i modelli punitivi "a doppio binario"' (2021) Diritto penale contemporaneo 188.

[53] See Supreme Court of Iceland of 21 September 2017, Bragi Gudmundur Kristjánsson, cit.; Italian Supreme Court (Criminal Division III) judgment of 14 January 2021 n. 4439, cit.

[54] As alluded to above, the ruling was seen as putting the brakes on an evolutionary approach to *ne bis in idem*: cf. F Viganò, 'La Grande Camera della Corte di Strasburgo su *ne bis in idem* e doppio binario sanzionatorio' cit. para. 12; G Gaeta, 'Dove non arriva il principio: il *ne bis in idem* tra sanzioni tributarie e politica giudiziaria delle Corti superiori' (2018) Archivio penale 17; P Paulesu, '*Ne bis in idem* and Conflicts of Jurisdiction' in RE Kostoris (ed.), *Handbook of European Criminal Procedure* (Springer 2018) 401; JI Escobar Veas, Ne bis in idem *and Multiple Sanctioning Systems* cit. 94; Judge Pinto de Albuquerque was of the same view in his dissenting opinion, see the dissenting opinion of Judge Pinto de Albuquerque in A and B v Norway cit. para. 79 ff.

track systems in numerous cases brought to its attention.[55] More specifically, it is precisely with reference to the Member States' actual integrated sanctioning systems in the areas of taxation and market abuse that the close connection test has proved to be a merely *apparent* limitation of the guarantee since the ECtHR has never failed to find that art. 4 of Protocol No 7 ECHR has been violated in such instances.

In *Jóhannesson v Iceland*,[56] the first tax case after the close connection test had been established, the test was failed – despite the fact that the criminal court had taken the previous administrative sanction into account when determining the penalty – due to the insufficient coordination in collecting and assessing evidence and the excessive length of the second set of proceedings. More specifically, the fact that the criminal police carried out investigations autonomously and did not rely solely on the investigation carried out by the administrative authority was considered sufficient on its own to give rise to a lack of connection in substance.[57] In addition, the criminal proceedings were concluded approximately five years after the administrative ones after having proceeded in parallel for a little over a year, thus also breaking the close connection in time.[58]

The same outcome can be seen in *Ragnar Thorisson v Iceland*[59] and in *Bjarni Ármannsson v Iceland*:[60] the independence of the two prosecuting authorities in the collection and assessment of evidence and the fact that the two proceedings had not been conducted in parallel – in the first case – or had only overlapped for a few months – in the second – were evaluated as elements in themselves capable of arriving at a finding that combination was unlawful due to the lack of a close connection.[61] Even in these cases, however, the overall penalty could be said to be proportionate: the criminal court, taking into account the administrative sanction already imposed, had sentenced the applicants, respectively, to three and six months' imprisonment with suspended sentences and to the payment of a fine.

[55] Cf. amongst many, ECtHR *Johannesson and others v Iceland* App n. 11828/11 [18 May 2017] commented on by F Viganò, 'Una nuova sentenza di Strasburgo su *ne bis in idem* e reati tributari' (2017) Diritto penale contemporaneo 392 ff.; *Nodet v France* cit., commented on by M Scoletta, 'Il *ne bis in idem* "preso sul serio": la Corte Edu sulla illegittimità del doppio binario francese in materia di abusi di mercato' (17 June 2019) Diritto Penale Contemporaneo air.unimi.it; ECtHR *Velkov v Bulgaria* App n. 34503/10 [21 July 2020] with comment by G Caneschi, '*Ne bis in idem*: una garanzia ancora in cerca di identità' (2020) Rivista italiana di diritto e procedura penale 2107 ff. See *infra* for more cases in which the close connection test was failed. Cf. also JI Escobar Veas, Ne bis in idem *and Multiple Sanctioning Systems* cit. 108 ff. for a brief overview of the case-law of ECtHR after *A and B v Norway* cit.

[56] *Johannesson and others v Iceland* cit.

[57] *Ibid*. para. 53.

[58] *Ibid*. para. 54.

[59] ECtHR *Ragnar Thorisson v Iceland* App n. 52623/14 [12 February 2019].

[60] ECtHR *Bjarni Ármannsson v Iceland* App n. 72098/14 [16 April 2019] commented on by G De Marzo, '*Ne bis in idem* e contestualità dei procedimenti paralleli' (2019) Cassazione penale 3087 ff.

[61] *Ragnar Thorisson v Iceland* cit. para. 48 ff.; *Bjarni Ármannsson v Iceland* cit. para. 55 ff.

In *Nodet v France*,[62] the only judgment on double-track systems in financial matters after *A and B v Norway*, the ECtHR held that there had been a violation of the *ne bis in idem* guarantee since it found that the two proceedings did not pursue different purposes but were aimed at protecting the same legal interest and were not adequately coordinated in terms of evidence nor sufficiently closely connected in time, even though once again the criminal court had taken into account the administrative penalty imposed for the same act.[63]

Of relevant interest is the latest ruling on tax matters in *Bragi Gudmundur Kristjánsson v Iceland.*[64] Applying the principles developed in ECtHR case-law, the Icelandic Supreme Court had carried out its own connection test, ascertaining the sufficiently close connection between the criminal proceedings against the applicant and the administrative ones already concluded for the same facts. In particular, assessing both the foreseeability of the duality and the complementarity of purpose as existing, the Supreme Court, with reference to the connection as to substance, held that there was an overlap in the collection and assessment of evidence in the two proceedings only where unavoidable, and that the trial court had adequately taken into account the administrative sanction when imposing the penalty. With reference to the connection in time, the two proceedings were considered sufficiently linked, even though they were conducted in parallel for only about one year, compared to their total duration of more than six years. In spite of the reasoning of the Icelandic judges, the ECtHR found once again the combination to be unlawful due to insufficient coordination in collecting and assessing evidence, as it was unclear whether and to what extent the prosecutor had access to the evidence gathered in the administrative proceedings, and due to the absence of a sufficiently close connection in time, as the period in which the proceedings ran in parallel was too short in relation to their total duration.[65] That said, it is interesting to note that in a dissenting opinion, some of the ECtHR's judges considered the Icelandic Supreme Court's application of the test to be correct.[66]

On the contrary, the ECtHR held that there was no duplication of proceedings in only three cases that did not concern instances of integrated sanctioning systems, in which the national legislature had not provided for coordination with the precise intention of creating a unitary sanctioning system but rather cumulative punishments concerning road traffic offences or in any case designed to protect life and physical integrity. The ECtHR did so even

[62] *Nodet v France* cit. para. 47 ff. Regarding this decision, see also N Madia, Ne bis in idem *europeo e giustizia penale* cit. 63.

[63] *Nodet v France* cit. para. 48.

[64] ECtHR *Bragi Gudmundur Kristjánsson v Iceland* App n. 12951/18 [31 August 2021].

[65] *Bragi Gudmundur Kristjánsson v Iceland* cit. para. 62 ff.

[66] See the joint dissenting opinion of Judges Lemmens, Dedov and Pavli attached to *Bragi Gudmundur Kristjánsson v Iceland* cit. para. 3 ff., who in autonomously performing the close connection test found the two proceedings sufficiently linked both in time and substance, just as the Icelandic Supreme Court had.

though in such instances there was no framework aimed at ensuring a proportionate sanctioning response or an effective coordination between the authorities involved.

In the above-mentioned *Bajcic v Croatia* case concerning proceedings for speeding and ones for vehicular homicide for the same act,[67] the yardstick used to ascertain the different factors of the connection test appears to be totally different. Indeed, the criminal court did not even mention the previous administrative sanction when determining the penalty, it does not appear that there was any sharing of the probative material except for the use of an unspecified "evidence" in both proceedings and, above all, the criminal trial ended approximately six years after the administrative sanction had been imposed.[68] Nevertheless, the ECtHR considered the two proceedings to be sufficiently connected, expressly holding that the harm suffered by the applicant could not be considered excessive in relation to the offence perpetrated.

Similarly, in *Galović v Croatia*, the lawfulness of combination was recognised in the case of several incidents of domestic violence punished separately administratively and then cumulatively considered in criminal proceedings for domestic abuse. Also in this case, several connection factors exhibited significant problems, such as the complementarity of purposes and the timeline.[69] Nevertheless, considering the circumstances of the specific case, the connection test was once again passed.

It is also worth mentioning a recent decision of the ECtHR concerning a case of an physical attack motivated by hatred where the national authorities had decided not to open criminal proceedings against the attacker following the imposition of an administrative sanction for the same facts, justifying this decision on the basis of the need to respect *ne bis in idem*.[70] In that case, the ECtHR, with which the victim of the attack had lodged an application, held that there had been a violation of art. 3 ECHR, which places a positive obligation on the Member States of the Council of Europe to protect the life and physical integrity of their citizens.[71] In particular, the fact that the grounds of hatred had not been taken into account in the administrative proceedings was found to amount to a "fundamental defect" in the proceedings which, according to art. 4(2) of Protocol No 7 ECHR, would allow the proceedings to be reopened.[72] That said, the ECtHR went on to

[67] *Bajcic v Croatia* cit.

[68] Cf. *Bajcic v Croatia* cit. para. 43 ff.

[69] See ECtHR *Galović v Croatia* App n. 45512/11 [31 August 2021] paras 122, 118 and 120 concerning, respectively, the close connection in time, the complementary purposes of the two proceedings and the coordination in collecting and assessing evidence.

[70] ECtHR *Sabalić v Croatia* App n. 50231/13 [14 January 2021] with comment by V Di Nuzzo, 'Ne bis in idem" e tutela della vittima del reato: la Corte di Strasburgo riconosce la cedevolezza del principio di fronte a gravi violazioni dei diritti delle persone LGBTQ+' (2021) Il Foro Italiano 465 ff.

[71] The point is absolutely undisputed in the case-law of the ECtHR: see for all ECtHR *Opuz v Turkey* App n. 33401/02 [9 June 2009].

[72] Cf. art. 4(2) of Protocol No 7 ECHR and Council of Europe, Guide on Article 4 of Protocol No 7, cit., para. 65 ff. This limitation – that many countries have only if the reopening benefits the individual – is used

clarify that the State should guarantee the person subjected to the double trial *de eadem re* adequate remedies, such as, for example, the revocation of the administrative penalty previously imposed.[73]

IV. The "sufficiently close connection in substance and time": the unspoken balancing act engaged in by the ECtHR and an alternative criterion to assess whether there was a duplication of proceedings

A brief review of the ECtHR's case-law, considering the extreme elasticity of the close connection test, depicts a picture in which it is difficult to orient oneself in terms of the predictability of decisions.[74] In fact, it has been seen how the breach of the guarantee is often found in cases of substantially connected combined sanctions, also in consideration of the non-formally criminal nature of administrative proceedings in the field of taxation and market abuse (which according to the teaching of the ECtHR should also provide a criterion for assessing the breach of art. 4 of Protocol No 7 ECHR).[75] On the contrary, in cases where the offence certainly falls within the hard core of criminal law – think of *Bajic* and *Galovic* – and the two proceedings are much less connected than in the Nordic tax ones, the Court has never found the guarantee to be violated.

The reason behind this trend in case-law is to be found in the balancing act that the ECtHR implicitly and actually engages in but that would be more appropriate to explicitly bring out in the decision-making: the judgments in which the test is passed do not concern cases in which the two proceedings could actually be considered closely connected but, on the contrary, cases in which it was necessary to bring the second set of proceedings in order to provide adequate protection to an interest particularly worthy of being safeguarded, such as life or physical integrity. For this reason, in cases where the offence is fully remedied and adequately punished at the outcome of the first set of proceedings – as is the case in economic matters – the test is always failed whereas where criminal

by the court to remedy an overprotection that would otherwise be granted to the offender by the formal application of its case-law. It is clear, therefore, that the decision strikes a hidden balance between the right not to be tried twice for the same offence and the right to life and physical integrity: for more on this issue, see section IV.

[73] *Sabalić v Croatia* cit. para. 114.

[74] In the same vein, see RA Ruggiero, *Proscioglimento e* ne bis in idem *nel doppio binario sanzionatorio* (Giappichelli 2023) 111; JI Escobar Veas, Ne bis in idem *and Multiple Sanctioning Systems* cit. 142 ff. and 150, who however blames the unpredictability not only on the vagueness of the close connection factors but also on the notion of criminal matter.

[75] See *A and B v Norway* cit. para. 133 ff., to the effect that the difference between "the hard core of criminal law" and criminal law is a criterion that courts should use to assess whether the duplication of proceedings would entail a disproportionate burden on the defendant. Even if the Court does not explicitly state it, the other aspect of the proportionality assessment can only be the interest pursued by the State in implementing such dual-track proceedings.

protection is needed for interests deserving of greater protection, the standard of judgement is quite different from that used for tax offences or market abuse.

In other words, if the State's interest in collecting taxes or stamping out conduct detrimental to the stability of the financial markets does not justify the burden of a second set of punitive proceedings on the citizen, the same cannot be said in cases relating to vehicular homicide, domestic abuse or hate crimes. All the more so in the light of the fact that, for the former, the administrative sanctions are part of a formidable arsenal of penalties, in themselves capable of fully repairing the damage caused by the offence and adequately punishing it,[76] whereas for the latter the administrative response mentioned above is much weaker and is certainly not capable of tackling the entire anti-social aspects of the fact.[77] If administrative proceedings for drink-driving were to operate to preclude criminal proceedings for vehicular homicide, the right to life offended by the citizen's conduct would remain totally unprotected: a limitation of the right not to be tried twice for the same act is therefore justified, whereas the same could not be said for cases in tax matters that have come to the attention of the ECtHR. Again implicitly, the same principle has been recognised by the ECtHR: not only in the already mentioned *Sabalić* case, but also in *Tsonyo Tsonev v Bulgaria*,[78] another decision concerning a first prosecution for breach of the peace and a second one for injuries caused on the same occasion. In this case, although finding a violation of *ne bis in idem*, the Court ruled out that the State had to remove the criminal sanction imposed on the applicant at the end of the second set of proceedings (which, if the principle recognised as violated by the Court had been applied, should not even have been brought). This was because of the State's legitimate interest in maintaining the criminal sanction in the event of an offence against the physical integrity of the person.

It seems undeniable that the ECtHR actually exploits the test in all cases where it feels the need to provide adequate protection for legal interests that require it and for which administrative sanctions alone cannot suffice: it is so in the case of the life and physical integrity of citizens, in a hidden balancing act between art. 3 ECHR and art. 4 of Protocol No 7 ECHR. Indeed, only where the first set of proceedings – generally the administrative ones – are by themselves inadequate to effectively protect the interests at stake, does the Court invariably find that there has been no violation of the guarantee.

[76] For example, solely the administrative sanction for insider trading in Italy goes from EUR 20,000 to 5 million, plus confiscation and disqualification. Cf. art. 187-bis ff. TUF (Legislative Decree 58/1998). Similar sanctions are provided also for other market abuse and tax offences, to which the criminal penalty is added.

[77] Regarding road traffic offences, the administrative sanction for reckless driving in the *Bajcic* case was EUR 495; in *Tsonyo Tsonev* cit., the sanction for breach of the peace was EUR 25 and, in *Sabalic*, approximately EUR 40. Clearly, those sanctions fail to address properly the harm caused to life and physical integrity that States should by contrast protect appropriately.

[78] ECtHR *Tsonyo Tsonev v Bulgaria (No. 4)* cit. para. 47 ff. For analogous considerations, see G Ardizzone, 'Tsonyo Tsonev v Bulgaria' cit. 11 ff.

The criterion introduced in *A and B v Norway* to assess whether or not there has been a procedural duplication is not only greatly manipulated by the ECtHR according to an assessment that is actually rooted in the prominence of the interest protected by the combination of penalties, but has also been used by national courts precisely to legitimise, on the contrary, the hyper-repression of offences that do not require such a severe punishment, a stance that has always been condemned in ECtHR caselaw. Indeed, the test has been applied to justify procedural duplication not only in the Icelandic double-track system in tax matters[79] but also in numerous rulings of the Italian courts concerning business crime characterised by a sanctioning response informed by the logic of dual proceedings.[80]

In short, the overall results of the close connection test – the factors of which themselves exhibit numerous interpretative uncertainties[81] – are negative. On the one hand, it has been exploited by national courts to justify repressive sanctioning systems by contrast outlawed by the ECtHR and, on the other hand, it has not been able to provide a definite criterion capable of guiding the decisions of the ECtHR which, as we have seen, is instead driven by a need to strike a balance between the interest protected by the double-track system and the burden suffered by the applicant. It is therefore advisable to ultimately go beyond this criterion of assessment, and to explicitly bring out into the daylight the balancing act that is in fact already inherent in the ECtHR's decisions: it would be necessary to assess whether or not the second set of proceedings were strictly necessary to guarantee protection to a legal interest of primary rank that would otherwise have been deprived of it, without prejudice, in any event, to the obligation of the court in the second set of proceedings to ensure the overall proportionality of the punishment imposed.

Such a solution would have three main advantages: *i)* it would be more in line with the constitutional traditions of many Member States, which provide for a judgment of

[79] Cf. *Bragi Gudmundur Kristjánsson v Iceland* cit.

[80] The Italian case-law on this matter is copious. Regarding tax proceedings, among other decisions, the close connection test is used to legitimise double prosecution in Supreme Court (Criminal Division III) judgments of 22 September 2017 n. 6993, judgment of 12 September 2018 n. 5934, judgment of 16 December 2019 n. 33050, judgment of 14 January 2021 n. 4439 and judgment of 20 January 2021 n. 2245 cit. as well as in Supreme Court (Tax Division) judgment of 13 March 2019 n. 7131. Lastly, even the Constitutional Court has held that such an approach is lawful: judgment n. 222/2019 cit. As for market abuse, among others, cf. Supreme Court (Criminal Division V) judgment of 16 July 2018 n. 45829, judgment of 21 September 2018 n. 49869 and judgment of 15 April 2019 n. 39999. For a critique of that stance see L Baron, '*Ne bis in idem* e giudizio di proporzione: la certezza dell'incertezza applicativa' (2020) Giurisprudenza commerciale 743 ff.; E Fusco, G Baggio, 'Recenti pronunce in materia di *market abuse*' (2019) Diritto penale contemporaneo 67 ff.; AF Tripodi, Ne bis in idem *europeo e doppi binari punitivi* cit. 200 ff.

[81] See the dissenting opinion of Judge Pinto de Albuquerque attached to *A and B v Norway* cit. para. 40 ff. and *Menci* cit. opinion of AG Sánchez-Bordona para. 53 ff. In the italian literature, see AF Tripodi, 'Cumuli punitivi, *ne bis in idem* e proporzionalità' cit. 1064 ff.; F Mazzacuva, '*Ne bis in idem* e diritto penale dell'economia: profili sostanziali e processuali' cit., 23; N Madia, Ne bis in idem *europeo e giustizia penale* cit. 174 ff.; F Consulich, 'Il prisma del *ne bis in idem* nelle mani del giudice eurounitario' cit. 955 ff.

necessity as a step in the broader proportionality test in the balancing of rights;[82] *ii)* it would ensure greater predictability of the decisions of the ECtHR, which today, as we have seen, are contradictory at several points regarding the application of the test; *iii)* it would raise the standard of protection where necessary – economic offences in which the damage is entirely remedied by the administrative penalty that has a high punitive coefficient and for which the legislature may well provide for single-track proceedings in which to ascertain the violation and impose the consequent penalty – without however leaving unprotected those paramount interests for which it is unreasonable to consider that criminal proceedings should be precluded following the imposition of an administrative penalty inadequate to protect the life or physical integrity of citizens.

To be precise, therefore, the assessment to be carried out by the ECtHR would no longer concern whether or not there has been a duplication of proceedings using the test as a legal fiction to consider the two branches of enforcement as complementary and consequently part of a single set of proceedings. On the contrary, the Court should accept the existence of combination but check whether, nevertheless, this was essential for the safeguarding of an interest particularly deserving of protection and providing, where appropriate, for adequate corrective measures such as the overall proportionality of the penalty.

V. *Lis Pendens* and *Ne bis in idem*

Finally, it would be appropriate to extend the guarantee also to instances of *lis pendens*, which to date are outside the scope of application of the principle.[83] Indeed, the reason for

[82] In Italy, cf. G Scaccia, *Gli strumenti della ragionevolezza nel giudizio costituzionale* (Giuffrè 2000) 270 ff.; A Morrone, *Il custode della ragionevolezza* (Giuffrè 2001) 202 ff.; G Pino, *Il costituzionalismo dei diritti* (Il Mulino 2018) 141 ff.; and in the case-law of the Constitutional Court, judgment of 9 April 2013 n. 85, judgment of 9 April 2014 n. 162 and judgment of 23 February 2016 n. 63. In Germany, just for the most recent case-law, see *Bundersverfassungsgericht, 1st Senate*, 20 April 2016 – 1 BvR 966/09, 1 BvR 1140/09; *Bundersverfassungsgericht, 1st Senate*, 6 November 2019 – 1 BvR 16/13, 1 BvR 276/17; *Bundersverfassungsgericht*, 26 February 2020 – 2 BvR 2347/15. See also LS Rossi, 'Il "nuovo corso" del *Bundesverfassungsgericht* nei ricorsi diretti di costituzionalità: bilanciamento fra diritti confliggenti e applicazione del diritto dell'Unione' (2020) federalismi.it 4 ff.; A Lang, 'Proportionality Analysis by the German Federal Constitutional Court' in M Kremnitzer, T Steiner and A Lang (eds), *Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice* (Cambridge University Press 2020) 43 and 60 ff. Instead, for the balancing test of the ECtHR, see A Tesauro, 'Corte Edu e Corte costituzionale tra operazioni di bilanciamento e precedente vincolante', Parts I, II and III, respectively in (24 June 2019) Diritto penale contemporaneo archiviodpc.dirittopenaleuomo.org; (9 July 2019) Diritto penale contemporaneo archiviodpc.dirittopenaleuomo.org; (2020) Diritto penale contemporaneo; and N Madia, Ne bis in idem *europeo e giustizia penale* cit. 174 ff.

[83] Such an approach derives from the wording of art. 4 of Protocol No 7 ECHR, which requires that a person "has already been finally acquitted or convicted in accordance with the law and the penal procedure of that State". Therefore, the ECtHR has always excluded that the guarantee could apply to a case of lis pendens; see ECtHR *Garaudy v France* App n. 65831/01 [24 June 2003]; ECtHR *Zigarella v Italy* App n. 48154/99 [2 October 2002]; ECtHR *Tomasović v Croatia* App n. 53785/09 [18 October 2011] paras 30 and 32; *Muslija v Bosnia-Erzegovina* cit. para. 37; *Milenković v Serbia* cit. para. 46; *Nykänen v Finland* cit. para. 47 ff.; *Glantz v Finland* para. 57 ff.; ECtHR *Mihalache v Romania* App n. 54012/10 para. 93 ff. See also Council of

such an exclusion is not easy to understand if one considers the rationale of the principle. In fact, the purpose of *ne bis in idem* as codified internationally is to prevent the sword of Damocles of a criminal trial hanging *sine die* over the head of the citizen, precluding the bringing of more than one set of proceedings of a punitive nature for the same fact.[84] In truth, it is clear how continuous subjection to one of the most intrusive forms of private life such as criminal proceedings would have extremely negative effects on the enjoyment of the freedoms and rights that are recognised by the Convention and national constitutions. For this reason, a situation in which, even in the absence of a final decision, several proceedings of a punitive nature are instituted simultaneously for the same act seems to deserve application of the same safeguard of *ne bis in idem*. It is clear that the need for protection here is the same as that which underpins the case in which there has already been a final decision. Even in the absence of a final judgement, multiple proceedings initiated for the same fact multiply the economic, psychological and social costs to the citizen. Furthermore, not being able to halt one of them before another reaches its conclusion also gives rise to unnecessary costs for the State, initiating several proceedings already knowing that it cannot bring them all to a conclusion. After all, the extension of the principle also to cases of *lis pendens*, in the case of formal criminal proceedings, has long occurred in the Italian legal system, including as means to protect the certainty of *res judicata*.[85]

Some authors,[86] on the other hand, deny that the purpose of *ne bis in idem* is to place a limit on the cost of a trial for citizens precisely because the principle is triggered, according to the case-law of the ECtHR, by a final judgment. Such an opinion cannot be supported, and the steadfast view that art. 4 of Protocol No 7 ECHR does not apply to *lis pendens* must be reassessed.

In fact, in order to ensure broader protection for situations that are certainly worthy of it, once a second set of proceedings has been commenced for the same act, the State

Europe, Explanatory Report to the Protocol No. 7, cit., para. 29, and the Council of Europe, 'Guide on Article 4 of Protocol no. 7 to the European Convention on Human Rights' cit. para. 54 ff. However, see the dissenting opinion of Judge Pinto de Albuquerque in *A and B v Norway* para. 41, footnote 112, who states how such situation raises an issue of unfairness. In the Italian literature, see M Bontempelli, 'La litispendenza e il divieto di doppia decisione' (2015) Rivista italiana di diritto e procedura penale 1316 ff.; F Cassibba, '*Ne bis in idem* e procedimenti paralleli' (2017) Rivista italiana di diritto e procedura penale 351 ff.

[84] See the dissenting opinion of Judge Pinto de Albuquerque in *A and B v Norway* para. 35. In the Italian literature, see N Galantini, 'Il divieto di doppio processo come diritto della persona' (1981) Rivista italiana di diritto e procedura penale 97 ff. See also, more recently, RA Ruggiero, *Proscioglimento e* ne bis in idem *nel doppio binario sanzionatorio* cit. 23.

[85] Cf. Supreme Court (Combined Criminal Divisions) judgment of 28 June 2005 n. 34655, a decision that however is limited only to *lis pendens* in formal criminal proceedings.

[86] See JI Escobar Veas, Ne bis in idem *and Multiple Sanctioning Systems* cit. 138. As another argument in to support his view, the author cites the exception enshrined in the above-mentioned second paragraph of art. 4 Protocol n. 7 ECHR. However, this is a balancing act performed by the Convention, guardian of the minimum standard of protection, and certainly not a reason why the rationale would not be to defend the citizen against repeated prosecution.

should be forced to choose which of the two it wishes to pursue,[87] with the twofold benefit of saving the economic cost of a second prosecution and relieving the burden on the citizen. For the ECtHR, moreover, a criminal charge exists when it can be perceived by individuals: either because they have been notified by the competent authority of an allegation that they have committed a criminal offence or because their situation has been substantially affected by an investigative act undertaken against them, such as an interrogation.[88] It is, therefore, an interpretation that considers the burden imposed on the defendant by a trial, without being hostage to overly rigid formal criteria and that fits well with an extension of the guarantee also to instances of *lis pendens*, thus avoiding a situation whereby a citizen twice faces proceedings that are criminal or substantially criminal in nature even in the absence of a final judgment.

Rather, as regards dual-track proceedings, one could argue that failure to appeal against the administrative act imposing the sanction should not preclude criminal proceedings.[89] This for two reasons.

First, because the cost of administrative proceedings to citizens could be minimal: in some cases, they could be the direct addressee of the sanction without being informed that proceedings had been brought against them or, at most, they could be called upon to provide information to the administrative authority.[90] In such a circumstance, even considering the fact that there are no particular legal fees for this kind of enforcement, the burden of the first set of proceedings would not seem to justify preclusion of the criminal proceedings and only the need to ensure the overall proportionality of the penalty would remain. Obviously, there are different situations in which by contrast a citizen is called upon to actively participate in the administrative proceedings that culminate with a sanction, where legal assistance is required due to the extreme technicality of the matter, thus resulting in an actual burden on the individual.

Second, because such an interpretation would offer an undesirable exploitation of the guarantee: letting the administrative sanction become final in order to "escape" the

[87] For example, this is the choice made by French law on market abuse after the reform and it is the current way such offences are prosecuted also in the UK. Cf. art. 465-3-6*Code Monétaire et Financier* (CMF) for the French system and para. 6(2)(1), para. 6 of the *Decision Procedure and Penalties Manual*, the para. 12(3) of the *Enforcement Guide*, available at www.handbook.fca.org.uk, and Annex 2 to the FCA Handbook for the British one.

[88] See, amongst many, ECtHR *Deweer v Belgium* App n. 6903/75 [27 February 1980] para. 42 ff.; ECtHR *Eckle v Germany* App n. 8130/78 [21 June 1983]; ECtHR *McFarlane v Ireland* App n. 31333/06 [10 September 2010] para. 143; ECtHR *Ibrahim and Others v United Kingdom* App n. 50541/08 [13 September 2013] para. 249; ECtHR *Ragnar Thorisson v Iceland* cit. para. 44; *Mihalache v Romania* cit. para. 103.

[89] That is what happened in *Häkkä v Finland* para. 50 ff.

[90] This is generally what happens in Italian tax proceedings: cf. Decrees of the President of the Republic of 1973 and 1972 (DPR) 600/1973 and 633/1972. However, it should be pointed out that the powers of investigation of the tax authorities may result – in some cases – in an actual burden for the defendant, thus generating a need for effective protection from a re-prosecution. Nonetheless, this particular circumstance requires case-by-case assessment.

criminal trial would lead to the substantial neutralisation of the highest form of protection, in consideration of the greater speed that characterises administrative enforcement.[91] This seems to be the greatest danger: a blanket extension of the *ne bis in idem* principle to dual-track administrative and criminal proceedings without any corrective measures or balancing could lead to the sterilisation of criminal protection when in reality in the most serious cases, it should be the administrative ones that should be sacrificed also in the light of the fact that it is the formally criminal proceedings that afford the greatest procedural guarantees. Nonetheless, this is a conundrum that it is up to the legislature to resolve: in the absence of legislation on the point, the fundamental right not to tried twice for the same fact should be protected first and foremost. It will then be up to the law to regulate the aporias stemming from such a choice, which is necessary for the protection of the right at stake.[92] Moreover, the ECtHR itself considers it sufficient for there to be a final decision, meaning any act that cannot be challenged due to exhaustion of the ordinary means of appeal or the lapse of time to exercise them.[93]

VI. Conclusion

As we have seen, there are still numerous interpretative uncertainties relating to the *ne bis in idem* principle that generate a contrast between ECtHR and national case-law. For this reason, it would be advisable for the ECtHR to remedy the lack of clarity inherent in some of the formulas used to determine whether or not there has been a breach of the guarantee and come up with more immediately effective solutions that can be interpreted homogeneously by the Council of Europe Member States.

First, a clear definition of *idem factum* is needed, which in line with ECtHR case-law would circumscribe the fact to the conduct alone. Indeed, the formula used by the ECtHR as aforesaid is particularly elastic and, taken on its own, is certainly not suitable for circumscribing the identity of the fact to the conduct alone: on this basis, the national courts have adopted a divergent interpretation, which lowers the standard of protection of the fundamental right in question. Nevertheless, it has been observed that a different conclusion can be inferred from the judgments of the ECtHR: it would therefore be necessary

[91] In the Italian literature this issue is pointed out, amongst many, by GM Flick, V Napoleoni, 'A un anno di distanza dall'affaire Grande Stevens: dal *bis in idem* all'*e pluribus unum*?' (2015) Rivista AIC 15 ff.; E Scaroina, 'Costi e benefici del dialogo tra Corti in materia penale' (2015) Cassazione penale 2922 and 2931 ff.; M Di Bitonto, 'Una singolare applicazione dell'art. 649 c.p.p.' (2015) Diritto penale e processo 443 and 445 ff.; M Di Bitonto, 'Il *ne bis in idem* nei rapporti tra violazioni finanziarie e reati' (2016) Cassazione penale 1340 ff. *Contra*, see the dissenting opinion of Judge Pinto de Albuquerque, cit. para. 48 ff.; F Viganò, 'Doppio binario sanzionatorio e *ne bis in idem*: verso una diretta applicazione dell'art. 50 della Carta?' (2014) Diritto penale contemporaneo 226 ff.

[92] F Viganò, 'Doppio binario sanzionatorio e *ne bis in idem*' cit. 229.

[93] *Mihalache v Romania* cit. para. 103; *Zoluthukin v Russia* cit. para. 107; ECtHR *Sismanidis and Sitaridis v Greece* App n. 66602/09 and 71879/12 [9 June 2016] para. 42; *Nykänen v Finland* cit. para. 44.

to bring out that interpretation and to establish unequivocally that *idem factum* coincides with the same conduct, leaving it then to the assessment on the *bis* criterion to address the issue of providing adequate safeguard to interests that deserve protection.

Second, the issue that is most difficult to resolve concerns precisely the close connection test developed to establish whether or not there has been a duplication of proceedings. This criterion, in order to achieve greater clarity and predictability of decisions, must necessarily be abandoned. Indeed, the *vexata quaestio* of the applicability of *ne bis in idem* to double-track systems must be brought back to a balancing act that, more or less explicitly, all national and supranational courts actually perform:[94] it has been seen how the ECtHR reaches very different conclusions in cases in which the combining of sanctions serves to achieve a greater (and not always necessary) repression of business crimes and in cases in which it proves to be necessary in order not to leave totally unprotected a legal interest of paramount importance that the State has the obligation to protect through the criminal law, such as life and physical integrity.[95]

From this point of view, the distinction between the hard core of criminal law and criminal law made by the ECtHR in *A and B v Norway* should provide a key not for the yardstick of ascertaining the factors of connection but within a more predictable balancing act between the sacrifice endured by a citizen at the trial level and the interest from time to time protected by the duplication of proceedings. Faced with such a scenario, rather than continuing to hold that the principle enshrined in art. 4 of Protocol No 7 ECHR cannot be balanced,[96] it is in fact preferable to assess, on a case-by-case basis, whether criminal proceedings are strictly necessary to safeguard a legal good not adequately protected by administrative enforcement alone. Such without thereby undermining the applicability of the guarantee to double-track systems in economic matters and legitimising the "Leviathan-like approach"[97] feared in the aftermath of *A and B v Norway*, but at the same time allowing criminal proceedings to be brought where unavoidable.

Finally, given the rationale of the *ne bis in idem* principle, it would also be appropriate to extend the minimum standard of protection to cases of *lis pendens*, which are also a source of unnecessary and avoidable costs for the State and citizens alike. It has been said, in fact, that the purpose of *ne bis in idem* as codified in conventions, charters and constitutions is precisely to prevent citizens from having to bear the burden of two proceedings. This function is also confirmed by the approach of the ECtHR, which considers that proceedings begin as soon as individuals are aware of them, for whatever reason (*e.g.* because they have been served with a notice of completion of an investigation or are called to testify). It is therefore consistent with the rationale of the guarantee to extend the protection of citizens from repeated prosecution also to cases where neither of the

[94] *Supra* sections III and V.
[95] *Supra* section V.
[96] See the dissenting opinion of Judge Pinto de Albuquerque attached to *A and B v Norway* cit. para. 49.
[97] Cit. from the dissenting opinion of Judge Pinto de Albuquerque in *A and B v Norway* para. 79.

two proceedings has yet formally ended. Such an option, besides raising the standard of protection for the individual, is also cost-effective for the State, which would not have to spend money to initiate proceedings that it knows it cannot conclude.

Thus, after analysing the current situation regarding *ne bis in idem*, these solutions to the three major problems of interpretation would advance the right not to be tried twice for the same fact, both making it easier for national courts to apply it consistent with the supranational case-law and raising the standard of protection without prejudice to the safeguarding of legal interests that need to be defended by criminal law.

ARTICLES

The EU Green Deal and the Transformations of the European Administrative System: Does the "Epistemic Leadership" of the Scientific Advisory Board Push the Agency Model over the Sunset Boulevard?

ANDREA GIORGI*

TABLE OF CONTENTS: I. Setting the scene. – II. The (more than) discreet charm of EU agencies. – III. The evolution of the European regulatory space: the EU Green Deal as a transformative project. – IV. The European Environment Agency within the institutional architecture of the Green Deal: role and functions. – V. The EU Scientific Advisory Board on Climate Change as a multifunctional independent body: a taxonomy and its implications. – VI. The "external" dimension: increasing cross-fertilisation of climate change governance. – VII. The "internal" dimension: a thorny cohabitation with the European Environment Agency. – VIII. The integration of independent scientific expertise into the regulatory process: legitimising force or disputable "epistemic leadership"? – IX. Conclusions.

ABSTRACT: The *Article* aims to investigate the relevance of the EU agency model in the evolving European legal order and test its enduring ability to provide a functional and normative response to the complex challenges the EU is facing, first and foremost the achievement of climate neutrality, the macro-objective at the heart of the European Green Deal (EGD). By its long-term vision, latitude and regulatory effort, the latter has the capacity to determine a deep impact on the EU and its regulatory space. The analysis of the dynamics, governance arrangements, policy options and legal developments that characterise the EGD can thus represent an interesting "litmus test" for measuring more general trends and transformations in the European legal order and, in cascade, its administrative system. In light of these premises, the essence of the argument is as follows. Within the climate neutrality regulatory framework, a subtle functional downsizing of the European Environment Agency occurred due to the recent creation of the European Scientific Advisory Board on Climate Change, a multifunctional independent scientific body that should act as a point of reference for the EU on climate change issues. While testifying to the Union's ever-growing confidence in the independence formula, now experienced in climate neutrality realm, its establishment represents a significant and challenging development, capable of deeply impacting future EU climate policy-making, yet also triggering a series of tensions within the EGD political project.

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KEYWORDS: EU Agencies – European Green Deal – EU Scientific Advisory Board on Climate Change – climate neutrality governance – political salience of climate change measures – independent scientific climate expertise.

I. SETTING THE SCENE

In a series of pioneering articles dating from the early 1990s, Sabino Cassese questioned the possibility of recognising the existence of a Community administrative law different from national administrative law, the latter born within the conceptual framework of the nation-state, a distinctive feature of that theoretical model and expression of the traditional bipolar paradigm based on the dialectic between authority and freedom.[1] Today, no scholar could reasonably doubt the existence of a European administrative law[2] and of a European "integrated administration",[3] founded on the organisational and procedural dialectic between its national, supranational and composite components and on their mutual influence. The "European administrative system"[4] and the composite administrative machinery that articulates its operation, driven by the functional need to complete the internal market, have undergone a process of progressive complication, sophistication[5] and maturation, according to evolutionary dynamics that were not always harmonious and linear, but rather characterised by tensions, disharmonies, setbacks and underlying ambiguities.[6] The interest of legal science, once marginal, has grown in parallel with the evolution and consolidation of the European administrative system and there are now many, robust and influential analyses devoted to this disciplinary field.[7]

[1] The affirmative answer served as a prelude to a rigorous analysis of the organisational figures, principles and operational methods of Community administrative law and to a reconstruction of its distinctive features, to assess its elements of originality or continuity with domestic administrative law and to highlight the former's capacity to influence (both directly and indirectly) the latter, in a progressive convergence towards an "administrative jus commune". See S Cassese, 'I lineamenti essenziali del diritto amministrativo comunitario' (1991) Rivista italiana di diritto pubblico comunitario 3; S Cassese, 'Il sistema amministrativo europeo e la sua evoluzione' (1991) Rivista trimestrale di diritto pubblico 769; S Cassese, 'L'influenza del diritto amministrativo comunitario sui diritti amministrativi nazionali' (1993) Rivista italiana di diritto pubblico comunitario 329. The three essays are now collected in S Cassese, *Il diritto amministrativo: storia e prospettive* (Giuffrè 2010).

[2] Here understood as that set of principles, rules and practices, of both European and national sources, functionally oriented to ensure the implementation of European policies and laws. The definition is elaborated by E Chiti and J Mendes, 'The Evolution of EU Administrative Law' in P Craig and G de Burca (eds), *The Evolution of EU Law* (Oxford University Press 2021) 341.

[3] HCH Hofmann and A Turk, 'Introduction: Towards a Legal Framework for Europe's Integrated Administration' in HCH Hofmann and A Turk (eds), *Legal Challenges in EU Administrative Law: Towards an Integrated Administration* (Elgar 2009) 1.

[4] E Chiti, 'La costruzione del sistema amministrativo europeo' in MP Chiti (a cura di), *Diritto amministrativo europeo* (Giuffré 2018) 46 and bibliographical references therein.

[5] C Joerges and J Neyer, 'Deliberative Supranationalism Revisited' (EUI Working Papers LAW 20-2006) 16.

[6] As recently pointed out by E Chiti and J Mendes, 'The Evolution of EU Administrative Law' cit. 341.

[7] See P Craig, *EU Administrative Law* (Oxford University Press 2019); S Battini and others (eds), *Diritto amministrativo europeo* cit.; C Harlow, P Leino, G della Cananea (eds), *Research Handbook on EU Administrative Law* (Elgar 2017).

When we move on from the system to isolate one of its (albeit significant) components such as European agencies, "part and parcel of [...] the emerging, composite European executive",[8] the previous assumption seems not only confirmed, but indeed reductive. In other words, the impression is that of being faced with a deeply and repeatedly ploughed soil, on the furrows of which numerous fertile seeds have been sown, giving rise to as many interesting analyses and reflections. The individual pieces have thus contributed to creating a layered and complex mosaic.[9]

The reasons for such strong interest in the "agencification" process are anything but surprising, if one dwells on the cross-cutting nature of the topic,[10] the proportions assumed by the phenomenon in the European legal system and its ability to deeply affect the "composite and plural character"[11] of EU administrative organisation and of the law governing its functioning. Over the years, several waves of agencification[12] have passed through the main areas of economic and social regulation in the EU, contributing to consolidate the pivotal role played by this composition figure within the European regulatory space, to refine its functions and to clarify its tasks, characteristics and powers. Taking a retrospective look, it would be hard to deny that the story of EU agencies has been one of remarkable success.[13]

And yet, what is left for EU agencies today? Is the fever for agencies still high? Or has that model lost its appeal for the European administrative system, taking its last steps on the "Sunset Boulevard"?[14] To what extent are such satellite bodies of the EU executive

[8] M Busuioc, *The Accountability of European Agencies: Legal Provisions and Ongoing Practices* (Eburon 2010) 83.

[9] The literature on EU agencies is rich and cannot be recalled here in its entirety. Among the most recent books, it is worth mentioning at least M Conticelli, M De Bellis and G della Cananea (eds), *EU Executive Governance: Agencies and Procedures* (Giappichelli 2020); M Simoncini, *Administrative Regulation Beyond the Non-Delegation Doctrine: A Study on EU Agencies* (Hart Publishing 2018); J Alberti, *Le agenzie dell'Unione Europea* (Giuffrè 2018); M Chamon, *EU Agencies: Legal and political Limits to the Transformation of the EU Administration* (Oxford University Press 2016); M Everson, C Monda and E Vos (eds), *European Agencies in between Institutions and Member States* (Wolters Kluwer 2014); M Busuioc, M Groenleer and J Trondal, *The Agency Phenomenon in the European Union. Emergence, Institutionalisation and Everyday Decision-making* (Manchester University Press 2012).

[10] Capable of catalysing from the very beginning the attention of legal as much as political science. See respectively the works of E Chiti, *Le agenzie europee: Unità e decentramento nelle amministrazioni comunitarie* (Cedam 2002); and of D Keleman, 'The Politics of "Eurocratic" Structure and the New Europeans Agencies' (2002) West European Politics.

[11] E Chiti, 'La costruzione del sistema amministrativo europeo' cit. 79.

[12] Four waves of agency creation are usually identified, corresponding to the periods of the mid-1970s, the 1990s, the early 2000s and the early 2010s.

[13] As pointed out by E Chiti, 'Decentralized Implementation: European Agencies' in R Schutze and T Tridimas (eds), *Oxford Principles of European Union Law: The European Union Legal Order* (Oxford University Press 2018) 756.

[14] Reference is to the 1950 homonymous celebrated film directed by Billy Wilder and starring Gloria Swanson, William Holden and Erich von Stroheim. The movie tells the story of a former silent film diva, once acclaimed and idolised and now disgraced, abandoned by the public and the spotlight of modern cinema.

still able to provide a functional and normative response to the needs and challenges of a changing legal order? In what overall direction are the transformations of the EU pushing and what consequences do they have for its administrative component?

Certainly, an exhaustive answer to such questions would require "mapping the European administrative space"[15] in which EU agencies operate and whose characteristics they contribute to define and navigating through the various waves of the agencification process, by taking an evolutionary perspective and looking for the elements of continuity and change. Such an operation, however, is beyond the more modest ambitions of this *Article*. In referring back to studies of broader scope and depth,[16] the perspective purportedly adopted is avowedly partial, in that it focuses the analysis on a specific, albeit broad and cross-cutting, portion of the European regulatory space, represented generically by climate change and identifiable more precisely in the European Green Deal (EGD).[17] The reasons behind this *actio finium regundorum* stem from the conviction that the latter represents a phenomenon that, by its importance, characteristics, objectives, latitude and regulatory effort, has the capacity to determine a profound impact on the EU and its administrative dimension, potentially orienting and shaping its developments and future arrangements. In addition, it is a long-range political project functionally oriented to respond to one of the main challenges facing the EU and its Member States, namely the achievement of climate neutrality: what makes it a particularly topical and interesting angle of view. The analysis of the dynamics, governance arrangements, policy options and legal developments that characterise the EGD could thus represent an interesting "litmus test" for measuring more general trends and transformations in the European legal order and, in cascade, in its administrative system.[18]

In light of these premises, the article aims to develop the following hypothesis, which is made explicit from the outset. The thesis to be verified is that within the EGD regulatory framework, there appears to be a partial, possibly disguised, downsizing of the role of the European Environment Agency (EEA) due to the recent creation of the European

[15] HCH Hofmann, 'Mapping the European Administrative Space' (2008) West European Politics 671.

[16] E Chiti, 'The Agencification Process and the Evolution of the EU Administrative System' in P Craig and G de Burca (eds), *The Evolution of EU Law* (Oxford University Press 2021) 123.

[17] See Communication COM(2019) 640 final from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions of 11 December 2019 on The European Green Deal.

[18] In this respect, the choice of analysing with an inductive method the most recent positive law trends taking place within the EGD in order to infer consequences of a more general nature, related to broader institutional changes and transformations of the EU administrative space, represents a large-scale application and projection of the same logic and approach underlying the evolutionary study of EU administrative law, constantly in-between the development of different policy-fields characterised by their own rules, principles, practices and organisational arrangements and the attempt to infer from them implications of a more general and systematic nature, relating to the entire EU administrative system. See in this regard HCH Hofmann, GC Rowe and A Turk (eds), *Specialized Administrative Law of the European Union: A Sectoral Review* (Oxford University Press 2021).

Scientific Advisory Board on Climate Change (Advisory Board), a body of an independent nature that, by virtue of its high technical-scientific expertise, should act as a "point of reference" for the EU on climate change issues.[19] The establishment of such a body represents an intriguing and far from obvious development in the overall evolution of the EGD. While not openly questioning the role of the EEA, its tasks and attributions, it nevertheless testifies to the Union's ever-increasing reliance in the independence formula, now experienced in climate change realm. At the same time, the institution of such an organism is a decidedly problematic step capable of triggering a series of tensions within the EGD project. In this regard, the thorny cohabitation between the two administrative bodies (*i.e.*, the EEA and the Advisory Board) deputed to assist the Commission in the elaboration and evaluation of climate neutrality measures and the complex relationship between the technical and independent nature of the Advisory Board and the inherent political salience of climate neutrality choices represent the most interesting but also critical profiles to be discussed.

To develop the argument, the article is structured as follows. After a brief reconstruction of the main theoretical and factual reasons behind the success of the EU agency model (section II), the EGD is presented as an incremental "regulatory process"[20] functionally oriented towards achieving climate neutrality, and its profoundly transformative character for the European legal and societal construct is emphasised (section III). Subsequently, the *Article* dwells on the role and tasks of the EEA within the EU decarbonisation governance (section IV). The paragraph paves the way for analysing, through a dynamic-evolutionary perspective, the recent establishment of the EU Advisory Board on climate change, whose functions and attributions are outlined (section V) and implications for EU climate policy-making are discussed (sections VI, VII, VIII). Under this aspect, the two most interesting profiles are represented by the challenging coexistence between the Advisory Board and the EEA and, above all, by the choice to confer upon the former a kind of "epistemic leadership"[21] in the EU energy and ecological transition process, which might be hard to reconcile with the intrinsic and unamendable political salience of climate neutrality measures.

[19] See art. 3 of Regulation (EU) 1119/2021 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality (European Climate Law).

[20] For this conceptualisation of the EGD see E Chiti, 'Managing the Ecological Transition of the EU: The European Green Deal as a Regulatory Process' (2022) CMLRev 19.

[21] I borrow and adapt for the purpose the expression from JB Skjærseth and J Wettestad, 'Making the EU Emissions Trading System: The European Commission as an entrepreneurial epistemic leader' (2010) Global Environmental Change 314.

II. The (more than) discreet charm of EU agencies

Looking at the abundant and varied literature on EU agencies, there is no escaping the overall impression that the euphoria surrounding this topic stems as much from theoretical and conceptual reasons, relating to the application of models and principles capable of providing universal explanations, as from factors more properly linked to the European administrative system, its development and the evolution of its techniques of administrative integration, which EU agencies have contributed to shape and refine.[22] Admittedly, the distinction is not always clear-cut and often the two levels of analysis end up intertwining. What changes, however, are the objectives, method and perspective of the research.

Under the first aspect, the creation of EU agencies is traditionally read through the rationalist lenses of the principal-agent (P-A) model[23] and, in particular, through the horizontal delegation of administrative tasks and *lato sensu* regulatory powers from the principal (usually the Commission) to non-majoritarian bodies with high technical and scientific expertise.[24] Hence, interest shifts from delegation per se, as a "normative-legal principle",[25] to a whole range of sectoral issues inherent in delegation and the contextual "functional decentralization"[26] of powers within the composite European executive.[27]

In the second perspective, the diachronic analysis of EU agencies (from origin to consolidation to recent developments), their functions and the complex issues they raise is dropped within the history of the EU administrative system and proceeds hand in hand with its development and evolution, on the assumption that the agencification process

[22] See E Chiti, 'The Agencification Process and the Evolution of the EU Administrative System' cit. 124.

[23] P Magnette, 'The Politics of Regulation' in D Geradin, R Munoz and N Petit (eds), *Regulation through Agencies in the EU: A New Paradigm of European Governance* (Elgar 2005) 5; for a critical discussion of some of the limitations of this model see R Dehousse, 'Delegation of Powers in the European union: The Need for a Multi-principals Model' (2008) West European Politics 789.

[24] See G Majone, 'Delegation of Regulatory Powers in a Mixed Polity' (2002) ELJ 319.

[25] P Lindseth, 'Delegation is Dead, Long Live Delegation: Managing the Democratic Disconnect in the European Market-Polity' in C Joerges and R Dehousse (eds), *Good Governance in Europe's Integrated Market* (Oxford University Press 2002) 140.

[26] E Vos, 'EU Agencies and the Composite EU Executive' in M Everson, C Monda and E Vos (eds), *European Agencies in between Institutions and Member States* (Wolters Kluwer 2014) 11.

[27] Among the most investigated issues: what kind of powers can be delegated to EU agencies (purely executive or involving discretionary assessments) and what impact do they produce on the principle of institutional balance; how to make these bodies, endowed with autonomy or quasi-independence, publicly accountable for their actions through the construction of appropriate and accomplished accountability mechanisms; how to ensure their compliance with the principles and guarantees of the administrative rule of law, understood both as an instrument of control of administrative power and as a normative super-principle capable of conferring EU agencies a form of functional legitimacy. These profiles have been variously and thoroughly explored, among others, by M Simoncini, *Administrative Regulation Beyond the Non-Delegation Doctrine* cit.; M Chamon, *EU Agencies* cit.; M Busuioc, *The Accountability of European Agencies* cit.; D Curtin, 'Delegation to EU Non-Majoritarian Agencies and Emerging Practices of Public Accountability', in D Geradin, R Munoz and N Petit (eds), *Regulation through Agencies in the EU: A New Paradigm of European Governance* cit. 88.

cannot be fully grasped through a static and atomistic judgment, since this administrative phenomenon "is both a product of the internal dynamics of such system and a force capable of orienting its evolution and transformation".[28]

At least three reasons concur to explain the fascination exercised on scholars by this peculiar form of administrative integration. The first is related to the possibility of providing different explanations and conceptualisations of the emergence and mushrooming of EU agencies. There is general agreement in the literature that underlying the agencification process are reasons of an essentially functional nature, related to the increasing expansion and specialisation of supranational regulatory intervention and the risks of overburdening the Commission.[29] In this context, the creation of an agency finds its functional justification in the need to improve supranational efficiency and administrative capacity in policy areas characterised by high technical and scientific complexity, by allowing the Commission to concentrate on core tasks (policy-making) and giving agencies the responsibility of ensuring the effective and efficient administrative implementation of EU law (policy-implementation).[30] The prevailing view, tending to ascribe "factual legitimacy"[31] to these regulatory bodies, has not, however, prevented scholars from offering interesting alternative readings of the agencification process, based on different normative ideals, theoretical constructions and interpretations of political-institutional dynamics,[32] which are not necessarily mutually exclusive.

The second, more structural, stems from the hiatus between the legislative proliferation of EU agencies and the lack of a clear constitutional recognition or foundation for them, which has prompted legal doctrine to question how to reconcile the administrative-regulatory dimension of agencies with some form of constitutional legitimacy.[33] In this sense, it could be argued that the history of EU agencies mirrors at the "micro" level that of European

[28] E Chiti, 'The Agencification Process and the Evolution of the EU Administrative System' cit. 124.

[29] Interestingly, this is also the Commission's official narrative, expressed in various policy-documents. See, for instance, Communication COM(2022) 0718 final from the Commission of 11 December 2002, "The Operating Framework for the European Regulatory Agencies"; Communication COM(2001) 428 final from the Commission of 25 July 2001, "European Governance. A White Paper".

[30] For a synthetic reconstruction, see M Busuioc, *The Accountability of European Agencies* cit. 15 and M Everson, 'Independent Agencies: Hierarchy Beaters?' (1995) ELJ 180.

[31] M Everson, 'Good Governance and European Agencies: The Balance' in D Geradin, R Munoz and N Petit (eds), *Regulation through Agencies in the EU* cit. 158.

[32] See E Chiti, 'Decentralized Implementation' cit. for an overview of the diverse interpretations proposed by European legal scholarship, including the distinctive conceptualisation provided by the Author himself.

[33] Indeed, the creation of EU agencies granted with *de jure* or *de facto* regulatory powers took place in the absence of any constitutional recognition and solid constitutional anchorage, a lacuna that the Lisbon Treaty has only partly succeeded in filling, through the formal submission of agency acts to the scrutiny of the Court of Justice. On this profile see M Simoncini, 'Paradigms for EU Law and the Limits of Delegation: The Case of EU Agencies' (2017) Perspectives on Federalism 49.

administrative law as a whole, squeezed between a markedly functional legitimacy and orientation and the search for a normative vocation or constitutional foundation.[34]

The third, no less important, is related to the potential of EU agencies to assimilate two of the factors that, as noted in general terms by Yves Mény,[35] underpin the entire European scaffolding: bureaucracy and crises. The creation of an agency has often been a politically and legally appealing solution to managing a situation of crisis or an event of particular political salience. With the establishment of one or more new agencies, the Union has sought to harness the potential of its administrative machinery to provide a rapid and hopefully efficient response to crises (financial, above all, but also food and health and ultimately pandemic)[36] that could have undermined the foundations of European integration and disqualified the effectiveness of supranational regulation. Beyond the ability of agencies to embody a tool of "effective problem solving"[37] for the EU legal system in times of crisis, it is worth highlighting how the study of these new administrative bodies, their delegated powers and their scope of action became an opportunity to develop reflections with a broader and more systematic scope on the processes of "administrative reorganisation and transformation"[38] of the EU administrative system.

Over time, therefore, EU agencies have gradually emerged as specific organisational figures within the European administrative machinery, aimed at the joint exercise of European functions and instrumental to a project of "decentralized integration".[39] And along with them, a new model of implementing European law has been institutionalised and perfected, that of shared administration,[40] in which the pursuit of a European public interest goes through the distribution of (the exercise of) the administrative function

[34] This aspect of EU administrative law has been recently explored by E Chiti and J Mendes, 'The Evolution of EU Administrative Law' cit. 339.

[35] Y Meny, 'Europe: la grande hésitation' in O Béaud, A Lechevalier and I Pernice (eds), *L'Europe en voie de Constitution: Pour un bilan critique des travaux de la Constitution* (Bruylant 2004) 819.

[36] As demonstrated by the creation of the European supervisory authorities (ESAs) in the aftermath of the financial and public debt crisis, the establishment of the European Food Safety Authority (EFSA) following a series of food crises (e.g. the mad cow disease) and the institution of the Health Emergency Preparedness and Response (HERA) in the aftermath of the pandemic crisis.

[37] M Everson, 'Good Governance and European Agencies' cit.

[38] E Chiti, 'In the Aftermath of the Crisis: The EU Administrative System Between Impediments and Momentum' (2015) CYELS 311.

[39] E Chiti, 'Decentralisation and Integration into the Community Administrations: A New Perspective on European Agencies' (2004) ELJ 402; see also HCH Hofmann, 'European Administration: Nature and Developments of a Legal and Political Space' in C Harlow, P Leino and G della Cananea (eds), *Research Handbook on EU Administrative Law* cit. 29.

[40] On EU agencies ability to explore, complicate and institutionalise the rationale of shared execution, already present – though in simplified and embryonic form – in comitology see E Chiti, 'The Agencification Process and the Evolution of the EU Administrative System' cit. 132. On the concept of shared administration see the forerunner work of C Franchini, *Amministrazione italiana e amministrazione comunitaria: La coamministrazione nei settori di interesse comunitario* (Cedam 1993); and P Craig, 'Shared Administration, Disbursement of Community Funds and the Regulatory State' in HCH Hofmann and A Turk (eds), *Legal Challenges in EU Administrative Law* cit. 34.

among a multiplicity of national, European and composite bodies, formally distinct but functionally integrated within a substantively unitary procedure. The latter is usually dominated and coordinated by an EU agency placed in a position of "functional prominence"[41] towards the other actors operating within the sectoral administrative network and is designed in such a way as to make the agency "a kind of '*primus inter pares*' with the national authorities".[42]

Plenty of water has flowed under the bridges that, with varying geometries, interconnect the numerous components of the polycentric European administrative system. Admittedly, the many waves that have driven the agencification process have certified the crucial role played by such decentralised bodies within the European administrative governance and their significance "both as an institutional phenomenon and as a method of policy delivery".[43] And yet, the European regulatory space and the administrative machinery that articulates its functioning are anything but crystallised or monolithic. Their arrangements and structures are physiologically influenced by the transformations affecting the European legal order[44] and functionally adapt to the evolutionary objectives set from time to time by EU policy-making. If and to what extent the agency model is still capable of providing a functional and normative response to the new challenges raised by the EGD and the achievement of climate neutrality is the major problem to be addressed and the relevant question to be answered in the following sections.

III. The evolution of the European regulatory space: the EU Green Deal as a transformative project

Through the foundational communication on the EGD the EU redefined, on a new and more ambitious basis, its commitment to combating climate change and cutting carbon emissions: the macro-objective, made explicit from the outset, is the achievement of climate neutrality by 2050.[45] The EU's political engagement has been then legislatively formalised by the European Climate Law (ECL)[46] – translating the zero-emissions target into a legally binding obligation – and implemented on a sectoral basis by the recent "Fit for 55" package,[47] containing a series of measures – distinct by sector, rationale, approach and objective

[41] E Chiti, 'Decentralized Implementation' cit. 753; see also R Dehousse, 'Regulation by Networks in the European Community: The Role of European Agencies' (1997) Journal of European Public Policy 246, highlighting the role of EU agencies as "network coordinators rather than as central regulators".

[42] E Vos, 'EU Agencies and the Composite EU Executive' cit. 45.

[43] E Chiti, 'The Agencification Process and the Evolution of the EU Administrative System' cit. 124.

[44] On the complex relationship between new governance forms, law and constitutionalism see G de Burca and J Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing 2006).

[45] See Communication COM(2019) 640 final cit.

[46] Regulation (EU) 1119/2021 cit. 2.

[47] "'Fit for 55': Delivering the EU's 2030 climate target on the way to climate neutrality", Communication COM(2021) 550 from the Commission to the European Parliament, the Council, the European Economic and

– functionally geared to the decarbonisation of the European economy. These acts, which represent in a sense the "backbone" of the EGD and testify to its gradual and incremental character, have been complemented over time by numerous others of different origin, legal nature and normativity (policy documents, sectoral strategies, action plans, sector-specific regulations),[48] which have contributed to defining an ever-growing body of law aimed at regulating and governing the EU energy and ecological transition.

When analysing the EGD, its time horizon, ambitions and ramifications, there is no escaping the overall impression that it would be reductive to interpret it as a simple and linear development of EU environmental law and its conventional objectives. Indeed, the achievement of climate neutrality postulates the elaboration and implementation of a series of "profoundly transformative policies"[49] capable of affecting numerous interconnected domains and embracing different disciplines (such as industry, emission trading system, energy, transport, biodiversity, competition and social policy), each called upon to play a decisive role in the path towards decarbonisation. From the very beginning, the not purely technical but inherently political character of the EU climate neutrality project emerged. What had been presented by the Commission's political manifesto as an urgent challenge that could not be further postponed, *i.e*. combating climate change and achieving zero harmful emissions, became an opportunity to launch a process of remarkable transformation of the European construct, its values and fundamental mission, which clearly revolves around, but is not limited to, the overarching goal of climate neutrality.[50] The zeroing of emissions implied and manifested a deeper ambition, reflected in the Commission's quasi-constitutional language and "politically messianic"[51] narrative: that

Social Committee and the Committee of the Regions 'Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality. On the topic see Editorial Comments, 'The European Climate Law: Making the social market economy fit for 55?' (2021) CMLRev 1321. For a multi-disciplinary analysis of the sectoral proposal formulated in the package, I would also refer to G Cavalieri, B Celati, S Franca, M Gandiglio, AR Germani, A Giorgi and G Scarano, 'Il "Fit for 55" *unpacked*: un'analisi multidisciplinare degli strumenti e degli obiettivi delle proposte settoriali per la decarbonizzazione dell'economia europea (2022) Rivista della Regolazione dei Mercati 409.

[48] See, for instance, the "EU Biodiversity Strategy for 2030. Bringing nature back into our lives", Communication COM(2020) 102 final from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions of 10 March 2020 on A New Industrial Strategy for Europe; Communication COM(2020) 98 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 11 March 2020 A new Circular Economy Action Plan For a cleaner and more competitive Europe; Communication COM(2021) 706 final Proposal for a Regulation of the European Parliament and of the Council of 17 November 2021 on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010.

[49] Communication COM(2019) 640 final cit. 4.

[50] See E Chiti, 'Managing the Ecological Transition of the EU' cit. 19 according to which the EGD "is about the *finalité* of Europe. Far from dealing only with environmental protection, it is a wide-ranging and ambitious regulatory project, calling for a renewal of the European construct beyond the consolidated *acquis*".

[51] Reference is to the concept elaborated by JHH Weiler, 'The Political and Legal Culture of European Integration: An Exploratory Essay' (2011) International Journal of Constitutional Law 678; JHH Weiler,

of shaping a more fair, just and inclusive European society, based on an advanced growth model, a modern, resource-efficient (circular) and competitive economy, the protection of ecosystems and the establishment of harmonious relations between human beings and nature.[52] Thus, around an apparently technical and aseptic objective such as decarbonisation, numerous fundamental choices of an intrinsically political nature coalesced, affecting the economy, society and nature as a whole and shaping the way in which these components interact to each other.

Admittedly, the final outcome of the process is far from being defined. Time will tell whether the EGD project, naturally tending toward progressive juridification, specification and articulation, will be successful and whether it will be able to translate its ambitions into reality, thereby increasing the functional legitimacy of the EU. What is worth highlighting here is its dynamic and genuinely subversive character, which has been inextricably linked from the outset to the need to develop and implement an arsenal of transformative policies functional to decarbonisation that cut across almost major areas of economic and social regulation in the EU.[53] It is the transformative power of climate neutrality that makes the EGD a particularly relevant and intriguing field of investigation, on the assumption that the power dynamics and positive law trends observed within the EU energy and ecological transition may point in directions and reflect broader transformations of the European legal system and its regulatory machinery.

IV. The European Environment Agency within the institutional architecture of the Green Deal: role and functions

This is not the appropriate forum to analyse in detail the EU climate neutrality governance, its multiple features and distinctive regulatory techniques.[54] With the effort of maximum synthesis, it can be observed that the European Climate Law (ECL) draws the institutional architecture for achieving net zero emissions, which takes on the features of a soft and

'Europe in Crisis–On "Political Messianism", "Legitimacy" and the "Rule of Law"" (2012) Singapore Journal of Legal Studies 248.

[52] Communication COM(2019) 640 final cit. 2. On how the EGD articulates these regulatory objectives against the background of the EU substantive constitution see the in-depth analysis of E Chiti, 'Managing the Ecological Transition of the EU' cit. 19.

[53] On the characteristics and importance of social regulation within the European construct and its distinction with economic regulation see G Majone, *Regulating Europe* (Routledge 1996); G Majone, 'The Transformation of the Regulatory State' (2010) Osservatorio AIR; see also T Prosser, *The Regulatory Enterprise: Government, Regulation, and Legitimacy* (Oxford University Press 2010).

[54] For an analysis of the governance architecture outlined in the proposal for a European Climate Law, I would refer to A Giorgi, 'Substantiating or Formalizing the Green Deal Process? The Proposal for a European Climate Law' (2021) Rivista quadrimestrale di diritto dell'ambiente 17; more recently see D Bevilacqua, 'La normativa europea sul clima e il Green New Deal: Una regolazione strategica di indirizzo' (2022) Rivista trimestrale di diritto pubblico 297; and F Donati, 'Il Green Deal e la governance europea dell'energia e del clima' (2022) Rivista della Regolazione dei Mercati 22.

"experimentalist"[55] model of governance based on iterative and dialogic processes between the Commission and Member States. This flexible regulatory solution, which can be likened to a revised form of the well-known Open Method of Coordination (OMC),[56] is based on the centralisation of tasks and functions in the hands of the Commission, which is called upon to regularly monitor and evaluate the performance of the Member States (their decarbonisation plans and strategies) and the EU's progress against the climate neutrality target.[57] The entire construct appears to rest on confidence in the Commission's ability to guide, steer and supervise the EU energy and ecological transition process, even though it lacks effective enforcement and coercive powers over non-compliant states, whose sanction essentially ends up taking on the features of a political or reputational stigma ("public naming and shaming").[58]

It is in the context of this highly centralised institutional architecture that the genuinely auxiliary but no less important role of the European Environment Agency (EEA) emerges, called upon to assist the Commission in preparing its assessments on the effectiveness and consistency of climate neutrality measures and to provide it with highly qualified environmental information and scientific reports.[59] The role attributed to the EEA fully reflects the original functions and mandate of an "information agency"[60]

[55] According to the well-known definition of CF Sabel and J Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU' (2008) ELJ 271. The main features of this model, which can be easily detected in the EU decarbonisation governance, are the setting of a general goal at EU level, a wide discretion of local units (Member States) in pursuing the objective, regular reporting on the performance and the adoption of corrective measures.

[56] In the same vein see L Lionello, 'Il Green Deal europeo: Inquadramento giuridico e prospettive di attuazione' (2020) JUS-Online 127. On the OMC see, *inter alia*, C de la Porte, 'Is the Open Method of Coordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas?' (2002) ELJ 38; E Szyszczak, 'Experimental Governance: The Open Method of Coordination (2006) ELJ 486; K Armstrong and C Kilpatrick, 'Law Governance, or New Governance? The Changing Open Method of Coordination' (2006) ColumJEurL 650.

[57] See arts 6 and 7 Regulation (EU) 2021/1119 cit.

[58] Indeed, the Commission can only adopt soft law measures such as recommendations in order to structure Member State compliance (see art. 7(2) and (3) Regulation (EU) 2021/1119 cit.), envisaging that some kind of political or reputational sanction may influence the conduct of national public powers. Admittedly, this is the one of the rationales behind the use of soft law in the European legal order, whereas soft law is intended as "general rules of conduct laid down in instruments which have not been awarded legal force as such, but which nevertheless have certain legal effects and which are directed at and may produce practical effect". See L Senden and S Prechal, 'Differentiation in and Through Community Soft Law' in B de Witte, D Hanf and E Vos (eds), *The Many Faces of Differentiation in EU Law* (Intersentia 2001) 185, from which the definition is taken; more recently, on the impact of EU soft law on national courts and administrations, see M Eliantonio, E Korkea-aho, and O Ştefan (eds), *EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence* (Hart Publishing 2020). In a general perspective, the development by the EU legal order of steering and governing instruments "qualitatively different from coercive means of enforcement" and yet capable of structuring the compliance is discussed by E Chiti, 'The Governance of Compliance' in M Cremona (ed), *Compliance and the Enforcement of EU Law* (Oxford University Press 2012) 31.

[59] See recital 37 and art. 8(3)(b) and (4) Regulation (EU) 2021/1119 cit.

[60] E Chiti, 'European Agencies' Rulemaking: Powers, Procedures and Assessment' (2013) ELJ 98. For a general discussion on the EEA and the dynamics of environmental information see PGG Davies, 'The European

perfectly cast in the EU environmental and climate governance, charged with the production, collection and dissemination of qualitative environmental information needed both by policy and decision-makers: the former at the stage of drafting climate laws and policies, the latter at the phase of implementing those policies and concretely exercising decision-making powers. Nor should this role, traditionally described as "regulation by information"[61] to distinguish it from a genuine direct rule-making activity (whether *de jure* or *de facto* exercised), be underestimated: not only because the scientific input provided by the agency is essential for the proper implementation of European policies,[62] but also because it is unrealistic to deny that information, especially in case of complex technical issues, has become to all intents and purposes "an autonomous source of power"[63] capable of conditioning the general political discourse.[64]

In this, the EGD moves in a logic of substantial continuity with the past, requiring from the EEA an "apolitical", reliable and objective provision of scientific environmental information that can reduce the decision-maker's margin of discretion and ensure that its policy choices are guided "by the polity's normative commitment to the preservation of the environment"[65] and – it may be added – of ecosystems and natural capital. Rather, it seems to enhance the agency's supporting role *vis-à-vis* the Commission, not only in the upstream phase of drafting legislative proposals and policy documents, but also, and more importantly, in the downstream phase of soft enforcement, by requiring that the Commission's evaluation of the collective progress made by states and of the consistency of EU and national climate neutrality measures also take place on the basis of the EEA scientific reports. Several other strategies, policy documents and regulations further contain an express reference to the EEA and the information network it coordinates (Eionet), highlighting its functional significance within the EGD for ecological and biodiversity protection goals and clarifying its supporting and monitoring tasks towards Member

Environment Agency' (1995) Yearbook of European Law 313; E Chiti, *Le agenzie europee* cit. 247; more recently, M Martens, 'Voice or Loyalty? The Evolution of the European Environment Agency (EEA)' (2010) JComMarSt 881.

[61] G Majone, 'The New European Agencies: Regulation by Information' (1997) Journal of European Public Policy 262, according to which this specific regulatory intervention aims "to change behaviour indirectly, [...] by supplying the same actors with suitable information".

[62] E Chiti, 'European Agencies' Rulemaking' cit. 98.

[63] G della Cananea, 'The European Administration: Imperium and Dominium' in C Harlow, P Leino and G della Cananea (eds), *Research Handbook on EU Administrative Law* cit. 62.

[64] M Everson and C Joerges, 'Re-conceptualising Europeanisation as a Public Law of Collisions: Comitology, Agencies and an Interactive Public Adjudication' in HCH Hofmann and A Turk (eds), *EU Administrative Governance* (Elgar 2006) 530, characterising agencies as "political administration" to the extent that they "juxtapose technical and scientific information with political discourse".

[65] M Everson, 'Good Governance and European Agencies' cit. 146; see also C Waterton and B Wynne, 'Knowledge and Political Order in the European Environment Agency' in S Jasanoff (ed), *States of Knowledge: The Co-Production of Science and Social Order* (Routledge 2004) 87.

States.[66] Admittedly, this is far from surprising and results in a further articulation and "complication" of the traditional role played by the agency within the environmental protection provided by the EU through social regulation.[67]

V. The EU Scientific Advisory Board on Climate Change as a multifunctional independent body: a taxonomy and its implications

And yet, governance structures and arrangements are anything but static or monolithic. Rather, they are "the result of the evolutionary developments in the various policy areas"[68] and their geometry is linked to and driven by the functional needs and challenges faced by the EU legal order, as the progressive construction of EU administrative system shows.[69] This assumption is even more true when placed in the context of the transformative power and inherent dynamism of the EGD and is concretely evidenced by the recent establishment of the EU Scientific Advisory Board on Climate Change (Advisory Board). The decision to create a highly specialised body of an independent nature, which is mandated to act as a the Union's compass on climate change scientific knowledge, is an interesting and far from neutral development, capable of having implications not only on the profiles pertaining to the decarbonisation governance, but also, and more profoundly, on the relationship between (independent) scientific expertise and politics in the design and subsequent implementation of climate neutrality measures.[70] Hence, its genuinely problematic character.

[66] See, for instance, Communication COM(2020) 380 final cit. 7, which mandates the EEA, together with the Commission, to provide guidance to Member States on how to select species and habitats for protection and restoration, establishing an order of priority; see also the COM(2022) 304 final cit., which at recital 65 entrusts the EEA with the function of supporting Member States in the preparation of national restoration plans and in the monitoring of progress towards the achievement of nature restoration targets and obligations.

[67] On the difference between social regulation and social policy within the overall "social dimension" of European integration see G Majone, 'The European Community Between Social Policy and Social Regulation' (1993) JComMarSt 153.

[68] HCH Hofmann and A Turk, 'An Introduction to EU Administrative Governance' in HCH Hofmann and A Turk (eds), *EU Administrative Governance* cit. 5. On the capacity of environmental governance to provide an "unusually rich material" and a privileged observation point for the study of new governance processes see J Scott and J Holder, 'Law and New Environmental Governance in the European Union' in G de Burca and J Scott (eds), *Law and New Governance in the EU and the US* cit. 211.

[69] For an analysis of the phases and routes that led to the progressive construction of the European administrative system see E Chiti, 'La costruzione del sistema amministrativo europeo' cit. 46.

[70] In general terms, on the complex interface between scientific expertise and political-administrative decision within the EU legal order see C Joerges, KH Ladeur and E Vos (eds), *Integrating Scientific Expertise into Regulatory Decision-Making: National Traditions and Europeans Innovations* (Nomos 1997); R Dehousse, 'Misfits: EU Law and the Transformation of European Governance' (Jean Monnet Working Paper 2-2002) 13; M Everson and E Vos (eds), *Uncertain Risks Regulated* (Routledge-Cavendish 2009); M Weimer, 'Risk Regulation and Deliberation in EU Administrative Governance: GMO Regulation and Its Reform' (2015) ELJ 622.

The Advisory Board is given many different tasks and attributions, reflecting its centrality. These tasks range from reviewing the latest scientific conclusions and climate data of the Intergovernmental Panel on Climate Change (IPCC), to advising – through scientific opinions and reports – on existing measures and EU proposals to address the climate crisis, to proactively identifying the actions and opportunities needed to successfully achieve EU climate goals, via raising awareness about climate change and its harmful effects, and disseminating independent scientific knowledge on emissions reductions.[71] If I were to elaborate, with a functional approach, a rationalised version of the tasks and functions performed by the Advisory Board, I would argue that it is an independent body, endowed with a high degree of technical expertise, acting in a fourfold capacity:

i) as a "scientific advisor" to the EU in the energy and ecological transition process;

ii) as the EU "watchdog" to ensure the development of serious, consistent and scientifically based decarbonisation policies;

iii) as a reviewer and "scientific disseminator" of climate data and knowledge, in dialogue with counterparts established by international climate change regimes;

iv) as a proactive driver and "shadow policy-maker" of future EU climate actions.

The functional taxonomy I am proposing has not only a descriptive and classificatory value, but allows to reflect on the normative foundations of the choice to establish such a body and to analyse possible tensions inherent in it, both from an external and internal perspective.

VI. The "external" dimension: increasing cross-fertilisation of climate change governance

A first order of considerations concerns the external implications of the choice, which appears to push towards a more pronounced dialogue and cross-fertilisation between European and international law on climate change.[72] The new Advisory Board seems to find its functional source of inspiration in the IPCC, the United Nation body called upon to provide policy-makers with regular scientific assessments of climate change, its impacts and future implications, which governments can take as a basis for the elaboration of their own climate adaptation and mitigation policies.[73] Over the years, the IPCC has emerged as the most relevant and influential "informational source" in the international arena for climate change policy-

[71] For a more detailed list of tasks see art. 3(2) Regulation (EU) 2021/1119 cit.

[72] See in general terms S Kingston, 'Mind the Gap: Difficulties in Enforcement and the Continuing Unfulfilled Promise of EU Environmental Law' in S Kingston (ed.), *European Perspectives on Environmental Law and Governance* (Routledge 2013) 147 pointing out how parallel environmental governance regimes are increasingly resulting in inter-regime cross-fertilisation of a mutually reinforcing nature.

[73] On the topic see N Singh Ghaleigh, 'Science and Climate Change Law: The Role of the IPCC in International Decision-making' in CP Carlane, KR Gray and R Tarasofsky (eds), *The Oxford Handbook of International Climate Change Law* (Oxford University Press 2016) 55.

making.[74] While embracing and articulating its rationale, that is to condition the content of climate regulations with technical assessments and recommendations, the EU Advisory Board differs from the IPCC model in its independent nature and in the greater and more formalised number of functions exercised than the former. Interestingly enough, absent any proceduralisation, a sort of informal cooperation and "whispered" dialogue takes place between the two bodies, as the Advisory Board is called upon to examine the scientific conclusions of IPCC reports and climate data, paying particular attention to information relevant to the EU.[75]

The interplay between the different regimes on climate change thus becomes even more complex and articulated. It has been recently argued that the UN Paris Agreement[76] catalysed a process of trans-nationalization[77] (or rather of "administrativeisation") of international law in the area of climate change governance, by creating mechanisms and procedural structures that facilitated, within a bottom-up architecture, the participation in climate action of several transnational actors. Latest developments seem instead to open up a process of European import and re-adaptation of consolidated models operating in international climate change regimes, paving the way for a phenomenon of partial internationalization of European (administrative) law[78] and gradual convergence between the two legal systems, at least on an organisational level.

VII. The "internal" dimension: a thorny cohabitation with the European Environment Agency

Further reflections relate to the internal dimension of the decision to establish an independent scientific body on climate change, *i.e*. its repercussions on the European legal system and its administrative space. It is precisely here that the greatest challenges lie, both from an organisational point of view, concerning the allocation of tasks and functions among the various actors that in different ways condition the design of climate policies, and from a substantive point of view, due to the uneasy coexistence between the

[74] M Peeters, 'Climate Science in the Courts' in V Abazi, J Adriaensen and T Christiansen (eds), *The Contestation of Expertise in the European Union* (Palgrave Macmillan 2019) 145.

[75] Art. 3(2)(a) Regulation (EU) 2021/1119 cit.

[76] United Nations, Framework Convention on Climate Change of 12 December 2015, UN Doc FCCC/CP/2015/L9/Rev/1 ('Paris Agreement').

[77] See G Çapar, 'From Conflictual to Coordinated Interlegality: The Green New Deals Within the Global Climate Change Regime' (2021) Italian Law Journal 1003.

[78] On the administrative dimension of the interactions between EU law and international law, see E Chiti, 'EU Administrative Law in an International Perspective' in C Harlow, P Leino and G della Cananea (eds), *Research Handbook on EU Administrative Law* cit. 545 where the complex legal arrangements governing the interplay between EU administrative law and international law are reconstructed.

technical-neutral characterisation of the Advisory Board and the irredeemably political nature of climate neutrality measures.[79]

Starting with the former, the relationship between the Advisory Board and the EEA is not fully structured and clarified, nor is the scope of their respective attributions, which to a certain extent may even compete and overlap when it comes to sharing climate information and scientific reporting to the Commission. Indeed, both bodies play in principle an auxiliary role *vis-à-vis* the Commission, which is mandated to assess the coherence of national and European decarbonisation measures (also) in the light of the EEA and Advisory Board scientific reports.[80] Yet, while the Advisory Board is assigned a function that is meant to be "supplementary" to the work of the EEA,[81] this is difficult to reconcile with the quality, variety and significance of tasks assigned to the latter. What is more, no criteria seem to guide the decision-maker's choice should the reports of the two bodies be methodologically or substantially inconsistent with each other. It is currently uncertain what would occur if there were significant discrepancies between the scientific findings of the EEA and those of the Advisory Board. There are no normative or technical parameters available to determine which of the two scientific reports should be given greater epistemic value and, accordingly, capacity to influence and shape the Commission's decision-making process. In light of this, one should not assume that the interactions between the two bodies will be necessarily harmonious, particularly if the EEA were to perceive that its influence and information prerogatives have been downgraded in practice. On the contrary, there is a risk that a future indirect "regulatory conflict" may arise in the absence of effective coordination and clear allocation of functions, the consequences of which are as yet unforeseeable, but might jeopardise the overall coherence of the EU climate neutrality strategy.

VIII. The integration of independent scientific expertise into the regulatory process: legitimising force or disputable "epistemic leadership"?

So we have arrived at the heart of the problem, namely the reasons that justify from a normative point of view the choice of establishing an independent body, endowed with high technical expertise, entrusted with the task not only of providing scientific advice to policy-makers, but also of proactively identifying "the actions and opportunities needed

[79] Already with reference to environmental protection, scholars emphasised that "EU environmental law and policy-making entails an intriguing mix of political and technical considerations and final decisions are often of a political nature". In these terms A Volpato and E Vos, 'The Institutional Architecture of EU Environmental Governance: The Role of EU Agencies' in M Peeters, M Eliantonio (eds), *Research Handbook on EU Environmental Law* (Elgar 2020) 54, referring in turn to M Lee, *EU Environmental Law, Governance and Decision-Making* (Oxford University Press 2014) 56.

[80] See art. 8(3)(b) Regulation (EU) 2021/1119 cit.

[81] See recital 24 and art. 12 Regulation (EU) 2021/1119 cit.

to successfully achieve the Union's climate objectives".[82] Explanations for this development clearly lie in the need to increase the role of science in climate policy-making and the weight of expert advice within the EGD regulatory process.[83] Abstractly taken, these opinions, whose function is to restrict the decision-maker's room for manoeuvre by conditioning its choices on compliance with rigorous scientific evaluations and parameters, have a significant indirect regulatory power and, consequently, the capacity to considerably influence the substance of the Commission's climate neutrality choices.

In this respect, the Advisory Board should act as a legitimising force in the Union's energy and ecological transition process and its independence, combined with a high degree of scientific expertise, should increase the objectivity, effectiveness and credibility of stringent climate policies. Behind the creation of the body there is hence a clear functional rationale, which is to take the choice as far as possible away from the politics, its logic and arbitrariness, and to invest the independent neutral entity with it, to ensure that the development and subsequent implementation of climate measures are consistent with the goal of climate neutrality. Once the emergence of this peculiar form of "regulation by consultation" is recognised,[84] the discussion could therefore end here.

And yet, on closer examination, this regulatory option shows its decidedly problematic character. Leaving aside the physiological uncertainty to which (climate) science is subject,[85] its inherently controversial nature or the risk of pathological phenomena that may undermine the credibility of scientific findings (conflict of interest, undue pressure, capture),[86] it seems difficult to deny that environmental policy and *a fortiori* climate change measures

[82] Art. 3(2)(d) Regulation (EU) 2021/1119 cit.

[83] As seems to be confirmed by the EU invitation to each Member State to establish a national climate advisory body, responsible for providing scientific advice on climate policy to the competent national authorities, pursuant to art. 3(4) Regulation (EU) 2021/1119 cit. On the crucial role played by science in climate change policy-making see T Meyer, 'Institutions and Expertise: The Role of Science in Climate Change Lawmaking' in CP Carlane, KR Gray and R Tarasofsky (eds), *The Oxford Handbook of International Climate Change Law* cit. 441; AE Dessler and EA Parson, *The Science and Politics of Global Climate Change* (Cambridge University Press 2006) 18.

[84] Peculiar only in respect to its application to the climate change realm. Admittedly, the model in itself is far from new and the EU legal system has already experimented with it in other fields, such as the regulation of food safety. The point is recently highlighted by D Bevilacqua, 'La normativa europea sul clima e il Green New Deal' cit. 297, to whom we refer for an analysis of how a "technical administration" such as the European Food Safety Authority (EFSA) is able to influence the content of policy and administrative decisions of the food sector through its risk assessment activities.

[85] On the different varieties of scientific uncertainty and how science handles each of them to support climate policy-making see LA Smith and N Stern, 'Uncertainty in Science and Its Role in Climate Policy' (2011) Philosophical Transactions of the Royal Society A 4818.

[86] See R Dehousse, 'Misfits' cit. 15: "(w)hereas policy-makers expect scientific assessments to provide them with clear-cut answers, we have known since Karl Popper that there is no such thing as a stable and definitive truth in in scientific discussion". With specific reference to the climate change matter, some critical remarks concerning the functioning of the IPCC are made by D Henderson, 'Unwarranted Trust: A Critique of the IPCC Process' (2007) Energy and Environment 249.

are characterised by a strong "political and ethical significance"[87] that can hardly be sterilised by the scientific assessment of an independent body. The EGD, in this sense, is a striking example. Around an apparently technical and aseptic objective such as climate neutrality, hardly subsumed within a single policy-field, numerous fundamental choices of an intrinsically political nature coagulate, requiring policy-makers to strike difficult balances between economic, social, environmental and ecological considerations in accordance of an "overriding"[88] public interest in decarbonisation. The Commission itself has repeatedly highlighted how the realisation of the EGD necessitates the elaboration and implementation of a range of transformative policies spanning different interconnected policy fields and capable of deeply impacting the European legal and societal order.

Therefore, climate neutrality measures adopted by both national and supranational public powers[89] imply a cross-sectional vision and engage them in a delicate political process of balancing and adjusting several competing interests, values and instances (public, private, collective). This process often requires taking an intergenerational perspective and addressing social justice, ethical, and equity considerations inherent in the choice, to avert potential regressive effects and protect the most vulnerable groups against the setbacks of the transition.[90]

But there is more than that. Not only the purpose and content (*quid*) of a climate policy, but also the way to achieve the envisaged goal (*quomodo*) are the result of a choice that cannot be fully delegated to a scientific assessment conducted by an independent technical subject. The choice of the most suitable instrument to control externalities and reduce emissions is often influenced by normative ideals, past experience, the criteria used to assess its effectiveness (economic efficiency *vis-à-vis* distribution of costs and benefits over the population) and the political feasibility and desirability of the instrument. As the

[87] A Volpato and E Vos, 'The Institutional Architecture of EU Environmental Governance: The Role of EU Agencies' cit. 54.

[88] Communication COM(2022)108 final from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions of 8 March 2022 on REPowerEU: Joint European Action for more affordable, secure and sustainable energy, para. 2(2)(3). See recently on this topic E Bruti Liberati, 'La strategia europea di decarbonizzazione e il nuovo modello di disciplina dei mercati alla prova dell'emergenza ucraina' (2022) Rivista della Regolazione dei mercati 3.

[89] On the crucial role of public powers in reorienting the economic system to address the challenges of decarbonisation and ecological transition see, with different perspectives, A Moliterni, 'Transizione ecologica, ordine economico e sistema amministrativo' (2022) Rivista di Diritti Comparati 395; E Bruti Liberati, 'Politiche di decarbonizzazione, costituzione economica e assetti di governance' (2021) Diritto pubblico 415; F de Leonardis, 'La transizione ecologica come modello di sviluppo di sistema: il ruolo delle amministrazioni' (2021) Diritto amministrativo 779.

[90] On the inevitable intertwining of climate concerns and social justice profiles see, *inter alia*, LR Mason and J Rigg, 'Climate Change, Social Justice: Making the Case for Community Inclusion' in LR Mason and J Rigg (eds), *People and Climate Change: Vulnerability, Adaptation, and Social Justice* (Oxford Academic 2019); MT Brown, *A Climate of Justice: An Ethical Foundation for Environmentalism* (Springer 2022).

literature on environmental regulation shows, no one tool is abstractly superior to the others when all dimensions relevant to environmental policy decision are taken into account.[91] And the final decision, although based on technical criteria and evaluations, is fundamentally political in nature, affected by a number of contextual factors and influenced by ideological preferences capable of masquerading with neutral choices.[92]

How, then, can the inherent political salience of climate change be reconciled with the "epistemic leadership" that seems to be conferred on the Advisory Board? To what extent is a scientific body of an independent nature capable of making assessments of appropriateness in climate change realm that require balancing several competing interests and exercising political discretion? And what legitimacy does this body have in indicating the actions necessary to achieve a goal as transformative as climate neutrality?[93]

Admittedly, it is not possible to provide a definitive answer due to the freshness of the regulatory intervention and the dynamic and evolutionary nature of the EGD. Furthermore, it remains to be seen how and to what extent the Advisory Board technical advice will actually influence (the substance of) EU climate measures and policy-making and how its scientific deliberations will be organised from a procedural point of view, in light of the administrative rule of law principles and guarantees. In this regard, establishing an independent body like the Advisory Board requires not only fully regulating the criteria and conditions that ensure its structural and functional independence and the scientific independence of the experts that are its members, but also to design mechanisms to control their work, to subject their scientific assessments to transparency guarantees and to construct a fully-fledged "accountability regime"[94] that reinforces the overall legitimacy of the independent body.[95] On both these aspects, however, the supranational discipline is currently laconic and excessively vague.[96]

[91] See LH Goulder and IWH Parry, 'Instrument Choice in Environmental Policy' (2008) Review of Environmental Economics and Policy 152.

[92] On how ideologies and interests are able to influence technical choices and masquerade with them see the seminal work of K Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press 2001); and J Weiler, 'The Transformation of Europe' (1991) YaleLJ 2403.

[93] This last question becomes even more relevant when one considers that "the scale and veracity by which the contestation of expertise (in the European Union) has been taking place in recent years is unprecedented". The passage is extrapolated from the preface to V Abazi, J Adriaensen and T Christiansen (eds), *The Contestation of Expertise in the European Union* cit.

[94] Reference is to the notion elaborated by JL Mashaw, 'Structuring a "Dense Complexity": Accountability and the Project of Administrative Law' (2005) Issues in Legal Scholarship 8; see also M Bovens, D Curtin and P 't Hart (eds), *The Real World of EU Accountability: What Deficit?* (Oxford University Press 2010); and P Craig, 'Accountability' in A Arnull and D Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 431.

[95] On the possibility of basing the legitimacy of scientific evaluations on the way these deliberations are organised, with particular reference to the principles of transparency, accountability, and independence see R Dehousse, 'Misfits' cit. 14.

[96] As evidenced by reading art. 12 Regulation (EU) 2021/1119 cit.

Those raised above, however, are relevant questions that the Union will have to answer sooner or later. While waiting for a clarification of the overall direction of the EU decarbonisation project and the power relations between its multiple actors, it seems possible to point out the problematic coexistence between the innate "politicity" of climate neutrality measures and the alleged scientific "neutrality" of an independent technical body in charge of substantiating these measures, which risks generating a tension (or, in worst-case scenarios, a contradiction) within the EGD that could be hardly remediable, especially should a process of genuine dialectic and political synthesis be lacking.

IX. Conclusions

This *Article* started with a number of questions concerning the role played by EU agencies in the evolving EU legal system and their ability to provide a functional and normative response to the Union's complex challenges, first and foremost the achievement of climate neutrality. The perspective adopted, focused on the EU energy and ecological transition project, does not permit nor pretend to provide an exhaustive answer to these ambitious questions. However, the analysis of the institutional dynamics, governance arrangements and policy choices that characterise a political project as profound as the EGD allows for some concluding remarks that can serve as a basis for further discussions and broader analysis. The conclusions are summarised as follows.

First, the EGD does not seem to openly question the agency model based, among other things, on the distinguishing feature of autonomy. The EEA continues to play a relevant role in the EU climate neutrality governance, it is not – in Dino Buzzati's words – a "fortress Bastiani"[97] overtly deprived of its strategic importance. Nor could be otherwise, given its well-established function of high-quality environmental information dissemination and the ramified network that coordinates. This prototypical, almost "totemic" character of one of the first agencies created in the EU legal system might explain why the supranational legislator did not choose the path of enhancing its tasks and attributions, opting instead for the creation of an independent scientific Advisory Board.

Second, the establishment of such a body, while not disavowing the agency model, perforce entails its partial functional downsizing, in a more subtle and disguised manner than the *mens legis* might suggest. The quantity, quality and relevance of tasks and functions attributed to the Advisory Board, a rationalised version of which was provided, testifies to the EU's need to strengthen the role of independent science and the weight of expert advice in the development of credible and rigorous climate policies, beyond the

[97] D Buzzati, *Il deserto dei Tartari* (Rizzoli 1940). In Buzzati's famous novel, the Bastiani fortress represents a once important and strategic defensive outpost, but now devoid of any utility and functional relevance due to the prolonged absence of attacks and threats from the desolate plain that the monumental construction, perched on the mountain, dominates. There is thus a hiatus between the apparently solemn character of the fortress and the function of mere historical testimony that the defensive construction, like a hollow simulacrum, essentially performs.

mere "regulation by information" of the EEA. The new scientific body and its distinctive "regulation by consultation" stand to become the *de facto* cornerstone of the entire structure built by the EU to tackle the challenge of climate neutrality. Yet, if not appropriately coordinated and harmonised, the two indirect regulatory functions of the EEA and the Advisory Board, rather than tending towards integration, could instead lead to potential conflicts and the "disintegration" of the functional rationality of the overall EGD.

Third, a general EU's tendency to rely on the independence formula to cope with situations and contexts *lato sensu* of crisis seems to be confirmed, despite the unquestionable diversity of assumptions, expected outcomes and powers attributed to the independent body.[98] Yet, when experienced and declined in climate change realm, the model of independent experts with highly specialised technical knowledge seems to show some limitations. Climate neutrality measures, as has been thoroughly argued, are characterised by a strong political significance. And their political salience cannot nor should be entirely neutralised by technical assessments conducted by an independent body ill-suited to balance between competing claims, values and interests in the same way as political-administrative institutions. The risk, otherwise, is that instead of serving as a legitimising force for the EGD, the Advisory Board may turn into a questionable "shadow policy-maker" and "epistemic leader" in the EU energy and ecological transition process, especially if its functioning is not accompanied by effective consensus-building[99] and full compliance with the administrative rule of law guarantees and principles. While awaiting clarification on the dynamics and power relationships among the multiple actors operating within the climate neutrality governance, as well as the actual influence of the Advisory Board on EU climate policy-making, it is worth pointing out the existence of a number of latent tensions, knots and potential conflicts that might functionally and normatively undermine the EGD legitimate ambitions.

[98] Admittedly, the creation of the three European Supervisory Authorities (EBA, EIOPA, ESMA) in the aftermath of the financial and public debt crisis represents a striking example of the EU political choice to go beyond the traditional EU agency model, based on simple autonomy from the Commission, and to establish genuine EU independent authorities provided with relevant regulatory powers. On the rise of an EU independent authority model within the agencification process see E Chiti, 'The Agencification Process and the Evolution of the EU Administrative System' cit. 146.

[99] On the need to develop "civic epistemologies" as "publicly accepted and procedurally sanctioned ways of testing and absorbing the epistemic basis for decision making" see S Jasanoff, 'Cosmopolitan Knowledge: Climate Science and Global Civic Epistemology' in JS Dryzek, RB Norgaard, and D Schlosberg (eds), *The Oxford Handbook of Climate Change and Society* (Oxford University Press 2011) 129.

Articles

Future-proof Regulation and Enforcement for the Digitalised Age

edited by Gavin Robinson, Sybe de Vries *and* Bram Duivenvoorde

Introduction: Future-proof Regulation and Enforcement for the Digitalised Age

This *Special Section* in *European Papers* is devoted to assessing whether core areas and core values of European law are future-proof (and how they could or should be made future-proof) in light of developments in terms of digitalisation and technological innovation.

Digital technologies create various challenges, in many cases associated with the use of algorithms, the massive collection of personal data and the possibilities (and difficulties) of access to digital content. All these challenges require careful consideration, and regulation and enforcement arrangements which protect and balance the possibly conflicting values that we deem important in our societies, including innovation and technological development and protection of fundamental rights. Yet, it is exactly the continuous and fast-paced technological developments that make it difficult to regulate in these areas. In the European Union, this response is predominantly shaped and guided within the multi-level legal order, whereby the EU legislature has gained a growing role in shaping the regulatory response to technological developments and in shaping our digital societies: through policy, through soft-law instruments, through regulations, directives, and other legal instruments. Add the crucial contributions of the EU judiciary to the interpretation and development of regulation and enforcement through the growing body of CJEU jurisprudence, and the great extent to which the European Union is shaping our digital futures becomes clear.

This *Special Section* is the result of a joint project of researchers at the Utrecht Centre for Regulation and Enforcement in Europe (RENFORCE) at Utrecht University.[1] The project brought together researchers with expertise in different fields of EU law, who are all focusing on the impact of digitalisation on their respective fields of law. The different fields of expertise include EU internal market law, consumer protection law, data protection law, competition law, financial law, intellectual property law and criminal law. This *Special Section* follows

[1] More specifically, the project took place within the 'Digitalisation & Technological Innovation in Europe' Building Block, essentially a sub-group within RENFORCE focusing on the impact of digitalisation and technology on EU law.

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a joint workshop organised in Utrecht on 4 November 2022, in which each of the authors – after an inspiring keynote by Sofia Ranchordas (Tilburg University and LUISS, Rome) on future-proofing EU regulation – presented and discussed their preliminary findings.

What stands out in the seven contributions in this *Special Section* is that despite the impressive legislative output at EU level, more – or rather, different or "out of the box" thinking – is needed to tackle the digital challenges now and in the future.

The first contribution in this *Special Section* is written by Sybe De Vries, Olia Kanevskaia and Rik De Jager, who discuss the future-proofness of the proposed AI Act from three perspectives: *i)* the internal market; *ii)* protection of fundamental rights and *iii)* democratic legitimacy in the EU decision-making processes. Ultimately, their contribution offers a broader reflection on the policy and legal implications of AI and proposes a number of recommendations on how to increase the fitness of the future AI Act, bearing in mind the balance between the economic and fundamental rights goals of the AI Regulation.

Secondly, Alessia D'Amico offers an *Article* rooted in a matter of perennial importance for legal research and for citizens more broadly: consent in data protection law, and more specifically the credibility of the notion of both "informed" and freely-given consent in today's Big Tech-dominated world. The piece focuses on the recent proceedings in Case C-252/21 *Meta vs Bundeskartellamt* before the CJEU, including the novel proposal from the Advocate General to include dominance as a factor in the assessment of customers' freedom of consent to data processing. Competition law thus meets data protection law on both the theoretical and practical levels, with the author sharing a critical and constructive discussion of how such an interplay between competition authorities and data protection authorities may contribute to better protection of individuals' rights over their data into the future.

The third contribution is from Bram Duivenvoorde, who discusses whether EU consumer law is future-proof in terms of protecting consumers against harmful personalised advertising. After explaining that personalised marketing can exploit consumer vulnerabilities, he shows that the current EU legal framework is unfit to effectively protect consumers against these harms. Duivenvoorde argues that recent EU laws and proposals address this problem only to a limited extent. He therefore draws the conclusion that EU marketing law should be redesigned in order to better protect consumers, both in terms of regulation and enforcement.

The next contribution is written by Catalina Goanta, with the title "Digital Detectives: A Research Agenda for Consumer Forensics". Goanta argues that effective enforcement on digital markets is one of the key challenges of contemporary consumer law and policy, and that public authorities need to arm themselves with the means necessary to detect digital violations. In her *Article*, Goanta proposes a new field of research focused on the investigation and enforcement of consumer violations on digital markets in the form of "consumer forensics", and argues that consumer forensics is the way forward in making consumer enforcement future-proof. She offers insights on how this could be achieved,

focusing on the potential of consumer forensics in response to consumer protection violations in the context of influencer marketing.

Goanta's *Article* is followed by the contribution of Nikita Divissenko, which analyses the EU's recent Markets in Crypto-Assets (MiCA) Regulation, sitting within the Digital Finance Package (DFP), from the perspective of financial innovation. The legislative desire to foster said digital financial innovation whilst ensuring adequate protection of European consumers is the key balancing act explored in the *Article*. Divissenko highlights two main points of vulnerability that tend to undermine future-proofness in this field – the scope of the new MiCA Regulation and its capacity to incorporate future innovation, and the responsiveness of the regulatory and supervisory framework to as-yet-unknown risks – before discussing potential solutions in the shape of (greater use of) regulatory sandboxes and technological regulation.

Next is the *Article* by Vicky Breemen, who discusses the difficult position of libraries in the digital society under EU copyright law. She explains that despite modernisation efforts in the past decades, the "library privilege" (i.e. the provisions regulating library functions) still persistently focuses on physicality. Breemen finds that the most recent addition to the EU copyright acquis, the Digital Single Market Directive (2019), does offer some openings in this regard. Looking at the future, Breemen argues that copyright law should move away from the library privilege's focus on physicality, facilitating remote access at least to some extent.

Lastly, Gavin Robinson discusses the collection and preservation by private companies, for the public purposes of preventing, investigating and prosecuting criminal offences, of EU citizens' communications metadata (for instance, records of mobile telephone calls or emails) – a practice more widely known as "data retention". Nearly ten years on from the CJEU's seminal decision in Case C-293/12 *Digital Rights Ireland,* the *Article* tackles the prospect that will not go away – that of a fresh EU-level data retention law – both in terms of its compatibility with the body of CJEU case law today and its viability into the future, also in light of technological evolution in the very kinds of data it may be technologically possible for private actors to retain. The *Article* looks at the first attempts at the national level to square the circle presented by the CJEU as its favoured middle ground – "targeted" data retention – and discusses the need for the effectiveness of any such scheme to be credibly demonstrated over time.

A key challenge for any collective effort seeking to tackle disparate fields within the realm of EU law, alongside ensuring a common focus on its animating theme (the future-proofness of EU law today) together with a shared constructive approach (how EU law can be more future-proof tomorrow), is that of ensuring the *Articles* all tackle recent or ongoing legal developments – or in other words, that they are all up-to-date. We are therefore most grateful to everyone at *European Papers* and to our colleagues at Utrecht for their commitment to ensuring the topicality as well as the quality of all parts making up this whole. We hope that the contributions provide food for thought, useful insights

and inspiration for the process of making regulation and enforcement in the EU (more) future-proof for digitalisation – both within the specific fields of expertise and beyond.

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ARTICLES

FUTURE-PROOF REGULATION AND ENFORCEMENT FOR THE DIGITALISED AGE

Edited by Gavin Robinson, Sybe de Vries *and* Bram Duivenvoorde

INTERNAL MARKET 3.0: THE OLD "NEW APPROACH" FOR HARMONISING AI REGULATION

SYBE DE VRIES*, OLIA KANEVSKAIA** AND RIK DE JAGER***

ABSTRACT: In April 2021, the European Commission proposed a Regulation on Artificial Intelligence (AI) as part of a package of EU legislative harmonization measures that seek to tackle the societal challenges of digitalization and technological innovation. The proposed legislation draws heavily on the "New Approach" technique for the technical harmonization and standardization of goods. This raises several questions and concerns. Firstly, it can be questioned whether a harmonization technique that has been developed for health and safety standards in the offline, physical market, can be that easily transposed to the field of AI, where ethical and fundamental rights issues abound. Secondly, despite its success, the "New Approach" regulatory technique has been subject to much criticism, such as the responsibility of the manufacturers to carry out a conformity assessment, the role and decision-making powers of the private law standardization organizations and notified bodies, and the lack of public participation and public oversight in standardization and certification processes. These concerns are aggravated in the AI environment due to the pertaining legal, ethical and fundamental rights issues. This *Article* therefore seeks to explore the future-proofness of the proposed AI Act from three perspectives: *i)* the internal market; *ii)* protection of fundamental rights and *iii)* democratic legitimacy in the EU decision-making

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processes. Ultimately, it offers a broader reflection on the policy and legal implications of AI and proposes a number of recommendations on how to increase the fitness of the future AI Act, bearing in mind the balance between the economic and fundamental rights goals of the AI Regulation.

KEYWORDS: EU Digital Single Market – AI Act – standardisation – "New Approach" – harmonised standards – fundamental rights.

I. INTRODUCTION

On April 21, 2021, the European Commission published a proposal for a "Regulation laying down harmonised rules on artificial intelligence", also called the Artificial Intelligence Act ("Draft AI Act").[1] Being a core part of the EU Digital Market Strategy, this pioneering attempt to regulate AI in the EU aims to ensure the proper functioning of the European internal market by introducing harmonised rules on the use, development, and placement of AI systems in conformity with the Union values. The aim of the Draft AI Act is twofold: to ensure the free movement of AI-based goods and services in the EU internal market and to protect public interests such as health, safety and fundamental rights.[2]

While bringing positive solutions and benefits in multiple sectors, *e.g.*, finance, health care, transportation, and sustainability,[3] AI also carries many effects that are (potentially) disruptive for society, ranging from algorithmic bias enabling discriminatory practices[4] to the situation where we are unable to explain the rationale for an AI system's conclusions and actions (the so-called "black box" phenomenon).[5] Consequently, a wide range of fundamental rights and other values risk being negatively impacted by AI systems: to name a few, AI technologies may violate the rights to privacy and data protection, non-discrimination, human dignity and self-determination, the rights of effective judicial remedies and a fair trial, freedom of expression and consumer protection.[6] It is then not surprising that the use of AI technologies has fuelled concerns of policymakers and academics alike.

Regulating emerging technologies is not an easy task. Next to the question "how" such technologies should be regulated, there are also questions of "what" to regulate,

[1] Communication (COM)2021 206 final from the Commission of 21 April 2021 on a Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts (Draft AI Act).

[2] *Ibid*. recital 13.

[3] DM West and JR Allen, 'How Artificial Intelligence is Transforming the World' (24 April 2018) Brookings www.brookings.edu; G Misuraca and C van Noordt, 'AI Watch – Artificial Intelligence in Public Services' (Publication Office of the European Union 2020) publications.jrc.ec.europa.eu 40 ff.

[4] A Jobin, M Ienca and E Vayena, 'Artificial Intelligence: The Global Landscape of Ethics Guidelines' (2019) Nature Machine Intelligence 389, 390.

[5] Y Bathaee, 'The Artificial Intelligence Black Box and the Future of Intent and Causation' (2018) Harvard Journal of Law & Technology 890; M Ebers, 'Standardising AI – The Case of the European Commission's Proposal for an Artificial Intelligence Act' in L Di Matteo, C Poncibò and M Cannarsa (eds), *Cambridge Handbook of Artificial Intelligence: Global Perspectives on Law and Ethics* (Cambridge University Press 2022) 4.

[6] See for example M Ebers, 'Standardising AI' cit. 3.

and "when". Too tight, or too early a regulation may unduly restrict the development of new technologies, while regulating at the later stage risks not capturing the major risks brought by these technologies. This dilemma, also known as the "pacing problem", is very well familiar among law and technology scholars.[7]

Regulation of AI is no exception. Governments worldwide are still exploring the avenues for regulating this technological development. In this regard, the approach chosen by the EU represents an ambitious attempt that seeks to tackle the economic and societal challenges of digitalization and technological innovation through the adoption of a regulation and the use of a well-established harmonisation technique of internal market legislative harmonisation, *i.e.*, the "New Approach". Developed in the 1980s for the harmonization of rules on product safety, this approach entails in short that the Draft AI Act is confined to setting only essential safety and consumer protection standards which AI systems must comply with, whereas more detailed requirements for AI systems are developed and defined by private bodies.[8] This *Article* focuses on the regulatory regime of so-called high-risk AI systems, as only these systems are subject to the New Approach harmonisation technique and constitute the most impactful systems the Draft AI Act aims to regulate.[9]

The fact that the proposed act uses this regulatory technique for the regulation of AI raises several questions and concerns. First and foremost, it can be questioned whether a harmonization technique that is developed in the "offline market" can be that easily transposed to an online environment and to the field of AI, where ethical and fundamental rights issues are abound. Second, the "New Approach" has been frequently criticised for its perceived lack of democratic legitimisation and accountability and, related to this, the lack of public participation and public oversight in the standardization and certification processes.[10]

[7] For the literature overview, see A Butenko and P Larouche, 'Regulation for Innovativeness or Regulation of Innovation?' (2015) Law, Innovation and Technology 52. The critique of this theory has been, among others, that the law does not react on sociotechnical changes, but constructs them; see, among others, M Leta Jones, 'Does Technology Drive Law? The Dilemma of Technological Exceptionalism in Cyberlaw' (2018) Journal of Law, Technology and Policy 101. In this regard, Kamiski also argues that from the viewpoint of legal construction, the regulation of AI also creates the meaning of AI systems and the harms they bring, ME Kaminski, 'Regulating the Risks of AI' (forthcoming 2023) Boston University Law Review 5.

[8] By analogy, see Council Resolution of 7 May 1985 on a new approach to technical harmonization and standards, Annex II. See also H Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* (Bloomsbury 2005) and M Egan, *Constructing a European Market* (Oxford University Press 2001).

[9] It concerns, in short, AI systems that manipulate human (group) behaviour, enable the social scoring of people by public authorities, or use real-time and remote biometric identification systems, which the Commission considers to be at fundamental odds with Union values, see Communication (COM)2021 206 final (Draft AI Act) cit. 21.

[10] See, among many others, L Senden, 'Towards a More Holistic Legitimacy Approach to Technical Standardisation in the EU' in M Eliantonio and C Cauffman (ed), *The Legitimacy of Standardisation as a Regulatory Technique: A Cross-disciplinary and Multi-level Analysis* (Elgar Publishing 2020) 27.

Against this backdrop, we seek to explore whether the proposed use of the "New Approach" regulatory technique in the Draft AI Act is sufficiently future-proof, in the sense that it both enhances the EU internal market and other core values, including fundamental rights. The remainder of this *Article* is organized as follows. Section II provides a brief overview of the evolution of EU harmonization, from product safety to the Digital Single Market. Section III explains the main elements of the Draft AI Act, focusing specifically on its risk-based approach. Section IV dives into the "future-proofness" of the Draft AI Act in regulating AI in the current digitalised era from three perspectives, *i.e.*, the internal market, fundamental rights, and democracy and legitimacy. Section V provides several recommendations on future-proofing the Draft AI Act and places the Draft AI Act in the broader AI policy agenda at the EU level.

II. The evolution of the "New Approach" to harmonisation in the EU: setting the scene

Harmonisation of national laws is a crucial instrument for the realisation and functioning of the EU's internal market, next to the application of the Treaty rules on free movement and competition.[11] The last fifty years have marked a shift in the EU's legislative praxis, from merely harmonising product requirements, mainly through the adoption of directives, to adopting rules that span across many features of the digital world and cut through the arising concerns of fundamental rights. Here, the key legislative instrument seems to be the regulation, which is directly applicable, rather than the directive, which needs to be transposed into national law. To understand the embedment of the recent Draft AI Act into the EU legal system, this section broadly outlines the development of the EU harmonisation, focusing in particular on the New Approach technique that plays a central role in the European proposal for AI regulation.

II.1. The "New Approach" to technical harmonisation

Until the early1980s, technical harmonisation was carried out through the "traditional" approach: the Commission established detailed technical requirements in its Directives and issued the lists of products these requirements applied to.[12] Needless to say, this harmonization method was ill-equipped to deal with the ever-increasing variety of

[11] PJ Slot, 'Harmonisation' (1996) ELR 378-387. SA de Vries, *Tensions within the Internal Market: The Functioning of the Internal Market and the Development of Horizontal and Flanking Policies* (Europa Law Publishing 2006) 247.

[12] H Schepel, 'The New Approach to the New Approach: The Judification of Harmonized Standards in EU Law' (2013) Maastricht Journal of European and Comparative Law 521; J Pelkmans, 'The New Approach to Technical Harmonization and Standardization' (1987) JcomMarSt 249.

products and unpredictable technical developments due to its slow pace and lack of the necessary expertise in the Commission.[13]

The breakthrough came with the CJEU's landmark ruling in *Cassis de Dijon* that introduced the principle of mutual recognition to the EU acquis. In light of the Court's judgment, and to promote European integration by addressing the "impediments to the internal market that were not already neutralised by the application of the principle of mutual recognition",[14] the Commission introduced the "New Approach" framework in 1980.[15] Under the New Approach regulatory technique, the Commission's Directives set the essential requirements of health, safety, consumer protection or environmental protection,[16] while the methods of achieving these essential requirements were prescribed in harmonized standards adopted by the three European Standardisation Organisations ("ESOs") following the request of the Commission.[17] These harmonized standards are then endorsed by the Commission and their references are published in the Official Journal of the European Union ("OJEU").[18] Compliance with harmonized standards grants a presumption of compliance with the essential requirements.[19] The New Approach was amended in 2008 with the "New Legislative Framework", updating rules for certification and conformity assessment.[20]

In principle, harmonized standards are voluntary, meaning that manufacturers are free to pursue an alternative method to demonstrate conformity with the essential requirements of the Directives. In practice, however, compliance with harmonized standards is less costly and provides more (legal) certainty, making it the preferred option

[13] P Messerlin, 'The European Union Single Market in Goods: Between Mutual Recognition and Harmonisation' (2011) Australian Journal of International Affairs 412-413.

[14] Communication COM(1980) 256/3 from the Commission of 3 October 1980 concerning the consequences of the judgment given by the Court of Justice of 20 February 1979 in Case 120/78 ('Cassis de Dijon').

[15] Council Resolution of 7 May 1985 on a New Approach to Technical Harmonisation and Standards cit. See also I Govaere, '"*Ceci n'est pas... Cassis de Dijon*": Some Reflections on its Triple Regulatory Impact' in A Albors-Llorens, C Barnard and B Leucht (eds), *Cassis de Dijon 40 Years On* (Hart Publishing 2021) 105.

[16] PJ Slot, 'Harmonisation' cit.

[17] See, for example, Notice C/2016/1958 of the Commission of 26 July 2016 on the 'Blue Guide' on the implementation of EU products rules.

[18] Regulation 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council, art. 10(6).

[19] Member States can still adopt legislation with additional requirements under certain conditions, see cases C-470/03 *A.G.M.-COS.MET Srl* ECLI:EU:C:2007:213 para. 53 and case T-474/15 *GGP Italy v Commission* ECLI:EU:T:2017:36.

[20] Decision 768/2008/EC of the European Parliament and of the Council of 9 July 2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC, art. 1 ff.

among most producers.[21] From this vantage point, the "voluntarism" of harmonized standards becomes somewhat debatable, with recent case law of the European Court of Justice (the Court or CJEU) adding confusion to whether harmonized standards, being subjected to the CJEU's jurisdiction, are indeed a part of European law,[22] and which legal consequences it would entail for both manufacturers and the ESOs.[23]

Compliance with harmonized standards is verified through conformity assessments, typically conducted in a testing house following the order of the manufacturer (also known as a "self-assessment") or by "notified bodies". These bodies are independent technical organisations, typically private sector certification firms or, more rarely, by public authorities,[24] that perform the required testing and certify products that successfully passed the testing requirements.[25] Once the conformity assessment is fulfilled, the producer issues a Declaration of Conformity (DoC) and affixes a *Conformité Européenne* (CE) marking to the product, which allows for free circulation of that product within the EU. Conformity assessments thus take place in the pre-marketing phase of the product to determine whether the product's safety and performance meet the applicable legal requirements.

The "New Approach" and later, the "New Legislative Framework", have brought substantial benefits to the integration of the EU market. Rooted in public-private partnership, these legislative techniques have contributed considerably to fostering the free movement of goods, while relieving the EU legislature from the onerous duty of issuing sector-specific technical specifications through the EU decision-making process.[26] Furthermore, it allows the EU legislator to balance the interest of free trade with public, non-economic interests, such as safety, health or environmental protection.[27] The ratio behind the New

[21] R van Gestel and H Micklitz, 'European Integration through Standardisation: How Judicial Review is Breaking Down the Club House of Private Standardisation Bodies' (2013) CMLRev 145, 157.

[22] Case C-613/14 *James Elliott Construction v Irish Asphalt Ltd* ECLI:EU:C:2016:821 para. 40; but also case T-185/19 *PRO and Right to Know v Commission* ECLI:EU:T:2021:445 paras 53-54.

[23] M Gerardy, 'The Use of Copyrighted Technical Standards in the Operationalisation of European Union Law: The Status Quo Position of the General Court in Public.Resources.Org (T-185/19)' (2022) European Journal of Risk Regulation 532; B Lundqvist, 'European Harmonized Standards as "Part of EU Law": The Implications of the *James Elliott* Case for Copyright Protection and, Possibly, for EU Competition Law' (2017) Legal Issues of Economic Integration 421; A Volpato, 'The Harmonized Standards before the ECJ: James Elliott Construction' (2017) CMLRev 591. See also CEN and CENELEC position on the consequences of the judgment of the European Court of Justice on James Elliott Construction Limited v Irish Asphalt Limited, available at opil-ouplaw-com.proxy.library.uu.nl.

[24] Regulation (EC) 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93.

[25] G Spina Alì and R Yu, 'Artificial Intelligence between Transparency and Secrecy: From the EC Whitepaper to the AIA and Beyond' (2021) European Journal of Law and Technology 15.

[26] See J Pelkmans, 'The New Approach to Technical Harmonization and Standardization' cit. 249.

[27] See also I Govaere, '"*Ceci n'est pas… Cassis de Dijon*"' cit. 106.

Approach seems also to stem from the aim to distinguish between law and technical expertise. The law merely sets the general framework and broad policy choices, while the exact technical details are fleshed out by the industry.[28]

Yet, next to generating efficiency in making and adopting harmonised rules with a view to the functioning of the internal market, the New Approach raises pertinent questions of legitimacy and accountability in European rulemaking. The actual standardisation work takes place in ESOs' technical committees and working groups predominantly consisting of national standards bodies,[29] but which also include representatives of commercial firms as well as trade associations or consumer groups, although the latter categories lack voting rights on adopting harmonized standards.[30] Given that participation in these committees, as well as in the national standards bodies representing the interests of the Member States in the ESOs, requires time and resources, in practice, key industry actors play a crucial agenda setting role.[31] This prevalence of commercial interests, together with the increased politization of standards development processes and the lack of democratic accountability of ESOs have been among many points of criticism against the New Approach, which will be discussed in section IV.[32] To address some of these concerns, the Commission issued a new Standardization Strategy in February 2022 which, among others, aims to improve governance and decision-making of the European standardization system.[33]

II.2. The Digital Single Market

As the digital transition drew closer, the Commission began to rethink its approach to legislative harmonisation within the context of the Digital Single Market. The EU Digital Single Market strategy (DSM) was adopted as one of the Commission's political priorities with a view to promote the digitalisation of European industry, incentivise investments in

[28] B van Leeuwen, 'Standardisation in the Internal Market for Services: An Effective Alternative to Harmonisation' (2018) Revue Internationale de Droit Économique 323.

[29] It should be noted, however, that while CEN/CENELEC and ETSI membership indeed consists of national bodies, ETSI also allows membership of private companies.

[30] M Egan, *Construction a European Market: Standards, Regulation, and Governance* (Oxford University Press 2001) 133.

[31] *Ibid*. 143.

[32] See, among others, H Schepel, 'The New Approach to the New Approach' cit. 521; C Frankel and E Hojbjerg, 'The Constitution of a Transnational Policy Field: Negotiating the EU Internal Market for Products' (2007) Journal of European Public Policy 96.

[33] Communication COM(2022) 31 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 2 February 2022, 'An EU Strategy on Standardisation Setting global standard in support of a resilient, green and digital EU single market'; M Gerardy, 'The New EU Strategy on Standardisation: Real Step Forward or Missed Opportunity?' (14 March 2022) EU Law Live eulawlive.com.

digital infrastructure and create fair(er) conditions on the emerging digital markets.[34] The DSM "is [a market] in which the free movement of persons, services and capital is ensured and where the individuals and businesses can seamlessly access and engage in online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence".[35] In other words, the DSM is about allowing the freedoms of Europe's Single Market to enter the digital age but also about taking account of public interests and fundamental rights.[36]

Although the DSM is clearly intertwined with the offline or physical internal market, it has certain distinctive characteristics, which primarily revolve around the strong role of private actors, the importance of data and fundamental rights, and the (initial) lack of a public economic law infrastructure at national level and the (consequential) use of the instrument of a regulation instead of a directive.[37] The strength and power of private actors has important ramifications, not only for market access of businesses and consumers but also for citizens' fundamental rights, public interests and social values. The DSM recognizes their often crucial role in the regulatory domain and of the breaking down of the tradition public-private divide.[38] For instance, the Draft AI Act illustrates how the EU legislator increasingly imposes direct obligations on private actors with art. 114 TFEU as the legal basis, just as is the case in for example the Digital Services Act (DSA) (*e.g.* measures to counter illegal content online), the Digital Markets Act (DMA) (obligations for platforms as gatekeepers) or the Roaming Regulation (a wholesale roaming access obligation imposed on roaming providers).[39]

Furthermore, data and information are at the centre of the digital economy, which emphasizes the importance of the political, non-market, next to economic, aspects of the

[34] Communication COM(2015) 192 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 6 May 2015 on A Digital Single Market Strategy for Europe.

[35] Commission Staff Working Document SWD(2015) 100 final of 6 May 2015 on A Digital Single Market Strategy for Europe - Analysis and Evidence Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A Digital Single Market Strategy for Europe.

[36] See S de Vries, 'The Resilience of the EU Single Market's Building Blocks in the Face of Digitalization' in U Bernitz and others (eds), *General Principles of EU Law and the EU Digital Order* (Kluwer Law International 2020).

[37] *Ibid*. 4-5.

[38] S de Vries, 'The Potential of Shaping a Comprehensive Digital Single Market with the Long Awaited Digital Single Market Act' (21 January 2021) Utrecht University www.uu.nl.

[39] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act); Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act); Regulation (EU) 2022/612 of the European Parliament and of the Council of 6 April 2022 on roaming on public mobile communications networks within the Union (recast). S de Vries, 'The Potential of Shaping a Comprehensive Digital Single Market with the Long Awaited Digital Single Market Act' cit.

internal market.[40] Whilst the process of digitalization enlarges the (commercial) space of the market, the boundaries between commercial and public spaces become increasingly blurred.[41] Examples are the position of Big Tech companies, whose power do not only impact market access but also the political and democratic processes.[42] In a similar vein, the content monetization business models used on social media blur the lines between commercial advertising and political speech.[43] Meanwhile, within the context of the EU's DSM and the internal market legal basis of art. 114 TFEU, the EU legislator seeks to protect and balance fundamental rights, such as the protection of personal data and privacy, the freedoms of expression and information, the rights to non-discrimination and human dignity and the freedom to conduct a business, which are all enshrined in the EU Charter of Fundamental Rights. This is inherent to legislative harmonisation within the context of the (digital) single market as it "sets common rules for the European market, but, against a background of diverse national sources of regulatory inspiration, it also involves a standard of re-regulatory protection [...]".[44] It makes internal market legislation by its very nature receptive to public and social policy interests. This approach, whereby the EU legislator seeks to give considerable weight to public, non-market values and fundamental rights vis-à-vis market interests has been endorsed by the CJEU. For instance, in cases like *Sky Österreich* and *Google Spain* the CJEU in balancing conflicting fundamental rights and market interests within the context of EU internal market legislation, recognised the importance of freedom of information, media plurality (Sky Österreich) and the right to be forgotten as part of data protection (Google Spain), vis-à-vis the economic interests of commercial broadcasters or Google.[45]

[40] MZ van Drunen, N Hellberger and RÖ Fathaigh, 'The Beginning of EU Political Advertising Law: Unifying Democratic Visions through the Internal Market' (2022) International Journal of Law and Information Technology 194.

[41] *Ibid*. 194; J Habermas, *Ein neuer Strukturwandel der Öffentlichkeit und die deliberative Politik* (Suhrkamp Verlag 2022).

[42] A Gerbrandy, 'General Principles of European Competition Law and the "Modern Bigness" of Digital Power: The Missing Link Between General Principles of Public Economic Law and Competition Law' in U Bernitz and others (eds), *General Principles of EU Law and the EU Digital Order* cit. 309.

[43] G De Gregorio and C Goanta, 'The Influencer Republic: Monetizing Political Speech on Social Media' (2022) German Law Journal 204-225.

[44] S Weatherill, 'Protecting the Internal Market from the Charter' in S de Vries, U Bernitz and S Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Hart Publishing 2015) 228. See also S de Vries, *Tensions within the Internal Market: The Functioning of the Internal Market and the Development of Horizontal and Flanking Policies* (Europa Law Publishing 2006) 247-296.

[45] S de Vries, 'The Resilience of the EU Single Market's Building Blocks in the Face of Digitalization' cit. p. 22-23. In *Sky Österreich*, the Court interpreted the Audiovisual Media Services Directive and held that the EU legislator may give precedence to the protection of media pluralism over the free movement of services and the freedom to conduct business, see case C-283/11 *Sky Österreich* ECLI:EU:C:2013:28. In a similar vein, the Court held in *Google Spain* that the right to be forgotten as enshrined in the former Data protection directive overrides the economic interests of Google, see case C-131/12 *Google Spain and Google* ECLI:EU:C:2014:317.

Nevertheless, the extent to which non-market values and fundamental rights may constitute a counterweight to market values in EU internal market legislation is not always clear. There are also judgments where the Court in interpreting EU internal market legislation, sidelined public interests to the benefit of the internal market and business interests, sticking to the internal market rationale of the harmonization measure.[46] The chosen legal basis of the regulation or directive may thus inform the way in which this balance is carried out.[47] To further illustrate this, the General Data Protection Regulation ("GDPR"), adopted in 2016, is a prime example of protecting fundamental rights within the DSM based on the specific legal basis of art. 16 TFEU (protection of personal data). Like the DSA and the Draft AI Act, the GDPR aims to balance fundamental values and economic goals.[48] Yet, whereas the GDPR is based on a specific legal basis aimed at the protection of personal data, the other regulations as well as the Draft AI Act are based on the internal market legal basis of art. 114. It is then not surprising that the balance between the "economic" and "fundamental rights" objectives may be tilted towards the former in the Draft AI Act (see hereafter, section III).

Finally, with a view to realise a more comprehensive DSM, the EU legislator, as already observed above, shows an increasing preference for the instrument of a regulation instead of a directive, thereby achieving a higher "intensity" of EU legislation by directly intervening in all Member States' legal orders. Legislative harmonisation in the field of AI thereby follows other Regulations that were recently adopted within the context of the DSM, such as the above-mentioned DMA, the DSA and the Roaming Regulation. All these share a similar goal, *i.e.*, better access for consumers and businesses to online goods and services across Europe, creating the right environment for digital networks and services, and maximising the growth potential of the European Digital Economy.[49]

III. Harmonization in the Draft AI Act: old wine in a new bottle, or new wine?

With the proposed AI Act, the Commission's long-term plan to create a robust regulatory framework for addressing the ethical and legal concerns surrounding AI[50] was put into

[46] *E.g.*, case C-426/11 *Alemo-Herron and Others* ECLI:EU:C:2013:521 on the interpretation of the Transfer of Undertakings Directive, which is based on art. 94 EC (old).

[47] E Hirsch Balling and others (eds), *Variation in the European Union* (The Netherlands Scientific Council for Government Policy 2019) 84.

[48] G De Gregorio and P Dunn, 'The European Risk-based Approaches: Connecting Constitutional Dots in the Digital Age' (2022) CMLRev 473, 493.

[49] Communication COM(2015) 192 final cit.

[50] Communication COM(2019) 218 final from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions of 30 April 2019 on Preparing for a more united, stronger and more democratic Union in an increasingly uncertain world The European Commission's contribution to the informal EU27 leaders' meeting in Sibiu (Romania) on 9 May 2019, 33.

effect in April 2021. The Draft AI Act pursues four objectives. Firstly, it aims to ensure that AI systems that are placed on the Union market are safe and respect existing law on fundamental rights and Union values. Secondly, it aims to provide legal certainty to facilitate investment and innovation in AI. Thirdly, it strives to enhance governance and effective enforcement of existing law on fundamental rights and safety requirements applicable to AI systems. And finally, it intends to facilitate the development of a single market for lawful, safe and trustworthy AI applications and prevent market fragmentation.[51] Recall, however, that despite these variety of stated purposes, the legal basis of the Draft AI Act is art. 114 TFEU, meaning that the aim of ensuring the (AI) internal market and eliminating divergent national approaches to AI regulation should be viewed as prevailing.[52]

This section will examine the relevant provisions of the Draft AI Act, explaining how the draft legislation incorporates the New Approach technique and which roles it assigns to the different actors on the AI market, *i.e.*, ESOs, notified bodies, manufacturers, and the Commission.

III.1. Risk-based approach of the Draft AI Act

The Draft AI Act is a risk-based regulation with a multi-layered enforcement structure.[53] As such, it addresses two types of risks that stem from AI systems: product safety risks and risks to fundamental rights.[54] In its crux, the Draft AI Act introduces a wide range of mandatory requirements for designing and developing specific AI systems prior to their placement on the EU internal market. Since the Draft AI Act applies to private and public providers inside and outside the EU whose AI systems are put or used in the EU market,[55] it will also impact third-country businesses that are not legally present in the EU.

The Draft AI Act applies different legal regimes to AI systems with varying risks, differentiating between *i)* unacceptable risks (generally prohibited safe for some exceptions), *ii)* high risks, *iii)* limited risks and *iv)* minimal risks.[56] The larger the risk, the stricter the regulatory requirements. The Draft AI Act identifies two sub-categories of high-risk AI systems:[57] those that are (parts of) a product or a safety component already subject to

[51] Communication (COM)2021 206 final (Draft AI Act) cit. 3.

[52] *Ibid*. 6. See the established case law on the choice of legal basis for harmonisation, case C-58/08 *Vodafone and Others* ECLI:EU:C:2010:321 and case C-376/98 *Germany v Parliament and Council* ECLI:EU:C:2000:544.

[53] Communication (COM)2021 206 final (Draft AI Act) cit. recital 14. See further on whether risk regulation is an adequate mechanism to tackle AI Regulation, M Kaminski, 'Regulating the Risks of AI' cit. 103.

[54] See, for example, Communication (COM)2021 206 final (Draft AI Act) cit. 11.

[55] *Ibid*. art. 2.

[56] Upon the amendments of the Parliament in June 2023, the Draft AI Act also introduces requirements of transparency and conformity assessment for generative AI (art. 28(b)).

[57] Communication (COM)2021 206 final (Draft AI Act) cit. art. 6.

specific EU harmonisation legislation on health and safety;[58] and those that fall into one of the Annex III categories, such as educational and vocational training, employment and migration and asylum management.[59] Chapter 2 of Title III introduces various requirements and obligations to these high-risk AI systems,[60] most of which fall on the provider, *i.e.*, the entity that "develops the AI system or has an AI system developed to place it on the market or put it into service under its name or trademark".[61] These requirements can be broadly divided into *ex ante* (regulatory requirements that need to be complied with before the AI systems are placed on the market), and *ex post* (monitoring compliance with requirements once the AI systems are already on the market). The latter ranges from installing risk and quality management systems to identifying, estimating and evaluating the risks that may emerge during the use of AI systems.[62] In addition, they see to construct post-market monitoring systems that collect, document and analyse "relevant data" generated by the high-risk AI system throughout its lifetime in order to evaluate compliance with the essential requirements,[63] and to implement procedures for reporting incidents.[64] In turn, *ex ante* requirements for high-risk AI systems heavily rely on the New Approach harmonisation technique.

III.2. The "New Approach" technique in the Draft AI Act

The Draft AI Act follows the familiar logic of the New Approach. High-risk AI systems that comply with harmonised standards that are developed by ESOs upon the request of the Commission, and to which a reference is published in the OJEU, are presumed to conform

[58] Communication (COM)2021 206 final from the Commission of 21 April 2021 on Annexes to the Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain union legislative acts 2 (Annex II). See also M Veale and F Zuiderveen Borgesius, 'Demystifying the Draft EU Artificial Intelligence Act' (2021) Computer Law Review International 102.

[59] Examples of high-risk AI systems are the algorithmic-driven scoring of exams, CV sorting software for recruitment procedures, verification of travel documents' authenticity, and credit scoring to determine whether a citizen can obtain a loan. See also M Kop, 'EU Artificial Intelligence Act: The European Approach to AI' (2021) Vienna Transatlantic Technology Law Forum 1.

[60] M Veale and F Zuiderveen Borgesius, 'Demystifying the Draft EU Artificial Intelligence Act' cit. 102.

[61] Communication (COM)2021 206 final (Draft AI Act) cit. arts 3(2) and 16(a), the latter stating that the providers must ensure the AI system's compliance with the requirements in Chapter II. Interestingly, the adopted text by the European Parliament speaks about "obligations of providers and deployers of high-risk AI systems and other parties" when describing the introduced requirements, see European Parliament, Amendments adopted by the European Parliament on 14 June 2023 on the proposal for a regulation of the European Parliament and of the Council on laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts (COM(2021)0206 - C9-0146/2021 - 2021/0106(COD)), 303 a.f.

[62] *Ibid*. arts 9 and 14(1).

[63] *Ibid*. art. 62(1).

[64] *Ibid*. arts 17(i) and 62.

to the requirements and obligations defined in the Draft AI Act.[65] The Draft AI Act thus sets high-level requirements regarding AI's desired objectives and outcomes, but leaves the technical solutions to implement the requirements to more flexible market-driven standards.[66]

The Draft AI Act provides several routes to conduct the required *ex ante* conformity assessment necessary to demonstrate compliance with harmonized standards. A first essential step is to determine whether the high-risk AI system is a component of a consumer product already covered by existing EU product harmonisation legislation. Is this the case, the AI system in question is covered by the conformity assessment procedures under the legislation that applies to that consumer product.[67] If, however, the high-risk AI system is a "stand-alone" system, art. 43 introduces different types of conformity assessment procedures that require either conformity assessment based on *internal control* or via a so-called *third-party notified body*.[68] The former category must be followed by providers of high-risk AI systems that affect fundamental rights and are set out in points 2 to 8 of Annex III; upon successful self-assessment, these producers may mark their systems as in conformity with the Draft AI Act.[69] The latter category applies to AI systems that may carry product safety concerns, and should be performed by the notified bodies.[70] This type of conformity assessment should also be followed by the AI-providers that have not (sufficiently) applied the applicable harmonised standards or when such harmonised standards or if common specifications[71] do not (yet) exist.[72]

After a successful conformity assessment procedure, the Draft AI Act requires the provider to draw up a written DoC for each AI system in question,[73] which must be kept at the disposal of the competent national authorities for ten years after the high-risk AI system was placed on the EU market. Importantly, by adopting the DoC, the provider assumes responsibility for compliance with the requirements for high-risk AI systems as set out in the Draft AI Act.[74] The high-risk AI system products that have passed the conformity assessment and are foreseen with a CE-marking that is affixed "visibly, legally and indelibly",[75] are then allowed to be deployed and traded freely within the EU internal market.[76]

[65] *Ibid*. art. 40.

[66] Communication COM(2021) 206 final from the Commission of 21 April 2021 on the Impact Assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative Acts, 52.

[67] Communication (COM)2021 206 final (Draft AI Act) cit. 13 and art. 43(1).

[68] *Ibid*. art. 43.

[69] *Ibid*. art. 43(2).

[70] *Ibid*. art. 43(3).

[71] See section IV.2 of this *Article*.

[72] Communication (COM)2021 206 final (Draft AI Act) cit. art. 43(1).

[73] *Ibid*. art. 48(1).

[74] *Ibid*. art. 48(4).

[75] *Ibid*. art. 49(1).

[76] *Ibid*. art. 44.

III.3. "Privatization" of AI regulation by ESOs and conformity assessment bodies

In AI technologies, standards as such are not a novelty. A great variety of standards and specifications developed by private standards bodies enable the technical functioning of AI products and interoperability of AI systems.[77] The Draft AI Act adds to this *technical* relevance also *legal, policy and market* relevance,[78] going beyond the typical use of standards in the AI industry. At the same time, the Draft AI Act practically outsources the development of the rules to be followed by producers of high-risk AI systems to industry driven ESOs. The same goes for the procedure to demonstrate conformity with the New Approach rules, which the Act outsources to private conformity assessment bodies or producers themselves, without any mandatory checks and reviews by public authorities.[79]

Indeed, as set out in section II.1, AI providers are not *required* to follow harmonised standards – after all, they may choose any other methods to demonstrate that their products comply with the essential requirements of the Draft AI Act. However, it is widely known that harmonized standards provide more legal certainty to producers and prove to be cheaper, compared to other means of interpreting the specific essential requirements.[80] Given the turbulent and rapid development in the AI market, these considerations will be even more prevalent as the use AI technologies unfolds.

It appears thus that harmonised standards developed by ESOs under the New Approach are to become the leading requirements that high-risk AI systems need to satisfy for conforming with the Draft AI Act and subsequently for being legally marketed in the EU. This, in turn, makes the private ESOs *de facto* AI regulators, wielding large and influential power over the specific regulation of high-risk AI systems.

IV. Future-proofing AI regulation through the "New Approach"

According to the Commission, reliance on harmonised standards allows the horizontal legal framework of the Draft AI Act to remain sufficiently agile to deal with the ever-increasing technological progress in AI.[81] However, the use of the New Approach regulatory technique in the Draft AI Act raises several questions and concerns, which relate to the fitness of the proposed regulatory regime for safeguarding both market access and core

[77] Examples include the recent ISO/IEC 23053:2022 standards establishing the framework for AI systems using Machine Learning. See further S Nativi and S De Nigris, 'AI Standardisation Landscape: State of Play and Link to the EC Proposal for an AI Regulatory Framework' (14 July 2021) Publications Office of the European Union publications.jrc.ec.europa.eu.

[78] M Cantero Gamito, 'The Role of ETSI in the EU's Regulation and Governance of Artificial Intelligence' (draft on file with the authors).

[79] That said, the decisions of notified bodies can in principle be appealed, see art. 45 Draft AI Act cit. It should also be noted that for self-assessment, there is in principle no control by an independent third party, and although regulators may check performance against such self-assessment, this type of conformity assessment is considered weaker than third party certification, M Kaminski, 'Regulating the Risks of AI' cit. 52.

[80] See R van Gestel and H Micklitz, 'European Integration through Standardisation' cit.

[81] Communication COM(2021) 206 final cit.

values and fundamental rights throughout the development and use of AI systems. Against this background, this section focuses on the "future-proofness" of the Draft AI Act in regulating (high-risk) AI systems from three perspectives: *i)* the internal market, *ii)* fundamental rights, and *iii)* legitimacy and democratic rule-making.

IV.1. The future-proofness from the perspective of the Internal Market

a) Benefits of the proposed AI Act for market integration

From the internal market perspective, introducing the New Approach for harmonising high-risk AI systems, combined with provisions on a presumption of conformity, benefits the internal market for trustworthy AI systems. Specific procedures apply to derogate from the conformity assessment, namely in exceptional cases of public security, the protection of life and health of persons, environmental protection, and the protection of key industrial and infrastructural assets.

Furthermore, the use of the instrument of a regulation rather than a directive is with a view to truly create a level playing field for an internal market in AI systems highly welcomed. Regulations by their very nature provide for a common, more uniform approach, thereby creating a level playing field for businesses and seeking to abolish barriers to trade within the internal market. In so far as it harmonises the field of AI exhaustively, the regulation pre-empts Member States from introducing and maintaining additional protective measures, which would otherwise lead to competitive disturbances in the DSM. It has been observed elsewhere, though, that the scope and thus exhaustive nature of the Draft AI Act in respect of all, not only high-risk AI systems, is still unclear, which means that that not all elements of AI technologies are entirely covered by the Draft AI Act.[82] Fragmentation, as a result, is lurking, which undermines legal certainty.

Another advantage of the choice for a regulation from the perspective of the DSM is the potential horizontal direct effect of the AI Act. As Directives only apply in vertical relations, the lack of horizontal direct effect may be problematic in case of conflicts between private parties, which are likely to arise in the DSM.[83]

b) Shortcomings of the proposed AI Act for market integration

However, there are also a few possible shortcomings of the New Approach in respect of AI that may jeopardise the future-proofness of the Draft AI Act with a view to the functioning of the internal market, which relate to *i)* risk-categorisation, *ii)* the application of the provisions of the Draft AI Act to the AI systems already in use and *iii)* the use of vague language.

[82] See also M Veale and F Zuiderveen Borgesius, 'Demystifying the Draft Eu Artificial Intelligence Act' cit. 110. See also fn 58 in this *Article*.

[83] See also case C-261/20 *Thelen Technopark Berlin* ECLI:EU:C:2022:33. The Court takes a very different stance than AG Szpunar in his opinion.

Regarding risk-categorisation *i)* one of the main critiques on the current text of the Draft AI Act is its approach to categorizing the risk. For instance, Margot Kaminski argues that by subjecting different kinds of AI systems to different regulatory regimes, the Draft AI Act creates "sharp lines [...] between systems with similar risks that fall definitionally into different buckets".[84]

Furthermore, as it stands at the moment of writing, the proposed regulation substantially limits the possibilities to expand the list of high-risk AI systems covered by its provisions and to which the New Approach applies. New high-risk AI systems can only be added to the list of high-risk AI systems if they fall within the scope of the existing eight "categories" and pose a risk equivalent to or greater than the listed high-risk AI systems in Annex III.[85] The ratio behind this limitation primarily reflects the Commission's wish of creating certainty for the market and encouraging AI innovation.[86] At the same time, there are existing AI systems which do not fall within one of the eight areas but still have substantial risks. For instance, high-frequency trading algorithms or AI deployed for housing purposes are currently not covered by the Draft AI Act.[87] Given the rapid development of AI, it is conceivable that new AI systems will emerge which could also be unclassifiable under the eight specified areas, leading to a significant gap in EU harmonisation.[88] This poses the risk that providers may circumvent the requirements and obligations imposed on high-risk AI systems by arguing that their system does not fall within this rather static definition.[89]

It comes as no surprise that the insufficient possibilities to expand the list of high-risk AI systems came up in the discussions on the way forward for the Draft AI Act. In April 2022, the European Parliament proposed to extend the scope of delegated acts to allow

[84] M Kaminski, 'Regulating the Risks of AI' cit. 70. The adopted text by the European Parliament is an interesting development in this regard. Under the text, the European Commission is empowered to adopt delegated acts to add or modify areas or use-cases of high-risk AI systems where these "pose a significant risk of harm to health and safety, or an adverse impact on fundamental rights, to the environment, or to democracy". In addition, that risk must be "equivalent to or greater than the risk of harm or of adverse impact posed by the high-risk AI systems already referred to in Annex III", see art. 7(1). The requirement that the AI system is intended to be used in any of the areas already mentioned in Annex III has been left out of the text. contrary to art. 7(1)(a) of the European Commission's proposal.

[85] Communication (COM)2021 206 final (Draft AI Act) cit. art. 7(1).

[86] L Edwards, 'Regulating AI in Europe: Four Problems and Four Solutions' (1 March 2022) Ada Lovelace Institute www.adalovelaceinstitute.org.

[87] N Smuha and others, 'How the EU Can Achieve Legally Trustworthy AI: A Response to the European Commission's Proposal for an Artificial Intelligence Act' (5 August 2021) papers.ssrn.com 31.

[88] M Ebers and others, 'The European Commission's Proposal for an Artificial Intelligence Act: A Critical Assessment by Members of the Robotics and AI Law Society (RAILS)' (2021) Multidisciplinary Scientific Journal 594-595.

[89] N Smuha and others, 'How the EU Can Achieve Legally Trustworthy AI' cit. 13.

for modifying and expanding the current high-risk categories.[90] Concretely, the Parliament proposed to expand or modify several existing categories of high-risk AI systems, such as adding to the list AI systems that interact with children, make decisions regarding health or life insurance, or relate to voting and election.[91] The Parliament's considerations are in part echoed in the recent common position of the Council of the EU,[92] which suggested to add several categories to the list of high-risk AI-systems (*e.g.*, those used in life and health insurance and critical digital infrastructure)[93] and to add a "horizontal layer" to the high-risk classifications to ensure that the list does not capture AI systems that do not pot significant risks.[94]

These proposals, however, do not solve the main issue of high-risk classification. If new categories of high-risk AI systems cannot be added or current categories not modified, the Draft AI Act fails to become future-proof. New and unforeseen AI systems that cause equal (if not more) risks to fundamental rights and Union values would not fall under the imposed requirements and obligations. As a result, harmonising the rules on high-risk AI systems in the EU and achieving a comprehensive EU internal market for AI, both major goals of the Draft AI Act, would be difficult to achieve.

Regarding *ii)*, pursuant to art. 83(2), the Draft AI Act (and subsequently the New Approach) will only apply to high-risk AI systems already in use if those encounter significant changes in their design or intended purpose. Unfortunately, neither art. 83 nor the explanatory memorandum of the Draft AI Act provide further guidance or details on interpreting "significant changes". Art. 83(2) therefore lacks a clear and comprehensive interpretation.[95] While this legislative choice is understandable from the viewpoint of legal certainty, the current divide between high-risk AI systems marketed before or after the entry into force of the Draft AI Act does not sit well with its primary goal of preventing fragmentation of the internal market on essential requirements for AI products.[96]

[90] Draft Report COD(2021) 0106 of the European Parliament on the Proposal for a Regulation of the European Parliament and of the Council (April 2022) on harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts.

[91] *Ibid*. amendments 289, 291 and 296.

[92] European Council COD(2021/0106) General Approach on the Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain union legislative acts, 5.

[93] *Ibid*. 5.

[94] *Ibid*. 5.

[95] J Mökander and others, 'Conformity Assessments and Post-market Monitoring: A Guide to the Role of Auditing in the Proposed European AI Regulation' (2022) Minds and Machines 241. The adopted amendments by the European Parliament in June 2023 removes the mention of "significant changes in their design or intended purpose", instead proposes to apply the obligation of art. 82 to "systems [that] are subject to substantial modifications as defined in Article 3(23)". Substantial modifications, in turn, are newly defined in art. 3(23) as "not foreseen or planned in the initial risk assessment by the provider as a result of which the compliance of the AI system" with the requirements of Title III, Chapter 2 of the AI Act is affected.

[96] Communication (COM)2021 206 final (Draft AI Act) cit. 6.

Arguably, harmonised rules on the marketing, use and supervision of high-risk AI systems that only apply to future high-risk AI systems will only worsen the fragmentation of the internal market on essential requirements for AI products. In addition, it may not lessen but increase legal uncertainty for providers of high-risk AI systems marketed before and after the proposed AI Act enters into force, given the various rules applicable to those AI systems. Additional guidance in the final text of the Draft AI Act regarding the extent to which it covers the existing AI systems is therefore much desired.

Regarding *iii)* a common concern of the Draft AI Act is its – often – vague and unspecified language, which arguably leaves ample room for interpretation, possibly undermining the intended regulatory effect. Commentators have voiced these concerns with respect to art. 47(1), which provides for a derogation from the conformity assessment procedure for certain reasons by national market surveillance authorities (MSAs).[97] Furthermore, art. 10, which mandates the requirements relating to data quality and governance, requires data sets to have "appropriate" statistical properties without specifying what "appropriate" entails,[98] while art. 10(2)(f) mandates an "examination in view of possible biases", without clarifying the notion of "bias".[99] In a similar vein, art. 13, requiring providers to design high-risk AI systems in way that is "sufficiently transparent to enable users to interpret the system's output and use it appropriately",[100] does not establish any threshold for "sufficiently" transparent and "appropriate" use. This lack of clarity may lead to differing interpretations of the providers obligations.

At the same time, specifying the requirements and obligations of the proposed AI Act in a (too) detailed manner may jeopardise the flexible character of the regulation and negatively impact its future-proofness. Leaving sufficient room for interpreting regulatory requirements may carry some substantial benefits for regulation of emerging technologies. In fact, the recourse to such uncertain and vague language is common in EU legislation, even in well-established regulatory domains. In this regard, such formulation may even contribute to future-proofness of the Draft AI Act by allowing the Court to

[97] J Mökander and others, 'Conformity Assessments and Post-market Monitoring' cit. 241; N Smuha and others, 'How the EU Can Achieve Legally Trustworthy AI' cit. 58. The Parliament proposed to remove this article from the draft, see Draft Report COD(2021) 0106 cit.

[98] Communication (COM)2021 206 final (Draft AI Act) cit. art. 10(3).

[99] M Ebers and others, 'The European Commission's Proposal for an Artificial Intelligence Act' cit. 596. The European Parliament describes biases in the sense of art. 10(2)(f) as biases "that are likely to affect the health and safety of persons, negatively impact fundamental rights of lead to discrimination prohibited under Union law", making explicit reference to so-called "feedback loops" where data outputs influence inputs for future operations, see amendment 285 of the adopted text. The European Council holds a more limited view, labeling "biases" as those "likely to affect health and safety of natural persons or lead to discrimination prohibited by Union law", see European Council COD(2021/0106) General Approach on the Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain union legislative acts, 92.

[100] Communication (COM)2021 206 final (Draft AI Act) cit. art. 13(2).

interpret these terms in the light of the EU Charter, hence contributing to the protection of fundamental rights.

IV.2. Future-proofness from the perspective of fundamental rights and ethics

The Commission's choice for a relatively "old harmonisation technique" in the Draft AI Act can be interpreted as an important signal that the EU legislative praxis in the offline internal market for goods can easily be continued in a digital environment. But is this possible when ethical issues and fundamental rights are at stake? Apart from the apparent cases of safety of products that (will) use or rely on AI systems,[101] AI technologies involve a wide range of complex fundamental rights questions, which need to be carefully balanced with the economic goals pursued by regulating AI.

In this regard, some authors argue that in the Draft AI Act, this balance is (heavily) tilted towards market access rather than the protection of fundamental rights.[102] As stated above, the fact that art. 114 TFEU constitutes the legal basis of the proposed AI Act may explain why market interests are more dominant. Yet, at the same time, considering the inherently dual nature of harmonisation,[103] fundamental rights and public interests need to be protected by the EU legislator within the context of the internal market as well.[104] At the same time, this in no way implies that the two objectives are mutually exclusive: product safety regulation may cover fundamental rights,[105] and consumer protection – the ultimate goal of many safety regulations – is in itself a fundamental right according to the EU Charter.[106] But it has been rightly questioned whether the way in which the product safety legal framework regulates health and safety risks of "static products" can, considering the types of risks to fundamental rights that may be caused or amplified by the adoption of AI technologies, be transposed just like that to the field of AI. AI systems are complex, dynamic and changeable in nature, and fundamental rights are hard to measure in such relatively unstable systems.[107] In addition, as scholars have signaled, the Draft AI Act currently does

[101] See, *e.g.*, Directive 2014/33/EU of the European Parliament and of the Council of 26 February 2014 on the harmonisation of the laws of the Member States relating to lifts and safety components for lifts and Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys.

[102] *E.g.*, M Almada and N Petit, 'The EU AI Act: A Medley of Product Safety and Fundamental Rights?' (2022) available at ssrn.com, comparing the fundamental rights protection in the Draft AI Act with the one in GDPR and DSA.

[103] See section II.2.

[104] See also S Weatherill, *The Internal Market as a Legal Concept* (Oxford University Press 2017) 152-166. See also S Weatherill, 'Protecting the Internal Market from the Charter' cit.

[105] M Almada and N Petit, 'The EU AI Act' cit., citing the Medical Device Regulation.

[106] Codified in art. 38 of the Charter of Fundamental Rights of the EU.

[107] M Almada and N Petit, 'The EU AI Act' cit. With a view to increase fundamental rights safeguards and risk management, the European Parliament proposed to include a new provision, Article 29a, which requires deployers of high-risk AI systems before they are put into use to conduct a fundamental rights impact assessment.

not provide any rights of redress for individuals nor a complaint mechanism, which absence could both weaken the fundamental rights protection offered by the legislation.[108] However, in September 2022, the Commission proposed the AI Liability Directive, which installs a fault-based liability regime for damage caused by high-risk AI systems.[109] Equally based on art. 114, the proposed Directive may potentially fill the gap left by the Draft AI Act regarding the enforcement of individual rights.

In addition, if it comes to that, the CJEU may, once the AI Act has been adopted, be asked to provide a Charter-conform interpretation of the provisions of the Draft AI Act, and thus perform its own balancing act between economic goals and fundamental rights protection. There are, however, two caveats for relying on the Court's interpretation to safeguard fundamental rights. Firstly, the Court proceedings tend to last for a long time which, in case of the fast-paced development of AI technologies, do not offer timely solutions. Secondly, many regulatory requirements will be established in harmonized standards, which the Court cannot interpret.[110]

This possible "fundamental rights deficit" is aggravated by the fact that fundamental rights and ethical aspects for harmonized standards will be defined by the ESOs. Being private bodies that are led by commercial companies, the ESOs are arguably ill-equipped to judge on these highly sensitive matters.[111] Engineers and other technical experts attending the meetings of standards development committees do not necessarily possess the knowledge and expertise necessary to embed ethical issues in technical discussions. And while ethics and fundamental rights experts may indeed be present in every large commercial company, these experts are typically involved in other standardization initiatives that pertain specifically the questions of ethics.[112] Even if such experts will eventually manage to have a seat at ESOs standardization committees, smaller stakeholders that do not have such an in-house expertise, and societal stakeholders that do not have an active voice in ESOs, remain disadvantaged. This expertise deficit is especially problematic in the field of AI, given its immensely complex nature that is often difficult to grasp for technology experts, let alone stakeholders with less technological expertise. Allowing large commercial players to define the requirements of fundamental rights and ethical

[108] See, for more in-depth, M Veale and F Zuiderveen Borgesius, 'Demystifying the Draft EU Artificial Intelligence Act' cit.; N Smuha and others, 'How the EU Can Achieve Legally Trustworthy AI' cit. 44-46.

[109] Communication COM(2022) 496 final from the Commission of 28 September 2022 on a proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence.

[110] O Kanevskaia, *The Law and Practice of the Global ICT Standardization* (Cambridge University Press 2023) 87-93.

[111] See N ten Oever and S Milan, 'The Making of International Communication Standards: Towards a Theory of Power in Standardization' (2022) Journal of Standardization.

[112] One of such initiatives is the IEEE Global Initiative on Ethics of Autonomous and Intelligent Systems, of Standards Associations of the Institute of Electrical and Electronics Engineers.

aspects in AI is a dangerous precedent that can potentially result in a regulatory capture and the race to the bottom of harmonized standards.

A possible solution may be to leave the definition of issues related to fundamental rights and ethical concerns to the Commission acting through common specifications.[113] Such a common specification, which is explicitly not a standard, contains technical solutions to comply with the requirements set by the – in this case – Draft AI Act.[114] This relatively new method of restoring, albeit only in part, the Commission's power to define technical requirements is not uncommon in highly specific and narrowly focused areas, such as in the Machinery Directive.[115] Another example forms the In Vitro Diagnostic Regulation, in which the Commission established common specifications for certain high-risk *in vitro* diagnostics.[116]

However, the use of such common specifications in the Draft AI Act is still vague, and the current formulation of art. 41 potentially leaves the Commission with a huge discretionary power while imposing no obligation to state reasons for acting through common specifications. For instance, it remains unclear which process the Commission will follow when deciding that the existent harmonized standards are insufficient, and whether it will make any distinction between safety and fundamental rights concerns[117]. Without any further clarifications regarding the type of technical specifications that the Commission may issue under art. 41, this method is also likely not to sit well with the commercial stakeholders. They may see in the Commission a potential "competitor" in harmonized standards development, or even risk being deprived of the traditional industry-driven character of standardization.[118] The considerable discretion of the Commission is also problematic from the viewpoint of the Member States, since the level of protection of most (ethical) values and fundamental rights, which have not been subject to EU harmonization, is primarily determined at the national rather than the EU level.

On a positive note, if the final AI Act eventually results in the higher level of protection of fundamental rights, be it through harmonized standards, common specification or the

[113] Communication (COM)2021 206 final (Draft AI Act) cit. art. 41.

[114] *Ibid*. art. 3(28).

[115] See, for example, Directive 2006/42/EC of the European Parliament and of the Council of 17 May 2006 on machinery, and amending Directive 95/16/EC (recast), art. 9.

[116] Commission Implementing Regulation (EU) 2022/1107 of 4 July 2022 laying down common specifications for certain class D in vitro diagnostic medical devices in accordance with Regulation (EU) 2017/746 of the European Parliament and of the Council.

[117] The amendments of the European Parliament of June 2023 have clarified some of these issues, if only in part, adding that the Commission should consult the AI Advisory Forum and listing conditions to be fulfilled in order for the Commission in order to invoke this provision (see the amended Article 41a). One may also argue that this provision is tilted towards fundamental rights, since following the amendemnt (proposed article 41b), the EC can act "when it wants to address specific fundamental rights concerns".

[118] DIN/DKE, Position Paper on the EU "Artificial Intelligence Act" (June 2021) www.din.de. Note that the Council proposal suggest that if the harmonized standards arise – or Commission considers them sufficient – they will replace common specifications.

CJEU's interpretation of the AI Act's provisions, this may signal a positive development towards the global enforcement of fundamental rights. Similarly to the GDPR, the AI Act is likely to set global rules for AI regulation, since the requirements of this legislation, including the New Approach framework implemented for high-risk AI systems, will need be adhered to by non-EU companies operating on the EU market. As Kop puts is, by embedding Union fundamental rights and values into the architecture and infrastructure of AI, the EU "provides direction and leads the world towards a meaningful direction".[119] From this perspective, the Draft AI Act could also play a valuable role in the development of so-called "values-based design" in AI,[120] contributing to its future-proofness. However, such a key role in the global AI regulation implies that the EU needs to actively embed norms, principles and values into the architecture of AI's technology, *i.e.*, a bottom-up design that focuses on incorporating fundamental rights into the earliest stages of AI design.[121] By imposing a wide variety of obligations on AI during the development of AI systems, the Draft AI Act forms a much welcome contribution in this regard. If the EU would *not* take a leading role in values-based AI design, the potential risk could be that other economies with less, or even absent, democratic and constitutional values and ethical norms, could design and distribute their AI technology in a way that imposes their values in the EU's "AI order".[122]

IV.3. The future-proofness from a democratic and legitimacy perspective

Several considerations regarding the "future-proofness" of the Draft AI Act can also be made from the viewpoint of the legitimacy and democratic character of the New Approach. Granting rule-making power to ESOs remains controversial. Long before the global world expressed the need to regulate AI, it was argued that the European standardisation regime lacks sufficient democratic oversight and adequate stakeholder participation.[123] According to McGee and Weatherill, there are "structural reasons why the [New Approach] might serve the European consumer ill".[124] In short, tensions exist regarding ESOs governed by private law but issued with public tasks and which do not have to comply with key public guarantees and can pursue commercial interests.[125] There is

[119] M Kop, 'EU Artificial Intelligence Act' cit. 10.

[120] *Ibid*. 10.

[121] See P Nemitz, 'Constitutional Democracy and Technology in the Age of Artificial Intelligence' (2018) Royal Society Philosophical Transactions 12;C Djeffal, 'AI, Democracy, and the Law' in A Sudmann (eds), *The Democratization of Artificial Intelligence: Net Policies in the Era of Learning Algorithms* (De Gruyter 2020) 255-284.

[122] M Kop, 'EU Artificial Intelligence Act' cit. 14. See Communication COM(2022) 31 final from the Commission of 2 February 2022 on a EU Strategy on Standardisation.

[123] A McGee and S Weatherill, 'The Evolution of the Single Market: Harmonisation or Liberalisation' (1990) The Modern Law Review cit. 585. See also H Schepel, *The Constitution of Private Governance* cit. 67.

[124] *Ibid*. 585.

[125] See also M Veale and F Zuiderveen Borgesius, 'Demystifying the Draft EU Artificial Intelligence Act' cit. The recent ECJ case law confirmed that ESOs can pursue commercial goals, albeit the dispute was set

thus an imminent clash between private and public interests within the framework and practice of ESOs.

The EU legislation prescribes ESOs to adhere to certain good governance principles, such as transparency, openness, and participation.[126] In particular, art. 5(1) of Regulation 1025/2012 stipulates that each ESOs "shall encourage and facilitate an appropriate representation and effective participation of all relevant stakeholders, including SMEs, consumer organisations and environmental and social stakeholders in their standardisation activities". However, whether stakeholder participation materializes in practice remains debatable,[127] especially since it is the national standards bodies – and not necessarily the ESOs, – that should guarantee stakeholder participation at the European level.[128] While this is generally a serious shortcoming of the New Approach standardisation technique,[129] insufficient stakeholder participation is especially problematic for AI due to its value-loaded choices. To incorporate fundamental rights and values in the harmonised standards, standardisation processes will need to include stakeholder representation from organisations that are usually unfamiliar with standardisation.

Furthermore, stakeholder participation in standardisation processes in the ESO's technical committees often seems unevenly balanced, which could have profound influence on the development of harmonised standards in AI. Non-technical stakeholders such as consumer or civil society organisations, as well as small and medium enterprises (SMEs), encounter *de facto* exclusion from participating in the technical committees preparing the harmonised standards, in part due to the lack of resources necessary to take part in standardization processes.[130] Active and meaningful participation in ESOs is time-consuming and generally subjected to a (substantive) fee.[131] As a result, large commercial stakeholders, possessing the required expertise and resources, play a disproportionately large role in providing input for harmonised standards. In addition, ESO's internal procedures are believed to fall short on safeguarding sufficient participation, transparency and

in the other context, see case T-185/19 *Public.Resource.Org and Right to Know v Commission*. ECLI:EU:T:2021:445 para. 73.

[126] O Kanevskaia, *The Law and Practice of the Global ICT Standardization* cit.; M Eliantonio and M Medzmariashvili, 'Hybridity under Scrutiny: How European Standardisation Shakes the Foundations of Constitutional and Internal Market Law' (2017) Legal Issues of Economic Integration 332.

[127] See M Kallestrup, 'Stakeholder Participation in European Standardisation: A Mapping and an Assessment of Three Categories of Regulation' (2017) Legal Issues of Economic Integration 381-393.

[128] The emphasis on national standards bodies appears from the new European standardization strategy.

[129] See, for a more in-depth contribution, M Eliantonio and C Cauffman (eds), *The Legitimacy of Standardisation as a Regulatory Technique: A Cross-disciplinary and Multi-level Analysis* (Elgar Publishing 2020).

[130] M Eliantonio and C Cauffman, 'The Legitimacy of Standardisation as Regulatory Technique in the EU: A Cross-sector and Multi-level Analysis: An introduction' in M Eliantonio and C Cauffman (eds), *The Legitimacy of Standardisation as a Regulatory Technique* cit. 9.

[131] P Cuccuru, 'Interest Representation in European Standardisation: The Case of CEN and CENELEC' (2019) Amsterdam Law School Legal Studies 14.

accessibility.[132] Social stakeholders only enjoy an observer status, without voting rights. Although in theory, anyone may comment on the drafts discussed within the ESOs technical committees through the public enquiry procedure, in practice, awareness of every public enquiry remains a Herculean task.[133] Together with its ambiguous and fast-moving development, the possibility to safeguard 'all citizens' interests during AI standardisation process seems rather challenging. [134]

Given the lack of stakeholder participation, various organisations have advocated in recent years to improve participation of interest groups in the standardisation process.[135] In its recent Standardisation Strategy, the Commission acknowledged these concerns,[136] stating that the current decision-making processes within the ESOs allow for "uneven voting power to certain corporate interests",[137] and proposed to amend Regulation 1025/2012.[138] At its core, the proposed Regulation strengthens the role of national standardisation bodies in the decision-making process of the ESOs. For example, decisions on the adoption, revision and withdrawal of European standards need to be taken exclusively by national standardisation bodies.[139] The Commission considers the national standardisation bodies as best placed to make sure that the interests, policy objectives and values of the Union as well as public interests in general are duly considered in European standardisation organisations.[140]

However, it may also be argued that the Commission removes from ESOs any responsibility to ensure stakeholder participation, instead placing this responsibility on national bodies without providing for any penalties in case national bodies fail to ensure stakeholder representation. Furthermore, the question remains whether it is realistic to expect national standards bodies to protect *European* interests, let alone public interests, not least due to their often modest (human and financial) resources. At the same time,

[132] C Caufmann and M Gérardy, 'Competition Law as a Tool to Ensure the Legitimacy of Standard-setting by European Standardisation Organizations?' in M Eliantonio and C Cauffman (eds), *The Legitimacy of Standardisation as a Regulatory Technique* cit.

[133] M Eliantonio and C Cauffman, 'The Legitimacy of Standardisation as Regulatory Technique in the EU' cit. 9. The reports issued by the ESOs technical committees merely contain the outlines of the meetings, making it near-to-impossible to verify the negotiations and possible collusion between participants.

[134] See Senden who suggests that they should represent the interests of all citizens, L Senden, 'Towards a More Holistic Legitimacy Approach to Technical Standardisation in the EU' in M Eliantonio and C Cauffman (eds), *The Legitimacy of Standardisation as a Regulatory Technique* cit. 27.

[135] See for example European Association for the Co-ordination of Consumers Representation in Standardisation, Comments on the European Commission proposal for an Artificial Intelligence Act (ANEC 2021).

[136] Communication COM(2022) 31 final from the Commission of 2 February 2022 on an EU Strategy on Standardisation 4.

[137] *Ibid*. 4.

[138] Communication COM(2022) 32 final Proposal for a Regulation of the European Parliament and the Council of 2 February 2022 amending Regulation (EU) No 1025/2012 as regards the decisions of European standardisation organisations concerning European standards and European standardization deliverables. Approved by European Parliament in October 2022.

[139] Communication COM(2022) 32 final cit. art. 2(a).

[140] Communication COM(2022) 32 final cit. recital 5.

shifting the balance to national standardisation bodies could lower the barrier for social stakeholders to, for example, raise concerns or exercise influence on the decision-making. As such, to increase and maintain trust in the EU standardisation process in the field of AI, as well as to enhance the legitimacy of this process, effective participation of affected stakeholders must be a prerequisite.

V. Conclusion and recommendations

This contribution examined whether the proposed use of the "New Approach" regulatory technique in the Draft AI Act is sufficiently future-proof, in the sense that it both enhances the EU internal market and other core values, including important fundamental rights that are at stake when developing and applying AI.

We found that the use of the New Approach in regulating (high-risk) AI systems has several important upsides. From the perspective of the internal market, the Draft AI Act brings substantial benefits, contributing to the free movement and market integration. Private regulation by means of standards and certification generally delivers a high level of expertise, which suits well with large and up-to-date knowledge of AI industry players in tackling technical, complex and detailed issue relating to AI. Because private regulation may lead to a broader ownership of AI's policies, as well to the involvement of private parties during the development of harmonised standards, the end-result could be a higher level of compliance with the AI Act.[141] The New Approach thus offers a flexible regulatory framework, especially compared to the traditional EU legislative process.

Furthermore, the use of a Regulation instead of a Directive is welcomed. By its regulatory nature, the Draft AI Act allows for a level playing field for providers placing AI systems on the EU market. Instead of having 27 Member States implementing the requirements and obligations of the Draft AI Act by themselves, the choice of a regulation ensures a uniform application and increased legal certainty of the Draft AI Act throughout the EU. The AI Act can also be applied directly in horizontal conflicts, which would have not been the case as a directive. Additionally, the impact of setting harmonised rules for AI systems will likely extend beyond the EU's borders, possibly creating a so-called "Brussels effect" and strengthening the EU's role as a global actor in safeguarding fundamental rights.[142]

At the same time, we have identified several shortcomings that affect the future-proofness of the Draft AI Act. From an internal market perspective, there are currently insufficient possibilities to expand the list of high-risk AI systems, which could severely limit the AI's Act adaptability to future, still unknown developments. In addition, the frequent use of vague wording and definitions in the Draft AI Act offers providers of AI

[141] M Eliantonio and C Cauffman, 'The Legitimacy of Standardisation as Regulatory Technique in the EU' cit. 9.

[142] A Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020).

systems (too) much room for interpretation, for example when self-assessing the conformity of their high-risk AI systems with the harmonised standards.

With regard to the protection of fundamental rights, the question remains how suitable the New Approach, once developed for an "offline" world, is for the fast-evolving and complex "online" field of AI. The risk-based approach in the Draft AI Act means that providers need to evaluate their operational risks against *fundamental rights*. This suggested balancing exercise, however, ignores the often-non-negotiable character of fundamental rights, especially considering AI's potential adverse impact. The fact that the New Approach was particularly designed to speed-up the decision-making process, to protect the unity of the EU internal market and to enhance free movement, sits uneasily with the importance of fundamental rights' aspects of AI. In that light, endowing private standards bodies with ethical and fundamental rights decision-making is generally a worrisome development.

Finally, the "New Approach" raises questions from the perspective of democratic legitimacy. Social stakeholders, SMEs and Member States struggle for input in the standardisation process. However, precisely in the value-loaded field of AI, space for diverse opinion and the possibility to raise ethical concerns should not be lacking.

To mitigate these concerns, we propose several recommendations that would contribute to the future-proofness of the AI Act. Firstly, to better protect fundamental rights, we propose to provide more oversight from the European Commission and European Parliament over the standardization process when it comes to the issues of fundamental rights and ethical considerations taking into account the dynamic nature of AI systems, combined with the inclusion of a complaint and redress mechanism for individuals. This approach is to be preferred to the "decoupling" of economic and fundamental rights issues of the AI Act, by regulating fundamental rights aspects separately,[143] which is difficult due to the lack of a specific legal basis for such a regulation.[144] Furthermore, our proposal does not affect the innovative and market friendly character of the regulation, allowing for regulatory flexibility for the Member States.

Secondly, although oversight by the European Commission (and European Parliament) is desirable, this should go hand in hand with a clarification of the scope of art. 41 of the Draft AI Act, while the recent amendments of the European Parliament addressed some of the concerns raised by this provision, the extent of the discretionary power of the Commission to develop and issue common specifications, as well as the decision-making processes the Commission should follow when assessing whether such specifications are desired, should be (further) addressed. An interesting analogy can be made in that regard with how the Regulation for medical devices provides for common

[143] As suggested, for instance, by M Almada and N Petit, 'The EU AI Act: Between Product Safety and Fundamental Rights' (2022) available at ssrn.com. The amendment of the EP in the form of art. 29(a) to include a fundamental rights impact assessment is to be very much welcomed.

[144] The Charter of Fundamental Rights of the EU does not constitute a separate legal basis for invoking harmonisation legislation.

specifications.[145] Similar to the Draft AI Act, the Commission can lay down common specifications in areas where no harmonised standards exist or are insufficient. However, this possibility arises *only* after the Commission has consulted the expert committee called Medical Device Coordination Group (MDCG), which consists of experts representing the Member States and holding specific expertise in medical devices.[146] The MDCG, in turn, consists of several sub-groups that possess the necessary in-depth technical expertise. This approach forms a positive blueprint for the AI Act, which currently only states – rather vaguely – that the Commission shall "gather the views of relevant bodies or expert groups".[147] A, for example, Artificial Intelligence Coordination Group would create a more coherent framework of expertise the Commission needs to consult before issuing common specifications. In general, improving the current design of art. 41 would mitigate the risk of a "carte blanche" by the Commission in setting requirements for high-risk AI systems. An untransparent discretionary power by the Commission would have negative effects on the involvement of societal stakeholders and industry players, which in turn may undermine the quality of the requirements developed.

Thirdly, we encourage the ESOs and notified bodies to open up to non-technical expertise that can make a meaningful contribution in the area of ethics and fundamental rights. For example, granting societal stakeholders voting or approval rights in the ESOs technical committees could increase their participatory power and improve the overall quality of the harmonised standard. If a societal stakeholder, focussing on fundamental rights aspects of an AI harmonised standard, votes against the final draft standard, this could result in further action within the standardisation process, such as consulting an expert working in the specific field of the societal stakeholder.[148] In a more practical sense, the funding problems in both human and financial resources non-technical stakeholders face in the standard processes needs to be improved. If not, non-technical representation in setting harmonised standards in AI may end up playing second fiddle to the technical, Big Tech stakeholders.

Overall, "futureproofing" the regulation of a fast-paced, multifaced field as AI is not an easy task. With the inevitable regulatory and technical instability, it is difficult to predict what the future holds. Arguably, the use of AI in different sectors may require different regulatory approaches and strategies, which may include experimental legislation like

[145] Regulation (EU) 2017/745 of the European Parliament and of the Council of 5 April 2017 on medical devices, amending Directive 2001/83/EC, Regulation (EC) No 178/2002 and Regulation (EC) No 1223/2009 and repealing Council Directives 90/385/EEC and 93/42/EEC.

[146] Art. 9(1) of Regulation (EU) 2017/745.

[147] Communication (COM)2021 206 final (Draft AI Act) cit. art. 41(2).

[148] See, for example, the recommendations made by the European Environmental Citizen's Organisation for Standardisation: European Environmental Citizen's Organisation for Standardisation, 'The Future of European Standardisation: ECOS' Recommendations for a Transparent and Inclusive Standardisation System, that can Effectively Support EU Legislation and Policies' (23 July 2015) ecostandard.org.

regulatory sandboxes, mechanisms for proactive legislative updates, or legislature allowing deviation and exceptions.[149] In this regard, the criticism on the risk-based nature of the AI Act seems justified. However, the many benefits for European integration that the proposed legislation aims to bring should not be forgotten. Future-proofness is about a legislation that is effective and adapt despite the legal, social and technical changes that come with time. Only time will tell whether the Draft AI Act has successfully anticipated these challenges and provided adequate mechanisms to address them. At least, the Draft AI Act forms a welcome starting point in the increasing policy need to regulate AI in a wide array of domains. Whether it concerns calls to set conditions for effective governance of AI in the military domain,[150] or a separate EU legal framework for AI in the employment context,[151] a successful balance between economic and fundamental rights objectives in the Draft AI Act could form a blueprint for the future AI policy agenda.

[149] See S Ranchordas and M van 't Schip, 'Future-Proofing Legislation for the Digital Age' in S Ranchordas and Y Roznai (eds), *Time, Law and Change: An Interdisciplinary Study* (Bloomsbury 2020) 347.

[150] See, for example, the recent Summit on the Responsible Artificial Intelligence in the Military Domain (REAIM), see Government of the Netherlands, *About REAIM 2023* www.government.nl.

[151] A Ponce del Castillo, 'Labour in the Age of AI: Why Regulation is Needed to Protect Workers' (2020) ETUI Policy Brief.

ARTICLES

FUTURE-PROOF REGULATION AND ENFORCEMENT FOR THE DIGITALISED AGE

Edited by Gavin Robinson, Sybe de Vries *and* Bram Duivenvoorde

MARKET POWER AND THE GDPR: CAN CONSENT GIVEN TO DOMINANT COMPANIES EVER BE *FREELY* GIVEN?

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ABSTRACT: The GDPR is designed to render data protection rights more effective and to address the challenges created by the digital world. In line with the understanding of the right to data protection as data subjects' right to have control over their data, the GDPR empowers data subjects through individual choice. However, the market power of big tech casts doubts on individuals' ability to choose. In particular, reliance on consent is problematic when dealing with dominant platforms. If an individual does not have alternatives on the market, can the consent for the processing of personal data be considered as freely given? This issue is at the core of the case against Facebook brought by the German competition authority, now before the CJEU. This *Article* puts the case into context and discusses what it could mean for the regulation of big tech in the future. The focus is on the novel assertion of Advocate-General Rantos that dominance plays a role in the assessment of the freedom of consent under the GDPR. This statement raises two main issues surrounding the role of market power in the GDPR that this *Article* seeks to address. Firstly, how should data protection authorities assess dominance? Secondly, what role should dominance play in the assessment of the validity of consent? The *Article* aims to further the debate around how to ensure the continued future-proofness of the GDPR in the digital market, in light of the market power of tech companies. It proposes to introduce a two-tier approach which reduces the extent to which dominant firms can rely on consent for data processing.

KEYWORDS: GDPR – digital platforms – freely given consent – dominance – competition law – DMA.

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I. Introduction

The General Data Protection Regulation (GDPR)[1] is the cornerstone of EU data protection law and is designed to render data protection rights more effective and to address the challenges created by the digital world. The aim of the Regulation is to "ensure a consistent level of protection for natural persons throughout the Union and to prevent divergences hampering the free movement of personal data within the internal market".[2] Under the GDPR, data subjects are treated as active agents; they are granted a set of "micro-rights"[3] and empowered through individual choice regarding the way their data is used.[4] At the same time, the GDPR contains provisions designed to create a reliable and secure environment for data subjects, through technological measures (*e.g.* security measures and privacy by default settings) and organisational means (*e.g.* the accountability principle and the data protection impact assessment).[5]

The GDPR is designed in a technologically neutral way[6] and adopts a risk-based approach,[7] in order to prevent circumvention and be future-proof.[8] In the staff working document evaluating the GDPR two years after its adoption, the Commission wrote: "The GDPR's technologically-neutral and future-proof approach was put to the test during the COVID-19 pandemic and has proven to be successful".[9] Nonetheless, as argued by Colomo, "the success of future-proof regulation does not depend—at least, not primarily—on the *ex ante* design of a regime, but on the ability of authorities and legislatures to credibly commit, over time, to the same design. The challenge, in other words, is fundamentally exogenous, as opposed to endogenous".[10]

In the digital world, one of the risks to the rights of data subjects, which undermines the success of the GDPR's future-proofness, is that "in the face of recent technological developments and emergence of new social practices which seem to undermine the

[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

[2] Recital 13 of the General Data Protection Regulation (hereinafter, GDPR).

[3] For instance, the right to access personal data, the right to rectification, erasure and data portability (GDPR, arts 15-20).

[4] Through the role of consent as a legal basis for processing (GDPR, arts 6 and 7). See also D Clifford, 'Data Protection and Consumer Protection: The Empowerment of the Citizen-Consumer' (2020) ANU College of Law Research Paper No 20.11 ssrn.com, pp. 2-3.

[5] GDPR, arts 5(1) and 5(2) and 25.

[6] GDPR, recital 15.

[7] See for instance GDPR, recital 76-77; GDPR, arts 24(1) and 25(1).

[8] Communication COM(2020) 264 final from the Commission to the European Parliament and the Council of 24 June 2020 on Data protection rules as a pillar of citizens empowerment and EUs approach to digital transition - two years of application of the General Data Protection Regulation.

[9] *Ibid*.

[10] P Ibáñez Colomo, 'Future-Proof Regulation against the Test of Time: The Evolution of European Telecommunications Regulation' (2022) OJLS 1194.

very capacity, if not the will, of individuals to 'self-manage' their informational privacy [the] apparently simple and familiar notion [of control] becomes very ambiguous".[11] Individuals' ability to control what happens with their data is particularly threatened by the market power of data-driven tech companies. These companies often benefit from economies of scale, network effects, and self-reinforcing positive feedback loops, which create entry barriers and are conducive to market tipping and monopolization.[12] Internet giants such as Google, Facebook, Amazon and Apple all have a significant degree of market power in one or more markets within the digital sphere. The problem, as described by Kerber, is that: "especially the examples of Google and Facebook with their often alleged dominant market positions have raised the question whether weak competition might lead to an excessive collection of private data and to an insufficient provision of privacy options for fulfilling the different privacy preferences of users".[13]

One specific shortcoming of the current application of the GDPR, in this respect, relates to the validity of consent obtained by dominant players. If an individual does not have alternatives on the market, can the consent for the processing of personal data be considered as freely given? In the words of the European Data Protection Supervisor (EDPS): "where there is a limited number of operators or when one operator is dominant, the concept of consent becomes more and more illusory".[14]

This issue is at the core of the case against Facebook brought by the German Competition Authority, the Bundeskartellamt (BKA),[15] now before the CJEU.[16] On 20 September 2022, Advocate-General (AG) Rantos gave his opinion in the case. This *Article* will put the case into context and discuss how it can contribute to a better protection of individuals' rights over data. It will start by presenting the issues raised by the BKA case against Facebook and the implications of the AG's opinion. The focus will be on the AG's assertion that dominance does play a role in the assessment of the freedom of consent under the GDPR. This statement raises two main issues surrounding the role of market power in the GDPR that the *Article* seeks to address. Firstly, how should dominance be

[11] C Lazaro and D Le Métayer, 'Control over Personal Data: True Remedy or Fairy Tale?' (2015) SCRIPTed 3, 4.

[12] R Pollock, 'Is Google the Next Microsoft? Competition, Welfare and Regulation in Online Search' (2009) ssrn.com. See also OECD, *Data-Driven Innovation for Growth and Well-being: Interim Synthesis Report* (October 2014) www.oecd.org.

[13] W Kerber, 'Digital Markets, Data, and Privacy: Competition Law, Consumer Law, and Data Protection' (MAGKS Joint Discussion Paper Series in Economics 14-2016) MACIE Paper Series Nr. 2016/3, Philipps-Universität Marburg, p. 7.

[14] European Data Protection Supervisor, 'Privacy and Competitiveness in the Age of Big Data: The Interplay between Data Protection, Competition Law and Consumer Protection in the Digital Economy' (2014) edps.europa.eu 35.

[15] BKA Decision B6-22/16 of 6 February 2019.

[16] Case C-252/21 *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social)* ECLI:EU:C:2023:537. This contribution was written before the Meta judgment was published by the CJEU on 4 July 2023.

established by data protection authorities (DPAs)? Secondly, what role should dominance play in the assessment of the lawfulness of data processing? The *Article* aims to further the debate around freely given consent for data processing in the digital market and anticipate what issues DPAs will grapple with if the CJEU follows the AG's opinion in the Facebook case. It will propose how DPAs can ensure that individuals' data protection rights are adequately safeguarded in a space dominated by the interests of big tech and thus ensure the future-proofness of the GDPR in this space. More generally, the *Article* seeks to show that to regulate digital platforms effectively, we cannot look at different regulatory regimes in isolation, but must ensure that we adopt a coherent approach and use relevant expertise across regimes.

II. The Facebook case

II.1. Case overview

In February 2019, the BKA imposed on Facebook restrictions on the processing of user data, upon finding that it was imposing exploitative business terms under Section 19(1) GWB (largely corresponding to art. 102 TFEU).[17] Facebook was found to be abusing its dominant position, because it essentially forced users to agree to its terms and conditions, under which it could collect user data also outside of the Facebook website[18] and combine this data with users' Facebook profiles. The BKA argued that "there is no effective consent to the users' information being collected if their consent is a prerequisite for using the Facebook.com service in the first place".[19] The finding of a lack of valid consent was also tied to Facebook's dominance and the lack of alternative social networks on the market. Furthermore, the BKA maintained that the merging of data deprived consumers of control over their personal data and, thereby, constituted a violation of the right to informational self-determination.[20] Under German competition law, Section 19(1) GWB must be applied in order to protect constitutional rights, including

[17] Bundeskartellamt, 'Facebook, Exploitative Business terms Pursuant to Section 19(1) GWB for Inadequate Data Processing' (6 February 2019) www.bundeskartellamt.de.

[18] The BKA talks about third party sources as services owned by Facebook, like WhatsApp and Instagram as well as third party websites that "embedded Facebook products such as the 'like' button or a 'Facebook login' option or analytical services such as 'Facebook Analytics', data"; Bundeskartellamt, 'Background Information on the Facebook Proceeding' (19 December 2017) www.bundeskartellamt.de.

[19] Bundeskartellamt, 'Facebook, Exploitative Business terms Pursuant to Section 19(1) GWB for Inadequate Data Processing' cit.

[20] In one of the first articulations of the right to informational self-determination, the German Federal Constitutional Court defined it as "the authority of the individual to decide himself, on the basis of the idea of self-determination, when and within what limits information about his private life should be communicated to others", BVerfGE 65, 1 – Volkszaehlung Urteil des Ersten Senats vom 15. Dezember 1983 auf die muendliche Verhandlung vom 18. und 19. Oktober 1983 – 1 BvR 209, 269, 362, 420, 440, 484/83 in den Verfahren ueber die Verfassungsbeschwerden.

data protection rules, in particular "in cases where one contractual party is so powerful that it is practically able to dictate the terms of the contract and the contractual autonomy of the other party is abolished".[21] Accordingly, the BKA could rely on GDPR rules when assessing whether Facebook's conduct was abusive.

Following Facebook's appeal, the Higher Regional Court in Düsseldorf suspended the BKA's order in interim proceedings.[22] Among other reasons, the Düsseldorf Court argued that an infringement of data protection rules by a dominant firm cannot be seen as a violation of competition law, if there is no causal connection between the illegitimate data processing and the firm's market power. The Federal Court of Justice annulled the decision of the Düsseldorf Court,[23] reasoning that to prove an abuse of Facebook's dominant position, it sufficed to show that it had restricted users' freedom of choice. The main proceedings are still ongoing in the Düsseldorf Court, which filed a request for a preliminary ruling to the CJEU. The request comprises key questions of data protection law and the relationship between competition and DPAs. This *Article* discusses whether dominant firms should carry a higher responsibility than non-dominant firms in regard to compliance with data protection law. More specifically, the Düsseldorf court referred the following question to the CJEU: "Can consent within the meaning of Article 6(1)(a) and Article 9(2)(a) of the GDPR be given effectively and, in accordance with Article 4(11) of the GDPR in particular, freely, to a dominant undertaking such as Facebook Ireland?".[24]

What is noteworthy is how a competition law case raised crucial questions regarding the interpretation of the GDPR. The BKA stated that the GDPR includes elements of market power when assessing whether consent is freely given, *e.g.*, power imbalances and the availability of options. The BKA explored this issue by using data protection rules as a benchmark to establish an exploitative abuse in competition law, where market power and the notion of "special responsibility" are inherent parts of the analysis. However, according to the BKA, the Facebook case was not only a case of a dominant undertaking violating competition law through a GDPR breach, but also a case of an undertaking breaching GDPR, because of its dominance. In this way, the BKA extended the notion in competition law of 'special responsibility' to the GDPR.[25] In this respect, Graef and Van Berlo argue that "in formulating this two-way interaction between data protec-

[21] *Ibid*.

[22] Higher Regional Court of Düsseldorf VI-Kart 1/19 of 26.08.2019 Facebook / Bundeskartellamt available at www.olg-duesseldorf.nrw.de.

[23] Courtesy translation of Press Release No 080/2020 published by the Bundesgerichtshof (Federal Court of Justice) on 23 June 2020 www.bundesgerichtshof.de provided by the Bundeskartellamt, available at www.bundeskartellamt.de.

[24] *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social)* cit.

[25] I Graef and S Van Berlo, 'Towards Smarter Regulation in the Areas of Competition, Data Protection and Consumer Law: Why Greater Power Should Come with Greater Responsibility' (2020) European Journal of Risk Regulation.

tion law and competition law, the Bundeskartellamt has not only incorporated data protection principles into its competition analysis, but similarly transferred elements of competition law into data protection".[26]

II.2. The opinion of the AG

The judgment in this case has yet to be handed down, but the opinion of the AG sheds some light on how the court might answer the questions. As to the question concerning the role of dominance in freely given consent, the AG has responded as follows: "In the present case, I am of the opinion that any dominant position on the market held by a personal data controller operating a social network is a factor when assessing whether users of that network have given their consent freely. Indeed, the market power of the controller could lead to a clear imbalance [...] Besides, that circumstance alone cannot, in principle, render the consent invalid".[27]

Thus, according to the AG, while dominance plays a role in the assessment of the freedom of consent, it is not determinative.[28] This seems like a rather neutral outcome, which will give both controllers and authorities flexibility in assessing the validity of consent. However, on a closer look, it does raise some fundamental questions. Firstly, although dominance is a concept commonly used by competition authorities, DPAs are not accustomed to it, and might not have the necessary expertise to assess whether a company is or is not dominant on the market. As will be discussed below, the AG claimed that a dominant position for GDPR purposes does not necessarily need to "be regarded as a dominant position within the meaning of Article 102 TFEU".[29] But then, how should dominance be established by DPAs? Secondly, if consumers[30] do not have a viable alternative on the market, increasing the requirements for valid consent could compensate for the fact that data subjects do not have the freedom to choose among different providers. Dominant firms can, thus, be held to have a higher burden to satisfy, in order to be able to use consent as a ba-

[26] *Ibid*.

[27] Case C-252/21 *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social)* ECLI:EU:C:2022:704, opinion of AG Rantos, para. 75. In its judgment, published on 4 July 2023, the CJEU agreed with the AG on this point; case C-252/21 *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social)* ECLI:EU:C:2023:537 paras 147-148.

[28] *Ibid*. para. 77.

[29] *Ibid*. para. 75. In its judgment, the CJEU does not mention anything about the concept of dominance. Case C-252/21 *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social)* ECLI:EU:C:2023:5379.

[30] In this *Article* the terms "individuals", "consumers" and "data subjects" are used somewhat interchangeably. Although, the terms "consumers" and "data subjects" are distinct and, respectively, belong to the areas of competition (and consumer) law and data protection regulation, when it comes to the digital market, these regimes are interconnected, as this paper demonstrates. The conduct of market players, and their regulation, can affect individuals' interests as consumers and data subjects contemporaneously.

sis for processing. But how should DPAs integrate market power concerns in their assessments? These two issues will be discussed in turn in the remainder of the *Article*.

III. Dominance for GDPR purposes

III.1. Market power and the GDPR

In competition law, the presence of market power is determined by the fact that an undertaking does not face significant competitive pressure, allowing it to behave to an appreciable extent independently of its competitors, customers and, ultimately, its consumers.[31] This means that it can profitably raise prices above competitive levels or restrict output or quality below competitive levels and, in the present case, impose data protection terms that users would otherwise not accept. Digital markets are particularly prone to concentration, due to network effects, which occur when an increase in the number of participants improves the value of a good or service. Direct network effects typically characterise social media platforms, in which users directly benefit from other users being active on the same platform. Indirect network effects exist in two-sided markets, if, for example, the number of users on a platform benefit the advertisers. Facebook, for instance, benefits from both forms of network effects.[32]

Market power is evidently also relevant for the purposes of the GDPR, especially when data controllers rely on consent as a basis for processing. Currently, however, when determining data controllers' obligations under the GDPR, only limited weight is given to their market power, and DPAs do not assess whether a market is competitive enough for consumers to have a real choice. Depending on whether the CJEU follows the AG's opinion in the Facebook case, DPAs might need to start having a closer look at market dynamics. In order to take a more market-focused approach to data protection, DPAs would need to resort to economic concepts used in competition law.[33] This would allow DPAs to get a better idea of the market forces that can impact the level of data protection afforded by these firms and to have a benchmark for evaluating when obligations need to be enforced more strictly.

[31] Case C-27/76 *United Brands v Commission* ECLI:EU:C:1978:22.

[32] ML Katz and C Shapiro, 'Network Effects, Competition, and Compatibility' (1985) American Economic Review 424.

[33] I Graef, D Clifford and P Valcke, 'Fairness and Enforcement: Bridging Competition, Data Protection, and Consumer Law' (2018) International Data Privacy Law 206.

III.2. Dominance in AG Rantos' opinion

In his opinion, AG Rantos argues that "the validity of consent should be examined on a case-by-case basis"[34] and that it is for the controller to demonstrate that consent was given freely, "taking into account, where appropriate, the existence of a clear imbalance of power between the data subject and the controller [...]".[35] This was already suggested by Clifford et al., who argued that: "in keeping with the accountability principle, the controller may be required to prove not only that informed, specific, and unambiguous consent has been provided in line with the requirements in the GDPR, but also that the clear imbalance in power did not affect the consumer-citizen's decision to consent, despite the fact that this consent was required to access the service in question".[36]

Even if the burden to prove that consent was freely given is on data controllers, DPAs, when enforcing the GDPR, will need to determine the extent to which market power or other barriers to competition reduce choice and, correspondingly, in which situations consent is valid. Furthermore, in order to increase legal certainty and compliance, there should be guidance for data controllers as to when they have a higher threshold to satisfy to obtain valid consent.

The AG has not specified how market power should be established, but has argued that, for the purposes of GDPR enforcement, it "need *not necessarily* be regarded as a dominant position within the meaning of Article 102 TFEU [emphasis added]".[37] This suggests that there might be more leeway when establishing dominance under the GDPR compared to competition law. Accordingly, DPAs might not necessarily have to carry out the extensive economic analysis of the market required in competition law. At the same time, however, the statement implies that competition law assessments may be used as a baseline for the purposes of GDPR enforcement. It would, indeed, be desirable for DPAs to use findings of dominance in competition law when enforcing the GDPR. Not only would this be efficient inasmuch as it would allow DPAs to make use of the existing expertise and analysis of competition authorities, it would also contribute to consistency in the definition of dominance across different legal frameworks. The latter is particularly important in digital markets, in which the regimes are increasingly interrelated.[38]

[34] Case C-252/21*Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social)*, opinion of AG Rantos, cit. para. 76.

[35] 21*Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social)*, opinion of AG Rantos, cit. para. 77.

[36] D Clifford, I Graef and P Valcke, 'Pre-formulated Declarations of Data Subject Consent: Citizen-Consumer Empowerment and the Alignment of Data, Consumer and Competition Law Protections' (2019) German Law Journal 713.

[37] AG Opinion, para. 75, emphasis added.

[38] See A D'Amico, 'Conceptualising the Interrelation between Data Protection Regulation and Competition Law' in E Kosta and R Leenes (eds), *Research Handbook on EU Data Protection Law* (Edward Elgar 2022).

Nonetheless, since dominance in competition law is established in relation to specific relevant markets, the existence of dominance in one market cannot usually be simply transferred to another market. To illustrate the point, Google can be dominant in the markets for general search services and the licensing of smart mobile OSs, but not in the market for mobile web browsers.[39] DPAs' greater flexibility in determining dominance means that they could adopt findings of dominance from competition law, without paying too much attention to the precise market definition. Clarifying how definitions of dominance can be transferred from one regime to the other should not be a major obstacle; the main limitation of DPAs relying on competition law classifications of dominance is that they are restricted to recent competition law cases or investigations that are underway. This could prove a major obstacle, in particular, if new dominant companies that do not raise competition law issues emerge.

III.3. The definition of "gatekeeper" under the DMA

To fill the gap, DPAs could use the classification of gatekeepers of the Digital Markets Act (DMA),[40] in addition to findings from competition law. The DMA is considered one of the centrepieces of the European digital strategy and aims to ensure that platforms that act as gatekeepers in digital markets behave fairly.[41] It is designed to complement competition law, recognising that "existing Union law does not address, or does not address effectively, the challenges to the effective functioning of the internal market posed by the conduct of gatekeepers that are not necessarily dominant in competition-law terms".[42]

The DMA formulates a set of criteria for determining gatekeeping status. It foresees that an undertaking is a gatekeeper if: [43]

it has a significant impact on the internal market;[44]

it provides a core platform service[45], which is an important gateway for business users to reach end users;[46] and

[39] Case T-604/18 *Google and Alphabet v Commission (Google Android)* ECLI:EU:T:2022:541.

[40] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

[41] Commission website, *The Digital Markets Act: ensuring fair and open digital markets* ec.europa.eu.

[42] Digital Markets Act, recital 5.

[43] *Ibid*. arts 3(1) and 3(2).

[44] Defined as €7,5 billion annual Union turnover or €75 billion market valuation and it provides the same core platform service in at least three MSs.

[45] "'Core platform service' means any of the following: (a) online intermediation services; (b) online search engines; (c) online social networking services; (d) video-sharing platform services; (e) number-independent interpersonal communications services; (f) operating systems; (g) web browsers; (h) virtual assistants; (i) cloud computing services; (j) online advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by an undertaking that provides any of the core platform services listed in points (a) to (i)" (Digital Markets Act, art. 2(2)).

it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future.[47]

With the DMA, DPAs will soon have an updated list of gatekeepers in the digital market, monitored by the Commission.[48] Given that the DMA is designed, among other things, to regulate the behaviour of digital companies that can unilaterally impose unfair terms on end-users,[49] the definition of a "gatekeeper" is useful for GDPR purposes as well. The high threshold to reach a gatekeeping status means that these companies can be considered dominant for the purposes of GDPR enforcement, as suggested by AG Rantos[50] (even though not necessarily under art. 102 TFEU). Again, relying on existing definitions of market power and gatekeepers is efficient and contributes to consistency and legal certainty in the way digital platforms are regulated. This is particularly important in light of the EU's digital strategy and recent legal acts intersecting with the GDPR in the digital arena. To guarantee the GDPR's future-proofness and meet the challenges posed by the digital market, efforts need to be made to ensure that the GDPR is compatible and synergistic with the regulatory landscape that surrounds it.

The largest digital platforms will fall under the definitions of competition law and the DMA and, by using these definitions, DPAs have a solid ground on which to impose special obligations on these platforms. In cases in which DPAs believe that specific companies should have higher responsibilities under the GDPR and these have not (yet) been labelled as dominant under competition law or do not fall under the definition of a gatekeeper under the DMA, DPAs can carry out their own case-by-case assessments and determine whether market power impedes consent from being given freely. When doing so, DPAs can follow guidance used by competition authorities when assessing

[46] Defined as 45 million monthly active end users in the Union and 10 000 yearly active business users.

[47] The thresholds must be met in the previous three financial years.

[48] Digital Markets Act, arts 3 and 17.

[49] In particular, in recital 13 of the Digital Markets Act the following rationale behind the need to regulate specific gatekeepers is put forward: "Weak contestability and unfair practices in the digital sector are more frequent and pronounced for certain digital services than for others. This is the case in particular for widespread and commonly used digital services that mostly directly intermediate between business users and end users and where features such as extreme scale economies, very strong network effects, an ability to connect many business users with many end users through the multisidedness of these services, lock-in effects, a lack of multi-homing or vertical integration are the most prevalent. Often, there is only one or very few large undertakings providing those digital services. Those undertakings have emerged most frequently as gatekeepers for business users and end users, with far-reaching impacts. In particular, they have gained the ability to easily set commercial conditions and terms in a unilateral and detrimental manner for their business users and end users".

[50] *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social)*, opinion of AG Rantos, cit. para. 75.

dominance[51] and make use of the increased collaborations taking place with competition authorities.[52]

In this part it was proposed how to determine which companies should have higher responsibilities under the GDPR. The next part builds upon this and discusses what the higher responsibilities of these companies should entail. More specifically, what role market power should play in the assessment of the validity of consent.

IV. Dominance and the validity of consent

IV.1. Freely given consent under the GDPR

Under the GDPR, consent is one of the six legal bases for processing.[53] In order to be valid, it "should be given by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject's agreement to the processing of personal data relating to him or her [...]".[54] This *Article* focuses on the "freely given" component of consent, and, specifically, how this requirement should be interpreted when data controllers are dominant companies.

Consent is the only legal basis which requires data subjects to be actively involved in the decision regarding the processing of their data.[55] When data processing is not "necessary" under one of the other legal bases,[56] firms can still obtain permission for the data processing directly from the data subjects. This is in line with the core value underlying data protection to give individuals control over their data. The nature of the digital market, with its monopolistic tendencies, however, has apparent repercussions on the validity of consent. Dominant firms can obtain consent through users' lack of alternatives or user lock-ins, thereby potentially fulfilling the safeguards imposed by the GDPR in a purely formalistic fashion. A problem that is linked to the controllers' market power is that, upon seeing privacy terms, users are often only given a take-it-or-leave-it option. They are

[51] For an overview, see for instance Communication from the Commission of 24 February 2009 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings', p. 7-20.

[52] For instance, at EU level, the EDPS launched the Digital Clearinghouse "as a voluntary network of regulators involved in the enforcement of legal regimes in digital markets, with a focus on data protection, consumer and competition law" (www.digitalclearinghouse.org), which has been endorsed by the European Parliament. Furthermore, a number of member states, including the Netherlands, Spain, and France have formal collaboration agreements. In the Netherlands, the Authority for Consumers and Markets and the Data Protection Authority collaborate as part of a wider cooperation platform, the Digital Regulation Cooperation Platform ("SDT"), which was launched in October 2021 (autoriteitpersoonsgegevens.nl).

[53] GDPR, art. 6.

[54] GDPR, recital 32.

[55] The other legal bases are: contract performance, legal obligation, vital interest, public interest and legitimate interests (GDPR, art. 6).

[56] GDPR, art. 6.

thereby deprived of the freedom to exercise a meaningful choice, since they do not have the possibility to select their data protection preferences in the market and to tailor these to different contexts.[57] It has been argued that the "binary choice is not what the privacy architects envisioned four decades ago when they imagined empowered individuals making informed decisions about the processing of their personal data".[58]

The GDPR contains requirements for consent to qualify as "freely given".[59] The central element for the purposes of this *Article* is the following recital: "in order to ensure that consent is freely given, consent should not provide a valid legal ground for the processing of personal data in a specific case where there is a clear imbalance between the data subject and the controller".[60] The Regulation specifically refers to public authorities as type of controllers that would have difficulties to rely on consent because it would be "unlikely that consent was freely given in all the circumstances of that specific situation".[61] The European Data Protection Board (EDPB) also mentions an employment context as one in which an imbalance of power could undermine the validity of consent.[62] It then states that:

> "Imbalances of power are not limited to public authorities and employers, they may also occur in other situations. As highlighted by the WP29 in several Opinions, consent can only be valid if the data subject is able to exercise a real choice, and there is no risk of deception, intimidation, coercion or significant negative consequences (e.g. substantial extra costs) if he/she does not consent. Consent will not be free in cases where there is any element of compulsion, pressure or inability to exercise free will".[63]

The element of imbalance of power appears to be relevant in monopolised markets as well as in markets in which consumer choice is undermined, for instance, through strong network effects or lock-ins.[64] Nonetheless, so far market power has not played a role in the assessment of the validity of consent.[65]

[57] See O Lynskey, *The Foundations of EU Data Protection Law* (Oxford University Press 2015); and F Costa-Cabral and O Lynskey, 'Family Ties: The Intersection between Data Protection and Competition in EU Law' (2017) CMLRev 11.

[58] F Cate and V Mayer-Schönberger, 'Notice and Consent in a World of Big Data' (2013) International Data Privacy Law 67.

[59] GDPR, art. 4(11).

[60] *Ibid.* recital 43.

[61] *Ibid*.

[62] EDPB, Guidelines 05/2020 on consent under Regulation 2016/679, version 1.0, adopted on 4 May 2020, para. 21.

[63] *Ibid*. para. 24.

[64] See F Lancieri, 'Narrowing Data Protection's Enforcement Gap' (2022) MaineLRev 15 digitalcommons.mainelaw.maine.edu.

[65] See, for instance, the GDPR case brought by the French Data Protection Commission (CNIL) against Google in 2019. The CNIL held that Google had violated the obligation to have a legal basis for processing in relation to ads personalisation, because consent, on which it relied, was not informed, specific and un-

A second key element of freely given consent is contained in art. 7(4),[66] which states that "when assessing whether consent is freely given, utmost account shall be taken of whether, *inter alia*, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract".[67] It seems difficult to reconcile this requirement with a take-it-or-leave-it approach that forces data subjects to consent to the processing of their data in exchange for using a service. However, the term "utmost account" leaves room for interpretation and this provision has indeed been interpreted in a flexible manner. In *Planet49*[68] an online gaming company held an online promotional lottery that required users to give personal information in order to participate. The case was mainly about explicit consent, with the CJEU ruling that consent is not valid if given by way of pre-checked checkboxes. However, this was also a case in which users were obliged to disclose data in order to participate in the lottery. The Advocate General saw no problems with the "selling" of personal data and the Court did not raise the question around art. 7(4) GDPR.[69]

IV.2. A TWO-TIER APPROACH

So far it has been argued that the way consent is currently collected by dominant digital platforms sits uneasily with the notion of freely given consent. The GDPR does contain provisions which could render consent invalid when *i)* the data controller is dominant and users do not have alternatives on the market and *ii)* the data controller does not give users a choice but to accept its terms, if they want to use its service. However, they have not played a significant role in the assessment of the validity of consent in the digital market. The Facebook case could mark a turning point in this respect. In that case, the president of the BKA claimed that: "voluntary consent means that the use of Facebook's services must not be subject to the users' consent to their data being collected and combined in this way. If users do not consent, Facebook may not exclude them from its services and must refrain from collecting and merging data from different sources".[70]

ambiguous. The CNIL ordered Google to correct these shortcomings, but failed to address Google's market power and the fact that many users considered Google indispensable. Commission Nationale de l'Informatique et des Libertés, 'The CNIL's Restricted Committee Imposes a Financial Penalty of 50 Million Euros against Google LLC' (21 January 2019) www.cnil.fr.

[66] See also GDPR, recital 42: "consent should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment".

[67] GDPR, art. 7(4); see also GDPR, recital 43.

[68] Case C-673/17 *Planet49* ECLI:EU:C:2019:801.

[69] Case C-673/17 *Planet49* ECLI:EU:C:2019:46, opinion of AG Szpunar.

[70] Bundeskartellamt prohibits Facebook from combining user data from different sources, Bundeskartellamt (7 February 2019) www.bundeskartellamt.de.

Andreas Mundt thereby suggests that, *since it is dominant*, Facebook cannot make the data processing a prerequisite for using its service, but must give users the option to opt out of the data processing in question. This approach seems to be compatible with the relevant provisions of the GDPR described in this section. In accordance with this, the AG's opinion points to the fact that dominant companies should be treated as having a special responsibility also under the GDPR.

This would lead to a form of asymmetric regulation, as is typically found in cases in which a formerly monopolistic sector is deregulated. In those cases, it is believed that regulating dominant incumbents and new entrants asymmetrically can reduce impediments to market contestability.[71] Asymmetric regulation also characterises the DMA; gatekeepers in the digital space have to adhere to stricter rules than other companies. In the case of the GDPR, a somewhat inverse rationale applies: asymmetric regulation is not meant to improve competition,[72] but to compensate for the lack thereof and secure the protection of individuals' rights. Although this approach is consistent with the goals of the GDPR, it is not immediately clear how the relevant GDPR provisions should be interpreted, to put this approach into practice. In other words, what role should dominance play when establishing whether consent is freely given? A possible answer is proposed in the rest of this section.

It was mentioned that DPAs allow for consent to be used as a legal basis when firms offer services in exchange for data, despite sitting uneasily with art. 7(4) GDPR.[73] This reflects the fact that in the digital market there are situations in which individuals can effectively choose whether to use a service that comes with data collection or not, in the same way in which they can choose whether to use a service that requires monetary payment. When consumers have multiple options and lock-in and network effects are not particularly strong, it is arguably legitimate to leave the discretion to firms as to what kind of data to request in return for their services, as long as they obtain informed, specific, and unambiguous consent. In these cases, it can be assumed that consumers would only agree to the terms, if they considered them fair in relation to what they are getting in return.[74] Essentially, this will allow firms in competitive markets to compete on data protection terms.

On the contrary, when it comes to players like Facebook or Google, which have significant market power and create consumer lock-ins, there is not a sufficient degree of com-

[71] EE Bailey and WJ Baumol, 'Deregulation and the Theory of Contestable Markets' (1984) Yale Journal on Regulation 111; A Pera, 'Deregulation and Privatisation in an Economy-wide Context' (1989) OECD economic studies 159.

[72] It could, however, result in more competition.

[73] Art. 7(4) GDPR states that "when assessing whether consent is freely given, utmost account shall be taken of whether, inter alia, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract".

[74] This refers only to the freely given element of consent; there are other issues around consent, for instance whether it can ever be truly informed.

petition in the market that would guarantee consumer choice. In order to protect individuals' control over data it is, thus, justifiable to prohibit that these firms make the provision of their services conditional on consent to terms that go beyond what is necessary for the provision of their services. Instead, they should be ordered to give users a real choice (in terms of opting in or out) for consent to be valid.[75] Essentially, the "freely given" requirement of consent should play a more important role in digital markets, but should be interpreted as meaning that there needs to be *some* freedom as opposed to *complete* freedom: either the freedom to renounce a specific service or the freedom to choose whether or not to disclose data in connection to that service (when renouncing is not a possibility).

In the Proposal for the ePrivacy Regulation, the Council of the European Union reasons along the same line:

> "In contrast to access to website content provided against monetary payment, where access is provided without direct monetary payment and is made dependent on the consent of the end-user to the storage and reading of cookies for additional purposes, requiring such consent would normally not be considered as depriving the end-user of a genuine choice if the end-user is able to choose between services [...] Conversely, in some cases, making access to website content dependent on consent to the use of such cookies may be considered, in the presence of a clear imbalance between the end-user and the service provider as depriving the end-user of a genuine choice... such imbalance could exist where the end-user has only few or no alternatives to the service, and thus has no real choice as to the usage of cookies for instance in case of service providers in a dominant position".[76]

This also appears to be consistent with the DMA, a recital of which reads: "to ensure that gatekeepers do not unfairly undermine the contestability of core platform services, gatekeepers should enable end users to freely choose to opt-in to such data processing and sign-in practices by offering a less personalised but equivalent alternative, and without making the use of the core platform service or certain functionalities thereof conditional upon the end user's consent".[77]

In its guidelines on consent, endorsed by the EDPB, the art. 29 Working Party, however, seemed to reject such an approach, *i.e*. distinguishing between competitive and

[75] This differentiation applies to the determination of the lawfulness of processing (GDPR, art. 6), more specifically, whether undertakings can use consent as a legal basis for processing. The other data protection principles (*e.g*. purpose limitation and data minimisation, GDPR, art. 5) remain unaltered.

[76] Proposal COM(2017) 10 final for a Regulation of the European Parliament and of the Council of 10 January 2017 concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications), recital 20.

[77] Digital Markets Act, recital 36.

non-competitive markets for the purposes of establishing the validity of consent.[78] It maintained that, while controllers can rely on consent for use of data that is not necessary for the provision of the service, provided that they offer data subjects a genuinely equivalent service that does not require consenting to the data use, they cannot argue that data subjects have a choice between their own service and an equivalent service offered by another provider. Essentially, this implies that data subjects should always be able to opt out, regardless of the competitive situation in the market. The Working Party argues that otherwise: "the freedom of choice would be made dependant [sic] on what other market players do and whether an individual data subject would find the other controller's services genuinely equivalent. It would furthermore imply an obligation for controllers to monitor market developments to ensure the continued validity of consent for their data processing activities".[79]

Nonetheless, as argued by Clifford et al., it appears unlikely that the Working Parties' "strict interpretation of consent [...] will be sustainable in light of the various moves to recognize the economic value of personal data and the broader internal market considerations of the EU legislator".[80] First of all, if the CJEU follows the AG's opinion, data controllers and DPAs will have no choice but to take market conditions into account in these circumstances. Besides, the problem identified by the Working Party only emerges if the threshold of market concentration is placed too low; when dealing with a tech giant and gatekeeper like Google, it is safe to say that users do not have a real choice among different providers. If DPAs adopt transparent and consistent methods of determining dominance, for instance, by relying on the classification of the DMA, identifying when individuals do and do not have sufficient alternatives will be straightforward. Implementing a two-tier approach is a way in which the GDPR can respond to the challenges represented by the market power of big tech and ensure its future-proofness when it comes to safeguarding data subjects in the digital market.

If such a two-tier approach is put into place, firms that cannot rely on consent, *i.e*. dominant firms, would have to offer consumers the choice to opt out of the data processing that is tied to consent. While this a beneficial outcome from the point of view of individuals' control over their data, firms will be reluctant to do, if they rely on the data to monetise their services. Allowing users to utilise a service without processing their data in exchange would involve offering the service truly for free. To compensate for the lack of data monetisation, firms might need to charge users a fee. This outcome would safeguard data protection rights, but deprive individuals of the choice to pay with

[78] Art. 29 Working Party, 'Guidelines on consent under Regulation 2016/679', adopted on 28 November 2017, as last Revised and Adopted on 10 April 2018.

[79] Art. 29 Working Party, 'Guidelines on consent under Regulation 2016/679', adopted on 28 November 2017, as last Revised and Adopted on 10 April 2018, p. 9-10.

[80] D Clifford, I Graef and P Valcke, 'Pre-formulated Declarations of Data Subject Consent: Citizen-Consumer Empowerment and the Alignment of Data, Consumer and Competition Law Protections' cit.

data instead of money. From a more holistic perspective, switching to monetary payment would empower consumers to the extent that they are better at comparing prices than the cost of a service in terms of the disclosure of their data. This could incentivise entry into the market, since new entrants could attract users by undercutting the dominant undertaking's prices.

IV.3. The legitimate interests legal basis

This two-tier system, in which dominant companies are forced to either offer their service for free or charge monetary prices, while non-dominant companies can offer the same service in exchange for data (*i.e*. for "free" from the point of view of many consumers), will undoubtedly be disruptive for the business models of the companies affected. However, consent is not the only basis for data processing; an alternative is the "legitimate interests" legal basis. This legal basis contains an express balancing requirement between the controllers' interests and data subjects' fundamental rights.[81] Under this legal basis, dominant companies have the chance to monetise services through data (and offer them for "free"), but only when they have legitimate interests in doing so.

The EDPB provides guidance to data controllers and authorities as to what qualifies as a legitimate interest.[82] With the legitimate interests legal basis, DPAs can carry out their own substantive assessment to verify that the legitimate interests justification relied upon by a data processor constitutes a valid legal basis, and thereby protect data subjects' rights. When it comes to consent, on the other hand, if the framework conditions for its validity are met, the substantive assessment is in the hands of data subjects alone. It seems sensible that in a concentrated market, in which data subjects do not have the freedom to choose, data protection regulators are the ones ensuring that data is processed in a legitimate manner, by taking into account and balancing the interests of data controllers and subjects.

DPAs should take a more active role in regulating how digital platforms can legitimately process and monetise individuals' data. The first step would be to lay down more explicit rules regarding the exchange of data against services in the digital mar-

[81] GDPR, art. 6(1)(f); GDPR, recital 47: "The legitimate interests of a controller, including those of a controller to which the personal data may be disclosed, or of a third party, may provide a legal basis for processing, provided that the interests or the fundamental rights and freedoms of the data subject are not overriding, taking into consideration the reasonable expectations of data subjects based on their relationship with the controller... At any rate the existence of a legitimate interest would need careful assessment including whether a data subject can reasonably expect at the time and in the context of the collection of the personal data that processing for that purpose may take place".

[82] See art. 29 Working Party 2014, 'Opinion 06/2014 on the notion of legitimate interests of the data controller under Art. 7 of Directive 95/46/EC' (WP 217) (9 April 2014).

ket.[83] The Board already indicated that it will issue new guidelines on the application of legitimate interest as a legal basis for processing, after stakeholders have pointed out a lack of guidance and a lack of consistency between national DPAs.[84] These new guidelines would represent a great opportunity to better regulate how dominant companies can process data, especially if their ability to rely on consent will decrease in the future.

IV.4. Obligations under the DMA

In parallel to the GDPR, the DMA introduces specific obligations for gatekeepers concerning their data practices. According to art. 5(2),

> "The gatekeeper shall not do any of the following:
> (a) process, for the purpose of providing online advertising services, personal data of end users using services of third parties that make use of core platform services of the gatekeeper;
> (b) combine personal data from the relevant core platform service with personal data from any further core platform services or from any other services provided by the gatekeeper or with personal data from third-party services;
> (c) cross-use personal data from the relevant core platform service in other services provided separately by the gatekeeper, including other core platform services, and vice versa; and
> (d) sign in end users to other services of the gatekeeper in order to combine personal data".[85]

Since the DMA's aim is to increase the contestability of digital markets rather than protect individuals' rights over data, the obligations above concern only specific data practices that are seen as restricting competition and consolidating gatekeepers' market power. Nonetheless, it is good for DPAs to be aware of these obligations, in order to ensure consistency among the regimes. Art. 5(2) specifies that the forms of processing above are allowed if the end user has been presented with the specific choice and has given consent within the meaning of the GDPR. This is compatible with the approach suggested in this

[83] The EDPB and before that the art. 29 Working Party have published guidelines on when the legal bases can be relied upon, however, there is not one comprehensive guideline that sets out the views taken when it comes to the extent to which data can be used in exchange for digital content and services. For relevant guidelines, see art. 29 Working Party 2014, 'Opinion 06/2014 on the notion of legitimate interests of the data controller under Art. 7 of Directive 95/46/EC' (WP 217) (9 April 2014); EDPB, 'Guidelines 05/2020 on consent under Regulation 2016/679', version 1.0, adopted on 4 May 2020; and EDPB, 'Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects', 8 October 2019, version 2.0.

[84] Commission Staff Working Document accompanying the document Communication COM(2020) 264 final from the Commission to the European Parliament and the Council of 24 June 2020 on Data protection rules as a pillar of citizens empowerment and EUs approach to digital transition – two years of application of the General Data Protection Regulation.

[85] Digital Markets Act, art. 5(2).

Article, meaning that the processing can be based on consent, if consent is truly freely given. A discrepancy however is potentially created by the last sentence of art. 5(2), which foresees that the obligations mentioned above, are "without prejudice to the possibility for the gatekeeper to rely on Article 6(1), points (c), (d) and (e)" of the GDPR.[86] The three legal bases mentioned in the Article do not include the "legitimate interests" legal basis. Thus, to prevent inconsistencies, when providing guidance on when the legitimate interest legal basis can be relied on by digital platforms, the EDPB and DPAs should take into account the obligations that apply to gatekeepers under the DMA.

V. Conclusion

In an age in which data is ubiquitous and an integral part of digital companies' business models, it is pivotal to ensure that individuals' rights and interests around data are adequately protected. This *Article* has focused on the issue surrounding the validity of consent given to dominant tech companies. Currently, when establishing whether consent is freely given, the market position of the data controller is not taken into account, although it can evidently foreclose individuals' choice. In the Facebook case, AG Rantos stated that dominance is a factor in the assessment of the freedom of consent under the GDPR. The *Article* addressed two main issues surrounding the role of market power in the GDPR, which the AG's opinion raises. Firstly, how should dominance be established by DPAs? It was argued that DPAs should rely on the findings of dominance in competition law and the designation of gatekeepers under the DMA, when available. Secondly, what role should dominance play in the assessment of the validity of consent? Here it was proposed that dominant companies should only be allowed to rely on consent if they give individuals the possibility to opt out of the processing. Alternatively, they can rely on the legitimate interests legal ground, if applicable.

By contextualising the issues raised by the Facebook case, the *Article* explored in what ways market power needs to be taken into account when determining the validity of consent in the digital market, in order to ensure the protection of individuals' rights under the GDPR. It has been indicated that this also requires DPAs to take a more active role in determining the ways in which dominant digital platforms are allowed to legitimately process data. Enforcing the GDPR in manner that takes into account the market realities and is consistent with neighbouring regulatory regimes is crucial for it to be future-proof and have a meaningful impact on individuals' rights in the digital world.

[86] These are the following legal bases: "(c) processing is necessary for compliance with a legal obligation to which the controller is subject; (d) processing is necessary in order to protect the vital interests of the data subject or of another natural person; (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller", GDPR, art. 6(1).

ARTICLES

FUTURE-PROOF REGULATION AND ENFORCEMENT FOR THE DIGITALISED AGE

Edited by Gavin Robinson, Sybe de Vries *and* Bram Duivenvoorde

CONSUMER PROTECTION IN THE AGE OF PERSONALISED MARKETING: IS EU LAW FUTURE-PROOF?

BRAM DUIVENVOORDE*

ABSTRACT: While companies used to advertise primarily via mass media, marketing (in particular online) is becoming increasingly personalised. Personalised marketing offers benefits to consumers, but can also exploit their vulnerabilities. For example, personalised marketing enables companies to specifically target psychological weaknesses in consumers. This threatens their autonomy and increases the power asymmetry between companies and consumers. EU marketing law, and in particular the Unfair Commercial Practices Directive, aims at protecting consumers against economic harm by reducing power asymmetries between companies and consumers. This *Article* will discuss to what extent EU marketing law is future-proof in terms of its fitness to effectively protect consumers against personalised marketing techniques. It will be argued that the law is currently unfit to effectively protect consumers, and that recent legislative changes and proposals only address this problem to a limited extent. It is argued that a "quick fix" to make EU marketing law future-proof is not available, and that an overall redesign of EU marketing law is necessary to protect consumers against the personalised marketing techniques of today and tomorrow.

KEYWORDS: EU marketing law – personalised marketing – consumer protection – consumer vulnerability – Unfair Commercial Practices Directive – future-proofing.

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I. Introduction

Marketing is changing rapidly. In particular online, marketing is increasingly personalised to the specific interests and characteristics of consumers. While personalised marketing can be beneficial to consumers, it also raises consumer protection concerns and has led to debate in society and in politics.[1] This *Article* will discuss whether EU law is future-proof in terms of protecting consumers against harmful personalised marketing. In particular, this *Article* will address the following two questions:

i) Is EU marketing law currently future-proof in terms of its fitness to effectively protect consumers, taking into consideration the shift from mass media marketing to personalised marketing?

ii) What should be the main points on the research and policy agenda for the coming years in this regard?

After introducing personalised marketing and how it can be used to exploit consumer vulnerabilities (section II), this *Article* will discuss to what extent EU marketing law (with the Unfair Commercial Practices Directive at its centre) is currently future-proof in terms of its fitness to effectively protect consumers against harmful personalised marketing (section III). After concluding that EU marketing law is currently *not* future-proof, it will be discussed to what extent recent legislative changes and proposals (namely: the Modernisation Directive, the Digital Services Act and the Artificial Intelligence Act) address the shortcomings identified (section IV). Finally, it will be explained what the main points on the research and policy agenda should be for the coming years (section V).

As follows from the two research questions, future-proofness is addressed in this *Article* from the perspective of effectively protecting consumers against personalised marketing – a marketing technique which has advanced in the past years and is expected to continue to further develop in the years to come (see section II.1 below). In proposing a research and policy agenda for the coming years, the focus is on effectively protecting consumers, while at the same time leaving room for innovation.[2] This approach also makes sense from a political perspective: while EU institutions have shown to be open to increasing consumer protection in the digital context,[3] an overall ban of online

[1] See *e.g.* A Mahwadi, 'Targeted Ads are One of the World's most Destructive Trends. Here's Why' (5 November 2019) The Guardian www.theguardian.com; N Lomas, 'EU's Top Privacy Regulator Urges Ban on Surveillance-based ad Targeting' (10 February 2021) TechCrunch techcrunch.com and C Goujard, 'European Parliament Pushes to Ban Targeted Ads Based on Health, Religion or Sexual Orientation' (20 January 2022) Politico www.politico.eu.

[2] The approach of this *Article* is therefore what you could call a typical example of future-proofing, addressing current and future challenges in a way that tries to give room to innovation. See similarly S Ranchordas and M van 't Schip, 'Future-Proofing Legislation for the Digital Age' in S Ranchordas and Y Roznai (eds), *Time, Law, and Change* (Hart 2020) 347.

[3] See *e.g.* the recent changes in the Modernisation Directive and the newly adopted Digital Services Act (section IV of this *Article*) and the European Commission's fitness check of EU consumer law in terms of digital fairness ec.europa.eu.

behavioural advertising (one of the prime examples of personalised marketing) was discussed in European Parliament in the process of adoption of the Digital Services Act, but did not find a majority.[4] In addition, the research and policy agenda seeks solutions that do not only address current harms of personalised marketing, but that also aim at protecting consumers in relation to future developments in terms of personalisation.[5]

II. Personalised marketing and its potential to exploit consumer vulnerabilities

II.1. Personalised marketing

Through their online activities, consumers produce large amounts of personal data that are collected and processed by companies.[6] The personal data can be used by companies to build consumer profiles and disseminate personalised marketing output. For example, companies are increasingly able to target specific groups of consumers with personalised online advertising, and the content of webstores is increasingly tailored to the specific interests and characteristics of individual consumers.[7]

Personalisation can be based on earlier online behaviour of consumers that indicate preferences, such as search behaviour. It can also be based on the psychological characteristics of consumers (such as extraversion or impulsiveness), which are inferred from consumers' digital footprints (so-called psychological targeting).[8] Personalisation can be optimised through A/B testing, in which the effectiveness of different versions of personalised marketing content is shown to different segments of consumers to determine which version is most effective.[9] Machine learning algorithms are often applied to automate personalisation. This allows for the automated and continued prediction and testing of effective persuasion strategies for individual consumers.[10]

[4] See C Goujard, 'European Parliament Pushes to Ban Targeted Ads Based on Health, Religion or Sexual Orientation' cit.

[5] In that sense, this *Article* aims at setting an agenda for sustainable and (and least to some degree) adaptable solutions, which are fit to address future challenges. See in this regard also S Ranchordas and M van 't Schip, 'Future-Proofing Legislation for the Digital Age' cit. 347.

[6] A Acquisti, L Brandimarte and G Loewenstein, 'Privacy and Human Behavior in the Age of Information' (2015) Science 509.

[7] J Strycharz, G van Noort, N Helberger and E Smit, 'Contrasting Perspectives: Practitioner's Viewpoint on Personalised Marketing Communication' (2019) European Journal of Marketing 635.

[8] SC Matz and others, 'Psychological Targeting as an Effective Approach to Digital Mass Persuasion' (2017) Proceedings of the National Academy of Sciences of the United States of America 12714; SC Matz, RE Appel and M Kosinski, 'Privacy in the Age of Psychological Targeting' (2020) Current Opinion in Psychology 116.

[9] M Esteller-Cucala, V Fernandez and D Villuendas, 'Experimentation Pitfalls to Avoid in A/B Testing for Online Personalization' (2019) Adjunct Publication of the 27th Conference on User Modeling, Adaptation and Personalization 153.

[10] *Ibid*. 153; J Strycharz and BB Duivenvoorde, 'Vulnerability Arising from Personalized Marketing Communication: Are Consumers Protected?' (2021) Internet Policy Review 1.

Personalised marketing offers a number of benefits to consumers, such as increased relevance, informativeness and credibility of communication.[11] For companies, personalised marketing is the key to more effective persuasion. By collecting data on individual consumers, companies are better able to predict how consumers will react to marketing and what persuasion strategies are most effective.[12]

The shift towards personalised marketing is expected to continue to develop in the near future, leading to marketing content (such as apps and webstores) being increasingly personalised one-on-one, offering each consumer a unique experience.[13]

A specific development that may boost such one-on-one personalisation is the growing use of voice-operated smart assistants. While smart assistants (such as Google Assistant and Amazon's Alexa) are currently used for shopping purposes to a limited extent only, this may change when smart assistants become more advanced in the near future – and, as a result, become indispensable in our daily lives as well as for marketing.[14] In terms of personalised marketing, smart assistants could become a particularly strong tool for consumer persuasion when making use of emotion recognition technology.[15] Through the application of emotion recognition technology, *e.g.* on the basis of voice analysis, smart devices could potentially be used for the automated recognition of and response to consumers' real-time emotions. This feature would be particularly interesting for companies in terms of the promotion and sale of products through smart assistants, allowing companies to directly respond to real-time emotions of consumers.[16] This would effectively bring companies closer to the holy grail of consumer persuasion: having direct access to the emotions that drive purchasing decisions. According to consultancy firm Accenture, big tech companies like Apple and Amazon are already performing large-scale research into the integration of emotion recognition technology in smart assistants.[17]

[11] SC Boerman, S Kruikemeier and FJ Zuiderveen Borgesius, 'Online Behavioral Advertising: A Literature Review and Research Agenda' (2017) Journal of Advertising 363; TP Tran, 'Personalized Ads on Facebook: An Effective Marketing Tool for Online Marketers' (2017) Journal of Retailing and Consumer Services 230.

[12] J Strycharz and BB Duivenvoorde, 'Vulnerability Arising from Personalized Marketing Communication' cit. 1. Note however, that personalization can pose accuracy issues. See *e.g.* C Summers, R Smith and R Walker Reczek, 'An Audience of One: Behaviorally Targeted Ads as Implied Social Labels' (2016) Journal of Consumer Research 156.

[13] See for an elaborate overview BB Duivenvoorde, 'Datagedreven marketing en de toekomst van het consumentenrecht: tijd voor een nieuwe beschermingsgedachte?' (2021) Tijdschrift voor Consumentenrecht & Handelspraktijken 189 (in Dutch).

[14] N Dawar, 'Marketing in the Age of Alexa: AI Assistants Will Transform how Companies and Customers Connect' (2018) Harvard Business Review 80.

[15] BGC Dellaert and others, 'Consumer Decisions with Artificially Intelligent Voice Assistants' (2020) Marketing Letters 335; BB Duivenvoorde, 'Datagedreven marketing en de toekomst van het consumentenrecht' cit.

[16] D Rauschenfels, 'Is Emotional AI The Future of Advertising?' (11 July 2019) Datadriveninvestor medium.datadriveninvestor.com.

[17] R Murdoch and others, 'Getting Emotional. How Platforms, Technology, and Communications Companies can Build a Responsible Future in Emotional AI' (2020) Accenture www.accenture.com. Note, however, that many are still sceptic about the current accuracy of emotion recognition technology. See *e.g.* A

II.2. Potential to exploit consumer vulnerabilities

While personalised marketing promises a number of benefits to consumers, the targeting of consumers' personal characteristics can make consumers more susceptible to persuasion attempts, blurring the line between persuasion and manipulation.[18] This can result in the exploitation of vulnerabilities of consumers.[19] For example, companies can specifically target psychological weaknesses such as impulsiveness or insecurity, taking advantage of consumers' vulnerabilities beyond the light of their own awareness.[20] For instance, Facebook allegedly offered advertisers the opportunity to target teenagers during moments of psychological vulnerability, such as when they felt insecure or stressed.[21] Similarly, companies can exploit external circumstances that can make consumers vulnerable.[22] Uber has been criticised for raising the price of a taxi ride when the battery of the consumer's mobile device is running low, forcing the consumer to accept a high price before his phone turns off.[23] In this context it is relevant that consumer vulnerability is highly situational and can apply to anyone – it is not limited to a small number of consumers who are categorically vulnerable.[24] The exploitation of vulnerabilities through personalised marketing can be seen as harmful for consumers, threatening their autonomy to make informed decisions.[25] The potential for exploitation

Hern, 'Information Commissioner Warns Firms over 'Emotional Analysis' Technologies' (25 October 2022) The Guardian www.theguardian.com.

[18] R Calo, 'Digital Market Manipulation' (2014) GWashLRev 995; G Sartor, 'New Aspects and Challenges in Consumer Protection: Digital Services and Artificial Intelligence' (2020) Study for the committee on the Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament www.europarl.europa.eu.

[19] OECD, 'Online Advertising: Trends, Benefits and Risks for Consumers' (2019) OECD Publishing digital economy papers www.oecd-ilibrary.org; J Strycharz and BB Duivenvoorde, 'Vulnerability Arising from Personalized Marketing Communication' cit. 1.

[20] R Calo, 'Digital Market Manipulation' cit. 995; K Ward, 'Social Networks, the 2016 US Presidential Elections, and Kantian Ethics: Applying the Categorical Imperative to Cambridge Analytica's Behavioural Microtargeting' (2018) Journal of Media Ethics: Exploring Questions of Media Morality 133.

[21] N Tiku, 'Get Ready for the Next Big Privacy Backlash Against Facebook' (21 May 2017) Wired www.wired.com.

[22] J Strycharz and BB Duivenvoorde, 'Vulnerability Arising from Personalized Marketing Communication' cit. 1.

[23] J Golson, 'Uber Knows you'll Probably Pay Surge Pricing if your Battery is About to Die' (20 May 2016) The Verge www.theverge.com.

[24] SM Baker, JW Gentry and TL Rittenburg, 'Building Understanding of the Domain of Consumer Vulnerability' (2005) Journal of Macromarketing 128; RP Hill and E Sharma, 'Consumer Vulnerability' (2020) Journal of Consumer Psychology 551. See also N Helberger and others, 'Choice Architectures in the Digital Economy: Towards a New Understanding of Digital Vulnerability' (2021) Journal of Consumer Policy 175.

[25] R Calo, 'Digital Market Manipulation' cit. 995; Q André and others, 'Consumer Choice and Autonomy in the Age of Artificial Intelligence and Big Data' (2018) Customer Needs and Solutions 28; D Susser, B Roessler and H Nissenbaum, 'Technology, Autonomy, and Manipulation' (2019) Internet Policy Review 1; G Sartor, 'New Aspects and Challenges in Consumer Protection' cit.

of consumers through personalised marketing increases the power asymmetry between companies and consumers.[26]

III. Consumer protection against personalised marketing: shortcomings of the current EU legal framework

III.1. The Unfair Commercial Practices Directive

EU marketing law aims at protecting consumers against economic harm by reducing power asymmetries between companies and consumers.[27] This makes it the best placed legal field to protect consumers against the exploitation of their vulnerabilities through personalised marketing.[28]

The legal instrument that is most relevant for protecting consumers against the exploitation of vulnerabilities through personalised marketing is the Unfair Commercial Practices Directive ("UCPD").[29] The UCPD harmonises the regulation of business-to-consumer commercial practices (including marketing) in the EU. As confirmed by the European Court of Justice ("CJEU"), this includes one-to-one commercial practices.[30] This is relevant in the context of personalised marketing: even communications that are personalised at the level of one single consumer are "commercial practices" as defined by the UCPD.

The UCPD contains general prohibitions of misleading and aggressive commercial practices (arts 6 to 9 UCPD). In addition, the UCPD contains a list of specifically defined misleading and aggressive practices that are deemed unfair under all circumstances (Annex I UCPD). The list includes practices like falsely stating that a product will only be available for a very limited time (a misleading practice) and creating the impression that the consumer cannot leave the premises before signing a contract (an aggressive practice).[31] Finally, art. 5 UCPD prohibits commercial practices that are "contrary to the requirements of professional diligence". This notoriously vague general clause essentially functions as

[26] R Calo, 'Digital Market Manipulation' cit. 995; N Helberger and others, 'EU Consumer Protection 2.0: Structural Asymmetries in Digital Consumer Markets' (2021) Report for BEUC www.beuc.eu; BB Duivenvoorde, 'Datagedreven marketing en de toekomst van het consumentenrecht' cit. 189; N Helberger and others, 'Choice Architectures in the Digital Economy' cit. 175.

[27] Apart from protecting consumers, EU marketing law also aims at boosting the EU internal market, by providing a level playing field for companies and by increasing consumer confidence. See *e.g.* art. 1 of the Unfair Commercial Practices Directive.

[28] J Strycharz and BB Duivenvoorde, 'Vulnerability Arising from Personalized Marketing Communication' cit. 1.

[29] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive').

[30] Case C-388/13 *UPC* ECLI:EU:C:2015:225.

[31] See points 7 and 24 of Annex I to the UCPD.

a "safety net" in the UCPD: if a practice is neither misleading nor aggressive, the practice may still be prohibited as unfair under Article 5 UCPD.[32]

III.2. Three main obstacles in effectively protecting consumers

While the UCPD aims at providing a high level of protection to consumers,[33] it fails to effectively protect consumers against the exploitation of their vulnerabilities through personalised marketing.[34] The UCPD essentially raises three main obstacles in this regard.

Firstly, the UCPD is designed to assess the lawfulness of mass media marketing in relation to the general public, and is much less suitable to assess whether personalised marketing is unlawful to the targeted consumer.[35] When assessing whether a commercial practice is unfair, courts and enforcement authorities must apply the benchmark of the average consumer.[36] If the average consumer is not manipulated by the practice, the practice will in principle not be prohibited. This may make sense when assessing mass media marketing (and in that sense the choice for the average consumer benchmark was understandable at the time of the UCPD's adoption in 2005), but application of the average consumer benchmark makes much less sense for personalised marketing. The UCPD does provide exceptions to the average consumer benchmark, but these essentially apply only if a specific group can be identified, which must have uniform characteristics that are different to those of the average consumer.[37] In practice this requirement is difficult to satisfy, since companies may base their targeting on a combination of different characteristics (such as several demographics as well as past search behaviour), rather than on a specific group characteristic. The alternative benchmarks are even more difficult to apply to marketing that is personalised at the individual level.[38]

Secondly, while the UCPD primarily provides protection by ensuring the supply of sufficient and correct information to the consumer, exploitation of consumer vulnerabilities through personalised marketing calls for further-reaching consumer protection

[32] W van Boom, 'Unfair Commercial Practices' in C Twigg-Flesner (ed.), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar 2016) 388.

[33] Art. 1 UCPD.

[34] N Helberger and others, 'EU Consumer Protection 2.0' cit.; BB Duivenvoorde, 'Datagedreven marketing en de toekomst van het consumentenrecht' cit. 189.

[35] J Strycharz and BB Duivenvoorde, 'Vulnerability Arising from Personalized Marketing Communication' cit. 1; J Laux, S Wachter and B Mittelstadt, 'Neutralizing Online Behaviour Advertising: Algorithmic Targeting with Market Power as an Unfair Commercial Practice' (2021) CMLRev 719.

[36] See art. 5(2) UCPD.

[37] See the target group benchmark and the vulnerable group benchmark in arts 5(2) and 5(3) UCPD.

[38] J Strycharz and BB Duivenvoorde, 'Vulnerability Arising from Personalized Marketing Communication' cit. 1, 11-12. See similarly N Helberger and others, 'Choice Architectures in the Digital Economy' cit. 175 and A Davola, 'Fostering Consumer Protection in the Granular Market: The Role of Rules of Consent, Misrepresentation and Fraud in Regulating Personalized Practices' (2021) Technology and Regulation 76, 82.

measures.[39] Through its prohibitions of providing misleading information and omitting material information, the UCPD's primary focus is on ensuring that consumers are correctly informed about the price and characteristics of a product.[40] The UCPD also prohibits aggressive marketing practices by use of harassment, coercion (including the use of physical force) or undue influence. However, this prohibition is essentially limited to blatant infringements of consumer autonomy, while personalised marketing often relies on more subtle forms of manipulation.[41] In this context it is relevant that the average consumer is expected to be reasonably informed, observant and circumspect, while personalised marketing has the potential to recognise and exploit situations in which consumers are not informed, observant or circumspect.[42] The UCPD does provide room to protect particularly vulnerable consumers, but this protection is limited to groups that are seen as categorically vulnerable (such as elderly consumers and children), rather than recognising that consumer vulnerability is situational and can apply to anyone.[43]

Thirdly and finally, personalised marketing presents challenges in terms of enforcement, for which the UCPD does not provide a solution.[44] The UCPD is enforced in the EU Member States by civil courts and public enforcement authorities, but also by self-regulatory advertising standards authorities. In order to assess whether personalised marketing is unlawful, it is essential that enforcement authorities are able to assess exactly what marketing content was disseminated to what consumers. This is typically easy for mass media marketing, where there is usually one advertisement that is being disseminated to the general public. Determining what marketing content was disseminated to what consumers can be much more difficult for personalised marketing, where marketing content can be adapted automatically, can be different for each targeted consumer and can be

[39] P Hacker, 'Manipulation by Algorithms: Exploring the Triangle of Unfair Commercial Practice, Data Protection, and Privacy Law' (2021) ELJ 1; BB Duivenvoorde, 'Datagedreven marketing en de toekomst van het consumentenrecht' cit. 189; J Laux, S Wachter and B Mittelstadt, 'Neutralizing Online Behaviour Advertising' cit. 719; J Strycharz and BB Duivenvoorde, 'Vulnerability Arising from Personalized Marketing Communication' cit. 1.

[40] Arts 6 and 7 UCPD. Note that the UCPD does not require companies to disclose that marketing communication is personalised, although it could be argued that personalisation of *offers* does constitute a misleading omission under art. 7 UCPD.

[41] See for an elaborate analysis J Strycharz and BB Duivenvoorde, 'Vulnerability Arising from Personalized Marketing Communication' cit. 1; P Hacker, 'Manipulation by algorithms' cit. 1.

[42] BB Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (Springer 2015); J Laux, S Wachter and B Mittelstadt, 'Neutralizing Online Behaviour Advertising' cit. 719; J Strycharz and BB Duivenvoorde, 'Vulnerability Arising from Personalized Marketing Communication' cit. 1.

[43] J Strycharz and BB Duivenvoorde, 'Vulnerability Arising from Personalized Marketing Communication' cit. 1.

[44] P Hacker, 'Manipulation by algorithms' cit. 1; J Strycharz and BB Duivenvoorde, 'Vulnerability Arising from Personalized Marketing Communication' cit. 1.

determined on the basis of many different parameters.[45] The UCPD currently does not offer authorities any tools in this regard.

IV. Recent legislative changes and proposals: only a partial solution

IV.1. Introduction

While the UCPD contains obstacles in protecting consumers against the exploitation of their vulnerabilities, the EU has not been sitting still in developing new laws to better protect EU citizens against online practices, including personalised marketing. Three recent legislative initiatives are particularly relevant in this respect: the Modernisation Directive, the Digital Services Act and the Artificial Intelligence Act. To what extent do these initiatives take away the obstacles identified in the previous section?

IV.2. Modernisation directive

In 2019, several EU consumer protection directives were updated by the so-called Modernisation Directive (also known as "Omnibus Directive").[46] The Modernisation Directive aims at bringing EU consumer law up to date with technological and societal developments, including the shift from offline to online marketing and purchasing in recent years.[47] However, while the Modernisation Directive does introduce changes to the UCPD, the amendments in the UCPD do not address personalised marketing, or take away the obstacles identified in the previous section.

The Modernisation Directive did introduce a specific rule in relation to personalised *pricing* in the Consumer Rights Directive.[48] Companies that apply personalised pricing (*e.g.* offering consumers a higher or lower price depending on their location) will have to disclose that they do so, without having to disclose what data the personalisation has

[45] J Strycharz and BB Duivenvoorde, 'Vulnerability Arising from Personalized Marketing Communication' cit. 1; see similarly for US law: L Willis, 'Deception by Design' (2020) Harvard Journal of Law & Technology 115.

[46] Directive (EU) 2019/2161 of the European Parliament and of the European Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules.

[47] C Twigg-Flesner, 'Bad Hand? The "New Deal" for EU Consumers' (2018) Zeitschrift für Gemeinschaftsprivatrecht 166; MBM Loos, 'The Modernisation of European Consumer Law: A Pig in a Poke?' (2019) European Review of Private Law 133; BB Duivenvoorde, 'The Upcoming Changes in the Unfair Commercial Practices Directive: A Better Deal for Consumers?' (2019) Journal of European Consumer and Market Law 219.

[48] Recital 45 of the Preamble to the Modernisation Directive and art. 4(4)(a)(ii) Modernisation Directive. The Consumer Rights Directive deals with several aspects of consumer contracts, including the conclusion of distance contracts (such as online purchases). See Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

been based on and to what extent the personalised price is different to the price offered to other consumers.[49] This makes it a partial solution only: it only addresses price personalisation and not other forms of personalised marketing, and does not go beyond informing consumers that a price has been personalised.

IV.3. Digital Services Act

The Digital Services Act ("DSA") is an ambitious attempt to regulate online intermediaries (like online marketplaces and social media platforms) in relation to a broad range of issues.[50] The original proposal was published by the European Commission in December 2020.[51] The European Parliament approved the proposal in its first reading on 20 January 2022, making a large number of amendments.[52] Following negotiations between the European Parliament and the Council, the DSA was adopted on 4 October 2022 and published in the Official Journal on 27 October 2022.[53] It will be applicable as of 17 February 2024.[54] The DSA will specifically regulate personalised marketing in several ways.[55]

Firstly, online platforms that display advertising will have to provide their users with "*meaningful information about the main parameters used to determine the recipient to whom the advertising is displayed*".[56] In essence, this means that platforms will have to let consumers know on the basis of what data their ads are personalised. It is questionable

[49] The information duty does not apply to techniques such as "dynamic" or "real-time" pricing that involve price changes in response to market demands. See Recital 45 of the Preamble to the Modernisation Directive.

[50] See on the DSA also *e.g.* M Eifert and others, 'Taming the Giants: The DMA/DSA Package' (2021) CMLRev 987; D Savova, A Mikes and K Cannon, 'The Proposal for an EU Digital Services Act – A Closer Look from a European and Three National Perspectives: France, UK and Germany' (2021) Computer Law Review International 38; A Savin, 'The EU Digital Services Act: Towards a More Responsible Internet' (2021) Journal of Internet Law 1; C Cauffman and C Goanta, 'A New Order: The Digital Services Act and Consumer Protection' (2021) European Journal of Risk Regulation 1; C Busch and V Mak, 'Putting the Digital Services Act in Context: Bridging the Gap Between EU Consumer Law and Platform Regulation' (2021) Journal of European Consumer and Market Law 109; S Tommasi, 'The Liability of Internet Service Providers in the Proposed Digital Services Act (2021) ERPL 925.

[51] Communication COM(2020) 825 final Proposal for a Regulation of the European Parliament and of the Council of 15 December 2020 on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC. The Digital Services Act forms part of the "Digital Services Act Package", which also includes the proposal for the Digital Markets Act, see *Ibid*.

[52] P9_TA (2022)0014 Amendments Adopted by the European Parliament on 20 January 2022 on the Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC (COM (2020)0825' – C9-0418/2020 – 2020/0361(COD)).

[53] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act).

[54] Art. 93(2) DSA.

[55] See elaborately B Duivenvoorde and C Goanta, 'The Regulation of Digital Advertising under the DSA: A Critical Assessment' (2023) Computer Law & Security Review (forthcoming).

[56] Art. 26(1)(c) DSA.

whether the information that will need to be provided will actually make consumers understand whether and how their vulnerabilities are being targeted.[57] In addition, the transparency obligation will be limited to advertising via online platforms and will not apply to other forms of personalised marketing, such as personalised advertising via other media and personalised marketing via the own channels (such as apps and webstores) of companies.

Secondly, the DSA will introduce an obligation for *very large online platforms* like Google and Facebook to publish a database containing, for each ad displayed, whether the advertisement was intended to be targeted at specific groups and, if so, on the basis of what main parameters these groups were targeted.[58] Since the database will be publicly available, this will likely help to effectively enforce the UCPD in relation to personalised marketing that is disseminated through very large online platforms. In particular, such a register may make it easier for courts and public enforcement authorities to determine who is targeted by an ad and, as a consequence, what the appropriate consumer benchmark would be. At the same time, similar to the duty to inform users on the basis of what data their ads are personalised, the question will be whether the data provided by platforms will be sufficient for enforcement authorities to actually determine that consumer vulnerabilities are being targeted. In addition, the solution will be partial in the sense that it will apply to personalised advertising that is disseminated via very large online platforms, and not to other forms of personalised marketing.

Thirdly and finally, the DSA will specifically prohibit targeted advertising based on profiling using personal data of minors, or using sensitive data such as health, religion or sexual orientation.[59] These prohibitions will at most provide a partial solution: all sorts of data can be used to exploit consumer vulnerabilities through personalised marketing, and personalisation is not just applied by online intermediaries.

II.4. Artificial Intelligence Act

Another ambitious attempt in making the EU fit for the digital age is the Artificial Intelligence Act, proposed by the European Commission in 2021.[60] The proposed Artificial Intelligence Act aims at protecting EU citizens against certain risks of the use of artificial intelligence. The proposal by the European Commission contains two prohibitions of manipulation through artificial intelligence, which could (at least in theory) also be relevant for personalised marketing. However, these prohibitions are limited to forms of

[57] See more elaborately B Duivenvoorde and C Goanta, 'The Regulation of Digital Advertising under the DSA' cit. (forthcoming).

[58] Art. 39 DSA.

[59] Arts 26(3) and 28(2) DSA.

[60] Communication COM(2021) 206 final Proposal for a Regulation of the European Parliament and of the Council of 21 April 2021 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts (hereinafter, Artificial Intelligence Act).

manipulation that cause physical or psychological harm.[61] For protection against other types of harm, the proposal explicitly refers to existing EU law, including (for protection against economic harm to consumers) the existing consumer acquis.[62] Hence, the prohibitions of manipulation in the Artificial Intelligence Act will not be relevant for the economic protection of consumers through personalised marketing.[63]

At the same time, the Artificial Intelligence Act will become relevant for certain forms of personalised marketing. In particular, companies will have to inform consumers if they make use of an emotion recognition system, for instance if such a system is integrated into a voice-operated smart assistant.[64] This is, however, "transparency-light": companies will not have to inform how emotion recognition technology is used to influence consumers.[65]

II.5. Conclusion

In conclusion, the Modernisation Directive, the Digital Services Act and the Artificial Intelligence Act can help protect consumers, but at most provide partial solutions to the obstacles identified above.[66]

V. Research and policy agenda: towards future-proof marketing law

V.1. An overall redesign of EU marketing law

Taking into consideration that the recent legislative initiatives regulate only specific aspects of personalised advertising, or apply only to certain parties, the UCPD remains the

[61] Arts 5(a) and 5(b) of the Artificial Intelligence Act.

[62] See pages 12-13 of the the European Commission's proposal for the Artificial Intelligence Act.

[63] Note that the European Parliament has proposed to broaden the scope of protection of art. 5 to include any "significant harm". It remains to be seen whether this suggestion will be followed by the European Council and the European Commission. See P9_TA(2023)0236 Amendments adopted by the European Parliament on 14 June 2023 on the proposal for a regulation of the European Parliament and of the Council on laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts (COM(2021)0206 – C9-0146/2021 – 2021/0106(COD)). In any case, the Artificial Intelligence Act would only provide a partial solution to the obstacles identified above, since it is limited to AI-based personalisation only, and would not extend to other types of (manual or automated) personalisation.

[64] Art. 52(2) of the Artificial Intelligence Act. In addition (see art. 52(1)), companies will have to inform consumers that they make use of AI systems that are intended to interact with humans (like chatbots), unless this is obvious from the circumstances and the context.

[65] Note that the European Parliament has proposed to emphasize that consent for processing personal data in this context is required. Again, it remains to be seen whether this suggestion will be followed by the European Council and the European Commission. See P9_TA(2023)0236 Amendments adopted by the European Parliament on 14 June 2023 on the proposal for a regulation of the European Parliament and of the Council on laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts (COM(2021)0206 – C9-0146/2021 – 2021/0106(COD)).

[66] BB Duivenvoorde, 'Datagedreven marketing en de toekomst van het consumentenrecht' cit. 189; P Hacker, 'Manipulation by algorithms' cit. 1.

central legal instrument to protect consumers against unfair marketing, including personalised marketing.[67] However, while the UCPD is clearly the most suitable instrument to protect consumers against personalised marketing, changes are necessary to effectively protect consumers against harmful personalised marketing.

Some suggestions for reform of marketing law have been made in legal literature, which could be applied to the UCPD in order for it to more effectively protect consumers against personalised marketing. For example, Willis has suggested for US law that the lawfulness of personalised marketing could be assessed by testing whether a commercial practice is *fair by design*, similar to the notion of *privacy by design* in EU data protection law.[68] Hacker has suggested that a similar test could be incorporated into the UCPD to assess the lawfulness of mind-reading algorithms.[69] This would require companies using mind-reading algorithms to proactively audit their algorithms in order to prevent breaches of the UCPD. Another amendment to the UCPD is suggested by Laux, Wachter and Mittelstadt, who have proposed that a stricter unfairness test could be applied to dominant market actors such as Google and Facebook, when they act as advertising intermediaries.[70] Helberger et al have suggested yet a different approach, arguing that consumers could be protected more effectively against data-driven marketing practices by reversing the burden of proof as to the fairness (and thus the lawfulness) of the commercial practice.[71]

These suggestions aim at tweaking the UCPD in a way that make it more suitable to protect consumers against personalised marketing. They are all useful suggestions that could improve the position of consumers, but are insufficient to make the UCPD future-proof. The suggested amendments largely leave the fundamental problems of the UCPD in place and offer only partial solutions. For example, the stricter fairness test for dominant market actors, proposed by Laux, Wachter and Mittelstadt, will leave all personalised marketing that is not disseminated via parties like Google and Facebook untouched. Similarly, the implementation of a test that is based on fairness by design (as suggested by Willis and Hacker) could indeed form an essential element of a UCPD reform, but would on its own not take away the substantive barriers in the UCPD, such as the unsuitability of the consumer benchmarks to assess the fairness of personalised marketing and the UCPD's lack of protection against more subtle forms of manipulation (see section III.2). Finally, a reversal of the burden of proof, as suggested by Helberger et al, would

[67] P Hacker, 'Manipulation by algorithms' cit. 1.

[68] L Willis, 'Deception by Design' cit. 115.

[69] P Hacker, 'Manipulation by algorithms' cit. 1, 34.

[70] J Laux, S Wachter and B Mittelstadt, 'Neutralizing Online Behaviour Advertising' cit. 719.

[71] N Helberger and others, 'EU Consumer Protection 2.0' cit. 77. The idea of the authors is that the unfairness of "data exploitation strategies" is presumed, and that it would be up to the company to demonstrate that the practice complies with the law. The company could do so through an impact assessment by the controller under the GDPR, or through a certificate provided by an auditor.

only truly be effective if the UCPD would first be amended to make it more suitable to deal with personalised marketing. Hence, a quick fix to make the UCPD future-proof is not available.[72]

What is therefore needed is an overall redesign of the UCPD. This redesign should move past the existing obstacles in the UCPD in order to effectively protect consumers against personalised marketing. Hence, the UCPD should be redesigned in order to make it suitable to assess the lawfulness of both mass media and personalised marketing, to offer consumer protection beyond providing information and preventing blatant infringements of consumers' autonomy, and to provide better enforcement tools for civil courts, public enforcement authorities and advertising standards authorities.

V.2. Research and policy agenda

Hence, the central issue on the research and policy agenda in terms of EU marketing law should be the overall redesign of the UCPD, in order to make it fit to effectively protect consumers against personalised marketing.[73] More in particular, the following main points should in my view be on the research and policy agenda for the coming years.

i) In order to redesign the UCPD effectively, it will be important to gain further insight into what exact personalised marketing techniques are currently applied and how they can be used to exploit consumer vulnerabilities. Within the fields of communication and marketing research, there is a growing body of literature on personalised marketing techniques as well as their potential to exploit consumer vulnerabilities. In order to redesign the UCPD in a way that is future-proof, it will also be important to explore what personalised marketing techniques are likely to be applied in the future. For example, what will marketing personalisation look like if voice-operated smart assistants indeed become indispensable personal assistants, as Dawar suggests?[74] What would be the impact of emotion recognition technologies on personalised marketing, its effectiveness and its potential to exploit consumer vulnerability? And what forms of personalised marketing are likely to emerge in the metaverse?[75] Discussions amongst marketing professionals and academics can provide useful insights in this respect. While it is impossible to predict the future, it does make sense for policy makers and researchers to take into account likely developments in personalised marketing in preparing the UCPD's redesign.

[72] J Strycharz and BB Duivenvoorde, 'Vulnerability Arising from Personalized Marketing Communication' cit. 1.

[73] This is not to say that other legal instruments can also (remain to) play a role in the protection of consumers against harmful personalised marketing. For example, processing of certain types of data for personalised marketing purposes could be further limited (or prohibited) through the GDPR.

[74] N Dawar, 'Marketing in the Age of Alexa' cit. 80. See also section II.1 of this *Article*.

[75] See *e.g.* The Guardian, 'Facebook Gives a Glimpse of Metaverse, its Planned Virtual Reality World' (2021) www.theguardian.com.

ii) An overall redesign of the UCPD calls for a reconsideration of the notion of fairness in the UCPD.[76] The UCPD does not clearly define fairness, but is implicitly based on the idea that consumers are adequately protected if they have sufficient and correct information, and are not subjected to blatant infringements of their autonomy.[77] This does not suffice to effectively protect consumers in the age of personalisation. The conceptualisation of unfairness as being "contrary to professional diligence" (see the general clause, art. 5 UCPD) does not suffice either, since it essentially refers to industry standards rather than providing a substantive notion of fairness.[78]

iii) The substantive rules of the UCPD should be redesigned, including a fundamental redesign of the UCPD's fundamental notions (including the consumer benchmarks) and general clauses.[79] As part of the redesign, a new list can be compiled of personalised marketing practices that should be deemed unfair under all circumstances. In this regard, inspiration can be sought in communication and marketing literature (see point 1 above). Moreover, in order to make the list adaptable to new developments in the field of personalised marketing, a more flexible way to amend it could be considered.

iv) The redesign should not be limited to substantive regulations, but should also cover the enforcement framework. As explained, the UCPD currently falls short in providing effective enforcement tools to national authorities, for whom it is often difficult to determine exactly what marketing content is disseminated to what consumers. The enforcement tools should be designed to accommodate the diverse enforcement practices in the EU Member States, including enforcement through civil courts, public enforcement authorities and advertising standards authorities. Inspiration can be drawn from the proposed personalised advertising database for very large platforms in the Digital Services Act (see section IV.3), and – taking into consideration the diverse enforcement practices in the EU Member States – possibly also from innovative enforcement practices initiated at the national level.

V. Conclusion

This *Article* has shown that EU marketing law, with the UCPD at its centre, is not future-proof in terms of its fitness to effectively protect consumers, taking into consideration the shift from mass media marketing to personalised marketing. The UCPD essentially

[76] See similarly N Helberger and others, 'Choice Architectures in the Digital Economy' cit. 175, 195-196.

[77] See section III.2 of this *Article*.

[78] See art. 5(2) UCPD and the definition of professional diligence in art. 2(h) UCPD: "professional diligence' means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity".

[79] See for an attempt to redesign the UCPD's consumer benchmarks and general clauses, written after this *Article* was submitted for review: B Duivenvoorde, 'Redesigning the UCPD for the Age of Personalised Marketing: A Proposal to Redesign the UCPD's Consumer Benchmarks and General Clauses' (2023) Journal of European Consumer and Market Law (forthcoming).

raises three obstacles in this regard. Firstly, the UCPD is designed to assess the lawfulness of mass media marketing in relation to the general public, and is much less suitable to assess whether personalised marketing is unlawful to the targeted consumer. Secondly, while the UCPD primarily provides protection by ensuring the supply of sufficient and correct information to the consumer, exploitation of consumer vulnerabilities through personalised marketing calls for further-reaching consumer protection measures. Thirdly and finally, personalised marketing presents challenges in terms of enforcement, for which the UCPD does not provide a solution. The recently adopted Modernisation Directive and Digital Services Act and the proposed Artificial Intelligence Act can help protect consumers against personalised marketing, but at most provide partial solutions to the UCPD's obstacles. While the UCPD remains the most suitable instrument to protect consumers against personalised marketing, changes are necessary.

Since a "quick fix" to the UCPD is not available, the central issue on the research and policy agenda in terms of EU marketing law should in my view be its overall redesign, in order to make it fit to effectively protect consumers against personalised marketing. In particular, such a redesign requires researchers and policy makers to *i)* gain further insight into what exact personalised marketing techniques are currently applied and will likely be applied in the future, and how they can be used to exploit consumer vulnerabilities; *ii)* reconsider the underlying notion of fairness in the UCPD; *iii)* redesign the substantive provisions of the UCPD, including its fundamental notions, general clauses and its blacklist and *iv)* redesign the enforcement framework in order to provide effective enforcement tools to civil courts, public enforcement authorities and advertising standards authorities.

ARTICLES

FUTURE-PROOF REGULATION AND ENFORCEMENT FOR THE DIGITALISED AGE

Edited by Gavin Robinson, Sybe de Vries *and* Bram Duivenvoorde

DIGITAL DETECTIVES: A RESEARCH AGENDA FOR CONSUMER FORENSICS

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TABLE OF CONTENTS: I. Introduction. – II. Consumer law enforcement through computational investigations. – II.1. The CPC Regulation. – II.2. DSA. – III. Computational Measurements of Influencer Activity: a case study for digital enforcement. – IV. Consumer forensics: a new field for digital detectives. – IV.1. Consolidating data collection and analysis methods for consumer law. – IV.2. Classifying new forms of consumer harms. – IV.3. Developing new approaches to consumer protection. – IV.4. Exploring the legal and ethical implications of consumer forensics. – V. Conclusion.

ABSTRACT: Effective enforcement on digital markets is one of the most essential considerations for contemporary consumer law and policy. On digital markets, traders engage in very sophisticated commercial practices that are opaque to the average consumer. Online information is necessary for the monitoring of how companies engage in legal compliance, and where public authorities should intervene. This puts a lot of pressure on public administration to develop investigation and enforcement approaches that match the different consumer harms and needs arising out of digital markets. As it is virtually impossible to police technology practices without understanding the technologies and business models behind them, public authorities need to arm themselves with the means necessary to detect digital violations. This *Article* focuses on the digital enforcement of consumer protection law in the European Union and proposes a new field of research focused on the investigation and enforcement of consumer violations on digital markets in the form of "consumer forensics". In the author's opinion, consumer forensics is the answer to the question of how consumer enforcement regulation can become future-proof. As digitalization is rapidly affecting the way in which consumers are protected on the Internet, both the substantive and procedural dimensions of regulatory effectiveness will be impacted by evidence gathering to understand and further prove the existence of new online harms. To show the potential of this topic, the *Article* will offer some in-depth insights from a very specific topic of administrative scrutiny, namely measuring influencer marketing activities that are relevant for consumer protection.

KEYWORDS: consumer protection – consumer forensics – influencer marketing – digital enforcement – European private law – computer science.

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I. Introduction

Effective enforcement on digital markets is one of the most essential considerations for contemporary consumer law and policy. In the offline world, authorities do on-site inspections, track shipments and test substances to make sure that consumer products are safe and practices fair.[1] Yet the current state of digital markets challenges existing paradigms of law enforcement. On digital markets, traders engage in very sophisticated commercial practices that are opaque to the average consumer. For instance, consumer interfaces are now masterfully designed in ways that are said to nudge users to engage in transactions;[2] websites comparing product prices give consumers more comparative information about existing offers but also raise product prices altogether;[3] and reviews can give more insights into the qualities of products or services, but they can also be gamed by malicious actors.[4] These are only a handful of examples of how in addition to their role of facilitating transactions in goods and services, consumer digital markets are increasingly designed to convey information, in ways and to ends that we do not yet fully grasp, and which may not always favour consumers.

The online information given to consumers is necessary for the monitoring of how companies engage in legal compliance, and where public authorities should intervene. This puts a lot of pressure on public administration to develop investigation and enforcement approaches that match the different consumer harms and needs arising out of digital markets. On 17 February 2023, the United States Federal Trade Commission (FTC) launched a new Office of Technology, aiming to "support FTC investigations into business practices and the technologies underlying them".[5] The FTC's approach to safeguarding consumer interests on digital markets is an example of a worldwide trend, which emphasizes one very clear direction: developing technology to investigate and assess other

[1] U Wollein and others, 'Potential Metal Impurities in Active Pharmaceutical Substances and Finished Medicinal Products: A Market Surveillance Study' (2015) European Journal of Pharmaceutical Sciences 100.

[2] CM Gray and others, 'The Dark (Patterns) Side of UX Design' *Proceedings of the 2018 CHI Conference on Human Factors in Computing Systems* (ACM 2018) dl.acm.org; CM Gray and others, 'Dark Patterns and the Legal Requirements of Consent Banners: An Interaction Criticism Perspective' *Proceedings of the 2021 CHI Conference on Human Factors in Computing Systems* (ACM 2021) dl.acm.org; A Mathur and others, 'Dark Patterns at Scale: Findings from a Crawl of 11K Shopping Websites' (2019) Proceedings of the ACM on Human-Computer Interaction 1.

[3] D Ronayne, 'Price Comparison Websites' (2021) International Economic Review 1081.

[4] EF Cardoso, RM Silva and TA Almeida, 'Towards Automatic Filtering of Fake Reviews' (2018) Neurocomputing 106; M Juuti and others, 'Stay On-Topic: Generating Context-Specific Fake Restaurant Reviews' in J Lopez, J Zhou and M Soriano (eds), *Computer Security* (Springer International Publishing 2018); J Malbon, 'Taking Fake Online Consumer Reviews Seriously' (2013) Journal of Consumer Policy 139; J M Martínez Otero, 'Fake Reviews on Online Platforms: Perspectives from the US, UK and EU Legislations' (2021) SN Social Sciences 181; R Mohawesh and others, 'Fake Reviews Detection: A Survey' (2021) IEEE Access 65771.

[5] Federal Trade Commission, 'FTC Launches New Office of Technology to Bolster Agency's Work' (16 February 2023) www.ftc.gov.

technologies. As it is virtually impossible to police technology practices without understanding the technologies and business models behind them, public authorities need to arm themselves with the means necessary to detect digital violations. In addition, the sheer scale at which harmful practices (*e.g.* dark patterns)[6] may be deployed requires an overhaul of how investigations are done.

This *Article* focuses on the digital enforcement of consumer protection law and proposes a new field of research focused on the investigation and enforcement of consumer violations on digital markets in the form of "consumer forensics". While forensic science has traditionally been affiliated with the criminal field,[7] the proposed concept of consumer forensics deals with uncovering consumer violations though various methods and procedures. In the author's opinion, consumer forensics is the answer to the question of how consumer enforcement regulation can become future-proof. As digitalization is rapidly affecting the way in which consumers are protected on the Internet, both the substantive and procedural dimensions of regulatory effectiveness will be impacted by evidence gathering to understand and further prove the existence of new online harms. To show the potential of this topic, the *Article* will offer some in-depth insights from a very specific topic of administrative scrutiny, namely measuring influencer marketing activities that are relevant for consumer protection.

The *Article* is structured as follows. Section II makes an overview of the characteristics of EU consumer law enforcement on contemporary digital markets, and briefly discusses some administrative powers enabled through EU sectoral regulation such as the Consumer Protection Cooperation Regulation (CPC Regulation)[8] and the Digital Services Act (DSA).[9] Section III discusses influencer marketing and the need to monitor influencer activities, as an example of how digital enforcement tasks can be dealt with by existing technologies. In doing so, the section also offers insights into the various categories of computational approaches which may be used to monitor the activities of social media influencers. Section IV defines and elaborates upon the concept of consumer forensics as a multidisciplinary field of research, and proposes a research agenda for the future. Section V concludes.

[6] A Mathur and others, 'Dark Patterns at Scale' cit.

[7] A Årnes (ed.), *Digital Forensics: An Academic Introduction* (John Wiley & Sons Inc 2018); John Sammons, *The Basics of Digital Forensics: The Primer for Getting Started in Digital Forensics* (Elsevier/Syngress 2012); K Nance, B Hay and M Bishop, 'Digital Forensics: Defining a Research Agenda' (2009) 42nd Hawaii International Conference on System Sciences ieeexplore.ieee.org.

[8] Commission Regulation 2017/2394 of the European Parliament and of the Council of 12 December 2017 on Cooperation Between National Authorities Responsible for the Enforcement of Consumer Protection Laws and Repealing Regulation (EC) No 2006/2004.

[9] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC.

II. Consumer law enforcement through computational investigations

Digital enforcement is a development rooted in the increased digitalization of our societies. In the past years, due to the rising interest of monitoring digital markets, Open Source Intelligence (OSINT) and academic initiatives have proposed new approaches for Internet investigations that are relevant for digital enforcement.[10] The FTC has been a trail-blazer in this respect. In the past years, the FTC has supported academic events where scientific labs working on privacy and security, network science, natural language processing, and other relevant computer science fields, present their cutting-edge computational research relevant for consumer protection. For instance, in the 2022 edition of one such events, the 6th Workshop on Technology and Consumer Protection,[11] one of the papers presented (and co-authored by staff of the FTC's Office of Technology Research and Investigation) featured the largest dataset of Yelp reviews currently available in academic research. The dataset consists of a total of two million unique reviews of more than 10,000 businesses monitored over periods from four months to eight years, resulting in 12.5 million data points.[12] This dataset was used to study an upcoming problem with fake review monitoring, namely reclassification – the dynamic algorithmic filtering and reallocation of quality review labels by platforms. The dataset is publicly available, and so is the code used in the project, including the crawler used to gather the data.[13] Another study that showed the potential of computational approaches for digital monitoring was the dark patterns study conducted at the Center for Information Technology Policy at Princeton University.[14] The study analysed 53,000 product pages from 11,000 shopping websites, and uncovered 1,818 dark pattern instances. 183 websites were identified to engage in deceptive practices.[15]

These are examples of how even with their existing limitations, computational approaches can contribute to the development of digital monitoring methodologies. Data collection, facilitated by automated crawlers that visit pre-determined Internet paths and scrape html code, photos, url links, etc. from webpages, or collect meta data, can be used to scale Internet investigations. The dark patterns study by Mathur et al. mimicked the steps a consumer would take when purchasing goods or products on the Internet. In the study, no transactions were completed, but data relating to consumer options available up to the very moment of clicking on the purchase button were registered through the crawl.[16]

[10] See for instance the evidence review undertaken by the UK Consumer and Markets Authority. CMA, 'Evidence Review of Online Choice Architecture and Consumer and Competition Harm' (5 April 2022) www.gov.uk.

[11] Workshop on Technology and Consumer Protection www.ieee-security.org.

[12] R Amos and others, 'Reviews in Motion: A Large Scale, Longitudinal Study of Review Recommendations on Yelp' (2022) 6th Workshop on Technology and Consumer Protection (ConPro).

[13] Princeton Longitudinal Reviews Dataset sites.google.com.

[14] A Mathur and others, 'Dark Patterns at Scale' cit.

[15] *Ibid.*

[16] *Ibid.*

Such research projects are not necessarily cost-prohibitive (*e.g*. they often do not entail consumer experiments, which are generally expensive), but the type of computer science expertise needed for them can sometimes be a limitation. This is why public authorities still have a long way to go to be able to conduct such wide-scale investigations, and why the academic world has been so far the cradle of development for state-of-the-art methodologies and results. Most importantly, public authorities cannot undertake investigations at scale without considering their legitimacy to collect data or to have broader, explicit powers for digital monitoring. Against this background, a lot of recently adopted regulatory instruments introduce new procedural frameworks for digital enforcement. Two such instruments are the CPC Regulation and the DSA. The first regulatory instrument included in this analysis has been a much-needed upgrade to consumer law enforcement, and the DSA, while not being a part of the consumer *acquis* as such, is one of the most modern frameworks in EU platform liability, particularly due to its enforcement mechanisms.

II.1. The CPC regulation

The CPC Regulation is a European Union regulation that aims to improve consumer protection and strengthen the cooperation between consumer protection authorities in the EU. It was first introduced in 2004[17] and updated in 2017 to take into account changes in the digital market.[18] One of the key features of the CPC Regulation is that it allows consumer protection authorities in the EU to work together to monitor and enforce consumer protection laws in a more coordinated and effective way.[19] This includes sharing information and coordinating enforcement actions across different member states, which can be particularly useful in cases where digital companies operate across multiple countries.

Digital enforcement by public authorities under the CPC Regulation typically involves the use of various tools and techniques to monitor, investigate, and take action against individuals or organizations that violate European consumer protection rules.[20] Generally, the powers granted to consumer authorities can be bundled in five main categories.[21] Public authorities may use *monitoring and surveillance techniques* to collect digital

[17] C Poncibò, 'Networks to Enforce European Law: The Case of the Consumer Protection Cooperation Network' (2012) Journal of Consumer Policy 175.

[18] V Balogh, 'Digitalization and Consumer Protection Enforcement' (2022) Institutiones Administrationis – J Adminstrative Science 85. See also DM Rao, 'International Consumer Protection Framework & Policy' (2021) International Journal of Law Management & Humanities 2439.

[19] C Goanta and G Spanakis, 'Discussing the Legitimacy of Digital Market Surveillance' (2022) Stanford Computational Antitrust 44.

[20] *Ibid*. 49; V Balogh, 'Digitalization and Consumer Protection Enforcement' cit. See also M Damjan and K Lutman, 'Administrative Enforcement of EU Consumer Law: A Disoriented Tiger in the Regulatory Jungle of E-Commerce' (2022) Journal of European Consumer and Market Law 130-138.

[21] For a comprehensive overview of the CPC Regulation, see C Goanta and G Spanakis, 'Discussing the Legitimacy of Digital Market Surveillance' cit. The proposed classification is the author's interpretation of the various types of investigation and enforcement options offered by the CPC Regulation.

data related to individuals or organizations suspected of violating digital laws or regulations. For instance, authorities may monitor online commercial communications, track digital footprints, and using data analysis tools to identify suspicious activity (*e.g.* art. 9(3)(a) CPC Regulation). Authorities may also use *blocking and filtering techniques* to restrict access to websites, content, or services that violate digital laws or regulations. This may include blocking access to websites that distribute illegal content or services that violate consumer protection laws (*e.g.* art. 9(4)(g)(i) CPC Regulation). In addition, public authorities may take *legal actions* against individuals or organizations that violate digital laws or regulations. This may include the power to bring about the cessation or the prohibition of consumer law infringements (*e.g.* art. 9(4)(f) CPC Regulation). Authorities may impose additional *administrative penalties* and fines on individuals or organizations that violate digital laws or regulations (*e.g.* art. 9(4)(h) CPC Regulation), and may work closely with the private sector, including internet service providers, social media companies, and e-commerce platforms to enforce digital regulations (*e.g.* art. 9(4)(b) CPC Regulation).

The CPC Regulation also brings new provisions to digital monitoring, compared to earlier regimes.[22] It provides consumer protection authorities with new powers to request information from online platforms and marketplaces, and to take enforcement actions against companies that violate European consumer regulation.[23]

An example of such a new provision is art. 9(d), which explicitly offers authorities the right to engage in mystery shopping. Mystery shopping is an approach traditionally used by companies to measure quality of service, staff performance, compliance with regulatory framework, and other specific topics related to effective functions related to the customers. It is a common assessment method across all commercial industries including travel, food, retail, and banks.[24] Given the proliferation of e-commerce, mystery shopping has become an increasingly important method on digital markets.[25] According to art. 9(3)(d) of the CPC Regulation, mystery shopping is defined as "the power to purchase goods or services as test purchases, where necessary, under a cover identity, in order to detect infringements covered by this Regulation and to obtain evidence, including the power to inspect, observe, study, disassemble or test goods or services". While the Regulation codifies earlier practices of mystery shopping, certain limitations remain. On the one hand, national interpretations of the CPC Regulation have led to questions of whether the powers granted to consumer authorities need to be further grounded in

[22] Regulation (EC) 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on Consumer Protection Cooperation).

[23] *Ibid*.

[24] R Chen and C Barrows, 'Developing a Mystery Shopping Measure to Operate a Sustainable Restaurant Business: The Power of Integrating with Corporate Executive Members' Feedback' (2015) Sustainability 12279.

[25] UNCTAD Working Group on Consumer Protection in E-commerce (June 2022) unctad.org.

national administrative law.[26] This is due to the applicability of administrative law across a wide spectrum of enforcement authorities, and the need to systematically clarify and harmonize sectoral practices. On the other hand, mystery shopping is resource-heavy. Resources include money for the purchases (which may vary depending on the type of good/service or sector), familiarity with investigation methods, or availability of automation in terms of processes, staff and computing power.

Mystery shopping has been traditionally undertaken manually. Scaling up these operations is possible, such as in the Commission's 2015 study on cross-border shopping and geo-blocking, where a total of 10,537 observations for 147 country pairs were analysed.[27] Large scale mystery shopping exercises have generally reflected coordinated shopping across Member States. However, mystery shopping can be further scaled using computational approaches. Large scale mystery shopping surveys have traditionally entailed the purchase of goods or services. Web crawling for the purpose of data collection does not, but it could be set up for purchases as well. An important addition is that the type of digital monitoring that can be performed through mystery shopping might also benefit from the development of data access. Web scraping entails collecting data (*e.g.* html code) from selected trader websites. However, marketplaces and other relevant market actors may also choose to standardize access to that data through making an Application Programming Interface (API) available to relevant authorities. APIs offer access to industrial level data, which can be useful to monitor activity on social media. The future of digital compliance entails that digital companies need to be asked to share data, and infrastructures and procedures for such data access need to be made available in administrative law, and further financial and knowledge resources need to be invested in digital compliance. The CPC Regulation is a good example of a broad legislative mandate that was given to consumer authorities to conduct Internet investigations. The practical implementation of this Regulation will pose considerable issues, particularly because of the absence of a systematic and cohesive approach in how to undertake Internet investigations found at the intersection of substantive legal frameworks and available technologies. A solution to these problems which can ensure the fitness of the CPC Regulation for the coming decade is proposed under section IV.

II.2. DSA

The DSA is a recent platform regulation that aims to update and modernize the existing rules governing intermediary liability for Internet companies in the EU, and impose novel

[26] C de Rond, 'De toezichthouder als *mystery shopper*' (17 August 2018) www.recht.nl.

[27] M Cardona, 'Geo-blocking in Cross-border e-Commerce in the EU Digital Single Market' (2016) Institute for Prospective Technological Studies Digital Economy Working Paper www.econstor.eu. It is noteworthy that while the DSA is not a European consumer *acquis* instrument as such, it is highly relevant for consumer protection.

transparency and due diligence obligations, as well as novel enforcement architectures.[28] The DSA introduces an updated legal framework for online platforms, which places greater responsibility and liability on these platforms for illegal content and activity on their sites.[29] This will help to incentivize platforms to take more proactive measures to monitor and remove illegal content, and will make it easier for authorities to hold them accountable for any illegal activity that occurs on their sites. The DSA requires online platforms to implement measures to monitor and report on illegal content and activity on their sites. This includes requirements for platforms to establish complaint mechanisms for users to report illegal content, and to provide regular reports to authorities on their efforts to remove such content, as well as due diligence obligations such as conducting internal audits (art. 37) and setting up internal compliance mechanisms (art. 41).

The DSA also introduces new provisions to improve cooperation and coordination among authorities in different EU member states (Chapter IV). This includes establishing a new EU-wide regulatory body to oversee the enforcement of the DSA (the European Board of Digital Services – art. 61), as well as provisions for greater information-sharing and cooperation between member state authorities (*e.g.* art. 60 on joint investigations). The DSA also establishes new national regulatory bodies in this respect (the Digital Services Coordinators), which will be responsible for overseeing the enforcement of the new rules in each Member State (art. 49). The DSA also gives authorities new oversight and enforcement powers to ensure compliance with the new rules (art. 51).

One important aspect of the DSA framework is its data access provision (art. 40), which is designed to ensure that authorities have the necessary tools to monitor and enforce compliance with the new rules, and that independent academic researchers who are vetted can be granted access to platform data for analysis purposes. Under the DSA, online platforms will be required to provide authorities with access to relevant data in order to monitor and enforce compliance with the new rules. This provision may enable a new era for the collaboration between academic researchers and public authorities in the development of public interest technology, given that national authorities will have to undertake vetting processes and appoint researchers who ought to have access to platform data. Under art. 40, a legal compliance API could facilitate Internet investigations into illegal content.[30] While the DSA does not specify a standard API for accessing data, in practice, a DSA API for academic research could be designed to provide secure and

[28] Ecommerce Europe, 'EP IMCO Adopts DSA Report: Some Good Progress, but Key Concerns Remain to Be Addressed' (14 December 2021) ecommerce-europe.eu.

[29] C Cauffman and C Goanta, 'A New Order: The Digital Services Act and Consumer Protection' (2021) European Journal of Risk Regulation 1; C Goanta, T Bertaglia and A Iamnitchi, 'The Case for a Legal Compliance API for the Enforcement of the EU's Digital Services Act on Social Media Platforms' (2022) *ACM Conference on Fairness, Accountability, and Transparency* (ACM 2022) dl.acm.org.

[30] C Goanta, T Bertaglia and A Iamnitchi, 'The Case for a Legal Compliance API for the Enforcement of the EU's Digital Services Act on Social Media Platforms' cit.

controlled access to specific data points within digital platforms.[31] A DSA API would require researchers to authenticate themselves and obtain authorization before they can access the data. This could involve providing credentials as issued by the relevant authorities vetting the researchers who are supposed to be granted data access. The usefulness of a DSA API could be rooted in the collection of data points on user behaviour data, content moderation data, or platform policies, based on specific tasks outlined in the project applications submitted for the vetting process, as well as the standardization of data formats, which would enable researchers to easily process and analyse the data. Additional considerations need to be given to limits imposed on the rate of data retrieval, to prevent overloading the platform's infrastructure. This would ensure that researchers can access the data they need without disrupting the platform's operations. Most importantly, the API would need to comply with data protection regulations applicable to academic research, and could involve implementing measures to protect the confidentiality and security of the data, such as data encryption, anonymization, and access controls.

The DSA framework on data access is designed to ensure that authorities have the necessary tools and powers to monitor and enforce compliance with the new rules. By providing greater transparency and oversight of online platform practices, it can contribute to the development of technologies to monitor consumer harms on digital markets. The standardization of data access through products such as a DSA API for legal compliance could further facilitate this goal. The DSA is a good example of how the fitness of enforcement – particularly as far as data access is concerned – is seen as a technology problem, to which technology-related solutions must be applied (*e.g.* data access).

III. Computational measurements of influencer activity: a case study for digital enforcement

Section II focused on briefly discussing recent digital enforcement trends, including regulatory practices in the European Union. This section will continue this discussion by giving a concrete example of a monitoring activity which has become increasingly popular with consumer authorities: the monitoring of social media influencers. From the perspective of the CPC, influencer activities are relevant for the enforcement of consumer law, while for the DSA, influencer marketing could be argued to be a systemic risk (art. 34(1) DSA) which may raise a lot of data access and investigation questions in the future.

The growth of digital markets has been leading to new iterations of consumer harms, and nowhere is that clearer than in the case of consumer manipulation through native

[31] See the proposal for a legal compliance API, and more basic descriptions of what an API is and what it can achieve, C Goanta, T Bertaglia and A Iamnitchi, 'The Case for a Legal Compliance API for the Enforcement of the EU's Digital Services Act on Social Media Platforms' cit.

advertising. Based on electronic word-of-mouth marketing (eWOM)[32] and parasocial relationships,[33] influencer marketing is an increasingly popular form of native advertising. It entails advertising which is embedded in non-advertising content. In the case of influencer marketing, advertising is embedded in the organic content made by influencers – also known as content creators – who make online content on a professional basis.[34] In other words, influencer marketing is a form of marketing where brands collaborate with individuals who have a significant social media following (known as influencers) to promote their products or services.

Public authorities are struggling to understand and investigate the scope of this market and its harmful implications. This is due to the fact that authorities often have to deal with a very high degree of information asymmetry, explained – amongst others – by the opacity of platform governance. For instance, even the most basic question of "how many social media influencers exist in jurisdiction x?" is very challenging to answer in practice, especially without access to structured data from social media platforms.

While influencer marketing can be an effective way for brands to reach new audiences, and for individuals to engage in new entrepreneurial activities, it can also lead to a number of harms. Four examples of harms are discussed in what follows. First, influencer marketing can sometimes be deceptive if it is not clear that a post or endorsement is sponsored.[35] This can mislead consumers into thinking that an influencer's endorsement is based on their genuine opinion, rather than being a paid advertisement.[36] Second, this type of marketing often promotes beauty standards that are unrealistic and unattainable for most people, which can contribute to body image issues and low self-esteem, especially among young people. This has led some jurisdictions such as Norway

[32] AB Rosario, K de Valck and F Sotgiu, 'Conceptualizing the Electronic Word-of-Mouth Process: What we Know and Need to Know about EWOM Creation, Exposure, and Evaluation' (2020) Journal of the Academy of Marketing Science 422; S Chu and Y Kim, 'Determinants of Consumer Engagement in Electronic Word-of-Mouth (EWOM) in Social Networking Sites' (2011) International Journal of Advertising 47; S Doh and J Hwang, 'How Consumers Evaluate EWOM (Electronic Word-of-Mouth) Messages' (2009) CyberPsychology & Behaviour 193; M Lee and S Youn, 'Electronic Word of Mouth (EWOM): How EWOM Platforms Influence Consumer Product Judgement' (2009) International Journal of Advertising 473.

[33] C Lou and H K Kim, 'Fancying the New Rich and Famous? Explicating the Roles of Influencer Content, Credibility, and Parental Mediation in Adolescents' Parasocial Relationship, Materialism, and Purchase Intentions' (2019) Frontiers in Psychology 2567; AN Tolbert and KL Drogos, 'Tweens' Wishful Identification and Parasocial Relationships With YouTubers' (2019) Frontiers in Psychology 2781.

[34] M De Veirman and others, 'Unravelling the Power of Social Media Influencers: A Qualitative Study on Teenage Influencers as Commercial Content Creators on Social Media' in C Goanta and S Ranchordás (eds), *The Regulation of Social Media Influencers* (Edward Elgar Publishing 2020) www.elgaronline.com; C Goanta and S Ranchordás, *The Regulation of Social Media Influencers* cit.

[35] M Swart and others, 'Is This An Ad?: Automatically Disclosing Online Endorsements On YouTube With AdIntuition' *Proceedings of the 2020 CHI Conference on Human Factors in Computing Systems* (ACM 2020) dl.acm.org.

[36] LE Bladow, 'Worth the Click: Why Greater FTC Enforcement Is Needed to Curtail Deceptive Practices in Influencer Marketing' (2017) William & Mary Law Review 1123.

to adapt consumer legislation in such a way that it now also requires influencers to disclose synthetic media (*e.g.* the use of filters) in order to alleviate mental health concerns.[37] Third, another health concern is physical. Some influencers use their platform to promote unhealthy behaviours, such as extreme dieting or excessive exercise, which can be harmful to their followers, or can be based on the promotion of harmful products which would pose issues for product liability laws. Fourth, some influencers may exploit their followers by promoting products or services that are overpriced or of poor quality, or by engaging in fraudulent practices such as fake giveaways or scams.[38]

The popularity of influencer marketing[39] has also created new challenges for public authorities in their efforts to enforce consumer protection laws and prevent misleading or deceptive advertising. One potential solution to these challenges is the computational analysis of influencer activities which can provide valuable insights into the reach and impact of influencer marketing campaigns. Such computational approaches include the use of data analysis tools and techniques to measure and analyse the performance of social media influencers. This includes data on their audience demographics, engagement rates, and the impact of their content on consumer behaviour. By using such computational approaches, public authorities can gain a better understanding of the reach and impact of influencer marketing campaigns, and can more effectively identify and target cases of illegal or deceptive advertising.

There are several ways that public authorities can use computational approaches for digital enforcement in relation to harmful influencer activities. First, they can use these tools to identify potential cases of misleading or deceptive advertising by influencers. By analysing data on engagement rates and audience demographics, authorities can identify cases where influencers are promoting products or services in a way that is likely to mislead consumers. This can help to target enforcement efforts more effectively and ensure that consumers are protected from fraudulent or deceptive advertising.

Second, computational approaches can be used to monitor the activity of social media influencers and ensure that they are complying with relevant consumer protection laws over time. By tracking the performance of influencers over time, authorities can identify trends and patterns in their behaviour and take action when necessary. This can lead to requesting information from influencers or their sponsors, conducting investigations and taking legal action when appropriate.

Finally, such approaches can be used to educate consumers about the risks and benefits of influencer marketing. By analysing data on consumer behaviour and attitudes, authorities can identify the most effective ways to communicate with consumers and

[37] BBC, 'Influencers React to Norway Photo Edit Law: "Welcome Honesty" or a "Shortcut"?' (6 July 2021) www.bbc.com.

[38] Federal Trade Commission, 'Social Media a Gold Mine for Scammers in 2021' (25 January 2022) www.ftc.gov.

[39] S Skalbania, 'Advising 101 for the Growing Field of Social Media Influencers Comments' (2022) WashLRev.

help them make more informed decisions about the products and services they purchase. This can include developing educational campaigns, creating online resources or guides, and providing consumers with tools and resources to protect themselves from fraudulent or deceptive advertising.

More specifically, the computational approaches referred to above reflect a wide array of methods grounded in computer science, which can be used for data collection and analysis for the sake of identifying consumer protection violations. Two examples of such approaches are Natural Language Processing (NLP) and network analysis. NLP entails using machine learning and computational linguistics techniques to analyse and understand human language. It can be used to monitor social media influencers by analysing the sentiment of their posts and identifying common themes or topics. NLP is also often used to understand whether influencers comply with disclosure obligations. NLP techniques can be used to search for specific keywords in social media posts that indicate that the post is sponsored or an advertisement. Words like "sponsored," "ad," or "paid" may be used as indicators of a sponsored post.[40] NLP approaches can also analyse the context of a social media post to determine whether it is an advertisement or a sponsored post. NLP can analyse the language used in a post to detect whether the influencer is promoting a product or service in exchange for compensation.[41] Named Entity Recognition (NER) is a technique used in NLP to identify and classify named entities in text, such as people, organizations, or locations. NER can be used to identify when an influencer or brand is mentioned in a social media post, indicating that it may be a sponsored post. Lastly, NLP techniques can be used to analyse the sentiment of social media posts to determine whether the influencer is endorsing a product or service in a positive or negative way. This can help determine whether sponsored posts are considered positive from the perspective of consumers.[42]

The second field of computer science that can be relevant in the context of computationally measuring influencer activities is network analysis. Network analysis involves studying the connections between entities, such as people or organizations. It can be used to monitor social media influencers by analysing, for instance, the network of followers and connections they have, identifying potential fraud or fake activity, and uncovering new opportunities for collaboration or partnership. Network analysis can be used to identify

[40] D Ershov and M Mitchell, 'The Effects of Influencer Advertising Disclosure Regulations: Evidence From Instagram' *Proceedings of the 21st ACM Conference on Economics and Computation* (ACM 2020) dl.acm.org; X Fang and T Wang, 'Using Natural Language Processing to Identify Effective Influencers' (2022) International Journal of Market Research 611.

[41] JP Santos Rodrigues, AC Munaro and E Cabrera Paraiso, 'Identifying Sponsored Content in YouTube Using Information Extraction' *2021 IEEE International Conference on Systems, Man, and Cybernetics (SMC)* (IEEE 2021) ieeexplore.ieee.org.

[42] E Lahuerta-Otero and R Cordero-Gutiérrez, 'Looking for the Perfect Tweet: The Use of Data Mining Techniques to Find Influencers on Twitter' (2016) Computers in Human Behaviour 575; B Auxier, C Buntain and J Golbeck, 'Analysing Sentiment and Themes in Fitness Influencers' Twitter Dialogue' in NG Taylor and others (eds), *Information in Contemporary Society* (Springer International Publishing 2019) link.springer.com.

influential users in a social media network based on factors such as the number of followers, engagement rates, and the frequency and type of content posted.[43] These influencers may be more likely to engage in influencer marketing and promote products or services. Influential influencers (based on size or engagement) could be an enforcement priority. Network analysis can also be used to detect collaborations between influencers and brands based on patterns of interactions and connections in the network. For example, if multiple influencers are promoting the same product or service at the same time, it may be an indication of a coordinated campaign. This approach can shed light into how the market for influencer marketing campaigns looks like, and which stakeholders (other than influencers) are involved. A recent study used network analysis in this way to identify vaping campaigns and brands in influencer networks.[44] Lastly, network analysis can be used to identify fake followers and bots in a social media network.[45] By analysing patterns of interactions and connections in the network, it may be possible to detect accounts that are not genuine and are being used to inflate follower counts and engagement rates. Such accounts may be further investigated and monitored for engaging in deceiving practices.

In addition, other computer science approaches may be used to undertake web measurement studies. One such study dealt with the collection of 500,000 YouTube videos and 2.1 million Pinterest pins including affiliate marketing, in order to measure how many of them included consumer disclosures. The findings revealed that only around 10% of the affiliate marketing content on both platforms contained disclosures.[46]

These computer science methods and approaches can be combined and tailored to specific needs to monitor the activity of social media influencers in a more effective and efficient way.

IV. Computational measurements of influencer activity: a case study for digital enforcement

Legal enforcement has always had a procedural or administrative framework in which evidence plays an important role. For digital markets however, with investigations having

[43] SA Ríos and others, 'Semantically Enhanced Network Analysis for Influencer Identification in Online Social Networks' (2019) Neurocomputing 71; C Yi-Hsuan Chen, WK Härdle and Y Klochkov, 'SONIC: SOcial Network Analysis with Influencers and Communities' (2022) Journal of Econometrics 177.

[44] J Vassey and others, 'E-Cigarette Brands and Social Media Influencers on Instagram: A Social Network Analysis' (2022) Tobacco Control.

[45] S Cresci and others, 'Fame for Sale: Efficient Detection of Fake Twitter Followers' (2015) Decision Support Systems 56; A Mehrotra, M Sarreddy and S Singh, 'Detection of Fake Twitter Followers Using Graph Centrality Measures' *2016 2nd International Conference on Contemporary Computing and Informatics (IC3I)* (IEEE 2016) ieeexplore.ieee.org; Y Zhang, J Lu, 'Discover Millions of Fake Followers in Weibo' (2016) Social Network Analysis and Mining 16.

[46] A Mathur, A Narayanan and M Chetty, 'Endorsements on Social Media: An Empirical Study of Affiliate Marketing Disclosures on YouTube and Pinterest' (2018) Proceedings of the ACM on Human-Computer Interaction 1.

to increasingly rely on technology, there is currently a lot of unclarity in terms of the strategies, goals and practices of Internet investigations in different regulatory sectors. In 2010, Garfinkel wrote about digital forensics that "[w]ithout a clear strategy for enabling research efforts that build upon one another, forensic research will fall behind the market, tools will become increasingly obsolete, and law enforcement, military and other users of computer forensics products will be unable to rely on the results of forensic analysis".[47] The two examples given in this quote – law enforcement and the military – accurately reflect the focus on criminal investigations and national safety that digital forensics has had in its early days. In the same paper, Garfinkel also outlined a short history of digital forensics, which was in 2010 around forty years old.[48] Other regulatory sectors – such as consumer protection – have much to learn from digital forensics, given the vast array of research and best practices that has been amassed in this field previously.

As explored earlier in this *Article*, there is no Internet policing without digital investigations and enforcement, and without policing, consumers are literally left to their own devices and their own literacy to escape the novel harms of the digital economy. Against this background, it is important to acknowledge the need to support a cohesive research agenda around the development of forensic science for the purpose of monitoring and identifying consumer protection violations. A lot of the technology that is needed in the exercise of investigation and enforcement powers by consumer or DSA authorities simply does not yet exist. For instance, as appealing and inspiring as the dark patterns study has been for regulators and administrative agencies around the world, making detection tools based on the proposed methodology remains a highly complex and constantly evolving task. This *Article* puts forth that consumer forensics should be recognized as a new, growing field of multidisciplinary research that aims to explore the application of digital forensic techniques and tools to the study of consumer harms and consumer protection. The goal of consumer forensics is to develop new insights and computational approaches that can help regulators, policymakers, and industry stakeholders better understand and prevent consumer harms on digital markets. The consolidation of such a field can contribute to ensuring the long-term fitness of the legal enforcement frameworks such as those addressed in section II.

The remainder of this section is dedicated to structuring a proposed research agenda for consumer forensics, focusing on four key points: the consolidation of data collection and analysis methods for consumer law; the classification of new forms of consumer harms for digital markets; the development of new approaches to consumer protection; and the exploration of the legal and ethical implications of consumer forensics.

[47] SL Garfinkel, 'Digital Forensics Research: The next 10 Years' (2010) Digital Investigation S64.
[48] *Ibid.*

IV.1. Consolidating data collection and analysis methods for consumer law

One important area of research in consumer forensics should be the development of new methods for analysing consumer data. This could involve the use of advanced statistical methods, machine learning, and other data science techniques to uncover patterns and trends in consumer behaviour. It could also involve the development of new data sources, such as consumer-generated content, that can provide insights into consumer preferences and behaviour.

While many of the computer science methods referred to in section III are not as such new, their application to consumer protection is. Fields such as digital forensics can provide insights into how data collection and analysis has been done so far in the context of other regulatory sectors, such as criminal law. It is essential that sectors which are new to digital forensics liaise with the relevant regulatory frameworks, authorities and practices pre-dating their own interest in and need for computational approaches for digital investigations and enforcement. This task can bring together various stakeholders such as public authorities, academia or civil society.

IV.2. Classifying new forms of consumer harms

Another important area of research in consumer forensics would be the investigation of new forms of consumer harms. This is probably one of the most difficult aspects of enforcing consumer protection on digital markets. Apart from regular harms which are known to offline economies as well (*e.g.* non-conformity in goods), the digital implications of practices that ought to be considered unfair, manipulative, aggressive, generally remain difficult to grasp (*e.g.* which dark patterns are harmful to consumers?).

Even the wide-spread example of dark patterns, which have inspired regulators around the world to take measures against them, are difficult to pinpoint in terms of their impact.[49] While some dark patterns such as obstructions (*e.g.* blocking consumers from specific actions) are harmful because they have been used to make it difficult for consumers to legally get out of subscriptions, not the same can be said for all other categories. For instance, dark patterns such as confirm-shaming, which are supposed to allegedly shame consumers into choosing a transaction, may be somewhat blown out of context. The claim that a button with such a question would amount to a consumer harm, because it would influence the consumer to take a decision they otherwise would not, is not a claim that has sufficient scientific grounding.[50] At the same time, the scientific modelling of consumer behaviour is becoming increasingly difficult to undertake, due to the many different variables that influence it.

[49] See for instance J Luguri and L Jacob Strahilevitz, 'Shining a Light on Dark Patterns' (2021) Journal of Legal Analysis 43.

[50] *Ibid*.

Multidisciplinary methodologies bringing together behavioural sciences, computer science and socio-legal inquiries into consumer decision-making should be used to identify criteria for the classification of digital harms and their impact, as well as criteria for the identification of harm seriousness.

IV.3. Developing new approaches to consumer protection

Consumer forensics could also explore new approaches to consumer protection.[51] What exactly would count as a new approach? Currently, positive consumer protection law has led to the creation of standards such as the "average consumer" which projects a certain level of knowledge and diligence onto consumer behaviour.[52] Similarly, rules on mandated disclosures are considered commonplace in European consumer law, but the reality of consumers not reading terms of service really challenges transparency paradigms which are based on the provision of information.[53] As a field of study, consumer forensics can help by iterating evidence-based policy-making until new approaches can be developed. What are the harms identified on digital markets, and what characterizes them? Such data-driven information can help clarify business practices and consumer expectations in ways which can lead to new paradigms in consumer regulation.

IV.4. Exploring the legal and ethical implications of consumer forensics

Finally, research in consumer forensics would need to consider the legal and ethical implications of using forensic techniques in the study of consumer behaviour. Some of these implications include algorithmic transparency, consumer privacy and proportionality. Data collection and analysis always include some form of automation. In administrative procedural frameworks, automation has led to some concerning outcomes, such as algorithmic bias.[54] For consumer forensics, since the focus of investigations is on markets and not individuals, this risk is somewhat reduced.[55] However, it is not inexistent. The case study discussed in section III dealt with influencer marketing. Influencers currently are commodified identities: on the one hand they may be commercial actors, but on the other hand, they retain an individual identity. Any automated investigations or enforcement that lead to measures against such stakeholders can learn from the earlier frameworks on algorithmic accountability developed within public administration. The

[51] See for instance Omri Ben-Shahar and Ariel Porat, *Personalized Law* (Oxford University Press 2021).

[52] R Incardona, and C Poncibò, 'The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution' (2007) Journal of Consumer Policy 21.

[53] O Ben-Shahar and C Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton University Press 2014).

[54] S Ranchordás and L Scarcella, 'Automated Government for Vulnerable Citizens: Intermediating Rights' (2018) William & Mary Bill of Rights Journal 30(2).

[55] C Rosca and others, 'Digital Monitoring of Unlawful Dark Patterns: What Role for Public Interest Technology?' (CHI Position Paper 2021) drive.google.com.

influencer case study also reveals why individual privacy is equally an important consideration,[56] in which case consumer authorities should take appropriate measures to protect personal data. Similarly, proportionality is an important aspect of consumer forensics due to the fact that the methods must align to the objectives pursued.[57]

V. Conclusion

This *Article* took digital enforcement as a starting point and discussed how Internet investigations are increasingly reliant on technology, not only in fields such as criminal law, but increasingly in other fields as well, such as consumer protection. Cohesive public policies relating to the implementation of digital enforcement frameworks will determine whether regulatory reforms such as the CPC Regulation and the DSA are future-proof. The *Article* combined insights from computer science literature with some brief discussions of European reforms in procedural law, to showcase the overlapping interests between academic fields busy with the study of consumer protection violations through computational methods, and public (consumer) authorities with growing procedural powers for carrying out digital investigations and enforcement. The *Article* further exemplified this overlap by taking the measurement of influencer marketing activities as a case study for the discussion of how computer science approaches can be honed to monitor consumer protection violations. The goal of this case study was to also to visualize in a more concrete way what computational approaches can achieve. Lastly, the *Article* proposed a new field of study in the form of consumer forensics and outlined a research agenda focusing on four key points: the consolidation of data collection and analysis methods for consumer law; the classification of new forms of consumer harms for digital markets; the development of new approaches to consumer protection; and the exploration of the legal and ethical implications of consumer forensics. Overall, the goal of consumer forensics would be to develop new insights and tools that can help prevent consumer harm and promote more transparent, accountable, and consumer-friendly markets. By bringing together researchers from a range of disciplines, including computer science, economics, law, and psychology, consumer forensics has the potential to be a powerful new field for promoting consumer protection and enhancing our understanding of consumer behaviour.

[56] CW Savage, 'Managing the Ambient Trust Commons: The Economics of Online Consumer Information Privacy' (2019) Stanford Technology Law Review 95; BA Martin, 'The Unregulated Underground Market for Your Data: Providing Adequate Protections for Consumer Privacy in the Modern Era Notes' (2019) Iowa Law Review 865.

[57] M Oswald and others, 'Algorithmic Risk Assessment Policing Models: Lessons from the Durham HART Model and "Experimental" Proportionality' (2018) Information & Communications Technology Law 223; M Schuilenburg and R Peeters (eds), *The Algorithmic Society: Technology, Power, and Knowledge* (Routledge/Taylor & Francis Group 2021).

ARTICLES

FUTURE-PROOF REGULATION AND ENFORCEMENT FOR THE DIGITALISED AGE

Edited by Gavin Robinson, Sybe de Vries *and* Bram Duivenvoorde

REGULATION OF CRYPTO-ASSETS IN THE EU: FUTURE-PROOFING THE REGULATION OF INNOVATION IN DIGITAL FINANCE

NIKITA DIVISSENKO*

ABSTRACT: The 2023 EU regulation of markets in crypto-assets (MiCA) is a timely and ambitious response to the regulatory challenges of a fast-developing and technology-intensive field. The new regulation expands the regulatory perimeter, thus enabling EU-wide supervision of crypto-asset service providers and issuers of the so-called "stablecoins". As such, the MiCA is in line with the key objectives of the 2020 EU Digital Finance Strategy: it updates the existing EU regulatory framework to facilitate digital innovation while protecting European consumers. "Same activity, same risk, same rule" approach is at the core of the MiCA regime. The new regulatory intervention, however, is to be put to test by the incessant technological and business model innovation within the crypto industry. Is this new regulation future-proof? This paper identifies and explores the two main points of vulnerability that often undermine the future-proof nature and, ultimately, the effectiveness of regulatory interventions in innovative sectors. First, it analyses the structures that define the scope of the new framework, and their capacity to adjust to and incorporate innovation falling outside of the regulatory perimeter. Second, the paper explores the mechanisms that ensure the regulatory and supervisory framework under the MiCA remains relevant and able to address the changes in the amplitude and sources of risks. Against this background, the paper discusses two features indispensable for a future-proof regulation: the openness of the regulatory perimeter, and the regulatory capacity for risk anticipation.

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I. INTRODUCTION

A series of events that took place in 2022 led to a dramatic decline in the markets in crypto-assets. From the collapse of the so-called Terra/Luna "stablecoin" in spring,[1] to the failure of the FTX in the autumn,[2] the "crypto winter" befell the entire crypto ecosystem.[3] Understandably, the reaction from the regulators across the globe concentrated around the issues of consumer and investor protection, and the potential risks to financial stability emanating from the highly interconnected crypto industry.[4] These issues have been central to the 2020 MiCA proposal by the European Commission (EC), that predated the crisis. In line with the Digital Finance Strategy for the EU,[5] the proposed framework aims at unlocking the potential of the markets in crypto assets – the objective that it balances against the need to ensure consumer and investor protection as well as financial stability. As the chills of the "crypto winter" show no signs of wavering, the dual objectives of MiCA will constitute a test to its effectiveness in promoting security, financial stability and innovation in the markets in crypto-assets.

EC's 2020 Digital Finance Strategy for the EU outlines key digital innovation trends, and underscores the impact of digitalisation on the process of innovation as well as on the evolution of business models. The EC outlined four key trends: (I). Digitally enabled growth and economies of scale that allow firms to offer better quality services at lower costs; (II). Accelerating innovation cycles, where innovation becomes open, collaborative, and with higher level of communication; (III). Innovation processes driven by the availa-

[1] S Lee, J Lee and Y Lee, 'Dissecting the Terra-LUNA Crash: Evidence from the Spillover Effect and Information Flow' (2023) Finance Research Letters.

[2] T Conlon, S Corbet and Y Hu, 'The Collapse of FTX: The End of Cryptocurrency's Age of Innocence' (14 December 2022) SSRN paper ssnr.com; D Yaffe-Bellany, 'Embattled Crypto Exchange FTX Files for Bankruptcy' (11 November 2022) The New York Times www.nytimes.com.

[3] D W Arner and others, 'The Financialization of Crypto: Lessons from FTX and the Crypto Winter of 2022-2023' (University of Hong Kong Faculty of Law Research Paper-2023) 2.

[4] S Lee, J Lee and Y Lee, 'Dissecting the Terra-LUNA Crash' cit. 2; DW Arner and others, 'The Financialization of Crypto: Lessons from FTX and the Crypto Winter of 2022-2023' (2023) Finance Research Letters; see also, E Akyildirim and others, 'Understanding the FTX Exchange Collapse: A Dynamic Connectedness Approach' (2023) Finance Research Letters; G Cornelli and others, 'Crypto Shocks and Retail Losses' (BIS Bulletin 2023); L McLellan, 'FTX Bankruptcy Will Show Importance of Regulatory Approach' (3 February 2023) OMFIF www.omfif.org.

[5] Communication COM (2020) 591 final from the Commission on a Digital Finance Strategy for the EU (Digital Finance Strategy).

bility of digital data and information technology that enables service providers to maximise its value; and, finally, (IV). Shifting market dynamics, drastically changing market structure and incumbent business models.[6] One of the objectives of the Digital Finance Strategy is to ensure that EU legislation is future-proof and that the new as well as existing frameworks do not hamper innovation in financial services. The EC approaches future-proofing by suggesting "regular legislative reviews" and "interpretative guidance" that would ensure the regulatory frameworks in the EU do not limit technological choices by prescribing or prohibiting the use of specific technologies, and that at the same time the frameworks remain effective, meeting their objectives.[7] While acknowledging that regulatory uncertainty is detrimental to technological innovation in finance, and harmful to consumers and investors, the EC envisages to conduct regular analysis with the aim to identify emerging issues and offer guidance by means of interpretative communications with the view to ensure effective response to these issues.[8] The EC outlined regulatory and supervisory treatment of crypto-assets as one of the priority areas for issuing such interpretative communication in light of its legislative proposal. Moreover, the European Forum of Innovation Facilitators (EFIF) is to further advance cross-border supervisory coordination, create common data space and innovation testing facility.[9]

The legislative proposal[10] issued by the EC alongside its Digital Finance Strategy constituted the cornerstone of the EU regulatory framework for crypto-assets. The final text of the Regulation for the Markets in Crypto-Assets (MiCA)[11] emphasises that "legislation adopted in the field of crypto-assets should be specific, future-proof and be able to keep pace with innovation and technological developments and be founded on an incentive-based approach".[12] As such, the new MiCA framework and the debates surrounding the regulation of crypto-assets in the EU is a fascinating example of EU legislators and regulators embarking on the challenge of future-proofing their intervention in the context of fast-changing innovative markets, characterised by high-pace of technological development, changing user demand, and evolving risk landscape.

MiCA has four main objectives: legal clarity and certainty, supporting innovation and fair competition, ensuring consumer and retail investor protection, and promoting financial stability.[13] The main question this paper addresses is whether the new framework is future-proof considering key digital innovation trends and evolving market reality in

[6] *Ibid*. 2-3.

[7] *Ibid*. 11-12.

[8] *Ibid*. 12.

[9] *Ibid*. 8.

[10] Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets and amending Directive (EU) 2019/1937.

[11] The final text voted by the European Parliament on 20 April 2023 (hereinafter "the Final Text"), available at www.europarl.europa.eu.

[12] *Ibid*. recital 12.

[13] *Ibid*. recitals 5 and 6.

terms of risks emanating from the innovative services. Focusing on the two-fold nature of the objectives of the new framework, that is to support innovation while addressing its risks, the following sections of the paper are structured as follows: section II sets the scene by discussing regulatory impacts on innovation and crypto-assets as innovation; section III analyses the activity- and risk-based regulatory framework for crypto-assets in the EU under the MiCA; section IV engages with the core question of the paper, discussing the challenges of future-proofing EU regulation of crypto-assets from the innovation perspective; section V concludes.

II. Regulating innovation in the digitalised age

II.1. Impact of regulation on innovation

Regulatory interventions in the EU, including those targeting innovative markets, have traditionally been targeting market failures with the aim to ensure the "proper functioning" of the EU internal market.[14] As such, the two main approaches, distinguished in the EU regulation acquis, are horizontal and sector-specific regulations. Recently, ever more voices advocate in favour of more horizontal approach to regulatory interventions, in particular amidst the growing importance of datafication and digitalisation of the European economy.[15]

It is undeniable that regulation has an impact on innovation. EU regulation has been shown to have impact at all stages of the innovation process from R&D to commercialisation and diffusion.[16] This impact, however, is not always positive and regulation may have negative effects on innovation. From reducing the incentives to innovate by increasing regulatory burden associated with innovative products or services and reducing potential for profit-making, to perpetuating uncertainty, regulation may have hampering effects on innovative activity.

Although legal certainty, low regulatory burden (compliance costs), timing of interventions and regulatory flexibility are generally deemed to be innovation-enhancing, the impact of these regulatory characteristics is not unequivocal.[17] While legal uncertainty is generally considered to be detrimental to innovation, it may have positive effects at early stages of technological development (*e.g.*, when market entry barriers remain low).

[14] J Pelkmans and A Renda, 'Does EU Regulation Hinder or Stimulate Innovation?' (19 November 2014) CEPS www.ceps.eu 12; More generally on core justifications for regulatory interventions, R Baldwin, M Cave and M Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford University Press 2011, 2nd edition).

[15] See, for instance, the discussion of the regulation of innovation in the payments sector. Expert Group on Regulatory Obstacles to Financial Innovation (ROFIEG), Thirty Recommendations on Regulation, Innovation and Finance Final Report to the European Commission of 13 December 2019, 88.

[16] J Pelkmans and A Renda, 'Does EU Regulation Hinder or Stimulate Innovation?' cit. 8; also, P Aghion and others, 'Impact of Regulation on Innovation' (NBER-2021).

[17] J Pelkmans and A Renda, 'Does EU Regulation Hinder or Stimulate Innovation?' cit.10-12.

The same applies to the timing of the intervention, where early intervention may be detrimental in the markets with innovation based on immature technologies whereas later interventions may be less effective due to higher entry barriers, rigid market structure and strong network effects.

In the context of digital innovation in finance, key regulatory obstacles to innovation have been delineated in the 2019 report by Expert Group on Regulatory Obstacles to Financial Innovation (ROFIEG).[18] Composed of regulators, industry representative and academics, ROFIEG was tasked with analysing "the extent to which the current framework for financial services is technology-neutral and able to accommodate FinTech innovation and whether it needs to be adapted, also with a view of making the framework future-proof".[19] Amongst the main issues affecting innovation, the ROFIEG report emphasised regulatory fragmentation, lack of level playing field between market incumbents and new entrants, unfair competition between large incumbent platforms and smaller entrants providing downstream services, and the lack of comprehensive framework for access to, processing and sharing of data.[20] The report, largely using the terms "technology neutral" and "future-proof" as closely correlated (if not synonymous), focused on ensuring that the forthcoming regulation is informed by the opportunities and risks stemming from the uses of new technologies in the financial sector without targeting specific technologies. This need to understand and target the risks associated with new technologies led to the prominence of the "same activity, same risk, same rule" approach to regulation underpinned by activity-based (*i.e*. functional) and risk-based approaches to regulating technology-enabled innovation in finance.[21]

Despite the emphasis on regulatory obstacles to innovation, the effects are usually reciprocal. Indeed, the process of innovation often leads to the erosion of regulatory effect(iveness), derailing regulatory and supervisory efforts away from reaching their objectives. Financial sector regulation provides abundant examples, from the innovation in financial instruments that seriously undermined the regulatory objectives of financial stability and effectiveness of supervision and led to the 2008 crisis,[22] to the instances of the technology-enabled innovation in finance that lead to substantial regulatory gaps. Perhaps the most vivid illustration of the latter phenomenon is the case of the new data-driven business models in retail banking, leading to the revision of the payment services

[18] Expert Group on Regulatory Obstacles to Financial Innovation (ROFIEG), Thirty Recommendations on Regulation (2019) cit.

[19] *Ibid*. 9.

[20] *Ibid*. 13-14.

[21] *Ibid*. 67-68.

[22] C Ford, *Innovation and the State: Finance, Regulation, and Justice* (Cambridge University Press 2017) 24-50.

directive.[23] Considering the fast-paced technological and market developments, innovation in crypto-assets is deemed to become a new test to the effectiveness of regulatory interventions in innovative markets.

II.2. Crypto-assets as innovation: a moving target

The use of crypto-assets in providing innovative financial services has many facets. From raising capital by means of coin or token offerings, to the use of cryptocurrencies as means of exchange and storage of value replacing commercial bank (or private) money, to the so-called "stablecoins" – asset-backed cryptocurrencies – aimed at replacing central bank or government (public) money, crypto-assets have made their way from individual crypto-wallets to bank balance sheets.[24] From the peak of initial coin offerings (ICOs) in 2017-2018,[25] to the publication of Libra's White Paper in 2019, and the repercussions of the 2022 FTX collapse on the banking sector,[26] new uses and applications captivate the markets across the globe, and attracted attention of supervisors and regulators.[27] As such, crypto-assets came along with several promises, but also a number of risks.

The new opportunities and benefits to the financial service users are largely associated with reduced transaction costs and the capacity of distributed ledger technology (DLT) to facilitate peer-to-peer financial transactions. The promise of cheaper money transfers between individuals (payments or remittance systems),[28] customers and merchants (e-commerce) and investors and businesses (SME finance) is based on the decentralised and distributed nature of DLT, immutability of transactions and real-time settlement that can simplify the underlying infrastructure, cut-out intermediaries, and increase liquidity of financial assets.[29]

DLT-based projects and solutions continue to be (re)shaped in search of the best value propositions to business and individual users. The spectrum of technology-enabled

[23] See, for instance, the example of payment initiation services. European Payment Institutions Federation, EPIF Position Paper on Payment Initiation Services (PIS) (July 2013).

[24] R Corrias, 'Banks' Exposures to Cryptoassets: A Novel Dataset' (BIS Monitoring Report-2022) 101-106.

[25] I Gächter and M Gächter, 'Success Factors in ICOs: Individual Firm Characteristics or Lucky Timing?' (2021) Finance Research Letters 1-2.

[26] B Smith-Meyer, 'The Crypto "Contagion" that Helped Bring down SVB' (14 March 2023) POLITICO www.politico.eu.

[27] A Narain and B Moretti, 'Regulating Crypto' (September 2022) IMF www.imf.org; H Allen, 'Beware the Proposed US Crypto Regulation: It May Be a Trojan Horse' (17 November 2022) Financial Times www.ft.com.

[28] P De Filippi and A Wright, *Blockchain and the Law: The Rule of Code* (Harvard University Press 2018) 63-65.

[29] See, for instance, T Adrian and T Mancini-Griffoli,'Technology Behind Crypto Can Also Improve Payments, Providing a Public Good' (23 February 2023) IMF www.imf.org; R Garratt and H Song Shin, 'Stablecoins versus Tokenised Deposits: Implications for the Singleness of Money' (BIS Bullettin-2023).

products and infrastructure is continuously expanding. Decentralised models for the provision of financial services (known as DeFi)[30] and non-fungible tokens (NFTs)[31] as unique digital property certificates continue to thrill the minds of institutional investors and consumers alike, opening new frontiers and expanding the scope of crypto-asset markets.

At the same time, risks stemming from the use of crypto-assets in finance have several dimensions that have also been expanding over time with a more wide-spread use of crypto-assets in the EU financial sector. First, the rise of innovation in cryptocurrencies[32] and popularity of ICOs[33] brought about consumer and (retail) investor protection issues and recurring instances of fraud.[34] Second, cyber security risks stemming from both centralised and decentralised uses of DLT-based solutions which despite their immutability are susceptible to cyber-attacks. Cyber-attacks thus pose risks to user funds as well as privacy.[35] This is complemented by the related concerns over fraud and money laundering, where crypto-assets – in particular, cryptocurrencies – have increasingly represented an attractive venue of illicit money flows.[36] Third, crypto-assets are increasingly deemed to pose risks to financial stability. Largely rejected at first due to the relatively low volume of crypto-asset transactions,[37] the increasing exposure of banks' and investment firms balance sheets to crypto-assets (including as a result of tokenisation of traditional assets) has prompted a wider recognition of the potential threat.[38] In parallel, a

[30] OECD, *Why Decentralised Finance (DeFi) Matters and the Policy Implications* (19 January 2022) www.oecd.org.

[31] L Ante, 'Non-Fungible Token (NFT) Markets on the Ethereum Blockchain: Temporal Development, Cointegration and Interrelations' (2022) Economics of Innovation and New Technology 1–19.

[32] GD Marzo, F Pandolfelli and VDP Servedio, 'Modeling Innovation in the Cryptocurrency Ecosystem' (2022) Scientific Reports 1.

[33] P de Filippi and others, 'Regulatory Framework for Token Sales: An Overview of Relevant Laws and Regulations in Different Jurisdictions' (Blockchain Research Institute and COALA-2018) 6-7.

[34] According to some estimates, as many as 80% of ICOs have been fraudulent, resulting in investors losing all their money. ESMA, 'Advice Initial Coin Offerings and Crypto-Assets' (9 January 2019).

[35] V Wylde and others, 'Cybersecurity, Data Privacy and Blockchain: A Review' (2022) SN Computer Science 127.

[36] R Coelho, J Fishman and D Garcia Ocampo, *Supervising Cryptoassets for Anti-money Laundering* (FSI Insights on policy implementation, No. 31, April 2021); Chainalysis Team, 'Cryptocurrency Brings Millions in Aid to Ukraine, But Could It Also Be Used For Russian Sanctions Evasion?' (28 March 2022) Chainalysis blog www.chainalysis.com.

[37] See, for instance, ESMA, 'Initial Coin Offerings and Crypto-Assets' cit.

[38] "While the cryptoasset market remains small relative to the size of the global financial system, and banks' exposures to cryptoassets are currently limited, its absolute size is meaningful and there continue to be rapid developments. The Committee believes that the growth of cryptoassets and related services has the potential to raise financial stability concerns and increase risks faced by banks. Certain cryptoassets have exhibited a high degree of volatility, and could present risks for banks as exposures increase, including liquidity risk; credit risk; market risk; operational risk (including fraud and cyber risks); money laundering / terrorist financing risk; and legal and reputation risks"; Basel Committee on Banking Supervision, 'Second Consultation on the prudential Treatment of Cryptoasset Exposures' (June 2022) BIS www.bis.org.

threat to financial stability has been recognised in the wake of the emergence of the above-mentioned "stablecoins".[39] Most significant of those was the Facebook (now Meta) proposal of a "global stablecoin" Libra (later Diem). According to the 2019 white paper, the objective of the Libra project was to eliminate the volatility characterising cryptocurrencies, and thus enable mass adoption of blockchain-based solutions and offer a 'global currency and financial infrastructure' to Facebook's 2.5 billion users.[40] The considerations relative to the risks arising from the potential for a fast-paced and global adoption of such crypto-assets have triggered attention from regulators across the globe.[41]

III. (Future-proof) Regulation of crypto-assets in the EU

III.1. The MiCA Framework, its objectives and challenges

The new framework distinguishes between three types of crypto-assets,[42] defines crypto-asset services and sets up an authorisation regime for crypto-asset issuers and service providers. The MiCA thus complements the existing framework for regulating financial services and instruments in the EU, thus filling the gap in supervisory and regulatory treatment of crypto-asset related financial services and "stablecoins".

The MiCA proposal by the EC has been met with considerable support from the side of regulators and supervisors, including the European Supervisory Authorities (the ESAs), industry groups as well as academics.[43] While the proposal had been welcomed as an important step forward towards ensuring better consumer protection and potential risks to financial stability,[44] voices of caution have been raised with respect to the effects of new regime on further innovation and crypto activities in the EU. Two potential side effects of crypto-asset regulation on innovation emphasised by various commentators concerned i) the stringency of certain rules and their proportionality in view of different levels of risk and different degrees of decentralization of services, and ii) the potential of the EU regulatory intervention to lead to crowding out of the largest crypto-asset service providers and token issuers based outside of the EU, thus reducing the amount of innovation in Europe.[45] These concerns, not entirely unfounded, reflect the difficult task facing EU

[39] ED Martino, 'Regulating Stablecoins as Private Money between Liquidity and Safety. The Case of the EU "Market in Crypto Asset" (MiCA) Regulation' (Amsterdam Law School Research Paper-2022).

[40] Libra Association Members, *An Introduction to Libra: White Paper (2019)* librenotlibra.info.

[41] See, for instance, A Diez de los Rios and Y Zhu, 'CBDC and Monetary Sovereignty' Bank of Canada' (February 2020) www.bankofcanada.ca.

[42] See recital 18 of the preamble to the final text, describing the three types of crypto-assets as classified under the regulation.

[43] I Hallak, 'Markets in Crypto-Assets (MiCA)' (EPRS-2022) 2-3.

[44] *Ibid*.

[45] See, for instance, G Pavlidis, 'Europe in the Digital Age: Regulating Digital Finance without Suffocating Innovation' (2021) Law, Innovation and Technology 464–77; T van der Linden and T Shirazi, 'Markets in

regulators in search of the right balance between the innovation objectives, such as facilitating wider adoption of crypto-assets, and the need to address the risks emanating from the novel activities in the market. The choices thus made inevitable affect the architecture (structure) of the new framework.

The core of the structure of the regulatory framework under the MiCA corresponds to the four main objectives of the regulation:

- legal certainty and clarity;
- support for innovation and fair competition;
- consumer and investor protection and market integrity;
- financial stability.

The main elements and tools of the framework are built around the unified notion of crypto-assets, the authorisation regime, and a new standard for consumer and investor protection in the sector.

First, the regulation defines crypto-assets as "digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology",[46] and provides a categorisation of crypto-assets falling within the scope of the framework. Thus, the MiCA distinguishes between crypto-asset related services, including the custody and administration of crypto-assets on behalf of third parties; the exchange of crypto-assets for fiat currency that is legal tender and/or for other crypto-assets; or the execution of orders for crypto-assets on behalf of third parties.[47] Moreover, the regulation defines e-money tokens and asset-referenced tokens as types of crypto-assets that purport "to maintain a stable value" by referring to the value to several fiat currencies or commodities (asset-referenced tokens) or to a single fiat[48] currency (e-money token), thus regulating the offering of "stablecoins".[49]

Second, in addition to an authorisation regime applicable across the EU and enhancing legal clarity necessary to support innovation in the markets for crypto-assets, the regulation adopts a wide definition of "crypto-assets" and "distributed ledger technology" to ensure it captures all types of crypto-assets used in finance and currently falling outside of the scope of EU legislation on financial services. The MiCA thus attempts to enhance innovation in crypto-assets by providing legal certainty and a supervised access to the EU internal market for a wide variety of service providers and business models.

Crypto-Assets Regulation: Does It Provide Legal Certainty and Increase Adoption of Crypto-Assets?' (2023) Financial Innovation 22; INATBA Marketing, *INATBA Policy Position on Market in Crypto-Assets (MiCA) Regulation* www.inatba.org.

[46] Art. 3(1)(5) of the final text.

[47] For the complete list see art. 3(1)(17) of the final text.

[48] The term "official currency" as defined in art. 3(1)(8) of the MiCA means an official currency of a country issued by a central bank or other monetary authority and covers currencies of EU member states other than the euro.

[49] Arts 3(1)(6) and 3(1)(7) of the final text.

Third, the authorisation regime under the MiCA introduces a consumer and investor protection standard aimed at ensuring market integrity. Authorised service providers are obliged to meet the governance, disclosure and information requirements, disclosing key characteristics, functions and risks associated with the purchased crypto-asset. The framework, moreover, provides consumers with rights (*e.g.*, right of withdrawal) and adequate complaint handling procedures.

In light of these key structural elements, the effectiveness of the approach undertaken by the EU regulators has been questioned both with respect to its scope as well as its approach to tackling risks arising in the new crypto-asset markets.

With regard to the scope of the new framework, Zetzsche and others argued that defining the scope of the applicability of the MiCA framework[50] is insufficient as it makes it vulnerable to "the risks of re-characterisation and re-qualification of tokens" by their issuers, undermining the effectiveness and efficiency of the new regime.[51] The authors also questioned the intention of the EC to specify the definitions contained in the regulation by adopting delegated acts. Aimed at adapting the scope of the framework to the changing technological and market realities, the effectiveness of this approach has been called into question due to the length and complexity of the process of drafting and of the adoption of such new standards in the form of delegated acts.[52]

A number of concerns with respect to the ability of the MiCA framework to address the changing amplitude of risks. Some authors have raised issues with respect to consumers' rights in case of insolvency of a crypto-asset service provider,[53] the problem that has been reiterated in the bankruptcy cases of the "crypto winter".[54] Others have emphasised the need to ensure that the "significance" thresholds do not allow for "gaps" in supervision of largest market players to the detriment of consumer and investor protection[55]. With respect to the emerging financial stability risk, Martino argued that the MiCA fails to ensure the balance between consumer and investor protection, innovation, and

[50] Arts 2(1) and 2(2) of the final text.

[51] DA Zetzsche and others, 'The Markets in Crypto-Assets Regulation (MiCA) and the EU Digital Finance Strategy' (2021) Capital Markets Law Journal 203-225.

[52] *Ibid*. 220. These concerns have to some extent been considered and addressed by the legislators, with the recital 18 of the preamble to the final text stating with respect to the asset-referenced tokens, that this "second type [of crypto-assets] covers all other crypto-assets, other than e-money tokens, whose value is backed by assets, so as to avoid circumvention and to make this Regulation future-proof".

[53] I H-Y Chiu, 'A Legal Mapping of the Crypto Economy and the Drivers for Institutional Change' in I H-Y Chiu and J Linarelli (eds), *Regulating Crypto Economy : Business Transformations and Financialisaton* (Hart Publishing 2021) 12.

[54] J Oliver, 'FTX Clients to Vie for Priority Payouts in US Bankruptcy Case' (21 December 2022) Financial Times www.ft.com.

[55] M Arnold and S Chipolina, 'European Central Bank Official Warns of "Gaps" in Forthcoming Crypto Rules' (5 April 2023) Financial Times www.ft.com.

financial stability objectives, with the latter remaining secondary.[56] Increasingly considered as a safe and "flight to" asset, that is an asset to which investment could be converted in case of a shock or instability in the market, e-money and asset-referenced tokens may lead to amplified financial stability risks due to insufficient safeguards against liquidity shortage under the proposed framework.[57] This vulnerability, moreover, may be further exacerbated by the expansion of the DeFi segment, currently left outside of the scope of the MiCA. Is the new framework future-proof in light of these challenges?

III.2. Activity- and risk-based approach to regulating innovation

The essence of future-proofing of crypto-asset regulation under the MiCA appears to be in its technology neutral nature *vis-à-vis* technological choices made by innovating service providers. This "neutrality" towards technological development manifests through the focus of the framework, on the one hand, on the specific function of the innovative service (activity-based approach) and, on the other hand, on the specific risks and the intensity of such risks that emanate from crypto-assets and service providers (risk-based approach).

a) Activity-based approach

The activity-based approach to regulating innovative products and services means that the same regulatory requirements should apply irrespective of whether the activities (*e.g.,* services offered) "are led by an incumbent financial institution, BigTech or start-up (whether or not controlled by a financial institution)".[58] This approach is opposed to a traditional (for the financial sector) "institutions-based" or "entity-based" approach,[59] and is meant to apply to the entirety of the rules applicable to the activity of a financial service provider (including organisational, prudential, disclosure, or conduct-related requirements).[60]

The (intended) impact of this approach on innovation is manifold. For one, the activity-based approach reduces the risks of regulatory intervention leading to uneven playing field between market actors, common to the regimes relying on the institutions-based approach.[61] By ensuring a level playing field is maintained between service providers, those innovating by bringing new technology into the provision of the service fulfilling the

[56] ED Martino, 'Regulating Stablecoins as Private Money between Liquidity and Safety' cit.

[57] *Ibid*.

[58] Expert Group on Regulatory Obstacles to Financial Innovation (ROFIEG), Thirty Recommendations on Regulation (2019) cit. 68.

[59] DA Zetzsche and others, 'The Markets in Crypto-Assets Regulation (MiCA) and the EU Digital Finance Strategy' cit.; see also, K Pistor, 'Host's Dilemma: Rethinking EU Banking Regulation in Light of the Global Crisis' (ECGI - Finance Working Paper No. 286 2010; Columbia Law and Economics Working Papers No. 378 2010) 70.

[60] Expert Group on Regulatory Obstacles to Financial Innovation (ROFIEG), Thirty Recommendations on Regulation (2019) cit. 68.

[61] For the discussion in the context of financial stability, see C Borio, S Claessens and N Tarashev, 'Entity-based vs Activity-based Regulation: A Framework and Applications to Traditional Financial Firms and Big Techs' (FSI Occasional Papers-2022).

same function do not face different rules or remain outside of the regulatory perimeter as a result of innovating.

Another facet of the activity-based approach from the innovation perspective is a more proportionate allocation of regulatory burden associated with authorisation and compliance with regulatory requirements (operational, prudential, conduct requirements). This is contrary to the situation where an entity-based regime would entail an equal regulatory burden for market actors engaged in activities subject to regulatory requirements in full, as well as for those who only provide financial services (and functions) in part together with non-financial functions.

b) Risk-based approach

Risk-based approach under the MiCA manifests through the divergent requirements (organisational, prudential or conduct) that are based on the risks emanating from a specific activity. With explicit reference to the need for a risk-based approach,[62] the MiCA foresees that, similar to other financial services, the EU approach to crypto-assets should be guided by the principles of "same activities, same risks, same rules" and of technological neutrality.[63]

In the context of digital finance, the principles have been spelled out in the 2019 ROFIEG report, suggesting that the assessment of the functional similarity of an activity should be done by looking at its effects, such as consumer risks, and that same activities that do not pose the same risks can be subjected to different regulatory requirements.[64] The report further acknowledges, that "[d]escribing the risk that an activity creates is more complex, as this requires an assessment of all consequences of that activity in its broader context".[65]

The evolving and complex nature of risks arising from the wider use of crypto-assets in the financial system has been underlined by international financial standards setting bodies. Recently, the Bank for International Settlements (BIS) has emphasised the changing nature of the risks to the financial system stemming from increasing exposure of banks to crypto-assets.[66] The BIS Committee on Banking Supervision underlined the potential of the growing size of crypto-asset markets and banks' exposure to increase financial stability concerns and risks faced by banks, such as liquidity risk, credit risk, market risk, operational risk (including fraud and cyber risks), money laundering and terrorist financing risk, and legal and reputation risks.[67] More specifically focusing on crypto-assets marketed as "stablecoins", the Financial Stability Board (FSB) outlined the emergence

[62] Recital 6 of the preamble to the final text.

[63] Recital 9 of the preamble to the final text.

[64] Expert Group on Regulatory Obstacles to Financial Innovation (ROFIEG), Thirty Recommendations on Regulation (2019) cit. 68.

[65] *Ibid*.

[66] Basel Committee on Banking Supervision, 'Second Consultation on the prudential Treatment of Cryptoasset Exposures' cit.

[67] *Ibid*. 1.

of asset-specific risks as these become more spread globally: risks stemming from the existence of a stabilisation mechanism; risks coming from the usability of these crypto-assets as a means of payment and/or store of value; and the potential reach and adoption across multiple jurisdictions.[68] The risks defined by BIS and FSB have been reflected in the operational, prudential and conduct requirements of the MiCA applicable to crypto-asset service providers and offering of "stablecoins" (asset-referenced and e-money tokens) to European consumers. Are these efforts sufficient to ensure the future-proof nature of the new framework?

IV. Future-proofing the EU Regulation of crypto-assets

IV.1. The challenge of future-proofing regulatory intervention in innovative markets

EU regulation of markets in crypto-assets reflects the almost inevitable dilemma of how to strike the right balance between two components of future-proof regulation of innovative markets: on the one hand, future-proof regulation should not hinder innovative producers from introducing novel goods and services, and from reshaping their business models to be able to meet constantly changing consumer demand and to compete in the market; at the same time, such regulation has to provide these same innovators with legal certainty and clarity of the applicable rules while ensuring consumers and market integrity are protected from potential new or changing risks.

This challenge has been largely framed, both in the regulatory theory and impact analysis literature as well as in the literature on future-proof and better regulation, as the challenge of flexibility and responsiveness of regulation.[69] Flexibility or flexible regulation has been defined both by reference to the possibility of regulatory subjects (innovating producers) to choose between different paths of compliance, as well as for the regulators themselves to amend and adjust the regulatory framework over time.[70] The former is usually manifested through less rigid and top down regulatory approaches, such as co-regulation, but also by means of a more principles-based approach, notably by reliance

[68] Financial Stability Board, 'Review of the FSB High-level Recommendations of the Regulation, Supervision and Oversight of "Global Stablecoin" Arrangements, Consultative report' (11 October 2022) www.fsb.org 1.

[69] For discussion of flexible regulation in the context of financial innovation and more broadly, see A Mcquinn, 'Supporting Financial Innovation Through Flexible Regulation' (4 November 2019) ITIF www.itif.org; C Ford, 'Financial Innovation and Flexible Regulation: Destabilizing the Regulatory State' (2013) North Carolina Banking Institute 27; N Cortez, 'Regulating Disruptive Innovation' (2014) Berkeley Technology Law Journal 175-228. On responsive regulation, see J Black and R Baldwin, 'Really Responsive Risk-Based Regulation' (2020) Law and Policy 181-213. In the context of future-proof legislation and policy, see S Ranchordas, M van 't Schip, 'Future-Proofing Legislation for the Digital Age' (University of Groningen Faculty of Law Research Paper Series-2019) 12.

[70] S Ranchordas, M van 't Schip, 'Future-Proofing Legislation for the Digital Age' cit. 14.

on the principle of technological neutrality. The latter – flexibility for regulators to fine-tune regulatory requirements and standards – in practice, has been approached by recurring to a multi-level design of regulatory architecture with diverging degrees of detail and different timelines for revision at each level.[71] In the financial sector and beyond, regulatory technical standards became one of the main tools to achieve such flexibility.[72] In literature, the possibilities for relying on periodic revision and temporary rules, such as sunset and sunrise clauses, or experimental legislation, have been offered as potential solutions in the debates over better regulation.[73]

The new MiCA framework offers a fascinating example of EU legislators and regulators embarking on the challenge of future-proofing their intervention in the context of fast-changing innovative markets. Considering the high-pace of technological development, changing consumer demand, and evolving risk landscape, the new framework for crypto-assets also provides a test ground for the mainstream approach to regulating innovation in the EU – the activity- and risk-based regulation. This approach has been solidified in the recent years, in particular with the advent of interventions in the markets disrupted by the FinTech industry, and the following sections discuss its implications on the future-proofing of the MiCA.

IV.2. Activity-based regulation of crypto-assets: future-proofing the regulatory perimeter

a) The challenges of future-proofing from the innovation perspective

The activity-based regulation, focusing on the functions of the specific (novel) services offered by market actors rather than on the entity as a whole, has been aimed at incorporating innovative service providers within the regulatory perimeter without subjecting them to disproportionate regulatory burden. From the standpoint of regulators and supervisors, the future-proof nature of this approach consists in ensuring the level-playing field amongst market actors engaged in activities that produce the same level of risk. The principle of technological neutrality, as discussed above, implies that the same conditions

[71] The three levels could be distinguished as *i)* legislation (directives and regulations), *ii)* regulatory technical standards and guidelines, and *iii)* (mandated) industry standards, with more general rules and principles defined at the first level, and the most specific (technical) at the third level.

[72] Regulatory Technical Standards are adopted by the European Commission as delegated acts under art. 290 TFEU in accordance with arts 10 to 14 of Regulation (EU) No 1093/2010 of the European Parliament (EBA regulation) and of the Council and Regulation (EU) No 1095/2010 of the European Parliament and of the Council (ESMA regulation). See EBA regulation: Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC; and ESMA regulation: Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC.

[73] S Ranchordas and M van 't Schip, 'Future-Proofing Legislation for the Digital Age' cit. 15.

apply to these market actors regardless of the use of new technologies or changing business models over time. Two issues can be raised with respect to the effects of this approach on technological and business model innovation.

First, despite the objectives of the activity-based regulation, the authorisation regime that underpins this approach is prone to erecting entry barriers for new service providers. Often developed in consultation with market incumbents alongside early, and more established, entrants, authorisation-based regimes tend to have an effect akin to a sieve, with the most established entrants acquiring authorisations upon the entry into force of the regime, while less capable actors leave the market. Examples include the revised payments services framework (PSD2) with the spike in authorisations during the first two years of its implementation in 2018.[74] In many instances this has a positive effect for consumers, since most of the speculative actors with low value proposition leave the market. However, this positive effect tends to be of temporary nature. With authorised entities obtaining larger market share and benefiting from network effects,[75] the entry to the regulated market becomes less attractive for small innovative players due to the regulatory costs associated with the authorisation procedures and low incentives stemming from the size of the market. Thus, despite their objective of creating a level playing field within the market, activity-based regimes almost inevitably lead to innovation outside of the regulatory perimeter. This, in turn, undermines the future-proof nature of regulation and, in the absence of level playing field and entry barriers for innovative service providers outside the regulatory perimeter, may stifle innovative activities.

Second, the future-proof nature of the activity-based approach to regulating innovation is further challenged by its tendency towards standardisation. The flexible and technology-neutral approach aims at leaving the choice with respect to the best available and most secure technology to the service providers, who are best positioned to serve changing consumer demands. However, the regulatory regimes, such as flexible frameworks introducing minimum requirements, tend to incentivise standardisation. This, in turn, leads to a certain rigidity and inflexibility in terms of consumer-facing solutions by regulated service providers despite allowing for flexibility (and discretion) with respect to the paths of compliance.

One example from the MiCA is the proposed regime for the custodial services. Art. 75(1) of the final text foresees a certain standard content for client agreements, with the requirements for crypto-asset service providers to define the applicable communication

[74] For the analysis of the EBA register data on payment and e-money service providers exhibiting this trend, see Mastercard, *Q4 2021 Open Banking tracker* b2b.mastercard.com; KPMG, *The Netherlands: Europe's number [one payments and e-money fintech hub?* assets.kpmg.com.

[75] Authorisation regime tends to amplify the trends and market features affecting competition and innovation, in particular in the digital markets. On this relation between regulatory and non-regulatory barriers to entry in finance, see Financial Services Authority and the Bank of England, *A Review of Requirements for Firms Entering into or Expanding in the Banking Sector: One Year On* www.bankofengland.co.uk.

and authentication technologies and security features. In addition, art. 75(3) requires regulated service providers to lay down a custody policy with internal rules defining (and potentially restricting) their customers' choice of options to keep and access cryptographic keys. If today, in the unregulated crypto-asset services market, consumers are subject to security risks that are often difficult to adequately assess, the regulatory framework comes in bringing a minimum-security standard. Whilst this is likely to bring benefits of better security to some users, others may find the standardised environment restrictive of their choices compared to an unregulated environment and the options offered by unauthorised service providers.

The two issues – the entry barriers and uneven playing field between regulated innovative service providers and those outside of the regulatory perimeter, as well as the inevitable tendency towards greater standardisation based on minimum requirements introduced by regulatory frameworks – do not necessarily result in negative effects of regulation on innovation. Indeed, it is common if not inevitable that certain innovative market actors and service users/user groups[76] exist and emerge outside of the regulatory perimeter, and that more mature markets and technologies have higher levels of standardisation that are better suited for mass adoption of new products and services. From the perspective of future-proof regulation, the challenge, however, is to ensure the regulatory framework is designed in such a way that enables to bring new actors and their users within the regulatory perimeter without the need to overhaul the entire regime. This meaning of future-proofing is further emphasised by the innovation objective – "niche" markets for specialised consumers[77] constitute an important part of the process of innovation and, as such, an inseparable part of the regulatory objective of supporting innovation. It also highlights a wider spectrum of challenges to the activity-based approach. Today, the main concerns raised in the literature and policy debate consider the limits of the scope of the MiCA framework, and the effectiveness of the activity-based approach that may be undermined by the issuers' efforts to re-characterise or re-qualify tokens (regulatory arbitrage).[78] The innovation-focused lens offers a broader view of the obstacles to level-playing field with innovating actors (unwillingly) excluded from the scope of the framework, and emphasises the need for regulatory safeguards that would ensure flexibility and "openness" of the regulatory perimeter.

[76] For instance, von Hippel's "lead users", who are always "at the leading edge of the market". See, E von Hippel, *Democratizing Innovation* (MIT Press 2006) 22-23.

[77] See, for instance, M Farhana and others, 'Dynamic Capabilities Impact on Innovation: Niche Market and Startups' (2020) Journal of Technology Management & Innovation 83–96.

[78] DA Zetzsche and others, 'The Markets in Crypto-Assets Regulation (MiCA) and the EU digital Finance Strategy' cit. 220.

b) Ensuring the flexibility and openness of the regulatory perimeter: the regulatory safeguards for future innovation under the MiCA Framework

The neutrality of definitions of distributed ledger technology and crypto-assets under the MiCA[79] is a step in the direction of future-proofing the regulatory perimeter, leaving the entry possibility open for future technological and business model innovations. In addition to the technologically neutral definitions, the new framework includes several clauses aimed at ensuring the flexibility of its (material) scope. For one, both the preamble and the text of the MiCA specify the cases for the application of the framework (at least in part) to the use of non-fungible tokens (NFTs), otherwise excluded from its scope.[80] Moreover, the regulation defines the scope of the applicability of the new rules to the decentralised finance (DeFi) application, by limiting its application to the instances of intermediation of otherwise automated and autonomous structures.[81] Finally, the MiCA includes an explicit limitation with respect to its applicability to the digital (crypto) wallets with hardware and software providers of non-custodial wallets excluded from its scope.

Despite the neutrality of the definitions with respect to the technology underpinning crypto-assets and related services and the clearly defined limits to the scope of the MiCA, its consistent and effective implementation is likely to be challenged by the innovation-driven change in crypto markets. This is particularly relevant with respect to the scope of the framework, with shifting application and new use cases for NFTs, fluctuating decision-making and control structures in DeFi and more wide-spread uses and wider range of actors offering crypto wallets. These ongoing changes will raise many questions to national regulators and supervisors as to the interpretation and implementation of the framework.

Technological and business-model innovation has challenged the effectiveness of EU regulatory interventions before, underlining the importance of supervisory coordination alongside technological neutrality. Such coordination is important to avoid regulatory arbitrage and unnecessary regulatory burden and/or entry barriers for innovative service providers. This has been recently highlighted by the European Banking Authority (EBA) in its proposal to merge the Payment Services Directive (PSD2) with the E-money Directive (EMD2).[82] The EBA underlined that merging two regulatory instruments would advance

[79] Under art. 3(1)(1) of the final text, the distributed ledger technology is defined as "a type of technology that support the distributed recording of encrypted data", whereas crypto-asset services are defined as "means a digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology" under art. 3(1)(5) of the final text.

[80] Recital 11 of the preamble to the final text, that provides that the MiCA applies "to crypto-assets that appear unique and not fungible, but whose de facto features or features linked to de facto uses would make them either fungible or not unique".

[81] Recital 22 of the preamble to the final text, stating that crypto-asset services provided with no intermediaries involved and in an entirely decentralised manner are not covered by the scope of the MiCA.

[82] European Banking Authority, Opinion of the European Banking Authority on its technical advice on the review of Directive (EU) 2015/2366 on payment services in the internal market (PSD2), 2022, EBA/Op/2022/06.

"harmonisation, simplification and consistent application of the legal requirements" for payment and e-money service providers, help to avoid regulatory arbitrage in the EU, and ensure the level playing field and a future-proof regulatory framework.[83] The problem has been further spelled out in the EBA's recent report on supervisory practices, where the absence of clear guidance from under the PSD2 made it hard to ensure that market actors employing innovative business models are authorised under the regulatory framework in a manner that is consistent across the EU, thus creating additional regulatory burden and undermining the level playing field.[84] Therefore, the technological and business model neutrality that underpin the activity-based approach in the context of innovative sectors requires consistent efforts from the EU regulators in coordinating and aligning regulatory and supervisory practices. Such coordination is crucial to ensure the openness and flexibility of the regulatory perimeter, indispensable for future-proof regulation that supports innovation.

The innovation-centred lens thus delineates additional challenges to activity-based and neutral regulatory interventions, such as the new MiCA framework. These additional innovation-related considerations are also essential in addressing the potential effects of entry barriers erected by the authorisation regime and the restrictions on consumer choices that result from the mandated minimum-security standards. Supervisory coordination, understood as harmonisation of supervisory practices through coordinated interpretation as opposed to additional legislative measures, is destined to play the central role in ensuring that the borders of the regulatory perimeter with respect to crypto-assets remain equally open in all EU jurisdictions, and hence future-proof.

IV.3. Risk-based approach to regulating markets in crypto-assets

The implementation of the risk-based approach under the regulatory framework for crypto-assets, on the one hand, largely focuses on existing risks to consumer protection, protection of consumer funds and privacy. On the other hand, divergent risk-based requirements have been adopted in response to the evolving risk to the financial stability due to increasing banks' exposure to crypto-assets and the potential for global "stablecoins". Both instances raise important issues with respect to the future-proof nature of the regulatory framework and its effects on innovation in markets in crypto-assets in the EU.

When it comes to risks and risk-based approach, the risk regulation literature emphasises the importance of "anticipation" or "predicting" of risks.[85] For regulators, who introduce risk-based measures to mitigate the risks emanating from the products and services offered in the market, the risk-based approach offers tools to design a framework that accounts for existing risks but also ensures that innovation-driven change does not lead to a

[83] *Ibid*. 4.

[84] European Banking Authority, Report on the Peer Review on Authorisation under PSD2, 2023, EBA/REP/2023/01 34.

[85] S Ranchordas and M van 't Schip, 'Future-Proofing Legislation for the Digital Age' cit.13.

blind spot about new risks. However, as can be seen from the consumer protection, financial stability and market integrity-related provisions of the MiCA framework, the instruments employed by the regulator bear very limited anticipatory (or predictive) capacity.

With respect to consumer protection-related risks, such as safety of consumer funds and protection of privacy (including cyber risks and identity fraud), the flexible and technology-neutral framework under the MiCA largely delegates the risk assessment and the necessary adjustment of approaches to risks and risk-evaluation to the market actors. This traditional approach relies on regulatory subjects' due performance of reporting duties. According to the text of the MiCA,[86] the report on the developments in the markets in crypto-assets shall be based upon the data collected by the EU regulators (ESMA in close cooperation with EBA) based on the input from the national competent authorities.[87] This means that the authorised service providers have to provide their home competent authorities[88] with data that would allow the authorities to get an overview of the market developments. Data provided by the market actors includes the quantitative data regarding fraud, scams, hacks, the use of crypto-assets for payments related to ransomware attacks, cyberattacks, thefts or losses of crypto-assets in the EU, types of fraudulent behaviour, and the numbers of user complaints received. The regulatory risk-anticipatory and predictive capacity, therefore, will be largely based on the aggregate data reliant on the input obtained from the market, and on the analysis of trends and tendencies based on the accumulated reporting data. Although the new framework foresees communication channels necessary for accumulating the necessary information about the tendencies and potential new or amplified risks or risk concentration, it appears to stop short of addressing the challenge of risk anticipation, reinforcing the reactive nature of risk regulation with respect to innovative development in the markets in crypto-assets.

In what concerns the risks to financial stability, the framework's predictive or anticipatory tools also appear to be based on the periodical revision of the regulatory thresholds. With respect to "significant" asset-referenced and e-money tokens ("global stablecoins"), the regulation foresees a possibility for review of the appropriateness of the thresholds between significant tokens and non-significant tokens.[89] Such review, to be performed by the European Commission, may then be followed by a legislative proposal.

[86] Art. 141 of the final text.

[87] Arts 141 and 141(k). See, in particular, art. 142 of the final text providing a detailed regulation for the input sources and composition of the report on latest developments on crypto-assets, including the developments in DeFi applications in the financial sector.

[88] Home competent authorities refer to the national competent authority of the "Home Member State" as defined in art. 3(1)(22) of the MiCA, in most cases the competent authority granting authorisation.

[89] Recital 59 of the preamble to the final text. Some have already questioned the appropriateness of the currently set thresholds for 'significant' tokens and issuers. See, for instance, M Arnold and S Chipolina, 'European Central Bank Official Warns of "Gaps" in Forthcoming Crypto Rules' cit.

In terms of adjustment of supervisory practices to evolving risks (and risk levels), the framework, from the innovation perspective, is likely to be guided by European Forum of Innovation Facilitator (EFIF)[90] and the reporting by ESMA and EBA.[91] The cross-border co-operation and interaction-enhancing function of the EFIF will be further complemented by a cross-border testing facility.[92] This is an important development. To date, regulatory innovation in the form of innovation hubs or regulatory sandboxes[93] has been limited across the EU.[94] With the enhanced convergence at EU level the information obtained in the EU-wide cross-border setting from innovation facilitators and regulatory sandbox facilities will provide better indication of new trends, as well as of the potential sources of risks to financial stability. However, similar to traditional reporting, the supervisory capacity to respond to emerging risks to financial stability will largely be based on the accuracy, quality and timely analysis of reported data.[95]

The anticipatory and predictive capacity of these risk-related regulatory instruments under the MiCA framework appears to be limited by the reliance on the conventional market-based input in compliance with reporting obligations. Where the risk-related market developments require change in regulatory requirements, the space for manoeuvre for the EU regulators in adjusting risk-based framework, such that would not require an overhaul of the framework (that is, without adopting "MiCA2" within 2-3 years after the entry into force of the current framework, a possibility that is implicit in the recitals of the final text of the regulation), appears to be limited to the adoption of regulatory technical standards

[90] Digital Finance Strategy, 8. EFIF work, under coordination by the European Supervisory Authorities (the ESAs) is aimed at sharing experiences from engagement with firms through innovation facilitators (regulatory sandboxes and innovation hubs), sharing of technological expertise, and consolidating views on the regulatory treatment of innovative products, services and business models. For more detail, see www.eba.europa.eu.

[91] Arts 141-142 of the final text.

[92] Digital Finance Strategy, 8. See, EFIF, Procedural Framework for Innovation Facilitator Cross-Border Testing (2021) www.eiopa.europa.eu.

[93] As defined by the EBA, the "innovation hubs" are institutional arrangements allowing regulated or unregulated entities (unauthorised firms) to engage with the national competent authority in the discussion of FinTech-related issues or "to seek clarification on the conformity of business models with the regulatory framework or on regulatory/licensing requirements (*i.e*. individual guidance to a firm on the interpretation of applicable rules)". Regulatory "sandboxes", in turn, are defined as a controlled space in which financial institutions and non-financial firms "can test innovative FinTech solutions with the support of an authority for a limited period of time, allowing them to validate and test their business model in a safe environment". EBA, *Discussion Paper on the EBA's Approach to Financial Technology (FinTech) (2017)* www.eba.europa.eu 7; Communication COM(2018) 109 final from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions of 8 March 2018 on FinTech Action Plan: For a More Competitive and Innovative European Financial Sector www.eur-lex.europa.eu. 8-9.

[94] European Banking Authority, *ESAs Publish Joint Report on Regulatory Sandboxes and Innovation Hubs* (7 January 2019) www.esma.europa.eu 39.

[95] See, for instance, the discussion at EFIF Meeting, October 2022, digital-finance-platform.ec.europa.eu.

(RTS) by the European Commission. As known from the existing framework, such as MiFID2 and PSD2 regimes, the process of developing regulatory technical standards is prone to similar defects as market input-based supervision, where the effectiveness of the RTS as a tool is undermined by the limited "predictive powers" of regulatory agencies and the need for the balancing between the general and neutral yet precise technical requirements.[96]

Two more innovative regulatory instruments and approaches are widely discussed in the literature and are of relevance in the context of the MiCA. For one, innovation hubs and regulatory sandboxes are considered to be able to offer regulators and supervisors complementary "market intelligence" and thus "constitute a source for understanding potential risks and their mitigating elements".[97] According to some authors, sandboxes can be characterised as a form of "opportunity-based" regulation, distinct from the more traditional risk-based regulation by the "active nurturing" of innovation and learning by regulators.[98] This view of sandboxes and innovation hubs reiterates the strategic importance of the EFIF framework, discussed above, yet at the same time raises questions as to whether such EU-level coordination instrument is sufficient in view of the existing inconsistencies in the national practices and approaches to regulatory sandboxes and innovation hubs.[99]

In addition, ever more voices suggest incorporating technological regulation to enhance the anticipatory and predictive powers of the regulatory and supervisory frameworks in digital finance, such as the MiCA. The proponents of technological solutions suggest stepping up the efforts of incorporating the tools allowing regulators and supervisors to use distributed ledger technology as a regulatory technology.[100] For instance, by incorporating specific requirements and/or restrictions into the technological architecture of asset-referenced and e-money tokens, in order to ensure compliance with existing requirements and proactive evolution (towards stricter/higher thresholds) in anticipation of increasing risks.[101] Other solutions include the so-called RegTech tools which facilitate

[96] DA Zetzsche and others, 'The Markets in Crypto-Assets Regulation (MiCA) and the EU digital Finance Strategy' cit. 220-221.

[97] IOSCO, 'The Use of Innovation Facilitators in Growth and Emerging Markets, Final Report' (2022) FR08 www.iosco.org.

[98] DM Ahern, 'Regulators Nurturing FinTech Innovation: Global Evolution of the Regulatory Sandbox as Opportunity Based Regulation' (9 March 2020) Indian Journal of Law and Technology 4.

[99] For details, see European Supervisory Authorities, 'Report. FinTech: Regulatory Sandboxes and Innovation Hubs' (2018) www.esma.europa.eu 74.

[100] R Auer, 'Embedded Supervision: How to Build Regulation into Decentralised Finance. Bank for International Settlements' (BIS Working Papers-2019) 3.

[101] For instance, where increasing volumes in terms of issue, trade, number of active users, changes in underlying asset classes can be observed. Cf A Collomb, P De Filippi and K Sok, 'Blockchain Technology and Financial Regulation: A Risk-Based Approach to the Regulation of ICOs' (2019) European Journal of Risk Regulation.

reporting by focusing on one-stop reporting platforms or platforms for collection, analysis of data and supervisory workflows, that combine risk data and risk reporting to enable extracting the maximum value from the reported data.[102]

Considering the above, the risk-based (as well as the activity-based) approach to regulating market in crypto-assets appears to be largely limited to the expansion of the regulatory perimeter to enable the supervision of the emerging players. This supervision, however, is likely to face similar obstacles to its effectiveness as experienced by national and European supervisors in other highly innovative sectors due to the lack of risk anticipation and predictive capacity against the fast-changing risk environment, and the rigidity of the borders of the authorisation-based regulatory perimeter. Framed with the innovation perspective in mind, the discussion of the effectiveness of the core principles underpinning the new framework, and of the tools it offers to the national and EU supervisors, would benefit from incorporating the considerations and possible solutions for enhancing the openness of the regulatory perimeter and risk anticipatory capabilities of the framework that have been presented in this *Article*.

V. Conclusions

This *Article* sheds new light on the challenges facing the regulatory regime for markets in crypto-assets in the EU under the MiCA framework. The analysis in this paper has been performed from the innovation perspective, considering the fast-paced technological and market-driven change characterising the crypto industry. The paper focused on unpacking the design elements and the specific instruments of the new framework that are intended to take account of changing market reality as well as to ensure that the scope of the rules and the instruments available to regulators and supervisor remain relevant and able to adjust to such changes (future-proofing). The paper complements the ongoing debate over the approaches to regulating markets in crypto-assets by looking at the two main components of the MiCA as future-proof regulation.

First, the *Article* analysed the activity-based regime based on technology neutral definitions and authorisation-based market entry. Focus on the MiCA's objective to facilitate innovation and uptake of crypto-assets in the financial sector allowed for an extended inquiry into the challenges of designing a regulatory framework with an open and dynamic scope. The innovation-centred lens thus helped to uncover the regulatory challenge of striking the balance between legal clarity and certainty with respect to the personal scope of the regulatory framework and the delineation between different activities and functions that might be treated differently by the regulation. A future-proof regime in the context of innovation-driven change needs to be complemented by a consistent effort of regulatory and supervisory coordination. Such coordination at EU level is an indispensable safeguard ensuring that the regulation does not lead to erecting unnecessary regulatory obstacles or additional

[102] EFIF Meeting cit. 3.

burden for innovating service providers, in particular in case of business model innovation. Under the MiCA framework, coordination is thus also central to ensuring the openness and flexibility of the regulatory perimeter, ensuring that such flexibility does not undermine the level playing field nor lead to regulatory arbitrage.

Second, with respect to the risk-based approach, the innovation-centred perspective of the *Article* highlighted the challenges brought by the changing risk landscape. The *Article* emphasised the need for incorporating within the regulatory design the mechanisms of adjustment to the changes in the amplitude and location of risks within the regulated markets. This capability of the regulatory framework is central to ensuring that activities producing the same risks are regulated by adequate rules. Fast-paced innovation, such as observed in the markets in crypto-assets, requires traditional market-input based methods for risk mitigation to be complemented by the more innovative instruments that can enhance regulatory and supervisory capacity to anticipate and predict changes in the risk environment. Regulatory sandboxes and technological regulation appear to be two potentially effective instruments which, however, are yet to be fully embraced into the EU regulators' and supervisors' arsenal. The innovation-centred lens adopted in this *Article* offers an additional consideration for further research and discussion view the view of fine-tuning both the existing requirements as well as the use of the novel regulatory tools.

ARTICLES

FUTURE-PROOF REGULATION AND ENFORCEMENT FOR THE DIGITALISED AGE

Edited by Gavin Robinson, Sybe de Vries *and* Bram Duivenvoorde

DIGITAL LIBRARIES UNDER EU COPYRIGHT LAW: A RELATIONSHIP SET IN STONE?

VICKY BREEMEN*

TABLE OF CONTENTS: I. Introduction: libraries and copyright law in the digital networked environment. – II. Digital library developments: institutional organisation, purpose and functions. – III. Assessment: digital libraries under the modernised DSM directive: is EU copyright law currently future-proof? – III.1. Institutional organisation. – III.2. Purpose. – III.3. Functions. – III.4. Conclusion. – IV. Outlook: towards a future-proof library privilege in EU copyright law. – IV.1. Institutional organisation. – IV.2. Purpose. – IV.3. Functions. – IV.4. Conclusion.

ABSTRACT: Digitisation – and its implications for the creation and dissemination of cultural content – has been on the EU policy agenda for decades, notably in the field of copyright law. Yet, despite modernisation efforts from the 1990s onwards, the "library privilege" – *i.e.*, the provisions regulating library functions – persistently focuses on physicality. For instance, the consultation of digital materials remains confined to library buildings. Given the increasing options for remote access to content, it is questionable whether this focus still works in the digital information society. Therefore, this *Article* aims to critically assess, first, whether EU copyright law is currently future-proof taking into consideration digital library developments on the one hand and copyright modernisation efforts on the other. It finds that the most recent addition to the EU copyright *acquis*, the Digital Single Market Directive (2019), offers some openings for interpretative space to accommodate the library's evolving side. Second, in addressing the research and policy agenda for the years to come, the *Article* offers a way of thinking about a copyright law that flexibly balances right holder, library and user interests. Seeing that copyright law and libraries share goals in the organisation and dissemination of information, the argument is made that their relationship should not be "set in stone": rather,

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copyright law should facilitate remote access at least to some extent. While the historical focus on physicality may have been intended to prevent the library privilege from becoming too broad in scope, this delineation rationale should be operationalised differently.

KEYWORDS: Copyright law – Libraries – Digitisation – Library privilege – Modernisation – Balance.

I. INTRODUCTION: LIBRARIES AND COPYRIGHT LAW IN THE DIGITAL NETWORKED ENVIRONMENT

Libraries have become "hybrids", that is, they currently operate in both a physical and digital fashion. For instance, "paperless" libraries are upcoming, but still use physical branches to check out e-readers. Another example is the New York Public Library (NYPL): on the one hand, its iconic building is being renovated since 2018, on the other, the NYPL is heavily involved in digitisation projects.[1] Evidently, library characteristics have evolved over time on a spectrum from physical to fully online. As Library and Information Sciences (LIS, an interdisciplinary field of study focusing on the creation, management and use of information regardless of form)[2] scholar Baker phrased it in 2005: "The 'library' is being de- and re-constructed, with a digital future being seen as the norm in many environments".[3] So, while buildings are unlikely to disappear completely, library characteristics have advanced towards the latter part of the spectrum in accelerating speed, leaving us to wonder: have the characteristics of copyright law kept up? In other words, despite modernisation efforts over the years, is EU copyright law still fit for the digital age when assessed trough a library lens?

Whereas a "library" traditionally designates "A building [...] containing a collection of books for the use of the public [...]",[4] its four stone walls have since long marked the boundaries of the activities that EU copyright law allows without prior right holder permission. For instance, from a historical perspective, consultation of analogue cultural content in the library's traditional reading room did not pose questions of copyright infringement. In this sense, the library walls formed a natural boundary.[5] Strikingly, in the early 2000s, this boundary was retained in the modernised Copyright Directive, which aimed to harmonise

[1] See VE Breemen, *The Interplay Between Copyright Law and Libraries: In Pursuit of Principles for a Library Privilege in the Digital Networked Environment* (Eleven International Publishing 2020) 3-4 and sources mentioned there.

[2] Cf. LS Estabrook, 'Library and Information Sciences' in MJ Bates and MN Maack (eds), *Encyclopedia of Library and Information Sciences* (Taylor and Francis 2010) 3287.

[3] Citation taken from D Baker, 'Combining the Best of Both Worlds: The Hybrid Library' in R Earnshaw and J Vince (eds), *Digital Convergence: Libraries of the Future* (Springer 2008) 95.

[4] Definition taken from the Oxford English Dictionary.

[5] Cf. VE Breemen, *The Interplay Between Copyright Law and Libraries* cit.; VE Breemen, 'Artikel 5 DSM-Richtlijn en de magie van kennisverspreiding: digitaal en grensoverschrijdend onderwijs' (2020) Tijdschrift voor Auteurs-, Media- en Informatierecht 94, 97; see also JI Krikke, *Het bibliotheekprivilege in de digitale omgeving* (Kluwer 2000) 64, 149.

"certain aspects of copyright [...] in the information society".[6] The European Commission had acknowledged that the then existing copyright exceptions needed to be reassessed in light of the new digital information environment.[7] Yet, although the Copyright Directive introduced a library privilege – that is, specific exceptions for libraries in copyright law – the consultation of digital materials remained confined to on site facilities.

In view of the advancing technological possibilities for remote access to cultural materials, it is questionable whether this focus on physicality still works in the digital era. After all, user expectations are changing since the "library" concept has gained a digital dimension. No longer a fixed place only, it has evolved into a structured infrastructure that can be accessed remotely and "walls" are consequently no longer necessarily brick-and-mortar. Given copyright law's limited interpretation of the library concept, the library privilege thus risks to become unusable in the digital domain. Consequently, the debates on a future-proof library privilege centre on challenges of interpretation and delineation of scope.

This *Article* questions copyright law's focus on physicality. To that end, it critically assesses, first, whether EU copyright law is currently future-proof taking into consideration digital library developments on the one hand and copyright modernisation efforts on the other. Following its previous attention for copyright law in the digital networked environment, the European legislator adopted the directive on copyright in the Digital Single Market (hereafter: DSM Directive) in 2019.[8] What does this most recent addition to the EU copyright *acquis*, *i.e.*, the existing body of directives, offer to offset the challenges for digital library activities?[9] Second, in addressing the research and policy agenda for the years to come, the *Article* aims to offer a way of thinking about a library privilege which effectively takes into account the interests involved and proposes the new perspective of a "libratory copyright law", *i.e.* a law that flexibly reconciles and balances right holder, library and user interests. Seeing that copyright law and libraries share goals in the organisation and dissemination of information, the argument is made that their relationship should not be "set in stone", *i.e.* confined to physical walls. Rather, copyright law should facilitate remote access at least to some extent. The historical rationale to delineate the library privilege to some extent should be kept in mind, yet be operationalised in a suitable way, *i.e.* as an alternative to the physical boundaries.

The methodology to concretise this proposal will be as follows. Taking a "law and humanities" approach, this *Article* zooms in on the nexus between EU copyright law and LIS. First, an LIS based assessment framework is set forth as an analytical tool. The aim is to examine libraries through a copyright lens and the other way round. This *Article* elaborates

[6] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

[7] Cf. art. 5(3)(n) of Directive 2001/29 cit.

[8] Cf. VE Breemen, *The Interplay Between Copyright Law and Libraries* cit. 227-229.

[9] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

on the framework I developed in previous research, which consists of three main library characteristics and their traditional and evolving interpretations, notably "institutional organisation", "purpose" and "functions" (section II).[10] Second, the analytical tool is applied to the DSM Directive, since it introduces new specific and mandatory exceptions for the benefit of cultural heritage institutions, including libraries. Analysing the references to "libraries" in this directive against the background of the existing library privilege in the Copyright Directive of 2001, the *Article* maintains that the privilege should reflect the evolving, digital perception of "libraries" to a greater extent (section III). In addition to traditional criteria such as "premises", that have persisted in the DSM Directive to some extent, it will be shown that various criteria can be distilled from the library privilege in force that have strong traditional connotations, but do not exclude a broader reading beforehand, such as the criterion that a library must be "publicly accessible" in order to benefit from an exception. In opening up the interpretation of existing terminology lies space for teasing out a number of principles towards a future-proof library privilege in EU copyright law with a scope that fits the modernisation efforts of the EU Commission (section IV).

II. Digital library developments: institutional organisation, purpose and functions

From a historical perspective, libraries have always reflected the societies they are part of, adjusting to societal and technological developments and advancing the functions required at a given time.[11] Arguably, therefore, the same goes for the digital information society, where libraries are operating as hybrids, *i.e*. in both the physical and digital environment.[12] The library's societal function and close connection to human rights – such as free speech and the right to participate in cultural life – are among the justifications for a privileged position under copyright law, that is, certain library activities are exempted from prior right holder permission.[13] Preceding the legal analysis, this section therefore outlines the main library characteristics which surface in LIS literature. I will summarise the characteristics as "institutional organisation", "purpose" and "functions", and place them on the spectrum from traditional to evolving.

First, "institutional organisation" denotes how "the library" operates – conventionally as a fixed place with a centrally located physical infrastructure and organised collections managed by library staff for local users. In other words, from a traditional perspective, this characteristic ties in with the perception of libraries as buildings, as reflected in the dictionary definition cited above. Yet, as we have seen, library operations have

[10] VE Breemen, *The Interplay Between Copyright Law and Libraries* cit. 124-125.

[11] *Ibid*. 553. See among others also JB Edwards, 'Symbolic Possibilities' in JB Edwards and SP Edwards (eds), *Beyond Article 19: Libraries and Social and Cultural Rights* (Library Juice Press 2010) 9-12, 23.

[12] VE Breemen, *The Interplay Between Copyright Law and Libraries* cit. 553.

[13] See the analysis in *ibid*. 131 ff. and 136 ff. and the sources cited there.

developed. On the other extreme of the spectrum, therefore, "institutional organisation" goes beyond the physical stereotype and indicates that location is no longer fixed. While the library's infrastructure still runs in a structured way, the collection has gained a digital component and remote users can now be served as well. As indicated, many libraries currently function in a hybrid fashion to fulfil their societal missions, hence are positioned somewhere in the middle of the spectrum.[14]

Second, "purpose" signifies the missions libraries see for themselves, as often expressed in mission statements.[15] Briefly put, irrespective of type, the mission of libraries concerns providing useful and organised (long-term) access to diverse information and culture, for instance via their collections – a mission which is relevant both in the analogue and in the digital world and contributes to users' self-development.[16] In addition, a number of recurring values underlie the mission of most/libraries, including accessibility, diversity and trustworthiness. In the digital domain, the latter two gain in importance in light of contemporary challenges – such as fake news – in order to ensure meaningful access.[17] Insofar as the mission constitutes a public task, and increasingly a digital public task,[18] this contributes to justifying the library's privileged position from a copyright perspective.

Third, "functions" indicate what libraries do to operationalise their missions in practice. Put differently, libraries perform what I call "organising" functions on the one hand. These include collection development and classification, which facilitate day-to-day functioning behind the scenes. On the other, libraries have "operationalising" functions to effectuate their missions in relation to users. Two common functions in this regard are preservation, which national libraries focus on mostly, and providing various forms of access, such as consultation and lending possibilities as offered by public libraries.[19] All functions currently have digital dimensions. As already hinted at in the introduction and elaborated in the next section, the physical side of library practices is less likely to encounter copyright implications than the digital dimension.

In sum, libraries nowadays have different manifestations. Their main characteristics of "institutional organisation", "purpose" and "functions" no longer have a physical component only, but entered the digital domain. Either way, libraries can still be regarded as established structures in society: not the designation of an entity as "library" is decisive, but its systematic way of functioning. This *Article* argues that a privileged position is still, or maybe

[14] VE Breemen, *The Interplay Between Copyright Law and Libraries* cit. 120-121.

[15] Cf. International Federation of Library Associations and Institutions / United Nations Educational, Scientific and Cultural Organization, Public Library Manifesto 1994 and IFLA/Unesco Manifesto for Digital Libraries, *Bridging the Digital Divide: Making the World's Cultural and Scientific Heritage Accessible to All* www.ifla.org.

[16] VE Breemen, *The Interplay Between Copyright Law and Libraries* cit. 70 ff., 121-122.

[17] *Ibid*. 101 ff., 106 ff.

[18] Cf. Kamerstukken II 2013/14, 33 846, no. 3, Explanatory Memorandum Wet stelsel openbare bibliotheekvoorzieningen, 10 ff.

[19] VE Breemen, *The Interplay Between Copyright Law and Libraries* cit. 84 ff., 122.

especially, justified in the digital domain to safeguard values such as trustworthiness and diversity. Yet, does EU copyright law sufficiently reflect the digital reality of library functioning? The three main characteristics of libraries are taken to the next section as a tool to analyse the DSM Directive and place it on the spectrum of traditional-evolving.

III. Assessment: digital libraries under the modernised DSM directive: is EU copyright law currently future-proof?

Like libraries, copyright law is continuously evolving in response to technological developments – including in the library context, such as advancing reprography techniques, and, more recently, digital lending possibilities. Discussions on the library privilege are clearly not new, but have intensified as access to protected content becomes easier and easier, leading to right holder concerns as place-and-time-related restrictions disappear in the digital domain. As digital developments pose both opportunities and concerns, a balance between user and right holder interests must be found.[20]

The DSM Directive fits the line of intensified discussions: adopted in 2019 after years of heated debates, the directive addresses stakeholder interests in the online environment in view of new uses and distribution possibilities of protected works, including across borders.[21] As such, the directive intends to strengthen the position of right holders, but also explicitly aims to facilitate digital education, research and cultural heritage interests by introducing mandatory exceptions for, among others, teaching and preservation. Whereas the directive's recitals confirm that the objectives and principles of EU copyright law are still deemed valid, they must be adapted to the new realities.[22] Still, the question remains whether the digital library concept has been truly considered, and, consequently, whether EU copyright law can be regarded as "future-proof" in this context.

This section applies the previously explained LIS assessment framework to EU copyright law, and more specifically, the DSM Directive: where is this directive's "view" on libraries positioned on the spectrum from traditional to evolving? From a legal perspective, scholars such as Dirk Visser have observed for years that people expect the "library without walls" to enable everyone to read everything remotely, but he warns that copyright law likely raises barriers.[23] As Jane Ginsburg put it in a 1993 special issue on future libraries: "Are literary property rights as we have known them inimical to a networked environment? Or can there be copyright without walls?"[24] Thus, using the analytical tool set forth in the previous section, this section assesses how EU copyright law qualifies "libraries", their purpose and functions

[20] Cf. VE Breemen, *The Interplay Between Copyright Law and Libraries* cit. 16, 129.

[21] Communication COM(2016) 593 final from the Commission of 14 September 2016 Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, 2.

[22] Cf. among others Directive (EU) 2019/790 cit. Recital 13.

[23] D Visser, 'De auteursrechtelijke bibliotheek-exceptie van morgen' (1997) Informatie Professional 25.

[24] JC Ginsburg, 'Copyright Without Walls?: Speculations on Literary Property in the Library of the Future' (1993) Representations. Special Issue: Future Libraries 53.

on the spectrum of traditional-evolving. At the same time, I explore to what extent the DSM Directive offsets any identified shortcomings. Given the goals underlying the European Commission's copyright modernisation efforts, we might expect space for evolving digital library practice, yet, as we will see, traditional implications also persist.

III.1. Institutional organisation

This section investigates how the DSM Directive views the library's institutional organisation – the first identified characteristic. Against the background of the existing library provisions in the EU *acquis*, where is the DSM Directive positioned at the traditional-evolving spectrum? This will be illustrated by highlighting how different elements of "institutional organisation", ranging from brick-and-mortar cliché to library without walls surface in EU copyright law and the DSM Directive in particular.

To assess the legal perception of "institutional organisation", EU copyright's perception of locality – be it physical or less fixed – offers a starting point. As it turns out, "libraries" are often not defined, but simply mentioned or denoted as "public institutions"[25] or, in the DSM Directive, "cultural heritage institutions".[26] Alternatively, in legislative history, libraries have sometimes been brought under the heading of "establishments which are accessible to the public".[27] Arguably, "institution" and "establishment" are generic terms that are not inherently traditional or evolving but rather context dependent. Therefore, the qualification of "publicly accessible" seems to hinge towards the traditional end of the spectrum, *i.e*. designating a fixed place. Nevertheless, online accessibility might also qualify as "publicly accessible", depending on the concrete modalities. Yet, the EU legislator has presumably not intended to go that far, especially given the persistent reference to the library's "premises", upholding a predominantly traditional view on libraries.

Indeed, the Copyright Directive introduced an exception for consulting digital library content (art. 5(3)(n)), but the scope of this exception is limited to the library's "premises". That is, digital materials may only be consulted via "terminals" in the library. Although neither the provision's text, nor the recitals define "premises" and the term is therefore not traditional *per se*, the exception *de facto* excludes virtual premises at distance, since consultation must take place in the library's *building*s. So art. 5(3)(n) Copyright Directive, which will be discussed in more detail below (see section III.3.2.), contains both a "spatial" and a "technical" restriction by confining the scope of permitted consultation to the specific equipment on the library's premises.[28] Even if terminals only provide access within

[25] Directive 2001/29/EC cit. Recital 34.

[26] Directive (EU) 2019/790 cit. among others: Recitals 8, 11, 13-15, 22, 25-33, 35, 37-38, 40-41, 43-44, 53, art. 2(3).

[27] Communication COM(90) 586 final of 24 January 1991, Proposal for a Council Directive on rental right, lending right, and on certain rights related to copyright, Recitals 10, 11, art. 2(1)(b).

[28] J-P Triaille and others, *Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (the "Infosoc Directive")* (European Union 2013) 311.

the physical establishment, the notion of "terminals" in my view inherently connects the library's physical and digital infrastructures, moving the perception of the library's locality towards the evolving end of the spectrum but not entirely meeting it.

Notably, this connection also appears in the DSM Directive: references to "premises" are retained in a different yet related context: the exception for teaching purposes in art. 5, the mandatory exception for "use of works and other subject matter in digital and cross-border teaching activities". Art. 5 DSM Directive benefits activities that take place under the responsibility of an "educational establishment", *i.e*. "on its premises" via digital tools in the classroom, such as electronic whiteboards; or "at other venues", so "outside the premises of educational establishments, for example in a [...] library".[29] In addition to the use of digital means in the classroom or at other venues, the exception covers at distance uses, provided that these take place "through a secure electronic environment accessible only by the educational establishment's pupils or students and teaching staff".[30] This construction is something to keep in mind when designing the library privilege's future principles. For now, art. 5 seems to recognise the hybrid nature of libraries and their use of digital tools, yet the exception does not extend to fully virtual libraries.

It must be admitted that the EU legislator has explicitly acknowledged the library's "online presence" since at least 2005.[31] Still, apart from the specific context of orphan works – *i.e*., works of which the right holder is unknown or cannot be found – this has not yet found expression in a general copyright directive.[32] In its consultation on the review of the EU copyright rules (2013), the European Commission addressed "off-premises access to the library collections".[33] Two years later, the European Parliament found that library access "through online platforms" and through "the internet or the libraries' networks" should be promoted.[34] However, the European Commission's proposed DSM Directive (2016) did not go into this. As explained, nor does the final text (2019), confirming limited factual recognition of the library's online operations. In sum, therefore, the notion of "premises" mostly evokes a traditional picture of libraries, and the connection with

[29] Directive (EU) 2019/790 cit. Recitals 20 and 22.

[30] *Ibid*. art. 5(1)(a).

[31] Communication COM(2005) 465 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 30 September 2005, "i2010: Digital Libraries", 4. This has been reiterated in 2015: European Parliament Resolution of 9 July 2015 on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society 2014/2256(INI), paras 39, 53.

[32] Under strict conditions, online access is under strict conditions only possible for orphan works; see Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works.

[33] European Commission, Public Consultation on the review of the EU copyright rules of 5 December 2013, 20 ff.

[34] European Parliament Resolution of 9 July 2015 cit. paras 39, 53.

their digital infrastructure has been observed rather than operationalised at the EU level. Can the same be said for the library's evolving collections?

Second clues to search for EU copyright's view on "institutional organisation" indeed regard the collection. The notion of "collection" is as such not indicative for a traditional or evolving copyright view on libraries. Rather, the meaning of "collection" is a matter of context and interpretation. Whereas copyright scholars observe that "the word 'library' is not to be etymologically interpreted as a collection of books",[35] the copyright legislator has at various occasions noted the diversifying character of library collections – both regarding format and content. For instance, under art. 5(3)(n) Copyright Directive, libraries may make available works "which are contained in their collections" via terminals, which includes both born-digital collections and physical works which have been digitised.[36] Still, EU copyright law in this sense seems mainly tailored to physical libraries serving local users. The specific Orphan Works Directive referred to above goes a step further, explicitly allowing online access to orphan works contained in library "collections, including digital collections".[37] This should serve the overall aim of the orphan works regime to create "European-wide access to a comprehensive world class digital library so that every citizen can access the consolidated EU library collections from a computing device anywhere in the EU",[38] so including remote, online collections confirming mostly the evolving end of the spectrum. Both the diverse and potentially digital character of the collections are confirmed in the DSM Directive, which places libraries under the heading of "cultural heritage institutions" "regardless of the type of works" in their collections, while the "variety of works" in "different manifestations" is noted, from physical unique exemplars to works in digital format.[39]

Clearly, at various occasions, EU copyright law refers to physical and digital library collections. For the scope of the library privilege, these references constitute a delineation criterion. That is, for library activities to be permitted under copyright law, works from the "collection" must be involved. In this sense, the collection functions as a natural boundary to the scope of an exception, similar to "premises". The implications of the recognition of collections in multiple formats are further assessed with the functional analysis (see section III.3 below).

All things considered, various aspects of the library's institutional organisation surface in EU copyright law, regarding both traditional and evolving manifestations. As a feature of EU copyright law, traditional interpretations can often be traced back to delineation choices. Yet, apart from the reference to "premises", other concepts such as

[35] S Nérisson, 'The Rental and Lending Rights Directive' in I Stamatoudi and P Torremans (eds), *EU Copyright Law: A Commentary* (Edward Elgar 2014) 149, 164; cf. also M Walter and S Von Lewinski (eds), *European Copyright Law: A Commentary* (Oxford University Press 2010) 1036.

[36] As later confirmed in case C-117/13 *Technische Universität Darmstadt/Eugen Ulmer KG* ECLI:EU:C:2014:2196.

[37] Directive 2012/28/EU cit. Recital 20 and arts 1(2)(a) and 6(1).

[38] Commission Staff Working Paper SEC(2011) 615 final from the European Commission of 24 May 2011, Impact Assessment on the Cross-Border Online Access to Orphan Works, 14-15.

[39] Directive (EU) 2019/790 cit. Recitals 13 and 37.

"institution" or "collection" can potentially be understood in a broader sense, depending on the wording of the relevant provisions, legislative intent, judicial interpretation and political will. As with all delineation choices, a balance of interests must be taken into account. It is clear that, in order to let the legal and "real" reality meet, an altered legal conceptualisation is needed that does not predominantly rely on physical space. What should count under the heading of "institutional organisation", is a structured mode of functioning, which can be operationalised digitally as well. What boundaries might replace "walls" – offsetting the trend in copyright law to erect "walls wherever possible"[40] – will be elaborated in section IV.

III.2. Purpose

The second library characteristic of the assessment framework is "purpose", which is connected to the library's mission. This section examines whether EU copyright law regards the library's mission in a traditional or more evolving sense. Notably, copyright law and libraries are both concerned with organising and disseminating information, knowledge and culture, and of fostering self-development. Furthermore, both have always responded to technological developments, including digitisation. This section focuses on (the legislative history of) the Copyright Directive and the subsequent modernisation efforts, culminating in the DSM Directive, yet also takes a brief look at other contexts.

The library's disseminative purposes and cultural and educational goals colour the justifications for the library exceptions in EU copyright law from the early 1990s onwards. For instance, the cultural dimension was contrasted with commercial parties in the specific context of lending, providing an argument for a privileged lending regime for libraries.[41] In addition, in its 1995 Green Paper, the European Commission recognised that public libraries have the "aim of ensuring the widest possible dissemination of works and data" and thus "play an important role in society" as a "link in the chain running from author to the public" and in permitting "knowledge to be disseminated".[42] Moreover, the European Commission made the case that libraries should be able to "meet their responsibilities in this new digital environment, with as few restrictions as possible", to keep fulfilling their services in support of users.[43] Subsequently, the proposal for the Copyright Directive (1997) realised that online activities would likely play a "major role in the tasks"

[40] JC Ginsburg, 'Copyright Without Walls?' cit. 59; cf. also J-P Triaille and others, *Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (the "Infosoc Directive")* cit. 307.

[41] Communication COM(90) 586 final cit. 15, 32.

[42] Communication COM(95) 382 final from the Commission of 19 July 1995, Green Paper. Copyright and Related Rights in the Information Society, 58-59.

[43] VE Breemen, *The Interplay Between Copyright Law and Libraries* cit. 246; Communication COM(95) 382 final cit. 58.

of libraries and equivalent institutions.[44] Thus, in the build-up to the Copyright Directive, the EU copyright legislator clearly acknowledged the library's evolving purposes in connecting users to a diverse offering of digital content.

Yet it remains to be seen whether the Copyright Directive as ultimately adopted accommodates these purposes. To some extent, the recitals and provisions show that the library's disseminative purposes and cultural and educational goals are valued. On the one hand, Recital 40 of the Copyright Directive highlights the library's "disseminative purposes". On the other, the European Commission noted increased impact of applying "traditional" exceptions to the "network environment". The need to delineate the scope of the library privilege was thus stressed. Therefore, online dissemination was excluded from the scope of the exceptions and made dependent on licenses to ensure libraries could still act in the online environment.[45] The same goes for the cultural and educational purposes: on the one hand, the legislator aimed to promote, as Recital 14 phrases it, "learning and culture" by both right holder protection and permitting exceptions in the public interest for the purpose of "education and teaching".[46] Both purposes converge in art. 5(3)(n), the exception for making works available on terminals for users' "research and private study", so also in the digital domain. On the other hand, this does again not extend to remote acts of research and private study.

Also after the Copyright Directive's adoption, a number of questions remained. Consequently, the European Commission continuously initiated copyright modernisation efforts, also with an eye to libraries – EU Commissioner Reding even remarked that libraries had to adapt to "challenges in coping with the transition to the digital age", rather than become "the dinosaurs of the future".[47] In its Green Paper of 2008, for instance, the European Commission indicated the public's wish to advance its "knowledge and educational levels by using the Internet", and that wider dissemination of knowledge would contribute to more inclusive and cohesive societies, fostering equal opportunities,[48] which resonates with traditional library values and declares them applicable in the digital domain. And in the process of the most the recent EU copyright reform, the European

[44] Communication COM(97) 628 final from the Commission of 10 December 1997, Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society, 31.

[45] VE Breemen, *The Interplay Between Copyright Law and Libraries* cit. 246; Communication COM(97) 628 final cit. 18.

[46] Directive 2001/29/EC cit. Recital 14. See also R Xalabarder, 'Digital Libraries in the Current Legal and Educational Environment: Towards a Remunerated Compulsory License or Limitation?' in L Bently, U Suthersanen and P Torremans (eds), *Global Copyright: Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace* (Edward Elgar 2010) 230.

[47] V Reding, 'The Role of Libraries in the Information Society' (29 September 2005) CENL Conference (on file with the author).

[48] Communication COM(2008) 466/3 from the European Commission of 16 July 2008, Green Paper on Copyright in the Knowledge Economy, 4.

Parliament underlined that the promotion of "wide-ranging access to cultural heritage", also online, justified the strengthening of the library privilege.[49] The European Parliament thus valued the "importance of libraries for access to knowledge", including digitally.[50] In this view, copyright law should allow libraries to fulfil their purposes in an effective and up-to-date manner. The attention for the library's evolving purpose recurs in the discussion of the actual legal space offered by the new provisions in the DSM Directive, featuring in the next section.

Notably, the DSM Directive pays attention to long-term access as well. In other words, the library's preservation purposes are explicitly endorsed. Whereas the Copyright Directive is silent on general preservation,[51] the DSM Directive elaborately describes the role cultural heritage institutions, including libraries, currently play in preserving their collections for future generations. While the enabling role of digital technologies is noted, these technologies raise challenges as well. In this sense, evolving preservation practices constitute a justification for an updated legal regime: to prevent works from becoming technologically obsolete, the use of appropriate preservation technologies should be allowed. Furthermore, the sharing of means of preservation between libraries should be facilitated, also across borders.[52]

Despite this *Article*'s focus on the Copyright Directive as a backdrop for the DSM Directive, the specific Orphan Works Directive is noteworthy, since it features the various elements of the library's purpose as well. The Orphan Works Directive stems from both Member States' "cultural promotion objectives" and the promotion of "learning and disseminating culture" for which an exception is introduced to facilitate the digital dimension of these purposes.[53] Hence, these objectives, which reflect library purposes (including long-term access, thus preservation), formed the justification to create a legal framework for facilitating both the digitisation and the dissemination of specific categories of works – orphan works – as part of the library's "public interest mission", which is thus confirmed for the digital environment.[54]

In addition to directives, the (digital counterpart of the) library's purpose has also been highlighted in recent cases. First, in *Darmstadt*, the ECJ called the dissemination of knowledge "the core mission of publicly accessible libraries", serving the public interest of education. The Copyright Directive, to which the ECJ assigns similar aims, should therefore be interpreted in such a manner that this library purpose is safeguarded.[55] Second,

[49] European Parliament Resolution of 9 July 2015 cit. para. 39.

[50] *Ibid*. para. 53.

[51] Other than exempting the preservation of ephemeral recordings of works made by broadcasting organisations in art. 5(2)(d) of Directive 2001/29/EC cit.

[52] Directive (EU) 2019/790 cit. Recitals 25-28.

[53] Directive 2012/28/EU cit. Recitals 18, 20.

[54] *Ibid*. Recitals 1, 20.

[55] *Technische Universität Darmstadt/Eugen Ulmer KG* cit. paras 27-28.

in *Vereniging Openbare Bibliotheken/Stichting Leenrecht*, the ECJ reiterated the AG's argument that libraries have fulfilled "cultural dissemination" purposes since time immemorial, something they should, in his view, be able to continue in the advancing digital realities.[56] So, the ECJ has confirmed the library's purposes towards the evolving end of the spectrum and used it to carve out actual legal space as discussed in the next section.

To conclude, one promising feature of EU copyright law is that it has repeatedly recognised the library's evolving purpose to a considerable degree, contributing to a rethink of the role of libraries. In this sense, the library's purpose supports enabling copyright view on libraries. The question remains, however, whether this recognition of purpose has been truly translated into the wording and scope of the relevant directives in force.

III.3. Functions

The third part of the assessment analyses to what extent the EU *acquis* facilitates the acts involved in the library's main functions – preservation and access. What conditions govern their permitted scope? How is author protection balanced with "universal, unrestricted access to culture"? According to Advocate General Szpunar, the reconciliation of rights is copyright law's "chief dilemma", as reflected in art. 27 of the Universal Declaration of Human Rights.[57] This provision covers the right to participate in cultural life on the one hand and the right to the protection of the moral and material author interests on the other. Legislators strive for a balance by introducing exceptions to copyright, such as the library privilege, the scope of which has been subject to debate in the networked digital environment.

Indeed, the European Commission's Green Paper of 2008 set out to stimulate "debate on how knowledge for research, science and education can best be disseminated in the online environment".[58] Though library exceptions were considered of utmost relevance for the dissemination of knowledge, the European Commission identified "two core issues" with regard to libraries: "the production of digital copies of materials held in the libraries' collections" and "the electronic delivery of these copies to users".[59] The European Commission drew attention to the balance that copyright law has traditionally intended to strike, also with regard to library activities.[60] Whereas the Copyright Directive asserts that copyright law should be adapted and supplemented in light of technological developments while maintaining a balance of interests,[61] and the same goes for the DSM

[56] Opinion C-174/15 *Vereniging Openbare Bibliotheken/Stichting Leenrecht* ECLI:EU:C:2016:856 paras 1-3; *Ibid*. para. 50.

[57] Opinion C-470/14 *EGEDA e.a. v. Administración del Estado* ECLI:EU:C:2016:24, opinion of AG Szpunar, paras 1-2.

[58] Communication COM(2008) 466/3 cit. 3.

[59] *Ibid*. 7.

[60] *Ibid*. 4.

[61] Directive 2001/29/EC cit. Recitals 5 and 31.

Directive,[62] the question is how that is reflected in the current library exceptions. Are all interests in the digital reality taken into account in a sufficiently balanced way and are the rationales of the delineation choices still valid?

As will be explained, the EU *acquis* contains not only exceptions for certain forms of access, but, since the DSM Directive, for preservation as well. Apart from legislation, the analysis again includes relevant case law, given the fairly recent move towards a purposive and dynamic interpretation to safeguard the effectiveness of exceptions, notably in the digital domain, away from the principle of strict interpretation.[63]

a) Preservation

The first main library function, preservation, concerns different stages of care for cultural materials and carriers in both analogue and digital format. Until the adoption of the DSM Directive, this function was not regulated by a specific exception in the EU copyright *acquis*. Instead, depending on Member State implementations, libraries could invoke the general art. 5(2)(c) Copyright Directive on "specific acts of reproduction made by publicly accessible libraries". The Dutch legislator, for instance, used art. 5(2)(c) to introduce an exception for three types of preservation activities.[64] By contrast, the DSM Directive now features a specific library exception for (digital) preservation in art. 6. This is a mandatory exception, which meets a number of the issues that art. 5(2)(c) Copyright Directive left open, as discussed below.

First, art. 5(2)(c) Copyright Directive is formulated in a technology neutral way – 'specific acts' does not expressly indicate either traditional or evolving preservation acts – yet the provision does not specify how many copies may be made and when. For digital preservation practices, which inherently involve multiple copies since a work must first be converted in another format or back-up copies are made, the question is whether such additional copies are allowed. And is preventive preservation permitted? For digital works can suddenly become unreadable without visible warnings. Yet, apart from legal uncertainty, which might stifle digitisation efforts, this apparent lack of limitations offers flexibility for preservation practices at the evolving end of the spectrum.

Nevertheless, it is useful that art. 6 DSM Directive now explicitly includes this flexibility: copies may be made "in any format or medium" and "to the extent necessary" for preservation purposes. Admittedly, these open phrases still might raise questions, but digital preservation is now at least covered by a mandatory exception. Preservation being one of the European Commission's areas of "intervention", the envisaged privileged acts

[62] Directive (EU) 2019/790 cit. Recitals 3 and 83.

[63] Cf. European Copyright Society, *Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union. Opinion on The Judgment of the CJEU in Case C201/13 Deckmyn* europeancopyrightsociety.org.

[64] Art. 16n Wet van 23 september 1912 (Auteurswet), Stb. 1912, 308 (hereafter Dutch Copyright Act) wetten.overheid.nl, which has in the meantime been altered due to the implementation of Directive (EU) 2019/790 cit.

should address "technological obsolescence or the degradation of original supports".[65] Therefore, as the recitals clarify, reproductions may be made by any "appropriate preservation tool, means or technology, in the required number and at any point in the life of a work [...]".[66] Some scholars believe that the new provision might even facilitate mass digitisation projects, whereas art. 5(2)(c) Copyright Directive used to be implemented by Member States in a restrictive way.[67] On the contrary, the scope of art. 6 DSM Directive now generously encompasses the evolving variant of preservation, *i.e*. the different stages of digitisation.

A second issue is that art. 5(2)(c) Copyright Directive lacks cross-border effect: as an optional provision, its effect depends on national implementations. Libraries indicate that the resulting limited level of harmonisation might stifle "digitization projects across countries".[68] In line with the goals of the DSM Directive, the mandatory art. 6 should foster "the sharing of means of preservation", "the establishment of cross-border preservation networks" and more efficient use of resources.[69] Notably, art. 6 cannot be set aside contractually, a characteristic which also contributes to legal certainty across borders.[70]

Third, while preservation activities may contribute to the long-term accessibility of content, it should be borne in mind that art. 5(2)(c) Copyright Directive, though enabling preservation copies, does not automatically allow their dissemination as well. In turn, institutional users indicate that digitisation efforts go beyond preservation goals: they want to be able to make the works "more easily searchable or available across digital networks including across research platforms and infrastructures". Hence, in their view, the prevailing interpretation's focus on preservation is "too narrow".[71] Still, art. 5(2)(c) contains an exception to the *reproduction* right, meaning that "online delivery" is outside the scope.[72] This choice stems from delineation rationales due to the "economic impact at stake". According to the European Commission, an exception encompassing "the making

[65] Directive (EU) 2019/790 cit. Recitals 25 and 27.

[66] *Ibid.* Recital 27 DSM Directive.

[67] C Geiger, G Frosio and O Bulayenko, 'Opinion of the CEIPI on the European Commission's Proposal to Reform Copyright Limitations and Exceptions in the European Union' (Centre for International Intellectual Property Studies, Research Paper No. 2017-09) 5, 25; more critically: European Copyright Society, *General Opinion on the EU Copyright Reform Package* europeancopyrightsocietydotorg.files.wordpress.com 3; also, the ECJ's reasoning in *Technische Universität Darmstadt/Eugen Ulmer KG* cit., which allows for digitisation to ensure the use of works via dedicated terminals under the exception of art. 5(3)(n) of Directive 2001/29/EC cit. was limited to individual works and did not extend to the digitisation of entire collections.

[68] See the responses of institutional users to the European Commission's copyright consultation: European Commission Report on the responses to the Public Consultation on the review of the EU copyright rules of July 2014, 40-42 ec.europa.eu.

[69] Directive (EU) 2019/790 cit. Recital 26.

[70] See *ibid.* art. 7(1).

[71] European Commission Report of July 2014 cit. 40.

[72] Cf. Directive 2001/29/EC cit. Recital 40.

available of a work [...] by a library or an equivalent institution from a server to users online" or "making available via a library home page" was not justified at the time.[73]

This issue of (digital) access to preservation copies is however not addressed by the DSM Directive, a gap which might be surprising since the European Commission repeatedly called this a "core issue".[74] Clearly, online access remains one of the thorniest issues in the copyright arena, though progress has been made in specific contexts such as orphan works and, under the DSM Directive, out-of-commerce works (see section III.3 below).

Lastly, it should be noted that, apart from clarifications, art. 6 DSM Directive is narrower in some respects given the conditions it imposes. For instance, art. 6 requires the works to be "permanently" in the institutions' collections, a condition that previously was only implicit. That is, an institution must own or permanently hold the copy, *e.g.* following a transfer of ownership, license agreement or legal deposit obligation.[75] Now, for works that libraries "subscribe to",[76] they are not allowed to make backup copies. Also, the question is how the collection criterion relates to the observed space for cooperation between cultural heritage institutions if works may not be shared. Therefore, the case has been made that the exception should encompass materials that fail to meet this criterion,[77] such as licensed works. Otherwise, the delineation rationale notwithstanding, since cultural materials are increasingly licensed, the new provision will not actually benefit the preservation of all cultural heritage on the evolving side of the spectrum.[78]

In conclusion, EU copyright law enables libraries, under conditions, to digitise their collections. The new, mandatory and specific art. 6 DSM Directive provides an enhanced sense of legal support for evolving preservation practices, since national implementations used to vary greatly in these respects.[79] Shortly after the proposal, first reactions indicated that the flexible exception was satisfying the needs of cultural heritage institutions.[80] That is, with regard to digitisation *sec* – access is another matter.

[73] Communication COM(97) 628 final cit. 31.

[74] VE Breemen, *The Interplay Between Copyright Law and Libraries* cit. 264; Communication COM(2008) 466/3 cit. 7.

[75] Directive (EU) 2019/790 cit. Recital 29.

[76] European Commission report of July 2014 cit. 40.

[77] C Geiger, G Frosio and O Bulayenko, *Opinion of the CEIPI on the European Commission's Proposal to Reform Copyright Limitations and Exceptions in the European Union* cit. 5.

[78] A Aronsson-Storrier, 'Contractual Override and the New Exceptions in the Copyright in the Digital Single Market Proposal' (30 November 2018) IP Kat ipkitten.blogspot.com.

[79] G Westkamp, *Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society* (part II, study commissioned by the European Commission's Internal Market Directorate-General 2007) 22 ff.; J-P Triaille and others, *Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (the "Infosoc Directive")* cit. 272 ff.; see also Directive (EU) 2019/790 cit. Recital 26.

[80] P Keller, 'Copyright Reform: A First Look at the Commission's Plans for Cultural Heritage Institutions' (8 September 2016) Europeana Professional Blog pro.europeana.eu.

b) Access

The second main library function is providing access to materials in various ways. The main question is again to what extent EU copyright law currently facilitates evolving access possibilities. This section focuses on consultation, traditionally via on site reading rooms, but more and more via remote browsing options. Admittedly, the distinction between various forms of access is not always clear as lending modalities *de facto* result in temporary consultation as well. In light of the foregoing, two further remarks are in order: first, whereas consultation of tangible materials is possible due to the exhaustion doctrine,[81] it is immediately clear that the discussion will centre around modern – *i.e.*, digital – forms of consultation. Second, lending as such remains outside the scope of this *Article*, also because I mainly focus on the DSM Directive. Despite the hope that copyright modernisation would include digital lending,[82] this issue was not addressed by the European Commission.[83]

On-the-spot consultation is governed by a specific yet optional exception in art. 5(3)(n) Copyright Directive, which remains in force and already appeared in the discussion on institutional organisation above. This section selects some issues which the current regime poses to evolving forms of access and discusses to what extent the DSM Directive plays a role here.

First, art. 5(3)(n) obviously raises traditional connotations where the exception is confined to consultation via "dedicated terminals on the premises" of the library. This delineation constitutes a traditional feature which has been called "extremely" limited and "too narrow" for user needs and technological possibilities, since in practice, "online access from outside the premises and the use of the user's own (laptop) computer are the norm now, but the exception cannot even enable such an exception in national law".[84] It calls to mind the previous discussion of the prohibition of online delivery of preservation copies to users, based on Recital 40. Here, the delineation is inherent in the provision's substance. Yet, the delineation rationale may be still valid and there is still some interpretative space: for instance, if it is about serving users via a "controllable area", then this should be operationalised in a different way that meets the digital realities.[85] We will return to this argument in the next section.

[81] That is, under EU copyright law, right holders can no longer assert control over the further distribution of exemplars of a work they have put on the market; cf. Directive 2001/29/EC cit. art. 4(2).

[82] In the policy discussions resulting in the Directive (EU) 2019/790 cit., the European Parliament had aimed to legally facilitate digital lending, arguing in favor of strengthening library exceptions in this regard. See European Parliament Resolution of 9 July 2015 cit. para. 39.

[83] Instead, it is the European Court of Justice that has created space for certain forms of digital lending; cf. *Vereniging Openbare Bibliotheken v Stichting Leenrecht* cit.

[84] P Torremans, 'Archiving Exceptions: Where Are We and Where Do We Need to Go?' in E Derclaye (ed.), *Copyright and Cultural Heritage: Preservation and Access to Works in a Digital World* (Edward Elgar 2010) 111, 117-118.

[85] Cf. The national court Landgericht Frankfurt am Main of 16 March 2011 2/6 O 378/10, B. III.2 regarding *Technische Universität Darmstadt/Eugen Ulmer KG* cit.

Before turning to the potential added value of the DSM Directive in this regard, interpretative space for digital library access has been sought in case law prior to its adoption. In the *Darmstadt* case, which centred around the effectiveness of the terminal exception, the ECJ did not go as far as allowing online access, but confirmed that libraries have an "ancillary" right to digitise works in their collections if that is necessary to make them available at terminals. Hence, as an extension of the exception, the step preceding the making available of works is now explicitly allowed as a "specific act of reproduction" in conjunction with art. 5(2)(c) Copyright Directive.[86] Although the exception is optional and the effectiveness in practice still depends on member state implementations,[87] the ruling confirms that art. 5(3)(n) goes beyond traditional library functioning, yet does not entirely reach the evolving end of the spectrum as remote access is still off limits.

The *Darmstadt* case is also noteworthy with regard to a second issue raised by art. 5(3)(n): the "subscription" discussion touched on above. One of the exception's conditions is that the works may not be "subject to purchase or licensing terms". The AG Jääskinen argued that the exception's effectiveness and contribution to "promoting learning and culture" would be undermined if a library were prevented from relying on the exception. Therefore, a "simple offer" by a publisher, which might lead to "unilateral decisions", would not suffice.[88] While the ECJ indeed underlined that an agreement must actually have been concluded,[89] the question remains how this reasoning relates to the "collection" criterion in art. 5(3)(n). Especially for born digital works without a physical counterpart, it makes libraries and their users dependent on right holders' willingness to let libraries acquire such works or the conditions imposed with subscription. For analogue works, on the other hand, libraries do not depend on licensing terms, hence can digitise themselves. Whereas a balance between protection and the accessibility of works should be kept in mind, it should be prevented that the terminal exception loses its effectiveness in the digital domain.[90]

The explanatory memorandum to the DSM Directive, in turn, acknowledges that libraries want to offer online access, but the directive's actual text does not translate this into a general exception. Two specific contexts are however noteworthy. First, in addition to the separate Orphan Works Directive (2012), which enables online access to potentially copyrighted works with an unknown right holder under strict conditions, the DSM

[86] *Technische Universität Darmstadt/Eugen Ulmer KG* cit. paras 43-47.

[87] Cf. E Rosati, 'CJEU Says that Member States May Grant Public Libraries the Right to Digitize Works in Their Collections' (2015) Journal of Intellectual Property Law & Practice 6.

[88] Opinion C-117/13 *Technische Universität Darmstadt/Eugen Ulmer KG* [*Eugene Ulmer*] ECLI:EU:C:2014:1795, opinion of AG Jääskinen, para. 24.

[89] *Technische Universität Darmstadt/Eugen Ulmer KG* cit. paras 26, 30.

[90] Cf. L Guibault, G Westkamp and R Rieber-Mohn, *Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society* (The study was commissioned by the European Commission's Internal Market DirectorateGeneral, and conducted by Institute for Information 2007) 56-57.

Directive now regulates access to out-of-commerce works. Complementing the Copyright Directive, art. 8 DSM Directive prescribes a licensing mechanism with fall-back exception for wider access for European citizens to this cultural heritage.[91] As a result, the use of out-of-commerce work is in first instance governed by a licensing system following the conditions of art. 8(1). Only when these conditions are not met, Member States must introduce an exception or limitation, following art. 8(2) in conjunction with art. 8(3), which would allow libraries to make available out-of-commerce works – again, under conditions.[92] This regime, meant to ensure "wider access to content", also in a cross-border fashion,[93] includes evolving forms of access.

Second, the new teaching exception in art. 5 DSM Directive should be mentioned again, concerning making accessible works under the responsibility of teaching establishments. Libraries are however still mentioned, be it regarding traditional access, since one of the permitted activities is making available works on library premises for teaching purposes. The teaching exception goes on to privilege evolving forms of access, ranging from digital means in the classroom to online uses via secured environments for authenticated users. In this sense, the DSM Directive creates space for access at the evolving end of the spectrum, but outside the library context as such.

All in all, access versus protection discussions in EU copyright law are not new, but have intensified in the digital domain. This section aimed to assess whether the EU legislator's recognition of the library's evolving disseminative purposes has been expressed in the actual library privilege, though it was shown that clearly traditional features still manifest themselves: physical walls as a boundary. Accordingly, it was found that online access to library materials is not generously accommodated by the library privilege in force, though recent cases create space and specific contexts offer inspiration for a way forward. Proposals for solutions are briefly considered in the next section.

III.4. CONCLUSION

Against the background of the digital networked information environment, this *Article* set out to explore the features of copyright law and libraries on their own, alongside the relationship between both, to examine how future-proof EU copyright law currently taking into consideration digital library developments on the one hand and copyright modernisation efforts on the other. To that end, the library characteristics of "institutional organisation", "purpose" and "functions" were assessed to bring LIS language and narrative into the copyright analysis. So, an LIS lens was used to measure where EU copyright

[91] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC 2016; see critically on license-based versus exception-based approaches: P Keller, 'Copyright Reform' cit.

[92] See on this: SJ van Gompel, "Artikelen 8 tot en met 11 DSM-richtlijn: niet of niet meer in de handel zijnde werken en andere materialen' (2020) Tijdschrift voor Auteurs-, Media- en Informatierecht 3.

[93] Communication COM(2016) 593 final cit. 26.

law – and the DSM Directive more specifically – is positioned on the spectrum between traditional and evolving in a digital sense. We can conclude that libraries and copyright law are both evolving, so their relationship should (and need) not be set in stone, but evolve as well.

IV. Outlook: towards a future-proof library privilege in EU copyright law

For the research and policy agenda for the years to come, the previous discussion on a future-proof library privilege means that EU copyright law should not hold on to traditional views on "libraries" for the sake of convenience, out of sheer habit or due to ignorance. As will be explained in more detail below, certain traditional features persist, but interpretative space offers opportunities to more generally encompass the evolving, digital manifestation of libraries. This way, the principles of a future-proof library privilege move towards a "libratory copyright law", which flexibly balances the various interests involved. These interests include right holder interests in protection and compensation; library and user interests of (digital) access to information on equitable terms; and the interest of society at large in effectuating fundamental rights pertaining to the core values of freedom of expression, education and cultural participation in the digital domain. As copyright law and libraries share goals in the organisation and dissemination of information, the case can be made that copyright law should facilitate the library's task in that regard at least to some extent, also digitally. This way, as an overarching principle, the library privilege functions as a minimum safeguard.

The remainder of this section briefly elaborates starting points for a future-proof library privilege, again connected to the library characteristics, so as to advance (discussion on) the principles that should underlie such a library privilege. A central presumption is that rationales behind the current library privilege that are still deemed valid should be operationalised in an evolving manner. An example is the delineation rationale, which should no longer focus on physicality. This way, copyright's inherent tension, *i.e.* between protection and access, will be better served in the digital reality. For the three characteristics, ensuing principles, that deserve further research, could take the following directions:

IV.1. Institutional organisation

Whereas EU copyright law does not define "libraries", a traditional view emerges where libraries are characterised by their premises, but there is space to move this view to the evolving end of the spectrum. Whereas such notions do not reflect the entanglement of libraries from a fixed place, this is merely a matter of (legislative) choice to determine the scope of the library privilege's beneficiaries. As the delineation rationale is still justified, we should therefore, as a new feature of a digital and future-proof copyright law, consider extending the interpretation of terms that by themselves are not (or need not be) traditional or evolving per se – think of persistent notions such as "institution", "establishment"

and "publicly accessible". Legislators should clarify and update their prevailing interpretations so as to allow the extension of the 'library' notion in copyright law.

Determining the interpretative possibilities requires additional research. For instance, in addition to opening up existing terminology in the library privilege, copyright law could strive to incorporate LIS terminology in order to encompass a broader view of libraries as integrated physical and digital entities for sure, resulting in an enabling copyright law. The Dutch Copyright Act offers an example with the notion of "public library facilities", which stems from the modernised Dutch Library Act (2014) and indeed encompasses the library's dual nature.[94] The notion is currently only used in the specific exemption from payment for lending materials transposed for the visually impaired, but the case could be made that LIS terminology could help shape a future-proof library privilege.[95]

Put differently, given the benefits of flexibility, we could even go as far as stating that copyright law need not define, but characterise "libraries", with their features depending on the context of the privilege, such as the non-commercial objective pursued, meaning that their interpretation may differ according to an exception's purpose. In any case, any interpretation of the term "libraries" should not fix them in the past, but should acknowledge their evolving characteristics, for instance pertaining to locality and collection. So, the focus should not be on physical walls as a natural boundary, but on the structured way of operating and gained authority in the digital domain.

The demarcation could in turn be based on serving a controllable circle of users via the library's closed networked infrastructure, which ties in with the discussion of "purpose" and "functions" below, where the spatial and technical elements will recur and it will become clear that the DSM Directive already offers inspiration in this regard. Another option would be to use the library's "collection" as a delineation criterion for the scope of the library privilege, since we have seen that the collection currently consists of both analogue and digital materials. These collections should benefit both libraries' own users and remote users.

In sum, as a future-proof feature of copyright law, the delineation of the beneficiaries of the privilege should thus be connected to the presence of an organised location or infrastructure to maintain content, possibly a digital environment, and the ability to serve a controllable circle of users, including remotely. It means that, as a result of a widened spatial perception, innovative actors that "function as libraries" in light of their purpose and constitute an established structure in society might also be covered. It is the characteristic of "purpose" that this section now turns to.

IV.2. Purpose

The analyses in section III showed that EU copyright law, including the process leading to the adoption of the DSM Directive in 2019, has definitely recognised the library's

[94] See art. 27 Dutch Library Act; see also Kamerstukken II 2013/14, 33 846, no. 3, Explanatory Memorandum Wet stelsel openbare bibliotheekvoorzieningen cit. 10.

[95] VE Breemen, *The Interplay Between Copyright Law and Libraries* cit. 574.

disseminative, cultural and educational purposes, also digitally. What is more, these purposes form fundamental rationales or core values behind the library exceptions. Therefore, building on the justification function of 'purpose', purpose could be established as an alternative delineation criterion in itself rather than the focus on physical boundaries. How could such a new feature of EU copyright law, as a fundamental and evolving alternative to the prevailing factor of locality, be operationalised?

One option is to let the purpose of an actor determine its privileged position under copyright law, rather than its premises. In other words, beneficiaries of the library privilege should be defined by their public service – *i.e.*, non-commercial – purpose, functioning as established structures in (the digital) society, in line with the "functional extension of the library concept" as proposed in legal literature, which would centre around the "special purposes" as the decisive criterion for qualifying as a "library" instead of its concrete manifestation.[96] Despite the potential lower foreseeability, the advantage of such a task-oriented description of permitted activities would be that it does not hinge on certain technologies, hence is less likely to become outdated.[97] Though perhaps a bit abstract, this view can be a starting point for copyright legislators to express this stance more explicitly in the library privilege by allowing acts insofar these are necessary for the effectuation of the library mission.[98] This way, this feature is not only embraced by the ECJ, but also by the legislator. Some examples will be provided below with the discussion of functions.

In conclusion, to do justice to the evolving purpose of libraries, their digital side should not only be *recognised* in legislative drafting histories or case law, but should be actually translated to (the scope of) the library privilege for the operationalising functions to offer both legal space and legal certainty. This way, establishing "purpose" as a general feature of EU copyright law contributes to creating space for the evolving library concept, hence an enabling copyright regime and effective exceptions. As such, the aim is not to protect the institutions by themselves, but their societal missions insofar these remain valid in the digital society.

IV.3. Functions

Lastly, the analysis of the EU copyright regime for the library's main functions of preservation and access proved not altogether unpromising with regard to changing traditional features in favour of the library's evolving, digital functions.

First, preservation now has an explicit basis in the mandatory art. 6 DSM Directive, which enables copies to be made "in any format or medium" and "to the extent

[96] Cf. M Duppelfeld, *Das Urheberrecht der Bibliotheken im Informationszeitalter* (Mohr Siebeck 2014) 20.

[97] Cf. T Dreier and others, 'Museen, Bibliotheken und Archive in der Europäischen Union' (2012) Zeitschrift für Urheber und Medienrecht 273, 281.

[98] See in this sense also: J-P Triaille and others, *Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (the "Infosoc Directive")* cit. 321.

necessary" for preservation purposes. Digital preservation is thus covered, although more research on the exception's value in practice is needed. Still, the chosen construction seems to fit the purpose-oriented direction proposed in the previous section and is moreover an example of a flexible and enabling copyright regime in light of evolving library practice, which might even be extended to the library's other function – access.

Second, access being the more pressing issue, another solution to accommodate evolving library practice apart from adopting entirely new provisions lies in utilising interpretative space. Although this *Article* did not focus on lending, inspiration can be drawn from the *Vereniging Openbare Bibliotheken/Stichting Leenrecht* ruling mentioned previously. This ruling extended the conventional concept of lending to encompass certain forms of the digital counterpart, "e-lending", enabling remote users to check out the books, confirming evolving lending practices. Further research should examine how this stance of facilitating a dynamic interpretation of both copyright conditions and library functions can take root regarding other forms of access as well. Admittedly, the ruling only covers e-lending models with "similar characteristics" to traditional lending, such as a 'one copy one user model' which has inherent (technical) limitations as well. Despite the *subjective* differences between e-books and traditional books, for instance due to their different format, the AG regards e-lending as "modern equivalent" of the lending of traditional books for purposes of the (optional) regime established by the Rental and Lending Rights Directive.[99] Given the *objective* similarity that, in both cases, users want to acquaint themselves "with the content of that book, without keeping a copy of it at home", their legal regulation should in his view be aligned.[100] The ECJ followed this view.[101] Hence, the perceived functional equivalence from a foundational perspective has resulted in an interpretation which must guarantee the effectiveness of the law in an evolving context, despite potential criticisms of artificial scarcity in light of digital possibilities and reconciliation with existing practice. A balance between possibilities and concerns is therefore needed.[102]

[99] *Vereniging Openbare Bibliotheken/Stichting Leenrecht* cit. para. 30; Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version).

[100] *Vereniging Openbare Bibliotheken/Stichting Leenrecht* cit. para. 31.

[101] *Ibid*. paras 51-54.

[102] VE Breemen, *The Interplay Between Copyright Law and Libraries* cit. 578; see on the discussion of functional equivalence of the supply of books on a material medium and e-books from a technological and economic perspective, against the background of interpretative questions regarding another directive, namely Directive 2001/29/EC cit. of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society: case C-263/18 *Nederlands Uitgeversverbond v Tom Kabinet* ECLI:EU:C:2019:1111. See on this case among others: C Sganga, 'Digital Exhaustion After Tom Kabinet: A Nonexhausted Debate' in T Synodinou and others (eds), *EU Internet Law in the Digital Single Market* (Springer 2021); P Mezei, 'The Doctrine of Exhaustion in Limbo: Critical Remarks on the CJEU's Tom Kabinet Ruling' (2020) Jagiellonian University Intellectual Property Law Review 130-153.

For the context of consultation, the notion of "premises" turned out to be interpreted as accommodating digital access via terminals on site, so this is currently still tied to a fixed location, hence insufficient to cover remote access. Notably, technical possibilities to open up the interpretation of "premises" towards the evolving end of the spectrum are present, while taking note of the delineation rationale: indeed, in conjunction with the library's evolving institutional organisation, we can understand a closed, digital environment as part of the library's premises, provided that the spatial restriction of "terminals" is subsequently abandoned.[103] This would be a step towards the library privilege as a minimum safeguard as libraries would be able to act in the digital networked environment under an exception at least to some extent, via their virtual premises, while the delineation rationale would be honoured. This is something the legislator should explicitly acknowledge. The teaching exception of art. 6 DSM Directive offers interesting parallels in moving forward to facilitate digital access via a comparable construction, serving a closed circle of users via a controllable environment.

Inspiration to operationalise the minimum safeguard approach could also be taken from the regime for out-of-commerce works in art. 8 DSM Directive, but then the other way round: instead of a license with fall-back exception, the exception could be put first and if libraries wanted to go beyond the acts permitted under the exception, the provision should prescribe licenses allowing for access under fair conditions, both part of a statutory solution.

IV.4. Conclusion

All in all, this *Article* critically examined the position of digital libraries under EU Copyright Law. To that end, the *Article* analysed the scope of the existing and modernised library privilege in the EU *acquis*, and more specifically the modernised DSM Directive. Legal (interpretative) space and shortcomings were identified regarding the traditional and evolving manifestation of three main library characteristics, *i.e*. "institutional organisation", "purpose" and "functions". As a result, the *Article* has established various avenues worth pursuing by the EU legislator and ECJ, as well as for further research, to move away from the library privilege's focus on physicality. The aim is to create an enabling copyright law for the evolving side of library functioning, *i.e*. a "libratory copyright law" built on features such as flexibility and interpretative space which at the same time ensures a certain delineation. In future research, it might be worth assessing more in-depth what space national legislators already find in the EU framework to flexibly balance the interests involved, or how legislators elsewhere, for instance in the US, deal with updating copyright law's library privilege to make it future-proof in light of ongoing digitisation.

[103] Cf. J-P Triaille and others, *Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (the "Infosoc Directive")* cit. 317 ff.

ARTICLES

FUTURE-PROOF REGULATION AND ENFORCEMENT FOR THE DIGITALISED AGE

Edited by Gavin Robinson, Sybe de Vries *and* Bram Duivenvoorde

TARGETED RETENTION OF COMMUNICATIONS METADATA: FUTURE-PROOFING THE FIGHT AGAINST SERIOUS CRIME IN EUROPE?

GAVIN ROBINSON*

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ABSTRACT: In many countries worldwide, everyone's communications metadata is pre-emptively retained by telecoms and internet service providers for possible later use by the relevant public authorities to combat crime and safeguard national security. Within the European Union, however, for nearly a decade the Court of Justice of the European Union (CJEU) has consistently rejected the pre-emptive "general and indiscriminate" retention of communications metadata for the purpose of combatting serious crime – although its position on safeguarding national security is more nuanced. For crime, the CJEU continues to insist that any retention of traffic and location data be done on a "targeted" basis, leaving the details of any such scheme to the relevant legislator (EU or national). This *Article* discusses the prospect of a return to EU-level data retention from a future-proofing perspective. It does so by summarising the most relevant recent CJEU case law, noting its internal consistency but arguing that its future resilience should not be taken for granted, particularly with the ePrivacy Regulation on the horizon. It offers a first analysis of efforts to implement "targeted" retention in national legal systems. Should any fresh EU legislative proposal on data retention emerge, it is argued that in addition to fully complying with the relevant CJEU standards, it will also be essential

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to gauge the desirability of such a reform in light of technological shifts in the information labelled "metadata", and the intertwined condition that any such harmonising measure must be demonstrably effective over time.

KEYWORDS: communications data retention – future-proofing – CJEU case law – crime prevention – data protection – privacy.

I. INTRODUCTION: DATA RETENTION AND FUTURE-PROOFING

Communications metadata reveals when and where you go online, whom you call, message or email, for how long, how often, as well as when and where you happen to go "in real life". In many countries worldwide, everyone's metadata is pre-emptively retained by telecoms and internet service providers for possible later use by the relevant public authorities to combat crime and safeguard national security.

In its seminal 2014 judgment in *Digital Rights Ireland*, the CJEU noted that metadata is information which, "taken as a whole, may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained".[1] In the follow-up judgment in *Tele2*, the Court observed that it may provide a means "of establishing a profile of the individuals concerned, information that is no less sensitive, having regard to the right to privacy, than the actual content of communications".[2] Memorably, even hauntingly, the Court opined that where users are not informed that "their" retained data has been accessed by the authorities, this is "likely to generate in the minds of the persons concerned the feeling that their private lives are the subject of constant surveillance".[3]

As such, blanket metadata retention goes beyond that which is strictly necessary to combat even the most serious crime and violates the rights to respect for private life (art. 7) and data protection (art. 8) enshrined in the Charter of Fundamental Rights of the European Union. No degree of substantive trammelling and procedural tightening could repair it; blanket retention will be unlawful even when a national retention law:

a) restricts access to cases of serious crime

b) strictly limits means of communication affected, categories of data retained and retention period(s),

c) requires prior review of access requests by a court or an independent administrative authority (except in urgent cases),

d) ensures solid data security and storage within the EU, and provides for notification of the person whose retained data has been accessed.

The near-decade since *Digital Rights Ireland* was decided has brought clusters of high-profile terrorist attacks, growing cybersecurity concerns, the unfurling of the GDPR in the

[1] Joined cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others* ECLI:EU:C:2014:238 para. 37.

[2] Joined cases C-203/15 and C-698-15 *Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others* ECLI:EU:C:2016:970 para. 99.

[3] *Digital Rights Ireland* cit. para. 37; *Tele2* cit. para. 100.

European legal order, and multiple scandals detailing corruption and abuse of power within law enforcement authorities in EU Member States. As will be seen in II. below, far from rowing back its stance on data retention for the purpose of combatting crime, in the intervening years the judges in Luxembourg have doubled down on their position, as national regime after national regime has been deemed incompatible with the Charter on the grounds that it entails "general and indiscriminate" retention. At the same time, the Court has gone so far as to erect a "hierarchy of public interest objectives" according to which it has confirmed (through gritted teeth) that blanket data retention for the superior purpose of safeguarding *national security* may exceptionally be tolerated.

As the Court's complex jurisprudence expands and is refined through multiple waves of proceedings, it continues to prise open new boxes of questions and challenges affecting actors as far apart as criminal judges and prospective regulators. In Europe, several national governments are now scrambling to piece together domestic data retention schemes that might avoid (further) censure from the CJEU whilst sating the consistent demands of law enforcement for a workable solution to secure the supply of data which is purportedly the lifeblood of today's criminal investigations. Meanwhile, some national criminal justice systems are still bridling at the perceived audacity of the Court and refusing to fully heed its guidance, whilst some national governments seem to favour triggering a direct clash with the case law – extending to challenging the primacy of EU law itself. Potentially at stake, therefore: nothing short of the credibility of the CJEU as a supranational authority on fundamental rights protection.

Against that turbulent backdrop, this *Article* has two goals. The first is to provide, in II., an up-to-date summary and critical discussion of the main legal complexities and contentions running through the now-mature "data retention debate" in the EU. As the first main part of the *Article* aims to show, that maturity need not bring a staleness or stasis, despite a recurrent framing of the debate – especially in mainstream media coverage but also in EU policy circles and academic literature – within the reductive paradigm of a "privacy v security" zero-sum game (more privacy necessarily equals less security, and vice versa). Indeed, the legal tensions generated by the data retention question continue to evolve, whether in the technical (and increasingly, technological) details of the interplay in CJEU case law between fundamental rights standards and national security or crime prevention imperatives, in the friction between shifting visions of national prerogatives and EU competences, or in intensifying dialogue between European and national courts.[4]

Having thus set the scene in II. with a snapshot of the EU data retention debate in 2023, in keeping with the future-proofing theme of this special issue the *Article*'s second goal is to look forward: ultimately, to the prospect of "data retention 2.0" – a fresh

[4] J Podkowik, R Rybski and M Zubik, 'Judicial Dialogue on Data Retention Laws: A Breakthrough for European Constitutional Courts?' (2022) ICON 1597.

proposal for EU legislation on the matter.[5] Will we see such a proposal soon? In III., this *Article* seeks neither to predict future policy developments nor – in the limited space available here – prescribe specific criteria for future-proof legislation on data retention (whether at EU or any national level).[6] It also eschews assuming a normative stance as to whether a fresh EU data retention law is on the whole desirable. Rather, it aims to identify priorities for the policy and research agenda for the years ahead, which, it is posited, double as essential prerequisites for any re-introduction of an EU-level data retention mandate that is to be sufficiently resilient, adaptable, durable and legitimate.

For Ranchordás and van 't Schip, "a future-proof approach should be embraced with caution and should primarily entail that legislation takes into account the needs of future generations, remains adaptable and does not entrench politically sensitive policy programmes or institutions".[7] The same authors examine the potential of two instruments for the implementation of their proposed future-proof approach: "experimental" legislation and future-proof impact assessments.

Viewing the data retention debate in Europe through such a prism is admittedly subject to limitations. The scope for "experimentation" with a view to future-proofing legislation is narrower in issues of criminal law enforcement, which directly connect to public safety. Crime equals real victims, for whom there can be no regulatory sandbox. In the context of "outsourced" surveillance of metadata for public purposes, room for norm flexibility is also limited: is a private entity legally bound to retain data or not? What data precisely, and for how long? For what purposes are those data retained, and what kinds of procedural safeguards should govern investigators' access thereto? In such matters, legal certainty weighs heavily in the scales against adaptability.

Notwithstanding these limitations, in III. the *Article* argues that a future-proofing perspective on the data retention debate in the EU is worth taking for three reasons.

Firstly, any future initiative at either EU or national level will have to comply with the CJEU's interpretation of Charter rights, now and into the future – although it will be argued that the Court's position may itself be less "future-proof" than it currently appears and

[5] It is thus possible future regulation aiming to contribute to the fight against serious crime that is the object of future-proofing, and not any sense of future-proofing society itself against serious crime. Indeed, the imperative of crime *prevention* might be seen as a form of future-proofing, in the sense of the progressive calibration of a safer society with ever-fewer instances of (serious) crime. The same notion might apply fortiori to the pre-emptive foiling of threats to national security (such as terrorist activities). Arguably, it is precisely this dimension of future-proofing that has been consistently rejected by the CJEU in its body of data retention case law.

[6] See A Juszczak and E Sason, 'Recalibrating Data Retention in the EU: The Jurisprudence of the Court of Justice of the EU on Data Retention – Is this the End or is this the Beginning?' (2021) Eucrim 238-266; M Rojszczak, 'The Uncertain Future of Data Retention Laws in the EU: Is a Legislative Reset Possible?' (2021) Computer Law & Security Review.

[7] S Ranchordás and M van 't Schip, 'Future-Proofing Legislation for the Digital Age' in S Ranchordás and Y Roznai (eds), *Time, Law, and Change: An Interdisciplinary Study* (Hart 2020) 10.

may yet evolve in unexpected new directions. Secondly, as electronic communication itself continue to develop, any fresh retention mandate will have to deal with changes in the very notion of "metadata": what data types it is reasonable (in terms of regulatory burden and resources) or even technologically possible to retain, especially on a "suspicionless" basis. Thirdly, future-proofness is reflected in the valid demands of the citizens of democratic societies that any retention scheme be able to demonstrate (an adequate degree of) effectiveness over time.

In retrospect, the now-infamous Data Retention Directive ("DRD") from 2006 was less future-proof than ticking time-bomb.[8] That is where the analysis begins in II., with a brief overview of CJEU case law up to today on communications data retention, summarising the Court's more recent – and controversial – forays into retention for national security purposes, in order to prepare the ground for a discussion of the data retention debate in Europe from a future-proofing perspective in III.

II. "The lighthouse for privacy rights in Europe"?[9] Past and present CJEU case law on communications data retention

II.1. Retain in haste, repent at leisure: the legacy of Directive 2006/24/EC

From 2006 onward the so-called "Data Retention Directive"[10] (the "DRD") committed Member States to imposing obligations on internet access and telecoms providers to retain the subscriber, traffic and location data of all users without exception (but not the content of their communications) for possible later use by law enforcement in the investigation, detection and prosecution of serious crime.[11]

In the years following its entry into force, domestic implementations of the DRD met with resistance especially from civil society and service providers in multiple Member States, drawing challenges before several national (constitutional) courts,[12] before in 2014 the Court of Justice of the European Union (CJEU) famously annulled the Directive

[8] For Markou, writing in 2012, "(t)he Directive has placed a bomb in the privacy of European citizens and has allowed the Member States alone to take measures to prevent it from exploding"; C Markou, 'The Cyprus and Other EU Court Rulings on Data Retention: The Directive as a Privacy Bomb' (2021) Computer Law & Security Review 471.

[9] ECtHR *Case of Big Brother Watch and Others v The United Kingdom* App. nos. 58170/13, 62322/14 and 24960/15 [13 September 2018], Partly Concurring and Partly Dissenting Opinion of Judge Pinto de Albuquerque, para. 59.

[10] Directive (EC) 2006/24 of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks.

[11] "Serious crime" as defined by each Member State in its national law; art. 1 DRD.

[12] See national constitutional Court judgments involving data retention in twelve Member States, M Zubik, J Podkowik and R Rybski (eds), *European Constitutional Courts towards Data Retention Laws* (Springer Nature Switzerland 2021).

in its landmark judgment in *Digital Rights Ireland* on the grounds that it was incompatible with arts 7, 8 and 52(1) of the Charter.

Although that legislation, adopted to harmonise a data retention obligation across the Union, was declared invalid *ab initio*,[13] in the wake of the *Digital Rights Ireland* judgment there remained the question of the Charter-compliance of national data retention regimes – most of which had been adopted in implementation of the DRD, but some of which predated it. National regimes could still seek to rely on an exception to the protections (including an effective prohibition on retaining traffic and location data) set out in the ePrivacy Directive, then as now a key regulatory instrument for electronic communications service (ECS)[14] providers in the EU. Art. 15(1) of that Directive explicitly foresees the adoption of legislative measures providing for the retention of data for a limited period justified on grounds including the prevention, investigation, detection and prosecution of criminal offences – provided that such a restriction respect Charter rights as interpreted by the CJEU.[15]

Following *Digital Rights Ireland*, references for a preliminary ruling in relation to data retention laws in two Member States, Sweden and the UK, reached the Court in 2016. In its judgment in *Tele2 Sverige and Watson* ('*Tele2*'), the Court essentially confirmed its stance in *Digital Rights Ireland*: notwithstanding the room for manoeuvre in art. 15(1) of the ePrivacy Directive, general and indiscriminate retention of traffic and location data is incompatible with arts 7, 8, 11 and art. 52(1) of the Charter.

It is worth underlining that this is so, according to the Court in *Tele2*, even where a hypothetical national law should meet every other condition laid out by the CJEU pertaining to proportionality of retention scope and strength of safeguards against the misuse of retained data (or other irregularities, *e.g.* loss of data).[16] In other words, for the CJEU in *Tele2* no level of substantive trammelling or procedural stringency could render lawful any retention regime which is "general and indiscriminate" (*i.e.* applying to all users, "blanket") of traffic and location data for the fight against even serious crime: that would constitute a *per se* irredeemably disproportionate interference with the aforementioned Charter rights.[17]

[13] *I.e.*, from 3rd May 2006, meaning the April 2014 judgment's retroactive effects stretched back fully eight years.

[14] Since *Digital Rights Ireland* was decided, the ambit of "Electronic Communications Service" (ECS) under EU law has been expanded to include, notably, some "over-the-top" (OTT) service providers such as instant messaging and "voice-over-IP" (VoIP) services; the interplay between technological change, the regulatory framework and metadata retention for the purposes of combatting crime is discussed in section III.1 and III.2 below.

[15] Art. 15(1) of Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector ('ePrivacy Directive').

[16] *Ibid.*

[17] Retention of *content* data (for instance, recordings of telephone conversations or the message "inside" emails) the CJEU importantly underlined, would constitute the most serious violation of all – by violating the very essence of the relevant Charter rights. For a critical analysis of this aspect of the Court's reasoning, see M

By contrast, continued the Court, "targeted" retention may be permissible "provided that the retention of data is limited, with respect to the categories of data to be retained, the means of communication affected, the persons concerned and the retention period adopted, to what is strictly necessary"[18] and "meet[s] objective criteria, that establish a connection between the data to be retained and the objective pursued".[19] What such a "targeted" retention scheme might look like, also in light of subsequent elaborations from the Court and recent developments in a handful of Member States, will be discussed at III.1. below.

Legislative and judicial responses at national level to *Tele2* have varied significantly over the years since 2016 and remain in a state of flux. Some Member States have replaced or amended – in some cases, more than once – their national laws with the stated aim of ensuring compliance with the CJEU jurisprudence. In other Member States, national implementations of the DRD were subsequently struck down and have not yet been replaced. In yet others, domestic laws implementing the annulled DRD are still in place.[20]

At EU level meanwhile, ever since *Tele2* the prospect of fresh legislation has waited in the wings – without any draft proposal surfacing – as the Court has gradually refined as well as expanded its case law on communications data retention.

References from Spain[21] and Estonia[22] have seen the Court confirm the stance taken on retention *per se* in *Digital Rights Ireland* and *Tele2* whilst providing important clarifications on the matter of access to retained data. If those two cases might be labelled "access

Brkan, 'The Essence of the Fundamental Rights to Privacy and Data Protection: Finding the Way Through the Maze of the CJEU's Constitutional Reasoning' (2019) German Law Journal 864-883, esp. 871-874.

[18] *Tele2* cit. para. 108.

[19] *Ibid*. para. 110.

[20] For a snapshot of the most recent developments, see Report of the European Union Agency for Fundamental Rights (FRA), 'Fundamental Rights Report' (2022) 180-181. The FRA put together an overview in 2017 after *Tele2* of steps taken by Member States to bring national laws into line with that ruling. See also Privacy International, 'National Data Retention Laws since the CJEU's Tele-2/Watson Judgment' (September 2017), finding that 40% of the 21 Member States surveyed still had the pre-*Digital Rights Ireland* regime transposing the DRD in place. In 2020, a report commissioned by the European Commission observed "While a handful of Member States have repealed national transposing data retention laws (chiefly due to decisions of their respective Constitutional Courts) most Member States still apply the regime transposing the DRD. A few countries have set up new legal regimes to comply with the CJEU case-law" (page 25). However, no comprehensive overview was provided; the study aimed to collect information on the legal frameworks and practices for retention of and access to non-content data at national level, but only covered ten Member States. See European Commission, 'Study on the Retention of Electronic Communications Non-content Data for Law Enforcement Purposes – Final report' (Milieu Consulting 2020).

[21] In *Ministerio Fiscal* (2018) the Court validated access to retained *subscriber* data – a category of data deemed to entail a less-than-serious interference with arts 7 and 8 of the Charter – in cases of less-than-serious crime, whilst confirming the *Tele2* jurisprudence; case C-207/16 *Ministerio Fiscal* ECLI:EU:C:2018:788.

[22] In *HK Prokuratuur* (2021), wherein the Court added that the requirement of independent (judicial or administrative) authorisation of access to traffic and location data cannot be met by a public prosecutor's office whose task is to direct the criminal pre-trial procedure and to bring, where appropriate, the public prosecution in subsequent proceedings; case C-746/18 *H. K. Prokuratuur* ECLI:EU:C:2021:152.

cases",[23] the remaining recent decisions of the Court can be sorted into two categories. Into the first category falls a series of cases mainly concerned with the Charter-compatibility of national laws mandating – as had the DRD – blanket data retention for the fight against serious crime (references from courts in Ireland,[24] Germany[25] and France[26]). Into the second category falls a set of cases which concern not only data retention for the purpose of fighting *crime* but also address for the first time the relationship between EU fundamental rights standards and national regimes involving data retention for the purpose of safeguarding *national security* (references from France, Belgium[27] and the UK[28]).

Whilst this *Article* concentrates on the possible regulatory futures of data retention for the purposes of combatting crime, before crossing that bridge it is necessary to lay the groundwork by summarising the most relevant aspects of recent CJEU case law on data retention and Member State responses thereto, beginning in II.2 with the Court's unprecedented engagement with the lawfulness of data retention for national security purposes, before turning in II.3 to its embryonic vision for sufficiently-"targeted" retention for the purpose of crime prevention.

II.2. *La Quadrature du Net* and Privacy International: from crime to national security (and back)

Of all the rulings thus far handed down in a burgeoning body of case law, it is the two rulings issued on the same day in October 2020 in response to references from courts in France and Belgium (in *La Quadrature du Net*) and the UK (in *Privacy International*) that have indisputably deepened the complexity of the CJEU's stance on data retention – whilst also opening new, if familiar, fissures in the tensions between national (constitutional) law and prerogatives and the limits of EU competence.

On a higher level (and as mentioned above) this is due to the Court's engagement for the first time with national security as a purpose of data retention, leading to its ultimate position to the effect that blanket retention of traffic and location data may be exceptionally permissible for national security purposes whereas it remains irredeemably impermissible for the purpose of fighting crime (however serious). Yet on a closer view too, the rich 2020 rulings take the *Tele2* line of jurisprudence in multiple new directions. As far as

[23] The label is admittedly imperfect, in particular in light of the significance of *H. K. Prokuratuur* on the matter of the admissibility as evidence at criminal trial of data which had been unlawfully retained. At the time of writing a further "access case", referred by an Italian court, is pending at the CJEU: case C-178/22 *Procura della Repubblica presso il Tribunale di Bolzano* (hearing on 21 March 2023).

[24] Case C-140/20 *GD v Commissioner of An Garda Síochána and Others* ECLI:EU:C:2022:258.

[25] Joined cases C-793/19 and C-794/19 *SpaceNet and Telekom Deutschland* ECLI:EU:C:2022:702 ('SpaceNet').

[26] Joined cases C-339/20 and C-397/20 *VD and SR* ECLI:EU:C:2022:703.

[27] Joined cases C-511/18, C-512/18 and C-520/18 *La Quadrature du Net and Others* ECLI:EU:C:2020:791.

[28] Case C-623/17 *Privacy International* ECLI:EU:C:2020:790.

data *retention* is concerned,[29] they notably reach beyond the core battleground of traffic and location data as data *categories* by embarking on a proportionality analysis involving 'new' data categories (such as "civil identity data") as well as increasingly granular data *types* (such as source IP addresses). Those data categories and data types are systematically ascribed 'intrusiveness' ratings and in turn arranged in cascading fashion according to a "hierarchy of public interest (security) objectives".[30]

Since the judgments in *La Quadrature du Net* and *Privacy International,* that hierarchy stands as follows:

a) The objective of safeguarding national security is more important than…

b) the objectives of combatting serious crime and serious threats to public security, which are more important than…

c) the objectives of combatting non-serious crime and non-serious threats to public security.

The possible contours of Charter-compliant data retention regimes match and correspond to the above objectives as follows:

a) For national security, general and indiscriminate retention of traffic and location data (including all IP addresses) as well as "civil identity data" is permissible subject to conditions.

b) For serious crime and serious threats to public security, retention of traffic and location data must be "targeted", but source IP addresses and "civil identity data" may be retained generally and indiscriminately.

c) For non-serious crime and non-serious threats to public security, "civil identity data" may be retained generally and indiscriminately.[31]

[29] The rulings also go beyond the retention of data by private actors at all to confront bulk collection and transfer as well as automated analysis carried out by private actors on behalf of the security and/or intelligence services. For this reason alone, any labelling of *La Quadrature du Net* and *Privacy International* as "data retention case law" requires a good measure of nuance. In doing so, the CJEU has furthermore engaged in a broader dialogue with the European Court of Human Rights on the contours of permissible mass surveillance in a democratic society. The CJEU decisions in *La Quadrature du Net* and *Privacy International* arrived on 6 October 2020, after the ECtHR's First Section judgment in *Big Brother Watch and Others v UK* cit. but before the appeal was decided by the Grand Chamber (25 May 2021). See further ECtHR *Centrum för Rättvisa v Sweden* App n. 35252/08 [25 May 2021], decided by the Grand Chamber on the same day as the *Big Brother Watch* appeal. This *Article* will not analyse that case law, instead focusing on the targeted retention of traffic and location data for the purpose of combatting serious crime under EU law.

[30] V Mitsilegas and others, 'Data Retention and the Future of Large-Scale Surveillance: The Evolution and Contestation of Judicial Benchmarks' (2022) European Law Journal 6-10.

[31] As mentioned above (n. 17), for a), b) and c), content may never be retained. Additionally, the overview provided here covers only pre-emptive data retention, and not expedited preservation of data (widely known as "quick freeze"). For detailed analysis of the judgments, see for instance M Tzanou and S Karyda, '*Privacy International* and *Quadrature du Net*: One Step Forward Two Steps Back in the Data Retention Saga?' (2022) European Public Law 123-154; M Zalnieriute, 'A Struggle for Competence: National Security, Surveillance and the Scope of EU Law at the Court of Justice of the European Union' (2022) Modern Law 198-218.

In placing the safeguarding national security at the top of the above pyramid, the Court observed that the objective of safeguarding it "goes beyond [those] of [...] combating crime in general, even serious crime, and of safeguarding public security", and is "therefore capable of justifying measures entailing more serious interferences with fundamental rights".[32] Ultimately, the Court settled on the permissibility of the retention of the traffic and location data of all users of ECS "for a limited period of time, as long as there are sufficiently solid grounds for considering that the Member State concerned is confronted with a serious threat [...] to national security which is shown to be genuine and present or foreseeable".[33] Verification that one of those situations exists must be entrusted to a court or an independent administrative body whose decision is binding, and that review must also encompass a check on the observation of further conditions and safeguards: instructions given to private parties to preventively retain the data of all users must be limited in time to what is strictly necessary (renewals are possible but cannot exceed a foreseeable period of time), and personal data must be effectively protected against the risk of abuse.[34]

It has been noted in the literature that the Court offers no specific justifications or arguments in support of its determination that the safeguarding of national security "goes beyond" the fight against even serious crime; nor, indeed, to substantiate the position that it does so to a degree capable of tipping the balance toward the acceptability of blanket data retention for the first purpose but not the second. *Cela va de soi.* The most obvious explanation for this absence is that the CJEU felt compelled, having first drawn data retention for national security purposes into the scope of EU law on the basis of questionable reasoning, to then apply a less-than-stringent proportionality test to retention carried out in such a politically sensitive area.[35] Whatever the motivations, the putatively clean separation of crime from national security in *La Quadrature du Net* and *Privacy International* immediately raised a series of questions, of which three will be tackled here.

The first question concerned the potential risk, noted by Sajfert shortly after the judgments were released,[36] that Member States would seek to generally and indiscriminately retain data for the purpose of safeguarding national security (permissible, exceptionally, according to the CJEU) only to subsequently use the data in the fight against (serious) crime, for example in an investigation into organised crime – thus leading to an outcome which appears to be self-evidently against the spirit of the judgment, if not necessarily against its letter. This loophole approach had even reportedly been included in a planned

[32] *La Quadrature du Net* cit. para. 136.

[33] *Ibid*. para. 137.

[34] *Ibid*. paras 138-139.

[35] For a discussion of the sustainability of the Court's reasoning in *La Quadrature du Net* and *Privacy International*, see further section III.1 below.

[36] J Sajfert, 'Bulk data interception/retention judgments of the CJEU – A victory and a defeat for privacy' (26 October 2020) European Law Blog www.europeanlawblog.eu.

reform to the Danish data retention law,[37] before a further judgment from the CJEU confirmed that access to retained data "would be contrary to [the] hierarchy of public interest objectives"[38] and thus impermissible.

The second question raised by this aspect of the judgments in *La Quadrature du Net* and *Privacy International*, which also partly explains the difference of view between the Danish government and the CJEU just outlined, is that it can indeed be challenging in law and in practice to fully separate some of the most serious forms of criminality (to take only one example, terrorist acts[39]) from threats to national security.

By extension, the task of investigating, detecting, prosecuting and especially *preventing* the commission of a serious criminal offence may overlap or even entirely coincide with that of foiling a threat to national security. To a greater or lesser extent depending on the jurisdiction, the respective public authorities – on the one hand, law enforcement, and on the other, security and intelligence services – can and do cooperate, for instance by sharing data (including data initially retained by private entities).[40] With this operational reality (at least in some Member States) front of mind, at the hearings in subsequent data retention cases before the CJEU some Member States as well as the European Commission accordingly argued that some *very* serious crimes should be assimilated to national security and thus be deemed capable of justifying blanket retention of traffic and location data. This was rejected by the Advocate General and the Court in *GD*, settling the question within the context of the CJEU case law – although the inclusion of a "halfway house" category of extra-serious crime may yet present an option for future legislation at EU level.[41]

The third question raised by the judgments in *La Quadrature du Net* and *Privacy International* was more fundamental: would (all) Member State governments be willing to accept them?

[37] J Lund, 'The New Danish Data Retention Law: Attempts to Make it Legal Failed After Just Six Days' (15 June 2022) IT-Politisk Forening www.itpol.dk.

[38] *GD* cit. paras 96-100 (cited text from para. 99).

[39] Such as causing extensive destruction to a government or public facility, a transport system, an infrastructure facility etc, as criminalised at EU level pursuant to art. 3(1)(d) of Directive 2017/541/EU of 31 March 2017 on combating terrorism ('the Terrorism Directive') 6-21. Additionally, terrorist groups may also qualify as organised crime groups under the relevant (EU) legislation, at the same time as posing a national security risk; see K Ligeti and M Lassalle, 'The Organised Crime-Terrorism Nexus: How to Address the Issue of ISIS Benefitting from Lucrative Criminal Activities' in M Engelhart and S Roksandić Vidlička (eds), *Dealing with Terrorism: Empirical and Normative Challenges of Fighting the Islamic State* (Max-Planck-Institut, Duncker & Humblot 2019) 73-96.

[40] See in detail I Cameron, 'Metadata Retention and National Security: *Privacy International* and *La Quadrature du Net*' (2021) CMLRev 1433-1472, esp.1462-1463.

[41] According to the AG Sánchez-Bordona: "The difficulties which were made clear when this was debated at the hearing, in relation to defining the offences that could make up that *tertium genus,* confirm that this is not a task to be carried out by a court"; *GD* cit., Opinion of AG Sánchez-Bordona, para. 52. Future regulatory options are discussed at section III.1 below.

It is no secret that the French government has particularly strongly objected to the Court's interpretation of art. 15(1) of the ePrivacy Directive and by extension of that of EU law to cover data retention for national security purposes (not to mention crime prevention, where its view also diverges from that of the Court). Whilst the French government is far from alone in holding such a position, the *Conseil d'État* was the first – and so far remains the only – national court to handle a direct challenge to the primacy of EU law as a consequence of the CJEU rulings in *La Quadrature du Net* and *Privacy International*.

In a nutshell, the French government had taken the extraordinary step of asking the *Conseil d'État* to rule that the CJEU acted *ultra vires* in issuing those rulings. In an April 2021 judgment ('*French Data Network*'), the highest administrative court in France managed to avert a direct clash with the CJEU, dismissing the *ultra vires* head of the government's argument.[42] However, in doing so it also interpreted the scope of "national security" in French law in strikingly broad fashion: for the *Conseil d'État*, the notion (and with it lawful general and indiscriminate retention of traffic and location data) covers not only risks from terrorism but also a host of other threats including serious threats to public peace due to a rise in radical and extremist groups, industrial or scientific espionage, and sabotage.[43] For De Terwangne, in *French Data Network* the *Conseil d'État* gives the impression of respecting EU law without fully applying the lesson it had received in the answers handed down – or as the French judges might see it, handed *across* (or even *up?*) – from the Luxembourg court in response to its questions.[44]

Since that thunderclap from the *Conseil d'État*, sparked by the French government's opposition to what it sees as the CJEU's straying into domestic (state) prerogatives of national security (extending to the definition of that notion), 2022 brought further important judgments from both the *Conseil constitutionnel* and the *Cour de cassation*. On the whole, the former has hemmed more closely to the CJEU's position, in particular supporting the inadmissibility of general and indiscriminate retention of traffic and location data for serious crime,[45] whereas the latter has "taken liberties with the applicable case law of the Grand Chamber [of the CJEU] on both retention of and access to both traffic and location

[42] J Ziller, 'The Conseil d'État refuses to follow the Pied Piper of Karlsruhe' (24 April 2021) Verfassungsblog www.verfassungsblog.de.

[43] *Conseil d'État* Judgment of 21 April 2021 *French Data Network et autres* para. 44. Noting the "particularly acrobatic" reasoning on the relationship between the primacy of EU law and French constitutional norms employed by the *Conseil d'État* in order to arrive at this conclusion, see (in French) É Dubout, 'Le Conseil d'État, gardien de la sécurité' (2021) Revue des droits et libertés fondamentaux; and in detail A Turmo, 'National security as a an exception to EU data protection standards: The judgment of the *Conseil d'État* in *French Data Network and others*' (2022) CMLRev 203-222.

[44] C de Terwangne, 'L'illégalité nuancée de la surveillance numérique : la réponse des juridictions belge et française à l'arrêt *La Quadrature du Net* de la Cour de Justice de l'Union Européenne' (2022) Revue trimestrielle des droits de l'homme 22.

[45] M Lassalle, 'Conservation et réquisitions des données relatives aux communications électroniques: un débat serein est-il enfin possible?' (2022) Recueil Dalloz 1540.

data",[46] for example by giving its blessing to, as the *Conseil d'État* had *before* the CJEU's judgment in *GD*, the "loophole" use for serious crime of data retained for national security purposes, despite the CJEU clearly disapproving of this practice in *GD*.

On the statute books,[47] in the national apex courts but also in the wider criminal justice system,[48] the data retention controversy in France looks unlikely to fizzle out soon. Of course, that domestic turbulence is not without its ramifications at EU level – most notably, in the ongoing negotiations toward a new ePrivacy Regulation. That instrument is due to repeal and replace the ePrivacy Directive, and thus harbours the opportunity (in the eyes of many interior ministries and governments) to finally dispose of its key provisions, stretched beyond reason by the "activist" judges in Luxembourg. Although progress on the file has been notoriously slow, in what is at the time of writing still the latest available draft of the ePrivacy Regulation – the mandate agreed by the EU Council in February 2021, just months after *La Quadrature du Net* and *Privacy International* – one can clearly see the Member States' desire to remove this particular stone from their shoe. We return to the ePrivacy reform in III.1. below, having first introduced the CJEU's stance on the retention of traffic and location data for the purpose of combatting serious crime in the next sub-section.

II.3. CJEU guidance on "targeted" retention for serious crime

As shown by the overview in II.1., whereas in *La Quadrature du Net* and *Privacy International* the CJEU established that the general and indiscriminate retention of traffic and location data may be exceptionally permissible for the purposes of safeguarding national security, it held firm on its flat opposition to that same practice for the purposes of combatting serious crime. General and indiscriminate retention of traffic and location data for the fight against crime is thus limited to source IP addresses (serious crime only) and "civil identity data" (all crime). Any retention of the more intrusive categories of traffic and location data (once more, limited to serious crime) must be "targeted", as opposed to general and indiscriminate.

The Court's position on "targeted" data retention did not come out of the blue in *La Quadrature du Net* and *Privacy International*; its roots can be traced back to *Tele2*[49] and

[46] X Tracol, 'The joined cases of *Dwyer*, *SpaceNet* and *VD and SR* before the European Court of Justice: The judgments of the Grand Chamber about data retention continue falling on deaf ears in Member States' (2023) Computer Law & Security Review 12.

[47] For details of recent legislative changes in France, see M Lassalle, 'Conservation et réquisitions des données relatives aux communications électroniques' cit.

[48] For example, Tracol reports that in July 2022 the management board of the National Conference of Prosecutors "violently reacted" to the four judgments of the criminal chamber of the *Cour de cassation*, and "recognised daily infringements of the well-established case law of the Grand Chamber [of the CJEU] on the retention of and access to traffic and location data"; X Tracol, 'The joined cases of *Dwyer*, *SpaceNet* and *VD and SR* before the European Court of Justice' cit. 13.

[49] *Tele2* cit. paras 105-112.

Digital Rights Ireland[50] before it. In the 2020 rulings, the CJEU thus confirmed *Tele2* in stating that Charter-compliance might be secured by "legislation permitting, as a preventive measure, the targeted retention of traffic and location data for the purposes of combating serious crime, preventing serious threats to public security and equally of safeguarding national security, provided that such retention is limited, with respect to the categories of data to be retained, the means of communication affected, the persons concerned and the retention period adopted, to what is strictly necessary".[51]

In *La Quadrature du Net* and *Privacy International,* the Court developed and clarified its previous two alternative (and non-exhaustive) recommended routes to Charter-compliance: through personal targeting and geographical targeting. The specific guidance offered in each respect is worth citing in full, beginning with personal targeting:

> "As regards the limits to which a data retention measure must be subject, these may, in particular, be determined according to the categories of persons concerned, since art. 14(1) of [the ePrivacy Directive] does not preclude legislation based on objective evidence which makes it possible to target persons whose traffic and location data is likely to reveal a link, at least an indirect one, with serious criminal offences, to contribute in one way or another to combating serious crime or to preventing a serious risk to public security or a risk to national security.
> In that regard, it must be made clear that the persons thus targeted may, in particular, be persons who have been identified beforehand, in the course of the applicable national procedures and on the basis of objective evidence, as posing a threat to public or national security in the Member State concerned".[52]

On geographical targeting, the CJEU advised as follows:

> "The limits on a measure providing for the retention of traffic and location data may also be set using a geographical criterion where the competent national authorities consider, on the basis of objective and non-discriminatory factors, that there exists, in one or more geographical areas, a situation characterised by a high risk of preparation for or commission of serious criminal offences. Those areas may include places with a high incidence of serious crime, places that are particularly vulnerable to the commission of serious criminal offences, such as places or infrastructure which regularly receive a very high volume of visitors, or strategic locations, such as airports, stations or tollbooth areas".[53]

Taken together, the cited guidance on "targeted" retention raises a whole host of issues ranging from its doubtful added value to law enforcement in terms of crime *prevention* (especially personal targeting), open questions around technical feasibility and readiness (especially geographical targeting), as well as potential risks of discrimination and

[50] *Digital Rights Ireland* cit. para. 59.
[51] *La Quadrature du Net* cit. para. 147.
[52] *Ibid.* para. 148-149.
[53] *Ibid*. para. 150.

stigmatisation (both forms of targeting).[54] In the immediate aftermath of *La Quadrature du Net* and *Privacy International,* several Member States appeared unconvinced of the binding nature of such guidance, ostensibly preferring to treat it as obiter[55] and/or ask (once again, in the case of France) the CJEU to reconsider its position. So it was that in *GD*, *VD and SR* and *SpaceNet* data retention laws in Ireland, France and Germany respectively were defended (once more, in the case of France) by the national governments *not* on the grounds that those laws were already "targeted" in accordance with CJEU case law,[56] but on a variety of other grounds marshalled in an attempt to convince the Court to soften its position – or, failing that, to at least secure a degree of damage limitation.

In *GD*, the Irish defence combined a strong emphasis on the importance to the public interest in combatting serious crime with a reliance on the stated independence of the internal police unit handling access requests.[57] Predictably, this line of argument ran aground, but not without the Court embarking on a panorama of the different investigative measures available to law enforcement which are not the wished-for blanket retention of traffic and location data.[58] In *VD and SR*, meanwhile, the defence of data retention for the purposes of combatting crime as enshrined in French law – in essence, that EU market abuse legislation presupposed the existence of a blanket data retention scheme,[59] thereby clashing with the Court's insistence that such retention must in all cases of serious crime be "targeted" – was also unsurprisingly dismissed by the Grand Chamber.[60]

[54] See further section III.1. below.

[55] On the reluctant judicial response in Italy, see A Malacarne, 'Ancora sulle ricadute della sentenza della Corte di Giustizia in materia di acquisizione di tabulati telefonici: il G.i.p. di Roma dichiara il "non luogo a provvedere" sulla richiesta del p.m.' (5 May 2021) Sistema Penale www.sistemapenale.it.

[56] On domestic developments in Portugal, see T Violante, 'How the Data Retention Legislation Led to a National Constitutional Crisis in Portugal' (9 June 2022) Verfassungsblog www.verfassungsblog.de.

[57] J Teyssedre, 'Strictly regulated retention and access regimes for metadata: *Commissioner of An Garda Síochána*' (2023) CMLRev 569-588.

[58] Another objective of the challenge in *GD* (the "damage limitation" alluded to above) was to seek, as the Belgian government had in *La Quadrature du Net*, to seek to delay the effects of the finding of incompatibility in national law and/or find a way to preserve the admissibility of (illegally) retained data in criminal proceedings (whether appeals, ongoing trials, or future proceedings). The CJEU was unmoved, and stuck closely to its earlier decisions, on the one hand determining that its judgment would produce effects immediately, and on the other placing the ball firmly back in the court of the trial state on the matter of admissibility – although its precise contribution in this area is nuanced. Due to lack of space as well as its focus on future-proofing data retention, this *Article* will not discuss the potential ramifications of the case law in terms of admissibility at trial of retained data.

[59] For instance, under art. 23(2)(g) and (h) of the Market Abuse Regulation competent authorities shall have the power "to require *existing* recordings of telephone conversations, electronic communications or data traffic records held by investment firms, credit institutions or financial institutions", and "to require, in so far as permitted by national law, *existing* data traffic records held by a telecommunications operator [...]" (emphasis added).

[60] "It is clear from the wording of those provisions that they merely provide a framework for that authority's power to 'require' the data available to those operators, which corresponds to access to those

Of the three national regimes at stake in the trio of cases, it is the German law examined in *SpaceNet* that came closest to securing the approval of the Court. Indeed, in many respects the relevant provisions of the German Telecommunications Law (the *Telekommunikationsgesetz*, or *TKG*) would, on an ordinary construction of the term, warrant the label of "targeted": emails entirely exempted, so too the communications of registered confidential services such as religious or social assistance lines, high data security standards, stringent procedural safeguards against abuses at the point of access to retained data, and – perhaps most significant of all – far shorter retention periods than the Court had seen before: 10 weeks for telephony data, source IP, connection and network identifiers IP allocation records, and 4 weeks for location data.

The German Federal Administrative Court had opined in its reference to the CJEU that this combination of an exclusion of certain means of communication or certain categories of data and a limitation of the retention period would "considerably reduce" the risk of establishing a comprehensive profile of the persons concerned.[61] Although in its judgment the CJEU carefully acknowledged the legislator's efforts to circumscribe the national data retention regime in this case, ultimately its response was withering. The proffered exemptions of emails as well as communications of those entities on the social or religious register (1.300 entities, the German government disclosed at the hearing) were seen as negligible.[62] As for short retention periods,

> "the retention of traffic or location data, that are liable to provide information regarding the communications made by a user of a means of electronic communication or regarding the location of the terminal equipment which he or she uses, is in any event serious regardless of the length of the retention period and the quantity or nature of the data retained, when that set of data is liable to allow precise conclusions to be drawn concerning the private life of the person or persons concerned".[63]

The Court reiterated (yet again) that the retention of data and access thereto each constitute separate interferences with Charter rights; as such, even national legislation ensuring full respect for access conditions set down by the Court in its case law "cannot, by its very nature, be capable of either limiting or even remedying the serious interference, which results from the general retention of those data [...]".[64]

The message sent by the CJEU back to the Member States thus appears to be crystal clear: in future, a targeted form of retention of traffic and location data is the only kind

data. Furthermore, the reference made to 'existing' records, such as those 'held' by those operators, suggests that the EU legislature did not intend to lay down rules governing the option open to the national legislature to impose an obligation to retain such records"; para. 70.

[61] *SpaceNet* cit. para. 34.

[62] *Ibid*. paras 80-83. The Court also noted that whereas registered social and religious entities are exempted, the data of users who are subject to a duty of professional secrecy, such as lawyers, doctors and journalists, are retained; *ibid*. para. 82.

[63] *Ibid*. para. 88.

[64] *Ibid*. para. 91.

of retention that might comply with the Charter. As the following section will show, two Member States (Belgium and Luxembourg) have recently taken up the gauntlet and designed "targeted" national data retention schemes. The regulatory choices already made in fashioning those first iterations of targeted data retention at the national level, as well as experiences of implementing such schemes in future, could be of crucial value for any pan-EU "targeted" retention initiative going forward (and to other national systems).

Before reaching that point, however, III. begins by inspecting more closely the ground upon which the CJEU's "targeted" retention requirement sits. In light of both the reasoning used by the CJEU and upcoming regulatory changes, just how durable – in that sense, how future-proof – is the CJEU case law itself? Should the CJEU's position yet shift in future, targeted retention schemes the likes of which are emerging in Belgium and Luxembourg may no longer be required.

III. Future-proof data retention

III.1. How future-proof is the case law? ePrivacy reform and judicial fears of profiling

As it stands, the CJEU's consistent case law points unequivocally to "targeted" retention of traffic and location data; any general and indiscriminate retention of those data categories, no matter how serious the crime, appears destined to trigger incompatibility with the Charter. But just how durable or "future-proof" is that same case law? In this regard, a degree of caution is advised for two main reasons.

The first reason is that, despite the entrenchment of the Court's position in *Tele2* and its elaboration through *La Quadrature du Net* and *Privacy International*, the reasoning upon which the "hierarchy of public interest objectives" is based remains open to scrutiny – and as such, (minor) reversals in future proceedings cannot be discounted. The second reason is that the ePrivacy Directive, the juridical "platform" on which the CJEU's case law rests, is due to be repealed and replaced by an ePrivacy Regulation whose precise impact on data retention regimes remains to be seen. These two reasons will now be unpacked in turn, beginning with the CJEU's reasoning in *La Quadrature du Net* and *Privacy International*.

In order to place data retention for national security purposes at the top of its hierarchy of public interest objectives, the Court first had to establish the applicability of EU law to that mode of retention despite the exclusory language in both art. 4(2) TEU ("[i]n particular, national security remains the sole responsibility of each Member State")[65] and art. 1(3) of the ePrivacy Directive, which reads:

[65] "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. *In particular, national*

> "This Directive shall not apply to activities which fall outside the scope of the Treaty establishing the European Community, such as those covered by Titles V and VI of the Treaty on European Union, and in any case to activities concerning public security, defence, State security (including the economic well-being of the State when the activities relate to State security matters) and the activities of the State in areas of criminal law".

Try as they might in written argument and pleadings to marshal the above provisions in an attempt to have data retention for national security purposes declared to fall outside the scope of EU law, the Member States have repeatedly encountered a CJEU which is sticking steadfastly to the *effet utile* reasoning it first used in *Tele2* in order to dismiss analogous arguments in relation to crime. According to that line of reasoning, to exclude national legislative measures requiring the retention of data for the purpose of combatting crime would lead to the limitation clause in art. 15(1) of the ePrivacy Directive[66] being "deprived of any purpose".[67]

The extension in *La Quadrature du Net* and *Privacy International* of that *effet utile* reasoning beyond crime to cover national data retention regimes in place for national security purposes – notwithstanding the emphasis in the aforementioned third sentence of art. 4(2) TEU – has attracted much commentary and some criticism. For Cameron, "[i]t is quite possible to argue that the Member States included both a national security exclusion clause and a national security limitation clause in the Directive in order to be doubly sure that national security was out of bounds for the Court: a "belt and bootstraps" approach."[68]

The Court took a different view, hitching the applicability of the ePrivacy Directive (and necessarily also the Charter) to a test based on personal scope: data processing carried out by the private parties in question (electronic communications service providers) falls within the scope of the Directive, irrespective of its ultimate purpose (in this case, safeguarding national security) whereas the direct implementation by the Member States of measures that derogate from the rule that electronic communications are to be

security remains the sole responsibility of each Member State." (emphasis added); art. 4(2) of the Consolidated version of the Treaty on European Union [2012].

[66] "Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in arts 5 and 6, art. 8(1), (2), (3) and (4), and art. 9 of this Directive when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in art. 13(1) of Directive 95/46/EC. To this end, Member States may, *inter alia*, adopt legislative measures providing for the retention of data for a limited period justified on the grounds laid down in this paragraph. All the measures referred to in this paragraph shall be in accordance with the general principles of Community law, including those referred to in art. 6(1) and (2) of the Treaty on European Union".

[67] *Tele2* cit. para. 73; confirmed in *Ministerio Fiscal* cit. paras 34-35, and in subsequent case law.

[68] Cameron, 'Metadata Retention and National Security' cit. 1458.

confidential, without imposing processing obligations on providers of ECS, the Directive does not apply – only national law will.[69]

Enter the Member States' positioning on the upcoming ePrivacy Regulation. At the time of writing, the contents of the new law, and in particular whether it will overall maintain, raise or lower the levels of protection afforded by the old ePrivacy Directive (an instrument dating back to 2002), remain uncertain. For present purposes, it is worth highlighting the following provision in the Council's 2021 mandate regarding the Regulation's material scope: art. 2(2)(a) provides that it will not apply to:

> "activities, which fall outside the scope of Union law, and in any event measures, processing activities and operations concerning national security and defence, regardless of who is carrying out those activities whether it is a public authority or a private operator acting at the request of a public authority."[70]

The wording of this provision as well as the timing of the mandate, four months on from the CJEU's decisions in *La Quadrature du Net* and *Privacy International*, leave little room for doubt that it was intended as a response to those rulings. In particular, the above provision squarely contradicts the Court's conclusion that the processing of personal data (including retention and transmission) by electronic communications service providers for the purpose of safeguarding national security falls within the scope of EU law – notwithstanding art. 4(2) TEU.[71] For the European Data Protection Board ("EDPB"), this aspect of the Council mandate "runs against the premise for a consistent EU data protection framework"; whilst Tzanou and Karyda observe that "circumventing – or indeed abolishing – the CJEU's jurisprudence on data retention in the ePrivacy Regulation would also set a dangerous precedent for the Court's assessment of third country metadata retention laws and practices, such as the US, in light of *Schrems I* and *Schrems II*. Double standards in this regard risk rendering the CJEU's case law meaningless and cannot be accepted".[72]

These concerns are well-founded, but it is also possible for that case law to itself evolve in different directions – and not only that of further *tightening* the scope of permissible forms of data retention. In this respect, it is worth mentioning Advocate General Szpunar's recent Opinion in *La Quadrature du Net II*, a pending case at the CJEU concerning

[69] Subject to the application of the so-called "Law Enforcement Directive" ("LED"); *Privacy International* cit. para. 48; *La Quadrature du Net* cit. para. 103. The Court recalled that the measures in question must comply with, *inter alia*, national constitutional law and the requirements of the ECHR.

[70] Council, 'Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications) - Mandate for negotiations with EP', 6087/21, 10 February 2021.

[71] *Privacy International* cit. para. 44.

[72] M Tzanou and S Karyda, '*Privacy International* and *Quadrature du Net*' cit. 152-153.

the French "Hadop" copyright law.[73] Although it is a copyright case, both the position taken and the reasoning used by the Advocate General in *La Quadrature du Net II* are of relevance to data retention for the fight against crime more broadly, as will be unpacked in the next two paragraphs.

In his Opinion, the Advocate General has proposed a readjustment of the case law of the CJEU on the interpretation of art. 15(1) of the ePrivacy Directive as regards measures for the retention of IP addresses assigned to the source of a connection. As was seen above, the *La Quadrature du Net* and *Privacy International* jurisprudence limits general and indiscriminate retention of source IP to the purpose of combatting serious crime. In *La Quadrature du Net II,* the Advocate General proposes widening this purpose threshold to include the prevention, investigation, detection and prosecution of "online criminal offences for which the IP address is the *only means* of investigation enabling the person to whom that address was assigned at the time of the commission of the offence to be identified".[74]

The Advocate General's invitation raises a number of discrete questions (what would qualify as an "online criminal offence"? Is this any more straightforward than determining what is "serious crime"?) and it will be intriguing to see how it is handled by the Court in the judgment. For present purposes, it suffices to note the tone of the Opinion, which emphasises the need to avoid "de facto systemic impunity for offences committed exclusively online, not just infringements of intellectual property rights"[75] and, in a hint of the *effet utile* dial swinging back toward effective law enforcement, stresses that limitations of the rights and obligations established in arts 5, 6 and 9 of the ePrivacy Directive may be limited in proportionate fashion in order to pursue a public interest objective, "namely the prevention, investigation, detection and prosecution of criminal offences laid down in legislation *which would otherwise have no effect*".[76]

More fundamentally, however, the true litmus test for the CJEU's stance on data retention for the purposes of combatting crime is likely to be provided by the overall strength of the privacy protections to be included in the upcoming ePrivacy Regulation. art. 7(4) of the 2021 Council mandate text includes a specific provision envisaging data retention measures. The provision itself is minimal; its significance lies in its very inclusion on top of draft art. 11 ("Restrictions"), the equivalent of art. 15 of the ePrivacy Directive – in a subtle but important departure from an earlier Council text adopted under the German Council presidency in the second half of 2020.[77]

Of course, no overhaul of the regulatory framework would alter the applicability of the protections in the Charter. Yet if the moral objection to blanket data retention in the CJEU's standing case law can be distilled down to a strong aversion to widespread

[73] Case C-470/21 *La Quadrature du Net and Others* ECLI:EU:C:2022:838, opinion of AG Szpunar.

[74] *Ibid*. para. 83.

[75] *Ibid*. para. 80.

[76] *Ibid*. para. 85, emphasis added.

[77] See M Tzanou and S Karyda, '*Privacy International* and *Quadrature du Net*' cit. 152, and the sources cited there.

profiling of citizens ("*feelings* of constant surveillance") and fears of a deleterious chilling effect on freedom of expression, its juridical "platform" is to be found in the ePrivacy Directive: to evidence this platform, one need only mention the Court's recurring references to the EU legislature's objectives and priorities at the relevant time in support of its stringent approach to exceptions to the confidentiality and erasure obligations established therein. That time, of course, means the years between the "latest implementation" date for the Data Protection Directive of October 1998,[78] and adoption of the ePrivacy Directive in July 2002 – aeons ago in terms of electronic communications.[79] Two decades on, there can be little doubt that every aspect of the wording and the overall balance struck by the upcoming ePrivacy Regulation will be scrutinised by those aiming to shear the CJEU's data retention case law of its sharpest edges.[80]

III.2. First national "targeted" retention laws: the exception becomes the rule?

For the time being, the Court's position is that any retention of traffic and location data for the purposes of combatting serious crime must be "targeted". In stark contrast to the French response to the *La Quadrature du Net* and *Privacy International* rulings, in Belgium the Constitutional Court struck down the national data retention provisions the very next day. In July 2022, a new law[81] was passed with the stated aim of ensuring compliance with the jurisprudence of the CJEU.

The Belgian e-Privacy Directive implementing law[82] thus limits general and indiscriminate retention (mostly for 12 months after either end of service or end of session) to subscriber data and related usage data,[83] whereas traffic and location data may only be retained, for 12 months[84] for the purposes of combatting serious crime and safeguarding

[78] Art. 32 of Directive 95/46/EU of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (the "Data Protection Directive").

[79] For example, *SpaceNet* cit. para. 53, gauging the EU legislature's intent by examining the 2000 proposal and several recitals of the ePrivacy Directive.

[80] L Bertuzzi, 'EPrivacy: EU Legislators Chase Compromise on Processing Electronic Communications Data' (15 November 2022) Euractiv www.euractiv.com.

[81] Belgian Legislator, Law on the collection and preservation of identification data and metadata in the electronic communications sector and the provision of these data to the authorities, 20 July 2022, 61505.

[82] Belgian Legislator, Law on electronic communications, 13 June 2005, 28070.

[83] The latter term (the author's own) also encompasses what might be called "location data", but pertaining only to the *source* of a communication, *e.g.*, the geographical location of a mobile telephone when the service is activated.

[84] Subject to one exception: mobile ECS, date and time of the connection of the terminal equipment to the network in question due to power-on and disconnect from the network in question due to power-off; see art. 162/2, para. 2 10, Belgian e-Privacy implementing law as amended; Law on electronic communications cit.

national security, where a communication starts or ends on equipment located in a designated geographical zone. A zone may be designated in no fewer than five different ways:

a) as a zone which is particularly exposed to national security risks or the commission of serious crime (including ports, railway and metro stations, prisons and customs buildings, and "critical infrastructures");

b) as a zone where there is a serious potential threat to the vital interests of the country or for the essential needs of the population (including buildings listed as economically- or scientifically-important, motorways, public parking areas, the Royal Palace, military domaines, and the Belgian national bank);

c) as a zone where there is a serious potential threat to the interests of international institutions (including the EU, NATO and the UN),

d) as a zone where the "OCAM" threat level is at least at level 3 (on a scale of 1 to 4);[85]

e) or as a zone (concretely, either a judicial province or police zone) where set totals of specified criminal offences[86] have been recorded per 1000 inhabitants on a three-year rolling average (i.e. for 2025, the average over 2022, 2023 and 2024).

The Belgian reform is as complex as it is novel and it would merit its own dedicated analysis, also in comparison with the similar reform announced in early 2023 in Luxembourg.[87] For present purposes, the discussion will be limited to highlighting a few open questions on the nature of the "targeted" retention foreseen in Belgium and its relationship with the CJEU case law.

The first such question is whether it will be possible to credibly portray the geographical calibrations built into the new law as delivering "targeted" retention in compliance with the CJEU's guidance if it should be borne out – as critics have advanced – that their overall

[85] OCAM concentrates on terrorism, extremism and problematic radicalisation. At the time of writing, the national threat level was at 2 ("medium").

[86] The long list in art. 90*ter*, para. 2, of the Belgian *Code d'instruction criminelle*, plus those in para. 4.

[87] The Luxembourg Government, *Sam Tanson presented the draft law on the retention of personal data* gouvernement.lu. The Data Retention Bill proposes to insert a new art. 5bis in the 2005 Law on the Protection of Private Life, establishing the targeted retention of traffic and location data of users who find themselves (even for a moment, if mobile) in a designated geographical zone. In terms of crime, the retention mandate would cover geographical zones with higher risks of preparation and commission of acts of serious criminality, meaning: *a)* Areas (*lieux*) where crimes or *délits* punishable with a maximum term of imprisonment of at least one year are repeatedly committed; *b)* Areas (*lieux*) which, by their "configuration", tend to encourage (*favoriser*) the commission of such offences; *c)* The surroundings and limits of infrastructure where events of national or international stature (*envergure*) are regularly organised; *d)* Areas (*lieux*) which by their nature gather a large number of individuals. Unlike the more detailed, prescriptive Belgian law, more of the inner workings of "targeted retention" is left to secondary legislation in the form of an *Arrêté grand-ducal* (Grand-Ducal Circular). That Circular, a joint product of the *Haut commissariat à la protection nationale* and a specially-constituted consultative commission, would draw the geographical perimeters of each of the above zones, renewable after evaluation every three years. All translations of the Bill (from the French) are the author's own. See further K Ligeti and G Robinson, 'Digital Evidence and the Cooperation of Service Providers in Luxembourg' in V Franssen and S Tosza (eds), *The Cambridge Handbook of Digital Evidence in Criminal Investigations* (Cambridge University Press forthcoming).

outcome would be to cover the entire Belgian territory and population.[88] Indeed, it has been claimed that due to its enshrinement of low thresholds the new law's crime rates-based retention (the fifth listed above) would on its own amount to blanket coverage of the entire country – before the further four zoning provisions are even taken into account.[89]

On the one hand, the Belgian incorporation of crime rates does respond directly to repeated invitations from the CJEU to focus on average crime rates in order to establish geographical targeting; the Court has gone so far as to defend such an approach as "in principle, not likely [...] to give rise to discrimination, as the criterion drawn from the average rate of serious crime is, in itself, entirely unconnected with any potentially discriminatory factors".[90]

On the other hand, where the outcome is that retention covers the entire territory, this sits as uneasily with the specific warning that the adoption by national legislators of distinctive criteria *other* than a personal or geographic criterion "it being understood that there can be no question of reinstating, by that means, the general and indiscriminate retention of traffic and location data,[91] as it does with the Court's consistently strict aversion to any measures affecting "the entire (European) population". Ultimately, it is submitted here that any regime which results in (near-)total coverage can only be described as "targeted" with a heavy dose of sophistry, since it plainly turns the exception into the rule.

In terms of future-proofness, the Court has been clear that geographical areas "may and, where appropriate, must be amended in accordance with changes in the circumstances that justified their selection, thus making it possible to react to developments in the fight against serious crime".[92] Such facilities are built into the Belgian reform.[93] What the Court has not even implicitly encouraged, however, is legislating for a "targeted" retention scheme with which operators are unable to comply for practical or technical reasons. In such a scenario, the question of fallback options becomes central: in the new Belgian law, notably, where a service provider is unable to localise equipment more precisely than "Belgium", it is to retain either for the entire national territory or, where this is not possible, not

[88] P Breyer, 'Targeted Data Retention: our map explained' (8 June 2022) www.patrick-breyer.de.

[89] The new regime arranges different retention periods on a sliding scale relative to crime rates as follows: 6 months' retention for 3 or 4 recorded offences per 1.000 inhabitants of a relevant geographical zone; 9 months' retention for 5 or 6 recorded offences; and 12 months' retention for 7 or more recorded offences. *In concreto,* according to the calculations put forward by Patrick Breyer MEP, the national average over the past three years sits at 11 offences, with all judicial provinces bar one (Eupen, at 5.5 offences, triggering retention for a period of 9 months) individually meeting the threshold of 7 offences, consequently triggering retention for a period of 12 months across the vast majority of the Belgian territory. *Ibid*.

[90] *SpaceNet* cit. para. 109.

[91] *Ibid*. para. 112.

[92] *Ibid*. para. 111.

[93] Pointedly, the Belgian evaluation report is to specifically include the percentage of the national territory covered by the new traffic and location data retention scheme. A comparable mechanism is also built into the planned Luxembourg reform.

at all. Where a service provider is unable, for technological reasons, to limit data retention to any specified geographical zone, similarly it is required to retain the data necessary to cover the totality of the (presumably, larger) zone, whilst limiting retention outwith the (smaller) specified zone as strictly as its technological means will allow.

These selected features of the Belgian reform make clear that the new generation of data retention legislation coming through in that country (as well as in Luxembourg, if the Bill is adopted) will provide an opportunity to gauge its impact in practice – and potentially also a bellwether for the CJEU's tolerance of such an interpretation of its guidance.[94] Could a similar approach be taken at EU level? In June 2021, the European Commission sought the views of Member State delegations on possible regulatory paths forward including the possibility of harmonising "targeted" retention at the EU level.[95] In response to an access to documents request by *Statewatch*, seven Member States agreed to release their responses to the questionnaire.[96]

Whilst their representativeness cannot be ascertained, delegations' responses on "targeted" retention are telling. In addition to practical difficulty (in some cases, technological impossibility), risks of discrimination or stigmatisation, what emerges is a dim view of the potential added value to law enforcement of targeted retention of traffic and location data in the fight against serious crime. A familiar crime prevention logic is identifiable – blanket retention is, seen through this prism, inevitably preferred over "targeted" retention[97] – but delegations also pointed out specific limitations of the latter. For instance, the German delegation noted:

> "Serious offences are not limited to specific geographical areas, […] and often take place in a private setting. Moreover, the key communications activity frequently takes place somewhere other than the location at which the offense occurs […]. Especially when it comes to organised crime, analysing the communications activities in pro-active phase prior to the deed is of decisive importance for evaluating acts contributing to the principal

[94] In November 2020, a European Parliament resolution called on the European Commission to launch infringement procedures against Member States whose laws implementing the invalidated DRD had not been repealed to bring them into line with the CJEU case law. It remains to be seen whether the European Parliament might issue a comparable call-in relation to the Belgian reform.

[95] See European Council, 'Data Retention – Commission Services Non-Paper' (EC Working Paper 7924-2021) www.statewatch.org.

[96] Unfortunately, another thirteen Member States refused to release the information on the grounds that it would undermine public security; see Statewatch, 'EU: Data Retention Strikes Back? Options for Mass Telecoms Surveillance Under Discussion Again' (1 December 2021) www.statewatch.org.

[97] As the German delegation observed, "both [the DRD], which since has been declared invalid, and the domestic regulations on the generalised retention of data respectively in place derive their rationale from the fact that in order to fight serious crime it is impossible to predict in advance which traffic data will be required for which persons, for which region, and for which period"; German Delegation, Response to EC Working Paper on 'Data Retention – Commission Services Non-Paper' cit. 3.

offence. Concurrently, limiting data retention to a specific geographical area is not particularly useful given the mobility of suspects".[98]

The Netherlands delegation advised *inter alia* that criminals will avoid locations where data is retained, that many forms of (organised) crime cannot be "geographically defined", because location changes are part of the concealment strategy, targeted retention "will most likely not work" for retaining metadata of (potential) perpetrators of crimes like cybercrime or cyber-enabled crime, and for OTT services it is not always possible or legally permissible to determine the location of a user in order to decide if the users' data should be retained.[99] Ultimately, "it is more a theoretical than practical option, but [...] it would be interesting to further (empirically) investigate its operational potential", specifically mentioning the Belgian scheme.

The future-proofness of any EU-level data retention scheme might therefore be boosted by observing the first years of operation of national "targeted" retention schemes such as that already in place in Belgium (and that proposed in Luxembourg) from the perspectives of added value to law enforcement, technical feasibility and impact on fundamental rights. Particularly on the last point, should one ever reach the CJEU it will be interesting to see whether a national data retention scheme such as Belgium's can be accepted as "targeted", in light of both the letter and the spirit of the CJEU's case law, if indeed its ultimate effect is to "target" virtually the entire population of the relevant national territory.

III.3. What we talk about when we talk about data retention: tomorrow's metadata and future necessity

On even a short historical view, the very reason for retention regimes – such as the invalidated DRD and the various impugned national systems discussed in this *Article* – is bound up in successive waves of technological change. From the 1980s onward, in most EU Member States law enforcement actors began to face the possibility of losing access to the "one-stop-shop" for communications data when (monopolistic, state-owned) telecoms providers were replaced by one[100] or multiple competing private firms. In the early

[98] *Ibid*.

[99] Netherlands Delegation, Response to EC Working Paper on 'Data Retention – Commission Services Non-Paper' cit. OTT stands for "over-the-top", denoting services offered "directly" over the internet, in the sense that the provider of that service does not also provide the (infrastructure required to convey) the communication – rather, it uses existing networks such as the Internet and cellular networks. In terms of electronic communications (not media), the most relevant examples are OTT "instant" messaging, which has largely outstripped SMS and MMS, and OTT voice calling, often called Voice over Internet Protocol or "VoIP". The likes of WhatsApp, WeChat, Google Duo, Telegram, and FaceTime offer one or both of these functionalities.

[100] For example in Ireland, where telecommunications services were transferred from central government to a separate State-owned company, Telecom Éireann, in 1983. See TJ McIntyre, 'Data Retention in Ireland: Privacy, policy and proportionality' (2008) Computer Law & Security Review 327-328.

2000s, it was the arrival of flat-rate billing and broadband internet which dovetailed with a strengthening of privacy protections in law – especially in the context of the flexibility offered by a burgeoning internal market – to undermine voluntary retention of unnecessary metadata across the key sectors of fixed and mobile telephony and internet access.

Today, a further migration of communications from ECS to OTT services has already taken place, with the advent of dynamic IP necessitating adaptation of data retention mandates, and an increasing roll-out of end-to-end encryption (E2EE) as standard diminishing the scope for law enforcement access to the content of communications. It should be a simple exercise to include technological review clauses in legislation, whether at EU or national level.[101] But in the not-so-distant future 5G is projected to fully hit its stride in Europe, raising two baskets of issues for data retention mandates that may prove more problematic.[102] The first relates to quantity: far greater quantities of data processed translates into far greater quantities of data to be retained, potentially at greater expense. Thinking optimistically, this could yet translate into greater popular pressure and policy attention on demonstrable usefulness of such schemes (as is discussed separately below). But on a technological level, it is no good providing in law for the retention of data which is inaccessible to the service providers managing it on behalf of their customers. This would appear to be a very real prospect should the roll-out of 5G lead to (greater) use of end-to-end encryption for metadata as well as content.

The changing shape of what is placed into the boxes marked "metadata", "traffic data", "location data" or otherwise is not only a question of legislative or regulatory celerity but also of legitimacy.

Before it was passed in 2005, the usefulness of data retained under the Data Retention Directive for the purposes of combatting serious crime, chiefly terrorism, was largely assumed – controversially, by the Parliament as well as its co-legislators. Before the Directive was annulled by the CJEU, at EU level a lone Commission report tackling this point had been issued, in 2011,[103] and was plagued by a lack of statistics on crime rates and the structural limitations (for many, the fruitlessness) of comparing rules and practices across diverse national criminal justice systems.

Fast forward to today, and the heart of the CJEU's case law is the art. 52(1) proportionality test. In its case law, from *Digital Rights Ireland* to *SpaceNet*, the CJEU has barely

[101] For example, the new Belgian provisions provide for the addition by Royal Decree (a form of secondary legislation) of new data types emerging from technological evolution, for both blanket and targeted retention, subject to confirmation in law within 6 months; see arts 126, paras 1-17 and 126/2, paras 2-10.

[102] European Commission, 'Study on the Retention of Electronic Communications Non-content Data for Law Enforcement Purposes' cit. 112-117.

[103] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks; Communication COM(2011) 225 final from the Commission of 18 April 2011, Evaluation report on the Data Retention Directive, 23-25.

addressed the necessity of pre-emptive data retention – whether of a blanket or targeted nature. Nor is that in its gift, as a court working within the parameters of extant legislation, rights, litigation questions addressed to it, and precedent. Almost 20 years on from the "rush job"[104] that was the DRD, any new data retention scheme will need to meet higher standards. How might *ex post* evaluation of the effectiveness of data retention (transparency, benchmarks, etc) be configured along the lines of CJEU-proof targeted retention? How would *ex post* evaluation be affected if the policy is achieved by "carve-out" (in the ePrivacy Regulation) as opposed to standalone legislation? These questions ought to be much more central to the policy debate moving forward. Future-proofing the fight against serious crime in Europe through pre-emptive data retention mandates (whether those are blanket or targeted) carries a responsibility to demonstrate, over time, a positive impact on the fight against such crime – *sine qua non*.

IV. Conclusion

This *Article* set out to take a future-proofing lens to pre-emptive metadata retention laws, a category of legislative intervention that has struggled in recent times to qualify even as "Court-proof" – in light of Charter rights to privacy, data protection and freedom of expression, as adjudged by the CJEU.

It did so, in the first main part of the analysis (II.), by sketching the complex aftermath of the Data Retention Directive since its annulment in *Digital Rights Ireland* 2014 and providing an up-to-date summary of the expansion and refinement of the leading CJEU case law since that seminal judgment. In the second main part of the analysis (III.), a future-proof perspective was taken to the current "data retention debate" in the EU, with a view to identifying research and policy priorities for the years to come – intended to double as conditions for the adoption of any fresh EU-level (legislative) initiative installing "data retention 2.0" for the purposes of combatting serious crime.

The analysis showed that whilst the CJEU case law establishes strong bulwarks against general and indiscriminate pre-emptive metadata retention, its resilience should not be taken for granted. Whether through creative interpretations in national law of what does and does not qualify as "targeted" retention, or a future softening of the Court's position – which may be brought along depending on the outcome of the ePrivacy Regulation negotiations – a re-introduction of blanket retention of traffic and location data cannot be discounted, especially if such a reform is propelled by the strong political will history teaches us is generated by "high-impact, low-frequency" events such as major terrorist attacks.

Whether retention of metadata is targeted or blanket, the *Article* went on to address two core aspects of the legal mandates imposing that retention: the technological aspect (in particular: what will "metadata" mean in future, will it always be possible to retain it?)

[104] TJ McIntyre, 'Data Retention in Ireland' cit.

and, relatedly, the necessity to credibly ascertain the effectiveness of such schemes for their stated purpose (here, the discussion was limited to serious crime, as opposed to the avoidance of national security risks). If and when a new EU data retention scheme should come to be proposed, legal researchers ought to be prepared to fully engage with the impact assessment process, in order to better complement stakeholders both public and private. In particular, if the Court-approved approach of "targeted retention" is to stay, we will need more substantial work on its potential roll-out at EU level, the transparency of its use, its demonstrable effectiveness, and constant attention to these aspects into the medium- to long-term in view of revision or ultimately repeal.

Although their ramifications are weighty, data retention mandates are narrow, uncomplicated pieces of regulation: in the first place, certain types of data must be retained (and others may not, such as content) by specified private entities for clearly defined periods of time. In that sense, the design of a future-proof data retention scheme rather easily swerves concerns around technological neutrality – or, rather, it largely depends on the future-proofness already built into the underlying regulatory framework to which it constitutes an exception.[105] What such a scheme may not easily swerve, however, is the potential futility brought on by technological change. To take only the most obvious example: if metadata cannot be accessed by electronic communications service providers (if, for instance, it is encrypted end-to-end), it cannot be retained.

To close, it is submitted that therein lies a fruitful and overdue path for future research efforts and policy attention. "Data retention" has most often been viewed in isolation – from other (EU) laws, from other CJEU case law, and even from other investigatory options. This is perhaps understandable, not least in light of the daunting complexity of the case law. Increasingly, however, there is a convergence of policy developments that seem to imply a need for blanket metadata retention and/or indirectly maintain the technological possibility of retention. In other words, the time has come to de-silo the data retention debate in the EU both horizontally and vertically. The new European Production Order, however fast, cannot catch data that has already been deleted. The European Commission's plans for a CSA Regulation[106] may both dampen end-to-end encryption of metadata into the future and imply its retention. Reaching beyond EU law, it will also be important to monitor the impact of the new Second Additional Protocol to the Council of Europe's Cybercrime Convention (the "Budapest Convention"), accelerating the direct disclosure of subscriber information, on the data retention debate at Member State level.

[105] P Ibáñez Colomo, 'Future-Proof Regulation against the Test of Time: The Evolution of European Telecommunications Regulation' (2022) Oxford Journal of Legal Studies 1170-1194.

[106] "CSA" stand for Child Sexual Abuse; see the Proposal COM(2022) 209 final from the Commission of 11 May 2022 for a Regulation of the European Parliament and of the Council laying down rules to prevent and combat child sexual abuse.

Articles

The Externalisation of EU Migration Policies in Light of EU Constitutional Principles and Values

edited by Juan Santos Vara, Paula García Andrade *and* Tamás Molnár

The Externalisation of EU Migration Policies in Light of EU Constitutional Principles and Values: Reconciling the Irreconcilable? An Introduction to the *Special Section*

In recent years, the European Union (EU) has substantially intensified its activities directed at externalising the management of immigration, asylum and borders towards the territories of third countries. These actions aim at reducing the pressure on EU Member States located at the Union's external borders and, pursuant to official statements, preventing migrants, asylum seekers and refugees from risking their lives when embarking on journeys to reach European soil. This multi-faceted process of externalisation of migration control comes together with an increased securitisation of the aims and means, including even military ones; alongside the more intense involvement of EU Agencies with extended mandates and the constant informalisation of instruments of cooperation with third countries. The emergence and incessant development of this specific model of EU migration policy, which appears to be consolidated under the New Pact on Migration and Asylum,[1] is often realised at the expense of democratic scrutiny, judicial supervision, transparency and, most importantly, the protection of human rights, also entailing unprecedented challenges for the legitimacy of the EU in its international projection.

There is a common agreement between the Member States on the need to further enhance international cooperation with third countries of origin and transit in order to more effectively face current challenges in the area of migration. The European Council, in its Conclusions of 9-10 February 2023, has reiterated the longstanding call for an intensified EU engagement in the external dimension of migration "with the objective of strengthening [third countries] capacity for border management, preventing irregular flows, breaking the business model of smugglers, including through strategic information campaigns, and increasing returns".[2] The Swedish Presidency of the Council of the EU

[1] The new Pact is composed of a Commission communication serving as the policy frame (Communication COM(2020)609 final from the Commission of 23 September 2023 on a New Pact on Migration and Asylum), and a number of legislative proposals aiming at reforming the EU acquis on borders, asylum and immigration.

[2] European Council Conclusions of 9 February 2023, para. 23.

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has also called for "a true whole-of-government approach and sustained engagement, both from Member States and EU institutions and from EU agencies" to achieve results in this external dimension, "while making full use of all relevant policies, instruments and tools" in order to strengthen cooperation with partner countries.[3] As a result of the limited progress in the political negotiations of the different legislative proposals included in the New Pact on Migration and Asylum, it seems that the EU and the Member States are once more seeking solutions externally to the challenges raised by the management of migration. Cooperation with third countries, an essential element of any coherent and effective migration policy, appears focused on advancing EU's own interests and thus subordinated to the objectives of alleviating pressure on its external borders and reception capacities, preventing, as close as possible to the point of departure, irregular arrivals to Member States' territories, ensuring effective returns and transferring the burden of protection responsibilities.

The aim of the present *Special Section* is to assess the implications of the externalisation of EU migration policies for the EU constitutional principles and values, and to take stock of the latest developments in different concrete policy areas. Particular attention is devoted to analyse compliance of externalisation practices with the requirements imposed by the EU constitutional framework, specifically with the principles and values that should guide Union's external conduct in this area. As per the origins of this exercise, a joint webinar was organized in collaboration with the European Society of International Law Interest Group 'The EU as a Global Actor' and the European Papers Jean Monnet Network on 10 June 2021, [4] under the coordination of Prof. Juan Santos Vara (University of Salamanca), Prof. Paula García Andrade (Universidad Pontificia Comillas - ICADE) and Dr. Tamás Molnár (EU Agency for Fundamental Rights and the Corvinus University of Budapest). The workshop was the beginning of a discussion and writing process that led to the publication of this *Special Section*. The latest round of revision took place in October 2023. We would like to sincerely thank the anonymous reviewers for the time devoted to thoroughly review the whole Section and the valuable comments made on the different contributions. The usual disclaimer applies.

The first two papers deal with the challenges arising from the externalization process to the rule of law, democracy and fundamental rights in the EU. One of the key experts in this area, Prof. Tineke Strik, sets the stage by reflecting on the way the Union values and principles are guiding the external dimension of EU's asylum and migration policy. She argues that there are ample reasons to reverse the current policy trend to keep the external dimension of asylum and migration policy outside the scope of the EU Treaties and its safeguards for democracy, fundamental rights and other key EU principles. Strik contrasts the increasing pressure on rule of law compliance in Member States with the

[3] Council of the European Union, "Asylum and migration: external and internal dimensions", 27 February 2023, 6748/23.

[4] Project Reference: 610707-EPP-1-2019-1-ES-EPPJMO-NETWORK.

failure to respect the institutional balance and fundamental rights protection in the EU decision-making on external cooperation on migration. According to Strik, the current externalisation measures put practically all objectives of the EU external policy as enshrined in art. 21 TEU at risk. This paper is followed by a contribution discussing the informalisation of EU readmission policy. Eleonora Frasca and Emanuela Roman argue that informality has always coexisted with formalisation efforts at the EU level, but the most recent wave of informalisation of EU readmission policy emerged as a consequence of the search for increased effectiveness in EU return policy. In exploring the legal nature of informal agreements, their contribution focuses on the interplay between informal agreements and conditionality and the use of informal agreements to return or push back asylum seekers. Frasca and Roman submit that the EU seeks to provide a legally-sound legitimacy to the externalisation of protection responsibilities by trying to incorporate the legal concepts of safe country of origin, safe third country and first country of asylum into informal migration agreements and arrangements.

A second set of papers addresses the externalisation of migration controls from the perspectives of the specific means used by the EU and its Member States, such as recourse to other external policies or the increasing involvement of EU agencies in these processes, as well as the legal consequences of externalisation in terms of EU actors' international responsibility when cooperation with third countries entails fundamental rights violations. First, Prof. Paula García Andrade analyses the implications of resorting to the means and instruments of the Common Foreign and Security Policy (CFSP) and the Common Security and Defense Policy (CSDP) to attain migration objectives. The aim of her contribution is to review the legal implications of the recourse to the CFSP instead of the Area of Freedom, Security and Justice (AFSJ) instruments for migration purposes addressing and comparing the competence question, as well as the institutional consequences in terms of decision-making and judicial protection in both policies. She then focuses on the Court of Justice of the EU (CJEU) doctrine on the choice of the appropriate legal basis and its "centre of gravity test" in order to clarify how its criteria apply to the linkages between CFSP and migration policy. García Andrade considers that accepting the instrumental dimension of the CFSP means that migration and internal security concerns appear to be preponderant over CFSP objectives and thus the "centre of gravity test" would solve the conflict in favour of the TFEU and the AFSJ integrated policies.

The question of how the European Border and Coast Guard Agency, Frontex contributes to the current process of externalisation of EU migration policies is central in the contribution by Prof. Juan Santos Vara. He argues that the deployment of border management teams on the territory of third countries raises complex legal and political questions as regards the applicable legal regime and the delimitation of responsibilities between the different actors involved in these extraterritorial operations. Santos Vara considers that the allegations of fundamental rights violations in which Frontex was reportedly involved in the Aegean Sea show that clarifying the role of Frontex in any wrongdoing that will happen in

the context of operations implemented in the territory of third countries will not be an easy task. In these extraterritorial scenarios, it will be difficult to sustain in the future that the responsibility as regards infringements of fundamental rights lies exclusively with third states. According to Santos Vara, it should be further explored how to develop adequate mechanisms and safeguards for ensuring the protection of fundamental rights in the case of operations implemented in the territory of third countries.

Finally, Tamás Molnár focuses his contribution on the EU Member States' responsibility under international law for human rights breaches when cooperating with third countries on migration. His piece is set against the backdrop that practically speaking it is still the Member States that most of the time implement EU law extraterritorially. He analyses selected extraterritorial, cooperative border management scenarios, which are in the "grey zone" in terms of State responsibility under international law from the perspective of various human rights violations. He argues that more legal clarity is needed in this regard, especially when EU Member States "aid or assist" third countries in their efforts to manage migration flows. Molnár submits that it is still debated whether related conduct entails State responsibility in such situations, which involve activities carried out under the umbrella of international cooperation, but with the aim of preventing migrants from reaching the EU. Nevertheless, he posits that complicity of EU Member States – notably in the form of "aiding or assisting" – on the basis of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA)[5] can be established under certain circumstances.

Juan Santos Vara[*], Paula García Andrade[**] and Tamás Molnár[***]

[5] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, annexed to UNGA Res 56/83 (2001) UN Doc A/RES/56/83 (12 December 2001) as the UN General Assembly took note of the articles.

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ARTICLES

THE EXTERNALISATION OF EU MIGRATION POLICIES IN LIGHT OF EU CONSTITUTIONAL PRINCIPLES AND VALUES

edited by Juan Santos Vara, Paula García Andrade *and* Tamás Molnár

EU EXTERNAL COOPERATION ON MIGRATION: IN SEARCH OF THE TREATY PRINCIPLES

TINEKE STRIK*

ABSTRACT: This *Article* analyses to what extent the EU values and principles are guiding the external dimension of EU migration policies, especially the principle of democracy and fundamental rights. To illustrate this, it elaborates on the consequences of the informalization of this cooperation, and of the lack of safeguards for fundamental rights compliance. In the second part, the *Article* analyses the consequences of the increasing tendency to apply conditionality in the external migration cooperation, illustrated with three recent examples (Union Visa Code, post-Cotonou Agreement and trade tariff preferences). While referencing to political science research from the perspective of third countries, the *Article* concludes that the conditionality approach also risks undermining the principles of equality and sincere cooperation, which eventually impede the effectiveness of the external dimension on migration policies. By drawing lessons from the internal rule of law mechanisms, the EU could bring the external cooperation on migration more in line with its own values and principles enshrined in the Treaties. By doing so, it would offer the necessary safeguards for more coherence in the EU's policies.

KEYWORDS: external dimension – rule of law – conditionality – institutional balance – fundamental rights – equal partnerships.

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Part of this *Article* draws on her inaugural lecture 'Dealing with Migration. Constitutional challenges in the external cooperation on migration', given on 17 June 2022 at the Radboud University.

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I. Introduction

The principles of rule of law, democracy and fundamental rights constitute a vital reference at all levels of the EU: the legal order of the Member States, the inter-institutional relations and decision making by the EU, including its actions on the external dimension. Migration has increasingly become a priority in the EU's external cooperation, and according to the Commission, it will be "systematically factored in as a priority in the programming" of external policy instruments.[1] This *Article* reflects on the way the Union values and principles are guiding the external dimension of the EU's asylum and migration policy. The *Article* focusses on two values prone to be affected in the external cooperation on asylum and migration, namely democracy and fundamental rights. Subsequently, the author elaborates on the way the EU imposes migration-related conditionality in its external cooperation, and how this may affect respect for EU values and principles. This is illustrated with three recent (draft) legal instruments in which visa (the EU Visa Code), development aid (the Post-Cotonou Treaty) and trade benefits (the revised GSP+ Regulation) are made dependent on the third country's cooperation on border controls and readmission. The *Article* analyses the types of policy it can trigger in the partner countries, and how these may affect the fundamental rights of migrants as well as the relationship with the EU. In addition, it will be assessed how the conditionality in migration cooperation impacts the EU objective to promote fundamental rights, as well as the principles of coherence, equality and sincere cooperation.

II. The EU Treaty as guidance for rule of law, democracy and fundamental rights

Since the EU had developed into a political Union which has granted its citizens fundamental rights, Union's responsibility for the protection of its values and rights has been anchored in the Treaties. The 1997 Amsterdam Treaty inserted a new provision into the EU Treaty (TEU) which provided that "the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States".[2] In the current art. 2 TEU, the Treaty of Lisbon constitutionalized the respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, as intrinsically linked and interdependent.[3] According to art. 4(3) TEU, Member States must cooperate sincerely and loyally in achieving the EU's objectives. And one of these objectives, laid down in art. 3(1) TEU, is to promote its values.

[1] See Communication COM(2016) final 385 from the Commission of 7 June 2016 on establishing a new Partnership Framework with third countries under the European Agenda on Migration, 20.

[2] Ex art. 6(1) TEU.

[3] These values are reflected in different policy areas covered by the EU Treaties, such as the objectives to promote the equality between men and women and to eliminate all forms of discrimination, see arts 8 and 10 TFEU.

Most treaty provisions to safeguard these principles are related to the national systems, and due to serious rule of law backsliding in Poland and Hungary, these have been the most debated ones. This attention is also reflected in the development and use of instruments aimed at safeguarding rule of law standards in the Member States. Apart from the art. 7 TEU procedure, the Commission has used art. 258 TFEU to conduct several infringement procedures in case of breaches of specific rule of law related provisions in the Treaties or secondary legislation.[4] In order to prevent deficiencies, a monitoring mechanism has been developed with an annual report on the state of the rule of law in all EU Member States.[5] The latest legal instrument is the so-called conditionality mechanism, adopted in December 2020, which has made EU funding conditional upon rule of law compliance, in particular independent judiciary and anti-corruption policies.[6]

The design and legal order of the EU itself are based on the same democratic principles.[7] The principle of institutional balance in the EU implies that each of its institutions (Commission, Council, Parliament and the Court of Justice) has to act in accordance with the powers conferred on it by the Treaties.[8] This safeguards the separation of powers, which is especially important for democratic and judicial control, and thus the legitimacy of EU's policies. The increased application of co-decision has further cemented the institutional balance in the legislative process.

When negotiating the Lisbon Treaty, the Member States were keen to improve the coherence of the EU's external action.[9] A new set of general provisions was dedicated to this area, among which art. 21 TEU is the most important as far as the rule of law is concerned.[10] Rule of law but also fundamental rights and democratisation objectives have been progressively integrated into all aspects of the EU's external policies and actions, promoting these values in different ways.[11] Coherence of external actions implies

[4] See *inter alia* CJEU 15 July 2021, C-791/19, ECLI:EU:C:2021:596; CJEU 8 April 2014, C-288/12, ECLI:EU:C:2014:237; CJEU 6 November 2012, C-286/12, ECLI:EU:C:2012:687; CJEU 24 June 2019, C-619/18, ECLI:EU:C:2019:531; CJEU 18 June 2020, C-78/18, ECLI:EU:C:2020:476; CJEU 6 October 2020, C-66/18, ECLI:EU:C:2020:792; CJEU 14 July 2021, C-204/21; CJEU 15 July 2021, C-791/19, ECLI:EU:C:2021:596; pending case C-769/22.

[5] See the Communication COM(2019) 343 final from the Commission of 17 July 2019 on Strengthening the rule of law within the EU. A blueprint for action.

[6] Regulation (EU) 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, LI 433/1.

[7] See *inter alia* arts 9 to 12 TEU, but also arts 15 to 22 FTEU on the democratic principles and individual rights of Union citizens.

[8] See specifically art. 13 TEU.

[9] See P Van Elsuwege, 'EU External Action after the Collapse of the Pillar Structure. In Search of a New Balance between Delimitation and Consistency' (2010) CMLRev 987.

[10] L Pech, 'Rule of Law as a Guiding Principle of the European Union's External Action' (CLEER working papers 3-2012).

[11] M Cremona, 'Values in EU Foreign Policy' in M Evans and P Koutrakos (eds), *Beyond the Established Legal Orders. Policy Interconnections between the EU and the Rest of the World* (Hart 2011) 292.

coherence with internal policies as well, as the Union principle of consistency requires that external policies are consistent with all other Union policies.[12] Consistency between EU's internal and external asylum and migration policies is of special importance, as external cooperation on migration, including on border control, may affect the core rights of the EU asylum acquis, in particular access to an asylum procedure and the right to *non-refoulement*.

III. External dimension of EU asylum and migration policy

III.1. Democracy and institutional balance

The legal basis for internal and external asylum and migration policies can be found in arts 78 and 79 TFEU, which list the topics for asylum and migration law and policies and provide for co-legislation.[13] The external elements are covered by the legal basis for partnership and cooperation with third countries and the legal ground for formal readmission agreements. However, the extremely limited use of these legal grounds is in stark contrast to the rapidly increasing externalisation of migration policy.[14] The policy choice by the Commission and Council to develop these policies beyond these legal bases, renders the safeguards for an institutional balance much less effective. The next subparagraphs elaborate on the potential use of this legal framework for shaping external policies and the actual use of it.

a) Partnership and cooperation

Art. 78(2) TFEU includes all asylum-related areas on which the EU takes measures according to the ordinary legislative procedure. Subparagraph (g) is the only area covering the external dimension, namely "partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection". This provision reaffirms that the EU can cooperate with third states in situations where the adoption of secondary legislation does not result in an exclusive external treaty making competence, including through financial and operative support.[15] The Court of Justice has made clear that the content and objective of the instrument in question determines which legal basis applies; in case of multiple aims and components, the

[12] Art. 21(3) TEU.

[13] The only exception are emergency measures based on art. 78(3) TFEU. This has been used for emergency relocation decisions for the benefit of Greece and Italy, Decision 2015/1523, adopted 14 September 2015 and Decision 2015/16, adopted 22 September 2015. See Proposal COM(2021) 752 final for a Council Decision of 1 December 2021 on provisional emergency measures for the benefit of Latvia, Lithuania and Poland.

[14] See art. 78(2)(g) and art. 79(3) TFEU.

[15] K Hailbronner and D Thym (eds), *EU Immigration and Asylum Law: A Commentary* (II edition C.H. Beck/Hart/Nomos 2016) 1040.

central elements prevail over incidental aspects if the measure has an identifiable focus.[16] If an instrument is specifically related to another policy, such as financial support as part of the development and neighbourhood policies, or if corollary rules on asylum are laid down in association and neighbourhood agreements, the asylum-related provisions are covered by the legal basis of those policies and agreements.[17] So far, art. 78(2) sub (g) TFEU has only been used for the financial consequences of partnerships aiming at "managing inflows" of asylum seekers, such as the Asylum Migration and Integration Fund (AMIF) Regulation, and for the proposed Resettlement Framework.[18] Regarding the content of the partnerships however, the Parliament is sidelined through the use of informal cooperation.

b) Readmission agreements

The external dimension of return policies, provided for in art. 79(3) TFEU, is subject to the procedure for external agreements in art. 218 TFEU. This implies that Parliament has the right to consent for the conclusion of readmission agreements and the right to be "immediately and fully" informed at all stages of the negotiations on those agreements.[19] Parliament and Council can both obtain an opinion from the Court of Justice on the compatibility of the agreement with the Treaties.[20] If incompatible, the agreement cannot enter into force without amendment or revision of the Treaties.

Although return is often at the heart of external migration cooperation, we observe a limited use of art. 79(3) TFEU in the last decade.[21] Formally, the legal framework does not prevent the EU or Member States from applying informal types of cooperation. Since the Lisbon Treaty, the EU has entered into migration "arrangements", shaped in different ways such as regional dialogues, joint declarations, Memoranda of Understanding. EU Arrangements have been made with Afghanistan, Bangladesh, Ethiopia, the Gambia, Guinea and Ivory Coast.[22] Unlike formal readmission agreements, most of them are not made public, they do not include references to human rights, they are not reciprocal and they do include commitments from the EU on other areas, for instance on financial

[16] See, for instance, case C-91/05 *Commission v Council* (*ECOWAS*) ECLI:EU:C:2008:288 para. 73.

[17] D Thym, 'Legal Framework for Entry and Border Controls' in K Hailbronner and D Thym (eds), *EU Immigration and Asylum Law* cit. 39-40.

[18] See the AMIF Regulations 516/2014 and 2021/1147 and the Communication COM(2016) final 468 from the Commission of 13 July 2016 where are mentioned both art. 78(2)(d) (common procedures) and (g) (partnerships) TFEU as legal grounds for the proposed Union Resettlement Framework Regulation.

[19] Art. 218(6)(a) and art. 218(10) TFEU.

[20] Art. 218(11) TFEU.

[21] Since 2015, only one EU Readmission Agreement has been concluded, with Belarus in 2020, Agreement between the European Union and the Republic of Belarus on the readmission of persons residing without authorisation, 9 June 2020.

[22] European Commission, *Return and readmission* ec.europa.eu. See also T Molnár, 'EU Readmission Policy: A (Shapeshifter) Technical Toolkit or Challenge to Rights Compliance?' in E Tsourdi and P De Bruycker (eds), *Research Handbook on EU Migration and Asylum Law* (Edward Elgar Publishing 2022) 486-504.

assistance.[23] Also the negotiation process is more flexible, due to the lack of strict negotiating directives and formal negotiation rounds. Even if a formal instrument has been concluded, it can be easily circumvented and left aside, as this process does not exclude the option of informal cooperation.[24] While, according to art. 218(2) TFEU, the Council mandates the Commission to negotiate and conclude formal agreements, it is in practice often the European Council that gives political guidance regarding informal arrangements. For instance, in its December 2021 conclusions, the European Council urged the Commission to make funding available and to use all the leverage possible to ensure effective returns to third countries.[25] Accordingly, we must conclude that, despite the actual role of the European Council, the negotiating role of the Commission, the involvement of all three EU institutions for the approval of the budget and the fact that the subject matter of cooperation belongs to the competences of the EU, the actual informal cooperation on migration takes place outside the protective realm of the Treaties.

The informalisation of migration cooperation not only undermines democratic but also judicial control and thus access to justice, as illustrated by the General Court's judgement in 2018 on the EU-Turkey Statement, which was concluded two years prior.[26] According to this Statement, Turkey would receive EU funding to host the 3,5 million Syrian refugees, in exchange for preventing their departure to the EU and for readmitting irregular migrants and refugees. In this package, Turkey was promised to get visa-free travel soon and have the EU-accession talks accelerated. The General Court ruled, to the surprise of many, that it lacked competence as the Statement concerned an agreement between the heads of the Member States and Turkey, not between the EU and Turkey. It made several scholars question the legal basis for Member States, acting in their autonomous international law capacity, to negotiate on topics belonging to the exclusive competence of the Union like EU accession, visa policy and EU funds.[27] The decision of the General Court has made Dutch NGOs in March 2023 to issue a statement in which they hold the Dutch government accountable for the fundamental rights impact on the refugees stuck on the Greek islands, as the Netherlands negotiated the deal during its EU Presidency.[28] Despite referring to criticism of civil society organisations and the European Parliament on the lack of transparency and the potential impact on returnees' human rights, in 2021, the EU Court of Auditors

[23] European Court of Auditors Special Report 17/2021, 'EU Readmission Cooperation with Third Countries: Relevant Actions Yielded Limited Results' para. 37.

[24] See for instance the Agreement between the European Union and the Republic of Belarus on the readmission of persons residing cit., art. 18(2).

[25] European Council Conclusions EUCO 22/21 of 16 December 2021 www.consilium.europa.eu para. IV.

[26] See for the Statement EU Council press release of 18 March 2016, consilium.europa.eu; for the judgement CJEU Joined cases T-192/16, T-193/16 and T-257/16 *NF, NG and NM v Council* ECLI:EU:T:2017:128.

[27] See M Giuffré, *The Readmission of Asylum Seekers under International Law* (Hart Publishing 2020) 168; P García Andrade, 'External Competence and Representation of the EU and its Member States in the Area of Migration and Asylum' (17 January 2018) EU Immigration and Asylum Law and Policy eumigrationlawblog.eu.

[28] Statewatch, *Netherlands liable for human rights violations in Greek refugee camps* statewatch.org.

recommended stepping up informal cooperation on migration, as it made the content of arrangements more flexible and more likely to be successful.[29]

The General Court's decision on the EU-Turkey Statement does not, however, mean the Court is at ease with the institutional imbalance that informal arrangements might cause. In 2012, the CJEU annulled guidelines that the Council had adopted as an annex to the Schengen Borders Code, to which the Parliament is co-legislator.[30] The Court judged that, despite the title "guidelines", these rules intend to have a binding effect, and therefore have to be established in the legislation itself. It gave three additional reasons: first, the rules concern a major development of the Schengen rules; second, the rules may interfere with the fundamental rights of the persons concerned; third, they require political choices to be made by the EU legislature.

So, the reasons for the Parliament and the Court of Justice being sidelined in the area of external cooperation on migration are the result of political decisions by the Council and the Commission. It is not unlikely that external arrangements between the EU and third countries, in which EU instruments are interlinked, can be qualified as an unlawful circumvention of the legislature. That may well be the case if the Treaties confer a competence to the Parliament for the matters at issue. For example, think of visas or financial assistance, where the Parliament is co-legislator, or readmission or trade where the Parliament has a right to consent.[31] Such circumvention might be regarded as unconstitutional, especially if fundamental rights are at stake. A recent example is the Memorandum of Understanding on a strategic and global partnership between the EU and Tunisia of July 2023, which (despite references to a number of economic investments) centers around cooperation on border control and combatting irregular migration (including human smuggling and trafficking), return and readmission, as well as policies on visa and labour migration.[32] These areas all mirror the topics on which the Parliament has the role of co-legislator regarding EU internal policies.[33] But the MOU might be legally challenged for its arrangements regarding readmission between the EU and Tunisia.[34]

III.2. Fundamental rights

Notwithstanding the Treaty provisions emphasizing fundamental rights, so far, the EU has failed to set clear, public benchmarks in its external policies, necessary to assess and monitor compliance with fundamental rights. For this reason, the EU is criticized for the

[29] European Court of Auditors Special Report, 'EU readmission cooperation with third countries' cit. paras 38 and 124.

[30] Case C-355/10 *Parliament v Council* ECLI:EU:C:2012:516.

[31] See art. 77(2)(a), art. 79(2)(c), art. 79(3) and art. 218(6)(a) TFEU.

[32] Memorandum of Understanding on a strategic and global partnersship between the EU and Tunisia, July 2023, ec.europa.eu.

[33] See art. 77(2) and art. 79(1) and (2) TFEU.

[34] Art. 79(3) TFEU.

lack of political will to take fundamental rights seriously, and for arguing "that publicly articulated benchmarks would introduce tension into a dialogue and undermine its role as a 'confidence building exercise', as if the purpose of the dialogue were to promote warm and fuzzy feelings rather than to improve respect for human rights".[35] These concrete benchmarks are also absent in the external instruments on asylum and migration.

The lack of clear criteria for the implementation of human rights provisions also hampers any other type of accountability within the EU framework, such as the obligation to conduct *ex-ante* impact assessments, which follows from the rules on better regulation.[36] This implies that monitoring and evaluation exercises are not embedded in the policy framework either. The European Parliament therefore called upon the Commission to conduct human rights *ex-ante* impact assessments prior to entering into forms of migration cooperation and to monitor the results, in order to ensure that the formal or informal cooperation will not affect fundamental rights of migrants and refugees.[37] Another complicating element is that the relevant EU institutions that could contribute to transparent and independent monitoring, like the EU Ombudsman and the Fundamental Rights Agency (FRA), lack the competence to operate outside the EU territory.[38] This sharply contrasts with the extraterritorial scope granted to operational agencies like Frontex and Europol.[39]

The protection level for migrants and refugees in a third country does not constitute a criterion for the selection of a partner country, nor a condition for entering or continuing the cooperation, although at least in the area of border management this should be the case.[40] Yet, extensive research points at heightened human rights risks of migration cooperation with third countries where human rights of migrants are not protected.[41]

[35] See K Roth, 'A Facade of Action: The Misuse of Dialogue and Cooperation with Rights Abusers' in *Human Rights Watch, World Report 2011. Events of 2010* (Seven Stories Press 2011) 8-9.

[36] See the Interinstitutional Agreement on Better Regulation, 12 May 2016, and the Better Regulation Guidelines, Chapter IV, SWD(2021) 305 final of 3 November 2021.

[37] European Parliament, Report A9-0060/2021of 25 March 2021 on Human Rights Protection and the EU External Migration Policy, (2116/2020 (INI))., , .

[38] See art. 3(3) of Council Regulation 555/2022 of 5 April 2022 amending Regulation (EC) No. 168/2007 establishing the FRA, and Regulation 1163/2021 laying down the regulations and general conditions governing the performance of the EU Ombudsman's duties.

[39] See art. 10(1)(u) and arts 71-77 of the Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 and arts 17(1) (b), 23(1) and 25 of the Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA.

[40] Art. 72 of Regulation 1896/2019 cit.

[41] See M Giuffré, *The Readmission of Asylum Seekers under International Law* cit.; V Moreno-Lax, 'EU External Migration Policy and the Protection of Human Rights' (September 2020) Policy Department for External Relations, European Parliament; T Strik, 'Human Rights Impact on the "External Dimension" of European Union Asylum and Migration Policy. Out of Sight, out of Rights?' (2018) PACE, Council of Europe, doc. no. 14575 assembly.coe.int.

Arrangements on strengthened border control leads to more difficulties for migrants to leave a transit country, which is especially problematic if that country fails to protect or even maltreats migrants. Several studies even reveal that the cooperation leads to more restrictive migration policies by third country governments, on the request of the EU or as a way to avoid responsibility for migrants transiting their territory.[42] Although part of the EU funding aims to strengthen protection regimes in third countries, these reports indicate that the overall impact on fundamental rights may be negative. This should be a reason for more thorough scrutiny and monitoring. Yet, European policy documents are often limited to generally formulated human rights notions, while refraining from conducting *ex-ante* impact assessments or setting up monitoring systems to gain insight into how the cooperation affects the human rights of migrants and refugees. The few known evaluations are mainly quantitative, focusing on return rates and the number of irregular crossings into the EU. The information about the situation of migrants and refugees in a third country is not based on a variety of independent sources, but merely on information from the authorities of the countries concerned.[43]

Where policy documents include the objective of improving human rights, the implications of this objective are not clearly defined. The Action Plan on Libya of December 2021 is a painful example of this, bearing in mind the horrendous situation of migrants and refugees in Libya in general, and specifically of those detained after being intercepted by the EU-funded Libyan coastguard.[44] It defines abolishing unlawful detention of migrants as a key priority, but this objective is not linked to any condition for funding or other types of support. The EU actions to achieve the end of the detention practices is limited to advocacy and encouragement.[45] Despite the lack of progress in this field, the funding of the Libyan authorities has only increased. In March 2023, the UN Fact-Finding Mission on Libya found that crimes against humanity were committed against migrants in places of detention under the actual or nominal control of Libya's Directorate for Combating illegal Migration, the Libyan Coast Guard and the Stability Support Apparatus, state institutions which also received significant revenue from "trafficking, enslavement, forced

[42] B Frelick, IM Kysel and J Podkul, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants' (2016) Journal on Migration and Human Security 190-220.

[43] See the Commission progress reports based on information from the Turkish and Greek authorities, for instance the Communication COM(2017) 470 final from the Commission of 6 September 2017 on the implementation of the EU-Turkey statement.

[44] See OHCHR, *"Lethal Disregard": Search and Rescue and the Protection of Migrants in the Central Mediterranean Sea* ohchr.org; OHCHR, *Fact-finding Mission on Libya: Human Rights Violations are Impeding Transition to Peace, Democracy and the Rule of Law* ohchr.org.

[45] Operationalization of the Action Plan for strengthening comprehensive migration partnerships with priority countries of origin and transit. Draft Migration Action Plan: Libya, Council document 11946/1/21 REV 1, JAI 993, ASIM 64, RELEX 777 MIGR 207, COAFR 273, 2 December 2021.

labour, imprisonment, extortion and smuggling".[46] It also observed that these entities "receive technical, logistical and monetary support from the EU and its member States for inter alia the interception and return of migrants".[47] The Mission therefore recommended to cease all direct and indirect support to these actors "involved in crimes against humanity and gross human rights violations against migrants".[48]

The funding, like any other type of migration cooperation, is not preceded by impact assessments either. Yet, in 2015, in a case on a EU trade agreement with Morocco encompassing products from Western Sahara, the Court of Justice ruled that the EU must avoid situations where an agreement "indirectly encourages" violations of fundamental rights.[49] This obligation to take precautionary measures not only implies *ex ante* impact assessments and fundamental rights criteria to be met beforehand, but also the need for an independent monitoring and the possibility to suspend the cooperation in case of fundamental rights violations. None of these safeguards are foreseen in the current external cooperation on migration. In the case of Libya, the report of the UN Fact-Finding Mission on Libya of March 2023 will not be followed by updated reports, despite its urgent call to the Human Rights Council for a sufficiently resourced, independent international investigation mechanism as the gross human rights violations continue unabated.[50] The linkage between these violations and the EU funding did not lead the EU to support such an investigation or monitoring mechanism. The resolution adopted by the Human Rights Council in response to this fact-finding mission report only includes recommendations on technical support for implementing measures. It is quite remarkable that the resolution, despite the UN conclusion about state involvement in crimes against humanity, calls upon the Libyan authorities to monitor, investigate and collect evidence on human rights violations.[51] The resolution was submitted by a group of states, including Italy and Malta, which indicates that they prioritise to continue their cooperation with the Libyan Coastguard to prevent arrivals at their shores. The silence and non-action by the other EU Member States and the EU delegation in Geneva suggest that there is little preparedness to acknowledge the EU's role and responsibility and to end its contribution to the crimes against humanity in Libya or, at least, to impose very strict conditions to the funding. A joint press release of the Tripartite Taskforce on the Situation of Migrants and Refugees in Libya, consisting of the EU, the African Union (AU) and

[46] Report of the UN Independent Fact-Finding Mission on Libya (A/HRC/52/83) of 3 March 2023, Human Rights Council, 52nd session, 27 February-31 March 2023, Agenda item 10, paras 4 and 41-45.

[47] *Ibid*. paras 4 and 46.

[48] *Ibid*. Chapter IV para. 103 (g).

[49] Case T-512/12 *Front Polisario v Council* ECLI:EU:T:2015:953 para. 231. See V Kube, 'The European Unio's External Human Rights Commitment: What is the Legal Value of art. 21 TEU?' (EUI LAW Working Paper 10-2016) 25.

[50] Report of the Fact-Finding Mission cit. para. 7.

[51] Resolution on Technical assistance and capacity-building to improve human rights in Libya, proposed by Côte d'Ivoire, Iceland, Italy, Malta, Türkiye and Yemen, Human Rights Council 52nd session, 27 Feburary-4 April 2023, Agenda item 10, A/HRC/52/L33.

the United Nationals (UN), only "reaffirmed its commitment to supporting the Libyan authorities' efforts for tackling the urgent needs on the ground", and repeated its call upon the Libyan authorities to end arbitrary detention of migrants and refugees.[52]

III.3. Conditionality and Treaty concerns

EU cooperation with third countries is historically made conditional upon compliance with the EU's values by these countries. Especially if the cooperation includes benefits to third countries, the EU tends to impose conditions on good governance, human rights and democracy. The last decade, these value-based conditions are increasingly being replaced or complemented by performances on border control and readmission. Initially a policy was developed in which the EU sought to make migration cooperation mutually beneficial, seeking to create a common agenda with third countries.[53] This was followed by attempts to offer benefits like trade, development aid or visa facilitations in exchange for cooperation on migration (the so-called more-for-more approach).[54] The EU then turned toward a negative conditionality, where third countries receive fewer of these benefits if they did not sufficiently cooperate (the "less-for-less approach").[55] While the Commission seems to become aware of the limits of this approach,[56] the European Council continues to increase pressure on third countries. In mid-December 2021, it took more control with a new Mechanism for the Operational Coordination for the External dimension of Migration: MOCADEM.[57] The mechanism, based on the system underlying the EU Integrated Political Crisis Response Arrangements[58], established a group of national and Commission experts who intended to propose concrete actions with third countries. These actions can include diplomatic steps, capacity building, financial support and visa measures. All policy tools can be used to achieve cooperation on migration, with the exception of humanitarian aid, as this would infringe upon the humanitarian principles.[59]

[52] EEAS Press Team, Joint Press Release: EU, AU and UN Push for Urgent Action to Address the Pressing Needs of Migrants and Refugees in Libya, EU External Action Service, 21 March 2023, eeas.europa.eu.

[53] European Council Conclusions of 17 December 2005, Global Approach to Migration: Priority Actions focusing on Africa and the Mediterranean, 15914/05.

[54] Communication COM(2011) 743 final from the Commission of 18 November 2021 on the Global Approach to Migration and Mobility.

[55] Communication COM(2016) 385 final from the Commission of 7 June 2016 on establishing a new Partnership Framework with Third Countries under the European Agenda on Migration.

[56] Communication COM(2020) 609 final from the Commission of 23 September 2020 on a New Pact on Migration and Asylum, chapter 6: 'Working with our International Partners'.

[57] Council Implementing Decision 2022/60/EU of 12 January 2022 on the Operational Coordination Mechanism for the External Dimension of Migration.

[58] Council Implementing Decision 2018/1993/EU of 11 December 2018 on the EU Integrated Political Crisis Response Arrangements.

[59] Communication COM(2016) 385 final from the Commission to the European Parliament, the European Council the Council and the European Investment Bank of 7 June 2016 on establishing a new Partnership Framework with third countries under the European Agenda on Migration, footnote 26.

In its proposal for the new Pact on Migration and Asylum in September 2020, the Commission exposed its ambiguity concerning third country cooperation, by stressing the importance of both equal partnerships and negative conditionality.[60] To illustrate that migration-related conditionality has become a structural part of EU's external cooperation, I will highlight three recent examples of it enshrined in (draft) legal instruments: the visa conditionality, the post-Cotonou agreement, and the general trade preferences. For each instrument, I will mention its risks for fundamental rights and the principles of coherence and equality.

a) Suspension mechanisms in the Visa rules

The conditionality between visa and readmission started to develop in the relations with Eastern European and Western Balkan states, where the EU offered visa-free travel in exchange for close cooperation on readmission. This not only led to a long list of migration-related requirements (many on border control and readmission) to gain visa-free travel, but also to a visa suspension mechanism in case those requirements were no longer met.[61] With the introduction in 2019 of a suspension mechanism in the Common Visa Code, the conditionality has expanded to third countries with a less advantageous relationship with the EU: no visa-free travel, and no perspective of accession either. This not only means that the incentives for complying with the visa-related obligations are less strong, but also the level of human rights safeguards is far from secured. The readmission obligations derive from either an EU readmission agreement, concluded with 18 third countries, or as part of a multilateral treaty such as the Cotonou Agreement, concluded with 79 African, Caribbean and Pacific countries. In addition, the EU has concluded a readmission *arrangement* with six countries, which due to its informal nature, fall outside the obligation to disclose the content.[62] The current EU visa regime includes two different types of suspension mechanisms: one for visa waivers and one for visa facilitation rules.

i) Visa waivers. The conditionality regarding visa-free travel is laid down in the Regulation listing the third countries whose nationals have to possess a visa for crossing the EU's external borders, and the third countries whose nationals are exempt from this requirement. In 2018, after a series of amendments since 2001, this regulation has been codified again.[63] The regulation provides for the temporary suspension of the visa exemption in case of non-compliance with the obligation of readmission, including readmission of third

[60] Communication COM(2020) 609 final cit. para. 6(5).

[61] F Trauner and E Manigrassi, 'When Visa-free Travel Becomes Difficult to Achieve and Easy to Lose: The EU Visa Free Dialogues After the EU's Experience with the Western Balkans' (2014) European Journal of Migration and Law 125-145.

[62] These countries are (apart from the EU-Turkey Statement) Afghanistan, Bangladesh, Ethiopia, The Gambia, Guinea, Ivory Coast.

[63] Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (codification), 39.

country nationals who have transited through that third country. Non-compliance with a readmission obligation agreed between a Member State and the third country can also trigger the suspension of the visa exemption at the Union level.[64] The regulation prescribes that the consequences of suspension for the external relations between the Union and its Member States have to be taken into account.[65] According to the recitals, the human rights situation has to be considered, but the consequences of a deterioration are not defined.[66] The only reference to refugees concerns a substantial increase of the number of asylum requests with a low recognition rate (around 3 or 4 percent) as an indicator for the suspension.[67]

ii) Visa facilitations. The EU developed a similar linkage between negotiations of visa facilitation agreements and negotiations on readmission agreements, which ultimately linked the entry into force of a Visa Facilitation Agreement (VFA) to the entry into force of a readmission agreement with that same country. The migration-related suspension mechanism for visa facilitation is introduced in the revised Common Visa Code, adopted in 2019.[68] Since then, the Regulation includes art. 25a, which provides that in case of insufficient cooperation with readmission, the EU will suspend visa facilitations provided in the Visa Code. This can imply more conditions to be met for travelling into the EU, longer procedures or higher fees. This sanction obviously has a negative impact on nationals who are in need of protection as well. In its annual assessment of the third countries' cooperation with regard to readmission and return, the Commission takes into account the overall cooperation in the field of migration, in particular regarding border management, combatting migrant smuggling and preventing transit of irregular migrants through its territory.[69] The EU is thus not only using its visa leverage for furthering returns, but also for preventing irregular arrivals from transit countries. If the Commission concludes that the country is insufficiently cooperating, or if a simple majority of Member States has notified the Commission accordingly, the Commission is obliged to propose an implementing decision to the Council. This decision implies a temporary suspension of more favourable provisions such as exemptions of requirements for certain documents, a short duration of the procedure, exemptions of the visa fee for holders of a diplomatic or service passport and/or the issuance of multiple-entry visas. If the suspension does not lead to an improved cooperation, the visa fees will be doubled or tripled

[64] *Ibid*. art. 8 and recital 22.

[65] *Ibid*. see art. 8(6) and recital 17.

[66] *Ibid*. recitals 26 and 28.

[67] *Ibid*. art. 8(2)(b) and recital 24.

[68] Regulation (EU) 1155/2019 of the European Parliament and of the Council of 20 June 2019, amending Regulation 810/2009 establishing a Community Code on Visas, art. 25. The indicators to be assessed by the Commission are listed in para. 2 of the new art. 25(a).

[69] Recital 13 of the Common Visa Code cit.

for all nationals of that specific country.[70] If the Commission concludes that a third country cooperates sufficiently on readmission, it can propose to the Council the adoption of positive visa measures, such as the reduction of the visa fee or the processing time, or an increased period of validity of multiple entry visas.[71] This however has not occurred yet.

Based on its first assessment of the level of compliance by the third countries with readmission, the Commission concluded in 2021 that with more than one third of the partner countries, the cooperation is not sufficient.[72] Regarding The Gambia, the Council adopted the implementing decision proposed by the Commission, to suspend certain facilitating provisions for nationals of The Gambia, due to the country's reluctance to cooperate with forced returns.[73] Although the detailed progress report and the proposal to the Council for an implementing decision are confidential, there is some external reporting that the Commission also considered proposing suspensions regarding the Democratic Republic of Congo, Egypt, Eritrea and Ethiopia, Iraq, Iran, Libya, Mali and Somalia.[74] This means that in many countries potentially subject to visa restrictions, human rights violations are taking place at a large and structural scale, which may force citizens to flee their country. This is reflected in the number of asylum applications from these countries, and the high recognition rate of some of them.[75] Suspension measures for all nationals of those countries would affect human rights defenders or other victims of persecution who need a low threshold for swiftly obtaining a visa to be protected by the international community. Furthermore, the obligation to readmit migrants who transited a third country may trigger a more restricted border control and the preventing of departures, without any guarantee that this transit country secures access to protection for refugees. These real risks raise the pertinent question to what extent the human rights level in the partner countries are actually taken into account in applying this suspension mechanism.

Due to their national specific situation and interests, Member States have difficulties to achieve a united position.[76] Some Member States want to protect and foster their privileged bilateral relation with a third country against interference by the Union, others suffer from a bad relation and need the Union to protect their interests. The discussions in the Council fail to address the reasons of the limited number of readmissions or a

[70] See art. 25(a)(5) Common Visa Code cit.

[71] *Ibid*. art. 25(a)(8).

[72] Communication COM(2021) 56 final from the Commission of 10 February 2021 on enhancing cooperation on return and readmission as part of a fair, effective and comprehensive EU migration policy, para. 4.3.

[73] Implementing Decision 11748/2021/EU of the Council of 28 September 2021 on the suspension of certain provisions of Regulation 810/2009 with respect to The Gambia. The suspension concerns provisions set out in art. 25(a)(5)(a) of the Visa Code.

[74] ECRE, 'Playing the Visa Card?' (2021) ECRE Weekly Bulletin ecre.org.

[75] See UNHCR's Global Trends report over 2019, which reports that the protection rate for asylum seekers from DRC, Eritrea and Somalia was around or higher than 80 percent. unhcr.org 42.

[76] See Communication COM(2021) 6583 final from the Council of 5 March 2021 on enhancing cooperation on return and readmission, available at Statewatch, statewatch.org.

problematic cooperation.[77] A one-sided focus on the suggested unwillingness of a third country and the lack of self-reflection, overlooks the role that Member States themselves have in improving their return and readmission procedures.[78]

iii) Little result, more sanctions? In its impact assessment to its proposal for the revised Visa Code, the Commission concluded that there was no hard evidence that visa leverage leads to better cooperation of third countries on readmission.[79] The question can be raised if the incentive of procedural obstacles for obtaining a visa is sufficiently strong for third countries. They have to weigh procedural disadvantages against their economic interest in irregular migration and their internal political interest in resisting the EU.[80] Their situation is incomparable to countries for which the significantly more beneficial visa-free travel or the perspective of accession is at stake.

As EU Member States appear reluctant to offer positive incentives in the field of migration, such as labour migration pathways, Member States and the Commission consider additional negative conditionalities to improve cooperation.[81] Art. 7 of the proposed Asylum and Migration Management Regulation, launched as part of the Asylum and Migration Pact, permits the annual Visa Code report to be used as a basis for "the identification of any measures which could be taken to improve the cooperation of that third country as regards readmission", rather than just restrictions on visa issuance.[82] Member States are currently discussing the option to require alignment of the partner country's visa policy with the EU visa regime, as more liberal rules in a transit country would create an avenue for irregular migration into the Union. For that reason, the Commission

[77] For instance, according to the assessment by the Commission, Member States experience an overall positive cooperation with Morocco, except a few Member States. Instead of blaming Morocco, the Commission could first dig deeper into the reasons for these specific troublesome bilateral relations, see Communication COM(2021) 55 from the European Commission of 10 February 2021, report to the Council on Assessment of third countries' level of cooperation on readmission in 2019, available at Statewatch, statewatch.org.

[78] For insight into gaps and failures by the Member States in implementing return procedures, see Policy document COM(2023) 45 final from the European Commission of 24 January 2023 towards an operational strategy for more effective returns, para. 2, in which is mentioned that only 16 percent of the return decisions are followed by a request for readmission.

[79] European Commission, Commission Staff Working Document Impact Assessment SWD(2018) 77 of 14 March 2018 accompanying the Proposal for the revised Visa Code, 31; O Sundberg Diez, F Trauner and M De Somer, 'Return Sponsorships in the EU's New Pact on Migration and Asylum: High Stakes, Low Gains' (2021) EJML 238.

[80] See also O Sundberg Diez, F Trauner and M De Somer, 'Return Sponsorships in the EU's New Pact on Migration and Asylum' cit. 239-240. See the case of Morocco: L Laube, 'The Relational Dimension of Externalizing Border Control: Selective Visa Policies in Migration and Border Diplomacy' (2019) Comparative Migration Studies; and T Abderrahim, 'A Tale of Two Agreements: EU Migration Cooperation with Morocco and Tunisia' (2019) EuroMeSCo Series euromesco.net.

[81] F Trauner and E Manigrassi, 'When Visa-free Travel Becomes Difficult to Achieve and Easy to Lose' cit.

[82] Communication COM(2020) 610 final from the Commission of 23 September 2020, Proposal for a regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU).

monitors the visa-regime in the countries with visa waivers and raises divergences with the Union's visa regime. After a sharp increase in irregular migration via the Western Balkan route, partly relating to Serbia's non-alignment to EU visa policy in 2022, the Swedish Presidency initiated a broader debate in the Schengen Council in 2023 to reflect on EU's visa policy, including on a possible revision of the visa suspension mechanism.[83] It proposed to extend the grounds for suspension by including alignment to EU visa policy, irregular migration including transit-hubs and citizenship by investment schemes.

In April 2020, the Croatian Presidency presented the option to introduce a conditionality clause in a Union instrument or international agreement - not related to migration- which is being amended or under negotiation.[84] In case of reluctance to agree with such clause, the EU could suspend the negotiations or withhold approval on provisions favorable to the third country to be included in the agreement. In addition, the Commission proposed to consider other measures in relevant sectorial instruments (for instance on trade or development) as leverage for non-cooperation on readmission, including financial ones. Both options have been realized, as the next two examples will show.

b) Post-Cotonou Partnership Agreement

In 1999, the Council decided to include standard readmission clauses in all European association and cooperation agreements with third countries.[85] Such clauses were introduced in the Cotonou Agreement, signed in June 2000 between the EU and the African, Caribbean and Pacific countries, aiming to promote the sustainable development goals.[86] The Cotonou Agreement serves as the model to emulate for all substantive human rights clauses, since the refinement in 2005 of the procedure whereby either party may withdraw from the agreement or take "appropriate measures" when the other party fails to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law or when a party seriously violates one of these "essential elements". Until now, in all cases that "appropriate measures" have been adopted, this was done by the EU against Organization of African, Caribbean and Pacific States (ACP) countries.[87] The Agreement obliges ACP states to accept the return and readmission of its nationals who are illegally present on the territory of a Member State of the European Union, at a

[83] Note from the Presidency to the Visa Working Party on the future of EU visa policy, 17 February 2023, 6268/23, found on www.statewatch.org.

[84] Communication COM(2020) 7256 final from the Commission to the European Parliament and the Council of 20 April 2020 on Proposal for a coordination mechanism to activate different policies to improve the cooperation of third countries on the return/readmission of their nationals.

[85] European Council Note 13409/99 of 25 November 1999, Consequences of the Treaty of Amsterdam on readmission clauses in Community agreements and in agreements between the European Community, its Member States and third countries.

[86] See Decision 2000/483/EC of the Council of 15 December 2000, Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000.

[87] L Pech, 'Rule of Law as a Guiding Principle of the European Union's External Action' cit. 21.

Member State's request and without further formalities. [88] In addition, ACP states must conclude a bilateral agreement at the request of an EU Member State, not only on the return and readmission of own nationals but also regarding third country nationals and stateless persons.[89] The negotiations on the renewed Partnership Agreement were concluded in April 2021, but has not yet been approved and entered into force.[90] Migration and readmission was one of the most controversial issues during the negotiations, and a key priority for the EU. The EU insisted on the legal obligation to readmit own nationals, and on the possibility to take "appropriate measures" in case the ACP-country does not comply. While the EU side was seeking firm ACP commitments to assist in the repatriation and readmission of ACP nationals, the ACP countries urged for the facilitation of legal migration.[91] These negotiations however resulted in a focus on managing migration flows and fighting irregular migration and trafficking.

Where the Cotonou Agreement only included one provision on migration (art. 13), it is now given its own title (14 articles) and a specific annex in the foundation, and another distinct title in the Africa protocol (seven articles). They enshrine the obligation to conclude a bilateral readmission agreement or arrangement with simplified procedures, which are laid down at a very detailed level in the annex.[92] These specific obligations (*de facto* addressed to the ACP-countries) contrast with the provisions on promoting mobility (including labour migration) and lowering the transaction costs of remittances, which are limited to expressing good intentions.[93] Also the root causes of migration and the relationship between migration and development are not really built upon. These different formulations imply that only in case of non-compliance with the return and readmission provisions, the "other Party" can take appropriate and proportionate measures, including the partial or full suspension of the Agreement.[94] If the EU Member States fail to perform on mobility, remittances or other commitments, the ACP-countries are left with empty hands.

c) Tariff preferences for developing countries

The most recent example of anchoring a readmission obligation in an international agreement is the Commission proposal for a revision of the Regulation for generalized

[88] Art. 13(5)(c)(i) of the Cotonou Agreement.

[89] *Ibid*. art. 13(5)(c)(ii).

[90] See the text of the Negotiated Post-Cotonou Agreement initialled by the EU and OACPS chief negotiators and concluded on 15 April 2021, ec.europa.eu.

[91] See J-C Boidin, 'ECP-EU Relations: The End of Preferences? A Personal Assessment of the Post-Cotonou agreement' (2020) ECDPM ecdpm.org.

[92] See art. 74 and Annex I: Return and Readmission Processes.

[93] See arts 63 and 67 of the Agreement, and also arts 74 and 76(2) of the Africa Protocol.

[94] See arts 74(4) and 101 paras 5-8 post Cotonou Agreement. This suspension can include development aid assistance as well.

scheme of tariff preferences for developing countries.[95] Since 1971, the EU has granted trade preferences to developing countries in the framework of the so-called generalised system of (tariff) preferences (GSP). One of the characteristics of this trade arrangement is that it includes a special incentive arrangement known as GSP+, which offers additional trade preferences to the most vulnerable developing countries on the condition that they ratify and effectively implement a set of core international conventions on human and labour rights, environmental protection and good governance. On these grounds, the Commission can temporarily withdraw trade preferences if the beneficiary country has seriously and systematically violated the principles laid down in these international conventions concerning core human rights and labour rights or related to the environment or good governance.[96] In order to enforce compliance, beneficiary countries have to accept regular monitoring of its implementation of these conventions. The temporary withdrawal option has been used in the past in response to the political situation in Myanmar and in Belarus.[97] The current GSP regime provides non-reciprocal preferential access to the EU market to developing countries.[98] In its proposal for revision presented in September 2021, the Commission added the possibility to withdraw preferences in case of violations of the obligation of readmission.[99] Apparently, the idea to insert this negative condition emerged at a late stage of the legislative process, as it was not included in the scope of the *ex-ante* impact assessment. However, that did not keep the Commission from arguing that the impact of this condition can only be positive, as it would prevent "a constant drain in active population in the countries of origin, with the ensuing long-term consequences on development", and it would ensure that migrants are treated with dignity.[100] This justification is an attempt to hide the EU interest of the readmission obligation, which fundamentally differs from all current conditions that serve the wellbeing and rights of the people in the least developed countries. The proposal to insert this migration-related condition is also criticized as not being compatible with the WTO-rules. In a

[95] Communication COM(2021) 579 from the European Commission of 22 September 2021 on Commission proposal for a Regulation on applying a generalised scheme of tariff preferences and repealing Regulation (EU) No 978/2012,.

[96] See also L Pech, 'Rule of Law as a Guiding Principle of the European Union's External Action' cit. 16-17.

[97] Council Regulation (EC) No 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 552/97, (EC) No 1933/2006 and Commission Regulations (EC) No 1100/2006 and (EC) No 964/2007, recital 23; Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008, recital 25.

[98] See art. 9(1) and Annex VIII (conditions), and art. 15 (grounds for temporary withdrawal) of Regulation 978/2012 cit.

[99] Communication COM(2021) 579 final cit. art. 19(1)(c).

[100] Commission Staff Working Document SWD(2021) 266 of 22 September 2021, Impact assessment report accompanying Commission proposal for a Regulation of the European Parliament and of the Council on applying a generalized scheme of tariff preferences and repealing Regulation (EU) No 978/2012 of the European Parliament and of the Council , 24 and 43; see also recital 26 of COM(2021) 579 final cit.

legal opinion, Vidigal argues that, as GSP-schemes aim to facilitate and promote the trade of developing countries, the conditions imposed must respond positively to the development, financial and trade needs of these countries.[101] Since the conditionality regarding return and readmission of migrants does not meet this criterion but demands action that is in the domestic interest of the WTO-Member, the proposed conditionality should be withdrawn "if the EU is to comply with its international commitments and avoid further straining the multilateral trading system".[102]

Furthermore, the Treaty provides for the definition of development cooperation objective to reduce and eradicate poverty.[103] This does not only bind the EU and Member States while making development cooperation policies, but also when implementing other external policies which are likely to affect developing countries. Adding a (negative) condition accommodating EU's own interest to return undocumented migrants to a regime meant to support the least developing countries, does not only risk to affect development aid goals, but it also takes away the possibility to promote other external policy objectives. Incentives lose their functionality if they are linked to such broad range of performances, as it makes prioritization inevitable. The risk of undermining external policy objectives is especially real if compliance with the readmission obligation gets priority over fundamental rights, good governance, labour rights or environmental policies. This priority was actually the reason behind creating a partnership framework on migration, as the Commission unambiguously underlined: "[t]his means, for each partner country, the development of a mix of positive and negative incentives, the use of which should be governed by a clear understanding that the overall relationship between the EU and that country will be guided in particular by the ability and willingness of the country to cooperate on migration management".[104]

Where the Council fully supported the Commission's proposal to insert this new conditionality, the Parliament proposed to delete it.[105] This resulted in a deadlock after seven rounds of trilogues, with the risk that no new Regulation would be adopted before the

[101] S Vidigal, 'Legal Opinion on the Lawfulness of Proposals to Include Migration-related Conditionalities in the EU GSP (2023) CSW csw.org.uk.

[102] Similar criticism in the in-depth study requested by the DROI committee, authored by G van der Loo, 'The Commission Proposal on Reforming the Generalised Scheme of Tariff Preferences: Analysis of Human Rights Incentives and Conditionalities' (January 2022) www.europarl.europa.eu.

[103] Art. 208(1) TFEU.

[104] Communication COM(2016) 385 cit. 17. See also 3: "It is essential that in close cooperation with all Member States it is made clear to our partners that a solution to the irregular and uncontrolled movement of people is a priority for the Union as a whole".

[105] See for the Council Mandate Council document no. 16270/22, adopted on 22 December 2022, and the European Parliament position report n. A9-0147/2022, adopted on 17 May 2022 in the INTA committee. See I Zamfir, 'New EU Scheme of Generalised Preferences' (July 2022) EPRS Briefing, European Parliament.

current one would expire on 31 December 2023.[106] The Commission therefore proposed to extend the duration of Regulation 978/2012 with four years to allow Council and Parliament to find an agreement in the meantime, to which both institutions agreed.[107]

The prioritization of own migration interests in external relations poses three challenges to key principles of the EU. First, it impedes the EU's effectiveness related to its external policy objectives, especially those where EU Member States' own interests are not immediately at stake. Member States will not endanger their cooperation on security, trade or other beneficial policies, just because of a lack of cooperation on readmission. The areas which are prone to be sacrificed are those related to the interests and rights of people in those countries, non-citizens and citizens alike. Second, it may affect the EU's coherence as its leverage to pursue a strong agenda on human rights has become dependent on the strategic importance of the third country for EU's border and migration policy. Finally, it endangers the Union principle of sincere cooperation, if prioritizing EU interests affects the equality of the partnerships. Research on externalization conducted from the perspective of third countries points at their perception of inequality, sometimes resulting in reluctance or strategic responses to the pressure from the EU. Below, I will highlight some examples.

III.4. Principles of equality and sincere cooperation

EU Member States (and the EU agencies) have to cooperate sincerely and loyally in achieving the EU's objectives, in mutual respect, based on the principles of solidarity and fair sharing of responsibility.[108] It requires that the content and results of Member States' external cooperation on migration is in line with democracy, the rule of law, human rights, and that Member States refrain from taking international action capable of affecting the Union's position.[109] The way Member States exercise their competences in their external cooperation on migration to circumvent or counterbalance EU action, not seldomly impeding EU's objectives, is subject to critical analyses.[110] Although the principle of sincere cooperation applies to internal EU relations, the principles of equality and solidarity in external actions make it plausible that Member States are to respect this

[106] See the urgent call of Human Rights Watch, C Francavilla, 'Migration Paranoia Jeopardizes EU Trade and Development Scheme. EU Council, Commission Should Listen to Parliament, Drop Migration-Trade Benefits' (6 June 2023) hrw.org.

[107] Communication COM(2023) 426 final from the European Parliament and the Council of 25 October 2012, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No. 978/2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008.

[108] Art. 4(3) TEU and art. 80 TFEU.

[109] C Molinari, 'Sincere Cooperation between EU and Member States in the Field of Readmission: The More the Merrier?' (2021) CYELS 269–289.

[110] See *i.a.* P García Andrade, 'EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally' (2018) CMLRev 157, 175.

principle toward partner countries as well. Furthermore, art. 21 TEU explicitly defines the principles of equality and solidarity as belonging to the basis of EU external action.[111] In its 2020 Communication, the Commission showed an increasing awareness of the need to achieve "real" mutually beneficial partnerships with key countries of origin and transit.[112] However, after expressing a "warning" that migration issues such as border management or return and readmission can be politically sensitive for partners, it failed to elaborate on the implications of this reality.

a) Counterproductive effects

Interdisciplinary research offers useful insights into third countries' perceptions and the way they respond to pressure from the EU. Stutz and Trauner found that intensifying cooperation on readmission does not lead to a higher return rate.[113] They observe that developments in return rates are regionally defined, regardless of the fact that a specific country in that region has concluded a readmission agreement. They illustrate this with the significant drop of the return rate in African countries during the last decade, partly because of the worsening human rights situation (like in Yemen and Libya), but also due to pressure from the electorate and diaspora in democratised African countries like Senegal, The Gambia and, until 2021, Tunisia. In addition, the lack of a real perspective to more mobility into the EU impedes cooperation on return, which mirrors the increasing return rates in Eastern Europe and the Western Balkans, where visa free travel and the prospect of accession trigger an improved cooperation. Cassarino and Marin conclude that cooperation on readmission is inextricably based on unbalanced reciprocities, because of the asymmetric costs and benefits having economic social and political implications for countries of origin, especially in Southern countries.[114] Accordingly, both the polarisation on migration with EU and the lack of real gains predict ineffective readmission cooperation. Although the effectiveness of the conditionality seems to be limited, it may lead to soured and strained relationships, impeding cooperation on other policy areas.

b) From reversed conditionality to instrumentalisation

On the other hand, the eagerness of the EU to achieve cooperation on border control and returns also empowers third countries, especially if they are important to the EU, geographically or otherwise. Cassarino observed that the EU's dependency has created

[111] Art. 21(1) TEU.

[112] Communication COM(2020) 609 cit. 2 and 17. It also mentions that responsibility-sharing would serve the interests of all countries involved, including the demonstration of solidarity with third countries hosting refugees (see also page 22 of the Communication).

[113] P Stutz and F Trauner, 'The EU's 'Return Rate' with Third Countries: Why EU Readmission Agreements Do Not Make Much Difference' (2021) International Migration 1-19.

[114] J-P Cassarino and L Marin, 'The New Pact on Migration and Asylum: Turning European Union Territory into a Non-territory. Externalisation Policies in 2020: Where is the European Union Territory?' (2020) EU law analysis eulawanalysis.blogspot.com.

the phenomenon of "reversed conditionality", in which third countries use the EU's dependency as a bargaining chip to benefit their interests.[115] For instance Morocco was successful with its demand that the EU would conclude EURAs with other African countries and that it would fund certain programs in Morocco.[116] This strategy exposes the self-created vulnerability of the EU, especially when it is confronted with demands it is unwilling or unable to meet, like visa liberalisation or progress in accession talks.[117] The power conferred upon the partner country by the EU also affects the coherence in EU's external actions, as the first thing to perish is human rights criticism towards that specific country. The mild attitude of the EU towards the violations of human rights and the principles of democracy and rule of law by its autocratic neighbours like Turkey, Egypt and Morocco is telling. The same effect is visible on the national level, for instance when in May 2022, the Dutch government expressed its intention to "no longer meddle in the legal framework" of Morocco and to involve the Moroccan authorities in decisions on funding of Dutch-Moroccan communities, in order to gain cooperation on readmission of Moroccan nationals.[118]

This exposed dependency can also make the EU vulnerable to other types of threats, even beyond the scope of migration negotiations. In recent years, four non-democratic states have taken advantage of the EU's desire to prevent irregular migration and used it as an opportunity to instrumentalise migrants, either as an attempt to blackmail the EU or as a mean to hit back for human rights criticism.[119] By framing these actions as a security threat, the EU made a clear link between its eagerness to externalise border control and the securitisation of its migration policy. In response to these threats, the European Commission has proposed to allow Member States to derogate from the EU Schengen and asylum acquis in cases of instrumentalisation.[120] Member States can make border crossing points less accessible and deviate from the safeguards to have an asylum

[115] J-P Cassarino, 'Informalising Readmission Agreements in the EU Neighbourhood' (2007) The International Spectator halshs.archives-ouvertes.fr 179-196; S Carrera and others, 'EU-Morocco Cooperation on Readmission, Borders and Protection: A Model to Follow?' (CEPS Papers in Liberty and Security in Europe n. 87-2016) 1-18; F Tittel-Mosser, 'Reversed Conditionality in EU External Migration Policy: The Case of Morocco' (2018) Journal of Contemporary European Research 349-363 doi.org.

[116] S Carrera and others, 'EU-Morocco Cooperation on Readmission, Borders and Protection' cit.

[117] See about the case of Turkey, S Smeets and D Beach, 'When Success is an Orphan: Informal Institutional Governance and the EU-Turkey Deal' (2020) West European Politics 129-158.

[118] See the Communiqué in May 2022 by the Dutch and Moroccan government, open.overheid.nl, parliamentary questions and answers in Dutch open.overheid.nl.

[119] That was the case with Libya in 2011, Morocco in 2018 and 2021, Turkey in 2020 and Belarus in 2021.

[120] See the Proposal COM(2021) 891 final for a Regulation of the European Parliament and of the Council of 14 December 2021 amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, especially the proposed revision of arts 2 (definition of instrumentalisation), 5 and 13, and the Proposal COM(2021) 890 final from the Commission for a Regulation of the European Parliament and of the Council of 14 December 2021 addressing situations of instrumentalisation in the field of migration and asylum.

request registered and assessed, as well as from the safeguards for detention and return. Accordingly, the EU response to threats from neighbouring countries penalises the migrants who are subjected to this instrumentalisation, including those who are seeking protection. The EU thus tries to preserve its external dimension of migration and asylum policy at the cost of the human rights protection of asylum seekers on the EU territory. This further blurs the lines between external and internal migration policies.[121]

c) Human rights responses to the EU's externalisation

Apart from the need to know what determines the level of cooperation from a third country, it is also relevant from a human rights perspective to understand which migration policies third countries develop in response to their cooperation with the EU. Norman found that apart from liberal and repressive policies, specific non-democratic third countries like Egypt, Morocco and Turkey developed a policy of "strategic indifference".[122] These rather new host countries tend to defer to international organisations and civil society actors to provide basic services to migrants and refugees, which still may lead to their *de facto* integration, mainly through the informal labour market. Even after Morocco and Turkey formally adopted a more protective approach, their attitude did not significantly change.[123] On the other hand, the increased EU funding of the "fight against irregular migration" has led to securitization and criminalization of migration policies in partner countries and regions.[124] More repression, especially in countries lacking rule of law safeguards, is likely to affect human rights of migrants and refugees, including access to justice and protection. The EU should not only become more aware of the variety of the responses to migration and migration cooperation, but also of the increased risks of human rights violations accompanying migration cooperation, and thus of the importance of independent and in-depth monitoring of its impact on the rights of migrants and refugees.

The studies on third countries' responses show the warning signs that the prioritisation of migration in the EU's external actions may undermine other policy aims, including the promotion of fundamental rights. While autocrats seem to be eager to cooperate on migration to silence the EU in its human rights criticism, leaders of democracies are under a sandwich pressure from the EU as well as from their own societies. The EU's migration priority endangers the effectiveness and coherence of EU's external policies, and it even leads to counter-conditionalities. These findings feed the presumption that until now, the

[121] See also my analysis of the link between the negotiations on the safe third country concept in the proposed Asylum Procedures Regulation and the aim to outsource the protection of refugees to third countries in T Strik, 'Migration Deals and Responsibility Sharing: Can the Two go Together?' in S Carrera, J Santos Vara and T Strik, *Constitutionalising the external dimensions of EU migration policies in times of crisis. Legality, rule of law and fundamental rights reconsidered* (Edward Elgar Publishing 2019) 57-74.

[122] K P Norman, 'Inclusion, Exclusion or Indifference? Redefining Migrant and Refugee Host State Engagement Options in Mediterranean "Transit" Countries' (2019) Journal of Ethnic and Migration Studies 42-60.

[123] Since the coup, the Egyptian regime developed a repressive policy towards migrants and refugees.

[124] J-P Cassarino, 'Beyond the Criminalisation of Migration: A Non-Western Perspective' (2018) International Journal of Migration and Border Studies 397–411.

EU is failing an important test: it has not incorporated and guaranteed the Treaty's principles regarding its external policies in its cooperation with third countries on migration.

IV. Lessons learnt from the EU rule of law crisis?

Despite the applicability of the EU Treaties, the external dimension of asylum and migration policy falls short from respecting key EU principles, in particular democracy, institutional balance, fundamental rights and coherence. They are not structurally embedded in the shaping and implementing of the external cooperation on asylum and migration. There are lessons to be drawn from the way rule of law and fundamental rights are monitored and enforced within the EU, for instance by looking at the annual reports on the rule of law situation in all Member States, based on a wide range of sources. This tool mirrors the EEAS annual reports on human rights and democracy in the world, based on the periodic EU Action Plan on Human Rights and Democracy.[125] The Action Plan only briefly refers to migration related objectives, and the recent implementation reports merely mention the EU actions based on the New Pact, such as combatting smuggling, trafficking and instrumentalizing migrants, and returns and resettlement.[126] What is lacking is a periodic evaluation of the human rights impact of the external dimension of asylum and migration policy, to grasp intended or unintended human rights effects of the migration cooperation. For an evidence-based overview, it should include findings from independent humanitarian and human rights organisations. The Fundamental Rights Agency and European Ombudsman should be able to monitor and evaluate the impact of the external action on migration, and thus contribute to coherence between the internal and external migration policies from a human rights perspective. Such an evaluative overview would offer the European Parliament and national parliaments a better way to scrutinise the externalisation and thus ensure a better institutional balance. For an effective democratic and judicial control, the third country partnerships should be brought under the scope of the Treaties, either on the basis of art. 218 TFEU or art. 78(2) TFEU. Adequate monitoring requires clear criteria to be met before the EU enters into or maintains cooperation on border control and return. Those benchmarks should be based on the necessary human rights protection standards, with a special focus on the rights of migrants and refugees.

[125] EEAS, 'Report of the EU High Representative for Foreign Affairs and Security Policy 2021 Annual Report on Human Rights and Democracy in the World' (2022) eeas.europa.eu. See the Joint Communication JOIN(2020)5 to the European Parliament and the Council of 25 March 2020 EU Action Plan on Human Rights and Democracy 2020-2024 and its Annex.

[126] The objectives in the Action Plan are mentioned on page 3: "Advocate for the specific protection to which migrants, refugees, and internally displaced and stateless persons are entitled. Support measures to improve integration, social cohesion and access to quality basic services. Support a human rights-based approach to migration governance and strengthen the capacity of states, civil society and UN partners to implement this approach".

The most innovative rule of law instrument in the EU, the conditionality mechanism, could be a source of inspiration as well. Where this mechanism is primarily meant to protect the EU budget against corruption and misuse,[127] the EU external funding should also be protected against use that would violate key EU values. Instead of applying conditionality in relation to border control, return and readmission, EU funding and other benefits could be conditioned to strengthen the rights of migrants and refugees in third countries. The Refugee Convention could be added to the list of conventions that the least developed countries should adhere to, to enjoy beneficial treatment, provided that the cooperation goes hand in hand with the relevant EU support. Such approach would align the external cooperation on migration with the EU's external action, where conditionality is normally linked to human rights.

Apart from restoring coherence, the principles of solidarity and equality should be safeguarded as well; as a matter of EU principle, but also to make those partnerships more effective. This requires that interests of third countries are taken into consideration, for instance by compensating possible loss of mobility for their citizens with legal pathways. Member States cannot expect successful negotiations by the Commission when they refuse to grant the necessary (national) leverage to make partnerships mutually beneficial. Creating a real positive agenda on migration would make the current conditionality regimes redundant, which are, apart from harmful, ineffective anyway.

[127] Regulation (EU) 2092/2020 of the European Parliament and of the Council of 16 December 2020 on the general regime of conditionality for the protection of the Union budget, art. 1.

ARTICLES

THE EXTERNALISATION OF EU MIGRATION POLICIES IN LIGHT OF EU CONSTITUTIONAL PRINCIPLES AND VALUES

edited by Juan Santos Vara, Paula García Andrade *and* Tamás Molnár

THE INFORMALISATION OF EU READMISSION POLICY: ECLIPSING HUMAN RIGHTS PROTECTION UNDER THE SHADOW OF INFORMALITY AND CONDITIONALITY

ELEONORA FRASCA* AND EMANUELA ROMAN**

ABSTRACT: The informalisation trend in EU migration law-making is seen most often in EU readmission policy. Informal readmission agreements and multi-purpose agreements which include readmission objectives have multiplied with new third countries involved in the EU external relations on migration, beyond the EU Neighbourhood. In discussing the legal nature of informal agreements, this *Article* focuses on two main issues. First, the interplay between informal agreements and conditionality, with positive conditionality replaced by negative conditionality in a blind search for effectiveness in the EU return policy. Second, the use of informal agreements to return or push back asylum seekers are the epitome of the EU externalisation strategy. While informality is part and parcel of the EU readmission policy, increasing informalisation has significant unintended long-term effects, both for the European Union as an international organisation with law-making

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capacity, and for individuals in a field of law – migration – where human rights should be protected rather than frustrated.

KEYWORDS: EU readmission policy – third-country cooperation – informality – informalisation – soft law – conditionality.

I. INFORMALITY AND THE EU EXTERNAL ACTION ON MIGRATION AND ASYLUM

In the regional normative experience of the European Union (EU), both EU migration law and the EU external migration law have always presented a certain degree of informality.[1] The emergence of migration as an internal challenge created room for the progressive building of a common policy on border, asylum and migration, at first internally to the Union and then externally. After initial intra-EU cooperation characterised by informality and inter-governmentalism, a gradual but steady process of "Europeanisation" of these policy fields witnessed a shift from discretion to law.[2] Since then, the direction of further integration through law has been driven by a series of policy and programming documents.[3] Although the declared purpose of those documents is to lay down the basis for future legislative developments, formalisation phases of policy commitments into hard law do not always follow as EU migration law is an area characterised by "legal complexities and political rationales".[4]

Externally, the EU has progressively taken up a global stance on migration. However, as much as it can act as a facilitator for inter-State dialogue, it has not yet taken the lead in international law developments. Some commentators argued that the European Commission tried to take such a lead after the adoption of the New York Declaration for Refugees and Migrants, but the Union's desire for a "unified position" in the negotiations of the Global Compacts was hijacked by its own Member States' divisions on migration.[5] Although the Union has concluded a series of international agreements with third countries, legal instruments regulating aspects of migration do not occupy a

[1] On this topic, more extensively: E Frasca and F L Gatta, 'Changing Trends and Dynamics of EU Migration Law and Governance: A Critical Assessment of the Evolution of Migration Legislation and Policy in Europe' (2022) European Journal of Migration and Law 56.

[2] E Guild and P Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Martinus Nijhoff 2012).

[3] For an appraisal of the interplay between legal developments and programming documents: P De Bruycker, M De Somer and E De Brouwer (eds), *From Tampere 20 to Tampere 2.0* (EPC 2019).

[4] L Azoulai and K de Vries (eds), *EU Migration Law: Legal Complexities and Political Rationales* (Oxford University Press 2014).

[5] UNGA, New York Declaration for Refugees and Migrants of 3 October 2016; Communication COM(2018) 168 final from the Commission of 21 March 2018 on proposal for Council decisions authorising the Commission to approve, on behalf of the Union, the Global Compact for Safe, Orderly and Regular Migration in the area of immigration policy. For a detailed analysis of the EU's participation in the negotiation of the Global Compact for Migration, see E Guild and S Grant, 'What Role for the EU in the UN Negotiations on a Global Compact on Migration?' (2017) CEPS Research Report. See also P Melin, 'The Global Compact for Migration: Lessons for the Unity of EU Representation' (2019) European Journal of Migration and Law 194.

prominent role in the international relations of the EU. Migration cooperation is primarily conducted at the inter-governmental level, inside and outside the United Nations (UN) framework, and it is fostered by the technical work of international organisations. Most of the international cooperation on migration is informal, with rare phases of formalisation which characterise the segmentation of international migration law.[6]

I.1. Informalisation and cooperation on readmission

Readmission cooperation, which aims at facilitating the return of people irregularly residing in a country to their country of origin or transit, is no exception to this soft law/hard law trend.[7] Fully-fledged EU readmission agreements (EURAs), resulting from intergovernmental relations, are based on reciprocal obligations between the EU and third countries. With the Lisbon reform, the Union has been provided with an explicit legal basis for the conclusion of international agreements on readmission with third countries in art. 79(3) of the Treaty on the Functioning of the European Union (TFEU). The fact that this is the only express external power of the Area of Freedom, Security and Justice not only testifies to the importance of EU readmission policy at the time of the Treaty reform but also reveals the relevance of *formal* international law with regard to this policy field. Despite this, EU readmission agreements coexist with Member States' bilateral readmission agreements (hybridity) and with informal agreements concluded both by the EU and by its Member States (informality).[8]

In this *Article*, we argue that both the absence of the conditions leading to the conclusion of fully-fledged EU readmission agreements and the EU's need to make its return policy effective have paved the way for a new wave of informalisation of the EU readmission policy. Informal readmission agreements and multi-purpose agreements which include readmission objectives have reinvigorated past informal tendencies in this domain. Even though informality and hybridity have always coexisted with formalisation efforts at the EU level, the most recent wave of informalisation of EU readmission policy (triggered by the 2015 migration "crisis") presents unique features and poses new issues.[9] After presenting a partial account of informalisation of migration law-making in EU and international law literature, we clarify the link between informalisation and ex-

[6] V Chetail, *International Migration Law* (Oxford University Press 2020).

[7] S Carrera, *Implementation of EU Readmission Agreements: Identity Determination Dilemmas and the Blurring of Rights* (Springer 2016). See also T Molnar 'EU Readmission Policy: A (Shapeshifter) Technical Toolkit or Challenge to Rights Compliance?' in EL Tsourdi and P De Bruycker (eds), *Research Handbook on EU Migration and Asylum Law* (Edward Elgar 2022) 486.

[8] F Trauner and S Wolff, 'The Negotiation and Contestation of EU Migration Policy Instruments: A Research Framework' (2014) European Journal of Migration and Law 1.

[9] Informalisation in readmission has been well-documented even prior to the migration "crisis": E Roman, *Cooperation on Readmission in the Mediterranean Area and its Human Rights Implications* (2017) Doctoral thesis iris.unipa.it.

ternalisation (section I). We address the concept of informal agreements and we illustrate both the main features of informal agreements and the main functions of soft law in the readmission policy field (section II). We discuss how EU readmission policy is a prime example of informalisation in EU migration law-making (section III) and we then focus on two issues: first, the interplay between informal agreements and conditionality (section IV); second, the use of informal agreements to return or push back asylum seekers (section V).

I.2. Growing interest in informalisation: a literature review

Informalisation received scholars' attention first and foremost in political science research,[10] Cassarino being the first scholar to acknowledge the importance of informal cooperation in readmission policy.[11] The controversial adoption of the EU-Turkey Statement and the defective jurisprudence over its legality have sparked a growing interest in the study of the *nature* of EU migration cooperation with third countries also among legal scholars.[12] In the wake of this legal controversy, many EU and international law scholars have rediscovered the evergreen doctrinal concept of soft law as a means to explain the informalisation trend in EU external law-making on migration.[13] Soft law, a concept at the interplay between policy and law, is a highly debated doctrinal category with which different authors engage with different outcomes. Scholars' views on soft law are primarily influenced by their views on the law: some authors reject the concept of soft law as not pertaining to the legal sphere on the assumption that normativity has no degree (binary view).[14] Others consider normativity as "gradual" and defend that norms can carry a variety of different impacts and legal effects (*continuum* view).[15] Although not always referred to as "informalisation", comprehensive and dedicated stud-

[10] S Lavenex, *Migration and the Externalities of European Integration* (Lexington books 2002).

[11] J-P Cassarino, 'Informalising Readmission Agreements in the EU Neighbourhood' (2007) The International Spectator 179.

[12] As it is well-known, the EU-Turkey Statement was signed in 2016 and published as a press release by the European Council. In 2017, the EU General Court declared its lack of jurisdiction to hear and adjudicate over the actions brought against the EU-Turkey Statement by three asylum seekers [General Court of the EU, joined cases C-208/17 P and C-210/17 P *NF, NG and NM v European Council* ECLI:EU:T:2017:129]. In October 2018, the European Court of Justice declared inadmissible the appeal against the General Court's decision [joined cases C-208/17 P and C-210/17 P *NF, NG and NM v European Council* ECLI:EU:C:2018:705]. Widely commented upon, *ex multis*: E Cannizzaro, 'Denialism as the Supreme Expression of Realism: A Quick Comment on *NF v. European Council*' (2017) European Papers europeanpapers.eu 251; T Spijkerboer 'Bifurcation of Mobility, Bifurcation of Law: Externalization of Migration Policy Before the EU Court of Justice' (2018) Journal of Refugee Studies 216.

[13] E Kassoti and N Idriz (eds), *The Informalisation of the EU's External Action in the Field of Migration and Asylum* (Springer 2022).

[14] J Klabbers, 'The Redundancy of Soft Law' (1996) Nordic Journal of International Law 167.

[15] A Peters and I Pagotto, 'Soft Law as a New Mode of Governance: A Legal Perspective' (2006) SSRN Electronic Journal 1.

ies have shed light on this phenomenon in the external dimension of EU migration law and policy.[16] Sharing the *continuum* view, authors defend the existence of "normative transformations" in the field of EU external migration law, intended as processes of softening of the law whereby soft law becomes even softer and hard law disappears.[17]

Triggered by the urgency of providing reparation for the human costs of migration cooperation, the main area of international law studies on informalisation concerns direct and indirect State responsibility for individual human rights violations. Most of the international law scholarship focuses on violations committed as a result of the implementation of informal migration agreements by the EU solely,[18] by the EU agencies[19] or by the Union together with its "international partners".[20] This strand of research is concerned with extra-territorial jurisdiction, and it covers a wide range of human rights along with access to asylum and protection against *refoulement*.[21] One of the major issues caused by informalisation is that violations committed in the application of informal cooperation often have little recourse for complaint.[22]

Under EU law, the Open Method of Coordination provided an impetus to "new governance studies".[23] As "governance" is made of formal and informal legal acts, the distinction between those becomes less important.[24] This is equally true for the EU's external action on migration, where new tools and instruments "other" than international agreements have been widely deployed.[25] Accounts of informalisation are also

[16] F Casolari, 'The Unbearable "Lightness" of Soft Law: on the European Union's Recourse to Informal Instruments in the Fight Against Illegal Immigration' in E Bribosia and others (eds), *L'Europe au kaléidoscope. Liber Amicorum Marianne Dony* (Éditions de l'Université de Bruxelles 2019) 457; M-L Basilien-Gainche, 'L'emprise de la soft law dans la gestion des migrations en Europe' in M Benlolo-Carabot (dir.), *Union européenne et migrations* (Bruylant 2020).

[17] S Saurugger and F Terpan, 'Normative Transformations in the European Union: on Hardening and Softening Law' (2021) West European Politics 1.

[18] I Atak and F Crépeau, 'Managing Migrations at the External Borders of the European Union: Meeting the Human Rights Challenges' (2015) European Journal of Human Rights 601.

[19] JJ Rijpma, 'External Migration and Asylum Management: Accountability for Executive Action Outside EU-Territory' (2017) European Papers europeanpapers.eu 571; M Fink, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford University Press 2018); L Tsourdi, 'Holding the European Asylum Support Office Accountable for its Role in Asylum Decision-Making: Mission Impossible?' (2020) German Law Journal 1.

[20] V Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, *S.S. and Others v. Italy*, and the "Operational Model"' (2020) German Law Journal 385.

[21] A Pijnenburg, 'Containment Instead of Refoulement: Shifting State Responsibility in the Age of Cooperative Migration Control' (2020) HRLRev 306; M Giuffré, *The Readmission of Asylum Seekers under International Law* (Hart Publishing 2020).

[22] M Fink and N Idriz, 'Effective Judicial Protection in the External Dimension of the EU's Migration and Asylum Policies?' cit. 117.

[23] G de Búrca and J Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing 2006).

[24] C Möllers, 'European Governance: Meaning and Value of a Concept' (2006) CMLRev 313.

[25] PJ Cardwell, 'Rethinking Law and New Governance in the European Union: The Case of Migration Management' (2016) ELR 1.

found in the ”crisis” literature.[26] The migration ”crisis” is one of the explanatory factors of these ‘normative transformations’ in EU external relations.[27] Authors observed an ”over-focus” on the external dimension[28] or ”hyperactivity”[29] linked to the Union's internal institutional crisis of 2015, despite the fact that there is no proven causality between the crisis, the increase in irregular migration to the EU and the resort to informalisation.[30]

In addition, much of EU law scholarship focuses on the impact of the informalisation process on the EU constitutional order.[31] Central issues range from the impact on the institutional asset of the EU, both in terms of distribution of powers[32] and of EU principles,[33] to the human rights compliance of informal deals.[34] Others have argued that pleading for the existence and the legality of the EU actors’ choice over informalisation would allow for the creation of a parallel universe, ”a parallel reality which favours pragmatism over some of the basic structural principles”.[35]

Among the most important consequences of the process of informalisation, there is the lack of democratic scrutiny and judicial accountability which surround informal agreements.[36] The idea that soft cooperation ”lacks something” is exemplified by the preference expressed by some scholars for the term ”de-formalisation” of the EU's ex-

[26] J-Y Carlier, F Crépeau and A Purkey, ‘From the European “Migration Crisis” to the Global Compact for Migration: A Political Transition Short on Legal Standards’ (2020) McGill Journal of Sustainable Development 1.

[27] RA Wessel, ‘Normative Transformations in EU External Relations: The Phenomenon of Soft International Agreement’ (2021) West European Politics 72.

[28] S Sarolea, ‘Asile et Union européenne face à la crise: d’une gestion interne à une gestion externe’ (2019) Revue québécoise de droit international 283.

[29] PJ Cardwell, ‘New Modes of Governance in the External Dimension of EU Migration Policy’ (2013) International migration 54.

[30] Costello explains causality as follows: “Containment contributed to the events styled as the 2015 refugee crisis in Europe, yet the crisis has generated a more intensified set of containment practices, also likely to backfire” in C Costello, ‘Overcoming Refugee Containment and Crisis’ (2020) German Law Journal 17.

[31] S Carrera, J Santos Vara and T Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* (Edward Elgar 2019); A Ott, ‘Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenges’ (2020) Yearbook of European Law 569.

[32] P García Andrade, ‘The Distribution of Powers Between the EU Institutions for Conducting External Affairs Through Non-binding Instruments’ (2016) European Papers europeanpapers.eu 115.

[33] C Molinari, ‘EU Readmission Deals and Constitutional Allocation of Powers’ cit. 15.

[34] M Giuffré and V Moreno-Lax, ‘The Raise of Consensual Containment: From “Contactless Control” to “Contactless Responsibility” for Migratory Flows’ in S Juss (eds), *The Research Handbook on International Refugee Law* (Edward Elgar 2019); V Moreno-Lax, *EU External Migration Policy and the Protection of Human Rights: In-depth Analysis* (European Parliament 2020).

[35] RA Wessel, ‘Normative Transformations in EU External Relations’ cit. 87.

[36] J Santos Vara, ‘Soft International Agreements on Migration Cooperation with Third Countries’ cit.; M Gatti, ‘The Gendarmes of Europe: Southern Mediterranean States and the EU’s Partnership Framework on Migration’ in F Ippolito and others (eds), *Bilateral Relations in the Mediterranean: Prospects for Migration Issues* (Edward Elgar 2020) 141.

ternal action in the field of migration and asylum.[37] In many words of Latin derivation, the prefix "de" indicates removal (*e.g.*, deportation) or deprivation (*e.g.*, deterrence), and it has mainly a negative value (*e.g.*, decreasing). According to Vitiello, the term proves more accurate than "in-formalisation".[38] In fact, in these diagnostic exercises, authors' views tend to converge towards the judgement that informal deals are poor copies of hard law and that informalisation is a worrisome trend in EU law-making.[39]

In this account of the process, it appears that informalisation is part of the Union's legal design of migration controls which increasingly reverts to out-of-sight negotiations to secure cooperation from third countries.[40] Surprisingly, as much as EU readmission policy is an area where informality has always existed, readmission cooperation is somehow an outlier of the EU externalisation strategy.[41] While externalisation mainly aims at migration prevention and is pursued through pre-emptive initiatives, readmission cooperation intervenes to correct the shortcomings of pre-emption. What the Union seeks is to reduce the numbers of foreigners illegally staying in the EU, individuals who have somehow "already" managed to circumvent the Union rules on international migration, either by overstaying their visa or the expiration date of their residence permits or by not securing one.

II. Informalisation, soft law and soft agreements: key concepts and definitions in the readmission policy field

Informalisation and soft law are not synonyms. As a normative transformation, informalisation is a process that concerns law-making, while soft law may be an output of the informalisation process. If informalisation is pursued in bilateral relations between the EU and third countries, its outcomes may be informal international agreements and soft international law. Since neither scholars nor Courts have offered a unanimous interpretation of what an informal agreement is, we deem it important to clarify what we

[37] D Vitiello, 'Legal Narratives of the EU External Action in the Field of Migration and Asylum: From the EU-Turkey Statement to the Migration Partnership Framework and Beyond' in V Mitsilegas, V Moreno-Lax and N Vavoula (eds), *Securitising Asylum Flows* (Leiden 2020) 130.

[38] Treccani, preposition 'de' www.treccani.it.

[39] B Ryan, 'The Migration Crisis and the European Union Border Regime' in M Cremona and J Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford Scholarship Online 2019).

[40] T Gammeltoft-Hansen, 'International Cooperation on Migration Control: Towards a Research Agenda for Refugee Law' (2018) European Journal of Migration and Law 373.

[41] A definition of "EU externalisation" is provided by V Moreno Lax and M Lemberg-Pedersen: "European externalisation processes occur when European Member States, through bi-, multi- or supranational venues, complement policies of controlling cross-border migration into their territories with pre-emptive initiatives realising such control extra-territorially and/or through sub-contracting to actors and agencies other than their own". V Moreno-Lax and M Lemberg-Pedersen, 'Border-induced Displacement: The Ethical and Legal Implications of Distance-creation through Externalisation' (2019) Questions of International Law 9.

mean when we talk about informal agreements, if and how they differ from formal agreements and what are their main features.

II.1. Understanding formal and informal readmission agreements

In order to define what an informal deal is, it may be useful to recall what a fully-fledged international agreement is. The notion of "agreement" or "treaty" has a wide interpretation under international law regardless of its name or form.[42] As the language of treaties is a normative one, what matters the most is the intention to create legal obligations binding on the parties. Usually, fully-fledged international agreements envisage accountability mechanisms in case of violations of their provisions and in case of controversies, they can be brought before a court. Their negotiation and adoption require the involvement of Parliamentary Assemblies through either treaty ratification (*ex-post*) or authorisation procedures (*ex-ante*). In addition, it is usually required that treaties are made publicly available and officially published (in domestic or regional official journals).

For over a decade, the EU made extensive use of its external powers by fostering formal cooperation on readmission with countries belonging to the EU Neighbourhood.[43] Between 2000 and 2014, readmission cooperation underwent a formalisation phase with the adoption of 18 EURAs. The entry into force of an EURA was generally followed by the negotiations of an EU visa facilitation agreement, those being the two main binding instruments – fully-fledged EU international agreements – deployed for cooperation with third countries by the EU.[44] Almost all the EURAs in force include third-country nationals clauses which stipulate that third-country nationals and stateless persons who have transited through a country with whom the EU has concluded an EURA can be returned back to that country provided that a valid link with that country is established.[45]

On the contrary, informal or soft agreements or deals (we use the terms as synonyms) usually aim at establishing a series of commitments, but not under international law. Soft agreements do not create rights and obligations, but they create legitimate expectations upon the parties to comply in the application of the good faith principle in

[42] See art. 2(1) sub (a) of the Vienna Convention on the Law of Treaties.

[43] The European Neighbourhood Policy (ENP) was launched in 2004 and it governs the relations between the EU and 16 EU Southern Neighbours (Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestine, Syria and Tunisia) and Eastern Neighbours (Armenia, Azerbaijan, Belarus, Georgia, the Republic of Moldova and Ukraine).

[44] So far, the EU has concluded EURAs with the following countries: Hong Kong (2004), Macao (2004), Sri Lanka (2005), Albania (2006), Russia (2007), Ukraine (2008), North Macedonia (2008), Bosnia and Herzegovina (2008), Montenegro (2008), Serbia (2008), Moldova (2008), Pakistan (2010), Georgia (2011), Armenia (2014), Azerbaijan (2014), Turkey (2014), Cape Verde (2014), Belarus (2020).

[45] E Carli, 'EU Readmission Agreements as Tools for Fighting Irregular Migration: An Appraisal Twenty Years on from the Tampere European Council' (2019) Freedom, Security & Justice: European Legal Studies 11.

international relations.[46] Usually, these agreements do not foresee the possibility of addressing a Court in case of controversies, therefore excluding formal accountability mechanisms under international law. Parliaments are often not involved in the negotiations and adoption of such deals (sometimes not even informed). Official publication is not compulsory.[47] Governments decide at their own discretion whether to make the content and, sometimes, the mere existence of a soft agreements public.[48]

In his 1991 landmark paper 'Why are some international agreements informal?', Lipson considers international agreements to be informal when "they lack the State's fullest and most authoritative *imprimatur*, which is given most clearly in treaty ratification".[49] In their broad empirical-based study on "informal international law-making", Pauwelyn, Wessel, and Wouters provide a complete definition of informality; similarly to Lipson, they consider an agreement to be informal when "it dispenses with certain formalities traditionally linked to international law".[50] However, according to the authors, these formalities may have to do with three distinct elements of international law-making: the output, the process, and the actors involved. Lipson and Pauwelyn agree that not all sorts of informal talks between public authorities at the international level amount to informal agreements or informal law-making. According to Lipson, "to be considered genuine agreements, they must entail some reciprocal promises or actions, implying future commitments".[51] In Pauwelyn's words, the output of informal international law-making "must be normative in that it steers behaviour or determines the freedom of actors".[52] It "may not, strictly speaking, be part of law but merely have legal effects or fit in the context of a broader legal or normative process".[53]

With regard to the output, international cooperation may be informal when it does not lead to a treaty but rather to a statement, declaration or even a more informal type of policy coordination. Output informality does not necessarily imply the lack of legally bind-

[46] V Chetail, *International Migration Law* cit.

[47] In the case of *Khlaifia and others v Italy*, the European Court of Human Rights acknowledged the consequences of informal cooperation: "the Court would note that the full text of that agreement had not been made public. It was therefore not accessible to the applicants, who accordingly could not have foreseen the consequences of its application. Moreover, the press release published on the website of the Italian Ministry of the Interior on 6 April 2011 merely referred to a strengthening of the border controls and the possibility of the immediate return of Tunisian nationals through simplified procedures. It did not, however, contain any reference to the possibility of administrative detention or to the related procedures". ECtHR *Khlaifia and others v Italy* App n. 16483/12 [15 December 2016] para. 102.

[48] M Gatti, 'The Right to Transparency in the External Dimension of the EU Migration Policy' cit. 97.

[49] C Lipson, 'Why are Some International Agreements Informal?' (1991) International Organization 498.

[50] J Pauwelyn, 'Informal International Law-making: Framing the Concept and Research Questions' in J Pauwelyn, RA Wessel and J Wouters, *Informal International Law-making: Mapping the Action and Testing Concepts of Accountability and Effectiveness* (Oxford University Press 2012) 15.

[51] C Lipson, 'Why are Some International Agreements Informal?' cit. 498.

[52] J Pauwelyn, 'Informal International Law-making' cit. 16.

[53] *Ibid*. 21.

ing character of the instrument as informal agreements can be binding or non-binding. Chetail stresses the importance of the distinction between the form and the substance of an instrument. He notes that, "in many cases, bother the form and substance [of soft law instruments] are devoid of legal value. [...] However, in other circumstances, the non-binding form of an instrument does not necessarily prejudice its binding content and *vice-versa*".[54] Although its legal nature remains open to discussion, the EU-Turkey statement, published in the form of a press release, is considered by some as a legally-binding treaty[55] and by others as capable of, at the very least, producing legal effects.[56] As for the process, international cooperation may be informal when it occurs "in a loosely organised network or *forum*", although this does not exclude that international law-making may take place in the context or under the auspices of a more formal organisation.[57] As to the actors involved, international cooperation may be informal when it does not engage traditional diplomatic actors (heads of State or Government, foreign Ministers) but other Ministries, domestic regulators, independent or semi-independent agencies, etc. In addition, private actors may also participate in informal law-making.

II.2. Informality in readmission agreements

As for readmission policy, since 2015, the golden age of EURAs has been replaced by a phase of ever-growing informalisation. This phase is characterised by both the proliferation of atypical instruments as well as the diversification and multiplication of the countries involved in external relations on migration with the Union due to their migration salience as countries of migrant origin or transit. In practice, when third countries cooperate informally with the Union and its Member States on readmission, they provide assistance in the identification of their own nationals, they accept return flights and operations, they issue their own travel documents or accept EU travel documents and *laissez-passer*.[58] The three-fold definition of informality proposed by Pauwelyn, Wessel and Wouters can apply to international migration cooperation, and more specifically, readmission, at both the bilateral (interstate) and EU level.

[54] V Chetail, *International Migration Law* cit. 284.

[55] M den Heijer and T Spijkerboer, 'Is the EU-Turkey Refugee and Migration Deal a Treaty?' (2016) EU Law Analysis eulawanalysis.blogspot.com; G Fernandez Arribas, 'The EU-Turkey Statement, the Treaty-Making Process and Competent Organs – Is the Statement an International Agreement?' (2017) European Papers europeanpapers.eu 6.

[56] O Corten and M Dony, 'Accord politique ou juridique: quelle est la nature du "machin" conclu entre l'UE et la Turquie en matière d'asile?' (2016) EU Migration Law.

[57] J Pauwelyn, 'Informal International Law-making' cit. 17.

[58] For instance, Joint Way Forward on migration issues between Afghanistan and the EU (2 October 2016) asyl.at. para. 3, it is written that "joint return flights will be carried out in the framework of this declaration". In the MoU between Italy and Sudan, it is written (*sub* k) that Sudan cooperates in the "identification and repatriation of its nationals present in the territory of Italy in an irregular situation with respect to immigration legislation". Both instruments are analysed and referenced below.

In terms of output, informal cooperation on migration, including on readmission, has materialised in a variety of instruments that differ from international treaties in their form and denomination. At the bilateral level, we find instruments such as Memoranda of Understanding (MoUs), exchanges of letters, administrative and operational protocols, etc.[59] At the EU level, next to fully-fledged EU readmission agreements, the EU and third countries have concluded several informal agreements which, in principle, are not governed by international law.[60] Among those, there are six informal readmission agreements whose only purpose is the regulation of readmission, and several multi-purpose informal agreements, which regulate different aspects of migration besides readmission cooperation.[61] According to the nomenclature of the European Commission, informal "non-binding readmission arrangements" (known as Standard Operating Procedures, Good Practices on Identification and Return, Admission Procedures or Joint Way Forward) fulfil the same function as EU readmission agreements. However, their text is not always accessible, and it is often purposely kept secret for reasons deemed protective of EU international relations.[62] Other than in informal readmission arrangements, readmission objectives have been integrated into different multi-purpose, proclaimed non-binding forms of partnership such as Mobility Partnerships, the EU-Turkey Statement and the Migration Compacts.[63] Even if they are not fully-fledged international agreements, all these instruments are meant to generate reciprocal commitments upon the parties and, at the very least, produce legal effects.[64]

[59] A Spagnolo, 'The Conclusion of Bilateral Agreements and Technical Arrangements for the Management of Migration Flows: An Overview of the Italian Practice' (2018) ItYBIL 209; AM Calamia, 'Accordi in forma semplificata e accordi segreti: questioni scelte di diritto internazionale e di diritto interno' (2020) Ordine internazionale e diritti umani 1.

[60] These are: the EU-Gambia Good Practices on Identification and Return, entered into force on 16 November 2018, the EU-Côte d'Ivoire Good Practices, in force since October 2018, the EU-Ethiopia Admission Procedures, agreed on 5 February 2018, the EU-Bangladesh Standard Operating Procedures, agreed in September 2017, the EU-Guinea Good Practices, in force since July 2017 and the Joint Way Forward with Afghanistan of 2 October 2016. For an analysis, J Santos Vara and L Pascual Matellán, 'The Informalisation of EU Return Policy' cit. 37.

[61] Communication COM(2021) 56 final from the Commission of 10 February 2021 on enhancing cooperation on return and readmission as part of a fair, effective and comprehensive EU migration policy, Brussels, 6.

[62] Informal agreements are often the object of request for access to EU documents pursuant to Regulation 1049/2001; the EU Institutions often deny access to informal agreements referring to one of the exceptions to disclosure allowed for by art. 4(1), namely "the protection of international relations" Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, 43.

[63] S Carrera, 'On Policy Ghosts: EU Readmission Arrangements as Intersecting Policy Universes' in S Carrera and others (eds), *EU External Migration Policies in an Era of Global Mobilities*: *Intersecting Policy Universes* (Brill Nijhoff 2018).

[64] By way of example, the EU-Turkey Statement led to a reform of the Greek Law on Asylum n. 4375 of 2016 on the organisation and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC [Greece], 3 April 2016, refworld.org.

With regard to the process, international law-making in the field of migration may not always take place within traditional *fora* and may not follow standard procedures, including the involvement of the European or national Parliaments. The procedure for the conclusion of international treaties by the EU, which covers EURAs, is subject to clear procedural rules enshrined in primary law (art. 218 TFEU) and accompanied by multiple safeguards, including a high degree of transparency and a clear division of roles and competences among the EU institutions. When concluding soft deals, negotiations do not follow formal procedures and may disregard constitutional safeguards. Even if formal procedures are not followed, the prerogatives of each institution in the field of readmission should be respected and "can be inferred through a combined reading of the general institutional provisions (arts 13-19 TEU) and the legal basis in the field of readmission (art. 79(3) TFEU)".[65]

As for the actors involved, in the field of migration, it has become common practice for home affairs Ministers and heads of Police to take part in informal negotiations held at the interstate level.[66] At the EU level, the staff of EU agencies such as Frontex may participate in informal negotiations along with representatives of the EU institutions and the Member States, as in the case of Frontex Working Arrangements with third countries.[67] In addition, international organisations such as the International Organization for Migration (IOM) and United Nations High Commissioner for Refugees (UNHCR) may also play a relevant role in informal policy-making.[68] By way of example, the Union has "established a partnership to organise Assisted Voluntary Returns and reintegration in Sub-Saharan Africa" with the IOM and it has "a closer cooperation" with UNHCR.[69]

II.3. Functions of soft law in EU readmission policy

As a process, informalisation symbolises a development of law-making, while soft law is a development of the law itself. A functional classification of soft law which became popular in EU law scholarship is the distinction among "pre-law", "law-plus", and "para-law" functions of soft law.[70] Soft law with pre-law functions consists of those acts which serve as an impulse for hard legislation. The example of Moldova is illustrative of the EU

[65] C Molinari, 'EU Readmission Deals and Constitutional Allocation of Powers' cit. 29.

[66] This is, for instance, the cited case of the MoU between Italy and Sudan.

[67] For example, in one of the progress reports on the Migration Partnership Framework, it is stated that "negotiations between the European Border and Coast Guard Agency and the Senegal authorities on improved working arrangements for closer cooperation have also been launched". Communication COM(2017) 205 from the Commission and EEAS of 2 March 2017, 3rd progress report on the implementation of the Migration Partnership Framework.

[68] M Geiger and A Pécoud, 'International Organisations and the Politics of Migration' (2014) Journal of Ethnic and Migration Studies 865.

[69] Communication COM(2016) 792 from the Commission of 8 December 2016, 4th progress report on the implementation of the EU-Turkey Statement, .

[70] L Senden, *Soft Law in European Community Law* (Oxford University Press 2004) 121.

unwritten requirement that a third country intending to cooperate with the EU on migration must sign an EU readmission agreement first, as only afterwards will its nationals (possibly) benefit from a visa suspension mechanism.[71] The soft instrument of the Mobility Partnership, a non-binding agreement, has led to the conclusion of an EURA with Moldova, and it has absolved the role of "pre-law" in view of the EURA.[72]

Law-plus functions of soft law complete the interpretation of existing law. Closely linked to readmission, the EU return policy is an example of this function whereby soft law interacts with hard law. EU and national actors who implement the EU Return Directive (2008/115) are also, in theory, bound by the reading of the directive provided for in soft non-legal documents, such as the EU Return Action Plan or the Return Handbook.[73] However, the European Court of Justice has recently clarified in the ruling *Westerwaldkreis* that the scope of the Return Directive cannot be altered by the Return Handbook, adopted through a Commission recommendation which has no binding effect.[74]

Finally, soft law assumes a para-law function as a substitute for non-available hard law because of divergences of views on the desirability of hard law and its content. Due to informalisation, law-making procedures can lose certain qualities, such as legal certainty, transparency, and democratic legitimacy. Informal readmission agreements concluded by the EU with several third countries could be an example of this para-law function.

II.4. Main features of informal readmission agreements

Informal agreements are characterised by a number of specific features, which make them more desirable to policy-makers.[75] These are flexibility, which allows for adaptation to changing conditions and swift re-negotiation; the possibility for rapid negotiation/adoption and immediate implementation, as they do not require parliamentary ratification or authorisation procedures, with no time lapse between signature and entry into force; reduced publicity and visibility (if not complete secrecy), as there is no

[71] L Laube, 'The Relational Dimension of Externalizing Border Control: Selective Visa Policies in Migration and Border Diplomacy' (2019) Comparative Migration Studies 29.

[72] S Brocza and K Paulhart, 'EU Mobility Partnerships: A Smart Instrument for the Externalization of Migration Control' (2015) European Journal of Futures Research 15; F Tittel-Mosser, 'The Unintended Legal and Policy Relevance of EU Mobility Partnerships' (2018) European Journal of Migration and Law 314.

[73] European Commission Recommendation C(2015) 6250 of 1 October 2015 establishing a "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks; P Slominski and F Trauner, 'Reforming Me Softly – How Soft Law Has Changed EU Return Policy since the Migration Crisis' (2020) West European Politics 93. According to the authors, the drawback of this kind of soft law is that, by exploiting legal gaps in hard, ambiguous law, it adds a new policy layer for its interpretation.

[74] Case C-546/19 *Westerwaldkreis* ECLI:EU:C:2021:432 para. 47; see J-Y Carlier and E Frasca, 'Droit européen des migration' (2022) Journal de droit européen 145.

[75] C Lipson, 'Why are Some International Agreements Informal?' cit.; J-P Cassarino, 'Cooperation on Readmission and its Implications' in J-P Cassarino (ed.), *Unbalanced Reciprocities: Cooperation on Readmission in the Euro-Mediterranean Area* (Middle East Institute 2010).

publication obligation. It follows that "the most sensitive and embarrassing implications of an agreement remain nebulous or unstated for both domestic and international audiences, or even hidden from them".[76]

Often, a partial account of the progress in external relations (ongoing negotiations, conclusion of new agreements) is provided for in non-legal documents. In the absence of official negotiating mandates of the European Commission, it is not possible to discern if the EU has engaged in formal relationships with third countries and, most importantly, what is the content of those. The exact scope of informal negotiations – and sometimes the mere existence of agreements – can only be deduced *a posteriori* from non-legal documents.

The case of the Standard Operating Procedures (SOPs) with Mali well illustrates the issues of legal certainty that arise from informal negotiations. In one of the progress reports on the Migration Partnership Framework, it was reported that "Mali has worked with the EU in view of the return of persons irregularly staying in the Union on the basis of Standard Procedures finalised between the two parties respecting their mutual obligations".[77] It was reported that the Dutch Minister for Foreign Affairs signed a "Joint Declaration" with Mali on the return of Malian migrants on behalf of the EU. However, according to Mali's Minister for Foreign Affairs, no such agreement existed.[78] Through the mechanism of Parliamentary questions, Judith Sargentini asked the former High Representative of the Union for Foreign Affairs and Security Policy, who also denied the existence of the agreement.[79]

The circumvention of the formalities traditionally linked to international law is what makes informal agreements more desirable and effective. Lipson summarises the main reasons for decision-makers to choose informal agreements as follows: "1) the desire to avoid formal and visible pledges, 2) the desire to avoid ratification, 3) the ability to renegotiate or modify as circumstances change, or 4) the need to reach agreements quickly".[80] However, it is precisely due to the circumvention of such formalities that soft agreements raise concerns in terms of the rule of law both at the national and the EU

[76] C Lipson, 'Why are Some International Agreements Informal?' cit. 501.

[77] Communication COM(2016) 960 final from the Commission and EEAS of 14 December 2016, 2nd progress report on the Migration Partnership Framework, Strasbourg, 6: "This strengthened cooperation has been enshrined in the form of a Joint Declaration that was issued in the occasion of the visit of the Dutch Minister for Foreign Affairs to Mali on behalf of the HRVP on 10-11 December 2016".

[78] J Sargentini, Question for written answer of 19 December 2016 to the Commission (Vice-President/High Representative), 'VP/HR — EU-Mali migration' E-009622-16.

[79] We report here an excerpt of the answer E-09622/201of the former High Representative of the Union for Foreign Affairs and Security Policy Federica Mogherini: "[...] contrary to media reports, no bilateral agreement on return and readmission has been signed with Mali. The EU's cooperation with Mali on this issue is based on article 13 of the Cotonou Agreement signed in the year 2000" (30 March 2017).

[80] C Lipson, 'Why are Some International Agreements Informal?' cit. 501.

levels.[81] Informality is usually associated with weaker forms of Parliamentary oversight and reduced accountability checks.[82] This has led scholars to question the role of both national and the European Parliaments *vis-à-vis* international cooperation on migration.[83] The same is true for judicial controls and the role of both the European Court of Justice and domestic Courts *vis-à-vis* EU informal, non-binding agreements.[84]

III. The intersection between EU readmission policy and the informalisation trend

Establishing formal legal relations on readmission with the EU is not always in the interest of third countries. If third countries are not willing to cooperate formally with the EU, the informal path will be tested. In the words of the European Commission, "with some partners, the EU engaged in formal dialogues or negotiations on legally binding instruments while with others more informal tools were tested, such as Standard Operating Procedures, technical missions, or identification missions".[85] However, third countries' compliance rates with both formal and informal readmission agreements remain modest and constant throughout the years.[86]

III.1. Lack of conditions leading to hard law

In the absence of the conditions which can lead to the conclusion of an EURA, the EU and its Member States have exercised their normative influence to achieve the same result (readmission cooperation) with different, atypical means, often resulting in softer forms of cooperation, including adapting "programming in terms of bilateral relations and funding to achieve our objectives".[87]

[81] C Molinari, 'The EU and its Perilous Journey Through the Migration Crisis: Informalisation of the EU Return Policy and Rule of Law Concerns' (2019) ELR 824.

[82] K Eisele, 'The EU's Readmission Policy' cit. 135; R Wessel, 'Normative Transformations in EU External Relations' cit.

[83] P García Andrade, 'The Role of the European Parliament in the Adoption of Non-Legally Binding Agreements with Third Countries' in J Santos Vara and S Sánchez Rodríguez-Tabernero (eds), *The Democratisation of EU International Relations through EU Law* (Routledge 2019) 115; N Reslow, 'Human Rights, Domestic Politics, and Informal Agreements: Parliamentary Challenges to International Cooperation on Migration Management' (2019) Australian Journal of International Affairs 546; E Olivito, 'The Constitutional Fallouts of Border Management Through Informal and Deformalised External Action: the Case of Italy and the EU' (2020) Diritto, Immigrazione e Cittadinanza 114.

[84] J Santos Vara, 'Soft International Agreements on Migration Cooperation with Third Countries' cit. 21.

[85] Communication COM(2017) 350 final from the Commission and EEAS of 13 June 2017, 4th progress report on the Migration Partnership Framework Strasbourg.

[86] P Stutz and F Trauner, 'The EU's "Return Rate" with Third Countries: Why EU Readmission Agreements do not Make much Difference' (2021) International Migration 1.

[87] Communication COM(2016) 385 final from the Commission of 7 June 2016 on Communication on establishing a new Partnership Framework with third countries under the European Agenda on Migration, 6.

The conditions that can hinder the signature of an EU readmission agreement include, among others: the lack of third State consent, lack of incentives for third countries in exchange for cooperation (*e.g.*, future membership, visa liberalisation), fear of loss of sovereignty, and unpopularity of readmission with a country's own constituency.[88] In an internal policy document, the EU clearly stated that among the challenges encountered against the conclusion of a readmission agreement, there is "the inclusion of a third-country national clause or the acceptance by the partner country of EU travel documents for return".[89] In fact, many countries strongly oppose third-country national clauses. For example, the European Commission obtained its first negotiating mandate for securing an EURA with Morocco in the year 2000.[90] No agreement has been finalised so far, despite several rounds of negotiations held in more than two decades. The case of Morocco reveals that, when the incentives are low, formal EU readmission agreements are unlikely to be secured.

III.2. The quest for effectiveness in return policy

In recent times, the EU focused on the link between return policy (mainly an internal policy) and readmission (an external policy) to make return implementation "more effective" by fostering legal relations with third countries, both formally and informally. Effectiveness justifies an increasing and pervasive recourse to atypical instruments and the use of "a mix of positive and negative incentives and of all leverages and tools" to make third countries cooperate.[91] Whether the agreements are formal or informal, it does not matter as long as "they work".[92]

In the two audits by the European Court of Auditors concerning EU readmission cooperation with third countries, "effectiveness" and "success" of readmission agreements are uncritically measured by the Court in terms of the effective return rate of third-country nationals, while other important factors, including lack of State consent, human rights compliance or lack of incentives are not taken in consideration[93]. Most of the ob-

[88] N Coleman, *European Readmission Policy: Third Country Interests and Refugee Rights* (Nijhoff 2009).

[89] Communication COM(2017) 350 final from the Commission and EEAS of 13 June 2017, 4th progress report on the European Partnership Framework, Strasbourg.

[90] Negotiations with Morocco have been on and off for the last twenty years. The example of Morocco is widely commented: T Abderrahim, 'A Tale of Two Agreements: EU Migration Cooperation with Morocco and Tunis' (2019) PapersIEMed 7; S Carrera and others, 'EU-Morocco Cooperation on Readmission, Borders and Protection: A Model to Follow?' (2016) CEPS 87; N el Qadim, *Le gouvernement asymétrique des migrations. Maroc/Union européenne* (Dalloz 2015).

[91] Communication COM(2016) 385 final cit.

[92] Communication COM(2017) 350 final cit.

[93] European Court of Auditors, Special report 17/2021 'EU Readmission Cooperation with Third Countries: Relevant Actions Yielded Limited Results'; European Court of Auditors, Special report 24/2019 'Asylum, Relocation and Return of Migrants: Time to Step up Action to Address Disparities Between Objectives and Results'.

stacles encountered in readmission cooperation are practical, such as weak enforcement of the obligation to readmit (in the case of formal agreements) or low compliance rates with the commitments taken informally (in the case of informal agreements). Even when fully-fledged readmission agreements are in place, implementation can be ineffective.[94] This gap between the rhetoric of effectiveness and the implementation of readmission cooperation in practice is particularly wide in the EU's external migration relations.

IV. Informalisation and conditionality

In this and the next section (section V), while discussing the legal nature of informal agreements, we focus on two issues: the interplay between informal agreements and conditionality and the use of informal agreements to return asylum seekers. We centre our discussion on these two issues (among other problematic aspects of informalisation in the field of readmission) as they show in an evident manner the most controversial consequences of informal readmission agreements, especially in terms of human rights protection. Such consequences are borne by those third-country nationals who see their ability to legally access the EU territory (with a valid visa) or their right to seek protection in the EU frustrated due to the informal turn of the EU readmission policy.

IV.1. Informal cooperation on readmission and conditionality mechanisms

In general terms, conditionality refers to "the quality of being subject to one or more conditions or requirements being met".[95] The EU often imposes political conditionality to development aid receiving States whereby economic assistance is conditioned upon progress in democratisation, good governance and human rights compliance.[96] The same strategy is pursued through EU membership conditionality, a particular type of legal influence that the Union exercises on the aspiring Member States in the larger context of the ENP.[97] More recently, internally to the EU, the concept of conditionality has been at the centre of the negotiations and, later, the adoption of the new conditionality mechanism for the protection of the Union budget.[98] The regulation envisages the measures to be

[94] P Stutz and F Trauner, 'The EU's "Return Rate" with Third Countries' cit. 1.

[95] Oxford English Dictionary, 'conditional' www.oed.com.

[96] O Morrissey, 'Conditionality and Aid Effectiveness Re-Evaluated' (2004) Development Financing, The World Economy 19.

[97] The conditions that must be fulfilled by candidate States to join the EU are spelled out in the Copenhagen Criteria.

[98] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, 1–10. Under the mechanism, various types of measures (*e.g.*, suspension of payments, economic advantages or commitments, etc.) are dependent on certain conditions identified as "breaches" of the principles of the rule of law (*e.g.*, fraud, corruption, etc.).

taken where breaches of the principles of the rule of law in an EU Member State affect or seriously risk affecting the financial management of the EU budget.[99]

As for EU external migration law, conditionality can be both positive (obligation to do something that will trigger a reward) or negative (obligation to do something which, if not done, will trigger a sanction), in "a fine balance of incentives and pressures [that] should be used to enhance the cooperation of third-countries on readmission and return".[100] In the words of the European Council, the "more for more" principle (another name for conditionality) "must be applied more broadly and actively used in a concerted way at both EU and national levels, linking improved cooperation on return and readmission to benefits in all policy areas".[101] However, more recently, conditionality has meant that "the greater the success in managing migration, the larger the benefits that partner countries will receive from the EU" (better trade conditions, more development aid, etc.).[102] As Lemberg-Pedersen observes, "powerful EU states have conditioned less powerful states to boost and expand their border control".[103] In most cases, under readmission cooperation, conditionality mechanisms are there to compensate for the lack of effectiveness of formal obligations (in the case of EURAs) or informal commitments (in the case of informal readmission agreements).

The kind of conditionality that emerged in recent migration cooperation differs from traditional forms of conditionality in EU foreign policy. The very essence of conditionality (better external relations and support in exchange for democratisation and human rights compliance) is eclipsed by migration control objectives and, in particular, by the search for effectiveness in the EU return policy at any cost. Two examples demonstrate this trend, the undertaking of informal cooperation on readmission with countries with poor human rights records and the instrumental use of visa policy.

a) Human rights conditionality neglected for migration control purposes

While EU conditionality is usually associated with human rights performances, conditionality linked to migration control and readmission completely bypasses a third country's human rights records. Since the main objective of the Union and its Member States is to make the EU return policy effective, it becomes irrelevant if foreign relations on migration are fostered with third countries which do not effectively respect human rights (nor protect their own nationals). Moreover, readmission cooperation is often carried out in the absence of formal readmission agreements (EU or bilateral) on the

[99] *Ibid*. art. 4.

[100] European Council Conclusions of 8 October 2015 on the future of the return policy.

[101] *Ibid*.

[102] S Poli, 'The Integration of Migration Concerns into EU External Policies: Instruments, Techniques and Legal Problems' (2020) European Papers europeanpapers.eu 71.

[103] M Lemberg Pedersen, 'Effective Protection or Effective Combat? EU Border Control and North Africa' in P Gaibazzi and others (eds), *EurAfrican Borders and Migration Management: Palgrave Series in African Borderlands Studies* (Palgrave Macmillan 2017) 37.

basis of soft agreements or practical cooperation which significantly weakens the scope of human rights protection.

Irrespective of any assessment of the human rights situation in the cooperating country, the costs of informal cooperation are exemplified by the case of *M.A. v. Belgium*.[104] The case concerns the deportation of a Sudanese national who was apprehended without documents by the Belgian Police and detained pending removal, despite an order to suspend the measure. The Belgian authorities organised an identification mission from Sudan for the purpose of deportation, thus aggravating the applicant's risk under art. 3 of the European Convention on Human Rights.[105] The European Court of Human Rights considered that identification missions by the country of origin's authorities – with a view to issuing travel documents to its nationals – are not problematic *per se*. However, the organisation of a meeting between M.A. and the authorities of Sudan with a view to positively identify him and issue documents for his return was deemed unlawful because it was not supported by sufficient procedural guarantees.[106]

Parallel cases of informal – and secret – cooperation between EU countries and Sudan at the expense of individuals can be drawn, as witnessed by the police agreement on readmission between Italy and Sudan.[107] Similar questions to those in the case of M.A. (*e.g.*, the lawfulness of detention, treatment of applicants during their arrest, lack of effective domestic remedy for the complaints) were raised in the pending cases of *A.E. and T.B. v Italy*, which concern four Sudanese nationals arrested at the French-Italian border, transferred to the Hotspot of Taranto and subsequently placed on a flight to Sudan.[108]

The case of Sudan is not isolated. However, despite the possible serious breaches of procedural guarantees, informal cooperation is rarely the object of judicial scrutiny. In the context of cooperation on readmission, when there are no fully-fledged readmission agreements in place, cooperation is left to informal, non-public and non-transparent agreements, often between the police authorities of the two countries involved in deportations. As recently suggested by the European Parliament, a human

[104] ECtHR *M.A. v Belgium* App n. 19656/18 [27 October 2020]. For a case note, see: E Frasca, '*M.A. v. Belgium*: the (in)voluntary Return of a Sudanese Migrant and the Dangers of Informal Migration Cooperation with Third Countries' (3 December 2020) Strasbourg Observers strasbourgobservers.com.

[105] *Ibid*. paras 106-112.

[106] The mission took place before a genuine assessment of the applicant's protection needs. He was not informed in advance about the meeting, and he was left alone with the Sudanese authorities during the interview. Even if the Aliens Office agent was present, it is uncontested that the officer was not in proximity of the applicant during the whole duration of the interview and that he was not fluent in Arabic, the language in which the interviews had been conducted.

[107] The Italy-Sudan MoU for the fight against crime, border management, migration control and repatriation, signed on 3 August 2016, has not been officially published. The text of the agreement is available at asgi.it.

[108] ECtHR *A.E. and T.B and others v Italy* App n. 18911/17, n. 18941/17 and n. 18959/17 [24 November 2017].

rights impact assessment should be undertaken prior to the conclusion of an agreement with a third country on readmission – both formal and informal – and human rights considerations should accompany the whole stages of the deportation procedure.[109] Although human rights issues may also arise in the case of formal agreements, the protection of human rights is lessened by informal agreements as democratic scrutiny over their adoption as well as implementation is, *de facto*, hindered and no judicial protection is available. At the EU level, in the case of formal negotiations, the European Parliament can question the conclusion of readmission agreements because of their insufficient reference to human rights. This was the case of the EURAs with Pakistan.[110] The same holds true for domestic Parliaments in bilateral agreements.

b) Visa policy (punitive) conditionality

The simple fact that the majority of EU readmission agreements have been negotiated together with EU visa facilitation agreements is a form of positive conditionality.[111] In exchange for readmission cooperation, the EU can offer the easing of the Schengen visa regime, which eventually allows the circular mobility of nationals of those countries involved in readmission cooperation with the EU through visa suspension mechanisms or liberalisation.[112] The more a country is considered by the Union a "privileged" and "reliable" partner, the more it will be "tested" in terms of its ability to apply EU legislation (*acquis*).[113] In fact, in order to benefit from visa liberalisation, after having signed an EU readmission agreement, third countries agree to adopt visa rules borrowed from the EU legal order.

On the contrary, negative conditionality in visa policy emerged when an official legal mechanism was included in the Visa Code in 2019.[114] The newly added art. 25*a* on "cooperation on readmission" turns into hard law the informal trend to use visa policy as leverage for cooperation on readmission. In practice, this provision creates hierarchies

[109] European Parliament Resolution 2116(INI) of 19 May 2021 on human rights protection and the EU external migration policy.

[110] European Parliament Briefing of April 2015 on EU Readmission Agreements Facilitating the Return of Irregular Migrants.

[111] The European Commission itself recognises that "negotiating a Visa Facilitation Agreement in parallel with a readmission agreement provides tangible incentives to third countries to cooperate on readmission". Communication COM(2015) 453 from the Commission of 9 September 2015 on EU Action Plan on return, 14.

[112] For instance, holders of biometric passports from Albania, Bosnia and Herzegovina, North Macedonia, Montenegro, Serbia, Ukraine, Moldova and Georgia are exempted from the Schengen visa for short-term stays in the EU.

[113] C Billet, 'EC Readmission Agreements: A Prime Instrument of the External Dimension of the EU's Fight against Irregular Immigration: An Assessment after Ten Years of Practice' (2010) European Journal of Migration and Law 45.

[114] Regulation (EU) 1155/2019 of the European Parliament and of the Council of 20 June 2019 amending Regulation (EC) 810/2009 establishing a Community Code on Visas (Visa Code) PE/29/2019/REV/1 [2019], 25–54.

between partner countries "depending on the level of cooperation on the readmission of irregular migrants".[115]

The Commission yearly evaluates the performance of the third countries in terms not only of readmission cooperation but of the "overall migration relations" with the Union. The assessment is based on indicators such as the number of return decisions issued by the Member States, the number of actual forced returns, the number of readmission requests accepted by the third country, as well as the level of practical cooperation in the different stages of the return procedure. Several articles of the Visa Code "shall not apply to applicants" (meaning: individuals) who are nationals of the third country that is "not cooperating sufficiently" (meaning: the Government).[116] In other words, the provision makes the conditions for issuing Schengen visas stricter for the nationals of those countries which fail to cooperate with the EU on migration in general and readmission in particular.[117] In 2021, the mechanism was applied to The Gambia; the first country judged to cooperate insufficiently on readmission.[118] The "more for more" approach has turned into a "less for less" approach.

This kind of conditionality is far from the political conditionality in EU foreign relations, which should stimulate democracy, the rule of law compliance and human rights. It is a form of punitive conditionality which directly impacts individual applicants who have to bear the consequences of non-sufficient cooperation of their Governments with the Union. In practice, applicants will be subject to higher visa fees, will have to present additional documents for their visa application and can experience slower visa procedures. The provision of art. 25(a) of the Visa Code is also likely to affect the relationship between the State concerned and its own nationals, as in many countries, readmission remains a controversial topic. Conditionality acquires a coercive dimension as the EU exercises undue pressure on third States to convince them to enforce readmission obligations.

V. The disregard for human rights in readmission cooperation

In the context of the 2015 migration "crisis", characterised by tensions among Member States on how to share equitably the responsibility for asylum seekers entering the EU territory, a pragmatic convergence was found in the cooperation with third countries. Since then, the EU and its Member States have been increasingly attempting to out-

[115] Art. 25(a) of Regulation (EC) 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas Latest consolidated version (2 February 2020).

[116] *Ibid*.

[117] S Barbou Des Places, 'Le code des visas, nouveau "levier"de la politique d'éloignement des étrangers en situation irrégulière' (2020) Revue trimestrielle de droit européen 127; E Guild, 'Amending the Visa Code: Collective Punishment of Visa Nationals?' (2019) EU Migration Law; S Peers, 'The Revised EU Visa Code: Controlling EU Borders From a Distance' (2019) EU Law Analysis eulawanalysis.blogspot.com.

[118] Decision 1781/2021/EU of the Council of 7 October 2021 on the suspension of certain provisions of Regulation (EC) 810/2009 of the European Parliament and of the Council with respect to The Gambia, 124.

source to third countries the responsibility not only for border and migration control but also for readmitting asylum seekers, examining asylum applications, and providing reception and protection to forced migrants. Thus, the EU has moved from the externalisation of border control to the externalisation of asylum management, promoting the shifting – rather than sharing – of the "asylum burden" to third countries.

This additional externalisation objective is mainly pursued through recourse to informal agreements. While formal (bilateral and EU) readmission agreements can only apply to third-country nationals irregularly present on the EU territory and can never apply to asylum seekers, informal multi-purpose agreements are vaguer in their wording and tend to associate different legal statuses – including potential beneficiaries of international protection – to a single "catch-all" category of migrants not having the right to enter the EU.[119] Olivito notes the striking language of the EU-Turkey Statement, where "no distinction is drawn between migrants, refugees and asylum seekers, as the levelling expression of irregular migration is preferred".[120] This wording reflects an expansion *ratione personae* of the scope of informal readmission deals to include asylum seekers along with unauthorised migrants. The EU-Turkey Statement[121] and the Joint Way Forward on migration issues between Afghanistan and the EU[122] (recently renewed)[123] are informal agreements exemplifying this expansion. Indeed, these instruments do not aim at regulating (and facilitating) the readmission of irregular migrants but they target primarily asylum seekers.

V.1. Readmitting failed asylum seekers to their war-torn country of origin

Signed in October 2016, the Joint Way Forward on migration issues between Afghanistan and the EU (JWF) regulates the readmission of Afghan nationals – rejected asylum seekers – from the EU.[124] Even if it is not in itself illegitimate to repatriate an asylum seeker whose application has been rejected – provided that all legal safeguards have been guaranteed – an agreement that aims at accelerating deportations towards a country such as Afghanistan is highly controversial. In fact, it could lead to breaches of the *non-refoulement* principle if we consider the security situation in the country at the time when

[119] P Cardwell, 'Tackling Europe's Migration "Crisis" through Law and "New Governance"' (2018) Global Policy 67; A Palm, 'The Italy-Libya Memorandum of Understanding: The Baseline of a Policy Approach Aimed at Closing all Doors to Europe?' (2017) EU Migration Law.

[120] E Olivito, 'The Constitutional Fallouts of Border Management Through Informal and Deformalised External Action' cit.

[121] European Council, EU-Turkey Statement, press release of 18 March 2016.

[122] Joint Way Forward on migration issues between Afghanistan and the EU (02 October 2016) asyl.at.

[123] Joint Declaration on Migration Cooperation between Afghanistan and the EU (26 April 2021) statewatch.org.

[124] C Warin and Z Zheni, 'The Joint Way Forward on Migration Issues between Afghanistan and the EU: EU External Policy and the Recourse to Non-Binding Law' (2017) Cambridge International Law Journal 143.

it was signed,[125] as well as after the Taliban took over the country in August 2021.[126] Furthermore, the JWF explicitly opens up to the possibility of the repatriation of Afghan unaccompanied minors and other vulnerable groups, including single women, elderly and seriously ill people (although providing assistance).[127] In doing so, the agreement sets out a practice that EU countries rarely had (if ever) implemented before.

In April 2021, the EU and Afghanistan signed a Joint Declaration on Migration Cooperation (JDMC), a renewed informal deal reiterating the purpose to facilitate "the return of irregular migrants", a category that explicitly includes rejected asylum seekers.[128] Similarly to its predecessor, despite its name, the agreement does not cover the various aspects relating to migration and mobility between the EU and Afghanistan but rather focuses exclusively on supporting and increasing deportations to Afghanistan. According to NGOs, compared to the JWF, the JDMC further reduces protection safeguards for individuals, particularly vulnerable groups (*e.g.*, by narrowing the concept of a family unit and the definition of seriously ill people), and it introduces a set of measures aimed at making it easier for the Member States to deport people to Afghanistan at a time of increasing instability.[129]

V.2. Pushing back asylum seekers to a third country deemed "safe"

The EU-Turkey Statement signed in March 2016 regulates the readmission of all migrants and asylum seekers who cross over from Turkey to the Greek islands – a majority of them being Syrian and Afghan asylum seekers.[130] The implementation of the agreement targets and actually affects mainly those who try to reach the EU to seek protection. Based on the controversial assumption that Turkey is a "safe" country for them, the readmission (or actually the push-back) to Turkey of persons who wish to apply for international protection in the EU is made possible and deemed compatible with EU and international law.[131] This assumption is grounded on the application of the concepts of a safe third country (STC) or first country of asylum (FCA) as set out, respective-

[125] Joint Commission-EEAS non-paper on enhancing cooperation on migration, mobility and readmission with Afghanistan of 3 March 2016, 6738/16; EASO, 'Afghanistan Security Situation', Country of Origin Information Report' (2016); EASO, 'Individuals targeted by armed actors in the conflict', Afghanistan Country Focus (2017).

[126] EASO, Afghanistan Security Situation Update. Country of Origin Information Report (2021); EASO, Afghanistan Country Focus. Country of Origin Information Report (2022).

[127] Joint Way Forward on migration issues between Afghanistan and the EU cit. paras 4-5.

[128] Joint Declaration on Migration Cooperation between Afghanistan and the EU cit. para. 1.

[129] European Council on Refugees and Exiles (ECRE), 'The JDMC: Deporting People to the World's least peaceful country' (2021) ecre.org.

[130] United Nations High Commissioner for Refugees (UNHCR), *Operational Portal – Refugee Situations, Mediterranean Situation* data2.unhcr.org.

[131] J Poon, 'EU-Turkey Deal: Violation of, or Consistency with, International Law?' (2016) European Papers europeanpapers.eu 1195.

ly, by arts 38 and 35 of the Asylum Procedures Directive (APD).[132] In the first case (Turkey is an STC), asylum seekers could be returned to Turkey because they allegedly face no risk of persecution, serious harm and *refoulement* in their country and could request and receive protection in accordance with the 1951 Geneva Convention. In the second case (Turkey is an FCA), asylum seekers could be returned to Turkey because they would allegedly already benefit from sufficient protection in Turkey, including from the principle of *non-refoulment*. In both cases, the asylum application is deemed inadmissible based on art. 33(2) APD before any evaluation of the merits of the claim. Both concepts draw on two assumptions: first, that there is a safe place for the asylum seekers already before they enter the EU; second, that asylum seekers do not have the right to choose to settle in the EU when there are other safe places available to them.[133]

In implementing the EU-Turkey Statement in practice, Greek authorities have never applied the FCA concept as a ground for inadmissibility.[134] Instead, they have resorted to the STC concept. However, as argued elsewhere,[135] Turkey could hardly be considered an STC, *inter alia* due to the fact that, despite having ratified the 1951 Geneva Convention and its 1967 Protocol, it maintains a geographical limitation for non-European asylum seekers, based on which it does not recognise refugee status to asylum seekers who come from outside Europe – which makes Turkey unable to satisfy the last requirement set by art. 38(1) APD.[136]

For a long time, the Greek legislator has neither declared Turkey an STC nor has it adopted a general list of STCs.[137] Thus, whether Turkey is an STC could only be assessed by Greek asylum authorities on a case-by-case basis during the initial admissibility test for asylum applications at the borders – a procedural step that was introduced in Greek law following the EU-Turkey deal.[138] Over time, different interpretations and lines of reasoning have emerged among Greek administrative and judicial authorities, sometimes leading to contradictory jurisprudence on the criteria to establish whether Turkey

[132] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, 60.

[133] R Lehner, 'The EU-Turkey-"deal": Legal Challenges and Pitfalls' (2019) International Migration 176.

[134] AIDA, Country Report: Greece, First Country of Asylum (last updated 30 November 2020) asylumineurope.org.

[135] E Roman, T Baird and T Radcliffe, 'Why Turkey is Not a "Safe Country"' (2016) Statewatch Analyses www.statewatch.org 1.

[136] However, on this issue there is disagreement among legal scholars. See: S Peers and E Roman, 'The EU, Turkey and the Refugee Crisis: What Could Possibly go Wrong?' (2016) EU Law Analysis eulawanalysis.blogspot.com; D Thym, 'Why the EU-Turkey Deal Can Be Legal and a Step in the Right Direction' (2016) EU Migration Law.

[137] C Favilli, 'La cooperazione UE-Turchia per contenere il flusso dei migranti e richiedenti asilo: obiettivo riuscito?' (2016) Diritti Umani e Diritto Internazionale 405, 417; R Lehner, 'The EU-Turkey-"Deal"' cit.

[138] Law n. 4375 of 2016 [Greece] cit.

is an STC for a certain asylum seeker.[139] In June 2021, Greece designated Turkey as an STC for asylum seekers from Syria, Afghanistan, Pakistan, Bangladesh and Somalia, based on a Joint Ministerial Decision by the Ministry for Foreign Affairs and the Ministry for Migration and Asylum.[140] Notwithstanding this, Greek authorities are still required to assess the admissibility of each asylum claim individually and consider the individual circumstances of the case. Despite the EU-Turkey deal's alleged formal adherence to EU law, it should be emphasised that a faulty application of the STC concept in daily practice may limit, when not violate, the right of many asylum seekers to seek and enjoy protection.

VI. Conclusion: eclipsing human rights protection under informal agreements

Even if its features have evolved over time, informality is part and parcel of the EU readmission policy. However, increasing informalisation is not without consequences. Short-sighted policy choices bear costs and unintended long-term effects. Informalisation contributes to the persistence and further development of informal international law-making on migration and to the diffusion of EU atypical acts, with often little recourse for complaint, in an area of law where guarantees should be stronger as the human rights of migrants are involved. The issues that arise from informal cooperation are wide and varied. We illustrated the risks in terms of legal certainty, increased by the circumvention of formalities, as well as the absence of democratic accountability which characterises informal agreements and negotiations. Moreover, informalisation is seen by the Union and its Member States as a way to reach policy effectiveness without bearing the costs of being bound by enforceable acts. As Cannizzaro notices with respect to the EU-Turkey Statement, "law, and more specifically the normative instruments offered by international law seem to be used by the Member States to pursue their objectives over and above the Constitutional framework established by the Treaties".[141]

As exemplified by the EU-Turkey Statement, since 2015, the EU has been trying to outsource its protection responsibilities to third countries in the EU Neighbourhood through migration cooperation and the labelling of those countries as "safe" for asylum seekers. EU leaders have often referred to that agreement as a model that could be

[139] E Roman, 'The "Burden" of Being "Safe" - How Do Informal EU Migration Agreements Affect International Responsibility Sharing?' in E Kassoti and N Idriz (eds), *The Informalisation of the EU's External Action in the Field of Migration and Asylum* cit. 317, 331.

[140] Hellenic Republic, Ministry of Migration and Asylum, Press Release: Greek legislation designates Turkey as a safe third country, for the first time. This decision is for asylum seekers from Syria, Afghanistan, Pakistan, Bangladesh and Somalia, 7 June 2021, migration.gov.gr.

[141] E Cannizzaro, 'Disintegration Through Law?' (2016) European Papers europeanpapers.eu 36.

replicated with other third countries, especially in North Africa.[142] When talking about the EU-Turkey Statement in its Communication on establishing a New Partnership Framework, the European Commission itself affirmed that "its elements can inspire cooperation with other key third countries and point to the key levers to be activated".[143] Since 2016, the EU and some Member States (*e.g.*, Italy and Germany) have engaged in negotiating, in a more or less public and transparent way, similar migration cooperation agreements with countries like Tunisia, Egypt and Libya.[144] However, as argued by NGOs, it is highly controversial to define those countries as "safe" without proper consideration of their capacity *de iure* and *de facto* to protect the fundamental rights of returnees and offer protection to those in need.[145]

In its attempts to outsource the 'asylum burden' to non-EU countries, the EU is pursuing a dual strategy. On the one hand, it seeks to negotiate an externalisation of asylum responsibilities by means of informal agreements whose adherence to the rule of law is questionable. The reason for that is that States may have an interest in cooperating but, in such a politically sensitive policy area, are often reluctant to commit to a strict international regulatory framework. On the other hand, the EU seeks to provide a legally-sound legitimacy to the externalisation of protection responsibilities by trying to incorporate the legal concepts of safe country of origin, safe third country and first country of asylum into these informal agreements. There seems to be a tension between, on the one hand, the need to secure a deal through an instrument that allows avoiding the formalities that are typical of international agreements and, on the other hand, the need to provide a formal legal basis to the responsibility-shifting mechanism that the informal deal aims to establish. One could hypothesise that, by providing a legal validation to such burden-shifting mechanisms, EU decision-makers aim to make both such mechanisms acceptable to the public opinion and avoid being struck out by EU, domestic or international courts.

Pragmatism and opportunism have become the main drivers of the EU's external action on migration, regardless of the human rights aspects of international coopera-

[142] E Collett, 'Turkey-Style Deals Will Not Solve the Next EU Migration Crisis' (2018) Migration Policy Institute; C Favilli, 'Nel mondo dei "non-accordi". Protetti sì, purché altrove' (2020) Questione Giustizia 143; T Strik, 'Migration Deals and Responsibility Sharing' cit. 57, 70.

[143] Communication COM(2016) 385 final cit.

[144] Euromed Rights, 'Joint Statement: Asylum down the Drain - Intolerable Pressure on Tunisia' (21 February 2017) euromedrights.org; EurActiv, 'Germany Proposes EU Rules Making Migrant Deportations Easier' (22 February 2017) euractiv.com; F Fubini, 'Tunisi accoglierà 200 migranti al mese partiti dalla Libia' (17 February 2017) corriere.it.

[145] Euromed Rights, 'Joint Statement' cit.; T Abderrahim and A Knoll, 'Egypt Under the Spotlight: can it be a safe third Country?' (17 March 2017) ecdpm.org; Forum Tunisien pour les Droits Economiques et Sociaux (FTDES), 'Politiques du non-accueil en Tunisie. Des acteurs humanitaires au service des politiques sécuritaires européennes' (9 June 2020) migreurop.org; B Rouland, 'Redistributing EU "burdens": the Tunisian Perspective on the new Pact on Migration and Asylum' (2021) ASILE Project www.asileproject.eu.

tion. The most recent and worrying trend in the EU's externalisation strategy consists in negotiating with third countries informal agreements that aim to prevent asylum seekers from entering the jurisdiction of the EU country where they intend to apply for asylum and, at the same time, delegate third countries to provide protection.

ARTICLES

THE EXTERNALISATION OF EU MIGRATION POLICIES IN LIGHT OF EU CONSTITUTIONAL PRINCIPLES AND VALUES

edited by Juan Santos Vara, Paula García Andrade *and* Tamás Molnár

TACKLING MIGRATION EXTERNALLY THROUGH THE EU COMMON FOREIGN AND SECURITY POLICY: A QUESTION OF LEGAL BASIS

PAULA GARCÍA ANDRADE*

ABSTRACT: The response of the EU's external action to migration challenges is not limited to the use of its migration competences under Title V TFEU, but also extends to CFSP/CSDP instruments, governed by the TEU. As a further illustration of the securitisation approach evidenced in the EU's management of migration, the Union deploys CSDP missions with components and objectives related to strengthening border controls, fighting human trafficking and migrant smuggling, and promoting third countries' capacity-building in these purposes areas. Using CSDP instruments, mainly foreseen to preserve international security, for migration purposes touches upon the horizontal demarcation of EU competences and raises an essential question related to the choice of the correct legal basis in cross-Treaty cases, at a time in which the CFSP still presents some intergovernmental features. This *Article* firstly reviews the legal implications of the recourse to the CFSP instead of AFSJ instruments for migration purposes, addressing and comparing the competence question, decision-making and judicial protection in both policies. This shows how the increasing "normalisation" of the CFSP does not match yet the degree of integration of the AFSJ and its corresponding safeguards.

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Secondly, the ECJ doctrine on the choice of the appropriate legal basis and its "centre of gravity test" is revisited to clarify how its criteria apply to the linkages between CFSP and migration policy. Although a simultaneity of inextricably linked objectives complicates this cross-Treaty delimitation, a strict application of the "centre of gravity test", by which a CFSP tool is instrumentalised to pursue an AFSJ objective, may provide the answer to this controversy.

KEYWORDS: Common Foreign and Security Policy – CSDP missions – migration – Frontex Agency – European Court of Justice – choice of the appropriate legal basis.

I. INTRODUCTION

The importance of the external action on migration has been continuously on the top of the political agenda of EU migration policies for the last two decades now. Cooperation with countries of origin and transit certainly appears essential in approaching a phenomenon of international nature such as migration. The EU has therefore set and intensified cooperation with partner countries through the conclusion of international agreements and other informal instruments on diverse dimensions of migration, such as readmission, fight against irregular migration and migrant smuggling, management of border controls, short-term visa facilitation, as well as financial assistance to third countries in capacity-building on migration management and refugee protection.[1] While this external dimension consolidated, the EU official discourse insisted on fully incorporating migration into other Union's external policies. In that process, the attention was put on how the Common Foreign and Security Policy (CFSP) could contribute to the Union's migration objectives within the Area of Freedom, Security and Justice (AFSJ),[2] mostly through support in the fight against migrant smuggling and border management.[3]

As a consequence, the EU's external response to migration challenges has not been limited to the use of its migration powers under Title V TFEU, but it also extends to the means and instruments of the CFSP, and particularly its Common Security and Defence Policy (CSDP), governed by Title V TEU. In the last decade, we are thus witnessing a

[1] For an overview on these instruments, see, *e.g.* P García Andrade and I Martín, *EU Cooperation with Third Countries in the Field of Migration*, Study (European Parliament 2015) www.europarl.europa.eu. In academic literature, see, among others, S Carrera, T Strik and J Santos Vara (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered* (Elgar 2019); S Carrera and others, *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes* (Brill/Nijhoff 2019).

[2] Council doc. No. 7653/00 of 6 June 2000, Report by the Presidency on European Union priorities and policy objectives for external relations in the field of justice and home affairs, 5; European Union, 'The Hague Programme: Strengthening Freedom, Security and Justice in the European Union' (3 March 2005) points 1(6) and 4; European Union, 'The Stockholm Programme. An open and secure Europe serving and protecting citizens' (4 May 2020) point 7; Communication COM(2011)743 from the Commission of 18 November 2011, 'The Global Approach to Migration and Mobility', 4.

[3] Communication COM(2015)240 from the Commission of 13 May 2015, 'European Agenda on Migration', 3 and 5.

stronger securitisation of migration as the EU has been deploying CSDP missions and operations with clear migration-related objectives.[4] This is the case, for instance, of certain civilian crisis management operations in third countries, such as the EU Border Assistance Mission in Libya (EUBAM Libya) or the EU Capacity Building Mission in Niger (EUCAP Sahel Niger), which include migration and border management elements of capacity-building, as well as military missions such as the EUNAVFOR MED Operations Sophia and Irini, specifically focused on combatting migrant smuggling and human trafficking.[5] In this way, the EU is resorting, for (apparently) internal security purposes, to the still intergovernmental instruments of the CFSP and CSDP, traditionally aimed at preserving peace and international security.[6]

Recourse to CSDP instruments for migration objectives touches upon the horizontal demarcation of EU competences between the CFSP and the AFSJ, more particularly the external dimension of the EU migration policy, and thus raises an evident legal question related to the choice of the appropriate legal basis in these cross-Treaty cases. The delimitation of TEU-TFEU policies has not received an unambiguous answer yet neither in legal scholarship nor in the European Court of Justice's case-law. Although the ECJ has addressed a significant number of CFSP-TFEU conflicts, it has still not clarified the interpretation to accord to the mutual non-affectation clause of Article 40 TEU.

With the purpose of revisiting this question and after providing more details on the background of these operations (section II), this *Article* will firstly review the legal implications of the recourse to the CFSP instead of AFSJ instruments for migration purposes (section III). Apart from the political impact these internal-international security linkages may be having in both policies,[7] our analysis will address, from a strict legal perspective, the competence question, particularly regarding the nature of EU powers and the margin of action left to Member States (section III.1); the institutional implications of this choice for decision-making procedures (section III.2), and, finally, the differences regarding ECJ competences and judicial protection in the two policies (section III.3). This will lead us to review, in a second part, the ECJ doctrine on the choice of the appropriate legal basis and

[4] The term "militarisation", sometimes used in this context, would not be adequate strictly speaking since CSDP missions might be of military or civilian nature (art. 42(1) TEU).

[5] The practice of resorting to CFSP/ CSDP missions for internal security purposes is also visible, within the AFSJ, in police and judicial cooperation in criminal matters, as EULEX Kosovo or EUNAVFOR Atalanta illustrate. See, in this sense, A Bendiek and R Bossong, 'Shifting Boundaries of the EU's Foreign and Security Policy: A Challenge to the Rule of Law' (SWP Research Paper 12-2019) 11.

[6] Council Conclusions 14149/16 from the General Secretariat of the Council of 14 November 2016 on implementing the EU Global Strategy in the area of Security and Defence, 5 and 7. See also Council document 7371/22 of 21 March 2022, 'A Strategic Compass for Security and Defence - For a European Union that protects its citizens, values and interests and contributes to international peace and security', 15.

[7] M Drent, 'Militarising Migration? EU and NATO Involvement at the European Border' (2018) Clingendael Spectator; N Pirozzi, 'The Civilian CSDP Compact: A Success Story for the EU's Crisis Management Cinderella?' (2018) European Union Institute for Security Studies.

its "centre of gravity test" in order to discern how its criteria apply to the linkages between CFSP and migration policy (section IV).

II. Background: setting CFSP/CSDP missions on migration

In the last decade, the EU has deployed several CFSP/CSDP missions having, within their mandates, migration-related components and purposes, mainly regarding border management, combatting human trafficking and fighting against smuggling of migrants.

Among the recent ones, EUBAM Libya and EUCAP Sahel Niger can be qualified as civilian crisis management operations, while EUNAVFOR MED Operations Sophia and Irini are examples of military missions.

EUBAM Libya was launched in 2013 under Decision 2013/233/CFSP.[8] It was presented as part of the EU support to the post-conflict reconstruction of Libya and principally aimed at assisting the Libyan authorities to develop their capacity to enhance the security of the land, sea and air borders of the country. For this purpose, EUBAM Libya was designed to develop an Integrated Border Management strategy in the long term, through training, mentoring and advising this country's border authorities, including in maritime search and rescue. Its mandate, currently in force until 30 June 2023, has been revised to explicitly refer to the mission's contribution to "disrupt organised criminal networks involved notably in migrant smuggling, human trafficking and terrorism in Libya and the Central Mediterranean region", as well as to its support to UN efforts "for peace in Libya in the areas of border management, law enforcement and criminal justice".[9]

A few years later, the EU set EUNAVFOR MED Operation Sophia, the paradigmatic example of a CSDP military operation with AFSJ-migration aims. Its deployment started in 2015 with the aim of disrupting "the business model of human smuggling and trafficking networks in the Southern Central Mediterranean".[10] It was mandated to identify, capture and dispose of vessels and assets suspected of being used by smugglers and traffickers in accordance with international law of the sea and UN Security Council (UNSC) resolutions for these purposes. The Operation was developed in several phases: a first phase was just focused on information gathering and patrolling on the high seas; the intention, in a second phase, was to conduct boarding, search, seizure and diversion of suspected vessels on the high seas or in the territorial and internal waters of Libya according to an UNSC resolution or with the coastal state's consent; and, in a third phase, to dispose or render the vessels inoperable.[11] The international legal mandate for these

[8] Council Decision 2013/233/CFSP of 22 May 2013 on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya). It has been modified up to 10 times, the latest by Council Decision (CFSP) 2021/1009 of 18 June 2021.

[9] See art. 2 of Decision 2013/233/CFSP cit. consolidated version 1 July 2021.

[10] Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), consolidated version 1 October 2019, art. 1(1).

[11] *Ibid*. art. 2(2).

tasks was conferred by UNSC Resolution 2240(2015), which however authorised States and regional organisations, including the EU, to act under strict parameters. These actions were to be undertaken exclusively on the high seas off the coast of Libya – and not within its territorial waters – and only over unflagged vessels when there were "reasonable grounds to believe" were being used for smuggling and trafficking from Libya by criminal networks, or over vessels with nationality provided States and organisations "make good faith efforts to obtain the consent" of the flag State.[12] In 2016, the mandate of Operation Sophia was extended to provide training to the Libyan Coast Guard and Navy in the fight against smuggling and trafficking, and to contribute to the implementation of the UN arms embargo on the high seas off the Libyan coast, in accordance with a second UNSC resolution.[13]

After having suspended its naval activities in 2019 and with a dubious record on both effectiveness and impact, Operation Sophia was repealed in February 2020,[14] and replaced with EUNAVFOR MED Irini, a new military crisis management operation launched on 31 March 2020 for a three-years period.[15] Its main aim relates to the implementation of the UN arms embargo on Libya, the prevention of arms trafficking as well as the illicit export of petroleum from this country. The Operation is mandated to undertake, in accordance with UNSC 2292(2016), inspection of vessels on the high seas off the coast of Libya suspected to carry arms. Among its objectives, it also includes developing capacities and training of the Libyan coast guard in law enforcement at sea, and contributing, as its predecessor Operation Sophia, "to the disruption of the business model of human smuggling and trafficking networks" through information gathering and patrolling by planes.[16]

EUCAP Sahel Niger could also be mentioned as another example of a CSDP mission with migration aims, albeit originally on a more incidental basis.[17] This civil CSDP operation, launched in 2012, focuses on strengthening capacity building of interior security forces of the country mainly in the fight against organised crime and terrorism. Since 2018, its mandate, extended until 30 September 2024, was modified to include the aim of "improving

[12] UNSC Resolution 2240 (2015) of 9 October 2015. On the inception and design of this operation, as well as on the scope of the UN mandate, see S Blockmans, 'New Thrust for the CSDP from the Refugee and Migrant Crisis' (July 2016) Friedrich-Ebert-Stiftung International policy analysis. On the context and specificities of UNSC resolutions, see C Klocker, 'The UN Security Council and EU CSDP Operations: Exploring EU Military Operations from an Outside Perspective' (2021) Europe and the World: A law review 17. See also G Butler and M Ratcovich, 'Operation Sophia in Uncharted Waters: European and International Law Challenges for the EU Naval Mission in the Mediterranean Sea' (2016) Nordic Journal of International Law 235-259.

[13] Security Council, Resolution 2292 of 16 June 2016.

[14] Council Decision (CFSP) 2020/471 of 31 March 2020 repealing Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA).

[15] Council Decision (CFSP) 2020/472 of 31 March 2020 on a European Union military operation in the Mediterranean (EUNAVFOR MED IRINI).

[16] *Ibid*. arts 1(1) and 5.

[17] Council Decision 2012/392/CFSP of 16 July 2012 on the European Union CSDP mission in Niger (EUCAP Sahel Niger).

their capacity to control and fight irregular migration and reduce the level of associated crime",[18] by assisting Nigerien authorities and security forces in the development of policies, techniques and procedures "to effectively control and fight irregular immigration" and "providing strategic advice and training, including on border control, in support of the *Union's objectives on migration*",[19] thus clearly contributing to AFSJ purposes.

It seems this practice of using CSDP missions to advance migration-related objectives has come to stay. In the New Pact on Migration and Asylum presented in September 2020, under the heading "reinforcing the fight against migrant smuggling", the European Commission stated that "Common Security and Defence Policy operations and missions will continue making an important contribution, where the fight against irregular migration or migrant smuggling is part of their mandates". The Pact refers specifically to EUCAP Sahel Niger, EUBAM Libya and EUNAVFOR MED Irini to this effect.[20]

From a legal perspective, recourse to these missions in order to further migration objectives raise several controversial issues, such as, for instance, their judicial accountability or their impact on the fundamental rights of migrants. The focus of this *Article*, however, lies, as stated above, on whether these missions, established under Council decisions adopted pursuant to the CFSP provisions of the TEU, are founded on a correct legal basis or should rather have been based on the EU immigration powers of Title V of the TFEU. To answer this question, we will firstly examine the legal implications that opting for CFSP or AFSJ instruments may have. Regarding the latter and within the common policies on immigration and border controls established under this title, our attention will be centred on the intensive operational powers of the European Border and Coast Guard Agency (Frontex) and its wide mandate to cooperate with third countries in the kind of tasks undertaken by these CSDP operations.

III. CFSP/CSDP missions versus AFSJ instruments

III.1. Competence question

The Union enjoys, more clearly since the Treaty of Lisbon, a real competence to develop a Common Foreign and Security Policy,[21] which covers, quite vaguely, "all areas of foreign policy and all questions relating to the Union's security",[22] including the progressive framing of a common defence policy. These general terms used in art. 24 TEU together with

[18] Arts 1 and 2 of Decision 2012/392/CFSP, as amended by Decision (CFSP) 2018/1247.

[19] Art. 3(c) of Decision 2012/392/CFSP (emphasis added).

[20] Communication COM/2020/609 final from the Commission of 23 September 2020 on a New Pact on Migration and Asylum, 16. On the Pact, see D Thym and Odysseus Academic Network (eds), *Reforming the Common European Asylum System. Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New Pact on Migration and Asylum* (Nomos 2022).

[21] Art. 2(4) TFEU.

[22] Art. 24(1) TEU.

the inclusion of the list of objectives of EU external action *lato sensu* in art. 21 TEU make it certainly complicate to untangle the precise scope of the CFSP.

The existence of a certain correspondence between the drafting of current art. 21 TEU, in particular paras (a) to (c),[23] and the objectives traditionally assigned to the CFSP in former art. 11(1) TEU would allow to consider, as argued by Advocate General Bot,[24] that EU actions which principally pursue one or more of those objectives, especially preserving peace, preventing conflicts and strengthening international security, fall within the sphere of the CFSP. Nevertheless, as Cremona rightly explains, there is nothing in the current Treaties that could support this reading and cannot thus be used to set apart the remaining objectives now listed in art. 21 TEU as if they were alien to this policy.[25] In addition, interpreting current provisions of primary law by reference to the drafting of a previous version of the Treaties is certainly arguable, since this would dilute or even contradict the modifications brought by a Treaty reform.[26] Consequently, CFSP might have now a broader scope.

We indeed see how the introduction of common horizontal objectives for EU external action in art. 21 TEU and the abolishment – at least formally according to art. 40 TEU – of any hierarchy between CFSP and TFEU policies are examples of increasing coherence in EU external relations, but to be more precise, and as Eckes indicates, these are ways of ensuring "coherence through ambiguity".[27] Working with common objectives and protecting both Treaties from mutual interferences complicates indeed differentiation between policies and, by losing distinctive criteria, the choice of the appropriate legal basis becomes even more difficult, thus working against transparency and reducing the ability of citizens to know who is in charge, empowering also the Court to make us dependent on their decisions. Its lack of clarity, the fact that the Court is not consistent and illustrative in its case-law on the criteria to be followed when delineating CFSP and AFSJ certainly preserves this ambiguity.[28]

[23] Art. 21(a) to (c) TFEU refer to safeguarding values, interests, security and integrity; consolidating and supporting democracy, rule of law, human rights and international law; and to preserve peace, prevent conflicts and strengthening international security.

[24] Case C-130/10 *Parliament v Council* ECLI:EU:C:2012:50, opinion of AG Bot, paras 62-64.

[25] M Cremona, 'The Position of CFSP/CSDP in the EU's Constitutional Architecture' in S Blockmans and P Koutrakos (eds), *Research Handbook on the EU's Common Foreign and Security Policy* (Elgar 2018) 15. Note also that the Court has pointed out that the EU policy on development cooperation is not limited to measures aimed at the eradication of poverty, but also pursues the general objectives in art. 21 TEU, such as the one in para. 2(c): case C-180/20 *Commission v Council* ECLI:EU:C:2021:658 para. 49.

[26] C Hillion, 'A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy' in M Cremona and A Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart 2014) 64.

[27] C Eckes, *EU Powers Under External Pressure: How the EU's External Actions Alter its Internal Structures* (Oxford University Press 2019) 98 ff.

[28] *Ibid*.

Regarding its nature, CFSP is usually categorised as a *sui generis* competence, since it appears difficult to include it under the general classification of EU competences. On the one hand, it could be inferred from the specific allocation of CFSP competence in art. 2(4) TFEU that the residual allocation of shared competences does not apply here; and that CFSP is not simply a coordination of Member States policies or just a way of supporting or supplementing national policies, but rather the latter are to support the Union policy according to art. 24(3) TEU.[29] On the other hand, it is possible, in my view, to characterise the Union competence in CFSP as a shared or parallel competence,[30] since Union powers lack preemption effects over Member States' action, as can clearly be inferred from Declarations 13 and 14.[31] Consequently, Member States are not prevented from acting on the same subject as the EU. They are of course bound to respect CFSP provisions and acts, on the basis of the principle of sincere cooperation enshrined in art. 24 TEU.[32] However, infringement procedures against defaulting Member States do not form part of the judicial competences of the ECJ, which does not mean that respect for CFSP is judicially insignificant since national judges must ensure Member States fulfil their obligation under this policy.[33]

Among the different instruments conforming the CFSP and to the exclusion of legislative acts in this policy, our interest focus, of course, in the ability of the EU to deploy civil and military missions in third countries. Indeed, the CSDP, as integral part of the CFSP, provides the operational capacity to this policy through civilian and military assets,[34] supplied, for the time being, by EU Member States.[35] The use by the Union of missions abroad is foreseen, pursuant to art. 42 TEU, "for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter". More specifically, art. 43 TEU clarifies that the tasks for which CSDP missions may be employed comprise joint disarmament operations, humanitarian and rescue tasks, military advice and assistance, conflict prevention, peace-keeping, combat forces in crisis management, including peace-making and post-conflict stabilisation. The objectives of capacity building in border management or in fighting migrant smuggling and human trafficking that the abovementioned examples of CSDP missions fulfil are, in

[29] M Cremona, 'The Position of CFSP/CSDP in the EU's Constitutional Architecture' cit. 7.

[30] Depending on whether we are referring to the internal competence to adopt CFSP acts (shared) or to the conclusion of international agreements on CFSP (parallel).

[31] Declarations 13 and 14 state that the CFSP will not affect the responsibilities and powers of Member States in relation to the formulation and conduct of their foreign policy.

[32] See, on its scope within the CFSP, P Van Elsuwege, 'The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations' in M Varju (ed.), *Between Compliance and Particularism: Member State Interests and European Union Law* (Springer 2019) 286-288.

[33] See A Mangas Martín, 'Sobre la vinculatoriedad de la PESC y el espacio aéreo como territorio de un Estado' (2021) Revista General de Derecho Europeo; also D Thym, 'Holding Europe's CFSP/CSDP Executive to Account in the Age of the Lisbon Treaty' (2011) Serie Unión Europea, CEU 26.

[34] Art. 42(1) TEU.

[35] Art. 42(1) TEU *in fine* and art. 42(3) TEU.

my view, difficult to integrate under the tasks defined in art. 43 TEU. Certainly, the Council, when adopting its conclusions on the implementation of the EU Global Strategy in the area of security and defence, produced a non-exhaustive typology of civilian and military mission, which included, to our effects, "maritime security or surveillance operations" – in which we could classify EUNAVOR MED Sophia and Irini –,[36] as well as "civilian capacity building and security sector reform missions" –[37] such as EUBAM Libya and EUCAP Sahel Niger. Even if it seems complicate to include the Council typology under the umbrella of art. 43 TEU, the list of tasks foreseen in this provision is not presented as *numerus clausus*, so it could be formally argued that migration-related objectives anyhow contribute to strengthening international security in accordance with art. 42 TEU.

Border management, as well as prevention and fighting against irregular immigration and human trafficking are part of the EU policy on border controls and the common immigration policy pursuant to arts 77 and 79 TFEU, respectively. These policies are qualified as shared competences in art. 4(2)(j) TFEU. More precisely, EU competences on borders and immigration are concurrent powers in which pre-emption applies.[38] In addition to these internal competences, the EU clearly enjoys external competences in these fields too, as they can be inferred from both arts 77 and 79 TFEU in application of the ECJ doctrine of implied external powers codified in art. 216(1) TFEU. Regarding the nature of these external competences, EU secondary legislation on external border controls– the Schengen Borders Code – allows us to qualify this field as "an area largely covered" by "common rules" in the sense of *ERTA* exclusivity.[39] This EU exclusive external competence however regards only the normative aspects of border management, since the implementation powers of Member States on border controls are preserved.[40]

If we thus focus on the operational aspects of border management, as these CFSP operations seem to concentrate, Member States still exercise the power to perform border controls, a power which does not belong to their exclusive realm[41] but that they still preserve in

[36] M Acosta Sánchez, 'Sobre el ámbito competencial de las operaciones de paz: el enfoque integral de la operación militar Sophia de la UE ante la crisis migratoria' (2018) Revista del Instituto Español de Estudios Estratégicos 15, 37.

[37] Council Conclusions on implementing the EU Global Strategy in the area of Security and Defence cit. 15.

[38] Art. 2(2) TFEU.

[39] Originated in the landmark judgment in the *ERTA* case C-22/70 *Commission v Council* ECLI:EU:C:1971:32 para. 17, consolidated in subsequent case-law and codified in the last scenario of art. 3(2) TFEU.

[40] See the competence analysis in P García Andrade, 'EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally' (2018) CMLRev 157.

[41] Note that the old reference in the EC Treaty to the rules on external border controls to be applied by Member States (art. 62(2)(a) ECT) was supressed by the 2007 Lisbon reform, in art. 77(2)(b) TFEU. In addition, the ECJ has clarified that the reservation included in art. 72 TFEU, regarding the "exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security", must be interpreted restrictively and cannot be understood as a general exception excluding all measures taken for reasons of law and order or public security from the scope of

accordance with EU secondary law.[42] However, the increasing process of integration of the operational aspects is evident, as shown by the executive powers conferred to Frontex in the last reform of its mandate and its competence to cooperate with third countries' authorities. On the one hand, the Agency now disposes of a standing corps, whose members are not only staff seconded by Member States but also Frontex's own statutory staff, with real executive powers of border control.[43] On the other, the Agency may cooperate with the authorities of third countries in the fields of its mandate, which includes providing training and technical assistance in border management, border surveillance, rescue at sea and return, as well as carrying out border management operational activities in their territories.[44]

Comparing competence-related aspects in terms of resources also appears relevant. CSDP missions rely, as indicated above, on assets provided by Member States, and it seems that some of these missions are currently operating at a lower capacity than planned and needed due to the limited political will and capabilities in Member States' governments.[45] By contrast, although Frontex used to rely on the voluntary contributions of Member States in terms of resources for its operations, the reform of the Agency's mandate has included, as stated above, a standing corps of Frontex operational staff based on mandatory national contributions, staff whose profile and training on migration appears to be more specialised than that of national officers in CSDP missions. Additionally, having the possibility to deploy a Frontex operation or a CSDP mission for the same purpose could create the risk of detracting resources away from fields and objectives in which we can only resort to CSDP operations or these have proven to be more effective.[46] For this reason, it can be argued that using CSDP missions may be preferred in order to

EU law: case C-808/18 *Commission v Hungary (Accueil des demandeurs de protection internationale)* ECLI:EU:C:2020:1029 paras 212-216.

[42] See Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), and art. 7 of Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

[43] See especially arts 54 and 55 of Regulation 2019/1896. For an analysis of the scope of these powers, see D Fernández Rojo, 'Regulation 2019/1896 on the European Border and Coast Guard (Frontex): The Supranational Administration of the External Borders?' in Kotzur and others (eds), *The External Dimension of EU Migration and Asylum Policies: Border Management, Human Rights and Development Policies in the Mediterranean Area* (Nomos 2020) 295-323.

[44] See arts 10, 73 and 74 of Regulation 2019/1896 cit. For further developments, see J Santos Vara, 'The Activities of Frontex on the Territory of Third Countries: Outsourcing Border Controls Without Human Rights Limits?' (2023) European Papers www.europeanpapers.eu 985.

[45] See European Council of Refugees and Exiles, 'Migration missions creep? ECRE's assessment of the emerging role of CSDP missions in forced displacement and migration' (Policy Note 2019) ecre.org/wp-content 3.

[46] *Ibid*. 3.

address the security dimension of the root causes of forced displacement – such as insecurity, violent conflicts, or lack of rule of law in general –,[47] instead of intervening in capacity building and training of third countries' authorities in border management, which rather pertains to the specific mandate of Frontex.

A final reference to variable geometry characterising the AFSJ seems necessary. Although the United Kingdom is no longer a Member State of the EU and thus Protocol 21 no longer applies to this country, the special situation of derogation foreseen in that Protocol to the Treaties still applies to Ireland with regard to EU policies within the AFSJ. Protocol 22 foresees a similar reservation in favour of Denmark. With regard, in particular, to Frontex activities, the Agency's founding regulation is considered, in accordance with Protocol 19, to be a measure developing a part of the Schengen acquis in which Ireland – neither the UK before Brexit – does not participate. As the ECJ had clarified, a Member State which is in derogation from that part of the Schengen acquis cannot opt-in into its developments and is thus excluded from the Frontex Regulation.[48] In the context of this *Article*, this means that Ireland and Denmark do not – or, more precisely, cannot – take part in Frontex activities, either within Member States' borders or in third countries' territories.[49] By contrast, CFSP binds, in general terms and with the nuances applicable to this not fully integrated policy, all Member States. Consequently, satisfying migration purposes through recourse to CFSP/CSDP, in which this variable geometry does not apply, can be considered as a distortion, as these two Member States are able to take part in external activities on border management from which they would be excluded under Title V TFEU.[50]

III.2. Institutional implications for decision–making procedures

Decision-making procedures are clearly divergent too between the CFSP/CSDP, as regulated in the TEU, and the AFSJ policies, pursuant to Title V TFEU. Within the former, the Council holds the decision-making power without the initiative role of the Commission as defendant of the Union interest but instead at the High Representative's initiative as *mandataire* of the Council.[51] Most importantly, CFSP acts are adopted without the involvement of the European

[47] *Ibid*. 4.

[48] Case C-77/05 *UK v Council* ECLI:EU:C:2007:803. See, on its implications, JJ Rijpma, 'Case C-77/05, United Kingdom v. Council, Judgment of the Grand Chamber of 18 December 2007, not yet reported and Case C-137/05, United Kingdom v. Council, Judgment of the Grand Chamber of 18 December 2007, not yet reported' (2008) CMLRev 835.

[49] We have analysed this subject in P García Andrade, 'La geometría variable y la dimensión exterior del espacio de libertad, seguridad y justicia' in J Martín y Pérez de Nanclares (ed.), *La dimensión exterior del espacio de libertad, seguridad y justicia de la Unión Europea* (Iustel 2012) 87.

[50] This argument would also apply to EU funding of migration-related initiatives and projects, as these Member States participate in CFSP funds but not in AFSJ financing instruments.

[51] Arts 26 and 27 TEU.

Parliament (EP),[52] an unfortunate characteristic of this policy when it comes to acts which, as in our case, establish operations that may so intensively affect the rights of individuals. In particular, CSDP missions are normally adopted on the basis of art. 42(4) TEU, according to which decisions relating to the CSDP, including those initiating a mission, shall be adopted by unanimity in the Council, on a HR or Member State's proposal.[53] Monitoring their implementation is also in the hands of the HR, who, under the Council's authority and in close and constant contact with the Political and Security Committee, is in charge of ensuring coordination of the civilian and military aspects of these missions.[54]

By contrast, EU acts within the external borders management or immigration policies are adopted following the ordinary legislative procedure, in which the Council and the EP act as co-legislators following the Commission's initiative.[55] If the comparison is however established with the procedure to adopt operations coordinated by Frontex to take place in the territory of third countries, Regulation 2019/1896 dictates how the Agency may cooperate with third countries. Operational cooperation and technical assistance may take place between Frontex and border management authorities of a third country through a working arrangement, whose adoption, to be approved by the management board of the Agency and the competent authorities of the country in question, requires the Commission's previous approval and providing detailed information to the EP prior to its conclusion.[56] Besides, the operational plan of any operation deployed on the territory of a third country shall be agreed between Frontex and the third country, in consultation with participating Member States.[57]

Current CSDP missions seem to correspond, in the Frontex context, with operations that imply the deployment to a third country of border management teams with executive powers. In those circumstances, art. 73(3) of Frontex Regulation 2019/1896 requires the conclusion of a status agreement between the Union and the third country, in which the latter provides its consent to the setting up of border control operational activities in its territory and

[52] As explained by Wessel, parliamentary influence in CFSP is not directed towards a concrete decision, but only on the main aspects and basic choices of CFSP through consultation by the HR-VP (art. 36 TEU): RA Wessel, 'Legal Aspects of Parliamentary Oversight in EU Foreign and Security Policy' in J Santos Vara and S Rodríguez Sánchez-Tabernero (eds), *The Democratisation of EU International Relations through EU Law* (Routledge 2019) 137. See his analysis for consideration of the EP as an active player in external action and in this policy in particular.

[53] Note, quite importantly, that EU missions or operations are acts of the Union and that, in spite of their still intergovernmental features, they are not "collectively made by Member States": G Butler and M Ratcovich, 'Operation Sophia in Uncharted Waters' cit. 239.

[54] Art. 43(2) TEU.

[55] Arts 77 and 79 TFEU.

[56] Art. 76(4) of Regulation 2019/1896 cit.

[57] Art. 74(3) of Regulation 2019/1896. Unless a Member State neighbours the country or the operational area of the third country, in which case the operational plan requires the agreement of that Member State.

covers all the necessary aspects to undertake the operation: scope, tasks and powers of members of the team, civil and criminal liability, practical measures regarding the protection of fundamental rights and provisions on the transfer of data. Before the introduction of this new category of agreement in the 2016 reform of the Agency's mandate,[58] and given that the Agency lacks international legal personality to conclude true international agreements,[59] Frontex border management operations in third countries mostly relied on bilateral agreements concluded by a Member State with that country or quite usually on bilateral arrangements assumed by a Member State or even the EU itself, which lacked safeguards inherent to legal certainty. This has surely improved with the conclusion of status agreements by the EU, as binding legal instruments providing for the necessary consent of the third State with regard to the deployment of foreign forces within its territory and the launching of actions, as well as foreseeing the legal safeguards applicable to the tasks and powers of border agents and their responsibility.[60]

The conclusion of status agreements by the EU follows the procedure regulated in art. 218 TFEU, which reflects the supranational division of powers between EU institutions,[61] in which the Commission enjoys the power of initiative and negotiates the agreements as holder of the external representation of the Union, the Council authorises negotiations and decides, by qualified majority,[62] on the signature and conclusion of agreements, while the EP intervenes in the conclusion with its previous approval.[63]

Although the same provision, art. 218 TFEU, also applies to international agreements relating exclusively or principally to CFSP, this policy concentrates most of the exceptional rules within this procedure, such as the HR initiative and negotiating position, the unanimity voting rule in the Council or the absence of EP involvement. Nevertheless, the duty to inform the Parliament in all the stages of the procedure of conclusion of international agreements applies to CFSP agreements too, as clarified by the Court in the *Tanzania* case.[64]

[58] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC (no longer in force).

[59] On this issue, see A Ott, E Vos, and F Coman-Kund, 'EU Agencies and Their International Mandate: A New Category of Global Actors?' (CLEER Working Papers 7-2013); J Santos Vara, 'The External Activities of AFSJ Agencies: The Weakness of Democratic and Judicial Controls' (2015) European Foreign Affairs Review 118-121.

[60] See J Santos Vara, 'The Activities of Frontex on the Territory of Third Countries: Outsourcing Border Controls Without Human Rights Limits?' cit.

[61] See J Helikoski, 'The Procedural Law of International Agreements: A Thematic Journey through Article 218 TFEU' (2020) CMLRev 79.

[62] Art. 218(8) TFEU, as external borders control is not a field in which unanimity is required for the adoption of internal acts (art. 77(2) TFEU).

[63] Art. 218(6)(a) TFEU, as external borders control is a field to which ordinary legislative procedure applies (art. 77(2) TFEU).

[64] Case C-263/14 *European Parliament v Council (Tanzania)* ECLI:EU:C:2016:435.

For the deployment of military CSDP operations in the territory of third countries, the EU must also secure either a UN Security Council authorisation[65] or the third State's consent. While obtaining the former on the basis of Chapter VII of the UN Charter is not always easy,[66] the latter is normally procured through the negotiation and conclusion by the EU of an international agreement on the status of the CSDP mission in the host state.[67] However, in light of the political situation in the third country, this agreement cannot be adopted in all scenarios.[68] This does not mean that Frontex operations are more feasible from a legal perspective, since the exercise of executive powers within the territory of a third country also requires that State's consent or authorisation.[69] But the Agency's operations appear as cooperation activities of law enforcement deployed within the framework of an international agreement between the EU and the third country – the status agreements –, which includes some (limited) safeguards applicable during the operations.[70] Status agreements of CSDP missions rather focus on regulating privileges and immunities of participating staff.[71]

III.3. ECJ COMPETENCES AND JUDICIAL PROTECTION

Finally, as far as judicial protection is concerned, the ECJ enjoys, with the last reforms introduced by the Lisbon Treaty, the whole spectrum of its competences in AFSJ fields. However, in accordance with arts 24 TEU and 275 TFEU, it only holds jurisdiction, regarding the CFSP, to review the legality of restrictive measures affecting physical or legal persons, as well as

[65] As explained above, Operation Sophia was however established by the EU through the adoption of the CFSP decision without the previous UNSC authorisation, which was only asked for later: C Klocker, 'The UN Security Council and EU CSDP Operations' cit.

[66] Note that the Council decision establishing Operation Sophia foresaw the eventual seizure of vessels within the territorial waters of Libya while UNSC Resolution 2240(2015) only authorised action in international waters off the Libyan coast.

[67] See Council document n. 17141/08 of 15 December 2008, 'Draft Model Agreement on the Status of the European Union Civilian Crisis Management Mission in a Host State (SOMA)'.

[68] This appears to be the case of Libya, since, due to the political circumstances in the country, the status agreement of EUBAM Libya has not been concluded yet: European External Action Service EEAS(2021)174 of 19 February 2021, 'EUBAM Libya Strategic Review 2021', 5. A memorandum of understanding would have been signed between EUBAM Lybia and the Libyan Ministry of Justice, while another MoU was adopted between EUNAVFOR Med Sophia and the Libyan Coast Guard to carry out training activities.

[69] Klocker argues that a Frontex operation which uses force within the territory of a third country would also need the UNSC authorisation in case the State does not give its consent. In her view, the EU internal distinction between military action (CSDP) and law enforcement (Frontex) does not change the assessment from an international law perspective: C Klocker, 'The UN Security Council and EU CSDP Operations' cit. 16.

[70] See, *e.g.* the Status Agreement between the European Union and Montenegro on actions carried out by the European Border and Coast Guard Agency in Montenegro, done on 7 October 2019. See, to this effect, JJ Rijpma, 'External Migration and Asylum Management: Accountability for Executive Action Outside EU-Territory' (2017) European Papers www.europeanpapers.eu 591 ff.

[71] See the Agreement between the European Union and the Republic of Niger on the status of the European Union mission in Niger CSDP (EUCAP Sahel Niger), done at Niamey on the 30 July 2013.

to monitor compliance with the mutual non-affectation clause of art. 40 TEU and thus precisely to verify the choice of the correct legal basis of Union acts, which is the focus of our attention. As this constitutes, nevertheless, a derogation from the general jurisdiction of the ECJ according to art. 19 TEU and since the EU, also within the CFSP, is founded on the values of equality and rule of law, CFSP exclusions of ECJ competences are to be interpreted narrowly.[72] There is continuous evidence of the ECJ willingness to widen its jurisdiction over CFSP on these bases:[73] firstly, the Court has indeed recognised its competence to issue preliminary rulings on validity as a way, in addition to annulment actions, to review the legality of restrictive measures against natural or legal persons;[74] secondly, it enjoys a general jurisdiction to ensure that the conclusion of international agreements on CFSP respect the procedural requirements of art. 218 TFEU;[75] and, thirdly, it has declared its competence to hear annulment actions and actions for damages against acts of staff management brought by personnel of CFSP bodies and missions.[76] Most importantly, the Court is generously interpreting its competence to adjudicate on CFSP acts imposing restrictive measures, as it has declared actions for damages against these acts admissible for the sake of coherence of the system of legal protection provided for by EU law.[77]

However, although exceptions to the lack of jurisdiction of the Court in the CFSP are indeed expanding, the Court is still not competent to protect, outside the scope of staff's statute conflicts, the rights of individuals affected by CFSP missions/operations with migration purposes.[78] It is true that art. 40 TEU constitutes precisely the legal foundation to verify whether these missions are correctly based on TEU provisions instead of a TFEU legal basis or instrument. However, that ground of jurisdiction may allow the Court to deal with the legality of the mission but not with the affectation of individual rights.[79] We

[72] Case C-455/14 P *H v Council and Commission* ECLI:EU:C:2016:569 paras 40-41; case C-72/15 *Rosneft* ECLI:EU:C:2017:236 paras 74-75.

[73] RA Wessel, 'Legality in EU Common Foreign and Security Policy: The Choice of the Appropriate Legal Basis' in C Kilpatrick and J Scott (eds), *Contemporary Challenges to EU Legality* (Oxford University Press 2020).

[74] *Rosneft* cit. In case C-351/22, *Neves 77 Solution* (pending), the ECJ will have to decide on its competence to issue preliminary rulings on interpretation regarding restrictive measures. See the already published opinion by AG Ćapeta who proposes to reject the Court's jurisdiction: case C-351/22 *Neves 77 Solution* EU:C:2023:907, opinion AG Ćapeta.

[75] Case C-658/11 *European Parliament v Council (Mauritius)* ECLI:EU:C:2014:2025 and *Tanzania* cit.

[76] See case T-286/15 *KF v SatCen* ECLI:EU:T:2018:718 paras 95-97; case *H v Council and Commission* cit. As indicated by AG Bobek, an EU act must fulfil two requirements in order to fall within the CFSP judicial derogation: to be *formally* based on CFSP provisions and also *substantively* correspond to a CFSP measure (case C-14/19 *KF v SatCen* ECLI:EU:C:2020:220, opinion of AG Bobek, para. 61).

[77] Case C-134/19 P *Bank Rafah Kargaran v Council* ECLI:EU:C:2020:793 para. 31 ff.

[78] See S Johansen, 'Human Rights Accountability of CSDP Missions on Migration' (8 October 2020) EU Immigration and Asylum Law and Policy eumigrationlawblog.eu.

[79] CFSP operations are nonetheless subject to certain means of dispute-settlement (*e.g.* art. 16 of the SOMA on EUCAP Sahel Niger provides for amicable settlement, diplomatic means or the appointment of an arbitration tribunal in case of claims for death, injury, damage or loss), but this does not substitute for a judicial review and does not ensure the right to judicial protection enshrined in art. 47 CFR.

will have to be attentive to future ECJ case-law on the CFSP,[80] as well as to the role national courts should play in accordance with the non-limited scope of art. 19 TEU in this regard,[81] and the openness of art. 274 TFEU.[82]

Operations undertaken by Frontex are, on the contrary, subject to the review of legality of the ECJ under art. 263 TFEU, since the Treaty of Lisbon included "acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties" as reviewable acts under the annulment action. Also, bringing failure to act actions under art. 265 TFEU is possible against "bodies, offices and agencies of the Union". However, although obtaining judicial review of the Agency's actions, including its extraterritorial operations, is legally possible,[83] the filing of legal actions by individuals is not devoid of complications, especially when Frontex activities take place in the territory of third countries. Procedural difficulties relate to the legal standing of individual applicants and to whether the Agency's acts deploy legal effects vis-à-vis third parties. Obstacles arise too from transparency limitations as regards certain aspects of the practical implementation of Frontex activities and the multi-actor character of its operations,[84] which truly complicate the judicial protections of individual rights in these settings. Nonetheless and in spite of the restrictive attitude the Court seems to have adopted,[85] the truth is that the potential for judicial review of Frontex actions is, at least on paper, better articulated than the complete absence of jurisdiction regarding CSDP missions for the protection of individual rights.[86]

[80] Another pending case, *KS and KD*, will give the ECJ the opportunity to decide on its competence to hear actions for damages committed in the implementation of CFSP missions: see joined cases C-29/22 P and C-44/22 *P KS, KD* ECLI:EU:C:2023:901, opinion AG Ćapeta.

[81] See, to this effect, P Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy' (2018) ICLQ 27-35.

[82] Recall that, according to this provision, "[s]ave where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States".

[83] See art. 98 of Regulation 2019/1896 in connection to art. 263(5) TFEU.

[84] See S Tas, 'Frontex Actions: Out of Control? The Complexity of Composite Decision-making Procedures' (TARN Working Paper 3-2020); D Fernández Rojo, 'The Introduction of an Individual Complaint Mechanism within Frontex: Two Steps Forward, One Step Back' (2016) Tijdschrift voor Bestuurswetenschappen en Publiekrecht no. 4-5; S Carrera, L Den Hertog and J Parkin, 'The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability Versus Autonomy?' (2013) European Journal of Migration and Law.

[85] See the order dismissing the action for failure to act against Frontex on admissibility grounds: case T-282/21 *SS and ST v Frontex* as well as the judgment in case T-600/21 *WS v Frontex* ECLI:EU:T:2023:492, in which the General Court also dismissed an action for damages against the Agency because of a lack of evidence of a direct causal link between the damage invoked by the applicants and the conduct of Frontex. Other actions against the Agency are pending before the General Court (case T-136/22 *Hamoudi v Frontex* and case T-205/22 *Naass and Sea Watch v Frontex*).

[86] Estrada-Cañamares highlights how the Council was safer from an annulment action by using a single CFSP legal basis for Operation Sophia: M Estrada-Cañamares, 'Operation Sophia before and after UN Security Council Resolution no 2240(2015)' (2016) European Papers www.europeanpapers.eu 191.

After having thus examined the legal implications of resorting to instruments of the CFSP or AFSJ policies and thus having observed how the increasing "normalisation" of the former does not match yet the degree of integration of the latter, the importance of determining the correct legal basis of these operations appears evident.

IV. The ECJ doctrine on the choice of the appropriate legal basis and the delimitation between CFSP and migration policy

In the search for the correct legal foundation of the kind of operations described above, we should start by examining the consolidated ECJ doctrine on the choice of the legal basis and its "centre of gravity test".[87] Its use is not limited to conflicts among TFEU policies but also applies, as the Court confirmed,[88] to cross-Treaty disputes, such as the one in hand.

This legal question is closely related to the interpretation to be accorded to art. 40 TEU, which prohibits that the implementation of the CFSP affects the application of procedures and institutional powers enshrined in the TFEU and, similarly, excludes that the implementation of TFEU policies affects the application of those set under the TEU for the CFSP. Before the Treaty of Lisbon, former art. 47 TEU protected the *acquis communautaire* from the incursions of the CFSP and the former third pillar, and thus the ECJ gave, in conflicts about legal bases, a default priority to the EC Treaty-based measures in case of acts with double components pertaining to CFSP-EC policies.[89] With its transformation into a *mutual* non-affectation clause, current art. 40 TEU formally accords a symmetric protection to CFSP and TFEU policies, the former being no longer supplementary to the EU external action pursuant in development of the TFEU.

In the post-Lisbon "legal basis litigation", the ECJ has not, quite strikingly, pronounced itself on the interpretation to be given to art. 40 TEU, sometimes simply referring to the provision without further elaboration,[90] whereas in other cases completely ignoring it in its argumentation, as in the *Kazahstan* case.[91] In the latter, the Court applied instead the principle of institutional balance horizontally as if art. 40 TEU was a redundant repetition

[87] I have just sketched this issue in P García Andrade, 'EU External Competences in the Field of Migration' cit.

[88] Case C-91/05 *Commission v Council* (*ECOWAS*) ECLI:EU:C:2008:288 para. 60; case C-130/10 *Parliament v Council* (*UN Sanctions*) ECLI:EU:C:2012:472.

[89] It was precisely former art. 47 TEU which led the ECJ to exclude a dual legal basis CFSP-EC in the *ECOWAS* case, conferring priority to the EC Treaty with the aim of protecting the Community *acquis*.

[90] *Tanzania* cit. para. 42.

[91] Even when the parties use art. 40 TEU in their argumentation, as the Council did: case C-244/17 *Commission v Council* (*Kazahstan*) ECLI:EU:C:2018:662 paras 16 and 19. In this sense, see P Van Elsuwege and G Van der Loo, 'Legal Basis Litigation in Relation to International Agreements: Commission v Council (Enhanced Partnership and Cooperation Agreement with Kazahstan)' (2019) CMLRev 1333-1354; also RA Wessel, 'Legality in EU Common Foreign and Security Policy: The Choice of the Appropriate Legal Basis' cit.

of that principle,[92] but this was probably because the case referred to the conclusion of international agreements and, to that effect, art. 218 TFEU applies to all EU policies.

In a more general sense, Cremona highlights that the focus of art. 40 TEU is not on policy content or on the nature of competences, but rather on procedures and institutional balance. Consequently, since CFSP is characterised by a different institutional balance and instrumental toolkit than TFEU policies, this provision would be designed to ensure that action within each policy field respects its own boundaries and operates within its proper sphere.[93]

In spite of the Court's silence on the value of art. 40 TEU, several AG Opinions have specified that the two non-affectation clauses this provision contains have been formulated in a symmetric way,[94] and therefore do not allow precedence to be granted to competences falling within either the CFSP or the TFEU. When it comes to the choice of the legal basis, this reading requires the application of a "neutral test", such as the "centre of gravity test", which gives the same value to CFSP than to other EU external action policies under the TFEU,[95] as we will now show.

IV.1. Revisiting the ECJ doctrine on the choice of the appropriate legal basis

The choice of the correct legal basis, as the Court has been constantly recalling, presents constitutional significance,[96] since it conditions the legality of the measure, particularly when the procedure foreseen in the correct legal basis is different from the one which has been followed. Indeed, from a constitutional perspective, choosing the legal basis of a measure determines compliance with the principle of conferral, respect for the nature of EU competences, potential preemption of Member States powers, the geographical scope of the measure, as well as the applicable institutional balance and ECJ jurisdiction.[97]

The selection of the adequate legal basis of the Treaties must rest, in accordance with the Court's doctrine, on objective factors amenable to judicial review, which include the aim and content of the measure in question. In case the act has several aims or components, the main or predominant aim/content will determine the legal basis of the act, as dictated by the "centre of gravity test" in which this ECJ doctrine is founded since *Titanium Dioxide*.[98] As the Court has specified, in particular for international agreements concluded by the EU,

[92] P Van Elsuwege and G Van der Loo, 'Legal Basis Litigation in Relation to International Agreements' cit. 1341 and 1344. See *Kazahstan* cit. paras 22, 24 and 30.

[93] M Cremona, 'The Position of CFSP/CSDP in the EU's Constitutional Architecture' cit. 8.

[94] Case C-244/17 *Commission v Council* (*Kazahstan*) EU:C:2018:364, opinion AG Kokott, para. 50.

[95] Case C-180/20 *Commission v Council* (*Armenia*) EU:C:2021:495, opinion AG Pitruzzella, para. 35.

[96] Initially in Opinion 2/00 (*Cartagena Protocol*) ECLI:EU:C:2001:664 paras 5-6.

[97] C Eckes, *EU Powers Under External Pressure* cit. 116.

[98] Case C-300/89 *Commission v Council* (*Titanium Dioxide*) ECLI:EU:C:1991:244 para. 17 ff.; case C-211/01 *Commission v Council* ECLI:EU:C:2003:452 para. 39 ff.; *ECOWAS* cit. para. 73 ff.; *UN Sanctions* cit. para. 43 ff.; *Tanzania* cit. para. 43 ff., among others.

it should be verified whether the provisions of the agreement related to each aim or component are "a necessary adjunct to ensure the effectiveness of the provisions of those agreements" which pursue other objectives or components or "whether they are extremely limited in scope".[99] If the elements of the act which "display a link with the CFSP" are such that "do not determine in concrete terms the manner in which the cooperation will be implemented",[100] they are to be considered "incidental" to the main components or aims and the legal basis corresponding to that policy should not be included.

However, when the EU act has several purposes or components which are inextricably linked without one being incidental to the other, the measure will have to be founded on the various corresponding legal basis; a dual legal basis is therefore justified. Nevertheless, as the ECJ doctrine continues to uphold, recourse to a dual legal basis is excluded where the decision-making procedures laid down for each legal basis are incompatible with each other.[101] This criterion led the Court to favour, in earlier case-law, the "more democratic legal basis" as that which ensured a more intensive intervention of the EP.[102] Nonetheless, this does not seem to be upheld in later case-law,[103] particularly after the Lisbon Treaty. The EP's limited role in the procedure to conclude CFSP agreements was neither decisive in the *Tanzania* case.[104] It is however striking that the fact that TFEU legal bases no longer have priority over TEU provisions – that is, that no hierarchy exists between integration and intergovernmentalism in accordance with current art. 40 TEU – also means that the principle of institutional balance is to be accorded preference over the democratic principle.

In the application of this "centre of gravity test", what is also problematic, in my view, is that the Court seems to give more importance to the aim and purpose of the measure over the content, even if the Court insists that one of these criteria does not prevail over the other.[105] This was evident when the ECJ doctrine on the choice of the legal basis was applied in the *Tanzania* case: evaluating the content of the EU-Tanzania agreement on the conditions of transfer of suspected pirates and seized property would have led the

[99] In each of those cases, the existence of that objective or component does not justify it being specifically reflected in the substantive legal basis of the decision to sign or conclude the agreement on behalf of the EU: Opinion 1/19 (*Istanbul Convention*) ECLI:EU:C:2021:198 para. 286. Besides, the criteria used to evaluate the incidental nature of a purpose or component of an act are both quantitative and qualitative, since the Court refers to the number of provisions devoted to it, and the nature and scope of those provisions (para. 287 of Opinion 1/19).

[100] *Kazahstan* cit. para. 45; case C-377/12 *Commission v Council* (*PCA with the Philippines*) ECLI:EU:C:2014:1903 para. 56.

[101] *Titanium Dioxide* cit.; *Commission v Council* cit.; *ECOWAS* cit.; *UN Sanctions* cit.; *Tanzania* cit.

[102] *Titanium Dioxide* cit. para. 20.

[103] See, in this regard, C Eckes, *EU Powers Under External Pressure* cit. 117.

[104] RA Wessel, 'Legality in EU Common Foreign and Security Policy' cit. 17.

[105] *Armenia* cit. para. 33.

Court to conclude this was mainly an instrument of criminal cooperation.[106] However the Court's focus on the aim of the agreement resulted on a CFSP legal basis, since the objectives of the agreement were to combat maritime piracy as a threat to international security. If this was favourable to CFSP in the *Tanzania* case, it would probably be favourable to border and immigration policies in our subject here, considering that EUBAM Libya or EUNAVFOR MED Sophia seemed to predominantly pursue migration objectives.

I also find controversial that the context of the act appears to acquire such an importance in the analysis of the Court within its doctrine on the choice of the correct legal basis. The significance of the criterion related to the context of the analysed measure had already been formalised in previous pronouncements of the Court, in particular in scenarios in which the EU act sought to amend the rules contained in agreements concluded by the Union.[107] However, in those cases, the analysis of the context of the act referred, logically, to the aim and content of those agreements together with an evaluation of the aim and content of the contested measure.[108] In the *Tanzania* case however, more weight was given to the objectives of the Atalanta operation that the agreement intended to implement than to the specific aims of the contested measure, the Agreement with Tanzania. Even more concerning, a great importance was conferred to the previous existence of UNSC resolutions authorising, in that case, the activities undertaken within the Atalanta Operation.[109] Note that UNSC resolutions may also intervene, as explained above, in the migration field, as the one adopted to allow for the inspection of boats on the high seas suspected of undertaking migrant smuggling or human trafficking within Operation Sophia. In my view, it would be extremely problematic if the existence of a UNSC resolution on a given subject would systematically tip the balance in favour of CFSP when the EU acts on it irrespective of the content and aim of the concrete act at stake, when we are dealing with issues that constitute a challenge to both the international security and the internal security of the EU. Consequently, the context of the act, that is the aim and

[106] In this sense, see also C Matera and RA Wessel, 'Context or Content? A CFSP or AFSJ Legal Basis for EU International Agreements' (2014) Revista de Derecho Comunitario Europeo 1047-1064. See also our analysis of this case in P García Andrade, 'La base jurídica de la celebración de acuerdos internacionales por parte de la UE: entre la PESC y la dimensión exterior del espacio de libertad, seguridad y justicia' (2017) Revista General de Derecho Europeo 128–160.

[107] This is the series of cases related to the annulment actions brought by the UK against Council decisions adopting the EU position on the development of provisions on coordination of social security of the EEA, the Free Movement of Persons Agreement with Switzerland and the Association agreement with Turkey: case C-431/11 *United Kingdom v Council* ECLI:EU:C:2013:589; case C-656/11 *United Kingdom v Council* ECLI:EU:C:2014:97 and case C-81/13 *United Kingdom v Council* ECLI:EU:C:2014:2449.

[108] *United Kingdom v Council* cit. para. 39.

[109] As Koutrakos highlights, by focusing on the context in which the agreement was concluded, "the Court avoided the complex task of distinguishing between international and EU security and defining the scope of both" in P Koutrakos, 'The Nexus between CFSP/CSDP and the Area of Freedom, Security and Justice' in S Blockmans and P Koutrakos (eds), *Research Handbook in EU Common Foreign and Security Policy* (Edwar Elgar 2018) 296-311.

content of other measures related to it, should not be accorded, in my view, such an importance so as to shade the significance of the aim and content of the act in question.

IV.2. Applying the ECJ doctrine to CFSP/CSDP missions on migration

Security concerns are indeed shared by both policy areas, CFSP and AFSJ. The latter aims at ensuring the internal security of the Union and, particularly, the external dimension of AFSJ policies is precisely designed as a means to safeguard internal security "within the Union".[110] The CFSP – and the CSDP as part of this policy – is arguably aimed, in spite of the current broad formulation of its scope in primary law, at preserving peace, preventing conflicts and strengthening international security. The problem is that the delimitation between threats or challenges to internal security, on the one hand, and to international security, on the other, is increasingly blurred,[111] and thus linkages and overlaps between the two policy frameworks are unavoidable, making difficult to assess to "which security" the measure is contributing.

This broad, holistic conception of security and how international and internal security are more and more inextricably linked may lead to affirm that operations such as the ones examined here, aimed at enhancing third countries capabilities on migration management and combatting migrant smuggling and human trafficking, pursue CFSP and AFSJ aims. Consequently, they should be simultaneously based on CFSP and AFSJ legal bases, for having several components or aims which are inextricably linked without one being incidental to the other. The pertinent question would be therefore whether there is procedural compatibility between both policies and thus whether a dual legal basis CFSP-AFSJ is feasible or not.

As it is well-known, the Court discarded, before Lisbon, a dual cross-pillar legal basis between EC policies and the CFSP, since, in the *ECOWAS* case in which the act could pertain simultaneously to development policy and to CFSP, preference was given to the EC Treaty in accordance to a pro-integration interpretation of the old "one-way" non-affectation clause in former art. 47 TEU. Post-Lisbon, when current art. 40 TEU does not seem to accord that automatic priority to the TFEU over the TEU, the Court of Justice has theoretically accepted the possibility of a CFSP-TFEU legal basis. In practice, however, their respective decision-making procedures have been considered incompatible,[112] excluding thus a joint legal basis.

[110] Council doc. No. 7653/00 cit. 5.

[111] The *Global Strategy for the European Union's Foreign and Security Policy* explicitly states that "[i]nternal and external security are ever more intertwined: our security at home depends on peace beyond our borders" (Council document 10715/16 of 28 June 2016, 'A Global Strategy for the European Union's Foreign and Security Policy', 5 and 12).

[112] *UN Sanctions* cit. para. 47 (combining the ordinary legislative procedure foreseen in art. 75 TFEU with the only information to the Parliament of art. 215 TFEU was incompatible).

As regards the conclusion of international agreements, the combination of both CFSP-non CFSP legal bases has occurred,[113] as in cases of dual legal bases within the TFEU also with respect to internal measures.[114] This appears controversial, in my view, when we are confronted to clear divergences in decision-making procedures, since it leads to the non-application of a procedural requirement of one of the Treaty provisions at stake.[115] Although it could be argued that the conclusion of an international agreement can be jointly based on CFSP-non CFSP provisions because of the common procedure established in art. 218 TFEU,[116] combining, in internal legal acts, the ordinary legislative procedure with CFSP decision-making clearly appears hard to undertake.[117]

In other scenarios, the CFSP-non CFSP components of an agreement may lead to the adoption of two different acts corresponding to TEU and TFEU substantive legal bases, respectively.[118] However, this could be feasible for the conclusion of international agreements only, since the procedural legal basis, art. 218 TFEU, is the same. It seems however more complicate for the adoption of internal measures, particularly, when it comes to operational activities as the ones at hand here. Adopting two different acts, CFSP and AFSJ-based, would mean to set two different operations in practice – a CSDP mission and a Frontex operation – leading to an excessive investment of material and human resources, clear risks of overlap, as well as demarcation and coordination conflicts on the ground.

[113] Pre-Lisbon, this happened in I-III pillar agreements (see RA Wessel, 'Cross-Pillar Mixity: Combining Competences in the Conclusion of EU International Agreements' in C Hillion and P Koutrakos (eds), Mixed Agreements in EU Law Revisited (Hart Publishing 2010), but also, post-Lisbon, in CFSP-TFEU agreements. See, among several examples, the Council Decision 2022/1007 of 20 June 2022 on the conclusion on behalf of the Union of the Partnership Agreement on Relations and Cooperation between the European Union and its Member States, of the one part, and New Zealand, of the other part, which is based on art. 37 TEU, and arts 207 and 212 TFEU; see also the Council decision 2016/342 of 12 February 2016 on the conclusion, on behalf of the Union, of the Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part, using both art. 37 TEU and 217 TFEU as material legal bases. See RA Wessel, 'Legality in EU Common Foreign and Security Policy' cit. However, the practice of combining CFSP-TFEU legal bases in the conclusion of global or framework agreements including CFSP provisions might have ended after the Kazahstan case: see P Van Elsuwege and G Van der Loo, 'Legal Basis Litigation in Relation to International Agreements' cit. 1351.

[114] In case C-166/07 *Parliament v Council* ECLI:EU:C:2009:499, the Court concluded on the combination of former art. 159 EC and art. 308 EC, "while complying with the legislative procedures laid down therein, that is to say, both the 'co-decision' procedure referred to in Article 251 EC and the requirement that the Council should act unanimously".

[115] In the case of the agreement with New Zealand mentioned above, the Council decision of signature was adopted by unanimity instead of QMV and on the basis of a joint proposal by the Commission and the HR-VP. As argued by Eckes, this cross-Treaty legal basis "seems to depart from the compatibility requirement as formulated by the Court in *UN Sanctions*", see C Eckes, *EU Powers Under External Pressure* cit. 138.

[116] There is still theoretical incompatibility between EP consent/consultation – no EP intervention or QMV-unanimity in the Council.

[117] RA Wessel, 'Legality in EU Common Foreign and Security Policy' cit. 27.

[118] *Ibid*.; C Eckes, *EU Powers Under External Pressure* cit. 136; P Eeckhout, *EU External Relations Law* (Oxford University Press 2011 second edition) 184.

That cooperation is, in fact, foreseen in the Frontex mandate, in which it is indicated that the Agency shall cooperate with CSDP missions and operations with a view to ensuring the promotion of EU integrated border management standards, situational awareness and risk analysis and, specifically, when cooperating with the authorities of third countries.[119] Nonetheless and even if these references might have not been drafted with the possibility of CSDP missions devoted to migration purposes in mind, Acosta precisely refers, when assessing Operation Sophia, to the difficulties in ensuring coordination with Frontex. [120] In his view, the complexity of the endeavour arose from the CSDP nature of the operation and thus from its peculiar structure and logistics, which required a clarification of its real functions and how to coordinate them with Frontex operations in the region.[121] It is also very relevant, as Acosta highlights, how the assumption of internal security functions and the complexity of the migration phenomenon led to the need of a specific training for the agents participating in Operation Sophia,[122] specialization that is already present in Frontex staff. A more recent example is provided by the working arrangement signed, in July 2022, between Frontex and EUCAP Sahel Niger,[123] by which cooperation is set between the AFSJ Agency and the CSDP mission regarding capacity-building of Nigerien border management authorities, the deployment of experts to operational activities, as well as operational cooperation and information exchange through EUROSUR, all of these tasks clearly pertaining to the specific mandate of Frontex.

IV.3. Alternatives to the "centre of gravity test"

At this impasse, other alternatives to the "centre of gravity test" should be explored in order to determine the most adequate way to govern and organise the deployment of external missions with CFSP-migration purposes.

Firstly, priority could be provided to TFEU provisions through the application of the *lex generalis /lex specialis* principle by which recourse to general CFSP competence would only be possible in the absence of a more specific competence or legal basis.[124] Although

[119] Art. 68(1)(j) and 73(2) of Regulation 2019/1896; arts 77(3) and 78(1) of this Regulation also refer to coordination regarding the deployment of Frontex liaison officers and observers.

[120] M Acosta Sánchez, 'Sobre el ámbito competencial de las operaciones de paz' cit. 40.

[121] The *Global Strategy for the European Union's Foreign and Security Policy* points to how "CSDP missions and operations can work alongside the European Border and Coast Guard and EU specialised agencies to enhance border protection and maritime security in order to save more lives, fight cross-border crime and disrupt smuggling networks", Council document 10715/16 cit. 16.

[122] M Acosta Sánchez, 'Sobre el ámbito competencial de las operaciones de paz' cit. 40.

[123] Frontex, 'Frontex signs Working Arrangement with EUCAP Sahel Niger' (15 July 2022) frontex.europa.eu. The text of the working arrangement has been directly consulted by the author.

[124] M Cremona, 'Defining Competence in EU External Relations: Lessons from the Treaty Reform Process' in A Dashwood and M Maresceau (eds), *Law and Practice of EU External Relations. Salient Features of a Changing Landscape* (Cambridge University Press 2008).

some precedents can be found in which the Court applied, when choosing the appropriate legal basis of a measure, a "*lex specialis* test", as a different one from the "centre of gravity test",[125] there are also cases in which the CFSP was rejected to be seen as a general or residual competence only applicable when other competences do not apply.[126]

Other views put the accent on the criterion of the legislative character of the measure in question. The exclusion of legislative acts in art. 24 TEU would be read in a substantive rather than a formalistic way,[127] that is, excluding that the Council *qua* CFSP adopts normative acts of general application which directly affect individuals without the participation of the EP.[128] This could be probably applied to a scenario similar to the *Tanzania* case, in which the measure in question, an international agreement on the transfer of suspected pirates, presented a normative content, but certainly not to operational activities as the ones represented by CSDP missions and Frontex operations.

A third alternative would be to preserve a pro-integrationist reading of art. 40 TEU within the "centre of gravity test". This would be done by interpreting that the one-way protection accorded by former art. 47 TEU to EC policies from CFSP incursions was explained because the principle of conferral already prevented the Community from invading the CFSP area.[129] After the Union's succession to the EC and the suppression of pillars with the entry into force of the Lisbon Treaty, the principle of conferral would have lost that protection effect since all TEU and TFEU policies are now EU competences – with varying degree of intensity in their nature, of course –, justifying the mutual non-affectation sense of current art. 40 TEU. It could be argued that the authors of the Treaties still have the intention of advancing in the integration path and this, together with the protection of certain EU structural principles and fundamental values in which the EU is founded, such as the democratic principle or the rule of law,[130] would continue to tip the balance in favour of the

[125] See RA Wessel, 'Legality in EU Common Foreign and Security Policy' cit. 16. See case C-48/14 *Parliament v Council* ECLI:EU:C:2015:91 para. 49.

[126] M Cremona, 'The Position of CFSP/CSDP in the EU's Constitutional Architecture' cit. 14. See *UN Sanctions* cit.; AG Bot indicates that the relationship between art. 75 TFEU and art. 215 TFEU shall not be that of *lex generalis* and *lex specialis*, but must be viewed as one of complementarity (para. 69), implicitly accepted by the Court in its judgment (para. 66).

[127] P Van Elsuwege, 'EU External Action after the Collapse of the Pillar Structure: In Search of a New Balance Between Delimitation and Consistency' (2010) CMLRev 1003.

[128] C Matera and RA Wessel, 'Context or Content?' cit. 1058.

[129] See C Martínez Capdevila and I Blázquez Navarro, 'La incidencia del artículo 40 TUE en la acción exterior de la UE' (2013) Revista Jurídica de la Universidad Autónoma de Madrid 206 and 216.

[130] Applicable to the CFSP as recalled by the Court: see *H v Council and Commission* cit., *Rosneft* cit., and the *Tanzania* case cit. paras 70-71.

TFEU in case of incompatible procedures within the "centre of gravity test".[131] Consequently, if a measure simultaneously pursues a CFSP and a migration objective, that act should, according to this reading of art. 40 TEU, be based on the TFEU legal basis.

V. Conclusion

The interpretation of the mutual non-affectation clause suggested above is probably not possible in light of the recent Court's approach tending to an increasing "normalisation" and "constitutionalisation" of CFSP within the EU legal order.[132] Within this framework, a strict application of the "centre of gravity test" may nonetheless provide the answer to this legal basis controversy. Indeed, the EU political discourse has insisted for more than a decade that migration should be mainstreamed into the external policies of the Union. This justifies that a CSDP mission, aimed at reinforcing the rule of law in a third country by strengthening their security forces' capacities, may include, as an incidental component, some training and advice on building their migration management system. Certainly, the main or preponderant aim or content of the mission is not migration-related and can be considered to principally contributing to specific CFSP-international security purposes. That could be the case of EUCAP Sahel Mali or EUCAP Sahel Niger at its origins.

Nevertheless, the EU discourse seems to evidence in recent years a certain "instrumentalization" of CFSP/CSDP in favour of migration-related objectives, while developments in practice, Operation Sophia being a case in point, corroborate this. As Koutrakos explains, the CSDP, while being shifted away from the hard end of security and moved closer to its soft end, has been instrumentalised in order to achieve the objectives of other EU policies, and the AFSJ constitutes a clear example.[133] This would be, for instance, the case of an international mission aimed at eminently and directly addressing migration challenges to the security of the Union that come from a certain country or region, such as disrupting international networks devoted to migrant smuggling in the territory of a third country or in international waters, or assisting a third country in reinforcing its migration management or border controls system in order to prevent irregular flows heading to the EU. Under this approach, it would not be a question of simultaneity of objectives, but rather of an AFSJ objective which is being pursued through CFSP tools.

[131] Very interestingly, Contreras García argues in favour of using the TFEU legal basis as a requirement flowing from the principle of consistency of the EU external action, since the competence question or the inter-institutional demarcation of powers better protect that principle within the TFEU: I Contreras García, *La delimitación horizontal entre la PESC y la dimensión exterior del espacio de libertad, seguridad y justicia*, Final dissertation for the Degree in Law, Universidad Pontificia Comillas, April 2020.

[132] See RA Wessel, 'Integration and Constitutionalisation in EU Foreign and Security Policy' in R Schütze (ed.), *Governance and Globalization: International Problems, European Solutions* (Cambridge University Press 2018); J Santos Vara, 'El control judicial de la política exterior: Hacia la normalización de la PESC en el ordenamiento jurídico de la Unión Europea (a propósito del asunto Bank Refah Kargaran)' (2021) Revista de Derecho Comunitario Europeo 159-184.

[133] P Koutrakos, 'The Nexus between CFSP/CSDP and the Area of Freedom, Security and Justice' cit. 13.

Accepting the instrumental dimension of CFSP means, in my view, that migration and internal security concerns appear to be preponderant over CFSP objectives and thus the "centre of gravity test" would easily solve the conflict in favour of resorting to the TFEU and the AFSJ integrated policies. This would respect the EU constitutional safeguards the authors of the Treaty specifically assigned to the Union's response to migration challenges under Title V TFEU, safeguards which, at least for the time being, appear to be more protective of the values and principles in which the Union is founded than those provided by the CFSP legal framework.

ARTICLES

THE EXTERNALISATION OF EU MIGRATION POLICIES IN LIGHT OF EU CONSTITUTIONAL PRINCIPLES AND VALUES

edited by Juan Santos Vara, Paula García Andrade *and* Tamás Molnár

THE ACTIVITIES OF FRONTEX ON THE TERRITORY OF THIRD COUNTRIES: OUTSOURCING BORDER CONTROLS WITHOUT HUMAN RIGHTS LIMITS?

JUAN SANTOS VARA*

ABSTRACT: The aim of this *Article* is to examine the role played by Frontex in the process of externalisation of EU migration policies. It is not surprising that the external dimension of Frontex's powers has been reinforced in the successive reforms of its legal framework. There is a common agreement between Member States on the need to intensify international cooperation with third countries in order to face current challenges in the area of migration. The deployment of border management teams on the territory of third countries raises complex legal and political questions as regards the legal regimen applicable and the delimitation of responsibilities between the different actors involved in the extraterritorial operations. The allegations of fundamental rights violations in which Frontex was reportedly involved in the Aegean Sea show that it will be very difficult to clarify the role of Frontex in any wrongdoing that will happen in the context of operations implemented on the territory of third countries.

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I. INTRODUCTION

In the last years, the EU has intensified the externalisation of migration policies with the aim of preventing the access of irregular migrants and persons in need of international protection to the territory of the Member States. Externalisation often amounts to a policy of deterrence preventing third countries' nationals from entering into direct contact with EU or Member States' authorities.[1] Extraterritorial immigration control has been increasingly used by States aiming to prevent flows of migrants and asylum seekers towards their territory.[2] The failure to reach an agreement between the Member States on the reform of the Common European Asylum System (CEAS) has led the EU to intensify the externalisation process.[3]

The EU has tried to reinforce the cooperation with third countries in the management of migration, including Turkey, Libya and the Sahel countries in order to externalize migration controls.[4] The EU has provided third countries with financial assistance, equipment, training and it has even deployed liaison officers on the ground.[5] The externalisation of migration policies may also lead the EU and its Member States to exercise directly effective control over migrants and persons in need of international protection on the territory of third countries on the basis of the agreements concluded with them.[6]

[1] See S Lavanex, 'Shifting Up and Out: The Foreign Policy of European Immigration Control' (2010) West European Politics 329-350; JJ Rijpma, 'External Migration and Asylum Management: Accountability for Executive Action Outside EU-territory' (2017) European Papers www.europeanpapers.eu 571.

[2] See V Guiraudon, 'Before the EU Border: Remote Control of the Huddle Masses' in K Groenendijk, E Guild and P Minderhoud (eds), *In Search of Europe's Borders* (Kluwer Law International 2003); V Mitsilegas, 'Extraterritorial Immigration Control, Preventive Justice and the Rule of Law in Turbulent Times: Lessons from the Anti-Smuggling Crusade' in S Carrera, J Santos Vara and T Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis. Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar Publishing 2019).

[3] See JA González Vega, 'Non-Refoulement at Risk? Asylum's Disconnection Mechanisms in Recent EU Practice' in S Carrera, J Santos Vara and T Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* cit.

[4] J Santos Vara, *La dimensión exterior de las políticas de inmigración de la Unión Europea en tiempos de crisis* (Tirant lo Blanch 2020) 71-76; J Santos Vara, 'Soft International Agreements on Migration Cooperation with Third Countries: A Challenge to Democratic and Judicial Controls in the EU' in S Carrera, J Santos Vara and T Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* cit.

[5] See P García Andrade, *La acción exterior de la Unión Europea en materia migratoria* (Tirant lo Blanch, 2015); P García Andrade, I Martïn and S Mananashvili, *EU Cooperation with Third Countries in the Field of Migration* (Study for the LIBE Committee 2015) www.europarl.europa.eu.

[6] On the constitutional challenges of EU external cooperation on migration with third countries, see T Strik, 'EU External Cooperation on Migration in Search of the Treaty Principles' (2023) European Papers www.europeanpapers.eu 905.

The externalisation of EU migration policies has also involved an expansion in the number of European actors involved in migration cooperation and border controls with third States. EU agencies are called to play a key role in developing the cooperation between the EU and third countries in this field, which increasingly leads to the externalisation of the management of migration and protection obligations.[7] A good example in this regard is the increased role played by Frontex in practical and operational cooperation with third countries, including on return and readmission, the fight against human trafficking, the provision of training and technical assistance to authorities of third countries for the purpose of border management. It is explicitly laid down in the 2019 European Border and Coast Guard (EBCG) Regulation that the Agency may cooperate, to the extent required for the fulfilment of its tasks, with the authorities of third countries.[8]

The weakness of the Frontex legislative framework has been the source of a fierce debate as regards the implications of the Agency's activities for fundamental rights since its establishment in 2005. This continuing controversy seems to have intensified in light of the new powers conferred on Frontex by the 2016 and 2019 versions of its founding Regulation, in particular the establishment of the standing corps with executive powers. At the same time, the Agency and its compliance with human rights has been under scrutiny from multiple angles, including the European Parliament, the European Ombudsman, the European Court of Auditors (ECA) and the European Anti-Fraud Office (OLAF). The expanded mandate and powers of Frontex has not been accompanied by adequate accountability mechanisms.[9] It has been argued that the fact that Frontex is systematically involved in fundamental rights breaches has led to the emergence of a rule of law crisis in European border management.[10]

Frontex is expected to help EU Member States secure external borders and externalize migration controls. Third countries are not obliged to respect the fundamental rights of the persons affected by the Frontex extraterritorial operations in accordance with EU law. The increasing cooperation with third countries takes place without clarity as regards the applicable legal framework and human rights safeguards. As a consequence, the Agency risks becoming involved in the commission of illegal acts. It is not surprising that

[7] S Carrera, J Parkin and L den Hertog, 'The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy' (2013) European Journal of Migration and Law 337-358; D Fernández Rojo, *EU Migration Agencies the Operation and Cooperation of FRONTEX, EASO and EUROPOL* (Edgar Elgar Publishing 2021); J Santos Vara, 'The External Activities of AFSJ Agencies: The Weakness of Democratic and Judicial Controls' (2015) European Foreign Affairs Review 118-136; J Santos Vara, *La gestión de las fronteras exteriores de la UE: los nuevos poderes de la Agencia Frontex* (Tirant lo Blanch 2021).

[8] Art. 73(1) of Regulation 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

[9] M Gkliati, 'The New European Border and Coast Guard: Do Increased Powers Come with Enhanced Accountability?' (17 April 2019) EU Law Analysis eulawanalysis.blogspot.com.

[10] L Marin, 'Frontex and the Rule of Law Crisis at EU External Borders: A Question of Legal Design?' (5 September 2022) Verfassungsblog verfassungsblog.de.

the external dimension of Frontex's powers has been reinforced in the successive reforms of its Regulation. There is a common agreement between the Member States on the need to intensify international cooperation with third countries in order to face current challenges in the area of migration. The European Council has recently called for the rapid conclusion of negotiations on new and revised status agreements between the EU and third countries on the deployment of Frontex as part of the efforts to strengthen cooperation on border management and migration.[11]

The aim of this *Article* is to examine the role played by Frontex in the process of externalisation of EU migration policies. First, the establishment of the EBCG in 2016 will be examined taking into account the evolution of the Agency in the successive amendments of its legal framework. Second, the main implications of new powers conferred on Frontex will be analysed paying particular attention to the new tasks entrusted to the standing corps. Third, the cooperation developed between the Agency and third countries will be explored. Frontex is probably the EU agency that has experienced the greatest increase of powers in the relations with third countries, in particular through the deployment of liaison officers and the signing of working arrangements. Finally, the operations implemented on the territory of third States raise complex legal and political issues, in particular from the perspective of the protection of fundamental rights. The possibility to carry out extraterritorial activities, including executive powers, is one the most relevant innovations introduced by the recent reforms of the Frontex legal framework. The extraterritorial activities of the Agency should be framed in the current process of externalisation of EU migration policies.

II. The establishment of the European Border and Coast Guard

Frontex was established with the aim of coordinating and assisting Member States' actions in the surveillance and control of the external borders of the EU.[12] Frontex has been characterized as an agency with a dual character.[13] On the one hand, it assists Member States in the implementation of a common integrated management of the external borders through the provision of technical support. On the other hand, Frontex is entrusted with the coordination of joint operations between Member States' national border guards. Since its establishment, Frontex has coordinated many joint operations covering the air, land and sea borders of the Member States and has experienced a substantial increase in its powers.[14]

[11] European Council Conclusions of 9 February 2023 para. 23.

[12] Council Regulation 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

[13] J Rijpma, 'Hybrid Agencification in the Area of Freedom, Security and Justice and its Inherent Tensions: The Case of Frontex' in M Busuioc, M Groenleer and J Trondal (eds), *The Agency Phenomenon in the European Union: Emergence, Institutionalisation and Everyday Decision-making* (Manchester University 2012).

[14] See Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council

The establishment of the EBCG in 2016 was one of the main initiatives adopted by the EU to deal with the asylum and migration "crisis".[15] The creation of the EBCG and the transformation of Frontex into the Agency of the EBCG did not amount to establishing a real European Border and Coast Guard System that replaced national authorities in charge of border management in each Member State. Even though the Regulation on the EBCG has significantly reinforced the tasks conferred upon Frontex, these innovations did not entail a real transformation of its legal nature. Member States continue to retain the primary responsibility for the management of the external borders.[16] According to de Bruycker, the EBCG is essentially "a new model built on an old logic".[17] As it was pointed out by Carrera and den Hertog, the 2016 Frontex Regulation led to transform the former Agency into a "Frontex+".[18] The changes introduced in the configuration of the Agency could not be qualified as revolutionary but more as a natural evolution in the process initiated in 2004 with the creation of Frontex.[19] It should be acknowledged that the exact division of responsibility between the Member States and the Agency remains unclear in practice.

The reliance on voluntary Member States' contributions of staff and equipment resulted in persistent gaps affecting the support that the Agency could offer to Member States. Less than two years after the adoption of the Regulation establishing the EBCG, the Commission proposed an updated version of the Regulation on the EBCG.[20] The new Regulation on the EBCG was adopted by the Council on 8 November 2019.[21] These

Regulation (EC) 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers and Regulation 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers.

[15] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.

[16] *Ibid*. Recitals 6 and 5 of the Preamble.

[17] P De Bruycker, 'The European Border and Coast Guard: A new Model Built in an Old Logic' (2016) European Papers www.europeanpapers.eu 559.

[18] S Carrera and L den Hertog, 'A European Border and Coast Guard: What's in a Name?' (2016) Centre of European Policy Studies; S Carrera and others, 'The European Border and Coast Guard: Addressing Migration and Asylum Challenges in the Mediterranean?' (2017) Centre of European Policy Studies.

[19] See J Rijpma, 'The Proposal for a European Border and Coast Guard: Evolution or Revolution in External Border Management?' (European Parliament 2016); J Santos Vara, 'La transformación de Frontex en la Agencia Europea de la Guardia de Frontera y Costas: ¿Hacia una centralización en la gestión de las fronteras?' (2018) Revista de Derecho Comunitario Europeo 143.

[20] Proposal for a Regulation COM(2018) 631 final of the European Parliament and of the Council on the European Border and Coast Guard and repealing Council Joint Action n°98/700/JHA, Regulation (EU) n. 1052/2013 of the European Parliament and of the Council and Regulation (EU) n° 2016/1624 of the European Parliament and of the Council A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018.

[21] Regulation 2019/1896 cit.

developments point to the gradual emergence of an increasingly "integrated European administration" as its powers have been significantly expanded, in particular in the areas of border management and returns.[22]

It seems that the successive amendments to the Agency's legal framework in a short period of time are "symptomatic of a lack of strategic thinking on the future of border management at EU level".[23] According to a special report published by the ECA in June 2021, Frontex has not been sufficiently effective in helping Member States in managing the EU's external border.[24] The auditors considered that the Agency's support is not adequate to combat illegal immigration and cross-border crimes. As well as concluding that Frontex has not fully implemented the mandate that it received in 2016, ECA also cast doubt on its capacity to effectively implement the new operational role that has been assigned to it. ECA held that "the Agency responded to its new responsibilities in an *ad hoc* fashion and only began to address its needs in a systematic way in 2019".[25]

III. The enhancement of the Agency's mandate

The evolution of the Agency should be framed within the process of *agencification* that the Area of Freedom, Security and Justice (AFSJ) has experienced over the last years.[26] EU agencies, in particular Frontex and the EU Asylum Agency (EUAA), are called to play an increasing role to respond to the challenges that the EU is facing in the areas of migration, asylum and border management. They are presented by the institutions as instruments to reinforce the implementation of EU law, to enhance solidarity between the Member States and to implement cooperation between the EU and third countries. The 2016 and 2019 Regulations on the EBCG involve a substantial reinforcement of Frontex as regards

[22] See P de Bruycker, 'The European Border and Coast Guard' cit.; J Santos Vara, 'La transformación de Frontex en la Agencia Europea de la Guardia de Frontera y Costas' cit.

[23] Meijers Committee, 'CM1817 Comments on the draft for a new Regulation on a European Border and Coast Guard, (COM (2018) 631 final) and the amended proposal for a Regulation on a European Union Asylum Agency (COM (2018) 633 final)' (November 2018).

[24] ECA, 'Special Report 08/2021: Frontex's Support to External Border Management: Not Sufficiently Effective to Date' (7 June 2021).

[25] *Ibid*. 36.

[26] See E Bernard, 'Accord sur les agences européennes: la montagne accouche d'une souris' (2012) Revue du Droit de l'Union Européenne 399-446; M Busuioc, 'Accountability, Control and Independence: The Case of European Agencies' (2009) ELJ 599-615; M Chamon, *EU Agencies: Legal and Political Limits to the Transformation of EU Administration* (Oxford University Press 2016); E Chiti, 'An Important Part of the EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies' (2009) CMLRev 1395-1442; E Vos, 'EU Agencies: Features, Framework and Future' (Maastricht Faculty of Law, Working Paper 3-2013); S Carrera, L den Hertog and J Parkin, 'The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy' (2013) European Journal of Migration and Law; J Santos Vara, 'The External Activities of AFSJ Agencies' cit.

tasks, human and financial resources with the aim to strengthening the protection of the external borders and restoring the normal functioning of the Schengen area.

III.1. The conferral of executive powers on the Agency's staff

The conferral of executive power on the Agency's staff is one of the main innovations introduced by Regulation 2019/1896. The establishment of a Rapid Reaction Pool of 1.500 border guards by Regulation 2016/1624 was considered a positive step to address emergency situations at the external borders. The creation of the standing corps of 10.000 operational staff by 2027 is the main innovation introduced by the new Frontex Regulation. The standing corps should enable the Agency to deploy border guards where needed and therefore enhance the Agency's capacity to support Member States in securing external border controls.[27] The enhancement of human and financial resources of individual Member States through Frontex can be perceived as a tool of EU solidarity and fair sharing.[28]

The members of the standing corps, including the operational staff of the Agency, are conferred executive powers.[29] Providing the Agency's own staff with executive powers is questionable since the primary responsibility for the management of the external borders lies primarily with the Member States. It can be argued that art. 77(2)(d) TFEU provides the legal basis for any measure necessary for the gradual establishment of an integrated management system for external borders. It is true that the members of the teams may only exercise executive tasks under the command and control of the host Member State and as a rule in the presence of border guards or staff involved in return-related tasks of the host Member State. However, such tasks may be performed by the Frontex operational staff in the case that they have been authorized by the host Member State to act on its behalf.[30]

Frontex is entering unchartered waters with the conferral of executive powers.[31] This new task raises serious concerns as regards judicial control in the case that fundamental

[27] Art. 54 Regulation 2019/1896 cit.

[28] D Fernández Rojo, 'The Umpteenth Reinforcement of FRONTEX's Operational Tasks: Third Time Lucky?' (4 June 2019) EU Law Analysis eulawanalysis.blogspot.com; B Parusel, 'Should They Stay or Should They Go? Frontex's Fundamental Rights Dilemma' Swedish Institute for European Policy Studies (December 2022) www.sieps.se.

[29] The statutory staff of the Agency may perform executive tasks such as the verification of the identity and nationality of persons, the authorisation or refusal of entry upon border check, the stamping of travel documents, issuing or refusing of visas at the border, border surveillance, or registering fingerprints. See arts 54(3) and 55(7) of Regulation 2019/1896 cit.

[30] Art. 82 Regulation 2019/1896 cit.

[31] J Santos Vara, 'The European Border and Coast Guard in the New Regulation: Towards Centralization in Border Management?' in S Carrera, D Curtin and A Geddes (eds), *20 Year Anniversary of the Tampere Programme. Europeanisation Dynamics of the Area of Freedom, Security and Justice* (European University Institute 2020).

rights violations are committed in the context of operations involving Frontex teams. The substantial autonomy enjoyed by AFSJ agencies and, in particular Frontex, in developing their activities does not mean that they are immune to judicial controls. The Treaty of Lisbon expressly introduced in art. 263 TFEU the possibility of taking legal action to annul legal acts of the agencies. However, there is sometimes uncertainty as regards the distribution of responsibility between Frontex and the Member States involved in the agencies' activities. It can be difficult sometimes to understand who does what and who is responsible for what. This situation is particularly worrying because its operations can have a serious impact on the fundamental rights of migrants and refugees. A good illustration are the hotspots set up to manage the massive arrival of refugees to Italy and Greece where EUAA, Frontex and Europol work together on the ground with the authorities of Member States to help them to fulfill their obligations under EU law.[32] The broadening of powers conferred on Frontex by the new Regulation may exacerbate the problems facing individuals who are victims of human rights violations and try to obtain judicial redress.

III.2. The emergence of a supervisory role

The Agency is called to supervise the effective functioning of the national external borders and detect deficiencies in their management. There is a hierarchical relationship placing Frontex above national authorities. Both the 2016 and 2019 EBCG Regulations have equipped the Agency with a mechanism to assess vulnerabilities in the Member States' capacities to face challenges at the external borders.[33] In case of non-compliance with the recommendations made by the Executive Director and the decisions taken by the Management Board of the Agency to address the deficiencies identified at the external borders, the vulnerability assessment may lead to the so called "right to intervene". If the Member State concerned does not cooperate with the Agency, the Council, acting on the basis of a proposal from the Commission, may adopt a decision by means of an implementing act identifying the measures needed to mitigate those risks and requiring the Member State concerned to cooperate with the Agency.[34] The implementing power to adopt such a decision is conferred on the Council because of the potentially politically sensitive nature of the measures to be decided. However, if a Member State is opposed to the application of certain measures, Frontex does not have at its disposal any means to impose them. In practice, intervention will not consist in sending teams from the EBCG to take over the responsibilities or tasks of a particular Member State in managing its borders, but in suspending the

[32] EL Tsourdi, 'Bottom-up Salvation? From Practical Cooperation Towards Joint Implementation Through the European Asylum Support Office' (2016) European Papers www.europeanpapers.eu 987 and 'Hotspots and EU Agencies: Towards an integrated European Administration?' (26 January 2017) EU Migration and Asylum Law and Policy eumigrationlawblog.eu.

[33] Art. 32 Regulation 2019/1896 cit.

[34] *Ibid*. art. 42.

application of Schengen in relation to the Member State concerned insofar as the persistent deficiencies relating to the external borders constitute a serious threat to public policy or internal security within the area without internal borders.[35] There is an underlying tension between the new operational tasks bestowed upon Frontex and, in particular, the executive powers and the conferral of a supervisory and intervention role. Frontex is called to play a double role since it is involved in implementing EU external border policy and monitoring policy implementation.[36] There is a risk of politization of the Agency when conducting the vulnerability assessment and identifying the weaknesses in a particular sector of the external border. AFSJ agencies and, in particular Frontex, are not independent from the Member States and are not immune to political influences. Member States are represented at the Management Board of Frontex which plays a key role in operationalizing its mandate. It should be further reflected how to ensure the independence of the Agency when supervising the implementation of EU external border policy by the Member States.

IV. Cooperation with third countries in the framework of the European Border and Coast Guard Regulation

Once the evolution of the Frontex legal framework has been analysed, it is possible to examine the role played by the Agency in the externalization of border control activities. The activities carried out by AFSJ agencies in the relations with third countries are very diverse, and have continued to expand in recent years.[37] International cooperation is one of the core dimensions of the European integrated border management. Frontex is probably the EU agency that has experienced the greatest increase of powers in the relations with third countries.[38] In order to facilitate operational cooperation with third countries, Frontex has been allowed to implement a number of cooperation activities. The instruments provided for in both the 2016 and 2019 EBCG Regulations to carry out the cooperation with third States are the same as those that have been developed in previous years. However, the EBCG Regulation regulates this set of instruments in more detail and pays greater attention to the protection of fundamental rights and, in particular, to the principle of *non-refoulement*.

[35] See art. 29 Regulation 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification).

[36] L Tsourdi, 'Monitoring and Steering through FRONTEX and EASO 2.0: The Rise of a New Model of AFSJ Agencies' (29 January 2018) EU Migration and Asylum Law and Policy eumigrationlawblog.eu.

[37] See C Billet, 'Le contrôle des relations extérieures des agences ELSJ après Lisbonne' in C Flaesch-Mougin and L Serena Rossi (dirs), *La dimension extérieure de l'espace de liberté, de sécurité et de justice de l'Union Européenne après Lisbonne* (Bruylant 2013) 95-129; A Ott, 'EU Regulatory Agencies in EU External Relations: Trapped in a Legal Minefield Between European and International Law' (2008) European Foreign Affairs Review 515-540; J Santos Vara, 'The External Activities of AFSJ Agencies' cit.

[38] The reforms introduced by Regulation 1168/2011 attempt to provide legal support for the practices developed in relations with third States. See art. 14 of Regulation 1168/2011 cit.

Firstly, the Agency may deploy liaison officers in third countries and receive liaison officers from third countries on a reciprocal basis, with a view to contributing to the prevention of and fight against irregular immigration and the return of irregular migrants. It is foreseen that priority for the deployment of liaison officers shall be given to those third countries which, on the basis of a risk analysis, constitute a country of origin or transit regarding illegal immigration.[39] In recent years, Frontex has deployed liaison officers to Turkey, Niger, Senegal and in the Western Balkans (Belgrade and Tirana). It is explicitly laid down in the 2019 Regulation that the liaison officers will be involved in the field of return by providing technical assistance in the identification of third-country nationals and the acquisition of travel documents.[40] In order to sustain the growing network of Frontex liaison officers, the Agency collaborates with the Commission, the European External Action Service (EEAS) and other EU actors. Frontex also has experts deployed to the Common Security and Defence Policy (CSDP) missions and operations.[41] Since 2017, a Frontex expert is supporting the EU Border Assistance Mission in Libya (EUBAM) on the ground.[42] Frontex has exchanged experts acting as liaison officers with EU NAVFOR Med Sophia and the NATO Operation in the Aegean Sea. The 2019 Frontex Regulation introduced for the first time a legal framework for implementing the cooperation with CSDP missions that has developed in practice in the last years.[43] The EU has also strengthened Frontex's activities in Niger by signing a working arrangement with the CSDP mission EUCAP Sahel Niger and it is planned to finalise a similar partnership with EUBAM Libya.[44] It has been questioned the need for and added value of the coordination of liaison officers with CSDP missions because the military purposes of the latter operations are different Frontex's mandate in the field of border management.[45]

[39] Art. 77(3) Regulation 2019/1896 cit.

[40] *Ibid*.

[41] On the relation between migration and CFSP, see P García Andrade, 'Tackling Migration Externally Through the EU Common Foreign and Security Policy: A Question of Legal Basis' (2023) European Papers www.europeanpapers.eu 959.

[42] Council Decision (CFSP) 2013/233 of 22 May 2013 on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya).

[43] Council Decision (CFSP) 2015/972 of 22 June 2015 launching the European Union military operation in the southern Central Mediterranean (EUNAVFOR MED).

[44] Frontex, 'Frontex signs Working Arrangement with EUCAP Sahel Niger' (15 July 2022) www.frontex.europa.eu. See also Mécanisme opérationnel de coordination des actions pour la dimension externe des migrations, Action file Niger (8 February 2022) and Statewatch, 'Frontex to Boost Border Control Efforts in Niger, Algeria and Libya' (10 March 2022) www.statewatch.org.

[45] European Council on Refugees and Exiles, 'ECRE Comments on the Commission Proposal for a Regulation on the European Border and Coast Guard, (COM (2018) 631 final)' (November 2018); M Estrada-Canamares, 'Operation Sophia Before and After UN Security Council Resolution no 2240 (2015)' European Papers www.europeanpapers.eu 185; V Moreno-Lax and E Papastavridis (eds), *Boat Refugees and Migrants at Sea: A Comprehensive Approach. Integrating Maritime Security with Human Rights* (Brill 2016).

Second, Frontex may invite observers from third countries to participate in its activities at the external borders, return operations, return interventions and training. The new 2019 Regulation expands the possibility of inviting observers from EU institutions, bodies and agencies, including other international organizations and CSDP missions "to the extent that their presence is in accordance with the objectives of those activities, may contribute to the improvement of cooperation and the exchange of best practices, and does not affect the overall safety and security of those activities".[46] In addition, the bilateral agreements concluded by the Member States with third States may include provisions on the role of the Agency in the framework of joint operations implemented on the territory of third States.[47] Furthermore, the Agency may receive Union funding in accordance with the provisions of the relevant instruments supporting third countries and activities relating to them. It may launch and finance technical assistance projects in third countries regarding matters covered by the Frontex Regulation and in accordance with the financial rules applicable to the Agency.[48]

Third, Frontex has resorted very often to negotiate working arrangements with the authorities of third countries "to the extent required for the fulfilment of its tasks".[49] Working arrangements constitute a very important instrument to implement and develop the operational cooperation of Frontex with third States. Frontex has made extensive use of this prerogative by entering into agreements with a large number of States and even with various international organisations.[50] The content of the working arrangements is quite similar, including undertakings in the field of information exchange and the creation and coordination of joint operational measures and pilot projects, as well as cooperation in risk analysis, technical development of border procedures and training. There is a need to cooperate with third countries in order to promote EU standards and practices in the field of border management, including the respect for fundamental rights.

As regards the procedure for negotiating working arrangements with third countries, the Director of the Agency has to follow the guidelines established by the Management Board and the Commission is fully involved in the negotiation process. Working

[46] Art. 78(1) Regulation 2019/1896 cit.

[47] The agreement concluded between Spain and Cape Verde in 2009 introduced a legal framework that allowed the cooperation between Frontex and the African country (Acuerdo entre España y Cabo Verde sobre vigilancia conjunta de los espacios marítimos bajo soberanía y jurisdicción de Cabo Verde, BOE núm. 136 (5 Junio 2009), 47545).

[48] Art. 73(6) Regulation 2019/1896 cit.

[49] *Ibid*. art. 73(1).

[50] See M Fink, 'Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding "Technical Relationships"' (2012) Utrecht Journal of International and European Law 20-35; J Santos Vara, 'Análisis del marco jurídico-político de la dimensión exterior de la Agencias del Espacio de Libertad, Seguridad y Justicia' in M Pi Llorens and E Zapater Duque (coords), *La dimensión exterior de las agencias del espacio de libertad, seguridad y justicia* (Marcial Pons 2014) 7-36.

arrangements are usually based on a model previously drawn up by the Commission.[51] Before the Management Board approves any working arrangement, the Agency is obliged to notify them to the Commission that has to give its prior approval.[52] The participation of the European Parliament in the process of negotiating working arrangements has been gradually reinforced in the successive reforms of the Frontex Regulation. Since the reform introduced by Regulation 2019/1896, the Agency is obliged to provide the Parliament with detailed information as regards the parties to the working arrangement and its envisaged content before they are concluded.[53] As the working arrangements may have serious implications for human rights, it has been pointed out that they should be subject to prior approval by the Parliament. [54] However, it seems logical that the signing of mere administrative agreements agreed with the border services of third countries is not dependent on the previous approval by the Parliament.[55] Furthermore, the democratic control of all Frontex activities has been substantially strengthened since the adoption of Regulation 2016/1624.[56] All working arrangements contain a similar provision highlighting that they are deprived of binding legal effects and that the implementation of its provisions does not amount to the fulfilment of international obligations.

In conclusion, before 2016, the Agency could deploy liaison officers in third countries and receive them from third countries on a reciprocal basis, launch technical assistance and exchange information with third countries within the framework of working arrangements. However, the Agency was not allowed to implement joint operations on the territory of third countries that involve the deployment of EU border guards. As it will be shown in the following section, the deployment of border management teams on the territory of third countries raises complex legal and political issues.

V. The implications of the extraterritorial Frontex joint operations

V.1. The deployment of border management teams on the territory of third countries

The 2016 Regulation introduced the possibility of carrying out operations on the territory of neighbouring third countries subject to a prior agreement concluded by the EU and

[51] Art. 76(2) Regulation 2019/1896 cit.

[52] *Ibid*. art. 76(4).

[53] *Ibid*.

[54] Parliamentary Assembly of the Council of Europe, 'Frontex: Human Rights Responsibilities' Doc. 13161 (8 April 2013).

[55] J Santos Vara, 'La transformación de Frontex en la Agencia Europea de la Guardia de Frontera y Costas' cit. 175.

[56] See J Santos Vara, 'The EU's Agencies. Ever more Important for the Governance of the Area of Freedom, Security and Justice' in F Trauner and A Ripoll Servent (eds), *The Routledge Handbook of Justice and Home Affairs Research* (Routledge 2018) 445-457.

the third country concerned (so-called status agreements). The geographical scope of the cooperation with third countries is substantially expanded in the 2019 Regulation since the Agency can develop operational cooperation with any third country. Arts 73 and 74 EBCG Regulation provide the legal basis for launching joint operations on the territory of third state territories. The cooperation between the Agency and authorities of third countries may concern all aspects of European Integrated Border Management, including border control and return activities.[57] Frontex may support third countries by providing financial technical assistance, sending technical equipment and deploying personal on the ground. The personnel are drawn from the European Border and Coast Guard standing corps. The status agreements may also include the establishment of antenna offices in third countries in order to facilitate and improve coordination of operational activities.[58]

When the deployment of border management teams from the standing corps to a third country involves the use of executive powers, a status agreement has to be concluded by the EU with the third country concerned on the basis of art. 218 TFEU.[59] The negotiations with third countries are based on a model status agreement previously developed by the Commission as provided for in art. 76(1) of Regulation 2019/1896.[60] Each status agreement can serve as an umbrella under which multiple operational activities can be carried out. After the entry into force of the 2016 EBCG Regulation, priority was given to negotiate the first agreements with the Balkan countries. So far, status agreements have been concluded with Albania (2019), Montenegro and Serbia (2020), North Macedonia (2022) and it is pending finalization of the agreement with Bosnia Herzegovina (initialled in 2019).[61] In March 2022, a status agreement was signed with Moldova in order to support this country to address the challenges arising from the invasion of Ukraine by

[57] Art. 73(1) Regulation 2019/1896 cit.

[58] See *ibid*. arts 73(3) and 60.

[59] *Ibid*.

[60] Communication COM(2021) 829 final from the Commission to the European Parliament and the Council of 21 December 2021 on the Model status agreement as referred to in Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, COM/2021/829 final.

[61] Council Decision 2019/267 of 12 February 2019 on the conclusion of the Status Agreement between the European Union and the Republic of Albania on actions carried out by the European Border and Coast Guard Agency in the Republic of Albania; Council Decision 2020/729 of 26 May 2020 on the conclusion of the Status Agreement between the European Union and Montenegro on actions carried out by the European Border and Coast Guard Agency in Montenegro; Council Decision 2020/865 of 26 May 2020 on the conclusion of the Status Agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia; and Council Decision (EU) 2022/1350 of 29 July 2022 authorising the opening of negotiations on a status agreement between the European Union and the Republic of North Macedonia on operational activities carried out by the European Border and Coast Guard Agency in the Republic of North Macedonia.

Russia.[62] Since the beginning of the Russian war of aggression against Ukraine in February 2022, Moldova has received the highest number of refugees per capita in the region. The provisional application of the agreement allowed the immediate deployment of Frontex staff on the ground.

The first joint operation outside the territory of the Member States was launched in Albania on 21 May 2019 at the Albanian-Greek border and is still ongoing.[63] In 2020, two operations were launched in Montenegro: the first operation at the border with Croatia and a second one aimed at tackling cross-border crime at the country's sea borders (including the smuggling of drugs and weapons, smuggling of migrants, trafficking in human beings and terrorism).[64] Serbia is the third country in the Western Balkans to host a fully-fledged Frontex operation helping to detect criminal activities such as people smuggling, trafficking in human beings, document fraud and smuggling of stolen vehicles, illegal drugs, weapons and excise goods, as well as potential terrorist threats.[65]

The extraterritorial exercise of executive powers, including the use of force, is one of the most sensitive aspects included in the status agreements.[66] The agreements concluded so far explicitly allow to perform all tasks and executive powers required for border control and return operations, such as verification of the identity and nationality of a person or patrolling a border.[67] However, only the agreement concluded with Albania includes a definition of executive powers as "the powers necessary to perform the tasks required for border control and return operations which are conducted [...] during a joint action as included in the operational plan".[68] The deployed teams may be authorised to use force, including service weapons ammunition and equipment, with the consent of the home State.[69] In addition to joint operations and rapid border interventions, the status agreements refer also to return operations from Member States to the respective

[62] Council Decision 2022/544 of 4 April 2022 on the conclusion of the Agreement between the European Union and the Republic of Moldova on operational activities carried out by the European Border and Coast Guard Agency in the Republic of Moldova; Agreement between the European Union and the Republic of Moldova on operational activities carried out by the European Border and Coast Guard Agency in the Republic of Moldova.

[63] Frontex, 'Frontex Launches First Operation in Western Balkans' (21 May 2019) www.frontex.europa.eu.

[64] Frontex, 'Frontex Launches Second Operation in Montenegro' (14 October 2020) www.frontex.europa.eu.

[65] Frontex, 'Frontex Expands Presence in Western Balkans with Operation in Serbia' (16 June 2021) www.frontex.europa.eu.

[66] See F Coman-Kund, 'The Territorial Expansion of Frontex Operations to Third Countries: On the Recently Concluded Status Agreements in the Western Balkans and Beyond...' (6 February 2020) Verfassungsblog verfassungsblog.de.

[67] Council Decision 2019/267 cit.; Council Decision 2020/729 cit.; Council Decision 2020/865 cit. and Council Decision (EU) 2022/1350 cit.

[68] Art. 2 of Council Decision 2019/267 cit.

[69] Art. 4(5–6) of Council Decision 2019/267 cit.; art. 5(5– 6) of Council Decision 2020/729 cit.; art. 5(5–6) of Council Decision 2020/865 cit.

third country. However, the Commission acknowledges that a status agreement would not be the appropriate instrument to be used to organise return operations.[70]

The parties complement the status agreement with the adoption of an operational plan for each operation that is launched. The operational plan specifies the operational aim and objectives, the implementation plan, the command and control arrangements, specific instructions to deployed personnel and the provision in respect of fundamental rights compliance. The operational plans are binding on the Agency, the third state concerned and the participating Member States.[71] Operational plans are not publicly available and also not made accessible — not even in part or for past operations — upon request.[72]

The legal framework laid down in the status agreements requires the members of the team operations to respect the laws and regulations of the host third State. Therefore, command and control structures on the ground during joint operations implemented on the territory of third States are similar as those developed within the EU Member States. The teams deployed, including the officers from the EBCG standing corps, may only perform tasks and exercise powers on the territory of third countries under the instructions from the authorities of the third countries. It is specified in all status agreements that the host authorities may authorise the deployed teams to act on its behalf "as long as the overall responsibility and command and control functions remain with the border guards or other police officers [...]" of the host State.[73] The Agency, in turn, only retains the power to communicate its views on those instructions to the third country or suspend/terminate the operation altogether.[74] All status agreements concluded so far follow the same model as regards the powers conferred on the actors involved on the ground.[75] As it has been argued, when team members act on behalf of third countries, "this leaves potentially considerable powers to team members to externalise the EU's border control and prevent irregular migration towards the EU far beyond its physical borders, without independent oversight".[76]

The status agreements with Balkan countries should be framed in the current process of accession to the EU that are at various stages of approximating domestic law with

[70] Communication COM(2021) 829 final cit.

[71] Art. 74(3) in conjunction with art. 38(3) of Regulation 2019/1896 cit.

[72] The European Ombudsman has recently criticized the lack of transparency of the operational plans, as well how Frontex takes decisions on suspending, terminating or not launching activities due to fundamental rights concerns (European Ombudsman, 'How the European Border and Coast Guard Agency (Frontex) complies with its fundamental rights obligations and ensures accountability in relation to its enhanced responsibilities' CASE OI/4/2021/MHZ, 18 January 2022).

[73] Art. 5(3) of Council Decision 2020/865 cit.

[74] *Ibid*. See also art. 74(3) in conjunction with arts 43(1–2) and 46 of Regulation 2019/1896 cit.

[75] Art. 4(3) of Council Decision 2019/267 cit.; art. 5(3) of Council Decision 2020/729 cit.; art. 5(3) of Council Decision 2020/865 cit.

[76] ECRE, 'Comments on the Commission Proposal for a Regulation on the European Border and Coast Guard, (COM (2018) 631 final)' cit. 17.

the EU acquis. This process involves substantial amendments to their migration and asylum internal systems. As a result of the reinforced mandate of Frontex introduced by the 2019 Regulation, the Commission is willing to strengthening cooperation on border management with the Balkan countries. In October 2022, the Commission adopted a recommendation to the Council to authorise the opening of negotiations of upgraded Frontex's status agreements between the EU and Albania, Serbia, Montenegro, as well as with Bosnia and Herzegovina.[77] Under the currently existing status agreements between Frontex and Albania, Serbia and Montenegro, the deployment of the standing corps may only take place at the countries' borders with the EU and without exercising executive powers. Under the new legal framework, the status agreement will allow Frontex standing corps to be deployed in the third country both at the EU border and at the borders with other third countries and exercise the executive powers.

In the case of Serbia, the negotiation of the status agreement led to a fierce political debate at the internal level in Serbia. It seems that the fact that Serbia cooperates with the EU to close the so-called Balkan route and on border security management put Serbia in a better bargaining position for EU accession. The political parties opposing the agreement in Serbia argued that the cooperation with Frontex would undermine Serbian sovereignty. The EU is willing to conclude also status agreements with African countries, in particular Morocco, Senegal and Mauritania. In July 2022, the Council authorized the opening of negotiations on status agreements with Senegal and Mauritania that would allow Frontex to carry out operational activities on the territory of both countries.[78] The intended status agreements with Mauritania and Senegal will lead to further externalize migration controls and create serious risks for the respect of fundamental rights because the level of protection in Mauritania and Senegal is lower than in the EU. The Commission has also proposed to reach a comprehensive migration partnership with Morocco, including a status agreement to implement operational activities by Frontex officials.[79]

Apparently, Frontex status agreements look quite similar to the status of forces agreements (SOFAs) and status of mission agreements (SOMAs) that the EU usually concludes in the context of its military operations and civilian missions implemented on the territory of third countries. However, the command and control framework foreseen is

[77] European Commission, 'EU Increases Support for Border and Migration Management in the Western Balkans' (25 October 2022).

[78] Council Decision 2022/1169 of 4 July 2022 authorising the opening of negotiations on a status agreement between the European Union and the Republic of Senegal on operational activities carried out by the European Border and Coast Guard Agency in the Republic of Senegal; and Council Decision 2022/1168 of 4 July 2022 authorising the opening of negotiations on a status agreement between the European Union and the Islamic Republic of Mauritania on operational activities carried out by the European Border and Coast Guard Agency in the Islamic Republic of Mauritania.

[79] Commission services to Delegations of 18 February 2021 on Operationalization of the Pact – Action plans for strengthening comprehensive migration partnerships with priority countries of origin and transit - Draft Action Plan: Morocco.

not comparable to CSDP operations where command always remain with an EU commander.[80] The fact that the Frontex joint operations are under the command of a third state has major practical implications. As it has correctly been pointed out, "it severely limits the possibilities of Frontex and the Member States to direct the course of action on the ground and thus also their means to ensure fundamental rights compliance during a joint operation".[81]

V.2. The delimitation of responsibilities between the actors involved in joint operations

The deployment of border management teams on the territory of third countries raises complex legal and political questions as regards the legal regimen applicable and the delimitation of responsibilities between the different actors involved in the operations. This issue can become very problematic in the event that human rights violations are reported during the implementation of the operations on the territory of third countries.[82] It has been very difficult to establish the delimitation of responsibility between the different actors involved in the operations that take place on the territory of the Member States. Frontex joint operations have become increasingly complex involving the Agency itself, officers from the Member State, third states, private parties and other EU agencies like EUAA or Europol. As it has been pointed out, "multi-actor situations like these are unavoidably challenging when it comes to allocating responsibility for wrongdoing".[83]

The involvement of third country authorities adds a layer of complexity to the already unclear division of responsibility between Frontex and Member States' border guard authorities in the implementation of joint operations on the territory of the Member States. In the past, the Agency has always argued that the responsibility for human rights violations lies with Member States because it merely exercises a coordinating role and Frontex teams were deprived of executive powers. Since the mandate, powers and operational capacity of

[80] F Naert, 'The International Responsibility of the Union in the Context of its CSDP Operations' in MD Evans and P Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart Publishing 2013).

[81] M Fink and N Idriz, 'Effective Judicial Protection in the External Dimension of the EU's Migration and Asylum Policies?' in E Kassoti and N Idriz (eds), *The Informalisation of the EU's External Action in the Field of Migration and Asylum* (Springer 2022) 117-146.

[82] See M Fink, 'Salami Slicing Human Rights Accountability: How the European Border and Coast Guard Agency may Inherit Frontex' Genetic Defect' (10 March 2016) EJIL Talk www.ejiltalk.org; D Fernández Rojo, 'Reglamento 2016/1624: de Frontex a la Guardia Europea de Fronteras y Costas' (2017) Revista General de Derecho Europeo; J Santos Vara and L Pascual Matellán, 'The Externalisation of EU Migration Policies: The Implications Arising from the Transfer of Responsibilities to Third Countries' in WTh Douma and others (eds), *The Evolving Nature of EU External Relations Law* (Asser Press/Springer 2020).

[83] M Fink, 'Why it is so Hard to Hold Frontex Accountable: On Blame-Shifting and an Outdated Remedies System' (26 November 2020) EJIL Talk www.ejiltalk.org.

the Agency have been enhanced, in particular after the amendment of the EBCG Regulation in 2019, this argument is increasingly unsustainable. The delimitation of the respective areas of responsibility between the actors involved has to be specified in the operational plan of each operation that is developed in collaboration with the respective third State. However, the EBCG Regulation does not clarify the legal value of the operational plans agreed with third countries, nor whether they can be obliged to comply with them.[84]

As a result of the status agreements negotiated so far, Frontex teams can exercise extra-territorial activities in the field of border control and return operations which may affect the fundamental rights of third country nationals. Neither the participation of officers from third States in the operations, nor the development of joint patrols with a third country exonerates the Member States and Frontex from their responsibility in the event that human rights violations are committed. It is not excluded the possibility that operations will be developed on the territory of third countries with a questionable human rights record.

As it was pointed out above, the members of the operation perform their duties under the instructions of the third country concerned, and as a general rule in the presence of local border guards or other police officers. Granting such a degree of control to a third State over the members of the deployed teams may lead to a situation where the Agency and the Member States involved are unable to issue the relevant instructions. This issue is especially problematic because third states are not bound by EU law or the Charter of Fundamental Rights.[85] The fact of working under the instructions of the host third country can limit the capacity of the Agency to fulfil its fundamental rights obligations. In these circumstances, it will not be easy to determine the possible responsibility of the actors involved in the extraterritorial operations of the Agency since the members of the Frontex teams will theoretically be under the control of third States. It is understandable that it has been claimed that the extraterritorial Frontex operations should be limited to the territory of the Member States of the ECHR.[86]

All status agreements include rather detailed provisions with regard to the privileges and immunities of the members of the teams. According to the status agreements negotiated with the Balkan countries, the members of the team enjoy immunity from the criminal and civil jurisdiction of the host Member State in respect of the acts performed in the exercise of their official functions in the course of the actions carried out in accordance with the operational plan.[87] Before the initiation of any judicial proceeding, the Executive Director has to certify whether or not the act in question was performed by members of the team in the exercise of their functions.[88] There are some differences between the

[84] J Rijpma, 'The Proposal for a European Border and Coast Guard' cit.

[85] ECRE, 'Comments on the Commission Proposal for a Regulation on the European Border and Coast Guard, (COM (2018) 631 final)' cit. 17

[86] J Rijpma, 'The Proposal for a European Border and Coast Guard' cit. 26; Proposal for a Regulation COM(2018) 631 final cit. 17.

[87] Art. 6(3) of Council Decision 2019/267 cit. and Art. 7(3) of Council Decision 2020/729 cit.

[88] Art. 6(3) of Council Decision 2019/267 cit.

status agreements concluded so far as regards the legal effects of the waiver extended by the Executive Director. While in the agreements with Albania, Montenegro and North Macedonia it is stated that the certification produced by the Director is binding upon the authorities of the host State, no similar provision is included in the agreements with Serbia and Bosnia-Herzegovina.

The immunity of the officers may be waived by the home Member State.[89] It is not clear in the status agreements negotiated so far if this possibility can be extended to the members of the standing corps. While the staff from the Member States will remain criminally and civilly liable under the laws of their home Member State, there is some uncertainty as regards the officers from the Frontex own statutory staff.[90] The Frontex staff members do not depend on a specific Member State so there is a gap when it comes to demanding criminal responsibility.

V.3. Redress in case of fundamental rights breaches

It is explicitly stated in all status agreements concluded so far that the team members fully respect fundamental rights and freedoms, "including as regards access to asylum procedures, human dignity and the prohibition of torture, inhuman or degrading treatment, the right to liberty, the principle of non-refoulement and the prohibition of collective expulsions, the rights of the child and the right to respect for private and family lie".[91] The European Parliament regretted that the agreements do not include "specific measures for the operationalisation of human rights as part of border management, and do not ensure that material support and training to third countries is not given to perpetrators of human rights violations".[92] Since the cooperation with third countries may have serious fundamental rights implications, there is a clear need to carry out a fundamental rights assessment prior to engaging in operational cooperation.

The status agreements concluded so far fail to clearly regulate accountability for potential human rights violations. It is only specified that each party will have a complaints mechanism to handle allegations of infringements of fundamental rights committed by its staff in the performance of their official tasks and in the exercise of their powers. The 2016 EBCG Regulation introduced a new complaints mechanism to monitor and ensure respect for fundamental rights.[93] Any person who is directly affected by the actions or failure to act on the part of staff involved in a Frontex operation can submit a complaint

[89] *Ibid*. Art. 6(4).

[90] See Meijers Committee, 'CM1817 Comments on the draft for a new Regulation on a European Border and Coast Guard, (COM (2018) 631 final) and the amended proposal for a Regulation on a European Union Asylum Agency (COM (2018) 633 final)' cit.

[91] Art. 8 of Council Decision 2019/267 cit.

[92] European Parliament 'Report on Human Rights Protection and the EU External Migration Policy' Rapporteur: Tineke Strik, A9-0060/2021 (25 March 2021).

[93] See art. 109 Regulation 2019/1896 cit.

to the Agency.[94] The procedure brought a positive development to address human rights violations since the victims have at their disposal a complaints mechanism. However, it is an administrative procedure that cannot substitute the right to an effective judicial remedy under art. 47 of the Charter of Fundamental Rights. The individual complaints mechanism remains an internal oversight that is not impartial or independent.

The status agreements with the Balkan countries allow the host states to authorise members of the team to consult national databases if necessary for reaching the operational aims specified in the operational plan and for return operations. The access to the data is limited to what is necessary for performing their tasks and exercising their powers. It is expected that the conditions are further developed in the operational plans. The processing of personal data is subject to the EU legal framework, in particular to Regulation 2018/1725, Directive 2016/680 and the General Data Protection Regulation (GDPR).[95] In case that the processing of data involves the transfer to third countries, the Agency and the Member States have to indicate any restrictions on access and use. It has been rightly argued that "the scarcity of provisions regarding data subject rights and effective legal remedies suggests that these agreements might fall short of providing appropriate safeguards regarding protection of fundamental rights at EU standards".[96] The European Data Protection Supervisor has to be consulted on the provisions of the status agreement related to the transfer of data "if those provisions differ substantially from the model status agreement".[97] It would not be an easy task to determine whether or not the legal framework negotiated with a particular country differs substantially from the model status agreement. Regulation 2019/1896 requires the Commission to consult the following relevant actors before adopting a model for the new status agreements: Member States, the Agency, FRA and the European Data Protection Supervisor.[98]

The allegations of fundamental rights violations in which Frontex was reportedly involved in the Aegean Sea show that it will be very difficult to clarify the role of Frontex in any wrongdoing that will happen in the context of operations implemented on the

[94] *Ibid*. Art. 111 Regulation 2019/1896 cit.

[95] Regulation 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC; Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA; Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

[96] F Coman-Kund, 'The Territorial Expansion of Frontex Operations to Third Countries' cit.

[97] Art. 76(1) Regulation 2019/1896 cit.

[98] See *ibid*. Art. 73(3).

territory of third countries. Frontex and Operation Poseidon have been the subject of numerous criticisms throughout the years.[99] A joint investigation by Bellingcat, Lighthouse Reports, Der Spiegel, ARD and TV Asahi revealed in October 2020 that the Agency was involved in push backs operations in the Greek-Turkish border.[100] The allegations were that the Greek authorities forced little boats with potential refugees on board from Greek islands back to Turkish waters. It was considered that the Agency was carrying out joint border surveillance operations in the area where the alleged pushbacks took place and did nothing to ensure compliance with legal obligations.[101] In essence, Frontex remained inactive even though it was aware of the serious and continuous violations. As a result of the public attention paid to these events, the Management Board established in November 2020 a Working Group on Fundamental Rights and Legal Operational Aspects of Operations (WG FRaLO) to investigate the alleged involvement of Frontex with pushbacks in the Eastern Mediterranean. In its final report published in March 2021, the Management Board concluded that there was no sufficient evidence to consider that Frontex was involved in violations of fundamental rights.[102] The report of the Frontex Management Board found that, of the 13 incidents examined, 8 of them did not amount to illegal pushbacks and that 5 incidents required further investigation.[103] Only in two cases the facts presented support an allegation of possible violation of fundamental rights and, in particular, the principle of non-refoulement. The Management Board committed to improve the reporting mechanisms and the possibility to monitor follow up actions by national authorities. In addition, the Management Board requested a legal opinion from the Commission on the nature and extent of Frontex's obligations in the context of its implementation of joint maritime operations.[104]

As a result of the alleged fundamental rights violations, the European Parliament decided to establish the Frontex Scrutiny Working Group (FSWG) of the LIBE Committee on 23 February 2021 with the aim to permanently monitor all aspects of the functioning of Frontex.[105] The FSWG concluded that there was not clear conclusive evidence that the

[99] See Migreurop, 'Frontex, 15 Years of Impunity: The Outlaw Agency must Disappear!' (8 December 2020) migreurop.org; N Nielsen, 'Why Frontex won't Leave Greece like it Left Hungary' (27 April 2022) EUobserver euobserver.com; Human Rights Watch, 'Frontex Failing to Protect People at EU Borders: Stronger Safeguards Vital as Border Agency Expands' (23 June 2021) Human Rights Watch www.hrw.org.

[100] Bellingcat, 'Frontex at Fault: European Border Force Complicit in 'Illegal' Pushbacks' (23 October 2020) www.bellingcat.com.

[101] *Ibid*.

[102] Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea, *Final Report of the Frontex Managements Board Working Group* www.frontex.europa.eu.

[103] *Ibid*.

[104] European Commission of 3 March 2021 'The nature and extent of Frontex's obligations in the context of its implementation of joint maritime operations at the Union's external sea borders'.

[105] Other investigation initiatives have been launched by the EU Ombudsman, the EU Court of Auditors, and OLAF. See European Ombudsman, 'Ombudsman opens Inquiry to Assess European Border and Coast Guard Agency (Frontex) "Complaints Mechanism"' (1 May 2020) www.ombudsman.europa.eu; Politico, 'EU

Agency was involved in the pushbacks and collective expulsions under scrutiny.[106] However, it held that "the Agency found evidence in support of allegations of fundamental rights violations in Member States with which it had a joint operation, but failed to address and follow-up on these violations promptly, vigilantly and effectively".[107] Therefore, Frontex did not prevent the alleged fundamental rights violations nor establish adequate mechanisms to monitor, report and assess fundamental rights situations and developments.[108] After years of intense media reporting on violations on its alleged role in pushbacks in Greece and elsewhere and an investigation by the EU's anti-fraud office OLAF, the Director Executive of Frontex, Fabrice Leggeri, resigned from his position at the end of April 2022. OLAF found evidence of serious misconduct that weakens its capacity to monitor compliance with fundamental rights in its activities at the external borders.[109]

The limits and risks that Frontex has experienced in practice to fulfil its fundamental rights obligations within the framework of the operations implemented on the territory of the Member States can be substantially increased in the extraterritorial operations. In addition, the members of the Frontex teams are confronted very often with complex geopolitical circumstances. For example, the Agency had to face several aggressive actions by officials of the Turkish Coastguard in the Aegean Sea in the last years. There is a need to ensure that third countries are willing to cooperate with Frontex to investigate alleged fundamental rights violations committed in the operational area of the Agency. Frontex is under an obligation to guarantee the protection of fundamental rights in the performance of its tasks whether the operations take place on the territory of the Member States or extraterritorially.[110]

Since the establishment of Frontex, the question of human rights responsibility has been a source of controversy.[111] The new Regulation does not give an adequate solution

Watchdog opens Investigation into Border Agency Frontex: Organization faces Allegations of Harassment, Misconduct and Migrant Pushback' (11 January 2021) www.politico.eu; Special Report 08/2021 by the Court of Auditors of 7 June 2021 'Frontex's support to external border management: not sufficiently effective to date'.

[106] Frontex welcomed the report and its conclusions which, according to the agency, "reaffirmed that there is no evidence of the Agency's involvement in any violation of human rights". See Frontex, 'Frontex welcomes Report by the Scrutiny Working Group' (15 July 2021) www.frontex.europa.eu.

[107] European Parliament, 'Report on the Fact-finding Investigation on Frontex Concerning Alleged Fundamental Rights Violations LIBE Committee' Rapporteur: Tineke Strik (14 July 2021).

[108] See T Strik, 'European Oversight on Frontex: How to Strengthen Democratic Accountability' (8 September 2022) Verfassunblog verfassungsblog.de.

[109] This report was not officially published, but was leaked to media. See for example G Christides and S Lüdke, 'Why Der Spiegel Is Publishing the EU Investigative Report on Pushbacks' (13 October 2022) Der Spiegel www.spiegel.de.

[110] Art. 80 Regulation 2019/1896 cit.

[111] See M Gkliati, 'The First Steps of Frontex Accountability: Implications for its Legal Responsibility for Fundamental Rights Violations' (13 August 2017) EU Migration and Asylum Law and Policy eumigrationlawblog.eu; M Fink, 'Frontex: Human Rights Responsibility and Access to Justice' (30 April 2020) EU Migration and Asylum Law and Policy eumigrationlawblog.eu; B Parusel, 'Should They Stay or Should They Go?' cit.

to the question of responsibility for fundamental rights violations occurred in the course of joint operations coordinated by Frontex. In a recent case, the General Court was confronted with the non-contractual liability of the Union when the Agency carries out joint operations together with Member States in the areas of border management and return of third country nationals. On 6 September 2023, the General Court delivered its landmark judgement in *WS and others v Frontex*.[112] The applicants were a group of Syrian refugees that were expelled from Greece to Turkey in 2016 and claimed a compensation for the damages suffered since Frontex was involved in the return operation that led to the violation of the principle of non-refoulement. On the basis of art. 340 TFUE, the non-contractual liability of the EU may arise when three cumulative conditions are met: a sufficiently serious breach of an EU rule conferring rights on individuals, damage caused as a result and causal link between the alleged conduct ant the damage. The General Court opted for changing the order in which the conditions are usually analysed and concluded that there was not a direct link between the damage in question and the conduct of the Agency. The General Court followed the mantra held always by Frontex that it only provides technical operational support to the Member States and Greece had exclusive responsibility for examining applications for international protection and adopting return decisions.[113] The General Court failed to acknowledge the role played by Frontex in the implementation of joint operations coordinated by the Agency and, in particular, in the return of third country nationals.[114] The joint liability of the EU agencies and Member States has not yet found a satisfactory solution in the EU legal order as it was also pointed out in the recent case *Kočner v Europol* that it is currently under appeal.[115] The judgement in *WS and others v Frontex* can likewise be appealed before the Court of Justice. There is also another interesting case pending before the General Court concerning an action for damages against Frontex regarding the pushbacks at the Aegean Sea.[116] The intervention of the Court of Justice will be an excellent opportunity to do justice to the applicants because the argument that Frontex systematically escapes non-contractual responsibility is untenable. The enhancement of the Agency's mandate is leading to a system of shared administration in the management of external borders between Member States and Frontex. In the context of extraterritorial operations implemented by the Agency, the exercise of executive powers entailing a wide margin of discretion by Frontex may

[112] Case T-600/21 *WS and others v Frontex* ECLI:EU:T:2023:492.

[113] *Ibid*. paras 64 and 66.

[114] See G Davies, 'The General Court finds Frontex Non Liable for Helping with Illegal Pushbacks: It was Following Orders' (11 September 2023) European Law blog europeanlawblog.eu; M Fink and JJ Rijpma, 'Responsibility in Joint Return after WS and Others v Frontex: Letting the Active By-Stander Off the Hook' (22 September 2023) EU Law Analysis eulawanalysis.blogspot.com; T Molnár, 'The EU General Court's Judgment in WS & Others v Frontex: What Could International Law on the Responsibility of International Organizations Offer in Grasping Frontex' Responsibility?' (22 October 2023) EJIL: Talk! www.ejiltalk.org.

[115] Case C-755/21 *Kočner v Europol* (pending). See case T-528/20 *Kočner v Europol* ECLI:EU:T:2021:631.

[116] Action brought on 10 March 2022, case T-136/22 *Hamoudi v Frontex*.

exacerbate the problems facing individuals who are victims of human rights violations and try to obtain judicial redress.

The deployment of extraterritorial joint Frontex operations raises also the question of the attribution of responsibility for breaches of human rights that might take place on the territory of third countries. The concept of jurisdiction is not framed today exclusively in territorial terms. The European Court of Human Rights (ECtHR) held that the responsibility of a Contracting Party could arise when as a consequence of military action it exercises effective control of an area outside its national territory.[117] It is also admitted that a State exercises jurisdiction over individuals held on its military bases, detention centres, or other closed facilities controlled[118] or on board crafts or vessels which are registered in that State.[119] The jurisdiction of a State can be also established when their agents exercise authority or direct control over an individual in the absence of a spatial element of control.[120] This expansive notion of extraterritorial jurisdiction imposes relevant legal constraints on migration policies.[121]

There is no doubt that when a State is exercising public authority on the territory of a third country or effective control over migrants the situation does not raise any doubt from a legal perspective. In the case of *Hirsi Jamaa and Others v Italy*, the ECtHR dealt with an application made by eleven Somali nationals and thirteen Eritrean nationals, who were intercepted by Italian ships on the high seas and forced to return to Libya.[122] The Court sustained that "whenever the State through its agents operating outside its territory exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms".[123] The ECtHR held that there has been a violation of art. 3 of the ECHR on account of the fact that the applicants were exposed to the risk of being subjected to ill-treatment in Libya.

As it has been exposed before, command and control functions remain with the host third country. The fact that Frontex joint operations are carried out on the territory of third countries does not absolve the EU and its Members States from its obligations

[117] ECtHR *Loizidou v Turkey* App n. 15318/89 [23 March 1995] para. 62.

[118] ECtHR *Al-Saadoon and Mufdhi v the United Kingdom* App n. 61498/08 [2 March 2010] paras 135, 140 and 155.

[119] See ECtHR *Bankovic v Belgium* App n. 52207/99 [12 December 2001] para. 73, and ECtHR *Hirsi Jamaa v Italy* App n. 27765/09 [23 February 2012] para. 81.

[120] ECtHR *Al-Skeini v United Kingdom* App n. 55721/21 [7 July 2011] paras 135-142. See also ECtHR *Banković and Others v Belgium and Others [GC]* App n. 52207/99 [12 December 2001] paras 59-73. See T Gammeltoft-Hansen and J C Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) ColumJTransnatlL 235–283.

[121] M Savino, 'Refashioning Resettlement: From Border Externalization to Legal Pathways for Asylum' in S Carrera and others (eds), *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes* (Brill Nijhoff 2017).

[122] ECtHR, *Case of Hirsi Jamaa and others v Italy* App n. 27765/09 [23 February 2012].

[123] *Ibid*. para. 74.

under the ECHR.[124] It may be argued that the cooperation and support of Frontex to third countries amount to "assistance" according to the Draft Articles on the Responsibility of International Organizations (ARIO).[125] Art. 14 of ARIO states that the an international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible if "the former organization does so with knowledge of the circumstances of the internationally wrongful act". It is not easy to demonstrate that the cooperation established by the Agency with third countries is developed with the intention of facilitating the violation of migrants' rights. Nevertheless, it is held that a State exercises extraterritorial jurisdiction "when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government".[126] The decision of the Committee against Torture in *JHA v Spain* is very relevant in the case of Frontex extraterritorial operations. The Committee considered that Spain exercised jurisdiction over the applicants because it "exercised, by virtue of a diplomatic agreement concluded with Mauritania, constant de facto control over the alleged victims during their detention in Nouadhibou".[127]

In sum, in the framework of extraterritorial Frontex joint operations, limiting responsibility only to third countries would create a gap in the rule of law. The fact that the command and control of the Frontex teams lies with the host third country does not exonerate the Agency from its obligations as regards fundamental rights. Frontex cannot be held responsible for the lack of protection of refugees or the ineffectiveness of the asylum systems in third countries, but it has an obligation to ensure the respect of human rights obligations in the operations implemented on the territory of third countries. There is a risk that the refugees intercepted by Frontex on the territory of third countries will be denied the right to apply for asylum.

VI. Conclusions

EU agencies, in particular Frontex, are called to play an increasing role to respond to the challenges that the EU is facing in the areas of migration, asylum and border management. They are presented by the Union institutions as instruments to reinforce the implementation of EU law, to enhance solidarity between the Member States and to implement cooperation between the EU and third countries. The successive amendments of

[124] See Commissioner of Human Rights – Council of Europe, 'Letter to the Minister of the Interior of Italy, CommHR/INM/sf 0345-2017' (28 September 2017).

[125] On state responsibility in cooperative border management scenarios, see T Molnár, 'EU Member States' Responsibility Under International Law for Breaching Human Rights When Cooperating with Third Countries on Migration: Grey Zones of Law in Selected Scenarios' (2023) European Papers www.europeanpapers.eu 1013.

[126] *Al-Skeini v United Kingdom* cit.

[127] UN Committee against Torture (CAT) of 10 November 2008 CAT/C/41/D/323/2007 *JHA v Spain (Marine I)* Decision of the Committee, para. 8(2).

the Agency's mandate show a lack of a common vision on how the European administration of border management at EU level should develop. The 2019 Regulation does not take the definitive step that will lead in the future to the establishment of a true European system of border and coast guards. Despite the fact that the Commission refers constantly to the Agency as a fully-fledged European border and coast guard system, the EU has not yet developed a real European administration in this area. The new EBCG Regulation does not create a genuine integrated border and coast guard that replaces national border guards and provides for genuine solidarity in the management of external borders. The EU should progress towards a more centralized model that includes more solidarity among Member States in the management of external borders. However, without developing a common asylum and migration policy, the constant amendments of the Agency's mandate will not be the adequate solution in times of crisis and the failures of the Agency could lead to more frustration and a lack of credibility of the EU.

The dynamic evolution of the tasks undertaken by the AFSJ agencies, in particular, by Frontex in the last years, has not led the Union institutions to admit that the agencies' activities may have potential fundamental rights implications. It is considered that these agencies were mainly set up in order to facilitate and coordinate operational cooperation between the authorities of the Member States. Frontex and the Commission have always held that the responsibility for fundamental rights breaches lies exclusively with the Member States. In the case of extraterritorial operations implemented on the territory of third countries, it will be difficult to sustain in the future that the responsibility as regards infringements of fundamental rights lies exclusively with third states. For this reason, it should be further explored how to develop adequate mechanisms for ensuring the protection of fundamental rights in the case of operations implemented on the territory of third countries. Future status agreements should establish with more clarity who will be responsible for the infringement of fundamental rights: the Agency itself, the Member States involved in the operation or the third State. The responsibility of Frontex regarding violations of human rights has not yet found a satisfactory solution. The fact that the operations can be developed on the territory of third countries raises additional concerns for fundamental rights. It is still too early to assess the added value of the Frontex extraterritorial operations. This kind of instruments should not be used to outsource the control of EU external borders without paying due attention to the protection of fundamental rights and the situation of people in need of international protection. The EU should avoid concluding status agreements with third countries that do not offer a satisfactory protection of fundamental rights.

The EU has constantly argued that the reinforcement of its external borders should not prevent access to the territory of the EU Member States of persons in need of international protection. The emphasis put by the EU on the cooperation with third countries may result in a model that prioritizes the prevention of migration flows over the protection of human rights. The cooperation developed by Frontex with third countries may

lead in practice to preventing migrants from reaching the territory of the EU Member States and result in migrants being stranded in countries where their human rights are at risk. The implementation of Frontex joint operations on the territory of third countries does not exonerate the EU and its Member States from the infringements of human rights that might take place on the territory of third countries. The ECtHR has accepted that a contracting party can exercise its jurisdiction extraterritorially in a broad range of circumstances. If the violations of human rights occurred as a result of the cooperation established with the EU, it could be considered responsible on the basis of the criteria laid down in the Project of ARIOs.

ARTICLES

THE EXTERNALISATION OF EU MIGRATION POLICIES IN LIGHT OF EU CONSTITUTIONAL PRINCIPLES AND VALUES

edited by Juan Santos Vara, Paula García Andrade *and* Tamás Molnár

EU MEMBER STATES' RESPONSIBILITY UNDER INTERNATIONAL LAW FOR BREACHING HUMAN RIGHTS WHEN COOPERATING WITH THIRD COUNTRIES ON MIGRATION: GREY ZONES OF LAW IN SELECTED SCENARIOS

TAMÁS MOLNÁR*

ABSTRACT: EU Member States are ever more involved in border management activities in cooperation with third countries. Such activities entail risks of violating various human rights of the people on the move, such as the right to leave any country, the principle of *non-refoulement*, and the prohibitions of ill-treatment and arbitrary detention. When Member States carry out various cooperative border control activities outside their sovereign territory, their responsibility is unclear. Under international law, responsibility may also arise when a State aids or assists another State to engage in conduct that violates international obligations (art. 16 of the Articles on the Responsibility of States for Internationally Wrongful Acts – ARSIWA). Member States' responsibility can thus emerge via "derived responsibility" flowing from an internationally wrongful act committed by a third country. The *Article* seeks to discuss selected extraterritorial border management scenarios, which are in the "grey zone" in terms of State responsibility from the perspective

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of various human rights violations. More legal clarity is needed in such (and similar) concrete scenarios, especially when Member States "aid or assist" third countries in their efforts to manage migration flows. The *Article* submits that it is still debated whether related conduct entails State responsibility in such specific externalised border management situations, which involve activities carried out under the umbrella of international cooperation, but with the aim of preventing migrants from reaching the EU. Nevertheless, this piece argues that complicity of Member States under the ARSIWA can be established under certain circumstances as the presented scenarios demonstrate.

KEYWORDS: externalisation – EU migration law and policy – human rights – Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) – aiding or assisting – positive obligations.

I. SETTING THE SCENE

"Externalisation" of European Union (EU) policies on border management and migration has been a buzzword in discussions relating to the EU migration and asylum law and policy for almost two decades which does not seem to go out of style.[1] Of the multiple scholarly descriptions of this highly debated practice I find particularly fitting the below succinct one: "the term externalization refers to the shifting of responsibilities to third countries of origin and transit of migrants, as well as to the activities carried out by the EU and the Member States on the territory of third countries aiming to externalize the management of migration".[2]

Borrowing den Heijer's words, this phenomenon "entails both the geographical relocation of border controls (to the open seas and the territories of third countries) and the transfer (or sharing) of responsibilities for controlling the border to (with) States at the other side of the border".[3] The latter form is typical in the field of border management, where – following the concept of European Integrated Border Management, which in-

[1] For some key reference legal works on the phenomenon of the "externalisation" of EU migration policies, see *e.g.* A Geddes, 'Europe's Border Relationships and International Migration Relations' (2005) JComMarSt 787; E Guild and D Bigo, 'The Transformation of European Border Controls' in B Ryan and V Mitsilegas (eds), *Extraterritorial Immigration Control. Legal Challenges* (Martinus Nijhoff Publishers 2010) 257; JJ Rijpma, 'External Migration and Asylum Management: Accountability for Executive Action Outside EU-territory' (2017) European Papers europeanpapers.eu 571; V Mitsilegas, 'Extraterritorial Immigration Control, Preventive Justice and the Rule of Law in Turbulent Times: Lessons from the Anti-Smuggling Crusade' in J Santos Vara, S Carrera and T Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis. Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar Publishing 2019) 290; V Moreno-Lax and M Lemberg-Pedersen, 'Border-induced Displacement: The Ethical and Legal Implications of Distance-creation through Externalisation' (2019) QuestIntlL 5; J Santos Vara and L Pascual Matellán, 'The Externalisation of EU Migration Policies: The Implications Arising from the Transfer of Responsibilities to Third Countries' in W Th Douma and others (eds), *The Evolving Nature of EU External Relations Law* (TMC Asser Press/Springer 2021) 315; and D Cantor and others, 'Externalisation, Access to Territorial Asylum, and International Law' (2022) IJRL 120.

[2] J Santos Vara and L Pascual Matellán, 'The Externalisation of EU Migration Policies' cit. 316.

[3] M den Heijer, 'Europe Beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control' in B Ryan and V Mitsilegas (eds), *Extraterritorial Immigration Control. Legal Challenges* (Martinus Nijhoff Publishers 2010) 169.

cludes the increased cooperation with third countries, as set out in art. 3 of the new European Border and Coast Guard (EBCG) Regulation (Regulation (EU) 1896/2019)[4] – Member States of the EU have been intensifying their cooperation *with* third countries; *under the authority* of third countries; or even operating *in* third countries.

As multiple scholarly writings[5] and a report published by the EU Agency for Fundamental Rights (FRA) in December 2016 outlined,[6] these diverse forms of cooperation include:

i) posting Member State document experts or immigration liaison officers at third country airports to assist airlines in checking passengers before embarkation;

ii) the presence of EU Member State officials on third-country vessels patrolling the sea;

[4] Regulation (EU) 1896/2019 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 1624/2016, art. 3(g). See also recital 85: "Member States should be able to cooperate at operational level with [...] third countries at the external borders, including as regards military operations with a law enforcement purpose, to the extent that that cooperation is compatible with the actions of the Agency."; recital 87: "Cooperation with third countries is an important element of European integrated border management. It should serve to [...] supporting third countries in the area of border management and migration, including through the deployment of the standing corps where such support is required to protect external borders and the effective management of the Union's migration policy."; and recital 91: "This Regulation includes provisions on cooperation with third countries because well-structured and permanent exchange of information and cooperation with such countries, including but not limited to neighbouring third countries, are key factors for achieving the objectives of European integrated border management". See also European Commission, Guidelines for Integrated Border Management in European Commission External Cooperation (November 2010) and J Wagner, 'The European Union's model of Integrated Border Management: Preventing Transnational Threats, Cross-border Crime and Irregular Migration in the Context of the EU's Security Policies and Strategies' (2021) Commonwealth & Comparative Politics 424.

[5] In addition to the academic commentary by JJ Rijpma, 'External Migration and Asylum Management: Accountability for Executive Action Outside EU-territory' (2017) European Papers europeanpapers.eu 571-596; V Mitsilegas, 'Extraterritorial Immigration Control, Preventive Justice and the Rule of Law in Turbulent Times: Lessons from the Anti-Smuggling Crusade' in J Santos Vara, S Carrera and T Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis. Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar Publishing 2019) 290; V Moreno-Lax and M Lemberg-Pedersen, 'Border-induced Displacement: The Ethical and Legal Implications of Distance-creation through Externalisation' (2019) Questions of International Law 5-33; J Santos Vara and L Pascual Matellán, 'The Externalisation of EU Migration Policies: The Implications Arising from the Transfer of Responsibilities to Third Countries' in W Th Douma and others (eds), *The Evolving Nature of EU External Relations Law* (TMC Asser Press/Springer 2021) 315, see also M den Heijer, 'Europe Beyond its Borders' cit. 191; P García Andrade, I Martín, and S Mananashvili, *EU cooperation with Third Countries in the Field of Migration*. *Study for the LIBE Committe*e (European Parliament October 2015) section 1.3; S Trevisanut, 'The EU External Border Policy: Managing Irregular Migration to Europe' in F Ippolito and S Trevisanut (eds), *Migration in the Mediterranean: Mechanisms of International Cooperation* (Cambridge University Press 2016) 215-235; and N Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) EJIL 610-613.

[6] European Union Agency for Fundamental Rights (FRA), 'Scope of the Principle of Non-refoulement in Contemporary Border Management: Evolving Areas of Law' (December 2016) fra.europa.eu.

iii) EU Member State vessels patrolling the territorial waters of a third country based on a bilateral agreement (*e.g.* Spain has concluded such agreements with Senegal and with Mauritania[7]);

iv) after identifying people approaching the other side of the green border, EU Member State authorities sharing information with the neighbouring third country and requesting the latter to intercept the people before they cross the border; as well as

v) EU Member States providing border management capacity building activities (*e.g.* training, technical assistance with equipment, intelligence, and even financing) in third countries (*e.g.* Italy supporting the Libyan Coast Guard and Navy under their bilateral Memorandum of Understanding[8]).

Such externalised, extraterritorial cooperative border control activities entail risks of violating various *human rights* of people on the move.[9] These include, but are not limited to, interferences with the right to leave any country including one's own – often amounting to "pull-backs"[10] –, the prohibitions of *refoulement*, torture and other forms of ill-treatment and arbitrary detention, and the right to seek asylum. These rights are firmly anchored in

[7] On these bilateral agreements, see *e.g.* P García Andrade, 'Extraterritorial Strategies To Tackle Irregular Immigration By Sea: A Spanish Perspective' in B Ryan and V Mitsilegas (eds), *Extraterritorial Immigration Control. Legal Challenges* cit. 305-340; and C González Enríquez and others, 'Italian and Spanish Approaches to External Migration Management in the Sahel: Venues for Cooperation and Coherence' (Working Paper 13-2018) media.realinstitutoelcano.org.

[8] Memorandum of Understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic. Source of the English translation: eumigrationlawblog.eu.

[9] For instance, as the Parliamentary Assembly of the Council of Europe indicated the externalisation of the EU migration polices may negatively affect the following human rights: the right of asylum, the right to an effective remedy, the right to leave any country, human dignity and non-discrimination, and the obligation of non-refoulement (Parliamentary Assembly, Council of Europe, Human Rights Impact of the "External Dimension" of European Union Asylum and Migration Policy: out of Sight, out of Rights?, Report – Document n. 14575, 13 June 2018). See also similarly T Bachirou Ayouba and others, 'Asylum for Containment. EU arrangements with Niger, Serbia, Tunisia and Turkey' (March 2023) ASILE Project asileproject.eu section 5.1 'Contributing to violations of international law in third states'.

[10] Consider *e.g.* L Riemer, 'From Push-backs to Pull-backs: The EU's new Deterrence Strategy Faces Legal Challenge' (16 June 2018) FluchtforschungsBlog – Netzwerks Fluchtforschung blog.fluchtforschung.net; and V Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, S.S. and Others v. Italy, and the "Operational Model"' (2020) German Law Journal 385.

international law[11] and Council of Europe law,[12] hence EU Member States are legally bound to respect and protect them. The types of possible wrongdoings encompass breaches of negative obligations (*e.g.* not to engage in actions leading to *refoulement*, arbitrary deprivation of liberty, torture or other forms of ill-treatment etc. – "obligations of result") and positive obligations alike (requiring EU Member States to take all reasonable measures to prevent apparent human rights risks from materializing – "obligations of means").[13]

One thing is the legal qualification of a given (wrongful) conduct and applying to it, with great confidence and persuasive legal arguments, the relevant rules of State responsibility – another one is the *justiciability* of such claims before international *fora*. As per the latter, EU countries making the neighbouring third countries do the "dirty job" by using them as "proxies" in certain border management activities might avoid the jurisdiction of the European Court of Human Rights (ECtHR) within the meaning of art. 1 of the European Convention on Human Rights (ECHR).[14] In such cases of eventual human rights violations, *attribution* of a wrongful conduct to a State – which needs to be sharply distinguished from "*jurisdiction*" under art. 1 ECHR, although the ECtHR tends to mix up the two concepts[15] – is typically not contested, as it is clear in virtually all instances that officials of State organs have been involved in the allegedly wrongful conduct.[16] As a result, certain EU Member States

[11] See 1948 Universal Declaration of Human Rights, arts 13(2) and 14; 1966 International Covenant on Civil and Political Rights, arts 6, 7, 9, 12(2); and several other regional human rights instruments such as the 1969 American Convention on Human Rights; the 1981 African Charter of Human and Peoples' Rights; and the 2004 Arab Charter on Human Rights. On these rights' customary international law foundations, see *e.g.* V Chetail, *International Migration Law* (Oxford University Press 2019) 85-92; WA Schabas, *The Customary International Law of Human Rights* (Oxford University Press 2021) 137-138, 148-154, 240-253.

[12] European Convention on Human Rights (ETS n. 5), arts 2, 3, 5 and Protocol n. 4 to the European Convention on Human Rights (ETS n. 46), art. 2(2), which has been several times interpreted by the European Court of Human Rights, including "interpreting in" the right to seek protection from harm, although these instruments do not contain the "right to asylum".

[13] For comprehensive treatises on the concept of positive obligations in human rights law, see *e.g.* V Stoyanova, *Positive Obligations under the European Convention on Human Rights. Within and Beyond Boundaries* (Oxford University Press 2023); X Dimitris, *The Positive Obligations of the State under the European Convention of Human Rights* (Routledge 2012); and R Pisillo Mazzeschi, 'Responsabilité de l'Etat pour violation des obligations positives relatives aux droits de l'homme' (2009) Recueil des Cours de l'Académie de Droit International de La Haye 175-506.

[14] See also N Markard, 'The Right to Leave by Sea' cit. 593. Other quasi-judicial bodies such as the Human Rights Committee set up by the ICCPR equally use a similar concept of "jurisdiction" in order for a state conduct to fall under their purview.

[15] See *e.g.* J Crawford and A Keene, 'The Structure of State Responsibility under the European Court of Human Rights' in A van Aaken and I Motoc (eds), *The European Convention on Human Rights and General International Law* (Oxford University Press 2018) 189-197; M Milanovic, 'Jurisdiction and Responsibility: Trends in the Jurisprudence of the Strasbourg Court' in A van Aaken and I Motoc (eds), *The European Convention on Human Rights and General International Law* (Oxford University Press 2018) 97-111; and M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011).

[16] See similarly G Kajtár, *Betudás a nemzetközi jogban. A másodlagos normák szerepe a beruházásvédelemtől a humanitárius jogig* (Orac 2022) 225.

endeavour to get off the hook of Strasbourg litigations by severing any meaningful jurisdictional links – even beyond territoriality[17]– with the persons concerned.

Against this backdrop, putting on the "*international law lenses*", in lieu of an EU law-driven scrutiny, serves to shed light on the power and potential of the general (customary) rules governing international responsibility in this specific and highly complex context of extraterritorial cooperative border management. The first steps of conceptualisation and rigorous legal inquiry into the ways relevant rules of State responsibility under international law – as "secondary rules" in Hartian terms[18] – operate in this specific area have been taken. The materials engaged with in this piece, including targeted monographic works by Liguori,[19] Pijnenburg,[20] and Heschl[21] have made crucial inroads into the topic, exploring more in-depth the implications on State responsibility of these cooperative migration management activities. Still, much more needs to be done to shine light onto the details as applied to specific real-life scenarios with the aim to understand – and ideally unpack – the real power, nuances and potential of international law on State responsibility.

More specifically, this *Article* primarily looks into the under-studied questions of *joint* (*shared)* and *ancillary (derivative) responsibility* of EU Member States under general international law[22] when the above-depicted cooperation forms with third countries end up in violating human rights of migrants and asylum seekers, as listed above. After outlining selected cooperative border management scenarios which are in a somewhat "grey zone" in terms of the general rules of State responsibility as codified in the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA)[23] (Section II), this piece discusses

[17] See *e.g.* ECtHR *Hirsi Jamaa and Others v Italy* [GC] App n. 27765/09 [23 February 2012]; ECtHR *Khlaifia and Others v Italy* [GC] App n. 16483/12 [15 December 2016].

[18] HLA Hart, *The Concept of Law* (Oxford University Press 1994, 2nd edn).

[19] A Liguori, *Migration Law and the Externalization of Border Controls. European State Responsibility* (Routledge 2019).

[20] A Pijnenburg, *At the Frontiers of State Responsibility: Socio-economic Rights and Cooperation on Migration* (Intersentia 2021).

[21] L Heschl, *Protecting the Rights of Refugees beyond European Borders. Establishing Extraterritorial Legal Responsibilities* (Intersentia 2018).

[22] Using this term implies that the State responsibility-related jurisprudence of the ECtHR, including the latter's own inventions such as the concept of "acquiescence and connivance" – which does not exist in general international law and can be regarded either as an ECHR-specific rule of attribution of conduct, or a particular form of complicity – are, in principle, not discussed here. ECtHR case law is only relied on when it can shed light onto some details of ARSIWA rules and constructs. For more on the ECtHR's case law concerning "acquiescence or connivance" of States parties to the ECHR in the wrongful conduct of third states, see M Milanovic, 'State Acquiescence or Connivance in the Wrongful Conduct of Third Parties in the Jurisprudence of the European Court of Human Rights' in G Kajtár, B Çalı, and M Milanovic (eds), *Secondary Rules of Primary Importance in International Law* (Oxford University Press 2022) 221-241.

[23] International Law Commission (ILC), Articles on Responsibility of States for Internationally Wrongful Acts, annexed to UNGA Res 56/83 (2001) UN Doc A/RES/56/83 (12 December 2001) as the UN General Assembly took note of the articles. These rules explain when States incur international legal responsibility for their internationally wrongful acts, including those that are shared with, or delegated to, other States –

them from the perspective of possible breaches of human rights (Section III). Section IV formulates some conclusions and presents an outlook to the future.

As a preliminary remark, it needs to be stated at the outset that reliance on specific (derivative) forms of State responsibility under the ARSIWA rules is not necessary in situations where human rights violations occurred on the territory of a State which clearly engages its duty to protect, respect and fulfil them.[24] In this case, attribution of conduct and allocating responsibility (to the territorial State) does not cause a problem. However, forms of ancillary or derived responsibility become more pertinent and can represent the only legal accountability hooks when this "*territorial link*" is missing as the scenarios under scrutiny in Section III showcase. A further caveat is that this contribution exclusively focuses on the responsibility of EU Member States from the *international law* perspective – some scholars referred to it earlier as still a "blind spot" in the migration debate.[25] Therefore, the responsibility of the *EU itself* as in international legal person and that of its agencies (*e.g.* the European Border and Coast Guard Agency (Frontex) either under international law, within the meaning of the Articles on the Responsibility of International Organizations (ARIO);[26] or as such responsibility would flow from or can be adjudicated under *lex specialis* EU law instruments,[27] are *not examined* herewith. One might also add that

also encompassing externalisation measures. For a comprehensive analysis of outstanding quality, written by the last ILC Special Rapporteur on the matter, see J Crawford, *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries* (Cambridge University Press 2002). On the ARSIWA's applicability to human rights violations by States as the key duty-bearers, see concisely *e.g.* H Duffy, 'Articles on Responsibility of States for Internationally Wrongful Acts and Human Rights Practice' (5 August 2021) EJIL:Talk! ejiltalk.org.

[24] Consider *e.g.* ECtHR *El-Masri v The Former Yugoslav Republic of Macedonia* [GC] App n. 39630/09 [13 December 2012]; ECtHR *Al Nashiri v Poland* App n. 28761/11 [24 July 2014] paras 440-457, 509-519; and ECtHR *Husayn (Abu Zubaydah) v Poland* App n. 7511/13 [24 July 2014]. Also noted by N Markard, 'The Right to Leave by Sea' cit. 614. For more on States' obligations to "respect, protect and fulfil human rights", see *e.g.*, from a critical perspective, DJ Karp, 'What is the Responsibility to Respect Human Rights? Reconsidering the "Respect, Protect, and Fulfill Framework"' (2020) International Theory 83-108.

[25] A Skordas, 'A "Blind Spot" in the Migration Debate? International Responsibility of the EU and its Member States for Cooperating with the Libyan Coastguard and Militias' (30 July 2018) EU Immigration and Asylum Law eumigrationlawblog.eu; M Fink, 'A "Blind Spot" in the Framework of International Responsibility? Third-party Responsibility for Human Rights Violations: the Case of Frontex' in T Gammeltoft-Hansen and J Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: transnational law enforcement and migration control* (Routledge 2017) 272-293.

[26] ILC, Draft Articles on the Responsibility of International Organizations UN Doc A/66/10 (2011). The UN General Assembly endorsed the text of the "articles on the responsibility of international organizations" in UN Res 66/100 (9 December 2011) UN Doc A/RES/66/100, Annex. On the ARIO's applicability to "human rights damages" cases against Frontex before the EU Courts, see *e.g.* T Molnár, 'The EU General Court's Judgment in WS & Others v Frontex: What Could International Law on the Responsibility of International Organizations Offer in Grasping Frontex' Responsibility?' (18 October 2023) EJIL:Talk! ejiltalk.org.

[27] See *e.g.* art. 263 (action for annulment), art. 265 (action for failure to act) and art. 340 (action for damages) of the Treaty on the Functioning of the European Union (TFEU), as well more specific provisions of the EBCG Regulation mirroring the aforementioned TFEU actions (arts 97-98 of the EBCG Regulation

practically speaking it is still the Member States that most of the time implement EU law on borders extraterritorially, even if Frontex' role is on the rise in this dimension with Status Agreements transacted with third countries[28] – thus far concluded with Western Balkan countries[29] plus Moldova[30] – and other bilateral working arrangements.[31] Therefore, the (international) responsibility of the EU as an entity does not emerge (yet) with the same intensity in these externalised cooperative border management situations.

II. Challenges of EU Member States' extraterritorial border management measures in select scenarios

When EU Member States carry out border control activities outside their sovereign territory, notably when they are engaged in joint extraterritorial immigration measures (some commentators call it "outsourcing"[32]), multiple challenges emerge. The subsequent analysis puts under scrutiny selected issues of allocating international responsibility of EU Member States in the following three particular cooperative migration control scenarios:

- Activities carried out by EU Member States *within third countries* for the benefit of the latter, such as Member State vessels patrolling in the territorial sea of the third country (typically based on a bilateral agreement); and capacity building activities for third countries implemented by EU Member States (*e.g.* providing training, technical assistance, funding).

governing non-contractual liability; actions for annulment; and failure to act in relation to the work of Frontex). For more on these otherwise salient legal issues, see *e.g.* M Gkliati, *Systemic Accountability of the European Border and Coast Guard: the Legal Responsibility of Frontex for Human Rights Violations* (2021) PhD dissertation, University of Leuven Department of Law.

[28] For good overviews, see L Letourneux, 'Protecting the Borders from the Outside. An Analysis of the Status Agreements on Actions Carried Out by Frontex Concluded by the EU and Third Countries' (2022) European Journal of Migration and Law 330-356; and J Santos Vara, 'The Activities of Frontex on the Territory of Third Countries: Outsourcing Border Controls without Human Rights Limits' (2023) European Papers www.europeanpapers.eu 985.

[29] See *e.g.* Status Agreement between the European Union and the Republic of Albania on actions carried out by the European Border and Coast Guard Agency in the Republic of Albania (2019); Status Agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia (2020); and Status Agreement between the European Union and Montenegro on actions carried out by the European Border and Coast Guard Agency in Montenegro (2020). More of such agreements are in the making, including with African countries.

[30] Agreement between the European Union and the Republic of Moldova on operational activities carried out by the European Border and Coast Guard Agency in the Republic of Moldova (2022).

[31] For an overview, see European Border and Coast Guard Agency, *Beyond EU Borders: Working Arrangements* www.frontex.europa.eu.

[32] K Gombeer and S Smis, 'The Establishment of ETOs in the Context of Externalised Migration Control' in M Gibney and others (eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2022) 169-181.

- Activities carried out by EU Member State officials *on board of vessels flying the flag of third countries* when these extraterritorial actions essentially aim at preventing irregular departures and thus people irregularly entering the EU.

- In case EU Member State border guards identify people moving towards the "green" (land) or "blue" (sea) border and suspect that they intend to cross the EU external border irregularly, these national authorities *share this information* and *request assistance* from the neighbouring third country to intercept these people before they cross the external border of the Union.

The key guiding line for the above selection was to present scenarios with "grey zones" owing to the derivative nature of EU Member State responsibility or the legal qualification of which is not yet settled. It is the multiplicity of States involved, and their nuanced cooperation patterns that may lead to a diffusion and dilution of responsibility. Therefore, arguably more straightforward situations, as stemming from either international case law[33] or research materials,[34] are *not discussed* in this piece. These encompass – but are not limited to – joint operations or joint patrolling in which several EU Member States and third countries equally take part by independently deploying their own patrol boats and other assets.[35] In such cases, all participating States are separately – or independently[36] – responsible for any international wrongful act in application of art. 4 (conduct of organs of a State) and art. 47 (plurality of responsible States) ARSIWA. Another delimitation is that the legal complexities arising out of the applicability of certain substantive human rights norms (see examples in Section I above) in extraterritorial cooperative border management situations are not discussed here due to the narrow, spot-on focus this piece has chosen to employ.

The different, sometimes even opposing, legal assessments of each scenario are hereunder presented, taking the general rules enshrined in ARSIWA – and to some extent the pertinent case law of the ECtHR – as the point(s) of reference in reaching conclusions on the question whether the international responsibility of a cooperating EU Member State is incurred.

[33] *E.g. Hirsi Jamaa and Others v Italy* cit.

[34] As depicted in, *e.g.* FRA, 'Fundamental Rights at Europe's Southern Sea Borders' (2013) Publications Office of the European Union 11, 45-46; and FRA, 'Scope of the Principle of Non-refoulement' cit. scenarios 5 and 9.

[35] See *e.g.* M den Heijer, 'Europe Beyond its Borders' cit. 191.

[36] The ILC pointed out in the ARSIWA commentaries that the principle of independent responsibility reflects the position under general international law, in the absence of agreement to the contrary between the States concerned. The ILC added: terms such as "joint", "joint and several" and "solidary" responsibility derive from different (domestic) legal traditions and analogies must be applied with care (ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries UN Doc A/56/10 (2001), commentary to art. 47 para. 3.

III. Allocating international responsibility of EU Member States for their extraterritorial border management activities: twilight zone

It can be stated at the outset that in the above-described extraterritorial border management situations, the international responsibility of EU Member States for possible violations of the right to leave and other internationally protected human rights such as the prohibitions of *refoulement*, collective expulsion, torture and other forms of ill-treatment and arbitrary detention – as the case may be – remains unclear. The present section endeavours to shed light on why so.

III.1. First scenario: Activities carried out by EU Member States within third countries or for their benefit

Let us start with putting the ARSIWA rules into context in the *first scenario*. In this case, EU Member State officials carry out various border-management related activities in or for the benefit of a third country. For instance, when a *vessel of an EU country patrols in a third country's territorial sea*[37] and is involved in wrongdoings, the EU Member State's responsibility – and its nature – depends on the types of measures or the degree of control and on the fact whether or not its officials have been placed at the disposal of the host country within the meaning of art. 6 ARSIWA.[38] According to the ARSIWA Commentaries, triggering this latter form of responsibility requires that the organ acts "in conjunction with the machinery" of that State and under its exclusive direction and control, not on the basis of instructions from the home State.[39] In this specific scenario, the terms of a bilateral agreement – most typically constituting the legal background of such operations –, as well as the host country's relevant domestic legislation and operational plans can greatly inform the legal assessment and the conclusion reached thereof.

In order for these acts to be attributable to the host third country within the meaning of art. 6 ARSIWA, the threshold to reach is quite high – enough to mention here the requirement of exercising "elements of the governmental authority" of the host State. Next to the above-cited International Law Commission (ILC) commentaries unpacking the relevant ARSIWA rule, ECtHR case law in *X and Y v Switzerland*[40] and *Xhavara and Others v Italy and Albania*[41] equally illustrates that high threshold. The first case related to the delegation of

[37] As described in FRA, 'Scope of the Principle of Non-refoulement' cit. 28-31.

[38] Art. 6 ARSIWA (Conduct of organs placed at the disposal of a State by another State): "The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed".

[39] ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts cit. 44 commentary to art. 6 para. 2.

[40] ECtHR *X and Y v Switzerland* App n. 7289/75 and 7349/76 [14 July 1977].

[41] ECtHR *Xhavara and Others v Italy and Albania* App n. 39473/98 [11 January 2001].

immigration law enforcement competences to Switzerland by Liechtenstein, with the question whether entry bans to Liechtenstein issued by Swiss authorities were attributable to Switzerland or Liechtenstein; whereas the second was about prevention of departure at sea by the Italian coastguard, which had been given the permission to operate in Albanian territorial waters and intercepted and sank a vessel with Albanian migrants heading to Italy. According to the Strasbourg Court, the mere exercise of some elements of public authority is not enough to attribute the conduct of a state organ (here: immigration authorities issuing entry bans; or military or law enforcement operating the vessel) to another State. If then art. 6 ARSIWA is not likely to "waive" the EU Member State's responsibility by way of shifting it to the host third country, unlawful action against people at sea (*e.g.* turning their boat back; excessive use of force against the people crossing the sea; not carrying out a search and rescue operation), over whom the Member State officials on board of the vessel thus exercise jurisdiction, is attributable to the EU country concerned and triggers its direct responsibility pursuant to the general rules embodied in arts 1-2, 4 and 12 ARSIWA.

Still remaining in the first scenario, another typical form of EU Member States cooperation with third countries of transit and origin is providing training, supplying equipment and other forms of *capacity-building activitie*s to increase the third country's capacity to prevent irregular (outward) migration (some scholars coin it as "contactless control"[42]). The legal appraisal of the consequences of providing training and capacity-building by an EU Member State to the third-country's border officials gets trickier. As mentioned above, resolving such instances via States' duty to respect, protect and fulfil human rights on its own territory is not an option,[43] due to the extraterritorial nature of the EU country's engagement. Arguably, undertaking these activities in itself does not constitute an internationally wrongful act, hence the EU Member State's direct responsibility is not incurred.

However, international responsibility may also arise when a State *aids or assists another State* to engage in conduct that violates international obligations. The applicable general rules of international law governing this form of derived responsibility are codified in art. 16 ARSIWA,[44] which arguably constitute the most controversial form of international responsibility of EU Member States for joint extraterritorial immigration measures. The International Law Commission explicitly acknowledged in the ARSIWA

[42] V Moreno-Lax and M Giuffré, 'The Raise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows'" in SS Juss (ed.), *Research Handbook on International Refugee Law* (Edward Elgar Publishing 2019) 82-108.

[43] See also N Markard, 'The Right to Leave by Sea' cit. 615; M den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012) 99-100; and H Aust, *Complicity and the Law of International State Responsibility* (Cambridge University Press 2011) 401-412.

[44] Art. 16 ARSIWA (Aid or assistance in the commission of an internationally wrongful act) stipulates: "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State".

Commentaries[45] that "material aid to a State that uses the aid to commit human rights violations" is one example of providing aid or assistance within the meaning of art. 16 ARSIWA. In fact, the support or contribution does not need to be essential to the commission of the act or be a *conditio sine qua non*. Nonetheless, it has to significantly contribute to it[46] (although the ILC did not provide examples as for what this "significant contribution" threshold actually means).[47]

Here, the responsibility of the EU Member State concerned is not triggered by its own unlawful action, but it arises in connection with an internationally wrongful act committed by another State. This is the case, for instance, when third-country border/coast guard officials who have been trained by or received funding or equipment from a Member State engage in human rights violations (*e.g.* obstructing the right to leave by intercepting people still in the territorial sea of that third country and thereby preventing their departure; subjecting the intercepted people to ill-treatment, arbitrary detention, slavery or forced labour etc.). Although some of the third countries concerned (*e.g.* North African countries) are not parties to the ECHR and the 1951 Geneva Refugee Convention, the right to leave, the prohibition of torture and other forms of ill-treatment, the prohibition of arbitrary detention, the principle of *non-refoulement* and the prohibition of collective expulsion stem from quasi universally ratified UN human rights conventions and they also have the character of general customary international law.[48] Scholars like Pascale,[49] Giuffré,[50] Moreno-Lax,[51] Staiano[52] and Liguori[53] have argued in this direction as concerns Italy's engagement with Libya by providing funding, equipment and training; and the for-

[45] ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts cit. 67 commentary to art. 16 para. 9.

[46] *Ibid*. 66-67 commentary to art. 16 paras 1, 5.

[47] See also V Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (Hart Publishing 2016) 97, also citing Bruno Simma (an ILC member at that time) and his criticism about the absence of clarity and precision as concerns the "interrelationship between the aid… and the wrongful act…" (ILC, Summary Record of the 2578th Meeting UN Doc A/CN.4/SR.2578 (28 May 1999) para. 41.

[48] For the customary foundations of these core human rights norms protecting non-nationals, see *e.g.* V Chetail, 'The Transnational Movement of Persons under General International Law – Mapping the Customary Law Foundations of International Migration Law' in V Chetail and C Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 1-72; and WA Schabas, *The Customary International Law of Human Rights* cit. 137-138, 148-154, 240-253.

[49] G Pascale, 'Is Italy Internationally Responsible for the Gross Human Rights Violations against Migrants in Libya?' (2019) Questions of International Law 35-58.

[50] M Giuffré, 'State Responsibility beyond Borders: What Legal Basis for Italy's Push-Back to Libya?' (2012) IJRL 692-734.

[51] M Giuffré and V Moreno-Lax, 'The Raise of Consensual Containment' cit.

[52] F Staiano, 'Questions of Jurisdiction and Attribution in the Context of Multi-Actor Operations in the Mediterranean' in GC Bruno, F Palombino and A Di Stefano (eds), *Migration Issues before International Courts and Tribunals* (CNR Edizioni 2019) 25-43.

[53] A Liguori, *Migration Law and the Externalization of Border Controls* cit.

mer's ensuing derived responsibility for such assistance. Markard also concludes similarly as per the violation of the right to leave at sea in general.[54] This "derivative responsibility" or complicity – forming part of customary international law according to the International Court of Justice's pronouncement in the *Bosnian Genocide Case*[55] – "heralds the extension of legal responsibility into areas where States have previously carried moral responsibility but [international] law has not clearly rendered them responsible for the acts that they facilitate", as Professor Lowe aptly opined.[56]

Nonetheless, not all forms of cooperation amount to complicity. Taking it to the extreme, an expansive interpretation of art. 16 ARSIWA on aiding or assisting could have a chilling effect on international cooperation, as Nolte and Aust convincingly note.[57] Likewise, the whole concept of providing development aid would be made paralysed if lending financial loans by a donor State qualified unlawful in case, using den Heijer's words, "funds were to incidentally fall into the hands of state officials committing human rights violations".[58] Based on the examples the ILC enumerates in its Commentaries to the ARSIWA and concurring views of international law scholarship,[59] the connection between the aid or assistance and the commission of the internationally wrongful conduct must not be too remote, which also serves the interests of international cooperation. The ILC already highlighted the requirement of a certain link or nexus as long ago as at the end of 1970s by positing that the "eventual possibility" that an internationally wrongful act could derive from a State's assistance is not sufficient to establish the necessary link between the act of aid or assistance and the wrongful conduct.[60] Put differently, a sort of a "plausible likelihood"[61] that the aid or support will be unlawfully utilised is the trigger which will activate this form of derived or indirect responsibility within the meaning of art. 16 ARSIWA.

Against this backdrop, extraterritorial border management activities, such as training, funding and capacity building in third countries, could potentially fall under the scope of art. 16 ARSIWA if three requirements are fulfilled:[62]

[54] N Markard, 'The Right to Leave by Sea' cit. 615.

[55] ICJ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43.

[56] V Lowe, *International Law* (Oxford University Press 2007) 121.

[57] G Nolte and H Ph Aust, 'Equivocal Helpers – Complicit States, Mixed Messages and International Law' (2009) International & Comparative Law Quarterly 1-30. See similarly V Lowe, 'Responsibility for the Conduct of Other States' (2002) Japanese Journal of International Law 5.

[58] M den Heijer, 'Europe beyond its Borders' cit. 195.

[59] V Lanovoy, *Complicity and its Limits in the Law of International Responsibility* cit. 95.

[60] ILC, Report of the International Law Commission, Thirtieth session UN Doc A/33/10 (1978) para. 18.

[61] M Giuffré and V Moreno-Lax, 'The Raise of Consensual Containment' cit. 103.

[62] Following the ARSIWA commentaries, the same three-pronged categorisation is employed by V Lanovoy, *Complicity and its Limits in the Law of International Responsibility* cit. 94.

1) the relevant state organ providing aid/assistance must have knowledge of the circumstances making the conduct of the assisted State internationally wrongful;

2) aid/assistance must be provided to facilitate that conduct which must indeed result in a wrongful act; and

3) conduct must be such that it would have been wrongful even if it had been committed by the assisting State itself ("a State cannot do by another what it cannot do by itself"' as the ILC put it in its Commentaries to ARSIWA[63]), also known as the requirement of "opposability".

The fulfilment of this latter condition under point 3) should not be a problem, since all EU Member States have ratified all the relevant UN and European human rights instruments – with some (notable) exceptions[64]– and all third countries concerned are bound by the 1966 International Covenant on Civil and Political Rights codifying pertinent human rights such as the right to leave, the prohibition of arbitrary detention, and the prohibition of torture and other forms of ill-treatment (let alone their customary international law equivalent). In this regard, there seems to be no formal leeway for EU Member States in circumventing their negative and positive obligations arising out of the respect of the aforementioned human rights (and beyond).

More problematic might be that the threshold to trigger State responsibility is high in these cases of complicity, hence it is necessary to establish a close causal connection between the EU Member State's act of aiding/assisting (here: providing training, supplying equipment and other forms of capacity-building activities) and the third country's internationally wrongful act, as the first and second criterion above dictate. As per the first criterion above under art. 16 ARSIWA, some authors argue that in the human rights context a lower threshold of *knowledge* on the part of complicit States, such as "constructive knowledge", suffices to incur their responsibility.[65] As per the second criterion above under the same ARSIWA provision, although the element of "intent" was dropped from the final version of art. 16 ARSIWA, the explanation of this condition in the Commentaries refers to some form of *intent*. The ARSIWA Commentaries qualify the mental element called "intent" as a constitutive factor in the legal construct under this provision as follows: "aid or assistance must be given *with a view to* facilitating the commission of the wrongful act" and "[a] State is not responsible for aid or assistance [...] unless the relevant State organ *intended*, by the aid or

[63] ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts cit. 66 commentary to art. 16 para. 6.

[64] For instance, Protocol n. 4 to the ECHR, which guarantees to right to leave any country and prohibits collective expulsion, has not been ratified by Greece, and the ratification of the (revised) European Social Charter – namely the acceptance of its provisions due to its *à la carte nature* – also varies considerably among EU Member States, see coe.int.

[65] T Gammeltoft-Hansen and JC Hathaway, 'Non Refoulement in a World of Cooperative Deterrence' (2015) Columbia Journal of Transnational Law 280; M Jackson, *Complicity in International Law* (Oxford University Press 2015) 54.

assistance given, *to facilitate* the occurrence of the wrongful conduct".[66] Although the precise contours of the mental component of this complicity rule remain unclear,[67] the expressions "with a view to facilitating" and "intended [...] to facilitate" suggest that the standard of knowledge "is subsumed by one of wrongful intent".[68]

Scholars underscore the *difficulties in proving* that a State provided aid to a third country precisely with the aim of committing an internationally wrongful act,[69] such as violating migrants' rights. By the same token, in view of avoiding responsibility, a State can also intentionally refrain from making public pronouncements declaring its will.[70] Some academics claim that requiring that a State intends to facilitate the commission of a wrongful act "would raise the bar so much as to render recourse to art. 16 [ARSIWA] nearly impossible."[71] Other authoritative voices argue that compliance with the requirement to avoid knowingly assisting (well-documented) violations by another State of international obligations binding upon both States warrants adopting *effective mitigation measures* to meaningfully *reduce the foreseeable harmful impact* of the assistance. "The fact that a State has, or [...] has not, taken such mitigating measures may not in itself be determinative, but may be one indicator as to whether the aid or assistance [was] provided 'with a view to facilitating the commission of [internationally wrongful acts]'" – UNHCR submits.[72]

Be it as it may, if obstructing the right to leave – *i.e.* preventing departures – is concretely envisioned by EU Member States (*e.g.* in the bilateral cooperation agreement with a third country[73] or in other soft law instruments such as the 2017 Malta Declaration[74]), and if

[66] ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 66 commentary to art. 16 para. 6.

[67] M Milanovic, 'State Acquiescence or Connivance' cit. 236.

[68] M Jackson, *Complicity in International Law* cit. 159; citing G Nolte and H Ph Aust 'Equivocal Helpers' cit. 14. International jurisprudence (notably the ICJ's ruling in the *Bosnian Genocide* case) does not seem to resolve either the ambiguity of the ARSIWA provisions and the Commentaries thereto.

[69] B Graefarth, 'Complicity in the Law of International State Responsibility' (1996) RBDI 375; M Gibney, K Tomasevski and J Vedsted-Hansen, 'Transnational State Responsibility for Violations of Human Rights' (1999) HarvHumRtsJ 294; and more specifically in the migration context, J Santos Vara and L Pascual Matellán, 'The Externalisation of EU Migration Policies' cit. 326; M den Heijer, 'Europe beyond its Borders' cit. 194-195.

[70] B Graefrath, 'Complicity in the Law of International State Responsibility' cit. 375-376; V Moreno-Lax and M Giuffré, 'The Raise of Consensual Containment' cit. 101.

[71] V Moreno-Lax and M Giuffré, 'The Raise of Consensual Containment' cit. 102.

[72] UNHCR, Submission by the Office of the United Nations High Commissioner for Refugees in the case of *S.S. and Others v Italy* (App n. 21660/18) before the European Court of Human Rights, 14 November 2019 refworld.org.

[73] Under art. 42 of the Regulation (EU) 399/2016 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

[74] Council of the EU of 3 February 2017 Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route, Statements and

equipment is provided and/or information is shared specifically for this purpose, then *intent is established* – and detailed knowledge of the concrete events or incidents (as in joint operations) is thus not required.[75] As an analogy, this was the conceptual line the ECtHR took in a case concerning CIA extraordinary renditions in Poland where the Polish government was found to have violated art. 3 ECHR (prohibition of torture and other forms of ill-treatment) by enabling and supporting these secret CIA operations in full knowledge of the high likelihood that the detainees would be tortured (as a form of complicity).[76]

In addition, the aforementioned first precondition under art. 16 ARSIWA concerning the knowledge of the circumstances making the conduct of the assisted State internationally wrongful is equally met by the EU Member States cooperating with certain third countries such as some North African countries and Turkey, since an ocean of reliable sources produced by international organisations, monitoring bodies and other key human rights actors are available documenting the serious human rights violations and/or the very dire, or even unbearable, human rights situation of people on the move in these countries.[77]

Another aid or assistance-related responsibility scheme which is worth mentioning in this context, at least *en passant*, is what art. 41(2) ARSIWA regulates under the aggravated form of responsibility for serious breaches of peremptory norms of international law (*jus cogens*). Particular consequences of serious breaches of *jus cogens* include that other States must not "render aid or assistance in maintaining that situation" which arose as a result of a serious breach of a *jus cogens* norm. This is thus a special, "after the fact"[78] type of derivative responsibility (as opposed to art. 16 ARSIWA addressing assistance prior to the commission of an internationally wrongful act). Compared to the general rule on aiding and assisting, aggravated responsibility in the sense of art. 41 ARSIWA requires that a serious breach of *jus cogens* occurred and that it resulted in a "situation" – although the ILC articles do not define what it means, only its commentaries give a few possible examples.[79] This aggravated form of complicity under art. 41(2) ARSIWA does not expressly require satisfying subjective elements: intent is certainly not needed, while knowledge of the commission of a serious breach by another State is implied.[80] Arguably,

Remarks 42/17 www.consilium.europa.eu paras 3, 5, and 6(j), which refer to "significantly reduc[ing] migratory flows", "combat[ing] transit" and "preventing departures".

[75] N Markard, 'The Right to Leave by Sea' cit. 615; T Gammeltoft-Hansen and JC Hathaway, 'Non Refoulement in a World of Cooperative Deterrence' cit. 235-284.

[76] ECtHR *Al Nashiri v Poland* App n. 28761/11 [24 July 2014]. See also ECtHR *Husayn (Abu Zubaydah) v Poland* App n. 7511/12 [24 July 2014].

[77] See similarly *e.g.* J Bast, F von Harbou and J Wessels, *Human Rights Challenges to European Migration Policy. The REMAP Study* (Hart Publishing/Nomos 2022, 2nd edn) 46.

[78] ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts cit.115 commentary to art. 41 para. 11.

[79] *Ibid*. 114 commentary to art. 41 para. 5.

[80] *Ibid*. 115 commentary to art. 41 para. 11.

the horrible situation in Libya amounts to the violation of certain *jus cogens* norms, too[81] – enough here to refer to the prohibition of torture and other forms of ill-treatment or the prohibition of forcing people into slavery which qualify as peremptory norms of international law[82] and their flagrant breaches there. One can thus argue that EU Member States are under a clear duty of non-assistance, *e.g.* by not providing capacity building activities to Libyan authorities associated with committing torture or other forms of ill-treatment and/or forcing them into slavery, to avoid their aggravated complicity in maintaining such a grave situation.

Finally, a further possible line of argumentation submits that through funding, training and supplying technical equipment, border authorities of the third countries concerned (*e.g.* in North Africa) essentially function as *subsidiary organs* of the EU Member States in implicitly enforcing these countries' legislation on border controls and immigration.[83] One needs again to examine whether art. 6 ARSIWA is applicable in this context and whether it is arguable that such border authorities have been appointed to perform functions pertaining to the (EU Member) State at whose disposal they are placed. In view of the current frameworks and intensity of joint actions, the degree of cooperation between EU Member States and African countries – where the latter do not lose their command-and-control autonomy – would not satisfy the stringent requirements and not reach the elevated threshold to attribute the conduct of the border guards of these cooperating African countries to EU Member States under art. 6 ARSIWA.

III.2. Second scenario: Activities of EU Member State officials carried out on board of third country vessels with the aim to prevent irregular entry to the EU

As per the second scenario when Member State representatives are present *on board of vessels flying the flag of third countries* and patrolling the sea,[84] the legal qualification of their action revolves around the question whether or not their role played qualifies as "exercising effective control". In case they do not have law enforcement powers and essentially merely advise the third-country vessel crew to prevent boats carrying migrants from reaching the high seas or the territorial waters of an EU Member State, direct responsibility of that EU country is not engaged for human rights violations committed by

[81] For a recent overview of the human rights situation in the county, see *e.g.* Human Rights Council, Report of the Independent Fact-Finding Mission on Libya, UN Doc A/HRC/50/63 (27 June 2022).

[82] ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 422; See also Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), UN Doc A/77/10 (2022), para. 43, Annex, para. (g).

[83] See *e.g.* M den Heijer, 'Europe beyond its Borders' cit. 192-193 who discusses this scenario.

[84] FRA, 'Scope of the Principle of Non-refoulement' cit. 27-28.

the third country officials. However, the former's derived responsibility can still be established under art. 16 ARSIWA if the above-mentioned requirements – setting a high threshold as the preceding analysis has shown – are met.

In case they do exercise law enforcement powers and hence they exercise *effective control* over the individuals stopped at sea, unlawful conduct such as violating these people's right to leave or subjecting them to ill-treatment or arbitrary detention most likely results in a "shared"[85] or "joint and several" responsibility of the EU Member State and the third country concerned in application of arts 4 and 47 ARSIWA, read in light of the ILC Commentaries thereto.[86] Joint and several responsibility of States under international law arises when two or more States commit in concert an internationally wrongful act.[87] This form of responsibility presupposing co-perpetrators needs to be distinguished from complicity. As the ILC Commentaries to the ARSIWA point out, in such collaborative conduct of States (here: mixed crew with law enforcement powers), responsibility is to be determined in line with the principle of "independent responsibility", which implies that each State is separately responsible for conduct attributable to it. Where a single course of action is attributed to two or more States, State responsibility is not diminished by the fact that other States are equally responsible for the same wrongful act: the conduct is attributable to all States concerned.[88] The ECtHR came to similar conclusions in cases concerning inter-state cooperation: "[i]n so far as any liability under the [ECHR] is or may be incurred, it is liability incurred by the Contracting State[s]"[89] and "[i]t would be incompatible with the purpose and object of the [ECHR] if Contracting States were to be absolved from their responsibility under the Convention [by concluding international agreements governing their co-operation]".[90] Hence, individual (parallel) responsibility of States continues to govern these cases. This type of responsibility serves as an important tool to discourage cooperation-based *non-entrée* practices.[91]

Given that two States which are jointly – or more precisely perhaps, in parallel but independently – responsible for wrongful acts need not be violating the same norms, pull-backs by a third country could, at the same time, constitute push-backs by an EU Member State (once the persons concerned are already on high seas, although some scholars see preventing migrants reaching the high seas as an infringement of good faith

[85] See *e.g.* A Nollkaemper and others, 'Guiding Principles on Shared Responsibility in International Law' (2020) EJIL 15-72, commentaries to Principle 7 (Shared responsibility in situations of concerted action) and Principle 10 (Reparation in situations of shared responsibility).

[86] ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts cit. 124-125 commentary to art. 47.

[87] V Lanovoy, *Complicity and its Limits in the Law of International Responsibility* cit. 147.

[88] ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts cit. 124 commentary to art. 47 para. 1.

[89] ECtHR *Saadi v United Kingdom* App n. 37201/06 [28 February 2008] para. 126.

[90] ECtHR *KRS v United Kingdom* App n. 32733/08 [2 December 2008].

[91] T Gammeltoft-Hansen and JC Hathaway, 'Non Refoulement in a World of Cooperative Deterrence' cit. 276.

which is a foundational general principle of international law[92]). Even if the prohibition of *refoulement* is technically not in breach since the third-country patrol vessel with Member State law enforcement officials sails in the former's territorial waters, such an EU Member State can still violate the intercepted persons' right to leave[93] and right to asylum; or the excessive use of force by this Member State's officials can amount to ill-treatment.

III.3. Third scenario: EU Member States sharing information with neighbouring third countries

Turning to the third scenario under scrutiny in this *Article* (inspired by the above-cited 2016 FRA report[94]), an emerging practice followed by EU Member States located at the external borders is to have migrants and asylum seekers apprehended before they reach the land or sea border by *sharing information and intelligence* with the neighbouring third country. This allows the authorities of the third country concerned to stop the people before they actually reach the EU external (land or sea) border. Patrols carried out at the land borders by the neighbouring country may prevent people on the move from entering the EU territory via the green border, whereas patrols carried out at sea may prevent them from entering the territorial waters of the EU Member State concerned.[95]

As a preliminary remark, it should be noted that EU Member States have a duty to prevent unauthorised border crossings by virtue of the Schengen Borders Code.[96] To operationalise this obligation, some EU Member States explored new ways of cooperating with neighbouring third countries, notably by requesting the latter's authorities to intercept people while they are still in their territory, before reaching the EU external border. As FRA noted, depending on the terrain, vegetation and weather conditions, technical equipment often allows EU Member State border guards to spot people at a significant distance from the external border while they are still within the land territory or in the territorial sea of the third country[97] (when there is not much distance between the two shores, *e.g.* in case of the Greek islands in the Aegean Sea and the Turkish coast).

In this scenario, the crux of the matter is whether the EU Member State located at the external border exercises *effective control* over the detected people on the move when it shares information with, and requests assistance from, the neighbouring third country;

[92] See G Goodwin-Gill and J McAdam, *The Refugee in International Law* (Oxford University Press 2007, 3rd edn) 383; N Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' cit. 616; and similarly, V Moreno-Lax and M Guiffré, 'The Raise of Consensual Containment' cit. 108.

[93] See *e.g.* M den Heijer, 'Europe beyond its Borders' cit. 192, and N Markard, 'The Right to Leave by Sea' cit. 616.

[94] FRA, 'Scope of the Principle of Non-refoulement' cit. 2, 37-38; and also, FRA, 'How the Eurosur Regulation Affects Fundamental Rights' (2018) Publications Office of the European Union 23-24.

[95] FRA, 'Scope of the Principle of Non-refoulement' cit. 36.

[96] Art. 13(1) of Schengen Borders Code cit.

[97] FRA, 'Scope of the Principle of Non-refoulement' cit. 37.

or whether effective control also requires physical action to stop the migrants as they approach the (land or sea) border. Sharing information on migrants and asylum seekers approaching the external border is usually based on bilateral or multilateral agreements.[98] As another possible legal basis, art. 75 of the EBCG Regulation also enables Member States to share information with third countries in the framework of EUROSUR (European Border Surveillance System) under certain conditions.[99]

Set against this background, one way of reasoning to allocate State responsibility for eventual rights violations as a result of people's interception is that these people are prevented from reaching the EU external border through the actions of the border guards of the neighbouring country. Put differently, the wrongful conduct, *i.e.* violating human rights, is attributable only to the third country concerned and *not the EU Member State* whose officials simply provided the information on the migrants' position to the former. Although this line of interpretation excludes an EU country's direct, stand-alone responsibility, such action – where the fulfilment of the knowledge/intent requirement, no matter how narrowly or extensively this mental element is construed,[100] is hardly contestable – clearly incarnates a form of aid or assistance to the commission of an international wrong pursuant to art. 16 ARSIWA. This can be thus associated, for instance, with the violation of these individuals' right to leave the neighbouring third country, or any forms of ill-treatment inflicted upon them. It is purported that the precondition of "with a view to facilitating the commission of the wrongful act" is clearly fulfilled in such a situation, at least in relation to the breaches of the right to leave: the very purpose of sharing information and intelligence with the authorities of the bordering third country is to prevent departures and to stop people crossing the EU external border. In addition, rendering aid or assistance under art. 41(2) ARSIWA which triggers an aggravated form of complicity can equally apply in relation to those wrongdoings, which qualify as serious breaches of *jus cogens* norms – consider *e.g.* the dire human rights situation of migrants in Libya and the role of local authorities therein (see also above under sub-section iii.1). To the author's best knowledge, no case law from international courts or quasi-judicial bodies is available yet on whether complicity could also consist of the sharing of information which enables a third country to take actions in violation of human rights of the people on the move.

[98] For an overview of such co-operation agreements with third countries, see FRA, 'How the Eurosur Regulation Affects Fundamental Rights' cit. Annex (List of bilateral and multilateral agreements reviewed).

[99] For an analysis of an earlier (draft) version of this provision, see European Council of Refugees and Exiles (ECRE), 'ECRE Comments on the Commission Proposal for a Regulation on the European Border and Coast Guard (Communication COM(2018) 631 final)' (2018) ecre.org 28-29, 34; and FRA, 'The Revised European Border and Coast Guard Regulation and its Fundamental Rights Implications – Opinion of the European Union Agency for Fundamental Rights', FRA Opinion – 5/2018 [EBCG] (27 November 2018) 45-46.

[100] R Mackenzie-Gray Scott, 'Torture in Libya and Questions of EU Member State Complicity' (11 January 2018) EJIL:Talk! ejiltalk.org.

An alternative, arguable standpoint is to claim that the authorities of the EU Member States *indirectly exercise effective control* when they activate the action (*i.e.* the apprehension of people on the move) by the authorities of the third country through the information exchange. Using the vocabulary of some leading scholars, this is a sort of a typical "contactless control" – meaning that the spatial element of control is absent – which can incur "contactless responsibility".[101] Art. 89(5) of the EBCG Regulation appears to support this view as it prohibits an information exchange with third countries if the information provided could lead to the identification of persons in need of international protection or those who are at serious risk of any other fundamental rights violations. In other words, this secondary EU law provision lays down a due diligence duty and obliges Member States to take into account the (human rights) situation in the third country and not to take action when they know, or should have known, that the individuals concerned face a risk of serious harm. In case the above human rights obligations are not honoured, the direct responsibility of the EU Member State concerned incurs in application of arts 4 and 12 ARSIWA – and can be invoked against it at least as a co-author of the wrongful act pursuant to art. 47 ARSIWA. Thus far, no case law of an international court (*e.g.* ECtHR) or quasi-judicial body (*e.g.* the UN Human Rights Committee, the Committee on the Rights of the Child, the Committee Against Torture etc.) is available to shine some light on the legal qualification of such a constellation and the attribution of responsibility in this setting.

IV. Assessment and outlook to the future

It is not contested that EU Member States' cooperation with third countries can lead to preventing migrants and protection seekers from reaching the territory of EU Member States and result in people on the move being stranded in third countries which seriously violate their human rights. Nevertheless, as the ECtHR underscored, "problems with managing migratory flows cannot justify having recourse to practices which are not compatible with the State's obligations under the [ECHR]".[102]

The foregoing analysis of selected cooperative border management scenarios aimed at demonstrating that EU Member States are not in a legal accountability vacuum when acting beyond their borders in cooperation with third partners. Mitsilegas aptly pointed out that "limiting responsibility only to third countries would create the very gaps in the rule of law that ECtHR attempted to address in *Hirsi*"[103] – and also in subsequent Strasbourg jurisprudence, this author would add.

EU Member States cannot thus "exonerate themselves from their international obligations by engaging [third] countries of origin and transit in migration control".[104] In

[101] V Moreno-Lax and M Giuffré, 'The Raise of Consensual Containment' cit.
[102] ECtHR *Hirsi Jamaa and Others v Italy* [GC] App n. 27765/09 [23 February 2012] para. 179.
[103] V Mitsilegas, *Extraterritorial Immigration Control* cit. 302.
[104] N Markard, 'The Right to Leave by Sea' cit. 616.

some cooperative migration control scenarios, EU Member States' participation in or support to a third country's internationally wrongful act (*e.g.* preventing departures) can make them complicit in or jointly liable for in the commission of the wrongful act.

The preceding legal analysis of selected scenarios showcases that a number of areas call for more legal clarity when it comes to determining EU countries' international responsibility along the lines of ARSIWA. There are several factors to consider in this regard. In particular, some grey areas remain which concern EU Member State operations in and with third countries, especially when they support or collaborate with them in their efforts to manage migration flows. Such involvement comes rather from the "background", without a direct or simultaneous engagement in the commission of unlawful acts such as violations of migrants' and asylum seekers' right to leave any country including their own; or their ill-treatment. I fully agree with Gammeltoft-Hansen and Hathaway who note that ARSIWA rules on aiding or assisting another State in breaching its obligations under international law have "enormous potential to close the accountability gaps that the new generation of *non-entrée* practices seek to exploit",[105] but they also acknowledged that this is not yet settled law – and this potential is yet to be realised. Other commentators expressed similar views on the role of the "secondary norms" – in Hart's terms – laid down in ARSIWA in ensuring "that both forms of direct and indirect responsibility are not evaded".[106] As of yet, there exists no specific international case law (be it at the universal or regional level) which would give guidance as to how States' derived responsibility under the complicity regime of ARSIWA would be applied in the context of border management, neither in general, nor in any of the particular scenarios presented herein. It is still debated whether the conduct of an EU Member State entails international responsibility in those situations which involve activities carried out under the umbrella of international cooperation but, in some cases, with the ultimate aim of preventing people from heading towards the EU. A broader scope of derived responsibility for complicity could lead to a greater respect for the international rule of law and the promotion of the legal interests of the international community in the observance of international (human rights) obligations.[107]

As the materials cited and engaged with in this piece demonstrate, the first steps of rigorous and profound legal investigation into State responsibility in this specific matter have been taken. This strand of State responsibility-focused legal research must go on, along with scrutinizing ECtHR case law on States' positive obligations to prevent human rights violations as a functional – somewhat overlapping[108] – alternative to the complicity

[105] T Gammeltoft-Hansen and JC Hathaway, 'Non Refoulement in a World of Cooperative Deterrence' cit. 283-284.

[106] R Mackenzie-Gray Scott, 'Torture in Libya and Questions of EU Member State Complicity' cit.

[107] V Lanovoy, *Complicity and its Limits in the Law of International Responsibility* cit. 106.

[108] A Liguori, *Migration Law and the Externalization of Border Controls. European State Responsibility* cit. 29-32; A Liguori, 'Overlap Between Complicity and Positive Obligations: What Advantages in Resorting to Positive Obligations in Case of Partnered Operations?' (2022) Journal of Conflict and Security Law 229-252.

rules in ARSIWA;[109] with a view to shedding more light on the various forms of EU Member States' responsibility under international law for unlawful acts committed in externalized, cooperative border management scenarios with the involvement of third countries. More awareness about their possible legal responsibility can also have a preventive effect – hopefully resulting in EU Member States' better human rights compliance when engaging in actions outside their borders. The intentions of such a close scrutiny are indeed more *preventive* than punitive: scholarship of this kind hopes to contribute to the reduction of the likelihood of human rights violations by shattering the myth of non-accountability and depicting in detail the applicability of various responsibility schemes, including derivative responsibility under international law in the presented cooperative border management scenarios.

[109] On this avenue, see H Ph Aust, 'Equivocal Helpers' cit. In addition, there is a (communicated) pending case currently before the ECtHR the applicants of which argue for Italy's complicity for wrongful acts committed by the Libyan Coastguard (*S.S. and Others v Italy* App n. 21660/18 which concerns a rescue operation at sea of the NGO-operated "Sea Watch" rescue vessel hindered in November 2017 by the Libyan Coastguard through a patrol boat donated by Italy and with the coordination of the Italian Maritime Rescue Coordination Centre).

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