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FROM THE EDITORIAL DESK

It is our pleasure to present the first issue of our second volume. This issue features seven articles covering both public and private law. Our catalogue throws light on topical issues in the field of arbitration, property, taxation, migration law, and influencer advertisement.

Two years after the foundation of the Journal, our team continues to provide aspiring legal scholars across the globe with the possibility to advance their research and writing skills as well as publish their work. The Atlas Law Journal further strives to develop the skills of its team - a team that has tremendously grown since our inaugural volume. It is composed of as many as 13 nationalities with varying degrees of education, working experiences, and areas of expertise. This has only proven to be an asset in providing our readers and authors with a high-quality editorial experience. We take this opportunity to appreciate all members of the Atlas Law Journal Team for investing countless hours towards a smooth editorial experience for all stakeholders.

Further, we would like to thank the Maastricht University Faculty of Law for their continued institutional support for the Atlas Law Journal. We offer our sincere gratitude to Dr. Agustín Parise for his advice and unwavering help. We also extend our gratitude to everyone that has supported us in our publicity, in particular our partners at the London School of Economics Law Review.

Likewise, we are thankful to all researchers, new and returning, for having trusted us with your work throughout the editorial process. Your interest in the Journal, combined with your thought-provoking ideas, made our work highly rewarding.

As a final point, we invite our readers to engage with the *University Maastricht Green Office* to use their voices to a socially beneficial end. The Green Office bridges the university and college staff to student bodies. At Maastricht University, the Green Office movement has turned into an international movement engaging hundreds of students and staff. It provides for different projects, initiatives, and events on sustainability in collaboration with the *Taskforce Sustainable UM 2030*.

We look forward to further expanding our readership and stimulating the legal discourse.

The Atlas Law Journal Editorial Team,
Maastricht, 31 January 2023.

The Reform of Investor-State Dispute Resolution: Curtailing Judicial Activism by Arbitral Tribunals

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TABLE OF ABBREVIATIONS:

BIT	Bilateral Investment Treaty
DoB	Denial of Benefits
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
FET	Fair and Equitable Treatment
ICSID	International Centre for the Settlement of Investment Disputes
IIA	International Investment Agreement
IIL	International Investment Law
ISDR	Investor-State Dispute Resolution
ISDS	Investor-State Dispute Settlement
MFNT	Most Favoured Nation Treatment
MIC	Multilateral Investment Court
MIT	Multilateral Investment Treaty
NY Convention	New York Convention of 1958
PCIJ	Permanent Court of International Justice
UNCITRAL	United Nations Commission on International Trade Law
VCLT	Vienna Convention on the Law of Treaties

1. INTRODUCTION

International Investment Law (IIL) was conceived to ensure that individuals investing in countries whose legal systems could not guarantee the integrity of their investment may resort to a subsidiary mechanism in order to ensure the protection of that investment.[2] This, it is alleged, created more confidence in other investors that their investments would be safe, which in turn led to more investment in States.[3] As a consequence, all parties involved could benefit: the host States received much-needed inflows of capital and investors received guarantees and protection that they would otherwise not necessarily enjoy. In order to make those guarantees and rights afforded to investors enforceable, States began consenting to have disputes that may arise between themselves and investors settled by international arbitration. This is the core advantage that IIL offers: the capacity for an investor to bypass the domestic legal order and have their claim adjudicated in arbitration before a neutral panel.[4] This is achieved through the dispute resolution clauses in International Investment Agreements (IIAs) that act as an expression of a host State's consent to arbitration. Today, over 3,000 IIAs exist, in large part due to the very potent protections of Investor-State Dispute Resolution (ISDR) clauses contained therein and the belief, albeit unproven,[5] that foreign investment leads to increased development in the host State.

However, IIL also creates many tensions. These tensions are the result of conflicting interests between multi-national corporations and the host States, in the growing foreign ownership that results in shrinking domestic ownership, in the policies designed to attract more investment as opposed to those that seek to maximise the benefits of investment, in a country's interest as a host State as opposed to its interests as a home State, and in the constraints imposed by globalisation.[6] All of the aforementioned issues are underlined by two ubiquitous and opposite forces: the interest of the investor to consolidate and profit from the

[2] NK Schefer, *International Investment Law* (3rd edition, Edward Elgar Publishing 2020), pp. 4–11; M Sornarajah, *The International Law on Foreign Investment* (4th edition, Cambridge 2017) pp. 67–75.
[3] ibid.
[4] S Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Hart Publishing 2009) p. 370.
[5] OK Fauchald, 'International investment law in support of the right to development?' (2021) 34 Leiden Journal of International Law 181, p. 200.
[6] K Sauvant, *Appeals Mechanism in International Investment Disputes* (OUP 2008) p. 11.

investment and the State's space to regulate. Far too often, the former force prevails over the latter, as will be seen throughout this paper. This is the root cause of backlash the system is currently experiencing, with investment arbitration already being prohibited between EU Member States[7] and with the Energy Charter Treaty (ECT) seemingly on the verge of collapse.[8] It is therefore evident that IIL is in need of reform if it is to survive.

There have been multiple suggestions for ISDR reform, such as increasing transparency,[9] or introducing an appeal system, be it fractured or in the form of a world investment court.[10] The main sources of reform are the United Nations Committee of International Trade Law (UNCITRAL), the EU and the International Centre for the Settlement of Investment Disputes (ICSID). UNCITRAL's Working Group III has proposed reforms based on a stand-alone review or an appellate mechanism, a Multilateral Investment Court (MIC), and changes related to the selection and appointment of arbitrators.[11] The EU echoes a similar call, advocating for a MIC.[12] Finally, the third major current of reform originates from ICSID, which has recently approved an amendment to its

[7] C-284/16, *Slowakische Republik v Achmea BV* [2018] ECLI:EU:C:2018:158; see further Sauvant (n 6) p. 11.

[8] J Tropper, 'Withdrawing from the Energy Charter Treaty: The End is (not) Near' (Kluwer Arbitration Blog, 4 November 2022) <http://arbitrationblog.kluwerarbitration.com/2022/11/04/withdrawing-from-the-energy-charter-treaty-the-end-is-not-near/> accessed 12 December 2022.

[9] F Marisi, 'The Importance of Transparency for Legitimizing Investor-State Dispute Settlement' in J Chaisse, L Choukroune, and S Jusoh (eds), *Handbook of international investment law and policy* (Springer 2021) pp. 1576–1580; Sauvant (n 6) pp. 217–218.

[10] Sauvant (n 6) pp. 231–239; AH Qureshi, 'An Appellate System in International Investment Arbitration', in P Muchlinski, F Ortino, and C Schreuer (eds), *The Oxford handbook of international investment law* (OUP 2008) pp. 1159–1167.

[11] UNCITRAL, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session* (A/CN.9/1004/Add.1, 2020); see further A Nica, 'UNCITRAL Working Group III: One Step Closer to a Multilateral Investment Court?' (Kluwer Arbitration Blog, 2020) <http://arbitrationblog.kluwerarbitration.com/2020/03/24/uncitral-working-group-iii-one-step-closer-to-a-multilateral-investment-court/> accessed 28 August 2022; 'UNCITRAL WG III Series' (Kluwer Arbitration Blog) <http://arbitrationblog.kluwerarbitration.com/category/archives/uncitral-wg-iii-series/> accessed 28 August 2022.

[12] Council of the European Union, 'Multilateral investment court: Council gives mandate to the Commission to open negotiations' (Press release, 20 March 2018) <https://www.consilium.europa.eu/en/press/press-releases/2018/03/20/multilateral-investment-court-council-gives-mandate-to-the-commission-to-open-negotiations/> accessed 28 August 2022; see further CM Brown, 'The contribution of the European Union to the rule of law in the field of international investment law through the creation of a Multilateral Investment Court' [2022] European Law Journal Special Edition 96.

arbitration rules, thus concluding a five-year reform process.[13] The amendment focuses on increasing transparency and publicity of ICSID arbitration hearings, third-party funding, and final decisions, as well as providing broader access to the ICSID additional facility arbitration.[14]

Even so, calls for reform are still on-going as most academics agree that change must come to ISDR.[15] However, what is largely missing from these calls for reform is the recognition that an appellate system with potential precedential consequences can be dangerous if some systemic issues of IIL remain unaddressed or that minor increases in transparency and structural changes can be counterproductive as long as the issues discussed in this paper are ignored.[16] While it is uncontroversial to state that increasing transparency will not fix ISDR, there is broad support and misplaced hope in the solution of a MIC. However, simply introducing an appellate system is insufficient: 'if the base is weak, as a problem cannot be dealt with by building another layer on top of a weak foundation', so too can issues with ISDR not be solved by short-sighted procedural reform.[17] Any reforms of ISDR must go beyond the superficial observation that investment tribunals are inconsistent in their awards. None of the reforms mentioned above address the problematic grounds on which tribunal jurisdiction is established or put an end to the extensive substantive tests that lead to highly problematic awards. Moreover, while the reform proposals do address the third pillar of this paper none of these push for expanding the grounds of review, which is the most pressing issue at the enforcement stage plaguing IIL.

Accordingly, this paper seeks to answer the question: what are the fundamental issues that need to be resolved in any serious ISDR reform?

[13] International Centre for Settlement of International Disputes, 'ICSID Administrative Council Approves Amendment of ICSID Rules' (Press release, 21 March 2022) <https://icsid.worldbank.org/news-and-events/communiques/icsid-administrative-council-approves-amendment-icsid-rules> accessed 28 August 2022.

[14] F Dias de Almeida and E Milou Moison, 'Amended ICSID Arbitration rules will take effect from 1 July 2022' (Houthoff Arbitration Blog, 13 June 2022) <https://www.houthoff.com/expertise/Practice/Arbitration/Arbitration-Blogs/Amended-ICSID-Arbitration-rules-will-take-effect-from-1-july-2022> accessed 28 August 2022.

[15] NJ Diamond, 'ISDS Reform and Advancing All "Generations" of Human Rights' (Kluwer Arbitration Blog, 17 June 2020) <http://arbitrationblog.kluwerarbitration.com/2020/06/17/isds-reform-and-advancing-all-generations-of-human-rights/> accessed 28 August 2022.

[16] Sauvant (n 6) p. 267.

[17] ibid p. 44.

Another way to pose this same question is: what are the core issues that delegitimise IIL that must be reformed in order to legitimise it? In order to answer this question, the paper will assess issues that appear within all three stages of investment arbitration: the jurisdiction of tribunals to decide on claims, the material assessment of the claim by tribunals, and the enforcement of the award. The paper will rely heavily on the work of other academics to establish the standards of equivalent notions under national law that are considered in IIL and to illustrate issues pervasive in the enforcement stage of ISDR. Apart from that, this paper will analyse the specific reasoning of investment tribunals and illustrate why some decisions do not stand to reason. The paper will focus on all sources of ISDR because arbitral tribunals pervasively cite each other, and there is no ISDR institution that is immune from the issues discussed.

First, the paper will explain the research methodology used in order to substantiate the claims made. At chapter 3, it will proceed to argue that arbitral tribunals exert jurisdiction even where there are reasonable interpretations of investment treaty provisions that would bar jurisdiction over a claim or at the very least, their admissibility. Accordingly, chapter 3 will demonstrate that the capacity of tribunals to establish jurisdiction must be curtailed. At chapter 4 the paper will illustrate that tribunals tend to take highly problematic substantive decisions once jurisdiction is established. This will be demonstrated through an analysis of the limits of property rights under national law and the corresponding capacity of States to interfere with those rights, which will be contrasted with the equivalent under IIL. Such an exercise will reveal that property rights under IIL are much more extensive than those under national law. Thereby, chapter 4 will demonstrate that tribunal capacity to issue such problematic awards should be curtailed. Finally, chapter 5 will provide an overview of the enforcement stage in ISDR, which will elaborate on the high thresholds of review and will make plain the need to expand avenues for review.

Once it is established that tribunals are deciding on issues that they perhaps should not be deciding on; that they are allowed to do so on the grounds that they themselves decide are appropriate, which even other tribunals find suspect; and that there are effectively no avenues to appropriately challenge these decisions, it will be plain to see that any reform of ISDR must begin by addressing these issues.

2. METHODOLOGY

In furtherance of the stated goal, this paper employs doctrinal legal research in its third and fifth chapters, given that it synthesises various rules, case-law, principles, norms, interpretative guidelines, and values of investment arbitration.[18] The focus in chapter 3, on jurisdictional overreach, is placed squarely on the interpretations and reasoning of arbitral tribunals due to the impact of tribunal decisions and the broad discretion of arbitrators. While the languages of Bilateral Investment Treaty (BIT) and Multilateral Investment Treaty (MIT) provisions are very different from one to another and therefore important, the paper explains these differences only in the context of the various analysed cases because synthesising the treaty practice on the subject would shift attention away from the practice of tribunals. Chapter 5 on enforcement relies more heavily on the letter of the law and only offers brief examples of its application due to the concrete language of the relevant enforcement provisions and the lack of doctrinal controversy in the application of these rules. While some Investor-State Dispute Settlement (ISDS) cases do get bogged down at the enforcement stage, the analysis in such cases continues to revolve around the restrictive standards imposed, such as whether or not the arbitral tribunal manifestly exceeded its capacity, or whether consent was adequately established, as exemplified by the enforcement of the *Yukos* award in the Netherlands.[19]

Chapter 4, on problematic material decisions, employs comparative legal research, given that it compares and contrasts the applicable thresholds of expropriation in investment arbitration and the equivalent limits under national law.[20] However, it is necessary to highlight that this chapter does not provide a comprehensive guide to national approaches on property as that would go beyond the pursued scope. Moreover, this paper does not purport to delineate all areas where investment jurisprudence might be problematic. The reason why chapter 4 focuses on expropriation, and not on the other areas of investor treatment, is because it is here that some of the most controversial aspects of investment law

[18] T Hutchinson and NJ Duncan, 'Defining What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 84, p. 84; C Morris and C Murphy, *Getting a PhD in Law* (Hart Publishing 2011) pp. 30–31.
[19] Case C/20/01595 (5 November 2021) (Hoge Raad).
[20] Morris and Murphy (n 18) p. 37.

are illustrated, such as the elevation of the investor's property rights above the property rights of everyone else in society.

The scope of this paper is to provide an overview of the main issues that delegitimise IIL, in the hope that by highlighting these issues, the reform proposals of IIL will shift towards addressing them. The paper neither provides nor intends to provide a comprehensive analysis of the peripheral issues considered. It operates on the premise that even one instance of judicial overreach in ISDR is highly improper and must be curtailed. The paper does propose suggestions on what reformers should be aiming for, but it limits itself to these suggestions in the interest of maintaining focus on the issues that need to be addressed.

3. UNWARRANTED EXTENSION OF JURISDICTION

The practice of arbitral tribunals illustrates the willingness to extend jurisdiction beyond what could reasonably be said the terms of the treaty suggest. This chapter will prove the extent of the aforementioned discretion and the ways in which this is unreasonably applied. It will be argued that tribunals should err on the side of caution whenever the terms of a BIT are inconclusive. As argued by Bolivia in the course of the *AdT* arbitration and echoed by other governments on other occasions: "jurisdiction should be limited to circumstances that a State can reasonably contemplate, as consent is a cornerstone of arbitration".[21] It is important to underline that tribunal decisions are heavily influenced by the wording of the treaty provisions and the way that the respondents formulate their objections.[22] Accordingly, the paper will be cautious in making any generalisations. The point sought to be made is that even one decision where tribunals extend their mandate is cause for concern and even more so when there is a general trend. Parties should not be beholden to the whims of tribunals. Therefore, any reform of ISDR must ensure that even if tribunals take liberties with their discretion, there is something that blunts the innate inequity that this creates. To do so this chapter will explore tribunal jurisprudence on Most Favoured Nation Treatment (MFNT), nationality

[21] *Aguas del Tunari, SA v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (21 October 2005) para. 194.
[22] M Couet, 'Round-Tripping in International Investment Law: A Teleological Assessment' (2021) 22 Journal of World Investment & Trade 459, p. 473.

of the claimant and how this can be unduly claimed, umbrella clauses, and reflective loss.

3. 1. Extending Host State Consent Through MFNT

MFNT is a core obligation undertaken by States in most IIAs. It provides a right for the foreign investor to be treated no less favourably than what the host State affords to foreign investors of other nationalities, unless special exceptions apply, such as in the case of free trade agreements.[23] Nevertheless, some tribunals have used MFNT to extend the protections offered to investors to include the most favourable standard of protection that the State party to the BIT has agreed to in other BITs, including the dispute settlement clauses contained therein. This is particularly the case where the MFNT provision is vague or general. Given that where certain limits to MFNT are expressly and unambiguously established, tribunals are unable to misconstrue the intent of the parties to the BIT.[24] Tribunal jurisprudence indicates that the wording of the MFNT commitment is decisive in determining the willingness of the tribunal to extend the jurisdictional protections of other BITs to the investor.[25]

On the one hand of the doctrinal debate is the approach of the *Maffezini* tribunal, which set aside an 18-month consultation or "cooling-off" period requirement expressly provided for in the BIT at issue (Argentina-Spain) due to the existence of an immediate arbitration clause in an unrelated BIT (Chile-Spain).[26] The main reasoning behind this conclusion was that "dispute settlement arrangements are inextricably related to the protection of foreign investors" and that, therefore, it was necessary to allow the investor access to arbitration in order to secure their substantive rights under the BIT.[27]

On the other side of the debate, the tribunal in *Plama v. Bulgaria* recognised the generally accepted practice of recourse to arbitration in ISDR.

[23] P Acconci, 'Most-Favoured-Nation Treatment', in P Muchlinski, F Ortino, and C Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) pp. 381–387.
[24] Schefer (n 2) p. 521; C Schreuer, 'Consent to Arbitrate' in P Muchlinski, F Ortino, and C Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) pp. 851–855.
[25] *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on Jurisdiction (3 July 2013) paras. 76–78.
[26] *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction (25 January 2000).
[27] ibid paras. 54, 58–59.

However, it stressed that this general practice does not override the concrete BIT that is to confer such a right on the basis of the parties' consent to arbitration.[28] The tribunal underlined the necessity of agreement to arbitration being "clear and unambiguous".[29] It then assessed the ambiguity of the MFNT clause at issue, which read, "treatment which is not less favourable than that accorded to investments by investors of third States" and, by way of reference to other BITs, inferred that such wording was not clear and unambiguous enough to allow access to the dispute settlement clauses of other BITs.[30] The *Plama* tribunal also placed heavy emphasis on the lack of capacity of an MFNT clause to replace an existing procedure as is dictated by the BIT, stating "It is one thing to add to the treatment provided… it is quite another to replace a procedure specifically negotiated by the parties".[31] Finally, the *Plama* tribunal countered the perceived legal impact of the *Maffezini* decision, arguing that the approach adopted therein causes chaos that cannot be reasonably presumed to be the intent of the contracting parties since such an approach leads to the multilateralisation of BITs.[32] Nevertheless, MFNT to expand host State consent was reaffirmed and expanded by the *Garanti Koza* tribunal.[33] In the dissent to that decision, arbitrator Laurence Boisson de Chazournes underlined the paramount importance of adequately establishing host State consent to arbitration,[34] as well as the obligation to respect the limits to jurisdiction imposed by international law on ISDR tribunals as a corollary of the *kompetenz-kompetenz* that such tribunals have.[35] On that basis, the arbitrator insisted that the consent to ISDR must be established pursuant to the concrete BIT in question and to establish such consent by importing formulations from other BITs violated the aforementioned principles of international law.[36] The tribunal therefore considered that the interpretation of MFNT was also subject to the consent of the host State. This dissenting opinion triggered an avalanche of

[28] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 February 2005) para. 198.
[29] ibid.
[30] ibid paras. 200–208.
[31] ibid para. 209.
[32] ibid para. 219.
[33] *Garanti Koza* (n 25) paras. 73–74.
[34] *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Dissenting Opinion of Arbitrator Laurence Boisson de Chazournes (3 July 2013) para. 2.
[35] ibid paras. 5–6.
[36] ibid para. 7.

changes to model BITs as well as subsequent reluctance by ISDR tribunals to establish consent through MFNT.[37]

It is clear that while tribunals seemed to have corrected themselves, there was no obligation or imperative to do so. There was nothing to bar the adoption of such an extensive interpretation of MFNT clauses until other tribunals finally made a compelling argument against such an approach. However, such self-correction is absent in other areas of jurisprudence on the extent of tribunal jurisdiction, such as in the formalistic interpretation of the nationality requirement and the approach to "control" under Article 25(2) (b) ICSID Convention.

3.2. Extending the Nationality Requirement

3.2.1. Basis of Tribunals' Personal Jurisdiction and Expansive Attitudes to Personal Jurisdiction

According to Article 25(1) ICSID Convention, ICSID jurisdiction is established where there is a legal dispute arising directly out of an investment, the dispute is between a contracting State and a national of another contracting State.[38] Moreover, both parties must consent to ICSID jurisdiction. Putting aside the other elements, it is clear that in order to establish personal jurisdiction over the parties, a tribunal must principally satisfy itself that both the investor and the State have consented to arbitration in an underlying IIA and that the investor is entitled to access ISDR through the underlying treaty.[39] State consent is automatically established through Article 25(1) ICSID in the same way that it is established through ISDR clauses in IIAs. Accordingly, the focus at the jurisdictional stage is on the nationality of the investor; tribunals have to satisfy themselves that an investor has the privilege to consent to arbitration. Article 25(2) of the ICSID Convention defines a "National of another Contracting State" as one that cumulatively meets a positive and negative requirement where the investor must be a national of another contracting party and cannot be a national of the host

[37] Schefer (n 2) p. 535.
[38] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ('ICSID Convention') art 25(1).
[39] Schreuer in Muchlinski et al. (n 24) p. 831; Couet (n 22) p. 460.

State.[40] Alternatively, a juridical person may also meet the ICSID nationality requirement if it is a domestic company controlled by a corporation legally constituted under the laws and regulations of another State party, as long as this is stated in the underlying IIA.[41]

The issue IIL is confronted with is that IIAs are entered into by a State to protect investors of the other signatory or signatories with the assumption that the same treatment will be afforded to investors of that State in the territory of the other party or parties to the treaty. That is the very basic goal of an IIA and has been such since the inception of IIL. Nevertheless, the whole *raison d' être* of IIAs is being undermined by the expansive jurisprudence referred to below.

The aforementioned standards have been the subject of major controversy in ISDR because tribunals have adopted a very formal test for attributing nationality in cases of individuals.[42] The regrettable consequence is that investment law is often used to challenge the home State by nationals of that very State. This is termed "round tripping".[43] Aside from round-tripping, the nationality requirement to establish jurisdiction is further expanded by a broad approach to the notion of "control" where the investor is a company registered and active in the host State but is treated as a national of the other party due to alleged control by a national of the other party to the IIA. Finally, the aforementioned oversights in the law are widened by the refusal of some tribunals to give effect to Denial of Benefits (DoB) clauses. The following subchapters will expand on these points.

3.2.2. Round-Tripping

In *Tokios Tokeles*, a Lithuanian advertising, publishing, and printing company that wholly- owned a subsidiary in Ukraine, initiated ISDR proceedings under the Ukraine–Lithuania BIT. However, the claimant was 99% owned by Ukrainians, headquartered therein, and had all its business activity in Ukraine.[44] Ukraine

[40] ICSID Convention (n 38) art 25(2)(a).
[41] ibid art 25(2)(b).
[42] A Reinisch, *Advanced Introduction to International Investment Law* (Edward Elgar Publishing 2020) p. 110.
[43] Couet (n 22) pp. 461–464.
[44] *Tokios Tokelės v Ukraine*, ICSID Case No ARB/02/18, Decision on Jurisdiction (29 April 2004) para. 37.

contested the tribunal's jurisdiction on the basis that the claimant was not "a genuine entity of Lithuania".[45] The tribunal, citing Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT), considered only the ordinary meaning of the terms within the BIT.[46] It found that as long as the claimant met the requirements imposed by Lithuania to be considered one of its nationals, it would be considered as such.[47] Given the tribunal's unwillingness to consider that the Lithuanian company was a mere letterbox for the Ukrainian subsidiary, it established that the claimant had standing to give consent to arbitration.[48] Moreover, the tribunal negatively inferred that the lack of a DoB illustrated the State parties´ deliberate intention to treat the matter of nationality on a purely formal basis.[49] The president of the tribunal dissented, stating that the majority had failed to give effect to the object and purpose of the ICSID Convention due to the "indisputable and undisputed Ukrainian character of the investment".[50] He further argued that the evident purpose of Article 25(2) (b) ICSID is to protect foreign, not domestic, investments.[51]

The tribunal followed the same formalistic approach to nationality in *Rompetrol v. Romania*, where an ICSID tribunal found that the claimant was lawfully incorporated in the Netherlands even though the claimant had no substantial activity in the Netherlands, was owned by a Romanian national, and all other matters relating to the dispute occurred in Romania.[52] The same conclusion was reached in the factually almost similar *Yukos* case on the basis of the same reasoning,[53] and reaffirmed in *Isolux v. Spain*.[54] More recently, this view was upheld in *Mera Investments* where a Cypriote company was said to be investing in Serbia despite the fact that the Cypriote company was fully owned by

[45] ibid para. 21.
[46] ibid para. 38.
[47] ibid.
[48] ibid.
[49] ibid para. 35.
[50] *Tokios Tokelės v Ukraine*, ICSID Case No ARB/02/18, Dissenting Opinion of Arbitrator Prosper Weil (29 April 2004) para. 20.
[51] ibid, para. 23.
[52] *Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility (18 April 2008) para. 50–51.
[53] *Hulley Enterprises Limited (Cyprus) v The Russian Federation*, PCA Case No AA 226, UNCITRAL, Interim Award on Jurisdiction and Admissibility (30 November 2009) paras. 411, 415.
[54] *Isolux Infrastructure Netherlands BV v Kingdom of Spain*, SCC Arb. V2013/153, Award (12 July 2016) para. 667.

a Panamanian company, which in turn was owned by a Serbian national. The tribunal refused to pierce the corporate veil and see the investment for what it was: a Serbian national creating multi-level shell companies to challenge his own State under a more preferential regime. The claimant was deemed a Cypriote company because the BIT merely required constitution in accordance with this country's laws.[55]

While some tribunals have rejected such an application of the VCLT and applied a more comprehensive interpretation of the nationality requirement, being willing to attribute due weight to the reality of the investment in accordance with the object and purpose of the ICSID,[56] these are few and far between.[57] The effect of this is that some of the basic elements on the basis of which the State grants consent to engage in arbitration are undermined. Despite recognising the importance of consent for any arbitration, tribunals seem to afford too much latitude to investors to claim nationality. The issue here is that all arbitral tribunals exist only on the basis that both parties to a dispute have voluntarily submitted themselves to its authority. Regardless of the possible interpretations that can be afforded to the particular language of a treaty, a State signs an IIL with another State with the expectation that its own nationals or nationals of other States will not use it as consent for ISDR. Tribunals should be expected to abide by their ad-hoc role and duty to delineate consent to arbitrate and opt for a more restrictive, cautious interpretation. A serious reform of IIA must reflect this.

3.2.3. Investors "Controlled" by Foreign Companies

Given that many States require an investment to be carried out through a domestic company, many IIAs also allow access to ISDR for domestic companies controlled by a national of other contracting States. ICSID also endorses this possibility provided the underlying BIT allows it.[58] The notion of control, however, is not

[55] *Mera Investment Fund Limited v Republic of Serbia*, ICSID Case No ARB/17/2, Decision on jurisdiction (30 November 2018) paras. 62, 70.
[56] *Venoklim Holding BV v Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/22, Award (3 April 2015) para. 156; *TSA Spectrum de Argentina SA v Argentine Republic*, ICSID Case No ARB/05/5, Award (19 December 2008) para. 153.
[57] Couet (n 22) p. 472.
[58] ICSID Convention (n 38) art 25(2)(b).

defined by ICSID and only rarely defined by States in IIAs.[59] Accordingly, tribunals have to define this term themselves. Thus, tribunals are required to decide on an issue which could reasonably be decided either way. Some tribunals show restraint and carefully examine the impact of their decisions; others do not.

In *AdT v. Bolivia*, the tribunal found that the term "control" could be validly interpreted as either legal capacity to control, where it is sufficient that the foreign entity merely has the ability to influence the decisions of the domestic company but does not need to exercise such control, or actual or factual control, where there must be a concrete influence exerted upon the domestic company.[60] Nevertheless, the tribunal cited the case of ownership where "control" is a recognised component, but the parent company may still choose not to actually influence activity in the daughter company.[61] It considered that the "exercise of [the] actual control" test was too vague as to be operational.[62] Pointing to the spirit of the BIT in encouraging investment,[63] it found that the notion of "control" entails simply the capacity to exercise actual control and found that the Bolivian company was controlled by Dutch nationals.[64] In his dissent, arbitrator Alberro-Semerena cited the past participle nature of the adjective "controlled" in the BIT in question to find that the majority erred in its interpretation. He argued that "controlled" implies "the effect of an action" and the lack of any special meaning to be afforded to the notion by the drafters of the BIT.[65] The dissenting arbitrator reasoned that to afford the Bolivian company ISDR protection would contradict the object and purpose of the BIT because Bolivian nationals fully ran the domestic company and its Dutch owners did not exercise any control over it.[66]

The approach of the *AdT* tribunal was rejected in *Caratube v. Kazakhstan*, where the tribunal did not recognise an American shareholder holding 92% of shares as the owner of a domestic company because he did not exercise any control

[59] C Schreuer, *The ICSID convention: a commentary on the Convention on the settlement of investment disputes between States and nationals of other States* (CUP 2009) pp. 813–825.
[60] *Aguas del Tunari* (n 21) paras. 227, 231–233.
[61] ibid para. 245.
[62] ibid para. 246.
[63] ibid para. 247.
[64] ibid para. 264.
[65] *Aguas del Tunari, SA v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Declaration of José Luis Alberro-Semerena (21 October 2005) paras. 26–27.
[66] ibid para. 41.

and could therefore only be considered a mere passive shareholder.[67] Evidently, there is no crystallisation of a dominant approach.

There is further inconsistency in the capacity of investors that hold the nationality of the host State, alongside other nationalities, to challenge that State. In *Champion Trading*, the tribunal found that nothing precluded a dual national from ultimately controlling the claimant under Article 25(2) (b) ICSID.[68] However, the tribunal in *Eagle Games* found that to agree with such an interpretation of Article 25(2) (b) ICSID would result in the unreasonable consequence that the negative nationality requirement could be circumvented by establishing a company in the host State and then simply asserting foreign control of that company.[69]

The issue with adopting such permissive attitudes with regard to the control requirement is that – once again – the domestic company that is merely meant to be operating as an emanation of the investor, de facto conducts the whole business for itself. The result is that IIL is used by a claimant to challenge his or her own State. The relationship with the foreign investor is morphed into a transaction where a domestic company pays dividends in exchange for the right to use the nationality of that foreign investor. It is argued that this is a clear loophole in the law solely created by the careless interpretations of tribunals.

3.2.4. Restrictive Interpretation of Denial of Benefits (DoB) Clauses

The issues addressed in this sub-chapter would be much less damning if tribunals were willing to give effect to DoB clauses. DoB clauses are investment treaty provisions that exclude from the treaty's protection investors that technically satisfy the personal scope of the IIA but nevertheless maintain no real connection with the other party to a BIT.[70] Thus, a theoretical mechanism exists that prevents what is referred to above as the circumvention of the very *raison d' être* of the treaty. This mechanism is not widely implemented, as less than 10% of BITs have

[67] *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award (5 June 2012) paras. 406–407.
[68] Schefer (n 2) p. 202.
[69] *Burimi SRL and Eagle Games SH.A v. Republic of Albania*, ICSID Case No. ARB/11/18, Award, (29 May 2013) para. 121.
[70] Schefer (n 2) pp. 174–175; L Mistelis and C Baltag, ''Denial of Benefits' Clause in Investment Treaty Arbitration' (Queen Mary University of London 2018) pp. 1–4.

such clauses inserted,[71] but tribunals are divided on whether to grant them full effect. The divide in tribunal jurisprudence is due to the wording of some DoB clauses that employ the term "may deny benefits" or "reserve the right to deny" as opposed to "shall deny".[72] Terms such as "may deny" are used to interpret the DoB clause as requiring that the State actually exercise the right to deny benefits.[73] Many tribunals thus consider that the existence of the right to deny benefits is distinct from actually exercising it.[74] They also consider that DoB clauses do not have retroactive effect unless explicitly and so worded in the treaty,[75] and that triggering such clauses must follow a specific and redundant procedure.[76] Such tribunals argue that had the State parties intended to have DoB clauses apply automatically, the BIT provision would be explicit in that direction.[77] Moreover, this right must be exercised publicly and with notice to the particular investor.[78] Tribunals consider that to interpret DoB clauses otherwise creates too much uncertainty for the investor and undermines their legitimate expectations if there

[71] 'Investment Policy Hub Mapping of IIA Content' (UNCTAD) <https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping#iiaInnerMenu> accessed 9 August 2022.

[72] Article I(b) of US-Democratic Republic of the Congo BIT [1989] provides: Each Party reserves the right to deny to any of its own companies or to a company of the other Party the advantages of this Treaty…if nationals of any third country control such company; Article 8.16 of the Canada-EU Comprehensive Trade and Economic Agreement ('CETA') provides: A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of that Party and to investments of that investor if… ; Article 1113 of the North American Free Trade Agreement ('NAFTA'), entered into force on 1 January 1994 provides: A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such Party and to investments of such investor if investors of a non-Party own or control the enterprise and the denying Party if…; Article 8 of the Iran-Slovakia BIT, entered into force on 30 August 2017 provides: The benefits of this Agreement shall be denied…; Hong Kong, China SAR – ASEAN Investment Agreement (2017) Article 19.5 provides: A Party's right to deny the benefits of this Agreement as provided for in this Article may be exercised at any time… . (emphasis added)

[73] Mistelis and Baltag (n 70) pp. 13–16.

[74] *Plama* (n 28), paras. 155–156.

[75] C Nunez-Lagos, 'The invocation of "denial of benefits clauses": when and how?' (Kluwer Arbitration Blog, 2014) <http://arbitrationblog.kluwerarbitration.com/2014/02/17/the-invocation-of-denial-of-benefits-clauses-when-and-how-2/> accessed 9 August 2022.

[76] *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award (22 June 2010) para. 224; *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Traiding Ltd v. Republic of Kazakhstan*, SCC Case No. V116/2010, Award (19 December 2013) para. 745.

[77] *Khan Resources Inc., Khan Resources B.V. and CAUC Holding Company Ltd. v. Government of Mongolia*, UNCITRAL, Decision on Jurisdiction (25 July 2012) paras. 419, 421.

[78] *Plama* (n 28) para. 157; *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction (1 February 2016) para. 147; *Khan Resources Inc., Khan Resources B.V. and CAUC Holding Company Ltd. v. Government of Mongolia*, UNCITRAL, Decision on Jurisdiction (25 July 2012) para. 423.

could always be a looming possibility that they could be denied investor protections at any time.

The counter argument to the aforementioned position is that States only become aware of the potential application of DoB after a dispute has arisen.[79] Moreover, and using the tribunals' own train of thought, if States intended to mandate prior notification, they would explicitly use such terms, as some have actually done.[80] Furthermore, it is doubtful that States are even capable of issuing prior notification, particularly for those investments that do not require licencing or direct interaction with the government before the actual investment is made.[81] A further matter worthy of consideration is the fact that some tribunals consider DoB clauses in the merits stage of the case because "to do otherwise would unduly restrict tribunal jurisdiction".[82] However, the opposite is also true, as considering this matter at the merits stage creates a presumption that the tribunal has the capacity to consider the matter in the first place. Such tribunals argue their position on the basis that most clauses deny benefits to "this part", that is, the substantive part of the IIA conferring specific protections to the investor.[83] This has received much more pushback from other tribunals as compared with the issue of the automaticity of DoB clauses; they argue that ISDR is an advantage granted by the BIT in its totality. Since DoB clauses have the effect of preventing the tribunal from deciding on the underlying matters, it should be considered a jurisdictional issue.[84]

Once again, the discussion above illustrates the willingness of tribunals to engage in judicial creativity and to add meanings to treaties that, while

[79] Mistelis and Baltag (n 70) pp. 17–18.
[80] Article 16(3) of Brazil-Angola Cooperation and Investment Facilitation Agreement (2017): "Subject to prior notification and consultation, any Party may deny the benefits of this Agreement to an investor of the other Party or to investments of this investor, if…".
[81] Mistelis and Baltag (n 70) pp. 17–18.
[82] J Paulsson, 'Jurisdiction and Admissibility' in G Asken (ed), *Global reflections on international law, commerce and dispute resolution: Liber Amicorum in honour of Robert Briner* (ICC Publishing 2005) pp. 601–617.
[83] *Plama* (n 28) paras. 147–148; *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. 227, Interim Award on Jurisdiction and Admissibility (30 November 2009) paras. 441–443; similarly addressed in *Veteran Petroleum Limited (Cyprus) v. Russian Federation*, PCA Case No. 228, Interim Award on Jurisdiction and Admissibility (30 November 2009); and in *Hulley Enterprises Limited (Cyprus) v. Russian Federation*, PCA Case No. AA 226, Interim Award on Jurisdiction and Admissibility (30 November 2009).
[84] *Ulysseas, Inc. v. Ecuador, PCA Case No. 2009-19, Interim Award (28 September 2010)* para. 172; *Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia*, PCA Case No. 2011-17, Award (31 January 2014) para. 381.

grammatically plausible in an overly narrow sense, are detrimentally expansive. The argument that the respondents must declare that a particular investor is denied benefits before the dispute arises renders the DoB clause practically inoperable. Such an interpretation would require the host State to investigate and analyse all investors under its jurisdiction and essentially compile a list of those to whom one of the many IIAs to which the State is a party does not apply. Although it is theoretically possible, doing so would entail a significant effort and drain resources of the State. This also ignores the reality of how investment disputes arise, with the State often only becoming aware of a dispute after it has arisen.[85] The difficulty in enforcing the aforementioned interpretation would suggest that if a State had intended to only trigger DoB clauses before a dispute arises, it would have made this explicit in the treaty. Finally, the *Liman Caspian, Plama* and *Stati* tribunals fail to explain why a State would agree to such a heavily investor-friendly commitment. It follows from the aforementioned that such an interpretation is too expansive to be considered a legitimate interpretation of a treaty provision that indicates nowhere such an outcome.

3.3. Umbrella Clauses

While contracts between States and investors are traditionally considered outside the purview of ISDR as their breach is generally considered a matter of domestic private law, there are certain provisions in IIAs – coined umbrella clauses – which have been interpreted as allowing investors to claim ISDR protection for breach of contract.[86] The wording of these clauses range from the undertaking of "observance of any other obligation undertaken by the State with regard to the investment",[87] to a "constant guarantee to observe commitments entered into with respect to the investment",[88] to "[the commitment to] create and maintain a legal framework apt to guarantee continuity of legal treatment".[89] The problem with

[85] Mistelis and Baltag (n 70) p. 18.
[86] Schefer (n 2) p. 538.
[87] US–Romania BIT (signed 28 May 1992, entered into force 15 January 1994) art II.2(c); subject of ISDS in *Noble Ventures, Inc v Romania,* ICSID Case No ARB/01/11, Award (12 October 2005).
[88] Swiss–Pakistan BIT (signed 11 July 1995, entered into force 06 May 1996), art 11; subject of ISDS in *SGS Societe Generale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision on Objections to Jurisdiction (6 August 2003).
[89] Italy – Jordan BIT (signed 21 July 1996, entered into force 17 January 2000) art 2; subject of ISDS in *Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/ 13, Decision on Jurisdiction (29 November 2004).

umbrella clauses is that these do not expressly refer to contracts undertaken by a State-affiliated entity and an investor but can be used to find a simple contract violation to be an internationally wrongful act.[90]

In *SGS v. Philippines*, the tribunal held that to extend umbrella clauses to breach of contract was "firmly within the realm of investment law".[91] It argued that the clauses in question were there to "provide assurances to foreign investors with regard to the performance of obligations assumed by State under its own law with regard to specific investments".[92] In *Eureko v. Poland* and *Noble Ventures v. Romania*, it was argued that the provisions in question were sufficiently clear, capacious, and lacking in obscurity, as "any" obligation, meaning all obligations entered into with the investor, were subject to the protections offered by the IIA.[93] In *Burlington Resources v. Ecuador*, the tribunal considered that umbrella clauses can also apply even in the absence of the exercise of sovereign powers.[94] In *LG&E v. Argentina*, the tribunal established that national legislation can also be considered umbrella clauses if these are sufficiently exclusive. The tribunal established the specificity of the law in relation to the claimant by pointing to the fact that the legislation in question fixed and regulated the tariff scheme, ensuring the value of the claimant's investment.[95] However, this has "far-reaching, unqualified and automatic consequences" for the host State.[96] To subject these breaches to investment arbitration is furthermore unnecessary, as the contract itself will usually designate an appropriate dispute settlement procedure. This also infringes upon the jurisdiction of the host State's courts. It opens up the IIAs' far-reaching standards of Fair and Equitable Treatment (FET), protection against expropriation, and favourable treatment standards to issues that these IIAs were not intended to address.

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[90] Schefer (n 2) p. 539; R Pereira and S Fleury, 'Umbrella clauses: a trend towards its elimination' (2015) 31 Arbitration International 679, pp. 681–685.
[91] *SGS Société Générale de Surveillance SA v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004) para. 127.
[92] ibid paras. 115–116.
[93] *Eureko BV v Republic of Poland*, Partial Award (19 August 2005) para. 246; *Noble Ventures, Inc v Romania*, ICSID Case No ARB/01/11, Award (12 October 2005) para. 61.
[94] *Burlington Resources Inc and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (2 June 2010) para. 190.
[95] *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006) para. 174.
[96] *SGS Societe Generale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision on Objections to Jurisdiction (6 August 2003) paras. 166–167.

In *SGS v. Pakistan*, the tribunal rejected the idea that simple contractual violations can be worthy of international protection.[97] It also pointed out that upholding umbrella clauses requires setting aside the dispute settlement mechanism agreed to in the contract itself.[98] The tribunal reasoned that a vague treaty commitment could not be used to set aside concrete contractual provisions;[99] such a position was also supported in *Salini v. Jordan*.[100] Numerous States seem to agree with the *SGS v. Pakistan* tribunal given that many have either excluded umbrella clauses from their model BITs and any other BITs they have concluded, or have explicitly rejected it within the terms of a treaty.[101] Out of 54 new instruments in 2017 relating to investment, only two (3.7%) contain an umbrella clause, namely, the Austria-Kyrgyzstan BIT and the Japan-Iran BIT.[102] The discussion above speaks to a need to prevent the interpretation of obscure clauses to include contractual violations.

3.4. Reflective Loss

Standard corporate law doctrine throughout the world perceives the corporation in two dimensions: on the one hand, the corporation shields the assets of the owners from the corporation's creditors;[103] on the other hand, the corporation is shielded from the creditors of its owners.[104] Nevertheless, the owners of the corporation, the shareholders, can theoretically suffer direct or indirect loss.[105] Direct loss occurs when the rights of shareholders are directly infringed, such as the right to participate in decision-making or the right to receive dividends as mandated by the articles of association.[106] Protection for this type of loss is typically well entrenched.[107] The other type of conceivable loss that a shareholder might incur is the injury to the value of the company, which – in turn – may affect the amount of

[97] ibid para. 167.
[98] ibid para. 168.
[99] ibid.
[100] *Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/ 13, Decision on Jurisdiction (29 November 2004) para. 155.
[101] Pereira and Fleury (n 90) pp. 688–690.
[102] ibid.
[103] V Korzun, 'Shareholder Claims for Reflective Loss: How International Investment Law Changes Shareholder Corporate Law and Governance' (2018) 40 University of Pennsylvania Journal of International Law 189, p. 192.
[104] ibid.
[105] ibid p. 198.
[106] ibid.
[107] ibid.

compensation through dividends or the value of the shares.[108] This is coined reflective loss. Reflective loss typically receives no protection at a domestic level. In the US, shareholders can raise claims for damages they have incurred, or they can also initiate derivative action; that is, actions on behalf of the company.[109] However, derivative actions are limited to the harm done to the company, not to the shareholder.[110] Accordingly, the shareholder merely acts as a company representative but is explicitly prohibited from claiming damages based on losses that they incurred as an aftereffect of the damage suffered by the company, and it is only the company that is reimbursed if wrongdoing is found. The US's firm rejection of the reflective loss doctrine was expressed by its representative in the *Gami investments* dispute.[111] A similar approach can be seen in the UK where courts have also explicitly condemned the recovery of "a sum equal in value to the diminution in the market value of his/her shares".[112] Courts in the UK are hostile to such actions because it would allow double recovery, multiple identical claims, inconsistent outcomes, and would negatively impact other stakeholders such as creditors.[113] UK jurisprudence also allows for some exceptions to this rule, but these exceptions are narrowly defined and thus do not undermine the premise that municipal law rejects reflective loss. This premise is further strengthened by European Court of Human Rights (ECtHR) jurisprudence as well as German, Dutch, and French practices, that also reject such claims.[114] Even some investment tribunals have found it "not conceivable that a Mexican corporation becomes entitled to the anti-discrimination protections of international law by virtue of the sole fact that a foreigner buys a share of it", conveying that even in IIL some tribunals resist the notion that loss in value of shares can entitle an investor to access ISDR.[115]

[108] ibid p. 199.
[109] ibid p. 201.
[110] *Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 351 (1988) (US Supreme Court); *F.D.I.C. v. Howse*, 802 F. Supp. 1554, 1562 (1992) (US Supreme Court).
[111] *Gami Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL, Final Award (15 November 2004) para. 29: The United States in its written observation before this Tribunal accepts that Article 1116 entitles minority shareholders to bring a claim for loss or damage on their own behalf. It argues however that Article 1116 does not reflect an intent to derogate from the rule that shareholders may assert claims only for injuries to their interests and not for injuries to the corporation.
[112] *Prudential Assurance v Newman Industries* (1982) Ch 204 (English Court of Appeal).
[113] *Johnson v. Gore Wood & Co.* (2002) 2 AC 1 (HL) 62 (UK House of Lords).
[114] Korzun (n 103) pp. 193, 206–208.
[115] *Gami Investments, Inc.* (n 111) para. 115.

The discussion above stands in stark contrast with the practice of other investment tribunals, which have recognised the possibility of shareholders claiming ISDR protection for the loss in value of shares and to claim compensation on that basis.[116] Tribunals were able to reach this conclusion because the definitions "investment" and "investor" are wide enough to accommodate claims for diminution in value of company stock. In ISDR, the well-established *Salini* criteria define an investment as the contribution of an asset for certain duration and the assumption of risk by the investor.[117] The *Salini* tribunal also left room for consideration of the economic benefit that such contribution should have for the host State, but there is disagreement between tribunals on the inclusion of this final criterion.[118] These criteria are extremely influential because IIAs rarely define the concept of "investment". In any case, none of the above criteria precludes, for example, damage done to the value of shares as a result of government actions. Moreover, many investment treaties explicitly extend protection to investment portfolios, including company shares.[119] Tribunals view the claims of shareholders autonomously from those of their companies and permit shareholders to challenge measures that affect the value of their share independently.[120] Both direct and indirect shareholders[121] have been allowed to challenge host action.[122] Finally, tribunals have fully endorsed a practice of minority shareholder protection on the basis of the *lex specialis* nature of investment treaties.[123] Thus, investment tribunals are unconcerned by the factors that motivate national courts to prevent

[116] *American International Group, Inc. and American Life Insurance Company, v. Islamic Republic of Iran*, Iran-US Claims Tribunal, Award No. 93-2-3 (7 December 1983).
[117] *Salini Costruttori S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001) para. 52.
[118] *Masdar Solar & Wind Cooperatief, U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award (16 May 2018) para. 199; see also *Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award (9 April 2015) para. 371.
[119] Korzun (n 103) pp. 213-215.
[120] *CME Czech Republic B.V. (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award (13 September 2001) para. 620; *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Respondent's Application under Rule 41(5), (20 March 2017) paras. 20–21.
[121] The term "Indirect Shareholder" refers to shareholders who invest in companies that invest in other companies and so on until the investment trickles down to the investment which is alleged to have been denied protection under a given BIT; see further Schefer (n 2) pp. 82, 147.
[122] *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 August 2004) para. 137; *Anglo-American v. Venezuela*, ICSID Case No. ARB(AF)/14/1, Final Award (18 January 2019) para. 197.
[123] *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on objections to Jurisdiction (17 July 2003) para. 48; *Enron v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (14 January 2004) para. 39.

double recovery, increased cost of litigation, and conflicting awards.[124] *CMS Gas Transmissions v. Argentina* is a clear-cut example of tribunals accepting reflective losses as a base for challenging the government. Therein, the investor claimed damages on the basis of "loss of profits" endured by TGN, a company in which the claimant had less than 30 % shareholding.[125] The tribunal found it had jurisdiction to hear the claim despite the fact that the claimant challenged only general measures of economic policy. The only measures challenged were Argentina's devaluation of its currency, its tying of the peso to the dollar, and its ending the right of the gas industry to adjust prices based on the US Producer Price Index.[126]

This must be considered problematic because it provides an avenue for domestic actors to avoid national legislation, particularly when one considers the relatively loose and unrestrictive nature of tribunal practice in allowing a State's own nationals to challenge it by simply creating a shell company in a country with which the home country has a favourable BIT. Tribunals may be within their capacity to make some of the choices discussed in this chapter, but that is exactly the issue that this paper seeks to underline. Even though the understanding and context of any given IIA would seem to suggest an opposite outcome, tribunals are nevertheless granted the authority and discretion by the current system to decide for themselves. This must be addressed in the coming reform process of ISDR if this system is to gain any semblance of legitimacy.

4. Problematic Material Decisions – Expropriation under IIL

Expropriation, which is classically defined as the confiscation of property carried out by the State against the property's owner, is subject to severe restrictions in most legal systems.[127] In the context of IIL, an investor's legal title to their investment, as well as the right to use and profit from the investment, is protected under the restrictions undertaken by governments when these engage in the taking of title (direct expropriation) or the taking of value or control (indirect

[124] Korzun (n 103) p. 219.
[125] *CMS* (n 123) paras. 18–21.
[126] ibid.
[127] Schefer (n 2) pp. 208–210, 243.

expropriation).[128] If a State is found to have expropriated an investor's property, it will be obliged to compensate without exception. In broad terms, arbitral tribunals first have to determine whether the property subject of the complaint is even capable of being expropriated.[129] Next, tribunals must determine whether the government measure constituted expropriation or whether it was merely a regulatory measure.[130] A measure is more than merely regulatory when there has been a neutralisation of the investment.[131] If it is established that a measure neutralises an investment, the tribunal will then assess if the measure is nevertheless lawful (legal).[132] If it is an unlawful expropriation, the tribunal will award the investor compensation.

In assessing the neutralisation of the investment, most tribunals apply three criteria (some also add an additional criterion pondering the public interest involved).[133] The first criterion assesses whether the measure resulted in an interference with the investor's enjoyment of the investment.[134] Secondly, the severity of the effect is assessed, namely, whether or not this had the effect of loss in value, loss in management capacity, or if use or control was substantially affected.[135] The third criterion is the long-lasting nature or permanence of the interference.[136] Given that indirect expropriation is established because the interference is so grave that it is a measure equivalent to expropriation, it must technically have a permanent character.[137] Nevertheless, some tribunals have also found violations for only temporary breaches, though only exceptionally.[138] Finally, some tribunals also assess whether or not the State had public interest in applying the interfering measure.[139] Of these four criteria, this paper will focus on the second criterion of the severity of the interference owing to the difference between thresholds at the national level and those in IIL jurisprudence.

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[128] ibid; A Reinisch, 'Expropriation' in P Muchlinski, F Ortino, and C Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) p. 422.
[129] ibid pp. 410–411.
[130] ibid p. 426; Schefer (n 2) p. 255.
[131] ibid.
[132] Schefer (n 2) p. 210.
[133] ibid p. 255.
[134] ibid pp. 256–259.
[135] ibid pp. 259–260; Reinisch in Muchlinski et al (n 128) pp. 438–442.
[136] Schefer (n 2) p. 260.
[137] ibid.
[138] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award (8 December 2000) para. 99.
[139] Schefer (n 2) pp. 261–262; Reinisch in Muchlinski et al (n 128) pp. 442–444.

Once it is established that a measure neutralises the investment and therefore amounts to expropriation, its legality must also be considered. This essentially results in the application of tribunal jurisprudence on direct expropriation because investment law does not prohibit expropriation outright; on paper it recognises the State's right to regulate.[140] An expropriation is legal where it has a public purpose, observes due process, is non-discriminatory, and offers compensation.[141]

Tribunals generally look at the aforementioned criteria holistically, meaning that they do not strictly consider each criterion in a self-standing manner.[142] Their decisions are informed by their adherence to one of three leading approaches. The first approach balances the relevant interests.[143] The second approach applies significant weight to the legitimate expectations of the investor.[144] The final approach is the sole-effect doctrine. It focuses only on the how the control of the investor or value of the investment was affected by the measure imposed.[145] The goals pursued and intentions of the State play no role in the tribunal's assessment, irrespective of how legitimate these may be.[146] The sole-effect doctrine offers the highest level of protection for an investor's property. However, all three approaches are capable of protecting the investor's property on a level far more favourable than any other system of law.

As will be demonstrated below, the property rights endowed upon individuals and corporations in human rights instruments, and even in the most advanced of the developed countries are subject to far-reaching qualifications stemming from public interest. These qualifications are removed through the network of IIAs to the effect that a near absolute property right is created for investors. The jurisprudence above directly contradicts, among others, the

[140] Schefer (n 2) p. 210.
[141] ibid.
[142] ibid p. 263.
[143] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2 (29 May 2003) para. 122; see further Schefer (n 2) pp. 264–265.
[144] *Grand River Enterprises Six Nations, Ltd., et al., v. United States of America*, NAFTA, UNCITRAL Arbitration, Award (12 January 2011) p. 140; Schefer (n 2) p. 273.
[145] Reinisch in Muchlinski et al (n 128) pp. 444–447; Montt (n 4) pp. 255–269; Schefer (n 2) pp. 263–264.
[146] *Phelps Dodge Corp et al. v. Iran*, Iran-US Claims Tribunal (19 March 1986) p. 13: The Tribunal fully understands the reasons why the Respondent felt compelled to protect its interests through this transfer of management, and the tribunal understands the financial, economic and social concerns that inspired the law pursuant to which it acted, but those reasons and concerns cannot relieve the Respondent of the obligation to compensate Phelps Dodge for its losses.

principle of equality before the law. The paper will argue that this is possible in IIL because the main concern of most arbitrators seems to be contractual or BIT sanctity, as is illustrated by tribunal jurisprudence.

Four criticisms can therefore be levied at IIL jurisprudence on expropriation: first of all, the threshold for the severity of the interference under IIL is higher than under most domestic jurisdictions; second of all, some investment tribunals are willing to wholly disregard the public interest of the State in enacting such measures, particularly those that adhere to the sole-effect doctrine; third of all, even where tribunals are willing to engage in a proportionality assessment and consider State motivations, the final assessment tends to be heavily skewed towards the perspective of the investor. Accordingly, it is not only the sole-effect doctrine that is an issue here. Finally, the method of compensation for expropriation is equally problematic as the issue of the severity of the interference. Before the aforementioned issues are assessed in detail, this chapter will first explore the general limits to property protection in municipal law, which will act as a useful point of reference or compass for the analysis of tribunal jurisprudence that will follow.

4.1. Expropriation in National Law

National doctrines on expropriation are characterised by a stricter view on what amounts to a severe interference as compared to investment law jurisprudence. It was seen above that in IIL, any expropriation requires compensation. However, at national level, expropriation does not automatically lead to compensation. At national level there are extreme carve-outs in the law such as the US public nuisance exception[147] or the French pre-eminent public interest.[148] These allow State intervention without compensation to protect third parties from the injurious uses of property by other members in society, regardless of the effect on the property holder.[149] However, they are only triggered in very narrow instances that do not align with most expropriation cases in IIL. Moreover, the classic cases of

[147] Montt (n 4) p. 194; see further *Mugler v. Kansas*, 123 U.S. 623 (1887) (US Supreme Court): "All property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."
[148] Montt (n 4) pp. 195–196.
[149] ibid pp. 192–196.

expropriation under municipal law are subject to comparatively more qualifications before compensation is awarded.

According to the US Supreme Court, wielding of executive power inherently entails the adjustment of various rights in the name of the public good.[150] These adjustments sometimes result in diminishing or the restriction of existing property rights.[151] US jurisprudence upholds the idea that to allow compensation in all cases described above would be akin to requiring the government to regulate by purchase.[152] The CJEU maintains the same idea in that liability for measures of economic policy can only be incurred in limited and special circumstances.[153] It follows from the discussion above that, while property rights are a staple of a free democratic market society, they are nevertheless subject to well-defined limits.[154]

In US jurisprudence, compensation is required when there is a physical taking or, alternatively, an act is considered a *per se* or a regulatory taking, with results equivalent to the sole-effect doctrine in IIL.[155] The former occurs when the government out-right nationalises property or directly interferes with an individual's property rights.[156] *Per se* or regulatory takings occur when property rights are emptied of all economically beneficial uses.[157] The US Supreme Court has further indicated that a measure, the result of which was a diminution in value of 95 per cent instead of 100, would not amount to a regulatory taking.[158] Moreover, it is regarded that such an effect must touch on the full bundle of property rights, not merely "a strand of that bundle".[159] A substantial reduction in

[150] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (US Supreme Court); *Andrus v Allard*, 444 US 51, 53 (1979) (US Supreme Court).
[151] ibid.
[152] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (US Supreme Court).
[153] Montt (n 4) p. 171.
[154] S Denstedt and RV Rodier, 'What Happens When Developers Can't Develop: Can and Should Resource Developers be Compensated When They Can't Develop Their Assets?' (2010) 48-2 Alberta Law Review, p. 335.
[155] *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982) (US Supreme Court); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) (US Supreme Court); *Lucas v South Carolina Coastal Council*, 505 US 1003 (1992) (US Supreme Court); *Lingle v. Chevron U.S.A*, 544 U.S. 538, 546 (2005) (US Supreme Court).
[156] ibid.
[157] ibid.
[158] *Lucas v South Carolina Coastal Council*, 505 US 1003 (1992) (US Supreme Court) p. 1019 footnote 8; *Palazzolo v. Rhode Island*, 533 U.S. 618 (2001).
[159] *Andrus v Allard* 444 US 51, 53 (1979) (US Supreme Court); Montt (n 4) p. 190; M Perkams, 'The Concept of Indirect Expropriation in Comparative Public Law - Searching for Light in the

value or the prohibition of the most beneficial uses of the property does not – on its own – amount to a total regulatory taking under US law.[160] Thus, absolute protection for property rights in the US is triggered only when there is either a permanent physical occupation of the property or deprivation of all economically viable uses.[161] In cases where a measure does not have such an effect, the *Penn Central* test requires a balancing exercise between the intent of the government and the impact on the claimant in order to establish whether a partial regulatory taking had occurred.[162] However, the focus of the analysis remains the "parcel as a whole".[163] Finally, court practice further illustrates that partial regulatory takings are also difficult to establish since substantial loss of economic value is often outweighed by a lack of reasonable expectations or the public interest.[164]

In Canada, de facto expropriation requires that the government obtain a direct benefit from enacting the measure and that all reasonable uses of the property be rendered "virtually useless".[165] Courts consider that the government obtains a benefit when its measure adds value to public land, but even removing an encumbrance could suffice. In order for a measure to amount to de facto expropriation, it must render the property right meaningless, wherein "virtually all aggregate incidents of ownership are taken away".[166] To illustrate this point, when a railway company sought to repurpose its land and requested an authorisation to redevelop it for commercial and residential purposes, the government refused to grant the licence. The railway company argued that, in effect, this amounted to expropriation because the land in question had become wholly unprofitable. The Canadian Supreme Court disagreed and found that all reasonable uses were not

Dark' in SW Schill (ed), *International Investment Law and Comparative Public Law* (Oxford 2010) p. 18.

[160] Perkams (n 159) p. 124; see also *Concrete Pipe & Products v Construction Laborers Trust* 508 US 645 (1993) (US Supreme Court): mere diminution of the value of property, however serious, is insufficient to demonstrate a taking.

[161] *Loretto v Teleprompter Manhattan* 458 US 419 (1982) (US Supreme Court); *Concrete Pipe & Products v Construction Laborers Trust* 508 US 602 (1993) (US Supreme Court); *Brown v Legal Foundation of Washington* 538 US 216 (2002) (US Supreme Court).

[162] *Penn Central Transportation v. New York*, 438 U.S. 124 (1978) (US Supreme Court).

[163] ibid pp. 130–131.

[164] Denstedt and Rodier (n 154) p. 349.

[165] *Manitoba Fisheries Ltd. v. The Queen* (1979) 1 S.C.R. 101 (Supreme Court of Canada) para. 118; *Rock Resources Inc. v. British Columbia* (2003) 229 D.L.R (British Columbia Court of Appeal) para. 48; *Canadian Pacific Railway v. Vancouver* (2006) 1 S.C.R. 227 (Supreme Court of Canada) para. 30.

[166] *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)* (1999) 178 N.S.R (Nova Scotia Court of Appeal) paras. 716–717.

removed because the land could still be used to maintain railway operations, even if unprofitably.[167] Accordingly, the executive measure was upheld.[168]

Courts in the UK have – similarly to the US and Canada – recognised that *de facto* expropriation occurs when a person is deprived of all meaningful use of the property in question.[169] Similarly, the ECtHR interprets Article 1 of Protocol 1 to the ECHR to mean that only total deprivation of property incurs special protection. As long as there is some economic interest retained by the property, the ECtHR is unwilling to disregard the public interest of the State and engages in a balancing exercise.[170]

The jurisdiction that is most similar to IIL jurisprudence on this point is Germany. Yet even the German concept of expropriation is characterised by the emphasis on State interest to deprive the owner of his property or to transfer title; the impact on the property owner does not characterise it.[171] German law requires that courts engage in a proportionality assessment to balance the interests involved. It requires that the Government pursues a legitimate aim with suitability, necessity, and an adequate balancing of interests.

Thus, German proportionality underlines the reasonableness of the government measure, its interference with legitimate expectations, and the reasonable person test.[172] However, specific sectors of activity empower the State with extra prerogatives. Accordingly, in cases of environmental protections, compensation is only required to alleviate an excessive burden.[173] Another example is the phasing-out of nuclear energy, which is regarded as an area where the State has a wide margin of appreciation when acting to reorient the political

[167] *Canadian Pacific Railway v. Vancouver* (2006) 1 S.C.R. 227 (Supreme Court of Canada) para. 34.
[168] ibid.
[169] *Adams & Ors v. Scottish Ministers* (2004) (Scottish Court of Session) para. 93; *Prest v Secretary of State for Wales* (1982) 81 LGR 193 (Court of Appeal of England and Wales); see further Department for Levelling Up, Housing and Communities (UK), 'Guidance on Compulsory purchase process and The Crichel Down Rules' (OGL 2019); M Barnes, *The law of Compulsory Purchase and Compensation* (Hart Publishing 2014) pp. 15–19.
[170] *Tre Traktorer Aktiebolag v Sweden* (App no 10873/84) (1989) 13 EHRR 309 (ECtHR) para. 55: Where the ECtHR reasoned "severe though it may be, the interference at issue did not fall [under the relevant provision because] … the applicant kept some economic interest [in a restaurant that was refused a permit] by the possibility of leasing the premises and the property rights contained therein, even though it could no longer operate the restaurant in question"; see further Montt (n 4) pp. 190, 200.
[171] Perkams (n 159) pp. 133–137.
[172] Perkams (n 159) p. 136.
[173] G Winter, 'Property and Environmental Protection in Germany' in G Winter (ed), *Property and Environmental Protection in Europe* (Europa Law Publishing 2016) p. 183.

and economic regime,[174] and can thus act in ways that infringe property rights without compensation.[175] Ironically, Germany was forced to settle with an operator of a nuclear plant, due to its phase-out programme of nuclear energy, following an investment arbitration.[176]

From the brief analysis above, two conclusions follow: domestic courts will consider the effect of the measure relative to the full bundle of property rights, not only a portion of it. Furthermore, when a government measure does not render property completely devoid of value, domestic courts will consider the State interest involved and balance it with its effect.

4.2. Severity of Interference under IIL

4.2.1. Defining "Significant Part of the Investment"

In *Ampal-American*, the Egyptian government provided EMG with free-zone and tax-free status since 2000 and repeatedly confirmed it.[177] EMG was an Egyptian-incorporated company created by Egyptian and Israeli investors, in which Ampal-American – the claimant – invested.[178] EMG's role was to facilitate the sale and transport of natural gas from Egypt to Israel via a pipeline that was to be constructed.[179] Following a breakdown in diplomatic relations with Israel, Egypt nullified EMG's free-zone status along with its tax-exemption and cancelled all exports of natural gas to Israel in 2008,[180] with 17 years left until this status was to expire.[181] The revocation resulted in EMG being subjected to Egypt's corporate tax, which was set at 20%, as well as customs duties on equipment and

[174] *Jahn and Others v. Germany* (2006) 46720/99 (ECtHR) paras. 94, 113.
[175] Winter (n 173) pp. 183–184.
[176] *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Discontinuance Order (9 November 2021); see further D Páez-Salgado, 'A Battle on Two Fronts: Vattenfall v. Federal Republic of Germany' (Kluwer Arbitration Blog, 18 February 2018) <http://arbitrationblog.kluwerarbitration.com/2021/02/18/a-battle-on-two-fronts-vattenfall-v-federal-republic-of-germany/#:~:text=Vattenfall%20adopted%20a%20two%2Dfront,the%20%E2%80%9CECT%20Arbitration%E2%80%9D> accessed 28 August 2022.
[177] *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, and BSS-EMG Investors LLC v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss (21 February 2017) paras. 153–155.
[178] ibid para. 30; *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, and BSS-EMG Investors LLC v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction (1 February 2016).
[179] *Ampal* (n 177) para. 30.
[180] ibid paras. 44–45.
[181] ibid para. 155.

machinery.[182] The claim had multiple grounds on the basis of which it was argued that Egypt had expropriated Ampal's investment in EMG, one of which was that the revocation of the tax-exempt status constituted an expropriation in of itself. The tribunal upheld this challenge. It found that the tax-exemption was a fundamental part of the economic structure of the investment and that Egypt had thus taken away a defined and valuable interest validly conferred under Egyptian law.[183] Even though the tribunal recognised that the revocation of the tax exemption did not "per se, destroy the entire Peace Pipeline project", the tribunal agreed with the claimant that the license – which included the tax-free status – was an investment in its own right.

The *Ampal* tribunal found support for its finding in the *GAMI Investments v Mexico* case, where it was asserted that "[t]he taking of 50 acres of a farm is equally expropriatory whether that is the whole farm or just a fraction".[184] In this case, GAMI, a US company purchased shares in GAM, a Mexican company that owned 5 sugar mills in Mexico. The Mexican government nationalised all five mills in September 2001.[185] GAMI argued that the measure had diminished the value of its shares.[186] The *GAMI* tribunal considered the standards of severity established by other tribunals, such as the *Pope & Talbot* tribunal, but believed that was too strict. It pointed to the hypothetical case of a farm, finding that even if a piece of that land is expropriated, that alone is to be considered severe enough. Accordingly, it did not matter whether only one mill or five were nationalised.[187] Similar findings may be found in *Middle East Cement*, where it was held that government measures deprived the investor of "parts of the value of an investment".[188]

Investment tribunals purport to apply the same threshold of severity as under domestic jurisdictions. It is almost universally recognised that the degree of severity must be such that the investment is deprived of all economic value. However, when tribunals turn to apply this test, it can be seen that they run into

[182] ibid para. 44.
[183] ibid paras. 182–183.
[184] *Gami Investments, Inc.* (n 111) paras. 126–127.
[185] ibid para. 17.
[186] ibid para. 23.
[187] ibid para. 126.
[188] *Middle East Cement Shipping and Handling v Egypt*, ICSID Case No ARB/99/6, Award (12 April 2002) para. 107.

what is termed the denominator problem under US jurisprudence.[189] In assessing the severity of a measure's impact in expropriation it is important to define the affected asset.[190] This is similar to how defining the appropriate market is crucial under customs law and international trade law, so that one can establish likeness of products. It is also similar to competition law's test of establishing whether or not a company is abusing a dominant position. If the asset is defined too narrowly, it is easier to establish that interference is so severe as to deprive it of all value. As is illustrated above, national law defines the asset in the widest possible terms.[191] While tribunals also have a similar starting point requiring that there be deprivation "in whole or significant part" of either control or value,[192] divergences occur in defining what amounts to a "significant part" of an investment. Tribunals seem to limit their assessment to whether or not the investment can continue to be used for the same purpose that it was intended to be used for. Once it finds that the refusal of a permit or the ban on certain crucial materials deprives the investment of its intended purpose, the conclusion that always follows is that the investment is no longer viable and expropriation had occurred. This also allows tribunals to assess the severity in relation to "a bundle" or part of an investment, which is not permitted under national law.

One could argue that the type of assessment undertaken by a tribunal is fundamentally different in investment law because of the guarantees that the host State has committed to uphold. However, this does not take anything away from the point that investment law is more favourable to investors than national law. Tribunals' use of narrow definitions for what amounts to significant parts of an investment already illustrate that the severity of an interference is subject to a lesser threshold under investment law.

4.2.2. The Sole-Effect Doctrine

The *Metaclad* case is an example of the sole-effect doctrine in practice. Here, a violation of treaty standards was established only on the basis of the impact that the measure had on the investor. No other criteria were assessed to reach the

[189] *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 497 (1987) (US Supreme Court).
[190] Montt (n 4) pp. 188–191.
[191] ibid.
[192] *AES Summit Generation Limited and AES-TISZA Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, ECT, Award (23 September 2010) para. 14.3.1.

tribunal's conclusion, laying bare an apparent bias for investors in IIL. In *Metaclad*, the tribunal considered that when a local municipality denied the permit for the operation of a hazardous waste material plant,[193] the effects of this denial were such that the owner was deprived of all "…reasonably to be expected benefit [due to representations made at federal level] of the property".[194] The particularities of this case are much more complex, in particular, because there seems to have been lack of agreement between the federal and local governments.[195] Nevertheless, the reasoning of the tribunal is damning because it found that indirect expropriation had taken place without any regard for the position of the State.[196] The *Metaclad* tribunal, in considering a further ground for expropriation on the basis of the State Governor's enactment of an ecological decree which designated the waste management site as being placed on an ecological reserve, also explicitly rejected considering the motives in the enactment of the measure.[197] The tribunal stressed that the municipality did not have the capacity to refuse the permit. It determined on its own authority that the local government acted unlawfully under Mexican law, without such determination having been made by Mexican courts. This reflects how far tribunals are willing to stretch their authority.[198]

The example above is not an isolated case. Many other tribunals have been willing to find expropriation on the basis of the sole-effect doctrine.[199] As was highlighted in the previous section, when domestic and regional courts assess partial expropriation, they balance the damage done to the individual against the interest that the State was protecting, its method of implementation, and the existence of alternatives. Disregarding the public interest is only legitimate when the very core of the property right is extinguished. This is not even a consideration

[193] *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, NAFTA Arbitration, Award (30 August 2000) para. 50.
[194] ibid para. 103.
[195] ibid paras. 32–35, 56–58.
[196] ibid paras. 105–108.
[197] ibid para. 111.
[198] ibid para. 106.
[199] *Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award (7 December 2011) para. 328; *Vivendi v. Argentina (I)*, ICSID Case No. ARB/97/3, Award II *(20 August 2007)*, para. 7.5.21; *Santa Elena v. Costa Rica*, ICSID Case No. ARB/96/1, Award (17 February 2000) para. 72; *Tippets, Abbett, McCarthy, Stratton v. TAMS-AFFA*, Iran-US Claims Tribunal, Award (29 June 1984) para. 22; *Middle East Cement Shipping and Handling v Egypt*, ICSID Case No ARB/99/6, Award (12 April 2002).

in investment arbitration, at least for those tribunals that follow the sole-effect doctrine. Nevertheless, even tribunals that do consider the State interest can apply extensive standards.

4.2.3. Expansive View on Proportionality in the Assessment of Severity

In *Tecmed*, a local landfill in Mexico owned in full by the local municipality was auctioned off to Tecmed, a Spanish company, which followed to administer the site through its local subsidiary, Cytrar.[200] In 1996, the responsible federal ecological authority, the INE, authorised Cytrar to operate the site on the basis of a licence to be renewed yearly.[201] The licence was renewed once in 1997.[202] In 1998, the federal agency responsible for monitoring compliance with environmental rules, PROFEPA, which was also empowered to suspend authorisations granted by government, concluded an investigation into Cytrar's conduct and issued fines for violation of standards but did not revoke Cytrar's operating permit.[203] However, following a long protest campaign against Cytrar's conduct and local elections in both the municipality and the State, the INE rejected to renew the licence in 1998.[204] Tecmed claimed that when it won the tender it took over both the physical site of the landfill as well as the associated intangible assets,[205] including the prior unlimited operating permit granted to the municipality in 1995.[206] On this basis, the claimant argued that its investment had been expropriated in violation of the 1996 IIA between Spain and Mexico. Mexico argued that the auction did not include the previous permits and Tecmed had not even requested they be included.[207] The government also pointed to the discretion of the INE to deny renewal of licences, and the negative attitude of the local population and the new local administration towards the landfill being located 8 km from the municipality, despite federal laws mandating that landfills be at a distance of 25 km from the nearest population centre.[208] The tribunal found that

[200] *Tecmed* (n 143) para. 35.
[201] ibid para. 38.
[202] ibid.
[203] ibid para. 44.
[204] ibid para. 39.
[205] ibid para. 40.
[206] ibid paras. 36–37.
[207] ibid para. 47.
[208] ibid para. 49.

local pressure and the distance of the landfill to the municipality was legally irrelevant.[209] It then proceeded to assess the proportionality of the INE's decision and – noting that the government's intention is nevertheless less important than the effects of its measures –[210] found that it was disproportionate and expropriatory.[211]

Tecmed is illustrative of the power of investment law to wholly undermine executive discretionary competences. In most – if not all – jurisdictions, the capacity of the government to make certain assessments in concrete situations is guaranteed when the legislature confers the requisite discretion to do so. When such decisions are contested before national courts, the judiciary is typically subjected to a reduced capacity of assessment. In Germany, judicial review of administrative measures in areas of conferred discretion is limited to the determination of whether or not discretion was implemented in an unreasonable way, or in excess of competences conferred.[212] Courts engage in a proportionality assessment only if the executive acted in excess of competence.[213] In France, only restrictions on fundamental rights invite a proportionality assessment with a restrictive threshold applied to what qualifies as a fundamental right;[214] otherwise, review is limited to manifest errors of assessment following a cost-benefit analysis.[215] In the Netherlands, while the law allows courts to assess proportionality in instances where discretion is conferred,[216] Dutch courts have only applied such assessments only where there is an unreasonable outcome.[217] In England, the *Wednesbury* test provides that only manifestly unreasonable

[209] ibid para. 106.
[210] ibid para. 116.
[211] ibid paras. 107, 112, 151.
[212] Administrative Procedure Act (Germany) [Verwaltungsverfahrensgesetz (VwVfG)] para. 40; German Administrative Court Procedure Act (Germany) [Verwaltungsgerichtsordnung (VwGO)] (19 March 1991) para. 114; see further G Nolte, 'General Principles of German and European Administrative Law: A Comparison in Historical Perspective' (1994) 57 The Modern Law Review 191, pp. 192–194.
[213] ibid.
[214] French Counseil d'Etat, *Benjamin* (1932).
[215] French Counseil d'Etat, *Bleton* (1989); French Counseil d'Etat, *Ville Nouvelle Est* (1979).
[216] General Administrative Law Act (Netherlands) [Algemene wet bestuursrecht (Awb)] (1 January 1994), art 3:4(1)–(2).
[217] *Kwantum Nederland BV / Praxis and Maxis* (9 May 1996) (Hoge Raad).

measures, where no authority would act in the same way as the authority under investigation, can trigger a proportionality assessment.[218]

The *Tecmed* tribunal did engage in a proportionality assessment despite the local government's discretion to revoke the license.[219] It bears noting that in measuring the public interest, the tribunal underlined that community opposition to the landfill was "not massive", which further speaks to the kinds of high burdens of proof imposed on the State in ISDR.[220] The case demonstrates that investors have access to far better protections under investment law than under national law. None of the jurisdictions analysed could have conceivably reached the same conclusions as the *Tecmed* tribunal.

Accordingly, this sub-chapter proved that IIL is more favourable to the investor when it comes to the severity of the interference through wide definitions for what amounts to substantial interferences. It was also demonstrated that the interest of the State is completely ignored in cases which would be unthinkable at national level. Finally, *Tecmed* illustrated that even when the State interest is taken into account, the kind of balancing exercise that tribunals engage in far exceed their equivalent at national level.

4.3. Issues with Compensation for Expropriation

The issue of compensation for expropriation may also be considered problematic. Below it is argued that there is acquiescence for a significant political choice being made by ISDR tribunals despite these entities lacking the mandate to do so.

ISDR tribunals link their jurisprudence to the 1928 Factory at *Chorzow Factory* case. In *Chorzow* the Permanent Court of International Justice (PCIJ) reasoned that in order to rectify an internationally wrongful act, it is not sufficient to only compensate the injured party for the loss in value of the property plus interest.[221] The PCIJ argued that doing so would assume that the injuring State had

[218] *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* (1948) 1 KB 223 (Court of Appeal of England and Wales); the Human Rights Act 1998 did introduce an expanded judicial review for rights derived from EU law or the ECHR; see further *Bank Mellat v Her Majesty's Treasury* (2013) UKSC 38 (UK Supreme Court) p. 39.
[219] *Tecmed* (n 143) paras. 132–149.
[220] ibid para. 144.
[221] *Factory at Chorzów (Germany v Poland)* (Merits) Judgment (13 September 1928) 1928 PCIJ Series A, No 17 (Permanent Court of International Justice) pp. 47–48.

a right to expropriate.[222] In this case, Poland had committed in a 1922 treaty to refrain from expropriating private property in territory received following the Treaty of Versailles ending WW1. The PCIJ reasoned that "reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed".[223] This entailed restitution in its entirety of the property or, if impossible, its monetary equivalent.[224] Accordingly, compensation for the violation of the protection against expropriation committed to in IIAs entails – for some tribunals [225] – compensation not only for the value of the investment and the corresponding interest but also compensation for expected future profits.[226] This is because takings or measures neutralising an investment can be regarded as more than mere legal expropriations that simply failed to compensate.[227] Such measures are considered to have been enacted without the right to do so and are thus considered an internationally wrongful act.[228]

The problematic political choice referred to at the beginning of this sub-section is that the right of compensation for an internationally wrongful act that a State owes to another State is transferred to a private party. The effect of this is that companies or particularly wealthy private investors are conferred through IIL, a core right of an international legal personality without having any corresponding responsibility imposed on them.[229] Moreover, this is a significant departure from what would occur in some jurisdictions because it allows loss for future income.[230] Although there are jurisdictions that allow compensation for lost future profits, like the ECHR, the argument here is that IIL – even though accompanied by other

[222] ibid.
[223] ibid.
[224] *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award (22 April 2009) para. 108.
[225] ibid paras. 110–112.
[226] *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (6 February 2007) para. 352; *ADC v Hungary*, ICSID Case No. ARB/03/16, Award (2 October 2002) para. 499; *CMS v. Argentina*, ICSID case No. ARB/01/8, Award (12 May 2005) paras. 419, 444; *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL (NAFTA), Second Partial Award for Damages (21 October 2002) para. 228.
[227] Schefer (n 2) pp. 234–238.
[228] TW Walde and B Sabahi, 'Compensation, Damages and Valuation' in P Muchlinski, F Ortino, and C Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) pp. 1056–1062.
[229] Sornarajah (n 2) p. 81.
[230] B Sabahi and NJ Birch, 'Comparative Law on Expropriation' in SW Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) pp. 779–784.

jurisdictions – is at the extreme end of the spectrum of views on State compensation for expropriation.[231] If compared to German, US, and French expropriation, which do not admit future profits in calculating compensation for expropriation, IIL is clearly on the other end of this spectrum.[232]

Thus, IIL favours the investor not only in respect to how easily he or she can establish expropriation, but also the amount of the compensation for expropriation.

5. Inadequacy of Control Mechanisms

5.1. Enforcement under the New York Convention

Under Article III of the New York (NY) Convention, contracting States are bound to recognise international arbitral awards as binding upon the parties and are also bound to enforce them. According to Article V of the NY Convention, there are seven grounds for refusal of recognition and enforcement.[233] These relate to a lack of capacity, lack of notice to the respondent, or the constitution of the tribunal not being in accordance with the parties' agreement or the law of the seat of arbitration. Moreover, when the award is yet to become binding or has been challenged in the seat of arbitration, Article V of the NY Convention can also be used to prevent its enforcement. One major ground for refusal is defect in consent to arbitrate.[234] Another important ground for refusal is the lack of arbitrability of the matter submitted to arbitration,[235] and finally when recognition of the award would be contrary to the public policy of the place of enforcement, enforcement can be refused in that jurisdiction.[236]

[231] ibid.
[232] ibid.
[233] M Moses, *The principles and practice of international commercial arbitration* (CUP 2017) pp. 232–244.
[234] UNCITRAL, 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958), art V(1)(c); see further NC Port and others, 'Article V(1)(c)' in H Kronke and others (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) pp. 261–266.
[235] ibid art V(2)(a); see further D Otto and O Elwan, 'Article V(2)' in H Kronke and others (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) pp. 348–355, 360, 362–363.
[236] New York Convention, art V(2)(b); D Otto and O Elwan, 'Article V(2)' in H Kronke and others (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) pp. 365–373, 383, 386.

It is evident that the aforementioned grounds offer limited capacity for review of arbitral decisions.[237] Once an ISDR tribunal has made a decision, the NY Convention will only allow the courts of the State where enforcement is sought to review the decision on extraordinary grounds. Given that the NY Convention has almost universal acceptance, the respondent can only either challenge enforcement on the aforementioned limited grounds, or appeal to the courts of the State where the arbitral tribunal had its legal seat as per Article V(1)(e) of the NY Convention.[238] The courts of the place where the tribunal had its seat can only and extraordinarily set the ISDS award aside on the basis of overriding mandatory provisions of law, which differ in content from State to State, but are nevertheless restrictive.[239] Moreover, the courts of the place where enforcement is sought will reject enforcement if the award has been set-aside or is not yet binding in the State under whose laws the arbitration was conducted.[240]

The extremely restrictive grounds through which appeal can be sought are illustrated in the Canadian government's challenge of the *SD Meyers* arbitral award. Canada was the seat of arbitration in this decision[241] and the North American Free Trade Agreement (NAFTA) Treaty further offered the Canadian government the possibility to challenge the award in its national courts.[242] The Canadian Federal Court upheld the award, citing its limited competence for judicial review as per Article 34 of the Canadian Commercial Arbitration Code. It clarified that it had no competence of review for errors of law, nor for erroneous finding of fact, so long as the decision was made within the jurisdictional competence of the tribunal.[243] It added that the only other avenue for setting aside the award was an abuse of authority that amounted to a flagrant injustice.[244]

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[237] L Jacobsen, 'ISDS Control Mechanisms (Annulment and Setting Aside)' in J Chaisse, L Choukroune, and S Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer 2021) pp. 1549–1555.
[238] See further N Darwazeh, 'Article V(1)(e)' in H Kronke and others (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) pp. 303–305, 312–315, 321, 326.
[239] ibid.
[240] ibid.
[241] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL (NAFTA), Explanatory Note to Procedural Order No. 10 (16 November 1999) para. 6.
[242] North American Free Trade Agreement (NAFTA), 32 I.L.M, pp. 289, 605; (NAFTA) (1993), art 1136(3)(b).
[243] *Attorney General of Canada v. S.D. Myers Inc.* (13 January 2004) T-225-01 (Ottawa Federal Court).
[244] ibid paras. 55–56: "[the relevant national provision requires, in order to set aside the arbitral award] patently unreasonable, irrational or results in a flagrant denial of justice".

5.2. Enforcement under the ICSID Convention

If arbitration takes place under the auspices of ICSID, the grounds for review are even fewer than the possibilities under the NY Convention, as the centre is wholly denationalised. ICSID tribunals do not have a seat of arbitration.[245] According to Article 54(1) of the ICSID Convention, ICSID awards are final and to be treated as decision of final instance in domestic courts.[246] This also entails that national courts are completely locked out of the review process.

Thus, the only route for appeal is under Article 52(1) of the ICSID Convention. It provides for the annulment of a tribunal decision if the tribunal was not properly constituted,[247] if it manifestly exceeded its powers,[248] if its members engaged in corruption,[249] if it seriously departed from a fundamental rule of procedure,[250] or if it failed to state the reasons on which it based its decision.[251] Annulment committee jurisprudence illustrates how restrictive the aforementioned tests are. For example, "manifestly exceeded its powers" is interpreted to mean a clear or self-evident extension of the tribunal's mandate to the effect that even if the tribunal did exceed its mandate, it may not be considered manifest.[252] The tribunals' determination is conclusive if it is debatable or requires further examination.[253] Moreover, a serious departure from procedure is one that causes the tribunal to reach a result substantially different from what it would have, had the rule been observed.[254] It can, thus, be concluded that the grounds for annulment are very restrictive, and this is also reflected in the miniscule amount of annulment committees that have been called to rule on a potential annulment.

It is a recognised phenomenon that when a court considers the application of a treaty, it may provide interpretations that the drafters of the text may not have intended. However, in these circumstances, there are control mechanisms that allow for review of the decisions made.[255] In ISDR on the other hand, ad hoc

[245] Reinisch (n 42) pp. 118–120; see further Schreuer ICSID Commentary (n 59) pp. 1139–1143.
[246] ibid.
[247] Schreuer ICSID Commentary (n 59) pp. 934–937.
[248] ibid pp. 937–943.
[249] ibid pp. 978–979.
[250] ibid pp. 979–993.
[251] ibid pp. 996–1023.
[252] Reinisch (n 42) p. 116.
[253] ibid.
[254] ibid p. 117.
[255] Sauvant (n 6) p. 41.

tribunals carry out reviews for the sole purpose of dealing with the dispute at hand; there are no comprehensive control mechanisms and the few avenues for control that do exist are woefully restrictive.[256] Moreover, these tribunals are constituted largely of persons with experience in commercial arbitration and lean towards solutions based on commercial prudence. Little concern is shown for the duties and obligations that the State owes towards its own citizens and towards other stakeholders apart from the investor.

6. CONCLUSION

The aim of this paper was to answer the question: "what are the fundamental issues that need to be resolved in any serious ISDR reform?" It was demonstrated that all three major legal phases were plagued by issues that ultimately delegitimise ISDR.

In regard to the jurisdictional phase, it was highlighted that tribunal practice is highly skewed towards admitting investor claims. This reaches the point that even treaty provisions, which have a rich tradition of conferring substantive protection such as MFNT protections, have been used to establish jurisdiction. This was demonstrated in chapter 3.1. Moreover, tribunals have been more than willing to undermine the very reason for the existence of the BIT: States committing to protect each other's investors. By allowing mere shell companies to benefit from ISDR, tribunals have allowed nationals of the host and nationals of third States to challenge the host. It is clear that the continued existence of round-tripping is highly destabilising to ISDR, and thus this doctrine must be eliminated, as was illustrated at chapter 3.2.2. Moreover, the control requirement that exists to allow investors to conduct business in the host State must be interpreted in the spirit of all IIAs – that is, to ensure that purely domestic companies are not simply purchasing the nationality of a BIT partner, as was illustrated at chapter 3.2.3. With regard to DoB clauses, chapter 3.2.4 explained that such clauses are inserted to protect the State against investors that it did not foresee would be granted ISDR protection. However, tribunals have inexplicably refused to apply DoB clauses. Thus, the automaticity of these clauses has to be reaffirmed. Finally, umbrella clauses and reflective losses have to be reined in. These are notions that IIL simply was not meant to address and serve little purpose

[256] Jacobsen (n 237) pp. 1537–1543.

other than to further delegitimise IIL by unduly extending tribunal jurisprudence, as was illustrated in chapters 3.3 and 3.4.

In regard to the material phase, it was illustrated that in assessing the severity of interference for the purpose of establishing expropriation, tribunals are willing to narrowly define the investment so that the government measures considered satisfy the deprivation in "whole or in significant" part requirement with much less difficulty, as was demonstrated in chapter 4.2.1 with reference to national law covered in chapter 4.1. Furthermore, chapter 4.2.2 illustrated that tribunals adhering to the sole-effect doctrine are willing to find expropriation without due consideration afforded to the public interest of the host State. This occurs in situations that would be considered partial expropriation at national level which would always entail consideration of the public interest, as was laid out in chapter 4.1. Moreover, it was proven that even where tribunals do take account of State motivations, their test of proportionality is far broader than the national equivalent, as was demonstrated in chapter 4.2.3. Additionally, it was also stressed in chapter 4.3 that the aforementioned is underlined by an extensive right to compensation for the investor. It follows that ISDR reform must address the expansive approach tribunals assert towards the severity of expropriation and to the inclusion of State interests in a balancing exercise for cases where the severity of the expropriation does not reach the threshold of "full deprivation of all economically beneficial uses of the property".

In regard to the post-judgment phase, the paper made clear in chapter 5 that the available means through which an arbitral award could be challenged are wholly inadequate, particularly in light of the high importance of the decisions contemplated. More so, it was underlined that essentially no grounds exist for substantive appeal as the threshold for appeal on the merits in both ICSID appellate committees and under the NY Convention provide that only manifestly absurd results could be overturned, while the procedural grounds are equally as restrictive. Thus, any ISDR reform must be accompanied by an effective appeal system.

It has been argued that arbitral tribunals have been given the capacity to make extremely problematic decisions that touch on some of the core tenants of government and society, property, and the right to regulate. It has been further illustrated that when tribunals essentially wield a passive capacity to regulate on

such sensitive issues that there are no avenues to effectively overturn or even challenge these decisions. Finally, it was laid bare that often such tribunals do not even possess a right to take such decisions in the first place. Thus, any reform of ISDR must address the aforementioned concerns if this system is to survive.

The Berlin Housing Crisis: German Basic Law and the ECHR on the Expropriation of Housing Units without Compensation

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1. INTRODUCTION

In 2018, the Deutsche Wohnen & Co Enteignen initiative proposed the expropriation of 240.000 housing units owned by housing corporations in Berlin and their subsequent nationalisation.[2] Activists attributed the lack of affordable rental flats to speculation by corporations, which allegedly traded housing units on the exchange stock market. On this note, a consultative referendum was held in September 2021 from which it was found that 56% of voters were in favour of expropriation.[3] The latter, nevertheless, would constitute a severe interference with the individual right to property protected under the German Property Clause,[4] and Art. 1 Protocol 1 to the European Convention on Human Rights (hereinafter, referred to as "ECHR"). Additionally, it must also comply with specific requirements of lawfulness, public interests, proportionality, and compensation. This last aspect is particularly problematic, as activists argue that the Berlin developers' expropriation without compensating the housing units' market value would not be disproportionate.

This paves the way for the question of whether expropriating mega-landlords in Berlin without providing compensation would comply with Article 14 of the German Basic Law and Article 1 Protocol 1 to the ECHR and relevant case law.

This qualitative legal research presents a doctrinal approach. It entails a descriptive analysis of the applicable rules on expropriation and compensation flowing from Article 14 of the German Basic Law and Art. 1 Protocol 1 to the ECHR to assess whether they would be abided by in the case study at hand. Both primary sources, i.e., German legislation, case law by the German Federal Court and by the European Court of Human Rights (hereinafter referred to as "ECtHR"), ECHR Protocols, and secondary sources, i.e., policy documents, journal articles, discussion papers and newspaper articles are used.

[2] The initiative "Deutsche Wohnen & Co enteignen" is run by engaged individuals collaborating with tenants' associations, urban planning organizations and political parties. The name of the initiative, translated "Expropriate Deutsche Wohnen & Co", refers to an effort to increase the number of rental housing units in Berlin to the detriment of real estate corporations such as Deutsche Wohnen and Vonovia.
[3] Arthur Sullivan, 'Berliners vote 'yes' on property expropriation' (DW.com, 27 September 2021) *<https://www.dw.com/en/berliners-vote-yes-on-property-expropriation-but-what-happens-now/a-59070328>* accessed 5 December 2022.
[4] Artikel 14 GG.

For a good understanding of the subject, this paper begins with an explanation of the background of the Berlin housing crisis, the actions by the activists of the Deutsche Wohnen & Co Enteignen, and the referendum of 26 September 2021 (Section 2). Subsequently, the notion of expropriation is defined on the basis of Article 14 of the German Basic Law and Art. 1 Protocol 1 to the ECHR and related case law (Section 3). Rules on compensation according to the German Basic Law and the ECtHR case law are discussed thereafter (Section 4). This research paper finally presents an assessment of the possible outcome of the application of the relevant rules to the Berlin case study (Section 5) and some general conclusions (Section 6).

2. THE BERLIN HOUSING CRISIS

Section 2 discusses the background of the Berlin housing crisis (sub-section 2.1) and its latest developments leading to the September 2021 referendum (sub-section 2.2).

2.1. BACKGROUND

Over the past ten years, approximately 240,000 people moved to Berlin. This development started with the German reunification when the government granted subsidies to stimulate new construction.[5] Increasing urbanisation, strong migration patterns from abroad, insufficient housing construction within the last decade, and low-interest rates caused a considerable increase in rental prices.[6] Pursuant to the legal framework, after World War II, rent regulations in West Germany mainly concerned social housing and tenants' protection, usually in the form of rent-capping limits. In the past decade, the federal government enacted less intrusive forms of rental control, such as the 2015 rental price brake – in German, *Mietpreisbremse* – aimed at preventing landlords from significantly increasing rent following a tenancy change. Implementation in several States (German: *Länder*), including Berlin, followed, yet without success. In this regard, specific requirements were laid down under §556d of the German Civil Code. The failure

[5] Lorenz Thomschke, 'Distributional price effects of rent controls in Berlin: When expectation meets reality' (2016) CAWM Discussion Paper No. 89, p. 4 <https://www.econstor.eu/bitstream/10419/147489/1/872238865.pdf> accessed 19 April 2022.
[6] ibid.

of the *Mietpreisbremse* is mainly due to the fact that the interested parties, i.e., landlords and housing corporations, did not make the necessary effort to comply with the law. Arguably, this reform produced a limited and temporary effect on high-price apartments but did not affect low-and middle-income households, in spite of this being its ultimate goal. This was also aggrieved by the lack of a mechanism to verify the enforcement of the law.[7]

2.2. Latest Developments and the September 2021 Referendum

Statistical data shows that over the last decade rent in Berlin has doubled mainly due to speculation by large estate corporations.[8] Since 85% of Berlin residents are renters, this resulted in social unrest and protests.[9]

Berlin's government, therefore, introduced the Berlin Rent Cap Act (the Act) in 2020.[10] This radical rent control policy froze the maximum rent price per square meter for five years and imposed legal sanctions for transgressors.[11] As a result, there was a considerable decline in the number of advertised rental units: newcomers and first-time renters struggled significantly to find a suitable place to live.[12] In April, the Act was repealed by the Federal Court of Justice, for being in violation of Art. 70 Basic Law.[13] The Berlin government was not allowed to legislate on this matter since the German federal government had already adopted a milder form of rent control allowing municipalities to limit prices in compliance

[7] Lorenz Thomschke, 'Distributional price effects of rent controls in Berlin: When expectation meets reality' (2016) CAWM Discussion Paper No. 89, p 27. <https://www.econstor.eu/bitstream/10419/147489/1/872238865.pdf>, accessed 19 April 2022.

[8] Berlin HYP & CBRE, 'Housing Market Report Berlin 2019' (2019), 8 <https://www.berlinhyp.de/en/media/newsroom/housing-market-report-berlin-2019?file=files/media/corporate/newsroom/weitere-publikationen/en/2019/wohnmarktreport-2019-en.pdf> accessed 19 April 2022.

[9] Emily Schultheis, 'Berlin's radical plan to stop rocketing rents' (*BBC: Worklife*, 26 February 2019) <https://www.bbc.com/worklife/article/20190226-berlins-radical-plan-to-stop-rocketing-rents, accessed 13 January 2022.

[10] GVBl. S. p. 50.

[11] Anja M. Hahn, Konstantin A. Kholodilin and Sofie R. Waltl, 'Forward to the Past: Short-Term Effects of the Rent Freeze in Berlin' (2021) DIW Berlin Discussion Paper No.1928, p. 1-2, <https://deliverypdf.ssrn.com/delivery.php?ID=255100081087114092120114119009004023016039060039010087100112100070068093029100073022019117103061008030027113122018100100089078043075078051054003005098024100086100055023077070082009095031103016123090007112005 00 >, accessed 19th April 2022.

[12] ibid 32.

[13] BVerfG, Beschluss des Zweiten Senats vom 25 März 2021 – 2 BvF 120 -, Rn. 1-5. Art. 70 Basic Law also regulates the division of legislative powers between the federation and the federal states. This provision allows the federal states to legislate only if the Basic Law does not confer the legislative power on a specific matter to the federation.

with special requirements, i.e., locations and rent brakes, namely the *Mietpreisbremse.*[14]

Activists of the Deutsche Wohnen & Co Enteignen, a joint initiative of several political groups and parties in Berlin, presented their own solution: expropriating housing units owned by large real estate corporations. Their proposal became the object of a non-binding referendum in September 2021, obtaining support from 56% of voters.[15] Activists put forward the following arguments in favour of expropriation and subsequent nationalisation: the urge to stop speculations by real estate companies trading housing units on the stock exchange, the belief that socialisation of the expropriated units would grant lower rent for over 240.000 housing units, and lastly, the demand for a more democratic system of administration of estates, promoting new constructions to serve the public good.[16]

Whereas the response by the German federal government to the referendum is not clearly defined yet, Berlin's largest estate corporations reacted by putting 10% of their properties in Berlin on the market.[17] Furthermore, the German Federal Court did not adjudicate the legal feasibility of this proposal yet.

On this final note, the next section deals with the legal framework for expropriation under German law and the ECHR.

3. EXPROPRIATION

Firstly, Section 3 tackles expropriation under German law, with reference to Art. 14 Basic Law and related case law (Sub-section 3.1). Secondly, expropriation is analysed in light of Art. 1 Protocol 1 to the ECHR and relevant judgments by the ECtHR (Sub-section 3.2). For the purposes of this section:

[14] §556d BGB.
[15] Arthur Sullivan, 'Berliners vote 'yes' on property expropriation' (*DW.com, 27 September 2021) <https://www.dw.com/en/berliners-vote-yes-on-property-expropriation-but-what-happens-now/a-59070328>* accessed 5 December 2022.
[16] Deutsche Wohnen & Co Enteignen 'Warum enteignen?' <https://www.darumenteignen.de/en/> accessed 19 April 2022.
[17] Arthur Sullivan, 'Berlin's big property investors not intimidated by expropriation vote' (*DW.com*, 30 September 2021) < https://www.dw.com/en/berlins-big-property-investors-not-intimidated-by-expropriation-vote/a-59349145 > accessed 13 January 2022.

(1) Art. 14 German Basic Law applies to legal persons within Germany.[18]

(2) Article 1 Protocol 1 to the ECHR is binding upon all the states that have signed and ratified it, including Germany.[19]

3.1. GERMAN LAW: ARTICLE 14 BASIC LAW

The German Property Clause is found under Art. 14 Basic Law. Firstly, paragraph 1 of this provision enshrines the protection of property rights and the right of inheritance in compliance with the content and limits defined by the law. Secondly, paragraph 2 states that property entails obligations and shall also serve the public good. Thirdly, paragraph 3 deals with expropriation, which shall only be permissible if ordered by or pursuant to a law that determines the nature and extent of compensation; the latter shall be determined by striking an equitable balance between public interest and the individual interests of conflicting parties.

In case of disputes concerning compensation, ordinary courts are competent. According to this provision, being capable of owning and inheriting property is regarded as a fundamental human right, i.e., securing personal liberty in the patrimonial sphere.[20] Art. 14 Basic Law aims at striking a balance between individual liberty and the social function of property, which are not mutually exclusive: by exercising their personal right to property, individuals participate in the formation of the society and its economic order; this leads to the creation of a social order.[21]

The German Federal Court defined expropriation as the partial or complete taking of individual property for the sake of the public good; expropriation is only lawful if it fulfils the legal requirements of Art. 14(3) Basic Law: a legal basis, compensation, public interest, and proportionality.[22]

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[18] Artikel 116(1) GG.
[19] European Court of Human Rights, ' The ECHR in 50 questions' (2021), p. 3 <https://www.echr.coe.int/documents/50questions_eng.pdf>, accessed 5 December 2022.
[20] Elmien Wilhelmina J. du Plessis, 'Compensation for Expropriation Under the Constitution' (2014) Stellenbosch University , p. 148. <https://deliverypdf.ssrn.com/delivery.php?ID=771116074111075005002075104107080025101007035037088048102102103022004003102093096103042029024024049112097064120104105076117090061081024064042097093101113009017023125085038045121110117014126089095125099015022120113097104101014003070100091087004122090007&EXT=pdf&INDEX=TRUE> accessed 19 April 2022.
[21] ibid p. 149.
[22] BVerfGE 58, 300 – *Nassauskiesung*.

Pursuant to the lawfulness requirement, only the legislator can issue a legal act to authorise expropriation. Thus, since the legislator is included in the administrative planning process, the executive plays an important role. Nevertheless, the executive shall be limited to executing expropriation and shall not create reasons thereof.[23] The legal rule authorising expropriation shall mention the public purpose and clarify the extent and nature of the compensation. If this is not the case, the act of expropriation is void and cannot be enforced.

The public purpose requirement is extensively discussed in the *Durkheimer Gondelbahn*.[24] The notion of public purpose can be limited and expanded by the courts in compliance with the case facts and context. The judiciary enjoys broad scrutiny powers in this regard; generally, expropriation cannot be carried out for improper purposes – such as increasing State property – or for a third party's benefit.[25] Furthermore, expropriation is tested against proportionality: deprivation of property shall be the *ultima ratio* – the most suitable and less intrusive means available to achieve objectives of public interest – and shall not create an excessive burden on the individual (proportionality in a narrow sense, weighing of interests).

Finally, the requirement of compensation is dealt with by Section 4.

3.2. ECHR: ARTICLE 1 PROTOCOL 1 TO THE ECHR

Article 1 Protocol 1 to the ECHR (hereinafter referred to as A1P1) comprises three distinct rules, namely the principle of peaceful enjoyment of possessions (first sentence of paragraph 1), the subjection to deprivation of possessions in accordance with specific requirements (second sentence of paragraph 1), and the State powers to control the use of the property to serve the public good (paragraph 2).

The notion of deprivation of possessions applies to expropriation and nationalisation, as they involve a direct transfer of a property title to a state body

[23] VVerfGE 56, 246 - *Durkheimer Gondelbahn*, para. 262.
[24] VVerfGE 56, 246 - *Durkheimer Gondelbahn*, paras. 266-269.
[25] BVerfGE 38, 175 - *Ruckenteignung* para 180.

or another individual, as established in *James and Others*.[26] Temporary dispossession does not amount to deprivation.[27]

The ECtHR distinguishes between indirect deprivation,[28] which is ordered via a legal procedure by public authorities and effected by the owner, e.g., forced sales, and *de facto* expropriation.[29] The latter covers situations where the owner has, in fact, lost control of and access to their property.[30] According to A1P1(1) second sentence, deprivation of possessions is only allowed when it is in the public interest and in compliance with the conditions set out by law and by general principles of international law.

Regarding the principle of lawfulness, the existence of a legal basis for expropriation under national law does not suffice: the provisions or case law on which deprivation of property is based shall be of a certain quality (in accordance with the rule of law) and provide sufficient guarantees against arbitrariness.[31] Another important requirement is foreseeability pursuant to the interpretation and application of the law, which shall not be unexpected, overly broad, or arbitrary.[32]

With regard to the requirement of public interest, the ECtHR clarified that the taking of property aimed at the enactment of social, economic, or other policies might be of public interest. Examples of purposes falling within the notion of public interest are the elimination of social injustice in the housing sector,[33] preventing mass homelessness,[34] adopting land and city development plans,[35] as well as the protection of the environment.[36] The Court, moreover, stressed the

[26] *James and Others v United Kingdom* App no 8793/79 (ECtHR, 21 February 1986).
[27] *Handyside v United Kingdom* App no 5493/72 (ECtHR, 7 December 1976).
[28] Transfer of property originating by public authorities' action but effected by the owner himself e.g., forced sales according to *Hakansson and Sturesson v Sweden* App no 11855/85 (ECtHR, 15 July 1987).
[29] *Hakansson and Sturesson v Sweden* App no 11855/85 (ECtHR, 15 July 1987).
[30] Laurent Sermet, 'The European Convention on Human Rights and property rights' (1992) Human rights files, No 11 rev., 24 < https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-11%281998%29.pdf > accessed 19 April 2022.
[31] European Court of Human Rights, 'Guide on Article 1 Protocol No.1 to the European Convention on Human Rights: Protection of property' (31 December 2021), 25, para. 15 <https://www.echr.coe.int/Documents/Guide Art 1 Protocol 1 ENG.pdf>, accessed 21st April 2022.
[32] ibid 26 para 120.
[33] *James and Others v United Kingdom* App no 8793/79 (ECtHR, 21 February 1986), para [45].
[34] *Bela Nemeth v Hungary* App no 73303/14 (ECtHR, 17 December 2020), paras [42]-[45].
[35] *Sporrong and Lonnroth v Sweden* App no 7151/75 and 7152/75 (ECtHR, 23 September 2972), para [69].
[36] *G.I.E.M. S.R.L and Others v Italy* App no 1828/06 and 2 others (ECtHR, 28 June 2018), para [295]. As an additional note, in C-234/20 and C-238/20 *Sātiņi-S* ECLI:EU:C:2021:734, the

extensive nature of the notion of public interest which may encompass various new purposes in compliance with relevant public policy considerations and factual contexts; this is especially the case when dealing with the enactment of laws expropriating property.[37]

Finally, interferences with the right to peaceful enjoyment of property shall strike a fair balance between individual and public interests.[38] The Court shall, therefore, consider whether the interference constituted a disproportionate and excessive burden on the individuals by adopting a case-by-case approach. Factors to be taken into account in this regard are the notion of fair balance, the margin of appreciation by public authorities, and compensation.

For the sake of this paper, the latter is dealt with in the subsequent section.

4. COMPENSATION

Section 4 examines compensation requirements under Art. 14(3) Basic Law (Sub-section 4.1) and under A1P1 and related case law (Sub-section 4.2). Finally, the *New Farmers* case is discussed as an example of exceptional circumstances justifying an absence of compensation (Sub-section 4.3).

4.1. GERMAN LAW: ART. 14(3) BASIC LAW

Under German law, in compliance with the property clause,[39] the State has the power to determine by means of a legal act whether compensation for expropriation is due and how it should be calculated. According to the case law of the Federal Supreme Court, compensation is only due when the requirements of Art. 14(3) Basic Law are met. Namely when an individual is partially or completely deprived of their property for the sake of realising specific public duties.[40]

European Court of Justice established that restrictions to the right to property justified based on environmental protection do not necessarily give rise to a right to compensation. According to the Court, compensation in such circumstances would amount to an unfair economic advantage.

[37] *Former King of Greece and Others v Greece* App no 25701/94 (ECtHR, 23 November 2000), para [87].

[38] *Beleyer v Italy* App no 3302/96 (ECtHR, 5 January 2000), para. [107].

[39] Artikel 14 GG.

[40] Elmien Wilhelmina J. du Plessis, 'Compensation for Expropriation Under the Constitution' (2014) Stellenbosch University, p. 147.

As mentioned earlier, Art. 14(3) Basic Law specifies that the nature and extension of compensation is to be determined by law and shall establish an equitable balance between the public interest and the individual interest of the parties affected. Expropriation without compensation amounts to deprivation.[41] Thus, since compensation shall be determined in compliance with the principle of proportionality by carrying out a case-by-case assessment of facts and context of expropriation, a fair balance of interests is not necessarily struck by the repayment of the full market value of the property (constitutional principle of compensation).[42] Under the Federal Planning Code,[43] procedures on the calculation of compensation are set out; expropriation is specifically dealt with in §93.1. Since expropriation is considered a proceeding in rem, the focus is on the property: right-holders are compensated for their loss, but the fact that their rights in land are not forever is taken into account.[44]

4.2. ECHR: ARTICLE 1 PROTOCOL 1 TO THE ECHR

Compensation in the context of expropriation is a common principle of constitutional property.[45] In this regard, A1P1 to the ECHR does not explicitly mention compensation. Nevertheless, the ECtHR found that expropriation without compensation constitutes a disproportionate interference with the individual right of peaceful enjoyment of possessions unless exceptional circumstances apply.[46] Generally, compensation is established with reference to the market value of the expropriated property; thus, A1P1 only grants a right to proportionate

<https://deliverypdf.ssrn.com/delivery.php?ID=771116074111075005002075104107080025101007035037088048102102103022004003102093096103042029024024049112097064120104105076117090061081024064042097093101113009017023125085038045121110117014126089095125099015022120113097104101014003070100091087004122090007&EXT=pdf&INDEX=TRUE> accessed 19 April 2022.

[41] ibid.

[42] BVerfGE 24, 367 - *Hamburgisches Deichordnungsgesetz.*

[43] Baugesetzbuch (BauGB).

[44] Elmien Wilhelmina J. du Plessis, 'Compensation for Expropriation Under the Constitution' (2014) Stellenbosch University , p. 165. <https://deliverypdf.ssrn.com/delivery.php?ID=771116074111075005002075104107080025101007035037088048102102103022004003102093096103042029024024049112097064120104105076117090061081024064042097093101113009017023125085038045121110117014126089095125099015022120113097104101014003070100091087004122090007&EXT=pdf&INDEX=TRUE> accessed 19 April 2022.

[45] Sabrina Praduroux, 'Property and Expropriation: Two Concepts Revisited in the Light of the Case Law of the European Court of Human Rights and the European Court of Justice' (2019) 8 EPLJ 180.

[46] *Vistins and Prepjolkin* App no 71243/01 (ECtHR, 8 March 2011), para [36].

compensation which does not necessarily entail compensation in full if justified by objectives of public interest.[47] Compensation below the market price, for instance, can be legitimate if public interests are adequately balanced as against individual interests. The notion of public interest involves considerations of political, economic, and social issues and leaves a wide margin of appreciation to the legislature unless a reasonable foundation for their decision is lacking.[48] The Court recognised that a fair balance between conflicting interests could be only struck if there is no excessive burden on the individual. Specifically, measures of economic reform designed to achieve social justice may allow for compensation below the market price.[49] The main criterion is that the disproportion between the property's market value and the compensation awarded shall not be extreme or too significant for the applicant.[50]

With Germany being an EU Member State, in the realm of compensation, another relevant provision is Art. 17 of the EU Charter of Fundamental Rights, which shall be interpreted in light of A1P1. Art. 17(1) states that anyone shall have the right to own, dispose of, and inherit or bequest inheritance of their lawfully acquired possessions; depriving someone of their possession is possible on public interest grounds provided that a legal basis exists and that fair compensation is awarded. The CJEU established in its case law that fair compensation shall be paid in good time in case of measures depriving a person of their property and that a right to compensation can be directly based on Art. 17(1): the exact level of compensation to be awarded is, nevertheless, unclear. The CJEU case law on this matter aligns with the ECtHR case law by virtue of Art. 52(3) EU Charter of Fundamental Rights.

4.3. Exceptional Circumstances: New Farmers

[47] *Urbaska obec Trencianske Biskupice v Slovakia* App no 74258/01 (ECtHR, 27 November 2007), para. [126].
[48] ibid para. 113.
[49] ibid para. 115.
[50] Kozacioglu v Turkey App no 2334/03 (ECtHR, 19 February 2009).

On 30 June 2005, the Grand Chamber of the ECtHR overturned the unanimous judgement by the Chamber of 22 January 2004,[51] related to the expropriation of the new farmers' heirs in the former German Democratic Republic (GDR).[52]

The case facts concerned a land reform enacted in September 1945 by the Soviet Military Administration together with the German Communist Party in the German Soviet Occupied Zone. Such reform, which formally aimed at expropriating land from national socialists and war criminals, *de facto* targeted landowners of more than 100 ha as a means to minimise their power and secure food supply for the population.[53] The expropriated land became State-owned and was redistributed to new farmers owning almost no land at all. These new farmers' ownership rights were rather limited as they were not allowed to sell, lease, burden, or divide the land which ought to be used for agricultural purposes. Using the land for agricultural purposes was also a condition for passing it on to their heirs.

The expropriated land was subsequently reassigned to third parties according to the Change of Possession Decrees of 1951, 1975, and 1988. Thus, changes in ownership were never entered in the appropriate land register of the GDR: there was no correspondence between formal and factual owners. In 1990, with the introduction of the Modrow Law,[54] all the restrictions on ownership rights of the new farmers were abrogated; this piece of legislation was then integrated into the law of the Federal Republic of Germany (FRG).

After the German reunification, the FRG issued new rules providing that the land acquired under the 1945 land reform would pass on to the heirs of the registered owners;[55] thus, only those owners who kept cultivating the land were enabled to retain ownership of it.[56] On this basis, the FRG required reassignment to the pool of state-owned land; the new farmers' heirs, who formally were still

[51] *Jahn and Others v Germany* App no 46270/99 (ECtHR, 22 January 2004).
[52] *Jahn and Others v Germany* App no 46720/99, 72203/01, 72552/01 (ECtHR, 30 June 2005).
[53] Ulrike Deutsch, ' Expropriation without Compensation – the European Court of Human Rights sanctions German Legislation expropriating the Heirs of "New Farmers" (2005) German Law Journal 1367 <https://www.cambridge.org/core/journals/german-law-journal/article/expropriation-without-compensation-the-european-court-of-human-rights-sanctions-german-legislation-expropriating-the-heirs-of-new-farmers/872A245BB18C76C3F950C760ECEE638F> accessed 19 April 2022.
[54] Hans Modrow was the prime minister of the GDR from November 1989 until March 1990.
[55] Introductory Act to the Civil Code, section 233 (11), para. [2].
[56] Introductory Act to the Civil Code, section (11), paras. [2]-[3].

the owners as the GDR registers had not been modified, started legal proceedings to challenge expropriation.

On 6 October 2007, the German Federal Constitutional Court assessed the compatibility of Section 233(11-16) of the Introductory Act to the Civil Code with the property right protected under Art. 14 Basic Law.[57] According to the Court, since applicants inherited the land by the new farmers and fully became owners, regardless of the restrictions imposed on the land. The 1992 provisions infringed on Art. 14 Basic Law.[58] The Court, then, distinguished between expropriation and rules establishing content and limits of ownership. The former is dealt with by Art. 14(3) and entails individual and concrete deprivation of property rights for the public good; the latter is, in accordance with Art. 14(1) Basic Law, a general and abstract definition of the rights and duties of the owners who acquired the land under the land reform. The main difference is that, unlike expropriation, limitation to the right of ownership does not require compensation.

The Court ruled that the case at hand related to a rule establishing limits to the right to ownership; thus, they consequently applied a proportionality test by analogy to expropriation assessing whether the measure enacted was suitable to achieve a legitimate aim (suitability), the less intrusive means to do so (necessity) and whether public and individual interests were balanced out correctly (proportionality in a narrow sense).

Concerning the criterion of a legitimate aim, the measure was intended to provide legal certainty with regard to the status of the new farmers' heirs by remedying loopholes in the current law and to enhance the development of a free market economy. Furthermore, the Court found the other proportionality criteria to be met considering the challenge of transitioning from a socialist property regime into the Federal Republic of Germany's market economy.

Therefore, it was established that the provisions in question did not infringe on Art. 14 Basic Law.

The new farmers' heirs then lodged several applications with ECtHR claiming a violation of A1P1. On 22 January 2004, despite acknowledging the exceptional circumstances of the case, the Chamber found that the applicant's right

[57] BVerfG 1 BvR 1637/99.
[58] Introductory Act to the Civil Code, section 233(11-16).

to property had been violated due to a lack of compensation. The German government had failed to strike a fair balance between the protection of the new heirs' rights and the public interest. The absence of compensation constituted an excessive burden on the individual.[59]

In 2005, upon request by the German Government, the Grand Chamber reverted this judgement. The Grand Chamber found that the land had passed on to the new farmers' heirs and that the Modrow Law had granted them full ownership by lifting all the restrictions; the fact that the owners had to subsequently reassign their rights to the FRG tax authorities amounted to a violation of A1P1 paragraph 2. To be justified, such violation shall meet requirements of lawfulness, legitimate aim, and proportionality. Based on the assessment by the Federal Constitutional Court, the Grand Chamber found the measure to be lawful and pursuing a legitimate aim. In terms of proportionality, the Grand Chamber recognised that expropriation without compensation might be possible under A1P1 provided that it does not impose an excessive burden on the applicants and can be justifiable under exceptional circumstances.[60] Here, the Court found expropriation without compensation to be proportionate due to the exceptional circumstances of the period of transition between a socialist regime to a market economy, which caused an excessive burden on the legislature and did not lead the new farmers' heirs to have any legitimate expectations of maintaining their legal status. Furthermore, expropriation was deemed to be a means to achieve social justice.

The Grand Chamber found no violation of A1P1 pursuant to expropriation without compensation yet clarifying that this is a singular case and that the term *exceptional circumstances* ought to be determined in a restrictive manner.

The next session discusses, among other requirements for expropriation, the applicability of the *New Farmers* precedent to the Berlin housing crisis case study.

5. Application to the Berlin Housing Crisis Case Study

[59] 'Jahn and Others v. Germany' (2004-2005) 15 Hum Rts Case Dig 757.
[60] See, *e.g., James and Others v United Kingdom* App no 8793/79 (ECtHR, 21 February 1986), para. [54].

Section 5 aims at applying the research findings to the Berlin housing crisis case study and to assess whether the expropriation of mega-landlords, as proposed by Berlin's activists, would be likely considering the legal basis, lawfulness, public interest, proportionality, and compensation requirements emerging from the relevant legal sources.

Firstly, activists of Deutsch Wohnen & Co. Enteignen refer to Art. 15 Basic Law as the main legal basis for their claim. This provision states that land, natural resources and means of production may be transferred to public ownership for the purpose of nationalisation. Thus, this must be done by means of a law determining the nature and extent of compensation in accordance with Art. 14(3) Basic Law. A partial or total transfer of private property for the purposes of nationalisation – here, housing units owned by housing corporations – would amount to expropriation, according to the German Federal Court.[61] Furthermore, the ECtHR recognised that the notion of deprivation of possession, as enshrined in the second sentence of paragraph 1 A1P1, covers also nationalisation since the latter entails a transfer of property title (ownership) to a State body.[62]

Secondly, as to the lawfulness requirement, the ECtHR found that the existence of a legal basis alone does not suffice. Provisions allowing for expropriation ought to meet a certain quality standard; namely, they shall provide sufficient guarantees against arbitrariness and shall ensure foreseeability as to interpretation and application.[63] In the German legal system, lawfulness is ensured by the fact that only the legislator is allowed to authorise expropriation and by requiring that the authorising legal act mentions the public purpose and clarifies the extent and nature of the compensation. Art. 15 Basic Law does not seem problematic in this regard. It is, nevertheless, of utter importance that the separation of powers between the legislator and the executive is upheld: the decision-making powers of the executive shall be strictly limited to avoid arbitrariness. Therefore, executive authorities shall merely carry out a factual

[61] BVerfGE 58, 300 – *Nassauskiesung.*
[62] *James and Others v United Kingdom* App no 8793/79 (ECtHR, 21 February 1986); *Hakansson and Sturesson v Sweden* App no 11855/85 (ECtHR, 15 July 1987).
[63] European Court of Human Rights, 'Guide on Article 1 Protocol No. 1 to the European Convention on Human Rights: Protection of property' (31 December 2021),25, para 15 <https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf> accessed 21 April 2022.

assessment of the circumstances and shall not be awarded discretion as to expropriation.

Thirdly, the requirements of public interest and proportionality are intertwined. On the one hand, the notion of public interest is rather broad according to the German legal system and ECtHR case law. Under German law, courts can expand or restrict the meaning of public interest by considering the case facts.[64] The decisive criterion is that public interest shall be of such importance to justify the extraordinary disturbance of constitutional balance in society.[65] Likewise, the ECtHR clarified that depriving individuals of their possessions for the purpose of enacting social and economic policies would satisfy the public interest requirement. Activists claim that socialisation would contribute to ensure the sustainable distribution of property and prevent housing corporations from trading housing units on the stock exchange: socialisation would end speculation. It is, then, arguable whether this would be enough to justify such an extraordinary interference with the individual right to property protected under Art. 14 Basic Law.[66] Therefore, in case of expropriation proved to be ineffective in remedying the lack of affordable housing for Berlin's renters or State authorities did not manage to socialise the expropriated properties, there would be a possibility for the housing units to be returned to the corporations that owned them.

Proportionality, on the other hand, entails striking a fair balance between individual and public interest. The test adopted by the ECtHR resembles the German one: expropriation shall be the most suitable and least intrusive means to achieve the public interest goal and shall not create an excessive burden on the individual. Arguing for expropriation as the least intrusive means to ensure affordable housing seems rather far-reaching in virtue of the importance that both the German Basic Law and A1P1 confer the right to property. Nevertheless, a point could be made that all the other rent-control instruments enacted by governmental authorities in Berlin have failed to remedy the housing crisis due to a lack of law

[64] VVerfGE 56, 246 - *Durkheimer Gondelbahn*, para 266-269.
[65] Elmien Wilhelmina J. du Plessis, 'Compensation for Expropriation Under the Constitution' (2014) Stellenbosch University, p. 157. <https://deliverypdf.ssrn.com/delivery.php?ID=771116074111075005002075104107080025101007035037088048102102103022004003102093096103042029024024049112097064120104105076117090061081024064042097093101113009017023125085038045121110117014126089095125099015022120113097104101014003070100091087004122090007&EXT=pdf&INDEX=TRUE> accessed 19 April 2022.
[66] BVerfGE 38, 175 – *Rückenteignung*.

enforcement. When assessing the burden on the individual subject to expropriation, instead, it seems rather reasonable to argue that depriving large housing corporations of a limited number of housing units located in a specific area would not cause major financial damages to them. If the expropriation order targeted multinational corporations only, they would still own many other housing units in different areas or countries; thus, this may potentially set a precedent for other national governments wanting to promote social justice in the context of housing.

In assessing proportionality, compensation plays a decisive role. Thus, compensation shall be dealt with as a separate requirement. In this regard, activists in Berlin demand for no compensation at all or compensation below the market price. Although compensation shall generally correspond to the market value of the expropriated property, both Art. 14(3) Basic Law and A1P1 specify that what matters is striking a fair balance between the individual and the public interests. Drawing an analogy with the *New Farmers* case, expropriation without compensation may be allowed under exceptional circumstances.[67] Nevertheless, the *New Farmers* case dealt with a rather singular situation, namely ensuring social justice during the transition from a socialist regime to a market economy. Furthermore, the ECtHR clarified that the notion of exceptional circumstances ought to be determined restrictively. The lack of affordable housing in Berlin, being a rather common issue for highly urbanised areas, does not seem to be exceptional at all.[68] Thus, one may use the *New Farmers* case to argue for an intermediate solution. The Berlin Government may establish an obligation for housing corporations to rent out their housing units if they want to retain ownership.[69] This would still amount to de facto expropriation, as housing corporations would, at least partially, lose control of their properties. Thus, they would be able to retain the profits derived from renting out such housing units receiving what can be deemed to be a form of compensation. The burden on the expropriated owners would, therefore, be considerably diminished.

[67] *Jahn and Others v Germany* App no 46720/99, 72203/01, 72552/01 (ECtHR, 30 June 2005).
[68] Susanne Bauer, 'Urban Agenda for the EU' (2019) City of Wien – Wiener Wohnen <https://ec.europa.eu/futurium/en/system/files/ged/folder_action_plan_of_the_euua_housing_partnership.pdf> accessed 12 May 2022.
[69] In New Farmers, ownership of the land was conditional to agricultural use. See sub-section 4.3.

To conclude, although some of the premises for expropriation and subsequent nationalisation, i.e., a legal basis, lawfulness and public interest, are present, the requirements of proportionality and compensation are still areas for contention. There is a considerable difference between the context of the Berlin housing crisis and the case facts of the *New Farmers* case:[70] using the latter as a precedent to justify expropriation without compensation would most likely not be possible. Nevertheless, this case may pave the way for a less intrusive solution that would facilitate meeting proportionality requirements, namely imposing an obligation on housing corporations to rent out their properties as a condition to retain ownership.

6. CONCLUSION

This paper aimed to conduct a doctrinal analysis of the relevant legal rules and case law to assess whether expropriation of mega landlords in Berlin without compensation or with compensation below the market price, as proposed by the activists of the Deutsche Wohnen & Co Enteignen, would be in compliance with Article 14 of the German Basic Law and A1P1.

It was found that the lack of affordable rental flats in Berlin is rooted in increasing urbanisation, strong migration patterns, and insufficient housing construction within the last decade. Furthermore, forms of rental control enacted by the federal government (*Mietpreisbremse*),[71] and by the Berlin government (Berlin Rent Cap),[72] have proved to be ineffective in ensuring social justice in the context of housing. On the one hand, the interested parties failed to comply with the *Mietpreisbremse* due to the lack of a proper enforcement mechanism; on the other hand, the Berlin Rent Cap Act was deemed unconstitutional as the federal government had already adopted milder forms of rent control.

When diving into the notion of expropriation, Art. 14 Basic law and A1P1 lay down similar conditions. As protecting the right to property or to peaceful enjoyment of possession is the extremely important, partial or complete taking of individual property is only allowed provided that strict requirements are met: the

[70] *Jahn and Others v Germany* App no 46720/99, 72203/01, 72552/01 (ECtHR, 30 June 2005).
[71] §556d BGB.
[72] GVB1. S. 50.

existence of a legal basis, lawfulness, public interest purposes, proportionality, and compensation. Compensation is generally necessary under both Art. 14(3) Basic Law and A1P1 as a way to strike an equitable balance between the public interest and the individual interest of the private parties affected. Nevertheless, case law shows that such a fair balance does not necessarily require compensation equating to the market value of the expropriated property. In particular, the *New Farmer* case suggests that expropriation without compensation may be possible in cases of extraordinary circumstances.

When applying the relevant requirements to the Berlin housing crisis case study, several issues emerged in the context of proportionality and compensation: despite the existence of a lawful legal basis for expropriation and having proved that such measure would pursue a public interest goal, that being eliminating social injustice in the housing sector, expropriation of mega landlords in Berlin seems to be rather unlikely. The rationale for this is found in the difficulty of proving that expropriation would be the least intrusive means to ensure sustainable distribution of housing units, since it constitutes a severe encroachment upon the individual right to property. Furthermore, as to the absence of compensation, drawing an analogy between the current Berlin housing crisis and the facts of the *New Farmers* case is not possible due to the lack of exceptional circumstances. However, this case may constitute the foundation for a milder solution: making ownership by housing corporations dependent on an obligation to provide rental housing units.

As a final note, since the Berlin government and the German Federal Court have neither legislated, nor expressed their final judgment as to the constitutionality of expropriation upon the proposal of Berlin activists, this question remains open. One may reach a different conclusion by drawing from the same doctrinal analysis since requirements, such as a fair balance of interests and proportionality, allow for a rather broad interpretation.

Taxation and State Aid: Two Symbiotic Frameworks or Natural Enemies

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Practice-based legal research on the assessment criteria of fiscal measures following the current European Union's State Aid legal framework.

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1. INTRODUCTION

An extensive collection of Articles aimed at addressing issues with Competition law are gathered in the Treaty on the Functioning of the European Union (TFEU). The five main branches of competition law are spread among several general Articles, with extensive case law by the ECJ/CJEU elaborating further on the practical application of these regimes.[2] The contentious point of this research will be the substantive character of the State aid branch. In that context, it would be worth mentioning the fact that the Commission has extensive and almost exclusive powers to decide whether a State measures are compatible with the State aid framework. This is laid down in Article 107 TFEU.[3] Furthermore, considering the amount of case law on the different fiscal measures, the scope of research will be limited to cases of intra-group transactions or, more specifically, compliance with a valuation principle applied for the calculation of financial and commercial transactions between related companies, the "arm's length principle".

At the end of the 18th century, the British Isles and continental Europe underwent the First Industrial Revolution, a time of cultural and economic advancement. More specifically, in the year 1776, Adam Smith published his work *"Inquiry into the Nature and Causes of the Wealth of Nations".* In that book, the author conceptualised and structured a system of definitions depicting the inner workings of the Economic Market.[4] Scrolling through his work, one concept is particularly interesting in light of this paper: "the invisible hand of the Market". The idea behind the "invisible hand" is that the common market is subject to natural self-regulation, aiming towards the maximisation of welfare in society.[5] Unfortunately, such self-regulation is only possible on the presumption that no participant abuses his position. As beautiful as it sounds, the author elaborates further that, in practice, a person, no matter whether private or natural, will always abandon the idea of the common good to pursue their own interests.[6] Therefore, to ensure the existence of such a process, a legal order punishing such selfish

[2] Jones et al., *EU competition law: Text, cases, and materials*, 2019, pp.90,91,92.
[3] *Deufil GmbH & Co. KG v Commission of the European Communities*, (310/85), EU:C:1987:96, [1987] ECR 910, para.24.
[4] Otteson, *Adam Smith: Major conservative and liberal thinkers* 2013, pp.89,90,91.
[5] Smith A, *An Inquiry into the Nature and Causes of the Wealth of Nations by Adam Smith*, (printed for A Strahan; and T Cadell Jun and W Davies 1802), pp.33-43.
[6] Otteson, *Adam Smith: Major conservative and liberal thinkers* 2013, p.97.

conduct by the participants shall be created. On that substantive basis and in pursuit of the idea of an internal market, the European Union created a set of rules regulating Market "irregularities".[7] This was introduced by the Treaty establishing the European Economic Community (EEC) as a competition law system in line with the aim of Article 3(1)(g) of that Treaty, which is to create "a system ensuring that competition in the internal Market is not distorted".

Measures within the scope of State Aid can take many forms of operating aid, and, regardless of the broad array of measures available in the European Community, exercising preferential treatment through a Member State's national tax system is trendy.[8] That trend is based on the presumption, which was asserted by *Grand Duchy of Luxembourg and Fiat Chrysler Finance Europe v European Commission*, that direct taxation is a domain of jurisdiction of the Member States.[9] Upon considering the tax autonomy[10] of the Member States, the Court of Justice clarified that the legislation shall not exclude fiscal measures from the scope of Article 107(1) TFEU.[11] However, the sphere of State aid is a subject that undergoes development where the constant expanding creates confusion and ambiguity. Therefore, the purpose of the following paper is not to answer a single question, but instead to lay down how fiscal State aid is assessed according to European Union law. Several sub-questions shall be answered accordingly.

Approaching the issue at hand, the jurisdiction of the State aid regime shall be considered first (Section 2). Consequently, the sub-question which will be answered is: "How far does the scope of the State aid regime reach in regard to the Member State's tax autonomy?"

The next step is to define the concepts deriving from Article 107(1) TFEU. In that context, definitions such as tax ruling, arm's length principle, and transfer pricing rulings are of great relevance; ergo they are elaborated on as well. The

[7] Jones et al., *EU competition law: Text, cases, and materials*, 2019, p.1.
[8] Cardoso R, "State Aid: Commission Orders Estonia and Poland to Deliver Missing Information on Tax Practices; Requests Tax Rulings from 15 Member States" (*European Commission - European Commission (*June 8, 2015) https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5140 accessed 6 May 2022.
[9] *Grand Duchy of Luxembourg and Fiat Chrysler Finance Europe v European Commission* (C-885/19 P and C-898/19 P), EU:C:2022:859, [2022] ECR 885, para.73.
[10] The concept "tax autonomy" (or taxing power) captures the extent of freedom governments exert over tax policy (Blöchliger & Nettley, *Sub-central tax autonomy*, 2015, pp 3,4,5.).
[11] *Banco Exterior de España SA v Ayuntamiento de Valencia* (C-387/92), EU:C:1994:100 , [1994] ECR 387, 15 March 1994, paras. 12,13,14.

following question will be answered: “How are the relevant concepts related to fiscal State aid defined according to European and international standards?” In sub-section 3.1., the concepts referred to in Article 107(1) TFEU such as “undertaking” and “economic activity” will be clarified (Sub-section 3.1). In the following sub-sections, other broad tax-related concepts will be clarified further (Sub-section 3.2).

Keeping in mind the limits of authority and clarity on the scope of the research, the next step is to review the general assessment criteria established in case law. Consequently, the following issue to be discussed is: “What is the legal framework for the assessment of State measures according to Article 107(1) TFEU?” Section 4 will take the form of a small-scale overview describing the four-step assessment criteria for State measures and whether they fall within the scope of Article 107(1) TFEU. This Section will be introduced with an explanation of the relevant framework. Secondly, the State of origin criteria will be investigated (Sub-section 4.1). Thirdly, the burden of proof for the existence of beneficial treatment (advantage criteria) will be reviewed (Sub-section 4.2). Fourthly, the broad application of the selectivity condition will be presented concisely (Sub-section 4.3). Finally, the effect on trade conditions will be elaborated on (Sub-section 4.4).

The selectivity criteria will be further examined in Section 5 by reference to case law. The following Chapter is based on the three-step approach established in case law: First, the reference network criteria (Sub-section 5.1), second, the “non-discrimination” test (Sub-section 5.2) and, finally, justifications in the nature and logic of the reference system (Sub-section 5.3) will be elaborated on. This section ends with a depiction of an application of that test and its latest development in the landmark decision: *Grand Duchy of Luxembourg and Others v European Commission* (Joined Cases C-885/19 P and C-898/19 P) (Section 5.4). Finally, a summary of all findings will conclude the research (Chapter 6).

2. TAX AUTONOMY AND EU PRIMACY

In the early 60's, the ECJ shaped the authority of Union law by ruling two cases in an unusual and unexpected manner. The rulings of *Van Gend and Loos*[12] and *Costa ENEL*[13] are pivotal for the establishment of the Union law authority. Both cases created a new legal order of international law by limiting the sovereign rights of the States. These precedents defined the doctrines of European Union primacy and authority.[14]

The notion of tax autonomy implies the exclusivity of national law to preside over the tax policy of the respectful State.[15] That freedom might be exercised in three directions: to raise revenue, to regulate the population, and to redistribute wealth in society.[16] Regardless, States might grant preferential treatments to certain entities to implement their policies. The legality of such arrangements is assessed on a case-by case basis.

Back in 1974, in a case before the CJEU, the Court stated that each Member State has the fiscal autonomy to design their own taxes within their borders.[17] However, a few decades later, the CJEU limited such freedom to the extent where Member States may still exercise their fiscal autonomy, but that autonomy must comply with the State Aid framework established by the Union.[18] Despite this development, the area of fiscal measures escaped the scrutiny of the State Aid regime until 1997. The basis for that phenomenon was the fact that the Community was seen as purely economic. For that reason, the area of direct taxation was presumed to be fully up to the Member States' discretion. In 1997, the European ministers of finance at the time agreed to the creation of a non-binding instrument whose primary aim was to identify and assess preferential tax treatments. For that purpose, the Code of Conduct Group was created.[19] Using the

[12] The case proved the ability of EU law to be relied upon by individuals (*NV Algemene Transport-en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration 26-62*, 1963).
[13] The case showed the EU law supremacy over national law (*Flaminio Costa v ENEL (Case 6/64)*, EU:C:1964:66, [1964] ECR 585, 15 July 1964, p.596, 597.).
[14] Chalmers et al., *European Union Law: Text and Materials*, 2019, p. 207.
[15] Blöchliger & Nettley, *Sub-central tax autonomy*, 2015, p. 1.
[16] Avi-Yonah, *The three goals of taxation*, 2006, pp. 5, 10, 22.
[17] *Italian Republic v Commission of the European Communities (173-73)*, EU:C:1974:71, [1974] ECR 585, 2 July 1974.
[18] *Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v 3M Italia SpA (C-417/10*), EU:C:2012:184, [1974] ECR 585, 29 March 2012, para. 25.
[19] "Code of Conduct Group (Business Taxation)" (*Consilium* December 7, 2022). https://www.consilium.europa.eu/en/council-eu/preparatory-bodies/code-conduct-group/ accessed 6 April 2022.

work of the group as an inspiration, the Commission launched research to identify fiscal measures that may fall within the scope of Article 87(1) TFEU (amended to Article 107 TFEU). The result of that research was an adopted Notice on the application of State aid control to direct business taxation.[20]

This resulted not only in the removal of selective fiscal measures, but also constituted a reason for the Commission to look further into the inner workings of the Member State's tax systems. From that point onwards, the Commission supervised tax measures exercised by Member States and took serious steps toward broadening the scope of the State Aid regime. Such steps include but are not limited to the CJEU's endorsement of the arm's length principle "as a prescribing method for the calculation of integrated group companies" taxable profit in 2006.[21] Another example would be the inquiry conducted in 2013 by the Commission issuing tax rulings for the period from 2010-2013 granted by the Member States in the Union.[22] That inquiry led to the filing of dozens of cases by the Commission against Member States such as Luxembourg,[23] the Netherlands,[24] Ireland,[25] and Belgium[26].[27]

[20] "Commission Notice on the Application of the State Aid Rules to Measures Relating to Direct Business Taxation (98/C 384/03) (Text with EEA Relevance)" (*EU Lex* 10 December 1998) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R0720 accessed 6 April 2022.

[21] *Kingdom of Belgium and Forum 187 ASBL v Commission of the European Communities* (C-182/03 and C-217/03), EU:C:2006:416, [2006] ECR 182, 29 March 2012.

[22] "State Aid: Commission Extends Information Enquiry on Tax Rulings Practice to All Member States" (*European Commission* December 17, 2014) https://ec.europa.eu/commission/presscorner/detail/es/IP_14_2742 accessed 6 May 2022.

[23] "Competition Policy SA.38375 (2014/NN - 2014/C) State Aid Which Luxembourg Granted to Fiat" (*Competition policy* 21 February 2014). https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38375 accessed 7 May 2022.

[24] "Competition Policy SA.38374 (2014/NN - 2014/C) State Aid Implemented by the Netherlands to Starbucks" (*European Commission* February 21, 2014) https://competition-policy.ec.europa.eu/state-aid_en accessed 6 June 2022.

[25] "Competition Policy SA.38373 (2014/NN - 2014/C - 2016/CR) - Aid to Apple" (*Commission* 21 April 2014). https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38373 accessed 6 May 2022.

[26] "Competition Policy SA.37667 (2015/NN - 2015/C) Excess Profit Exemption in Belgium – Art. 185§2 b) CIR92" (*Competition policy* 7 November 2013). https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_37667 accessed 6 May 2022.

[27] Directorate General Competition , *DG Competition Working Paper on State aid and tax rulings* 2016.

In conclusion, as much as the area of taxation is, in principle, reserved for Member States, national authorities must refrain from adopting measures coinciding with the definition set in Article 107(1) TFEU.

3. Concepts and Definitions

"*Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."*

Article 107 (1) TFEU

The concept of State aid set up in the aforementioned Article is the starting point of majority of cases dealing with instances of State aid. Regardless, the wording of that paragraph may be subject to interpretation by the Member States. To prevent such frivolities, the CJEU dissected the section and gave extensive definitions of each and every word used by the legislator. For the purposes of this research, the concept of undertaking will be investigated together with economic activity. Additionally, definitions related to the intra-group transaction cases, such as tax ruling, arm's length principle, and transfer pricing rulings will be reviewed.

3.1." Undertaking" and "Economic Activity"

When talking about the scope of the regime, it is worth mentioning that Article 107(1) TFEU only includes legal persons, or, in the wording of the relevant case law, "undertakings". According to case law, the Court of Justice takes the engagement of a legal entity in economic activity as the "decisive factor for an entity to be considered an undertaking".[28] Therefore, parameters such as legal status in national law and the way they are financed is of little to no relevance.[29]

To define what an undertaking is, it is vital to distinguish economic from non-economic activity. Case law straightforwardly defines economic activity: "any activity consisting in offering goods and services on a given market is an

[28] *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten*, (Joined cases C-180/98 to C-184/98 2000), EU:C:2000:428, [2000] ECR 180, 12 September 2000, para. 74.
[29] 92/521/EEC: Commission Decision of 27 October 1992 relating to a proceeding under Article 85 of the EEC Treaty 1992, para. 43.

economic activity".[30] Having clarified the concept of economic activity, some consequent specifics must be clarified. The nature of the economic activity is of no importance as soon as the entity offers a good or service on the market. If that criterion is covered, the legal person falls within the scope of the definition of "undertaking".[31] As for non-economic activities, such activities are of no importance for the Court in that context.[32]

3.2. TAX RULING

According to the OECD Glossary of tax terms, a tax ruling is a decision or opinion in response to a taxpayer question coming as an assessment procedure.[33] According to EU case law, Member States have the authority to exercise an administrative act whose sole function is to establish in advance the application of the ordinary tax system in a particular case and certain circumstances to a person.[34] Despite the fact that tax autonomy might be exercised in regard to the tax ruling, the Member State must still comply with the State aid framework.[35]

3.2.1. Arm's Length Principle

A substantial part of the case law deals with occurrences where an inaccurate calculation of the tax basis by the Member State's tax authority results in a selective advantage for an undertaking, thereby creating unfair competition.[36] To prove such a violation, the CJEU makes a separate calculation to figure out what the tax base would be under normal circumstances. In some cases, the Court deploys the arm's length principle to make such a calculation. According to the OECD Glossary of tax terms, the arm's length principle is a widely recognised

[30] *Commission of the European Communities v Italian Republic* (C-35/96), EU:C:1998:52, [1998] ECR 035 , 18 June 1998, para. 36.
[31] *Klaus Höfner and Fritz Elser v Macrotron GmbH* (C-41/90), EU:C:1991:161, [1998] ECR 041, 23 April 1991, paras. 21, 22, 23.
[32] *SAT Fluggesellschaft mbH v Eurocontrol* 1994 (C-364/92), ECLI:EU:C:1994:7, [1994] ECR 364, 19 January 1994, paras. 18,19.
[33] "Glossary of Tax Terms" (*OECD*) https://www.oecd.org/ctp/glossaryoftaxterms.htm accessed 7 May 2022.
[34] *Kingdom of the Netherlands and Others v European Commission.* 2019 (T-760/15 and T-636/16), EU:T:2019:669, [2019] ECR 760, 24 September 2019, para. 12.
[35] *Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v 3M Italia SpA* (C-417/10), EU:C:2012:184, [2012] ECR 760, 29 March 2012, para. 25.
[36] *Banco Exterior de España SA v Ayuntamiento de Valencia* (C-387/92), EU:C:1994:100 , [1994] ECR 387**,** 15 March 1994**,** para. 14.

international principle that implies that calculations between related and independent enterprises are different and profits that have been exempted on that basis must be included in the enterprise tax base and taxed accordingly.[37] When this principle is not considered by the Member State in the approximation of the market-based outcome, the measure is considered selective and contrary to the established State aid regime.

3.2.2. Transfer Pricing Rulings

Instances where the arm's length principle is central for the precise approximations are the cases including a granted tax ruling on transfer pricing arrangements. The OECD Glossary of tax terms gives a clear definition of transfer pricing from a tax law perspective. Transfer pricing is the price charged by a subsidiary or other legal person with sufficient relation to the company for services, goods, or intangible property (royalties).[38] Such pricings may be exempted by the national administration, which would grant an advantage, resulting in the majority of the cases as a fiscal State aid under Art.107(1) TFEU. In its calculation, the Commission uses the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations,[39] whereas, for transfer pricing arrangements, the Commission may adopt five general methods of calculation.[40]

4. ART. 107(1) TFEU: THE FOUR-STEP CRITERIA TO PROVE STATE AID

The short definition of State aid in Article 107(1) TFEU contains a four-step criteria for assessing State aid.[41] Such beneficial treatment is not strictly negative for the Market and sometimes vital. Instances of such circumstances are covered

[37] "Glossary of Tax Terms" (*OECD*) https://www.oecd.org/ctp/glossaryoftaxterms.htm accessed 6 May 2022.
[38] "Glossary of Tax Terms" (*OECD*) https://www.oecd.org/ctp/glossaryoftaxterms.htm accessed 6 May 2022.
[39] OECD (2022), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022*, OECD Publishing, Paris, https://doi.org/10.1787/0e655865-en.
[40] According to the Guidelines set by the OECD there are five methods to approximate an arm's length pricing of intra-group transaction: The comparable uncontrolled pricing method (CUP); the cost plus method; the resale minus method ;the transaction net margin method (TNMM) ;the transactional profit split method; OECD (2022), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022*, OECD Publishing, Paris, https://doi.org/10.1787/0e655865-en.
[41] Vincent Verouden and Philipp Werner (eds.), *EU State Aid control: Law and Economics* 2017 Kluwer Law International, pp. 7, 8, 9.

in the set of exemptions including but not limited to the second and third paragraphs of Article 107 TFEU, the General Block Exemption Regulation (GBER),[42] and the *de minimis* rule[43] where special treatment is granted for small and medium-sized enterprises (SME's).

4.1. STATE ORIGIN

The first step of the test stipulates that there must be a link between the aid granted and the State's resources. To prove that there is a sufficient link between the measure and the State, two cumulative conditions must be fulfilled. Therefore, the aid must be traceable to the State and an involvement of State resources must be proven.[44]

Regarding the imputability of a measure, in the majority of cases, aid is granted through legislative means or as a decision made in the limits of discretion of public authorities.[45] However, the possibilities extend beyond these straightforward means and extend to acts of public or private undertakings under State control. Such cases present difficulties for assessment as the participation of the State is not clear, which would require an individual approach based on the circumstances of the case.[46]

Regarding the second condition, the notion of "State resources" tends to be interpreted broadly by the Court. State resources may include the resources of

[42] "Commission Regulation (EU) No 651/2014 of 17 June 2014 Declaring Certain Categories of Aid Compatible with the Internal Market in Application of Articles 107 and 108 of the Treaty (Text with EEA Relevance) Text with EEA Relevance" (*EUR-Lex* 17 June 2014) https://eur-lex.europa.eu/eli/reg/2014/651/2021-08-01 accessed 9 May 2022.

[43] "Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the Application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to De Minimis Aid Text with EEA Relevance" (*EUR-Lex* 18 December 2013) https://eur-lex.europa.eu/eli/reg/2013/1407/oj accessed 7 May 2022.

[44] *Steinike & Weinlig v Federal Republic of Germany* (Case 78-76 *)* , EU:C:1977:52, [1977] ECR 078, 22 March 1977, para. 21.

[45] *Kwekerij Gebroeders van der Kooy BV and others v Commission of the European Communities* (Cases 38 67, 68 and 70/85), EU:C:1988, [1988] ECR 067**,** 2 February 1988, para. 35.

[46] *Firma Sloman Neptun Schiffahrts AG v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG* (Joined cases C-72/91 and C-73/91), EU:C:1993:97, [1993] ECR 072, 17 March 1993, paras 20, 21.

public companies,[47] intra-governmental bodies exercising discretion,[48] or rare resources of private persons that prove to be directly attributable to the State.[49]

4.2. ADVANTAGE

Besides State origin, a measure must form an advantage to fall within the scope of State aid. An advantage may include a monetary subsidy in the form of investments[50] or actual benefits like granting a license,[51] which would not be obtainable under normal market conditions. Furthermore, the definition of "advantage" extends to the mitigation or elimination of obligations for which a company would not be subject to under normal circumstances, including but not limited to tax exemptions.[52]

To determine whether there is an advantage, the circumstances of the case must be looked at through the prism of the Market Economy Operator (MEO) test.[53] The MEO test implies that the advantage granted through the State and its resources must be compared to the situations in which such a policy would not have been implemented. Where under normal Market conditions such a measure would not be available to the economic operator in the same horizontal situation, the contested action would be defined as advantageous toward the undertaking.[54] Thereby, the Court does not consider the aim of the measure, but rather its effect compared to other participants.[55]

Exemptions may be made where the Member State provides an advantage to an undertaking that would be available to operators on the Market in a similar

[47] *French Republic v Commission of the European Communities* 2002 (C-482/99), EU:C:2002:294, [2002] ECR 482, 16 May 2002, para. 34.
[48] *Pearle BV, Hans Prijs Optiek Franchise BV and Rinck Opticiëns BV v Hoofdbedrijfschap Ambachten* (C-345/02), EU:C:2004:448, [2004] ECR 345, 15 July 2004, paras. 35, 36, 37.
[49] *PreussenElektra AG v Schhleswag AG, in the presence of Windpark Reußenköge III GmbH and Land Schleswig-Holstein* (C-379/98), EU:C:2001:160, [2001] ECR 379, 13 March 2001, para 58.
[50] *Kingdom of Belgium v Commission of the European Communities* (C-142/87), EU:C:1990:125, [1990] ECR 142, 21 March 1990, para 25.
[51] *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* (C-280/00), EU:C:2003:415, [2003] ECR 280, 24 July 2003, para. 41.
[52] *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community* 1961 (Case 30-59), EU:C:1961:2, , [1961] ECR 030, 23 February 1961, para 59.
[53] "Notices on the European Union Institutions, Bodies, Offices and Agencies" (*EUR-Lex* July 19, 2016) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R0720, accessed 6 June 2022, paras. 76, 77, 78.
[54] *Kingdom of Belgium v Commission of the European Communities* (C-142/87), EU:C:1990:125, [1990] ECR 142 ,21 March 1990,para 29.
[55] *Italian Republic v Commission of the European Communities (173-73)* , EU:C:1974:71, [1974] ECR 585, 2 July 1974, para 13.

horizontal situation. In such a case, the MEO test would not be relevant as the advantage would fall under the normal economic circumstances.[56]

4.3. SELECTIVITY

As established by the previous two conditions, the scope of the test extends to financial support, administrative support,[57] but also to tax reliefs[58] and comparable exemptions from financial burdens that would otherwise be imposed on the private person.[59] The third criterion entails that a measure that originates in a Member State, exercised through national resources, and falls within the definition of an advantage, shall also be sufficiently selective. To be sufficiently selective, the scrutinised measure must favour a single undertaking or an exceptional group of comparable undertakings.[60] Such a benefit shall be interpreted in line with the aim of the measure and be compared with economic circumstances where such a measure was not implemented.[61]

This selectivity can be viewed from two angles, namely a geographical or material point of view. Geographical selectivity relates to occurrences of selectivity where a group of undertakings in a particular geographical region is subject to privileged treatment compared to other regions of the Member State.[62] Material selectivity covers instances where the measure benefits only a specific private person, group of companies, or economic sector on a national level compared to other subjects in comparable circumstances.[63] Material selectivity is

[56] *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* (C-280/00), EU:C:2003:415, [2003] ECR 280, 24 July 2003, para. 95.
[57] *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* (C-280/00), EU:C:2003:415, [2003] ECR 280, 24 July 2003, paras. 75, 76.
[58] *Commission of the European Communities v Italian Republic, Wam Spa* (C-494/06 P), EU:C:2009:272, [2009] ECR 494, 30 April 2009, para. 51.
[59] *Philip Morris Holland BV v Commission of the European Communities* (730/79), EU:C:1980:209, [1980] ECR 730, 17 September 1980, para 11.
[60] *Ferring SA v Agence centrale des organismes de sécurité sociale (ACOSS)* (C-53/00), EU:C:2001:627, [2001] ECR 053, 22 November 2001, paras. 20, 21, 22.
[61] *Ferring SA v Agence centrale des organismes de sécurité sociale (ACOSS)* (C-53/00), EU:C:2001:627, [2001] ECR 053, 22 November 2001, paras. 25, 26, 27, 28.
[62] *Portuguese Republic v Commission of the European Communities* 2006 (C-88/03), EU:C:2006:511, [2006] ECR 088, 6 September 2006**,** paras. 63, 64, 65, 66.
[63] *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v Finanzlandesdirektion für Kärnten* (C-143/99), EU:C:2001:598, [2001] ECR 143, 8 November 2001, paras 34, 35.

divided into two sub-groups: *de jure* and *de facto* selectivity.[64] The former relates to measures that are designed so specifically only a single or a selected group of undertakings could benefit.[65] The latter covers all situations where the State measure is general enough and available to all relevant participants on the Market, but where the effect of the measure favours a pre-selected group or economic sector.[66]

4.4. Effect on Trade and Distortion of Competition

According to the fourth step, a selective advantage granted by the State must also have a negative effect on the internal Market. The last and most straightforward criteria, based in the definition of State Aid, relates to the effect of the measure and whether it affects the trade within the Union and distorts the competition on national level.[67] The two tests enshrined in the last step of the criteria are inter-linked and always reviewed together. The point of contention of the tests is not the actual effect of the measure at the time of review, but rather the likelihood of undesired effects by the State aid.[68] For a State measure to be considered threatening or actually distorting the competition within the national Market, the measure itself has to actually improve the competitive position of its subject and put the other relevant participants on the Market at a disadvantage.[69] In regard to the second test, a measure must affect the intra-Union trade to fall within the set criteria.[70] Both of the tests must overcome their burden of proofs for a measure to fulfil the criteria.[71]

5. Selectivity Criteria and the Assessment of Fiscal State Aid

[64] "Notices on the European Union Institutions, Bodies, Offices and Agencies" (*EUR-Lex* July 19, 2016) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R0720, accessed 6 June 2022, para 120.
[65] ibid para 121.
[66] "Notices on the European Union Institutions, Bodies, Offices and Agencies" (*EUR-Lex* July 19, 2016) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R0720, accessed 6 June 2022, para 122.
[67] *Philip Morris Holland BV v Commission of the European Communities* (730/79), EU:C:1980:209, [1980] ECR 730, 17 September 1980, para.11.
[68] *Commission of the European Communities v Italian Republic, Wam Spa* (C-494/06 P), EU:C:2009:272, [2009] ECR 494, 30 April 2009, para. 50.
[69] ibid para 187.
[70] ibid para 190.
[71] *Grand Duchy of Luxembourg and Fiat Chrysler Finance Europe v European Commission* (C-885/19 P and C-898/19 P), EU:C:2022:859, [2022] ECR 885, para. 66.

Since the creation of the European State aid regime, the Commission's and the Court's main goal has been to establish neutrality in the European Market, or, in other words, to establish a level playing field.[72] The role of the European Union is supervisory, but also regulatory.[73] The assessment of beneficial treatment by the State towards a particular subject is tested in accordance with the four-step test based on Article 107(1) TFEU. Being applied to beneficial fiscal treatments, the assessment of the selectivity of a measure presents much controversy. The lack of clarity derives from the hardship presented by the act of balancing a Member State's tax autonomy with ensuring a fair market.[74] The selectivity of a measure has a high burden of proof and its three-level analysis is rather vague; however, that condition appears to be fundamental for determining whether the tax treatment is of specific or general nature.[75]

5.1. The Reference Networks

As crystallised through the case law of the CJEU, the primary step of the "selectivity" analysis would be proving the existence of a derogation from "the common and normal taxation".[76] The collective term in the given context for a system of taxation that is characteristic, customary, and common in application for the Member State is "reference network".[77] Based on the research in Section 4.3, the selectivity criteria may be reviewed from two angles, namely the geographical and the material one. Such a division translates in the analysis of Member State's reference network; therefore, the reference network can be either or.

The scope of the former type of reference network covers all occurrences of beneficial tax treatments towards a private entity exercised through regional authorities instead of the central government.[78] The case of *Portuguese Republic*

[72] Papp M, *Trento SGEU Conference* (ECPR Standing Group 2016).
[73] Schön, *Tax Legislation and the Notion of Fiscal Aid: A Review of 5 Years of European Jurisprudence in State Aid Law and Business Taxation vol. 6* 2016, pp.26,31.
[74] Nicolaides, P. and Rusu, I.E, *The Concept of Selectivity: An Ever Wider Scope 791-803* 2012 European state aid law quarterly.
[75] Forrester, Emily, *Is the State aid regime a Suitable instrument to be used in the fight against Harmful Tax Competition* 2018 EC TAX Review eds.n Ben Kiekebeld, p. 7.
[76] *Portuguese Republic v Commission of the European Communities* 2006 (C-88/03), EU:C:2006:511, [2006] ECR 088, 6 September 2006, para 56.
[77] Forrester, Emily, *Is the State aid regime a Suitable instrument to be used in the fight against Harmful Tax Competition* 2018 EC TAX Review eds.n Ben Kiekebeld, p. 3.
[78] Vincent Verouden and Philipp Werner (eds.), *EU State Aid control: Law and Economics* 2017 Kluwer Law International, pp.120, 121.

v. Commission, or the "Azores" case deals with the issue of unequally distributed taxation system (asymmetrical taxation). In that case, the Azores regional tax authority adopted a series of measures reducing the income and corporate tax for regionally established companies. However, one of the measures related to the reduction for "intra group" financial activities was unjustified and therefore problematic for the Commission.[79] In its ruling, the Court distinguished three related situations.[80] The first situation relates to the reduction of the applicable tax, based on the unilateral decision made by the central governmental authority. In such cases, the measure's selectivity nature cannot be contested. The second situation relates to the specific distribution of tax competences between regional authorities on the same level, where one of the authorities reduces the tax rate in the specific region. In such cases, a reference network on the national level would be impossible to be defined. Therefore, regional selectivity would not occur. Finally, a local institution exercises its competence and lowers the national tax rate for undertakings in that region. In that situation, the intra-State authority must be evaluated for sufficient procedural, institutional, and financial autonomy from the central government, or the so-called "sufficiently autonomous" test shall be applied.[81] In case the authority is not sufficiently autonomous, the State shall be responsible for the actions of the local authority.[82]

However, defining a State measure as non-regional does not prevent the possibility of being classified as materially selective.[83]

In comparison, an analysis of material selectivity is not so clear cut. The aim pursued is to prove an advantage for a certain sector outside the common national tax system. The basis for establishing material selectivity therefore

[79] *Portuguese Republic v Commission of the European Communities* (C-88/03), EU:C:2006:511, [2006] ECR 088, 6 September 2006, paras 14, 15, 16, 17.
[80] *Portuguese Republic v Commission of the European Communities* (C-88/03), EU:C:2006:511, [2006] ECR 088, 6 September 2006**,** paras. 63, 64, 65.
[81] ibid para 62.
[82] ibid para 68.
[83] Vincent Verouden and Philipp Werner (eds.), *EU State Aid control: Law and Economics* 2017 Kluwer Law International, p.121.

extends to almost all kinds of tax systems, including but not limited to VAT,[84] CIT,[85] and insurance tax.[86]

While being interconnected, both approaches defining the reference network have distinguishable aims. While the geographical selectivity concentrates mainly on the regulatory techniques used for the implementation of the specific measure, the material selectivity relies heavily on the effect on the chosen sector of the national economy.[87] Both approaches are criticised for excluding the *ratio* behind the implemented measure when analysing the selectivity.[88] For that reason, the Court skips the reference network step on occasion despite the fact that it is a well-established standard.[89]

5.2. Objective of the Measure and Non-Discrimination between Undertakings

Having proven the reference network, or *de facto* derogation, the analysis will take a more subjective approach in the following steps. The second step in the analysis of selectivity relates to the aim of the measure and its application to all relevant economic operators.[90] The aim of that part of the discussion is to determine whether or not discrimination arises between the relevant economic operators in light of the aim of the measure.[91] The *prima facie* criterion consists of two cumulative elements, namely the aim being pursued and, considering the established aim, the occurrence of discrimination between undertakings in comparable circumstances.[92]

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[84] *Wolfgang Heiser v Finanzamt Innsbruck* (C-172/03), EU:C:2005:130, [2005] ECR 172, 3 March 2005, paras. 40, 41, 42.
[85] *Kingdom of Belgium and Forum 187 ASBL v Commission of the European Communities* (C-182/03 and C-217/03), EU:C:2006:416, [2006] ECR 182, 29 March 2012, para. 95.
[86] *GIL Insurance Ltd and Others v Commissioners of Customs & Excise* (C-308/01), EU:C:2004:252, [2004] ECR 308, paras. 75, 78.
[87] *British Aggregates Association v Commission of the European Communities* (T-210/02), EU:T:2006:253, [2006] ECR 210, paras.89, 120, 121.
[88] Micheau, *Tax selectivity in state aid review: A debatable case practice*, 2008, pp. 276-284.
[89] *European Commission and Kingdom of Spain v Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland* 2011 (Joined cases C-106/09 P and C-107/09 P), EU:C:2011:732, [2011] ECR 106, 15 November 2011, paras. 94, 95, 96, 101.
[90] Hofmann et al., *State aid law of the European Union; Part II The Notion of State Aid, 4 Criterion of Selectivity* 2016 Oxford Competition Law [OCL], pp.135-140.
[91] ibid pp. 137-138.
[92] *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v Finanzlandesdirektion für Kärnten* (C-143/99), EU:C:2001:598, [2001] ECR 143, 8 November 2001, paras. 41, 42.

The choice of justifications for the applied measure is an area where the Member States retain much discretion, based on the extensive case law on the matter. The Court of Justice recognises a vast number of goals. Such goals are subject to only one limitation, being truly horizontal,[93] or, in other words, applicable to all relevant Market operators. A common choice for objectives is based on Article 107(2) and (3) TFEU. The idea behind that choice is the fact that both sub-sections are well recognised justifications by the Court.[94] As proven by academics and case law there are two levels of objectives. Those groups are referred to as extrinsic and intrinsic, where the former is recognised when analysing the presence of discrimination between undertakings and the latter when analysing the reasons behind the alleged selective treatment. While the aim of the second step is to review the objectives justifying the discrimination in light of the application of the measure, the third step concentrates on the measure itself and the logic of the system. Therefore, the objectives recognised by the second step are not related to the nature of the reference system, but rather to something outside the logic of the national scheme, whereas the objectives under the third step regard the purpose of the measure and whether the characteristic features and tests were followed when applying the measure.[95]

Having defined the goal of the reference network relating to the measure, the position of the undertaking will be compared to the position of private persons in similar factual and legal circumstances. The aim is to determine whether all undertakings generally subject to the measure are practically in the same position considering the objective. In case the application of the recognised objective is discriminatory, the measure might be defined as "*prima facie*" selective. [96] Being "*prima facie*" selective does not guarantee selectivity of the measure until the objective of the measure itself has been analysed.[97]

[93] ibid paras. 48, 49.
[94] Vincent Verouden and Philipp Wener (eds.), *EU State Aid control: Law and Economics* 2017 Kluwer Law International, pp. 126, 127.
[95] Traversa, *State Aid and Taxation: Can an Antiavoidance Provision Be Selective? Annotation on the Judgment of the Court of Justice of 18 July 2013 in Case C-6/12* 2014 European State Aid Law Quarterly 13, no. 3, pp. 518-525.
[96] *British Aggregates Association v Commission of the European Communities* (T-210/02), EU:T:2006:253, [2006] ECR 210, paras 83, 84, 85.
[97] Vincent Verouden and Philipp Werner (eds.), *EU State Aid control: Law and Economics*, 2017, Kluwer Law International, pp. 126, 127.

5.3. The Objective of the Measure and Available Justifications

The last part of the "selectivity" analysis emphasises the role of the measure in the grant scheme of the national reference system's aim and logic. As already discussed in the previous sub-section, the final step is based on internal objectives or, in other words, specific objectives for the fiscal system adopted in the Member State.[98] The fact that a measure derogates from the normal tax system and is *prima facie* selective creates the presumption that a measure is selective in nature. Regardless of that fact, in case a measure is "justified by the nature or general scheme of that system"[99] and derives from the basic principles characteristic for the reference system, the selectivity of the measure might be justified based on the logic of the national tax system or any relevant national scheme.[100]

In addition to the objective, the exercise of that objective must be in line with the principle of proportionality. The proportionality test consists of three steps which are suitability, subsidiarity, and proportionality *strictu sensu*.[101] To prove that one measure falls within the scope of the objective, the consistency of application is also checked, in combination with *post factum* measures such as supervision and control on the consistent application.[102]

When it comes to justification in that context, the Court accepts purely fiscal justifications. In comparison, the *prima facie* criteria does not recognise such a reason, instead requiring a general objective outside the logic of the system to justify the act in question.[103] The number of justifications is very extensive, but the majority of successful cases avoid liability through objectives such as

[98] *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v Finanzlandesdirektion für Kärnten* (C-143/99), EU:C:2001:598, [2001] ECR 143, 8 November, para 41.
[99] ibid para 42.
[100] *Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v Paint Graphos Soc. coop. arl , Adige Carni Soc. coop. arl, in liquidation v Agenzia delle Entrate and Ministero dell'Economia e delle Finanze and Ministero delle Finanz* 2011 (Joined cases C-78/08 to C-80/08), EU:C:2011:550, [2011] ECR 078, 8 September 2011, para. 65.
[101] Vincent Verouden and Philipp Werner (eds.), *EU State Aid control: Law and Economics*, 2017, Kluwer Law International, p.129.
[102] ibid p.130.
[103] Rossi-Maccanico, Pierpaolo, *Fiscal state aids, tax base erosion and profit shifting*, 2015, pp.63-73.

prevention of tax evasion,[104] prevention of double taxation,[105] tax advantages to ensure minimum national and private business protection,[106] etc.

5.4. TRANSFER-PRICING RULINGS: PRACTICAL APPLICATION

In 2013, the Commission's investigation into Member States' tax rulings resulted in eight final decisions and opened four formal investigations. Among these, Member States like the Netherlands,[107] Luxembourg[108] and Ireland[109] were scrutinised based on adopted tax rulings granted in years prior to the investigation. For the purposes of the research based on the discussion in Chapter 1, the scope of the research will be limited to the *Fiat* case. In line with the research presented in Chapter 1, the following section will be limited solely to the development of *Fiat Chrysler and Luxembourg v Commission* (Joined Cases C-885/19 P and C-898/19 P)[110] case.

The appeal was brought on 4 December 2019 by Fiat Finance Group (formerly known as Fiat Finance and Trade Ltd (FFT)) with the Duchy of Luxembourg and Ireland as an intervener in the first decision against the Grand Chamber. Seeking to set aside the judgement of the General Court of the European Union of 24 September 2019 (T-755/15 and T-759/15), by which an action for annulment of Commission Decision 2016/2326, 21 October 2015 on State aid (SA. 38375) was dismissed. Referring back to the facts of the dispute set out in

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[104] *GIL Insurance Ltd and Others v Commissioners of Customs & Excise* (C-308/01), EU:C:2004:252, [2004] ECR 308, 29 April 2004**,** paras. 73 et seq.

[105] *Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v Paint Graphos Soc. coop. arl , Adige Carni Soc. coop. arl, in liquidation v Agenzia delle Entrate and Ministero dell'Economia e delle Finanze and Ministero delle Finanz* 2011 (Joined cases C-78/08 to C-80/08), EU:C:2011:550, [2011] ECR 078, 8 September 2011, para 71.

[106] *Freskot AE v Elliniko Dimosio* (C-355/00), EU:C:2003:298, [2003] ECR 355, 22 May 2003, para 86.

[107] "Commission Decision (EU) 2017/502 of 21 October 2015 on State Aid SA.38374 (2014/C Ex 2014/NN) Implemented by the Netherlands to Starbucks (Notified under Document C(2015) 7143) (Text with EEA Relevance.)" (*EUR-Lex* 21 October 2015) https://eur-lex.europa.eu/eli/dec/2017/502/oj accessed 6 June 2022.

[108] "Commission Decision (EU) 2016/2326 of 21 October 2015 on State Aid SA.38375 (2014/C Ex 2014/NN) Which Luxembourg Granted to Fiat (Notified under Document C(2015) 7152) (Text with EEA Relevance)" (*EUR-Lex* 21 October 2015) https://eur-lex.europa.eu/eli/dec/2016/2326/oj accessed 6 May 2022.

[109] "Commission Decision (EU) 2017/1283 of 30 August 2016 on State Aid SA.38373 (2014/C) (Ex 2014/NN) (Ex 2014/CP) Implemented by Ireland to Apple (Notified under Document C(2017) 5605) (Text with EEA Relevance.)" (*EUR-Lex* 30 August 2016) https://eur-lex.europa.eu/eli/dec/2017/1283/oj accessed 6 June 2022.

[110] *Grand Duchy of Luxembourg and Fiat Chrysler Finance Europe v European Commission* (C-885/19 P and C-898/19 P), EU:C:2022:859, [2022] ECR 885.

paragraphs (paragraph 1-46) of the main proceedings,[111] the company FFT (currently known as Fiat Chrysler Group) based in Luxembourg provided treasury services and financing to the Fiat/Chrysler group companies established in Europe, with the exclusion of those based in Italy. The services provided by the company, as described by the Commission, included financial coordination and consultancy, and inter-company funding.[112] On 14 March 2012, FFT's tax adviser issued an approval for advance transfer pricing arrangement[113] by the Duchy of Luxembourg. The Grand Duchy of Luxembourg granted the request and issued a tax ruling[114] binding from the year 2012 to 2016 (paragraphs 52 and 54 of the main decision), allowing FFT to determine its corporate income tax liability on yearly basis.[115] The tax ruling was issued on the legal basis of Article 164(3) of the Luxembourg Income Tax Code (the Tax Code) and Circular L.I.R. No 164/2 of 28 January 2011. The former established the application of the arm's length principle, where transactions between intra-group companies (integrated companies) shall be equally treated as independent undertakings (stand-alone companies) in comparable circumstances. The latter indicated the calculation method of such transactions in line with the arm's length principle.[116]

The main dispute in that case arise from the alleged existence of a selective advantage for the company FFT, granted through the single-case tax ruling by the Grand Duchy of Luxembourg. Such an allegation was based on the fact that FFT's tax liability had been lowered compared to the sum that FFT would have been liable to under the ordinary corporate income tax system. This allowed the Commission to provide an assessment on whether the tax measure in hand was selective.[117] In regard to the first step of the assessment, the Commission identified the reference system in that case to be the Luxembourg corporate income tax system, with an objective to tax the profits of all companies residing in Luxembourg. Taking a rather over-reaching general approach towards the identification of the reference system, the Commission disregarded the exceptional

[111] ibid para. 2.
[112] ibid para. 8.
[113] *Grand Duchy of Luxembourg and Fiat Chrysler Finance Europe v European Commission* (C-885/19 P and C-898/19 P), EU:C:2022:859, [2022] ECR 885, para. 3.
[114] ibid para. 4.
[115] ibid para. 10.
[116] ibid para. 11.
[117] ibid para. 15.

nature of Article 164 of the Tax Code and Circular No164/2.[118] Continuing to the second criteria, the Commission had to identify a selective advantage.[119] The assessment method applied was taken straight from the judgement of *Belgium and Forum 187 v Commission*,[120] where the position of FFT was juxtaposed to a stand-alone company in similar circumstances.[121] Identifying the Luxembourg corporate income tax system as a reference system, the assessment of the second step disregarded the legal basis of the transfer pricing arrangement for a second time as it resulted in alleged miscalculation of FFT's taxes.[122] Therefore, without any justifications derived directly from the reference system or indirectly from mechanisms necessary for the functioning and the effectiveness of the tax framework,[123] the Commission concluded that the case constituted aid within the meaning of Article 107(1) TFEU.[124] To that end, the General Court asserted the Commission's arm's length principle application,[125] affirmed the three-step analysis,[126] and rejected any breach of Member State's fiscal autonomy by using the arm's length principle as an assessment tool.[127]

In light of that judgement, the applicants forwarded five grounds of appeal relating to an error in law and misapplication of Article 107(1) TFEU with the usage of arm's length principle as an assessment tool. This included wrongful selectivity analysis on the Commission's behalf, and breach of obligation to state reasons. Finally, breach of Article 4 and 5 TEU and 114 TFEU, on the merits that the State aid was used to harmonise direct taxation rules.[128] The starting point of the Court of Justice was to establish the proper interpretation of the relevant law and principles, such as the prohibition to adopt measures constituting State Aid[129] and the assessment of State Aid in accordance with Article 107(1) TFEU.[130] The

[118] ibid para. 16.
[119] ibid para. 17.
[120] *Kingdom of Belgium and Forum 187 ASBL v Commission of the European Communities* (C-182/03 and C-217/03), EU:C:2006:416, [2006] ECR 182 , 29 March 2012.
[121] *Grand Duchy of Luxembourg and Fiat Chrysler Finance Europe v European Commission* (C-885/19 P and C-898/19 P), EU:C:2022:859, [2022] ECR 885, para 18.
[122] ibid para. 20.
[123] ibid para. 22.
[124] ibid para. 24.
[125] ibid para. 30.
[126] ibid para. 32.
[127] ibid para. 35.
[128] ibid para. 49.
[129] ibid para. 65.
[130] ibid para. 66.

Court elaborates further by offering a detailed application scheme of the aforementioned three-step analysis of selectivity.[131] With respect to the identification of the reference system, the ruling emphasises the fiscal autonomy of the Member States and the freedom to establish their normal tax regime.[132] To that extent, the Court confirmed the applicant's arguments supporting the inclusion of Member States' law as a central point for the identification of the reference system.[133] As for the application of the arm's length principle, the Court emphasised that the arm's length principle, where relevant, is an essential part of the selectivity analysis as an unbiased standard.[134] In assessing the decision made by the General Court, the Court of Justice analysed the correct identification of the Luxembourg Tax system and determined that no parameters or rules external to the system should be used in the assessment of selective tax advantage, unless the national tax system explicitly referenced them.[135] This conclusion is an expression of the principle of legality of taxation, which entails that the taxable person shall be able to foresee and calculate the tax due and determine the point in which it becomes payable.[136] Based on Luxembourg law, the method based in the legal foundation of the transfer pricing arrangement had not been considered.[137] The Commission in its analysis did not consider the application of the arm's length principle enshrined in the Article 164(3) of the Tax Code, and therefore, the analysis validated by the General Court in the main proceeding was set aside.[138]

Based on these merits, the Court of Justice overruled the General Court and annulled the decision based on the Commission's irrelevant analysis of the reference system and consequently the selectivity of the fiscal measure. As a result, the transfer pricing arrangement did not constitute State Aid.[139] Regardless,

[131] ibid paras. 68-71.
[132] ibid para. 73; *European Commission v Hungary* (C-596/19 P), EU:C:2021:202, [2021] ECR 596, 16 March 2021, paras. 44 and 45.
[133] *Grand Duchy of Luxembourg and Fiat Chrysler Finance Europe v European Commission* (C-885/19 P and C-898/19 P), EU:C:2022:859, [2022] ECR 885, para. 74.
[134] ibid para. 79.
[135] ibid para. 96.
[136] ibid para. 97; *Związek Gmin Zagłębia Miedziowego w Polkowicach v Szef Krajowej Administracji Skarbowej* (C-566/17), EU:C:2019:390, [2019] ECR 566, 8 May 2019, para. 39.
[137] *Grand Duchy of Luxembourg and Fiat Chrysler Finance Europe v European Commission* (C-885/19 P and C-898/19 P), EU:C:2022:859, [2022] ECR 885, para. 103.
[138] ibid paras. 100, 105, 112.
[139] ibid para. 117.

Member States shall refrain from enforcement of measures constituting aid under Article 107(1) TFEU.[140]

The landmark decision brought significant clarity to the legal landscape of Europe. By clearly separating the legal order of the European Union from the Member State's national tax system, the Court took a conservative stance adhering to the fiscal autonomy of the Member States (Articles 4 and 5 TEU).

6. CONCLUSION

Even though, direct taxation is defined as an area where the Member States have exclusive jurisdiction, they must follow the State aid regime set by the European Union's institutions.

The definitions used in Article 107(1) TFEU are well-defined for the most part and fundamental to the scope of the assessment of State aid. The relevant tax definitions are also clear and well-defined with the work of organisations such as the OECD. Being clear on the wording of the relevant framework and instruments used by Member States, the Court offers legal clarity and creates legal expectations.

The four-step criteria are subject to many variables and leave much room for justifications. Considering the numerous variables, the test offers a reasonable opportunity to carefully analyse all circumstances related to the effects and goals of the measure. Since the three-level analysis of selectivity is rather expansive, decisions on fiscal arrangements continue to develop on a case-by-case basis. However, considering the latest legal development mentioned in the *Fiat* case, the Court of Justice brought significant clarity in regard to the Commission's analysis of tax arrangements coinciding with the definition of aid under Article 107(1) TFEU. Adhering to the fiscal autonomy ensured by Articles 4 and 5 TEU and case law, the Court of Justice limited the State aid regime to analyses based on principles and methodologies already introduced in the tax system under scrutiny.

In conclusion, tax rulings are still a controversial area for the European State aid regime which is constantly developing through legislation and case law. This will continue expanding and specializing in a constant pursuit of ensuring the well-being of the internal market and regulation of fair competition.

[140] ibid para. 121.

Influencer Advertising and Disclosure *Chiara Gallo*[1]

The analysis of the digital phenomenon that is deeply shaping the 21st century society in light of the necessity for disclosure according to EU consumer protection.

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TABLE OF ABBREVIATIONS

AGCM / ICA	Autorità Garante della Concorrenza e del Mercato / Italian Competition Authority
B2C	Business-to-Consumer
CA	Codice di Autodisciplina della Comunicazione Commerciale/ Italian Code of the Self-Regulation of Commercial Communication
CJEU	Court of Justice of the European Union
CMA	Competition and Markets Authority
E-Commerce Directive	Directive (EC) 2000/31/EC of the European Parliament and the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L 178
EU	European Union
FTC	Federal Trade Commission
IAP	Istituto dell'Autodisciplina Pubblicitaria/ Italian Organisation for the Self-Regulation of Advertisement
ICC	Italian Consumer Code
MS	Member States
Omnibus Directive	Directive (EU) 2019/2161 of the European Parliament and of the 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 [2019] OJ L 328
TAR Lazio	Tribunale Amministrativo Regionale – Lazio (Regional Administrative Court – Lazio)
UCPD	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 [2005] OJ L 149
UK	United Kingdom
USA	United States of America

1. INTRODUCTION

1.1. EXPOSÉ OF SUBJECT

In recent years, there has been an increase in companies that resorted to use advertising techniques on online platforms. Hence, this phenomenon can be divided into different categories. First of all, most of the globally known brands use online platforms to promote their own products through brand ambassadors and campaign faces. This is possible to see from the official online pages of companies and businesses such as Rolex, whose brand ambassador is Roger Federer, Lancôme, with Penelope Cruz, and Calvin Klein, with its campaigns represented by, among others, Gigi Hadid.[2] Another category is represented by the businesses that resort to Personal Branding, which is the strategy of influencing the perception received by the public, of a determined individual by elevating them as an authority in their industry, resulting in the affirmation of their credibility, differentiating themselves from the competition and having a larger impact. This can be seen in the case of Elon Musk and of Kim Kardashian.[3] In the middle, it is possible to find the Influencer Marketing, a marketing strategy based on endorsements and product placement from people and organisations that possess

[2] 'ROLEX and Partners: Kindred Spirits in Pioneering Endeavours' (*ROLEX*, 2021) <https://www.rolex.com/world-of-rolex/rolex-and-partners.html> accessed on 26th December 2022; @ROLEX, 'Roger Federer has been the epitome of tennis excellence for more than two decades. The Swiss maestro has captivated audiences worldwide with his grace and elegance, on and off the court, combining skill, determination and unfailing sportsmanship. #Rolex #Datejust #AusOpen' (*Instagram*, 29th January 2020) <https://www.instagram.com/p/B76UG6YoLff/> accessed on 26th December 2022; Nicola Moulton, 'On Beauty: Penélope Cruz' (*Vogue Britain*, 18th February 2016) <https://www.vogue.co.uk/article/penelope-cruz-beauty-interview> accessed on 26th December 2022; @penelopecruzoficial, 'La nuit Trésor @lancomeofficial #tresor #valentineday #sanvalentin #lanuittresor' (*Instagram*, 29th January 2021) < https://www.instagram.com/p/CKoEfWJnAvv/> accessed on 26th December 2022; Elana Fishman, 'Gigi Hadid strips down for Calvin Klein underwear campaign' (*Page Six Style*, 11th September 2020) <https://pagesix.com/2020/09/11/gigi-hadid-strips-down-for-calvin-klein-underwear-campaign/> accessed on 26th December 2022; @calvinklein, '#CKxKITH exclusively at KITH stores and KITH.com' (*Instagram*, 10th September 2020) <https://www.instagram.com/p/CE91wXsDV0u/> accessed on 26th December 2022.

[3] 'The Official Definitions: Personal Brand and Personal Branding' (*PersonalBrand.com*, 2022) <https://personalbrand.com/definition/> accessed on 26th December 2022; Emily Shanklin, 'Elon Musk' (*SpaceX*, 27th March 2017) <https://web.archive.org/web/20170912061006/http://www.spacex.com/elon-musk> accessed on 26th December 2022; @kimkardashian, 'COMING SOON: @SKIMS Summer Mesh. Our latest collection with new styles and a never-before-seen print. You guys are going to love this collection! Photo, styling and creative all done by @sitabellan! Launching in 4 colors and sizes XXS-4X on Tuesday, April 20 at 9AM PT on SKIMS.COM.' (*Instagram*, 16th April 2021), <https://www.instagram.com/p/CNvN9CbgovV/>, accessed on 26th December 2022.

the appropriate knowledge of social influence.[4] Indeed, the influencers‘ main objectives are creating content, filtering information, advertising products and services, offering advice, promoting specific political views and manipulating their audience's opinions and behaviour.[5] Thus, several challenges surface due to the fact that it appears that influencers' endorsements and their online commercial practices could disregard the consumer protection regulation imposed by national governments, intergovernmental organisations and the moral society.[6]

Consequently, one of the issues that can be highlighted in the situation can be linked to the role of these categories of online personalities and to the fact that influencers, while acting on behalf of their own brands or while hired by other companies, can pose as the traders and deeply influence the average consumer into commercial and economic transactions that, otherwise they would not have entered into.[7]

In order to discuss and analyse the issues relating to the topic, it is important to consider that every type of commercial action and practice relating to the promotion of services and goods on online platforms is strictly governed by international and national rules on consumer protection. Indeed, influencer marketing is a practice that can be analysed and regulated by the already existing legal framework on unfair commercial practices, and, in particular, by the Unfair Commercial Practices Directive[8] in the EU. However, the main goal regarding consumer protection is to create harmonised guidelines and rules in order to

[4] Catalina Goanta and Sofia Ranchordás (eds), *The Regulation of Social Media Influencers* (Edward Elgar Publishing 2020) 167; Marijke de Veirman, and others, 'Marketing through Instagram Influencers: The Impact of Number of Followers and Product Divergence on Brand Attitude' (2017) 36(5) International Journal of Advertising 798; Christian Fieseler and German Newlands, '#dreamjob: navigating pathways to success as an aspiring Instagram Influencer' in Catalina Goanta and Sofia Ranchordás (eds), *The Regulation of Social Media Influencers* (Edward Elgar Publishing 2020) 167.

[5] Catalina Goanta, 'The regulation of social media influencers' (*Maastricht University Blog*, 25th May 2020) <https://www.maastrichtuniversity.nl/blog/2020/05/regulation-social-media-influencers> accessed 26th December 2022.

[6] ibid.

[7] 'Behavioural Study On Advertising And Marketing Practices In Online Social Media: Final Report' (*Directorate-General for Justice and Consumers*, October 2018) 28, <https://commission.europa.eu/system/files/2018-07/osm-final-report_en.pdf> accessed 26th December 2022.

[8] 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 ('*UCPD'*) [2005] *OJ L 149*.

regulate the influence of commercial and contractual relationships between influencers and the weaker party, namely the average consumer, who is constantly exposed to these practices. Moreover, due to the role and impact of international legislation and domestic provisions, online platforms have decided to update their regulations in order to comply with the common standards that characterise consumer protection in a global and digital society as the current one. An example are the recently updated Instagram's Terms and Conditions, which include the clause that any branded content must follow and comply with the Service's Branded Content Policies and that permission must be requested from the same Service.[9] Indeed, due to the increase of paid-partnerships between brands and online content creators, the Facebook-owned online platform has introduced new methods of sharing digital content aiming at the facilitation of transparency and consistency, including the option to tag commercial partners or affiliated brands. This recent feature also highlights the desire of a brand to comply with national and international legislation on consumer protection.[10]

The introduction of similar rules begs the question as to whether these measures are enough to protect the consumers in real-life scenarios.

1.2. RELEVANCE

The relevance of the topic must be linked to the continuous developments made in the online sector and their impact on consumer protection. The argument proposes several points of view in relation to the spread of the digital society during the first two decades of the 21st century and the regulation concerning the protection of consumer rights, since there are always new ways of manipulating the weaker party and the average consumer into commercial transactions, using more and more innovative platforms. Moreover, this field of law is important in a progressive society that deeply relies on technology because consumer protection propels a fair and transparent structure of commercial transactions, and it contributes to the development and growth of businesses and their markets. It

[9] 'Terms of Use' (*Instagram*, 20 December 2020), the current version is the one updated on the 26th July 2022, which does not change the Branded Content Policies, <https://www.facebook.com/help/instagram/termsofuse> accessed 26th December 2022.
[10] ibid.

requires economic innovation and development while maintaining fair practices, prices and good quality of the products and services put on the market.

Consequently, it is necessary to recognise that consumer protection in the digital society and, particularly, in relation to influencer advertising on online platforms, permits well-known media and online personalities to reach the average users and gives them the ability to create commercial relationships and conclude economic transactions. This, in turn, can lead to the creation of standards that are meant to avoid the creation of several social issues, from the manipulation of the users and consumers to the influence of disclosing and non-disclosing relevant information related to the product advertised on social networks.

1.3. Problem and Hypothesis

The essay will discuss the following research question:

"How are influencer disclosures regulated in EU consumer protection?"

In other words, the issue mainly focuses on the phenomenon that recently has become a daily reality and how the EU consumer protection legislation and legal developments aim at the safeguarding of the weaker party, namely the average consumer and online platform user, in relation to the disclosure of information in influencer advertising. Thus, the essay starts from the hypothesis that, in this particular aspect of consumer protection in the Digital Age, where it has become easier to advertise and promote products and services, there is a necessity for a specific EU piece of legislation. This would serve the aim of providing a clear structure to detect whether an advertising practice conducted on an online platform by a celebrity is in compliance with the principles of consumer protection and does not fall within one of the categories that, by "influencing" the platform user, misleads and manipulates the average consumer into an economic decision that would have not been taken otherwise.

1.4. Methodology

The methodology that is used is called *Doctrinal Analysis*, or the *Black Letter Methodology*. It can be described as a method which focuses on the language of

statutes and case law to make sense of the legal world.[11] It is a method of research that systematically analyses the principles, rules, and concepts that relate to a specific legal field and their relationship with the issues that can arise.[12] As a consequence, in relation to the research idea and using EU provisions and case law, this type of methodology will be used to describe the scope of the guidelines provided concerning consumer protection and, particularly, unfair commercial practices in the Digital Age. In other words, these sources will be considered to analyse the regulation of the activity of influencer advertising and its disclosure on online platforms.

1.5. GLOSSARY

It is necessary to consider the different terminology attached to the issue due to the continuous developments and transformations of the global phenomenon.
The essay focuses on advertising on online platforms. In the analysis, several different types of advertising will be mentioned in the assessment of unfairness according to the rule of EU consumer protection. In this case, it is necessary to define the main concept behind the issue, which, among others, includes the one identified as disguised advertising. Disguised advertising includes "any form of commercial communication that presents itself as authentic, non-commercial communication, in a way that 'blends-in' with the other content published by users" on online platforms.[13] There are three key types of disguised advertising practices that can be considered as potentially problematic for the consumers' economic benefit: *native advertising*, used by the traders to promote their products or services online, by making them blend in with non-commercial content and

[11] Caroline Morris, Cian C Murphy, *Getting a PhD in Law* (Hart Publishing Ldt 2011) 30.
[12] Jan Smiths, 'What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' in Rob van Gestel and others (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press 2017) 207; Rob van Gestel, Hans-Wolfgang Micklitz, 'Revitalizing Doctrinal Legal Research in Europe: What About Methodology?' (2011) 5 EUI Working Papers; Frank B Cross, Emerson H Tiller, 'What Is Legal Doctrine' (2006) 100 Northwestern University Law Review 517; Amrit Kharel, 'Doctrinal Legal Research' (*SSRN*, 26th February 2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3130525> accessed on 26th December 2022; Nigel Duncan, Terry Hutchinson, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) Deakin Law Review 83.
[13] 'Behavioural Study On Advertising And Marketing Practices In Online Social Media: Annex 1.5 Legal assessment of problematic practices' (*Directorate-General for Justice and Consumers*, June 2018) 11, <https://edepot.wur.nl/512851> accessed on 26th December 2022.

mimic user-generated content, in order to capture the consumers' attention;[14] *influencer marketing*, which only contains few characteristics that make it possible for the consumer to identify the content as advertisement and which is based on the promotion and sale of products, services and digital content through well-known individuals who have specific influence within a specific community;[15] and *advertorials*, which are phenomena that rarely appear on online platforms, but that employ editorial content promoting a product without clarifying that the content is sponsored.[16]

Another important term that needs to be defined before embarking into the discussion regarding the practice of advertising on online platforms is the concept of "average consumer", which can be defined as the person that "is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors."[17] The average consumer has to be presented with the necessary information to make an "informed" decision since he or she is well-informed but is not an expert in the subject matter.[18]

1.6. READER'S GUIDE

After Chapter 1, in which the introduction and the research question were highlighted, the essay will proceed by analysing the problem at hand and providing some background information about the current situation of influencer advertising in the Digital Era.

In the following section, the key features of one of the most important pieces of legislation of the European Union concerning consumer protection and commercial practices, namely Directive 2005/29/EC, will be described. Following

[14] Bartosz W Wojdynski, Nathaniel J Evans, 'Going Native: Effects of Disclosure Position and Language on the Recognition and Evaluation of Online Native Advertising' (2016) 45 Journal of Advertising 157.
[15] Bryan Lipiner, 'What is Influencer Marketing? An Industry on the Rise' (*Babson Thought & Action*, 16th September 2020) <https://entrepreneurship.babson.edu/what-is-influencer-marketing/> accessed on 26th December 2022.
[16] 'Behavioural Study On Advertising And Marketing Practices In Online Social Media' (n 13) 13.
[17] Case C-470/93 *Handel und Gewerbe Köln e.V. v Mars GmbH* [1995] ECR I-1923; Case C-210/96 *Gut Springenheide and Tusky v Oberkreisdirektor Steinfurt* [1998] ECR I-4657; Case C-220/98 *Estée Lauder Cosmetics GmbH & Co. ORG, v Lancaster Group* [2000] ECR I-117; C-446/07 *Alberto Severi v Regione Emilia-Romagna* [2009] ECR I-8041; Bram B Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (Springer International Publishing 2015).
[18] UCPD, recital 18.

that description, the analysis will be directed to the most relevant articles and sections of the same Directive, including Article 2(b) and (d), in relation to the definitions of trader and of B2C commercial practices. Later, Point 22, Annex I will be considered in relation to blacklisted practices and, particularly, the prohibited situation in which the trader is falsely claiming to be acting for purposes relating to his business or trade, considering also the improvements made by the Omnibus Directive.[19] The following section will be dedicated to the description of Articles 6 and 7 UCPD in relation to misleading actions and omissions, and their main characteristics. Aggressive commercial practices, as they are described in Articles 8 and 9, will be discussed before resorting to the ultima ratio provision, Article 5, which analyses the main features of the general prohibition of unfair commercial practices and the necessity for professional diligence in the fairness assessment. Chapter 4 will consider and briefly describe the transposition of the *UCPD* into national law, taking into consideration the example of the *Italian Consumer Code*.

The application of the relevant provisions to the problem at hand will follow. Indeed, the first step will be to analyse whether both influencers and online platforms can be considered as traders in relation to influencer advertising and whether the same advertising practice falls within the meaning of a B2C commercial practice, as described in Article 2 UCPD. The next step will be to examine whether online advertisement could be considered as captured under the meaning of Point 22, Annex I. In the case in which influencer advertisement does not fall within the previous provision, there is also the possibility for it to be classified under the heading of misleading practice, as analysed in Section 5.3, which uses as basis the Articles 6 and 7 UCPD.

Lastly, Chapter 6 will include a summary of the most important points analysed and the answer to the research question considered in the essay.

[19] UCPD, annex I, point 22; Directive (EU) 2019/2161 of the European Parliament and of the 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 (‘*Omnibus Directive‘*) [2019] *OJ L 328;* Hayley Brady and others, ‘European Commission publishes revised guidance on the Omnibus Directive’ (*Herbert Smith Freehills - HSFnotes.com*, 28 May 2022) <https://hsfnotes.com/tmt/2022/05/28/digital-regulation-timeline-eu-commission-publishes-revised-guidance-on-the-omnibus-directive/> accessed on 26th December 2022.

2. PROBLEM ANALYSIS

The phenomenon of influencer advertising and the related commercial practices, including the promotion of goods and services, endorsements, sponsorships and product placements, eventually gives rise to some issues that need consideration. The most known issues linked to online platforms like social media concerning advertising might include commercial practices set up to facilitate and sell paid 'likes', and sponsored reviews to increase the reputation of a certain account or brand in order to manipulate the average consumer's economic decisions. They could also include online platform services that employ hidden, fake or misleading marketing and other unfair commercial practices. There is, thus, an increasing spread and development of new techniques of commercial activities related to advertising on online platforms by specific well-known personalities, celebrities and the brands themselves. Moreover, the possibility of engagement by the same actors, through advertising tactics and strategies, can result in the misinformation and manipulation of the average user and consumer. This calls for the introduction of specific regulations and legal provisions aimed at the protection and the safeguarding of the same consumers.[20] Specifically, this analysis will develop around the discussion related to the Unfair Commercial Practices Directive. It will especially consider the online application of the same Directive, analysing whether the legal structure provided by the piece of legislation is appropriate to contain the issue, and ensure the protection of the average consumer, also known as the weaker party. It is important to state that these measures are necessary because the weaker party lacks the knowledge of all information attached to the goods or services advertised on online platforms and marketplaces. Consequently, the analysis will consider whether the UCPD is accurate to ensure disclosure in relation to the practice of influencer advertising.

[20] European Commission, 'Commission Staff Working Document Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices 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 comprehensive approach to stimulating cross-border e-Commerce for Europe's citizens and businesses *SWD(2016) 163 final' (European Commission,* 25th May 2016) 38, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52016SC0163> accessed 26th December 2022.

3. UNFAIR COMMERCIAL PRACTICES DIRECTIVE

3.1. UCPD: GENERAL INFORMATION

The most important piece of legislation that concerns the regulation of commercial practices and the safeguarding of consumers in relation to unfair commercial activities linked to business-to-consumer transactions is represented by Directive 2005/29/EC.[21] The principle-based directive was issued in 2005 in order to provide a useful instrument to protect the economic interests of the consumers by safeguarding the average online platform users from misleading and aggressive marketing and advertising practices. It also contributes to the promotion of informed choices, to the proper functioning of the internal market and to the achievement of a high level of consumer protection.[22] The scope of the Unfair Commercial Practices Directive includes any act, omission or representation, commercial communication, including advertising and marketing of a product, namely any good or service, to the consumer.[23] Particularly, it is necessary to highlight the fact that the scope of the directive is extremely broad, and it is not always clear how the directive applies to new and emerging business models, especially in the online sector. Indeed, as mentioned in the EC Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, the UCPD applicability to an online platform is deeply influenced by the E-Commerce Directive[24], especially considering Articles 5 and 6, which deal with the general information requirements for service providers and with the information to be provided in the commercial communication.[25] Moreover, the

[21] European Commission, 'Commission Staff Working Document Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices 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 comprehensive approach to stimulating cross-border e-Commerce for Europe's citizens and businesses *SWD(2016) 163 final' (European Commission,* 25th May 2016) 38, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52016SC0163> accessed 26th December 2022, 5.
[22] UCPD, art 3(1).
[23] European Commission (n 20) 6.
[24] Directive (EC) 2000/31/EC of the European Parliament and the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('*E-Commerce Directive*') [2000] *OJ L 178.*
[25] European Commission (n 20) 21; E-Commerce Directive, art 5: 'Member States shall ensure that the service provider shall render easily, directly and permanently accessible to the recipients of the

provision is technology-neutral, which implies that the piece of legislation does not make any reference to the requirement of a particular type of technology for its implementation and that there is a necessity to apply certain provisions both online and offline, regardless of the medium or device used to engage in a commercial activity.[26]

3.2. Traders and Business-to-Consumer Commercial Practices – Article 2(b) and (d) UCPD

The first step in the fairness assessment of a commercial practice is to consider the fact that the UCPD only applies to B2C contracts, and it requires to evaluate, on a case-by-case analysis, whether the online platform provider or the individual involved qualifies as a trader, as described in Article 2(b) UCPD.[27]

Moreover, it is necessary to consider the marketplace in which the events take place. In the particular case of influencer advertising, the marketplace considered must be traced back to online platforms, which usually provide the

service and competent authorities, at least the following information: (a) the name of the service provider; (b) the geographic address at which the service provider is established; (c) the details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner; (d) wheretheserviceproviderisregisteredinatradeorsimilar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that register; (e) where the activity is subject to an authorisation scheme, the particulars of the relevant supervisory authority; (f) as concerns the regulated professions: — any professional body or similar institution with which the service provider is registered, — the professional title and the Member State where it has been granted, — a reference to the applicable professional rules in the Member State of establishment and the means to access them; (g) where the service provider undertakes an activity that is subject to VAT, the identification number referred to in Article 22(1) of the sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment.' 'Member States shall at least ensure that, where information society services refer to prices, these are to be indicated clearly and unambiguously and, in particular', including whether they include tax or delivery costs; E-Commerce Directive, art 6: 'Member States shall ensure that commercial communications which are part of, or constitute, an information society service comply at least with the following conditions: (a) the commercial communication shall be clearly identifiable as such; (b) the natural or legal person on whose behalf the commercial communication is made shall be clearly identifiable; (c) promotional offers, such as discounts, premiums and gifts, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions which are to be met to qualify for them shall be easily accessible and be presented clearly and unambiguously; (d) promotional competitions or games, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented clearly and unambiguously'.

[26] Chris Reed, 'Taking Sides on Technology Neutrality' (2007) 4(3) SCRIPT-ed 264, 266.

[27] European Commission (n 20) 29; UCPD, art 2(b): 'trader' means any natural or legal person who, in commercial practices covered by the Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader.

infrastructure that enables interactions between the supplier and the users in relation to the provision of goods, services, digital content, and information. Many different types of online platforms exist as it is possible to notice with the examples of social media, the most relevant in the current analysis being search engines and app stores. Furthermore, they operate according to the specific business model represented, providing the users with the ability to look for information and to create facilitated contractual relationships. Online platforms can also engage in practices concerning advertising and the sale of products in their own name or for the benefit of third-party traders.[28] Thus, when discussing whether the UCPD applies to online platforms it is necessary to consider whether the platform can be classified as a trader according to the definition provided in Article 2(b) UCPD. This assessment is conducted by analysing the impact and role that is played by the platform itself on the product advertised and marketed.[29] Indeed, it is necessary to consider whether there are commissions or revenues attached to the targeted advertisement conducted by the platform itself.[30] Not only platforms can be classified as traders. In fact, there is, also, the possibility for an individual to be considered as such, according to the definition provided by the aforementioned provision. Hence, in the case in which a natural or legal person "is acting for purposes relating to his trade, business, craft or profession", it can be considered as a trader.[31]

The following step is to analyse which types of commercial practices are defined under Article 2(d) UCPD. Indeed, the provision describes these types of practices as business-to-consumer commercial activities, namely "any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers".[32] In other words, the provision concerns those commercial practices that occur either before, during, or after the marketing, the supply and the transaction stages.[33]

[28] European Commission (n 20) 30, 31.
[29] ibid 30.
[30] ibid.
[31] UCPD, art 2(b).
[32] UCPD, art 2(d).
[33] UCPD, art 3(1).

3.3. BLACKLISTED PRACTICES – POINT 22 ANNEX I UCPD

It is necessary to consider the list of directly prohibited commercial activities as described in Annex I UCPD and, particularly, the practices described in its Point 22, which include all the commercial practices and activities that falsely claim, or create the "impression that the trader is not acting for purposes to his trade, business, craft or profession" or falsely represent "oneself as a consumer".[34] Moreover, with the introduction of the Omnibus Directive, Points 23(b) and (c) are added in order to include the manipulation of the consumers' review, which is extremely relevant to the issue concerning the promotion of a product or service online.[35]

In the general case of the exhaustive category of "blacklisted commercial practices", it is necessary to understand that they represent the only exception to the case-by-case assessment, based on whether a trader acts contrary to the UCPD, employed by other provisions of the UCPD.[36] In other words, in the case in which one of the 31 commercial practices described in Annex I of the 2005/29/EC Directive is used by the trader in question, the Annex leads to greater legal certainty, and there is no need for a fairness assessment. Thus, the national authorities of the concerned MS, in the case of said practices, can carry out actions to sanction and punish the trader without applying the case-by-case assessment and without considering the likelihood of the impact of the commercial practice on the economic behaviour of the average consumer.[37]

3.4. MISLEADING PRACTICES – ARTICLES 6 AND 7 UCPD

In the case in which the commercial practice does not fall under the Annex I's blacklist, the activity could be still categorised as a misleading practice that could likely distort the transactional decision of the average consumer. Thus, in this situation, a case-by-case assessment is required.[38]

Articles 6 and 7 UCPD concern misleading actions and misleading omissions. In particular, Article 6(1) states that a practice can be considered

[34] UCPD, annex I point 22.
[35] Omnibus Directive, art 3(7)(b).
[36] European Commission (n 20) 12; UCPD, recital 17.
[37] European Commission (n 20) 79.
[38] European Commission (n 20) 57.

misleading in the case in which the trader provides the average consumer with false, untruthful, and deceptive information. In other words, not only the information itself can be false, but the manner in which it is presented can be influenced by deceit.[39] Indeed, the national enforcers, in assessing whether the commercial practice under scrutiny has a misleading character, must take into account whether the misleading action can be related to the nature or the existence of the product, its main characteristics, the motives for the commercial practice, the price or the way to calculate it, the need for service, trader identity, and the consumers' rights.[40]

In contrast, Article 7 UCPD deals with omissions that can be considered misleading due to the fact that the trader involved omits to present the average consumer with the material information necessary in the course of a transactional decision, or due to lack of clarity, or due to the presence of information that can be considered incomprehensible and ambiguous.[41] Moreover, Article 7(2) UCPD provides for the obligation of the trader to disclose the commercial nature of their practices, if not immediately recognisable from the context. In other words, in case material and key information is hidden or presented to the consumer in an unclear, unintelligible, ambiguous, or untimely manner, these omissions could cause the weaker party to take part in a commercial activity that otherwise he or she would have not considered.[42] Thus, when the trader fails to identify the commercial intent of a commercial practice, it is possible to regard this omission as misleading.

Furthermore, in relation to business-to-business contracts, it is possible to recognise that, linked to Articles 6 and 7 UCPD, the Directive 2006/114/EC concerning misleading and comparative advertising was issued to implement standards employed to avoid methods of advertising that are likely to affect the economic behaviour of the competition, and cause losses and damage to the same.[43] The Directive in question seeks to protect traders against misleading advertising from other businesses (B2B) and it determines the conditions under

[39] UCPD, art 6.
[40] 'Behavioural Study On Advertising And Marketing Practices In Online Social Media' (n 13).
[41] UCPD, art 7.
[42] UCPD, art 7(2).
[43] Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising [2006] *OJ L 376*, recital 3.

which comparative advertising is authorised.[44] One of the key points set out in the Directive highlights the fact that whether advertisements are classified as misleading depends on a set of criteria. The criteria include the characteristics of the goods or services, the results to be expected from their use, and the results of the quality checks carried out; the price or manner in which the price is calculated; the conditions governing the supply of the goods and services; the nature, qualities and rights of the advertiser.[45] On the other hand, comparative advertising makes reference to a competitor or competitor's goods or services. In order to avoid unfair commercial practices, the EU countries must ensure that those businesses involved with a legitimate interest may bring to court an action that can be considered to be illicit.[46] The courts in the MS must order the withdrawal of illicit advertising, even in the absence of proof, of actual loss, damage or of intention of negligence, or they must prohibit the illicit advertising in question even though it has not been published yet.[47]

3.5. Aggressive Practices – Articles 8 and 9 UCPD

The following set of provisions analysed concerns the concept of aggressive practices, which was introduced in the EU legal system by the UCPD itself.[48] Consequently, it is important to understand that according to Articles 8 and 9, the commercial practice in question must fulfil several conditions in order to be considered unfair towards the economic choices of the consumers. These conditions are described in the Articles as followed: a commercial practice is considered aggressive in the case in which harassment, coercion or undue influence are present. These types of influences must impact consumer behaviour in a manner that significantly impairs or is likely to impair the average consumer's freedom of choice or economic conduct to the extent that he or she takes transactional decisions that would not otherwise have been taken in regard to a

[44] 'Directive 2006/114 – Misleading and comparative advertising (codified version)' (EU Monitor, 24 October 2016) <https://www.eumonitor.eu/9353000/1/j4nvk6yhcbpeywk_j9vvik7m1c3gyxp/vitgbgilclzv> accessed 26th December 2022.
[45] Misleading and Comparative Advertising Directive, art 2(b).
[46] Misleading and Comparative Advertising Directive, art 2(c).
[47] 'Directive 2006/114 – Misleading and comparative advertising (codified version)' (n 44).
[48] Hans-Wolfgang Micklitz, 'Unfair Commercial Practices and Misleading Advertising' in Hans-Wolfgang Micklitz and others (eds), *Understanding Consumer Law* (Intersentia 2009) 107.

specific product or service.[49] Moreover, Article 9 lists several features that need to be taken into consideration when assessing the level of harassment, coercion, physical force, or undue diligence. The list, among other features, includes the "time, location, persistence and nature", a threatening or abusive language, the exploitation of any specific misfortune or grave circumstance, an onerous or disproportionate non-contractual barrier, or illegal action or threat.[50]

In other words, the main objective of the provisions on aggressive commercial practices is to prevent "the trader from adopting selling techniques which limit the consumer's freedom of choice or conduct", distorting the economic behaviour of the average individual.[51] Hence, it is possible to say that given the standards described in the provision, which are particularly specific to the selling stage of the transaction, advertisements do not usually fall within this category.

3.6. General Clause – Article 5 UCPD

Lastly, the provision analysed in the current section prohibits commercial practices that are deemed to be unfair.[52] In a similar way to the provisions concerning misleading and aggressive commercial practices, the general clause described in Article 5 requires for a fairness assessment that focuses on a case-by-case basis. Indeed, the legal instrument provides for the requirements for the assessment of the unfairness of a practice in relation to professional diligence.[53] Professional diligence, as defined by Article 2(h) UCPD, implies a "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".[54] In other words, advertising, as other commercial practices, can be recognised as unfair in the case in which it satisfies the two cumulative criteria set out in Article 5(2), namely if the practice is contrary to the requirement of professional diligence, and if it materially distorts, or has the potential to distort the economic behaviour of the

[49] UCPD, arts 8 and 9.
[50] UCPD, art 9.
[51] European Commission (n 20).
[52] UCPD, art 5.
[53] UCPD, art 5(2).
[54] UCPD, art 2(h).

consumer to whom it is addressed. It usually serves as a safety net in the case in which an unfair practice that is not caught by other provisions of the UCPD can still be penalised. Nonetheless, online advertising is rarely considered within the meaning of Article 5 UCPD due to its specific features that could be easily detected to fall within the blacklisted practices, or as a misleading practice.

An example of the enforcement of the Article outside the area of influencer advertising can be seen in two cases extrapolated from the national case law of two EU Member States.[55] As a matter of fact, the Polish Competition and Consumer Protection offices brought an action against a trader providing satellite television services on the grounds that it lacked professional services. Even though the contracts were limited in time, the consumer was obliged to take active steps in order to prevent the renewal at the time of expiry. Otherwise, the trader would have automatically considered the contract renewed.[56] Moreover, in April 2015, the Italian Antitrust Authority (AGCM) brought an action against a debt collector in accordance with Article 5(2) UCPD. The Authority considered that the behaviour used by the debt collector, who was considered to have applied undue pressure and used repeated aggressive practices against his consumers, fell within the scope of the Article. The same behaviour was considered to be contrary to the requirements of professional diligence and to impair the freedom of choice of the average consumers, as they were manipulated into taking a specific transactional decision, that in other circumstances would have not been taken.[57]

4. The Transposition of the UCPD in Italian Law

The Chapter in question, Chapter 4, provides information on the transposition of the UCPD in Italian law, which were acquired and confirmed through an interview, dated 8th June 2021, with one of the officers working at AGCM, Dr Marana Avvisati.[58]

In the specific case of the regulation of consumer protection related to unfair commercial practices in Italy, it is necessary to consider the fact that every

[55] European Commission (n 20) 51.
[56] Decision No DKK 6/2014 (Poland).
[57] AGCM 15 April 2015, n 25425 (PS9540), Boll 16/2015 (Italy).
[58] Dr Marana Avvisati, officer at AGCM, <http://www.ermes.unina.it/images/Curriculum%20dott.ssa%20Avvisati.pdf>.

MS had to adopt and implement the "laws, regulations and administrative provisions" with the aim of harmonising the EU consumer protection system.[59] In particular, it is relevant to identify the pieces of legislation employed, namely the *Decreto Legislativo No. 146/2007* on unfair business to consumer practices and the *Decreto Legislativo No. 221/2007* on the rights of the consumers, and the related independent administrative authority that is responsible for the investigation of unfair commercial practices and the enforcement of the same pieces of legislation, namely the *Autorità Garante della Concorrenza e del Mercato* (Italian Competition Authority).[60] Specifically, the *Legislative Decree No. 146/2007* aims at the regulation of misleading advertisement procedures and mechanisms that harm the consumers and it adds important principles to the Italian Consumer Code (ICC), which was already set to ensure adequate protection to consumers.[61]

Following the structure of the analysis employed to analyse the UCPD, the first step is to consider whether the practice taken into account in relation to unfair commercial practices falls within the first 23 practices in the blacklist as transposed into Article 23 ICC.[62] Thus, Point 22 Annex I UCPD, falls under the Italian Article 23.

In a parallel way to Articles 6-9 UCPD, in Article 20 ICC, two categories of unfair practices are defined as misleading practices and as aggressive

[59] UCPD, art 19.

[60] 'Consumer protection' (*AGCM*, 2021) <https://en.agcm.it/en/scope-of-activity/consumer-protection/> accessed on 26th December 2022; Decreto Legislativo 2 agosto 2007, n 146, 'Attuazione della direttiva 2005/29/CE relativa alle pratiche commerciali sleali tra imprese e consumatori nel mercato interno e che modifica le direttive 84/450/CEE, 97/7/CE, 98/27/CE, 2002/65/CE, e il Regolamento (CE) n 2006/2004', pubblicato nella Gazzetta Ufficiale n 207 del 6 settembre 2007 (Italy);Decreto Legislativo 23 ottobre 2007, n 221 'Disposizioni correttive ed integrative del decreto legislativo 6 settembre 2005, n 206, recante Codice del consumo, a norma dell'articolo 7, della legge 29 luglio 2003, n 229' pubblicato nella Gazzetta Ufficiale n 278 del 29 novembre 2007 (Italy); Legge 10 ottobre 1990, n 287 'Norme per la tutela della concorrenza e del mercato' pubblicata nella Gazzetta Ufficiale n 240 del 13 ottobre 1990 (Italy); 'Natura dell'Istituzione e composizione del Collegio' (*AGCM*, 2021) <https://www.agcm.it/chi-siamo/> accessed on 26th December 2022; Antonio Mancini, 'Italian experience in enforcing consumer protection law: Recent challenges. Synergies between competition and consumer protection' (*GVH*, 11th November 2015) <https://gvh.hu/pfile/file?path=/en/gvh/Conference/gvh25/jubilee_conference/conference/presentations/3-3_Antonio_Mancini&inline=true> accessed on 26th December 2022.

[61] Decreto Legislativo 6 settembre 2005, n 206 'Codice del consumo, a norma dell'articolo 7 della legge 29 luglio 2003, n 229' pubblicato nella Gazzetta Ufficiale n 235 del 8 ottobre 2005, Supplemento Ordinario n 162 (Italy) ('*ICC*').

[62] ICC, art. 23.

practices.[63] Moreover, Article 21 ICC further specifies the level of protection of the consumer, and explains that a commercial practice can be identified as misleading if it presents false information to deceive, to endanger the health of the average consumer, and to force them to neglect the normal standards of prudence and vigilance.[64] The concept was later interpreted and clarified by the CJEU, in the case *Trento Sviluppo*, which provides for the fact that, in order to be able for a practice to be classified as unfair and misleading, it is necessary for the elements of unfairness to be combined.[65]

Furthermore, specifically aggressive practices fall under Article 24, which defines them as characterised by coercion, harassment, use of physical force, and undue influence.[66]

Lastly, when discussing the requirements of unfairness and of professional diligence, and the distortion of consumer behaviour in *Article 20 ICC*, it is possible to notice that the provision identically reproduces *Article 5(2) UCPD*, even though a definition of "average consumer*"* is not provided in the Italian code. The phrase is interpreted as covering both the trusting and the suspicious consumer, rather than the reasonable one, as stated in the *TAR Lazio* case law, providing for the fact that the trader has the responsibility to impart fair information to the consumer in any situation.[67]

In the particular case of disclosure in influencer advertising, the *AGCM* is currently employing a mechanism to face the risks that the consumer perceives the influencers' commercial interaction more as an advice based on personal experience rather than an advertisement.[68] Thus, in collaboration with the Italian

[63] ICC, art. 20.
[64] ICC, art. 21.
[65] C-281/12 *Trento Sviluppo Srl and Centrale Adriatica Soc. coop. arl v Autorità Garante della Concorrenza e del Mercato* [2013] EU:C:2013:859.
[66] ICC, art. 24.
[67] ICC, art 20; TAR Lazio, Sede di Roma, Sezione I, Sentenza n 2020/2004, 3 March 2004 (Italy); TAR Lazio, Sede di Roma, Sezione I, Sentenza n 2066/2007, 10 January 2007 (Italy).
[68] 'Comunicato Stampa: Antitrust su Influencer Marketing: la pubblicità deve essere sempre trasparente' (*AGCM*, 24 July 2017) <https://www.agcm.it/media/comunicati-stampa/2017/7/alias-8853> accessed on 26th December 2022; 'Comunicato Stampa: Pubblicità trasparente su social media, influencer recepiscono le indicazioni AGCM ma il monitoraggio sul fenomeno proseguirà' (*AGCM*, 1 December 2017) <https://www.agcm.it/media/comunicati-stampa/2017/12/alias-9049> accessed on 26th December 2022; 'Comunicato Stampa: Seconda moral suasion per influencer: pubblicità occulta vietata sempre, anche sui social network' (*AGCM*, 6 August 2018) <https://www.agcm.it/media/comunicati-stampa/2018/8/alias-9449> accessed on 26th December 2022.

Antitrust Authority, a campaign that promotes transparency and clarity in relation to the advertising activities was initiated and it led to the introduction of special hashtags and other measures that both the influencers and the other individuals involved must employ in similar situations.[69] Moreover, the *Code* of the *Istituto dell'Autodisciplina Pubblicitaria (IAP)*, one of the Italian independent organisations that specifically deal with the regulation of advertising and marketing techniques, provides for the fact that the commercial intent of any advertisement must be "honest, truthful […] accurate" and identifiable.[70] *IAP* also closely works with the companies and businesses that join the organisation and have the obligation to comply with its *Code* and rules, as in the example of Chiara Ferragni's TBS Crew.[71] Moreover, during the negotiation practices for a collaboration or a sponsorship, it is also common practice that both parties, namely the influencers and the brands, come up with self-regulatory rules, codes and guidelines aimed at safeguarding the average consumer.

The division of liability in the advertising supply chain, with a specific connection with influencer advertising and hidden advertisement on online platforms, is addressed by the Italian case law, namely *Barilla*,[72] which highlights the possibility of an unfair commercial practice even in a culinary post on *Instagram* and the risk of violation of Articles 20(2), 22(2) and 23(1) ICC, and *WIND*, [73] which involved the possible violation of the same articles in relation to a music video posted on YouTube by an Italian online personality. The case law provides for the fact that the liability and responsibility for transparency are primarily associated with the influencers, if they are "supplied*"* with the goods of

[69] 'Consumer protection' (n 60); Confirmed by Dr Avvisati. She said that AGCM had an ongoing project that was focused on the implementation of specific measure to reduce the risk of infringement.

[70] Codice di Autodisciplina della Comunicazione Commerciale del 12 maggio 1966 (Italy) ('*CA*'); CA, art 1; CA, art 7; Pronuncia n 45/2018 del 26/06/2018, *Comitato di Controllo vs. Peugeot Automobili Italia SpA and Newtopia Srl* (Italy); Pronuncia n 21/2019 del 02/03/2019, *Comitato di Controllo vs Estée Lauder Srl and Dorian Corporation* (Italy); Pronuncia n 26/2019 del 30/05/2019, *Comitato di Controllo vs Wycon SpA and The One Celebrity Srl* (Italy).

[71] 'Gli influencer entrano direttamente a far parte dello IAP' (*IAP*, 28 November 2018) <https://www.iap.it/notizie/influencer_aderiscono_iap/> accessed on 1st August 2021.

[72] AGCM 25 February 2020, n 28167 (PS11435) Boll 11/2020, 15 and 55 (Italy); Luena Collini, and others, 'The Impact of Influencers on Advertising and Consumer Protection in the Single Market' (*Policy Department for Economic, Scientific and Quality of Life Policies – Directorate-General for Internal Policies*, February 2022) 83 <https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU(2022)703350_EN.pdf> accessed 26th December 2022.

[73] AGCM 13 October 2020, n 28386 (PS11604) Boll 43/2020, 8 (Italy).

a specific brand without a commercial relationship between the two parties, and, secondly, in the case of a brand collaboration or paid sponsorship. This means that both parties, namely the influencer and the brand involved, have to clearly state the commercial intention of the content shared online.[74] In other situations, mainly in relation to influencers that have a smaller amount of influence, which includes also the phenomenon of "micro-influencers*",*[75] the liability, as described in the previously mentioned provisions, falls within the responsibilities of the agency that manages and promotes the influencer. An Italian example is provided by the New Co Management agency that deals with the collaborations and sponsorships created between small-range Italian social media personalities as Giulia Valentina and Tess Masazza.[76]

Lastly, in relation to the actions taken by the Italian administrative authority against unfair commercial practices, it is necessary to consider that unfair advertising is developing and improving due to the always new methods of manipulation of the consumer created by both the influencers and the brands advertised. Indeed, a new issue tackled by the AGCM relates to the manipulation of the user-generated content, and the way in which influencers and brands employ the average consumer to advertise, promote and share their products. Consequently, the same Competition Authority started proceedings against BAT Italia S.p.A. and against the influencers Stefano De Martino, Cecilia Rodriguez and Stefano Sala because they urged their followers to share how the average consumers use the product in question using tags and hashtags in order to promote the brand in the same way the influencers do. The authority, as a result, recognises

[74] AGCM 22 May 2019, n 27787 (PS11270) Boll 23/2019 (Italy); AGCM 25 February 2020, n 28167 (PS11435) Boll 11/2020 (Italy); AGCM 13 October 2020, n 28385 (PS11603) Boll 43/2020 (Italy); AGCM 13 October 2020, n 28386 (PS11604) Boll 43/2020 (Italy); AGCM 13 October 2020, n 28387 (PS11605) Boll 43/2020 (Italy).

[75] Tatum Hunter, 'What is a Micro-Influencer, and Why Do Brands Use Them?' (*builtin*, 20 January 2021) <https://builtin.com/marketing/micro-influencer> accessed on 26th December 2022.

[76] 'ADV. ' (*New Co Management*, August 2021) <https://www.newco-mgmt.com/03-adv> accessed on 26th December 2022; @giuliavalentina, 'Quando sembra una selfie ma in realtà è un photo shoot. Getting ready with #dysonsupersonic and #dysoncorrale @dyson_it #dysonitalia #adv' (*Instagram*, 29 July 2021) <https://www.instagram.com/p/CR62zwkN6H5/> accessed on 26th December 2022; @tessmasazza, 'Viaggiare attraverso i ricordi… e i sapori grazie a Nuii. Ps: la mia passione per il viaggio è più forte della mia paura in aereo. Ma comunque se posso prendo il treno. #Nuiiicecreamadventure #NUII #ad' (*Instagram*, 31 July 2021) <https://www.instagram.com/p/CR_Pbp3sOix/> accessed on 26th December 2022.

as hidden advertising also the statements made by the influencers in order to involve their followers in the same advertising campaign.[77]

5. APPLICATION

5.1. TRADER AND BUSINESS-TO-CONSUMER COMMERCIAL PRACTICES

The current section takes into consideration the practical application of the previously discussed legislation and provisions. The first step is to assess whether both the role played by the online platform, and the figure of the influencer fulfil the definitions presented in Article 2 UCPD.[78] In particular, the assessment concerns whether influencers and online platforms can be considered as traders according to Article 2(b).

It is possible to consider that most online platforms, including social media, will generally qualify as traders due to their attitude towards consumers. Indeed, this behaviour can be noticeable in relation to the charges acquired by online marketplaces and platforms while employing advertisements, and allowing other parties to use the same platform to promote, and advertise third parties' products.[79] Moreover, another category of behaviour that falls under the description of trading is represented by third parties that use the online platform as a tool to engage in commercial practices towards consumers and on behalf of the trader itself. Consequently, online influencers as well are to be considered as traders due to the fact that one of their main features is to promote and advertise products and services using their influence among a specific community.[80] Specifically, influencers can be recognised as traders, following Article 2(b) UCPD because they are hired and receive revenue from a company or a brand in order to use their popularity and their celebrity status to promote a particular product of the same brand or company through promotional videos, product placement and online collaborations.[81] In other words, the digital influencers can

[77] 'PS12009 – Avviata istruttoria nei confronti di BAT e di alcuni influencer per pubblicità occulta' (*ACGM*, 31 May 2021) <https://www.agcm.it/media/comunicati-stampa/2021/5/PS12009> accessed on 26th December 2022.
[78] European Commission (n 20) 129.
[79] 'Behavioural Study On Advertising And Marketing Practices In Online Social Media' (n 13).
[80] ibid.
[81] Nadia Feci, Valerie Verdoodt, 'Digital Influencers and Vlogging Advertising: Calling for Awareness, Guidance and Enforcement' (2018) 1 Auteurs en Media 11.

be qualified as traders when the advertising is an integrant part of their business. This is the case when they advertise their own products, as it happens for example when Chiara Ferragni promotes her own clothing collection,[82] or when they act on behalf of the brand or company that hired them, for example when Zendaya promotes Bvlgari jewels.[83] Another example of the latter situation is represented by the *CJEU* case *Komisia za zashtita na potrebitelite v. Eveline Kamenova*, in which the Court held that "a [natural] person who publishes a number of sales advertisements on a website is not automatically a trader"[84] and that there is the necessity to take into consideration whether the person is carrying out the action for the purposes relating to his or her own trade, business, craft or profession.[85] Moreover, the Court added that the criteria analysed in order to assess the role of a person as trader include "whether the sale was carried out in an organised manner, whether it was a regular occurrence or was for profit, whether the offer was concentrated on a small number of goods, and the legal status and technical experience of the seller."[86]

Following the application of the concept of "trader*"* to the issue, it is necessary to consider whether advertising on online platforms can be considered as a B2C commercial activity. The definition provided by the UCPD itself serves as proof that commercial communications, which include advertising and marketing, by a trader fall within the scope of the provision.[87] Hence, having assessed that it is possible to define as traders both influencers and online platforms depending on the role they play in the promotion of a determined product or service, it can be claimed that influencer advertising falls within the meaning of a B2C commercial

[82] Rachel Sanderson, 'Chiara Ferragni – the Italian influencer who built a global brand' (*The Financial Times*, 8th February 2019) <https://www.ft.com/content/9adce87c-2879-11e9-a5ab-ff8ef2b976c7> accessed on 26th December 2022.
[83] 'Bvlgari Invites You to Rome in Star-Studded Mai Troppo Campaign' (*Vogue Arabia*, 5th October 2020) <https://en.vogue.me/fashion/bulgari-mai-troppo-campaign/> accessed on 26th December 2022; @zendaya, 'Thank you for a gorgeous night, proud to be an official member of the @bulgari family.' (*Instagram*, 7th February 2020) <https://www.instagram.com/p/B8SEeKRgNdd/> accessed on 26th December 2022.
[84] Case C-105/17 *Komisia za zashtita na potrebitelite v. Evelina Kamenova* [2018] EU:C:2018:808; 'Press Release No 143/18: Judgment in Case C-105/17 *Komisia za zashtita na potrebitelite v Evelina Kamenova*, (*CJEU*, 4th October 2018) <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-10/cp180143en.pdf> accessed on 26th December 2022.
[85] Case C-105/17 (n 84).
[86] 'Press Release No 143/18' (n 84).
[87] UCPD, art 2(d).

practice. Indeed, when the influencer, acting as a trader, promotes and advertises their own products, the definition applies without further analysis because advertising their own products or services is considered to be an integrant part of their profession and, consequently, of their commercial activity. In contrast, in the case in which the influencer promotes third-party products, two important principles must be considered. As a matter of fact, influencer advertising is considered as a B2C commercial transaction, when the following principles are fulfilled: (1) the influencer acts on behalf of the brand as they are participating in the commercial activity of the company itself;[88] (2) the primary responsibility in the case in which the practices can be considered unfair, lies with the trader that hired the influencer and the same has to ensure the appropriate disclosure of the advertisement.[89]

5.2. BLACKLISTED PRACTICES

The following step concerns whether advertisements on online platforms created and "shared" by influencers can be considered as one of the blacklisted practices described in Annex I UCPD. In particular, Point 22, as previously mentioned, provides for a prohibition for traders to deceive the average consumer by falsely representing themselves as consumers and it does not require a case-by-case assessment.[90] Thus, it is possible to categorise disguised advertisement practices as one of the practices prohibited under Point 22, Annex I UCPD. This category also includes native advertising and influencer marketing. As previously defined, in the former situation, the trader disguises its trading purposes with the aim of concealing the commercial advertisement as a non-commercial content benefitting from several advantages, which can include the reduction of the consumers' ad recognition through the use of ambiguous language. This type of language might not always be in compliance with the legal regulations as phrases as "sponsored content" or "other content you might be interested in" are usually connected to the user's previous online searches or online interactions with other content of the

[88] C-391/12 *RLvS Verlagsgesellschaft mbH v Stuttgarter Wochenblatt GmbH* [2013] EU:C:2013:669.
[89] Geraint Howells and others, *European Fair-Trading Law: The Unfair Commercial Practices Directive* (Routledge 2006) 68.
[90] UCPD, point 22, annex I.

same trader or content that has the same underlying theme.[91] Hence, in the case in which the tag used identifies the commercial category of the post or content under scrutiny, the trader does not violate the practice prohibited by Point 22, Annex I. In other words, the digital content does not fall under the meaning of disguised trading when the commercial purpose of the advertisement shared by the influencer to the users and consumers is communicated by the tag assigned to the same. In contrast, it is necessary to take into consideration the phrase "influencer marketing", which, as already described, is based on the reputation of a specific individual, namely the influencers themselves or some other type of celebrity. The phrase can, in specific circumstances, fall within the practices prohibited by the Annex I and, particularly, Point 22 UCPD. Similarly to native advertisement, influencer marketing requires the same level of disclosure and transparency required by the UCPD, which can include the link to the commercial partner or the specification that the content represents a paid ad by the company that produces the goods.[92] One example of influencer marketing and the manner in which the nature of the digital content must be disclosed is represented by the Italian case *Aeffe-Alitalia.* The Court, after some well-known Italian influencers subliminally advertised the product in question on *Instagram*, held that the practice of influencer marketing requires certain standards of transparency and clarity, which must include hashtags such as *#suppliedby (name of the brand), #adv* or *#paidadvertisement(brand).* Thus, if similar hashtags are added to the shared content, it does not fall under the category of "disguised trading", which is prohibited by the Annex I UCPD in all MS.[93]

5.3. Misleading Practices Related to Online Advertising

There is also the possibility for influencer advertising to fall under the general prohibition described in Articles 6 and 7 UCPD. Indeed, as previously stated,

[91] 'Behavioural Study On Advertising And Marketing Practices In Online Social Media' (n 13); Michael Sebastian, 'Five Things to Know about The New York Times' New Native Ads' *(AdAge, 8th January 2014) <https://adage.com/article/media/york-times-debuts-native-ad-units-dell/290973> accessed on 26th December 2022; Brandon R Einstein, 'Reading between the Lines: The Rise of Native Advertising and the FTC's Inability to Regulate It' (2015) 10 Brooklyn Journal of Corporate, Financial & Commercial Law;* Wojdynski and Evans (n 14).
[92] 'Behavioural Study On Advertising And Marketing Practices In Online Social Media' (n 13).
[93] AGCM 22 May 2019, No. 27787 (PS11270) Boll. 23/2019, 33, 35 and 36 (Italy); Collini, and others (n 72).

Article 6 protects the weaker party, namely the average consumer, from actions, which main objective is to provide deceptive information about the product promoted.[94] Identifying this type of practice is rather less complicated than the one defined by Article 7. Article 6 requires the presence of false and deceiving information regarding the origin or the product itself to deem a commercial practice as misleading.[95] On the other hand, Article 7 deals with omissions that can be considered misleading in order to avoid the disclosure of the commercial intent of the practice.[96] The method of assessment of whether the information given or omitted can lead to a misleading practice under the provisions in analysis, considers whether a given practice can cause, or is likely to cause the average consumer "to take a transactional decision that he would have not taken otherwise", which must be done on a case-by-case basis.[97] In the case of influencer advertising it is important to consider that often, when the practice does not fall under Point 22, Annex I, there is a considerable chance that the practice can be considered as a misleading omission as reported in Article 7. Consequently, in order to assess whether the practice can be considered as misleading it is necessary to evaluate the situation using the test provided by the article and by the relevant case law. EU case law provides for additional evidence of how the test is applied to the current scenario. The assessment of such disclosure is conducted analysing the following steps:

whether the influencer can be considered as a trader, taking into consideration the already provided definition of Article 2(b) and the analysis of the level of organisation of the activity, the legal status of the individual and the connection of the online practice with their commercial or professional activity, the taxation of the activity and the receipt of remuneration of incentives of any kind;[98]

whether by posting sponsored content, the influencer performs a commercial practice within the meaning of the UCPD, taking into consideration the definition provided in Article 2(d);[99]

[94] UCPD, art 6.
[95] UCPD, art 6.
[96] UCPD, art 7.
[97] 'Behavioural Study On Advertising And Marketing Practices In Online Social Media' (n 13).
[98] Case C-105/17 (n 84).
[99] C-391/12 (n 88).

whether the influencer's practice is likely to distort the transactional behaviour of the consumer, as described with the concept of material distortion in Article 7(2).[100]

Hence, given the fact that the first two points were previously analysed, it is possible to reach the following conclusions: first, when influencers promote their products or act on behalf of brands or other third parties as a form of business, they can be considered traders; second, influencers perform commercial practices in relation to their businesses and professions when they promote their own brand or when they are endorsed by third parties and other companies that are responsible for the disclosure of any relevant information in regard to the advertisement in question.[101] Thus, considering the first two steps fulfilled, the last point relates to the distortion of the transactional behaviour of the consumer.[102] In other words, it is possible to consider that material distortion, as described in Article 7(2) can take place in situations that fall within the meaning of Article 2(e), namely when the trader uses a "commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise".[103] Moreover, there is no need to prove that a consumer was actually misled, as the possibility of deception is alone considered as a misleading practice. The national authorities, in order to properly assess whether there was a material distortion of the transactional behaviour of the consumer caused by the actions or omission of the trader, must take into consideration the "features and circumstances and the limitations of the communication method".[104] Having stated that, it is necessary to realise that any form of advertisement, including online and influencer advertising, cannot be considered as a contract, but a mere invitation to purchase. Advertisement is namely "a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase".[105]

[100] European Commission (n 20) 65.
[101] UCPD, art 2(b) and (d); Case C-105/17 (n 84); 'Press Release No 143/18' (n 84); C-391/12 (n 88); Howells (n 89).
[102] UCPD, art 7(2).
[103] UCPD, art 2(e).
[104] UCPD, art 7(1).
[105] UCPD, art 2(i).

As such, it must fulfil the material information requirement described in Article 7(4), which includes the following information that need to be given in order not to be considered as misleading and unfair in the regards of the weaker party:
"the main characteristic of the product";
"the geographical address and the identity of the trader";
"the price inclusive of taxes";
"the arrangements for payment, delivery, performance and the complaint handling policy";
"for products [...] involving a right of withdrawal or cancellation, the existence of such a right".[106]

Many examples exist to describe the concept defined in Article 7(2) UCPD in relation to the need for disclosure of key information and evidence that a specific celebrity or internet personality has been paid or incentivised to promote a particular product. For example, it is possible to cite the events that took place in relation to the Fyre Festival in 2017.[107] Even though the case takes place outside of the European Union jurisdiction, it is provided in order to give a better understanding on the amount of impact the "recommendations", "promotions" and "advertisements" made by influencers have on the average consumer. It further shows the necessity of considering the material information, which include the disclosure of the commercial intent of the influencers' digital content in the digital society. The event in question concerns an example of social media promotion that caused the "fury" of the purchasers, due to the lack of the luxurious amenities that were promised by the organisers and the celebrities that endorsed the festival to the wealthy participants. The celebrities involved, who were, among others, Bella Hadid, Kendal Jenner and Hailey Bieber, promoted through their social media accounts the festival before it took place and without having any proof of the concept. Thus, they manipulated the trust-based relationships, they, as influencers, have with their fanbase in order to endorse products, services and events only with the objective of revenue at the expense of honesty towards the users that follow them.[108] It follows that, similarly to Article 7 UCPD, the FTC (Federal Trade

[106] UCPD, art 7(4).
[107] Goanta and Ranchordás (n 4).
[108] Catalina Goanta, 'Consumers on Fyre: Influencer Marketing and Recent reactions of the United States Federal Trade Commission' (2017) 2017 Transatlantic Antitrust and IPR Developments 35.

Commission), that investigated and considered the case in the United States, where the events took place, highlights that influencers and other celebrity-status personalities must disclose their relationship with the brands and the objective of the shared content. This must be done in order not to manipulate the consumers into commercial transactions that without the "influencer advertising" they would not have entered into. Indeed, from the testimonies of the participants, it is clear that they only purchased the tickets to the events because of the advertising made by the previously mentioned influencers on online platforms.[109]

Another example is related to the actions taken by the Competition and Markets Authority (CMA) in the UK in relation to social media celebrities' endorsements.[110] The investigations started in 2018 when the UK was still part of the EU and, having a dualistic legal system, the country had to transport the legislation of the EU in order to be able to implement it in the UK.[111] In the situation at hand, the investigations were deeply influenced by the impact of consumer protection on the *Unfair Trading Regulations 2008*, which implemented the *UCPD* in the UK.[112] The UK legislation, in a similar way to the EU provision on misleading practices, requires the trader, in the case of online influencers and celebrities, to disclose the commercial intent of the shared digital content.[113] In particular, the *CMA* assessed whether influencers and social media and online personalities, such as Ellie Goulding and Rita Ora, were clearly disclosing their relationship with the brands they were endorsing in order to provide for a less manipulating online environment.[114] Consequently, the same influencers agreed to change their online behaviour in order to comply with more transparent and consumer-friendly guidelines. This action was taken to ensure that the consumers

[109] Goanta (n 108).
[110] Competition and Markets Authority, 'Press Release: Celebrities pledge to clean up their act on social media' (*Gov.UK*, 23rd January 2019) <https://www.gov.uk/government/news/celebrities-pledge-to-clean-up-their-act-on-social-media> accessed on 26th December 2022.
[111] Lorraine Conway, 'Consumer Protection: Unfair Trading Regulations 2008' (*House of Commons Library*, 3rd March 2020) <https://commonslibrary.parliament.uk/research-briefings/sn04678/#:~:text=The%20Unfair%20Trading%20Regulations%20impose,omissions%20and%20aggressive%20sales%20tactics.> accessed on 26th December 2022.
[112] Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277).
[113] Conway (n 111).
[114] Competition and Markets Authority (n 110).

were not manipulated in order to economically act differently than what they would have without the celebrity endorsement.[115]

In other words, going back to the EU legal system, when applying the sections of Article 7 UCPD to the relevant scenarios, it is necessary to remember that advertising, especially online and "shared" by celebrity-status personalities, has to provide certain material information. The required information must include the origin and main characteristics of the product and the identity of the trader in order not to be considered unfair in the regards of the average consumer. This is done in order to benefit the same, who does not possess the appropriate knowledge to make an informed decision if this kind of information is hidden and who lacks awareness with respect to the commercial nature of the content they are exposed to on a daily basis.[116] It is also necessary to add that the "definition and delimitation of what amounts to sufficient disclosure practices in order to enable the consumer to understand the commercial intent of a trader" is not always clear and definable, especially when considering online platforms due to the continuous development of the online sector.[117]

5.4. Critical Remarks: Are These Rules Fit for the Purpose?

As presented by the analysis of the relevant provisions in relation to the disclosure of information in the online advertising phenomenon, the *UCPD* can be considered in most scenarios accurate to regulate the transparency and clarity of such information. Nonetheless, given the constant development of the online sector and the always new "sharing functions*"* on online platforms, there is an urgent need for revision of the most relevant provisions in order to update them and make them efficient against such unfair commercial practices.[118] Moreover, it is possible that

[115] Competition and Markets Authority, 'Guidance: Social Media endorsements: being transparent with your followers' (*Gov.UK*, 23rd January 2019) <https://www.gov.uk/government/publications/social-media-endorsements-guide-for-influencers/social-media-endorsements-being-transparent-with-your-followers> accessed on 26th December 2022.

[116] 'Behavioural Study On Advertising And Marketing Practices In Online Social Media: Final Report' (n 7).

[117] 'Behavioural Study On Advertising And Marketing Practices In Online Social Media' (n 13).

[118] Hester Bates, 'The Legal Issues That Influencers and Marketers Must Get Right' (*TheDrum*, 28th February 2020) <https://www.thedrum.com/profile/influencer/news/the-legal-issues-that-influencers-and-marketers-must-get-right> accessed on 26th December 2022; 'UnSocial Media: Embracing Unsocial Metrics: The New Way to Win at Influencer Marketing' (*Influencer*, 2021) < https://www.influencer.com/unsocial-report-influencer> accessed on 26th December 2022.

different MS, by adopting different marketing legislation, in some ways, diverge and create problems with cross-border transactions, as is the case of the definition of the average consumer within the Italian legislation that slightly diverges from the EU definition.[119] Consequently, it is necessary to clearly identify whether the *UCPD* provides rules sufficient to cover the issues and harms that may arise out of non-disclosure and whether they are clear enough to identify the accountable party. In considering these issues, it is possible to state that while the *UCPD* needs constant updating, it clearly presents the necessary basis for the MS to implement efficient provisions aimed at the regulation of online advertising specifically. Firstly, it is possible to state that according to Articles 11 and 13 UCPD, "effective and adequate means" are enforceable to fight against the potential harms created by non-disclosure and unfair commercial practices and that MS have to impose "effective, proportionate and dissuasive" penalties in the case of infringement.[120] Moreover, most MS recognise that the main responsibility in the case of non-disclosure is to link to either or both the influencers and the brands depending on the type of contractual and commercial relationship that exists between the two parties.[121] Furthermore, the main criteria analysed while considering these issues are threefold: firstly, fundamental rights, such as the freedom of expression of every individual including those, namely the influencers, who have the right to share their opinions and aspects of their lives as they prefer without violating the law; secondly, the principle of legal certainty as it relates to the necessity for the most important information linked to the law to be made public; thirdly, the provision of legitimate expectation and good faith.[122] Lastly, it is necessary to

[119] Civic Consulting, 'State of Play of the implementation of the provisions on advertising in the unfair commercial practices legislation' (*Directorate-General For Internal Policies*, 2010) <http://www.civic-consulting.de/reports/misleading%20advertising_state%20of%20play.pdf> accessed on 26th December 2022; ICC, art 20; TAR Lazio, Sede di Roma, Sezione I, Sentenza n 2020/2004, 3 March 2004 (Italy); TAR Lazio, Sede di Roma, Sezione I, Sentenza n 2066/2007, 10 January 2007 (Italy).

[120] UCPD, arts 11 and 13.

[121] Susanna Lee and Eunice Kim, 'Influencer Marketing on Instagram: How Sponsorship Disclosure, Influencer Credibility, and Brand Credibility Impact the Effectiveness of Instagram Promotional Post (2020) 11(3) Journal of Global Fashion Marketing 232.

[122] Case C-29/69 *Stauder v Stadt Ulm* [1969] ECR 419; Case C-11/70 *International Handelsgesellschaft mbH v Einfuhr – und Vorratsstelle Getreide und Futtermittel* [1970] ECR 1125; Case C-4/73 *Nold, Kohlen – und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECR 491; Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] *OJ C* 306, art 6(1); Charter of Fundamental Rights of the European Union [2012] *OJ C* 326, art 11; The Convention for the Protection of

consider the proportionality of the same piece of legislation in order to avoid the individual's freedom of action to be limited beyond necessity in the public interest.[123]

6. CONCLUSION

Online advertising requires some specific regulations. Indeed, due to the new improvements and practices linked to the sector, it is imperative to protect the weaker party from unfair commercial activities that would only benefit the traders and the companies that own and produce the goods considered. Moreover, different types of online advertising exist and each of them possesses different characteristics and features that can, sometimes, not comply with the relevant legislation.

The new phenomenon linked to influencer advertising and product placement is considered as an example of the continuous evolution of the online environment. Hence, having analysed the EU consumer protection legislation on unfair commercial practices, the area of discussion is broad. Thus, a clear structure is presented in order to assess whether an advertisement and the related commercial practices are to be considered unfair or whether online advertising influences the economic behaviour of the average consumer or endangers the internal market and the competition. Consequently, the main piece of legislation taken into consideration is Directive 2005/29/EC.[124] Thus, in relation to online and influencer advertising, the following structure is considered: Firstly, the main subjects are assessed, meaning the identification of the trader and the definition of the commercial activity as a B2C transaction. Secondly, it is assessed whether the commercial practice falls within the blacklist of prohibited practices that do not require a case-by-case analysis. Indeed, there are different cases of online advertisement that could fall within the blacklist and, specifically, within the

Human Rights and Fundamental Freedoms 1950; Case 105/75 *Franco Giuffrida v Council of the European Communities* [1976] ECR 1395; Case C-120/86 *Mulder v Minister van Landbouw en Visserij* [1988] ECR 2321; Case T-115/94 *Opel Austria GmbH v Council of the European Union* [1998] ECR II-2739.

[123] Case C-8/55 *Federation Charbonnière de Belgique v High Authority of the European Coal and Steel Community* [1954] ECR 245; Case C-11/70 (n 122); Case C-331/88 *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others* [1990] ECR 1–4023; Treaty of Lisbon, art 5.

[124] European Commission (n 20) 109.

meaning of Point 22 of Annex I, which implies any commercial practices that falsely claim or create the "impression that the trader is not acting for purposes to his trade, business, craft or profession" or falsely represent "oneself as a consumer", or within the meaning of Point 23(b-c) introduced by the Omnibus Directive and concerning the manipulation of product reviews.[125] Lastly, if otherwise, it is assessed whether the practice can be considered as misleading action, or a misleading omission as described in Articles 6 and 7 UCPD. Indeed, when discussing online advertisements, a misleading action is easier to assess than an omission due to the false information provided by the trader about the origin or other features of the product. Thus, omissions are assessed by identifying whether the definitions in Article 2(b) and (d) are satisfied and whether the influencer's practice is likely to materially distort the transactional behaviour of the consumer.[126] In the case of influencer advertising, the last condition is not fulfilled, namely that the practice should indicate "the characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase"; therefore, they were not making commercial intent clear to the consumer, as evidenced by the CMA investigation into 16 influencers.[127] In other words, the average consumer must be provided with the information to make an informed economic decision.

These are the most pertinent provisions even though in exceedingly rare cases it could be possible to link influencer advertising to Articles 8 and 9 concerning aggressive practices if the language used could be categorised as a threat, harassment or undue influence, or to Article 5, as an ultima ratio if the commercial practice does not fall within the meaning of the previous articles.[128]

Consequently, in order to answer the research question, it is important to consider that influencer advertising is a relatively new commercial practice, conducted by influential people using online platforms as social media and other

[125] UCPD, annex I, point 22; Omnibus Directive, art 3(7)(b).
[126] UCPD, art 7(2).
[127] UCPD, art 2(i); Competition and Markets Authority (n 110); Competition and Markets Authority (n 115).
[128] European Commission, 'Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market' (*Official Journal of the European Union*, 29 December 2021) 36, 37, 38, 59, 60 and 61 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021XC1229(05)> accessed on 26th December 2022.

online outlets, and that this category of people has the ability to manipulate the users "following" them into taking decisions, whether or not of economic nature. Thus, regulations and provisions exist in order to contain and regulate their influence and to avoid a possible distortion of the internal market.

Hence, the regulation of disclosure in influencer advertising is necessitated by the objective of ensuring consumer protection and preventing misinterpretation and unfair use of online advertising techniques. In light of this consideration, the Directive 2005/29/EC, and its later amendment by the Omnibus Directive, is the most appropriate existing legal instrument to protect the weaker party from manipulation into unfair commercial transactions that would have not happened without the celebrity's influence. This instrument achieves its purpose by enabling MS to hold influencers and/or brands accountable for their commercial activity; and it does so while upholding general principles of EU law such as proportionality, legal certainty, and fundamental rights.

Mass Influx of People from Ukraine into the EU: The Activation of the Temporary Protection Directive

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1. INTRODUCTION

One million as of 3 March 2022, four million as of 31 March, and eight million as of 21 June: these are the numbers of people who crossed the border from Ukraine into the European Union (EU) since Russia's invasion of Ukraine on 24 February 2022.[2] Of these people, some flew out of the EU, others went back to their country, but the majority stayed in the EU.[3] Indeed, as of 14 July 2022, more than 5 005 000 migrants from Ukraine were recorded across Member States (MS).[4] This is no less than the largest refugee inflow on the European continent since the Second World War.[5] In the face of this large influx, the Council of the EU (hereinafter referred to as "the Council") activated the Temporary Protection Directive ("TPD" or "the directive"). This legal instrument provides its beneficiaries with an automatic access to a great number of rights ranging from the right to work to the right to access medical care, and gives them the freedom to stay in the MS of their choice.[6]

The aim of this paper is to answer the following question: how has the TPD been implemented in light of its recent activation for those fleeing the war in Ukraine? More specifically, this essay discusses approaches taken by 17 countries, including France, Hungary, Poland and Germany. The reason behind choosing a large number of countries is that it allows an analysis of the diversity of ways of implementing the directive: while some MS merely comply with what is strictly necessary, others chose to expand the scope of the rights they offer. Indeed, the TPD is, like any other EU directive, a document made of several legal provisions that must be implemented by MS into their own laws.[7] MS are free to do so in any

[2] 'Ukraine refugee situation' (*Operational data portal*, 2022) <https://data.unhcr.org/en/situations/ukraine> accessed 22 November 2022.
[3] Lucas Guichard, Joël Machado & Jean-François Maystadt, 'Réfugiés ukrainiens : un besoin de coordination renforcé' (2022) 170 Regards économiques <https://s3.tamtam.pro/prod/storage/media/PDF/26230/9aa95aff136cca29e650f52b9fbc3907b56040c0.pdf> accessed 22 November 2022.
[4] Massimo Spinelli, 'Rallying around the Directive: will the EU deliver what it has promised?' (*The Governance Post*, July 2022) <https://www.thegovernancepost.org/2022/07/rallying-around-the-directive-will-the-eu-deliver-what-it-has-promised/> accessed 22 November 2022.
[5] Guichard, Machado & Maystadt (n 3), p. 1.
[6] ibid p. 5.
[7] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ L326/47-326/390 (TFEU), Art. 288; see also 'Summaries of EU legislation: European Union directives' (*EUR-Lex*) <https://eur-lex.europa.eu/EN/legal-content/summary/european-union-directives.html#:~:text=unlike%20a%20regulation%2C%20which%20is,the%20directive%20has%20general%20application> accessed 31 December 2022.

way they see fit, and can decide to extend the scope of the rights contained therein.[8] With regard to the TPD, MS also have to implement Council decision 2022/382 (hereinafter referred to as "the Council decision" or "the decision).[9] The leeway that MS enjoy leads to a variety of ways in which directives are implemented, which makes those implementing measures worth analysing. To answer this research question, this paper uses the doctrinal research methodology. In other words, this essay aims to describe and analyse the law with respect to the TPD (discussing its scope and rights), and the laws of the MS implementing this directive. Additionally, this essay intends to briefly discuss some of the strengths and weaknesses of the directive. It is divided into various sections, which are addressed in turn.

To start with, a preliminary analysis of the directive is carried out. The aim of this section is twofold: to discuss the way in which the TPD was activated and to analyse the reasons why it was chosen as the proper mechanism to respond to the current crisis, as opposed to other mechanisms, such as asylum and subsidiary protection. Then, the content of Council decision 2022/382, activating the directive, is broken down. More precisely, this part covers the directive's personal, geographical and temporal scopes. Following this, the content of some of the rights contained in the directive, namely the right to work and the rights to access suitable accommodation, necessary assistance, medical care and education, is analysed. These specific rights have been chosen as the focus of this section because they are crucial in the integration process of migrants. Therefore, it is interesting to analyse what scope different MS have given to these rights. Eventually, this theoretical discussion on the directive leads to an analysis of the main topic of this paper, that is the various ways in which several MS have implemented the directive. Building on the knowledge acquired via the previous sections, this part addresses the personal scopes chosen by some MS and the extent of the rights covered by them. After that, the strengths and weaknesses of the directive are

[8] 'Types of EU law' (*Website of the European Commission*) <https://ec.europa.eu/info/law/law-making-process/types-eu-law_en#:~:text=Regulations%20are%20legal%20acts%20that,entirety%20on%20all%20EU%20countries> accessed 31 December 2022.

[9] 'Analysis of measures to provide protection to displaced persons from Ukraine: situational report' (*European Union Agency for Asylum*, 6 July 2022) <https://euaa.europa.eu/publications/situational-report-analysis-measures-provide-protection-displaced-persons-ukraine> accessed 31 December 2022.

evaluated, with particular attention being devoted to the advantages of an automatic access to the rights provided therein, and disadvantages of the freedom of beneficiaries to choose their country of stay. This is done by describing the criticisms most commonly found in academic literature on this directive, with the aim of enabling a reflection on potential ways to improve it. Additionally, this paper discusses, as a subject of further research, some of the current issues barring the proper enjoyment of the rights enshrined in the directive. Finally, the biggest challenge to come is addressed, namely the future prospect of migrants from Ukraine in the EU if the war goes on for longer than the three years provided for by articles 4(1) and (2) of the directive.

2. The Temporary Protection Directive

To understand the way in which the directive was implemented in the context of the war in Ukraine, it is necessary to first address what this directive consists of, how it came to be and why it was preferred to other types of international protection mechanisms, namely asylum and subsidiary protection.

2.1. What Is the TPD and How Was It Activated?

The TPD is a law guaranteeing access, for a limited period of time, to several rights – such as the right to work[10] or to have access to suitable accommodation[11] – for people fleeing a situation of conflict as part of a mass influx.[12] Its aim is to provide its beneficiaries with a temporary solution – lasting no more than three years – until the situation that made them leave stabilises.[13] Therefore, the directive is built

[10] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2022] OJ L212/16 (Temporary Protection Directive), Art. 12.
[11] Temporary Protection Directive, Art. 13(1).
[12] John Koo, 'Protecting Ukrainians fleeing to the EU … but for how long?' (*European law blog*, 10 March 2022) <https://europeanlawblog.eu/2022/03/10/protecting-ukrainians-fleeing-to-the-eu-but-for-how-long/> accessed 31 December 2022.
[13] Gabriel Braga Guimaraes, Tarin Cristino Frota Mont'Alverne & Julia Motte-Baumvol, 'Extending social protection for migrants under the European Union's temporary protection directive: lessons from the war in Ukraine' (2022) SSRN, p. 9 <https://ouclf.law.ox.ac.uk/extending-social-protection-for-migrants-under-the-european-unions-temporary-protection-directive-lessons-from-the-war-in-ukraine/> accessed 31 December 2022.

on the assumption that MS will only temporarily need to host people fleeing.[14] Its enactment in 2001 was shaped by the arrival of Bosnians and Kosovans fleeing the war in former Yugoslavia in the 1990s,[15] and it is not until the war in Ukraine broke out that it was first activated.[16] Indeed, despite calls by some countries to activate the directive in other contexts, for instance with respect to the wave of Syrian migrants in 2011, no agreement had ever been reached.[17] Some scholars, such as Leila Hadj Abdou and Andrea Pettrachin, argue that this political choice can be explained by factors such as "racism toward non-Europeans, geographic proximity and perception of Ukrainians as culturally and ethnically similar."[18]

For the temporary protection mechanism to be activated, the Council must adopt a decision, by qualified majority voting, recognising the existence of a mass influx of people in accordance with article 5 of the directive.[19] Indeed, when the directive was adopted, no definition of the term "mass influx" was given as this was deemed to be dependent on the circumstances at hand. Therefore, instead of referring to a specific number of people, the directive provides for the aforementioned procedure.[20] In the case at hand, the procedure was activated on 4 March 2022, when the MS unanimously established, via the enactment of Council decision 2022/382, that there was a mass influx of people from Ukraine into the EU.[21] Therefore, this directive only covers exceptional situations, namely cases of

[14] John Koo, 'Temporary protection of Ukrainians – an uncertain model' LSBU, p. 1 <https://www.lsbu.ac.uk/lsbu-research-blogs/blogs/lss/2022/temporary-protection-ukrainians-uncertain-model> accessed 31 December 2022.
[15] Sabine Corneloup, 'Sur la protection temporaire des personnes déplacées en provenance d'Ukraine' (2022) 2 Revue critique de droit international privé p. 440 <https://www.cairn.info/revue-critique-de-droit-international-prive-2022-2-page-439.htm> accessed 31 December 2022.
[16] Claire Rodier, 'Réfugiés d'Ukraine : le deux poids, deux mesures de l'Europe' (*Esprit*, May 2022), p. 45 <https://esprit.presse.fr/article/claire-rodier/refugies-d-ukraine-le-deux-poids-deux-mesures-de-l-europe-43996> accessed 22 November 2022.
[17] Guimaraes, Mont'Alverne & Motte-Baumvol (n 13), p. 3.
[18] Leila Hadj Abdou & Andrea Pettrachin, 'Explaining the remarkable shift in European responses to refugees following Russia's invasion of Ukraine' (*London School of Economics Blog*, 9 March 2022) <https://blogs.lse.ac.uk/europpblog/2022/03/09/explaining-the-remarkable-shift-in-european-responses-to-refugees-following-russias-invasion-of-ukraine/> accessed 22 November 2022.
[19] Temporary Protection Directive, Art. 5; see also Council Decision implementing the Temporary Protection Directive, Recital 10; see also Guimaraes, Mont'Alverne & Motte-Baumvol (n 13), pp. 1-2.
[20] Jean Yves Carlier, 'Ukraine temporary protection' (*Youtube channel « Droit d'asile et des réfugiés* », 5 April 2022), 8'30 <https://www.youtube.com/watch?v=OO3qM_cMRdU&t=118s> accessed 31 December 2022.
[21] ibid 10'45; see also Council Decision implementing the Temporary Protection Directive, Art. 1; see also Koo (n 12).

major movements of people into the EU.[22] After the adoption of the Council decision, the next step is the transposition by MS of that decision into their national laws.[23] In doing so, MS enjoy some degree of flexibility as they are allowed to go further than what the directive and the decision provide for.[24]

2.2. Why Provide People from Ukraine with Temporary Protection rather than Asylum or Subsidiary Protection?

Both asylum[25] and subsidiary protection[26] could, in principle, be applied to the situation of people fleeing Ukraine. With respect to asylum, provided that a well-founded fear of being persecuted would be found, the refugee status could be granted.[27] Indeed, the state of war in the situation at hand does not prevent the Geneva Convention Relating to the Status of Refugees,[28] establishing the right to asylum, from being applied.[29] Additionally, subsidiary protection is to be granted to "people who do not qualify as refugees but in respect to whom substantial grounds have been shown for believing that, if they are returned to their countries of origin, they would face a real risk of suffering serious harm".[30] Serious harm is defined in different ways, including as a "serious and individual threat to a civilian's life or person by reasons of indiscriminate violence in situations of international or internal armed conflict".[31] Since there is an armed conflict and violence against civilians in the case at hand, subsidiary protection could theoretically be granted to people fleeing Ukraine.[32]

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[22] Carlier (n 20), 8'15.
[23] Steffen Angenendt and others, 'Maintaining mobility for those fleeing the war in Ukraine: from short-term protection to longer-term perspectives' (2022) 26 SWP comment, p. 2 <https://www.swp-berlin.org/publications/products/comments/2022C26_RefugeesUkraine.pdf> accessed 31 December 2022.
[24] Temporary Protection Directive, Art. 13(5); see also Corneloup (n 15), p. 440.
[25] UN High Commissioner for Refugees, 'The 1951 Convention Relating to the Status of Refugees Geneva Convention Relating to the Status of Refugees 1951' (Refugee Convention).
[26] Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted OJ L337/9 (Qualification Directive); see also Council of Europe, 'European Convention for the Protection of Human Rights and Fundamental Freedoms' (1950).
[27] Refugee Convention, Art. 1(a)(2).
[28] ibid.
[29] Carlier (n 20), 4'10.
[30] Qualification Directive, Art. 2(f).
[31] ibid Art. 15(c).
[32] Carlier (n 20).

However, according to many scholars, including Professor Jean-Yves Carlier, such international protections are not suitable for the present case.[33] Those two protections indeed require that the situation of every migrant be examined individually and that important administrative means be implemented to satisfy the procedural needs of such a large-scale endeavour.[34] This means, for asylum, that the person requesting it needs to possess a "well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership of a particular social group".[35] A "well-founded fear of persecution" is, in contemporary refugee law, to be determined based on two elements: there must be a "subjective and preferably experienced perception of risk that is neither feigned nor overstated", and this perception must be "supported by an objective situation of persecutory risk in one's country of origin".[36] With regard to people fleeing Ukraine, only those who directly faced risks would therefore stand a chance to be granted asylum. This means that those who fled before such risks arose, or were in parts of Ukraine, such as in the West, where the risks were lower, would have difficulties being granted asylum.[37] In comparison, it would be easier for Ukrainians to acquire the subsidiary protection status.[38] Indeed, in order to benefit from subsidiary protection, one must prove that they would "face a real risk of suffering serious harm should they be returned to their country of origin".[39] With the war currently going on in several parts of Ukraine, this is an easier threshold to reach. Therefore, this subsidiary protection mechanism, which applies to those who do not qualify as refugees, is a compromise between temporary protection and asylum.[40]

However, it is to be kept in mind that evaluating the individual situation of every migrant – whether in relation to the asylum status or subsidiary protection – takes time and is thus not the most effective solution when millions of people

[33] ibid 5'55.
[34] Angenendt and others (n 23), p. 2.
[35] Refugee Convention, Art. 1(a)(2); see also Qualification Directive, Art. 2(d).
[36] Zacarias Negron, 'Subsidiary protection for Ukrainian Asylum Seekers: a practical protection measure for Europe's next refugee crisis' (2022) 17(1) AmeriQuests, p. 1 <https://ejournals.library.vanderbilt.edu/index.php/ameriquests/article/view/5289> accessed 31 December 2022.
[37] ibid p. 1.
[38] Corneloup (n 15), p. 443.
[39] Qualification Directive, Art. 2(f).
[40] Negron (n 36), p. 2.

arrive at once. In this regard, granting temporary protection to those fleeing Ukraine is more appropriate, as it is a group-based mechanism which is automatic, and therefore does not require the examination of the personal situation of each of them.[41] Nonetheless, despite the activation of the TPD, people fleeing Ukraine can still ask for asylum or subsidiary protection at any time.[42] It is however possible for MS to decide that temporary protection cannot be "enjoyed concurrently with the status of asylum seeker while applications are under consideration".[43] In the event that an international protection application is rejected, the applicant continues to benefit from the temporary protection mechanism until it expires.[44]

3. COUNCIL DECISION 2022/382

In order to activate the TPD, a decision by the Council is necessary.[45] In the case at hand, this was done via Council decision 2022/382.[46] This decision provides further details on the application of the directive in the context of the flow of migrants from Ukraine, for instance with respect to the personal,[47] temporal[48] and geographical[49] scopes of the directive, and the possibility for its beneficiaries to freely choose their country of establishment.[50] In this respect, this section aims to gather some basic knowledge of the different categories of people encompassed in the scope of the directive, the countries bound by it, and the duration of its application. Additionally, the non-application of article 11 of the TPD in the context of the Ukrainian migration is discussed. In sum, this part builds the foundations to understand section five, which covers the ways in which this directive was implemented in some MS.

[41] Carlier (n 20), 5'55.
[42] Temporary Protection Directive, Art. 17; see also Qualification Directive, Art. 15; see also Corneloup (n 15), p. 443; see also Koo (n 14).
[43] Temporary Protection Directive, Art. 19; see also Koo (n 14); see also Carlier (n 20), 16'.
[44] Corneloup (n 15), p. 443.
[45] Guimaraes, Mont'Alverne & Motte-Baumvol (n 13), pp. 1-2.
[46] Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC and having the effect of introducing temporary protection [2022] OJ L 71 (Council Decision implementing the Temporary Protection Directive).
[47] Council Decision implementing the Temporary Protection Directive, Art. 2.
[48] ibid Recital 21.
[49] ibid Recital 26.
[50] ibid Recital 15.

3.1. Personal Scope

Pursuant to article 5(3)(a) of the TPD,[51] the decision must clearly mention to whom the directive applies. In the case at hand, this was established via article 2 of Council decision 2022/382.[52] On the one hand, article 2(1)[53] refers to three categories of people to whom the directive applies, namely people with Ukrainian nationality,[54] those who enjoyed an international protection status in Ukraine,[55] and the family members of these two categories.[56] The people from the first two categories must have been residing in Ukraine before 24 February 2022.[57] On the other hand, article 2(2)[58] relates to stateless people and third country nationals who had a valid permanent residence permit in Ukraine before 24 February – that is, who had been residing in Ukraine for more than five years[59] – and who are unable to safely and durably return to their home country. Regarding those people, who account for almost five million,[60] MS can choose to either apply the TPD or another "adequate protection under their national law".[61]

Other categories of people, such as those who were illegally residing in Ukraine,[62] those who were legally residing in Ukraine on a short-term permit such as students,[63] those who anticipated Russia's invasion and left the country before 24 February 2022,[64] or those whose international protection application was underway,[65] are all excluded from the scope of the TPD.[66] This can be explained

[51] Temporary Protection Directive, Art. 5(3)(a).
[52] Council Decision implementing the Temporary Protection Directive, Art. 2.
[53] ibid Art. 2(1).
[54] ibid Art. 2(1)(a).
[55] ibid Art. 2(1)(b).
[56] ibid Art. 2(1); see also Carlier (n 20), 11'40.
[57] Guimaraes, Mont'Alverne & Motte-Baumvol (n 13), p. 4.
[58] Council Decision implementing the Temporary Protection Directive, Art. 2(2).
[59] Carlier (n 20), 14'10.
[60] Guimaraes, Mont'Alverne & Motte-Baumvol (n 13), p. 4.
[61] Council Decision implementing the Temporary Protection Directive, Art. 2(2); see also Commission, 'Communication from the Commission on operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection' (2022) C 126 I/1 Official Journal of the European Union (Communication from the European Commission on the implementation of Council implementing Decision 2022/382), p. 2.
[62] Corneloup (n 15), p. 440.
[63] Koo (n 12).
[64] Council Decision implementing the Temporary Protection Directive, Recital 14; see also Koo (n 12).
[65] Corneloup (n 15), p. 440.
[66] Koo (n 12).

by the fact that some MS, such as Poland, were only willing to vote in favour of the activation of the directive provided that its personal scope was limited.[67] However, MS can decide to include these people as beneficiaries of the temporary protection mechanism in their national law implementing the decision.[68] This was stressed by the Council,[69] which, for instance, encouraged MS to "consider extending temporary protection"[70] to people who fled Ukraine before 24 February 2022. In any case, all the people excluded from the scope of the TPD retain the right to apply for asylum.[71] Additionally, the Council emphasised that MS should admit those people on humanitarian grounds "to ensure safe passage with a view to returning to their country of origin".[72] Finally, people who committed war crimes, crimes against humanity, crimes against peace,[73] or in relation to whom "there are reasonable grounds for regarding him or her as a danger to the security of the host MS"[74] can be excluded, at the discretion of the MS, from the scope of the TPD.[75]

Pursuant to article 2(4) of the Council decision,[76] the term "family members" of Ukrainian nationals and people benefiting from international protection having left Ukraine after 24 February (categories (a) and (b) of article 2(1) of the Council decision[77]) covers three categories of people.[78] First, family members can either be spouses or unmarried partners in a stable relationship, provided that, for the latter, "the legislation or practice of the MS concerned treats unmarried couples in a way comparable to married couples under its national law".[79] Second, the definition of family members includes minor unmarried children of people from categories (a) and (b) of article 2(1) of the Council decision or of these people's spouses.[80] The Council adds that those children

[67] Guimaraes, Mont'Alverne & Motte-Baumvol (n 13), p. 7.
[68] Temporary Protection Directive, Art. 7; see also Council Decision implementing the Temporary Protection Directive, Art. 2(3) and Recital 13.
[69] Council Decision implementing the Temporary Protection Directive, Art. 2(3).
[70] ibid Recital 14.
[71] Koo (n 12); see also Corneloup (n 15), p. 440.
[72] Council Decision implementing the Temporary Protection Directive, Recital 13.
[73] Temporary Protection Directive, Art. 28(1)(a)(i).
[74] ibid Art. 28(1)(b).
[75] ibid Art. 28; see also Corneloup (n 15), p. 441.
[76] Council Decision implementing the Temporary Protection Directive, Art. 2(4).
[77] ibid Art. 2(1)(a) and 2(1)(b).
[78] Koo (n 12).
[79] Council Decision implementing the Temporary Protection Directive, Art. 2(4)(a).
[80] ibid Art. 2(4)(b).

constitute family members irrespective of "whether they were born in or out wedlock or adopted".[81] Third, family members can also be "close relatives who lived together as part of the family unit at the time of the circumstances surrounding the mass influx of displaced people, and who were wholly or mainly dependent on a person referred to in paragraph 1, point (a) or (b) at the time".[82]

3.2. Temporal and Geographical Scopes

The temporal scope of the TPD is the following: the directive is initially activated for one year and then automatically renewed by two periods of six months each, unless the Council decides, by qualified majority, to put an end to its application before that.[83] In addition to this, the Council may "decide to extend the temporary protection by up to one year".[84] In total, the TPD can thus be applied for a maximum duration of three years. The geographical scope, in turn, covers all MS[85] except for Denmark which opted out of this directive.[86] With regard to Ireland, while recital 25 of the TPD[87] mentions that Ireland does not participate in the adoption of the directive, recital 25 of the Council decision[88] mentions that it is bound by it. Ireland is thus covered by the geographical scope of the TPD.

3.3. The Non-Application of Article 11 of the Temporary Protection Directive

Article 11 of the TPD holds that a person enjoying temporary protection in one MS shall be returned to that MS if they ended up in another MS.[89] However, this article also stipulates that MS can, via a bilateral agreement, decide that this article should not be applied.[90] In the case at hand, this was done via a statement by MS,

[81] ibid Art. 2(4)(b).
[82] ibid Art. 2(4)(c).
[83] Temporary Protection Directive, Art. 4(1) and 6(1)(b); see also Council Decision implementing the Temporary Protection Directive, Recital 21; see also Angenendt and others (n 23), p. 2.
[84] Council Decision implementing the Temporary Protection Directive, Recital 21; see also Temporary Protection Directive, Art. 4(2).
[85] Temporary Protection Directive, Art. 5(3).
[86] ibid Recital 26; see also Koo (n 12); see also Council Decision implementing the Temporary Protection Directive, Recital 26.
[87] Temporary Protection Directive, Recital 25.
[88] Council Decision implementing the Temporary Protection Directive, Recital 25.
[89] Temporary Protection Directive, Art. 11; see also Carlier (n 20), 17'30.
[90] Temporary Protection Directive, Art. 15.

and it was formally mentioned in recital 15 of Council decision 2022/382.[91] Concretely, this means that people fleeing Ukraine can choose in which country they want to apply for temporary protection, and that they will not be returned to the country in which they benefit from the temporary protection status if they end up in another MS.[92] Instead, relocation can only occur if the person to be relocated agrees to it.[93] This is in sharp contrast with Dublin regulation III,[94] the law commonly applied to determine which MS is responsible for the examination of a person's international protection application, which lays down clear criteria for this assessment, thereby leaving no choice of destination to the applicants.

The Council's decision to provide people fleeing Ukraine with free destination choice can be explained by several reasons. One of these is that many of those people have acquaintances or relatives in the EU, which should be capitalised on.[95] Additionally, Ukrainian citizens have, since 2017, the right to enter the Schengen area without the need for a visa and to stay there for 90 days over a period of 180 days.[96] In this respect, their freedom to choose the MS in which to request temporary protection is a logical consequence of their right of free travel through the Schengen area.[97]

This "self-distribution and mobility"[98] of migrants from Ukraine is the way MS have chosen to deal with responsibility sharing.[99] The adoption of this flexible mechanism is rendered possible by the leeway the TPD gives in this regard, as it does not mention, for instance, the necessity for MS to implement a quota system.[100] Rather, only article 25 of the TPD makes reference to responsibility sharing and merely mentions that "MS shall receive people who are eligible for

[91] Council Decision implementing the Temporary Protection Directive, Recital 15.
[92] Angenendt and others (n 23), p. 2; see also Carlier (n 20), 17'30; see also Corneloup (n 15), pp. 441-442.
[93] Temporary Protection Directive, Art. 26; see also Angenendt and others (n 23), p. 2.
[94] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180/31.
[95] Guichard, Machado & Maystadt (n 3), p. 3; see also Koo (n 12).
[96] Council Decision implementing the Temporary Protection Directive, Recital 6; see also Angenendt and others (n 23), p. 2; see also Negron (n 36), p. 1; see also Corneloup (n 15), p. 439.
[97] Angenendt and others (n 23), p. 2.
[98] ibid p. 7.
[99] Koo (n 12).
[100] ibid.

temporary protection in a spirit of solidarity".[101] This opens the door to many possible interpretations, including the one adopted by Council decision 2022/382.[102] Following this preliminary analysis of the scope of application of the directive and the non-application of its article 11,[103] a more thorough assessment focusing on the rights contained therein is conducted.

4. Rights Contained in the Temporary Protection Directive

The holders of the temporary protection status have several rights. Among those, they have the right to be issued a residence permit proving their status for the entire duration of the protection,[104] to work,[105] and to have access to suitable accommodation.[106] Additionally, they have the right to necessary assistance in terms of social welfare and means of subsistence,[107] to medical care,[108] and those under the age of 18 have the right to education.[109] They also enjoy the right to family reunification[110] and unaccompanied minors have the right to representation.[111] The content of those rights is not further detailed in the Council decision, but documents such as the Commission's operational guidelines[112] and communications[113] are helpful to better understand what those rights entail. By discussing these rights, the aim of this section is to provide some additional background information on the directive to facilitate the analysis of its implementation in various MS in section five of this present article.

[101] Temporary Protection Directive, Art. 25.
[102] Council Decision implementing the Temporary Protection Directive.
[103] Temporary Protection Directive, Art. 11.
[104] ibid Art. 8(1); see also Koo (n 12); see also Communication of the European Commission on the implementation of Council implementing Decision 2022/382, p. 10.
[105] Temporary Protection Directive, Art. 12.
[106] ibid Art. 13(1).
[107] ibid Art. 13(2).
[108] ibid Art. 13(2).
[109] ibid Art. 14(1).
[110] ibid Art. 15.
[111] ibid Art. 16(1); see also Corneloup (n 15), p. 441.
[112] Communication from the European Commission on the implementation of Council implementing Decision 2022/382.
[113] Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions — Welcoming those who are fleeing war in Ukraine: Readying Europe to meet the needs' COM (2022) 131 final (Communication from the European Commission on the arrival of people fleeing war in Ukraine).

4.1. Right to Work

The right to work of beneficiaries of the TPD is enshrined in article 12 of the TPD and includes the possibility for them to carry out employed and self-employed activities and to participate in other forms of work such as vocational training.[114] MS shall ensure that those people are treated in the same way as their nationals when it comes to remuneration and working conditions.[115] However, in terms of employment opportunities, MS can decide to "give priority to EU citizens of States bound by the Agreement on the European Economic Area".[116]

In this respect, the right to work is rather passive as it only requires MS to let people work. However, the Commission recommends that MS interpret this provision as widely as possible. Similarly, some scholars, such as Angenendt and others, argue that MS should take active steps to turn this passive right of access to the labour market into a proactive policy.[117]

4.2. Access to Suitable Accommodation

Pursuant to article 13(1) of the TPD, people benefitting from the temporary protection status must have access to suitable accommodation – that is, accommodation that meets their specific needs – or to the means to find such accommodation.[118] The way in which this right is to be fulfilled does not seem to be pre-determined. However, in practice, this could take the form of MS providing newly arrived migrants with emergency housing solutions in places like large reception centres. Additionally, this right could involve the implementation of mechanisms providing people with the necessary means and guidance to find medium-term accommodation.[119] In order to guarantee the right to

[114] Temporary Protection Directive, Art. 12; see also Gunneflo Markus & Noll Gregor, 'Directive 2001/55 temporary protection: synthesis report' (2007) Academic network for legal studies on immigration and asylum in Europe, p. 33 <https://odysseus-network.eu/wp-content/uploads/2015/03/2001-55-Temporary-Protection-Synthesis.pdf> accessed 31 December 2022.
[115] Communication from the European Commission on the arrival of people fleeing war in Ukraine, p. 12.
[116] Temporary Protection Directive, Art. 12.
[117] Angenendt and others (n 23), p. 6.
[118] Temporary Protection Directive, Art. 13(1); see also Communication from the European Commission on the arrival of people fleeing war in Ukraine, p. 14.
[119] 'Analysis of measures to provide protection to displaced persons from Ukraine: situational report' (n 9), p. 12.

accommodation, programs matching citizens willing to help with people fleeing war could also be appropriate. However, as argued by Angenendt and others, this cannot be the only mechanism relied on by governments to fulfil their obligation.[120] Additionally, such programs would need to include measures aiming to prevent abuse from citizens towards migrants within their homes.[121]

4.3. Access to Necessary Assistance

Article 13(2) of the TPD provides the following: "MS shall make provision for persons enjoying temporary protection to receive necessary assistance in terms of social welfare and means of subsistence, if they do not have sufficient resources".[122] Therefore, it seems that beneficiaries of temporary protection who are in need have the right to some form of necessary assistance.[123] However, the substance of this right remains unclear as no further details are provided by either the TPD or the Council decision.[124] Nonetheless, as argued by Guimaraes, Mont'Alverne and Motte-Baumvol, the right to necessary assistance could be interpreted along the lines of the MS' international commitments on social protection.[125]

On the one hand, International Law recognises the right to social protection via, for instance, article 9 of the International Covenant on Economic, Social and Cultural rights.[126] The content of this right includes the obligation for States to "work towards a non-contributory safety net", which has been interpreted as encompassing the "minimum core".[127] This "minimum core" includes access to "water and sanitation, food products, essential primary healthcare, basic shelter

[120] Angenendt and others (n 23), p. 5.
[121] ibid p. 5.
[122] Temporary Protection Directive, Art. 13(2).
[123] Katrien Luyten, 'Temporary Protection Directive: briefing' (2022) European Parliamentary Research Service p. 5; see also Angenendt and others (n 23), p. 1; see also Markus & Gregor (n 114), p. 36; see also 'Migration and home affairs – temporary protection' (*Website of the European Commission*) <https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/temporary-protection_en#:~:text=The%20Temporary%20Protection%20Directive%20defines%20the%20decision-making%20procedure,can%20last%20from%20one%20year%20to%20three%20years%29> accessed 31 December 2022.
[124] Guimaraes, Mont'Alverne & Motte-Baumvol (n 13), pp. 4 and 8.
[125] ibid.
[126] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Art. 9.
[127] Guimaraes, Mont'Alverne & Motte-Baumvol (n 13), p. 8.

and housing and the most basic forms of education"[128] or, put in broader terms, access to the basic necessities and to a standard of living above the poverty line. On the other hand, European law recognises the right to social assistance via, *inter alia*, article 13 of the European Social Charter[129] and article 34 of the Charter of Fundamental Rights of the European Union.[130] The European Pillar of Social Rights, in turn, refers to a right to social assistance via the notion of a "minimum income protection" which, pursuant to principle 14, would entail that "everyone lacking sufficient resources has the right to adequate minimum income benefits ensuring a life in dignity and effective access to enabling goods and services".[131]

Additionally, Guimaraes, Mont'Alverne and Motte-Baumvol highlight that the use of the word "necessary" before the word "assistance" in the TPD aims to restrict the scope of protection in that only protection that is necessary to achieve a specific aim is covered under the directive.[132] Then, relying on the analysis of the TPD's preparatory works, they argue that this specific aim is to "ensure that such persons are treated humanely and receive assistance and protection allowing them to recover from the traumas they have suffered, and to provisionally enter into social, cultural and human relations in the host country, on the same footing as refugees".[133] Therefore, the term "necessary" is to be interpreted broadly. Directive 2011/95/EU, which covers the standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protections, follows the same line of reasoning. Indeed, the latter interprets the right to assistance as the entitlement to core benefits, which is "understood as covering at least minimum income support".[134]

In sum, this analysis, taken together with the interpretation of the right to social assistance in International and European law, seems to suggest that the right to assistance provided for in the TPD encompasses access to all the elements that are needed for a person's self-preservation and ability to live with dignity.[135]

[128] Guimaraes, Mont'Alverne & Motte-Baumvol (n 13) p. 8.
[129] European Social Charter (adopted 18 October 1961, entered into force 26 February 1965), Art. 13.
[130] Charter of fundamental rights of the European Union (26 October 2012) C 326/391, Art. 34.
[131] European pillar of social rights (2017), principle 14; see also Guimaraes, Mont'Alverne & Motte-Baumvol (n 13), p. 9.
[132] Guimaraes, Mont'Alverne & Motte-Baumvol (n 13), p. 9.
[133] ibid p. 9.
[134] ibid p. 10.
[135] ibid pp. 9-10.

Beneficiaries of temporary protection who do not have access to basic necessities are therefore entitled to this assistance. Moreover, while the directive does not specify whether MS shall provide beneficiaries with access to a type of assistance that is equal to the one granted to their own nationals, Council directive 2011/95/EU mentions that "beneficiaries of international protection receive, in the MS that has granted such protection, the necessary social assistance as provided to nationals of that MS".[136] Similarly, Guimaraes, Mont'Alverne and Motte-Baumvol believe, based on a general comment by the UN Committee on Economic, Social and Cultural Rights,[137] that MS "should not only extend their domestic schemes to migrants covered by the TPD, but also give special attention to those individuals and groups who traditionally face difficulties in exercising social rights".[138] Finally, it is to be noted that the enjoyment of social protection does not preclude the application of the EU humanitarian aid policy, which can be granted concurrently. Indeed, they both have different aims – while the former focuses on the medium-term, the latter exclusively covers emergency situations.[139]

4.4 Access to Medical Care

People falling within the scope of the TPD have the right to access medical care, including "at least emergency care and essential treatment of illness".[140] MS shall ensure that those people have access to health care in the same way as their nationals do.[141] However, considering that the rules vary by country, this entails that a beneficiary who is in MS "A" might benefit from a larger extent of health care rights than another beneficiary enjoying the temporary protection status in MS "B".[142] Additionally, the Commission recommends that the range of health care services provided by MS to people fleeing Ukraine be broader than what is required at minimum, including with respect to mental health.[143] MS are also

[136] ibid pp. 10-11.
[137] General Comment No. 19 of the United Nations Committee on Economic, Social and Cultural Rights, 39th Session, Art. 9.
[138] Guimaraes, Mont'Alverne & Motte-Baumvol (n 13), p. 11.
[139] ibid p. 3.
[140] Temporary Protection Directive, Art. 13(2).
[141] Paul Spiegel, 'Responding to the Ukraine refugee health crisis in the EU' (2022) 399 Lancet p. 2084 <https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(22)00841-8.pdf> accessed 31 December 2022.
[142] ibid p. 2084.
[143] Communication from the European Commission on the arrival of people fleeing war in Ukraine, p. 9.

required to provide people with special needs – such as victims of rape or "other serious forms of psychological, physical or sexual violence"[144] – with necessary medical assistance.[145] Finally, regarding COVID-19, testing and vaccinations are available free of charge to both nationals and Ukrainian refugees in all MS.[146]

4.5 Access to Education

The right of minors holding the temporary protection status to access education is granted under article 14 of the TPD.[147] With respect to them, MS shall guarantee that they enjoy this right "under the same conditions as their nationals and EU citizens",[148] however, this obligation exclusively applies to the public education system.[149] Additionally, whereas the TPD only refers to children benefitting from temporary protection as beneficiaries of the right to education, the Commission, in its operational guidelines for the implementation of Council implementing decision 2022/382,[150] considers that this right is also applicable to "minors benefitting from adequate protection under national law".[151] Those who enjoy adequate protection include, *inter alia*, third country nationals with a permanent residence in Ukraine who cannot safely go back to their country of origin, and in relation to whom the MS decided to apply this protection rather than the TPD.[152] Given that Commission guidelines merely constitute guidance and are not legally binding, it seems that only those holding the temporary protection status formally have the right to education under the TPD.[153] However, MS can decide to extend that right to people with other statuses. Finally, it is important to note that access to the education system shall be given "as soon as materially possible".[154]

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[144] Temporary Protection Directive, Art. 13(4).
[145] Markus & Gregor (n 114), p. 37.
[146] Spiegel (n 141), p. 2085.
[147] Temporary Protection Directive, Art. 14.
[148] ibid Art. 14.
[149] ibid Art. 14; see also Communication from the European Commission on the implementation of Council implementing Decision 2022/382, p. 8.
[150] Communication from the European Commission on the implementation of Council implementing Decision 2022/382.
[151] ibid p. 8.
[152] Council Decision implementing the Temporary Protection Directive, Art. 2(2).
[153] 'Legal Instruments' (*EU Monitor*) <https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vh75mdhkg4s0> accessed 1 December 2022.
[154] Communication from the European Commission on the implementation of Council implementing Decision 2022/382, p. 8.

While not strictly mandatory, the Commission also recommends that "support measures, such as preparatory classes, be provided to children to facilitate their access to and participation in the education system".[155] This is especially important to assist the beneficiaries in learning the host country's language – be it via measures integrated into mainstream education or via preparatory classes – to evaluate their knowledge, and to guide them and their parents with guidance related to the host country.[156] In addition to this, the Commission suggests that MS should "support access to early childhood education and care, as well as vocational training, under the same conditions as their own nationals and other EU citizens".[157] Finally, with respect to the education of adults, article 14(2) of the TPD provides that "MS may allow adults enjoying temporary protection access to the general education system". However, as the word "may" indicates, this is not mandatory. Following this analysis of the theoretical background of the personal scope and content of the rights of the directive, examples of ways in which MS have implemented this scope and those rights are presented.

5. Implementation of the Temporary Protection Directive and Council Decision 2022/382

Under this section, various implementing measures taken by 17 MS are discussed. More specifically, the extent of the personal scope chosen by Hungary, Poland, France, Slovakia and seven other MS is examined, and the content of the rights transposed in Italy, Belgium, Malta, Lithuania and five other countries is evaluated.

5.1. Personal Scope

To start with, the categories of people chosen by 11 MS to be included in their scope of application of the directive are assessed. More specifically, this section addresses non-Ukrainians with a permanent residence permit who cannot safely

[155] Communication from the European Commission (n 154).
[156] ibid.
[157] ibid.

and durably go back to their country of origin, and those fully excluded from the mandatory scope of the directive.

5.1.1. Non-Ukrainians with a Permanent Residence Permit Who Cannot Safely and Durably Go Back to Their Country of Origin

In terms of personal scope, most of the discretion MS have relates to third country nationals and stateless people who have a permanent residence permit from Ukraine, and who cannot safely and durably go back to their country of origin. Indeed, MS can decide to provide them with either the temporary protection status or another adequate protection under national law.[158] In this regard, many MS decided to provide them with temporary protection, except for countries such as Austria, Greece, Hungary and Estonia.[159]

In Hungary, for instance, while the government had initially included this category of people in its scope of application of the directive, on 8 March 2022, a government decree with retroactive effect removed them from it.[160] Consequently, those people can now only have a Certificate of Temporary Residence which is valid for 30 days and gives access to accommodation but grants no other right like the TPD does.[161] However, it seems that Hungary provides no adequate protection to these people despite its obligation to do so. Indeed, the government mentions that those people can enjoy "protection in accordance with the general rules",[162] but the general rules do not currently enable people to apply for asylum. The reason for this is that, to lodge an asylum application, people have to go to a Hungarian embassy either in Belgrade or Kyiv, which, in a state of war, is

[158] Council Decision implementing the Temporary Protection Directive, Art. 2(2).
[159] 'Temporary protection for displaced persons from Ukraine' (*European Union Agency for Asylum*) <https://whoiswho.euaa.europa.eu/temporary-protection> accessed 31 December 2022.
[160] Boldizsar Nagy, 'About-face or camouflage? Hungary and the refugees from Ukraine' (*Asile*, 11 April 2022) <https://www.asileproject.eu/about-face-or-camouflage-hungary-and-the-refugees-from-ukraine/> accessed 31 December 2022; see also 'Hungary – Information on temporary protection' (*United Nations High Commissioner for Refugees*) <https://help.unhcr.org/hungary/temporary-protection/> accessed 31 December 2022.
[161] 'New restrictions on temporary protection for those fleeing Ukraine' (*Helpers*, 9 March 2022) <https://helpers.hu/refugees/new-restrictions-on-temporary-protection-for-those-fleeing-ukraine/> accessed 31 December 2022.
[162] Karolina Babicka, 'Temporary protection: Poland and Hungary once again creating their own rules in breach of EU law' (*OpinioJuris*, 11 April 2022) <https://opiniojuris.org/2022/04/11/temporary-protection-poland-and-hungary-once-again-creating-their-own-rules-in-breach-of-eu-law/> accessed 31 December 2022.

extremely difficult to do.[163] Therefore, in practice, people from the above-mentioned category do not have access to adequate protection in Hungary.

In Poland, in turn, the opposite happened. While, at first, the Polish government had excluded this category of people from the scope of its implementing measure, on 26 March 2022, it amended it to include them.[164] Another interesting example relates to France, where non-Ukrainians with a permanent residence permit from Ukraine who cannot safely and durably go back to their country of origin enjoy temporary protection.[165] An example of the application of this rule is the case of a third country national of Bangladeshi origin with a permanent residence permit from Ukraine. On 10 June 2022, he brought a case before a French tribunal disputing the decision not to grant him temporary protection, which had been taken on the grounds that he could safely and durably go back to Bangladesh. In the end, the court decided in favour of the applicant based on personal details which indicated that he would be at risk in Bangladesh. Therefore, in France, to determine whether it is safe for someone to go back to their country of origin, their personal circumstances must be considered.

5.1.2. Categories of People Excluded from the Scope of the Temporary Protection Directive

Pursuant to article 2(3) of Council decision 2022/382, protection can – but does not need to – be extended to people originally excluded from the scope of the TPD.[166] In this way, several MS broadened their scope to include additional categories of people. For instance, Croatia, Germany and Luxembourg cover

[163] Karolina Babicka (n 162); see also 'New restrictions on temporary protection for those fleeing Ukraine' (n 161).
[164] 'Poland expands temporary protection benefits for Ukraine' (*Erickson immigration group*, 8 April 2022) <https://eiglaw.com/poland-expands-temporary-protection-benefits-for-ukraine/> accessed 31 December 2022; see also 'Amendment to the law on assistance to Ukrainian citizens in connection with the armed conflict on the territory of the country' (*Website of the Republic of Poland*, 28 March 2022) <https://www.gov.pl/web/udsc-en/the-law-on-assistance-to-ukrainian-citizens-in-connection-with-the-armed-conflict-on-the-territory-of-the-country-has-entered-into-force#:~:text=Foreigners%20who%20are%20not%20covered%20by%20the%20aforementioned,within%20the%20territory%20of%20the%20Republic%20of%20Poland> accessed 31 December 2022.
[165] 'Information à destination des personnes déplacées d'Ukraine et souhaitant demander une protection temporaire en France' (*Website of the Ministère de l'intérieur et des outre-mer*, 10 March 2022) <https://www.interieur.gouv.fr/actualites/dossiers/situation-en-ukraine/information-a-destination-des-personnes-deplacees-dukraine> accessed 31 December 2022.
[166] Council Decision implementing the Temporary Protection Directive, Art. 2(3).

Ukrainians and their family members who left Ukraine before the war started, and Greece and the Netherlands include Ukrainians who left Ukraine no longer than 90 days before 24 February.[167] Similarly, Slovakia allows third country nationals coming from Ukraine to enter its territory even if they do not comply with entry conditions under regular circumstances,[168] and Romania does the same but requires those people to have a passport, following which they can obtain a visa.[169] Finally, some MS, such as Finland, Spain and Germany, broadened their scope to include people who were legally residing in Ukraine on a short-term permit and who cannot safely and durably go back to their country of origin.[170]

5.2. CONTENT OF THE RIGHTS

Following this analysis of the categories of people included in the scope of application of the implementing measures of 11 MS, the content of the rights which beneficiaries are entitled to is evaluated. This is done by comparing nine MS, including France, Hungary, Poland and Greece.

5.2.1. Right to Work

In addition to the actual right to work without a work permit,[171] some MS provide beneficiaries of temporary protection with services to help them find a job. In France, for instance, they can be guided by "Pôle Emploi", a public structure in charge of accompanying job seekers in their search for a job, providing them with French language courses and carrying out a deep analysis of their personal situation based on their knowledge and skills.[172] Similarly, in Lithuania, the Employment Service provides beneficiaries with "free labour market services related to job search"[173] and closely collaborates with structures such as municipalities and governmental organisations to help people from Ukraine.

[167] 'Analysis of measures to provide protection to displaced persons from Ukraine: situational report' (n 9), p. 10.
[168] 'Situation in Ukraine - information and assistance' (*Website of the Ministry of Interior of the Slovak Republic*) <https://www.minv.sk/?ukraine-information-assistance> accessed 31 December 2022; see also Guimaraes, Mont'Alverne & Motte-Baumvol (n 13), p. 6.
[169] Guimaraes, Mont'Alverne & Motte-Baumvol (n 13), pp. 6-7.
[170] 'Temporary protection for displaced persons from Ukraine' (n 159).
[171] Council Directive 2001/55/EC, Art. 12.
[172] 'Pour l'Ukraine: vos droits/où se renseigner' (*Website of the French government)* <https://parrainage.refugies.info/ukraine/vos-droits/index.html> accessed 31 December 2022.
[173] 'Temporary protection for displaced persons from Ukraine' (n 159).

Additionally, incentives for employers to work with holders of the temporary protection status have been put in place in some MS. In Hungary, for instance, a government decree implemented that 50 percent of the employee's monthly accommodation and travel expenses would be paid by the Hungarian government for up to 12 months.[174] With regard to the right of MS to favour their own nationals and EU citizens in the event of a labour shortage,[175] some MS, such as Hungary, decided not to exercise that right.[176] Finally, it should not be forgotten that beneficiaries of temporary protection must be able to enjoy the right to work in the same manner as the nationals of the MS they are in.[177] Therefore, they are entitled to the "full range of statutory employment rights and protections".[178]

5.2.2. Access to Suitable Accommodation

Access to suitable accommodation[179] seems to progress in different phases. In France, for instance, people from Ukraine are first received in an emergency reception site for up to two nights. Following this, they are placed in one location for a few weeks or months at most, after which they receive a more permanent housing arrangement. Those willing to rent a private place may benefit from personalised housing aid granted by the government.[180] Similarly, in Italy, migrants from Ukraine are received in Emergency Reception Centres and Reception and Integration System facilities. If they find private accommodation, they can get a monthly sum of money which may, however, only be granted for up to three months.[181] Additionally, in both countries, citizen initiatives have emerged via platforms connecting those willing to help with those looking for help. Nonetheless, it seems that, in both countries, those mostly serve as back-up options, the priority being given to state-run infrastructures.[182]

[174] Nagy (n 160).
[175] Temporary Protection Directive, Art. 12.
[176] Nagy (n 160).
[177] Temporary Protection Directive, Art. 12.
[178] 'Employment, childcare and education' (*Website of the Irish government*) <https://www.gov.ie/en/publication/320e9-employment-and-education/> accessed 31 December 2022.
[179] Temporary Protection Directive, Art. 13(1).
[180] 'Pour l'Ukraine : vos droits/où se renseigner' (n 172).
[181] 'Temporary protection for displaced persons from Ukraine' (n 159).
[182] 'Pour l'Ukraine : vos droits/où se renseigner' (n 172).

5.2.3. Access to Necessary Assistance

Beneficiaries of the TPD have the right to access necessary assistance, which mainly takes the form of a sum of money, but can take other forms.[183] For instance, in Poland, necessary assistance consists of, *inter alia*, social assistance benefits, food parcels, and a one-off cash benefit to cover expenses such as clothes and personal hygiene products.[184] However, entitlement to necessary assistance can be made subject to certain conditions. For instance, in Belgium, only those in precarious situations have the right to receive the social integration income, which depends on factors such as people's work, housing situation, and family structure.[185] This is in line with the formulation of this right in the TPD which only provides for assistance that is necessary.[186] MS are therefore free to decide that, for instance, once a person works, they no longer need money from the government to live with dignity. Additionally, considering that the cost of living varies greatly between MS and that the TPD does not provide for a social floor, the amount of money received by holders of the temporary protection status varies as well.[187]

5.2.4. Access to Medical Care

Access to medical care[188] covers the most urgent needs of beneficiaries, but also, in some countries, additional types of medical services such as mental health care. In Greece, for instance, the government implemented a phone support line offering free psychological support to people from Ukraine.[189] Similarly, in France, beneficiaries can access free medico-psychological support and have their expenses related to, for instance, dental care, prescribed drugs and medical laboratory analyses, covered by French health insurance.[190] Ultimately, the extent

[183] Temporary Protection Directive, Art. 13(2).
[184] 'Amendment to the law on assistance to Ukrainian citizens in connection with the armed conflict on the territory of the country' (n 164).
[185] Arnaud Ruyssen, 'Allocations, logement, travail … quels sont les droits des réfugiés ukrainiens ?' (*RTBF*, 24 March 2022) <https://www.rtbf.be/article/allocations-logement-travail-quels-sont-les-droits-des-refugies-ukrainiens-10961338> accessed 1 December 2022.
[186] Temporary Protection Directive, Art. 13(2).
[187] Guimaraes, Mont'Alverne & Motte-Baumvol (n 13), p. 12.
[188] Temporary Protection Directive, Art. 13(2).
[189] 'Mental health helpline' (*Website of the Hellenic Republic, Ministry of Migration and Asylum*) <https://migration.gov.gr/en/mental-health-ukraine/> accessed 31 December 2022.
[190] 'Pour l'Ukraine : vos droits/où se renseigner' (n 172).

of the right to medical care which beneficiaries enjoy depends on the MS they are in. Indeed, MS shall give holders of temporary protection the same rights in terms of health care as the ones they provide their own nationals with.[191] Considering that different MS have different policies and views on the types of medical services which should be granted for free, a beneficiary in MS "A" may enjoy more or less benefits than a beneficiary in MS "B".

5.2.5. Access to Education

The right to education enshrined in the TPD applies to children under the age of 18.[192] However, some MS have extended that scope to cover people above that age enrolled in higher education. For instance, in Poland, it is possible for those who were studying medicine and dentistry in Ukraine to continue their studies in a Polish institution, provided that they meet certain requirements.[193] Similarly, in Malta, adults with a temporary protection status may, subject to conditions, access the general education system.[194] Additionally, in some countries, measures were implemented to ensure that children can integrate into society as smoothly as possible. In Hungary, for example, schools offer extra classes in the afternoons for children to learn Hungarian, and the government provides schools with an additional 350 euros per child per month.[195] In Portugal, in turn, the government simplified the process of equivalence of foreign qualifications so that children can be placed in the right year of schooling. Moreover, the Polish government created measures to reinforce their learning of Portuguese.[196]

[191] Spiegel (n 141), p. 2084.
[192] Temporary Protection Directive, Art. 14(1).
[193] 'Information on the possibility to study at the faculties of medicine and dentistry at a Polish higher education institution for students who have studied in Ukraine' (*Website of the Polish government*) <https://www.gov.pl/web/ua/Informatsiya-shchodo-mozhlyvosti-prodovzhennya-navchannya-v-polskomu-vyshchomu-navchalnomu-zakladi-a-medychnomu-i-medychni-ta-stomatolohichni-fakulteti-studentamy-yaki-navchalysya-v-Ukrayini> accessed 31 December 2022.
[194] Subsidiary Legislation 420.5 Temporary Protection for Displaced Persons (Minimum Standards) Regulations, Art. 15 (2).
[195] 'Government offers schooling to minors fleeing war in Ukraine' (*About Hungary*, 24 March 2022) <https://abouthungary.hu/news-in-brief/government-offers-schooling-to-minors-fleeing-war-in-ukraine> accessed 31 December 2022.
[196] 'Temporary protection for displaced persons from Ukraine' (n 159).

6. Strengths and Weaknesses of the Temporary Protection Directive and Council Decision 2022/382

Following this analysis of the personal scope and content of the rights of the directive, as well as the various ways in which those are implemented in some MS, the strengths and weaknesses of the TPD and Council decision 2022/382 are evaluated. The aim of this section is to provide an opportunity to rethink the directive and highlight potential changes to be made in the future. Particular attention is given to the positive effects of the automatic access to the TPD's rights, the consequences of the free destination choice mechanism, the restricted personal scope of the TPD, and the lack of a clear responsibility sharing agreement.

6.1. Strengths

Arguably, the activation of the TPD is a positive development. After years of deadlock within the Council and lack of will on the part of MS to share the responsibility of large inflows of migrants,[197] this provision is finally being used. What is particularly positive about this directive is that it grants automatic protection to a whole group of people without the need for their individual situations to be examined.[198] This prevents administrative structures from being overburdened and ensures that beneficiaries have direct access to their rights.[199] In turn, being granted direct access to rights such as the right to work is very beneficial in that it enables the beneficiaries to rapidly acquire their autonomy,[200] favours their economic integration,[201] reduces the economic burden for their host country,[202] and potentially even helps address the skills shortage present in many

[197] Marie De Somer & Alberto-Horst Neidhardt, 'EU responses to Ukrainian arrivals – not (yet) a blueprint' (*European Policy Centre*, 14 October 2022) <https://www.epc.eu/en/publications/EU-responses-to-Ukrainian-arrivals-not-yet-a-blueprint~4b5eec> accessed 31 December 2022.
[198] Carlier (n 20), 5'55.
[199] Rodier (n 16), p. 22; see also 'ECRE weekly bulletin: 3 June 2022' (*European Council on Refugees and Exiles*) <https://us1.campaign-archive.com/?u=8e3ebd297b1510becc6d6d690&id=982f20bce4#Editorial1> accessed 31 December 2022.
[200] Corneloup (n 15), p. 441.
[201] Guichard, Machado & Maystadt (n 3), p. 2.
[202] UN High Commissioner for Refugees (UNHCR), UNHCR Annotated Comments on Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving Such Persons and Bearing the Consequences Thereof, 19 May 2003.

MS.[203] Moreover, the faster people are given the right to work, the less likely it is that they will engage in undeclared employment.[204]

Another positive characteristic of the TPD is the possibility for its beneficiaries to choose the MS they want to stay in.[205] Indeed, considering that around half of all migrants from Ukraine have existing social links in the EU, enabling them to enjoy temporary protection in whichever MS they want means that they can live with or nearby their acquaintances.[206] This is beneficial as their relatives can integrate them into their networks and give them leads to find a job. Additionally, this free choice of people from Ukraine allows for their potentials to be mobilised to the fullest.[207] Indeed, they can decide, based on their specific skills, where they are most useful and can thereby get the most appropriate job. Moreover, this measure significantly reduces the transaction costs for the receiving countries as they do not need to relocate the beneficiaries.[208] This will especially hold true if monetary compensations are given to countries hosting the largest numbers of people from Ukraine.[209] It is now to be hoped that this free choice will lead to a fair distribution of migrants across MS.[210] Finally, unlike the asylum status, the temporary protection status enables beneficiaries to shortly go back to Ukraine in case they need to solve issues linked to their family or property, and to do so without losing their protection.

6.2. WEAKNESSES

Despite the positive developments brought about by the TPD, this directive is subject to criticism. Arguably, its main flaw is its restricted personal scope. Indeed, people with a pending asylum application, those legally residing in Ukraine on a

[203] Communication from the European Commission on the arrival of people fleeing war in Ukraine, p. 13.
[204] Angenendt and others (n 23), p. 6.
[205] Council Decision implementing the Temporary Protection Directive, Recital 15; see also Conseil de l'Union Européenne, 'Proposition de décision d'exécution du conseil constant l'existence d'un afflux massif de personnes déplacées en provenance d'Ukraine, au sens de l'article 5 de la directive 2001/55/CE du Conseil du 20 juillet 2001, et ayant pour effet d'introduire une protection temporaire – déclaration des Etats membres' (4 march 2022); see also Corneloup (n 15), p. 441.
[206] Angenendt and others (n 23), p. 3; see also Council Decision implementing the Temporary Protection Directive, Recital 6.
[207] ibid p. 7.
[208] ibid p. 7.
[209] Angenendt and others (n 23), p. 7.
[210] Corneloup (n 15), p. 442.

short-term permit, and those who were in Ukraine illegally, are fully excluded from its scope.[211] This is particularly problematic for those who cannot go back to their home country and who will therefore have to go through the uncertainty of an asylum application process. It can be debated whether this even goes against the very aim of the TPD which is to "ensure an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the EU".[212]

Another point of contention is the possibility for migrants from Ukraine to choose their country of destination. Indeed, there is a fear that it will not lead to an equitable sharing of responsibility as some countries are more popular than others.[213] This is a well-founded fear as it was estimated that, as of April 2022, more than 73 percent of people from Ukraine were being hosted by neighbouring countries.[214] In turn, a quota mechanism based on the individual situations of MS in terms of population and financial means would have provided for a more equitable and foreseeable repartition of migrants.[215] However, such quota mechanisms have never been agreed to in the Council.[216] In fact, countries like Poland, which is currently hosting the majority of people from Ukraine, are themselves opposed to an organised redistribution. This could be explained by their fear of setting a precedent for future waves of migrants, when they will no longer be one of the first countries of arrival.[217]

Another criticism is about the effect of the combination of the restricted personal scope of the TPD and the free choice mechanism. Indeed, given that the TPD does not grant mandatory protection to certain types of people – for instance those who cannot safely go back to their country of origin – it is at the discretion of the MS to do so if they want to. Considering that those countries are in the

[211] Council Decision implementing the Temporary Protection Directive, Art. 2.
[212] Guimaraes, Mont'Alverne & Motte-Baumvol (n 13), p. 5; see also Temporary Protection Directive, Recital 1.
[213] Koo (n 12).
[214] Guichard, Machado & Maystadt (n 3), p. 5.
[215] ibid p. 3.
[216] 'EU seeks compromise on migrant quotas' (*Euronew*s, 25 January 2018) <https://www.euronews.com/2018/01/25/eu-seeks-compromise-on-migrant-quotas> accessed 31 December 2022.
[217] Angenendt and others (n 23), p. 3.

minority,[218] they are likely to be over-burdened.[219] This might eventually lead those MS to no longer applying the directive to these additional categories of people.

7. CONCLUSION

The activation of the TPD is a big step forward in EU asylum and migration law. Indeed, it triggered the application of a mechanism with automatic access to a wide range of rights and free choice of permanent destination, something that is unprecedented in the EU. Those rights, ranging from the right to work to the right to access necessary assistance, are rather broad. Moreover, given that MS enjoy discretion in the way they implement the directive, the extent of those rights varies from MS to MS. Therefore, while some MS have chosen to provide their beneficiaries with the minimum required, others have broadened the directive's scope of application and widened the content of the rights provided.

With respect to the personal scope of the directive, the TPD automatically grants temporary protection to three categories of people – Ukrainian nationals, people with an international protection status in Ukraine, and the family members of these two categories. However, several MS decided to go beyond what is required by the directive. For instance, Hungary and Austria give temporary protection to non-Ukrainians who cannot safely go back to their country of origin, and Greece and the Netherlands give it to Ukrainians who left Ukraine no longer than 90 days before 24 February 2022. Regarding the content of the rights, several MS equally went beyond the requirements of the TPD. First, countries like France and Lithuania do not merely allow beneficiaries to work, but also provide them with additional services to help them find a job. Second, the right to suitable accommodation, fulfilment of which follows no pre-established criteria, was implemented similarly in MS such as France and Italy. There, beneficiaries are first hosted in emergency centres before being given housing aid to live in a private place. Third, in some MS, including in Belgium and Hungary, certain categories

[218] 'ECRE editorial: TPD implementation: Ukraine displacement crisis at the end of its beginning' (*European Council on Refugees and Exiles*, 13 May 2022) <https://ecre.org/tpd-implementation-ukraine-displacement-crisis-at-the-end-of-its-beginning/> accessed 31 December 2022.
[219] Guimaraes, Mont'Alverne & Motte-Baumvol (n 13), p. 7.

of people – such as those who receive an income from work – are prevented from receiving necessary assistance. This is in line with the phrasing of article 13(2) of the TPD, which only foresees this right for people in need. Fourth, some countries, like France and Greece, provide beneficiaries with medical services other than those strictly required – that is, emergency care and essential treatment of illness. Indeed, in these two countries, beneficiaries can access free psychological support, either in person in France, or by calling a support line in Greece. Fifth, in some MS like Malta, access to education is given not only to children, but also to adults. Moreover, additional measures – such as extra language lessons – are taken in Hungary and Portugal to help children integrate into society.

In sum, the aim of this paper was to address the following question: "How has the temporary protection directive been implemented in light of its recent activation for those fleeing the war in Ukraine?". In this respect, one potential response could be that the TPD was implemented by MS in ways that are at least as diverse as their people, cultures and politics. Indeed, while some chose generosity over self-centredness by going beyond what is required by the TPD and doing so in different ways, others, by keeping to the requirements of the directive, chose nationalism over solidarity.

Another point discussed in this paper concerns the strengths and weaknesses of the directive. On the one hand, it has been praised for preventing administrative infrastructures from being over-burdened, speeding up social and economic integration of beneficiaries, and giving them the freedom to stay wherever they want. On the other hand, it has been criticised for its restricted personal scope leaving out a great number of people, and lack of a clear responsibility sharing mechanism. Leaving all these issues aside, provided that the war goes on, the biggest challenge for MS is yet to come: how to deal with people from Ukraine once the protection guaranteed by the directive expires? This topic, which could be the subject of further research, is briefly addressed under section eight.

8. Further Research: Present and Future Challenges

Several months after the activation of the directive, issues have already emerged as some beneficiaries seem unable to exercise the rights they are entitled to. By

addressing the present and future challenges, this section aims to highlight possible improvements and warn about potential difficulties to come.

8.1. Present Challenges

Currently, there seem to be issues with the proper enjoyment of the rights contained in the TPD and Council decision 2022/382. For instance, it has been reported that some Ukrainians are not allowed to travel within the EU and to come back from Ukraine after a short stay there, while they should be able to do so.[220] Some reports also highlight a "concerning practice of non-issuance of residence cards and lack of provision of information by MS",[221] as well as a large percentage of people not having registered for temporary protection.[222] Moreover, due to the large inflow of people, some MS struggle to provide beneficiaries with adequate housing options,[223] especially in big cities,[224] and even access to livelihoods and cash-based assistance in some cases.[225] These issues are likely to get worse if changes are not adopted by governments, as the needs of access to health care, education and the labour market are only going to become more significant the longer people are forced to stay outside Ukraine.[226] Another challenge relates to the risks of trafficking and sexual exploitation. In the present case, the risks are high as most migrants are women and children;[227] and most victims are from that

[220] Sergiy Sydorenko, 'EU failed to manage temporary protection for Ukrainians: it turned into chaos' (*European Pravda*, 19 July 2022) <https://www.eurointegration.com.ua/eng/articles/2022/07/19/7143461/> accessed 31 December 2022; see also Communication from the European Commission on the implementation of Council implementing Decision 2022/382, p. 9; see also 'ECRE editorial: TPD implementation: Ukraine displacement crisis at the end of its beginning' (n 218).
[221] 'ECRE editorial: TPD implementation: Ukraine displacement crisis at the end of its beginning' (n 218).
[222] 'ECRE weekly bulletin: 17 June 2022' (*European Council on Refugees and Exile)* <https://mailchi.mp/ecre/ecre-weekly-bulletin-17062022?e=989a4aebdd#Eastern%20Borders> accessed 31 December 2022.
[223] 'EU updates – migrants and refugees in the Euromed region' (*Euromed rights*, June to December 2022) <https://euromedrights.org/eu-updates-migrants-and-refugees-in-the-euromed-region/> accessed 31 December 2022.
[224] Angenendt and others (n 23), p. 5.
[225] 'ECRE editorial: TPD implementation: Ukraine displacement crisis at the end of its beginning' (n 218).
[226] 'ECRE weekly bulletin: 17 June 2022' (n 222).
[227] Adrianna Murphy and others, 'The health needs of refugees from Ukraine' (2022) 377 BMJ, p. 1 <https://pubmed.ncbi.nlm.nih.gov/35383103/> accessed 31 December 2022.

category of people that finds itself in a vulnerable situation while fleeing their country.[228]

8.2. Future Challenge: Three Years of Protection, and Then What?

Temporary protection, as its name suggests, is only temporary. This means that, after the maximum of three years during which the directive can apply,[229] if the war in Ukraine is still ongoing, a new solution will have to be found. In turn, even if the war ends, the longer it lasts, the more likely it is that people will be willing to stay in the EU.[230] Therefore, in any case, MS must prepare for the eventuality of a prolongation of the war and a potential switch from their short-term plan to a long-term response.[231] Among the solutions, people from Ukraine could apply for asylum. However, this is likely to lead to the very situation the TPD intends to avoid, that is the over-burdening of administrative systems, as they would have to deal with many asylum applications at once.[232] Another solution would be for the EU directive on the status of long-term residents from third countries[233] to be amended. Indeed, if people could, after only three years of legally residing in the EU instead of the current five, benefit from this directive, beneficiaries of the TPD could "seamlessly transfer into long-term residency" after the TPD expires.[234] However, such an amendment is not guaranteed, especially if the public opinion towards migrants from Ukraine changes – which is something that has often been witnessed in situations of large migrations[235] –, and governments of the MS follow this change. Finally, other solutions – such as other types of national permanent resident statuses – could be explored. However, as "a cold assessment of MS'

[228] 'Ukraine assessment report – waiting for the sky to close: the unprecedented crisis facing women and girls fleeing Ukraine' (*Relief web,* 26 May 2022) <https://reliefweb.int/report/ukraine/ukraine-assessment-report-waiting-sky-close-unprecedented-crisis-facing-women-and-girls-fleeing-ukraine> accessed 31 December 2022.
[229] Temporary Protection Directive, Art. 4.
[230] Angenendt and others (n 23), p. 6.
[231] ibid p. 6.
[232] ibid p. 6.
[233] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L16/44.
[234] Angenendt and others (n 23), p. 7.
[235] Spiegel (n 141), p. 2086.

weariness to long term commitment to refugees"[236] suggests, this is likely to be a challenge. Unless, maybe, Ukraine becomes an EU MS in its own right?[237]

[236] Koo (n 12).
[237] Vitalii Hnidyi & Pavel Polityuk, 'EU grants Ukraine candidate status in historic moment' (*Reuters*, 24 June 2022) <https://www.reuters.com/business/aerospace-defense/ukraine-becomes-eu-membership-candidate-battle-east-enters-fearsome-climax-2022-06-23/> accessed 31 December 2022.

The Arbitral Award, The End of the Road or Might There Be Roadworks Ahead: On the Possibility of an Arbitral Appeal within the Arbitral Institution

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TABLE OF ABBREVIATIONS

ICSID	International Centre for Settlement of Investment Disputes treaty
RvA	Raad van Arbitrage voor bouwgeschillen
ECHR	European Court for Human Rights
ICDR	International Centre for Dispute Resolution
ICC	International Chamber of Commerce
CEPANI	Belgium Arbitration and Mediation Centre
JAMS	Judicial Arbitration and Mediation Services centre in the United States
IAA	Singapore International Arbitration Act
AA	Singapore domestic Arbitration Act
AAA	American Arbitration Association
BJC	Belgian Judicial Code
FCPC	French Civil Procedure Code
DCCP	Dutch Code of Civil Procedure
FAA	Federal Arbitration Act
US	United States
UK	United Kingdom
CPR	International Institute for Conflict Prevention & Resolution
LCIA	London Court of International Arbitration
NAI	(Nederlands Arbitrage Instituut) The Dutch Arbitration Institute
New York Convention	1958 UN New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

OUTLINE

Arbitration is characterised by the principle of finality. Over the years, the legal world has raised awareness for the possibility of an arbitral appeal. This article examines the possibility to lodge an appeal against a rendered arbitral award, within the arbitral institution.

The article first gives an overview on the different possibilities to review an award and argues why an arbitral appeal is preferred. Second, an overview on the current discussion on whether or not an appeal should be made available, is given. Third, a comparative study shows the differences between civil and common law, but also between several jurisdictions that are closely linked. The article finishes by examining the effect of an arbitral appeal on the recognition and enforcement of an arbitral award under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Award.

1. INTRODUCTION

An arbitral award is well known for its finality. In most cases, a party that is unsatisfied about the outcome of the arbitral proceeding, can only resort to a limited number of actions. Mostly, those are the setting aside procedure and challenging the recognition and enforcement of the award.[2] However, there is an additional remedy, an appeal against the arbitral award. Such an appeal can have many forms, ranging from an appeal before the national court to an appeal held within the arbitral institution.[3] The idea of an arbitral appeal is not new. Until now it lacks popularity, due to the main characteristics of arbitration, such as finality and the ability to promptly resolve cases. Nonetheless, as empirical research from the Queen Mary University points out, the interest of parties for allowing an appeal mechanism is rising.

[2] Naom Zamir and Peretz Segal, 'Appeal in International Arbitration – an efficient and affordable arbitral appeal mechanism', (2019) 35 Arbitration international 79 p.79.
[3] Guangjian Tu, 'Appeal on Merits in Commercial Arbitration? – An overview' (Conflicts of law), https://conflictoflaws.net/2021/appeal-on-merits-in-commercial-arbitration%EF%BC%9Aan-overview/. accessed October 29th 2022; Rowan Platt, 'The appeal of appeal mechanisms in international arbitration: fairness over finality?, (2013) 30 (5) Journal of international arbitration, 531 p533.

This article advocates for the use of arbitral appeal, and especially for an appeal within the arbitral institution. It gives an overview of the different types of review mechanisms that exist and why the arbitral appeal prevails over the other review mechanisms. In addition, a comparative study is conducted on the ability to appeal within different jurisdictions, as well as on the differences of appeal procedures in different institutions. Lastly, this article examines the effect of an appeal on the recognition and enforcement of an award under the New York Convention on Enforcement and Recognition of Foreign Arbitral Awards.

For the comparative element, the jurisdictions of Belgium, France, the United States, the Netherlands, and the UK will be examined.

First, the situation in Belgium, the Netherlands, and France is addressed. These are all civil law countries whose legal systems have the same origins, Le Code Napoléon. Furthermore, in practice there is a lot of commercial transaction between these countries. As an arbitration clause is often included in commercial contracts, it is useful to show the differences in these jurisdictions.

Last, but not least, this paper incorporates two common law jurisdictions in this article, the United States and the United Kingdom. By doing so, a comparison between civil law and common law and between two common law jurisdictions is possible.

The structure of this article consists out of four chapters. The first two chapters provide for a more theoretical overview on the concept of arbitral appeal (chapter 1) and discuss the implementation thereof (chapter 2). The last two chapters approach the practical side, by first comparing the possibility of arbitral appeal in different jurisdictions (chapter 3) and finally by examining the effect of an appeal procedure on the recognition and enforcement of an arbitral award under the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (chapter 4).

2. Defining the Concept of Arbitral Appeal

This chapter explains some critical terms. It clarifies what is meant by arbitral appeal and how this term is used throughout this article. In addition, it sets out the different types of remedies against an arbitral award and how they differ from the concept of arbitral appeal.

2.1. The Concept of Arbitral Remedies

2.1.1. Arbitral Appeal

When it comes to appealing to a rendered award, two paths can be chosen. On the one hand, parties can go to the national court of the seat of arbitration and appeal the award or seek a review based on the merits of the case. On the other hand, when possible, parties can try and appeal within the arbitral institution they went to in first instance.[4]

For this article, the term "arbitral appeal" means the second possibility of lodging an appeal within the arbitral institution. An appeal before a national court will be indicated as a judicial review or court review.

As professor Niek Peters mentions, the concept of arbitral appeal is not new. In other fields of international arbitration, such as international investment arbitration, actions against the rendered award are dealt with within the institution.[5] A prime example of this is the ad-hoc committee mentioned in the International Centre for Settlement of Investment Disputes treaty (ICSID).[6] The difference with the concept of arbitral appeal that this article examines, is that the ICSID mechanism deals with annulment procedures and does not review the case based on the merits or facts. This shows, on the other hand, that review of appeal mechanisms can exist within the arbitral institution.

Also, on the level of national arbitration, there are possibilities of arbitral appeal. A prime example can be found in the Netherlands, at the "Raad van Arbitrage voor bouwgeschillen (RvA)". Their arbitral rules prescribe an opt-out mechanism for arbitral appeal within the institution.[7] The fact that such mechanism does exist in national arbitration, is regarded as an argument to also make it available to international arbitration, and specifically in international commercial arbitration.[8] According to Professor Niek Peter, the question on legality would probably not pose a big problem. Professor Peters argues that, in

[4] Tu, (n 3); Platt (n 3) p. 533.
[5] Niek Peters, 'Vernietiging van arbitrale vonnissen door ad-hocscheidsgerechten, is dat niet vernieuwend?', in Piet Sanders, *Een honderdjarige vernieuwer* (Boom Juridische uitgevers 2012) p. 220.
[6] Art. 52 (3) ICSID.
[7] Art. 22 (1) RvA Arbitral Rules.
[8] Erin Gleason, 'International Arbitral Appeals: What are we so afraid of' (2007) 7 Pepperdine Dispute Resolution Law Journal 269 p.291.

case of an annulment procedure, the European Court of Human Rights (ECtHR) would not resist against transferring this procedure to ad-hoc tribunals, as there is a possibility to even waiver your right to annul an award.[9] The same reasoning can be upheld for an arbitral appeal mechanism within the arbitral institution.

The fact that there are similar mechanisms, for example national commercial arbitration procedures and in international investment arbitration, in addition to the fact that there is no danger for the principle of due process, are clear arguments that these procedures should also be made available for international commercial arbitration. Although it needs to be said that there are already institutions, such as the International Centre for Dispute Resolution (ICDR) who allow internal appeals against international arbitral awards.[10]

2.1.2. Other Types of Remedies

The first type of remedy against a rendered arbitral award is a judicial review. This form of remedy entails the possibility for a dissatisfied party to have the award reviewed by a national judge.[11] Such judicial appeal or judicial review appears in many forms. It can deal with the setting aside of an arbitral award, go against the recognition and enforcement of an arbitral award or even review the award on certain points of law or on the merits.[12] The power a national court holds in reviewing the award, depends on national law.[13] There is a tendency to lower the courts' powers, as it promotes the finality of the arbitral award.[14]

As previously mentioned, the power of the court depends on national law, but so does the scope of such judicial review. You rarely find jurisdictions where a judicial review is based on both issues of law and facts.[15] The UK, for example,

[9] Peters (n 5) p. 220.
[10] Kyle Richard Olson, 'The appeal of the right to appeal: The ICDR adopts optional appellate arbitration rules to advance the availability of appellate rights in International Commercial Arbitration' (2016-2017) 3 McGill Journal of Dispute Resolution 86 p. 87.
[11] Roman Mikhailovich Khodykin, 'Chapter 16: National Court Review of Arbitration Awards: Where do we go from here?', in Julian D.M. Lew, *The Evolution and Future of International Arbitration*, (Kluwer Law International 2016) p. 274.
[12] Miguel Gomez Jene, *International Commercial Arbitration in Spain*, (Kluwer Law International 2019) 247; Khodykin (n 11) p. 269.
[13] ibid.
[14] Platt (n 3) p. 532; Hossein Abedian, 'Judicial Review of Arbitration Awards in International Arbitration – A case for an efficient system of judicial review', (2011) 28 Journal of International Arbitration 553 p. 553.
[15] Khodykin (n 11) p. 276.

has a judicial review mechanism. Section 69 of their Arbitration Act provides for a court review on the merits, on limited grounds. In practice, British courts are reluctant to allow revisions based on this section, and therefore give weight to the principle of finality.[16]

As mentioned before, there are two sorts of appeal/review possible by either a court or a tribunal, a review on the merits or one on points of law. The latter differs from the former on its standard of review. Appeal on points of law only allows a review when the dissatisfied party is under the impression that the arbitral tribunal failed to apply the applicable law in a correct manner, or not even at all.[17]

Besides an appeal or court review, a dissatisfied party can always try to set aside the arbitral award, this is also commonly referred to as a vacating procedure. This procedure is regarded as a guarantee that a dissatisfied party to a dispute can ask the court to review the arbitral award when he or she has a good reason that the procedure was not conducted in a suitable manner.[18] The exact grounds for a setting aside procedure depend on the law of the arbitration seat, but these are usually limited. These grounds are often related to fraud, partiality etc, whereas an appeal is mainly based on the findings of the arbitrator.[19]

A third remedy is to try and challenge the recognition and enforcement of the arbitral award. This is done based on one of the limited grounds of refusal, mentioned in article V of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[20] This article is built on two different levels. Article V (1) holds the grounds on which a party may challenge the recognition and enforcement. Article V (2) holds the grounds on which the court can decide to refuse it.[21] These grounds are of an exhaustive nature.[22]

[16] Duncan Matthews, 'Sections 68 and 69 of the Arbitration Act 1996', (2021) Journal of Business Law 3 259 p. 262-264.
[17] Julian David Mathew Lew; Loukas A. Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 678.
[18] ibid p. 665.
[19] Eric Van Ginkel, 'Reframing the dilemma of contractually expanded judicial review: arbitral appeal v. vacatur', (2003) 3 *Pepperdine Dispute Resolution Law Journal* 157 p. 189.
[20] Hereinafter "New York Convention".
[21] Emmanuel Gaillard and George A. Bermann, *Guide on the Convention of the Recognition and Enforcement of Foreign Arbitral Awards: New York 1958*, (Brill 2017) 132.
[22] Gary B. Born, *International Commercial Arbitration*, (Kluwer Law International 2014) 3711; Gaillard and Bermann (n 21) 134.

A final mechanism is called scrutiny of the arbitral award. This mechanism is a little different, as it cannot be seen as a remedy, because the parties do not have any influence on the use of it. Even so, it is a mechanism that aims to improve the quality of the rendered award. The idea is that before rendering the award, the tribunal presents its draft to the arbitral institution, who can then comment on for example the form and the substance of the award, without touching upon the tribunal's discretion to decide on the case at hand.[23] This mechanism is used in a lot of arbitral institutions such as the International Chamber of Commerce (ICC),[24] the Belgian Arbitration and Mediation Centre (CEPANI)[25] and many more.[26]

2.2. Differences between the Other Remedies and Arbitral Appeal

After clarifying the different remedies available for a dissatisfied party and mechanisms that the institution can use to enhance the quality of the award in the previous section, this section places those next to the arbitral appeal and reveals the differences and similarities between the two.

For the judicial review, the first difference is very clear. Where an arbitral appeal is held within the arbitral institution, the other one is held before the national court of the seat of arbitration.[27] The standard of review can differ between the two. A similarity between them, is that the standard or review depends on where the appeal or review is initiated.[28] A big difference lies in the expanding of the standard of review. In several jurisdictions, such as the US, it is not possible to contractually expand the standard of review.[29] To the contrary, arbitral institutions allow modifications to the standard of review based on the principle of party autonomy, unless it would violate mandatory provisions on the arbitration act of the state where the proceedings are conducted.[30] Therefore, in some institutions – such as the Spanish Court of Arbitration - it is possible to conduct a

[23] Benoit Allemeersch, Benoit Khol, Dirk De Meulemeester, Emma Campenhoudt en Olivier Caprasse, *Guide to the cepani arbitration rules*, (Wolters Kluwer 2021), 185; Gleason (n 8) p. 289.
[24] Art. 36 ICC Procedural rules 2021.
[25] Art. 33 CEPANI Procedural rules.
[26] Gleason (n 8) p. 289.
[27] Platt (n 3) p. 532.
[28] Khodykin (n 11) p. 269; Ojaswa Pathak, 'The Advisability of Appellate Arbitration: Proposing an Efficient institutional Framework', (2021) 10 Indian Journal of Arbitration 155 p. 155.
[29] Hall Street Associates, LLC v. Mattel [2007] Inc 128 S. Ct. 1396 2008.
[30] Platt (n 3) p. 548.

full review of the case on the merits which is, generally not possible in judicial review.[31]

The question that thus arises, is why arbitral appeal should prevail over judicial review. Firstly, there is the possibility to modify the arbitral rules in light of the standard of review. Secondly, an arbitral appeal would fit more into the idea behind choosing arbitration instead of litigation. One of the incentives for arbitration is neutrality and avoidance of "home town" bias.[32] If parties can only resort to judicial appeal, it would deter the principles and incentives behind arbitration.[33] Therefore, an arbitral appeal mechanism would fit better in the realm of arbitration than a judicial review. Lastly, when talking about international arbitration, it is not uncommon that parties speak different languages. For that reason, parties might opt to conduct the procedure in English. On the other hand, if parties opt for a judicial review in a non-English speaking country, the proceedings will be held in the language of that country. This can also be seen as a big difference and even as a disadvantage of judicial review, compared to arbitral appeal, where the proceedings can still be held in the language of choice.[34]

When comparing the vacating or setting aside procedure with an arbitral appeal, the only similarity is that an award can be confirmed or stopped dead in its tracks.[35] An important difference are the grounds on which both procedures can be initiated. The exact grounds for a setting aside procedure depend on the law of the arbitration seat, but they are limited. These grounds are usually related to fraud, partiality etc, whereas an appeal is mainly based on the findings of the arbitrator.[36]

Another difference lies in the outcome of the procedure. When a setting aside procedure is successful, the award is annulled. Parties will return to the situation in which they were before the commencement of the arbitration procedure. When an appeal is successful, there will still be an award that can be enforced.[37] In addition, the power of the court is different from that of the appeal tribunal. In a setting aside procedure, the court can only decide on the annulment,

[31] Platt (n 3) p. 550
[32] Olson (n 10) p. 89.
[33] ibid.
[34] Peters (n 5) p. 221.
[35] Van Ginkel (n 19) p. 188.
[36] ibid p. 189.
[37] Lew, Mistelis and Kröll (n 17) p. 665.

but they can't modify the award. On the contrary, the arbitral tribunal is allowed to alter the award.[38] In case of an annulment, the parties end up in the situation they were in before the proceedings and have to start all over again. This can result in a prolonging of the overall procedure and augmentation of the costs. In contrast, an appeal allows the time frame to be lowered and enables the parties to secure an enforceable award.

Some legal scholars even see a correlation between these two procedures. When an award is rendered with reason and care, the grounds for vacating are not applicable, and thus such procedure is not possible.[39] Furthermore, the possibility to appeal against erroneous awards, will lower the amount of setting aside procedures that will be initiated against rendered awards.[40]

The first difference between an arbitral appeal and a challenge against the recognition and enforcement is the place of action. A challenge is done at the place where the enforcement and recognition are sought. Secondly, when a court has to decide on the recognition and enforcement, it is not allowed to review the merits of the case or decide on points of law.[41] As mentioned above, the grounds on which a challenge can be initiated, are exhaustive.[42] In contrast, as previously stated, in an arbitral appeal, parties are able to modify the standard of review. Thirdly, as the name suggests, challenging the recognition and enforcement does nothing to fix the erroneous award, it just makes it impossible to enforce. An appeal procedure on the other hand, makes it possible to correct the mistakes made in such an award.

The biggest difference between scrutiny and arbitral appeal lies in the question of who initiates the procedure. Where an appeal procedure is initiated by a dissatisfied party, a scrutiny procedure is initiated by the arbitral tribunal itself.[43] The outcome is also different. The institution makes remarks, but the tribunal is not under any obligation to alter its award.[44] In an appeal procedure, the appeal

[38] Lew, Mistelis and Kröll (n 17) p. 665.
[39] Van Ginkel (n 19) p. 213.
[40] Gleason (n 8) p. 288.
[41] Gaillard and Bermann (n 21) p. 135.
[42] Born (n 22) p. 3711.
[43] Allemeersch, Khol, De Meulemeester, Campenhoudt and Caprasse (n 23) p. 185; Gleason (n 8) 289.
[44] ibid p. 290.

tribunal renders a new reward when it is under the impression that the original one was faulty.

2.3. The Supremacy of Arbitral Appeal

In the previous section, the different types of remedies were put next to each other for the purpose of comparing them with an arbitral appeal. In this section, this article argues why an arbitral appeal should prevail over them, based on the overall cost, the timeframe of the different remedies and the outcome.

2.3.1. Overall Cost of the Procedure

When an additional procedure is being initiated, it is a fact that additional costs are attached to such procedure.[45] For example, higher counselling cost, higher institutional costs etc. This could be seen as a negative side effect of an arbitral appeal.[46] However, as some proponents argue, the use of an appeal procedure could reduce the costs in the first instance procedure. For example, when arbitral appeal is possible, parties are less prone to appoint a three-piece panel.[47] In addition, it could also lead to a drop in the use of vacating procedures.[48]

Building on that argument of lowering the amount of vacating procedures, the cost of a successful vacating procedure will be higher in the long run, because of the outcome of that remedy. When successful, the vacating procedure annuls the award.[49] Thus, parties have to start over again, in order to receive an enforceable award. Arbitral appeal procedures will end in the reaffirming of the first award or the rendering of a new one, which can then be enforced.

2.3.2. Timeframe of the Procedure

It does not need much explaining that a remedy against an arbitral award prolongs the overall timeframe of the procedure. The opponents of an appeal mechanism, see this as a concern that the prolonging of the procedure would be too long and

[45] Peters (n 5) p. 222.
[46] Mateus Carreteiro, 'Appellate arbitral rules in international commercial arbitration' (2016) 33 Journal of international arbitration 185 p. 186.
[47] Gleason (n 8) p. 288; Peters (n 5) p. 221.
[48] Gleason (n 8) p. 288.
[49] Lew, Mistelis and Kröll (n 17) p. 665.

unnecessary.[50] However, the institutional rules can set sharp time limits and in addition, parties can always modify those time limits in favour of time saving activities.[51] For example, Judicial Arbitrations and Mediation Services (JAMS) has set fixed time periods in which certain aspects of the appeal procedure have to be reached.[52] CEPANI in Belgium is another example of an arbitral institution that sets a time limit in which the award must be rendered.[53] When judicial review would be initiated, the risk of an 'Italian torpedo' – which is a procedural strategy to start a lawsuit before a national court of a jurisdiction where the timeframe for handling cases is very long, in order to prolong the procedure[54] - would not be unreal, when the arbitration was conducted in Italy.[55] Professor Ten Cate sees the voluntary aspect of arbitral appeal as a reassurance that arbitral procedures would not unnecessarily be prolonged.[56]

The argument made in the previous part relating to the comparison of arbitral appeal to a vacating procedure, can also be upheld when talking about the timeframe. Challenging the award and having to start over, would probably consume more time than an arbitral appeal procedure.

2.3.3. The Possible Outcome

As seen above in the previous paragraph, the outcome of the various remedies is different. However, it could be argued that the outcome of the arbitral appeal is the most desirable. For example, after a scrutiny procedure, there is still an award, but it might not have been altered or corrected and thus still be faulty or disadvantageous.[57] After the challenging of an award, there is no award anymore.[58]

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[50] Irene Ten Cate, 'International Arbitration and the Ends of Appellate Review', (2012) 44 NYU J. Int'l L. & Politics 1109 p. 1164.
[51] Albert Marsman, *International arbitration in the Netherlands: with a commentary on the NAI and PCA Arbitration Rules*, (Kluwer Law International 2021) p. 401; Filip De Ly, 'The 2013 Belgian Arbitration Law in a comparative perspective,' in Dirk De Meulemeester, eds., *Liber Amicorum CEPANI (1969-2019): 50 Years of Solutions*, (Kluwer Law International 2019) p. 107.
[52] Gleason (n 8) p. 292.
[53] Art. 30 CEPANI Arbitration Rules.
[54] Mario Franzosi and Franzosi Dal Negro 'The Italian Torpedo' <https://uk.practicallaw.thomsonreuters.com/6-101-1410?contextData=(sc.Default)&transitionType=Default&firstPage=true> (accessed 31st December 2022).
[55] Born (n 22) p. 1403.
[56] Ten Cate (n 50) p. 1164.
[57] Gleason (n 8) p. 289-290.
[58] Lew, Mistelis and Kröll (n 17) p. 665.

Parties have to start the proceeding all over again or resort to other measures of dispute resolution. On the other hand, arbitral appeal, as mentioned above, ends with an enforceable award. Therefore, it can be seen as superior to those other remedies based on the possible outcome.

3. Current View and Fundamental Principles behind the Arbitral Appeal Discussion

3.1. The Current Opinion on Arbitral Appeal

The legal world is not characterised by reaching a consensus on all topics. Also, in the discussion on whether or not arbitral appeal is needed, a consensus is far out of reach. There are proponents and opponents of such a system. This part will place the arguments of both parties next to each other, in order to give an overview of the current discussion. An interesting preliminary remark we can make, is that both sides sometimes use the same argument to prove their case.[59] This concerns both international investment arbitration and international commercial arbitration. Despite, the reasons that proponents use in both sorts of arbitration, in favour of an appeal mechanism are different.[60]

Besides the opinion of legal scholars, universities such as the Queen Mary University of London have conducted international empirical research in order to determine the new trends in commercial international arbitration.

When we specifically look at the subject of a possible appeal mechanism, we see a slow but steady change on the opinion on the possibility for an arbitral appeal. In the first survey, held in 2006, an overwhelming majority of 91% of the participants rejected the idea of an arbitral appeal mechanism. Yet, it did already made notice of the fact that the lack of it could become problematic.[61] Nine years later, in the 2015 survey, despite the fact that the majority still ruled against an arbitral appeal, 17% of the participants placed the lack of such possibility among

[59] Yilei Zhou, 'Breaking the ice in the international commercial arbitration: from the finality of arbitral award to the arbitral appeal mechanism', (2013) 3 China-EU Law Journal 289 p. 289; Ten Cate (n 50) p. 1111.
[60] For more information on the distinction between investment arbitration and commercial arbitration see: Ten Cate (n 50) p. 1110-1113.
[61] Queen Mary University of London 2006 arbitration survey on Corporate Attitudes and Practices: https://arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy_2006.pdf (accessed October 30, 2022).

the worst characteristics of international arbitration, whether it was commercial or investment arbitration.[62] A few years later, in 2018, the lack of arbitral appeal was placed within the worst characteristics.[63] Unfortunately, the Queen Mary University did not entail a study on arbitral appeal in their latest survey. What can be said, is that there is positive evolution towards a desire for arbitral appeal. It is suggested that in a future survey, the percentage of proponents for an arbitral appeal will be increased.

When we switch the focus from an academic point of view to a more practical one, we see that over the years, some jurisdictions have altered their legal framework in favour of an arbitral appeal system. For example, the Dutch Arbitration Act has changed its rules on arbitral appeal. It has grouped them more together.[64] During this period of legislative change, Dutch scholars have raised the question whether or not annulment procedures could also be made possible within the arbitral institution.[65] In Singapore, there has been a legislative change regarding their Arbitration Act (AA).[66] Unlike the International Arbitration Act (IAA), the AA does provide a review mechanism.[67] However, they started a project to consider whether or not such appeal procedure would also be necessary in the IAA.[68]

Taking all this into consideration, the world of arbitration is witnessing much activity. It remains divided in the topic of arbitral appeal. The following sub-section provides an overview of the main arguments advanced by proponents and opponents of the arbitral appeal.

[62] Queen Mary University of London 2015 arbitration survey on improvements and innovations in international arbitration: https://arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf (accessed October 30, 2022).
[63] Queen Mary University of London 2018 arbitration survey on the evolution of international arbitration: https://arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF (accessed October 30, 2022).
[64] Gerard J. Meijer and Pauline Ernste, 'Interface perikelen rondom arbitral hoger beroep', (2018) 2 *TvA* 1 p. 1.
[65] See Peters (n 5) p. 217-223.
[66] The Arbitration Act is the relevant source of law in Singapore for domestic arbitral proceedings. In principle are International Arbitration proceedings not governed by this act, unless the parties explicitly declare the Arbitration Act applicable instead of the International Arbitration Act.
[67] Section 49 Singapore Arbitration Act.
[68] Singapore Academy of Law – Law Reform Committee, "Report on the Right of Appeal against International Arbitration Awards on Questions of Law, February 2020, 1.

3.1.1. Proponents

The arguments of both the proponents and opponents of arbitral appeal cannot be seen in isolation from one another. Some of the arguments are made by both parties and in some cases, one party has a counter argument. In order to avoid too much unnecessary repetition, overlapping arguments and counter arguments will be discussed together.

The first argument made by the proponents, is that arbitrators are human beings and thus liable to make mistakes. Therefore, the proponents plead for the possibility of arbitral appeal, in order to correct such errors. This is one of the main arguments made in favour of arbitral appeal, by many legal scholars.[69] According to proponents, when looking back at ancient Rome, appeals were made with the sole purpose of correcting mistakes made by arbitrators.[70] This argument does not only apply to international commercial arbitration, but is also regarded as one of the main reasons behind the "appeal movement" in international arbitration.[71] The risk of being stuck with an erroneous arbitral award, does not favour international arbitration, especially when the stakes are high.[72]

On the other side of the discussion, stand the opponents. Their point of view on this argument is rather surprising. According to them, it does not matter if the arbitrator makes mistakes. The reason for that, is that the arbitrator in this case is not in the "law making business". Furthermore, the parties to the dispute choose the arbitrator themselves and take into consideration the level of expertise on the matter.[73] According to the opponents, this choice of what distinguishes international commercial arbitration from international investment arbitration. The latter entails a public element because states are involved, whereas international commercial arbitration takes place between two private actors. This point of view is strengthened by the fact that commercial arbitral proceedings are

[69] Zamir and Segal (n 2) p. 86; Carreteiro (n 46) p. 195.
[70] Carreteiro (n 46) p. 196.
[71] Zhou (n 59) p. 291.
[72] Van Ginkel (n 19) p. 204; Gleason (n 8) p. 272; Ten Cate (n 50) p. 1110-1111; Caroline Larson, 'Substantive fairness in international commercial arbitration: achievable through an arbitral appeal process?', (2018) 84 Arbitration 104 p. 105.
[73] Steven Shavell, 'The appeal process as a means of error correction', (1995) 25 Journal of Legal Studies 379 p. 381-382.

mostly confidential and that the award will never be published to the extent that court decisions are being published.[74]

A second, and rather strong argument is that arbitral appeal would reduce the number of vacating procedures after an award has been rendered.[75] The difference between an arbitral appeal and a setting aside procedure was explained in depth in the previous chapter. It is important to remember that after an award has been rendered, the only option for the dissatisfied party in many jurisdictions is to try and set aside the award based on one of the grounds provided in the applicable procedural law of the arbitration seat.[76] By analogy, the argument could also be made that the availability of an arbitral appeal would lower the number of attempts to prevent the recognition and enforcement of the award in the country of enforcement.

Thirdly, Proponents believe that an appeal system would contribute to the access of justice.[77] This principle will be explained in depth in the next section. For now, it is important to know that it encompasses two main areas. First of all, there is a need for a dispute resolution procedure. Secondly, that procedure has to result in a correct outcome.[78] Proponents believe that an appeal system would contribute to the access of justice, as it would help to come to a correct outcome and thus promote the overall legitimacy of (international) arbitration.[79]

3.1.2. Opponents

The first argument made by the opponents relates to the inherent differences between court proceedings and arbitration.[80] The person who decides on the case in court proceedings, is appointed by the state and the parties have, in principle, no say in this appointment. In arbitration, the parties appoint the arbitrator. Appeal mechanisms were created to ensure the integrity of the judge. With arbitration, by appointing the judge themselves, parties agree on the integrity of the arbitrator.[81]

[74] Carreteiro (n 46) p. 196.
[75] Gleason (n 8) p. 288.
[76] Ilias Bantekas, *An introduction to international arbitration*, (Cambridge University Press 2015) p. 204; Meijer and Ernste (n 64) p. 5; Gleason (n 8) p. 287. Van Ginkel (n 11) p. 202.
[77] Zamir and Segal (n 2) p. 86.
[78] Leonardo V.P. de Oliveira and Sara Hourani, *Access to Justice in Arbitration: Concept, Context and Practice* (Wolter Kluwer 2020) p. 15.
[79] Zamir and Segal (n 2) p. 86; Gleason (n 8) p. 287.
[80] Zamir and Segal (n 2) p. 83.
[81] ibid p. 83.

This argument is also in line with their answer to the fact that arbitrators can make mistakes, as explained above.[82]

A second argument is that an appeal mechanism would make arbitral proceedings inefficient[83] and too costly.[84] With regards to the timing, the opponents think that appeal mechanisms would prolong the procedure and with it, increase the costs.[85] On the other hand, the proponents try to counter this argument with the following.

First of all, the lack of an appeal system would push parties more into choosing for a three-piece arbitrators panel, whereas if an appeal system would be available, a one-piece panel would be sufficient.[86] Secondly, by implementing an appeal mechanism, parties would be less likely to pursue setting aside procedures or go against the recognition and enforcement of rendered awards, which would also lower the overall procedural costs.[87] One could postulate that, arbitral appeals within the arbitral institutions also lower the timeframe of the overall procedure. As commonly known, court proceedings tend to be longer than arbitral proceedings.[88] In addition, due to the different outcome, parties have to start all over again when their award has been set aside. Therefore, being able to appeal within the same arbitral institution, would possibly be faster.

The third and final argument is related to the principle of finality. According to the opponents, by choosing arbitration as a dispute settlement system, the parties accept the finality of the rendered award.[89] This finality argument is diametrically opposed to the first arguments made by the proponents. According to the opponents, by choosing for arbitration, the parties accept the fact that an arbitrator can make mistakes and thus accept the finality of the arbitral award.[90] On the other side, the proponents think that too much finality decreases

[82] Carreteiro (n 46) p. 196.
[83] Zamir and Segal (n 2) p. 84.
[84] Carreteiro (n 46) p. 186.
[85] Ten Cate (n 50) p. 1164.
[86] Gleason (n 8) p. 288.
[87] ibid p. 288.
[88] Pamela K. Bookman, 'Arbitral Courts' (2021) 61 Virginia Journal of International Law 161 p. 170.
[89] Zamir and Segal (n 2) p. 83.
[90] Noah D. Rubins and William H. Knull III, 'Betting the farm on International arbitration; Is it time to offer an appeal option', (2000) 11 The American Review of International Arbitration 531 p. 532.

the legitimacy of international arbitration.[91] To what extent this finality principle reaches and how it relates to the other fundamental rights, will be discussed in the next section.

3.2. The Fundamental Principles behind Arbitral Appeal

In the debate on whether or not an arbitral appeal mechanism should be made available, different principles of law are implicated. In this section an overview of the most important principles will be given, as well as how they relate to each other. Note that this section does not have the intention to examine the point of view in the different jurisdictions on these principles.

3.2.1. An Overview of Rights

The first principle that is used as an argument by the proponents of arbitral appeal, is the principle of access to justice. Many legal scholars have written about this topic in its various applications.[92] For the purpose of this article, we will only focus on the access to justice in an arbitration context. As said before, access to justice contains two areas: access to a form of dispute resolution and getting to a correct result.[93] In essence, the goals of these two areas are to make sure that parties have access to courts, get legal aid when needed and that there are basic principles to ensure an equal process for all parties involved.[94]

The second principle is one that is favoured by the opponents but questioned by the proponents. It is the principle of finality. It means an award, once it is rendered, cannot be appealed on its merits.[95] In 2018, 16% of the respondents of the Queen Mary School of International Arbitration's survey found that the principle of finality was one of the most valuable characteristics of international arbitration.[96] It must be said that in practice, this principle is not

[91] Zamir and Segal (n 2) p. 84.
[92] See for example Francesco Francioni, *Access to Justice as a Human Right*, (Oxford University Press 2007) p. 244.
[93] De Oliveira and Hourani (n 78) p. 15.
[94] ibid p. 15-16.
[95] Platt (n 3) p. 532.
[96] Queen Mary University of London 2018 arbitration survey on the evolution of international arbitration: https://arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF (accessed October 30, 2022).

absolute. The degree of finality depends a lot on the law of seat of arbitration.[97] For example, in the UK, a court review on the merits is possible in certain situations.[98] In addition, the same Arbitration Act, provides an option for the parties to not declare the award final and binding.[99]

The third principle that is "*incontournable*" when talking about arbitration, is party autonomy. Party autonomy is not something that specifically applies to the topic of arbitral appeal, but to the arbitration procedure in general.[100] The principle of party autonomy has been used on both side of the discussion. It's based on the presumption that parties to an arbitral proceeding are well-informed on the state of affairs of such proceedings.[101] According to the opponents, parties thus make a well-informed choice concerning the finality of arbitration.[102] On the other hand, allowing appeal for the minority that wants such mechanisms, enhances the overall contractual freedom of the parties involved.[103]

3.2.2. How Do They Relate to Each Other

After having given a short overview of the different principles that are in play, the biggest question that remains is how they relate to each other.

Can the principle of finality and access to justice exist next to each other? Finality makes sure that an award is final and binding. The principle of access to justice wants to ensure that the outcome is just.[104] But what if this is an erroneous award? The question is thus whether or not finality should always prevail. Some legal scholars see this as a tension between finality and fairness.[105] The risk that lies in prioritising finality too much, is a possible shift from arbitration to litigation, when dealing with high-risk cases.[106] This a statement that is shared by the US Supreme Court. In their decision on the AT&T v. Concepcion case, the

[97] Jennifer Kirby, 'Finality and Arbitral rules: Saying an award is final does not necessarily make it so', (2012) 29 Journal of International Arbitration 119 p. 119.
[98] Section 69 UK Arbitration Act 1996.
[99] Section 58 UK Arbitration Act 1996.
[100] Charles Chatterjee, 'The reality of the party autonomy rule in International Arbitration', (2003) 20 Journal of International Arbitration 539 p. 540.
[101] ibid p. 539.
[102] Platt (n 3) p. 534.
[103] Zamir and Segal (n 2) p. 86.
[104] Platt (n 3) p. 532; De Oliveira and Hourani (n 78) p. 15.
[105] William W. Park, 'Why courts review arbitral awards', (2001) 16 International Arbitration Report 595 p. 596.
[106] Platt (n 3) p. 534.

Court stated that arbitration is not equipped for high stake cases because of the lack of review mechanisms.[107]

Despite the fact that finality is an important aspect of arbitration, it is not absolute. As mentioned above, the degree of finality is determined by the applicable law of the arbitration seat.[108] Some countries, such as the UK, have already deteriorated this principle, in order to give more weight to the principle of party autonomy and overall fairness.[109]

This brings us to an intermediate conclusion that the principle of access to justice alone cannot overrule the principle of finality. But, backed up by the principle of party autonomy, the parties who wish to decrease the impact of the finality principle, can give more wait to getting a "just" outcome with an appeal mechanism.

What about the other way around? Can certain rights such as the right to an appeal be waivered? This answer is fairly easy, yes. In the past, the European Court of Human Rights[110] has answered this question, more specifically in the Deweer v. Belgium case. Here the court stated that a waiver of procedural rights is possible, when this waiver was given voluntarily, without constraint and in an unequivocal manner.[111] Consequently, it can be stated that the right to appeal can be waivered in the manner mentioned above.

4. Arbitral Appeal in Different Jurisdictions

The previous two chapters were aimed at giving a short theoretical overview on the topic of arbitral appeal. In this chapter, we will look at the current appeal possibilities across different jurisdictions. Firstly, this chapter will analyse the different national legal frameworks, before looking into possible existing appeal mechanisms on an institutional level.

4.1. Possibilities under National Law

[107] US Supreme Court AT&T Mobility L.L.C. v; Concepcion [2006], 131 *S. Ct.* 2011, 1740.
[108] Kirby (n 97) p. 119.
[109] Section 58 and 69 UK Arbitration Act
[110] Hereinafter ECHR.
[111] ECHR February 27th 1980, Deweer v. Belgium, no. 6903/75, https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-57469%22]} (accessed October 30, 2022).

In this part, we inquire more information on what is stated in the provisions in the applicable national arbitration acts. Is there a possibility to appeal, or is it prohibited? And if possible, what is the applicable standard of review and procedure?

4.1.1. National Legal Frameworks

In this section we look at the applicable national legal frameworks to determine whether or not a provision, or section, on arbitral appeal is included.

To start off, the applicable national framework in Belgium is the Judicial Code (BJC).[112] In contrast to other jurisdictions, the Belgian legal framework does not make a distinction between national or international arbitration. The applicable rules can be found in the articles 1676-1722 BJC. According to article 1716 BJC, parties can only lodge an appeal against the rendered award when they provided for this in an agreement.[113] It is important to note that, however this is not explicitly expressed, the possibility to appeal according to Belgian law is only a possibility to appeal before another arbitral tribunal. Under Belgian law an appeal before a national court is not possible.[114]

Contrary to Belgium, France does make a difference between international and domestic arbitration.[115] Despite that fact that France has two regimes, a lot of the provisions applicable to domestic arbitration, are also applicable to international arbitration.[116] The applicable legal framework for international arbitration can be found in the articles 1504 to 1527 of the French Civil Procedure Code (FCPC).[117] When reading article 1518 of the Code, it is clear that the only recourse available against an international arbitration award, are the annulment

[112] Gerechtelijk Wetboek.
[113] Arbitration procedures and practice in Belgium: overview: https://uk.practicallaw.thomsonreuters.com/w-013-9378?transitionType=Default&contextData=(sc.Default)#co_anchor_a518840 (accessed October 30, 2022).
[114] Caroline Verbruggen, "Recourse against Arbitral Award: Articles 1716 to 1718" in Maarten Draye, Niuscha Bassiri (eds.), *Arbitration in Belgium. A Practitioner's Guide*, (Kluwer Law International 2016) p. 452.
[115] Arbitration procedures and practices in France: overview: https://uk.practicallaw.thomsonreuters.com/7-501-9500?transitionType=Default&contextData=(sc.Default)#co_anchor_a323078 (accessed October 30, 2022).
[116] Guido Carducci, 'The arbitration reform in France: Domestic and International Arbitration Law', (2012) 28 Arbitration International 125 p. 126.
[117] Code de Procédure Civile.

and vacating procedure. This stands in contrast with a domestic arbitral procedure, where appeal is possible when agreed upon (Art 1489 FCPC).[118]

The applicable legal framework in the UK, is the UK Arbitration Act 1996. Similar to Belgium, it does not make a distinction between national or international arbitration. When it comes to remedies against arbitral awards, the UK has an elaborate system. According to UK law, a review is possible in three situations.

The first remedy is to challenge the award when the tribunal lacks substantive jurisdiction.[119] In order to determine if the panel had jurisdiction, three conditions have to be met. First, there has to be a valid arbitration agreement. Second, the tribunal has to be constituted appropriately and third, all the issues that were raised in the discussion should have fallen under the valid arbitration agreement.[120]

Secondly, a challenge is possible based on a serious irregularity.[121] The House of Lords has clarified that such a challenge is only possible in extreme cases.[122] The irregularity has to relate to the conduct of arbitration. On the other hand, not every irregularity will pass the threshold. The conduct has to be so far removed from what could reasonably be expected.[123]

Last but not least, a court review is possible on points of law.[124] Again, before being able to resort to this remedy, the applicant has to reach a high threshold.[125] In order to be able to appeal before the court under this section, an agreement is needed from all parties involved in the dispute or a leave of the court.[126] In order to be able to receive such leave, the conditions stated in section 69 (3) UK Arbitration Act 1996 should be met.

Before ending the possibility under UK law, it is important to note one remark. While reading the relevant provisions in the UK Arbitration Act 1996, it is clear that those provisions apply for a judicial review, and not an arbitral appeal.

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[118] Carducci (n 116) p. 145.
[119] Section 67 UK Arbitration Act 1996.
[120] Devrim Deniz Celik, 'Judicial Review under the UK and US Arbitration Acts: Is Arbitration a Better Substitute for Litigation', (2013) 1 *IALS Student Law Review* 13 p. 19.
[121] Section 68 UK Arbitration Act 1996.
[122] Matthews (n 16) p. 262.
[123] *Terna Bahrain Holding Co WLL v Al Shamsi* [2012] EWHC 3283.
[124] Section 69 UK Arbitration Act 1996.
[125] Matthews (n 16) p. 263.
[126] Section 69 (2) UK Arbitration Act 1996.

Nonetheless, section 70 UK Arbitration Act 1996 states that judicial review is only possible when all other appeal procedures within the institution are exhausted.[127] Therefore, arbitral appeal on the level of the institution is possible according to the UK Arbitration Act 1996.

The applicable rules in the Netherlands can be found in the articles 1020 – 1077 of the Dutch Code of Civil Procedure (DCCP).[128] In their recent reforms of 2015, the Dutch legislator has chosen to bring all provisions regarding arbitral appeal together in one section.[129] Regarding the question whether or not a possibility to lodge an appeal exists, we turn to article 1061b DCCP. According to this article an appeal is possible when parties have agreed to it.

Before this reform, legal scholars such as Prof. Niek Peters already questioned whether or not certain remedies should be made available on the level of the arbitral institution.[130] In his article, professor Peters argues for the possibility to allow ad-hoc arbitral tribunals to decide on the question of annulment.[131]

In the United States (US), the main legislation that has to be taken into consideration is the Federal Arbitration Act (FAA).[132] Furthermore, the FAA prevails over state law, as a result of the doctrine of federal pre-emption.[133] Section 16 deals with appeals, but this is about appeals from interlocutory orders regarding the enforcement of arbitration agreements or the challenges thereof.[134] For appeal mechanisms and court review, there is nothing mentioned in the Act. Yet, it is possible according to the institutional arbitration rules from some of the arbitral institutions such as the American Arbitration Association (AAA) and the International Institute for Conflict Prevention & Resolution (CPR). In order to have this appeal possibility, the parties must include this in their arbitration agreement or in a later submission.[135]

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[127] A Ltd v B Ltd [2014] EWHC 1870 (Comm), Andrew Smith J., June 11, 2014.
[128] Wetboek van Rechtsvordering.
[129] Meijer and Ernste (n 64) p. 1.
[130] Peters (n 5) p. 217.
[131] See Peters (n 5) p. 217-223.
[132] Thomas H. Oehmke, *Appealing Adverse Arbitration Awards* (American Jurisprudence Trials 2004) p. 35.
[133] ibid p. 38.
[134] WHITE & CASE LLP, 'Understanding the Federal Arbitration Act', *Practical Law Note*, (1) 14.
[135] Arbitration procedures and practice in the United States: Overview: https://uk.practicallaw.thomsonreuters.com/0-502-1714?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a718029 (accessed October 30, 2022).

4.1.2. Standard of Review

After reviewing the possibility to lodge an appeal or other remedy, we now turn our attention to the standard of review of the different jurisdiction. As we mentioned before, an appeal in France is not possible. Therefore, this jurisdiction will not be examined for its standard of review.

In Belgium and the Netherlands, a similar standard of review is being upheld. Both in Belgium and the Netherlands, the applicable legislation does not explicitly set a standard of review. Therefore, we can state that the same standard of review as for an appeal in a litigation procedure will apply.[136] However, as party autonomy is a very important aspect of (international) arbitration, the parties to the dispute can always prescribe a higher standard of review in their agreement.[137]

In the US, the standard of review for arbitral appeal depends on the arbitral institutions. When looking for example to the AAA arbitration rules, we see that an appeal is possible in two situations. A first situation is when there is an error of law that is material and prejudicial.[138] The second situation is when the award contains determinations of facts that are clearly erroneous.[139] Contrary to for example Belgium and the Netherlands, a contractual expansion of the standard or review is not possible[140]

As seen above, the UK has extensive rules on the standard of review, when talking about the judicial review or the challenging of an award.[141] On the contrary, when talking about an arbitral appeal within the institution, the UK arbitration act 1996 remains silent on the standard of review. Therefore, we can state that the UK arbitration Act 1996 does not entail a higher standard of review when it comes to judicial reviews.

4.1.3. Applicable Appellate Rules

After determining the different possibilities to appeal under national law and their standards of review, we examine the applicable rules laid down in the national

[136] Marsman (n 51) p. 398.
[137] ibid p. 398.
[138] Article 10 (1) AAA Optional Appellate Arbitration Rules.
[139] Article 10 (2) AAA Optional Appellate Arbitration Rules.
[140] Hall Street Associates, LLC v. Mattel [2007] Inc 128 S. Ct. 1396 2008.
[141] For a further analysis on the standard of review for judicial review see: Celik (n 120) p. 13-25.

legal framework for the procedure of lodging an appeal. This section will focus on the statute of limitation and the manner in which the appeal has to be lodged.

Regarding the statute of limitation, there are many divergences across the three jurisdictions. The longest time period can be found in the Netherlands, where parties who have agreed upon arbitral appeal have three months to lodge such an appeal.[142] In Belgium, parties only have one month.[143] Whereas in the UK, parties only have 28 days to file the appeal.[144] However, as previously stated, party autonomy allows the parties to modify the procedure and thus set a different time limited than the default rules provide.[145]

In the Netherlands this time limit is not deemed to be of public policy. The reason behind this is that parties can agree on the exact time limit being used. The tribunal can therefore only declare an appeal lodged outside of the time limit inadmissible upon request of the other party.[146] In the US, as mentioned before, nothing is mentioned in the FAA. Therefore, we must turn to the applicable institutional rules for more information.

What about the way an appeal has to be lodged? In the UK rule 62 of the Civil Procedure rules provide that an appeal has to be initiated by filling an arbitration claim form, which has to refer to the relevant section of the Arbitration Act 1996 which holds the basis for the appeal.[147] Although, this is the way to lodge a remedy before the national court on one of the grounds set forth in section 67, 68 and 69 UK Arbitration Act 1996. In absence of any other rules provided by the parties or the institutions, these rules will apply.

In Belgium, the provisions on arbitration in the Judicial Code do not say anything on how an appeal has to be lodged. Therefore, we have to fall back to the other provisions in the Judicial Code, to the institutional rules or to the agreement made between the parties.[148] Article 1056 BJC mentions two different ways a party

[142] Art. 1061c DCCP.
[143] Art. 1716 BJC.
[144] Section 70 (3) UK Arbitration Act 1996.
[145] Marsman (n 51) p. 401; De Ly (n 51) p. 107.
[146] Marsman (n 51) p. 401.
[147] Arbitration procedures and practice in the UK (England and Wales): overview: https://uk.practicallaw.thomsonreuters.com/4-502-1378?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a753668 (accessed October 30, 2022).
[148] De Ly (n 51) p. 107.

can lodge an appeal. First by using a deed, delivered by a bailiff. A second manner is through a petition deposited by the appellant at the registry.[149]

In the Netherlands the other provisions of the DCCP apply after two conditions have been met. Firstly, Section three A of the DCCP does not contain a provision governing the matter. Secondly, the substance of the provision used is not incompatible with the nature of an arbitral appeal procedure.[150] The section on arbitration does not provide for rules on how the appeal has to be lodged, therefore we fall back to the default rules provided in the DCCP or the institutional rules.

In the United States, the same reasoning applies as for the statute of limitation. Due to the fact that the FAA does not contain any provision on arbitral appeal, the institutional rules need to be consulted in order to find the correct way to lodge an appeal.

4.2. Institutional Framework

After determining the rules on appeal mechanisms, and in particular on arbitral appeal at the level of the national legislator, we now examine the arbitral appeal on the level of the arbitral institutions. Do they allow an appeal? What is their standard of review and what are the applicable rules regarding an appeal procedure? These questions will be answered in this section. The following four institutions will be further examined: The International Chamber of Commerce (ICC), The London Court of International Arbitration (LCIA), The Dutch Arbitration Institute (NAI), CEPANI, American Arbitration Association (AAA) and the International Institute for Conflict Prevention & Resolution (CPR).

4.2.1. The Possibility to Appeal

The London Court of International Arbitration does not contain any provisions on arbitral appeal. To the contrary, article 26.8 of its institutional rules prohibits an appeal, unless such prohibition is unlawful under the applicable law.

Under the NAI (Nederlands Arbitrage Instituut), arbitral appeal is actually non-existent. To the contrary, under domestic arbitration, there is a frequent use

[149] Beatrix Vanlerberghe, Dirk Scheers, Jean Laenens, Pierre Thiriar and Stefan Rutten, *Handboek Gerechtelijke Recht*, (Intersentia 2020) p. 766.
[150] Art. 1061a DCCP.

of arbitral appeal mechanisms.[151] A prime example for this can be found in the proceedings of the "Raad van Arbitrage voor bouwgeschillen (RvA)".

When the parties have agreed to follow the rules of the RvA, arbitral appeal is always possible (opt-out). When parties did not agree to these rules, article 1061b DCCP applies.[152] In order to determine whether or not an appeal is possible under the RvA, one must check whether or not the same decision, if it were made by a national judge, would be eligible for appeal.[153] In the Netherlands the applicability limitation is set at €1.750,00.[154]

In Belgium there is CEPANI. According to their arbitral rules, there is no arbitral appeal possible. According to article 35 (1) of the institutional rules, all awards rendered are final. Furthermore, in subsection 2 of that same article, the institution declares that the parties, by agreeing to the institutional rules, waive any right to an appeal or other form of recourse. Thus, under the CEPANI rules there is no default setting for an arbitral appeal. Nevertheless, given the power of party autonomy and the possibility under national law, parties can always agree on an appeal possibility and thus deviate from the CEPANI institutional rules.

The International Chamber of Commerce (ICC) has a similar approach to arbitral appeal as CEPANI. Article 35 (6) of their arbitration rules state that every award is binding upon the parties and that these parties wave their right to any form of recourse. Nonetheless, as mentioned above, parties can choose to deviate from these rules.

It must be said that the ICC has a safeguard mechanism when it comes to rendering awards. Article 34 of ICC Arbitration Rules state that every award must be checked by the institution, before being rendered. This is the so-called "scrutiny of the award".

The American Arbitration Association (AAA) has, in comparison to its European counterparts, an elaborate arbitral appeal system. The *ratio legis* behind this, is to create a streamlined procedure that aligns itself with the goal to provide

[151] Marsman (n 51) p. 394.
[152] Raad van Arbitrage, 'information about the raad van arbitrage in bouwgeschillen' <https://www.raadvanarbitrage.nl/onze-procedures/hoger-beroep-de-appelprocedure/> accessed October 30, 2022.
[153] Art. 22 (2) RvA Arbitral rules.
[154] Art. 332 DCCP.

for an objective, cost efficient and correct appellate procedure.[155] The AAA works with an opt-in system, requiring parties to integrate an agreement to arbitral appeal in their arbitration agreement or after the rendering of the award.[156] It is quite remarkable that the contested award does not have to be rendered by the AAA for their rules to apply.[157]

The International Institute for Conflict Prevention and Resolution (CPR), also has an elaborated appeal system. As their American colleague, the AAA, they also work on an opt-in basis. In addition, their rules are also available for appeal procedures against awards rendered by another arbitral institution.[158]

4.2.2. Standard of Review

In this section the ICC, NIA, LCIA and CEPANI will not be further reviewed, as it is clear that they do not have any appellate rules. The RvA, AAA and CPR however, will be assessed on their standard of review.

The RvA's appellate rules remain silent when it comes to the standard of review. Therefore, we can refer to what was explained in the section above, regarding the standard of review under the applicable national legislation in the Netherlands.

Regarding the AAA, as mentioned above, there are two situations in which a party can lodge an appeal. Firstly, when the award contains an error of law that is material and prejudicial.[159] It is clear from the wording that these two conditions are cumulative. Secondly, when it contains a determination of fact that are clearly erroneous.[160]

Regarding the first situation, in order to fall under this condition, the error must cause harm and, had it not occurred, would have let to another conclusion by the tribunal. This sets a very high threshold.[161]

The standard of review under the CPR can be found in rule 8.2 of the CPR appellate rules. Subsection (a) contains more or less the same standard of review

[155] Carreteiro (n 46) p. 198.
[156] Rule A-1 AAA Appellate rules.
[157] Rule A-1 AAA Appellate rules; Carreteiro (n 46) p. 199.
[158] Rule 1.1 CPR appellate rules; Carreteiro (n 46) p. 199.
[159] Article 10 (1) AAA Optional Appellate Arbitration Rules.
[160] Article 10 (2) AAA Optional Appellate Arbitration Rules.
[161] Carreteiro (n 46) p. 205.

as the AAA. In addition, subsection (b) also mentions the grounds for which an award can be vacated following section 10 of the Federal Arbitration Act.

4.2.3. Applicable Appellate Rules

As was explained in the previous section, only the RvA, AAA and CPR will be examined for their procedural rules. More specifically on the statute of limitation and the way to lodge and appeal.

With regards to the statute of limitation, the RvA does not deviate from the DCCP. It prescribes a period of three months in which the parties can lodge their appeal.[162] The parties to a procedure at the RvA can always agree to prolong this time period.[163]

The CPR prescribes a notice period of 30 days. This period starts on the day that the parties receive the award.[164] After receiving a notice of appeal, the counterparty has then a period of 14 days in which they can lodge a counter-appeal.[165]

The AAA also prescribes a period of 30 days to lodge an appeal.[166] In spite of this similarity, there is a difference in wording between the CPR and the AAA, regarding the start of this period. Where according to the CPR the period starts when the parties receive their award,[167] the AAA rules mention that the period starts when the award is submitted to the parties.[168] The latter could intend that the period starts at the moment the award is sent to the parties, but not yet received. A second difference between these two institutions can be found regarding the time period to file a counter appeal. The AAA only rewards a period of seven days to file the counter appeal.[169]

There are different ways in which an appeal can be lodged. Following the RvA rules, the appellant has to file a 'memorie van grieven' to the secretary of the RvA before the end of the three months appeal period.[170] In comparison, the AAA

[162] Art. 22 (3) RvA Arbitral rules.
[163] Raad van Arbitrage (n 152).
[164] Rule 2.1 CPR Appellate Rules.
[165] Rule 2.2 CPR Appellate Rules.
[166] Art. 3 (a) (i) AAA Optional Appellate Arbitral Rules.
[167] Rule 2.1 CPR Appellate Rules.
[168] Art. 3 (a) (i) AAA Optional Appellate Arbitral Rules.
[169] Art. 3 (c) AAA Optional Appellate Arbitral Rules.
[170] Art. 22 (3) RvA Appellate Rules.

requires far more for filing an appeal. Besides a notice of appeal, also an administrative filing fee has to be paid, a copy of the arbitration agreement and a copy of the contested award must be filed. Which can be done both physically at the AAA office, or online.[171]

The CPR rules hang between those of the RvA and those of the AAA. Like its American counterpart, the CPR rules provide a list of requirements that need to be fulfilled in order to file an appeal. The notice of appeal must contain the elements of the original awards that is being contested and the basis on which the appeal is based.[172] Contrary to the AAA, it does not allow for an online filing. Same as for the RvA, the parties in a CPR procedure must provide the notice in writing to the other party and the institution.[173]

4.3. Overview

4.3.1. Legislative Level

	Belgium	**Netherlands**	**UK**	**US**	**France**
Is appeal possible?	Yes: Article 1716 BJC	Yes: Article 1061b DCCP	Yes: Both Judicial review as arbitral appeal	Yes, if agreement is reached, but not an appeal before a state court	No: Art 1518 FCPC
Standard of review	Same as for judicial appeal	Same as for judicial appeal	Enhanced standard of review of judicial review but not for arbitral appeal	Depends on the arbitral institution	/
Statute of limitation	Art 1716 BJC: 1 month	Art 1061c DCCP: 3 months	Section 70 (3) UK arbitration Act 1996: 28 days	Depends on the arbitral institution	/

When comparing the three civil law jurisdictions with each other, large differences come to the surface. First of all, France does not allow for an appeal. Between

[171] Art. 3 (a) (i) AAA Optional Appellate Arbitral Rules.
[172] Rule 2.1 CPR Appellate Rules.
[173] Rule 2.1 CPR Appellate Rules.

Belgium and the Netherlands, the biggest difference lies in their statute of limitation to lodge an appeal. This is three times longer in the Netherlands than in Belgium. This can have advantages in having more time to prepare, but it also prolongs the overall procedural timeframe and uncertainty that comes with it regarding the recognition and enforcement of the arbitral award.

After examining the two common law jurisdictions, one big difference revealed itself. Under the US Federal Arbitration Act, no appeal before a state court is possible, whereas in the UK this is possible.[174] However, it is also possible for parties to include an internal appeal regime on the institutional level.[175] In fact, the possibility for a court review in the UK is on an opt-out basis, which is already an exception as many jurisdictions have an opt-in system for arbitral appeal or judicial review.

When we put the common law jurisdictions next to the civil law jurisdictions, we can conclude that in Belgium and the Netherlands, it is easier to appeal (both arbitral as before the court) according to their national legal framework. The requirements set in the UK Arbitration Act are imposing a higher threshold to act than its Dutch and Belgian counterparts.

4.3.2. Institutional Level

	AAA	**CPR**	**RvA**
Is appeal possible?	Yes, when parties opt for it in their agreement	Yes, when parties opt for it in their agreement	Yes, even on an opt-out basis.
Standard of review	Material and prejudicial error of law Or Clearly erroneous determination of facts	Same as AAA + Grounds mentioned in section 10 FAA	Falls back on national legislation
Statute of limitation	30 days for appeal, 7 for counter appeal	30 days for appeal, 7 for counter appeal	3 months

All chosen institutions have an appeal system. Nonetheless, the procedure that is used differs between the three of them. while the American institutions work with an opt-in system, the Dutch RvA has an opt-out system. In my opinion, this

[174] Celik (n 120) p. 14; Platt (n 3) p. 547.
[175] Platt (n 3) p. 548.

enhances the availability of an arbitral appeal without harming the parties who do not want such a possibility.

The standard of review differs as well. The RvA falls back to national law for what would be appealable, whereas the US institutions set a strict standard of review.

One of the biggest differences can be found in the statute of limitation. In proceedings before the RvA, a party has three months to decide on an appeal, whereas in the other two institutions a time limit of 30 days is given to parties to lodge an appeal.

When comparing the national legal frameworks with the institutional rules, it is clear that institutions are more open to appeal systems. The biggest contrast therefore is, that their threshold is slightly lower than those imposed by national legislation.

5. The Effect of Arbitral Appeal on the Recognition and Enforcement under the New York Convention

In this last chapter, we will examine the impact of an arbitral appeal on the recognition and enforcement of an arbitral award. To do so, we will limit the assessment to the effects on recognition and enforcement of international arbitral awards in light of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[176]

5.1. General Rule

When States are party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, they are obliged to recognise and enforce an international arbitral award that complies with the conditions set forth in this Convention.[177] One could only refuse to fulfil its international obligation to recognise and enforce the award, when the situation falls under one of the grounds for refusal mentioned in article V of the New York Convention, which are of an exhaustive nature.[178]

[176] Hereinafter "New York Convention".
[177] Art. III New York Convention.
[178] Gaillard and Bermann (n 21) p. 134.

The provisions that are of importance for this article, are the articles V (1) (e) and VI of the New York Convention. The latter provides for the refusal to recognise and enforce when the award has not yet become binding or has been set aside by a competent authority in the home state.[179] The former deals with the situation where one party seeks the annulment of the award in the home state, at the same time that the other seeks the recognition and enforcement in the other state.[180]

During the drafting stage of the convention, clear rules on the burden of proof were created for the application of article V of the convention.[181] Out of the wording of this article, the national courts of the contracting states have recognised that it is up to the party who seeks to challenge the recognition and enforcement of the arbitral award, to carry the burden of proof on whether the award is not yet binding upon the parties.[182] Also, for the application of article VI, the burden of proof lies with the party seeking the refusal[183]

5.2. Article V (1) (e) New York Convention

5.2.1. General Info

Article V (1) (e) states that the recognition and enforcement of the award can be refused when the award has not become binding yet, or that the award has been set aside or suspended by a competent authority of the country where the award was made. There are two important aspects to this article. Firstly, the term 'has not become binding yet'. Secondly the term 'competent authority'.

Already under previous conventions such as the 1927 Geneva Convention, the enforcement of awards was not possible when they were not final.[184] The

[179] George A. Bermann, *Recognition and Enforcement of Foreign Arbitral Awards: The interpretation and application of the New York Convention by National Courts, Cham*, (Springer International Publishing 2017) p. 5.
[180] Gaillard and Bermann (n 21) p. 279.
[181] Travaux préparatoires, United Nations Conference on International Commercial Arbitration, Recognition and Enforcement of Foreign Arbitral Awards, Comparison of Drafts Relating to Articles III, IV and V of the draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *E/CONF.26/L.33/Rev.1*, 3; Born (n 22) p. 3958.
[182] Europcar Italia SpA v. Maiellano Tours Inc., Court of Appeals, Second Circuit, United States of America, 2 September 1998, 97-7224, XXIV Y.B. COM. ARB. 860; Encyclopedia Universalis S.A. v. Encyclopedia Britannica Inc., Court of Appeals, Second Circuit, United States of America, 31 March 2005, 04-0288-cv, XXX Y.B. COM. ARB. 1136; Gaillard and Bermann (n 21) p. 138.
[183] Gaillard and Bermann (n 21) p. 284.
[184] Art. 1 (d) 1927 Geneva Convention.

reason therefore was that the award could still be open for opposition or appeal.[185] However, it became too easy for the 'losing' party to delay or obstruct the enforcement by simply starting an annulment procedure.[186]

5.2.2. Has not Become Binding Yet

First, the notion of "has not become binding yet". In previous conventions, there was a discussion whether the award had to be final or binding. With the adoption of the New York Convention, the legislators have abandoned the notion of final and went for the criterium of bindingness.[187]

This term has to be defined specifically for this convention.[188] It means that there is no ordinary recourse available anymore to the parties.[189] Nevertheless, there are national courts who uphold the view that it is up to the law of the arbitration seat to determine whether or not an award is binding.[190] There are also courts who opt for an approach that combines the two views.[191] Namely, in order to determine whether or not an ordinary recourse is available, you should look at the national law of the state where the award was rendered.[192]

An appeal is an ordinary recourse. Hence, when parties have concluded an arbitral appeal in their agreement, the award will not become binding until this period has come to an end. How longer the appeal period (for example in the Netherlands 3 months) lasts, the longer an award cannot be recognised, nor enforced.

5.2.3. Competent Authority

The Convention does not define the term 'competent authority'. Despite the absence there will be no doubt that it entails the national courts who have the jurisdiction to suspend or set aside an award.[193]

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[185] Gaillard and Bermann (n 21) p. 221.
[186] Albert Jan Van den Berg, *The New York Arbitration Convention of 1958: Towards a uniform judicial interpretation*, (Kluwer Law and Taxation 1981) p. 333.
[187] *Universal Tractor Holding LLC v. Escorts Ltd*, [2012] Ex. P. 372/2010; Born (n 856) p. 3957.
[188] Born (n 22) p. 3959; Meijer and Ernste (n 64) p. 4.
[189] Gaillard and Bermann (n 21) p. 224.
[190] Born (n 22) p. 3958-3960.
[191] For a deeper discussion regarding this approach see: Gaillard and Bermann (n 855) p. 226-228.
[192] Meijer and Ernste (n 64) p. 4.
[193] Gaillard and Bermann (n 21) p. 232.

The question thus arises whether such authority could also be given to an arbitral appeal tribunal. According to several legal scholars, this could be possible.[194] The fact that the convention did not clarify this term a wide interpretation is to be preferred. An arbitral tribunal should fall under this term.[195]

5.2.4. Effect of an Appeal

The doctrine upholds the opinion that an appeal before the arbitral institution would indeed prevent the award from reaching the status of binding.[196] Even during the drafting stage of the convention, the possibility of an internal appeal was foreseen as one of the possibilities to prevent an award from becoming binding.[197]

Therefore, if an appeal before the arbitral tribunal is lodged, or there is an internal statute of limitation that has not yet been reached, the arbitral award has not become binding yet and the refusal to recognise and enforce the award can successfully be asked by the opposing party.[198]

5.3. ARTICLE VI NEW YORK CONVENTION

5.3.1. General Info

According to this article, an opposing party can ask the refusal of the recognition and enforcement of the arbitral award when an application to set aside or suspend the arbitral award has been made before the competent authority.[199] The timeframe in which this article operates, is the one after the award is rendered, but before it is set aside or suspended as foreseen in article V (1) e New York Convention.[200]

In order to be applicable, this article has two requirements. First, an application had to be made for setting aside or suspend the award. Second, the application had to be filled before a competent authority.[201]

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[194] Peters (n 5) p. 220; Meijer and Ernst (n 64) p. 4-5
[195] Peters (n 5) p. 220; Meijer and Ernst (n 64) p. 4-5.
[196] Born (n 22) p. 3966.
[197] U.N. Economic and Social Council, Summary Record of the Seventeenth Meeting of the United Nations Conference on International Commercial Arbitration, *U.N. Doc. E/CONF.26/SR.17*, 1958, 3.
[198] Meijer and Ernst (n 64) p. 4.
[199] Art. VI New York Convention.
[200] Gaillard and Bermann (n 21) p. 281.
[201] Gaillard and Bermann (n 21) p. 282-283.

5.3.2. The Requirement of a Pending Application

As a first requirement, the application has to be pending. If such application has not been filled, the courts cannot adjourn the decision on the recognition and enforcement of the award.[202]

There has been some case law on what constitutes an application to suspend or set aside an arbitral award. For example, a damage claim initiated before the same tribunal, for damages that arose after the award was issued, did not constitute such an application.[203] In addition, when the applicant is unable to prove that the application relates to the setting aside or suspension of the award, a request made based on this article has to be denied.[204]

Next to proving that an application has been made, the applicant should also prove that the application is still pending. If such application has already been dealt with and it had a negative outcome for the applicant, refusal based on this article has to be denied.[205]

5.3.3. The Requirement of a Competent Authority

The second requirement states that such an application had to be made before a competent authority. This requirement relates back to the same notion of 'competent authority' under article V (1) e New York Convention.[206]

5.4. CONCLUSION

After examining the application of both article V and VI of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, it became clear that an appeal procedure, even lodged within the institution itself, is able to suspend the recognition and enforcement of the award.

It is clear that an arbitral tribunal falls under the notion of 'competent authority'. Therefore, when such an appeal is filed and the appeal procedure is

[202] Gaillard and Bermann (n 21) p. 282.
[203] *Stephen and Mary Birch Foundation, Inc. v. Admart AG, Heller Werkstatt GesmbH and others*, Court of Appeals, Third Circuit, United States of America, 8 August 2006, 04-4014.
[204] *Hallen v. Angledal*, Supreme Court of New South Wales, Australia, 10 June 1999, 50055 of 1999.
[205] *S.A. Recam Sonofadex v. S.N.C. Cantieri Rizzardi de Gianfranco Rizzardi*, Court of Appeal of Orléans, France, 5 October 2000.
[206] Gaillard and Bermann (n 21) p. 283.

pending, the award is suspended until the end of the appeal procedure and thus falls within the scope of those two articles.

6. CONCLUSION

As the finality of an arbitral award becomes more and more questionable, the need for a suitable review mechanism becomes more immanent. As shown in the first chapter, there are all sorts of remedies or review mechanisms, to challenge an erroneous award. However, it also showed that an arbitral appeal, within the arbitral institution, trumps the other types of remedies on several grounds.

Arbitral appeal remains for instance closer to the core values of arbitration such as neutrality, party autonomy and confidentiality. In addition, the outcome is more desirable when compared to the setting aside procedure or a challenging of the recognition and enforcement.

After having examined the different jurisdictions, it becomes clear that most of them are not opposed to an arbitral appeal. Nonetheless, the differences in arbitral rules are large. Especially with regards to the statute of limitation.

Also, when comparing the judicial review on the merits, as provided for by the UK Arbitration Act 1996, the threshold for an arbitral appeal is significantly lower and thus more accessible to parties.

With regards to the recognition and enforcement under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the existence of an arbitral appeal procedure poses no difficulties. To the contrary, during the drafting stage of the convention, the legislators did take into account the possibility of internal review mechanisms such as an arbitral appeal. According to the preparatory documents, such appeal would prevent the award from becoming binding upon the parties and thus unable to recognise and enforce. Consequently, the risk of enforcing an award even though a different arbitral outcome is still possible due to the appeal, is low.

For the aforementioned reasons, this article advocates for the use of an internal arbitral appeal system. It creates an affordable solution to correct erroneous awards, without touching upon the core values of arbitration such as confidentiality and party autonomy.

Should Business-to-Business Unfair Trading Practices Be Harmonised Cross-Sector at the EU Level?

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1. INTRODUCTION

The COVID-19 pandemic has not only caused a crisis in public health but, from the perspective of international commerce, it has also brought to light the fragility of current supply chain systems. On the surface, the pandemic directly caused disruption of supply and demand in both local and global economies.[2] Yet, it has also exposed the "dark side" of supply chain contracts, namely the incorporation of unfair trading practices (UTPs) in contractual terms, which allows stronger parties to impose imbalances in risk allocation toward weaker parties.[3]

Nevertheless, business-to-business (B2B) UTPs are not a new issue and have raised different regulatory discussions in the last decade, especially within the EU, both at national and Union levels. Yet, the legal framework for B2B UTPs still needs to be completed. This is mirrored in the altering approaches taken by EU Member States (MS) at national level, which were tackled by efforts of harmonisation on EU level in 2019. The harmonisation is evident in EU Directive 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain.[4] However, the Directive is specifically tailored to the agricultural and food supply chains.

This raises the question of whether the EU should take a step further and expand the scope of B2B UTPs harmonisation to other sectors as well. Here, it should be considered that B2B UTPs themselves are not limited to any specific sector but can appear in different settings, such as retail, fashion, automotive, agriculture and food, etc.[5] Furthermore, in this era of international trade and globalisation, where businesses operate transnationally, B2B UTPs can be considered a universal issue involving parties from different legal systems.

[2] Dmitry Ivanov and Alexandre Dolgui, 'Viability of Intertwined Supply Networks: Extending the Supply Chain Resilience Angles towards Survivability. A Position Paper Motivated by COVID-19 Outbreak' (2020) 58 International Journal of Production Research 2904, p. 2904.
[3] Food and Agriculture Organisation of the United Nations (FAO), *Legal Mechanisms to Contribute to Safe and Secured Food Supply Chains in Times of COVID-19* (2020), p. 4.
[4] Directive (EU) 2019/633 of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain [2019] OJ L 111 (UTP Directive).
[5] Victoria Daskalova, 'Regulating Unfair Trading Practices in the EU Agri-Food Supply Chain: A Case of Counterproductive Regulation?' (2020) 21 YARS 7, p. 29; See also Jean-Michel Durocher-Yvon et al, 'Relevance of Supply Chain Dominance: A Global Perspective' (2019) 13 Journal of Transport and Supply Chain Management, p. 7.

Therefore, it is crucial that the issue is widely and properly regulated on common ground to maintain the certainty of law.

This paper aims to critically analyse the question of whether the EU should extend harmonisation of B2B UTPs to other sectors besides the food supply chain. Doctrinal research is chosen as the methodology, as the analysis revolves around the latest EU Directive 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain. [6] Here, it should be noted that the paper looks at B2B UTPs from the perspective of commercial law. Therefore, it will not discuss the desirability of regulating B2B UTPs through other branches of law (competition law, etc.) or whether voluntary framework as opposed to mandatory regulation would be more suitable.

The paper proceeds as follows: It first sets out a conceptual overview of B2B UTPs (Chapter 2), then illustrates the current status of relevant legislation within the EU on national and Union levels (Chapter 3). In Chapter 4, the paper critically assesses the desirability of EU harmonisation regarding this issue in general, followed by an examination of whether harmonisation should be extended further. It finally concludes in Chapter 5 and indicates implications for future research.

2. Overview of B2B UTPs in the Context of Supply Chain

2.1. Understanding Supply Chain Dominance

In general, a supply chain is a network of complex activities involving different key actors, namely buyers, suppliers, service providers and end-consumers,[7] that can operate either on a national or international scale.[8] A supply chain is known for its dependent and collaborative nature, which has been enabled by the connectivity between the supply chain partners and reliance on information and physical flows, both upstream and downstream.[9] Supply chain relationships are

[6] UTP Directive (n 4).
[7] Sumayah Goolam Nabee and Elana Swanepoel, 'Exploring Supply Chain Business Bullying of Small and Medium-Sized Business Suppliers by Dominant Buyers in the Apparel Retail Sector in Gauteng' (2021) 13 The Southern African Journal of Entrepreneurship and Small Business Management, p. 1.
[8] Jean-Michel Durocher-Yvon et al, 'Relevance of Supply Chain Dominance: A Global Perspective' (2019) 13 Journal of Transport and Supply Chain Management, p. 1.
[9] ibid.

built upon "trust, commitment, cooperation, mutual objectives and executive, managerial support, as well as the acceptance and understanding of mutual dependence".[10] As supply chains flourish, such dependency significantly increases, due to the development of technological innovations, changing economic landscape, as well as the rise of international trade and globalisation.[11]

Supply chain dependency has also created a power imbalance between partners, most notably between buyers and suppliers, which is considered one of the most important characteristics of supply chain systems.[12] Compared to buyers, suppliers are generally known as the weaker parties in the chain, which can be attributed to the lack of shares and dominant position in the market. This leads to the so-called supply chain dominance, which has been explored by academics under different terms (i.e., supply chain power,[13] asymmetrical relationships,[14] dominant player behaviour,[15] etc.) and research can be dated back to 1958.[16]

Nevertheless, there is no clear definition of the term. However, generally, supply chain dominance can be understood as a positive or negative influence that an actor has over other participants operating within the same supply chain.[17] Indeed, the existence of a dominant relationship is not bad in itself since power can provide effective coordination within the operation of the supply chain.[18] Issues only arise when the dominant party abuses its power and goes against the

[10] Noémi Ványi, 'Members of a Supply Chain and Their Relationships' (2012) 6 Applied Studies in Agribusiness and Commerce 131, p. 131.
[11] Kaur Arshinder, Arun Kanda and S.G. Deshmukh, 'A Review on Supply Chain Coordination: Coordination Mechanisms, Managing Uncertainty and Research Directions' in Tsan-Ming Choi and Tai-Chiu Edwin Cheng (eds), *Supply Chain Coordination under Uncertainty* (Springer Berlin Heidelberg 2011) p. 40.
[12] Farooq Habib, Marko Bastl and Colin Pilbeam, 'Strategic Responses to Power Dominance in Buyer-Supplier Relationships: A Weaker Actor's Perspective' (2015) 45 International Journal of Physical Distribution & Logistics Management 182, p. 183. See also Marko Bastl, Mark Johnson and Thomas Y. Choi, 'Who's Seeking Whom? Coalition Behavior of a Weaker Player in Buyer-Supplier Relationships' (2013) 49 Journal of Supply Chain Management 8, p. 14.
[13] Elizabeth Barber, 'Strategic Approaches to Domination in Supply Chains' in Sanda Renko (ed), *Supply Chain Management - New Perspectives* (InTech 2011) p. 168.
[14] Cagri Talay, Lynn Oxborrow and Clare Brindley, 'How Small Suppliers Deal with the Buyer Power in Asymmetric Relationships within the Sustainable Fashion Supply Chain' (2020) 117 Journal of Business Research 604, p. 604.
[15] Jing Li, Zhaohan Sheng and Hiumin Liu, 'Multi-Agent Simulation for the Dominant Players' Behavior in Supply Chains' (2010) 18 Simulation Modelling Practice and Theory 850, p. 850.
[16] Bertram H. Raven and John R.P. French, 'Group Support, Legitimate Power, and Social Influence' (1958) 26 Journal of Personality 400, p. 400.
[17] Durocher-Yvon et al (n 8) p. 2.
[18] Habib, Bastl and Pilbeam (n 12) p. 2.

weaker party's business objectives.[19] This behaviour leads to the use of UTPs within the context of the supply chain, which is discussed below.

2.2. B2B UTPs WITHIN THE CONTEXT OF SUPPLY CHAIN

2.2.1. Defining B2B UTPs

The European Commission defines UTPs as "practices that deviate grossly from good commercial conduct, are contrary to good faith and fair dealing and are unilaterally imposed by one trading partner on another",[20] which appears to be a broad umbrella term and vague definition.[21] However, this definition does not make the identification of UTPs easier, as there is no solid theoretical foundation for defining and analysing B2B UTPs.[22] Evidently, there have been various efforts within the EU alone to categorise UTPs.

One of the earliest efforts is by Supply Chain Initiative (SCI) in 2011, which lists down behaviours to be considered UTPs, such as refusing to put specific terms in writing, imposing general terms and conditions that contain unfair clauses, unilaterally terminating a commercial relationship with no notice or unreasonably short notice, etc.[23] Later on, the Commission has also tried to classify B2B UTPs in its 2013 Green Paper[24] and 2016 Report[25] as follows:

- A trading partner's retroactive misuse of unspecified, ambiguous or incomplete contract terms;

[19] Marjolein C.J. Caniëls and Cees J. Gelderman, 'Power and Interdependence in Buyer Supplier Relationships: A Purchasing Portfolio Approach' (2007) 36 Industrial Marketing Management 219, p. 221.
[20] European Commission, 'Report from the Commission to the European Parliament and the Council on Unfair Business-to-Business Practices in the Food Supply Chain' COM (2016) 32 final, p. 2.
[21] Claude Ménard, 'Summary and Conclusions: The Many Challenges of Unfair Trading Practices in Food Supply Chain Systems' in European Commission Joint Research Centre, *Unfair Trading Practices in the Food Supply Chain: A Literature Review on Methodologies, Impacts and Regulatory Aspects* (Publications Office 2017) p. 70.
[22] Richard Sexton, 'Unfair Trade Practices in the Food Supply Chain: Defining the Problem and the Policy Issues' in European Commission Joint Research Centre, *Unfair Trading Practices in the Food Supply Chain: A Literature Review on Methodologies, Impacts and Regulatory Aspects* (Publications Office 2017) p. 7.
[23] Supply Chain Initiative (SCI), 'Vertical Relationships in the Food Supply Chain: Principles of Good Faith' (2011) <http://www.supplychaininitiative.eu/about-initiative/principles-good-practice-vertical-relationships-food-supply-chain> accessed 14th October 2022.
[24] European Commission, 'Green Paper on Unfair Trading Practices in the Business-to-Business Food and Non-Food Supply Chain in Europe' COM (2013) 37 final.
[25] European Commission (n 20).

- A trading partner's excessive and unpredictable transfer of costs and risks to its counterparty;
- A trading partner's use of confidential information;
- The unfair termination or disruption of a commercial relationship.[26]

Additionally, there have been other categorisations of B2B UTPs from various sources, for instance, by the Agricultural Markets Task Force.[27] In short, B2B UTPs can be summarised into four main categories:

- Excessive shifting of risks;
- Unilateral changes in contract terms;
- Unfair termination of contracts or commercial relationships, including abrupt termination and termination without justification;
- Unfair shifting of costs and levying of charges.[28]

2.2.2. Practical Relevance of UTPs in Supply Chain

Based on the above-mentioned definition and categories of UTPs, it is important to question the extent of which they are relevant in practice. This section focuses on the relevance of UTPs in different sectors as well as the impact of UTPs on businesses.

Firstly, it has been shown by research that the use of B2B UTPs by dominant buyers is widespread across different industries, including automotive,[29] aviation,[30] consumer electronics,[31] fashion,[32] retails, agricultural and food sector,[33] etc. For example, Amazon (American multinational e-commerce retailer) has

[26] European Commission (n 24), pp. 18-21; See also European Commission (n 20) p. 5.
[27] Agricultural Markets Task Force (AMTF), 'Improving Market Outcomes: Enhancing the Position of Farmers in the Supply Chain' (2016) p. 33.
[28] Sexton (n 22) p. 9.
[29] Arshia Khan, 'Managing risks under highly dependent supplier-producer relation in modern automotive industry' in Irina Dovbischuk, Guido Siestrup and Axel Tuma (eds), *Nachhaltige Impulse für Produktion und Logistikmanagement* (Springer Fachmedien Wiesbaden 2018) p. 141.
[30] Shawei He, Keith Hipel and D. Marc Kilgour, 'A Hierarchical Approach to Study Supply Chain Conflicts between Airbus and Boeing' in *2014 IEEE International Conference on Systems, Man, and Cybernetics (SMC)* (IEEE 2014), p. 1559.
[31] Martin C. Schleper, Constantin Blome and David A. Wuttke, 'The Dark Side of Buyer Power: Supplier Exploitation and the Role of Ethical Climates' (2017) 140 Journal of Business Ethics 97, p. 98.
[32] Mallory Schlossberg, 'The top retailer in the world has a dirty little secret – and it's spiraling out of control' (2016) <https://www.businessinsider.com/zara-accused-of-copying-artists-and-designers-2016-7?international=t rue&r=US&IR=T> accessed 14th October 2022.
[33] Vesna Popović, Branko Mihailović and Zoran Simonović, 'Modern Food Retail and Unfair Trading Practices' (2018) 65 Ekonomika poljoprivrede 1499, p. 1499.

abused their dominant position to discourage consumers from buying from specific suppliers[34] or by interfering with contracts, etc.[35] Other instances would be Marks & Spencer (British multinational clothing retailer) asking suppliers to contribute money on store development and advertising[36] or Kmart and Mosaic Brands (Australian retailers) avoiding their financial commitments, asking for discounts from suppliers, etc., due to COVID-19, yet still demanding short order lead times.[37]

Secondly, there is evidence illustrating that B2B UTPs have a huge impact on suppliers, especially on small and medium-sized enterprises (SMEs). According to empirical research, the most common forms of UTPs are late payments, long payment terms, and discount for prompt payments.[38] Participating SMEs in this research indicated that their cash flow was largely affected by those practices.[39] Other studies also points out that long and conditional payment terms ultimately have an adverse effect on suppliers' overall profits as they may experience increased financing costs.[40] Furthermore, UTPs can exist as "pay-to-stay" practices, where suppliers must pay buyers to retain their position within the supply chain.[41]

Despite UTPs being so widespread and having significant impacts, there are few reported cases, mostly from Europe or the United States, and fewer cases from Asia, South America, and Africa.[42] It should be pointed out that, in today's global economy, most suppliers and weaker parties are located in developing countries.

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[34] John B. Kirkwood, 'Collusion to Control a Powerful Customer: Amazon, E-Books, and Antitrust Policy' (2014) 69(1) University of Miami Law Review 1, pp. 4-5.

[35] Rebecca Greenfield, 'Let's count all the ways Amazon's a big bully' (2011) <https://www.theatlantic. com/business/archive/2011/12/lets-count-all-ways-amazons-big-bully/333771/> accessed 14th October 2022.

[36] Sarah Gordon, 'Retail bully boys must not protect themselves unfairly' (2011) <https://www.ft.com /content/eb78f00c-f0d5-11e0-aec8-00144feab49a> accessed 14th October 2022.

[37] Zona Black, 'Bullying' clothing companies are asking struggling suppliers for discounts' (2020) <https://thenew daily.com.au/finance/consumer/2020/05/13/kmart-mosaic-coronavirus/> accessed 14th October 2022.

[38] Nabee and Swanepoel (n 7), p. 6-7.

[39] ibid p. 7.

[40] Durocher-Yvon et al (n 8), p. 4; see also Rupert Steiner, 'How the bully-boy banks and supermarkets conspire to rip off suppliers by delaying payment of loans if they can't wait for settlement' (2015) <http://www.dailymail.co.uk/news/article-3015570/How-bullyboy-banks-supermarkets-conspire-rip-suppliers-delaying-payment-loans-t-waitsettlement.html> accessed 14th October 2022.

[41] Durocher-Yvon et al (n 8), p. 8.

[42] ibid.

The fact that there are fewer reported cases in these contexts may imply that there remain many more cases which have not been exposed.

There are two factors that play into the situation. The first one is suppliers' lack of awareness. While the majority might know the concept of supply chain dominance and UTPs, some of them may not be familiar with this concept. Thus, research shows that suppliers may know the concept but do not consider their experience to fall within its scope.[43] This leads to the implication that there is not enough common understanding of B2B UTPs in practice.

The second and more important factor is the so-called "fear factor" – the fear of losing business transactions that often prevents victims of UTPs from complaining.[44] This is truly the case where suppliers may only have one main buyer, and the supplying market is highly competitive. This leads to even less bargaining power for suppliers, and buyers can act in a "take-it-or-leave-it" manner. Thus, it has been shown that suppliers are reluctant when being asked to participate in research on this matter, out of fear of being tracked by retailers and losing their business relationships.[45]

To summarise, it can be noted that B2B UTPs in the context of the supply chain are not yet understood uniformly and completely. The lack of common understanding is not only apparent in business practice, but also among academics and regulators. This may result in different approaches and a fragmentation of national law, in cases of EU MS, when regulating B2B UTPs.

3. B2B UTPs Legislation within the EU

3.1. Pre-harmonisation: Fragmentation of National Law

Prior to the efforts of the EU to harmonise B2B UTPs in 2019, there had been various unilateral measures taken by EU MS to tackle the issue. According to the European Commission Report in 2016, MS have addressed B2B UTPs using various methods, ranging from regulation to self-regulation among market participants, despite the lack of Union legislation on the issue.[46] Most MS have

[43] Nabee and Swanepoel (n 7), p. 6.
[44] European Commission, 'Tackling Unfair Trading Practices in the Business-to-Business Food Supply Chain' COM (2014) 272 final, p. 7.
[45] Nabee and Swanepoel (n 7), p. 5.
[46] European Commission (n 20) p. 3.

adopted UTP-specific legislation, while some have decided to stretch their existing legal frameworks to cover B2B UTPs (i.e., Finland, Germany). A few MS have chosen voluntary self-regulatory frameworks (i.e., Belgium, the Netherlands, and Estonia). Other MS like Denmark, Sweden, and Poland have no form of legislation to specifically address UTPs.[47] It should be noted that the list of States without regulation had grown thinner even before EU harmonisation in 2019, with regulation developing in this aspect.[48]

Another variation in MS' approaches shows up in the different choices regarding the suitable branch of law. Some have decided to regulate UTPs by stretching their competition law. UTPs have also been found in different branches of law, namely tort law, commercial or contract law, etc.[49] Furthermore, national measures have also varied in their scope and subject matter. It is pointed out that they either had a general (cross-sector), or sector-specific scope (with the food sector being the most relevant).[50] Additionally, EU MS have also differed in the coverage of UTP categories in their legislations, with some implicitly or explicitly covering a higher number of UTPs than others.[51] Lastly, some legislations target particular UTPs and prohibit them, while others take more a general approach, focusing on power imbalances, such as economic dependence or superior bargaining power.[52]

As can be observed from this overview, without harmonisation, the legal frameworks of B2B UTPs among MS were highly fragmented. Besides the debate on which form of law or which branch of law is more suitable, the fact that MS vary in the definition and identification of UTPs implies that there is a lack of common understanding of the issue, which can lead to legal uncertainty. A behaviour that is classified as UTP in a MS is not considered UTP in another. With the rise of globalisation, weaker parties in regional or international supply chains

[47] ibid.
[48] Johan Swinnen and Senne Vandevelde, 'Regulating UTPs: diversity versus harmonisation of Member State rules' in European Commission Joint Research Centre, *Unfair Trading Practices in the Food Supply Chain: A Literature Review on Methodologies, Impacts and Regulatory Aspects* (Publications Office 2017) p. 42.
[49] European Commission, Directorate General for the Internal Market and Services et al, *Study on the Legal Framework Covering Business-to-Business Unfair Trading Practices in the Retail Supply Chain: Final Report* (Publications Office 2014) pp. 35-37.
[50] ibid p. 90.
[51] Swinnen and Vandevelde (n 48) p. 43.
[52] Daskalova (n 5) p. 19.

can be located in different countries. Therefore, highly fragmented legal frameworks of B2B UTPs may make it difficult for weaker foreign parties to seek remedies under national law since there exists confusion as to whether they would be protected or not. This is also one of the driving forces for the EU to step in and harmonise B2B UTPs law[53], resulting in the adoption of Directive 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain (UTP Directive).[54]

3.2. EU HARMONISATION OF B2B UTPS

The UTP Directive was adopted in 2019, aiming at providing minimum harmonisation of UTPs between businesses in the agricultural and food supply chain. The Directive deals with the following aspects of B2B UTPs: subject matter, the scope of application and definitions (Articles 1-2); prohibition of unfair practices (Article 3); enforcement mechanism (Articles 4-13); and miscellaneous provisions.[55] For the purpose of this paper, the provisions for enforcement of the Directive will not be discussed.

According to Article 1(1), the EU has adopted a broad definition of UTPs – "practices that grossly deviate from good commercial conduct, that are contrary to good faith and fair dealing and that are unilaterally imposed by one trading partner on another".[56] It is observed that, when referring to "significant imbalances in bargaining power between suppliers and buyers" as the key driving factor of UTPs,[57] the Directive carefully deviates from terminologies that exist in competition law to avoid confusion.[58] It can be seen that the EU has settled with a broad "umbrella" definition of UTPs that had been used in many preceding official documents, which can be criticised as too vague.

The Directive is also sector-specific, in the sense that it only applies to UTPs occurring "in relation to sales of agricultural and food products."[59] Moreover, the Directive provides protection to smaller suppliers against bigger

[53] Swinnen and Vandevelde (n 48), pp. 54-55.
[54] UTP Directive (n 4).
[55] ibid.
[56] UTP Directive (n 4), Article 1(1).
[57] UTP Directive (n 4), Preamble para (1).
[58] Daskalova (n 5), p. 13.
[59] UTP Directive (n 4), Article 1(2).

buyers, based on their relative sizes in terms of annual turnover.[60] Article 1(2) contains a list of supplier-buyer relationships covered by the Directive with different turnover thresholds. The indicated annual turnover thresholds range from EUR 2,000,000 to EUR 350,000,000,[61] with maximum limits applied to suppliers and respective minimum thresholds applied to buyers. For example, the Directive applies to UTPs imposed by buyers with an annual turnover of more than EUR 10,000,000 on suppliers with an annual turnover of more than EUR 2,000,000 and not exceeding EUR 10,000,000.[62] This means that the Directive would not extend to UTPs in other sectors or cases of seller power.[63] It is criticised that the Directive focuses on buyer power and, therefore, lacks two-folded protection.[64] Here, the reference point is annual turnover, or the size of the undertaking, which is criticised as not the key factor in the assessment of bargaining power[65], and the assessment should focus on how one party can influence the other.[66] Besides, the Directive applies to "sales where either the supplier or the buyer, or both, are established in the Union",[67] which means that the Directive aims at covering international contracts and supply chains.

Regarding the substantive prohibition of UTPs, Article 3 illustrates a long list of behaviours that are considered "unfair practices". This includes the prohibition of late payments, unreasonable cancellation of orders, unilateral changes of contractual terms, excessive charges, refusal to confirm supply agreement in writing, etc.[68] It is an exhaustive list, which can enhance legal

[60] UTP Directive (n 4), Preamble para (9).
[61] UTP Directive (n 4), Article 1(2)(a)-(e).
[62] UTP Directive (n 4), Article 1(2)(b).
[63] Hanna Schebesta et al, 'Unfair Trading Practices in the Food Chain: Regulating Right?' (2018) Wageningen Working Papers in Law and Governance 2018/03, p. 10; See also Magdalena Knapp, 'Protection of a Weaker Party in Public Interest – Material Scope of the Directive on Unfair Trading Practices in Business-to-Business Relationships in the Agricultural and Food Supply Chain' (2021) 5 Public Governance, Administration and Finances Law Review 62, p. 67.
[64] Anna Piszcz, 'EU Directive on Unfair Trading Practices in Business-to-Business Relationships in the Agricultural and Food Supply Chain: Dipping a Toe in the Regulatory Waters?' in Zlatan Meškić and others (eds), *Balkan Yearbook of European and International Law 2019*, vol 2019 (Springer International Publishing 2019), pp. 114-117.
[65] Ulrich Heimeshoff and Gordon J. Klein, 'Bargaining Power and Local Heroes' (Beiträge zur Jahrestagung des Vereins für Socialpolitik 2014: Evidenzbasierte Wirtschaftspolitik - Session: Empirical Industrial Organisation I, No. D09-V1, Hamburg, 20th February 2014), p. 2.
[66] Magdalena Knapp, 'Protection of a Weaker Party in Public Interest – Material Scope of the Directive on Unfair Trading Practices in Business-to-Business Relationships in the Agricultural and Food Supply Chain' (2021) 5 Public Governance, Administration and Finances Law Review 62, p. 65.
[67] UTP Directive (n 4), Article 1(2).
[68] UTP Directive (n 4), Article 3.

certainty and avoid the fear of over-regulation.[69] Nevertheless, this approach is criticised as failing to capture every possible UTP and not allowing the opportunity to circumvent it.[70] While a general clause is difficult to operationalise, it would allow enforcement authorities to grasp potential UTPs in long term.[71]

In short, over the last decade, there have been multiple initiatives adopted with the aim of addressing B2B UTPs. Significant divergence in national law led to harmonisation efforts by the EU in 2019, with the result being the UTP Directive. Despite encountering certain criticisms, the UTP Directive has been adopted with the view of providing minimum harmonisation across the EU on this matter. As EU MS are required to integrate the UTP Directive into their national legal frameworks, it may be too early to conclude on the successful performance or efficiency of the UTP Directive. Still, since the EU has been willing to step in and regulate B2B UTPs in recent years, it is crucial to assess whether EU harmonisation should expand to other sectors to provide an inclusive legal framework for supply chain contract management.

4. Assessing the Desirability of Cross-Sector B2B UTPs Harmonisation

4.1. Costs and Benefits of Harmonisation

Before going into the question of whether the scope of B2B UTPs harmonisation should be extended, the costs and benefits of harmonisation should be laid down to see if the issue is even worth harmonising. A similar discussion has also been raised upon the adoption of the UTP Directive.

The main advantage of harmonisation can be attributed to the transnational nature of UTPs. A survey shows that 27% of the perceived UTPs have occurred among businesses located in different states.[72] Though this number alone does not mean that Union regulation is needed, this implies that the presence of UTPs is not

[69] Schebesta et al (n 63), p. 19.
[70] Knapp (n 66), p. 67.
[71] Schebesta et al (n 63), p. 19.
[72] Directorate General for Internal Market, Industry, Entrepreneurship and SMEs et al, *Monitoring of the Implementation of Principles of Good Practice in Vertical Relationship in the Food Supply Chain: Final Report, Revisited Version* (Publications Office 2016); See also Swinnen and Vandevelde (n 48), p. 52.

limited to any territorial boundary, especially in today's globalisation with the flourishment of cross-border trade and commerce. Thus, considering the development of international supply chains and the trend of outsourcing to developing countries, the international dimension of buyer-supplier contracts is more prevalent than ever. EU harmonisation would then provide a common legal basis to tackle the transnational issue uniformly, reducing the uncertainty of the law.

Furthermore, harmonisation can lead to cost savings in two ways. Primarily, it is argued that harmonisation may reduce transaction costs. By having uniform laws, citizens would not need to inform themselves about different substantive national rules, thus decreasing information costs.[73] It is suggested that removing the obstacle of legal fragmentation would make suppliers, especially those outside Europe, more confident in taking legal action against their buyers, which leads to a reduction of the "fear factor".[74] Thus, harmonisation can also lead to economies of scale in administration, where agency costs in different states would be centralised at the Union level.

On the other hand, harmonisation can incur other costs, namely switching costs – cost of adapting to EU rules. This is especially the case for MS who do not have any legal framework in place or those who already have enacted stricter rules on the issue.[75] Additionally, there are fears of under- or over-regulation, in which EU rules would deviate from the country's social optimum.[76] Therefore, a one-size-fits-all solution might not be efficient since it affects the balance of law in national frameworks.[77] Lastly, harmonisation of UTPs is criticised as adding to the already dense EU legal system, which then can lead to legal uncertainty and fragmentation at EU level.[78]

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[73] Johan Swinnen and Senne Vandevelde, 'Unfair trading practices — the way forward' in European Commission Joint Research Centre, *Unfair Trading Practices in the Food Supply Chain: A Literature Review on Methodologies, Impacts and Regulatory Aspects* (Publications Office 2017), p. 61.
[74] Swinnen and Vandevelde (n 48), pp. 53-55.
[75] Swinnen and Vandevelde (n 48), p. 53.
[76] Swinnen and Vandevelde (n 48), p. 61.
[77] Swinnen and Vandevelde (n 48), p. 55.
[78] Reto M. Hilty, Frauke Henning-Bodewig and Rupprecht Podszun, 'Comments of the Max Planck Institute for Intellectual Property and Competition Law, Munich of 29 April 2013 on the Green Paper of the European Commission on Unfair Trading Practices in the Business-to-Business Food and Non-Food Supply Chain in Europe Dated 31 January 2013, COM (2013) 37 Final' (2013) 44 IIC - International Review of Intellectual Property and Competition Law 701, p. 702.

As such, it can be observed that the costs of harmonisation are not only limited to the issues of B2B UTPs. Any harmonisation would result in similar disadvantages. Meanwhile, the benefits of harmonisation are tailored to specific issues existing in B2B UTPs, namely the lack of common ground and the transnational phenomena, as illustrated. Whether harmonisation is efficient requires further assessment, particularly regarding the effectiveness of UTP Directive. Yet, as a preliminary analysis, it is reasonable to conclude that harmonisation of B2B UTPs should be the way forward.

4.2. Beyond Agricultural and Food Sector?

Although harmonisation can be considered beneficial, it is still not clear whether harmonisation for all sectors in this aspect would be desirable. This section aims at assessing the stand of UTPs in other sectors, compared to that in the agricultural sector. It also briefly explains the regulatory rationale behind agriculture-targeted harmonisation, showing the implication for harmonising UTPs cross-sector.

It cannot be denied that B2B UTPs are not limited to any specific sector, as illustrated in the previous section. In fact, reports have shown that B2B UTPs are generally encountered in the retail trade of other products, not just in relation to farmers and the agricultural sector.[79] It is also shown that supply chain power – the driving force of B2B UTPs – is mostly found in the retail and automotive sectors.[80] Therefore, it is reasonable to expect regulations to provide protection to all sectors, instead of focusing on any specific one. Prioritising one sector over another should not be the case for extensive issues like UTPs.

Here, it is acknowledged that this paper only distinguishes between food and non-food sectors and overlooks the heterogeneity among non-food sectors. Nevertheless, as the paper deals with UTPs regulation from the lens of contractual terms and commercial practices, such differences between sectors would not be triggered, as the issues are common among them. In fact, it argues that, in the context of UTPs, food sector does not have much difference from others to be specifically regulated.

[79] Daskalova (n 5), p. 29.
[80] Durocher-Yvon et al (n 8), p. 7.

One might claim that farmers are more disadvantaged than other suppliers when facing powerful buyers since they usually operate on a smaller scale than suppliers of other sectors and are thus more vulnerable to buyers' power and influence. This might be true, but not in every context. Considering the situation of non-food suppliers located in developing countries, they usually have only one large-scale buyer in their immediate vicinity.[81] Thus, the underdeveloped infrastructure and weak economies in these countries bolster the power of buyers, giving even less bargaining power to suppliers.[82] In such cases, the position of suppliers is not that different from that of farmers.

It is also stated in the UTP Directive that protection is more important for agricultural operators due to higher risk and uncertainty, which relate to their reliance on weather conditions or the perishable and seasonal nature of products.[83] This is legitimate, but other sectors still face such high risks, especially when looking at the current COVID-19 pandemic. It has caused massive disruption in the global economy, which leads to powerful parties asserting their dominance in supply chains and shifting risks to their suppliers. Protection of weaker parties, therefore, should be required, regardless of their industries.

However, there are certain rationales behind the adoption of the UTP Directive regarding its sector-specific nature, mainly due to the legal basis for the EU to step in. The Directive was adopted pursuant to Article 43 TFEU regarding common agricultural policy (CAP).[84] It is said that farmers are "privileged" actors in the supply chain since their rights are protected under EU treaties.[85] Specific protection of this kind is not available for actors in other sectors. It should also be noted that, even with the rationale of pursuing CAP, the Directive is still criticised for its inadequate legal basis since the food supply chain should not be considered within the scheme of CAP.[86] Therefore, this implies an extreme difficulty for the EU to harmonise B2B UTPs in other sectors.

[81] Swinnen and Vandevelde (n 48), p. 55.
[82] UNCTAD, Report on 'Abuse of Dominance' (2008) Trade and Development Board - Intergovernmental Group of Experts on Competition Law and Policy 9th Session.
[83] UTP Directive (n 4), Preamble para (6).
[84] Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2008] OJ C115/47, Article 43.
[85] Daskalova (n 5), p. 29.
[86] Schebesta et al (n 63), p. 14.

Nevertheless, the concern of legal basis lies with whether the EU can harmonise B2B UTPs in other sectors, which is not the essence of this paper. As analysed earlier, B2B UTPs exist across sectors. The food sector does not pose any differences from non-food ones, considering the frequency of UTPs occurrence, lack of bargaining power, or high risks inherent within. Therefore, it is concluded that B2B UTPs should be harmonised beyond the agricultural and food sectors.

5. CONCLUSION

In summary, to answer the research question, the paper lays down a conceptual overview of UTPs within the supply chain and then describes the legal frameworks available in the EU. Finally, it assesses the desirability of harmonisation in general as well as the necessity of expanding the scope to cover other sectors. Here, the paper concludes that B2B UTPs should be regulated uniformly, which should be done through harmonisation of EU law. Specifically, it argues that such harmonisation should go beyond the current sector-specific approach and cover other sectors since the protection of weaker parties against UTPs is necessary, and there is no major difference that distinguishes food and non-food sectors in this aspect.

Nevertheless, it acknowledges that harmonisation beyond the agricultural and food sector faces difficulties, such as lack of legal basis. Yet, this is the question of whether the EU can regulate and how, which is not the focus of this paper and requires additional research. The paper also realises the lack of literature on this topic, together with a diverse understanding of the concept, thus implying that this is still a developing field in law. Finally, for the future, it is also important to assess the effectiveness of the UTP Directive to better examine the outcome of harmonisation.