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FROM THE EDITORIAL DESK

It is our pleasure to present the second issue of our second volume. This issue features twelve pieces - eleven articles and a case note - covering both public and private law topics. We are happy to present a catalogue including topical issues in the fields of taxation, EU law, intellectual property, competition law, as well as different facets of human rights law. Collaborating with our authors, new and returning, has been an enriching experience. We hope to inspire researchers to produce their best possible work consistently, and are ourselves inspired by their perspectives on the law. The hard work put in by these thirteen authors and our editorial team is greatly appreciated and valued. Their tireless efforts drive us to publish issue after issue with a commitment to the highest standards of academic integrity and legal analysis.

We thank the Maastricht University Faculty of Law for their institutional support for the Atlas Law Journal. We also extend our gratitude to our partners at the London School of Economics Law Review, The Hague International, and the Esade Law Review. Our cooperation has not only contributed to our publicity but also been a rich source of inspiration for best practices in publication.

Lastly, we would like to express our gratitude for our readership and your support during the past two years. We hope you continue to follow our endeavours beyond this final issue of the Atlas Law Journal. After the summer, our Journal will join forces with the EMaas Law Review under the auspices of Maastricht University Faculty of Law, serving as its official student-run law review. Our union into one entity is symbolised by the name under which you can find our future publications: “Maastricht Student Law Review”, or MSLR. We are excited to embark on this new venture.

This Journal was conceived as a platform for legal scholars to publish their research, and for law students to develop their editorial skills. We have strived to accomplish these goals by expanding our readership and contributing to the legal discourse. Our initiative in forming the Maastricht Student Law Review will serve to advance our aforesaid objectives.

After this issue, the Atlas Law Journal may cease to exist in name, but its essence will live on. With the support of the Faculty of Law at Maastricht University, we look forward to further stimulating the legal discourse in the years to come.

The Atlas Law Journal Editorial Team,
Maastricht, 30 June 2023.

Case Note - Basu v. Germany: Much Ado About Nothing? The European Court of Human Rights on Racial Profiling

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TABLE OF ABBREVIATIONS

CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
EU	European Union
FPA	Federal Police Act

1. INTRODUCTION

In 2020, the Black Lives Matter movement experienced an uprise in countries all over the world. In Germany, existing voices trying to raise awareness regarding racism within society were given a larger platform.[2] One point focused upon was racial or ethnic profiling carried out by the German police, which is defined as 'the use by the police, with no objective and rational justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities'.[3]

It was demanded that Germany would carry out a study about the existence of violence and discriminatory conduct including racial profiling by the police.[4] This call was also endorsed by the European Commission against Racism and Intolerance (ECRI) in its report on Germany in 2020.[5] However, Horst Seehofer, at that time Germany's Federal Minister of the Interior, famously rejected these calls, stating that racial profiling was already prohibited and thus, there was no need to conduct a study.[6]

Despite the fact that racial profiling has been a serious and grave interference with the fundamental rights of ethnic minorities, the European Court of Human Rights (ECtHR) has not ruled on the matter until recently. This changed on 18th October 2022 with the case *Basu v. Germany*, in which the Court found a violation of Germany's positive obligations under Article 8 in conjunction with Article 14 of the European Convention on Human Rights (ECHR).[7] However, on the same day, the ECtHR

[2] Josef Kolisang, 'Anti-Rassismus-Proteste: "Jetzt gibt es keine Ausrede mehr"' *Deutschlandfunk* (Köln, 8 June 2020) <https://www.deutschlandfunk.de/anti-rassismus-proteste-jetzt-gibt-es-keine-ausrede-mehr-100.html> accessed 27 May 2023.

[3] European Commmission against Racism and Intolerance, 'General Policy Recommendation No. 11 on combating racism and racial discrimination in policing' ((CRI(2007)39, 2007) para. 1.

[4] Manual Bewarder and Alexander Nabert, 'Die Rassismus Studie, die Seehofer aus politischen Gründenstoppte' (*Welt,* 20 August 2021) <https://www.welt.de/politik/deutschland/article233265189/Polizei-Seehofer-hielt-Rassismus-Studie-fuer-politisch-nicht-opportun.html> accessed 27 May 2023.

[5] European Commission Against Racism and Intolerance, 'Report on Germany – sixth monitoring cycle' (17 March 2019) <https://rm.coe.int/ecri-report-on-germany-sixth-monitoring-cycle-/16809ce4be> accessed 27 May 2023, para. 109.

[6] Hannes Leitlein, 'Bundesministerium sagt Studie zu Rassismus bei der Polizei ab' (*Zeit online,* 4 July 2020) <https://www.zeit.de/gesellschaft/zeitgeschehen/2020-07/racial-profiling-studie-polizei-abgesagt-justizministerium-horst-seehofer> accessed 27 May 2023.

[7] *Basu v. Germany* app. no. 215/19 (ECtHR, 18 October 2022), para. 46(1).

handed down a second judgement concerning racial profiling, namely *Muhammad v. Spain*, in which it held that there had been no violation by Spain concerning the same provisions.[8]

This case note will analyse the approach adopted by the ECtHR concerning racial profiling, paying particular attention to the consistency between the tests applied in *Basu* and in *Muhammad*. By doing so, the three most important factors in the Court's assessment which are: first, the test applied by the ECtHR to determine the admissibility of a claim under Article 8 ECHR, the lack of assessing the adequate legal framework existent in the Member State in the light of Article 14 ECHR, and lastly, the lack of reversal of the burden of proof when assessing the merits of the case.

2. Legal and Factual Background

With Directive 2000/43, the European Union (EU) aimed at protecting individuals by combating discrimination based on racial or ethnic origin and enforcing the principle of equal treatment within the Member States.[9] To this effect, the Directive provides that Member States shall ensure that judicial and/or administrative procedures are available to all persons that may have been treated in a discriminatory manner.[10] Article 8 further lays down an important aspect concerning the reversal of the burden of proof in such procedures. It dictates that when a person has brought forward facts that lead to the presumption that there has been direct or indirect discrimination, it will be for the respondent to prove that there has been no breach of the principle of equal treatment. The Directive has been transposed into German law with the 'Gesetz zur Umsetzung europäischer Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung' on 17th August 2006.[11] In its report from 2007, the European

[8] *Muhammad v. Spain* app. no. 34085/17 (ECtHR, 18 October 2022), para. 103(2).
[9] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Race Equality Directive) [2000] OJ L180/22, art 1.
[10] ibid art 7.
[11] Bundesgesetzblatt Nr. 39 (17.08.2006) 1897, para. 1.

Parliament remarked that the burden of proof requirement had not been adequately implemented into German law.[12]

The underlying issue in the present case arises from the possibility for identity checks to be carried out by the German Federal Police as codified in §23 of the Federal Police Act (FPA). In this regard, §23(1)(3) FPA provides that the Federal Police is allowed to establish a person's identity within the German border area up to 30 kilometres behind the border in order to either prevent or stop an unlawful entry into German territory or to prevent an offence defined in §12(1)-(4) FPA. These offences relate inter alia to dangers against the security of the border, unlawful crossings of the border and the transfer of illegal or unauthorised objects. A specific suspicion regarding the person concerned is not required.[13]

Basu v. Germany concerned Biblap Basu, a German national with Indian origin, who was travelling on a train from Prague to Dresden with his daughter in July 2012. Right after passing the border to Germany, two police officers carried out an identity check on the applicant.[14] When inquiring about the reason, the police officers stated that it was a random check. One of the police officers later added that cigarettes were frequently smuggled on the train but denied that there had been any specific suspicion regarding Mr Basu.[15]

On 19th July 2013, the applicant brought an action before the Dresden Administrative Court to declare the identity check unlawful, as it could not be justified on the basis of §23(1)(3) FPA. He argued that his right to self-determination in the sphere of information had been infringed because there had been no valid reasons for the identity check. Moreover, he submitted that the check had been discriminatory as out of all the passengers on the train, only he and his daughter, the only persons of colour, had been approached. The government rejected these claims stating that other people had also been checked.[16]

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[12] European Parliament, 'Report on the application of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin' [2007] (2007/2049(INI)) 14.
[13] ECRI Report on Germany (n 4) 105.
[14] *Basu* (n 7) para. 5.
[15] ibid para. 6.
[16] ibid.

On 20th May 2015, the Dresden Administrative Court dismissed the action as inadmissible on the ground that the applicant had no legitimate interest concerning the lawfulness of the identity check after the act had ended. Solely the applicant and neither his daughter, nor the police officers concerned were heard as witnesses in the proceedings.[17] The Saxony Administrative Court denied the applicant's request for leave of appeal based on the same line of reasoning. Additionally, it stated that the identity check constituted only a minor interference with the applicant's right to self-determination in the sphere of information, as no data was being stored. Furthermore, it reasoned that Mr Basu also had no interest with respect to rehabilitation, as the identity check lacked any stigmatising element and had no lasting consequences on him.[18] The applicant subsequently lodged a constitutional complaint before the Federal Constitutional Court for a breach of his right to self-determination in the information sphere, his right to freedom of movement, the right to effective judicial protection, and the prohibition of discrimination.[19] The complaint was rejected on 19th June 2018.[20]

As part of a strategic litigation, the applicant brought the case before the ECtHR on 19th December 2018.[21] He submitted that the identity check had been carried out in a discriminatory manner by the police officers and that the authorities had failed to sufficiently investigate his claim of racial profiling. Thus, he alleged that his right to respect for private life protected under Article 8 in conjunction with the prohibition of discrimination under Article 14 ECHR, as well as the right to an effective remedy stipulated in Article 13 ECHR had been violated.[22]

3. COURT'S FINDINGS

[17] *Basu* (n 7) para. 7.
[18] ibid para. 8.
[19] ibid para. 9.
[20] ibid para. 9.
[21] Johannes Siegel, 'Welchen Reformdruck die Entscheidung Basu v. Deutschland dennoch auslöst' (*Verfassungsblog*, 24 October 2022) <https://verfassungsblog.de/basu-2/> accessed 27 May 2023.
[22] *Basu* (n 7) para. 1.

Concerning the alleged violation of Article 8 in conjunction with Article 14 ECHR, the Court first had to establish whether the identity check carried out by the police had a serious negative effect on the individual's private life in order to reach the necessary threshold of severity required for the applicability of Article 8 ECHR.[23] The Court has emphasised that racial discrimination is 'a particularly egregious kind of discrimination'[24] and will require special vigilance from the authorities.[25] Nevertheless, in the first instance it is the applicant's duty to substantiate their claim that there have been concrete repercussions on their private life and to show the nature and extent of the suffering caused.[26] Thus, the applicability of Article 8 will only be triggered where a person has an arguable claim that they may have been targeted for an identity check based on specific physical or ethnic characteristics. Such a claim may exist where only one person (or persons sharing the same characteristics) were asked to identify themselves and there are no other apparent reasons for the check.[27] Additionally, the Court considered that the public nature of the identity check may have an effect on a person's reputation and self-respect.[28]

In the case of Mr Basu, the ECtHR considered there to be an arguable claim based on the facts that only the applicant and his daughter, the only people of colour, had been checked by the police and that the police officer could not provide an objective reason for the check.[29] Furthermore, the applicant claimed there to be serious negative effects on his private life, as following the identity check he stopped travelling by train for multiple months.[30] Thus, the Court concluded that the threshold of severity was met and consequently, Article 8 in conjunction with Article 14 ECHR was applicable.[31]

[23] *See Denisov v. Ukraine* [GC] app. no. 76639/11 (ECtHR, 25 September 2018), paras. 110-13.
[24] *Basu* (n 7) para. 24.
[25] ibid.
[26] *Denisov* (n 23) para. 114.
[27] *Basu* (n 7) para. 25.
[28] ibid.
[29] ibid para. 27.
[30] ibid para. 26.
[31] ibid para. 27.

Ruling on the merits of the case, the ECtHR held that when a person has managed to establish an arguable claim of having been targeted based on racial characteristics, there will be an implicit positive obligation for the authorities under Article 14 in conjunction with Article 8 ECHR to investigate whether the conduct of the State agent was racially motivated.[32] Such an investigation has to be effective,[33] meaning that the authorities do everything reasonable within their powers to secure evidence and discover the truth and deliver fully reasoned, impartial and objective decisions.[34] Furthermore, the institutions and persons involved in the investigation must be independent of those investigated, both in an institutional and practical sense.[35]

Concerning *Basu*, the ECtHR concluded that the internal investigations carried out by the Dresden Office of the Federal Police had not been independent.[36] Additionally, in all instances, the administrative courts and the constitutional court refused to rule on the merits of the applicant's complaints. Thus, despite the existence of an arguable complaint, the judicial authorities failed to hear the available witnesses and take other evidence into account.[37] Therefore, the Court held that Germany had failed to conduct an effective investigation into the existence of potential discriminatory conduct by State agents to the extent of making it impossible for the Court to rule on whether the applicant had been asked for his identity due to his ethnic characteristics.[38] Hence, the judges held unanimously that there had been a violation of Article 8 in conjunction with Article 14 ECHR.[39]

Concerning a potential violation of Article 13 ECHR, the Court concluded that the complaints raised had already been sufficiently examined in its assessment of Article 8 in conjunction with Article 14 ECHR and thus, it was unnecessary to

[32] *Basu* (n 7) para. 35.
[33] ibid para. 32.
[34] *B.S. v. Spain* app. no. 47159/08 (ECtHR, 24 July 2012), para. 58.
[35] *Burlya and Others* app. no. 3289/10 (ECtHR, 6 November 2018), para. 127.
[36] *Basu* (n 7) para. 36.
[37] ibid para. 37.
[38] ibid para. 38.
[39] ibid para. 39.

consider them again separately.[40] Furthermore, the applicant's claim that his freedom of movement protected under Article 2 of Protocol 4 ECHR had been violated due to the lack of a legal basis for the identity check carried out was dismissed as manifestly ill-founded.[41]

4. Comments – The ECtHR's Approach to Racial Profiling

Parallel to *Basu*, *Muhammad v. Spain*, a second case concerning racial profiling, was handed down by the Third Section of the Court. Mr Muhammad and a friend, both Pakistani nationals, were stopped on a busy street in Barcelona by two police officers and asked to identify themselves. The applicant refused and according to his statement, had subsequently been slapped softly and called a derogatory term by the police officer before being arrested.[42] The applicant submitted that he and his friend had been the only ones stopped by the police due to their different skin colour.[43] Different to *Basu*, the Court decided with a four to three judgement that there had been no breach of Article 8 in conjunction with Article 14 ECHR, both concerning the State's obligation to conduct an effective investigation as well as regarding the existence of racially motivated reasons for the identity check.[44] This poses the question of how two cases, that factually are so similar with regards to the identity check conducted, could lead to such different outcomes. Therefore, both cases will be taken into consideration in order to paint a complete picture of the ECtHR's current approach towards racial profiling.

4.1 The Test of Admissibility

Unsurprisingly, the tests applied in *Basu* and *Muhammad* are nearly identical. First, it is established whether the applicants' claim falls under the ambit of Article 8 in conjunction with Article 14 ECHR, by proving that they have an arguable claim that

[40] *Basu* (n 7) para. 42.
[41] ibid paras. 43-44.
[42] *Muhammad* (n 8) para. 7.
[43] ibid para. 1.
[44] ibid para. 103(2)-(3).

during the identity check they were targeted based on specific physical or ethnical characteristics.[45] It is already at the stage of applicability that the first potential shortcoming of the Strasbourg court's test materialises.

One of the main factors to establish that a person has been targeted is that only that person or persons with the same characteristics had been checked and that there were no other grounds for the check. However, this test seems to contain some gaps. Neither does it establish a real alternative way of proving to have been targeted nor does it clarify whether a situation where, for example, primarily a group of persons sharing a specific characteristic are asked to identify themselves would fall within the arguable claim test. Additionally, the current test makes it very easy for police officers to simply justify an identity check based on a person's behaviour where there are no witnesses to attest the opposite as might have been the case in *Muhammad*.

Moreover, the Court seems to place importance on the public element involved in the identity check and connects it to the existence of sufficiently severe consequences to the applicant's private life.[46] In *Muhammad*, the Court remarked that no neighbours were present at the time the applicant had been identified.[47] The factor that familiar persons witnessed the identity check might be an important one to consider when determining whether a person's reputation has been damaged. Nevertheless, it is questionable whether such a condition is necessary in order to establish the existence of discrimination. The Court itself refers to research conducted by the ECRI, which states that racial discrimination has considerable negative effects, generating feelings of humiliation, stigmatisation, alienation, and injustice in the victim.[48] Hence, it appears that the requirement of a public element is rather superfluous, as the mere act of racial profiling by itself can have severe negative effects on the person's self-respect. Moreover, this part of the test only adds another

[45] *Muhammad* (n 8) para. 44; *Basu* (n 7) para. 25.
[46] *Basu* (n 7) para. 25.
[47] *Muhammad* (n 8) para. 97.
[48] ECRI, Policy Recommendations on combating racism (n 2) Memorandum para. 1(34)(iii); *Basu* (n 7) para. 12.

potential hurdle to be overcome by victims, especially in cases where no other (familiar) persons are present.

4.2 Adequate Legal Framework

Both Judge Pavli and Judge Krenc, in their respective dissenting opinions in *Basu* and *Muhammad*, criticised that the Court had refrained from determining whether the Respondent States had legal frameworks in place, which were capable of effectively preventing and deterring police profiling on prohibited grounds.[49] This test has been applied by the Court on multiple occasions in the past where there was a risk of a systemic human rights violation,[50] and where the State's positive obligations under Article 14 ECHR were at stake.[51]

Arguably, a State that does not put sufficient effort and resources into preventing racial profiling not only fails to sufficiently protect potential victims, but also hinders the victims' claims that they have been subject to misconduct.[52]

It is regrettable that the ECtHR abstained from assessing Germany's legal framework because it would have brought to light essential shortcomings in the effective protection of ethnic minorities. First of all, different to what has been claimed by Minister Seehofer, numerous claims of racial profiling by German police officers exist, as was presented in the 2015 report on Germany by the Council of Europe Commissioner for Human Rights.[53] Second, despite the fact that the Court ruled that the internal investigations conducted by the German police could not be

[49] *Basu* (n 7) Dissenting Opinion by Judge Pavli, para 14; *Muhammad* (n 8) Dissenting Opinion by Judge Krenc, para. 9.
[50] Sien Devriendt and Tess Heirwegh, 'Human Rights Centre submits third party interention in a case concerning ethnic profiling by law enforcement officers' (*Strasbourg Observers*, 2 May 2018) <https://strasbourgobservers.com/2018/05/02/human-rights-centre-submits-third-party-intervention-in-a-case-concerning-ethnic-profiling-by-law-enforcement-officers/> accessed 27 May 2023.
[51] *See Volodina v. Russia* app. no. 41262/17 (ECtHR, 6 November 2018), paras. 78-79.
[52] Hendrik Cremer, "'Racial Profiling" – Meschenrechtswidrige Personenkontrolle nach § 22 Abs. 1 a Bundespolizeigesetz: Empfehlungen and den Gesetzgeber, Gerichte und Polizei' (Deutsches Institut für Menschenrechte study, 2013) < https://www.institut-fuer-menschenrechte.de/publikationen/detail/racial-profiling-menschenrechtswidrige-personenkontrollen-nach-22-abs-1-a-bundespolizeigesetz> accessed 27 May 2023, 29-30.
[53] ECRI Report on Germany (n 5) 104.

considered independent,[54] it did not address the issue that according to recent ECRI reports, Germany is generally lacking independent investigation bodies.[55]

Furthermore, Germany's legal framework has been criticised both on a European and a domestic level.[56] The ECRI criticised that §23 FPA empowers police officers to stop persons in the absence of reasonable suspicion based on objective criteria.[57] Equally, the Court of Justice of the European Union (CJEU) ruled in 2017 that §23(1)(3) FPA lacked a regulatory framework limiting the exercise of powers conferred on the police and thus, authorises identity checks irrespective of a person's behaviour or surrounding circumstances.[58] Also, domestic courts including the Baden-Württemberg Higher Administrative Court, held that §23 FPA was not a sufficient legal basis for an identity check in the aftermath of the CJEU's assessment.[59]

Therefore, Strasbourg had an opportunity in *Basu* to address the lack of regulatory provisions and restraints for the German police when conducting identity checks under §23(1)(3) FPA. By refraining from doing so, it did not acknowledge the inherent link between the lack of an effective system and the room to manoeuvre that is offered to police officers acting in an unlawful, discriminatory manner.

4.3 Existence of Discriminatory Grounds

In *Basu*, the Court stopped its assessment after the procedural stage. It concluded that due to the lack of investigation carried out by the national authorities, it would be unable to decide whether the State agent's behaviour had indeed been racially-motivated.[60] However, in *Muhammad* the Court continued its examination, ultimately

[54] *Basu* (n 7) para. 36.
[55] ECRI Report on Germany (n 4) 107; *See* German Federal Anti-Discrimination Agency, 'ECRI-Report: Germany needs to make greater efforts against racism' (17 March 2020) <https://www.antidiskriminierungsstelle.de/SharedDocs/pressemitteilungen/EN/2020/20200317_ECRI_Bericht.html> accessed 27 May 2023.
[56] Cengiz Barskanmaz, 'Der Fall Basu v. Germany vor dem Europäischen Gerichtshof für Menschenrechte' (*Verfassungsblog*, 21 October 2022) <https://verfassungsblog.de/ein-sieg-gegen-racial-profiling/> accessed 27 May 2023.
[57] ibid 105.
[58] CJEU, C-9/16 *Criminal Proceedings Against A* [2017] EU:C:2017:483, paras. 55, 57-58.
[59] VGH Baden-Württemberg, Urteil vom 13.02.2018 – 1 S 1469/17, para. 26.
[60] *Basu* (n 7) para. 38.

leading to the finding that there had been no discriminatory grounds for the identity check and arrest of the applicant.[61]

The outcome of this decision is based on one important step in the Court's assessment, or rather the omission thereof. It has been general practice in cases of indirect racial discrimination that once an applicant has brought forward proof of having been subjected to discrimination, the burden of proof will be reversed, and it is for the State to refute these claims or show that the treatment was justified.[62]

However, there was no reversal of the burden of proof in either *Basu*, or *Muhammad* to the benefit of the applicant. This is problematic for two reasons. First, it appears as if the threshold for the establishment of direct discrimination might be higher than that applicable to indirect discrimination.[63] Second, this approach makes it virtually impossible for applicants to prove they have been victims of racial or ethnic profiling. Neither the lack of evidence discovered through an ineffective investigation, nor that it is the word of the applicant against that of police officers should lead to a ruling that precludes a finding of discriminatory conduct *prima facie*.

Moreover, it remains unclear why the Court stated that the studies and statistics which had been submitted by Mr Muhammad in order to substantiate the existence of racism within the Spanish police force[64] could not be taken as a *prima facie* indication of a racial motivation.[65] It is reasonable that such evidence cannot be the sole factor for proving the existence of discriminatory grounds in an individual case. Nevertheless, where multiple studies of independent third parties brought forward by the applicant seem to indicate a trend of stereotyping and discriminatory conduct within a State's police force,[66] there arises at least a certain presumption that the applicant may have been targeted due to this systemic issue. Considering that Strasbourg has accepted statistics to establish indirect discrimination under Article 14

[61] *Muhammad* (n 8) para. 103.
[62] *D.H. and Others v. the Czech Republic* app. no. 57325/00 (ECtHR, 13 November 2007) para. 177.
[63] *Basu* (n 7) Dissenting Opinion by Judge Pavli, para. 20(iv).
[64] *Muhammad* (n 8) para. 19.
[65] ibid para. 100.
[66] ibid para. 19.

ECHR in the past,[67] the same approach should also apply to cases of direct discrimination.

5. CONCLUSION

With *Basu v. Germany* the ECtHR has addressed the issue of racial profiling for the first time. Paradoxically, despite the fact that the Court ruled unanimously that there had been a violation of Article 8 in conjunction with Article 14 ECHR, this is less of a win for victims of racial or ethnic profiling than it may seem at first glance.

First, as has been illustrated, the admissibility test applied by the Court to a claim concerning racial profiling has certain deficits, which concern in particular the arguable claim that will have to be shown by the applicant. The requirement of showing that only the applicant or persons sharing the same physical or ethnic characteristics had been targeted appears to be overly restrictive in reality. Moreover, the Court's focus on a public element in order to reach the minimum threshold of humiliation appears to further complicate the matter.

Second, the lack of assessment of an adequate legal framework by the Court needs to be criticised. In doing so, the Court passed up the opportunity to make the establishment of an effective system preventing and deferring State agents from acting in a discriminatory manner a prerequisite to the State's defence of no discriminatory conduct having taken place.

Lastly, it needs to be emphasised that the Court found the violation of Article 8 in conjunction with Article 14 ECHR in the case of Mr Basu based on procedural grounds, but did not rule on the question whether the police officer's behaviour has actually been a case of racial profiling due to the alleged lack of evidence.[68] However, even where the Court proceeds to the next step in the assessment, it appears that based on the non-reversal of the burden of proof in favour of the victim, it is almost impossible for applicants to prove their claims.

[67] *D.H. and Others v. the Czech Republic* (n 62), para. 180.
[68] *Basu* (n 7) para. 38.

Basu has to be considered as a step in the right direction in the sense that the ECtHR has, for the first time, turned their attention to the specific problem of racial profiling. Nevertheless, the Court's ultimate approach concerning the assessment of actual racial profiling leaves room for improvement. As has been illustrated, what is missing first and foremost is on the one hand, the requirement on States to have an effective legal and regulatory system in place capable of preventing racial and ethnical profiling, and on the other hand, the reversal of the burden of proof on the State.

Finally, *Basu* reveals that Minister Seehofer's claims concerning the unnecessity of a study on discriminatory conduct within the German police force must be rejected. On the contrary, such a study is not only valuable but even necessary in order to ensure an effective protection of ethnic minorities in the future. Despite the fact that individual *Länder* have conducted investigations, an overarching study that would be able to provide a holistic overview of the beliefs carried within the police force and related discriminatory conduct has still not been carried out.[69] One can only hope that the judgement in *Basu* may lead to a renewed interest and demand by the German public into this highly problematic issue.

[69] Mediendienst Integration, 'Recherche: Rassismus und Antisemitismus bei der Polizei: Was tun Bund und Länder?' (4 August 2022) <https://ec.europa.eu/migrant-integration/library-document/recherche-rassismus-und-antisemitismus-bei-der-polizei-was-tun-bund-und-laender_de> accessed 27 May 2023.

How has the international tax system of Estonia developed between 1993 and 2023?

Jasen Pomakov[1]

A three-stage analysis of the Estonian international tax system: independence from the USSR, tax reform in 2000 en route to EU membership, and OECD membership.

Normative lessons from a non-G20 jurisdiction.

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TABLE OF ABBREVIATIONS

CFC	Controlled Foreign Company
CIT	Corporate Income Tax
CJEU	Court of Justice of the European Union
DTT	Double Tax Treaty
EBITDA	Earnings Before Interest, Taxes, Depreciation and Amortisation
EEK	Estonian Kroon
EU	European Union
FDI	Foreign Direct Investment
GAAR	General-Anti-Abuse Rule
GDP	Gross Domestic Product
HDI	Human Development Index
ITR	International Tax Regime
LCF	Loss Carried Forward
MNE	Multinational Enterprise
MTC	Model Tax Convention
OECD	Organisation for Economic Cooperation and Development
NATO	North Atlantic Treaty Organisation
PE	Permanent Establishment
PSD	Parent-Subsidiary Directive
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
USSR	Union of Soviet Socialist Republics
VAT	Value Added Tax

ABSTRACT

Background

This dissertation will examine the development of the Estonian international tax system in three stages. Estonia's regained independence in 1993 marked the first major stage for the development of its international tax system. The second stage is the tax reform of 2000 which presented concerns with future EU integration in 2004. The last stage of the Estonian international tax system, which will be examined, is when the country joined the OECD in 2010.

Purpose

It will be argued that the development of the Estonian international tax system has been a success in terms of integrating Estonia into the EU and the OECD. International tax policy during the three stages aimed to move Estonia away from its Soviet past and towards a European future. The dissertation will attempt to demonstrate that the Estonian approach to international taxation is an exemplar for the countries in Central and Eastern Europe which had to transition from Communism to a democracy and free market.

Methodology

To demonstrate how Estonia was integrated into the international tax regime following its regained independence, the relevant legislation for each of the three developmental stages will be analysed.

Conclusion

Estonia is a small country that began its journey towards international taxation from a very disadvantaged position. As a former Soviet Socialist Republic, its legislative actions after its independence in 1993 have been tantamount to its development. It introduced simple tax administration to gain international popularity whilst protecting its tax base by implementing provisions from the UN MTC in its DTTs. An infrequent corporate tax structure was implemented, which only triggers a charge when profits are distributed. During its OECD membership, the country has enhanced its integration with the EU and the OECD by implementing the BEPS Action Plan. However, it is reluctant to accept the recent Pillar 2 Proposal. Nonetheless, levels of regulation have failed to tackle the problem of tax evasion and the shadow economy.

1. INTRODUCTION

The history of the Estonian international tax system goes back to the country's independence from the Union of Soviet Socialist Republics (USSR) in 1991.[2] The dissolution of the USSR meant that the Russian Federation acquired all the international tax treaties which the USSR had entered into with other countries.[3] Therefore, Estonia, as a sovereign state, had to devise its own tax treaty network. The first international tax treaties were with its Baltic neighbours – Latvia and Lithuania – [4] they were negotiated in 1992 but became effective in 1994.[5] The subsequent treaties were executed between the Baltic states and Finland, Norway, Iceland, Denmark, and Sweden, and became effective in 1994.[6]

The next stage in the development of Estonia's international tax regime began when the country embarked upon formal negotiations to join the European Union (EU) in March 1998.[7] This was followed by a newly enacted Income Tax Act in 2000, which governed personal and corporate income tax.[8] It was an innovative piece of legislation and deviated from standard tax systems because corporate profits are not taxed when earned – a tax charge is only triggered when these profits are distributed, most commonly in the form of dividends.[9] This tax regime is now known as the Estonian CIT system or the Estonian CIT model.[10] Academics such as Professor of

[2] Romuald J Misiunas and others, 'Estonia' (*Encyclopedia Britannica*, 11 October 2021) <https://www.britannica.com/place/Estonia> accessed 9 February 2022.
[3] Irina Dmitrieva, 'Tax Treaty Disputes in Russia' in Eduardo Baistrocchi (ed), *A Global Analysis of Tax Treaty Disputes*, vol. 2 (Cambridge University Press 2017) p. 905.
[4] Ivo Vanasaun, 'Tax in History: Transition from Soviet Union's Tax Regime to Estonia's Own Tax System', (2021) 49 Intertax, p. 847. <https://kluwerlawonline.com/journalarticle/Intertax/49.10/TAXI2021081> accessed 9 February 2022.
[5] Republic of Estonia Ministry of Finance, 'Double Taxation Agreements' (*Republic of Estonia Ministry of Finance*, 8 June 2022) < https://www.fin.ee/en/double-taxation-agreements> accessed 19 May 2023.
[6] ibid.
[7] Republic of Estonia Ministry of Foreign Affairs, 'History and Principles of the Negotiations' (*Republic of Estonia Ministry of Foreign Affairs*, 1 October 2009) <https://vm.ee/en/history-and-principles-negotiations> accessed 9 February 2022.
[8] Lasse Lehis and others 'Compatibility of the Estonian Corporate Income Tax System with the Community Law' (2008) 36 Intertax, p. 389 <https://kluwerlawonline.com/journalarticle/Intertax/36.8/TAXI2008054> accessed 9 February 2022.
[9] ibid.
[10] Vanasaun (n 4) p. 847.

Tax Law at the University of Tartu, Estonia Lasse Lehis, government specialist Helen Pahapill, the Tax Treaty Negotiator at the Ministry of Finance of Estonia, and practitioners like Erki Uustalu, Senior Tax Manager at PriceWaterhouse Coopers, support the claim that this tax regime was successful in attracting businesses to Estonia.[11] For example, Finnish biomass giant Stora Enso Oyj incorporated 33 subsidiaries in Estonia after 2000, which cover most of the conglomerate's operations – from packaging to wood harvesting.[12] This government initiative was taken by then Prime Minister Mart Laar, who led a centre-right government in pursuit of economic liberalisation through minimal state intervention.[13] However, this measure was subject to fierce judicial scrutiny as there were doubts as to whether the system was compatible with EU law. The jurisprudence of the European Court of Justice will be discussed to demonstrate compatibility.

Finally, the country's membership in the Organisation for Economic Co-operation and Development (OECD) will be discussed. The most notable legislative changes are in relation to Estonia's implementation of the BEPS Action Plan. Domestic and EU-wide measures will be discussed to provide an understanding of the way the country tackles base erosion and profit shifting. Subsequently, a case study on the shadow economy in Estonia will be provided to examine why tax evasion is a pervasive issue. This will be followed by a normative discussion as to how Estonia may rectify issues of tax administration. Finally, the dissertation will offer an outlook towards the future of Estonia's international tax regime, most notably focusing on its reaction to the OECD Pillar 1 and 2 Proposals.

1.1. Economic and Institutional Contexts

[11] Lehis and others (n 8) p. 390.

[12] United States Securities and Exchange Commission, 'Subisdiaries of Stora Enso Oyj' <https://www.sec.gov/Archives/edgar/data/1120557/000119312504069332/dex81.htm> accessed 28 May 2023.

[13] Mikko Lagerspetz and Henri Vogt, 'Estonia' in Sten Berglund, Tomas Hellén, Frank H Aarebrot (eds) *The Handbook of Political Change in Eastern Europe* (1st edn, Cheltenham 1998) p. 75.

Estonia has a population of 1.329 million, ranking in 155th place globally.[14] It has a GDP per capita of USD 37,659.[15] Its economy ranks in 100th place by GDP of USD 36,039 million[16]. This GDP is perceptually derived from the following sectors: services (71%), industry (25%), and agriculture (4%)".[17] The country has experienced steady GDP growth from its independence until now (approximately 4% per year[18]) except for the Global Financial Crisis 2007-08, during which Estonia experienced a circa 14% decline in GDP.[19]

Estonia is a very small country, both in terms of population and area (45,339 km^2 [20]) which means that it is difficult to produce all goods in demand locally. For this reason, the country relies on imports – EUR 19,969,388,223[21] worth of goods were imported in 2021 against EUR 18,219,566,661[22] worth of exported goods. Therefore, the balance of trade in goods was EUR -1,749,821,562 for that year. In the last 10 years, the trade balance of goods was always in a similar net negative position.[23] Estonia's main import partners are Russia (12% of all imports), Germany

[14] OECD, 'Population (indicator)' (*OECD*, 2022) <https://data.oecd.org/pop/population.htm> accessed 9 February 2022.
[15] OECD, 'Gross domestic product (GDP) (indicator)' (*OECD*, 2022) <https://data.oecd.org/gdp/gross-domestic-product-gdp.htm> accessed 9 February 2022.
[16] International Monetary Fund, 'Report for Selected Countries and Subjects: October 2021' (*International Monetary Fund*, 31 October 2021) <https://bit.ly/3v5TrSx> accessed 9 February 2022.
[17] Maris Lauri, 'Structure of the Economy' (*Estonica*, 27 September 2012) <http://www.estonica.org/en/Economy/General_overview_of_Estonian_economy/Structure_of_the_economy> accessed 10 February 2022.
[18] World Bank, 'GDP growth (annual %) – Estonia' (*World Bank*, 2020) <https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?locations=EE> accessed 16 February 2022.
[19] ibid.
[20] Republic of Estonia, 'Information about Estonia' (*Republic of Estonia*, 11 October 2021) <https://www.eesti.ee/en/republic-of-estonia/republic-of-estonia/information-about-estonia> accessed 15 February 2022.
[21] Statistics Estonia, 'Imports of Goods' (*Statistics Estonia*, 1 February 2022) <https://www.stat.ee/en/find-statistics/statistics-theme/economy/foreign-trade/imports-goods> accessed 15 February 2022.
[22] Statistics Estonia, 'Exports of Goods' (*Statistics Estonia*, 1 February 2022) <https://www.stat.ee/en/find-statistics/statistics-theme/economy/foreign-trade/exports-goods> accessed 15 February 2022.
[23] Statista, 'Estonia: Trade balance of goods from 2010 to 2020' (*Statista*, 1 October 2021) <https://www.statista.com/statistics/377165/trade-balance-of-estonia/> accessed 15 February 2022.

(10%), Finland (9%), Lithuania (7%), Latvia (7%), Sweden (6%), Poland (6%) and China (6%).[24]

On the other hand, Estonia's trade balance of services is at a net positive position – EUR 5,564,700,000[25] worth of exports in services were recorded in 2021 against EUR 5,094,200,000[26] of imported services, resulting in a balance of trade in services of EUR 470,500,000. In the last 10 years, the trade balance of services was always in a similar net positive position.[27] These statistics lead to a service-oriented economy categorisation, and the trade in services accounts for 41.8% of the country's GDP.[28] The country's main export partners are Finland (15% of all exports), Sweden (10%), Latvia (8.8%), Russia (8.5%), United States (7.9%), Germany (6.2%), and Lithuania (5.6%).[29]

Estonian FDI inflow and outflow have grown between 1998 and 2020.[30] This is represented in the table below (*Figure 1*). The Bank of Estonia does not possess accurate FDI data for the years following the country's independence due to several challenges related to controlling inflation and adopting a new currency. These issues will be examined in the first stage of this dissertation in relation to the first steps Estonia took following its independence to create a viable international tax regime. An interesting pattern is that Estonia's largest FDI outflow has been with its Baltic

[24] Statista, 'Estonia: Main import partners in 2019' (*Statista*, 1 October 2022) <https://www.statista.com/statistics/377064/most-important-import-partners-of-estonia/> accessed 15 February 2022.

[25] Statistics Estonia, 'Exports of Services' (*Statistics Estonia*, 31 December 2021) <https://www.stat.ee/en/find-statistics/statistics-theme/economy/foreign-trade/exports-services> accessed 15 February 2022.

[26] Statistics Estonia, 'Imports of Services' (*Statistics Estonia*, 31 December 2021) <https://www.stat.ee/en/find-statistics/statistics-theme/economy/foreign-trade/imports-services> accessed 15 February 2022.

[27] Statista, 'Services trade balance in Estonia from 1993 to 2020' (*Statista*, 1 September 2021) <https://www.statista.com/statistics/1264465/estonia-services-trade-balance/> accessed 15 February 2022.

[28] World Bank, 'Trade in services (% of GDP) – Estonia' (*World Bank*, 2020) <https://data.worldbank.org/indicator/BG.GSR.NFSV.GD.ZS?locations=EE> accessed 15 February 2022.

[29] Trading Economics, 'Estonia Exports by Country' (*Trading Economics*, 2021) <https://tradingeconomics.com/estonia/exports-by-country> accessed 15 February 2022.

[30] Bank of Estonia, 'Direct investment position in Estonia and abroad by country (EUR million)' (*Bank of Estonia*, 10 March 2022) <https://statistika.eestipank.ee/#/en/p/146/r/2293/2122> accessed 19 April 2022.

neighbours (Latvia – 52.76% (1999), 28.53% (2005), 19.42% (2011), 23.56% (2020) and Lithuania – 23.00% (1998), 32.30% (2005), 21.98% (2011), 27.77% (2020).[31] This data is represented below numerically (*Figure 2*) and graphically (*Figure 3*) with pinpoints to the most important years for Estonia's international development. However, this is not reciprocal: Estonia's largest inflows are from Finland (26.97%) (1998), 23.29% (2005), 24.00% (2011), 20.97% (2020)) and Sweden (32.45% (1998), 46.86% (2005), 28.86% (2011), 20.76% (2020)).[32] This data is represented below numerically (*Figure 3*) and graphically (*Figure 5*) with pinpoints to the most important years for Estonia's international development.

Furthermore, the data shows how FDI outflow towards Russia and the CIS decreases as Estonia becomes more closely aligned with Western economies (i.e. joining the EU and the OECD). Estonia also invests more in Cyprus than vice versa, and recently more investments are coming from low-tax jurisdictions like Luxembourg and the Netherlands and other "offshore" jurisdictions.[33]

Figure 1: Table Showing Estonia's FDI Inflow and Outflow between 1998 and 2020 (in EUR million):[34]

Year	FDI inflow	FDI outflow	GDP
1998	1561.3	170.0	5102.7
1999	2454.0	279.7	5406.5
2000	2843.0	278.5	6169.0
2001	3573.0	499.5	6984.9
2002	4034.6	645.4	7822.3
2003	5553.2	815.6	8746.2
2004	7374.3	1040.2	9779.8

[31] Bank of Estonia (n 30).
[32] ibid.
[33] ibid
[34] ibid.

2005	9487.1	1603.8	11332.1
2006	9202.2	2626.8	13551.3
2007	10645.0	4040.6	16375.1
2008	11100.7	4631.3	16608.9
2009	10995.8	4346.8	14147.5
2010	11638.3	4149.6	14734.9
2011	12635.9	3713.7	16672.7
2012	14352.3	4596.5	17914.7
2013	15964.2	4950.5	18910.4
2014	17215.0	5120.3	20036.0
2015	17375.8	5546.7	20621.7
2016	18650.0	5975.3	21738.8
2017	20052.0	6514.0	23799.7
2018	21878.0	6951.4	25772.8
2019	25064.5	9045.6	27695.4
2020	28122.9	9011.6	26821.2

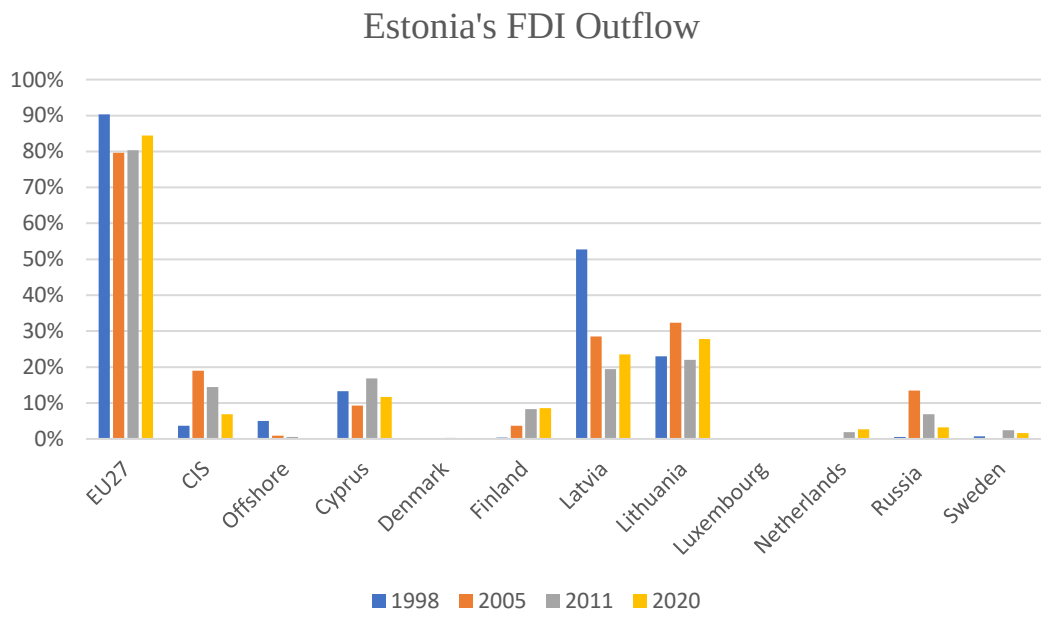
Figure 2: Table Showing Estonia's FDI Outflow by Countries (in EUR million):[35]

FDI outflow	**1998**	**2005**	**2011**	**2020**
EU27	90.29	79.62	80.36	84.48
CIS	3.71	19.03	14.47	6.88

[35] Bank of Estonia (n 30).

Offshore	5.00	0.91	0.57	0.17
Cyprus	13.29	9.27	16.89	11.70
Denmark	0.00	0.07	0.32	0.10
Finland	0.35	3.64	8.28	8.61
Latvia	52.76	28.53	19.42	23.56
Lithuania	23.00	32.30	21.98	27.77
Luxembourg	0.00	0.00	0.11	0.02
Netherlands	0.00	0.00	1.87	2.65
Russia	0.53	13.5	6.86	3.24
Sweden	0.76	0.14	2.4	1.66

Figure 3: Graph Showing Estonia FDI Outflow by Countries (%):[36]



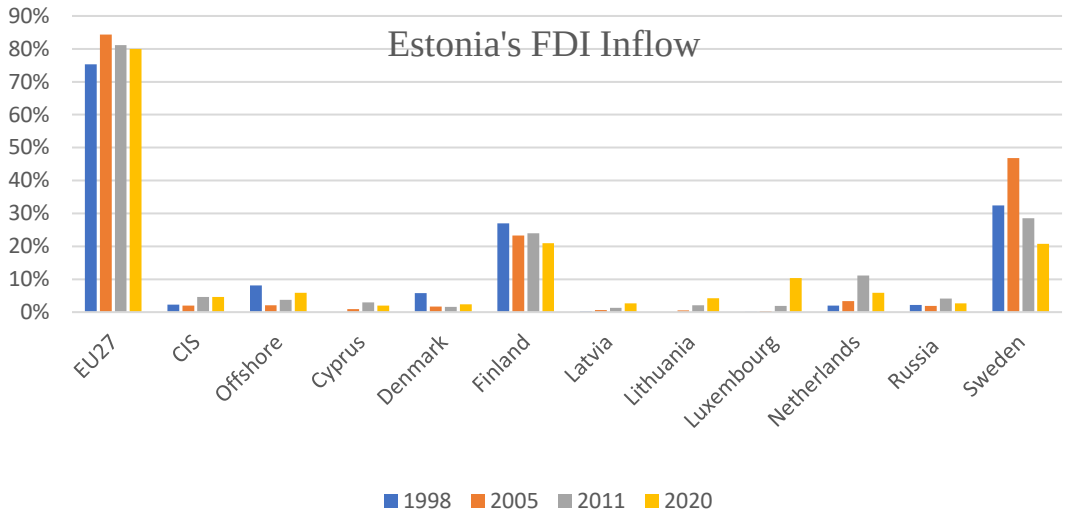
[36] Bank of Estonia (n 30).

Figure 4: Table Showing Estonia's FDI Inflow by Countries (in EUR million):[37]

FDI Inflow	1998	2005	2011	2020
EU27	75.31	84.39	81.1	80.00
CIS	2.23	1.97	4.64	4.57
Offshore	8.08	2.1	3.69	5.90
Cyprus	0.00	0.89	2.94	1.99
Denmark	5.80	1.72	1.56	2.34
Finland	26.97	23.29	24.00	20.97
Latvia	0.27	0.66	1.30	2.65
Lithuania	0.00	0.55	2.12	4.20
Luxembourg	0.06	0.32	1.87	10.31
Netherlands	1.95	3.33	11.13	5.92
Russia	2.14	1.88	4.14	2.62
Sweden	32.45	46.86	28.51	20.76

[37] Bank of Estonia (n 30).

Figure 5: Graph Showing Estonia FDI Inflow by Countries (%):[38]



1.2. History of Estonian Tax Treaty Law

As of 8 June 2022, Estonia had double tax treaties with 62 countries which are in force.[39] They are shown in *Figure 6* below. Additionally, treaties with Russia and Morocco were ratified by Estonia and treaties with Bosnia and Herzegovina, Oman, South Africa, Tajikistan, Pakistan, and Qatar are under negotiation.[40]

Figure 6: Table Showing Estonia's Double Tax Treaties (Year Signed/Effective from):[41]

Western Europe *(20)*	Austria (2001/2003)	Greece (2006/2009)	Norway (1993/1994)	**Middle East** *(3)*	Bahrain (2012/2014)	UAE (2011/2011 *retroactively*)

[38] Bank of Estonia (n 30).
[39] Republic of Estonia Ministry of Finance (n 5).
[40] ibid.
[41] ibid.

	Belgium (1999/2004)	Iceland (1994/1996)	Portugal (2003/2005)		Israel (2009/2010)	
	Cyprus (2011/2014)	Ireland (1997/1999)	Spain (2003/2005)			
	Denmark (1993/1994)	Italy (1997/2001)	Sweden (1993/1994)	**British Crown Dependencies** *(3)*	Guernsey (2019/2021)	Jersey (2010/2012)
	Finland (1993/1994)	Luxembourg (2006/2008; 2014/2016)	Switzerland (2002/2005); 2014/2016)		Isle of Man (2009/2010)	
	France (1997/1996 *retroactively*)	Malta (2001/2004)	United Kingdom (1994/1995)			
	Germany (1996/1994 *retroactively*; 2018/2022)	Netherlands (1997/1995 *retroactively*; 2005/2005;		**Africa** *(1)*	Mauritius (2021/2022)	

		2008/2010)				
Western Other *(3)*	Canada (1995/1996)	Turkey 2003/2006)	United States (1998/2000)	**Latin America** *(1)*	Mexico (2012/2014)	
Former USSR *(12)*	Armenia (2001/2001)	Kazakhstan (1999/2001)	Moldova (1998/1999)	**Asia** *(8)*	China (1998/2000; 2014/2016)	Singapore (2006/2008; 2011/2012)
	Azerbaijan (2007/2009)	Kyrgyzstan (2017/2019)	Turkmenistan (2011/2014)		Hong Kong (2019/2020)	South Korea (2009/2011)
	Belarus (1997/1999)	Latvia (1993/1994; 2002/2002 *retroactively*	Ukraine (1996/1997)		India (2011/2013)	Thailand (2012/2014)
	Georgia (2006/2008;	Lithuania (1993/1994; 2004/2006	Uzbekistan (2012/2014)		Japan (2017/2019)	Vietnam (2015/2017)

	2010/2012)	(*retroactively*)				
Eastern Europe *(11)*	Albania (2010/2018)	Hungary (2002/2005)	Serbia (2009/2011)	***Under negotiation*** *(8)*	Bosnia and Herzegovina (*2010 initiated*)	Russia (*ratified only by Estonia in 2004*)
	Bulgaria (2008/2009)	North Macedonia (2008/2010)	Slovakia (2003/2007)		Morocco (*ratified only by Estonia in 2014*)	Qatar (*2019 initiated*)
	Croatia (2002/2005)	Poland (1994/1995)	Slovenia (2005/2007)		Pakistan (*2016 initiated*)	South Africa (*1999 initiated*)
	Czech Republic (1994/1996)	Romania (2003/2006)			Oman (*2019 initiated*)	Tajikistan (2015 *initiated*)

2. Stage 1: Economic Liberalisation after 1993

2.1. Historical Context

The collapse of the Soviet Union meant that the international tax treaties which have previously operated in now-independent Estonia were inherited by the Russian

Federation.[42] Consequently, the Estonian government had to devise its own tax policy. This was very challenging for the country as it had numerous issues occupying the political, economic, and legal space, such as inflation, political instability, and constitutional reform.[43]

Firstly, a few clarificatory notes on the historical chronology of events will be mentioned to understand the tax policies in that period. Estonia was officially recognised as the Republic of Estonia by the Soviet Union on 6 September 1991[44] and joined the United Nations on 17 September 1991 as an internationally recognised independent and sovereign state[45]. Furthermore, its constitution was adopted on 28 June 1992 following a referendum which established Estonia's national currency, the kroon (EEK).[46] Legal commentators like Ivo Vanasaun have pointed out that tax reforms during the period 1991-93 were of a temporary nature.[47] Their role was to abolish Soviet-style taxes and sustain the tax regime until major tax reforms took place in 1993. It was not expected for these measures to last due to the rapidly changing regulatory environment.[48] This is inherent to all regime changes, especially when former Soviet Republics regained independence and were on a path towards self-determination.[49] However, these regulations are obscure and have no value for an analysis of Estonia's overall international tax regime. Therefore, they will not be analysed in this dissertation. Instead, the analysis will proceed from 1993 onwards, when the most substantive and long-lasting tax reforms took place.

In 1992, the President of the Republic of Estonia was Lennart Meri, who stated that the country had two avenues for development – work towards European

[42] Helen Pahapill, 'Estonia's Tax Treaty Policy' in Michael Lang and others (eds), *European Union: Tax Treaties of the Central and Eastern European Countries* (Linde 2008) p. 62.
[43] Vanasaun (n 4) p. 844.
[44] Lagerspetz and Vogt (n 13) p. 63.
[45] Republic of Estonia Ministry of Foreign Affairs, 'Estonia in the United Nations' (*Republic of Estonia Ministry of Foreign Affairs*, 3 February 2022 <https://vm.ee/en/activities-objectives/estonia-united-nations#:~:text=Estonia%20became%20a%20member%20of%20the%20United%20Nations%20on%2017%20September%201991> accessed 10 March 2022.
[46] Constitution of the Republic of Estonia 1992, Preamble.
[47] Vanasaun (n 4) p. 845.
[48] ibid p. 846.
[49] ibid.

integration or become a Russian "oblast".[50] Although Estonia is considered a developed country and an advanced economy by the International Monetary Fund from a present-day perspective, it was very far from this categorisation when it began to develop in 1993. Bauc notes that inflation was at a rate of 51% in 1992[51] and production capacity was reduced by up to 39%.[52] Additionally, average salaries fell by around 50%, and the newly emerging private banking sector saw the collapse of many banks.[53] As a result of the challenging economic atmosphere following the collapse of the Soviet Union, Estonia looked towards Western Europe and the United States on how to continue its development under the leadership of prime minister Mart Laar.[54]

This sentiment also spilled over into the way the country sought to develop a functional tax regime. This was a difficult task because it did not have previous exposure to negotiating and administrating an international tax regime. As mentioned previously, this was an area of international policy previously under the centralised control of the USSR. From a practical standpoint, this meant that Estonia did not have experts in negotiating international tax treaties with foreign states. Additionally, negotiating DTTs is undoubtedly a costly endeavour which was a further impediment for developing a DTT network. Ms Helen Pahapill, Deputy Secretary General for Financial and Tax Policy at the Estonian Ministry of Finance, has highlighted that these problems were conveniently addressed when the OECD Tax Treaty Training Centre opened in Copenhagen in 1992.[55] According to her expert opinion, this was crucial for introducing Estonian delegates to the foundational principles of international taxation and treaty negotiation, all in a comparatively short time.[56]

[50] Lagerspetz and Vogt (n 13) p. 77.
[51] Jarosław Bauc, 'Estonian Way to Liberal Economic System' (1995) Working Paper CASE Center for Social & Economic Research, p. 4 <https://www.files.ethz.ch/isn/140213/38.pdf> accessed 13 April 2022.
[52] ibid p. 3.
[53] David Storobin, 'Estonian Economic Miracle: A Model For Developing Countries' (*Global Politician*, 16 April 2005) <https://web.archive.org/web/20110628230137/http://www.globalpolitician.com/2614-baltic-eu-expansion-estonia> accessed 13 April 2022.
[54] Bauc (n 51) p. 11.
[55] Pahapill (n 42) p. 55.
[56] Pahapill (n 42) p. 55.

Additionally, Estonia relied on Harvard University's International Tax Programme, which inspired the creation of The Basic World Tax Code[57] by Donald C Lubick and Ward M Hussey.[58]

2.2. Initial Tax Treaty Considerations

Firstly, a preliminary analysis of the reason Estonia sought to establish a tax treaty network will be offered. As Dagan observes, tax treaties are conventionally assumed to be "the indispensable mechanism for alleviating double taxation".[59] There is an assumption that a double tax treaty must exist to resolve instances of double taxation, and its absence is seen as unusual and a sign that countries are not in cooperative relations.[60] To continue the analysis, two key definitions for the international tax regime will be offered: "residence" and "source" country. The OECD defines a residence country under Art. 4 of the OECD MTC as the country in which a person who, according to the laws of that country, resides in it and incurs tax liability by reason of their residence.[61] On the other hand, the source country is defined by the OECD as the country in which income is taxed because it arises within that country's jurisdiction.[62]

Dagan advocates that double taxation can be avoided without two countries contracting under a double tax treaty (DTT).[63] She examines how the national interests of residence and source countries match up, resulting in a coherent international tax regime.[64] However, the national interests of residence countries are not relevant for the purposes of this dissertation. It suffices to state that some countries may prefer to

[57] Ward M Hussay and Donald C Lubick, *Basic World Tax Code* (International Tax Program at Harvard University 1996) <http://www.taxhistory.org/www/bwtc.nsf/PDFs/basica.pdf/$file/basica.pdf> accessed 13 April 2022.
[58] Vanasaun (n 4) p. 846.
[59] Tsilly Dagan, 'The Tax Treaties Myth' (2000) 32 *New York University Journal of International Law and Politics*, p. 939.
[60] Dagan (n 59) p. 941.
[61] Organisation for Economic Co-operation and Development Model Tax Convention on Income and on Capital (Condensed Version 2017) (OECD MTC (Condensed Version 2017)) Art. 4.
[62] OECD, 'Glossary of Tax Terms' (*OECD*) <https://www.oecd.org/ctp/glossaryoftaxterms.htm> accessed 13 April 2022.
[63] Dagan (n 59) p. 940.
[64] ibid p. 947.

exempt residents' foreign income, some to offer credit for taxes paid on such income, and others to deduct taxes already incurred in a different jurisdiction.[65] However, her analysis operates under the assumption that host countries are small, developing, and have no power to influence global markets.[66] Critics of this assumption may correctly argue that a host country may be any country whatsoever, not merely one which fits this definition. This criticism will be conceded in the dissertation, but it will be noted that Estonia, in its 1990s period of economic development, fits the limitation of Dagan's definition. As Pahapill notes, Estonia was eager to receive FDI for the purposes of economic development.[67] Furthermore, it was described in the "**1.1. Economic and Institutional Contexts**" section that the country had a small population and economic parameters which could not influence global landscapes.

Therefore, Dagan's analysis of host countries will be offered here. As she describes, for a country of this calibre to compete in international capital/equity markets and to bring FDI, it should not tax foreign investors.[68] She offers four possible unilateral tax policies which host countries in that position may adopt, depending on the tax policies of the residence countries of foreign investors.[69] If a residence country operates an exemption tax model with respect to foreign investment, a host country would be creating a disincentive for international investors to invest in its jurisdiction if it imposes taxes.[70] If, on the other hand, residence countries offer to deduct foreign taxes, host countries should not tax because the deductions offered would "not fully offset the amount of foreign taxes paid", and so host taxation would drive investors away due to the additional burden.[71] Lastly, if residence countries offer credits, a host country may gain some tax revenue from investments assuming it imposes similar taxes with respect to the residence country.[72] Therefore, it becomes apparent how

[65] Dagan (n 59) p. 956.
[66] ibid pp. 952-53.
[67] Pahapill (n 42) p. 63.
[68] Dagan (n 59) p. 952.
[69] ibid pp. 955-56.
[70] ibid p. 954.
[71] ibid p. 955.
[72] ibid p. 954.

foreign investments should not be subject to host taxes unless there is a corresponding credit in the residence country.[73]

On the other hand, Dagan notes that DTTs, most commonly based on the OECD MTC, disadvantage host countries which are typically developing countries, due to the FDI they receive when seeking to develop.[74] She gives examples of instances where former colonies entered into DTTs with European Colonial powers.[75] One such example is described by Picciotto between Ghana and the United Kingdom, where source taxation was extremely limited, so Ghana could not raise finances through international taxation effectively.[76] In the modern context, Dagan illustrates how host countries usually do not exercise tax jurisdiction over income, which does not arise from a permanent establishment under OECD MTC Art. 7.[77] Additionally, she describes how passive income (interest or dividend income) is taxed at low rates (0% - 15%) by host countries in the modern international tax regime.[78] Therefore, she describes this phenomenon as a "revenue shift" where developing countries do not exercise tax jurisdiction to the benefit of developed countries.[79] Moreover, these developing countries will fail to receive FDI because "the total level of taxation is not reduced".[80] This occurs because the credit method means tax jurisdiction is split between the host (or source country) and the residence country by virtue of OECD MTC Art. 23B but with the caveat that source countries must tax at low rates.[81]

Although the arguments made above are stricto sensu aimed towards developing countries emerging from colonialism, as described by Picciotto,[82] many parallels can be drawn with Estonia in the 1990s. It was described in "**2.1. Historical Context**" that even though the country is categorised as "developed" or an "advanced economy", Estonia was in a very challenging position in its early days of

[73] Dagan (n 59) p. 954.
[74] ibid p. 989.
[75] ibid p. 991.
[76] Sol Picciotto, *International Business Taxation: A Study in the Internationalization of Business Regulation* (Weidenfeld and Nicolson London 1992) pp. 55-56.
[77] Dagan (n 59) p. 980.
[78] ibid p. 981.
[79] ibid.
[80] ibid p. 989.
[81] Dagan (n 59) p. 981.
[82] Picciotto (n 76) p. 56.

independence. As noted, the high inflation rates, lowered salaries, and insolvency of the private banking sector mean that the considerations above are also relevant for Estonia. Whereas it was the case that former colonies had to navigate the international tax regime as newly independent states, the same was true for the entire Eastern Bloc in its transition from Communism towards independence and democracy. This regime change is no less cumbersome. As Bauc analyses, Estonia was very dependent on the USSR, which meant that when it sought to break away in 1992, it saw a 30% decrease in trade, equivalent to 10% of its GDP.[83] This can be contrasted with satellite states within the Eastern Bloc, like Hungary and Poland, which experienced trade decreases equivalent to 3-5.5% of their GDP.[84] In conjunction with its small population and lack of experience negotiating tax treaties, one could easily see how the country may fall victim to the disadvantageous version of the international tax regime, as described by Dagan above. So why did Estonia seek such profound integration into the international tax regime, despite the risks that this process carried? With the benefit of hindsight, Estonia joined the EU and the OECD, meaning it became fully integrated into the international tax regime. The policy decisions in relation to international tax will be subsequently analysed.

2.3. Looking towards the OECD Model Tax Convention

Dagan offers an account of several benefits of having a DTT in place between two countries.[85] In relation to Estonia, being part of a tax treaty network was a sign of integration with "Western" and more developed partners.[86] As noted earlier, Estonia aspired for sophisticated relations with Europe and to potentially become a member of the EU. Therefore, joining a tax treaty network would serve as a strong indication that the country was ready to cooperate with leading countries and reach their standards of tax administration. This could then be complemented by another benefit of DTT as described by Dagan – trading tax revenues.[87] As a new and inexperienced

[83] Bauc (n 51) p. 11.
[84] ibid.
[85] Dagan (n 59) pp. 983-86.
[86] ibid p. 986.
[87] ibid p. 984.

country with respect to tax administration, Estonia could benefit from the proper taxation of its residents' investments abroad.[88] Accordingly, she could participate in this quid pro quo arrangement by ensuring that investors from other residence countries are taxed.[89] This would subsequently signal to the West that the country was a reliable partner for trade and observed the basic rule of law standards when taxes were administered correctly. This goal would be furthered by the exchange of information required under bilateral tax treaties.[90] Conversely, a failure to integrate to this extent could have disastrous effects on its future Western partnerships. As Eccleston and Johnson observe, the OECD has the power "to unilaterally 'name and shame' tax havens and preferential tax regimes".[91] This phenomenon can be observed by the results of the OECD "Harmful Tax Competition: An Emerging Global Issue"[92] reports which aimed to address the negative effects of "harmful tax competition".[93] Subsequently, the OECD labelled 35 countries as "uncooperative tax havens"[94] due to opaqueness and "very low tax rates expressly to attract foreign capital or investment".[95] Consequently, 28 of those countries began to cooperate by administering tax in a transparent manner, according to OECD standards[96]. Estonia's foreign policy during the 1990s meant that it could not jeopardise being labelled in such a way.

Moreover, as the "**2. STAGE 2: Tax Reform in 2000 and EU Membership**" section will uncover it was strategically correct to achieve this level of integration before Estonia adopted its corporate tax reform in 2000.

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[88] Dagan (n 59) p. 984.
[89] ibid.
[90] ibid pp. 984-85.
[91] Richard Eccleston and Lachlan Johnson, 'The OECD's governance of international corporate taxation: initiatives, instruments, and legitimacy' in Lukas Hakelberg and Laura Seelkopf (eds), *Handbook on the Politics of Taxation* (Cheltenham 2021) p. 265.
[92] OECD, 'Harmful Tax Competition: An Emerging Global Issue' (*OECD,* 19 May 1998) <https://www.oecd-ilibrary.org/taxation/harmful-tax-competition_9789264162945-en> accessed 13 April 2022.
[93] Eccleston and Johnson (n 90) p. 265, citing OECD, 'Harmful Tax Competition' (n 91).
[94] ibid citing OECD, 'List of Unco-operative Tax Havens' (*OECD,* 18 April 2002). <https://www.oecd.org/ctp/harmful/theoecdissuesthelistofunco-operativetaxhavens.htm> accessed 9 May 2023.
[95] Eccleston and Johnson (n 90) p. 265.
[96] ibid.

Estonia sought to compete in the international tax regime but was faced with the "competition between incompatible or compatible standards" problem, which has been astutely observed by Baistrocchi.[97] He refers to the competition between Philips and Sony with respect to the VHS and Betamax videocassette standards.[98] In that instance, because there was no cooperation between the two companies, which offered incompatible standards, Betamax became obsolete as a format, whereas VHS prevailed.[99] The two companies, however, agreed on a compatible standard and focused their competition efforts on other aspects, e.g., customer service, price, etc.[100] Consequently, a "co-opetition"[101] regime was created where cooperative and competitive forces are observed.[102] Baistrocchi notes that this leads to "the creation of a network market, i.e., an ecosystem where network users can interact at a relatively low transaction cost".[103] The analysis is taken further by the discussion of "network effects", meaning that it is better for each participant in a network if there are more members in that network.[104] As a result, countries that want to compete in the international tax regime do so using the OECD Model Tax Convention because it is seen as the "global benchmark" which allows for multinational enterprises (MNEs) to determine whether a potential jurisdiction is tax-efficient based on deviations from the OECD MTC.[105] Accordingly, it becomes apparent that as a new entrant in the international tax regime, with little global influence, and no experience in tax treaty negotiation, Estonia sought to base its double-tax treaties on the OECD MTC.[106] This is what Dagan calls "stepping into a pre-existing game".[107] It was the only option to achieve credibility in front of foreign investors who would have been familiar with

[97] Eduardo A Baistrocchi, 'Global Tax Hubs: Theory and Evidence' (2022) p. 9 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4077374> accessed 20 April 2022.
[98] ibid.
[99] ibid.
[100] ibid.
[101] ibid citing Adam M Brandenburger and Barry J Nalebuff, *Co-opetition* (Profile Books Ltd 1996).
[102] ibid.
[103] ibid.
[104] ibid p. 10.
[105] Ibid.
[106] Pahapill (n 42) p. 63.
[107] Dagan (n 59) p. 990.

the OECD MTC.[108] This can then be furthered by what Baistrocchi calls the "global community of tax advisors" which allows them to offer better client service using "new technologies like tax analytics".[109] Ultimately, as he notes, the costs of MNEs for researching a favourable tax jurisdiction are lowered because comparing tax regimes is much easier if they are based on the OECD MTC.[110]

2.4. Mechanics of Negotiation

Among the first international tax treaties which Estonia concluded were with the Nordic states (Denmark, Finland, Iceland, Norway, and Sweden); see *Figure 6*. These were signed in 1993 and became effective in 1994. An interesting point to note is that the treaties were negotiated in a "3 + 5" format.[111] This meant that three delegations from the three Baltic states negotiated with five delegations from the Nordic states. However, this did not mean that a multilateral tax agreement was concluded; each country negotiated its own tax treaty with all the other delegations present.[112] This method intended to guarantee negotiation power whilst achieving individual DTTs with foreign countries. Subsequently, the Baltics negotiated tax treaties amongst each other, and by 1994, Estonia had seven treaties in place.

The Baltics continued their cooperation when negotiating tax treaties and always negotiated together with other states (i.e.., in a "3 + 1") format.[113] This practice continued until 2002, when Estonian Finance Minister Siim Kallas abolished it as he believed an independent Estonia was capable of negotiating tax treaties on its own.[114] Until then, Estonia concluded tax treaties independently only with the United States and Russia.[115]

[108] Dagan (n 59) p. 986.
[109] Baistrochhi (n 97) p. 17.
[110] ibid p. 16.
[111] Vanasaun (n 4) p. 847.
[112] ibid.
[113] ibid.
[114] ibid.
[115] Pahapill (n 42) p. 56.

2.5. Domestic Tax Measures: Signs of a Business-Friendly International Atmosphere

The international tax regime cannot be examined in isolation. In its route towards development, Estonia has adopted tax measures which reflect broader policy considerations. As former Prime Minister of Estonia Mart Laar acknowledges, Estonia sought to break away from socialism and embrace people's desire for self-development.[116] He then describes how this entails reducing regulatory pressures on the economy.[117] Therefore, he wanted to create a flat tax system in the hopes of fostering an entrepreneurial spirit and attracting international investors.[118] Consequently, an income tax at a flat rate of 26% was instituted by virtue of the Income Tax Act of 8 December 1993.[119]

What is more interesting is that this tax system had ancillary benefits related to the points made above concerning Estonia's need to garner the support and credibility of the West. In an interview with Pahapill, she commented that the international experts who were advising Estonia perceived the country as a territory where they could test their ideas because they would otherwise be unpopular in their own countries.[120] Laar also confirms this was the case for the flat tax system.[121] He states that he followed Milton Friedman's Negative Income Tax theory[122] in support of a flat tax but noted how this was not embraced by Western politicians who were in favour of free markets, such as Margaret Thatcher.[123] He states that "in a way, Estonia had to stick its neck out and hope that the ideas […] would find verification".[124]

[116] Mart Laar, *Estonia: Little Country that Could* (Centre for Research into Post-Communist Economies 2002) 271 <https://pb1lib.org/book/3515121/199329?id=3515121&secret=199329> accessed 14 April 2022.
[117] ibid p. 272.
[118] ibid.
[119] Income Tax Act of 8 December 1993 § 7.
[120] Interview with Helen Pahapill, Tax Policy Adviser to the Deputy Secretary General for Financial and Tax Policy, Ministry of Finance, Republic of Estonia (London, United Kingdom, 14 February 2022).
[121] Laar (n 116) p. 272.
[122] Milton Friedman, *Capitalism and Freedom* (1st ed, The University of Chicago Press 1962) p. 174.
[123] Laar (n 116) p. 272.
[124] ibid.

Accordingly, it became the first Eastern European country to adopt a flat tax system.[125]

Vanasaun has argued that there were additional benefits to adopting a flat tax system.[126] As noted above, inflation was very high after the introduction of Estonia's own currency. However, a flat tax system meant that adjustment of tax brackets was not an issue.[127] Additionally, Laar states how Estonia's budget increased by 10% following the tax reform.[128] He attributes this achievement to the fact that taxpayers had the incentive to declare taxes correctly – the system was perceived as "fair" and embraced the values of freedom to which Estonians aspired.[129] This was mirrored at the government level as tax agencies became more efficient[130] due to the transparent nature of the new regime, which had removed most deductions and exemptions.[131]

Laar then describes the success of this domestic tax reform on the international landscape.[132] A Tax Board was instituted, which cooperated with foreign tax authorities, including those of Finland, Sweden, and Germany, to exchange information and execute their DTTs to minimise double taxation.[133] He also describes the growth of enterprises – from 2,000 enterprises in 1992 to 70,000 in 1994.[134] "Estonia had been transformed from a country of workers to a country of entrepreneurs"[135], he notes. Consequently, the Estonian tax system was in the spotlight among former Communist countries – Latvia and Estonia used the Estonian model as a template to develop their own systems.[136] In the next 10 years, Central and

[125] Daniel Hinšt, 'Flat Tax Reforms in Estonia and Slovakia' (2011) Centre for Public Policy and Economic Research Zagreb 7 <https://issuu.com/danhinst/docs/flat_tax_reforms_in_estonia_and_slovakia> accessed 14 April 2022.
[126] Vanasaun (n 4) p. 846.
[127] ibid.
[128] Laar (n 116) p. 276.
[129] ibid.
[130] ibid.
[131] Vanasaun (n 4) p. 846.
[132] Laar (n 116) p. 276.
[133] ibid pp. 276-77.
[134] ibid p. 276.
[135] ibid.
[136] ibid p. 277; *see also* Anatolijs Prohovs, Ļevs Fainglozs and Velta Jonina, 'Introduction of Corporate Income Tax Deferral As an Essential Factor for Economic Development of Latvia' (2016) University of Business, Arts and Technology RISEBA Working Paper 16/9 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2939173> accessed 14 April 2022.

Eastern European countries adopted a flat tax system, including Russia, Serbia, Slovakia, Georgia, Romania, Northern Macedonia (then the Former Yugoslav Republic of Macedonia), Montenegro, and Albania.[137] This popularity has come much to the surprise of flat tax proponents like Hall and Rabushka, who note that "the flat tax has proven influential in the unlikeliest of places".[138]

2.6. Constitutional Status of Tax Treaties

Art. 123 of Estonia's Constitution establishes that the country cannot enter into international treaties which conflict with its Constitution.[139] Furthermore, if Estonian laws or other legislative provisions conflict with international agreements which have been ratified by parliament, the latter prevail.[140] Lastly, it must be noted that there are no procedures in Estonian law to override treaties.[141]

2.7. Scope of Treaties

DTTs which Estonia concluded with other states before 2000, covered income tax, corporate tax and a special licence tax which was imposed on companies which transacted in cash.[142] Treaties which included the licence tax were with Sweden, Finland, Norway and Denmark.[143] Treaties with Belarus, Germany, Canada, United States, Latvia, Ukraine, Lithuania, Czech Republic, China, Moldova, Belgium, Iceland, Netherlands and Ireland referred to income and capital taxes as laid down in OECD MTC Art. 2(2).[144]

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[137] European Central Bank, 'Flat Taxes in Central and Eastern Europe' (2007) Monthly Bulletin, 81 <https://www.ecb.europa.eu/pub/pdf/other/mb200709_focus10.en.pdf> accessed 14 April 2022.
[138] Robert E Hall and Alvin Rabushka, *The Flat Tax* (2nd edn, Hoover Institution Press 1995) p. vii.
[139] Constitution of the Republic of Estonia 1992, Art. 123.
[140] ibid.
[141] Iren Lipre and Maret Ansperi, 'Estonia' in Ekkehart Reimer, Stefan Schmidt and Marianne Orell (eds), *Permanent Establishments: A Domestic Taxation, Bilateral Tax Treaty and OECD Perspective* (Kluwer Law International 2016) §6.03[D] para. 72.
[142] Pahapill (n 42) p. 59.
[143] Inga Klauson and Erki Uustalu, 'Estonia' in Michael Lang and others (eds) in *The Impact of the OECD and UN Model Conventions on Bilateral Tax Treaties* (Cambridge University Press 2012) p. 363.
[144] ibid.

However, by virtue of the Income Tax Act 1999, the tax structure in Estonia was changed. This will be analysed in more depth in "**3. STAGE 2: Tax Reform in 2000 and EU Membership**" but in sum, income tax became the only applicable tax.[145] Therefore, treaties with Latvia, Lithuania, Germany, and the Netherlands were renegotiated to reflect this.[146] The remaining countries have chosen to disapply the capital provisions and are kept for the purposes of treaty interpretation in their domestic courts.[147]

2.8. Balancing Initial Concerns: Key Deviations in the Initial Period

It was already described that Estonia had an interest in integrating fully with the OECD MTC to gain international credibility. However, as Pahapill explains, Estonia wanted to maintain strong rights to tax at source.[148] The two reasons that support this will be discussed below.

2.8.1. Provisions which Protect the Tax Base

Firstly, as Pahapill explains, Estonia's tax negotiation policy in the period between 1993-2000 was bifurcated.[149] One MTC was used to negotiate treaties with countries deemed more developed than Estonia, and a different MTC with countries less developed than Estonia.[150] The significance of the year 2000 will be explained subsequently. This bifurcated approach voices the concern of the United Nations (UN), which has declared the reasons for publishing its own model tax convention. In the mid-1990s, when Estonia was developing its tax treaty network, the UN MTC available was the 1980 version.[151]As Pahapill has observed above, the country was careful in developing its tax treaty network with a view to protect itself from economic and other types of exploitation by global powers.[152]used provisions from the UN

[145] Pahapill (n 42) p. 59.
[146] Kaulson and Uustalu (n 143) pp. 363-64.
[147] ibid pp. 362-63.
[148] Pahapill (n 42) p. 56.
[149] ibid p.63
[150] ibid.
[151] United Nations Model Double Taxation Convention Between Developed and Developing Countries (UN MTC) (1980)).
[152] Pahapill (n 42) p. 63.

MTC, analysed further below, to conclude treaties with these countries. to conclude treaties with these countries.

The first way in which this would protect Estonia from potential exploitation was that the UN MTC favoured taxation at source.[153] The UN observed that in most treaties between "industrialised countries"[154] residence-based taxation was prevalent. This is in line with the OECD MTC, which favours this mode of taxation.[155]However, the UN also noted that this might not be adequate when a treaty is concluded between a developed and a developing country because "the revenue sacrifice would be one-sided"[156] because the profits of investments in developing countries are repatriated to developed countries. As a result, Estonia was careful to balance its domestic economic concerns with deeper international integration in the field of taxation. The most relevant deviation from the OECD MTC, which aimed to achieve this was to include the place of corporation as a criterion for determining residence, which mirrors Art. 4(1) of the UN MTC and is also described as a reservation in the commentaries relating to the OECD MTC in its full version.[157] Additionally, the place of effective management is not a consideration when determining the residence of companies, and treaties follow the OECD MTC Commentary in para. 24.1, which allows tax authorities to make a determination using a broad range of factors.[158]

In the mid-1990s, the other major deviation from the OECD MTC, which aims to protect Estonia's tax base, is the "limited force of attraction principle".[159] The provision was included in the treaties concluded between 1993 and 1996 with its early partners like Denmark, Finland, Iceland, Norway, Poland and Sweden.[160] Because Art. 7 of the OECD MTC, grants the source country tax jurisdiction over business

[153] UN MTC (1980) (n 151) Introduction A, 2.
[154] ibid.
[155] OECD MTC (Condensed Version 2017) (n 60) Introduction, para. 15.2.
[156] UN MTC (1980) (n 151) Introduction A, 2.
[157] Organisation for Economic Co-operation and Development Model Tax Convention on Income and on Capital (Full Version 2017) Commentary on Art. 4, para. 34.
[158] OECD MTC (Condensed Version 2017) (n 61) Commentary on Art. 4(3) para. 24.1.
[159] Michael Lennard, 'The UN Model Tax Convention as Compared with the OECD Model Tax Convention – Current Points of Difference and Recent Developments' (2009) Asia-Pacific Tax Bulletin, 7 <https://www.taxjustice.net/cms/upload/pdf/Lennard_0902_UN_Vs_OECD.pdf> accessed 16 April 2022.
[160] Klauson and Uustalu (n 143) p. 367.

profits only when these have been generated by a permanent establishment (PE),[161] Estonia used Art. 7(1) of the UN MTC in its treaties with those countries to include business profits made under a similar to a PE business structure.[162] It is hereby submitted that two interconnected reasons likely influenced Estonian authorities to adopt this policy. Firstly, as Lipre and Ansperi note, permanent establishments only entered Estonian jurisprudence as a result of the country's tax treaty negotiations in the mid-1990s, and this entity was otherwise unknown up to this point.[163] Additionally, they note that the Estonian revenue service is unfamiliar with PEs, and even to this day, there is no case law which interprets PEs.[164] Therefore, it would be sensible to broaden the definition of this concept to cover the functional features of a PE. This is achieved under Art. 7(1) of the UN MTC. Lastly, as was described above in "**2.4. Mechanics of Negotiation**", the Nordics were one of Estonia's initial trading partners. Therefore, it was reasonable for Estonia to broaden the definition of a PE and thus benefit from more taxation at source.

Another interesting difference which enhances Estonia's taxation at source jurisdiction in the face of developed countries was to implement Art. 21 UN MTC, which stipulated the option of taxing all other income at source. Unsurprisingly, the treaties including this provision are with Iceland, Denmark, Finland, Norway, Latvia, Sweden, Ireland, Canada, and the USA.[165] These are not only some of Estonia's early trading partners but are generally developed countries, and it is understandable why Estonia sought to protect its tax base against them.

The last significant deviation Estonia implemented during this period was in relation to the exchange of information practices described in Art. 26 of the OECD MTC and the UN MTC. As Oberson notes, the OECD, in its commentaries,[166] recognises that DTTs operate to eliminate double taxation but are also instrumental in

[161] OECD MTC (Condensed Version 2017) (n 61) Art. 7.
[162] Klason and Uustalu (n 143) p. 367.
[163] Lipre and Ansperi (n 142) §6.02[A] para. 5.
[164] ibid §6.03[E] paras. 69-73.
[165] Kaulson and Uustalu (n 143) p. 377.
[166] OECD MTC (Condensed Version 2017) (n 61) Commentary on Art. 26, para. 5.4.

tackling tax avoidance and tax evasion.[167] Therefore, the exchange of information is critical for both purposes.[168] However, as Lennard observes, the exchange of information is much more significant for developing countries, or in the Estonian context during the 1990s – a country in transition.[169] He describes the possibility of how developed countries may refuse to offer information to less developed ones but may abuse their global influence to pressure developing countries to provide information on a unilateral basis.[170] For this reason, Estonia opted to include the UN MTC version of Art. 26, which states that "in particular, information shall be exchanged that would be helpful to a Contracting State in preventing avoidance or evasion of such taxes".[171] The accentuation on preventing tax avoidance or evasion serves to eliminate any disparity between countries in their ability to gather information. This has been voiced clearly in the UN's recent commentaries on the article, which states that "it [Art. 26] does not allow a developed country to refuse to provide information to a developing country on the ground that the developing country does not have an administrative capacity comparable to the developed country".[172] This has played an important role in the development of Estonia's international tax system because it was able to signal to the world that it had serious intentions to integrate and observe international standards of tax administration and exchange information. It also built its image as a country disinterested in becoming a tax haven. As such, it was able to avoid OECD criticisms of the kind Eccleston and Johnson have discussed above.[173]

2.8.2. Practicality

The second reason for favouring source taxation in this period was purely practical. As Dagan notes, host countries cannot "eliminate the tax wedge unilaterally" if

[167] Xavier Oberson, *International Exchange of Information in Tax Matters: Towards Global Transparency* (Edward Elgar 2015) p. 14.
[168] ibid.
[169] Lennard (n 168) p. 10.
[170] ibid.
[171] UN MTC (1980) (n 151) Art. 26(1).
[172] United Nations Model Double Taxation Convention Between Developed and Developing Countries (2017) Commentary on Art. 26, para. 1.3.
[173] Eccleston and Johnson (n 91) p. 265.

residence countries exercise tax jurisdiction. She also describes how "International tax policies are not crafted in a vacuum" and, therefore, each country devises policies whilst taking account of the policies of other countries.[174] Consequently, Estonia appreciated that many of its initial treaty partners, including the United Kingdom, United States, Italy and Iceland,[175] all provided tax credits for the amount of foreign taxes already paid abroad.[176] Therefore, Estonia could "capture tax revenues" by taxing at the source without discouraging potential investors because they would owe tax revenues in any case.[177] As Dagan notes, this comes with the caveat that the tax rate must be the same as that of the residence state[178]. This was not an issue since Estonia's tax rate was 26%[179] which was considered lower than the rates in the developed residence counties.[180] As a result, Estonia gained additional revenues from source taxation without repelling international investors because their tax expenditure was identical.

3. Stage 2: Tax Reform in 2000 and EU Membership

Analysing the next stage of Estonia's international tax system presents the problem envisaged by Avi-Yonah in his analysis of the US international tax regime because drawing a line through history "masks underlying continuities".[181] This is undoubtedly the case for Estonia because the major tax reform was in 2000, brought on by the Income Tax Act 2000. However, a substantial analysis of this system occurred when the country was in the process of joining the European Union before 2004.[182] This is because the new regime invited issues of EU law compatibility which

[174] Dagan (n 59) pp. 949-54.
[175] European Commission, DG XV – Internal Market and Financial Services, 'Report of the Committee of independent experts on company taxation' (Publications Office 1995) p. 267 <https://op.europa.eu/en/publication-detail/-/publication/0044caf0-58ff-4be6-bc06-be2af6610870> accessed 20 April 2022.
[176] Dagan (n 59) p. 979.
[177] ibid p. 954
[178] ibid.
[179] Vanasaun (n 3) p. 846.
[180] Dagan (n 59) p. 981.
[181] Reuven S Avi-Yonah, 'All of a Piece throughout: The Four Ages of U.S. International Taxation' (2005) 25 Virginia Tax Revue, pp. 313- 15.
[182] Vanasaun (n 4) p. 847.

are of interest because, by 2004, Estonia was truly integrated with the European market, and therefore, the functionality of the system was even more pertinent. The dissertation will proceed by introducing the main ideas of this system, and the surrounding policies. Finally, the impacts of EU membership will be discussed using jurisprudence from the European Court of Justice and EU legislation.

3.1. HISTORICAL CONTEXT

President Meri's aspirations for Estonia to join the EU were increasingly close to materialisation at the end of the 1990s.[183] Even as early as 1995, initial agreements between the EU and Estonia were signed to pave the way for future EU membership.[184] This included a free trade agreement with the European Union and Switzerland, Norway, Iceland and Liechtenstein to stimulate FDI.[185] This underlying policy is important for the analysis of the tax reforms in 2000, which will be provided below. Subsequently, in 1997, the European Commission issued a recommendation to invite Estonia for accession negotiations, which began in March 1998.[186] The same year US President Bill Clinton and Estonian President Lennart Meri committed to a Charter of Partnership.[187] In effect, this agreement served to highlight that the US supported Estonia in joining NATO and offered its assistance in furtherance of that goal.[188] Additionally, the US expressed its support for Estonian "independence, sovereignty and territorial integrity" by not recognising the country's annexation by the USSR in 1940.[189] Therefore, it became clear that Estonia was becoming increasingly more aligned with the West. Mart Laar notes how its fast economic growth allowed it to start negotiating with the EU.[190] This was due to a 9.1% GDP growth in 1996, increased profitability of companies and a 33% increase in service

[183] Lagerspetz and Vogt (n 13) p. 77.
[184] Ian Jeffries, *The Countries of the Former Soviet Union at the Turn of the Twenty-First Century: The Baltic and European States in Transition* (Routledge 2004) p. 138.
[185] Laar (n 116) p. 329.
[186] ibid p. 140.
[187] ibid.
[188] ibid.
[189] ibid p. 35.
[190] Laar (n 116) p. 164.

exports during the same year.[191] This was complemented by significant market-liberating policies such as an abolition of measures which restricted exports and no tariffs on imports, apart from petroleum, alcohol and tobacco products.[192]

As EU reports indicate, Estonia's economy was developed to the extent that it would be able to compete effectively on the European landscape and would be able to become an EU member state in 2004.[193] From signing the Accession Treaty in 2003, Estonia successfully joined the EU on 1 May 2004.[194] Approximately one month earlier, on 29 March 2004, it joined NATO.[195] This thus concludes Estonia's most significant steps towards Westernisation. As a fully integrated EU economy, it is then necessary to analyse its change to its taxation structure which emerged in 2000, against the background of the integrative processes described above.

3.2. Structure of the Corporate Income Tax (CIT) System

3.2.1. Why Reform Was Needed

As Pahapill recounts, simplicity is a foundational feature of Estonia's tax system.[196] Therefore, to comply with this principle, the system was in desperate need of reform. As Lehis et al. observes, the Income Tax Act 1993 underwent 34 amendments.[197] The authors note how these amendments not only made it harder for taxes to be administered correctly but also had the potential of introducing anticompetitive effects onto the market.[198] As analysed above, this was an unacceptable state for the economy to be in as it cut against the goal of integrating into the European Economic Area. Therefore, Estonia needed effective legislation, including tax legislation, which

[191] Laar (n 116) p. 335.
[192] ibid p. 237.
[193] Jeffries (n 184) p. 151.
[194] Republic of Estonia, Ministry of Foreign Affairs, 'Estonia – 10 Years in the European Union' (*Republic of Estonia Ministry of Foreign Affairs*, 8 May 2014) <https://vm.ee/en/estonia-5-years-european-union> accessed 17 April 2022.
[195] NATO, 'Seven new members join NATO' (*North Atlantic Treaty Organization*, 29 March 2004) <https://www.nato.int/docu/update/2004/03-march/e0329a.htm> accessed 17 April 2022.
[196] Pahapill (n 42) p. 65.
[197] Lehis and others (n 8) p. 389.
[198] ibid.

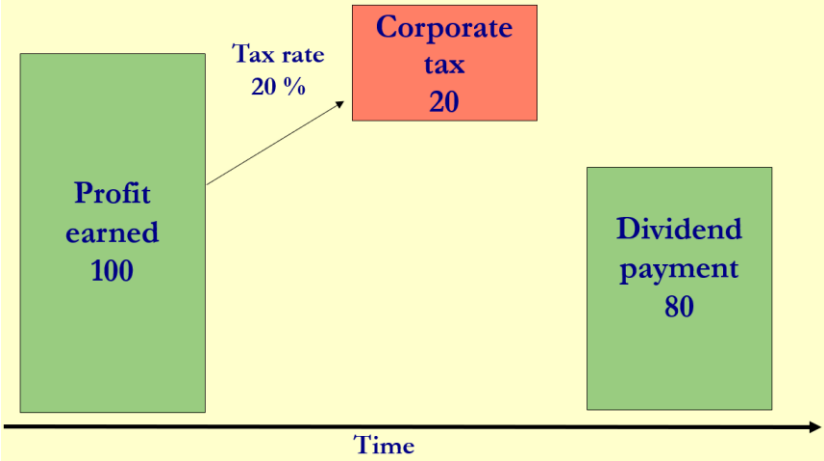
promoted healthy competition and put Estonia in a good position to compete in the EEA.

3.2.2. Legal Aspect

The Income Tax Act 1999 became effective on 1 January 2000 and introduced the new CIT regime. The distinguishing feature of this system is that the tax charge is not triggered at the point of earning; rather, it occurs when profits are distributed.[199] Effectively, this creates an opportunity for the payment of tax to be deferred.[200] The corporate tax rate (on the distributed profits) was initially 26%,[201] but the current tax rate is 20%.[202] Interestingly, companies cannot distribute more than 80% of profits, which means there is a 20/80 ratio.[203] This is perhaps best illustrated with an example: if a company makes a profit of 100, it can distribute (usually in the form of dividends) 80, for which 20 are paid in taxes.[204] A comparative graphical representation is provided below. The comparison includes how an identical transaction may be treated in most countries compared to Estonia. It is observed that the Estonian CIT is "reversed"– most countries charge corporate tax on profits, and then certain distributions (such as dividends) are considered deductible.[205]

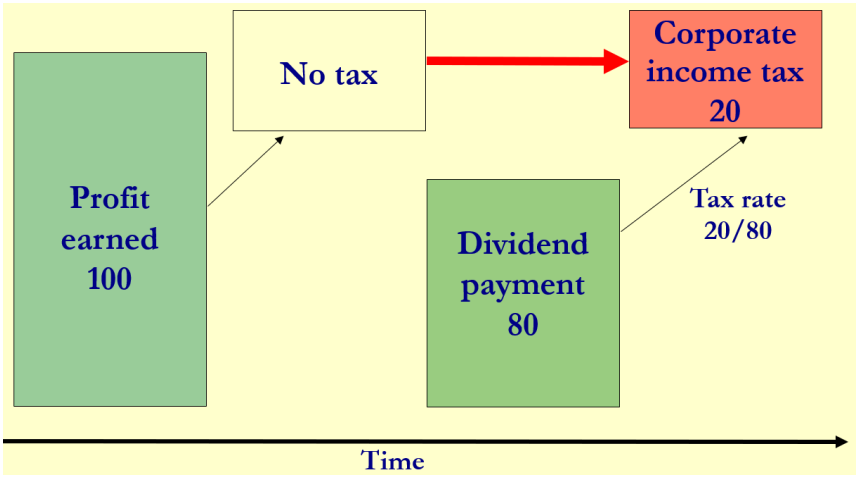
[199] Lehis and others (n 8) p. 389.
[200] ibid.
[201] Vanasaun (n 4) p. 846.
[202] Income Tax Act 1999 § 4(1)(2)
[203] Lipre and Ansperi (n 142) §6.02[C] para. 15.
[204] Hannes Lentsius, 'Estonia: Corporate – Taxes on corporate income' (2021) PwC Worldwide Tax Summaries <https://taxsummaries.pwc.com/estonia/corporate/taxes-on-corporate-income> accessed 17 April 2022.
[205] Lipre and Ansperi (n 142) §6.01 para. 3.

Figure 7: Graph Showing a Corporate Tax Charge under a Traditional Model[206]



Graph showing the taxation of a corporation which makes a profit of 100 and makes a dividend payment of 80. The applicable tax rate is 20% and the dividend payment is deductible (shown in green).

Figure 8: Graph Showing a Corporate Tax Charge under the Estonian CIT Model[207]:



Graph showing the taxation of a corporation which makes a profit of 100 and makes a dividend payment of 80. There is no tax on the profit but only 80 can be distributed. 20% tax is applied to the profit from which the dividend distribution originates (i.e. 100), therefore resulting in a tax expenditure of 20.

[206] Republic of Estonia Ministry of Finance (Tax Policy Department), 'Estonian Taxes and Tax Structure' (*Republic of Estonia Ministry of Finance*, 1 December 2021) <https://www.slideshare.net/rahamin/estonian-taxes-and-tax-structure-dec-2021> accessed 18 April 2022.
[207] ibid.

The corporate tax is imposed on distributed profits to companies and permanent establishments.[208] It is worth remembering how Estonia adopts the broader definition of PE as prescribed by the UN MTC. Additionally, if these distributions are made for the purpose of granting income to an employee, the charge is still applied to the distributed amount.[209] Consequently, this sum is not subject to personal income tax from the employee's perspective, thus ensuring that the amount is not doubly taxed.[210] Furthermore, gifts and donations and non-enterprise expenses are also taxed[211] because they are considered to be a form of "hidden profit distribution".[212]

3.2.3. Expectations

The goals which this reform aimed to achieve can broadly be placed into three categories.[213] The first is that this system is easy to administer – for practical purposes, there are negligible exceptions and technicalities.[214] This has advantages both for the tax authorities and the taxpayer because the system is easily understood by companies and their advisors but is also easy to enforce by tax authorities.[215] Additionally, there is no need for Loss Carried Forward (LCF) provisions because under the Estonian Commercial Code, it is only possible to distribute profits on a given year if the company has no losses from the preceding year.[216] Consequently, if there are losses there is no tax charge.[217] Moreover, because "non-deductible expenses are taxed on the cash basis", the Estonian system eliminates the necessity of depreciation, depletion and amortisation rules in accounting.[218] Finally, any profits which are

[208] Lipre and Ansperi (n 142) §6.02[C] para. 15.
[209] Lehis and others (n 8) p. 391.
[210] ibid.
[211] Inga Klauson, 'Estonia' in Stef van Weeghel (ed) *Cahiers de Droit Fiscal International: Studies on International Fiscal Law Volume 95a* (International Fiscal Association 2010) p. 286.
[212] PwC, 'Doing Business in Estonia' (PwC Publications 2019) p. 54 <https://www.pwc.com/ee/et/publications/DoingBusinessinEstonia/Doing%20Business%202019.pdf > accessed 17 April 2022.
[213] Lehis and others (n 8) p. 391.
[214] ibid.
[215] Panu Pikkanen and Kaisa Vaino, 'Long-Term Effects of Distributed Profit Taxation on Firms: Evidence from Estonia' (Lund University Publications Student Papers 2018) p. 10 <https://lup.lub.lu.se/student-papers/record/8947906/file/8947918.pdf> accessed 17 April 2022.
[216] Lehis and others (n 8) p. 391.
[217] ibid.
[218] ibid.

retained in the company, i.e. they are not distributed but are kept within the company as a form of reinvestment, are not to be accounted for when the company submits its tax return to the government.[219] This simplicity, coupled with lax accounting rules for filing taxes, was expected to encourage companies to report their taxes and other financial statements diligently and honestly, making their submissions more accurate.[220]

The other consideration for implementing this reform was to create a corporate environment in which businesses could flourish.[221] Because companies have more capital available internally due to "tax savings", they are less reliant on loans and other external growth methods.[222] This was a well-timed benefit which was made available to companies during a period when banks were struggling to solidify a strong market position.[223] Even towards the end of the 1990s, many banks had undergone unsuccessful privatisations and were facing insolvency.[224] Additionally, Laar observes that "Banks' loan portfolios became more and more speculative".[225] This meant that the availability of loans did not necessarily lead to a stronger and more stable market because banks were issuing faulty loans. This problem was exacerbated by an observation by Lasse et al. that companies' profit reports were likely inaccurate and misleading.[226] As a result, the Bank of Estonia Lending Rate was 12.13% in February 1999 compared to 2.66% in February 2022.[227] Thus, borrowing was not the most efficient way of financing enterprises when aiming to achieve growth. On the other hand, retained profits which remained within the company were not taxed and could have been reinvested towards growth initiatives.[228] Additionally, as Pikkanen and Vaino observe, companies would have more equity, which in combination with

[219] Lehis and others (n 8) p. 391.
[220] ibid.
[221] ibid p. 389.
[222] Pikkanen and Vaino (n 217) p. 51.
[223] Laar (n 116) p. 261.
[224] ibid.
[225] ibid., p. 343.
[226] Lehis and others (n 8) p. 391.
[227] CEIC Data, 'Estonia Bank Lending Rate' (*CEIC Data*, 1 March 2022) <https://www.ceicdata.com/en/indicator/estonia/bank-lending-rate> accessed 18 April 2022.
[228] Lehis and others (n 8) p. 391.

the argument raised above in relation to accurate reporting of profits, could mean that companies would be able to draw loans at better rates.[229]

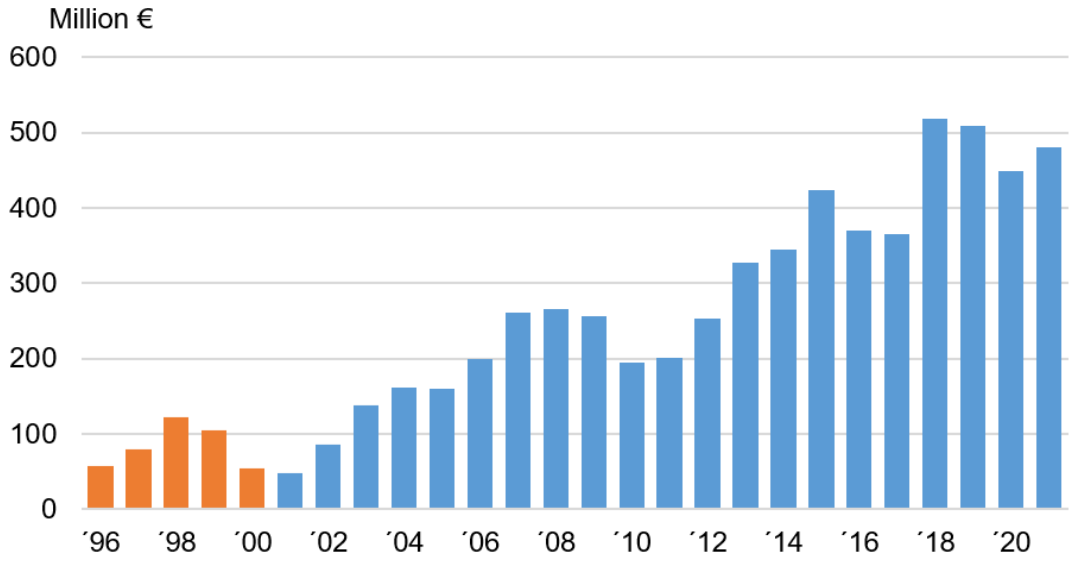
The last category of expected benefits from this reform can be called "macroeconomic".[230] The Estonian government hoped to attract more FDI as a result of the benefits analysed above.[231] This, in turn, was supposed to increase the number of companies in Estonia, integrate its economy with the European and global markets, increase GDP, and provide more jobs.[232]

3.2.4. Results

After discussing the benefits which the reformed system was supposed to create, this section will provide empirical data and statistics analysing the success. It is stressed that the data should not be interpreted so as to prove causation. It is conceded that economic development is a complex process affected by many political, social, environmental, and other international factors outside this dissertation's scope. The data provided below should serve as an indicator that there may be a correlation between the enacted reforms and the mentioned economic parameters.

Figure 9: Graph Showing Corporate Income Tax in Estonia (1995 – 2021):[233]

[229] Pikkanen and Vaino (n 217) p. 14.
[230] ibid p. 19.
[231] Lehis and others (n 8) p. 389.
[232] ibid. pp. 389-90.
[233] Republic of Estonia Ministry of Finance (Tax Policy Department), 'Estonian Taxes and Tax Structure' (n 208).



It is important to note that in the year 2000, the tax revenue figures were calculated using the previous regime because figures still relate to 1999 as a tax year.[234] A decline can be observed following the introduction of the CIT regime, however, Lehis et al. argue that this is owed to "transitional rules" which expired in 2003.[235] After this year, an increase in corporate income tax revenues can be observed. However, it is difficult to state with absolute certainty that the reason for this was solely due to the reform. For example, as *Figure 11* shows, there has been an increase in the overall number of companies registered in Estonia which are then taxable. Nonetheless, Lehis et al. are of the opinion that the increase in corporate income tax revenues is attributable to the success of the CIT regime.[236] They claim that the simplicity and non-taxability of retained profits, described above, has encouraged companies to report tax figures more honestly.[237] Additionally, the growth in Estonian firms during the initial years from 2000 to 2003 has not been that significant so as to attribute the revenue growth to new firms. They are also convinced that the increase in corporate tax revenue suggests that companies previously hid profits and did not report them correctly.[238]

[234] Lehis and others (n 8) p. 390.
[235] ibid.
[236] ibid p. 391.
[237] ibid.
[238] ibid.

The table below (*Figure 10*) illustrates the real GDP growth as well as the unemployment rates from 1996 to 2021. It is interesting to observe that the Estonian GDP figures outperformed the entire EU from 2000 (when the reform took place) to 2007. The comparative values of real GDP growth for the EU can be observed in *Figure 12* below.

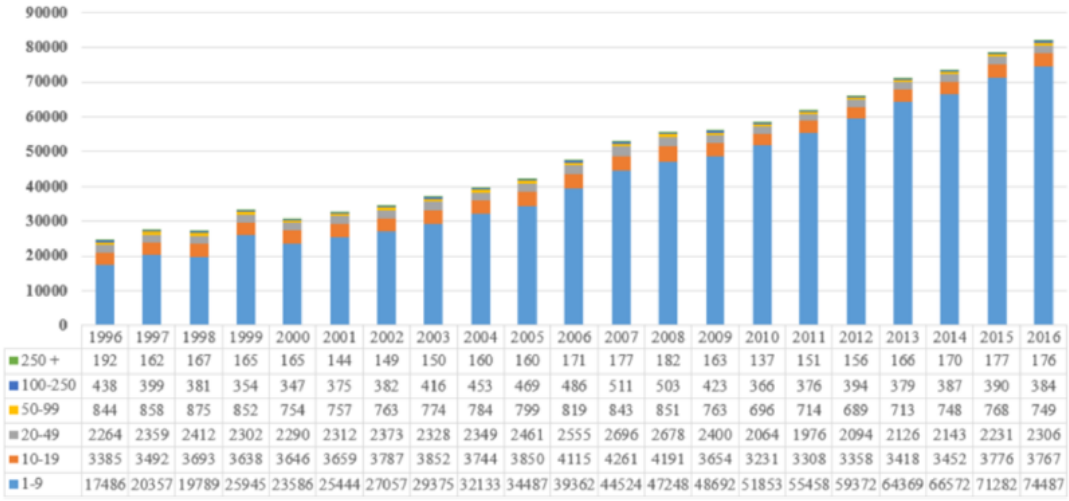
It is also worth noting how the unemployment rate has been progressively falling after the reforms took place. This also coincides with the growth of companies shown in *Figure 11* below.

Figure 10: Table showing GDP Real Growth (%) and Unemployment Rates (1996 – 2021):

Year	**1996**	**1997**	**1998**	**1999**	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**
GDP (real growth, %)[239]	4.8	13.1	4.6	-0.5	9.9	6	6.8	7.8	6.6	9.3	9.9	7.2	-4.6
Unemployment (%)[240]	10.4	10.2	10.4	12.7	15.2	13.5	11.7	11	10.7	8.5	6.2	4.8	5.6

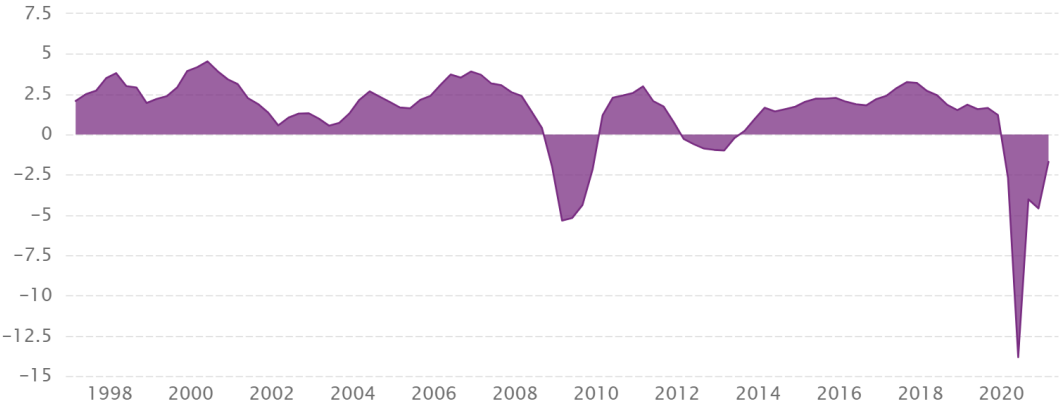
Year	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**	**2020**	**2021**
GDP (real growth, %)[241]	-14.3	2.1	7.1	3.3	1.4	2.8	2.3	3.1	5.5	4.1	4	-2.6	8.2
Unemployment (%)[242]	14.1	17.4	12.8	10.4	9	7.7	6.4	7.1	6	5.4	4.6	7.1	6.5

Figure 11: Graph Showing the Number of Firms by Number of Employees (1996 – 2016)[239]:



	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
250 +	192	162	167	165	165	144	149	150	160	160	171	177	182	163	137	151	156	166	170	177	176
100-250	438	399	381	354	347	375	382	416	453	469	486	511	503	423	366	376	394	379	387	390	384
50-99	844	858	875	852	754	757	763	774	784	799	819	843	851	763	696	714	689	713	748	768	749
20-49	2264	2359	2412	2302	2290	2312	2373	2328	2349	2461	2555	2696	2678	2400	2064	1976	2094	2126	2143	2231	2306
10-19	3385	3492	3693	3638	3646	3659	3787	3852	3744	3850	4115	4261	4191	3654	3231	3308	3358	3418	3452	3776	3767
1-9	17486	20357	19789	25945	23586	25444	27057	29375	32133	34487	39362	44524	47248	48692	51853	55458	59372	64369	66572	71282	74487

Figure 12: Graph Showing Real GDP Growth (Expressed in %) in the EU[240]:



Although it is difficult to prove causation between the CIT reform and the successful state of Estonia's economy, a correlation may nonetheless be observed. Moreover, the economic parameters mentioned above suggest that the economy has been strong following the reform. Whether or not this is a consequence of the reform is difficult

[239] Pikkanen and Vaino (n 217) p. 44.

[240] CEIC Data, 'European Union Real GDP Growth' (*CEIC Data*, 1 March 2021) <https://www.ceicdata.com/en/indicator/european-union/real-gdp-growth> accessed 18 April 2022.

to prove, but it may suggest that there is a healthy level of compatibility and inter-functionality between the CIT regime and Estonia's economy.

3.2.5. Problems with the CIT Regime and Available Solutions

However, the potential disadvantages of the CIT system must also be analysed in order to understand it holistically. As Lehis et al. observes, one of the main dangers of the Estonian reform was that the world would view Estonia as a tax haven.[241] This incorrect understanding largely stems from advertisements and investment scheme promoters who try to attract clientele to start a business in Estonia.[242] Consequently, it is often wrongly assumed that there is no corporate tax in Estonia, and hence it is a tax haven.[243] However, this is not true. The dissertation will not discuss the various definitions of a tax haven and related terms like "secrecy jurisdictions"[244], "low tax areas"[245], "preferential tax regimes"[246] and many others. Instead, a broad definition will be offered for the purpose of demonstrating that Estonia is not a tax haven. Beckett describes the "classic definition of a tax haven" to mean a jurisdiction which has low tax rates, and political stability, is not cooperative with neighbouring countries and has lax immigration policies.[247] On this account, Estonia's tax rate of 20% is not low – the worldwide average for corporate tax is 23.79%.[248] Moreover, as a member of the EU, it cooperates with law enforcement agencies regularly and, as noted above, favours the UN MTC Art. 26 on the exchange of information. Lastly, because Estonia is part of the EU, it must abide by strict immigration laws. It was important not to label Estonia as a tax haven because of OECD's power to

[241] Lehis and others (n 8) p. 391.
[242] Invest in Estonia, Taxation and Benefits' (*Invest in Estonia*, 2019) <https://investinestonia.com/business-in-estonia/taxation/#:~:text=There%20is%20no%20corporate%20income,incentives%20available%20for%20foreign%20investors> accessed 20 April 2022.
[243] Lehis and others (n 8) p. 391.
[244] Paul Beckett, *Tax Havens and International Human Rights* (Routledge 2018) p. 7.
[245] ibid.
[246] Eccleston and Johnson (n 91) p. 265.
[247] Beckett (n 250) p. 16.
[248] Dan Moskowitz, 'Countries with the Highest and Lowest Corporate Tax Rates' (*Investopedia*, 7 December 2020) <https://www.investopedia.com/articles/personal-finance/051915/corporate-tax-rates-highs-and-lows.asp> accessed 20 April 2022.

disenfranchise jurisdictions as "non-cooperative"[249] which could have impacted the country's OECD membership.

Another issue was that for the purposes of DTTs with other countries, the corporate tax reform could have been interpreted to stipulate that the tax rate was 0%.[250] This was problematic because Latvia set a dangerous precedent. Latvia claimed that the "liable to tax" provision of OECD MTC Art. 4(1) was not fulfilled because corporate profits were essentially not taxed at the moment when they were earned.[251] It was further claimed that the new CIT was radically different from what the DTTs had envisaged, so Latvia ceased to apply the DTT for companies.[252] This threatened the existing tax treaty network because Latvia was historically one of Estonia's closest allies in its developmental journey. Therefore, the message that this action sent was strong. Fortunately, other countries accepted that Estonia's new regime was still within the "spirit" of the DTTs they had signed and continued to apply them.[253] The DTT with Latvia was renegotiated and came into force in 2002[254] (see *Figure 6*).

The final concern often raised in relation to the Estonian CIT is the issue of deductibility.[255] Economic double taxation is avoided when the dividend amount is taxed only once at the point of distribution.[256] Therefore, this income is not calculated in all other types of income for which certain deductions are available.[257] As a result, it follows that a person whose only income comes from distributed dividends cannot benefit from claiming deductions.[258] Lehis et al. explain that, nonetheless, economic double taxation is fully avoided, which is beneficial, and furthermore, it is logical that a person cannot claim deductions if there is no taxable amount.[259] An argument may

[249] Eccleston and Johnson (n 91) p. 265.
[250] Lehis and others (n 8) p. 392.
[251] Klauson and Uustalu (n 144) p. 363.
[252] ibid.
[253] ibid.
[254] ibid.
[255] Lehis and others (n 8) p. 392.
[256] ibid.
[257] ibid.
[258] ibid.
[259] ibid.

be made that this causes problems for tax evasion in the international tax regime.[260] Critics of the system have argued that if dividend distributions are not taxed, international taxpayers would not declare them and not tax will be paid on them in Estonia or in their country of residence. [261] This can be addressed by stating that Estonia would have received tax revenue because the distributions are subjected to corporate income tax.[262] This is a manifestation of the source taxation preference of Estonia, and international taxpayers will then be motivated to declare this tax expenditure in their country of residence in order to receive a tax credit or a deduction, as opposed to being taxed doubly in relation to the same amount.[263]

3.3. COMPATIBILITY WITH EUROPEAN UNION LAW

Under Art. 6 of the TFEU,[264] taxation is a competence area of the member states, not the EU. This is reiterated in Art. 65(1)(b),[265] which stipulates that the principle of free movement does not in any way affect member states' competence over issues of taxation. Nonetheless, the CJEU has stated that all national tax laws should be consistent with EU law.[266] It is, therefore, eminent that the Estonian CIT system is analysed against governing EU legislation such as the PSD.[267]

3.3.1. Parent-Subsidiary Directive

The Council has explained that the purpose of the PSD is to ensure that disadvantageous tax provisions do not distort the internal market of the Europian Union.[268] It was, therefore, important to establish a tax regime which treats parent

[260] Lehis and others (n 8) p. 392.
[261] ibid.
[262] ibid.
[263] ibid pp. 392-93.
[264] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU) Art. 6.
[265] ibid art. 65(1)(b).
[266] Case C-446/03 *Marks & Spencer* v *David Halsey (Her Majesty's Inspector of Taxes)* [2005] ECR I-10837, para. 29.
[267] Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States [1990] OJ L225/6 (Parent-Subsidiary Directive – PSD).
[268] ibid Preamble.

companies and their subsidiaries equally, regardless of whether the subsidiary is physically located in a different member state to the parent company.[269] This was achieved through Art. 5(1) which states that profits from a subsidiary which are repatriated to the member state in which the parent company is based should not be subjected to withholding tax.

The CJEU has interpreted the meaning of a withholding tax in *Athinaiki*[270] "that the chargeable event […] is the payment of dividends".[271] This ruling led the European Commission to view the Estonian CIT as a withholding tax and thus mandated that it changes its structure. The following provision was inserted in Estonia's Act of Accession:

> By way of derogation from Article 5(1) of Directive 90/435/EEC, Estonia may, for as long as it charges income tax on distributed profits without taxing undistributed profits, and at the latest, until 31 December 2008, continue to apply that tax to profits distributed by Estonian subsidiaries to their parent companies established in other Member States.[272]

Therefore, Estonia was given a period up until the end of 2008 to change its corporate tax structure to fulfil its obligations under the EU Treaties.

3.3.2. Assessment

However, it is important to understand that there are significant differences between *Athinaiki* and the Estonian CIT. The *Athinaiki* case discussed an issue of Greek tax law where subsidiary profits were taxed when they were distributed to the parent company abroad.[273] The Court noted that losses could not be carried forward to offset the tax liability which arose from the distribution.[274] However, losses could be carried forward in the general corporate tax regime in Greece, which meant that the

[269] Council Directive 90/435/EEC (n 267) Preamble.
[270] Case C-294/99 *Athinaiki Zithopiia AE* v *Eliniko Dimosio (Greek State)* [2001] ECR I-6813.
[271] ibid para. 28.
[272] Annex VI List referred to in Art. 24 of the Act of Accession: Estonia [2003] OJ 812, ch. 7(2).
[273] *Athinaiki* (n 270) para. 29.
[274] ibid.

distribution tax on subsidiary profits was indeed a withholding tax because it was a different tax to the corporate income tax.[275] Moreover, in the *FII Group* [276] case, the CJEU laid down more specific criteria of what a withholding tax is. The court has stated that there are three components: (1) "the chargeable event for the tax is the payment of dividends", (2) "the taxable amount is the income from those shares" and (3) "the taxable person is the holder of the shares".[277] Another interesting observation by the CJEU is in *Oy AA*[278] where the Court noted that the "Directive […] does not constitute the first taxation of income arising from a business activity of a subsidiary".[279] Finally, in *Burda*,[280] the Court determined that if a national tax regime stipulates those subsidiary profits which are retained and taxed only when distributed to the parent company should not be considered a withholding tax.[281]

From this analysis, it becomes apparent that the Estonian CIT regime fails to meet the definitions of the PSD. In relation to the *Athinkaiki* case, Lehis et al. observe that Estonia allows for the taxable amount under the CIT to be mitigated – for example, if an Estonian-based subsidiary received dividends from a parent company abroad which have already been taxed, Estonia grants credits for that amount.[282] This demonstrates that the Estonian CIT functions as the primary corporate tax regime because it is further stipulated that taxation upon distribution is the first stage of taxation,[283] and thus, by virtue of *Oy AA*, the PSD does not apply. Finally, the *FII Group* case has correctly recognised that "the taxable person is the holder of the shares".[284] Conversely, "According to the Estonian CIT system, the taxpayer is the Estonian subsidiary distributing profits to the parent company, and the latter is not

[275] *Athinaiki* (n 270) para. 29.
[276] Case C-446/04 *Test Claimants in the FII Group Litigation* v *Commissioners of Inland Revenue* [2006] ECR I-11814.
[277] ibid para. 108.
[278] Case C-231/05 *Oy AA* [2007] ECR I-6392.
[279] ibid para. 27.
[280] Case C-284/06 *Finanzamt Hamburg-Am Tierpark* v *Burda GmbH* [2008] ECR I-04571.
[281] ibid para. 64.
[282] Lehis and others (n 8) p. 396.
[283] ibid p. 397.
[284] *FII Group* (n 276) para. 108.

liable to pay income tax on dividends received".[285] Therefore, it is evident that the Estonian regime is not in violation of EU law.

Moreover, the other aim of the PSD is to ensure that the internal market is not distorted by the disadvantageous taxation of foreign companies. This may be threatened by violating Art. 63 TFEU, which establishes the free movement of capital, the freedom of establishment under Art. 49 TFEU and freedom to offer services under Art. 56. The Court has explained in *Burda* that these freedoms are not threatened as long as national legislation does not differentiate between the distribution of subsidiary profits to a resident parent company and to a non-resident parent company.[286] Lehis et al. accentuate that the Estonian CIT does not discriminate between subsidiaries with resident parent companies and those with non-resident companies – in both cases, the subsidiary is taxed at the point of distribution, and no additional taxes are imposed.[287] This further demonstrates that the CIT system does not have distorting effects on the internal market. As a result, the European Commission has not pursued the Estonian state for non-compatibility with EU law.

4. Stage 3: OECD Membership

4.1. Historical Context

Estonia ratified the Convention on the OECD on 9 December 2010, and officially became a member[288] after having received an invitation to join from all other OECD countries on 10 May 2010.[289] It was noted by the OECD that Estonia was "one of the most successful reformers in Central and Eastern Europe" and "had important reform experience to share with OECD members and others, e.g. in the field of tax and

[285] Lehis and others (n 7) p. 396.
[286] *Burda* (n 280) para. 84.
[287] Lehis and others (n 8) p. 395.
[288] OECD, 'List of OECD Member countries – Ratification of the Convention on the OECD' (*OECD*, 25 May 2021) <https://www.oecd.org/about/document/ratification-oecd-convention.htm> accessed 19 April 2022.
[289] OECD, 'Estonia and the OECD' (*OECD*, 10 May 2010) <https://www.oecd.org/estonia/estoniaandtheoecd.htm#:~:text=Estonia%20became%20a%20member%20country,achieving%20the%20Organisation's%20fundamental%20aims> accessed 19 April 2022.

deregulation".[290] Estonia was, therefore, ready to become an equitable partner of the OECD, which would further its ability to analyse and devise policies with the expertise of some of the most developed countries in the world.[291] It became apparent that the relationship was going to be of a symbiotic nature.

This important milestone was complemented by the country's acceptance into the Euro zone, which occurred three weeks later on 1 January 2011.[292] It was a significant step towards European integration – Estonian markets were easily accessible by foreign investors, and international trade could also become more efficient.[293] It was observed that companies no longer needed to transact in two currencies which simplified contracts, business accountancy, and the state of the economy could be easily communicated to foreigners who intrinsically understood economic metrics with the Euro as a benchmark for orientation.[294] Lastly, it meant that the risk of inflation and other economically destructive factors was drastically reduced as the Euro was a major global currency.[295]

Parallel to this development, Estonia performed very well in other societal metrics. In 2011, Estonia had similar values of GDP per capita as Poland and even outperformed Portugal, with a GDP per capita at USD 21,997.[296] Additionally, Estonia ranked in 34th place on the Human Development Index (HDI), very close to Andorra (32) and Greece (29), whilst surpassing all Baltic and Eastern European countries except for the Czech Republic.[297] Lastly, as *Figure 10* above shows,

[290] OECD (n 289).
[291] ibid.
[292] Republic of Estonia Ministry of Foreign Affairs, 'Changeover to the euro in Estonia from 1 January 2011' (*Republic of Estonia Ministry of Finance*, 22 March 2016) <https://vm.ee/en/changeover-euro-estonia-1-january-2011> accessed 21 April 2022.
[293] ibid.
[294] ibid.
[295] ibid.
[296] Our World in Data, 'GDP per capita, 1999-2018' (*Our World in Data*, 2020) <https://ourworldindata.org/grapher/maddison-data-gdp-per-capita-in-2011us-single-benchmark?time=1999.latest&country=IDN~ARG~KOR~FRA~GBR~AUT~USA~EST~PRT~POL> accessed 21 April 2022.
[297] UN, 'Human Development Report 2011' (*United Nations Development Programme*, 11 September 2013) 127 <https://hdr.undp.org/en/content/human-development-report-2011> accessed 21 April 2022.

unemployment was on a decline for the first time after the Global Financial Crisis of 2007-08. Therefore, it appears that Estonia's economy was in a healthy state.

4.2. BEPS ACTION PLAN

One of the most important OECD initiatives in this period is the OECD Base Erosion and Profit Shifting (BEPS) Action Plan.[298] This aimed to address the problem of exploitative tax planning used by entities to allocate profit to low or zero-tax jurisdictions, often for no commercially viable purpose other than obtaining a tax advantage.[299] As a result, the OECD published 15 proposals in 2015 to tackle this problem across 60 jurisdictions; Estonia was one of the countries to implement the provisions.[300] This section will analyse Actions 1, 2, 3,4 and 6. These are the provisions to which Estonia has acceded using hard, substantive law which can be analysed. It should be mentioned that Estonia generally follows all 15 Actions; however, there is not enough juridical material, results and specificity in order to analyse them to a high-quality standard.[301] It will be noted that the EU has actively endorsed these proposals, and there are EU-wide measures which address most of the issues raised by the OECD.[302] Moreover, the mentioned Actions will be analysed in conjunction with any domestic measures introduced by Estonia.

4.2.1. Action 1: Digital Economy

The first Action was to target the way digitalisation of the economy was increasing the risks of BEPS[303]. The OECD decided to expand the meaning of PE so that it captures business activities as part of the digital economy, such as having storage

[298] OECD, 'Action Plan on Base Erosion and Profit Shifting' (*OECD*, 13 July 2013) <http://dx.doi.org/10.1787/9789264202719-en> accessed on 21 April 2022.
[299] OECD, 'OECD/G20 Inclusive Framework on BEPS' (*OECD*, 13 July 2013) <https://www.oecd.org/tax/beps/flyer-inclusive-framework-on-beps.pdf> accessed on 21 April 2022.
[300] ibid.
[301] KPMG, 'OECD BEPS Action Plan: Moving from Talk to Action in Europe' 7 (*KPMG*, September 2017) <https://assets.kpmg/content/dam/kpmg/xx/pdf/2017/09/ema-beps-report-2017.pdf> accessed 21 April 2022.
[302] ibid.
[303] OECD, 'Addressing the Tax Challenges of the Digital Economy, Action 1 – 2015 Final Report' 11 (OECD, 5 October 2015) <https://doi.org/10.1787/9789264241046-en> accessed 21 April 2022.

facilities from which goods are delivered to an online seller.[304] Additionally, new measures to collect value-added tax (VAT) were suggested to address issues of VAT collection in international online sales. For example, transferring the owed amount of tax online to the tax authority of the country in which the goods or services were supplied immediately upon receiving the funds from consumers.[305]

Firstly, in relation to the meaning of a PE, it has been observed that Estonia does not deviate from the OECD Commentaries in relation to the interpretation of DTTs.[306] Therefore, the Commentary on Art. 5 states that internet servers which store websites may give rise to a PE unless their performative function is "preparatory or auxiliary"[307] as they have a physical presence. However, it should be noted that if there is no DTT between Estonia and the residence country of a parent company, domestic tax law has no preparatory or auxiliary exceptions, and thus Estonia can exercise tax jurisdiction if it is determined that the activity is of a business nature.[308]

Secondly, the issue of value-added taxation of services provided in the digital economy was addressed at the EU level back in 2006 with the implementation of the VAT Directive.[309] The European Commission, in its explanatory notes, has stated that under Art. 44 and 58 of the Directive, VAT on all digital services should be charged wherever the final customer is located, and it is immaterial whether services are provided by a non-EU or EU company.[310] Therefore, Estonia will have jurisdiction to charge VAT for services which are digitally made available in its territory.

It is interesting to note that the Estonian parliament voted against a new reporting standard which corresponded to OECD's guidance on reducing BEPS in the

[304] OECD (n 303).
[305] ibid.
[306] Lipre and Ansperi (n 142) §6.03[C] para. 61.
[307] OECD MTC (Condensed Version 2017) (n 60) Commentary on Art. 5, para. 128.
[308] Lipre and Ansperi (n 141) §6.03[C] para. 61.
[309] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L347/1 (VAT Directive).
[310] European Commission, 'Explanatory notes on the EU VAT changes to the place of supply of telecommunications, broadcasting and electronic services that enter into force in 2015', p. 54 (*European Commission Directorate-General Taxation and Customs Union*, 3 April 2014) <https://ec.europa.eu/taxation_customs/system/files/2016-09/explanatory_notes_2015_en.pdf> accessed 21 April 2022.

digital economy.[311] The proposal would have required providers of digital services to report their profits from digital services to the tax authorities.[312]

4.2.2. Action 2: Neutralising the Effects of Hybrid Mismatch Arrangements

This OECD proposal attempts to resolve the issue of double non-taxation in the international tax regime.[313] This is an aggressive tax avoidance technique where a company makes a payment to another related company located in a different jurisdiction.[314] The transaction takes the form of a complex financial instrument which is deductible in the first jurisdiction but is also exempt from tax in the second jurisdiction, thus resulting in double non-taxation.[315] The OECD has encouraged countries to change their domestic law so that it does not grant tax exemptions to transactions which have already triggered a deduction.[316]

In Estonia, this has been achieved by EU law, namely by the 2014 amendment to the Parent-Subsidiary Directive (PSD 2014).[317] Art. 4(1)(a) compels member states to tax any profit for which an exemption has been granted elsewhere. There are two additional Directives which govern Estonia's treatment of hybrid mismatches. The first is the Anti-Tax Avoidance Directive (ATAD) 1,[318] which recognises in its preamble[319] the problem of hybrid mismatches and lays down in Art. 9 that deductions are only to be given in the member state in which the profit has originated (i.e. the source member state). In 2017, this was expanded to also cover business with entities from non-EU countries under Art. 1 of the Anti-Tax Avoidance Directive (ATAD)

[311] KPMG, 'Taxation of the digitalized economy' (*KPMG*, March 2022) p. 111 https://tax.kpmg.us/content/dam/tax/en/pdfs/2022/digitalized-economy-taxation-developments-summary.pdf> accessed 21 April 2022.
[312] ibid.
[313] OECD, 'Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2 – 2015 Final Report' (*OECD*, 5 October 2015) 11 <http://dx.doi.org/10.1787/9789264241138-en> accessed 21 April 2022.
[314] ibid.
[315] ibid p. 17.
[316] ibid p. 16.
[317] Council Directive 2014/886/EU of 8 July 2014 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States [2014] OJ L219/40.
[318] Council Directive 2016/1164/EU of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market [2016] OJ L193/1 (Anti-Tax Avoidance Directive (ATAD) 1).
[319] ibid recital 13.

2.[320] Consequently, Estonia has three legislative measures to combat double non-taxation on the international plain.

4.2.3. Action 3: Controlled Foreign Companies (CFC)

This OECD Action attempts to establish taxation rules for when taxpayers shift income to a CFC in which they have a controlling interest for the purposes of eroding their residence tax base.[321] The OECD has issued six "building blocks" to curb this problem: defining a CFC, CFC income exemptions and thresholds, rules for calculating and attributing income and preventing double taxation.[322]

Estonia has CFC legislation by virtue of the Income Tax Act 2000.[323] It taxes CFC income if 50% or more of voting rights or shares are owned by Estonian residents and an individual resident has a 10% stake or controlling interest in the CFC.[324] As Klauson notes, these limitations exist in order not to tax individuals who have some associations with CFCs but have no real way of making decisions as to the tax strategy of the CFC.[325] It is worth mentioning that these rules only apply if such income is derived from a CFC in a low-tax territory which, according to the ITA 2000, means that the jurisdiction charges less than 7% of business tax.[326] However, the Estonian Ministry of Finance makes exceptions if these profits were made in pursuit of a "genuine economic activity" and if the low-tax jurisdiction is cooperative, transparent and provides tax information.[327]

Additionally, Estonia is bound by the ATAD 1, which, under Art. 7 obliges member states to tax residents if they, individually or together with other residents, have a 50% controlling interest if they have paid less tax on the CFC compared to

[320] Council Directive 2017/952/EU of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries [201] OJ L144/1 (Anti-Tax Avoidance Directive (ATAD) 2) Art. 1.
[321] OECD, 'Developing Effective Controlled Foreign Company Rules, Action 3 – 2015 Final Report' 9 (*OECD*, 5 October 2015) <http://dx.doi.org/10.1787/9789264241152-en> accessed 22 April 2022.
[322] ibid 11.
[323] Income Tax Act 2000 Arts. 10, 22.
[324] ibid Art. 22.
[325] Klauson (n 213) p. 284.
[326] Income Tax Act 2000 Art. 10.
[327] Klauson (n 213) pp. 284-85.

what their resident member state would have charged.[328] This is a stricter standard than Estonia's domestic rules.

4.2.4. Action 4: Interest Deductions

This Action attempts to minimise BEPS when multinational enterprises (MNEs) artificially issue. This usually occurs in the international tax regime when third-party debt is issued to countries with high taxes and issuing loans between different entities related to a MNE to increase the number of interest [329] [330]

This issue is once again addressed by the ADAT 1. Firstly, in Art. 2(1), the Directive includes a very wide definition of interest related to loans which is referred to as "borrowing costs". This provision addresses the problem identified by the OECD that MNEs may mask what is functionally an interest payment using complex financial instruments.[331] Consequently, the Directive contains an interest limitation rule in Art. 4(1) where all borrowing costs are deductible only if they are under 30% of the amount of earnings before interest, tax, depreciation and amortisation (EBITDA). This is aligned with the OECD proposal that where such limitations should be made in reference to EDITDA, recommending values between 10% and 30%.[332]

4.2.5. Action 6: "Treaty Shopping"

With this Action, the OECD attempts to prevent international taxpayers from "treaty shopping" – usually for the purposes of attaining any treaty, DTT benefit which was

[328] ATAD 1 (n 318) Art. 7.
[329] OECD, 'Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 4 – 2016 Update' 13 (*OECD*, 22 December 2016) <http://dx.doi.org/10.1787/9789264268333-en> accessed 22 April 2022.
[330] ibid.
[331] OECD, 'Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 4 – 2016 Update' (n 329) p. 13.
[332] ibid.

unintended is against the spirit of the relevant DTT, and ultimately results in countries losing tax revenues.[333]

Estonia considers that tax treaty abuse can be resolved through domestic provisions, and therefore, anti-avoidance provisions are not typically included in its DTTs.[334] However, as Klauson analyses, the 2002 version of the Income Tax Act contains two anti-avoidance measures.[335] Firstly, artificial transactions are caught by an "abuse of law" doctrine if they attempt to conceal another transaction for the purpose of acquiring a tax advantage.[336] Secondly, the "substance-over-form" test discards any transactions with no commercial purpose other than seeking to minimise tax expenditure.[337]

Furthermore, the ATAD 1 contains functionally the same provisions under Art. 6, which establish a General-Anti-Abuse Rule (GAAR), to which Estonia complies as a result of the measures discussed above.

4.3. Case Study on Estonian Tax Avoidance

The analysis of Estonia's international tax regime thus far has presented many of the positive aspects of its system. This is not due to a bias or any other prejudice. Rather, it exemplifies what the international community, including the OECD[338], appreciated in Estonia's development towards democracy and a free market. However, to offer a complete and trustworthy discussion, this section will explore any deficiencies the system has and how they may be improved.

The first important observation to keep in mind is that Estonia is what is known as "a transition country from Central and Eastern Europe".[339] Therefore, the quality of administration of public institutions was sub-par in comparison to

[333] OECD, 'Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 – 2015 Final Report' 10 (*OECD*, 5 October 2015) <http://dx.doi.org/10.1787/9789264241695-en> accessed 22 April 2022.
[334] Klauson and Uustalu (n 143) p. 361.
[335] Klauson (n 213) p. 283.
[336] ibid.
[337] ibid.
[338] OECD, 'Estonia and the OECD' (n 295).
[339] Merike Kukk and Karsten Staehr, 'Income underreporting by households with business income: evidence from Estonia' (2014) 26 Post-Communist Economies, p. 258.

developed Western government structures.[340] As a result, it has been observed that the shadow economy in these countries has historically been a bigger problem.[341] To effectively provide an analysis, a definition of the shadow economy must be provided. The OECD recognises that defining the exact qualities of the shadow economy is difficult and subject to a lot of academic debate[342]. However, there is certain consensus over the following definition:

> Economic activities, whether legal or illegal, which are required by law to be fully reported to the tax administration, but which are not reported and which therefore go untaxed, unlike activities which are so reported.[343]

Schneiders' research has indicated the following results for the size of the shadow economy in Estonia between 2003 and 2012, shown in the table below, compared to the EU average for the same period[344]:

Figure 13: Table Showing the Size of the Shadow Economy of Estonia Compared to the EU Average (Expressed as a % of the Total GDP)[345]:

	2003	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**
Estonia	30.7	30.8	30.2	29.6	29.5	29	29.6	29.3	28.6	28.2
EU Average	22.3	21.9	21.5	20.8	19.9	19.3	19.8	19.5	19.2	18.4

[340] Kukk and Staehr (n 339) p. 258.
[341] ibid.
[342] OECD, 'Shining Light on the Shadow Economy: Opportunities and Threats' (*OECD*, 29 September 2017) 8 <https://www.oecd.org/tax/crime/shining-light-on-the-shadow-economy-opportunities-and-threats.pdf> accessed 22 April 2022.
[343] ibid p. 9.
[344] Friedrich Schneider and Friedrich Georg Schneider, 'Size and Development of the Shadow Economy of 31 European and 5 other OECD Countries from 2003 to 2012: Some New Facts' (*Research Gate*, 1 January 2013) <https://www.researchgate.net/publication/268185661_Size_and_Development_of_the_Shadow_Economy_of_31_European_and_5_other_OECD_Countries_from_2003_to_2012_Some_New_Facts> accessed 20 May 2023.
[345] ibid.

As observed by Kukk and Staehr, it is surprising that despite the regulatory changes Estonia adopted in all aspects of its public administration – from tax law to industry regulation – EU membership did not significantly reduce the shadow economy.[346]

Profound research on why the shadow economy is so prominent in Estonia has been performed by Putniņš and Sauka.[347] They identify the key reasons entities in the business sector prefer to operate in the shadow economy.[348] The first reason is perhaps universal – businesspeople find taxes too high.[349] This then translates into another key factor which is that companies become more competitive when they lower their tax expenditure through tax evasion, gain a more significant market share, and generally become more influential.[350]

The last group of reasons for evading tax can be called "cultural".[351] This relates to the ideas mentioned above about the deficiencies in the government apparatus of Central and Eastern European states.[352] Williams and Horodnic observe that former USSR countries suffer from a "low tax moral".[353] They define it as the "intrinsic motivation to [not] pay taxes"[354] which is described to stem from dissatisfaction with the finance sector as well as the lack of trust in the way government spends tax revenues and, more broadly – distrust in the government apparatus.[355] The authors observe that this is even more relevant for firms which are new entrants to the market.[356] This is largely because tax evasion is a very effective

[346] Kukk and Staehr (n 339) p. 271.
[347] Tālis J Putniņš and Arnis Sauka, 'Size and determinants of shadow economies in the Baltic States' [2011] Baltic Journal of Economics 5 <https://doi.org/10.1080/1406099X.2011.10840498> accessed on 22 April 2022.
[348] ibid p. 22
[349] ibid.
[350] ibid p. 23
[351] Kukk and Staehr (n 339) p. 258.
[352] ibid.
[353] Colin C Williams and Ioana A Horodnic, 'Explaining and tackling the shadow economy in Estonia, Latvia and Lithuania: a tax morale approach' [2015] Baltic Journal of Economics 82 <http://dx.doi.org/10.1080/1406099X.2015.1114714> accessed 22 April 2022.
[354] ibid.
[355] Putniņš and Sauka (n 347) p. 22.
[356] ibid.

mechanism for gaining a competitive edge against older companies which have proven market positions.[357]

4.3.1. Potential Solutions

The authors who conducted the research are of the opinion that government trust would be the most effective way to shrink the shadow economy.[358] A possible suggestion is ensuring that the government's fiscal initiatives do not change radically but instead create a reliable and durable atmosphere which does not frustrate investors and businesspeople.[359] Although this is a reasonable suggestion, the practicalities cannot be ignored. Taxation is inherently a politically influenced area of public policy which is subject to change whenever a new democratic government is elected. Furthermore, successive governments cannot be expected to be bound by the tax policies of their predecessors – humanitarian crises like the war in Ukraine, healthcare crises like the Covid-19 pandemic, and financial crises like the one of 2007-08 have shown that the world is unstable. Governments must be able to react however they see reasonable, which may include adjusting tax policy.

Another solution offered is to ensure that the government's spending of tax revenues is more transparent. An example from the tax administration practices in Belgium may provide a useful guide. In Belgium, every taxpayer receives a letter reminding them when taxes are due, how to file them, etc., but most importantly – a printed infographic of how taxes are spent, categorised by different areas of public policy and expressed as a percentage of the total national budget.[360] This can leave a positive impression on the taxpayer that the government is acting transparently and is proud to advertise its spending. Consequently, public trust may be improved.

Putniņš and Sauka conclude that it would be well worth the investment if governments pursue initiatives of this kind due to the magnitude of the shadow

[357] Putniņš and Sauka (n 347) p. 22.
[358] ibid p. 24.
[359] ibid.
[360] Anouck Thibaut, 'À quoi servent nos impôts?' (*Le Ligueur*, 24 February 2014) <https://www.leligueur.be/actujeunes/a-quoi-servent-nos-impots> accessed 22 April 2022.

economy.[361] Firstly, shifting any business activity away from the shadow economy and into the legitimate market will bring more revenue to the government.[362] Additionally it will also contribute to the credibility of the Estonian government in the eyes of foreign investors and thus build on the country's economic progress.[363]

4.4. ESTONIA'S INTERNATIONAL TAX REGIME AND THE FUTURE: PILLAR 1 AND 2

The last stage of Estonia's international tax regime is in relation to OECD's newest two-pillar proposal to "address the tax challenges arising from the digitalisation of the economy".[364] The initiative aims to subject MNEs to at least a 15% corporation tax and ensure that countries receive fair tax revenue from the globalised business operations of MNEs.[365]

The first pillar will strive to grant taxation at source rights to countries where consumers of the goods and services offered by MNEs reside.[366] This extended right will cover 25% of MNEs' residual profit.[367] However, the scope of the Pillar is quite narrow – it purports to target MNEs "with global turnover above EUR 20 billion and profitability above 10% (i.e. profit before tax/revenue)".[368] It is estimated that this would bring USD 125 billion of additional tax revenue to source jurisdictions.[369]

Furthermore, Pillar 2 tries to curtail "race-to-the-bottom" tax competition between countries by imposing a minimum 15% tax rate on corporations.[370] This provision is significantly broader and is intended to capture all MNEs with a yearly

[361] Putniņš and Sauka (n 347) p. 25.
[362] ibid.
[363] ibid.
[364] OECD, 'Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy' (*OECD*, 8 October 2021) <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf> accessed 23 April 2022.
[365] OECD, 'Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy (Highlights Brochure)' 3 (*OECD*, 8 October 2021) <https://www.oecd.org/tax/beps/brochure-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf> accessed 23 April 2022.
[366] ibid p. 4.
[367] ibid.
[368] OECD, 'Statement on a Two-Pillar Solution' (n 364) p. 1.
[369] OECD, 'Statement on a Two-Pillar Solution (Highlights Brochure)' (n 365) p. 5.
[370] ibid p. 4.

revenue above EUR 750 million.[371] As a result, it is estimated to generate even greater tax revenues – in the region of USD 150 billion.[372] Moreover, in conjunction with Pillar 1, the OECD hopes to provide stability and certainty for MNEs and governments.[373]

4.4.1. Estonia's Position

In a government announcement, the Minister of Finance has expressed concerns about the OECD reform from Estonia's perspective.[374]

Firstly, however, it must be noted that Estonia fully supports Pillar 1.[375] This is in line with Pahapill's analysis of the guiding principles of Estonia when it seeks to negotiate DTTs.[376] It generally favours imposing tax jurisdiction on foreign investments, as discussed previously, to protect its tax base from exploitation by developed and economically powerful countries, but also because they mainly offer tax credits for any taxes imposed by Estonia.[377] As the Finance Minister comments, this tax instrument would allocate tax revenues from companies that profit in Estonia but do not have a physical presence.[378] Furthermore, the authorities have pointed out that "99 per cent of companies are outside the scope".[379]

However, Estonia has shown discontent over Pillar 2.[380] The government has been of the opinion that its CIT system "is not designed to promote tax avoidance" and has given statistics to demonstrate its efficiency – it claims that Estonia receives just as much corporate tax revenue as Germany and France and even outperforms the

[371] OECD, 'Statement on a Two-Pillar Solution (Highlights Brochure)' (n 365) p. 4.
[372] ibid p. 5.
[373] ibid.
[374] Republic of Estonia Ministry of Finance, 'Estonia continues talks over OECD tax deal' (*Republic of Estonia Ministry of Finance*, 7 September 2021) <https://www.rahandusministeerium.ee/en/news/estonia-continues-talks-over-oecd-tax-deal> accessed 23 April 2022.
[375] ibid.
[376] Pahapill (n 42) p. 63.
[377] see "1. STAGE 1h) (i) Provisions which protect the tax base"
[378] Republic of Estonia Ministry of Finance, 'Estonia continues talks over OECD tax deal' (n 374).
[379] Helen Wright, 'Analysts: Estonia's criticism of OECD minimum tax rules is reasonable' (*News ERR*, '1 February 2022) <https://news.err.ee/1608485102/analysts-estonia-s-criticism-of-oecd-minimum-tax-rules-is-reasonable> accessed 23 April 2022.
[380] ibid.

US when this is calculated as a percentage of the GDP of each country.[381] One of the criticisms Estonia puts forward as a justification for not agreeing to Pillar 2 is that the OECD is currently developing and focusing primarily on Pillar 1, which, as noted above, does not materially impact the Estonian taxpayers.[382]

More significantly, however, the Estonian Ministry of Finance has clarified that the OECD must "accept a few modifications".[383] In December 2022, the Council of the European Union agreed to implement the OECD Pillar 2.[384] A minimum corporate tax of 15% was agreed between Member States, including Estonia.[385] However, it should be noted that the new legislation will only apply to companies which have profits over €750 million a year.[386] Additionally, Estonia has negotiated a very long implementation period – until the end of 2030.[387] Lastly, these changes must be analysed in light of the political atmosphere in Estonia. The newly elected government plans to raise the current 20% tax on distributed profits to 22%[388]. That being the case, it is not difficult to imagine circumstances in which the country's corporate tax regime is wholly revised.

Another important aspect of the EU law is to allow countries to apply a "top-up tax"[389]. For example, if a MNE has its residence in country X with a corporate tax rate of 15% and has a subsidiary which generates profit in country Y where the corporate tax rate is 10%, which is taxed at source, country X can apply a "top-up"

[381] Wright (n 379).
[382] ibid.
[383] Republic of Estonia Ministry of Finance, 'Estonia continues talks over OECD tax deal' (n 374).
[384] Katharina Pausch-Homblé, 'International taxation: Council reaches agreement on a minimum level of taxation for largest corporations' (*Council of the EU*, 12 December 2022) <https://www.consilium.europa.eu/en/press/press-releases/2022/12/12/international-taxation-council-reaches-agreement-on-a-minimum-level-of-taxation-for-largest-corporations/> accessed 28 May 2023.
[385] ibid.
[386] ibid.
[387] Viktoria Jakovleva and Tiiu Mõttus, 'Agreement reached to postpone Estonia's implementation of the global minimum tax' (*BDO Tax News*, May 2022) <https://www.bdo.global/en-gb/microsites/tax-newsletters/corporate-tax-news/issue-62-may-2022/estonia-agreement-reached-to-postpone-estonia%E2%80%99s-implementation-of-the-global-minimum-tax> accessed 28 May 2023.
[388] Joost Haddinga, 'Why the Estonian Tax System Would Remain Competitive after Tax Reform' (*Tax Foundation*, 1 May 2023) <https://taxfoundation.org/estonia-tax-system-competitiveness-reform/> accessed 28 May 2023.
[389] Jakovleva and Mõttus (n 387).

tax of 5%.[390] This can then create a situation where Estonia would be losing tax revenue to other countries in the form of "top-up" taxes.[391] For example, tax practitioners in Estonia have suggested that under the current rules where Estonia taxes distributed profits on a 20/80 basis[392], the effective tax rate would fall below the 15% threshold imposed by EU law[393]. On the other hand, if the Estonian government starts applying a 22% tax on distribution, this would decrease the tax revenues that go to other countries. The threat of losing public funds could be seen as a factor to reform the system altogether so that it falls in line with the EU and OECD proposals. Another possibility would be the implement a required minimum of profits which must distributed annually, which in turn would bring up the effective tax rate and keep other countries from applying a "top-up" tax. However, this approach is very economically invasive and is unlikely to stand to political scrutiny. What is certain is that the development of the Estonian CIT regime is very much subject to the political tendencies which could develop over the next ten years.

5. CONCLUSION

In conclusion, the development of the Estonian international tax system between 1993 and 2023 had numerous successful aspects for integrating Estonia into the Western world. The country was able to mobilise quickly after regaining independence from the Soviet Union. Public opinion favoured Western integration and decreased Soviet or Russian influence. This presented various challenges, perhaps the most notable of which was that Estonia had no experience negotiating DTTs. However, it received invaluable training from the OECD, which set the country on the course towards Western integration. The first independent treaties were with its neighbouring trading partners and generally relied on the OECD MTC, except for provisions which favoured taxation at source, inspired by the UN MTC. Estonia demonstrated to the

[390] Jakovleva and Mõttus (n 387).
[391] ibid.
[392] See "2. STAGE 2: Tax Reform in 2000 and EU Membership: b) Structure of the Corporate Income Tax (CIT) System".
[393] Jakovleva and Mõttus (n 374).

West that it was capable of being a valuable trading partner, which was also reflected in domestic tax provisions such as a flat tax.

The following stage in developing the Estonian ITR was marked by the tax reform of 2000, which introduced an unusual method of taxing corporate income. Under the CIT regime, taxes are only charged when corporate profits are distributed. This had the potential to be advantageous for companies as they retained profits which could have been reinvested to spur business growth. The Estonian economy was in a healthy condition during this reform. However, the regime faced opposition from the EU due to potential incompatibility. Fortunately, the jurisprudence of the CJEU demonstrated compatibility, which allowed Estonia to fully integrate with the EU Single Market in 2004.

Furthermore, the country was invited to join the OECD in 2010.[394] The OECD administration commended it for its ability to establish a simple, transparent, and efficient tax regime. When faced with the first major proposal as an OECD member, Estonia responded in unison with the OECD and the EU to integrate the BEPS Action Plan. Furthermore, Estonia was initially reluctant to accept the Pillar 2 proposal as it cut against the distributable profits method of corporate taxation. However, after lengthy and tense negotiations, it managed to negotiate a 10-year implementation period. Additionally, the "top-up" tax provisions of the EU law would mean Estonia would be placed at a disadvantage for charging lower corporate tax rates. Therefore, it is not difficult to imagine a reform of the system in the next decade, and early signs of political will to raise rates can already be observed.

Nonetheless, statistics were used to present that despite the advanced integration of Estonia with the EU and the OECD, the shadow economy and tax evasion remains pertinent problem. It was argued that cultural and practical reasons contributed to evasive tax practices by businesses in Estonia. Introducing more transparency in how the government spends tax revenues as well as steering away from radical changes to tax policy were suggested as potential remedies. The long

[394] OECD, 'Estonia and the OECD' (n 274).

implementation period which is afforded to Estonia to implement new changes is a good sign that changes will occur gradually and with enough time for adaptation.

Fictional Characters and Their Protection under Intellectual Property Law

Chiara Gallo[1]

An Analysis of the Relation between Trademark Law and Protection of Copyright associated with Iconic 'Pop Culture' Characters in the EU and the US

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TABLE OF ABBREVIATIONS

Berne Convention	Berne Convention for the Protection of Literary and Artistic Works 1886
CDPA	Copyright, Designs and Patents Act 1988
CDSM Directive	Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130
CJEU	Court of Justice of the European Union
Cofemel	Case C- 683/17 *Cofemel v G-Star Raw* [2020] ECDR 9
EFTA	European Free Trade Association
EU	European Union
EUIPO	European Union Intellectual Property Office
EUTM	European Union Trade Mark
EUTMD	Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks [2015] OJ L 336
EUTMR	Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L 154/1
EU(W)A 2018	European Union (Withdrawal) Act 2018
Fisher	*Fisher v Star Co*, 231 N.Y. 414 (1921)
Infopaq	Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569
InfoSoc Directive	Directive (EU) 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167
IP	Intellectual Property
IPRs	Intellectual Property Rights

Levola Hengelo	Case C-310/17 *Levola Hengelo BV v Smilde Foods* BV [2018] OJ C 269
Mickey Mouse Protection Act	Sonny Bono Copyright Term Extension Act 1998
OHIM	Office for Harmonisation in the Internal Market (Trade Marks and Designs)
Painer	Case C-145/10 *Eva-Maria Painer v StandardVerlags GmbH and others* [2011] EU:C:2011:789
Pop Culture	Popular Culture
Shazam	*Shazam v Only Fools The Dining Experience* [2022] EWHC 1379 (IPEC)
Term of Protection Directive	Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights [2006] OJ L 372
TRIPS	Agreement on Trade-Related Aspects of International Property Rights, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1C, 1869 UNTS 299, 33 ILM 1197 (15th April 1994)
UK	United Kingdom
UKIPO	Intellectual Property Office of the United Kingdom
US	United States of America
USC / US Code	Code of Laws of the United States of America 2018
US Constitution	Constitution of the United States of America 1787
USPTO	United States Patent and Trademark Office
Vigeland	EFTA Court, Municipality of Oslo, *Case E-5/16*
Video Pipeline	*Video Pipeline, Inc v Buena Vista Home Entertainment, Inc*, 275 F. Supp. 2d 543 (D.N.J. 2003)
WCT	World Intellectual Property Organisation Copyright Treaty 1996
WIPO	World Intellectual Property Organisation

1. INTRODUCTION

An important part of the artistic and cultural world of the past few decades is represented under the heading of 'Pop Culture'. Indeed, artists like Andy Warhol or Roy Lichtenstein employed the use of 'mythic personages', which 'are created by the media stage simply by being suspended in a mythic reality of their own'.[2] The same category includes those fictional characters that have acquired a high degree of public and media attention while displayed at the centre of the media stage. Important characteristics related to these characters are considered within the elements of longevity, ubiquity, distinction, and a lasting place of recognition in the popular society.

The issue arises when the same mythic characters associated with Pop Culture are analysed from a legal perspective. Indeed, while these iconic characters, such as Disney's Mickey Mouse and the Detective Comics' (DC Comics) superheroes, will maintain their popularity for generations, the protection given by intellectual property only lasts, in most cases, for a specific period of time in order to allow the work to be freely enjoyed by the public after it lapses.[3] It is an understandable process for most of the literary and artistic works, given the changes to society and the different interests of a specific time in history. On the other hand, some examples are deemed to be considered as a shaping part of society, a way of identification of a specific author or a symbol of a company or brand. This is the case for Mickey Mouse, which, notwithstanding the influence it has had on pop culture for nearly a century, is set to lose its copyright protection on 1st January 2024, according to the same laws that it had helped shape.[4] Moreover, the famous mouse was represented in different formats, both by the company that created it and by other artists and authors in derivative works. Nonetheless, it is important to remember that the same is also protected as a

[2] Bojan Maric, 'What is Popular Culture? A Discovery Through Contemporary Art' (*Widewalls*, 21st October 2016) <https://www.widewalls.ch/magazine/blurred-lines-of-popular-culture> accessed on 20th March 2023;
Marcel Danesi, *Popular Culture: Introductory Perspectives* (Rowman & Littlefield Publishers 2015).
[3] ibid.
[4] Eleonora Rosati, 'Copyright protection of fictional characters: is it possible? how far can it go?' (*The IPKat*, 28th November 2019) <https://ipkitten.blogspot.com/2019/11/copyright-protection-of-fictional.html> accessed 20th March 2023.

trademark and such protection only expires if the owner stops using the mark in commerce.[5]

Consequently, referring to Mickey Mouse's case and the intrinsic relation between copyright law and trademark protection, the research question at hand acknowledges the most important differences in the interaction between copyright and trademark in the European Union (EU) and in the United States of America (US or USA). A further step in the analysis will be to discuss the issue of whether the fictional character can be protected once copyright lapses. In other words, the research question can be formulated as follows:

'Considering the main differences between the EU and the US, to what extent does a fictional character enjoy intellectual property rights after its copyright protection expires?'

To answer the research question, the paper will consider the doctrinal methodology in order to analyse the content and the language of the legal provisions and the case law that govern and regulate the two Intellectual Property Rights (IPRs) discussed in relation to fictional characters. In addition, a comparative element can be evidenced by the comparison between two jurisdictions. While looking specifically at the EU, the legal structure of the US will be compared with that of the EU.

The first section after the Introduction is dedicated to the discussion of the most important differences when it comes to defining and regulating copyright protection of these subjects. The following subsection will consider a landmark case involving copyright protection of fictional characters in the United Kingdom (UK) by recognising a few similarities with the EU legal system. Indeed, the recent case concerning the popular British sitcom, Only Fools and Horses was decided on the basis of EU copyright law, as it provided for the rights and principles covered by retained EU law.[6] Moreover, due to the importance of the case at hand, the analysis of the case in light of the protection of iconic pop culture *personages* could provide novel insights into this topic. In addition, the exceptions that allow appropriation

[5] Eleonora Rosati, 'Branderella: Trade Marks and Fictional Characters' in Yann Basire (ed), *Propriété intellectuelle et pop culture* (LexisNexis 2020).
[6] *Shazam v Only Fools The Dining Experience* [2022] EWHC 1379 (IPEC) (United Kingdom).

artists, such as Andy Warhol, to use iconic characters such as Mickey Mouse, will be briefly discussed. The following section is set to analyse the characteristics of trademarks and the differences between the EU and the US, while the last section is focused on the interaction between the two systems of legal protection, the application of the same to Mickey Mouse's case and the recent recognition of Steamboat Willie as a trademark. The conclusion aims at answering the research question and at considering future developments in the protection of these iconic characters as well as at highlighting possible consequences to the presence of '*mutant'* IPRs.

2. FICTIONAL CHARACTERS AND COPYRIGHT

2.1. EUROPEAN UNION

While copyright law in the European Union is essentially represented by the domestic law of each Member State, several directives were introduced to harmonise different aspects of this Intellectual Property (IP) right, including the InfoSoc Directive, the Term of Protection Directive and the Copyright in the Digital Single Market Directive.[7] These legislative instruments were drafted in accordance with the international treaties that originally provided for the modern regulation of copyright, namely the Berne Convention, the Agreement on Trade-Related Aspects of International Property Rights, Marrakesh Agreement Establishing the World Trade Organisation (TRIPS) and the World Intellectual Property Organisation (WIPO) treaties.[8] Consequently, in the EU, copyright grants a set of rights and prerogatives to

[7] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167 ("InfoSoc Directive"); Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights [2006] OJ L 372 ("Term of Protection Directive"); Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130 ("CDSM Directive"); Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights [1993] OJ L 290; Stephanie Fenech and others, 'Copyright in the EU. Salient features of copyright la across EU Member States' (*EPRS*, June 2018) <https://www.europarl.europa.eu/RegData/etudes/STUD/2018/625126/EPRS_STU(2018)625126_EN.pdf> accessed 20th March 2023.

[8] Berne Convention for the Protection of Literary and Artistic Works 1886 ("Berne Convention");

the authors of original works, in order to incentivises creative endeavour and accessibility to the same creative works by the public. The scope of the protection in the EU includes exclusive right of exploitation of the work, exclusive rights of reproduction of the work and moral rights.[9]

A subject to be granted copyright must satisfy certain criteria pursuant to the EU legal system. Firstly, it must fall within the definition of 'work'.[10] The Court of Justice of the European Union (CJEU) considers this requirement to be satisfied when the creative product represents an autonomous concept and it is the result of the author's intellectual creation.[11] Nonetheless, the same concept can vary in accordance with the specific conditions set by national laws, which could limit the scope of the IP right.[12] Consequently, a work must be original, objectively identifiable, precise, and perceivable.

In the case of fictional characters, the originality criteria do not necessarily state the form of the *personage.* It is not important if they are portrayed as fictional humans or fictional non-humans, as long as they present a physical appearance, a personality, and a name. The same characteristics must be 'original in the sense that [they are] the author's own intellectual creation', namely the free and creative choice of the creator, and the expression of their idea.[13] Objective identification and recognition of the creation are other determinant aspects, which can be easily assessed in the case of graphic novels and cartoon characters, but can present some difficulties in the case of literary characters which need to be assessed as works of art on the basis

Agreement on Trade-Related Aspects of International Property Rights, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1C, 1869 UNTS 299, 33 ILM 1197 (15th April 1994) ("TRIPS"); World Intellectual Property Organisation Copyright Treaty 1996 ("WCT").

[9] EUIPO, 'FAQs on copyright for consumers' (*EUIPO*, April 2022) <https://euipo.europa.eu/ohimportal/it/web/observatory/faq-sv?TSPD_101_R0=085d22110bab200072cdcd4bc9ac9d71a7f8755e7ce9f0aefbdb8f874e446da7a11166e9ce16c053089b4a32661430001ff2cc38aeca13b788fb489da3447412c8f8a1ea8186e42beeb0678daaa371acc18feab7b41ed5f2a7020a975bc73235> accessed 20th March 2023.

[10] Berne Convention (n 7) art 2(1).

[11] Case C-310/17 *Levola Hengelo BV v Smilde Foods BV* [2018] OJ C 269, para 37.

[12] 'Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)' (1978) No.615(E) WIPO Publication, p 17.

[13] Case C-833/18 *SI and Brompton Bicycle Ltd v Chedech / Get2Get* [2020] EU:C:2020:461, paras 22-24: Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECRI-6569, para 37-38.

of their description.[14] In other words, due to the fact that, in relation to a novel, every reader can imagine the character in a different way, the more accurate the character is described, the more it is deemed to be objectively identifiable and the easier the process of assessment is. Thus, cartoon characters can especially be recognised as works under the InfoSoc Directive, because they satisfy the originality requirement, representing the free and creative choice of the author or artist, as their physical appearance and personality is usually precisely described.[15] Fictional characters to be protectable must not fall within the category of stock character or archetype, without any original characteristic or trait referred to its physical appearance and personality, but they must represent the character of a story.[16] Examples of characters protected in the EU under the originality requirement include the Belgian Tintin and the Italian Corto Maltese, whose stories revolve around them as they are the main characters.

It is also necessary to look at the different parts of copyright-protectable characters. Indeed, the CJEU criteria are assessed by recognising that a fictional character is considered as a work only when it is identifiable, and it appears only in a single work.[17] In other words, a work represented by a character falling within the category analysed is deemed to be infringing on a previous work if the overall impression made on the public or audience by the comparison of the two works, especially when the physical appearance of the character is influenced by the personality of the author through the use of specific creative and aesthetic choices, is the same.[18] Moreover, the fictional character must be easily recognisable outside and independently of its original context, namely where it was initially invented, as the

[14] Valentine Labaume, 'The Protection of Fictional Characters under EU Intellectual Property Law' (2021) 4(2) Stockholm Intellectual Property Law Review <https://stockholmiplawreview.com/wp-content/uploads/2022/01/The-protection-of-fictional-characters_Tryck_IP_nr-2_2021_A4.pdf> accessed 20th March 2023.

[15] Joined Cases C-403/08 *Football Association Premier League Ltd and Others v QC Leisure and Others* and C-429/08 *Karen Murphy v Media Protection Services Ltd* [2011] ECRI-09083, para 98; C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2011] EU:C:2011:798, paras 87-89.

[16] Jasmine Abdel-Khalik, 'Scènes à Faire as Identity Trait Stereotyping' (2018) 2(2) The Business, Entrepreneurship & Tax Law Review 241.

[17] *Levola Hengelo* (n 10) para 37.

[18] Tribunal de grande instance (TGI) de Paris, Chambre civile 3, 21.05.2008, 08/00609 (France); Cour d'appel de Paris, Pôle 5, Chambre 2, Arrêt du 24.01.2020, Répertoire général 18/06949 (France).

result of the creator's autonomous and personal artistic idea.[19] Another issue arises in relation to its personality because its abstractness and its importance within the work usually influence this characteristic.[20] The most recognisable characters present personalities that are distinctive of the subject represented, as for example, the fact that *Asterix* is described as diminutive but fearless and as a cunning warrior while *Obelix*'s personality is characterised by his simple-mindedness, by his love and care for his dog and his best friend, and by his enthusiasm. Consequently, if the personality is associated with a physical trait and if it is an integral part of the same character, it can be eligible for the protection of copyright.[21] Lastly, when assessing these creations and their protectability, it is a relevant fact that with the passing of time, the same characters may evolve and change. The dominant and most objectively and precisely identifiable characteristics must remain the same in such cases.[22] Moreover, with the introduction of new elements linked to the evolution of the fictional character, it is necessary to recognise that the same elements must be original, while the character has to keep its identity and its most important physical and personality traits.

2.2. Comparison with the United States

In contrast with the EU legal system, copyright protection is granted under the Constitution because the US adopted the Berne Convention only in a later instance.[23] In accordance with the law of the United States, and in particular the Constitution's Intellectual Property Clause, copyright is provided to works to incentivise and reward the authors that make available and disseminate their creations, upon consent, to the public for a limited amount of time, after which the same works become available to the public, and enter into the public domain.[24] Copyright law is particularly focused

[19] Tribunale di Roma, Sezione XVII, Tribunale delle Imprese, Sentenza 6504/2021 pubblicata il 16.04.2021, RG 27160/2017, *Unidis Jolly Film SRL e Paramount Pictures Corporation* (Italy).
[20] Cour d'appel de Versailles ch.civ.réun. 15.12.1993 (France).
[21] Cour d'appel de Paris (n 17).
[22] *Levola Hengelo* (n 10) para 40.
Rosati, 'Branderella: Trade Marks in Fictional Characters' (n 4).
[23] 'US – Berne Convention. WIPO – Administered Treaties.' (*WIPO IP Portal*, 2022) <https://wipolex.wipo.int/en/treaties/parties/remarks/US/15> accessed on 20th March 2023.
[24] Constitution of the United States of America 1787, art I, §8, cl 8 ("US Constitution") (USA).

on the protection of fictional characters, providing authors with control of the use and of exploitation of their creations.[25]

The fictional character should be eligible for copyright protection as a separate entity, namely an original work of authorship, from the original work in which the character appears. The most important example is represented by Steamboat Willie's Mickey Mouse. The first representation of the mouse is, thus, considered and protected under copyright law as a separate identity from the cartoon, allowing Walt Disney to retain the meaningful and exclusive right to create derivative works.[26]

Nonetheless, US courts on some occasions have been reluctant to recognise copyright protection for fictional characters, mainly because there must be the understanding that the protected works will serve to enrich the public domain as building blocks of commerce and art by allowing a general indulgence of copying.[27] Consequently, US law provides for specific steps that need to be taken in order to assess whether a fictional character can be subject to copyright.

The first requirement involves the distinct delineation standard and is described in *Nichols v Universal Pictures* as the fact that the character could be protected independently of the plot, resembling the EU concept of the character taken into consideration out of the context from where it originated.[28] In order to find the fictional character to be an original expression, the necessary threshold of distinct delineation must be understood as more than a mere appropriation of general types and ideas and of the 'pictorial and literary details of complainant's copyrights'.[29]

The following test was created out of necessity for a more efficient, yet more restrictive, legal mechanism to assess whether a fictional character can be identified as a copyrightable subject. It is called 'the story being told' and only regards the protagonists of a story as copyrightable characters.[30] Put it differently, only the

[25] US Code 2000, Title 17, §106 ("USC") (USA).
[26] Jesse Green, 'Building a Better Mouse' (*NY Times*, 18th April 2004) <https://www.nytimes.com/2004/04/18/arts/film-building-a-better-mouse.html> accessed on 20th March 2023.
[27] Leslie Kurtz, 'The Independent Legal Lives of Fictional Characters', (1986) Wisconsin Law Review 429, p 438.
[28] *Nichols v Universal Pictures Corp*, 45 F. 2d 119, 121 (2d Cir. 1930) (USA).
[29] *Detective Comics, Inc v Bruns Publications, Inc*, 111 F. 2d 432, 433–34 (2d Cir. 1940) (USA).
[30] *Warner Bros Pictures, Inc v Columbia Broadcasting System*, 216 F. 2d 945 (1954) (USA).

characters that are clearly delineated and around which the story revolves are eligible for copyright protection without falling within the category identified as 'stock characters'.

After several struggles, in 2015, the test for fictional characters was conclusively stated in the *Batmobile* case.[31] Three requirements need to be fulfilled: (i) the character must have both physical and conceptual qualities; (ii) it must be original and have sufficiently distinctive, consistent and widely identifiable traits, characteristics and qualities to be recognisable in every context it appears, as described in Godzilla; and (iii) lastly, it must be especially distinctive, namely possessing some elements of expression that make it stand out.[32] As a consequence, any fictional character or element linked to the same, if it plays an important role in the work by fulfilling the criteria of the test, can be copyrightable, as it happened with the DC Comics' vehicle.

Similar to the shortcomings analysed when considering the EU legal system, in the US, the more accurately described the characters are, the more protectable they are. It is easier to assess graphically-represented fictional characters found in animated cartoons or in graphic novels rather than characters that are only described in the literature. Furthermore, a further condition is required in the case of literary characters, namely the description of each character and each part of the literary work.[33] The requirement is linked to the fact that copyright protects the expression of the idea but not the idea itself, and in the case of literary works, the public has to imagine the fictional character, and the reader's imagination cannot be protected under IPRs. The example provided by copyright law in the US evidenced the fact that in recent years there has been a tendency for countries to harmonise copyrights on the basis of the rationale that created the Berne Convention, namely avoiding discrepancies between its Contracting States.[34]

[31] *DC Comics v Towle*, 802 F. 3d 1012 (9th Cir. 2015) (USA).
[32] ibid p. 1022.
Toho Co, Ltd, v William Morrow And Company, 33 F. Supp. 2d 1206 (C.D. Cal. 1998) (USA).
[33] Janice McCutcheon, 'Works of Fiction: The Misconception of Literary Characters as Copyright Works' (2019) 66 Journal of the Copyright Society of the USA.
[34] Berne Convention (n 7) preamble.

The impact of accurate descriptions on the protectability of a fictional character is noticeable in the 2022 case concerning the Only Fools and Horses sitcom tried by the High Court of England and Wales.

2.3. ONLY FOOLS AND HORSES[35]

The first UK case concerning fictional characters involved Shazam Productions Ltd, the company holding the IPRs to a famous British sitcom, Only Fools and Horses, that run from 1981 to 2003, and the Only Fools the Dining Experience Ltd, an Australian company that decided to create an interactive and immersive theatre show using some of the fictional characters created by the original sitcom.

The issue concerning the case was represented by the fact that the claimant deemed specific characters, Del Boy and his brother, to be the protagonists of the sitcom and, as such, protected by copyright, while the defendant argued that the Dining Experience was not infringing Shazam's copyright as it did not use any of the script or the music from the TV series.[36] The two questions that arose in relation to the issue were: (1) Can fictional characters be protected under copyright law, and can Del Boy, as a fictional character, be copyrightable? (2) Does the Dining Experience fall within the scope of the exception of parody in accordance with the new features brought to copyright law in 2014?

The Judge, John Kimbell KC, at that point, looked at the relevant legal provisions under English copyright law under the English legal system, but he realised that both Copinger's definition,[37] the Copyright Designs and Patents Act 1988 and the

[35] *Shazam* (n 5); UEA Law School Conference "John Kimbell KC – Character in copyright and the character of copyright: Reflections on Only Fools and Horses" (9th March 2023).
[36] *Shazam* (n 5) para 10; Emily Gould, 'Copyright cases in the spotlight (*The Institute of Art and Law*, 1st July 2022) <https://ial.uk.com/copyright-cases-in-the-spotlight/> accessed on 20th March 2023.
[37] Gillian Davis and others (eds), *Copinger and Skone James on Copyright* (17th edn, Sweet & Maxwell 2016) para 7.93, standard definition used by the English courts to identify the difference between literary works and dramatic works: "... a basic distinction between literary works and dramatic works is that the choice of dramatic incident and the arrangement of situation and plot may constitute, to a much greater extent, the real value of a dramatic work. ... It should be remembered that dramatic works include not only plays and screenplays ...".

case *Kelly v Cinema Houses Ltd*,[38] were not able to provide an accurate basis for the answer to the two questions.[39] While it was possible to consider that the individual scripts of the sitcom were protected under copyright as 'dramatic works' in accordance with sections 1(1)(a) and 3(1)(a) Copyright, Designs and Patents Act,[40] the United Kingdom had never dealt with the issue related to the protection of characters in literary and dramatic works.[41] As a consequence, the Judge noted that the most recent changes made to English copyright law were introduced as the result of the ratification of the law of the European Union.[42] In particular, the claimant argued that if the standard test for protection of a work should apply to a character of a literary works, as in itself, it is the expression of the intellectual creation of an author.[43] The Judge looked at the German Supreme Court decision, *Re Pippi Longstocking*, in order to find a persuasive, out-of-jurisdiction application of the law to a similar issue.[44] Indeed, in the German case it was recognised that the character was a protectable literary work in its own right in addition to the copyright on the stories and the books.[45] The Judge's decision to look at EU law was influenced by the fact that the case *Marleasing SA v La Comercial Internacional de Alimentación SA* set out the correct approach to interpreting the CDPA.[46] Consequently, the following

[38] *Kelly v Cinema Houses Ltd* [1928–35] macG.C.C. 362, Maugham J: "If, for instance, we found a modern playwright creating a character as distinctive and remarkable as Falstaff… or as Sherlock Holmes, would it be an infringement if another writer, one of the servile flock of imitators, where to borrow the idea and to make use of an obvious copy of the original? I should hesitate a long time before I came to such conclusion" (United Kingdom).

[39] *Shazam* (n 5) paras 84, 87, 91.

[40] Copyright, Designs and Patents Act 1988 ("CDPA 1988"), ss 1(1)(a), 3(1)(a) (United Kingdom); *Norowzian v Arks* [1999] EWCA Civ 3018; [2000] FSR 363 held that films can be dramatic works, as Nourse LJ stated that "a dramatic work is a work of action, with or without words or music, which is capable of being performed before an audience" (United Kingdom); *Martin v Kogan* [2019] EWCA Civ 1645 held that a screenplay is a dramatic work "as its primary purpose lies in being performed, as opposed to being read, like a novel" (United Kingdom).

[41] *Shazam* (n 5) para 76.

[42] *Shazam* (n 5) paras 77, 91, 92.
Davis and others (eds) *Copinger and Skone James on Copyright* (n 36) para 3.15.

[43] Ibid Davis, para 3.15.

[44] *Re Pippi Longstocking* [2014] ECC 27 (Germany).

[45] ibid.

[46] Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-413; European Union (Withdrawal) Act 2018, s 5(2) ("EU(W)A 2018"): retained EU law in the UK has supremacy over any other conflicting UK domestic legislation if the latter was issued and adopted

step involved the analysis of the two requirements of the Cofemel test: (1) an original subject matter must exist in the sense of being the author's own intellectual creation; (2) a work is an element that is the expression of the same creation.[47]

A work must be 'original', in that it necessarily and sufficiently reflects the personality of its author and the expression of their creative choices.[48] The first requirement is satisfied in the case of Del Boy as it was an original creation of John Sullivan and the expression of his own free and creative choices.[49] Moreover, Del Boy was not a stock character or cliché of the specific social class the creator wanted to represent, but rather a fully rounded character with a complex personality and a full, detailed and intricate backstory.[50] It was a multi-layered character, and it was based on Sullivan's own experience and original idea.[51] Accordingly, the originality requirement was satisfied, also considering that some of Del Boy's vocabulary and phrases entered into the English language as linked to the character himself.[52] The second requirement is represented by the fact that the CJEU held that a work must be identifiable; namely, the identification must not only be essentially based on the

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before 11pm GMT on the 31st December 2020 (United Kingdom); EU(W)A 2018, s 6(6) considers that the meaning of retained EU law can be determined in accordance with the relevant retained case law and retained general principles of EU law, including the one of indirect effect, as in the case at hand (United Kingdom); *Vodafone 2 v Revenue and Customs Commissioners* [2009] EWCA Civ 446 [2010] Ch 77, paras 37-38 (United Kingdom).

[47] Case C- 683/17 *Cofemel v G-Star Raw* [2020] ECDR 9, paras 29-31; *Infopaq* (n 12) paras 37-39; *Levola Hengelo* (n 10) paras 33-37.

[48] *Painer* (n 14) paras 88-89, 94; Case C-161/17 *Land Nordrhein-Westfalen v Dirk Renckhoff* [2018] EU:C:2018:634, para 14.

[49] *Shazam* (n 5) paras 98(a), 99, 99(b), 99(f): "[…] Mr Sullivan described his creation of Del Boy in the following terms: "I took the archetypal fly pitcher with the gold watch and the battered suitcase and decided to give him a family and a home life... I made him a guy with a burning ambition to make it big – but who never quite managed it... Other aspects of, like buying drinks for people down the pub even when he couldn't really afford to, came from people I knew in the car trade. They always wanted to keep face and even if they were doing badly, they'd borrow money to flash about to let everyone think they were doing well. Wearing lots of gold rings was also part of that" […] In the same interview he used the following words: "I had written a one-page treatment thing explaining the idea. It was all about modern working-class London. I was sick to death of the kind of comedies I saw on telly which were based in the forties or earlier with toffs and that sort of tugging the forelock 'Gor, bless you guv' type of stuff which didn't exist. Now we had a modern, vibrant, multi-racial, new slang London where a lot of working class guys had suits and a bit of dosh in their pockets and that was a very different thing""; Steve Clark, *Only Fools and Horse: The Official Inside Story* (Splendid Books Limited 2011) p 15.

[50] ibid para 99(c).

[51] ibid paras 99(g)-(i), 103.

[52] ibid para 99(j): "cushty", "lovely jubbly" and "plonker" and the label, "He is a bit of a Del Boy".

intrinsically subjective sensations of an individual who perceives the subject matter.[53] The Judge, on this point, recognised that the majority of the character's behaviour, attitude, mannerisms and external appearance were included in Sullivan's script and not just an interpretation made by the actor portraying the character, Sir David Jason.[54] The two-stage test was satisfied in the same way it had been satisfied in the assessment of the copyright protectability of the character of Pippi Longstocking, as decided by the German Supreme Court.[55]

It is also possible to compare the decision in relation to Del Boy as a copyrightable character to *Klinger v Conan Doyle Estate*, as decided in the United States.[56] It was highlighted by the Judge that the US case could be considered as a basis for the assessment of whether a fictional character can fall within the scope of copyright protection as long as it possesses enough complexity and distinctiveness.[57]

To conclude the analysis of Del Boy as a copyrightable character, the case highlighted the fact that a fictional character permits copyright protection as a literary work for the purpose of the closed list of protected works under English law, provided that the same *personage* is sufficiently complex and distinctive.[58]

Subsequently, it had to be assessed whether the work was infringed or whether any exception, including the concept of parody, applied.[59] The essential test was to assessed whether the Dining Experience contained elements that were the expression of the intellectual creation of John Sullivan as the creator of the character of Del Boy.[60] The Court held that infringement took place according to the two-steps test in English law, as described in *Designers Guild Ltd v Russell Williams*,[61] namely by

[53] *Cofemel* (n 46) paras 29, 32; *Levola Hengelo* (n 10) para 40.
[54] *Shazam* (n 5) paras 106-112.
[55] *Re Pippi Longstocking* (n 43); *Shazam* (n 5) paras 113-117.
[56] *Klinger v Conan Doyle Estate, Ltd*, 755 F. 3d 496 (7th Cir. 2014) para 498 (USA); *Shazam* (n 5) paras 118-120.
[57] *Shazam* (n 5) paras 119-120; *Klinger v Conan Doyle Estate, Ltd* (n 55) paras 498-501.
[58] *Shazam* (n 5) paras 120-122.
[59] ibid paras 135-136.
[60] ibid para 125(d); *Sheeran and others v Chokri and others* [2022] EWHC 827 (Ch) para 21 (United Kingdom); *Newspaper Licensing Agency Ltd and others v Meltwater Holding BV and others* [2011] EWCA Civ 890, paras 24-28 (United Kingdom);
Mitchell v British Broadcasting Corporation [2011] EWPCC 42, paras 28-29 (United Kingdom); *Infopaq* (n 12) paras 47, 51.
[61] *Designers Guild Ltd v Russell Williams* [2000] 1 WLR 2416, Lord Millett (United Kingdom).

identifying the copied elements and whether they constitute a substantial part in the new work.[62] Indeed, the representation of the sitcom's Del Boy and the Dining Experience's one were almost identical. Moreover, since the audience had the possibility to interact and watch the performance of the representation of Del Boy, the entire Dining Experience was based on the main characters of the sitcom.[63] On the other hand, a possible exception to apply related to the concept of fair dealing under Section 30A CDPA,[64] which was introduced in October 2014 as the result of the adoption of the Regulation 5(1) of Copyright and Rights in Performances (Quotation and Parody) Regulations 2014/2356, which originated from Article 5(3)(k) of the InfoSoc Directive.[65] Precisely, the English Regulation adopted the EU legal provision that provides for the exceptions of caricature, parody and pastiche when there is not any exploitation of the original work or other subject matter that infringes the legitimate interests of the right holder.[66] Consequently, it is determined via a three-step test, whether an exception, according to the Berne Convention, might apply in this specific case..[67] In applying the test, the Judge noticed that:

(1) The exception must be confined to certain special cases;
(2) The exception must not conflict with the normal exploitation of the work or other subject matter by the copyright owner;
(3) And it must not unreasonably prejudice the legitimate interests of the right holder.[68]

In the consideration of the three conditions, stated in the case *England and Wales Board Limited v Tixdaq Limited,* EU law was taken into account. The Belgian case of

[62] CDPA 1988, s 16(3)(b); Davis and others (eds) *Copinger and Skone James on Copyright* (n 36) paras 7.22-24; *Designers Guild Ltd v Russell Williams* (n 60).
[63] *Shazam* (n 5) paras 129-130.
[64] CDPA 1988, s 30A: fair dealing with a work for the purposes of caricature, parody or pastiche does not infringe copyright in the work.
[65] Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 (SI 2014/2356), Regulation 5(1) (United Kingdom).
[66] InfoSoc Directive, arts 5(3)(k), 5(5); UEA Law School Conference (n 34).
[67] Berne Convention (n 7) art 9(2); TRIPS (n 7) art 13; WCT (n 7) art 10(2); *England and Wales Board Limited v Tixdaq Limited* [2016] EWHC 575 (Ch) paras 90-92 (United Kingdom);
Shazam (n 5) paras 146-151.
[68] *England and Wales Board Limited* (n 66).

Deckmyn heard by the CJEU was looked at in relation to the assessment of whether the Dining Experience fulfilled the main characteristics of this exception, especially in relation to the fact that parody is an autonomous concept of EU law.[69] It was acknowledged that parody must be a mockery of the original work or of the society the original work portrays. To be identified as parody, a work must fulfil the following conditions: (1) evoke an existing work; (2) be noticeably different from that existing work; (3) constitute an expression of humour or mockery.[70] In the case at hand, the same witnesses, the actors interpreting the fictional characters in the Dining Experience, stated that they were trying to be as faithful as possible to the original work in order to give the audience the opportunity to be put in front of the original characters. Consequently, while the Dining Experience evoked the work, it failed to critically distance the new work from the original one.[71] Moreover, the Judge regarded that it was relatively unusual for the exception of parody to apply to comedies and that it was not the case of the Dining Experience.[72] While it was argued, by the defendant, that if not parody the Dining Experience could be identified as a pastiche, the statement was rejected by the Judge because in order for a work to be a pastiche, it must satisfy three conditions: (a) imitate the style of another work; or (b) comprise an assemblage of a number of pre-existing works; and (c) in either case, be noticeably different from the original work. The later work, as a matter of fact, did not merely imitate the style of the previous work, but made extensive use of the protected materials, namely the characters, to produce something that was not noticeable different from the sitcom.[73] In sum, neither the parody and the pastiche exceptions was unsuccessful because the Dining Experience was found to be a mere imitation of a work of comedy, and not as fair dealing, and as such it conflicted with the normal exploitation of the right-holder's work. The Dining Experience took place at the same

[69] Case C- 201/13 *Deckmyn v Vandersteen* [2011] EU:C:2011:771; *Shazam* (n 5) para 167.
[70] ibid *Shazam*, para 172.
[71] ibid paras. 175-176.
[72] Richard Webber, 'Remembering the Two Ronnies, part two: Parody was no laughing matter for the comedy duo' (*The Sunday Post*, 16th May 2019) <https://www.sundaypost.com/fp/remembering-the-two-ronnies-part-two-parody-was-no-laughing-matter-for-the-ronnies/> accessed on 20th March 2023; *Shazam* (n 5) paras 177-180.
[73] ibid paras. 181-190, 195

time of the newly created and fully authorised Only Fools and Horses musical, whose one of the creators was Sullivan's son and one of the current copyright holders of the original work and of the fictional characters.[74] The judgement on this issue served to acknowledge for the first time that a fictional character can be protected in UK under copyright law as long as it is sufficiently detailed and can recognised independently of the claimant's work.

2.4. In Art

While the assessment of Del Boy provided an important court instance in which a fictional character was protectable under copyright as a literary work, fictional characters are known to appear in artistic works, especially in the case of appropriation and post-modern art. Some examples are represented by Andy Warhol's and Roy Lichtenstein's Pop Art works in the US.[75] In appropriation art, artists intentionally use, change, modify, and build on another artist's work; thus creating something new and unique, which not necessarily criticises or parodies the original work or society it was created in.[76] Moreover, the practice of appropriating another artist's work falls within the 'fair use' exception, as long as the transformative value is present, which can be noticed in many Pop Art works that include fictional characters.[77] This can take place through colour changes or transformations that reflect the artist's style, as is the example of Warhol's Quadrant Mickey Mouse.[78] On the other hand, the legal system of the EU does not allow for a 'fair use' exception even though it still allows for critically different use of existing works for purposes of

[74] *Shazam* (n 5) para. 196(d)(iii-iv).

[75] 'Andy Warhol – Mickey Mouse – 1982' (*TATE*, 2023) <https://www.tate.org.uk/art/artworks/warhol-mickey-mouse-ar00335> accessed on 20th March 2023; 'Look Mickey – Roy Lichtenstein' (*NGA*, 2023) <https://www.nga.gov/collection/highlights/lichtenstein-look-mickey.html> accessed on 20th March 2023: "Twenty years into his career artist Roy Lichtenstein realized that he could create an original work of art only 'by doing something completely unoriginal".

[76] Julie Van Camp, 'Originality in Postmodern Appropriation Art' (2007) 36(4) Journal of Arts Management, Law and Society 247.

[77] Eldon Ham, 'Fair game: Does the fair use doctrine apply to Andy Warhol's pop art?' (*ABAJOURNAL*, 9th January 2020) <https://www.abajournal.com/voice/article/when-is-a-warhol-a-warhol> accessed 20th March 2023.

[78] ibid.

quotation, criticism, review, caricature and parody, as seen in the *Only Fools and Horses* case.[79] The same purposes are the result of the creative tradition in Europe, which can be evidenced in the post-modern art movement, which was focused on irony, parody and, later, on the replacement of concept for a made object.[80] Due to these characteristics, if the EU copyright legal system would have existed during the post-modern art movement, the exceptions would have applied especially in relation to fictional characters and to the artists' intention of adding these peculiar *personages* to their artworks as a form of parody, quotation, criticism, caricature and reimagination, otherwise, the infringement would have been based on the assessment of domestic law of the EU Member State in which the artwork was created.[81]

3. TRADEMARK PROTECTION OF FICTIONAL CHARACTERS

3.1. EUROPEAN UNION

The second aspect analysed in the paper is represented by the protection provided by recognising a work as a trademark.

By looking, firstly, at EU law, it is necessary to recognise that EU trademark protection can be defined as an exclusive right and, if approved, it cannot be registered, transferred, surrendered or subject to any type of decision related to revoking any part of it as long as it is registered with the EUIPO, and undertakers cannot rely on unregistered trademarks to enforce their rights.[82] Moreover, it is characterised by many functions. Firstly, it serves as the indicator of the source or origin of the goods and services. This is necessary to allow the consumer to make informed decisions without the risk of confusion or mistake.[83] The source must be a single undertaker; otherwise, the original function would be negatively impacted and not guaranteed.[84]

[79] *Shazam* (n 5) paras 142-144; InfoSoc Directive, art 5(3).
[80] 'Postmodernism' (*TATE*, 2023) <https://www.tate.org.uk/art/art-terms/p/postmodernism> accessed on 20th March 2023.
[81] InfoSoc Directive, art 5(3).
[82] Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L 154/1 ("EUTMR"), arts 1(2), 6, 30.
[83] ibid recital 11.
[84] Case C-17/06 *Céline SARL v Céline SA* [2007] ECR I-7041, para 27.

Secondly, it acts as a guarantee of the quality of the goods and services, as a form of advertising and communication to the consumer. The goal of trademark protection is to inform the purchaser of the properties and characteristics of the product itself and to persuade them to enter into a commercial agreement for the same.[85]

Lastly, trademark protection is strictly related to investments. It protects the concept that the interest in acquiring and preserving the attractiveness, goodwill and reputation of the commercial origin will attract and retain the consumers.[86] Article 4 of the European Union Trade Mark Regulation (EUTMR) stipulates the requirements for a mark to be considered as a trademark in the EU. It includes a list of the subjects that can be classified as 'mark': words, names, and designs, in any possible combination as long as presented adequately and accurately in the registry. In addition, a mark must be presented in a clear, precise, self-contained, easily accessible, intelligible, durable and objective manner.[87]

Thus, several issues arise because the EUIPO clearly stated that literary and cartoon characters can enjoy protection under trademark law, which can cover both their name, as a wordmark, and their design. Normally, protection can only be assigned to figures and shapes, in either 2D, 3D, or as a motion mark, as long as they are registered as trademarks.[88] While the shape is protectable because it includes physical appearance and attributes, their personality is not, since trademark protection can only exist in relation to goods and services and not in relation to moral characteristics.[89]

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[85] Case C-10/89 *HAG GF (HAG II)* [1990] ECRI-3711; Frank Bøggild, Kolja Staunstrup, *Community Trade Mark Law* (Kluwer 2016) p 19; Joined Cases C-236/08, C-238/08 *Google France SARL and Google Inc* [2010] ECRI-2417.

[86] ibid Bøggild, p. 19.

[87] EUTMR (n 81) art 4; Mark Holah, Patricia Collis, *The European Trade Mark - A Practical Guide* (Globe Law and Business Ltd 2016) p 54; Case C-273/00 *Ralf Sieckmann v Deutsches Patent- und Markenamt* [2002] ECR I-11737, para 55.

[88] Decision O-392-03 *Animated Music Ltd* [2004] ETMR 79, paras 18-21.

[89] EUIPO (n 8).

Chantal Koller, 'Character wars: trademark and copyright protection for fictional characters' (*Novagraaf*, 21st June 2019) <https://www.novagraaf.com/en/insights/character-wars-trademark-and-copyright-protection-fictional-characters> accessed on 20th March 2023.

The first requirement that needs to be satisfied relates to the distinctive character of the mark, which provides it with something similar to a badge of origin, regardless of its associated goods and services.[90] The assessment is based on the perception of the average consumer, one who is reasonably informed, observant and circumspect.[91] Distinctiveness can be inherent or acquired.[92] On the one hand, inherent distinctiveness is present where properties of the mark are considered independently of the use and education of the audience or consumers when they try to recognise the product. On the other hand, its acquired version can be associated with the lack of inherent distinctiveness and the fact that it acquired this characteristic through the use of the same.[93]

Moreover, within the EU, the use of entirely descriptive signs is prohibited, and it is not possible to register marks that reference the nature of the goods and services or words that are used on a daily basis to refer to a specific category of product, including kind, quality and intended purpose, as stated in Article 7(1)(c) EUTMR.[94] The rationale behind this principle is public interest and to allow for certain signs to be freely used by everyone. An example is represented by fictional characters, which the EUIPO treats on a case-by-case basis. The EUIPO has taken into account several situations, including when the sign is applied with the only goal of referencing the author's work without "any additional element which could impart a distinctive character to the sign indicating the business origin" when the sign has "entered into common language" due to the great number of adaptations, or in the case

[90] EUIPO, 'Trade mark guidelines' (*EUIPO guidelines*, 1st March 2021) <https://guidelines.euipo.europa.eu/1922895/1786763/ trade-mark-guidelines/1-2-distinguishing-character> accessed on 20th March 2023.

[91] Case C-342/97, Lloyd Schuhfabrik Meyer & Co. GmbH V Klijsen Handel BV [1999] EU:C:1999:323, para 25-26; Case C-521/95 SABEL BV v Puma AG, Rudolf Dassler Sport [1997] EU:C:1997:528, para 23; Case C-363/99 *Koninklijke KPN Nederland NV v Benelux-Merkenbureau (Postkantoor)* [2004] ECR I-1619, paras 34-35; Case T-99/01 *Mystery Drinks GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* [2003] OJ C 101/57, para 32.

[92] EUTMR (n 81) art 7(1)(b).

[93] Ilanah Fhima, Dev Gangjee, *The confusion test in European Trade Mark Law* (Oxford University Press 2019) pp 139-140.

[94] EUTMR (n 81) art 7(1)(c).

in which it is a thematic description of a subject in the public domain. [95] In these cases, the creative work is not entitled to be eligible for trademark protection, and it does not allow for the identification of the commercial origin.[96] Thus, in the case in which the EUIPO, or the Intellectual Property Office of any of the EU Member States, identifies that the name used for the sign refers to the creative origin rather than the commercial one, as it was in the *Dr No* decision, trademark protection is not guaranteed.[97]

At a domestic level, a similar situation took place in another case, which involved the mark 'Sherlock Holmes', because due to its usage by many traders and the numerous adaptations throughout the years, no customer would have expected those same products to originate from the Conan Doyle Estate. Consequently, lacking the distinctive character, the mark was rejected by the UKIPO.[98] However, the rulings are not always as straightforward.

A peculiar example is represented by the registration of the Batman logo as a trademark with the EUIPO.[99] In May 2020, in the Cancellation Section, the judge held that the same logo could be registered as a trademark, because it could be associated by the public with the concept of the Batman character in the DC Comics universe and not any other character. Moreover, it was stated that the consumers, when looking at the mark, would think directly of the commercial origin instead of the character itself and its longevity, especially considering that the same had appeared in multiple

[95] Decision of 18th March 2015, *The Jungle Book*, R 118/2014-1; Decision of 25th February 2015, *Pinocchio*, R 1856/2013-2.
[96] ibid.
[97] Case T-435/05 *Danjaq, LLC v European Union Intellectual Property Office* [2006] OJ C 60/79.
[98] UK Intellectual Property Office, 24th March 1999, *trademark No 1589463* (United Kingdom).
Trade Marks Act 1994: At the time, in 1999, the United Kingdom was still a Member State of the European Union, and the Act: (1) implemented the First Council Directive of 21st December 1988 to approximate the laws of the Member States relating to trade marks (89/104/EEC) (at the moment of writing already repealed); (2) made provision in connection with Council Regulation (EC) No 40/94 of December 1993 on the Community trade mark (at the moment of writing already repealed); (3) gave effect to the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks 1989, and to certain provisions of the Paris Convention for the Protection of Industrial Property 1883.
[99] Cansu Çatma Bilen, Melike Gülşah Yardimci, 'Batman Rises Again: EUIPO Boards of Appeal Dismissed The Claim Of Invalidity For The Bat Symbol' (*mondaq*, 22nd December 2021) <https://www.mondaq.com/turkey/trademark/1143444/batman-r305ses-aga305n-eu305po-boards-of-appeal-d305sm305ssed-the-cla305m-of-inval305d305ty-for-the-bat-symbol> accessed on the 20th March 2023.

adaptations, cartoons, graphic novels, feature films, and the longevity of the characters, since it is the first time in 1939.[100] The judgement highlighted that a relaxation of the idea of distinctiveness was present in relation to well-known and iconic characters of Pop Culture. In 2021, the concept was reiterated, by the 2nd Board of Appeal of the EUIPO which stated that the symbol was associated with one of the famous figures of popular culture and this characteristic did not alone constitute an adequate reason for the symbol too be devoid of distinctiveness.[101]

Lastly, it is important to acknowledge that there are absolute grounds which can exclude trademark protection, as provided in Article 7 EUTMR as cumulative criteria.[102] In the particular case of fictional characters, the most relevant rationales are public interest and morality, due to the fact that these *personages* are artistic creations. As such, due to the sporadic EU case law on the topic, it is possible to analyse the legal principles linked to the expiration of copyright by looking at the *Vigeland* case, which concerns the interaction of the two IPRs in Norway.[103] The issue arose in the instance in which there was the desire to prolong the IP protection of the artworks of the Norwegian artist Gustav Vigeland, in order for them not to fall into the public domain once copyright had expired, especially considering the potentially unlimited period of protection provided by trademark.[104] While the registration of the creative works would not be offensive per se, if the same artworks are part of the nation's cultural heritage and values, the consumer could perceive offensive associating the art pieces with commercial practices, thus, defying the principle of

[100] Cancellation Division, CANCELLATION No 31 962 C, Batman; Bilen (n 98).

[101] Case T-735/21 *Aprile and Commerciale Italiana v European Union Intellectual Property Office* [2022] OJ C 37/60.

[102] Eleonora Rosati, 'The absolute ground for refusal or invalidity in Article 7(1)(e)(iiii) EUTMR/4(1)(e)(iiii) EUTMD: in search of the exclusion's own substantial value' (2020) 15(2) Journal of Intellectual Property Law & Practice 103.

[103] Sebastian Remøy, 'EFTA Free Trade Relations' (2006) 2 EFTA Bulletin: Norway is not a Member State of the European Union and as such the law and the legal principles of the EU do not apply. Nonetheless, alongside Iceland, Switzerland and Liechtenstein, is part of the European Free Trade Association and it participates in the European Single Market and it is part of the Schengen Area;
The case was brought in front of the EFTA Court and the same has the ability to enforce a number of European laws in accordance with European Economic Area Agreement 1992, art 108(2).
Consequently, the case in question, will be considered in order to analyse the public interest and morality exception to the trademark registration procedure in accordance with EU law, as in front of the EFTA, EU law is identified as a legal basis and can be enforced.

[104] EFTA Court, Municipality of Oslo, *Case E-5/16* ("*Vigeland*") (Norway).

morality. In addition, public interest is at stake when there is a need to safeguard the value of the public domain, which represents one of the fundamental interests of society.[105] Consequently, if applied to fictional characters, the main issues that arise in relation to absolute grounds need to be assessed on a case-by-case basis[106] The status and perception of the artwork, which includes the aesthetics of a mark and the representation of fictional characters, plays an important aspect in the application to acquire trademark protection. This is the case when the mark is pleasing in its representation and, because of the values associated with the character, it leads the audience to make a particular purchasing decision.[107]

3.2. Comparison with the United States

Similarly to the EU, the United States jurisdiction acknowledges trademark protection as the power of the Congress to regulate commerce in order to guarantee the consumers' ability to make informed choices when approaching the marketplace.[108] Trademark extends beyond the confusion of the consumer and strictly relates to the mark reputation and its position within the portion of society that is involved in a specific sector of the marketplace.[109] The main goal of the protection is to safeguard both the commercial value of a product and the customers against confusion in relation to the source of the same product.[110] The Lanham Act provides for a similar definition to the one in the EU legal system, which includes words, names, symbols or devices or any combination of the same. Moreover, the mark should convey consistency and transparency and encourage the manufactures to provide for quality products.[111]

[105] *Vigeland* (n 103) paras 91-96.
[106] Rosati, 'Branderella: Trade Marks and Fictional Characters' (n 4).
[107] Opinion of AG Szpunar, Case C-205/13 *Hauck GmbH & Co. KG v Stokke A/S and Others* [2014] OJ C 421/13; Opinion of AG Szpunar, Case C-163/16 *Christian Louboutin and Christian Louboutin Sas v van Haren Schoenen BV* [2018] OJ C 211.
[108] US Constitution (n 23) c l3.
[109] USC, Title 15 2012, §1125(c)(2) (USA).
[110] Christine Nickels, 'The Conflicts Between Intellectual Property Protections When a Character Enters the Public Domain' (1999) 7(1) UCLA Entertainment Law Review 133, p 155.
[111] William Landes, Richard Posner, 'Trademark Law: An Economic Perspective' (1987) 30(2) Journal of Law and Economics 265, p 269; USC, §§1114, 1125(e), 1127.

The following step is to consider the condition of distinctiveness as described in §1127 US Code. The legal provision presents similarities to the EU trademark system as a mark must serve the purpose of identifying and distinguishing goods or services from a determined commercial origin. In relation to fictional characters, the courts have not had many opportunities to rule on the subject of distinctiveness. Nonetheless, trademarks are preferably assigned to those *personages* that have undergone a reasonable degree of circulation and are widely known. An example is provided in the *Fisher*, which describes how the protagonists of the cartoon had acquired the trademark due to their continued use and established recognition. Consequently, in similar cases, any commercial exploitation from another author world be unfair.[112]

The single source identification represents another relevant statutory requirement in trademark law in both the EU and the US.[113] Case law provides for this requirement especially in relation to marks, particularly fictional characters, that appear in a variety of different media. There is not the requirement for the source to be known as the same, but there must be the understanding that the product has its commercial origin associated with a single source.[114] An example is given by Nintendo's fictional character Donkey Kong. The fictional character was associated with another mythic creation, King Kong, suggesting that the existence of various competing property interests, from the owner of the original 1933 movie, to the owner of the worldwide book to the unauthorised third-party use of the trademark, could hinder the single source identification.[115]

Considered the requirements for trademark, once the elements that need protection are recognised by the court, in a similar manner to the EUTM legal system, it is important to assess whether the mark is likely to cause confusion or mistake in

[112] Kathryn Foley, 'Protecting Fictional Characters: Defining the Elusive Trademark-Copyright Divide Note' (2009) 41(3) Connecticut Law Review 921, p 941; *Fisher v Star Co*, 231 N.Y. 414, paras 431-432 (1921) (USA).
[113] USC, §1127; EUTMR (n 81) art 4.
[114] Michael Helfand, 'When Mickey Mouse is as Strong as Superman: The Convergence of Intellectual Property Laws to Protect Fictional Literary and Pictorial Characters' (1992) 44 Stanford Law Review 623, pp 635-638.
[115] *Universal Studios v Nintendo Co*, 578 F. Supp. 911, paras 923-26 (S.D.N.Y.1983) (USA).

the eventual case in which it is alleged to be infringing another trademark, or is likely to deceive the public in relation to the source or sponsorship of the goods or services.[116] In other words, likelihood of confusion takes place in the instance in which two marks are so similar and the goods or services for which they are employed are similarly associated, allowing for mistakes in the recognition of the source by the consumer.[117] In the case in which the likelihood of consumer confusion is not present, an infringement according to trademark law is considered as an unfounded limitation on freedom of expression and creativity.[118] Consequently, the use of fictional character on commercial products has become a widespread and lucrative practice, especially if the same fictional characters are well known and with a universal popularity, like Superman and Wonder Woman, which according to the US case law are protected from unauthorised use in new works, which includes the singing telegram and advertisement business.[119] Thus, the limitation of the scope of trademark protection is implemented also through the analysis of the likelihood of confusion, which is linked to the reputation and recognition of the character in question.[120]

While within the European framework, dilution is regulated through Directives 89/104/EEC and 2008/95/EC in order to protect extremely well-known marks, in the US dilution is a further mechanism that provides for a powerful form of protection for the trademark.[121] In accordance with the Federal Trademark Dilution Act 1995 and the Federal Trademark Dilution Revision Act 2006, dilution can be described as 'the gradual whittling away or dispersion of the identity and hold upon the public mind of the mark or name by the use upon non-competing goods', and it is aimed at avoiding the practices of overriding copyright law and traditional trademark

[116] USC, §§1114, 1125.
[117] 'Likelihood of Confusion' (*USPTO*, 19th February 2021) <https://www.uspto.gov/trademarks/search/likelihood-confusion> accessed on 20th March 2023.
[118] Foley (n 111) pp 946-947.
[119] *DC Comics, Inc v Unlimited Monkey Bus, Inc*, 598 F. Supp. 110, 115–16 (D.C.Ga.1984) (USA).
[120] Foley (n 111).
[121] First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks [1989] OJ L 40; Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks [2008] OJ L 299.

protection and of removing certain subject-matters from the public domain creating trademark rights in gross.[122] The type of protection provided can be differentiated by the traditional trademark protection through the prerequisite that a mark must deemed to be 'famous' and the fact that a broad protection is provided in the case of absence of a likelihood of consumer confusion even on marks on non-competing products.[123] Dilution is relevant in relation to the legal status of fictional characters, due to the fact that most of them are easily recognisable and extremely well-known among the consumers and audience, as, for example, *Danjaq LLC v Sony Corp*, which concerned the assignment of the television and film rights of the James Bond character. In this case, the court ordered an injunction forbidding Sony from using the mark, assessing the likelihood that the company would use the mark in any capacity resulting in dilution by blurring.[124]

4. INTERACTION BETWEEN COPYRIGHT AND TRADEMARK

As previously discussed, it is important to highlight that copyright and trademark protect different scopes and functions and thus have different legal formalities. In other words, the interaction of both protection regimes can be translated into different requirements, durations, infringement procedures, enhanced anti-dilution protection, limitations, and exceptions, especially if analysed through different jurisdictions.[125] Three important differences between the two IPRs are linked to the fact that:

- the duration of the two rights differs; while copyright has a set period of protection, trademark protection could potentially last eternally, as long as it is used in relation to the commercial activity it identifies, even though it requires to be renewed every 10 years in the EU;[126]

[122] Frank Schechter, 'The Rational Basis of Trademark Protection' (1927) 40 Harvard Law Review 813, p 825; Helfand (n 113) p 639; Federal Trademark Dilution Act 1995 (USA); Federal Trademark Dilution Revision Act 2006 (USA).
[123] USC §§1125(c)(2)(A), 1125(c)(1).
[124] *Danjaq LLC v Sony Corp*, 49 U.S.P.Q. 2d 1341–44 (C.D. Cal. 1998) (USA).
[125] Irene Calboli, 'Overlapping Copyright and Trademark Protection: A Call for Concern and Action' (2014) 3 Illinois Law Review Slip Opinions 25.
[126] USC, §1058; EUTMR (n 81) art 52; Berne Convention (n 7) art 7.

- the personality of a character can be protected under copyright but not under trademark law;
- the name alone cannot be protected under copyright, but it could be eligible for trademark protection.

Nonetheless, it is not always straightforward to identify the boundaries related to those creative elements that can be identified as both distinctive and original. Indeed, in the case of fictional characters, which are usually used as the representation of commercial origin and that can be able to be granted the originality aspect if considered as in light of the creative idea of their authors, it is not always easy to draw a line. An example is provided by the identification of Mickey Mouse as the representation of its commercial origin, The Walt Disney Company, and the creative idea of Walt Disney, who directed, wrote, produced and starred in the first ever representation of the cartoon mouse, thus, fulfilling both the distinctiveness requirement for trademark protection and the originality aspect for copyright.[127] Moreover, the same fictional character had a great impact in the development of the term of copyright protection in the US.[128] While the EU legal system harmonised the different pieces of legislation of its Member States through the 1993 Directive and set the limit to the copyright term to 70 years after the death of the author of the work, similarly to the Berne Convention,[129] the US has gone through a more complex process to develop its final term. Indeed, when Disney's first representation of the mouse was created the copyright term allowed for a 28-year protection that could only be renewed once.[130] The company started lobbying to increase the term, when in 1976

[127] Lawrence Lessing, 'The Creative Commons Commentary' (2004) 65(1) Montana Law Review 1, p 1; Peter Decherney, 'Steamboat Willie' in Claudy Op den Kamp, Dan Hunter (eds) *A History of Intellectual Property in 50 Objects* (Cambridge University Press 2019) p 171.
[128] Sonny Bono Copyright Term Extension Act 1998 (referred also as Mickey Mouse Protection Act) (USA).
[129] Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [1993] OJ L 248; Berne Convention (n 7) art 7(1): "The term of protection granted by this Convention shall be the life of the author and fifty years after his death"; Berne Convention (n 7) art 7(8): "In any case, the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work".
[130] Copyright Act of 1909, ch 320, §23, 35.

it succeeded and was allowed the minimum term provided by the Berne Convention, even though the country had not yet implemented the Convention.[131] The entrance into public domain of the work was then postponed to 2003.[132] Lastly, foreseeing the 2003 deadline, the lobbying campaign was resumed and through the Mickey Mouse Protection Act of 1998 the fictional character obtained copyright protection until the end of 2023.[133] Therefore, in the United States, copyright law protects works for 70 years after the author's death, for 95 years from their original publication in the case of collaborations, or 120 years from creation, based on whichever expires first.[134]

The difference between the two jurisdictions is highlighted in the *Sherlock Holmes* case.[135] The court acknowledged that some of the traits of the character were part of the public domain, as they were mentioned in Conan Doyle's works published in the UK and before 1923.[136] This characteristic allowed for the standard EU copyright protection term on the four novels and the first 46 short stories,[137] while the traits introduced for the first time in the last ten stories, first published in the US with illustrations in the Liberty and Collier's magazines, were allowed 95 years of copyright protection as provided by the Copyright Term Extension Act 1998.[138] While the last ten stories were protected by copyright and infringeable subjects in 2013, as of 1st January 2023, all Sherlock Holmes novels and stories, including the latter ones,

[131] The United States became a part of the Berne Convention in 1989, namely 13 years after Steamboat Willie's Mickey Mouse was allowed to enjoy a 50-year term copyright protection.
[132] Copyright Act of 1976, § 302(a) (USA); USC, Title 17, §302(a) (USA); Micah Uptegrove, 'Copyright Protection: The Force Could Not Keep Han Solo Alive, but Can It Protect Him from Authors' Derivative Works' (2016) 81 Missouri Law Review 629, pp 629-630, 633.
[133] Copyright Term Extension Act (n 127); Uptegrove (n 131) pp 629-630.
[134] Copyright Term Extension Act (n 127).
[135] *Klinger v Conan Doyle Estate, Ltd* (n 55); Uptegrove (n 131) pp 640-642.
[136] At the time of *Klinger v Conan Doyle Estate, Ltd* (n 55), the UK was still part of the European Union and, as such, the copyright protection of the works published in the UK had a statutory protection of 70 years as provided by the implementation of the Council Directive 93/98/EEC (later amended by the Term of Protection Directive) in the UK through The Duration of Copyright and Rights in Performances Regulations 1995.
[137] Term of Protection Directive, art 1(1): "The rights of an author of a literary or artistic work within the meaning of Article 2 of the Berne Convention shall run for the life of the author and for 70 years after his death, irrespective of the date when the work is lawfully made available to the public".
[138] Copyright Term Extension Act (n 127); Uptegrove (n 131) pp 640-642.

are in the public domain.[139] Consequently, the issue of a limited duration of protection and the 'commercial' losses on the side of the author's estate or company, can be overcome by applying for trademark protection for the character.[140] Most jurisdictions, including the ones analysed in the paper, provide for legal provisions allowing simultaneous protection via different IPRs. The reason behind this aspect of the legal frameworks relates to the fact that different IPRs cover the protection of different subject-matters and prohibit different activities.[141] EU law expressly allows for the cumulation between different IPRs, as long as the creative sign represents goods or services to which is assigned, as it is the case of distinctive and original book titles or fictional characters.[142]

In the United States it is possible to conceive dual protection in relation to their inherent emphasis on creativity, as provided for in the following example. In the late 2000s, the Walt Disney Company, foreseeing the eventual expiration of copyright on the first representation on Mickey Mouse, tried to take the initial steps to protect the black and white mouse piloting a steam-river sidewheeler by adding few seconds of the cartoon at the beginning of most of the new Disney productions.[143] By associating the Steamboat Willie representation of Mickey Mouse with the entertainment

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[139] *Klinger v Conan Doyle Estate, Ltd*, (n 55) 497-498; Jessica Smith, 'Sherlock Holmes & the Case of the Contested Copyright' (2015) 15 Chicago-Kent Journal of Intellectual Property 537, p 550; '2023 public domain debuts include last Sherlock Holmes work' (*APNews*, 30th December 2022) <https://apnews.com/article/public-domain-2023-5c30746553953b5accffcbaa9e860de0> accessed on 20th March 2023.

[140] Uptegrove (n 131) p 630; Timothy Lee, '15 years ago, Congress kept Mickey Mouse out of the public domain. Will they do it again? (*The Washington Post*, 25th October 2013) <https://www.washingtonpost.com/news/the-switch/wp/2013/10/25/15-years-ago-congress-kept-mickey-mouse-out-of-the-public-domain-will-they-do-it-again/> accessed on 20th March 2023;
Beth Barany, 'Trademark Protection for Fictional Characters' (*Writer's Fun Zone*, 23rd December 2011) <http://www.writersfunzone.com/blog/2011/12/23/trademark-protection-for-fictional-characters/> accessed on 20th March 2023.

[141] Belinda Isaac, Craig Mende, 'When Copyright and Trademark Rights Overlap', in Shamnad Basheer and others (eds), *Overlapping Intellectual Property Rights* (1st edn, OUP 2012) pp 137, 158.

[142] EUIPO (n 8); Martin Senftleben, 'Public domain preservation in EU trademark law—a model for other regions?' (2013) 103(4) Trademark Rep 775, pp. 814-817;
Danjaq (n 96) para 26; Martin Senftleben, '*Vigeland* and the Status of Cultural Concerns in Trade Mark Law – The EFTA Court Develops More Effective Tools for the Preservation of the Public Domain' (2017) 48 IIC 683, pp 685-687.

[143] Barany (n 139): Used for the *Walt Disney Animation Studios*' production logo in *Meet the Robinsons* (Walt Disney Animation Studios 2007), *Tangled* (Walt Disney Animation Studios 2010), and *Encanto* (Walt Disney Animation Studios 2021) and others.

company, the Animation Studios initiated the first steps to be eligible to acquire trademark protection in the US when copyright would have eventually expired.[144] It was followed in February 2022 by the trademark application by the company to the US Patent and Trademark Office. The mark was described as 'the motion mark of an animator's drawings visually flipping one after another and transitioning into an animated clip of a mouse character tapping its foot and whistling while holding a ship's wheel, followed by the appearance of the wording WALT DISNEY ANIMATION STUDIOS underneath the animated mouse character'. [145]

Moreover, the goods and services represented by the proposed mark were included in the category of entertainment services, particularly the production and distribution of motion pictures. The proposed mark was aimed at the identification of the Steamboat Willie's version of Mickey Mouse with its commercial origin, namely the animation studios and distribution of cartoons and similar productions.[146]

In September 2022, the proposed mark was registered as a trademark representing Disney Enterprises, Inc.[147] In other words, while on the 1st January 2024, the first representation of Disney's marquee character and the relative cartoon will enter the public domain and will be able to be fully and freely reproduced without requesting an authorisation from the company, the iconic character will be still protected under different safeguards.[148] Consequently, in addition to the later modifications made to the character, which are still protected by copyright, any public domain use of the original Mickey Mouse cannot be perceived as coming from Disney Enterprises, since the commercial assurance to the consumers about the source and

[144] Kayleigh Donaldson, 'Disney May Lose Mickey Mouse's First Cartoon in Five Years' (*ScreenRant*, 20th November 2018) <https://screenrant.com/disney-mickey-mouse-steamboat-willie-copyright-2024/#:~:text=That%27s%20because%20Disney%20still%20hold%20a%20trademark%20brand,near%20future%20are%20slim%20because%20of%20those%20trademarks> accessed 20th March 2023.

[145] 'Walt Disney Animation Studios – Trademark Details' (*JUSTIA*, 1st March 2022) <https://trademarks.justia.com/972/85/walt-disney-animation-97285747.html> accessed on 20th March 2023.

[146] ibid.

[147] 'Walt Disney Animation Studios – Disney Enterprises, Inc.' (*USPTO.report*, 13th September 2022) <https://uspto.report/TM/97285747> accessed on 20th March 2023.

[148] Brooks Barnes, 'Mickey's Copyright Adventure: Early Disney Creation Will Soon Be Public Property' (*The New York Times*, 27th December 2022) <https://www.nytimes.com/2022/12/27/business/mickey-mouse-disney-public-domain.html> accessed on 20th March 2023.

the quality of the creation is still linked to the renowned company. The connection between the company and the character is strong, due to the fact that the later, even in his original form, has a close association with success of the company and it cannot easily be identified as an independent character or product.[149] Consequently, while in theory the 8-minute cartoon and its characters will be soon available freely to be reproduced, Disney Enterprises, Inc, will still be able to enforce any perceived infringement.[150]

Nonetheless, there has been some resistant to the idea of granting trademark protection in creative works where it seeks to prevent them for entering into public domain at the expiration of copyright protection.[151] First of all, trademark protection would only protect characters that are identified with a brand and are actively used in commerce, but it can only protect a limited number of characters and not the entire work in which they appeared originally.[152]

Moreover, in the EU, the resistance is highlighted in the absolute grounds for refusal of trademark protection.[153] While courts have not yet ruled on fictional characters, the same, as previously considered as to be identifiable as creative works, are subject to an assessment on a case-by-case basis which puts particular emphasis on public policy and morality. Indeed, the two concepts represent the two most important grounds for refusal in trademark law and they are applied in relation to the combination of trademark protection and copyright, as in the *Vigeland* case. In the previously mentioned Norwegian case, the court held that a similar justification for the application for the registration of trademark was not acceptable explaining that a trademark 'based entirely on copyright protected work carries a certain risk of monopolization of the sign for a specific purpose' by proving the proprietor with a level of 'exclusivity and permanence of exploitation which not even the author of the

[149] ibid.
[150] ibid.
[151] Rosati, 'Branderella: Trade Marks and Fictional Characters' (n 4); Sarah Landau, 'Of Mouse and Men: Will Mickey Mouse Live Forever?' (2020) 9(2) NYU Journal of Intellectual Property & Entertainment Law 249; Calboli (n 124); Annette Kur, 'The presentation right – time to create a new limitation in copyright law?' (2000) 31(3) International Review of Intellectual Property and Competition Law 308, p 312.
[152] Foley (n 111) p 943.
[153] EUTMR (n 81) art 7.

work or his estate enjoyed'.[154] As a result, in some particular situations, since the concept of fictional characters influenced the society of a determined country or community, it is necessary to understand that the temporal limitations provided by copyright depend on fundamental societal interests, including the deep societal value of the public domain and the freedom to copy and to build on granted by the same.[155]

Thus, it is possible to state that trademark rights are shifting towards the direction of becoming complementary to copyrights since, in relation to fictional characters, practitioners tend to resort to acquiring both types of protection, as it is the example of many Disney characters in the US and the French Pilote characters in the European Union. The boundaries of the traditional scope of intellectual property protection resemble more and more absolute rights in creative works, as represented by the *Video Pipeline* case, which implies that copying previews of motion pictures, usually protected by copyright, and showing them to an audience, is infringing trademark if they include specific characters.[156] Moreover, bringing a claim under copyright law for the unauthorised use of the creative works and lack of originality in conjunction with the lack of fair use exception in the US, or a similar exception in the EU, could result in more complications than directly resorting to trademark law.[157] Consequently, the focus should also be shifted to the fact that overlapping protection could degenerate in the creation of mutant rights capable of disrupting the copyright equilibrium, as evidenced by the *Vigeland* case in relation to the public interests and the freedom of society's creativity linked to the ability of freely copy, adapt and distribute the creative work after it enters into the public domain. Trademark protection, as applied in the *Video Pipeline* and the other cases analysed, would severely impact both the freedom to copy, which is fundamental in incentivising

[154] *Vigeland* (n 103) para 70.

[155] Martin Senftleben, 'The Copyright/Trademark Interface – "How the Expansion of Trademark Protection is Stifling Cultural Creativity"', (*Youtube*, 19th March 2021) <https://www.youtube.com/watch?v=UZc_mEzmip4&t=514s> accessed on 20th March 2023.

[156] *Video Pipeline, Inc v Buena Vista Home Entertainment, Inc*, 275 F. Supp. 2d 543 (D.N.J. 2003) (USA).

[157] *Warner Bros Entertainment v Global Asylum, Inc*, No CV 12-9547PSG (CWx), 2012 WL6951315 (C.D. Cal. Dec. 10, 2012) (USA); Calboli (n 124); Labaume (n 13).

advances in creative works and the access to knowledge, in case the same creative works would not be made available to the public domain.

5. CONCLUSION

The paper focused on the analysis of whether fictional characters could enjoy other forms of intellectual property rights protection, especially the one provided by registering a work as a trademark once the copyright expires. The analysis provides for the identification of similarities both between the two jurisdictions considered, the EU and the US, and between the two IPRs discussed. Indeed, for both IPRs, in order to be applied to fictional characters, there are a few fundamental requirements that need to be satisfied, including the aspect of distinctiveness for trademark protection, the requirement to be considered as a famous mark in dilution and the element of originality under copyright law. Appropriation art movements, including American Pop Art and European Post-modernism, are allowed to use copyrighted fictional characters: in the US through the exception of fair use, as long as the reinterpretation is transformative enough, and in the EU and the UK, if the "reuse" can be classified as parody, criticism, quotation and review. The use of fictional characters for other purposes, especially if linked to the reputation of the fictitious *personage*, is regarded as infringing the artists' economic and moral rights and their control over the reproduction of the creative work, as it happened in relation to the exploitation of the character of Del Boy in the case concerning the famous British sitcom Only Fools and Horses.

Moreover, challenges arise when the IPRs are combined in order to provide for 360-degree protection. Both jurisdictions either expressly allow within the scope of their legal provision or imply, in their case law, the possibility for cumulative rights. It is thus necessary to remember that while the name of the fictional character can only be protected under trademark law, their personality is a copyrightable-only aspect. In the specific case of *Steamboat Willie*'s *Mickey Mouse,* alternative ways of protection were sought in order not to lose the profit linked to the fictional character. In addition, this action was linked to the fact that the same fictional character played an important role in the cultural, art and entertainment sectors, for the commercial

activity of the company that created it and on the copyright framework of a country. Nonetheless, when comparing the two rights against each other, it is necessary to appreciate the societal bargain on which copyright protection is built and justified. While in the US, the practice of applying for trademark protection for creative works, as fictional characters, is seen with suspicion but yet condoned, in the EU, some cases are present on the subject matter. Consequently, registering for trademark protection following the expiration of copyright is against public interest and morality due to the societal benefit linked to the public domain. The possible overlap may result in mutant rights in the future, which could protect creative works under the scope of both copyright and trademark provided that they are used commercially, allowing for the introduction of specific licencing agreements and other arrangements that could have a negative impact on cultural development, freedom of copy and adaptation.

A Veiled Threat to Our Democratic Society and European Identity?

Jakob Piep[1]

The legal and sociological reasons behind the acceptance of "living together" as a justified restriction of art. 9 ECHR in S.*A.S. v. France*

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1. INTRODUCTION

Through the principle of "othering", it becomes possible to create both an individual and collective identity.[2] This "othering" has taken on a religious form in Europe, whose population has for the most part been predominantly Christian, and was one of the ways by which a first feeling of a European identity was created. [3]

Over the last centuries, Islam and Judaism have prominently filled the role of being the religious other.[4] There were different levels of religious othering against these two religions throughout history, ranging from simple prejudices to paranoid hatred.[5] The focus of this paper lies precisely on the perception of Islam as the religious other during the twenty-first century. As a preliminary point, it is very interesting to note that there has been a significant rise in the perception of Islam as a violent religion during the last 30 years, especially after recent terrorist attacks, such as the attacks on the World Trade Centre in 2001.[6] To demonstrate this emerging fear of Islam in Western Europe, this paper focuses on a popular French example of Islamic othering.

In 2010, the French Parliament adopted the Law of 11 October 2010 prohibiting the concealment of the face in public places.[7] After an objective analysis of the statute, it seems to be factually neutral since it covers all means of face-concealments. However, Muslim women are undoubtedly the most significant group targeted because it prohibits wearing a *niqab*[8] or *burqa*[9] in public places. Since numerous Muslim women wear a burqa out of religious conviction, there is a

[2] M Wintle, 'Islam as Europe's 'Other' in the Long Term: Some Discontinuities' (2016) 10(344) History 42, p. 42.
[3] ibid.
[4] ibid; G Delanty, *Inventing Europe: Idea, Identity, Reality* (1st edn, Palgrave Macmillan 1995) pp. 4-8, 99.
[5] S Beller, *Antisemitism: A Very Short Introduction* (2nd edn, Oxford University Press 2015) p. 2; Wintle (n 2) pp. 43-46.
[6] K Creutz-Kämpi, 'The Othering of Islam in a European Context Polarizing Discourses in Swedish-Language Dailies in Finland' (2008) 29(2) Nordicom Review 295, p. 299.
[7] LOI n° 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public (FR).
[8] "A niqab is a face veil which covers women's hair, shoulders, and face, and only the two eyes are visible". See, A Mohammadi & AM Hazeri, 'Two Different Narratives of Hijab in Iran: Burqa and Niqab' (2021) 25(2) Sexuality & Culture 680, p. 681.
[9] "A burqa is a kind of mask which covers just part of the face". See, ibid.

restriction on the expression of their religious belief and, consequently, of Art. 9 of the European Convention of Human Rights ("ECHR"), which guarantees the freedom of religion. In the subsequent landmark decision of *S.A.S. v. France*, the European Court of Human Rights ("ECtHR" or "the Court") ruled for the first time in favour of a nationwide ban of face concealments in public places.[10]

This paper takes an interdisciplinary approach and has both sociological and legal elements. This approach is chosen with the aim of providing the reader a deeper understanding of the rationales behind the legal restrictions on the right of freedom of religion, which stem from the French Law of 11 October 2010. To acquire this deeper understanding, this paper takes the position that it is necessary to comprehend the underlying sociological implications behind the French legal prohibition of face concealments in public places.

Consequently, this research paper addresses two questions. Firstly, it analyses the question: How can the presence of Islamic othering still be explained during the twenty-first century in Western Europe? Secondly, it examines the question: How did the ECtHR justify the nationwide ban of face veils in public places in France, in light of Art. 9 ECHR? Additionally, the consequences of this decision are analysed.

The first section of this paper starts with an analysis of what the principle of religious othering entails (section 2.1). Subsequently, a dive into the European history of religious othering is provided, focusing especially on the perception of Islam throughout that history (section 2.2). Section three deals with a concrete French example of Islamic othering. To achieve a thorough comprehension of the adoption of the piece of legislation, its history and scope are analysed (section 3.1). In Section 3.2, Art. 9 ECHR is analysed, which guarantees the freedom of religion. Subsequently, the judgement in *S.A.S. v. France* (2014) is examined, in which the ECtHR ruled on the compatibility of the French legislation with the fundamental right of freedom of religion. The fourth and final section places the concept of "Islamic othering", which was examined in previous sections of the paper, in the context of European identity and, thereby, aims to provide rationales of the continued existence of "Islamic othering".

[10] *S.A.S. v France* App no 43835/11 (ECtHR, 2014), para. 159.

A doctrinal and descriptive research method is primarily followed in the first sections of this paper. The answer to the research question requires a detailed analysis of multiple secondary sources. To fully understand the extent of Western European "Islamic othering" and the freedom of religion, it is further necessary to consult diverse primary sources, such as the original French article, the ECHR, and the case law of the ECtHR. In the last section of the research paper, an evaluative research method is applied to place Islamic othering into the context of European identity, thereby, explaining why Islamic othering takes such a significant form in the twenty-first century in Western Europe.

This research paper aims at advancing two arguments: firstly, from a sociological perspective, the rationales behind Islamic othering are deeper rooted in our society than a simple perception of fear of violence or cultural differences; and secondly, from a legal perspective, it became easier for a country to justify a restriction under Art. 9 ECHR after the ruling of *S.A.S. v. France*, which potentially sets a dangerous precedent.

2. The Principle of Religious Othering

2.1. Definition of Religious Othering

A popular way of creating a collective identity is by comparing a group of people to an "outer collective" or "other".[11] Through this comparison against an outer collective, it becomes possible for a group of people that do not share too many similarities at first sight to form a distinct and common substance in contrast to the other.[12] The negative aspect of identification (i.e., self-identification through contrast with the other) especially appears when the "outer collective" is perceived as a threatening stranger.[13] It is furthermore essential to note that it is not mandatory that "the other" is a group of people external to society. Instead, the key difference is more

[11] Wintle (n 2) p. 43; Creutz-Kämpi (n 6) p. 298.
[12] Creutz-Kämpi (n 6) p. 299.
[13] ibid p. 298.

the perception of differences between the people who are not considered as the "us" or the "in-group".[14]

With regard to "religious othering", the difference between the in-group and the outer collective is primarily a different religion. It is, however, a mistake to only focus on the factor of a different religion since other elements such as culture or values are closely intertwined with the religion one believes in.

The concept of "Islamic othering", which is closely linked to Islamophobia, can be defined as a "form of governmentality that directs societies towards a westernizing horizon", and through which a Western European identity can be constructed via the contrast with Islam.[15] Islamophobia takes its concrete form where Muslim autonomy is effectively denied, for example by prohibiting Muslim communities to build places of worship or denying the expression of their religious beliefs.[16] To demonstrate the rising Western European perception of Islam as the "religious other" through a concrete example, section three analyses the French face veil ban of 2010.

2.2. Religious Othering throughout European History

During the last centuries, European identity has been built to a large extent by contrasting a common heritage of a European set of values, customs, and culture in contrast to those of Muslims.[17] As already indicated in the introduction, there were different levels of religious othering towards the religion throughout history, ranging from simple prejudices to paranoid hatred.[18] It should, however, be noted that the Western European perception of Islam as the "other" has changed considerably throughout time.[19] Thus, it is essential to analyse the different perceptions of Islam throughout European history for the discussion of Islamic othering in this paper.

[14] Wintle (n 2) p. 43.
[15] S Sayyid, 'Islamophobia and the Europeanness of the other Europe' (2018) 52(5) Patterns of Prejudice 420, p. 431.
[16] ibid p. 424.
[17] Wintle (n 2) p. 43.
[18] Beller (n 5) p. 2; Wintle (n 2) pp. 43-46.
[19] Wintle (n 2) p. 46.

After the rise of Islam in the seventh century and the connected conquests of large parts of Spain and Portugal, Islam became the prime candidate for religious othering in Europe.[20] This external threat provoked a feeling of fear against Islam and simultaneously united European nations against a common enemy.[21] Knowledge about Islam was very limited until the twelfth century when European crusaders started to explore other continents and countries.[22] At that time, Islam was perceived as powerful, threatening, and superior, but also as alien, backward, and uncivilised.[23] However, in subsequent centuries, knowledge of the religion expanded as a result of trade, war, and an emerging tradition of Oriental studies.[24] With this expanded knowledge, Islam became more familiar, and it can be generally affirmed that the feeling of fear towards the religion had mostly been contained from the seventeenth century onwards.

A factor that is often neglected is that Islam had a substantive positive influence in shaping Europe's current form. It can safely be said that Europe has never been and will probably never be purely Christian. During seven centuries of Arab occupation of the Iberian Peninsula, many Arab achievements were made that subsequently influenced the European continent (e.g., advancements in scholarship, agriculture, science, and architecture).[25] Due to these positive influences, Europeans had, for a long time, much regard for Islam and its achievements. Nowadays, this feeling of acknowledgement can be considered mostly overshadowed by a feeling of fear.[26]

This feeling of fear of Islam has been especially present during the last thirty years, when conceptions such as "Islam is dangerous, backward, or a threat to civilisation" became popular again.[27] Many of today's representations have

[20] Wintle (n 2) p. 47.
[21] Sayyid (n 15) pp. 427-429; Wintle (n 2) pp. 46-47; G Delanty, '*Formations of European Modernity'* (2nd edition, Palgrave Macmillan Cham, 2018) pp. 94-95.
[22] Creutz-Kämpi (n 6) p. 304.
[23] ibid pp. 299-305; E Jamsari & N Talib, 'Eurocentrism in Reinhart Dozy's Spanish Islam: A History of The Muslims in Spain' (2015) 5(29) Mediterranean Journal of Social Sciences 74, p. 74; Wintle (n 2) pp. 47-48.
[24] Wintle (n 2) pp. 43-44.
[25] Delanty (n 21) pp. 103-104.
[26] ibid p. 101.
[27] Creutz-Kämpi (n 6) p. 305.

similarities with the conceptions of Islam in the Middle Ages. This (re)emergence of "Islamic othering" in such an intense form stems, to a certain extent, from increased media coverage after recent terrorist attacks (e.g., the attacks on the World Trade Centre), combined with a misconception that these individual extremists represent the whole of Islam, and, thereby, a religion of terrorism and political violence.[28]

It can be concluded in this section that the current feeling of fear of Islam is not a new phenomenon and existed already to a similar extent in the Middle Ages. However, whereas at that time the feeling originated mostly from grounds such as lack of knowledge and violent conquests, the reasons for "Islamic othering" in the twenty-first century go deeper than a simple perception of fear of violence or cultural differences and are further explored in the fourth section.

3. The French Example of Islamic Othering

3.1. History and Scope of the French Legislation

An (in)famous example of "Islamic othering" is the French Law 2010-1192, through which the concealment of the face was prohibited in public places. Article 2(2) of that law sets out multiple exceptions to the general ban of face concealments: first, when it is authorised by legislative or regulatory provisions; second, when the person has a professional or health reason; and third, when the clothing is part of a sportive, festival, artistic, or traditional activity. Thus, many activities fall out of the scope of the general ban of the face veil. Therefore, even though the legislation is formulated in a neutral way, prohibiting all means of face-concealments, it is clearly focused on Muslim women, since it prohibits wearing a *niqab* and *burqa* in public places.[29]

The legislation was justified on the basis of multiple arguments, including public safety, human dignity, and gender equality.[30] However, the essential underlying French reason for the adoption of the face-veil ban was the "living

[28] D Silva, 'The Othering of Muslims: Discourses of Radicalization in the "New York Times", 1969–2014' (2017) 32(1) Sociological Forum 138, pp. 138-140.
[29] J Marshall, 'The legal recognition of personality: full-face veils and permissible Choices' (2014) 10(1) International Journal of Law in Context 64, p. 66.
[30] E Brems, 'Uncovering French and Belgian Face Covering Bans' (2013) 2(1) Journal of Law 69, p. 83.

together" argument. Following the argument, there exists a basic standard that every member of French society must abide by, to which the *burqa* and *niqab* do not correspond.[31] It is accordingly not possible for the French population to live together in a functioning society with people who wear a face veil in public. Accordingly, the legal version of "living together", which corresponds to the underlying sociological rationale of promoting a "French identity", implies that there are basic standards that everyone in French society needs to meet. This legal version of "living together" could be, according to the advisory opinion of the French Council of State, compared to a "non-material public order" standard that demonstrates public morality and respect for human dignity.[32] The Council of State added that "as soon as individuals are situated in a public place, they cannot deny their belonging to society and must abide by minimum reciprocal requirements of that society".[33]

In many debates that led to legislative prohibitions of the wearing of Islamic clothing in the public space, the perspective of Muslim women was completely left out, for whom the wearing of a *niqab* and *burqa* can be an important instrument of religious or ethnic self-identification as a minority group in society.[34] This was not different in the French case, where the ban might have been adopted for the sake of "living together", but this living together apparently excludes certain minorities of French society, such as Muslim women who wear a *niqab* or *burqa*. This is further emphasised by the fact that France has a strong tradition of *laïcité.*[35] This doctrine means that France adopts a state system with a strong separation between state and religion.[36] The consequence of the secular state system is that France does not promote a specific religion but instead a unified national identity.[37] This French national identity implies that foreigners should adapt themselves to a certain level of French

[31] Brems 8 (30) p. 88.
[32] Rapport Assemblée générale plénière du Conseil d'Etat, Etude relative aux possibilités juridiques d'interdiction du port du voile integral (2010). See also, Brems (n 30) p. 88.
[33] ibid.
[34] Mohammadi & Hazeri (n 8) p. 697.
[35] M Troper, 'French Secularism, or Laïcité' (2000) 21(4) Cardozo Law Review 1267, p. 1267.
[36] ibid pp. 1282-1284.
[37] J Heider, 'Unveiling the Truth behind the French Burqa Ban: The Unwarranted Restriction of the Right to Freedom of Religion and the European Court of Human Rights' (2012) 22(1) Indian International & Comparative Law Review 93, p. 99.

identity, or as the former French president, Nicholas Sarkozy, illustrated in 2011: "France will not welcome people who do not agree to melt into a single community".[38]

Thus, the French *burqa* and *niqab* ban in the public sphere exemplifies how "Islamic othering" takes place in praxis in Western Europe. The French ban was justified on the basis of the "living together" argument, which implicitly indicates that the French society is only able to live together by excluding a certain part of society. It is, furthermore, a way of strengthening French identity by defining this identity through the exclusion of a certain part of society (i.e., everyone who lives together in French society belongs to the "in-group", which are in fact people who do not wear a *burqa* or *niqab*; thus, people who are not the "Islamic other").

3.2. How Far Does the Freedom of Religion Extend according to the ECHR?

Since numerous Muslim women wear the aforementioned pieces of clothing out of religious convictions and this conduct has now been criminalized in France, a restriction of their expression of religious belief is evident. This human right is guaranteed under Art. 9 ECHR. The ECHR was established by the Council of Europe, an international organisation in which European States beyond the Member States of the EU can be part of (e.g., Turkey), and which consequently represents European standards of human rights. The Court of this international organisation, the ECtHR, held in its landmark decision of *S.A.S. v. France* (2014) that the French argument of "living together" could be considered a legitimate aim and was, thereby, in line with Art. 9 ECHR and the freedom of religion.

3.2.1. Scope of Art. 9 ECHR

The first paragraph of Art. 9 ECHR guarantees everyone the right to freedom of thought, conscience, and religion. This entails the freedom to manifest one's religion or belief in public. The second paragraph provides cumulative conditions for a justified restriction of this freedom. A restriction is justified when it is prescribed by law, necessary in a democratic society, and pursues one of the aims listed in the Article

[38] Heider (n 37).

(most importantly, the "protection of rights and freedoms of others").[39] While assessing whether the restriction of Art. 9 ECHR is "necessary in a democratic society", the Court determines whether the restriction on the freedom of religion is proportionate to the legitimate aim pursued.[40]

Freedom of religion under the ECHR does not protect every act motivated by religion, as this would make the scope of Art. 9 very broad.[41] In determining whether there is a religious duty in the case at hand that is protected by Art. 9 ECHR, the Court applies a subjective test and looks at the individual's beliefs about whether a religious duty exists and thereby, avoids theological issues.[42]

The human right of freedom of religion can be limited by the rights and freedoms of others. How the Court interprets this could become problematic for minorities, whose personalities might not correspond with those of the rest of society.[43] The ECtHR explicitly stated that this does not mean that the views of majorities should always prevail over those of minorities and an abuse of this dominant position should be prevented.[44] However, the Court faces a difficult task in balancing the rights and freedoms of a (religious) minority against those of the rest of society, and problems might arise concerning other Articles of the ECHR, such as Art. 14, which guarantees, *inter alia*, non-discrimination based on religion.[45] The following section will provide a detailed analysis of how the Court dealt with the controversial French legislation in *S.A.S. v. France*.

3.2.2. S.A.S. V. France

[39] The different aims of a justified restriction under Art. 9(2) ECHR are: Public safety, the protection of the public order, health or morals, and for the protection of the rights and freedoms of others. See ECHR, art. 9(2).
[40] *S.A.S.* (n 10) para. 131.
[41] Brems (n 30) p. 90.
[42] ibid.
[43] J Marshall, 'S.A.S. v France: Burqa Bans and the Control or Empowerment of Identities' (2015) 15(2) Human Rights Law Review 377, p. 377.
[44] *S.A.S.* (n 10) para. 128.
[45] ibid paras. 123-131. See also, Marshall (n 30) p. 66.

S.A.S. v France concerned a French national who wore both her *burqa* and *niqab* out of religious faith and personal convictions.[46] She claimed that the French legislation, which prohibits the concealment of the face in the public space, violated her freedom of religion as guaranteed under Art. 9 ECHR.[47] The case sets an important precedent since it was the first time the ECHR ruled in favour of such a nationwide ban.[48] The Court's previous position can be well illustrated in *Ahmet Arslan v. Turkey*, where the Court held that a ban on religious coverings in all public life without justification by a legitimate interest is disproportionate and, consequently, violates the freedom of religion.[49]

However, the Court in *S.A.S. v. France* ruled that the French national face veil ban served a legitimate aim deemed necessary in a democratic society.[50] The legitimate aim accepted by the Court was the "living together" argument.[51] The ECtHR accepted that the "living together" argument could be linked to the "protection of rights and freedoms of others".[52] This justified restriction of the freedom of religion is explicitly enshrined in Art. 9(2) ECHR. The Court affirmed that a State could put particular importance on the minimum requirements for social interaction between individuals.[53] Continuing this line of reasoning, it concluded that face concealments could "adversely affect" social interactions and that a national ban in public places consequently pursues a legitimate aim.[54]

Regarding the proportionality of the law of 11 October 2010, the essential requirement is whether limiting the freedom of religion constitutes a "choice of society" in the particular case.[55] France was given a wide margin of discretion in this

[46] *S.A.S.* (n 10) paras. 10-12.
[47] ibid para. 76.
[48] S Wade, '"Living Together" or Living Apart from Religious Freedoms? The European Court of Human Right's Concept of "Living Together" and Its Impact on Religious Freedom' (2018) 50(1) Case Western Reserve Journal of International Law 411, p. 423.
[49] *Ahmet Arslan v Turkey* App no 41135/98 (ECtHR, 2010), press release, p. 2. See also, Wade (n 48) p. 421.
[50] *S.A.S.* (n 10) para. 159. See also, Wade (n 48) p. 425.
[51] *S.A.S.* (n 10) paras.142-157.
[52] ibid para. 121.
[53] ibid para. 141. See also, Marshall (n 43) pp. 384-385.
[54] *S.A.S.* (n 10) paras. 141-142.
[55] ibid para. 153.

case since the ECtHR accepted that opinions over matters of general policy might deviate to a great extent, and there was no common approach among the Member States of the Council of Europe.[56] Considering this wide margin of discretion left for France, the Court ruled that the requirement of "necessary in a democratic society" was fulfilled in this case.[57] The fact that Contracting States enjoy a margin of interpretation with regards to restrictions of Art. 9 ECHR was also confirmed by the previous case law of the ECtHR. The Court ruled, for example, in the case of *Lautsi and Others v. Italy* in favour of the presence of crucifixes in State-school classrooms, while taking into account this margin of appreciation and "the principles and values which form the foundation of democracy and western civilisation".[58]

To conclude, the French Law of 11 October 2010 was regarded as proportionate to the legitimate aim pursued, which was the "living together" argument as a part of "protection of the rights and freedoms of others". Consequently, there was no violation of Art. 9 ECHR.[59] Thus, it is within the European standard of human rights to adopt a legislative act, prohibiting the wearing of Islamic clothing as long as it was for the sake of "living together" in a European society. This society, however, evidentially excludes those Muslim women who wear a *burqa* or *niqab*.

3.2.3. Consequences of the Judgement

The original approach of the ECtHR to national laws which restricted the freedom of religion was to apply a strict balancing test (e.g., in the case of *Ahmet Arslan* illustrated above).[60] If the restrictions were not sufficiently narrowed down or specific enough, the Court would declare that this measure violates Art. 9 ECHR. This approach changed with *S.A.S. v France*, where the Court accepted the concept of "living together" and the intertwined wide margin of appreciation in determining whether a legitimate aim is proportionate.

[56] *S.A.S.* (n 10) paras.154-156.
[57] ibid para. 158. See also, Marshall (n 43) pp. 385-386.
[58] *Lautsi and Others v. Italy* App no 30814/06 (ECtHR, 2011) paras 67-69.
[59] *S.A.S.* (n 10) para. 159. See also, Wade (n 48) p. 425.
[60] Wade (n 48) p. 433.

An example of a case where the new principle of "living together" was implicitly applied is *Osmangolu and Kocabas v. Switzerland*. The case concerned the refusal of the applicants to send their daughters to mixed swimming lessons since this was against their religious convictions.[61] The Court did not refer explicitly to the "living together" argument while justifying the restriction of the freedom of religion by the Swiss Parliament. However, the Court's reasoning relied on the argument that it is necessary for successful socialisation and integration to participate in collective activities with other children.[62] Thus, the Court referred implicitly to the same line of reasoning presented in *S.A.S. v. France*.[63]

Another case that demonstrates the shift in the approach of the ECtHR is *Dakir v. Belgium.* In this case, the Court explicitly referenced *S.A.S. v. France* and the "living together" principle. First, it accepted that the Belgian law of 1 June 2011 could be justified under the "living together" argument, and thus, pursues the legitimate aim of "protecting the rights and freedoms of others".[64] Second, the Court gave the Belgian Parliament, just as it gave the French Parliament in *S.A.S. v. France*, a wide margin of discretion in deciding whether and to what extent a restriction of Art. 9 ECHR is "necessary".[65] Consequently, the Belgian law was regarded as proportionate to the aim pursued, and there was no violation of Art. 9 ECHR, even though the imposed penalties under the Belgian legislation were considerably heavier than the French penalties.[66]

It can be concluded that the "living together" argument was not only used to demonstrate a "legitimate aim that was necessary in a democratic society" in a single case. Thus, the Court changed its approach in assessing whether the national restriction of the freedom of religion in public places pursues a legitimate aim and is proportional. The new test is problematic since it is very broad. Nothing would prevent invoking this justification in other cases concerning further religious objects or clothing, as long as the State demonstrates that the ban lies within the interest of

[61] *Osmanoglu and Kocabas v Switzerland* App no 29086/12 (ECtHR, 2017), para. 3.
[62] ibid paras. 96-103.
[63] Wade (n 48) pp. 433-434.
[64] *Dakir v Belgium* App no 4619/12 (ECtHR, 2017), para. 51.
[65] ibid para. 54.
[66] ibid paras. 60-62.

"living together".[67] As illustrated above, France and Belgium were both given a wide margin of discretion in establishing that the measure was proportionate to the legitimate aim pursued.[68] Therefore, it has become more accessible for a State to implement a measure limiting the freedom of religion by relying on the "living together" argument.

4. TOWARDS A EUROPEAN IDENTITY

The previous sections explained the various forms of "Islamic othering" throughout Western European history and established that this is currently taking on a rather intense form. The following section aims at analysing the rationales behind this and will provide the perceived reasons for this "othering". It should be noted that the rationales are presented just as they are perceived by the Europeans and that there is legitimate criticism that can be levelled against each of the two rationales.

As a starting point, the fear of terrorism and violence or the simple fact that Muslims practise a substantively different religion comes to mind as rather obvious reasons for "Islamic othering". However, these reasons only scratch the surface of the actual rationales and are often presented as easily depictable grounds for Islamic othering to shift the focus away from complex cultural and socioeconomic issues.[69] This paper examines two rationales that are able to explain the phenomenon of Islamic othering.

Firstly, Islamic othering can serve as an astonishingly useful and simple tool for the creation of a "European identity". In the case of Islamic othering, the "other" is primarily constructed by referring to a common set of European values, which are in contrast to Islamic values.[70] Europe is only a vaguely defined institutionalized concept with limited substance for the creation of a European identity.[71] However, it is possible to fill this European identity by referring to a similar set of European values and traditions, which are often not too similar under a closer look, but still, have in

[67] Wade (n 48) p. 434.
[68] *S.A.S.* (n 10) paras. 154-156; *Dakir* (n 64) para. 54.
[69] Silva (n 28) p. 141.
[70] Creutz-Kämpi (n 6) p. 298.
[71] ibid; Sayyid (n 15) p. 429.

common that they are different from Islamic values. Thus, Islamic othering makes it possible to construct a European identity by claiming that what Europeans have in common is that they do not share Islamic values.

The main criticism against this first rational lie in the fact that these arguments, which illustrate Islam as completely outside of Western culture, are not sound. It was for example seen in section 2.2 that Islam had a substantive positive influence on the current shape of Europe after seven centuries of Arab occupation of Spain and Portugal. Thus, these strict boundaries between Western and Muslim cultures that are presented under this rational simply do not exist.

Secondly, it is perceived that there is an economic and political power shift toward the Middle East and that the West loses its central place in the world.[72] Economic insecurity concerns especially the working middle class, who find refuge in a European collectively and the "othering" of Islam.[73] This part of society considers itself as the "in group" that safeguards its economic privileges against those "outsiders" that want to be part of the middle class.[74] A classic example of this form of "Islamic othering", which is certainly also linked to Islamophobia, can be found in the speech from 2018 of the AFD-politician Gottfried Curio in front of the Bundestag, in which he claimed that: "While the 'new citizen' catches up with his second and third wife, the 'old citizen' is allowed to look for a second and third job to finance himself",[75] "Muslim immigrants are coming to Europe without accepting *our* legal norms" and "the religion of Islam promotes violence".[76] The argument thus also indicates that, in the light of economic insecurities, the European middle class must stand together against the outside Muslims that want to be part of this middle class.

[72] Silva (n 28) p. 141; R Kappel, 'The Challenge to Europe: Regional Powers and the Shifting of the Global Order' (2011) 46(5) Intereconomics: review of European economic policy 275, pp. 285-286.
[73] D Bell, 'Europe's "new jews": france, islamophobia, and antisemitism in the era of mass migration' (2018) 32(1) Jewish History 65, pp. 69-76.
[74] ibid p. 72.
[75] The context of the terms "new citizen" and "old citizen" becomes evident when one interprets the cited sentence in the light of the whole speech. First, the term "new citizen" implicitly refers to Muslim immigrants. Second, the term "old citizen" refers to the existing German population. Additionally, by referring to "a second and third job", it is highly likely that Mr. Curio wanted to especially address the working middle class with his speech.
[76] Deutscher Bundestag, 'Plenarprotokoll 19/55' (2018), pp. 5891-5892.

The second rationale behind "Islamic othering" serves to justify and hold tight onto economic inequalities between Europeans and Muslims.

By generally referring to "Muslims", the person behind the argument means to refer only to a small group of refugees from the Middle East.[77] This is equally as unsound as the person referring to "Muslims" when speaking of their fear of Islamic-motivated terrorism, since they should be speaking about "religious extremists". Thus, the main criticism against this second rational lies in the unjustified generalisations and the tendencies towards Islamophobia.

5. CONCLUSION

This research paper aimed at examining two research questions, which are closely intertwined. Firstly, it examined: How can the presence of Islamic othering still be explained during the twenty-first century in Western Europe? Secondly, it addressed the question: How did the ECtHR justify the nationwide ban of face veils in public places in France, in light of Art. 9 ECHR?

With regard to the first question, the central claim of the paper is that the current extent of "Islamic othering" is not a new phenomenon in Western Europe and that the rationales of "Islamic othering" are more deeply rooted in our society than a simple perception of fear of violence or cultural differences. The paper started with an analysis of the concept of "Islamic othering" throughout Western European history. In the first section, it was noticed that the current extent of "othering" against Islam existed already to a similar extent in the Middle Ages. However, whereas in the Middle Ages, the feeling originated mostly from grounds such as lack of knowledge and as the result of violent conquests, the reasons for "Islamic othering" in the twenty-first century are much deeper rooted than a simple perception of fear, violence, or cultural differences.

The French outlawing of the *niqab* and *burqa* serves also as a concrete example of how identity can be strengthened by the exclusion of an "other". The last section of the paper placed the concept of "Islamic othering" in the context of

[77] Bell (n 73) p. 71.

European identity and consequently provided two rationales for the "othering" of Muslims in the twenty-first century, which represent complex socioeconomic and cultural issues. Firstly, Europe is a loose construct of many countries with very limited substance for the creation of a collective identity. A rather simple way of achieving a feeling of a common European identity is to build this on the fact that most of the European States share, at least to some extent, a common "other" with the name of Islam. Secondly, the "othering" of Muslims can also be explained to a certain point by the perceived economic insecurities of the Western European middle class, who find safety in a European collective, and the "othering" of Islam. There is certainly valid criticism against both of these rationales for Islamic othering rooted in unjustified generalization and Islamophobia. Nevertheless, the original presumption that the rationales of "Islamic othering" are more deeply rooted in society than a simple perception of fear, violence, or cultural differences has been confirmed with the two rationales advanced above. It should, however, be noted that this research paper focused on two possible rationales behind Western European "Islamic othering". There exist alternative explanations of the phenomenon that were not presented in the scope of this paper due to limitations in research.

Concerning the second research question, the argument advanced in this paper is that it became easier for a country to justify a restriction under Art. 9 ECHR after the ruling of *S.A.S. v. France*, which potentially set out a dangerous precedence. After the first research question has been answered, it should be easier to understand why a country adopts these restrictions and why a Contracting State, such as France, excludes a certain Muslim population through the "living together" argument.

Section three analysed the history and reasons behind the French legislation in the light of Art. 9 ECHR. The law of 11 October 2010 is not as "neutral" as it seems and mainly affects the Muslim women of France. Art. 9(2) ECHR provides that a national measure limiting this freedom of religion is justified if it is prescribed by law, pursues a legitimate aim, and is proportionate to the aim pursued. In the past, the Court ruled against the proportionality of measures with similar scope of application than in *S.A.S. v. France*, as illustrated in *Ahmet Arslan v. Turkey*. However, in *S.A.S. v. France*, the ECtHR changed its approach. Firstly, it accepted that a State could

emphasise the minimum requirements of social interaction between individuals. This "living together" argument formed part of the justifying reason of “protection of the rights and freedoms of others” and consequently pursued a legitimate aim. Secondly, a Contracting State has a wide margin of discretion in assessing whether the national measure limiting the freedom of religion is proportionate to the “protection of the rights and freedoms of others”. In this assessment, the Court generally also considers the principles and values which form the foundation of democracy and western civilisation.

Thus, by accepting the legitimate aim of “living together”, the Court also lowered the bar of the required level of proportionality. After the ruling in *S.A.S. v. France*, it has consequently become more accessible for a Member State of the ECHR to produce a measure that limits the freedom of religion under Art. 9 ECHR. A Contracting State “only” needs to demonstrate that the measure lies within the aim of “living together” and is not grossly disproportionate. The effect of the new approach is demonstrated in the subsequent case law of the ECtHR (*Osmanoglu and Kocabas v. Switzerland* or *Dakir v. Belgium),* where the countries explicitly or implicitly referred to the "living together argument. This approach of the Court is not undisputed, as it *de facto* allows the legal exclusion of a certain part of our society through an argument which should ensure the “living together”. It remains to be seen in the future whether the ECtHR remains faithful to its loose approach to the protection of the freedom of religion under Art. 9 ECHR.

Live Facial Recognition Technology and the ECHR: An Evaluation of Compliance with Reference to the United Kingdom

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1. INTRODUCTION

When Thomas Cooley wrote in 1879 that privacy was the right of the individual to "be let alone",[2] he was likely not privy to the far-reaching significance this concept would have on law and society in the present day. 144 years later, the right "to be let alone" has been elaborated on in countless national constitutions, statutes, and international conventions, and is now more generally referred to as the right to privacy. The fields in which our privacy plays a central role, such as medical records and online activity, go beyond what Cooley could have imagined when he coined this seminal aphorism. Another area he would likely also have struggled to conceptualise, is the subject of this study: life facial recognition (LFR) technology.

LFR technology is capable of cross-referencing biometric data with information stored in a digital database. This technology has found applicability in both the public and private sector. Though its utility within the latter surely generates intriguing legal questions, this study will focus on its use within the former. There, LFR is used for verification, categorization, and identification. The use of LFR for identification, the subject of this study, is highly efficient and can be effective to apprehend criminals or to track down missing persons. While undeniably a potent tool, its use does not come without costs. International human rights watchers bemoan the software's lack of procedural safeguards, its compatibility with international human rights conventions, and its unreliability, especially in crowded and inconsistently lit settings and in respect of persons of colour. Additionally, employment of LFR may serve as a case study on how suitable our national and international legal frameworks, such as the European Convention of Human Rights (ECHR), are to protect a well-developed and cherished right in the face of ever more sophisticated and rapidly developing technologies, many of which we, like Cooley in 1879, cannot imagine nowadays.

This analysis follows a doctrinal research method. Both primary and secondary sources are considered. Primary sources mainly comprise statutes and

[2] Louis Brandeis and Samuel Warren, 'The Right to Privacy' [1890] Harvard Law Review 195.

European Court of Human Rights (ECtHR) case law. Case law is thoroughly analysed to distil relevant legal conditions. Secondary sources such as academic articles and government publications support the argumentation. The subject of this study is the United Kingdom (UK). This choice was motivated by the knowledge that police are afforded more powers than would usually be the case in continental Europe, and by its well-established widespread use of surveillance.[3] The evaluative question this analysis engage with is "*To what extent does the UK comply with Article 8 ECHR in its use of live facial recognition technology?"*. To answer this question authoritatively, more context on the functioning of LFR technology is required, which is provided in Section II. An analysis of ECHR requirements for LFR technology and an application of UK law to this framework follow in Section III.

2. Virtues and Vices of Facial Recognition Software and its Standing with Human Rights

To start this analysis, it is useful to briefly discuss what LFR technology consists of. This section will also illuminate the technology's advantages and disadvantages. How its disadvantages influence its standing with human rights will be considered last.

First, it is necessary to define what LFR technology entails. The UK will be used as a reference. On the street, LFR technology is composed of a camera and the "control room", the latter generally housed in a van.[4] Biometric images captured on the live feed are overlaid with facial analytical software in the control room.[5] In case of a match with the "watchlist" (a pre-composed file containing digital signatures of wanted persons) officers are tasked to verify the match, interrogate and/or arrest the

[3] Emma Woollacott, 'UK Bulk Surveillance Violated Right to Privacy' (Forbes, 25 May 2021) https://www.forbes.com/sites/emmawoollacott/2021/05/25/uk-bulk-surveillance-violated-right-to-privacy/ accessed 24 June 2023.
[4] Pete Fussey and Daragh Murray, 'Independent Report on the London Metropolitan Police Service's Trial of Live Facial Recognition Technology' (The Human Rights, Big Data and Technology Project, 2019) p.19 < https://repository.essex.ac.uk/24946/1/London-Met-Police-Trial-of-Facial-Recognition-Tech-Report-2.pdf > accessed 24 June 2023.
[5] ibid.

suspect. Subsequently, data is stored for 31 days. In the absence of a match, the data is deleted immediately.[6]

LFR technology is useful for law enforcement operations for three main reasons: efficiency, prevention, and public confidence. LFR technology is highly efficient as a large amount of data can be processed at once. Being able to scan facial images and simultaneously compare these with stored data would allow law enforcement to immediately identify criminals in highly-trafficked areas such as border crossings.[7] Moreover, the widespread use of LFR technology would have a preventative effect, as criminals who make use of border crossings or transit terminals would be aware of the risk that they might be easily identified.[8] Additionally, provided that the public has trust in the police to deploy this technology cautiously, confidence in law enforcement's ability to reliably bring criminals to justice would be enhanced.[9]

When considering effectiveness, it is important to note that the reliability of such technology cannot be generalised. Performance differs between developers and is influenced by external factors such as lighting or image quality.[10] This analysis will therefore limit itself to general trends which are accepted within the research community. The most significant challenge that LFR technology faces is its accuracy. Accuracy is primarily undermined by the inherent biases of the software. Empirical evidence points to a high level of variance. A recent study by the National Institute of Standards and Technology, a branch of the US Department of Commerce, found false-positive rates ranging from (on average) 4.1% to 20.5%.[11] The staggering upper end of this spectrum can be explained by the software's bias. There are two dimensions of bias: sex and ethnicity. With respect to sex, facial recognition software is more

[6] Metropolitan Police Service, 'Live Facial Recognition: Legal Mandate' (Metropolitan Police, 24.01.2021) p. 12 <https://www.met.police.uk/SysSiteAssets/media/downloads/force-content/met/advice/lfr/policy-documents/lfr-legal-mandate.pdf> accessed 24 June 2023.
[7] Christopher Milligan, 'Facial Recognition Technology, Video Surveillance, and Privacy' [1999] Southern California Interdisciplinary Law Journal 295.
[8] ibid.
[9] Ben Bradford and others, 'Live Facial Recognition: Trust and Legitimacy as Predictors of Public Support For Police Use of New Technology' [2020] 60 British Journal of Criminology 1502.
[9] *Fussey and Murray* (n 3) p. 21.
[11] National Institute of Standards and Technology, *Face Recognition Vendor Test (FRVT): Performance of Face Identification Algorithms* (NIST Interagency Report 8009) p. 3.

accurate in men than in women[12], with older women having a higher rate of false positives.[13] With regard to ethnicity, facial recognition software is more accurate in lighter individuals than in darker individuals.[14] It follows that dark-skinned women are the group with the highest rate of false positives.[15]

While the primary human right to be considered when examining the use of LFR technology is the right to privacy, its use also triggers a range of others. Firstly, the use of LFR technology activates the rights of freedom of expression[16] and freedom of assembly and association.[17] The former relates to a person's liberty to express their opinions without fear of retaliation, and the latter to a group's liberty to do the same. The presence of an LFR van might dissuade people from exercising these rights by participating in meetings or protests due to fear of "guilt by association".[18] Where persons feel they might be guilty by association, they fear their actions are more easily considered condemnable acts of public disobedience due to their connection to an activity which is deemed to be worthy of heavy surveillance by law enforcement authorities. The legitimacy of individual protests might also be compromised due to the foregoing reason.[19] Secondly, its use triggers the prohibition of discrimination,[20] which is the right to enjoy human rights regardless of sex, race, language, or opinion. When it comes to LFR technology, indirect discrimination, which entails "disproportionate prejudicial effects of a general policy or measure which, though

[12] National Institute of Standards and Technology, *Face Recognition Vendor Test (FRVT) Performance of Automated Gender Classification Algorithms* (NIST Interagency Report 8052) i.
[13] ibid p. 8.
[14] Joy Buolamwini, 'Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification' [2018] 81 Proceedings of Machine Learning Research Journal 1, p. 12.
[15] Joy Buolamwini, 'Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification' [2018] 81 Proceedings of Machine Learning Research Journal 1, p. 1.
[16] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) Art. 10.
[17] ibid Art. 11.
[17] *Fussey and Murray* (n 3) p. 37.
[19] Valerie Aston, 'State surveillance of protest and the rights of privacy and freedom of assembly: a comparison of judicial and protester perspectives' [2017] 8 European Journal of Law and Technology 1, p.2.
[20] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) Art. 14.

couched in neutral terms, discriminates against a group",[21] is especially pertinent due to the inherent inaccuracies when it comes to race and sex. These inaccuracies (if they remain unaddressed) make it questionable whether LFR can comply with the ECHR's requirements regarding the prohibition of discrimination and freedom of assembly. Additionally, compatibility with national anti-discrimination laws[22] and subsequent incompatibility with the lawfulness requirement of various ECHR norms[23] is a cause for concern.

3. Live Facial Recognition Software and its Compatibility with the Right to Privacy

Article 8 of the ECHR entrenches the right to privacy, thus placing all state parties to the convention under an obligation to consider this notion when regulating their internal affairs. The analysis of any action's compliance with Article 8 ECHR consists of four main steps. These steps are that an interference with private life by a state authority must have occurred, that the interference took place in accordance with the law, whether there was a legitimate aim for the interference, and whether the interference took place in line with necessity and proportionality. This section will examine each of these requirements in turn and draw conclusions by reliance on ECtHR case law and UK legislation.

3.1. The Interference with Private Life

In *Niemitz* the ECtHR was confronted with the question of what the Convention refers to when it speaks of "private life". It resisted to issue a conclusive definition, rather electing to maintain ambiguity, writing that "it would be too restrictive to limit the notion to an "inner circle" (…) [it] must also comprise to a certain degree the right to establish and develop relationships with other human beings". The absence of a definition means that the question of whether this requirement is fulfilled, and the

[21] *D. H. and Others v. the Czech Republic* App. no 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81 (ECtHR, 8 July 1986), para. 177.
[22] For example, Data Protection Act 2018, ss. 64(3)(b) and (c).
[23] For example, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) Art. 8(2).

Article is triggered, must be determined with reference to the specific action in question. Generally, with respect to LFR and other systematic surveillance systems, Article 8, it is triggered when a "systematic or permanent record comes into existence".[24] Additionally, the interference must be carried out by a state authority, such as the police. As litigation of Article 8 usually follows from house searches[25] or the taking of intrusive photographs,[26] it is unclear whether LFR technology would be included in its scope. From case law, one gathers that the Article's reach is rather broad, encompassing a person's name, gender, ethnic identity, and the right to their image.[27] Indeed, the Court established in *Peck* that "private life is a term not subject to exhaustive definition".[28]

ECtHR case law confirms that a picture constitutes a "chief attribute of one's personality", the protection of which thus being an "essential component of personal development".[29] In *P. G. and G. H. v the United Kingdom*,[30] and in the British case *R(Wood) v Commissioner of the Police Metropolis*,[31] this notion was further developed in the context of surveillance. As national courts are the first instance of ECHR application and enforcement, their arguments will also be considered here. In *Wood*, the judge considered the "bare act of taking pictures"[32] to not be an interference with rights under Article 8(1). For such a breach to exist, there must be "aggravating circumstances", such as the storage and processing of the images.[33] In *P.G.*, the ECtHR states that a person's reasonable expectation of privacy is a significant factor when considering recordings done outside of their homes.[34] Where the expectation of

[24] *Uzun v Germany* App no 35623/05 (ECtHR, 2 September 2010), para. 44.
[25] *Prade v Germany* App no 7215/10 (ECtHR, 3 March 2016), para. 9.
[26] *Von Hannover v Germany* App nos 40660/08, 60641/08 (ECtHR, 7 February 2012), para. 50.
[27] *Christine Goodwin v the United Kingdom* App no 28957/95 (ECtHR, 11 July 2002); *Mentzen v Latvia* App no 71074/01 (ECtHR, 7 December 2004); *Tasev v North Macedonia* App no 9825/13 (ECtHR, 16 May 2019); *López Ribalda and Others v Spain* App nos 1874/13, 8567/13 (ECtHR, 17 October 2019).
[28] *Peck v the United Kingdom* App no 44647/98 (ECtHR, 28 January 2003), para. 57.
[29] *López Ribalda and Others v Spain* App nos 1874/13, 8567/13 (ECtHR, 17 October 2019), paras. 87-91.
[30] *P.G. and J.H. v the United Kingdom* no 44787/98 (ECtHR, 25 September 2001).
[31] *R(Wood) v Commissioner of the Police Metropolis* [2009] EWCA Civ 414; [2009] HRLR 25.
[32] ibid paras. 36-37.
[33] ibid para. 28.
[34] *P.G. and J.H* (n 29) para. 57.

privacy is especially low, there may be no claim under Article 8(1).[35] However, this changes once the recordings become part of a "systematic or permanent record".[36] In such a case, private-life considerations become relevant.[37] Further elaboration was provided in *S. v the United Kingdom*: "The mere storing of data relating to private life of an individual amounts to an interference within the meaning of Article 8."[38] The subsequent use of the data is thereby irrelevant.[39]

It cannot be said that the use of LFR technology does not constitute an interference in the sense of Article 8 because a person was situated in public. When it is deployed, the person's facial data is processed, analysed, and compared against an existing database, going beyond the "bare act of taking pictures". Due to the subsequent analysis of the facial data, one may speak of "aggravating circumstances". LFR technology also satisfies the requirements set forth in *P.G. v UK* and *S and Marper v UK*, as the data collected by the technology is stored and becomes part of a record. It is irrelevant whether the data is deleted shortly after storage; the fact of storage is enough.[40] Therefore, as there is an interference with private life and it is carried out by a state authority, it can be said that the application of ECHR can give rise to actionable claims.

3.2. The Lawfulness of the Interference

This section will first present the conditions the ECHR lays out for lawfulness. Then, the UK law that has been used as a basis for the use of LFR technology will be specified. Lastly, the ECHR "double lawfulness" test, which combines the two previously mentioned steps, for national legal basis will be carried out.

The ECHR's lawfulness test entails two stages: the legal basis test and the ECHR test. The legal basis test encompasses a consideration of the availability, accessibility and transparency of the national law. The ECHR law test is an evaluation

[35] ibid.
[36] ibid.
[37] ibid.
[38] *S. and Marper v the United Kingdom* App nos 30562/04, 30566/04 (ECtHR 4 December 2008), para. 67.
[39] ibid.
[40] ibid para. 34.

of the *quality*, meaning ECHR compatibility, of the national law. As a case concerning LFR technology has not reached the ECtHR, the requirements for its lawfulness must be inferred from existing case law.[41] An analogous case is *Catt v. the United Kingdom*. This case concerned the collection and retention of personal data of the applicant who was attending a protest.[42] The following conditions, which were originally derived from another case,[43] were echoed by the Court,[44] with considerations for future technological advancements in mind[45]: the legal basis must be clear and foreseeable regarding the circumstances of deployment. If there is no definite legal basis, publicly available codes of practice can improve the foreseeability of a measure.[46]

Moving on to the ECHR test, requirements for which must also be established by analogy, this time by using *S. and Marper v United Kingdom*. The purpose of this test is to determine whether the national laws are in compliance with the ECHR. This case was about the retention of DNA and fingerprint information of the applicants, who were at the time of collection suspected of various crimes.[47] When the police refused to destroy the information after the cases of the two applicants were dismissed, the case was brought before the ECtHR.[48] The holding, in this case, is relevant for application to LFR by analogy, as case law has confirmed that recording someone's features activated Article 8, a central component of LFR technology. In this case, the Court required the national law to provide sufficient guarantees against abuse and arbitrariness,[49] as well as to afford safeguards to:

> "prevent any (…) use of data which may be inconsistent with the guarantees of Article 8. The need for such safeguards is all the greater where the protection of personal data undergoing automatic processing is concerned, not least when such data are used for police

[41] *Fussey and Murray* (n 3) p. 21.
[42] *Catt v the United Kingdom* App No. 43514/15 (ECtHR 24 January 2019), para. 7.
[43] *S. and Marper v the United Kingdom* (n 37) para. 95.
[44] *Catt v the United Kingdom* (n 41) para. 2.
[45] *Catt* (n. 41) para. 90.
[46] *Kennedy v the United Kingdom* App No. 26839/05 (ECtHR 18 May 2010), para. 124.
[47] *S. and Marper* (n 37) paras. 9-11.
[48] ibid para. 12.
[49] ibid para. 99.

> purposes. The domestic law should notably ensure that such data are relevant and not excessive in relation to the purposes for which they are stored. The domestic law must also afford adequate guarantees that retained personal data was efficiently protected from misuse and abuse."[50]

Having established the pertinent requirements for the "double lawfulness" test, UK law can be applied to the criteria. However, one issue remains: what is the legal basis for LFR technology? As this gadget has only recently been added to the police's toolbox, its legal basis is shaky (at best) as it relies exclusively on legal mandates.[51] Legal mandates outline law which is applied analogously to fields which are yet to receive their own legislation. Those applying to LFR technology are the first of their kind.[52] Critically, even the government admits that there is no definite legal basis for its deployment.[53] This, as it will turn out, is a problem that the UK faces from an ECHR standpoint. The legal bases provided by the mandates are the *Human Rights Act 1998*, (HRA 1998),[54] the *Data Protection Act 2018*[55] (DPA 2018), and the *Protection of Freedoms Act 2012*[56] (PFA 2012).

Firstly, the legal basis test requires that the law is accessible and foreseeable as to the circumstances of deployment. The first condition is fulfilled here, as the combination of laws can be accessed by everyone through the internet. Regarding foreseeability, the DPA 2018 provides some answers. Specific conditions must be met for LFR technology to be ordered.[57] These conditions are that the processing is

[50] ibid.
[51] Metropolitan Police Service, 'Live Facial Recognition: Legal Mandate' (*Metropolitan Police*, 24.01.2021) <https://www.met.police.uk/SysSiteAssets/media/downloads/force-content/met/advice/lfr/policy-documents/lfr-legal-mandate.pdf> accessed 24 June 2023.
[52] *Fussey and Murray* (n 3) p. 49.
[53] Surveillance Camera Commissioner 'A National Surveillance Camera Strategy for England and Wales' (*GOV.UK;* 14.03.2021) p. 12 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/608818/NSCS_Strategy_post_consultation.pdf> accessed 24 June 2023.
[54] Human Rights Act (1998 UK).
[55] Data Protection Act (2018 (UK)).
[56] Protection of Freedoms Act (2012 (UK)).
[57] Data Protection Act 2018 (UK), s. 35(3).

"strictly necessary"[58], and that at least one of the conditions of Schedule 8 are fulfilled. The most frequently used conditions are that it is necessary for the exercise of a function conferred on a person enacting the rule of law,[59] for reasons of public interest,[60] and for the administration of justice.[61] The DPA 2018 is a data protection law with a focus on surveillance systems. As this legal basis is unsuited[62] for LFR technology, since it does not specifically address the use of LFR technology by police forces, it is questionable whether the used conditions are sufficient, and more importantly, applicable to it. As the legal basis is constituted of laws not tailored towards LFR technology, foreseeability is compromised, raising ECHR issues.

Turning to the ECHR test, the first main requirement is that the use of data must be consistent with Article 8 ECHR. As the UK is a dualist system, the ECHR was not directly applicable in the UK upon its adoption. Indeed, it had to be transposed into UK law with the HRA 1998. While this Act requires that legislation be given effect in ways compatible with ECHR rights,[63] and provides for avenues to declare incompatibilities,[64] it is difficult to find any consequence that incompatibility findings entail. According to section 6(1) HRA, a declaration of incompatibility does *not* influence the validity, continued operation, or enforcement of a provision,[65] nor is it binding to the parties to the proceedings in which it is made.[66] Subsequently, this provision comprises a significant barrier to ECHR compliance, as uses inconsistent with the requirements of Article 8 cannot be effectively ameliorated.

The second main requirement of the ECHR test pertains to safeguards, specifically concerning the processing and storage of images, the relevance of stored images, and protections against misuse and abuse. In this category, UK law provides extensive protections in the DPA 2018 and PFA 2012. In the DPA, six data protection

[58] Under which conditions this is "strictly necessary" can be found in Data Protection Act 2018 (UK), s 31.
[59] Data Protection Act 2018 (UK), sch 8, s. 1(a).
[60] ibid s. 1(b).
[61] ibid s. 2.
[62] Joe Purshouse and Liz Campbell, 'Privacy, Crime Control and Police Use of Automated Facial Recognition Technology' [2019] 3 Criminal Law Review 198, p. 15.
[63] HRA 1998 (n 53) s. 3(1).
[64] ibid ss. 4(1), (2) and (4).
[65] ibid s. 6(1)(a).
[66] ibid s. 6(1)(b).

principles are laid down. Especially the second (purposes of processing must be specified, explicit and legitimate),[67] third (data must be adequate, relevant, and not excessive),[68] fifth (data must not be kept longer than necessary),[69] and sixth (data must be secured in a secure manner)[70] principle are relevant to this analysis. The burden is on the controller of the technology to prove that the deployment complied with these requirements. An additional safeguard is provided by the PFA 2012, which requires a code of practice to provide further guidance on the usage of surveillance technology.[71] This Code, known as the Surveillance Camera Code of Practice, provides further guidelines[72] which must[73] be considered when surveillance cameras are used.

To summarise, this section has shown that the UK's compliance with the lawfulness requirement of Article 8 cannot be easily demonstrated. Even though it provides strong safeguards for the use of data collected during LFR deployment, concerns remain over the impotence of the incompatibility procedure in the HRA 1998 and the lack of a clear legal basis for LFR technology. Whether the use of LFR technology constitutes a lawful interference with the rights under Article 8 ECHR will likely not be determined until this usage is challenged before the ECtHR; however, the foregoing makes it more likely that an interference will be found than not. Additionally, the only English case revolving around the use of LFR technology has found that, in that instance, the lawfulness requirement under the ECHR was not fulfilled.[74]

3.3. THE LEGITIMATE AIM, NECESSITY, AND PROPORTIONALITY

The ECHR does not preclude the limitation of Article 8, so long as the limitation pursues a legitimate aim, and is deemed "necessary in a democratic society". The

[67] *DPA 2018* (n 54) s. 36(1).
[68] ibid s. 37(1).
[69] ibid s. 39(1).
[70] ibid s. 40.
[71] *PFA 2012* (n 55) s. 30(1)(a).
[72] Surveillance Camera Code of Practice 2014 (UK) s 2.6.
[73] ibid s. 1.2.
[74] *R (on the application of Bridges) v Chief Constable of South Wales* [2020] EWCA Civ 1058, para. 152.

legitimate aims are enumerated within the Article. Accordingly, Article 8 can be limited as follows:

> "In the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others"[75]

Whether a measure is "necessary in a democratic society" depends on various criteria. The most suitable ones for LFR technology were developed in *S and Marper v the United Kingdom*: The measure must be proportionate to the aim pursued, answer to a "pressing social need" (one of the legitimate aims from Article 8(2) ECHR) and be justified by the authorities with relevant and sufficient reasons.[76] The Court has furthermore elaborated that there must be a pressing social need for both the collection and retention of the data.[77]

Compliance with these criteria very much depends on the context and the conduct of law enforcement when LFR technology is being deployed. When considering the proportionality of a measure, an analysis of its compliance with the data protection principles of the DPA would play a central role.[78] In the only case about it to ever go before an English High Court, the UK deployment and legal framework (primarily DPA data protection principles) were deemed to be in line with necessity and proportionality, as the court found that the DPA 2018 provided grounds considered "proper law enforcement purposes" (which may be understood as those described by Article 8 itself) and allowed for examinations into whether the deployment was strictly necessary and proportionate. It follows that the deployment of LFR can have a legitimate aim and be in line with necessity and proportionality,

[75] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) Art. 8(2).
[76] *S. and Marper* (n 37) para. 112.
[77] *Catt* (n. 43) para. 116.
[78] *R (on the application of Bridges) v Chief Constable of South Wales* [2020] EWCA Civ 1058, para. 69.

but, as mentioned previously, this determination will depend heavily upon the context in which the technology is employed.

4. CONCLUSION

This paper aimed at providing a holistic overview of the challenges LFR technology poses, and to specifically examine how the UK's use of the technology interacts with the various requirements of Article 8 ECHR. First, a thorough analysis of LFR technology was conducted, illuminating both its merits and its defects, and describing the complex relationship between this technology and various human rights other than Article 8, the focal point of this study. Next, this study applied the various stages of the Article 8 test to LFR technology, concluding that it does fall within the scope of the Article. The subsequent application of the ECHR's conditions to the UK's legal framework on the technology's use yielded the result that some conditions for the lawful interference with the right to privacy are not fulfilled.

As a result of the above examination, the research question, "*To what extent does the UK comply with Article 8 ECHR in its use of live facial recognition technology?"*, can be answered conclusively. While the UK provides sufficient safeguards through the data protection principles and thus complies with ECHR requirements, it faces significant problems when it comes to foreseeability. As its deployment is legally based on provisions designed mainly for surveillance cameras, a technology which does not use facial recognition, LFR technology is operating in a legal vacuum. This makes it difficult to foresee when the technology will be applied. This problem is exacerbated by the lack of protection provided by the Human Rights Act 1998, which would not be able to afford potent protection against any legislation which may be adopted on LFR technology in the future due to the weakness of its incompatibility procedure. Therefore, one can say that the UK complies with Article 8 ECHR standards to a lesser extent.

The answer to the research question, and the analysis as a whole, have two major implications. Firstly, they reflect that the challenges of LFR technology cannot be addressed with existing legal frameworks. Its ability to process information in real-time differentiates it from normal surveillance, and therefore precludes regulation by

the same laws. Secondly, they reflect how inadequate the Human Rights Act 1998 is at protecting the right to privacy, specifically with respect to use of LFR technology, and perhaps in respect of fundamental rights as a whole. Due to this lack of protection, the British people have no guarantee that the use of the current legal mandate, or indeed any subsequent legislation produced on LFR technology, can be held to the conditions prescribed by the ECHR. As the topic of LFR technology has not been explored thoroughly by the academic community, the author hopes that these implications can provide impetus to generate more interest in this novel and fascinating technology. Further avenues of research could be exploring LFR technology's compatibility with other ECHR Articles, such as data protection and the prohibition of non-discrimination.

Revival of Golden Shares as a Foreign Direct Investment Control Mechanism

Cristian Zubco[1]

The reform of a protectionist tool into a protector of EU Member States' interests and corporate market.

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1. INTRODUCTION

The Covid-19 pandemic's social and economic crisis has completely restructured principles, identities, and values for the greater good - preserving a cohesive and functional society. Laws, practices, guidance, and guidelines were adopted left and right to effectively deal with health emergencies and those trying to profit from them. From caps and quotas on the production and distribution of specific goods to the near-total prohibition on leaving one's home or conducting business in the "usual" way, the pandemic has significantly impacted the financial and operational capabilities of most corporations registered in the European Union (EU or Union). The physical restrictions imposed on their employees has caused numerous issues. The decrease in the number of available employees globally has resulted in a decrease in the output of services and goods, which has increased losses and uncapitalised gains. As a result, shareholders looked to sell their positions as soon as possible to the highest bidder. To mitigate the impact of these companies' impending financial collapse, the governments of the EU States hosting these corporations, such as Lufthansa, Air France, and Telecom Italia, had to inject large sums of money to keep them afloat.[2] Aside from the possibility of these companies going bankrupt, another imminent danger caused by the pandemic-induced rapid selloff of shares was a foreign takeover. The need to assist in the capitalisation of vulnerable corporations combined with the risk of and actual attempts at takeovers of "national champions" and strategic assets has necessitated the use of measures that have fallen out of use since 2008 - the golden share.

This research paper focuses on the revival of gold shares in the European Union as a tool to combat abusive foreign direct investments (FDI). Since the outbreak of the pandemic in 2019, EU Member States have been concerned about predatory foreign direct investments. The risk of selling key technological, economic, and strategic firms to foreign third-country interests has piqued the interest of both

[2] Peter Alexiadis, 'Revisiting the state's role in the private sector: Reflections on the EU's system of checks and balances in the age of covid-19' (2021) 22(1) Business Law International 21-67, 21.

national governments and EU institutions as a threat to national security.[3] The imminence of the risk of losing the Union's economic sovereignty in the wake of the pandemic has been perfectly surmised by the president of the European Commission, Ursula von der Leyen. In late March 2020, she urged governments to either adopt or vigorously enforce investment screening mechanisms to protect Europe's industrial and corporate assets at the time of distress.[4] She has emphasised the importance of the free market and foreign investment while asserting that openness is not unconditional.[5] This statement, together with the implementation of the FDI Regulation,[6] could be a significant step toward shifting policy away from trade liberalism and toward union-centric protectionism. This policy shift, in my opinion, could also result in the return of the golden share.

Considering the aforementioned policy change possibility, the pros, and cons of golden shares, and the recently adopted FDI control measures, this research paper will investigate: to what extent can golden shares be used as foreign direct investment control tools in the European Union? The approach will not only include a theoretical assessment of the golden share as a tool capable of regulating FDI, but it will also investigate the practical aspects and applications in some of the EU's most influential economies.

To answer this research question, a doctrinal research method will be used, and the paper will be structured into nine main sections, each containing several subsections. Section two provides a brief history of golden shares. The characteristics and benefits of golden shares will be discussed in section three. The current legal framework for golden shares will be discussed in section four. Section five will elaborate on the evolution of the FDI Regulation and its articles. Section six will

[3] Barbel Sachs, So-Ang Park, and Georg Schneider, 'Increasing importance of foreign investment control in M&A practice' (*NOERR*, 1 February 2019) <https://www.noerr.com/en/insights/aussenwirtschaftsrechtliche-investitionskontrolle> accessed 12 January 2023.

[4] Alex Irwin-Hunt, '*EC calls for 'vigilance' in screening healthcare related FDI*' (*fDi Intelligence*, 1 April 2020) <https://www.fdiintelligence.com/content/news/ec-calls-for-vigilance-in-screening-healthcarerelated-fdi-77237> accessed 12 January 2023.

[5] ibid.

[6] Regulation (EU) 2019/452 of the European Parliament and of the Council establishing a framework for the screening of foreign direct investments into the Union [2019] OJ L79I/1 (FDI Regulation).

describe how the Member States have implemented the FDI regulation via national golden share practices. Section seven will assess national practices' compliance with the golden shares' framework. Before concluding, section eight will discuss the underlying reasons for the facilitation of implementing golden shares practices and the shift in the interpretation of restrictive measures to treaty freedoms.

This research paper focuses on comparative developments in the EU, particularly in France, Germany, and Italy, for two reasons. First, the EU has been one of the world's major economies to implement FDI control changes during the pandemic through Regulation 2019/452, which is gradually proving to be aimed at a more long-term change in economic policy. The Regulation and its accompanying documents, such as the FDI Guidance and the FDI Guidelines, have facilitated and removed some concerns about the use of golden shares, which had been severely restricted under the EU Court of Justice (CJEU or the Court) case law. The selection of France, Germany, and Italy is based on reforms undertaken by these countries in the field of golden shares and the acquisition of these types of shares in certain strategic corporations. The author believes that the changes on the European continent have been "remarkable", necessitating a more thorough examination of the status quo of golden shares as an FDI control mechanism.

2. A Short History of Golden Shares

The concept of a golden share emerged during the privatisation period, a process from the 1980s to the 2000s that sought to remove state-nationalised enterprises from state ownership and allow them access to the free market and its potential shareholders.[7] In the early to mid-1990s, governments issued themselves a golden share as part of the privatisation process before privatising a company. The use of a golden share was a common feature of privatisation in all European countries, particularly in the defence and energy sectors.[8] The justifications for the use of a golden share all revolved around

[7] Ivan Kuznetsov, 'The Legality of Golden Shares under EC Law' (2005) 1(1) Hanse Law Review 22-29, p. 22.

[8] 'Special rights of public authorities in privatized EU companies: the microeconomic impact' (*Oxera*, November 2005) <https://www.oxera.com/wp-content/uploads/2018/03/Special-rights-of-public-authorities-in-privatised-EU-companies.pdf> accessed 12 January 2023, p. 17.

the protection of the public interest. At the time, Member States cited a variety of reasons to justify public interest protection:

- ensuring that privatised companies maintain their corporate purpose;
- protecting companies from unfavourable takeovers;
- preventing the sale of strategic assets;
- ensuring the provision of important societal services;
- safeguarding public security, public health, and national defence.[9]

This list of reasons will be of importance later when the perspective of the CJEU on the use of golden shares and their compatibility with Union law is assessed.

After establishing the historical origins of golden shares and the basic rationale for governments' adoption of these forms of preferential equity, it is critical to comprehend what golden shares are in terms of their form and manifestation.

3. GOLDEN SHARES AS A LEGAL MECHANISM

3.1. WHAT ARE GOLDEN SHARES?

3.1.1. The Form of Golden Shares

When defining what golden shares are, there appears to be a general misunderstanding, or rather, a bias, towards one specific form that golden shares can take. At the same time, there is a limit to the levels of control that golden shares can achieve in a business. As a result, when developing a comprehensive definition of golden shares, we must consider the forms they can take and how they can manifest.

From the perspective of its form, the most common version of a golden share is that of an equity interest or a holding position in a privatised company that confers

[9] 'Special Rights in Privatized Companies in the Enlarged Union – A Decade Full of Developments' (*Commission of the European Communities*, 22 July 2005) <http://old.europe.bg/upload/docs/privcompanies_en.pdf> accessed 12 January 2023 (Commission Staff Working Document).

rights that do not correspond to the nominal value of a share.[10] Sometimes, they can offer a marginal advantage over that of normal shares that can be acquired on the stock market. Still, more often than not, they have proven to offer majority control over a corporation through an absolute right of veto or other forms of control.[11] As previously elaborated, the establishment of golden shares comes on justificatory grounds of the necessity to either attain national policy or security objectives or based on a public interest argument.[12]

In the EU, this basic academic definition has been broadened under the scope of CJEU case law. Through the judgments in the *Volkswagen* case[13] and the *Commission v Italian Republic* case,[14] the definition of golden shares has been extended to encompass "…any legal structure applicable to individual companies which preserve or help to perpetuate the influence of the state over such companies." Some common ways under which golden shares have been incorporated into the equity pool of a private company are through laws regulating the privatisation process in general,[15] the privatisation process of strategic companies,[16] and through secondary law instruments.[17] In any case, the CJEU's precedent shows that golden shares introduced directly through these modalities are bound to be declared as either a restriction of treaty rights or an infringement of treaty and secondary Union law duties. There is, however, a silver lining, which will be discussed further on in the research paper.

The definition established by the CJEU shows the possibility of maintaining a golden share structure without the requirement for a public authority to hold a single share in the company.[18] This means that through tailored legal arrangements or state legislation, public authority can be exercised beyond the extent to which such

[10] Thomas Papadopoulos, 'Privatized Companies, Golden Shares and Property Ownership in the Euro Crisis Era: A Discussion after *Commission v. Greece*' (2015) 12(1) European Company and Financial Law Review 1 <https://doi.org/10.2139/ssrn.2635884> accessed 12 January 2023.
[11] Irwin-Hunt (n 4).
[12] Oxera (n 8).
[13] Case C–112/05 *Commission v Federal Republic of Germany* [2007] ECR I-8995.
[14] Case C–326/07 *Commission v Italian Republic* [2009] ECR I-2291.
[15] Case C–271/09 *Commission v Republic of Poland* [2011] ECR I-13613.
[16] Case C–171/08 *Commission v Portuguese Republic II* [2010] ECR I-6817.
[17] Case C–483/99 *Commission v French Republic* [2002] ECR I-4781.
[18] Irwin-Hunt (n 4).

influence would be afforded under general company law.[19] In a sense, these shares are synthetic golden shares because they are not issued by the company *per se*, but rather are an emanation of a law that regulates certain aspects of a privatised company's activity. The Golden Powers in Italy and the combined application of the Foreign Trade and Payments Ordinance (Außenwirtschaftsverordnung – AWV) and the Foreign Trade and Payments Act (Außenwirtschaftsgesetz – AWG) in Germany are relevant examples of this type of synthetic golden shares.

Because the concept of public authorities has been mentioned several times, we must define it for clarity. The concept of public authority is to be understood broadly in the context of EU law. This varies from the central to the local governments, public institutions, and state agencies, from state-owned commercial entities that perform activities in the public interest to the exclusively private companies that exercise a public function under the CJEU-determined veil of "emanation of the state".[20]

3.1.2. The Manifestation of Golden Shares

Having established the forms that golden shares can take, being both a physical ownership of equity and an emanation of the law, it is appropriate to touch upon the manifestation of the golden shares and their reach. Golden shares can be manifested in three broad genres – as a set of the state's special powers, as statutory constraints on privatised companies,[21] and as a source of more favourable economic and control rights within a company.[22]

The special powers offered by golden shares can take the form of the right to appoint members to corporate boards, the right to consent to or to veto the acquisition of relevant interests in the privatised companies, consent rights relating to the transfer

[19] Johannes Adolff, 'Turn of the Tide? The "Golden Share" Judgments of the European Court of Justice and the Liberalisation of the European Capital Markets' (2002) 3(8) German Law Journal, E7 3.
[20] Maria Wiberg, *The EU Services Directive: Law or Simply Policy?* (TMC Asser Press 2014) ch. 8.
[21] Commission Staff Working Document (n 9).
[22] Juan Rodriguez, Andrea Zúñiga, and Camilo Caicedo, 'Golden shares: To what extent could they be abusive?' (*CMS Legal Services*, 14 March 2019) <https://cms.law/en/col/publication/golden-shares-to-what-extent-could-they-be-abusive> accessed 12 January 2023.

of subsidiaries, dissolution of the company, and ordinary management, and the right to consent to or to veto the change in the Articles of Association of a corporation.[23]

Statutory constraints allow public authorities to set or change ownership limits in terms of who can buy and sell shares, the extent to which shares can be purchased, and the terms of the purchase. Other constraints include vote distribution caps and some other specialised national control provisions, such as screening and pre-approval of sales and purchases of shares and assets by the company and external parties.[24] Italy and Germany impose such legal restrictions on the number and type of shares that foreign investors or EU-based investors with ties to a third country can purchase. Section six contains an in-depth examination of the use of statutory constraints.

The final manifestation of golden shares is preferential rights, which aid in the preservation of public authorities' influence and control over corporations.[25] Because of the diversity of legislation around the world, as well as the differing positions of states on privatisation, there is an open-ended list of these rights.[26] Nevertheless, a binary classification can be established. Special voting rights are of primary importance because they can offer the state leverage in the decision-making process through veto rights that are disproportionate to the number of shares owned or through exclusive areas of control in the company.[27] In terms of the latter, we will discuss in this paper the recent practice in Germany and France of using golden shares to amend airline companies' operational guidelines in response to environmental concerns. Another method of providing preferential rights to the state is through rights conferring ex-ante and ex-post review of company decisions, such as the acquisition or disposal of shares.[28] When combined with the ability to advise, call for reconsideration or even veto decisions, it provides the golden shareholder with a

[23] Commission Staff Working Document (n 9).
[24] Alexiadis (n 2).
[25] Irwin-Hunt (n 4).
[26] Commission Staff Working Document (n 9).
[27] Stefan Grundmann and Florian Moslein, 'Golden Shares – State Control in Privatized Companies: Comparative Law, European Law and Policy Aspects' (2004) 1 European Banking and Financial Law Journal (EUREDIA) <https://doi.org/10.2139/ssrn.410580> accessed 13 January 2023.
[28] Mads Andenas and Frank Wooldridge, *European Comparative Company Law* (CUP 2009).

margin of discretion that ensures control over most decisions in medium to large enterprises.

3.2. Advantages of Golden Shares

The increased degree of control in a company achieved through a voting rights supermajority held by public authorities is one of the main advantages conferred by golden shares. Depending on their form, either through a contract for standard golden shares or by law for synthetic ones, golden share owners can do a plethora of things.

They can, both directly and indirectly, limit investments in the company. Indirect restrictions grant enhanced control over the company's decision-making process as well as the ability to limit the control that other shareholders can exert.[29] These include approval and veto rights over important decisions in the company and rarely are these powers used for matters of informal control.[30] They can veto strategic decisions, stop takeover bids,[31] make decisions involving the sale of a substantial part of the company's assets or specific assets, and can even block a company from filing for bankruptcy.[32] Other indirect rights include the ability to appoint board members outside of the general meeting and the ability to limit other shareholders' voting rights – typically as a cap on voting rights exceeding a certain threshold.[33]

In terms of direct investment restrictions, golden shares can provide exclusive rights to control changes in ownership and influence the company's shareholder structure.[34] These include but are not limited to caps restricting foreign investments (restriction on the number of shares acquired), caps restricting substantial block-holdings (restriction on the number of shares that an investor or group of investors

[29] Commission Staff Working Document (n 9).
[30] Assaf Hamdani and Ehud Kamar, 'Hidden Government Influence over Privatized Banks' (2012) 13(2) Theoretical Inquiries in Law, pp. 567-596, 567.
[31] Commission Staff Working Document (n 9).
[32] 'The "Golden Share": All That Glitters Is Not Gold' (*Proskauer Rose LLP*, 18 March 2020) <https://www.proskauer.com/alert/the-golden-share-all-that-glitters-is-not-gold> accessed 13 January 2023.
[33] Christine O'Grady Putek, **'**Limited but Not Lost: A Comment on the ECJ's Golden Share Decisions' (2004) 72(5) Fordham Law Review pp. 2219-2285, 2219.
[34] Commission Staff Working Document (n 9).

can hold), and authorisation requirements for the change of ownership of shares over a threshold.[35]

Focusing on the European Union and the examples of retained public control that have been implemented in the last twenty years, we can see the following: limits on foreign investors' shareholding, caps restricting influential block-holdings for all investors, national requirements for the approval by a public authority of the purchase and sale of shares that would result in the formation or transfer of a certain percentage of shares, rights to approve or appoint members of boards of directors, and temporary limitations on other investors' voting rights.[36] Following the implementation of the FDI Regulation, the use of this type of corporate control has seen a resurgence. For example, the German AWV and AWG limited the number of shares purchased in Hamburg by the Chinese-owned shipping corporation Cosco.[37] In Italy, the Golden Powers review prerogatives have been present in every purchase of shares in strategic companies, particularly in the health and telecommunications sectors.[38]

Aside from control advantages, there are also social advantages that benefit the entire nation. Some scholars consider that golden shares can mitigate the gap between social objectives and the private interests of unconstrained private companies, and that this is a social benefit that justifies their use.[39] When we discuss private companies that provide public services such as water supply, energy, and heating, the importance of golden shares in securing this benefit becomes evident. As such, golden shares ensure a steady supply, universal access to services, and pricing policy control. This can only be accomplished if the government can limit and control

[35] Commission Staff Working Document (n 9).
[36] ibid.
[37] Joachim Hofer and others, 'Elmos-Übernahme: Bund plant Einwilligung zu China-Kauf von Chip-Fertigung – Geheimdienste warnen' *Handelsblatt* (Germany, 2 November 2022) <https://www.handelsblatt.com/politik/deutschland/elmos-uebernahme-bund-plant-einwilligung-zu-china-kauf-von-chip-fertigung-geheimdienste-warnen/28772192.html> accessed 13 January 2023.
[38] Giuseppe Fonte, 'Italy's Draghi vetoed third Chinese takeover this year' *Reuters* (Rome, 23 November 2021) <https://www.reuters.com/markets/deals/italys- at: draghi-vetoes-third-chinese-takeover-this-year-2021-11-23/> accessed 7 February 2023; Tommasina Cazzato, 'Voluntary Tender Offer launched by AGC Inc. on all ordinary shares of MolMed: the Board of Directors approves the Issuer's notice.' (*Molmed*, 29 May 2020) <https://www.borsaitaliana.it/borsa/notizie/price-sensitive/download/1024_88648_2020_oneinfo.html> accessed 7 February 2023.
[39] Thomas Naveen, 'Golden Shares and Social Enterprise' (2021) 12(1) Harvard Business Law Review 201.

the actions of foreign investors after they acquire controlling stakes in strategic national enterprises.[40]

While the use of golden shares may appear restrictive to the concept of a free market, the general benefits of golden shares have made it an excellent tool for implementing direct control over foreign investments. There already is an established body of CJEU case law on the use of golden shares and, more recently, an EU Regulation that clearly defines the checklist of do's and don'ts as well as the permissible exceptions to the rules. This legal framework of golden shares will be defined in the following chapter.

4. The Current Legal Framework Governing Golden Shares

The traditional approach to regulating golden shares in the EU was to severely limit them in practice while not completely outlawing them. Over the last three decades, a large body of CJEU case law and the Commission's decisional practice in its working documents have endorsed this tendency. The ratio followed is that the legal regime established by golden shares grants public authorities excessive privileges and competencies that conflict with the Union's fundamental freedom of establishment (Art. 49 Treaty on the Functioning of the EU (TFEU)) and free movement of capital (Art. 63 TFEU).[41] This laid the foundation for the idea that they must be circumscribed both in terms of the scope of application, in operational terms, and even through the public policy rationale – which is the exception to the restriction.[42]

The freedom of establishment (FoE) of companies, established in Art. 49 TFEU in conjunction with Art. 54 TFEU and the right to the free movement of capital (FMoC), as established in Art. 63 TFEU facilitate the functioning of corporate entities outside of the nationalistic restrictions that could be established in the EU Member States' national legal frameworks. These freedoms, however, are not absolute. They

[40] Papadopoulos (n 10).
[41] Tamás Szabados, 'Recent Golden Share Cases in the Jurisprudence of the Court of Justice of the European Union' (2015) 16(5) German Law Journal 1099-1130, 1099; Case C–58/99 *Commission v Italy* [2000] ECR I-3811.
[42] Alexiadis (n 2).

can be limited by express derogations provided for in TFEU provisions as well as by mandatory requirements of general interest established in CJEU case law.[43]

Looking at the treaty-based restrictions on the aforementioned freedoms, it is clear that the two restrictions are permitted on the same grounds but on a different legal basis. According to Art. 52(1) TFEU, the FoE can be limited by a law, regulation, or administrative action that establishes a system of special treatment for foreign nationals for reasons of public policy, security, or health. On the other hand, Article 65(1) TFEU states that the right to free capital movement may be restricted if one of the following conditions is met: either the transaction/s is/are subject to national tax law provisions, violate or could be prevented from violating national laws, or the measures taken are justified on the grounds of public policy, security, or health. Even if the provisions require a different legal source justifying the restriction as a precondition, practice shows that it can be interchangeable. This is why the CJEU rarely examines them separately. After all, because they are "inextricably linked", restrictions on FoE can be "a direct result of obstacles to the free movement of capital" and vice versa.[44] What pertains to the common grounds that the two restrictions hold, the idea of public policy, public security, and public health persist.

Because of their open-ended nature and the margin of appreciation, the three grounds are usually given under international law, the EU Treaties do not necessarily hold the definition of these three categories. The ambiguity of these terms stems from their function as a safety net for national conditions and events that cannot be predicted, limited, or quantified. The CJEU has examined this issue in several cases and established the following rules. First and foremost, EU Member States have the authority to determine the needs of public policy, public security, and public health based on their national circumstances.[45] However, because they are to be applied in community aspects and as derogations to fundamental principles of EU law, there must be safeguards that limit abuse. Therefore, the grounds must be interpreted

43 Mads Andenas, Tarjei Bekkedal, and Luca Pantaleo (eds) *The Reach of Free Movement* (TMC Asser Press 2017) pp. 2–55.

44 Case C–463/00 *Commission v Kingdom of Spain* [2003] ECR I-4581, para. 86; Case C–367/98 *Commission v Portuguese Republic I* [2002] ECR I-4731, para. 56.

45 Case C–54/99 *Association Eglise de scientologie de Paris and Scientology International Reserves Trust v The Prime Minister* [2000] ECR I-1335, para 17.

strictly, and their scope cannot be determined unilaterally by each Member State without any control by the community institutions.[46] Under such a circumstance, the following three cumulative conditions have arisen, which allow the use of the public policy, security, and health derogations: there must be a genuine and sufficiently serious threat to a fundamental interest of society,[47] then, the derogations invoked must not be misapplied to the extent that they serve purely economic ends,[48] and finally, the persons or entities affected by the restrictions must have access to legal redress.[49]

Some examples of grounds that have managed to pass this assessment include safeguarding energy supply in the event of a crisis[50]; safeguarding the provision of telecommunications services in case of a threat of war or of a natural disaster[51]; continuity of public service; ensuring the presence of a minimum supply of energy resources or goods essential to society; protection of the interests of workers and minority shareholders in a large company that affects the general interest.[52] In later golden shares cases, the CJEU considered more modern and current events as justifying grounds.[53] Modern challenges, such as state-owned enterprises and ambiguous sovereign wealth funds, have made the application of these "public concerns" far more flexible. They are no longer bound by the trifecta of human despair – that is war, famine, and natural disasters – but are open to economic and legally engineered practices that seek to undermine a state's economic value or power.[54] This shift in perception can now be seen in the operation of FDI mechanisms, including the tool under consideration in this paper, golden shares.

Since the early days of privatisation, Member States have attempted and mostly failed to legally engineer special rights arrangements that do not infringe on

[46] *Case 36/75 Rutili v Minister for the Interior* [1975] ECR 1219, paras. 26, 27.
[47] ibid para. 28; Case C–348/96, *Calfa* [1999] ECR I-11, para. 21.
[48] *Rutili* (n 46) para 28; Case C–563/17 *Associação Peço a Palavra and Others v Conselho de Ministros* [2019] ECLI:EU:C:2019:144, para. 70.
[49] Case C–222/86 *Unectef v Heylens* [1987] ECR 4097, paras. 14-15.
[50] *Commission v French Republic* (n 17).
[51] *Commission v Portuguese Republic II* (n 16).
[52] Case C–112/05 *Commission v Federal Republic of Germany* [2007] ECR I-8995.
[53] Case C–212/09 *Commission v Portuguese Republic* [2011] ECR I-10889.
[54] ibid.

the FoE and the right to free capital movement. Through the Commission's investigation and the CJEU's judicial diligence, they discovered and eliminated the majority of these arrangements, which amounted to discriminatory and non-discriminatory measures.[55] When the measures in question apply only to foreign investors, they are viewed as discriminatory. Non-discriminatory measures, on the other hand, are any other restrictions that apply regardless of the investors' nationality. For the last thirty years, the Commission and the CJEU have held that national legislation that is likely to discourage potential direct investments restricts the treaty freedoms of corporations and companies alike. Notwithstanding that, restrictions can be lawful if "…they are not discriminatory on grounds of nationality, are a response to overriding requirements relating to the general interest and are suitable and proportionate to the objective which they pursue".[56]

Four distinct criteria can be distilled from CJEU golden shares cases, which justify the use of restrictions, such as golden shares.[57] First, the public authority's measure must not discriminate based on nationality. This is self-explanatory as discrimination *stricto sensu*. The measure must then be necessary and implemented in light of a prevailing general interest, such as public interest, public and national security, or public health. As one can see, this is a recurring requirement required to justify such interference. However, in this assessment, the state must demonstrate a genuine and sufficiently serious threat to a fundamental interest of society or the need to ensure an overarching public policy objective that is not purely economic.[58] The third requirement is to demonstrate the suitability of the measure and whether it is appropriate to achieve the desired goal. The fourth condition is that the measure is proportionate, in the sense that it does not cause more harm by restricting trade than is necessary to achieve the goal advanced as justification. This is a *stricto sensu* need for proportionality, and it, along with the other three conditions, forms the framework

[55] Communication of the Commission on certain legal aspects concerning intra-EU investments [1997] *OJ C220/15.*

[56] *Commission v Kingdom of Spain* (n 44) Opinion of AG Ruiz-Jarabo Colomer, para. 30.

[57] Cases such as: Case C–55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165; *Commission v Italy* (n 41); *Commission v Portugese Republic I* (n 44); *Commission v France* (n 17).

[58] Alexiadis (n 2).

of the *Gebhard* test.[59] On top of these four criteria, two more can also be configurated, and they stem from one of the few cases in which the use of golden shares has been seen as justified – the 2002 *Commission v Belgium* case.[60]

The case concerned the Belgian government's golden shares in Société Nationale de Transport and Distrigaz, which allowed them to review and veto board decisions in both companies. What the Court added to the four-pronged test is the review of the ex post facto prerogative of the state and public authorities in the approval of a corporate decision. The Court focused on the Belgian state's ability to review a corporate decision after it was made, based on factors and prerogatives that it did not hold ex-ante. This simulates, to some extent, the power of a golden shareholder to conduct an ex post facto review of a company's corporate decision through the use of a synthetic, law-based golden share. Another condition added was the availability of a legal remedy if such review power existed.[61] The Court found that if the process of review and approval is not automatic, is subject to a strict time limit, restricted to certain sets of decisions concerning strategic assets, and the investors affected could appeal to a court of law, then the measure was justified. Given that the other four conditions of the *Gebhard* test are met.

As can be seen, this is a long and rather stringent list of criteria that would allow restrictions on the freedoms granted to corporations under the EU Treaties. The conditions are so stringent that states have only permitted the preservation of gold shares in two cases. The first case, *Commission v Belgium*, has already been mentioned, while the second concerned the Dutch government's influence over the energy company Essent.[62] The Court found a restriction on the free movement of capital in this case but determined that the security of the energy supply was an overriding public interest.

What we typically see in the CJEU's practice in determining the permissibility of the use of golden shares is that the majority of the Member States are successful in

[59] *Reinhard Gebhard* (n 57).
[60] Case C–503/99 *Commission v Belgium* [2002] ECR I-4809.
[61] ibid paras. 49–52.
[62] Joined Cases C–105 to C–107/12 *Essent and others* [2013] ECLI:EU:C:2013:677.

convincing the Court of the public interest grounds that they pursue.[63] However, these cases fail to demonstrate the proportionality principle in the law used to acquire the golden shares or in the measures used to carry out the powers conferred by these shares. What if this proportionality principle was no longer an issue? What if the EU institutions gave free rein to the measures that could be used to achieve a goal in a time of crisis? A goal that benefits the Union in the long run and protects its citizens from foreign interests but contradicts thirty years of CJEU case law. The section that follows will look at the preconditions that led to the emergence of this possible scenario through the lens of the adopted documents on foreign direct investment restrictions and support for golden share mechanisms.

5. The Foreign Direct Investment Regulation

5.1. How the FDI Regulation Came to Be

A change of this magnitude can only begin if there is an imminent threat of harm to the Member States and the Union as a whole. This threat to the European market began long before the pandemic, with the People's Republic of China's (China) growing financial and political influence.

In late June 2016, after deliberations with representatives of Member States, the Commission addressed a communication to the European Parliament and the European Council on the matter of Chinese state-owned enterprises (SOEs) undertaking investments in Europe.[64] The Commission highlighted the need to discourage China from its practices of "…underwriting its companies' competitiveness through subsidisation or the protection of domestic markets."[65] This represented the start of an internal policy change towards the unfair practices of China. By May 2017, the Commission was investigating the impact of foreign interests buying out EU companies. The Commission has found that over the last ten years, there has been an increase in the number of inbound FDI transactions undertaken

[63] Steffen Hindelang, *The free movement of capital and foreign direct investment: The scope of protection in EU law* (OUP 2009).
[64] Commission, 'Elements for a New EU Strategy on China' (Communication) JOIN (2016) 30 final.
[65] ibid.

under government direction and funding, stemming from third-country investors that were outside of the Organisation for Economic Co-operation and Development (OECD).[66] The Commission substantiated these findings again in September 2017 in the communication "Welcoming Foreign Direct Investment while Protecting Essential Interests".[67] Later that month, the European Parliament expressed its concern about the Chinese state-owned enterprises' acquisition of companies in Member States. In its Resolution, the European Parliament stated that their investments "…are part of an overall strategy to have Chinese state-controlled or state-funded companies take control of banking, the energy sector, and other supply chains."[68]

This feeling of impending dread has kept escalating, and already by March 2019, the Commission had published its policy paper on EU-China relations. In this paper, the Commission has labelled China as "…an economic competitor in the pursuit of technological leadership, and a systemic rival."[69] Their investigation shows that the investments in EU companies are usually authorized by the government and into fields that are relevant to the China 2025 strategy, and the resources used to fund these acquisitions come from loans from state-owned banks.[70] The Commission also admitted that the EU's current legal framework is incapable of controlling the influx of foreign SOEs directly or indirectly acquiring companies in MS. The fact that merger control laws, specifically the Merger Control Regulation (EC) 139/2004, did not allow the Commission to intervene against the acquisition of a European company solely because the buyer received foreign subsidies was problematic.[71] This stressed

[66] Commission, 'Reflection Paper on Harnessing Globalization' (Communication) COM (2017) 240 final.
[67] Commission, 'Welcoming Foreign Direct Investment while Protecting Essential Interests' (Communication) COM (2017) 494 final.
[68] European Parliament resolution on the state of EU-China relations *[2019] OJ C433/103.*
[69] Commission, 'EU-China - A strategic outlook' (Communication) JOIN (2019) 5 final.
[70] Commission, 'Commission Staff Working Document on Foreign Direct Investment in the EU Following Up on the Commission's Communication "Welcoming Foreign Direct Investment while Protecting Essential Interests" of 13 September 2017' SWD (2019) 108 final.
[71] Commission, 'Commission Staff Working Document on Foreign Direct Investment in the EU Following Up on the Commission's Communication "Welcoming Foreign Direct Investment while Protecting Essential Interests" of 13 September 2017' (n 70).

the need for a new legal framework to function as a defence against foreign direct investments.

Fast-forward one year, and in March 2020, the Commission released several policy documents which laid the foundation for a New Industrial Strategy for Europe.[72] In these papers, the Commission highlighted the need to revise the rules governing horizontal and vertical agreements while stating that merger control rules should not be involved in this matter.[73] Instead, the Commission proposes the creation of a "*…distinct legal instrument that would address the distortive effects of the foreign subsidies*."[74] They opted for a new set of laws rather than using the existing legal framework for merger control because in assessing the compatibility of a notified shares concentration conducted under the EU Merger Regulation, the Member States will only be limited to a legal basis of competition. While in the case at hand, there are concerns about national security and the protection of public order.[75]

The FDI Regulation was adopted in a noticeably short period without a prior comprehensive impact assessment, which shows the sense of urgency that accrued over the years.[76] While this might have been an issue in other legislative instances, the preconditions laid before the entry into force have facilitated a smooth transition. Before the Regulation entered into force in October 2020,[77] the Commission issued a set of Guidelines and Guidance on the use of available national measures to regulate FDI.

The Commission Guidance on FDI was a Covid-19 pandemic-specific tool that urged Member States to be cautious about transactions in their domestic markets. At the time, there was concern that the current health crisis would lead to a "…sell-off of Europe's business and industrial sectors," which are critical to Europe's

[72] Commission, 'Making Europe's Businesses Future-Ready: A New Industrial Strategy for a Globally Competitive, Green and Digital Europe' (Press release) IP (2020) 416.
[73] ibid.
[74] Commission, 'A New Industrial Strategy for Europe' (Communication) COM (2020) 102 final.
[75] 'FEPORT Reply to Consultation Concerning the Proposal for a Regulation of the European Parliament and of the Council Establishing a Framework for Screening of Foreign Direct Investments into the European Union' (COM (2017)487)' (Federation of European Private Port Operators and Terminals 2017).
[76] Leonie Reins, 'The European Union's framework for FDI screening: Towards an ever more growing competence over energy policy?' (2019) 128 Energy Policy, pp. 665-672, 665.
[77] FDI Regulation (n 6) art. 17.

security.[78] The Commission emphasised that protection should not be limited to large national enterprises but should also include small and medium-sized businesses (SMEs). The document urged the Member States to protect corporate assets from foreign takeovers while ensuring that their actions do not jeopardize the EU's openness to foreign investment.[79] This openness is no longer unconditional, however, as per the statement of Valdis Dombrovski – the Executive Vice-President of the Commission.[80] The Commission considered that the main way to tackle this unconditionality and to safeguard key European assets would be an efficient, cooperative, EU-wide investment screening mechanism.[81]

With the guidance, the Commission urged Member States to fully utilise their national FDI screening mechanisms.[82] It was recommended that states that do not yet have such mechanisms in place should establish them but, in the meantime, use all other available options to address acquisitions that could endanger EU security or public order.[83] Either way, the message of the Commission was to exhaust all available options to closely examine the involvement of foreign investors in critical European industries.[84] Around this time, the Commission has also opened the possibility for Member States to acquire golden shares to prevent targeted predatory buy-outs.[85] The openness towards the use of golden shares was also highlighted by

[78] Communication from the Commission, Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation) [2020] OJ C99I/1 (Communication concerning the FDI Regulation).

[79] Falk Schoning and Stefan Kirwitzke, 'The rise of foreign investment control in Europe and beyond under the impact of covid-19' (2020) 16(1) Competition Law International 31.

[80] Commission, 'EU foreign investment screening mechanism becomes fully operational' (Press Release) IP (2020) 1867.

[81] ibid.

[82] Communication concerning the FDI Regulation (n 78).

[83] ibid.

[84] Bärbel Sachs and others, 'In the wake of the Covid-19 pandemic: Germany considers prohibition to close transaction pursuant to foreign direct investment control regime' (*NOERR*, 24 April 2020) <https://www.noerr.com/en/insights/in-the-wake-of-covid-19-pandemie-germany> accessed 4 February 2023.

[85] 'Commissioner Vestager's comments at the Virtual Enforcers Roundtable of the American Bar Association's (ABA) Antitrust Section', (*American Bar Association*, 24 April 2020) <https://www.americanbar.org/news/abanews/aba-news-archives/2020/04/antitrust-roundtable--enforcement-continues-in-u-s--and-abroad-a/> accessed 3 February 2023.

Commission Vice-President Margrethe Vestager.[86] Through golden shares, the state would be capable of blocking or restraining purchases based on public security or public policy grounds.[87]

While the guidance urged Member States to use any measure available, it laid out directions to be followed so that there is overall congruence with the upcoming Regulation. The Commission suggested that the focus of the screening operations not be the transaction's value because small start-ups may have limited physical assets but strategic importance, such as the production of military circuit boards.[88] Another aspect mentioned was that FDI screening should not only focus on the acquisitions conferring controlling majorities, but it should also focus on minority shareholdings. This is because a qualified minority shareholding will confer voting rights to the shareholders, which allows them to receive insider information and thus affect security and public order.[89] What pertains to the use of public interest justifications stemming from CJEU jurisprudence? The Commission ascertained that such interest justifications for restricting the movement of capital from third countries should be interpreted more broadly than similar restrictions applied to intra-EU capital movements.[90] Nevertheless, the restrictions on free movements must be limited to what is necessary and proportionate to achieve a legitimate public policy objective.[91]

Although the Guidance focused on the adoption of FDI measures in the medical field and issued recommendations more oriented toward FoE, the Guidelines were more oriented toward the tech sector and free capital movement. The Commission encouraged the Member States to use the movement of capital rules, which apply to non-EU investments, and to limit them in the pursuit of public policy objectives.[92] As EU trade commissioner Phil Hogan put it: "the use of FDI tools will

[86] Javier Espinoza, 'Vestager urges stake building to block Chinese takeovers.' *Financial Times* (Brussels, 12 April 2020) <https://www.ft.com/content/e14f24c7-e47a-4c22-8cf3-f629da62b0a7> accessed 4 February 2023.
[87] Alexandr Svetlicinii, *Chinese State-owned enterprises and EU merger control* (1st edn, Routledge 2020).
[88] Communication concerning the FDI Regulation (n 78) Annex 1.
[89] ibid Annex 3.
[90] ibid Annex 4.
[91] *Commission v Belgium* (n 60).
[92] Communication concerning the FDI Regulation (n 78).

bring clarity to who invests in EU companies and for what purpose."[93] If malice is to be found during the investment screening, these transactions must be prevented. Adversely, this might create a ripple effect in other Member States because "…acquisition of a company in your country may have a security effect in other Member States or it may negatively affect a project of union interest."[94]

As we can see, the Guidelines and Guidance were preparatory instruments before the FDI Regulation went into effect. They were designed to sharpen national tools for FDI control. The MS were also encouraged to use physical and synthetic golden shares among these tools. The paper will discuss how these documents re-vitalised the use of both types of golden shares in section six. For now, we should investigate the regulation to see how it influenced the application of FDI rules and how it may have facilitated the implementation of golden shares in the EU.

5.2. The Structure of the FDI Regulation

The Regulation establishes from the start, in its preamble, that FDI is beneficial to the Union's financial and economic growth. It boosts competitiveness by attracting capital, technology, and innovation. However, during times of insecurity, such as the Covid-19 Pandemic, and in the face of dubious intentions from foreign investors, the Union was forced to react. The Regulation was adopted without prejudice to Member States' right to restrict the free movement of capital and companies based on the EU Treaties. It also does not compel Member States to establish a screening mechanism or to screen specific foreign direct investments. The decision to do so and participate in the cooperative system is entirely up to the Member State. It makes the FDI system more accessible to interested Member States and frees them from the confines of the Merger Regulation. The FDI Regulation was more of a leverage tool than a law-creating regulation, allowing Member States to legally go against restrictions

[93] Commission, 'Coronavirus: Commission issues guidelines to protect critical European assets and technology in current crisis' (Press Release) IP (2020) p. 528.
[94] Oliver Geiss and James Pascoe, 'COVID-19: EC Ready to Cooperate with Member States on FDI Screening to Prevent Predatory Takeovers During Crisis' (*Lexology*, 20 April 2020) <https://www.lexology.com/library/detail.aspx?g=891743e3-8e9e-4315-9b53-99426d757f31> accessed 4 February 2023.

established in the last 30 years of EU company law. A situational caveat is carved into the trunk of case law governing restrictions on capital mobility and FoE**.**

The substantive scope of the regulation is that it covers investments which establish or maintain lasting and direct links between investors from third countries, including state entities and undertakings conducting an economic activity in a Member State.[95] From the perspective of a material scope, the regulation covers screening by Member States of foreign direct investments into the Union on the grounds of security and public order and for a mechanism of cooperation between Member States.[96]

Under Art. 3(1), Member States may maintain, amend, or adopt mechanisms to screen foreign direct investments on the grounds of public security and order. The regulation defines foreign direct investments as "…lasting and direct links between the foreign investor and the entrepreneur to whom or the undertaking to which the capital is made available to carry on an economic activity in a Member State".[97] The investments in question can be used to participate in and control a company, making the link with foreign interest relevant, not the amount of ownership. The Regulation also includes a list of factors to consider when determining whether an FDI is likely to disrupt security or public order. In essence, any real or potential factor can be used in a preliminary assessment. However, to be considered a reasonable threat, it must involve the disruption, failure, loss, or destruction of critical infrastructure, technologies (including key enabling technologies), and inputs required for security or the maintenance of public order in a Member State or the Union.[98] Additionally, the Member State may also take into account the context and circumstances of foreign direct investment. Things like the chain of control over the investor, whether there is a direct or indirect link between him and the government (Art. 4(2)(a)), and the source of the funding are also of interest. Is it a bank loan from a state-owned bank or a

[95] Oliver Geiss and James Pascoe (n 94); FDI Regulation (n 6) Preamble.
[96] ibid art. 1(1).
[97] ibid art. 2(1).
[98] ibid Preamble.

governmental subsidy, or is it part of a state-issued grant for the pursuit of foreign projects or programmes?[99]

An intriguing feature that can also play a role, is the investor's cross-border involvement in activities that affect the security or public order of another Member State. As a result, Art. 6(1) establishes a cooperation mechanism under which Member States must report internal mishaps to the Commission and other Member States or provide comments on other states' FDI screening incidents (Art. 6(2)). When the Commission finds that a reported FDI is likely to affect security or public order in more than one Member State (Art. 6(3)), or when the foreign investment concerns "projects or programs of Union interest", it has the authority to investigate and comment (Art. 8). Given the complexities of some investment schemes, the ability to provide a comment has been expanded to an ex-post format, allowing the Commission and FDI mechanism participants to do so within fifteen months of the completion of such investments (Art. 7(8)). This creates a situation in which a national decision may have been made following the FDI review, however, on a Union level, there may still be the caveat of re-evaluating the status quo of the investment retroactively. While this may not have been done on purpose, it could theoretically be used as a re-examination procedure if the national assessment were incorrect.

The Member States also have procedural duties. When implementing screening rules and procedures, the Member States shall be transparent and non-discriminating between third countries – a requirement of a proportionality test of sorts (Art. 3(2)). The Member State is also held to a standard of confidentiality and protects all commercially sensitive information (Art. 3(4)). Finally, they must offer a possibility for the parties involved in the screening to access recourse in a national court of law or at an administrative instance (Art. 3(5)). This final requirement of court access was also mentioned when discussing the restrictions on freedom of movement and capital movement in the context of golden shares. Given that golden shares were proposed as an FDI control mechanism, making an element required in the lawful use of golden shares a mandatory condition was critical.

[99] FDI Regulation (n 6) Recital 13.

The Regulation's most important provision was the expansion of the concept of critical/strategic sectors. This is because the use of FDI screening methods, including the use of golden shares, depends on the existence and scope of this definition. The FDI toolbox was created primarily to protect strategic infrastructures from foreign takeovers, as this would jeopardise public security and order. Strategic/critical sectors are classified into five distinct and broad categories. First, in Art. 4(1)(a), we have sectors that provide critical infrastructure. Critical infrastructure includes energy, transportation, water, health, communications, media, data processing, aerospace, defence, financial infrastructure, sensitive facilities, and land, and real estate critical for their use. This covers everything that represents public services and amenities. Second, we have critical technologies, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, and nuclear technologies, as well as nanotechnologies and biotechnologies (Art. 4(1)(b)). Any cutting-edge technology with civilian and military applications falls in this category. Up next are the sectors which provide critical inputs through energy, raw materials, and industrial, and agricultural assets that maintain food security (Art. 4(1)(c)). Last but not least, we have two interesting sections, as represented by the industries which offer access to sensitive information and personal data and the industries that cover freedom and pluralism of the media (Art. 4(1)(d) and (e)). The private data and information aspect is relevant when considering the strategic and economic value of data in the so-called data economy.

As we can see, the FDI Regulation merely facilitated the implementation of direct investment screening. It did not establish a centralised EU-wide screening system comparable to the US Committee on Foreign Investment, nor did it harmonise existing national FDI procedures or establish an independent EU body capable of conducting such procedures and issuing binding decisions. All it did was set a goal that must be met to protect EU interests and allow Member States to assemble an additional level of regulatory scrutiny for FDI transactions. Some states in question have discovered that using golden or synthetic golden shares is the best way to ensure FDI control. These countries are Germany, France, and Italy, and their use of dual modes will be evaluated in the following section.

6. USE OF GOLDEN SHARES AS FDI TOOLS IN THE EU MEMBER STATES

Following the entry into force of the FDI Regulation and the earlier directions provided in the Guidelines and Guidance, EU Member States have begun to shape their new legal frameworks for investment control. The same developments occurred in all three jurisdictions investigated in this paper, albeit with different outcomes.

6.1. DEVELOPMENTS IN FRANCE

The French government has explicitly implemented the rules governing FDI and the extension of the scope of the sectors that are classified as strategic/critical. Article L 151 Code monetaire et financier (CMF)[100] houses the expansive list of sectors that are subject to the FDI control rules, as found in Art. 4 of the FDI Regulation. The French state has chosen the control method of a stand-still obligation before clearance, essentially a synthetic golden share that allows for ex-post review of a commercial decision. This measure of control goes even further, as it limits the number of shares that shareholders in certain industries can hold. This law mandates that an investor obtain the prior approval of an industry-relevant minister before holding more than 25% of capital or voting rights.[101] Initially, a 10% share cap was applied only to national champions such as TotalEnergies SE, Havas SA, and Thales Group, but this cap was gradually reduced.[102] All critical industries were already subject to a 10% share acquisition threshold that applied to all non-EU acquirers by April 2020.[103] Because ministerial approval was required and the number of applications was increasing a more simplified procedure was implemented: the appointment of a government representative as a temporary member of the board for the duration of the

[100] *Code monetaire et financier [CMF] [Monetary and Financial Code], as amended by LOI n° 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises (1)*, arts. L 151-1–L 151-7.
[101] ibid.
[102] Bernardo Bortolotti and Mara Faccio, 'Government Control of Privatized Firms' (2005) European Corporate Governance Institute (ECGI) Finance Working Paper No. 40/2004 <https://doi.org/10.2139/ssrn.536683> accessed 17 January 2023.
[103] DG Trésor, 'Adaptation du contrôle des investissements étrangers en France (IEF) pendant la crise sanitaire' (*French Ministry of Economy and Finances*, 30 April 2020) <http://www.tresor.economie.gouv.fr/Articles/2020/04/30/covid-19-adaptation-du-controle-des-investissements-etrangers-en-france-ief-pendant-la-crise-sanitaire> accessed 17 January 2023.

purchase, sale, or takeover. In some instances, these representatives are granted specific veto powers. In Total S.A., the representative could prevent the sale of certain strategic company assets, whereas in Thales S.A., he could veto any board resolution.[104]

The requirement to obtain state approval before finalising a transaction has allowed the French government to halt the acquisitions of several large and SME-level strategic companies. When it comes to large corporations, the Canadian holding Couche-Tard has curtailed its takeover of the food giant Carrefour in December 2021.[105] The twenty-billion-euro offer was halted by French Finance Minister Bruno Le Maire due to a threat to the country's food security.[106] From the perspective of a specialised small business, the purchase of Photonis by the American company Teledyne has been stopped. This restriction was unexpected given France's close ties with the United States. Instead, a quick clearance was expected. The block was caused by the fact that Photonis is a high-tech company that specialises in the design, manufacture, and sale of photo-sensor imaging technologies. At the same time, they are the sole supplier of night vision cameras to the French military.[107] As a result, the authorities and the Ministry of Defence have labelled the transaction a threat to French economic and industrial defence sovereignty and have blocked it entirely.[108]

In terms of contract-based golden shares, the French government has established a national seven-billion-euro fund for state aid to assist struggling airlines and automobile manufacturers.[109] The majority of this money was used to revitalize

[104] Bortolotti and Faccio (n 102).
[105] Leigh Thomas, Gwénaëlle Barzic, and Allison Lampert, 'French government hardens stance against Carrefour takeover' *Reuters* (Paris/Montreal, 14 January 2020) <https://www.reuters.com/article/us-carrefour-m-a-couchetard-idUSKBN29J1K4> accessed 4 February 2023.
[106] ibid.
[107] Nicola Bonucci and others, 'French authorities block U.S. acquisition of French company' (*Paul Hastings LLP*, 13 January 2021) <https://www.paulhastings.com/fr/publications/client-alerts/french-authorities-block-u-s-acquisition-of-french-company#_edn2> accessed 17 January 2023.
[108] 'Communiqués Souveraineté des entreprises statégiques: Florence Parly annonce que L'tat travaille à une solution alternative de reprise de Photonis' (*Ministère Des Armées*, 18 December 2020) <https://www.defense.gouv.fr/salle-de-presse/communiques/communiques_souverainete-des-entreprises-strategiques-florence-parly-annonce-que-l-etat-travaille-a-une-solution-alternative-de-reprise-de-photonis> accessed 17 January 2023.
[109] Authorisation for State aid pursuant to Articles 107 and 108 of the Treaty on the Functioning of the European Union [2021] OJ C50/01; Commission, 'State aid: Commission approves French plans to provide €7 billion in urgent liquidity support to Air France' (Press Release) IP (2020) p. 796.

the French side of the Air France-KLM Group through a support scheme that included the state guaranteeing the corporation's loans and a three-billion-euro shareholder loan. The loan had to be converted into bonds as part of a four-billion-euro recapitalisation scheme, which increased the French government's equity stake in Air France from 14.3% to 28.6%.[110] This loan is conditional on the state implementing its environmental policy in Air France's business dealings. As a result, the state is not intrinsically involved in the company's daily decision-making, but the company must meet certain thresholds within the next few years. Air France has committed to reducing CO2 emissions from domestic flights by 50% by the end of 2024 and to incorporating 2% alternative fuels into its consumption by 2025.[111] The most intriguing goal woven into this share acquisition was a 50% reduction in gas emissions per passenger by 2030, as well as a reduction in the number of domestic flights on routes that could be covered in less than three hours by train.[112] This represents a significant shift in the company's business model and services, which would not have been possible even with the state's increased stake of 28.6%. This demonstrates the incorporation of a golden share scheme into an equity acquisition in exchange for state aid, which provided the state with enhanced powers.

As we can see, the French government has successfully integrated the FDI Regulation into its legal framework, giving it competence and control over share acquisition screening procedures in the country. This has aided in maintaining national control of valuable assets by actively employing this protocol. The same can be said of the use of contractual golden shares, which kept one of the state's national champions afloat while implementing the government's progressive environmental policies. The approach taken in the Air France transaction has proven to be a measure

[110] Jean-Yves Guérin, 'L'État possède 28,6% d'Air France-KLM' *LE FIGARO* (Paris, 19 April 2021) <https://www.lefigaro.fr/economie/l-etat-possede-28-6-d-air-france-klm-20210419> accessed 18 January 2023.

[111] Leigh Thomas, 'Air France must cut emissions, domestic flights for aid: minister' *Reuters* (Paris, 29 April 2020) <https://www.reuters.com/article/us-health-coronavirus-france-economy-idUSKBN22B2EL> accessed 18 January 2023.

[112] Elaine Cobbe, 'France has banned short-haul domestic flights. How much it will help combat climate change is up in the air.' *CBS News* (Paris, 24 May 2023) <https://www.cbsnews.com/news/france-ban-short-haul-domestic-flights-climate-change/> accessed 18 January 2023.

of corporate control, but not of an active nature, rather, it is passive management through the influence of the end result. Nonetheless, it was all made possible by the "re-energised" reach of the golden shares.

6.2. Developments in Germany

Across the border, the legislative branch in Germany effectively reformed the FDI system in 2020 based on the text of the FDI Regulation and the directions recommended by the Guidelines and Guidance. The process began in late November 2019, when Federal Minister for Economic Affairs Peter Altmaier announced the Republic's "Industrial Strategy 2030", which included tighter investment controls at its core.[113] The measures began with a focus on the health sector, given that the country was in the midst of the Covid-19 crisis, and was aimed at reforming the AWG and the AWV.

The amendments to the Foreign Trade and Payments Ordinance (AWV) have more than doubled the public authorities' capacity to conduct cross-sectoral reviews. The modifications to Sections 55 to 59 AWV increased the number of case groups of companies subject to FDI control from eleven to twenty-seven.[114] While the case groups focused on the sectors introduced by Art. 4 of the FDI Regulation, such as artificial intelligence, autonomous driving, biotechnology, semiconductors, and cyber-security, they were not transposed verbatim, as some other states have done. The legislative branch took it upon itself to define them more precisely, thereby limiting their applicability.[115] Sector-specific review authority has also been expanded to include all acquisitions of companies that develop, manufacture, modify, or have de facto control over listed military technology and equipment. Sections 60 to 62 AWV have been expanded to include all investors, including those based in the EU,

[113] Bärbel Sachs and Florian Becker, 'Further tightening of investment control planned to secure Germany's technological sovereignty' (*NOERR*, 31 January 2020) <https://www.noerr.com/en/insights/weitere-verscharfung-investitionskontrolle-zur-sicherung-der-technologischen-souveranitat-geplant> accessed 4 February 2023.
[114] Florian Becker and others, 'Further tightening of investment screening in Germany expected' (*NOERR*, 2 February 2021) <https://www.noerr.com/en/insights/further-tightening-of-investment-screening-in-germany-expected> accessed 4 February 2023.
[115] ibid.

and operate under an active presumption of threat to German public order or security. A comprehensive prohibition on implementing transactions of companies in the sectors covered by sections 60 and 62, combined with a reporting obligation for investors and company investments, adds to the rigour with which these corporations are shielded.

Reporting obligations continue to apply to investments from third countries in the case groups subject to cross-sectoral review. This obligation is triggered when a current or prospective third-country investor wishes to acquire shares with more than 10% voting rights. All investments that have been notified to the Federal Ministry of Economic Affairs and Energy (BMWi) will be provisionally prohibited until the period of review has expired or they have received written clearance from the BMWi. The assessment presumption is based on the possibility that this transaction will endanger German public order or security. Before the AWV reform, the review requirement was triggered only when an investor achieved 25% of the voting rights. What is fascinating about this investment screening procedure is that it must be completed every time a shareholder who has crossed the 10% threshold acquires more shares, regardless of whether the number of voting rights changes. The possession of a previous certificate of non-objection or approval from the BMWi for acquisitions within the same company does not relieve the obligation to report and review. According to BMWi estimates, the number of reportable acquisitions increased by around 180 per year, 150 in the cross-sectoral examination and 30 in the sector-specific examination.[116] When we consider the economic and strategic value of the industries protected by FDI control rules, this figure does not appear to be so high.

The second part of the FDI control scheme involved the empowerment of the AWG as a tool to combat the arduous threshold of the requirement of "threat to public safety or order". As a result, the threshold for state involvement in a transaction has been reduced from an actual threat to public order – defined in German state practice as a sufficiently serious threat that will affect a fundamental interest of society – to the existence of a probable impairment.[117] This lowered threshold is not only

[116] Florian Becker and others (n 114).
[117] Florian Becker and others (n 114).

applicable to the perceived threats to the German state but also to presumed impairments in other Member States besides Germany.[118] While some might consider this interpretation quite invasive into the other Member States' national doctrines of public security and order, the explanatory memorandum to the AWG skilfully ties this to the system of EU-wide coordination on investment supervision.[119] The extent to which the German state can use this expansive power is to make comments under Art. 6 of the FDI Regulation, hence making it proportional as it has no real impact on the other Member States' policies.

Another addition made possible by the AWG is the introduction of Germany's conception of technological sovereignty. This goes beyond the list of case groups added to the AWV and focuses on strict control over critical technologies, the acquisition of which could be labelled as a detriment to the community's good in some cases. Defence, energy storage, robotics, semiconductors, cyber security, artificial intelligence, quantum and nuclear technologies, biotechnologies, nanotechnologies, and the aerospace industry are among the industries covered by the label of critical technologies.[120]

Ironically, while the German position on critical technology protection appears to be rather strict on paper, there appears to be a lack of zeal in practice to avoid foreign acquisitions. This can be seen through the lens of the takeover of Elmos, a semiconductor manufacturer based in Dortmund. This is a small and medium-sized enterprise that designs and manufactures semiconductors for the automotive industry.[121] Elmos operates in a particularly critical market because there were global supply chain issues and bottlenecks during the Covid-19 pandemic. The German automotive industry, which relies on chips in the production of modern vehicles, was

[118] ibid.

[119] Explanatory memorandum to the adoption of the Foreign Trade and Payments Act [Außenwirtschaftsgesetz — AWG] <https://www.bmwk.de/Redaktion/DE/Downloads/Gesetz/englische-begruendung-eines-dreizehnten-gesetzes-zur-aenderung-aussenwirtschaft.pdf?__blob=publicationFile&v=2> accessed 17 February 2023.

[120] Sachs and others (n 84).

[121] Joachim Hofer and others, 'Bund plant Einwilligung zu China-Kauf von Chip-Fertigung – Geheimdienste warnen' *Handelsblatt* (Munich/Berlin/Frankfurt, 11 February 2022) <https://www.handelsblatt.com/politik/deutschland/elmos-uebernahme-bund-plant-einwilligung-zu-china-kauf-von-chip-fertigung-geheimdienste-warnen/28772192.html> accessed 12 February 2023.

one of the victims of such disruptions. While indispensable, the German government did not use its synthetic golden share power to review and limit this acquisition, but instead gave permission to an EU company called Silex. The caveat is that while Silex is an EU company based in Sweden, it is a wholly-owned subsidiary of China's Sai Microelectronics.[122] The chip manufacturer's 85-million-euro acquisition has been met with a barrage of warnings from high-ranking officials. The president of the Federal Intelligence Service (BND) has warned of China's practice of investing in specific industries to exert pressure on individual countries, as well as a prevailing tendency in Beijing's policies to become the largest producer of semiconductors, chips, and PCBS.[123] Because the transaction was a critical investment, the German Economy Ministry reviewed it, and the security services audited it. Despite the warnings, the government approved the takeover, claiming that the technology Elmos employs is outdated and that there will be no flow of critical knowledge to China.[124]

Another case of questionable FDI control in which the synthetic golden share power of review and control was used is the sale of a portion of the Hamburg port. In this case, a Chinese state-owned shipping giant called Cosco purchased a 35% stake in Europe's third-largest port. Cosco is a 97-company international conglomerate that also owns a stake in the ports of Rotterdam, Antwerp, and Athens. As we can see, this company with a strong connection to a foreign government is slowly gaining a foothold in all European ports. This triggered a wave of concern and warning directed at German Chancellor Olaf Scholz. Six federal ministers in his coalition, including the Minister of Economic Affairs and Climate Action Robert Habeck and Foreign Minister Annalena Baerbock, warned him. Minister Baerbock recommended that the deal be prohibited entirely, citing the state's competence and the fact that Chinese companies use "salami tactics" to gain control, first purchasing a small stake and gradually

[122] ibid.
[123] Tristan Fiedler, 'Report: Germany to push ahead with Chinese takeover of chips plant' *POLITICO* (Germany, 27 October 2022) <https://www.politico.eu/article/report-germany-government-chip-plant-china-despite-secret-service-warning/> accessed 12 February 2023.
[124] ibid.

gaining control through subsequent acquisitions.[125] The Federal Ministry of Economics also advised against the transaction to limit China's ability to influence port operations and merchant shipping to Germany and Europe. Tim Ruhling of the German Society for Foreign Relations has warned of the possibility of Cosco accessing the port terminal's data, which provides extensive information about international trade, supply and demand, and national deficiencies and dependencies.[126]

Under intense pressure from all sides, Chancellor Scholz has caved and allowed the deal to be restricted rather than completely prohibited. As a result, Cosco could only acquire up to 25% of the Hamburger Container Terminal Tollerort, preventing the state-owned company from influencing port decisions and having a blocking minority. The Federal Ministry of Economics has further restricted the purchase of shares above the 25% limit in perpetuity, reducing the investment to a purely financial stake by prohibiting any special rights or even contractually granted veto rights.[127] Cosco currently owns the most shares in the port but has inversely proportional control over strategic, business, and personnel decisions. As things stand, it is difficult to say whether this was a good or bad decision and whether the risk was worth it. But one thing is certain: the government has undertaken all types of investment control established by law-based golden shares in the AWV and the AWG. This has resulted in a significant turn of events that would not have been possible without the new legal framework and the revision of how golden shares can be used.

[125] Martin Greive, Dana Heide, and Julian Olk, 'Streit um Hafen-Deal geht weiter – Cosco warnt: „Keine Garantie, dass die Transaktion stattfinden wird"' *Handelsblatt* (Berlin, 26 October 2022) <https://www.handelsblatt.com/politik/deutschland/cosco-einstieg-in-hamburg-streit-um-hafen-deal-geht-weiter-cosco-warnt-keine-garantie-dass-die-transaktion-stattfinden-wird/28770726.html> accessed 6 February 2023.

[126] Martin Greive and Dana Heide, 'Cosco-Einstieg: Bundeskabinett genehmigt umstrittenen Hamburger-Hafen-Deal – Cosco beteiligt sich an Container-Terminal' *Handelsblatt* (Berlin, 26 October 2022) <https://www.handelsblatt.com/politik/deutschland/cosco-einstieg-bundeskabinett-genehmigt-umstrittenen-hamburger-hafen-deal-cosco-beteiligt-sich-an-container-terminal/28764762.html> accessed 6 February 2023.

[127] Parlamentarisches Kontrollgremium, 'Nachrichtendienste warnen vor Gefahren durch Russland und China' (*German Bundestag*, 17 October 2022) <https://www.bundestag.de/dokumente/textarchiv/2022/kw42-pa-pkgr-908684> accessed 7 February 2023.

While golden-share-like powers have become common in Germany, standard contract-based golden shares have also been successfully implemented. The European Commission approved the German Economy Stabilization Fund, based on the Temporary State Aid Framework, in July 2020.[128] The fund proposed stabilisation instruments worth up to 100 billion euros in hybrid capital instruments (bonds and silent government participation) and equity instruments (purchase of newly issued shares and golden shares).[129] One of the main beneficiaries of the fund was Lufthansa Group, which was severely impacted by the Covid-19 pandemic. While it reported over 2 billion pounds in profit in 2019,[130] by 2020 it has registered around 5.5 billion pounds in losses and announced that it would go insolvent without the government's help.[131] When the state realised that one of its national champions was reaching default, it offered its helping hand by acquiring a part of the Lufthansa Group.[132] The corporation received a 9 billion euro support scheme, divided into a 6 billion euro recapitalisation scheme and a 3 billion euro state loan. In exchange, the state received 20% equity, which could be increased to 25% plus one share. It also received appointment rights, such as the ability to nominate members of the supervisory board, as well as control rights, such as the ability to change the group's business strategy through enhanced voting rights. The extent of the use of control rights, however, has been internally limited by the German state to ensure that the company adheres to all sustainability requirements established in response to the Paris Climate Agreement

[128] Jens Peter Schmidt, Dorothee Prosteder, and Sarah Blazek, 'European commission approves German EUR 500 billion economy stabilization fund' (*NOERR*, 8 July 2020) <https://www.noerr.com/en/insights/european-commission-approves-german-eur-500-billion-economy-stabilization-fund> accessed 7 February 2023.

[129] ibid.

[130] 'Annual Report 2019' (*Lufthansa Group*, 31 December 2019) <https://investor-relations.lufthansagroup.com/fileadmin/downloads/en/financial-reports/annual-reports/LH-AR-2019-e.pdf> accessed 7 February 2023.

[131] 'Lufthansa Group prepares for strong demand growth in 2021 after operating loss of 5.5 billion euros' (*Lufthansa Group*, 4 March 2021) <https://www.lufthansagroup.com/en/newsroom/releases/lufthansa-group-prepares-for-strong-demand-growth-in-2021-after-operating-loss-of-5-5-billion-euros.html> accessed 7 February 2023.

[132] Felix Wadewitz, 'Staatsbeteiligung: Die fliegende Deutschland AG' *Tagesspiegel* (Potsdam, 16 April 2020) <https://background.tagesspiegel.de/mobilitaet/staatsbeteiligung-die-fliegende-deutschland-ag> accessed 8 February 2023.

and the state's sustainability policy.[133] This use of golden shares has benefited all parties involved: Lufthansa Group did not go bankrupt, the state maintained the competitiveness of its national champion and did not allow a foreign predatory acquisition, and tertiary stakeholders (i.e., citizens) benefit from the company's climate policies through reduced emissions and pollutants in the fuel.

As can be seen, the German government successfully implemented the FDI Regulation and revitalised its golden share practices in both contractual and legislative terms. On the other hand, the practical application can still be improved, but this is due to the government's internal policies, decisions, proclivities, and deficiencies rather than the golden shares themselves.

6.3. Developments in Italy

The Italian government has also incorporated FDI Regulation into its golden share system in southern Europe. This system already went through reform in 2012, and it has shifted its preference from the actual acquisition of a leveraged stake in strategic companies to the use of externally derived legal control. The reason for abandoning contractual shares stems from the state's protracted legal battle with the Commission over the Italian government's stake in Telecom Italia, Eni, Enel, and Finmeccanica.[134] In that case, the state would own roughly 30% of all companies, and the Minister of Foreign Affairs would be able to recommend members of the ministry to work in the companies and vice versa. As a result, the CJEU ruled that the golden share system violated the right to free capital circulation and discouraged other Member States and investors from investing in these companies. Thus, the Italian government was forced to implement a new legal system that provided greater legal certainty while rationalising and clearly defining the scope and criteria for exercising state powers.[135]

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[133] Joe Miller and Taya Powley, 'Lufthansa warns it will run out of cash in weeks' *Financial Times* (Frankfurt/London, 23 April 2020) <https://www.ft.com/content/0cac7f90-5d42-4bec-aab6-c003f90a3b49> accessed 8 February 2023.

[134] *Commission v Italian Republic* (n 14).

[135] Ian Tully and others, 'COVID-19: Impact on Italian golden powers regulations' (*Squire Patton Boggs*, 8 April 2020) <https://www.squirepattonboggs.com/-/media/files/insights/publications/2020/04/covid-19-impact-on-italian-golden-powers-regulations/covid19_impact_on_italian_golden_powers_regulations.pdf> accessed 9 February 2023.

When the Covid-19 pandemic hit, and the Italian market was sent in disarray, the state was confronted with the issue of predatory acquisitions by foreign multinationals subsidised by other Governments.[136] The risk that became a reality was liquid companies taking advantage of Italy's weakened position. In light of this, on April 8, 2020, Law Decree No. 23 of 2020 (Decreto Liquidità or DL) was published in the Official State Journal as an amendment to Law Decree No. 21/2012 granting the government special powers over companies in strategic sectors – the Golden Power Law.

The law was passed in support of the FDI Guidelines and Regulation to protect a new subset of Italian companies that were previously outside the scope of the Golden Power Law and could fall victim to opportunistic foreign investors. The expansion of scope has resulted in two changes: the types of companies covered and the territorial reach of the law. From the perspective of covered corporate groups, the Decreto Liquidità enriched its coverage with the categories found in Art. 4 FDI Regulation. What concerns the territorial aspect, there was an interesting development. Unlike the 2012 Golden Power Law, which only allowed the defence industry to be reviewed for investments from EU Member States, the 2020 Decreto Liquidità allows the state to review all strategic industries for dubious investments from third-country investors and EU Member States until the end of December 2020.[137] This is the only instance when a state has given itself an across-the-board competence to review all investments from all investors regardless of their place of incorporation or domicile.

Companies subject to the review procedures were now required to notify the Prime Minister of certain share transactions. For non-EU entities, the notification obligation requires the acquisition of at least 10% or the attainment of 10% at the time of investment. Following this threshold, all acquisitions that exceed 15%, 20%, 25%, or 50% are subject to subsequent notification requirements, regardless of whether the previous acquisition was approved. The notification obligation applies to EU-based

[136] Vittorio Minervini, 'Insolvency, Competition, Economic Growth (and Recovery)' (*Federalismi.it*, 27 May 2020) <https://www.sipotra.it/wp-content/uploads/2020/06/Insolvency-Competition-Economic-Growth-and-Recovery.pdf> accessed 12 February 2023.

[137] DECRETO-LEGGE 8 aprile 2020, n. 23 <https://www.gazzettaufficiale.it/eli/id/2020/04/08/20G00043/s> arts. 15-17.

foreign investors if the acquisition amounts to the exercise of the investors' FoE rights. So far, there has not been a clear-cut established doctrine on this subject in Italian court jurisprudence because the main threat Italy faced has been third-country investments. In the event of a failure to notify, the Council of Ministers Presidency has the authority to initiate the review procedure and exercise golden powers ex officio (Art. 16 DL). Failure to notify within ten days of the transaction will result in the application of a monetary administrative fine up to twice the value of the transaction (Art.1-bis. DL). As previously stated, the government has powers in addition to the FDI review. They have the authority to halt the sale of shares, veto shareholder resolutions, and impose specific conditions on the transfer of technology, assets, and data for national defence and security reasons.[138]

The reciprocity principle embedded in the Golden Power Law adds another layer of protection. Any non-EU investor who buys shares in an Italian company is subject to the same terms and conditions as an Italian investor who buys a company's equity or assets in the investor's home country.[139]

Following the FDI Regulation's entry into force in October 2020, the Italian government adopted a new set of implementing laws that broadened the covered sectors via Prime Ministerial Decree No. 179/2020. The categories' new iteration took a more descriptive approach, focusing on the activities of specific companies operating on Italian soil. For example, in Art. 3 of the Decree, the energy sector is mentioned. While Sections 1(a) and (b) discuss the critical infrastructure of fuels and nuclear materials, as well as assets used in their handling, section 1(c) discusses coastal storages of crude oil and petroleum products with a capacity of 100,000 m3 or more used for the domestic market. This is a clear nod to Eni S.p.A., a previously state-owned, multinational energy company that is a major player in the transportation

[138] Francesca Toricelli and Pietro Missanelli, 'Italian Low: Corporate Transparency and 'Golden Power' Provisions in Emergency Legislation for Coronavirus Disease 2019' (*Greenberg Traurig*, 23 April 2020) <https://www.gtlaw.com/en/insights/2020/4/italian-law-corporate-transparency-and-golden-power-provisions-in-emergency-legislation> accessed 12 February 2023.

[139] Gian Luca Zampa and Ermelinda Spinelli, 'The Foreign Investment Regulation Review: Italy' (*The Law Reviews*, 21 October 2020) <https://thelawreviews.co.uk/title/the-foreign-investment-regulation-review/italy> accessed 12 February 2023.

of fossil fuels in the Mediterranean region.[140] The health sector is specifically reinforced to reduce the possibility of disruptions of physical medical services, critical technologies for health, diagnostics, and therapy (Art. 5(1)(b) DL), and long-distance consultation services, and critical digital technologies for the delivery of health care services (Art. 5(1)(a) DL). They also protected the medical and economic activities of strategic importance, such as medicine and medical equipment procurement, research and development activities, and administrative and financial management of the aforementioned categories (Art. 5(1)(d) DL). An entrenchment of this kind was to be expected in the Italian medicines industry, given the Covid-19 pandemic, which was at its peak in mid-2020. In general, the Decree adheres to the general structure of the Decreto Liquidità, with additional details and some instances of company-specific tailored provisions. Except for one detail, this appears to be a standard FDI regulation enforcing the law.

The Italian legislator has masterfully managed to introduce under the scope of Golden Powers competence to review, amend, and in some instances control the:

> "…critical infrastructures, for the multilateral trading of financial instruments or deposits monetary, for the offer of basic services of the central depositories of securities and clearing services as a central counterparty office as well as for the clearing or settlement of payments. (Art. 8(1)(a) DL)"

Simply put, this includes the entire Milan Stock Exchange as well as independent hedge funds that acquire stocks on this exchange. This decision gives the Italian Prime Minister the authority to veto or impose conditions on foreign investments aimed at all Italian publicly listed companies, regardless of whether they traditionally meet the strategic qualification.[141] While the Italian government does not have a controlling stake in all of these companies, it does have the legal authority to list them on the public market. With some legal engineering here and some specific

[140] Elissabeta Brighi and Marta Musso, 'Italy in the Middle East and the Mediterranean' (2017) 32(1) Italian Politics, p. 70.

[141] 'International: COVID-19 - impact on governmental foreign investment screening' (*Baker McKenzie*, 31 March 2020) <https://insightplus.bakermckenzie.com/bm/antitrust-competition_1/international-covid-19-impact-on-governmental-foreign-investment-screening> accessed 12 February 2023.

interpretation of the law there, the Italian government has regained control of the market it had before privatisation. In addition to establishing the state's broad review powers, the Decree extended the authority of public authorities to exercise the Golden Powers until December 31, 2021.

The Italian government, using its authority to review foreign investments, has blocked several takeover attempts by Chinese state-funded companies in various industries in 2021. In March, they stopped the purchase of a 70% controlling stake by Shenzhen Invenland Holdings Co. in the semiconductor manufacturer LPE S.p.A.[142] This company was responsible for the production of electronic components for the automotive industry.[143] If this transaction had not been prevented, the automotive industry would have faced additional strains on top of the chip shortage it was experiencing at the time. In the same month, the review process resulted in the partial restriction of a supply contract between Linkem S.p.A. and Huawei Technologies Ltd.[144] The purchase of hardware components and software programs was restricted due to the risk of using these elements for espionage, which is a threat to national security. In the medicines sector, the state restricted a takeover between two Italian-based companies – MolMed S.p.A. and AGC Biologics Italy S.p.A. AGC as the acquirer and the subsidiary of a Japanese biotech corporation – AGC Inc. It was required to notify the Minister of Economic Development of any intellectual property transfer agreement, to keep research and development activities, including research laboratories and related production facilities, on Italian territory, and to maintain the employment levels of personnel dedicated to essential research and development

[142] 'Italy blocked Chinese takeover of semiconductor company' (*Automotive News Europe*, 9 April 2021) <https://europe.autonews.com/suppliers/italy-blocked-chinese-takeover-semiconductor-company> accessed 12 February 2023.

[143] Alberto Brambilla and Daniele Lepido, 'China targeted Milan semiconductor firm before Draghi's veto' *Bloomberg* (New York, 9 April 2021) <https://www.bloomberg.com/news/articles/2021-04-09/china-targeted-milan-semiconductor-firm-before-draghi-s-veto?leadSource=uverify%20wall> accessed 13 February 2023.

[144] Gabrielle Carrer, 'Draghi stoppa ancora il 5G Cinese. Golden power su Huawei e Zte' (*Formiche.net*, 8 April 2021) <https://formiche.net/2021/04/golden-power-accordo-linked-huawei-zte/> accessed 12 February 2023.

activities.[145] Even in agriculture, the state blocked the purchase of Italian seed producer Verisem by Switzerland-based Chinese-owned Syngenta.[146] As can be seen, the Italian government has established complete monitoring and partial control over the state's economy. They have successfully used Golden Powers to prevent foreign interests from infiltrating or potentially threatening the integrity of various aspects of the country, ranging from military interests and industrial capacity to food security and bio-medical research and development.

In March 2022, the Government came forward with a new package of laws, the Emergency Measures Decree (Law Decree No. 21/2022).[147] This was a law enacted in response to Russia's attack on Ukraine in February 2022 to address the economic and humanitarian consequences of the crisis. It altered the state's Golden Power in the fields of defence and national security. Previously, the government could only intervene in foreign companies' share acquisitions; now, they can use their veto power to block resolutions and transactions that result in a change in ownership, control, or availability of strategic assets, including the assignment of tangible and intangible assets. The screening procedure has also been simplified to deal with an increase in review procedures, and it is now combined with a pre-filing procedure. Companies in the defence sector must now file a report detailing the key features of the transaction before engaging in the transaction.

The final change brought about by the Emergency Measures Decree is an unexpected turn of events by indefinitely extending the Golden Powers' temporal scope. With this change, the government has established expansive control over foreign investments. It has combined golden-share-like control and veto powers, review powers, contract amendment and ex-ante contract annulment powers, all to protect the state's and the public's national interests. So far, there has been no instance of reported abuse affecting the interests of citizens or other EU or Member State

[145] Press release posted by MolMed S.p.A. upon request of AGC Inc <https://transactions.morrowsodali.com/attachments/1595881315-Press%20release%20-%20Provisional%20results%20of%20the%20Offer.pdf.> accessed 12 February 2023.

[146] 'Italy's blocking of Chinese deal hurts agricultural cooperation' *Global Times* (Beijing, 14 March 2022) <https://www.globaltimes.cn/page/202204/1259361.shtml> accessed 14 February 2023.

[147] Decreto-Legge convertito con modificazioni dalla L. 20 maggio 2022, n. 51 (in G.U. 20/05/2022, n. 117).

interests, which explains the lack of complaint filings to the CJEU based on the Golden Power Law. While some may argue about the proportionality, adequacy, and other aspects of the law and its application, one thing is certain: it has proven to be an effective use of golden shares in the control of acquisitions by foreign interests during times of turmoil. It may even be a good control measure at all times.

7. RATIONALISING THE USE OF GOLDEN SHARES AS AN FDI MECHANISMS

Golden shares are generally restricted within the EU market because they violate the Union's fundamental freedom of establishment (Art. 49 *juncto* 54 TFEU) and free movement of capital (Art. 63 TFEU).[148] While these freedoms take precedence over restrictive national laws, specifically rules limiting FDI, they can still be limited.[149] Thus, for golden shares to be considered an effective form of FDI control, they must cohesively fit within the scope of the exceptions to the FoE and FMoC. The most efficient way to assess this would be to compare the implementation of the two types of golden shares, classical and synthetic, with the EU law principles that allow for the limitation of these company freedoms. At the same time, this comparison should be juxtaposed with the *Commission v Belgium* case ratio,[150] which represents one of the unique instances in which golden shares have been justified.

The first step in the assessment will be establishing whether there is a restriction of the FoE and the FMoC in the use of the golden shares. The answer is a resounding yes because the sole reason for the use of golden shares as an FDI control tool would be to restrict foreign investments and acquisitions in EU companies by third-country investors. The scope of the FDI Regulation substantiates this, as it covers investments that establish or maintain long-term and direct links between investors from third countries, including state entities and undertakings conducting an economic activity in a Member State.[151] As a result, the states that revitalised their golden share laws through the implementation of the FDI Regulation are restricting treaty freedoms, either directly or indirectly.

[148] Szabados (n 41); *Commission v. Italy* (n 41).
[149] Andenas, Bekkedal, and Pantaleo (n 43).
[150] *Commission v Belgium* (n 60).
[151] FDI Regulation (n 6) Preamble.

The existing restrictions to the freedoms are lawful if they can be justified by reasons referred to in the Treaty or by overriding requirements of the general interest and which apply to all persons and undertakings pursuing an activity in the territory of the host Member State.[152] To derive this justification, either from the express derogations provided in Art. 52(1) TFEU and Art. 65(1) TFEU, or from the casuistic general interest, the national law must be suitable to achieve its goal, and it must be proportional.[153] Depending on the goal invoked by the MS applying the restriction, there will be a different assessment and balancing of interest. Given that the overarching concern that drove the use of FDI control – with golden shares as a by-product – was the protection of national strategic and critical industries from foreign takeovers, the general ground of public security best describes the situation. The CJEU has affirmed on several occasions the view that Member States may maintain, for public security, golden shares in undertakings active in fields involving the provision of services in the public interest or strategic services.[154] Looking at the Member States that were researched in this paper, all of them have implemented an ex post facto review of acquisitions, i.e., synthetic golden shares, in the industries that are classified as public service providers and strategic interests under Art. 4(1) of the FDI Regulation. The French government has directly transposed the list of sectors from the Regulation into Art. L 151 Code monetaire et financier[155] while Germany and Italy have taken a more restrictive or interpretative approach. Germany, through the AWV and the AWG, has taken the restrictive road to clearly define the affected industries and restrict any legislative spillover. Italy, on the other hand, through subsequent amendments to the Golden Power Law and intricate legal engineering, has allowed itself to conduct FDI control in the sectors mentioned in the regulation and more. An argument can be made that the inclusion of the Milan Stock Exchange into the scope of foreign acquisition control has gone over the exhaustive list of sectors that can be subject to FDI. A broad interpretation of 'financial infrastructure' could,

[152] *Commission v Belgium* (n 60) para. 45.
[153] ibid; Joined Cases C–163/94, C–165/94 and C–250/94 *Sanz de Lera and Others* [1995] ECR I-4821, para. 23.
[154] *Commission v Portuguese Republic I* (n 43) para. 47; *Commission v Belgium* (n 59) paras. 43, 47.
[155] *Code monetaire et financier*, arts. L 151-1–L 151-7.

however, give the Italian government the benefit of the doubt that this was a necessary action in the interest of society. The evidence is found in the wide decisional margin that the Member States have in identifying such instances,[156] as well as the precedents of the CJEU, which usually accepts the Member State's justifications in this stage of the assessment.

Other factors that support the public security claim are that foreign acquisitions are an EU-wide issue that has been deliberated upon for three years before the Covid-19 pandemic, and the EU institutions have issued a call to action. Hence the ground for issuing and implementing protectionist measures was not determined unilaterally.[157] This threat was genuine and sufficiently serious,[158] and its aim was not to be misapplied by the Member States for their financial gains.[159] The Regulation itself mentions the value of foreign investments and how they are essential to the development of the EU market, so any restrictions on the FDI were indeed necessary as a protective measure to maintain regional control over national companies. France, Germany, and Italy spent billions to finance struggling companies and screen share-acquisitions by third-country investors, rendering the financial gain argument moot.

While the need for public security is substantiated in law, the legislation that implements the restrictive golden shares must also meet certain requirements. This is what the CJEU refers to as a proportionality assessment of the measures used, and it has proven to be the most significant deterrent to the use of golden shares in the EU. Generally, for legislation implementing the use of golden shares to be considered lawful, it must not be discriminatory on the grounds of nationality, be a response to overriding requirements relating to the general interest and be suitable and proportionate to the objective it pursues.[160]

7.1. Non-Discrimination

[156] *Association Eglise de scientologie de Paris* (n 44).
[157] *Rutili* **(**n 46**)** paras. 26-27.
[158] ibid para. 28; *Calfa* **(**n 47) para. 21.
[159] *Rutili* (n 45) para. 28; *Associação Peço a Palavra* (n 47) para. 70.
[160] *Commission v Kingdom of Spain* (n 44) Opinion of AG Colomer, para. 30.

First comes the requirement of non-discrimination based on the nationality of the share-acquirer. None of the states researched has laws that explicitly mention the nationality of the investor whose acquisition is screened; as such, there is no direct discrimination. Indirectly, however, there are possible instances of discrimination or bias towards a particular state. Considering how many times it was mentioned in this paper, it comes as no surprise that this state is China. The creation of the FDI Regulation was triggered by China's investments, and the restrictions are widely applied to Chinese SOEs or their subsidiaries. De jure, however, Germany and Italy have widened over time the territorial scope of the FDI screening to all investors, be they from a third country, European Economic Area (EEA), or EU, so long as they have a tie to foreign interests or assets. France was the only instance where the government maintained a position of screening only towards non-EU countries. This is justified by the FDI Regulation, which affirms that a Member State can screen an investment if there is proof that it establishes or maintains long-term and direct links between investors from third countries and undertakings conducting economic activity in a Member State.[161] As it stands, based on the letter of the law, all states fulfil this requirement, be it by compliance or external justifications.

However, practice can sometimes differ from the juridical confines of legal documents. What if the powers exercised by public authorities are, in some instances, explicitly or implicitly discriminatory? Will this fail the test of proportionality and amount to a breach of EU Treaty rights? We could look at the past practice of the CJEU and infer from it what the consequences are of the non-discrimination requirement, but a strong argument can be made that the way FDI control rules have been adopted and implemented represents a direct exception from the norm. They have been developed with a reasonable expectation of being discriminatory, whether to foreign partners or market rivals. The Regulation is an EU-wide, *ultima ratio* type law, which was adopted in times of distress with one interest at heart – protecting EU Member State interests regardless of the consequences. The preamble, preparatory documents, FDI assessments in the years preceding the Regulation, and public comments by EU institutions representatives all provide proof of this. This is why the

[161] FDI Regulation (n 6) Preamble and art. 1(1).

states have so much discretion with the clauses they can invoke, the measures and methods they can use and the penalties they can impose. The fact that overarching similarity in the application is present, in law and fact, does not remove the possibility that a Member State could, in its measures, be discriminatory towards another state. So long as this "discriminated" state is not an EU Member State, but a third-country nation, chances are that neither the EU institutions nor other Member States will raise an issue in as much as the other conditions of the test are fulfilled, and the restrictions hold at their core the safeguarding of EU market interests.

As it stands, the FDI Regulation has as its precondition a seed of discrimination because anything that is "foreign" to the Member State using control measures, and more broadly, the EU, will be restricted and, by extension, discriminated against. So, it should not come as a surprise that if a public authority is to apply its FDI control competencies in a discriminatory manner, they could, in this instance, be justified or excused if the means of the conditions are fulfilled, and the purpose of the regulation is achieved.

7.2. Prevailing Interest

Secondly, there must be a prevailing general interest in the law, such as public interest, public and national security, or public health. Previously, it was established that the use of golden shares as an FDI screening mechanism was justified based on public security.

7.3. Suitability

The measure's suitability in securing the attainment of the objective that they pursue is the third requirement. Suitability is established by demonstrating the presence of a rational link between the legislator's devised instruments and the desired goal. This assessment does not seek the absolute best instrument for the situation but rather examines whether the particular measure used by the Member State is not manifestly unsuitable. This leaves the Member State with the sole discretion over which instrument to use. The alternative assessment based on what could or should have been used would result in an invasion of the democratic competence of the

legislator.[162] As such, if the measure is not unsuitable and is applied consistently and systematically, it will pass the standard of suitability.[163]

Non-unsuitability can be assessed by looking at the effectiveness of the FDI control tools, specifically golden shares, in aiding the supervision and restriction of share acquisitions in strategic companies by foreign investors. By implementing the FDI Regulation and using golden shares as an ex-post review tool, the Member States were able to control and reduce acquisitions by suspicious and hostile non-EU foreign investors. It has halted takeovers and acquisitions of polarising entities, such as Sovereign Wealth Funds, which are not subject to binding international law, and, more commonly, State-owned or State-funded enterprises.[164] FDI control through golden shares allows the EU Member States to be aware of share transactions and board decisions before they have the potential to harm the company and the Member State's interests. It gives governments time to investigate the financial and political records of foreign companies before making an informed decision. As we have seen in France and Germany, most acquisitions and takeovers will result in changes. A limit on the number of shares owned here, as well as a reduction in the ability to influence decisions there, ensures that an overbearing influence cannot be established. At the same time, we can see Italy's approach, which has limited multiple foreign acquisitions through reviews to protect its domestic supply of goods and scientific breakthroughs.

In times of crisis, the use of golden shares has also demonstrated the ability to maintain the supply of services and goods while not impeding the operation and development of businesses. Consider the Covid-19 pandemic and how the Member States have protected their national manufacturers and distributors of pharmaceutical

[162] Scaccia di Gino, 'Proportionality and the Balancing of Rights in the Case-law of EU Courts' (2019) 4 federalismi.it <https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=38092> accessed 16 February 2023.
[163] Case C–49/98 *Finalarte* [2001] ECR I-7831; Joined Cases C–72/10 and C–77/10 *Costa and Cifone* ECLI:EU:C:2012:80.
[164] Danielle Gallo, 'The CJEU vis-à-vis EU and Non-EU Investors, between National and European Solidarity: Golden Shares, Sovereign Investment and Socio-Economic Protectionism under Free Movement Rules' (2014) *Luiss Guido Carli Department of Law Working Paper* <https://iris.luiss.it/handle/11385/95387> accessed 16 February 2023.

products, research and development facilities, and vaccine manufacturers.[165] The existing shortage would have been felt more aggressively over the last three years if it had not been for the governments' influence while exercising leveraged control over these companies. Furthermore, by having the ability to participate as a shareholder, they can better monitor and implement laws against monopolies or price gouging practices that may have arisen in the eyes of national and foreign opportunists. Thus, there is no doubt that the use of golden shares as an FDI control tool was not unsuitable. They have proven their efficiency and capacity to achieve the goals envisioned by the FDI Regulation and the invoked public security concerns of the MS.

As to the consistency of application of the measures, Germany, France, and Italy, all use golden shares as an FDI control tool and apply the ex-post review rules to the same category of industries and the same territorial scope of foreign investors, albeit with some differences. Nevertheless, the discrepancies between these jurisdictions do not take away from the fact that, as things stand, the measures applied are suitable for reaching the goal envisioned for their use.

7.4. PROPORTIONALITY

When determining whether a state's golden share system is proportional, the CJEU engages in the comparative assessment of the societal advantages gained by the measures used versus the interests overshadowed by this potential restriction of rights.[166] In an optimal case, the public benefits should be enhanced maximally as opposed to a comparably low actual or potential damage to the rights of the companies. In this balancing act, the court takes a rather strict approach, as evidenced by the fact that most Member States attempting to justify the use of golden shares fail to establish proportionality in their ratio.

The damage pertains to the restriction of FoE and FMoC of EU companies that benefit from or intend to accept capital coming from third countries. Due to these

[165] Katrin Bennhold and David Sanger, 'U.S. offered 'large sum' to German company for access to coronavirus vaccine research, German officials say' *New York Times* (Berlin, March 15 2020) <https://www.nytimes.com/2020/03/15/world/europe/cornonavirus-vaccine-us-germany.html> accessed 16 February 2023.
[166] Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (CUP 2012) ch. 12.

restrictions, the shareholders and the company as a whole could potentially lose uncapitalised gains or even miss partnership or merger opportunities with bigger corporations. However, these losses are only relevant in the limited instances where the public authorities outright ban foreign investment. The rules on FDI do not generally restrict foreign investments so long as the transactions do not pose heightened national security risks or ties to direct funding from third-country governments. According to the 2022 Report of the European Commission on the screening of foreign direct investments into the Union, only a meagre 1% of transactions notified to the MS have been refused based on FDI rules.[167]

This number is significantly small, considering the counterbalancing interests at stake. First and foremost, the restrictive rules apply solely to industries that are considered strategic. Industries that have at their foundation the provision of core services to the citizens of a nation and those industries that represent a technological and military interest. The protection of these industries and the safeguarding of the supply of food, medicines, energy, and fuel sources in a time of ongoing crisis will consciously trump the financial gains of 1% of an already small group of companies. As such, from the perspective of the discretion of public authorities to ward off FDI and to undermine some corporations' rights, the use of golden shares to review transactions is proportional. The damage caused is significantly smaller than the general societal benefits gained and/or ensured.

Because several strong societal interests are at play, the range of measures used and the level of discretion available to the Member States is enhanced. Thus, proportionality cannot solely be assessed from the perspective of the right of the Member States to restrict certain company rights. Still, it has to be assessed through the way that public authorities exercise their restrictive powers. Because there is interference with core company rights, it is expected of Member States to implement certain mitigating practices in their golden shares mechanisms to make them proportional.

[167] Commission, 'Second Annual Report on the screening of foreign direct investments into the Union' COM (2022) 433 final.

In the *Commission v Belgium* case, the court emphasised several governance constraints that the Belgian government imposed on itself in the exercise of its review and leveraged control competencies. These constraints are what made the golden share power of ex-post review proportional in the service providers Distrigaz and Moniteur Belge. First, the public authorities undertaking the review of company decisions, such as sales, acquisitions, dilution of shares, etc., must follow strict time limits. Because of the invasive nature of the government's competence to oppose corporate decisions, the involvement of public authorities must be based on the principle of respect for the undertaking's decision-making autonomy.[168] Thus, the power of opposition must be restricted to well-established and reasonable time limits. In France, Art. L. 151 does not explicitly state a time limit given to authorities for review. However, Art, L 151-2 refers to section 4 of Art. L. 231-4 CRPA, which implicitly mentions a time limit of two months. This period is almost three times the period found in the *Commission v Belgium* case – 21 days from receiving the notice. This could raise a point of contention regarding the diligence and pace of review, considering that every extra day could result in losses or changes to the companies involved. In Germany, the process of review is even longer and more bureaucratically burdened. Following Section 58(2) of the AWV *juncto* Section 12(4) AWG, the base period for issuing a certificate of non-objection is four months. This period can then be extended by three months if the assessment procedure reveals particular actual or legal difficulties and by a further one month if the acquisition particularly affects the defence interests of Germany (Section 14a (4) AWG). Given that the majority of companies that meet the FDI Regulation's strategic criteria are also subject to questionable acquisitions by foreign SOEs, a half-year wait period is almost certain for all share transactions covered here. The Italian approach to review is more expedient than the German approach, as public authorities have 45 days to assess a joint Golden Power filing by the parties involved in the transaction. This period can be extended by ten days if additional information from the filing party is required or by 20 days if it is from a third party.

[168] *Commission v Belgium* (n 60) para. 49.

Another restriction to the power of review needed to ensure proportionality is the ability of the government representatives to intervene where there is a threat to the objectives pursued.[169] If the enterprise in question is a public service provider, the Member State should only intervene to ensure compliance with the public service obligations incumbent on them. The limited level of involvement in the jurisdictions investigated stems from the material scope of the FDI regulation – the screening of foreign direct investments into the Union by Member States on security and public order grounds (Art. 1(1) FDI Regulation). This scope has been transposed in the legislation of all the Member States. Thus, the golden shares can only empower the public authorities to review and then approve or reject a share acquisition by a third-country investor. On the other hand, the classical golden shares, found in the funding deals between Germany and Lufthansa and France and Air France, have seen the imposition of conditions that go beyond FDI control. However, these conditions on environmental matters are not so invasive as to restrict trade. This is because they are part of the state's national environmental policy, which corporations such as the one mentioned here will have to follow in the next ten years – courtesy of the Paris Climate Accords.

The last aspect in assessing proportionality would be proportionality *stricto sensu*. Will the use of golden shares, in particular the ex-post review of synthetic ones, restrict trade? This is an unequivocal yes, and the Commission acknowledged it in the regulation's preamble. FDI is a major source of inbound foreign capital that helps national companies grow. However, this capital has been shown to gradually shift control from shareholders who benefit the EU market to those who prioritise the interests of non-EU entities and states. At the same time, the review restricts only those share acquisitions that prove to be a threat to any real or potential factor that could disrupt a Member State's security or public order. Acquisitions that can be restricted to the point of being merely a financial investment, as Germany did with the Port of Hamburg acquisition, or acquisitions that pass the review process, can proceed with no further restrictions.

[169] *Commission v Belgium* (n 60) para. 51.

The assessment of the proportionality of the FDI control measures employed by Germany, France, and Italy, cannot be efficiently subjected to the standard test of whether the Member State should restrict the EU Treaty freedoms of certain companies. This is why proportionality had to be assessed through the lens of the balancing act of the counterbalancing restrictions applied to the restrictive measures. In this light, it can be established that in all instances, proportionality is minimally affected by the exceptionally long period needed for review. However, the margin of appreciation in the review is limited to the intent of the acquisition and the ties to foreign interests. Therefore, we could conclude that the use of golden shares and measures of ex-post review are proportional.

7.5. WEIGHING OF THE EX POST FACTO PREROGATIVE OF THE STATE

As stated in the proportionality assessment, the ability of public authorities to actively participate in company decision-making precludes the right of these companies to autonomous governance. In these cases, the authority crosses the public-private divide to function as a shareholder while using its state competencies as a protective shield. The court clearly states in *Commission v Belgium* that a Member State cannot create rules within their competence as the state and then use them as "…justification for obstacles resulting from privileges attached to their position as a shareholder in a privatised undertaking."[170] Thus, the ability to review must be exercised only while wearing the proverbial "hat" of the state. At the same time, the review regime must be limited to specific decisions concerning the strategic assets of the companies in question, as well as any specific management decisions concerning those assets that may be called into question in any given case.[171] This means that the state can only review, as a public authority, upon the application or request of the limited company, decisions that could impede the aim protected by the golden share system.

In all the jurisdictions researched in this paper, the procedure of review and the matters reviewed follow a similar pattern because they are based on the FDI Regulation and the FDI Guidelines and Guidance. In France, the need for a review of

[170] *Commission v Belgium* (n 60) para. 44.
[171] ibid para. 50.

foreign investments arises when a non-French investor acquires, directly or indirectly, alone or in concert, the threshold of 10% holding of voting rights of a company incorporated under French law (Art. L. 151-3 CMF). After the acquisition is initiated, the investor or the company is required to communicate to the administrative body all the documents and information necessary for the execution of its acquisition and the origin of the funds (Art. L. 151-5 CMF). The review is limited to the fields listed in Art. L. 151-3 and Art. 4 FDI Regulation.

Germany follows a more sophisticated index that may trigger a review depending on the type of company and strategic field in which it operates. A 10% voting rights threshold for companies in Section 55a (1) (1 to 7), a 20% voting rights for companies in Section 55a (1) (8 to 27), and 25% of voting rights if the company does not fit any of these classes. When looking over the categories listed, the threshold of shares acquired needed is lower for fields that have a more direct societal impact than others. Social services and critical infrastructures are higher than ore refining and quantum technologies. This proves the tight link with the protection of national security and services, which is the root of the golden shares law. The review itself is limited to acquisitions where a non-EU resident acquires a definable part of the operation of a domestic company or all the essential operating equipment of a domestic company (Section 55(1a) AWV). The review is not limited only to non-EU acquirers but also covers EU investors if there are indications that an abusive approach or a transaction circumventing the law has been undertaken (Section 55(2) AWV). The subject of the review is limited to the security concerns of the transaction to Germany and other EU Member States and the trustworthiness of the acquirer. Trustworthiness is assessed by considering the political ties of the investor with the government or public authorities of other states or if it engaged in activities that put under risk the security of the public (Section 55a (3) AWV).

As in Germany, Italy follows a tiered approach starting with a 10% vote threshold, going up to 50%, which is necessary to trigger the ex-post review duties (Art. 1(5) DL). The procedure and basis of the review are similar to all other jurisdictions and are based on the protection of public interests and are limited to share transactions (Art. 1(1)(a) DL). What distinguishes this state from others is that public

authorities have the authority to veto shareholder resolutions. In Art. 1(1)(b) DL the state establishes its competence:

> "…to veto the adoption of resolutions, acts or operations of the assembly or administrative bodies of a company which have the effect of modifying the ownership, the control or availability including those concerning the merger or demerger of the company."

While the MS can put the acquisition of shares on hold, subject to the FDI review, they should not be capable of exerting more control over the decision-making of the corporations *in casu*. This allows the authorities to step over the boundary that the CJEU expects the Member States to uphold between company autonomy and the state's legal powers.

The ability of the state to influence ex-post decisions of corporations in which it owns golden shares is a practice that the CJEU does not fully support. There is a presumption of separability between the state as a shareholder and the state itself. In such a case, the Member State's competence to ex post facto review the sale of shares to foreign investors should be permitted under the CJEU's jurisdiction as long as the state does not retain or add additional competencies. This raises the question of Italy's ability to veto corporate resolutions while it should only have the authority to review them and, if necessary, impose restrictions or modifications. At this point, the only clear decision on this matter can be made by the CJEU because the Italian Golden Power Law has had this provision since 2012 and has not been changed since. On the other hand, France and Germany adhere to the requirements of the FDI Regulation and limit their golden share review competencies to inbound foreign investments in strategic fields. Based on the practices of the states in question, France and Germany fully comply with this requirement, while Italy only marginally so. However, one could argue that their authority is limited to share transactions involving foreign investors, which is essentially FDI control. As such, they are not necessarily infringing the limited scope rule of governmental control in the companies subject to golden shares.

7.6. Availability of a Legal Remedy

The possibility of companies, that are subject to golden shares, to appeal in a court of law the review decisions of public authorities is a requirement that does not need an in-depth assessment. This is because the companies that accepted the competence to implement FDI control measures subject to the Regulation must offer a possibility for the parties involved in the screening to access recourse in a national court of law or at an administrative instance (Art. 3(5) FDI Regulation). Hence, France, Germany, and Italy all have incorporated the appeal procedure in case the review brings a negative outcome.

7.7. Assessment of Compliance

The conditions establishing the lawful use of golden shares represent a limited set of parameters that would prevent Member States from abusing their enhanced powers in these companies. This is why over the years, there have been so few successful golden share systems in the EU. With the entry into force of the FDI Regulation, a new possibility to use these mechanisms has arisen, and now they are encouraged by the EU institutions themselves. The Member States that have decided to use golden shares as an FDI mechanism, in particular the ex-post review of foreign shares acquisitions, had to comply strictly with these conditions. From the aforementioned, we can derive that despite some deviations, bureaucratic complexity, and diverging practices, the Member States subject to this research have complied with the conditions established by the CJEU and the EU Treaties. In the worst-case scenario, they have some margin of discretion due to the nature of justifying the restriction of EU Treaty rights, namely ensuring national security.

8. A Shift in Perspective towards Restrictive Measures

In the last two decades, the conditions necessary to justify the infringement of the freedom of establishment and the free movement of capital have not changed much. At the same time, security risks that could trigger their lawful restriction have increased alarmingly. Even in the assessment of previous sections, we could see the heightened possibility to justify the use of golden shares given the actual and potential risk of foreign takeovers. This raises the question: to what extent have the challenges

that Europe has faced (i.e., pandemic, economic crisis) and is still facing (i.e., war, supply chain shortages) led to a shift in the lawfulness of golden shares and other similar structures?

For a Member State to lawfully restrict a corporation's EU Treaty freedoms, they must act upon a matter justified by the Treaty or override requirements of general interest. As discussed in section four, several justifications may be invoked, but all fit within three main categories: public policy, public security, or public health. These categories are open towards interpretation, because, in the practice of the CJEU, the Member State has the authority to determine these circumstances based on their national policies and events.[172] There are, of course, safeguards against arbitrariness and invoking these circumstances for a state's personal needs,[173] but these safeguards become rather irrelevant when the negative event affects all the Member States at the same time, and the Union institutions declare a state of emergency. This shows a duality of perception between Union-wide issues and national crises. When a Member State unilaterally applies restrictions to the freedoms, the CJEU accepts only highly specific, scope-limited justifications such as safeguarding the energy supply in the event of a crisis[174]; safeguarding the provision of telecommunications services in case of a threat of war or of a natural disaster.[175] This seemed appropriate when the EU did not face such high-impact economic, social, and political challenges. Modern challenges, such as global pandemics, state-owned enterprises, and the looming threat of a new war on the continent, have made it possible for measures usually classified as protectionist to be used more frequently and with fewer internal restrictions. Case in point – the FDI Regulation.

The issue of SOEs and foreign acquisitions that plagued the EU market has been discussed for many years, but it took the Covid-19 pandemic to weaken all the Member States for the problem to reach critical mass and for the Regulation to be drafted. As mentioned in section 5.1., the legislative process was noticeably short with little to no arduous deliberation. It came through with the highest level of restriction

[172] *Association Eglise de scientologie de Paris* (n 45).
[173] These were discussed in detail in Section 4.
[174] *Commission v French Republic* (n 17).
[175] *Commission v. Portuguese Republic II* (n 16).

available, balanced solely by a review process and the possibility of appeal. The Regulation covers all FDI so long it has a tangent to a foreign state or public authority and is not limited in time, meaning that the Member States can use these restrictions whenever they like, even if the law was triggered by one crisis from the past. For the sake of clarity, a temporal restriction does not need a specific date. By looking at the justifications accepted by the CJEU, we can see an inclination towards the applicability of restrictions towards finite events – a crisis, a war, and a natural disaster all have a start and an end. The FDI Regulation did not mention any such end, and while Germany and France did consider introducing limits to the investment control measures, using it until roughly 2023, Italy did not.

So, not only has the CJEU demonstrated a shift in its perspective of events that would justify the use of measures restricting FoE and FMoC over the years, but crises have also been approached at the EU institutional level with the intent of preserving the Union's overall economic sovereignty. This could represent a pivotal moment where we will see an acceleration in the restrictive measures that can be undertaken against third countries and their interests represented in the EU through companies and other funds and foundations.

9. The Silver Lining

Within the European Union, the issue of inbound foreign direct investments has been a looming threat for years, and the relevant institutions have not taken significant measures until the situation has reached critical mass. The start of the pandemic in 2019 and the continuous energetic supply chain crisis have destabilised a large number of national and multinational companies and have made them even more vulnerable, underfunded, and ripe for takeovers through foreign direct investments. These situations have stimulated the EU legislator, at the behest of worried Member States, to create a new sub-set of laws that could help them protect themselves and the Union's market. The law *in casu* came in the form of the FDI Regulation 2019/452, which empowered the European Member States to engage in FDI control practices within the strategic sectors enumerated within. The Member States would be allowed to screen for FDI, establishing whether they are ambiguous or hostile and given the

right to block their materialisation. However, the regulation was to serve as just a facilitator while the national legislators were tasked with the legal engineering part of priming their measures to deal with the incoming FDI. Golden shares were chosen as the main tool used to accomplish this objective. While classical contract-based golden shares give more control to the Member States, they have opted for synthetic golden shares, which confer ex-post review competencies to the Member States' public authorities.

The choice of the highly scrutinised and usually restricted golden shares as the preferred *modus operandi* for FDI control has garnered the question of whether they were a suitable and appropriate means to achieve the end established in the Regulation. This paper has gone over all the conditions that facilitate the lawful use of golden shares, as established in the EU Treaties and CJEU case law, and the national practices implemented through golden share reforms. In France, we have seen both contractual golden shares being used as a recapitalisation tool for its struggling national champion Air France. We have also seen the law-based synthetic golden share as a review tool for share acquisitions by non-EU investors in strategic sectors. Across the border, in Germany, a stricter system of review is established through a dual set of laws in the AWV and AWG that allow the Federal Ministry for Economic Affairs and Energy to undertake a cross-sectoral review of investments in more technology-based industries, e.g., robotics, microchips manufacture, artificial intelligence, for non-EU investors and sector-specific review for the military industry for all investors, including EU based ones. Additionally, Germany represented the only practice, where, through the use of golden shares, the national policy for state interventionism threshold has been lowered – from actual threat to public safety or order to probable impairment of safety and order. From a practical perspective, the synthetic golden shares stemming from the AWV and AWG have allowed the German public authorities to review and modify multiple FDI cases, including the tricky share acquisition in the port of Hamburg by a Chinese SOE. In southern Europe, Italy has taken a much more restrictive legal and practical approach to golden shares. Through the periodic revision of the Golden Power Law, the legislative branch has indefinitely given the State the power to review incoming investments from EU and third countries

in an incredibly broad range of sectors. On top of that, they have circumvented the sectoral restrictions through the regulation of the entire Milan Stock Exchange, and, by proxy, the companies listed therein. The public authorities have used their synthetic golden share power to review FDI's, even in an ex-ante fashion, to restrict takeovers of important SMEs that felt financial damage during the Covid-19 pandemic. The government has taken an austere approach to investments coming from China or tied to Chinese funds and has applied the power of the state to review and restrict such equity acquisitions in a draconian fashion. This has proven effective in dissuading opportunistic and potentially detrimental investments in Italy, which has given the state's and the company's financial situation time to recover under the protection of the Golden Power Law.

What we can ascertain in all jurisdictions is that the use of golden shares has been restrictive upon the FoE and the FMoC, but that they are justified and proportional as to the end they try to reach. All measures are based on the protection of public security justification and use a similar approach to review. With some differences, they employ similar proportionality enhancing techniques such as the material and temporal limiters on review and the right to appeal the public authority decision in national courts. From the reports of the Commission, we can see that among the countries that use golden shares as an FDI control mechanism, only one percentile of acquired shares by foreign investors have been restricted, which reduces the assumption of abuse of power by the Member State to a minimal amount, but not zero. The developments in Italy with the Milan Stock Exchange, which is classified within the scope of FDI review, require further vigilance and overview in the matter. While some small matters can be contested in the practical application of golden shares by the researched Member States, the overall test of proportionality has been answered in the positive. Golden shares are indeed an appropriate tool to deal with FDI review and control.

At the same time, due to the shift in the foreign investment policy of the EU and the rising use of golden shares, this could potentially lead to the transformation of the current test used by the CJEU in the proportionality assessment of golden shares. An intriguing development would be if the present assessment will be

morphed into a lower permissibility threshold since the Member States and all EU institutions support the measures used. The test is dependent on the general purview of the parties involved in the Union and the wording of the current and future legislation. In our case, the FDI Regulation itself granted the Member States complete control over all aspects of FDI control, in this instance via golden shares, as long as they effectively ensure EU market security. This development suggests that the Union institutions' usual Treaty rights-oriented strategy may give way to a more EU-interests-oriented approach: the primacy of the EU market in the hierarchy of policy interests, so to speak, and the Member States as guardians to this goal – acting on the Union's direction but using their competencies and powers while being excused for minor abuses due to the value of the goal to European society as a whole.

Nevertheless, one thing is clear – golden shares can be used as a foreign direct investment control tool in the EU. They have proven to be effective, dependable, versatile, and customisable to the personal needs of the Member State using them. The foundations for the use of golden shares have long been established through CJEU case law, and reforms have been enacted long ago in the national laws of the Member States to comply with the Court's judgements. All that was lacking, was a purpose and an EU-level law that could adjust some thresholds and clarify some practices. Both conditions have been fulfilled in the last years, and there are practical results of the implementation of the FDI Regulation and FDI Guidance and Guidelines. As such, golden shares now have a future as an investment control vehicle that allows EU Member States to protect their strategic industries and assets from bad-faith corporate actors that profit off the rights and rules under EU law to further their country's economic and political agendas.

The Green Revolution within the EU's Automotive Industry

Zdzisław Robert Rypniewski[1]

The analysis of Regulation 2019/631 and its impact on the change in average CO2 emissions per new passenger car within the EU-wide passenger car fleet

The world hates change,
yet it is the only thing that has brought progress.[2]
~ Charles F. Kettering

[1] An International Baccalaureate graduate from Poland, second-year student at the European Law School of Maastricht University, with a passion for the automotive industry, history, law and philosophy. The combination of these passions drew the author's attention to the rapidly changing dynamics within the sustainability movement in the automotive industry, which led to the motivation to critically assess these changes, starting with this article.

[2] Charles Kettering, *In Memoriam, Charles F. Kettering* (Southern Research Institute 1959) p. 10.

TABLE OF ABBREVIATIONS

BEV	Battery Electric Vehicles
CO2	Carbon Dioxide
CO2g/km	Grams of Carbon Dioxide per kilometre
EU	European Union
MS	Member States
NASA	National Aeronautics and Space Administration
NEDC	New European Driving Cycle
PEHV	Plug-in Hybrids Vehicles
UN	United Nations
WLTP	Worldwide Harmonized Light Vehicles Test Procedure

1. INTRODUCTION

In 2020, the European Union's (EU) automotive industry revenue reached 968 billion U.S. dollars, having one-third share in the worldwide revenue.[3] However, could such an immense undertaking take place without a significant footprint on the surrounding environment? In 2021, the combined land and ocean temperature worldwide has increased by 1 Degree Celsius[4], at an unprecedented rate, according to National Aeronautics and Space Administration (NASA) not seen in the past 10,000 years.[5] One of the main reasons for such a rapid change is global carbon emission, which, in 2021, reached 40 billion metric tons of carbon dioxide, at least ten times more than in the year 1900.[6] Of the total global CO2 emissions, the road transportation sector contributes about 7%.[7] This seemingly not high but influential number caused a significant stir among EU legislators, especially since the EU automotive market is responsible for 20.5% of worldwide motor vehicle production.[8] For this reason, on the 1st of January 2020 Regulation (EU) 2019/631 entered into force, setting CO2 emission performance standards for new passenger cars.[9]

By setting up stringent emission targets and promoting zero- and low-emission vehicles, the Regulation seeks to reduce CO2 emissions within the new passenger car sector, forcing the automotive companies to make fundamental changes in their policies regarding car production. Therefore, this analysis aims at answering the

[3] Mathilde Carlier, "Global Automotive Manufacturing Market Size 2022" (*Statista* August 9, 2022) <https://www.statista.com/statistics/574151/global-automotive-industry-revenue/> accessed September 24, 2022.

[4] NOAA National Centers for Environmental Information, "State of the Climate: Monthly Global Climate Report for Annual 2021", published online January 2022, accessed September 24, 2022, from https://www.ncei.noaa.gov/access/monitoring/monthly-report/global/202113.

[5] NASA, "Climate Change Evidence: How Do We Know?" (*NASA* September 20, 2022) <https://climate.nasa.gov/evidence/> accessed September 24, 2022.

[6] Rebecca Lindsey and Luann Dahlman, "Climate Change: Global Temperature" (*NOAA Climate.gov*) <https://www.climate.gov/news-features/understanding-climate/climate-change-global-temperature> accessed September 24, 2022.

[7] Ralf Hannappel, "The impact of global warming on the automotive industry", AIP Conference Proceedings 1871, 060001 (2017) <https://doi.org/10.1063/1.4996530> last accessed November, 30 2022.

[8] ibid.

[9] Regulation (EU) 2019/631 of the European Parliament and of the Council of 17 April 2019 setting CO2 emission performance standards for new passenger cars and for new light commercial vehicles, and repealing Regulations (EC) No 443/2009 and (EU) No 510/2011 (recast) [2009 and 2011] OJ L111.

following research question: How does Regulation (EU) 2019/631 of the European Parliament and of the Council, setting CO2 emission performance standards for new passenger cars, contribute to the change in average CO2 emission per new passenger car within the EU-wide passenger car fleet?

The purpose of this analysis is to provide conclusions based on data analysis aiming to set out significant foundations for future, more elaborative, and evaluative research indicating the effectiveness of the EU policies concerning the climate change battle in the transport sector. By indicating and describing various statistical data and sources, the analysis aims at answering the research question by creating a critical, doctrinal but also socio-legal overview of the changes within the passenger car production resulting from the implementation of the Regulation and their contribution to the intended goal of decreasing average CO2 emission levels per new passenger car.

This will be done by describing the tools and the scope of the EU Regulation 2019/631 by firstly indicating why it was created, secondly who is the subject of the legislation, thirdly what exactly is regulated, fourthly until when are the subjects obliged to implement the changes, and finally what are the consequences of non-compliance with the Regulation. Then, the analysis will aim to describe this Regulation's contribution to the average CO2 emissions of new passenger cars within the EU-wide passenger car fleet. The scope of this research was narrowed down to the EU-wide fleet because the Regulation explicitly refers to it, and statistics are widely available. This paper will further address how the Regulation pressured the technological restructuration of the passenger car fleet and show how the addressees of the Regulation convince the market of this new fleet. Finally, it will be illustrated how these phenomena have affected the change in the average CO2 emissions level per new passenger cars in comparison to the goals set out by the Regulation.

2. REGULATION 2019/631

2.1. WHY? - THE UNDERLYING RATIONALE

To understand the motivation of the legislators, we need to go back to 2015. This was the time when the realisation process concerning the seriousness of global climate

change and the need for international cooperation to battle its dire consequences reached its climax during the UN Climate Change Conference in Paris. The Conference resulted in the historic Paris Agreement, a milestone in establishing international cooperation mechanisms which pursue the reduction of global CO2 emissions.[10] For a reason, it is the Paris Agreement that is explicitly cited in the first recitals of the Regulation's preamble.[11] The EU, which ratified this international treaty with all its Member States, obliged itself to undertake long-term actions aimed at reducing CO2 emissions to a minimum.[12] The Paris Agreement marked a turning point in the fight against global climate change. This international treaty accelerated the development of new EU policies and led to a 'legislative trend' prioritising environmental goals. As a result, many legislative packages aimed at reducing the consequences of global climate change were introduced.

The agenda "Europe on the Move" initiated the strategy for pursuing a low-emission mobility plan for a Single European Transport Area.[13] A significant part of the strategy was the Commission's proposal of a regulation aimed at imposing duties on car manufacturers to reduce their CO2 output by setting CO2 standards for new passenger cars and light vehicles.[14] After receiving a positive response from the European Economic and Social Committee, the proposal reached the EU legislators. It was adopted as Regulation 2019/631 on 17th April 2019.

Therefore, the EU institutions created Regulation 2019/631 to meet the demand for climate-neutral policies following Paris Agreement obligations. To fulfil the objectives of the Paris Agreement, the Regulation was designed to pursue the

[10] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.
[11] Regulation (EU) 2019/631 of the European Parliament and of the Council of 17 April 2019 setting CO2 emission performance standards for new passenger cars and for new light commercial vehicles, and repealing Regulations (EC) No 443/2009 and (EU) No 510/2011 (recast) [2009 and 2011] OJ L111, §§ 3 and 4.
[12] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.
[13] EESC, "European Transport Policy: Europe on the Move" (*European Economic and Social Committee* 2018) <https://www.eesc.europa.eu/> last accessed November 21, 2022, p. 75.
[14] ibid p.76.

accelerated transformation of the transport sector towards a zero-emission level.[15] This was especially relevant in light of 'A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy' created by the Commission in February 2015, where it was indicated that the transport sector has a significant potential for decreasing the CO2 levels through tightening the emissions standards.[16] The Commission spotted such a potential based on a fact that as by 2015, 94% of transport in the EU relied on oil products, which in 90% was imported.[17]

Now, being aware of the motivation and the developments preceding Regulation 2019/631, the analysis can proceed to explore the second question – to whom is the Regulation directed?

2.2. WHO? - THE PERSONAL SCOPE

The answer to the question of who the subject of the concerned Regulation is might not be as apparent as it may seem. Taking note of EU law and its principles, especially the direct effect and general application of EU regulations, the most evident addressees of the concerned legislation are EU Member States.[18] This is especially relevant considering the duty conferred on the Member States by article 7 of Regulation 2019/631, which obliges them to monitor and report to the Commission each new passenger car and each new light commercial vehicle registered in its territory accordingly to part A of Annex II of the Regulation constituting a long list of factors that need to be included in the report.[19]

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[15] Regulation (EU) 2019/631 of the European Parliament and of the Council of 17 April 2019 setting CO2 emission performance standards for new passenger cars and for new light commercial vehicles, and repealing Regulations (EC) No 443/2009 and (EU) No 510/2011 (recast) [2009 and 2011] OJ L111, § 4.

[16] European Commission, "COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE, THE COMMITTEE OF THE REGIONS AND THE EUROPEAN INVESTMENT BANK A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy", 25 February 2015, COM (2009) 080 final, p. 2-3.

[17] ibid p. 3.

[18] Treaty on the Functioning of the European Union [2016] OJ C202/1 (TFEU), art. 288.

[19] Regulation (EU) 2019/631 of the European Parliament and of the Council of 17 April 2019 setting CO2 emission performance standards for new passenger cars and for new light commercial vehicles, and repealing Regulations (EC) No 443/2009 and (EU) No 510/2011 (recast) [2009 and 2011] OJ L111, Art. 7.

Nevertheless, when looking at the content, scope, and purpose of the Regulation, it is undeniable that it is not the Member States that are primarily affected by this legislation, but those responsible for placing new cars on the EU market – car manufacturers. Even though the Regulation does not directly specify the addressees of the measures at stake, it indicates its scope under article 2 applying to new passenger cars.[20] One can therefore state that the primary actors bearing the most responsibility for the new CO2 emission standards are car manufacturers. This is especially true considering that the burden of following the specific emissions targets under article 4 of Regulation 2019/631 lies on the manufacturer's shoulders, which is explicitly mentioned.[21] However, the notion of "manufacturer" is quite vague. Luckily, the Regulation in question defines it under article 3:

"Manufacturer' means the person or body responsible to the approval authority for all aspects of the EC type-approval procedure in accordance with Directive 2007/46/EC and for ensuring conformity of production."[22]

While the definition itself might seem very complex and ambiguous, it simply implies that a manufacturer is any person or body that places vehicles on a market that are following European administrative and technical requirements as indicated in Directive 2007/46/EC, which mostly revolves around formalities regarding car production standards.[23] Moreover, under article 2(4) and article 10 the Regulation distinguishes between manufacturers responsible for fewer than 1000 passenger cars or light vehicles registered in the Union, those responsible for less than 10.000 and those responsible for more that. That is crucial regarding the different levels of responsibilities based on these three types of actors, whereas the former ones are fully

[20] Regulation (EU) 2019/631 of the European Parliament and of the Council (n 19) art. 2.
[21] ibid art. 4.
[22] ibid art. 3.
[23] Directive 2007/46/EC of the European Parliament and of the Council establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles [2007] OJ L 263, p. 1.

excluded from the scope of the Regulation.[24] This aspect, however, will be referred to in the next section.

2.3. WHAT? - THE MATERIAL SCOPE

The reflection of the main aim and purpose of the legislation finds itself in its material scope, which is of particular significance. The title of Regulation 2019/631, 'establishing new CO2 emission performance standards for new passenger cars and new light commercial vehicles', is already very suggestive. However, there are still aspects calling for further explanation.

Firstly, it needs to be established what new passenger cars are. Pursuant to article 2(1) of the Regulation, a passenger car is a motor vehicle of category M1.[25] Unsurprisingly, this does not explain much to a non-EU legislator, and that is where Directive 2007/46/EC becomes the source of clarification. Under Annex II of that directive, M1 motor vehicles are:

"Vehicles designed and constructed for the carriage of passengers and comprising no more than eight seats in addition to the driver's seat."[26]

One unclear concept remaining is the question of what makes a passenger/commercial vehicle a "new" one. According to article 2(1) of Regulation, this relates to the aspect of registration since a new car is one registered for the first time in the Union which has not been registered previously outside of the Union.[27]

Moving on to the second essential aspect referring to the new standards matter: Firstly, the Regulation distinguishes between standards for manufacturers producing

[24] Regulation (EU) 2019/631 of the European Parliament and of the Council of 17 April 2019 setting CO2 emission performance standards for new passenger cars and for new light commercial vehicles, and repealing Regulations (EC) No 443/2009 and (EU) No 510/2011 (recast) [2009 and 2011] OJ L111, art. 2(1).
[25] ibid art. 2(4).
[26] Directive 2007/46/EC of the European Parliament and of the Council establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles [2007] OJ L 263, Annex II, Part I, Appendix 1.
[27] Regulation (EU) 2019/631 of the European Parliament and of the Council of 17 April 2019 setting CO2 emission performance standards for new passenger cars and for new light commercial vehicles, and repealing Regulations (EC) No 443/2009 and (EU) No 510/2011 (recast) [2009 and 2011] OJ L111, art. 2(1).

more than 10.000 cars registered annually in the Union and those below this threshold. With regards to the former ones, according to article 1(2), the Regulation sets a target of 95g CO2/km for the average emissions of new passenger cars.[28] 95g CO2/km is approximately equivalent to the emissions produced by driving an average gasoline-powered car for about 0.6 miles or 1 kilometre. To achieve that, the Regulation specifies the formula determining the specific CO2 emissions for each, individual, new passenger car in Annex II. Most importantly, the formula considers the vehicle's mass decisive, meaning that the heavier it is, the more CO2 it can produce.[29] However, as indicated earlier, the average target of CO2 emission for the whole fleet of new passenger cars manufactured cannot exceed 95g CO2/km. Therefore, manufacturers need to strategically establish what kind of models in what quantity can constitute their fleet. In terms of the latter ones, such manufacturers, can apply for a derogation under article 10 of the Regulation if they produce less than 10.000 registered cars annually in the Union. In such a case, the manufacturer can indicate his own CO2 emissions reduction standards if it is consistent with its reduction potential.[30] In the end, the Commission still needs to give its consent and assess the fulfilment of these criteria. However, it still leaves quite a wide margin to such manufacturers compared to the strict 95g CO2/km standard for "ordinary" manufacturers.

Considering the information mentioned above, new passenger cars' CO2 emissions standards seem comprehensible. The EU legislators, however, being aware of the importance of the progressive aspect of the transition to clean energy from fossil fuels, indicated a limited period for which these standards apply and left the gate opened for tightening the standards in future, which will be covered in the next section.

2.4. When? - The Timelines Regarding the Implementation of the New Standards

[28] Regulation (EU) 2019/631 of the European Parliament and of the Council (n 19) art. 1(2).
[29] ibid Annex II, Part I, Appendix 1.
[30] Regulation (EU) 2019/631 of the European Parliament and of the Council of 17 April 2019 setting CO2 emission performance standards for new passenger cars and for new light commercial vehicles, and repealing Regulations (EC) No 443/2009 and (EU) No 510/2011 (recast) [2009 and 2011] OJ L111, art. 10(1).

Most EU legislative acts, especially regulations due to their direct applicability, are relatively straightforward concerning its temporal scope and the moment of when a new law/ rule enters into force. In that regard, Regulation 2019/631 is special because it prescribes three separate periods during which different CO2 emission standards apply. This is significant since it implies that some parts of the Regulation become inapplicable after a certain time lapse, making it self-adjusted to the moment.

The first period has already started on 1st January 2020, so at that exact moment the Regulation became applicable. It will last until 1st January 2025.[31] This is when the EU fleet-wide standards of 95g CO2/km, as explained in the preceding section, are applicable in the unchanged form. The situation changes with the start of the second period referred by the Regulation on 1st January 2025, lasting until 1st January 2030. During this period, the EU fleet-wide standards will be lowered by 15% compared to the target from 2021.[32] The reference to the year 2021 might be confusing, however, it refers to the planned, changed method of CO2 emissions measurements that took place that year, simultaneously changing the reference target for the standards (see: Chapter III, section 3).[33] Analogically, during the start of the third period on 1st January 2030, the emissions standards will fall by 37.5% compared to the 2021 target.[34] With the start of each of these periods, the standards become more restrictive, and the Regulation also imposes new obligations on its addressees. From 1st January 2025, the manufacturers producing more than 10 000 registered cars annually will also be obliged to ensure that 15% of their passenger cars fleet constitutes of zero- and low-emissions vehicles. From the beginning of the year 2030, this obligatory share will be increased to 35%.[35]

As it is visible, depending on the moment, the manufacturers will be obliged not only to comply with more stringent CO2 emission standards but also to restructure their passenger car fleet based on the technologies used in their cars. This pressures the manufacturers to transition from combustion engines to alternatively fuelled

[31] Regulation (EU) 2019/631 of the European Parliament and of the Council (n 19) art. 1(1)(2).
[32] ibid art. 1(4)(a).
[33] ibid art. 1(2).
[34] ibid art. 1(5).
[35] ibid art. 1(7)(a)(b).

vehicles. Concerning recent developments, such as the first agreed Commission's proposal of the "Fit for 55" legislative packages prohibiting registration of any combustion engine passenger car from 2035 onwards, this pressure only builds in strength leading to a zero-emission passenger car transportation goal.[36] Nevertheless, what if a manufacturer will not comply with the new standards?

2.5. What Consequences? - Cases of Non-Compliance with the New Standards

Under article 8 of the Regulation, at the end of each year, the Commission is obliged to impose a so-called "excess emission premium" fine on the manufacturer, which exceeds the average CO2 emission standards.[37] The fine is calculated by multiplying the CO2 emission surplus by 95 EUR and then by the number of newly registered vehicles.[38] For example, suppose a car manufacturer X produces a passenger car fleet with average emissions of 100g CO2/km at the end of the year 2022 and 100 000 of these cars are registered. In that case, he will be obliged to pay a fine amounting to 47 500 000 EUR.[39] Even for the wealthiest car manufacturers, such fines are severe since the more cars one produces, the harsher the fines become.

Concerning how unbeneficial the non-compliance with the new CO2 emissions standards is, the Regulation leaves no choice to the manufacturers. It forces them to completely restructure their car production to comply with strict quality boundaries. The second part of this research paper will analyse how the manufacturers comply with such standards and what measures they implement to pursue the aim and purpose of Regulation 2019/631.

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[36] European Parliament, "Reducing Car Emissions: New CO2 Targets for Cars and Vans Explained: News: European Parliament" (*European, Parliament June* 9, 2022) <https://www.europarl.europa.eu/news/en/headlines/society/20180920STO14027/reducing-car-emissions-new-CO2-targets-for-cars-and-vans-explained> last accessed December 5, 2022.

[37] Regulation (EU) 2019/631 of the European Parliament and of the Council of 17 April 2019 setting CO2 emission performance standards for new passenger cars and for new light commercial vehicles, and repealing Regulations (EC) No 443/2009 and (EU) No 510/2011 (recast) [2009 and 2011] OJ L111, art. 8(1).

[38] ibid art. 8(2).

[39] $\left(100\text{g}\frac{\text{CO2}}{\text{km}} - 95\text{g}\frac{\text{CO2}}{\text{km}}\right)$ x 95 EUR x 100000

3. How Did the Regulation Impact the Average CO2 Emission Per New Passenger Car in the EU-Wide Fleet? A Balancing Test.

The severity of fines imposed on a car manufacturer that does not comply with the new standards is an effective deterrent to potential adversaries within the industry. Car manufacturers need to look for ways to obey the limits by implementing changes in ways of production. If the current combustion engine cars exceed the authorised CO2/km limits, the most obvious way is to switch to new technologies emitting significantly less CO2. However, what if the current technologies are still imperfect and inferior to internal combustion engines in many respects, such as vehicle range?[40] In such a situation, the manufacturers need to strike a balance to comply with both new emissions standards and market expectations. This section will explore how the EU automotive industry and its passenger car fleet seek this balance by, on the one hand, progressively converting to new technologies in car production and, on the other, convincing the market that the benefits of new technologies outweigh their disadvantages.

3.1. The Change in Used Technologies – Restructuring the EU-Wide Passenger Car Fleet

Even though not the only one, the most advanced technology aimed at replacing combustion engines is the electric one.[41] Electric cars include technologies such as battery electric vehicles (BEV) and plug-in hybrids (PEHV).[42] Between 2010 and 2019, the share of electric cars among all new cars registered in the EU increased by merely 3%, reaching a slightly more than a 3% share.[43] After the introduction of

[40] John W. Brennan and Timothy E. Barder, "Battery Electric Vehicles vs. Internal Combustion Engine Vehicles" (*Arthur D. Little* 2016) <https://www.adlittle.de/sites/default/files/viewpoints/ADL_BEVs_vs_ICEVs_FINAL_November_292016.pdf> last accessed December 13, 2022.
[41] Douglas Miller and Mark Porter, "Electric Vehicles Are the next Dominant Class of Renewable Energy Buyers" (*RMI* March 2, 2022) <https://rmi.org/electric-vehicles-are-the-next-dominant-class-of-renewable-energy-buyers/> last accessed December 13, 2022.
[42] EEA, "New Registrations of Electric Vehicles in Europe" (*European Environment Agency* 2022) <https://www.eea.europa.eu/ims/new-registrations-of-electric-vehicles> last accessed December 13, 2022.
[43] ibid.

Regulation 2019/631 in 2019, the share increased to 18% in 2021.[44] Therefore, within only two years after the implementation of the new standards, the share of electric cars registered in the EU increased by five times. This is not surprising, looking at the sales statistics. In the third quarter of 2022, electric and hybrid models constituted 43% of all cars sold in the EU.[45] Diesel cars, for instance, accounted for 16.5% compared to 32% in 2019.[46] It is thus visible how accelerated the process of converting fossil-fuel-powered cars to electric ones became after introducing Regulation 2019/631. Moreover, some of the biggest manufacturing brands, such as Volkswagen, already indicated goals regarding the share of electric vehicles in their sales amounting to even 70% by 2030, significantly exceeding the EU's Regulation aim.[47]

As it is visible, the transition to "clean energy" vehicles is inevitable and flourished after the introduction of the Regulation, but was this possible only by the mere fact of its existence? As indicated earlier, electric technology is still inferior to combustion engines in many aspects, so how could the market be persuaded to opt for clean energy vehicles instead?

3.2. The Change in Market Expectations – Policies Aimed at Encouraging Consumers to "Clean Energy" Passenger Cars

Most importantly and explicitly, Regulation 2019/631 aims at regulating the qualitative aspect of car manufacturing. However, as indicated earlier, this cannot happen without meeting the market expectations, which are rooted in the combustion

[44] ibid.
[45] Nick Carey, "EVs and Hybrids Account for 43% of Third-Quarter EU New Car Sales" (*Reuters* November 3, 2022) <https://www.reuters.com/business/autos-transportation/evshybrids-account-43-third-quarter-eu-new-car-sales-2022-11-03/> last accessed December 13, 2022.
[46] Statista Research Department, "Europe: Diesel Car Sales Share by Country" (*Statista* March 10, 2022) <https://www.statista.com/statistics/425113/eu-car-sales-share-of-diesel-engines-by-country/> last accessed December 13, 2022.
[47] Volkswagen AG, "Way to Zero: Volkswagen Presents Roadmap for Climate-Neutral Mobility" (*Volkswagen Newsroom* April 29, 2021) <https://www.volkswagen-newsroom.com/en/press-releases/way-to-zero-volkswagen-presents-roadmap-for-climate-neutral-mobility-7081> last accessed December 13, 2022.

engine standards. This section therefore explores how the addressees of the Regulation encourage consumers to "clean energy" vehicles.

First and foremost, the primary actors in this process are those concerned mainly with the market – car manufacturers. The implementation of Regulation 2019/631 fuelled a massive marketing battle aimed at informing consumers about the need for such changes and convincing them to choose new, alternatively fuelled vehicles from their offer. One of the predominant examples is already mentioned Volkswagen, which launched its "Way to Zero" campaign in 2021, declaring its strategy to become carbon neutral by 2050.[48] Through the campaign, the brand seeks to encourage the consumers to consider the outweighing benefits of electric vehicles in the form of their innovative technologies enabling cheaper and smoother transportation. Another objective is to spread awareness concerning the importance of complying with the Regulation's goals and Paris Agreement's terms.[49] In the first nine months of 2022, Volkswagen's sales of electric vehicles grew by 25% compared to the preceding year in which the campaign was introduced.[50] The manufacturer aims to spend over 14 billion euros on this campaign by 2025.[51] Volkswagen is, however, not the only brand that announced pivotal changes regarding carbon-neutrality. Toyota, the largest producer of light vehicles, did it already in 2017, as well as the Renault-Nissan-Mitsubishi Alliance, which plans to reach zero CO2 impact by 2050 through introducing new vehicles, vehicle manufacturing methods and optimized operations.[52] Thus, these marketing efforts not only benefit car manufacturers by increasing their sales but also help them comply with the new Regulations and contribute to the shift towards clean energy vehicles.

[48] Volkswagen AG (n 47).
[49] ibid.
[50] Zachary Shahan, "Volkswagen Bev Sales Nearly 500,000 a Year - Ewan McGregor Now Providing a Boost" (*CleanTechnica* October 17, 2022) <https://cleantechnica.com/2022/10/18/volkswagen-bev-sales-nearly-500000-a-year-ewan-mcgregor-now-providing-a-boost/> last accessed December 13, 2022.
[51] Interia, "The Ambitious Plan of Volkswagen" (*Motoryzacja w INTERIA.PL* April 29, 2021) <https://motoryzacja.interia.pl/wiadomosci/producenci/news-way-to-zero-czyli-ambitny-plan-volkswagena-zainwestuja-niewy,nId,5200448> last accessed December 13, 2022.
[52] Alejandro Enríquez, "World's Largest Automakers Go Carbon Neutral" (*Mexico Business*, 2017) <https://mexicobusiness.news/automotive/news/worlds-largest-automakers-go-carbon-neutral> last accessed 6 June 2023.

Secondly, the other vital actors are the Member States themselves. By launching policies which shall provide benefits exclusively to the owners of electric vehicles, Member States effectively contributed to the encouragement of consumers towards "clean energy" vehicles. A notable example is the German Government that introduced an environmental bonus granting each consumer of an electric vehicle 4,000 euros, and 3,000 euros for the purchase of the plug-in hybrid one.[53] The policies can also aim at the operational benefits. For instance, in its law on electromobility from 2021, the Polish Government introduced a parking fee exemption for electric vehicles, but also the possibility for the regional municipalities to introduce so-called "Clean Transport Zones", enabling only electric vehicles to enter the city centre.[54] Besides that, electric vehicles are from then on allowed to drive on the bus lanes, effectively avoiding traffic jams.

Clearly, both the manufacturers and the Member States, actively undertook actions to promote and restructure the market's needs and expectations to accelerate the transition from combustion engines to electric ones. Thanks to national policies, the demand for electric vehicles is continuously progressing, which enables car manufacturers to comply with the new standards imposed by Regulation 2019/631. Nevertheless, how did these policies and impacts of the Regulation contribute to the decrease in CO2 emissions within the transportation sector?

3.3. The Impact on the CO2 Emissions Decrease

Finally, this section will analyse how the described developments pressured by Regulation 2019/631 contributed to reducing the CO2 emission levels as pursued by the Regulation in question.

[53] BMWK - Federal Ministry for Economics Affairs and Climate Action, "Electric Mobility in Germany" (*BMWK*2022) <https://www.bmwk.de/Redaktion/EN/Dossier/electric-mobility.html> last accessed December 13, 2022.

[54] 2018 Electromobility and Alternative Fuels Act *(Ustawa o elektormobilności i paliwach alternatywnych*) (PL) (Dz.U. z 2018 r., poz. 317), art. 12a.

In 2019, at the time of the introduction of the Regulation, the average CO2 emission for new passenger cars amounted to 122g CO2/km.[55] In 2020, this figure fell to 107,5g CO2/km. Therefore, in just one year it decreased by 14,5g CO2/km, a change that before 2010 took place at the rate of at least ten years.[56] In 2021, there was a transition from the New European Driving Cycle (NEDC) test to the Worldwide Harmonized Light Vehicles Test Procedure (WLTP) that changed the point of reference and converted the limit of 95g CO2/km to equivalent 119g CO2/km for the 2020-2025 period.[57] The motivation behind transitioning from NEDC to WLTP was to address the shortcomings of the NEDC cycle, which had become outdated and no longer representative of modern driving styles.[58] The NEDC cycle had an average speed of 34 km/h, smooth accelerations, few and prolonged stops, and a top speed of 120 km/h. In contrast, the WLTP was designed to be more representative of real and modern driving conditions. It is 10 minutes longer, with a more dynamic velocity profile featuring quicker accelerations followed by short brakes.[59] According to WLTP, in 2021, the average CO2 emission values for passenger cars amounted to 115g CO2/km, complying with the 119g CO2/km standard.[60] Moreover, according to the International Council on Clean Transportation, all manufacturers met their 2021 CO2 targets.[61]

It is, therefore, visible that the current trend effectively leads to compliance with the newly established emission standards by Regulation 2019/631. Suppose car

[55] EEA, "Average Co_2 Emissions from New Passenger Cars" (*European Environment Agency* September 26, 2022) <https://www.eea.europa.eu/data-and-maps/daviz/average-emissions-for-new-cars-8#tab-chart_1> last accessed December 13, 2022.
[56] ICCT, "CO2 Emissions from New Passenger Cars in Europe: Car Manufacturers' Performance in 2021" (*International Council on Clean Transportation* October 11, 2022) <https://theicct.org/publication/CO2-new-passenger-cars-europe-aug22/> last accessed December 13, 2022.
[57] Regulation (EU) 2019/631 of the European Parliament and of the Council of 17 April 2019 setting CO2 emission performance standards for new passenger cars and for new light commercial vehicles, and repealing Regulations (EC) No 443/2009 and (EU) No 510/2011 (recast) [2009 and 2011] OJ L111.
[58] Stephen E. Plotkin, "Examining Fuel Economy and Carbon Standards for Light Vehicles", Discussion Paper No. 2007-1 (December 2007).
[59] WLTP, 'Worldwide Harmonised Light Vehicle Test Procedure' (*WLTPfacts.eu*, 6 September 2017) < https://www.wltpfacts.eu> last accessed 25 May 2023.
[60] ICCT, "CO2 Emissions from New Passenger Cars in Europe: Car Manufacturers' Performance in 2021".
[61] ICCT (n 60).

manufacturers will maintain such a pace. In that case, the ambition to decrease CO2 emissions to 0g CO2/km per newly registered passenger car by 2035, as indicated by the Regulation, is within reach and can start a period of only zero-emission vehicles which means that from this year it will not be possible to find combustion cars in any car showrooms in EU. However, there are doubts regarding the impact of the Regulation, as it does not address the carbon footprint of production or the controversial supply chain for lithium batteries.[62] This raises the question of the extent to which the reduction in CO2 emissions per new passenger car has a positive impact on the environment? Whether it is not just an illusory change that allows for so-called "greenwashing" that worsens environmental sustainability in certain sectors? However, such questions require much more in-depth research, looking not only at the average CO2 emissions per newly registered car, but also at the overall emissions within the transport system with a particular focus on the changes in the supply chain brought about by the regulation in question.

4. CONCLUSION

The main objective of this research was to answer the question of how Regulation 2019/631 contributes to the change in the average CO2 emissions per new passenger car within the EU-wide passenger car fleet? The analysis reached the following conclusions:

The first section of the analysis indicated that the Regulation came as the result of the legislative development aimed at battling the dystopian effect of global climate change. The primary source of origin is the Paris Agreement establishing international cooperation aimed at battling CO2 emissions, but also the potential for improvement within the transportation sector, significantly contributing to the extent of the problem within the EU. Secondly, the Regulation mainly addresses the car manufacturers as the ones responsible for complying with the new standards, distinguishing between three different groups of manufacturers depending on the quantity of their production.

[62] Elizabeth Partsch, "Are Lithium Batteries for Electric Vehicles a Threat to the Environment?" (*Impakter* April 28, 2022) <https://impakter.com/electric-vehicles-lithium-batteries/> last accessed December 22, 2022.

Thirdly, the new CO2 emission standards can vary depending on the group under which a particular manufacturer falls and aims primarily at the average of 95g CO2/km per new passenger car registered within the first indicated period. Moreover, the Regulation strives for only carbon-neutral passenger cars production by 2035, indicating three periods to which progressively stricter standards apply. Finally, the Regulation punitively fines manufacturers not complying with the standards.

The second section explored how the EU-wide passenger car fleet changed as the result of complying with the new standards. It indicated a statistical trend showing that the Regulation pressured the manufacturers to transition from combustion engine technology to mainly electric one, forcing them to restructure their new passenger car fleet. It explored how the manufacturers and Members States strike a balance by adhering to the standards and meeting the consumer's expectations through promoting and restructuring the market's needs and awareness of the problem at stake. It established that the changes within the new passenger car production, aimed at compliance with the new standards, contributed positively to the planned decrease in the average CO2 emission levels per newly registered passenger car. This way, it described a significant contribution of the legislation to the decrease in average CO2 emissions per new passenger car within the EU-wide passenger car fleet.

Nevertheless, this analysis is just a reference point for much more ambitious research that could precisely assess the contribution of the Regulation to the real CO2 emission problem. This analysis was based only at the average CO2 emission per new passenger car factor, but to draw critical conclusions, much more elements need to be analysed.

Return Detention in Post-2015 Germany –Legal Reform and Compliance with the Multi-layered Prohibition of Arbitrary Detention

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TABLE OF ABBREVIATIONS

ACHR	American Court on Human Rights
BGH	Bundesgerichtshof (German Federal Court of Justice)
BVerfG	Bundesverfassungsgericht (German Federal Constitutional Court)
CJEU	Court of Justice of the European Union
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FamFG	Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction)
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
JRS	Jesuit Refugee Service
NGO	Non-Governmental Organisation
UDHR	Universal Declaration of Human Rights
UN	United Nations
WGAD	Working Group on Arbitrary Detention

1. INTRODUCTION

Recent years have unveiled a continuous global trend of increasing detention of migrants.[2] This is especially true in the context of third-country nationals subjected to return detention prior to enforced deportation. As Professor Costello remarks: "With deportability comes detainability".[3]

Correspondingly, driven by political imperatives produced by the 2015 influx of migrants, Germany has continuously increased its capacity and practice of detaining individuals subjected to return procedures.[4] In some Länder,[5] every second person ordered to leave was detained to ensure deportation.[6] These realities contrast international and European Union (EU) law on arbitrary deprivation of liberty, which explicitly prescribe the exceptional nature of return detention as ultima ratio.[7]

Against this backdrop, this paper analyses the compatibility of German legislation on pre-deportation detention with fundamental supranational frameworks. Thereby, this article aims to contribute to the international academic discourse, as well as amplify the voices of national organisations that have called attention to the German mechanics of return detention.[8] While the proliferation of return detention

[2] Robyn Sampson and Grant Mitchell, 'Global Trends in Immigration Detention and Alternatives to Detention: Practical, Political and Symbolic Rationales' (2013) 1 Journal on Migration and Human Security, p. 97.

[3] Cathryn Costello, *The human rights of migrants and refugees in European law* (Oxford University Press 2015) p. 280.

[4] Bundestagsdrucksache (hereinafter: BT-Drucks) 19/31669 (04 August 2021), p. 1f. <https://dserver.bundestag.de/btd/19/316/1931669.pdf> accessed 22 May 2023.

[5] The German term *Länder* refers to the sixteen states of the federal republic of Germany.

[6] BT-Drucks 19/31669 (04 August 2021), p. 2 < https://dserver.bundestag.de/btd/19/316/1931669.pdf> accessed 22 May 2023.

[7] See for instance article 17(1) of Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals; UN Human Rights Committee (HRC), Concluding Observations (9 May 2018) UN Doc CCPR/C/HUN/CO/6, para. 46 (b).

[8] Pro Asyl, Stellungnahme zum Entwurf eines Zweiten Gesetzes zur besseren Durchsetzung der Ausreisepflicht (29 May 2019), p. 16f. <https://www.proasyl.de/wp-content/uploads/PRO-ASYL_Stellungnahme-zum-Geordnete-R%C3%BCckkehr-Gesetz_Sachverst%C3%A4ndigenanh%C3%B6rung.pdf> accessed 9 May 2023; Deutscher Caritasverband e.V., Stellungnahme zum Gesetzesentwurf der Bundesregierung eines Zweiten Gesetzes zur besseren Durchsetzung der Ausreisepflicht (Geordnete-Rückkehr-Gesetz) (3 June 2019), p. 12 <https://www.asyl.net/fileadmin/user_upload/publikationen/Stellungnahmen/StellungnDCV/Caritas_Stellungnahme_zum_Geordnete-Rueckkehr-Gesetz.pdf> accessed 9 May 2023; Hilfe für Menschen in

has increased academic interest, this paper provides a contextual critique by positioning and analysing domestic legislation within its supranational legal regime.

Germany is of particular interest for this research because it returns the highest number of migrants within the EU,[9] reflecting its legislative approaches. The State's relevance within and beyond the EU's borders further confers upon it a significant leverage to influence wider political and legal developments. As a comprehensive analysis of legal regulation exceeds the scope of this paper, the following remarks focus on two recently adopted reforms, namely the federal Orderly Return Act and the state-level Deportation Detention Act of North-Rhine Westphalia. As one of the Länder, North-Rhine Westphalia is responsible for the enforcement of federal laws and, as such, competent to adopt respective legislation. In this respect, it has, for the past seven years consecutively, effected the most returns within Germany,[10] and holds the largest return detention facility in the country.[11]

In this context, this research focuses on the question of whether and to what extent the German legal regime, instances through recent reforms, adheres to the legal obligations derived from the prohibition of arbitrary detention imposed by International, EU and domestic constitutional law. As such, this paper aims to achieve two heterogeneous objectives. Firstly, derived from the legal analysis of the multi-layered framework on deprivation of liberty, this research establishes six distinctive criteria, the absence or negation of which indicates a violation of standards set by such a framework. Secondly, the criteria are applied for the examination of German legislation to analyse the latter's compatibility with the legal macrostructure.

Abschiebehaft Büren e.V.,Anhörung zum Abschiebungshaftvollzugsgesetz (7 November 2018) Stellungnahme 17/901 <https://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument/MMST17-901.pdf> accessed 9 May 2023.

[9] European Migration Network, Annual Report on Migration and Asylum 2019, Statistical Annex (December 2020), p. 27 <https://www.emn.at/wp-content/uploads/2019/12/emn-arm-2019-statistics-annex.pdf> accessed 9 May 2023.

[10] BT-Drucks 20/890 (02 March 2022), p. 16 <https://dserver.bundestag.de/btd/20/008/2000890.pdf> accessed 23 May 2023; Bundeszentrale für politische Bildung, Zahlen zu Asyl in Deutschland, Abschiebungen in Deutschland (19 April 2022) <https://www.bpb.de/themen/migration-integration/zahlen-zu-asyl/265765/abschiebungen-in-deutschland/#node-content-title-1> accessed 30 January 2023.

[11] BT-Drucks 19/31669 (04 August 2021), p. 24.

2. METHODOLOGY

Reflecting the twofold objective of this research, the paper is logically divided into two parts. The first section commences with a reflection upon the current state of the arts, which predominantly neglects a comprehensive analysis of domestic regulation on return detention and its adherence to superseding legal standards. This paper thus, analyses primary sources of International, EU, and German law, including legislation and relevant jurisprudence.

This contribution strongly emphasises the fundamental rights perspective, thus, referring to the underlying values enshrined in the legal instruments. In the field of human rights, this approach ensures that human rights are not diminished to purely formal norms. The prohibition of arbitrary deprivation of liberty allows for the adoption of such an approach, as the standard forms an integral part of EU and German legislation.

The analysis of the supranational framework follows a comparative research method. As such, the study of primary sources facilitates an information synthesis, which permits the revelation of gaps and ambiguities between distinct legal sources. Moreover, juxtaposing legal frameworks clarifies the general legal tenor and thereby emphasises core values shared across legislations. An integrated reading of the sources further adds to this. It highlights the similarities and cornerstones of legal sources and demonstrates the growing interrelation between international and regional human rights frameworks.

Based on the comparative analysis, essential cornerstones established within the different legal instruments are identified. These legal principles reflect the most pertinent guarantees enshrined in the law for the protection of the right to personal liberty. As such, the identification facilitated by this paper is grounded in the widespread nature of the respective aspects and their recognition as fundamental key elements to the field of law under research. The identification of these criteria concludes the examination of the International, EU, and domestic legal frameworks, and provides the groundwork for the compliance analysis following thereafter. The identified criteria include (i) judicial control, (ii) access to information, (iii)

lawfulness, (iv) the purpose of deportation, (v) appropriate places and conditions, and (vi) proportionality.

These six principles are applied in the second part of this research, which engages with legal reforms in the field of return detention in Germany and examines their compliance with superseding legal frameworks. After a brief introduction of the amendments, each criterion is addressed individually. To examine Germany's adherence to these standards, the implications of the legal reform and their potential interference with these criteria are discussed.

Notably, these criteria do not claim universal validity. Instead, they are put forward as a helpful tool, assisting in understanding the interrelated legal frameworks. These designated standards facilitate the analysis of the legislation by disentangling the net of state obligations and instead producing distinguished benchmarks which reflect the requirements of legal regulation regarding arbitrary deprivation of liberty. Further, the identified criteria reflect international consensus, thereby underscoring the relevance of the legal regulation under analysis. Concurrently, this approach facilitates the identification of lacunae and ambiguities within the reforms under examination and, as such, assists in the study of state compliance.

While pinpointing legal interferences with the right to personal liberty, this paper does not pursue a solution of the like. Instead, in line with Benhabib,[12] this contribution supposes that contradictions between fundamental human rights and territorial rights of states are inherent to legal systems, hence difficult to overcome. Against this backdrop, this research seeks to identify and call attention to fundamental rights issues in the context of German legal practice relating to return detention. Accordingly, this paper pursues to take part in the strengthening of fundamental rights.

3. TERMINOLOGY

To provide guidance, some terms call for clarification. "Detention" refers to the deprivation of liberty or the confinement in a closed space,[13] including more severe

[12] Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) p. 11.
[13] UNHCR, Policy on Detention Monitoring (November 2015) UN Doc UNHCR/HCP/2015/7, p. 13; UNHCR, Detention Guidelines (2012), para. 5.

restrictions of motions within a narrower space than those associated with the sole interference of the freedom of movement.[14] Human Rights instruments prominently apply the terminology of "deprivation of liberty" to refer to the concept of detention, as endorsed by the UN Commission on Human Rights.[15] In accordance with the practice of the UN Working Group on Arbitrary Detention (WGAD), the term detention is used in the following abstracts to refer to the internment of third-country nationals during the deportation procedure.[16]

The term "immigration detention" refers to the deprivation of liberty for migration-related reasons, such as an alleged breach of domestic conditions for entry, stay, or residence.[17] As such, "return detention" aims at securing a "seamless", that is, practically enforceable deportation.[18] Synonyms include the terms "pre-removal detention" or ("pre-) deportation detention". In line with European legislation, this paper uses the term "return detention". While the German legal regime further distinguishes between different categories of return detention,[19] a meticulous differentiation is not necessitated by the objective of this research. The Länder themselves demonstrate the mere technical relevance of these distinctions.[20]

4. State of the Arts

[14] HRC, General Comment No. 35 on Article 9 (liberty and security of person) (December 2014) UN Doc CCPR/C/GC/35, para. 5.
[15] UN Commission on Human Rights, Res. 1997/50 (1997) UN Doc E/CN.4/1997/50.
[16] UN Human Rights Council, Report of the Working Group on Arbitrary Detention (WGAD) (21 July 2022) UN Doc A/HRC/51/29.
[17] Michael Flynn, 'Who must be Detained? Proportionality as a Tool for Critiquing Immigration Detention Policy' (2012) 13 Refugee Survey Quarterly, p. 40, 42f.; Mariette Grange and Izabella Majcher, 'When Is Immigration Detention Lawful? The Monitoring Practices of UN Human Rights Mechanisms' (2017) Global Detention project Working Paper No. 21, p. 1f. <https://www.globaldetentionproject.org/wp-content/uploads/2017/02/Grange-Majcher-GDP-WP-Final.pdf> accessed 17 November 2022.
[18] Johanna Caroline Günther, 'Debating deportation detention in Germany' in Elzbieta M. Goździak, Izabella Main, Brigitte Suter (eds), *Europe and the Refugee Response: A Crisis of Values?* (Routledge 2020) p. 91.
[19] A detailed description of the distinct categories of return detention can be found in the German Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory (Residence Act), section 62(2), (3), and (5), section 62b and section 15(5); For an overview of the different kinds of return detention in German s*ee:* Muzaffer Öztürkyılmaz, 'Strafe ohne Verbrechen' (2019) 41 Hinterland Magazin 21, p. 29.
[20] BT-Drucks 19/31669 (04 August 2021), p. 9f.

The academic discourse regarding return detention is predominantly concerned with criticising individual legal frameworks and the functional effects stemming from these regulations.

International instruments of regulation, including the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) have been extensively studied and continue to develop through contemporary interpretations by the respective bodies and courts. While these regulatory frameworks are less explicit in terms of return detention, their content is a dominant subject of legal studies. Similarly, a large body of scholarly writing engages with the critical evaluation of relevant EU law, demonstrated by research published in relation to the Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive).[21] What is lacking in this context is an integrated perspective of how these regulations function within the net of distinct legal principles and how they have added weight to emerging tendencies in the national context.

Concurrently, domestic reforms in Germany have been subjected to strong criticism. Against this backdrop, civil society organisations have called out the equivocal constitutionality of these legal doctrines.[22] A comprehensive work from Droste and Nitschke underlines this criticism by elaborating on practical experiences and empirically linking it to a state of political and social exclusion.[23] However, the

[21] Katharina Eisele, Izabella Majcher and Mark Provera, 'The Return Directive 2008/115/EC, European Implementation Assessment' (2020) European Parliamentary Research Service; Izabella Majcher and Tineke Strik, 'Legislating without Evidence: The Recast of the EU Return Directive' (2021) 23 European Journal of Migration and Law; Marie-Laure Basilien-Gainche, 'Immigration Detention under the Return Directive: The CJEU Shadowed Lights' (2015) 17 European Journal of Migration and Law; Madalina Moraru, 'EU Return Directive: a cause for shame or an unexpectedly protective framework?' In Evangelia (Lilian) Tsourdi and Philippe de Bruycker (eds) *Research Handbook on EU Migration and Asylum Law* (Edward Elgar 2021); Fabian Lutz, Sergo Mananashvili and Madalina Moraru M, 'Chapter 11' in Daniel Thym/Kay Hailbronner (eds) *EU Immigration and Asylum law Article-by-Article Commentary* (third ed. C.H. Beck 2022).

[22] Der Paritätische Gesamtverband, 'Stellungnahme zum Gesetzesentwurf der Bundesregierung für ein Zweites Gesetz zur besseren Durchsetzung der Ausreisepflicht' (19 May 2019), p. 10; Deutscher Caritasverband e.V., 'Stellungnahme zum Gesetzesentwurf der Bundesregierung eines Zweiten Gesetzes zur besseren Durchsetzung der Ausreisepflicht' (3 June 2019), p. 3, 11; Karl Kopp, 'Op-ed: Detention, Insecurity, Rights Deprivation – The Legal Crackdown on Asylum Seekers in Germany', European Council on Refugees and Exiles (19 April 2019).

[23] Lina Droste and Sebastian Nitschke S, *Die Würde des Menschen ist abschiebbar* (EDITION ASSEMBLAGE 2021), pp. 65ff, 84ff, 224.

domestic discourse lacks an international and EU law perspective and fails to reflect the interrelation of distinct legal frameworks. Accordingly, this research endeavours to complement the contemporary discourse through a comparative and integrated lens.

5. The Legal Framework

States have complex and multi-layered obligations deriving from different sources. The subsequent section analyses distinct legal frameworks which provide statutory protections for persons subject to return detention. First, the examination will turn to international law, focusing on the ICCPR and the regional ECHR. Thereafter, the EU regulative framework is scrutinised before concluding the analysis with the German constitution. The examination thereby outlines the interrelated system of norms and more importantly, permits the identification of shared key principles.

5.1. International Law

The right to personal liberty predates contemporary human rights treaties as one of the "oldest recognized rights in liberal democracies",[24] deriving its origins from the principle of *habeas corpus*.[25] Its historical significance as a means of impairing the enjoyment of other rights[26] is especially relevant in the German context, where racist and anti-Semitic discourses have historically perpetuated immigration detention.[27]

[24] One of the earliest codifications of the right to liberty of person can be traced back to the Magna Carta and its clause 39 "No free man shall be seized or imprisoned […] except by the lawful judgement of his equals or by the law of the land", *s*ee William Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) p. 220; Daniel Wilsher, 'Whither presumption of liberty? Constitutional law and immigration detention' in Michael J. Flynn and Matthew B. Flynn (eds), *Challenging Immigration Detention: Academics, Activists and Policy-Makers* (Edward Elgar Publishing Ltd 2017) p. 66.

[25] ECtHR, 'Guide on Article 5 of the European Convention on Human Rights, Right to liberty and security' (updated 31 August 2022) p. 44 <https://www.echr.coe.int/documents/guide_art_5_eng.pdf> accessed 11 May 2023.

[26] HRC, 'General Comment No. 35 on Article 9 (liberty and security of person)' (December 2014) UN Doc CCPR/C/GC/35, para. 2.

[27] Return Detention in Germany dates back until the aftermath of the first World War, after which Germany detained and deported former Jewish workers previously recruited from Eastern Europe. The internment explicitly pursued the objective to "first render Eastern Jews harmless [and] deter new illegal immigration", see Droste and Nitschke, (n 23) p. 24; For an overview of historic developments in respect of return detention in Germany see also Raphael Müller '100 Jahre Abschiebehaft – Geschichtliche Kontinuitäten' (2019) 41 Hinterland Magazin, p. 16f.

The right to personal liberty is stipulated inter alia in the Universal Declaration of Human Rights (UDHR), the ICCPR, the American Convention on Human Rights (ACHR) and the ECHR.[28] Due to spacious limitations, the subsequent analysis focuses on the ICCPR and the ECHR.

5.1.1. Article 9 ICCPR

Article 9 (1) of the ICCPR proclaims that "[e]veryone has the right to liberty of person. No one shall be subjected to arbitrary arrest or detention". As a State Party,[29] Germany is bound by this article and its obligations stemming from it.

The first paragraph of article 9 details the prohibition of arbitrary and unlawful deprivation of liberty. The principle of lawfulness codified therein, affirmed by the Human Rights Committee,[30] prescribes that laws must be sufficiently precise to avoid arbitrary interpretation and application.

However, detention may be in contradiction to the law but lack arbitrariness and *vice versa.*[31] In this respect, the prohibition of arbitrary detention complements the principle of legality.[32]

The prohibition of arbitrary detention under the ICCPR is absolute and forms a peremptory norm of customary international law, rendering all derogations from it unlawful.[33] Arbitrariness is not to be equated with "against the law", but rather includes questions of proportionality and inquires whether the detention was in

[28] Additionally, guidelines for the protection of detainees are found in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the Convention relating to the Status of Refugees, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[29] United Nations Treaty Collection, Status of Treaties, International Covenant on Civil and Political Rights <https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND#EndDec> accessed 24 September 2022.

[30] HRC, *Concluding Observations* (10 November 2000) UN Doc CCPR/CO/70/TTO, para. 16; UN Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants* (24 April 2013) UN Doc A/HRC/23/46, para. 53.

[31] HRC, *General Comment No. 35 on Article 9 (liberty and security of person)* (December 2014) UN Doc CCPR/C/GC/35, para. 11.

[32] Galina Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (Brill 2010) p. 252.

[33] Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (3rd edn, Cambridge University Press 2020) p. 381; WGAD, Revised Deliberations No. 5 on deprivation of liberty of migrants (February 2018) para. 8; UN Human Rights Council, *Report of the WGAD* (24 December 2012) UN Doc A/HRC/22/44, paras 43, 51.

relation to its purpose.[34] Return detention must therefore abide by the legal standards of reasonableness, necessity, and proportionality and correspondingly constitutes a measure of last resort.[35] Moreover, such detention must not resemble punitive detention facilities, either with respect to conditions[36] or the place.[37]

In recognition of the inherent risk of torture and ill-treatment within detention facilities,[38] the ICCPR stipulates procedural safeguards in article 9 paragraphs (2), (4), and (5). These safeguards include *inter alia* the right to be informed of the reasons for the arrest and the right to take proceedings before a court to assess the lawfulness of the detention, in which the individual must be assisted for the vindication of their rights.[39] The right to have one's case speedily heard by a court (*habeas corpus*) provides an essential safeguard against institutionalised forms of deprivation of liberty.[40] Although not found in the ICCPR, the Working Group on Arbitrary Detention (WGAD) further argues, with reference to UN General Assembly Resolution 43/173, that any form of detention, including those exercised during migration proceedings, shall be initially ordered and approved by a judge.[41]

5.1.2. Article 5 ECHR

A distinct codification of the right to the liberty of person is found in article 5 of the ECHR, ratified by Germany in 1952.[42] Article 5 ECHR aims to ensure "that no one

[34] HRC, *General Comment No. 35 on Article 9 (liberty and security of person)* (December 2014) UN Doc CCPR/C/GC/35, para. 12.
[35] ibid para. 18; HRC, *Concluding Observations* (9 May 2018) UN Doc CCPR/C/HUN/CO/6, para. 46 (b); *Concluding Observations* (1 May 2017) UN Doc CCPR/C/ITA/CO/6, para. 25 (c).
[36] HRC, *General Comment No. 35 on Article 9* (liberty and security of person) (December 2014) UN Doc CCPR/C/GC/35, para. 14.
[37] ibid para. 18; HRC, *Concluding Observations* (22 November 2016) UN Doc CCPR/C/SVK/CO/4, para. 31 (c).
[38] HRC, *General Comment No. 35 on Article 9 (liberty and security of person)* (December 2014) UN Doc CCPR/C/GC/35, para. 56.
[39] ibid para. 19.
[40] Bantekas and Oette (n 32) p. 384; see also: UN WGAD, *The right of anyone deprived of his or her liberty to bring proceedings before court, in order that the court may decide without delay on the lawfulness of his or her detention* (September 2014) Background paper on State Practice on Implementation of the Right, p. 7.
[41] WGAD, *Revised Deliberations No. 5 on deprivation of liberty of migrants* (February 2018) para. 13.
[42] Council of Europe, Treaty Office, Chart of signatures and ratifications of Treaty 005, <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=005> accessed 24 September 2022.

should be deprived of [physical] liberty in an arbitrary fashion".[43] Subparagraph (1) (f) explicitly addresses return detention.

According to the Convention, detention must be closely connected to the ground justifying the deprivation of liberty,[44] and ordered following a procedure prescribed by law. Detention ordered contrary to the demands of domestic law is incompatible with the ECHR.[45] However, arbitrary deprivation of liberty, "extends beyond the lack of conformity with national law",[46] and incorporates elements of bad faith or deception.[47] Relating to the principle of legality, the ECHR requires that the law be accessible, clearly defined, and its application foreseeable.[48] As established by the European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment (CPT),[49] the place of detention must be appropriate, thus, excluding accommodation in prisons.[50] Likewise, detention conditions must be

[43] ECtHR, 'Guide on Article 5 of the European Convention on Human Rights, Right to liberty and security' (updated 31 August 2022) paras. 1, 159 <https://www.echr.coe.int/documents/guide_art_5_eng.pdf> accessed 11 May 2023.
[44] *Mikolenko v Estonia* App no 10664/05 (ECtHR 8 October 2009), para. 60.
[45] Evangelia (Lilian) Tsourdi, 'Alternatives to Immigration Detention in International and EU Law: Control Standards and Judicial Interaction in a Heterarchy' in M Moraru, G Cornelisse and P De Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* (Hart Publishing 2020) p. 173.
[46] Schabas (n 24) p. 232; As such, the Court held that domestically lawful detention may regardless violate the standards of the ECHR, see *Mikolenko v Estonia* App no 10664/05 (ECtHR 8 October 2009).
[47] *Saadi v the United Kingdom* App no 13229/03 (ECtHR 29 January 2008), para. 69; *Čonka v Belgium* App no 51564/99 (ECtHR 5 February 2002), para. 36f.
[48] *Mooren v Germany* App no 11364/03 (ECtHR 9 July 2009), para. 72; *Creangă v Romania* App no 29226/03 (ECtHR 23 February 2012), paras. 101, 118; Schabas (n 24) p. 231.
[49] The CPT standards are frequently cited and reproduced by the ECtHR. Therefore, the works of the CPT are used as a source of interpretative guidance for the purpose of this analysis. For the Court's reliance see for instance: *Bureš v The Czech Republic* App no 37679/08 (ECtHR 18 October 2012), paras. 56ff.; *Muršić v Croatia* App no 7334/13 (ECtHR 20 October 2016), para. 34; *Ivan Karpenko v Ukraine* App no 45397/13 (ECtHR 16 December 2021), para. 34.
[50] CPT Standards, CPT/Inf/E (2002) 1 – Rev. 2015, IV. Immigration detention, para. 28 <https://www.echr.am/resources/echr//pdf/ba2e032f91eb6673220a419b698fd89c.pdf> accessed 11 May 2023; CPT, 'Report to the German Government on the visit to Germany carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 25 November to 7 December 2010', CPT/Inf (2012) 18 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680696317> accessed 11 May 2023.

appropriate and shall be assessed with regard to their cumulative effect[51] and duration.[52]

Procedural guarantees entailed in subparagraphs (2) and (4) include the right to judicial review and information.53 The latter, subject to strict requirements,[54] demands that detainees be promptly informed about the grounds for their arrest in order to challenge the lawfulness of detention in front of a court of law.[55] In contrast to the ICCPR, article 5 (1) (f) does not require that detention be "reasonably considered necessary",[56] providing a narrower scope of protection.[57] The Convention merely necessitates that "action is being taken with a view to deportation"[58] and accordingly negates the lawfulness of detention where removal is no longer possible.[59] Nevertheless, the European Court of Human Rights (ECtHR) has taken into account domestic legislation and has correspondingly declared detention unlawful where it

[51] Conditions that indicate inappropriateness may include the lack of personal space, absence of outdoor exercise or the paucity of natural light and fresh air within the cells, see *Ahmed v Malta* App no 55352/12 (ECtHR 23 July 2013) para. 87; *Ananyev and Others v Russia* App no 42732/12 (ECtHR 10 December 2020), para. 150ff.; ECtHR, Guide on Article 3 of the European Convention on Human Rights, Prohibition of torture (31 August 2022), para. 56 <https://www.echr.coe.int/Documents/Guide_Art_3_ENG.pdf> accessed 22 May 2023.

[52] ECtHR, 'Guide on Article 5 of the European Convention on Human Rights, Right to liberty and security' (updated 31 August 2022) para. 150 <https://www.echr.coe.int/documents/guide_art_5_eng.pdf> accessed 11 May 2023.

[53] Notably, the right to automatic judicial review upon arrest contained in article 5(3) does not apply to immigration-related detention, see ibid para. 153.

[54] The Court held that neither a mere indication as to the legal basis for arrest, nor a leaflet containing information on the right to hire a lawyer, the right to obtain further information and the right to appeal the detention constituted sufficient information in the sense of art. 5(2) ECHR, see *Kerr v the United Kingdom* App no 40451/98 (ECtHR 7 December 1999) and *J.R. and Others v Greece* App no 22696/16 (ECtHR 25 January 2018), paras. 123-124.

[55] *Shamayev and Others v Georgia and Russia* App no 36378/02 (ECtHR 12 April 2005), para. 425; Schabas (n 24) p. 244.

[56] *A. and Others v The United Kingdom* App no. 3455/05 (ECtHR 19 February 2009), para. 164; However, as the ECtHR notes, a necessity assessment may still be required under national law, see ECtHR, 'Guide on Article 5 of the European Convention on Human Rights, Right to liberty and security' (updated 31 August 2022) para. 146 <https://www.echr.coe.int/documents/guide_art_5_eng.pdf> accessed 11 May 2023.

[57] The absence of a necessity assessment has evoked strong criticism, see for instance*: Saadi v The United Kingdom* (42) Joint Partly Dissenting Opinion of Judges Rozakis et al.; Tsourdi (n 44) p. 174; Alice Edwards, 'Back to Basics: The Right to Liberty and Security of Person' and 'Alternatives to Detention of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants' (UNHCR April 2011), p. 19f. <https://www.refworld.org/docid/4dc935fd2.html> accessed 22 May 2023.

[58] *M.A. v Cyprus* App no 41872/10 (ECtHR 23 July 2013) para. 206; Schabas (n 24) p. 233; Fabian Lutz, Sergo Mananashvili and Madalina Moraru, 'Chapter 11' in Daniel Thym/Kay Hailbronner (eds) *EU Immigration and Asylum law Article-by-Article Commentary* (third ed. C.H. Beck 2022), para. 3.

[59] *Chahal v the United Kingdom* App no 22414/93 (ECtHR 15 November 1996), para. 113; *Quinn v France* App no 18580/91 (ECtHR 22 March 1995), para. 48.

disregards national legal imperatives.[60] In interpreting the ECHR for the purpose of this analysis, German legislation is thus, decisive.

5.2. EU LAW – DIRECTIVE 2008/115/EC (RETURN DIRECTIVE)

Over the past two decades, a distinct body of legislation has emerged governing return detention within the European Union. Directive 2008/115/EC, hereinafter referred to as the Return Directive is fundamental in this regard and thus, constitutes the focal point of the following section. The right to liberty of person is also codified in article 6 of the Charter of Fundamental Rights of the European Union. However, due to spacious limitations and its substantive equivalence to the ECHR,[61] its merits will not be subject to detailed scrutiny.

The Return Directive provides a horizontal set of rules applicable to third-country nationals who do not (or no longer) fulfil the conditions for entry, stay, or residence in a Member State.[62] Its preamble reiterates well-established principles enshrined in the ICCPR, e.g., the commitment to proportionality and necessity.[63] Accordingly, the Return Directive stipulates in article 8(4) that return detention must be in line with fundamental rights and a measure of last resort,[64] demonstrated by the priority given to voluntary return in article 7,[65] and the "first order duty" to examine the sufficiency of alternatives to detention on a case-by-case basis.[66]

Article 15 provides that persons subject to return procedures may only be detained to prepare or execute the removal, notably encompassing all stages of the return

[60] *Rusu v Austria* App no 34082/02 (ECtHR 2 October 2008), para. 54.
[61] See article 52 (2) of the Charter, see also Daniel Wilsher, 'Article 6' in Steve Peers et. al. (eds) *The EU Charter of Fundamental Rights, A Commentary* (Bloomsbury Publishing 2014) p. 80; Schabas (n 24) p. 221.
[62] Prior to the implementation of the Returns Directive, detention in the context of migration was only briefly addressed in two legal instruments of the European Union, namely in Council Directive 2005/83/EC (article 18) and in Directive 2003/9/EC (article 7), both limited to rather general remarks.
[63] Return Directive, recitals 13, 16, and 20.
[64] CJEU Case C-61/11 *PPU v El Dridi* [2011] ECR I-0000, para. 39.
[65] However, the manifold exceptions laid down in subparagraph (4) substantially alleviate this principle.
[66] Edwards (n 56) p. 34.

procedure.[67] Return detention ceases to be lawful where no reasonable and practical prospect of removal exists.[68]

Return detention may be implemented in particular, when there is a risk of absconding or when the concerned individual avoids or hampers the preparation of the return. In assessing the risk of absconding, Member States are recommended to consider *inter alia* a lack of documentation or financial resources, the failure to report to the competent authorities, or non-compliance with a previous return decision.[69] In contrast, the notions of avoidance or hampering are less pellucid. While the *travaux préparatoires* fail to reveal a clear definition,[70] scholars suggest that the non-appearance before competent authorities might demonstrate avoidance. Non-cooperation with consular authorities may constitute a hampering of the process.[71]

Article 15(2) demands that detention is ordered by administrative or judicial authorities based on reasons grounded in fact and law. Moreover, States must either provide for speedy and automatic judicial review of detention, or immediately inform the affected person about their right to do so. In addition to article 12, encompassing "all other procedural safeguards which are part of the rights of the defence",[72] articles 13 and 16(5) entail further clarifications regarding the right to information and an effective remedy, including entitlements to gratuitous legal advice.[73]

As established by articles 15 (5) and (6), individuals may be detained for up to 18 months.[74] Subsequently, article 16 clarifies that such detention must take place

[67] Lutz/Mananashvili/Moraru (n 58) para. 30.
[68] Marie-Laure Basilien-Gainche, 'Immigration Detention under the Return Directive: The CJEU Shadowed Lights' (2015) 17 European Journal of Migration and Law, pp. 104, 115.
[69] For the full list of criteria to be taken into account see Commission Recommendation (EU) 2017/2338 (16 November 2017) p. 92 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017H2338> accessed 23 May 2023; Owed to their broad terminology however, these indicators can be held against a large number of irregular migrants, see Izabella Majcher and Tineke Strik, 'Legislating without Evidence: The Recast of the EU Return Directive' (2021) 23 European Journal of Migration and Law, pp. 103, 115.
[70] Lutz, Mananashvili and Moraru (n 58) para. 35.
[71] ibid paras. 36-38.
[72] ibid para. 21.
[73] The right to free legal assistance might be limited in accordance with article 13(4) for instance, if the respective appeal is unlikely to succeed, see: Commission Recommendation (EU) 2017/2338 (16 November 2017) p. 136.
[74] Notably, the first proposal for the Return Directive presented by the Commission in September 2005 provided a significantly lower time period in its article 14, with a maximum detention of 6 months, see Frances Webber, Statewatch analysis, 'The original EU Directive on return (expulsion)' (2007) p. 10

in specialised (non-criminal) detention facilities.[75] Detainees are allowed to contact legal representatives, family members, and consular authorities (article 16 (3)-(5)). International and Non-Governmental Organisations (NGOs) shall have access to the detention facilities. Conditions relating to the size of rooms, access to sanitary facilities, open air, and nutrition are likewise entailed in article 16, aiming to ensure a "humane and dignified" treatment.[76]

The Return Directive mirrors significant components of the international legal regime, reflecting the principle of *ultima ratio*, as well as pivotal procedural safeguards. Following these outlines, this research now turns to domestic constitutional law to further analyse the legal environment in which the German reforms have emerged.

5.3. German Constitutional Framework

The German Basic Law (*Grundgesetz*) entails two articles proclaiming the liberty of person and its protection. Article 2(2) determines that "the liberty of person is inviolable".[77] Article 104 specifies conditions under which such liberty may be legally restricted. Following the provision, restrictions upon personal liberty must be in accordance with a procedure established by law,[78] which complies with the principle of legal certainty, as found in article 103(2). Although the exact requirements of legal

<https://www.statewatch.org/media/documents/news/2007/apr/eu-expulsion-sw-analysis-I.pdf> accessed 23 May 2023.

[75] As such, prisons are unsuitable for individuals that are "neither convicted nor suspected" of having committed criminal offences. The exception in the second sentence necessitates a strict interpretation and thus underscores of the importance of said principle, see CJEU Case C-18/19 *WM v Stadt Frankfurt am Main* [2020] ECR, para. 31.

[76] Lutz, Mananashvili and Moraru (n 58) para. 11; Further guidance regarding detention conditions is found in the CPT guidelines on forced return.

[77] In the original language: "Die Freiheit der Person ist unverletzlich". In the same respect, the German Constitutional Court underlined the status of this right as particularly high-standing, see: Bundesverfassungsgericht (BVerfG) 2 BvR 309/15 (24 July 2018) para. 65. This virtue of it applying to *everyone* is underlined in contrast to a number of fundamental rights, including the right to assembly, which only apply to German (or EU) nationals. For more information on this s*ee for instance:* Andreas Fischer-Lescano, 'Deutschengrundrechte: Ein kolonialistischer Anachronismus' in: J von Bernstorff, P Dann and I Feichtner (eds), *Koloniale Rechtswissenschaft* (2020), emphasising the colonial background of the German Basic Law.

[78] In this instance, compliance with such law amounts to a "constitutional obligation", see BVerfG, 2 BvR 1194/80 (07 October 1981), para. 33.

certainty depend on the intensity of the encroachment,[79] fundamental rights, such as liberty of person, create strict demands.

Article 104(2) requires that only judicial authorities may decide on the initial permissibility and continuation of a deprivation of liberty. Any person subject to (return) detention must thus, after arrest, be brought before a judge without delay.[80]

Domestically, encroachments upon the liberty of person are subject to a proportionality assessment. This requires that the interference with fundamental rights pursues a legitimate purpose, that the measures in question are suitable and necessary (*ultima ratio*), and that no excessive burden is imposed on the concerned individual.[81] Additionally, the measures must comply with standards of reasonableness.[82]

A detention order (and hence the detention) is arbitrary when it is not "legally justifiable from any conceivable point of view and […] based on irrelevant considerations".[83] Further, arbitrariness is given when a measure is "actually and clearly inappropriate" in relation to the situation it is trying to address,[84] reflecting the underlying rationales of proportionality, necessity, and reasonableness.

While largely leaving procedural guarantees to be determined by distinct instruments, the German Basic Law intersects with the international and EU frameworks in its requirement of proportionality and necessity.

5.4. Identification of Criteria

While acknowledging their respective peculiarities, the above-illustrated remarks demonstrate a substantial regulatory overlap of the multi-layer framework in respect of the arbitrary deprivation of liberty of third-country nationals. An integrated reading of the different legal sources thus illustrates their interrelation and permits the identification of substantive criteria deriving from the very core of the right to liberty

[79] BVerfG, 2 BvR 2343/14 (2 September 2015), para. 20.
[80] BVerfG 2 BvR 2292/00 (15 May 2002), para. 13.
[81] BVerfG 1 BvL 20/81 (8 February 1983), para. 43; BVerfG 2 BvR 2099/04 (02 March 2006), para. 96.
[82] ibid.
[83] BVerfG 1 BvR 735/09 (12 October 2009), para 14.
[84] BVerfG 1 BvR 1428/88 (15 May 1989), para 19.

of person.[85] While the failure to meet one of these criteria does not render the detention arbitrary by default, multiple violations of these criteria or a lack of adequate implementation may point to arbitrary elements of the legal regime under scrutiny. Crucially, the weight of individual criteria may vary depending on the circumstances of the case as an assessment of arbitrariness is characterised by quality rather than quantity. The compiled list of criteria does neither claim universality, nor comprehensiveness, but provides selective and qualitative paradigms which assist in the legal analysis of instruments touching upon the right to liberty of person.

An essential requirement referred to in the separate legal sources is the right to judicial control, explicitly framed as the right to a legal remedy.[86] In addition to the Return Directive cumulatively demanding an initial authoritative order, the UN WGAD and the German Basic Law mutually underline the imperative of detention being ordered by a judge.[87] Thus, under the term of judicial control, the subsequent examination considers the initial judicial order and the right to legal remedy alike.

Inevitably connected to the right to judicial remedy is the right to be informed without delay about the prospects of judicial review, the grounds for the arrest, and related procedural rights, as stipulated in the ICCPR, the ECHR, and the Return Directive. Highlighting its intrinsic value, the right to information is distinctively considered in the subsequent analysis.

Virtually universally codified is the condition of the lawfulness of detention, i.e. its compliance with procedures established by law. To allow for such adherence, and as emphasised by the different regulatory regimes, the law in question must meet legal certainty standards. Lawfulness, as analysed in the subsequent sections, thus, entails compliance with rules and procedures but also requires that the law be sufficiently precise to avert arbitrary detention.

While the ICCPR prescribes that return detentions must follow a certain purpose, the ECHR and the Return Directive impose that such detention may only be

[85] Tsourdi (n 45), recognising legal fragmentation in various frameworks yet affirming the existing of an ‘inviolable core’, p. 169, 171.
[86] Article 9(2) ICCPR, article 5(4) ECHR, article 15(2) Return Directive.
[87] WGAD, Revised Deliberations No. 5 on deprivation of liberty of migrants (February 2018) para. 13; article 104(2) German Basic Law.

carried out for expulsion and only where deportation proceedings are in progress. Thus, it is held that where detention is not directed at preparing, facilitating, or carrying out the return of the individual, deprivation of liberty under the auspices of return detention is not in accordance with the obligations imposed by the multi-layer regime.

A further focal point of the different legal instruments concerns the place and conditions of detention. In this regard, a pre-eminent requirement is the separation of individuals facing detention for the purpose of removal and those detained in punitive prison facilities, in respect of placement and conditions alike. Where detention facilities and conditions contradict this principle, they are considered arbitrary for the purpose of the analysis.

Moreover, the ICCPR, the Return Directive and the German Basic Law crucially accentuate the imperative of proportionality, with the ECHR and the EU Charter ambiguously excluding this criterion. However, as it is found throughout the different layers of the legal regime, the subsequent analysis places significant weight on the proportionality assessment, including the narratives of reasonableness and necessity.

These six distinct criteria are identified to guide the subsequent assessment of domestic reforms. Firstly, legal instruments must provide for judicial control, including an initial judicial order and judicial review (i). Secondly, the affected individual must be informed about their factual and legal situation (ii). Return detention must further comply with the law and demands of legal certainty (iii). Additionally, it may only be carried out for the purpose of expulsion (iv) and must take place in appropriate places and conditions (v). Lastly, every detention must be proportionate, reasonable and necessary (vi).

6. Legal Reform in Post-2015 Germany

The treatment of migrants constitutes a highly politicised subject that has crucially affected the political climate in Germany.[88] As such, legal reforms concerning return detention have been centred around the narrative of returning "criminal and dangerous persons" (*Gefährder*).[89] However, this objective amplifies problematic stereotypes[90] and demonstrates the rationales underlying legal reform while further confusing return detention with criminal incarceration.

Accordingly, legislative packages adopted after the influx of third-country nationals in 2015 greatly relied on repressive measures and a deterioration of the social standing of asylum seekers.[91] It is under these conditions that the legal texts to be analysed have been adopted by the federal and state-level legislators. Firstly, the next section regards the German Orderly Return Act, which amended the Residence Act and hence, the federal regime on return detention. Thereafter, this paper turns to the Deportation Detention Act enacted by North-Rhine Westphalia, specifying the federal regulation. Before individually particularising the reforms' compliance with the above-identified criteria, the respective Acts and their amendments are briefly introduced.

6.1. Orderly Return Act

[88] Gert Pickel, Antje Röder and Andreas Blätte, 'Migration und demokratische politische Kultur – ein dynamisches und polarisierendes Thema?' (2018) 12 Zeitschrift für Vergleichende Politikwissenschaft, p. 1f.; Droste and Nitschke (n 23) p. 37.

[89] Landesregierung Nordrhein-Westfalen, 'Novelle der Abschiebehaft beschlossen' (12 December 2018) <https://www.land.nrw/pressemitteilung/novelle-der-abschiebehaft-beschlossen> accessed 08 November 2022; The term *Gefährder* was introduced by the Federal Criminal Office in 2004 and is understood to describe a situation where certain facts justify the assumption that a person will commit politically motivated offences of substantial significance, such as *inter alia* offences against the public order or sexual self-determination see: BT-Drucks 18/7151 (22 December 2015), p. 1 <https://dserver.bundestag.de/btd/18/071/1807151.pdf> accessed 22 May 2023; the term has been criticised by multiple Organisations, for a short summary of the debate see: Matthias Monroy, 'Security Architectures in the EU' (04 November 2021) <https://digit.site36.net/2021/11/04/controversial-term-german-ministry-of-the-interior-sneaks-gefaehrder-into-the-eu/> accessed 18 November 2022.

[90] In a comprehensive report on pre-removal detention in Germany it was found that the widespread stigmatisation of persons in pre-removal detention as alleged criminals contributes to adverse impacts on physical and mental health of the concerned individuals, see: Marei Pelzer and Uli Sextro 'Schutzlos hinter Gittern – Abschiebungshaft in Deutschland' (PRO ASYL and Diakonisches Werk in Hessen und Nassau e.V. June 2013), p. 28 <https://www.proasyl.de/wp-content/uploads/2014/07/Abschiebungshaft_Bericht_Juli_2013_Webversion.pdf> accessed 15 May 2023.

[91] ibid p. 37.

The Orderly Return Act (*Geordnete-Rückkehr-Gesetz*) was adopted in August 2019. In its explanatory memorandum, the federal government explicitly elaborated on the imperative to reform current legislation, holding that existing instruments were not sufficiently effective to adequately facilitate the practical execution of deportations.[92]

The Act considerably expands the list of legitimate grounds for return detention. This is exemplified in section 62(6) of the Residence Act, introducing custody to enforce cooperation (*Mitwirkungshaft*). Pursuant to this provision, persons may be detained where it is to be expected that the concerned individual fails to appear at appointments for identification. While detention under this regime is solely permitted where a real prospect of deportation exists,[93] the Federal Ministry of the Interior notes that such custody is meant for "obstinate deceivers of identity." It shall, during the detention period of 14 days, exert pressure on the respective person to increase compliance and cooperation.[94]

Whereas previous norms required the state to substantiate the reasons for an alleged risk of absconding, the reformed section 62(3a) reverses the burden of proof and provides that a risk of absconding is presumed as a refutable assumption.[95] The Act specifies six scenarios in which this reversed burden of proof applies, including a prior deception of authorities in questions of identity, the failure to appear for an interview or examination, or a previous evasion of deportation.

In addition to these scenarios, section 62(3b) entails further indicators that may evidence a risk of absconding, including that the concerned person paid "considerable

[92] BT-Drucks 19/10047 (10 May 2019), p. 1 <https://dserver.bundestag.de/btd/19/100/1910047.pdf> accessed 22 May 2023; This reasoning was however negated by the European Council on Refugees and Exiles, finding that failed removals were not brought about by the relevant legislation, see Michael Kalkmann and Daniel Kamiab Hesari, 'Country Report: Germany' (European Council on Refugees and Exiles [ed] 2019), p. 106 <https://asylumineurope.org/wp-content/uploads/2020/07/report-download_aida_de_2019update.pdf> accessed 15 May 2023.

[93] BT-Drucks 19/10047 (10 May 2019), p. 43f. <https://dserver.bundestag.de/btd/19/100/1910047.pdf> accessed 22 May 2023.

[94] Federal Ministry of the Interior, Entwurf eines Zweiten Gesetzes zur besseren Durchsetzung der Ausreisepflicht, (2019), p. 53 <https://www.bmi.bund.de/SharedDocs/gesetzgebungsverfahren/DE/Downloads/referentenentwuerfe/grg-geord-rueckkehr-2019-durchsetzung-ausreisepflicht-refe.pdf;jsessionid=4FAC960B9C514FDE53EF6B31C564E199.2_cid373?__blob=publicationFile&v=5> accessed 08 October 2022.

[95] Notably, this provision is applicable to custody to secure deportation (*Sicherungshaft*) which constitutes the great majority of return detention cases, see Kalkmann and Kamiab Hesari (n 92) p. 108.

sums of money" to enter the state's territory or that they do not have a registered place of residence. These factors further the substantial expansion of the existing grounds of detention.[96]

Additionally, the reform temporarily enabled the Länder to place people awaiting deportation in regular prisons owing to the lack of specialised facilities at the time of adoption.[97]

6.2. North-Rhine Westphalia's Deportation Detention Act

While federal laws provide a general framework for return detention, the *Länder* are responsible for its enforcement and are competent to adopt respective legislation.[98] Acting upon this competence, North-Rhine Westphalia amended its specialised Deportation Detention Act (*Abschiebungshaftvollzugsgesetz*) in December 2018.[99]

Although the idea of ultima ratio is embodied in section 1 of the Act, its new subparagraph (2) enumerates distinctive objectives to be fulfilled in the execution of return detention. These include the protection of the public and assistance to police authorities and law enforcement.

Originally, section 3 of the Deportation Detention Act detailed the obligation to inform detainees about the grounds for detention and available procedures of judicial review in subparagraph (4). The provision further entailed information about the possibility of acquiring legal advice free of charge. The regional legislator repealed this subparagraph without substitution, noting that the detention facility was under no obligation to inform detainees about legal remedies.[100]

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[96] Kalkmann and Kamiab Hesari (n 92) p. 109f.

[97] BT-Drucks 19/10047 (10 May 2019), p. 45 <https://dserver.bundestag.de/btd/19/100/1910047.pdf> accessed 22 May 2023; At the time the reform was enacted, only eight *Länder* had specialised detention facilities with a relatively low capacity compared to the high number of deportations, see: Kalkmann and Kamiab Hesari (n 92) p. 106.

[98] Despite this competence, only a few of the sixteen *Länder* have enacted specialised legislation, with the regimes in the remaining *Länder* being governed by the federal Prison Act (Strafvollzugsgesetz). The lack of specialised legal regimes in many *Länder* has been criticised by the CPT, see European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 'Report to the German Government on the visit to Germany' (Council of of Europe, CPT/Inf 2019), p. 27.

[99] LT-Drucks 17/3558 (07 September 2018), p. 1 <https://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument/MMD17-3558.pdf> accessed 22 May 2023.

[100] ibid p. 73.

The thereafter inserted section 4 regulates the new access procedure (*Zugangsverfahren*), aiming to facilitate an improved assessment of the detainees' basic needs and the risks potentially emanating from them,[101] furthering an effective application of EU law.[102] To this end, arriving individuals may be kept in isolation for up to a week. Authorities are commissioned to further restrict several detainees' rights, including *inter alia* the right to leisure and sports (section 12), the right to religious practice (section 13(4)), and the right to use means of telecommunication in accordance with section 16(1).

Moreover, the reformed sections 19 and 20, significantly extend the restrictive measures used to react to misconduct within the facility.[103] Such measures entail significant restrictions on participation in joint events, the use of telecommunication means, the right to personal belongings or the total exclusion of freedom of movement for up to two weeks. Measures of this kind aim to ensure the secure accommodation of persons in detention but may also, preventively, be employed to hamper the planning of criminal activities.[104]

7. Compliance Analysis

The subsequent section pursues a detailed analysis of the introduced reforms and their congeniality with the previously identified criteria. This research aims at conceptualising these amendments within the multi-layer framework and examining their compliance with the obligations and prohibitions stemming from the latter. To this end, the following remarks consider the provisions' terminologies, their context, as well as their direct and indirect impact.

7.1. Judicial Control

[101] LT-Drucks 17/3558 (n 99) p. 2.
[102] Tsourdi (n 45) p. 183.
[103] LT-Drucks 17/3558 (07 September 2018), p. 81 <https://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument/MMD17-3558.pdf> accessed 22 May 2023.
[104] ibid p. 82.

To begin with, the legal demand for judicial control is scrutinised, separated into an analysis of the implications produced by the legal amendments for a required judicial order (1) and for the right to judicial review (2).

7.1.1. Initial Judicial Order

On the face of it, the amendments do not touch upon the subject of an initial judicial order. However, the implications produced by the access procedure as introduced by North-Rhine Westphalia are of particular relevance. While purportedly facilitating a compulsory risk assessment of the concerned individuals, neither the provision nor the explanatory memorandum specifies the criteria to be applied in such an assessment. The lack of clear instructions may result in vivid encroachments upon the detainees' fundamental rights, no longer covered by the purpose of detention (and thus, the detention order).[105] Especially considering the isolation and restrictions imposed upon individuals during the access procedure, one may argue that such additional confining methods are beyond the legitimate realm of the initial judicial order. In this respect, regardless of the authorisation of detention itself, certain conditions may exceed the mandate of the judicial order and contradict the requirement of judicial approval. However, while acknowledging the change of nature of detention through additional physical confinement, the German Constitutional Court (*Bundesverfassungsgericht*, BVerfG) held that mere confinement to smaller units does not constitute a new deprivation of liberty necessitating additional approval.[106]

Nevertheless, the strictly prohibitive character of the procedure may go beyond the methods authorised by judicial order. In support of this argument, Keßler infers that the encroachments upon the right to free development of personality required by the access procedure surpass the authority of the judicial detention

[105] Stefan Keßler (Jesuit Refugee Service) Stellungnahme zum Gesetzentwurf der Landesregierung: Gesetz zur Änderung des Abschiebungshaftvollzugsgesetzes Nordrhein-Westfalen (11 October 2018), p. 5 <https://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument/MMST17-877.pdf> accessed 22 May 2023.
[106] BVerfG 2 BvR 133/10 (18 January 2012), para. 111.

order.[107] In line with this, the BVerfG held that particularly intensive interventions, such as physical fixation, in fact, require additional judicial authorisation and are no longer covered by the initial order.[108] The Court endorsed the conjecture that overly restrictive measures may exceed the authorised realm. However, this reasoning neglects an important argument which, applied in analogy, points to a different outcome. Crucially, Keßler's argument builds on the restrictions imposed upon the right to develop one's personality, stipulated in section 2(2) of the German Basic Law. Regardless of its legal standing, limitations of this right do not, in principle necessitate explicit judicial approval but, in contrast, may be regulated through legislative instruments, such as the Deportation Detention Act.[109] Moreover, the argument posits that the more restrictive a measure is, the more likely it is that supplementary judicial authorisation is required. While the general tenor corresponds to the principles of proportionality, this paradigm neglects a distinct judgement of the BVerfG, finding that a measure as intrusive as disciplinary detention does not necessitate additional judicial approval. Judicial orders, it was held, also encompass potential disciplinary action, including, for instance, disciplinary detention and resulting restrictions.[110]

While comparably similar rights are affected in cases of disciplinary detention in penal systems and those commanded under the regime of the access procedure, disciplinary detention arguably imposes the gravest restriction upon personal freedom. Furthermore, disciplinary detention can be ordered for up to four weeks,[111] significantly exceeding the maximum length envisaged under section 4 of the Deportation Detention Act. Considering these circumstances, any argument claiming the insufficiency of an initial judicial order for the restrictions imposed during the access procedure neglects the pellucid case law produced by the BVerfG.

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[107] Stefan Keßler (Jesuit Refugee Service) Stellungnahme zum Gesetzentwurf der Landesregierung: Gesetz zur Änderung des Abschiebungshaftvollzugsgesetzes Nordrhein-Westfalen (11 October 2018), p. 6 <https://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument/MMST17-877.pdf> accessed 22 May 2023.
[108] BVerfG 2 BvR 309/15 (24 July 2018), para. 69.
[109] Gertrude Lübbe-Wolf, *Die Rechtsprechung des Bundesverfassungsgerichts zum Strafvollzug und Untersuchungshaftvollzug* (Nomos 2016), p. 250f.
[110] BVerfG 2 BvR 213/93 (8 July 1993), para. 10; (BVerfG) 2 BvR 309/15 (24 July 2018), para. 69.
[111] Act on the Execution of Prison Sentences and Measures of Reform and Prevention Involving Deprivation of Liberty (Prison Act) Section 103(1) number 9.

Considering the relevant jurisprudence, the access procedure does not contradict the requirement of a judicial order. Regardless, this finding does not preclude the access procedure's dubiousness in respect of its proportionality, as analysed in section 7.6.1.

7.1.2. Judicial Review

The right to judicial review has been of tremendous relevance in the context of return detention. Approximately every second person subjected to return detention is wrongfully imprisoned. The exact numbers range from 47 per cent up to 60 per cent of legally unjustified detention orders.[112] Alarmingly, the Federal Court of Justice (*Bundesgerichtshof*, BGH) found 85-90 per cent of decisions brought before it relating to return detention unlawful.[113] These figures emphasise the pivotal role of judicial review in remedying unlawful detention orders, while also illustrating the susceptibility of the legal regime and involved authorities.

Under national law, the right to judicial review is stipulated in sections 63-64 of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (FamFG).

As held by the Strasbourg Court and affirmed by the ICCPR,[114] review applicants must have "a realistic possibility of using the remedy",[115] including legal and linguistic assistance.[116] Third-country nationals subject to return detention must

[112] Droste and Nitschke (n 23) p. 147; Notably, the state itself and the *Länder* do not collect data in this respect. While some *Länder* do not collect data pertaining to judicial review of immigration detention at all, others merely declare how many persons have been released from the specialised detention facilities based on judicial decisions without providing insights regarding the legal reasoning and the decisive facts. Yet another approach is followed by the state of North-Rhine Westphalia which, despite its collection of data relating to the initiated procedures, fails to provide numbers for the judicial procedures that resulted in the detention being declared wrongful, see BT-Drucks 19/31669 (04 August 2021), p. 25f. <https://dserver.bundestag.de/btd/19/316/1931669.pdf> accessed 22 May 2023.

[113] BT-Drucks 19/31669 (04 August 2021), p. 2 <https://dserver.bundestag.de/btd/19/316/1931669.pdf> accessed 22 May 2023.

[114] Mariette Grange and Izabella Majcher, 'Immigration detention under international human rights law: the legal framework and the litmus test of human rights treaty bodies monitoring*',* in Michael J. Flynn and Matthew B. Flynn (eds) *Challenging Immigration Detention: Academics, Activists and Policy-makers* (Edward Elgar Publishing Ltd 2017) p. 265, 275.

[115] *Čonka v Belgium* App no 51564/99 (ECtHR 5 February 2002), para. 46.

[116] ibid.

be provided with the necessary means to defend themselves, including the appointment of a lawyer[117] and the provision of legal aid.[118]

In accordance with section 62a(2) of the Residence Act, detainees are permitted to contact legal representatives. Individuals may further receive a gratuitous initial legal consultation pursuant to section 7(3) of the Deportation Detention Act. However, a one-time legal consultation is far from sufficient, particularly considering the position of return detainees.[119] Nevertheless, and in contrast to criminal prisoners, individuals facing return detention are not entitled to legal counsel.[120] The absence of mandatory defence ultimately leaves individuals unable to effectively exercise their rights.[121]

While legal aid may assist the concerned persons in shouldering the financial weight of appellate proceedings,[122] it is only granted where a court finds the appeal likely to succeed,[123] resulting in most of the requests being denied (even though the procedures often have a positive outcome).[124]

Considering the shortcomings of the current legal environment, the lack of reforms in this regard demonstrates the political rationales behind the legislative amendments.

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[117] BGH V ZB 138/12 (28 February 2013), para. 14.

[118] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 'Factsheet on Immigration detention', CPT/Inf(2017)3, March 2017, p. 2 <https://rm.coe.int/16806fbf12> accessed 23 May 2023.

[119] Hilfe für Menschen in Abschiebehaft Büren e.V.,Anhörung zum Abschiebungshaftvollzugsgesetz (7 November 2018) Stellungnahme 17/901, p. 6 <https://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument/MMST17-901.pdf> accessed 15 May 2023.

[120] Janne Grote, 'The use of detention and alternatives to detention in Germany*'* (July 2014) Study by the German National Contact Point for the European Migration Network (EMN), Working Paper 59, p. 30 <https://www.bamf.de/SharedDocs/Anlagen/EN/EMN/Studien/wp59-emn-abschiebungshaft.pdf?__blob=publicationFile&v=15> accessed 30 January 2023; Droste and Nitschke (n 23), p. 94.

[121] Johanna Schmidt-Räntsch, 'Vorgaben des Art. 5 EMRK für die Abschiebungshaft' (2020) 9 Asylmagazin, p. 292, 298.

[122] In appellate proceedings, such legal aid can be applied for in accordance with sections 76ff. FamFG in conjunction with sections 114ff. of the Code of Civil Procedure.

[123] UN Human Rights Council, Report of the Working Group on Arbitrary Detention, Follow-up mission to Germany (10 July 2015) UN Doc A/HRC/30/36/Add.1, para. 49.

[124] Hilfe für Menschen in Abschiebehaft Büren e.V.,Anhörung zum Abschiebungshaftvollzugsgesetz (7 November 2018) Stellungnahme 17/901, p. 6. <https://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument/MMST17-901.pdf> accessed 15 May 2023.

Against the assertions entailed in the multi-layer framework, the German legal regime does not guarantee an effective judicial remedy. Affected individuals are systemically left without comprehensive legal advice or financial aid and are, therefore, not provided with the material pre-conditions to use their right to judicial review. The restrictive narrative of the recent reforms perpetuates this insufficient legal protection.

7.2. RIGHT TO INFORMATION

A crucial prerequisite to an effective judicial review is the information provided to the concerned individual. In this respect, the high standards of quantity and quality, have been particularly emphasised by the ECtHR,[125] and the CPT.[126]

The practical relevance of this entitlement is underlined by the fact that individuals subjected to return detention are common without knowledge about their situation. As such, JRS reports that "Why am I being detained? I did not do anything wrong!" is among the most frequently asked questions posed to its workers.[127] This lack of information was also evidenced in German deportation detention facilities.[128]

Thus, it is regrettable that the reform enacted by North-Rhine Westphalia cut out the very provision that entailed the obligation to inform persons subjected to return detention about their situation. While the legislator insinuates that information about legal assistance and representation is still provided on the basis of section 3(4),[129] no comments are made in respect of information concerning the grounds of arrest or legal remedies in general.

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[125] *Kerr v the United Kingdom* App no 40451/98 (ECtHR 7 December 1999) and *J.R. and Others v Greece* App no 22696/16 (ECtHR 25 January 2018), paras. 123-124.

[126] CPT, 'Report to the German Government on the visit to Germany' (13 to 15 August 2018) CPT/Inf (2019) 14, para. 78, recommending a systemic provision of written documents setting out the rights and procedures applicable <https://rm.coe.int/1680945a2d> accessed 22 May 2023.

[127] Stefan Keßler (Jesuit Refugee Service) Stellungnahme zum Gesetzentwurf der Landesregierung: Gesetz zur Änderung des Abschiebungshaftvollzugsgesetzes Nordrhein-Westfalen (11 October 2018), p. 4. <https://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument/MMST17-877.pdf> accessed 22 May 2023; Droste and Nitschke (n 23), p. 94.

[128] CPT, 'Report to the German Government on the visit to Germany' (13 to 15 August 2018) CPT/Inf (2019) 14, para. 78, recommending a systemic provision of written documents setting out the rights and procedures applicable <https://rm.coe.int/1680945a2d> accessed 22 May 2023.

[129] LT-Drucks 17/3558 (07 September 2018), p. 73 <https://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument/MMD17-3558.pdf> accessed 22 May 2023.

However, the provision referred to does not mention the right to legal advice. Information duties pertaining to grounds of arrest or legal remedies are likewise omitted. The paragraph solely stipulates that detainees are to be informed, without delay, about their rights and obligations.[130] Taking this into account, the explanation provided in the explanatory memorandum appears rather arbitrary. It does not become clear why the right to free legal representation would be included in the terminology of "rights and obligations" while the right to be informed about the reasons for arrest or legal procedures for judicial review remains excluded.

It is important to highlight that section 3(4) was not introduced by the reform in 2018. Rather, the provision was formerly found in subparagraph (3) being followed by the now repealed provision, which stipulated the right to be informed about grounds for arrest, judicial review procedures, and free legal assistance. It is doubtful that the legislator intended subparagraph (3) to include information duties that were already explicitly stipulated in subparagraph (4). The rendition provided in the explanatory memorandum fails to take this systemic and teleological concern into consideration. Against this background, the sole inclusion of the right to be informed about legal representation, while excluding other relevant information duties falls short of legal reasoning.

Subsuming the information duty through authoritative interpretation does not supersede the need for the right to be made explicit and acknowledged in writing. The failure to unambiguously integrate information obligations into the legal regime creates room for the arbitrary application of the norm and conveys a deleterious message. It further places an additional burden on NGOs and social workers engaging with detainees. This outsourcing of state obligations not only contradicts the internationally recognised duties imposed on the State by the multi-layer framework but also results in the effective denial of the right to judicial review.

7.3. LAWFULNESS

[130] The provision ultimately mirrors section 62a(5) of the Residence Act, which requires that detainees are to be informed "of their rights and obligations", likewise without further indication of either obligations or rights applicable.

Lawfulness foresees compliance with rules and procedures established by law, as well as their precision and adherence to the principle of legal certainty. Laws restricting fundamental rights, such as liberty of person, must abide by a particularly high standard. In this regard, section 62(3a) seems to necessitate closer scrutiny. The provision lists distinct scenarios to guide the authorities in their determination of the risk of absconding. As noted, these indicators entail a refutable assumption. Due to their weight as legal arguments, these factors need to be clearly defined to avert any ambiguities in their interpretation.

However, the grounds, lack precision in various instances. The failure to incorporate explicit temporal limitations is one example.[131] This has been especially denounced regarding the deception of authorities.[132] The provision itself delineates that the deception must take place "around the same time as the deportation". The exact time frame remains unclear. This ambiguity is further exacerbated by the differences between the German and English versions of the legal text. As opposed to the English *around the same time,* the German text requires such deception to stand in a *temporal relation* with the deportation. While the notion of around the same time already introduces uncertainty regarding its scope, the narrative of a timely relation between the deportation and the deception seems to terminologically stretch yet further, not requiring near simultaneity but a mere interconnection. This ambiguity contravenes the demands of legal certainty.

According to section 62(3b), the risk of absconding may be evidenced when a third-country national constitutes a significant threat to legally protected internal security interests. Notably, in its reference to security interests, this definition includes

[131] Pro Asyl, 'Stellungnahme zum Entwurf eines Zweiten Gesetzes zur besseren Durchsetzung der Ausreisepflicht' (29 May 2019), p. 16f. <https://www.proasyl.de/wp-content/uploads/PRO-ASYL_Stellungnahme-zum-Geordnete-R%C3%BCckkehr-Gesetz_Sachverst%C3%A4ndigenanh%C3%B6rung.pdf> accessed 15 May 2023; Deutscher Caritasverband e.V., 'Stellungnahme zum Gesetzesentwurf der Bundesregierung eines Zweiten Gesetzes zur besseren Durchsetzung der Ausreisepflicht (Geordnete-Rückkehr-Gesetz)' (3 June 2019), p. 12 <https://www.asyl.net/fileadmin/user_upload/publikationen/Stellungnahmen/StellungnDCV/Caritas_Stellungnahme_zum_Geordnete-Rueckkehr-Gesetz.pdf> accessed 15 May 2023.

[132] Pro Asyl, 'Stellungnahme zum Entwurf eines Zweiten Gesetzes zur besseren Durchsetzung der Ausreisepflicht' (29 May 2019), p. 16f. <https://www.proasyl.de/wp-content/uploads/PRO-ASYL_Stellungnahme-zum-Geordnete-R%C3%BCckkehr-Gesetz_Sachverst%C3%A4ndigenanh%C3%B6rung.pdf> accessed 15 May 2023.

indefinite legal terminology. Such terminology is excluded from the realms of criminal law, as it conflicts with the principle of legal certainty.[133] While the Orderly Return Act amends public law, its provisions regarding immigration detention arguably produce the same factual outcome for concerned individuals as those of criminal law (e.g., detention).

The indefinite legal terminology prevents individuals from foreseeing a potential deprivation of liberty. A pivotal rationale behind legal certainty is not to convey an overly broad discretion to the competent authorities. The margin of discretion and interpretation that results from the indefinite legal terminology contradicts this objective. Due to the paucity of time frames provided and the inclusion of indefinite terminology, the reform falls short of the requirements of legal certainty. Thereby, arbitrary elements are introduced into the law.

7.4. Purpose of Expulsion

Pursuant to the ECHR, the Return Directive and relevant jurisprudence of the BVerfG,[134] section 62 of the Residence Acts determines that the sole purpose of return detention is safeguarding the deportation. Although overlapping in their terminology, the various stipulations of this principle throughout the multi-layer framework are subject to distinct and, in fact, mutually opposing interpretations.

The Orderly Return Act introduced custody to enforce cooperation in section 62(6) of the Residence Act, aiming to force cooperation in matters of medical or consular interviews.

Even though the norm makes its sole "purpose of deportation" explicit, the very name of the legal institute seems to suggest otherwise, implying the aim of exerting pressure on the affected person to facilitate bureaucratic objectives. Arguably, these objectives put into question whether custody to enforce cooperation can be justified and executed under the regime of return detention.

[133] Bundeszentrale für politische Bildung, Das Rechtslexikon, Rechtsbegriff, unbestimmter <https://www.bpb.de/kurz-knapp/lexika/recht-a-z/323904/rechtsbegriff-unbestimmter/> accessed 23 November 2022.
[134] BVerfG 2 BvR 2106/05 (16 May 2007), para. 19.

Domestically, this issue has been negotiated by the BGH. The Court, although acknowledging that cooperation may be forced through certain means, established that detention was not one of them.[135] The judges held that were detention applied to enforce cooperation, it would resemble coercive detention of repressive character and would thus, contradict the inherent function of securing the deportation.[136] The judgement demonstrates the domestic understanding of the imperative purpose of deportation and, in this respect, illustrates that the mere furtherance of the removal process, or rather the prevention of interference, does not justify detention under the framework of the Residence Act. This authoritative interpretation clearly contrasts article 15(1) of the Return Directive, which explicitly foresees return detention in cases of hampering or avoiding the removal procedure. In clarifying these grounds, the European Commission held that the refusal to cooperate in the identification process reasonably substantiated a risk of absconding and thus, justified detention.[137] Confoundingly, Germany integrated this ground into its legal regime in section 62(3b)(5) of the Residence Act. Therefore, apart from being declared unconstitutional by the BGH, the institution of custody to enforce cooperation pursuant to section 62(6) is redundant, as it merely restates already existing powers stipulated a few paragraphs above. In practice, while detention ordered under section 62(6), despite European specifications, contradicts national jurisprudence, section 62(3b)(5) has remained without judicial commentary.

The complexity of this legal synergy demonstrates the peculiarities of EU law's implementation at the domestic level. The EU framework, broadly refers to the preparation of the removal, including required assistance from the detainee to that end. Domestic custody to enforce cooperation does not contradict but is rather endorsed by EU law. In contrast, although not caused by stricter requirements entailed in the ECHR instead by close consideration of national jurisprudence, the instrument of custody to enforce cooperation is likely to be found unlawful by the ECtHR.

[135] BGH V ZB 204/09 (10 June 2010), para. 29.
[136] ibid.
[137] Katharina Eisele, Izabella Majcher and Mark Provera, 'The Return Directive 2008/115/EC, European Implementation Assessment' (2020) European Parliamentary Research Service, p. 86.

7.5. Appropriate Place and Conditions

The realities of individuals subjected to enforced return detention, which have been characterised as "normal life minus freedom",[138] often translate to the restriction of a multitude of basic rights. In recognition of these circumstances, the multi-layer framework requires that detention is enforced in appropriate places and conditions.

7.5.1. Place

Despite recognising the principle of separation between criminal detainees and those awaiting deportation, the Orderly Return Act allowed for both groups to be detained in prisons, as stated in section 62a of the Residence Act. Thereby, the legislator addressed the lack of places in specialised facilities.[139] However, disregarding the fact that such justification has been explicitly rejected by the CJEU.[140]

The temporal limitation of the provision, being outlawed in 2022, does not conceal its evident neglect of supranational obligations stemming from the legislative works of the EU and ECHR alike. At the time of adoption, the reform still accounted for three more years of people awaiting deportation being detained in prisons.[141] Thereby, the Orderly Return Act contrasted its very objective of implementing the Return Directive and, moreover, negated relevant jurisprudence of the CJEU. The legislator actively allowed for interference with EU regulations based on the grounds

[138] Deutscher Anwaltverein, 'Stellungnahme durch den Ausschuss Migrationsrecht', Stellungnahme 56/2017 (November 2017), p. 6 <https://anwaltverein.de/de/newsroom/sn-26-2017-qualifikationsverordnung-bericht-des-libe-ausschusses?file=files/anwaltverein.de/downloads/newsroom/stellungnahmen/2017/DAV-SN_26-17.pdf> accessed 22 May 2023; The inherent paradox in this statement is evident, because there is no life without freedom, let alone a normal one, see Droste and Nitschke (n 23), p. 99.

[139] BT-Drucks 19/10047 (10 May 2019), p. 3 <https://dserver.bundestag.de/btd/19/100/1910047.pdf> accessed 22 May 2023.

[140] CJEU Case C-473/13 *Bero and Bouzalmate* [2014] ECR, para. 32; Notably, the joined case concerned two municipalities in Germany, one of which (Kleve) is located in North-Rhine Westphalia.

[141] Despite the explicit permission however, the *Länder* have maintained a practice of accommodating third-country nationals in specialised facilities rather than prisons. In most of the *Länder*, no persons subject to return detention were kept in prisons from 2018 to 2021. Where they were, the numbers are comparatively low, ranging from three people (Bavaria and Hesse) to a maximum of six in Saxony-Anhalt, see BT-Drucks 19/31669 (04 August 2021), p. 20f. <https://dserver.bundestag.de/btd/19/316/1931669.pdf> accessed 22 May 2023.

of practicality and evidenced the priority of national enforcement interest over supranationally protected fundamental rights of detainees.

7.5.2. Conditions

Detainees subject to return detention must be treated humanely and in a manner permitting a dignified life.[142] This includes the sufficient provision of basic health care, lighting, heating, personal space and outdoor activities. A comprehensive study on conditions at pre-removal facilities in Germany was published in 2014.[143] Yet, generalisations are only permissible to a limited extent, as facilities vary greatly in size and material conditions. Thus, the following remarks focus on the pre-deportation facility in North-Rhine Westphalia, to which the Deportation Detention Act applies. In January 2018, the National Agency for the Prevention of Torture conducted a visit to the specialised facility in Büren (North-Rhine Westphalia) and published its findings in a subsequent report. The Agency denounced the exceptional extension of restrictive measures, translating to detainees being confined to their cells not only at night but also from 7 a.m. to 2 p.m.[144] Further, a lack of privacy, psychological care, and compliance with principles of necessity and proportionality were highlighted.[145]

Despite these findings, the reform adopted later that year detailed new restrictive measures, permitting significant encroachments upon *inter alia* the freedom of movement, the right to leisure and sports, religious practice, or the use of telecommunication means (sections 19 and 20). Although the explanatory memorandum argues that these regulations "clearly" differed from those found in

[142] WGAD, 'Revised Deliberations No. 5 on deprivation of liberty of migrants' (February 2018) para. 17.

[143] As a rule, one or two beds are found in the cells, in which detainees may be locked for up to fourteen hours over night. Detainees are allowed to contact lawyers, family members, NGOs or consular authorities, although use of telecommunication means may be restricted. Leisure facilities are widely available but their use substantially limited to around 90 minutes of outdoor time per day, see Grote (n 119), p. 37.

[144] 'Nationale Stelle zur Verhütung von Folter, Besuchsbericht der Unterbringungseinrichtung für Ausreisepflichtige Büren' (9 July 2018) 234-NW/1/18, p. 4 <https://www.nationale-stelle.de/fileadmin/dateiablage/Dokumente/Berichte/Besuchsberichte/20180124_-_UfA_Bueren/20180124_Besuchsbericht_UfA_Bueren_Web.pdf> accessed 30 January 2023.

[145] ibid.

criminal detention facilities,[146] similarities in structure and, beyond this, a partially equivalent terminology are evident in comparing the amendments to the Prison Act.[147]

Thus, the reform causes a closer approximation to the criminal justice system.[148] This stands in stark contrast to the obligations imposed by the multi-layer framework. As the CJEU confirmed in 2022, the principle of separation between criminal and non-criminal detainees was not limited to the place of detention but rather extended to the conditions. In fact, if detention centres are to be characterised as specialised detention facilities in the sense of article 16(1) Return Directive, prevailing conditions must not resemble those in criminal detention facilities.[149] Accordingly, conditions in return facilities must "reflect the nature of their deprivation of liberty",[150] and ought to be distinct from the regime of criminal detention.[151] Taking these legal standards into consideration, the pervasive restrictive provisions additionally introduced by the Deportation Detention Act constitute a problematic renunciation of a clearly stipulated principle under the multi-layer framework.

7.6. PROPORTIONALITY

In the final section of this chapter, this paper explores the proportionality of measures under the legal reforms. This requires that a balance is struck between the societal interests of law enforcement and the fundamental rights of the individual

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[146] LT-Drucks 17/3558 (07 September 2018), p. 81f. <https://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument/MMD17-3558.pdf> accessed 22 May 2023

[147] See for example section 103 of the Prison Act on disciplinary action, especially with regards to the type of restrictions imposed and the terminology applied.

[148] Flüchtlingsrat NRW e.V., 'Stellungnahme Referentenentwurf Gesetz zur Änderung des Abschiebungshaftvollzugsgesetzes Nordrhein-Westfalen' (9 August 2018), p. 2 <https://www.frnrw.de/fileadmin/frnrw/media/Abschiebung/20180809_Stellungnahme_FRNRW_AHaftVollzG.pdf> accessed 22 May 2023; 'Hilfe für Menschen in Abschiebehaft Büren e.V.,Anhörung zum Abschiebungshaftvollzugsgesetz' (7 November 2018) Stellungnahme 17/901, p. 9 <https://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument/MMST17-901.pdf> accessed 15 May 2023.

[149] CJEU Case C-519/20 *K v Landkreis Giffhorn* [2022] ECR, paras. 54, 57.

[150] HRC, 'General Comment No. 35 on Article 9 (liberty and security of person)' (December 2014) UN Doc CCPR/C/GC/35, para. 14; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 'Factsheet on Immigration detention', CPT/Inf(2017)3, March 2017, p. 5.

[151] WGAD, 'Revised Deliberations No. 5 on deprivation of liberty of migrants' (February 2018) para. 31.

concerned.[152] Moreover, proportionality entails notions of reasonableness and necessity. Necessity highlights the exceptional *ultima ratio* nature of detention. Additionally, reasonableness assesses whether a particular action is appropriate considering all circumstances[153] and facilitates the concise weighing of interests. As a comprehensive proportionality assessment is beyond the scope of this paper, the focus is on two particularly contentious matters, namely the access procedure and the reversed burden of proof.

7.6.1. Access Procedure

As established above, the restrictive character of the access procedure does not affect a violation of the requirements of judicial order. Nevertheless, the repressive nature may refute the demands of proportionality, and especially, necessity. Notably, the measure pursues a legitimate objective, namely the assessment of personal needs, as specifically called for by the Return Directive.[154] However, this process is accompanied by significant restrictions on fundamental rights such as freedom of movement, religious practice, communication, or personal belongings.

In the absence of additional explanations, it remains dubious as to why the assessment of personal needs would necessitate the restriction of fundamental rights, including isolation for up to seven days.[155] Besides the broad period allocated for such assessments, the necessity of respective restrictions is called into question. In this respect, it is not clear to what extent the prohibition of partaking in religious services or leisure activities facilitates the assessment of personal needs. Likewise, there is no apparent impairment of the assessment if the individuals were able to participate fully in these matters. On the contrary, to better understand personal needs and risks, it is, in fact, beneficial to observe a person in different situations and positions. The

[152] *Soering v the United Kingdom* App no 14038/88 (ECtHR 7 July 1989), para. 89.
[153] Bantekas and Oette (n 33), p. 431.
[154] See for instance art. 4(a), 14(d), 17(4) calling for the needs of vulnerable persons to be taken into account.
[155] The legislator explicitly notes that for the majority of cases, the one week time period need not be exploited and instead, shorter procedures may suffice, see LT-Drucks 17/3558 (07 September 2018), p. 74 <https://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument/MMD17-3558.pdf> accessed 22 May 2023; This does however, not restrict the legal competence given, nor is the exceptionalism of the one week period reflected in the relevant law.

encompassing restrictions during the access procedure may translate to a practical negation of the right to contact a legal representative. This pivotal encroachment on the most fundamental right of detainees cannot be justified by reference to a needs assessment. Thus, these restrictions lack proportionality regarding the objective pursued. The aim of conducting a needs assessment could be effectively achieved without excluding numerous of the remaining freedoms of detainees, including the most fundamental ones. Correspondingly, a regional NGO found that the access procedure represented a sequence of disproportional restrictions.[156] Similarly, no evident connection to the requirements of a personal assessment is identified, leading the organisation to instead infer the pursuit of organisational and staff objectives.[157] Considering the weight of the personal freedoms limited in this case, such aims would render the procedure disproportional altogether.

7.6.2. Reversed Burden of Proof

As elaborated above, section 62(3a) of the Residence Act entails a list of situations which produce a refutable assumption sufficient to infer a risk of absconding. In contrast to criminal and civil procedure, the provision places the burden of proof on the individual facing detention. Thus, people subjected to return detention need to disprove factors alleged by the state, often without legal representation and while already detained.[158] In light of the weight of the life-changing and repressive character of return detention, this seems concerning, at least. Defending oneself against assumptions made by resourceful state authorities can hardly be expected from (often traumatised or vulnerable) detainees. Therefore, the provision does not take account

[156] 'Hilfe für Menschen in Abschiebehaft Büren e.V., Anhörung zum Abschiebungshaftvollzugsgesetz' (7 November 2018) Stellungnahme 17/901, p. 10. <https://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument/MMST17-901.pdf> accessed 15 May 2023; Droste and Nitschke (n 23) 224.
[157] 'Hilfe für Menschen in Abschiebehaft Büren e.V., Anhörung zum Abschiebungshaftvollzugsgesetz' (7 November 2018) Stellungnahme 17/901, p. 10. <https://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument/MMST17-901.pdf> accessed 15 May 2023.
[158] Karl Kopp, 'Op-ed: Detention, Insecurity, Rights Deprivation – The Legal Crackdown on Asylum Seekers in Germany', European Council on Refugees and Exiles (19 April 2019) <https://ecre.org/detention-insecurity-rights-deprivation-the-legal-crackdown-on-asylum-seekers-in-germany/> accessed 05 November 2022.

of the legal and factual situation of the affected persons and, for this reason, cannot be regarded as reasonable.

Pro Asyl further points out that the legal mechanism of a refutable assumption was not provided for in the Return Directive and thus, contradicts the latter.[159] However, this argument is misleading, as it neglects that the Directive does not administer exhaustive criteria or methods regarding the determination of a risk of absconding. What is, nevertheless, explicitly prescribed in the Directive is the imperative of detention as *ultima ratio*, emphasising the exceptional nature of return detention.

It is difficult to reconcile this narrative with grounds for detention being legally classified as a refutable assumption. In this vein, the risk of premature incarceration contradicts the basic idea of detention as a measure of last resort and rather supports the use of deprivation of liberty as an interim measure. The elaborated contentious lawfulness of section 62(3a) adds to its questionable proportionality. In this regard, the failure to establish precise definitions provides broad discretion to the competent authorities in the identification of legal grounds justifying a refutable assumption.

Evidently, these circumstances challenge the demands of proportionality by disproportionally burdening individuals who lack the material conditions to effectively defend themselves. Furthermore, integrating refutable assumptions into instruments enforcing detention regimes is irreconcilable, with detention being conceptualised as a last resort, as it refutes an imperative case-by-case analysis. The ambiguous terminology additionally exacerbates this factor.

8. CONCLUSION

As shown throughout this paper, Germany does not pose an exception to the global expansion of detention of third-country nationals. This research contextually positioned the domestic reforms within the framework of coextensive obligations

[159] Pro Asyl, 'Stellungnahme zum Entwurf eines Zweiten Gesetzes zur besseren Durchsetzung der Ausreisepflicht' (29 May 2019), p. 16 <https://www.proasyl.de/wp-content/uploads/PRO-ASYL_Stellungnahme-zum-Geordnete-R%C3%BCckkehr-Gesetz_Sachverst%C3%A4ndigenanh%C3%B6rung.pdf> accessed 15 May 2023.

stemming from International, EU and national law, identifying six criteria that constitute decisive elements in terms of the legality of return detention.

The preceding remarks demonstrated the questionable compatibility of German legislation with these essential standards required by the multi-layer framework.

Contrasting the widely acknowledged rule of law, the right to judicial review is practically inaccessible and further impeded by the lack of financial and legal support under German legislation. The paucity of reforms in this regard is regrettable and withholds structural improvement. Under the reforms, this situation is aggravated by the lack of information provided to the concerned individuals. Against this backdrop, and despite significant criticism from relevant NGOs, the reform adopted by North-Rhine Westphalia rescinds the explicit duty to inform detainees about crucial procedural rights. Taken into perspective, these factors substantially interfere with the right to a fair trial.

The inclusion of indefinite legal terminology and negligent temporal scopes within legal regulation of grounds for detention adds to the lack of understanding, and in view of the importance of personal liberty, defies the strict limits of legal certainty.

The purpose of expulsion, predetermined by the multi-layer framework is reflected in the national legal regime. However, this is only true considering the wide interpretation of the term under EU law. Domestic judgements, decisive in front of the ECtHR, apply a narrower understanding of the purpose of expulsion and thus, declare the broad approach of custody to enforce cooperation unlawful. While thus contrasting constitutional law, the provision does not conflict with EU or International law.

The legislative approaches followed by Germany and North-Rhine Westphalia expose a systemic disregard for the principle of separation of administrative and criminal detention regimes. Besides temporarily abrogating the prohibition of accommodating return detainees in prisons, the reforms introduced significantly restrictive measures, not merely linguistically stemming from the criminal justice sector. Thereby, the legislation alienates the practice of return detention from its purpose.

The lens of proportionality further reveals manifest conflicts with the principles of necessity and reasonableness. The reversed burden of proof further underlines due process concerns. Moreover, the access procedure evades conceptions of necessity in that its restrictions do not seem to be justifiable by the aim pursued.

The conducted analysis unveils numerous aspects of contradictory provisions in the obligations derived from the multi-layered framework. While the encroachments upon rights guaranteed under international or EU law may vary, their cumulative effect, introducing arbitrary elements into the regime, is scarcely reconcilable with the prohibition of arbitrary detention. Particularly the effective negation of the principle of separation is striking. Accordingly, and especially considering the exceptionally restrictive nature of the new provisions, the execution of return detention closely approaches the realities of the criminal justice system. In contrast to the latter, however, individuals in return detention are not eligible for mandatory defence and suffer a grave lack of information, thus failing demands of the rule of law and putting their right to liberty into question.

All these factors militate against strict adherence to the manifold obligations imposed by the multi-layer framework. Clear violations of various guarantees were identified, including the right to judicial remedy and the narrative of proportionality. Arguably, this lack of compliance is brought about by political imperatives which prioritise objectives of efficiency rather than the fundamental guarantees enshrined in a multitude of legal documents. In factors of decisive nature, the legal regime of Germany, and the provisions implemented in North-Rhine Westphalia, oppose the obligations prescribed by the multi-layer framework of International and EU legislation with respect to the right to personal liberty and the prohibition of arbitrary detention.

Militant Democracies: Reconciling the Prohibition of Political Parties with the Freedoms of Assembly and Association

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A Comparison between German Human Rights Law and the European Convention on Human Rights

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TABLE OF ABBREVIATIONS

GG	Grundgesetz
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
KPD	Kommunistische Partei Deutschlands
NPD	Nationaldemokratische Partei Deutschlands
NSDAP	Nazi Party of Adolf Hitler
SRP	Sozialistische Reichspartei

1. INTRODUCTION

Political parties are one of the most important actors in modern democracies.[2] This is reflected, inter alia, in the rights to freedom of assembly and association, guaranteed and safeguarded in most democratic constitutions. However, the recent global growth of anti-democratic sentiments has renewed the question of when a political party should be banned. Such a prohibition necessarily curtails the right to freedom of assembly and association, thereby creating a paradox: The limitation of political freedom and the democratic order is justified with the aim of protecting that same political freedom within that democratic order. In this context, reference is often made to the concept of a "militant democracy". Militant democracy is a democracy that can protect itself against anti-democratic movements by using, prima facie, undemocratic instruments.[3] Here, the anti-democratic movements are certain political parties, whilst the undemocratic instrument is their prohibition.

Interestingly, Germany is said to have developed "the most explicit – and the most far-reaching – theory of militant democracy".[4] This can be seen in the special character of the German Constitution, the Basic Law (*Grundgesetz,* GG), which grants political parties and their prohibition a prominent position. Nevertheless, the German Constitutional Court (*Bundesverfassungsgericht*) has only twice prohibited parties.

Moreover, the concept of a "militant democracy" can also be found in European legal frameworks. In particular, the rights to freedom of assembly and association, as guaranteed in Article 11 of the European Convention on Human Rights (ECHR)[5], and their limitation in the form of party prohibitions by the European Court of Human Rights (ECtHR) indicate this.

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[2] For example, the European Court of Human Rights has often emphasised the essential role of political parties in ensuring pluralism and the proper functioning of democracy (see also: *United Communist Party of Turkey and Others v. Turkey* App no 19392/92 (ECtHR, 30 January 1998), para. 25.

[3] Paulien de Morree, *Rights and Wrongs under the ECHR – The prohibition of abuse of rights in Article 17 of the European Convention on Human Rights* (Intersentia 2016), p. 148.

[4] Jan-Werner Müller, 'Militant democracy' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012), p. 1260.

[5] Convention for the Protection of Human Rights and Fundamental Freedoms, 04 November 1950, 213 UNTS 221, 03 September 1953, Article 11. Hereinafter referred to as 'European Convention on Human Rights' or 'ECHR'.

These two different systems seem to find different answers to the same problem of the above-mentioned paradox inherent in the prohibition of political parties.

Thus, this paper addresses the following question: How can the concept of a "militant democracy" as expressed by the prohibition of political parties in Germany and by the European Court of Human Rights, be reconciled with the freedom of assembly and association guaranteed in a democracy, as protected under the German Basic Law and the European Convention on Human Rights?

In answering this question, first, the notion and origin of the concept of a "militant democracy" are briefly explained. Next, the application of this concept in Germany is analysed by focusing on the legal framework of the prohibition of political parties, which is laid out by the *Bundesverfassungsgericht*. The latter's argumentation mainly developed in three cases and reveals the further importance of the concept of a militant democracy. The following part concerns the comparison of the ECHR with Germany, commencing with an analysis of the legal basis for party prohibitions in the ECHR. Afterwards, the relevant case law of the ECtHR is assessed. Naturally, this is put into the context of a militant democracy and contrasted to the approach taken in Germany.

This research, therefore, concerns a descriptive analysis of the relevant primary sources in both jurisdictions. For Germany, the focus lies on the *Grundgesetz* and the case law of the *Bundesverfassungsgericht*, whereas the ECHR and jurisprudence of the ECtHR form the basis of the part thereafter. This doctrinal approach is supplemented with secondary sources, mostly in the form of legal scholarship publications, particularly on militant democracy. Thereby, this paper aims to understand how the concept of a militant democracy underlies party prohibitions in both jurisdictions.

2. THE CONCEPT OF A MILITANT DEMOCRACY – BASIC NOTION AND ORIGIN

The theory of militant democracy was developed as a response to the expansion of fascism in Europe during the first half of the 20th century.[6] Karl Loewenstein, a German jurist and political scientist, coined the term in the 1930s.[7] He observed the rise of European autocratic movements, attributing this to democracies being "pacifist instead of militant".[8] According to Loewenstein, pacifist democracies are unable to protect themselves against totalitarian actors, as they are subjected to exploitation of their own principal guarantees such as fundamental rights and the rule of law.[9] Thereby, democracy provides the means for autocratic movements to implement themselves within the system.[10] A militant democracy, on the other hand, would be able to withstand fascist movements, by applying undemocratic means.[11] These may take form in anti-fascist legislation,[12] or, more generally, the "temporary suspension of constitutional principles".[13]

An important defence tool of a militant democracy is the possibility to prohibit political parties that aim at undermining the democratic order by abusing the rights set forth therein. However, the decision to prohibit a party is a highly delicate one, due to the inherent conflict it entails. In banning political parties, it may seem like democracy is not adhering to its own principle of free political choice and competition, endorsed in the rights to freedom of assembly and association.[14] Nevertheless, it is argued that nowadays, almost a century after Loewenstein,

[6] de Morree (n 3) p. 150.
[7] See Loewenstein's publication in *The American Political Science Review* between 1935-39: Karl Loewenstein, 'Autocracy versus Democracy in Contemporary Europe, I' (1935) 29 (4) The American Political Science Review 571 p. 580; Karl Loewenstein, 'Autocracy versus Democracy in Contemporary Europe, II' (1935) 29 (5) The American Political Science Review 755 p. 762; Karl Loewenstein, 'Militant Democracy and Fundamental Rights, I' (1937) 31 (3) The American Political Science Review 417, p. 423.
[8] Karl Loewenstein, 'Autocracy versus Democracy in Contemporary Europe, I' (1935) 29 (4) The American Political Science Review 571, p. 580.
[9] ibid p. 582.
[10] Karl Loewenstein, 'Militant Democracy and Fundamental Rights, I' (1937) 31 (3) The American Political Science Review 417, p. 423.
[11] Loewenstein characterizes these anti-democratic means as applying "a modicum of the coercion that autocracy will not hesitate to apply against democracy". See Loewenstein, 'Autocracy versus Democracy in Contemporary Europe, I' (n 7) p. 593.
[12] Loewenstein, 'Militant Democracy and Fundamental Rights, I' (n 10) p. 429.
[13] ibid p. 432.
[14] András Sajó, 'Militant Democracy and Transition towards Democracy' in András Sajó (ed), *Militant Democracy* (Eleven International Publishing 2004) p. 211.

practically all democracies have militant characteristics.[15] Two of these modern democratic orders, in Germany and under the ECHR are considered in turn.

3. Germany as the Archetypal Militant Democracy

3.1. Militant Character of the German Basic Law (GG)

Germany is said to be an "archetypal militant democracy".[16] This stems primarily from the unique character of the *Grundgesetz.* Indeed, it is considered to be the first European constitution that expressly recognised the need for a democracy to install mechanisms that avert anti-democratic actors who abuse the democratic state order to debilitate it.[17] In a way analogous to Loewenstein's reaction to the rise of totalitarian regimes in the 1930s, the creation of the *Grundgesetz* was a reaction to World War II and, more specifically, to the crucial role of the former constitution of the Weimar Republic[18] in paving the way for Hitler to establish his power with legal means.[19] From this experience, a value-based constitution was drafted,[20] placing fundamental rights at its heart.[21] Equally clear from history was the necessity to protect these rights from abuse. The German Constitutional Court expressly recognised and emphasised the influence of the experiences of World War II on the *Grundgesetz* several times.[22]

[15] Otto Pfersmann, 'Shaping Militant Democracy: Legal Limits to Democratic Stability' in András Sajó (ed), *Militant democracy* (Eleven International Publishing 2004) p. 53.
[16] Morree (n 3) p. 185.
[17] Paul Harvey, 'Militant Democracy and the European Convention on Human Rights' (2004) 29 (3) European Law Review 407, p. 408.
[18] The Weimar Republic, officially called the *German Reich*, describes the period between 1918 and 1933 in Germany, where, for the first time, a parliamentary democracy was established. On the weaknesses of the Weimar constitution, see: David Parra Gomez, 'The Failure of the Weimar Constitution: Institutional Keys and Lessons to Be Drawn' (2020) 11 (1) Journal on European History of Law 188, pp. 192-193.
[19] de Morree (n 3) pp. 188-189.
[20] Prior to this idea, law and morality were rather seen as separate notions. See for more: Donald P Kommers, 'German Constitutionalism: A Prolegomenon.' (2019) 20 (4) German Law Journal 534.
[21] This characteristic is underlined by the so-called eternity clause, laid down in Article 79(3) GG, which pronounces the following principles as unalienable: The principle of democracy (as defined in Article 20 GG), the federal structure and the principle of human dignity (found in Article 1 GG).
[22] See, for example: BVerfG, Urteil vom 23.10.1952 - 1 BvB 1/51, para. 48, or: BVerfG, Urteil vom 17.08.1956 - 1 BvB 2/51 paras. 257-258, where the Court condemned the neutral stance and political indifference of the constitution in the Weimar Republic as no longer viable, since this prevented the creation and protection of an own system of values.

Thus, various provisions provide for the lawful encroachment of fundamental rights, legitimising those seemingly undemocratic means proposed by a militant democracy.

3.2. Fundamental Rights and their Limitation

3.2.1. Article 18 GG – Abuse Clause

A prominent example of the protection of fundamental rights can be found in Article 18 GG, the so-called abuse clause. It sets out that by abusing the rights enshrined in the *Grundgesetz* to combat the free democratic order, one forfeits these rights. The free democratic order is the 'principal good of protection' (*Schutzgut)* of the *Grundgesetz,*[23] characterised by the rule of law, freedom, equality, and the exclusion of violence and arbitrariness.[24] Its protection is the central aim of the German militant democracy.

The conditions of Article 18 GG are demanding. The therein stipulated forfeiture of rights necessitates the abuse of fundamental rights, in the form of active and aggressive actions endangering the fundamental order. These actions need not involve physical violence or other criminal behaviour but can be purely cognitive, manifesting as ideological combat.[25] Moreover, there must not be a concrete possibility of success of the envisioned destruction of the free democratic order.[26] However, a certain threshold of danger must be met. Therefore, cases of obvious futility do not trigger the applicability of Article 18 GG. More specifically, Article 18 GG requires a risk for the free democratic order in the present moment as well as in the future.[27] This future risk must be highly probable.[28] Additionally, the application

[23] In contrast, the constitution of the Weimar Republic aimed primarily at the protection of the state and constitution. The free democratic order is a good of higher rank, connecting democracy to the rule of law. See Martin Morlok, ‚Parteiverbot als Verfassungsschutz – Ein unauflösbarer Widerspruch' (2001) 40 Neue Juristische Wochenschrift 2913.

[24] BVerfG, Urteil vom 17.08.1956 - 1 BvB 2/51, para. 51.

[25] Walter Schmitt Glaeser, *Mißbrauch und Verwirkung von Grundrechten im politischen Meinungskampf: eine Untersuchung über die Verfassungsschutzbestimmung des Art. 18 GG und ihr Verhältnis zum einfachen Recht, insbesondere zum politischen Strafrecht* (Gehlen 1968) p. 71.

[26] Klaus Stern, *Das Staatsrecht der Bundesrepublik Deutschland*, vol 3 (C.H.Beck'sche Verlagbuchhandlung 2022) p. 954.

[27] BVerfG, Beschluss vom 02.07.1974 - 2 BvA 1/69, para. 12.

[28] ibid para. 9.

of Article 18 GG is subject to strict procedural conditions. The forfeiture of rights can only be pronounced by the *Bundesverfassungsgericht*, upon an application by the *Bundestag*, the *Bundesrat*, or the Federal Government.[29] No other entity may file proceedings under Article 18 GG nor may another court than the *Bundesverfasssungsgericht* decide on it.

In practice, however, the application of Article 18 GG is rather limited. In total, it has been raised in only four cases, all of which were denied already in the preliminary proceedings.[30] This can partly be attributed to the stringent requirements of Article 18 GG. Additionally, there appear to be more effective constitutional mechanisms against anti-democratic actors. One of these mechanisms is the possibility to prohibit certain political parties, as analysed below. Nevertheless, Article 18 GG carries an important symbolical character. It illustrates that the *Grundgesetz* was drafted around the idea of self-defence.[31] The capacity of a democracy to safeguard itself by constitutional means is a crucial characteristic of a militant democracy. Thus, Article 18 GG exemplifies the militant nature of the *Grundgesetz.*

3.2.2. Article 8 GG – Freedom of Assembly and Article 9 GG – Freedom of Association

Two of the most important fundamental rights guaranteed in the *Grundgesetz* are the right to freedom of assembly and association. The *Bundesverfassungsgericht* categorized the right to freedom of assembly, guaranteed in Article 8 GG, as constitutive for a democratic system.[32] Article 9 GG sets out the right to freedom of association. Interestingly, this right is inherently limited in paragraph two: Associations whose aims or activities "run counter to criminal law or which are aimed against the constitutional order or the idea of understanding between nations are prohibited.". This is another feature of the German militant democracy as it allows

[29] §36 *Bundesverfassungsgerichtsgesetz* 1951 [Act on the Federal Constitutional Court].
[30] BVerfG, Beschluss vom 25.07.1960 - 2 BvA 1/56 para. 5; BVerfG, Beschluss vom 02.07.1974 - 2 BvA 1/69 para. 13; BVerfG, Beschluss vom 18.07.1996 - 2 BvA 1/92, 2 BvA 2/92.
[31] Gerhard Robbers, *Constitutional Law in Germany* (Wolters Kluwer 2017) p. 188.
[32] See, most recently: BVerfG, Urteil vom 27.06.2022 - 1 BvQ 45/22, para. 6.

effective action to be taken against anti-constitutional associations, even outside the general abuse clause of Article 18 GG. However, political parties are dealt with separately in the *Grundgesetz.*

4. Germany as a Political Parties' Democracy

4.1. Constitutional Role of Political Parties

It appears the German legal system accredits parties with the status of constitutional institutions.[33] Article 21 GG is entirely dedicated to political parties, recognising their participation in the formation of the political will of the people. In general, political parties are defined as associations of citizens that influence, constantly or for a long time, the formation of a political will, who want to participate in the representation of the German people, presenting satisfying indications for the seriousness of their aims.[34] Historically, Article 21 GG is one of the first cases of "positive constitutional codification of political parties in post-war Europe".[35] Political parties are furthermore said to be of constitutional relevance as they play a crucial part in the free democratic order.[36] They are thus not only democratic actors themselves, but through their function actively contribute to the flourishing of democracy as a whole: The *Bundesverfassungsgericht* argues that people exercise their democratic sovereignty through votes and elections. However, in sizeable modern democracies, the political will of the people can only emerge in the form of political parties. Thus, the formation and activities of political parties should, prima facie, be free in a democratic state.[37] Nevertheless, the freedom of political parties is not unlimited.

4.2. Article 21(2) GG – The Prohibition of Political Parties

[33] Ingrid van Biezen, 'The Constitutionalisation of Political Parties in Post-war Europe' in Ingrid van Biezen, Hans-Martien ten Napel et al., (eds), *Regulating political parties: European democracies in comparative perspective* (Leiden University Press 2016) p. 98.
[34] See §2(1) *Parteiengesetz* 1967 [Act on Political Parties] and Robbers (n 31) p. 157.
[35] Biezen, 'The Constitutionalisation of Political Parties in Post-war Europe' (n 33) p. 97.
[36] §1(1) *Parteiengesetz* 1967 [Act on Political Parties].
[37] BVerfG, Urteil vom 17.08.1956 - 1 BvB 2/51, para. 47.

The importance of political parties is also reflected in the strict requirements surrounding their prohibition. The second paragraph of Article 21 GG sets out that parties aiming to interfere with or set aside altogether the free democratic order or threaten the existence of the Federal Republic of Germany are unconstitutional. These parties are excluded from state subsidies and financial support.[38] The question of unconstitutionality can only be answered by the *Bundesverfassungsgericht* (Article 21(4) GG). This qualification is pointedly called "party privilege".[39] Moreover, an application to start such a procedure can be filed only by the *Bundesrat, Bundestag,* or the Federal Government.[40] If a party is declared unconstitutional under Article 21(2) GG,[41] the *Bundesverfassungsgericht* orders the dissolution of the party, prohibits the creation of a substitute party, and may authorize the confiscation of its assets.[42] These demanding conditions indicate the severity of party prohibitions and their delicate role in the German militant democracy. The sensitivity of such limitations is, furthermore, demonstrated by the small number of actual party prohibitions in Germany.

4.3. Party Prohibitions by the German Constitutional Court – A Threshold Analysis and the Role of the Concept of a Militant Democracy

4.3.1. Prohibition of the Sozialistische Reichspartei (SRP) - 1952

The first party prohibition under Article 21(2) GG occurred in 1952. In that instance, the *Bundesverfassungsgericht* developed criteria to ascertain when a political party should be dissolved: only if a party wants to unsettle the highest values of the democratic state can it be prohibited.[43]

In that case, the *Bundesverfassungsgericht* declared the Socialist Reich Party (*Sozialistische Reichspartei* or SRP*)* unconstitutional and dissolved it.[44] The SRP

[38] Article 21(3) GG.
[39] Müller (n 4) p. 1258.
[40] §43 *Bundesverfassungsgerichtsgesetz* 1951 [Act on the Federal Constitutional Court].
[41] ibid §46(1).
[42] ibid §46(3).
[43] BverfG, Urteil vom 23.10.1952 – 1 BvB 1/51, para. 50.
[44] BverfG, Urteil vom 23.10.1952 – 1 BvB 1/51, para. 50.

deemed itself to be the successor of the NSDAP, the Nazi Party of Adolf Hitler and adopted its structure and ideology. A party violating fundamental human rights[45] and democratic principles[46], which, most importantly, imitated Hitler's party, was held to constitute a sufficient threat to the free democratic order. Thus, the SRP was prohibited. This proved the practical importance of Article 21(2) GG.

Strikingly, the Court took notice of one of the principal motivations behind a militant democracy, namely, to prevent the possibility to use constitutional means to overthrow a state. It observed that, instead of open means of immediate violence, modern states were increasingly subverted with "creeping means of inner degradation".[47] Along these lines, the Court recognised the need for protection against such abuses and emphasised the importance of the *Grundgesetz* as a value-bound system that constitutes the opposite of a totalitarian state, having to protect the free democratic order.[48] Thus, the *Bundesverfassungsgericht* implicitly employs the concept of a militant democracy in its argumentation: to protect the free democratic order from the threat emanating from the SRP, the rights and freedoms guaranteed to the SRP as a political party had to be curtailed.

4.3.2. Prohibition of the Kommunistische Partei Deutschlands (KPD) - 1956

Only four years later, in 1956, the *Bundesverfassungsgericht* declared another party unconstitutional, albeit with a revised approach. The application concerned the German Communist Party (*Kommunistische Partei Deutschlands* or KPD), a Marxist-Leninist party that aimed at establishing the dictatorship of the proletariat through a violent revolution.[49] The Court took this opportunity to further elaborate on the requirements of Article 21(2) GG. Indeed, it diverged from its argumentation in the SRP case. Instead of a party already being unconstitutional, if it does not recognise the free democratic order, it must adopt an "active, militant, aggressive attitude"

[45] ibid para. 332.
[46] ibid para. 333.
[47] ibid para. 67.
[48] ibid para. 50.
[49] BverfG, Urteil vom 17.08.1956 – 1 BvB 2/51, paras. 105-106.

towards it.[50] It is sufficient if it can be inferred from the political course of the party that it aims at threatening the free democratic order by using democratic means.[51] Thus, Article 21(2) GG is a preventive measure.[52] This was also ascertained by the intention behind the Article, namely the will to preclude the development of parties aiming at infringing democratic principles.[53] Once again, this demonstrates how the Court justifies the curtailment of the fundamental rights of political parties with notions of a militant democracy.

Moreover, such curtailments seem to be an inherent necessity of the *Grundgesetz*. In recognising absolute values, it must defend these against all attacks, even if this means the limitation of free political participation.[54] The fundamental rights and principles on which German democracy is founded define the scope of the freedom of political parties. Democracy under the new German Basic Law was held to act to the maxim of "no unlimited freedom for the enemies of freedom".[55] The *Bundesverfassungsgericht* clearly views the *Grundgesetz* as a guarantor of the rights set forth therein. The procedure under Article 21(2) GG is an important means to protect and defend these rights and thus a significant characteristic of the militant democracy in Germany.

However, the inherent tension of the possibility to prohibit a party does not escape the *Bundesverfassungsgericht*. According to the Court, the will of the people establishes itself in the confrontation of political forces, with which a State interferes when it bans a political party.[56] Nevertheless, the *Bundesverfassungsgericht* finds that the normative sense behind Article 21(1) GG determines that only those parties actually grounded on the free democratic order may participate in the formation of the will of the people.[57] Therefore, Article 21(2) GG reflects the conflict of a militant

[50] BverfG, Urteil vom 17.08.1956 – 1 BvB 2/51, paras. 5 and 264.
[51] ibid para. 48.
[52] ibid para. 266.
[53] ibid para. 271: „*Der Wille des Verfassungsgebers war es, keine Partei sich entwickeln zu lassen, die während der Geltungsdauer des Grundgesetzes darauf ausgeht, die freiheitliche demokratische Grundordnung zu verletzen*".
[54] ibid para. 258.
[55] ibid para. 139.
[56] ibid para. 252.
[57] BverfG, Urteil vom 17.08.1956 – 1 BvB 2/51, para. 73.

democracy, as it is the result of a conscious attempt "to construct a synthesis between the principle of tolerance of all political positions, and the avowal to certain inviolable fundamental values".[58]

4.3.3. Unconstitutional but not Prohibited: Nationaldemokratische Partei Deutschlands (NPD) - 2017

Strikingly, more than half a decade later, in 2017, the *Bundesverfassungsgericht* developed a higher threshold. While the *Schutzgut* of Article 21(2) GG is still the free democratic order, a hostile stance towards it does no longer suffice for a party to be prohibited. Additionally, a party must have a real chance at achieving its anti-constitutional aims.[59] This new criterion of "potentiality" is assessed by the resolute and premeditated action of the party as well as its current state, societal impact, and public representation.[60] There does not need to be a concrete danger, but weighty indicators of the possibility of the realisation of such.[61] Otherwise, a ban is unnecessary.[62] As will be shown later, this decision was highly influenced by the jurisprudence of the ECtHR.

The new criterion of potentiality led to the remarkable judgment of a party being declared unconstitutional but not prohibited. The subject of that case was the National Democratic Party (*Nationaldemokratische Partei Deutschlands* or NPD), a small party known as a neo-fascist platform. At the time of the hearing, the NPD did not have more than 6000 members, one representative in the European Parliament, and no representative at the federal stage.[63] Considering its size, the Court did not regard the new threshold of potentiality to have been met. Specifically, it referred to the NPD's incapacity to influence the political process due to the insufficient extent, intensity, and density of their actions.[64] Thus, it concluded that a prohibition of the

[58] ibid para. 258.
[59] BverfG, Urteil vom 17.01.2017 – 2 BvB 1/13, para. 586.
[60] ibid para. 578.
[61] ibid para. 6c.
[62] ibid para. 586.
[63] ibid paras. 848 and 850.
[64] BverfG, Urteil vom 17.01.2017 – 2 BvB 1/13, para. 1008.

NPD was not necessary,[65] although its aims were unconstitutional.[66] In 2017, the *Bundesverfassungsgericht,* therefore, approached Article 21(2) GG with more caution.

The concept of a militant democracy plays a crucial role in the justification of party prohibitions and has been consistently and expressly recognised by the *Bundesverfassungsgericht*. The latter appears to be aware of the inherent tension of the possibility to prohibit political parties, characterising it as the "sharpest and moreover double-edged sword of the democratic state of law against its organized enemies".[67] Article 21(2) GG thus allows for a balancing test between the rights and freedoms granted to political parties and the protection of the free democratic order without having to violate constitutional law.[68] The jurisprudence of the *Bundesverfassungsgericht,* therefore, explains how the restriction of fundamental rights, in the form of the prohibition of political parties, is thus neither contradictory nor exceptional, but an inherent element of Germany's militant democracy.[69]

5. Party Prohibitions and Militant Democracy under the European Convention on Human Rights (ECHR) - A Comparative Analysis

5.1. Historical Context of the ECHR

The ECHR is, like the *Grundgesetz*, considered to be a defensive reaction to the experiences of World War II, as well as a protective reaction to the fragility of democratic systems.[70] The ECHR was adopted in 1950, enshrining fundamental human rights on a European stage, safeguarded by the simultaneous creation of the

[65] ibid para. 9.
[66] ibid para. 846.
[67] ibid para. 1.
[68] Robbers (n 31) p. 187.
[69] Peter Niesen, 'Anti-Extremism, Negative Republicanism, Civic Society: Three Paradigms for Banning Political Parties' (2002) 3 (7) German Law Journal 2, p. 28.
[70] De Morree (n 3) p. 16.

ECtHR.[71] Germany ratified the Convention in 1952 and thereby became bound by it.[72] Given this parallel development, it is not surprising to also encounter elements of militant democracy in the ECHR.

5.2. Comparison of the Concept of a "militant democracy" in Germany and the ECHR

While notions of militant democracy underlie both German Human Rights Law and the ECHR, there are some considerable differences in the emanation of this concept in both jurisdictions. The characteristics of the ECHR will be analysed in detail below.

Generally, the distinct nature of the ECHR and the *Grundgesetz* must be emphasised. In Germany, militant democracy operates within the framework of the national constitution as outlined in the *Grundgesetz*. In contrast, it is not the primary role of the ECtHR to uphold an existing constitutional order but rather to observe the adherence of states to the rights and freedoms set forth in the ECHR.[73] As a result, the idea of "militant democracy" seems to lie at the core of the *Grundgesetz,* whereas it does not hold such far-reaching importance in the jurisprudence of the ECtHR. Neither the Court nor the Commission ever expressly referred to a "militant democracy" when examining the limitation of fundamental rights and freedoms.[74] Nevertheless, the analysis below reveals that national contentions of systematic self-defence against anti-democratic actors are usually endorsed.[75] Moreover, such contentions are even acknowledged to also compose the ECHR itself.[76]

Furthermore, when dealing with political parties and their prohibitions, the ECHR does not appear to be as refined as the provisions of the *Grundgesetz.* Instead of dealing with political parties separately, the ECHR subsumes political parties

[71] The ECtHR has jurisdiction over the interpretation and application of the rights set forth in the ECHR (Article 32(1) ECHR). In case of an alleged breach of the ECHR by one of the state parties, either another contracting state (Article 33 ECHR) or individuals (Article 34 ECHR) may, after the exhaustion of domestic remedies (Article 35(1) ECHR), file an application to the ECtHR.
[72] By joining the ECHR, a state becomes bound by the judgements of the ECtHR in cases to which it is party (Article 46(1) ECHR).
[73] Harvey (n 17) p. 411.
[74] De Morree (n 3) p. 227.
[75] For example, *Vogt v. Germany* App no 17851/91 (ECtHR, 02 September 1996), para. 54.
[76] *Reisz v. Germany* App no 32013/96 (Commission Decision, 20 October 1997), p. 5.

within the freedom of assembly and association.[77] Thus, the concept of a militant democracy cannot be depicted as clearly within the framework of the Convention, as shown in the following. Nevertheless, the case law on party prohibitions showcases the capacity of the ECHR to provide for effective mechanisms of self-preservation. This objective of self-preservation in the sense of upholding democracy in the signatory states was one of the guiding motivations behind the creation of the Convention.[78] This is very similar to the historical development of the militant character of the *Grundgesetz.* As previously seen, safeguarding a democratic system and its rights and freedoms by imposing limitations on these, is the principal idea of a militant democracy.[79] Hence, while the expression of militant democracy may not be as prominent as in Germany, its underlying principles are evident in the provisions of the Convention and the jurisprudence of the ECtHR.

5.3. Fundamental Rights and their Limitation

5.3.1. Article 17 ECHR – Abuse Clause

Similarly to Article 18 GG, Article 17 ECHR prohibits any State, group, or person from employing the rights guaranteed in the Convention as a basis for any activity aimed at the excessive limitation or destruction of these rights.[80] The general purpose of Article 17 ECHR has been described as the prevention of totalitarian or extremist groups exploiting the principles safeguarded by the ECHR.[81] In this context, the ECtHR links the provision to the concept of a "democracy capable of defending

[77] Article 11 ECHR, see sections 3.3.2 and 3.3.3 below.
[78] A.H. Robertson (ed), *Collected edition of the 'travaux préparatoires' of the European Convention on Human Rights = Recueil des travaux préparatoires de la Convention Européenne des Droits de l'Homme*, vol 2 (Nijhoff 1975) p. 60.
[79] De Morree (n 3) p. 148.
[80] European Court of Human Rights, 'Guide on Article 17 of the European Convention on Human Rights' (31 August 2022), p. 7 < https://www.echr.coe.int/Documents/Guide_Art_17_ENG.pdf>, accessed 18th May 2023.
[81] *Paksas v. Lithuania* App no 34932/04 (ECtHR, 06 January 2011), para. 87; *Ayoub and Others v.* France App nos 77400/14, 34532/15 and 34550/15 (ECtHR, 08 October 2020), para. 9.

itself".[82] Article 17 ECHR is thus recognised by the ECtHR, albeit not explicitly, as a means of a militant democracy.

Importantly, Article 17 ECHR is limited in its scope and application. It is used only exceptionally and in extreme cases.[83] This is mostly due to its subsidiary nature: Article 17 ECHR is rarely applied on its own,[84] but mostly in conjunction with substantive provisions of the ECHR.[85] Here, it assists the Court in interpreting these provisions,[86] often to emphasise the necessity of a limitation of a right. This seems to align with the role of the abuse clause in the *Grundgesetz,* having rather modest practical significance and being principally symbolic in nature.

5.3.2. Article 11 ECHR – Freedom of Assembly and Association

In contrast to the constitutional role of political parties in Germany, the ECHR does not deal with political parties separately but provides for their protection under the rights to freedom of assembly and association. These are dealt with together in Article 11 ECHR and considered to be essential in a democracy, providing for the free and open formation of political programmes.[87] Moreover, the rights to freedom of association and assembly allow for the formation of a political opinion through participation in the political process.[88] Therefore, when party prohibitions are contested before the ECtHR, it tends not to rely on Article 17 ECHR, but rather on the direct possibility in Article 11 ECHR to legitimately limit these rights.

[82] *Vogt v. Germany* App no 17851/91 (ECtHR, 02 September 1996) paras. 51 and 59; *Ždanoka v. Latvia* App no 58278/00 (ECtHR, 16 March 2006), para. 100; *Perinçek v. Switzerland* App no 27510/08 (ECtHR, 15 October 2015), para. 242; *Ayoub and Others v.* France App nos 77400/14, 34532/15 and 34550/15 (ECtHR, 08 October 2020), para. 138.
[83] *Šimunić v. Croatia* App no 20373/17 (ECtHR, 22 January 2019), para. 38.
[84] On the rare possibility to directly apply Article 17 ECHR, see ECtHR Guide on Article 17 ECHR (n 80) p. 18.
[85] *Mozer v. the Republic of Moldova and Russia* App no 11138/10 (ECtHR, 23 February 2016), para. 222.
[86] *Z.B. v. France* App no 46883/15 (ECtHR, 02 September 2021), para. 101.
[87] *Socialist Party and Others v. Turkey* App no 21237/93 (ECtHR, 25 May 1998), para. 47; *Freedom and Democracy Party (ÖZDEP) v. Turkey* App no 23885/94 (ECtHR, 08 December 1999), para. 4.
[88] *Stankov and The United Macedonian Organisation Ilinden v. Bulgaria* App nos 29221/95 and 29225/95 (ECtHR, 02 October 2001), para. 61.

5.3.3. Article 11(2) ECHR – The Prohibition of Political Parties

Like the inherent limitations in Article 9(2) GG and Article 21(2), Article 11 ECHR itself provides, in its second paragraph, grounds for a legitimate restriction of the rights to freedom of assembly and association. Where limitations are: (1) prescribed by law and (2) necessary in a democratic society, in the interests of national security or public safety, for the prevention of disorder or crime, or for the protection of health, morals, or rights and freedoms of others, they are allowed. These criteria were further developed in the jurisprudence of the ECtHR, as analysed below.

5.3.4. Party Prohibitions by the ECtHR – A Threshold Analysis and the Role of the Concept of a Militant Democracy

Given the importance of the rights in Article 11 ECHR, only convincing and compelling reasons can justify their limitation.[89] The dissolution of an entire political party may only be ordered in the most serious cases,[90] as an *ultima ratio*.[91] There must be a "pressing social need",[92] the existence of which is assessed in three steps. These were most prominently formulated in 2003 in *Refah Partisi*,[93] in which the ECtHR upheld the ban on the Turkish Welfare Party, which aimed at establishing a regime based on sharia.[94] First, there must be plausible evidence that the party poses a sufficiently imminent risk to democracy. To assess this imminence, the programme of a political party as well as the actions of its leaders and members must be analysed. Secondly, these acts must be attributable to the party. Thirdly, these observations must lead to the conclusion that the party advocates a model of society that is incompatible

[89] *United Communist Party of Turkey and Others v. Turkey* App no 19392/92 (ECtHR, 30 January 1998), para. 46.
[90] *Herri Batasuna and Batasuna v. Spain* App nos 25803/04 and 25817/04 (ECtHR, 30 June 2009), para. 78; *Linkov v. the Czech Republic* App no 10504/03 (ECtHR, 07 December 2006), para. 45.
[91] *Ayoub and Others v. France* App nos 77400/14, 34532/15 and 34550/15 (ECtHR, 08 October 2020), para. 199.
[92] *Socialist Party and Others v. Turkey* App no 21237/93 (ECtHR, 25 May 1998), para. 49.
[93] *Refah Partisi (The Welfare Party) and Others v. Turkey* App nos 41340/98, 41342/98, 41343/98 and 41344/98 (ECtHR, 13 February 2003).
[94] Sharia is the name of the legal system of Islamic law based on the Koran.

with the requirements of a democratic society.[95] In its assessment, the ECtHR also paid attention to the party's actual potential to seize political powers[96] and thus the existence of a real risk emanating from it. With these criteria, the Court determines whether the dissolution of the party by national courts was proportionate.[97] These complex requirements reflect the delicacy of party prohibitions.

In the first criterion of the imminence of the risk, the link to the latest German jurisprudence can be seen. Thirteen years after *Refah Partisi*, the *Bundesverfassungsgericht* took the NPD case as an opportunity to align its jurisprudence with that of the ECtHR, in introducing its own potentiality criteria,[98] thereby also assessing the actual threat of a political party. It is striking that Germany, although considered to have developed the leading system of party prohibitions,[99] was compelled to adapt its standards to comply with the ECtHR. This evolution to a higher threshold is explained, inter alia, with the prior approach no longer reflecting the political reality of modern democracies, the latter being well-established and less threatened by small undemocratic parties.[100]

Additionally, like the *Bundesverfassungsgericht,* the ECtHR considers the historical context in which the contested dissolution took place.[101]

Furthermore, in its argumentation, the ECtHR implicitly puts forward notions of a militant democracy. *Refah Partisi* describes democracy as being based on a compromise that demands the restriction of certain freedoms of certain individuals in the interest of the stability of the state.[102] More generally, in *Heinz Reisz*, it was acknowledged that the concept of effective self-defence underlies the ECHR.[103] The

[95] *Refah Partisi (The Welfare Party) and Others v. Turkey* App nos 41340/98, 41342/98, 41343/98 and 41344/98 (ECtHR, 13 February 2003), para. 104.
[96] ibid para. 108.
[97] ibid para. 135.
[98] James Hogan, 'Analyzing the risk thresholds for banning political parties after NPD II' (2022) 23 (1) German Law Journal 97, p. 106.
[99] Richard H Pildes, 'Political parties and constitutionalism', in Rosalind Dixon and Tom Ginsburg (eds), *Comparative constitutional law* (Elgar 2011), p. 262.
[100] Hogan (n 98) pp. 106-107.
[101] *Refah Partisi (The Welfare Party) and Others v. Turkey* App nos 41340/98, 41342/98, 41343/98 and 41344/98 (ECtHR, 13 February 2003), para. 105.
[102] ibid para. 99.
[103] *Reisz v. Germany* App no 32013/96 (Commission Decision, 20 October 1997), p. 5.

ability of a democratic system to protect itself is seen as indispensable to guarantee its stability and effectiveness and, therefore, justifies interference with individual rights.[104] Such interferences must balance ”the requirements of defending democratic society on the one hand and protecting individual rights on the other”.[105] This self-defending capacity is the core characteristic of a militant democracy, demonstrating that the latter is, at least in some regards, part of the system of the Convention. Nevertheless, as shown above, the *Bundesverfassungsgericht* uses the theory of militant democracy to a greater extent.

In parallel to the *Bundesverfassungsgericht,* the ECtHR is aware of the careful balance that must be struck when providing for undemocratic means intended to protect democracy. States may not “adopt whatever measures they deem appropriate” behind the curtain of self-defence.[106] Thus, even though states are allowed to provide for such means, the risk these pose for the democratic order must always be kept in mind. This underlines the cautious attitude towards party prohibitions, adopted by both Courts, revealing the tension of a militant democracy.

6. Conclusion

To conclude, the concept of a militant democracy as reflected in the *Grundgesetz* and the ECHR, allows for the reconciliation of party prohibitions with the freedom of assembly and association as it provides both jurisdictions with legitimate grounds for such a measure and prescribes strict criteria regarding its application, requiring it to stay within constitutional boundaries.

This similarity between the two legal systems can first be explained by their parallel historical development. Against the background of World War II, there existed a strong desire to create a robust system of values, capable of defending itself. Consequently, the concept of a militant democracy as introduced by Loewenstein was, at least partially, constitutionalised both in the *Grundgesetz* and in the ECHR.

[104] *Ždanoka v. Latvia* App no 58278/00 (ECtHR, 16 March 2006), paras. 99-100.
[105] *Ždanoka v. Latvia* App no 58278/00 (ECtHR, 16 March 2006), para. 99.
[106] *Klass and others v. Germany* App no 5029/71 (ECtHR, 06 September 1978), para. 49.

One prominent indicator of this, is the inclusion of an abuse clause in both legal instruments, demonstrating an inherent will of self-defence. Interestingly, both Article 18 GG and Article 17 ECHR appear to have a greater symbolic than practical value.

Besides these abuse clauses, both systems provide for legal mechanisms to prohibit political parties, a means of curtailing the latter's fundamental rights in the most extreme form. Whereas the ECHR does so by using the inherent limitation in the right to freedom of association, set out in Article 11(2) ECHR, Germany employs a more sophisticated method. The *Grundgesetz* grants political parties and their prohibition a distinguished place in Article 21 GG, not subsuming them under the rights to freedom and association protected under Articles 8 and 9 GG.

The *Bundesverfassungsgericht* as well as the ECtHR have proven their essential role in the interpretation of the above-mentioned legislation. In Germany, an ever-growing threshold developed in mainly three cases, culminating in 2017, where the *Bundesverfassungsgericht* aligned its argumentation with the ECtHR in developing an additional criterion of potentiality, assessing the actual danger of a political party.

Despite this approximation, the concept of a militant democracy is expressly used only by the *Bundesverfassungsgericht,* whereas the ECtHR merely alludes to it. Nevertheless, the idea of a militant democracy provides the courts and underlying legal systems with a theoretical legitimisation of the seemingly undemocratic measure of party prohibitions.

Moreover, the low number of party prohibitions shows how both systems regard this possibility as a means of last resort and one to be approached with careful consideration. Both seem to be aware of the inherent paradox of a militant democracy and try to balance this cautiously.

The right to freedom of association and assembly is therefore safeguarded by the requirement that party prohibitions must always be weighed against these fundamental rights. A militant democracy, as implemented in Germany and under the ECHR, only accepts party prohibitions when these actually serve to protect democracy and the rights to freedom of assembly and association guaranteed therein.

Rethinking EU Insolvency Law: The Need for EU Harmonisation of Insolvency Law from A Post-covid-19 Perspective

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TABLE OF ABBREVIATIONS

COMI	'Centre of main interest'
Commission	European Commission
CR 2014	Commission Recommendation of 12 March 2014
EU	European Union
IR 2000	Insolvency Regulation 2000
IRR 2015	Insolvency Regulation (Recast) 2015
MS	Member States
PRFD 2019	Preventive Restructuring Framework Directive
PRFD Proposal 2016	Proposal for a Directive on Preventive Restructuring Frameworks

1. INTRODUCTION

The EU harmonisation of insolvency law has focused on creating a standardisation of legally binding laws across EU Member States (MS) for the enhanced functioning of the internal market. Harmonisation of insolvency law has been designated as a key priority on the agenda of institutional leaders since the 2007-2008 financial crisis.[2] The COVID-19 pandemic largely suspended the momentum for harmonisation of insolvency law, as other matters took centre stage for the EU.[3] After more than three years of economic stagnation, the implementation of EU insolvency law has offered the legislator a practical outlook on the limitations of insolvency proceedings.[4][5] These limitations have arisen from both the lack of substantive content of legislation and remaining incoherences of national insolvency laws in the MS.[6]

This research paper will answer the following question: 'Is there a need for further post-COVID-19 pandemic harmonisation of EU insolvency law, and if so, what issues should the European Commission take into consideration?'. In this context, 'issues' refers to the principal aspects the European Commission (Commission) should adhere to before finalizing a proposal for new harmonising measures.

A doctrinal and social-legal method will be used to answer the research question. The doctrinal method will introduce EU insolvency law from a neutral perspective to grasp the rationale of past, present, and future insolvency legislation. To understand its current functioning, EU insolvency law will be introduced, after

[2] B Wessels, 'European Insolvency Law: the Year Ahead' (2022) Wessels Insolventierecht Global Restructuring Review, para. 2.
[3] D Edward, R Lane and L Mancano, 'EU Law in the Time of COVID-19' (2020) European Politics and Institutions Programme Policy Centre, p. 7.
[4] The term "insolvency proceedings" is referring to collective proceedings as referred to the material scope of application of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015
on insolvency proceedings (recast).
[5] Currently, a Commission proposal on enhancing insolvency proceedings is pending submission for legislative action to address these potential inconsistencies. This proposal is titled 'Implementation of the Capital market Union Action Plan including the Initiative on harmonising certain aspects of substantive law on insolvency proceedings (provisional title)'.
[6] IF Fletcher and B Wessels, 'Harmonisation of Insolvency Law in Europe' (2012) Reports 2012 presented to the Association for Civil Law, pp. 8-11.

which its shortcomings during the COVID-19 pandemic are identified, followed by a delineation of potential improvements. The reasoning behind choosing the research question was made in the bigger picture of 'European Private Law'. The aim of a uniform system of 'European Private law' has slowed down since the withdrawal of the CESL and as seen with the piecemeal approach taken by the EU in the 2019 Consumer Rights Directives. Thus, other harmonising legislation outside contract law appeal to the larger debate on EU law. Therefore, the current state of EU insolvency law makes for an interesting analysis of the implementation of EU insolvency law. The literature used mainly consists of primary sources such as EU legislation and case law, which will be exhaustively analysed and juxtaposed with secondary sources like books, journals, and electronic sources.

The research paper follows this structure:

i. Reasoning of past, present, and future EU insolvency legislation
ii. Shortcomings of EU insolvency legislation during the COVID-19 pandemic
iii. Principal aspects for harmonisation of insolvency law across EU Member States

The first section describes the rationale behind the legal framework of EU insolvency law in a sequential manner. It provides an overview of the rationale behind four main EU insolvency legislations: the Insolvency Regulation 2000 (IR 2000),[7] the Insolvency Regulation (Recast) 2015 (IRR 2015),[8] the Commission Recommendation of 12 March 2014 (CR 2014)[9] and the Preventive Restructuring Framework Directive 2019 (PRFD 2019).[10] Additionally, there is an 'Inception Impact Assessment' launched by the Commission after the COVID-19 pandemic. This will be analysed by

[7] Council Regulation (EC) 1346/2000 on insolvency proceedings.
[8] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).
[9] European Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency.
[10] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency).

providing a general overview of the purpose and results of the assessment. The second section analyses the shortcomings of legislation during the COVID-19 pandemic. This paper will not assess the effectiveness of insolvency legislation during the COVID-19 pandemic, as this would require a quantitative analysis,[11] which is outside the scope of the research. The third section delves into the issues the Commission should attend to when planning to harmonise insolvency law across the MS based on a potential legislative proposal. This section adopts a narrower approach compared to the broad shortcomings mentioned in the preceding section. These issues include judicial expertise and coordination, "centre of main interest" (COMI), secondary proceedings and the use of Article 114 TFEU as a legal basis and its limitations.

2. Reasoning of Past, Present, and Future EU Insolvency Legislation

2.1 Synopsis of EU Insolvency Legislation

The magnitude and frequency of EU insolvency legislation have significantly gained momentum since the 2007-2008 financial crisis.[12] The first impetus for greater harmonisation of insolvency laws across the MS was the IR 2000.[13] Shortly after the financial crisis, the Commission issued a communication delineating a plan to emendate the legal incoherences of MS' insolvency proceedings observed during the crisis to fit the needs of companies across the EU.[14] After the reformation of the IR 2000 by virtue of the IRR 2015, the Commission passed the CR 2014.[15] This recommendation would be the grounds for the adoption of the PRFD 2019.

[11] Only substantive grounds will be assessed when evaluating the functionality of the legislations.
[12] Wessels (n 2).
[13] The IR 2000 would be repealed in 2017 by the European Insolvency Regulation (Recast) 2015 (IRR 2015).
[14] Communication from the European Commission to the European Parliament, the Council and the European Economic and Social Committee, a new European approach to business failure and insolvency (COM 2012).
[15] Council Regulation (EC) 1346/2000 on insolvency proceedings; Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast); Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency.

2.2 INSOLVENCY REGULATION 2000 & INSOLVENCY REGULATION (RECAST) 2015

Article 46 IR 2000 imposed an obligation on the Commission to present a quinquennial review of the application of the regulation and, if need be, an adaptation of it. The Commission agreed on the efficacy of the regulation in governing effective cross-border insolvency proceedings across the EU.[16] However, several issues regarding the scope of the regulation, such as group insolvency, convergence in judicial cooperation, the commencement of debtor insolvency proceedings, and the right of priority of creditors, remained unaddressed.[17]

The IRR 2015, like the IR 2000, recognised that the incoherences of national laws across the EU were a major hurdle towards the enhanced functioning of the internal market. The IRR 2015 maintained the same scope as its predecessor by addressing the incoherences in the jurisdictions of the MS.[18] The focal change in the IRR 2015 was the addition of preliminary insolvency proceedings (for the purpose of rescue, adjustment, restructuring and liquidation) between creditors and debtors. The IRR 2015 indicated a sizeable extension of the scope compared to the IR 2000. This addition to the IRR 2015 would be the main aim of the CR 2014 and the PRFD 2019.[19]

2.3 COMMISSION RECOMMENDATION OF 12 MARCH 2014

The report by the Commission in 2012 stated that as many as 200,000 businesses entered insolvency proceedings per year during the time of the global financial crisis;[20] additionally, one-quarter of all insolvent businesses had a cross-border implication.[21] In the report, the Commission stressed the need for a higher level of

[16] Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency.
[17] C Thole and M Dueñas, 'Some Observation on the New Group Coordination Procedure of the Reformed European Insolvency Regulation' (2015) International Insolvency Review, pp. 219-221.
[18] In other words, addressing the issue of conflict-of-laws.
[19] P Wetter 'Recast of the EU Regulation on insolvency law applicable as of today June 27, 2017' <https://www.schoenherr.eu/content/recast-of-the-eu-regulation-on-insolvency-law-applicable-as-of-today/> accessed 7 October 2022.
[20] European Commission (n 14) These statistics represent 2009-2011.
[21] This reiterates the perquisite for harmonisation of insolvency law as it is necessary for the enhancement of the internal market.

debtor protection. The Commission followed up by identifying multiple fields of insolvency law which would be best suited for enhancing debtor protection.[22]

The CR 2014 represented a shift in perspective at the EU level. The recommendation's main rationale was based on encouraging higher levels of trust in creditors and debtors concerning foreign investments via standardisations of MS' insolvency laws. This marked the first time the Commission sought to implement EU-wide insolvency law.[23] The report reiterated that there were still vast incoherences between national laws in the EU; however, a higher level of standardisation would be required to increase the internal market's functioning.[24] A revolutionary aspect of EU insolvency law was also introduced with the CR 2014, namely the concept of preventive restructuring frameworks (a sub-field of insolvency law).[25] This recommendation for future harmonisation in insolvency law was in line with the shift in perspective to ensure that higher levels of trust of creditors and debtors would be represented in every MS jurisdiction, thus increasing the likelihood of cross-border transactions occurring. Albeit the recommendation was purposed as a tool for soft law by encouraging a minimal approach to harmonisation of insolvency laws, much of the content found in the CR 2014 would be transposed into law with the adoption of the PRFD 2019.[26]

2.4 Preventative Restructuring Framework Directive

[22] European Commission (n 9), the areas which were considered for harmonisation included: second chance for entrepreneurs in honest bankruptcies; discharge periods that do not encourage a second chance; varying chances for restructuring due to different rules on the opening of proceedings; unfulfilled expectations of creditors for different categories of debtors; uncertainty for creditors relating to procedures to file and verify claims; promoting restructuring plans; special needs of SMEs to promote second chance.

[23] European Commission (n 9) Recitals 4,8,11.

[24] The Commission aimed to improve the functioning of the internal market by lowering the costs of assessing the risks of investing in another Member State; increasing recovery rates for creditors; and remove difficulties in restructuring cross-border groups of companies.

[25] European Commission (n 9) Recitals 6-7.

[26] WA Tollenaar Nicolaes, 'The European Commission's Proposal for a Directive on Preventive Restructuring Proceedings' (June 1, 2017) pp. 65-66.

Before the adoption of the PRFD 2019, the Commission released the Proposal for a Directive on Preventive Restructuring Frameworks (PRFD Proposal 2016).[27] The PRFD Proposal 2016, among many features, pivoted on the need for standardised insolvency proceedings across MS to encourage cross-border transactions. This would be done by progressively eliminating the minimum barriers restricting the free movement of capital arising from the divergent MS' insolvency systems.[28] As stated in the previous section, the main method of implementation would be the preventive restructuring frameworks. The main purpose of preventive restructuring frameworks is to allow debtors the opportunity to restructure their debt at an early phase to avoid default on their obligations.[29] In essence, this would allow companies to avoid unwanted liquidation of their financially distressed companies.

The PRFD 2019 does not impose maximum harmonisation of insolvency laws. The directive merely provides the MS with a "catalogue" of minimum standards to be transposed in national jurisdictions. This "catalogue" is a compilation of the most common and constructive insolvency laws across the national jurisdictions of the EU.[30]

2.5 Inception Impact Assessment: Enhancing the Convergence of Insolvency Laws

A common characteristic among the aforementioned pieces of legislation is the focus on harmonising at least pre-insolvency proceedings of debtors to avoid formal insolvency proceedings. After the COVID-19 pandemic, the shortcomings of insolvency law became known to the EU institutions and bodies, in particular, the Commission.[31] The Commission has launched an 'Inception Impact Assessment'

[27] Proposal COM (2016) 723 final 2016/0359 (COD) DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on preventive restructuring frameworks, second chance and measures to increase the
efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU.
[28] Directive (EU) 2019/102 (n 10) Recital 1 PRFD (2019), One of the "four freedoms" of the European Union to guarantee the free movement of goods, capital, people and services.
[29] DC Ehmke and others, 'The European Union Preventive Restructuring Framework: A Hole in One?' (2019) 28 Internal Insolvency Review, pp. 184-189.
[30] ibid.
[31] These shortcomings are discussed in the following section.

designed to provide information to interested parties about the potential content of the proposal and to offer opportunities to consolidate feedback on the intended initiative.[32] The prospective initiative will focus on striking a balance between different types of creditors and debtors while approaching the harmonisation from a holistic perspective.[33] This paper only provides a general outline of the current state of insolvency law across the EU, clarifying the potential need for harmonisation due to the lack of substantive content in current legislation and the remaining incoherencies of law amongst the MS.[34]

3. Shortcomings of EU Insolvency law during the COVID-19 Pandemic

3.1 General Remarks

The COVID-19 pandemic has revealed that the EU still lacks formal insolvency proceedings. In its present condition, there are vast incoherences in the MS' insolvency proceedings. This problem is most prevalent for cross-border companies conducting operations across multiple jurisdictions.[35] These proceedings are often too timely and costly for companies considering the hassle of navigating differing national insolvency laws. Additional rights and obligations conferred upon directors of cross-border companies only serve to the detriment of the efficiency of the

[32] European Commission, Inception Impact Assessment, "Enhancing the convergence of insolvency laws" (Ref. Ares, 2020) para. D.

[33] ibid., 'Insolvency law is considered to be a cross-cutting area of civil law that always has to strike a delicate balance between the legitimate interests of creditors and debtors, as well as between those of different types of creditors. This initiative will take a holistic approach towards insolvency issues, taking into account the banking/investor perspective and other stakeholders' interests - including suppliers (often SMEs), employees, the public purse, and debtors to identify an adequate balancing of those interests; there will be appropriate cross-references to the work on consumer insolvency carried out in parallel. An optimal insolvency framework will maximise economic value in the economy as a whole adequately balancing the interests of the various groups of creditors/stakeholders.'

[34] No substantive material has been provided by the Commission on the concrete plans for the proposal, currently the proposal has entered its indicative planning period in quarter two of 2022.

[35] D Valiante, 'Harmonising Insolvency Laws in the Euro Area: Rationale, Stock-Taking and Challenges. What role for the Eurogroup?' (2016) Economic governance support unit Directorate-General for internal policy, p.16.

businesses' economic activities.[36] This has led to such legal intricacy that investments have been deterred, thus affecting the functioning of the internal market. The substantive incoherences between EU MS are not only limited to the time constraints and the costs associated with the proceedings themselves. These incoherences also include the administrative regulations necessary to commence pre-insolvency proceedings. This, in turn, affects security regimes and employee rights, which are also subject to lengthy timetables.

3.2 INSOLVENCY TRIGGERS

Even after decades of careful shaping of insolvency laws, many MS still diverge when insolvency commences. Some national jurisdictions opt for over-indebtedness, default of payments, illiquidity, or a mix of various insolvency triggers.[37] For example, the French and Belgian national systems have chosen the default of payments of the debtor as the main trigger for insolvency, while Germany and Luxembourg require both illiquidity and over-indebtedness.[38] The insolvency trigger plays an important role for businesses that have established economic activities across the MS. Frequent confusion arises with the liability imposed upon their purview.[39] Present harmonisation does not provide managers of cross-border companies with enhanced guidance on their rights and duties imposed on their financially distressed companies.[40] Debtors lack the assurance of avoiding violations within insolvency proceedings and the freedom to proactively analyse other methods for restructuring debt.

[36] EMEA, "Quick Guides to Directors' Duties across Europe: Overview of Considerations for Directors When a Company Is in Financial Difficulty" (*Full-service Global Law Firm* August 27, 2020) quick-guides-to-directors-duties-across-europe.pdf (squirepattonboggs.com), accessed October 3, 2022.
[37] MA McGowan and D Andrews, 'Design of Insolvency Regimes across Countries' (2018) OECD Economics Department Working Papers, pp. 16-21.
[38] A Schluck-Amend, "Restructuring and Insolvency Law - Legal Research: CMS Expert Guides" (Restructuring and insolvency law - Legal research | CMS Expert Guides) <https://cms.law/en/int/expert-guides/cms-expert-guide-to-restructuring-and-insolvency-law>, last accessed October 15, 2022.
[39] G McCormack and A Keay, 'Directors' Liability and Disqualification' in Sarah Brown (ed), European insolvency law (Edward Elgar Publishing) p. 63.
[40] McCormack and Keay (n 39) p. 63.

3.3 Realisation of Securities

As soon as insolvency proceedings are triggered, creditors are notified of their opportunity to realise the assets the debtor contracted as collateral. The COVID-19 pandemic signalled to the EU that the current insolvency legislation does not offer a streamlined approach for the realisation of registered securities.

Respecting the principle of *paritas creditorum*,[41] and the right of priority for creditors,[42] has been a foundational feature of insolvency law.[43] [44] Creditors, especially those with a high level of security across the EU, encounter great difficulties when attempting to secure their assets across multiple MS jurisdictions.[45] The complexity of the formalities and administrative requirements encountered by creditors were found to be too time-consuming and costly.[46] Creditors are unable to base their cross-border investments on uniform and dependable insolvency proceedings; consequently, the incentive for investments is deterred.

Cross-border insolvency proceedings for both debtors and creditors imply a high level of cooperation. This problem was already tackled by Article 36 IRR 2015. In essence, Article 36 aimed at reducing the number of unnecessary insolvency proceedings by safeguarding creditor priorities through undertakings in one national jurisdiction.[47] Nevertheless, the cost of employing this assurance has not been favourable for secured creditors.[48] The costs would vary based on the size of the insolvent debtor. Meanwhile, the longer it takes to resolve insolvency proceedings, the higher the costs will be, as the costs include not only monetary expenses but also

[41] The principle of *paritas creditorum* refers to a legal concept that involves the dividing of assets of a debtor among their creditors in a proportional manner of each creditors claim.
[42] The principle of the right of priority for creditors refers to a legal concept in insolvency law that establishes the order in which creditors are entitled to receive payment from a debtor's assets. Under this principle, certain creditors are given priority over other creditors in the distribution of the debtor's assets. Generally, secured creditors, are satisfied first after which unsecured creditors must be satisfied.
[43] Moritz Brinkmann, 'The Position of Secured Creditors in Insolvency' (2008) 5 ECFR 248, p. 251.
[44] These principles have been assumed from the ability for natural and legal person to contract freely without restrictions from the legislator.
[45] Bork, Reinhard, 'Principles of Cross-Border Insolvency Law' Intersentia Ltd (2017) pp. 237-255.
[46] Brinkmann (n 43) pp. 268-269.
[47] Refer to Article 36 IRR 2015 for more clarification.
[48] B Hess and others, 'The Implementation of the New Insolvency Regulation: Improving Cooperation and Mutual Trust' (Hart Publishing 2017) pp. 71-72.

the time it takes for overseeing the insolvency procedure.[49] During the COVID-19 pandemic, the lack of transparency in the costs of proceedings and the avoidance of unnecessary costs obstructed the ability of secured creditors to realise cross-border securities.[50]

3.4 EMPLOYMENT

Employees only supersede the right of priority of unsecured creditors once a business enters insolvency proceedings.[51] The EU has harmonised multiple aspects of substantive and procedural labour laws,[52] however, incoherences among the MS still exist in employee dismissal procedures and insolvency proceedings for the transfer of undertakings.[53]

These disparities hinder the efficiency of cross-border insolvency proceedings when a company or part of a company is transferred to another company, including the rights and duties resulting from the former's employment contracts. Moreover, during the COVID-19 pandemic, one of the main issues of insolvent companies subjected to liquidity was the legal protection of employees and their right to receive payment of unpaid wages.[54] Currently, the MS have diverging insolvency proceedings for employer liability to employees due to the lack of harmonisation. For instance, in Germany, the state gives priority to employees to guarantee that wages are paid while providing financial support to distressed companies to continue commerce.[55] Other

[49] These costs are proportionally assigned to each creditor's claim. The main purpose of the administrator of the insolvency proceeding is to provide evaluations to both debtors and creditors during realisation s of assets.
[50] European Commission, 'Study on tracing and recovery of debtor's assets by insolvency practitioners' (Final Report 2022) pp. 106-116.
[51] Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer; this Directive requires MS to set up institutions to guarantee the payment of wages in the event of an insolvent employer.
[52] Council Directive 77/187/EEC of 14 February 1977.
[53] Ionel Didea, Ramona Duminica & Diana Maria, 'Interference between the Insolvency Law and the Labor Law. Convergence between Interests - Integrative Vision' (2018) 10 JL &Admin Sci 4, pp. 20-22.
[54] ibid pp. 9-12.
[55] G Streit and F Bürk, "Restructuring and Insolvency in Germany: Overview | Practical Law" (Restructuring and Insolvency in Germany: Overview 2022) <https://uk.practicallaw.thomsonreuters.com/2-501-

EU MS choose not to provide financial aid to companies and instead require employees to wait for their late wages until formal insolvency proceedings have been concluded.[56]

4. Principal Aspects for Harmonisation of Insolvency Law across EU Member States

4.1 Judicial Coordination and Expertise

The Commission must first pay attention to the way national judges at all judicial levels approach cross-border insolvency proceedings. As a prerequisite, MS should sponsor the effective application of EU law and the training of judges to achieve a more uniform application. However, realising harmonisation in this field may be a burdensome task for the Commission.[57] As it stands now, judges across the EU disseminate information to other courts when it comes to cross-border insolvency cases. This dissemination of information has led to an increase in efficiency for cross-border insolvency proceedings and the training of judges in niche insolvency issues. The former has also resulted in the reduction of time and costs. To further increase efficiency, many MS have set up specialised insolvency courts and judges.[58] A Commission legislative proposal for new insolvency legislation would increase incentives for investments across the EU, benefitting both creditors and debtors by addressing the issue of efficiency in national courts.

As a matter of course, the Commission should ensure the harmonisation of the cooperation among courts and potentially the training of judges, resulting in a higher level of functioning of the internal market. Cross-border insolvency proceedings, as seen before, differ in terms of insolvency triggers, the treatment of employees and

6976?contextData=(sc.Default)&transitionType=Default&firstPage=true > last accessed November 2, 2022.

[56] Chrispas Nyombi, 'Employees' rights during insolvency' [2013] 55(6) International Journal of Law and Management 417-428, pp. 423-424.

[57] E Mak, N Graaf and E Jackson, 'The Framework for Judicial Cooperation in the European Union: Unpacking the Ethical, Legal and Institutional Dimension of 'Judicial Culture'' (2018) 34 Utrecht Journal of International and European Law 24, p. 33.

[58] B Wessels and S Madaus, 'Business Rescue in Insolvency Law in Europe: Introducing the Eli Business Rescue Report' (2018) 27 International Insolvency Review 255, para. 77.

secured creditors, and the realisation of securities during the COVID-19 pandemic. As these insolvency proceedings tend to lead to a conflict-of-laws problem, cooperation among courts and training of judges would reduce costs and time when handling these legal complexities.

4.2 'Centre of Main Interest' and Secondary Proceedings

The Commission should take note, in its potential legislative proposal, of insolvency proceedings commenced in a MS where the COMI is located, and ensure that there is no need for creditors to commence secondary insolvency proceedings in their home MS. Articles 3(1) and 4(1) of the IR 2000 stipulate that under certain circumstances, the central activity of a business determines the MS which has jurisdiction and whose law will be applied for the insolvency proceedings. Furthermore, the CJEU has emphasized in *Rastelli* that a causal link must exist between the legal certainty and foreseeability of the main formal insolvency proceedings.[59] For example, if company A is registered in France but carries out its economic activity in Germany, German insolvency law will apply if the debtor enters formal insolvency proceedings. The German insolvency court would not follow the French application and/or interpretation of *paritas creditorum* or apply French-prioritized security rights. This example has been simplified for practical purposes since large companies across the EU carry out economic activity to a much larger extent than in this case. This creates the problem of forum shopping, where companies argue their COMI is in the MS, which provides the most beneficial insolvency law based on their situation.[60] In

[59] Case C-191/10 *Rastelli Davide e C. Snc v Jean-Charles Hidoux* [2011] ECLI:EU:C:2011:838 (Rastelli), p. 33; "the Court held that the centre of a debtor's main interests must be identified by reference to criteria that are both objective and ascertainable by third parties, in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open the main insolvency proceedings (Eurofood IFSC, paragraph 33, and Interedil, paragraph 49)".

[60] Case C-723/20 *Galapagos BidCo. S.a.r.l. v DE and Others* [2022] ECLI:EU:C:2022:209 (Sàrl), para. 32; "…to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position, and found that that objective would not be achieved if the debtor could move the centre of his or her main interests to another Member State between the time when the request to open insolvency proceedings was lodged and the time when the judgment opening the proceedings was delivered and thus determine the court having jurisdiction and the applicable law."

principle, this deters creditors from investing in companies carrying out economic activities in MS other than their own.

As mentioned in the preceding section, but on a broader scale, Article 36 IRR 2015 attempted to tackle this issue by reducing the number of unnecessary insolvency proceedings by safeguarding creditor priorities through undertakings in one national jurisdiction. However, the Commission should propose a refined version of this provision that recognises different secured priorities and *paritas creditorum* in insolvency proceedings, as it would increase the incentive for creditors to engage in cross-border transactions. Additionally, the Commission should focus on discouraging the need for the commencement of secondary proceedings in the home MS, which would reduce the financial obligations of creditors and debtors, but also the pressure put on the judicial systems of MS.

4.3 Article 114 TFEU as a Legal Basis and its Limitations

Article 114 TFEU has been paramount to the Commission's efforts to harmonise national laws. It permits the EU to harmonise national laws where incoherences between MS create a likely distortion of competition, and EU legislation would contribute to the likely removal of direct or indirect obstacles to the functioning of the internal market (*Tobacco Advertising*).[61] Nonetheless, as Article 114 TFEU is a shared competence of the EU, any measure taken by virtue of this article must comply with the principles of conferral, subsidiarity, and proportionality.[62]

The Commission must show that the act, to be adopted under Article 114 TFEU, deals with the harmonisation of national insolvency laws.[63] Article 114 would be suitable for a potential measure if the content of the act and the objective of the act

[61] Case C-376/98 *Federal Republic of Germany v European Parliament and Council of the European Union* [2000] ECLI:EU:C:2000:544 (Tobacco Advertising), para. 49.
[62] A 'shared competence is where both the EU and the MS may adopt binding legislation in the specified area, with the exception that the MS may only do so where the EU has not already exercised its competence, this is known as pre-emption; Article 4 TFEU.
[63] Tobacco Advertising (n 61) para. 27.

do not lead to the creation of measures outside the objectives of the Treaties.[64] The new legislation must seek out harmonisation of laws across the MS.

To prevent a future measure on insolvency law from being declared void by the CJEU, the measure must contribute to eliminating current or future obstacles to the functioning of the internal market.[65] The sole presence of disparities among MS' laws does not justify the application of Article 114 TFEU. The diversity of national insolvency laws must impede the functioning of the internal market. Moreover, the Court has stated that even the smallest incoherence among MS is incompatible with the principle of conferral.[66]

In accordance with the principle of conferral, the MS have delegated power to the EU to legislate under certain competencies.[67] Article 114 TFEU is a shared competence of the EU, meaning that the MS may legislate under the pretext of the functioning of the internal market if the EU has not exercised its power in that area.[68] The CJEU may decide, either by annulment action[69] or preliminary reference on the validity of EU acts,[70] whether the principles of conferral, subsidiarity and proportionality have been respected. Subsidiarity dictates that the EU may only act if there exist matters which cannot be solely dealt with by the MS. In contrast, proportionality dictates that the EU measures should be suitable to accomplish a legitimate aim which must not exceed what is necessary for it to be accomplished. These principles can be reviewed by MS national parliaments in which a legislative proposal may be tabled for breaching these principles.[71]

5. CONCLUSION

[64] This would be allowed under Article 352 TFEU, the 'flexibility clause'. However, under this legal basis no harmonisation is permitted.
[65] Tobacco Advertising (n 61) para. 49.
[66] Tobacco Advertising (n 61) para. 83.
[67] Article 5(2) TFEU; "Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the EU in the Treaties remain with the Member States."
[68] This is also referred to as the pre-emption clause.
[69] See Article 263 TFEU.
[70] See Article 267 TFEU.
[71] Article 6-7, protocol (No 2) on the application of the principles of subsidiarity and proportionality.

This paper assessed the following question: 'Against the background of the COVID-19 pandemic, is there a need to further harmonise EU insolvency law and, if so, what issues should the new legislation address?'. In this context, 'issues' refers to the suggestions made to the Commission when approaching future harmonisation. The first section of the research paper analysed the reasoning behind four key pieces of legislation: the Insolvency Regulation 2000, the Insolvency Regulation (Recast) 2015, the Commission Recommendation of 12 March 2014, and the Preventive Restructuring Framework Directive 2019. The legislation indicates that the EU institutions have maintained their focus on enhancing the functioning of the internal market. However, the content of the EU legislation has changed due to the widening of the scope and the addition of new insolvency mechanisms. This assessment reflected on EU insolvency law from a post-COVID-19 perspective by outlining the present state of insolvency law across the EU. It suggests a potential proposal for further harmonisation both because of the lack of content and remaining incoherences of national laws among EU MS.

MS jurisdictions maintain substantial differences in insolvency proceedings across the EU. One of these disparities is related to insolvency triggers, namely the moment when a debtor is legally considered insolvent. This varies among jurisdictions, ranging from over-indebtedness, default on payments, illiquidity, to a mix of these insolvency triggers. Once a debtor is insolvent, secured creditors have the power to realise securities. EU legislation has not made this process easy for creditors in cross-border cases. A high level of cooperation is required meanwhile, key property law principles, like *paritas creditorum* and the right of priority are being violated throughout these proceedings. Furthermore, fundamental insolvency law stipulates that employees always maintain the right to preferential compensation for unpaid wages. However, the procedural method to wage disbursement varies greatly.

To alleviate these shortcomings, the Commission should first forge cooperation and ensure proper training among national courts and judges of the MS. Cross-border insolvency proceedings are often decided on a case-by-case basis and demand intricate legal solutions to address the three main shortcomings mentioned before. Furthermore, to protect legal certainty and the legitimate expectations of

secured creditors, the Commission should address the regulation of the unfavourable practice of forum shopping. While Article 36 IRR 2015 addresses the issues created by Articles 3(1) and 4(1) IRR 2000, its application is unfavourable both in terms of time and costs to creditors. All told, these measures are most likely to be based on Article 114 TFEU: the legal basis for enacting harmonising measures for the purpose of enhancing the functioning of the internal market. Article 114 TFEU is not without limitations. Any measure taken under this legal basis would entail the harmonisation of insolvency laws and its compliance with the principles of conferral, subsidiarity, and proportionality. Overall, there is a further need for post-COVID-19 harmonisation of EU insolvency law, due to lack of EU legislation and existing incoherence in national insolvency laws across MS. The elements that the Commission should adhere to for potential future harmonising measures are judicial expertise and coordination, COMI, secondary proceedings and the use of Article 114 TFEU as a legal basis and its limitations.

During a time of crisis recovery, a more in-depth analysis of the effectiveness of insolvency law during the COVID-19 pandemic is required. This research paper's scope was limited to identifying the shortcomings of insolvency law observed during the COVID-19 pandemic. However, a statistical evaluation on the effectiveness of insolvency law is necessary to conduct a comprehensive assessment. Additionally, a substantive proposal from the Commission has still yet to be published. If the Commission deems it necessary to put forward a proposal, supplemental research should be conducted to analyse the new measure.

The Single Market Emergency Instrument - (Too) Far – reaching Competencies for The European Commission in Times of Crisis (?)

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TABLE OF ABBREVIATIONS

Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
EU	European Union
ICPR	Integrated Political Crisis Response Mechanism
SMEI	Single Market Emergency Instrument
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UCPM	Union Civil Protection Mechanism

1. INTRODUCTION

Since the EU's financial crisis in 2009, the EU has faced a series of challenges: the migration crisis, Brexit, the COVID-19 pandemic and the war in Ukraine.[2] Each of these crises resulted in a substantial upgrading of EU mechanisms to enhance their capacity to respond to future challenges.[3] One of these numerous responses, unveiled by the Commission on the 19th of September 2022, concerns the proposal for a Regulation establishing a Single Market Emergency Instrument (SMEI).[4] The SMEI has been proposed in the aftermath of recent crises in which the EU experienced disruptions to individual supply chains and the whole EU Single Market, lockdowns forcing businesses to halt trade, border closures, and workers and service providers being unable to move across Europe.[5] This set of rules aims at ensuring the continued functioning of the EU Single Market in future emergency situations. The SMEI focuses on preserving the free movement of goods, services, and persons, as well as on the availability of essential goods and services. The aim of the proposal is a positive step forward, as it is evident that transparency and coordination are essential to maintain the functioning of the Single Market in times of crisis. However, specific provisions of the proposal allow for a number of extensive and intrusive measures, including direct intervention by the European Commission in the market. Critics have argued that these competencies are too far-reaching.[6]

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[2] P Craig, '2. Development of the EU', in Catherine Barnard and Steve Peers (eds.), *European Union Law* (3rd edn, OUP 2020) pp. 31 ff.

[3] See for instance, the European Stability Mechanism (ESM) in the context of the Euro crisis, or the European Health Union package to improve the Union's ability to prevent, detect and rapidly respond to cross-border health emergencies.

[4] Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a Single Market emergency instrument and repealing Council Regulation' COM (2022) 459 final [hereinafter Draft Regulation].

[5] Dutch government, 'Considerations by Denmark, Estonia, Finland, Ireland, Netherlands, Slovenia and Sweden on a Single Market Emergency Instrument' (2022) <https://open.overheid.nl/repository/oep-81b8e60f1a12c5af348345471ac96a23222faa17/1/pdf/blg-1041239.pdf> accessed 8 April 2023.

[6] E Janssens and A Wiener, 'European Union: The European Commission published its proposal for a Single Market' (Global Compliance News, 2022) <https://www.globalcompliancenews.com/2022/10/21/european-union-the-european-commission-published-its-proposal-for-a-single-market-emergency-instrument-smei_10212022/> accessed 8 April 2023; Eurochambres, 'Single Market Emergency Instrument: chambers ask for rebalancing of priorities

Given these points of criticism, one question in particular arises: *To what extent does the proposed SMEI reveal shortcomings in the light of the Commission's increased powers?* This is also the main research question that is going to be examined in this paper.

To address this question, at first, a document analysis of, *inter alia*, the Commission's proposal as well as preparatory documents, reports and resolutions by EU institutions accompanying the process towards EU crisis responses and enhancing resilience is conducted. In a second stage, this is complemented by doctrinal legal research. Accordingly, the EU Treaties, the Charter of Fundamental Rights (the Charter), secondary legislation and CJEU's case law are analysed to address the current proposal as well as EU competences, interferences with businesses' freedoms and rights and workers' rights. A stronger focus is centred on literature review concerning scholarly contributions and critics' views. The discussion in this paper aims to contribute to the current debate on the shortcomings of the framework of the Commission's proposal by comparing the controversial views of some critics, and finally concluding with the author's own view.

Following this methodology, the paper starts by analysing the Commission's proposal by briefly examining its context and its framework of available elements and measures (Chapter 2). Chapter 3 delves into an analysis of the shortcomings of the current approach to crisis regulation of the Single Market by focusing on issues of competence and its limits, difficulties in defining an emergency situation, tensions with other EU proposals and crisis elements, and interferences with rights and freedoms of businesses and workers. Finally, Chapter 4 will conclude the findings of the paper.

2. THE SINGLE MARKET EMERGENCY INSTRUMENT

and more legal certainty' (2022) <https://www.eurochambres.eu/wp-content/uploads/2022/09/220919-Eurochambres-Press-release-Single-Market-Emergency-Instrument.pdf> accessed 8 April 2023; J Allenbach-Ammann, 'EU member states critical of Single Market Emergency Instrument' (EURACTIV, 2022) <https://www.euractiv.com/section/economy-jobs/news/eu-member-states-critical-of-single-market-emergency-instrument/> accessed 8 April 2023.

The EU Commission unveiled its proposal for a Regulation establishing a SMEI on the 19th of September 2022. To understand the reasons behind this proposal, this chapter will first focus on the context of the proposal (2.1). The second section will deal with the framework of available elements and measures under the proposal (2.2).

2.1 Context of the Proposal

Recent crises, especially the COVID-19 pandemic as well as Russia's invasion of Ukraine, have exposed insufficiencies when it comes to response measures in the Single Market and its supply chains in cases of unforeseen disruptions and times of emergency.[7] With regard to this, the European Council stated that the EU 'will draw the lessons from the Covid-19 crisis' and 'address remaining fragmentation, barriers and weaknesses' of the Single Market in emergency situations.[8] In her opening speech at the EU Industry Days 2021 on 23rd February 2021, the Commission's President von der Leyen initially announced to work on a SMEI to ensure the free movement of goods, services and people with greater transparency and coordination whenever a critical situation emerges.[9] In the context of Updating the 2020 New Industrial Strategy by building a stronger Single Market for Europe's recovery, the European Commission referred to the former speech and confirmed to propose such an instrument[10]. This Commission's plan for a SMEI was, *inter alia*, strongly supported by the European Parliament by calling on the Commission to develop it as a legally binding structural tool to ensure the free movement of persons, goods, and services in case of future crises.[11]

2.2 Framework of Available Elements and Measures

[7] Draft Regulation (n 4) p. 1.
[8] European Council, 'Special meeting of the European Council (1 and 2 October 2020) – Conclusions' (2020) EUCO 13/20.
[9] Commission, 'Opening speech by President von der Leyen at the EU Industry Days 2021', (2021) <https://ec.europa.eu/commission/presscorner/detail/en/speech_21_745> accessed 8 April 2023.
[10] Commission, 'Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe's recovery' (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions) COM (2021) 350 final, p. 6 f.
[11] European Parliament, 'European Parliament resolution of 17 February 2022 on tackling non-tariff and non-tax barriers in the single market (2021/2043(INI))' P9_TA (2022) 0043, No. 79.

The SMEI provides for a crisis-response architecture that essentially includes the establishment of four elements: an advisory group, a contingency planning framework, a vigilance mode framework, and an emergency mode framework.[12]

2.2.1 The Advisory Group

The role of the advisory group is to advise the Commission about appropriate measures to anticipate, prevent or remedy the effects of a crisis on the Single Market. It will be composed of one representative of each Member State with expertise in Single Market matters, and observers representing other crisis-relevant bodies such as the Integrated Political Crisis Response group of the Council, the Health Crisis Board, the Health Security Committee, the European Semiconductor Board, and the European Food Security Crisis preparedness and response Expert Group.[13]

2.2.2 The Contingency Planning Framework

The framework for contingency planning allows for preparatory measures during non-crisis times and does not require any activation.[14] It consists of arrangements for crisis communication systems, training, exercises, and simulations of potential scenarios of internal market emergencies, organised by the Commission, to ensure timely cooperation and exchange of information between the Commission, Member States and relevant bodies at Union level.[15] The framework, *inter alia*, requires both the Commission and Member States to put in place an inventory of relevant national competent authorities and to prepare for consultations of economic operators as well as arrangements for risk and emergency communication.[16]

The contingency planning framework also provides for ad hoc alerts for early warning systems for incidents that significantly or seriously disrupt, or have the potential to disrupt, the functioning of the internal market and its supply chains for

[12] Draft Regulation (n 4) p. 15.
[13] ibid.
[14] ibid p. 15 f.
[15] ibid p. 16.
[16] ibid Article 6(2).

goods and services.[17] In that case, the national competent authority shall inform both, the Commission and other Member States, of such incidents with the degree of disruption to be determined on a basis of pre-determined parameters, such as, the number of economic operators affected, its geographic reach and the proportion of the Single Market affected, or the duration of the disruption.[18]

2.2.3 The Vigilance Mode Framework

If there is a significant threat of disruption to the supply of 'goods and services of strategic importance'[19], which has the potential to escalate into a Single Market emergency within the next six months, the proposal provides for the opportunity for the Commission to activate the vigilance mode by means of an implementing act.[20] Vigilance measures, *inter alia*, concern the opportunity for the Commission to monitor supply chains of goods and services of strategic importance and, if necessary, allows the Commission to require Member States to build a strategic reserve of goods of strategic importance to prepare for a Single Market emergency.[21] The vigilance mode lasts for a maximum duration of six months, but can also be extended by the Commission for another six months or deactivated if the threat is no longer present.[22]

2.2.4 The Emergency Mode Framework

Finally, in the event of a crisis with a wide-ranging impact on the Single Market, such as severe disruptions of the free movement or to essential supply chains in the Single

[17] Draft Regulation (n 4) p. 16.
[18] ibid p. 16, Article 8.
[19] See for a definition Article 3(5) of the Draft Regulation (n 4) stipulating that *'goods and services of strategic importance' means goods and services that are indispensable for ensuring the functioning of the Single Market in strategically important areas and which cannot be substituted or diversified.* For a definition of 'strategically important areas' see Article 3(4) of the Draft Regulation (n 4) conceptualising it as '*those areas with critical importance to the Union and its Member States, in that they are of systemic and vital importance for public security, public safety, public order or public health, and the disruption, failure, loss or destruction of which would have a significant impact on the functioning of the Single Market*.
[20] Draft Regulation (n 4) p. 16, Article 3(2), Article 9; implementing acts may be of general or individual application and are subject to ex ante control mechanism by Member States, afforded by 'comitology'.
[21] ibid Article 11 f.
[22] ibid Article 9 f.

Market, if the Commission considers there is a Single Market emergency, it is obliged to propose to the Council to activate the emergency mode.[23] The activation will occur by a Council implementing act.[24] This stage of the SMEI particularly shows the sweeping powers of intervention of the Commission in the Single Market. Especially, in the event of severe crisis-related shortages or an immediate threat thereof, the Commission can request economic operators to transmit specific information on production capacities and possible existing stocks of crisis-relevant goods.[25] Moreover, it can recommend Member States to distribute strategic reserves in a targeted way, and to implement specific measures to ensure the efficient re-organisation of supply chains and production lines.[26] In exceptional circumstances, the emergency mode also provides for the Commission to invite business operators to prioritise certain orders for the production or supply of crisis-relevant goods.[27] These additional extraordinary measures, in accordance with Article 23 of the proposal, can only be activated under the strict condition of a further Commission implementing act and only after a Single Market Emergency has been activated by a Council implementing act.[28] Despite the fact that these measures are intended to be used only as 'last-resort measures',[29] the SMEI already raises deep concerns for being too 'interventionist'.[30] These worries are further aggravated by Article 28 of the proposal which provides for hefty fines of up to 1% of the average daily turnover if the business operator intentionally or through gross negligence, does not comply with priority-rated orders, or EUR 200,000 if the operator does not sufficiently comply with the obligation to reply to mandatory information requests. In addition to that, the

[23] Draft Regulation (n 4) Article 14(2).
[24] ibid Article 14(3); by qualified majority voting which requires 55% of the Members of the Council (i.e., currently 15).
[25] ibid Article 24; for a definition of crisis relevant goods and services see Article 3(6) defining it as *'goods and services that are indispensable for responding to the crisis or for addressing the impacts of the crisis on the Single Market during a Single Market emergency*.
[26] ibid Article 32 f.
[27] ibid Article 27.
[28] i.e., the requirement of dual activation.
[29] Pub Affairs Bruxelles, 'Questions and Answers: Single Market Emergency Instrument' (2022) <https://www.pubaffairsbruxelles.eu/eu-institution-news/questions-and-answers-single-market-emergency-instrument/> accessed 8 April 2023
[30] Janssens and Wiener (n 6).

emergency mode lasts for a maximum of six months with a possibility of extension and/or deactivation.[31]

3. The Shortcomings of the Current Approach to Crisis Regulation of the Single Market

Critics have argued that those sweeping competencies of the European Commission are too interventionist. To be able to answer the question of whether its competencies under the proposal are too far-reaching, the shortcomings of the current approach to crisis regulation of the Single Market must be considered. The focus hereby lies on the issues of competence and its limits (3.1.) as well as on the difficulties of defining an emergency (3.2.). In the next step, tensions and relations with other EU proposals and crisis elements are examined (3.3.). Finally, the chapter ends with a closer look at interferences with rights and freedoms of businesses and workers (3.4.).

3.1 Issues of Competence and Limits to the SMEI

The SMEI falls within the scope of the EU's internal market policy.[32] This area of policy is a shared competence between the EU and the Member States.[33] As regards the arrangement of sharing competences within the internal market, there is already a significant number of EU frameworks governing various aspects, economic sectors and policy fields, such as the Single Market for goods and services, public procurement, European standardisation, CE marking as well as governance and monitoring of the Single Market.[34] They all aim at contributing to the smooth operation of the Single Market, but mostly concern the general functioning of the Single Market irrespective of any crisis-related context.[35] This is where the SMEI attempts to provide for a horizontal, and broader set of rules with a specific focus on

[31] Draft Regulation (n 4) Article 15.
[32] ibid p. 7 stipulating that the SMEI is based on Articles 114, 21 and 45 TFEU, all dealing with the EU internal market.
[33] Article 4(2)(a) TFEU.
[34] See for an overview Commission, 'Single market and standards' (2022) <https://single-market-economy.ec.europa.eu/single-market_en> accessed 29 April 2023.
[35] Draft Regulation (n 4) p. 8.

crisis response measures concerning the Single Market. It is worth mentioning, however, that in the realm of shared competences, EU action is always underpinned by the principle of subsidiarity and proportionality. According to the principle of subsidiarity, the EU can only act 'if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States', but can rather be better achieved at Union level.[36] In other words, subsidiarity is meant as 'a presumption in favour of lower level decision-making, and one which allows for the centralisation of powers only for particularly good reasons'.[37] This principle serves to preserve Member States' autonomy and their protection from 'unnecessary Union action'.[38] The principle of subsidiarity is further complemented by the principle of proportionality meaning that the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.[39] This means that EU action, thereby including the proposed SMEI, must operate within the constraints of those principles.

Economic activities within the internal market, however, are highly integrated in the sense that business operators, clients, consumers and workers located in different Member States are closely interconnected due to their full enjoyment of free movement rights under the Treaties.[40] In this regard, the COVID-19 pandemic has shown that national interests have come to the fore and 'the objective of ensuring the smooth and undisrupted functioning of the internal market could not be achieved by unilateral national measures'.[41] On the contrary, it can be argued that the proposed measures were 'in fact more likely to further exacerbate the said crisis across the EU by adding further obstacles to the free movement and/or additional strain on products already impacted by shortages'.[42] This is where the proposed establishment of transparency and coordination by the exchange of information between Member

[36] Article 5(3) TEU.
[37] T Jaroszyński, 'National Parliaments' Scrutiny of the Principle of Subsidiarity: Reasoned Opinions 2014–2019' (2020) 16 European Constitutional Law Review, p. 93 f. with reference to M Jachtenfuchs and N Krisch, 'Subsidiarity in Global Governance' (2016) 79 Law and Contemporary Problems, p. 1.
[38] Jaroszyński (n 37) p. 95.
[39] Article 5(4) TEU.
[40] Draft Regulation (n 4) p. 7.
[41] ibid p. 8.
[42] ibid.

States at the Union level under the SMEI could make an outstanding contribution, thereby justifying action at the Union level and complying with the principle of subsidiarity.[43]

However, the sweeping interventions into the market by, *inter alia*, deprioritising certain orders for the production or supply of crisis-relevant goods of business operators, in fact, partially suspend the internal market coordination by supply and demand.[44] This further begs the question, especially raised by Bardt et al., whether the adaptability of decentralised processes at the national level via markets within the EU is truly insufficient in times of crisis, consequently justifying intervention by a public centralised authority.[45] In this regard, Bardt et al. argue that crisis situations are precisely characterised by scarcity, the handling of which must be managed using regulation via market prices (i.e., supply and demand).[46] As past crises, ranging from natural disasters to humanitarian emergencies, have shown, private companies play an essential role in responding to such emergencies including the provision of essential goods and services, 'both on business terms and through contributions of funding, supplies or volunteers'.[47] Supply chains are especially complex, and their management requires specialised know-how of economic operators.[48]

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[43] c.f., also C Bausch, 'Binnenmarkt-Notfallinstrument der EU-Kommission schießt übers Ziel hinaus' (2022) Bundesverband der Deutschen Industrie <https://bdi.eu/artikel/news/binnenmarkt-notfallinstrument-der-eu-kommission-schiesst-uebers-ziel-hinaus/?tx_news_pi1%5Bday%5D=18&tx_news_pi1%5Bmonth%5D=10&tx_news_pi1%5Byear%5D=2022&cHash=6fff936b80d055eeab486513c8eaf192> accessed 8 April 2023; H Bardt, C Rusche and S Sultan, 'Single Market Emergency Instrument: Ein Instrument mit Tücken' (2022) Institut der Deutschen Wirtschaft Köln e.V. IW-Policy Paper 7/2022, p. 16 <https://www.iwkoeln.de/fileadmin/user_upload/Studien/policy_papers/PDF/2022/IW-Policy-Paper_2022-SMEI.pdf> accessed 8 April 2023.

[44] Bardt et al. (n 43) p. 3.

[45] ibid p. 14.

[46] ibid.

[47] L Dreier and J Nelson, 'Pandemic Preparedness and Response, Why some companies leapt to support the COVID-19 response' (World Economic Forum, 2020) <https://www.weforum.org/agenda/2020/07/companies-action-support-covid-19-response/> accessed 29 April 2023.

[48] Brink News, 'The EU Wants to Control Company Supply Chains in Emergencies' (Brink News, 2022) <https://www.brinknews.com/the-eu-wants-to-control-company-supply-chains-in-emergencies/> accessed 8 April 2023.

This especially begs the question of whether the Commission's expertise can effectively address supply chain disruptions. Or, putting it differently, it raises the question as to how far the Commission's expertise truly weighs up against the know-how of economic operators. The Commission as a rather political institution concentrates on market coordination and relies on Member States and business operators for information, making it unlikely to be the first entity to notice disruptions in the Single Market. In this respect, business operators will be able to notice disruptions much more quickly, in a targeted and efficient manner and react accordingly. During the COVID-19 pandemic, it was essentially the private sector, most particularly pharmaceutical companies, that launched intensive efforts to develop vaccines and treatments and to accelerate medical production.[49] Non-medical manufacturers have retooled their supply chains to produce vital medical supplies, such as the Groupe PSA, Schneider Electric and Valeo cooperating with Air Liquide to produce more respirators for hospitals and healthcare workers,[50] major 3D printing companies such as Ultimaker, In Brescia or FabLab in producing ventilator valves,[51] clothing companies like New Balance or industrial manufacturers such as Dräger, TechnipFMC and Gundfos in producing masks, face shields and gowns,[52] or other private companies in producing and donating hand sanitisers.[53] Additionally, many large companies such as Facebook, Netflix and Tencent established massive funds

[49] Dreier and Nelson (n 47).

[50] O Ubertalli, 'Respirateurs : l'industrie française à la rescousse des hôpitaux' (Le Point, 2020) <https://www.lepoint.fr/economie/respirateurs-l-industrie-francaise-a-la-rescousse-des-hopitaux-31-03-2020-2369597_28.php#11> accessed 30 April 2023.

[51] S Stolton, 'EU industry touts 3D printing as 'immediate solution' to COVID-19 shortages' (EURACTIV, 2020) <https://www.euractiv.com/section/digital/news/eu-industry-touts-3d-printing-as-immediate-solution-to-covid-19-shortages/> accessed 30 April 2023; RTL Info, 'Respirateurs: face à une forte demande, l'industrie s'organise' (2020) <https://www.rtl.be/actu/respirateurs-face-une-forte-demande-lindustrie-sorganise/2020-03-24/article/296198> accessed 30 April 2023; M Morbidini, 'How the engineering industry is aiding the fight against COVID-19' (Kilburn & Strode, 2020) <https://www.kilburnstrode.com/knowledge/covid-19/engineers-worldwide-respond-to-covid-19> accessed 30 April 2023.

[52] Dreier and Nelson (n 47); M Baily, 'Dräger, TechnipFMC, Grundfos and more manufacture PPE to fight COVID-19 pandemic' (Chemical Engineering, 2020) <https://www.chemengonline.com/drager-technipfmc-grundfos-and-more-manufacture-ppe-to-fight-covid-19-pandemic/?pagenum=1> accessed 30 April 2023.

[53] Dreier and Nelson (n 47).

and committed to financial support for small businesses, employees and actors, or for relief work.[54]

Additionally, public centralised authority decisions can limit the economy's ability to innovate by restricting the economic freedom of private economic actors.[55] However, recent crises have brought about a paradigm shift in the EU towards more interventionist crisis-related activities by public institutions in the internal market.[56] The need to ensure the proper functioning of the internal market in emergency situations, where supply chains are deemed to be a matter of European security and not just subject to the 'whim of the free market', has become evident.[57] However, this shift does not automatically justify the intervention of the Commission in situations where market forces are sufficient.

So far, challenges remain in striking the right balance between public regulatory autonomy and private economic activities and business decisions, so as not to overregulate and de facto suspend the market economy.[58] The Commission's broad discretionary powers under the SMEI without a strict self-binding obligation, unlike, for example, in state aid law,[59] occasionally give rise to fears that the SMEI could be

[54] Dreier and Nelson (n 47).
[55] M Ferber, 'Für die Zukunft aufstellen. Europas Wirtschaft im Lichte der sozialen Marktwirtschaft' (Politische Studien der Hans-Seidel-Stiftung, no. 501/2022) p. 32.
[56] Brink News (n 48)*;* see also current EU legislation, e.g. Regulation (EU) No 123/2022 of the European Parliament and of the Council of 25 January 2022 on a reinforced role for the European Medicines Agency in crisis preparedness and management for medicinal products and medical devices, [2022], OJ L20/1; Commission, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937' COM (2022) 71 final; Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a framework of measures for strengthening Europe's semiconductor ecosystem (Chips Act)' COM (2022) 46 final; Commission, 'Contingency plan for ensuring food supply and food security in times of crisis' (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions) COM (2021) 689 final; Commission, 'Proposal for a Council Regulation on a framework of measures for ensuring the supply of crisis-relevant medical countermeasures in the event of a public health emergency at Union level' COM (2021) 577 final.
[57] J Allenbach-Ammann, 'How the EU's economic sovereignty repoliticises the market' (EURACTIV, 2022) <https://www.euractiv.com/section/economy-jobs/news/how-the-eus-economic-sovereignty-repoliticises-the-market/> accessed 8 April 2023.
[58] J Mulder, '(Re) Conceptualising a Social Market Economy for the EU Internal Market' (2019) 15(2) Utrecht Law Review, p. 17; J Pelkmans, 'The Economics of Single Market Regulation' (Bruges European Economic Policy Briefings 25/2012) Abstract.
[59] See CJEU, Case C-288/96 *Germany v Commission* [2000] ECLI:EU:C:2000:537, para. 62; Case C-310/99 *Italy v Commission* [2002] ECLI:EU:C:2002:14, para. 52.

misused as more of a political signal allowing it to become permanent in nature rather than an emergency instrument.[60]

Besides that, national security of supply systems also appears to constitute decisive limits to the SMEI.[61] According to Article 4(2) TEU 'national security' remains the sole responsibility of the Member States and in that regard, the Union shall respect 'essential state functions' of the Member States including the safeguarding of national security. In this respect, the CJEU[62] has demonstrated that the obligation to respect national security does not amount to an 'inherent general exception excluding all measures taken for reasons of public security from the scope of Community law'.[63] Even though the CJEU has dealt with the obligation to respect national security, and clarified that the only Articles in which the Treaty provides for derogations in situations which may affect public security are Articles 36, 45, 52, 65, 346 and 347 TFEU[64]; the exact boundaries and their implementation still remain blurred. The CJEU, in that context, only named the justification grounds to restrict the fundamental freedoms, especially Article 36 (concerning restrictions on the free movement of goods), 45 (concerning restrictions on the free movement of workers) and 52 TFEU (concerning restrictions on the freedom of establishment), in the name of national security without, however, clarifying the exact limits of the obligation to respect national security, as the decision is usually made on a case-by-case basis taking proportionality into consideration, and, in case of a preliminary reference procedure, ultimately left for the national court to decide.

[60] Bardt et al. (n 43) p. 15; Brink News (n 48); Dutch government (n 5); E Monard, J Weiss, B Maniatis and K Shin, 'The EU Single Market Emergency Instrument: Comparing the SMEI Against the U.S. Defense Production Act' (Steptoe Global Trade Policy Blog, 2022) <https://www.steptoeglobaltradeblog.com/2022/11/the-eu-single-market-emergency-instrument-comparing-the-smei-against-the-u-s-defense-production-act/> accessed 8 April 2023.

[61] Finnish government, 'Government submits its position on Single Market Emergency Instrument to Parliament' (2022) Ministry of Economic Affairs and Employment <https://tem.fi/en/-/government-submits-its-position-on-single-market-emergency-instrument-to-parliament> accessed 8 April 2023.

[62] CJEU, Case C-300/11 *ZZ* [2013] ECLI:EU:C:2013:363, para 38; Case C-387/05 *Commission v Italy* [2009] ECLI:EU:C:2009:781, para. 45.

[63] CJEU, Case C-38/06 *Commission v Portugal* [2010] ECLI:EU:C:2010:108, para 62 and the case law cited; Case C-186/01 *Dory* [2003] ECLI:EU:C:2003:146, para. 31.

[64] See for example CJEU, Case C-186/01 *Dory* [2003] ECLI:EU:C:2003:146, para 31; Case C-300/11 *ZZ* [2013] ECLI:EU:C:2013:363, para. 38.

However, one important example worth mentioning is the *Richardt* case, in which the CJEU explicitly accepted a derogation from the principle of free movement of goods (Article 34 TFEU) grounded on public security reasons for the trade of 'strategically sensitive goods'.[65] The court explicitly stipulated that Member States' both internal and external public security could form the basis to derogate from the principle of free movement of goods since 'it is common ground that the importation, exportation and transit of goods capable of being used for strategic purposes may affect the public security of a Member State, which it is, therefore, entitled to protect pursuant to Article 36 of the Treaty'.[66] The same was concluded for dual use goods in the *Werner* and *Leifer* cases.[67]

For the SMEI, which refers in particular to 'goods and services of strategic importance'[68], this could imply that derogations for these types of goods could easily be based on national security grounds. However, it should be noted that the concept of Member States' national security should not be understood as an absolute one or a 'carte blanche' to derogate from EU law at whim, most notably since Member States have committed themselves to membership of an EU community of integration, and thereby sacrificed a part of their absolute sovereignty to become part of 'the common enterprise in the EU composite system'.[69] The wording of Article 4(2) TEU merely requiring the EU to respect national essential state functions, including national security, does not lead to the conclusion that any Member States' derogation from EU law may be justified. It should, therefore, be seen as a concept that Member States are free to determine their national security as long as they do not undermine the functioning of the entire EU legal order, including the EU Single Market.[70] On the other hand, however, the EU cannot be authorised to regulate on security matters in

[65] CJEU, Case C-367/89 *Richardt* [1991] ECLI:EU:C:1991:376.
[66] ibid para. 22.
[67] CJEU Case C-70/94 *Werner v Germany* [1995], ECLI:EU:C:1995:328, para 25; Case C-83/94 *Leifer and Others* [1995] ECLI:EU:C:1995:329, para. 26.
[68] Draft Regulation (n 4) Article 3(5).
[69] M Bonelli, 'Has the Court of Justice embraced the Language of Constitutional Identity?' (Diritti Comparati, 2022) <https://www.dirittocomparati.it/has-the-court-of-justice-embraced-the-language-of-constitutional-identity/?print-posts=pdf> accessed 2 May 2023, p. 5.
[70] See on the notion of 'national identity' European Parliament, 'European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary' P7_TA (2013) 0315, Recitals K and M.

any case since this would certainly undermine Member States' diversity and pluralism that must be safeguarded as can be drawn from the Union's obligation to respect the equality of Member States and their national identities stipulated under Article 4(2) TEU.

Even though the SMEI refers to national security systems in a few parts,[71] it remains unclear to what extent national security should be respected by the EU, and where its limits lie. Yet, this clearly proves that challenges persist in striking the right balance between Member States' autonomy of determining national security of supply systems, and security regulation, particularly with a view to the SMEI at the EU level. The lack of clarity both in the Treaties, the SMEI, and the CJEU case law on this issue may therefore affect the implementation and effectiveness of the SMEI, most importantly due to a potential overlap with national security of supply systems. Member States may try to invoke 'national security' arguments as 'trump cards' in order to derogate from EU law, including the obligations foreseen under the SMEI. In this context, particularly Article 2(8) of the proposal stipulates that the SMEI 'is without prejudice to the responsibility of the Member States to safeguard national security or their power to safeguard essential state functions'. This, however, demonstrates that the SMEI is explicitly open to derogations necessitated for 'national security' reasons. Being faced with various crises such as migration, terrorism and lastly, the COVID-19 pandemic, the past practice, particularly in the field of Schengen law, has already evidenced that Member States are able to repeatedly and easily invoke 'national security' grounds as exceptional circumstances to reintroduce internal border controls,[72] although being deemed to be 'a thing of the past'.[73] A similar trend is also emerging in the EU rule of law crisis: Member States, first and

[71] Draft Regulation (n 4) Recital 8, Article 2(8) and Article 12(7).
[72] Commission, 'Member States notifications of the temporary reintroduction of border control at internal borders pursuant to Article 25 and 28 et seq. of the Schengen Borders Code' (2023) <https://home-affairs.ec.europa.eu/system/files/2023-01/Full%20list%20of%20MS%20notifications%20of%20the%20temporary%20reintroduction%20of%20border%20control%20at%20internal%20borders_en_1.pdf> accessed 8 March 2023.
[73] The Economist, 'Border checks are undermining Schengen Europe's open-border zone is being compromised' (2018) <https://www.economist.com/europe/2018/10/27/border-checks-are-undermining-schengen> accessed 18 March 2023.

foremost Poland and Hungary,[74] keep rejecting the authority of the CJEU or the EU in general and refuse to give full effect to EU law, *inter alia*, grounded on arguments of the EU's lack of competence, Member State's sovereignty, national (constitutional) identity, essential state functions or the supremacy of their Constitution.[75] Complemented by various concerns and points of criticism on the SMEI already raised by national governments,[76] this is a strong indication to believe that the same practice could happen under the future application of the SMEI, thereby severely jeopardising its effectiveness. Therefore, the proposal (and beyond the proposal, perhaps even EU law in general) clearly needs to provide for clarifications as to when an issue of national security becomes a matter of EU wide concern, and in order to close the loopholes for Member States' derogation practice, where to draw the limits between the different levels of regulation. This is also crucial, particularly in relation to the SMEI's impact on Member States and business operators since potential overlaps might result in confusions as to whom they are accountable – national or EU authorities. This is important as companies may face heavy fines if they fail to comply with the obligations under the SMEI.

Ultimately, the instrument reaches its limits as regards the EU's dependencies, *inter alia*, on third countries[77] since the proposed measures under the SMEI only concern matters of the EU's internal market. Most importantly, third countries are not bound by EU law, and so, do not fall within the coordinating measures to ensure the Single Market freedoms, and the increased cooperation foreseen under the SMEI. The EU Single Market, however, is internationally too interconnected and interdependent, especially regarding the procurement of goods from third countries.[78] In its analysis of Europe's strategic dependencies, the Commission explicitly identified great

[74] See e.g., CJEU, Case C-156/21 *Hungary v European Parliament and Council* [2022] ECLI:EU:C:2022:97, para. 202; Case C-157/21 *Republic of Poland v European Parliament and Council* [2022] ECLI:EU:C:2022:98, paras. 273 ff.
[75] M Claes, 'Safeguarding a Rule of Law Culture in the Member States: Engaging National Actors' (2023) 29(2) The Columbia Journal of European Law, p. 222; see also M. Claes, 'How Common Are The Values Of The European Union?' (2015) 15 Croatian Yearbook of European Law & Policy, XIV.
[76] e.g., Finnish government (n 61); Dutch government (n 5) concerning considerations by Denmark, Estonia, Finland, Ireland, Netherlands, Slovenia and Sweden.
[77] Bardt et al. (n 43) p. 16.
[78] ibid.

dependencies of the EU on third countries such as China, India, the US, Vietnam, Kazakhstan and Russia.[79] Those dependencies, *inter alia*, concern particular raw materials such as rare earths, magnesium and PV panels stemming from a strong concentration of global production in China,[80] for which there are currently limited options for supply diversification, including from within the EU, or substitution.[81] Further dependencies exist in the field of pharmaceutical and medical supply due to an increased concentration in China and India.[82] The Commission's review also highlights dependencies on third countries for the access to several chemicals[83] crucial to products and technologies,[84] identifies dependencies in the area of batteries,[85] and weaknesses in comparison with the EU's global competitors for key technologies such as cybersecurity and IT software.[86] Such dependencies are most certainly too complex to be regulated under the SMEI, and there already appears to be a vast sea of proposed measures specifically to address those dependencies, with the EU Chemicals Strategy for Sustainability, the EU Cybersecurity Strategy or the European Raw Materials Alliance being some of the opportunities to mention.[87] This all the more indicates that the SMEI will eventually not be capable of addressing scarcities and dependencies in times of crisis when the EU is so dependent on third-country supply.

3.2 Defining an Emergency – A Wicked Problem

Under the proposed Regulation, Article 3 No. 1 refers to the notion of a crisis which exists where 'an exceptional unexpected and sudden, natural or man-made event of

[79] Commission, 'EU strategic dependencies and capacities: second stage of in-depth reviews' (Commission Staff Working Document) SWD (2022) 41 final, pp. 7, 13, 32, 49.
[80] 93% of global production of rare earth magnets and 89% of magnesium.
[81] Commission, 'EU strategic dependencies and capacities: second stage of in-depth reviews' (Commission Staff Working Document) SWD (2022) 41 final, p. 2.
[82] ibid p. 7.
[83] such as iodine, fluorine, red phosphorus, lithium oxide and hydroxide, molybdenum dioxide and tungstate.
[84] Commission, 'EU strategic dependencies and capacities: second stage of in-depth reviews' (Commission Staff Working Document) SWD (2022) 41 final, p. 12.
[85] ibid pp. 7 f.
[86] ibid pp. 15 f.
[87] Commission, 'Second in-depth review of strategic areas for Europe's interests' (2022) <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/european-industrial-strategy/second-depth-review-strategic-areas-europes-interests_en> accessed 30 April 2023.

extraordinary nature and scale takes place inside or outside of the Union', whereas a Single Market emergency is defined as 'a wide-ranging impact of a crisis on the Single Market that severely disrupts the free movement on the Single Market or the functioning of the supply chains that are indispensable in the maintenance of vital societal or economic activities in the Single Market'.[88] Complementing this, Article 13 of the proposal provides for a non-exhaustive set of criteria that needs to be taken into account by the Commission when determining an emergency situation, such as the importance of the goods and services to the sector, the impact in terms of degree and duration on economic and societal activities, the market position of the affected economic operator, whether the affected economic operator had not been able to provide a solution within a reasonable time, the geographic area that is and could be affected, and the absence of substitute goods, inputs, or services. In practice, the Commission, relying on concrete and available evidence and information gathered by the Member States, the Commission itself, and economic operators, will essentially assess the severity of a disruption for the purposes of ascertaining whether the impact of a crisis on the Single Market qualifies as a Single Market emergency, taking the criteria listed under Article 13 of the proposal into due account.[89] The advisory body will assist the Commission in establishing whether those criteria have been fulfilled.[90]

At first glance, it is already noticeable that these criteria, as well as the previously mentioned definitions, appear quite broad and vague, and leave room for wide interpretation.[91] Taking the broad definition of a Single Market emergency, especially with a view to the vague and ambiguous notions of 'wide-ranging impact' and 'severely disrupts', those criteria do not provide for sufficient clarifications and conceptualisations of the definition of a Single Market emergency. The criteria of 'degree', 'duration', 'market position', 'reasonable time' and 'geographic area' ultimately all entail evaluative elements for which it is not clear against which yardsticks they are to be measured. Most importantly, the definition of a Single

[88] Draft Regulation (n 4) Article 3 No. 3.
[89] Draft Regulation (n 4) Article 13(1).
[90] ibid Article 4(6)(b).
[91] See also Bardt et al. (n 43) p. 15*;* Eurochambres (n 5); Janssens and Wiener (n 6); P Lombardi, 'EU's supply chain plan criticized for overreaching' (POLITICO, 2022) <https://www.politico.eu/article/eu-supply-chain-plan-criticize-overreaching/> accessed 8 April 2023.

Market emergency that is referred to in the Commission's Impact Assessment, initially referred to a 'wide ranging impact on the Single Market in **at least two Member States** [emphasis added]'.[92] The number of Member States, however, has been removed eventually from the definition under the final proposal of the SMEI. As a result, this ultimately leaves open whether an effect on a minimum number of Member States is required at all, if less or more than two Member States, or whether it is sufficient if effects are only apparent in third countries or merely among business operators with an effect on the Single Market. Additionally, the nebulous phrases also beg the follow-up question of when an emergency ceases to exist. Recalling a ruling of the CJEU, 'the principle of legal certainty requires that rules […] must be clear and precise so that [one] may know without ambiguity what are [the] rights and obligations and may take steps accordingly'.[93] However, as regards the rather vague and ambiguous terms under the Single Market emergency definition as well as the list of criteria set out in Article 13 of the proposal, the SMEI does not clarify how such an assessment should be carried out specifically, and which exact conditions, yardsticks and criteria should be applied accordingly, thereby giving leeway to the Commission's own conduct. This not only grants a considerable discretion to the Commission in determining when there is a Single Market emergency but also when such a situation ceases to exist. Ultimately, the determination is thus put at whim of the Commission's political will. Additionally, the SMEI does not require a threshold for when there is sufficient information for the Commission to assess whether a Single Market emergency is present. Consequently, there is a danger that the Commission may take arbitrary and possibly hasty decisions, particularly based on insufficient or non-reliable information.

Whilst the flexibility for a context-specific application of the SMEI is needed, the lack of a precise definition could give rise to considerable leeway for political arbitrariness. For example, the Commission could abuse the broad notion of a Single Market emergency and its broad criteria by exhausting all the loopholes of

[92] Commission, 'Impact Assessment Report, Accompanying the document Regulation of the European Parliament and of the Council for a Single Market Emergency Instrument Regulation […]' SWD (2022) 289 final, p. 28.
[93] CJEU, Case C-169/80 *Gondrand Frères* [1981] ECLI:EU:C:1981:171, para. 17.

interpretative discretion, and by invoking any new risk to the Single Market that appears, in order to be able to take wide-ranging steps under the SMEI. Even after the Single Market emergency mode seemingly ceases to exist, the Commission, where it considers that an extension of such is necessary, could easily prolong it. Although the Council may then extend the Single Market emergency mode by no more than six months,[94] it is not essentially clear whether the Commission could not actually discontinue the mode for a certain amount of time before activating it on the exact same grounds after the time elapse, or merely pretend that based on the subject of the risks, its scale or intensity, location and origin that a reintroduction was justified. Such a practice could thus turn the emergency instrument into a permanent one.

Nevertheless, this risk of arbitrary application of the SMEI is already debatable in view of the rule of law which is one of the EU's fundamental values.[95] According to that value, 'all public powers must act within the constraints set out by law',[96] which, *inter alia*, also entails the respect for the principles of legal certainty and the prohibition of arbitrary exercise of executive power.[97] In this regard, further clarification of what circumstances particularly constitute a crisis seems not only desirable[98] but inevitable. Otherwise, in combination with the sweeping competencies of the Commission (see 3.1.), the insufficient definition of an emergency raises fears of legal uncertainties and the abuse of power, thus turning the emergency instrument for exceptional cases into a permanent instrument on a regular basis.[99] Crucially, it should be clarified that the SMEI is reserved for exceptional circumstances affecting the Single Market only.

3.3 Tensions with Other EU Proposals and Crisis Elements

[94] Draft Regulation (n 4) Article 15(1)
[95] Article 2 TEU.
[96] Commission, '2020 Rule of Law Report. The rule of law situation in the European Union' (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions) COM (2020) 580 final, p. 1.
[97] Commission, '2020 Rule of Law Report. The rule of law situation in the European Union' (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions) COM (2020) 580 final, p. 1.
[98] Janssens and Wiener (n 6).
[99] ibid; Bardt et al. (n 43) p. 15.

Due to the unclear definition of an emergency situation, tensions and demarcation difficulties with other crisis response measures could also potentially arise.[100] However, the Commission's proposal tries to remedy the situation: based on the proposal, the SMEI is not intended to lay down a detailed set of EU-level provisions which should be exclusively relied upon in the case of crisis but rather to complement existing EU crisis management frameworks.[101] Crisis response and preparedness frameworks applicable to specific sectors, *inter alia*, the proposed European Chips Act,[102] will, however, take precedence over the SMEI.[103] In this respect, the proposal appears to be key to determining the applicable framework when demarcation difficulties with other crisis response measures arise. It remains questionable, however, whether this would also apply in practice.

For example, medicinal products, medical devices or other medical countermeasures (i.e., any goods or services for the purpose of preparedness and response to a serious cross-border threat to health)[104] are explicitly excluded from the scope of application of the SMEI.[105] However, in the same vein, Articles 16 to 20 of the proposal concerning measures during the Single Market emergency mode, in particular those established to remove restrictions to reinstate and facilitate free movement as well as notification measures, are deemed to apply to medicines, medical devices and other medical countermeasures.[106] Furthermore, starting material for medicines, intermediaries or components for medical devices are not explicitly precluded from the scope of the SMEI.[107] This will risk potential overlaps with crisis

[100] Janssens and Wiener (n 6).
[101] Draft Regulation (n 4) p. 8, Recitals 12 f., Recitals 18 f.
[102] Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a framework of measures for strengthening Europe's semiconductor ecosystem (Chips Act)' COM (2022) 46 final.
[103] Draft Regulation (n 4) p. 5.
[104] Commission, 'Proposal for a Regulation of the European Parliament and of the Council on serious cross-border threats to health and repealing Decision No 1082/2013/EU' COM (2020) 727 final, Article 3 No. 4.
[105] Draft Regulation (n 4) Article 2(2).
[106] ibid Article 2(3).
[107] Janssens and Wiener (n 6).

management instruments relevant to the pharmaceutical and medical sector.[108] Particularly, such a risk becomes evident in a comparison with the Commission's proposal for a 'Council Regulation on a framework of measures for ensuring the supply of crisis-relevant medical countermeasures in the event of a public health emergency at Union level'.[109] This proposal, just like the SMEI, provides for the possibility of mandatory information requests for business operators, conducting priority rated orders, stockpiling and procurement of crisis-relevant (health) products. Since the proposal applies in the event of a public health emergency, which could in the same vein potentially also constitute a Single Market emergency, and it is not fully exempted from the scope of the SMEI, overlap between those two instruments appears inevitable. However, neither the SMEI nor the proposal concerning the public health emergency provide guidance on how potential overlaps are to be resolved and which instrument is to be given priority accordingly. This would again cause confusion not only among Member States, but also among business operators, who may eventually also face double-burden caused by simultaneously applied crisis-related instruments.

Another example that might lead to potential overlaps is the 'Integrated Political Crisis Response Mechanism'(ICPR) of the Council.[110] The ICPR is used to facilitate information sharing and political coordination among Member States in responding to all types of complex crises, i.e., situations 'of such a wide-ranging impact or political significance, that it requires timely policy coordination and response at Union political level'.[111] In October 2015, the instrument first scrutinised the refugee and migration crisis, and it has since then been instrumentalised to respond

[108] See for example, Regulation (EU) No 123/2022 of the European Parliament and of the Council of 25 January 2022 on a reinforced role for the European Medicines Agency in crisis preparedness and management for medicinal products and medical devices [2022] OJ L20/1; Commission, 'Proposal for a Council Regulation on a framework of measures for ensuring the supply of crisis-relevant medical countermeasures in the event of a public health emergency at Union level' COM (2021) 577 final; Commission, 'Proposal for a Regulation of the European Parliament and of the Council on serious cross-border threats to health and repealing Decision No 1082/2013/EU' COM (2020) 727 final.

[109] Commission, 'Proposal for a Council Regulation on a framework of measures for ensuring the supply of crisis-relevant medical countermeasures in the event of a public health emergency at Union level' COM (2021) 577 final.

[110] Council Implementing Decision (EU) No 1993/2018 of 11 December 2018 on the EU Integrated Political Crisis Response Arrangements ST/13422/2018/INIT [2018] OJ L320/28.

[111] ibid Article 3(a).

to major crises caused by cyber-attacks, natural disasters, the COVID-19 pandemic, the Russian invasion in Ukraine, and most recently the earthquake in Türkiye and Syria.[112] The ICPR essentially brings together key actors of EU institutions, affected Member States and other actors such as stakeholders or experts in order to coordinate political responses to crises.[113] The instrument provides for two modes: the information sharing mode, which serves to establish a clear picture of the situation, and the full activation mode, which implies the preparation of response measures.[114] The full activation of the ICPR thus eventually provides for the preparation of proposals for action with regard to EU response. Due to its overarching scope, the ICPR may certainly also comprise Single Market emergencies. Despite the SMEI demonstrating that there is an interplay between both the SMEI and the ICPR, it does not clarify the exact relation and how to resolve potential overlaps. Most notably, since two main actors, the Council under the ICPR and the Commission under the SMEI, become present, it remains unclear how envisaged measures are to be coordinated in order to provide for a concerted crisis response strategy. This may potentially also result in applying double-standards as two different actors assess the (crisis) situation and propose measures without being bound by the findings of the other respective institution.

Another instrument for general crisis response is the Union Civil Protection Mechanism (UCPM),[115] that allows the Commission to respond 24/7 to emergency situations by providing for the establishment of strategic stockpiles, disaster risk assessments, scenario building, disaster resilience goals, EU wide overview of natural and man-made disaster risks and other prevention and preparedness measures, such as, training and exercises.[116] However, again the SMEI does not determine the exact relation between the UCPM and the SMEI, and how measures are to be coordinated

[112] Council of the European Union, 'How the Council coordinates the EU response to crises' (2023) <https://www.consilium.europa.eu/en/policies/ipcr-response-to-crises/#ipcr> accessed 2 May 2023.
[113] ibid.
[114] Council Implementing Decision (EU) No 1993/2018 of 11 December 2018 on the EU Integrated Political Crisis Response Arrangements ST/13422/2018/INIT [2018] OJ L320/28, Article 2(1).
[115] Decision (EU) No 1313/2013 of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism [2013] OJ L347/924.
[116] Draft Regulation (n 4) p. 2.

accordingly. Since crisis response instruments already exist or have been recently proposed at the EU level, the overriding question arises as to whether the SMEI is at all necessary to be introduced. In this regard, the Commission argues, that the SMEI is necessary, despite the existing instruments, because 'there is currently no horizontal set of rules and mechanisms which address aspects such as the contingency planning, the crisis anticipation and monitoring and the crisis response measures, which would apply in a coherent manner across economic sectors and the entire Single Market'.[117]

In this respect, the SMEI appears to be necessary and proportionate in adding value by laying down mechanisms for a swift and structured way of coordination and information exchange between the Commission and the Member States where no EU instrument already exists or where the existing instruments do not lay down crisis-relevant provisions.[118] However, it remains contestable whether the specific measures under the SMEI really meet this proportionality and necessity threshold. What looks good on paper, does not necessarily also look good in practice. Additionally, the assertion of the Commission is only partially true as there are already existing horizontal crisis response mechanisms (for example the ICPR and the UCPM) which provide at least similar and sometimes even equivalent measures. Eventually, it may thus remain debatable whether the SMEI is necessary at all or whether it would not be appropriate and sufficient to draw on existing instruments, improve them where necessitated, or to incorporate all approaches of general crisis response instruments into a common framework. Such an approach would eventually preclude overlap of the vast sea of mechanisms, avoid double-standards and provide for the necessary degree of legal certainty and clarity.

3.4 Interferences with Rights and Freedoms of Businesses and Workers

The greatest shortcomings of the SMEI, however, arise in the field of rights and freedoms of businesses and workers. In this respect, it is questionable whether the Commission's interventionist competences can be justified and, most importantly, whether they are proportionate.

[117] Draft Regulation (n 4) p. 8.
[118] ibid.

3.4.1 Interferences with Businesses' Rights and Freedoms

Under the activated emergency framework mode of the SMEI proposal, the Commission, *inter alia*, will be empowered to impose mandatory information requests, instructions to expand or reallocate production capacities, as well as mandatory priority orders to business operators. However, the mandatory requests may cause business operators to disclose trade secrets and sensitive business information to the Commission. Although guaranteeing the confidentiality of this information,[119] this is a strong interference with the companies' right to (intellectual) property protected by Article 17 of the Charter.[120] In addition, there are also concerns that the obligatory measures, in particular the prioritising of certain orders, could lead to business operators breaching their contractual obligations to other companies or customers;[121] therefore, it can potentially result in claims for damages and decisively affect business operators. While legal recourse options are usually available under civil law, business operators under the SMEI cannot remedy their damages against the Commission and claim compensation for the harm they have suffered. Instead, they are left with their costs. Furthermore, the prioritising of certain orders leads to strict interferences with the economic operators' freedoms to conduct business protected by Article 16 of the Charter.

It should be critically noted that the real failure, particularly during the COVID-19 pandemic, strictly speaking, lay with the Member States that closed their borders or imposed export bans.[122] The Commission, however, with its most severe competences of intervention, takes business operators to task the most and, in case of non-compliance, may even impose fines on them. In this respect, it seems disproportionate to hold business operators accountable as they have already suffered from closed borders, export bans and dispersed trade. Contributing most to the fragmentation of the internal market by introducing their measures, as a matter of fact,

[119] ibid Article 11(2), Article 25(2).
[120] Bausch (n 43).
[121] Dial P for Procurement, 'Can the EU function as a single market in an emergency?' (Supply Chain Now, 2022) <https://supplychainnow.com/eu-function-single-market-emergency-dp46/> accessed 8 April 2023; Lombardi (n 91).
[122] Bardt et al. (n 43), p. 15.

the right addressees should therefore be the Member States. In this respect, the Commission unjustifiably exceeds its objectives by means of its sweeping powers of intervention.[123] The question of how to distribute responsibilities among various actors in times of crisis is complex, and further discussion and analysis are needed to ensure a fair and effective crisis response.

3.4.2 Interferences with Social, Workers' and Trade Union Rights

Finally, concerns arise also as regards the rights and freedoms of workers and trade unions. As the crisis definition of the proposal also comprises 'man-made events' the right to strike of workers and trade unions, laid down in Article 28 of the Charter, might be endangered. Under the SMEI, the Commission, among others, also proposed to repeal Council Regulation No (EC) 2679/98 on the functioning of the internal market in relation to the free movement of goods among Member States (the so-called 'Strawberry Regulation')[124]. This instrument was adopted in 1998 due to serious obstacles to the free movement of goods in relation to, amongst others, the blocking of roads and tunnels under certain protests of farmers that negatively affected the free movement of agricultural products (in particular strawberries, tomatoes and wine).[125] Based on the evaluation of the Strawberry Regulation, strikes and demonstrations, in fact, accounted for 34 % of the obstacles in the period of 2007-2019.[126]

Against this background, the current proposal of the SMEI and in particular the Commission's Impact Assessment[127] do not sufficiently consider the protection of

[123] Bausch (n 43).
[124] Commission, 'Evaluation of Regulation (EC) 2679/98 on the functioning of the internal market in relation to the free movement of goods among the Member States' (Commission Staff Working Document) SWD (2019) 371 final, p. 2.
[125] ibid p. 3.
[126] ibid p. 18.
[127] Commission, 'Impact Assessment Report Accompanying the document Regulation of the European Parliament and of the Council for a Single Market Emergency Instrument Regulation of the European Parliament and of the Council amending Regulations (EU) 2016/424, (EU) 2016/425, (EU) 2016/426, (EU) 2019/1009 and (EU) No 305/2011 as regards emergency procedures for the conformity assessment, adoption of common specifications and market surveillance due to a Single Market emergency and Directive of the European Parliament and of the Council amending Directives 2000/14/EC, 2006/42/EC, 2010/35/EU, 2013/29/EU, 2014/28/EU, 2014/29/EU, 2014/30/EU, 2014/31/EU, 2014/32/EU, 2014/33/EU, 2014/34/EU, 2014/35/EU, 2014/53/EU and 2014/68/EU as

fundamental rights of individuals as well as the respect for collective rights including trade unions rights and notably the right to strike.[128] Whereas the Impact Assessment only considers the perspective of business operators in relation to data protection, privacy and the freedom to conduct business, the assessment of interferences with workers' and trade unions' rights is completely missing. Contrary to the SMEI proposal, the Strawberry Regulation contains a provision explicitly safeguarding the right to strike.[129] However, if the Strawberry Regulation is to be repealed by the SMEI, the right to collective bargaining and action might be endangered. Furthermore, in line with the CJEU case law,[130] a strike must not be considered as an extraordinary circumstance justifying measures under a crisis response instrument, but as an 'event inherent in the normal exercise of the employer's activity'.[131] Consequently, the crisis definition under the SMEI proposal is to be read in light of the CJEU's case law in order to guarantee the workers' and trade unions' right to strike. This argument is also supported by Article 153(5) TFEU which excludes explicitly the EU's competence to legislate as far as the right to strike is concerned. Regrettably, the SMEI proposal refers to the right to collective bargaining and action protected by Article 28 of the Charter only in its non-enforceable recitals.[132] Under the principle of legal certainty as well as to sufficiently guarantee the workers' and trade unions' rights to collective bargaining and action, a similar provision, such as the one enshrined in the Strawberry Regulation, could be included as part of the binding articles of the SMEI.[133]

4. CONCLUSION

regard emergency procedures for the conformity assessment, adoption of common specifications and market surveillance due to a Single Market emergency' (Commission Staff Working Document) SWD (2022) 289 final.

[128] ETUC, 'Safeguarding the Right to Strike against Emergency Measures in the Single Market' (2022) <https://www.etuc.org/en/document/safeguarding-right-strike-against-emergency-measures-single-market> accessed 8 April 2023.

[129] Council Regulation (EC) No 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States [1998] OJ L337/8.

[130] CJEU, Case C-28/20 *Airhelp Ltd v Scandinavian Airline System* [2021] ECLI:EU:C:2021:226.

[131] ibid para. 28.

[132] Draft Regulation (n 4) Recital 36.

[133] ETUC (n 128).

With regard to the Commission's far-reaching powers of intervention, the unclear definitions, possible overlaps with other existing or proposed emergency crisis instruments, and the far-reaching encroachment on corporate as well as employees' and trade unions' rights, the current SMEI proposal reveals numerous shortcomings of the instrument in the light of the principle of subsidiarity and proportionality, for which there is still a considerable need for improvement, especially from the point of view of legal certainty. The proposal will now be discussed by the European Parliament and the Council of the European Union before entering trialogue negotiations with the Commission.

In this respect, it is hoped that the shortcomings that have been criticised will be given sufficient consideration. Above all, it would be important to make clear that the main addressees of the instrument remain the Member States and that business operators are to be empowered and not disadvantaged. Further clarification is also needed regarding the nebulous wording of the crisis definition and its determining criteria. The analysis further reveals that the nature of the role of state actors and EU institutions in times of crisis, and the justification of intervention by a public centralised authority remain open to further research. In conclusion, it can already be said that despite all these possibilities for intervention, the SMEI is unlikely to completely prevent supply chain crises since the EU's internal market is internationally too interconnected and interdependent, expressly regarding the procurement of goods from third countries.

Populism and EU Competition Law: The Overarching Impact of The Rule of Law Crisis on Competition Law Enforcement Between NCAs Under Regulation 1/2003

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TABLE OF ABBREVIATIONS

AFSJ	Area of Freedom, Security and Justice
CJEU	Court of Justice of the European Union
EEC	European Economic Community
EU	European Union
MS	Member State
NCA	National Competition Authority
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UOKiK	Office of Competition and Consumer Protection

1. INTRODUCTION

"Competition is a basic mechanism of the market economy which encourages companies to offer consumers goods and services at the most favourable terms".[2] The existence of healthy competition in a market is usually an indicator of a well-functioning democratic and legal system.[3] The predominant aim of European competition law is to safeguard consumer welfare and ensure "the integration of national markets through the establishment of a single market".[4] Within the European Union (EU or Union), the European Commission is the central executive body which may 'police' competition cases that threaten the internal market.[5] More specifically, the European Commission is endowed with certain enforcement powers under Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

However, it is of paramount importance to remember that EU law is "a creature of international law".[6] From a supranational standpoint, the Commission is at the apex of the EU competition law system. Below the Commission, Regulation 1/2003 has granted each Member State (MS) enforcement powers through the establishment of a singular National Competition Authority (NCA). Moreover, NCAs possess "the guarantees of independence, resources, and enforcement and sanctioning powers necessary to apply Articles 101 and 102 TFEU effectively".[7] Ultimately, this system of decentralised enforcement is essentially based on the presumption of mutual trust that each MS will apply EU competition law in an equal and uniform manner. In other words, this presumption establishes that MSs are both willing and able to enforce competition law within their own respective mandate.[8]

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[2] Moritz Lorenz, *An Introduction to EU Competition Law* (Cambridge University Press 2013) p. 1.
[3] Katalin J Cseres, 'EU Competition Law and Democracy in the Shadow of Rule of Law Backsliding' (2022) Amsterdam Centre for European Law and Governance Research Paper No. 2022-01, p. 1.
[4] Joined Cases C--501, 513, 515, and -519/06 P *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-9291, para. 61.
[5] Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty [2004] OJ C101/05, para. 27.
[6] Katja Ziegler, 'The Relationship between EU Law and International Law' (2015) University of Leicester School of Law Research Paper No. 15-04, p. 1.
[7] Maciej Bernatt, *Populism and Antitrust: The Illiberal Influence of Populist Government on the Competition Law System* (Cambridge University Press 2022) p. 177.
[8] Adam Łazowski, 'The sky is not the limit: mutual trust and mutual recognition après Aranyosi and Câldâraru' (2018) 14(1) Croatian Yearbook of European Law & Policy 1, pp. 1–3.

However, such a presumption becomes increasingly dangerous when certain MSs decide to stray away from their obligations under EU law stemming from the Treaties. This precise obligation can be found in Article 2 of the Treaty on European Union (TEU), which maintains that the Union is "founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights".[9] In recent years, the EU is facing what can be best described as a "crisis of values".[10] The so-called 'rule of law crisis' in Hungary and Poland has displayed an increase in constitutional backsliding in national political and judicial systems. Moreover, the EU has become worried about the fate of mutual trust as the respect for Article 2 values significantly diminishes.

As a result, the negative impacts of the crisis have spread to other branches of administrative law, specifically EU competition law. Due to the lack of mutual trust, the overall enforcement and cooperation between NCAs become weaker. To give a clear picture of the administrative enforcement of competition law in the internal market as a whole, it is crucial to analyse the entire influence of the rule of law crisis on NCA cooperation. The Court of Justice of the European Union (CJEU) has held that competition policy ranks as one of the most "fundamental provisions" under EU law.[11] As this topic is largely unexplored, it is vital to provide an account of the severity that this crisis has on the overall enforcement of EU competition law. Therefore, this paper seeks to answer the research question: *what impact does the rule of law crisis have on the overall enforcement of EU competition law between NCAs pursuant to Regulation 1/2003?*

Chapter 2 aims to elaborate on the main principles of 'mutual trust' and the 'rule of law' from an administrative EU law standpoint. Ultimately, this chapter defines, discusses, and explains the relevance of these salient principles considering that they form the basis of the research paper. Chapter 3 examines the concept of

[9] Consolidated version of the Treaty on European Union [2012] OJ C326/13 (TEU), art. 2.
[10] Marion Ho-Dac, 'The Principle of Mutual Trust in EU law in the Face of a Crisis of Values' (*The European Association of Private International Law*, 22 February 2021) <https://eapil.org/2021/02/22/the-principle-of-mutual-trust-in-eu-law-in-the-face-of-a-crisis-of-values/> accessed 26 September 2022.
[11] Opinion 2/13 of the Court of Justice of the European Union [2014] ECLI:EU:C:2014:2454, para. 172.

'mutual trust' under Regulation 1/2003. Here, it is necessary to lay out the law and describe how this important principle plays a role in the statute. In addition, this chapter explores the overall effectiveness of the Regulation when there is no mutual trust between MSs. For this reason, it is also necessary to investigate how Article 2 TEU values play a role in the enforcement of EU competition law. Chapter 4 discusses the adverse effect of the rule of law crisis on cooperation and enforcement between NCAs. This chapter provides a close examination of the NCAs in both Hungary and Poland and shows how the crisis has weakened their overall effectiveness. In order to answer the proposed research question, this paper relies on the primary sources highlighted in legislation, namely, as articles of the TFEU and TEU. In addition, this paper makes use of secondary sources such as relevant case law, journal articles, books, and other forms of literature such as websites, blogs, or academic papers. This research paper is limited in the sense that this topic remains largely unexplored. Although the topic of the rule of law crisis in the EU is widely published, few scholars have looked specifically at its effects on the enforcement of EU competition law. However, since the crisis stems from the deterioration of public systems within a MS, it is logical to deduce that the democratic backsliding would lead to further complications within the competition law realm. Bearing this in mind, it is still of paramount importance that this paper examines how the crisis has negatively affected EU competition law enforcement. As the rule of law is extremely complex, it is not necessary to provide a prolonged commentary from an EU constitutional law standpoint.

2. The Principles of Mutual Trust & The Rule of Law

2.1 Introduction

EU law relies on a number of principles in order to run effectively and efficiently. From an administrative law perspective, some of these principles go to the very heart of public institutions within the individual MSs. The two main principles which are discussed in this paper are those of mutual trust and the rule of law. This chapter

provides a detailed examination of what these principles entail as well as their general role within the competition law realm.

2.2 Mutual Trust

The principle of mutual trust is of paramount importance in EU law. According to Article 2 TEU, the EU builds on the assumption that its MSs operate under a common set of values including "freedom, democracy, equality, the rule of law and respect for human rights".[12] Ultimately, this assumption "implies and justifies the existence of mutual trust between the MSs that those values will be recognised and, therefore, that the law of the EU that implements them will be respected".[13] In addition, MSs are bound under the principle of sincere co-operation to assist, in full mutual respect, other MSs in carrying out their obligations arising out from the Treaties.[14] Furthermore, this co-operation is done to attain the goal of achieving the Union's tasks and thus MSs must refrain from measures that could frustrate this objective.[15]

The principle of mutual trust finds its origin in the seminal ruling of *Cassis de Dijon*, which maintained that goods lawfully produced and marketed in one MS are allowed to be sold in the jurisdiction of another MS.[16] Since this judgment, the principle of mutual recognition has become a prominent "cornerstone"[17] in the EU internal market,[18] as well as the "area of freedom, security and justice" (AFSJ).[19] In other words, the principle of mutual recognition is the *bona fide* belief that "other Member States [are] complying with EU law and particularly with the fundamental rights recognised by EU law".[20] Without mutual trust, an element of distrust may

[12] TEU, art. 2.
[13] Opinion 2/13 (n 11) para. 168.
[14] TEU, art. 4(3).
[15] ibid.
[16] Case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, para. 14.
[17] Mariolina Eliantonio and others, 'The Principle of Mutual Recognition in European Administrative Law: Still Alive and Kicking?' (2020) 13(3) Review of European Administrative Law 183, p. 183.
[18] TEU, art. 3(3).
[19] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU), art. 67.
[20] Joined Cases C-404 and 659/15 PPU *Aranyosi and Căldăraru* [2016] ECLI:EU:C:2016:198, para. 78.

creep in between other MSs. Moreover, this lack of confidence could lead to a decrease in willingness and respect to comply with other EU norms.

2.3 The Rule of Law

The concept of the 'rule of law' finds itself in the common set of values enshrined in Article 2 TEU. Unfortunately, "the concept of the rule of law is notoriously difficult to pin down".[21] This notion historically dates back to the early works of Montesquieu who identified three main functions of the State. Firstly, the creation of rules through the promulgation of legislation. Secondly, the implementation and execution of this legislation by the administration. Thirdly, the application of legislation to either individual or general cases. Ultimately, Montesquieu advanced that these "three functions ought to be kept apart and should be assigned to three separate branches of the State: the legislature, the executive, and the judiciary".[22] This separation of state powers has famously become known as the *trias politica*. Furthermore, this clear separation is indicative of a well-functioning institutional system within a country. This is because state actors can prevent the abuse of powers through mutually checking the lawfulness of other actors. This has become what is known as 'checks and balances'.

The rule of law essentially entails that the State itself is both built upon and functions on the substance of constitutional law which confers it certain powers. Therefore, the exercise of state powers in creating decisions should be clearly defined in statute and be free from any arbitrariness.[23] Moreover, courts should remain independent and impartial to correctly scrutinise the acts of government. Hence, the rule of law can only exist when there is evidence of clear checks and balances within a State.[24]

[21] Christopher May and Adam Winchester, *Handbook on the Rule of Law* (Edward Elgar Publishing 2018) p. 21.
[22] Jaap Hage and others, *Introduction to Law* (2nd edn, Springer International Publishing 2017) p. 179.
[23] Trevor Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press 2001) p. 31.
[24] May and Winchester (n 21).

The CJEU first recognised the concept of the rule of law in *Les Verts*, where it held that "the European Economic Community (EEC) is a community based on the rule of law".[25] Ultimately, this ruling ensured that this concept would be recognised as a general principle of EU law. From here, EU primary law sought to include the concept of the rule of law in the common set of values shared by MSs. As a result, MSs are required to safeguard these shared values in order to guarantee the effectiveness of EU law. Furthermore, the Commission has recently noted that the rule of law is "a well-established and well-defined principle whose core meaning is furthermore shared as a common value among all Member States".[26]

2.4 The two Principles within the EU Competition Law Realm

As this chapter has illustrated, these two administrative law principles serve a very important role in the exercise of state powers. Mutual trust has shown that it is vitally important to acknowledge that other MSs are acting in accordance with their obligations as set out by EU law. Mutual trust is essential in ensuring that Union law is uniformly applied throughout the EU. Ultimately, incompliance by a single MS could encourage other MSs to abandon their EU law obligations. This mutual distrust could be catastrophic for the Union as a whole and the strength of EU law would arguably deteriorate. Similarly, MSs must ensure that there is a visible separation between the three state powers (judiciary, executive and legislature) and that each power acts within the powers that they are conferred with. Each state power should mutually check the lawfulness of the acts of the other branches. This combined effort will ensure that public institutions can operate within the ambit of the law and produce legally sound decisions. Moreover, this collaboration guarantees that the rule of law is upheld in the strongest sense. EU competition law is no different in this regard. NCAs should be guided by mutual trust to acknowledge the legal decisions of other NCAs. Furthermore, competition law falls under the public law of a given MS. Therefore, in order for it to function effectively, the State should uphold the rule of

[25] Case 294/83 *Parti écologiste "Les Verts" v European Parliament* [1986] ECR 1339, para. 23.
[26] Laurent Pech, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law' (2022) 14 Hague Journal on the Rule of Law 107.

law. In the absence of the rule of law, a NCA may not act independently and impartially. In addition, the NCA may take decisions based on political reasons or upon instructions from the government. From here, the overall mutual trust in the EU competition law realm will rapidly decline.

3. The Principle of Mutual Trust under Regulation 1/2003

3.1 Introduction

Almost 20 years ago, Regulation 1/2003[27] brought about both significant and seismic changes in the way that Articles 101 and 102 TFEU are enforced. Ultimately, this important regulation aimed to establish a uniform application of EU competition law across the EU with the co-operation of NCAs located in each MS. This chapter will discuss the principle of mutual trust established under Regulation 1/2003 and how it operates in practice to achieve uniform enforcement. In addition, this chapter will elaborate on the concern when NCAs start to engage in conduct that may threaten the prospect of mutual trust and uniform application.

3.2 The System of Co-operation under Regulation 1/2003

Regulation 1/2003 has represented a crucial "turning point in the modernisation of EU antitrust enforcement, because it created a system where the Commission, the MSs' administrative and judicial bodies together enforce the material EU antitrust rules".[28] In other words, this statute has created a "parallel competence"[29] in which the Commission and the NCAs enforce EU competition law within their respective mandates. However, this still means that the NCAs should be empowered to apply EU law and closely scrutinise the substance of EU competition law.[30]

[27] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 (Regulation 1/2003).
[28] Naida Dzino and Catalin Rusu, 'Public Enforcement of EU Antitrust Law: A Circle of Trust?' (2019) 12(1) Review of European Administrative Law 127.
[29] Commission Notice on informal guidance relating to novel or unresolved questions concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union that arise in individual cases (guidance letters) [2022] OJ C381/07, para. 2.
[30] Regulation 1/2003, recital 6.

Therefore, Regulation 1/2003 establishes a system of cooperation that is strongly based on "multi-level administration" with respect to EU competition law enforcement on both a European and national level.[31] This system of cooperation ensures that EU competition law can be applied uniformly across the MSs.

NCAs are established and governed under their own system of national law. However, national provisions still need to comply with the application of EU competition law when NCAs are deciding on "individual cases" within their own jurisdiction.[32] Individual cases are those in which NCAs possess the requisite competence to prosecute instances of anti-competitive behaviour. If this is not the case, national provisions must be set aside in order to respect EU law.[33] This primacy clause is codified in Article 3(2) and (3) of Regulation 1/2003. Therefore, it can be acknowledged that the Commission and the NCAs apply the EU competition rules in close co-operation with each other.[34]

The existence of this multi-level administration system ensures that the principle of mutual trust can be fully respected. In order to guide the NCAs to apply Articles 101 and 102 TFEU effectively, it is absolutely necessary to ensure that NCAs assist one another by carrying out inspections as well as other fact-finding measures.[35] With reference to the previous chapter, mutual trust happens when a MS confidently trusts in the legal systems of other MSs.[36] This trust is of paramount importance to ensure that EU law is applied consistently. From a competition law perspective, trust under the Regulation comes in the form of exchanging information.[37] In order to consistently apply EU competition law, NCAs have "the power to provide one another with and use in evidence any matter of fact or of law, including confidential information".[38]

[31] Dzino and Rusu (n 28).
[32] Regulation 1/2003, art. 5.
[33] TEU, art. 4(3).
[34] Regulation 1/2003, art. 11(1).
[35] Regulation 1/2003, recital 28.
[36] See Chapter 2.
[37] Regulation 1/2003, art. 12(3).
[38] Regulation 1/2003, art. 12(1).

In addition, the previous chapter also made express reference to the salience of the concept of *trias politica* regarding the public law set-up of a MS.[39] According to this notion, national courts must remain fully independent and cannot be influenced by political pressures when rendering their decisions. Regulation 1/2003 also makes direct reference to the aspect of courts within a MS when applying EU competition law. NCAs may out of their own initiative submit written observations to the national court of that MS on issues relating to the application of EU competition law.[40] According to Article 16 of Regulation 1/2003, national courts are not empowered to adopt decisions that directly run counter to the correct application of EU competition law. Hence, there needs to be a clear separation of powers within a MS so that courts adopt decisions which are lawfully sound and in compliance with their EU law obligations.[41]

3.3 Regulation 1/2003 with Mutual (Dis)trust?

The overall effectiveness of enforcement underlined in Regulation 1/2003 is dependent on "safeguarding uniform and consistent application in the multi-level governance system".[42] However, the Regulation remains silent on what happens if MSs stray away from their obligations under EU competition law. Ultimately, the EU legislator drafted this Regulation under the impression that all MSs would ensure that their national systems upheld the separation of powers and the rule of law. Furthermore, this left room for incompliant MSs to abuse EU law and engender a feeling of mutual distrust amongst other MSs when enforcing EU competition law. This is mainly due to the fact that the EU legislator failed to take into account that "different authorities abide by significantly different rules meaning that competition law is not being fully and evenly enforced across the common market".[43] This has

[39] See Chapter 2.3.
[40] Regulation 1/2003, art. 15(3).
[41] Regulation 1/2003, art. 3(1).
[42] Katalin J Cseres, 'Rule of Law Challenges and the Enforcement of EU Competition Law: A case-study of Hungary and its implications for EU law' (2019) Amsterdam Centre for European Law and Governance Research Paper No. 2019-05, p. 8.
[43] Katalin J Cseres and Or Brook, 'Evaluation of Regulations 1/2003 and 773/2004: Position paper by Katalin Cseres and Or Brook (Annex to the general questionnaire)' (2022) The Priority Setting Project, p. 6.

best been seen with the current dismantling of constitutional structures within the MSs of Poland and Hungary. The rule of law crises in these two MSs has ultimately led to a weakening of mutual trust and thus the overall strength of EU law has grown significantly weaker. The next chapter discusses competition law cases dealt with by the Polish and Hungarian NCAs which show evidence of how the crisis has adversely affected the EU competition law enforcement. As a result, this chapter provides a useful illustration of the major difficulty the Commission encounters in trying to adopt a uniform strategy for enforcing EU competition law throughout all 27 MSs.

4. The Case of Mutual (Dis)trust against Poland and Hungary

4.1 Introduction

As the previous chapter indicated, Regulation 1/2003 aims to implement a multi-level of governance whereby NCAs and the Commission co-operate to enforce EU competition law. Unfortunately, this reality can only occur when a NCA's decisions are firmly grounded in law. This legal certainty within a MS will ultimately create a level of mutual trust amongst other MSs. Without mutual trust, the quality and strength of EU law compliance significant diminishes. This chapter aims to analyse recent cases of Poland and Hungary which provide evidence of how these NCAs have deviated from their obligations under EU law and disregarded the principle of mutual trust.

4.2 Poland

The best case which indicates the adverse consequences of the rule of law crisis on competition law is *Sped-Pro*.[44] In 2016, Sped-Pro, a Polish freight transport company, filed a formal complaint with the European Commission. This complaint was levelled against Poland's largest railway freight company, PKP Cargo. This company was also owned and controlled by the Polish State. Sped-Pro argued that PKP Cargo had

[44] Case T-791/19 *Sped-Pro S.A. v European Commission* [2022] ECLI:EU:T:2022:67.

abused its position of dominance[45] when it refused to conclude a co-operation contract under normal market conditions.

The Commission rejected[46] Sped-Pro's complaint and argued that the Office of Competition and Consumer Protection (*UOKiK)*[47] was in a better position to deal with the matter as the "effects of the alleged anti-competitive conduct were essentially confined to Poland".[48] However, the applicant brought an action for annulment against the Commission's decision arguing that "the Commission was better placed to examine the complaint, given the systemic and generalised deficiencies in the rule of law in Poland, which affected the independence of the Polish competition authority and courts".[49] Most importantly, the applicant stated that the *UOKiK* president had been appointed by the Polish Prime Minister.[50]

The General Court agreed with the applicant's claim in this regard. Therefore, the Court fully upheld the applicant's argument of systemic deficiency of the rule of law in Poland. Moreover, the Court also stated that since competition law is linked to the state, it may sometimes be absolutely necessary to assess the rule of law in a MS before swiftly "rejecting a complaint for lack of an EU interest".[51] The Court held that Regulation 1/2003 is designed to ensure co-operation between the Commission and the NCAs on the basis of "mutual recognition, mutual trust, and sincere cooperation".[52] However, this presumption may be rebutted in the case that there are

[45] TFEU, art. 102.
[46] Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L123/18 (Regulation 773/2004), art. 7(2).
[47] *Urząd Ochrony Konkurencji i Konsumentów* (UOKiK).
[48] Ben Van Rompuy, 'Independence as a Prerequisite for Mutual Trust between EU Competition Enforcers: Case T-791/19, Sped-Pro v Commission' (2022) 13(6) Journal of European Competition Law & Practice 413, p. 413.
[49] David Pérez de Lamo, 'Mutual Trust and Rule-of-Law Considerations in EU Competition Law: The General Court Extends the "L.M. Doctrine" to Cooperation Between Competition Authorities (Sped-Pro, T-791/19)' (*Kluwer Competition Law Blog*, 1 March 2022). <http://competitionlawblog.kluwercompetitionlaw.com/2022/03/01/mutual-trust-and-rule-of-law-considerations-in-eu-competition-law-the-general-court-extends-the-l-m-doctrine-to-cooperation-between-competition-authorities-sped-pro-t-791-19/> accessed 17 October 2022.
[50] Van Rompuy (n 48).
[51] Kati Cseres and Michael Borgers, 'Mutual (Dis)trust: EU Competition Law Enforcement in the Shadow of the Rule of Law Crisis' (*Verfassungsblog*, 16 February 2022) <https://verfassungsblog.de/mutual-distrust/> accessed 17 October 2022.
[52] Van Rompuy (n 48).

manifest deficiencies of the rule of law in a given MS. In conclusion, the *Sped-Pro* case highlights how the rule of law crisis erodes the principle of mutual trust within the ambit of Regulation 1/2003.

4.3 HUNGARY

The *Hungarian Watermelon cartel* case is the best example that highlights an NCA's effort to undermine and disapply EU competition law within the context of their own national law.[53] In 2012, the Hungarian NCA[54] launched proceedings against several local melon producers, the Hungarian Melon Association as well as six major supermarket chains concerning the alleged formation of a cartel for Hungarian-produced melons. According to the NCA, these parties had unlawfully cooperated to fix the prices of locally produced melons in order to protect the domestic market.

In reaction to this, the Hungarian Parliament adopted an amendment to their Agricultural Act which stated that the prohibition of anti-competition agreements would not apply to the agricultural sector.[55] In other words, the Parliament's amendment meant that the NCA's sanctioning powers would be significantly reduced with respect to cartels formed within the agricultural industry. From an EU law perspective, this adaption of legislation would mean that Hungary would inevitably not apply Article 101 TFEU with respect to illegal behaviour in this certain sector. Moreover, the changes to the Agricultural Act indicate that the NCA's powers have been limited since they can "lawfully" deviate from their obligations of effective enforcement under Regulation 1/2003.[56] Moreover, this case shows that the rule of law crisis has caused Hungary to stray away from their EU law obligations under loyal co-operation. Hence, this behaviour would also lead to an overall decrease in mutual trust and the strength of EU competition law enforcement being seriously reduced.

5. CONCLUSION

[53] Case Vj-62/2012 (Hungary).
[54] *Gazdasági Versenyhivatal* (GVH).
[55] Act No. CLXXVI of 2012 on inter-branch organizations and on certain issues of the regulation of agricultural markets adopted on November 19, which amended Act CXXVIII of 2012.
[56] Regulation 1/2003, art. 5.

In closing, this paper sought to answer the research question: *What impact does the rule of law crisis have on the overall enforcement of EU competition law between NCAs pursuant to Regulation 1/2003?*

Chapter 2 provided evidence which outlined the fundamental importance of 'mutual trust' and the 'rule of law' within the EU law system. These two principles effectively work hand in hand when it comes to the enforcement of EU competition law. In other words, if a MS demonstrates that their legal systems operate within the ambit of the law then other MSs will mutually trust the decisions of that jurisdiction. Moreover, NCAs should be lawfully established and create legal decisions which are independent and impartial in light of the merits of the case. Ultimately, the erosion of rule of law systems in a MS will lead to a decrease in mutual trust in the competition law area.

Chapter 3 outlined that mutual trust was not just a general principle of EU law but also that it was firmly established in secondary legislation, namely Regulation 1/2003. This regulation indicates that NCAs should work closely with the Commission and other NCAs in order to apply the provisions of Articles 101 and 102 TFEU throughout the Union. Hence, this regulation establishes a multi-level system of governance which sees the co-operation on both a national and EU level. For this to function properly, NCAs should operate lawfully and within the boundaries of both national and EU competition law. This chapter ultimately showed that in cases where MSs deviate from their obligations under this regulation, a mutual distrust arises amongst other MSs which significantly decreases the strength and application of EU law.

Chapter 4 provided concrete examples in both Poland and Hungary which showed how the rule of law crisis has diminished the NCA's willingness and power to apply EU competition law. The cases of *Sped-Pro* and the *Hungarian Watermelon cartel* are very clear examples of how NCAs have taken decisions which have been contrary to EU competition law. Therefore, these decisions were unlawful and destructive in the interests of EU law. Moreover, this research question was open-ended in order to take into account of all of the technicalities of the crisis on the enforcement of EU competition law. In conclusion, it is evident that the rule of law

crisis has an extremely negative affect for the overall enforcement of EU competition law between NCAs pursuant to Regulation 1/2003.