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EDITORIAL

Max Münchmeyer*

This summer issue marks the end of a particularly busy academic year for the European Journal of Legal Studies (EJLS, the Journal). In addition to our two regular issues, we also published a Special Issue, entitled *Adjudicating Migrants' Rights: What Are European Courts Saying?*[1] The contributions to the special issue analyse how courts in four EU Member States, as well as the Court of Justice of the European Union (CJEU, the Court), have approached migrants' rights, painting a picture of methodologically diverse, if not fragmented, judicial practices between, and indeed sometimes within, the jurisdictions examined.[2] While more varied thematically, the articles in the present issue of the EJLS can all be said to continue the thrust of inquiring into whether and how systems comprising many diverse actors can provide coordinated and efficient answers to intricate law and governance challenges.

The first article in the New Voices section of this issue has a particularly strong connection to the theme of our special issue. **Chiara Scissa** examines how the European Union (EU, the Union) has engaged with migration caused by climate change. Based on recent legislative innovations and judicial practice in Italy, Scissa suggests three ways in which existing legal instruments could be leveraged to develop a more contemporary approach to migration that takes into account the complex but increasingly undeniable links between migration and the climate crisis. This innovative

* PhD Researcher, European University Institute; Editor-in-Chief, European Journal of Legal Studies.

1 [2022] (special issue) European Journal of Legal Studies.

2 Veronica Federico, Madalina Moraru and Paola Pannia, 'The Growing but Uneven Role of European Courts in (Im)migration Governance: A Comparative Perspective' [2022] (special issue) European Journal of Legal Studies 1.

contribution won the Journal's 2021/22 *New Voices Prize*, an award that recognises the best short-form article by an emerging scholar published in the EJLS.

The next New Voices article in this issue, meanwhile, reflects on how the COVID-19 crisis has impacted the complex international institutional architecture surrounding sovereign debt governance. **Livia Hinz** explores possible solutions to debt sustainability issues, which have been exacerbated by the global health emergency, particularly in low-income countries. She argues that the so-called 'comparability of treatment' principle can be an effective means to achieve more equitable burden sharing between the public and private sector, but identifies several obstacles to its effective operation that will need to be overcome.

In the third and final New Voices contribution to this issue, **Selen Kazan** argues for the establishment of a Truth and Reconciliation Commission (TRC) in the United States as one meaningful step that can be taken towards addressing past human rights violations that still affect the structure of economy and society. Kazan draws on conflict resolution literature, as well as examples of previous TRCs, to arrive at a set of pragmatic lessons and recommendations for the design of such a body in the United States.

In the first General Article in this issue, **Tleuzhan Zhunussova** focuses on 'good membership' obligations, which abound in the foundational treaties of international organisations. Zhunussova counters criticisms that see these clauses as mere formalities and argues, through the use of case studies, that membership duties' clear connection to the principle of good faith endows them with the potential to act as much more muscular instruments of coordination in the context of international organisations.

Zhunussova's conclusions complement the insights offered in the second General Article in this issue. **Lukáš Boháček** examines the principle of mutual trust in EU law, which he argues is based on the shared values of the Union enshrined in Article 2 of the Treaty on European Union. Boháček

concludes that these fundamental values, which imbue the mutual trust principle with meaning in the first place, should, in turn, not be endangered through the application of that very principle by the CJEU. In the next contribution to this issue, **Jan Blockx** also examines the CJEU's jurisprudence, enlisting logical principles to conduct an empirical analysis of the modes of reasoning employed by the Court in its *effet utile* jurisprudence. This exercise leads the author to insightful, and perhaps counterintuitive, conclusions regarding the frequent criticism of the CJEU as a body engaged in 'judicial activism'.[3]

The final two General Articles take a pragmatic approach to evaluating recent efforts by the EU to establish governance frameworks in complicated and evolving fields. **Federico Ferretti** engages in a thorough stock-taking and analysis of the tools available to the EU to counter market imbalances in the realm of data, where access is often constrained by the actions of so-called "Big-Tech" companies. Ferretti puts forward the case that the EU may already possess the governance instruments needed to achieve this aim in its Revised Payment Services Directive. **Marloes van Rijsbergen** and **Ebbe Rogge** identify the benefits of the recent reform of the European Supervisory Authorities, while also pointing to several 'legitimacy puzzles' that still remain to be solved in this context.

This issue closes with three book reviews of recently published titles. First, **Maria Kotsoni** reviews *European Welfare State Constitutions after the Financial Crisis* (Oxford University Press 2020), edited by Ulrich Becker and Anastasia Poulou. She finds that the book successfully zooms in on the

[3] Complementary to the analysis and findings in this article are a number of contributions to recent issues of the EJLS that focus on the interpretative methodology of the CJEU. Readers may thus be interested in consulting: Orlando Scarcello, 'Proportionality in the *PSPP* and *Weiss* Judgments: Comparing Two Conceptions of the Unity of Public Law' 13(1) European Journal of Legal Studies 45; Sorina Doroga and Alexandra Mercescu, 'A Call to Impossibility: The Methodology of Interpretation at the European Court of Justice and the PSPP Ruling' 13(2) European Journal of Legal Studies 87.

impact that the financial crisis has had on social rights in the constitutional orders of the countries examined. Next, **Jaka Kukavica** reviews *The Impact of European Institutions on the Rule of Law and Democracy: Slovenia and Beyond* (Hart 2020), written by Matej Avbelj and Jernej Letner Černič, with a chapter by Gorazd Justinek. Kukavica offers some methodological and definitional critique while lauding the book's important and original mission of shining a light on rule-of-law issues in Slovenia. Finally, **Sophia Ayada** engages with *Anti-Discrimination in Civil Law Jurisdictions* (Oxford University Press 2019), edited by Barbara Havelková and Mathias Möschel, concluding that it is a valuable contribution to the existing literature and a potential catalyst for future (comparative) research in this area.

It is incumbent on me to thank all authors, as well as the members of the Journal's Editorial Board, who have facilitated the publication of this issue, the last in my term as Editor-in-Chief, by generously volunteering their time to the EJLS. In October 2021, the Journal recruited thirteen new editors, a heartening sign that the support for our researcher-run organisation is enduring. I am greatly indebted to the enthusiastic support of a committed executive team, without which this year's ambitious publication schedule would have been impossible to realise. In 2022, the Journal's executive welcomed two new members: Sophie Berner-Eyde as Executive Editor, and Alexander Lazović as Head of Section for Legal Theory. Many EUI alumni who have now continued their academic journeys have been exceptionally generous and encouraging in their capacity as senior external editors. All this support gives me the privilege of leaving my position with great optimism for the Journal's future. For now, however, I hope that the excellent contributions to this issue will prove enjoyable and thought-provoking to all readers.

THE CLIMATE CHANGES, SHOULD EU MIGRATION LAW CHANGE AS WELL? INSIGHTS FROM ITALY

Chiara Scissa*

The climate is changing, generating increasingly significant migration flows. Yet the climate change-migration nexus is scarcely reflected in the relevant legislation of the European Union. This article argues that the EU needs to address this nexus coherently for its migration and climate actions to be effective. To this end, three avenues might be feasible: 1) EU institutions could promote an extensive application of existing protection instruments; 2) the European Court of Justice could expansively interpret asylum and migration provisions in light of potential environmental threats to migrants' rights; and 3) within the framework of the New Pact on Migration and Asylum, EU institutions could encourage the revision of the Common European Asylum System by making explicit reference to the environmental causes of migration. Although overlooked in the literature so far, Italy has already developed all three of these avenues to foster protection against environmental causes of migration and may provide helpful insights for the supranational level.

Keywords: EU law; Italian law; migration; climate change; New Pact on Migration and Asylum; international protection.

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I. INTRODUCTION

The climate is undoubtedly changing with unprecedent rapidity and, in some cases, irreversible effects.[1] Although environmental factors have constantly shaped migration movements in the past, data suggest that they will do so even more strongly in the future.[2] Indeed, the World Bank's 2021 *Groundswell* report suggests that the impact of climate change and environmental degradation, which have been recognized as drivers of forced

1 'Climate Change Widespread, Rapid, and Intensifying – IPCC' (IPCC, 9 August 2021) <https://www.ipcc.ch/2021/08/09/ar6-wg1-20210809-pr/> accessed 17 June 2022.

2 Marie McAuliffe and Anna Triandafyllidou (eds), *2022 World Migration Report* (International Organization for Migration (IOM) 2021) 233.

migration at the international level,[3] may lead to the displacement of 216 million people by 2050.[4]

In this scenario, the European Union (EU, the Union) can and should play an active role not only in minimizing the adverse environmental drivers of migration in climate-vulnerable third countries in a spirit of solidarity, but also in fostering the protection of environmental migrants under international human rights obligations when disasters occur. While significant EU funds and projects deal with the former,[5] little attention has been dedicated to the latter. In recent years, in fact, the European Commission has developed the European Green Deal and the New Pact on Migration and Asylum (the New Pact) to address climate change and migration separately. This division potentially disregards the scientific evidence as to the cross-cutting effects of climate change, including as a trigger for migration, while also contradicting the results achieved at different policy and judicial levels.[6] Emblematically, the Commission recognises climate change in many Communications as one of the major global challenges that will characterise present and future migration flows but fails to take concrete actions to comprehensively address these

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3 UNGA Res 72/220 (20 December 2017) UN Doc A/RES/72/220.

4 Viviane Clement and others, *Groundswell Part 2: Acting on Internal Climate Migration* (The World Bank 2021).

5 Commission, 'Forging a climate-resilient Europe - the new EU Strategy on Adaptation to Climate Change' (Communication) COM (2021) 82 final, 1, 17, 21. Here, the Commission mentions that '[t]he EU is already committed to helping Africa adapt to a more hostile climate, including through nature-based solutions' and the mobilization of '[…] EUR 3.4 billion to support climate adaptation in the region'. Ibid 18.

6 UN Human Rights Committee, 'Views Adopted by the Committee under Article 5(4) of the Optional Protocol, Concerning Communication No 2787/2016' (24 October 2019) UN Doc CCPR/C/127/D/2728/2016 (*Teitiota v New Zealand*); UNHCR, 'Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters' (refworld, 1 October 2020) <https://www.refworld.org/docid/5f75f2734.html> accessed 1 May 2022.

interconnected challenges.[7] This attitude, moreover, contrasts with the Union's ambition to provide global responses to global challenges, such as climate change, a core tenet of this Commission's objectives.[8]

As the climate changes, migration law should also change to protect environmental migrants from climate-related violations of human rights. For the EU's climate and migration actions to be truly comprehensive and effective, the EU should address the nexus between the two. *But, how*? This article argues that three avenues might be available: 1) EU political institutions could promote an extensive application of existing protection instruments; 2) the European Court of Justice (CJEU) could expansively interpret asylum and migration provisions in light of potential environmental threats to migrants' rights; and 3) within the framework of the New Pact, EU institutions could encourage the revision of the Common European Asylum System (CEAS) by making explicit reference to the environmental causes of migration.

This article presents an Italian case study as illustrative of how this can be done. Over time, Italian institutions have promoted an extensive application of national protection provisions dealing with environmental causes of migration. Meanwhile, the judiciary has supported an evolutionary reading of national asylum provisions. Therefore, I argue that the Italian experience, although under-researched in the literature so far, may provide inspiration for a comprehensive EU approach to climate change and migration that both builds upon existing instruments and upholds the CEAS.

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7 Commission, 'A New Pact on Migration and Asylum' (Communication) COM (2020) 609 final, 1-17. See also Commission, 'The European Green Deal' (Communication) COM (2019) 640 final; Commission, 'Forging a climate-resilient Europe (n 5).

8 Commission, 'The European Green Deal' (n 7) 20.

II. THREE PROTECTION AVENUES TO ADDRESS ENVIRONMENTAL CAUSES OF MIGRATION IN THE EU LEGAL ORDER

The first two protection avenues, examined here together in light of their strong correlation, concern the promotion of an extensive application and expansive interpretation of existing EU protection instruments. As they do not require negotiations to amend or create binding arrangements, these options may be more feasible, especially in the short-term. In my view, three EU Directives might *already* cover environmental causes of migration, namely the Qualification Directive (QD),[9] the Temporary Protection Directive (TPD),[10] and the Return Directive.[11]

1. Promoting an Extensive Application and Expansive Interpretation of Existing EU Protection Instruments

It has been widely argued that international protection statuses, namely refugee status and subsidiary protection within the meaning of the QD, cannot apply to purely environmental causes of migration in the absence of one or more grounds substantiating a well-founded fear of persecution or of serious harm.[12] According to international and EU asylum law, refugees can

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9 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2002] OJ L192/27 (Qualification Directive).

10 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12.

11 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98 (Return Directive).

12 Jane McAdam, 'Swimming Against the Tide: Why a Climate Change Displacement Treaty is Not the Answer' in Mary Crock (ed), *Refugees and Rights*

have a well-founded (individual) fear of persecution on account of their race, nationality, religion, political opinion or membership to a particular social group. Environmental reasons *per se* can hardly amount to 'persecution' because climate change is unlikely to qualify as a 'persecutor', and because evidence regarding the individual adverse impact of general climate conditions is often lacking. Thus, environmental threats are usually cast as a supplementary, not the main, reason to issue international protection.

According to Article 2(f) QD, a person who does not qualify as a refugee may nonetheless be eligible for subsidiary protection when there are substantial grounds for believing that, upon removal, they would face a real risk of suffering serious harm.[13] Article 15 QD establishes three possible sources of serious harm: a) death penalty or execution; b) torture or inhuman or degrading treatment or punishment; or c) serious and individual threat by reason of indiscriminate violence in situations of international or internal armed conflict. Importantly, the CJEU has stipulated that subsidiary protection requires that a specific actor intentionally inflicts serious harm, which cannot result from 'a general shortcoming' in the country of origin.[14]

Environmental threats arguably fall outside of the scope of Article 15(a) QD, as they do not involve formal judicial death sentences or execution. As for Article 15(b) QD, the CJEU has ruled that the prohibition of torture or inhuman, degrading treatment or punishment, which is borrowed from Article 4 of the EU Charter of Fundamental Rights (EU Charter), is absolute in that it is closely linked to the respect for human dignity mandated by

(Routledge 2017) 379; Matthew Scott, *Climate Change, Disasters, and the Refugee Convention* (Cambridge University Press 2020). For opposing views, see Norman Myers, 'Environmental Refugees: A Growing Phenomenon of the 21st Century' (2002) 357 Philosophical Transactions of the Royal Society of London 609; Roger Zetter, 'More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization' (2007) 20(2) Journal of Refugee Studies 172.

13 Qualification Directive (n 9) art 2(f).

14 Case C-542/13 *M'Bodj* EU:C:2014:2452, para 35.

Article 1 of the EU Charter.[15] In *Hamed*, the CJEU clarified that the breach of human dignity linked to Article 4 of the EU Charter requires a particularly high threshold of seriousness.[16] However, in elaborating this threshold, it expressly included cases where State authorities' acts or omissions create 'a situation of extreme material deprivation' that would prevent the claimant from meeting their most basic needs and that would impair their physical or mental health or place them in a state of degradation incompatible with human dignity.[17] Therefore, it might be argued that unbearable environmental conditions caused by a State's actions or inertia and involving extreme material deprivation might, in certain circumstances, amount to violation of Article 4 of the EU Charter and, consequently, meet the threshold of serious harm under Article 15(b) QD. As for Article 15(c), in *Elgafaji*, the CJEU ruled that the existence of a serious and individual threat in the country of origin may exceptionally be established where indiscriminate violence is so endemic that the applicant would be at serious risk for the sole reason of returning there.[18] On this point, as we will see, the Italian jurisprudence has recently provided some fresh insights that might suggest a broader application of subsidiary protection under specific environmental conditions.

The TPD, for its part, applies in the case of a mass movement of international protection-seekers (IP-seekers) who are unable to return home due, *in particular*, to armed conflict or endemic violence or a serious risk of systematic or generalised violations of their human rights. In light of growing scientific evidence, academic literature and relevant jurisprudence supporting the recognition of a link between environmental threats and

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15 Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru* EU:C:2016:198, paras 85-86. See Charter of Fundamental Rights of the European Union [2012] OJ C326 (EU Charter), arts 1, 4.

16 Cases C-540/17 and C-541/17 *Bundesrepublik Deutschland v Adel Hamed and Amar Omar* EU:C:2019:964, para 36.

17 Ibid para 39 (my translation).

18 Case C-465/07 *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* EU:C:2009:94.

human rights violations, there might be cases where people displaced because of environmental disasters may qualify as beneficiaries of temporary protection pursuant to the TPD.[19] Furthermore, its scope might be extended to encompass additional causes of migration, such as those associated to an adverse environment, given the presence of the phrase 'in particular'. Besides, Article 7 grants the Member States discretion to extend temporary protection to additional categories of displaced persons, including those affected by environmental factors. Yet, some key shortcomings notably weaken its possible applicability. Indeed, since its adoption in 2001, it has been activated only in the context of the ongoing Russian-Ukrainian conflict, primarily because doing so entails a cumbersome and highly politicized process involving the absolute discretion of the Council in determining the actual existence of a mass influx of displaced people.[20] Moreover, the TPD applies only in case of mass inflows coming from the same geographical area and displaced for the same reason. Arguably, there might be few cases where mass inflows to the EU can be attributed primarily to environmental threats. Finally, the Commission has expressed its intention to abrogate the TPD and substitute it with a crisis management mechanism.[21] Therefore, its very existence is currently under discussion.

The Return Directive contains *non-refoulement* obligations that may provide a mechanism to prevent the removal of a third-country national affected by

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19 Giovanni Sciaccaluga 'Sudden-Onset Disasters, Human Displacement, and the Temporary Protection Directive: Space for a Promising Relationship?', in Giovanni Carlo Bruno, Fulvio Maria Palombino and Valentina Rossi (eds), *Migration and the Environment: Some Reflections on Current Legal Issues and Possible Ways Forward* (CNR Edizioni 2017).

20 Commission, 'Staff Working Document Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC)2003/109 and the proposed Regulation (EU)XXX/XXX [Asylum and Migration Fund]' SWD (2020) 207 final.

21 Commission, 'Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum' COM (2020) 613 final (Migration Crisis Proposal).

environmental and climatic changes.[22] It states that the implementation of a return decision must respect this principle and that any removal that would violate it must be postponed.[23] Other limitations on removal stemming from this principle concern the obligation for competent authorities to consider the returnee's personal and family situation, their health conditions, and the best interests of the child.[24] Moreover, the Return Directive allows the Member States to decide at any moment to withdraw or suspend a return decision or to grant a right to stay for compassionate, humanitarian or other reasons.[25]

In this framework, both *non-refoulement* and humanitarian reasons may apply to cases where removal to climate change-affected countries would be unsafe, although the latter would apply only on a discretional basis.[26] An expansive interpretation of the exceptions to removal that would include environmental considerations would also be consistent with the views adopted by the UN Human Rights Committee in *Teitiota v New Zealand*, as later described.[27]

The above directives demonstrate how protection from environmental causes is implicit in EU law. As a result, the protection of migrants from such environmental causes is mostly left to national competence, which means that such protection may be susceptible to significant variation across the EU. Not only do very few countries provide national protections to migrants

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22 *Non-refoulement* is a core principle of international asylum law that forbids any state, or any person or group exercising governmental or institutional authority, from expelling or returning an IP-seeker or -holder to the frontiers of territories where their life or freedom would be threatened. Humanitarian admission and stay are positive measures through which states comply with this principle.

23 Return Directive (n 11) recital 8, arts 5, 9.

24 Ibid art 5.

25 Ibid art 6(4).

26 This was the case for an Afghan citizen whose removal order was annulled by a German Court in part due to the country's environmental conditions. VGH Baden-Wuerttemberg, Judgment of 17 December 2020, A 11 S 2042/20.

27 See text to nn 33-34.

on environmental grounds, but those that do often subject them to radical changes or even to repeal. Until 2015, for instance, environmental disaster qualified as grounds for claiming protection in Sweden and Finland. However, both countries suspended and ultimately repealed them during the so-called "refugee crisis".[28] In opposition to potentially fragmented national responses, a common and uniform approach to the climate change-migration nexus could support the Union's efforts to act as a global leader and provide much-needed assistance to people displaced because of a changing climate.

2. Revising the CEAS within the New Pact on Migration and Asylum

The third protection avenue seizes upon the New Pact, which could offer a significant opportunity to revitalise the CEAS to provide protection against emerging new causes of forced migration, where climate change and environmental degradation will play a critical role. To date, this opportunity has arguably been missed. The crisis management mechanism that the Commission proposed to create in place of the TPD only refers to mass influxes triggered by indiscriminate violence in exceptional situations of armed conflict, thus excluding environmental factors from its application.[29] The proposed Qualification Regulation does not amend the components of persecution and serious harm, thus leaving the protection against environmental factors difficult to obtain.[30] However, the Commission's

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28 Emily Hush, 'Developing a European Model of International Protection for Environmentally-Displaced Persons: Lessons from Finland and Sweden' (Preliminary Reference Blog, 7 September 2017) <http://cjel.law.columbia.edu/preliminary-reference/2017/developing-a-european-model-of-international-protection-for-environmentally-displaced-persons-lessons-from-finland-and-sweden/> accessed 1 May 2022.

29 Migration Crisis Proposal (n 21) art 10.

30 Commission, 'Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of

pending proposal for a Union Resettlement Framework, adopted in 2016 and re-proposed under the New Pact, aims to provide safe and legal pathways to vulnerable IP-seekers displaced within or beyond national borders, including people with socio-economic vulnerability and those with family links in the EU.[31] Not only do these categories widen the classical scope of resettlement beneficiaries, but they may also cover different categories of people hit by environmental threats. The proposal might, indeed, apply to those displaced for environmental reasons and those whose vulnerability is linked to the impact of environmental factors on their livelihood and wealth, as well as those who may count on family links to flee from dire environmental conditions. If such applications, currently only hypothetical, were made explicit, this proposal could constitute a relevant protection instrument in the environmental context. Still, this proposal has been in a deadlock for the past six years and its adoption remains uncertain.

Although the Union's restrictive approach to migration might make negotiating protection for additional categories of migrants seem unrealistic, EU institutions should acknowledge that, as it stands, the CEAS is not equipped from an operational viewpoint to deal with movements triggered by environmental forces. From a legal perspective, moreover, it seems inconsistent with the recent authoritative interpretation of international human rights standards in the context of climate change given by the UN Human Rights Committee in *Teitiota v New Zealand*, which reaffirms that 'environmental degradation, climate change and unsustainable development constitute some of the *most pressing and serious threats* to the ability of present and future generations to enjoy the right to life', thus rendering *refoulement*

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the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents' COM (2016) 466 final.

31 Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the Parliament and the Council' COM (2016) 468 final.

improper.[32] In doing so, *Teitiota* undoubtedly consolidates the existence of a direct, causal link among environmental threats, forced migration and *non-refoulment*. As a result, it confirms the possibility for migrants compelled to flee due to environmental threats to obtain complementary protection.[33] Although formally non-binding, the views expressed in *Teitiota* have already influenced subsequent jurisprudence, as the Italian experience highlights.

III. Drawing Insights from Italy: Recent Developments in Domestic Migration Law

This section presents an Italian case-study as illustrative of how the EU could develop a coherent approach to climate change and migration. Indeed, Italian institutions have promoted an extensive application of humanitarian protection that includes environmental factors, while the judiciary has supported an evolutionary reading of national asylum and migration provisions, in conformity with *Teitiota*. Finally, over the last three years, Italian legislators have amended domestic law to include specific provisions dealing with environmental causes of migration. Of all the 27 Member States, Italy is currently the only one to offer explicit and multiple protection statuses to people displaced because of environmental factors.

The first provision in Italian migration law that deals with the protection of migrants on environmental grounds is Article 20 of the Consolidated Act on Immigration (CAI).[34] Under this provision, the President of the Council of Ministers may adopt temporary protection measures to fulfil relevant

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32 *Teitiota v New Zealand* (n 6) para 9.4 (emphasis added).

33 Miriam Cullen, 'The UN Human Rights Committee's Recent Decision on Climate Displacement' (Asylum Insight, February 2020) <https://www.asyluminsight.com/c-miriam-cullen> accessed 1 May 2022.

34 Legislative Decree 25 July 1998, n 286 'Consolidated Act on Provisions Concerning the Immigration Regulations and Foreign National Conditions Norms', art 20.

humanitarian needs in the case of conflicts, natural disasters or other serious events in non-EU countries.

A second relevant provision in Italian migration law is the inclusion of environmental and climate factors in the assessment of applications for humanitarian protection. Article 5(6) CAI has regulated humanitarian protection for over two decades. It operates as a safeguard to ensure full compliance with the principle of *non-refoulement* and with on the constitutional right to asylum. It was therefore conceived to apply to people who are ineligible for international protection statuses but who nevertheless cannot be expelled because of serious humanitarian reasons or because such expulsion would violate the constitutional or international obligations of the Italian state. Humanitarian protection was a flexible remedy to be granted to persons who had suffered, or would have been at risk of suffering upon removal, an '*effective deprivation of human rights*', to be assessed by taking into account both the objective situation in the country of origin and the applicant's personal conditions, with particular reference to their vulnerability.[35] As noted by the Tribunal of L'Aquila, vulnerability needed to be interpreted broadly to encompass, *inter alia*, the IP-seeker's exposure to famine, natural or environmental disasters and land grabbing, as well as the general environmental and climatic conditions of the country of origin, if these are such as to jeopardize the core of basic human rights of the individual.[36]

It was in this context that, in January 2008, the Ministry of the Interior decided to temporarily suspend the expulsion of Bangladeshi citizens due to the serious damage in part of the country caused by the violent cyclone Sidr in November 2007.[37] More recently, it gave humanitarian protection to IP-

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35 *Inter alia*, Court of Cassation, I Civil Section, Judgment of 23 February 2018, n 4455, 8 (my translation, emphasis added).

36 Tribunal of L'Aquila, Order of 16 February 2018, 4.

37 Circolare n 400/C/2008/128/P/1.281 del 9 gennaio 2008 Ministero dell'Interno: Bangladesh ciclone SIDR. Problematiche varie.

seekers coming from Nepal following the dramatic earthquake that destroyed wide areas of that country in 2015.[38] This dynamic approach was endorsed by administrative and judicial authorities alike and formed the basis for the issuance of humanitarian protection with respect to serious natural disasters,[39] droughts,[40] famine[41] and floods.[42]

In recent years, Italian legislators have intervened significantly, *inter alia*, to amend migration provisions in the context of natural disasters. The Decree-Law number 113 of 4 October, among other things, introduced Article 20-bis CAI, a new provision that offered protection to IP-seekers whose country of origin was in a situation of '*contingent and exceptional calamity*' that did not allow for a safe return.[43] Under these circumstances, a six-month residence permit would be issued that could be renewed for a further period of six months if unsafe conditions persisted. The requirement that the calamity should be contingent and exceptional meant that only sudden and singular events, such as earthquakes or floods, could be considered as eligible events under this provision and that slow-onset events were excluded from

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38 Court of Appeal of Genoa, 'La protezione umanitaria dai lavori preparatori all'applicazione pratica. Breve excursus di giurisprudenza' (6 November 2017) <https://webcache.googleusercontent.com/search?q=cache:5zgKSRrQQUIJ:https://www.corteappello.genova.it/Distretto/formazione_magistrati.aspx%3Ffile_allegato%3D1768+&cd=1&hl=it&ct=clnk&gl=it> accessed 1 May 2022.

39 Territorial Commission for the Recognition of International Protection of Rome, Section II, Decision of 21 December 2015.

40 Tribunal of Cagliari, Order of 31 March 2019, n 4043.

41 Tribunal of Milan, Order of 31 March 2016, n 64207.

42 Tribunal of Naples, Order of 5 June 2017, n 7523. On this point, Chiara Scissa, 'Estrema povertà dettata da alluvioni: condizione (in)sufficiente per gli standard nazionali di protezione?' [2022] Questione Giustizia <https://www.questionegiustizia.it/articolo/estrema-poverta-dettata-da-alluvioni> accessed 1 May 2022.

43 Decreto-legge 4 ottobre 2018, n 113 'Disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica', convertito con modificazioni dalla L 1 dicembre 2018, n 132, art 1.1(h) (my translation, emphasis added).

its scope of application.[44] Interestingly, the legislator did not qualify the nature of the calamity in question, meaning that both natural and man-made environmental disasters were potentially covered.

The Decree-Law number 130 of 21 October 2020 amended the former Decree-Law, including Article 20-bis, which now provides for the issuance of residence permits in the context of a '*serious*' (rather than a 'contingent and exceptional') calamity.[45] This amendment seems to allow for a broader interpretation of 'calamity' based on the degree of severity rather than on its progression over time. Additionally, the provision no longer specifies the maximum duration of renewal, thus potentially suggesting that the initial six-month permit can be renewed for as long as the conditions of environmental insecurity in the country of origin persist.[46]

The 2020 Decree-Law also amends the grounds on which removal is prohibited under Article 19 CAI, already modified by the former 2018 Decree-Law. Pursuant to the new formulation, *refoulement* is prohibited when there are reasonable grounds for believing that the applicant would be at risk of torture, inhuman or degrading treatment, or otherwise of systematic and gross violations of human rights.[47] Moreover, removal cannot take place when it would result in a violation of the applicant's right to private and family life.[48] In such cases, 'special protection' residence permits

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44 On this point, Court of Cassation, II Section, Order of 8 April 2021, n 9366, 3.

45 Decreto-legge 21 ottobre 2020, n 130 'Disposizioni urgenti in materia di immigrazione, protezione internazionale e complementare, modifiche agli articoli 131-bis, 391-bis, 391-ter e 588 del codice penale' art 1.1(f)(1) (my translation, emphasis added). For a comparative analysis of the use of the term calamity in Italian environmental and migration law, see Chiara Scissa, 'Alla ricerca di un fil rouge tra le molteplici nozioni di "calamità" nell'ordinamento italiano' (2021) 3 Rivista di Diritto Agrario 423.

46 Decreto-legge 21 ottobre 2020, n 130 (n 45) art 1.1(f)(2).

47 Ibid art 1.1(e)(1).

48 Ibid.

are issued to those persons who, although not qualifying for international protection, cannot be expelled.[49]

Therefore, it can be argued that a broad range of environmental causes of migration are expressly protected under Article 20 and 20-bis CAI, respectively, through temporary protection and protection against serious calamity. At the same time, before ordering the removal of a third-country national, the competent authorities are required pursuant to Article 19 to assess whether the environmental conditions of the country of origin may constitute a violation of their basic human rights and human dignity. Although the exact number of permits issued on environmental grounds is not available, it is important to stress that Italy's migration law is equipped with specific provisions providing protection to migrants who fled their home countries because of environmental factors and who would otherwise potentially be left without protection. Adapting law to the current causes of migration helps states not only to comply with human rights norms and their (inter)national obligations, but also to ensure a functioning asylum system prepared for eventual future inflows. It is in this vein that the CEAS needs to consider the effects of climate change on migration to adequately respond to migration movements heightened by environmental and climate stressors.

1. Drawing Insights from Italy's Jurisprudence: Emblematic Case Law of Evolutionary Interpretation

The following pages describe the relevant Italian case law through which the Supreme Court of Cassation, the highest court of appeal in Italy, has promoted a human rights-based and evolutionary interpretation of these domestic norms in light of the effects of climate change and environmental degradation. In doing so, the Court helped unveil these norms' full potential. By following the Italian example, the CJEU could give full effect to the

[49] Ibid art 1.1(e)(2).

protections enshrined in Article 78 of the Treaty on the Functioning of the EU and in the EU Charter.

In early 2020, a Bangladeshi citizen appealed to the Court of Cassation against a decision rejecting his international protection claim, lamenting that the dire environmental situation of his country of origin was not adequately considered.[50] Indeed, the Court noted that the destruction of the applicant's home due to flooding that hit large parts of Bangladesh in 2012 and again in 2017 could 'affect the vulnerability of the applicant if accompanied by adequate allegations and evidence relating to the possible violation of primary human rights, which may expose the applicant to the risk of living conditions that do not respect the core of fundamental rights that complement dignity'.[51] The Court argued that natural disasters, which have the capacity to exacerbate people's vulnerability and violate core human rights, can themselves be a compelling reason to leave.[52] Hence, the judges suggested endorsing an evolutionary interpretation of humanitarian protection in light of the 2018 permit against contingent and exceptional calamities, in particular by exploring whether the repeated floods 'amount to disasters that do not allow the return to the country of origin in safe conditions'.[53]

The CJEU might draw insights from this evolutionary approach, which demonstrates that, in specific cases, environmental factors can be the main cause of migration and of living conditions that are precarious that they cannot satisfy fundamental rights and ensure respect for human dignity. By leveraging the EU Charter, which protects human dignity, life and integrity, the CJEU might uphold its jurisprudence on international protection.

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50 Court of Cassation, I Civil Section, Order of 4 February 2020, n 2563.

51 Ibid 6 (my translation).

52 The Court reached the same conclusion in two recent cases. Court of Cassation, I Civil Section, Order of 8 January 2021, n 121; Court of Cassation, Civil Section - Labour, Order of 19 May 2021, n 13652.

53 Court of Cassation, n 2563 (n 50) (my translation).

In February 2021, the Court of Cassation issued another order of crucial importance for a future interpretation of subsidiary protection in light of environmental circumstances.[54] The case was lodged by an IP-seeker from the Niger Delta who appealed against a decision by the Tribunal of Ancona rejecting international protection. Indiscriminate exploitation of natural and oil resources by numerous companies and conflict among paramilitary groups fighting for control over these resources, as well as sabotages that led to oil spills, made the Niger Delta an unbearable place to live. Evidence of soil and water pollution due to oil depletion, environmental disasters and widespread instability was, however, disregarded by the Tribunal, which denied subsidiary and humanitarian protection to the claimant.

The Court noted that the right to life is susceptible to violation not only in case of armed conflict, but also when socio-environmental conditions are so dire as to put one's life at serious risk. Therefore, the Court ruled that humanitarian protection should be granted in the case of 'conditions of social, environmental or climatic degradation, or contexts of unsustainable exploitation of natural resources, which entail a serious risk for the survival of the individual'.[55] This evolutionary reasoning, if pursued in future judgments, may pave the way for the recognition of subsidiary protection when environmental disasters stemming from intentional human misconduct or overexploitation of natural resources endanger a claimant's life or safety, as already found in *Teitiota*.

This interpretation could be revolutionary also at the EU level where, as seen, the CJEU requires an actor to perpetrate serious harm for subsidiary protection to be issued. It could be argued that, when migration is found to be compelled by illicit environmental actions committed by states or non-state actors, these actors may qualify as perpetrators of serious harm.

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54 Court of Cassation, II Civil Section, Order of 24 February 2021, n 5022.

55 Ibid [5].

55 Ibid [6] (my translation).

Likewise, subsidiary protection might be offered if the damage caused to migrants could place their life at serious risk, such as in the Niger Delta case.

V. Concluding Remarks

This contribution has argued that the effects of climate change on human mobility need to be fully recognised and endorsed by the EU for its actions to be truly effective, as well as for law to respond efficaciously to current challenges. To do so, three avenues were considered feasible: extensively applying existing EU protection instruments; expansively interpreting them in light of potential environmental causes of migration; and revising the CEAS by making explicit reference to environmental migration. The above analysis revealed that a few EU secondary provisions may provide implicit protection, although with relevant limitations.

In this context, the Italian case showed, first, that an evolutionary approach can allow for an expansive interpretation of existing norms, resulting in the full respect and implementation of human rights standards, in compliance with the interpretation given in *Teitiota*. Second, despite the fact that the CJEU uses a high threshold for eligibility for subsidiary protection, the Italian case law unveils ground-breaking scenarios where intentional human misconduct damaging the environment can also amount to profound human rights violations, legitimizing the need for protection. Third, although there is little room for the inclusion of environmental causes of migration in the New Pact, the Italian experience offers, again, a unique perspective where environmental threats are considered as valid grounds for protection (Article 20 and 20-bis CAI) and as a restriction on removal to environmentally unsafe countries (Article 19 CAI). In conclusion, the Union should consider studying more closely the Italian legislation and case law to assess whether its experience might be leveraged as part of the EU's common efforts on climate change and migration management.

PRIVATE SECTOR INVOLVEMENT IN SOVEREIGN DEBT GOVERNANCE IN THE POST-PANDEMIC WORLD: THE ROLE OF THE 'COMPARABILITY OF TREATMENT' PRINCIPLE

Livia Hinz*

The article investigates recent developments in sovereign debt governance, focusing on the 'Common Framework for Debt Treatments beyond the DSSI', a G20 and Paris Club initiative to address debt sustainability issues in low-income countries in the post-pandemic world. The analysis revolves around the 'comparability of treatment' requirement, a longstanding principle of Paris Club debt management practice reintroduced in the Common Framework to foster private and public sector burden sharing and cooperation in financial crisis resolution processes. This requirement obliges debtor countries to seek debt renegotiation from external creditors on terms comparable to those negotiated within the Paris Club framework. By examining the operation of the 'comparability of treatment' principle in past Paris Club debt restructurings, this article traces the evolution of its meaning and economic function in parallel with the transformation of sovereign debt markets and identifies key challenges surrounding its implementation, focusing on the lack of transparency and on fundamental differences in the approach to debt treatments between official and commercial creditors. The concluding section puts forward options for future developments to foster private sector involvement. First, it investigates the possibility of embedding Common Framework debt treatments within a broader institutional arrangement capable of tying together official and private debt restructurings and explores the role of IMF policies on lending into arrears. It then highlights the potential complementary role of domestic statutory

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solutions in influencing commercial creditors' incentives and preventing hold-out behaviors.

Keywords: sovereign debt governance; G20; Common Framework; comparability of treatment; private sector involvement

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I. INTRODUCTION

The COVID-19 pandemic exacerbated growing vulnerabilities in the international financial architecture. The effectiveness of the transnational framework for sovereign debt governance, in particular, was increasingly questioned long before the outbreak of the health emergency due to rising debt levels in many low- and middle-income countries. According to International Monetary Fund ('IMF', 'the Fund') estimates, already in 2019 around half of low-income economies were deemed to be in or at high risk of debt distress.[1] The global health crisis further aggravated strains on public finances and worsened pre-existing inequalities, as the limited fiscal space available to vulnerable countries severely constrained their capacity to mitigate its social and economic fallout.

This article assesses recent developments in sovereign debt governance, focusing on the so-called 'Common Framework for Debt Treatments

[1] IMF, 'The Evolution of Public Debt Vulnerabilities in Lower Income Economies' (2020) IMF Policy Paper 20/003, 1 <https://www.imf.org/en/Publications/Policy-Papers/Issues/2020/02/05/The-Evolution-of-Public-Debt-Vulnerabilities-In-Lower-Income-Economies-49018> accessed 5 October 2021.

beyond the DSSI' (the 'Common Framework'), a G20 and Paris Club initiative launched in the wake of the pandemic to address debt sustainability issues in low-income countries ('LICs').[2] The analysis revolves around the perennial challenge of enforcing effective burden sharing between the official and private sectors, a recurrent problem in sovereign debt crises currently reflected in the features of the Common Framework. As public debt stocks of several LICs comprise significant components of commercial debt, private sector involvement is key to achieving debt sustainability.[3] In this respect, the Common Framework exhibits significant continuity with previous debt crisis resolution patterns, relying on the contested 'comparability of treatment' principle, which requires debtor countries to seek debt treatment from commercial creditors that is at least comparable to that negotiated with G20 official creditors.[4] Indeed, comparability of treatment has always constituted one of the core principles of the Paris Club, the traditionally hegemonic forum for official bilateral debt treatment since the late 1950s.[5]

Notwithstanding its key role in modern sovereign debt governance, however, the adequacy of this requirement in ensuring equitable burden sharing among all public and private stakeholders has long been open to

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2 'Common Framework for Debt Treatments beyond the DSSI' (Paris Club, 13 November 2020) <https://clubdeparis.org/sites/default/files/annex_common_framework_for_debt_treatments_beyond_the_dssi.pdf> accessed 2 February 2021.

3 IMF and the World Bank, 'Implementation and Extension of the Debt Service Suspension Initiative' (28 September 2020) <https://www.devcommittee.org/sites/dc/files/download/Documents/2020-10/Final%20DC2020-0007%20DSSI.pdf> accessed 23 January 2022.

4 In principle, comparability of treatment applies to all external creditors except multilateral institutions, including commercial creditors and other non-G20 and non-Paris Club bilateral creditors.

5 Official debt, as opposed to private sector debt, refers to obligations incurred with public sector creditors and comprises multilateral debt (owed to multilateral institutions) and bilateral debt (owed to individual public sector lenders on a bilateral basis).

doubt. This article investigates the complex and contentious role of comparability of treatment in achieving official and private sector cooperation through past Paris Club practice. It identifies the main obstacles and tensions surrounding the concrete operation of the comparability requirement and draws some insights on its future implementation within the Common Framework. In fact, comparable treatment is central to the success of the G20 initiative and the effectiveness of sovereign debt governance processes more broadly.

Section II briefly describes the evolution of the G20 policy response to the pandemic and the launch of the Common Framework. Section III analyses the issues surrounding the comparability of treatment principle under Paris Club practice and identifies present challenges. Finally, Section IV sketches tentative proposals to better implement comparability of treatment going forward.

II. BACKGROUND: FROM THE DSSI TO THE COMMON FRAMEWORK

The extraordinary severity and global reach of the shock caused by the pandemic prompted a long-awaited evolution in sovereign debt governance, namely the emergence of the G20 as a new forum for coordination among official bilateral creditors. Since the late 1950s, the leading forum for official bilateral debt management has been the Paris Club, which began as an informal group of lenders and gradually evolved into an established intergovernmental apparatus.[6] However, its representativeness

[6] Alexis Rieffel, 'The Role of the Paris Club in Managing Debt Problems' (1985) Princeton University Essays in International Finance No. 161 <https://ies.princeton.edu/pdf/E161.pdf> accessed 2 March 2021; Mauro Megliani, *Sovereign Debt: Genesis, Restructuring, Litigation* (Springer 2015) 277-310; Annamaria Viterbo, *Sovereign Debt Restructuring: The Role and Limits of Public International Law* (Giappichelli 2020) 90ff. Nowadays, Paris Club permanent membership includes 22 states, mostly OECD countries (except Brazil and the Russian Federation). Other countries may participate in negotiations on an *ad hoc* basis.

and capacity to foster creditors' coordination has significantly decreased over the past decades with the rise of new bilateral lenders, most notably China.[7]

Following urgent calls for action by the international financial institutions, the academic community and civil society, in April 2020 the G20 and the Paris Club imposed a temporary moratorium on bilateral debt payments for LICs – the 'Debt Service Suspension Initiative' ('DSSI') – to ease immediate liquidity pressures.[8] This initiative, however, was subject to important limitations both in terms of scope and economic purpose. DSSI eligibility was restricted to the poorest economies – countries eligible for support from the International Development Association ('IDA') and Angola - whereas it excluded other low- and middle-income countries severely affected by the pandemic.[9] The economic purpose of the DSSI was confined to the alleviation of temporary liquidity pressures, while debt sustainability issues were left unresolved: the payments suspension was designed to be neutral in

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7 This is reflected by the gradual decrease in the amounts and number of debt treatments after the peak in the 1980s. The committee for the first debt treatment under the Common Framework, concerning Chad, consists of China, Saudi Arabia, India and France. All but France became prominent lenders only recently and occupy marginal roles within Paris Club practices, as none is a permanent member.

8 G20 and Paris Club, 'Debt Service Suspension Initiative for Poorest Countries: Term Sheet' (15 April 2020) <https://www.tresor.economie.gouv.fr/Articles/009a4adf-23c2-4283-b88f-83ce405e1272/files/ec1895a7-ac0d-4eaf-a300-e8d8a057a2fd> accessed 4 May 2020. The DSSI was subsequently extended until 31 December 2021. 'Final Extension of the Debt Service Suspension Initiative (DSSI)' (Paris Club, 13 April 2021) <https://clubdeparis.org/en/communications/press-release/final-extension-of-the-debt-service-suspension-initiative-dssi-13-04> accessed 6 September 2021.

9 IDA eligibility is based on a poverty threshold defined as GNI per capita below an annually updated level ($1,205 for 2022). Angola was deemed eligible as it falls under the UN's least developed countries category. DSSI eligibility encompasses 73 countries, of which 48 applied for an effective amount of debt service deferment of approximately $12.9 billion. World Bank, 'Debt Service Suspension Initiative: Q&As' (10 March 2022) <https://www.worldbank.org/en/topic/debt/brief/debt-service-suspension-initiative-qas> accessed 10 March 2022.

net present value ('NPV') terms, leaving the underlying debt stock unaffected. Most importantly, the initiative failed to secure voluntary private sector participation, notwithstanding some coordination efforts by the Institute for International Finance ('IIF').[10] This significantly curbed the initiative's effectiveness.[11] What is more, fear of market stigma appears to have deterred countries with relevant bond issuances from requesting DSSI activation, although preliminary research suggested that DSSI eligibility had positive effects on borrowing costs.[12]

The DSSI's constraints, coupled with rising concerns regarding the medium-term debt sustainability of LICs, ultimately induced the G20 and the Paris Club to adopt the Common Framework in November 2020, which was meant to signal a significant shift in policy approach.[13] Even though it shares the DSSI's eligibility restrictions, the Common Framework aims to address fundamental debt sustainability concerns through rescheduling and debt relief, allowing debt reductions in NPV terms and even debt cancellations in exceptional circumstances. Debt treatments are defined on a case-by-case basis according to a debt sustainability analysis within the framework of an IMF financing program. Crucially, the Common Framework also abandons the voluntary approach to private sector participation, introducing the contested requirement of 'comparability of treatment' of all external bilateral and commercial creditors. However, the

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10 See IIF, 'Terms of Reference for Voluntary Private Sector Participation in the G20/Paris Club DSSI' (28 May 2020) <https://www.iif.com/Publications/ID/3920/Terms-of-Reference-for-Voluntary-Private-Sector-Participation-in-the-G20Paris-Club-DSSI> accessed 14 January 2021, including links to related documentation released on 3 December 2020.

11 IMF and the World Bank, 'Implementation and Extension of the Debt Service Suspension Initiative' (n 3).

12 Valentin Lang, David Mihalyi and Andrea Presbitero 'Borrowing Costs After Sovereign Debt Relief' (2021) CEPR Discussion Paper No. 15832 <https://cepr.org/active/publications/discussion_papers/dp.php?dpno=15832> accessed 21 December 2021.

13 'Common Framework for Debt Treatment beyond the DSSI' (n 2).

concrete operation of this requirement remains rather unclear: the G20 statement merely specifies that debtors are required to provide updates on their negotiations with other creditors and identifies some potentially relevant metrics (duration of claims, changes in nominal debt service and debt stock in NPV terms).

The expiration of the DSSI in December 2021 leaves LICs vulnerable. Over the coming years, they will be obliged to repay accumulated suspended amounts under the DSSI on top of regular debt service. In this context, the Common Framework remains the only multilateral mechanism for the resolution of post-pandemic debt sustainability issues.

III. 'COMPARABILITY OF TREATMENT': HISTORY AND CHALLENGES

The comparability of treatment requirement has always constituted a core principle of Paris Club practice.[14] By obliging debtor countries to seek treatment from all external official and commercial creditors that is at least as favorable as that granted by the Paris Club, it protects the finances of the Club's members by avoiding *de facto* subordination of their claims.[15] The only exception concerns multilateral debt, given the "lender of last resort" function of multilateral institutions. Notwithstanding the pivotal role of the requirement, however, legal scholarship has devoted only cursory attention to its concrete implementation.[16] The absence of systematic engagement

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[14] Its first formulation dates to negotiations on Argentina in 1956, which marked the inception of the Club. Enrique Cosio-Pascal, 'The Emerging of a Multilateral Forum for Debt Restructuring: the Paris Club' (2008) UNCTAD Discussion Paper No 192, 5 <https://unctad.org/system/files/official-document/osgdp20087_en.pdf> accessed 27 February 2021.

[15] It figures as a specific condition in the so-called "Agreed Minutes", the informal stipulation concluding the negotiations between the Paris Club and debtor countries that forms the basis for bilateral agreements with each lender. See Viterbo (n 6) 92ff.

[16] For notable exceptions, see Viterbo (n 6) 92-98; Rieffel, 'The Role of the Paris Club in Managing Debt Problems' (n 6) 10-14. For a brief explanation of

with the operationalization of this requirement is probably due to the lack of transparency surrounding Paris Club debt treatment practices, which has been only partially ameliorated through the recent launch of an official website.[17] The legal and institutional setting for assessing comparability throughout the negotiation and implementation of Paris Club debt treatments, as well as the relevant benchmarks, have always been obscure.[18]

Despite its deep historical roots, the economic rationale and concrete operation of the 'comparability of treatment' principle have profoundly evolved over time, along with the transformation of the global sovereign debt structure. During the initial period of Paris Club activity, in line with the predominance of official financial flows after WWII, the requirement was mainly aimed at influencing negotiations with other bilateral creditors.[19] Given the considerable expansion of private lending in the form of

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comparability of treatment, see G Russel Kincaid and others, 'Recent Developments in External Debt Restructuring' (1985) IMF Occasional Papers no 40 <https://www.elibrary.imf.org/view/books/084/05573-9780939934522-en/05573-9780939934522-en-book.xml> accessed 26 April 2022. For an account of burden sharing arrangements between official and private creditors, see Daphné Josselin, 'Regime Interplay in Public-Private Governance: Taking Stock of the Relationship Between the Paris Club and Private Creditors Between 1982 and 2005' (2009) 15 Global Governance 521.

17 The website provides some general information on standard terms of debt treatment and the main parameters of individual debt treatments accorded to debtor countries. See e.g. 'Standard Terms of Treatment' (Paris Club) <https://clubdeparis.org/en/communications/page/standard-terms-of-treatment> accessed 23 February 2021; 'The Paris Club Creditors Provide Debt Relief to Sudan' (Paris Club, 16 July 2021) <https://clubdeparis.org/en/communications/press-release/the-paris-club-creditors-provide-debt-relief-to-sudan-16-07-2021> accessed 26 April 2022. However, the Agreed Minutes, incorporating the agreement in principle among the Club's members and establishing the details of each planned debt treatment, remain confidential, as do the implementing agreements with individual lenders.

18 n 46 and accompanying text.

19 Alexis Rieffel, *Restructuring Sovereign Debt: The Case for Ad Hoc Machinery* (Brookings Institution Press 2003); Cosio-Pascal, 'The Emerging of a Multilateral Forum for Debt Restructuring' (n 14).

syndicated bank loans throughout the 1970s and 1980s, the principle pivoted towards ensuring the participation of syndicates in crisis resolution processes.[20] Official and private sector coordination was facilitated by the emergence of a parallel inter-bank forum, the London Club.[21] An in-depth analysis of the dynamics underlying commercial banks' involvement in the governance of the 1980s debt crisis lies outside the scope of this work: it is sufficient to highlight that, beyond the relative homogeneity of the nature of creditors and their business models, informal public sector pressures, especially through regulatory agencies, were crucial.[22] Around the turn of the decade, the implementation of the Brady Plan – aimed at overcoming the crisis through the securitization of outstanding syndicated loans – and the emergence of the secondary market for sovereign debt laid the foundation for the rapid growth of bonded debt, marking a fundamental shift in the composition of the global sovereign debt structure.[23]

The growing component of international bonds in sovereign debt stocks exposed the need to devise effective forms of bondholder involvement in the resolution of debt crises to avoid bailouts and moral hazard dynamics. Thus, it prompted an implicit evolution in the function of the comparability of treatment requirement, which began to encompass bonded debt. The first instance in which the clause was specifically intended to induce a 'comparable' restructuring of bonds was the 1999 Paris Club agreement on

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20 Charles Lipson, 'Bankers' Dilemmas: Private Cooperation in Rescheduling Sovereign Debts' (1985) 38 World Politics 200; Alexander Szodruch, *Staateninsolvenz und private Gläubiger: Rechtsprobleme des Private Sector Involvement bei staatlichen Finanzkriesen im 21. Jahrhunder*t (BWV 2008) ch 3.

21 Rieffel, *Restructuring Sovereign Debt* (n 19) ch 6.

22 Ibid.

23 Philip J Power, 'Sovereign Debt: The Rise of the Secondary Market and Its Implication for Future Restructurings' (1996) 64 Fordham Law Review 2701; Ross P Buckley, 'The Facilitation of the Brady Plan: Emerging Markets Debt Trading From 1989 to 1993' (1998) 21 Fordham International Law Journal 1802.

Pakistan.[24] However, the operation of the principle has proven extremely challenging with regards to bonded debt. The underlying reasons, as will be analyzed in detail below, are primarily related to the fragmentation of the creditor structure and the lack of transparency regarding sovereign obligations, as well as fundamental differences in approaches to debt treatment among official and private creditors. Indeed, comparability of treatment has come under increasing pressure, as epitomized by the tensions surrounding bonds exchanges in Ukraine (1999-2000) and Ecuador (2000) and growing private sector calls for 'reverse comparability'.[25] Especially after the turn of the century, the principle's operation has been marked by significant elasticity and inconsistency. Under the Heavily Indebted Poor Countries Initiative ('HIPC'), for instance, commercial creditors' comparable treatment was partially favored through IDA-financed discount debt buy-backs, but holdout creditors were still able to recover considerable amounts.[26]

Thus, the rise of bonded debt in sovereign borrowing exacerbated the challenges surrounding the comparability of treatment principle. These challenges relate, on the one hand, to the segmentation and diversification of public debt stocks and the lack of transparency on sovereign obligations and, on the other, to fundamental differences in debt treatment methods, depending on the nature of the affected creditors and debt instruments.

Regarding the first aspect, clarity on the nature, specific characteristics and amounts of outstanding obligations is indispensable for comparability of

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24 Josselin (n 16) 531. Pakistan restructured three Eurobond issues with $600 million through a unilateral exchange.

25 Josselin (n 16). For a brief description of the debt restructurings in Pakistan, Ukraine, Russia and Ecuador between 1998 and 2000 see IMF, 'Sovereign Debt Restructurings and the Domestic Economy Experience in Four Recent Cases' (2002) <https://www.imf.org/external/NP/pdr/sdrm/2002/022102.pdf> accessed 2 April 2021.

26 Mark A Walker and Barthélemy Faye, 'Sovereign Debt Renegotiation: Restructuring the Commercial Debt of HIPC Debtor Countries' (2010) 73 Law and Contemporary Problems 317.

treatment. As Anna Gelpern aptly argues, sovereign debt constitutes a public good and there are strong public accountability and economic efficiency rationales for adequate transparency.[27] Nonetheless, incomplete reporting and disclosure of financial and legal terms by borrowers and lenders alike has long impeded effective sovereign debt governance.[28] This has been compounded by the growing heterogeneity of capital flows, as disclosure on bilateral lending by non-Paris Club members and on certain forms of commercial lending tends to be particularly scarce.[29] Even international bond issuances pose transparency challenges: creditor identity is easily obfuscated by secondary market trading, despite being a fundamental factor shaping creditors' incentives.[30] Public sector organizations and financial industry associations have undertaken several efforts to improve transparency and accountability on public debt, such as the G20 Operational Guidelines for Sustainable Financing from 2017 and the IIF Voluntary Principles on Debt Transparency ('IIF Principles') from 2019.[31] The latter is

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27 Anna Gelpern 'About Government Debt … Who Knows?' (2018) 13 Capital Markets Law Journal 321; Shakira Mustapha and Rodrigo Olivares-Caminal 'Improving Transparency of Lending to Sovereign Governments' (2020) ODI Working Paper 583 <https://cdn.odi.org/media/documents/200710_debt_transparency_final_v2.pdf> accessed 3 November 2021.

28 Gelpern (n 27). There is no consensus even on the basic definition of public debt. Serkan Arlanap and others, 'Concepts, Definitions and Composition' in S Ali Abbas, Alex Pienkowski and Kenneth Rogoff (eds), *Sovereign Debt: A Guide for Economists and Practitioners* (Oxford University Press 2019).

29 Insufficient transparency on Chinese lending is especially troublesome considering its growing relevance and the reported use of non-traditional financial structures and collateral arrangements. Sebastian Horn, Carmen M Reinhart and Christoph Trebesch, 'China's Overseas Lending' (2019) NBER Working Paper 26050 <https://www.nber.org/papers/w26050> accessed 1 February 2022.

30 Gelpern (n 27).

31 G20, 'G20 Operational Guidelines for Sustainable Financing' (March 2017) <https://www.bundesfinanzministerium.de/Content/EN/Standardartikel/Topics/world/G7-G20/G20-Documents/g20-operational-guidelines-for-sustainable-financing.pdf?__blob=publicationFile&v=4> accessed 14 April 2021; IIF,

especially interesting for present purposes, as it aims to improve transparency on LICs' commercial debt exposures and recommends extensive information sharing encompassing both financial and legal terms.[32] The IIF Principles have been complemented by the OECD's recent Debt Data Transparency Initiative.[33] Through this initiative, the OECD actively promotes transparency by collecting and disseminating data provided by lending entities through a Debt Transparency Database and providing analysis and advisory services. However, the effectiveness of these initiatives is still curbed by their voluntary character and the absence of monitoring mechanisms.[34]

Regarding the second aspect, uncertainties and tensions surrounding the implementation of the comparable treatment principle also stem to a significant extent from legal and economic differences in the approaches to distressed debt treatment typically adopted by official bilateral and commercial creditors.[35] Commercial debt treatments usually take the form of stock treatments, affecting the entire stock of distressed debt. This is especially true for bonds, which are generally restructured through bond exchanges.[36] Given the diversity of creditors and their business models, bond

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'Voluntary Principles for Debt Transparency' (10 June 2019) <https://www.iif.com/Publications/ID/3387/Voluntary-Principles-For-Debt-Transparency> accessed 14 April 2021.

32 IIF, 'Voluntary Principles for Debt Transparency' (n 31). For now, these apply to countries eligible for support under the IMF Poverty Reduction and Growth Facility. They concern all financial transactions having the economic effect of borrowing, including not only traditional loans but also guarantees and asset-back facilities, repos and other transactions.

33 'OECD Data Transparency Initiative' (OECD, 29 March 2021) <https://www.oecd.org/finance/OECD-Debt-Data-Transparency-Initiative.htm> accessed 14 April 2021.

34 Mustapha and Olivares-Caminal (n 27).

35 Cosio-Pascal, 'The Emerging of a Multilateral Forum for Debt Restructuring' (n 14); IMF, 'Sovereign Debt Restructurings and the Domestic Economy Experience in Four Recent Cases' (n 25).

36 On the function of collective action clauses, see e.g. Mark C Wedemaier and Mitu Gulati, 'A People's History of Collective Action Clauses' (2014) 54 Virginia Journal of International Law 51.

restructurings often comprise several options, from debt relief in NPV terms through coupon reductions and rescheduling to outright reductions of the face value of debt claims. By contrast, Paris Club treatments have traditionally been limited to flow treatments, which involve a rescheduling of outstanding payments over a pre-defined period to cover the financing needs of debtor countries as identified in IMF-supported programs.[37] Over time, the Club's practice has evolved towards more comprehensive and concessional forms of debt treatment, mainly through the elaboration of 'standard terms' for specific groups of countries based on income-levels.[38] However, flow treatments remain the dominant modality of crisis management and debt relief has been mostly limited to relief in NPV terms. Debt cancellation has been rather exceptional.[39] The 'Evian approach', launched to resolve Iraq's debt situation in 2003, was, in principle, meant to allow comprehensive debt treatments on a case-by-case basis, potentially opening space for convergence in the approaches and parameters of official and commercial creditors.[40] However, this approach has been significantly influenced by geo-political considerations and its scope of application has remained limited.[41]

The preceding analysis highlights a few key issues shaping the operation of the comparable treatment principle and the future of public and private

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37 Cosio-Pascal, 'The Emerging of a Multilateral Forum for Debt Restructuring' (n 14); Viterbo (n 6) 96ff.

38 See 'Standard Terms of Treatment' (n 17). However, geo-political considerations have often motivated the Club to negotiate ad-hoc deals. Cosio-Pascal, 'The Emerging of a Multilateral Forum for Debt Restructuring' (n 14).

39 Partly due to constraints in the budgetary and accounting rules of some bilateral creditors. See Viterbo (n 6).

40 Thomas Callaghy, 'The Paris Club, Debt and Poverty Reduction: Evolving Patterns of Governance' in Rorden Wilkinson and Jennifer Clapp (eds.), *Global Governance, Poverty and Inequality* (1st edn Routledge 2010).

41 Of the 14 countries who have undergone a debt treatment pursuant to this approach, only five have received debt relief. In three cases, the negotiations were deeply linked to the support of regime changes (Iraq in 2004, Nigeria in 2005 and Myanmar in 2013). Ibid.

sector interaction within the Common Framework. The first element concerns the degree of flexibility in the application of the comparability requirement. Past experience reveals that certain forms of commercial obligations could be exempted from restructuring due to concerns related to the preservation of market access or financial stability. However, the significance of commercial debt as a component of the public debt structure of some DSSI-eligible countries seems to reduce the scope for such flexibility, both from a political and an economic perspective. Incipient experience with the G20 initiative confirms this. The recent approval of an IMF financing arrangement for Chad, which provided the basis for the sole debt treatment effectively negotiated under the Common Framework as of this writing, was only possible following the partial opening of restructuring talks with its main commercial creditor, a bank syndicate led by Glencore.[42]

A second key factor will be the official creditors' approach in addressing debt sustainability issues. Under the Common Framework, treatments are defined on a case-by-case basis, in accordance with IMF debt sustainability analyses. While the agreement foresees the possibility of granting debt relief in NPV

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[42] As of April 2022, only three countries – Ethiopia, Zambia and Chad – have activated the Common Framework. Negotiations regarding Ethiopia reached a stalemate and the creditor committee for Zambia is only currently being formed, more than one year after the debtors' request for debt relief. Michael Cohen and Felix Njini, 'China, France to Co-Chair Zambia's Debt Talks' (Bloomberg, 9 May 2022) <https://www.bloomberg.com/news/articles/2022-05-09/china-france-to-co-chair-zambia-s-debt-talks-hichilema-says> accessed 10 May 2022. As regards Chad, despite an agreement in principle reached by the committee of bilateral creditors in June 2021, final approval of an IMF financing arrangement which had already been negotiated in January 2021 remained suspended until December pending the initiation of negotiations concerning the restructuring of the country's commercial debt, mainly consisting of a $1 billion resource-backed syndicated loan. See Karin Strohecker and Andrea Shalal, 'Glencore Ready to Enter Chad Debt Talks, Paving Way for IMF Program – Sources' (Reuters, 13 November 2021) <https://www.reuters.com/business/glencore-assurances-chad-pave-way-imf-lending-program-sources-2021-11-11/> accessed 10 May 2022.

terms, debt cancellations are explicitly reserved for exceptional cases.[43] Greater openness from bilateral creditors to comprehensive forms of debt treatment, including stock treatments and outright debt reductions, could positively influence cooperation with the private sector, facilitating a convergence of the metrics relevant to the comparability assessment.[44] Moreover, economic research has consistently shown that comprehensive restructurings, including debt write-offs, significantly enhance outcomes in terms of debt sustainability and economic growth.[45]

Finally, the operation of the comparability of treatment principle will largely depend on the degree of institutionalization and transparency of debt treatment processes under the Common Framework. In Paris Club practice, the assessment of the requirement and the consequences of violations remained obscure.[46] The Common Framework seems to perpetuate, at least in part, this lack of transparency, as it merely indicates broad benchmark criteria: 'assessment of comparable efforts will be based on changes in nominal debt service, debt stock in net present value terms and duration of the treated claims'.[47] The elaboration of detailed guidelines for the assessment

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43 'Common Framework for Debt Treatment beyond the DSSI' (n 2).

44 As discussed in Section II, a key benchmark for the comparability assessment is the ultimate impact on the sustainability of the debtor's public finances.

45 E.g. Gong Cheng, Javier Diaz-Cassou and Aitor Erce, 'From Debt Collection to Relief Provisions: 60 Years of Official Debt Restructurings Through the Paris Club' (2016) ESM Working Paper Series 20/2016 <https://www.esm.europa.eu/publications/debt-collection-relief-provision-60-years-official-debt-restructurings-through-paris> accessed 26 January 2022; Carmen M Reinhart and Cristoph Trebesch, 'Sovereign Debt Relief and its Aftermath' (2016) 14 Journal of the European Economic Association 215.

46 Agreed Minutes reportedly included a 'pullback clause' triggering the termination of Paris Club agreements in case of a violation of the comparability requirement. Viterbo (n 6). However, to my knowledge, no further information on instances of activation of that clause or procedures for assessing compliance is available.

47 'Common Framework for Debt Treatment beyond the DSSI' (n 2) 1. No further indications on the timing and institutional setting of review procedures or the consequences for non-compliance are provided.

of comparability and a process of review and close engagement with the private sector could foster clarity and transparency, increasing pressures on commercial creditors to share the burden of crisis resolution processes.[48]

V. Concluding Remarks and Options for the Way Forward

Two years into the COVID-19 pandemic, global financial stability remains precarious and a reform of the international financial architecture fostering effective sovereign debt governance processes is more urgent than ever.[49] The inclusion of the comparability of treatment principle within the Common Framework reflects the need to ensure equitable burden sharing among all public and private stakeholders in the prevention and resolution of debt crises in LICs in the aftermath of the pandemic. This section presents some tentative proposals to reinforce official and private sector cooperation. These involve embedding debt treatments under the Common Framework within a robust institutional setting and devising complementary statutory tools to influence creditors' incentives.[50]

First, the 'comparability of treatment' principle could be strengthened by tying bilateral and commercial debt treatments together within an institutional arrangement capable of ensuring, at least to some extent, parallel

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48 The need to institutionalize the dialogue among official and commercial creditors and the process for assessing comparability is demonstrated by difficulties faced by Chad's bilateral creditor committee in directly engaging with private creditors prior to the completion of the agreement on bilateral debt treatment. See 'Indonesian G20 Presidency Welcomes the Statement of the Creditor Committee for Chad' (G20, 7 January 2022) <https://g20.org/indonesian-g20-presidency-welcomes-the-statement-of-the-creditor-committee-for-chad/> accessed 10 February 2022.

49 G30 Working Group on Sovereign Debt and COVID-19, *Sovereign Debt and Financing for Recovery after the COVID-19 Shock: Next Steps to Build a Better Architecture* (Group of Thirty 2021).

50 On market-based contractual approaches to these issues, see e.g. Lee Buchheit and Mitu Gulati, 'Avoiding a Lost Decade—Sovereign Debt Workouts in the Post-Covid Era' (2021) 16 Capital Markets Law Journal 45.

progression on the restructuring of different types of debt. Attaching the implementation of successive phases of official debt treatments to identified stages in commercial debt restructurings would help lock the private sector into crisis resolution processes from the very beginning. In this respect, Paris Club practice offers a useful precedent, as debt treatments have often been structured around several phases strictly connected to the successful implementation of IMF programs.[51] Similarly, a tripartite arrangement could be developed linking IMF programs – a prerequisite for debt treatments under the Common Framework – to bilateral as well as commercial debt treatments.

Complete symmetry and uniformity in the structure and progress of different debt treatment processes would be unfeasible. The objective of a tripartite framework of this sort would be limited at ensuring coordination between the fundamental elements of these processes, conditioning the advancement of bilateral debt treatments upon the parallel involvement of the private sector. The IMF could play a vital role here. Leveraging the flexibility of its policies on lending into arrears, the Fund might signal the possibility of implementing financial assistance programs even in the case of default on commercial debt, strengthening the negotiating position of debtor countries.[52] This would help overcome an implicit 'veto power' of commercial creditors over the progression of debt treatments – a very concrete risk, as demonstrated by Chad, where negotiations protracted for over a year only reached a turning point following the opening of

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51 Enrique Cosio-Pascal, 'Paris Club: Intergovernmental Relations in Debt Restructuring' in Barry Herman, José Antonio Ocampo and Shari Spiegel (eds), *Overcoming Developing Country Debt Crises* (Oxford University Press 2010).

52 The IMF Policy of Lending into Arrears to Private Creditors allows the provision of financing despite payment arrears subject to the effort of good faith negotiations, a discretionary and flexible criterium. See IMF, 'IMF Policy on Lending into Arrears to Private Creditors' (1999) <https://www.imf.org/external/pubs/ft/privcred/lending.pdf> accessed 29 December 2020; Lee Buchheit and Rosa Marìa Lastra 'Lending into Arrears – A Policy Adrift' (2007) 41 The International Lawyer 939.

negotiations on private sector debt. Furthermore, IMF financing would alleviate debtors' concerns over rating downgrades and temporary loss of market access, incentivizing participation in the Common Framework.[53] Interestingly, it appears that this possibility is increasingly being considered within the Fund. In a recent comment, IMF Managing Director Kristalina Georgieva and Ceyla Pazarbasioglu advocated a debt service standstill pending negotiations to strengthen the Common Framework and stated that further clarification on the enforcement of the comparability of treatment principle is necessary, 'including as needed through implementation of IMF arrears policies'.[54]

Naturally, the development of a similar tripartite framework would require several preconditions. First, it would involve a close dialogue between official and commercial creditors. Notwithstanding the segmentation of the creditor landscape, financial industry associations such as the IIF could play an increasingly important role of representation and mediation, following an emerging trend.[55] Furthermore, as the principle of comparable treatment would become an explicit benchmark for the parallel progression of debt treatments, greater clarity and transparency would be required in its actual assessment, both in terms of institutional setting and metrics.

On a complementary level of analysis, a further option could be to implement statutory tools to influence private creditors' incentives by limiting the prospects of recovery through litigation, thus favoring cooperation in debt settlements. There are some relevant precedents at both

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53 On the contested role of rating agencies in sovereign debt governance, see Yuefen Li, 'Debt Relief, Debt Crisis Prevention and Human Rights: The Role of Credit Rating Agencies' (17 February 2021) UN Doc A/HRC/46/29.

54 Kristalina Georgieva and Ceyla Pazarbasioglu 'The G20 Common Framework for Debt Treatments Must Be Stepped Up' (IMFBlog, 2 December 2021) <https://blogs.imf.org/2021/12/02/the-g20-common-framework-for-debt-treatments-must-be-stepped-up/> accessed 23 February 2022.

55 Cf text to n 10.

the international and national level, albeit exceptional and limited in scope.[56] Based on the political support of the broader G20 membership, domestic legislation could be enacted in key jurisdictions for international bonds issuances – the US, UK and Japan – staying or limiting litigation against DSSI-eligible countries pending debt treatments under the Common Framework.[57] Both the politics and design of such legal arrangements would undoubtedly carry several complexities. However, they could nonetheless represent a valuable complement to the Common Framework, evidencing the international community's strong commitment to achieving equitable burden sharing in the reform of the international financial architecture in the post-pandemic world.[58]

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[56] The most significant example is the UN Security Council Resolution supporting Iraq's debt restructuring process through the time-bound immunization of its oil proceeds. UNSC Res 1483 (22 May 2003) UN Doc S/RES/1483. At the national level, the UK, Belgium and France have experimented with statutory solutions to curb litigation against HIPC countries. George Pavlidis, 'Vulture Litigation in the Context of Sovereign Debt: Global or Local Solutions?' (2018) 12 Law and Financial Markets Review 93.

[57] See Lee Buchheit and Mitu Gulati, 'Sovereign Debt Restructuring and U.S. Executive Power' (2019) 14 Capital Markets Law Journal 114.

[58] Even the IMF has contemplated statutory solutions, albeit as a last resort in the context of a systemic crisis. IMF, 'The International Architecture for Resolving Sovereign Debt Involving Private-Sector Creditors – Recent Developments, Challenges and Reform Options' (2020) IMF Policy Paper No 2020/043 <https://www.imf.org/en/Publications/Policy-Papers/Issues/2020/09/30/The-International-Architecture-for-Resolving-Sovereign-Debt-Involving-Private-Sector-49796> accessed 31 November 2021.

A Truth and Reconciliation Commission for the USA – a Starting Point for a National Discourse

Selen Kazan*

Truth and Reconciliation Commissions (TRCs) are a means for a nation to reconcile with its past, restore justice, and give victims the chance to speak about their experiences. TRCs can also be used in democratic states to deliver (historic) justice. This article looks at the possibility of a United States of America (US) TRC, based on the need for reconciliatory measures, including reparations for African Americans. This article argues that the current political unrest in the US demonstrates the need to explore different avenues for the pursuit of justice. A US TRC could be one option for a transition to a more just nation by addressing past and present injustices. It could offer an alternative to court proceedings to tackle the manifold, long-lasting injustices in the US and the unprocessed history of how Black people have been treated. The article will highlight current US reconciliatory initiatives, as well as obstacles to the emergence of a TRC in the United States. It will draw on the experience of other TRCs to propose ways in which these obstacles may be overcome. However, the article also highlights potential downsides of a US TRC by discussing the danger of democratic states using these fora to perpetuate the status quo, or to avoid the punishment of powerful people. The article stresses the importance of social and political cohesion for the establishment and effectiveness of a TRC.

Keywords: Truth and Reconciliation Commissions, USA, Black Lives Matter, Canada, South Africa

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I. INTRODUCTION

Human rights violations are often dealt with in an unsatisfactory way, leaving open wounds that can sometimes lead to more division. Examples of this can be found in many places, even in democratic countries, where dark chapters of history are acknowledged, but not addressed in a way that honors the victims and holds perpetrators accountable.[1] Restoring unity or furthering reconciliation in a nation is vital to promote justice – not only because it is a service a government owes to its people, but also because the aftermath of a past conflict is often still felt today in the form of unequal wealth distribution, racism, and structural inequalities.

An example of widespread historical injustices can be found in the US. Past human rights violations, especially those perpetrated against the Black population, have not been dealt with adequately. This can weaken national unity, because enduring discrimination leads to societal divisions.[2] Such disunity can be felt in contemporary debates brought to the fore by the Black Lives Matter (BLM) movement. The historical wrongs committed against African Americans date back several centuries. The lack of reconciliation

1 Ruti G Teitel, *Transitional Justice* (Oxford University Press 2000) 69.

2 David R Cole, *Irreconcilable Differences: Limits to United States National Unity* (Lexington Books 2021).

with the history of slavery in the US leaves many African Americans without closure.[3] The link between slavery in the US and today's (socio-)economic situation of African Americans and the need for (financial) reparations have been widely discussed. However, opinions vary on which means of redress should be used.[4] Some claim that descendants of enslaved people should receive reparations.[5] This, it has been argued, could be accomplished through a holistic Truth and Reconciliation Commission (TRC) process that includes reparations and apologies.[6] Hunter finds historical evidence for

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3 Ron Eyerman, *Cultural Trauma: Slavery and the Formation of African American Identity* (Cambridge University Press 2001).

4 Maxine Burkett, 'Reconciliation and Non-Repetition: A New Paradigm for African-American Reparations' (2007) 86 Oregon Law Review 99; John Torpey and Maxine Burkett, 'The Debate over African American Reparations' (2010) 6; William A Darity, Bidisha Lahiri and Dania V. Frank, 'Reparations for African-Americans as a Transfer Problem: A Cautionary Tale' (2010) 14 Review of Development Economics 248; Glenn C Loury, 'Trans-Generational Justice – Compensatory vs. Interpretative Approaches' in Jon Miller and Rahul Kumar (eds), *Reparations* (Oxford University Press 2007); Rashawn Ray and Andre M Perry, 'Why We Need Reparations for Black Americans' (Brookings Institution, 15 April 2020) <https://www.brookings.edu/policy2020/bigideas/why-we-need-reparations-for-black-americans/> accessed 16 Janaury 2022; Edieth Y Wu, 'Reparations to African-Americans: The Only Remedy for the U.S. Government's Failure to Enforce the Thirteenth, Fourteenth, and Fifteenth Amendments' (2004) 3 Connecticut Public Interest Law Journal 403.; Allan D Cooper, 'From Slavery to Genocide: The Fallacy of Debt in Reparations Discourse' (2012) 43 Journal of Black Studies 107; Jeffrey Prager, 'Do Black Lives Matter? A Psychoanalytic Exploration of Racism and American Resistance to Reparations' (2017) 38 Political Psychology 637.

5 Stephen Winter, *Transitional Justice in Established Democracies* (1st edn, Palgrave Macmillan 2014); Joe Feagin, 'A Legal and Moral Basis for Reparations' (Time, 28 May 2014) <https://time.com/132034/a-legal-and-moral-basis-for-reparations/> accessed 11 June 2021; Torpey and Burkett (n 4); Wu (n 4).

6 Stephen Day, 'The US Needs Truth and Reconciliation' (Fair Observer, 21 April 2021) <https://www.fairobserver.com/region/north_america/stephen-day-

> sociopolitical and economic calculations for the uncompensated and stolen Black labor, the loss of property, the loss of home space and heritage, forcible rape, lynching, the loss of opportunity, and continued systems and practices of racial capitalism and racial domination.[7]

I argue that the US might indeed benefit from several transitional justice tools such as reparations, a TRC, and public apologies.[8]

Amid the persistent political tensions in the US, voices demanding reconciliatory mechanisms have become louder. For example, at the beginning of 2020, Congresswoman Barbara Lee announced plans to propose a resolution establishing the first United States Commission on Truth, Racial Healing, and Transformation (TRHT). This Commission would examine the effects of slavery, institutional racism, discrimination against people of color, and how US history impacts laws and policies today.[9] The resolution was supported by a broad coalition of Congress members and was officially introduced on June 4, 2020. It acknowledges the inequality in the country and commits to understanding its past so that the US population can move forward as a people. The Commission would aim to recognize and memorialize injustice properly and to be a catalyst for progress towards discarding the belief in a hierarchy of human values based on race.[10] It is yet to be seen if the resolution will be adopted and, if so, whether it will ultimately focus on one issue or minority, such as the Black community.

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capitol-hill-us-america-politics-american-society-america-world-news-71303/> accessed 17 January 2022.

7 Marcus Anthony Hunter, 'Seven Billion Reasons for Reparations' (2018) 20 Souls 420, 421.

8 Eric Wiebelhaus-Brahm, 'Truth Commissions and Transitional Societies' in Eric Wiebelhaus-Brahm (ed), *Routledge Handbook of International Criminal Law* (Routledge 2010) 369.

9 H.Con.Res.100 116th Congress (2019-2020) Urging a United States Commission on Truth, Racial Healing, and Transformation.

10 Ibid.

The above-described initiative and several other ones show that significant segments of the American public seem to be open and even demanding a conversation on race issues and inequalities.[11] A TRC could act as a forum for this dialogue. The purpose of this article is to suggest the use of a TRC to address issues of inequality in the US and to ask whether this idea is feasible. To do so, the article will first look at what TRCs are and how they can serve as an alternative justice mechanism for the US. Then, the political conditions in the US that could act as possible hindrances for a TRC will be evaluated to gauge the likelihood of the emergence of a US TRC. Other TRCs that have faced similar constraints will also be comparatively assessed. The article concludes that a truth dialogue with reconciliatory (fiscal) measures is indeed necessary, possibly in the form of a TRC, and its likelihood is dependent on political constraints, and in particular on social and political cohesion.

II. THE THEORY OF TRCS

This section examines the theory behind TRCs and how they are traditionally used. Then, it considers the use of TRCs as an alternative justice mechanism when used in untraditional settings.

TRCs are non-judicial inquiries set up to determine the facts, causes, and societal consequences of past human rights violations. They focus on the testimony of victims of atrocities, acknowledging and recognizing the suffering of survivors. The results and recommendations of TRCs can have supportive effects on criminal and restorative justice, as they may incorporate reparations and institutional reform processes to redress past abuses and

[11] Amy Sherman, 'Protests Renew Call for Reparations for African Americans' (Politifact, 18 June 2020) <https://www.politifact.com/article/2020/jun/18/protests-renew-call-reparations-african-americans/> accessed 11 June 2021.

prevent new ones.[12] The use of TRCs as a transitional justice mechanisms is increasing, and they have become an ever more popular object of academic inquiry. They can be helpful as a tool for addressing periods of colonialism, Apartheid, and structural racism that still affect the communities concerned.[13] Admittedly, sometimes a TRC can just be that: a tool to highlight human rights violations without being able to effectively implement the change that is needed. It is what comes after the TRC process that is equally crucial for the success of the TRC. Only when recommendations that have resulted from a fair, open, and authentic TRC process are taken seriously and implemented can one say that the TRC was a helpful tool.[14] Further, studies on the impact and effectiveness of TRCs are still limited and focus on single case studies.[15] The use of TRCs in long-standing democracies has not attracted a lot of attention in academia due to its novelty.[16]

TRCs can be adapted to the circumstances of the 'transitional' nation, resulting in differences in the variables defining their mandates. Hayner defines TRCs as (1) focused on the past rather than on ongoing events; (2)

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12 'Truth Commissions' (*International Center for Transitional Justice*, March 14, 2012) <https://www.ictj.org/gallery-items/truth-commissions> accessed 31 December 2020.

13 Chandra Lekha Sriram and Suren Pillay, *Peace Versus Justice?* (University of KwaZulu-Natal Press 2009) 21-43; Rosemary Nagy, 'Transitional Justice as a Global Project: Critical Reflections' (2008) 29(2) Third World Quarterly 275.

14 Eric Brahm, 'What Is a Truth Commission and Why Does It Matter?' (2009) 3 Peace & Conflict Review 1, 3.

15 Elisabeth Bunselmeyer, *Truth, Reparations and Social Cohesion - Transitional Justice Lessons from Peru* (1st edn, Routledge 2020) 25.

16 TRCs emerged in Latin America after the fall of authoritarian leadership and thus have been a tool to help countries establish democratic structures after addressing and solving human rights violations that took place during, e.g., dictatorship. Since TRCs traditionally helped form democracies, their use in consolidated democracies is something out of the ordinary. See Ian Dunbar, 'Consolidated Democracies and the Past: Transitional Justice in Spain and Canada' (2011) 8 Federal Governance 15.

investigating a pattern of events that took place over a period of time; (3) engaging directly and broadly with the affected population, gathering information on their experiences; (4) temporary bodies, intending to conclude with a final report with further recommendations; and (5) officially authorized or empowered by the state under review.[17] TRCs create an official record and fulfill demands for victim-centered truth to establish social healing and a future foundation.[18]

TRCs usually form part of a broader transitional justice plan, meaning that the government frequently uses other tools from the transitional justice tool-kit to complement the TRC. These could include political reforms, educational programs, commemorations, or reparations planned alongside the TRC to provide redress.[19] However, the TRC is often the primary tool of reconciliation in this broader transitional justice plan.[20] It is a unique opportunity for victims, perpetrators, and the general public to come together and share their narratives and understandings.[21]

Most importantly, TRCs contribute to the formation of a shared, collective memory. They are advantageous in addressing injustices and in offering a platform for open discussions that create a shared truth. Especially in societies like the US, where human rights violations are denied or disregarded under the excuse that they are a 'matter of perspective', such a discourse is vital for the transition towards a more just society.[22] Consequently, a TRC is not only

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17 Priscilla B Hayner, *Unspeakable Truths* (2nd edn Routledge 2011).

18 Alexander Dukalskis, 'Interactions in Transition: How Truth Commissions and Trials Complement or Constrain Each Other' (2011) 13(3) International Studies Review 434.

19 Brahm (n 14).

20 Eduardo González, Elena Naughton and Felix Reátegui, *Challenging the Conventional: Can Truth Commissions Strengthen Peace Processes?* (International Center for Transitional Justice and the Kofi Annan Foundation 2014).

21 Alexander L Boraine, 'Transitional Justice: A Holistic Interpretation' (2006) 60 Journal of International Affairs 17.

22 Day (n 6).

valuable in countries that are facing regime change, but also in societies that are undergoing a transition to a more just and truthful society that reassesses their own history. Advocacy for such a change in society is currently happening in the US. Arguably, such societal changes and quests for truth often take place in long -standing democracies and can also be viewed as a 'transition 2.0' – transitional justice within a consolidated democracy, with the objective of creating a more just society.

A US TRC would fall into the category of these non-traditional TRCs due to it being a democratic state that is not in transition post-war or after a civil conflict. There are different types of TRCs, which can be event-specific, thematic, institutional, or sociohistorical in orientation.[23] For example, event-specific TRCs – like the Canadian one that focused on Indian Residential schools – examine an episode of human rights violations. Since a US TRC should look at the implications of historical wrongs for the current situation of African Americans and possibly other disadvantaged groups, it is advisable to form a sociohistorical TRC. Sociohistorical TRCs address historical wrongs that may have happened in the distant or recent past. The goal of such a TRC would be to define the lasting political and socio-economic consequences of past human rights violations.

1. TRCs as Alternative Justice Mechanisms

Doubts have been raised about the integrity of TRCs in both transitional and non-transitional societies: are TRCs simply a tool to perpetuate the *status quo*, or do they represent a genuine effort to reconcile the nation?[24] Especially when high-ranking officials of the government, church, or community are likely to face long prison sentences after criminal proceedings, opting instead for a TRC seems like the less threatening and

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23 Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge University Press 2006).

24 Glen Sean Coulthard, *Red Skin White Masks - Rejecting the Colonial Politics of Recognition* (University of Minnesota Press 2014).

demanding route.[25] Opting for a US TRC could be perceived as an attempt to circumvent the prosecution of police officers and state officials because the US is not undergoing a regime change like other transitional countries. Nonetheless, TRCs are not a pre-trial chamber for subsequent criminal cases and have a specific goal and approach. The goal in trials is to have a deterrent effect by affirming the rule of law and punishing the wrongs committed through individualized accountability. TRCs have a more restorative and reconciliatory focus necessary for a society to function in the future. Using all or several of the available transitional justice measures creates a 'justice balance', because it uses restorative and retributive efforts leading to a more balanced approach.[26]

A possible route could also be the merging of prosecutions and a TRC, with different sequencing options.[27] A crucial precondition of a TRC is the need for a comprehensive transitional justice plan that is unique and that fits the political landscape.[28] Every TRC should be established with the specific needs of the country in mind. Moreover, establishing a US TRC should not be based on the motivation to halt the ongoing social protest or conflict, but instead offer a platform for conflicting narratives to be exposed. Finally, it is also fundamental to have a clear timeline for the transitional justice plan. Uncoupling a TRC from other redress tools, such as reparations, undermines

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25 Thomas Obel Hansen, 'The Vertical and Horizontal Expansion of Transitional Justice: Explanations and Implications for a Contested Field' in Susanne Buckley-Zistel and others (eds), *Transitional Justice Theories: An Introduction* (Routledge 2014) 119.

26 Olsen and others talk about the necessity for a broader transitional justice plan because TRCs by themselves have empirically proven to be not as successful. Tricia D Olsen, Leigh A Payne, and Andrew G Reiter, 'The Justice Balance: When Transitional Justice Improves Human Rights and Democracy' (2010) 32(4) Human Rights Quarterly 980.

27 Dukalskis (n 18).

28 Evelyne Schmid, 'Transitional Justice: Information Handbook' (United States Institute of Peace 2008).

the aforementioned plan's credibility. For example, reparations alone 'can only assist, not generate or sustain, a critical reappraisal of the past'.[29]

III. Prospects for a US TRC

This section examines the feasibility of a US TRC by looking at the current political climate, as well as the social and political cohesion of the country.

The likelihood of a US TRC depends on two crucial points: (1) social cohesion (2) political cohesion. Social cohesion is a more horizontal concept, referring to interactions between citizens, whereas political cohesion is a more vertical concept, focusing on the relationship between citizens and the state. Social cohesion can be generated through bottom-up approaches that are being supported by the public and their wish to improve, e.g., race relations. Political cohesion is established either when top-down approaches are initiated by the government or when the government supports the efforts of civil society. Sometimes these two dimensions can even come together and reinforce each other.

Grassroots movements have advocated the idea of reconciliatory talks, which is evident in the initiatives that are already taking place, or the support that they receive from civil society and people in power. For example, district attorneys in Boston, Philadelphia, and San Francisco declared that they would form commissions addressing racial injustices and police brutality. The project is called the 'Truth, Justice, and Reconciliation Commission' to 'process and address the past injustices that simply were not given the time, attention, and dignity that they deserved'.[30]

Still, a considerable portion of people in the US (67%) is not in favor of individual fiscal reparations, which have been demanded for quite some

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29 Ernesto Verdeja, 'A Normative Theory of Reparations in Transitional Democracies' (2006) 37 Metaphilosophy 449, 460.

30 Truth, Justice, & Reconciliation Commission, (2020) <https://www.tjrc.org/?source=glp-website> accessed 21 November 2020.

time, to descendants of American slaves.[31] Some Americans do not see the connections between slavery, Jim Crow, and the contemporary structural injustices towards Black people. This dissonance could be due to the fact that federal efforts to provide fiscal redress are seen as unnecessary by some because slavery happened a long time ago.[32] Societal mobilization and advocacy can cause a shift in politics. Currently, there is a lack of social cohesion in the US on questions of reparations of past injustices. This is evident in the attitude of the general public and the government to this issue, for reasons of political orientation and feasibility questions. This is why many initiatives remain at city and not state level.[33] As Frum states, to this day, 'affirmative action ranks among the least popular thing that US governments do'.[34]

Political cohesion, i.e. governmental support for citizen's demands for justice, is even weaker. In a tense political climate, where former President Trump's 1776 Commission report dismissed systemic racism as identity politics, cries for a justice discourse became louder.[35] The lack of

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31 Mohamed Younis, 'As Redress for Slavery, Americans Oppose Cash Reparations' (Gallup, 29 July 2019) <https://news.gallup.com/poll/261722/redress-slavery-americans-oppose-cash-reparations.aspx> accessed 16 February 2021; The US Congress refused for three decades to pass the bill *Commission to Study and Develop Reparation Proposals for African Americans Act* (116th Congress 2019-2020) [HR 40].

32 PR Lockhart, 'What Slavery Reparations from the Federal Goverations Looks like in 2021' (NBC News, 12 May 2021) <https://www.nbcnews.com/news/nbcblk/slavery-reparations-federal-goverations-looks-2021-rcna900> accessed 17 January 2022.

33 David Frum, 'The Impossibility of Reparations' (*The Atlantic,* 3 June 2014) <https://www.theatlantic.com/business/archive/2014/06/thecity'sibility-of-reparations/372041/> accessed 22 February 2021.

34 Ibid.

35 The commission was rescinded by President Biden. The President's Advisory 1776 Commission, 'The 1776 Report' (2021) 16 <https://trumpwhitehouse.archives.gov/wp-content/uploads/2021/01/The-Presidents-Advisory-1776-Commission-Final-Report.pdf> accessed 22 February 2021.

governmental support, i.e. lack of political cohesion, especially during the Trump presidency, presses the nation more and more into partisanship. Yet, it is not necessarily civil society's job to provide justice through underfunded local initiatives. Politically cohesive initiatives take, successfully, place on a more local level: for example, the Asheville City Council in North Carolina voted unanimously for a resolution that apologized to its Black residents for the city's role in slavery, discriminatory housing practices, and other racist policies throughout its history. The resolution also envisions reparations in the form of investments in Black communities.[36] The city of Evanston, Illinois, followed this example and found innovative ideas to pay for the reparations, using tax revenues from newly legalized marijuana sales for funding.[37]

The lack of governmental support is palpable in debates about police violence.[38] The US faces a political atmosphere that demands change and recognition of injustices done to its Black community. The killings of George Floyd, Ahmaud Arbery, Breonna Taylor, and Rayshard Brooks are the latest in a persistent pattern of violence committed by state agents and citizens against African Americans.[39] These recent deaths have stoked strong

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36 Nia Davis, 'Asheville Reparations Resolution Is Designed to Provide Black Community Access to the Opportunity to Build Wealth' (The City of Asheville, 20 July 2020) <https://www.ashevillenc.gov/news/asheville-reparations-resolution-is-designed-to-help-Black-community-access-to-the-opportunity-to-build-wealth/> accessed 22 February 2021.

37 City Council of Evanston, *Establishing a City of Evanston Funding Source Devoted to Local Reparations*, 126-R-19, Evanston (14 November 2019).

38 Rashwan Ray, 'How Can We Enhance Police Accountability in the United States?' (*Brookings*, 25 August 2020) <https://www.brookings.edu/policy2020/votervital/how-can-we-enhance-police-accountability-in-the-united-states/> accessed 17 January 2022.

39 Elle Lett and others, 'Racial Inequity in Fatal US Police Shootings, 2015–2020' [2020] Journal of Epidemiology and Community Health jech <https://jech.bmj.com/lookup/doi/10.1136/jech-2020-215097> accessed 13 November 2020; Felicia Campbell and Pamela Valera, 'The Only Thing New Is the Cameras': A

requests to end police brutality and structural racism. 2014 was a turning point in the national conversation around police violence after the killings of Michael Brown, Laquan McDonald, and Eric Garner. Protests erupted in Ferguson, and a new movement for racial justice was established under the banner of BLM. What was true in 2014 is still valid in 2022: there are still symptoms of a centuries-old pattern of white supremacy in America, which the government does not sufficiently address.[40]

Structural issues, such as US police officers' protection through qualified immunity, impede political change that could lead to cohesion. Qualified immunity is a judicial principle that protects police from lawsuits unless the plaintiff can show that police have previously been found guilty of violating a person's right in the same way.[41] Nevertheless, a right is not fully established until an officer has been successfully charged for violating that right, opening a vicious circle that is hard to break because there are no precedents. The lack of political cohesion, i.e. lack of governmental support, is also the problem in the 'George Floyd Justice in Police Act' Bill, which is now with the US Senate and aims to reform police's qualified immunity, but splits opinions between Democrats and Republicans.[42]

If the government endorses a US TRC, the TRC could be the place of information and clarification. Through an open debate that touches upon the current issues marginalized people face and that sets the historical record

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Study of US College Students' Perceptions of Police Violence on Social Media' (2020) 51 Journal of Black Studies 654 <http://journals.sagepub.com/doi/10.1177/0021934720935600> accessed 13 November 2020.

40 Campaign Zero 2020, <https://www.joincampaignzero.org/> accessed 22 November 2020.

41 Harlow v. Fitzgerald, 457 US 800, 818 (1982). On April 20th, 2021, Derek Chauvin, the police officer that murdered George Floyd, was convicted on all counts of murder. Stephen Collinson, 'The Law Delivered Justice to George Floyd. America's Political Leaders Are up Next' (CNN Politics, 21 April 2021) <https://www.cnn.com/2021/04/21/politics/joe-biden-derek-chauvin-trial-verdict/index.html> accessed 17 January 2022.

42 Collinson (n 41).

straight on how Black Americans became marginalized, the general public may be more inclined to support policy changes. First and foremost, the TRC could act as a way to confront American racism. A chance for Black Americans to speak up. A desirable secondary goal would be that a TRC could allow Americans to learn about the unfair treatments of marginalized people and why improvement is needed, and the wide gaps in attitudes and perceptions on race could potentially be altered. Although civil society organizations can mobilize the masses, governmental support is still necessary to form a successful TRC.

IV. Reflecting on other TRCs

In this section, the article compares the US setting with other (international) TRC examples. These cases were chosen because they show similarities in historic wrongs, culture, and social/political division. Positive and negative aspects of the cases will be highlighted to draw inferences for a US TRC through a best practice approach. The following section will help show how some of these TRCs – namely South Africa, Canada, and the Greensboro TRC – have managed to find solutions for similar issues.

The South African TRC provided a way to address the country's socio-historic legacy. Its approach worked on a victim/perpetrator basis, making the proceedings before the TRC very individualized.[43] Consequently, the focus was on the crimes of Apartheid rather than on Apartheid itself. There was consensus that Apartheid was a 'crime against humanity', but only its symptoms or consequences were examined.[44] Yet, by putting the emphasis solely on crimes committed, the TRC failed to hold accountable people that *prima facie* did not feel responsible for the nation's state of Apartheid because

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43 Mahmood Mamdani, 'Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)' (2002) 32 Diacritics, 33 <https://philpapers.org/rec/MAMAOI> accessed 11 June 2021.

44 Ibid.

they did not actively commit crimes, but were rather bystanders. In a US TRC, the process should not be individualized, meaning that the bigger picture, namely the problems in institutions, actions, and laws, should be at the center and their effects on the present and future. Only by addressing the whole nation, through enhanced publicity, and by dissecting the US's structural problems will a US TRC honestly speak to its people and create a better understanding for social cohesion.

Canadian redress has been lobbied for by the affected groups, similar to the US. The emergence of grassroots movements was one of the catalyzing factors for the Canadian TRC.[45] It resulted from a large class-action lawsuit by Indigenous peoples and organizations and was a component of the Indian Residential School Settlement Agreement (IRSSA),[46] which could also be a possible route for the US to achieve political cohesion. Some might assume that the Canadian TRC was simply a way for the government and for churches, who were involved in the funding and operation of those schools, to circumvent retributive justice. However, it became apparent with time that a national discourse was indeed needed to offer survivors a platform.[47] The IRSSA also included financial compensation in various forms. The timing of the reparations became problematic when the reparations were separated from the TRC, because some survivors had not yet had the chance to speak about their trauma in counseling, which made them feel

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45 Rosemary Nagy, 'Settler Witnessing at the Truth and Reconciliation Commission of Canada' (2020) 21 Human Rights Review 224; Matt James, 'A Carnival of Truth? Knowledge, Ignorance and the Canadian Truth and Reconciliation Commission' (2012) 6 International Journal of Transitional Justice 192.

46 The IRSSA recognized the damage inflicted on Indigenous peoples by Canadian residential schools and established a multi-billion-dollar fund to help former students in their recovery that included a TRC, as per applicants' wishes. *Indian Residential Schools Settlement Agreement* <https://www.residentialschoolsettlement.ca/settlement.html> accessed 23 February 2021.

47 Ibid.

dissatisfied.[48] Separating reparations from an overarching context that may include legal proceedings and a TRC may give the material compensation connotations of hush money. TRCs and reparations complement each other. If used nationally rather than locally, TRCs could recommend reparations in their final report to alleviate 'the consequences of suffering for those most directly affected'.[49]

One motivation for a Canadian TRC was to re-educate and re-write the ignored chapters of the country's history. The TRC managed to create shared views between Indigenous and non-Indigenous people. A 2019 study found that both believe that the process of attaining reconciliation should be advanced.[50] There is also recognition within Canadian society of the gaps in living standards between Indigenous and non-Indigenous people and the need to address them.[51] Additionally, most Canadians support several specific policies that could improve Indigenous well-being and advance reconciliation, such as increases in government funding for Indigenous schools and the transfer of self-government powers to Indigenous communities.[52] TRCs may positively contribute to enhancing understanding between the parties in conflict or in civil society at large for

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48 Brandon Hamber and Richard A Wilson, 'Symbolic Closure through Memory,Reparation and Revenge in Post-Conflict Societies' (2002) 1 Journal of Human Rights 35, 16; Courtney Jung, 'Canada and the Legacy of the Indian Residential Schools: Transitional Justice for Indigenous People in a Non-Transitional Society' (2009) 295 Aboriginal Policy Research Consortium International (APRCi) 3 <https://ir.lib.uwo.ca/aprci> accessed 23 February 2021.

49 Luke Moffett, 'In the Aftermath of Truth: Implementing Truth Commissions' Recommendations on Reparations - Following Through for Victims', in Jeremy Sarkin (ed), *The Global Legacy of Truth Commissions* (Intersentia 2019) 143.

50 Environics Institute, '2019 Survey of Canadians: Toward Reconciliation: Indigenous And Non-Indigenous Perspectives - Final Report Confederation of Tomorrow' (2019) <http://irpp.org> accessed 27 October 2020.

51 Ibid.

52 Ibid.

taking reconciliatory steps and increasing government spending on minorities (such as the Black community in the US).

The Canadian example shows that a TRC can enhance the majority's support for the rights of minorities. The example also shows that sometimes a TRC can be established as a compromise, i.e. a settlement, through lawsuits. While this could be perceived as a circumvention of legal responsibility, a national truth discourse can be a means of restorative redress, too.

The initiatives mentioned in Part III, grassroots movements and cities' plans to redirect their budget, represent attempts to find community-based solutions to a national problem. This is the more practical solution due to the US's size, the number of people involved, and the present political climate. The Greensboro TRC is a prime example of a TRC that emerged because of a lack of political cohesion. There was a lack of political will and insufficient funding to extend it in terms of the commission's size and the proceeding's length.[53] The TRC, which came about after the Greensboro massacre (an ambush by the Ku Klux Klan and Nazi party members on a coalition of racial and economic justice protesters in North Carolina in 1979), emerged through a bottom-up approach. It managed to bring the perpetrators, victims, survivors, and their families together into a public forum to discuss not only the events of the day but also, and more importantly, the systemic racism that led to it. However, the recommendations of the TRC were not listened to, let alone implemented, by the city of Greensboro, which instead rejected the final report.[54] Although a community TRC based on strong social cohesion has its benefits, it can also lead to funding issues and obstacles to implementing the recommendations. These consequences result from a lack of political

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53 Lisa Magarrell and Joya Wesley, *Learning from Greensboro - Truth and Reconciliation in the United States* (University of Pennsylvania Press 2010).

54 Marnell Wesley and Lisa Joya, *Learning from Greensboro: Truth and Reconciliation in the United States* (University of Pennsylvania Press 2008) 138-39.

cohesion, in this case the lack of governmental support. Thus, a future US TRC needs enough support from the government and backing from civil society for it to thrive. After the election of Joe Biden, chances might be higher for TRC proposals to be endorsed by the government.

V. Conclusion

To conclude, the feasibility of a TRC in the US is tied to many variables. This article has argued that African Americans deserve truth-telling concerning the US' past and recent instances of discrimination and police violence. The current political momentum can be used to start initiatives on either a local or national level. Ideally, it should be harnessed to support a national transitional justice plan that operates on a federal/regional level and gives as many people as possible the chance to interact and adapt to local conditions and needs. Such a plan is vital to offering social protest a platform, changing schools' curricula, coordinating media outreach, and administering reparations. Having a platform like a TRC can promote comprehension by non-Black Americans for the reasoning behind reparations and other measures. The issue of reparations has been raised many times before the government and in (primarily African American) scholarship. On a national level, these pleas have so far remained unsuccessful. However, the plans that have appeared over the past few years in the US on a local level could provide a blueprint for a national plan for reparations and wealth redistribution in the US.

The article has compared certain obstacles to a US TRC with those faced by other international TRCs established in Canada and South Africa, and has shown the benefits of using a TRC to take the first step into a justice discourse. Criminal convictions can happen alongside a TRC, combining retributive with restorative justice. This article does not claim that a TRC is an answer to all questions and issues surrounding human rights violations, but it is an alternative to traditional means of justice that can start a discourse. The (inter-)national examples also show that a TRC does not automatically

solve deep-rooted issues and achieve justice. The truth that emerges through a TRC process, however, might contribute to societal changes in ways that other mechanisms could not achieve. The emergence of more and more initiatives shows that the time is right for a truth-seeking endeavor.

GENERAL ARTICLES

WHAT DOES IT TAKE TO BE A LOYAL MEMBER? REVISITING THE 'GOOD MEMBERSHIP' OBLIGATIONS IN THE LAW OF INTERNATIONAL ORGANIZATIONS

Tleuzhan Zhunussova*

The goal of this article is to examine the nature and the scope of the 'good membership' obligations that every state acquires as a consequence of its membership in international organizations. While the concept of membership duties represents one of the most foundational issues in the law of international organizations, so far, it has received little attention in legal scholarship. This article aims to remedy this gap and to demonstrate that, contrary to the descriptive approach prevailing in the field, the 'good membership' duties are more than a simple reiteration of member states' commitments formulated in an organization's constitution. Instead, it is argued that these obligations are of a more far-reaching nature, having their basis in the application of the principle of good faith to the interpretation and performance of member states' institutional commitments. In this regard, good faith represents an overarching principle of institutional legal order, which – through the generation of more concrete norms and sub-principles – serves to maintain the loyalty of member states to the joint enterprise by ultimately requiring them to cooperate and compromise for the achievement of common institutional goals. The article subsequently illustrates this thesis by exploring the use of the principle by the International Court of Justice and the Administrative Tribunal of the International Labour Organization to determine the scope of members' obligations in three case studies concerning, respectively, the United Nations membership crisis in the late

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1940s, the potential transfer of the World Health Organization's Regional Office for the Middle East in 1980 and the premature ousting of the Organisation for the Prohibition of Chemical Weapons' Director-General in 2003. The resulting analysis underscores the potential normative value of good faith, which can contribute to the continuous development of institutional legal order while protecting the primacy of common endeavour from manifestations of excessive unilateralism by the member states.

Keywords: international organizations; member states; membership duties; principle of good faith; treaty interpretation

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I. INTRODUCTION

It is commonplace in the law of international organizations to speak about the so-called 'duties of good membership' or the 'duties of loyal co-operation' that every member acquires as a consequence of its membership in international organizations. In fact, most treaties establishing international organizations contain provisions providing for such 'good membership' duties, with one of the most common formulations found in Article 2(2) of the United Nations (UN) Charter, requiring the UN member States to 'fulfil in good faith the obligations assumed by them in accordance with the present Charter'.[1] Another prominent example is contained in Article 4(3) of the Treaty on European Union (TEU), which calls on European Union (EU) Member States to 'facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives'.[2]

While the concept of membership duties represents one of the most foundational issues in the law of international organizations, its comprehensive examination in the field is lacking. The classical sources in the discipline tend merely to provide a summary of the most typical membership-related duties found in constitutions of most international organizations, such as the duty to contribute to the organization's budget or to grant privileges and immunities to its staff.[3] These expressly formulated duties arise directly from the text of these treaties and, as such, do not require

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1 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119 (UN Charter) art 2(2). For other examples of 'good membership' clauses, see Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge University Press 2002) 194-95; Henry G Schermers and Niels Blokker, *International Institutional Law: Unity Within Diversity: Fifth Edition* (Martinus Nijhoff 2011) 121–22.

2 Consolidated Version of the Treaty on European Union [2008] OJ C115/13 (TEU) art 4(3).

3 See, for example, Schermers and Blokker, *International Institutional Law* (n 1) 121; Klabbers, *An Introduction to International Institutional Law* (n 1) 194).

further elaboration. However, this approach does not account for a number of membership obligations that are not specified in an organization's constitution and that instead have been developed in the case law of international courts and tribunals, as well as the work of the International Law Commission (ILC) and several scholarly writings.[4] Indeed, in the absence of specific treaty provisions providing for these duties – ranging from the duty to consider non-binding decisions of international organizations to the duty to cover their debts towards third parties – their legal basis is not evident. As a consequence, the lack of a comprehensive conceptualization of the 'good membership' obligations that could account for both explicit and implicit duties makes it hard to identify their full scope. This, in turn, makes it hard to evaluate the legal parameters within which the contestation of power between international organizations and their member states takes place.

Against this background, the goal of this article is to shed light on the nature and scope of 'good membership' obligations in the law of international organizations. The main argument presented herein is that these obligations stem from the application of the principle of good faith to the interpretation and performance of member states' institutional commitments. In other words, it is submitted that it is the principle of good faith that determines how member states' commitments must be interpreted and performed in particular legal scenarios. While what good faith requires will depend upon the particular circumstances of each case, its ultimate *raison d'être* is to facilitate the realization of common institutional goals by demanding from member states loyalty towards the joint enterprise. As will be demonstrated, the conceptualization of the 'good membership' duties by reference to good faith contributes to further understanding the complex dynamics existing between international organizations and their member states and allows for

[4] These include, for instance, the duty to consider non-binding recommendations of the UN General Assembly, as well as the obligation to cover the organization's debts towards third parties. For a detailed discussion, see text to footnotes 22-26.

reflection on the process of informal "constitutional" change in international institutions more generally.

In constructing this argument, the paper first presents in Section II an overview of explicit and implicit 'good membership' obligations that have been identified in institutional law scholarship, albeit without a valid legal basis. Section III, in turn, theorizes the principle of good faith as the foundation of the membership obligations, which – by means of several more concrete sub-principles and norms – specifies how institutional commitments should be interpreted and performed in particular legal scenarios. This argument is further developed in Section IV, which shows how the principle of good faith has been used by international courts and tribunals in developing various membership obligations in three cases, namely the *Conditions of Admission* and *Interpretation of the Agreement of 25 March 1951* Advisory Opinions rendered by the International Court of Justice (ICJ) and the *Bustani* case decided by the Administrative Tribunal of the International Labour Organization (ILOAT). The selection of the case studies was motivated by the aspiration to demonstrate the application of the principle of good faith in different institutional areas: the admission of new members to the organization; the relations between organization and the host state; and the relations between the organization and its employees. Finally, Section V will summarize the argument presented in the article and provide some concluding remarks on the role of good faith in the development of institutional legal order.

II. An Overview of 'Good Membership' Obligations in the Law of International Organizations

During the negotiations on the text of the UN Charter during the San Francisco Conference in 1945, a debate arose around the proposal of the Colombian delegation to include the term 'good faith' in Article 2(2).[5]

[5] 'Documents of the United Nations Conference on International Organization', vol VI (San Francisco, 1945) (UNCIO) 71-80.

Several delegates from the Anglo-Saxon legal tradition, including the United States (US), United Kingdom and Australia, maintained that the emphasis on fulfilling the Charter obligations in good faith was superfluous as it was already clear from the text of the provision that the obligations under the Charter must be observed by the Member States.[6] However, the Colombian delegation, with the support of several European and Latin American countries, insisted upon the importance of including the principle of good faith in the UN Charter, with the aspiration that it will 'develop into the "*leit motif*" of the new International Organization'.[7] The Colombian delegate Mr. Yepes added that:

> The United Nations must […] proclaim that international life requires a minimum of morality as a normative principle of conduct for peoples. This minimum cannot be anything else than full good faith and respect for the pledged word. The Colombian amendment, therefore, has a profound spiritual meaning. It symbolizes this new spirit of loyalty, of full good faith, of good neighborliness and honesty in international life.[8]

Eventually, the US, along with other opposing countries, declared itself convinced by the argument that 'we are all to observe these obligations, not merely the letter of them but the spirit of them',[9] and on this reading of the term, the Colombian proposal was adopted unanimously.[10]

Although 'good membership' clauses in the constituent treaties of various international organizations, similarly to Article 2(2) of the Charter, contain references to good faith,[11] the legal import of the principle in determining

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6 Ibid 73-77. See also Robert Kolb, *Good Faith in International Law* (Hart 2017) 160.

7 UNCIO (n 5) 71.

8 Ibid 72.

9 Ibid 74.

10 Ibid 80.

11 See, for instance, Statute of the International Atomic Energy Agency (adopted 26 October 1956, entered into force 29 July 1957) 276 UNTS 3, art IV, which provides that '… all members, in order to ensure to all of them the rights and

the scope of the membership duties has rarely been explored in institutional law scholarship, as the rest of this section will demonstrate.[12] In their seminal treatise on international institutional law, Schermers and Blokkker contend that 'there are some rights and obligations that each individual member has as a consequence of its membership of an organization'.[13] As examples of such duties, the authors mention the obligations to contribute one's share to the organization's budget, to be present at sessions of the organization's organs and to grant privileges and immunities to the organization and its staff when necessary.[14] Elsewhere, the authors state that, as a part of the 'good membership' duties, members should fulfil all other additional obligations formulated in the organization's constitution.[15] These, naturally, vary from one organization to another and may include obligations to disclose or report certain information of common concern to other members and organization's organs, to bring relevant national legislation in line with

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benefits resulting from membership, shall fulfill in good faith the obligation assumed by them in accordance with this Statute'. See also Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 119 UNTS 3, which likewise stipulates that good faith will govern its members' mutual relations.

12 The only exceptions are two articles discussing the connection between the principle of good faith and the EU law principle of loyalty. See Geert De Baere, Timothy Roes, 'EU Loyalty as Good Faith' (2015) 64 International & Comparative Law Quarterly 829, 835–838; Daniel Davison-Vecchione, 'Beyond the Forms of Faith: Pacta Sunt Servanda and Loyalty' (2015) 16 German Law Journal 1163.

13 Schermers and Blokker, *International Institutional Law* (n 1) 121.

14 Ibid 122.

15 Henry G Schermers and Niels Blokker, 'International Organizations or Institutions, Membership' *Max Planck Encyclopedia of Public International Law* (January 2008) <https://opil-ouplaw-com.eui.idm.oclc.org/view/10.1093/law:epil/9780199231690/law-9780199231690-e505?prd=MPIL> accessed 19 October 2020, para 13. See also Niels Blokker, 'International Organization and Their Members: 'International Organizations Belong to All Members and To None' – Variations on A Theme' (2004) 1 International Organizations Law Review 139, 147.

standards agreed in the institutional framework or to carry out certain decisions of the organization.[16]

From this conventional account of 'good membership' presented by leading scholars in the field, it may appear that it is simply an umbrella term for all member state commitments formulated in an organization's constitution. In this sense, the various 'good membership' clauses in the treaties establishing international organizations, such as Article 2(2) of the UN Charter, are simply restatements of the *pacta sunt servanda* principle.[17] However, as noted by Klabbers, such a reading would make these provisions redundant, as it goes without saying that all treaty commitments must be observed.[18] Instead, he argues that 'good membership' clauses go beyond the letter of the treaties, albeit without elaborating on their alternative legal basis:

> … these solidarity clauses remind the member-states of organizations that they may be called upon to do things which are not to their liking and which they may never even have expected; rather than merely replicating the *pacta sunt servanda* norm […] they remind the member-states that they enter into a relationship which aspires to create 'an ever closer union' as the EC Treaty poetically puts it.[19]

Most importantly, the *pacta sunt servanda* rule codified in Article 26 of the Vienna Convention on the Law of Treaties (VCLT) merely stipulates that existing treaty commitments must be executed by contracting parties.[20] In Kolb's words, *pacta sunt servanda* is nothing 'but a formal injunction to

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16 Schermers and Blokker, 'International Organizations or Institutions, Membership' (n 15) para 13.

17 The *pacta sunt servanda* principle is codified in Article 26 of the Vienna Convention on the Law of Treaties. Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 26.

18 Klabbers, *An Introduction to International Institutional Law* (n 1) 194.

19 Ibid 195.

20 VCLT (n 17) art 26, which provides: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.

execute the due, a sort of blanket to be filled by concrete content'.[21] Since it does not determine what needs to be done in order to fulfill the obligation, it cannot account for various membership obligations that have been developed in international legal practice and scholarship outside of explicit treaty commitments.

Among these are a number of extensive obligations for EU member states that have been elaborated by the European Court of Justice in its case law on the basis of the principle of loyal co-operation enshrined in Article 4(3) of the TEU, probably the most successful 'good membership' clause.[22] Most recently, these duties included an obligation to abstain from any form of action in external affairs in any matter on which the EU has taken a common position.[23] While it is true that the most wide-ranging 'good membership' obligations are found in the field of EU law, similar expansive approaches to such duties, going beyond the explicit commitments formulated in the organizations' constitutions, have been also invoked in relation to classical inter-governmental organizations that are less integrated than the EU.

For instance, Amerasinghe devotes several pages of his monograph to the UN member states' duties to consider non-binding recommendations of the General Assembly and other UN organs and to report their plans and progress in respect of implementation.[24] In his view, even though the UN Charter does not contain obligations to carry out non-binding decisions of the above-mentioned organs, these duties stem implicitly from membership status. In particular, Amerasinghe maintains that this duty to consider

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21 Kolb, *Good Faith in International Law* (n 4) 34.

22 For overviews on this topic, see Marise Cremona, 'Defending the Community Interest: the Duties of Cooperation and Compliance' in Marise Cremona and Bruno De Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Hart 2008) 125; De Baere and Roes (n 12) 835-38.

23 Andrés Delgado Casteleiro and Joris Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?' (2011) 4 European Law Review 524.

24 Chittharanjan F Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd edn, Cambridge University Press 2005) 177–79.

recommendations of the General Assembly in good faith stems from the 'basic obligation of membership … to co-operate in achieving the objectives of the organization'.[25]

A similarly expansive interpretation of 'good membership' duties was adopted by the ILC in its work on the 2011 Draft Articles on the Responsibility of International Organizations (DARIO). During the preparatory stages of the DARIO, there was much debate about the general obligation of member states to provide funds to the organization for the purpose of making reparation to third parties in the absence of explicit rules to this effect in the organization's constitution.[26] The final approach taken by the Commission in the commentary on Article 40 provides that, in the absence of any express rules on the issue, the duty to cover the organization's debts can be considered as part of the 'good membership' obligations and inferred from the 'general duty to cooperate with the organization'.[27]

How, then, can we comprehend the legal basis and scope of 'good membership' duties, when a wide-ranging number of obligations not originally formulated in the organization's constitution have been included in their ambit? Although detailed conceptualization of 'good membership' duties is absent in scholarship, both Amerasinghe and the ILC mention a 'general duty to cooperate', conceived as a general principle of law, as their legal basis. Could this principle account for the expansive reading of the membership obligations in the manner described?

To start with, the obligation for states to cooperate in international law is said to be conceptually linked to the idea that modern international law has

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25 Ibid 178.

26 For an overview of the debate, see Paolo Palchetti, 'Exploring Alternative Routes: The Obligation of Members To Enable the Organization to Make Reparation' in Maurizio Ragazzi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff 2013) 303, 305-06.

27 ILC, 'Report of the International Law Commission on the work of its 63rd Session' (26 April-3 June and 4 July-12 August 2011) UN Doc A/66/10, 133.

developed from the 'law of coexistence' to the 'law of co-operation'.[28] As part of this development, a number of instruments – including primarily the UN Charter and several resolutions of the General Assembly – proclaimed the aspiration of states to achieve objectives of common concern through coordinated action, including through the channel of inter-governmental institutions.[29] In a nutshell, the duty to co-operate is defined as 'the obligation to *enter into* […] co-ordinated action so as to achieve a specific goal'.[30] However, the binding nature of the duty to co-operate as a general legal obligation remains contested.[31] This is because both the wording and the negotiating history of both the Friendly Relations Declaration and the Charter of Economic Rights and Duties of States, two non-binding UN General Assembly resolutions that contain such a duty,[32] demonstrate that it is meant to have a declaratory character only.[33] Moreover, even if one accepts the binding nature of the duty to co-operate in international law, at maximum, it can be interpreted as an obligation to establish an international organization in order to foster international co-operation in a particular field.[34]

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28 Rüdiger Wolfrum, 'Cooperation, International Law of', *Max Planck Encyclopedia of Public International Law* (April 2010) <https://opil-ouplaw-com.eui.idm.oclc.org/view/10.1093/law:epil/9780199231690/law-9780199231690-e1427?rskey=zw8KxS&result=2&prd=MPIL> accessed 19 October 2020, para 1.

29 Ibid para 2. These include UN Charter (n 1) arts 1, 11, 13 and s IX; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970) (adopted without a vote) (Friendly Relations Declaration).

30 Wolfrum (n 28) para 2 (emphasis added).

31 On contested nature of the obligation to co-operate in international law, see ibid paras 16-22.

32 Friendly Relations Declaration (n 26); Charter of Economic Rights and Duties of States, UNGA Res 3281 (XXIX) (17 December 1974) (adopted by 115 votes to 6, 10 abstentions).

33 Wolfrum (n 28) para 16-18.

34 Ibid para 4.

The same reasoning is valid for the terms 'loyalty' or 'solidarity', which are frequently utilized to describe the 'good membership' obligations in EU law: all these terms simply stand for the readiness of a member to take into account the interests of the organization and make compromises for the common good, even at one's own expense.[35] Both are merely *sociological* terms that refer to a particular state of mind and, as such, have no intrinsic *legal* content.[36] Instead, as will be demonstrated in the next section, it is good faith – as a *general principle of law* – that is capable of forming the legal basis for 'good membership' obligations.

III. The Role of the Principle of Good Faith in Institutional Legal Order

The principle of good faith has been described by many scholars as one of the most fundamental principles of international law, in the sense of Article 38(1) of the Statute of the ICJ.[37] Indeed, the principle can be found across all fields of public international law, including international criminal law, the law of the sea, international trade law, investment law and others.[38] The

35 Wolfrum (n 28) para 3.

36 Ibid para 2.

37 See e.g. John F O'Connor, *Good Faith in International Law* (Aldershot 1991) 124. Kolb, in turn, distinguishes in his treatise between three different meanings of good faith in public international law: a state of mind related to an erroneous subjective belief, a legal standard for evaluating the normality of reasonableness of behaviour and, finally, a general principle of law in the sense of Article 38(1). See Kolb, *Good Faith in International Law* (n 4) 15. For other authors confirming the status of good faith as a general principle of law, see Michel Virally, 'Review Essay: Good Faith in Public International Law' (1983) 77 American Journal of International Law 130, 131-12*;* Georg Schwarzenberger, *Fundamental Principles of International Law* (Brill 2006) 25-26.

38 See e.g. Marion Panizzon, *Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement* (Hart Publishing 2006) 13-20, Markus Kotzur, 'Good Faith (Bona Fide)', *Max Planck Encyclopedia of Public International Law* (January 2009) <https://opil-ouplaw-com.eui.idm.oclc.org/view/10.1093/law:epil/9780199

principle has also been frequently referred to in resolutions of the UN General Assembly and the UN Security Council, including the Friendly Relations Declaration, demonstrating the wide acknowledgment of the principle by the UN member states.[39] Last but not least, good faith is consistently mentioned in the case law of international courts and tribunals, most notably that of the ICJ and of the WTO Appellate Body.[40] To illustrate, in *Nuclear Tests Cases,* the ICJ defined good faith as 'one of the basic principles governing the creation and performance of legal obligations, whatever their source'.[41] Likewise, the WTO Appellate Body in the landmark *US-Shrimp* case unequivocally affirmed that good faith is 'at once a general principle of law and a general principle of international law, [which] controls the exercise of rights by states'.[42] After this brief introduction, the rest of this section will explore in more detail the operation of the principle in institutional legal order.

At the outset, it should be noted that good faith – as with any other general principle – does not directly create binding obligations for legal subjects where none exist. Instead, it plays a pivotal role in defining how existing commitments should be interpreted and performed.[43] In other words, for the principle of good faith to have legal effects, 'qualified relationships of confidence' should already exist among legal subjects, such as involvement in judicial proceedings, the relationships of protectorate or simply the conclusion of bilateral or multilateral treaty.[44] Accordingly, the principle of

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231690/law-9780199231690-e1412?rskey=F6ESwH&result=1&prd=MPIL> accessed 19 October 2020, paras 13-14.

39 Kotzur (n 38) paras 9-11.

40 For an overview of relevant case law, see ibid paras 15-18.

41 *Nuclear Tests Case (Australia v France)* (Judgment) [1974] ICJ Rep 253, para 46.

42 *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (12 October 1998) WT/DS58/AB/R, para, 158. See also Panizzon (n 36) 109-19.

43 De Baere and Roes (n 12) 871.

44 Jörg P Müller and Robert Kolb, 'Article 2(2)' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary*, vol 1 (2nd edn, Oxford University Press 2002) 91, 95; Kolb, *Good Faith in International Law* (n 6) 159.

good faith may acquire different meanings, depending on the nature of legal bond existing between particular legal actors: the stronger such bond is, the more demanding the obligations flowing from the good faith principle become.[45]

While in bilateral relationships of contractual origin, such as investment treaties, the protection of legitimate expectations becomes good faith's main *raison d'être*, in the law of international organizations, the principle is of a more ambitious nature.[46] In particular, good faith in the law of international organizations, expressed in 'good membership' clauses, serves to protect and to further loyalty to the common enterprise against excessive unilateralism by member states.[47] In doing so, it requires member states to compromise and cooperate towards the achievement of common goals.[48] While the understanding of what good faith requires will vary from one organization to another depending on the degree of integration achieved, at a minimum, loyalty to common commitments constitutes a necessary condition for the proper functioning of any organization as a joint enterprise.[49] Ultimately, good faith serves as an overarching principle for the entire institutional legal order, whose main function is to ensure the primacy of common objectives over member states' excessive unilateralism.[50]

How exactly does the principle of good faith operate within international organizations? By producing various more concrete sub-principles and norms that channel the value of loyalty to common organizational goals throughout the institutional legal order.[51] These include the norm of *pacta sunt servanda,* the obligation to interpret and perform the treaty in accordance with its spirit rather than the letter, the prohibition against the

45 Kolb, *Good Faith in International Law* (n 6) 163.
46 Ibid.
47 Ibid 160.
48 Ibid 162.
49 Müller and Kolb (n 44) 96.
50 Kolb, *Good Faith in International Law* (n 6) 164.
51 Ibid 23.

abuse of rights and the abuse of procedure, the notions of acquiescence and estoppel, the duty to negotiate and cooperate in the execution of the treaty, the obligation to settle disputes in good faith, the doctrine of reasonable notice for withdrawal from an agreement and others.[52] As is clear from this description, good faith essentially dominates all stages of contractual behaviour in international law.[53]

Of most relevance to the current argument are the obligations to interpret and to perform one's obligations in good faith, codified in Articles 31 and 26 of the VCLT, respectively.[54] To start with the former, the interpretation of treaty commitments in good faith has several meanings. At the most basic level, the principle implies the primacy of the spirit of the treaty over an excessive adherence to the letter.[55] In particular, good faith implies consideration of the object and purpose of the treaty, together with its context and other relevant elements.[56] In the words of the ICJ:

> It is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized.[57]

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52 Ibid. See also Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (first published 1953, Cambridge University Press 1987) 106–20.

53 For more on this subject, see Kotzur (n 38) para 21; Kolb, *Good Faith in International Law* (n 6) 34.

54 VCLT (n 17) arts 26, 31. The VCLT also codifies, among other relevant norms, an obligation not to defeat the object and purpose of the treaty before its entry to force. Ibid art 18(1).

55 Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill 2008) 426; Kolb, *Good Faith in International Law* (n 6) 62–64.

56 Villiger (n 55) 426.

57 *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7, para 142 (as cited in De Baere and Roes (n 12) 844). See also Cheng (n 52) 115–18.

Here, reference to the purpose of the treaty, rather than pointing to a teleological reading, means choosing an interpretation that enables the treaty to have appropriate effects or, in other words, ensures its *effet utile*.[58] The second meaning of the principle in the context of treaty interpretation is that good faith prohibits an interpretation that will lead to manifestly absurd or unreasonable results.[59] Good faith here corresponds to the standards of reasonable and non-abusive interpretation.[60] The corollary of this is an obligation of the parties to refrain from fraudulent use of the language, in order to evade their obligations under the treaty.[61] In this sense, one can see a clear connection between the requirement of good faith interpretation and the prohibition of the abuse of rights granted by the treaty.[62]

In addition to the obligation to interpret one's commitments in good faith, several other norms flow the principle that re applicable during the execution stage. These are covered under Article 26 of the VCLT. According to the well-established case law of the ICJ and other international courts, such norms include the duty to negotiate and cooperate to solve any difficulties in the execution of the treaty, the duty not to frustrate the object and purpose of the treaty after it has entered into force, the duty abstain from exercising one's rights in an abusive manner and others.[63]

To sum up, this section has maintained that good faith is an overarching principle of institutional legal order that manifests itself in various more concrete sub-principles and norms that transmit allegiance to the common objectives pursued through institutional co-operation. Through these

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58 Villiger (n 55) 428; De Baere and Roes (n 12) 872. See also Hersch Lauterpacht, *The Function of Law in the International Community* (first published 1933, Oxford University Press 2011) 131-35.

59 De Baere and Roes (n 12) 872.

60 Panizzon (n 38) 44; Kolb, *Good Faith in International Law* (n 6) 64-65.

61 Villiger (n 55) 425-26; Kolb, *Good Faith in International Law* (n 6) 63.

62 Villiger (n 55) 426; Kolb, *Good Faith in International Law* (n 6) 63.

63 For more on these performance-related duties, see Villiger (n 55) 365-67; Kolb, *Good Faith in International Law* (n 6) 67-73.

norms, the principle of good faith constantly shapes the standards of member states' behaviour in accordance with ideals of honesty, loyalty and reasonableness, allowing them to adapt to changing conditions of communal life.[64] Although a brief overview of the norms flowing from good faith has been provided above, their meaning will necessarily remain context-dependent, leading to different interpretations of membership obligations that are appropriate to the circumstances of each individual case.

IV. GOOD FAITH AS THE BASIS OF 'GOOD MEMBERSHIP' OBLIGATIONS IN THE PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS

The three sections below will demonstrate how the principle of good faith has been utilized by the ICJ and the ILOAT to develop 'good membership' obligations in three case studies concerning, respectively, the UN membership crisis in the late 1940s, the potential transfer of the World Health Organization's (WHO) Regional Office for the Middle East in 1980 and the premature ousting of the Organization for the Prohibition of Chemical Weapons' (OPCW) Director-General in 2003.

1. Voting in Good Faith on the Admission of New Members to the UN: The Conditions of Admission *Advisory Opinion of the ICJ*

The *Conditions of Admission* advisory opinion issued by the ICJ is one of the leading examples of the application of the principle of good faith in institutional legal order.[65] As the analysis of the case below will demonstrate, good faith here assumed a function of limiting the exercise of voting discretion by UN members on the admission of new members to the organization.[66] In particular, it required the member states to refrain from espousing abusive interpretations of the UN Charter admission criteria for the sake of their ideological interests.

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64 Kotzur (n 38) para 22; Kolb, *Good Faith in International Law* (n 6) 164.

65 Müller and Kolb (n 44) 98; Kolb, *Good Faith in International Law* (n 6) 163.

66 Müller and Kolb (n 44) 98.

The case arose in the early years of the Cold War when the United States and the Soviet Union each started to halt the admission of members belonging to the rival bloc. To protect itself from becoming outnumbered in the General Assembly, the Soviet bloc insisted that, when a country from one camp is admitted, a country from the other camp should be admitted simultaneously (so-called 'conditional admission').[67] This eventually created a membership deadlock, with only six (out of seventeen) applicants being accepted into the UN during the first two years of its existence.

In an attempt to resolve the crisis, the General Assembly requested the ICJ to render an advisory opinion, inquiring whether a member of the UN, when casting a vote on the admission of new members to the organisation, either in the General Assembly or in the Security Council, is allowed to make its decision based on criteria not explicitly provided in the UN Charter.[68] In particular, could a member state condition its vote for a candidate's membership upon other states being allowed to join the UN?

To clarify, Article 4 of the UN Charter regulates the question of admission of new members in the following manner:

> Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.[69]

Several states from the Eastern bloc, including Yugoslavia and Poland, argued that the Article 4 criteria were open-ended and, as a result, individual decisions on the admission of new members were entirely within each state's

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67 Simon Chesterman, Ian Johnstone and David M Malone, *Law and Practice of the United Nations: Documents and Commentary* (Oxford University Press 2016) 196.

68 *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* (Advisory Opinion) [1948] ICJ Rep 57.

69 UN Charter (n 1) art 4(1).

political discretion.[70] The Western bloc, represented by the United States, Canada, Australia, Belgium and others, instead argued that member states were not legally entitled to invoke any other conditions external to the Charter when casting their votes.[71]

The Court, by a majority of nine judges to six, sided with the latter position, ruling that the membership conditions provided in Article 4 of the UN Charter were exhaustive. To clarify, in reaching this conclusion, the Court first ruled that the wording of the provision clearly demonstrated that the authors intended Article 4 to represent 'an exhaustive enumeration' of the membership criteria that 'are not merely stated by way of guidance or example'.[72] Further, the judges emphasized that the contrary interpretation would deprive the provision of its 'significance and weight' and would grant the member states an unlimited discretion that is incompatible with the very spirit of the UN Charter.[73] At the same time, the ICJ noted that the UN member states were allowed to take into account other political factors to determine whether the prescribed conditions were fulfilled in the case of each individual applicant.[74] Although this granted a wide margin of discretion to the member states in deciding on the admission of new members, this did not imply that such discretion was open-ended. Importantly, the Court emphasized that states were only allowed to take into

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70 *Conditions of Admission* (Observations Submitted by Governments) [1948] ICJ Pleadings 22; *Conditions of Admission* (Annexes to the Minutes) [1948] ICJ Pleadings 99-112. See also Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2006) 372.

71 *Conditions of Admission* (Observations Submitted by Governments) (n 70) 14-33. See also Koskenniemi (n 70) 372.

72 *Conditions of Admission* (Advisory Opinion) (n 68) 9.

73 Ibid 10.

74 Ibid. In his individual opinion, Judge Azevedo gives examples of such permissible political factors. When interpreting the 'peace-loving' criterion in Article 4, they include, for instance, positions that the countries adopted during World War II or the status of their diplomatic relations with existing UN members, See *Conditions of Admission* (Individual Opinion by M Azevedo) [1948] ICJ Rep 78.

account such factors that could 'reasonably and *in good faith*' be connected to the Article 4 conditions.[75]

As noted by Koskenniemi, even though the ICJ referred to good faith only once in the judgment, the principle played a pivotal role in its reasoning.[76] The paramount role of good faith in constraining the member states' decisions on the admission of new members was also emphasized by the dissenting judges. For instance, dissenting Judge Zoričič emphasized that good faith represents a legal basis for the member states' conduct in institutional settings:

> Any organization, and especially that of the United Nations, is, as a general principle, founded on good faith. This rule, which all States have bound themselves to observe when signing the Charter (Article 2/2), requires that a Member shall fulfil its obligations in accordance with the purposes of and in the interests of the Organization.[77]

Moreover, in the joint dissenting opinion, Judges Basdevant, Winiarski, McNair and Read reached the conclusion that, although the UN members were allowed to take any political considerations into account when deciding on the question of membership, they are 'legally bound to have regard to the *principle of good faith*, to give effect to the Purposes and Principles of the United Nations' when exercising their votes. [78]

Thus, in both the majority and dissenting opinions, good faith was utilized as a limit on states' interpretative powers, prohibiting them from invoking criteria that are not intrinsically connected with those prescribed in the Charter.[79] In other words, the principle provided a yardstick for distinguishing between political factors that were permissible in the

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75 Ibid (emphasis added).

76 Koskenniemi (n 70) 378.

77 *Conditions of Admission* (Dissenting Opinion by M. Zoričič) [1948] ICJ Rep 94, 103.

78 *Conditions of Admission* (Dissenting Opinion by Judges Basdevant, Winiarski, Sir Arnold McNair and Read) [1948] ICJ Rep 82, para 9 (emphasis added).

79 Müller and Kolb (n 44) 98.

admission decisions and the ones that were not. As emphasized by the Court, only arguments that can be reasonably justified in terms of Article 4 were admissible in support of member states' votes. This, in essence, is the articulation of one of the corollaries of good faith, the doctrine of abuse of rights, which prohibits the exercise of a right or discretion 'for an end different from that for which the right was created, to the injury of another person or the community'.[80] The doctrine was most explicitly articulated in the individual opinion of Judge Azevedo:

> Having established that the required conditions are fixed, it might still be possible – having regard to the doctrine of the relativity of rights already accepted in international law … – to admit a kind of censorship for all cases in which there has been a misuse or, at any rate, abnormal use of power in the appreciation of the exhaustive list of qualities.[81]

The judge also noted that the concept of misuse of rights is no longer determined by subjective intent but is rather defined in accordance with objective standards, by reference to 'what is normal, having in view the social purpose of the law'.[82] He further observed that, although it would be difficult to ascertain such limits in abstract, several examples may be provided.[83] As one of such examples, the judge mentioned the hypothetical claim that Switzerland, despite its neutrality in both World Wars, did not satisfy the requirement of being a' peace-loving' country, which at the time referred to the countries that did not side with the Axis powers during the World War II.[84]

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80 BO Iluyomade, 'The Scope and Content of a Complaint of Abuse of Right in International Law' (1975) 16 Harvard International Law Journal 44, 48. See also Michael Byers, 'Abuse of Rights: An Old Principle, A New Age' (2002) 47 McGill Law Journal 389, 392-410.

81 *Conditions of Admission* (Individual Opinion by M. Azevedo) [1948] ICJ Rep 79-80.

82 Ibid 80.

83 Ibid.

84 Ibid. The judge also noted that states are not obliged to state their reasons for vote but subject themselves to scrutiny if they choose to do so.

The majority of the judges seemed to believe that the case of conditional admission presented before the Court in the current case clearly constituted a manifest misinterpretation of the Article 4 criteria. In particular, the Court characterized conditional admission as being 'entirely unconnected" with the Charter conditions because it makes the admission to the organization dependent not upon certain characteristics of the applicant in question but on completely foreign conditions, concerning the admission of another state.[85] The *Conditions of Admission* advisory opinion represents a compelling example of the application of good faith in clarifying the UN members' obligations under Article 4 of the Charter. When presented with the membership crisis provoked by the ideological divide between the Western and the Eastern blocs, the ICJ required the member states to interpret the article in good faith or, in other words, to refrain from abusing the UN Charter criteria when deciding on the admission of new members.

2. The Duty to Negotiate the Transfer of a WHO Regional Office in Good Faith: Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt *Advisory Opinion of the ICJ*

As mentioned above, the application of the principle of good faith extends beyond the phase of interpretation of institutional commitments and also covers their execution. One of the main norms flowing from good faith performance of institutional commitments is the general duty to cooperate.[86] As explained by Kolb, this duty is a natural consequence of the 'treaty bond itself', the existence of which creates legitimate expectations that the parties will work together to solve any issues that may arise during implementation of the treaty.[87] The specific manifestations of the duty to cooperate in relation to the possible termination of a treaty between an international organization and one of its member states were clearly articulated by the ICJ

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85 Ibid 65.

86 Kolb, *Good Faith in International Law* (n 6) 67.

87 Ibid. See also De Baere and Roes (n 12) 853.

in its Advisory Opinion on the *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt.*[88]

The advisory opinion concerned the potential transfer of the WHO seat for the Eastern Mediterranean Regional Office from Alexandria to Amman due to changes in the political climate in the region. To elaborate, since 1949, the former Alexandria Sanitary Bureau, an international health agency created in Egypt back in the nineteenth century to prevent the spread of diseases among pilgrims on the way to and from Mecca, had for decades been operating as the WHO seat for its Eastern Mediterranean Regional Office.[89] While the Alexandria office was integrated into the WHO system in July 1949 pursuant to Article 54 of the Constitution of the WHO and a subsequent resolution of the WHO's Executive Board,[90] the agreement between Egypt and the organization for determining the latter's privileges, immunities and facilities was concluded only in 1951 (the '1951 Agreement').[91] From that point, the office in Alexandria functioned as a

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88 *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 73.

89 Ibid. For more on the historical background of the dispute, see paras 11-27.

90 Constitution of the World Health Organization (adopted 22 July 1946, entered into force 7 April 1948) 14 UNTS 185 (WTO Constitution), art 54, which states the following: 'The Pan American Sanitary Organization, represented by the Pan American Sanitary Bureau and the Pan American Sanitary Conferences, and all other inter-governmental regional health organizations in existence prior to the date of signature of this Constitution, shall in due course be integrated with the Organization. This integration shall be effected as soon as practicable through common action based on mutual consent of the competent authorities expressed through the organizations concerned'; WHO (Resolution of the Executive Board) 'Establishment of Regional Organization and Place of Regional Office' (March 1949) EB3.R30, para 1, which states that 'The Executive Board … conditionally approves the selection of Alexandria as the site of the Regional Office for the Eastern Mediterranean Area, this action being subject to consultation with the United Nations'.

91 Agreement between the World Health Organization and the Government of Egypt for the Purposes of Determining the Privileges, Immunities and Facilities

fully-fledged WHO Regional Office until the conclusion of a series of peace treaties between Egypt and Israel in 1978 (the so-called 'Camp David Accords') drastically changed the situation in the region.[92]

As a consequence of the shift in Egypt's position on the Arab-Israeli conflict, the relationships between Egypt and other Arab states became hostile, with the latter pressing for the immediate transfer of the Regional Office from Egypt to Jordan.[93] Egypt objected to the office transfer, claiming that, in line with Section 37 of the 1951 Agreement, the decision to transfer could not be taken unilaterally by the WHO. Rather, it was to be made in consultation with the other party and was subject to two years' notice:

> The present Agreement may be revised at the request of either party. In this event the two parties shall consult each other concerning the modifications to be made in its provisions. If the negotiations do not result in an understanding within one year, the present Agreement may be denounced by either party giving two years' notice.[94]

The other Arab states, in turn, contested this interpretation, arguing that it was the decision of the Health Assembly giving effect to the 1949 resolution of the WHO Executive Board that formed the legal basis for the establishment of the Regional Office, not the 1951 Agreement, which was concluded two years after the Alexandria Bureau began operating as a WHO

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to Be Granted in Egypt by the Government to the Organization, to the Representatives of Its Members and to Its Experts and Officials (WHO-Egypt) (signed 25 March 1951) (1951 Agreement). For more on the process through which the Alexandria Bureau was integrated within the WHO framework, see Kolb, *Good Faith in International Law* (n 6) paras 14-27.

92 Catherine Brölmann, 'Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, [1980] ICJ Rep 73' in Cedric Ryngaert, Ige F Dekker, Ramses A Wessel and Jan Wouters (eds), *Judicial Decisions on the Law of International Organizations* (Oxford University Press 2016).

93 *Interpretation of the Agreement* (n 88) paras 29-31.

94 1951 Agreement (n 89) s 37, quoted in *Interpretation of the Agreement (*n 88) 166. For further discussion, see *Interpretation of the Agreement* (n 88) 165-70.

site.[95] As a result, Section 37 did not govern the choice and the potential transfer of the site of the WHO Regional Office.[96] Rather, it was completely within the power of the World Health Assembly to change the location of the WHO regional office, whenever it wished to do so.[97] To bring some clarity to the question, the World Health Assembly decided to refer the question of the applicability of Section 37 of the 1951 Agreement to the potential transfer of the Regional Office to the ICJ. In addition, the Assembly inquired about the legal obligations of both the WHO and Egypt in relation to the Regional Office during the two-year period between the notice and the actual termination of the 1951 Agreement.[98]

The Court's reasoning was clearly motivated by the concern that an abrupt denunciation of the 1951 Agreement by either of the parties would lead to a serious disruption of the WHO's work in the region. To avoid such an outcome, the ICJ decided to bypass the controversial issue of whether the 1951 Agreement, concluded two years after the Alexandria Bureau had been operating as the WHO Regional Office, constituted the legal foundation for its establishment and whether, as a result, the Agreement's provisions on treaty termination were applicable to the Office's potential transfer.[99] Instead, the Court declared at the outset that the real question underlying the advisory opinion was the identification of the wider legal framework regulating the permissibility and the conditions of the transfer of the Regional Office from Egypt, not just the application of Section 37.[100]

After reformulating the question in this manner, the Court emphasized that, irrespective of the legal nature of the 1951 Agreement, there existed 'a contractual legal regime' regulating the relations between Egypt and the

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95 *Interpretation of the Agreement* (Written Statements) [1980] ICJ Pleadings 141-55.

96 Ibid.

97 Ibid 142.

98 *Interpretation of the Agreement* (Request for Advisory Opinion) [1980] ICJ Pleadings 3.

99 See Brölmann (n 92) 249.

100 *Interpretation of the Agreement* (n 88) para 35.

organization. This legal regime consisted of various agreements concluded between the parties in the period from 1949 to 1951 and, most importantly, was based on Egypt's status as both a WHO member and one of the organization's host states.[101] As a consequence of this strong 'contractual' bond between the parties, they were under an obligation to implement their treaty commitments in good faith, including the duty to cooperate in resolving any problems related to the transfer of the Regional Office. In Court's own words:

> … the very fact of Egypt's membership in the Organization entails certain mutual obligations of co-operation and good faith incumbent upon Egypt and the organization. Egypt offered to become host to the Regional Office in Alexandria and the Organization accepted that offer: Egypt agreed to provide the privileges, immunities and facilities necessary for the independence and effectiveness of the Office. As a result, the legal relationship between Egypt and the Organization became, and now is, that of a host State and an international organization, the very essence of which is a body of mutual obligations of *co-operation and good faith.*[102]

The Court stressed once again that it was the deliberate actions of both parties that led to the creation of an important WHO office, 'employing large staff and discharging health functions important both to the Organization and to Egypt itself' for over thirty years.[103] This, in turn, created legitimate expectations that both parties would handle the transfer of the office with due care, in order to preserve the continuous work of the WHO in the region.[104] Thus, in these particular circumstances, good faith required the parties to allocate a reasonable period of time for a 'smooth and orderly' transfer of the Office to the new location and, in the meantime, to ensure that the WHO enjoyed full use of its privileges, immunities and facilities at the old site.[105] In summary, the Court opined that it was the very

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101 Ibid para 43.

102 Ibid (emphasis added).

103 Ibid.

104 Ibid para 44.

105 Ibid para 44. See also Kolb, *Good Faith in International Law* (n 6) 68.

nature of this situation or, in other words, the urgent need to protect the effectiveness of institutional commitments, that 'demands consultation, negotiation and co-operation' between the parties.[106]

On the basis of these legal and practical considerations, the Court derived three specific manifestations of the duty to cooperate in the current context: firstly, to negotiate the conditions of the potential transfer in good faith; secondly, if such transfer is to be effectuated, to continue consultations with regard to the logistics of such transfer 'with a minimum prejudice to the work of the Organization'; and, thirdly, to give a reasonable period of notice for the termination of the existing arrangements.[107] The Court concluded by emphasizing, once again, that throughout the whole process both parties should be guided by the principle of good faith:

> the paramount consideration both for the Organization and the host State in every case must be their clear obligation to co-operate in good faith to promote the objectives and purposes of the Organization as expressed in its Constitution.[108]

To summarize, this advisory opinion is another illustration of the important role that good faith plays throughout all stages of the execution of institutional commitments, including right before their termination. In this particular case, the ICJ emphasized the existence of a close 'contractual' bond between Egypt and the WHO, the natural consequence of which was the duty of both parties to cooperate in resolving any problems arising out of the implementation of their respective treaty obligations. Thus, the Court developed, as a part of good faith performance of the parties' institutional commitments, specific duties of negotiation and co-operation concerning the transfer of the WHO Regional Office in order to ensure the smooth and continuous work of the organization in the Middle East.

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106 *Interpretation of the Agreement* (n 88) para 44. See also Kolb, *Good Faith in International Law* (n 6) 68.

107 *Interpretation of the Agreement* (n 88) para 49.

108 Ibid.

3. Ensuring the Due Process Rights of International Civil Servants: Bustani *Case Before the ILOAT*

International administrative law, or the law of international civil service, which regulates the relationships between international organizations and their staff members, represents one of the main areas of application of the good faith principle in the law of international organizations.[109] Indeed, as was affirmed by the Court of Justice of the European Communities already in the 1960s, the principle is the cornerstone of the contractual relationships between an organization and its staff.[110] Thus, as elsewhere, a number of more concrete sub-principles and norms, through which the principle of good faith operates, can be traced in this area.[111]

According to Amerasinghe, such sub-principles are mainly centred on the prohibition of arbitrary conduct of an organization vis-à-vis its employees, which has been reviewed by administrative tribunals on the basis of three grounds: irregularity of motives, substantive deficiencies and procedural deficiencies.[112] The first category refers to organizational decisions vis-à-vis its employees that are taken on discriminatory basis or for any other malice or irregular purposes.[113] In turn, review of administrative decisions on substantive grounds further includes lack of legal basis for the decision,

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109 On the role of good faith and related principles, including abuse of power, in the law of international civil service, see Kolb, *Good Faith in International Law* (n 6) 169-75.

110 Joined Cases 43, 45 and 48/59 *Eva von Lachmüller, Bernard Peuvrier, Roger Ehrhardt v Commission of the European Economic Community* [1960] EU:C:1960:37 (cited in Kolb, *Good Faith in International Law* (n 6) 170).

111 Amerasinghe, *Principles of the Institutional Law of International Organizations* (n 24) 301-02; Kolb *Good Faith in International Law* (n 6) 170.

112 Chittharanjan F. Amerasinghe, 'Termination of Permanent Appointments for Unsatisfactory Service in International Administrative Law' (1984) 33 International and Comparative Law Quarterly 859, 862; Amerasinghe, *Principles of the Institutional Law of International Organizations* (n 24) 303.

113 Amerasinghe, 'Termination of Permanent Appointments' (n 112) 871; Amerasinghe, *Principles of the Institutional Law of International Organizations* (n 24) 303.

absence of competent authority, error of law or fact and omission of facts, as well as reaching unreasonable conclusions.[114] For their part, procedural irregularities concern the absence of fair procedure in the taking the administrative decision, including not providing the employee the possibility to defend herself or not stating reasons for the administrative decision.[115]

Indeed, all typical elements of the application of good faith in the law of international civil service can be found in the high-profile *Bustani* case before the ILOAT. The case concerned the premature termination of the second term appointment of the former Director-General of the OPCW, Mr. Jose Bustani, an unprecedented action in the history of international organizations.[116] He was first appointed in 1997 for the period of four years. In 2000, his mandate was unanimously renewed for another four years by the Conference of the States Parties, upon the recommendation of the Executive Council and with strong support from the US. However, by 2001, the relationship between Bustani and the US, the main contributor to the organization's budget, had started to deteriorate. The US accused Bustani of 'polarizing and confrontational conduct' and financial and political mismanagement of the organization, as well as 'advocacy of inappropriate roles for the OPCW', in particular referring to his continuous encouragement of the OPCW's inspections of weapons of mass destruction

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114 Amerasinghe, 'Termination of Permanent Appointments' (n 112) 862-71; Amerasinghe, *Principles of the Institutional Law of International Organizations* (n 24) 303.

115 Amerasinghe, 'Termination of Permanent Appointments' (n 112) 875-82; Amerasinghe, *Principles of the Institutional Law of International Organizations* (n 24) 305-06.

116 *Bustani v Organisation for the Prohibition of Chemical Weapons (Case No 2232)* Judgment of the ILO Administrative Tribunal (16 July 2003). For analysis of this case, see Jan Klabbers, 'The *Bustani* Case Before the ILOAT: Constitutionalism in Disguise?' (2004) 53 International and Comparative Law Quarterly 455, 461.

in Iraq.[117] Eventually, in March 2002, the US presented a no-confidence motion to the OPCW Executive Council demanding Bustani's resignation. After the motion failed to meet the required two-thirds majority, the US called for a special session of the Conference of the State Parties, once again pressing for the termination of Bustani's appointment, which was eventually accepted.[118]

Bustani subsequently appealed the decision before the ILOAT, which, under the OPCW Staff Regulations, was competent to hear the disputes between the organization and its staff members.[119] In particular, he alleged that a number of substantive and procedural deficiencies rendered the decision terminating his contract illegal. As regards substantive irregularities, he first claimed that the decision lacked a valid legal basis in the Chemical Weapons Convention, which only allowed the Conference to appoint the Director-General or to renew his or her mandate.[120] He also claimed that the decision was adopted by an incompetent authority, specifically the special session of the Conference, which he alleged was 'abusively and erroneously seized' by the US to overrule the previous decision of the Executive Council rejecting the no-confidence motion brought against him.[121] Lastly, he submitted that the decision was procedurally flawed as it was not properly substantiated, with the 'lack of confidence' being the only reason indicated for the termination of his contract.[122]

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117 Bureau of Arms Control, 'Fact Sheet: Preserving the Chemical Weapons Convention: The Need for a New Organization for the Prohibition of Chemical Weapons (OPCW) Director-General' (US Department of State, 2 April 2002) <https://2001-2009.state.gov/t/ac/rls/fs/9120.htm> accessed 19 October 2020. See also Sean Murphy, 'U.S. Initiative to Oust OPCW Director-General' (2002) 96 American Journal of International Law 711, 711.

118 Murphy (n 117) 711. The motion was adopted with 48 votes in favour, seven against and 43 abstentions.

119 *Bustani* (n 116).

120 Ibid para B.

121 Ibid.

122 Ibid.

On the other hand, the OPCW affirmed that lack of confidence presented a legitimate basis for terminating the Director-General's contract in exceptional circumstances when 'preservation and effective functioning of the Organisation' were at stake.[123] In addition, the organization objected to the ILOAT's jurisdiction to hear the case, claiming that the decision ending Bustani's appointment was political in nature and could not be subject to the ILOAT's review.[124] Further, the OPCW claimed that, in any event, the Director-General, in light of his position and responsibilities, cannot be considered an ordinary staff member of the organization, thereby falling outside the material scope of the tribunal's jurisdiction.[125]

The judgment of the ILOAT represents an affirmation of the above-mentioned principles of international administrative law aimed at prohibiting arbitrary conduct of the organization vis-à-vis its employees, even in the most high-profile cases. To this end, it was not surprising that the ILOAT's main focus in the case was on asserting jurisdiction over the dispute by construing the case as an ordinary staff dispute and downplaying its significant political connotations.[126] In doing so, it observed that, according to the standard usage of the word 'official' in the OPCW rules and its own Statute, the Director-General was to be regarded as a staff member entitled to the protection of his labour rights, as opposed to a political leader who can be removed simply due to lack of support from his constituency.[127] As regards the jurisdiction *ratione materiae,* the Tribunal emphasized that the decision to prematurely terminate the appointment of

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123 Ibid para C.

124 Ibid paras C and E.

125 Ibid para C.

126 Klabbers, 'The *Bustani* Case Before the ILOAT' (n 116) 461. For an extensive analysis of the case, see also Treasa Dunworth, 'Towards a Culture of Legality in International Organizations: The Case of the OPCW' (2008) 5 International Organizations Law Review 119, 124.

127 *Bustani* (n 116) paras 7-8. On the ambiguous role of Director-Generals in international organizations more generally, see Klabbers, 'The *Bustani* Case Before the ILOAT' (n 116) 458-60.

an international civil servant is necessarily administrative in nature.[128] As such, it cannot be exempted from the Tribunal's review, even if it was adopted by the Organisation's highest decision-making organ.[129]

At the merits stage, the Tribunal cautiously dodged the central question concerning the authority of the Conference of the State Parties to dismiss the Director-General in the absence of an explicit provision to this end in the organization's constitution. Instead, it simply noted that the Conference enjoys a broad competence to examine any issue concerning the Secretariat under the Chemical Weapons Convention.[130] However, at the same time, it ruled that the contested decision violated the core principles of international administrative law, whose observance represents a necessary condition for the effective functioning of any international organization. In doing so, it once again affirmed the limitations on the discretionary power of the organization:

> In accordance with the established case law of all international administrative tribunals, the Tribunal reaffirms that the independence of international civil servants is an essential guarantee, not only for the civil servants themselves, but also for the proper functioning of international organisations [...] To concede that the authority in which the power of appointment is vested – in this case the Conference of the States Parties of the Organisation – may terminate that appointment in its unfettered discretion, would constitute an unacceptable violation of the principles on which international organisations' activities are founded […] by rendering officials vulnerable to pressures and to political change.[131]

In doing so, the ILOAT emphasized that any decision prematurely ending the appointment of a staff member should respect all procedural guarantees, including access to an independent body where the applicant can defend his

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128 *Bustani* (n 116) para 10.

129 Ibid.

130 Ibid para 15. See also Klabbers, 'The *Bustani* Case Before the ILOAT' (n 116) 458-60.

131 *Bustani* (n 116) para 16.

case.[132] In addition, any decision of this kind should be well substantiated, pointing to 'grave misconduct' displayed by the staff member or other abnormal circumstances that could justify the exceptional measure of the civil servant's dismissal.[133] However, in case of Mr. Bustani, no such procedural guarantees were followed and the reasons for his replacement were 'extremely vague', merely referring to 'the lack of confidence in the present Director-General'.[134] As a result, the impugned decision resulted in the violation of his contract of employment and the fundamental principles of the law of the international civil service and, thus, was set aside.[135]

To sum up, the *Bustani* judgment rendered by the ILOAT illustrates the important role that the principle of good faith can play in protecting international civil servants from abusive conduct by the organization. In particular, in present circumstances, the *leit motif* of the Tribunal's reasoning was the reaffirmation of the application of well-recognized principles of international administrative law – flowing from the principle of good faith – to the decision to terminate the Director-General's appointment. As demonstrated, while the Tribunal recognized that the organization's highest plenary organ had broad discretion in adopting the decision, it nevertheless maintained that this discretion cannot be exercised in an arbitrary manner, or, in other words, that the organization should respect essential procedural guarantees, including providing the employee with the possibility to defend herself and stating reasons for terminating the appointment. The application of substantive and procedural limits on an organization's conduct is important not only for the protection of its employees' individual rights but also to ensure the independence of the international civil service, without which no modern international organization can function effectively.

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132 Ibid para 15.

133 Ibid.

134 Ibid.

135 Ibid para 17.

V. CONCLUSION

The aim of this article was to examine the foundation of various explicit and implicit obligations pertaining to membership in international organizations that have been developed in legal practice and scholarship. In particular, against the grain of the descriptive approach prevailing in international institutional law, it was argued that these duties are not merely a reiteration of the member states' commitments as formulated in the constitutions of particular international organizations. Rather, their scope is much more far-reaching, being determined by the application of the principle of good faith to the performance of states' institutional commitments in particular legal scenarios. To put it differently, the resulting analysis demonstrated that the principle of good faith allows an international organization to constantly shape the scope of membership duties, leaving the legal parameters within which the power between the organization and its member states is contested in constant flux. With the principle of good faith as the legal basis for the membership obligations, the member states cannot claim that their duties have been set once and for all. Instead, whenever a new problem of institutional life arises, new expectations will emerge with regard to member states' conduct, depending on organizational needs at a particular point in time.[136]

Moreover, the analysis undertaken in this article underscored the pivotal role that the principle of good faith, as a general principle of law, can play in the development of institutional legal order. Normally, constitutions of international organizations only establish the basic rules of communal life, leaving resolution of various legal problems to subsequent stages. With formal constitutional amendment being frequently unattainable, good faith, in light of its flexible and comprehensive nature, contributes to the organic evolution of an organization's legal order.[137] As demonstrated, this is realized through the generation of more concrete norms and sub-principles – such

136 Kolb, *Good Faith in International Law* (n 6) 164.

137 See De Baere and Roes (n 12) 872.

as the obligation to interpret and perform the treaty in accordance with its spirit rather than the letter, the prohibition of the abuse of rights and of the abuse of procedure, the notions of acquiescence and estoppel and others – that are then used to *concretize, supplement* and *correct* existing institutional norms. The three functions played by good faith and these related norms in the development of institutional legal order can be explained in more detail by the three cases presented in the article.

Firstly, the *Conditions of Admission* advisory opinion exemplifies the concretizing function of good faith, which allows the assessment of an act whose legal limits have not been well defined *prima facie* in the constituent instrument against the standard of reasonableness existing in the organization at a particular point in time.[138] As previously illustrated, in this case, good faith served as a limit on the exercise of member states' interpretative powers, verifying whether their votes were based on acceptable reasons.[139] Arguably, this function is essential in the majority of international organizations, which, unlike the European Union, include no organ that can provide an authoritative interpretation of their constitutions that is binding on other organs and member states.[140] In this light, reliance on good faith can compel member states to exercise self-restraint in their auto-interpretation of provisions of the constituent instrument by requiring them to act reasonably.[141]

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138 Robert Kolb, 'Principles as Sources of International Law: (With Special Reference to Good Faith)' (2006) 3 Netherlands International Law Review 1, 28; Martijn W Hesselink, 'The Concept of Good Faith' in Arthur S Hartkamp, Martjin W Hesselink, Ewoud H Hondius, Chantal Mak and C Edgar du Perron (eds), *Towards a European Civil Code, Fourth Revised and Expanded Edition* (Kluwer Law International 2010) 623-627.

139 Eric De Brabandere and Isabelle Van Damme, 'Good Faith in Treaty Interpretation' in Andrew D Mitchell, M Sornarajah and Tania Voon (eds), *Good Faith and International Economic Law* (Oxford University Press 2015) 57.

140 Müller and Kolb (n 44) 95.

141 Ibid 97. See also De Brabandere and Van Damme (n 139) 38-40.

In turn, the second case study concerning the potential transfer of the WHO Regional Office in the Middle East is an illustration of the supplementary function of good faith, which consists of devising specific additional duties to cover novel legal situations.[142] As explained in the analysis of the case, the ICJ developed various duties of consultation and co-operation incumbent upon Egypt and the organization, which were a natural consequence of faithful execution of their commitments. The case illustrates the fundamental role that the duty of cooperation plays in compensating for institutional shortcomings, specifically in relation to law enforcement. In the absence of a final judicial authority capable of resolving disputes between the organization and its member states and enforcing the solution by means of sanctions (with the ICJ exercising merely an advisory function), the willingness to cooperate in good faith is essential for peaceful resolutions of major and minor crises.[143]

Lastly, the *Bustani* case before the ILOAT highlights the role of the principle of good faith in correcting institutional norms. As mentioned, while the ILOAT noted that the Conference of the States Parties had the power to terminate the appointment of the Director-General prematurely, it also noted that any decision terminating such an appointment should respect the basic procedural guarantees provided in international administrative law, which derive from the principle of good faith and the prohibition of arbitrary conduct of the organization vis-à-vis its employees. By limiting the exercise of discretion by the organization's plenary organ by means of due process norms, the Tribunal managed to mitigate the unjust consequences suffered by the applicant as a result of the organizational act.[144] In other words, it allowed the ILOAT the flexibility to balance the right of the organization's plenary organ to remove the Director-General, when the

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142 Mathias E Storme, 'Good Faith and Contents of Contracts in European Private Law' in Santiagu Espiau and Antoni Vaquer (eds), *Bases de un Derecho Contractual Europeo* (Tirant lo Blanch 2003); Hesselink (n 138) 627.

143 Kotzur (n 38) para 8.

144 Kolb, 'Principles as Sources of International Law' (n 138) 28.

support for his policies is lacking, with the need to protect the latter's employment's rights.

Thus, the theoretical analysis and the three cases presented above underlined an understanding of the principle of good faith as an instrument for informal constitutional change within international organizations, allowing for continuous functioning of the legal order in changing circumstances.[145] While the success of its application will depend largely on the political climate existing in an organization at a particular point in time, good faith represents a powerful legal mechanism for promoting the loyalty of member states to the common endeavour pursued through an international organization.[146]

145 See Kolb, *Good Faith in International Law* (n 6) 164.

146 Ibid.

MUTUAL TRUST IN EU LAW: TRUST 'IN WHAT' AND 'BETWEEN WHOM'?

Lukáš Boháček*

Mutual trust is a fundamental principle of European Union (EU) law. It co-creates and justifies the autonomous nature of the EU legal order and operates as a vital component of its proper functioning. With reference to the reasoning used by the Court of Justice of the EU to justify the existence of mutual trust in EU law, the article identifies the general legal characteristics of this principle and examines the limits of its application. In this respect, two questions are analysed: trust 'in what' and 'between whom'. The article shows that the object of trust is complex and limited by ensuring the actual implementation of values enshrined in article 2 of the Treaty on European Union. As a related normative claim, it argues that the principle should be applied in a way that cannot endanger or undermine any of these values. Subsequently, it examines between what subjects the principle applies, focusing on the Member States, EU institutions, and even non-EU countries. As the principle applies mutually between its subjects, the article suggests that these subjects should be bound by the object of trust to the same extent and assesses whether this requirement is fulfilled.

Keywords: Court of Justice of the European Union; EU law autonomy; subjects of trust; object of trust; mutual recognition; European values; fundamental rights.

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I. INTRODUCTION

Mutual trust is one of the fundamental principles of European Union (EU) law. According to the Court of Justice of the EU (CJEU), it is a vital component of the EU legal order that co-creates and justifies its autonomous nature and constitutes a necessary precondition for its effective functioning.[1] However, this principle is surrounded by many questions relating to its nature, limits, consequences, and scope of application that have not yet been

[1] See e.g. *Opinion 2/13* EU:C:2014:2454; Case C-284/16 *Slowakische Republik v Achmea BV* EU:C:2018:158.

sufficiently answered by the CJEU. As such, mutual trust is considered one of the 'most elusive' concepts in EU law.[2]

Moreover, due to concerns about the adequate protection of fundamental rights, and recently in the context of the rule of law crises in Poland or Hungary, mutual trust has become a contested principle.[3] Despite the efforts of legal commentators and references for preliminary rulings, the concept of mutual trust remains unclear. The literature mostly focuses on this principle in specific areas of EU law[4] or addresses it through the constitutional perspective of fundamental rights protection.[5] A comprehensive discussion of relevant issues and perspectives, reflecting a more general approach

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2 E.g. Madalina Moraru, '"Mutual Trust" from the Perspective of National Courts: a Test in Creative Legal Thinking' in Evelien Brouwer and Damien Gerard (eds), *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law* (2016) EUI Working Paper MWP 2016/13, 38 <https://cadmus.eui.eu/bitstream/handle/1814/41486/MWP_2016_13.pdf;jsessionid=BAAE1ABC19E3B4F752312C14049A5C68?sequence=1> accessed 1 February 2022; Małgorzata Kozak, 'Mutual Trust as a Backbone of EU Antitrust Law' (2020) 6(1) Market & Competition Law Review 127, 134.

3 Not only legal scholars contest the principle and its operation; individuals also challenge it before national courts on fundamental rights grounds to avoid the execution of mechanisms based on mutual recognition. National judges also test the principle and its limits, e.g. by making references for a preliminary ruling to the CJEU, which may be thereby forced to defend its previous case-law. See e.g. Joined Cases C-354/20 PPU and C-412/20 PPU *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)* EU:C:2020:1033. Furthermore, the Commission initiated several infringement procedures against Poland and even requested action based on Article 7 TEU, which – if successful – could potentially result in suspension of some mechanisms in relation to Poland. See e.g. Case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)* EU:C:2018:586, para 72.

4 E.g. Nathan Cambien, 'Mutual Recognition and Mutual Trust in the Internal Market' (2017) 2 European Papers 93; Auke Willems, 'The Court of Justice of the European Union's Mutual Trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal' (2019) 20 German Law Journal 468; Kozak (n 2).

5 E.g. Ermioni Xanthopoulou, *Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice: A Role for Proportionality?* (Hart Publishing 2020).

towards mutual trust as a general principle of EU law, is to a large extent lacking. Meanwhile, the unclear nature and scope of application of mutual trust carries a risk that the use of this principle by national courts may not be uniform and consistent. As a result, decisions in otherwise like cases may produce different outcomes, which in turn means that standards of fundamental rights protection may vary.[6] Ultimately, this may hinder even the basic objective of ensuring the effective functioning of EU law. Further clarification of mutual trust is, therefore, warranted.

The article takes a general approach, considering the legal aspects of mutual trust, as developed by the CJEU in its case-law, across different EU law areas.[7] In this regard, it builds on Sacha Prechal's conceptualisation of mutual trust as a structural principle of EU constitutional law.[8] However, it goes further and looks at mutual trust through the lens of the universal reasoning that the CJEU repeatedly invokes in various areas of EU law to justify this principle's existence.[9] This perspective offers new views and arguments to the ongoing discussion about the general definition, scope of application, and limits of mutual trust.

The article then contributes to the clarification of mutual trust by analysing two issues that are key to applying the principle in practice – namely, its *object* and *subjects*. Although the literature has identified some of their basic

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6 Compare e.g. Cass, sez VI, 26 maggio 2020, n 15924, in which the Italian Supreme Court of Cassation called the reasoning of a lower court into question and requested a more thorough analysis of the rule of law situation in Poland, with Cass, sez VI, 12 aprile 2018, n 54220, in which the same Court rejected similar arguments.

7 Accordingly, this article disregards potential discrepancies between the legal concept and the actual level of trust within the EU. It also leaves aside the views and roles of other actors such as the EU legislature or national courts.

8 Sacha Prechal, 'Mutual Trust Before the Court of Justice of the European Union' (2017) 2 European Papers 75.

9 See e.g. *Opinion 2/13* (n 1) para 168.

descriptive aspects,[10] it has yet to offer a thorough discussion and general conceptualisation of these elements and their normative limits. In the social sciences, interpersonal (or inter-institutional) trust is considered a three-element relation, in which 'A trusts B to do X'.[11] The same logical structure applies to the EU concept of mutual trust. It combines the perception of trust as a social construct with a legal principle that is likewise applied between two subjects in relation to a particular subject matter ("X").[12] Therefore, if mutual trust is a structural principle of EU law, then EU law should precisely identify "X" (the object of mutual trust and the answer to the question, 'trust in what?'), "A and B" (the subjects of mutual trust and the answer to the question, 'trust between whom?'), and their respective limits, as these elements determine the scope of application of this principle in practice.

The article fills this gap by addressing two questions:

1. What is the object of mutual trust in EU law, or, in what contexts does (and should) the principle apply?

2. Who are the subjects of mutual trust in EU law, or, between whom does (and should) the principle apply?

Although the answers may seem straightforward, this article reveals their complexity and argues that the underlying rationale for the principle

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10 For a brief description of these elements, see Michael Schwarz, 'Let's Talk about Trust, Baby! Theorizing Trust and Mutual Recognition in the EU's Area of Freedom, Security and Justice' (2018) 24 European Law Journal 124, 130. For analyses in the context of EU criminal law, see Massimo Fichera, 'Mutual Trust in European Criminal Law' (2009) University of Edinburgh School of Law Working Paper 10/2009, 13 <https://ssrn.com/abstract=1371511> accessed 2 April 2021; Aleksandra Sulima, 'The Normativity of The Principle of Mutual Trust Between EU Member States within the Emerging European Criminal Area' (2013) 3(1) Wroclaw Review of Law, Administration & Economics 72, 75.

11 Schwarz (n 10) 131.

12 For in-depth discussions of the EU concept of mutual trust in comparison to the understanding of trust in social sciences, see ibid; Auke Willems, 'Mutual Trust as a Term of Art in EU Criminal Law: Revealing its Hybrid Character' (2016) 9(1) European Journal of Legal Studies 211.

imposes certain constraints in this respect. In response to each question, the article offers both descriptive and normative answers derived from the CJEU's analysis in *Opinion 2/13* and subsequent decisions.[13] Regarding the first question, it presents a descriptive claim that the object of trust is complex and constrained by the need to ensure the actual implementation of values stated in article 2 of the Treaty on European Union (TEU).[14] As a related normative claim, it argues that the principle should be applied in a way that cannot endanger or undermine any of these values. In cases of their possible violation, mutual recognition should be based only on a constitutionally compatible assessment, not simply presumed compliance with the object of trust. In answer to the second question, the article puts forward a descriptive claim that the principle applies between Member States but also affects their relations with some non-EU countries and, potentially, EU institutions. As a related normative claim, it argues that the principle should be applied only between subjects who are bound by the object of trust to the same extent.

These claims are developed in three sections. In Section II, the article derives the general legal characteristics of and justification for mutual trust from the case-law of the CJEU. These findings form the basis for its subsequent analysis of the object and subjects of mutual trust and its claims regarding the principle's scope of application. In Section III, the article expands upon the object of trust and its complexity. It starts by analysing the CJEU case-law and then moves on to its normative claim regarding the limits to the objective scope of mutual trust. In particular, it builds on the previous section by examining how the principle should be applied in a manner consistent with its underlying justification. In this respect, the article suggests how the

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13 The universal reasoning regarding mutual trust presented in *Opinion 2/13* is still relevant as it has been followed and cited by the CJEU in subsequent cases in various areas of EU law. See e.g. *Minister for Justice and Equality* (n 3) para 35; or Case C-163/17 *Abubacarr Jawo v Bundesrepublik Deutschland* EU:C:2019:218, para 80; *Achmea* (n 1) para 34.

14 Consolidated Version of the Treaty on European Union [2012] OJ C 326/13 (TEU).

use of mutual recognition instruments should be justified in cases involving a risk of a violation of any of the values enshrined in article 2 TEU. Finally, in Section IV, the article addresses the link between the subjects of mutual trust – the trustor ("A") and the trustee ("B") – and the notion of mutuality, as these follow from the case-law. It builds on the previous claims by analysing the requirements the subjects should meet for the principle to be used in a way that does not lead to a risk of endangering common values (Article 2 TEU). Accordingly, the article examines which subjects the principle mutually applies between and the extent to which they fulfil these requirements. This analysis focuses not only on the Member States but also on two other potential subjects: Non-EU countries and EU institutions.

II. Characteristics of the Principle of Mutual Trust and its Justification

The principle of mutual trust has been developed by the CJEU through its case-law. It is not explicitly referenced in primary law. Although some secondary law acts (e.g. the Brussels I Recast Regulation,[15] European Arrest Warrant Framework Decision,[16] or Dublin III Regulation[17]) mention mutual trust, such references are limited to supportive contextual declarations contained in the preamble. Moreover, while explicit statements about

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15 Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1, recital 27 (Brussels I Recast Regulation).

16 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1, recital 10 (EAW Framework Decision).

17 Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013, establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180/31, recital 22 (Dublin III Regulation).

mutual trust may also be found in various program documents; in this context, they serve merely as an expression of political priorities.[18]

Nevertheless, as mutual trust is a prerequisite for the effective functioning of cooperation systems based on *mutual recognition*,[19] its operation is apparent in various areas of EU law. In the internal market, and especially in the Area of Freedom, Security and Justice (AFSJ), the CJEU has used mutual trust broadly to support, justify and legitimize the application of the principle of mutual recognition (in various forms).[20] Mutual recognition is an integration method that aims to expedite and simplify cross-border cooperation among Member States by ensuring the recognition of various legal products (e.g. judicial decisions or legal standards) of individual Member States within others. Treating Member States as "different but equal", it serves to overcome obstacles to integration stemming from a lack of uniform rules. As such, mutual recognition is used particularly in areas of EU law that are not fully harmonized.[21] However, the effective operation of this principle presupposes some level of trust in the legal systems of all the participating Member States, which, although different, should provide an equivalent level of fairness and procedural quality. In this respect, whereas mutual recognition represents a regulatory method, mutual trust serves as the basis

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18 E.g. The Hague Programme: Strengthening Freedom, Security and Justice in the European Union [2005] OJ C53/1, s 3.2; The Stockholm Programme: An open and secure Europe serving and protecting the citizens [2010] OJ C115/5, s 1.2.1; Council conclusions on mutual recognition in criminal matters: 'Promoting mutual recognition by enhancing mutual trust' [2018] OJ C449.

19 See *Opinion 2/13* (n 1) para 191; Xanthopoulou (n 5) 26.

20 Valsamis Mitsilegas, 'Conceptualising Mutual Trust in European Criminal Law: The Evolving Relationship Between Legal Pluralism and Rights-Based Justice in the European Union' in Brouwer and Gerard (eds) (n 2) 23-36. In the context of the internal market, see Cambien (n 4) 98-102.

21 Nevertheless, some legal approximation is necessary for a proper functioning of mutual recognition. See Xanthopoulou (n 5) 14-17.

and justification for its effective functioning – the principle behind principle.[22]

The precise implications of mutual trust vary across individual instruments, such as the Brussels I Recast Regulation, European Arrest Warrant (EAW), or the Dublin IIII Regulation. For example, in the internal market, the primary aim of mutual trust is to assure proper functioning of the four basic freedoms by commanding Member States to respect each other's national standards in non-harmonized areas of law (as follows from *Cassis de Dijon*[23]). Meanwhile, in the AFSJ, mutual trust operates more directly to stimulate cooperation between the Member States,[24] compelling Member States to rely on sufficient procedures and products (e.g. decisions) while applying a particular EU instrument (e.g. EAW). Nevertheless, from a general perspective, the common theme of the principle of mutual trust is to spare Member States the task of second-guessing each other's legal systems by promoting the broad and automatic recognition of the outcomes they produce.

The new, elevated status of mutual trust is connected primarily with *Opinion 2/13*. In this opinion, the CJEU declared the fundamental importance of mutual trust not only for certain areas but for the whole EU legal order.[25] Thus, it no longer constitutes a mere political declaration or a supporting normative principle underpinning the operation of a few secondary law instruments. Instead, its position as a distinctive feature of the whole EU legal order is now expressly acknowledged. Mutual trust governs the relations between Member States within the autonomous and supranational system of

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22 For more details, see Ibid 9-45.

23 Case 120/78 *Rewe v. Bundesmonopolverwaltung für Branntwein* EU:C:1979:42 (*Cassis de Dijon*).

24 Evelien Brouwer, 'Mutual Trust and Judicial Control in the Area of Freedom, Security, and Justice: an Anatomy of Trust' in Brouwer and Gerard (eds) (n 2) 60.

25 *Opinion 2/13* (n 1) paras 192-194.

EU law[26] and 'allows an area without internal borders to be created and maintained'.[27] In this respect, the principle is 'essential to the structure and development of the Union'.[28] As such, mutual trust is considered a vital aspect of the EU legal order, a *raison d'être* of the EU that co-creates and justifies its autonomy.[29] Therefore, the somewhat supportive principle has developed into a more general and – as Prechal puts it – 'structural principle of EU constitutional law'.[30]

In *Opinion 2/13* (and in subsequent cases in various areas of EU law),[31] the CJEU followed a universalist formula to justify the existence of the principle of mutual trust. According to its reasoning, the fundamental premise is that the EU is based on certain values expressed in Article 2 TEU (such as freedom, democracy, the rule of law, or respect for human rights), which are shared by all Member States. That premise, as the CJEU states: 'implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected'.[32] Although this phrasing might seem to suggest that the principle operates as an expectation rather than obligation, the CJEU sees things otherwise. According to the CJEU: '[the] principle requires [each Member State], save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law'.[33] It is

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26 Prechal (n 8) 92.

27 *Opinion 2/13* (n 1) para 191.

28 Prechal (n 8) 92.

29 Jens Hillebrand Pohl, 'Intra-EU Investment Arbitration after the Achmea Case: Legal Autonomy Bounded by Mutual Trust?' (2018) 14 European Constitutional Law Review 767, 781.

30 Prechal (n 8) 76, 92.

31 E.g. *Achmea* (n 1) para 34; *Minister for Justice and Equality* (n 3) para 35; or *Jawo* (n 13) para 80.

32 *Opinion 2/13* (n 1) para 168.

33 Ibid para 191.

therefore conceived and considered by the CJEU to be a 'duty of mutual trust'.[34]

Three characteristics emerge from this reasoning:

> 1. The essence of the legal principle is the *presumption* that other Member States fulfil the object of trust – generally, the recognition of values common to the EU and its Member States and compliance with EU law (the 'presumption of compliance').
>
> 2. The presumption of compliance is justified by two fundamental premises: a) all Member States *share* values on which the EU is based; and b) the law of the EU *implements* these values. As a result, the actual fulfilment of the presumption of compliance is in principle very likely, because all the Member States are not only obliged to respect the values stated in Article 2 TEU,[35] but they are also bound by other specific provisions of the EU legal order implementing those values.[36]
>
> 3. The principle then imposes a *duty* on the Member States to rely on other Member States to fulfil the object of trust – in other words, to place confidence in the presumption of compliance.

The CJEU does not use the principle of mutual trust as an entirely independent standard of review. As Prechal points out, the principle is used in the context of individual acts of EU law, guiding the interpretation of their provisions and limiting the discretion of exercising authorities.[37] In this

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34 As such, the legal principle of mutual trust has little in common with trust as it is understood in social sciences and is thus criticized as a formal, coerced trust or a fiction. See e.g. TP Marguery, 'Towards the End of Mutual Trust? Prison Conditions in the Context of the European Arrest Warrant and the Transfer of Prisoners Framework Decisions' (2018) 25 Maastricht Journal of European and Comparative Law 704. Nonetheless, as indicated in the introduction, this article leaves these shortcomings aside and addresses the specific legal concept.

35 TEU (n 14) arts 4(3), 7, 49.

36 See the wording in *Opinion 2/13* (n 1) para 168. It would be more precise to say that it 'puts the values into effect'.

37 Prechal (n 8) 79, 81.

respect, besides the general duty to consider all other Member States to be compliant with EU law, the CJEU in *Opinion 2/13* also introduced two specific and independent negative obligations that relate to the protection of human rights:

> 1. Member States may not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law.
>
> 2. Member States may not check whether that other Member State actually has, in a specific case, observed the fundamental rights guaranteed by the EU.[38]

Although the principle does not generate legal effects by itself,[39] using it while interpreting or applying acts of EU law may nevertheless result in a positive obligation, specifically that of relying on the sufficiency of legal procedures or products of other Member States. Even though this duty is connected to a particular legal act and operates within such context, it may still have considerable influence on its application, especially as a justification for mutual recognition. Furthermore, since mutual trust is a vital aspect of EU law with significance for its autonomous nature, a potential threat to this principle's operation may also have serious consequences. In this regard, the protection of mutual trust serves to preserve the *effet utile* of a bundle of existing cooperative mechanisms (based on the presumed compliance with EU law that embodied the shared values as stated in Article 2 TEU), whose effective operation could be otherwise endangered. *Opinion 2/13* and the EU's inability to access the European Convention on Human Rights (ECHR) demonstrate such significance. According to the CJEU, questioning the presumed sufficiency of fundamental rights protections within the EU (by requiring the Member States to verify their actual observation) could 'upset the underlying balance of the EU and undermine

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38 *Opinion 2/13* (n 1) para 192.

39 Prechal (n 8) 79.

the autonomy of EU law'.[40] Another reference can be made to the *Achmea* case. In this judgment, the CJEU held that the bilateral investment agreement in question endangered, inter alia, the principle of mutual trust in EU law, and thus its autonomous nature.[41]

However, the presumption of compliance can be rebutted in 'exceptional circumstances'.[42] In such cases, the corresponding duty to rely on such compliance (and possibly the application of a mutual recognition instrument justified in that way) also ceases to exist. Depending on the mechanism in question, a Member State may therefore be allowed to refuse or postpone the execution of the relevant mutual recognition instrument. In some cases, the law explicitly provides for this possibility. For instance, under article 7 TEU, the presumption of compliance is rebutted if the Council determines the existence of a serious and persistent breach of values by a Member State. Furthermore, under some conditions, a court may use a public policy clause to refuse to enforce a decision[43] or execute an EAW.[44] Besides that, within the internal market, the CJEU has accepted that a Member State can refuse to recognise certain products from another Member State if there is a legitimate reason and such refusal is proportionate.[45] Similarly, trust in the accuracy of documents is rebutted in cases of reasonable doubt based on objective evidence.[46]

Finally, the CJEU has also allowed the presumption of compliance to be rebutted when fundamental rights are at stake. At first, the CJEU limited such rebuttal to cases involving severe violations and systemic deficiencies in

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40 *Opinion 2/13* (n 1) para 193.

41 *Achmea* (n 1) paras 58-59.

42 See e.g. *Opinion 2/13* (n 1) para 191.

43 E.g. Brussels I Recast Regulation (n 15) art 45(1)(a). See also Dublin III Regulation (n 17) art 3(2).

44 EAW Framework Decision (n 16) art 4.

45 As follows from *Cassis de Dijon* (n 23) and subsequent related case-law. See Cambien (n 4) 102.

46 E.g. Case C-105/94 *Ditta Angelo Celestini v Saar-Sektkellerei Faber GmbH & Co KG* EU:C:1997:277, para 34. See Prechal (n 8) 90.

fundamental rights protection.[47] However, this threshold was not fully compatible with the approach of the European Court of Human Rights (ECtHR), which stressed in its case-law a need to conduct an individualised assessment of particular circumstances.[48] For this reason, the CJEU has remedied this discrepancy in more recent case-law on asylum[49] and criminal matters[50] by clarifying the test and explicitly allowing national authorities to consider whether a 'serious' and 'real' risk of individual violation exists.

However, the test for rebuttal is not set in stone. First of all, some uncertainties concerning its application persist, for example the treatment of cases involving threats to the rule of law[51] or the burden, standard, and source of proof required for a rebuttal.[52] Moreover, the test relates only to absolute rights and the right to a fair trial (and in the latter case, only if its 'essence' is affected).[53] Finally, although in some cases (especially in the asylum law context[54]) systemic deficiencies in rights protection are no longer a

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47 E.g. Joined Cases C-411/10 and C-493/10 *NS and Others v Secretary of State for the Home Department, ME and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* EU:C:2011:865, para 86.

48 See in particular *Tarakhel v. Switzerland* ECHR 2014-VI 159. See also e.g. *MSS v Belgium and Greece* ECHR 2011-I 121.

49 See Case C-578/16 PPU *CK and Others v Republika Slovenija* EU:C:2017:127; *Jawo* (n 13); Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17 *Mahmud Ibrahim and Others, Nisreen Sharqawi, Yazan Fattayrji, Hosam Fattayrji v Bundesrepublik Deutschland, Bundesrepublic Deutschland v Taus Magamadov* EU:C:2019:219.

50 See Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* EU:C:2016:198; *Minister for Justice and Equality* (n 3).

51 For instance, whether systemic deficiencies relating to the independence of the judiciary are sufficient for the rebuttal, see *Openbaar Ministerie* (n 3).

52 In detail, see Adam Lazowski, 'The Sky Is Not the Limit: Mutual Trust and Mutual Recognition après Aranyosi and Caldararu' (2018) 14 Croatian Yearbook of European Law and Policy 1, 13-17, 25.

53 E.g. *CK and Others* (n 49); *Minister for Justice and Equality* (n 3). For more details, see Xanthopoulou (n 5) 29-36, 42-43.

54 See e.g. *CK and Others* (n 49) para 96.

requirement for rebuttal,[55] in other cases (especially criminal matters),[56] such deficiencies are still a crucial criterion that must be examined in the first stage of the test. Therefore, although rebuttal is generally possible, it is allowed only as a narrowly interpreted exception. The duty of trust remains the rule, obliging Member States to presume each other's compliance with EU law.

III. The Object of Mutual Trust ('Trust in What?')

The article will now examine two issues that define the practical scope of application for mutual trust: its *object* and *subjects*. It will illustrate the complexity of these elements and argue that the rationale underpinning mutual trust places some limits in this respect.

In the social sciences, the identity of the 'object of trust' (e.g. a person, a system) determines the type of trust (e.g. interpersonal, structural).[57] Mutual trust in EU law is an example of inter-institutional trust. As it always applies between two subjects, i.e. the trustor ('A') and the trustee ('B'), the object of the EU principle of mutual trust at first appears to be these two subjects themselves. However, as Schwarz points out, what we are really dealing with is a three-element relation, in which 'A trusts B to do X'.[58] It is therefore crucial to determine precisely what A is trusting B to do – i.e. the object of the legal principle of mutual trust.[59]

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55 Prechal (n 8) 88.

56 *Minister for Justice and Equality* (n 3) para 61.

57 E.g. D Harrison McKnight and Norman L Chervany, 'Trust and Distrust Definitions: One Bite at a Time' in Rino Falcone, Munindar Singh and Yao-Hua Tan (eds), *Trust in Cyber-societies* (Springer 2001) 40.

58 Schwarz (n 10) 135-37.

59 Ibid 131; Willems (n 12) 239.

1. The Main Object(s)

Opinion 2/13 identifies two objects[60] towards which the principle of mutual trust aims:

> 1. *Recognition* of (and respect for) the shared values of the EU, i.e. the presumption that Member States will not endanger or undermine the rule of law, human rights, or democracy (Article 2 TEU).
>
> 2. *Compliance* with EU law, i.e. the presumption that authorities of Member States will comply with EU law (because it implements shared values).

Given the justification behind the principle of mutual trust, the first of these two objects is the primary one. The mere desire to uphold shared values could perhaps be sufficient on its own to promote mutual trust between like-minded countries. However, an argument seeking to justify the principle of mutual trust as a distinctive feature of EU law based on this premise alone would be weak. The fact that a country currently recognises certain values does not guarantee that it will continue to respect them in the future. Adherence with the values expressed in Article 2 TEU is verified during the EU accession process;[61] but things may change considerably in subsequent years. The current rule of law crises in Poland and Hungary demonstrate this point. In addition, and more importantly, this argument is not unique to the application of EU law. One can easily argue that countries likewise try to honour their shared values when applying international law, or even their own national law. Therefore, the construction of mutual trust based on this premise alone could not constitute a characteristic of EU law sufficient to establish its autonomous nature.

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60 *Opinion 2/13* (n 1) para 168.

61 TEU (n 14) art 49. See also the Copenhagen criteria. European Council, 'Conclusions of the Presidency' (European Council in Copenhagen, 21-22 June 1993) SN 180/1/93 REV 1 <https://www.consilium.europa.eu/media/21225/72921.pdf> para 7.A(iii).

Therefore, the first and primary object of mutual trust is connected to and recognised by the second object: the law of the EU. The values enshrined in Article 2 TEU are presumed to be respected in conjunction with the application of EU law and according to its standard. Such a legal concept and the reasoning behind it are stronger, but at the same time, more complicated because the basic premise of sharing common values must be complemented by a second premise – that EU law itself *implements* these values.[62] Therefore, the duty to presume fulfilment of the object is sufficiently justified only when both these premises are valid and correct (i.e. when all Member States really share the same values and when EU law actually implements them). Finally, this same justification can be used to extend the presumption of compliance and the corresponding duty even further – to a presumption of general compliance with EU law.

2. The Complexity of the Object

'Compliance with EU law' is broad and questions may arise about what it entails. In this respect, Brouwer has pointed out that the requirement of trust often relates to different objects. Sometimes it is stressed in relation to a specific decision or measure in a particular case ('particular trust'), while at other times trust in the entire legal system or general conditions in another country is required ('general trust').[63] However, general and particular trust are not independent; instead, they are interconnected and form one complex object of trust. As such, the object of trust encompasses a general trust that manifests through several sub-objects of particular trust. Moreover, this composite object – and its sub-objects – may relate to past, present, or future events (i.e. another Member State did, does, or will comply with EU law).

The requirement of general trust is evident in cases involving another Member State's legal system. An example of such a situation may be the surrender of individuals based on an EAW, transfer of asylum seekers

62 *Opinion 2/13* (n 1) para 168.

63 Brouwer (n 24) 61.

according to the Dublin III Regulation, or *lis pendens*.[64] In these cases, the duty of trust primarily entails the need to rely on the sufficient quality of the entire legal system of another Member State (i.e. its legal order, the actions of its authorities, and its products) in the sense that EU law is complied with. However, in the background of this general trust, there are always instances of particular trust, e.g. that a particular procedure or a decision will not violate the fundamental rights of the surrendered or transferred person,[65] that an asylum seeker will not face extreme material poverty,[66] or that the courts of another Member State will correctly assess their jurisdiction according to the Brussels I Recast Regulation. Thus, although general trust is evident, it is always accompanied by particular trust in relation to several sub-objects.

In other situations, particular trust is more apparent. While recognizing foreign decisions or findings (e.g. veterinary controls[67]), the requirement of trust is primarily aimed at individual legal products. However, trust that these products comply with EU law requires trust in everything that preceded their adoption. Therefore, in the background, there is general trust, which entails reliance on the sufficient quality of the legal system of another Member State – that its operation and products, as a whole, comply with EU law. This general trust then again manifests itself through a number of sub-objects, e.g. that a competent court issued a decision recognised under the Brussels I Recast Regulation, that this court possessed certain qualities (was

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64 *Lis pendens* essentially involves recognizing the competence of another Member State to assess its jurisdiction and respecting the outcome of such assessment. Brussels I Recast Regulation (n 15) art 29.

65 E.g. compliance with principle of specialty or rights enshrined in Articles 4, 6, 48 or 50 of the Charter of Fundamental Rights of the European Union. Charter of Fundamental Rights of the European Union [2012] OJ C326/391 (CFR). See also e.g. *Aranyosi and Robert Căldăraru* (n 50); *Minister for Justice and Equality* (n 3).

66 And thus be subject to cruel or inhuman treatment contrary to Article 4 of the CFR. CFR (n 65). See e.g. *CK and Others* (n 49); *Jawo* (n 13).

67 See Case 46/76 *WJG Bauhuis v The Netherlands State* EU:C:1977:6, para 22.

independent and impartial),[68] and that EU law was correctly interpreted and applied and the rights and freedoms guaranteed by EU law were respected in both the proceedings and the decision (or, if not, at least that effective remedies[69] were available).[70]

The interconnection between general trust and particular trust also exists in the internal market. In this area of EU law, the principle of mutual trust requires the Member States to recognise that certain standards are sufficiently ensured by all of them despite the differences in their legal systems. Thus, a mere difference in laws and requirements in non-harmonized areas of EU law cannot generally justify the restriction of free movement.[71] This again presupposes both general trust in the entire legal system – that it respects shared values and complies with EU law – as well as particular trust in a number of sub-objects – e.g. the laws, national standards, and requirements in question, the manner in which they are adopted and applied, and even their future amendment in conjunction with EU harmonization efforts.

Therefore, mutual trust in a Member State's general compliance with EU law actually covers a whole range of sub-objects that presuppose a certain *sufficient* quality in the products and procedures that have led or will lead to them. This quality is sufficient if it corresponds with the standards of EU law.[72] This suggests that, materially, the object of trust covers compliance not only with the values recognised by EU law and acts based on these principles, but also with other provisions of both primary and secondary law.

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68 Case C-551/15 *Pula Parking doo v Sven Klaus Tederahn* EU:C:2017:193, para 54. See also *Minister for Justice and Equality* (n 3); *Openbaar Ministerie* (n 3).

69 See e.g. Case C-681/13 *Diageo Brands BV v Simiramida-04 EOOD* EU:C:2015:471, para 63.

70 In some cases, recognition can be refused based on an explicit exception to the presumption of compliance. Brussels I Recast Regulation (n 15) art 45.

71 *Cassis de Dijon* (n 23).

72 And particularly 'with the fundamental rights recognised by EU law'. *Opinion 2/13* (n 1) para 191.

Even national law and authorities must comply with EU law.[73] However, since the values remain the primary object, the presumption relates especially to provisions that implement or assist in implementing them. As such, the object of trust also includes, for instance, the expectation that the courts of each Member State did or will make a reference for a preliminary ruling to the CJEU if conditions expressed in Article 267 (3) of the Treaty on the Functioning of the European Union (TFEU)[74] are met.

It can therefore be concluded that the construction of the object of mutual trust is very *complex*. At a general level, it involves trust in the sufficient quality of the entire legal system of another Member State whose legal product or jurisdiction is being recognised. Moreover, given the requirement of 'mutuality', it essentially presupposes the *equivalent*[75] quality of all the Member States' legal systems, such that they all can be, in general, expected to comply with EU law. This general trust then manifests itself through instances of particular trust in relation to a number of sub-objects – especially legal products (e.g. decisions) and procedures.

3. Limits to the Scope

There are some risks related to the use of such a broadly constructed duty of mutual trust. The principle allows Member States to exercise, to a certain degree, some of their prescriptive and enforcement powers extraterritorially in other Member States, which are, in principle, unable to review or limit them. In this regard, Rizcallah correctly points out some challenges and potential problems that mutual trust may cause with respect to national

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73 See discussion and cases referenced in Prechal (n 8) 81-85. See also Case C-897/19 PPU *Ruska Federacija v IN* EU:C:2020:128, Opinion of AG Tanchev, para 105.

74 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU).

75 However, 'equivalent' does not mean 'identical'. See Prechal (n 8) 83-84.

sovereignty, democratic legitimacy, or state liability.[76] However, the most serious and frequently discussed risk is the potential threat that compliance with the duty of trust may result in a breach of fundamental rights, for instance in connection with the surrender of a person pursuant to an EAW. By complying with the duty of trust, the trusting Member State may violate its obligations to protect human rights.[77]

The CJEU has allowed the presumption of compliance with fundamental rights to be rebutted.[78] However, as was already mentioned, despite considerable improvement in the recent case-law, the test for rebuttal is not fully fledged.[79] Moreover, the CJEU's approach still reflects a primary concern for ensuring the most effective functioning of EU law mechanisms and controlling derogations from the duty of mutual trust. An individual assessment is now allowed, but only to a limited extent and only where there are 'serious doubts' and 'a real risk of a violation', especially of absolute rights and the right to a fair trial (but only if the 'essence' of this latter right is affected).[80] Furthermore, in criminal matters, systemic or general deficiencies are still generally stressed by the CJEU as a crucial criterion that must be

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76 Cecilia Rizcallah, 'The Challenges to Trust-based Governance in the European Union: Assessing the Use of Mutual Trust as a Driver of EU Integration' (2019) 25 European Law Journal 37, 48-50.

77 See e.g. Eduardo Gill-Pedro and Xavier Groussot, 'The Duty of Mutual Trust in EU Law and the Duty to Secure Human Rights: Can the EUs Accession to the ECHR Ease the Tension?' (2017) 35 Nordic Journal of Human Rights 258, 259-61.

78 See the CJEU judgments cited in nn 49-53 above.

79 For a summary of the relevant case-law in the AFSJ, where the collision with fundamental rights is the most visible, see e.g. Oskar Losy and Anna Podolska, 'The Principle of Mutual Trust in the Area of Freedom, Security and Justice. Analysis of Selected Case Law' (2018) 8 Adam Mickiewicz University Law Review 185.

80 *Minister for Justice and Equality* (n 3) para 68; Xanthopoulou (n 5), 29-36, 42-43 and the case-law discussed therein; see also above (nn 49-53).

examined in the first stage of the test.[81] This restrictive interpretation of 'exceptional circumstances' advocated by the CJEU prevents an extensive assessment with regard to all fundamental rights. Thus, compliance with the duty of trust continues to be stressed to the possible detriment of ensuring sufficient protection of *all* fundamental rights in every single case.

This approach is flawed. It not only ignores the constitutional importance of the protection of human rights but also contradicts the very reasoning and justification of the concept itself. As has been stated, the presumption that the object of trust was or will be fulfilled is justified by the premises that the EU is based on values shared by all the Member States and that the law of the EU implements these values.[82] Therefore, since the implementation of these values is key to justifying the principle of mutual trust, it follows that the use of this principle should not be detrimental to this implementation. Otherwise, such use would be contrary to its justification. Yet, due to the approach of the CJEU, this is exactly what might happen.

Instead, if mutual trust is to operate as a duty, it should be applied in a way that cannot endanger or undermine any of these values, which include not only the fundamental rights, but also other values stated in Article 2 TEU, such as democracy or the rule of law. Moreover, since the duty is imposed by EU law, it requires the EU legal order itself to stand up for the common values – or in the terminology used by the CJEU, to 'implement' them.[83] As such, the objective scope of the principle of mutual trust is necessarily limited by the need for EU law to ensure the actual implementation of the values on which the EU is based (Article 2 TEU).

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81 *Minister for Justice and Equality* (n 3) paras 60-61; or *Openbaar Ministerie* (n 3) para 54.

82 *Opinion 2/13* (n 1) para 168. Also discussed in ss II and III.1 above.

83 See ibid.

Other provisions of EU law may ensure the implementation of shared values in practice.[84] However, not every aspect of all the fundamental rights standards is sufficiently harmonised at the EU level, nor is the actual observance of the other common values guaranteed. The EU lacks universal competence to harmonise fundamental rights standards. Thus, the nature and extent of harmonisation depends on the scope of EU competence in a particular policy area.[85] The same logic applies to other means by which EU law could ensure that the values in Article 2 TEU are actually given effect in the Member States in particular cases.[86]

Therefore, the principle of mutual trust, which is used to overcome such lack of harmonisation and to respect the differences between the legal traditions and systems of the Member States, should itself assist, at least to some degree, in ensuring implementation of common values. To achieve this, modifications to the current approach of the CJEU towards rebutting the presumption of compliance are warranted. First, the high standard of 'serious doubts' and 'real risk' of a violation should be required only if the actual implementation of the value in question is ensured by EU law.[87] Second, the rebuttal should relate to all common values enshrined in Article 2 TEU, including all EU fundamental rights, because a threat to the actual

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84 For instance, in relation to the fundamental rights, Member States are bound to respect the CFR. Its actual implementation is then – at the EU level – promoted and secured by acts of secondary law that harmonise a variety of its aspects and standards. See e.g. Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects, of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L65/1.

85 In some areas of EU law, the harmonisation of various standards may be very limited and only subsidiary. With regard to EU criminal law, see TFEU (n 74) art 82(2).

86 Although the procedure covered by Article 7 TEU may have some preventive effects, these are limited due to the problematic use of the procedure in practice (consider e.g. the recent attempts to do so in relation to Poland).

87 This requirement is fulfilled e.g. with respect to the harmonised standards of presumption of innocence. See n 84.

implementation of any of them may result in contradiction of the concept's own justification.

Relevant risks will usually be linked to human rights. However, this does not mean that a mutual recognition instrument (e.g. an EAW) cannot be applied in these cases. Rather, it means that any such use at the potential expense of any of the EU fundamental rights should not be justified by the duty of mutual trust. Thus, the operation of mutual recognition in these situations should be based on a different constitutionally compatible argument that would justify such restriction.

Therefore, the current test for rebutting the presumption of compliance should be modified to allow for broader review in individual cases. If a risk of violating any of the EU values in Article 2 TEU is alleged, national authorities should conduct a two-step assessment based on foreseeable criteria developed by the CJEU. The first step would concern the rebuttal of the presumption of compliance. This assessment should consider the level of implementation of the value in question by the EU (particularly a fundamental right recognised by EU law). The less its implementation in practice is ensured by EU law, the less strict a standard of proof should be required to rebut the presumption of compliance. Thus, the 'serious and real' risk threshold should apply only if the relevant aspect of the value is sufficiently secured by EU law (e.g. a specific fundamental right standard is harmonised). Moreover, while systemic deficiencies could still be viewed as an indicator of individual risk, they should not be an indispensable requirement.

Once the existence of a risk is established, the presumption should be rebutted, and the court should then conduct a second assessment of whether taking such a risk in the given case is justified. This assessment should be based on the constitutional significance attributed to the value (particularly a fundamental right) in the EU legal order while also considering the

common principles of the relevant national constitutions and the ECHR.[88] While absolute rights could not be restricted in favour of the effective application of EU law, a proportionality-based analysis as envisioned in Article 52 of the Charter of Fundamental Rights of the EU (CFR) could be used with regard to relative rights.[89] The obligation to use a particular mutual recognition instrument would then be justified by a constitutionally compatible assessment instead of presumed compliance with common values by other subjects of mutual trust. Only then would the principle of mutual trust really assist in implementing the shared values of the EU in line with its underlying reasoning, rather than facilitating possible violations thereof.

IV. Subjects of Mutual Trust ('Trust between Whom?')

In general, the object of trust is presumed to be fulfilled mutually between certain subjects. Therefore, it is necessary to identify the subjects between whom the principle applies and what requirements these subjects should meet to ensure that the principle is not used in a way that risks endangering the values enshrined in Article 2 TEU.

1. The Trustor, the Trustee, and the Requirement of Mutuality

As Schwarz points out, the CJEU considers mutual trust to be a three-element relation in which one subject ('A') relies on another subject ('B') to comply with the object of trust ('X').[90] As such, in every situation in which the principle applies there are two subjects in different positions – the trustor and the trustee. While applying a mutual recognition instrument based on mutual trust (e.g. an EAW), the trustor is required to presume compliance by the subject whose legal outcome or jurisdiction is being recognised.[91]

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88 However, if these differ, the EU law standards – as interpreted by the CJEU – should be decisive. TEU (n 14) art 19.

89 For possibilities and limits of the proportionality-based analysis in the AFSJ, see Xanthopoulou (n 5).

90 Schwarz (n 10), 130. See *Opinion 2/13* (n 1) paras 191-92.

91 *Opinion 2/13* (n 1) para 191.

This second subject – the trustee – is then expected to fulfil this presumption and actually comply with the object of trust.

This legal construction only makes sense when the two subjects fulfil certain requirements. For one thing, since mutual trust applies only when EU law imposes a specific duty on the trustee, this subject must be bound by a relevant act of EU law (e.g. the Dublin III Regulation). Otherwise, the trustor has no reason to presume compliance by the trustee. However, this fact alone does not suffice. As previously discussed, no duty of trust can be imposed when doing so would endanger the values enshrined in Article 2 TEU.[92] Therefore, certain safeguards must be in place at the EU level to ensure that the trustee will actually uphold these values. In the framework of mutual trust, these safeguards are the premises that the values stated in Article 2 TEU are shared by all EU Member States and that EU law implements these values.[93] Therefore, the imposition of a duty of trust on a trustor is only appropriate when the trustee shares the values expressed in Article 2 TEU and is bound by the EU law instruments ensuring their implementation. Only a subject that fulfils both these preconditions can be presumed to comply with the object of trust and, thus, act as a trustee.

Though in each instance the subjects assume the distinct roles of trustor and trustee, the principle ultimately applies 'mutually' between its subjects.[94] To fulfil the requirement of mutuality, all subjects must be equally able to act as trustor and trustee, depending on the situation in question.[95] The consequences of such a requirement are twofold. First, the principle may apply only in relations premised on horizontal cooperation and mutual recognition. Second, the subjects between whom the principle applies

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92 As discussed in ss III.1 and III.3 above.

93 Ibid. See also *Opinion 2/13* (n 1) para 168.

94 In other words, every subject must presume the compliance by all the other subjects. See *Opinion 2/13* (n 1) paras 167-68, 191.

95 E.g. if a subject recognises a foreign decision pursuant to the Brussels I Recast Regulation, it acts as the trustor. The same subject is then the trustee if its decision is recognised by another subject bound by this regulation.

should be bound by the object of trust to the same extent. In particular, the principle can be used interchangeably between two subjects without endangering or undermining the values stated in Article 2 TEU only if the two subjects are equally bound by EU law provisions that implement or assist in implementing these values. As such, only subjects bound by the constitutional foundations of EU law, including the preliminary reference procedure (Article 267 TFEU), may be presumed to fulfil the object of trust (i.e. shared values and EU law) equivalently.[96] Moreover, this requirement extends to any other legal provisions with which compliance is presumed, including secondary law provisions, even if they do not directly ensure the implementation of shared values. The reason for this is simple: a subject cannot be presumed to comply with a legal instrument by which it is not bound.

2. Member States

The article will now examine the actual subjects between which the principle applies and the extent to which they fulfil these requirements. When discussing mutual trust, the CJEU refers only to EU Member States as the relevant subjects between whom the principle applies; no other subjects are explicitly mentioned in this context.[97] As a practical matter, the duty of trust falls upon Members States' judicial and administrative authorities when they apply EU law, particularly mutual recognition instruments based on mutual trust.[98] Thus, the legal duty to rely on the presumption of compliance does not apply directly to ordinary EU citizens.[99]

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96 As discussed in ss III.2 and III.3 above.

97 See e.g. *Opinion 2/13* (n 1) paras 168, 191.

98 Of course, the duty vanishes when authorities are permitted or required to engage in some form of review. For instance, while the duty of mutual trust generally applies while recognizing judicial decisions according to the Brussels I Recast Regulation, Article 45 of that regulation permits countries to invoke certain grounds for refusal and conduct a review of certain circumstances. Such control mechanisms are based on *distrust*.

99 Cf Sulima (n 10) 75.

Even though they should have a high degree of actual trust in all the Member States, the legal principle of mutual trust relates only to the authorities that apply it on their behalf.[100]

Applying the principle between the Member States is logical. These subjects share the values expressed in Article 2 TEU and are bound by the EU legal order that implements them.[101] In particular, they are bound by the constitutional foundations of EU law (i.e. the TEU and TFEU ('the Treaties')), the CFR, and the preliminary reference procedure (Article 267 TFEU) that ensures the correct application of EU law). As such, each Member State can generally act as both the trustor and the trustee because compliance with the common values and EU law may be equivalently presumed between them. Therefore, applying the principle between the Member States does not in itself risk endangering the values enshrined in Article 2 TEU.

Yet, there are some differences in the extent to which the Member States are bound by EU law. Some of them, such as Ireland, have negotiated opt-out exceptions and, thus, certain EU legislation does not apply to them.[102] Besides that, EU law allows the Member States to establish enhanced cooperation and adopt legislation that then applies only between the participating countries.[103] Although justified by the nature of the EU's competence in question, these differences limit the extent to which Member States can faithfully fulfil their role as trustees by creating situations where the object of trust covers acts by which they are not bound. The presumption of compliance cannot relate to legislation by which a Member State is not

100 For a similar discussion, see Schwarz (n 10) 135-37.

101 *Opinion 2/13* (n 1) paras 168, 191.

102 E.g. Ireland has an *opt-out* in the AFSJ with a possibility to *opt-in*. See TFEU (n 74) protocol 21.

103 E.g. Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [2016] OJ L183/1.

bound. Therefore, the mutual application of the principle depends on the extent to which the Member States are bound by the relevant acts of EU law.

Hence, while the principle of mutual trust can generally be applied among the Member States with respect to common values and compliance with EU law in a general sense, the object of mutual trust between two Member States is limited in particular cases by the extent to which these Member States are bound by the relevant EU legal instruments. This requires an assessment, in each case, of whether the duty to presume compliance with particular provisions of EU law is applicable.[104] At present, this requirement does not raise major problems because there are only a few relevant exceptions. Nevertheless, given the complexity of the object of trust, it may become more significant in the future, especially if the idea of multi-speed Europe is put into effect. With many different exceptions, it may become confusing to determine whom and what can be trusted because each Member State will be partly bound by different legislation. This would be especially problematic if various exceptions led to different degrees of harmonisation in fundamental rights standards. Such an approach could create a double standard regarding which subjects may be presumed to fulfil the object of trust in a sufficient (equivalent) way.

3. Non-EU Countries

Although mutual trust is considered a characteristic of EU law, some legal instruments based on this principle also apply in relations with third countries. First, based on association agreements, several acts of EU law are applicable in some non-EU countries. These mainly include the countries participating in the European Economic Area ('EEA'), such as Norway or Iceland. Although the principle of mutual trust does not apply in EEA law, these countries are nevertheless partly bound by the duty of mutual trust.[105] Moreover, even some non-EEA countries have committed themselves to

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104 Brouwer (n 24), 65.

105 *Ruska Federacija*, Opinion of AG Tanchev (n 73) paras 97, 101-07.

comply with particular EU legislation. For instance, Switzerland has done so with regard to the regulations that created the Dublin system.[106] Some of the case-law essential for this system's operation was justified by the CJEU with reference to the EU principle of mutual trust, particularly in the context of transferring asylum seekers to the competent country.[107] Therefore, if a person applies for asylum in Switzerland, the Swiss authorities may be required to recognise the competence of – and thus trust – an EU Member State. Similarly, a Member State may be in some cases obliged to recognise the competence of Switzerland to examine the asylum application – and therefore trust that it will fulfil the object of trust (e.g. respect the applicant's fundamental rights).

Secondly, some international treaties concluded with non-EU countries are essentially the same as the existing legislation at the EU level. Thus, their functioning is effectively extended to these countries. For example, Lugano Convention II[108] extends the regime for the determination of the competent court and recognition of judicial decisions under the Brussels I Regulation[109] to Switzerland, Norway, and Iceland. Although only the Convention is formally applicable, its interpretation is influenced by the case-law of the

106 Agreement between the EC and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland [2008] OJ L53/5, art 1.

107 See e.g. Evelien Brouwer and Hemme Battjes, 'The Dublin Regulation and Mutual Trust: Judicial Coherence in EU Asylum Law? Implementation of Case-Law of the CJEU and the ECtHR by National Courts' (2015) 8(2) Review of European Administrative Law 183. For recent case-law, see *CK and Others* (n 49); *Jawo* (n 13); *Ibrahim and Others* (n 49).

108 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L339/3.

109 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1.

CJEU with respect to related EU legislation.[110] As such, Member States' relations with non-EU countries are influenced not only by legislation premised on mutual trust, but also by conclusions of law reached in EU case-law interpreting this legislation. Some of these conclusions were justified by the CJEU by reference to the EU principle of mutual trust, including in relation to automaticity of recognition and enforcement, or *lis pendens*.[111] Thus, a Member State may be obliged to trust the judicial decisions and jurisdictional findings issued by non-EU countries.

Mutual trust, therefore, manifests itself in relations with some non-EU countries, particularly when they apply relevant mutual recognition instruments (e.g. the Dublin III Regulation) or when such a cooperative mechanism is used with respect to their products or jurisdiction. However, this is problematic. The principle and its corresponding duty apply in relations with these countries because they are bound by EU legislation (or a treaty similar to EU legislation) that operates on the basis of mutual trust.[112] However, this basis only suffices if the non-EU countries act solely in the position of the trustor. It does not sufficiently justify the presumption that these countries will comply with the object of trust as the trustee. To do so, the non-EU countries would need to share the common values of the EU and be bound by the EU law that implements them.[113]

Given that the EEA countries, Switzerland, and the EU Member States are all members in the Council of Europe – whose aim is to protect human

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110 Protocol 2 to the Lugano Convention II states: 'Any court applying and interpreting this Convention shall pay due account to the principles laid down by any relevant decision […] rendered by the courts of the States bound by this Convention and by the [CJEU]'. Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L339, protocol 2, art 1(1).

111 See e.g. Case C-139/10 *Prism Investments BV v Jaap Anne van der Meer* EU:C:2011:653, paras 27-28; Case C-116/02 *Erich Gasser GmbH v MISAT Srl* EU:C:2003:657, paras 72-73.

112 See *Ruska Federacija*, Opinion of AG Tanchev (n 73) paras 101-107.

113 As discussed in s IV.1 above.

rights, democracy, and the rule of law in Europe[114] – it can be assumed that these countries share the values expressed in Article 2 TEU. However, non-EU countries are not bound by the entire EU legal order – only certain individual acts. Although it is argued that the EU fundamental rights standards apply to them to some degree,[115] this is not sufficient. Despite the special relationship of some of the third countries with the EU, their position differs from those of the Member States.[116] For instance, courts from non-EU countries cannot make a reference for a preliminary ruling to the CJEU. Furthermore, significant differences persist in the extent to which various non-EU countries are bound by EU law. While courts from the EEA countries can make a reference to the EFTA court, this is not extended to other countries and legal instruments. Therefore, in relation to the Lugano Convention II for instance, an absurd situation arises. According to its Protocol 2 (Article 2), the courts of the Member States can make a reference to the CJEU, whereas non-EU courts cannot. Hence, a risk may arise that the relevant legal instrument may not be applied in an equivalent manner by these countries.

For these reasons, from a general point of view, the legal systems of non-EU countries and their authorities' operation cannot be considered equivalent to the same extent as may be expected between the Member States.[117] The fulfilment of the object of trust by them is not equivalently secured because these countries are not equally bound by EU law provisions that ensure the actual implementation of the values enshrined in Article 2 TEU. For

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114 Statute of the Council of Europe (adopted 5 May 1949, entered into force 3 August 1949) ETS 1, arts 1-3.

115 For more detail, see e.g. Astrid Epiney and Benedikt Pirker, 'The Binding Effect of EU Fundamental Rights for Switzerland' in Norman Weiß and Jean-Marc Thouvenin (eds), *The Influence of Human Rights on International Law* (Springer 2015).

116 Brouwer (n 24) 65.

117 E.g. if a *lis pendens* is filed, can a court of a Member State really trust a Swiss court to the same extent as another Member States court to correctly assess its own jurisdiction even though it cannot make a reference to the CJEU?

instance, if an asylum seeker is transferred to a non-EU country for the purpose of carrying out the asylum procedure, this country's compliance with the fundamental rights recognised by EU law is not ensured to entirely the same extent as that of Member States. As a result, applying the principle of mutual trust in relations with third countries can potentially endanger EU values in specific cases. Therefore, as compliance with the object of trust by these countries cannot be presumed to the same extent as by Member States, the principle of mutual trust and its corresponding duty should not apply equally in relations between Member States and non-EU countries.

It follows that the EU principle of mutual trust cannot justify the use of mutual recognition instruments in these relations. Therefore, the CJEU case-law justified by the EU principle of mutual trust also cannot be automatically applied to these instruments (e.g. Lugano Convention II) in relation to non-EU countries. Thus, the CJEU should separately assess the conclusions reached in its judgments while considering the specifics of the relations with third countries. If there is to be an effectively similar duty to apply mutual recognition instruments, its effects, limits, and justification in these relations must be adjusted accordingly. The premise that common values will be implemented by EU law cannot apply with respect to non-EU countries. Only the premise that these countries recognize the values stated in Article 2 TEU may justify a duty of trust in relations with them. However, imposing the duty on this basis alone would be less persuasive. In such a case, the compliance with the object of trust would not be ensured by the same system of law from which the duty derives.[118]

4. EU Institutions

Mutual trust is not directly stressed in relations with EU institutions. However, its potential impact on their operation has been identified. For example, in *Commission v. Combaro*,[119] the CJEU explicitly imposed a duty

[118] For more detail, see s III.1 above.

[119] Case C-574/17 P *European Commission v. Combaro SA* EU:C:2018:598.

of trust on the Commission in customs matters. The case concerned the findings of the customs authorities of the country of export (Latvia) that certain certificates of the origin of goods are invalid. Even though the European Anti-Fraud Office (OLAF) found that these certificates were probably authentic, the Commission nevertheless decided to rely on the Latvian findings and did not ask for their re-examination. The CJEU referred to mutual trust in concluding that the 'Commission is justified in claiming that it was, in principle, required to rely on the findings and on the determinations legally made by the Latvian customs authorities'.[120]

Although the CJEU explicitly mentioned mutual trust in this context, this does not necessarily imply that the principle applies systematically and in general between Member States and EU institutions. The CJEU merely extended to EU institutions the obligation already applied between national authorities in customs matters. According to the CJEU, if the Member States have a duty to rely on the findings and on the determinations made by their customs authorities,[121] then EU institutions cannot, in principle, question them either.[122] However, no general and reciprocal duty of trust has been imposed on Member States and EU institutions in their mutual relations.

Nevertheless, there are horizontal relations between Member States and EU institutions in which the principle could potentially apply. For instance, while applying Article 101 and 102 TFEU, the Commission cooperates with the national competition authorities within the Network of Competition Authorities in order to coordinate investigations and share information and evidence.[123] Moreover, the EU itself is based on the values expressed in Article 2 TEU and is bound by its own legal order, which implements these values. Although EU institutions cannot themselves make a reference based

120 Ibid paras 52-53, 56.

121 See e.g. Case 218/83 *Les Rapides Savoyards Sàrl and Others v Directeur Générale des Douanes et Droits Indirects* EU:C:1984:275, paras 26-27.

122 *Combaro* (n 119) paras 52-53, 56.

123 Commission Notice on cooperation within the Network of Competition Authorities [2004] OJ C101/43.

on Article 267 TFEU, judicial review of their proceedings and decisions is within the competence of the CJEU.[124] As such, the correct application of EU law by EU institutions is sufficiently ensured. It follows that they can act equivalently as both trustor and trustee because the presumption of their compliance is sufficiently justified.

Therefore, applying the principle of mutual trust in horizontal relations between Member States and EU institutions cannot, in and of itself, endanger common values. Conversely, requiring these subjects to rely on the sufficient quality of each other's legal products or, for instance, the correctness of the information each other provides, could potentially increase the effectiveness of their cooperation and the application of relevant EU law instruments.[125]

However, the relations between EU institutions and Member States are already governed by the principle of sincere (loyal) cooperation. According to Article 4(3) TEU, this well-established principle of EU law imposes a duty on the EU and its Member States to, 'in full mutual respect, assist each other in carrying out tasks which flow from the Treaties'. The general expression of this reciprocal obligation is then reflected in various EU law provisions.[126] Moreover, the CJEU has repeatedly used this principle as an independent legal basis to develop EU law and ensure its effective functioning, both by filling the gaps in the primary law and deciding particular cases.[127] As such,

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124 TEU (n 14) art 19; TFEU (n 74) arts 263-65. Usually, the General Court decides the case in the first instance. This decision can then be appealed to the CJEU.

125 However, the principle should still be used only in a way that cannot endanger the values, as discussed in s III.3.

126 E.g. TFEU (n 74) art 344. See also Case C-469/03 *Commission of the European Communities v Ireland* EU:C:2006:345, para 169.

127 Damien Gerard, 'Mutual Trust as Constitutionalism?' in Brouwer and Gerard (eds) (n 2) 76; Case C-620/16 *European Commission v Federal Republic of Germany* EU:C:2019:3, Opinion of AG Szpunar, paras 87-92.

the principle of sincere cooperation has proven to be an essential part of the EU law regulating relations between the EU and its Member States.[128]

Yet, in *Commission v. Combaro,* the CJEU stayed silent on the principle of sincere cooperation and referred only to mutual trust. This raises a question about the link between these two principles. Although it is acknowledged that mutual trust fulfils a similar role as the principle of sincere cooperation,[129] their precise connection is not entirely clear. Some literature suggests that the principle of mutual trust could form a part of the broader principle of sincere cooperation, complementing it on the horizontal level[130] or even operating as *lex specialis*.[131]

Indeed, the requirement to act 'in full mutual respect' stated in Article 4(3) TEU indicates that the link between the principles is complementary. The general obligation of mutual assistance in carrying out tasks flowing from the Treaties does not necessarily require the restriction of review powers; however, at the same time, such a restriction could expand the scope of the obligation of mutual assistance. Imposing the reciprocal duty of trust on Member States and EU institutions in their mutual relations could promote mutual assistance and, ultimately, the aims of both the principles of mutual trust and sincere cooperation. In the end, these principles serve the same goal – the effective functioning of EU law. Accordingly, complying with a duty of trust in horizontal cooperative relations could be one way for Member States and EU institutions to respect their general obligation to assist each other in carrying out tasks derived from EU law. This could in turn increase

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128 For more detail, see Gerard (n 127) 76-77; Prechal (n 8) 91-92. However, to some extent, the principle also regulates the horizontal relations between the Member States. See e.g. Case C-178/97 *Barry Banks and Others v Theatre royal de la Monnaie* EU:C:2000:169, paras 38-39.

129 See Case C-297/07 *Klaus Bourquain* EU:C:2008:206, Opinion of AG Ruiz-Jarabo Colomer, para 45; Case C-145/03 *Heirs of Annette Keller v Instituto Nacional de la Seguridad Social (INSS) and Instituto Nacional de Gestión Sanitaria (Ingesa)* EU:C:2005:17, Opinion of AG Geelhoed, para 21.

130 Prechal (n 8) 92; Gerard (n 127) 77.

131 Kozak (n 2) 135.

the effectiveness of their cooperation and the application of relevant EU law instruments.

It remains to be seen whether the CJEU will apply the principle of mutual trust in relations between Member States and EU institutions more systematically. Nonetheless, since there is no relevant difference in the extent to which these subjects are bound by the object of trust, such a use of the principle would – in general – be in line with the principle's underlying justification. In this regard, mutual trust can complement and support the well-established principle of sincere cooperation (Article 4(3) TEU).

V. Conclusion

The EU principle of mutual trust is designed and treated by the CJEU as a duty to rely on other subjects to comply with EU law and recognise values enshrined in Article 2 TEU (whether in the past, present, or future). This legal construction is based on the presumption that these main objects of trust were, are, or will be fulfilled. Two other premises justify this presumption: 1) all Member States share the values stated in Article 2 TEU; and 2) EU law implements these values. At the same time as it justifies the existence of the principle of mutual trust, this very reasoning poses some limits that affect the objective and subjective scope of its application.

This article first addressed the object of this principle. In general, the values expressed in Article 2 TEU are presumed to be respected in conjunction with the application of EU law and according to its standards. This entails both general trust in the equivalent quality of all the Member States' legal systems and particular trust in specific legal products and procedures. As such, the object of trust is broad and complex, which means that the presumption of compliance relates not only to a particular applied legal act but to the EU legal order in general.

In this context, this article put forward an argument that, if such broadly constructed mutual trust is to operate as a duty, it should be imposed only in

situations where it cannot endanger or undermine any of the values on which the EU is based (Article 2 TEU). If the principle is justified by certain values (e.g. the protection of fundamental rights), its use should not be detrimental to them. Otherwise, mutual trust would be applied contrary to its justification. Therefore, in cases that threaten the actual implementation of any of the common values following the application of EU law, a constitutionally compatible assessment should be used – instead of presumed compliance with common values by other subjects of mutual trust – to justify the obligation to apply a particular mutual recognition instrument.

This article then addressed the subjects of mutual trust. It showed that, in every situation, there are two subjects between which the principle applies mutually – the trustor and the trustee. The article suggested that, in order to ensure the reciprocal application of the principle in a way that cannot endanger the values enshrined in Article 2 TEU, all subjects should be bound by the object of trust – particularly EU law provisions that implement or ensure the implementation of these values – to the same extent.

This requirement is generally satisfied in relations between Member States. However, compliance with individual acts can only be presumed if these acts bind all the Member States. Furthermore, mutual trust applies not only between EU Member States but also in relations with some non-EU (particularly EEA) countries. As these countries are not bound by the entire EU legal order, the presumption of their compliance is not justified to the same extent as that of Member States. Therefore, the application of mutual trust in relations with non-EU countries does not sufficiently safeguard the values enshrined in Article 2 TEU. As such, the principle should not apply reciprocally in these relations. Conversely, it can potentially apply in horizontal relations between Member States and EU institutions. In this context, it can complement the principle of sincere cooperation (Article 4(3) TEU), which generally governs the relations between the EU and its Member States.

EFFET UTILE REASONING BY THE COURT OF JUSTICE OF THE EUROPEAN UNION IS MOSTLY INDIRECT: EVIDENCE AND CONSEQUENCES

Jan Blockx*

Legal reasoning cannot merely be categorized by the content of the arguments used, such as reference to specific rules, principles or policies. Arguments can also be distinguished in terms of whether they are used directly (i.e. ostensively) to defend a certain position or interpretation or indirectly (i.e. apagogically) to contest it. Empirical analysis of the Court of Justice of the European Union judgments in the 'important pre-accession case law' demonstrates that effet utile *arguments are mostly used indirectly: the Court points out how a certain interpretation of European Union law would undermine its effectiveness and concludes that the opposite interpretation should be followed. This empirical analysis therefore appears to counter the claim that the Court uses* effet utile *reasoning in a maximalist manner. Nevertheless, apagogic reasoning is not an innocent way of reasoning, since it can lead to fallacies and provides greater opportunities to hide the reasons for decisions.*

Keywords: Court of Justice of the European Union; legal reasoning; *effet utile*; apagogic reasoning

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I. INTRODUCTION

Effet utile is widely recognized as an important principle or interpretative tool used by the Court of Justice of the European Union (CJEU, 'the Court') and has been the subject of a large body of scholarship. It has been said to play a 'particularly prominent role' in the CJEU's case law[1] and has been termed an 'indispensable tool' for the creation of the central tenets of European law.[2] At the same time, it is 'one of the most contested terms in

[1] Stefan Mayr, 'Putting a Leash on the Court of Justice – Preconceptions in National Methodology v *Effet Utile* as a Meta-Rule' (2012) 5(2) European Journal of Legal Studies 3, 7.

[2] José Luis da Cruz Vilaça, 'Le principe de l'effet utile du droit de l'Union dans la jurisprudence de la Cour' in Allan Rosas, Egils Levits and Yves Bot (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law* (Asser 2012) 279.

European case law',[3] including because it is often perceived as a tool for judicial activism.[4] This paper provides a new perspective on how the CJEU uses *effet utile* reasoning and how this affects its potential for judicial activism.

Section II will clarify the difference between direct (ostensive) and indirect (apagogic) ways of using arguments: in the case of direct reasoning, arguments are used to defend a certain position or interpretation; in indirect reasoning, arguments are used to contest a position or interpretation that one aims to reject. Section III will then demonstrate that the Court sometimes uses *effet utile* arguments in an ostensive manner and sometimes in an apagogic manner. In instances of the first type, the Court argues that a certain interpretation would enhance the effectiveness of European law. In instances of the second type, the Court argues that a certain interpretation would undermine or reduce the effectiveness of European law. The central argument of this article is that the Court actually uses *effet utile* reasoning mostly in the second manner, i.e. indirectly. This will be demonstrated through an empirical analysis of the judgments of the CJEU in the so-called 'important pre-accession case law'.[5] As will be discussed in more detail in Section III, in a large majority of the instances in which the CJEU uses *effet*

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3 Urška Šadl, 'The Role of *Effet Utile* in Preserving the Continuity and Authority of European Union Law: Evidence from the Citation Web of the Pre-Accession Case Law of the Court of Justice of the EU' (2015) 8(1) European Journal of Legal Studies 18.

4 Michael Potacs, 'Effet utile als Auslegungsgrundsatz' (2009) 44 Europarecht 465, 465. See also Takis Tridimas, 'The Court of Justice and Judicial Activism' (1996) 21 European Law Review 199, 199. On teleological interpretation more generally, see Henri de Waele, *Rechterlijk Activisme en het Europees Hof van Justitie* (Boom 2009) 107; Koen Lenaerts and Jose A Gutierrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' (2014) 20 Columbia Journal of European Law 3, 34-37.

5 'Judgments from the Historic Case-Law in the Languages of the 2004, 2007 and 2013 Accession Countries' (CJEU) <https://curia.europa.eu/jcms/jcms/Jo2_14955/en/> accessed 14 April 2020.

utile reasoning in these judgments, it in fact does so in an apagogic rather than an ostensive manner.

Subsequently, Section IV of the article discusses certain risks presented by indirect arguments. First, in the absence of a clear prior choice between two alternative interpretations, apagogic reasoning can lead to logical fallacies. Second, indirect reasoning allows a court to venture into new interpretations of the law without much need for explanation. Contrary to claims that *effet utile* reasoning tends to lead to a maximalist interpretation of the law, it is rather these characteristics of the apagogic use of *effet utile* reasoning that give such reasoning a potential for the judicial activism of which the CJEU is sometimes accused.

II. DIRECT VERSUS INDIRECT REASONING

There are various typologies of legal reasoning and judicial interpretation. Friedrich Carl von Savigny, for example, distinguished between (i) grammatical, (ii) logical, (iii) historical and (iv) systematic tools of interpretation.[6] In the second half of the 20th century, Ronald Dworkin's distinction of arguments based on (i) rules, (ii) principles and (iii) policies became very influential.[7] In European legal scholarship the distinction developed by Neil MacCormick between arguments from (i) consistency, (ii) coherence and (iii) consequence has been the basis of other categorisations.[8] These different typologies naturally overlap to a large extent. For example, despite MacCormick's disagreements with Dworkin, the similarities between the three types of reasoning that each refers to are

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6 Friedrich Carl von Savigny, *System des heutigen römischen Rechts*, vol 1 (Veit und Comp 1840) 213-14.

7 Ronald Dworkin, 'The Model of Rules' (1967) 35 University of Chicago Law Review 14, 22ff. See also Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 14, 22ff.

8 See Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford University Press 1978).

apparent if one compares Dworkin's description of principles and policies[9] with MacCormick's description of arguments from coherence and consequence.[10]

However, these typologies are limited to distinguishing *what* elements can be used to reason or to interpret; they do not differentiate as to *how* these elements are used.[11] What I mean to say is that all of the above-listed elements (such as the wording of a legal text, its history, the system in which it is located and so on) can be used either to support a certain interpretation or to contest it.[12]

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9 'I just spoke of "principles, policies and other sorts of standards." Most often I shall use the term "principle" generically, to refer to the whole set of these standards other than rules; occasionally, however, I shall be more precise, and distinguish between principles and policies. (…) I call a "policy" that kind of standards that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community (…). I call a "principle" a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.' Dworkin, 'The Model of Rules' (n 7) 22-23.

10 'Because consequentialist argument is intrinsically evaluative, and because coherence as explained above involves reflection on the values of the system, the two interact and overlap as will appear; but they are not identical.' MacCormick (n 8) 107.

11 There are nevertheless some scholars that have highlighted the difference between the content and use of an argument. Manuel Atienza, for example, regrets that legal argumentation theory does not distinguish between arguments for and arguments against. Manuel Atienza, *Las razones del derecho: Teorías de la argumentación jurídica* (Universidad Nacional Autónoma de México 2005) 208. See also Douglas Walton, Giovanni Sartor and Fabrizio Macagno, 'Statutory Interpretation as Argumentation' in Giorgio Bongiovanni and others (eds), *Handbook of Legal Reasoning and Argumentation* (Springer 2018) 519, 525.

12 Henrike Jansen seems to express this by stating that the *reductio ad absurdum* 'cannot be characterised by a specific content, but must instead be characterised as an argument *form*'. Henrike Jansen, 'Refuting a Standpoint by Appealing to its Outcomes: *Reductio Ad Absurdum vs.* Arguments from Consequences' (2007) 27 Informal Logic 249, 249 (emphasis in original).

The most straightforward manner of reasoning is using an argument to support a certain interpretation (or position). This can be called direct or ostensive reasoning.[13] To demonstrate this, let us consider some of the examples that Ronald Dworkin uses to distinguish arguments based on rules, principles and policies.[14] A lawyer may refer directly to a rule that a will is invalid unless it is signed by three witnesses to argue that a particular will bearing only two signatures is not valid. Or a lawyer may directly invoke the principle that no one can profit from his own crime to argue that a murderer cannot inherit from the person he murdered. And, in either example, a lawyer who argues that sticking to the relevant rule or principle will induce parties to take due care when making a will or considering murder is using a direct argument from policy.

However, a lawyer can also support a party's position not by arguing for it directly, but rather by attacking the position the opposing party defends or might defend. In such indirect or apagogic[15] reasoning, the lawyer points out why the other party's position is contrary – in Dworkinian terms – to a specific legal rule, principle or policy. A lawyer may, for example, argue that preventing a murderer from inheriting from the person he murdered would be contrary to the principle that punishment should be limited to what the legislature has stipulated. Or the lawyer may argue that validating a will with only two signatures may risk causing parties to be less careful in the future when making a will. A special instance of this approach is when lawyers do not merely criticize the position of an opposing party, but themselves create a hypothetical counterargument to their own position. In those cases, rather

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13 This distinction is already present in the work of Immanuel Kant. Immanuel Kant, *Kritik der reinen Vernunft* (Johann Friedrich Hartknoch 1781) 789.

14 Dworkin, 'The Model of Rules' (n 7) 22ff. See also Dworkin, *Taking Rights Seriously* (n 7) 22ff.

15 From the Greek ἀπαγωγή (to lead away). This type of reasoning is already discussed by Aristotle. Aristotle, *Analytica Priora* (first published c 350 BC, Hugh Tredennick trs, Harvard University Press 1962) book I, 29.

than providing reasons to support a certain position, the lawyer points to a fictitious opposite position and demonstrates how absurd that position is.

While ostensive arguments are based on *modus ponens* reasoning, apagogic arguments depend on the *modus tollens*. In the case of *modus ponens*, the antecedent is confirmed and therefore the conclusion follows (formally $P \rightarrow Q, P \vdash Q$).[16] The classical example of this is: All humans are mortal; Socrates is a human; therefore, Socrates is mortal. In *modus tollens*, the consequent is denied and therefore the antecedent must be denied as well (formally $P \rightarrow Q, \neg Q \vdash \neg P$). [17] An example could be: All gods are immortal; Socrates is not immortal; therefore, Socrates is not a god. Both forms of reasoning are valid syllogisms.[18]

The fact that, in apagogic reasoning, the consequent is denied seems to have led some authors to assimilate reductions to the absurd to consequentialist or pragmatic arguments.[19] Other authors argue that it is an example of

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16 In other words: *P* implies *Q; P* is true; therefore, *Q* must also be true.

17 In other words: *P* implies *Q*; *Q* is false (not true); therefore, *P* must also be false (not true).

18 These are short versions of such argumentations. Ostensive reasoning based on *modus ponens* can involve various steps, for example: All animals are mortal; humans are animals; Socrates is a human; therefore, Socrates is mortal. The same is true for apagogic reasoning, which in that case can take the form of a slippery slope argument. See Candice Shelby, 'Reductio Ad Absurdum and Slippery Slope Arguments: Two Sides of the Same Coin?' (2010) 1 Annales Philosophici 77; Douglas Walton, 'The Basic Slippery Slope Argument' (2015) 35 Informal Logic 273, 291.

19 See Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart 2012) 219; Frederik Peeraer, *Juridisch Argumenteren* (Gompel&Scavina 2019) 212. Joxerramon Bengoetxea also discusses apagogic reasoning under the heading of functional, teleological and consequentialist arguments, although he also sees it being used in systemic contexts. Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice* (Oxford University Press 1993). Similarly, Thomas Bustamante considers it to be a type of pragmatic argument, but admits links with systematic arguments, i.e. arguments from principles. Thomas Bustamante, 'On the Argumentum Ad Absurdum in Statutory Interpretation: Its Uses and

systematic argumentation, presumably because it uses a logic of inference.[20] I do not think either of these categorisations is correct. As pointed out above, the categories of consequentialist and systematic arguments only make sense if one looks at the content of the argumentation. The distinction between direct and indirect arguments cuts across any categorisation based on the content of an argument, since it looks at the way an argument is used. It may well be that certain types of arguments are more suitable for indirect reasoning than others. For example, all the examples of consequentialist arguments that MacCormick discusses are indirect forms of argument.[21] This may be because such arguments usually require balancing and therefore lend themselves more to indirect reasoning. But, as this article aims to show, that does not mean that the distinction between direct and indirect reasoning can simply be ignored. In the remaining sections, I will indeed point out how important indirect arguments are in legal reasoning and why this matters.

III. THE IMPORTANCE OF APAGOGIC REASONING: THE EXAMPLE OF *EFFET UTILE*

The importance of the distinction between ostensive and apagogic reasoning becomes apparent when looking at the use of the *effet utile* argumentation by the CJEU.

Normative Significance' in Christian Dahlman and Eveline Feteris (eds) *Legal Argumentation Theory: Cross-Disciplinary Perspectives* (Springer 2013) 21.

20 See Lenaerts and Gutierrez-Fons (n 4) 17. For a brief discussion of this categorisation, see also Harm Kloosterhuis, 'Ad Absurdum Arguments in Legal Decisions' in Josep Aguiló-Regla (ed), *Logic, Argumentation and Interpretation: Proceedings of the 22nd IVR World Congress Granada 2005*, vol 5 (Franz Steiner 2007) 68, 71. Ulrich Klug already pointed out that both systematic and teleological arguments can be used apagogically. *Juristische Logik* (Springer 1951) 142-43.

21 MacCormick (n 8). 129-51.

1. The concept of effet utile

The concept of *effet utile* needs little introduction to scholars of European Union (EU) law. The CJEU often uses the term '*effet utile*' explicitly in its judgments, but sometimes follows the same logic using other terms, such as 'effectiveness' ('*efficacité*' in the original French).[22] *Effet utile* reasoning is often viewed as a form of reasoning from policy (or pragmatic or teleological reasoning).[23] Other scholars, including the current president of the CJEU (writing in a personal capacity), have pointed out that *effet utile* reasoning can also be viewed as a form of systematic interpretation.[24] Regardless of how one wants to categorise it, however, *effet utile* reasoning can take both a direct and an indirect form.

An example of ostensive use of the *effet utile* argument can be identified in the judgment in *CIA Security*, where the CJEU ruled that, although directives cannot have horizontal direct effect, national courts must decline to apply a national technical regulation in a horizontal dispute if that regulation was not notified to the Commission as required by Directive 83/189.[25] To come to this conclusion, the Court held that:

> (…) it is undisputed that the aim of the directive is to protect freedom of movement for goods by means of preventive control and that the obligation to notify is essential for achieving such Community control. The effectiveness of Community control will be that much greater if the directive is interpreted as meaning that breach of the obligation to notify

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22 See e.g. Case 26/62 *Van Gend en Loos v Administratie der Belastingen* [1963] ECR 2, 13; C-194/94 *CIA Security International SA v Signalson SA and Securitel SPRL* EU:C:1996:172, para 48. For a discussion of other terms, see Mayr (n 1) 8; Šadl (n 3) 26.

23 See Roger-Michel Chevallier, 'Methods and Reasoning of the European Court in its Interpretation of Community Law' (1965) 2 Common Market Law Review 21, 32; Tridimas (n 4) 208; Mariele Dederichs, *Die Methodik des EUGH* (Nomos 2003) 27; Potacs (n 4) 469; Mayr (n 1) 9; Lenaerts and Gutierrez-Fons (n 4) 32.

24 See Lenaerts and Gutierrez-Fons (n 4) 17.

25 *CIA Security* (n 22).

> constitutes a substantial procedural defect such as to render the technical regulations in question inapplicable to individuals.[26]

In other words: the Court's interpretation of the effect of the directive was aimed at *giving greater* effectiveness (or *effet utile*) to Community control, which was one of the objectives of the directive.

In many other cases, however, the formulation is apagogic. In those circumstances, the Court will reject a certain interpretation because it would do away with the *effet utile* of a norm of EU law. This is apparent, for example, in *van Duyn*, where the Court established the (vertical) direct effect of directives.[27] To do so, the Court reasoned:

> It would be incompatible with the binding effect attributed to a directive by Article 189 [of the EEC Treaty] to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it in to consideration as an element of Community law.[28]

In other words: the Court's interpretation of the effect of the directives was aimed at *avoiding lower* effectiveness (or *effet utile*) of the obligations included in the directive. But the formulation can also be stronger, avoiding not merely *lower* effectiveness, but even a *complete lack* of effectiveness. This is indeed the approach famously used by the Court in *Van Gend en Loos*, when it established the principle of direct effect for the first time.[29] To do so, the Court argued:

> A restriction of the guarantees against an infringement of Article 12 [of the EEC Treaty] by Member States to the [infringement] procedures under

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26 Ibid para 48.

27 Case 41/74 *Yvonne van Duyn v Home Office* EU:C:1974:133.

28 Ibid para 12.

29 *Van Gend en Loos* (n 22).

> Article 169 and 170 [of the EEC Treaty] would remove all direct legal protection of the individual rights of their nationals. There is the risk that recourse to the procedure under these Articles would be ineffective if it were to occur after the implementation of a national decision taken contrary to the provisions of the [EEC] Treaty.[30]

Also in other cases, the Court used the specter of an ineffective European law to argue for a more effective interpretation of the EEC Treaty rules. In *Bosman*, for example, the Court established that professional footballers benefit from the free movement of workers and that football associations therefore could not restrict the number of players of a different EU nationality allowed to compete in their national leagues.[31] In its judgment, the Court explained that

> (…) the nationality clauses cannot be deemed to be in accordance with Article 48 of the [EEC] Treaty, otherwise that article would be deprived of its practical effect and the fundamental right of free access to employment which the [EEC] Treaty confers individually on each worker in the Community rendered nugatory (…).[32]

The above examples suggest that *effet utile* reasoning can be used in both a direct and an indirect manner. The next question, then, is whether the CJEU uses *effet utile* reasoning more often in an ostensive or an apagogic manner.

2. Empirical Analysis

To answer this question, one could review the case law of the CJEU since its inception in a systematic manner.[33] However, the volume of judgments and other decisions adopted by the CJEU since it was founded as the Court

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30 Ibid 13.

31 Case C-415/93 *Union royale belge des sociétés de football association and Others v Bosman and Others* EU:C:1995:463.

32 Ibid para 129.

33 Dederichs has done so, but only for the year 1999. The four examples of *effet utile* reasoning she identified in the case law of the CJEU of that year are all apagogic. Dederichs (n 23) 81-82.

of Justice of the European Coal and Steel Communities in 1952 is very significant, running into the hundreds of thousands of pages. A systematic review of this case law could in practice only be undertaken in an automated manner. Such an approach is problematic for a variety of reasons. First, there are obstacles to making the case law of the Court machine-readable. In particular, older judgments are only available in print form (in the European Court Reports) or scanned copies uploaded to the website of the CJEU, which limits the quality and readability of the text. A striking example of this can be seen in the judgment in *Van Gend en Loos*: on page 25 of the French-language European Court Reports (*Receuil de la Jurisprudence de la Cour*) of 1963, the word '*inefficacité*' is split over two lines ('*ineffi-*' and '*cacité*') and therefore is not picked up by the search engine on the curia website.[34]

Second, as is apparent from the examples discussed in this article, there is not one single formula that the Court employs when referring to the effectiveness of EU law. Different words are used by the Court to express *effect utile* reasoning and it would be difficult to come up with an exhaustive list of trigger words to allow automatic identification of relevant judgments. Finally, this problem is even more acute in respect of ostensive and apagogic reasoning. Indeed, the distinction between direct and indirect reasoning does not depend on the use of certain words but rather on whether an argument is used to support a certain interpretation or to contest it. Again, this would be a difficult task to automate.

I have therefore opted to base my research on a sample of CJEU case law. This sample comprises the 47 CJEU judgments in the so-called 'important pre-accession case law' up to the year 2000.[35] This collection consists of EU judicial decisions selected by the European Commission and the CJEU for translation into the official languages of the countries who acceded to the

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[34] This probably explains why it was not included in the selection used by Šadl (n 3). For more on this, see n 44.

[35] 'Judgments from the Historic Case-Law in the Languages of the 2004, 2007 and 2013 Accession Countries' (n 5).

EU in 2004. The first batch that was translated consisted of 57 decisions from the period 1963–2000, 47 of which were judgments of the CJEU (the batch also included three opinions of the CJEU and seven judgments of the Court of First Instance). [36]

This selection of judgments is, of course, only a snapshot of the Court's jurisprudence. It spans case law from only four of the now almost seven decades of the Court's operation.[37] It is also not a 'neutral compilation' but rather an attempt by the CJEU 'to (self-)define its legal order.'[38] This also means that certain subject matters are overrepresented in the selection while others are underrepresented.[39] Furthermore, it is a selection that contains some of the foundational cases of EU law.[40] However, because of the importance of the *effet utile* figure in EU law, this also likely means that this figure is more present in these judgments than in the case law overall. The selection therefore is not random but purposive for the analysis of the use of *effet utile* reasoning by the Court.[41]

By reviewing each of these 47 CJEU judgments, I determined which ones contain *effet utile* reasoning. This assessment is based on the French language text, French being the working language of the Court and therefore the source of the translations available in other languages. I have only looked at

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36 An additional batch of 79 cases from the period 2001–04 was translated afterwards. These are not included in my analysis.

37 The first case in the 'important pre-accession case law' is *Van Gend en Loos* (n 22), while the most recent judgment in the first batch that I use here is Case C-376/98 *Germany v Parliament and Council* EU:C:2000:544.

38 Urška Šadl and Mikael Rask Madsen, 'A Selfie from Luxembourg: The Court of Justice's Self-Image and the Fabrication of Pre-Accession Case-Law Dossiers' (2016) 22 Columbia Journal of European Law 327, 328.

39 Ibid 337.

40 '[A] great majority of selected cases (eighty-seven percent) are among the top ten percent of most cited cases in the full network of 9,581 cases [as of 2013], and twenty-nine percent of selected cases are among the top one percent of most cited cases in the full network'. Ibid 339–40.

41 On purposive samples, see Robert M Lawless, Jennifer K Robbennolt and Thomas S Ulen, *Empirical Methods in Law* (Aspen 2010) 149.

the Court's own reasoning in the case and not the description of the arguments of the parties in the case.[42] While I have taken into account the use of certain keywords associated with *effet utile* reasoning (in particular '*effet utile*', '*utilité*', '*(pleine) efficacité*' and '*(plein) effet*'), I have also considered the context in which these words are used to determine whether they truly form part of the reasoning of the Court. I have therefore not counted instances where the word '*effet*', for example, is used in other contexts in these judgments.[43] This manual coding of the sample uncovered 21 judgments in which *effet utile* reasoning is used, which are listed in the Appendix together with a brief extract of the relevant wording in the judgment. This selection largely corresponds with the judgments identified by Urška Šadl in a 2015 article, which she categorized as 'historic *effet utile* cases'.[44]

Next, I determined in which of these instances *effet utile* is used in a direct manner and in which instances it is used in an indirect manner. This required an assessment of the relevant wording within the context of the broader reasoning. It is not easy to formulate strict rules in this respect. However,

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42 So in the older case law I ignored the part of the judgment which is entitled '*En fait*' in the French version and only considered the '*En droit*' part.

43 For example, in *Krombach*, the Court uses this word in the expression '*[a] cet effet, (…)*', which has nothing to do with *effet utile* reasoning. Case C-7/98 *Dieter Krombach v André Bamberski.* EU:C:2000:164 para 25.

44 See Šadl (n 3). I am grateful to Urška Šadl for discussing her methodology with me. My list differs from hers in two respects. First, I have not included the judgment in *Cassis de Dijon*, as the relevant reasoning there merely concerns the fact that Member States can restrict free movement 'in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision (…)', which does not seem to rely on *effet utile*. Case 120/78 *Rewe v Bundesmonopolverwaltung für Branntwein* EU:C:1979:42 para 8. Second, I included the judgment in *Van Gend en Loos* because it bases the principle of direct effect on 'the risk that recourse to [infringement proceedings] would be ineffective if it were to occur after the implementation of a national decision taken contrary to the provisions of the [EEC] Treaty'. *Van Gend en Loos* (n 22) 13. For the likely reason why this judgment was not included in Šadl's list, see n 39 and accompanying text.

apagogic reasoning will often involve the use of words with negative connotations, including explicit negations ('*in-efficacité*', '*in-compatible*', '*nier*', '*éviter*') and words that indicating weakening ('*affaibli*', '*amoindri*', '*porter atteinte*'). Ostensive reasoning, on the other hand, generally uses more positive wording ('*assurer*', '*renforcée*'). The last column of the table in the Appendix shows whether I considered an instance of *effet utile* reasoning to be ostensive or apagogic.

As is apparent from the Appendix, in virtually all instances where *effet utile* reasoning is used in the 'important pre-accession case law', it is used in an apagogic manner. This is undoubtedly the case for 17 out of the 21 judgments. There are only a few (possible) exceptions. The first are *Von Colson* and *Johnston*, which concern the issue that 'Member States must take measures which are sufficiently effective to achieve the aim of [a] directive'.[45] However, the key point in these cases was, of course, what this obligation entails. In *Johnston*, to answer this question, the Court reasoned apagogically: 'If every provision of Community law were held to be subject to a general proviso, regardless of the specific requirements laid down by the provision of the EEC Treaty, this might impair the binding nature of Community law and its uniform application.'[46] In *Von Colson*, on the other hand, the Court simply concluded that the wording of the directive in question did not prescribe a specific sanction.[47] The second possible exception is the *Chernobyl* judgment, in which the CJEU discusses the standing of the European Parliament before the Court. While it refers there to 'the Court's duty to ensure that the provisions of the Treaties concerning the institutional balance are fully applied',[48] it points out that there is a procedural gap in the treaties (an absurdity), which it overcomes by giving the Parliament

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45 Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* EU:C:1986:206, para 17. See also Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* EU:C:1984:153, para 15, which contains similar wording.

46 *Johnston* (n 45) para 26.

47 *Von Colson* (n 45) para 18.

48 Case 70/88 *Parliament v Council* EU:C:1991:373, para 25.

standing. The last possible exception is the *CIA Security* judgment, already discussed above, which is, in my view, the only real ostensive use of the *effet utile* concept. Interestingly, this is a fairly controversial judgment, in which the CJEU introduced the theory of the incidental direct effect of directives in EU law.[49] The analysis of the 'important pre-accession case law' therefore indicates that the CJEU mostly uses *effet utile* in an apagogic manner.

3. Conclusion

Effet utile reasoning can be both direct (ostensive) and indirect (apagogic). To determine whether the CJEU uses *effet utile* more often directly or indirectly, it is worth considering the so-called 'important pre-accession case law', as it consists of some of the foundational cases of EU law and contains many instances of *effet utile* reasoning. An empirical analysis of the judgments in this selection of the case law shows that the Court, in almost all instances, used *effet utile* reasoning in an apagogic sense. Indeed, this is undoubtedly the case in 17 out of the 21 judgments. In only one instance is the Court's *effet utile* reasoning clearly ostensive, whereas in three other cases it could possibly be characterized as such. Based on this sample, it therefore seems that the CJEU uses *effet utile* reasoning mostly in an apagogic manner.

IV. THE RISKS OF APAGOGIC ARGUMENTS

Does it matter whether arguments are used in a direct or indirect way? I believe it does and, in the remainder of this paper, I will discuss some characteristics of apagogic arguments that may explain why *effet utile* is usually formulated in this negative manner and how this elucidates its role in the case law of the CJEU. In Section IV.1, I will point out that apagogic reasoning can lead to fallacies, in particular in the case of non-binary forms of reasoning such as legal argumentation. Section IV.2 will then point to the

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[49] See Anthony Arnull, 'Editorial: The Incidental Effect of Directives' (1999) 24 European Law Review 1. This theory has since been somewhat narrowed in the judgment. See Case C-122/17 *Smith v Meade and Others* EU:C:2018:631.

related issue that indirect reasoning reveals less about the logic behind an interpretation of the law than does direct reasoning. Section IV.3, finally, will link these conclusions to the debate about the alleged activism of the CJEU.

1. Apagogic Reasoning Can Lead to Fallacies

Apagogic argumentation can be a valid form of reasoning. Indeed, the reduction to the absurd has been used since antiquity to prove mathematical propositions. The most famous example is the proof of the irrationality of √2 (which is the same as the proof of the incommensurability of the side and the diagonal of a square), sometimes attributed to Euclid.[50] This proof starts from the assumption that √2 is a rational number (i.e. it can be expressed as a fraction of two integers) and shows that such an assumption leads to a contradiction. Therefore √2 must be an irrational number.[51]

However, such reasoning is only valid if the law of the excluded middle applies.[52] In other words, it applies to binary situations (i.e. when the falsity

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[50] It was in fact contained in early editions of Euclid's *Elements* as proposition 117 of book X, but is now considered an interpolation and therefore no longer present in modern editions. See Zoran Lučić, 'Irrationality of the Square Root of 2: The Early Pythagorean Proof, Theodorus's and Theaetetus's Generalizations' (2015) 37 The Mathematical Intelligencer 26, 27.

[51] In more detail: Assume that √2 is a rational number (i.e. it can be expressed as x/y, where x and y are integers with no common factors, since otherwise common factors can be eliminated). Following the theorem of Pythagoras, $x^2/y^2 = 2$, which can be rewritten as $x^2 = 2y^2$. This implies that x is even (only even integers have even squares) and hence a multiple of 2. In other words, x= 2z. If we insert this in the formula in step 2, we get $(2z)^2 = 2y^2$, which can be rewritten as $4z^2 = 2y^2$ or as $2z^2 = y^2$. This implies that y is even (only even integers have even squares) and hence a multiple of 2. x and y are therefore both multiples of 2 which contradicts the assumption that x and y do not have common factors.

[52] See Jean-Louis Gardies, *Le raisonnement par l'absurde* (Presses universitaires de France 1991) 183. See also Douglas Walton, *The New Dialectic: Conversational Contexts of Argument* (University of Toronto Press 1998) 160: 'Negative argumentation from consequences is very closely related to a form of argument well known in traditional logic – the dilemma'.

(absurdity) of the proposition implies that its negation (opposite) is true). On that condition, it is valid based on the *modus tollens* syllogism (formally: $P \rightarrow Q, \neg Q \vdash \neg P$).[53] This is why such reasoning works in mathematics. Since a number is either rational or irrational, the absurd conclusions drawn from the assumption that √2 is a rational number necessarily lead to the conclusion that √2 must be an irrational number.

However, in non-binary situations, the use of indirect reasoning is more problematic. If we can demonstrate that a certain interpretation of the law leads to absurd or unacceptable conclusions, that should not necessarily lead us to succumb to the opposite interpretation. A third (and possibly fourth, fifth, etc) interpretation may be available that is not excluded by the interpretation leading to the absurd or unacceptable conclusion. If such alternative interpretations have not first been rejected based on other arguments, then relying on apagogic reasoning risks amounting to the fallacy of the false dilemma (or false dichotomy).

An obvious example of this is *Van Gend en Loos*, the first judgment in the 'important pre-accession case law' and, also, the earliest example of *effet utile* reasoning in that selection of cases. The Court suggests that the only alternative to the direct effect of EU law is for the Commission or other Member States to bring infringement proceedings for breaches of EU law (which, according to the Court, would be 'ineffective if it were to occur after the implementation of a national decision taken contrary to the provisions of the [EEC] Treaty').[54] In reality, however, several other alternatives are available.

Another solution could have been to let national law determine the effect of EU law. This is somewhat of an intermediate solution, as it would have resulted in a differential effect of EU law depending on the Member State. In Member States with a monistic tradition, national law would imply that

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53 See Kloosterhuis (n 20) 69; Peeraer (n 19) 213.

54 *Van Gend en Loos* (n 22) 13.

EEC Treaty articles could be directly applicable, whereas in countries with a dualistic tradition, this would not be the case (and resort to infringement proceedings would indeed be the only enforcement tool available). This possibility was discussed extensively by some of the intervening Member States (e.g. the Netherlands and Belgium)[55] and also by Advocate General Roemer in his opinion in this case.[56]

Another alternative could have been to give direct effect/applicability only to regulations (as foreseen in Article 189 of the EEC Treaty) and not to treaty articles or other legislation. In the instant case, this would have implied that no direct effect could be granted to Article 12 of the EEC Treaty, which barred Member States from increasing custom duties. But this interpretation would not result in the removal of 'all direct legal protection of the individual rights of [Member State] nationals', as the Court states.[57] Such rights could still exist, though they would be dependent on the promulgation of relevant regulations.

A fifth option, finally, could have been to interpret the standing requirements for individuals to bring cases to the CJEU more liberally, so that it would be easier for individuals to challenge national rules that were contrary to the EEC Treaty before the CJEU, rather than before national courts. This solution must have been contemplated by the Court at the time of the *Van Gend en Loos* judgment, although there is no trace of it in the judgment itself. Indeed, the *Plaumann* case, in which the Court ultimately decided to restrict standing for individuals to bring direct actions, was pending before the Court at the time of the *Van Gend en Loos* judgment. Though *Plaumann* was decided a year after *Van Gend en Loos*, the request for a preliminary ruling in *Plaumann* was actually sent to the Court before

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55 *Van Gend en Loos* (n 22) 6-8.

56 Case 26/62 *Van Gend en Loos v Administratie der Belastingen* [1963] ECR 16, Opinion of AG Roemer, 19-24.

57 *Van Gend en Loos* (n 22) 13.

the one for *Van Gend and Loos*.[58] Admittedly, *Plaumann* concerned direct actions against acts of the institutions, while *Van Gend and Loos* concerned non-compliance by Member States with EU law. Still, the question of the standing of individuals could have had an impact in both cases.

The above discussion shows that several other interpretations were available beyond the two extremes which the CJEU highlighted. If such alternatives had been considered, it would not have been possible to deduce from the limitations of infringement proceedings that direct effect needed to be granted to Treaty articles under the conditions mentioned in *Van Gend en Loos*.

In theory, the fallacy of the false dilemma can also arise in the case of ostensive reasoning. Indeed, all indirect arguments can be rewritten as direct arguments, just like *modus tollens* reasoning can be rewritten as *modus ponens* reasoning.[59] Instead of arguing that a certain interpretation of European law would result in the *ineffectiveness* of European law, the Court could argue that another interpretation would lead to the *effectiveness* of European law. Instead of arguing that a certain interpretation would weaken the effectiveness of European law, the Court could argue that another interpretation would increase the effectiveness of European law.

There is, however, a difference between the two formulations. When it is used in an ostensive manner, *effet utile* reasoning seems to allow the Court to add effectiveness to European law which it did not enjoy before. In the case of apagogic reasoning, on the other hand, the Court seems to merely avoid that European law becomes ineffective or less effective. The latter not only appears less intrusive, but it also appears to be the essential role of the

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58 Case 25/62 *Plaumann v Commission* [1963] ECR 197.

59 See Jansen (n 12) 257; Peeraer (n 19) 100.

Court, which is now enshrined as 'ensur[ing] that in the interpretation and application of the Treaties the law is observed.'[60]

One could say that, in the case of apagogic reasoning, the false dilemma can be combined with the straw man argument: rather than arguing for one interpretation of the rules, the Court argues against another interpretation of the rules that is wrongly believed to be (or presented as) the only alternative. In a discussion of the case law on the supremacy of EU law, CJEU Judge Mancini has referred to the specter that European law would be ineffective or less effective as the 'or else' argument: 'the alternative to the supremacy clause would have been a rapid erosion of the Community; and this was a possibility that nobody really envisaged, not even the most intransigent custodians of national sovereignty.'[61] Indirect arguments in some way turn a 'Manichaeistic worldview into a dogma'.[62] It is as if the Court states: 'either you are with us or your against us'; 'either you accept this conclusion or the sky will collapse'. This mechanism makes the use of apagogic reasoning all the more effective, but also all the more dangerous.

This is not to say that creating contrasting solutions may not be a useful tool in some circumstances to highlight certain aspects of the question that needs elucidation. This is indeed why apagogic reasoning is so attractive in mathematics. Furthermore, when it has first been established (based on other arguments) that there are only two possible interpretations available, there is obviously no *false* dilemma and indirect reasoning can be used to reject one of the two interpretations and to accept the other. However, when there is no clear dichotomy and, instead, multiple interpretations are possible,

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60 Consolidated Version of the Treaty on European Union [2012] OJ C326/13, art 19.

61 Giuseppe Federico Mancini, 'The Making of a Constitution for Europe' in Giuseppe Federico Mancini, *Democracy and Constitutionalism in the European Union: Collected Essays* (Hart 2000) 1, 5.

62 de Waele (n 4) 168.

apagogic reasoning may come at the cost of nuance – something which may not be very relevant in mathematics, but is essential in legal reasoning.

2. Apagogic Reasoning Does Not Reveal the Reasons for Decisions

The risk that apagogic reasoning may lead to a false dilemma is further compounded by a peculiar characteristic of such reasoning that was noted by German philosopher Immanuel Kant. While Kant considered both ostensive and apagogic reasoning to be valid ways for 'pure reason' to reach a certain conclusion, he nevertheless considered the former superior to the latter. This superiority stems from the fact that ostensive reasoning provides insight into the sources of certainty, while apagogic reasoning does not.[63] This is apparent from the examples given earlier. In the example of the *modus tollens* (e.g. all gods are immortal; Socrates is not immortal; therefore, Socrates is not a god), we validly conclude that Socrates is not a god, but we know neither why he is not a god nor what other kind of being he may be. In the case of the *modus ponens* (e.g. all humans are mortal; Socrates is a human; therefore, Socrates is mortal), on the other hand, the reasoning also reveals what Socrates is (namely, a human) and, therefore, the explanation as to why he is mortal. In *modus ponens* reasoning, we come to a conclusion (Q) based on a fact (P), whereas, in *modus tollens* reasoning, the conclusion ($\neg P$) is based on a non-fact ($\neg Q$). The *modus tollens* gives us just as much certainty that the conclusion is true but does not contain facts which explain it.

From the Kantian perspective of pure reason, this feature of apagogic reasoning may be a disadvantage. But in the world of practical adjudication, the dissimulating aspect of apagogic reasoning may make it an attractive tool in some circumstances. One such circumstance was highlighted by the current president of the CJEU, writing in his personal capacity:

> [T]he ECJ operates under the principle of collegiality. In light of the latter principle, reaching an outcome based on consensus is of paramount

[63] See Kant (n 13) 789-91.

> importance for the daily inner workings of the ECJ. Accordingly, for the sake of consensus, in hard cases the discourse of the ECJ cannot be as profuse as it would be if dissenting opinions were allowed. As consensus-building requires bringing on board as many opinions as possible, the argumentative discourse of the ECJ is limited to the very essential.[64]

Apagogic reasoning can be a tool to reduce reasoning to the very essential. *Van Gend en Loos* again provides an iconic example of this. Historical research suggests that this was a 4:3 ruling by the CJEU and that there was a tactical decision made by the Court not to discuss the doctrine of primacy in this judgment, even though it was closely related to the issue of direct effect.[65]

Of (perhaps less controversial) interest is the example which Koen Lenaerts himself gives of the approach discussed above: the case of *Ruiz Zambrano*, in which the CJEU ruled that, even in the absence of a cross-border element, EU citizenship precludes national measures that deprive EU citizens of the enjoyment of the substance of their citizenship rights.[66] Despite – or, in light of what is stated above, because of – the importance of the Court's ruling in this case, the reasoning in the judgment is very brief, covering only six paragraphs, concluding with a reduction to absurdity:

> It must be assumed that such a refusal [to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside] would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources

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64 Koen Lenaerts, 'The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice' in Maurice Adams and others (eds), *Judging Europe's Judges* (Hart 2013) 13, 46. See also Tridimas (n 4) 210 and de Waele (n 4) 371-72.

65 See Morten Rasmussen, 'Revolutionizing European Law: A History of the Van Gend en Loos Judgment' (2014) 12 International Journal of Constitutional Law 136, 154.

66 Case C-34/09 *Ruiz Zambrano* EU:C:2011:124.

> to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.[67]

The use of this apagogic argument allowed the Court to stop there, without explaining in more detail the scope of EU citizenship – something which it needed to clarify in subsequent judgments. The Court could simply say "this will not stand" and leave it for another day to decide (or indeed agree *in camera*) what *will* stand. It was therefore only in subsequent judgments that further clarifications were provided as to what the notion of EU citizenship entails, following what Lenaerts calls a 'stone-by-stone approach'.[68]

3. The Relevance for the Debate on the Alleged Judicial Activism of the CJEU

The previous observations are relevant to the debate on the perceived activist attitude of the CJEU. To be clear, this paper does not purport to assess the merits of the claims that the CJEU is activist or not. I merely want to demonstrate how the fact that *effet utile* reasoning is used in an apagogic manner bears on the role this kind of reasoning can play for a court, including enabling more interventionist rulings.

A number of authors have claimed that the CJEU is an activist court or, at least, more activist than comparable courts. This debate was in many ways instigated by Hjalte Rasmussen's doctoral dissertation, which claimed that the case law of the CJEU in the 1960s and early 1970s was characterized by a 'broadened and intensified judicial incursion into Community policymaking' and that this had provoked a backlash amongst Member States.[69] Joseph Weiler has similarly argued that the CJEU only respects the boundary between law and politics to the extent that it itself 'draws the line

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67 Ibid para 44.

68 Lenaerts (n 64) 50.

69 Hjalte Rasmussen, *On Law and Policy in the European Court of Justice* (Martinus Nijhoff 1986) 377.

that divides "law" from "politics" [and then] does indeed stand firmly behind it'.[70]

On the other hand, other authors claim either that the CJEU is not activist or that any (perception of) activism is the consequence of the particular role the CJEU plays in the EU legal order. These authors point out, first of all, that the European treaties gave the court the authority to interpret the provisions of the European treaties, which were drafted in broad terms and therefore required more interpretation than is customary in national orders with established legal traditions.[71] These circumstances made the CJEU, from the beginning, a 'trustee court …, operat[ing] in an unusually permissive strategic environment'.[72] Furthermore, in the absence of preparatory texts, the general objectives set forth by the authors in the opening articles of the Treaty establishing the European Coal and Steel Community and the EEC Treaty seem to have taken the place usually taken up by historical interpretation in continental legal orders.[73] This approach was articulated in Pierre Pescatore's famous statement that teleological reasoning is a method of interpretation that is 'particularly suited to the characteristics of the treaties instituting the Communities'.[74] A purpose-

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70 Joseph Weiler, 'Epilogue: Judging the Judges – Apology and Critique' in Maurice Adams and others (eds), *Judging Europe's Judges* (Hart 2013) 235, 246.

71 See Giulio Itzcovich, 'The Interpretation of Community Law by the European Court of Justice' (2009) 10 German Law Journal 537, 558; Mayr (n 1) 6; Lenaerts and Gutierrez-Fons (n 4) 31-32. For an earlier formulation of this argument, see also Bengoetxea (n 19) 99ff.

72 Alex Stone Sweet, 'The European Court of Justice' in Paul Craig and Gráinne De Búrca (eds), *The Evolution of EU Law* (OUP 2011) 121, 127.

73 See Chevallier (n 23) 30-32. See also Lionel Neville Brown and Tom Kennedy, *The Court of Justice of the European Communities* (Sweet & Maxwell 2001) 330-334; Lenaerts and Gutierrez-Fons (n 4) 23.

74 '*[I]l s'agit d'une méthode particulièrement appropriée aux caractéristiques propres des traités instituant les Communautés*'. Pierre Pescatore, 'Les Objectifs de la Communauté européenne comme principes d'interprétation dans la jurisprudence de la Cour de Justice' in *Miscellanea WJ Ganshof van der Meersch:*

driven and necessarily dynamic interpretation was, in this reading, inherent in EU law.[75]

As already indicated, it is not my intention in this paper to take a position in this debate. However, regardless of whether one believes that the CJEU exercises sufficient judicial restraint, *effet utile* reasoning is often perceived as a tool for activism. It is then stated that, through the principle of *effet utile*, a court can give the *maximum* effect to legal provisions.[76] Conway makes this point succinctly, stating: 'It goes almost without saying that the EU as a legal and political system should be effective, but that does not mean that the ECJ can justifiably innovate whenever it considers an innovation would be more effective.'[77]

The same point is made by Michael Potacs, who has made a distinction between *effet utile* in the narrow sense, which aims at avoiding the lack of meaning of a legal provision, and *effet utile* in the broader sense, which aims at giving the widest possible effect to a provision.[78] This distinction is therefore quite similar to how I have distinguished between indirect and direct use of the *effet utile* argument. Potacs considers that only *effet utile* in the broader sense would result in a tool for activism. According to him, the CJEU uses *effet utile* mostly in this broader sense, thereby allowing it to develop the law in an activist manner. The limited empirical analysis above, on the contrary, suggests that the CJEU usually uses *effet utile* in an indirect manner. Therefore, it seems doubtful that the CJEU uses *effet utile* in the maximalist manner Potacs proposes. Even in the 'important pre-accession

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Studia ab discipulis amicisque in honorem egregii professoris edita, vol 2 (Établissements Emile Bruylant 1972) 325, 328 (emphasis in original).

75 See Tridimas (n 4) 205; Itzcovich (n 71) 558; Mayr (n 1) 6; Lenaerts and Gutierrez-Fons (n 4) 31-32.

76 Jolyon Maughan, 'Legislative Efficacy in the UK and EC' [1995] (4) Inter Alia: University of Durham Student Law Journal 8, 8.

77 Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press 2012) 117.

78 See Potacs (n 4) 473.

case law', a snapshot 'highlighting [the CJEU's] own centrality in the formation of the EU legal order',[79] the CJEU often limits itself to an apagogic approach. If Potacs' views on *effet utile* in its narrow and broad senses are followed, the empirical analysis above would suggest that the CJEU is not activist at all.

However, I think such a conclusion would be premature. Indeed, the fact (discussed in the previous two sections) that apagogic reasoning leads to fallacies and does not reveal the reasons for decisions means that it gives the Court extra leeway to come up with its own interpretation of the law. This may allow the Court to come up with interpretations that go significantly beyond previous case law, potentially in an integrationist manner (which is often equated with judicial activism).

To what extent this potential is realized depends on a number of factors. For instance, it may depend on whether the indirect use of the *effet utile* argument is the principal, or indeed the only, basis for the Court's judgment or, on the contrary, whether it is merely an additional, or even supererogatory, argument. This is a question which is beyond the scope of this paper but could clearly be the subject of further research. While there is no easy way to determine the importance of a specific kind of argument in an individual judgment, such further research could at least establish whether apagogic *effet utile* arguments are the only arguments used by CJEU in specific rulings or whether they are used alongside other arguments. At the very least, this section of this paper constitutes a warning. Namely, if apagogic reasoning is the only basis for a court to support one interpretation of the law rather than another, then this should raise some suspicions. Indeed, by focusing only on the problems connected with a rejected interpretation of the law, the court may obscure the fact that it is venturing into uncharted territory by upholding its own alternative interpretation.

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[79] Šadl and Rask Madsen (n 38) 353–54.

V. Conclusion

This paper has aimed to show that legal reasoning cannot merely be distinguished by its content (e.g. whether it refers to a legal rule, a principle or a policy, to use the Dworkinian terminology), but also by its direct (ostensive) or indirect (apagogic) use of that content (i.e. whether it is used to defend or contest a position or interpretation). Indirect argumentation can even start from a hypothetical alternative rather than a position which a counterparty actually defends. An empirical analysis was conducted to determine whether *effet utile* reasoning by the CJEU is used mostly in a direct or indirect manner. An assessment of the 'important pre-accession case law' of the CJEU indicates that *effet utile* reasoning by the CJEU is mostly indirect: the Court points out how a certain interpretation of EU law would undermine or reduce its effectiveness and concludes that the opposite interpretation should be followed.

Such apagogic reasoning entails a potential for fallacy if one is not mindful of the risk of false dilemmas. The alternative interpretation that is rejected by the Court through indirect use of the *effet utile* argument may act as a straw man and create the (possibly false) impression that there are no alternatives to the interpretation ultimately supported by the Court. This potential for fallacious reasoning is compounded by the fact that apagogic reasoning creates greater opportunities to obscure the reasons on which conclusions are based.

That *effet utile* reasoning is mostly indirect may appear to counter the claim that the CJEU is using this type of reasoning in a maximalist and activist way. However, the opaqueness of apagogic reasoning and its potential for fallacies also create a potential for activism. This paper has not investigated the role that the indirect use of *effet utile* reasoning has played in the specific judgments considered or in the case law of the CJEU as a whole. It would therefore be inappropriate to conclude that such reasoning is always problematic or even activist. Rather, to assess the soundness of the Court's interpretation of EU law, it is important to determine what other arguments

the CJEU has used to support its interpretations and how central the (indirect) *effet utile* argument has been to the Court's reasoning.

APPENDIX: *EFFET UTILE* IN IMPORTANT PRE-ACCESSION CASE LAW

Case citation	Wording used (French version)	Reasoning
Case 26/62 Van Gend en Loos v Administratie der Belastingen EU:C:1963:1 [1963] ECR 7, 25.	'le recours à ces articles risquerait d'être frappé d'inefficacité'	Apagogic
Joined Cases 56 and 58/64 *Consten and Grundig v Commission of the EEC* EU:C:1966:41 [1966] ECR 433, 499-500	'cette interdiction serait sans effet'; 'pour mettre en échec l'efficacité du droit communautaire des ententes'	Apagogic
Case 2/74 *Reyners v Belgian State* EU:C:1974:68, para 50	'éviter que l'effet utile du traité ne soit déjoué'	Apagogic
Case 41/74 *Van Duyn v Home Office* EU:C:1974:133, para 9	'il serait incompatible avec l'effet contraignant'; 'l'effet utile d'un tel acte se trouverait affaibli'	Apagogic
Case 43/75 *Defrenne v SABENA* EU:C:1976:56, paras 27-37, 64	'contre l'effet direct'; 'l'efficacité de cette disposition ne saurait être affectée'	Apagogic
Case 106/77 *Amministrazione delle finanze dello Stato v Simmenthal* EU:C:1978:59, paras 18-24	'nier ... le caractère effectif', 'l'effet utile de cette disposition serait amoindri'; 'obstacle à la pleine efficacité des normes',	Apagogic
Case 44/79 *Hauer v Land Rheinland-Pfalz* EU:C:1979:290, para 14	'qu'elle porterait atteinte à l'unité matérielle et à l'efficacité du droit communautaire'	Apagogic
Case 149/79 *Commission v Belgium* EU:V:1982:195, para 19	'aurait pour effet de porter atteinte à l'unité et à l'efficacité de ce droit'; 'éviter … que l'effet utile et la portée des dispositions du traité ... soient limités'	Apagogic
Case 8/81 *Becker* EU:C:1982:7, paras 23, 29	'incompatible avec le caractère contraignant'; 'l'effet utile d'un tel acte se trouverait affaibli'; 'obligation serait privée de toute efficacité'	Apagogic
Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* EU:C:1984:153, para 15	'toutes les mesures nécessaires en vue d'assurer le plein effet de la directive'	Ostensive?
Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* EU:C:1986:206, paras 17, 26	'prendre des mesures qui soient suffisamment efficaces pour atteindre l'objet de la directive'; 'risquerait de porter atteinte au caractère contraignant et à l'application uniforme du droit communautaire'	Ostensive? and Apagogic
Case 267/86 *Van Eycke v ASPA* EU:C:1988:427, para 16	'ne pas prendre ou maintenir en vigueur des mesures … susceptibles d'éliminer l'effet utile'	Apagogic

Case citation	Wording used (French version)	Reasoning
Joined Cases 46/87 and 227/88 *Hoechst v Commission* EU:C:1989:337, paras 27, 64	'serait dépourvu d'utilité'; 'incompatible avec l'obligation pour tous les sujets du droit communautaire de reconnaître la pleine efficacité'	Apagogic
Case C-70/88 *Parliament v Council* EU:C:1991:373 paras 20-27	'assurer la pleine application des dispositions des traités'	Ostensive?
Case C-213/89 *The Queen v Secretary of State for Transport, ex parte Factortame* EU:C:1990:257, paras 21-22	'la pleine efficacité du droit communautaire se trouverait … diminuée'; 'l'effet utile serait amoindri'	Apagogic
Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest v Hauptzollamt Itzehoe and Hauptzollamt Paderborn* EU:C:1991:65, para 31	'privé de tout effet utile'	Apagogic
Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* EU:C:1991:428, paras 33, 39	'la pleine efficacité des normes communautaires serait mise en cause'	Apagogic
Case C-415/93 *Union royale belge des sociétés de football association and Others v Bosman and Others* EU:C:1995:463, para 129	'priver cette disposition de son effet utile'	Apagogic
Joined Cases C-46/93 and C-48/93 *Brasserie du pécheur v Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, ex parte Factortame and Others* EU:C:1996:79, paras 20, 39, 52, 72.	'la pleine efficacité du droit communautaire serait mise en cause'	Apagogic
Case C-194/94 *CIA Security International v Signalson and Securitel* EU:C:1996:172, para 49	'L'efficacité de ce contrôle sera d'autant renforcée'	Ostensive
Case C-67/96 *Albany* EU:C:1999:430, paras 59-69.	'portent atteinte à l'effet utile'	Apagogic

A Single European Data Space and Data Act for the Digital Single Market: on Datafication and the Viability of a PSD2-like Access Regime for the Platform Economy

Federico Ferretti*

In its new digital strategy for Europe, the EU highlights the need for better data-access and sharing. In line with this priority, it is working on a proposal for a Data Act that aims to provide the underlying legal framework. This paper seeks to disentangle key legal concepts and issues related to datafication that affect the envisaged European Data Space. It reveals that the EU already has a suitable regulatory model under the Payment Services Directive 2 ('PSD2'). The strategy focuses on market imbalances of the platform economy and challenges the legitimacy of large technological companies ('Big-Techs'). The latter act as gatekeepers to maintain a key role in data-access and monetise their data dominance. The paper casts into question the existence of a data market, suggesting that the EU already has a viable legislative model provided by the 'PSD2' sectoral legislation. Its data-access model could be applied horizontally across data-driven markets and the platform economy without engineering new rules or adding regulatory layers.

Keywords: Digital Single Market; Data Act; data; data rights and control; data access; data sharing; platform economy; PSD2

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I. INTRODUCTION

The EU strives to attain a leading role in the data economy by exploiting an expanding amount of data to create innovative products and services in the Single Market. It views digitalisation as a tool for relaunching economic growth and social welfare.

This paper focuses on the key issue of data-access and sharing in the current market imbalances of the platform economy, where dominant undertakings act as gatekeepers. First, it explores the limits of existing EU laws addressing different aspects of data-access and sharing such as proprietary rights, data protection and competition that prevent the creation of a genuine market for data-driven products and services. Next, it investigates the extent to which the objectives set forth by proposed EU legislation can be met through the model of cognate regulatory instruments like the one governing the payment sector. Ultimately, this study claims that the latter provides a feasible regulatory model capable of creating the envisaged market in conjunction with current data laws. This model could be replicated for the entire digital market.

As part of the Digital Single Market Strategy,[1] the European Commission's latest policy goal is to create a single European Data Space, conceived as a 'genuine single market for data (…) where personal as well as non-personal data (…) are secure and businesses also have easy access to an almost infinite amount of high-quality data'.[2]

The digital expansion has placed data at the centre of major economic and social transformations. To the extent that data are the lifeblood of innovation, they have become an essential resource in economic terms. Data are no longer seen as mere outputs generated by the use of technology.

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1 Commission, 'A Digital Single Market Strategy for Europe' (Communication) COM (2015) 192 final.

2 Commission, 'A European strategy for data' (Communication) COM (2020) 66 final.

Instead, they are increasingly regarded as inputs for the creation or improvement of products and services such as information services, processes, or decision-making tools.[3]

To achieve its policy objectives, the EU has committed to combining fit-for-purpose cross-sectoral (horizontal) legislation and governance to ensure the free flow, access and sharing of data within the Union.[4] The legislation will integrate existing data laws such as the GDPR[5] and few others[6] to support the viability and sustainability of an alternative model for the data economy that is at once open yet fair, transparent, and accountable.[7] In addition to furnishing a legislative framework for the governance of a common data space and the reuse of public sector data, data sharing among market players has a preeminent role to be achieved by means of a Data Act.[8] Two major problems for the achievement of policy goals are the intense

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3 Ikujiro Nonaka, 'A Dynamic Theory of Organizational Knowledge Creation' (1994) 5 Organization Science 14; Francesco Mezzanotte, 'Access to Data: the Role of Consent and the Licensing Scheme' in Sebastian Lohsse, Reiner Schulze and Dirk Staudenmayer (eds), *Trading Data in the Digital Economy: Legal Concepts and Tools* (Nomos 2017) 159.

4 Commission, 'A European strategy for data' (n 2).

5 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L119/1 (GDPR).

6 See Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union [2018] OJ L303/59; Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019 on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification and repealing Regulation (EU) No 526/2013 (Cybersecurity Act) [2019] OJ L151/15; Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information [2019] OJ L172/56.

7 European Data Protection Supervisor, 'Opinion 3/2020 on the European Strategy for Data' (16 June 2020) <https://edps.europa.eu/sites/edp/files/publication/20-06-16_opinion_data_strategy_en.pdf>.

8 Commission, 'A European strategy for data' (n 2).

concentration of data in the hands of limited large online platforms (also known as 'Big-Techs') and market imbalances in the access and (re)use of data.[9] Big-Techs raise a number of different problems, some of which have already been addressed in legislative proposals.[10] Of concern here is that they are large multinational corporations that dominate the digital business. Within such a vast industry, Big-Techs dominate their respective niche market using the data to expand subsequently into other markets. Big-Techs may have very different business models, levels of maturity and financialisation, or corporate governance. They share in common the capacity to act as intermediary infrastructure and become gatekeepers of the indispensable facility represented by the data. They also become market gatekeepers in this way.[11] Their models build on creating, maximising, and monetising network effects and economies of scale to dominate the market, reduce competition and consumer welfare, and stifle innovation driven by others. Due to their distinctive features, Big-Techs have given rise to the so-called 'platform economy' which, overall, enjoys largely unchecked power in a regulatory vacuum.[12]

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9 Ibid.

10 See e.g. Commission 'Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)' COM (2020) 842 final, which proposes new ex-ante rules for gatekeeper platforms as well as a new supervisory framework at EU level to address conduct and competition harm risks.

11 The European Commission defines a gatekeepers as 'a provider of core platform services', where core platform services are any online intermediation services, online search engines, online social networking services; video-sharing platform services; number-independent interpersonal communication services; operating systems; cloud computing services; advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by a provider of any of the core platform services. See ibid art 2.

12 Anne Helmond, 'The Platformization of the Web: Making Web Data Platform Ready' (2015) 1 Social Media + Society 1; Rodrigo Fernandez and others, *The Financialisation of Big Tech* (SOMO 2020).

This paper disentangles key legal aspects of datafication in the policy and market context discussed above that impact the envisaged European Data Space and a prospective data-access regime under the Data Act. These aspects include proprietary data rights, data protection and competition law. Particular attention is granted to the market imbalances in the platform economy created by Big-Techs and the extent to which such organisations should be allowed to monetise data acting as gatekeepers. This analysis ultimately suggests that the objectives of the proposed EU Data Act are already met by the model of cognate regulatory instruments governing the payments sector. The model could be applied horizontally as a norm of general application for all data without adding regulatory layers to current standards.

The study employs a doctrinal approach, analysis, and analogy to sustain its claims. Its contribution to the literature is to propose the extension of an existing regulatory framework for the novel purpose of data-access and sharing in the digital single market as a whole.

Section 2 explores the concept of data and their features to identify the extent and reach of data ownership or control rights and how these influence the idea of a 'single market for data'.[13] The analysis of the existence of a single market for data-driven products and services, rather than a 'data market', serves to highlight the relationship among players in the digital market. In turn, market characteristics shape the horizontal data-access regime needed for a Data Act that could correct the problems created by the imbalances of the platform economy. Section 3 demonstrates the limits of competition law enforcement to offer solutions for the creation of a genuine market for data-driven products and services. Designing an adequate data-access regime for the European data strategy and Data Act requires an understanding of the inherent limitations of available legal tools. The essential question is what form the Data Act should take. This is examined in Section 4, which studies

[13] As framed by Commission, 'A European strategy for data' (n 2).

the sectoral EU legislation on payment services to explore its viability as a model of horizontal general application for the entire digital market.

The EU does not have to reinvent any measures, nor would it need to engineer new rules.

II. The Limits of Competition Law Enforcement: A Single Market for Data-Driven Products and Services, Not a Single market for Data

The strategy for creating a single European Data Space presupposes maximum data availability. These are considered an essential component—or raw material—for the development of a competitive digital market, especially in terms of data-access and (re)usability. The policy vision and debate centre around the creation of a 'single market for data' and the rebalancing of market power in relation to data-access and sharing.[14]

Inevitably, the idea of a 'data market' prompts questions about its nature and reintroduces the long-debated issue of data ownership or titles to data, i.e. the extent of exclusive right to use, exploit, and disclose data, subject only to the rights of persons with a superior interest or legal or contractual restrictions.

One fundamental reservation is the extent to which recognition of a title in rem to data, and therefore the resultant market type, can be justified. Claims to proprietary rights are linked to commercial exploitation and the delineation of the market. Simply put, the allocation of a title in rem to data, in whatever form this may be recognised, would give rise to important consequences. These lead in turn to the question of how to strike a balance between the rights, obligations, and limits of those claiming title and a general interest in access to - and reuse of - data for the innovation and development of the digital market.

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14 Ibid.

Moreover, if rights in rem are recognised and allocated, they must have limits and exceptions that serve the public interest.[15]

Therefore, defining the nature of data is key to informing public policy and establishing the legal basis for claims of title, including the very existence of a 'data market'.[16] It is also instrumental in defining the boundaries of the public interest in access to, and (re)usability of, data as an essential resource.[17]

As previous scholarship suggests, delineating the concept of data and their economic properties is a challenging exercise.[18] Yet it is a necessary one if data are to be treated as a commodity in the market.

1. The Nature of Data

The first difficulty is one of terminology and derives from the misleading interchangeability, in everyday jargon, of terms like 'data' and 'information'. However, the distinction between the two matters for policy and legal discourse. In information science, data is conceptualised in two ways: as signals, i.e. unprocessed reinterpretable digital representations, and as measurable and discrete observations of facts or acts in a formalised manner (such that there is a clear separation between the different possible values). However they are conceptualised, data must be suitable for communication,

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15 Also argued by Teresa Scassa, 'Data Ownership' (2018) CIGI Paper No 187 <https://www.cigionline.org/publications/data-ownership/#:~:text=Teresa%20Scassa%20is%20a%20CIGI,of%20data%20ownership%20and%20control> accessed 10 June 2022.

16 See also Vincenzo Zeno-Zencovich, 'Do "Data Markets" Exist?' (2019) 2 Media Laws 22.

17 Josef Drexl, 'Data Access and Control in the Era of Connected Devices' (BEUC, The European Consumer Organisation, 15 January 2019) <https://www.beuc.eu/publications/beuc-x-2018-121_data_access_and_control_in_the_area_of_connected_devices.pdf> accessed 12 April 2021.

18 See e.g. Nestor Duch-Brown, Bertin Martens and Frank Mueller-Langer, 'The Economics of Ownership, Access and Trade in Digital Data' (2017) JRC Digital Economy Working Paper 2017-01 <https://joint-research-centre.ec.europa.eu/system/files/2017-03/jrc104756.pdf> accessed 10 June 2022.

interpretation or processing.[19] The definition of data is often supplemented with the requirement that signals be readable, generated or observable by a machine.[20] Data are often viewed as a by-product of other activities.[21] Yet they are also a resource in their own right when converted into information - that is the number of discernible signals or data points necessary to transmit a message.[22]

Other characterisations distinguish between a syntactic level (signs and their relationship with each other) and a semantic level (the meaning of data), which leads to a distinction between the content and code layers.[23] Information is instead a broader concept than data that depends on context and usage to convey meaning.

In the end, data are most appropriately defined in relation to the other parameters in their lifecycle, which can be illustrated in sequential order: data

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19 Russel Ackoff defines data as 'symbols that represent the properties of objects and events. Information consists of processed data, the processing directed at increasing its usefulness'. 'From Data to Wisdom' in Russel Ackoff (ed), *Ackoff's Best* (John Wiley and Sons 1999) 170. See also Chaim Zins, 'Conceptual Approaches for Defining Data, Information, and Knowledge' (2007) 58 Journal of the Association for Information Science and Technology 479; Commission, 'Towards a thriving data-driven economy' (Communication) COM (2014) 442 final; Commission, 'Proposal for a Regulation on European data governance (Data Governance Act)' COM (2020) 767 final, art 2(1).

20 Herbert Zech, 'Data as a Tradable Commodity' in Alberto De Franceschi (ed), *European Contract Law and the Digital Single Market* (Intersentia 2017) 51.

21 Wolfgang Kerber, 'A New (Intellectual) Property Right for Non-Personal Data? An Economic Analysis' (2016) 65 Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil (GRUR Int) 989.

22 Max Boisot and Agustì Canals, 'Data, Information and Knowledge: Have We Got It Right?' (2004) 14 Journal of Evolutionary Economics 43; Ronaldo Vigo, 'Complexity over Uncertainty in Generalized Representational Information Theory (GRIT): A Structure-Sensitive General Theory of Information' (2013) 4 Information 1. See also Robert M Losee, 'A Discipline Independent Definition of Information' (1997) 48 Journal of the American Society for Information Science 254.

23 Zech (n 20).

(any representation of something in digital form) are the raw material for information, information (structured data with a discernible meaning) is the raw material for knowledge, and knowledge (information whose validity has been established through tests of proof or intellectual virtue) is the raw material for wisdom (the ability to use knowledge to achieve and establish desired goals).[24]

This multichotomy implies a linear flow and hierarchy that do not remain on a purely theoretical level but have important economic and legal consequences.

2. The Data Value Chain

From an economic perspective, data represent a primary material. A sequential process of transformation adds value to the data, especially when combined with the resourcefulness, capability and experience of the agents who utilise the outcomes at each stage.[25] This is the value extraction process. The extensive availability of large volumes of diverse datasets from various unrelated sources (big data) is decisive to extracting maximum value.[26] The

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24 Paul Bierly, Eric Kessler and Edward Christensen, 'Organisational Learning, Knowledge and Wisdom' (2000) 13 Journal of Organisational Change Management 595; Yochai Benkler, 'From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access' (2000) 52 Federal Communications Law Journal 561. According to Rob Kitchin, data are not neutral. They reflect choices about which data to collect or exclude and cannot exist independently of the ideas, instruments, practices, contexts and knowledges used to generate, process and analyse them. *The Data Revolution: Big Data, Open Data, Data Infrastructure and their Consequences* (Sage 2014) 1.

25 Antti Aine, Tom Bjorkroth and Aki Koponen, 'Horizontal Information Exchange and Innovation in the Platform Economy – A Need to Rethink?' (2019) 15 European Competition Journal 347.

26 Kitchin (n 24).

value of data grows progressively through the information, knowledge and wisdom conveyed by the data on the semantic level.[27]

In practical terms, the value chain distinguishes between data production, processing, collection, organisation and analysis and the achievement of set goals, including innovations based on the insights gained in the previous steps. As a raw material, data are an infinite resource generated at an insignificant cost. Moreover, they are immaterial and non-consumable (non-rival), which means usage does not exhaust the supply and they may be used simultaneously by more than one agent. These features are a novelty in economic theory, which considers limited or restricted resources, as well as production costs.[28]

Consequently, the economic value of data in their essential form is trivial and irrelevant.[29]

The paradox of the debate over titles to data is precisely that where there is no value, one would conclude that ownership or other rights of economic exploitation are not an issue. This deduction is reinforced by the unique nature of data as limitless and non-rivalrous, which fits uneasily with the

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27 Zech (n 20); Drexl, 'Data Access and Control in the Era of Connected Devices' (n 17).

28 Jean-Sylvestre Bergé, Stephane Grumbach and Vincenzo Zeno-Zenchovic, 'The "Datasphere", Data Flows beyond Control, and the Challenges for Law and Governance' (2018) 5 European Journal of Comparative Law 144.

29 See Commission, 'Decision of 27.6.2017 relating to the proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area (AT.39740 – Google Search (Shopping))' C (2017) 4444 final (Google Search case). See also Edouard Bruc, 'Data as an Essential Facility in European Law: How to Define the "Target" Market and Divert the Data Pipeline?' (2019) 15 European Competition Journal 177.

legal concept of a title in rem. As in the case of ideas, these features are the foundations for the classification of data as public goods.[30]

If property rights are difficult to extend to data, this, in turn, creates challenges in establishing usage rights.[31] Instead, the issue arises as soon as value is provided, i.e. at the later stage when data provide information, knowledge and wisdom.

Another complication that surfaces is the contribution of multiple actors to the datafication process and the relationship between them. Different persons (natural and/or legal) may contribute to generating data through human activities or technologies (e.g. data created or observed by a sensor, search engine, or website), or may add value during the processing, observation, aggregation, storage, selection, verification and analysis stages. Data can be directly generated by the person or by that person's use of services.[32] Value may also reside in the immediacy and instant availability of data.[33]

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30 Harold Demsetz, 'Toward a Theory of Property Rights' (1967) 57 The American Economic Review 347; Priscilla Regan, 'Privacy as a Common Good in the Digital World' (2010) 5 Information, Communication and Society 382. See also Drexl, 'Data Access and Control in the Era of Connected Devices' (n 17), which also makes reference to constitutional principles of freedom of information and the EU Charter of Fundamental Rights (Article 11(1)).

31 Some scholarship, forcing the established economic and legal notion of property, debates whether its concept should be flexible enough to extend to new immaterial goods and eventually allow the commodification of data. See Nadezhda Purtova, 'The Illusion of Personal Data as No One's Property' (2015) 7 Law, Innovation and Technology 83; Alberto De Franceschi and Michael Lehmann, 'Data as Tradable Commodity and New Measures for their Protection' (2015) 1 Italian Law Journal 51.

32 Inge Graef, 'Market Definition and Market Power in Data: The Case of Online Platforms' (2015) 38 World Competition 473; Josef Drexl, 'Legal Challenges of the Changing Role of Personal and Non-Personal Data in the Data Economy' (2018) Max Planck Institute for Innovation & Competition Research Paper No 18-23 <https://ssrn.com/abstract=3274519> accessed 12 April 2021.

33 Duch-Brown, Martens and Mueller-Langer (n 18).

From this perspective, the distinction between personal and non-personal data—which has thus far remained indistinct—assumes relevance. Data may be non-personal or personal in nature, where the latter are broadly defined in relation to an identified or identifiable natural person.[34]

Natural persons would intuitively assert that they own data about themselves, as these comprise personal attributes. However, individuals do not own information about themselves. Personal data do not pre-exist prior to their expression or disclosure. They are always to some extent constructed or created by more than one agent.[35] They pertain to a person yet do not belong in a proprietary sense to him/her. Those who process personal data (data controllers) have the right to process data pertaining to data subjects as long as such processing is lawful, i.e. they abide by procedural rules established by law (in the EU, the GDPR - infra) with the objective of protecting individual citizens not against data processing per se but against unjustified collection, storage, use and dissemination of the data pertaining to them.[36] Moreover, personal data may be turned into anonymous data, but

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34 Descriptive definition based on GDPR, art 4(1). See also the earlier Article 29 Data Protection Working Party, 'Opinion 4/2007 on the Concept of Personal Data' (European Commission, 20 June 2007) <https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2007/wp136_en.pdf> accessed 12 April 2022.

35 Federico Ferretti, *Competition, the Consumer Interest, and Data Protection* (Springer 2014). See also Annette Rouvroy and Yves Poullet, 'The Right to Informational Self-Determination and the Value of Self-Development: Reassessing the Importance of Privacy for Democracy' in Serge Gutwirth and others (eds), *Reinventing Data Protection?* (Springer 2009).

36 E.g. individuals do not own their criminal records or credit history. Ferretti, *Competition, the Consumer Interest, and Data Protection* (n 35). See also the discussions about individuals not owning information about themselves in Jerry Kang and Benedikt Bunter, 'Privacy in Atlantis' (2004) 18 Harvard Journal of Law and Technology 230; Rouvroy and Poullet (n 35).

they are still data (of a non-personal nature) that remain in existence without allocation to data subjects.[37]

In the end, the value chain and the role of different stakeholders are crucial from the legal perspective. Each transformation, creation of value, and interaction of different subjects at different levels epitomises a separate legal construction and allocation of rights. For this reason, it is crucial to determine whether and at what stage data may become a commodity giving rise to transferable rights, and whether legal protections should intervene.[38]

3. Data-related Rights

The value chain determines when legal rights should be allocated, who is entitled to claim a title over the data, and how to exercise such rights.

The fluid nature of data and their unsuitability to being defined and regulated in the same way as other tangible or intangible goods has generated debates about the potential creation of a new right in rem specific to data.[39] Under existing laws, however, no data property right can exist. Nor do there seem to be legal grounds for recognising rights of economic

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37 Gintare Surblyte, 'Data Mobility at the Intersection of Data, Trade Secret Protection and the Mobility of Employees in the Digital Economy' (2016) 65 Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil (GRUR Int) 1121.

38 Barbara Evans, 'Much Ado About Data Ownership' (2011) 25 Harvard Journal of Law and Technology 70; Viktor Mayer-Schonberger and Kenneth Cukier, *Big Data – A Revolution that Will Transform How We Live, Work and Think* (John Murray 2013).

39 For all, see Zech (n 20).

exploitation over data per se.[40] Likewise, no EU jurisprudence satisfactorily deals with the matter.[41]

Instead, rights over data usability and allocation can be constructed as a bundle of other rights. These originate from a patchwork of existing laws, protecting other goods or values, that affect interested parties in data use without allocating property rights. Not surprisingly, these rights shift from a sales or transfer paradigm to a licence model based on access.[42]

Access requires a subject to hold the data, which presupposes control. In the debate over data accessibility, the point is to define the precise extent of control rights and entitlements, as well as the legal mechanisms to deal with access restrictions in a framework that does not presuppose a comprehensive data regime.

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40 Zech (n 20); Mezzanotte (n 3); Sjef van Erp, 'Ownership of Digital Assets and the Numerus Clausus of Legal Objects' (2017) Maastricht European Private Law Institute Working Paper No 2017/6 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3046402> accessed 12 April 2021; Francesco Banterle, 'Data Ownership in the Data Economy: A European Dilemma' in Tatiana-Eleni Synodinou and others (eds), *EU Internet Law in the Digital Era* (Springer 2020) 199.

41 See Ivan Stepanov, 'Introducing a Property Right Over Data in the EU: The Data Producer's Right – An Evaluation' (2020) 34 International Review of Law, Computers & Technology 65. According to the author, however, although no property rights as such over data exist, when faced with gaps some national Courts seem to adapt and in certain aspects treat data as property offering points of divergence. German Courts ruled on the proprietary aspects of data on matters of mishandling by company employees, albeit in criminal and labour law cases. The Courts concluded that for the purposes of those fields of law, data can be owned, thus exhibiting traits associated with property. In the Netherlands, the Supreme Court stated that from the perspective of criminal law data could be the object of theft. Finally, Luxembourgian law gives the right to reclaim ownership in data from the cloud in bankruptcy proceedings if the circumstances provide for such an opportunity. Ibid 73-74.

42 Aaron Perzanowski and Jason Schultz, *The End of Ownership. Personal Property in the Digital Economy* (MIT Press 2016).

The assortment of laws that assign rights and obligations over data are discussed below.

A. Intellectual Property Laws

Intellectual property is the traditional form of protection of intangible assets. Its normative frameworks, including related rights, are often used to provide some form of protection for rights over data.

-*Copyright Law*

Copyright protects the original expression of ideas or facts, but there is no protection for ideas or facts in the abstract. What is protected is originality in the form, not in the contents.[43] To enjoy protection, data must therefore result from creative choices, not merely technical ones, and cannot be the straightforward result of investments. Accordingly, raw data aggregations or compilations do not satisfy the requirement of originality.[44] Human authorship is moreover essential. This element excludes generations, aggregations or compilations of data performed by software or automated processes (the latter, by contrast, are protected as intellectual property).[45]

Considering that the utilitarian value of data in the big data context does not derive from creativity or originality, copyright protection offers very limited rights, if any, over data control and access restrictions.

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43 Commission, 'Towards a thriving data-driven economy' (n 19); Commission, 'A Digital Single Market Strategy for Europe' (n 1).

44 Case C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others* EU:C:2011:798; Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others* and *Karen Murphy v Media Protection Services Ltd* EU:C:2011:631; Case C-604/10 *Football Dataco Ltd and Others v Yahoo! UK Ltd and Others* EU:C:2012:115.

45 *Football Dataco* (n 44).

-Trade Secrets and Confidentiality

In a business setting, anything may be confidential or secret in nature. Typically, the values protected by law are confidentiality and secrecy rather than the good itself. For example, ideas that cannot be protected under copyright law may find protection when shared under the private law setting of a confidentiality agreement. Likewise, information about customers and suppliers, business plans, market research and strategies can be used as business competitiveness or research innovation management tools.[46]

Thus, data may constitute the subject matter of confidential information or a trade secret, whether collected automatically or not and without any requirement of originality or creativity.

The Trade Secrets Directive sets forth a liability regime in tort against the unlawful acquisition, use and disclosure of trade secrets.[47] A trade secret is defined as information at the semantic level (i.e. it is different from data).[48] To enjoy protection, the information must be secret, i.e. it is not generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question.[49] Its commercial value derives from secrecy, and should be subject to adequate security measures to keep it secret.[50] Trivial information is excluded.[51] Here, the right holder controls the secret rather than the data that turn into information.[52]

As the scope of such protection is confidentiality and secrecy, both contracts and trade secrecy law confer rights in personam, applying only to the

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46 Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure [2016] OJ L157/1 (Trade Secrets Directive).

47 Ibid recital 2.

48 Zech (n 20).

49 Trade Secrets Directive, art 1.

50 Ibid art 2(1).

51 Ibid recital 14.

52 Ibid art 2(2).

contractual parties or persons who have unlawfully acquired, used or disclosed a trade secret.[53] Third parties are not bound by access restrictions and further dissemination. Equally, the law offers remedies only if parties knew or should have known of their secret nature.

Moreover, contracts or secrets presuppose a party holding the data. Questions remain regarding the legal title of control over data. This can be a de facto situation when data are generated internally by one agent only, with no other agent claiming rights over them.[54] This is already a substantial limit on value in the data economy.

As regards commercial value, the doubtful or trivial value of raw data has already been noted above. This is especially the case for data generated by multiple agents and/or interconnected machines.[55] The causal link between the secrecy of individual data and the commercial value of information or knowledge can be challenged too.[56] Some scholars use this point to argue that in a big data environment, trivial information may also have economic value when compiled in sufficient quantities, showing false premises in the law.[57] Nevertheless, whether their prospective value derives from their secrecy remains uncertain. Allocating value in a network environment may be unattainable.[58] By contrast, it is the secrecy of algorithms that holds value.

In light of the above considerations, some authors conclude that trade secrets legislation can nonetheless be better suited to serving the purposes of the

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53 Ibid art 2(3).

54 See e.g. Andreas Wiebe, 'Protection of Industrial Data – A New Property Right for the Digital Economy?' (2017) 12 Journal of Intellectual Property Law & Practice 62.

55 E.g. in the Internet of Things, which describes the network of physical objects owned by one or more parties that are embedded with sensors, software, and other technologies for the purpose of connecting and exchanging data with other devices and systems over the Internet.

56 Drexl, 'Data Access and Control in the Era of Connected Devices' (n 17); Banterle (n 40).

57 Zech (n 20).

58 Wiebe (n 54); Stepanov (n 41).

data economy by focussing on the specific way someone has unlawfully gained access to the data, allowing a more flexible regime than erga omnes rights over the data.[59]

Overall, it appears clear that trade secrecy law grants relative protection over data control.

-*Database Rights*

At first sight, the legal protection of databases may appear the simplest model for data rights. The growing importance of data over time has given rise to support for and protection of investments in databases, without which early EU policymakers believed the database industry could not emerge.[60]

With the creation in the Database Directive[61] of a sui generis right akin to copyright, EU legislature has provided a right for database creators able to demonstrate that 'there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database'.[62] No originality obligation is required.[63]

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59 Banterle (n 40).

60 It can be questioned whether any backing law was needed and the scope of its success, especially if the experience of other non-EU jurisdictions is compared. See Bernt Hugenholtz, 'Something Completely Different: Europe's Sui Generis Database Right Book' in Susy Frankel and Daniel Gervais (eds), *The Internet and the Emerging Importance of New Forms of Intellectual Property* (Wolters Kluwer 2016) 205; Scassa (n 15), comparing EU law with the experience of the US and Canada that have no specific database protection law.

61 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20 (Database Directive).

62 Ibid art 7.

63 Bernt Hugenholtz, 'Intellectual Property and Information Law' in Jan Kabel and Gerard Mom (eds), *Intellectual Property and Information Law: Essays in Honour of Herman Cohen Jehoram* (Kluwer Law International 1998).

The subject of the right is the substantial investment in the creation of a database, not the data themselves.[64] Under established jurisprudence, the investment should be in data that have been obtained, verified or presented. By contrast, investment in data created or generated by the person is excluded.[65] This is a limit of protection in the context of big data and artificial intelligence.

In addition, the protection is circumscribed to extraction and/or reutilisation of the 'whole' or a 'substantial part' of the contents of a database, not individual datasets. Unauthorised insubstantial extractions or reutilisations do not qualify as infringement.

Another difficulty that emerges is that big data, given their volume and diversity, are incongruent with traditional databases as conceived by the law. The Directive defines databases as collections of 'data or other materials which are systematically or methodically arranged and can be individually accessed'.[66] With big data, new technologies produce non-relational databases; that is, software associated with databases provide a mechanism for data storage and retrieval that is modelled using different means than the tabular schemas of relational databases. The 'systemic or methodical arrangement' elements are lacking and data are not compiled in a way that

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64 Commission, 'Building a European Data Economy' (Communication) COM (2017) 9 final. See also Case C-46/02 *Fixtures Marketing Ltd v Oy Veikkaus Ab* EU:C:2004:694; Case C-338/02 *Fixtures Marketing Ltd v Svenska Spel AB* EU:C:2004:696; Case C-444/02 *Fixtures Marketing Ltd v Organismos prognostikon agonon podosfairou AE (OPAP)* EU:C:2004:697.

65 Case C-203/02 *The British Horseracing Board Ltd and Others v William Hill Organization Ltd* EU:C:2004:695.

66 Database Directive, recitals 17, 21 (emphasis added). See also Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC [2015] OJ L337/35, art 1(2) (PSD2).

preserves the semantic value of data. These circumstances have induced scholars to conclude that protection does not apply.[67]

Although it pertains to the field of data protection law, the recent *Schrems*[68] case confirms in a novel way that the data in a database, regardless of their substantiality, do not automatically belong to the database owner. Invalidating the agreement between the EU and the US on the international transfer of personal data, the CJEU prevented the database owner from moving the data to a different jurisdiction that did not offer adequate protection under EU standards. The case imposed new limits on the proprietary rights to databases composed of personal data.

As the above analysis suggests, database protection legislation prevents the simple extension of real rights or legal control over individual or raw data.

B. Personal Data Protection Law

Data protection law dictates important rights and obligations in data usability and allocation relating to an identified or identifiable natural person.

The GDPR details the conditions under which data processing is legitimate. It forces processing to be transparent, enabling data subjects to control it where the processing is not authorised by the law itself as necessary for social reasons. In short, data protection law focuses on the activities of processors and enforces their accountability, thus regulating an accepted exercise of power.[69] The law is rooted in the idea that democratic societies should not

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67 Daniel Gervais, 'Exploring the Interfaces Between Big Data and Intellectual Property Law' (2019) 10 Journal of Intellectual Property, Information Technology and E-Commerce Law 22.

68 Case C-311/18 *Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems* EU:C:2020:559.

69 Paul De Hert and Serge Gutwirth, 'Data Protection in the Case Law of Strasbourg and Luxembourg: Constitutionalization in Action' in Serge Gutwirth and others (eds) (n 35). On a critical view that data protection acts are seldom

be turned into societies based on control, surveillance, actual or predictive profiling, classification, social sorting, and discrimination. It is not only a question of individual liberty, privacy, integrity and dignity, but a wider personal right aimed at fostering the social identity of individuals as citizens and consumers alike. Accordingly, the data protection regime provides legal protection to pursue the common goal of a free and democratic society where citizens develop their personalities freely and autonomously through individual, reflexive self-determination. It provides for collective deliberative decision-making about the rules of social cooperation.[70] Granting individuals control over their personal data is more than a mere tool allowing them to control the persona they project in society, free from unreasonable or unjustified associations, manipulations, distortions, misrepresentations, alterations or constraints on their true identity. It is the fundamental value of humans developing their personality in a way that allows them full participation in society without having to make thoughts, beliefs, behaviours, or preferences conform to those of the majority or those dictated from above by commercial interests.[71]

The conceptual principles outlined above are reflected in the provisions of the GDPR, the scope of which is to ensure those who determine the purposes and methods of personal data processing (the 'data controllers') engage in good data management practices. The GDPR incorporates a series of general rules on the lawfulness of personal data processing.[72] Data subjects must be informed of the processing, which has to be performed for legitimate, explicit and precise purposes. Processing is limited to the necessary time

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privacy laws but rather information laws, protecting data before people, see Simon Davis, 'Re-engineering the right to privacy: How privacy has been transformed from a right to a commodity' in Philip Agre and Marc Rotenberg (eds), *Technology and Privacy: The New Landscape* (MIT Press 1997) 143.

70 Federico Ferretti, 'Data Protection and the Legitimate Interest of Data Controllers: Much Ado About Nothing or the Winter of Rights?' (2014) 51 Common Market Law Review 843 (citing Rouvroy and Poullet (n 35)).

71 Ibid.

72 GDPR, art 13-14.

frame (principles of purpose specification and data minimization).[73] Finally, data subjects are granted the right to access their data[74] and non-absolute data portability rights.[75]

A data controller can claim a valid basis for processing only if it meets one of the exhaustive criteria established by the law. If the data controller's processing does not satisfy one of them, it is unlawful.[76]

4. De Facto Control

What emerges from the previous Sections is that the existing framework is not resolutive in allocating data rights.

Intellectual property protections or related regimes are unsuitable to grant legal recognition of exclusive powers of control over datasets.[77]

When data are personal, the law grants stronger control. Even here, however, legal control is not absolute but relative. The speciality is that the debate on data control and allocation is enriched with the respect of fundamental rights. Nonetheless, data protection does not provide economic rights.

If there are no legal rights in rem or title transfer of data, in principle the latter should be freely available and access to them unrestricted. The 'data market' should not exist. The conception of data as a collective good is not an unfamiliar one (res communis)[78], with the caveat of the control conferred by the GDPR.

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73 Ibid art 5.

74 Ibid art 15.

75 Ibid art 20.

76 Ibid art 6.

77 This conclusion is in line with those of Zech (n 20); Wiebe (n 54); Gervais (n 67).

78 Demsetz (n 30); Yoram Barzel, *Economic Analysis of Property Rights* (Cambridge University Press 1997). Collective goods (technically, things that are common to humankind) are not appropriable but the public may acquire certain usufructuary

Yet this scenario does not reflect reality. Data are regarded as a valuable economic asset, characterised by data gatekeeping, access restrictions, entry barriers, and lock-ins.

The question of how such power materialises conclusively leads to de facto control. This control allocates economic exploitation and allows sole use or access contracts. It transforms data from a non-rival good into a rival one. De facto control—which can also be termed 'possession'—is typically ensured by technical means and the ability of platforms to mine data from users. Simply put, de facto controllers are incentivised to invest in data collection because they appropriate the gains.

This finding could lead EU lawyers toward a nest of wasps regarding the law of possession in the absence of a legal title. Sharp divergences persist between civil and common law. Countries and doctrinal debates differ over the existence or nature of possessors' titles and the extent of protection.79 These fascinating discussions would deviate from this study. Here, it is sufficient to acknowledge that the law of possession would lead to weak non-resolutive protection.[80] In any event, it would not fall within the competence of EU law, but follow an impassable path for EU intervention that would frustrate from the outset any idea of harmonisation and a Single Digital Market.

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rights (a limited real right of *usus*), directly and without altering them, and their fruits (*fructus*, the right to derive profit from them). They should be kept separate from no one's good (*res nullius*), in that the latter derives from private Roman law whereby they are considered ownerless property appropriable by means of occupation or possession if not regulated otherwise (e.g. wild animals). See Paul Du Plessis, *Borkowski's Textbook on Roman Law* (Oxford University Press 2020).

79 For a comprehensive account of comparative doctrines on the law of possession, see James Gordley and Ugo Mattei, 'Protecting Possession' (1996) 44 The American Journal of Comparative Law 293.

80 Ibid.

Rather than a market for data, factual control defines a market for access to data holding. Due to regulatory gaps, the gatekeepers are dominant technological companies.

Big data are a game-changer. They have been exploited by new technologies for the collection, storage, mining, synthesis, pattern recognition, and analysis of large volumes of wide-scoped, varied, and accurate data almost in real-time.[81] The value lies in the cumulative features of the 4 Vs: volume, velocity, variety, and veracity.[82] The maximum value of data is created by mining and analytical tools of artificial intelligence and machine-learning technologies. Competitiveness is a function of the sophistication of technologies and analyses they can perform. Arguably, data analysis is the real commodity rather than the data themselves.

As discussed above, 'data markets' should have no reason to exist, at least in conventional economic and legal terms. Rather, data are an essential, non-rivalrous, and infinite component of novel product or service markets best represented as 'data-driven markets', with different markets employing different types of big data as inputs for different outcomes.

As things stand, it seems that 'data markets' exist as the de facto result of unsuitable regulation over a fluid res that is collective in nature.[83]

To the extent that this conclusion is plausible, de facto control negatively impacts the ensuing data-driven markets. Hence, it is not only conceivable but also desirable that data-access should become unrestricted.

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81 Mark Lycett, 'Datafication: Making Sense of (Big) Data in a Complex World' (2013) 22 European Journal of Information Systems 381.

82 Ibid. See also Maurice Stucke and Allen Grunes, *Big Data and Competition Policy* (Oxford University Press 2016); Daniel Rubinfeld and Michal Gal, 'Access Barriers to Big Data' (2017) 59 Arizona Law Review 339.

83 But see Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer 2016), according to which competition authorities and courts should define and analyse a potential market for data in addition to relevant product markets.

In principle, the enforcement of competition law should overcome abuses of market power and anticompetitive practices such as barriers to the access of essential facilities and market development.

III. The Limits of Competition Law Enforcement

1. The Unsuitability of Data as an Essential Facility

In principle, the importance ascribed to data as an indispensable input for the Digital Single Market could trigger the application of competition law. In its traditional application to dominant firms,[84] the question is the extent to which the de facto control of gatekeeping platforms over data qualifies as anticompetitive conduct harming the competitive process, innovation and entrepreneurship. A market where a data-dominant firm may restrict or impose unfair conditions on access can create a bottleneck. Provided there is abuse, the natural suggestion would be to use competition law as a tool for creating a level playing field of unrestricted data-access through a duty to share.

Competition law provides two legal grounds to remedy gatekeeping: the prohibition of anticompetitive agreements under Article 101 TFEU if the gatekeeper's refusal is based on an agreement with other firms, or in the absence of such an agreement, the prohibition of the abuse of dominant position under Article 102 TFEU.

To the extent that data constitute the essential input in the hands of monopolists, the most appropriate enforcement instrument is offered by the 'essential facility doctrine' under Article 102 TFEU. The doctrine may require a dominant firm to share its assets with others if those assets are indispensable to competing in the market and refusing access would eliminate effective competition. The market failure arising because control

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[84] Giorgio Monti, 'Abuse of Dominant Position: A Post-Intel Calm?' (2019) 3 CPI Antitrust Chronicle <https://www.competitionpolicyinternational.com/abuse-of-a-dominant-position-a-post-intel-calm/> accessed 12 April 2021.

of data infrastructure and network effects (direct or indirect) force competing firms to depend on platforms, which become indispensable in the same fashion as physical infrastructures like railroads or ports.

The imposition of dealing with a dominant undertaking interferes with fundamental principles of freedom of contract and party autonomy. This is a controversial point that demands a limited application of the doctrine.[85] Moreover, it should be borne in mind that this is a measure meant to stimulate competition in the market and not for the market.[86] In the context of data and the European strategy, it may emerge as an important factor since competition in the market and for the market each lead to a different form of innovation: sustaining innovation that improves existing products/services in the former case, and disruptive innovation that discontinues products or services in the latter. The scholarly literature highlights how competition authorities need to balance the two in determining whether or not to intervene.[87] In this scenario, competition law enforcement may be only partially useful to the goals of the European Data Strategy.

Given this caveat, there is no general approach for applying the essential facility doctrine. It is a test based on the analysis of the specific circumstances of each case: the specific characteristics of the relevant facility, the conduct under scrutiny, and its economic context. To apply the essential facility

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85 Inge Graef, 'Rethinking the Essential Facilities Doctrine for the EU Digital Economy' (2019) 53 Revue Juridique Thémis de l'Université de Montréal 33; Jaques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition Policy for the Digital Era – Final Report* (European Commission 2019). See also Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co KG and Mediaprint Anzeigengesellschaft mbH & Co KG* EU:C:1998:264, Opinion of AG Jacobs; Case T-41/96 *Bayer AG v Commission of the European Communities* EU:T:2000:242.

86 Ibid. See also Drexl, 'Data Access and Control in the Era of Connected Devices' (n 17).

87 Ibid.

doctrine, the facility (data) must be defined as a distinct relevant market from derivative markets. However, there is no market for (big) data as such. Moreover, platforms act as gatekeepers in different service markets. Therefore, one would need to examine the competitive reality of the markets in which each platform operates and to which the data content relates.[88] Next, robust evidence of likely anticompetitive effects should be provided.

The application of the doctrine is notoriously narrow and cumbersome.

The first step in establishing dominance is to define the relevant market. However, a digital market per se cannot be identified. Instead, platforms are heterogeneous with different business models. Relevant markets must be defined anew each time. Moreover, the potential harm to competition posed by platforms' dominance may not be always recognised if measured in terms of price and output.[89] Instead, the economic feature of platforms is their multi-sidedness; they interconnect and operate in two or more markets with network economy effects and economies of scale, where the basis for deriving income may be very diverse. In so operating, the benefits that one market (one side) derives from the platform depends on the participants of one or more other markets (other sides).[90] Data obtained in one market offer

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88 Joined Cases 6 and 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities* EU:C:1974:18.

89 Lina Khan, 'Amazon's Antitrust Paradox' (2017) 126 The Yale Law Journal 710; Inge Graef and Francisco Costa-Cabral, 'To Regulate or Not to Regulate Big Tech' (2020) 1 Concurrences 24. See also Google Search case (n 29), according to which, even if users do not pay a monetary consideration for the use of search services on the internet, they contribute by providing data with each query.

90 For example, a search engine provider offers its services to users for free, at the same time providing advertising services or tools to other companies for profit. Likewise, a retailer may offer its intermediation services to buyers for free, at the same time operating as retailer in competition with other retailers but with the advantage of having more complete profiles of users. On the two or multi-sidedness of platforms, see Inge Graef, *EU Competition Law, Data Protection and Online Platforms* (n 83); Geoffrey Parker, Marshall van Alstyne and Sangeet Choudary, *Platform Revolution* (Norton 2017); Crémer, de Montjoye and Schweitzer (n 85).

a competitive advantage in the other(s). Therefore, the definition of the relevant market depends not only on diverse data-driven markets to which undertakings may require access but also on the markets for the several types of information that can be extracted from the data.[91] In the big data age, defining relevant markets for the essentiality of data may prove highly complex if not impossible.[92]

Second, the degree of dependence needs to be established. A successful claim must demonstrate the indispensability of the facility to business activity and that there are no other actual or potential substitutes for the facility. Moreover, there should be technical, legal, or economic obstacles that make it impossible, or unreasonably difficult, for competitors to obtain the facility.[93] Accordingly, exclusivity does not necessarily imply either essentiality or monopolistic power. Resources are not essential as such, but relative to something or in comparison with other available inputs. With big data, it is impossible to recognise a certain set of data that could identify a product/service market. In principle, all data may be useful and they can be replaceable or interchangeable in connection with the purpose for which they are needed.[94] The very notion of big data suggests that they are an extremely heterogeneous resource, whose applications cannot be known in advance. However, to be essential, a facility should serve a defined product/service in a cause-and-effect relationship.[95] Therefore, data should be divided into different categories and access granted only to the truly

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91 Giuseppe Colangelo and Maria Teresa Maggiolino, 'Big Data as Misleading Facilities' (2017) 13 European Competition Journal 249; Mark Patterson, *Antitrust Law in the New Economy* (Harvard University Press 2017).

92 Patterson (n 91).

93 *Oscar Bronner* (n 85); Case C-418/01 *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* EU:C:2004:257; Case T-201/04 *Microsoft Corp v Commission of the European Communities* EU:T:2007:289.

94 Niels-Peter Schepp and Achim Wambach, 'On Big Data and its Relevance for Market Power Assessment' (2016) 7 *Journal of European Competition Law and Practice* 120; Colangelo and Maggiolino (n 91).

95 Ibid.

indispensable ones. From this perspective, the solution offered by the application of the doctrine appears far removed from the reality of big data and the goals of the European data policy.

Third, the refusal to provide access to the facility should exclude all effective competition on the market.[96] Mutatis mutandis, the features of platform business models and those of the facility (data) could impede the realisation of such a condition.

Finally, the refusal to provide access should not be justified by objective reasons.[97] When data are personal, data protection rules may be used as a defence against data-access requests based on competition law.

All the above illustrates that the already cumbersome enforcement of the essential facility doctrine finds additional obstacles when platforms and data are involved, making competition law enforcement an inadequate tool for the goals of unrestricted data-access and innovation.

2. Data Portability

When data are personal, Art. 20 of the GDPR recognises the right of data portability. Data subjects have the right to have their data transmitted to another controller in a structured, commonly used and machine-readable format, as long as the processing is based on consent or a contract.

Consent and contract necessity are only two of the grounds for lawful data processing as per Article 6 GDPR. The processing grounds of compliance with a legal obligation, protection of vital interests, the performance of a task carried out in the public interest, and the pursuit of legitimate interests of data controllers or third parties are therefore excluded from the data portability right.

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96 *Microsoft* (n 93).

97 Ibid.

Under the circumscribed range of situations in which the right is applicable, data subjects continue to have their data processed by the original controller after a data portability operation, since this operation does not trigger the erasure of the data from the former controller but simply a transfer to another controller for the provisions of services from the latter.[98] The decision of consumers to switch service providers becomes consent to pass their data to another provider, but the possibility of erasing their data from the former provider remains subject to a separate request and conditions as per Article 17 GDPR.

The absence of a general right to data portability in the GDPR already portrays a narrow scope. This is further restricted to data which data subjects have provided themselves to the data controller—so-called volunteered data. The scope of the provision includes observation of the data but excludes derived or inferred data, or anything resulting from the analysis of the data.[99]

The norm also reduces the reach of the right by adding that controllers may transfer data where it is 'technically feasible'[100] without providing any indication about its meaning. This vagueness allows significant leeway to data controllers unwilling to make a transfer.[101]

Data protection rights of third parties provide an additional constraint when the request involves data of other individuals. This situation is not infrequent in social media where individuals share activities and intertwine their data.[102]

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98 Article 29 Data Protection Working Party, 'Guidelines on the Right to Data Portability' (European Commission, 5 April 2017) <https://ec.europa.eu/newsroom/article29/items/611233/en> accessed 12 April 2022.

99 Ibid. see also GDPR, recital 68.

100 GDPR, art 20(2).

101 Aysem Vanberg and Mehmet Unver, 'The Right to Data Portability in the GDPR and EU Competition Law: Odd Couple or Dynamic Duo?' (2017) 8 European Journal of Law and Technology 1.

102 Barbara Engels, 'Data portability amongst online platforms' (2016) 5 Internet Policy Review <https://policyreview.info/articles/analysis/data-portability-among -online-platforms> accessed 12 April 2021.

Last but not least, true individual control over personal data – hence effective portability - has proven difficult to achieve due to the disproportionate costs or efforts borne by data subjects, especially with the advent of technologies utilising big data and the ability to turn anything into personal data without individuals' knowledge or communication.[103]

Keeping the above limitations in mind, legal scholars have already analysed the control mechanism of horizontal application of the right and its relationship with competition law.[104] The right is analogous to the control approach of data protection and its limited application (see above, Section 2.3.2). The GDPR addresses the issue from the perspective of data subjects' rights. The main policy objective is to ensure that individuals are in control of their data and trust the digital domain. However, the perspective of competition remains outside the remit of the GDPR, which must be complemented by the limited applicability of competition law (above).[105] The primary aim of data portability is data subjects' control, not competition concerns. It enables access and transferability to or via individuals without creating an access system at the disposal of competitors for product development. Thus, even if data portability impacts on competition for the prevention of service lock-ins alongside the equally limited Regulation

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103 Nadezhda Purtova, 'Do Property Rights in Personal Data Make Sense after the Big Data Turn: Individual Control and Transparency' (2017) 10 Journal of Law and Economic Regulation 64.

104 Peter Swire and Yianni Lagos, 'Why the Right to Data Portability Likely Reduces Consumer Welfare: Antitrust and Privacy Critique' (2013) 72 Maryland Law Review 335; Inge Graef, Martin Husovec and Nadezhda Purtova, 'Data Portability and Data Control: Lessons for an Emerging Concept in EU Law' (2018) 19 German Law Journal 1359; Inge Graef, 'The Opportunities and Limits of Data Portability for Stimulating Competition and Innovation' (2020) 2 CPI Antitrust Chronicle 1.

105 Ira Rubinstein, 'Big Data: The End of Privacy or a New Beginning?' (2013) 3 International Data Privacy Law 74; Paul De Hert and others, 'The Right to Data Portability in the GDPR: Towards User-Centric Interoperability of Digital Services' (2018) 34 Computer Law and Security Review 193.

2018/1807 on the free flow of non-personal data,[106] its applicability is narrow. The measure is very far from providing an appropriate data-access regime to satisfy the sharing obligation of European policy goals.[107]

IV. THE CASE FOR PSD2-LIKE REGULATION OF THE PLATFORM ECONOMY

1. Ex-ante Regulation and the PSD2 Model[108]

The Sections above aimed to demonstrate the shortcomings of property, competition, and data protection law enforcement to offer a regulatory framework hospitable to a data-access and sharing regime for the European Data Strategy. A major drawback in digital markets is that they move too fast and are too varied and complex to be supervised ex-post and comprehensively. Moreover, the amorphous nature of big data complicates their 'essentiality' in legal terms. This does not mean that competition law is

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106 Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union [2018] OJ L303/59. The Regulation operates on two specific obstacles to data mobility, i.e. data localization requirements imposed by Member States and contractual vendor lock-in practices in the private sector (situations where customers are dependent on a single provider and cannot easily switch to a different vendor without substantial costs, legal constraints or technical incompatibilities). On the latter aspect, it facilitates and encourages EU companies to develop self-regulatory codes of conduct to improve the competitive data economy based on the principles of transparency, interoperability and open standards. Companies that provide data processing services should introduce some self-regulatory codes of conduct to ensure the provision of clear and transparent information and thereby avoiding vendor lock-ins. In the case of a dataset composed of both personal and non-personal data, the Regulation applies to the non-personal data part of the dataset.

107 See also the Commission recognition that 'as a result of its design to enable switching of service providers rather than enabling data reuse in digital ecosystems the right [to data portability] has practical limitations'. Commission, 'A European strategy for data' (n 2) 10.

108 PSD2.

generally unfit to preserve the contestability of markets or other structural aspects not covered in this contribution.[109] However, legal intervention could give regulators the power to require or prohibit behaviours to reach desired economic and social outcomes without having to engage in proving unfit competition rules on a case-by-case basis.

Unsurprisingly, ex-ante regulation of the platform economy is gaining popularity in EU policy circles. In preventing a level playing field and obstructing innovation, the bottlenecks created by data are a difficult issue that could be better addressed by the regulatory realm.[110]

On the one hand, regulation ensures higher technical specialisation and can be more effective in addressing the structural problems of markets like the digital ones that cannot be tackled under EU competition rules. On the other hand, it is also capable of more effectively addressing the unfair allocation of resources, welfare, and social harms.[111]

The EU already has sector-specific legislative instruments enabling data-access in place.[112] Before engineering a new one, the question is whether any

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109 Nicolas Petit, *Big Tech and the Digital Economy: The Moligopoly Scenario* (Oxford University Press 2020).

110 Commission, 'A European strategy for data' (n 2) especially 8, 14.

111 Niamh Dunne, *Competition Law and Economic Regulation, Making and Managing Markets* (Cambridge University Press 2015); Jean Tirole, *Economics for the Common Good* (Princeton University Press 2017); Crémer, de Montjoye and Schweitzer (n 85).

112 See e.g., in the payment services sector, PSD2; in the motor vehicles sector, Regulation (EU) 2018/858 of the European Parliament and of the Council of 30 May 2018 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, amending Regulations (EC) No 715/2007 and (EC) No 595/2009 and repealing Directive 2007/46/EC [2018] OJ L151/1; in the digital content sector, Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L136/1; in the energy sector, Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on

of these could be suitable as a horizontal regulatory model of general applicability. The financial sector is an interesting case to investigate due to the precursory and more mature role it has traditionally played as a data-driven market.[113]

The PSD2 is the EU sector-specific legislation providing a normative data-access framework for payment services within the Internal Market.

Its objective is to lay down the terms for achieving integrated retail payments in the EU that are inclusive not only of existing but also new payment services and market players. Its ambitious goal is to take advantage of innovative technology-enabled solutions (fintech) to generate efficiencies and reach a broader market with more choice and integrated services, at the same time pursuing transparency and consumer protection.[114]

The Payment Services Directive ('PSD1')[115] was the first attempt to comprehensively regulate the sector and provide the necessary infrastructure for the perfection of the internal market. It specified the allocation of risk among service providers and customers, regulated a vast array of payment instruments, enhanced market transparency, and strengthened competition

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common rules for the internal market for electricity and amending Directive 2012/27/EU [2019] OJ L158/125.

113 George Akelof, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' (1970) 84 Quarterly Journal of Economics 488; Joseph Stiglitz and Andrew Weiss, 'Credit Rationing in Markets with Imperfect Information' (1981) 71(3) American Economic Review 393; Douglas Diamond, 'Monitoring and Reputation: The Choice between Bank Loans and Directly Placed Debt' (1991) 99 Journal of Political Economy 689; Allen Berger and Gregory Udell, 'Relationship Lending and Lines of Credit in Small Firm Finance' (1995) 68 Journal of Business 351; More recently, see Dirk Zetzsche and others, 'The Evolution and Future of Data-Driven Finance in the EU' (2020) 57 Common Market Law Review 331.

114 PSD2, recital 6.

115 Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC [2007] OJ L319/1 (PSD1).

by harmonising market access requirements, licencing and access to technical infrastructures.[116] Taking a pro-competition attitude, the PSD1 also enabled the operations of new end-to-end providers, i.e. new firms, in the form of closed platforms that digitally intermediate between the payer and the payee, arranging the payment transaction within their closed system with no dependence on other providers such as the firm where the payment account is held.[117]

At the same time, the market witnessed the emergence of infant front-end providers, i.e. third-party providers (TPP) of digital services based on the customer's payment account held by banks. These services could include payment initiation (Payment Initiation Services or 'PIS')[118] or account information (Account Information Services or 'AIS'),[119] either requiring direct and continuous access to the customer's account and the data therein contained. However, the banks where the payment account are held could legitimately refuse access to their infrastructure on grounds of intellectual

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116 See e.g. ibid recitals 10, 16-17, 42 and arts 10, 28. In the literature, see Despina Mavromati, *The Law of Payment Services in the EU: The EC Directive on Payment Services in the Internal Market* (Kluwer Law International 2008).

117 A typical example of end-to-end are e-money schemes such as the one provided by PayPal, a well-known firm operating as a payment processor and online payments system that supports instant online money transfers and serves as an electronic alternative to traditional methods like checks or money orders. Other end-to-end examples are virtual currencies/crypto-assets, or electronic money providers.

118 PIS operate as a bridging software between a trader's website and a payer's bank account. Examples of PIS are internet payment gateway providers or mobile wallets that position themselves as interfaces between the payers or the payees and the bank of the payment account.

119 AIS provide a single source of information on the current state of the aggregated finances of payment service users. Examples of AIS are services consolidating in one all the accounts of a person, money management, credit-risk analysis and scoring, financial advice, comparisons, access to targeted offers of other financial services such as credit or insurance, etc. They all analyse a person's transactions on their accounts to provide services based on information.

property protection, security risks, or persistent unclear rules regarding liabilities towards customers.[120]

Whilst applying in principle to online payment services, the PSD1 ignored both the specific issues and new developments of the fast-growing digital market. As a regulatory instrument conceived for payment services offered by traditional incumbents, the legal framework of the PSD1 displayed essentially two limits: i) the de facto low competition in the retail-banking sector characterised by low elasticity of demand, lock-in problems, and exclusivity of payments services linked to the holding of bank accounts;[121] ii) obsolescence in the face of fintech acceleration, with new unregulated market players and services operating outside the relationship between the banks and their account-holding customers.[122]

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120 Giuseppe Colangelo and Oscar Borgogno, 'Data, Innovation and Transatlantic Competition in Finance: The Case of the Access to Account Rule' (2020) 31 European Business Law Review 573.

121 The Netherlands Authority for Consumers and Markets, 'Barriers to Entry Into the Dutch *Retail* Banking Sector' (June 2014) <https://www.acm.nl/sites/default/files/old_publication/publicaties/13257_barriers-to-entry-into-the-dutch-retail-banking-sector.pdf> accessed 12 April 2021; Commission, 'Impact Assessment Accompanying the document Proposal for a directive of the European parliament and of the Council on payment services in the internal market and amending Directives 2002/65/EC, 2013/36/UE and 2009/110/EC and repealing Directive 2007/64/EC and Proposal for a Regulation of the European Parliament and of the Council on interchange fees for card-based payment transactions' SWD (2013) 288 final; European Central Bank, 'Financial Stability Review' (November 2016) <https://www.ecb.europa.eu/pub/pdf/fsr/financialstability review201611.en.pdf> accessed 12 April 2021; UK Competition and Market Authority, 'The Retail Banking Market Investigation Order 2017' (gov.uk, 2 February 2017) <https://www.gov.uk/government/publications/retail -banking-market-investigation-order-2017> accessed 12 April 2021.

122 European Banking Authority, 'Discussion Paper on Innovative Uses of Consumer Data by Financial Institutions' (2016) EBA/DP/2016/01 <https://www.eba.europa.eu/sites/default/documents/files/documents/10180/1455508/68e9f120-8200-4973-aabc-c147e9121180/EBA-DP-2016-01%20DP%20on%20innovative%20uses%20of%20consumer%20data%20by%20financial%

The fundamental drawbacks of this market physiognomy were the high profit margins of the traditional banking industry to the detriment of consumer welfare and the weak protection of consumers exposed to the legal vacuum of the alternative market of emerging, highly demanded fintech.[123] These trends occurred in a legal environment unfavourable to innovation, where the growth of the digital market played almost no role in policy decisions.[124]

This historical primer on EU payments law suggests similarities with the platform economy in terms of the rationale and extent of the changes heralded by the PSD2. The directive launched the banking industry into uncharted territory, to the extent that many observers have branded the resulting EU payments market a 'revolution'.[125]

20institutions.pdf?retry=1>; European Banking Authority, 'Discussion Paper on the EBA's Approach to Financial Technology (FinTech)' (2017) EBA/DP/2017/02 <https://www.eba.europa.eu/sites/default/documents/files/documents/10180/1919160/7a1b9cda-10ad-4315-91ce-d798230ebd84/EBA%20Discussion%20Paper%20on%20Fintech%20%28EBA-DP-2017-02%29.pdf?retry=1>. In the literature, see Dirk A Zetzsche and others, 'From FinTech to TechFin: The Regulatory Challenges of Data-Driven Finance' (2017) EBI Working Paper Series no 6 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2959925> accessed 12 April 2022; Federico Ferretti, 'Consumer Access to Capital in the Age of FinTech and Big Data: The Limits of EU Law' (2018) 25 Maastricht Journal of European and Comparative Law 476.

123 E.g. consumer protection concerns related to data protection, money laundering and fraud risks, and the difficulties of proof in establishing authorisation in cases of unauthorised payments. See Commission, 'Towards an integrated European market for card, internet and mobile payments' (Communication) COM (2011) 941 final.

124 Mary Donelly, 'Payments in the Digital Market: Evaluating the Contribution of Payment Services Directive II' (2016) 32 Computer Law and Security Review 827.

125 Inna Oliinyk and William Echikson, 'Europe's Payment Revolution' (2018) CEPS Research Report No 2018/06 <https://www.ceps.eu/ceps-publications/europes-payments-revolution/> accessed 12 April 2022, recalling industry trade and consumer groups.

2. The Access to Account Rule as a Game-changer: Open Banking and the Data Economy

With the PSD2, the EU legislature shifted its policy approach to digitalisation and undertook a significant intervention in the single payments market.[126]

Broadly, the law operates on two interrelated levels. Like the PSD1, it intervenes in the establishment, authorisation, and supervision of payment firms and the regulation of payment transactions. Adjusting to the digital market, the directive enlarges the scope of coverage of the law, clarifies the extent of consumer rights and service provider obligations, and reinforces security and authentication requirements.[127] In addition, the PSD2 recognises and incorporates into the regulation those TPPs emerging from new fintech endeavours in payment services. It brings TPPs under the same harmonised standards, requirements, and obligations as traditional payment providers and on an equal footing with them, regardless of the business model they apply.[128] Introducing the so-called 'access to account rule', it opens the market to new services by granting TPPs access to the customer payment accounts held by banks. The latter must allow TPPs authorised by the competent authority in their home Member State[129] access to the data contained in payment accounts in real-time and on a non-discriminatory basis.[130] By accessing and exploiting the large quantity of real-time data of the banking realm, technology firms have started disrupting retail financial markets.[131]

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126 See, in particular, PSD2, recital 95.

127 See the various provisions of ibid, titles II-IV.

128 Ibid, recitals 27-33.

129 Ibid art 36.

130 Ibid arts 64-68.

131 Oscar Borgogno and Giuseppe Colangelo, 'The Data Sharing Paradox: BigTechs in Finance' (2020) 16 European Competition Journal 492; Oscar Borgogno and Giuseppe Colangelo, 'Consumer Inertia and Competition-sensitive Data

The 'access to account rule' has therefore become the tool to unlock the data power of dominant banks over innovative fintech firms.

The TPPs access payment accounts. Such access must occur securely, under the guidelines laid down by the European Banking Authority ('EBA'),[132] and does not require any payment to the holding banks. The access is only carried out upon the conclusion of a contractual relationship between the account holder and a TPP for the provision of PIS or AIS and is instrumental to providing those kinds of services that require the data contained in the account.[133]

Governance: The Case of Open Banking' (2020) 4 Journal of European Consumer and Market Law 143; Fabiana Di Porto and Gustavo Ghidini, 'I Access Your Data, You Access Mine. Requiring Reciprocity in Payment Services' (2020) 51 IIC - International Review of Intellectual Property and Competition Law 307.

132 PSD2, art.95, followed by European Banking Authority, 'Final Report: Draft Regulatory Technical Standards on Strong Customer Authentication and Common and Secure Communication under Article 98 of Directive 2015/2366 (PSD2)' (2017) EBA-RTS-2017-02 <https://www.eba.europa.eu/sites/default/documents/files/documents/10180/1761863/314bd4d5-ccad-47f8-bb11-84933e863944/Final%20draft%20RTS%20on%20SCA%20and%20CSC%20under%20PSD2%20%28EBA-RTS-2017-02%29.pdf> accessed 12 April 2022; Commission Delegated Regulation (EU) 2018/389 of 27 November 2017 supplementing Directive (EU) 2015/2366 of the European Parliament and of the Council with regard to regulatory technical standards for strong customer authentication and common and secure open standards of communication C/2017/7782 [2018] OJ L69/23; European Banking Authority, 'Opinion of the European Banking Authority on the Implementation of the RTS on SCA and CSC' (2018) EBA-Op-2018-04 <https://www.eba.europa.eu/sites/default/documents/files/documents/10180/2137845/0f525dc7-0f97-4be7-9ad7-800723365b8e/Opinion%20on%20the%20implementation%20of%20the%20RTS%20on%20SCA%20and%20CSC%20%28EBA-2018-Op-04%29.pdf?retry=1> accessed 12 April 2022.

133 For PIS, see PSD2, art 66, stating that 'when the payer gives its explicit consent for a payment to be executed and (…)'. For AIS, see PSD2, art 67, providing that 'the account information service provider shall: (a) provide services only where based on the payment service user's explicit consent; (…)'.

These provisions have given rise to the novel concept of 'Open Banking', a market model that shifts from the money business to the data business and vice versa. Account data are shared with new market players of the fintech industry capable of capturing or creating value around existing un- or under-exploited assets.[134] By law, banks must share the data they control for the benefit of fintech firms for the creation of new products or the provision of new services.

Payment accounts contain a vast amount of data for analysis: financial data relating to incoming and outgoing transactions, balances, preferences, patterns, dependencies, behaviours, aspects of social life, etc. They are an exceptional tool for product development, especially when integrated with data from other unrelated sources ('big data') and processed by algorithms powered by artificial intelligence technologies.

The new paradigm of the Open Banking model thus reflects the unbundling of the provision of financial services in multiple market segments and the disintermediation of the banking industry.

Under the PSD2, TPPs are subject to business conduct restrictions and requirements that do not allow them to hold the payer's funds in connection with the service, store sensitive payment data of the service user, or process data beyond that necessary to provide the service.[135] The services can only exist via the traditional providers, creating a new market structure where the latter become digital platforms for the distribution of financial services. They facilitate and create a dependency for the contractual interactions of two or more market agents, but without having any contractual relationship with one of them (the TPP) and at the same time allowing the other one (the customers) to continue the fruition of their own services. The consent of customers is sufficient to allow TPPs to access account data.

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134 Henry Chesbrough, 'Business Model Innovation: Opportunities and Barriers' (2010) 43 Long Range Planning 354.

135 PSD2, art 66(3).

Thus, the Open Banking environment generates indirect network effects, enabling bilateral ventures not otherwise attainable with other means.[136]

The Open Banking market structure is moving towards a confluence of traditional financial service providers transforming into technological firms (while still engaging in their core business) and technological firms entering the financial services market, where the latter may be infant fintech businesses or established Big-Techs.[137]

From this point of view, the PSD2 is a law that encourages the expanding use of personal data. By forcing data sharing, it enables a vast array of newcomers to access an increasing amount of data sources for novel purposes.

Moreover, the 'access to account rule' does not entail access to an essential facility. It escapes the precise definition of the relevant market, which is a highly discretional exercise.[138] The rule permits the exploitation of a facility controlled by others and at the same time, reinforces the control requirements of data protection law.

The PSD2 also grants stronger bargaining power to consumers in the digital market. Unlike the one-off transfer upheld by the right to data portability, data-access under the PSD2 allows for continuous access to real-time data.

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136 Markos Zachariadis and Pinar Ozcan, 'The API Economy and Digital Transformation in Financial Services: The Case of Open Banking' (2016) SWIFT Institute Working Paper No 2016-001 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2975199> accessed 12 April 2021; Diana Milanesi, 'A New Banking Paradigm: The State of Open Banking in Europe, the United Kingdom and the United States' (2017) Stanford Law School TTLF Working Papers Series No 29 <https://law.stanford.edu/publications/a-new-banking-paradigm-the-state-of-open-banking-in-europe-the-united-kingdom-and-the-united-states/> accessed 12 April 2021.

137 René Stulz, 'FinTech, BigTech, and the future of banks' (2019) NBER Working Paper No 26312 <https://www.nber.org/papers/w26312> accessed 12 April 2021; Dirk Zetzsche and others, 'The Evolution and Future of Data-Driven Finance in the EU' (n 113); Di Porto and Ghidini (n 131).

138 Di Porto and Ghidini (n 131).

Adopting a pro-competitive perspective, the directive arguably strengthens subjects' control over their data by complementing the data protection right of portability. This way, it addresses the opening-up of retail financial markets. Together, the PSD2 and the GDPR may be regarded as a building block targeting the difficult relationship between competition and consumer protection.

Even as the PSD2 has broken the gatekeeping position of banks in the payment financial services sector, by analogy its regulatory model may well interrupt the gatekeeping role of Big-Techs in the platform economy. The PSD2 has disrupted the financial services sector traditionally dominated by large banks. Likewise, it can unlock the data power of Big-Techs and disrupt the digital market.

In short, it can be argued that the PSD2 attains for a single sector the same goals that the EU aims to achieve more generally with its recent data-access and sharing policies - that is, to ensure competition and consumer protection in the Digital Single Market. It already provides a regulatory model that would not require the reinvention of rules. A fragmented legislative strategy with a diverging data act could have the undesirable result of creating an uneven playing field among sectors, where technological firms enjoy unjustified advantages over traditional market players without reciprocity. Asymmetrical regulatory measures are prone to tilt the market in favour of platforms to the detriment of new market players. This is already the case in the Open Banking market structure, where the Big-Techs are entering the financial services market without reciprocity.[139]

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[139] Borgogno and Colangelo, 'Consumer Inertia and Competition-sensitive Data Governance' (n 131). For example, note that Google has secured an e-money license after Lithuania granted authorisation. The license enables the company to process payments, issue e-money, and handle electronic money wallets. It gives permission to operate across the EU via the passporting rights system. Likewise, Facebook and Amazon obtained licenses in Ireland and Luxembourg. See Milda Seputyte and Jeremy Kahn, 'Google Payment Expands With E-Money License

A one-size-fits-all Data Act built on the model of the PSD2 may set a fairer playing field, leaving room for competition law enforcement to challenge other anticompetitive practices in the market.

V. Conclusion

The EU has launched an ambitious policy for a Single Data Space. It seeks to combine legislation and governance across business sectors to ensure the free flow, access and sharing of data for competition and innovation. This paper analysed the legal aspects of the datafication process in the context of the market imbalances created by Big-Techs and how they influence the prospective Data Act for the establishment of a data-access and sharing regime for digital market players. It contributes to the field by assessing a recent policy and legislative announcement and advancing a novel suggestion for an alternative and simplified approach. It aimed to show that to build a genuine data-driven market for products and services and accomplish the latest policy goals, the EU should take stock of its legislation in the payments sector. The access to account rule of the PSD2 could be reproduced to grant free access to and sharing of data for innovation, at the same time breaking the gatekeeping role of Big-Techs in the same fashion as it did for banks in the financial services sector.

Many Big-Techs have built their business models on monetising data and acting as gatekeepers. Because data are so important for the digital economy, it is rational to assess the extent to which 'data markets' exist or take shape. No matter how tempting it may be, in legal terms, data cannot be qualified as tradable goods. Their fluid nature finds no parallel with existing concepts and traditional legal doctrines deriving from property and contracts. Likewise, competition principles cannot be directly applied.

From Lithuania' (Bloomberg, 21 December 2018) <https://www.bloomberg.com/news/articles/2018-12-21/google-payment-expands-with-e-money-license-from-lithuania> accessed 12 April 2021.

Therefore, a market for data cannot exist without further complications or elaboration. Instead, digital markets can be considered 'markets for data-driven products and services', where competition and innovation lie in the ability to exploit the data, e.g. through the use of software algorithms, digital infrastructures, or product/service engineering and design. This distinction matters as it hardly justifies gatekeeping practices, where data are controlled de facto without proper legal title except in those established circumscribed situations where intellectual property rights or data protection law intervene.

However, the controls granted by intellectual property escape individual data. Likewise, when data are personal, data protection law addresses data subjects' control as a relative right that does not necessarily exclude the possibility of others accessing or using the data. Moreover, third parties may well access personal data upon data subjects' consent.

De facto control and gatekeeping negatively impact data-driven markets. Yet competition law enforcement is limited in application and does not offer a regulatory framework capable of challenging them. Not only are data amorphous and challenging to traditional legal constructs, but digital markets move too fast and are too varied and complex to be supervised ex-post by the competent authorities. Moreover, competition law does not provide a general approach for applying the essential facility doctrine to dominant platforms; enforcement would depend on the specific circumstances of each case, in terms of the specific conduct in question and its economic context. Competition law may continue to serve the purpose of limiting anticompetitive practices but appears unsuitable to tackle data concentration and bottlenecking.

It seems inevitable that ex-ante regulation, as expressed in the Data Act, will eliminate the limits or uncertainties of competition law enforcement. Yet the question remains of how it can achieve the expected results established in the policy goals.

Arguably, an analysis of the existing sectoral legislation advanced by the PSD2 reveals that the EU does not have to reinvent the wheel. The directive already enacts, in the financial services market, the results envisioned by the EU for the entire digital market. The PSD2 has set a precedent of user-driven data-access, enabling the real-time sharing of data, favouring interconnectedness, and facilitating innovation. By providing for the 'access to account rule', the PSD2 breaks the data monopoly of the traditional banking sector. It has given rise to the Open Banking model that is disrupting the sector, allowing for a free data-access regime where fintech companies (including Big-Techs) enter the market, design new products and provide new services. In such a renewed market, consumers continue to enjoy the usual protections afforded by data protection law. At the same time, the expanded applicability of data portability and reinforced ability to consent to data-access enables consumers to drive the process. More transparent control over data-access further empowers them.

The PSD2 has disrupted the retail financial market and unlocked the data and service power of dominant banks in favour of innovative firms. By analogy, its regulatory model could disrupt the digital market and unlock the data power of Big-Techs.

To the extent that the market failure of the platform economy mirrors the one that existed in the banking sector, the 'access to account rule' could be a replicable legislative model that addresses the market imbalances caused by the Big-Techs. If it works for banks, why shouldn't it be suitable for gatekeeping platforms?

CHANGES TO THE EUROPEAN FINANCIAL SUPERVISORY AGENCIES' SOFT LAW POWERS: LEGITIMACY PROBLEMS SOLVED OR NEW PUZZLES CREATED?

Marloes van Rijsbergen* and Ebbe Rogge†

Important changes to the legislative framework of the three European Supervisory Authorities (ESAs) – the European Securities and Markets Authority (ESMA), the European Banking Authority (EBA), and the European Insurance and Occupational Pensions Authority (EIOPA) – have recently taken effect. The ESA review, which is regarded as an important step to ensure a fully functioning Capital Markets Union and Banking Union, reinforces the role and powers of the ESAs. This article focuses on the most significant changes which apply from 1 January 2020 with an impact on the legitimacy of the ESAs' soft law powers. These changes include the introduction of 'no-action letters', modifications to the ESAs' non-binding opinions and Q&As, and a possibility for market participants to address possible ultra vires problems at the European Commission. Altogether, the ESA review addresses several previous legitimacy issues, but at the same time brings to light new legitimacy concerns.

Keywords: European Supervisory Authorities (ESAs); ESA review; soft law; legitimacy; institutional balance; no-action letters

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I. INTRODUCTION

Over the last thirty-odd years, the European Union (EU) has seen a gradual increase in EU regulatory agencies as part of its administration.[1] The scope of delegation to these agencies has grown not only quantitatively, but also in qualitative terms: more and more soft rule-making powers are being delegated to EU agencies in an increasing number of policy areas.[2] These decentralised bodies are distinct from the EU institutions themselves and established with a mandate to accomplish specific tasks. Examples of such agencies include the European Medicine Agency (EMA), the European Aviation Safety Agency (EASA), and the Body of European Regulators of Electronic Communications (BEREC). Member States are represented in

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1 See generally Giandomenico Majone, 'The New European Agencies: Regulation by Information' (1997) 4 Journal of European Public Policy 262; Alexander Kreher, 'Agencies in the European Community – A Step Towards Administrative Integration in Europe' (1997) 4 Journal of European Public Policy 225; Miroslava Scholten and Marloes van Rijsbergen, 'The Limits of Agencification in the European Union' (2014) 15 German Law Journal 1223. Note there are also a number of executive agencies, which do not produce 'soft law', but assist the Commission in managing certain specific tasks.

2 Marloes van Rijsbergen, 'On the Enforceability of EU Agencies' Soft Law at the National Level: The Case of the European Securities and Markets Authority' (2014) 10 Utrecht Law Review 116

these agencies, for example by way of participation in their management board and through staffing. Often, these agencies operate as a 'network' as their organisational form allows for the participation of national authorities.[3]

In the wake of the financial crisis of 2008, the EU established the European System of Financial Supervision including three new EU agencies.[4]. These are known as the three European Supervisory Authorities (ESAs, or 'the Authorities'), each covering distinct areas of finance: the European Securities and Markets Authority, the European Banking Authority, and the European Insurance and Occupational Pension Authority.[5] The Authorities support important projects for the single market. For example, the single market for banking services, known as the Banking Union, aims for deeper integration of the banking system within Eurozone countries, including a stronger rulebook, supervisory system, and resolution regime. [6] Likewise, the single

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3 Saskia Lavrijssen and Leigh Hancher, 'Networks on Track: From European Regulatory Networks to European Regulatory Network Agencies' (2009) 36 Legal Issues of Economic Integration 23.

4 Jacques de Larosière, *The High-Level Group on Financial Supervision in the EU – Report* (European Commission, 25 February 2009) <https://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf> accessed 18 June 2022.

5 See generally Niamh Moloney, 'EU Financial Market Regulation after the Global Financial Crisis: "More Europe" or More Risks?' (2010) 47 Common Market Law Review 1317; Eddy Wymeersch, 'The European Financial Supervisory Authorities or ESAs', in Eddy Wymeersch, Klaus J Hopt and Guido Ferrarini (eds), *Financial Regulation and Supervision. A Post-Crisis Analysis* (Oxford University Press 2012).

6 See e.g. Danny Busch and Guido Ferrarini (eds), *European Banking Union*, (Oxford University Press 2015); Jens-Hinrich Binder and Christos Gortsos, *The European Banking Union: A Compendium* (CH Beck, Hart, Nomos 2016); 'What is the Banking Union?' (European Commission) <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/banking-union/what-banking-union_en> accessed 18 June 2022.

market for capital, the Capital Markets Union, aims for more resilient and deeper integrated capital markets within the EU.[7]

In 2010, the Authorities were established under the original ESA Regulations.[8] Over time, their powers gradually increased, casting uncertainty on the limitations and legitimacy of their authority.[9] The new ESA Regulations in 2019 entail a number of significant changes that may impact the Authorities' soft rule-making powers.[10] The main questions of

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7 See e.g. 'What is the Capital Markets Union' (European Commission) <https://ec.europa.eu/info/business-economy-euro/growth-and-investment/capital-markets-union/what-capital-markets-union_en> accessed 18 June 2022.

8 Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC [2010] OJ L331/12 (EBA Regulation); Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC [2010] OJ L331/48; Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC [2010] OJ L331/84 (ESMA Regulation) (collectively, ESA Regulations).

9 See e.g. Madalina Busuioc, 'Rule-Making by the European Financial Supervisory Authorities: Walking a Tight Rope' (2013) 19 European Law Journal 111; Marta Simoncini, 'Legal Boundaries of European Supervisory Authorities in the Financial Markets: Tensions in the Development of True Regulatory Agencies' (2015) 34 Yearbook of European Law 319; Jakob Schemmel, 'The ESA Guidelines: Soft Law and Subjectivity in the European Financial Market – Capturing the Administrative Influence' (2016) 23 Indiana Journal of Global Legal Studies 455; Elizabeth Howell, 'EU Agencification and the Rise of ESMA: Are Its Governance Arrangements Fit for Purpose?' (2019) 78 Cambridge Law Journal 324.

10 Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 December 2019 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority), Regulation

this article are whether the changes solve the legitimacy issues they aimed to tackle and whether the new powers bring to light any new legitimacy concerns. Although there exists a body of literature addressing the growing powers and legitimacy, the question can now be answered more fully following the entry into force of the new 2019 ESA Regulations.[11] For this purpose, an assessment framework to identify and evaluate potential legitimacy concerns with regard to EU agencies is used. This framework sets out the relevance for this article of the delegation of powers, the evolution of the case law regarding the legitimacy of EU agencies, as well as the notions of input, throughput, and output legitimacy as set out by Majone, Scharpf, and Schmidt. These conceptual tools as well as the existing case law can then be used to evaluate the ESAs soft law instruments under the new ESA Regulations and to evaluate whether the amendments to the original ESA Regulations effectively addressed existing legitimacy issues. Some legal instruments, such as the No-Action Letter, are novel and could potentially provide the ESAs with innovative new powers, meriting a thorough examination. Another novelty is the appeal mechanism contained in Article 60a of the new ESA Regulations. It merits closer examination on how it will work in practice.

In short, this article aims to set out, in a practical way, the evolution of the case law, the previous ESA Regulations, and the potential of the new ESA

(EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority), Regulation (EU) No 600/2014 on markets in financial instruments, Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds, and Regulation (EU) 2015/847 on information accompanying transfers of funds [2019] OJ L334/1 (ESA Amendment).

11 See e.g. Niamh Moloney, *The Age of ESMA: Governing EU Financial Markets* (Hart 2018); Danny Busch, 'A Stronger Role for the European Supervisory Authorities in the EU27' in Danny Busch, Emilios Avgouleas and Guido Ferrarini (eds), *Capital Markets Union in Europe* (Oxford University Press 2018).

Regulations in terms of improving legitimacy of the ESAs soft rule-making powers. In doing so, it adds to the existing body of literature developed in anticipation of the new ESA Regulations.[12] This article proceeds as follows: Section II provides an assessment framework, followed in Section III by a brief historical overview of the legislation creating the ESAs and the European System of Financial Supervision. Section IV examines the ESA soft law instruments under both the original and amended legal framework. This sets the stage for the application of a legitimacy framework to the ESAs' legal framework and soft law instruments in Section V. It is argued that the changes in these new regulations are significant and have an impact on the Authorities' soft rule-making powers. The final section concludes that, although a number of legitimacy problems targeted by the ESA review have been resolved, new legitimacy issues have arisen.

II. LEGITIMACY CONCERNS AROUND EU AGENCIES

1. No Legal Basis for the Delegation of Powers to EU Agencies

EU agencies are an increasingly important part of the Union's institutional framework, however their exercise of soft rule-making powers raise legitimacy concerns. In particular, neither the establishment nor the delegation of regulatory powers to EU agencies are explicitly regulated in the EU Treaties. Agencies are established by secondary law instruments, often regulations, on the legal basis of specific Treaty provisions such as Articles 114 and 352 TFEU.[13] These provisions confer powers on the EU to develop (substantive) laws and policies in different areas, but the EU legislature has interpreted them so as to also include the power to establish Union organs tasked with supervising and/or facilitating implementation of (substantive) laws and policies.

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12 Ibid.

13 See Pieter van Cleynenbruegel, 'Meroni Circumvented? Article 114 TFEU and EU Regulatory Agencies' (2014) 21 Maastricht Journal of European and Comparative Law 64, specifically criticizing the legal basis.

There is further no ex ante regulation in primary law of EU agencies' powers. Such rule-making was not foreseen in the Union's hierarchy of norms – which is the ranking of acts according to 'the democratic legitimacy of their respective authors and adoption procedures' as laid down in Articles 288–291 TFEU.[14] The Treaty of Lisbon also merely introduced ex post review in Articles 263 ('action for annulment') and 267 TFEU ('preliminary rulings'). This means that the lawfulness of EU agency acts can only be assessed after they have taken effect.

Such review is particularly difficult in the absence of prior regulation of EU agency powers. The non-regulation of EU agencies gives rise to uncertainty as to their rule-making competence. In the absence of a general legal framework allowing for the delegation of general implementing powers to entities other than the Commission and the Council, the powers of EU agencies are still subject to the constitutional limits formulated by the Court of Justice of the European Union (CJEU) in its case-law.

2. Evolution of the Case Law on the Delegation of Powers to EU Agencies[15]

The CJEU ruled in the 1958 Meroni judgment that delegation of power was possible in principle, but not in all cases. It distinguished two categories of powers: 'clearly defined executive powers the exercise of which can be subject to strict review in the light of objective criteria determined by the delegating authority' and 'discretionary powers, implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy'.[16] The CJEU accepted the

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14 Koen Lenaerts and Marlies Desomer, 'Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures' (2005) 11 European Law Journal 744, 745.

15 This subsection is largely based on Miroslava Scholten and Marloes van Rijsbergen, 'The ESMA-Short Selling Case: Erecting a New Delegation Doctrine in the EU upon the Meroni-Romano Remnants' (2014) 41 Legal Issues of Economic Integration 389.

16 Case 9/56 *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community (Meroni)* EU:C:1958:7, para 152.

delegation of the first kind of powers, but concluded that the second kind hindered the balance of powers guaranteed by the Treaties.[17] As a consequence, general rule-making powers cannot be delegated.

Another important case is the 1981 Romano judgment, in which the CJEU established an additional non-delegation criterion: the Council was not able to delegate to EU agencies the power to adopt acts 'having the force of law'.[18] In its reasoning, the CJEU referred in this specific case to: (i) the judicial system which, at that moment, did not provide for a remedy against the acts of bodies such as an EU agency; and (ii) Article 155, paragraph 4 EEC, which prescribed that it was only for the Commission to exercise executive powers and hence to issue legally binding decisions.[19] The delegation in question was therefore considered to be unlawful because, under the EEC Treaty, agencies were not envisaged among the possible authors of legally binding decisions and no judicial review of agency decisions was possible.[20]

In the more recent ESMA Short-selling case, the CJEU established a new delegation standard by allowing the delegation of powers to issue legally-binding and generally applicable measures, but only if these powers are subject to sufficiently delineating conditions, criteria limiting discretion and amenable to judicial review in the light of the objectives established by the delegating authority.[21] The main factor behind this relaxation of the delegation doctrine was the Lisbon Treaty, which recognizes the existence

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17 Ibid paras 151-152.

18 Case 98/80 *Giuseppe Romano v Institut national d'assurance maladie-invalidité (Romano)* EU:C:1981:104, para 20.

19 Merijn Chamon, 'Le recours à la soft law comme moyen d'éluder les obstacles constitutionnels au développement des agences de l'UE' (2013) 567 Revue de l'Union Européenne 152, 155.

20 Ibid.

21 C-270/12 *United Kingdom v. European Parliament and Council* (*Short selling)* C:2014:18. See also Scholten and van Rijsbergen, 'The ESMA-Short Selling Case' (n 15) 401; Carl Fredrik Bergström, 'Shaping the New System of Delegation of Powers to EU Agencies: United Kingdom v. European Parliament and Council (Short Selling)' (2015) 52 Common Market Law Review 219.

of EU agencies (at least indirectly). In other words, it overturns, at least in part, the Meroni-Romano non-delegation standard. In the *ESMA-short selling case*, the CJEU stated that Romano's ban on delegating powers with 'the effect of law' was effectively outdated by the Lisbon Treaty. It argued that Articles 263 and 277 TFEU imply the possibility to create EU agencies with powers to issue acts of general application and explicitly establish judicial review of EU agencies' acts.[22] In the CJEU's reasoning, Articles 263 and 277 TFEU therefore went beyond presuming the existence of such regulatory powers; in fact, they constituted them.[23]

Under the Lisbon Treaty, the powers that the Union legislature can give to EU agencies can therefore include discretionary powers transferring a part of the responsibility from the legislature to the agency.[24] Nonetheless, the delegation of general rule-making powers to EU agencies is still excluded.[25] The delegation of soft regulatory powers to EU agencies, however, appears to bypass the case law restrictions, which have therefore not prevented the

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22 *Short selling* (n 21).

23 See Heikki Marjosola, 'Bridging the Constitutional Gap in EU Executive Rule-making: The Court of Justice Approves Legislative Conferral of Intervention Powers to European Securities and Markets Authority: Court of Justice of the European Union (Grand Chamber) Judgment of 22 January 2014, Case C-270/12, UK v. Parliament and Council (Grand Chamber)' (2014) 10 European Constitutional Law Review 500.

24 Compare with *Meroni* (n 16) 152, in which the Court explicitly prohibited the delegation of 'discretionary power, implying a wide margin of discretion which may [. . .] make possible the execution of actual economic policy'.

25 Note that this is different for the supervisory and intervention powers of ESMA. These powers are circumscribed by various conditions and criteria that limit the agency's discretion. They are precisely delineated and amenable to judicial review and therefore do not imply a 'very large measure of discretion' incompatible with the EU Treaty. See also: Marloes van Rijsbergen and Jonathan Foster, '"Rating" ESMA's accountability: "AAA" status' in Miroslava Scholten and Michiel Luchtman (eds), *Law Enforcement by EU Authorities. Implications for Political and Judicial Accountability* (Edward Elgar 2017).

allocation of soft rule-making powers to EU agencies.[26] Indeed, institutional practice demonstrates that certain EU agencies have developed policy-making activity that comes close to full regulatory powers and 'while these general rule-making powers are soft by the label, they are often hard in practice'.[27] The delegation of soft regulatory powers to EU agencies therefore seems to provide a means for circumventing competent legislative and executive bodies in the decision-making process.[28]

3. Input, Throughput, and Output Legitimacy

Although legitimacy concerns and EU law dictate that EU agencies ought not to have far-reaching general rule-making powers, they increasingly obtain them de facto.[29] There are differing opinions about the meaning of legitimacy and how it should be analysed.[30] These opinions are often based on Majone's concepts of procedural and substantive legitimacy[31] and Scharpf's ideas on 'input' and 'output' legitimacy.[32] Schmidt adds to this the

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26 LAJ Senden and A van den Brink, 'Checks and Balances of Soft EU Rule-Making' (2012) European Parliament Study PE 462.433 <http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JURI_ET(2012)462433> accessed 18 June 2022, 65.

27 Ibid 23.

28 Marta Simoncini, 'The Erosion of the Meroni Doctrine: The Case of the European Aviation Safety Agency' (2015) 21 European Public Law 309, 320.

29 Senden and van den Brink (n 26) 65.

30 Gráinne De Búrca, 'The Quest for Legitimacy in the European Union' (1996) 59 Modern Law Review 3; Joanne Scott, 'Law, Legitimacy and EC Governance: Prospects for Partnership' (1998) 36 Journal of Common Market Studies 175; Giandomenico Majone, 'The Regulatory State and Its Legitimacy Problems' (1999) 22 West European Politics 1; Mark Bovens, Deirdre Curtin and Paul 't Hart, 'The Quest for Legitimacy and Accountability in EU Governance' in Mark Bovens, Deirdre Curtin and Paul 't Hart (eds), *The Real World of EU Accountability: What Deficit?* (Oxford University Press 2010) 9.

31 Giandomenico Majone, *Regulating Europe* (Routledge 1996).

32 Fritz Scharpf, *Governing in Europe: Effective and Democratic* (Oxford University Press 1999).

notion of 'throughput' legitimacy.[33] This article follows these three normative criteria for the evaluation of legitimacy and uses a number of legal principles to evaluate the extent to which the ESA's soft rule-making powers are legitimate – namely, legality (is there a clear legal basis), transparency, participation, and political and judicial accountability.

A. Input Legitimacy

According to Majone, the first dimension of legitimacy is that of procedural legitimacy.[34] Procedural legitimacy suggests regulatory authorities are created by democratically enacted statutes which define their legal authority and objectives (legality); regulators are appointed by representative bodies; decisions are justified and open to judicial review; and regulatory decision-making follows formal rules, which often require public participation.[35] As such, procedural legitimacy links with the notion of input legitimacy as it demands that those being affected by a norm have somehow been included in the process of its formulation and that they have a fair chance to scrutinize the results. According to Scharpf, input-oriented democratic thought emphasizes the notion of a 'government by the people'.[36] Political choices are legitimate if and because they reflect the 'will of the people'.[37] The latter can be determined directly via citizens' participation in the decision-making process or indirectly via their representation through elected delegates.[38]

B. Output Legitimacy

Majone's second dimension of legitimacy – substantive legitimacy –relates to aspects of the regulatory process such as policy consistency; the expertise and problem-solving capacity of the regulators; the exact boundaries within

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33 Vivien Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output and 'Throughput' (2013) 61 Political Studies 2.

34 Majone, *Regulating Europe* (n 31).

35 Ibid 291.

36 Scharpf (n 32) 6.

37 Ibid.

38 Ibid 7.

which regulators are expected to operate; and their ability to protect diffuse interests.[39] As such, substantive legitimacy links with the notion of output legitimacy as these regulatory aspects emphasize the importance of effective policy outcomes. Following this line of thought, political choices are legitimate when they effectively promote the overall welfare of the population in question, i.e. 'government for the people'.[40] Regulation is output legitimate when the regulatory outcomes are satisfactory. Furthermore, output legitimacy requires the prevention of abuse of political power by holding a regime accountable for its decisions ex post.[41]

C. Throughput Legitimacy

Schmidt explains that the quality of governance processes also is an important criterion for the evaluation of a polity's overall democratic legitimacy.[42] So-called throughput legitimacy concerns the adequacy, accountability and transparency of EU governance processes and policy-making rules' adequacy.[43] Here, accountability is understood as EU actors being judged on their responsiveness to participatory input demands and being held responsible both for their output decisions and for their policy-making processes meeting standards of ethical governance.[44] Transparency entails access to information and publication requirements covering EU institutions' processes and decisions.[45] Finally, institutional throughput

39 Majone, *Regulating Europe* (n 31) 291-92.

40 Scharpf (n 32) 6.

41 Ibid 13.

42 Schmidt (n 33) 2; Vivien Schmidt and Matthew Wood, 'Conceptualizing Throughput Legitimacy: Procedural Mechanisms of Accountability, Transparency, Inclusiveness and Openness in EU Governance' (2019) 97 Public Administration 727.

43 Schmidt (n 33) 6.

44 Carol Harlow and Richard Rawlings, 'Promoting Accountability in Multi-level Governance' (2007) 13 European Law Journal 542.

45 Adrienne Héritier, 'Composite Democracy in Europe: The Role of Transparency and Access to Information' (2003) 10 Journal of European Public Policy 814.

concerns the quality and quantity of EU governance processes' inclusiveness and the openness of the EU's various institutional bodies to 'civil society'.[46]

III. THE CASE OF THE EUROPEAN SYSTEM OF FINANCIAL SUPERVISION

The ESAs started operating in January 2011, deriving their powers from a series of European Regulations.[47] ESAs play an important role in the development of EU financial sector regulation. ESAs can be described as networks of national regulators[48] as they set up working groups and committees for national financial regulator experts to decide on technical details of European financial regulation. As the national experts lack democratic credentials, the ESA working groups and committees give rise to legitimacy concerns and questions regarding their place within the EU's constitutional framework.[49] Arguably, a construct where (soft) rule-making

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46 Schmidt (n 33) 6-7.

47 ESA Regulations.

48 See generally Burkard Eberlein and Abraham L Newman, 'Escaping the International Governance Dilemma? Incorporated Transgovernmental Networks in the European Union' (2008) 21 Governance: An International Journal of Policy, Administration, and Institutions 25; Lavrijssen and Hancher (n 3); Marco Zinzani, *Market Integration through 'Network Governance': The Role of European Agencies and Networks of Regulators* (Intersentia 2012). The same concept is applicable at transnational level. See generally Pierres-Hugues Verdier, 'Transnational Regulatory Networks and Their Limits' (2009) 34 Yale Journal of International Law 113; Ebbe Rogge, 'Transnational Financial Rulemaking: An Application of Comparative Law & Global Legal Pluralism' (2019) 39 Review of Banking and Financial Law 499. But see also Anne-Marie Slaughter, 'The Real New World Order' (1997) 76(5) Foreign Affairs 183. For the ESAs' role at transnational level, see Niamh Moloney, 'International Financial Governance, the EU, and Brexit: The "Agencification" of EU Financial Governance and the Implications' (2016) 17 European Business Organisation Law Review 451.

49 At the international level, the issue of whether there is a democratic deficit in international organizations being comprised of e.g. national regulators is raised by, for example, Slaughter (n 48); David Zaring, 'International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations' (1998) 33 Texas International Law Journal 281; and Verdier

powers are devolved to experts rather than elected representatives may warrant further democratic checks and balances. How these checks and balances fit within the European constitutional framework is an important part of the main questions posed in this article, in particular in light of the ever-expanding role and powers bestowed upon European regulatory bodies.

EU financial regulation is developed through the so-called Lamfalussy process, which is made up of four levels.[50] The first level relates to the passing of relevant EU legislation i.e., Directives and Regulations by the European Parliament and Council. At the second level, the Authorities develop draft regulatory technical standards or implementing technical standards on the basis of the level one texts and submit them to the Commission for endorsement. The Commission adopts level two regulatory technical standards and implementing technical standards by means of a delegated act[51] or implementing act,[52] respectively. This distinction between level one and two texts allows Parliament and Council to focus on the broad political lines, leaving the design of the technical details to the regulatory experts. ESAs have a large degree of discretion when developing draft technical standards. Given the agencies' technical expertise, the Commission has stated

(n 48). At the European level, see for example Marloes van Rijsbergen, *Legitimacy and Effectiveness of ESMA's Soft Law* (Edward Elgar 2021).

50 See generally *Regulatory Process in Financial Services* (European Commission) <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-reforms-and-their-progress/regulatory-process-financial-services/regulatory-process-financial-services_en>, accessed 18 June 2022. See also Niamh Moloney, 'The European Securities and Markets Authority: A Perspective from One Year On' (2013) 68 Zeitschrift für öffentliches Recht 59, explaining that ESMA's rule-making powers include assisting the EC in formulating and adopting a single rulebook applicable to all EU financial institutions.

51 Consolidated Version of the Treaty on European Union [2008] OJ C115/13 (TEU) art 290.

52 Ibid art 291.

it will, as a rule, rely on ESA submitted drafts.[53] These drafts are generally only rejected when there are strong reasons to believe they will not work. Rejection is unlikely, because the ESAs have done consultative work and collaborated with the stakeholders during the drafting process.[54] At the third level of the Lamfalussy process, the Authorities issue guidelines and recommendations to ensure a consistent interpretation of Directives and Regulations across all Member States. The Authorities increasingly make use of non-binding instruments such as opinions and Q&As. Finally, at the fourth level, the Commission ensures the consistent enforcement of Directives and Regulations across Member States.

In January 2020, important changes to the Authorities' legislative framework entered into force. These changes largely aimed at strengthening the ESAs' legitimacy. The changes are based on the so-called ESA-review of September 2017,[55] in which the Commission put forward proposals to reinforce the coordination role of the Authorities. On 21 March 2019, the European Parliament and Member States agreed on the core elements of reforming the European supervision in the area of EU financial markets.[56] This agreement was regarded as an important step to ensure a fully functioning Capital Markets Union and Banking Union. It reinforced the role and powers of the Authorities by ensuring convergence of supervisory

53 ESMA Regulation, as amended by ESA Amendment.

54 van Rijsbergen, *Legitimacy and Effectiveness of ESMA's Soft Law* (n 49).

55 'Public Consultation on the Operations of the European Supervisory Authorities' (European Commission) <https://ec.europa.eu/info/consultations/public-consultation-operations-european-supervisory-authorities_en> accessed 18 June 2022. Within the framework of this revision, the European Commission might take decisions or actions regarding the ESAs' establishing regulations.

56 'Press Release: Capital Markets Union: Political Agreement on a Stronger and More Integrated European Supervisory Architecture, including on Anti-Money Laundering' (European Commission, 21 March 2019) <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1655> accessed 18 June 2022.

outcomes, a level playing field for financial institutions and investors, and financial integration generally within the Single Market.[57]

IV. Soft Law Instruments Before and After the ESA Review

The ESAs can use a wide range of regulatory and guidance tools directly provided for in their founding Regulations. These may be categorised as: 1) draft regulatory and implementing technical standards, which are of a quasi-binding preparatory nature; 2) guidelines and recommendations, subject to 'comply-or-explain' for the national authorities; and 3) non-binding instruments such as opinions and Q&As, which are of a completely voluntary nature.[58] The sections below provide a brief overview of what the three categories of soft law instruments are, what soft law function they fulfil (pre-law, post-law or para-law) and on what basis the ESAs may exercise their powers.[59] This section also describes that the most important changes to the Authorities' legal framework aimed at improving the legitimacy of their soft law instruments include the introduction of 'no-action letters', modifications to non-binding instruments such as opinions and Q&As, and a possibility for market participants to address possible *ultra vires* problems at the European Commission.

1. Draft Regulatory and Implementing Technical Standards

At the second level of the Lamfalussy process - and in areas specifically set out in legislative acts referred to in Article 1(2) of the ESA Regulations - Authorities are empowered to develop two kinds of formally non-binding draft technical standards: *regulatory technical standards* and *implementing technical standards*.[60] The former are a delegation of quasi-rulemaking

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57 Ibid.

58 For a full analysis of these three categories of ESMA's soft law, see van Rijsbergen, *Legitimacy and Effectiveness of ESMA's Soft Law* (n 49).

59 For an elaborate explanation on the three main functions of Union soft law, see Linda Senden, *Soft Law in European Community Law* (Hart 2004) 119-20.

60 ESMA Regulation, arts 10-15.

authority from the EU's legislative institutions.[61] These draft regulatory technical standards are considered as soft law until adopted by Commission *delegated acts* under Article 290 TFEU. The latter, implementing technical standards, are more operational, with an implementing quality, and so, in effect, represent a form of delegation of powers from the Member States.[62] They are adopted by the Commission by means of *implementing acts* under Article 291 TFEU. Since the Authorities' draft technical standards are adopted with a view to elaborating and preparing future Union legislation and policy, they fulfil a *pre-law function*.

Before the ESA Review, and in accordance with the old Article 8(2)(a) and (b) of the ESA Regulations, agencies had the power to develop draft regulatory and implementing technical standards, or level two legislation, in the specific cases referred to in Articles 10 and 15. This provision limits the development of draft technical standards to 'specific cases'. Therefore the level one legislation needs to contain an explicit requirement or invitation for the Authorities to draft level two legislation. Articles 10 to 15 of the ESA Regulations provide only the procedural framework for developing this type of legal instrument, and thus do not establish the legal basis. Instead, the legal basis for this regulatory power has to arise from specific sectoral legislation. The Authorities do not have the power to draft level two legislation *on their own initiative*: they may do so only in accordance with the specific mandate provided in level one (financial) legislation. Ultimately, the EU's institutional balance of powers requires that each institution act in accordance with the principle of conferral and in line with the inter-institutional division of powers which bestows on the Commission the right of initiative.

The power to draft regulatory and implementing technical standards flows from Articles 10 and 15 of the new ESA Regulations. These articles were

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61 Moloney, 'International Financial Governance, the EU, and Brexit' (n 48) 66.

62 Niamh Moloney, 'Reform or Revolution? The Financial Crisis, EU Financial Markets Law and the European Securities and Markets Authority' (2011) 60 International & Comparative Law Quarterly 529, 530.

streamlined but not substantially modified content-wise. Importantly, the Authorities are still only allowed to develop technical standards where they are explicitly mandated to do so by a level one text. In other words, Authorities develop such technical standards only where the Parliament and Council delegate to the Commission the power to adopt technical standards pursuant to Article 290 or 291 TFEU. When the Commission receives draft technical standards, they are forwarded to the Parliament and Council. The draft technical standards need to be adopted within three months.

2. Guidelines and Recommendations

The ESAs' *guidelines and recommendations* are addressed to national supervisory authorities or financial market participants. They aim to establish consistent, efficient and effective supervisory practices within the European System of Financial Supervision, and ensure the common, uniform and consistent application of EU law.[63] While not legally binding stricto sensu, these are not merely voluntary or without legal effect and aim to influence the actions of the addressees.[64] Since national supervisory authorities and financial market participants are required to make every effort to comply with ESA guidelines and recommendations, these are referred to as 'comply or explain' instruments.[65] The Authorities' guidelines fulfil a *post-law function*, because they are adopted after the level one legislation entered into force in order to correctly interpret and support the proper implementation of that legislation in the Member States.[66]

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63 ESMA Regulation, art 16(1).

64 Dorothee Fischer-Appelt, 'The European Securities and Markets Authority: The Beginnings of a Powerful European Securities Authority?' (2011) 5 Law and Financial Markets Review 21, 25; Pierre Schammo, *EU Prospectus Law. New Perspectives on Regulatory Competition in Securities Markets* (Cambridge University Press 2011) 1881; Wymeersch (n 5) 276.

65 ESMA Regulation, art 16(3).

66 Senden (n 59) 119-20.

The most obvious legal basis for the Authorities' guidelines and recommendations, or level three legislation, is in Article 16 of the ESA Regulations. In contrast with the Authorities' draft technical standards, Article 16(1) of the old ESA Regulations empowers the agency directly and explicitly to issue guidelines and recommendations addressed to competent authorities or financial institutions. Therefore, the level one legislation does not need to provide the Authorities with a legal basis for adopting guidelines and recommendations, even though on many occasions such empowerment is explicitly provided for. In a more recent development, guidelines and recommendations are sometimes adopted on the basis of a mandate in the Commission's delegated or implementing acts (or level two acts), which – quite remarkably – are based on the interpretations provided by the Authorities themselves. This is the case for instance for ESMA's Guidelines on the validation and review of Credit Rating Agencies' methodologies.[67] Since Article 16(1) directly empowers the agency, the power to issue guidelines and recommendations is available to the Authorities *on their own initiative.*

In the new ESA Regulations, Article 16 is amended slightly compared with its previous wording. Paragraph 1 makes it clear that guidelines are intended for all competent authorities or all financial institutions, whilst recommendations are intended for one or more competent authorities or one or more financial institutions. In accordance with paragraph 2, the Authorities still have to conduct a public consultation and provide a cost benefit analysis where appropriate. The difference is that the Authorities will now be required to provide reasons if they choose not to consult or present a cost benefit analysis, which is an improvement from the perspective of transparency. Additionally, under a new paragraph 2a, the Authorities are

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67 ESMA, 'Guidelines on the Validation and Review of Credit Rating Agencies' Methodologies' (2017) ESMA/2016/1575 <https://www.esma.europa.eu/sites/default/files/library/2016-1575_guidelines_on_cras_methodologies_1.pdf>

required to ensure that any new guidelines and recommendations do not merely duplicate level one text or existing guidelines and recommendations.

3. Non-binding Instruments including Opinions and Q&As

The Authorities may issue a variety of non-binding instruments through which they provide scientific and technical assistance to the national authorities and financial market participants in their daily practice. Under the old ESA Regulations, those included: 1) *opinions* directed towards national supervisory authorities for the purposes of building a common Union supervisory culture and building consistent supervisory practices (Article 29(1)(a) ESA Regulations); 2) *opinions and technical advice* to the European Parliament, Council and the Commission (Article 16a), *Q&As* (Article 16b); and 3) *new practical instruments and convergence tools* to promote common supervisory approaches and practices (Article 29(2) ESA Regulations)[68] such as supervisory briefings. Such non-binding instruments are not subject to the 'comply or explain' mechanism and leave a wide discretion to their addressees, despite containing interpretations of financial regulation that Authorities and national authorities may apply in their supervisory practices. There is a serious risk that the underlying binding legislation will be breached if the interpretations in the non-binding instruments are not adhered to. Non-binding instruments also fulfil a *post-law function*, which means they are adopted subsequent to existing Union law in order to supplement and support secondary Union law.[69] Their

[68] This abbreviation stands for Questions & Answers. They enable ESMA to publish frequently asked questions which it receives from supervised entities and to provide clarifications on matters within its competence in a quick and efficient way where a more articulated explanation such as the one used in the guidelines is not required. Given the fact that Q&As provide guidance, they always need to be approved and adopted by the Board of Supervisors. For a list of all Q&As, see 'Questions and Answers' (ESMA) <www.esma.europa.eu/questions-and-answers> accessed 18 June 2022.

[69] Senden (n 59) 119-20.

purpose is to ensure the correct interpretation of existing Union law in the Member States.

The new ESA Regulations lay down general empowerments for the Authority to issue, on its own initiative, non-binding instruments. As Authorities in fact have a *carte blanche* with regard to the development of such instruments and tools, the legislature does not need to provide any express legal basis in the level one legislation. As such, one could speak of a *general* competence allocation.

Provisions allowing for the development of non-binding instruments have changed substantially in the new ESA Regulations. Under the original ESA Regulations, Opinions were provided for under Article 34 'Other tasks', first paragraph. This states that the Authorities 'may, upon a request from the European Parliament, the Council or the Commission, or on its own initiative, provide opinions to the European Parliament, the Council and the Commission on all issues related to its area of competence'. In the new ESA Regulations, this has been expanded upon by the introduction of Article 16a 'Opinions'. Opinions are thus placed together with guidelines and recommendations, as well as Q&As. Although the first paragraph of Article 16a on the providing of opinions is identical to the old Article 34, the following paragraphs now include more details. The second paragraph is important, because it explains that these opinions may, upon the request of one of the Union institutions, include a public consultation or technical analysis.

Whereas Q&As previously were used as a new convergence tool on the basis of Article 29(2) of the old ESA Regulations, they are now covered under Article 16b of the new ESA Regulations and have been strengthened considerably. Any natural or legal person may submit questions to the Authorities, Union institutions and bodies and national competent authorities, although it is stated that financial institutions must consider approaching their national competent authority first (para 1). The Authorities must provide answers in the language in which the question was

asked (para 2). Furthermore, the Authorities must publish the questions and answers concerned using a web-based tool, also when answers are not yet available or when questions that they do not intend to answer are rejected (para 3). Upon the instigation of three voting members of the Board of Supervisors, the Board is further able to request the relevant agency to obtain advice from the Stakeholder Group, to conduct a public consultation, or to carry out a cost-benefit analysis (para 4). Where questions require the interpretation of Union law, the answer must be provided by the Commission, but published by the Authorities (Para 5).

4. No-Action Letters

Perhaps the ESA Review's most eye-catching addition are the so-called 'no-action letters'.[70] This concept has been mentioned by stakeholders in their responses to the earlier Commission consultation on the operation of the Authorities.[71] The idea appears to be based upon powers granted to U.S. financial regulators, such as the Securities and Exchange Commission (SEC). An SEC-regulated firm may request a 'no-action letter' from the SEC in respect of a course of action the firm wants to take.[72] An example would be where a financial institution, regulated by the SEC, wants to offer a new product or service but is uncertain whether this is allowed under current regulation. For legal certainty and transparency reasons, the financial institution can ask the SEC before the actual development of the product or service whether the SEC would allow it. In such a case, the SEC may issue a 'no-action letter', indicating that the SEC believes it is most likely allowed

70 'ESA Review' (ESMA) <https://www.esma.europa.eu/about-esma/who-we-are/esa-review> accessed 18 June 2022.

71 'Feedback Statement on the Public Consultation on the Operations of the European Supervisory Authorities Having Taken Place from 21 March to 16 May 2017 (European Commission, 20 June 2017) <https://ec.europa.eu/info/sites/info/files/2017-esas-operations-summary-of-responses_en.pdf> accessed 18 June 2022.

72 *No Action Letters* (US Securities and Exchange Commission) <https://www.sec.gov/fast-answers/answersnoactionhtm.html> accessed 18 June 2022.

and that the SEC would not take retrospective action against the financial institution on these matters.

'No-action letters' were introduced in the ESA Review, and are now established in Article 9a of the new ESA Regulations.[73] ESA 'no-action letters' operate differently from their U.S. namesakes. The European 'no-action letters' are not addressed to individual firms but concern an issue for the market as a whole. These letters seek non-enforcement by national competent authorities of particular provisions within a level one Directive or Regulation or a level two delegated or implementing act causing some form of market disruption or other difficulties for market participants. The Authorities may use the new powers where such a level one text is 'liable to raise significant issues' in at least one of the following three situations as per Article 9a(1): 1) in case there is a conflict with another relevant act; 2) if the absence of delegated or implementing acts complementing or specifying the act would raise legitimate doubts concerning the legal consequences flowing from the act or its proper application; or 3) if the absence of guidelines and recommendations would raise practical difficulties concerning the application of the relevant act. The Authorities could arguably already resolve the third situation using their power under Article 16 of the old ESA Regulations by way of developing guidelines or recommendations. The first and second situation, however, were previously not within the Authorities' powers.

In all three of the above situations, the Authority will send a 'no-action letter' setting out its views of the issues to the national competent authorities and the Commission. The Authority must, if necessary, issue opinions under Article 9a(2) and (3) to ensure consistent supervisory and enforcement practices, and consistent application of Union law. The Authority has discretion to issue such opinions under paragraph (4). In this opinion, the Authority provides the Commission with its views on the level of urgency

[73] In case of the EBA Regulation, it is Article 9c, as 9a and 9b concern anti-money laundering.

and any action it considers appropriate. This may include new level one legislation, new delegated acts, or new implementing acts. The opinion is made public by the ESA once it is adopted by its Board of Supervisors.

The 'no-action letter' has already been used in practice. On 29 April 2020 ESMA sent the Commission such a letter in order to assess the new Economic, Social, and Governance (ESG) disclosure requirements under Articles 13(1)(d) and 27(2a) of the Benchmark Regulation (EU) 2016/1011.[74] Benchmark administrators had difficulties complying with said disclosure requirements, which were due to apply by 30 April 2020, in the absence of relevant Delegated Acts. These compliance issues arise because level two Delegated Acts will contain necessary details of what to include in the disclosure.[75] Alongside this letter, ESMA provided two opinions: 1) to the Commission and national competent authorities under Article 9a(2), setting out its views on the issues,[76] and 2) to the national competent authorities under Article 9a(3), as regards consistent supervisory and enforcement practices.[77] ESMA argued that the entry into force of disclosure requirements and of the related Delegated Acts should coincide, and in any event the

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74 'Press Release: ESMA Issues No Action Letter on the New ESG Disclosure Requirements under the Benchmarks Regulation' (ESMA) <https://www.esma.europa.eu/press-news/esma-news/esma-issues-no-action-letter-new-esg-disclosure-requirements-under-benchmarks> accessed 18 June 2022.

75 Note that the Delegated Acts setting out the detailed disclosure requirements are actually mandated under Article 27(2b) of the Benchmark Regulation.

76 ESMA, 'No Action Letter on Sustainability-related Disclosures for Benchmarks' (2020) ESMA41-137-1300 <https://www.esma.europa.eu/sites/default/files/library/esma41-137-1300_esmar_article_9a3_opinion_-_bmr_nca.pdf> accessed 18 June 2022. Note that this is actually an opinion rebranded as 'no-action letter'.

77 ESMA, 'Opinion of the European Securities and Markets Authority of 29 April 2020 on Appropriate Action in Respect of the New Disclosure Requirements in Regulation (EU) 2016/1011 of the European Parliament and of the Council Relating to the Sustainability-related Disclosures for Benchmarks' (2020) ESMA41-137-1299 <https://www.esma.europa.eu/sites/default/files/library/esma41-137-1299_esmar_article_9a2_opinion_-_bmr_ec.pdf> accessed 18 June 2022.

former should not come before latter. As it cannot disapply Union law, ESMA suggested that national competent authorities must not prioritise supervisory or enforcement action relating to the disclosure requirements in the absence of the Delegated Acts. One could argue that this guidance *de facto* recommends the disapplication of Union law.

V. Asking the Legitimacy Question – The Situation After the ESA Review

1. Input Legitimacy: Do No-Action Letters Create a Right of Initiative for the ESAs as Regards Level One and Two Legislation?

A. No-Action Letters in Practice

Under the previous ESA Regulations, the Authorities already had the power to issue guidelines, opinions and Q&As on their own initiative. The right of initiative for legislative texts, i.e. level one and two texts, however, was the exclusive domain of the Commission, with the usual role for the European Parliament and the Council taking on the legislative function. Under the Lisbon Treaty, the delegation of general rule-making powers to EU agencies is still excluded.[78] The new ESA Regulations however introduce the concept of the 'no-action letter', which raises the question whether the Authorities gain such right of initiative.

When using the 'no-action letters', the Authorities 'must' under Article 9a(2) and (3), and 'may' under (4), submit an opinion to the European Commission in which they actively ask for a change in level one or two texts. This implies that the Authorities get an influence on binding rule-making competences, including on Directives and Regulations, even though this power is only to be used in very specific circumstances. Consider again the example of ESMA's 'no-action letter' in the case of ESG disclosure

[78] Compare with *Meroni* (n 16) 152, in which the Court explicitly prohibited the delegation of 'discretionary power, implying a wide margin of discretion which may […] make possible the execution of actual economic policy'.

requirements under the Benchmark Regulation, as discussed earlier: by ensuring the temporary non-enforcement of the Benchmark Regulation, it could be argued that the no-action letter in effect delays the application of a level one text but without, of course, actually amending it. Although it can rightly be argued that the prevention of substantive issues is the underlying cause leading to the delay, this delay would not be realised without the issuance of the 'no-action letter'. It is an interesting input legitimacy puzzle as it may run somewhat counter to the institutional balance of powers within the EU, and it could be regarded as a further entanglement between the ESAs and the Commission.

B. No-Action Letters: A Different Path?

The Authorities commonly draft level two texts on the basis of a level one legislative provision i.e. using a top-down competence that has been democratically legitimated by the EU legislature. Level one legislation is adopted pursuant to the ordinary legislative procedure which gives the same weight to the European Parliament and the Council regarding a legislative proposal by the European Commission.[79] In addition, national Parliaments have a possibility to participate, e.g. in case they would take the view that the draft legal text in question does not comply with the principle of subsidiarity.[80]

Nonetheless, the 'no-action letters' allow for a different path to be taken. It could be argued that the Authorities now have more power to advise the Commission, in a bottom-up way - albeit in specific circumstances only – to make amendments in level one and two texts. This is not to say that this different path is entirely without democratic (input) legitimacy, first because the power to issue a 'no-action letter' is derived from a Regulation, and second because any such proposed amendment would be subject to the usual

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79 TEU, arts 289(1), 294.

80 Protocol on the Application of the Principles of Subsidiarity and Proportionality [2004] OJ C310/207, art 6.

parliamentary processes and scrutiny. Nonetheless, their 'no-action letter' power gives the ESAs an increased influence in the Level 1 sphere. On the one hand, the ESA opinions to the European Commission can be regarded as merely advisory, because the latter is not bound to follow it. On the other hand, the ESA opinions gain further force by the fact that the ESAs have to make their opinions public, which means that the Commission has to explain why it would not give follow-up to one of the ESAs' requests.

According to one view, giving the Authorities a specific tool to address shortcomings causing well-defined issues in financial markets could be regarded as a positive development, in particular from the perspective of output legitimacy. Since the ESAs are expert agencies, their involvement is also very useful, and it is eventually for the EU institutions or representatives of the Member States to decide what to do with the opinions. The ability to exercise such a tool can therefore enhance the quality of EU legislation and contribute to better meeting the goals which the rules aim to achieve. It appears to be a more powerful tool than, for example, a forbearance statement, such as the one issued in the context of COVID-19 and upcoming deadlines for the publication of periodic reports by fund managers.[81] Although both a forbearance statement and a 'no-action letter' may have the same impact for market participants, i.e. de facto disapplication of EU law, the latter allows for the submission of a legislative proposal.

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[81] ESMA, 'Public Statement: Actions to Mitigate the Impact of COVID-19 on the Deadlines for the Publication of Periodic Reports by Fund Managers' (2020) ESMA34-45-896 <https://www.esma.europa.eu/sites/default/files/library/esma34-45-896_public_statement_on_publication_deadlines_in_fund_management_area.pdf>, accessed 18 June 2022. See also Niamh Moloney and Pierre-Henri Conac, 'EU Financial Market Governance and the Covid-19 Crisis: ESMA's Nimble, Responsive, and Speedy Response in Coordinating National Authorities through Soft-Law Instruments' (2020) European Company and Financial Law Review 363.

2. Throughput Legitimacy: Increased Transparency and Participation as Regards the Opinions and Q&As Process

A. Increased Transparency and Participation

Under the previous ESA Regulations, the Authorities' Q&As and opinions overall lacked transparency. There were no consultation papers, cost-benefit analyses or Stakeholder Group advice preceding the publication of an adopted legal text on the Authorities' websites.[82] The reason for this being that such requirements did not exist in the framework of adopting opinions and Q&As.[83] Hence, only the final acts were published on the Authorities' websites. This had an impact on throughput legitimacy though, in the sense that it was difficult for individuals to understand and accept the guidance laid down in opinions and Q&As. Addressing this issue has been one of the main drivers behind the changes to the new ESA Regulations and solves this throughput legitimacy problem.

Indeed, in the new situation it is a requirement to publish all Q&As on the Authorities' websites, including questions rejected and questions received, even when no answers are yet available. The Authorities' capability to create Q&As is limited because questions concerning the interpretation of Union law must be passed on to the Commission: it is after all within competence of the Commission to provide such interpretation. A further change to the Q&A process is the new power for (any) three members of Board of Supervisors of the Authorities to make a request the (entire) Board for running a public consultation or consulting the formal Stakeholder Group. In the case of opinions, the European Parliament, Council or Commission may submit a similar request to the Authorities. The Union institutions

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82 With the exception of some examples where ESMA decided to carry out a cost-benefit analysis anyway, e.g. ESMA, 'Technical Advice under the CSD Regulation' (2015) ESMA/2015/1219 <https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1219_-_final_report_csdr_ta_incl_cba_for_ec.pdf> accessed 18 June 2022.

83 Ibid.

previously had this prerogative only when the Authorities developed draft technical standards and issued guidelines and recommendations.

Such consultations increase the transparency of opinions and Q&As as the ESAs will be under a duty to give reasons when publishing their responses to the feedback received from stakeholders. Indeed, stakeholder feedback cannot be simply put aside. Our recommendation is therefore for the Authorities to set up a similar internal procedure as for technical standards and guidelines in order to fulfil their duty to give reasons. In doing so, financial institutions may learn of the reasons and factual and legal considerations underlying the ESAs' choices and consider the guidance documents' legitimacy.

Adding these procedural steps to the decision-making process for opinions and Q&As makes the instruments more throughput legitimate, because they allow for the participation of stakeholders in the decision-making process. However, such procedural steps reduce the process' efficacy as there are more hurdles to overcome. This takes extra time, whereas opinions and Q&As typically were used as an instrument to respond to market changes in an expedited manner, precisely because of their lighter adoption procedure.[84]

B. Practice Issues Regarding Stakeholder Involvement: Regulatory Capture

Naturally, both the publication of Q&As and stakeholder involvement in the process of adopting opinions and Q&As could make the Authority more prone to pressure from the industry. This creates a new throughput legitimacy puzzle in and of itself, which seems most likely to arise when stakeholders' questions are rejected. Indeed, involving industry in the process risks 'regulatory capture': the situation where (regulated) industry itself is

[84] An example of a situation where a quick response was required is the aforementioned ESMA opinion relating to reporting requirements and COVID-19, see ESMA 'Public Statement: Actions to Mitigate the Impact of COVID-19 on the Deadlines for the Publication of Periodic Reports by Fund Managers' (n 81).

able to control decisions made by their own regulators.[85] In other words, the industry 'captures' regulatory decision-making, ensuring regulators decide in accordance with what industry prefers regulators to decide.[86] Stakeholder involvement may thus be seen as a double-edged sword, contributing to agency accountability and control, but with an inevitable risk of dependence on the regulated industry.[87] This is a risk that should be mitigated because it hinders the agency's independence duties, i.e. it has to operate freely from political, industry, and national interests.[88] Therefore, a balance needs to be struck between participation and consultation mechanisms, on the one hand, and the independence of the regulator, on the other. The Authorities need to take into account stakeholders' views when drafting the rules but should be careful to retain their own opinions and, in doing so, their discretion.

3. Output Legitimacy: Accountability of the European Supervisory Authorities an Enhanced System of Checks and Balances?

A. Reporting to European Parliament and Council

Fortunately, in order to solve the potential legitimacy problems described above, further safeguards on the new soft law powers of the Authorities are introduced as well. This section demonstrates that the accountability mechanisms of the ESAs to the democratic institutions of the Union are very

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85 See generally Barry Mitnick, 'Capturing "Capture": Definition and Mechanims' in David Levi-Faur (ed), *Handbook on the Politics of Regulation* (Edward Elgar 2011); Annetje Ottow, *Market and Competition Authorities: Good Agency Principles* (Oxford University Press 2015).

86 Ibid.

87 Sarah Arras and Caelesta Braun, 'Stakeholders Wanterd! Why and How European Union Agencies Involve Non-State Stakeholders' (2017) 24 Journal of European Public Policy 1, 3.

88 Independence is important, since it is the most distinctive feature of EU agencies. See Scholten and van Rijsbergen, 'The Limits of Agencification in the European Union' (n 1).

well arranged[89] and contribute to the throughput and output legitimacy of their regulatory decisions. Article 3 of the original ESA Regulations merely stated that the Authorities 'shall be accountable to the European Parliament and the Council'. This included accountability for the use of their soft law powers. However, what this entails and how the accountability to Parliament should work in practice is set out in far greater detail in Article 3 of the revised ESA Regulations. In perhaps the most conspicuous scenario, the Authorities are required to cooperate with an investigation by the European Parliament commenced under Article 226 TFEU. Such a procedure would require the establishment of a Committee of Inquiry, to be set up by the European Parliament in order to investigate alleged contravention or maladministration in the implementation of Union law (except where a court is already investigating). Additional ways in which the European Parliament can hold the Authorities to account include the annual appearance of the ESA Chairpersons before Parliament and their obligation to, upon request, hold confidential oral discussions with the Chair, Vice-Chairs, and Coordinators of the competent committee of Parliament.

The ESAs have been relieved of their obligation to report annually to the Council and the Commission how they intended to ensure that non-compliant national competent authorities would follow their guidelines and recommendations in the future. Under the new ESA Regulations, they merely have to inform which guidelines and recommendations have been issued.[90] This is a better reflection of the nature of guidelines and recommendations, which should have no binding effects when a competent authority explained its (intended) non-compliance with a particular set of guidelines or recommendations. The change further reflects the constitutional landscape in which the Authorities operate more appropriately, because national authorities should not be pushed when they

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89 This was also concluded in relation to ESMA's enforcement powers in van Rijsbergen and Foster (n 25) 43.

90 ESA Regulations, as amended by ESA Amendment, art 16(4).

have sound reasons for not following-up on guidelines or recommendations. The output legitimacy puzzle lies in the fact that the change is somewhat detrimental to transparency[91] and deprives the ESAs from a possibility to contribute to the achievement of satisfactory regulatory outcomes. After all, the objective of guidelines is to ensure common, uniform and consistent application of Union law. Achieving this objective will be hampered by those national authorities that do not comply.

B. Appeal Mechanism to the European Commission

Additionally, a new accountability mechanism was introduced by means of Article 60a ('exceeding of competence by the Authority').[92] This created an appeal mechanism before the Commission for any natural or legal person that is of the opinion that the ESA in question has exceeded its competence when issuing guidelines and recommendations under Article 16 or Q&As under Article 16b. The provision requires that the concerned person may send a reasoned advice to the Commission only if the act in question is of direct and individual concern to that person. This includes a failure to respect the principle of proportionality on the part of the ESA.

C. Practical Issues

There are two questions that come to mind when reflecting upon how this new mechanism would legitimately work in practice. The first relates to the uncertainty around legal remedies. A natural or individual person may send a reasoned advice to the Commission, but Article 60a remains silent on what the Commission can or must do when it receives a reasoned advice (e.g. should it require the ESAs to withdraw the soft law act concerned?). In fact,

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91 Although the guidelines compliance tables still literally state which competent authorities of which Member States comply, intend to comply or do not comply with ESMA's guidelines by indicating a 'Yes' in green or a 'No' in red. See van Rijsbergen, 'On the Enforceability of EU Agencies' Soft Law at the National Level' (n 2).

92 ESA Regulations, as amended by ESA Amendment.

it does not even require the Commission to provide a reasoned response to the reasoned advice. The second question relates to how one is supposed to prove direct and individual concern in the case of guidelines and Q&As. If this is to interpreted in line with Article 263 TFEU, the direct concern test is considered satisfied when the act in question directly affects the legal situation of the individual[93] and leaves no discretion to its addressees, who are entrusted with the task of implementing it.[94] Yet, how can soft law affect the legal situation of the individual, and does soft law not, considering its non-binding nature, leave discretion to the addressees on whether or not to follow up? The test of individual concern is even more difficult to satisfy. The applicant has to be a member of a 'closed category' of people, the membership of which is already formally fixed and ascertained when the act in question enters into force.[95] Carrying out a particular economic activity affected by the measure does not suffice, even where the applicant is gravely affected by the measure[96] or when, at the time the measure was enacted, the applicant was effectively one of very few – or even the only one – carrying out that activity, as long as others could decide to undertake that activity in the future (i.e. after the adoption of the act).[97] Given the fact that they are by definition addressed to all competent authorities and/or all financial market participants, this seems a very high threshold for guidelines and Q&As. The amended ESA Regulations clarify that recommendations may be issued to one or more competent authorities or to one or more financial market participants. Hence, it may be easier to satisfy the test of individual concern in relation to recommendations.

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93 Joined Cases 41 to 44/70 *NV International Fruit Company and others v Commission* EU:C:1971:53, paras 23-28.

94 Case 294/83 *Parti écologiste "Les Verts" v European Parliament* EU:C:1986:166.

95 Case 25/62 *Plaumann & Co v Commission* EU:C:1963:17.

96 Case T-173/98 *Agricultores Unión de Pequeños Agricultores v Council* EU:T:1999:296,

97 See e.g. Case 1/64 *Glucoseries réunies v Commission* EU:C:1964:57; Case C-290/94 P *Buralux SA, Satrod SA and Ourry SA v Council* EU:C:1996:54, paras 28-29.

VI. CONCLUSION

This article investigated the legitimacy of the legal framework surrounding ESMA's new soft law powers. It distinguished between input, output and throughput legitimacy. Input legitimacy requires *ex ante* participation in the decision-making process either directly by citizens or indirectly via representation through elected delegates. Throughput legitimacy involves a number of factors, including the transparency of EU governance processes, the quality and quantity of inclusiveness, and the openness of the EU's various institutional bodies to 'civil society'. Throughput legitimacy problems have been solved particularly with regard to the ESAs' opinions and Q&As. Union institutions or the Board of Supervisors may now require the Authorities to publicly consult stakeholders when elaborating this type of legal instrument. However, a new throughput legitimacy puzzle that has been created relates to involving industry in the process. This is the risk of 'regulatory capture', a risk that should be mitigated because it hampers the ESAs independence duties which imply that they have to be free from both political, industry and national interests.

The above analysis also shows the input legitimacy puzzle of the Commission's and ESAs' competences getting more and more entangled**.** On the one hand, the Commission gets more influence in the ESAs' Q&A process, because it is explicitly enabled to answer stakeholders questions submitted to the ESAs where they concern the interpretation of Union law. On the other hand, the ESAs obtain a right of initiative, under specific circumstances, within the traditional sphere of competence of the Commission: the ESAs can use their 'no-action letter' power to ask for a change in level one or two texts. However, the ESAs expertise also has the ability to enhance the quality of EU legislation and to better meet the goals which the rules aim to achieve.

An output legitimacy puzzle lies in the fact that the ESAs are EU agencies, meaning that they need to be able to act independently. The Commission should therefore give the ESAs enough freedom and not overly interfere

with all the Authorities' soft law activities. At the same time, the ESAs should not be unaccountable. Indeed, as we have seen, output legitimacy refers to satisfactory regulatory outcomes and requires the prevention of abuse of political power by holding a regulator accountable for its decisions *ex post*. In the case of the ESAs this is arranged by means of enhanced accountability mechanisms – varying from simple reporting obligations to the possibility of launching full scale parliamentary investigations – and the possibility for natural and legal persons to send a letter to the Commission when they are of the view that the ESA in question has exceeded its competence when issuing guidelines, recommendations or Q&As. The danger is that the latter becomes a dead letter given the difficulties for a legal or natural person to prove its individual and direct concern of a soft law act.

Overall, the new ESA Regulations have given the Authorities both new powers and new ways to be held accountable. Not only do the new powers come with procedural constraints, but the management of the ESAs can be held accountable by the European Parliament and by the public. This article explained the improvements made to the legitimacy of the ESAs soft law powers as a result of the ESA review, while also pointing at a number of new legitimacy puzzles that the review has created. It remains to be seen how the ESAs will use their newly acquired powers and how the new checks and balances will operate in practice over the coming years.

BOOK REVIEWS

ULRICH BECKER AND ANASTASIA POULOU (EDS), *EUROPEAN WELFARE STATE CONSTITUTIONS AFTER THE FINANCIAL CRISIS* (OXFORD UNIVERSITY PRESS 2020)

Maria Kotsoni*

I. INTRODUCTION

In the wake of the financial and economic crisis of 2008, a distinct field of comparative constitutional law scholarship emerged to explore the interaction of the crisis with constitutions. Especially at the European level, the sovereign debt crisis gained much attention as a distinct lens for examining constitutional responses, reactions and transformations.[1] At the same time, social rights scholarship began to provide a detailed account of welfare state reforms in the context of austerity programmes and financial assistance conditionality and the significant impact of these reforms on the enjoyment and realisation of social rights.[2] Edited by Ulrich Becker and

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1 See e.g. Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press 2014); Xenophon Contiades (ed), *Constitutions in The Global Financial Crisis: A Comparative Analysis* (Routledge 2016); Thomas Beukers, Bruno DeWitte and Claire Kilpatrick (eds), *Constitutional Change through Euro-Crisis Law* (Cambridge University Press 2017); Tom Ginsburg, Mark D Rosen and Georg Vanberg (eds), *Constitutions in Times of Financial Crisis* (Cambridge University Press 2019).

2 See e.g. Xenophon Contiades and Alkmene Fotiadou, 'Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation' (2012) 10 International Journal of Constitutional Law 660; David Bilchitz, 'Socio-Economic Rights, Economic Crisis, and Legal Doctrine' (2014) 12 International Journal of Constitutional Law 710; Claire Kilpatrick and Bruno DeWitte, 'A

Anastasia Poulou, *European Welfare State Constitutions after the Financial Crisis* builds on these two streams of scholarship and combines the study of constitutions with that of welfare states in the context of the recent economic and sovereign debt crisis.[3] The editors have succeeded in producing a volume that benefits from a comparative approach and offers important insights, both as a whole and as individual contributions.

The book begins by introducing the topic and framing the volume – that is, drawing links between welfare states, constitutions and responses to the sovereign debt crisis (Chapter 1). It then proceeds with a discussion on the application of human rights obligations to European financial assistance mechanisms (Chapter 2). The following chapters consist of nine national case-studies (Chapter 3 to 11). In the final chapter, the book offers conclusions from a comparative angle, building on the individual contributions (Chapter 12). Deviating from the structure of the book, in this review I first reflect on the national case-studies (Section II). Then, I discuss the second chapter in a separate section (Section III). In the final section, I turn to the framing, method and conclusions (Section IV).

Comparative Framing of Fundamental Rights Challenges to Social Crisis Measures in the Eurozone' (2014) 1 European Journal of Social Law 2; Claire Kilpatrick and Bruno DeWitte (eds), 'Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges' (2014) EUI Department of Law Research Paper 2014/05 <https://cadmus.eui.eu/handle/1814/31247>; Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014); Margot E Salomon, 'Of Austerity, Human Rights and International Institutions: Of Austerity, Human Rights and International Institutions' (2015) 21 European Law Journal 521; Stefano Civitarese Matteucci and Simon Halliday (eds), *Social Rights in Europe in an Age of Austerity* (Routledge 2017).

3 Ulrich Becker and Anastasia Poulou (eds), *European Welfare State Constitutions after the Financial Crisis* (Oxford University Press 2020).

II. THE NATIONAL CASE-STUDIES

The book examines welfare state reforms and their impact on the constitutional protection of social rights in the nine European Union (EU) Member States that were 'most seriously affected by the demands for rapid fiscal consolidation and structural reforms'.[4] The structure follows the timeline of financial assistance provision to seven states, examining the country-specific cases in chronological order. Italy and Spain, which were not subject to explicit financial assistance conditionality in the field of social policy, follow. Italy adopted reforms with the aim of reducing public expenditure following pressure from the European Central Bank (ECB). Spain, which received financial assistance for bank recapitalisation, also introduced a range of reforms limiting social expenditure.

The nine case-studies include three different groups of Member States. The first group of case-studies consists of Hungary, Latvia and Romania, the three non-Eurozone Member States that received financial assistance from the EU, the International Monetary Fund (IMF) and the World Bank. On the Hungarian case, József Hajdú provides an account of welfare state and employment policy reforms and the treatment of social rights under the 2011 Fundamental Law.[5] Kristīne Dupate discusses in detail the constitutional review of austerity programmes by the Latvian Constitutional Court, arguing that, for the most part, austerity did not lead to permanent shifts or structural changes in the Latvian welfare state.[6] Last, in the Romanian case-study, Elena-Luminița Dima highlights the importance of the constitutional entrenchment of social rights for their adjudication in the context of the

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4 Anastasia Poulou, 'Human Rights Obligations of European Financial Assistance Mechanisms' in Becker and Poulou (n 3) 24.

5 József Hajdú, 'The Transition from Welfare to Workfare in Times of Crisis: A Double-based Reform of the Hungarian Welfare State' in Becker and Poulou (eds) (n 3).

6 Kristīne Dupate, 'The Latvian Response to Its First Economic Crisis under a Free Market Economy' in Becker and Poulou (eds) (n 3).

crisis.[7] She sustains, however, that in Romania restrictions to benefits that did not stem from constitutionally protected rights were temporary.[8]

The second group of countries includes Greece, Ireland, Portugal and Cyprus, Eurozone Member States that were subjected to explicit social policy conditionality in the form of Memoranda of Understanding (MoUs). In the Greek chapter, Maria Bakavou identifies trends in constitutional adjudication of austerity measures by the Greek supreme courts.[9] She observes, for instance, a tendency to conflate the public interest with the state's fiscal interest.[10] Focusing primarily on social security and healthcare, she connects the imminence of state default with the intensity of Supreme Administrative Court scrutiny on measures that restricted welfare benefits.[11] At the same time, her case-study reports that Supreme Administrative Court judges also placed limits on restrictions to fundamental rights, both substantive and procedural, especially in cases concerning reforms in the social security system. The substantive limit refers to the decent standard of living.[12] The procedural limit refers to state authorities' obligation to justify social security reforms with 'recent actuarial reports and studies of the possible outcomes'.[13] Absent from the Greek case-study is a discussion on post-crisis constitutional amendment projects involving social rights. A 2019 constitutional amendment constitutionalised the state's obligation to ensure decent living conditions to its citizens through a minimum guaranteed

7 Elena-Luminița Dima, 'Upholding the Welfare State During the Financial Crisis: The Pivotal Role of the Constitutional Court of Romania' in Becker and Poulou (eds) (n 3).

8 Ibid.

9 Maria Bakavou, 'Salus Rei Publicae Suprema Lex Esto? Welfare State Reforms Before the Greek Courts' in Becker and Poulou (eds) (n 3).

10 Ibid 176.

11 Ibid 180.

12 Ibid 172, 176.

13 Ibid 176.

income policy.[14] More attention could have been paid to this development. The chapter would have benefited from an investigation into potential links between this constitutional amendment, on the one hand, and the crisis-related legislation and case-law, on the other.

The contributions proceed with the Irish case-study, in which Elaine Dewhurst reviews the Irish austerity measures and discusses the obstacles to challenging their constitutionality through litigation.[15] One central concern is the lack of explicit social rights protection in the Irish Constitution.[16] Contrary to the Greek chapter, which lacks any discussion on formal constitutional change, the Irish chapter reflects on this matter. It discusses the Constitutional Convention's 2014 recommendation to constitutionalise economic, social and cultural rights and subsequent attempts in the same direction.[17] The author hypothesises on the potential contribution of such reform in the protection of social rights and concludes that, even though any such change would not have changed the course of developments during the crisis, it would still be valuable in the advancement of socio-economic rights protection.[18]

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14 Vasileios G Tzemos, Eleni Palioura and Konstantinos Margaritis, 'Greece' in Luís Roberto Barroso and Richard Albert (eds), *The 2020 International Review of Constitutional Reform* (Program on Constitutional Studies at the University of Texas at Austin and the International Forum on the Future of Constitutionalism 2021).

15 Elaine Dewhurst, 'The Financial Crisis as a Turning Point for Constitutional Rights Jurisprudence: An Assessment of the Absence of Social Rights Protection in the Irish Constitution' in Becker and Poulou (eds) (n 3).

16 Ibid 199.

17 Dewhurst (n 15) 205. The Constitutional Convention, established in 2012, was a body of 100 members, consisting in its majority of randomly selected citizens (66 members), together with elected legislators (33 members) and a chairperson, with the mandate to debate and propose amendments to the Irish Constitution. For more information see 'Convention on the Constitution' (Citizens Information, 12 November 2021) <https://www.citizensinformation.ie/en/government_in_ireland/irish_constitution_1/constitutional_convention.html>.

18 Dewhurst (n 15) 205.

The book then moves on to the cases of Portugal and Cyprus. Written by José Carlos Vieira de Andrade, João Carlos Loureiro and Suzana Tavares da Silva, the Portuguese chapter pays a lot of attention to the constitutional review of austerity measures by the Portuguese Constitutional Court.[19] It analyses the novel ways of assessing the compliance of legislative measures with the Constitution that emerged through the crisis case-law, especially the concept of 'equal proportionality'.[20] In the Cypriot chapter, Constantinos Kombos and Athena Herodotou review welfare state reforms introduced during the crisis and the relevant administrative case-law. They argue that 'the assessment of the legality of the social protection cuts and reforms adopted as austerity measures in Cyprus is rather limited, one-dimensional, unclear and disappointing'.[21]

Both the Italian and Spanish chapters are not limited to reviewing welfare state reforms and constitutional case-law. They also provide an analysis about the constitutional amendments in both countries that constitutionalised balanced budget rules. Matteo De Nes and Andrea Pin, in their fascinating contribution, explore the treatment of the new constitutional 'golden rule' in the Italian Constitutional Court's social rights case-law.[22] Maldonado Molina and Romero Coronado show the 'constitutional imbalance' between the economic and the social constitution induced by the amendment of the Spanish Constitution.[23]

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19 José Carlos Vieira de Andrade, João Carlos Loureiro and Suzana Tavares da Silva, 'Legal Changes and Constitutional Adjudication in Portuguese Social Law in Consequence of the European Financial Crisis' in Becker and Poulou (eds) (n 3).

20 Ibid 233.

21 Constantinos Kombos and Athena Herodotou, 'A "Bail-In" of Social Rights? The Cypriot Experience of the Financial Crisis' in Becker and Poulou (eds) (n 3).

22 Matteo De Nes and Andrea Pin, 'The Outcome of the Financial Crisis in Italy: A Sea Change for the Doctrine of Social Rights' in Becker and Poulou (eds) (n 3).

23 Juan Antonio Maldonado Molina and Juan Romero Coronado, 'The Predominance of a "Strong" Economy over a "Weak" Social Constitution: The Legacy of the Financial Crisis in Spain' in Becker and Poulou (eds) (n 3).

III. European Financial Assistance Mechanisms

However important the national constitutional context may be, any discussion about the economic crisis of 2008 and the sovereign debt crisis in Europe would be incomplete without an examination of the involvement of EU institutions. Forged to a great extent by the IMF and EU institutions, legal and social policy responses to the crisis have a strong transnational element. This issue is explored in the remarkable contribution by Poulou, which forms the second chapter of the book.[24] There, she provides a nuanced account of the institutional arrangements and the different mechanisms (European Financial Stability Facility, European Financial Stabilisation Mechanism, European Stability Mechanism (ESM)) – each with its own distinct characteristics – that were set up to provide financial assistance. The author advocates a tailored approach to applying the EU Charter of Fundamental Rights to each EU institution (European Commission, ECB, European Council) and to holding them accountable to human rights norms more generally.[25] Lastly, the chapter explores three possible avenues for binding ESM under international human rights law: self-regulation via internal guidelines, similar to the practice of IMF and the World Bank; customary international law, including core socio-economic rights; and the human rights obligations of individual ESM Member States, which bind their representatives in their participation in the ESM decision-making.

Poulou's proposals on binding the ESM under human rights law – an undoubtedly interesting discussion grounded on detailed arguments – provokes further questions that deserved more attention. First, has self-regulation through internal guidelines in the cases mentioned, the World Bank and the IMF, actually succeeded in changing the attitude of these organizations towards social rights? The involvement of these organizations in the austerity programmes discussed in the book's case-studies suggests not. Second, is being bound only by *core* socio-economic rights obligations,

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24 Poulou (n 4).

25 Ibid.

a solution to which the author points, enough to respond to the whole range of fundamental social rights challenges that might emerge from financial assistance conditionality? The social policy conditionality that accompanied financial assistance during the crisis not only had a devastating effect for those at the lowest levels of income distribution, but also targeted pensioners, civil servants, workers. As Kilpatrick has pointed out, those with some resources, yet limited, form a 'central group at issue in euro-crisis constitutional challenges'.[26] Beyond social expenditure and wage levels, conditionality also targeted labour rights, the budgeting and institutions of welfare states and, in some cases, the public character of services.

IV. Reflections on the Method, Framing and Conclusions of the Volume

The volume benefits from a detailed description of all nine country studies and provides an insightful account of how these different and diverse constitutional orders and welfare states experienced the economic and sovereign debt crises. The consistency in descriptions across the contributions allows readers to draw comparisons with ease. One of the virtues of the book is the methodological choice of compiling country-specific chapters on all EU Member States that, in one way or another, were involved in explicit or implicit social policy conditionality.[27] This approach confirms that the economic crisis as a distinct lens of inquiry opened new possibilities for the combined study of constitutional orders and welfare states that are otherwise diverse. That is not to say that it is the first scholarly work that provides a comparative perspective on the matter of the economic

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[26] Claire Kilpatrick, 'Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry' in Beukers, de Witte and Kilpatrick (eds) (n 1) 301.

[27] On implicit conditionality, see Stefano Sacchi, 'Conditionality by Other Means: European Union Involvement in Italy's Structural Reforms in the Sovereign Debt Crisis' in Caroline De La Porte and Elke Heins (eds), *The Sovereign Debt Crisis, the EU and Welfare State Reform* (Palgrave Macmillan 2016).

and financial crisis and constitutional change. *Constitutions in Times of Financial* Crisis is one example.[28] The edited volumes *Constitutional Change through Euro-crisis Law* and *Constitutions in the Global Financial Crisis: A Comparative Analysis* also offer rich insights in the European context.[29] Becker and Poulou's book builds on this scholarship and goes a step further. First, because it compiles *all* of the EU Member States – Eurozone and non-Eurozone – that were most heavily impacted by the crisis, it brings into light the relatively less explored cases of non-Eurozone Member States in Eastern Europe. Second, because it focuses on one aspect of the constitution, its *social strand*, it enriches our understanding of fundamental social rights mobilization, evolution and change in a post-crisis context.

Beyond its methodological contribution, the conceptualization and framing of the book is of distinct interest. The combined study of constitutions, welfare states and social rights presumes, as Becker suggests in the introduction to the volume, that welfare states interact with their constitutional underpinnings.[30] He argues that two manifestations of this interaction can be observed in the context of the sovereign debt crisis in Europe. The first is where social policy reforms produce such significant changes to the welfare state that amount to informal constitutional change. The second is where constitutionalism controls and corrects the erosion of the welfare state caused by austerity, especially through constitutional review. This dual understanding of the relationship between the constitution and the welfare state during the crisis frames the whole volume and the individual contributions.

The common threads that come to the fore in the case-studies are tested against this conceptualization. However, the individual contributions suggest that there are more potential interactions between the welfare states

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28 Ginsburg, Rosen and Vanberg (eds) (n 1).

29 Contiades (ed), *Constitutions in The Global Financial Crisis* (n 1); Beukers, DeWitte and Kilpatrick (eds) (n 1).

30 Ulrich Becker, 'Introduction' in Becker and Poulou (eds) (n 3).

and constitutions during and after the crisis. The Italian and Spanish chapters, for instance, illustrate that two rather rigid constitutions were amended to accommodate fiscal discipline in the wake of the crisis.[31] These amendments changed the social fabric of the respective constitutions. Another example is the case of Ireland, where the commentator discusses the increased demand for constitutional amendment to accommodate better protection of social rights as justiciable fundamental rights.[32] Two additional modes of interaction thus emerge that could have been part of the analysis. One is formal constitutional change, demonstrated in the cases of Italy and Spain, as well as in the case of Ireland as unsuccessful reform projects. A second is the limited interaction that exists when constitutional design places limits on challenging social rights retrenchment. Ireland serves as an example in this case. The conceptualisation of the interplay between welfare states and constitutions perhaps could have been broadened to consider and discuss the possibility of these forms of interaction.

One of the common themes that emerges from the individual case-studies and is captured in the conclusions is a shift in the welfare states towards the development of universal social assistance systems. Greece, Portugal, Italy and Cyprus all witnessed the adoption of minimum income schemes (or restructuring of such schemes where they existed).[33] On this point, Becker argues that

> it is not by chance that in the aftermath of the financial crisis universal social assistance systems were set up in those countries that did not have such systems effectively in place at the beginning of this century. That does not mean the birth of new 'minimum welfare' states: a universal guarantee of subsistence is a necessary foundation for all developed welfare states.[34]

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31 De Nes and Pin (n 22), Maldonado Molina and Romero Coronado (n 23).

32 Dewhurst (n 15).

33 Bakavou (n 9) 160; Vieira de Andrade, Loureiro and Tavares da Silva (n 19) 217; Kombos and Herodotou (n 21) 254; De Nes and Pin (n 22) 296.

34 Ulrich Becker, 'Conclusions from a Comparative Perspective' in Becker and Poulou (eds) (n 3) 354.

Becker is swift in dismissing any objection to his conviction that such developments do not imply a move towards minimal welfare states. This is true especially considering that the focus of states' efforts on minimum income schemes is perceived as a shift, rather than a mere addition to the pre-crisis social security and social assistance techniques. In fact, concerns about this shift still emerge from the individual contributions.[35] Why, for instance, were these minimum income policies advanced instead of more generous welfare state techniques? Does the amount of such benefits respond and mitigate the pauperisation brought about by austerity? Did the adoption of such schemes lead to the expansion of welfare states or did it lead to reductions in welfare state expenditure and the scope of beneficiaries?[36] How should we think of such changes paired with the emergence of the concept of a decent standard of living in the constitutional review in some states?[37] The book does not engage with these questions, nor does it enter into the debate on the social minimum.[38] It thus leaves room for further inquiry into the constitutional significance of this observed turn in welfare states and compels us to ask: how does this shift change the constitutional protection of social rights? Does it limit the normative content and ambition of social rights constitutionalism?

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35 n 33.

36 See, for instance, Stefanos Papanastasiou and Christos Papatheodorou, '"Liberalising" Social Protection amid Austerity in Greece' in Sonja Blum, Johanna Kuhlmann and Klaus Schubert (eds), *Routledge Handbook of European Welfare Systems* (2nd edn, Routledge 2019) 232, arguing that the development of a minimum income policy in Greece was accompanied by cutbacks in other social provisions and by a decrease in social expenditure.

37 Becker (n 34) 348.

38 For relevant discussions, see e.g. Fernando Atria, 'Social Rights, Social Contract, Socialism' (2015) 24 Social & Legal Studies 598; Toomas Kotkas, Ingrid Leijten and Frans Pennings (eds), *Specifying and Securing A Social Minimum in the Battle Against Poverty* (Hart 2019); Fernando Atria and Costanza Salgado, 'Social Rights' in Emilios Christodoulidis, Ruth Dukes and Marco Goldoni, *Research Handbook on Critical Legal Theory* (Edward Elgar 2019).

Even without addressing in detail the issues of constitutional amendment and the social minimum, the book still contributes substantially to the knowledge of 'what happened' in post-crisis welfare states and social rights constitutionalism. It brings out trends and shifts in a clear and concise manner. While the COVID-19 crisis is still unfolding, with a profound impact on social rights, it is important and timely to reflect on how crises and responses thereto have the potential to re-shape the social fabric of constitutions. *European Welfare State Constitutions after the Financial Crisis* succeeds in provoking such reflection.

MATEJ AVBELJ AND JERNEJ LETNAR ČERNIČ, *THE IMPACT OF EUROPEAN INSTITUTIONS ON THE RULE OF LAW AND DEMOCRACY: SLOVENIA AND BEYOND* (HART 2020)

Jaka Kukavica*

I. INTRODUCTION

Since the early 2010s, the rule of law has been one of the hottest topics in the European Union (EU) – and with good reason. Viktor Orbán began dismantling Hungarian democracy in 2010 and Poland joined the illiberal party soon after. Endless scholarly ink has been spilled on the ever-deteriorating situation in these rogue, 'illiberally democratic' states.[1] Away from the spotlight, Romania and Bulgaria have also had their occasional bouts of constitutional crisis and dialogue with European institutions. But recently, a new player has emerged in the rule of law discourse: Janez Janša, one of the closest allies of Viktor Orbán, has become the Prime Minister of Slovenia. Since then, almost every major Western media outlet has reported on the attacks by the populist far-right Janša government on the rule of law.[2]

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1 See, for instance, Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019); Gabor Halmai, 'The Fall of the Rule of Law in Hungary and the Complicity of the EU' (2020) 12 Italian Journal of Public Law 204.

2 See, for instance, Lili Bayer, 'Inside Slovenia's War on the Media' (Politico, 16 February 2021) <https://www.politico.eu/article/slovenia-war-on-media-janez-jansa/> accessed 21 September 2021; Eszter Zalan, 'EU Institutions Brace for Impact of Slovenia's Janša' (EUobserver, 1 April 2021) <https://euobserver.com/democracy/151422> accessed 21 September 2021; Valerie Hopkins, 'Slovenia's Jansa Follows Hungary down Authoritarian Path' (Financial Times, 23 May 2021) <https://www.ft.com/content/100454c3-c628-40a0-af6e-392cc79a53f9> accessed 21 September 2021; Andrew Higgins, 'Wielding Twitter, Europe's "Marshal Twito" Takes Aim at the Media' (The New York Times, 16 June 2021) <https://www.nytimes.com/2021/06/16/world/europe/slovenia-jansa-press-

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[EJLS Online First, 30 May 2022]

Many others have also expressed similar concerns, including media freedom organisations,[3] European human rights institutions,[4] international academics,[5] and domestic constitutional scholars.[6]

Literally within days of Janša being sworn in for the third time as prime minister in March 2020, a monograph, '*The Impact of European Institutions on the Rule of Law and Democracy: Slovenia and Beyond*' by Matej Avbelj and Jernej Letnar Černič, was published.[7] The book tells a very different story to those above and provides an alternative perspective on the state of democracy and the rule of law in Slovenia. It aims to explain that rule of law problems in Slovenia are not recent, and that Slovenia should have been

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freedom-twitter.html> accessed 21 September 2021; Amanda Coakley, 'In Slovenia, a Trumpian Populist Assumes a Key European Post' (Foreign Policy, 30 June 2021) <https://foreignpolicy.com/2021/06/30/slovenia-janez-jansa-trumpian-populist-illiberal-european-council-presidency/> accessed 20 September 2021.

3 'Press Freedom Groups Raise Increasing Concerns over Situation in Slovenia' (International Press Institute, 16 March 2021) <https://ipi.media/letter-press-freedom-groups-raise-increasing-concerns-over-situaiton-in-slovenia/> accessed 21 September 2021.

4 Council of Europe Commissioner for Human Rights, 'Memorandum on Freedom of Expression and Media Freedom in Slovenia' CommDH (2021) 17.

5 Open letter from Hugh Agnew, Aleida Assmann and others to Janez Janša (10 December 2020) <https://publiclettertoslovenia.wordpress.com> accessed 20 September 2021.

6 Jaka Kukavica, '(Rule of) Law in the Time of Covid-19: Warnings from Slovenia' (Verfassungsblog, 25 March 2020) <https://verfassungsblog.de/rule-of-law-in-the-time-of-covid-19-warnings-from-slovenia/> accessed 20 September 2021; Samo Bardutzky, Bojan Bugarič and Saša Zagorc, 'Slovenian Constitutional Hardball' (Verfassungsblog, 1 April 2021) <https://verfassungsblog.de/slovenian-constitutional-hardball/> accessed 5 October 2021; Jure Vidmar, 'Slovenia's Legal Farce with the Nomination of European Delegated Prosecutors' (Verfassungsblog, 27 August 2021) <https://verfassungsblog.de/slovenias-legal-farce/> accessed 20 September 2021; Matija Žgur, 'Le trasformazioni del diritto al tempo del Covid-19. Il caso sloveno' (2021) 2 Rivista di Diritti Comparati 198.

7 Matej Avbelj and Jernej Letnar Černič, *The Impact of European Institutions on the Rule of Law and Democracy: Slovenia and Beyond* (Hart Publishing 2020).

under the strictest rule of law scrutiny by the EU ever since its accession. The authors argue that the true problems in Slovenia lie in the state capture by leftist post-communist elites that, according to the authors, have ruled and controlled nearly every aspect of Slovenian society – the economy, the judiciary, the media, higher education, and civil society – ever since its independence.

This argument is recounted critically and in detail in the section that follows. Subsequently, the review draws attention to some of the most important methodological and logical shortcomings of the argument that the authors posit. In conclusion, it highlights the parallels between the narrative forwarded by the book and the narratives that have been used elsewhere in Europe, particularly in Poland, to justify blatant encroachments upon the rule of law.

II. A Spectre is Haunting Slovenia – The Spectre of (Post)Communism

The title of Avbelj and Letnar Černič's book is somewhat misleading; in '*The Impact of European Institutions on the Rule of Law and Democracy: Slovenia and Beyond*', there is little discussion of anything beyond Slovenia. A cursory glance at the table of contents makes this point clear. Of the eleven substantive chapters, eight (Chapters 2-9) discuss the pitfalls of Slovenian democracy and the alleged state capture, two (Chapters 10-11) discuss the influence of the EU and the Council of Europe (CoE) on the rule of law in Slovenia, and one (Chapter 12) explains what a resilient democracy in the EU should be – a discussion that is, though doctrinally engaging, for the most part disengaged from the remainder of the book.

At its core, the book presents a challenge to the narrative of Slovenia as a success story of post-communist transition; though often considered as a role-model liberal democracy with a free-market economy in which the respect for human rights is guaranteed, it is anything but that. Slovenia, the authors argue, is a Potemkin village – perfect when it comes to *de jure*

observance of the rule of law and democratic norms, but there is something rotten on the inside. *De facto* respect for the rule of law is nearly non-existent and democratic processes are primitive. Avbelj and Letnar Černič identify the architects of the Potemkin's facade as the unnamed, spectre-like "post-communist elites" who, after the fall of communism in the early 1990s, never rescinded their power but merely changed its form. The good old days of the Politburo are gone and no longer can "institutional elites" control the country overtly and shamelessly; instead, their power is now covert and exercised through "informal networks" in which all the country's economic and political leverage is monopolised. Because of the omnipresent nature of state capture by the "leftist post-socialist elites", the authors suggest that Slovenia, not Hungary or Poland, should have been the prime candidate for rule of law oversight by the EU institutions. They explain that, unlike the backsliding Hungary and Poland, 'Slovenia […] did not have anywhere to slide backwards to. The rule of law […] appears to have been, since the fall of the iron curtain, under attack from nouveau riche elites very much connected to the former totalitarian regimes'.[8]

It is precisely in the former communist regime that Avbelj and Letnar Černič begin their exploration of the causes and manifestations of state capture. They argue that 'the reason for the present deficiencies of the rule of law in Slovenia' are the 'systematic and widespread human rights violations during the former [Yugoslav] communist regime'.[9] Slovenia has not done enough to address these historical grievances, they contend; processes of transitional justice have been neglected as the perpetrators of crimes against humanity have not been prosecuted and no (effective) lustration measures have been adopted (Chapter 3). Another historically predicated grievance is that the gradualist economic transition has been a failure; it has, in their view, permitted the old communist political elites to 'gain, accumulate and maintain the economic power within their hands and their influential circles'

8 Ibid 7.

9 Ibid 36.

and thus transform themselves into (covert) economic elites.[10] Basing their claims on almost decade-old data, the authors also argue that gradualism has allowed the state to directly control the economy by maintaining a high percentage of state-owned enterprises (Chapter 4).

Fast forward to today, and the protection of human rights in Slovenia is predicated on political biases, the authors argue. Human rights institutions selectively protect only the rights that are ideologically close to unspecified "private interests". These rights include LGBT rights, socioeconomic rights, and the rights of migrants, asylum seekers, and ethnic minorities such as the Roma. In the authors' view, human rights NGOs suffer from these same ideological biases favouring "transitional elites" and the rights close to them, such as gender rights or hate speech, but ignoring the alleged unfair functioning of the judiciary and issues of transitional justice. Because these NGOs are financed through public funds, the authors suggest they have been captured and that 'they should not be considered as proper civil society organisations, but rather as an extension of government or even as part of the public administration' (Chapter 5).[11] Avbelj and Letnar Černič maintain that, in addition to the civil society, the post-communist elites have also managed to capture the media, which is not pluralistic and is constructing "parallel realities" through its reporting. According to the authors, the public media has been captured to the extent that it is 'representing the interest of political parties and informal networks, and feeding information on their behalf.'[12] Similarly, the private media, through non-transparent ownership structures and innovative concentrations of ownership, are presented as merely 'fulfil[ing] the interests of their masters by protecting the privileges of informal political, economic, and other networks' (Chapter 8).[13]

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10 Ibid 70.

11 Ibid 95.

12 Ibid 163.

13 Ibid 166.

The Slovenian judiciary is one of the foremost culprits for this abysmal situation; the authors insist it is too inefficient at processing important cases. There are serious challenges to the independence and impartiality of courts, which are not trusted by the public and violate human rights *en masse* (Chapter 6). On a more abstract level, Slovenian democracy is on life support, as all three aspects of its legitimacy – input, throughput, and output – are in a deep crisis. The authors argue that this 'weak democratic system is a reflection of a strong informal system of power […] under the control of the communist elite and their successors' (Chapter 7).[14] Finally, Avbelj and Letnar Černič posit that poor compliance with the rule of law and a 'systematic failure in the exercise of constitutional democracy' have caused the welfare state to suffer.[15] This is explained through a chain of causality that is strongly reminiscent of a slippery slope: weak rule of law leads to weak institutions; weak institutions lead to a poor business and investment environment; a poor business and investment environment leads to slow economic growth; and slow economic growth leads to a weak welfare state (Chapter 9).

At this point the book moves from exclusively discussing the situation in Slovenia to discussing what the title of the book would suggest it might: the impact the CoE and the EU have had on the rule of law and democracy in Slovenia (Chapters 10 and 11, respectively). On this issue, it offers a mixed conclusion: European institutions have had a positive impact on the rule of law only *de jure*. *De facto*, however, the EU should have done more to undo the capture of the Slovenian economy, whereas 'the political and institutional elites have taken up the values [of the CoE] only when they have served their agendas and their parochial interests, particularly in the

14 Ibid 147.

15 Ibid 189.

power struggles to protect and advance their private – financial – objectives.'[16]

Though the final chapter (Chapter 12) offers a well-reasoned analysis of what a resilient democracy in Europe should be, it nonetheless brings the analysis of Slovenian democracy to a perverse conclusion: Hungary and Poland 'have still so much to do, especially with regard to subordinating the formal institutions of the state'[17] to reach a level of state capture on par with the one in Slovenia. Reading this seems surreal on any given day, but these words seem particularly at odds with reality when one reads them just a couple of days after the captured Polish (un)Constitutional Tribunal has assaulted the very foundations of the EU legal order by rejecting the primacy of EU law.[18]

III. WHAT WOULD KARL POPPER HAVE TO SAY?

Avbelj and Letnar Černič's book is the first monographic treatment of the rule of law and the state of democracy in Slovenia in legal scholarship. As such, it makes a welcome contribution to the academic literature: for too long have Slovenia and its particularities been unexamined in the scholarly discourse. Lack of scrutiny can lead to complacency, or worse. Their contribution is 260 pages of well-written and easy to read prose. Though the three authors (including Gorazd Justinek, who contributed Chapter 4 of the book) nurture notably different writing and argumentative styles, this

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16 Ibid 218. The only support cited for this conclusion is that Slovenia is allegedly performing particularly poorly regarding the execution of ECtHR judgments. This is empirically false. See Veronika Fikfak and Ula Kos, 'Compliance and ECtHR – Country Report: Slovenia – An Exemplary Complier with Judgments of the European Court of Human Rights?' (2021) iCourts Working Paper Series No 249 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3801105> accessed 10 October 2021.

17 Avbelj and Letnar Černič (n 7) 247.

18 Judgment K3/21 of the Constitutional Tribunal of 7 October 2021.

does not distract the reader, nor does it diminish the overall readability of the book.

In the words of the authors, 'this book aims, first, to portray the various pathways of the backsliding of the rule of law and democracy in Slovenia, and secondly to draw parallels and lessons for the broader CEE region'.[19] However, as already noted above, the book predominantly works towards reaching its first aim, while barely discussing the second one at all. The following paragraphs follow its example.

Avbelj and Letnar Černič's book justifiably draws attention to a number of (democratic) deficits that have been undermining the rule of law in Slovenia. For instance, the authors rightly point out the lack of respect by the legislature for the decisions of the Constitutional Court – dozens of them are still unexecuted by the legislature, demonstrating its complete contempt for the separation of powers.[20] They also provide a compelling analysis of some of the problems facing the judiciary: its inefficiency in processing hard cases; the troublingly legislature-dominated appointment procedure of judges; the disproportionately low remuneration of judges compared to the other two branches of government; and the many problems related to the mechanisms of internal and external oversight of the judiciary.[21] The book also justifiably draws attention to the existence of legally dubious media concentrations, as well as untransparent ownership structures of some private media outlets.[22] Additionally, the authors should be commended for accurately diagnosing and giving a name to a phenomenon that has long plagued the Slovenian legal system, that is, an extreme 'institutional attachment to a statutory-based legal positivism'.[23] Finally, as already noted, their doctrinal analysis of the concept of a resilient democracy in the EU is outstanding; the authors offer

19 Avbelj and Letnar Černič (n 7) 10.
20 Ibid 87.
21 Ibid 100–11.
22 Ibid 164–65.
23 Ibid 227.

sound recommendations as to how the EU and the CoE should approach democratic crises in their Member States and how they might effectively contribute to 'pro-constitutional democracy forces in the national political and civic environment'.[24]

However, some words of criticism cannot be left unsaid. Above all, there is the issue of conceptual and methodological opacity that permeates the book and is manifested in different forms. First, some of the central concepts that are used in the book are never operationalised. For instance, even though the authors acknowledge that the rule of law is an essentially contested concept,[25] they never offer a conception of the rule of law they subscribe to, other than a one sentence definition on page 197 (!) of the book. This leaves much of their argument toothless, as the book fails to define a normative standard against which the situation in Slovenia should be measured; it leaves space for the rule of law to be moulded at will to cover any (political) grievance one might have. Or, to put this in different terms, if one of the leading arguments is that the rule of law in Slovenia is under strain, the major premise of this syllogism, i.e. a conception of what the rule of law is and what it specifically requires, is missing. The same can be said about state capture. Like the rule of law, it is one of the central concepts in the book. And yet, the argument alleging state capture by post-communist elites is made without any underlying theoretical analysis of what state capture is, how it manifests itself, and how we can go about proving it. Though the book initially promises a look behind the scenes to supplement 'an exclusive formal constitutional focus […] by a more sociological approach',[26] one would be hard pressed to find any rigorous sociological methodology in the book.

The argumentative opacity of the book is also manifested in the mismatch between the concrete shortcomings related to the rule of law that the book

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24 Ibid 250-52.

25 Ibid 5.

26 Ibid 26.

diagnoses and the logically fallacious conclusions it draws from them. For example, the authors correctly note that the Slovenian judiciary is inefficient at processing complex cases. However, on this basis alone, they conclude that

> lack of efficiency in the so-called hard and complex, in particular criminal cases, […] suggests that the judicial system might be skewed in favour of influential individuals, white-collar crime, and crime with major economic and financial repercussions.[27]

They offer no further evidence for this conclusion. This is patently a *non sequitur*. With no empirical evidence or further explication, one simply does not follow from the other. And this argumentative pattern recurs throughout the book. For any woe of Slovenian democracy, the answer that explains it is the "post-communist elites". Of course, this is not problematic in and of itself; it could well be the correct explanation. But because the book fails to identify these mythical post-communist elites and leaves them completely anonymous (with very few exceptions),[28] the transitional post-communist elites hypothesis becomes an unfalsifiable theory of everything. It can be used to explain anything; it is irrefutable and untestable. If the book fails to explain who the individuals in these "informal networks" are and how they exercise their influence, how can one confirm or reject that they have these omnipotent powers and that they wield them as alleged? This opaque argumentation renders any meaningful criticism of the theory impossible. Karl Popper might argue that the theory fails to meet his falsifiability criterion, which in philosophy of science serves as a demarcation mechanism between theories that are scientific and those that are not.[29]

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27 Ibid 104.

28 See, for instance, ibid 164–68, where the authors discuss in detail the ownership structures of most media outlets and discuss how the owners of these outlets might have influenced their reporting.

29 Karl Popper, *The Logic of Scientific Discovery* (first published 1959, Routledge 2010).

IV. Conclusion

Setting aside for a moment whether the theory is scientific or not – and even whether it is true or not – it is difficult to ignore that the arguments advanced in this book might sound eerily familiar to some. For those acquainted with democratic backsliding elsewhere in the EU, many of the narratives forwarded by the authors might be easily recognisable. Avbelj and Letnar Černič's anonymous but omnipotent and omnipresent post-communist elites and their informal networks are highly reminiscent of what the Kaczyńskis and the Law and Justice (PiS) party in Poland have called '*układ*'. *Układ* is an inherently ambiguous concept coined and used by PiS as a central discursive device through which they have rallied support and justified their frontal assault on the rule of law. The term refers to the 'communist-era networks of patronage and power [and] a nebulous series of post-communist networks of supposed semicovert groups operating in a half-world between (mainly ex-communist) politicians and secret service officials and apparatchiks.'[30] Lech Kaczyński himself has described the mythical *układ* as 'a certain system of interests which stem from the old communist structures' and stated that 'above all it is about economic interests, which have a fundamental impact on events in Poland, also in a political sense.'[31] So much like the membership of the Slovenian "post-communist elites", the membership of the Polish *układ* is shrouded in mystery. And yet they both allegedly control their respective countries from the shadows in order to protect their undefined economic interests. The resemblance is uncanny. Unfortunately, Avbelj and Letnar Černič miss the opportunity to differentiate their arguments from these very similar ones that are being used elsewhere in service of the erosion of the rule of law.

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30 Jo Harper, 'Negating Negation: Civic Platform, Law and Justice, and the Struggle over "Polishness"' (2010) 57 Problems of Post-Communism 16, 22.

31 'Rozmowa Lecha Kaczyñskiego z Dorota Gawryluk' (Strona PiS, 12 August 2004) <http://old.pis.org.pl/article.php?id=3225> not accessed (password protected), cited in ibid.

Naturally, the mere similarity between the two discourses says nothing about the validity of Avbelj and Letnar Černič's argument; nor does it suggest that the authors are engaged in the same discursive project as the Kaczyńskis and PiS. These parallels do, however, raise the question of whether their arguments could be (ab)used in Slovenia in the same way as the far-right has used similar arguments in Poland, that is, to justify blatant assaults on the rule of law on the pretense of breaking up the phantasmic, omnipotent "post-communist networks" and establishing pluralism in public life. I would argue that this is already happening. The game of constitutional hardball that Janša's government has been playing since 2020 does not come as news to many.[32] What might have gone unnoticed, however, is that Janša has been consistently using the same arguments and discursive devices used by both this book and the Kaczyńskis to rally support when in opposition and to justify widespread encroachments upon the rule of law when in government. In a recent interview given to the Polish Press Agency, for instance, Janša spoke of there being 'a system of protection of the privileges of the elites, which is perpetuated by the Slovenian judiciary', because no lustration measures have been adopted after the fall of communism.[33] Again, the resemblance is uncanny: *caveat emptor!*

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[32] Bardutzky, Bugarič and Zagorc (n 6). See also n 2 above.

[33] Blaž Čermelj, 'Janša za poljske medije kritično o vladavini prava v Sloveniji in EU' (Domovina, 5 August 2021) <https://www.domovina.je/jansa-za-poljske-medije-kriticno-o-vladavini-prava-v-sloveniji-in-eu/> accessed 25 October 2021.

BARBARA HAVELKOVÁ AND MATHIAS MÖSCHEL (EDS), *ANTI-DISCRIMINATION LAW IN CIVIL LAW JURISDICTIONS* (OXFORD UNIVERSITY PRESS 2019)

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I. INTRODUCTION

In a context of mistrust towards theories of intersectionality and post-colonial studies perceived as emanations of "other" legal cultures, the publication of *Anti-Discrimination Law in Civil Law Jurisdictions* is particularly timely.[1] Indeed, suspicion towards "new theories" of equality often comes from the impression that, on the one hand, they are pure Anglo-Saxon legal productions and that, on the other, intersectionality and post-colonial studies cannot or should not be transferred into civil law systems.

Against this backdrop, its collection of essays unpacks and contextualizes the assumptions of otherness that can target antidiscrimination law. This one-of-a-kind volume explores how anti-discrimination laws 'fare and fit' in civil law contexts and factors influencing their (lack of) suitability. Starting from the premise that anti-discrimination law is indeed seen as a product of common law, this collection of essays 'aims to answer the question, analytically and critically, of whether and which specific issues arise when

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1 See, for instance, the French Senate's recent proposed amendment to the Research Programming Act of 2020, requiring that 'academic freedoms shall be exercised in accordance with the values of the Republic', referring to the alleged threat caused by post-colonial studies and intersectional approaches to equality law. See 'Recherche: un amendement du Sénat suscite la colère du monde universitaire' (Public Sénat, 30 October 2020) <https://www.publicsenat.fr/article/parlementaire/recherche-un-amendement-du-senat-suscite-la-colere-du-monde-universitaire> (my translation).

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anti-discrimination law meets the civil law jurisdictions of continental Europe'.[2]

Each chapter explores one or several legal regimes, identifying the key features of these that eventually strengthen or limit anti-discrimination law. These specificities can either be embedded in the structure of a national system or arise from its application. Following these two possibilities, the book is divided into two parts. Part I examines the structural aspects of specific domestic legal and extra-legal frameworks that limit or strengthen anti-discrimination law. Part II targets more concrete aspects of the enforcement and effectiveness of anti-discrimination laws. In both Parts, each chapter discusses either the barriers to the integration of anti-discrimination law into a given legal system, or that system's successes, understood in relation to a specific set of factors. These failures and successes are examined in the following section of this review. The final section then explores the depth of this intrinsically comparative volume, as well as the limitations that arise from its methodological variety.

II. Success and Failures in the Integration of Anti-Discrimination Law

Following the structure of the volume, this review starts with the theoretical limitations on the integration of anti-discrimination law in national legal systems, before turning to more practical ones.

1. Theoretical Limitations to the Incorporation of Anti-Discrimination in National Systems

In their introductory chapter, editors Barbara Havelková and Mathias Möschel classify the theoretical obstacles to the full reach of anti-

[2] Barbara Havelková and Mathias Möschel, 'Introduction: Anti-Discrimination Law's Fit into Civil Law Jurisdictions and the Factors Influencing It' in Barbara Havelková and Mathias Möschel (eds), *Anti-Discrimination Law in Civil Law Jurisdictions* (Oxford University Press 2019) 3-4.

discrimination law, based on the findings of the following chapters, into four types: first, the presence of pre-existing laws and their interpretation; second, institutional choices and narratives; third, constitutional and legal foundations; and finally, the wider political and social context. By delving into the elements that limit or facilitate the development of anti-discrimination law, the first eight contributions illustrate national specificities, such as legal cultures and narratives.

First, Stephanie Hennette-Vauchez and Elsa Fondimare argue in Chapter 2 that national specificities have sometimes been used as shields to justify the poor implementation of anti-discrimination law, as it is the case for French "republicanism".[3] Their contribution deconstructs the alleged incompatibility between anti-discrimination law and the "French Republican model", which affirms the ideals of state neutrality and equality between all citizens. While anti-discrimination is based on the premise that individuals are divided by society into groups based on specific characteristics, the French Republican model necessarily requires the disregarding of differences between individuals. Accordingly, the French legal framework builds theoretically on the abstract conception of the legal subject and on the idea of the formal equality of all before the law. Against the political use of the Republican model, which opposes the dissemination of anti-discrimination law, the authors demonstrate the inconsistency that has characterized this "model" since its birth. They bring to the fore divisions amongst French citizens, and between nationals and foreigners, that are embedded in the legal system. They thus 'underline the politics of keeping the myth alive' and conclude that that the Republican model never existed in practice.[4]

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3 Stephanie Hennette-Vauchez and Elsa Fondimare, 'Incompatibility between the "French Republican Model" and Anti-discrimination Law: Deconstructing a Familiar Trope of Narratives of French Law', in Havelková and Möschel (eds) (n 2).

4 Ibid 57.

Barbara Havelková finds a comparable dichotomisation between equality and non-discrimination to be part of the Czech legal regime.[5] Accordingly, national specificities can be conveyed through the legal culture of a state, understood as a set of implicit norms based on principles that are historically and socially contingent. In the Czech Republic, this takes the form of 'generalizations and stereotypes which then feed into prejudice and bias'.[6] In addition, Havelková finds the general principle of equality to 'act as a false friend to ground-related anti-discrimination rights', eventually leading to a narrow interpretation and application of the anti-discrimination law provisions.[7] Accordingly, judges will look for motive and intent when facing ground-related discrimination claims because they only understand discrimination as 'a "few bad apples" problem'.[8]

Legal cultures can ultimately lead to the weak legal mobilisation of anti-discrimination law, as Michael Wrase and Laura Carlson demonstrate for Germany and Sweden, respectively.[9] In the Swedish case, procedural constraints and legal (pre)conceptions, as well as the specific role of social partners, limit the adoption of a sound anti-discrimination framework. Indeed, Swedish social partners have the right to 'determine the terms and conditions of the labour market' through self-regulation in the form of collective agreements.[10] Their specific positioning, almost comparable to that of legislators in certain aspects, also curbs interactions between

5 Barbara Havelková, 'The Pre-eminence of the General Principle of Equality over Specific Prohibition of Discrimination on Suspect Grounds in Czechia', in Havelková and Möschel (eds) (n 2).

6 Ibid 73.

7 Ibid 93.

8 Ibid 76.

9 Michael Wrase, 'Anti-Discrimination Law and Legal Culture in Germany' in Havelková and Möschel (eds) (n 2); Laura Carlson, 'Access to Justice in Sweden from a Comparative Perspective', in Havelková and Möschel (eds) (n 2).

10 Laura Carlson (n 9) 134.

lawmakers and trade unions, eventually preserving 'existing legal structures' rather than challenging them.[11]

The reception of anti-discrimination instruments can also diverge depending on the grounds of discrimination and whether or not these are the fruit of external obligations. Lisa Waddington's chapter regarding the history of disability quotas in Europe is fascinating in this respect.[12] Her contribution does not focus solely on one legal system but provides an overview of disability quotas in various European countries. It demonstrates that, since disability quotas are the result of national decisions aimed at re-integrating returning soldiers disabled by World War I into the labour market, their legitimacy is uncontested in many jurisdictions, even in those that consider race or gender quotas to be breaches of the principle of equal treatment. Disability quotas thus reflect 'a welfare (or charity) model of people with disabilities, rather than a civil rights model' as characterises race or gender quotas.[13] Accordingly, they are fully integrated into, and considered legitimate by, civil law systems, at least insofar as they are not the product of common law. Disability quotas are usually considered as *sui generis* legal instruments with civil law origins, and hence that meet 'tolerant attitudes' from national legal actors and 'infrequent legal challenges'.[14]

2. Practical Limitations to the Incorporation of Anti-Discrimination in National Systems

The second part of the book develops more practical aspects of the (lack of) integration of anti-discrimination law into national regimes, focusing mostly on implementation and enforcement, which can be limited by several actors. First, difficulties regarding the implementation of anti-discrimination

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11 Ibid 135.

12 Lisa Waddington, 'The Relationship between Disability Non-discrimination Law and Quota Schemes: a Comparison between Common Law and Civil Law Jurisdictions in Europe' in Havelková and Möschel (eds) (n 2).

13 Ibid 95.

14 Ibid 111.

law may emanate from judicial practices. Stamatina Yannakourou and Dimitris Goulas scrutinise the reasons behind Greek courts' 'limited role in the enforcement of anti-discrimination law in Greece', finding that lack of awareness regarding social inequalities, ideological constrains and unease with discrimination-related legal concepts limit the potential for social transformations through anti-discrimination law.[15] More concretely, Greek courts have demonstrated their lack of familiarity with anti-discrimination-related concepts, such as indirect discrimination, or in assigning the burden of proof. When using these concepts, Greek judges have been prone to 'errors and misconceptions'.[16] Against this backdrop, they have often preferred to resort to 'well-known and established legal concepts and techniques' in the face of overt discriminatory practices.[17] This choice indeed represents the easy option. However, Yannakourou and Goulas argue that it is also the fruit of judges' own 'ideological or ethical values' regarding the importance one should give to anti-discrimination law.[18] In the same vein, Elena Brodeală provides an overview of Romania's enforcement of anti-discrimination law through the lens of the jurisprudence of the European Court of Human Rights.[19] Brodeală demonstrates that elements of Romania's jurisprudential culture, such as the absence of a contextual interpretation of legislation and the paternalistic vision of women as in need of protection, jeopardise the effectiveness of anti-discrimination law.

Other contributors examine the role played by equality bodies in the enforcement of anti-discrimination provisions. Martin Risak, Christian Berger and Miriam Rehm investigate the influence of socio-economic

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15 Stamatina Yannakourou and Dimitris Goulas, 'Enforcing Anti-Discrimination Law in Greece: Courts' Resistance and Deficiencies of Civil Litigation against Employment Discrimination' in Havelková and Möschel (eds) (n 2) 195.

16 Ibid 198.

17 Ibid 199.

18 Ibid 201.

19 Elena Brodeală, Gender Discrimination in Romania through the Case Law of the ECtHR: Searching for the Roots of the Systemic Failure to Protect Women's Rights in Romania' in Havelková and Möschel (eds) (n 2).

factors on the decision-making process of the Austrian Equal Treatment Commission (ETC).[20] Building on the quantitative examination of cases involving discrimination on the basis of age, race, religion, and sexual orientation, their contribution identifies several often counter-intuitive findings. For instance, they found that the majority of applicants are educated unemployed men, who claim mainly race- or sex-based discrimination. Only in 39% of cases did the ETC rule in favour of the applicants.

Nevertheless, the picture is not completely bleak, as revealed by certain 'success stories', to use the editors' words.[21] For instance, Susanne Burri demonstrates the clear influence of the Dutch Institute for Human Rights (IHR) on the tackling of pregnancy and maternity discrimination.[22] More specifically, the IHR helped further the implementation of CJEU jurisprudence by issuing non-binding opinions following individual complaints. These opinions are presented in court proceedings and often explicitly mention the European case-law. Accompanied by research reports and public information, these opinions participate in raising awareness regarding the impact of anti-discrimination law policies. The IHR's positive impact in the Netherlands is not limited to the pregnancy and maternity context but can also be seen in the area of religious discrimination, as Titia Loenen explores.[23] Backed by a sound religious anti-discrimination law framework, the IHR's opinions have, to a large extent, been followed by

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20 Martin Risak, Christian Berger and Miriam Rehm, 'Pares Inter Inequales? A First Glimpse of the Cases before Senate II of the Austrian Equal Treatment Commission' in Havelková and Möschel (eds) (n 2).

21 Havelková and Möschel (n 2) 5.

22 Susanne Burri, 'Combating Pregnancy Discrimination in the Netherlands: The Role of the Equality Body' in Havelková and Möschel (eds) (n 2).

23 Titia Loenen, 'The Impact of Anti-Discrimination Law in the Netherlands: A Case Study of Discrimination on Grounds of Religion in Employment' in Havelková and Möschel (eds) (n 2).

judges, governmental authorities, employers, and employees' organizations, influencing how expressions of religion on the workplace are dealt with.

Two other success stories are portrayed in the contributions of Möschel, regarding the influence of the prohibition of racial harassment in Italy, and Marie Mercat-Bruns, regarding indirect discrimination provisions in French employment law.[24] Möschel argues that, despite a weak anti-discrimination legal culture and race equality body in Italy, non-discrimination provisions still had a clear impact, thanks to the creative legal mobilisation of NGOs and individuals. Indeed, NGOs and civil society have fought against racial discrimination through litigation, relying on racial harassment provisions rather than following the traditional criminal law path or the indirect/direct discrimination dichotomy, which is shown to be more complicated for judges to understand. While the Italian example illustrates how certain legal actors had to bypass the lack of understanding of courts regarding the concept of indirect discrimination, French judges appear to have a better grasp over this notion. Mercat-Bruns' contribution explores French case-law on employment issues, evaluating the extent to which it incorporates the concept of indirect discrimination. This concept, she observes, was quickly embraced by labour courts, in contrast to the slower path of employment law caused by the strong resistance of political actors relying on the Republican model, as analysed by Hennette-Vauchez and Fondimare. In practice, the concept of indirect discrimination allowed courts to ensure the employers' accountability, in spite of the shortcomings of the employment law framework.

[24] Mathias Möschel, 'Italy's (Surprising) Use of Racial Harassment Provisions as a Means of Fighting Discrimination' in Havelková and Möschel (eds) (n 2); Marie Mercat-Bruns, 'Tackling Indirect Discrimination in Employment in France: A Relative Success?' in Havelková and Möschel (eds) (n 2).

III. Comparing National Anti-Discrimination Law Systems: Methodological Issues and Resulting Limitations

These contributions reflect the blurred line between theoretical and practical limitations to anti-discrimination. Theoretical and practical limitations to a strong antidiscrimination regime are often rooted in national legal systems, as exemplified by the Spanish case for instance. María Amparo Ballester Pastor attributes the 'failure' of the concept of indirect discrimination in Spain not only to legislative and jurisprudential difficulties, but also to the Spanish legal culture and the legal procedures involved in acknowledging and enforcing this principle.[25] In addition, these case studies reveal both the variety and specific nature of the factors impeding the incorporation and implementation of anti-discrimination law in national systems.

Nonetheless, it is possible to identify a series of commonalities amongst the legal and extra-legal factors that are at play in different countries, such as the nature of the legal regimes applicable to equality and anti-discrimination law, the role of legal culture, and the influence of equalities bodies, which can either limit or further the effectiveness of anti-discrimination law. Building on these findings, Havelková and Möschel's illuminating summary undertakes a thorough comparison of the diverse legal systems analysed.[26] The two editors identify two groups of states that share similar approaches towards anti-discrimination law. First, post-socialist countries often fail to implement anti-discrimination law due to a series of legal and extra-legal factors, classified by the editors in a further four categories: 'pre-existing law and its interpretation; institutional choices and mobilization; constitutional and legal foundations and narratives; and the wider political and social context'.[27] Second, Mediterranean countries are not particularly effective in

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25 María Amparo Ballester Pastor, 'Challenges to the Effectiveness of the Protection against Indirect Discrimination on the Ground of Sex in Spain' in Havelková and Möschel (eds) (n 2) 277.

26 Barbara Havelková and Mathias Möschel (n 2).

27 Ibid 10.

enforcing anti-discrimination law, though there are certain "success stories" which stand out. The editors also make two additional observations. On the one hand, Sweden is, against all assumptions when it comes to Nordic countries and equality, quite defective, mainly because of extra-legal factors (amongst others, the scepticism towards 'individualized solutions').[28] On the other, the Netherlands is the clear winner in the race for the most favourable anti-discrimination law, to borrow the editors' metaphor. Havelková and Möschel also suggest a series of factors that influence the integration of EU anti-discrimination law, which they picture as a 'legal irritant'.[29] These factors are, amongst others: time; the area of law involved and, even more so, the ground of discrimination; and specific concepts, some of which are less handy to deal with for national jurisdictions.

Ultimately, the volume offers a glimpse into the various struggles shared by, or specific to, European states in their integration of anti-discrimination law. It also pinpoints the limitations on the use of anti-discrimination law for the individuals. Thanks to its inherently comparative perspective, this series of essays is particularly helpful in separating the common aspects shared by more than one Member State from more country-specific features. The beautiful result is a compelling overview of the reality of anti-discrimination law in several legal regimes.

This is not to say, however, that each chapter examines analogous elements. The contributions neither share similar structures nor analyse each regime from similar perspectives. Indeed, the volume does not aim at offering a comprehensive overview of anti-discrimination legal frameworks. The analysis of each national regime and its practices cannot, and should not, be generalised to all civil law jurisdictions, as the contributors did not assess the national regimes based on similar criteria or methodologies. Some chapters draw on very detailed accounts of the legislative histories of the countries under scrutiny. Others offer more general criticism or adopt a comparative

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28 Ibid 5.

29 Ibid 3.

approach. Likewise, certain authors adopt qualitative methods, while others offer quantitative analyses.

Ultimately, the volume is a mosaic that offers diverse and colourful pictures. It opens one's eyes to the realities of anti-discrimination law in neighbouring legal regimes and helps us draw connections between elements that could otherwise have been thought of as peculiar national specificities. While I knew that France recently deleted the concept of race from its Constitution, I was unaware Sweden had removed this same word from its most recent Discrimination Act.[30] The volume also sheds light on specific limitations embedded in national legal or extra-legal systems that would have otherwise been ignored. This is clear in the Swedish case, where trade unions' interests are in line with those of the legislators (a position quite uncommon amongst European states) and tend towards the protection of the status quo. As a result, although each contribution discusses the specificity of one legal regime or approach, the assemblage of essays implicitly reveals the continuities and the discontinuities between certain groups of states.

However, although many contributions tackle, either indirectly or more explicitly, the impact of EU law on the construction of the domestic anti-discrimination law systems, EU law remains the elephant in the room. Questions necessarily arise regarding the participation of European states' representatives and EU civil servants – (mainly) natives of civil law states – in the construction of EU anti-discrimination law. One can only hypothesise how decisive the role (and geopolitical power) of civil law representatives might have been in this law's creation. Actually, a closer look at the CJEU's case-law reveals similar pitfalls to those noticed by Fondimare and Hennette-Vauchez in the case of France.

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30 Carlson (n 9) 128.

IV. Conclusion

Overall, the volume, gathering prominent scholars as much as emerging researchers, offers glimpses into legal conundrums, successes, and failures in many European legal regimes. It piques readers' curiosity about an often ignored, if not forgotten, aspect of anti-discrimination law, namely its common-law origins and its lack of "transposability" into civil law regimes. Certain chapters showed that this supposed origin can be a misconception, for instance in the case of disability quotas, which were developed quite early on by civil law systems themselves. Others demonstrated that it is not only the formal structure of common law systems that render the integration of anti-discrimination law into civil law systems difficult, but also other – more political – external factors.

As such, this collection of essays nicely complements the broad existing literature on anti-discrimination law, which focuses either on specific grounds of discrimination or specific geographic areas. More precisely, the bulk of the scholarship concentrates on EU anti-discrimination law and/or on the impact of EU anti-discrimination law on national regimes.[31] Additional contributions examine in detail the situation with regard to one ground of discrimination in a specific national legal system, but offer little in the way of broader context or comparison (and often are not written in

[31] See, amongst *many* others, Mark Bell, *Anti-Discrimination Law and the European Union* (Oxford University Press 2002); Evelyn Ellis and Philippa Watson (eds), *EU Anti-Discrimination Law* (Oxford University Press 2012); Anna Lawson and Dagmar Schiek (eds), *European Union Non-Discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination* (Routledge 2016); Uladzìslaŭ Belavusaŭ and Kristin Henrard (eds), *EU Anti-Discrimination Law Beyond Gender* (Bloomsbury 2019). On the German, Dutch, and English legal systems, see Jule Mulder, *EU Non-Discrimination Law in the Courts: Approaches to Sex and Sexualities Discrimination in EU Law* (Hart 2017).

English).[32] Finally, legal scholars in civil law countries often do not use the anti-discrimination law lens, which presumes the existence of inequalities between social groups, despite its usefulness in exposing the realities that lurk behind the limits of the legal language. Ultimately, the contributions prompt the reader to go beyond the boundaries of their own research framework and build bridges between legal regimes. As a constellation of studies enriched by their combination, this volume meets expectations and paves the way for future comparative and socio-legal research.

[32] See, in the context of France, Jimmy Charruau, 'La notion de non-discrimination en droit public français' (PhD thesis, Université d'Angers 2017). See also, regarding the Italian regime, Elena Consiglio, *La discriminazione tra eguaglianza e libertà* (Aracne editrice 2019).