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Let the Digital Euro Circulate: Introducing a Retail C.B.D.C. in the Eurozone With Unlimited Holdings by Users

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This paper was originally written as a master's thesis for the LLM Law & Finance course at the University of Amsterdam (the Netherlands) submitted in June 2022. Thanks to my supervisor Hossein Nabilou and fellow student Jules Vos, participants at the 2022 annual conference of the Italian Society of Law and Economics (14-16 December 2022 at LUMSA University, Italy) and two anonymous referees for their comments and suggestions.

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ABSTRACT

The European Central Bank (E.C.B.) anticipates including a holding limit of about €3,000 per user within the design of its potential retail central bank digital currency for the Eurozone, the digital euro. This is principally motivated by concerns regarding compliance with regulations related to anti-money laundering and countering the financing of terrorism and the disintermediation of banks as credit intermediaries. This paper argues that these concerns are unwarranted, and, in any case, the holding limit would not be an effective solution to these concerns. The digital euro could be introduced with unlimited holdings by individual users in conformity with E.U. law and while maintaining banks as credit intermediaries in the Eurozone financial system.

KEYWORDS

Central Bank Digital Currency; Digital Euro; Disintermediation; Money; Banking

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INTRODUCTION

The European Central Bank (E.C.B.) is assessing the viability and the design of a potential retail Central Bank Digital Currency [hereinafter C.B.D.C.] for the Eurozone, the digital euro.[1] In its *Report on a digital euro* published in October 2020,[2] the E.C.B. outlined principles and requirements which are to be incorporated in the design of the digital euro. One requirement limits the digital euro to being a means of payment [hereinafter M.o.P.] and not "a form of investment" used to hold a large sum of money. This could entail "limiting the quantity of digital euro that users can hold and/or transact".[3] The E.C.B. has mooted a limit of €3,000 held by any user (the "holding limit").[4]

The E.C.B. purportedly intends for the introduction of the digital euro to maintain public access to Central Bank Money [hereinafter Ce.B.M.] as cash usage declines.[5] But the digital euro would not merely offer the digital equivalent of euro banknotes and coins currently in circulation [hereinafter digital cash] if its features materially diverge from physical cash. The holding limit is such a divergence. It denies users the discretion to hold all their money in this form of Ce.B.M. Yet the holding limit may receive less scrutiny than the other design questions that the E.C.B. has reserved in its report for further deliberation.

The concerns that motivate applying the holding limit rest on two bases. Firstly, the digital euro could facilitate financial transactions linked to criminal activity and be inconsistent with regulations related to anti-money laundering and countering the financing of terrorism [hereinafter A.M.L./C.F.T.]. Secondly, the digital euro could reduce deposits held at Eurozone banks which could lead to both disintermediation of banks as credit intermediaries and financial instability. This paper considers these concerns and finds them to be unwarranted. Furthermore, the holding limit does little to address these concerns while doing much to undermine the utility of the digital euro to its potential users.

The holding limit would serve as a blunt instrument towards A.M.L./C.F.T. Meanwhile, there are other models devised that offer payment anonymity in compliance

[1] The project is currently in a twenty-four-month "investigation phase"; *see* European Central Bank, *Eurosystem Launches Digital Euro Project*, (July 14, 2021), https://www.ecb.europa.eu/press/pr/date/2021/html/ecb.pr210714 d99198ea23.en.html.

[2] European Central Bank, REPORT ON DIGITAL EURO (2020), https://www.ecb.europa.eu/pub/pdf/other/ Report _on_a_digital_euro 4d7268b458.en.pdf.

[3] *Id.* at 16–18; *see* Requirement R8.

[4] *See* Fabio Panetta, *Interview with Financial Times*, European Central Bank (June 20, 2021), https://www.ecb.europa.eu/press/inter/date/2021/html/ecb.in210620 c8acf4bc2b.en.html.

[5] *See* Fabio Panetta, *The ECB's Case for Central Bank Digital Currencies*, Financial Times (Nov. 18, 2021), https://www.ft.com/content/5e588cea-c218-4867-aeb7-e16e198ccd9a.

with A.M.L./C.F.T. regulations. Regulators would, however, have to countenance that lower-value C.B.D.C. transactions remain anonymous – as already occurs for some cash and electronic money [hereinafter e-money] transactions – to offer C.B.D.C. as an anonymous electronic means of payment [hereinafter e.M.o.P.]: digital cash.

This paper finds that the Treaties already provide for the issuance of digital euro, provided the design reflects a cash-like instrument. This restricts the ability of the E.C.B. to design a novel instrument that dissuades depositors from withdrawing their deposits in favour of digital euro – within the political constraint that an amendment of the Treaties to implement the digital euro is unlikely. The holding limit is not an effective alternative, however. It would tolerate about one trillion euros of leakage from Eurozone banks' balance sheets.

Importantly, a dynamic analysis of how the E.C.B. and the Eurozone national central banks [hereinafter N.C.B.s] (together, the "Eurosystem"), banks, depositors, borrowers and other parties may react to the availability of digital euro would demonstrate that the holding limit is ill-founded. The potential for further profit would continue to incentivise banks to lend. Banks can adjust the terms of their relationship with depositors and borrowers, as well as their funding model. Parties may increase reliance on the capital markets to facilitate credit intermediation and bank funding, which would be consistent with the E.U.'s Capital Markets Union ambitions. The Eurosystem may be required to embrace its refinancing operations remaining as an important potential source of bank funding that backstops bank liquidity. Nevertheless, there is no indication that banks would be unable to operate in a digital euro environment, that bank runs would pose a greater threat nor the access to credit would be threatened. The real concern for the E.C.B. should not be how to stop the public from holding too much digital euro but, rather, convincing the public to hold digital euro at all.

The remainder of this paper is organised as follows. Section 1 provides a literature review. Section 2 sets out considerations relating to the design of C.B.D.C.s Section 3 analyses the legal basis for the digital euro and the limitations that E.U. law imposes on its potential design. Section 4 assesses the feared incompatibility of an anonymous M.o.P. with A.M.L./C.F.T. regulations. Section 5 assesses the prospect of the digital euro triggering the disintermediation of banks. Section 6 briefly considers the potentially wider purpose of the digital euro for the Eurozone. Finally, the last Section concludes.

1. LITERATURE REVIEW

The compatibility of the digital euro with the provisions of the Treaties has been previously assessed.[6] Legal uncertainties have been highlighted.[7] This paper contributes to the literature considering the legal basis for the digital euro.

The optimal design of C.B.D.C.s has been widely discussed.[8] Many have modelled the impact of C.B.D.C.s on banks, albeit based on differing assumptions that make their findings only partially comparable.[9] The potential impact of C.B.D.C.s on the financial

[6] *See* Benjamin Geva, Seraina Neva Grünewald & Corinne Zellweger-Gutknecht, *The e-Banknote as a "Banknote": A Monetary Law Interpreted*, 41 Oxford Journal of Legal Studies 1119 (2021); Seraina Neva Grünewald, Corinne Zellweger-Gutknecht & Benjamin Geva, *Digital Euro and ECB Powers*, 58 Common Market Law Review 1029 (2021); Corinne Zellweger-Gutknecht, Benjamin Geva & Seraina Neva Grünewald, *Digital Euro, Monetary Objects, and Price Stability: A Legal Analysis*, 7 Journal of Financial Regulation 284 (2021).

[7] *See, e.g.*, Hossein Nabilou, *Testing the Waters of the Rubicon: the European Central Bank and Central Bank digital currencies*, 21 Journal of Banking Regulation 299 (2020); Peter Wierts & Harro Boven, *Central Bank Digital Currency - Objectives, Preconditions and Design Choices*, 20–01 De Nederlandsche Bank: Occasional Studies (2020), https://www.dnb.nl/media/c3qgn4lk/202004_nr-_1_-2020-_-_central_bank_digital_currency_-_objectives-_preconditions_and_design_choices.pdf.

[8] *See, e.g.*, Itai Agur, Anil Ari & Giovanni Dell'Ariccia, *Designing Central Bank Digital Currencies*, 125 Journal of Monetary Economics 62 (2021); Sarah Allen et al., Design Choices for Central Bank Digital Currency: Policy and Technical Considerations (2020), http://prasad.dyson.cornell.edu/doc/Design_Choices_for_CBDC_Final.pdf; Bank for International Settlements, Central Bank Digital Currencies: Foundational Principles and Core Feature, (2020), https://www.bis.org/publ/othp33.pdf; Michael Bordo & Andrew Levin, *Central Bank Digital Currency and the Future of Monetary Policy* (National Bureau of Economic Research Economics Working Paper 23711,2017), http://www.nber.org/papers/w23711.pdf; Michael Kumhof & Clare Noone, *Central Bank Digital Currencies - Design Principles and Balance Sheet Implications* (Bank of England, Staff Working Paper, 2018), https://www.ssrn.com/abstract=3180713; Jiaqi Li, *Predicting the Demand for Central Bank Digital Currency: A Structural Analysis with Survey Data* (Bank of Canada, Staff Working Paper, 2021), https://www.bankofcanada.ca/2021/12/staff-working-paper-2021-65/; Tommaso Mancini-Griffoli et al., *Casting Light on Central Bank Digital Currencies*, 8 IMF Staff Discussion Notes 1 (2018) https://elibrary.imf.org/view/journals/006/2018/008/006.2018.issue-008-en.xml.

[9] *See, e.g.*, David Andolfatto, *Assessing the Impact of Central Bank Digital Currency on Private Banks*, 131 The Economic Journal 525 (2021); John Barrdear & Michael Kumhof, *The Macroeconomics of Central Bank Issued Digital Currencies* (S.s.r.n. Electronic Journal, Working Paper No. 605, 2016), https://www.bankofengland.co.uk/-/media/boe/files/working-paper/2016/the-macroeconomics-of-central-bank-issued-digital-currencies.pdf?la=en&hash=341B602838707E5D6FC26884588C912A721B1DC1; Markus K. Brunnermeier & Dirk Niepelt, *On the Equivalence of Private and Public Money*, 106 Journal of Monetary Economics 27 (2019); Jonathan Chiu et al., *Bank Market Power and Central Bank Digital Currency: Theory and Quantitative Assessment* (Bank of Canada, Staff Working Paper, 2019-20, 2019), https://www.bankofcanada.ca/wp-content/uploads/2019/05/swp2019-20.pdf; Jesús Fernández-Villaverde et al., *Central Bank Digital Currency: Central banking for all?* (National Bureau of Economic Research, Working Paper 26753, 2020), http://www.nber.org/papers/w26753; Todd Keister & Daniel Sanches, *Should Central Banks Issue Digital Currency?* (Federal Reserve Bank of Philadelphia, Working Paper 19-26, 2019), https://www.philadelphiafed.org/-/media/frbp/assets/working-papers/2019/wp19-26.pdf; Young Sik Kim & Ohik Kwon, *Central Bank Digital Currency, Credit Supply, and Financial Stability*, Journal of Money, Credit and Banking (2022), https://doi.org/10.1111/jmcb.12913; Stephen Williamson, *Central Bank Digital Currency: Welfare and Policy Implications* (Society for Economic Dynamics, Meeting Papers 386, 2019) [hereinafter Williamson, *Welfare and Policy Implications*], https://ideas.repec.org/p/red/sed019/386.html; Stephen D. Williamson, *Central Bank Digital Currency and Flight to Safety*, 142 Journal of Economic Dynamics and Control 104-146 (2021) [hereinafter Williamson, *Flight to safety*].

system has been surveyed.[10] This paper reconciles their conclusions with the Eurozone financial system and the legal limitations to the potential design of the digital euro.

This paper considers historical examples that should inform expectations on the impact of C.B.D.C.s: the Bank of Amsterdam and other European public deposit banks that began in the seventeenth century;[11] the U.S. postal banks;[12] the Bank of Canada assuming banknote-issuing privileges;[13] the 2007 bank run on British bank Northern Rock;[14] and proto-C.B.D.C.s in Finland and Ecuador.[15] These examples facilitate a more realistic assessment of the likely impact of the digital euro and the holding limit, rather than relying solely on economic models and theoretical assumptions.

[10] *See, e.g.*, Bank for International Settlements, Central Bank Digital Currencies: Financial Stability Implications (2021), https://www.bis.org/publ/othp42_fin_stab.pdf; Ulrich Bindseil, *Tiered C.B.D.C. and the Financial System* (European Central Bank, Working Paper Series, 2020) [hereinafter Bindseil, *Tiered C.B.D.C*], https://data.europa.eu/doi/10.2866/134524; Ulrich Bindseil, *Central Bank Digital Currency: Financial System Implications and Control,* 48 Int'l. J. Pol. Econ. 303 (2019) [hereinafter Bindseil, *Central Bank Digital Currency*].

[11] *See* Jon Frost, Hyun Song Shin & Peter Wierts, *An Early Stablecoin? The Bank of Amsterdam and the Governance of Money* (Bank for International Settlements, BIS Working Papers No. 902, 2020), https://www.bis.org/publ/work902.htm; Isabel Schnabel & Hyun Song Shin, *Money and Trust: Lessons from the 1620s for Money in the Digital Age* (Bank for International Settlements, BIS Working Papers No. 698, 2018), https://www.bis.org/publ/work698.pdf.

[12] Steven Sprick Schuster, Matthew Jaremski & Elisabeth Ruth Perlman, *An Empirical History of the United States Postal Savings System* (National Bureau of Economic Research Working Papers No. 25812, 2019), http://www.nber.org/papers/w25812.

[13] Anna Grodecka-Messi, *Private Bank Money vs Central Bank Money: A Historical Lesson for C.B.D.C. Introduction* (Lund University Publications, Working Papers, 2019), https://lup.lub.lu.se/record/f4ae004e-5cbc-4551-9563-0d497589fe3e.

[14] Hyun Song Shin, *Reflections on Northern Rock: The Bank Run That Heralded the Global Financial Crisis*, 23 J. Econ. Persp., 101 no. 1 (2009).

[15] Andrés Arauz et al., *Dinero Electrónico: The Rise and Fall of Ecuador's Central Bank Digital Currency*, 2 Latin Am. J. Cent. Banking 100030 (2021).

2. DESIGN OPTIONS FOR C.B.D.C.S

A C.B.D.C. is a fiat currency issued by a central bank in digital form in place of, or as a complement to, physical currency.[16] The E.C.B. wishes to offer a digital alternative to cash in the Eurozone.[17] The decline in cash usage reflects the greater use of commercial bank money [hereinafter Co.B.M.], which is held in deposits[18] as a store of value and a M.o.P.[19] There is also a concern that the increasing adoption of crypto-assets by the public could reach a scale that undercuts monetary policy transmission.[20] This is despite the history of the Bank of Amsterdam indicating that stablecoins are not a sustainable alternative to Ce.B.M. and that such concerns are overblown.[21] Central banks are investigating the adoption of their own digital currency as a regulated, state-backed

[16] Allen et al., *supra* note 8; Eswar Prasad, *Central Banking in a Digital Age: Stock-Taking and Preliminary Thoughts* (Hutchins Center on Fiscal & Monetary Policy at Brookings, Working Papers, 2018), http://prasad.dyson.cornell.edu/doc/CentralBankingDigitalAge_Brookings.April18.pdf. There are numerous definitions offered for C.B.D.C., though some only reflect that author's proposed form of C.B.D.C.; see e.g. Bank for International Settlements, *supra* note 8; Bank for International Settlements, Central Bank Digital Currencies (2018), https://www.bis.org/cpmi/publ/d174.htm; Aleksi Grym et al., *Central Bank Digital Currency*, 5 BoF Economics Review (2017) (Fi.)., https://helda.helsinki.fi/bof/bitstream/handle/123456789/14952/BoFER_5_2017.pdf; Kumhof & Noone, *supra* note 8; Mancini-Griffoli et al., *supra* note 8.

[17] There are "wholesale C.B.D.C." projects examining cross-border, cross-currency or securities payment settlement among wholesale users; *see,* e.g., *Project Jura: Cross-Border Settlement Using Wholesale CBDC*, *BIS Innovation Hub*, Projects, BANK FOR INTERNATIONAL SETTLEMENTS (2022), https://www.bis.org/about/bisih/topics/cbdc/jura.htm (last visited Jun 21, 2022); *The Banque de France has Successfully Completed the First Tranche of its Experimentation Programme in Central Bank Digital Currency*, Banque de France (Dec. 16, 2021), https://www.banque-france.fr/en/communique-de-presse/banque-de-france-has-successfully-completed-first-tranche-its-experimentation-programme-central-bank.

[18] Certain institutions also issue e-money; see Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC, OJ L 267 7 (2009), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02009L0110-20180113 (the e-Money Directive).

[19] *See,* e.g., The Netherlands; *see DNB Study: Cash Must Remain Accessible and Available*, De Nederlandsche Bank (Dec. 17, 2020) (Neth.), https://www.dnb.nl/en/actueel/dnb/older-bulletins/dnbulletin-2020/dnb-study-cash-must-remain-accessible-and-available/; Jurgen Spaanderman, *The Role and Future of Cash*, 18–2 De Nederlandsche Bank: Occasional Studies 12 (2020) (Neth.)., https://www.dnb.nl/media/d5lnf32j/web_129212_os_toekomst_contant_geld_eng.pdf. This has been a long-term trend; see Hanna Jyrkönen, *Less Cash on the Counter: Forecasting Finnish Payment Preferences* (Bank of Finland, Discussion Papers No. 27, 2004) (Fi.)., http://hdl.handle.net/10419/211994; Tanai Khiaonarong & David Humphrey, *Cash Use Across Countries and the Demand for Central Bank Digital Currency* (International Monetary Fund, IMF Working Papers, 2019), https://www.elibrary.imf.org/configurable/content/journals$002f001$002f2019$002f046$002f001.2019.issue-046-en.xml. See also Sweden; *see* Niklas Arvidsson et al., *Cashless Society: When Will Merchants Stop Accepting Cash in Sweden. A Research Model, in* ENTERPRISE APPLICATIONS, MARKETS AND SERVICES IN THE FINANCE INDUSTRY 105-13 (Stefan Feuerriegel & Dirk Neumann eds., 2017).

[20] *See* Hossein Nabilou & André Prüm, *Central Banks and Regulation of Cryptocurrencies*, 39 REVIEW OF BANKING AND FINANCIAL LAW 1003 (2020).

[21] *See* Frost et al., *supra* note 11. Proposed stablecoin Diem (originally Libra) has already been abandoned by its promoter, Meta (formerly Facebook); see Diem Association, *Statement by Diem CEO Stuart Levey on the Sale of the Diem Group's Assets to Silvergate*, PR Newswire (Jan. 31, 2022), https://www.prnewswire.com/news-releases/statement-by-diem-ceo-stuart-levey-on-the-sale-of-the-diem-groups-assets-to-silvergate-301471997.html.

alternative.[22] The digital euro would be the Eurozone's C.B.D.C. offering Ce.B.M. that serves as an e.M.o.P. in the Eurozone.[23]

Many aspects of the design of C.B.D.C. remain open to consideration[24] and entail trade-offs against other M.o.P.s.[25] The design may represent digital cash or adopt additional features (and reject features of physical cash). Numerous central banks have been investigating the design choices.[26] There is some consensus, including under the auspices of the Bank for International Settlements[27] and the Group of 7.[28]

[22] *See* Bank for International Settlements, *supra* note 8; Bank for International Settlements, *supra* note 17. See also the U.K.; *see* Bank of England, *Bank of England Statement on Central Bank Digital Currency* (Apr. 19, 2021) (U.K.), https://www.bankofengland.co.uk/news/2021/april/bank-of-england-statement-on-central-bank-digital-currency. See also the U.S.; see Fed. Rsrv. Sys., Money and Payments: The U.S. Dollar in the Age of Digital Transformation (2022), https://www.federalreserve.gov/publications/files/money-and-payments-20220120.pdf. But concerns remain regarding implementation of c.b.d.c.s; see Andrew Bailey, *Bank of England Governor Andrew Bailey on the future of cryptocurrencies and stablecoins* (Sept. 3, 2020) (UK)., https://www.brookings.edu/wp-content/uploads/2020/09/es_20200903_england_bailey_transcript.pdf; Ansgar Belke & Edoardo Beretta, *From Cash to Central Bank Digital Currencies and Cryptocurrencies: A Balancing Act Between Modernity and Monetary Stability*, 47 J. Econ. Stud. 911 (2020).

[23] European Central Bank, *supra* note 2, at 49–51; see Core Principle P2.

[24] *See* Allen et al., *supra* note 8; Bindseil, *Tiered C.B.D.C*, *supra* note 10; Bindseil, *Central Bank Digital Currency*, *supra* note 10; Wouter Bossu et al., *Legal Aspects of Central Bank Digital Currency: Central Bank and Monetary Law Considerations* (International Monetary Fund, IMF Working Papers No. 2020/254, 2020), https://www.imf.org/en/Publications/WP/Issues/2020/11/20/Legal-Aspects-of-Central-Bank-Digital-Currency-Central-Bank-and-Monetary-Law-Considerations-49827; Grym et al., *supra* note 16.

[25] *See* Wierts & Boven, *supra* note 7; Paul Wong & Jesse L. Maniff, *Comparing Means of Payment: What Role for a Central Bank Digital Currency?*, FEDS Notes (Aug. 13, 2020), https://federalreserve.gov/econres/notes/feds-notes/comparing-means-of-payment-what-role-for-a-central-bank-digital-currency-20200813.htm.

[26] For surveys of central bank activity, see Codruta Boar, Henry Holden & Amber Wadsworth, *Impending arrival: a sequel to the survey on central banking digital currency*, 107 BIS PAPERS 1 (2020), https://www.bis.org/publ/bppdf/bispap107.pdf; Mancini-Griffoli et al., *supra* note 8; Prasad, *supra* note 16.

[27] Bank for International Settlements, *supra* note 8.

[28] G7, *G7 Finance Ministers and Central Bank Governors' Statement on Central Bank Digital Currencies (C.B.D.C.s) and Digital Payments – 13 October 2021*, (Oct. 13, 2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1025234/FINAL_G7_Statement_on_Digital_Payments_13.10.21.pdf;
G7, *Public Policy Principles for Retail Central Bank Digital Currencies (C.B.D.C.s)*, (2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1025235/G7_Public_Policy_Principles_for_Retail_CBDC_FINAL.pdf.

Trends have emerged among C.B.D.C.s that are already in circulation or are undergoing pilot projects.[29] But the E.C.B. continues to experiment and has yet to determine the likely design of the digital euro.[30] The principles and requirements published by the E.C.B. indicate that the digital euro would involve a two-tier system[31] – the Eurosystem operates a centralised ledger with private sector intermediaries responsible for user supervision and access – but most features remain undecided.[32]

The final proposed design of the digital euro will affect how widely it is adopted by potential users, as well as the legal and economic analysis of its impact on the Eurozone.[33] Nonetheless, the digital euro can be analysed for the purposes of this paper despite this uncertainty.

[29] See Sand Dollar in the Bahamas; see Central Bank of The Bahamas, *Annual Report & Statement of Accounts, 2020*, (Apr. 26, 2021), https://www.centralbankbahamas.com/viewPDF/documents/2021-05-05-14-14-43-2020-CBOB-Annual-Report.pdf; Central Bank of The Bahamas, *Annual Report & Statement of Accounts, 2021*, (Apr. 25, 2022), https://www.centralbankbahamas.com/viewPDF/documents/2022-05-05-11-51-31-CBOB-2021-Annual-Report-and-Financial-Statements.pdf. See e-C.N.Y. in China; see People's Bank of China, *Progress of Research & Development of E-C.N.Y. in China*, (July, 2021) (China)., http://www.pbc.gov.cn/en/3688110/3688172/4157443/4293696/2021071614584691871.pdf. See DCash in the Eastern Caribbean; see Eastern Caribbean Central Bank, *What You Should Know | E.C.C.B. Digital E.C. Currency Pilot*, (2022), https://www.eccb-centralbank.org/p/what-you-should-know-1 (last visited Jun 21, 2022). See eNaira in Nigeria; see Central Bank of Nigeria, *Design Paper for the eNaira*, (2021), https://enaira.com/download/eNaira_Design_Paper.pdf (last visited Feb 11, 2022). See e-krona in Sweden; *see* Sveriges Riksbank, *E-krona pilot phase 1*, (Apr. 2021) [hereinafter Riksbank, *Phase 1*], https://www.riksbank.se/globalassets/media/rapporter/e-krona/2021/e-krona-pilot-phase-1.pdf; Sveriges Riksbank, *E-krona pilot phase 2*, (Apr. 2022) (Swed.) [hereinafter Riksbank, *Phase 2*], https://www.riksbank.se/globalassets/media/rapporter/e-krona/2022/e-krona-pilot-phase-2.pdf (last visited Jun 6, 2022); Sveriges Riksbank, *The Riksbank's e-krona project, Report 1*, (Sep. 2017) (Swed.). [hereinafter Riksbank, *Report 1*], https://www.riksbank.se/globalassets/media/rapporter/e-krona/2017/rapport_ekrona_uppdaterad_170920_eng.pdf; Sveriges Riksbank, *The Riksbank's e-krona project, Report 2*, (Oct. 2018) (Swed.). [hereinafter Riksbank, *Report 2*], https://www.riksbank.se/globalassets/media/rapporter/e-krona/2018/the-riksbanks-e-krona-project-report-2.pdf. These are non-interest-bearing cash-like instruments, held in C.B.D.C. wallets and managed by authorised intermediaries in a two-tier system.

[30] E.g. Transacting C.B.D.C. with hardware as a bearer instrument; see Deutsche Bundesbank, *Eurosystem Experimentation Regarding a Digital Euro - Research Workstream on Hardware Bearer Instrument*, (2021) (Ger.)., https://www.ecb.europa.eu/paym/digital_euro/investigation/profuse/shared/files/deexp/ecb.deexp211011_2.en.pdf.

[31] European Central Bank, *supra* note 2, at 36–44.

[32] Although the E.C.B. confirmed the technical feasibility of the holding limit; *see* European Central Bank, *Digital Euro Experimentation Scope and Key Learnings*, (2021), https://www.ecb.europa.eu/pub/pdf/other/ecb.digitaleuroscopekeylearnings202107 564d89045e.en.pdf.

[33] Kumhof & Noone, *supra* note 8; Mancini-Griffoli et al., *supra* note 8.

3. THE LEGAL BASIS FOR DIGITAL EURO

3.1. LEGAL BASIS UNDER THE TREATIES

The Treaty on the Functioning of the European Union [hereinafter T.F.E.U.][34] and the Statute of the European System of Central Banks and of the European Central Bank [hereinafter E.S.C.B. Statute][35] entrust the Eurosystem with the responsibility for Eurozone monetary policy within the Economic and Monetary Union [hereinafter E.M.U.].[36] The responsibilities of the Eurosystem, which lacks legal personality, are coordinated by the E.C.B.[37] and implemented by the E.C.B. with the relevant N.C.B.s.[38] The digital euro project is, therefore, an Eurosystem project coordinated by the E.C.B.

The principles of conferral, subsidiarity and proportionality in the Treaty on European Union [hereinafter T.E.U.][39] determine whether the introduction of the digital euro is an *intra vires* act of the Eurosystem.[40] Subsidiarity is not applicable due to Eurozone monetary policy being an exclusive Union competence.[41] It is not feasible to evaluate proportionality without a concrete proposal. This paper, therefore, principally considers whether the Treaties confer the power on the E.U. (represented by the Eurosystem) to introduce the digital euro.

The legal basis for the digital euro lies in the E.C.B. having "the exclusive right to authorise the issue of euro banknotes within the Union" and the Eurosystem having the power to "issue such notes".[42] Digital euro that would operate as a digital equivalent of

[34] Consolidated Version of the Treaty on the Functioning of the European Union art. 15, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU], https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12016E/TXT&qid=1640690125551&from=EN.

[35] Consolidated Version of the Treaty on the Functioning of the European Union: Protocol (No. 4) on the Statute of the European System of Central Banks and of the European Central Bank, OJ C 202 230 (2016), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016M/PRO/04&qid=1661254745758&from=EN.

[36] The Treaties refer to the European System of Central Banks [hereinafter E.S.C.B.], consisting of the E.C.B. and the E.U. N.C.B.S; *see* TFEU, *supra* note 34, at 127; TFEU Protocol No. 4, *supra* note 35, at 1. However, non-Eurozone Member States and their N.C.B.s are exempt from Eurozone decision-making; *see* TFEU, *supra* note 34, at 139; TFEU Protocol No. 4, *supra* note 35, at 42.

[37] TFEU, *supra* note 34, at 132(1); TFEU Protocol No. 4, *supra* note 35, at 9.2.

[38] TFEU Protocol No. 4, *supra* note 35, at 12.1. On the Eurosystem, see Christos V. Gortsos, *The European Central Bank*, *in* THE E.U.LAW OF ECONOMIC AND MONETARY UNION (Fabian Amtenbrink, Christoph Hermann & René Repasi eds., 2020); Michael Ioannidis, *The European Central Bank*, *in* THE E.U.LAW OF ECONOMIC AND MONETARY UNION (Fabian Amtenbrink, Christoph Hermann & René Repasi eds., 2020); Bernd Krauskopf & Christine Steven, *The Institutional Framework of the European System of Central Banks: Legal Issues in the Practice of the First Ten Years of its Existence*, 46 COM. MAR. L. REV. 1143 (2009).

[39] Consolidated Version of the Treaty on European Union, OJ C 326 13 (2012), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12008M/TXT&from=EN.

[40] *Id.* at 5.

[41] TFEU, *supra* note 34, at 3(1)(c).

[42] *Id.* at 128(1); TFEU Protocol No. 4, *supra* note 35, at 16. On issuance of banknotes and coins, see Gortsos, *supra* note 38, at 7.3.

cash constitutes money.[43] It would serve the three functions of money: medium of exchange, store of value and unit of account. This status is bolstered by the digital euro being backed by the state and the central bank and (one would hope) its wide acceptance as a M.o.P.[44] However, there is no E.U. law definition of "banknotes". Irrespective of the drafters of the Treaties only contemplating paper banknotes, the Treaties provide no limitation on the medium of the banknote.[45] The concept can, therefore, be extended to the digital form.[46] The Eurosystem is capable of issuing two digital currencies given their distinguishable forms: the digital euro would be a general-purpose currency; reserves are intended for interbank payment settlement.

The Treaties do, however, distinguish between banknotes and coins. Issuance of coins is reserved for Member States.[47] No distinction between banknotes and coins can exist in digital currency other than any iconography used but the visual representation of the digital euro carries no legal significance. This provision originates from the historical role of nation-states in minting coins, and that rationale is not applicable to C.B.D.C.[48] It is then consistent with the Treaties to consider non-minted euro currency as falling within the "banknote" concept under the T.F.E.U. Article 128(1).[49] The digital euro would be the digital form of the euro "banknote" in accordance with the T.F.E.U. Article 128(1).

There are limitations to what can constitute money and banknotes when designing the digital euro. As features are incorporated that go further than being a digital manifestation of existing paper banknotes, it becomes increasingly unlikely that such digital euro falls within the T.F.E.U. Article 128(1).[50] The E.C.B. has indicated the same conclusion.[51] It would be problematic for the digital euro to have a variable value, whether for remuneration or monetary policy, or be programmable to restrict its use. A banknote is a negotiable instrument with a fixed nominal value.[52] A balance should be remunerated with additional money, not the variation of the nominal value of the instruments held. Similarly, certain features may require a Treaty amendment if they go

[43] Geva et al., *supra* note 6.
[44] Charles Proctor, Mann on the Legal Aspect of Money (7th ed. 2012).
[45] Cf. A restrictive interpretation could take the word "banknotes" to only denote physical banknotes; see Bossu et al., *supra* note 24.
[46] Geva et al., *supra* note 6; Grunewald et al., *supra* note 6; Wierts & Boven, *supra* note 7; Zellweger-Gutknecht et al., *supra* note 6.
[47] TFEU, *supra* note 34, at 128(2).
[48] Grunewald et al., *supra* note 6; Zellweger-Gutknecht et al., *supra* note 6.
[49] Geva et al., *supra* note 6; Grunewald et al., *supra* note 6; Zellweger-Gutknecht et al., *supra* note 6.
[50] Grunewald et al., *supra* note 6; Nabilou, *supra* note 7; Wierts & Boven, *supra* note 7; Zellweger-Gutknecht et al., *supra* note 6.
[51] European Central Bank, *supra* note 2, at 24–25.
[52] Bossu et al., *supra* note 24; Geva et al., *supra* note 6.

beyond existing Eurosystem tools,[53] or are tantamount to taxation such as negative interest charged on digital euro holdings.[54]

The Eurosystem is empowered under the Treaties to "provide facilities . . . to ensure efficient and sound clearing and payment systems".[55] This provides the legal basis for the Eurosystem to institute a digital euro payment system.[56] The Eurosystem has used this legal basis to drive integration towards a single Eurozone payments system[57]: the euro payment system [hereinafter T.A.R.G.E.T.2.], the euro payment area [hereinafter S.E.P.A.], payment settlement of securities transactions [T.2.S.], instant payment settlement [T.I.P.S.] and regulation of card interchange fees.[58] There are limits to the scope of this legal basis.[59] Nonetheless, a digital euro payment system relates to money and comfortably falls within the scope.

A more spurious argument would be that the E.S.C.B. Statute Article 22 acts as a legal basis for issuing the digital euro. This would construe the digital euro as a facility that allows payments to function in the absence of cash.[60] Cryptocurrencies, such as Bitcoin, are sometimes perceived in this dual role as both money and payment systems.[61] The regulatory role of the Eurosystem includes acting as a "catalyst" for advancing the Eurozone payment system.[62] Nonetheless, this is not a suitable basis on which to ground the issuance of the digital euro, provided digital euro represents money. Paper banknotes do not legally constitute a subset of a Eurosystem payment facility, especially when the T.F.E.U. Article 128(1) offers an explicit legal basis for the issuance of Ce.B.M. C.B.D.C. should not be legally construed in such a manner either.

If the digital euro were to take a more exotic form, those formulations of the digital euro would require an alternative legal basis to the T.F.E.U. Article 128(1). The E.S.C.B. Statute Article 22 could become relevant as a legal basis if its primary role was to

[53] Nabilou, *supra* note 7.
[54] Grunewald et al., *supra* note 6; Zellweger-Gutknecht et al., *supra* note 6.
[55] TFEU Protocol No. 4, *supra* note 35, at 22.
[56] Wierts & Boven, *supra* note 7.
[57] Phoebus L. Athanassiou, *Payment Systems*, *in* The EU Law of Economic and Monetary Union (2020); René Smits, *The Changing Payments Landscape of Europe: Issues of Regulation and Competition*, 27 Yearbook of European Law 405 (2008); Ivan Parać Vukomanović, *New Services Offered within the Remit of Target2 - How Do They Correspond with TFEU and Central Bank Tasks?*, 3 EU and Comparative Law Issues and Challenges Series 1048 (2019).
[58] Regulation (E.U.) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions, OJ L 123 1 (2015), http://data.europa.eu/eli/reg/2015/751/oj/eng.
[59] This is an inappropriate basis for regulation of central counterparties in derivatives clearing; *see* Case T-496/11, United Kingdom of Great Britain and Northern Ireland v. European Central Bank (E.C.B.), ECLI:EU:T:2015:133 (March 4, 2015), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62011TJ0496&from=en.
[60] Nabilou, *supra* note 7.
[61] Mary Donnelly, *Payments in the Digital Market: Evaluating the Contribution of Payment Services Directive II*, 32 Comput. L. & Sec. Rev. 827 (2016).
[62] Athanassiou, *supra* note 57; Vukomanović, *supra* note 57.

settle payments. For example, the instrument may be used merely as a temporary asset to digitally transmit payments between parties. However, the digital euro would be closer to a market infrastructure tool than currency in such circumstances. The E.S.C.B. Statute Article 17 allows the Eurosystem to open bank accounts for "credit institutions, public entities and other market participants". This could be interpreted broadly to allow the public to open bank accounts with the Eurosystem that would hold digital euro balances.[63] Such an interpretation of the term "other market participants" is unconvincing, especially when read within the context of the E.S.C.B. Statute Chapter IV.[64] In the E.S.C.B. Statute, Article 20 allows the E.C.B. to "decide upon the use of such other operational methods of monetary control as it sees fit". But this would be inappropriate to introduce a measure as significant as a currency that is otherwise lacking a basis under the Treaties.[65] These provisions, therefore, represent a problematic basis on which to issue a purported digital currency.[66] The E.C.B. cites the T.F.E.U. Article 127(2) and the E.S.C.B. Statute Articles 17, 20 or 22 as potential legal bases only if digital euro takes the form of "variants for limited uses, devoid of general legal tender status".[67]

The validity of the digital euro as conceived by the Eurosystem may rest on an assessment of its proportionality: such act "should be suitable for attaining the legitimate objectives pursued by the legislation at issue and should not go beyond what is necessary to achieve those objectives".[68] The Eurosystem's primary objective to "maintain price stability"[69] and its enumerated tasks[70] are relevant to that assessment. Maintaining the euro as a stable currency that is readily available to households and businesses offers a public benefit[71] and is necessary for the effective transmission of monetary policy.[72] These

[63] This design has been mooted in literature; *see,* e.g., George Selgin, *Central Bank Digital Currency as Potential Source of Financial Instability*, 41 CATO J. 333 (2021).
[64] Wierts & Boven, *supra* note 7.
[65] *Id.*
[66] Annelieke Mooij, *Central Bank Digital Currency: A Brief Analysis of Legal Issues Concerning the Introduction of Central Bank Digital Currencies*, BANKIERI, Oct. 2021, at 13. Zellweger-Gutknecht et al., *supra* note 6.
[67] European Central Bank, *supra* note 2, at 24.
[68] Case C-493/17, Proceedings brought by Heinrich Weiss and Others, ECLI:EU:C:2018:1000, 72 (Dec. 11, 2018), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62017CJ0493&from=en. *See* also Case C-62/14, Peter Gauweiler v Deutscher Bundestag, ECLI:EU:C:2015:400, 67 (June 16, 2015), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62014CJ0062&from=en.
[69] European Union, *supra* note 34, at 127(1); European Union, *supra* note 35, at 2. *See* European Central Bank, *Two per Cent Inflation Target*, https://www.ecb.europa.eu/mopo/strategy/pricestab/html/index.en.html (last visited June 21, 2022).
[70] European Union, *supra* note 34, at 127(2); European Union, *supra* note 35, at 3. This includes monetary policy and "the smooth operation of payment systems".
[71] Grunewald et al, *supra* note 6; Zellweger-Gutknecht et al., *supra* note 6. Although the term "public good" is often used to describe this benefit, the criteria for that economics term are not necessarily satisfied; *see* Lawrence H. White, *Should the State or the Market Provide Digital Currency?* CATO 237 (2021).
[72] Athanassiou, *supra* note 57; Zellweger-Gutknecht et al., *supra* note 6. *See* Cases C-422/19 and C-423/19, Johannes Dietrich and Norbert Häring v Hessischer Rundfunk, ECLI:EU:C:2021:63, 37–39, 43 (January 26, 2021), https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62019CJ0422.

considerations may support a determination that the digital euro is a necessary measure to achieve the Eurosystem's obligations.

The standard of review applied by the Court of Justice of the European Union [hereinafter C.J.E.U.] may be decisive for – and a contentious aspect of – its proportionality assessment.[73] The C.J.E.U. has generally afforded broad discretion to the E.C.B. when reviewing monetary policy decisions,[74] due to the technical nature of its policy choices and the need to undertake forecasts and complex assessments.[75] The E.C.B.'s proportionality determination when introducing the digital euro would again be grounded in complex economic assessments and may receive similar deference. However, the introduction of a C.B.D.C. is such a fundamental undertaking that it may provoke more robust judicial scrutiny than other E.C.B. acts.[76]

3.2. LEGAL INFLUENCE ON THE POTENTIAL DESIGN

In line with the existing payment system, the N.C.B.s are expected to function as the Eurosystem's intermediaries and be responsible for the management of the digital euro in their Member States. This is consistent with the decentralised mandate of the Eurosystem under the Treaties: tasks are allocated between the E.C.B. and relevant N.C.B.s.[77] This reflects how euro banknotes are currently issued and allows seigniorage to continue to be apportioned within the Eurosystem.[78] This also resembles T.A.R.G.E.T.2, which operates as a single system but is structured as a combination of the N.C.B.s' payment systems.[79]

[73] On the role of courts in E.M.U. policy, *see* Daniel Sarmiento & Moritz Hartmann, *European Monetary Union and the Courts*, *in* The EU Law of Economic and Monetary Union, May 2020, at 526.
[74] Nabilou, *supra* note 7.
[75] *See* Peter Gauweiler and Others v Deutscher Bundestag, ECLI:EU:C:2015:400, 68-69, 74-75 (June 16, 2015).
[76] Nabilou, *supra* note 7.
[77] European Union, *supra* note 35, at 12.1. *See* Krauskopf & Steven, *supra* note 38; Julian Langner, *ESCB/Eurosystem/National Central Banks*, *in* The EU Law of Economic and Monetary Union, May 2020, at 389.
[78] The E.C.B. and each Eurozone N.C.B. are entitled to the value of a predetermined percentage of euro banknotes in circulation; *see* European Central Bank, *Decision of the European Central Bank of 13 December 2010 on the Issue of Euro Banknotes (recast) (ECB/2010/29)*, Official Journal of the European Union, Feb.9, 2011, at 26, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02010D0029(01)-20200201&rid=9 *See* also Langner, *supra* note 77.
[79] Vukomanović, *supra* note 57.

The E.U. regulates the provision of payment services under the Second Payment Services Directive [hereinafter P.S.D.2].[80] The parties wishing to function as a payment service provider [hereinafter P.S.P.s] for digital euro can expect to be subject to the same rights and obligations.[81] However, access to the N.C.B.s in the existing payment system is limited to those parties accepted as participants to T.A.R.G.E.T.2. The N.C.B. terms and conditions of T.A.R.G.E.T.2 essentially limit participant status to the E.C.B., N.C.B.s and credit institutions - although the Eurosystem has discretion in determining eligibility.[82] A similar approach to the digital euro system would maintain non-banks relying on banks to access the payment system and function as digital euro P.S.P.s.

The E.C.B. expects the digital euro system to comply with A.M.L./C.F.T. requirements that apply to the financial system.[83] The Fourth Anti-Money Laundering Directive [hereinafter A.M.L.D.][84] would remain relevant to designing the digital euro payment system and the operational requirements for intermediaries. This includes subjecting "obliged entities"[85] to customer due diligence requirements [hereinafter C.D.D.] that apply upon establishing a business relationship and when encountering large-value payments.[86] Derogations exist for low-value e-money transactions.[87]

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[80] European Union, *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*, Official Journal of the European Union, Dec.12, 2015, at 35, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02015L2366-20151223&from=EN. *See* Benjamin Geva, *Payment Transactions under the E.U. Second Payment Services Directive - An Outsider's View*, 54 Texas International Law Journal, Dec. 11, 2018, at 211; Gabriella Gimigliano & Marta Božina Beroš, *Introduction to the Payment Services Directive II: A Commentary*, *in* The Payment Services Directive II, Dec.14, 2021, at 2.

[81] European Central Bank, *supra* note 2, at 42.

[82] European Central Bank, *Guideline of the European Central Bank of 5 December 2012 on a Trans-European Automated Real-time Gross Settlement Express Transfer system (TARGET2) (recast) (ECB/2012/27)*, Official Journal of the European Union, Jan. 30, 2013, at 1, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02012O0027-20211121&from=EN For the E.C.B. terms and conditions of T.A.R.G.E.T.2, *see* also European Central Bank, *Decision of the European Central Bank of 24 July 2007 concerning the terms and conditions of TARGET2-ECB (ECB/2007/7)*, Official Journal of the European Union, Sep. 8, 2007, at 71, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02007D0007-20211121&from=EN.

[83] European Central Bank, *supra* note 2, at 27; *see* Requirement 10. Other central banks expect the same of their potential C.B.D.C.s; *see* Bank for International Settlements, *supra* note 8.

[84] European Union, *Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing, Amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC*, Official Journal of the European Union, June 5, 2015, at 73 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02015L0849-20210630.

[85] *See Id.* at 2 (1).

[86] This includes any occasional transaction worth €15,000 or more, occasional transfer of funds for more than €1,000 or cash payment for goods for €10,000 or more (*see* A.M.L.D. Article 11) – or such lower threshold set by that Member State (*see* A.M.L.D. Article 5).

[87] Anonymous prepaid payment cards are exempt from certain C.D.D. if they store up to €150 and transactions are up to €50 (*see* A.M.L.D. Article 12).

The Charter of Fundamental Rights [hereinafter the Charter][88] provides the right to privacy.[89] This is a factor to be considered in the design of the digital euro system.[90] But this does not imply that users should expect a right to anonymity. Charter rights can be restricted by laws that are proportionate to achieving an objective of public interest.[91] As is apparent from existing A.M.L./C.F.T. legislation, privacy is not an absolute right.

However, the E.U. recognises that everyone has the right to the protection of personal data.[92] This would impose General Data Protection Regulation [hereinafter G.D.P.R.] standards on those parties processing data within the digital euro system.[93] Such standards for P.S.P.s and the Eurosystem have already been determined in the existing payment system.[94]

3.3. FURTHER GROUNDS FOR CHALLENGE

The Eurosystem is required to act in accordance with the principle of "an open market economy with free competition" and "favouring an efficient allocation of resources".[95] This principle is arguably contravened if the digital euro leads to money migrating from banks to central banks and a greater role of central banks in credit intermediation.[96]

This argument is unconvincing. The existing refinancing operations regime entails the Eurosystem's funding stimulating private sector lending by Eurozone banks.[97] This practice is considered *intra vires*. The consequences of greater reliance on

[88] Charter of Fundamental Rights of the European Union, Oct. 26, 2012, 2012 OJ (C 326/391), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT.

[89] *Id.* at 7.

[90] Zellweger-Gutknecht et al., *supra* note 6.

[91] European Union, *supra* note 88, at 52 (1).

[92] European Union, *supra* note 34, at 16(1); European Union, *supra* note 88, at 8. This is supplemented by European Union, *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)*, 2016 OJ (L 119) 1, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02016R0679-20160504. (the G.D.P.R.); European Union, *Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC*, 2018 OJ (L 295) 39, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R1725&from=EN.

[93] Allen et al., *supra* note 8.

[94] Nikita Divissenko, *Title IV "Rights and Obligations in Relation to the Provision and Use of Payment Services", Chapter 4 "Data Protection" (Art, 94),* The Payment Services Directive II, Dec.14, 2021, at 179 (Gabriella Gimigliano & Marta Božina Beroš eds., 2021).

[95] European Union, *supra* note 34, at 127 (1); European Union, *supra* note 35, at 2.

[96] Grunewald et al., *supra* note 6; Nabilou, *supra* note 7; Nabilou & Prüm, *supra* note 20.

[97] *See* section 5.6. *See also* Jens van 't Klooster, *Technocratic Keynesianism: A Paradigm Shift Without Legislative Change*, New Political Economy, 2022, at 771. Jens van 't Klooster & Clément Fontan, *The Myth of Market Neutrality: A Comparative Study of the European Central Bank's and the Swiss National Bank's Corporate Security Purchases*, New Political Economy, 865 (2020).

refinancing operations should merely factor into the E.C.B. determination of the merits of the policy and any proportionality assessment by the C.J.E.U. Furthermore, the existing banking system is itself a compromise of free competition. Banks as financial intermediaries are exempt from asset segregation rules and rely upon deposit insurance to reassure depositors.[98] Banks as P.S.P.s have preferential access to the payment system.[99] A private banking market would continue to function alongside C.B.D.C. but under different (perhaps less favourable) monetary conditions.[100] This would not amount to there no longer being an "open market economy." Finally, it is questionable whether the T.F.E.U. Article 127(1) itself constitutes a ground to invalidate an otherwise *intra vires* act.[101]

The Charter protects the "freedom to conduct a business".[102] A challenge could be brought by those whose business is purportedly harmed by the presence of the digital euro, such as commercial banks.[103]

Nevertheless it is doubtful that the digital euro would contravene this freedom. C.J.E.U. case law has borne out that the test would be whether the digital euro would "prevent the exercise of banking activities".[104] If banks are permitted to operate, but their business model becomes financially untenable, that is not a concern for the Charter. Furthermore, given that the digital euro would be grounded in E.U. legislation, it could be justified as proportionate to its intended objectives.[105]

[98] Hossein Nabilou, *The Law and Macroeconomics of Custody and Asset Segregation Rules: Defining the Perimeters of Crypto-banking*, SSRN Electronic Journal (March 30, 2022).

[99] Charles M. Kahn & William Roberds, *Why pay? An Introduction to Payments Economics*, Journal of Financial Intermediation, 1 (2009).

[100] *See* Section 5.3.

[101] Advocate-General Cruz Villalón referred to the T.F.E.U. Article 119, which uses the same phrase, as a "general and thus ambiguous" Article; *see* Case C-62/14, Peter Gauweiler and Others v Deutscher Bundestag, ECLI:EU:C:2015:7, 126 (Jan. 14, 2015), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62014CC0062&from=en.

[102] European Union, *supra* note 88, at 16.

[103] Grunewald et al., *supra* note 6.

[104] Case C-686/18, OC and Others v Banca d'Italia and Others, ECLI:EU:C:2020:567, 89 (July 16, 2020), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62018CJ0686&qid=1647625337000&from=EN.
See also Case C-540/16 UAB 'Spika' and Others v Žuvininkystės tarnyba prie Lietuvos Respublikos žemės ūkio ministerijos, ECLI:EU:C:2018:565, 38 (July 12, 2018), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62016CJ0540&from=EN.

[105] European Union, *supra* note 88, at 52 (1).

3.4. AMENDMENT OF THE TREATIES

If it is determined that the desired design of the digital euro falls outside the existing legal bases under the Treaties, amendment of the T.F.E.U. and/or the E.S.C.B Statute would be necessary.[106] There is currently a lack of political enthusiasm for reopening the Treaties under the ordinary revision procedure.[107] Simplified revision procedures are available but problematic.[108] Certain relevant Treaty provisions fall outside their scope. Purporting to merely clarify an existing Union competence may be accused of attempting an *ultra vires* increase in Union competences.[109] The E.C.B. is, therefore, likely to pursue a form of the digital euro that avoids amendment of the Treaties. This paper assumes that the legal basis of the digital euro is limited to the existing provisions of the Treaties.

3.5. LEGAL IMPLEMENTATION

In implementing the digital euro, the E.U. will have to enact a legal package that establishes the currency's requirements, mandates actions by certain institutions and amends existing legislation where appropriate.[110] For example, P.S.D.2 and the e-Money Directive [e-M.D.] govern the convertibility of money between cash, deposits and e-money and should be updated to address the digital euro and the requirements of digital euro P.S.P.s.[111] Furthermore, each Member State must reconcile the digital euro with its national law in relation to private law, bankruptcy law and administrative law. E.U. legislation may facilitate harmonisation but cannot codify a one-size-fits-all solution.

Regulations and directives necessary to implement the digital euro constitute "measures necessary for the use of the euro as the single currency" and so can be agreed

[106] E.U. Member States and the C.J.E.U. bound themselves to complying with the revision procedures under the Treaties; *see* Reijer Passchier & Maarten Stremler, *Unconstitutional Constitutional Amendments in European Union Law: Considering the Existence of Substantive Constraints on Treaty Revision*, 5 Cambridge Journal of International and Comparative Law 337 (2016). *See* also Case 43-75, Gabriella Defrenne v. Societe anonyme belge de navigation aerienne Sabena, ECR 455, 58 (April 8, 1976), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61975CJ0043&qid=1647459461544; Case C-370/12, Thomas Pringle v Government of Ireland and Others, ECLI:EU:C:2012:756, 36 (Nov. 27, 2012), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012CJ0370&from=en.

[107] European Union, *supra* note 39, at 48(2).

[108] T.F.E.U. Part Three (T.F.E.U. Articles 26-197) may be amended by Council decision (*see* T.E.U. Article 48 (6)). E.S.C.B. Statute Article 22 may be amended by legislation from the European Parliament and the Council (*see* E.S.C.B. Statute Article 40 (1)).

[109] Steve Peers, *The Future of EU Treaty Amendments*, 31 Yearbook of European Law 17 (2012); Lucia Serena Rossi, *A New Revision of the EU Treaties After Lisbon?*, *in* The EU After Lisbon: Amending or Coping with the Existing Treaties? 3 (2014).

[110] Panetta, *supra* note 5.

[111] N. Vandezande, *Between Bitcoins and Mobile Payments: Will the European Commission's New Proposal Provide more Legal Certainty?*, 22 International Journal of Law and Information Technology, 295 (2014).

upon by the European Parliament and the Council.[112] The E.C.B. anticipates using this approach,[113] which was taken for the introduction of the euro. The legislation would otherwise have to follow the ordinary legislative process.[114]

The E.C.B. would play a key role in steering the legislative process related to the digital euro. It has the right to be consulted regarding proposed legislation[115] and can propose legislation by delivering recommendations.[116] The E.C.B. can determine the technical implementation of the digital euro by issuing: decisions with its desired policies; opinions that declare its legal interpretation as to how the Eurosystem may operate; regulations of the payment and settlement system;[117] and "such measures as are necessary" to carry out its tasks.[118] The E.C.B. can also bring legal action against any N.C.B. that fails to fulfil its legal obligations.[119]

3.6. BRINGING LEGAL ACTIONS

Any E.C.B. acts and E.U. legislation regarding the digital euro would be subject to judicial review by the C.J.E.U.[120] Member States, the European Parliament, the Council and the Commission would have standing to seek judicial review. Under the so-called *Plaumann* test, private applicants, such as individuals and companies, have limited access to judicial review.[121] Standing to challenge E.U. measures is only available where the measure directly concerns the private applicant[122] and not simply because measures of general application impact that applicant.[123]

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[112] European Union, *supra* note 34, at 133. *See* Gortsos, *supra* note 38; Grunewald et al., *supra* note 6.
[113] European Central Bank, *supra* note 2, at 24.
[114] On the role of the E.U. legislative bodies in E.M.U. policy, *see* The EU Law of Economic and Monetary Union 16 - 18 (Fabian Amtenbrink et al. eds., 2020).
[115] European Union, *supra* note 34, at 127 (4), 133.
[116] *Id.* at 132 (1); European Union, *supra* note 35, at 34.1.
[117] TFEU, *supra* note 34, at 132(1); TFEU Protocol(NO 4), *supra* note, 35 at 34.1.
[118] TFEU, *supra* note 34, at 282(4).
[119] TFEU PROTOCOL (NO 4), *supra* note 35, at 35.6.
[120] TFEU, *supra* note 34 at 263; TFEU PROTOCOL (NO 4), *supra* note 35, at 35.1.
[121] Case 25/62 Plaumann & Co. v. Commission of the European Economic Community, ECR 95 (1963), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61962CJ0025&from=en.
[122] *See, e.g.*, T-323/16 Banco Cooperativo Español, SA v. Single Resolution Board, ECLI:EU:T:2019:822 (2019), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62016TJ0323&qid=1647383168981&from=EN; T-365/16 Portigon AG v. Single Resolution Board, ECLI:EU:T:2019:824 (2019), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62016TJ0365&qid=1647383168981&from=EN; T-377/16, T-645/16 and T-809/16 Hypo Vorarlberg Bank v. Single Resolution Board, ECLI:EU:T:2019:823 (2019), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62016TJ0377&qid=1647383168981&from=EN.
[123] T-492/12 Von Storch and Others v. European Central Bank, ECLI:EU:T:2013:702 (2013), https://curia.europa.eu/juris/document/document.jsf?text=&docid=146461&pageIndex=0&doclang=DE&mode=req&dir=&occ=first&part=1&cid=2738293; confirmed on appeal, C-64/14 P Von Storch and Others v. European Central Bank, ECLI:EU:C:2015:300 (2015), https://eur-lex.europa.eu/legal-content/DE/TXT/HTML/?uri=CELEX:62014CO0064&from=en.

However, in practice, private applicants in some Member States have indirect recourse to the C.J.E.U. by bringing a claim in national court that is referred to the C.J.E.U. for a preliminary ruling (pursuant to the T.F.E.U. Article 267) as to whether the relevant E.U. act is *ultra vires*. The C.J.E.U. has accepted such preliminary references as admissible despite evidently being a device by applicants to circumvent the *Plaumann* test.[124] National courts, such as the *Bundesverfassungsgericht* (German Federal Constitutional Court), may then add a further check on how cavalier the E.U. – including the C.J.E.U. – may be in its interpretation of the Treaties.[125] The E.U. can, therefore, reasonably expect a legal challenge to arise. When considering its proposed design of the digital euro, the E.C.B. may have to pre-empt those legal arguments likely to be raised.

4. ANONYMITY: BENEFIT OR BURDEN?

4.1. THE IMPORTANCE OF ANONYMITY

Cash is a bearer instrument that settles payment instantly and anonymously. Co.B.M. transactions leave an electronic record that can be scrutinised by the P.S.P. and the legal authorities. Some users are motivated to transact using cash because of its anonymity.[126] However, there are negative consequences to the anonymity of cash. It can facilitate crime, including tax evasion and corruption, which carries huge social costs.[127]

Some activities that are illegal or considered immoral are not necessarily socially harmful, however, and cash is beneficial in facilitating such transactions.[128] This distinction is important in countries governed by totalitarian regimes where political opposition can constitute illegal activity.[129] Access to an anonymous M.o.P. is critical to

[124] Sarmiento & Hartmann, *supra* note 73. *See* C-370/12 Thomas Pringle v Government of Ireland and Others, ECLI:EU:C:2012:756, 36 (2012); *See* C-370/12 Thomas Pringle v Government of Ireland and Others, ECLI:EU:C:2012:756, 38-44 (2012); C-62/14 Peter Gauweiler and Others v Deutscher Bundestag, ECLI:EU:C:2015:400, 18-31 (2015); C-493/17 Proceedings brought by Heinrich Weiss and Others, ECLI:EU:C:2018:1000, 17-26 (2018).

[125] *See* Proceedings brought by Heinrich Weiss and Others, BVerfG, 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16 111, 116, 133, 142–143, 5 May, 2020, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html. This judgement triggered European Commission infringement proceedings INFR(2021)2114.

[126] *See* Emanuele Borgonovo et al., *Privacy and Money: It Matters*, SSRN Electronic J. (2019); Charles M. Khan et al., *Money is Privacy*, 46 Int'l Econ. Rev. 377 (2005).

[127] *See* Kenneth Rogoff, *The Curse of Cash*, The Milken Institute Review: A Journal of Economic Policy (Jan. 2019), https://www.milkenreview.org/articles/the-curse-of-cash?IssueID=31 (last visited Dec. 28, 2021).

[128] White, *supra* note 71.

[129] Nabilou, *supra* note 7.

transacting outside of state surveillance and avoiding seizure of assets.[130] Although E.U. Member States are committed to democratic principles,[131] the digital euro can only be durable if its design guards against potential misuse upon democratic backsliding in any Eurozone Member State. The public would be especially vulnerable if cash availability were to eventually be phased out due to C.B.D.C. availability.

Although the E.U. intends to subject crypto-assets to stricter regulation,[132] crypto-asset transactions and their intermediaries currently receive less A.M.L./C.F.T. scrutiny than Co.B.M. transactions. The onus has instead been placed on regulated entities that transfer money to crypto-asset intermediaries (i.e., P.S.P.s) or have credit exposure to crypto-assets (e.g., banks).[133]

However, the prospect of crypto-assets as an anonymous e.M.o.P. widely facilitating criminal activity is overstated. Crypto-assets are not widely adopted by the public.[134] Deterrents include their uncertain legal status, lack of trusted intermediaries,[135] high transaction fees, slow payment processing, unstable values[136] and limited practicality for "real economy" transactions.[137] Importantly, crypto-assets are not necessarily anonymous. Bitcoin and Ethereum are pseudonymous and users have been traceable.[138] Monero and Zcash purport to be anonymous, although this has been

[130] Chris Hayes, *Is Bitcoin for Real? with Joe Weisenthal*, https://why-is-this-happening-with-chris-hayes.simplecast.com/episodes/joe-weisenthal-zN5ly8kv.

[131] TFEU, *supra* note 34, at Preamble.

[132] *See Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937*, (2020), https://eur-lex.europa.eu/resource.html?uri=cellar:f69f89bb-fe54-11ea-b44f-01aa75ed71a1.0001.02/DOC_1&format=PDF.

[133] Nabilou, *supra* note 7.

[134] Ten percent of Europeans were invested in crypto-assets in 2021; *see* Fabio Panetta, *For a few cryptos more: the Wild West of crypto finance*, European Central Bank (2022), https://www.ecb.europa.eu/press/key/date/2022/html/ecb.sp220425 6436006db0.en.html (last visited Jun 21, 2022).

[135] Consumer protection legislation, such as *Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council*, OJ L 304 64 (2011), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0083 (the Consumer Rights Directive) and P.S.D.2, does not apply. *See* Donnelly, *supra* note 61.

[136] Stablecoins are at risk of a run and breaking their peg; e.g., TerraUSD; *see* Scott Chipolina, *Terra crisis fans regulatory concerns over $180bn stablecoin market*, Financial Times, May 11, 2022, https://www.ft.com/content/48d82c7a-495f-4d5e-a87a-a56bea58e760 (last visited May 12, 2022).

[137] *Cf.* For use cases for crypto-assets, *see* Joe Weisenthal, *There's a New Vision for Crypto, and It's Wildly Different From Bitcoin*, BloombergQuint (2021), https://www.bloombergquint.com/business/bitcoin-btc-vs-ethereum-eth-and-defi-there-s-a-big-difference (last visited Jun 21, 2022). *E.g.*, If crypto-assets are only held briefly to execute payment, volatile values are less detrimental.

[138] *See, e.g.*, Wall Street Journal, *How The Government Tied One Couple to Billions in Stolen Bitcoin*, https://www.wsj.com/podcasts/the-journal/how-the-government-tied-one-couple-to-billions-in-stolen-bitcoin/ad579c04-a43b-4a95-8872-7665da330135 (last visited Mar 1, 2022).

questioned.[139] Crypto-asset transactions offer greater privacy than the banking system and make transactions harder to trace, but that does not equate to anonymity.

Demand for many crypto-assets instead derives from speculation that their value will grow or yield can be earned via "decentralised finance". They do not serve as a M.o.P. This makes it puzzling that the E.C.B. suggests that C.B.D.C. could function as a substitute e.M.o.P. that attracts crypto-asset users in the Eurozone.[140] Stablecoins are also desired to facilitate crypto-asset transactions.[141] Withdrawal into digital euro would have to be available on crypto-asset exchanges and cheaper than stablecoins in order to attract users.

The E.C.B. intends to maintain cash availability alongside the digital euro.[142] Despite cash usage declining in the Eurozone, cash will not necessarily become redundant. Many Eurozone consumers and merchants continue to use cash despite its expenses and physical limitations,[143] the availability of e.M.o.P.s and E.U. regulation of card interchange fees.[144] The anticipated demise of cash failed to materialise upon the emergence of e-money.[145] Users are not necessarily prepared to completely dematerialise their money.[146] Where digital euro fails to substitute cash suitably, certain users will continue to use cash.[147] Cash remains in circulation irrespective of alternative M.o.P.s because it can offer transaction privacy.[148] Some users prioritise privacy, whether from the state, their P.S.P. or their counterparty.[149] Privacy was the most important design feature among respondents to the E.C.B.'s digital euro consultation.[150]

[139] Allen et al., *supra* note 8; Prasad, *supra* note 16.

[140] Fabio Panetta, *Designing a digital euro for the retail payments landscape of tomorrow*, European Central Bank (2021), https://www.ecb.europa.eu/press/key/date/2021/html/ecb.sp211118 b36013b7c5.en.html (last visited Dec 8, 2021).

[141] *See* Sirio Aramonte, Wenqian Huang & Andreas Schrimpf, *DeFi risks and the decentralisation illusion*, BIS Quarterly Review (2021), https://www.bis.org/publ/qtrpdf/r_qt2112b.htm.

[142] European Central Bank, *supra* note 2, at 20. The E.C.B. has reaffirmed the importance of maintaining cash availability despite the prevalence of eM.o.P.s; *see,* e.g., *Opinion of the European Central Bank of 30 December 2019 on limitations to cash payments*, 2.7 (2019), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019AB0046&from=EN; *Opinion of the European Central Bank of 25 May 2020 on cash limitations concerning postal payments and anti-money laundering measures*, 2.1.6 (2020), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020AB0017&qid=1606682444372&from=EN.

[143] *See* Khiaonarong & Humphrey, *supra* note 19; Mancini-Griffoli et al., *supra* note 8; Williamson, *Welfare and Policy Implications*, *supra* note 9; Williamson, *Flight to Safety*, *supra* note 9.

[144] Regulation (E.U.) 2015/751, *supra* note 58.

[145] Grym et al., *supra* note 16.

[146] Belke & Beretta, *supra* note 22.

[147] Borgonovo et al., *supra* note 126; Grym et al., *supra* note 16. *See*, *What do Households in Germany Think About the Digital Euro? First Results from Surveys and Interviews*, Deutsche Bundesbank (2021), https://www.bundesbank.de/resource/blob/879312/807018037068359550e1d89a5dc366fe/mL/2021-10-digitaler-euro-private-haushalte-data.pdf.

[148] Kahn et al., *supra* note 126.

[149] *Id.*

[150] European Central Bank, *Eurosystem Report on the Public Consultation on a Digital Euro* (2021), https://www.ecb.europa.eu/pub/pdf/other/Eurosystem_report_on_the_public_consultation_on_a_digital_euro 539fa8cd8d.en.pdf. This is likely due to forty-seven percent of respondents originating from Germany. Germany maintains relatively high cash usage, partly due to privacy; *see* Deutsche Bundesbank, *supra* note 147.

It is apparent that some users prioritise other features.[151] Nonetheless, the absence of anonymity may make the digital euro undesirable to some users.[152]

4.2. COULD ANONYMITY BE ACCEPTABLE?

A.M.L./C.F.T. regulations have not altered the anonymity of cash. Such regulations make it more difficult to transact in cash for higher-value transactions and increase the legal peril of using cash for criminal activity.[153] Designing the digital euro as digital cash would combine the anonymity of cash with the ease of electronic payments.[154] But it could also encourage illicit payments. This raises concerns as to whether such a design is consistent with the objectives and the requirements of A.M.L./C.F.T. regulations.

The Eurosystem requires the design of the digital euro to be consistent with A.M.L./C.F.T. requirements, and digital euro P.S.P.s are subject to A.M.L./C.F.T. regulations.[155] However, although the public does not have a right to anonymous C.B.D.C.,[156] designing the digital euro with features that reduce its utility as a M.o.P. must be weighed against the A.M.L./C.F.T. risks from issuing an anonymous M.o.P. with unlimited holdings.

The holding limit is a design feature intended to assist A.M.L./C.F.T. Preventing users from anonymously holding a substantial amount of money hampers money laundering. However, it would undermine any anonymity purportedly included in the design of the digital euro. It increases the frequency of transferring money between a C.B.D.C. wallet and an alternative M.o.P., where the transaction data would likely be recorded in the banking system. If a C.B.D.C. wallet must be linked to a personal bank account to automatically transfer any excess holdings,[157] the users cannot maintain an anonymous user identity. At best, it would represent the digital equivalent of withdrawing cash at a cash machine to pay for certain transactions anonymously. This would mask the user's spending activities but leave a record of their withdrawals.

Yet potential designs have been developed that could allow for anonymous C.B.D.C. payments within an A.M.L./C.F.T.-compliant system and without the holding

[151] *E.g.*, Avant Card in Finland offered anonymous e-money yet most consumers preferred debit cards for equivalent transactions; *see* Grym et al., *supra* note 16.
[152] *See* Li, *supra* note 8. Li estimates that, in Canada, low anonymity compared to full anonymity could reduce C.B.D.C. demand by six - ten percent.
[153] *See* Section 3.2.
[154] Such "e-cash" was predicted by Milton Friedman; *see* Milton Friedman, *Milton Friedman Full Interview on Anti-Trust and Tech*, (1999), https://www.youtube.com/watch?v=mlwxdyLnMXM (last visited Jun. 21, 2022).
[155] *See* Section 3.2.
[156] *See id.*
[157] European Central Bank, *supra* note 32.

limit.[158] This would entail the use of "zero-knowledge proof" or "blind signature" technology that can verify the pre-conditions for a valid payment instruction and execute payment without storing user data.[159] If a proposed payment exceeds a given higher-value threshold, it would be subjected to C.D.D. in accordance with A.M.L.D. A two-tier system would be used for A.M.L./C.F.T. supervision. The viability of this model is, of course, subject to the technical feasibility of building such a payment system.[160] Nonetheless, this demonstrates *prima facie* that a design of the digital euro is conceivable and offers users anonymous holdings and transactions while subjecting higher-value payments to the same level of scrutiny as currently applies to cash transactions under A.M.L.D. In such circumstances, the holding limit is an unnecessary measure to address A.M.L./C.F.T. concerns.[161]

The E.C.B. is contemplating limited functionality for anonymous digital euro payments.[162] Legislators and regulators would thus need to tolerate an anonymous C.B.D.C. that surrenders oversight of certain data that is currently available for Co.B.M. There would be no oversight of how much digital euro is held by any user – being as anonymous as their cash holdings. Lower-value transactions would be completely anonymous – which would comprise most payments made by retail users. P.S.P.s may be largely unaffected if they deprioritise *ex-ante* screening of lower-value transactions, whether in digital euro or Co.B.M., given the volume of transactions and lower A.M.L./C.F.T. risk involved. The difficulty lies in denying *ex-post* review of transactions to

[158] *See* David Chaum, Christian Grothoff & Thomas Moser, *How to Issue a Central Bank Digital Currency* (Swiss National Bank, SNB Working Papers, 2021), https://www.snb.ch/n/mmr/reference/working_paper_2021_03/source/working_paper_2021_03.n.pdf; Jonas Gross et al., *Designing a Central Bank Digital Currency with Support for Cash-Like Privacy*, SSRN Electronic Journal (2021), https://www.ssrn.com/abstract=3891121 (last visited May 8, 2022). For related discussions, *see* also Digital Euro Association, *Will Central Bank Digital Currencies Enable Anonymous Payments?*, Digital Euro Association,https://home.digital-euro-association.de/podcast; Alexander Bechtel*, Digital Euro with Alexander Bechtel from Deutsche Bank*, All Things Digital Assets, https://uie360.podbean.com/page/2/ (downloaded using PodBean).

[159] Allen et al., *supra* note 8.

[160] The E.C.B. queries whether any digital transaction would be truly untraceable; *see* European Central Bank, *supra* note 32. Evidence obtained through illegal interception of transaction data could be declared inadmissible under national law as a safeguard; *see* C-310/16, Criminal proceedings against Petar Dzivev and Others, ECLI:EU:C:2019:30, ¶ 36 (2019); C-419/14, WebMindLicenses kft v. Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság, ECLI:EU:C:2015:832, ¶¶ 71, 73 (2015). This paper proceeds under the assumption that anonymity is technically feasible.

[161] An anonymous C.B.D.C. wallet tied to a device may see users voluntarily restrict digital euro holdings due to fear of theft or loss; *see* Chaum et al., *supra* note 158.

[162] European Central Bank, *supra* note 2, at 27–28. The E.S.C.B. developed a proof of concept involving "anonymity vouchers"; *see* European Central Bank, *Exploring Anonymity in Central Bank Digital Currencies*, (2019), https://www.ecb.europa.eu/paym/intro/publications/pdf/ecb.mipinfocus191217.en.pdf.
The Eurosystem is experimenting with privacy options; *see* European Central Bank, *The Eurosystem's Analysis of Privacy-Enhancing Techniques in Central Bank Digital Currencies*, (2021), https://www.ecb.europa.eu/pub/pdf/annex/ecb.sp210414_1_annex 43eee6196e.en.pdf?ed992ba1ebc6915f12bf5d57013ae54.

legal authorities because transaction data would not be stored. This already occurs with cash transactions but would have to be accepted for digital euro transactions.

The value of the C.D.D. threshold would become the contentious figure in the debate. The reality is that money laundering is unavoidable in our liberal society. As restrictions are applied to a given M.o.P., money laundering merely shifts to alternative methods, including clandestine schemes.[163] It remains cumbersome to launder vast sums of money in lower-value transactions. This is why exceptions exist for lower-value card payments.[164] Anonymous lower-value transactions in digital euro would be consistent. However, the E.C.B. has only mooted €70 or €100 as a threshold.[165] A threshold that is too low removes the anonymity of digital euro in practice. A policy debate is merited here. But it is apparent that the absence of anonymity and the presence of the holding limit should not be predetermined features of the design of the digital euro in pursuit of A.M.L./C.F.T. objectives.

5. DISINTERMEDIATION OF BANKS

5.1. COMMERCIAL BANK MONEY

The role of deposits in money creation and credit intermediation explains why banks are fundamental to the Eurozone payment system. Banks are partly funded by depositors. Banks are uniquely entitled to hold those deposits for their own account rather than segregating depositors' funds.[166] But those funds are not merely redeployed towards lending. Banks can create Co.B.M. to lend to borrowers, which immediately represents newly-created deposits in the borrower's bank account.[167]

[163] *E.g.*, money laundering using marketplaces within computer games for downloadable content; *see* Mark Warren & Karel Nihom, *Online Video Gaming: yet Another Front in the Perpetual Battle Against Money Laundering*, Linklaters (2020), https://www.linklaters.com/en/insights/blogs/sportinglinks/2020/april/online-video-gaming-yet-another-front-in-the-perpetual-battle-against-money-laundering (last visited Jun. 21, 2022).

[164] *See* Section 3.2.; *e.g.*, Avant Card in Finland allowed anonymous payments up to 2000 markka, equal to €336 (€461 in 2020 money); *see* David Gerard , *Avant Card — a Central Bank Digital Currency From 1990s Finland*, Attack of the 50 Foot Blockchain (2020), https://davidgerard.co.uk/blockchain/2020/01/25/avant-card-a-central-bank-digital-currency-from-1990s-finland/ (last visited Jun. 21, 2022). Avant Cards were capable of being used for online payments; *see* Grym et al., *supra* note 16.

[165] Panetta, *supra* note 5.

[166] Nabilou, *supra* note 98; *see also* Richard A. Werner, *How do Banks Create Money, and why can Other Firms not do the Same? An Explanation for the Coexistence of Lending and Deposit-Taking*, 36 International Review of Financial Analysis 71 (2014).

[167] *See* Michael McLeay, Amar Radia & Ryland Thomas, *Money Creation in the Modern Economy*, (2014), https://www.bankofengland.co.uk/-/media/boe/files/quarterly-bulletin/2014/money-creation-in-the-modern-economy.pdf?la=en. Money creation by Eurozone banks has been substantiated by empirical research; *see* Matteo Deleidi & Giuseppe Fontana, *Money Creation in the Eurozone: An Empirical Assessment of the Endogenous and the Exogenous Money Theories*, 31 Review of Political Economy 559 (2019).

Banks are disciplined when creating money, however. Firstly, banks are required to settle depositor withdrawals with Ce.B.M. (i.e., cash or reserves).[168] A bank will run out of Ce.B.M. if it creates money that is deposited with other banks. In such circumstances, that bank may have to increase its deposit interest rate to incentivise depositors to maintain deposits with that bank. Secondly, created money must be lent to profitable investments.[169] A bank cannot afford to pay its deposit interest rate without earning a higher yield on its lending. Ultimately the bank's balance sheet will need to balance, among other things, depositors' claims recorded as liabilities against loans (receivables) recorded as assets.

Cheques, cards and bank transfers are premised upon two parties settling payment using Co.B.M. and without recourse to cash. If a bank holds a substantial proportion of bank accounts in the local economy, once reserves payable between banks are netted-off against each other, it requires smaller outflows of reserves between banks. Such a reduction in Ce.B.M. outflows – on a stable basis – allows banks to reduce the proportion of their assets that need to be held in Ce.B.M. Banks can instead deploy their funding towards less liquid and higher-yielding lending rather than maintaining lower-yielding Ce.B.M. and government bonds to meet Ce.B.M. outflows. The long-term lock-in of capital allows for long-term investment that generally yields higher returns for the project and its investors.[170] The intensity of this maturity transformation is critical to maximising its net interest margin. It is, therefore, no coincidence that banks are integral to the payment system and enhance payment technology.[171] There is a financial incentive for banks to convince depositors to minimise their withdrawals. Deposits become more appealing than cash as deposits become more convenient as a M.o.P.[172]

The introduction of the digital euro would alter this equilibrium in the business model for Eurozone banks. C.B.D.C. offers users an alternative e.M.o.P. to Co.B.M. Replacing deposits with wholesale market funding is (typically) more expensive and less stable for the bank.[173] This reverses the current virtuous circle in banks' funding that

[168] McLeay, Radia & Thomas, *supra* note 167; *see also* George Selgin, *Central Banks as Sources of Financial Instability*, 14 Independent Review 485 (2010).
[169] *See* James Tobin, *Commercial Banks as Creators of Money*, Cowles Foundation Discussion Paper (1963), https://cowles.yale.edu/sites/default/files/files/pub/d01/d0159.pdf (last visited Dec. 30, 2021).
[170] *See* Giuseppe Dari-Mattiacci et al., *The Emergence of the Corporate Form,* 33 J.L. Econ. & Org. 193 (2017).
[171] The primary function of public deposit banks in Europe historically was to provide a payment and clearing system offering Co.B.M. as a M.o.P.; *see* Schnabel & Shin, *supra* note 11.
[172] Kahn & Roberds, *supra* note 99.
[173] Barrdear & Kumhof, *supra* note 9. C.f. Swedish banks receive a lower proportion of their funding from deposits than Eurozone banks; *see* Sveriges Riksbank, *supra* note 29.

depends upon substitution from Ce.B.M. to Co.B.M.[174] It is feared that this would reduce bank lending and consequently economic output.[175]

5.2. MIGRATION FROM DEPOSITS

Depositors receive a negligible or negative "monetary yield" for their on-demand deposits held with (lent to) their bank. Deposits typically yield a zero (or negligible) deposit interest rate and incur a service fee to maintain a bank account. Banks offer a "convenience yield" by providing a safe location to store cash, banking services and an eM.o.P.. Depositors will intentionally or subconsciously compare their deposit options based on an aggregate yield combining monetary yield and convenience yield.[176] The design of the digital euro will determine whether its aggregate yield surpasses deposits and triggers migration from deposits to C.B.D.C.

A possible solution is to offer a variable remuneration rate for digital euro that can be adjusted to avoid C.B.D.C. supplanting deposits.[177] If deposits offer a negligible monetary yield, the digital euro could require a negative remuneration rate.[178] Variable remuneration or a negative interest rate on holdings may be problematic to adopt in conformity with the Treaties.[179] P.S.P.s could charge service fees instead,[180] but this conflicts with the expectation that the digital euro would be free to access.[181]

Another possible solution is the holding limit. Users would respond by continuing to hold most of their money as deposits. However, if a reduction in deposits is the problem, the holding limit is only a marginally effective solution.[182]

[174] Bindseil, *supra* note 10.
[175] Agur et al., *supra* note 8; Bank for International Settlements, *supra* note 16. For a survey of studies on the potential impact, see Bank for International Settlements, *supra* note 10.
[176] Kumhof & Noone, *supra* note 8.
[177] Barrdear & Kumhof, *supra* note 9; Keister &Sanches, *supra* note 9; Kumhof & Noone, *supra* note 8.
[178] Agur et al., *supra* note 8. Alternatively, a "refresh fee" could be charged intermittently on holdings; *see* Chaum et al., *supra* note 158.
[179] *See* Section 3.1.
[180] Bordo & Levin, *supra* note 8.
[181] European Central Bank, *supra* note 2, at 19; *see* Requirement 2. However, cash machine withdrawal fees are charged and so it is conceivable that P.S.P.s charge fees to access digital euro.
[182] The Sound of Economics, *Money, Money, Money!*, Bruegel, (Apr. 29, 2021) https://www.bruegel.org/2021/04/money-money-money/.

A €3,000 holding limit would still tolerate the Eurozone banking system losing around one trillion euros in funding.[183] Furthermore, the impact of the holding limit on user behaviour will significantly differ depending on income, deposits and spending habits. This includes divergence in median income between Eurozone Member States.[184] The holding limit would not impede those whose deposits are typically around or below the threshold. High-earning depositors that spend large sums each month may find digital euro to be an inconvenient M.o.P.[185] The holding limit would, therefore, be a blunt instrument to achieve the objective of deterring substitution from deposits to digital euro.[186]

However, it both ignores the realities of human behaviour and the dynamism of the capitalist market system to assume that the digital euro will simply lead to a mass migration from deposits. The price mechanism is a dynamic process that is not captured by examining a static equilibrium measured on *ceteris paribus* principles.[187] Banks can adjust to the introduction of C.B.D.C. It is necessary to consider the likely responses and counter-responses by relevant stakeholders.

5.3. ADJUSTMENTS BY BANKS

Banks can improve the aggregate yield that they offer to depositors compared to digital euro: (i) by increasing monetary yield of deposits; (ii) by increasing convenience yield of deposits; and/or (iii) by reducing aggregate yield of digital euro.[188]

Banks can incentivise deposits by increasing their deposit interest rate.[189] Reducing the service fee charged to depositors is an alternative, though perhaps a less salient, means to increase the monetary yield. The immediate consequence is to increase funding costs and reduce profit margins for that bank.[190] In any oligopolistic banking

[183] Adrian Croft, *A digital euro would be "crypto kryptonite" for fintechs and a threat to banks, a critical new report warns*, Fortune, (Mar. 13, 2021), https://fortune.com/2021/03/13/digital-euro-fintech-banking-cryptourrency-european-central-bank/ (last visited Dec. 8, 2021).

[184] *See* Eurostat, *Mean and Median Income by Household Type - EU-SILC and ECHP surveys*, Eurostat - Data Explorer (2022), https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=ilc_di04.

[185] *See* Deutsche Bundesbank, *supra* note 147.

[186] Unless the holding limit would be personalised for each user based on their personal circumstances, which is not being proposed.

[187] F. A. von Hayek, *Economics and Knowledge*, 4 Economica 33 (1937).

[188] Although this Section focuses on retail on-demand deposits, the same principles apply to all depositors.

[189] Chiu et al., *supra* note 9. This is anticipated by Sveriges Riksbank; see Sveriges Riksbank, *supra* note 29. U.S. postal banks saw their inflows and outflows shift substantially as their deposit interest rate exceeded (1930s and 1940s) then underperformed (late 1940s and 1950s) market rates; *see* Schuster, Jaremski, and Perlman, *supra* note 12.

[190] First-movers will likely prompt competitors to match their deposit interest rate to deter depositors switching bank; *see* Ching-Wai (Jeremy) Chiu & John Hill, *The Rate Elasticity of Retail Deposits in the United Kingdom: A Macroeconomic Investigation* (Bank of England, Staff Working Paper No. 540, 2015), http://www.ssrn.com/abstract=2641028.

markets, where banks may currently pay a deposit interest rate below what would have been required in a competitive market,[191] such excess profits do not merit protection from the impact of C.B.D.C.

A proportion of bank profits derive from the seigniorage that they generate when creating Co.B.M. by lending. Higher deposit interest rates due to C.B.D.C. would increase the cost of money creation and reduce seigniorage. If banks reduce their lending, this also reduces seigniorage.[192] However, seigniorage for banks is not a privilege that the Eurosystem should be interested in protecting.[193] Central banks have historically curtailed seigniorage generated by banks issuing their own banknotes.[194] C.B.D.C. would simply erode bank seigniorage in digital money.[195]

Banks and their bankers are profit-seeking and generally lend when they expect an investment to be profitable for themselves.[196] In principle, lending is profitable for a bank when the interest charged to borrowers exceeds the interest paid on its funding (e.g., deposits) – positive net interest margin. Therefore, lending remains worthwhile for a bank provided the cost of deposits remains below the rate at which the bank can lend to borrowers.[197] Regulatory capital and liquidity requirements complicate how a bank can expand its profitable lending. Shareholder expectations regarding the rate of return on equity may make less-profitable lending unattractive for a particular bank. Nonetheless, while bank lending is profitable and any bank can obtain profit by simply creating Co.B.M., in a competitive market, a bank should emerge willing to lend. C.B.D.C. would merely reduce the net interest margin.

Yet further adjustments could see banks maintain their profitability. A higher deposit interest rate that retains existing depositors and leads to inflows from other sources could increase deposits and reduce funding costs.[198] Banks may reduce branch locations and cut operating costs.[199] They may even hold the pricing power to increase their lending interest rate charged to borrowers.[200]

[191] Chiu et al., *supra* note 9; Robin Greenwood, Samuel G. Hanson & Jeremy C. Stein, *The Federal Reserve's Balance Sheet as a Financial-Stability Tool,* Jackson Hole Economic Symposium Conference Proceedings (2016) https://www.hbs.edu/faculty/Pages/item.aspx?num=52330; Grunewald et al., *supra* note 6.
[192] On the impact of C.B.D.C. on seigniorage, *see* Bank for International Settlements, *supra* note 17.
[193] Brunnermeier & Niepelt, *supra* note 9; Nicholas Gruen, *Central Banks Get Serious On Digital Currencies*, Financial Times, (May 12, 2021) https://www.ft.com/content/faa29abd-aa2e-479b-9706-79ee16be9e35.
[194] E.g. Canada; *see* Grodecka-Messi, *supra* note 13.
[195] The Eurosystem would generate such seigniorage instead.
[196] Hyman P. Minsky, *The Financial Instability Hypothesis* (Levy Economics Institute, Working Paper No. 74, 1992), http://hdl.handle.net/10419/186760.
[197] Tobin, *supra* note 169.
[198] Andolfatto, *supra* note 9; Chiu et al., *supra* note 9.
[199] Grodecka-Messi, *supra* note 13.
[200] Mancini-Griffoli et al., *supra* note 8.

It is often assumed that an increase in lending interest rates will reduce the quantum of bank lending.[201] This simple assessment of supply and demand may underestimate a financial system containing competing financiers and flexible funding sources. Firstly, it neglects that a borrower will also be a depositor. If a borrower is receiving additional income due to the higher deposit rate,[202] it has additional funds to finance higher borrowing costs – leaving that borrower in essentially the same net position. Secondly, borrowers can seek alternative sources of funding, which may discipline banks to resist increasing their lending interest rate. Indeed, E.U. policy is currently seeking to encourage the use of the capital markets and reduce reliance on banks for credit intermediation by promoting the Capital Markets Union.[203] Thirdly, new entrants may be willing to enter the banking market if there is an opportunity to undercut the incumbents profitably.[204] The banking sector may maintain its credit intermediation even as incumbent banks reduce their lending.

Furthermore, not all bank disintermediation has the same economic impact. Easy credit conditions encourage the financing of speculative projects and asset price bubbles.[205] If an increase in borrowing costs dissuades speculative investments and unproductive projects, this would be beneficial to both the bank and the economy.[206] Moreover, the additional monetary yield received by depositors may stimulate the economy and offset the economic impact of any decline in bank lending.[207]

Banks have continually increased the convenience yield offered on deposits to outcompete cash as a M.o.P. However, this may be a challenging strategy to adopt for C.B.D.C. Deposits cannot be safer than C.B.D.C. It is difficult to materially (and observably) reduce the risk of bank failure. Banks would have to be willing to segregate services between depositors and C.B.D.C. users to generate a convenience yield spread

[201] Keister & Sanches, *supra* note 9; Kim & Kwon, *supra* note 9.

[202] This may also be indirect if deposit interest rates impact money market rates.

[203] *See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Capital Markets Union for people and businesses - new action plan*, European Commission (2020) 590 final (Nov. 24, 2020). https://eur-lex.europa.eu/resource.html?uri=cellar:61042990-fe46-11ea-b44f-01aa75ed71a1.0001.02/DOC_1&format=PDF. Although capital markets may already offer lower lending interest rates, larger arrangement costs (and other non-monetary burdens) mean that smaller capital markets financings are typically not worthwhile for borrowers compared to obtaining bank financing. If bank financing incurs higher servicing costs, this reduces the disincentive to obtaining capital markets funding.

[204] Although there are high barriers to entry to becoming a licensed bank, investors may acquire a smaller bank then provide capital to expand its balance sheet and E.U. passporting rights allow an E.U. bank to open a branch in another Member State.

[205] Minsky, *supra* note 196.

[206] Keister & Sanches, *supra* note 9.

[207] Agur et al., *supra* note 8.

between deposits and C.B.D.C.[208] But the banks would also have to consider the trade-off of losing potential customers for the on-selling of financial products.

If banks are offering their own Co.B.M. payment systems alongside the digital euro, they are able to both improve the appeal of deposits and undermine the appeal of the digital euro. The latter approach would avoid incurring the additional expense to increase the aggregate yield of deposits. Banks can tailor the fees charged for certain services to incentivise depositors to adopt certain behaviour.[209] Banks may cross the line into abusing such measures as a defensive and anti-competitive tactic. Legislators combated banks potentially abusing their dominant position as gatekeepers to the existing payment system. In response, P.S.P.s have been guaranteed fair access to the payment system.[210] Regulation is likely to be necessary to delineate the conflict of interest between banks as P.S.P.s of and competitors to the digital euro.

The E.U., however, faces the practical difficulty that it must conciliate the banks or construct a digital euro system that can function without their participation. Banks hold significant power over the transition process to the digital euro due to reliance on banks in both the existing payment system and the two-tier digital euro system. Their resistance could be terminal for digital euro ever reaching mass adoption.[211]

The impact of the digital euro on bank intermediation and the Eurozone economy should, therefore, be viewed as an aggregation of heterogeneous micro-level adjustments by banks, depositors and borrowers. These differences will be shaped by the differences between local banking markets and the ease of access to capital markets and foreign banking markets. There will not necessarily be a uniform Eurozone outcome triggered by the digital euro.[212]

[208] Bindseil, *Tiered C.B.D.C.*, *supra* note 10; Bindseil, *Central Bank Digital Currency*, *supra* note 10.

[209] E.g. In Finland; *see* Hanna Jyrkönen & Heli Paunonen, *Card, Internet and Mobile Payments in Finland*, (Bank of Finland, Discussion Papers, 2003) (Fin.)., https://helda.helsinki.fi/bof/bitstream/handle/123456789/7955/107277.pdf.

[210] European Union, *supra* note 80, at 35–36.

[211] E.g., In Ecuador, banks were hostile to the Dinero Electrónico; *see* Arauz, Garratt, and Ramos F., *supra* note 15. In Finland, banks developed their own financial technology (i.e., debit cards) that made Avant Cards redundant; *see* Jyrkönen & Paunonen, *supra* note 209.

[212] Agent-based modelling exists on the impact of introducing a C.B.D.C. system; *see* Digital Euro Association, *Agent-Based Simulation of CBDC*, https://home.digital-euro-association.de/podcast.

5.4. ADOPTION BY RETAIL DEPOSITORS

The decline of Ce.B.M. in the Eurozone is a consequence of a concerted public policy that has driven Co.B.M. to being considered as practically equivalent to Ce.B.M.[213] Governments increasingly require payment to be made in Co.B.M. despite cash being legal tender.[214] Yet the digital euro is desired to maintain the anchoring role of Ce.B.M. in the financial system, which may be lost if cash ceases to be available to redeem Co.B.M.[215] The digital euro only serves this purpose if it is adopted by potential users, but it is being designed to be less attractive than deposits and to avoid disruption of the banking sector. The holding limit represents a symptom of this incoherence in the digital euro project.

Concern for the banking sector underestimates that the greater difficulty may be convincing depositors to become C.B.D.C. users.[216] As an e.M.o.P., C.B.D.C. constitutes a substitute for Co.B.M.[217] Better understanding of consumer payment preferences is required to anticipate their response to C.B.D.C.[218] But there is no apparent reason for a Eurozone retail depositor to adopt the digital euro as their M.o.P. in place of Co.B.M.[219] The layperson depositor perceives no financial risk due to deposit insurance[220] and no difference between Co.B.M. and Ce.B.M.[221] The Eurozone already offers advanced payment infrastructure.

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[213] This was intensified by the COVID-19 pandemic. P.S.P.s were encouraged to increase contactless card payment limits to the legal maximum of fifty euros; *see* European Banking Authority, *Statement on Consumer and Payment Issues in Light of COVID19*, (2020), https://www.eba.europa.eu/sites/default/documents/files/document_library/News%20and%20Press/Press%20Room/Press%20Releases/2020/EBA%20provides%20clarity%20to%20banks%20and%20consumers%20on%20the%20application%20of%20the%20prudential%20framework%20in%20light%20of%20COVID19%20measures/Statement%20on%20consumer%20protection%20and%20payments%20in%20the%20COVID19%20crisis.pdf (last visited Mar 15, 2022). *See also* European Union, *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*, OJ L 69 23 11 (2018), http://data.europa.eu/eli/reg_del/2018/389/oj/eng.

[214] Robert Freitag, *Euro As Legal Tender (and Banknotes)*, *in* The EU Law of Economic and Monetary Union (Fabian Amtenbrink, Christoph Hermann & René Repasi eds., 2020).

[215] Wierts & Boven, *supra* note 7. *See* also Fabio Panetta, *Central Bank Digital Currencies: a Monetary Anchor for Digital Innovation*, European Central Bank (2021), https://www.ecb.europa.eu//press/key/date/2021/html/ecb.sp211105 08781cb638.en.html (last visited Dec 8, 2021); Panetta, *supra* note 140; Panetta, *supra* note 5.

[216] The E.C.B. has acknowledged this possibility; *see* Panetta, *supra* note 140; Panetta, *supra* note 215.

[217] Kumhof & Noone, *supra* note 8.

[218] Francesca Carapella & Jean Flemming, *Central Bank Digital Currency: A Literature Review*, Feds Note (Nov. 2020).

[219] Digital Euro Association, *Should the ECB Issue a Digital Euro?*, https://home.digital-euro-association.de/podcast/en (last visited Feb 14, 2022); Mancini-Griffoli et al., *supra* note 8.

[220] E.g., Deposit insurance for U.S. postal banks predated commercial banks and postal banks became obsolete once all banks benefitted from deposit insurance; *see* Schuster et al., *supra* note 12.

[221] *See* Bank of England, *Responses to the Bank of England's March 2020 Discussion Paper on CBDC*, (Bank of England, Discussion Paper, 2021), https://www.bankofengland.co.uk/paper/2021/responses-to-the-bank-of-englands-march-2020-discussion-paper-on-cbdc (last visited Dec 27, 2021); Deutsche Bundesbank, *supra* note 147.

Although users can be expected to use the M.o.P. that offers the best net benefit to them,[222] the reality is that people are unlikely to adopt a new M.o.P. simply because it is marginally better than their existing M.o.P.[223] It would pose an inconvenience to undertake the transition. There is a network effect that requires a critical mass of users for a M.o.P. to take hold.[224] First-mover advantage takes precedence.[225] But Co.B.M. is the first-mover, and bifurcating money between deposits and digital euro produces inconvenience for a retail user without any apparent benefit.

Any change in user behaviour is likely to be gradual as many alternative M.o.P.s already exist.[226] The digital euro may only ever reach a circulation similar to that of the cash currently in circulation.[227] That may suffice to maintain a Ce.B.M. anchor, but the digital euro would remain vulnerable to being swept aside upon further advances in Co.B.M. payment technology. Such an outcome is already foreshadowed by the failure of the Dinero Electrónico in Ecuador[228] and the Avant Card in Finland,[229] where both failed to gain a critical mass of users and were eventually discontinued.

[222] Mancini-Griffoli et al., *supra* note 8.
[223] *E.g.* Avant Card in Finland offered more advanced payment technology, microchips rather than magnetic stripes, but this was not salient with consumers; *see* Grym et al., *supra* note 16.
[224] Mikael Stenkula, *Carl Menger and the Network Theory of Money*, 10 European Journal of the History of Economic Thought 587 (2003). E.g. Avant Card in Finland suffered from expensive transition costs for merchants and a lack of merchant take-up; *see* Grym et al., *supra* note 16; Jyrkönen & Paunonen, *supra* note 209.
[225] Agur et al., *supra* note 8; Khiaonarong & Humphrey, *supra* note 19.
[226] Grodecka-Messi, *supra* note 13.
[227] Agur et al., *supra* note 8.
[228] Arauz et al., *supra* note 15.
[229] Gerard, *supra* note 164; Grym et al., *supra* note 16.

5.5. BANK RUNS

A bank run arises when depositors fear that their bank will be unable to satisfy withdrawals – whether because it is failing or suffering from a self-fulfilling panic. There is concern that depositors will be more likely to run and will run at an exceptionally faster rate once C.B.D.C. is available instead of cash.[230] The digital euro may then create instability in the Eurozone banking system through this run dynamic.[231]

The presence of the digital euro does not materially alter the run dynamic. Bank failure would likely be an insufficient catalyst to run from retail deposits to digital euro due to deposit insurance[232] and bank resolution tools. Depositors holding uninsured deposits have every reason to run.[233] Uninsured creditors are always subject to the risk of bank failure and would anticipate where they could run, whether investment assets or money market instruments.

If a depositor fears financial loss, a depositor will run.[234] The physical inconvenience of cash has traditionally functioned as a barrier to a run. Such barriers are merely a palliative, not a cure. If depositors wish to run, the question is "how" and not "if". A depositor run to cash is now an antiquated image that does not portray bank runs in the 21st century. Depositors already have the means to run from their bank swiftly using technology and without queuing outside of their bank.[235] Internet banking and mobile banking facilitate money transfers remotely. The digital euro is merely another potential substitute rather than opening the floodgates. Its status as risk-free Ce.B.M. may attract depositors as the path of least resistance.[236] But it is possible to open an account with a bank, an e-money institution or an investment broker within minutes

[230] Bank for International Settlements, *supra* note 17.
[231] Kim & Kwon, *supra* note 9; Nabilou, *supra* note 7.
[232] Douglas W. Diamond & Philip H. Dybvig, *Bank Runs, Deposit Insurance, and Liquidity*, 91 J. Pol. Econ. 401 (1983). See European Union, *Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (recast)*, OJ L 173 149 (2014), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02014L0049-20140702&from=EN. Deposit insurance protects deposits up to €100,000 per bank and payment is (currently) assured within ten working days. Runs may arise if the Member State is unable to cover any shortfall in the scheme's funds. This concern would be reduced if the European Deposit Insurance Scheme (E.D.I.S.) is implemented; *see* European Union, *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 806/2014 in order to establish a European Deposit Insurance Scheme*, (2015), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015PC0586&from=EN.
[233] *E.g.*, U.K. deposit insurance only protected ninety percent of deposits up to £35,000 at the time of the run on Northern Rock; all depositors feared financial loss and had reason to run; *see* Shin, *supra* note 14.
[234] Douglas W. Diamond & Raghuram G. Rajan, *Liquidity Risk, Liquidity Creation, and Financial Fragility: A Theory of Banking*, 109 J. Pol. Econ. 287 (2001). Williamson, *supra* note 9.
[235] Kumhof & Noone, *supra* note 8; Mancini-Griffoli et al., *supra* note 8. *E.g.*, Retail depositor withdrawals in the run on Northern Rock were more substantial from non-branch retail deposits than branch retail deposits; *see* Shin, *supra* note 14.
[236] Kumhof & Noone, *supra* note 8.

online.[237] Meanwhile, a real-time gross settlement [R.T.G.S.] system for the digital euro may face settlement delays comparable to those of traditional designated-time net settlement [D.T.N.S.] systems during a bank panic.[238] This is especially a concern if the failing bank lacks sufficient digital euro to satisfy withdrawal requests instantly.

Even upon a systemic banking crisis involving mass withdrawals to the digital euro, the holding limit would be problematic. Necessity is likely to inspire creativity. Secondary markets develop to allow liquidity to those seeking to dispose of assets. When deposits are worth less than their nominal value, cash is unavailable and the digital euro is restricted by the holding limit, it is foreseeable that depositors will sell their deposits below par and the digital euro will obtain a *market* value above its *nominal* value.[239] Someone who has headroom in their C.B.D.C. wallet may be willing to hold digital euro for someone else in return for a fee.[240] The digital euro losing its par value with physical euro would certainly not constitute stability in the money markets.

5.6. CENTRAL BANK REFINANCING OPERATIONS

If a bank is solvent with a quality loan portfolio but requires liquidity, the bank remains creditworthy to raise funding from wholesale markets. Securitisation and covered bonds allow banks to release liquidity from illiquid loans. Despite its hostility to securitisation in the aftermath of the financial crisis,[241] the E.U. increasingly recognises the usefulness of securitisation.[242] Information asymmetry is a challenge in accurately valuing a bank's loan portfolio. There are frictions when relying upon the capital markets for funding that deposit funding does not typically encounter.[243] It should also be acknowledged

[237] Eurozone deposits that left weaker banks during the financial crisis and the sovereign debt crisis were most commonly transferred to stronger banks, not non-banks or cash; *see* Bindseil, *Tiered C.B.D.C.*, *supra* note 10; Bindseil, *Central Bank Digital Currency*, *supra* note 10.

[238] On payment settlement, *see* Athanassiou, *supra* note 57; Andrew Dent & Will Dison, *The Bank of England's Real-Time Gross Settlement Infrastructure*, (2012); Kahn & Roberds, *supra* note 99.

[239] Pål Krogdahl & Ville Sointu, *LIVE Episode! To CBDC or not to CBDC, What Was the Question?*, https://anchor.fm/fintech-daydreaming/episodes/LIVE-episode–To-CBDC-or-not-to-CBDC–what-was-the-question-em2j8q. Sveriges Riksbank raises this concern; *see* Sveriges Riksbank, *supra* note 29, at 2.

[240] *E.g.*, In the United States, deposit brokers facilitate deposit insurance protection for depositors holding more than the $250,000 limit; *see* IntraFi Network Deposits, *How IntraFi Network Deposits Works*, https://www.intrafinetworkdeposits.com/how-it-works/ (last visited Jun 21, 2022).

[241] *See* Gerard Kastelein, *Securitization in the Capital Markets Union: One Step Forward, Two Steps Back, in* Capital Markets Union in Europe 464 (Danny Bush et al. eds., 2018).

[242] Synthetic ("on-balance-sheet") securitisations have become eligible for "S.T.S." securitisations; *see* European Union, *Regulation (EU) 2021/557 of the European Parliament and of the Council of 31 March 2021 amending Regulation (EU) 2017/2402 Laying down a General Framework for Securitisation and Creating a Specific Framework for Simple, Transparent and Standardised Securitisation to Help the Recovery from the COVID-19 crisis*, OJ L 116 1 (2021). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021R0557&from=EN.

[243] Michael Woodford, *Financial Intermediation and Macroeconomic Analysis,* 24 J. Econ. PersPs.,2010, at 21, 44.

that liquidity in the financial markets is procyclical and may be unavailable when banks are most under stress from depositor withdrawals.[244] Nonetheless, if market liquidity reaches a stage where market counterparties are unwilling to lend on realistic terms, the central bank will be the next avenue for liquidity.

Migration by depositors from deposits to C.B.D.C. results in a bank's funding moving to the central bank. Both require corresponding changes to their assets or liabilities (or equity) in order to balance their balance sheet. This is particularly pressing if there are sudden withdrawals where obtaining funding from the private sector is impractical.[245] Deposit interest rates suffer a lag before stimulating deposits.[246] An equilibrium can be maintained if new C.B.D.C. inflows to the central bank are recycled to fund the deposit outflows from the bank.[247] The bank would not have to liquidate its loan assets to fund withdrawals. The central bank would not need to redeploy its surplus funding towards buying large quantities of certain bonds, which could distort the market for those securities,[248] given that market participants do not necessarily substitute between all classes of securities.[249]

The Eurosystem operates refinancing operations that provide short-term funding to banks secured against securities or loans as collateral.[250] These operations have expanded since the financial crisis to targeted longer-term refinancing operations [hereinafter T.L.T.R.O.s] that provide multi-year funding to banks to incentivise lending to the real economy.[251] The fundamental objective remains constant providing funding to banks to maintain liquidity flowing from banks into the Eurozone economy.

Expanding the use of refinancing operations to balance out movements from deposits to digital euro would, therefore, be both ground-breaking and unexceptional.

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[244] Edoardo D. Martino, *Regulating Stablecoins as Private Money between Liquidity and Safety. The Case of the EU "Market in Crypto Asset" (MiCA) Regulation*, (Amsterdam Law School, Research Paper No. 2022-2027, 2022; Amsterdam Center for Law and Economics, Working Paper No. 22-07, 2022), https://ssrn.com/abstract=4203885 (last visited Jan 4, 2023).

[245] Sveriges Riksbank anticipates providing stopgap funding upon sudden withdrawals to C.B.D.C.; *see* Sveriges Riksbank, *supra* note 29, at 2.

[246] Chiu & Hill, *supra* note 190.

[247] Barrdear and Kumhof, *supra* note 9; Brunnermeier & Niepelt, *supra* note 9; Kim & Kwon, *supra* note 9; White, *supra* note 71. *E.g.*, U.S. postal banks lent their deposits to local banks prepared to pay their lending interest rate before applying any surplus towards buying government bonds; *see* Schuster et al., *supra* note 12.

[248] Williamson, *supra* note 9.

[249] Vasco Cúrdia & Michael Woodford, *The Central-bank Balance Sheet as an Instrument of Monetary Policy,* 58 J. Monetary Econ. 54 (2011).

[250] These offer overnight, one-week and three-month funding; *see* European Central Bank, *Open Market Operations*, https://www.ecb.europa.eu/mopo/implement/omo/html/index.en.html (last visited Jun 21, 2022).

[251] European Central Bank, *ECB Extends Pandemic Emergency Longer-Term Refinancing Operations*, (2020), https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr201210 8acfa5026f.en.html (last visited May 11, 2022). This was supplemented during the COVID-19 pandemic with pandemic emergency longer-term refinancing operations [P.E.L.T.R.O.s].

The Eurosystem is already empowered under the Treaties to conduct refinancing operations.[252] Although T.L.T.R.O.s were purported to be temporary and exceptional, T.L.T.R.O.s remain a source of bank funding. This policy would grasp the nettle and acknowledge the permanence of the Eurosystem's role in maintaining liquidity in the Eurozone banking system.[253] Given its role as supervisory authority for Eurozone banks within the Single Supervisory Mechanism,[254] the E.C.B. has a further interest beyond its "price stability" mandate in stabilising Eurozone banks.[255] The Eurosystem would then need to remain willing to expand its balance sheet when liquidity is required by banks in response to demand for digital euro.

Central banks function as lenders of last resort [hereinafter L.O.L.R.] to provide emergency liquidity to solvent banks. This avoids a "fire sale" by the bank to raise cash that turns illiquidity into balance sheet insolvency. This principle dates back to Walter Bagehot's *Lombard Street* (1873). Providing liquidity in such circumstances is what central banks are supposed to do.[256] The central bank is the only potential counterparty able to lever up its balance sheet and outlast a panic,[257]and is not incentivised to run.[258] Therefore, if a bank's depositors run to digital euro, the E.C.B. and the relevant N.C.B. would function as L.O.L.R.

The digital euro may serve to make L.O.L.R. funding more efficient. Whereas cash withdrawals suffer from a delay in observing outflows,[259] the central bank can provide C.B.D.C. instantly to the bank to meet withdrawals.[260] Indeed the central bank's ability to respond rapidly could conceivably provide reassurance that deters bank runs.[261] Yet if a bank run materialised, C.B.D.C. minimises disruption to economic activity by offering an e.M.o.P. to replace deposits, whereas cash may interfere with consumer transaction

[252] European Union, *supra* note 35, at 18.

[253] The E.C.B. wants to avoid such a role but has not ruled it out; *see* European Central Bank, *supra* note 2, at 18–19. *Cf.* Central banks should accept an evolution in their monetary policy tools rather than reverting back to their pre-crisis framework; *see* Cristiano Boaventura Duarte, *Alternative Monetary Targets, Instruments and Future Monetary Policy Frameworks*, 31 Rev. Pol. Econ. 582 (2019). Central bank funding can counter overreliance on short-term wholesale funding; *see* Greenwood et al., *supra* note 191.

[254] *See* Ohler Christoph, *Banking Supervision*, *in* The EU Law of Economic and Monetary Union (2020).

[255] Nabilou & Prüm, *supra* note 20. This would be under separate decision-making between its monetary policy and supervision functions; *see* European Central Bank, *Decision of the European Central Bank of 17 September 2014 on the Implementation of Separation Between the Monetary Policy and Supervision Functions of the European Central Bank (ECB/2014/39)*, 57 (2014), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014D0039(01)&from=EN.

[256] Williamson, *supra* note 9.

[257] Frost et al., *supra* note 11.

[258] Brunnermeier & Niepelt, *supra* note 9.

[259] *Id.*

[260] Mancini-Griffoli et al., *supra* note 8.

[261] Brunnermeier & Niepelt, *supra* note 9; Kumhof and Noone, *supra* note 8. *See* also Diamond & Dybvig, *supra* note 232.

patterns.[262] The L.O.L.R.'s willingness to lend could also signal to the market that a bank's loan portfolio remains valuable.[263]

There will, however, be various aspects to the design of the digital euro refinancing operations to be carefully considered. The Eurosystem must avoid becoming so central to credit intermediation that it determines the cost of credit rather than the private markets.[264] T.L.T.R.O.s entail banks making lending decisions and then sourcing funding from the Eurosystem.[265] The quantum of central bank funding does not necessarily alter that outcome. Mechanisms, such as auctions, can determine the supply and cost of credit in line with market and specific-party demand.[266] Securities, such as securitisation and covered bonds, allow the capital markets to remain responsible for price discovery,[267] before the central bank provides its liquidity via secondary market purchases[268] or repo financing collateralised by such securities.[269]

The E.C.B. will have to determine collateral criteria that protect the relevant N.C.B. against the risk of financial loss from the funding that it provides.[270] This includes the type and quality of eligible assets, the overcollateralisation required and the quantum it is willing to lend.[271] The E.C.B. and the C.J.E.U. have recognised it is inherent to the central bank's operations to face potential losses from such activities.[272] The banking sector can share that financial burden if the Eurosystem could recover losses from deposit insurance schemes.[273] But the Eurozone Member States will have to consider to what extent they will be prepared to recapitalise a N.C.B. that suffers losses.[274]

[262] Williamson, *supra* note 9.
[263] For example, public deposit banks in Europe promoted stability by vouching for the quality of deposited metal coins then issuing Co.B.M. that was trusted as a M.o.P.; *see* Schnabel & Shin, *supra* note 11.
[264] Bank for International Settlements, *supra* note 17; Bank of England, *Central Bank Digital Currency: Opportunities, Challenges and Design*, (2020), https://www.bankofengland.co.uk/-/media/boe/files/paper/2020/central-bank-digital-currency-opportunities-challenges-and-design.pdf; Bindseil, *Tiered C.B.D.C.*, *supra* note 10; Bindseil, *Central Bank Digital Currency*, *supra* note 10.
[265] *E.g.*, U.S. postal banks' deposits were applied to fund commercial banks without determining their lending decisions; *see* Schuster et al., *supra* note 12.
[266] White, *supra* note 71.
[267] Central banks remain competent to price loan portfolios themselves during market stress.
[268] The E.C.B. has adopted this approach for its bond-buying programmes with C.J.E.U. approval; *see* C-493/17 Proceedings brought by Heinrich Weiss and Others, ECLI:EU:C:2018:1000, 113-28 (2018).
[269] Grym et al., *supra* note 16; Woodford, *supra* note 243.
[270] The Eurosystem must lend against "adequate collateral" (*see* E.S.C.B. Statute Article 18.1).
[271] Bank of England, *supra* note 263; Bindseil, *Tiered C.B.D.C.*, *supra* note 10; Bindseil, *Central Bank Digital Currency*, *supra* note 10.
[272] Gauweiler and Others v Deutscher Bundestag, ECLI:EU:C:2015:400, 125-27 (2015).
[273] Kim & Kwon, *supra* note 9.
[274] Brunnermeier & Niepelt, *supra* note 9. This could be mitigated by shorter-term maturity for central bank lending; *see* Greenwood et al., *supra* note 191.

6. THE PURPOSE OF DIGITAL EURO

6.1. PAYMENT SYSTEM AUTONOMY

Payment system autonomy is increasingly recognised as a matter of national security. The U.S. dominates the international payment system. Visa and Mastercard dominate card payments. In response, China developed UnionPay as an international alternative and Russia developed its own national payment system.[275] E.U. payment system autonomy is restrained by relying substantially on non-E.U. companies.[276] There are national payment initiatives to process card and online payments via the banking system. The E.C.B. desires a European card or online payment system[277] and has endorsed[278] European banks forming the European Payments Initiative in pursuit of that goal.[279]

The shift in U.S. policy on Iranian financial sanctions in 2018 and the difficulties that it created for E.U. financial institutions highlighted the precariousness of E.U. dependence on U.S. payment intermediation.[280] There remains the tail risk that any future breakdown in U.S.-E.U. relations destabilises E.U. payment systems.[281] It would be politically sensitive – and may trigger state aid disputes at the World Trade Organization – if the E.U. promoted a European champion to force U.S. companies out of the E.U. payments market. As a new payment system without incumbents, the digital euro system offers a trojan horse for this strategy. Its use of Ce.B.M. and integration with the

[275] Siddharth Venkataramakrishnan, Polina Ivanova & Imani Moise, *Russia Reaps Reward of Domestic Payment System After Visa and Mastercard Withdraw,* Fin. Times (Apr. 20, 2022), https://www.ft.com/content/0bdef21b-426e-4e98-9a25-998c9bad500c (last visited May 11, 2022). Bank of Russia, *National Payment System*, (Dec. 2022), https://www.cbr.ru/eng/psystem/ (last visited Jun. 21, 2022).

[276] Panetta, *supra* note 140; Panetta, *supra* note 215. Dependence on Visa and Mastercard is a long-running concern for the E.U.; *see* Smits, *supra* note 57. There is also Google and Apple in mobile payments and PayPal in online payments.

[277] European Central Bank, *Card Payments in Europe: Current Landscape and Future Prospects: a Eurosystem Perspective,* (2019), https://data.europa.eu/doi/10.2866/75461 (last visited May 11, 2022); European Central Bank, Innovation and its Impact on the European Retail Payment Landscape (2019), https://www.ecb.europa.eu/pub/pdf/other/ecb.other191204 f6a84c14a7.en.pdf.

[278] European Central Bank, *ECB welcomes initiative to launch new European payment solution*, (2020), https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200702 214c52c76b.en.html (last visited May 11, 2022).

[279] *See* European Payments Initiative, *Major Eurozone Banks Start the Implementation Phase of a New Unified Payment Scheme and Solution, the European Payment Initiative (EPI)*, (2020), https://www.epicompany.eu/major-eurozone-banks-start-implementation-phase-unified-payment-scheme-solution-european-payment-initiative-epi/ (last visited Jun 21, 2022). The European Payments Initiative would use the S.E.P.A. Instant Credit Transfer (S.C.T. Inst) system to execute payments.

[280] E.U. persons are subject to anti-boycotting legislation in relation to U.S. sanctions on Iran; *see* European Union, *Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom*, OJ L 309 1 (1996), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:01996R2271-20180807&from=EN.

[281] However, most E.U. Member States are members of the North Atlantic Treaty Organisation [N.A.T.O.] alongside the United States, which includes their commitment to collective self-defence.

Eurosystem could justify requiring P.S.P.s to be E.U.-person-controlled entities for national security reasons.[282]

This may serve the long-term economic interests of the E.U., but political reasons prevent this argument from being emphasised by the E.U. The economic ramifications of payment system autonomy are worthy of further research that goes beyond the scope of this paper. Payment system autonomy could offer the most convincing rationale for the digital euro.

6.2. THE FUTURE OF MONEY

The digital euro offers numerous potential use cases,[283] including as a monetary policy tool,[284] although these may lie outside the competence of the Eurosystem under the Treaties.[285] However, the digital euro could simply represent the next step in the evolution of Ce.B.M.: from metal to paper to digital. C.B.D.C. threatens to disrupt incumbents. But this is inherent in the economic change that sustains the capitalist system.[286] The state has historically supplanted privately-issued money.[287] The holding limit would artificially prevent the digital euro from fully utilising the benefits of digitalisation. There should be caution exercised against any Luddite attempt to restrain technological progress in Ce.B.M.

If the eventual outcome of C.B.D.C. is a state monopoly on money, banks would compete using their acumen as credit intermediaries and P.S.P.s - not their ability to create Co.B.M. There is an inherent instability within banks that has not been solved.[288]

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[282] Digital Euro Association, *The Future of Payments in the Euro Area*, https://home.digital-euro-association.de/podcast; Krogdahl & Sointu, *supra* note 239. *E.g.*, An undertaking must be more than fifty percent owned and controlled by E.U. nationals or Member States to operate an airline in the E.U.; *see* European Union, *Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast)*, OJ L 293 3 4(f) (2008), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02008R1008-20201218&from=EN.

[283] These include sourcing macroeconomic data; "smart contracts" and programmable money; and distributing "helicopter money" from government; *see* Allen et al., *supra* note 8. Some wish to limit digital euro to novel use cases that avoid competing with the existing payment system; *see* e.g. Digital Euro Association, *supra* note 158; Digital Euro Association, *ABI's Spunta Project*, https://home.digital-euro-association.de/podcast (last visited Mar 1, 2022).

[284] A negative C.B.D.C. remuneration rate could be applied to stimulate economic activity; *see* Allen et al., *supra* note 8; Bindseil, *Tiered C.B.D.C.*, *supra* note 10; Bindseil, *Central Bank Digital Currency*, *supra* note 10; Bordo &Levin, *supra* note 8. This would be subject to the political limitations of negative rates; *see* Kumhof & Noone, *supra* note 8.

[285] *See* Section 3.1.

[286] Joseph Alois Schumpeter, Capitalism, Socialism & Democracy (George Allen & Unwin eds., 5th ed. 1976).

[287] *E.g.*, The Bank of Amsterdam; *see* Frost et al., *supra* note 11. *E.g.*, Banknotes in Canada; *see* Grodecka-Messi, *supra* note 13. *See* also Bindseil, *supra* note 11.

[288] *See* Mervyn King, *Banking: From Bagehot to Basel, and Back Again* (2010), https://www.bankofengland.co.uk/-/media/boe/files/speech/2010/banking-from-bagehot-to-basel-and-back-again-speech-by-mervyn-king.pdf?la=en. *C.f.* There are efficiency gains from maturity transformation and bonding mechanisms favouring depositors; *see* Diamond & Dybvig, *supra* note 232; Diamond & Rajan, *supra* note 234.

Removing money creation from the banks may offer a solution.[289] If banks would no longer be essential to providing on-demand deposits, they would not require an implicit state guarantee.[290] Banks could conceivably operate akin to investment funds.[291] The digital euro could be the harbinger of the end of banking as we know it – if proponents are willing to fundamentally reconsider the role of banks and Co.B.M. in the economy.

CONCLUSION

The potential design of the digital euro is entangled in contradictions in E.U. and E.C.B. policy. Retail deposits are protected by deposit insurance and made indispensable to payment settlement, yet cash must be supplemented by C.B.D.C. The public should adopt the digital euro, yet banks must be protected through deterring users from holding digital euro. The Capital Markets Union should wean borrowers from reliance on banks for credit intermediation, but the digital euro should not undermine banks as credit intermediaries. The holding limit is a symptom of these contradictions. Despite concerns that the digital euro will overwhelm Eurozone banks, there is a dearth of use cases to motivate potential users to bifurcate their money between their bank account and their C.B.D.C. wallet. The E.C.B. is at danger of the digital euro falling victim to the Avant-isation of its C.B.D.C.

A design for the digital euro that restricts or deters users from holding substantial amounts of digital euro is at risk of being followed despite both overstated concerns and an ineffectual proposed solution. A user-identified or pseudonymous C.B.D.C. wallet would repel potential users who prioritise anonymity. Yet the concept of digital cash – an anonymous, electronic means of payment – could be designed in a manner compatible with A.M.L./C.F.T. regulations. The challenge may be the technological feasibility of anonymous payments. The holding limit would needlessly inhibit a C.B.D.C. wallet functioning anonymously.

[289] This is not to discount that "free banking" without a central bank may be a more stable model; *see* David Beckworth, *George Selgin on the Future of CBDC, Fed Accounts, and Stablecoins*, https://macromusings.libsyn.com/george-selgin-on-the-future-of-cbdc-fed-accounts-and-stablecoins (last visited Mar 1, 2022); Milton Friedman & Anna J. Schwartz, *Has Government any Role in Money?*, 17 Journal of Monetary Economics 37 (1986); Selgin, *supra* note 168. Milton Friedman's "k-percent rule" proposal for regulating the money supply may also be implementable in a C.B.D.C.-only monetary system; *see* Brunnermeier & Niepelt, *supra* note 9.

[290] Digital Euro Association, *CBDC, Synthetic CBDC and Stablecoins*, https://home.digital-euro-association.de/podcast; Nabilou, *supra* note 7.

[291] Bruegel, *supra* note 182.Martin Wolf, *Cryptocurrencies Are Not the New Monetary System We Need,* Fin. Times (July 5, 2022), https://www.ft.com/content/f2faeec9-6d42-4d78-9c68-1f59795789a7 (last visited July 6, 2022).

Although banking may emerge as a less profitable enterprise in a digital euro environment, this should not impede profitable lending to productive projects. The holding limit only offers a cap on outflows from Eurozone banks - not a solution to outflows from deposits to digital euro. Rather, the Eurozone banking system can adjust to the presence of the digital euro. Banks can incentivise depositors to maintain their deposits. Borrowers may absorb any increased cost of credit. Capital markets and cross-border banking services offer alternative sources of credit. Securitisation and covered bonds offer an alternative means for banks to unlock liquidity from their illiquid loan portfolios. The Eurosystem would also have to be prepared to potentially maintain their refinancing operations at a larger scale than what is currently being employed under T.L.T.R.O.s - if banks require additional liquidity. The threat of the digital euro bank run does not alter this conclusion. The Eurosystem will have to grapple with electronic bank runs in the 21st century irrespective of the presence of C.B.D.C. These adjustments, therefore, require preparation and contingency planning, but the digital euro would undermine neither price stability nor financial stability.

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An Overview on the Scope of the Digital Markets Act: Fair Practices Versus Ex-Ante Competition Law

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ABSTRACT

The proposed Digital Market Act has been under severe scrutiny in the past couple of years. While it received mostly positive feedback, there were numerous authors and scholars arguing that the new legislation does not provide anything useful or new. The common denominator of most of the analyses is that the Digital Markets Act is an *ex-ante* antitrust legislation and that the obligations tackle the (abusive) dominance of the gatekeepers to be designated. In this article, I try to deconstruct the requirements for determining whether an undertaking is a gatekeeper and to assess whether the proposal fits into a regulatory compliance type of legislation or *ex-ante* competition law. In addition to the analytical approach, I will take the example of the Intel and Microsoft cases and the intricacies that arose from them. I will further assess possible implications that the regulation might have for innovation and other aspects of the market.

KEYWORDS

Digital Markets Act; Digital Platforms; Compliance; Innovation; Competition Policy

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INTRODUCTION

The Digital Markets Act [hereinafter the proposal or the D.M.A.], proposed by the European Commission on 16th of December 2020, is now approaching its final moments.

This somewhat new piece of legislation has been under scrutiny from the moment of public consultation, with most of the "tech giants" calling for more clarity and better understanding of its provisions, whilst also underlining the potential damage thereof.[1]

The overall feedback provided was overwhelmingly positive: showing support for the initiative of the European Commission, consisting of reviews done by some large business organisations[2] and many other (un-targeted parties') submissions. They not only welcomed the initiative and the proposed Act, but at the same time added keynotes to what should also be envisioned by the proposed Regulation. The need for transparent communication and access to data has been stressed in the advertising environment.[3] There was also a plea to add operating systems [hereinafter O.S.s] of connected T.V.s and digital voice assistant platforms to the list of services included in the D.M.A. .[4]

On the other hand, there was a concealed disagreement about the utility of an *ex-ante* regulation and the challenges brought forward by some of the Big Tech enterprises (Alphabet, Amazon, Apple, Meta, and Microsoft). For example, Apple stressed the need for recognition of the diversity of platforms' business models, proportionality and (supposed lack of) necessity of a regulatory framework.[5] At the same time, the comments made by

[1] *See* Mark Perves, *Feedback from: Apple*, European Commision (Jun. 30, 2020), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers/F535696_en.

[2] *See* Karl Cox, *Feedback from: Oracle*, European Commision (Jun. 30, 2020), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers/F535636_en; *see* Carel Maske, *Feedback from: Microsoft Corporation*, European Commision (Jun. 30, 2020) https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers/F535589_en; *see* Konstantinos Rossoglou, *Feedback from: YELP*, European Commision (Jun. 30, 2020), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers/F535343_en.

[3] *See* Gabrielle Robitaille, *Feedback from: World Federation of Advertisers*, European Commision(May 05, 2021), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers/F2256853_en.

[4] *See* Carolina Lorenzon, *Feedback from Mediaset S.p.A*, European Commision (May 05, 2021), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers/F2256891_en.

[5] Mark Perves, *supra* note 1.

future gatekeepers, for example, Facebook,[6] or Google,[7] elicited the same feelings as with the hearing held by the U.S. Congress:[8] a nice sugar-coated speech that tries to deem these companies as having been nothing but competition advocates and promoters. This is in high contrast with the numerous current and upcoming cases on antitrust at the level of the European Commission or the United States state attorney generals.

1. THE ROLE AND POSITION OF THE D.M.A. IN THE CURRENT EUROPEAN LEGISLATION

The European Commission stated that the proposal *complements existing E.U. (and national) competition rules,*[9] and it tackles issues that are either outside the scope of current antitrust rules or are almost impossible to deal with in a timely manner.[10] The European Commission even states that this is an *ex-ante* approach to the *detrimental structural effects of unfair practices.*[11]

This raised a lot of issues ranging from economic impact to possible legal issues infringing the *ne bis in idem* principle.[12] Amongst these is the possibility of affecting innovation: either in the form of the gatekeepers lacking incentive to pursue it further (due to possible constraints in the market); or for the lack of a buy-out possibility in

[6] *See* Phillip Malloch, *Feedback from: Facebook (Ireland)*, European Commision (Jun. 30, 2020), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers/F535672_en.

[7] *See* Sylwia Giepmans-Stepien, *Feedback from: Google*, European Commision (Jun. 30, 2020), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers/F535552_e.

[8] *See* Laura Feiner, *Facebook's Zuckerberg went before Congress a year ago – here's what has (and has not) changed since*, Cnbc (Apr. 09, 2019, 7:04 AM), https://www.cnbc.com/2019/04/09/facebooks-evolving-public-response-one-year-post-zuckerberg-testimony.html.

[9] *Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)*, at 4, COM (2020) 842 final (Dec. 15, 2020).

[10] European Parliament and Councl Regulation 2022/1925 of Sept. 14, 2022, Contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (Text with EEA relevance), recital 5, 2022 O.J. (L 265) 1-66.

[11] *Id.*

[12] *See* Aurelien Portuese, *The Digital Markets Act: European Precautionary Antitrust*, Information Technology And Innovation Foundation (May 24, 2021), https://itif.org/publications/2021/05/24/digital-markets-act-european-precautionary-antitrust.

some situations.[13] Additionally, some authors queried the need for antitrust legislation in some of the emerging fields.[14]

A great deal of the previous arguments emanate from one important point: the D.M.A. is competition law. Whilst most of the authors seem to agree that the proposal is complementary to current competition law, the analysis follows antitrust rules.[15] I think a crucial aspect that needs to be determined before addressing the fallacies, or lack thereof, in the Digital Markets Act proposal is the nature of this legislation: Is it a veritable competition law document? Or, is it rather a new set of compliance rules like the General Data Protection Regulation [hereinafter G.D.P.R.], Business-to-Business [hereinafter B2B] or Business-to-Consumer [hereinafter B2C] regulations?

The first thing that stands out is the European Commission's arguments that, in some respects, revolve around the inability of the current competition rules to tackle some of the issues that arose in the past effectively. That does not mean that the current proposal is, *per se,* an instrument enforcing competition law. The same motivation can be found in the aforementioned Regulations that, along with compliance provisions, have a powerful (secondary) impact in ensuring a fair internal market.[16] The link between the scope of the regulation and competition law should be an indicator but not an argument in itself.

[13] *See* Colin Wall, Eugenia Lostri, *The European Union's Digital Markets Act: A Primer*, Center For Strategic & International Studies (Feb. 08, 2022), https://www.csis.org/analysis/european-unions-digital-markets-act-primer.

[14] *See* Aurelian Portuese, *Antitrust and the Internet of Things: Addressing the Market-Tipping Fallacy*, Information Technology And Innovation Foundation (Sept. 15, 2021), https://itif.org/publications/2021/09/15/antitrust-and-internet-things-addressing-market-tipping-fallacy.

[15] *See* Matthias Bauer, Fredrik Erixon, Oscar Guinea, Erik van der Marel, Vanika Sharma, *The E.U. Digital Markets Act: Assessing the Quality of Regulation,* European Centre For International Political Economy (Feb., 2022), https://ecipe.org/publications/the-eu-digital-markets-act/#_ftn5.

[16] We can observe that protection of the internal market is one of the main purposes of some of the compliance-type legislation issued by the European legislator. This can be found in both competition-oriented provisions and consumer-oriented as such. For example: Regulation (EU) 2019/1150, of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, recitals (1), (6), (7), (51) and art. 1, 2019 O.J. (L 186) 57; Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications [hereinafter B.E.R.E.C.] and the Agency for Support for B.E.R.E.C. (B.E.R.E.C. Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No 1211/2009, Recitals (1), (4), 2018 O.J. (L 321) 1; Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast), Recitals (3), (12), (23), 2018 O.J. (L 321) 36; Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), Recitals (2), (5), (13), 2016 O.J. (L 119) 1.

Therefore, it is needed to analyse the provisions further, along with the material benchmarks set, within the proposal to be able to qualify it as competition law or ancillary compliance law. This first step needs to be done in order to scrutinise the D.M.A. further on grounds that are not merely arbitrary.

1.1. RIPPLE EFFECT: A (NEW) FORM OF MARKET FAILURE IN THE DIGITAL ENVIRONMENT

One of the main arguments put forward by Microsoft, while defending its anti-competitive behaviour and its dominant position in the market, was the Moore's law application.[17] In essence, Microsoft argued that the traditional antitrust analysis of tech industries is not efficient, and the idea of monopoly should be treated modestly given the fact that digital revolutions happen frequently.[18] Furthermore, it was stated that these new innovations might negatively impact Microsoft's market power.

While I side with the Commission's point of view and I do not think that a possibility might render competition law ineffective, there is a valuable point to be taken from Microsoft's statement. The digital market's interconnectivity and rapid growth make the effects of dominance greater and more destructive for the internal market.

The ripple effect related to closed interconnectivity means that the more a system is integrated within itself (as Windows O.S. was with its browser and media player), the more it can benefit from one service being dominant. It can further rely on that dominance to attract customers (consumers) that would not usually choose the ancillary services from the same provider. Creating a "closed space" that does not allow interoperability forces the consumer to remain in that sector even if some of the services are not as favourable as the ones offered by competitors.

Another important aspect of the ripple effect is the possibility of different markets influencing each-other even though only a part of them is ubiquitous and sealed off. As I am going to demonstrate further on, Intel was able to enter and, additionally, dominate the server central processing unit [hereinafter C.P.U.s] market by using both its anti-competitive behaviour and Microsoft's simultaneous takeover of the server O.S. market. Windows Media Player [hereinafter W.M.P.] and Internet Explorer, however,

[17] *See* Britannica, T. Editors of Encyclopaedia, *Moore's law*, Encyclopedia Britannica (Nov. 18, 2022), https://www.britannica.com/technology/Moores-law (last visited Jan. 22, 2023).

[18] *See* Commission Decision of May 24, 2004 relating to a proceeding pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement against Microsoft Corporation (Case COMP/C-3/ 37.792 — Microsoft), point 5.2.1.4., 2007 O.J. (L 32) 23.

were able to compete in the market by using the entrenched position of the O.S. and the lack of interconnectivity.

The examples of Microsoft,[19] and Intel,[20] can fully demonstrate that. Whilst the *Intel* case is not over yet (Case T-286/09 RENV is under appeal), and the solution might not change due to procedural shortcomings on the Commission's part, it can still be argued that an infringement existed in the behaviour examined.[21]

This particular example requires special attention because it portrays how the indirect market effect flowed from one case to another. In order to understand the analysis made better, it is important to underline a few characteristics and particularities of the digital environment.

The C.P.U.s used in computers were divided into two categories: those built on x86 architecture and the non-x86 infrastructure. Furthermore, it is needed to divide the market into personal and business/server computers.[22] Regarding personal computers [hereinafter P.C.s], the Microsoft O.S. was targeting primarily "*Intel-compatible" hardware* (*client P.C.s or servers*).[23] This did not happen; however, with Windows NT 3.1 in the case of commercial software (workstations and servers).

Windows NT 3.1 was developed as a multi-architecture operating system (meaning that it would work also on non-x86 infrastructure), supporting different C.P.U.s, with the main goal of portability and interoperability.[24]

Before I go into the analysis of the commercial software relationship between Intel and Microsoft, it is important to point out the situation that existed from 1975 onwards regarding personal computer O.S.s. While in 1983 the market share of Personal Computing Platforms by Operating System Shipments was 25% for Windows and Intel, in the years that followed they grew and maintained a market share of over 90%.[25]

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[19] *Id.*

[20] *See* Commission Decision of May 13, 2009 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case COMP/C-3/37.990 — Intel), 2009 O.J. (C 227) 13.

[21] Both the Federal Trade Commission [hereinafter F.T.C.] of the United States and the Fair Trade Commission in Japan have ruled that Intel Corporation violated the country's antitrust (anti-monopoly) laws by limiting purchases of microprocessors from Intel's rivals. Both cases ended, however, in settlements. *See* Todd Zaun, *Japan Says Intel Violated Antimonopoly Law*, N.Y. Times (Mar. 9, 2005), w.htmlhttps://www.nytimes.com/2005/03/09/technology/japan-says-intel-violated-antimonopoly-law.html; *Settles Charges of Anticompetitive Conduct Against Intel*, Ftc (Aug. 04, 2010), https://www.ftc.gov/news-events/news/press-releases/2010/08/ftc-settles-charges-anticompetitive-conduct-against-intel.

[22] For a more comprehensive approach of the market definition, see Commission, *supra* note 18, § 5.1.

[23] *Id.* at 88-130.

[24] *See* Pascal G. Zachary, Showstopper! The Breakneck race to create Windows NT and the Next Generation at Microsoft (Open Road Media, 2009).

[25] *See* Derek Thompson, *The 11 Most Fascination Charts From Mary Meeker's Epic Slideshow of Internet Trends*, The Atlantic (May 29, 2013), https://www.theatlantic.com/business/archive/2013/05/the-11-most-fascinating-charts-from-mary-meekers-epic-slideshow-of-internet-trends/276350/.

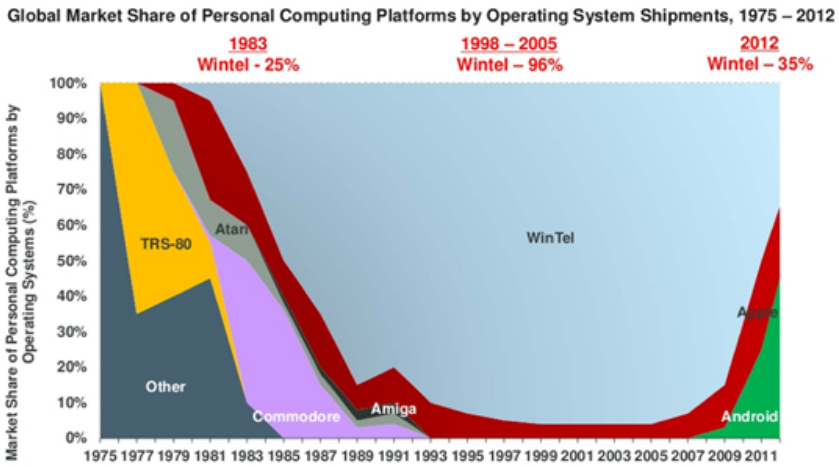

Figure 1: Global Market Share of Personal Computing Platforms by Operating System Shipments.[26]

It is clear from this chart that the collaboration between Microsoft and Intel, being premeditated or just a stroke of luck, was indeed very lucrative; and hence, put them both in a powerful position in the digital market. If you add the share of International Business Machine [hereinafter I.B.M.] P.C.s (and clones) in the personal computer market,[27] which grew steadily towards a position of monopoly, you will have a full picture of the indirect network effects in the tech industry, or as I like to call it: the ripple effect.

What we know so far: Microsoft used its dominant position on the P.C. market in order to enter the business computer market with workstations and servers. At the same time, Intel used its dominant position in the C.P.U. market in order to keep that position and to limit the possibility for other undertakings to compete. I.B.M. P.C.s (and clones) which were used either by choice or by agreements with Intel, being mostly Intel technology and Microsoft's Windows operating system, had been compatible with x86 infrastructure.

As stated before at the beginning, Microsoft O.S. for business computers was not created specifically for x86 architecture as it needed to be to enter the market. Only with the arrival of Windows NT 4.0 and Windows 2000 did Microsoft shift its view from interoperability to exclusivity (and, supposedly, full internal integration). It is important to underline the fact that Windows 2000 was released in February 2000 when Microsoft already had a market share of more than 50% in business operating systems. At the same time of launching Windows 2000, support for all the previous business operations was

[26] *Id.*

[27] *See* Jeremy Reimer, *Total share: 30 years of personal computer market share figures*, ARSTECHNICA (Dec. 15, 2005, 6:00 AM), https://arstechnica.com/features/2005/12/total-share/.

terminated within one year.[28] Enjoying an entrenched position in the market of personal computers: Microsoft uses that to push its own O.S. further into the market and cuts all ties (and interoperability) with other server operating systems; thus, creating even higher barriers to entry.

One could argue that this would not have been possible if it were not for the ripple effects created by the markets' specificity, as described below (Fig. 2) in an overly simplified version.

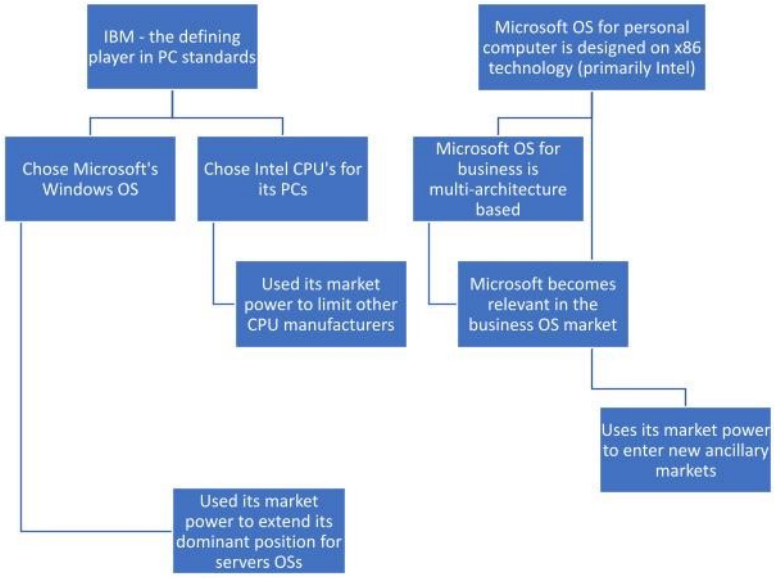

Figure 2: Interrelation Between I.B.M., Microsoft and Intel.

The relationship between the undertakings is clear: by targeting Intel x86 infrastructure in P.C.s, Microsoft ensures that it will keep a dominant position in the market; whilst Intel keeps the dominant position in the C.P.U. manufacturing market. Moreover, by switching its O.S. for servers (and increasing its market share) to a closed circuit, Microsoft creates a higher demand for x86 infrastructure in that market; thus, improving demand for Intel C.P.U.s.

In this scenario, both Intel and Microsoft can further utilise their market power to maintain and extend their position in ancillary markets. This can be observed, for example, in the tying of Windows Explorer and W.M.P. Both Microsoft and Intel helped each other, indirectly, in preserving their market dominance and the effects of this behaviour still produce consequences today.

[28] *See* Internet Archive, https://web.archive.org/web/20040611115848/http://support.microsoft.com/default.aspx?scid=fh;%5bln%5d;LifeWin (last visited Jan. 22, 2023).

The market share graph of C.P.U.s reveals an ongoing position of dominance for Intel throughout the years[29] with 60% - 80% being Intel's market share in the years 2004 – 2017. This has to take into account the established market position of Intel in the previous years, between 1997(8) and 2004, which amounted to around 80% for overall x86 C.P.U.s.[30] Intel's dominance was retained regardless of the fact that Advanced Micro Devices' [hereinafter A.M.D.] C.P.U.s were, on average, cheaper and, in some cases, more performant than Intel ones.[31] A small (and optimistic) presentation done by the Department of Agricultural & Resource Economics of the University of California, Berkeley,[32] shows a projected consumer benefit of $80 billion over the following decade starting from 2008-2009.

Moving forward, another aspect that needs to be considered is the innovation segment. Looking at the general release of C.P.U.s,[33] two main aspects can be observed: in the period 1996 – 2003, both Intel and A.M.D. have fought and innovated to push their product forward. And, in the years that followed, between 2003 – 2006 and 2011 – (the beginning of) 2017, A.M.D. was the only one creating new products. There was a small period between 2007 – 2010 in which Intel re-entered the market, which could, very well, be a response to the innovation brought forward by A.M.D. It is also important to note the "innovation stall" in the period 2014 – 2017 in which neither came up with any new product.

If we compare that innovation with its market share, we see that there was no difference: A.M.D. did not get better market share when it was "better" than Intel, and; consequently, we can argue that Intel did not innovate unless it was necessary. This can be outlined by the 2017 A.M.D. "boom" with the Ryzen 5 and Ryzen 7 processors which gave them both market recognition and a rapid growth in market share.[34] In the past

[29] *See* Odysseus Pyrinis, *Intel and AMD Market Competition*, Berkeley Economic Review (Feb. 27, 2019), https://econreview.berkeley.edu/intel-and-amd-market-competition/.

[30] *See* Commission, *supra* note 20, § 852.

[31] For example, the case of Athlon "Thunderbird" which outperformed Intel C.P.U.s at the time. This is in concordance with the information from the COMP/37.990 Intel case which shows that Intel was, at least, extremely cautious not to lose market share when this AMD C.P.U. was launched. – *See* Anand Lal Shimpi, *AMD Athlon "Thunderbird" 1GHz/800MHz*, Anandtech (Jun. 4, 2000, 10:10 PM), https://www.anandtech.com/show/557/3.

[32] *See AMD vs. Intel – Antitrust Case,* https://are.berkeley.edu/ sberto/AMDIntel.pdf.

[33] *See Computer processor history*(updated Dec. 12, 2022), https://www.computerhope.com/history/processor.htm.

[34] *See* Usman Pirzada, *AMD Outselling Intel By More Than Double – Analyzing 5-Year Historical Sales Act Mindfactory.de*, Wccftech (Sept. 23, 2019, 04:00 AM), https://wccftech.com/amd-outselling-intel-by-more-than-double-analyzing-5-year-historical-sales-at-mindfactory-de/; *see* Hassan Mujtaba, *AMD Ryzen and Intel Coffee Lake CPU Market Share at 50% Each in July – Strong Ryzen Sales, Intel CPUs Still Report Higher Revenue*, Wccftech (Aug. 02, 2018, 06:10 AM), https://wccftech.com/intel-coffee-lake-amd-ryzen-cpu-market-share-july-2018/; *see Mindfactory: AMS's average CPU prices have already surpassed Intel*, Tekdeeps (Jan. 11, 2021), https://tekdeeps.com/mindfactory-amds-average-cpu-prices-have-already-surpassed-intel/.

three years, A.M.D.'s market share grew to almost 40%. At the moment, the proportions are 63.5% Intel and 36.4% A.M.D.[35]

If we further investigate laptop and server market shares, we can observe that Intel still holds over 80% of the market.[36] This is astounding - especially in the case of high end server C.P.U.s where A.M.D. dominates in both benchmark and price performance.[37]

The same market strategy was used by Microsoft while promoting its own browser,[38] and media player.[39] However, it did not prove fruitful in the long run. During the period between 1998 and2002, W.M.P. increased its usage constantly due to tying the software with the O.S.,[40] and now it holds less than 0.01% of the market share.[41]

A similar development happened in the case of Internet Explorer which, due to the same tying method, enjoyed an 80 – 90% market share from 1999 to 2007. In this latter case, there were several factors that amounted to the ultimate failure of the Windows browser. First, we have the ruling on tying in U.S. antitrust law and, second, the existence of several security and privacy flaws over the years.[42] This led to a downwards trend for I.E. with 2012 as the breaking point at which Google Chrome browser became the market leader. Now Microsoft Edge has a market share of only 10%.[43]

The market has its means, sometimes, to self-regulate, and the example of Microsoft is self-evident. But, in the case of Intel, the adjustment has just begun. Therefore, it can be said that competition on those merits only started in the past three years. This shows that the market is slow and ineffective without some support from regulators: it is important to take note of the fact that Microsoft was sanctioned both in

[35] *See Distribution of Intel and AMD x86 computer central processing units (CPUs) worldwide from 2012 to 2022, by quarter*, Statista (Apr., 2011), https://www.statista.com/statistics/735904/worldwide-x86-intel-amd-market-share/.

[36] *See AMD vs Intel Market share*, Passmark Software (updated Feb. 12, 2023) https://www.cpubenchmark.net/market_share.html.

[37] *See High End CPUs - Intel vs AMD*, Passmark Software ((updated Feb. 12, 2023)), https://www.cpubenchmark.net/high_end_cpus.html.

[38] *See* U.S. v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001), https://law.justia.com/cases/federal/appellate-courts/F3/253/34/576095/.

[39] *See* Commission, *supra* note 18.

[40] From approx. 6.000 users in 1998 to 45.000 users in 2002. – *see id.*, § 5.3.2.1.4.3.1. Player Usage.

[41] *See Microsoft Windows Media Player*, Microsoft, https://www.datanyze.com/market-share/other-audio-video-graphics-software–419/microsoft-windows-media-player-market-share (last visited Feb. 02, 2023).

[42] *See* Charles Arthur, *Internet Explorer flaw being exploited by ad companies, analytics firm warms*, The Guardian (Dec. 13, 2012, 10:50 PM), https://www.theguardian.com/technology/blog/2012/dec/13/internet-explorer-flaw-exploit-companies; *see* Dan Goodin, *Internet Explorer info leak festers for 2 years*, The Register (Nov. 01, 2010, 10:30 PM), https://www.theregister.com/2010/11/01/internet_explorer_600_day_bug/; *see* Dan Goodin, *Researchers bypass Internet Explorer Protected Mode*, The Register (Dec. 02, 2010, 9:52 PM), https://www.theregister.com/2010/12/03/protected_mode_bypass/.

[43] *See Desktop Market Share Worldwide*, Statcounter, https://gs.statcounter.com/browser-market-share/desktop/worldwide/#monthly-200901-202204 (last visited Feb. 02, 2023).

the United States and in the E.U., while Intel remains unsanctioned in the E.U. (for now), whilst the case is already settled in the United States.

Moore's law, which I talked about at the beginning, is equally applicable in quantifying the ripple effects of digital markets. Growth in one sector, if channelled correctly, brings (potential) entry into another and amplifies the rate of growth in ancillary ones. It also allows for increased growth into other ancillary services, or main ones (since the effect can be bidirectional), as the undertaking develops more products. This is what happened both in the *Intel* case (regarding server C.P.U.s) and in the *Windows* case (regarding web browser and media player). As (closed) interconnectivity grows,[44] this effect will only become more powerful, and will, if used in an anti-competitive manner, prevent other players from entering the market.

1.2. THE UNDERTAKING(S) CONCERNED

Whilst the term "gatekeeper" is not new in competition law,[45] it had; however, remained undefined until recently. By the same token, the usage of this locution was not related to an undertaking that (might have) infringed competition law, but with one that had a say in "setting the trend" for consumers,[46] which, in turn, can influence the natural behaviour of the (internal) market. This is not, however, a synonym for "dominant" which I will further inspect.

The first (and only) moment in which the term gatekeeper had been used was in the *Intel* decision. Usage of the novel adjective was associated with Original Equipment Manufacturers [hereinafter O.E.M.s] and not with Intel nor Microsoft which had a

[44] For example, Metaverse which aims to interconnect socializing, learning, business space and entertainment, https://about.facebook.com/meta/ (last visited Feb. 02, 2023).

[45] *See* Commission, *supra* note 20, § 1594. Arguably you could find the same idea (though not directly expressed) in the *Microsoft* case where the European Commission states that: "[T]he issue at stake in this case is ultimately the question whether . . . Microsoft provides to its competitors in the work group server operating system market the interoperability information that it has a special responsibility to provide". This is not defined *per se* as a gatekeeper obligation (or position), but it can be seen as having the same idea behind it: the superior position that can provide a great deal of influence on other gatekeepers. – *see* Commission, *supra* note 18, § 33.

[46] For example, Intel states that the "[S.O.] appears to base its argument that [A.M.D.] would have performed better during the exclusionary period in part on the claim that [A.M.D.] was excluded from key [O.E.M.s], [H.P.] and Dell, which the [S.O.] portrays as essential gatekeepers that could have conferred instant credibility upon [A.M.D.]". Similarly, Intel refers to "the [S.O.]'s position that Dell and [H.P.] uniquely possess the ability to propel [A.M.D.] forward" and "the [S.O.]'s theory that [H.P.] and Dell serve as unique gatekeepers". However, the conclusion that those two [O.E.M.s] are found to be "*strategically more important* than other [O.E.M.s]" does not equate to Intel's absolute assertions that the Commission had claimed that those two [O.E.M.s] were "*essential gatekeepers*", *"unique gatekeepers*" or *"uniquely possess[ed] the ability to propel [A.M.D.] forward"*(emphasis added).
– *see* Commission, *supra* note 20, §§ 1594-1595.

monopolistic position. Dell and H.P., as key O.E.M.s, were "designated" as gatekeepers. However, if we look at the market share for 2005, neither Dell nor H.P. enjoyed a monopolistic position:[47] Dell – 16.8%; H.P. – 14.5%; Lenovo – 6.9%; Acer – 4.6%; Fujitsu – 3.8%; and others – 53.3%.

One thing that stands out regarding H.P. and Dell is the fact that they were created in the United States; thus having an easy entry into Europe – especially for H.P.. These had been old, entrenched companies having already established an important customer base. Longevity was the case for Lenovo, Acer, and Fujitsu, even though they did not occupy a significant part of the market at that moment. No further discussion can be made around H.P. and Dell having an important position within the internal market.

If we look at the market share of O.E.M.s in 2005, we can observe that the situation is still quite similar today with minor growth variations: Dell kept its 16-19% market share, H.P. remained an important player amounting to around 20-25%, whilst others remained with the same approximative levels of 4-6%. The only significant growth is in the case of Lenovo which now occupies around 20% of the market. These figures vary from year to year by 5%.[48]

In 2021, for example, total computer sales passed 250 billion dollars worldwide. If we look at the European, the Middle Eastern, and African [hereinafter E.M.E.A.] market, we can observe that the market share of O.E.M.s is quite similar. There is a slight increase for H.P. (3%) and a slight decrease for Lenovo and Dell (3%).[49] For this practical example, I will use the global figures and then roughly correct them to represent the European market. I am, however, aware that this method has its limitations, and I am just using it for demonstration purposes and not as a legitimate analysis.

If the global revenue of personal computers amounted to approx. 250 billion dollars, that would mean that Lenovo had $60bn revenue; H.P. – $50bn; Dell – $54bn; Apple – $20bn; Acer – $17.5bn; and other O.E.M.s amounted to $57.5bn.[50]

[47] *See* Martyn Williams, Stacy Cowley & I.D.G. News Service, *PC Market Achieved Double-digit Growth in 2005,* Macworld (Jan. 19, 2006), https://www.macworld.com/article/178529/pcmarket-2.html.

[48] *See* I. Mitic, *Laptops by the Numbers: Market Share and More*, Fortunly (Mar. 25, 2022), https://fortunly.com/articles/lap-top-market-share; *see also Global PC Shipments Pass 340 million in 2021 and 2022 is Set to Be even Stronger,* Canalys (Jan. 12, 2022), https://www.canalys.com/newsroom/global-pc-market-Q4-2021.

[49] *See EMEA PC Market Maintains Growth in 2021Q3, Despite Lower Consumer Spending and Continued Supply Issues, Says IDC*, Idc (Oct. 26, 2021), https://www.idc.com/getdoc.jsp?containerId=prEUR148333421.

[50] For this calculation I used rounded percentages as follows: 24% for Lenovo, 20% for H.P., 18% for Dell, 8% for Apple, 7% for Acer and the remaining 23% for others.

Firstly, I will compare global shipments to E.M.E.A. ones to obtain the revenue that corresponds with the European market.[51] Then I will adjust shipments to the European Economic Area [hereinafter E.E.A.] and calculate the 2021 revenue for this market.[52] By having used this method of calculation, I will have arrived at the following E.E.A. revenue figures for the undertakings: HP $12bn; Lenovo $12bn; Dell $7bn and Acer 4bn.[53]

From the market analysis of the year 2021, we can surely say that neither H.P. nor Lenovo enjoy a dominant position. However, if we analyse the undertakings from the proposal's perspective, we see that they are both gatekeepers (for argument's sake, I will only take into consideration the market power and not the element regarded by art. 3(1(b)).

They have a significant, but not dominant, impact on the internal market translating into around a 20% share each, and over 8bn euros turnover in the last three financial years. They both enjoy an entrenched and durable position in the O.E.M.s manufacturers market. This position started from 1939 for H.P. and 1983 for Lenovo - both having significant market presence at least from 2000 to 2005.

This brings us to the main question: what is a gatekeeper? Following the European Commission's description in the *Intel* case and the current definition, one can conclude that a gatekeeper is an undertaking that has significant market power,[54] enjoys an entrenched and durable position in the market,[55] and can use both market power and

[51] I was not able to find any public statistics regarding the market share and unit shipments corresponding to the E.E.A., so I used E.M.E.A. instead. If we look at the Middle East & Africa P.C. market vendor shares for 2021 we can observe that the percentage is roughly the same, with a 1% increase for H.P., *see* Lenovo and Dell, https://www.idc.com/ getdoc.jsp ?containerId=prMETA48387521 (last visited Feb. 03, 2023). Therefore, I believe we can use a comparison between 2021 Q3 shipments for both areas and subtract from the total amount the corresponding value for Middle East & Africa, in order to arrive to a rough approximation of the value in the E.E.A.

[52] 2021 Q3 shipments for the E.M.E.A. totalled 24.448 thousand units and 6.2 million units in Middle East and Africa, thus providing us a total of 18.248 thousand units for the E.E.A. market. If we compare global shipments with the E.E.A. market, we can observe that the Europe amounts to around 20% of the global market. This translates into an approximative $50 billion total revenue from P.C. shipments (desktops, notebooks, and workstations).

[53] In order to obtain these numbers, I used two methods. The first one consists in comparing the percentage between worldwide shipments and E.E.A. shipments and extracting the corresponding market power of the E.E.A. area. I used this percentage to calculate the equivalent revenue for the E.E.A. market. Therefore, as an example, in the case of H.P. O.E.M.s, the E.M.E.A. shipments accounted for 32.64% of global shipment, with E.E.A. consisting of 74.64% of the total E.M.E.A. market. This translates into a (rounded) 12bn dollars in revenue obtained in the E.E.A. market from the world-wide total of $50bn. The second method involved converting the global revenue into E.E.A. revenue. The ratio between worldwide shipments and the E.E.A. shipments is approx. 20%, therefore the E.E.A. total revenue is around 50bn dollars. I used this value to further calculate E.E.A. revenues of each undertaking. In the case of H.P., 24% of 50bn dollars amounted to 12bn dollars. For both methods I rounded the percentages.

[54] Not necessarily dominant, as it can be seen from the example with O.E.M. manufacturers.

[55] Meaning that it gained both consumer recognition and stability. Therefore, it is somewhat unreasonable to think that it might be easily replaced by any co-competitors or novel undertakings that want to enter that market.

brand recognition to set future trends.[56]

1.3. GATEKEEPER AND THE CONCEPT OF DOMINANCE

One main point, when arguing about the usefulness of the proposal, is that existing competition law is sufficient to cover the actions of the so-called gatekeepers.[57] However, others argue that it should not be a competition issue whatsoever.[58] This fallacy is primarily based on the confusion between the concepts: gatekeeper and dominant undertaking. There is a clear distinction between the definition of a gatekeeper and the rules set in Article 102 of the Treaty on the Functioning of the European Union [hereinafter T.F.E.U.].[59]

As shown before, from a quantitative criterion, the D.M.A. could be applied to selected O.E.M.s even though none meet the required thresholds to be considered dominant. The fact that some of the (to be designated) gatekeepers also happen to have a dominant position in their respective market is nothing more than a coincidence. Furthermore, it is often quite hard to assess where one (service) area of the digital market stops and where another begins. This was beautifully underlined by the example of multi-side platforms that serve consumers, content creators and advertisers.[60] The same applies to services offered at no price where the "Small but Significant and Non-transitory Increase in Prices" test [hereinafter S.S.N.I.P. test] is rendered useless.[61]

Take, for example, the case of Spotify. Spotify is an audio streaming service founded in 2006. It can be used in both free and premium versions by consumers. The premium version has four different plans: individual – $9.99/month; duo – $12.99/month for two

[56] As we can observe in the *Intel* case (COMP/37.990 - Intel), where I.B.M., H.P. and Dell propelled both Windows and Intel by adopting their O.S.s and C.P.U.s.

[57] *See* Jan Büchel & Christian Rusche, *Competition in the Digital Economy: An Analysis of Gatekeepers and Regulations*, (Institut der deutschen Wirtschaft (IW), Köln (Ger.), IW-Policy Paper, No. 26/2020); *see* Portuese, *supra* note 14; *see also* Michael G. Jacobides, *What Drives and Defines Digital Platform Power? A Framework, with an Illustration of App Dynamics in the Apple Ecosystem*, Evolution Ltd (Apr. 19, 2021), https://events.concurrences.com/IMG/pdf/jacobides_platform_dominance.pdf; *see* Francesco Ducci, *Gatekeepers and Platform Regulation: is the EU Moving in the Right Direction?*, Sciencespo (Mar. 2021) (Fr.), https://www.sciencespo.fr/public/chaire-numerique/wp-content/uploads/2021/04/GATEKEEPERS-AND-PLATFORM-REGULATION-Is-the-EU-moving-in-the-Right-Direction-Francesco-DUCCI-March-2021-2.pdf.

[58] *See* Ashley Johnson & Aurelien Portuese, *Why Antitrust Should Be off the Table for Content Moderation on Social Media Platforms,* Itif (Mar. 26, 2022), https://itif.org/publications/2022/03/26/why-antitrust-should-be-table-content-moderation-social-media-platforms.

[59] *See* Lodewick Prompers, *Digital Platforms – The Gatekeepers Under the EU's New Digital Markets Act*, Linklaters (Jan. 14, 2021), https://www.linklaters.com/en/insights/blogs/linkingcompetition/2021/january/digital-platforms-the-gatekeepers-under-the-eus-new-digital-markets-act.

[60] *See*, *e.g.*, Daniel Mandrescu, *Applying (EU) competition law to online platforms: Reflections on the definition of the relevant market(s)*', 41 World Competition: Law And Economics Review (2018), https://ssrn.com/abstract=3271624.

[61] *See* Daniel Mandrescu, *The SSNIP Test and Zero-Pricing Strategies: Considerations for Online Platforms*, 2 Eur. Competition & Regul. L. Rev. 244 (2018).

users; family – $15.99/month for six users; and student – $4.99 for one account. Each type of account offers almost the same service, with some nuanced features such as parental control and a Spotify kids for family version and tailored functionalities for the student version.[62] The free version offers the same functionality, but with the inclusion of advertisements.

If we consider the free version, we can find two distinct markets: one for audio streaming services and the other for advertising. If we look into the paid version, we only remain with the audio streaming service. This creates two distinct markets for a single service and, furthermore, two distinct markets for the same service. It is improbable that a free-version user will easily switch to the paid version and vice-versa.

How would one analyse the streaming music subscription market changes? The first problem is that we should identify in which market it enjoys a dominant position: is it one of free or subscription-based services? For the sake of the first example, let us assume that Spotify enjoys a dominant position both in the free and subscription-based market[63] The first problem is that we should identify in which market it enjoys a dominant position: is it the one of free or subscription-based service? For the first example we will assume it has dominance in both.

One way Spotify could abuse that position is by increasing the number of advertisements that are played between songs. If it becomes too annoying for its customers, they have two options: either move to a different platform or buy the premium version. If users decide to move to the premium version, it will be extremely difficult to prove that it happened because of the dominant position. If they decide to switch platforms, then it would be self-evident that increasing the number of ads can be used as an alternative of the S.S.N.I.P. test in this scenario.

If we regard the premium version, the S.S.N.I.P. test would work very well when we analyse possible increases in the price. However, what if Spotify decides to add another layer of "premium" or simply decides to add advertisements regardless of the type of subscription? Whilst in the latter example we could use the same analogy as with the free version of the service, in the situation of adding more layers it will be troublesome to identify price discrepancies. And even more so, it will be harder to define the market. If there is no other service that provides both paid subscription and advertisements (in a newly defined premium version where the end-user will still have

[62] *Spotify premium*, Spotify, https://www.spotify.com/us/premium/#plans (last visited Feb. 03, 2023).

[63] At this point it has 31% of the subscriber market share. *See* Jon Porter, *Streaming Music Report Sheds Light on Battle Between Spotify, Amazon, Apple, and Google*, TheVerge (Jan. 20, 2022), https://www.theverge.com/2022/1/20/22892939/music-streaming-services-market-share-q2-2021-spotify-apple-amazon-tencent-youtube (last visited Feb. 03, 2023).

ads, but at a lower frequency than in the free version), could we fully state that the market comprises all the different types of subscriptions?

One possible solution is the "Small but Significant Non-transitory Decrease in Quality" test [hereinafter S.S.N.D.Q. test][64] which considers quality and performance parameters. However, whilst in some cases benchmarks could be easily attained (video cards and C.P.U.s for example), in others it might prove extremely difficult. Could an increase in advertisement or a different pricing structure be considered lower quality? Even defining what quality means in some services might be cumbersome. If we take music streamers as an example, the S.S.N.D.Q. test can be related to user experience, security, speed, search options, audio quality and other ancillary features. While there are objective tools to measure some of these features, such as security and audio quality, others remain subjective.[65]

The second example becomes even more complicated. Assuming Spotify is dominant in only one service, be it a free or paid version, it would create a similitude with what happened in the *Microsoft* case.[66] In the case of streaming music, the subscription market revenue comes from both advertisement fees and subscriptions. While realising that one side of the market might be more profitable (for example, revenues from advertisements might prove to be higher than the ones from subscriptions), Spotify might choose to direct its own customers to the former (implying that it has a dominant position in the subscription-based market). This might be detrimental to consumer welfare and could affect the internal market.

The question that arises is how would one quantify the behaviour of Spotify and what test should be used to prove an abusive conduct? I am not talking about tying and bundling, but something as simple as actively redirecting (new) consumers to the service in which Spotify has a smaller market share.

It is proving to be a real challenge, now and even more so in the future, to identify the corresponding market to which each service is provided, as well as to identify dominance or abusive conduct of one product that can cover multiple similar market types. Such a problem might arise in the case of Meta Corporation, which offers more than fifty-one products and services[67] designed to interconnect seamlessly.[68] The

[64] *See* Mandrescu, *supra* note 61.

[65] Some users like the simplicity of use in case of iPhones, while others prefer the customisation properties in android O.s. phones. – *see* Jordan Palmer, *iPhone vs. Android: Which is better for you?*, Tom's Guide (Mar. 29, 2022), https://www.tomsguide.com/face-off/iphone-vs-android.

[66] *See* Commission, *supra* note 18.

[67] *See* Mahesh Mohan, *Over 61 Facebook Products & Services You Probably Don't Know*, Maheshone (Jan. 09, 2021), https://www.matrics360.com/facebook-products-and-services/.

[68] *See Technologies That Bring the World Closer Together,* Meta, https://about.facebook.com/technologies/ (last visited Feb. 02, 2023).

solution brought up by the Digital Markets Act proposal overcomes this issue and ties the gatekeeper definition to service usage and turnover/market value thresholds. Having a predefined list of services that define the market and the possibility of expanding that list, pursuant to a market investigation, shifts the market definition, at least for the digital sector, from a substitutability (traditional) approach to a service definition approach.

1.4. EX-ANTE COMPETITION LAW OR FAIR PRACTICES?

In the past years, the antitrust legislation shifted from protecting the internal market towards a more consumer welfare approach.[69] The importance (and sometimes ignorance)[70] of consumers as key players in competition law has been underlined by various legislative actions.[71]

Therefore, it is important to look into the obligations described by the proposal in order to assess whether these can be treated as a form of *ex-ante* competition law, or a new set of compliance rules that ensure fair practices.

Before I analyse the status of these obligations, it is important to assess whether they are correlated with other existing European provisions.[72] I was able to identify, beyond competition law, three other legal acts of the European Union that contain similar obligations: Regulation (EU) 2019/1150,[73] Regulation (EU) 2016/679,[74] and Directive (EU) 2018/1972.[75]

[69] *See* Emily Andersen, *The Role of Consumer Welfare in EU Competition Policy: How Understanding the Priority Conferred Upon Competition Policy Objectives May Shed Light on Modern Day Inconsistencies* (2020) (unpublished MEB20 Master Thesis, European Business Law), https://konkurransetilsynet.no/wp-content/uploads/2021/03/2020_0073-13-Emily-Andersen-Master-Thesis.pdf.

[70] *See* Daniel J Walters & Hal E Hershfield, *Consumers Make Different Inferences and Choices When Product Uncertainty Is Attributed to Forgetting Rather than Ignorance*, 47 J. Consumer Rsch. 56 (2022).

[71] As an example, the General Data Protection Regulation, supra note 16, highlights the importance of informing the consumers (natural persons) about the processing of their data. Furthermore, the rights described by General Data Protection Regulation are given the status of fundamental rights.

[72] In the *Explanatory Memorandum,* the European Commission already links to possible connections, in the subsection regarding *consistency with other Union policies.* I would argue that the complementing role of the D.M.A. sometimes is exceeded and brings forth an unwanted overlap.

[73] *See* Regulation (EU) 2019/1150, *supra* note 16.

[74] See General Data Protection Regulation, *supra* note 16.

[75] *See* Recast, *supra* note 16.

1.4.1. REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 27 APRIL 2016 ON THE PROTECTION OF NATURAL PERSONS WITH REGARD TO THE PROCESSING OF PERSONAL DATA AND ON THE FREE MOVEMENT OF SUCH DATA

The obligations that fall under the General Data Protection Regulation [hereinafter G.D.P.R.] are those described by art. 5.2 and art. 5.2 and 6.9 of the D.M.A. I will further argue that these provisions need to already be implemented by the controller and/or processor.

The actions prohibited in art.5.2 of the D.M.A. are already prohibited by the G.D.P.R.. The exemption specified in the latter part of that G.D.P.R., *unless the end-user has been presented with the specific choice in an explicit and clear manner and has provided consent in the sense of Regulation (EU) 2016/679*), is simply a reiteration of the already existing obligations in the referenced regulation.

Both combining and cross-using personal data is qualified as *processing* in the G.D.P.R. and needs approval by the person targeted. The action of using personal data from third-party services means, by default, a transfer of personal data from one undertaking to another and needs the consent of the data subject and an appropriate implementation of safeguards regarding the transfer. Lastly, signing in end-users (automatically) to other services of the gatekeeper means transferring personal data from one service to another, and implies a lack of consent from the subject of the processing.

Art. 5.2 falls under the same conclusion as art. 5.2 as it deals with combining personal data without explicit and clear consent.

Whilst art. 6 does not explicitly mention the *right to be forgotten*, obstructing the end-user form unsubscribing from a service (including a core platform service) means that the personal data that he/she has provided will continue to be collected (and/or kept) for as long as the end-user is using the service. Therefore, this provision also falls under the G.D.P.R. and can be interpreted in the same, yet broader, way as the possibility of the data subject unsubscribing from any form of communication (e.g., spam mail).

Finally, art. 6.9 brings about only one distinction from the equivalent provision existing in Regulation (EU) 2016/679: the fact that access and portability must be provided free of charge. It is hardly a notable mention, given the fact that art. 20 of G.D.P.R. did not mention anything regarding price and, if analysed in the context of the whole G.D.P.R., data portability should have already been interpreted as a “free-of-charge” service.

The "new" *ex-ante* obligations have, in our opinion, no place in the Digital Markets Act as they would most likely lead to a double incrimination and a violation of the *ne bis in idem* principle. Both legislative acts provide an *ex-ante* review with the possibility of sanctioning the undertaking that does not respect and implement its provisions.

The argument provided by the European Commission in the explanatory memorandum falls short.[76] The G.D.P.R. had already imposed rules for the undertakings and there was no debate as to whether these gatekeepers should or should not comply with the obligations laid down by it. Saying that the proposal clarifies this aspect raises a serious question about the legitimacy of the G.D.P.R. Reiterating the obligations does not solve a compliance issue (if there is one). Instead, a better enforcement procedure or an E.U. level Supervisory authority, similar to the one in competition law, could provide for better compliance.

1.4.2. REGULATION (EU) 2019/1150 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 20 JUNE 2019 ON PROMOTING FAIRNESS AND TRANSPARENCY FOR BUSINESS USERS OF ONLINE INTERMEDIATION SERVICES

When comparing the Digital Markets Act provisions with the ones in the Regulation (EU) 2019/1150 we notice a few interesting aspects. Some of the practices that are banned by the D.M.A. appear to be permitted by the aforementioned Regulation. At the same time, we can see that the same practices were or are likely to be sanctioned from a competition law perspective by the European Commission.

[76] The proposal complements the data protection laws. Transparency obligations on deep consumer profiling will help inform General Data Protection Regulation [G.D.P.R.] enforcement, whereas mandatory opt-out for data combination across core platform services supplements the existing level of protection under the [G.D.P.R.]. The proposal clarifies that it is for the gatekeepers to ensure that compliance with the obligations laid down in the Regulation should be done in full compliance with other [E.U.] law, such as protection of personal data and privacy or consumer protection.
– *See* Digital Markets Act, *supra* note 10, § 4.

Digital Markets Act	Regulation (EU) 2019/1150
Article 5.3	Article 6; Article 10
Article 5.4	Article 10
Article 6.5	Article 5
Article 6.10	Article 9
Article 6.11	Article 5; Article 9

Figure 3: Differentiated Treatment of Conduct Under the D.M.A. and Regulation (EU) 2019/1150.

One keynote that is to be taken into account is that Regulation (EU) 2019/1150 deals mostly with the principles of fairness and transparency.[77] At the same time, in the explanatory memorandum, another accent is put on consumer welfare and competition issues.

Another important aspect is the apparent permission of limitations with regard to restriction, suspension or termination, in full or in part, of the services provided by the online intermediary, with the sole obligation of giving the business user prior notice about the decision being taken.[78]

Furthermore, the phrasing of the obligations set out from art. 5 to art. 10 show that Regulation (EU) 2019/1150 does not prohibit any kind of differentiated treatment, with the best example being art. 7 that is also titled *"differentiated treatment"*. And, it places an obligation upon the provider of online intermediation services and/or online search engines to describe the differentiated treatment simply and with the reason behind it.

These provisions are in stark contrast with the provisions of the proposed Digital Markets Act – in which the same conduct is strictly prohibited. To reconcile the two pieces of legislation one can only interpret them in a way that Regulation (EU) 2019/1150 establishes the obligation of transparency and fairness with regard to the rules applied, whilst the Digital Markets Act banishes any anti-competitive rule that might be found.

Continuing the same idea proves that micro, small or medium-sized enterprises will not be subject to the prohibition of the differentiated treatment,[79] but they will still have an obligation to inform the business-users regarding the existence of such treatment and to be transparent about it.

[77] This can be seen from the key notes existing in the *Recital* of Regulation (EU) 2019/1150, showing that the main focus is on providing a trustworthy environment for undertakings that bind themselves contractually to online intermediation services (*Recital 2*). Transparency (*Recital 3*), accessibility (*Recital 5*) and the need for a Union-wide set of rules (*Recitals 7-8*) are the cornerstones of the Regulation.

[78] *See* Regulation (EU) 2019/1150, *supra* note 16, at recital 22.

[79] *See* Digital Markets Act, supra note 10, at art. 3, para. 6, subpara. 1.

However, the conduct of the provider that has been designated as a gatekeeper must firstly be transparent, according to Regulation (EU) 2019/1150 and, at the same time, compliant with the Digital Markets Act. Moreover, if, by some extraordinary circumstances,[80] it does have any kind of differentiated treatment, the obligation of transparency subsides.

Taking into account this point of view, the two provisions are not exclusionary, but complementary as they work together in order to protect both business users (and the fairness in treatment of the services to which they opted-in), and end-users (by ensuring a fair and competitive landscape).

Last, but not least, it is important to take note of the fact that Regulation (EU) 2019/1150 does not provide the European Commission with power to apply a fine, since such powers are set by each Member State [hereinafter M.S.] according to their own implementation rules. At the same time, there is a pillar for private enforcement of the aforementioned rules in the context of private civil law in each state. This is/will be without prejudice to any competition law rules applicable (depending on the level of the restriction – M.S. or E.U. level) or any Digital Markets Act rules.

1.4.3. OBLIGATIONS SIMILAR TO THOSE IN DIRECTIVE (EU) 2018/1972 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 11 DECEMBER 2018 ESTABLISHING THE EUROPEAN ELECTRONIC COMMUNICATIONS CODE

Directive (EU) 2018/1972 is aimed at ensuring a competitive framework for the internal market in electronic communications networks and services. From the enumeration of core platform services present in the Digital Markets Act we can only identify one that could fall under Directive (EU) 2018/1972: number-independent interpersonal communication service.

An important mention that needs to be made is that none of the core platform services can fall under Directive (EU) 2018/1972 by themselves.[81] In order for the aforementioned directive to apply, the undertaking must provide an electronic communications service. This includes the number-independent interpersonal communications service, but it has additional requirements: the undertaking must also provide a service of internet access.

[80] This could be only justified based only on grounds of public morality, public health, or public security pursuant to article 9 of the proposal. The Digital Markets Act does not provide for efficiency exemptions as provided by the Consolidated Version of the Treaty on the Functioning of the European Union art. 101(3), May 9, 2008, 2008 O.J. (C 115) 13 [hereinafter TFEU].

[81] *See* Digital Markets Act, *supra* note 10, at art. 2(2).

Taking this into account, a gatekeeper might fall under the scope of the European Electronic Communications Code, but only if its services include providing internet access to business and/or end-users. If a gatekeeper would satisfy both requirements, it is without any doubt that it will also qualify as an undertaking with significant market power pursuant to art. 63(2) of Directive (EU) 2018/1972.

Digital Markets Act	Directive (EU) 2018/1972
Art. 6.7	Art. 61(2 (c)) and art. 73 of Directive (EU) 2018/1972
Art. 6.7	Art. 61(2 (c)) and art. 73 of Directive (EU) 2018/1972
Art. 6.12	Art. 70 of Directive (EU) 2018/1972

Figure 4: Obligations in the D.M.A. and Directive (EU) 2018/1972.

Mentioning these limitations in the applicability of Directive (EU) 2018/1972, we are able to identify several obligations set by the Digital Markets Act that are similar to the provisions of the aforementioned legislation, or already mentioned by it.

While number-independent interpersonal services providers benefit from a lot of exemptions in Directive (EU) 2018/1972, interoperability,[82] transparency, and fairness rules are still applicable. These obligations include non-discrimination in relation with other providers of equivalent services,[83] and obligation of access to, and use of, specific

[82] *See* Recast, *supra* note 16, at art. 15(2(a));

> Where such undertakings provide electronic communications networks or services to the public, the general authorisation shall give them the right to: (a) negotiate interconnection with and, where applicable, obtain access to, or interconnection from, other providers of public electronic communications networks or publicly available electronic communications services covered by a general authorisation in the Union in accordance with this Directive.

Directive (EU) 2018/1972 of the European parliament and of the council of 11 December 2018 establishing the European Electronic Communications Code.

[83] *Id.* at art. 70:

> Obligations of non-discrimination shall ensure, in particular, that the undertaking applies equivalent conditions in equivalent circumstances to other providers of equivalent services, and provides services and information to others under the same conditions and of the same quality as it provides for its own services, or those of its subsidiaries or partners.

network elements in favour of third parties.[84]

1.4.4. THE SCOPE AND STATUS OF THE DIGITAL MARKETS ACT

If we analyse the European legislation that is connected with the proposal, we can have a starting point into defining whether the D.M.A. is part of *ex-ante* competition law or a form of defining fair practices.

Consumer welfare and (internal) market protection are co-dependent. Protection of one leads to protection for the other: ensuring that consumer decision is free, informed and unaffected leads, at least in theory,[85] to better competition and market structure. On the other hand, better competition leads to better consumer welfare.[86] I propose a functional-approach analysis of the obligations pursuant to the Digital Markets Act in order to decide on the type of regulation.

In the initial proposal, there were ten positive obligations and eight negative ones. A clear distinction between these provisions is visible: the positive obligations were targeted mostly at products and services, provided by business users (and/or third parties), and interoperability of such services,[87] whilst the negative ones are targeted at anti-competitive behaviour of the gatekeeper.[88]

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[84] *Id.* at art. 73, para. 1, subpara. 2:

> National regulatory authorities may require undertakings inter alia: (a) to give third parties access to, and use of, specific physical network elements and associated facilities, as appropriate, including unbundled access to the local loop and sub-loop; (b) to give third parties access to specific active or virtual network elements and services; (c) to negotiate in good faith with undertakings requesting access; (d) not to withdraw access to facilities already granted; (e) to provide specific services on a wholesale basis for resale by third parties; (f) to grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services; (g) to provide co-location or other forms of associated facilities sharing; (h) to provide specific services needed to ensure interoperability of end-to-end services to users, or roaming on mobile networks; (i) to provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services; (j) to interconnect networks or network facilities; (k) to provide access to associated services such as identity, location and presence service.

[85] *See Better Choices: Better Deals. Consumers Powering Growth*, Department For Business Innovation & Skills (2011), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/294798/bis-11-749-better-choices-better-deals-consumers-powering-growth.pdf.

[86] *See Competition Counts: How consumers win when businesses compete*, Federal Trade Commission, https://www.ftc.gov/sites/default/files/attachments/competition-counts/zgen01.pdf (last visited Apr. 20, 2022).

[87] This can be observed from the content of Digital Markets Act, *supra* note 10, at art. 5 (b) and (c), art. 6 (c), (f) and (j), 2022 O.J. (L 265)1. Other positive obligations serve the same purpose, as for example art. 6 (b) which tackles bundling and mandates un-installation of pre-installed software, in order to give the opportunity of other software manufacturer to enter the market.

[88] Most of the negative obligations are referring to forms of barriers to entry or abuse of monopolistic position. These provisions are a response to the monopolistic behaviour already observed by the European Commission in previous cases (such as Microsoft, Apple, or Google).

Furthermore, in the case of the party protected from a total of eighteen obligations,[89] fourteen were aimed directly at protecting business users (or advertisers), whilst the other four were either data-protection related or have an indirect effect on competition. This finding is consistent with the reasons described in the proposal.[90]

In the amended form, after the European Parliament's first reading, we can observe that not much has changed regarding the positive to negative ratio. And there are now twenty-three obligations: (two have been excluded and seven others have been added), from which fourteen are positive and nine are negative - increasing the percentage of positive obligations by 5%.

The new "table of obligations" now shows an even more contrasting effect to the phrasing regarding whether the conduct applies that of the gatekeeper or to the relationship with the products and services provided to business users.

Oblig.	Article (5)								Article (6)									
Act.	2	3	4	5	6	7	8	9;10	2	3	4	5	6	7	8	9	10	11	12
Business-user		•	•		•	•	•		•			•		•			•		•
End-user	•			•	•		•			•	•		•			•			
Adv. & publisher									•						•				
Other types											•	•		•			•	•	

Figure 5: Types of Obligations and Parties Protected.

The ratio between the types of obligations did not change much, with twelve being business-user (or publisher) oriented, eight being end-user oriented, and five that I put in a different category, because they are either data-protection related or regard possible indirect competition issues (such as bundling, refusal to supply and self preferencing).

[89] Proposal for a Digital Markets Act, *supra* note 9.

[90] These gatekeepers have a major impact on, have substantial control over the access to, and are entrenched in digital markets, leading to significant dependencies of many business users on these gatekeepers, which leads, in certain cases, to unfair behaviour vis-à-vis these business users. It also leads to negative effects on the contestability of the core platform services concerned. *See* Digital Markets Act, *supra* note 10, at 1.

Furthermore, from a competition perspective, business-users and end-users are both, though on different levels, consumers. Competition law would intervene only in specific cases in the situation of business users. As long as the gatekeeper does not operate in the market in which it does not provide information nor interoperability, competition law will not apply. As an example, if Apple were not to have its own music player, it would be highly debatable that requiring Spotify (only) to use its Apple store as a gateway is anti-competitive. This is one important aspect that eluded most authors when talking about the obligations in the proposal and analysing its provisions.

The aforementioned distinction is of high importance because once we observe the true nature of the D.M.A., we can further analyse the structure of its obligations. From a total of twenty-three obligations, we have only five of them that could, to some extent, be targeted by traditional competition law.

Therefore, it is difficult to say that the proposal is a veritable *ex-ante* competition law mechanism. In my opinion, the proposed D.M.A., as amended by the European Parliament, proves itself to be a set of compliance rules that ensures the existence of fair-practices in the digital market. These rules have a close relationship with competition law, but, at their core, they are nothing more than G.D.P.R.-type rules that offer protection and predictability to business and end-users.

2. LOOSENING THE GORDIAN KNOT: RELATIONSHIP WITH COMPETITION LAW

In the previous sections of this article, we observed the differences between the D.M.A. and the traditional European competition law whilst adopting the position of a clear difference between these two. Using the example of O.E.M.s associated with Microsoft and Intel, I tried to clarify the distinction between gatekeeper and dominant undertaking, as well as the difference that it provides in analysing whether the D.M.A. is a sub-part of the competition-law architecture. I attempted to distinguish each obligation specified by the D.M.A. and to evaluate its appropriateness for inclusion in the regulation, considering both the rationale for and against its inclusion. At the same time, I observed the shortcomings of the current competition legislation and described the specific role that the D.M.A. must play. In this part, I will use the analysis previously made to shed some light on the concepts used by the D.M.A.; primarily the interests protected, their overlap with current competition rules and, finally the risk of double,

triple or quadruple jeopardy as envisioned by the recent papers regarding of the recent Germanexit.[91]

2.1 THE OVERLAP WITH CURRENT COMPETITION RULES

Looking closely at the obligations laid out in the D.M.A., a simple statement can be made: the main inspiration for most of the obligations defined by Articles 5 and 6 is currently tackled by traditional E.U. competition law. From a total of twenty-three obligations, only ten have not been under the Commission's scrutiny and a remainder of three could easily be tackled by current competition rules - leaving only seven that are completely outside the scope of the traditional competition infrastructure.

All competition restrictions, to some extent, trigger the application of Article 102(b) of the T.F.E.U. in the form of restricting technological advancement to the prejudice of consumers, which is inherent to the service. Simply put, almost any anti-competitive behaviour in the tech industry will, automatically, limit technical development to the prejudice of consumers.

Obligation	E.U. Legislation and Type of Treatment Prohibited Treatment	Case Law
Art. 5		
.2	Art. 102 (b), (c) T.F.E.U.	AT.40462; AT.40684; AT.40703
.3	Art. 102 (c) T.F.E.U.	AT.40652; AT.40716
.4	Art. 102 (b), (c) T.F.E.U.	AT.40652;AT.40716
.5	Art. 102 (c) T.F.E.U.	AT.40652; AT.40716
.6	Art. 102 (d) T.F.E.U.	AT.40099
.7	Art. 102 (d) T.F.E.U.	AT.40099; AT.40716
Art. 6		
.2	Art. 102 (b), (c) T.F.E.U.	AT.40684; AT.40703
.3	Art. 102 (a), (b) T.F.E.U.	AT.40099
.4	Art. 102 (b), (c) T.F.E.U.	AT.40099; AT.40716
.5	Art. 102 (c) T.F.E.U.	AT.39740; AT.40462
.6	Art. 102 (d) T.F.E.U.	AT.40652; AT.40716
.7	Art. 102 (b), (c) T.F.E.U.	AT.40099
.8	Art. 102 (b) T.F.E.U.	
.12	Art. 102 (b), (c) T.F.E.U.	AT.40099; AT.40462 AT.40716

Figure 6: Connections Between the D.M.A. and Other E.U. Legislation. Case Law.

Taking these points into account, it can be easily concluded that the D.M.A. is nothing more than a part of the competition law environment, providing an ex-ante regulatory

[91] *See* Giuseppe Colangelo, *The European Digital Markets Act and Antitrust Enforcement: A Liaison Dangereuse*, 5 European Law Review 597 (2022).

system in order to preserve the competitive process.[92] However, I will further argue that this is a secondary objective and a result that derives from attaining a fair and contestable market.

This objective is primarily linked with the possibility of the undertakings concerned (gatekeepers) to exploit their presence in the market both against end-users and business users or competitors. The D.M.A. does not act as a tool to regulate positions of abuse or market imbalances, but it creates a *de minimis* set of rules that, in theory, should allow a fair and equitable playing field for all actors involved (including the end-user). The main issue regarding the digital sector is that it does not consist of traditional means, but encompasses mainly online intermediaries which can (easily) create artificial barriers to entry or "exclusivity-only" conditions.[93] Such an example is the Apple vs Android (Google) store, MacOS vs Windows or the lack of interconnectivity between messaging applications. These brute examples illustrate only a small part of the ocean of barriers that the online environment encompasses.

The D.M.A. does not tackle, in my opinion, true competition issues, but rather accessibility issues from both the viewpoint of end-users and business users. For example, a dominant undertaking may decide not to sell a product based on personal or business rationales. However, under Article 6(4), a gatekeeper is forbidden from refusing to list an app on its store or operating system without supplying an explanation that is limited solely to the "*integrity of the hardware or operating system provided by the gatekeeper, provided that such measures are duly justified by the gatekeeper*" or public safety concerns. The argument, in analysing the D.M.A., should be put on the "*important gateway*" characteristic of the gatekeeper as being the central piece.

Observing the D.M.A. through the gateway lenses provides an output that differs from traditional competition rules and brings meaning to the aims of the regulation: a fair and contestable market. The safeguards provided seek a general balance of the downstream market and (often) have an indirect effect on the products also offered by the gatekeeper. This is the case of Apple and Spotify, which would not have been, necessarily, a competition issue if Apple did not have its own music app. The same is true for Google and its add services and; furthermore, with the other cases that have been presented in Fig. 6. The competition law issue appears only when the gatekeeper is

[92] *See* Nicolas Petit, *The Proposed Digital Markets Act (DMA): A Legal and Policy Review*, 12 Journal Of European Competition Law & Practice 529 (2021).

[93] *See* Michael Y.Yuan, T*he effects of barriers to entry on monopolistic intermediary online services: The case of a digital library*, 42 Socio-Economic Planning Sciences 56 (2008). *See also* Leah Taylor Kelley, Jamie Fujioka, Kyle Liang, Madeline Cooper, Trevor Jamieson, Laura Desveaux, *Barriers to Creating Scalable Business Models for Digital Health Innovation in Public Systems: Qualitative Case Study*, Jmir Public Health Surveill (2020), https://publichealth.jmir.org/2020/4/e20579. *See also* Eric Schmidt & Jared Cohen, *The Digital Disruption: Connectivity and the Diffusion of Power*, 89 Foreign Aff. 75 (2010).

activated in the downstream market as well and, further, leverages its power to gain market power for ancillary services.

Such a difference can be observed from the analysis made in Section 1 of this article where, as stated, the O.E.M.s did not engage in anti-competitive behaviour. But due to the lack of interconnectivity, it virtually blocked other actors from entering or expanding in ancillary markets. While in the case of hardware, it is much harder to provide interoperability and interconnectivity – unlike in the software "world" which is not that closed off considering most of the barriers are artificially created. We can think of it as the "*Intra-E.U. calls*" Regulation[94] for gateway services which does not cap the retail price, but sets the minimum level of accessibility for (all) business users inside the European Union.

Therefore, the D.M.A. creates a fair market providing all businesses indiscriminate access to the same platforms, and the possibility for these business-users to contest anyentrenched position that the gatekeeper has in the ancillary market.

2.2 NE BIS IN IDEM. THE GERMANEXIT ISSUE.

A bigger concern voiced by scholars is the possibility of double jeopardy claims. Such a situation might arise from two different causes: the same conduct is being sanctioned both as competition law and D.M.A. infringement or, as in the situation of the German Competition Act [hereinafter G.W.B.] Digitalization Act, pursuant to national and E.U. rules.

In the first scenario, it is important to note that the European Court of Justice [hereinafter E.C.J.] has always taken into consideration previous fines or infringements when setting a new one. Therefore, such situations, however improbable, could be solved by similar solutions. Furthermore, I will argue that a situation of double incrimination is highly improbable at the level of the E.U..

First of all, the D.M.A. has a different scope and timeline of applicability. The main distinction: D.M.A. sanctions future non-compliance and not past antitrust behaviour. This makes it virtually impossible for an undertaking that could fall under both provisions to be sanctioned twice for the same action. Moreover, as stated before, the D.M.A. establishes rules, *in abstracto*, without taking into account the existence of an abuse of power against a specific person(s). In a scenario where a gatekeeper (who is also a dominant undertaking) refuses to comply with the obligations set by the D.M.A., the

[94] *See* Regulation (EU) 2018/1971, *supra* note 16.

fine will represent non-compliance - without taking into account actual damages that have or could have been inflicted upon competitors and/or the whole market. This is because the D.M.A. primarily protects a public interest, and only incidentally a private one, as opposed to the competition rules where, in order to start an investigation, a breach of a private interest must be observed first.[95] And only after determining such an infringement, might the public effect appear. Therefore, I could argue that, because of the different scope that these legislations have, there should not be a plea for *ne bis in idem*. However, even if we consider that the overall context is similar, the subsequent fine will take into account the fine previously set and will be adjusted accordingly.

The other issue is the moment of the imposition of the fine. As stated before, the D.M.A. applies for future situations, whereas competition law sanctions (mostly) previous infringements. The Commission, when dealing with the latter case, can easily take into account the period of time which had already been taken into account pursuant to the obligations described in the D.M.A.. This is further amplified by the full centralisation of the D.M.A. infrastructure and its enforcement only at E.U. level.

The second scenario, of national and European level sanctions, raises other issues that stem from a division of powers between the Member States and the European Union. Theoretically, this should not pose an issue as the D.M.A. clearly states that "Member States shall not impose further obligations on gatekeepers" – with the exception of matters strictly pertaining to competition law. It can be observed that enforcement and fines are the sole attribute of the Commission and the Member States cannot create forum administrative bodies for these purposes.

However, the new G.W.B. Digitalization Act seems to have already breached the balance between the competences of Member States and the European Union. In this regard, it is important to note that the amendment works only in direct correlation with competition law principles and serves as a directive and clarification to antitrust issues and does not maintain the same rules as the D.M.A. . Furthermore, this provision does not provide, in itself, any sanctions or behavioural rules – serving merely as a tool for attaining a proper definition of market dominance. The other traditional competition rules will still apply.

[95] This can be either in form of the damage inflicted upon customers or other competitors. In the Digital Markets Act there is no need to prove actual damage inflicted, creating a possibility where the simple act of not respecting the rule suffices, as opposed to competition law where, even in the situation of object restriction, there needs to be an effect on the E.U. market (Case C-226/11, Expedia Inc. v. Autorité de la concurrence and Others, ECLI:EU:C:2012:795, Dec. 13 (2012)).

Given these aspects, the principles set out in the first part remain valid and create a clear distinction between the two areas of applicability. If we were to consider that such a situation was not the case and that, in fact, the *Gesetz gegen Wettbewerbsbeschränkungen* (G.W.B.) contains provisions that are similar or observe the same aims as the D.M.A., those provisions would become inapplicable and parties could seek annulment of the decision. Such issues will probably arise regardless of scholastic interpretation and they will, most likely, be solved by the European Court of Justice. Another possible solution is the one observed in the *Amazon* case[96] where the Commission simply excluded the state in question from its territorial scope.

In conclusion, I consider the possibility of multiple jeopardy to be significantly lower than previsioned for the reasons detailed before. The difference in scope between competition law and the D.M.A. provides a clear line in application and enforcement. It is important to note also that the German legislation did not derail antitrust principles and requirements, but just added new criteria in order to determine market dominance and abuse without eliminating nor replacing the applicability of the existing ones. Therefore, the complementary nature of the D.M.A. remains and the differences in conditions, scope and effect remain.

3. INNOVATION AND OTHER INDIRECT EFFECTS

Having analysed the substantive structure of the D.M.A., another question arises: will the regulation have a negative impact on the market and if so, what will that impact be? Several critics of the D.M.A. have argued that the regulation is discriminatory,[97] and will have negative downstream effects on marketers and consumers,[98] and will deter

[96] *See* Case T-19/21, Amazon.com Inc. and Others v. Comm'n, ECLI:EU:T:2021:730 (Oct. 14, 2021).

[97] A paper written by Copenhagen Economics argued, among other things, that the proposal might have discriminatory effects, leaving out some of the companies that essentially compete for the same customers. I cannot agree with this argument, and I consider that comparing, for example, online marketplaces (like Amazon) with grocery stores (as Lidl) shows little understanding of the term "digital", the relevant market and the customers that are targeted by the online market. *See* Sigurd Næss-Schmidt, Bruno Basalisco, Signe Rølmer, Katrine Poulsgaard, Morten May Hansen, Laurids Leo Münier, Laura Virtanen, Jasper Lutz, Signe Bech, *The Implications Of The Dma For External Trade And Eu Firms*, Copenhagen Economics (2021), https://copenhageneconomics.com/wp-content/uploads/2021/12/copenhagen-economics-study-of-dma-implications-on-eu-external-trade.pdf.

[98] *See* Kim Davis, *The Digital Markets Act will have downstream effects on marketers and consumers*, Martech (2022), https://martech.org/the-digital-markets-act-will-have-downstream-effects-on-marketers-and-consumers/.

innovation.[99] Before going into further investigation of these critics, it is important to note that these do not represent the predominant view.[100]

I will start with the most stringent one: innovation. Deterring innovation can manifest in multiple ways. So I will limit the discussion to two main aspects: incentive to innovate from the gatekeeper's position (also as a *possible* dominant player), and incentive to innovate for start-ups and other small players.

One good example, in order to observe the incentive to innovate from a gatekeeper's position, is the Intel vs A.M.D. case presented before. I chose this one because it is one of the few where there is any competition and whose market had already been clearly defined.[101]

In 2008, a paper analysing the Intel – A.M.D. relationship concluded that "the monopolist innovates more than the duopoly, as its market power enables it to better extract the potential gains to trade resulting from innovations".[102] This seems to be one of the main arguments of the D.M.A. critics when addressing the innovation issue.[103]

However, another article, published in 2010, found that a "monopolist has fewer incentives to introduce products compared to an oligopolist and when he does introduce

[99] *See* Kif Leswing, *Apple CEO Tim Cook criticizes European law that would break App Store hold,* CNBC (Jun. 16, 2021), https://www.cnbc.com/2021/06/16/apple-ceo-tim-cook-rips-eus-proposed-digital-markets-act.html; *see* Portuese, *supra* note 12; *see* Jennyfer Chrétien & Henri Isaac, *Digital Markets Act: A Revolution Or A Legal Contradiction?,* RENAISSANCE NUMÉRIQUE (2021), https://www.renaissancenumerique.org/en/publications/digital-markets-act-a-revolution-or-a-legal-contradiction/.

[100] *See* Wall & Lostri, *supra* note 13.

[101] Even though neither Intel or A.M.D. would qualify as gatekeepers from a service approach, trying to do the innovation test on actual gatekeepers might prove cumbersome as we do not have relevant case law and competitors to compare with. I was able to identify six relevant (digital) competition cases that went through E.C.J. scrutiny: Summary of Commission Decision of 4 July 2007 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/38.784 — Wanadoo España v Telefónica), 2008 O.J. (C83) 6; Commission Decision of 19 december 2007 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/34.579 — MasterCard, Case COMP/36.518 — EuroCommerce, Case COMP/38.580 — Commercial Cards), 2009 O.J. (C264) 04; Commission Decision of 30 October 2002 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/35.587 PO Video Games, COMP/35.706 PO Nintendo Distribution and COMP/36.321 Omega — Nintendo), 2002 O.J. (L255); Commission, *supra* note 18; Summary of Commission Decision of 18 July 2019 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.39711 — Qualcomm (predation)), 2019 O.J. (C375) 25; Commission, *supra* note 20. Some of these cases are only bordering the digital market and others do not offer the effects of that position of power. In case of Microsoft tying and bundling, neither Windows Media Player nor Internet Explorer attained enough market power to be able to analyse the output of innovation from a dominant (or entrenched) position. MasterCard case could also be used as a valuable example, though I chose not to use it as I lack even basic knowledge of the characteristics of the product.

[102] Ronald Goettler & Brett Gordon, *Competition and innovation in the microprocessor industry: Does AMD spur Intel to innovate more*, 119 JOURNAL OF POLITICAL ECONOMY 1141 (2011).

[103] *See* Portuese, *supra* note 12.

products, they tend to be clustered at the high end. . . In a monopoly, the incentive to steal business is not present and so strategic quality choices play much less of a role".[104]

If we compare these findings to the history of C.P.U.s and look at the dates when new C.P.U.s have been introduced in the market,[105] we can observe that Intel was acting more as a responsive player to A.M.D.'s better products. Having a better market position and using that position to limit A.M.D.'s market share, provided Intel with the possibility of a reactive response.[106] Simply responding[107] to your competitor should not be called innovation and, ultimately, should not be attributed to the position of dominance.

The same logic applies in the case of gatekeepers that can, given their market power (which might not necessarily be equivalent to a dominant position), only respond to potential competitors and not innovate for the sake of innovation. If we take a more practical approach, the following question arises: who would invest millions (or even more) in research & development if there is no return? Innovation is a means to an end from a business perspective – not an end in itself. When there is little or no competition, the incentive for innovation will naturally be lower as there is no substitutability, and so monopoly profits work just fine.[108] However, it is worthwhile to mention that there is no consensus as to whether competition or monopoly produces more innovation.[109]

The next prospective issue that will be analysed is the impact on start-ups.[110] It has been argued that the exit strategies applied by some of the start-ups will be affected: specifically with the buy-out option. First, it is needed to separate the market into two different segments: start-ups that operate in the same area as the gatekeepers; and those who offer (possible) ancillary services.

[104] Chris Nosko, *Competition and Quality Choice in the CPU Market*, Semantic Scholar (2011) https://www.semanticscholar.org/paper/Competition-and-Quality-Choice-in-the-CPU-Market-%E2%88%97-Nosko/b1b1758112d0fe132064f7a61a80ad4f3763719d.

[105] Computer processor history, www.computerhope.com (last visited Mar. 12, 2022), https://www.computerhope.com/history/processor.htm (last visited Feb. 03, 2023).

[106] *See* Nosko, *supra* note 104. In his paper (Chris Nosko, 2011) calls this response a "result of an exogenous innovative process". The author here refers to the fact that "the project that led to the Core 2 Duo [. . .] began at least as early as 2001 to develop a CPU for laptops".

[107] *See* Ian King, *How Israel saved Intel*, The Seattle Times (Apr. 9, 2007), https://www.seattletimes.com/business/how-israel-saved-intel/; *see also* Keyanoush Razavidinani, *For Years, Intel Sat On Its CPU Monopoly And Now The Tide Turns Against Them*, Seeking Alpha (Oct. 1, 2020), https://seekingalpha.com/article/4377146-for-years-intel-sat-on-cpu-monopoly-and-now-tide-turns-against.

[108] *See New Economic Study Finds Intel Extracted Monopoly Profits of $60 Billion Since 1996*, Investor Relations (Aug. 2, 2007), https://ir.amd.com/news-events/press-releases/detail/114/new-economic-study-finds-intel-extracted-monopoly-profits.

[109] *See* Tyler Sayles, *Is competition or monopoly more innovative?*, http://www.hopesandfears.com/hopes/now/question/216743-is-competition-or-monopoly-more-innovative (last visited Feb. 03, 2023).

[110] *See* Pietro Lombardi, *The unintended consequences of Vestager's tougher take on 'killer acquisitions'*, Politico (Oct. 14, 2021, 6:38 PM), https://www.politico.eu/article/margrethe-vestager-tougher-take-boost-small-companies/#: :text= Entrepreneurs%2C%20venture%20capitalists%20and%20others,competition%20%E2%80%94%20actually%20threatens%20to%20dampen.

In the first scenario, the solution is, in my opinion, simple: if an undertaking buys a start-up that offers the same service, it is usually done to shut it down. This is in no way an innovative solution or a positive scenario for either consumers or the market.[111] This tactic is known and widely used,[112] and raises several competition issues.[113]

In the second scenario, there will still be a need to appraise the existence of concentration and, pursuant to Article 2 of Regulation (EC) No. 139/2004, to analyse whether the companies retain activities in the same market. The obligation is to simply notify the merger intention. This does not lead to a consequent interdiction – as the D.M.A. has no provision that could enforce that. The only means that can (still) be used are the ones described by the Merger Regulation; therefore, the *status quo* does not change. The only thing that changes is the possibility of the Commission to intervene, either *ex-officio* or after being notified by member states, but only through the powers conferred by Regulation (EC) No. 139/2004.

There has yet to be an academic consensus as to which market would be better from an innovation point of view. While, as indicated by past examples, competition brings more innovation than monopoly, it is not sufficient to rely solely on such a statement. This rationale works both ways: authors that are assured that creating compliance rules will hinder innovation should take a step back and reassess the situation. Probably, the answer should be searched on a case-by-case scenario, whilst considering the business model of each undertaking concerned.

[111] While the article focuses on the pharmaceutical sector, the same reasoning can be used for other markets that have acquisitions as a viable exit form for start-ups. – *See* Colleen Cunningham, Florian Ederer & Song Ma, *Killer Acquisitions*, 129 Journal Of Political Economy 649 (2021).

[112] *See* Richard Waters, *Big Tech's 'buy and kill' tactics come under scrutiny*, Financial Times (Feb. 13, 2020), https://www.ft.com/content/39b5c3a8-4e1a-11ea-95a0-43d18ec715f5; *see also* Killed by Google, https://killedbygoogle.com/ (last visited Feb. 03, 2023); *see* Killed by Microsoft, https://killedbymicrosoft.info/ (last visited Feb. 03, 2023).

[113] *See* Mark Glick and Catherine Ruetschlin, *Big Tech Acquisitions and the Potential Competition Doctrine: The Case of Facebook*, (Institute for New Economic Thinking, Working Paper Series No. 104, 2019), https://ssrn.com/abstract=3482213.

CONCLUSION

Fitting the D.M.A. into either the *ex-ante* competition law or compliance rules box will undoubtedly be a continuous debate in the following years. The public discourse and part of the reasoning put forth by the European Commission show arguments in favour of both parties. Analysing the position of the gatekeeper in the context of European Competition Law and the clarity of their current definition will provide for further discussions.

Tackling a diverse and complex market, that is characterised by interchangeability and overlapping, will pose multiple challenges in the future. The rapid growth of the structure and number of services provided will add to that complexity. As market boundaries become fuzzier, a service-oriented approach can only be welcomed. The trick will be in keeping up with the changes that might happen in the future. As Moore's law applied to C.P.U.s, it has a notable impact on (other) technological advances nowadays.

Compliance rules should be welcomed in order to ensure a fair environment for the tri-party system in the digital world: end-users, business users and competitors. A set of rules that ensure a minimum level of power balance is hard to make but is necessary. The internet, whether we like it or not, can be, due to indirect market effects, as powerful as a state. Therefore, a form of "Separation of powers" or "Checks and balances" between the main parties should be attained.

The D.M.A. is the first step in order to obtain a level of clarity and to further provisions better. While sometimes the market (and I use it in a broad sense) might regulate itself, in most of the cases this is not the norm, especially in digital markets, where power can be obtained and preserved much easier, without any regulatory provisions.

Traditional competition law is slow and most of the times will activate only after damage has been done or has become irrelevant.[114] This shortcoming should not, however, be solved by *ex-ante* competition enforcement, but with a clear set of rules that define a European standard.

Upon reflection, one may conclude that the D.M.A. is not without shortcomings but heads off in the right direction. Being a fair-practice type set of rules, it does not need to rely on traditional competition rules. The gatekeeper is not defined by dominance, but market power and reputation. Furthermore, the conducts sanctioned are not primarily competitor-oriented, but come in aid of end-users (consumers) and

[114] *See Innovation Kills Monopolies Faster Than Governments Can*, Old Gigaom (Jan 11, 2011), https://old.gigaom.com/2011/01/11/innovation-kills-monopolies-faster-than-governments-can/.

business-users (including advertisers and publishers) – wishing to establish an equal position for all parties involved. This follows, in my opinion, the natural direction of the G.D.P.R. .

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The Limits Imposed by Union Law on the Design of Fiscal Instruments Intended to Protect the Environment

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ABSTRACT

Since the Treaty of Rome, the protection of local producers by Member States is, in principle, prohibited. Indeed, the Court of Justice of the European Union has, throughout the decades, done its utmost to ensure that the Treaty provisions on the free movement of goods and services serve the goal of greater European integration. While reading these judgments, it is very easy to overlook the fact that taxation was at their core. Indeed, throughout the 1960s and 1970s, numerous taxes on imports and exports became the object of the Court's most foundational cases, and current legal literature still praises their unifying effect. Seventy years later, Europe, like the rest of the world, must face up to two unprecedented global crises: the collapse of biodiversity on the one hand, and climate change on the other.

The recent alarming reports regarding climate change and biodiversity loss mean that, from now onwards, the Union and its Member States must deploy all measures conceivable to reach the objectives set out in international agreements such as the Paris Agreement on Climate Change, the Glasgow Climate Pact and the latest Kunming-Montreal Global Biodiversity Framework. The object of this paper is to analyze which fiscal measures Member States and the Union may adopt to prevent further damage from being done to the environment. Damage which some would say has been primarily caused by failures in the market which the Court of Justice set out to create during the first two decades following the Union's inception. In this context, the author identifies all the legal constraints which Union law imposes on the design of environmental taxes at national level, together with the constraints which primary law places upon the potential conception of a European-wide environmental tax.

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The paper opens with a general discussion of the theoretical foundations of environmental taxes. It demonstrates that there exists, at least in theory, an elementary understanding of the essential functions which environmental taxes should possess. It then goes on to discuss the avenues open at the European level for the institutions to act in the fiscal field by adopting Europe-wide environmental taxes. Although the Union seems badly equipped to introduce a general tax on activities which are environmentally harmful, its efforts in matters of indirect taxation merit both praise and critical discussion. In the second part of the paper, the author discusses the principal provisions of Union law which guide Member States in their adoption of environmental taxes.

Finally, the author demonstrates that the actual state of Union law does, indeed, permit the utilization of environmental taxes to shift economic demand in favor of environmentally friendly goods. Although Member States continue to enjoy a large margin of appreciation in the field of taxation, the author still believes that a more comprehensive response to the current environmental crisis should ideally originate from the institutions - even if part of it means creating a European-wide environmental tax.

KEYWORDS

Environmental Taxation; Internal Market; Ecotaxes; State Aid; Circular Economy

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INTRODUCTION

By ratifying the Paris Agreement of 2015, the European Union has set itself the goal of becoming carbon neutral by 2050.[1] Under the guidance of the von der Leyen Commission, all legislative and administrative measures of the Union and its Member States must aim to respect the 1.5°C threshold on global temperatures envisaged in the Agreement. In a 2018 Communication, the Commission notes two things on the role that taxation ought to play in the fight against climate change. First, taxation is one of the most effective tools to implement this strategy, and secondly, taxes should be applied with the aim of offsetting negative environmental impacts and satisfying demand for more efficient and less polluting energy technology.[2] Four years before that, the Institute for European Environmental Policy observed an ever-increasing use of environmental taxes in Europe, and it appears that this trend is set to continue.[3]

Unfortunately, the climate crisis has also been accompanied by enormous rates of biodiversity-loss globally. This situation has been dubbed a global "double emergency" by the World Wildlife Fund [hereinafter W.W.F.] which states, in its most recent flagship report, that climate change is also a significant cause of biodiversity loss.[4] The W.W.F. reports that wildlife populations have plunged by an average of sixty-nine percent between 1970 and 2018.[5] Similarly, the Food and Agriculture Organization [hereinafter F.A.O.] reported in 2020 that an estimated 420 million hectares of forest have been lost through deforestation since 1990 (a territory approximately the size of Libya).[6] This dramatic state of affairs has led to the adoption of the Kunming-Montreal Global Biodiversity Framework which, while being hailed as a "Paris Biodiversity Agreement", has set out a widely publicised "30 by 30" nature conservation and restoration goal (i.e., to bring the loss of areas of high biodiversity importance close to zero by 2030, to restore thirty percent of degraded land and sea ecosystems globally by 2030, and to conserve and manage thirty percent of terrestrial, inland water, and coastal and marine areas by

[1] *See Climate Action and the Green Deal, European Commission* (Sept. 18, 2022), https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/climate-action-and-green-deal_en.

[2] *See Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, A Clean Planet for all A European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy,* COM (2018) 773 final (Nov. 28, 2018).

[3] *See Final report of the Institute for the European Environmental Policy (IEEP) on the "Environmental tax reform in Europe: Opportunities for the future"*, (May 30, 2014), https://ieep.eu/wp-content/uploads/2022/12/ETR_in_Europe_-_Final_report_of_IEEP_study_-_30_May_2014.pdf

[4] *See* WWF, *Living Planet Report 2022 Building a Nature-Positive Society*, 16 (Oct. 13, 2022), https://wwfint.awsassets.panda.org/downloads/embargo_13_10_2022_lpr_2022_full_report_single_page_1.pdf.

[5] *See id.* at 32.

[6] *See* FAO, Main Report of the Global Forest Resources Assessment 2020, at 18 (Nov. 12, 2020).

2030).[7] Both the Union and its Member States participated in the Biodiversity Framework,[8] which means that they must use all policy tools necessary to reach the targets set therein including fiscal instruments. Indeed, biodiversity-relevant taxes have been on the increase globally since 1980,[9] and recent economists have pointed out the usefulness of tropical carbon taxes in simultaneously tackling the twin threats of climate change and biodiversity loss.[10]

In light of the above, this paper analyzes the Member States' latitude of maneuver in their adoption of environmental tax policies which pursue current climate change and nature restoration ambitions. Given the evolving nature of environmental taxes, the author has decided to focus only on the essentials. This paper does not provide a description of all environmental taxes in Europe. Instead, it takes the elementary features of such taxes and tests them under the provisions of Union law as interpreted by the Court of Justice. In particular, the author searches for an answer to the question of which types of environmental tax are incompatible with the internal market. That question can be subdivided as follows: to what extent can a Member State adopt fiscal tools to: (i) discourage methods of production, distribution and consumption of products and services considered destructive to our planet; and (ii) promote the production, distribution and consumption of products and services that are respectful of our environment.

[7] *See* UN Environment Assembly decision, Kunming-Montreal Global Biodiversity Framework (GBF), at 1-3 (Dec. 19, 2022).

[8] *See* European Commission Press Release IP/22/7834, COP15: Historic global deal for nature and people (Dec. 19, 2022).

[9] *See* Organization for economic cooperation and development [OECD], *Tracking Economic Instruments and Finance for Biodiversity,* at 5 (2021) https://www.oecd.org/environment/resources/biodiversity/tracking-economic-instruments-and-finance-for-biodiversity-2021.pdf.

[10] *See* E. B. Barbier, R. Lozano, C.M. Rodriguez & S. Troëng, *Adopt a carbon tax to protect tropical forests*, NATURE, (Feb. 12, 2020), https://www.nature.com/articles/d41586-020-00324-w. According to the authors, a tropical carbon tax will finance adaptation and mitigation initiatives in biodiversity-rich countries where private investment alone has not registered much progress in this regard.

To answer these questions, the paper is divided into two sections and addresses both the proscriptive and the permissive facets of Union law in this sector. In the first section, the author analyzes the theoretical and legal foundations of tax instruments that are intended to protect not just a national but also the *European* environment. In the second section, the author then deals directly with the compatibility of environmental taxes with Union law. Since the scope of this paper is environmental *taxation,* generally, other complex market-intervention measures conceived to fight climate change (such as the E.U. Emissions Trading System) will only be discussed briefly and to the extent that they serve to place matters in their proper context.[11]

Throughout the paper, one sees that a unique paradox exists in Europe. While it is the Member States who possess the major fiscal initiative to deal with the current environmental emergency, the use of fiscal tools has implications for the entire Union and its citizens.[12] Therefore, the author also explains how the current division of competences within the field of taxation conditions the type, the extent, and the quality of the fiscal solutions available. One point to be made here is that the current division of competences has not set things in stone. The field of environmental taxation is moving, and it is moving fast. As we speak, major proposals in the field are being discussed within the institutions, such as the proposal for a new minimum tax on aviation fuel, the Carbon Border Adjustment Mechanism [hereinafter C.B.A.M.] proposal, or even the latest calls for a Union-wide windfall tax.[13] It is precisely in these urgent times that one cannot help but think that the deeper into crisis the world plunges, the bolder and swifter E.U. action in this field will become.

[11] For the differences and interactions between environmental taxes and market-based mechanisms such as the European Union Emission Trading Scheme [hereinafter E.U. E.T.S.], see Organization for economic cooperation and development [OECD], *Environmentally Related Taxes and Tradable Permit Systems in Practice*, COM/ENV/EPOC/CTPA/CFA(2007)31/FINAL, (2008), https://one.oecd.org/document/com/env/epoc/ctpa/cfa(2007)31/final/en/pdf;
see also Organisation for economic cooperation and development [OECD], *Interactions Between Emission Trading Systems and Other Overlapping Policy Instruments*, COM/ENV/EPOC/CTPA/CFA(2011)4/FINAL, (2011), https://www.oecd.org/env/tools-evaluation/Interactions%20between%20Emission%20Trading%20Systems%20and%20Other%20Overlapping%20Policy%20Instruments.pdf.

[12] *See* Alina Vysochnya et al., *Convergence trends of environmental taxation in European countries*, E3S Web Conf. 1, 2 (2020).

[13] *See* Resolution on the E.U.'s response to the increase in energy prices in Europe, Eur. Parl. Doc. PV 58(II) (1994).2022/2830(RSP), (2022), https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2022/2830(RSP).

1. CAN AN INTRINSICALLY EUROPEAN ENVIRONMENT BE PROTECTED BY NATIONAL FISCAL REGIMES?

While environmental protection is a global goal enshrined in the United Nations Sustainable Development Goals [U.N SDGs] and the Treaty on the Functioning of the European Union [hereinafter T.F.E.U.],[14] tax regimes see their application boxed into the four corners of each Member State. This is due to the age-old principle of international law that a sovereign state does not recognize and enforce the taxes of other sovereign states in its own territory. So how can one or a few Member States truly make a difference at the global level? With the environmental landscape that stretches from the French overseas territories to the ancient forests on Poland's eastern border, one question which arises is whether a Member State can adopt an environmental tax policy which affects trade both in its own territory and in other parts of the Union. We will see that the territorial confines of tax regimes in general have not prevented them from targeting harmful activities or goods which originate abroad. Indeed, a large part of the case-law on the free movement of goods concerns fiscal measures adopted by one Member State on goods originating in another Member State - sometimes on the basis that such measures protect the environment defined in the broadest sense. These types of measures can be especially effective if demand for a particular good or service is concentrated within the Member State that decides to tax it. Any tax imposed on such goods or services is very likely to affect production abroad by influencing consumers back home. Therefore, the idea that fiscal measures, albeit territorial, may still pursue a general vocation to protect the environment, wherever that environment may be situated. And this has given rise to a functional theory of environmental taxation which inspires legislators to this day. It is this theory which serves as the rational basis for the measures and legislative acts of Member States and the Union respectively.[15] It is in the second Paragraph that we ask the question of whether a European-wide environmental tax, based on the theory discussed in the first Paragraph, is at all legally possible.

[14] Consolidated versions of the Treaty on the Functioning of the European Union art. 191(1), June 7, 2016, 2016 O.J. (C 202) 47 [hereinafter TFEU]; UN Department of Economic and Social Affairs, sustainable development goals, (jan. 29, 2023) https://sdgs.un.org/goals, see Goals 11-15.

[15] This theory has been reproduced in Communication from the Commission, see *Communication from the Commission, Guidelines on State aid for climate, environmental protection and energy 2022, at 8-9,* COM (2022) C 80/01 (Feb. 18, 2022)[hereinafter C.E.E.A.G.].

1.1. THE THEORY UNDERLYING MODERN ENVIRONMENTAL TAXATION

An environmental tax can be defined simply as "a tax whose tax base is a physical unit (or a proxy of a physical unit) of something that has a proven, specific negative impact on the environment".[16] It is nothing more than a charge imposed on taxpayers that is sensitive to the environmental damage caused by human activities, notably large-scale industry that has become dominant due to the globalisation of value chains. The Organisation for Economic Co-operation and Development [hereinafter O.E.C.D.] offers an even more detailed definition: "Environment-related taxes are any compulsory, unrequited payment to the general government levied on tax-bases deemed to be of particular environmental relevance".[17] In this regard, the environmental taxes most found in European countries include taxes on energy products, motor vehicles, waste, pollutant emissions, and natural resource exploitation.[18]

But why use taxation to achieve environmental goals? To answer this we must first look at the two principal alternatives. The traditional alternative to environmental taxes is regulation. This instrument functions on the idea that actors should incur pecuniary, administrative or penal sanctions when they fail to respect precise environmental obligations laid down by law.[19] Environmental regulation and environmental taxation are not diametrically opposed, and a recent O.E.C.D. report highlights their synergetic effects on the restoration of ecosystems (regulation restricts activity while tax can create positive incentives for restoration by ensuring that the true costs of degradation are appropriately priced into economic activity).[20] A more modern alternative may be found in a hybrid system that combines both regulatory and fiscal elements. Such is the negotiable permit (market) mechanism which lays out rules for the concession of "permits to pollute" through State auction. These permits allow their acquirer to release a given volume of pollution into the environment over a given period

[16] *See* Eurostat, Environmental taxes: A statistical guide, at 9, (2013) https://ec.europa.eu/eurostat/documents/3859598/5936129/KS-GQ-13-005-EN.PDF.pdf/706eda9f-93a8-44ab-900c-ba8c2557ddb0?t=1414782946000. See also Regulation 2011/691, of the European Parliament and of the Council of 6 July 2011 on European environmental economic accounts, art. 2(2), 2011 O.J. (L192) 1, which contains an identical definition.

[17] Organization for economic cooperation and development [OECD], *The Political Economy of Environmentally Related Taxes,* at 26, (2006), https://www.oecd.org/env/tools-evaluation/thepoliticaleconomyofenvironmentallyrelatedtaxes.htm.

[18] *See generally* Adriano Di Pietro, La fiscalita' ambientale in Europa e per l'Europa [Environmental Taxation in and for Europe] 52 (Cacucci ed., 2016) (It.).

[19] *See* V. Sepulchre, La Fiscalite Environnementale en Belgique [Environmental taxation in Belgium] 11 (Larcier eds., 2009).

[20] *See* Report of the Organization for Econmic cooperation and development [OECD], *Biodiversity: Finance and the Economic Business Case for Action prepared for the G7 Environment Ministers Meeting of 5-6 May 2019,* at 51, (2019), https://www.oecd.org/environment/resources/biodiversity/G7-report-Biodiversity-Finance-and-the-Economic-and-Business-Case-for-Action.pdf.

and may be freely exchanged with economic actors. Under this system, operators facing high costs for reducing their emissions will attempt to buy permits from operators incurring lower costs for such a reduction. The intended effect is to drive operators towards more efficient modes of production. It is worth noting that a system of negotiable pollution permits is not based on Pigouvian theories of internalising externalities,[21] and its principal setback lies in the fact that its design, in practice, can only cover certain targeted sectors of economic activity.[22]

According to some authors, since fiscal instruments are more flexible than regulation they can eliminate environmental problems by creating a double effect.[23] On the one hand, they stimulate the economy through incentives. And on the other, they discourage environmentally harmful activities through expansion of the tax base and increase in the rate of environmental taxes.[24] Taking the above-cited definitions, it is hard not to notice that they are built around the idea of discouraging human activities which are harmful to the planet. Indeed, their common basis is the internalisation of negative externalities (i.e., environmental damage), caused by the production, distribution and consumption of a product or service into the cost of that same product or service. This additional cost, once passed on to the consumer, will make him choose whether to pay more for a product or service that is of greater cost to the environment.

We cannot talk about environmental externalities without mentioning the work of Arthur C. Pigou.[25] The British economist had theorised a type of "corrective taxation" that compensated for the negative externalities of goods traded on the market, such as pollution. This laid the basis for the famous Pigouvian tax,[26] which takes the form of an indirect tax on harmful goods or activities and which serves as inspiration for the polluter-pays principle.[27] According to Pigou, a negative externality could be categorised as a market failure because its external cost was passed on to society at large rather than being reflected in the price set by the seller and buyer (the parties to a contract do not normally factor social costs into the agreed price).[28] This phenomenon resulted in the creation of economic inefficiencies that could not be taken into account by the economic models of the time. Applying the polluter-pays principle to the private individuals signifies that it is the person who makes use of or puts the product into circulation who must bear the cost of compensating the negative externality.

[21] *See* Sepulchre, *supra* note 19, at 23.
[22] *See id.* at 29.
[23] *See id.* at 13.
[24] *See* Vysochnya, *supra* note 12, at 3.
[25] *See* A. C. Pigou, The Economics of Welfare (Palgrave Macmillan, 4th ed. 1932); *see also* Nicolas Caruana, La fiscalite Environnementale [Environmental Taxation], 69-78 (L'Harmattan ed., 2015).
[26] *See* R. C. Williams III, *Environmental Taxation* 2 (National Bureau of Economic Research: Working Paper 22303, 2016).
[27] *See* Caruana, *supra* note 25, at 80.
[28] *See* Pigou, *supra* note 25, at 185-86.

According to Pigou, only a tax imposed on the harmful product could correct an externality.[29] If the tax equals the external damage caused to society by one unit in addition to the product, the damage will be compensated by the price of the transaction, forcing the buyer to pay the marginal social cost of the product as well.[30] This tax encourages operators to reduce the externalities of their products so as to attract more buyers; it therefore shifts demand in favour of products that cost less to society in general.

While sound in theory, the theory of negative externalities suffers some major difficulties when put into practice. First, the degree of damage caused by a product is very difficult to calculate. Pollutants diffuse easily and can persist in the environment for several decades, thus requiring calculations to be made on the future environmental effects of certain productions. Secondly, the intricate design of a Pigouvian tax may create large administrative costs for fiscal authorities.[31] Thirdly, political acceptance of Pigouvian taxes may be lacking in certain countries as they may be considered to impose an unfair burden on low-income households - while allowing those who can afford it to pollute to their heart's content.

Quite apart from their compensatory nature, environmental taxes can be a good source of government revenue. From this perspective, environmental taxes may be used, not only to correct negative externalities, but also to contribute to the State's public expenses.[32] This idea has given rise to the modern "double-dividend" theory. According to this theory, a shift towards the levy of environmental taxes will allow Member States to reform their tax systems in such a way as to achieve a high level of environmental protection with a lower rate of unemployment (without increasing the overall tax burden in Member States).[33] To achieve this, Member States need to review the very nature of our current tax systems, which are still mainly based on general income tax provisions. The principle underpinning the double-dividend theory is that Member States should increase taxation on anti-social activities (such as pollution), in order to be able to decrease taxation on human activities that are considered virtuous (such as labour).[34]

[29] Pigou envisaged a tax system which would make private marginal cost match social marginal cost. However, he remains a liberal economist who did not recommend a systematic form of state intervention outside the realm of taxation: *see* Caruana, *supra* note 25, at 76-77.

[30] *See* Williams, *supra* note 26, at 3.

[31] *See* OECD, *supra* note 17, at 21.

[32] *See* Williams, *supra* note 26, at 4.

[33] *See Commission proposal for a Council Directive of 12 March 1997 restructuring the Community framework for the taxation of energy products,* at 1-2, COM(97) 30 final, (Mar. 12, 1997).

[34] *See generally* David Luckin & Simon Lightfoot, *Environmental taxation in contemporary European politics*, 5 Contemp. Pol. 243, 249 (1999).

1.2. IS A UNION-WIDE ENVIRONMENTAL TAX POSSIBLE?

1.2.1. SOME PRELIMINARY CLARIFICATIONS

Many experts have communicated their wish to create a single instrument harmonising environmental taxation at the supranational level. One can note three major movements in the evolution of environmental taxes within the Union. For a long period, all was left in the hands of the Member States.[35] In the 1980s, there was a slow progression towards higher levels of environmental levies.[36] Everything accelerated in the 1990s when the Nordic countries adopted the first legislation against climate change.[37] Soon afterwards, environmental taxation quickly lost its popularity and, from 2007 onwards, fell back to its 1980s level.[38] Current Eurostat statistics show that environmental tax revenues represent only 2.2% of E.U. Gross Domestic Product (G.D.P.); 77.2% of these revenues being due to energy taxes.[39]

As for the latter statistic, it is worth pointing out that not all energy taxes pursue environmental objectives. Historically, they have been used as a broad instrument for Member States to raise revenues. Such was, after all, the initial motivation behind the Energy Taxation Directive - although the Commission has admitted that the environmental aspect of this directive has now gained relevance.[40] Moreover, the Joint Research Council has demonstrated that excise taxes on energy consumption (as well as related emissions and resource use) do not necessarily converge with classical Pigouvian theory, as Member States often resort to such taxes to achieve other goals, such as fixing distortions in the energy market or achieving socio-economic objectives.[41] Paradoxically, the more effective a carbon tax levied on fossil fuels is at penalising their use and shifting behaviour towards cleaner methods of energy production, the greater the reduction in a Member State's tax base will be.

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[35] *See generally* Eloi Laurent & Jacques Le Cacheux, Une Union sans cesse moins carbonee ? [A Union with Increasingly Less Carbon?] 26 (Notre Europe ed., 2009) (Fr.).
[36] *See id.*
[37] *See id.*
[38] *Id.*
[39] *See Eurostat Website, Environmental tax statistics*, (April 24, 2022), https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Environmental_tax_statistics&action=statexp-seat&lang=fr; *see also* R. Hertzog, *Pourquoi la fiscalité de l'environnement ne prospère pas* [*Why Environmental Taxation is Not Flourishing*], Gestion & Finances Publiques [Mgmt. & Pub. Fin.] 51 (2021) (Fr.).
[40] *See* European Environment Agency (EEA), *The role of (environmental) taxation in supporting sustainability transitions*, Briefing no. 22/2021, at 17 (Jan. 30, 2023) https://www.eea.europa.eu/publications/the-role-of-environmental-taxation.
[41] *Joint Research Council science for policy report on the Energy Taxation and its Societal Effects*, at 8-9, EUR 30552 EN, (Jan. 14, 2021).

Since the adoption of the "Fit for 55" package,[42] the Commission is now committed to align its energy policy with its climate objectives, thereby placing greater emphasis on the environmental aspects of energy taxation.[43]

Coming back to our discussion regarding a possible European environmental tax, two statements are worth noting since they witness the first efforts to initiate environmental tax reform at supranational level. In 1998, the European Environment Agency (E.E.A.) published a communication indicating the great potential for job creation that a European-wide environmental tax reform could bring.[44] At the European Council in Copenhagen, the then President of the Commission, Jacques Delors, went as far as communicating his preference in favour of a new European double-dividend tax policy.[45] We feel that these very general statements in favour of promoting environmental taxes in Europe can be misleading since they fail to explain the type of concrete measures envisaged by the people making them. They therefore require some clarification.

When in the realm of taxation more generally, a distinction must be drawn between, first, the power to create a purely European tax which contributes to the Union's budgetary resources, secondly, the power to obligate Member States to tax persons, products or services in a certain manner and, thirdly, national taxes adopted on the Member States' initiative and which are only legal in so far as they are compatible with Union law, including secondary legislation. It suffices to say that regarding the first type of tax (or purely European tax) the Union has no competence to impose taxes directly on Union citizens or residents.[46] This would require a total revision of the treaties, as there is currently no single treaty article which confers this power on any of the Union's institutions. So, the statements calling for a regional and purely European environmental tax must be interpreted as excluding this possibility, simply because the Treaties do not and have not envisaged it since the Treaty of Rome.

The second and third scenarios are discussed further below.

[42] *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, "Fit for 55": delivering the E.U.'s 2030 Climate Target on the way to climate neutrality,* COM (2021) 550 final (July 14, 2021).

[43] *See Commission proposal for a Council Directive, restructuring the Union framework for the taxation of energy products and electricity (recast),* COM (2021) 563 final (July 14, 2021).

[44] *European Environment Agency (EEA), Environmental Taxes: Implementation and Environmental Effectiveness,* at 7, (Aug. 1996), https://www.eea.europa.eu/publications/92-9167-000-6/file.

[45] Bulletin des Communautés européennes No 6/93, at 18 (1993).

[46] *See* V. Dussart, *L'impossible création d'un impôt européen?* [*Is the Introduction of a European Tax Impossible?*], 144 Revue Française d'Administration Publique [French Rev. Pub. Admin.] 1085, 1088 (2012) (Fr.).

1.2.2. LIMITED LEGAL BASES FOR EUROPEAN ACTION

The Treaties offer few legal bases by virtue of which the Union can act in tax matters. Those legal bases, as we shall see, are in turn modelled around the strict dichotomy between direct and indirect taxes, thereby conditioning the type of legal act the Union can adopt in the direct and indirect tax fields. Coming back to the distinction drawn in the last Subparagraph, we can say that the Union, although lacking the power to impose its own taxes, may force Member States to tax (or not to tax) a particular product, service, person, or activity. The main legal bases for doing so are Articles 113 and 115 T.F.E.U.

Direct taxes do not fit easily into the definitions of environmental taxes cited earlier in this Section. However, it is not impossible to imagine a tax system which charges profits differently according to the harmfulness of the principal activity generating them. Such a system may, for instance, be used to incentivise a double shift towards less harmful production methods and employment. Furthermore, there is nothing generally to prevent a Member State from granting tax breaks on profits generated from activities related to environmental protection, provided that state aid rules on selectivity are observed. In this respect, the Court has refused to recognise any argument in favour of automatically excluding a fiscal measure from the scope of Article 107 T.F.E.U., particularly the criteria on material selectivity, simply because it pursues an environmental protection objective (see the discussion in Paragraph 2.3 below).

At this stage, the question one would need to answer is whether the Union has the competence, at all, to adopt measures for the harmonisation of direct and indirect environmental taxes. Article 115 T.F.E.U. enables the Council to act unanimously under a special legislative procedure with a view to issue *directives* for the approximation of such laws, regulations or administrative provisions of the Member States as directly affecting the establishment or functioning of the internal market. Only directives can be used to harmonise national tax provisions, thereby excluding the use of regulations which aim to uniformise direct taxes, and the harmonisation must have as its object of improvement of the conditions for "the establishment or functioning of the internal market".[47] In the author's view, this latter element was introduced into the Treaty of Rome to ensure that the Union will not be able to harmonise indiscriminately, but only to the extent necessary to be able to reinforce and guarantee the exercise of the fundamental freedoms of Union citizens. In no case can the Union harmonise on the simple pretext that it wishes to replace

[47] Case C-376/98, Tobacco Advertising I, 2000 E.C.R I-08419, ¶ 83.

the Member States' tax systems with a system which it believes is better suited to meet the objectives it sets for itself.

Another striking feature of Article 115 is the requirement of unanimity. While some inroads have been made in the field of direct taxation, the diversity of fiscal policies between Member States means that a total harmonisation of Member States' tax bases is almost impossible to achieve. On this point, De Sadeleer notes that the special legislative procedure,where the Council is the sole legislator and decides by unanimity, used since the Treaty of Rome to harmonise the tax provisions of the Member States, has prevented the adoption of a holistic system of environmental taxation at the supranational level.[48] Indeed, since the 1978 Spinelli Report, the creation of a direct tax at the European level, even if levied by the Member States, remains impossible in practice, since it would require the harmonisation of the tax bases of the Member States to such an extent that all disparities between them would be eliminated.[49] Naturally, while Member State sovereignty is currently the rule in the area of direct taxation, this does not mean that European law has no impact on the design of direct taxes. National tax provisions adopted in areas not subject to harmonisation must still comply with the fundamental freedoms and the fundamental rights set out in the Charter.[50] In other words, where a Member State adopts fiscal tools to incentivise a green transition towards environmentally friendly jobs or production processes, the provisions governing the granting of state aid, freedom of establishment and free movement of workers remain applicable.[51]

Historically, the Commission's initiatives to introduce environmental taxes have tended to focus on indirect taxes, i.e., taxes on transactions. Indeed, the first indirect tax in the history of the Union was envisaged by the Delors Commission with the creation of a CO2 ecotax. This initiative was rejected in 1992 by the Ecofin Council.[52] Nevertheless, it seems that the Commission retains a strong belief in this approach. Since the Lisbon Treaty, the current legal basis for the harmonisation of indirect taxes is found in Article 113 T.F.E.U.[53] According to this Article, the Council, acting unanimously in accordance with a special legislative procedure, shall adopt *provisions* for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation. Once again, the Council may act only to the extent that harmonisation is necessary to

[48] Nicolas De Sadeleer, Eu Environmental Law And The Internal Market 238 (Oxford University Press ed., 2014) (UK).
[49] *See* Dussart, *supra* note 46, at 1088; *see also* Alexandre Maitrot De La Motte, Droit Fiscal De L'Unions Europeenne [European Union tax law] 27-35 (Bruylant ed., 3rd ed. 2022) (Fr.).
[50] *See* Case C-446/03, Marks & Spencer plc, 2005 E.C.R. I-10837, ¶ 29.
[51] *See* Peter J. Wattel et al., European Tax Law, Volume I, 12 (Wolters Kluwer ed., 7th ed. 2018).
[52] *See* Dussart, *supra* note 46, at 1089.
[53] *See* Wattel et al., *supra* note 51, at 34.

ensure the establishment and functioning of the internal market and to avoid distortions of competition. Article 113 T.F.E.U. is considered by some authors as conferring a specific mandate on the Union to bring about a holistic and positive harmonisation of the internal market, such a mandate not being readily identifiable in the case of direct taxes.[54] Over time, the Union has adopted or proposed several legislative acts on the basis of Article 113 T.F.E.U. that have an impact on national environmental tax provisions such as the Energy Products Tax Directive,[55] the Excise Directive,[56] the Heavy Vehicle Tax directive,[57] and the Proposal for a Directive on Passenger Car Related Taxes.[58]

A third legal basis for the harmonisation of national environmental taxes has been inserted into the Treaties by the Single European Act. Article 192(2)(a) T.F.E.U. is more specific, and allows for the adoption of "provisions primarily of a fiscal nature" in the Union's promotion of a coherent European environmental policy. According to this Article, the Council shall, before adopting fiscal measures of an environmental nature, act unanimously in accordance with a special legislative procedure, and only after consulting the Parliament, the Economic and Social Committee and the Committee of the Regions. A couple of remarks can be made at this stage. First, the unanimity requirement in Article 192(2)(a) has been inserted to ensure that the article is not used to bypass the other legal bases discussed above. Secondly, any tax measures adopted on the basis of this Article must have a primarily environmental character and be based on the polluter-pays principle. Thirdly, although the wording of Article 192(2)(a) encapsulates the general principle that the Union will only harmonise exceptionally in the field of taxation, there is one stark difference between this article and Articles 113 and 115 T.F.E.U.: for the Council to be able to adopt a fiscal measure of an environmental character, there need not be a link subsisting between the measure and the need to ensure the proper functioning of the internal market. This means that the pure objective of environmental protection may be freely pursued when harmonising environmental taxes under Article 192(2)(a). The Directive establishing a scheme for greenhouse gas emission allowance trading within the Union,[59] as well as the proposed regulation for a C.B.A.M.,[60] are based on Article 192(2)(a) T.F.E.U.

[54] *Id.*
[55] Council Directive 2003/96, 2003 O.J. (L 283) 51 (EC).
[56] Council Directive 2020/262, 2020 O.J. (L 58) 4 (EU).
[57] Directive 1999/62/EC, of the European Parliament and of the Council of 17 June 1999 on the charging of heavy goods vehicles for the use of certain infrastructures, 1999 O.J. (L 187).
[58] *Commission Proposal for a Council Directive on passenger car related taxes,* COM (2005) 261 final (July 5, 2005).
[59] Directive 2003/87/EC, of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, 2003 O.J. (L 275) 32.
[60] *Commission proposal for a Regulation of the European Parliament and of the Council establishing a carbon border adjustment mechanism*, COM (2021) 564 final (July 14, 2021).

At this point, it would be interesting to know the precise scope of the words "provisions primarily of a fiscal nature". This is because under the general scheme of Article 192, an environmental measure not of a fiscal nature can be adopted through the ordinary legislative procedure. The response is not easy and can indeed depend on the legal culture and background of the person interpreting the words. What is sure is that at the European level there is no definition of "tax" and charges aiming to protect the environment which can serve eminently regulatory purposes too. This could open a whole debate about what is essentially "fiscal" in nature and what is not. It suffices to say that according to the classic definition attributed to Gaston Jèze, there is no tax that does not serve to cover public expenses.[61] We have seen that what may be generally called an environmental tax or charge may not necessarily be designed with the purpose of increasing government revenues, but to force a polluter to pay for the damage he has caused to society (in line with the polluter-pays principle derived from the Pigouvian theory of externalities).[62] As Caruana says, environmental taxation is an ambivalent notion,[63] and can manifest itself as a sanction-type measure to be found often in instruments of a regulatory character.[64] The question has not been addressed by the Court, but an instrument like the Energy Taxation Directive has generally been taken to contain "fiscal" measures despite the fact that one of its objectives is to ensure that some of the damage caused by the consumption of fossil fuels is compensated through a minimum rate of taxation.[65]

1.3. PRELIMINARY CONCLUSIONS PROVIDING A STRUCTURE FOR THE SECOND PART OF THIS PAPER

Paragraph 1.1. has discussed the general theory underpinning environmental taxes. According to this theory, environmental taxes serve to internalise negative externalities into the costs of products and services on the market. In Section 1.2 we saw that a system of environmental taxation in Europe is possible, but the current division of competences has brought about a situation where Union intervention is entirely sectoral and heavily

[61] *See* Maitrot De La Motte, *supra* note 49, at 44: où l'impôt est défini comme une «prestation pécuniaire requise des particuliers par voie d'autorité, à titre définitif et sans contrepartie, *en vue de la couverture des charges publiques*» [where tax is defined as «a pecuniary benefit required from individuals by means of authority, definitively and without compensation, for the purpose of covering public charges»].

[62] *See* Caruana, *supra* note 25, at 78-89.

[63] *See* Di Pietro, *supra* note 18, at 83: ". . . non esiste un'apposita e autonoma disciplina positiva della fiscalità ambientale. . .la fiscalità ambientale si presenta come un sistema eterogeneo e frammentato e, soprattutto, privo di disposizioni organiche" ["there is not a specific and autonomous positive regulation of environmental taxation. . .environmental taxation is a heterogeneous and fragmented system, and, above all, without organic provisions"].

[64] Caruana, *supra* note 25, at 289; *see also* Hervé Raimana Lallemant-Moe, *Les Deux Visages de l'impôt à finalité écologique* [The Two Faces of the Ecological Tax], 161 POUVOIRS 147, 151-52 (2017).

[65] Council Directive 2003/96, *supra* note 55, at Preambles 6-7.

focused on the creation of indirect taxes. It is, as yet, highly doubtful whether a holistic harmonisation of direct taxes in pursuit of a green transition is possible, since this would require all Member States to renounce their sovereign tax base. Such an outcome can hardly be said to have been envisaged by the treaty drafters. However, Article 115 T.F.E.U. allows the Union to harmonise the direct tax laws of the Member States, albeit limited to the extent that these directly affect the establishment or functioning of the internal market. This latter requirement limits all attempts to harmonise direct environmental taxes to the achievement of very specific goals. The imposition of a one-time retroactive "windfall" tax on fossil fuel companies could be one example, although politically difficult to achieve in practice.

We now propose approaching Section 2 of this paper in the following manner. Our focus will turn to the case-law of the Court which deals directly with the compatibility of national environmental taxes with various provisions of Union law, including the fundamental freedoms (Paragraph 2.1) and pieces of secondary legislation (Paragraph 2.2). Finally, the assessment of environmental taxes under the state aid provisions will be tackled (Paragraph 2.3).

2. THE COMPATIBILITY OF ENVIRONMENTAL TAXES WITH UNION LAW

Since the Treaty of Rome, the process of economic integration in Europe has been based on the free market with the Court of Justice of the European Union taking on the role of guardian of the internal market. Neo-protectionist measures incompatible with the fundamental freedoms of the Treaties were quickly set aside by the jurisprudence of the Court. In this second part of the paper, we discuss whether that jurisprudence has any bearing on the creation of environmental taxes by the Member States.

2.1. ENVIRONMENTAL TAXES AND FUNDAMENTAL FREEDOMS

The compatibility of any environmental measure adopted by Member States is assessed in a twofold way. If there is an act of secondary legislation fully harmonising an aspect of the internal market, and the measure falls within the scope of that act, it will be assessed in accordance with its provisions. If, on the other hand, there is no act harmonising an area of the internal market, or if the harmonisation is not complete, the legality of the environmental measure will be assessed in the light of the Treaties.[66]

2.1.1. FREE MOVEMENT OF GOODS

When studying the free movement of goods, a distinction is made between fiscal (or tariff) barriers on the one hand (Sub-Subparagraph 2.1.1.1.), and non-fiscal barriers on the other (Sub-Subparagraph 2.1.1.2.). In this paper, we will focus mainly on the former, i.e., the prohibitions contained in Articles 28 to 30 and 110 T.F.E.U. We will discuss non-tax barriers (Articles 34 to 36 T.F.E.U.) only insofar as they might be relevant to the implementation and collection of environmental taxes by Member States.

2.1.1.1. FISCAL BARRIERS TO TRADE

Our starting point is the observation that there is no harmonisation of environmental taxes in Europe. As a result, Member States are free to implement their own environmental tax policy,[67] a freedom that manifests itself through the differences in the base and rate of environmental taxes within the Union.[68] However, the fiscal autonomy of Member States is not absolute, as they are bound by the Treaties when introducing new environmental taxes.[69]

Normally, the financial nature of an environmental tax is sufficient to bring it within the scope of Articles 28 to 30 and 110 T.F.E.U., with the consequence that the Treaty articles dealing with quantitative measures are excluded.[70] What distinguishes customs duties and charges, having an equivalent effect to customs duties [hereinafter C.E.E.], from internal taxation is their operative event. According to the Court's definition, a C.E.E. is a "*pecuniary charge. . .imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier, and which is not a custom's duty in the strict sense* [. . .]".[71] By contrast, an internal tax is a charge "under a general system of internal

[66] *See* De Sadeleer, *supra* note 48, at 230-31.
[67] *Id.* at 238.
[68] *Id.* at 239.
[69] *Id.*
[70] *Id.* at 240.
[71] *See* Case C-24/68, Comm'n v. Italy, 1969 E.C.R. 193, ¶ 9.

charges applying systematically to domestic and imported products according to the same criteria".[72]

2.1.1.1.1. ARTICLES 28 TO 30 T.F.E.U.

The Customs Union is a fundamental part of the Union and is based on three things: a single external border; a single customs tariff; and a common legislative framework.[73] Article 28 T.F.E.U. provides that the Union shall comprise a customs union covering all trade in goods including the prohibition between Member States of customs duties on imports and exports; and of all charges having equivalent effect; and the adoption of a common customs tariff in their relations with third countries. Article 3 T.F.E.U. provides that the Union has exclusive competence in this area. It is therefore not open to Member States to legislate in this area. Any possibility of introducing a tariff regime, whether protective of the environment or not, is thereby excluded.

The Court has always applied the tariff prohibition rigorously, particularly, because of the automatically discriminatory and protectionist nature of these types of charges.[74] From the outset of its jurisprudence, the Court decided that the goal of protecting the environment cannot in any way justify these charges.[75] And, in addition, the revenues collected by customs tariffs used to finance, or in some way carry out, a national environmental policy, have no bearing on the classification of a customs tariff.[76] In principle, even the smallest charges are prohibited and the form, description and method of collection of the charge do not affect its classification as a C.E.E.[77]

The Court's rigorous approach is illustrated in Case C-72/03.[78] The municipality of Carrara in Italy had imposed a tax on the export of marble extracted on its territory with a rate that changed according to the weight of the marble. The Court declared such a tax incompatible with Article 30 T.F.E.U. because its chargeable event was the crossing of the municipality's borders by the marbles. It specified that the fact that the tax was levied to compensate for damage caused to the municipality by the marble industry could

[72] *See* Case C-130/96, Fazenda Pública v. Solisnor-Estaleiros Navais SA, 1997 E.C.R. I-5053; Case C-28/96, Fazenda Pública v. Fricarnes SA, 1997 E.C.R. I-4939, ¶ 21.
[73] *See* Marie Lamensch et al., European Tax law, Volume II 3 (Wolters Kluwer ed., 2018) (Neth.).
[74] *See* Catherine Barnard, The Substantive Law of the EU 42-45 (Oxford University Press ed., 6th ed. 2019) (UK).
[75] *See* Case 2-69, Diamantarbeiders, 1969 E.C.R. 211, ¶ 19; Case 29/72, S.p.A. Marimex v. Italian Fin. Admin., 1972 E.C.R. 1309, ¶ 7.
[76] *See also* De Sadeleer, *supra* note 48, at 242.
[77] *See also id.*
[78] *See* Case C-72/03, Carbonati Apuani Srl v. Comune di Carrara, 2004 E.C.R. I-8027.

not alter the solution adopted. Therefore, a C.E.E. cannot be justified, even if the money collected is used to maintain the urban or natural environment of a municipality.

Another Italian case before the Court concerned a tax imposed on the consumption of natural gas (from Algeria) on Italian territory.[79] A law of the Sicilian region provided for a tax on the ownership of gas pipelines that transported methane gas through Sicilian territory. The basis of the tax was the volume of the pipelines: i.e., the more methane gas was transported, the more was paid. For the Commission, the tax constituted a C.E.E. despite its environmental purpose. On the other hand, the Italian Government argued that the precautionary principle (a general principle of law contained in the Treaties) allowed for the introduction of such a tax despite the provisions of Article 30 T.F.E.U. The Court, having noted that the environmental tax was intended to finance investments aimed at reducing and preventing risks to the environment, declared it incompatible with that Article. Such is the strength of the prohibition on the use of C.E.E.s to achieve environmental objectives.

The Court recognizes only two exceptions to the application of Articles 28 and 30 T.F.E.U.[80] First, if a pecuniary charge is imposed as consideration for a service rendered to the importer, such a service must confer a specific and certain benefit on the individual importer, as a benefit in the public interest is considered too general and uncertain by the Court.[81] For example, a service provided by public authorities for the recycling of waste generated by an importer may be considered to fall within this first exception - provided that the service is not mandatory and the amount charged is proportionate to the volume of waste generated by the importer.

The other exception to Articles 28 and 30 T.F.E.U. is the payment for an inspection made mandatory by Union law. In environmental matters, Article 29 of Regulation 1013/2006/EC on the shipment of waste between Member States provides that in the case of shipments of waste within the Union, appropriate and proportionate administrative costs for the implementation of notification and monitoring procedures and the usual costs of appropriate analyses and inspections may be charged, inter alia, to the waste producers.

The two exceptions to Article 30 T.F.E.U. were addressed jointly in Case C-389/00.[82] In Germany, exporters of waste, before exporting, had to pay a contribution to the solidarity fund for the return of waste to Germany. This fund was to be used to implement Germany's obligations under the Basel Convention, which stipulates that in

[79] *See* Case C-173/05, Comm'n v. Italy, 2007 E.C.R. I-4917.
[80] *See* Maitrot De La Motte, *supra* note 49, at 102-06.
[81] *See* Case C-305/17, FENS v. Slovak Rep., ECLI:EU:C:2018:986, ¶ 43 (Dec. 6, 2018).
[82] *See* Case C-389/00, Comm'n v. Germany, 2003 E.C.R. I-2001.

the event of illegal exporting or non-compliance with a waste export contract, the illegally exported waste had to be re-imported into Germany. The German Government considered the fee to be adequate remuneration for services actually and individually rendered to economic operators. According to the Court, the fact that the charge was determined exclusively on the basis of the type and quantity of waste to be shipped by each exporter meant that no individual service was rendered to the operators. In addition, the economic operators required to pay the fee did not derive any actual, individual benefit from the activities financed by the fund. With regard to Article 29 of Regulation 1013/2006/EC, the Court decided that this Article could not be used to impose charges on operators that are not justified or are not strictly related to the administrative costs incurred for the implementation of the procedures of notification and supervision of waste shipments.

2.1.1.1.2. ARTICLE 110 T.F.E.U.

While C.E.E.s are imposed unilaterally and hit goods because of the crossing of a border, Article 110 T.F.E.U. applies to taxes that are imposed within a Member State on both local and imported products.[83] A tax measure cannot fall simultaneously within the scope of Articles 28 to 30 T.F.E.U. and Article 110 T.F.E.U., since the two prohibitions are aimed at different tax charges altogether.[84]

Under Article 110 T.F.E.U., a Member State may adopt charges on foreign products provided it does not discriminate and the charge does not have a protectionist effect.[85] As Craig points out, Article 110 was inserted into the Treaty to ensure that competition between local and imported products is not distorted once the imported product enters the market of a Member State, and after having gone past the "operational event" that normally triggers C.E.E.s.[86]

According to the Court, the purpose of Article 110 T.F.E.U. is "[to eliminate] all forms of protection which might result from the application of discriminatory internal taxation against products from other Member States, and to guarantee absolute neutrality of internal taxation as regards competition between domestic and imported products".[87] It is therefore obvious that an environmental tax is only allowed if it is neutral, although neutrality often turns out to be a difficult notion to seize and apply on a case-by-case basis.

[83] *See* De Sadeleer, *supra* note 48, at 243.
[84] *See* Joined Cases C-78-83/90, Compagnie Commerciale de l'Ouest, 1992 E.C.R. I-1847, ¶ 22.
[85] *See* De Sadeleer, *supra* note 48, at 243.
[86] *See* P. Craig & G. De Burca, Eu Law: Text, Cases and Materials 682 (Oxford University Press ed., 7th ed. 2020).
[87] *See* Case 356/85, Comm'n v. Belgium, 1987 E.C.R. 3299, ¶ 6.

2.1.1.1.2.1. SIMILAR PRODUCTS

The first Paragraph of Article 110 T.F.E.U. prohibits discrimination between "like" products, while its second Paragraph prohibits any taxation of an imported product that is intended to "indirectly protect" other products. It is important to note that under Article 110 T.F.E.U., once the discriminatory or protectionist character of an internal tax is demonstrated, no justification is allowed by the text of the Treaty.

Let us start with the first Paragraph which prohibits Member States from taxing products from other Member States more heavily than similar local products.[88] In order to apply this Paragraph, it is necessary to find a product manufactured in the importing Member State that can present an alternative choice to the consumer by fulfilling the same function as the imported product.[89] If no such local production exists at all, the tax measure will not fall under Article 110 T.F.E.U., but it remains to be seen whether it is of such a nature as to be prohibited by Article 34 T.F.E.U. (see Sub-Sub-Subparagraph 2.1.1.2. below on non-pecuniary barriers). Once the "like" product is identified, the importing Member State must tax the imported product in the same way as the like local product. This rule extends not only to the rate of tax, but also to the provisions relating to the basis of taxation and the procedures for collection of the tax.[90]

One question that arises is whether similar products may be subject to a different tax rate, depending on their essential characteristics and their mode of production in light of the objective of environmental protection. It seems that the Court has accepted this possibility as an exception to the general prohibition imposed by Article 110 T.F.E.U.[91] In Case C-213/96,[92] Finland taxed domestically produced electricity at different rates in accordance with its mode of generation. On the contrary, it charged imported electricity at a single rate regardless of how it was generated. The differentiation in tax rates was based entirely on environmental considerations. At Paragraphs 30 and 31, the Court states that:

> . . .in its present state of development Community law does not restrict the freedom of each Member State to establish a tax system which differentiates between certain products, even products which are similar within the meaning of the first paragraph of Article [110 T.F.E.U.], on the basis of objective criteria, such as the nature of the

[88] *See* De Sadeleer, *supra* note 48, at 251.
[89] *See id.* at 252.
[90] *See* Case 55/79, Comm'n v. Ireland, 1980 E.C.R. 481.
[91] *See* Maitrot De La Motte, *supra* note 49, at 123.
[92] *See* Case C-213/96, Outokumpu Oy, 1998 E.C.R. I-1777.

> raw materials used or the production processes employed. Such differentiation is compatible with Community law, however, only if it pursues objectives which are themselves compatible with the requirements of the Treaty and its secondary legislation, and if the detailed rules are such as to avoid any form of discrimination, direct or indirect, against imports from other Member States or any form of protection of competing domestic products.
>
> Article [110 T.F.E.U.] therefore does not preclude the rate of an internal tax on electricity from varying according to the manner in which the electricity is produced and the raw materials used for its production, in so far as that differentiation is based, as is clear from the actual wording of the national court's questions, on environmental considerations.

On the merits, the Finnish tax infringed Article 110 T.F.E.U. because it failed to give importers of electricity the opportunity to benefit from the same differentiated system of taxation which applied to domestic production. The fact that it was difficult in practice to know how electricity from elsewhere was produced could not justify the difference in treatment imposed by the Finnish measure. The case is important for the principle it lays down. While it is possible for Member States to impose a heavier tax on a production method with a higher carbon footprint, Finland should at least have given the importer the opportunity to prove how the imported product was produced.[93] In this manner, the Court relayed the message that environmental taxation should be treated as any other form of taxation, and should not, in any case, be used as a tool to protect or promote local production. Taking the environmental protection objective of the measure as its point of reference, it came to the logical conclusion that imported electricity having a lower carbon footprint is equally beneficial to the environment as domestic electricity having the same qualities. The Finnish tax policy was therefore incoherent in not allowing imported electricity to benefit from a lower tax rate.

The Court has been called upon to assess several taxes of an environmental nature in its judgments on the registration of cars. In principle, an excise duty imposed on passenger cars and levied on the basis of various operative events having no connection with the product crossing borders between Member States (such as the registration or the intra-Community acquisition of the vehicle) falls within the scope of Article 110 T.F.E.U.[94] Furthermore, there is nothing under E.U. law to prevent the

[93] *See id.* ¶ 39.
[94] *See* Case C-313/05, Brzeziński, 2007 E.C.R. I-513, ¶¶ 22-24.

adoption of an excise duty with a different rate depending on the pollution emitted by a car. However, in accordance with the principle that an excise duty may not be imposed on products originating in other Member States more heavily than on similar domestic products,[95] an excise duty system must be designed in such a way that it does not favour the internal sale of vehicles that are already on the market of a Member State. Such a principle has greatly irritated those Member States wishing to protect their own second-hand markets in passenger vehicles.

In Case C-290/05, a Hungarian registration tax on used cars from other Member States based on their environmental classification, irrespective of their value and length of time in circulation, was declared incompatible with Article 110 T.F.E.U.[96] The Court clarified that a registration tax can be calculated based on the type of engine, engine capacity and environmental classification of the car. There is no requirement that the amount of the tax be strictly related to the price of the vehicle. However, it held that while a new vehicle on which registration tax was paid in Hungary could be resold at a percentage of its original value, including the residual amount of registration tax, a vehicle of the same model, age, mileage and other characteristics, purchased second-hand in another Member State and registered in Hungary, was subject to registration tax at the rate of 100%. Such a tax had discriminatory effects between second-hand vehicles already registered in Hungary and others that were imported after their initial sale in another Member State. The environmental objectives pursued by the Hungarian tax were questionable at best.

In Case C-402/09,[97] the Court recalls that Article 110 T.F.E.U. obligates each Member State to select and adapt taxes on motor vehicles in a way that does not have the effect of favouring the sale of domestic second-hand vehicles and thus discouraging the importation of similar second-hand vehicles. In this case, cars imported into Romania were taxed at the time of registration, while cars already on the Romanian market were exempt from such tax. Whether the registration tax pursued environmental objectives was irrelevant, since the system of registration was outright discriminatory. But this did not discourage Romania. In Case C-263/10,[98] a Romanian emergency ordinance had obliged a Romanian national to pay a new pollution tax when registering his vehicle in Romania. This tax was higher than the other pollution tax that was previously in force. The Court clarified that Article 110 T.F.E.U. does not prevent Member States from

[95] *See id.* ¶ 29.

[96] See Case C-290/05, Nádasdi and Németh, 2006 E.C.R. I-10115, ¶¶ 58-59: the Court accepts that Article 401 of the V.A.T. Directive confers on Member States the power to adopt indirect taxes like stamp duty and excise on the registration of vehicles within their territory.

[97] *See* Case C-402/09, Tatu v. Statul roman, 2011 E.C.R. I-02711.

[98] *See* Case C-263/10, Nisipeanu v. Direcţia Generală a Finanţelor Publice Gorj, 2011 E.C.R. I-00097.

changing the rate or the basis of assessment of existing taxes. Moreover, the introduction of a new tax rate cannot be regarded as having a discriminatory effect between situations previously constituted and those which arose after the entry into force of the new rate. In this case, the Romanian ordinance had the effect of taxing imported used cars, while similar vehicles offered for sale on the domestic market were not taxed at all. According to the Court, Romania should have achieved its environmental protection objectives by taxing any similar vehicle that was put into circulation on its territory, regardless of its origin. Such a tax would be more effective, more consistent with the environmental objectives sought out to be achieved and would prevent all distortions within the national used car market.

Following Cases C-402/09 and C-263/10, Romania had introduced a new environmental tax on motor vehicles, this time it was called the "environmental stamp duty". A national entitled to a refund of the pollution tax he had previously paid when registering his vehicle in Romania was now obliged to pay this new environmental stamp duty (the refund was a direct result of the pollution taxes incompatibility with the Treaties). This obligation to pay subsisted even in the event that a Romanian court had ordered the restitution of the pollution tax previously paid. What Romania essentially did was create a new system which set-off the unduly paid "environmental" tax with a novel obligation to pay the environmental stamp duty. For the Grand Chamber,[99] such a system rendered ineffective the obligation to refund the pollution tax collected in violation of Union law. This was likely to perpetuate the discrimination for which Romania had already been condemned by the Court. According to the Grand Chamber, the reimbursement of an unduly collected environmental tax through a system of set-off with a new environmental tax (introduced after the repeal of the old tax) was illegal. Certain selective exemptions were debated in Case C-221/06. An Austrian law imposed a tax (*Altlastenbeitrag*) on the deposit of waste in a landfill, but exempted it when the waste originated from the securing or rehabilitation of contaminated sites listed in the country's official atlas. No foreign sites could be listed in the atlas, with the consequence that waste from abroad could not benefit from the exemption. According to Advocate General Sharpston, the differentiated tax treatment of the products concerned was based on an objective criterion, which was whether the waste was produced in the course of securing or cleaning up potentially contaminated sites listed in the Austrian contaminated sites register. However, the tax was structured in such a way as "to discourage the safeguarding and/or rehabilitation of sites in other Member States as compared with sites in Austria".[100] The Court recalled that Article 110(1) T.F.E.U. is

[99] *See* Case C-331/13, Nicula v. Administraţia Finanţelor Publice, ECLI:EU:C:2014:2285 (Oct. 15, 2014).

[100] *See* Case C-221/06, Stadtgemeinde Frohnleiten v. Bundesminister für Land-und Forstwirtschaft, 2007 E.C.R. I-09643.

violated when the taxation of the imported product and the taxation of the like domestic product are calculated differently, resulting, even if only in certain cases, in higher taxation of the imported product.[101] A tax such as the *Altlastenbeitrag*, which did not exempt the deposit of waste from rehabilitated sites outside Austria, was likely to hit an imported product harder than a domestic product. The Austrian Government's argument that it was difficult to identify rehabilitated contaminated sites in other Member States found no favour with the Court.[102]

At this stage of our analysis, we must therefore conclude that there is nothing to prevent Member States from adopting a system of environmental taxation that imposes a heavier burden on products that are harmful to the environment and that encourages consumers to change their habits towards more environmentally friendly purchases,[103] provided this system does not discriminate between local and imported similar products.

2.1.1.1.2.2. NON-SIMILAR PRODUCTS

As for the second Paragraph of Article 110 T.F.E.U., this applies when the local product and the imported product are not similar, but "in competition". In such a scenario, the Member State may apply different taxes so long as this difference in treatment does not constitute a form of indirect protection of local production. The stark contrast with Paragraph 1 is that differential taxation is *a priori* permitted in the case of competing products. It is the degree and overall effect of the differentiation which falls to be controlled by the Court. De Sadeleer notes that there is no single Court ruling applying Article 110(2) T.F.E.U. to an environmental tax.[104]

2.1.1.1.2.3. ARTICLES 30 AND 110 T.F.E.U.: WHAT DISTINGUISHES THEM?

Having examined the respective elements and scope of Articles 30 and 110 T.F.E.U., a question arises as to the difference in application between the charges prohibited by the two Articles.[105] The Court addressed this issue in Case C-213/96.[106] In Finland, a tax was applied to domestic electricity, the rate of which depended on the type of electricity

[101] *See id.* ¶ 49.
[102] *See id.* ¶ 70.
[103] *See* De Sadeleer, *supra* note 48, at 250-51.
[104] *See id.* at 254.
[105] See F. Martucci, Droit du marche interieur de l'Union europeenne (Presses Universitaires de France, 2021): while charges having an equivalent effect to customs tariffs are strictly prohibited even if neutral, internal taxes are, in principle, compatible with the internal market.
[106] *See* Case C-213/96, *supra* note 92.

production. There were three rates in total: one for nuclear electricity, one for hydroelectricity, and one for electricity from other sources. Electricity produced by generators with a capacity of less than two megawatts was exempt. As for imported electricity, Finland applied a single tax rate, regardless of its mode of production. While the Finnish legislator had set the tax rate with environmental considerations in mind, he failed to square the circle. However, the logical problem which arose was whether to tackle this under Article 30 or Article 110 T.F.E.U.

First, the Court noted that imported electricity and domestic electricity were taxed under the same tax regime. The tax was levied by the same authority, regardless of the origin of the electricity, and according to procedures governed by the general legislation on the taxation of products. The fact that the tax due by the importer was payable at the time of importation of the electricity did not mean that the tax was imposed on the product due to its crossing a border. Indeed, the Court clarified that the tax was levied at the moment of the product's commercialization because the production and importation of electricity amounted to the same thing, i.e., the arrival of the electricity on the national distribution network.[107] The Court declared the Finnish tax contrary to Article 110 T.F.E.U. stating that the fact that the origin of the goods was decisive for the amount of tax to be levied did not automatically lead to the application of Article 30 T.F.E.U.

The distinction between Articles 30 and 110 T.F.E.U. was again discussed in the Court's case law dealing with tax regimes that earmarked sums collected for use by environmental protection funds.[108] In Cases C-78-C-83/90,[109] sums collected through the imposition of a parafiscal charge on certain petroleum products were allocated to an Energy Savings Agency, which was to use them to finance measures to encourage energy savings or to encourage the rational use of insufficiently exploited energy resources. The question was whether the parafiscal charge was prohibited by Article 30 or Article 110 T.F.E.U. The Court answered that if the sums collected by a tax on petroleum products are allocated in such a way as to offset, fully, the burden borne by a national product when it is placed on the market, the tax will be contrary to Article 30 T.F.E.U. If, on the other hand, the sums collected from a tax on petroleum products are allocated in such a way as to offset only part of the burden on the national product, the tax will be evaluated under Article 110 T.F.E.U.[110]

[107] *See id.* ¶ 25; see also Case C-305/17, FENS v. Slovak Rep., ECLI:EU:C:2018:986, ¶ 43 (Dec. 6, 2018), where the Court clarified that a tax on the use of the electricity network was caught by Article 30 T.F.E.U. when it consisted in two distinct charges which were levied upon importers and producers of electricity respectively.
[108] *See* Maitrot De La Motte, *supra* note 49, at 101.
[109] Joined Cases C-78-83/90, *supra* note 84, at ¶ 22.
[110] *See* Case C-517/04, Koornstra, 2006 E.C.R I-5015.

2.1.1.2. NON-TARIFF BARRIERS

Articles 34 to 36 T.F.E.U. deal with quantitative restrictions and measures having an equivalent effect to quantitative restrictions [hereinafter M.E.E.Q.R.s]. These provisions apply to physical, administrative and technical barriers that prevent the importation of products for other Member States. The case law in this area is voluminous, so a full description of it is beyond the scope of this work.

This being the case, a distinction must, at least, be made between internal taxation and M.E.E.Q.R.s. In Case C-47/88, the Court clarified that in the complete absence of local production that can be considered "similar to" or "in competition" with an imported product, Article 110 T.F.E.U. does not apply to a tax charge.[111] It completed its logical discourse by saying that, despite this absence, there was nothing to prevent such a tax burden from being assessed in the light of Article 34 T.F.E.U. So this begs the question: what does an environmental charge do that is not in the nature of an internal tax but in the nature of a M.E.E.Q.R. look like?

It seems that the Court has in mind particularly intense tax burdens with a rate so high, or a mode of collection so burdensome, that it would compromise the free movement of goods within the internal market.[112] While Article 110 T.F.E.U. does not impose any limit or sanction on the rate applied to an imported product, Article 34 T.F.E.U. could be invoked in the case of a rate that is so high that any marketing of the imported product on the market of a Member State is no longer possible in practice. This idea was initially taken up by Advocate General Jacobs in his opinion in Case C-383/01.[113] He concludes that it appears to be incompatible in principle with the objectives of the internal market for a Member State to tax certain imported goods to such an extent that the flow of intra-Community trade is significantly affected.[114] In this case, the Court concluded that a tax of 200% on the price of new cars registered in Denmark did not constitute a M.E.E.Q.R. since it did not affect the free movement of cars between Denmark and the other Member States.[115]

Several observations must be made at this stage. The words used by the Court are well nuanced. It states very clearly that the rate of the (environmental) tax must be such to jeopardise the free movement of the imported product: is a mere restriction or reduction in the flow of imports of a product sufficient for Article 34 T.F.E.U. to apply? On the face of it, what is needed is a rate that has such a deterrent effect that any access of the

[111] Case C-47/88, Commission v. Denmark, 1990 E.C.R. I-04509.
[112] *Id.* ¶¶ 12-13.
[113] Case C-383/01, De Danske Bilimportører v. Skatteministeriet, 2006 E.C.R. I-04945.
[114] Opinion of Advocate General Jacobs in Case C-383/01, E.C.R. I-6065, ¶ 75 (Feb. 27, 2003).
[115] Case C-383/01, *supra* note 113, at ¶ 42.

product to the market of the importing member state will be rendered illusory. In other words, the tax rate must be such as to prohibit consumers from purchasing the product. Simply rendering its price less attractive will not suffice. De Sadeleer also notes that most eco-taxes act as incentives rather than disincentives; they encourage consumers to change their behaviour by lowering the costs of certain products considered less harmful to the environment.[116] It is, therefore, difficult to see how Article 34 T.F.E.U. can apply to an ecotax that, instead of hindering the marketing of an environmentally harmful product, facilitates the sale of a less harmful product. However, a recent judgement by the Grand Chamber may throw fresh light on the question of charges and M.E.E.Q.R.s. Indeed, that Court condemned Germany for imposing an infrastructural charge that mainly affected owners of vehicles registered in other Member States, even though the charge amounted to about 100 euros per year. Such a fee was found to hinder market access for products from other Member States and was considered a M.E.E.Q.R.[117]

We can close the debate on non-tariff barriers to trade created by certain ecotaxes by citing a very peculiar case which came before the Court. In Case C-13/96, the Belgian Federal Government introduced an ecotax on disposable articles. For purposes of better monitoring, all containers or products subject to the ecotax had to bear a distinctive mark indicating the amount of environmental tax payable on the product upon its release on the market. The Court considered that the national measure laying down the obligation to affix such a distinctive mark constituted a technical regulation.[118] (This is within what is now Directive (EU) 2015/1535 on the notification of technical regulations to the Commission).[119] It therefore had to be notified to the Commission prior to its adoption and failure to do so would oblige the national court to disapply it.

[116] De Sadeleer, *supra* note 48, at 250.
[117] *See* Case C-591/17, Austria v. Germany, ECLI:EU:C:2019:504, ¶ 127 (June 20, 2019).
[118] Case C-13/96, Bic Benelux SA v. Belgian State, 1997 E.C.R I-01753, ¶ 26.
[119] Directive 2015/1535, of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, art. 5, 2015 O.J. (L241) 1.

2.1.2. FREE MOVEMENT OF SERVICES

Article 110 T.F.E.U. only protects goods, and its scope does not extend to services.[120] But Article 56 T.F.E.U. enshrines the freedom to provide services as a fundamental freedom and this article has had (albeit rarely) some impact on the design of environmental tax measures.

In one case, the Court ruled that a Belgian municipal tax on antennas violated Article 56 T.F.E.U. This tax was intended to reduce the number of antennas within a municipality and preserve the quality of the environment in the area. However, the Court ruled that the tax constituted an obstacle to the reception of television broadcasts because it hit service providers (broadcasters) established in other Member States more heavily,[121] and was also disproportionate, since it went beyond what was necessary to control the proliferation of antennas. The Court suggested that the municipality could have instead adopted regulatory requirements concerning the size of the antennas, and the location and manner of their placement.[122]

This case demonstrates two things. First, an environmental tax which impacts the activities of local and foreign service providers in equal degree would have been accepted by the Court as a legitimate measure restricting the freedom to provide services.[123] Secondly, the use of tax tools to regulate the provision of certain services could be considered a risky choice because of their cumbersome nature. Of course, much will depend on the base and rate of the tax, but the Court seems to have indicated a preference for "milder" regulatory tools.

In a similar manner, the Court has ruled that a tax exclusively levied on natural and legal persons, having their domicile outside the territory of Sardinia, for each stopover made by their aircraft and pleasure boats, was an obstacle to the free provision of services. Such a tax could not be logically justified on the basis of environmental protection, since aeroplanes and boats pollute independently of the tax residency of their operators.[124] A more coherent approach would have been to do away, entirely, with the tax residency criteria and simply tax the presence of aircraft and pleasure boats once they entered the particular locality.

[120] Maitrot De La Motte, *supra* note 49, at 110-11.
[121] *See* Case C-17/00, De Coster, 2001 E.C.R. I-9445, ¶ 31.
[122] *Id.* ¶ 38.
[123] *See* Joined Cases C-544-545/03, Mobistar et Belgacom Mobile, 2005 E.C.R. I-07723, ¶ 29, 31.
[124] *See* Case C-169/08, Presidente del Consiglio dei Ministri v. Regione Sardegna, 2009 E.C.R. I-10821, ¶ 44.

2.2. THE COMPATIBILITY OF ENVIRONMENTAL TAXES WITH SECONDARY LEGISLATION

In the first Paragraph of this Section (Paragraph 2.1.), we saw how the fundamental freedoms of the internal market can affect the design of environmental taxes. In this second Paragraph, we deal with the principal acts of secondary legislation knowing that the principles contained in Articles 30, 34 and 110 T.F.E.U. apply only in the absence of a total harmonisation of internal market rules.[125] It is therefore essential for the readers to familiarise themselves with the regulations and directives that govern certain aspects of indirect taxation within the Union. They should do so bearing in mind that a Member State wishing to introduce an environmental tax must also comply with the provisions of these legislative acts. In the realm of indirect taxation, the Union has adopted, among others, acts harmonising V.A.T. (Subparagraph 2.2.1.) and excise duties on energy products and electricity (Subparagraph 2.2.2.). It is also in the process of adopting a proposal for a regulation on a carbon border adjustment mechanism (Subparagraph 2.2.3.).

2.2.1 V.A.T. DIRECTIVE

The V.A.T. Directive establishes the common system of value added tax within the European Union.[126] V.A.T. is a general consumption tax which is imposed, in principle, on supplies of goods and services made by a taxable person.[127] It is always assessed strictly on the price of the goods and services sold (excise taxes being calculated according to the quantity/volume of goods and services sold).[128] V.A.T. rates cannot be set unilaterally by Member States.

The Commission had initially considered introducing a system of V.A.T. rates that integrate environmental considerations.[129] The economic consulting firm, Copenhagen Economics, had published a report evaluating the effects of such a measure to reduce greenhouse gases.[130] According to the report, a reduced V.A.T. rate is nothing more than a subsidy.[131] Another report published by the Directorate General for

[125] *See* Case C-305/17, *supra* note 81, ¶ 22.
[126] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, 2006 O.J. (L347) 1 [consolidated version as of 1 July 2022].
[127] Lamensch et al., *supra* note 73, at 58.
[128] *Id.*
[129] *Id.* at 268.
[130] *Id.* at 270.
[131] *Id.* at 271.

Taxation and Customs Union (DG TAXUD)[132] shows that a reduced V.A.T. rate on green energy consumption could have an incentivising effect on consumers. Yet, such a rate, even if capable of helping consumers convert their energy consumption patterns, would probably have no effect on total energy consumption.[133] Another problem created by a reduced V.A.T. rate is that the subsidy granted via the reduced rate is often offset by an excise tax imposed on the same energy product. These contradictions tend to occur when policy instruments are adopted or amended in a fragmented manner without proper evaluation of the already existing tax framework.

The current V.A.T. Directive allows Member States to apply one or two reduced rates exclusively to supplies of goods and services falling within the categories listed in Annex III.[134] Annex III does not contain any criterion authorising the application of a reduced rate on the basis of the intrinsic characteristics of goods and services sold, or of their mode of production or distribution. Member States are simply not permitted to derogate from the provisions of the Directive for environmental reasons.[135] In fact, according to an Italian study, no country in the Union applies a V.A.T. rate regime that is based on the sole objective of fighting climate change and biodiversity loss.[136]

In its special provisions on the application of reduced rates, the V.A.T. Directive allows Member States, after consulting the V.A.T. Committee, to apply a reduced rate to supplies of natural gas, electricity or district heating.[137] But the application of such a reduced rate must nevertheless respect the principle of tax neutrality. This principle prevents similar goods, which are in competition with each other, from being treated differently from the point of view of V.A.T.[138] It does not matter whether they are designed, produced, or distributed differently. Goods or services are similar when they have similar properties and meet the same consumer needs, based on a criterion of comparability of use, and when any existing differences do not significantly influence the decision of the average consumer to use one or another of the said goods or services.[139] If the application of different V.A.T. rates on two similar products or services is likely to affect consumer choice, this would indicate a violation of the principle of fiscal neutrality.[140] This principle of V.A.T. neutrality bears a close resemblance to the

[132] *Final Report of the Center for Social and Economic Research on a study on the economic effects of the current VAT rates structure,* TAXUD/2012/DE/323 (Oct. 17, 2013).
[133] *Id.* at 31-33.
[134] Council Directive 2006/112/EC, *supra* note 126, at art. 98.
[135] Case C-161/14, Commission v. United Kingdom, ECLI:EU:C:2015:355, ¶¶ 30-31 (June 4, 2015).
[136] Di Pietro, *supra* note 18, at 83-85.
[137] Council Directive 2006/112/EC, *supra* note 126, at art. 102.
[138] *See* Case C-515/20, B AG v. Finanzamt A, ECLI:EU:C:2022:73, ¶ 42 (Feb. 3, 2022).
[139] *Id.* ¶ 44.
[140] *Id.* ¶ 45.

idea, advocated by some, that laws should be technologically neutral and avoid having any bearing on the choice which consumers make when deciding whether to purchase similar goods fulfilling the same functions. In a radical proposal, authors Traversa and Timmermans advocate instead for a V.A.T. system based on the life cycle assessment of the product or service, thus accounting for the impacts (across the value chain) of an activity or good on matters such as the environment, global warming, soil erosion, ocean acidification, ecotoxicity, etc. . .[141] It is not hard to see that such a system, if adopted, will require a complete revision of our current understanding of technological neutrality.

Finally, some recent developments on V.A.T. rates are of note. In 2021, the Commission declared that an agreement was reached in Council to revise the V.A.T. Directive by inserting new products and services deemed less harmful to the environment into Annex III.[142] This insertion converges with the Commission's goal of achieving a European green transition. On 5 April 2022, the Council adopted Directive (EU) 2022/542 which brought about the following major changes:[143]

- As of 1 January 2030, Member States shall no longer apply reduced rates or exemptions with deductibility of V.A.T. paid at the preceding stage on fossil fuels and other goods with a similar impact on greenhouse gas emissions, such as peat and firewood. Reduced rates or exemptions with deductibility of V.A.T. paid at the preceding stage on chemical pesticides and chemical fertilisers shall equally cease to apply, but this time from 1 January 2032;

- Furthermore, the following changes have been made to Annex III:

1. The supply and installation of solar panels on and adjacent to private dwellings, housing and public and other buildings used for activities in the public interest may benefit from a reduced rate of V.A.T.;

2. The supply of bicycles, including electric bicycles, and their repair, as well as the supply of services relating to the transport of passengers may benefit from a reduced rate of V.A.T.;

3. The supply of electricity, district heating and district cooling, and biogas produced from renewable materials listed in Directive (EU) 2018/2001 of the European

[141] Edoardo Traversa & Benoît Timmermans, *Value-Added Tax (VAT) and Sustainability in the European Union: A Radical Proposal Design Issues, Legal Aspects, and Policy Alternatives*, 49 INTERTAX 871, 876-78 (2021).

[142] European Commission Press Release QANDA/21/6609, Questions and Answers: Agreement on new rules governing VAT rates (Dec. 7, 2021).

[143] Council Directive 2022/542 of April 5, 2022, amending Directives 2006/112/EC and 2020/285 as regards rates of value added tax, 2022 O.J. (L 107).

Parliament and the Council on renewable energy sources may benefit from a reduced rate of V.A.T.;

4. Natural gas and wood used as firewood may benefit from a reduced rate of V.A.T. up until 1 January 2030;

5. The supply and installation of highly efficient low emissions heating systems that respect European regulations may benefit from a reduced rate of V.A.T.

2.2.2. ENERGY TAX DIRECTIVE

In 1992, the Commission presented a proposal to the Council for a directive obliging Member States to introduce a tax on carbon dioxide emissions and energy consumption.[144] The proposal was not adopted due to a lack of consensus among Member States in the Council.[145] In a 2001 paper,[146] the Commission declared that a lack of harmonisation in this sector could lead to confusion, since it was still possible for Member States to create several taxes with different bases and rates. Such a situation could undermine the proper functioning of the internal market, creating distortions in competition and in the prices of energy products.

Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity was adopted on 27 October 2003.[147] In its second premise, the Directive states that the absence of Community provisions imposing a minimum level of taxation on electricity and energy products other than mineral oils could be detrimental to the proper functioning of the internal market. The aim of the Directive is therefore to set a minimum level of taxation at Community level for energy products such as electricity, natural gas, and coal.[148] Having ratified the Kyoto Protocol, the Union wanted to use the taxation of energy products as an additional tool to achieve its objectives.[149] However, the Directive does not bring about a total harmonisation of the field, leaving Member States free to define and implement policies adapted to their national contexts.[150]

Article 1 of the Directive provides that Member States shall tax energy products and electricity in accordance with the Directive. The following are considered to be energy products among others: vegetable oils used as fuel or motor fuel, hydrocarbons, methanol

[144] *Proposal for Council Directive introducing a tax on carbon dioxide and energy,* COM (92) 226 final (June 2, 1992).
[145] Lamensch et al., *supra* note 73, at 267.
[146] *Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee, Tax policy in the European Union - Priorities for the years ahead*, at 8-9, COM (2001) 260 final (July 14, 2021).
[147] Council Directive 2003/96, *supra* note 55.
[148] *Id.* at preamble 4.
[149] *Id.* at preamble 7.
[150] *Id.* at preamble 9.

which is not of synthetic origin and where it is intended for use as fuel, and electricity falling within C.N. code 2716.

When intended for use, offered for sale, or used as motor fuel or heating fuel, energy products other than those for which a level of taxation is specified in the Directive shall be taxed according to their use, at the rate applied to the equivalent fuel or heating fuel. The Directive does not apply to the taxation of certain activities, such as mineralogical processes or the dual use of energy products.[151]

With respect to the levels of taxation of energy products, Article 4(1) of the Directive provides that Member States may not impose rates below the minimum levels envisaged by the Directive. "Level of taxation" means the total amount of indirect taxes (excluding V.A.T.) levied, calculated directly or indirectly on the quantity of energy products and electricity at the time of release for consumption. Member States are free, in principle, to adopt differentiated rates of taxation, but only in the following cases and provided they respect the minimum levels of taxation laid down in the Directive:

- where the differentiated rates are directly related to the quality of the product
- where the differential rates are dependent on quantitative levels of consumption of electricity and energy products for heating,
- for the following uses: local public passenger transport (including cabs), waste collection, the armed forces and public administration, disabled persons, ambulances, between business and non-business consumption of fuels and electricity.

The different rates are mainly found in Article 7 of the Directive and vary according to the nature of the energy product. A distinction is drawn between commercial and non-commercial use of electricity in Article 10(1), which refers directly to Table C of Annex I. Above the minimum levels applied to electricity, Member States are free to determine the applicable tax base, provided they respect Directive (EU) 2020/262 (which replaced Directive 92/12/EEC on excise duties).

[151] *Id.* at art. 2(4).

Article 14 of the Directive sets out the mandatory exemptions. The following are exempt from tax across the Union:

- energy products and electricity used to generate electricity and electricity used to maintain the ability to generate electricity;[152]

- energy products supplied for use as fuel for air navigation other than private pleasure craft;

- energy products supplied for use as fuel for navigation in Community waters (including fishing), other than on board private pleasure craft, and electricity generated on board vessels.

In the case of air and sea transport, Member States may limit the scope of the exemptions to international and intra-community transport, and may even conclude bilateral agreements between themselves suspending these exemptions. In both cases, Member States may apply a level of taxation lower than the minimum level set by the Directive. It is important to note that any conditions adopted by Member States to ensure the implementation of mandatory exemptions must be proportionate.[153]

Articles 15 and 16 of the Directive contain a list of optional exemptions that Member States may adopt in their environmental policy. For example, Member States may apply total or partial exemptions or reductions in the level of taxation:

- to taxable products used in pilot projects for the technological development of less polluting products, or in the case of fuels from renewable resources;

- to electricity: of solar, wind, wave, tidal, or geothermal origin; of hydraulic origin produced in hydroelectric installations; produced from biomass or products derived from biomass; produced from methane emitted abandoned coal mines; or produced from fuel cells;

- energy products and electricity used for the transportation of people and goods by rail, metro, tram and trolley bus;

In Article 16, Member States may apply an exemption or a reduced rate to energy products that consist of or contain certain other specific products (such as

[152] *Id.* at art. 14(1)(a): to protect the environment, Member States may tax these products without having to respect the minimum rates of taxation.
[153] *See* Case C-355/14, Polihim-SS v. Nachalnik, ECLI:EU:C:2016:403, ¶ 59 (Jun. 2, 2016).

biofuel or biomass). Through these exemptions and reduced rates, Directive 2003/96/EC seeks to promote the use of energy products that are less polluting for the environment.

As to the chargeable event, this is governed by Article 6(1) of Framework Directive (EU) 2020/262, which provides that energy products shall be subject to excise duty either at the time of their production, including, where appropriate, extraction, in the territory of the Union, or at the time of their importation into the territory of the Union. In parallel, Article 21 of Directive 2003/96/EC provides that the energy tax for products for which no minimum rate is set in Annex I will be due at the time they are intended to be used, offered for sale, or used as motor fuel or heating fuel.

According to Article 6(2) of Framework Directive (EU) 2020/262, excise duty becomes chargeable at the time of release for consumption and in the Member State where the release for consumption takes place. For electricity and natural gas, there are specific chargeability rules contained in Article 21(5) of Directive 2003/96/EC, i.e., excise duty on these products becomes chargeable at the time of their supply by the distributor or redistributor. Where the release for consumption takes place in a Member State where the distributor or redistributor is not established, the tax applied in the Member State where the supply is made shall be chargeable to a consignee which must be registered in the Member State of supply. The tax is in any event levied and collected in accordance with the procedures laid down by each Member State.

In the final provisions of Directive 2003/96/EC, Article 25 provides that Member States shall inform the Commission of the levels of taxation they apply to energy products and electricity on 1. January of each year, as well as following any changes to their national legislation. In addition, Member States shall also inform the Commission of the measures they take with regard to: (i) differentiated rates; (ii) limitations on the scope of exemptions applicable to air and sea transport; (iii) total or partial exemptions under Article 15; and (iv) reduced rates in favour of energy-intensive firms and firms pursuing environmental protection objectives. Naturally, any tax measure constituting state aid must be notified to the Commission under Article 108 T.F.E.U.

The Directive's overall appraisal has not been satisfactory, as the Commission notes that it contributes only to a very limited extent to the environmental objectives of the Union.[154] In its current state, the Directive raises issues of incoherency with current climate and energy efficiency objectives since: (i) it taxes less carbon-intensive fuels in the same way as their fossil equivalent; (ii) it *de facto* favours fossil fuel use, allowing Member States to grant exemptions and reductions to these fuels, especially when used

[154] Proposal for a revised Energy Taxation Directive, *supra* note 43, at 8.

in energy intensive industries; and (iii) it is no longer creating a viable floor for taxation and the exemptions and reductions it permits have fragmented the internal market.[155]

It simply does not go far enough as it sets minimum tax rates too low, does not distinguish between renewable and carbon-intensive electricity sources, and does not consider the environmental performance of biofuels which are being disadvantaged due to taxation based on rates expressed per litre.[156] Moreover, the total exemption of aviation fuel (kerosene) has attracted the ire of environmental campaigners across Europe and it is doubtful whether such an exemption will survive the next round of environmental reforms.[157] The directive must therefore be revised to accommodate the latest technological advances and the Union's revised objectives since its adoption.

2.2.3. C.B.A.M. PROPOSAL

The current Commission proposal for a C.B.A.M. regulation merits brief mention in this paper.[158] In its "Fit for 55" package, the Commission describes C.B.A.M. as a climate action instrument that protects the integrity of the E.U. and global climate policy by reducing global greenhouse gas emissions.[159] It will be gradually introduced for a few selected products, ensuring that the same carbon price is paid by domestic and imported products, since non-discrimination is a requisite of W.T.O. rules.[160] According to the current compromise text of the C.B.A.M. proposal, the mechanism will apply to cement, electricity, fertilizers, iron and steel, aluminium, and hydrogen.[161] The C.B.A.M. Regulation is only effective if it is backed up by amendments to, among others, the Energy Taxation Directive, the Renewable Energy Directive and the European Union Emission Trading System [hereinafter E.U.-E.T.S.] Directive which all aim at steeper emission reductions to achieve the 2050 goal set by the Commission.[162]

This Regulation is crucial to maintain the coherence of the Union's environmental policy on the external plane, through the prevention of carbon leakage with a view of achieving the objectives of the Paris Agreement. The idea of a C.B.A.M. is

[155] *Id.* at 2-3.
[156] *Id.* at 8.
[157] *See* Thierry Vigoureux, *Aviation : l'Europe peut-elle imposer une taxe sur le kérosène ? [Aviation: can Europe impose a tax on kerosene?]* (Fr.), Le Point (May 5, 2019, 8:58 AM), https://www.lepoint.fr/economie/aviation-l-europe-peut-elle-imposer-une-taxe-sur-le-kerosene-15-05-2019-2312633_28.php#1.
[158] CBAM Proposal, *supra* note 60.
[159] Commission Communication Fit for 55, *supra* note 42, at 12.
[160] *Id.*
[161] Regulation of the European Parliament and of the Council establishing a carbon border adjustment mechanism (CBAM) – Compromise text, Annex I, 2022 2021/0214(COD).
[162] Commission Communication Fit for 55, *supra* note 42, at 6, 9.

to internalise the greenhouse gas emissions that are linked to the consumption of products imported from third countries. The mechanism is based on a system of declarations made by "declarants" that import any of the goods listed in Annex I into the Union, and all declarants must seek authorization before importing those goods.[163] Since the instrument used is a regulation, the C.B.A.M. will become immediately applicable in all Member States if and once adopted (even if a transitional period is envisaged that will run from 1 October 2023 and 31 December 2025 during which only a reporting obligation will apply).[164]

In its proposal, the Commission has decided in favour of a C.B.A.M. that is intrinsically linked to the E.U.-E.T.S. and not to a general carbon tax.[165] Indeed, the mechanism covers the same emissions as those regulated by the E.T.S.: carbon dioxide, nitrous oxide and perfluorocarbons.[166] One of the biggest issues of the proposal will be the determination of the volume of emissions that will be taken into account to define the applicable carbon price: will the mechanism take into account the emissions produced only during the production of the product, or will it cover all the emissions produced during the life cycle of the product?[167] Unfortunately, it seems that the Commission had initially opted in favour of the first solution[168] and the effect of this choice on international trade remains to be seen. However, the latest compromise text indicates that C.B.A.M. will also apply to indirect emissions, except in the case of products that benefit from financial measures to compensate for indirect emissions costs.[169] According to Pirlot, the mechanism as envisaged will reduce carbon leakage, but not eliminate it.[170]

Since the C.B.A.M. Regulation's legal basis is Article 192(1) T.F.E.U. it is not perceived by the Commission as a fiscal measure requiring unanimity for its adoption. However, there is a tendency in public debate to see C.B.A.M. as a tax on imports from third countries.[171] This does not change the fact that the text of the Regulation is intimately tied with the E.U.-E.T.S. regime. For instance, the price of C.B.A.M. certificates shall be the average of the closing prices of the E.U.-E.T.S. allowances on the common

[163] CBAM Proposal, *supra* note 60, at art. 4-6.
[164] *Id.* at art. 36.
[165] *See* Alice Pirlot, *Carbon Border Adjustment Measures: A Straightforward Multi-Purpose Climate Change Instrument?*, 34 J. Env't L. 25, 38 (2022).
[166] CBAM Proposal, *supra* note 60, at Annex I.
[167] Pirlot, *supra* note 165, at 39.
[168] CBAM Proposal, *supra* note 60, at Preamble 17.
[169] CBAM – Compromise text, *supra* note 161, at Annex IA.
[170] Pirlot, *supra* note 165, at 47.
[171] *See* G. Budo, What's in a name? The New European Commission Proposal for a Carbon Border Adjustment Mechanism 51-55 (2022) (M.A. thesis, College of Europe).

auction platform for each week.[172] Also, C.B.A.M. certificates that are to be surrendered in such a manner as to reflect the extent to which E.U.-E.T.S. allowances are allocated free of charge to installations producing the goods listed in Annex I within the Union.[173]

2.3. ENVIRONMENTAL TAX INCENTIVES UNDER THE UNION'S STATE AID REGIME

As seen throughout Section 2 of the paper, a tension exists between the Member States' will to define their own tax systems and their obligation to respect the Treaty Articles.[174] To a certain extent, one of the aims of Union law is to strike down fiscal obstacles that can undermine the functioning of the internal market. In this context, one of the Articles which takes centre stage is Article 107 T.F.E.U., which prohibits all financial aid to undertakings which distorts competition on the market.[175] In this sense, Member States have limited their tax sovereignty by allowing the Commission to control the financial aid they grant to undertakings on their territory.

For the sake of brevity, this Paragraph of the paper will not delve into the special rules relating to "support schemes" which Member States may apply to promote the use of renewable energy on their territory. However, it is good to note that Directive (EU) 2018/2001 on the promotion of renewable energy sources allows Member States to apply "tax exemptions or reductions or tax refunds" to reach the Union's emission targets.[176] Such support schemes shall "shall provide incentives for the integration of electricity from renewable sources in the electricity market in a market-based and market-responsive way, while avoiding unnecessary distortions of electricity markets as well as taking into account possible system integration costs and grid stability".[177]

In a similar manner, and as we have seen in the previous Paragraph, the Energy Taxation Directive both allows and obliges Member States to grant a wide variety of reductions and exemptions on energy products and electricity. However, tax advantages granted in accordance with the Energy Taxation Directive (as it currently stands) do not necessarily need to pursue the Union's emission targets.

[172] CBAM – Compromise text, *supra* note 161, at art. 21(1).
[173] *Id.* at art. 31.
[174] *See* J. Munier, La fiscalite environnementale et les aides d'Etat 7 (Editions universitaires europeennes ed., 2018).
[175] *See* I. Papadamaki, Les aides d'Etat de nature fiscal de l'Union europeenne 29 (Emile Bruylant ed., 2018).
[176] Directive 2018/2001, of the European Parliament and of the Council of 11 December 2018 on the Promotion of the use of Energy from Renewable Sources (recast), art 2(5), 2001 O.J. (L 328).
[177] *Id.* at art 4(2).

For the purposes of this Paragraph, however, it is worth noting that while Union secondary legislation (such as the Renewable Energy Directive and the Energy Taxation Directive) may specifically allow Member States to grant tax benefits to promote the use of cleaner energy (or to achieve different goals altogether), any such measures must conform with Article 107(1) T.F.E.U. This is a logical conclusion drawn from the constitutional principle that secondary legislation, and any measures adopted by Member States in virtue of it, must be compatible with provisions of primary legislation. The articulation between secondary legislation and primary legislation is evidenced, for instance, by the fact that aid in the form of reductions in environmental taxes granted under the Energy Taxation Directive must in principle fulfil the requirements of Article 107(3)(c) T.F.E.U., but may qualify for an automatic exemption under the General Block Exemption Regulation, provided that the provisions of Article 44 of that Regulation are fulfilled.[178]

In sum, should Member States grant tax benefits to fight climate change and environmental degradation by inducing a shift towards a circular economy,[179] then they must notify their decision to the Commission. The Commission will then consider whether the tax advantage granted constitutes aid within the meaning of Article 107(1) T.F.E.U. (Subparagraph 2.2.1.). If so, it must verify whether the tax advantage is compatible with the internal market, in accordance with paragraph 3(c) of the same Article (Subparagraph 2.2.2.). In this final Paragraph, we will therefore see how environmental tax incentives are treated under the Treaty provisions on state aid.

2.3.1. MATERIAL SELECTIVITY OF TAX ADVANTAGES PURSUING ENVIRONMENTAL OBJECTIVES

Article 107(1) T.F.E.U. prohibits "any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods". As we shall see, aid which takes the form of a selective environmental tax incentive will be caught by the general wording of Article 107(1) T.F.E.U. According to established case law, four conditions must be met for a tax benefit to be prohibited by this Article[180]:

1. there must be an intervention by the State or through state resources;

2. the intervention must be liable to affect trade between Member States;

[178] Council Directive 2003/96, *supra* note 55, at 6(5)(e).
[179] C.E.E.A.G., *supra* note 15, ¶¶ 1-4.
[180] Case C-431/07, Bouygues et Bouygues Télécom v Commission, 2009 E.C.R. I-2665, ¶ 102.

3. it must confer an advantage on the recipient;

4. it must distort or threaten to distort competition.

To guide our discussion, we would like to give a brief description of these conditions. With respect to the first condition, it should be noted that the Court has always adopted a broad notion of the criterion of imputability of aid to the State.[181] Thus, if an advantage causes a burden on the public finances, which may take the form of less revenue being generated, this advantage will be qualified as aid.[182] All tax reductions and exemptions and tax deferrals are therefore likely to be considered as aid.[183] Since tax advantages constitute a renunciation by a Member State of its own tax resources, this first condition is almost always met when a Member State offers tax advantages to firms on account of their less polluting activities.

The second condition is presumed to be met when the selectivity criterion of the fourth condition is also met.[184] The third condition, interpreted very broadly by the Court, is met when the recipient's economic position has improved as a consequence of the tax break, or when the recipient's economic position would have deteriorated had it not been for the tax advantage.[185]

Our discussion of Article 107(1) T.F.E.U. will therefore focus solely on *the fourth condition*, called the selectivity test, because much of the debate centering on the legality of environmental tax incentives depend on whether they can be classified as selective or not. According to the Court's case law, aid measures that are general in nature cannot be considered selective. For instance, under the latest Temporary Crisis Framework for State Aid following the Russian invasion of Ukraine, measures targeting commercial energy consumers do not constitute aid, provided they are of a general nature and take the form of general reductions in taxes or a reduced rate for the supply of natural gas.[186]

Rather, a measure is selective when it favours "certain undertakings or the production of certain goods over others which are in a comparable factual situation with regard to the objective pursued by the given tax scheme", except where "such differentiation results from the nature or general scheme of the system of charges."[187] In the Court's jurisprudence, a tax measure is qualified as selective when it departs from the general

[181] Papadamaki, *supra* note 175, at 19-21.
[182] *Id.* at 21.
[183] *Id.*
[184] Munier, *supra* note 174, at 9.
[185] *Id.*
[186] Communication from the Commission, Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia, at ¶ 28, COM (2022) 426/01 final (Mar. 24, 2022).
[187] Case C-T-399/11, Banco Santander v Commission, ECLI:EU:T:2014:938, 33, 36 (Nov. 7, 2014).

cadre de référence or reference tax system existing within a particular geographical setting. In other words, a tax break which has the effect of excluding a particular activity from general provisions which would, in the absence of that exclusion, have charged that activity to tax, would be considered selective.[188] In this sense, aid in the fiscal sector possesses the characteristic of breaking with the principle recognized by all the tax systems of the Member States, namely, that of equality before taxes. As a consequence of this breach of equality, economic operators come to benefit from differentiated treatment in the eyes of the law.[189]

According to Advocate General Tizzano, where a tax system provides an exemption in favour of certain taxpayers, there is a breach of formal equality.[190] In such a scenario, it is the legislator itself who binds the discretionary power of the tax authorities to grant that relief.[191] But the mere fact that a tax measure provides for differential treatment is not sufficient for that measure to be classified as selective. The departure from formal equality must also be accompanied by a departure from material equality among operators.[192] This latter criterion requires us to find a comparator to see whether economic operators in a factually and legally similar situation are treated differently. If the situation between two operators is similar, Article 107(1) T.F.E.U. dictates that they must be treated identically.[193]

During the Commission's analysis of the selectivity of a tax measure, the definition of the fiscal frame of reference takes on a critical role. More particularly, in the case of environmental taxation, the question which arises is whether a tax scheme, specially conceived by the legislator to achieve a given environmental objective, should be considered as an autonomous reference tax system or simply a derogation from the pre-existing and generally applicable tax provisions of a Member State. On this point, the Court has stated that the environmental purpose of fiscal measures is not sufficient to prevent qualification of those measures as aid.[194] However, it has admitted that a

[188] Papadamaki, *supra* note 175, at 105.
[189] *Id.*
[190] Opinion of Advocate General Tizzano in Opinion of Advocate General Tizzano in Case C-393/04, Air Liquide Industries Belgium, E.C.R. I-5293, ¶ 70-71 (June 15, 2006).
[191] Papadamaki, *supra* note 175, at 113-14.
[192] *Id.* at 119.
[193] *Id.* at 124.
[194] Case C-T-210/02, British Aggregates Association v. Commission, ECLI:EU:T:2012:110, ¶ 52 (July 19, 2012). In joint Cases C-106/09 P and C-107/09 P, Commission and Kingdom of Spain v. Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland, 2011 E.C.R. I-11113, ¶ 87; the Court recalled that Consolidated Version of the Treaty on the Functioning of the European Union art. 107(1) , May 9, 2008, 2008 O.J. (C 115) 47 does not distinguish between measures of State intervention by reference to their causes or their aims, but defines them solely in relation to their effects.

specific ecotax could act as a frame of reference when assessing whether certain exemptions from such a tax are selective.[195]

When assessing selectivity, a Member State may justify a measure granting differential tax treatment to undertakings if that measure falls within "the nature or general scheme" of the tax system it has created.[196] Differential treatment between operators may be particularly justified in light of the objectives and mechanisms serving as the founding principles of the system in question. For schemes involving ecotaxes, the environmental objectives of the system will be taken into account to determine whether derogations from the reference tax system pursue the stated objective in a coherent manner.[197] If they are found to do so, then the criterion of selectivity will not be met. This is one of the exceptional instances in the Court's analysis of the material selectivity of environmental taxes where the coherence of an incentive measure is assessed in light of the objective the Member State wishes to achieve by adopting the tax system being examined.[198]

For example, a British law exempting from tax aggregates extracted from certain materials considered less polluting could have been justified by the nature or general scheme of an aggregates tax had the exemption been extended to cover other aggregates having the same environmental impact as the exempted ones. The incoherent policy of the British Government in exempting certain aggregates and not others undermined the objective of a general ecotax on aggregates.[199] This case-law demonstrates that the Court is willing to consider as justified any exemptions or tax deductions inspired by the environmental impact of products or services, provided they extend to similar products and services whose mode of production has a similar impact on the environment. In similar fashion, the Court has held that granting tax rebates on natural gas and electric power taxes exclusively to businesses that produce tangible goods and not to business which provide services is an aid (selective advantage); the ecological considerations

[195] Case C-T-210/02, British Aggregates Association v. Commission, ECLI:EU:T:2012:110, ¶ 51 (July 19, 2012).
[196] Case C-75/97, Belgium v Commission (Maribel bis/ter), 1999 E.C.R. 3671, at ¶ 33-34.
[197] See Case C-T-210/02, British Aggregates Association v. Commission, ECLI:EU:T:2012:110, ¶ 84 (July 19, 2012), citing case C-88/03, Portugal v Commission, 2006 E.C.R. I-7115.
[198] *See* Case C-233/16, Asociación Nacional de Grandes Empresas de Distribución (ANGED) v. Generalitat de Catalunya, ECLI:EU:C:2018:280, (Apr. 26, 2018) – in this case a regional (proportional) tax on large commercial establishments (exceeding 2.500m2) was meant to compensate for the environmental harm caused by both their construction and their activities. The tax system exempted smaller commercial establishments but also establishments due to their category (notably, car showrooms, flower shops and shops selling furniture, sanitary ware, etc...). At Paragraphs 53-55, the Court held that although there was a difference in treatment between large and small establishments the treatment was justified in light of the tax's goal of protecting the environment. As for the derogation by category of establishment; the Court was more cautious and held, at Paragraph 67, that the exemption will not be selective as long as the national court finds that the activities carried out in the exempted establishments did not cause the same degree of environmental damage and urban deterioration as the taxed ones.
[199] Case C-T-210/02, British Aggregates Association v. Commission, ECLI:EU:T:2012:110, ¶ 89 (July 19, 2012).

underlying the national legislation could not justify treating the consumption of natural gas or electricity by undertakings supplying services differently than the consumption of such energy by undertakings manufacturing goods, since energy consumption by each of those sectors is equally damaging to the environment.[200] However, exempting public transport, rail freight and electricity generated from clean energy sources from a general tax on the non-domestic use of energy products can be justified on the basis of the objective of fighting climate change which such a tax system pursues.[201]

2.3.2. THE COMPATIBILITY OF ENVIRONMENTAL TAX ADVANTAGES WITH THE INTERNAL MARKET

Before moving on to discuss the detailed rules governing the compatibility of environmental tax advantages under Article 107(3) T.F.E.U. and the latest Commission guidelines for assessing compatibility under that provision, we must point out that these do not constitute the sole basis for assessing compatibility of such measures with the internal market. Very importantly, the Guidelines we are about to discuss must be read jointly with the revised General Block Exemption Regulation [hereinafter G.B.E.R.] since, according to the recent State aid scoreboards, some ninety-five percent of aid directed to the energy and environmental objectives of the E.U. falls within the scope of G.B.E.R.[202] G.B.E.R. is doubly important for our purposes since fiscal aid in the form of reductions and exemptions form part of the principal measures caught by G.B.E.R. Generally, fiscal aid shall be compatible with the internal market under G.B.E.R. (and exempted from the notification requirement under Article 108(3) T.F.E.U.) if it falls beneath the notification thresholds set out for each category of aid[203] and the aid fulfils certain generic transparency requirements[204] together with the more specific requirements applicable to each category of aid and set out in Chapter III. By contrast, with the method used for assessing environmental tax advantages under the relevant Commission Guidelines, aid which falls under G.B.E.R. is presumed to have an incentive effect.[205]

[200] Case C-143/99, Adria-Wien Pipeline v. Finanzlandesdirektion, 2001 E.C.R. I-8365, at ¶ 52.
[201] Commission Decision 2002/676, ¶ 37, 2002, O.J. (L 229) 15 (EC); mais au paragraph 47 l'exonération donnée aux produits énergétiques à double usage constituait une aide puisqu'elle entraînait des conséquences dommageables pour l'environnement [but in paragraph 47 the exemption given to dual-use energy products constituted an aid since it had harmful consequences for the environment].
[202] *See* Commission Regulation 651/2014, 2014 O.J. (L 187) (EU) ; L. Hancher (ed), Research Handbook on European State aid law 83 (Edward Elgar ed., 2021) (UK).
[203] Commission Regulation 651/2014, *supra* note 202, at art. 4.
[204] *Id.* at art 5.
[205] *Id.* at art 6.

Once identified, fiscal aid of an environmental nature which *does not* benefit from the general block exemption described above could nevertheless be considered to comply with the internal market under Article 107(3)(c) T.F.E.U.,[206] if it: facilitates the development of an economic activity (the positive condition), and does not adversely affect trading conditions to an extent contrary to the common interest (the negative condition).[207] According to the latest Commission guidelines on State aid for climate, environmental protection and energy, the following criteria must be met for environmental aid more generally to be declared compatible with the internal market:[208]

1. the measure must facilitate an economic activity by identifying the positive effects for society at large and its relevance for specific policies of the Union;
2. the measure must have an incentive effect;
3. the measure must not breach any other provisions of Union law;
4. state intervention must be necessary;
5. the measure must be appropriate;
6. the measure must be proportionate (limited to the minimum necessary to attain its objective) including cumulation;
7. the measure must be transparent;
8. the undue negative effects of the aid on competition and trade have to be avoided;
9. the positive and negative effects of the aid have to be weighed up.

An explanation of each of these criteria is beyond the scope of this paper. However, the criteria of appropriateness of the aid should be noted because it means that aid can only be granted in the absence of another instrument less distorting of competition which is likely to achieve the desired results.[209]

According to its new Guidelines, the Commission accepts that aid may take the form of a reduction in environmental taxes.[210] In this scenario, the Member State introduces a general environmental tax to internalise the external costs of environmentally harmful behaviour, but offers reductions to companies whose economic activities are put at risk

[206] *See* Case C-143/99, Adria-Wien Pipeline v. Finanzlandesdirektion, 2001 E.C.R. I-8365, ¶ 31.
[207] C.E.E.A.G., *supra* note 15, ¶ 8.
[208] *Id.* ¶¶ 20-22.
[209] *Id.* ¶ 39.
[210] *Id.* § 4.7.1.

because of this tax. The Commission considers that aid in the form of environmental tax reductions will be compatible with the internal market if the Member State demonstrates that:

1. the reductions are targeted at the undertakings most affected by the environmental tax or levy that would not be able to pursue their economic activities in a sustainable manner without the reduction; and
2. the level of environmental protection actually achieved by implementing the reductions is higher than the one that would be achieved without the implementation of these reductions.[211]

If the Member State grants tax aid in sectors where taxes are harmonised (e.g., under Directive 2003/96/EC), the Commission may adopt a simplified approach to assess the necessity and proportionality of the aid.[212] However, to benefit from such an approach the Member State must ensure that the beneficiaries of the aid pay, at least, the minimum level of taxation set by the applicable directive and that the beneficiaries are selected according to objective and transparent criteria.

Outside the realm of tax harmonisation, tax relief must, among other things, respect the two criteria of necessity and proportionality.[213] A tax break is necessary when its beneficiaries are selected on the basis of objective and transparent criteria when the environmental tax, absent any reduction, would lead to a significant increase in production costs. Such production costs are calculated as a proportion of the gross value added for each sector or category of beneficiaries, and when the significant increase in production costs cannot be passed on to customers without causing a significant reduction in sales volumes. In addition, the tax relief must meet the requirements set out in Section 3.2.1.1 of the Guidelines and deal with the necessity of the aid. According to this Section, the proposed aid measure must be "targeted towards a situation where it can bring about a material development that the market alone cannot deliver, for example by remedying market failures in relation to 'the projects or activities for which the aid is awarded'".

[211] *Id.* ¶ 295.
[212] *Id.* ¶¶ 297-300.
[213] *Id.* ¶¶ 301-309.

Tax relief is considered proportionate if, at least, one of the following conditions is met:[214]

1. each aid beneficiary pays at least twenty percent of the nominal amount of the environmental tax or parafiscal levy that would otherwise be applicable to that beneficiary in the absence of the reduction;

2. the tax or levy reduction does not exceed 100% of the national environmental tax or parafiscal levy, and is conditional on the conclusion of agreements between the Member State and the beneficiaries or associations of beneficiaries. And therewith, the beneficiaries or associations of beneficiaries commit themselves to achieve environmental protection objectives which have the same effect as if beneficiaries or associations of beneficiaries paid, at least, twenty percent of the national tax or levy. Such agreements or commitments may relate, among other things, to a reduction in energy consumption, a reduction in emissions and other pollutants, or any other environmental protection measure.

The second type of fiscal aid envisaged by the Commission Guidelines takes the form of more generic tax reductions.[215] In this scenario, the Member State provides an incentive for companies to engage in projects or activities (listed in Sections 4.2 to 4.6 of the Guidelines) that increase the level of environmental protection - by according general reductions from taxes which do not necessarily have an environmental objective or character. For these tax reductions, the Commission's assessment differs as the Member State must demonstrate the incentive effect of the aid measure; its proportionality; as well as the avoidance of undue effect on competition and trade. To prevent unintended negative effects on competition and trade, the Member State must grant the reduction under the same conditions to all eligible undertakings active in the same economic sector, and who are in the same or similar factual situation with regard to the aims and objectives of the aid measure. Finally, the Member State must ensure that aid remains necessary for the duration of schemes that run for more than three years and evaluate them, at least, every three years.[216]

[214] *Id.* ¶ 308.
[215] *Id.* § 4.7.2.
[216] *Id.* § 4.7.2.5.

CONCLUSIONS

Member States retain considerable power in the use of fiscal instruments to protect the environment. While a common understanding surrounding the functions of environmental taxes in Europe exists, we note that the treaties do not offer a very generous legal basis for the adoption of a European-wide environmental tax of general scope. This explains why the proposed C.B.A.M. Regulation's legal basis is Article 192(2) T.F.E.U. Nevertheless, Member States' power to tax will only be compatible with the fundamental freedoms set out in the treaties if it is used to achieve a legitimate environmental goal in a coherent manner. In this respect, the following conclusions can be drawn from this paper.

First, in almost every case we have studied, the Court has made it clear that Member States may not design their fiscal system so as to favour domestic products and services, and it matters little that in doing so they set out to achieve laudable environmental goals. To put it plainly, domestic products cannot be the main beneficiaries, or the "chosen winners", of an environmental tax measure.[217] That line of thought was crystallised in *Outokumpu Oy*. The Court has applied a similar idea in the State aid field, although arguably the criteria for discrimination are different. According to settled case law, the environmental purpose behind a fiscal measure will not prevent it from being classified as aid. Furthermore, since *British Aggregates*, the Court analyses the issue of selectivity of an environmental tax in relation to similar products having an equivalent or superior impact on the environment than the one actually benefiting from a tax advantage. In short, if the goal behind a fiscal measure is protection of the environment, then similar goods having similar impacts on the environment must be "penalised" in an identical manner. Therefore, there seems to be a universal theme running through the case law, namely that like products must be treated alike.

Secondly, the main distinction to be drawn between free movement law and State aid law is that, although both set out general prohibitions on discriminatory fiscal measures, the latter admits justification of selective aid. This contrasts with Article 110 T.F.E.U. which does not allow Member States to justify discriminatory environmental taxes between similar domestic and imported products. Indeed, State aid law in the environmental sphere is characterised by very complex guidelines, which have only very recently been updated, on the compatibility of environmental fiscal aid with the internal market. Those guidelines are a witness to the Commission's will to allow as much aid as necessary to industries where failures in the market act as a hindrance to the

[217] Maitrot De La Motte, *supra* note 49, at 123; *see* also Céline Viessant, *The Impact of European Union Law on French Environmental Taxation*, Gestion & Fin. Pub. 20, 24-25 (May 13, 2021).

achievement of the Union's environmental and climate targets. Very importantly, fiscal aid in the environmental domain must be limited to that which is strictly necessary to both correct existing market failures and achieve the desired results.

Finally, we have seen that initiatives on the part of the Union legislature have to some extent further restricted the policy choices open to Member States in the environmental tax field. A distinction can be drawn between the Energy Taxation Directive and the V.A.T. Directive. While the first instrument (in its current state) allows for sweeping reductions and exemptions to be adopted on energy products, the second does not contain any criterion authorising the application of a reduced rate on the basis of the intrinsic characteristics of goods and services sold, or of their mode of production or distribution. Within this context, two of the most noteworthy restrictions that derive from Union secondary law are the prohibition on the taxation of kerosene and the stringent framework imposed on Member States when deciding whether to apply reduced rates of V.A.T. to environmentally friendly activities. It is likely that changes will be made to these instruments in the very near future to bring them in line with the Union's green and just transition targets.

ANNEX I: EUROSTAT GRAPH ON MEMBER STATE REVENUE FROM ENVIRONMENTAL TAXES

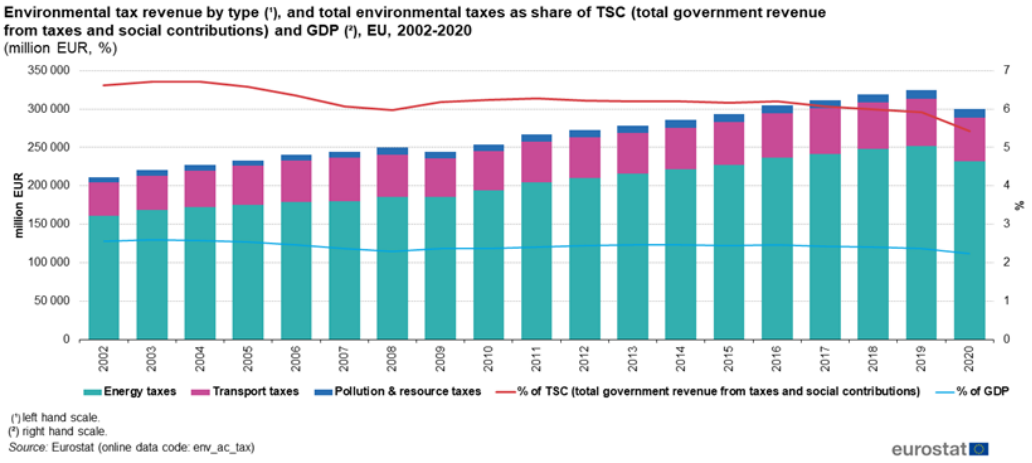

Figure 1: Annex I: Eurostat Graph on Member State Revenue from Environmental Taxes

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Rights-Based Boundaries Of The United Nations' Sanctions

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ABSTRACT

The article examines sanctions imposed by the United Nations (U.N.), the most critical sender of multilateral sanctions, by categorising them as embargoes against states and their main sectors, as well as targeted sanctions against individuals and micro entities. The U.N. Charter serves as the foundation for determining the boundaries of U.N. embargoes. Accordingly, the Security Council is bound by the U.N. Charter's Preamble and Articles as the only international treaty that can control its actions. Furthermore, based on the Charter's proportionality principle, the Security Council must balance subjective wrongdoings and the consequences of sanctions. The article then evaluates flaws in the designation, implementation, judicial reviews, and targets substantive and procedural human rights in order to determine how U.N. targeted sanctions should be formed to become rights-based. The central issue of due process is addressed by examining certain recorded rights-based challenges in the process of domestic implementation of sanctions that are reviewed by international courts in order to demonstrate that the Security Council's targeted sanctions require reconsideration as well as their own independent judicial review.

KEYWORDS

Economic Sanctions; Human Rights; Security Council; Targeted Sanctions

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INTRODUCTION

International law evolved from *jus ad bellum* to prohibit use of armed forces, and along the way, the United Nations Security Council [hereinafter U.N.S.C.] became the sole responsible organ for maintaining international peace and security. In this regard, the Security Council has the authority under Chapter VII of the U.N. Charter to issue recommendations or binding decisions such as imposing sanctions,[1] after determining the existence of a *threat to the peace*, breach of the peace or act of aggression.[2]

Sanctions are classified as embargoes and targeted sanctions. According to the present article, embargoes shall be considered as coercive measures that impose costs on states, major entities and sectors of states such as the oil industry or a state's central bank. Targeted sanctions are defined as coercive measures such as asset freeze and travel ban against individuals, whether official or non-official; entities governing privately or without affiliation with any state; as well as those against entities acting on behalf of the states but with minimal effects on people in general.

According to Article 41 of the Charter, the Security Council may call upon all U.N. Members to implement its sanctioning resolutions domestically. Under Article 25 of the Charter, they must agree to accept and employ the sanctions. As a result, all U.N. Member States are clearly obligated to implement Security Council Resolutions [hereinafter S.C.R.s] domestically. It is because they consented to the potential invasion of their sovereignty by joining the U.N. under the *pacta sunt servanda* principle.[3] This principle affirms that the legality of all the sanctions imposed by international organisations on their Member States can be established primarily based on the consent given by the targeted Member State. Therefore, any sanctioning regimes founded by the

[1] The U.N.S.C. in carrying out its mandate is authorised to use the powers outlined in Chapters VI, VII, VIII, and XII of the U.N. Charter. The Security Council has the authority to make recommendations under Chapter VI or legally binding decisions under Chapter VII. Chapter VI of the U.N. Charter addresses the methods of peaceful resolution of disputes and empowers the Security Council to call on all parties, to investigate, to request appropriate procedures or methods of adjustment, and to make recommendations to the disputing parties. As a result of meeting the requirements of Article 39, the Security Council based on its power that is given under Chapter VII, is authorised to impose binding sanctioning resolutions. These binding resolutions may impose coercive measures involving or not involving use of force, such as complete or partial disruption of economic relations.

[2] The ambiguity in the phrase *threat to the peace* has raised some concerns about the specific situations in which the Security Council may pass sanctioning resolutions. In practice, however, it is widely accepted that any S.C.R. that is passed under Chapter VII include an implied Article 39 determination, even though most resolutions passed under Article 41 do not explicitly refer to Article 39 and merely indicate that they were passed under Chapter VII of the Charter. *See generally* Richard Gordon et al., Sanctions Law 12 (2019).

[3] *Pacta sunt servanda* or the rule that any treaty in force is binding on the parties and must be carried out in good faith, is enshrined in the Vienna Convention on the Law of Treaties [hereinafter V.C.L.T.] (Article 26 V.C.L.T. 1969), as well as the Preamble and Article 2 of the U.N. Charter and is frequently invoked in international jurisprudence. *See generally* Freya Baetens, *Pacta Sunt Servanda*, *in* Elgar Encyclopedia of International Economic Law 283 (Edward Elgar Publishing, 2017) (U.K.).

Security Council must be implemented by all U.N. Member States, as the International Court of Justice [hereinafter I.C.J.] has also frequently advised so.[4]

In addition, according to Article 103 of the U.N. Charter, the obligations of Member States under the U.N. Charter take precedence over other obligations under separate international treaties. In this regard, the I.C.J.'s two *Lockerbie* cases, more than affirming this supremacy, also demonstrate that the I.C.J. is authorised to review the Security Council's decisions.[5] The I.C.J. also held that the obligations under Article 103 give effect to Chapter VII's measures and take precedence over other multilateral or bilateral treaties.[6] Furthermore, the rule of *lex specialis* has confirmed that any S.C.R. has precedence over other treaties.[7]

The supremacy of S.C.R.s over the U.N. Charter, which is this Article's challenging foundation, is not ruled out. Thus, the main issue is whether the embargoes imposed by the Security Council should be reconsidered in light of their compliance with the U.N. Charter. The other issue is whether the Security Council should adhere to the boundaries of due process established by Customary International Law [hereinafter C.I.L.] when imposing targeted sanctions to safeguard the substantive and procedural rights of the listed targets during the administrative reconsideration and judicial review phases.

[4] For example, I.C.J. in *Namibia* held that the S.C.R.s are binding on all the U.N. Member States, which are thus under obligation to accept and carry them out. *See* Legal Consequences for States of South Africa's Continued Presence in Namibia (South West Africa) Notwithstanding Security Council Resolution, Advisory Opinion, 1971 I.C.J. Rep. 16, 50 ¶ 115 (June 21) [hereinafter Namibia]. This Advisory Opinion was a reaffirmation of the I.C.J.'s previous opinion. *See* Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Rep. 174, ¶ 178 (Apr. 11) [hereinafter Reparation].

[5] The I.C.J.'s two *Lockerbie* cases which initiated against the United States [hereinafter U.S.] and the United Kingdom [hereinafter U.K.] were concerned the interpretation of Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177. Libya requested I.C.J. to issue a preliminary decision to halt the two countries' efforts to impose U.N. embargoes on Libya. The basis was due to the alleged involvement of Libya in the attack on a civilian plane and the deaths of many passengers. The two cases raised a complicated issue about the relationship between the U.N.'s two main organs, the I.C.J. and the Security Council. *See* Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.), Provisional Measures, 1992 I.C.J. 114 (Apr. 14), https://www.icj-cij.org/case/89/provisional-measures (Last visited Jul. 4, 2023); *see also* Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.), Provisional Measures, 1992 I.C.J. 3 (Apr. 14), https://www.icj-cij.org/en/case/88 (Last visited Jul. 4, 2023).

[6] *See id.*

[7] *See* Masahiko Asada, *Definition and Legal Justification of Sanctions*, *in* Economic Sanctions in International Law and Practice 3, 6 (Asada Masahiko ed., 2019) (U.K.).

1. BOUNDARIES OF THE UNITED NATIONS' EMBARGOES

As an alternative to using force, then-U.S. President Woodrow Wilson introduced the idea of an economic weapon in 1917 to emphasise the significance of joining the League of Nations. He underlined stated, "[a]pply this economic, peaceful, silent, deadly remedy, and there will be no need for force. It is a terrible remedy. It does not cost a life outside the nation boycotted, but it brings pressure upon the nation which, in my judgement, no modern nation could resist".[8] This assertion was the entire point of using sanctions at the time - implying that the only factor that did not matter, at all, was the rights of people in targeted countries.

One could argue that this logic is still prevalent - given the fourteen continuing sanction regimes in place at the U.N. level - the majority of which are embargoes.[9] Although the number of these regimes appear to be low in comparison to those sanctions imposed *unilaterally* by individual states or international organisations against non-Members,[10] there are several challenging grounds about the rights-based deficiencies of these regimes and their legality status and boundaries under international law; particularly regarding the extent to which these sanctions are implemented domestically by individual states.

While the Security Council's sanctioning resolutions supersede any conflicting treaty, the Security Council's embargoes are also subject to the U.N. Charter's boundaries. As a result, the notion that the U.N.S.C. is unbound by law is factually inaccurate. The fundamental issue is that the Security Council's sanctioning power should be limited, and, accordingly, in cases of imposing embargoes, the Security Council needs to act within the U.N. Charter's bounds. These boundaries include the U.N.'s primary purpose, as stated in the Charter's Preamble, as well as the other conditions stated in the Charter's Articles. Following such, both the principle of proportionality and the U.N. boundaries based on fundamental rights will be examined.

[8] Robert A. Pape, *Why Economic Sanctions do not Work*, Int'l Sec., Oct. 1997, at 90, 90-93.

[9] The current U.N. sanctions are against Somalia, Al-Qaida, the Islamic State of Iraq and the Levant [hereinafter I.S.I.L.], Iraq, Liberia, Congo, Sudan, Lebanon, the Democratic People's Republic of Korea [hereinafter D.P.R.K.], Libya, Afghanistan, Guinea-Bissau, the Central African Republic, and South Sudan, with the objectives of advancing conflict resolutions, nuclear non-proliferation, and counterterrorism. Notably, a sanctions committee chaired by a non-Permanent Member of the Security Council oversees each regime. As of March 3, 2023, eleven of the fourteen sanctions committees are supported by ten monitoring groups, teams, and panels. *See* Sanctions, United Nations Security Council, https://www.un.org/securitycouncil/sanctions/information (Last accessed Jul. 4, 2023).

[10] Seyed M. Rowhani, *Rights Based Boundaries of Unilateral Sanctions*, 32 Washington International Law Journal 127 (2023), https://digitalcommons.law.uw.edu/wilj/vol32/iss2/3 .

1.1. HUMAN RIGHTS BOUNDARIES

As specified in Article 1(3) and the U.N. Charter's Preamble, the Charter preserves fundamental human rights. The Charter also safeguards the pledges of Member States who vow to employ international mechanisms to promote the economic and social advancement of all peoples. It mentioned that one of the U.N.'s purposes is to promote and encourage respect for human rights and fundamental freedoms.[11] As a result, it is reasonable to assume that the primary policy objective for the U.N. sanctioning implementation should be settling global economic, social, cultural, or humanitarian issues.[12] This objective, which can also be interpreted as a boundary, is suggested in the U.N. Charter. Accordingly, the Security Council's primary responsibility is to "maintain peace and security".[13]

However, the negative effects of embargoes could themselves jeopardise peace and security. Implementation of embargoes would endanger the U.N.'s major goal of promoting a higher standard of living and preserving the conditions of economic and social progress and development and upholding the universal observance of human

[11] *See* U.N. Charter art. 1, ¶ 3.

[12] *Id.* ¶ 1.

[13] *Id.* art. 24, ¶ 2. The U.N. has so far established thirty sanctioning regimes, including as embargoes and targeted sanctions to maintain peace and security. As of March 7, 2023, in Southern Rhodesia, *See* S.C. Res. 253 (May 29, 1968) (declaration of independence by white minority regime); S.C. Res. 421 (Dec. 9, 1977) (Apartheid regime); S.C. Res. 713 (Sept. 25, 1991) (Outbreak of internal fighting); S.C. Res. 841 (June 16, 1993) (Military coup); S.C. Res. 661 (Aug. 6, 1990) (Kuwait's invasion); S.C. Res. 1483 (May 22, 2003) (Deposed Iraqi regime); S.C. Res. 864 (Sept. 15, 1993) (Internal political conflict); S.C. Res. 1011 (Aug. 16, 1995) (Civil war and genocide); S.C. Res. 1132 (Oct. 8, 1997) (Civil war); S.C. Res. 733 (Jan. 23, 1992) (Internal violence); S.C. Res. 1160 (Mar. 31, 1998) (Serbian forces violence and terrorist acts of Kosovo Liberation Army); S.C. Res. 1298 (May 17, 2000) (Conflict between Eritrea and Ethiopia); S.C. Res. 985 (Apr. 13, 1995) (Liberian civil war); S.C. Res. 1343 (Mar. 7, 2001) (Liberian support for rebels in Sierra Leone); S.C. Res. 1521 (Dec. 22, 2003) (Internal violence); S.C. Res. 985 (Apr. 13, 1995) (Liberian civil war); S.C. Res. 1343 (Mar. 7, 2001) (Liberian support for rebels in Sierra Leone); S.C. Res. 1521 (Dec. 22, 2003) (Internal violence); S.C. Res. 1572 (Nov. 15, 2004) (Internal conflict); S.C. Res. 1556 (Jul. 30,2004) (Atrocities committed by Janjaweed militia); S.C. Res. 1636 (Oct. 31, 2005) (Investigations into assassination of Rafiq Hariri by The International Committee on Census Coordination); S.C. Res. 1718 (Oct. 14, 2006) (Nuclear program); S.C. Res. 1737 (Dec. 26, 2006) (Uranium enrichment program); S.C. Res. 748 (Jan. 21, 1992) (Bombing the Pan American flight over Lockerbie); S.C. Res. 1970 (Feb. 26, 2011) (Internal conflict and use of force against civilians); S.C. Res. 2048 (May 18, 2012)(Military coup); S.C. Res. 2140 (Feb. 26, 2014) (Terrorist attacks inside Yemen); S.C. Res. 2206 (March 3, 2015) (Internal conflict between the government and opposition forces); S.C. Res. 2374 (Sept. 5, 2017) (Violations of the 2015 Agreement on Peace and Reconciliation); S.C. Res. 1988 (June 17, 2011) (Taliban activities in Afghanistan); S.C. Res. 1493 (July 28, 2003) (Domestic conflict and exploitation of natural resources); S.C. Res. 2127 (Dec. 5, 2013) (Breakdown of law and order and domestic conflict); S.C. Res. 1267 (Oct. 15, 1999) (International terrorism). It should be noted that the Security Council on October 21, 2022, by introducing the specific term of "targeted arms embargo," established a new regime against those who are responsible for the instability of Haiti. *See* S.C. Res. 2653, ¶ 11-14 (Oct. 21, 2022). According to the S.C., targeted arms embargoes are put in place against individuals and entities that the Committee has designated as being responsible for, complicit in, or engaged directly or indirectly in actions that threaten Haiti's peace, security, or stability. *See id.* ¶ 15.

rights and fundamental freedoms.[14] Accordingly, all U.N. embargoes must be designed by the Security Council in compliance with the framework of the U.N. Charter.

One may argue that the U.N. Charter only calls for the U.N. *Member States* to implement S.C.R.s and does not oblige the Security Council.[15] In response, it could be claimed that a U.N. organ cannot act in violation or *ultra vires* of the U.N. Charter, and since the U.N. Charter requires upholding human rights standards, both Member States and the Security Council are obliged. Nonetheless, the Article tries to establish that member states are required to carry out and domestically implement only those S.C.R.s that are in accordance with the Charter. Consequently, since the use of comprehensive embargoes violates the Charter's human rights principles, these Resolutions are not binding.[16]

Comprehensive embargoes imposed by the U.N., such as those imposed on Iraq during the *sanctions decade* will be considered illegal, because it would be impossible to uphold the Charter's obligations while implementing these measures.[17] In other words, if S.C.R.s violate the U.N.'s purposes or, more broadly, human rights obligations, they possibly would be in violation of the Charter.

[14] *See* U.N. Charter, *supra* note 11, art. 55.

[15] *Id.* art. 24-25.

[16] The U.N. had already imposed comprehensive embargoes on five occasions: in Southern Rhodesia S.C. Res. 232 (Dec. 16, 1966), Iraq S.C. Res. 661, *supra* note 13, Yugoslavia (Former), S.C. Res. 757 (May 30, 1992), Bosnia and Herzegovina S.C. Res. 820 (Apr. 17, 1993), and Haiti S.C. Res. 841, *supra* note 13.

[17] The sanctions decade began on August 2, 1990, four days after the Kuwait invasion, when the U.N.S.C. imposed a series of embargoes on Iraq. The Shatt-al-Arab waterway in southern Iraq was closed, and all vessels approaching the Jordanian port of Aqaba were boarded and inspected. It banned the importation of all products and commodities into Iraq, as well as the exportation of all commodities originating from Iraq. The Iraqi regime included a trade embargo; an oil embargo; freezing of Iraqi Government financial assets; arms-targeted sanctions; the suspension of international flights; and the ban of financial transactions. These embargoes were intended to force Iraq to remove its troops from Kuwait, to begin the reparation process, and, finally, to assure the termination of its alleged weapons of mass destruction programs. Iraqi embargoes remained in place until Saddam Hussain was overthrown in 2003.

This assertion is not applicable with limited embargoes or targeted sanctions that have gone through the proper assessment and implementation process.[18] This position was emphasised by the I.C.J. in *Certain Expenses* as well where it held that even when the Security Council's actions are required to maintain international peace and security, the presumption should be that it is not acting *ultra vires*.[19] Furthermore, the International Tribunal for the Former Yugoslavia (I.C.T.Y.) confirmed in *Prosecutor v. Dusko Tadic* that the Security Council's power is not unlimited and that the Security Council is subject to the boundaries of the Charter in all circumstances.[20]

These boundaries, however, appear to be quite broad and ambiguous. In other words, the Security Council's limitations on imposing embargoes under the Charter may be understood so broadly that they become practically meaningless. Notwithstanding, while the U.N.'s purposes are equivocal and more politically, than legally, defined, the legally binding nature of the U.N.'s purposes is undeniably clear under Article 24(2). As a result, they are clearly specified to be legally protected.

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[18] The Iraqi regime had major collateral humanitarian consequences for civilians. After a few years and by finding the negative consequences of Iraqi embargoes, the U.N.S.C. finally shifted toward designing limited embargoes and targeted sanctions. This first generation of rights-based sanctions targeted political leaders and wrongdoers and armed organisations while exempting other civilians. *See* Colum Lynch, *Sunset for UN Sanctions?* Foreign Policy (Oct. 14, 2021). Denis Halliday, the former U.N. humanitarian coordinator in Iraq, has named the U.N. embargoes against Iraq, as *genocide*. Denis Halliday, *Iraq: The Impact of Sanctions and U.S. Policy*, *in* Iraq Under Siege: The Deadly Impact of Sanctions and War 45 (Anthony Arnove ed., 2000). Also, a large body of legal and political literature labelled the Iraqi regime as a *genocidal tool*, claiming that embargoes imposed by the U.N. on Iraq drastically increased mortality rates. *See* Jeremy Matam Farrall, United Nations Sanctions and the Rule of Law 5 (Cambridge University Press, 2007). This assertion created the argument that the U.N. also should be bound by peremptory norms of *jus cogens* in imposing sanctions. *See* David Schweigman, The Authority of the Security Council Under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice 197-202 (Erasmus Universiteit Rotterdam, 2001) (Neth.). Holding the U.N., as an international organisation, responsible for the crime of genocide and ascertainment of the *mens rea* and the specific intent of the genocide in the case of adopting collective embargoes seems impossible. It is due to the fact that it is hardly acceptable that the duty to prevent genocide could be extended to the actions of the Security Council, given that the Genocide Convention governs only sovereign states that commit genocide. Also, since genocide is defined as specific "acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group" in Article 2 of the Genocide Convention, and thus requires intent to destroy or *dolis specialis*, the existence of intent to destroy the Iraqi people by the U.N. could not be established. In addition, it is obvious that Iraqis did not die just because they were Iraqis. While Iraqi people died because they were living in Iraq, the U.N. did not impose sanctions to kill them because they were Iraqis and thus, while this is not a moral assertion but based on the *rules* of international law and the plain wording of the Convention, the U.N. did not commit genocide and did not violate *jus cogens*. Relatedly, Professor Gordon, by labeling the collateral situation that was caused by the sanctions on Iraq as the "perfect injustice," mentioned that "[w]hat was probably not foreseen [in the process of drafting Genocide Convention] was the possibility that atrocities might be committed by institutions of international governance, acting in the name of international law and human rights". *See generally* Joy Gordon, *Smart Sanctions Revisited*, 25 Ethics & Int'l Aff. 317-18 (2011); *See also* Joy Gordon, *When Intent Makes All the Difference in the World: Economic Sanctions on Iraq and the Accusation of Genocide*, 5 Yale Hum. Rts & Dev. L. J. 77 (2002).

[19] Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151 (July 20) [hereinafter Certain Expenses].

[20] Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 28 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

The Security Council's actions are limited to the main principles outlined in Articles 1 and 2 of the Charter, as well as the more clearly defined Charter-based fundamental limitations imposed on U.N. Member States and the Security Council. These Charter-based fundamental limitations include the respect to the principle of self-determination;[21] fundamental human rights;[22] sovereign equality;[23] good faith;[24] dispute settlements through peaceful means;[25] refraining from the threat or use of force;[26] and respecting the principle of non-intervention to the Member States' sovereignty.[27]

As such, Article 1(2) states that the U.N.'s founding purpose is "to develop friendly relations among nations based on respect for the principles of equal rights and the self-determination of people".[28] According to the I.C.J. 's Advisory Opinion in *Western Sahara*, the right to self-determination requires a free and genuine expression of the concerned peoples' will.[29] This means each state has the sovereign right to determine its own political structure. This right is also mentioned in Article 2(1) of the Charter through the principle of sovereign equality among all U.N. Members.[30]

While comprehensive embargoes are in place, the infringement of people's rights to self-determination, or even to state sovereignty is inevitable. Acknowledging the will of the people concerned should be considered when designing any sanctioning resolution in order not to violate the genuine expression of their will in choosing their political structure, and subsequently the state's sovereignty. It could be argued that when people freely elect their leaders, the actions of those leaders will be judged in accordance with the people's will. However, for the majority of scenarios where embargoes are imposed against those states, the actions of their leaders differ over time - implying that the concerned people may freely elect their leaders, but the leaders' actions will differ after the election.

As a result, determining whether each target is a state with an authoritarian regime or a democratic regime in terms of freely elected officials and the ability to monitor their actions over time is critical. This is especially true when the concerned people democratically elect their leaders who then go on to become authoritarians and commit international wrongful acts. In the latter case, U.N. embargoes should be

[21] U.N. Charter, *supra* note 11, art. 1, ¶ 2.
[22] *Id.* ¶ 3.
[23] *Id.* art. 2, ¶ 1.
[24] *Id.* ¶ 2.
[25] *Id.* ¶ 3.
[26] *Id.* ¶ 4.
[27] *Id.* ¶ 7.
[28] *Id.* art. 1, ¶ 2.
[29] Western Sahara, Advisory Opinion, 1975 I.C.J Rep. 12, ¶ 55 (Oct. 16).
[30] U.N. Charter, *supra* note 11, art. 2, ¶ 1.

targeted and implemented only to the extent that they narrowly change the leaders' wrongdoings; otherwise, the sanctions would be in violation of the Charter.

In addition, Article 1(3) emphasises the importance of preserving "human rights and fundamental freedoms for all, without regard to race, sex, language, or religion".[31] The Security Council is required by this Article to consider the negative consequences of its embargoes on the targeted state's population when drafting and implementing sanctioning resolutions. Yet, since most of the U.N.'s embargoes are aimed at states that have violated the rights of other states or the international community as a whole by engaging in some type of international wrongful act, a short-term rights-based impact can be justified by that state's prior wrongdoing. However, long-term embargoes are illegal because they can impinge on human rights for decades after they are lifted.[32] Relatedly, as most of the U.N.'s embargoes are against states' main sectors and products, they may have long-term effects. For example, Iranian oil embargoes had long-term consequences because the target was unable to reclaim its previous positions in the lawful international oil market once the embargoes were lifted, forcing it to sell in the black market, which led to corruption and its long-term consequences.[33]

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[31] *Id.* art. 1, ¶ 3.

[32] *See* Seyed Mohsen Rowhani, *Corruption the Middle East as a Long-lasting Effect of the U.S. Primary and Secondary Boycotts Against Iran*, 3 ABA Middle East L. Rev. 30-33 (Feb. 22, 2019), https://www.researchgate.net/publication/331286560_CORRUPTION_IN_THE_MIDDLE_EAST_AS_A_LONG-LASTING_EFFECT_OF_THE_US_PRIMARY_AND_SECONDARY_BOYCOTTS_AGAINST_THE_ISLAMIC_REPUBLIC_OF_IRAN.

[33] U.N. embargoes against Iran specifically aimed to put an end to its uranium enrichment program, which was suspected of being part of an effort to develop a nuclear weapon. In 2006, the Security Council demanded Iran to stop its nuclear developments, despite Iran's claims that its program is peaceful and poses no threat. S.C. Res. 1696 (Jul. 31, 2006). Iran did not comply and five months later, the U.N. imposed a broad range of embargoes on Iranian financial sectors, as well as targeted sanctions against identified individuals and entities. S.C. Res. 1737, *supra* note 13. The regime imposed severe restrictions on the supply of goods and services to Iran, as well as freezing the assets of individuals mentioned in the resolution's Annex. *See, e.g.*, *id.* ¶ 12; S.C. Res. 1803, ¶¶ 5, 8 (Mar. 3, 2008); S.C. Res. 1929, ¶¶ 11-12, 19 (Jun. 9, 2010). Although the sanctions were a mix of embargoes and targeted sanctions, based on the Article's definition, and because they primarily targeted Iran's main sectors entities and industries, they are labelled as embargoes. Furthermore, it is because the Security Council had urged states to be vigilant in their dealings with Iranian banks, including the Central Bank of Iran, and in providing financial services to Iranian companies and their citizens, which greatly caused the issue of over compliance of international market in importing oil from Iran. *See* S.C. Res. 1803, *supra* note 33, ¶¶ 3,9,10; S.C. Res. 1929, *supra* note 33, ¶¶ 14,21,23,24. The Joint Comprehensive Plan of Action [hereinafter J.C.P.O.A.] agreed to by Iran and the five Permanent Members of the Security Council and Germany entered into effect on July 14, 2015. Based on the J.C.P.O.A., Iran agreed inter alia to reduce its stockpiles of enriched uranium substantially in return for lifting the U.N. embargoes and easing the E.U. and U.S. unilateral embargoes. Notably, J.C.P.O.A. is not a legally binding treaty because some of the parties were volunteers in implementing the measure. *See* S.C. Res 2231, Annex A (July 14, 2015) (Joint Comprehensive Plan of Action). The provisions for the termination were specified in U.N. Doc. S/RES/2231 ¶ 7(a), (2015). The JCPOA has a *snapback* procedure to be implemented if any party files a complaint concerning Iran's noncompliance. If the snapback procedure is triggered, all the UN embargoes against Iran would be reactivated immediately. *Id* at ¶¶¶ 11, 12, 13. Although the U.S. withdrew from the J.C.P.O.A. on May 8, 2018, the other parties remained committed to the agreement, and all members, including the U.S., are currently negotiating to resurrect the J.C.P.O.A. as of Mar. 7, 2023. Iran's embargoes were lifted on January 16, 2016, following the UN's approval of the J.C.P.O.A., but its effects are still being felt by Iranians.

1.2. THE PRINCIPLE OF PROPORTIONALITY

As stressed by the late Thomas Franck, the principle of proportionality has traditionally not been recognized as one of the general principles under C.I.L., and it remains to be seen if proportionality is fit to function as a self-standing principle in its own right.[34] The principle is acknowledged as a general concept of law by major legal systems. It states that the law should be proportionate to the situation, respond in a measured and reasonable manner, and not go beyond what is required to accomplish the objective of doing justice.[35]

Regardless of being addressed in International Humanitarian Law [hereinafter I.H.L.] and countermeasure codification by the International Law Commission (I.L.C.), the Article endeavours to establish the Security Council's boundaries in imposing sanctions in accordance with the U.N. Charter's principle of proportionality. It is because U.N. sanctions do not simply fit into the category of countermeasures, even though one may describe them as such and conclude that they must be aligned with the proportionality outlined in the Draft Articles on State Responsibility for Internationally Wrongful Acts [hereinafter A.R.S.I.W.A.].[36]

Also, relying on I.H.L., which is normally applicable in times of war, conflicts with the fact that sanctions are rarely considered as a use of force. It is because sanctions normally are imposed in times of peace.[37] Some commentators contend that the I.H.L. proportionality, which requires an assessment as to "whether the overall evil a war would cause was balanced by the good that would be achieved," can be applied in sanctions or a non-war situation.[38] They believe that even though the U.N. is not a state subject to the Geneva Convention, it cannot violate the laws of war as its Member States may do, otherwise the U.N.'s purpose of maintaining world's peace will be compromised.[39] Others assert that the effects of both wars and some embargoes were

[34] Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 715 (2008); *See also* Thomas M. Franck, *Proportionality in International Law*, 4 L. ETHICS HUM. RTS. 229 (2010).

[35] *See generally* NEWMAN RALPH ABRAHAM, EQUITY IN THE WORLD'S LEGAL SYSTEMS: A COMPARATIVE STUDY DEDICATED TO RENE CASSIN (Bruylant, 1973) (Belg.).

[36] Article 49 of A.R.S.I.W.A. defines countermeasures as a state's failure to comply with international commitments in response to an international wrongful act committed by another state that is justifiable in specific situations. However, sanctions, which an international organisation may be entitled to adopt against its Members according to its rules, are lawful measures and cannot be assimilated to countermeasures. *See* Denis Alland, *The definition of Countermeasures*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 1135, Oxford University Press (Crawford, Pellet & Olleson eds., 2010) (U.K.).

[37] This issue will almost certainly encounter conceptual difficulties due to the normative understanding of I.H.L. that deems only to govern during armed conflicts. *See* Pierre-Emmanuel Dupont, *Human Rights Implications of Sanctions*, *in* ECONOMIC SANCTIONS IN INTERNATIONAL LAW AND PRACTICE 39, 42 (Asada Masahiko ed., 2019) (U.K.).

[38] *See* Judith Gail Gardam, *Proportionality and Force in International Law*, 87 Am. J. Int'l L. 391, 395 (1993).

[39] The U.N. previously authorised the use of force by peacekeeping forces in the event of humanitarian law violations such as in the U.N.'s armed intervention in Somalia; thus, principles and rules of I.H.L. are applicable to U.N. forces in enforcement actions, or in peacekeeping operations. *See* Secretary-General's Bulletin, Observance by United Nations Forces of International Humanitarian Law (Aug. 6, 1999), https://www.refworld.org/docid/451bb5724.html.

regarded as similar to military blockades and armed conflicts.[40] Thus, the practice of those embargoes is considered "tantamount to a peacetime blockade".[41]

While several commentators have referred to embargoes as a political weapon or economic warfare, it is preferable not to compare them to any type of armed force. This is due to the fact that economic sanctions, in general, were designed to prevent military aggressions and wars in the first place. Furthermore, taking proportionality from C.I.L. and labelling it as a countermeasure to expand the scope of the Security Council's boundaries in imposing embargoes is erroneous. Not only does the U.N. Charter implicitly address the principle of proportionality, but the I.C.J. and other international tribunals have repeatedly highlighted and recognized it. The I.C.J.'s decision in the *North Sea Continental Shelf* in 1969,[42] and the *Naulilaa* arbitration between Portugal and Germany in 1928 are two key examples.[43]

Within the U.N. Charter, the principle of proportionality applies equally to the practice of the Security Council, as a legal principle falling under the category of *principles of justice and international law*. These principles, which are mentioned in Article 1(1) of the Charter, have also been recognised by several commentators.[44] Accordingly, Chapter VII's measures must prevent disproportionality in achieving its objectives and must not adversely affect other interests in a disproportionate manner.[45] The Security Council has considerable latitude in deciding whether Chapter VII's measures are proportionate to the objectives pursued. It means that the Security Council must

[40] *See generally* Richard Garfield et al., *The Health Impact of Economic Sanctions*, 72 Bull. N.Y. Acad. Med. 452, 458-62 (1995).

[41] U.N. Human Rights Council, Rep. of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights (2018), ¶ 34, U.N. Doc. A/HRC/39/54 (Sep. 10, 2018) [hereinafter U.N. Special Rapporteur]. The U.N. Special Rapporteur emphasised that "legal rights holders in target countries where the negative impact of such measures is particularly acute could be considered as in a war zone". *Id.* ¶ 42. Also, some I.H.L. rules such as the prohibition of civilian hunger and the unrestricted movement of essential food and medication, are identical to the situation with some comprehensive embargo regimes. The differentiation between civilian and military targets and the prohibition on causing unnecessary suffering to combatants are the other principles of I.H.L. which may be used in the case of sanctions as well, making I.H.L. to "serves as the most appropriate paradigm through which economic sanctions should be governed, even when implemented outside the armed conflict context". *See also* W. Michael Reisman & Douglas L. Stevick, *The Applicability of International Law Standards to United Nations Economic Sanctions Programmes*, 9 Eur. J. Int'l L. 86, 95 (1998).

[42] Where the I.C.J. determined that proportionality was a factor to be considered in the delimitation of the continental shelf and stated, "whereas the Federal Republic considered that such an outcome would be inequitable because it would unduly curtail what the Republic believed should be its proper share of [the] continental shelf area, on the basis of proportionality to the length of its North Sea coastline". *See* North Sea Continental Shelf Judgment, 1969 I.C.J. 17 (Feb. 20).

[43] Naulilaa Award (Port. v. Ger.), vol. 2 at 1011, (UN Rep. Int'l Arb. Awards 1928); Gabcikovo-Nagymaros Project, Hungary v. Slovakia, Judgment Merit, 1997 I.C.J. 7 (Sep. 25); *see also* Lori F. Damrosch, Enforcing International Law Through Non-Forcible Measures 57-59 (1998).

[44] Nicolas Angelet & Vera Gowland-Debbas, *International Law Limits to the Security Council, in* United Nations Sanctions and International Law 71-82 (Mariano Garcia Rubio & Hassiba Hadj-Sahraoui eds., 2001) (Neth.).

[45] *See* Frederic L. Kirgis, *The Security Council's First Fifty Years*, 89 Am. J. Int'l L. 506 (1995).

consider the proportionality principle to guarantee that its measures are proportionally designed. The Permanent Members of the Security Council also reaffirmed its significance by stating that all the future U.N. sanctions "should be directed to minimise unintended adverse side-effects of sanctions on the most vulnerable segments of targeted countries,"[46] and they should be "in support of clear objectives and [be] implemented in ways that balance effectiveness against possible adverse consequences".[47]

It is difficult to determine the precise scope of the proportionality principle as it applies to the Security Council. However, it is in this context that international human rights law can play a crucial role to advise on the scope of a procedural constraint rather than constituting a substantive limit for the Security Council as a matter of law.[48] Human rights laws may evaluate proportionality within the framework of the Security Council with a particular emphasis on how it should take this principle into account when designing sanctions adopted in accordance with Article 41 of the U.N. Charter. The Security Council should make a distinction between subjective wrongdoers and other civilians in order not to go beyond the targets. In this context, proportionality refers to the requirement to make sure that the effects of the Security Council's sanctions on civilian populations are proportionate to the harm caused by the target's wrongdoing and are consistent with the sanctions' objectives.

The principle of proportionality requires that the collateral negative effects of employing sanctions on innocent civilians be minimised. On this path, the Secretary-General and the sanctions committees should be held responsible in executing sanctions in the pursuit of proportionality and assessing the objective and commensurate response while taking fundamental human rights into account.

2. BOUNDARIES OF THE UNITED NATIONS' TARGETED SANCTIONS

Targeted sanctions, according to the Article's definition, are those that impose economic and/or travel restrictions on natural and legal persons who are not associated with the state, or those that have minor effects on the people at large. While targeted sanctions are preferable in comparison to embargoes, still it is likely that targeted sanctions may

[46] Rep. of the S.C., at 2, U.N. Doc. S/1995/300 (1995).
[47] Rep. of the S.C., U.N. Doc. S/PRST/2006/28 (2006).
[48] *See* Christopher Michaelsen, *Human Rights as Limits for the Security Council: A Matter of Substantive Law or Defining the Application of Proportionality?*, 19 J. Conflict & Sec. L. 451, 468 (2014).

infringe some substantive and procedural rights of the targets. As such the rights to property; privacy and reputation; freedom of movement; and the right to a fair and public hearing and an effective remedy by an impartial tribunal; or due process rights, are the most vulnerable to targeted sanctions.

This Article seeks to establish a pattern of rights-based considerations for future designations in designing targeted sanctions.[49] In this regard, the fundamental concern stems from the basis for determining the existence of a threat to international peace and security that allows a U.N. sanctions committee to list a target in a sanctioning regime.[50] Even though Article 39 of the U.N. Charter's determination criteria in assessing a threat to international peace and security is unclear, those Security Council's sanctioning resolutions that do not include a prior Article 39 determination could be considered non-binding under Chapter VII of the Charter.

The ambiguity is exacerbated by the fact that several of U.N.'s targeted sanctions on individuals and entities are based on classified evidence and undisclosed information.[51] To address this lack of transparency, the procedural boundaries in sanctioning designations, the infringements of which could result in a violation of due process, should be analysed. Notably, these procedural boundaries are recognised in domestic laws as customary international norms as well.[52]

In addition, the right to a fair and transparent listing procedure was stressed as a Security Council commitment in S.C.R. 1730 in 2006.[53] It is because when mistakes in listings based on false evidence occur, the individuals who are wrongly sanctioned will find their funds and assets frozen without having any realistic prospect of being delisted.[54]

[49] Since 1999, the main U.N. targeted sanctions regime, which encompasses a package of sanctions targeting the Taliban, has been in place, and since then it has become one of the most challenged regimes. It was mainly because of the bombing of the U.S. embassies in Dar-el-Salam in Tanzania and Nairobi in Kenya. It blocked the funds of the Taliban because it was protecting Osama Bin Laden. The Resolution demanded that the Taliban turn over Bin Laden and ordered that all the Taliban's assets be frozen. S.C. Res. 1267, *supra* note 13, ¶ 3. Following the September 11, 2001 terrorist attacks, the Security Council amended that regime by compiling a list of individuals, including Osama Bin Laden and individuals or entities associated with him, as well as Al-Qaida.

[50] The task of deciding on listings at the U.N. level is often delegated to the Sanctions Committee: a body entrusted with managing the sanctions regime. Because designated persons feature as entries on blacklists, sanctions are easy to modify, and designations can be added to or removed from the list without fundamentally altering the sanctions regime. *See* Gordon et al., *supra* note 2, at 30.

[51] *See* Thomas Biersteker, *Targeted Sanctions and Individual Human Rights*, 65 Int'l J.: Canada's J. Glob.Pol'y Analysis 109 (2010). *See also* Thomas Gehring & Thomas Dörfler, *Division of Labor and Rule-based Decisionmaking Within the UN Security Council: The Al-Qaeda/Taliban Sanctions Regime*, 19 Glob. Governance 567 (2013).

[52] It is a recognized rule that a judgement cannot be executed if it was obtained in a way that did not comport with the principles of due process. For example, in the U.S. legal precedent see Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1410, 1412 (9th Cir. 1995).

[53] *See generally* Thomas Biersteker et al., *Addressing Challenges to Targeted Sanctions: An Update of Watson Report*, The Graduate Institute of U.N. Academia 20-21 (2009).

[54] *See* HM Treasury v. Mohammed Jabar Ahmed and Others (FC) ¶ 182.

2.1. ADMINISTRATIVE RECONSIDERATIONS

According to Resolution 1730, the Focal Point for De-listing, as a dedicated part of the U.N.'s Secretariat, is responsible for receiving and processing de-listing requests from U.N. Member States and individual petitioners, as well as serving as the primary source for preserving the due process of targeted individuals and entities.[55] The Resolution stated that the Security Council is committed to ensuring a fair and clear procedure for listing and de-listing individuals and entities, as well as granting humanitarian exemptions.[56] Because of this obligation,[57] the Security Council passed Resolution 1735 to protect fundamental rights and increase the level of scrutiny for states proposing additional individuals or entities to be sanctioned.[58] In this regard, Resolution 1735 emphasised that after listing a new target, states should make a releasable portion of the statement available to the public.[59]

Despite these attempts, there have been complaints about how the de-listing mechanism works, including one from the then-President of the Security Council, who described the Resolution as "very modest and weak" which "does not at all constitute an effective means of fairness".[60] Due to these flaws, the U.N. Focal Point for Delisting was replaced on December 17, 2009, by the Office of the Ombudsperson, which exists solely to review designations under S.C.R. 1267.[61]

In order to improve the fairness of de-listing requests, the U.N. also established an additional review panel for complaints of people and entities that were incorrectly listed under the 1267 regime.[62] A significant step was taken to increase the fairness and

[55] The other function of the Focal Point for De-Listing is to facilitate communication during the de-listing process. To find the procedure of de-listing see U.N. Security Council, Focal Point for De-listing, https://www.un.org/securitycouncil/sanctions/delisting/ (last visited Jul. 4, 2023).

[56] G.A. Res. 60/1, ¶ 109 (Oct. 24, 2005).

[57] It was passed only three days after Resolution 1730. S.C. Res. 1735 (Dec. 22, 2006).

[58] For example, in some domestic cases like *H.M. Treasury*, Lord Roger, made specific reference to the veto power of the Committee members, and has expressed his concern by stating that "if a State applies on their behalf, the name will still not be removed unless all members of the Committee agree. There is an obvious danger that States will use listing as a convenient means of crippling political opponents whose links with, say, Al-Qaeda may be tenuous at best". *See* HM Treasury v. Mohammed Jabar Ahmed and Others (FC), ¶ 181.

[59] The obligation has been strengthened by the S.C. Res. 1822 (June 30, 2008) which mentions:

> For each such proposal Member States shall identify those parts of the statement of case that may be publicly released, including for use by the Committee for development of the summary [to be placed on the committee's website] or for the purpose of notifying or informing the listed individual or entity, and those parts which may be released upon request to interested States.

[60] *See* U.N. SCOR, 5599th mtg. at 4, U.N. Doc. S/PV.5599 (Dec. 19, 2006).

[61] It should be noted that applications for review of other U.N. sanctions regimes can still be submitted to the relevant Focal Point. According to the S.C. Res. 1904 ¶ 22 (Dec. 17, 2009): "the Focal Point shall continue to receive requests from individuals and entities seeking to be removed from other sanctions lists".

[62] *See* Rep. of the High-level Panel on Threats, Challenges and Changes addressed to the UN Secretary General, UN Doc A/59/596 (Dec. 1, 2004).

transparency of the sanctions regime when the Security Council stated in the Preamble of S.C.R. 1989 that it intended to guarantee due process rights and fair and transparent procedures.[63] The Ombudsperson was also given the authority to preserve the due process by recommending the Committee to review a de-listing request, and thereafter, the Committee must unanimously vote to maintain the listing if the Ombudsperson considers de-listing.[64] Furthermore, because the Al-Qaida Sanctions and Taliban Committee was assumed to make all decisions by consensus, it gave each Member of the Committee veto power over a de-listing request, paving the way for a more rights-based administrative reconsideration procedure.[65] The Ombudsperson was also tasked in this procedure with providing anyone who requested, with openly releasable, non-classified information about Al-Qaida and Taliban Sanctions Committee procedures, as well as informing individuals or entities about the status of their listing and submitting biannual reports to the Security Council.[66] Still, the Security Council was expected to incorporate new advancements into the sanctions regime founded by this Resolution.[67]

One of the main goals in this direction was to reduce the negative effects of targeted sanctions on humanitarian aid delivery through humanitarian organisations. The effects were brought on by the fact that most donors are overly compliant with sanctions regulations because they are so worried about the repercussions of sanctions violations. Furthermore, the frustration caused by the lengthy licensing process discourages them from transferring humanitarian aid to the targets. In this regard, and after several years, the adoption of S.C.R. 2664 on December 9, 2022, which was primarily drafted by the United States and Ireland, is the most admirable Security Council milestone.[68] Accordingly, for all current and future U.N. sanctioning regimes, including the 1267 regime, a cross-cutting humanitarian exemption has been established (unless otherwise decided), ensuring the timely and effective conduct of providing humanitarian aid. This S.C.R. affirms that any financial transactions or provision of goods and services required for humanitarian assistance and fundamental human needs are authorised, and that these assistances do not violate the sanctions. While this general exemption will not solve all of the concerns associated with providing

[63] U.N. SCOR, 6247th mtg., UN Doc S/PV.6247 (Dec. 17, 2009).
[64] Regarding the delisting request by the petitioner, the task of the Ombudsperson consists of three main levels: Information gathering in two months that is extendable to four months, making dialogue in two months that is extendable to four months, committee discussion and decision in two months. *See* Gordon et al., *supra* note 2, at 6-9.
[65] S.C. Res. 1904, Annex II (Dec. 17, 2009). Specified the Ombudsperson tasks.
[66] *Id.* at 15.
[67] S.C. Res. 1989, (Jun. 11, 2011).
[68] S.C. Res. 2664, (Dec. 9, 2002).

humanitarian assistance, it demonstrates the Security Council's solid *intention* to shift toward a more rights-based model of sanctions.

2.2. JUDICIAL REVIEW

The *domestic implementation* of the U.N. targeted sanctions may face a number of judicial reviews and legal challenges in various domestic and international courts. These judicial reviews primarily determine whether these sanctions violate rights-based boundaries while also contesting their legal status. By highlighting these inadequacies, this article aims to draw attention to the issue of the U.N. needing to establish a specialised judicial organ in order to achieve a rights-based model of sanctions.

Whereas the validity of the I.C.J.'s judicial review power to challenge the violation of S.C.R. boundaries is still debated,[69] based on *Lockerbie,*[70] and the absence of any exclusion of the I.C.J. 's power over the Security Council's decisions, the I.C.J. should be regarded as the primary available judicial forum for states with proper standing to determine whether rights-based boundaries have been violated by S.C.R.s. This assertion also could be understood by other cases such as *Certain Expenses* where the U.N. General Assembly asked the I.C.J. to provide an Advisory Opinion on whether the U.N. Member States were responsible for the expenses of the U.N. operations in Congo in 1960-1961 and in the Middle East in the 1950s.[71] Also according to *Namibia*, the I.C.J. confirmed that it has the power to decide whether a S.C.R. is in conformity with the Charter.[72]

[69] *See* S. Ghasem Zamani & Mazaheri Jamshid, *The Need for International Judicial Review of UN Economic Sanctions, in* Economic Sanctions Under International Law 219, 227-28 (Ali Z. Marossi & Marisa Bassett eds., 2015).
[70] *Lockerbie*, *supra* note 7.
[71] *Certain Expenses, supra* note 19, at 151. In response the I.C.J. recognized the expenses are related to the purpose of the U.N. and needs to be paid.
[72] Namibia, *supra* note 4, at 22.

Outside the I.C.J., the most well-known of these rights-based challenges began in 2008 when the European Court of Justice [hereinafter E.C.J.] overturned a decision by the European Community [hereinafter E.C.] in implementing U.N. targeted sanctions against *Kadi* and *Al-Barakaat* - resulting in the first court-ordered disobedience for domestic employment of a U.N. targeted sanctions.[73] These cases initially filed in 2005 before the European Court of First Instance [hereinafter C.F.I.], also known as the European General Court (E.G.C.), concerned the legality of the European Union's [hereinafter E.U.] *implementation* of the U.N. sanctions.[74] It challenged implementing U.N. targeted sanctions imposed through S.C.R. 1267 at the E.U.-level without informing Yasin Kadi and the Yusuf and Al Barakaat International Foundation about the basis for the freezing of their assets and without following due process.[75]

The claimants argued that the designation violated their due process rights, and specifically the rights to a fair hearing, property, and effective judicial protection.[76] Following that, the C.F.I. declared that the E.U. judicial system prioritised the E.U.'s constitutional identity.[77] The C.F.I. also noted that, in the event of procedural challenges, the E.U. is not legally bound domestically to implement the Security Council's resolutions because it is not a Member of the U.N.; however, it ultimately rejected the annulment request.[78] As a result of this rejection, Kadi and Al Barakaat filed a joint appeal with the E.C.J., which successfully reversed and set aside the two C.F.I. judgements.[79] It broadened the possible grounds and rights-based boundaries of U.N.

[73] Joined Cases C-402/05 P and C-415/05 P Yassin v Council of the European Union and Commission of the European Communities, 2008 E.C.R. I-6351.

[74] See Council Regulation (EC) No. 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No. 467/2001 of 6 March 2001 prohibiting the export of certain goods and services to Afghanistan - strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, annex 1, 2002 O.J. (L 139) 9-22.

[75] See Council Regulation 881/2002 of 27 May 2002, art. 2 (1), that with regard to states, "[a]ll funds and economic resources belonging to, or owned, or held by, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I shall be frozen".

[76] See cases C-402/05 P and C-415/05 P Yassin v Council of the European Union and Commission of the European Communities, 2008 E.C.R. I-6351, ¶¶ 20-21. Article 230 of the Treaty Establishing the European Community states that "[t]he Court of Justice shall review the legality of acts adopted". *See* Treaty Establishing the European Community arts. 230-231, Nov. 1997, 1997 O.J. (C 340). The Court enumerated the grounds for annulment. As such are infringement of an essential procedural requirement, and infringement of any rule of law relating to its application, or misuse of powers. *See id.* art. 230 ¶ 2.

[77] Case T-315/01, Kadi v. Council of the European Union and Commission of the European Communities, 2005 E.C.R. II-3649, ¶ 192.

[78] *Id.* ¶ 193.

[79] See Cases C-402/05 P and C-415/05 P, *supra* note 76. According to Article 16 of the Statute of the Court of Justice the E.C.J. sits in a Grand Chamber consisting of eleven out of the total of twenty-seven judges, instead of the normal chamber size of three or five judges. *Statute of the Court of Justice*, Article 16, 10 March 2001 O.J. (C 80).

targeted sanctions and granted full reviewability to all European acts, including the domestic implementation of S.C.R.s.[80]

Nonetheless, the E.C.J. rejected the argument that it has jurisdiction over S.C.R.s, emphasising that it only has jurisdiction over the domestic implementation of S.C.R.s.[81] Subsequently, it ruled that the appellants were not fully informed and notified - resulting in a violation of their due process rights. The Court also confirmed that the implementation of the S.C.R.s could be subject to judicial review in order to protect fundamental rights such as property rights, freedom of movement rights, reputation, family, and privacy rights.[82] Finally, the E.C.J. annulled the Council Regulation relating to Kadi and the Al Barakaat International Foundation be annulled.[83]

Nonetheless, based on E.U. law, the E.U. is bound by the U.N. Charter.[84] It means that the E.C.J. lacks the jurisdiction to decide whether the U.N. sanctions are lawful. *Jus cogens*, which cannot be violated by any rules of international law, including Security Council resolutions, are the only exception to the Charter's supremacy.[85] Therefore, only in cases of *jus cogens* violations may E.U. courts assess the legality of U.N. sanctions. Property rights and due process were all categorised by the C.F.I. as *jus cogens*. Although it is established that property rights and due process are among the norms of C.I.L., it is obvious that both Courts idealised and expanded the application of *jus cogens* with regard to these rights. As a result, the most apparent means of preventing domestic courts from redefining and reclassifying international norms is for the U.N. to establish its own

[80] According to Paragraph 326

> [E.C.] judicature must, in accordance with the powers conferred on it by the [E.C.] Treaty, ensure the review, in principle the full review, of the lawfulness of all [E.C.] acts in the light of the fundamental rights forming an integral part of the general principles of [E.C.] law, including review of [E.C.] measures which, like the contested regulation, are designed to give effect to the resolutions of the Security Council under Chapter VII of the Charter of the United Nations.

See Cases C-402/05 P and C-415/05 P, *supra* note 76, ¶ 326.

[81] *Id.* ¶ 287. It mentioned that European Community in their sanction implementations should "communicate those grounds to the person or entity concerned, so far as possible, either when that inclusion is decided on or, at the very least, as swiftly as possible after that decision in order to enable those persons or entities to exercise, within the periods prescribed, their right to bring an action". *Id.* ¶ 336.

[82] Notably, if the Security Council fails to meet the procedural requirements for listing the targets, their due process rights, as enshrined in the Universal Declaration of Human Rights [hereinafter U.D.H.R.], may be violated. U.D.H.R. art 8, Dec. 10, 1948 recognised "the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights," also, according to U.D.H.R. art 10 "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".

[83] Cases C-402/05 P and C-415/05 P, *supra* note 76, ¶ 51; Guglielmo Verdirame, *Implementation of UN Sanctions, in* The UN and Human Rights: Who Guards the Guardians? 300, 304 (Cambridge University Press ed., 2011) (U.K.).

[84] Case T-315/01, *supra* note 77, ¶ 193.

[85] *Id.* ¶ 226.

independent judicial organ with jurisdiction over challenging the legality of U.N. targeted sanctions.

CONCLUSION

The U.N. embargoes are presumably permissible under international law. It is primarily due to the fact that the S.C.R.s take precedence over other international treaties. This supremacy, however, is limited only to other treaties, and Member States may argue that they are not obligated to implement U.N. sanctions if doing so would violate the U.N. Charter. The U.N. Charter established the boundaries of human rights and the principle of proportionality between the consequences of sanctions and the subjective wrongdoing. While a short-term impact on a state's sovereignty can be justified by that state's previous wrongdoing, long-term embargoes against states or their main industries contradict the Charter's boundaries. In this regard, the most recent step forward in the U.N.'s sanctioning procedure toward a rights-based model is including a general exemption for conveying humanitarian aid. This general exemption may lead sanctions senders to implement similar considerations in their own current and future sanctioning regimes.

Individuals sanctioned under a targeted sanctions regime based on classified evidence may face violations of due process rights, particularly the right to a fair and transparent listing procedure. The listed individuals have filed challenges in domestic and international tribunals such as the E.U. Courts due to deficiencies in the administrative reconsideration process at the U.N. Office of the Ombudsperson and Focal Point for De-listing. Despite the existence of these fora, this article emphasised the importance of an independent rights-based mechanism and procedure for reviewing Security Council sanctioning resolutions. This mechanism should address shortcomings in upholding the rights-based boundaries of U.N. embargoes, as well as deficiencies in the process of filing an application for delisting and upholding due process.

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New Generation Free Trade Agreements at a Crossroads. Assessing Environmental Enforcement of the E.U.'s Trade and Sustainable Development Chapters from Global Europe to the Power of Trade Partnerships Communication

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ABSTRACT

Since the dawn of the era inaugurated by the 2006 Global Europe communication, the European Union (E.U.) has emerged as a key international actor in the negotiation and conclusion of ambitious New Generation Free Trade Agreements (N.G.F.T.A.s), striking to counterbalance commercial liberalization also with the enhancement of environmental safeguard. Interestingly, the latter represents for the Union not merely a policy goal, but a core normative target embedded in the founding treaties. A rationale which has thus been transposed to N.G.F.T.A.s by means of ad hoc Trade and Sustainable Development (T.S.D.) Chapters - including given green clauses dedicated to a vast array of eco-related domains. Nonetheless, ambiguities continue to subsist with regard to the enforcement phase of the present Chapters, having been at the center of an intense debate. Against the illustrated backdrop, this article is to focus on the major deficiencies characterizing green clauses' enforceability both from an upstream and a downstream perspective. First, the identified pillar environmental provisions will be assessed in their semantic formulation. Secondly, attention will be paid to the specialis, non-confrontational, approach to dispute settlement provided for by T.S.D. Chapters, disregarding reliance on countermeasures in the case of non-compliance. In order to introduce innovative inputs to the research, relevance is to be conferred to the E.U. political guidelines for T.S.D. Chapters announced by the June 2022 Power of Trade Partnerships communication. Whereas it will be ultimately demonstrated that the latter document has managed to open the door to a novel season for N.G.F.T.A.s' environmental enforcement. It is believed that further room for normative clarification seems to be appropriate.

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KEYWORDS

E.U. Free Trade Agreements; Common Commercial Policy; Environmental Protection; Dispute Settlement Mechanisms; European Green Deal.

EDITORIAL NOTE

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INTRODUCTION

The debate on the interlinks between the promotion of international trade and environmental protection is no novelty in the doctrinal discussion - including the works of several scholars.[1] Such an intricate relation presents both bright and bleak sides. Whilst, on the one hand, commercial intercourses at a global level might effectively contribute to increase domestic incomes, hence allowing States to assign more economic

[1] For an overview on the relationship between international trade and environmental protection see Steve Charnovitz, *Free Trade, Fair Trade, Green Trade: Defogging the Debate*, 27 Cornell Int'l L. J. 459 (1994); Edith Brown Weiss et al., Reconciling Environment and Trade (Brill, 2th ed. 2008); Brian R. Copeland & M. Scott Taylor, Trade and the Environment: Theory and Evidence (Princeton University Press, 2005); Barbara Cooreman, Global Environmental Protection through Trade: A Systemic Approach to Extraterritoriality (Edward Elgar Publishing, 2017); Elena Cima, From Exception to Promotion: Re-Thinking the Relationship between International Trade and Environmental Law (Brill, 2021).

resources abstractly to environmental protection. On the other hand, extensive liberalization in international commercial exchanges might well lead to higher consumption and pollution, also quickening the overuse of natural capitals.

In light of the presented background, various normative instruments have, over the past decades, been put forward to address the trade-and-environment nexus, both at international and European Union [hereinafter E.U.] level. With regard to the former, sustainability concerns connected to commercial patterns started to affirm in the late 1980s. In particular, the 1987 Brundtland Report, advancing a definition of sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs",[2] further emphasized the exigence to consider "the ecological dimension of policy at the same time as the economic, trade, energy, agricultural and other dimensions".[3] Subsequently, the 1992 Rio Declaration on Environment and Development demanded States both to reduce or eliminate unsustainable patterns of production and consumption,[4] and to cooperate as to uphold an environmentally sound international economic system.[5] Ten years later, in the bosom of the 2002 Johannesburg Summit on Sustainable Development, the tripartite structure of sustainable development was affirmed with environmental protection constituting one of its operational pillars.[6] Additionally, the Johannesburg Plan of Implementation urged the international Community to "play an active role"[7] in the eradication of unsustainable patterns of production and consumption, also by "delinking economic growth and environmental degradation".[8]

Coming to present days, the United Nations Agenda 2030 envisages international trade as an "engine for inclusive economic growth",[9] capable of contributing to the

[2] Rep. of the W.C.E.D.: Our Common Future, U.N. Doc. A/42/427, at Chapter 2, ¶ 4 (Aug. 4, 1987).
[3] *Id.* ¶ 38.
[4] U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, Principle 8, U.N. Doc. A/CONF.151/26 (Vol. I), annex I (Aug. 12, 1992).
[5] *Id.* at Principle 12.
[6] According to the Johannesburg plan of implementation, environmental protection was regarded as a specific component of sustainable development, along with economic and social development. *See* World Summit on Sustainable Development (W.S.S.D.), Johannesburg Summit, *U.N., Johannesburg Plan of Implementation*, Doc. A/CONF.199/L.7 (Aug. 24 - Sept. 4, 2002) [hereinafter Johannesburg Plan of Implementation], ¶ 2. The tripartite structure of sustainable development was later confirmed at the 2012 Rio+20 Conference. *See* Rio +20 U.N. Conference on Sustainable Development, *The Future We Want: Outcome document of the United Nations Conference on Sustainable Development*, ¶ 3, U.N. Doc. A/CONF.216/L.1 (June 20-22, 2012). For a detailed comment on the principle of sustainable development in international law, see Nico J. Schrijver, The Evolution of Sustainable Development in International Law: Inception, Meaning and Status (Cambridge University Press, 2008); Virginie Barral, *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*, 23 Eur. J. Int'l L. 377 (2012); Malgosia Fitzmaurice et al., Environmental Protection and Sustainable Development from Rio to Rio+20: Protection de l'environnement et developpement durable de Rio a Rio+20 (Cambridge University Press, 2014).
[7] Johannesburg Plan of Implementation, *supra* note 6, ¶ 14.
[8] *Id.*
[9] G.A. Res. 70/1, ¶ 68 (Oct. 21, 2015).

promotion of sustainable development. The document further stresses the need to continue promoting an equitable multilateral trade system, under the aegis of the World Trade Organization [hereinafter W.T.O.].[10]

As a matter of fact, the 1994 Marrakesh Agreement used the notion of sustainable development in its Preamble, acknowledging that the Parties' trade and economic endeavor shall be conducted by duly taking into consideration the "optimal use of the world's resources in accordance with the objective of sustainable development",[11] to preserve and safeguard the environment. Under this viewpoint, the W.T.O. Agreement innovates in comparison with the 1947 General Agreement on Tariffs and Trade [hereinafter G.A.T.T.], in which environmental contemplations were incorporated limitingly by means of a general exception clause.[12]

Widespread integration of environmental considerations in normative documents, notwithstanding stalemates in international trade negotiations at the heart of the W.T.O. Doha round, marked a dead-end in the global promotion of trade-and-environment issues as components of a large scale commerce agenda,[13] thus leading key players - including the E.U. - to turn from multilateral to bilateral regulatory trade tools in dealing with green issues related to business patterns.[14]

[10] *Id.*

[11] Marrakesh Agreement Establishing the World Trade Agreement, Apr. 15, 1994, 1867 U.N.T.S. 154.

[12] *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194. Relevant to the present analysis are, in particular, letter b (measures necessary to protection human, animal or plant life or health) and letter g (measures relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption) of Article XX, G.A.T.T. 1947. It proves essential to remember that, under the profile of environmental integration, the G.A.T.T. 1947 mirrored the spirit of its time, in which ecological concerns were not of particular relevance to the international Community. For an overview on the emergence and evolution of the trade-and-environment nexus in international trade law see Hyo Won Lee & Johann Park, *Free Trade and the Environment under the GATT/WTO: Negative or Compatible Relationship?*, 28 J. Int'l & Area Stud. 119 (2021).

[13] Interestingly, by means of the Doha Ministerial Declaration of 2001, the Parties still underlined the necessity to enhance the mutual supportiveness of trade and environment, agreeing to negotiations on selected issues. *See* World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, 41 ILM 746 (2002), ¶ 31.

[14] *See* Edward D. Mansfield & Eric Reinhardt, *Multilateral Determinants of Regionalism: The Effects of GATT/WTO on the Formation of Preferential Trading Arrangements*, 57 Int'l Org. 829 (2003); Surya P. Subedi, *The Road from Doha: The Issues for the Development round of the W.T.O. and the Future of International Trade*, 52 Int'l & Compara. L. Q. 425 (2003); Richard Tarasofsky & Alice Palmer, *The WTO in Crisis: Lessons Learned from the Doha Negotiations on the Environment*, in 82 Int'l Aff. 899 (2006); Richard Baldwin, *The World Trade Organization and the Future of Multilateralism*, 30 J. Econ. Persp. 95 (2016).

With the pendulum swinging from multilateralism to bilateralism in the normativization of the trade-and-environment nexus and settling on the latter, the E.U. 2006 Global Europe Communication[15] [hereinafter G.E.C.] officially inaugurated the season of New Generation Free Trade Agreements [hereinafter N.G.F.T.A.s][16] providing for a proper external dimension to the previously adopted Lisbon Strategy.[17] By acknowledging the need to "equip Europeans for globalization",[18] the former document resulted in bilateral trade agreements as normative vehicles capable of tackling issues - including environmental ones - not ready for proper discussion at the multilateral trade forum. In the Commission's words, N.G.F.T.A.s might thus represent stepping stones, instead of stumbling blocks,[19] for international trade liberalization, as long as they were: "comprehensive in scope, provide for liberalisation of substantially all trade and go beyond W.T.O. disciplines".[20]

Along with setting the trajectory for a broadened and deepened regulatory content, the Global Europe communication further managed to identify criteria for selecting novel Free Trade Agreements [hereinafter F.T.A.s] partners, first and foremost by taking into consideration their market potential - conceptualized as economic size and growth, as well as the presence of tariff and non-tariff barriers. Eventually, the need to work to reinforce sustainable development through bilateral trade relations had been recognized, mostly by means of the merger of *ad hoc* cooperative provisions.[21]

Under this regard, the G.E.C. transposed an integrated approach to sustainable development, thus conferring relevance to its three distinct but entwined structural

[15] *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Global Europe: Competing in The World: A Contribution to the EU's Growth and Jobs Strategy,* COM (2006) 567 final (Oct. 4, 2006).

[16] According to the definition provided by the Court of Justice, New Generation Free Trade Agreements entail agreements which contain: "[I]n addition to the classical provisions on the reduction of customs duties and of non-tariff barriers to trade in goods and services, provisions on various matters related to trade, such as intellectual property protection, investment, public procurement, competition and sustainable development". Opinion 2/15, ECLI:EU:C:2017:376 [hereinafter Opinion 2/15], ¶ 17 (May 16, 2017).

[17] *Communication from the Commission to The Spring European Council: Working together for growth and jobs: A new start for the Lisbon Strategy,* COM (2005) 24 final (Feb. 2, 2005).

[18] Communication from the Commission, *supra* note 15. Parallelly to the adoption of the Global Europe Strategy, in the same year the renewed E.U. strategy for Sustainable Development was adopted, in which the importance for both the Commission and Member States to step up efforts as to render global trade a tool for achieving sustainable development was stressed, also by means of cooperation with international trading partners. *See* Council Review of the EU Sustainable Development Strategy (EU SDS) - Renewed Strategy, Doc. N.10117/06, at 21 (June 9, 2006).

[19] For an overview of the doctrinal debate regarding the picturing of F.T.A.s as either stumbling blocks or stepping stones of the international trading systems, see Richard Senti, *Regional Trade Agreements: 'Stepping Stones' Or 'Stumbling Blocks' of the WTO?*, in Reflections on the Constitutionalisation of International Economic Law: Liber Amicorum for Ernst-Ulrich Petersmann 441 (Marise Cremona, Nikolaos Lavranos & Peter Hilpold eds., 2013).

[20] Communication from the Commission, *supra* note 15, at 8.

[21] *Id.* at 9.

pillars.[22] Whereas the Global Europe Communication did not, *per se*, epitomize a stark innovation in the assimilation of green variables into the Union's external trade policy tools,[23] it did, however, configure an improvement in providing guidance to systematically address given sustainability concerns, while also laying down the foundations for more recent policy documents specifically contemplating the trade-and-environment nexus. Amongst the most relevant and worth mentioning are the 2015 Trade for All communication;[24] restating the necessity for the E.U. trade policy going hand in hand with respect for environmental standards, along with the 2021 Trade Policy Review,[25] envisaging bilateral trade agreements as vehicles for the attainment of the specific European Green Deal[26] objectives, *inter alia* combating climate change and environmental degradation.[27]

Starting with the F.T.A. signed with the Republic of Korea in October 2010,[28] several N.G.F.T.A.s with key trading partners were thus negotiated or concluded. As part of a deep trade agenda,[29] environmental provisions were consequently enshrined into a vast array of trade deals, overcoming the original approach based on an exception-based model in favor of a promotional archetypal, still with varying degrees of normative approximation.[30] The so-called Deep and Comprehensive Free Trade Agreements

[22] For an overview regarding the principle of sustainable development in E.U. law, see Sander R.W. van Hees, *Sustainable Development in the EU: Redefining and Operationalizing the Concept*, 10 Utrecht L. Rev. 60 (2014); András Jakab, *Sustainability in European Constitutional Law*, *in* Intergenerational Justice in Sustainable Development Treaty Implementation: Advancing Future Generations Rights through National Institutions 166 (Alexandra R. Harrington, Marcel Szabó & Marie-Claire Cordonier Segger eds., 2021).

[23] *See* Rok Žvelc, *Environmental Integration in EU Trade Policy: The Generalised System of Preferences, Trade Sustainability Impact Assessments and Free Trade Agreements*, in The External Environmental Policy of the European Union: EU and International Law Perspectives 174 (Elisa Morgera ed., 2012).

[24] *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Trade for All - Towards a More Responsible Trade and Investment Policy,* COM (2015) 497 final (Oct. 14, 2015).

[25] *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Trade Policy Review - An Open, Sustainable and Assertive Trade Policy,* COM (2021) 66 final Brussels (Feb. 18, 2021).

[26] *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: The European Green Deal,* COM (2019) 640 final (Dec. 11, 2019). The European Green Deal was launched by the European Commission in December 2019, setting the Union's commitment to tackle climate and environmental challenges. In particular, the Green Deal aims at transforming the E.U. into a society characterized by a resource-efficient economy, capable of attaining the objective of zero net emissions of greenhouse gases by 2050. *See* Micaela Falcone, *Il Green Deal europeo per un continente a impatto climatico zero: la nuova strategia europea per la crescita tra sfide, responsabilità e opportunità*, 2 Studi sull'integrazione europea 379 (2020) (It.); Marco Onida, *Il Green Deal Europeo*, *in* Unione Europea 2020 - I dodici mesi che hanno segnato l'integrazione europea 257 (CEDAM ed., 2021) (It.); Dario Bevilacqua, *La normativa europea sul clima e il Green New Deal. Una regolazione strategica di indirizzo*, 2 Rivista trimestrale di diritto pubblico 297 (2022) (It.); Susanna Paleari, *The Impact of the European Green Deal on EU Environmental Policy*, 31 J. Env't & Dev. 196 (2022).

[27] Communication from the Commission, *supra* note 26, at 12.

[28] Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, E.U.-Korea, Oct. 6, 2011, O.J. L 127/7 [hereinafter E.U.-Korea F.T.A.].

[29] *See* Billy A. Melo Araujo, The E.U. Deep Trade Agenda: Law and Policy (Oxford University Press, 2016).

[30] *See* Gracia Marín Durán & Elisa Morgera, Environmental Integration in the E.U.'s External Relations: Beyond multilateral dimensions (Hart, 2012).

[hereinafter D.C.F.T.A.s] concluded with Ukraine,[31] Moldova,[32] and Georgia,[33] in fact, aim at gradually integrating the mentioned States in the Union's internal market, through the establishment of free trade areas and normative approximation. Differently, N.G.F.T.A.s, signed with "distant" commercial partners - including South Korea, Central America,[34] Andean Community,[35] Canada,[36] Japan,[37] Singapore,[38] Vietnam,[39] Mexico,[40] Mercosur,[41] and New Zealand,[42] mostly rely on cooperation in addressing ecological concerns related to boosted trade liberalization. In this spectrum and on the basis of homogeneity in content, the E.U.-U.K. T.C.A.[43] also deserves reference.

Yet, despite the Union's pioneering role[44] in including green variables in trade agreements by means of *ad hoc* sustainability clauses, two considerations are necessary.

First, the new generation free trade agreements do not denote an absolute innovation in the process of incorporating environmental variables into external normative instruments. In fact, the European Union had long advocated the necessity of

[31] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, opened for signature, E.U. - Ukraine, Mar. 21, 2014, O.J. (L 161) 1 [hereinafter E.U. - Ukraine A.A.].

[32] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, E.U.-Moldova, June 27, 2014, O.J. (L 260) 4 [hereinafter E.U.-Moldova A.A.].

[33] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, E.U.-Georgia, June 27, 2014, O.J. (L 261) 4 [hereinafter E.U.-Georgia A.A.].

[34] Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, E.U.-Central America, June 29, 2012, O.J. (L 346) 3 [hereinafter E.U.-Central America A.A.].

[35] Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, E.U.-Andean Community, Dec. 21, 2012, O.J. (L 354) [hereinafter E.U.-Andean Community F.T.A.]. Agreement amended following the accession of Ecuador. *See* Protocol of Accession to the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, to take account of the accession of Ecuador, Dec. 11, 2016, O.J. (L 356) 3.

[36] Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part, E.U.-Canada, Jan. 14, 2017 O.J. (L 11) 23 [hereinafter C.E.T.A.].

[37] Agreement between the European Union and Japan for an Economic Partnership, E.U.-Japan, July 17, 2018, O.J. (L 330) 1 [hereinafter E.U.-Japan F.T.A.].

[38] Free Trade Agreement between the European Union and the Republic of Singapore, E.U.-Singapore,Oct. 19, 2018, O.J. (L 294) 3 [hereinafter E.U.-Singapore F.T.A.].

[39] Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam, E.U.-Vietnam, June 30, 2019, O.J. (L 186) 3 [hereinafter E.U.-Vietnam F.T.A.].

[40] E.U.-Mexico Agreement in principle for an F.T.A., E.U.-Mex., Apr. 21, 2018.

[41] E.U.-Mercosur Agreement in principle for an F.T.A., E.U.-Mercosur, Jun. 28, 2019.

[42] E.U.-New Zealand concluded negotiations for an F.T.A. on 30 June 2022 [hereinafter E.U.-New Zealand F.T.A.]. Text published for information purpose, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/new-zealand/eu-new-zealand-agreement_en (last visited Nov. 22, 2022).

[43] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, Dec. 30, 2020, O.J. (L 149) [hereinafter E.U.-U.K. T.C.A.].

[44] *See* Jean-Frédéric Morin, Nicolas Michaud, Corentin Bialais, *Trade negotiations and climate governance: the EU as a pioneer, but not (yet) a leader* (Sept. 10, 2016), https://www.chaire-epi.ulaval.ca/sites/chaire-epi.ulaval.ca/files/publications/trade_and_climate.pdf.

integrating non-trade issues in its international agreements, originally of a development-driven nature.[45] A necessity relevantly emerging in the 1989 Lomé IV Convention,[46] concluded between the Union and the African, Caribbean and Pacific [hereinafter A.C.P.] countries and incorporating an *ad hoc* human rights clause, later transposed as an essential element in given cooperation and association agreements.[47]

Secondly, the integration of ecological variables into free trade agreements is no novelty in the international legal framework. In particular, since the adoption of the 1994 North American Free Trade Agreement [N.A.F.T.A.][48] and its side agreement on Environmental Cooperation,[49] concluded amongst the United States, Canada and Mexico, the United States [hereinafter U.S.] have stood out as a central player in addressing environmental reflections through trade tools, emerging as a regulatory model largely explored by commentators in comparison to the Union's one.[50]

[45] *See generally* Andrew Mold, EU Development Policy in a Changing World: Challenges for the 21st Century (Amsterdam University Press, 2007).

[46] Fourth A.C.P.-E.E.C. Convention, Dec. 15, 1989, O.J. (L 229). In particular, art. 33 states:

> in the framework of this Convention, the protection and the enhancement of the environment and natural resources, the halting of the deterioration of land and forests, the restoration of ecological balances, the preservation of natural resources and their rational exploitation are basic objectives that the A.C.P. States concerned shall strive to achieve with Community support with a view to bringing an immediate improvement in the living conditions of their populations and to safeguarding those of future generations.

[47] *See* Žvelc, *supra* note 23; *see also* T. Takács, A. Ott and A. Dimopoulos, *Linking trade and non-commercial interests: the EU as a global role model?* (CLEER, Working Paper No. 2013/4, 2013), https://www.asser.nl/media/1639/cleer_13-4_web.pdf; Laura Beke, David D'Hollander, Nicolas Hachez, Beatriz Pérez de las Heras, *Report on the integration of human rights in EU development and trade policies* (Frame, Work Package No. 9, Deliverable No. 1, 2014), https://www.europarl.europa.eu/cmsdata/86030/FP7%20report.pdf; Billy Melo Araujo, *Regulating through Trade: re-calibration of EU Deep and Comprehensive F.T.A.s*, 31 Pace Int'l L. Rev. 377 (2019).

[48] North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America, Can.-U.S.-Mex., Dec. 8, 1993.

[49] North American Agreement on Environmental Cooperation between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America, Can.-U.S.-Mex., Dec. 17, 1992.

[50] *See generally* Sikina Jinnah & Elisa Morgera, *Environmental Provisions in American and E.U. Free Trade Agreements: A Preliminary Comparison and Research Agenda*, 22 Rev. Eur. Compara. & Int'l Env't L. 324 (2013); Marco Bronckers & Giovanni Gruni, *Retooling the Sustainability Standards in E.U. Free Trade Agreements*, 24 J. Int'l Econ. L. 25 (2021); J. B. Velut et al., *Comparative Analysis of Trade and Sustainable Development Provisions in Free Trade Agreements,* european commision (Feb., 2022), https://trade.ec.europa.eu/doclib/docs/2022/february/tradoc_160043.pdf.

Against this backdrop, the present article aims at detecting if, and to what extent, environmental interests have been included into the new generation free trade agreements negotiated or concluded by the European Union with a key focus on their suitability for enforcement. Under this viewpoint, the research is to contribute to the existing doctrinal debate on the topic.[51] Yet, original inputs will be offered by underscoring the significance generated by the advent of the European Green Deal also on the E.U. external trade agenda. Consequently, it is to be ultimately demonstrated that further guidance and clarification reveals necessary. This is in spite of the inherent potential for the predisposed Power of Trade Partnerships communication[52] to turn the spotlight on a more assertive application of the ecological clauses enshrined in N.G.F.T.A.s., as demonstrated by the reformed sustainability blueprint adopted for the newborn EU-New Zealand F.T.A.

Following an introductory Section focusing on the normative rationales behind the inclusion of environmental clauses in external trade tools (Paragraph 1), the first part of the article is designed to identify and compare environmental provisions as enshrined in N.G.F.T.A.s' Trade and Sustainable Development [hereinafter T.S.D.] Chapters, with the primary aim of assessing their enforcement both from an upstream (Paragraph 2) and downstream (Paragraph 3) perspective. The work then elaborates on contemporary trajectories in the normativization of the trade-and-environment nexus, first and foremost in light of the June 2022 Commission's communication on the final revision of the fifteen-point action plan on trade and sustainable development[53] and E.U.-New Zealand F.T.A. (Paragraph 4). Eventually, concluding remarks are reported (Conclusion).

[51] *See generally* Wybe Th. Douma, *The Promotion of Sustainable Development through EU Trade Instruments*, 28 EUR. BUS. L. REV. 197 (2017); Giovanna Adinolfi, *A Cross-cutting Legal Analysis of the European Union Preferential Trade Agreement's Chapters on Sustainable Development: Further Steps towards the Attainment of the Sustainable Development Goals?*, *in* INTERNATIONAL TRADE, INVESTMENT, AND SUSTAINABLE DEVELOPMENT GOALS: WORLD TRADE FORUM 15-49 (Cosimo Beverelli, Jurgen Kurtz & Damian Raess eds., 2020); Gracia Marín Durán, *Sustainable Development Chapters in E.U. Free Trade Agreements: Emerging Compliance Issues*, 57 COMMON MKT. L. REV. 1031 (2020).

[52] *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The power of trade partnerships: together for green and just economic growth,* COM (2022) 409 final (Jun. 22, 2022).

[53] *Id.*

1. PROMOTING ENVIRONMENTAL INTERESTS THROUGH EXTERNAL TRADE TOOLS: A PRIMARY LAW OBLIGATION

In spite of a recurrent emphasis on the need to include environmental requirements in external trade instruments being made by E.U. policy documents, it proves necessary to underscore that, at Union level, environmental integration is not merely urged by soft-law sources. To the contrary, it is also prescribed by binding norms, entailing primary law provisions. Particularly, the Single European Act, inaugurating an *ad hoc* title on the environment, formulated for the first time the horizontal clause on environmental integration, recognizing that "environmental protection requirements shall be a component of the Community's other policies".[54]

Progressively strengthened,[55] the Principle was finally transposed into Article 11 of the Treaty on the Functioning of the European Union [hereinafter T.F.E.U.] following the Lisbon amendments. This confirmed the policy rationale that advancements in environmental protection may be more effectively attained in the absence of definition and implementation of E.U. policies and activities disregarding eco-friendly contemplations.[56] As a consequence, the principles proper of the Union's environmental policy, as enshrined in Article 191 T.F.E.U., were brought out of their niche, and made applicable to a vast array of Union's policies.[57] It shall be additionally borne in mind that the principle of environmental integration has found additional lymph by virtue of its enclosure in Article 37 of the E.U. Charter of Fundamental Rights which, with the entry into force of the Lisbon Treaty, was attributed primary law relevance.[58]

[54] Single European Act, art. 130r, ¶ 2, Jun. 29, 1987, O.J. (L 169).

[55] In particular, the principle of environmental integration was valorized by the Amsterdam Treaty, which managed to place it among the general principles of E.U. law, while also introducing an express mention to the notion of sustainable development.

[56] Consolidated Version of the Treaty on the Functioning of the European Union, art. 11, May 9, 2008, 2008 O.J. (C 115) 47 reads: "Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development". *See generally* Massimiliano Montini, *The principle of integration*, *in* Principles of Environmental Law 139 (Ludwig Krämer & Emanuela Orlando eds., 2018).

[57] This shall be, in particular, the case of the principle of prevention, which has been referred to by the Court of Justice in order to review an export ban adopted under the Common Agricultural Policy. *See* Case C-157/96, The Queen v Ministry Agric. & Others, 1998, E.C.R. I-02211. *See generally* Richard Macrory et al., Principles of European Environmental Law (4th ed. 2004).

[58] Art. 37, affirming: "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development". *See* Charter of Fundamental Rights of the European Union, Dec. 12, 2007, O.J. (C 326). For a comment in the literature, see Elisa Morgera & Gracia Marin-Duran, *Commentary to Article 37 - Environmental Protection of the EU Charter of Fundamental Rights*, *in* Commentary on the EU Charter of Fundamental Rights 983 (Peers et al. eds., 2d ed. 2021).

Notwithstanding its prescriptive formulation,[59] the enforceability of the environmental integration principle remains questionable, with the European Union Court of Justice [hereinafter E.C.J.] accentuating the broad discretionary powers in the hands of the Union's legislator to evaluate concretely to what extent ecological requirements ought to be integrated into the E.U. 's other policies and actions.[60]

Along with reaffirming the principle of environmental integration, the Treaty of Lisbon further contributed to confer significance to the chase of non-trade objectives by means of the common commercial policy [hereinafter C.C.P.]. Article 207 T.F.E.U. now compels the C.C.P. to be based on uniform principles, along with being conducted "in the context of the principles and objectives of the Union's external action",[61] as also overarchingly demanded by Article 205 T.F.E.U.[62]

For the purpose of the present examination, the *renvoi* operated by the aforementioned norms leads to the identification of precise aims. Notably, Article 21 of the Treaty on European Union [hereinafter T.E.U.], requiring the Union to define and pursue its external policies to "foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty"[63] and "help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development".[64] Eventually, mention has to be made to Article 3(5), T.E.U., highlighting the necessity for the Union to "uphold

[59] The conception of the integration of environmental considerations as an obligation for the Union legislator has also been acknowledged by the E.C.J. *See* Cases T-429/13 and T-451/13, Bayer CropScience AG & Others v Comm'n, ECLI:EU:T:2018:280, ¶ 106 (May 17, 2018).

[60] *See, e.g.*, Case C-733/19, Kingdom of the Neth. v Council & Parliament, ECLI:EU:C:2021:272, ¶ ¶ 49-50 (May 15, 2021). For a comment in the literature, see Francesco Munari & Lorenzo Schiano di Pepe, La Tutela Transnazionale dell'Ambiente (2012); Jan H. Jans, *Stop the Integration Principle?*, 33 Fordham Int'l L. J. 1533 (2011), https://ir.lawnet.fordham.edu/ilj/vol33/iss5/8.

[61] T.F.E.U., *supra* note 56, at art. 207. For a comment regarding the effects of the Lisbon Treaty on the common commercial policy, see Angelos Dimopoulos, *The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy*, 15 Eur. Foreign Aff. Rev. 153 (Feb. 15, 2010), https://hdl.handle.net/1814/17320; Joris Larik, *Entrenching Global Governance: The EU's Constitutional Objectives Caught Between a Sanguine World View and a Daunting Reality*, *in* The EU's Role in Global Governance: The Legal Dimension 7 (Bart Van Vooren, Jan Wouters & Steven Blockmans eds., 2013). The broadening of the field of application of the C.C.P., and the consequent evolution of the latter as embedded in Article 207 T.F.E.U., in comparison with art. 133 of the Treaty establishing the European Community, has also been acknowledged by the E.C.J. *See, e.g.*, Case C-414/11, Daiichi Sankyo Co. Ltd, Sanofi-Aventis Deutschland GmbH v. DEMO Anonimos Viomikhaniki kai Emporiki Etairia Farmakon, ECLI:EU:C:2013:520, ¶ ¶ 45-46 (July 13, 2013).

[62] T.F.E.U., *supra* note 56, at art. 205, stating: "The Union's action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union".

[63] Consolidated Version of the Treaty on European Union, art. 21, ¶ 2 (d), Oct. 26, 2012, 2012 O.J. (C326).

[64] *Id.* at art. 21, ¶ 2 (f).

and promote its values and interests"[65] in its relations with the wider world, to contribute to the sustainable development of the Earth, along with free and fair trade.

The era inaugurated by the Lisbon Treaty thus appears to attribute emphasis to an approach to foreign policy which has been epitomized as managed globalization, attempting at accommodating free trade imperatives with the prerequisite to uphold non-trade benefits in international commercial intercourses, including the promotion of sustainable development.[66]

A requirement which, in the aftermath of the landmark Opinion 2/15,[67] materializes as strengthened. The Court was, as a matter of fact, requested to determine whether the Union had the requisite competence to sign and conclude alone the F.T.A. with Singapore and, specifically, which provisions of the agreements fell within the E.U.'s exclusive and shared competences, as well as within the exclusive competence of the Member States.[68]

With particular regard to the commitments concerning sustainable development, the Opinion emphasizes that the obligation on the European Union to integrate the objectives and principles of the Union's external action into the conduct of the C.C.P. is "apparent from the second sentence of Article 207(1) T.F.E.U. read in conjunction with Article 21(3) T.E.U. and Article 205 T.F.E.U.".[69] Therefore, the Court underscores that account must be taken of Article 11 T.F.E.U.[70] and that the "objective of sustainable development forms an integral part of the common commercial policy".[71] An interpretation which departs from the reading provided by the Advocate General

[65] *Id.* at art. 3, ¶ 5.

[66] Rawi Abdelal & Sophie Meunier, *Managed Globalization: Doctrine, Practice and Promise*, 17 J. Eur. Pub. Pol'y 350 (2010).

[67] Opinion 2/15, *supra* note 16. Opinion 2/15 was delivered by the Full Court in May 2017, upon a request made by the European Commission ex T.F.E.U. art. 218, ¶ 11. It represents a landmark ruling for the common commercial policy in general and F.T.A.s' trade and sustainable development Chapters in particular, elaborating on the correct allocation of competences between the E.U. and its Member States. *See, e.g.*, David Kleimann, *Reading Opinion 2/15: Standards of Analysis, the Court's Discretion, and the Legal View of the Advocate General* (EUI RSCAS 2017/23 Global Governance Programme-264, Working Paper No. 23, 2017), https://cadmus.eui.eu/bitstream/handle/1814/46104/RSCAS_2017_23REVISED.pdf?sequence=4&isAllowed=y; Marise Cremona, *Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017*, 14 Eur. Cont. L. Rev. 231 (2018); Reinhard Quick & Attila Gerhäuser, EU *Trade Policy after Opinion 2/15: Internal and External Threats to Broad and Comprehensive Free Trade Agreements*, *in* Law and Practice of the Common Commercial Policy: The First 10 years after the Treaty of Lisbon 486 (Guillaume Van der Loo & Michael Hahn eds., 2021); Charlotte Beaucillon, *Opinion 2/15: Sustainable Is the New Trade. Rethinking Coherence for the New Common Commercial Policy,* 2 Eur. Papers 819 (2017).

[68] Kleimann, *supra* note 67, ¶ 1. It is important to remember that, by relying on settled case-law, the Court affirmed that an E.U. act is to fall within the common commercial policy if it: "relates specifically to such trade in that it is essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it". Concordantly, the fact that an E.U. act is merely liable to have implications for trade is not enough for it to be classified as a C.C.P. measure. *See* Kleimann *supra* note 67, ¶ 36.

[69] *Id.* ¶ 143.

[70] *Id.* ¶ 146.

[71] *Id.* ¶ 147.

[hereinafter A.G.], according to whom Article 11 T.F.E.U. could not "affect the scope of the common commercial policy laid down in Article 207 T.F.E.U."[72] or "modify the scope of the European Union's competence".[73]

The E.C.J. has thus offered an extensively broad reading of the Union's post-Lisbon competences in external trade policy,[74] unambiguously embracing also commitments concerning sustainable development as embedded in N.G.F.T.A.s.[75]

The Court of Justice has only narrowly advanced a fully-fledged scrutiny of Articles 21 and 3(5), T.E.U. Whereas, on the one hand, the obligation for the E.U. to integrate the objectives and principles of the Union's external action into the C.C.P. has been, as shown, declared.[76] On the other hand, the E.U. institutions' wide-ranging margin of appreciation in the field of external economic relations seems to have been confirmed.[77]

[72] Opinion of Advocate General Sharpston, ECLI:EU:C:2016:992, ¶ 495, (Dec. 21, 2016).
[73] *Id.*
[74] The Court, in fact, determined that all provisions of the E.U.-Singapore F.T.A. fell within the Union's exclusive competence, with the only exception of clauses relating to non-direct investment and on Investor-State dispute settlement.
[75] An extensive analysis concerning the implications of Opinion 2/15 on trade and sustainable development goes beyond the scope of the present analysis. *See, e.g.*, Charlotte Beaucillon, *Opinion 2/15: Sustainable Is the New Trade. Rethinking Coherence for the New Common Commercial Policy,* 2 Eur. Papers 819 (2017); Laurens Ankersmit, *Opinion 2/15: Adding some spice to the trade & environment debate*, Eur. L. Blog (Jun. 15, 2017) https://europeanlawblog.eu/2017/06/15/opinion-215-adding-some-spice-to-the-trade-environment-debate.
[76] Opinion 2/15, *supra* note 16, ¶ 143.
[77] *See* Case T-512/12, Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) v. Council, 2015 ECLI:EU:T:2015:953, ¶ 164. *See also* Alessandra Asteriti, *Article 21 TEU and the EU's Common Commercial Policy: A Test of Coherence*, *in* 2017 European Yearbook of International Economic Law 111 (Marc Bungenberg et al. eds., 2017).

2. UPSTREAM ENFORCEMENT: CONTENT AND RATIO OF ENVIRONMENTAL PROVISIONS IN NEW GENERATION F.T.A.S

Granted that an introductory analysis on the primary law requirements legitimizing the Union to include environmental contemplations into its N.G.F.T.A.s has been provided, the present Section turns to inspect the content of the specific provisions approaching green concerns, with the aim of assessing their potential for enforcement.

Since the E.U.-Korea F.T.A., environmental clauses have been mainly[78] included into a specific chapter which is rubricated as Trade and Sustainable Development. A relevant exception is to be found in C.E.T.A., where - granted a *chapeau* T.S.D. Chapter - sustainability clauses have been split into two *ad hoc* Sections, respectively coping with labor issues[79] and environmental considerations.[80] The C.E.T.A. model has been also reproduced in the E.U.-U.K. T.C.A., in which labor and environmental issues are pondered separately.[81] Besides, green provisions as embedded in T.S.D. Chapters do not come as general exceptions formulated on the blueprint of Article XX G.A.T.T. Instead, they rely on bilateral cooperation to foster environmental protection.[82]

Yet, a point remains firm: M.E.A.s clauses as embedded in N.G.F.T.A.s do not radically innovate with respect to the environmental obligations contracted by the Signatories at international level, they have consequently been baptized as a mere: "reaffirmation of obligations already binding on the Parties under those agreements".[83] But they are not meaningless in scope. Actually, the incorporation of obligations deriving from M.E.A.s into T.S.D. Chapters generates a double layer of protection since, by absorbing multilateral environmental agreements into N.G.F.T.A.s, the Parties have committed to respect those obligations also on the basis of the bilateral Agreement, as by analogy, rightly pointed out by the Panel of Experts in the Korea-E.U. dispute.[84]

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[78] The choice of the adverb "mainly" is not causal. T.S.D. Chapters aside, N.G.F.T.A.s contain provisions related, albeit in an indirect way, to the environment also by means of exception clauses modelled upon art. XX G.A.T.T. granted uniformity in content, by way of example, see E.U.-Korea F.T.A, *supra* note 28, at art. 2.15.

[79] C.E.T.A., *supra* note 36, at chapter 23.

[80] *Id.* at chapter 24.

[81] Namely: E.U.-U.K. T.C.A., *supra* note 43, at title XI, Chapter 6 (Labour and Social Standards); Chapter 7 (Environment and Climate Change) and Chapter 8 (Other instruments for Trade and Sustainable Development).

[82] *See, e.g.*, Adinolfi, *supra* note 51; Azzurra Muccione, *Il rapporto dei capitoli su "Commercio e Sviluppo Sostenibile" con la Disciplina in Materia Commerciale*, *in* Gli Accordi Preferenziali di Nuova Generazione dell'Unione Europea 235 (Giovanna Adinolfi ed., 2021) (It.).

[83] Lorand Bartels, *Human Rights and Sustainable Development Obligations in E.U. Free Trade Agreements*, 40 Legal Issues Econ. Integration 297 (2013).

[84] Panel Report, *Panel of Experts proceeding constituted under Article 13.15 of the E.U.-Korea Free Trade Agreement*, ¶ 107 (Jan. 20, 2021) [hereinafter E.U.-Korea Panel Report],

At the outset, it shall be underscored that mention to the *generalis* notion of sustainable development and the *specialis* concept of environmental protection[85] are to be found already in the preambles of several N.G.F.T.A.s, in which the Parties either reaffirmed or recognized their commitment to promote sustainable development in their economic intercourses,[86] or determined to strengthen their international trade relations in accordance with the objectives of sustainable development, along with endorsing exchanges respectful of high levels of environmental protection.[87] As pointed out by Adinolfi, despite lacking prescriptive force, environmental and sustainability references as embraced by N.G.F.T.A.s' Preambles may assume relevance under Article 31 of the 1969 Vienna Convention on the Law of Treaties, thus chiefly serving as interpretative criteria.[88]

Coming to their scope, T.S.D. Chapters do not, by and large, aim at reaching harmonization between the laws and standards of the Parties. Instead, they attempt to bolster cooperation on sustainability issues, conducting commercial exchanges which convict a "race to the bottom" generated by domestic deregulation favoring competitive market conditions. Green clauses contained into T.S.D. Chapters can be concordantly categorized into three main categories: clauses referring to ratification or implementation of Multilateral Environmental Agreements [hereinafter M.E.A.s]; right to regulate and levels of protection clauses; and upholding level of protection clauses (*infra* Annex Table).

Alongside, satellite provisions dealing with particular environmental concerns, including sustainable forest management and trade in forest products, as well as provisions on trade and biodiversity, trade and climate change and trade and sustainable

https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159358.pdf. *See also* Opinion of Advocate General Sharpston, *supra* note 72, ¶ 498.

[85] It proves essential to remember that, while constituting a specific pillar of sustainable development, the concept of "environment" represents an extremely broad and multifaceted notion. *See* Michelle Ben-David, *Defining International Environmental Law,* 38 ECOLOGY L. Q. 553 (2011).

[86] *See for example*, C.E.T.A., *supra* note 36, at preamble, in which the Parties reaffirmed: "Their commitment to promote sustainable development and the development of international trade in such a way as to contribute to sustainable development in its economic, social and environmental dimensions". *See also*, E.U.-Korea F.T.A., *supra* note 28, at preamble; E.U.-Andean Community F.T.A., *supra* note 35, at preamble; E.U.-Japan F.T.A., *supra* note 37, at preamble.

[87] *See for example*, E.U.-Singapore F.T.A., *supra* note 38, at preamble, in which the Parties determined to:

> strengthen their economic, trade, and investment relations in accordance with the objective of sustainable development, in its economic, social and environmental dimensions, and to promote trade and investment in a manner mindful of high levels of environmental and labour protection and relevant internationally-recognised standards and agreements to which they are party.

See also, E.U.-Vietnam F.T.A., *supra* note 39, at preamble; E.U.-New Zealand F.T.A., *supra* note 42, at preamble.

[88] Giovanna Adinolfi, *Alla ricerca di un equilibrio tra interessi economici e tutela dell'ambiente nella politica commerciale dell'Unione europea*, EUROJUS (May 14, 2017), http://rivista.eurojus.it/alla-ricerca-di-un-equilibrio-tra-interessi-economici-e-tutela-dellambiente-nella-politica-commerciale-dellunione-europea/ (It.).

management of fisheries and aquaculture are to be detected. With an eye evaluating their potential for enforcement, the analysis will now turn to the three pillar provisions constituting the basis of N.G.F.T.A.s' environmental regulation.

2.1.ACLAUSES REFERRING TO RATIFICATION OR IMPLEMENTATION OF MULTILATERAL ENVIRONMENTAL AGREEMENTS

M.E.A.s clauses, representing the first pillar of environmental provisions as enshrined in T.S.D. Chapters display several common features. To begin with, they generally comprise a *chapeau* paragraph, according to which the Parties recognize the importance of international environmental governance and agreements as a response of the international community to global ecological problems. Alongside that, they highlight the necessity to advance bilateral supportiveness between trade and environmental policies and measures,[89] also at the core of the United Nations Environmental Assembly.[90]

In this context, new generation free trade agreements deliberately provide for the Parties to consult and cooperate, as appropriate, with regard to environmental issues of mutual interest related to trade.[91]

[89] *See e.g.*, E.U.-Korea F.T.A., *supra* note 28, at art. 13.5, ¶ 1; E.U.-Andean Community F.T.A., *supra* note 35, at art. 270, ¶ 1; C.E.T.A., *supra* note 36, at art. 24.4, ¶ 1; E.U.-Japan F.T.A., *supra* note 37, at art. 16.4, ¶ 1; E.U.-Singapore F.T.A., *supra* note 38, at art. 12.6, ¶ 1; E.U.-Vietnam F.T.A., *supra* note 39, at art. 13.5, ¶ 1; E.U.-U.K. T.C.A., *supra* note 43, at art. 400, ¶ 1. As for association agreements, see E.U.-Central America A.A., *supra* note 34, at art. 287, ¶ 1; E.U.-Ukraine A.A., *supra* note 31, at art. 292, ¶ 1; E.U.-Moldova A.A., *supra* note 32, at art. 366, ¶ 1; E.U.-Georgia A.A., *supra* note 33, at art. 230, ¶ 1. With regard to agreements in principle reached by the Union and agreements whose negotiations have been recently concluded, see E.U.-Mexico Agreement in Principle, *supra* note 40, at art. 4, ¶ 1; E.U.-Mercosur Agreement in Principle, *supra* note 41, at art. 5, ¶ 2; E.U.-New Zealand F.T.A., *supra* note 42, at art. X.5, ¶ 1.

[90] *See* E.U.-U.K. T.C.A., *supra* note 43, at art. 400, ¶ 1; E.U.-Mexico Agreement in Principle, *supra* note 40, at art. 4, ¶ 1; E.U.-Mercosur Agreement in Principle, *supra* note 41, at art. 5, ¶ 2; E.U.-New Zealand F.T.A., *supra* note 42, at art. X.5, ¶ 1.

[91] *See, e.g.*, E.U.-Korea F.T.A., *supra* note 28, at art. 13.5, ¶ 1; E.U.-Andean Community F.T.A., *supra* note 35, at art. 270, ¶ 1; C.E.T.A., *supra* note 36, at art. 24.4, ¶¶ 1, 3; E.U.-Japan F.T.A., *supra* note 37, at art. 16.4, ¶ 1; E.U.-Singapore F.T.A., *supra* note 38, at art. 12.6, ¶ 1; E.U.-Vietnam F.T.A., *supra* note 39, at art. 13.5, ¶ 1; E.U.-U.K. T.C.A., *supra* note 43, at art. 400, ¶ 5; E.U.-Central America A.A., *supra* note 34, at art. 287, ¶ 1; E.U.-Ukraine A.A., *supra* note 31, at art. 292, ¶ 5; E.U.-Moldova A.A., *supra* note 32, at art. 366, ¶ 1; E.U.-Georgia A.A., *supra* note 33, at art. 230, ¶ 1; E.U.-Mexico Agreement in Principle, *supra* note 40, at art. 4, ¶¶ 1, 4; E.U.-Mercosur Agreement in Principle, *supra* note 41, at art. 5, ¶¶ 2, 5; E.U.-New Zealand F.T.A., *supra* note 42, at art. X.5, ¶¶ 1, 5.

Secondly and most remarkably, the Parties reaffirm their commitment to implement, effectively, into their laws and practices, the multilateral environmental agreements to which there are parties. Yet the provision, despite limited exceptions,[92] does not insert a detailed list of the ratified M.E.A.s, distancing E.U. practice from the one proper of the United States.[93] Apropos ratification of multilateral environmental agreements, the vast majority of N.G.F.T.A.s are silent on the topic, with only limited agreements[94] providing for the commitment to exchange information regularly on the progress on ratification of M.E.A.s, including their protocols and amendments. This practice comes in contrast with T.S.D. Chapters' labor-related provisions, mandating for the commitment to make continued and sustained efforts towards ratification of the fundamental International Labour Organization [hereinafter I.L.O.] Conventions, as well as other conventions classified by I.L.O. as up-to-date. A commitment which, still, is often articulated as a 'mere best effort' obligation.[95]

As highlighted by Bronckers and Gruni, the choice not to include compulsory ratification of M.E.A.s might find a justification in the fact that, to date, the majority of multilateral environmental agreements bearing a relevance for trade according to the W.T.O. has been extensively ratified.[96] Nevertheless, whilst this might be the case for several environmental agreements, different N.G.F.T.A.s partners have still not managed to ratify particular M.E.A.s, thus opening the door to uncertainties regarding the *ratio* for this neat exclusion.[97]

[92] It is notably the case of the E.U.-Andean Community F.T.A. and the E.U.-Central America A.A., in which ratified M.E.A.s are explicitly listed. *See* E.U.-Central America A.A, *supra* note 34, at art. 287, ¶ 2; E.U.-Andean Community F.T.A., *supra* note 35, at art. 270, ¶ 2.

[93] *See e.g.*, Agreement between the United States of America, the United Mexican States, and Canada, art. 24.8, ¶ 4, Nov. 30, 2008 [hereinafter U.S.M.C.A.]. Where not explicitly listed in a given agreement's provision, M.E.A.s may still be found listed in specific Annexes. *See, e.g.*, Free Trade Agreement between the United States of America and the Republic of Korea, Annex 20-A, U.S.-S. Kor., Jun. 30, 2007 [hereinafter U.S.-Korea F.T.A.]. For an analysis and comparison in the literature, see Jinnah & Morgera, *supra* note 50; Sikina Jinnah & Julia Kennedy, *A New Era of Trade-Environment Politics: Learning from US Leadership and its Consequences Abroad,* 12 Whitehead J. Dipl. & Int'l Rel. 95 (2011).

[94] *See* E.U.-Japan FTA, *supra* note 37, at art. 16.4, ¶ 3; E.U.-Vietnam FTA, *supra* note 39, at art. 13.5, ¶ 3; E.U.-U.K. T.C.A., *supra* note 43, at art. 400, ¶ 3; E.U.-Central America A.A., *supra* note 34, at art. 287, ¶ ¶ 3, 4; E.U.-Moldova A.A., *supra* note 32, at art. 366, ¶ 3; E.U.-Mexico Agreement in principle, *supra* note 40, at art. 4, ¶ 3; E.U.-Mercosur Agreement in principle, *supra* note 41, at art. 5, ¶ 4; E.U.-New Zealand F.T.A., *supra* note 42, at art. X.5, ¶ 3. An interesting exception is represented by E.U.-Central America A.A., *supra* note 34, at art. 287, whose Paragraph 3 contains the obligation for the Parties to undertake to ensure ratification of the amendment to Article XXI of Washington Convention (C.I.T.E.S.) by the entry into force of the Agreement. Paragraph 4 continues by underling the commitment to ratify, to the extent that the Parties have not yet done so, the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, at the latest by the entry into force of the Agreement.

[95] *See* Bronckers & Gruni, *supra* note 50; James Harrison et al., *Governing Labour Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters*, 57 J. Common Mkt. Stud. 260 (2019); James Harrison, *The Labour Rights Agenda in Free Trade Agreements*, 20 J. World Inv. & Trade 705 (2019).

[96] Bronckers & Gruni, *supra* note 50.

[97] *Id.*

Yet, a point remains firm: M.E.A.s clauses as embedded in N.G.F.T.A.s do not radically innovate with respect to the environmental obligations contracted by the Signatories at international level, they have consequently been baptized as a mere: "reaffirmation of obligations already binding on the Parties under those agreements".[98] But they are not meaningless in scope. Actually, the incorporation of obligations deriving from M.E.A.s into T.S.D. Chapters generates a double layer of protection since, by absorbing multilateral environmental agreements into N.G.F.T.A.s, the Parties have committed to respect those obligations also on the basis of the bilateral Agreement, as by analogy, rightly pointed out by the Panel of Experts in the Korea-E.U. dispute.[99]

Additionally and with an eye to enforcement, the assimilation of M.E.A.s obligations in the text of T.S.D. Chapters would confer the Parties the power to refer the dispute, in case of violation of the relevant clauses, to a specific adjudicatory procedure, as provided for by the F.T.A. itself.

Against this backdrop, further features of the present clauses remain opaque having been at the center of a vivid debate.

In primis, commitments related to M.E.A.s mostly come with hortatory or best endeavor formulations, which may suggest a lack of prescriptive force. Problematics might also arise regarding the commitment on implementation which, despite an apparent binding formulation, does not contain benchmarks for concretely actualizing pledges. The latter point deserves attention in the aftermath of the E.U.-Korea dispute - where the Panel embraced a broad understanding of the obligation to make continued and sustained efforts towards ratification of the core I.L.O. Conventions. As a matter of fact, the Panel emphasized that, in the absence of "specific forms or contents of efforts being required",[100] the Agreement's text would confer to the Parties a "certain level of leeway in selecting specific ways of making such required efforts",[101] which may ultimately come at the expense of effective implementation and enforcement.

Eventually, a point worth recalling relates to the presence, in M.E.A.s clauses, of a direct and immediate link between multilateral environmental agreements and trade and investment - a characteristic already detected by A.G. Sharpston in her delivered Opinion.[102] In particular, clauses relating to multilateral environmental agreements

[98] Lorand Bartels, *Human Rights and Sustainable Development Obligations in E.U. Free Trade Agreements*, 40 Legal Issues Econ. Integration 297 (2013).

[99] Panel Report, *Panel of Experts proceeding constituted under Article 13.15 of the E.U.-Korea Free Trade Agreement*, ¶ 107 (Jan. 20, 2021) [hereinafter E.U.-Korea Panel Report], https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159358.pdf. *See also* Opinion of Advocate General Sharpston, *supra* note 72, ¶ 498.

[100] E.U.-Korea Panel Report, *supra* note 97, ¶ 274.

[101] *Id.*

[102] Sharpston, supra note 72, ¶ 489.

would "specifically [address] the issue of disguised restrictions on trade which may result from measures implementing multilateral environmental agreements".[103]

Still, N.G.F.T.A.s provide no guidance on how environmental measures flowing from the implementation of M.E.A.s might, concretely, affect bilateral trade. From this perspective, E.U. praxis diverges from the one proper of the U.S. F.T.A.s concluded following the 2006 Peru-U.S. Agreement,[104] in which a violation of the provisions concerning multilateral environmental agreements shall be "in a manner effecting trade or investment between the Parties".[105] Interestingly, the United States-Mexico-Canada Agreement F.T.A.[106] sets indicators for identifying under what conditions such a violation may occur; specifying that a failure is to be regarded as affecting trade or investment if it involves "a person or industry that produces a good or supplies a service traded between the Parties or has an investment in the territory of the Party that has failed to comply with this obligation"[107] or "a person or industry that produces a good or supplies a service that competes in the territory of a Party with a good or a service of another Party".[108]

[103] *Id.*
[104] Peru Trade Promotion Agreement, Peru-U.S., Jan. 6, 2006, [hereinafter U.S.-Peru T.P.A.].
[105] *Id.* at art. 18.2. *See also* U.S.-Korea F.T.A., *supra* note 91, at art. 20.2; United States-Colombia Trade Promotion Agreement, Colombia-U.S., May 15, 2012, at art. 18.2; Free Trade Agreement, Columbia-U.S., Nov. 22, 2006 [hereinafter U.S.-Colombia F.T.A.]; U.S.-Panama Trade Promotion Agreement, art. 17.2, U.S.-Pan. F.T.A. [hereinafter U.S.-Panama F.T.A.]; U.S.M.C.A., *supra* note 91 art. 24.8. For an in-depth analysis in the literature, see Jinnah & Kennedy, *supra* note 91.
[106] Agreement between the United States of America, the United Mexican States, and Canada, *supra* note 95.
[107] U.S.M.C.A., *supra* note 91, at art. 24.8.
[108] *Id.*

2.2. RIGHT TO REGULATE AND LEVELS OF PROTECTION CLAUSES

Right to regulate and levels of protection clauses[109] best mirror the overarching objective of T.S.D. Chapters, by which the Signatories do not intend to harmonize their respective environmental laws and regulations. Conversely, they recognize the sovereign right of each Party to determine its own environmental priorities; establish its levels of environmental protection; and adopt or modify domestic legislation and policies accordingly, with still due regard to both ratified multilateral environmental agreements and internationally recognized standards.

As anticipated, a limited deviation from this model is to be detected in the D.C.F.T.A.s concluded with Ukraine, Moldova and Georgia, falling under the aegis of the E.U. neighborhood policy.[110] In the mentioned Agreements, the specific right to regulate clause is accompanied by a general commitment of legislative approximation to the E.U. *acquis* in the environmental domain.[111] Yet, the choice comes as no surprise, given the twofold objective of D.C.F.T.A.s calling for both the associated Country integration in the Union's internal market by means of the setting up of a free trade area and the progressive approximation of domestic legislation to that of the Community.[112]

Furthermore, right to regulate clauses encompass references to given levels of protection, demanding the F.T.A. partners to ensure that domestic laws and policies provide for and encourage high levels of environmental safeguard, along with enshrining a commitment to strive to keep incrementing domestic legislation and policies.

An analysis of right to regulate and levels of protection clauses hence reveals the presence of two distinct components, also termed in the literature as minimum-level and high-level clauses.[113] The former, phrased in mandatory terms, establishes a straightforward connection with M.E.A.s obligations, thus granting minimum standards of protection in the Party's exclusive right to regulate. Minimum-level provisions border the power of States to autonomously determine, without normative constraints, domestic environmental legislation. Also, they innovate with regard to the traditional

[109] *See, e.g.*, E.U.-Korea F.T.A., *supra* note 28, at art. 13.3; E.U.-Andean Community F.T.A., *supra* note 35, at art. 268; C.E.T.A., *supra* note 36, at art. 24.3; E.U.-Japan F.T.A., *supra* note 37, at art. 16.2, ¶ 1; E.U.-Singapore F.T.A., *supra* note 38, at art. 12.2; E.U.-Vietnam F.T.A., *supra* note 39, at art. 13.2; E.U.-U.K. T.C.A., *supra* note 43, at art. 391, ¶ 1; E.U.-Georgia A.A., *supra* note 33, at art. 228; E.U.-Moldova A.A., *supra* note 32, at art. 364; E.U.-Mexico Agreement in Principle, *supra* note 40, at art. 2, ¶¶ 1, 2; E.U.-Mercosur Agreement in Principle, *supra* note 41, at art. 2, ¶¶ 1, 2; E.U.-New Zealand F.T.A., *supra* note 42 at art. X.2, ¶¶ 1, 2.

[110] For an overview in the literature, see Bart Van Vooren, EU External Relations Law and the European Neighbourhood Policy: A Paradigm for Coherence (Routledge ed., 2011).

[111] E.U.-Ukraine A.A., *supra* note 31, at art. 290, ¶ 2; E.U.-Moldova A.A., *supra* note 32, at art. 91, 97; E.U.-Georgia A.A., *supra* note 33, at art. 306, 312.

[112] E.U.-Ukraine A.A., *supra* note 31, at art. 1, ¶ 2 (d); E.U.-Moldova A.A., *supra* note 32, at art. 1, ¶ 2 (f); E.U.-Georgia A.A., *supra* note 33, at art. 1, ¶ 2 (h).

[113] *See* Marín Durán, *supra* note 51.

affirmation of the principle on the blueprint of the exception-based model adapted on Article XX G.A.T.T.[114]

High-level provisions, while acting as a supplementary constraint to the Parties' right to regulate, still show an aspirational character, being enunciated in constructs such as "each part shall strive to continue to improve"[115] or "shall strive to ensure"[116] that relevant law and policies provide for high levels of environmental protection. Mostly due to their hortatory formulation - even raising doubts over their effective legal significance - high level of protection clauses may open the door to interpretative uncertainties in adjudicatory procedures, leading the doctrine to observe how their current phrasing could come with difficulties in both implementation and enforcement praxis.[117]

With limited precedents of T.S.D. Panel of Experts not providing for a comprehensive view on the way in which such clauses materially operate, it remains to be seen how semantic constructs such as "high levels of environmental protection" will be interpreted as to assign consistency to the clause.

By way of example, if the Panel decided to make reference to the E.C.J. jurisprudence, the expression "high levels of environmental protection" would not be interpreted as the highest standard of protection technically possible.[118] As asserted by Krämer, high levels of environmental protection are to be determined by referring to environmental denominators as set by those Member States which display an elevated grade of environmental safeguard, along with the reliance on policy declarations, resolutions or targets.[119]

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[114] A wide-ranging assessment of the Parties' right to regulate in preferential trade agreements is outside the scope of the present Article. *See e.g.*, Elizabeth Trujillo, *Balancing Sustainability, the Right to Regulate, and the Need for Investor Protection: Lessons from the Trade Regime*, 59 B. C. L. Rev. 2735 (2018).

[115] Despite minimum differences in formulation, see C.E.T.A., *supra* note 36, at art. 24.3, ¶ 1; E.U.-Singapore F.T.A., *supra* note 38, at art. 12.2, ¶ 2; E.U.-Mexico Agreement in Principle, *supra* note 40, at art. 2, ¶ 2.

[116] Despite minimum differences in formulation, see E.U.-Korea F.T.A., *supra* note 28, at art. 13.3; E.U.-Andean Community F.T.A., *supra* note 35, at art. 268; E.U.-Japan F.T.A., *supra* note 37 , at art. 16.2, ¶ 1; C.E.T.A., *supra* note 36, at art. 24.3, ¶ 1; E.U.-Singapore F.T.A., *supra* note 38, at art. 12.2, ¶ 2; E.U.-Vietnam F.T.A., *supra* note 39, at art. 13.2, ¶ 2; E.U.-U.K. T.C.A., *supra* note 43, at art. 391, ¶ 5; E.U.-Central America A.A., *supra* note 34, at art. 285, ¶ 2; E.U.-Ukraine A.A., *supra* note 31 at art. 290, ¶ 1; E.U.-Georgia A.A., *supra* note 33, at art. 228, ¶ 2; E.U.-Moldova A.A., *supra* note 32, at art. 364, ¶ 2; E.U.-Mexico Agreement in Principle, *supra* note 40, at art. 2, ¶ 2; E.U.-Mercosur Agreement in principle, *supra* note 41, at art. 2, ¶ 2; E.U.-New Zealand F.T.A., *supra* note 42, at art. X.2, ¶ 2.

[117] *See* Marín Durán, *supra* note 51; Marco Bronckers & Giovanni Gruni, *Taking the Enforcement of Labour Standards in The EU's Free Trade Agreements Seriously*, 56 Common Mkt. L. Rev. 1591 (2019).

[118] *See* Case C-284/95, Safety Hi-Tech Srl v. S. & T. Srl., 1998, E.C.R. I-04301.

[119] *See* Nicolas de Sadeleer, *The Principle of a High Level of Environmental Protection in EU Law: Policy Principle or General Principle of Law?*, *in* Mijöẗtsliga Perspektiv Och Tankeẅndor, *VÄNBOK TILL JAN DARPÖ & GABRIEL MICHANEK* 447, 447-65 (Lena Gipperth & Charlotta Zetterbeg eds., 2013); Ludwig Kẗmer, EU Environmental Law (Sweet & Maxwell eds., 8th ed. 2016).

Eventually, it proves necessary to accentuate that, contrary to M.E.A.s clauses, no explicit and direct connection with trade and investment is set in right to regulate at the level of protection clauses. As currently framed and verbalized, the right to regulate provisions would thus seem to establish a plain environmental commitment as noted by A.G. Sharpston in her delivered Opinion.[120]

2.3. UPHOLDING LEVELS OF PROTECTION CLAUSES

Contrary to M.E.A.s and right to regulate clauses, upholding protection level clauses[121] explicitly provide for a direct link with trade and investment to subsist in the case of a Party's failure, through a sustained or recurring course of action or inaction, to effectively enforce or derogate from domestic environmental norms.

The provision, phrased in mandatory terms, comes with subtle variations in N.G.F.T.A.s[122] and a broad scope of application, pertaining to national environmental legislation in its entirety, and not purely internal regulations implementing multilateral environmental agreements. Upholding levels of protection provisions; hence, complement high- and minimum-level of protection clauses by establishing an additional constraint on the Parties' sovereign right to regulate - calling on F.T.A.s Signatories not to fail to enforce or lower ecological regulations and standards in bolstering bilateral trade intercourses. Consequently , their *ratio* is to avoid the so-called "race to the bottom", promoting economic growth through trade exchanges by sustaining environmental deregulation.

As anticipated, the peculiarity of upholding levels of protection clauses rests on their inherent trade association which, in the absence of textual clarification on how this connection - or trade test - shall be envisaged, has led commentators to turn to foreign

[120] Opinion of A.G. Sharpston, ¶ 503.

[121] *See, e.g.*, E.U.-Korea F.T.A., *supra* note 28, at art. 13.7; E.U.-Andean Community F.T.A., *supra* note 35, at art. 277; C.E.T.A., *supra* note 36, at art. 24.5; E.U.-Japan F.T.A., *supra* note 37, at art. 16.2, ¶ 2; E.U.-Singapore F.T.A., *supra* note 38, at art. 12.12; E.U.-Vietnam F.T.A., *supra* note 39, at art. 13.3; E.U.-U.K. T.C.A., *supra* note 43, at art. 391, ¶ 2; E.U.-Central America A.A., *supra* note 34, at art. 291; E.U.-Ukraine A.A., *supra* note 31, at art. 296; E.U.-Georgia A.A., *supra* note 33, at art. 235; E.U.-Moldova A.A., *supra* note 32, at art. 371; E.U.-Mexico Agreement in Principle, *supra* note 40, at Art. 2, ¶¶ 3-6; E.U.-Mercosur Agreement in Principle, *supra* note 41, at art. 2, ¶¶ 3-5; E.U.-New Zealand F.T.A., *supra* note 42, at art. X.2, ¶¶ 3-6. In the literature, upholding levels of protection clauses are also referred to as "non-regression" and "non-derogation" clauses. *See* Adinolfi, *supra* note 51.

[122] On the one hand, in some N.G.F.T.A.s, such as C.E.T.A., upholding levels of protection clauses are formulated in slightly less mandatory terms, utilizing the expression: "[T]he parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their environmental law". On the other, different N.G.F.T.A.s, such as the E.U.-Korea F.T.A., do incorporate a stronger wording, prescribing that: "[A] Party shall not fail to effectively enforce its environmental and labour laws".

practice for interpretative guidance.[123] Remarkably, in the landmark decision given under the Dominican Republic-Central America-United States Free Trade Agreement [hereinafter C.A.F.T.A.-D.R.],[124] the Arbitral Panel accentuated that it shall be for the plaintiff to demonstrate that alleged practices regarded as being in contrast with sustainability provisions, as enshrined in the trade agreement, have assigned a "competitive advantage on the employer or employers engaged in trade",[125] by means of "repeated behavior which displays sufficient similarity"[126] or "prolonged behavior in which there is sufficient consistency in sustained acts or omissions as to constitute a line of connected behavior".[127]

Taking as a basis the arbitral panel's ruling, it can be accordingly ascertained that, on the one hand, a sole failure to effectively enforce environmental laws is not eligible to be classified as a violation of upholding levels of protection clauses. On the other, a competitive advantage shall be detected, accruing to a relevant employer and consequently affecting its competitiveness.[128] On the basis of semantic correspondence detected in the E.U. and in the U. S. upholding level of protection clauses, a convergence in interpretation may, thus, be plausible.[129]

3. DOWNSTREAM ENFORCEMENT: A SPECIALIS DISPUTE SETTLEMENT MECHANISM AND THE LACK OF ECONOMIC SANCTIONS

By means of new generation F.T.A.s, the European Union has assumed a promotional, or managerial,[130] approach in sustaining environmental interests through trade agreements, a normative choice disregarding the utilization of countermeasures in case

[123] Bronckers & Gruni, *supra* note 50.

[124] Dominican Republic - Central America - United States Free Trade Agreement Arbitral Panel Established Pursuant to Chapter 20 in the Matter of Guatemala, Issues Relating to the Obligations Under Article 16.2.1(A) of the C.A.F.T.A.-D.R., Final Report of the Panel, Jun. 14, 2017 [hereinafter C.A.F.T.A.-D.R. Panel Report]. For a comment in the literature, see Phillip Paiement, *Leveraging Trade Agreements for Labor Law Enforcement: Drawing Lessons from the US-Guatemala CAFTA Dispute*, 49 Geo. J. Int'l L. 675, 675-92 (2018); Tequila J. Brooks, *U.S.-Guatemala Arbitration Panel Clarifies Effective Enforcement Under Labor Provisions of Free Trade Agreement,* 4 Int'l Lab. Rts. Case L. 45 (2018).

[125] C.A.F.T.A.-D.R. Panel Report, *supra* note 122, ¶ 190.

[126] *Id.* ¶ 152.

[127] *Id.*

[128] *Id.* ¶ 195.

[129] *See, e.g.*, E.U.-Korea F.T.A., *supra* note 28, at art. 13.7; U.S.-Korea F.T.A., *supra* note 91, at art. 20.3.

[130] *See* Denise Prévost & Alexovicova Iveta, *Mind the Compliance Gap: Managing Trustworthy Partnerships for Sustainable Development in the European Union's Free Trade Agreements*, 6 Int'l J. Pub. L. & Pol'y 236, 236-269 (2019).

of non-compliance. A regulatory tactic epitomizing the central deviation point from its main alternative model is the confrontational one embraced by F.T.A.s negotiated and concluded by the United States.[131]

Notably, all E.U. new generation free trade agreements include a *specialis* dispute settlement mechanism [hereinafter D.S.M.] for "any matter of mutual interest"[132] arising from the provisions contained in trade and sustainable development Chapters. This is an apparatus structured around a recurrent double layer: governmental consultations followed by the potential establishment of a Panel of Experts, or group of experts,[133] in the case of failed bilateral dialogue. The adjudicatory procedure spelt out in T.S.D. Chapters thus unfolds into precise steps.

To begin with, in the case of a disagreement over a matter arising under the considered Chapters, a Party can request consultations with the Counterpart by delivering a written request to the specific contact point, i.e., a designated office within the other Party's administration. Consultations shall thus commence punctually after the delivery of the written request. A point worth mentioning regards the eventual consideration of the activity of relevant multilateral environmental organizations as to reach a mutually satisfactory solution, along with the possibility for the Parties, by mutual accord, to seek recommendations of these organizations or bodies in order to investigate the matter.

Secondly, in the eventuality of a Party's will to further examine the object of the dispute, a specific organ constituted under the F.T.A., denominated as Trade and Sustainable Development Committee or Board on Trade and Sustainable Development, may be convened with the view of considering the matter.[134]

Yet and thirdly, should the dispute fail to be satisfactorily addressed, each Party may request, again in writing to the contact point of the Counterpart, the establishment of a Panel of Experts to analyze the matter. Panelists are to be designated among individuals with specialized knowledge or expertise in relation to the topics addressed by T.S.D. Chapters - which shall be independent and serve in their individual capacities.

[131] Jinnah & Morgera, *supra* note 50.

[132] Granted uniformity in the content of the procedures, see e.g., E.U.-Korea F.T.A, *supra* note 28, at art. 13.14, ¶ 1.

[133] *See, e.g.*, E.U.-Andean Community F.T.A. *supra* note 35, at art. 284; E.U.-Ukraine A.A., *supra* note 31, at art. 301.

[134] The procedure spelt out in N.G.F.T.A.s for governmental consultations comes with slight variations in the analyzed agreements. *See* E.U.-Korea F.T.A., *supra* note 28, at art. 13.14; E.U.-Andean Community F.T.A., *supra* note 35, at art. 283; C.E.T.A., *supra* note 36, at art. 23.9; E.U.-Japan F.T.A., *supra* note 37, at art. 16.17; E.U.-Singapore F.T.A., *supra* note 38, at art. 12.16; E.U.-Vietnam F.T.A., *supra* note 39, at art. 13.16; E.U.-U.K. T.C.A., *supra* note 43, at art. 408; E.U.-Central America A.A., *supra* note 34, at art. 296; E.U.-Georgia A.A., *supra* note 33, at art. 242; E.U.-Moldova A.A., *supra* note 32, at art. 378; E.U.-Ukraine A.A., *supra* note 31, at art. 300, ¶¶ 4-6; E.U.-Mexico Agreement in Principle, *supra* note 40, at art. 16; E.U.-Mercosur Agreement in Principle, *supra* note 41, at art. 16.

The chief task of the Panel is thus to present a final report containing recommendations to the Parties.

In so doing, the matter is to be examined in light of the relevant provisions of the T.S.D. Chapter and, if deemed relevant, information from any ulterior source may be obtained. Particularly, in matters related to respect of M.E.A.s, the Panel might be entitled to seek information from the relevant multilateral environmental agreements' bodies. Coming to the Panel's final report, this shall set out the findings of facts, the applicability of the relevant provisions and the rationale at the basis of the recommendations. The Parties, despite variations in formulation, are required to make their best efforts to accommodate the Panel's advice.[135]

Henceforth, N.G.F.T.A.s establish a two-track system of judicial protection: a *generalis* adjudicatory procedure applicable to regular trade issues of commercial liberalization, along with intellectual property protection, and a *specialis* one characterizing non-trade components as contained in T.S.D. Chapters.

Such a normative bipartition raises doubts on the overall coherence of the C.C.P., in particular, in a post-Opinion 2/15 scenario abstractly elevating non-trade issues as integral components of the common commercial policy.[136] This is a view further toughened in the aftermath of the E.U.-Korea dispute.[137] Being requested by the Union to assess the consistency of a number of Korean law measures with Chapter 13, Article 13.4.3, of the E.U.-Korea F.T.A.,[138] the Panel ultimately affirmed the binding nature of the sustainability clause at stake.[139] Whereas the dispute related to the labor pillar of

[135] For example, E.U.-Vietnam F.T.A., *supra* note 39, at art. 13.17, ¶ 9, provides for the Parties to "discuss appropriate actions or measures to be implemented taking into account the final report of the Panel of Experts and the recommendations therein". Similarly, also: E.U.-Japan F.T.A., *supra* note 37, at art. 16.18, ¶ 6; E.U.-Singapore F.T.A., *supra* note 38, at art. 12.17, ¶ 9; E.U.-U.K. T.C.A., *supra* note 43, at art. 409, ¶ 16; E.U.-Georgia A.A., *supra* note 33, at art. 243, ¶ 8; E.U.-Moldova A.A., *supra* note 32, at art. 379, ¶ 8; E.U.-Mexico Agreement in Principle, *supra* note 40, at art. 17, ¶ 9; E.U.-Mercosur Agreement in principle, *supra* note 41, at art. 17, ¶ 11. Relevant also the variation contained in C.E.T.A., *supra* note 36, at art. 24.15, ¶ 11, stating:

> [I]f the final report of the Panel of Experts determines that a Party has not conformed with its obligations under this Chapter, the Parties shall engage in discussions and shall endeavour, within three months of the delivery of the final report, to identify an appropriate measure or, if appropriate, to decide upon a mutually satisfactory action plan. In these discussions, the Parties shall take into account the final report.

See also E.U.-Central America A.A., *supra* note 34, at art. 301, ¶ 3.

[136] Sharpston, *supra* note 72, ¶ 147 reading: "[I]t follows that the objective of sustainable development henceforth forms an integral part of the common commercial policy". *See* Susanna Villani, *Settling Disputes on TDS Chapters of E.U. FTAs: Recent Trends and Future Challenge in the Light of CJEU Opinion 2/15, in* The EU and the Rule of Law in International Economic Relations, An agenda for an Enhanced Dialogue 107 (Andrea Biondi & Giorgia Sangiuolo eds., 2021).

[137] E.U.-Korea Panel Report, *supra* note 97.

[138] *Id.* ¶¶ 100-102, 259-260.

[139] *Id.* ¶¶ 127, 277.

sustainable development, the decision reveals crucial also for the interpretation of environmental provisions, on the basis of homogeneity in linguistic formulation.[140]

It is thus no coincidence that claims have been raised as to strengthen sustainability Chapters further and align the T.S.D. mechanism for settling disputes to the N.G.F.T.A.'s regular one[141] - with particular regard to the possibility for demanding countermeasures be implemented in case of non-compliance, at date excluded.

Firmly advocating the promotion of environmental interests through cooperation, the E.U. 's approach had still for a long time rejected the confrontational tactic proper of the United States, which still deserves clarification. As emphasized, F.T.A.s concluded by the United States introduce the possibility for environmental provisions to be subject to the regular dispute settlement mechanism, thus granting the prospect of applying countermeasures in case of non-compliance. Nevertheless, as pointed out by Jinnah and Morgera, the triggering of such a normative leeway remains questionable in practice.[142] A closer look at the relevant provisions[143] reveals that, prior to resorting to the *generalis* D.S.M., the Parties shall turn to *ad hoc* consultative processes, as provided for by F.T.A.s environmental Chapters. Consequently, the prospect of effectively imposing sanctions in instances of missed observance of green provisions would stand out as a mere last resort option following the exhaustion of preliminary remedies.

In addition, the European Union has not excluded, *in toto*, a more assertive approach in enforcing T.S.D. provisions, also of an environmental nature. A partial deviation from the common D.S.M. blueprint for sustainability clauses has in fact been envisaged in the E.U.-U.K. Trade and Cooperation Agreement by means of Article 410 for non-regression areas. In particular, Paragraph 3 legitimizes the complaining Party, where the respondent Party decides not to take any action to conform with the report of the Panel and with the Agreement, to refer *mutatis mutandis* to any remedy authorized under Article 749. This thus regulates temporary remedies for non-compliance with a

[140] A critical assessment of the E.U.-Korea dispute lies outside the scope of this Article. *See* Ji Sun Han, *The EU-Korea Labour Dispute: A Critical Analysis of the EU's Approach*, 26 Eur. Foreign Aff. Rev. 531 (2021); María J. García, *Sanctioning Capacity in Trade and Sustainability Chapters in EU Trade Agreements: The EU–Korea Case*, 10 Pol. & Governance 58 (2022).

[141] *See* Axel Marx et al., Dispute Settlement in the Trade and Sustainable Development Chapters of EU Trade Agreements (Leuven Centre for Global Governance Studies ed., 2017); Dutch Trade Minister & French Trade Minister, *Non-paper from the Netherlands and France on trade, social economic effects and sustainable development* (2020), https://www.tresor.economie.gouv.fr/Articles/73ce0c5c-11ab-402d-95b1-5dbb8759d699/files/6b6ff3bf-e8fb-4de2-94f8-922eddd81d08.

[142] Jinnah & Morgera, *supra* note 50.

[143] For details regarding the procedures, see U.S.-Peru T.P.A., *supra* note 102, at art. 18.12; U.S.-Colombia F.T.A., *supra* note 103, at art. 18.12; U.S.-Korea F.T.A., *supra* note 91, at art. 20.9; C.A.F.T.A.-D.R. Panel Report, *supra* note 122, at art. 17.10; U.S.-Panama F.T.A., *supra* note 103, at art. 17.11; U.S.M.C.A. F.T.A., *supra* note 91, at art. 24.32.

Panel's ruling in the forms of compensation or suspension of obligations. Furthermore, Article 411, termed as "rebalancing", while recognizing each Party's sovereign right in determining its future policies and priorities in relation to environmental and climate protection,[144] underscores how the Partners acknowledge that "significant divergences in these areas can be capable of impacting trade"[145] between them, in a manner which "changes the circumstances that have formed the basis for the conclusion of this Agreement".[146] Henceforth, in case of material impacts on trade between the Parties, arising as a result of significant divergences in environmental and climate protection, each Party may take appropriate rebalancing measures to address the situation. Nevertheless, despite the norm containing procedural guidance on how these measures shall be applied,[147] interpretation is needed to determine what might constitute a "significant divergence" or a "material impact" on trade, with the article merely stating that "a Party's assessment of those impacts shall be based on reliable evidence and not merely on conjecture or remote possibility".[148]

Besides the peculiarities proper of the E.U.-U.K. T.C.A., it is interesting to notice that the possibility for suspension of commercial preferences has also been endorsed by the E.U. through the insertion in trade and cooperation agreements of human rights essential element clauses which, mostly coming into standard wording,[149] have been enclosed in external normative instruments since the 1990s prevalently as tools for triggering the suspension mechanism, are provided for by Article 60 of the Vienna Convention on the Law of Treaties.[150]

[144] E.U.-U.K. T.C.A., *supra* note 43, at art. 411, ¶ 1.Yet, the same Paragraph expressly underlines that the right of each Party to determine its future policy and priorities with regard to environmental or climate protection shall be consistent with each Party's international commitments, including those flowing from the Agreement itself.

[145] *Id.*

[146] E.U.-U.K. T.C.A., *supra* note 43, at art. 411, ¶ 1.

[147] *Id.* ¶¶ 2-3.

[148] *Id.* ¶ 2. The procedure contained in Article 411 is extremely detailed and subject to *ad hoc* procedural requirements. *See generally*, Azzurra Muccione, *La Tutela dell'Ambiente e del Clima*, *in* L'Accordo sugli Scambi Commerciali e la Cooperazione tra l'Unione Europea e il Regno Unito 149 (Alberto Leone Malatesta ed., 2022) (It.).

[149] Generally, essential element clauses concerning human rights present a fixed formula, as by way of exemplification illustrated by the Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, Jun. 23, 2000, O.J. (L 317) (Cotonou Agreement). In particular, see art. 9, ¶ 2: "[R]espect for human rights, democratic principles and the rule of law, which underpin the [A.C.P.-E.U.] Partnership, shall underpin the domestic and international policies of the Parties and constitute the essential elements of this Agreement".

[150] *See* Nicolas Hachez, *"Essential Elements" Clauses in EU Trade Agreements Making Trade Work in a Way that helps Human Rights?* (KU Leuven Working Paper, Paper No. 158, 2015); Bartels, *supra* note 96.

Nevertheless, standard essential element clauses are rarely reproduced in N.G.F.T.A.s,[151] with the limited exception of the E.U.-Andean Community F.T.A.[152] A remarkable exception to this trend can still be detected in the E.U.-U.K. T.C.A., which explicitly stipulates that Article 764(1) on climate change constitutes an essential element of the Agreement.[153]

The latter also elaborates on the fulfillment of the obligations stemming from the clauses marked as essential elements. It introduces the possibility for a Party - when considering that a serious and substantial failure has occurred and after having requested the intervention of the Partnership Council as to reach a mutually agreed solution - to terminate or suspend the operation of the Agreement, or any supplementing agreement, in whole or in part.[154]

Yet, the measures adopted ought to respect international law fully and be proportionate, with priority being conferred to those which "least disturb the functioning"[155] of the Agreement and of any supplementing agreement.[156] The provision concludes by attempting to confer interpretative guidance to the norm, underscoring that for a particular situation to constitute a serious and substantial failure to fulfill the obligations of Article 771, its gravity and nature would be of an "exceptional sort that threatens peace and security or that has international repercussions". [157]

The high threshold for assessing non-compliance with essential element clauses would thus lead to alimenting existing doubts[158] over the effective potential of these provisions in concretely contributing to the protection of human rights and respect for democratic principles abroad.[159] As underlined by Hachez: "essential elements have sparsely been invoked, they have not always led to sanctions proper but rather to consultations, and the sanctions when applied did not involve the lifting of trade

[151] Still, it shall be underscored that, as pointed out by the European Commission, in cases where N.G.F.T.A.s do not incorporate essential elements clauses, the latter is to be found in *ad hoc* framework agreements negotiated with the partner country and legally linked to the trade Agreement. *See Commission Non paper: Using EU Trade Policy to promote fundamental human rights, Current policies and practices* (2012), https://trade.ec.europa.eu/doclib/docs/2012/february/tradoc_149064.pdf.

[152] E.U.-Andean Community F.T.A., *supra* note 35, at art. 1, 2.

[153] E.U.-U.K. T.C.A., *supra* note 43, at art. 771.

[154] *Id.* at art. 772, ¶¶ 1-2.

[155] E.U.-U.K. T.C.A., *supra* note 43, at art. 772, ¶ 3.

[156] *Id.*

[157] *Id.* at art. 772, ¶ 4. For greater clarity, the same provision also underlines that: "[A]n act or omission which materially defeats the object and purpose of the Paris Agreement shall always be considered as a serious and substantial failure for the purposes of this Article".

[158] *See* Lorand Bartels, A Model Human Rights Clause for the EU's International Trade Agreements (German Institute for Human Rights and Misereor, 2014).

[159] *See* Hachez, *supra* note 148. For an overview also regarding essential element clauses in the E.U.-U.K. T.C.A., see Steve Peers, *So Close, Yet So Far: The EU/UK Trade and Cooperation Agreement*, 59 Common Mkt. L. Rev. 49 (2022).

preferences but rather suspension of meetings and technical co-operation programmes".[160]

Against this backdrop, it is still significant that, for the very first time, the E.U.-U.K. T.C.A. introduced an essential element clause explicitly dedicated to the fight against climate change - a factor which may be explained by the Parties' willingness to confer priority to environmental protection in its most pressing dimension.[161] Yet, it should be borne in mind that the peculiarities proper to the Trade and Cooperation Agreement signed with the U.K. might remain a normative *unicum* on the basis of the latter's status of former E.U. Member State.

4. THE ROAD FORWARD: NOVELTIES AHEAD IN THE ERA OF THE EUROPEAN GREEN DEAL

The criticalities characterizing both the upstream and downstream enforcement phases of trade and sustainable development Chapters have not gone unnoticed. Shortly after T.S.D. Chapters entered the scene of free trade agreements, claims have been raised for a more assertive enforcement of sustainability commitments, including environmental provisions as enshrined in new generation commercial agreements. In response to criticism addressing the alleged weak nature of T.S.D. commitments to endorse environmental considerations effectively, in 2017 the European Commission launched a debate[162] on how to improve trade and sustainable development Chapters enshrined in N.G.F.T.A.s.

[160] Hachez, *supra* note 148, at 19. *Contra* Lorand Bartels, *The Application of Human Rights Conditionality in the EU's Bilateral Trade Agreements and Other Trade Arrangements with Third Countries*, European Parliament (2008), https://www.europarl.europa.eu/RegData/etudes/etudes/join/2008/406991/EXPO-INTA_ET(2008)406991_EN.pdf.

[161] *See* Muccione, *supra* note 146; *but see* Giulia C. Leonelli, *From Extra-Territorial Leverage and Transnational Environmental Protection to Distortions of Competition: The Level Playing Field in the EU–UK Trade and Cooperation Agreement*, 33 J. Env't L. 611 (2021). Recently and following the conclusion of negotiations for the E.U.-New Zealand F.T.A., the Commission announced that, also for the aforesaid Agreement, respect of the Paris Agreement shall constitute an essential element. *See* European Commission Press Release IP/22/4158, EU - New Zealand Trade Agreement: Unlocking Sustainable Economic Growth (Jun. 30, 2022).

[162] *Non-paper of the Commission Services, Trade and Sustainable Development (TSD) Chapters in E.U. Free Trade Agreements (FTAs)* (Jul. 11, 2017), https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf.

One year later, the Commission published the non-paper on "Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development Chapters in E.U. Free Trade Agreements".[163] It was reiterating its aversion to the deployment of economic sanctions in order to grant compliance with environmental clauses included in T.S.D. Chapters. Yet, the non-paper managed to advance an action plan in fifteen points aiming at stepping up implementation of T.S.D. Chapters which, with an eye to enforcement, put forward a combination of deeds to be pursued, including enhanced action in the monitoring phase, enabling the civil society to take effective part in the proper functioning of T.S.D. Chapters and ensuring the proper implementation of the Panels' reports.

Nevertheless, the plan did not succeed in halting discussion,[164] which led the Commission to announce a new reflection on T.S.D. Chapters in line with the objectives proper of the European Green Deal. The latter, depicting the E.U. environmental path for the attainment of climate neutrality by 2050, addresses the necessity for the Union to develop a specific "green deal diplomacy"[165] centered on the necessity of "convincing and supporting others to take on their share of promoting more sustainable development".[166]

In order to reach this objective, trade policy is identified as a specific area of cooperation for the advancement of the Union's ecological transition, both at the fore of relevant international fora and through bilateral cooperation with partner countries. In particular, the Green Deal makes it clear how commercial intercourses can favor engagement with trading partners on climate and environmental action, with the E.U. aiming at utilizing its "expertise in green regulation"[167] for acting as an exporter of environmental standards at global level.

The assertion is not causal. Instead, it well mirrors both the first (a European Green Deal) and the fifth (a stronger Europe in the world) headline ambitions set by the Commission's President Ursula von der Leyen for the period 2019-2024.[168] The necessity

[163] *Non paper of the Commission services, Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in E.U. Free Trade Agreements* (Feb. 26, 2018), https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf.

[164] *See* Non-paper from the Netherlands and France on trade, social economic effects and sustainable development, *supra* note 139; Resolution on the trade-related aspects and implications of COVID-19, Eur. Parl. Doc. P9_TA(2021)0328 (2021); ClientEarth, *A New Blueprint for Environmental Provisions in EU Trade Agreements: ClientEarth Contribution to DG Trade Review of Trade and Sustainable Development Chapters*, CLIENTEARTH (Dec., 2021), https://www.clientearth.org/media/0ytbtiaq/blueprint-for-environmental-provisions-in-eu-ftas-final-071221.pdf.

[165] Communication from the Commission, *supra* note 26, at 20.

[166] *Id.*

[167] *Id.* at 21.

[168] *Political Guidelines for the Next European Commission 2019-2024, A Union that Strives for More, My Agenda for Europe, by Candidate of the European Commission Ursula von der Leyen*, https://ec.europa.eu/info/sites/default/files/political-guidelines-next-commission_en_0.pdf (last visited Nov. 22, 2022).

for the Union's trade agreements to present the highest standards of climate and environmental protection results was stressed, with a view for the E.U. to "uphold and update the rules-based global order".[169] It thus comes to mind how, in this context, the Union would aim at acting as a "normative power"[170] on the global scene, attempting at extending its standards into the international system.[171]

The reflection on the alignment of the proper objectives of the European Green Deal to the Union's external trade agenda, announced in February 2021,[172] ultimately led to the publication of the June 2022 Power of Trade Partnerships communication.[173]

Based on inputs and recommendations,[174] six policy priorities for trade agreements to contribute to sustainability have been identified, specifically: (i) proactive cooperation with partners; (ii) bolstering a country-specific approach; (iii) including sustainability commitments also in other Chapters of the F.T.A.s; (iv) incrementing monitoring and implementation of T.S.D. commitments; (v) strengthening the role of civil society; and (vi) stepping up enforcement through trade sanctions as *extrema ratio* options.[175]

Among them, one point deserves attention for present purposes. Notably, the "enhancement of enforcement by means of trade sanctions as a measure of last resort"[176] - mirroring a change in paradigm from previous policy documents. A reflection hence proves necessary in relation to two variables: on the one hand, the asserted alignment of the *specialis* and *generalis* D.S.M.s as embedded in N.G.F.T.A.s, and on the other, the inclusion of the Paris Agreement [hereinafter P.A.] as an essential element clause of new generation arrangements.

[169] *Id.* at 17.
[170] Ian Manners, *Normative Power Europe: A contradiction in Terms?*, 40 J. Common Mkt. Stud. 235 (2002).
[171] For a detailed examination regarding the global reach of E.U. law see Joanne Scott, *Extraterritoriality and Territorial Extension in EU Law*, 62 Am. J. Compar. L. 87 (2014).
[172] Communication from the Commission, *supra* note 25.
[173] *Id.*
[174] Velut et al., *supra* note 50.
[175] Communication from the Commission, *supra* note 52, at 4.
[176] *Id.*

First, the Communication suggests a focus on the particular enforcement phase concerning the implementation of the Panel's report which, until now, has not included given rules of monitoring. The compliance stage proper to the arbitral procedure under the *generalis* D.S.M. would consequently be extended to disputes arising from T.S.D. Chapters, with the Party found in violation having to communicate how the Panel's report is to be implemented within a specified timeframe.[177] This model, remarkably, has already been realized in the E.U.-New Zealand F.T.A., whose negotiations were concluded on 30 June 2022.[178]

Whereas the published version of the Agreement might still undergo amendments, an examination of the disclosed provisions reveals that: "[T]he Party complained against shall take any measure necessary to comply promptly with the findings and recommendations in the final report in order to bring itself in compliance with the covered provisions".[179]

Moreover, no later than thirty days following the delivery of the Panel's report, the Party complained against shall notify the complaining Party of the measures taken or to be taken to comply with the ruling.[180] In cases of disputes arising under trade and sustainable development Chapters, Article X.13(3) mandatorily demands the Party complained against to make the other aware of the measures to be adopted in its domestic civil society mechanism as established under the Agreement, along with the contact point of the Counterpart. Eventually, an asserted "body"[181] is to monitor the implementation of the compliance measures when T.S.D. commitments come into play, whereas the civil society mechanism is entitled to submit observations in this regard.[182]

[177] In particular, according to the Commission's communication this will entail that, were a Party found in violation of its commitments deriving from T.S.D. Chapters, they will have to "promptly inform how they will implement the panel report, and carry this out within a certain period of time". Also, the procedure is to be subject to Panel review, along with contemplating the possibility for the civil society to submit observations at this stage. *See* Communication from the Commission, *supra* note 52, at 11.

[178] European Commission Press release IP/22/4158, *supra* note 159. *See also* Giulia D'Agnone, *Sviluppo Sostenibile: una Condizionalità Ambientale...Soft? Alcune Brevi Osservazioni sull'Accordo Commerciale Negoziato tra l'Unione Europea e la Nuova Zelanda*, Blogdue (Sept. 11, 2022), https://www.aisdue.eu/giulia-dagnone-sviluppo-sostenibile-una-condizionalita-ambientale-soft-alcune-brevi-osservazioni-sullaccordo-commerciale-negoziato-tra-lunione-europea-e-la-nuova-zeland/ (It.).

[179] E.U.-New Zealand F.T.A., *supra* note 42, at Chapter 26, art. X.13.

[180] *Id.* ¶ 2.

[181] *Id.* ¶ 3 (b). Yet, the reading of E.U.-New Zealand F.T.A., supra note 42, at Chapter 19, art. X.15, reveals that the generic term "body" actually refers, in the context of T.S.D. Chapters, to the Committee on Trade and Sustainable Development, specifically established under the F.T.A.'s Chapter XX.

[182] *Id.* at art. X.13, ¶ 3.

Secondly, the eventual imposition of countermeasures in the case of non-compliance, in the form of suspension of trade concessions or compensation, has been put forward, with the possibility of being explicitly limited, in the environmental domain, to "instances of serious violations"[183] of the P.A. on climate change.[184] In detail, this has been envisaged as a "failure to comply with obligations that materially defeat the object and purpose of the agreement".[185] Consequently, respect for the P.A. is rendered an essential element of trade agreements.[186]

Yet, some criticalities shall be underscored. Firstly, it is not clear from the analyzed policy document what declination the asserted sanctions shall assume, since the Commission's communication merely states that these may take the form of suspension of trade concessions.[187] Still, as reported by commentators,[188] the plethora of economic remedies in the hands of the Union is far broader, also comprising financial penalties and targeted sanctions.

Notwithstanding, partial clarification deriving from Article X.16 of the E.U.-New Zealand F.T.A. explicates that trade "sanctions" would actually comprise suspension of obligations or compensation, which shall be temporary and apply only in given circumstances.[189]

Furthermore, and perhaps most importantly, uncertainty remains as to the framing of a material breach of the object and purpose of the Paris Agreement. While the understanding of the former might be drawn from Article 60(3) of the Vienna Convention on the Law of Treaties,[190] the identification of a violation concerning the "object and purpose" of the P.A. reveals more complicated in practice. Particularly, Signatories of the Paris Agreement would chiefly be legally bound to undertake and communicate "ambitious efforts", termed Nationally Determined Contributions [hereinafter N.D.C.s], with the view of achieving the objective of the Agreement as

[183] Communication from the Commission, *supra* note 52, at 11.
[184] Paris Agreement, Oct. 10, 2016, O.J. L 282/4.
[185] Communication from the Commission, *supra* note 52 (emphasis added).
[186] *Id.*
[187] *Id.*
[188] Bronckers & Gruni, *supra* note 50.
[189] In particular, Chapter 26, art. X.16, ¶ 7, excludes suspension of obligations or compensation after: (a) the Parties have reached a mutually agreed solution pursuant to Article X.32; (b) the Parties have agreed that the measure taken to comply brings the Party complained against into conformity with the covered provisions or; (c) any measure taken to comply which the Panel has found to be inconsistent with the covered provisions has been withdrawn or amended so as to bring the Party complained against into conformity with those provisions.
[190] Vienna Convention on the Law of Treaties art. 60, ¶ 3, May 23, 1969, 331 U.N.T.S. 1155 states: "[A] material breach of a treaty, for the purposes of this article, consists in: (a) a repudiation of the treaty not sanctioned by the present Convention; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty".

enshrined in Article 2. The latter, strikingly, does not prescribe national-level emissions' reduction targets, instead resorting to both a global temperature limit and elements proper to the long-term climate pathway.[191]

While the affirmed obligation to communicate N.D.C.s is granted,[192] it is to be considered whether the Paris Agreement effectively put in place an individual obligation on State parties, actually, to fulfill the content of such contributions. This is a hypothesis which may be disregarded in the lack of a clear substantive duty on the point.[193]

Yet, the P.A. opens the door for State parties to engage in a virtuous circle since, when communicating novel N.D.C.s, the latter shall: "represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition".[194] With an eye on the present analysis, it might be asserted that, whilst the actual unfulfilling of the content of N.D.C.s may not be eligible for triggering the suspension mechanism provided for by essential element clauses in N.G.F.T.A.s, along with the possible imposition of countermeasures, a Party's failure in actually improving its N.D.C.s or retrograding from it may, abstractly, be.

Notwithstanding, as underscored by Leonelli, insufficiently ambitious future targets, which still bring about (limited) ameliorations, would hardly be regarded as defeating the objective and purpose of the P.A., *de jure* not being in contrast with the text of the Agreement.[195] The E.U.-New Zealand F.T.A. does not provide major guidance on the point. Whilst Article X.16 on temporary remedies in cases of non-compliance straightforwardly refers, in the environmental domain, to violations pertaining to Article X.6 of the Agreement, i.e., trade and climate change. The latter, tautologically, restates the commitment to implement the Paris Agreement as an obligation to "refrain from any action or omission which materially defeats the object and purpose of the Paris Agreement".[196]

[191] *See generally* Ralph Bodle et al., *The Paris Agreement: Analysis, Assessment and Outlook*, 10 Carbon & Climate L. Rev. 5 (2016).
[192] Paris Agreement art. 4, ¶ 2.
[193] In particular, Bodle et al., *supra* note 189, at 7, underline that: «The [P.A.] does not oblige parties to actually fulfil these [N.D.C.s], hence their content is not as such legally binding. Parties are only required to pursue measures «with the aim of achieving» the objectives of such contributions». *See also* Daniel Bodansky, *The Legal Character of the Paris Agreement*, 25 Rev. Eur. Compar. & Int'l Env't L. 142 (2016).
[194] Paris Agreement, *supra* note 182, at art. 4, ¶ 3.
[195] Leonelli, *supra* note 159.
[196] E.U.-New Zealand F.T.A., *supra* note 42, at Chapter 19, art. X.6, ¶ 3.

CONCLUSION

The present article has attempted at providing an overview of environmental commitments, specifically enshrined in currently concluded and negotiated E.U. new generation free trade agreements, by emphasizing the normative profiles connected to enforceability.

As illustrated, the integration of environmental considerations into the Union's C.C.P. would respond to given primary law requirements, specifically enshrined in the E.U. founding Treaties. Yet, N.G.F.T.A.s have not, until now, proceeded to a complete equalization of trade and non-trade variables, with trade and sustainable development Chapters traveling on a separate track, being conferred a widely promotional role. This neat bipartition distinctly manifests itself in both the upstream and downstream enforcement capacities of green clauses.

As for the former, the scrutinized pillar provisions proper to environmental cooperation chiefly show a hortatory or best-endeavor formulation - as was demonstrated by the textual analysis of M.E.A.s clauses and high-level of protection provisions. On a similar footing, despite presenting stronger wording, minimum and upholding level protection clauses, the clauses do not come with specific criteria for implementation, which comes at the expense of effective enforcement. On the basis of the presented considerations, one might wonder whether T.S.D. provisions might still be deployed as valid exceptions to be invoked in cases of restrictions to bilateral trade exchanges.

Yet, a unanimous and negative response can be derived from the ruling of the Arbitral Panel constituted under the E.U.-Ukraine A.A.[197] specifying that the provisions contained in the trade and sustainable development Chapter do not integrate "self-standing or unqualified exceptions",[198] which may be relied upon for justifying measures which constitute, *per se*, a breach of titles dedicated to trade and trade-related matters.[199] The Panel further went on in unveiling the alleged normative scope of T.S.D.

[197] *Final Report of the Arbitration Panel Established Pursuant to Article 307 of the Association Agreement Between Ukraine of the One Part, and the European Union and its Member States, of the Other Part* (Dec. 11, 2020), https://trade.ec.europa.eu/doclib/docs/2020/december/tradoc_159181.pdf [hereinafter E.U.-Ukraine Panel Report]. *See also* Anzhela Makhinova & Mariia Shulha, *The Arbitration Panel Ruling on Ukraine's Certain Wood Restrictions under the EU-UA Association Agreement*, 16 Glob. Trade & Customs J. 355 (2021); Geraldo Vidigal, *Regional Trade Adjudication and the Rise of Sustainability Disputes: Korea - Labor Commitments and Ukraine - Wood Export Bans*, 116 Am. J. Int'l L. 567 (2022); Susanna Villani, *I Capitali in Materia di Sviluppo Sostenibile Negli Accordi Commerciali dell'Unione europea: Prove di Rilevanza Sistemica*, 3 Diritto del Commercio Internazionale (2022).

[198] E.U.-Ukraine Panel Report, *supra* note 195, ¶ 251.

[199] *Id.*

provisions, which would supposedly serve as "relevant context"[200] for the interpretation of provisions contained in "other parts" of the Agreement,[201] on the basis of Article 31 of the Vienna Convention of the Law of Treaties.

With regard to downstream enforcement, the *specialis*, non-confrontational dispute settlement mechanism applicable in cases of breach of sustainability commitments stands out. While a more assertive route towards enforceability has been recently suggested, this article has highlighted how relevant praxis does not seem to confirm its suitability in better addressing sustainability concerns - as illustrated by the U.S.-Guatemala case. Yet, the framing of the respect for the Paris Agreement as an essential element of N.G.F.T.A.s, as indicated by the Commission's communication, may represent a partial U-turn in the Union's conciliatory paradigm, opening the door to a stronger enforcement of T.S.D. obligations.

Notwithstanding, it has been suggested that it would prove particularly arduous to determine, concretely, the parameters for ascertaining an instance of serious violation of the objective and purpose of the Paris Agreements, on the basis of the latter framing of the Parties' commitments through obligations of means not mandating for the compulsory attainment of the content of specified N.D.C.s. Moreover, as the outcome of the 2022 T.S.D. review is to be proposed for ongoing and future F.T.A.s negotiations only, a comprehensive assessment reveals premature.

Detected criticalities notwithstanding, it is undeniable that the European Green Deal is turning the spotlight onto environmental components to be effectively integrated into the Union's external trade policy. A commitment which, remarkably, is also going beyond the deployment of bilateral instruments[202] - shedding light on the Union's potential to carry on a commercial agenda enhancing trade-related environmental interests.

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[200] *Id.*

[201] *Id.* reading:

> in light of the foregoing, the Arbitration Panel finds that the provisions of Chapter 13 are not self-standing or unqualified exceptions that could justify measures that are per se in breach of Article 35 of the [A.A.]. The Arbitration Panel is nonetheless persuaded that the provisions of Chapter 13 serve as relevant "context" for the interpretation of other provisions of Title IV, which allow the Parties to introduce or maintain measures in derogation to Article 35 of the [A.A.], including for environmental reasons based on Article 36 of the [A.A.] in conjunction with Article XX of the [G.A.T.T.] 1994.

See also Muccione, *supra* note 82.

[202] *See e.g.*, *Proposal for a Regulation of the European Parliament and of the Council for a Carbon Border Adjustment Mechanism,* COM (2021) 564 final (July 14, 2021)*; Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937,* COM (2022) 71 final (Feb. 23, 2022); *Proposal for a Regulation of the European Parliament and of the Council on the Making Available on the Union Market as well as Export from the Union of Certain Commodities and Products Associated with Deforestation and Forest Degradation and Repealing Regulation (EU) No 995/2010*, COM (2021) 706 final (Nov. 17, 2021).

ANNEX I

Agreement	MEA clause	Right to regulate and levels of protection clause	Upholding levels of protection clause
E.U.-Korea F.T.A.	Art. 13.5	Art. 13.3	Art. 13.7
E.U.-Andean Community F.T.A.	Art. 270	Art. 268	Art. 277
E.U.-Central America A.A.	Art. 287	Art. 285	Art. 291
E.U.-Ukraine A.A.	Art. 292	Art. 290	Art. 296
E.U.-Georgia A.A.	Art. 230	Art. 228	Art. 235
E.U.-Moldova A.A.	Art. 366	Art. 364	Art. 371
E.U.-Canada C.E.T.A.	Art. 24.4	Art. 24.3	Art. 24.5
E.U.-Japan E.P.A.	Art. 16.4	Art. 16.2	Art. 16.2
E.U.-Singapore F.T.A.	Art. 12.6	Art. 12.2	Art. 12.12
E.U.-Vietnam F.T.A.	Art. 13.5	Art. 13.2	Art. 13.3
E.U.-U.K. T.C.A.	Art. 400	Art. 391	Art. 391
E.U.-Mexico Agreement in Principle	Art. 4	Art. 2	Art. 2
E.U.-MERCOSUR Agreement in Principle	Art. 5	Art. 2	Art. 2
E.U.-New Zealand F.T.A.	Art. X.5	Art. X.2	Art. X.2

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Judicial Trajectories in the Recognition of Environmental Migrants

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ABSTRACT

This article aims to trace the recent judicial trajectories in the promotion and recognition of environmental migration. It will first show the general background in which the phenomenon is placed, thus underlying its main characteristics and problems. Subsequently, it will offer an overview of some noteworthy examples of the so-called "climate change litigation". Indeed, notwithstanding the lack of binding instruments and the inapplicability or inadequacy of the existing legal instruments for the protection of environmental migrants, noteworthy examples of increasing awareness about the relationship between environmental degradation and human rights can be found in several cases decided by international human rights judicial or quasi-judicial bodies. In particular, two recent decisions of the United Nations Human Rights Committee (U.N.H.R.C.) will be assessed. The article will also assess the increasing sensibility of the European Court of Human Rights (E.Ct.H.R.) in deciding environmental cases through a human-rights-based approach. By moving from the supranational context to the national one, the paper will focus on two recent decisions adopted by the French Bordeaux Administrative Court and the Italian Court of Cassation. Indeed, they both represent relevant examples of the role played by national courts in broadening the interpretation and application of the existing instruments of protection for environmental migrants. The analysis of the mentioned decisions will then be framed in the wider context of the legal order of the European Union (E.U.), highlighting how E.U. instruments of secondary law at disposal do not appear adequate for guaranteeing a sort of protection for environmental migrants.

CC BY

KEYWORDS

Environmental migration; European Union; Migration; Jurisprudence; Human Rights

EDITORIAL NOTE

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INTRODUCTION

With gradually worsening climate patterns and severe weather events, the climate crisis is remodeling our world. Climate change is described by variations in average weather conditions, and includes modifications in temperature, precipitation patterns, the frequency and severity of certain weather events.[1] Indeed, the increasing rise of global temperatures has contributed to more frequent and extreme weather hazards around the world,[2] including sudden-onset events, such as heat waves, droughts, heavy precipitation, floods, and storms, along with slow-onset events, such as the continuous sea-level rise, the ocean warming and acidification, and glacial loss.[3] When such severe

[1] *See* Alexa Jay et al., Fourth National Climate Assessment, Volume II: Impacts, Risk, and Adaptation in the United States 33 (Reidmiller et al. eds, 2018).

[2] According to Copernicus 2021, globally, the years 2016, 2019 and 2020 have been the warmest on record, and 2011–2020, the warmest decade ever. *See* Copernicus Press Release, Copernicus: 2020 Warmest Year on Record for Europe; globally, 2020 Ties with 2016 for Warmest Year Recorded (Jan. 8, 2020).

[3] World Meteorological Organisation [WMO], State of the Global Climate 2020, WMO-No.1264 (2021) https://public.wmo.int/en/our-mandate/climate/wmo-statement-state-of-global- [last visited 6 December 2022].

events are merged with social, political, and economic vulnerabilities, environmental degradation and climate change can also produce adverse effects on the availability of primary resources, such as food and water in rural, coastal, and urban systems across regions.[4]

Thus, climate change and environmental degradation are expected to increase the frequency and intensity of such hazards, bringing further damage and conflicts,[5] especially to vulnerable areas with high dependence on natural resources and low capacity to adapt.[6] Indeed, many countries are witnessing shifts in population distribution and alterations in the human mobility dynamics,[7] eventually leading to a large-scale human movement across continents or trapping people without resources to flee, thus preventing them from escaping their countries of origin due to the adverse effects of climate change and environmental degradation.[8]

In particular, statistics have shown the increasing role of extreme sudden weather-related events in changing mobility patterns and emphasizing pre-existing vulnerabilities.[9] After all, such scenarios are consistent with the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [hereinafter I.P.C.C.][10] registering that, since 2008, an annual average of over twenty million people have been internally displaced by weather-related extreme events, with storms and floods being the most common. Only in 2021, according to the 2022 Internal Displacement Monitoring Centre report, thirty-eight million people were displaced and, among them, 23.7 million were displaced due to disasters in 137 countries and territories.[11] In addition, the World Bank's Groundswell Report recognized that climate change and environmental degradation are potent drivers of migration, and they could force 216 million people across six world regions to move within their countries by 2050.[12]

[4] Viviane Clement et al., Groundswell Part 2: Acting On International Climate Migration 304 (The World bank, 2021), https://openknowledge.worldbank.org/handle/10986/36248.
[5] *Id*.
[6] *See* Jonathan S. Blake et al., *Addressing Climate Migration. A Review of National Policy Approaches*, RAND. Corporation (2021), https://www.rand.org/pubs/perspectives/PEA1085-1.html.
[7] *See* Clement et al., *supra* note 4.
[8] *See* Alex Randall (@AlexRandall), linkedin (July 18, 2022), https://www.linkedin.com/pulse/caught-trap-why-climate-change-might-actually-lead-some-alex-randall/ [last visited 6 December 2022].
[9] *See* Clement et al., *supra* note 4, at 230.
[10] H.-O. Pötner et al., *Climate Change 2022: Impacts, Adaptation and Vulnerability, Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* 52 (IPCC Working Group II Contribution, 2022).
[11] International Displacement Monitoring Centre [IDMC], *Global Report on Internal Displacement* [hereinafter GRID], 11 (2022).
[12] *See* Clement et al, *supra* note 4.

In light of the increasing alarming data, the nexus between environmental degradation and migration has been acquiring a growing space in political and societal debates.[13] The urgency to provide a definition was particularly felt by the International Organization for Migration [hereinafter I.O.M.],[14] which has been the actor at the forefront in the attempt to define "environmental migrants".[15] The 2007 Council Session defined the latter as "persons or groups of persons who, for reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their territory or abroad".[16] This definition by being conceptualized in this manner acknowledges that environmental migrants do

[13] In particular, on the different phenomena that may cause environmental migration see Diane C. Bates, *Environmental Refugees? Classifying Human Migrations Caused by Environmental Change, in* 23/5) Population & Env't 456, 465 (2002); *see* Frank Biermann & Ingrid Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees, in* Glob. Env't Pol., 60 (2010); *see also* Bruno Venditto, *Il futuro del Mediterraneo. Studio preliminare sui rifugiati ambientali, in* Il Mediterraneo: uno studio e una passione. Scritti in onore di Luigi Di Comite 251-269 (M. A. Valleri et al.eds. 2012). *See* Alison Heslin et al., *Displacement and Resettlement: Understanding the Role of Climate Change in Contemporary Migration, in* Loss and Damage from Climate Change: Concepts, Methods and Policy Options 237 (R. Mechler, et al., eds, 2019).

[14] I.o.m.'s defining effort - as well as the above-mentioned inclusion of the environmental causes of migration in soft law documents by other international actors - is placed in a global backdrop in which the issues of the protection of the environment, climate change and sustainable development have fully moved to the center of the political debates. Indeed, it is possible to cite the above-mentioned United Nations Framework Convention on Climate Change [hereinafter, U.N.F.C.C.C.] and its Paris Climate Conferences [hereinafter, c.o.p.s], the U.n. General Assembly Resolution stating the right to a healthy environment, the Sendai Framework for Disaster Risk Reduction 2015-2030 under the U.n. Office for Disaster Risk Reduction (U.n.d.r.r.), the 2030 Sustainable Agenda, as well as the E.U. Green Deal. It is due to note that also the United Nations University's Institute for Environment and Human Security in 2011 tried to define "environmental migrants". In particular, it distinguished among "environmental emergency migrants", "environmentally forced migrants" and "environmentally motivated migrants". "Environmental emergency migrants" are "people who have to flee because of the swiftness of an environmental event and who have to take refuge to save their lives". "Environmentally forced migrants", on the contrary, are "who have to leave in order to avoid the worst of environmental deterioration. The urgency for flight is less than for the environmental emergency migrant since the pace with which the environment is changing and or deteriorating is slower". Whereas "environmentally forced migrants" are those "who may leave a steadily deteriorating environment in order to preempt the worst. Here, there is no emergency nor is it a last resort action to move, but rather it is a situation in which individuals or communities who foresee a continuously deteriorating environment may decide to move in order to avoid further deterioration of their livelihoods" (for a detailed analysis also on the evolving legal scholars' attempts to draw a definition of this phenomenon; *see* Fabrice G. Renaud et al., *A Decision Framework for Environmentally Induced Migration*, *in* Int'l Migration, 5, 14 (2011); Resolution on Women, Gender Equality and Climate Justice, Eur. Parl. Doc. PV 15/01 (2018), para. 20 called:

> on the Commission and the Member States to contribute to the Global Compact for Safe, Orderly and Regular Migration, with a view to safeguarding climate justice by acknowledging climate change as a driver of migration, providing human rights-based input, and mainstreaming gender equality throughout the compact, consistently with the needs of climate- displaced people.

[15] On a methodological level, it is due to note that in the present paper the terms "environmental migrants", "environmental displaced persons" or "environmental induced displacement" will be used within the same meaning. *See* Geddes & William Somerville, *Migration, and environmental change in international governance: the case of the European Union*, *in* 30 Env't and Planning C, 1015, 1018 (2012).

[16] International Organization for Migration [IOM], *Discussion note: migration and the environment*, 1-2, Doc. MC/INF/288 (November 1, 2007).

not only move due to climate change alone, but also due to broader environmental reasons, such as sudden and slow-onset events; that movement of people could occur both within and outside national borders; that migration could be both short-term and long-term and, finally, that such movements could be either forced or voluntarily.[17]

Over time, harsh criticisms have not spared this definition, mainly underlining its broad character and the difficulty to disentangle the effects of environmental change from other drivers of migration. Indeed, environmental migrations have a so-called "multi-causal nature",[18] due to the difficulty, and in some cases the impossibility, in reconstructing a cause-and-effect relationship between a particular environmental event and the specific movement of individuals.[19] It is believed that the environmental conditions act as amplifiers, exacerbating already existing vulnerabilities,[20] in a way that those who experience the most adverse effects of climate change and environmental degradation already tend to be in a state of poverty, sickness, discrimination.[21] In this sense, climate change would interact with other overlapping non-environmental factors, such as economic, social, and political factors,[22] which evolve and change over time.

The lack of a generally accepted definition of environmental migrants, which results in the use of different (and sometimes not adequate) expressions (e.g., *environmental* or *climate migrant*, *environmental* or *climate refugee*, *eco-migrant*), [23] inevitably hinders the assignment of an actual legal status to those moving due to environmental reasons. Actually, some attempts to raise awareness of this gap have been made by certain international actors, such as the U.N.F.C.C.C. Secretariat, the I.O.M. and the U.N. High Commissioner for Refugees [hereinafter U.N.H.C.R.]. They have firstly begun to address the causes and consequences of environmental migration, thus raising the phenomenon as an emerging global priority through the development of frameworks,

[17] On the identified characteristics of environmental migration; *see* Renaud et al., *supra* note 14.
[18] *See* Blake et al., *supra* note 6.
[19] *See* Jane McAdam, *Managing Displacement in the Era of Climate Change*, Geo. J. Int'l Aff., Nov. 2019, at 1.
[20] *See* Jane McAdam, Climate change, forced migration and international law 5 (2012).
[21] *See* Etienne Piguet, *Climate Change and Forced Migration* (United Nations High Commissioner for Refugees, Research Paper No. 153, 2008), http://www.unhcr.org/research/working/47a316182/climate-change-forced-migration-etienne-piguet.html; *see* Valerio Calzolaio, Ecoprofughi. Migrazioni Forzate di ieri, di oggi, di domani (Nda Press, 2010).
[22] *See* Norman Myers, *Environmental refugees: A Growing Phenomenon of the 21st century, in* 357(1420) Phil. Transactions Royal Soc'y B: Biological Sci., 609 (2002).
[23] Due to such complexity, the terminology used to define who moves because of climate or environmental changes is various: climate or environmental refugees, eco-migrants or climate-induced migration, environmental migration, or environmental displaced persons. *See in particular id. see also* Graeme Hugo et al., *Migration, Development and Environment*, *in* 35 Migration Research Series, 42-61 (2008), https://publications.iom.int/system/files/pdf/mrs_35_1.pdf. *See Study on Climate Change and Migration. Legal and Policy Challenges and Responses to Environmentally Induced Migration*, Eur. Parl. Study PE 655.591 (July, 2020), https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655591/IPOL_STU(2020)655591_EN.pdf.

guidelines, and recommendations.[24] Significantly, reference to environmental migration can also be found in the 2010 Cancún Agreement on Adaptation to Climate Change,[25] adopted by the Conference of the Parties to the U.N.F.C.C.C., which called for a commitment by States to develop "measures to enhance understanding, coordination, and cooperation" on the issue.[26] More recently, the United Nations Global Compact for Safe, Orderly and Regular Migration,[27] drawing from the New York Declaration on refugees and migrants,[28] has explicitly acknowledged that climate change, natural disasters, environmental degradation, and other environmental factors are drivers of migration.[29]

[24] *See, e.g.*, under the I.O.M., the creation in 2015 of the Migration, Environment and Climate Change Division which was intended to spearhead work on the subject of environmental migration. Such involvement can be seen in the participation of global processes, such as the Global Compact for Safe, Orderly and Regular Migration [hereinafter G.C.M.], U.N.F.C.C.C., United Nations Convention to Combat Desertification, Sendai Framework for Disaster Risk Reduction, 2030 Agenda for Sustainable Development and Global Forum on Migration and Development, as well as regional dialogues.

[25] *See* United Nations Framework Convention on Climate Change, ¶14 (f), Mar. 15, 2011, U.N. Doc FCCC/CP/2010/7/Add.1.

[26] The necessity to develop and implement a comprehensive approach to migration in the context of disasters, climate change and environmental degradation can be found also in the objectives of the 2030 U.N. Agenda on Sustainable Development, in the 2015 Paris Agreement on Climate Change, in the Sendai Framework for Disaster Risk Reduction and in the Nansen Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change.

[27] As part of the General Assembly's effort, the New York Declaration on Refugees and Migrants sets out a comprehensive refugee response framework and two global compacts (one on refugees and one on international migration). In particular, the 2018 G.C.M. is a non-binding intergovernmental agreement that defines the common pledges to tackle challenges and opportunities in international migrations. The issue of environmental migration is included under Objective 2, which looks at addressing root causes of migration in the context of natural disasters, climate change and environmental degradation, as well as Objective 5, which identifies ways to strengthen opportunities for regular migration for those impacted by slow-onset natural disasters. On the contrary, the Global Compact on Refugees [hereinafter G.C.R.] addresses in a less prominently way environmental displacement. More in detail, the topic of climate change and disaster are only mentioned within the G.C.R.

[28] *See* G.A. Res. 217 (III)A, New York Declaration on Refugees and Migrants (Sept. 19, 2016) [hereinafter New York Declaration]. For an analysis of the Declaration *see* Lisa Ruozzi, *La Dichiarazione di New York sui rifugiati e migranti: verso un modello condiviso di gestione del fenomeno migratorio?, in* 1 Ordine Internazionale e Diritti Umani, 24 (2017). (It.).

[29] *New York Declaration, supra* note 27, at point 1 where it is stated that:

> Since earliest times, humanity has been on the move. Some people move in search of new economic opportunities and horizons. Others move to escape armed conflict, poverty, food insecurity, persecution, terrorism, or human rights violations and abuses. Still others do so in response to the adverse effects of climate change, natural disasters (some of which may be linked to climate change), or other environmental factors. Many move, indeed, for a combination of these reasons,

but also point 9 where it is stated that:

> Refugees and migrants in large movements often face a desperate ordeal. Many take great risks, embarking on perilous journeys, which many may not survive. Some feel compelled to employ the services of criminal groups, including smugglers, and others may fall prey to such groups or become victims of trafficking. Even if they reach their destination, they face an uncertain reception and a precarious future.

Despite the global commitment briefly presented above,[30] the protection of environmental migrants remains a grey area, for three main reasons.

Firstly, the absence of precise data on the number of people moving for environmental reasons from one State to another or within their country of origin makes it difficult to assess the extent of environmental migrants protection or make precise predictions.[31]

Secondly, as mentioned before, it is difficult to define precisely environmental migration,[32] as it is also influenced by other non-environment factors. Apart from evoking different images, the use of the terms *refugee*, *migrant* or *displaced person*, has political and legal implications, accentuating or reducing the forced nature of the movement and soliciting the responsibility of the countries of origin, transit and destination.[33]

Thirdly, there are no *ad hoc* binding instruments granting some kind of protection to these people, while the existing instruments are inadequate. As a matter of fact, even the attempts [34] to grant the refugee status under the 1951 Geneva Convention relating to the Status of Refugees and its 1967 Protocol [35] have proven ineffective.[36] According to art. 1A(2) of the Geneva Convention,[37] there are three main requirements to obtain refugee status which are, however, the reasons for such ineffectiveness.

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[30] *See* United Nations Environmental Programme, The Global Commitment 2022 (2022). https://ellenmacarthurfoundation.org/global-commitment-2022/overview.

[31] *See* Ilian Kelman, *Imaginary Numbers of Climate Change Migrants?*, 8(5) Soc. Sci., 131 (2019).

[32] *See in particular* W. Neil Adger et al., *Human Security, in* Climate Change 2014: Impacts, Adaptation, and Vulnerability, Part A: Global and Sectoral Aspects, 768 (Christopher B. Field at al. eds., 2014); *see also* Ingrid Boas et al., *Climate Migration Myths*, 9 Nat. Climate Change, 901 (2019); Saleh Ahmed, *Book Review: The Concept of Climate Migration: Advocacy and Its Prospects,* 19 Glob. Env't. Pol. 139, 139-141 (2019).

[33] *See* Anna Brambilla & Michela Castiglione, *Migrazioni Ambientali: Libertà di Circolazione vs. Protezione?*, Cosmopolis Rivista di Filosofia e Teoria politica 1, (2019), https://www.cosmopolisonline.it/articolo.php?numero=XVI12019&id=3 [last visited 6 December 2022] (It.).

[34] *See generally* Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 Harv. Env't. L. Rev., 349 (2009). *See also* James Morrissey, *Rethinking the 'Debate on Environmental Refugees': From 'Maximalists and Minimalists' to 'Proponents and Critics'*, 19 J. Pol. Ecology 36, (2012). *See* Benoît Mayer, The Concept of Climate Migration: Advocacy and its Prospects (2016).

[35] *See* U.N. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, (1954).

[36] On the inapplicability of the Geneva Convention to environmental migrants; *see generally* McAdam, *supra* note 20, at. 43; Jane McAdam, Climate Change, Forced Migration, and International Law 43 (2012). Even the Office of the U.N.C.H.R. rejected the use of the term "refugee" in this context on grounds that the term "refugee" is a legal term and should be reserved for refugees protected under the 1951 Geneva Convention. *See* U.N. High Commissioner for Refugees (U.N.H.C.R.), *Climate Change, Natural Disasters and Human Displacement: A U.N.H.C.R. Perspective* (Oct. 23, 2008).

[37] *See* Geneva Convention, *supra* note 36, at art. 1A(2) of the Geneva Convention the

> term refugee shall apply to any person who: [. . .] (2) [. . .] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

Primarily, the Convention requires "a well-founded fear of being persecuted"[38] for one of the five reasons enlisted (the so-called persecution requirement), which hardly amounts to climate change and environmental degradation. There is a reluctance[39] in characterizing "climate change" or the "environment" as agents of persecution.[40] Traditionally, persecutory acts encompass serious violations of human rights, either because of their intrinsic nature or because of their repetition,[41] and the *dolus specialis* – i.e., the special intention to hurt. In the case of environmental migration, since the environment cannot be considered as a persecutor, there is no particular intent. In addition, such fear of being persecuted is connected to a discriminatory element,[42] thus it must be individualized and proved. In other words, the five grounds of persecutions are tied to personal characteristics,[43] while the impacts of environmental degradation are largely indiscriminate. Thus, an environmental migrant would have to prove that something specific is exposing him or her to a real fear of persecution, but the mere environmental or climatic event is not sufficient to apply for international protection.[44]

[38] At the international level, there is not universal definition of "well-founded fear of persecution". *See* U.N. High Commissioner for Refugees (U.N.H.C.R.), *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees,* at 9, 37, HCR/1P/4/ENG/REV. 4, (2d ed. 1992).

[39] *See* Catherine-Amélie Chassin, *Dealing with International Vulnerability: European Law and Climate-Induced Migrants, in* Francesca Ippolito & Sara Iglesias Sanchez, Protecting Vulnerable Groups 274.

[40] It is due to note that there are some legal scholars that argued in the opposite way. *See generally* Jessica B. Cooper, *Environmental Refugees: Meeting the Requirements of the Refugee Definition*, 6 N.Y.U. Env't L. J. 480, 480-676 (1998). Cristopher M. Kozoll, *Poisoning the Well: Persecution, the Environmental, and Refugee Status*, 15 Colo. J. Int'l Env't L. & Pol'y 271 (2004). *See* Hossein Ayazi & Elsadig Elsheikh, *Climate Refugees: The Climate Crisis and Rights Denied* (2019), https://escholarship.org/uc/item/58w8r30h [last visited 6 December 2022].

[41] As highlighted by McAdam, *supra* note 20, at 44, the act classified as "persecutory" can be also composed by a repetition of breaches: "[F]or example, an accumulation of breaches which, individually, would not be so severe but which together constitute a serious violation". A similar approach can be found in the Council Directive 2011/95, 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), 2011 O.J. (L 337/9), artt. 2 and 9.

[42] *See* McAdam, *supra* note 20, at 44.

[43] *See* Susanna Villani, *Reflections on human rights law as suitable instrument of complementary protection applicable to environmental migration*, 3 Diritto, Immigrazione e Cittadinanza 1, 5 (2021), https://www.dirittoimmigrazionecittadinanza.it/archivio-saggi-commenti/saggi/fascicolo-n-2-2021-2/824-reflections-on-human-rights-law-as-suitable-instrument-of-complementary-protection-applicable-to-environmental-migration/file (It.).

[44] *Id.*

Furthermore, environmental and climatic events do not target a specific person or a specific group.[45] In this perspective, some authors have argued that the environmental factor could be interpreted as an aggravating element in the event of conflicts.[46] For example, in the event of the government's voluntary decision to not help specific ethnic groups after a disaster. As a matter of fact, in the few occasions in which environmental migrants have been considered as refugees, the environmental factor was connected to one of the five grounds of persecution.

Secondly, the definition only applies to people who have already crossed an international border; thus, they are already outside the country of their nationality or of their habitual residence.[47] *Stricto sensu,* the definition is not taking into account that most people affected by the adverse effects of environmental degradation and climate change tend to remain within their country of origin.[48] Thus, when displacement from a disaster remains within the affected country, environmental migrants should be recognized as internally displaced persons [hereinafter I.D.P.s][49] under the 1998 Guiding Principles on Internal Displacement[50] [hereinafter G.P.I.D.] or under the Kampala Convention[51] if the event occurs within the African Union' Member States. In this regard, the G.P.I.D. recognize that I.D.P.s are people who can be displaced by natural or human-made disasters and provide the international community and States - that wish to implement them in their national legislation - with a framework that addresses various human rights aspects of internal displacement.[52] In particular, the G.P.I.D., starting from the recognition of those displaced for natural or human-made disasters as

[45] *See* Chassin, *supra* note 39, at 274 when she stated that "[a]t a given location and point in time, all people will be exposed to the same climatic phenomenon, no matter their age, religion, skin color, political opinions, and so on. In essence, [environmental] migration is a collective migration".

[46] *See* Kozoll, *supra* note 40, at. 271; *see also* Eugénie Delval, *From the U.N. Human Rights Committee to European Courts: Which protection for climate-induced displaced person under European Law?*, E.U. Imm. Asylum L. Pol'y (April 8, 2020),https://eumigrationlawblog.eu/from-the-u-n-human-rights-committee-to-european-courts-which-protection-for-climate-induced-displaced-persons-under-european-law/ [last visited 6 December 2022].

[47] *See* James C. Hathaway, The Rights of Refugees under International Law 1285 (2d ed. 2005).

[48] *See* Guy S. Goodwin-Gill & Jane McAdam, The Refugee in International Law 2 (3rd ed. 2007). On the tendency to remain within the country of origin; *see* Nansen Initiative on Disaster- Induced Cross Border Displacement [hereinafter Nansen Initiative], at. 3 (2015).

[49] *See* Francis M. Deng (Representative of the Secretary-General), Guiding Principles on Internal Displacement, U.N. Doc E/CN.4/1998/53/Add.2 (Feb. 11, 1998). According to the Principle no. 2, "internally displaced persons" are:

> [P]ersons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized border.

[50] *Id.*

[51] *See* African Union [O.A.U.] Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), Dec. 4, 2009.

[52] *See* Giovanni Sciaccaluga, International Law and the Protection of "Climate Refugees" 37 (1st ed. 2020).

I.D.P.s, tackle also the protection from and during displacement, the humanitarian assistance, as well as return, resettlement, and reintegration.[53]

Thirdly, the Convention requires that the State of nationality of the applicant is unable or unwilling to protect. However, a person fleeing from the effects of environmental degradation is not escaping from his or her country of origin, but rather is seeking shelter from countries that have contributed to environmental degradation and climate change,[54] thus questioning the issue of who should bear the responsibility to protect those fleeing from an environmental disaster.

Considering such complexities and criticalities, alternative ways of protection for this category have been proposed by looking at the noteworthy increase of disputes and decisions brought before supranational,quasi-judicial and national bodies to complain about States' failure to comply with their positive obligations to limit the effects of climate change established in international agreements, such as the 2015 Paris Agreement.[55] As a matter of fact, there is constant evidence of the effects that climate change and environmental degradation have on human rights. Several reports,[56] including the U.N. Environmental Programme [hereinafter U.N.E.P.], have pinpointed how the adverse impacts of climate change and environmental degradation have "combined with direct harms to people, property, and physical infrastructure, pose a serious threat to the enjoyment and exercise of human rights across the world".[57]

In this scenario, the necessity to promote awareness about environmental migration, on both the adverse effects of climate change on human rights and on the elaboration of duties in environmental and human rights matters, has been promoted by the evolutionary interpretation of Courts.

Under the light of these theoretical premises, the present article proposes an analysis of the judicial debate about environmental migration. Hence, as a starting point, it will offer an overview of some noteworthy examples of the so-called "climate change litigation" (Section 1). Indeed, notwithstanding the lack of proper binding instruments

[53] *See* François Gemenne & Pauline Brücker, *From the Guiding Principles on Internal Displacement to the Nansen Initiative: What the Governance of Environmental Migration Can Learn from the Governance of Internal Displacement*, 27 Int'l J. Refugee L. 245 (2015).

[54] *See* McAdam, *supra* note 20, at 45.

[55] On the proposed solution to tackle the lack of protection of environmental migrants *see* Chiara Scissa, *Recognition and Protection of Environmental Migrants in International Law*, E-Int'l Rel. (Jun. 24, 2021), https://www.e-ir.info/pdf/91948 (last visited Dec. 6, 2022).

[56] A variety of international actors have highlighted the environmental effects on human rights. *See European Parliament Report on the effects of climate change on human rights and the role of environmental defenders on this matter,* A9-0039/2021 (Mar. 10, 2021), https://www.europarl.europa.eu/doceo/document/A-9-2021-0039_EN.html [last visited 6 December 2022]; Rep. of the Office of the U.N.H.C.R. on the Relationship between Climate Change and Human Rights, U.N. Doc A/HRC/10/61 (Jan. 15, 2009).

[57] Rep. of the U.N.E.P. on Climate Change and Human Rights (2015), https://www.unep.org/resources/report/climate-change-and-human-rights.[last visited 6 December 2022].

and the inapplicability or inadequacy of the existing legal instruments for protecting environmental migrants, noteworthy examples of increasing awareness about the relationship between environmental degradation and human rights can be found in several cases decided by international human rights judicial or quasi-judicial bodies. In particular, the implications of two recent decisions of the U.N. Human Rights Committee, and the increasing sensibility of the European Court of Human Rights in deciding environmental cases though a human-rights-based approach will be examined. By moving from the supranational context to the national one, the paper will focus on two recent decisions (Section 2) adopted by the French Bordeaux Administrative Court (Section 2.1) and the Italian Court of Cassation (Section 2.2). Indeed, they both represent relevant examples of the role played by national courts in broadening interpretation and application of the existing instruments of protection for environmental migrants. The analysis of the mentioned decisions will be then framed in the wider context of the legal framework of the European Union (Section 3). Indeed, the question whether the E.U., for its part, can guarantee a sort of protection for environmental migrants will be answered. Conclusive remarks will be finally proposed.

1. RECENT JUDICIAL DEBATE ON ENVIRONMENTAL MIGRATION AT THE INTERNATIONAL LEVEL

The first decision – albeit non-binding[58] – addressing environmental migration is the one of the U.N.H.R.C.[59] in the famous *Ioane Teitiota v. New Zealand* case.[60] On that occasion, the Committee recognized in an evolutionary manner, that there is an obligation of non-refoulement [61] also to environmental migrants. Indeed, when the reasonable foreseeability of a natural event (whether a disaster with immediate effects or an event

[58] It is classified among the "soft law" recognition since the U.N. Human Rights Committee's decisions are not binding. Despite that, they express the international human rights' bodies trend in dealing with a specific issue. On the non-binding character of the United Nations Human Rights Committee's decisions; *see* Ginevra Le Moli, *The Human Rights Committee, Environmental Protection and the Right to Life*, 69 Int'l & Compar. L. Q. 735 (2020).

[59] The U.N. Human Rights Committee is the quasi-judicial monitoring body of the International Covenant on Civil and Political Rights.

[60] Comm. on the Views adopted by the U.N.C.H.R. under Article 5(4) of the Optional Protocol, U.N. Doc. No. 2728016, (Jan. 7, 2020). For further analysis on the case; *see* Amina Maneggia, *Non-refoulement of Climate Change Migrants: Individual Human Rights Protection or 'Responsibility to Protect'? The Teitiota Case Before the Human Rights Committee*, 2 Diritti umani e diritto internazionale 635 (2020). (It.); *see also* Villani, *supra* note 43; Le Moli, *supra* note 58.

[61] *See* Alexa Jay et al., Fourth National Climate Assessment, Volume II: Impacts, Risk, and Adaptation in the United States 33 (Reidmiller et al. eds, 2018).

with gradual consequences) threatens the right to life or the enjoyment of life in a dignified manner (art. 6 ICCPR) and the State of origin is unable to fulfill its positive obligations of protection, third States have an obligation of non-refoulement also to environmental migrants. In particular, the U.N.H.R.C. established that three conditions must be met in order to potentially require the application of the right to life and the obligation of *non-refoulement* in case of environmental disasters. Firstly, the threats to the right to life must be proved in its actuality or imminency, thus excluding those environmental risks that can only be presumed. Secondly, the country of origin should be unwilling or incapable to apply positive measures to guarantee the protection of the right to life in the face of environmental events. Lastly, the applicant should bear the burden of proof in demonstrating not only the real risk for his right to life, but also that the reasons behind his forced decision to flee depends primarily on the environmental conditions which make livelihood impossible in that area. As it will be analyzed below,[62] the *Teitiota* case and the arguments issued by the U.N.H.R.C. were used by a National Court – i.e., the Italian Court of Cassation - in deciding what kind of domestic protection and guarantee to a migrant coming from an environmentally-degraded area.

Recently, on the 22nd of September 2022, the same Committee issued another ground-breaking decision in *Daniel Billy and others v. Australia (Torres Strait Islanders Petition)*.[63] The Committee, after examining a joint complaint filed by eight Australian nationals and six of their children (all indigenous inhabitants of four small, low-lying islands in the country's Torres Strait region), found that Australia has violated the rights of the Indigenous residents of the Torres Strait Islands under the I.C.C.P.R. by failing to protect them from the impacts of climate change. This is the first time in which the Committee found that a State's failure to protect people from the impacts of climate change can amount to a violation of International Human Rights Law under the Covenant. By doing so, the Committee has stated that the effects of climate change affect unequivocally the enjoyment of human rights.[64]

[62] *See infra* Section 2.2 of this paper, at 17.

[63] Comm. on the Views Adopted by the U.N.C.H.R. under Article 5(4) of the Optional Protocol, U.N. Doc. No. 3624/2019, (Sept. 22, 2022).

[64] *See* Erin Daly, *The UNHRC's Torres Strait Islands decision: A major Advance, and a Roadmap for the future,* The Glob. Network For Hum. Rts And Env't (Oct. 3, 2022), https://gnhre.org/community/the-unhrcs-torres-strait-islands-decision-a-major-advance-and-a-roadmap-for-the-future/; *accord* Christine Voigt, *UNHRC is Turning up the Heat: Human Rights Violations Due to Inadequate Adaptation Action to Climate Change,* Ejil.Talk (Sept. 26, 2022), https://www.ejiltalk.org/unhrc-is-turning-up-the-heat-human-rights-violations-due-to-inadequate-adaptation-action-to-climate-change/.

A glimmer of protection seems to be found by looking at the jurisprudence of the European Court of Human Rights.[65] Although the Strasbourg Court has not yet been called upon to decide on cases ascribable to forced migration for environmental migration, its copious jurisprudence is an effective tool capable of filling a normative gap in the international order, since human rights must be recognized for all individuals and, therefore, also for environmental migrants.[66] Indeed, the E.Ct.H.R. has increasingly been called upon to decide in environmental cases on the grounds that the exercise and enjoyment of certain rights enshrined in the Convention may be undermined by the existence of harm to the environment and exposure to environmental risks.[67] In particular, the right to life (art. 2), the right to respect for private and family life (art. 8), and prohibition of torture and cruel, inhuman or degrading punishment or treatment (art. 3) are likely to take on a significantly broad scope in relation to the case in which they come into play, and the breadth may even go as far as the recognition of new individual rights in accordance with the spirit of the Convention to ensure the broadest possible protection of the individual.[68]

Such extensive interpretation has been seen in the Court's case law concerning migration.[69] As a matter of fact, on several occasions, the Court has guaranteed protection to foreigners who, as a result of a deportation order, were at the risk of suffering the violation of one of the rights enshrined in the Convention. Indeed, the right to life and the prohibition of torture extends the States' obligations of protection to

[65] It is due to note that, since 2009, the Council of Europe has been recognizing the continuous challenges and the lack of binding tools in the protection of environmental migrants. *See, e.g.*, Eur. Par. Ass., *Resolution on Environmentally Induced Migration and Displacement: A 21st Century Challenge*, 9th Sess., Doc. No. 11814 (2009); Eur. Par. Ass., *Resolution on A Legal Status for «climate refugees»*, 34th Sess., Doc. No. 2037 (2019).

[66] On the applicability of the European Convention on Human Rights [hereinafter E.C.H.R.] and the E.Ct.H.R. case law in the European Court of Justice and Member States' decisions; see European Charter of Fundamental Rights, art. 52(3), (2000/C 364/01) which states that

> [i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law [from] providing more extensive protection.

See also Steve Peers et al., Commentary on the E.U. Charter of Fundamental Rights (Steve Peers et al. eds, 2nd ed, 2021).

[67] *See, e.g.*, Eur. Ct. H.R., *Factsheet, Environment, and the European Court of Human Rights*, Press Unit (2022), https://www.echr.coe.int/Documents/FS_Environment_ENG.pdf.

[68] *See* Francesco Perrini, *Il Riconoscimento della Protezione Umanitaria in Caso di Disastri Ambientali nel Recente Orientamento della Corte di Cassazione* [The Recognition of Humanitarian Protection in Case of Environmental Desasters in the recent Corte di Cassazione's case law] , 2 Ordine Internazionale e Diritti Umani 349 (2021).

[69] *See* Italy v. Saadi, App. No. 37201/66 Eur. Ct. H.R. (2008); Italy v. Ben Khemais, App. No. 246/07 Eur. Ct. H.R. (2009); NDL v. Salah Sheekh, App. No. 1947/04 Eur. Ct. H.R. (2007); Sufi and Elmi v. UK, App. No. 8319/07 and 1144/07 Eur. Ct. H.R. (2011); Italy v. Hirsi Jamaa and Others, App. No. 27765/09 Eur. Ct. H.R. (2012); Jabari v. Turkey, App. No. 40035/98 Eur. Ct. H.R. (2000). *See* Department for the Execution of Judgments of the European Court of Human Rights, *Thematic Factsheet: Migration and Asylum*, Council of Europe (Nov. 2021), https://rm.coe.int/thematic-factsheet-migration-asylum-eng/1680a46f9b.

include the prohibition of *refoulement.* In particular, since *Soering v. United Kingdom*,[70]. the E.Ct.H.R. has been affirming that States cannot directly or indirectly dismiss or reject a person if there is a risk that his life or physical integrity will be endangered in the country of origin. Since *Soering,* the E.Ct.H.R. has been developing a case law on art. 3,[71] affirming that a State is not only obliged to guarantee the prohibition of torture but is also subject to the duty of *non-refoulement* to the country of origin if there is a risk of inhuman or degrading treatment[72] - the latter being an extraterritorial effect under art. 3 of the E.C.H.R..[73]

[70] See Soering v. United Kingdom, 88 Eur. Ct. H.R. (1989), where the Court extended the scope of Article 3 to include also foreign issues. In particular, the Court affirmed that

> [I]t would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3 (art. 3), would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article (art. 3)

[71] *See* Cruz Varas and Others v. Sweden, App. No. 46/1990, 1990 Y.B. Eur. Conv. on H.R. (Eur. Ct. H.R.); Vilvarajah and Others v. United Kingdom, App. No. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, 1991 Y.B. Eur. Conv. on H.R. (Eur. Ct. H.R.); Chahal v. United Kingdom, App. No. 22414/93, 1996 Y.B. Eur. Conv. on H.R. (Eur. Ct. H.R.); *Italy v. Saadi,* App. No. 37201/66 Eur. Ct. H.R.; M.S.S. v. Belgium and Greece, App. No. 30696/09 Eur. Ct. H.R. (2011); Tarakhel v. Switzerland, App. No. 29217/12 Eur. Ct. H.R. (2014); Khlaifia and Others v. Italy, App. No. 16483/12 Eur. Ct. H.R. (Dec. 15, 2016), https://hudoc.echr.coe.int/fre?i=001-170054. In addition, there is the pending Duarte Agostinho v. Portugal, App. No. 39371/20 Eur. Ct. H.R. (2020), https://hudoc.echr.coe.int/fre?i=002-13055 which, among the others, is dealing with a violation of art. 3 ECHR, https://hudoc.echr.coe.int/fre#%7B%22fulltext%22:[%22duarte%22],%22sort%22:[%22kpdate%20Descending%22],%22itemid%22:[%22002-13055%22]%7D [last visited 6 December 2022].

[72] *See* Perrini, *supra* note 68.

[73] *See* Matthew Scott, *Natural Disasters, Climate Change and Non-Refoulement: What Scope for Resisting Expulsion Under Articles 3 and 8 of the European Convention on Human Rights?*, 26 Int'l J. Refugee L. 404 (2014).

Indeed, it could be affirmed that in the case of *refoulement* of an environmental migrant to a country where environmental degradation gives rise to conflicts,[74] or, in general, unlivable conditions that seriously undermine the right to life thus, concretizing inhuman or degrading treatment,such State's behavior would be incompatible with the case law developed by the E.Ct.H.R.[75]

Such evolutionary interpretation of rights – i.e., art. 2 and art.8 – can also be seen in environmental protection. Indeed, in the leading case *Oneryldiz v. Turkey*,[76] the Court found that States have a positive obligation to respect the right to life not only when monitoring hazardous industrial activities, but also in case of environmental disasters. Also, in the case *Budayeva and Others v. Russia*,[77] the Court further stated that when there are serious and foreseeable risks to the safety of persons, national authorities have a duty to take measures capable of mitigating the effects of dangerous natural events. In the Court's jurisprudence, the protection of the right to a healthy environment also passes through a broad interpretation of art. 8 E.C.H.R. as testified by a variety of cases.[78]Such decisions concerned severely polluting activities and the Court has broadly interpreted art. 8 to the point of recognizing that severely polluting activities may constitute a limitation of the right to respect for the private life of persons living in the affected areas.[79]

[74] *See* Brambilla & Castiglione, *supra* note 33; *see also* Emanuela Parisciani, *Migranti in fuga da situazioni di conflitto e violenza indiscriminata e la Convenzione Europea dei diritti dell'uomo: a margine della Sentenza K.A.B. contro Svezia* [Migrants Fleeing from Sitautions of Conflict and Arbitrary Violence and the European Human Rights Convention: Notes on K.A.B Sentence Against Sweden] , SIDIBLOG (Nov. 6, 2013) (It.), http://www.sidiblog.org/2013/11/06/migranti-in-fuga-da-situazioni-di-conflitto-e-violenza-indiscriminata-e-convenzione-europea-dei-diritti-delluomo-a-margine-della-sentenza-k-a-b-contro-svezia/.

[75] On the assessment of the influence of health grounds in the application of the principle of *non-refoulement* under Art. 3 D v. United Kingdom, App. No. 30240/96, 1997 Y.B. Eur. Conv. on H.R. (Eur. Ct. H.R.). The line of reasoning of D v. United Kingdom was later concretized in these cases; *see also* N. v. United Kingdom, App. no. 26565/05 Eur. Ct. H.R. (2008); Paposhvili v. Belgium, App. No. 41738/10 Eur. Ct. H.R. (2016), *M.S.S. v. Belgium and Greece*, App. No. 30696/09 Eur. Ct. H.R. (2011); Sufi and Elmi v. U.K., App. No. 8319/07 and 1144/07 Eur. Ct. H.R. (2011).

[76] Öneryildiz v. Turkey, App. No. 48939/99, ¶ 71-72 Eur. Ct. H.R. (2004).

[77] Budayeva and Others v. Russia, App No. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, ¶116, Eur. Ct. H.R. (2008).

[78] *See generally* López Ostra v. Spain, App. No. 16798/90, Eur. H.R. Rep. (1994); Fadeyeva v. Russia, App. No. 55723/00 Eur. Ct. H.R. (2005); Di Sarno and Others v. Italy, App. No. 30765/08 Eur. Ct. H.R. (2012); Cordella and Others v. Italy, App. No. 54414/13 and 54264/15, (2019).

[79] Also, it is worth mentioning the Duarte Agostinho v. Portugal, App. No. 39371/20, (2020), https://hudoc.echr.coe.int/fre#%7B%22fulltext%22:[%22duarte%22],%22sort%22:[%22kpdate%20Descending%22],%22itemid%22:[%22002-13055%22]%7D, which is currently pending before the Court.

2. BEYOND THE INTERNATIONAL CONTEXT: NATIONAL COURTS OF E.U. MEMBER STATES AND ENVIRONMENTAL MIGRATION

Having illustrated the international scenario in which the human rights' effect of climate change and environmental degradation have been tackled, it is due to note that some National Courts of E.U. Member States have started recognizing the necessity to uphold the rights of environmental migrants, taking – directly or indirectly – into consideration the arguments upheld at the international level. In particular, the analysis will focus on two noteworthy rulings adopted by national courts in France and Italy, which stressed how the principle of *non-refoulement* and an evolutionary interpretation can be an alternative instrument to guarantee protection to environmental migrants.

The choice to compare these two decisions has been made with the awareness that these are two of the very few decisions at the national level that recognized the environmental conditions in the countries of origin that expose migrants to the violation of their fundamental rights – on the one hand, the right to health, and on the other hand, the right to life – in the event of repatriation.[80]

2.1. RIGHT TO HEALTH, NON-REFOULEMENT AND HIGH LEVEL OF AIR POLLUTION: THE DECISION OF THE FRENCH BORDEAUX COURT OF APPEAL

In December 2020, the French Bordeaux Court of Appeal took a breakthrough decision by renewing a residence permit (the so-called *carte de séjour temporaire*) on the basis of the environmental conditions in the applicant's country of origin.[81]

The forty-year-old Bangladeshi man – known in the French news as Sheel – arrived in France in 2011. After diverse refusals of his asylum application, in 2015 he was able to obtain a temporary residence permit. As a matter of fact, the French *Code de l'entrée et du séjour des étrangers et du droit d'asile* [Code of the Entry and Residence of Foreigner and the Right of Asylum] envisages a specific residence permit for foreign nationals with health problems which require specific medical treatments that cannot be granted properly in

[80] In particular, there are few cases tackling these issues at the national level within the E.U. *See* VG (Administrative Trial Court) Baden - Wuerttemberg, Dec. 17, 2020, A 11 S 2042/20, at. 25 (Ger.).

[81] *See* Cour administrative d'appel [CAA] [regional administrative court of appeal] Bordeaux, 2ème ch., Dec. 18, 2020 20BX02193, 20BX02195, http://www.marinacastellaneta.it/blog/wp-content/uploads/2021/01/CAA-de-BORDEAUX-.pdf (Fr.).

their country of origin.[82] Indeed, that was the case of Sheel who suffered from severe asthma and sleep apnea.[83]

Nevertheless, in 2019, the Haute-Garonne Prefecture's medical advisory team refused to renew his *carte de séjour temporaire*,[84] affirming the adequacy of the Bangladesh medical system in treating his illnesses,[85] thus leading to a deportation order. Subsequently, on 15 June 2020, his case was brought before the Administrative Court of Toulouse which rejected the Prefecture's deportation order. According to the Court in Toulouse, the man's return to Bangladesh would have led not only to insufficient treatment, but it would have also exacerbated his medical condition due to the high level of air pollution in the country.[86] Finally, in December 2020, the Haute-Garonne Prefecture appealed the decision of the Administrative Court of Toulouse, and the case was then brought before the Court of Administrative Appeals in Bordeaux.

In particular, by interpreting national legislation, the Court considered the following relevant factors for determining the inadequacy of the Bangladesh health system in providing and granting effective services to treat the man's various diseases: the unavailability in Bangladesh of both the prescribed medications – which had relieved him during the observation period – and the ventilator that required a monthly

[82] According to art. L-313-11 of the French *Code de l'entrée et du séjour des étrangers et du droit d'asile* [Code of the Entry and Residence of Foreigner and the Right of Asylum] (Fr.),

> A l'étranger résidant habituellement en France, si son état de santé nécessite une prise en charge médicale dont le défaut pourrait avoir pour lui des conséquences d'une exceptionnelle gravité et si, eu égard à l'offre de soins et aux caractéristiques du système de santé dans le pays dont il est originaire, il ne pourrait pas y bénéficier effectivement d'un traitement approprié. La condition prévue à l'article L. 313-2 n'est pas exigée. La décision de délivrer la carte de séjour est prise par l'autorité administrative après avis d'un collège de médecins du service médical de l'Office français de l'immigration et de l'intégration, dans des conditions définies par décret en Conseil d'Etat. [. . .]

[83] *See* Maro Mantziara, *Climate Refugees Can't Wait Any Longer*, Our World Too (2020), https://ourworldtoo.org.uk/2021/11/03/climate-refugees-cant-wait-any-longer/ [last visited 6 December 2022].

[84] The medical advisory team had the duty to revise the applicant's health conditions in order to renovate the residence permits. See art. L-313-11 of the French Code of the Entry and Residence of Foreigner and the Right of Asylum.

[85] According to art. R. 313-22 of the French *Code de l'entrée et du séjour des étrangers et du droit d'asile* [Code of the Entry and Residence of Foreigner and the Right of Asylum] (Fr.),

> [P]our l'application du 11° de l'article L. 313-11, le préfet délivre la carte de séjour au vu d'un avis émis par un collège de médecins à compétence nationale de l'Office français de l'immigration et de l'intégration. / L'avis est émis dans les conditions fixées par arrêté du ministre chargé de l'immigration et du ministre chargé de la santé au vu, d'une part, d'un rapport médical établi par un médecin de l'Office français de l'immigration et de l'intégration et, d'autre part, des informations disponibles sur les possibilités de bénéficier effectivement d'un traitement approprié dans le pays d'origine de l'intéressé. (. . .).

[86] *See* Luc Lenoir, *La France a-t-elle accueilli son premier 'réfugié climatique'?*", Le Figaro (Jan. 8, 2021), https://www.lefigaro.fr/faits-divers/la-france-a-t-elle-accueilli-son-premier-refugie-climatique-20210108, (Fr.).

replacement,[87] the significant improvements to his respiratory capacity since his arrival to France, and the hearing evidence of his father's death of asthma attack at fifty-four-years-old.[88] As a matter of fact, the Court stated that:

> [I]t appears from the documents in the file that [Sheel] suffers from a chronic respiratory pathology combining severe allergic asthma treated daily with Symbicort 400 (antiasthmatic), Montelukast (antiasthmatic), Azélastine (antihistamine) and Salbutamol (bronchodilator), and a severe sleep apnea syndrome requiring the use of an electric ventilation device every night, which requires biannual maintenance and monthly replacement of the mask, filters and tubes. In Toulouse on July 25, 2019, the doctor in charge of assessing his health condition in Toulouse certified that the short and long-term care he receives has stabilized his respiratory function, which went from [fifty-eight percent] in 2013 to [seventy percent] in 2017.[89]

Surprisingly, the Court acknowledged that Bangladesh' environmental conditions – namely the severe air pollution levels in the applicant's country of origin – would have led to a worsening of the respiratory pathology and even to death. Indeed, the Court stated that:

> [. . .] in Bangladesh, [. . .] the rate of fine pollutant particles is one of the highest in the world, asthma-related mortality is 12.92 per 100,000 inhabitants compared to 0.82 in France. [Sheel], whose father died of asthmatic decompensation at the age of [fifty-four], would thus be exposed to a risk of aggravation of his state of health and premature death.[90]

[87] *See* Chiara Scissa, *Migrazioni Ambientali tra Immobilismo Normativo e Dinamismo Giurisprudenziale: Un'Analisi di Tre Recenti Pronunce* [Environmental Migration between Normative Immobilism and Case Law Dynamism: an Analysis of Three Resent Sentences], 2 Forum di Quaderni Costituzionali Rassegna 296 (2021).

[88] *See* Amali Tower & Ryan Plano, *French Court Recognizes Country's First Environmentally Impacted Migrant*, CLIMATE REFUGEES, (Jan. 15, 2021), https://www.climate-refugees.org/spotlight/2021/1/15/french-court.

[89] *See* Cour administrative d'appel [CAA] [regional administrative court of appeal] Bordeaux, 2ème ch., Dec. 18, 2020 20BX02193, 20BX02195, http://www.marinacastellaneta.it/blog/wp-content/uploads/2021/01/CAA-de-BORDEAUX-.pdf, at. 4.

[90] *Id.*

In addition, the Court of Bordeaux quoted the data collected by the World Health Organization (W.H.O.), according to which "air pollution was a high aggravating risk factor in the case of 572,600 deaths in Bangladesh that were attributed to non-communicable diseases in 2018 alone".[91] Citing the 2020 Environmental Performance Index (E.P.I.), the Court recognized also that Bangladesh is one of the countries with the worst levels of air pollution in the world.[92]

The Court overturned the deportation order considering that the general context of the Bangladesh's health system and the inevitable adverse effects of the environmental degradation would surely exacerbate the health and life conditions of the applicant, leading eventually to a risk to his own life and even to death. Thus, the Court found that the health and environmental conditions of the country of origin were so alarming that the renewal of the residence permit for health reasons was deemed necessary. As a matter of fact, the Court concluded its judgment by affirming that:

> [T]he accessibility and the quality-of-care services are not comparable to European standards in Bangladesh, where health professionals deplore a lack of equipment and drug shortages. [93]
>
> Thus, [Shell] would find himself confronted in his country of origin both with an aggravation of his respiratory pathology due to atmospheric pollution, with the risk of interruption of a treatment less well suited to his state of health, and to malfunctions of the respiratory system which he has a vital need due, on the one hand, to difficulties in replacing parts, in particular pipes that have to be changed regularly, and on the other hand, to power cuts during the night. In these particular circumstances, he could not be regarded as actually being able to benefit from appropriate treatment in Bangladesh, so that the refusal to renew his residence permit disregards the provisions of the Code for the Entry and Stay of Foreigners and the right to asylum.[94]

[91] *Id.*
[92] *Id.*
[93] On the European standards in health matters; *see* Giacomo Di Federico & Stefania Negri, Unione Europea e Salute. Principi, Azioni, Diritti e Sicurezza 307-39 (2020). It is due to note that the 8th of December, the Council of the E.U. finally gave "green light" to adapt EU standardization rules. Such regulation lays down procedures for developing harmonized standards within the E.U. which will make it easier to place products on the single market and thereby they will strengthen the E.U.'s competitiveness. *See* Council of the European Union Press Release 1059/22, *Council gives final green light to adapted EU standardization rules,* (December 8, 2022).
[94] *See* Cour administrative d'appel [CAA] [regional administrative court of appeal] Bordeaux, 2ème ch., Dec. 18, 2020 20BX02193, 20BX02195, http://www.marinacastellaneta.it/blog/wp-content/uploads/2021/01/CAA-de-BORDEAUX-.pdf, at. 4. In particular, the refusal to renew his residence permit would violate Art. 11° of Art. L. 131-11.

This was the first case in which environmental degradation and its connection with the enjoyment of the individual right to health was evoked as the leading argument for a Court's final ruling in France.

2.2. ENVIRONMENTAL DEGRADATION AND NON-REFOULEMENT: THE DECISION OF THE ITALIAN SUPREME COURT OF CASSATION.

In November 2020, the Italian Supreme Court of Cassation[95] upheld the action brought by a Nigerian applicant against the decision of the Court of First Instance in Ancona that rejected his application for subsidiary protection, or in the alternative, humanitarian protection.[96]

In this case,[97] the applicant, following the environmental instability in its region of origin – the Niger Delta – fled to Italy, seeking protection. According to the man, his region of origin was characterized by the presence of a serious form of environmental instability created by the indiscriminate exploitation of the area, primarily by oil companies; conflicts and political instability; environmental issues linked to the frequent sabotage, theft and damage causing spillages of oil shares, thus contaminating all zones nearby.[98] However, despite the critical situation in the region, the Court of First Instance of Ancona did not consider sufficient the presence of an armed conflict and generalized violence in the region – capable of constituting a serious and individual threat to the person's life – to grant subsidiary protection.[99] Additionally,the Tribunal did not consider granting humanitarian protection, given the condition of "environmental

[95] Besides the decisions by the Italian Supreme Court of Cassation, also courts of first instance decided cases on environmental migration. *See*, e.g., Trib. Aquila, 18 Feb. 2018, n. 1522/1, https://www.dirittoimmigrazionecittadinanza.it/allegati/fascicolo-n-2-2018/umanitaria-3/245-trib-aq-16-2-2018/file, (It.).

[96] It is due to note that in the Italian legislation, apart from the traditional instrument of international protection, there is the humanitarian protection regulated by the D.Lgs. n. 288/188 at the Article 5, para. 6. The humanitarian protection might be granted when the applicant is not eligible for international protection but affirms and proves to have specific and particular needs recognized as fundamental. *See* Nazzarena Zorzella, *La Protezione Umanitaria nel Sistema Giuridico Italiano*, Diritto, Immigrazione e Cittadinanza, Mar. 2018, at 1. (It.); Valeria Marengoni, *Il Permesso di Soggiorno per Motivi Umanitari*, Diritto, Immigrazione e Cittadinanza, Dec. 2012, at 59.

[97] Cass., 24 Feb. 2021, n. 5022, Giur. It. 2021, II (It.).

[98] *Id.* at 6.

[99] Directive 2011/95, *supra* note 41, at art. 2(f), a person eligible for subsidiary protection is

> a third- country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.

disaster" and the collective insecurity in the region of origin.[100] Due to the Tribunal's lack of assessment of the situation in the Niger Delta in the evaluation of the applicant's requests, the Court of Cassation found grounds to justify the grant of humanitarian protection under Italian law.[101]

Starting from mentioning the noteworthy *Teitiota* case and its interpretation of the right to life,[102] the Court of Cassation stated that:

> Whenever, [. . .] in a given area, the judge recognizes a situation capable of integrating an environmental disaster, or a context of such severe impairment of the natural resources that there is the exclusion of entire segments of the population from their enjoyment, the assessment of the widespread danger existing in the applicant's country of origin, for the purpose of the humanitarian protection's recognition, must be conducted with specific reference to the particular risk for the right to life and to a decent life deriving from the environmental degradation, climate change and the unsustainable development of the area.[103]

Through the reference to the *Teitiota* case, the Court seemed to confirm an extensive interpretation of the right to life in the evaluation of international protection through the transposition of the international law's principles of the U.N. Committee's case in the national system, not only in terms of rights of *non-refoulement*, but also in terms of granting and recognizing some forms of protection.[104] As a matter of fact, the Committee had stated the principle according to which States have the duty to ensure and grant people's right to life.[105] To be recalled that such rights, according to the U.N. Committee, also encompass all the reasonably foreseeable threats and potentially lethal situations that may involve the loss of life or a substantial worsening condition of the existence, including environmental degradation, climate change and unsustainable development. These environmental phenomena constitute some of the most serious and urgent threats to the life of present and future generations[106]: they can negatively affect the well-being

[100] For further analysis of the criminal institute of "environmental disaster" described in the Italian Criminal Code, *see* Fabrizio Vona, *Environmental Disasters and Humanitarian Protection: A Fertile Ground for Litigating Climate Change and Human Rights in Italy?*, 1 It. Rev. Int'l & Compar. L. 146 (2021).

[101] *See supra,* note 96. In addition, it must be said that the "humanitarian protection" can be granted when applicant's expulsion will zeroing his fundamental rights to life, freedom, and auto-determination; *see* Cass., 24 Febbraio 2021, n. 5022, Giur. It. 2021, II (It); Cass., 4 Febbraio 2022, n.2563, Giur. It. 2022, II (It), at. 5.4.

[102] *See* U.N. Human Rights Committee, views adopted, *supra* note 60.

[103] *See* Cass., 24 Febbraio 2021, n. 5022, Giur. It. 2021, II (It), at 5.

[104] *See* Perrini, *supra* note 68, at 349.

[105] *See* U.N. Human Rights Committee, views adopted, *supra* note 60, at 9.12 and 9.13.

[106] *Id.* at 9.4.

of an individual and, therefore, can cause a violation of the individual right to life.[107] In particular, the U.N. Committee considered that the general principle of *non-refoulement* – which prohibits the repatriation of an asylum seeker in a country in which there are substantial risks of irreparable damage to personal safety or that of the family members – also includes the right to a decent and dignified existence and to be free from any act or omission that could cause an unnatural or premature death of the human person.

Based on U.N. Committee's considerations, the Italian Court embraced the idea that the risks connected to the individual's right to life are not only those associated with armed conflicts. On the contrary, there are also "situations of social and environmental degradation or of unsustainable exploitation of the natural resources" [108] capable of weakening the right to life and the right to live with dignity. In particular, the Court affirmed that:

> [F]or the purpose of recognizing protection, the risks to the individual life do not necessarily derive from an armed conflict. On the contrary, they can depend on the socio-environmental conditions [. . .] [suitable to] jeopardize the very survival of the individual and hisrelatives. In this perspective, war or armed conflict, in general, represent the most striking manifestation of man's destructive action, but they do not exhaust the range of behaviors capable of compromising the individual's right to live with dignity.[109]

Thus, the Court specified that the concept of "ineradicable core constituting the foundation of personal dignity [. . .] is the minimum essential limit below which the right to life and the right to a dignified existence of an individual is not guaranteed".[110] According to the Court, a violation of such rights can occur not only with reference to armed conflict, but, also, in relation to any context that is materially capable of putting the fundamental rights to life, liberty and self-determination of the individual at risk. Among such situations, the Court also encompasses "situations of environmental disaster, [. . .] climate change, and unsustainable exploitation of natural resources".[111] More in detail, a risk to the individual's right is present in each situation of environmental degradation capable of undermining the right to life, the right to freedom, to auto-determination.

[107] *Id.* at 9.5. c
[108] Cass., 24 Febbraio 2021, n. 5022, Giur. It. 2021, II (It), at 5-6.
[109] *Id.*
[110] *Id.*
[111] *Id.* at 8-9.

Ultimately, the Italian Court of Cassation's decision demonstrates the progress in upholding the environmental migrants' rights. Firstly, the Court acknowledged the necessity to grant protection to those migrating from their country of origin because of environmental degradation and the effects of climate change. Secondly, the Court relied on its reasoning on the U.N. Human Rights Committee's decision in the *Teitiota* case, thus highlighting – besides its interpretation of the individual's right to life – the importance of supranational quasi-judicial bodies in interpreting human rights in an evolutionary way. Thirdly, the Court confirms its line of reasoning[112] and its case-by-case approach of scrutiny[113] in dealing with the particular risk to the right to life in a specific territorial area.

The Court's approach seems to confirm that in the event the country of origin is affected by natural disasters or environmental degradation, it is sufficient for the applicant to demonstrate a general difficulty in having access to the minimum conditions for the enjoyment of a dignified life. However, such approach raises some concerns regarding its compatibility with the residence permit for humanitarian reasons. More in detail, the rationale behind the humanitarian protection is the protection of situations of personal and individual vulnerabilities, whereas environmental degradation and natural disasters – as mentioned above in relation to the Geneva Convention[114] – are considered as general threats to the rights of the individual even if their effects lead to vulnerable situations.

[112] *See* Corte di Cassazione, prima sezione, Ordinanza n. 7832, 20th Mar. 2019 (It.).
[113] Villani, *supra* note 43; Le Moli, *supra* note 58, at 5.
[114] *See supra* Introduction, at 6-9.

3. SPOTLIGHT ON THE EUROPEAN UNION LEGAL FRAMEWORK

The European Union institutions (i.e., European Council, Council of the E.U., the European Commission and the European Parliament), Member States – i.e., also France and Italy - have all, through various degrees and at different time period, tried to offer leadership in international climate change politics in global *fora.*[115] Despite the E.U. being late in addressing the topic of environmental migration, it has increasingly addressed the nexus of environmental change and migration over the past decade.[116]

Starting from the institutional level, the European Commission has frequently recognized the nexus between human mobility and the environment and stressed the necessity to address environmental migrations in various communications.[117] Also, the European Parliament, for its part, promoted the urgency to address the topic, through the adoption of a Resolution.[118]

Despite such E.U. institutional commitments, when it comes to binding instruments it is possible to note that environmental migration suffers the same shortcomings highlighted at the international level. In particular, environmental migration is placed in an uncoordinated limbo between E.U. environmental and migration policies, thus being somehow in contrast with the objectives and values that guide these policies within the E.U.

Looking at primary law provisions defining the E.U. migration policies, they are designed in a broad manner, thus capable of handling environmental migrants' protection.[119] In particular, art. 77(3) T.F.E.U. states that the Union shall ensure "the absence of any controls on persons, whatever their nationality, when crossing internal

[115] On the role of the E.U. in climate change politics *see* Rudiger Wurzel & James Connelly, The European Union as a Leader in International Climate Change Politics 1 (Rudiger Wurzel & James Connelly eds., 2011).

[116] As a matter of fact, besides the references mentioned in the present paper, environmental change and migration is addressed also in the E.U. civil protection, humanitarian aid and development policies. *See* European Parliament Study, "*Climate Change and Migration. Legal and Policy Challenges and Responses to Environmentally Induced Migration*" (July, 2020), https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655591/IPOL_STU(2020)655591_EN.pdf [last visited 6 December 2022].

[117] Communication, The Global Approach to Migration and Mobility, COM (2011) 743 final (Nov.18, 2011), p. 7; Communication, An EU Strategy on Adaptation to Climate Change, COM (2013) 216 final (April 16 2013), and its Staff Working Document, Climate change, Environmental Degradation, and Migration, SWD (2013) 138 final (April 16, 2013); Communication, A European Agenda on Migration, COM (2015) 240 final, (May 13, 2015) p. 7. For a further analysis; *see* Monika Mayrhofer & Margit Ammer, *People Moving in the Context of Environmental Change: The Cautious Approach of the European Union* 4 Eur. J. Migration & L. 389 (2014).

[118] Joint Motion for a Resolution on the consequences of drought, fire, and other extreme weather phenomena: increasing the EU's efforts to fight climate change, Eur. Parl. Doc, (2022/2829(RSP)), (2022). See European Parliament Study, *supra* note 116.

[119] *See* Giuseppe Morgese, *Environmental Migrants and the EU Immigration and Asylum Law: Is There Any Chance for Protection, in* Migration and the Environment. Some Reflections on Current Legal Issues and Possible Ways Forward 50 (Giovanni C. Bruno et al., 2017).

borders", but also that "carrying out checks on persons and efficient monitoring of the crossing of external borders". In addition, art. 79 T.F.E.U. affirms that the Union should have "a common immigration policy aimed at ensuring the efficient management of migration flows, fair treatment of third-country nationals, and the prevention of, and enhanced measures to combat, illegal immigrations and trafficking in human beings" and that such policies, according to art. 80 T.F.E.U., "shall be governed by the principle of solidarity and fair sharing of responsibility". In turn, the Charter of Fundamental Rights of the European Union [hereinafter E.C.H.F.R.] states the obligation to respect the fundamental rights of every individual as such and the prohibition of discrimination in any respect (art. 21), and reaffirms, in addition to the right to asylum (art. 18) as guaranteed by international conventions, the prohibition of collective expulsions and the prohibition of extradition (art. 19) when there is a risk of the death penalty, torture or inhuman and degrading treatment (art. 4).[120]

Besides these broad formulations in the Treaties, current secondary law instruments fail to grant environmental migrants a proper protection within the E.U.[121] Looking at the Directive 2011/95 [hereinafter Qualification Directive][122] - which regulates both the refugee's status[123] *See* Heather Alexander & Jonathan Simon, *Unable to Return in the 1951 Refugee Convention: Stateless Refugees and Climate Change*, 26 Florida J. Int'l L. 532 (2015). and the subsidiary protection[124] See Hemme Battjes, *Subsidiary Protection and Other Alternative Forms of Protection, in* Research Handbook on International Law and

[120] The prohibition of inhuman and degrading treatment is a core argument within the case law of the E.C.J. which, with reference to the Dublin Regulation, challenges the application of the criterion of responsibility of the country of first entry when there are systemic deficiencies in the asylum procedure and in the applicants' reception conditions in that country which constitute serious and proven grounds for believing that the applicant runs a real risk of being subjected to inhuman and degrading treatment. *See* Case C-394/12, Shamso Abdullhai v. Bundesasylamt, ECLI:EU:C:2013:813 (Dec. 13, 2013); Case C-4/11, Bundesrepublik Deutschland v Kaveh Puid, ECLI:EU:C:2013:740 (Nov. 14, 2013); Case C-411/10 and C-493/10, N. S. v Secretary of State for the Home Department and M. E. v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, ECLI:EU:C:2011:865 (Dec. 21, 2011).

[121] For an analysis of the applicability of E.C.A.S. instruments to environmental migrants; *see* Morgese, *supra* note 119, at 47.

[122] *See* Directive 2011/95, *supra* note 41, at art. 9-26.

[123] *Id.* art. 2, lett. D):

> "refugee" means a third-country national [or a stateless person] who, owing to a well- founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality [or the coun- try of former habitual residence] and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country.

[124] *See* Directive 2011/95, *supra* note 41, at art. 2, lett. F)

> a person eligible for subsidiary protection' means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm [. . .] and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.

Migration 541, 550-56 (Vincet Chetail & Céline Bauloz eds, 2014). : as for the refugee status, the Directive recalls the 1951 Refugee Convention's definition,[125] thus raising the same concerns explained above.[126] Whereas in the subsidiary protection, the "real risk of suffering a serious harm" requested to obtain such protection does not seem applicable, unless a particularly extensive interpretation[127] of the notion of "serious harm" occurred *ex* art. 15(b).[128] The Court of Justice of the European Union (C.J.E.U.) – despite not having yet had the occasion to decide on environmental migration cases – tried to expand the interpretation of "serious harm" – as a ground encompassing the environmental factor – in the subsidiary protection under art. 15(b) of the Qualification directive. While in *Elgafaji v. Staatssecretaris van Justitie*,[129] the Court ruled that the wording of art. 15(b) is similar to art. 3 E.C.H.R. – thus recalling all the case law previously mentioned [130]; in *M'Bodj v. Belgium*[131] the Luxembourg judges affirmed that the "serious harm" required by the directive must be different from art. 3 E.C.H.R., and that it must be related to personal persecution and come from a third party (*ex* art. 6 of the Directive).[132]

Hence, environmental migrants do not seem to obtain proper safeguards under the subsidiary protection. Another (arguably) form of protection could be the Temporary Protection Status [hereinafter T.P.S.] enriched in the Directive 2001/95.[133] As stated in art. 1, the purpose of the Directive is:

> [T]o establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries who are unable to return to their country of origin and to promote a

[125] On the applicability of the 1951 Geneva Convention within the E.U. legal system without its ratification, *see* Case C-411/10 and C-493/10, N. S. v Secretary of State for the Home Department and M. E. v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, ECLI:EU:C:2011:865.

[126] *See supra* Introduction, at 6-9.

[127] An example of such extensive interpretation can be seen in the Judgment of the Case C-163/17, Abubacarr Jawo v. Bunderrepublik Deutschalnd, ECLI:EU:C:2019:218, ¶ 92 (March 19, 2019). *See* Maarten den Heijer, *Transferring a Refugee to Homelessness in Another Member States: Jawo and Ibrahim*, 57 Common Mkt. L. Rev. 539 (2020).

[128] *See* Directive 2011/95, *supra* note 41, at art. 15(b) where there are listed the cases in which there is a "serious harm". On the limits of the E.U. subsidiary protection in the protection of environmental migrants; *see also* Francesca Perrini, Cambiamenti Climatici e Migrazioni Forzate. Verso una Tutela Internazionale dei Migranti Ambientali 83 (2018).

[129] Case C-465/07, Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie, ECLI:EU:C:2009:94, (Feb. 17, 2009).

[130] *See supra* Section 1, at 11-14.

[131] Case C-542/13, Mohamed M'Bodj v. État belge, ECLI:EU:C:2014:2452, (Dec. 18, 2014).

[132] *See* Delval, *supra* note 46.

[133] *See* Council Directive 2001/55 of July 20, 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, annex, 2001 O.J. (L 212) 12, 23.

> balance of effort between Member States in receiving and bearing the consequences of receiving such persons.

Nevertheless, the definition of "mass influx" should encompass "the arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided [. . .]".[134] Thus, some authors consider the T.P.S. as an applicable regime to environmentally displaced persons following an environmental disaster, mainly due to the broad formulation of the eligibility criteria and the absence of an exhaustive list as to who may fall under this legal regime.[135] However, the directive establishes an exceptional procedure applicable only in "the event of a mass influx or imminent mass influx", thus excluding from its scope those who are not part of such mass influx arriving in the E.U.

Looking at the environmental side, the high level of protection and improvement of the quality of the environment and the sustainable development have been promoted as objectives of the E.U. (art. 3 of the T.F.E.U.). Also, after the entry into force of the 2009 Lisbon Treaty, the Union's action in these fields have been strengthened, through the inclusion of the fight against climate change, the promotion of the protection of the environment also for future generations (artt. 191-193 of the T.F.E.U.).[136] In addition, art. 11 of the T.F.E.U. requires the integration of environmental protection "into the definition and implementation of the Union's policies and activities".[137] Furthermore, art. 37 of the E.C.H.F.R.[138] defines the principle of environmental protection, requiring that to integrate a "high level of environmental protection" and "the improvement of the quality of the environment" extends, in principle, to all Union policies (internal and external); in other words, such principle should be integrated also in migration policies.

Even the recent E.U. legislative proposals confirm the protection gap. Indeed, in 2020 the European Commission presented two Communications aimed at addressing the

[134] *Id.* art. 2(d).

[135] *Id.* art. 2(a). *See also* Morgese, *supra* note 119, at 54-56.

[136] Consolidated Version of the Treaty on the Functioning of the European Union art. 191(1), May 9, 2008, 2008 O.J. (C 115) 47 states that: "[T]he Union policy on the environment shall contribute to pursuit of [. . .] promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change".

[137] T.F.E.U. art. 11 states that "[t]he requirements of environmental protection must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development". On the issues concerning the justiciability of the principle enriched in TFEU art. 11; Agata Cecilia Amato Mangiameli, *Article 11, in* 1 Treaty on the Functioning of the European Union – A Commentary 299 (Hermann-Josef Blanke & Stelio Mangiameli eds., 2021).

[138] Charter Of The Fundamental Rights Of The European Union art. 37, Dec. 18, 2000, 2000 O.J. (C 364) 1 states that: "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and assured in accordance with the principle of sustainable development". For an analysis of this article; *see also* Eloise Scotford, *Environmental Rights and Principles: Investigating Article 37 of the EU Charter of Fundamental Rights, in* Environmental Rights in Europe and Beyond (Sanja Bogojević & Rosemary Rayfuse eds., 2018).

(possible) future adoption of legislative proposals tackling, on the one hand, migration and, on the other hand, climate change. Unfortunately, these Communications, albeit being adopted in the same time period, do not communicate with each other. On the one hand, the Communication on the E.U. Green Deal[139] – which aims at achieving climate neutrality by 2050, does not address the issue of migration in any of its forms; on the other hand, the Communication on the New Pact on Migration and Asylum[140] the purpose of which- is to integrate or reform the Common European Asylum System (C.E.A.S.) – does not mention climate change or environmental protection. The New Pact addresses the safety of refugees but does not mention the needs of climate-induced migrants and, above all, does not recognize climate stress as a ground to seek refugee status.[141]

The E.U. undoubtedly plays a leading role in the fight against climate change, the promotion of environmental sustainability, and fuels the international discourse about the "green" transition. However, when it comes to environmental migration, the E.U. follows the international trend of preferring the use of soft law instruments.

Indeed, the confirmation of the same inconsistencies arises again within the E.U. Commission conclusions at the C.O.P.27 in Sharm el-Sheikh. On that occasion, the Commission highlighted how

> the consequences of climate change are unevenly distributed around the world, since we have seen extreme weather events happen often in the most vulnerable countries. It is therefore crucial that developed countries help developing countries to become more resilient to extreme weather conditions [. . .] This is therefore our duty to support countries to adapt to and prevent the impacts of climate change, focusing on where the needs are most urgent.[142]

[139] *See Commission Communication to the Europea Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal,* COM(2019) 640 final (Dec. 11, 2019).

[140] *See Commission Communication on a New Pact on Migration and Asylum,* COM (2020) 609 final (Sep. 23, 2020).

[141] *See* European Parliament, LIBE Committee, *The Future of Climate Migration*, Eamonn Noonan and ANA Rusu (March 2022), https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655591/IPOL_STU(2020)655591_EN.pdf (last visited Dec. 6, 2022).

[142] *See* European Commission Press Release IP/22/6888, Team Europe Steps up Support for Climate Change Adaptation and Resilience in Africa Under Global Gateway (November 16, 2022).

CONCLUSIONS

As the data continues to demonstrate, environmental migration is a constantly growing phenomenon that will not affect only the so-called future generations. On the contrary, the adverse effects of climate change and environmental degradation are currently perceived, highlighting how they undermine human rights and the necessity to protect the most affected ones. As a matter of fact, in a situation of environmental disaster, the primary responsibility to grant protection should be on the State of origin. As the U.N. Human Rights Committee's decisions outlined, States have the obligation to ensure protection for their citizens and that people live life with dignity,[143] through also the creation of tools to prevent, mitigate, adapt, and eventually manage internal and cross-borders climate-induced migration.

Despite the lack of effective protection in the international legal framework and the proliferation of soft law acts recognizing the urgency to address environmental migration, the emerging supranational, but especially national case-law of E.U. Member States' courts confirm the trend in tackling the lack of protection for environmental migrants through the incorporation of human rights in environmental cases, thus demonstrating the will to create an environmental migration awareness, on both the adverse effects of climate change and on the recognition of duties in environmental and human rights matters.

Even if these national decisions dealt with the adverse effects of environmental degradation, the environmental factual aspects of the cases are different. In the French case, the environmental aspect of migration is associated with the severe air level of pollution in the country of origin, whereas in the Italian case, there is the exploitation of natural resources by oil companies and political instability. Despite the respective differences, these two cases highlight one of the main aspects of environmental migration: the multi-causality. Both these cases stress that the reasons behind the forced or voluntary decision to migrate are not only linked to environmental factors. There are other reasons and elements, such as political instability, poverty that affect, even the type of protection to guarantee. In addition, in these selected decisions the judges did not use the same legal remedies. On the one hand, in the French case, there was the request for a decision of deportation and, on the other, in the Italian case, the request for international protection. The Court of Bordeaux relied on the right to health and the inadequacy of the Bangladesh health system compared to the French one in treating his diseases and in overturning the deportation order; instead, the Italian Court fixed an

[143] *See* U.N. Human Rights Committee, views adopted, supra note 60, at 9.12 and 9.13.

extensive reading of the right to life in dealing with the request of international protection. Eventually, through the annulment of the deportation order in France and the recognition of national protection in Italy, the decisions of the Administrative Court of Bordeaux and the Italian Court of Cassation stressed the necessity – albeit the duty – to recognize alternative or parallel instruments of protection for environmental migrants.[144]

The use of a broader interpretation of human rights by national courts – in particular the right to health, the right to life and to live with dignity– testifies to the international lack of protection, but also the international trend of filling such protection gaps through a human rights approach.

Despite the political statements at the supranational level, it seems that quasi-judicial and judicial bodies represent the real promotion of an adaptation process of the law to the increasing human developments and necessities [145] – i.e., the growing number of climate litigation cases.[146] Even if it will take time for judicial bodies to constitute a solid case law on this topic, the growing application of existing human rights law by national courts – and also the constant efforts of civil society groups – is pushing the environmental migration phenomenon in the spotlight.[147] Thus, such judicial involvement is stressing the necessity to consider the wider range of issues [148] that affect those who migrate for environmental reasons when taking legal decisions on climate change and environmental matters.

Environmental migrations, like other forms of migration, such as those due to living conditions that are objectively impossible, call for the implementation of a mighty, joint effort by the entire international community and supranational organizations, such as the E.U. The duty to cope with the massive flows with which they are invested cannot be borne solely by the, however limited, efforts of individual national courts.

[144] *See* Villani, *supra* note 43; Le Moli, *supra* note 58, at 26.
[145] *See* Perrini, *supra* note 68, at 350.
[146] *See* Villani, *supra* note 43; *see also* Le Moli, *supra* note 58.
[147] *See* Vona, *supra* note 100, at 148.
[148] *See* Jacqueline Pell & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation?*, 7 Transnat'l Env't L. 37 (2018).

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The Root Causes of Human Trafficking: A Critical Analysis of the Contemporary Approaches to Human Trafficking

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ABSTRACT

Contemporary anti-trafficking approaches reflect a reluctance to address the root causes (structural issues) of the human trafficking problem. The article critically analyses the three dominant approaches to combating human trafficking-criminalisation approach, the human-rights based approach and the celebrity humanitarianism approach-and unpacks the political choices inherent in each one of them. It is argued that common to all three approaches is the depoliticisation of the human trafficking problem through conceptualising it as an instance of individual criminals that act outside the boundaries of a liberal society, which is characterised by individual freedom and equality. By so doing, these approaches depoliticise the issue of human trafficking by not viewing the problem as one that emanates from the global political economy. They overlook and perpetuate the inequality and oppression that is inherent in capitalism. Against this background, the article unpacks the various ways that the law, particularly through criminalisation and the international human rights framework, works to insulate and reinforce the systemic injustices at the centre of the trafficking problem. Effectively the current anti-trafficking approaches only serve to produce and excuse violations rather than remedy them. It is argued that to be effective anti-trafficking approaches must focus on the initiating phenomena (the structural issues) that make people vulnerable to trafficking related exploitation.

KEYWORDS

Anti-trafficking; Root Causes; Systemic Injustice; Neoliberalism; Capitalism

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EDITORIAL NOTE

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This conference paper was subject to a single-blind peer review, in which the anonymity of the reviewer was guaranteed.

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INTRODUCTION

PROBLEM

Human trafficking [hereinafter H.T.] has been described as a process that commodifies human bodies and reduces them to objects of trade that can be bought, exploited and discarded.[1] The problem of H.T. is one that is widespread in the modern world, with almost every country being affected as either States of origin, transit or destination.[2] Considering the covert nature of H.T., it is methodologically impossible to understand and quantify the exact scale of the problem. The United Nations Office on Drugs and Crime [hereinafter U.N.O.D.C.] is one of the trusted sources for understanding the extent of the problem globally, and it has reported that at least 161 countries are categorically affected as States of origin, transit or destination for H.T. victims.[3] Additionally, it is reported that victims from at least 127 countries are being exploited in 137 States.[4] Reports of the International Labour Organization [hereinafter I.L.O] have estimated that at any given time traffickers globally earn approximately $150 billion U.S.D. per year in illegal profits gained from forced labour.[5] This clearly shows that H.T. has become a global phenomenon which concerns virtually all the countries of the world. With this background in mind, it is important to note that at the heart of H.T. is the accumulation of profit through the exploitation of vulnerable individuals.[6] Research has shown that "trafficking, whether in people or body parts, typically entails the exploitation of marginalised populations whose bodies are commoditised — generating profits for illicit entrepreneurs [. . .]".[7]

Consequently, the international community has developed laws that are designed to combat the problem of H.T. What has emerged is that which is labelled the "four Ps" policy in the fight against H.T. and these are: prevention, protection, prosecution and partnership.[8] These, in turn, form the core of all the anti-trafficking policies and debates worldwide. However, in practice only the prosecution, partnership

[1] *See* Julia O'Connell Davidson, *Modern Slavery: The Margins of Freedom* 109 (Palgrave Macmillan, 2015).
[2] *See* U.N.O.D.C., Factsheet on Human Trafficking <https://www.unodc.org/documents/human-trafficking/UNVTF_fs_HT_EN.pdf> last accessed 5 April 2022.
[3] *See* Kristiina Kangaspunta, *Trafficking in Persons: Global Patterns*, UNITED NATIONS, at 2, 5 (June 28-30, 2006), https://www.un.org/en/development/desa/population/events/pdf/other/turin/KANGASPUNTA.pdf.
[4] *See* U.N.O.D.C., *supra* note 2, at 1.
[5] *See* U.N. International Labour Office (ILO), Profits and Poverty: The Economics of Forced Labour (May 20, 2014).
[6] *See* Jay S. Albanese, *Consent, Coercion, and Fraud in Human Trafficking Relationships,* 8 J. HUM. TRAFFICKING 13, 19 (2022).
[7] *Id.* at 23.
[8] *See* Rochelle Dalla & Donna Sabella, *Routledge International Handbook of Human Trafficking: A Multi-Disciplinary and Applied Approach* 71 (Routledge, 2019).

and protection elements are emphasised in varying degrees. The prevention of H.T., by addressing its root causes, is often paid lip service without much concrete effort being made to conceptualise what such a policy would entail.[9] Root causes are the initiating phenomena in the chain of causation and are the foundation on which the H.T. problem rests.[10] It is at this level that any intervention aimed at addressing the problem is effective.[11] The literature review will analyse three contemporary approaches that have dominated the debates on how to tackle H.T. — that is, the criminalisation/abolitionist, human rights-based and celebrity humanitarianism approaches.[12]

This paper argues that rather than addressing the structural issues, and hence root causes of trafficking-related exploitation, these approaches instead focus on tackling problematic practices such as forced labour, sexual exploitation or organ removal without changing the underlying issues causing these practices.[13] In other words, they are concerned with treating the symptoms of the problem without fundamentally changing how the society is structured. The underlying structures such as a global economy that relies immensely on the exploitation of underprivileged people for growth and the restrictive immigration policies that make them vulnerable to exploitation remain unchallenged by these approaches.[14]

The current approaches to H.T. adopt a reductionist stance in perceiving the issue as one that concerns individual "bad apples" that criminally exploit the vulnerable (criminalisation approach); or that violate the human rights of individual persons (human rights-based approach); or that of people that need to be liberated from bondage through charity or "decaf" capitalism (celebrity humanitarianism).[15] This is despite the fact that liberalism (as a political ideology) and global capitalism (as the political economy) are acknowledged as the context within which H.T. occurs, and are believed to create certain problems such as inequality and poverty.[16] The current approaches to H.T. do not identify them as structural issues from which people need to be rescued. In fact, they reinforce neoliberal interests that maintain the boundaries between the haves and

[9] *See* Janie Chuang, *Beyond a Snapshot: Preventing Human Trafficking in the Global Economy*, 13 Ind. J. Glob. Legal Stud. 137, 138 (2006).
[10] *See* Susan Marks, *Human Rights and Root Causes,* 74 Mod. L. Rev. 57, 60 (2011).
[11] *Id.*
[12] *See* Kamala Kempadoo, *The Modern-Day White (Wo)Man's Burden: Trends in Anti-Trafficking and Anti-Slavery Campaigns*, 1 J. Hum. Trafficking 8 (2015); *see also* Ian Kapoor, *Celebrity Humanitarianism: The ideology of global charity* (Routledge, 2013); Patrick Twomey, *Europe's other Market: Trafficking in People*, 2 Eur. J. Migration & L. 1 (2000).
[13] *See* Anne T. Gallagher, *What's Wrong with the Global Slavery Index?*, 8 Anti-Trafficking Rev. 90 (2017).
[14] *Id.* at 11.
[15] *See* Kempadoo, *supra* note 12.
[16] *See* John Hilary, *The Poverty of Capitalism: Economic Meltdown and the Struggle for What Comes Next* 2, 7, 15-16 (Pluto Press ed., 2013); *see also* Kempadoo, *supra* note 12, at 16.

the have-nots by depoliticising and disavowing the dark side of the neoliberal order such as its tendencies to promote inequality, exploitation and imperialism.[17]

Furthermore, the current approaches to H.T. unquestionably accept the liberal construction of exploitation in H.T. legal instruments which support the ideological narrative that people can consent to exploitation — if there is no coercion or other improper means that negate consent.[18] This promotes the fiction of "free" labour in exploitative working conditions which is a construct of liberal ideology that conceals the lived experiences of oppression under capitalism.[19] By not contending with the politics of such a proposition and by accepting this position at face value, these approaches fail to recognise that liberal legalism obscures the oppression of the wage labourer in the fiction of consent under the general theory of contract.[20] Hence, by not questioning the exclusion of "consented" exploitation in the definition of H.T., as provided for in legal instruments such as the U.N. Trafficking Protocol,[21] the literature ignores the role of the law in making exploitation appear "free, natural and rational". This is something which is essential for the pervasive coercion of capitalism.[22]

This naturalisation of neoliberal interests and fictions of free labour is the work of ideology. Ideology is defined as a system of beliefs that naturalises social relations; particularly those of oppression or domination.[23] This naturalisation of legal liberalism and neoliberal interests in modern or current H.T. requires a nuanced approach that deconstructs this false consciousness through ideology critique as propounded by Žižek.[24] By lifting the veil of liberal ideology, the paper will critique how the current approaches depoliticise H.T. and, in turn, lead to the adoption of ineffective measures to address the problem.

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[17] *See* Kapoor, *supra* note 12, at 2.

[18] *See* Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, adopted Nov. 15, 2000, 2237 U.N.T.S. 319.

[19] *See* Mary Stokes, *Company Law and Legal Theory, in* A Reader on the Law of the Business Enterprise: Selected Essays 90 (Sally Wheeler ed., 1994).

[20] *See* Jairus Banaji, *The Fictions of Free Labour: Contract, Coercion, and So-Called Unfree Labour*, 11 Hist. Materialism 69-70 (2003).

[21] *See* Kara Abramson, *Beyond Consent, toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol*, 44 Harv. Int'l L J. 473, 477 (2003). Problematises the issue as follows:

> if an act is not carried out by way of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits *to achieve the consent* (emphasis added) of a person, even if such an act is paired with an intent to exploit, then the act is not trafficking.

See also Protocol to Prevent, Suppress and Punish Trafficking in Persons, *supra* note 18, at art. 3.

[22] Banaji, *supra* note 20, at 76.

[23] *Id.* at 73.

[24] *See* Slavoj Žižek, *Mapping Ideology* (Verso ed., 1994).

METHODOLOGY - CRITICAL LEGAL APPROACH

Critical legal theory [hereinafter C.L.T] is the theoretical framework utilised by the article to critique the current approaches to H.T. A central theme in critical studies is the achievement of human emancipation, a condition that is denied to H.T. victims by the current anti-trafficking approaches. Employing a critical legal perspective on the issue will be useful in understanding how the law functions in giving effect to and/or legitimising certain forms of oppression and power relations.[25] The target of C.L.T. is the core of the orthodox approach to law which is "legal liberalism" or "liberal legalism".[26] Legalism views the law as constituting authoritative texts that can be applied in a value-free manner through the application of logic.[27] This is rejected by critical scholars who view the law as political and reflecting the values of those legislating (being their dominant social values).[28] Thus, the law is best described as a site of political contestation and a platform on which hegemonic values are presented as universal.[29] Such an approach is essential in deconstructing how the law functions in giving effect to and/or legitimising certain forms of exploitation and power relations. For example, the emphasis on construing the trafficking problem as an instance of bad individuals that exploit vulnerable people overlooks and silences alternative constructions of the root causes of H.T., different conceptions of exploitation and the possible solutions to the problem. This works to depoliticise the issue by ignoring and insulating the relationship between meaning and power in the construction of H.T. under international law. This has an effect of international law perpetuating the very problems that it aims to alleviate.

The "liberalism" concept, on the other hand, emphasises the law's role in maximising individual freedom and equality.[30] This too is rejected by critical scholars who view liberalism as an ideological exercise that naturalises relations of social domination.[31] The "freedom" and "equality" to which liberalism adheres to are only formal and not substantive.[32] It ignores the social reality of inequality and the unfreedom that results from workers dependence on selling their labour power for

[25] *See* Donald Nicolson, *Critical Approaches, in* An Introduction to the Study of Law 43-44 (W. Green ed., 2012).
[26] *Id.* at 43.
[27] *Id.*
[28] *Id.*; *see also* Judith Wagner DeCew, *Critical Legal Studies and Liberalism: Understanding the Similarities and Differences*, 18 Phil. Topics 41, 44 (1990).
[29] *See* Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration*, 17 Cambridge Rev. Int'l Aff. 197, 200 (2004); *see also* Martti Koskenniemi, *The Politics of International Law – 20 Years Later*, 20 Eur. J. Int'l L. 7, 11 (2009).
[30] Nicolson, *supra* note 25, at 43-44.
[31] *See, e.g.*, Alan Hunt, *Problems of the State: Law, State and Class Struggle*, 20 Marxism Today 176, 184 (1976).
[32] *Id.*: "that is individuals are regarded as free if there is no legal bar to them entering into a contract, and are therefore deemed to be equal".

survival.[33] Employing a critical legal perspective to the issue will, therefore, be useful in understanding how the law naturalises relations of exploitation and conceptualises H.T. in a manner that ignores the structural issues.

Under critical legal theory the paper will utilise a Marxist lens in its analysis of the approaches adopted to deal with H.T. The relevance of a Marxist analysis of the law lies in the fact that it critiques the law based on the very same values that it purports to advance and also examines whether particular policies adopted advance those values.[34] Marxism is primarily a theory of history which asserts that in order to understand how a society functions it is essential to look at the economic structure of the relevant society.[35] Thus, employing a Marxist legal analysis will assist in understanding the root causes of H.T. and the exploitation that comes with it. The engagement with this approach will make an original contribution to the H.T. issue as Marxist studies of the law are rare especially in international law.[36] Therefore, this study will have an original theoretical contribution in the application of Marxist legal perspectives to the international law on the trafficking of human beings — particularly regarding the limitations of the current approaches and their conceptualisation of H.T.

1. TERMINOLOGY

1.1. CAPITALISM AND NEOLIBERALISM (STRUCTURAL ISSUES)

The concepts "capitalism" and "neoliberalism" have been marred by assertions that they contribute to inequalities and to the violation of human rights, particularly labour rights. This Section will attempt to define these concepts and briefly discuss how they can be construed as structural issues in the H.T. phenomenon. The aim of this Section is to lay a foundation for the understanding of capitalism and neoliberalism which informs the discussion in the subsequent Sections that highlight the limitations of the three dominant approaches to H.T.

Capitalism is a concept that is often used in practice with its meaning being largely considered to be self-evident. As to the origins of the word, it is commonplace for one

[33] *Id.* at 184.
[34] Brad R. Roth, *Marxian Insights for the Human Rights Project*, *in* International Law on the Left: Re-examining Marxist Legacies 221 (Susan Marks ed., 2008).
[35] Nicolson, *supra* note 25, at 44.
[36] *See* Robert Knox, *Marxist Approaches to International Law*, *in* The Oxford Handbook of the Theory of International Law 306 (Anne Orford & Florian Hoffmann eds., 2016).

to assume that the word comes from Karl Marx as he referred to its variations (capital, capitalist and the capitalist mode of production) in the *Capital, Volume I*.[37] The term was, however, coined by the English novelist Thackeray, but Weber is the one who proffered a famous paper on the definition of capitalism. The Weberian definition of capitalism entails the provision of human needs through private businesses with the aim of making profit.[38] While profit-seeking is as old as trade itself, continuous and generalised accumulation of surplus value through production is unique to capitalist societies.[39] These societies not only require that those who control production seek to make profit, but also that they are able to adapt the production process to ensure the maximisation of output.[40] Thus, at the heart of capitalism is the accumulation of profit through the manipulation of labour power.

Historically, capitalism has been associated with the gravest situations of human exploitation such as slavery.[41] It is widely considered that the cruelty and violence that are often associated with chattel slavery were caused by the slave owner's unquenchable thirst for profit.[42] Beckert states that although people have grown to associate capitalism with contracts and markets, early capitalism was based on violence and bodily coercion.[43] This is an assertion that finds support in Marx's *Capital I* where he stated that capitalism came into this world "dripping from head to foot, from every pore, with blood and dirt".[44] Thus, the history of capitalism shows that it has always been associated with labour regimes that are exploitative in nature by virtue of its emphasis on profit accumulation at all costs.

Having established what capitalism is, it is fitting to establish the relationship that it has with neoliberalism. In doing so, it is apposite to define what is meant by the term "neoliberalism" in the first instance. The term "neoliberalism" is now widely acknowledged as a controversial and crisis-ridden term.[45] It is often invoked in critical literature, but remains ill-defined with a meaning that appears to change from paper to paper.[46] In order to get a clearer picture of the meaning and scope of the term it is,

[37] Karl Marx, *Capital*: *A Critique of Political Economy*. Volume I: The Process of Capitalist Production (Frederick Engels ed., Samuel Moore & Edward Aveling trans., Progress Publishers, 1887).
[38] *See* Randall Collins, *Weber's Last Theory of Capitalism: A Systematization*, 45 American Sociological Review 925 (1980), https://doi.org/10.2307/2094910.
[39] *See* Angus Maddison, *Contours of the World Economy*, 1–2030 AD (Oxford University Press ed., 2007).
[40] *See* John J. Clegg, *Capitalism and Slavery*, 2 Critical Historical Studies 281 (2015), https://doi.org/10.1086/683036.
[41] *See* Sven Beckert, *Slavery and Capitalism*, The Chronicle of Higher Education (Dec. 12, 2014), https://www.chronicle.com/article/slavery-and-capitalism/?emailConfirmed=true&email=l.sibanda%40sussex.ac.uk&success=false&bc_nonce=k5179074tlaiapx8sd45i&cid=gen_sign_in.
[42] Clegg, *supra* note 40, at 290.
[43] Beckert, *supra* note 41.
[44] Marx, *supra* note 37, at 538.
[45] *See* Rajesh Venugopal, *Neoliberalism as a Concept*, 44 Economy and Society 165, 166 (2015).
[46] *Id.*

therefore, important to define the concept as present in the real world through its spheres of operation and historical development. For instance, scholars have noted that neoliberalism developed as a counter-revolution political project "carried out by the corporate capitalist class" to limit the power of labour.[47] Thus, the neoliberal project developed as an assault on organised labour which was viewed as a threat to the expansion of capital and a cause for market rigidity.[48] Consequently, its sphere of influence can be seen through policies aimed at advancing the neoliberal agenda of: "free" trade and capital mobility; the adoption of austerity measures; the "flexibilization of labour markets" through labour and business deregulation; the repression of wage demands and the "workfarist" restructuring of the welfare state.[49] A look at these characteristics of neoliberalism reflects the liberal, rational choice-based foundations of the project which advocate for the reduced role of the government in regulating economic activity.[50] However, it should be noted that there are other variations of neoliberalism that attempt to bridge the gap between the polar opposites of unbridled capitalism and state control as seen in the "ordoliberalism".[51]

Aside from neoliberalism being a political project, it is also an ideological tool.[52] Ideology is defined by Žižek as a "composite set of ideas, beliefs, concepts" that are meant to convince the society of its inherent truth while underhandedly serving some power interest.[53] Neoliberalism, naturally, is the most pro-capitalist ideology as it advocates for policies that are aimed at dismantling barriers to global trade and capital as well as the deregulation of labour.

The impact of these neoliberal policies has been a subject of debate with those who are pro-market liberalisation, arguing that it results in economic growth and development.[54] Conversely, those who argue against liberalisation state that it results in "a race to the bottom as governments, in their pursuit of economic competitiveness and foreign capital, competitively lower labour, environmental and other social welfare

[47] Bastiaan van Apeldoorn & Henk Overbeek, *Introduction: The Life Course of the Neoliberal Project and the Global Crisis*, *in* Neoliberalism in Crisis 1, 4 (Henk Overbeek & Bastiaan van Apeldoorn eds., 2012); Bjarke Skærlund Risager, *Neoliberalism Is a Political Project: An Interview with David Harvey*, Academia 2-3 (July 23, 2016), https://www.academia.edu/27261868/Neoliberalism_Is_a_Political_Project_An_Interview_with_David_Harvey?auto=citations&from=cover_page.

[48] *See* Christoph Hermann, *Neoliberalism in the European Union*, 79 Studies in Political Economy 61, 64 (2007).

[49] *Id.* at 62, 68; Robert Blanton & Dursun Peksen, *Economic Liberalisation, Market Institutions and Labour Rights*, 55 European Journal of Political Research 474, 475 (2016).

[50] Venugopal, *supra* note 45, at 172.

[51] *Id.* at 168.

[52] *See* Risager, *supra* note 47, at 3-4; Hermann, *supra* note 48, at 62.

[53] Žižek, *supra* note 24.

[54] *See* Alice Amsden, *Taiwan's Economic History: A Case of Etatisme and a Challenge to Dependency Theory* (1979), *in* The Globalization and Development Reader: Perspectives on Development and Global Change 159 (Timmons Roberts, Amy Hite & Nitsan Chorev eds., 2nd ed. 2015).

standards".[55] Such policies, aiming to increase economic competitiveness through lowering of labour standards, are essentially grounded in the neoliberal assumption that the respect for worker rights is hostile to economic growth. Through deregulation, this ideological position seeks to promote the accumulation of profit by businesses even at the expense of worker rights. This, coupled with the idea of reduced government intervention (minimal state), results in a government that is not well equipped to protect positive rights such as workers' rights.[56] Thus, there is a correlation between neoliberal policies and the exploitation of workers for the sake of profit accumulation.

1.2. HUMAN TRAFFICKING AND MODERN SLAVERY

The first internationally accepted definition of H.T. is found in the 2000 U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children [hereinafter the Protocol].[57] Article 3 of the Protocol defines H.T. as entailing some form of action such as the recruitment, transportation, transfer, harbouring or receiving of another human being through "unlawful" methods for the purpose of exploiting the person.

H.T. has three elements that need to be satisfied: an act, a means and a purpose. The "act" element of the H.T. definition relates to the control of a person by another by virtue of the enumerated actions, for instance, harbouring or recruitment. The second element, "means", points to the involuntary aspect of the relationship between the person and the entities who are exercising control over the trafficked person. This is illustrated by words such as coercion, deception or abuse of power to describe the relationship.[58] Last, but not least, is the element of exploitation of the person.[59] This element requires that perpetrators recruit, harbour, transfer or receive another person for the purpose of obtaining some benefit at the expense of the trafficked person. This could be for the purpose of financial gain, free/cheap labour services or obtaining the benefit of an organ donation.[60]

[55] Blanton & Peksen, *supra* note 49, at 475.
[56] *See* Robert Blanton & Dursun Peksen, *The Dark Side of Economic Freedom: Neoliberalism has Deleterious Effects on Labor Rights*, LSE Phelan US Centre (Aug. 20, 2016), https://blogs.lse.ac.uk/usappblog/2016/08/20/the-dark-side-of-economic-freedom-neoliberalism-has-deleterious-effects-on-labour-rights/.
[57] *See* Protocol to Prevent, Suppress and Punish Trafficking in Persons, *supra* note 18.
[58] *Id.* at art. 3(a).
[59] *See* Janne Mende, *The Concept of Modern Slavery: Definition, Critique, and the Human Rights Frame*, 20 Human Rights Review 229, 233 (2019).
[60] *See* IOM, *Counter-trafficking: Training Modules*, IOM Ireland 8 (2008), http://iomireland.ie/wp-content/uploads/2016/04/Train-the-Trainer-Manual-Original.pdf.

The question of whether a prescribed act and method must subsequently lead to exploitation for a case to be classified as H.T. is one that is subject to debate. One view is that all three elements must be present in any given case for it to be considered H.T. In other words, subsequent exploitation is an indispensable requirement.[61] This is a restrictive interpretation of the provision in the Protocol requiring where the utilisation of the conduct and method(s) prescribed must be for the *purpose* of exploitation.[62] A more literal interpretation of the provision contends that subsequent exploitation is to be treated as a sufficient but not a necessary element of H.T.[63] This is said to be in line with the ordinary and grammatical meaning of the provision which speaks to the "purpose" of exploitation; hence, referring to an intention to exploit.[64] The practical difference between the two interpretations can be seen once one takes into account the fact that not all trafficked persons are subsequently exploited. There may be cases where a person has been recruited, transported, or harboured through the use of coercion, and has suffered human rights violations in the process, but is rescued before they are exploited. In the restricted interpretation of Article 3 of the Protocol, such a person would not be considered a victim of H.T. Whereas in the literal interpretation of the provision, such a person would be a victim of H.T. and would consequently be entitled to all the necessary protection.

The exploitation of H.T. victims is characterised by an absence of autonomy or freedom on their part — mirroring the ancient practice of slavery. Hence, renewed attention has been given to the old phenomenon of slavery, although now focusing on modern slavery practices. Definitional problems are inherent in the discussions on "modern slavery", as no international instrument has given a definition of the concept.[65] While terms such as H.T. have been comprehensively covered in international legal instruments,[66] modern slavery is one term that eludes precise definition. This lack of a universally accepted definition of what modern slavery entails means that the term is often used to mean different things in different contexts.[67] Some scholars have used the term modern slavery or slavery-like conditions to refer to situations that are less

[61] *See* Ryszard Piotrowicz, *European Initiatives in the Protection of Victims of Trafficking who Give Evidence Against Their Traffickers*, 14 International Journal of Refugee Law 263, 266 (2002).
[62] Protocol to Prevent, Suppress and Punish Trafficking in Persons, *supra* note 18, at art. 3(a).
[63] *See* Tom Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach* 20 (Martinus Nijhoff Publishers ed., 2006).
[64] *Id.*
[65] *See* U.N., *International Day for the Abolition of Slavery*, U.N. (2021), https://www.un.org/en/observances/slavery-abolition-day.
[66] *See* Protocol to Prevent, Suppress and Punish Trafficking in Persons, *supra* note 18; Convention on Action Against Trafficking in Human Beings, adopted May 16, 2005, C.E.T.S. 197.
[67] *See* Ronald Weitzer, *Modern slavery and Human Trafficking*, Great Decisions 42 (Jan., 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3691649.

dehumanising than outright slavery. For instance, the term is often used to describe circumstances where a person is subjected to any one of the following: harsh working conditions, restricted freedom, presence of a debt bondage, or even when they receive paltry remuneration.[68]

Slavery is understood as the ". . . status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised".[69] Central to the definition of slavery is the idea that the slave lacks legal personality and is owned by the master. This ownership is life-long and more permanent in the case of slavery. This is not the case in modern slavery cases, as the victim still retains their legal personality.[70] In the context of modern slavery, it is the intention to subsequently exploit the victim that categorises it as slavery. In some instances, however, the traffickers may exercise continuous control over the victim for a long period and that would *de facto* amount to exercising the right to ownership (slavery).[71] A fundamental similarity between slavery and modern slavery is that in both instances the victim's rights and personal freedoms are restricted by the perpetrator. For example, in both cases, the victim's right to freedom of movement, liberty, property and dignity are restricted by the person exercising control over them. This is what justifies these practices being labelled as modern slavery or slavery-like.

However, it must be acknowledged that the term 'modern slavery' has been subject to severe criticism. The argument behind this critique is that the use of the term only serves to "de-historicise" and spectacularise the people to whom it refers.[72] What this means is that the use of the term "modern slave" has the effect of unifying the experiences of all victims, and eclipses their contextual and material conditions. The term then only serves to create grand narratives of what it means to be a contemporary slave while not considering the individual experiences of the victims themselves. Therefore, distancing ourselves from these narratives inherent in the term "modern slave" will allow for an understanding of violence as an everyday practice that intersects with other life experiences.[73] This will, in practice, allow for the recognition of problematic relations that are less visible in the modern slavery paradigm.[74] It has, furthermore, been contended that the term "modern slavery" has become a movement for the "deep-pocketed, high profile and increasingly glamorous "anti-modern slavery"

[68] *Id.*
[69] *See* Convention to Suppress the Slave Trade and Slavery, adopted Mar. 7, 1927, 60 L.N.T.S. 253.
[70] Obokata, *supra* note 63, at 19.
[71] *Id.* at 20.
[72] *See* Ella Parry-Davies, Modern Heroes, *Modern Slaves? Listening to Migrant Domestic Workers Everyday Temporalities*, 15 Anti-Trafficking Review 63, 68 (2020).
[73] *Id.* at 74.
[74] *Id.*

club, that counts movie stars and presidents amongst its members" — all of which conveniently view forced labour as an issue of individual bad people — doing bad things to good people — while ignoring the deeper structural causes.[75]

While taking cognisance of the above criticisms, this paper will use the terms modern slavery and H.T. interchangeably. The decision to use the highly criticised term — (that is, modern slavery) is motivated by the fact that it has become a very powerful tool for the mobilisation of action against all forms of exploitation sustained through threats, coercion, abuse of power, violence or deception. Virtually all state and non-state actors use the term to refer to these instances of exploitation. The United Nations has dealt with modern slavery through its various organs and procedures. For instance, through the special procedure mechanism, the U.N. has created a mandate for the Special Rapporteur on Contemporary forms of Slavery. Contemporary is a synonym for "modern" and the mandate of the special rapporteur includes all issues associated with modern slavery such as forced labour, domestic servitude, and slavery-like conditions among others.[76] The United Nations Office on Drugs and Crime and the I.L.O. have dealt extensively with modern slavery as a broad concept that includes different situations of H.T.[77] On the regional level, the Organization for Security and Cooperation in Europe [hereinafter O.S.C.E.] has also dealt with H.T. as a massive phenomenon of modern-day slavery in its policy documents.[78]

2. A CRITICAL ANALYSIS OF THE APPROACHES TO H.T.

This Section will analyse the three main approaches that can be identified in the literature on combating H.T. The literature review identifies international and regional legal frameworks as key determinants of anti-trafficking efforts and consequently, academic discussions have been centred on the effectiveness of these efforts.[79] Anti-trafficking efforts in the literature can be divided into three broad categories: the

[75] *See* Anne Gallagher, *What's Wrong with the Global Slavery Index?*, 8 Anti-Trafficking Review 90-112 (2017), https://www.antitraffickingreview.org/index.php/atrjournal/article/view/228/215.

[76] *See* U.N. Office of the High Commissioner of Human Rights (OHCHR), Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, U.N. Doc. A/77/163 (July 14, 2022).

[77] *See* U.N.O.D.C., Global Report on Trafficking in Persons, at 6 (Feb. 2009); U.N. International Labour Office (ILO), Global Estimates of Modern Slavery: Forced Labour and Forced Marriage, at 21 (Sep. 19, 2017).

[78] *See* Ryszard Piotrowicz et al., *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking*, O.S.C.E. (June 25, 2013), https://www.osce.org/files/f/documents/6/6/101002.pdf.

[79] *See* Jean-Pierre Gauci & Noemi Magugliani, *Final Report: Determinants of Anti-trafficking Efforts*, BIICL 67 (June, 2022), https://www.biicl.org/documents/154_determinants_of_anti-trafficking_efforts_final_report.pdf.

criminalisation/abolitionist approach, the human rights based approach and the celebrity humanitarianism approach. The review shows that each of them has assumptions on how to eliminate the problematic manifestations of H.T. such as forced labour, and criminal and sexual exploitation (among other forms of exploitation) with a focal point that is highly influenced by their respective actors, agendas, and politics. Consequently, all the approaches are reactive to the problem and do not seek to address its causes. What is striking about these approaches, as different as they may be, is their tacit legitimisation of the liberal political economy by focusing on the immediate crisis and tackling the symptoms of the H.T. problem rather than addressing the root causes. By not interrogating the pervasive exploitation essential to the survival of global capitalism and perpetuated by neoliberal policies, the approaches depoliticise the problem and, in turn, lead to the adoption of ineffective measures to combat H.T. It will be shown that, in order to combat H.T., it is essential for strategies to target the structural issues that are contributing to making individuals vulnerable.

2.1. CRIMINALISATION APPROACH

2.1.1. WHAT IS A CRIMINALISATION APPROACH TO H.T.

A review of the literature dealing with combating H.T. shows that one of the tactics that have been adopted to deal with the issue is the liberal abolitionist approach; commonly referred to as the criminalisation approach. This approach fundamentally views the issue of H.T. from the perspective of the state and as a violation of the laws of the state.[80] It fundamentally adopts a reductionist lens that attempts to understand a complex phenomenon such as H.T. from the study of distinct features of the system such as perpetrators, victims and the patterns of operation.[81] Consequently, emphasis is placed on utilising the law and the criminal justice system to punish trafficking perpetrators through the criminalisation of H.T. and various offences related thereto. Such related offences are prostitution and violations of labour and immigration law.[82]

[80] *See* Navid Pourmokhtari, *Global Human Trafficking Unmasked: A Feminist Rights-Based Approach*, 1 Journal of Human Trafficking 156, 159 (2015).
[81] *See* Marcel van der Watt & Amanda van der Westhuizen, *(Re)configuring the criminal justice response to human trafficking: a complex-systems perspective*, 18 Police Practice and Research 218, 224-5 (2017).
[82] Pourmokhtari, *supra* note 80, at 159.

Central to this approach is the distinction between perpetrators and victims — with it being argued that the latter should not be punished for criminal acts arising out of their situation as H.T. victims.[83] While this approach has certain strengths, such as deterring perpetrators from committing the offence, it also fails to provide a holistic approach that addresses the root causes of the problem.[84]

2.1.2. CRIMINALISATION APPROACH AND THE PREVENTION OF H.T.

While assessing the successes and shortcomings associated with this method of combating H.T., Kangaspunta argues that the criminalisation of the phenomenon has been a crucial step in sending a message to the would-be traffickers that the commission of the offence will not be accepted internationally or domestically.[85] The contention is that it brings the problem of H.T. under the official purview of the criminal justice system allowing for an allocation of the resources to ensure the proper investigation of the crime and prosecution of offenders.[86] Rogers, while speaking generally in terms of the functions of criminal law, notes that the creation of an offence can make a prohibited conduct more susceptible to prevention through general deterrence.[87] This is because it sends a clear message to potential offenders that they will be prosecuted, convicted and punished. Stoyanova adds to this discussion by arguing that criminalisation also provides for specific deterrence against repetition of the offence by individual offenders and protects the victim from further victimisation.[88]

Despite these strengths, there has been a growing realisation among academics that H.T. cannot be adequately prevented through criminalisation (legislation).[89] Kangaspunta asserts that the criminalisation of H.T. remains largely symbolic due to the lack of implementation, and the low numbers of convictions despite the widespread

[83] *See* Ryszard Wilson Piotrowicz & Liliana Sorrentino, *Human Trafficking and the Emergence of the Non-Punishment Principle*, 16 Human Rights Law Review 669, 673 (2016); U.N. Secretary-General, Trafficking in Women and Girls, ¶ 62, U.N. Doc A/63/215, para 62, (Aug. 4, 2008).

[84] *See* Paul Oluwatosin Bello & Adewale Olutola, *Effective Response to Human Trafficking in South Africa: Law as a Toothless Bulldog*, 12 Sage Open 1-14 (2022), https://doi.org/10.1177/21582440211069379 (last visited Sept. 27, 2022); Vladislava Stoyanova, *Article 4 of the ECHR and The Obligation of Criminalising Slavery, Servitude, Forced Labour And Human Trafficking*, 3 Cambridge Journal of International and Comparative Law 407, 414 (2014).

[85] *See* Kristiina Kangaspunta, *Was Trafficking in Persons Really Criminalised?*, 4 Anti-Trafficking Review 80-97 (2015).

[86] *Id.*

[87] *See* Jonathan Rogers, *Applying the Doctrine of Positive Obligations in the European Convention on Human Rights to Domestic Substantive Criminal Law in Domestic Proceedings*, 2003 Criminal Law Review 690-708 (2003).

[88] Stoyanova, *supra* note 84, at 414.

[89] Chuang, *supra* note 9, at 156; Nina Mollema, Combating Human Trafficking in South Africa: A comparative legal study 75 (2013) (D.Phil. thesis, University of South Africa); van der Watt & van der Westhuizen, *supra* note 81, at 218.

criminalisation.[90] The low number of convictions is attributed to the hidden and coercive nature of the phenomenon as well as the problems of victim (self-)identification due to the complex nature of H.T.[91] Where convictions are secured, they are often more focused on sexual exploitation grounds than labour exploitation — thus neglecting a key part of trafficking related exploitation.[92] Chuang states that this is because sex trafficking falls neatly within the scope of the criminal justice system.[93] However, labour trafficking in practice is less likely to attract a criminal justice response due to the greater moral tolerance that society has with regard to labour exploitation.[94] This raises a fundamental question on whether criminalisation performs the function of prevention by deterrence with regard to labour trafficking.

Less attention is afforded to labour trafficking despite recent global estimates that approximately twenty-eight million people are trapped in forced labour.[95] While H.T. and forced labour are different concepts, there is a significant overlap between them.[96] In analysing the definition of forced labour as found in the 1930 Forced Labour Convention,[97] Morehouse notes that ". . . all victims of forced labour can *potentially* (emphasis added) be considered victims of human trafficking",[98] In fact, an argument is made that the I.L.O. posits H.T. as a subset of forced labour.[99] The overlap between H.T. and forced labour is not complete. There are a few instances where forced labour does not amount to H.T.[100] Unfortunately, the Protocol itself does not offer a clear basis for resolving the exact relationship and boundaries between forced labour and H.T.[101] Mbah notes that "forced labour is the most common form or practice of trafficking . . . [and] the most common practice of exploitation because it is a lucrative business that generates a significant amount of revenue for the perpetrators".[102] Therefore, an

[90] Kangaspunta, *supra* note 85.
[91] Anne Gallagher & Paul Holmes, *Developing an Effective Criminal Justice Response to Human Trafficking Lessons from the Front Line*, 18 International Criminal Justice Review 318, 329 (2008); Kangaspunta, *supra* note 85.
[92] Gauci and Magugliani, *supra* note 79, at 38-40.
[93] Chuang, *supra* note 9, at 154.
[94] *Id.*
[95] International Labour Organization, Walk Free & International Organization for Migration, *Global estimates of modern slavery: forced labour and forced marriage* 22 (Sept. 28, 2022), https://www.ilo.org/wcmsp5/groups/public/—ed_norm/—ipec/documents/publication/wcms_854733.pdf.
[96] Chowdury and Others v. Greece, App. No. 21884/15, (Mar. 30, 2017), https://tinyurl.com/3fjsshfk.
[97] Convention Concerning Forced or Compulsory Labour art. 2(1), Jun. 28 1930, 39 U.N.T.S. 55.
[98] Christal Morehouse, *Combating Human Trafficking Policy Gaps and Hidden Political Agendas in the U.S.A. and Germany* 76-77 (VS Verlag für Sozialwissenschaften ed., 2009).
[99] *Id.* at 76.
[100] *Id.* at 78 states: "Only three of the [I.L.O.]'s 2005 criteria for identifying forced labor do not apply strictly to human trafficking. These are: "dismissal from current employment under the menace of penalty", the 'exclusion from future employment through menace of penalty' and 'physical confinement in prison'".
[101] Chuang Janie, *Exploitation Creep and The Unmaking of Human Trafficking Law*, 108 Am. J. Int'l L. 609, 630 (2014).
[102] Miriam U Mbah, Addressing Human Trafficking through Public Procurement: An Examination of US and Australian Federal Procurement Frameworks 61 (2020) (D.Phil. thesis, Bangor University).

over-emphasis on sex trafficking as found in the criminalisation approach overlooks a vital element of trafficking-related exploitation (i.e., labour trafficking).

Another practical limitation of the criminalisation approach stems from its reductionist lens as it problematises the H.T. issue in a linear and simplistic manner. Marcel van der Watt and Amanda van der Westhuizen describe the criminalisation approach as a systematic process of connecting evidence in a linear fashion with the aim of identifying, apprehending, and convicting perpetrators.[103] While this method is well suited for single event crimes such as murder and/or rape that take place within a specific context often characterised by a perpetrator, a victim, a crime scene and a possible witness, it does not adequately address complex crimes such as H.T. which are often made up of complicated non-linear relationships between various actors and context(s).[104] Morgan argues that reductionism cannot keep up with a complex way of life — and when employed will only serve to treat symptoms of the problem while ignoring its causes.[105] Such interventions will only serve to make things better in the short term and worse in the long run as the root causes of the problem are left intact.[106]

Thus, a reductionist method of dealing with H.T. inevitably leads to policies that are "micro-smart" and "macro-dumb".[107] It is therefore important to conceptualise how the nonlinear relationships found in the H.T. phenomenon interact in order to fashion policies that can adequately address the macro forces at play in H.T. systems. Newman and Cameron argue that for one to understand H.T. it is important to look at its broad social, economic, and political context (structural factors).[108] The argument is that understanding H.T. requires an appreciation of the interaction of various factors that contribute to making people vulnerable to trafficking-related exploitation.[109] Hence, an analysis of the structural factors, contributing to making people vulnerable, will contribute to "addressing the problem at both the site of origin and the destination, as well as at the international level".[110]

[103] Van der Watt & van der Westhuizen, *supra* note 81, at 221.
[104] *Id.*
[105] Peter Morgan, *The idea and practice of systems thinking and their relevance for capacity development*, ECDPM 6 (2005), https://ecdpm.org/application/files/2716/5547/2830/2005-Idea-Practice-Systems-Thinking-Relevance-Capacity-Development.pdf.
[106] *Id.*
[107] *Id.*
[108] Edward Newman & Sally Cameron, *Trafficking in Human Beings: Social, Cultural and Political Dimensions* 1 (United Nations University Press ed., 2008).
[109] *Id.* at 6.
[110] *Id.* at 7.

2.1.3. MARXIST CRITIQUE OF THE CRIMINALISATION APPROACH

On a theoretical level, the criminalisation approach to H.T. seeks to align itself with the liberal ideology by viewing the issue as an instance of individual criminals who act outside the boundaries of the liberal society.[111] In doing so, this approach depoliticises the issue of H.T. by not viewing the problem as one that emanates from the global political economy or one that is inherently structural.[112]

The tacit assumption of this approach is that the labour market or global political economy is an environment that is characterised by free exchange between individuals that are equal and who rationally contract to their mutual advantage.[113] Hence, there is a liberal-individualistic supposition of labour as being essentially free under the current political economy with labour being based on the consent of the individual worker.[114] From this background, H.T., which is the epitome of unfree labour, is considered as encroaching upon individual autonomy; and therefore, warranting criminalisation. Consequently, this approach embraces neoliberalism and upholds the capitalist political economy by effectively placing the blame outside of the economic structure (capitalism). Bernstein accurately captures the limitation of this current approach as follows:

> For modern-day abolitionists, the dichotomy between slavery and freedom poses a way of addressing the ravages of neoliberalism that effectively locates all social harm outside of the institutions of corporate capitalism and the state apparatus. In this way, the masculinist institutions of big business, the state, and the police are reconfigured as allies and saviors, rather than enemies, of unskilled migrant workers, and the responsibility for slavery is shifted from structural factors and dominant institutions onto individual, deviant men: foreign brown men (as in the White Slave trade of centuries past) or even more remarkably, African American men living in the inner city [. . .] .[115]

Therefore, the criminalisation approach places blame on "bad" individuals and corporations that violate laws. By virtue of this, abolitionists place emphasis on the adoption of more laws that are designed to bring these "deviant" entities in compliance

[111] *See* Judy Fudge, *Modern Slavery, Unfree Labour and the Labour Market: The Social Dynamics of Legal Characterization*, 27 Social & Legal Studies 414, 418 (2018).
[112] *Id.*
[113] *Id.*
[114] Banaji, *supra* note 20, at 74.
[115] Elizabeth Bernstein, *The Sexual Politics of the New Abolitionism*, 18 Differences 128, 144 (2007).

with the dominant western liberal ideals and values. Naturally, this leads to the criminalisation of greater areas of human life such as migration and the intensification of surveillance to combat H.T.[116] Ironically, this approach leaves intact the structural issues (root causes) that are in fact causing H.T., which are conveniently ignored for a more superficial approach.

Furthermore, the liberal approach to the problematisation of H.T. fails to appreciate the extent to which the law itself, especially contract law under capitalism, is an institutional process through which domination and oppression is naturalised.[117] On this point, it is useful to refer to Marx's renowned critique of contract law under legal liberalism in *Capital I.* He describes the wage labourer as bound to the employer by invisible threads through the legal fiction of a contract — with an appearance of independence sustained by an ability to change employers.[118] This "free" contract between the capitalist and the worker is said to be an illusion. Kessler contends as follows in this regard: "*Freedom of contract enables enterprisers to legislate by contract and, what is even more important, to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms*".[119]

Thus, there is a need for a more nuanced approach to H.T. that reconceptualises exploitation to include those instances where consent is involved. This will reflect the fact that in contemporary capitalism the boundary between free and unfree labour has become blurred — casting doubt on liberal legalism's emphasis on a freely concluded contract as truly signifying the will of the parties.[120] The I.L.O. has recognised that in the course of employment there are some "relationships in which the element of free choice by the worker begins at least to be mitigated or constrained, and can eventually be cast into doubt".[121] This necessitates an approach to H.T. that recognises that freedom or unfreedom in employment situations is no longer binary and exists on a continuum. This concept of a continuum of unfreedom is useful in understanding that exploitation can occur even in legally sanctioned relationships where there is a denial of rights. This is not accounted for in the current liberal approach to H.T. as seen in the criminalisation approach. The effect of such a gap is that the conceptualisation of H.T. under the law

[116] Kempadoo, *supra* note 12, at 16.
[117] Marc Steinberg, *England Great Transformation: Law, Labour, and* the *Industrial Revolution* 32 (University of Chicago Press ed., 2016).
[118] Marx, *supra* note 37, at 405.
[119] Friedrich Kessle, *The Contracts of Adhesion–Some Thoughts about Freedom of Contract Role of Compulsion in Economic Transactions*, 43 Colum. L. Rev. 629, 640 (1943).
[120] Sandro Mezzadra & Brett Neilson, *Border as a Method, or, the Multiplication of Labor* 100 (2013).
[121] International Labour Organization (ILO) Conference (98th Session), Report I(B): *The Cost of Coercion: Global Report Under the Follow-up to the ILO Declaration on Fundamental Principles and Rights to Work*, at 8-9 (May 12, 2009).

does not accurately reflect the lived experiences of H.T. victims. The illusion of freedom under the liberal abolitionist approach naturalises exploitation that does not fall neatly within the scope of the H.T. definition.

2.2. THE HUMAN RIGHTS APPROACH

2.2.1. WHAT IS A HUMAN RIGHTS-BASED APPROACH TO H.T.?

A human rights-based approach has emerged owing to the limitations of the criminalisation approach in supporting and protecting victims of H.T. Therefore, instead of placing emphasis on the prosecution of traffickers, this approach focuses more on individuals based on their status as victims of human rights violations. It is contended that this approach is the only way of maintaining focus on H.T. victims and their interests in order to avoid the issue from being simply reduced to a public order, migration or transnational crime problem.[122] As a result, there has been a trend towards the utilisation of a human rights approach to H.T. by the international community.[123] Also, since the structural issues associated with H.T. are socio-economic (e.g., poverty), there has been a call for them to be addressed by reference to the international human rights law [hereinafter I.H.R.L.] system.[124] Chuang avers that framing the problem of addressing the root causes of H.T. as a human rights issue would promote a proactive approach that is aimed at tackling the problems.[125] This Section will critically analyse the literature on the merits of utilising the I.H.R.L. system as a conceptual framework for addressing the root causes of H.T.

Due to the centrality of exploitation in H.T. situations, it is generally accepted that the phenomenon is one that concerns human rights violations. Some of the most recognisable violations pertain to the right to liberty, security of the person, non-discrimination, and the right to personal and physical integrity.[126] These rights cover a wide range of activities in the social reproduction of life, and are encroached upon through the various stages of the H.T. process such as recruitment, harbouring, transportation and exploitation. A human rights approach to H.T. is a conceptual

[122] C.R.J.J. Rijken, *A Human Rights Based Approach to Trafficking in Human Beings*, 20 Sec. & Hum. Rts. 212, 215 (2009).
[123] UNCHR, Human Rights and Human Trafficking, Fact Sheet No. 36 7-8, (2014).
[124] *See* Chuang, *supra* note 9, at 157; The Protocol to Prevent, Suppress and Punish Trafficking in Persons, *supra* note 18, at article 9(4) obliges states to "take or strengthen measures. . . to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity".
[125] Chuang, *supra* note 9, at 157.
[126] Rijken, *supra* note 122, at 215.

framework that deals with the H.T. problem normatively, based on I.H.R.L. standards, and which is also designed to protect these rights.[127] Here too, liberal values such as the rule of law, liberty, universality and equality are echoed — which will be critiqued later on in the analysis of the merits of this approach.[128] These values are said to give guidance to the human rights-based approach to H.T. It is argued that this framework has the potential of offering a legal and political space for vulnerable persons in the society to claim these rights and establish state responsibility.[129] From this background, the use of I.H.R.L. is proposed as a conceptual framework for addressing the root causes of H.T. The discussion below will critically analyse the value of such an approach.

2.2.2. HUMAN RIGHTS APPROACH AND ROOT CAUSES

Various scholars have identified "poverty" as a root cause for trafficking-related exploitation.[130] It is broadly accepted that socio-economic circumstances play a vital role in the trafficking process and that those vulnerable to victimisation disproportionately occupy a lower socio-economic status in society.[131] Such persons are often desperate to find employment and, in that process, overlook the hazards associated with a job offer. Kumar argues that "a family in desperate need of money is inclined to say yes even without knowing the full nature and circumstances of the work",[132] Cameron and Newman agree with this assertion and are of the view that poverty acts as a catalyst for H.T. as it places people in circumstances where they have few alternatives.[133] This desperation increases their vulnerability to deception and coercion.[134] It also decreases their chances of removing themselves from exploitative situations, as doing so would deprive them of a source of livelihood. In other words, their only choice is to either remain in the exploitative situation or face starvation as a "free" person.

Those who advocate for a human rights approach to poverty reduction argue that this conceptual framework will lead to the empowerment of poor people and

[127] *Id.* UNCHR, *supra* note 123, at 8.
[128] Rijken, *supra* note 122, at 215.
[129] Chuang, *supra* note 9, at 157.
[130] Cameron & Newman, *supra* note 108, at 22; Laura Gauer Bermudez, *No Experience Necessary: The Internal Trafficking of Persons in South Africa*, IOM 12 (2008), https://pdf.usaid.gov/pdf_docs/pnado562.pdf; Natalia Ollus & Matti Joutsen, *International Policies To Combat Human Trafficking*, *in* Routledge International Handbook of Human Trafficking a Multi-Disciplinary and Applied Approach 72 (Rochelle Dalla & Donna Sabella eds., 1st ed. 2019).
[131] Bermudez, *supra* note 130, at 12.
[132] Bal Kumar KC et al., *Nepal Trafficking in Girls with Special Reference to Prostitution: A Rapid Assessment*, ILO 24 (2001), https://s3.eu-west-3.amazonaws.com/observatoirebdd/2001_Trafficking_girls_prost_Nepal_ILO.pdf.
[133] Cameron & Newman, *supra* note 130, at 22.
[134] *Id.*

expand their freedom of choice.[135] It is asserted that human rights empower victims by granting them rights that are enforceable against others and remove the powerlessness associated with poverty. Narayan and Petesch are, however, of the view that poor people are usually aware of their rights and encroachments pertaining to conditions of employment, but are often powerless to enforce them.[136] This is because of their financial dependence on the traffickers and the fact that demanding their rights will likely endanger their livelihoods as they are labelled troublemakers.[137] The apparent limitation of the I.H.R.L. conceptual framework is that it is grounded in the liberal legal tradition, which assumes individual liberty on the basis of legal recognition.[138] However, poverty challenges the liberal notions of individual liberty as it compels people to enter and stay in exploitative working conditions.[139]

Furthermore, while such an approach might be instrumental in protecting the rights of H.T. victims after the fact, it has been criticised for being reactive to individual instances of exploitation.[140] In other words it fails to deal with the root causes of poverty itself (capitalism and neoliberalism) by dealing with workers as individual victims and "employers" as individual "bad apples".[141] Marks, after having analysed the human rights movement's investigation of root causes to rights abuses offered a useful critique. She observed a tendency in the movement to halt the investigation of causes too soon before identifying the actual root causes.[142] For instance, this is demonstrated through attention being directed at human rights abuses themselves without addressing the vulnerabilities that make people prone to such abuses.[143] Where vulnerabilities are discussed, the analysis does not go far enough to interrogate the "conditions that engender and sustain those vulnerabilities".[144] In a few instances where the conditions (e.g., poverty) are highlighted, the discussion ignores the larger framework within which those conditions are systemically reproduced.[145] The consequence of such an approach is that it ends up treating symptoms of the problem as root causes.[146] The result is that

[135] U.N. OHCHR, *Human Rights and Poverty Reduction a Conceptual Framework*, at 14, (2004).
[136] Deepa Narayan et al., *Voice* of *the Poor from Many Lands* 492 (Deepa Narayan & Patti Patesch eds., 1st. ed. 2002).
[137] *Id.*
[138] *See* Catherine Renshaw, *What Is a Classical Liberal Approach to Human Rights*, The Conversation, (Mar. 18, 2014), https://theconversation.com/what-is-a-classical-liberal-approach-to-human-rights-24452.
[139] *See* Kathmandu Gaushala et al., *Cross Border Trafficking of Boys* 18 (2002).
[140] *See* Katie Cruz, *Beyond Liberalism: Marxist Feminism, Migrant Sex Work, and Labour Unfreedom,* 26 Fem LegStud 65, 84 (2018).
[141] *See* Hilary, *supra* note 16, at 17-19; Cruz, *supra* note 140, at 84; Marx, *supra* note 37, at 496 states that: ". . . the production relations in which the bourgeoisie moves have not a simple, uniform character, but a dual character; that in the selfsame relations in which wealth is produced, poverty is produced also".
[142] Marks, *supra* note 10, at 71.
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.* at 72.

the human rights approach inadvertently overlooks and/or discourages engagement with the systemic character of abuses and only treats symptoms of the problem. By treating effects as causes depoliticises the problem leading to ineffective responses as it shall be discussed below.

2.2.3. MARXIST CRITIQUE OF THE HUMAN RIGHTS-BASED APPROACH

The practical implication of an approach that focuses on abuses, and treats symptoms as root causes, is that it focuses more on formal and procedural justice contained in the rule of law — while the substantial systemic injustice that is causing the H.T. phenomenon is ignored.

This reflects the role that the law plays as an ideology. While the human rights approach formally announces and guarantees every person's liberty, it simultaneously masks and sustains the inequality and oppression that is a characteristic of a capitalist society.[147] In theorising capitalism, Weber stated that it requires a "free" labour force that is able to move from employer to employer to satisfy demand.[148] The key to sustaining such a supply of labour is grounded in *inequality*: that is, the presence of a "propertyless stratum" that sells its labour power "under the compulsion of the whip of hunger".[149] This, of course, necessitates the private appropriation of the means of production, which is to be controlled by the dominant class. Thus, for capitalism to survive the "labour power withdrawn from the market by wear and tear and death, it must be continually replaced by, at the very least, an equal amount of fresh labour-power",[150] Capital does not care about the health or working conditions of the worker as experience has shown that, due to the propertyless class, there is always excess labour available. Marx states that this excess is "made up of generations of human beings stunted, short-lived, swiftly replacing each other, plucked, so to say, before maturity".[151]

Therefore, despite its role in sustaining the capitalist relations of production and safeguarding the capitalist's interests, the law presents itself as universal and representing the interests of all the people in the community.[152] Marks highlights that "universalisation" is one of the strategies that ideology employs, which operates by making the law appear "impartial, inclusory and rooted in considerations of mutual

[147] *See* Marie-Bénédicte Dembour, *Critiques, in* International Human Rights Law 49 (Moeckli et al. eds., 2018).
[148] *See* Collins, *supra* note 38, at 928.
[149] *Id.*
[150] Marx, *supra* note 37, at 121.
[151] *Id.* at 181.
[152] Nicolson, *supra* note 25, at 45.

interest."[153] The idea is that the law protects *every perso*n from any unlawful interference with their individual autonomy and property. It treats equally the employer's capital and the worker's human rights.[154] Hence, when it protects the interests of the capitalist it presents them as the interests of everyone.[155] In such a way, the law's universal form works to depoliticise its practical application.

Since human rights law is grounded in the liberal legal tradition, Marxists have long questioned whether it can truly lead to true human emancipation.[156] Kennedy has argued that I.H.R.L. "does more to produce and excuse violations than to prevent and remedy them."[157] This is because human rights remedies "treat the symptoms rather than the illness, and this allows the illness not only to fester, but to seem like health itself."[158] This is the case for instance when poverty (a symptom of capitalism)[159] is sought to be addressed by reference to a human rights based approach that promotes socio-economic rights.[160] By construing both the problem and solution very narrowly, human rights discourse insulates the political economy that is responsible for bringing about the problem.[161]

By aligning itself with the liberal political economy, the human rights-based approach largely fails to bring about true human emancipation to H.T. victims. Marx's *On the Jewish Question* distinguishes between political emancipation and human emancipation.[162] Political emancipation is achieved through the human rights approach as it entails the formal recognition of rights of the individual. While political emancipation is a step forward in the fight against H.T., it is not the final form of human emancipation.[163] Human emancipation is substantive and can be achieved when divisions (inequalities) between members of the society are eliminated.[164]

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[153] *See* Susan Marks, *Big Brother is Bleeping- With the Message that Ideology Doesn't Matter*, 12 Eur. J. Int'l L. 109, 112 (2001).
[154] Nicolson, *supra* note 25, at 45.
[155] *Id.*
[156] *See* Talal Asad, *What Do Human Rights Do? An Anthropological Enquiry*, 4 Theory & Event (2000), https://muse.jhu.edu/article/32601 (last visited Sept. 29, 2022). (Asad urges people to "examine critically the assumption that. . . human rights always lead in an emancipatory direction, that they enable subjects to move beyond controlling power into the realm of freedom".)
[157] *See* David Kennedy, *International Human Rights Movement: Part of the Problem?*, 15 Harvard Human Rights Journal 101, 118 (2002).
[158] *Id.*
[159] Hilary, *supra* note 16.
[160] *See* Chuang, *supra* note 9, at 161.
[161] Kennedy, *supra* note 157, at 109.
[162] *See* Karl Marx, *Bruno Bauer, The Jewish Question, Braunschweig*, *in* Deutsch-Französische Jahrbücher 15 (1844), https://www.marxists.org/archive/marx/works/download/pdf/On%20The%20Jewish%20Question.pdf (last visited Sept. 29, 2022).
[163] *Id.* at 7.
[164] *Id.* at 15.

Therefore, by treating symptoms as root causes — the human rights approach does not adequately investigate the causes of the H.T. problem. Instead of providing remedies to the problem, the I.H.R.L. framework contributes to the naturalisation of exploitation by insulating the systemic issues at the heart of the H.T. phenomenon.

2.3. CELEBRITY HUMANITARIANISM

While celebrity humanitarianism is not a traditional approach that can be equated with the previous two approaches, it plays an important role in legitimising an emerging anti-trafficking consensus driven by abolitionism and/or anti-sex work politics.[165] A recent study has highlighted that this approach has been influential in "legitimising troubling legislative, policing, and security interventions, and generating an anti-trafficking common sense that is increasingly difficult to challenge."[166] It is from this background that it deserves to be analysed as a distinct approach contributing to the wider debate on H.T. approaches.

Celebrity humanitarianism is a more recent approach to the H.T. problem, which is characterised by charity and philanthropy by entertainment personalities, billionaires and Non Governmental Organizations (N.G.O.s).[167] These entities have in recent times selected H.T. and modern slavery as social ills to speak against and to be actively involved in the "rescue" of victims.[168] This approach to H.T. is materialised through "mediatized events (concerts, awareness campaigns . . . travel to crisis areas), personal charity (donations . . . child adoption), or lobbying . . .".[169] The main focus of such celebrity campaigns and activism is directed at "rescuing" women and young girls while borrowing, largely, terms such as modern slavery and sex trafficking from the abolitionist approach.

One of the most highly publicised celebrity campaigns is that of the DNA Foundation, which launched the "Real Men Don't Buy Girls" campaign enlisting Hollywood personalities to advocate against sex trafficking through adverts and social media videos.[170] The role played by these celebrities in raising awareness of H.T. issues has increased through extensive use of social media platforms where they have a huge

[165] *See* Robert Heynen & Emily van der Meulen, *Anti-trafficking saviors: Celebrity, slavery, and branded activism*, 18 Crime Media Culture 301 (2022).
[166] *Id.* at 303.
[167] Kapoor, *supra* note 121, at 1.
[168] Kempadoo, *supra* note 12, at 11.
[169] Kapoor, *supra* note 12, at 13.
[170] *See* Cordelia Hebblethwaite, *By BBC Trending: #RealMenDontBuyGirls and the #BringBackOurGirls campaign*, BBC (May 8, 2014), https://www.bbc.co.uk/news/blogs-trending-27328414.

following; and hence, are able to influence the masses. What is concerning is that these celebrities have been able to reach "expert-advocate" status in such crucial matters by reason of the trust placed in them by the public without, however, understanding the complexities inherent in H.T. issues.[171] As a result, they have managed to reduce "the complexity of both the problem and its potential solutions to sound bites, leading the public to believe that doing something-anything at all- is better than doing nothing, when the opposite may well be true."[172] This explains the approach adopted by the DNA Foundation in the "Real Men Don't Buy Girls" campaign where they made simplistic videos poking fun at things that "real men" are not supposed to do like grilling a cheese sandwich on an iron, or driving while blindfolded in a bid to dissuade men from buying sex. Such approaches, while amusing, only serve to contribute to the precarity regarding victims when pushing for anti-prostitution ideologies, more surveillance on the sex trade, the criminalisation of migrants and the adoption of more immigration restrictions against people from less wealthy parts of the world often referred to as States of origin.

More importantly, these celebrity humanitarian campaigns contribute to the reproduction of existing ideals and the depoliticisation of H.T. issues. A cursory look at the "real men" campaign will show that emphasis is placed on advocating for individual interventions through, say, stopping individuals from buying sex. Such a focus on individual responsibility as a solution to the problem disavows the need to explore structural solutions to the H.T. problem.[173] Thus, by adopting this approach to H.T., the actual system that is making victims vulnerable through poverty and the reproduction of inequalities is not called into question. It is from this background that Kapoor argues that celebrity humanitarianism tends to be ideological in nature through sustaining and upholding capitalism even if it causes inequalities.[174] For instance, charity work is ideological to the core as it not only masks the inequalities but profits from them. In fact, the very emergence of celebrity charity work is linked to the development of capitalism — which promotes philanthropy as a remedy for structural problems.[175] This philanthropy in effect serves to soothe the harms and trauma caused by capitalism and neoliberalism — consequently masking the contradictions inherent in the political economy. This is the strategic function of ideology which naturalises the perception of

[171] *See* Alexandra Fanghanel et al., *Sex and Crime* 145 (SAGE Publications Ltd ed., 2021).
[172] *See* Dina Haynes, *The Celebritization of Human Trafficking*, 653 The Annals of the American Academy of Political and Social Science 25, 40 (2014).
[173] *See* Samantha Majic, *Real men set norms? Anti-trafficking campaigns and the limits of celebrity norm entrepreneurship*, 14 Crime Media Culture 289, 290-297 (2018).
[174] Kapoor, *supra* note 12, at 33.
[175] *Id.*

capital as the saviour in the fight against H.T. — conveniently ignoring that capitalism itself produces the problematic manifestations that campaigners are seeking to combat.

CONCLUSION

The article has critically analysed the three prevalent approaches to H.T., and it has been shown that they all lack the conceptual depth required to tackle a complex phenomenon such as H.T. All three approaches are simplistic and offer a narrow lens in the problematisation of H.T. As a result, they lead to the adoption of policies that only address the symptoms of the H.T. problem, such as, labour, criminal and sexual exploitation. They ignore the structural issues that are making people vulnerable to trafficking related exploitation. There is, therefore, a need for further research that re-conceptualises the H.T. problem with reference to philosophical perspectives that can adequately grasp the full picture of the problem. This is necessary for the understanding of the root causes to H.T. and the ultimate success of efforts designed to prevent it.


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