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FROM THE EDITORIAL DESK

The Maastricht Student Law Review or MSLR is a biannual, student-run law journal and the official student law review of the Faculty of Law at Maastricht University. We are committed to providing a platform for students in Maastricht and beyond to publish their works and aim to provide students with the opportunity to contribute to academic discourse and develop their writing and editing skills to the highest standards.

With great enthusiasm, we bring you the first issue of our second volume. This issue features nine submissions in total and covers many interesting legal topics that fall under the umbrella of international, European, and comparative law. These submissions include theses and articles that have been written by both undergraduate and graduate students, as well as UM alumni. We are pleased to invite you to explore a variety of fascinating themes, ranging from dispute resolution, democratic governance, and human rights to intellectual property law and competition law. We continue to be inspired by our authors' unique perspectives with each issue, and we hope they inspire you, our readers, in turn. We would like to thank our authors for their hard work throughout the editorial rounds. We deeply appreciate the dedication and effort our authors have shown throughout the editorial process, and we extend our gratitude for their contributions.

We would like to further extend our heartfelt gratitude to the Maastricht University Faculty of Law, as well as our staff and alumni advisory boards, for their invaluable support and guidance. A special thank you goes to ELSA Maastricht for their ongoing collaboration and commitment. Through their partnership with MSLR, ELSA Maastricht plays a vital role in promoting legal education by supporting the publication of high-quality, contemporary student submissions.

As the Editor-in-Chief, I would also personally like to thank each and every author who submitted their work for taking an interest in our journal. Their patience and diligence have made this editorial experience both rewarding and inspiring, and I am grateful for their contributions. I would also like to offer my immense gratitude to the Editorial Team for their dedication and hard work, without which this publication would not have been possible.

The editorial board hopes you enjoy reading our first issue of 2025.

Merle Sandhop
Editor-in-Chief of the Maastricht Student Law Review
Maastricht, 8 February 2025

Don't ChatGPT Words in my Mouth!: A Comparative Analysis of Text and Data Mining Approaches in Copyright Law

Ana Lazić[1]

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TABLE OF ABBREVIATIONS

AI	Artificial Intelligence
CDA	Computational Data Analysis
DMCA	Digital Millennium Copyright Act 1998
DSM Directive	Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market
EU	European Union
LLM	Large Language Model
TDM	Text and Data Mining
The NYT	The New York Times
TPM	Technological Protection Measure
SCA	Singapore Copyright Act 2021
US	United States

1. INTRODUCTION

There are currently 5.5 billion active internet users - and counting.[2] This figure, alongside the staggering 2020 finding of over 2.5 quintillion bytes of data being generated daily,[3] has made the discourse surrounding the significance of text and data mining (TDM) especially relevant. TDM refers to the automated method of selecting, analysing, and extracting large quantities of data "for purposes such as searching, finding patterns, discovering relationships, [and] semantic analysis."[4] It is a process that is useful for discovering knowledge and insights that would otherwise be undetectable through manual reading. The research method works by identifying input materials that undergo pre-processing, where they are transformed into machine-readable formats, and in some cases, then uploaded onto a platform; once machine-readable, these materials are processed, wherein patterns and information within the data are isolated. The 'mined' materials then serve as the foundation for subsequent analyses wherein insights and trends are identified. While TDM can be performed in various fields, the electronic analysis of extensive data sets involves the 'mining' and copying of substantial amounts of copyright-protected works.[5]

In this context, tools that perform such TDM activities have become increasingly prevalent. One such example is ChatGPT - an artificial intelligence (AI) large language model (LLM) designed by OpenAI that generates human-like text based on the input it receives; it was "the fastest-growing consumer application in history"[6] when it first entered the public domain. Since then, the prominence of ChatGPT in discourse has only grown, particularly in light of a recent lawsuit brought by The New York Times (NYT) against OpenAI and

[2] Ani Petrosyan, 'Number of internet users worldwide from 2005 to 2024' (*Statista*, 12 December 2024) <www.statista.com/statistics/273018/number-of-internet-users-worldwide> accessed 24 December 2024.
[3] Jency Durairaj, '2.5 Quintillion Bytes of Data Generated Everyday - Top Data Science Trends 2020' (*SG Analytics*, 14 August 2020) <www.us.sganalytics.com/blog/2-5-quintillion-bytes-of-data-generated-everyday-top-data-science-trends-2020> accessed 13 January 2024.
[4] SpringerNature, 'Data Solutions Text and Data Mining' (*Springer*, 2023) <www.resource-cms.springernature.com/springer-cms/rest/v1/content/17284494/data/v4> accessed 13 January 2024, p. 2.
[5] European Parliament Policy Department for Citizens' Rights and Constitutional Affairs, *The Exception for Text and Data Mining (TDM) in the Proposed Directive on Copyright in the Digital Single Market - Legal Aspects* (February 2018), pp. 5-6.
[6] Krystal Hu, 'ChatGPT sets record for fastest-growing user base - analyst note' (*Reuters*, 2 February 2023) <www.reuters.com/technology/chatgpt-sets-record-fastest-growing-user-base-analyst-note-2023-02-01> accessed 15 August 2024.

Microsoft in the United States (US).[7] This copyright infringement suit alleges that millions of publications by the newspaper were unlawfully used to train OpenAI's LLMs,[8] "without payment to create products that substitute for The Times and steal audiences away from it".[9] OpenAI, however, argues that its conduct falls in line with copyright law and constitutes 'fair use'- especially given the existence of an 'opt-out' for website proprietors to block its web crawlers from having access to their data.[10] Should it reach trial, the case may be significant for redefining the US approach to AI due to its potentially significant ramifications on the use of copyrighted materials in training machine learning models.

While this is yet to be determined, the broader question of how copyright law intersects with TDM is not unique to this dispute. Since copyright law protects the expression of ideas rather than the underlying ideas themselves,[11] prohibiting TDM from violating exclusive rights would contradict such a rationale. This is largely because the TDM process only triggers an incidental and transient reproduction right.[12] As such, the common thread observed worldwide has been the existence of an exception for TDM within copyright law regimes.

Copyright law is territorial to a large extent.[13] Thus, the jurisdictional approaches to TDM differ. This is despite the existence of rules under international copyright law frameworks, which are used to assess whether TDM exceptions in national laws comply with international obligations. Within international copyright law, the Berne Convention outlines the 'three-step test' that establishes three criteria that any exceptions or limitations to exclusive rights must satisfy to be legally recognised: (1) the exception must be well-defined and narrow in scope;

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[7] The New York Times Company v. Microsoft Corporation et al., 23-cv-11195 (SHS) (S.D.N.Y. Aug. 6, 2024).
[8] ibid paras. 2, 82.
[9] ibid para. 8.
[10] OpenAI, 'OpenAI and journalism' (*OpenAI*, 8 January 2024) <www.openai.com/blog/openai-and-journalism> accessed 4 February 2024.
[11] Mitchell Zimmerman, 'The Basics of Copyright Law: Just Enough Copyright for People Who Are Not Attorneys or Intellectual Property Experts' (*Fenwick & West LLP*, 2015) <www.assets.fenwick.com/legacy/FenwickDocuments/2015-03-17-Copyright-Basics.pdf> accessed 15 January 2024, p. 3.
[12] Maurizio Borghi, 'Text & Data Mining' (*CopyrightUser.org*) <www.copyrightuser.org/understand/text-data-mining/#:~:text=Text%20mining%20and%20copyright,process%20them%20using%20computer%20programs> accessed 13 January 2024.
[13] Simone Schroff, 'The purpose of copyright—moving beyond the theory' (2021) 16(11) Journal of Intellectual Property Law & Practice <https://doi.org/10.1093/jiplp/jpab130> accessed 15 August 2024, p. 1267.

(2) the exception should not interfere with the primary market for the work or any potential market that is significant; and, (3) the exception should not cause substantial harm to the copyright holder's legitimate rights.[14] This three-step test is essential for maintaining a balance between the rights of copyright holders and the public interest in accessing and using works, particularly in research and innovation contexts like TDM. It ensures that exceptions and limitations to copyright are not too broad, which could undermine the economic interests of right holders, yet not too restrictive, which could hinder technological and scientific progress.[15] Permitting TDM activities must thus be done according to this framework.

Countries have approached the exception for TDM in various ways to strike a balance between promoting innovation through TDM and protecting copyright holders' interests. This thesis will focus on three major jurisdictions: the European Union (EU), the US, and Singapore. Each jurisdiction has developed unique legal frameworks governing the interaction between copyright law and TDM activities. By analysing their regulatory environment, this thesis aims to investigate whether the legal frameworks are more 'open' or 'restrictive' to TDM activities, and subsequently, whether there is a prioritisation of particular stakeholders (text and data miners or rightsholders) in the TDM approaches.

To develop the comparison beyond an exploration of the legal rules themselves, the analysis will consider how they could be applied to an ongoing case. The *NYT v OpenAI* case will be used here for illustrative purposes - specifically focusing on the allegation that unauthorised reproductions were made of The NYT's content during the training of OpenAI's GPT models.[16] This will allow for an investigation into whether the legal frameworks of the EU, the US, and Singapore show an inclination toward favouring one party in such disputes and whether there is indeed a correlation between the 'openness' or 'restrictiveness' of TDM regulation in these jurisdictions and the potential outcomes of such cases.

[14] Berne Convention for the Protection of Literary and Artistic Works 1886, art. 9(2).
[15] Martin Senftleben, 'Compliance of National TDM Rules with International Copyright Law: An Overrated Nonissue?' (2022) 53 IIC <https://link.springer.com/article/10.1007/s40319-022-01266-8> accessed 24 December 2024, p. 1478.
[16] *The New York Times Company* (n 7), paras. 82-84, 92.

1.1. RESEARCH QUESTION

To this end, the overarching research question is: *How do the EU, US, and Singaporean Copyright Regimes address Text and Data Mining?* To answer this, the following sub-questions have been formulated:

1. What are the respective jurisdictional approaches, in light of recent legal developments and academic interpretations?
2. To what extent do the regimes align or differ in their approaches, and how does this affect whether they have a more 'open' or 'restrictive' framework for TDM activities?
3. Given the setup of the frameworks, who might the judiciary side with when determining a potential verdict in *The NYT v OpenAI* case?

1.2. METHODOLOGY

To answer the primary research question, this thesis will employ a doctrinal, comparative methodology in analysing the three copyright frameworks – namely, that of the EU, US, and Singapore – specifically with respect to TDM. The use of a doctrinal research methodology - "focus[ing] on the letter of the law rather than the law in action"-[17] will allow for the copyright law frameworks to be understood - with their respective analyses concentrating on the conditions laid out in the respective TDM exceptions. This approach ultimately seeks a rounded understanding of how copyright law addresses TDM. Moreover, the comparative method will be used with "the underlying goal of… search[ing] for similarity and variance"[18] between the chosen frameworks. This, in turn, will be beneficial for evaluating how rules on TDM impact the way the courts could decide in an example of a dispute - namely, *The NYT v OpenAI* case.

Furthermore, the choice of jurisdictions is deliberate. Firstly, for practical reasons and to ensure that well-founded conclusions can be made on the

[17] Jerome Hall Law Library, 'Legal Dissertation: Research and Writing Guide' (Maurer School of Law, 2019) <www.law.indiana.libguides.com/dissertationguide#:~:text=Doctrinal%20legal%20research%20methodology%2C%20also,%2C%20statutes%2C%20or%20regulations)> accessed 23 January 2024.

[18] Melinda Mills, Gerhard G. van de Bunt and Jeanne de Bruijn, 'Comparative Research: Persistent Problems and Promising Solutions' (2006) 21(5) International Sociological Association <http://euroac.ffri.hr/wp-content/uploads/2012/10/Comparative-Research_Problems-and-Solution.pdf> accessed 23 January 2024, p. 621.

approaches, frameworks originally written in English have been selected. Secondly, for purposes of legal comparison, the EU was chosen due to its specific provisions on TDM, which have been defined in its 2019 Directive on copyright and related rights in the Digital Single Market (DSM Directive).[19] This framework is characterised by its clear differentiation between categories of users, and by it offering explicit exceptions that apply under certain conditions.[20] Conversely, the US was chosen as a jurisdiction which has followed a different path; unlike the EU, the US does not have a specific legislative mechanism to address TDM activities, instead opting to rely on its doctrine of 'fair use'[21] that has been developed through case law. Singapore was included due to its unique combination of a fair use doctrine, alongside an express statutory provision for TDM known as the computational data analysis (CDA) exception. This approach provides a broad scope of application without explicit differentiation among users,[22] offering an interesting point of contrast with the EU and the US frameworks. It should be noted that while the avenue of protection under fair use exists, the Singaporean Ministry of Law has stated that when it comes to TDM, the CDA provision "is preferred to relying on the general open-ended fair dealing defence".[23] Given this and considering that research findings have shown that the fair use notion in Singapore is modelled from the US approach,[24] the discussion on the doctrine in Singapore will be limited to its description in Chapter 2.3.2. Furthermore, as this is a comparative thesis, there is limited value in extensively analysing Singapore's fair use when it mirrors what is seen in the US; similarly, in the discussion of *The NYT* case (in Chapter 3), it is reasonable to expect that the US illustration would be similar to what a Singaporean court would conclude if the case were heard under its fair use doctrine. Therefore, the Singaporean

[19] Directive (EU) 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market [2019] OJ L 130/92.
[20] ibid arts. 3 and 4.
[21] Title 17 U.S. Code 2024, § 107.
[22] Sean Flynn et al, 'Research Exceptions in Comparative Copyright' (2022) PIJIP/TLS Research Paper Series no. 75 <www.digitalcommons.wcl.american.edu/research/75> accessed 19 January 2024, p.30.
[23] Intellectual Property Office of Singapore, 'Singapore Copyright Review' (January 2019) <www.mlaw.gov.sg/files/news/public-consultations/2021/copyrightbill/Annex_A-Copyright_Report2019.pdf> accessed 8 May 2024, p. 33.
[24] David Tan, 'Generative AI and Copyright' (2023) 24 SAL Prac www.journalsonline.academypublishing.org.sg/Journals/SAL-Practitioner/Intellectual-Property-Law/ctl/eFirstSALPDFJournalView/mid/597/ArticleId/1921/Citation/JournalsOnlinePDF> accessed 22 July 2024, para. 5.

approach to TDM will be predominantly examined under the CDA exception for comparative purposes.

For the purposes of this research, the classifications of 'open' or 'restrictive' TDM frameworks will be made based on conditions which determine the applicability of TDM exceptions in the jurisdictions. These conditions will serve as points of comparison between the EU, US, and Singapore. The following parameters have been identified as crucial for this evaluation: (1) purposes and beneficiaries; (2) lawful access requirement; and (3) contractual and technological overrides. Regarding the first parameter, where an exception to TDM activities applies to a broader range of beneficiaries and purposes, this will be considered more open. On the other hand, when the exception is limited to a narrowly defined set of beneficiaries or purposes, it will be deemed more restrictive. Regarding the second parameter, the presence of a lawful access requirement can limit the scope of an exception as it could exclude datasets that are not freely accessible - rendering an exception more restrictive. In contrast, the absence of this requirement can indicate a more open approach. Regarding the third parameter, the option for rightsholders to enforce contractual terms or use technological protection measures (TPMs) to override TDM activities can limit making use of a TDM exception. Thus, where these mechanisms are in place, a framework would be deemed more restrictive.

To answer the overarching research question and its subquestions, the structure of the present thesis has been divided into four chapters. The introduction has laid out the background of the topic. Chapter 2 will examine the three jurisdictions and how they address TDM, thereby revealing the answer to the first subquestion. A comparative remark will be made at the end of the Chapter, providing an answer to the second subquestion - highlighting where the jurisdictions have similarities and differences in their frameworks. In doing so, their approaches will be ranked from more open to more restrictive. The findings from the comparison will inform Chapter 3 of the thesis, where *The NYT* case will be explored through the lenses of the jurisdictional approaches and their subsequent more open or restrictive natures. Therein, the third subquestion will be considered. Ultimately, this will lead to the conclusion in Chapter 4 where the main research question will be assessed, in light of the aforementioned considerations.

2. THE JURISDICTIONAL APPROACHES TO REGULATING TDM ACTIVITIES

To understand the three jurisdictional approaches to TDM, the parameters highlighted in Chapter 1.2. will be considered - namely: the purposes and beneficiaries of the exceptions, the presence of a lawful access requirement, and the existence of overriding contractual and technological measures. Through this analysis, a comparison will emerge allowing a determination on whether each jurisdiction's framework is more open or restrictive. In turn, this will address the second subquestion and guide the discussion in Chapter 3's hypothetical case rulings.

2.1. THE EU APPROACH TO REGULATING TDM ACTIVITIES

The EU's "very broad"[25] and "future-proof"[26] definition considers TDM to be "any automated analytical technique aimed at analysing text and data in digital form to generate information which includes but is not limited to patterns, trends, and correlations". [27] There exist explicit mandatory provisions providing exceptions to the reproduction right for these TDM activities - namely, Articles 3 and 4 of the DSM Directive.

2.1.1. Article 3 DSM Directive

Within the DSM Directive, Article 3 focuses on permitting TDM activities for scientific research. According to the Directive, beneficiaries of the exception are research organisations [28] and cultural heritage institutions. [29] Interestingly, the scope of this article indicates that alongside a commercial entity not being able to benefit from the exception, institutions (such as universities) cannot either, unless their conduct is solely for scientific research purposes.[30]

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[25] Tomas Margoni and Martin Kretschmer, 'A Deeper Look into the EU Text and Data Mining Exceptions: Harmonisation, Data Ownership and the Future of Technology' (2022) 71(8) GRUR International <https://doi.org/10.1093/grurint/ikac054> accessed 2 May 2024, p. 687.
[26] ibid.
[27] DSM Directive (n 19), art. 2(2).
[28] See DSM Directive (n 19), rec. 12 and art. 2(1) which define research organisations as those focused on scientific research, such as universities and research institutes, operating primarily on a not-for-profit basis.
[29] See DSM Directive (n 19), rec. 13, art. 2(3) which define cultural heritage institutions as publicly accessible libraries, museums, and archives that preserve and provide access to cultural works.
[30] Margoni and Kretschmer (n 25), p. 694.

Furthermore, per Article 3(1), this exception is provided to Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, and Article 15(1) of this Directive. The provisions under Directive 96/9/EC grant database makers the exclusive right to authorise or prohibit reproductions of their databases,[31] as well as the right to prevent the extraction or reutilisation of substantial parts of the database;[32] Article 2 of Directive 2001/29/EC outlines the exclusive right of creators to authorise and prohibit the reproduction of their works;[33] Article 15(1) DSM Directive pertains to the protections of press publishers from unauthorised online uses of their publications. Article 3 DSM Directive creates an exception which overrides these provisions by permitting these activities for TDM purposes, as long as research organisations and cultural heritage institutions have lawful access to the protected works.[34] This signifies that access to the materials must have been obtained through legal means such as: open access policies, contractual arrangements like subscriptions, purchases or other lawful methods, including content freely available online.[35]

Where the conditions under Article 3(1) are fulfilled, 3(2) permits storing copies made where this is done in a secure manner; the subparagraph further permits the retention of copies, but only for purposes directly related to scientific research, such as the verification of research results. Additionally, Article 3(3) recognises the rights of rightsholders by allowing them to implement measures necessary to ensure the security of their networks and databases where the works are hosted. Finally, Article 3 encourages Member States to define "commonly agreed best practices"[36] among rightsholders and beneficiaries of the provision.

In light of the aforementioned, the limitation under Article 3 was arguably designed to advance scientific understanding and innovation within research institutions, rendering its scope rather narrow. Importantly, while research organisations can engage in TDM under Article 3, this must not significantly harm the rightsholders' ability to commercially exploit their work.[37]

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[31] Directive 96/9/EC of 11 March 1996 on the legal protection of databases [1996] OJ L 77, art. 5.
[32] ibid art. 7.
[33] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10, art. 2.
[34] InfoSoc Directive (n 33), art. 3(1).
[35] DSM Directive (n 19), rec. 14.
[36] ibid art. 3(4).
[37] ibid recs. 6, 18.

2.1.2. Article 4 DSM Directive

Comparatively, Article 4 DSM Directive has a broader scope and applies to any purpose - including commercial applications. Like with Article 3, legal TDM activities are permitted without the need for permission from rightsholders where the content is lawfully accessed, even where databases are protected by copyright, and on press publications which are available online.[38] Moreover, Article 4 DSM permits TDM activities on lawfully accessed computer programs, including any necessary reproductions and adaptations. Article 4(2) further stipulates that reproductions and extractions made under the exception can be retained as long as is necessary for TDM purposes.

Crucially, Article 4(3) introduces a "caveat"[39] which is "not to be underestimated"[40] - namely, that the TDM exception, while applying to anyone, can only be benefited from where rightsholders have not expressly reserved their rights.[41] This can include through machine-readable means (such as robots.txt files). Thus, despite the breadth of Article 4, it is not a particularly viable alternative for researchers. This is because the existence of rights reservations could pose a hindrance to projects, as they may have to manually check terms and conditions, or obtain permissions for each work or database; this is often impractical due to the large volumes of data needed for TDM activities.[42] It can therefore be said that the opt-out mechanism significantly weakens the effectiveness of this 'broader' TDM exception, limiting the utility of the provision as a whole.[43]

[38] DSM Directive (n 19), art. 4(1).
[39] ReedSmith, 'Entertainment and Media Guide to AI: Text and Data Mining in EU' (*ReedSmith*, 2024) <www.reedsmith.com/en/perspectives/ai-in-entertainment-and-media/2024/02/text-and-data-mining-in-eu> accessed 3 May 2024.
[40] Martin Senftleben, *Study on EU copyright and related rights and access to and reuse of data* (European Commission Independent Expert Report, March 2022) <www.ivir.nl/publicaties/download/KI0822205ENN.en_.pdf> accessed 3 May 2024, p. 40.
[41] DSM Directive (n 19), art. 4(3).
[42] ibid.
[43] Cristophe Geiger, Giancarlo Frosio and Oleksandr Bulayenko, 'Text and Data Mining: Articles 3 and 4 of Directive 2019/790/EU' (2019) Centre for International Intellectual Property Studies Research Paper <https://ssrn.com/abstract=3470653> accessed 3 May 2024, p. 36.

2.1.3. Considering the Scope of the EU's Regulation of TDM

a) Beneficiaries and Purposes

The EU's regulation of TDM under Article 3 DSM Directive is quite narrow, as it is specifically limited to activities conducted for scientific research purposes by research organisations and cultural heritage institutions. In contrast, Article 4 has a wider scope, allowing TDM for any purpose, including commercial applications, but this is limited by the rightsholders' ability to opt out by reserving their rights. As such, these aspects of the scope of Articles 3 and 4 render the overall framework in the EU restrictive.

b) Lawful Access

Article 3 and Article 4 have in common the requirement of lawful access. This condition ensures that entities have obtained the necessary rights to access the content, whether through a subscription, a licence, or open access. This is reflective of the EU's inclination to balance the interests of rightsholders with the need to promote innovation and especially research.[44] In the context of Article 3, lawful access is relatively straightforward, as it applies to beneficiaries who can be expected to have access via their institutions to academic databases and other relevant resources for their research. However, in Article 4, lawful access can be seen as more nuanced, especially alongside the "unique" opt-out mechanism that grants rightsholders considerable control in how their works are used.[45] According to this, even if an entity has lawfully accessed the content, it may still be prohibited from engaging in TDM if the contract under which the access was obtained included a rights reservation.

[44] Tomas Margoni, 'Saving research: Lawful access to unlawful sources under Art. 3 CDSM Directive?' (*Kluwer Copyright Blog*, 22 December 2023) <https://copyrightblog.kluweriplaw.com/2023/12/22/saving-research-lawful-access-to-unlawful-sources-under-art-3-cdsm-directive/> accessed 19 January 2024.

[45] Paul Keller and Zuzanna Warso, 'Policy Brief 5: Defining Best Practices for Opting Out of ML Training' (*Open Future*, 29 September 2023) <https://openfuture.eu/wp-content/uploads/2023/09/Best-_practices_for_optout_ML_training.pdf> accessed 15 January 2024, p. 4.

Concerning the understanding of 'lawful access', the DSM Directive has been critiqued for its lack of clear definition.[46] This has culminated in the calls for a flexible interpretation of the requirement,[47] as a result of concerns that TDM to content with lawful access could allow rightsholders to restrict access through private agreements, potentially making TDM unaffordable for many research organisations. This, in turn, could lead to biased AI systems trained on outdated or unverifiable data due to cost constraints. As such, the proposition has been for recognition that content freely accessible online, without technical restrictions, should be considered lawful, and automated tools should not be expected to verify the legality of the content being mined.[48] To build on this further, scholars suggest that as Article 3 is focused on research purposes, lawful access should be centred around the behaviour of the user, as opposed to the legal status of the source - allowing researchers to use content that might not have been lawfully uploaded.[49] Such an interpretation intends to protect the broader public interest in scientific research and avoid rendering Article 3 ineffective due to high costs and rights clearance issues. In contrast, with its broader scope involving commercial actors, Article 4 might need to be more strictly interpreted in line with the traditional concept of 'lawful sources' as defined by the CJEU,[50] to ensure that only content lawfully made available online can be used for TDM.[51]

This distinction reflects the different objectives of Articles 3 and 4, with Article 3 highlighting the goal of protecting research organisations and upholding academic freedom, while Article 4, with its wider range of beneficiaries, perhaps necessitating stricter adherence to the lawful source doctrine to safeguard

[46] Jonathan Griffiths, Tatiana Synodinou and Raquel Xalabarder, 'Comment of the European Copyright Society Addressing Selected Aspects of the Implementation of Articles 3 to 7 of Directive (EU) 2019/790 on Copyright in the Digital Single Market' (*European Copyright Society*, 2022) <www.europeancopyrightsociety.org/wp-content/uploads/2022/05/ecs_exceptions_final-3.pdf> accessed 10 May 2024, p. 12.

[47] Tatiana Synodinou 'Comment of the European Copyright Society Addressing Selected Aspects of the Implementation of Articles 3 to 7 of Directive (EU)2019/790 on Copyright in the Digital Single Market' (Kluwer Copyright Blog, 2022) <www.copyrightblog.kluweriplaw.com/2022/07/27/comment-of-the-european-copyright-society-addressing-selected-aspects-of-the-implementation-of-articles-3-to-7-of-directive-eu-2019-790-on-copyright-in-the-digital-single-market/> accessed 10 May 2024.

[48] Griffiths, Synodinou and Xalabarder (n 46), pp. 11-12.

[49] Margoni (n 44).

[50] Historically, the EU has interpreted "lawful sources" in the context of copyright exceptions and limitations as requiring that content is both legally available and authorised by the rightsholder; See *C-435/12 ACI Adam v Stichting de Thuiskopie (2014) ECLI:EU:C:2014:254*, where the CJEU interpreted that exceptions cannot be applied to reproductions made from unlawful sources.

[51] Margoni (n 44).

rightsholders' interests. Overall, the very nature of a lawful access requirement limits the scope of the content that can be used for TDM. Although some flexibility is proposed for research under Article 3, the overall framework introduces barriers that prevent a fully open approach, adding another restrictive element to the EU's TDM framework.

c) Contractual and Technological Overrides

Any contractual clause that attempts to restrict or negate the exception under Article 3 is unenforceable.[52] This means that even if a database's Terms of Use attempt to limit or prohibit TDM activities, such clauses cannot legally bind users.[53] In Article 4, the option to protect the exception from contractual overrides does not exist.

While contractual restrictions are unenforceable, such a level of protection does not extend to TPMs that limit TDM.[54] Although there are mechanisms to ensure that users can still benefit from exceptions even when technological barriers are in place,[55] these have faced criticism. In this regard, Article 6 DSM Directive is relevant due to its incorporation of Article 6(4) Directive 2001/29/EC which ensures that, in the absence of voluntary agreements, Member States must take measures to ensure that TPMs do not block beneficiaries of the TDM exception from accessing content they are legally entitled to mine. In turn, TDM activities can proceed even if TPMs are in place, provided the content has been lawfully accessed. However, Subparagraph 4 of Article 6(4) Directive 2001/29/EC introduces an exclusion: if rightsholders offer works publicly under agreed terms that allow individual access, the mechanism to override technological restrictions does not apply. This has rendered the mechanism "ineffective"[56] as it does not apply when works are offered under contractual terms. It further obligates rightsholders to provide means to exercise exceptions but does not empower beneficiaries of the exceptions to bypass TPMs themselves. Thus, beneficiaries

[52] DSM Directive (n 19), art. 7(1).
[53] Margoni and Kretschmer (n 25), p. 695.
[54] DSM Directive (n 19), art. 7.
[55] See InfoSoc Directive (n 33), art. 6.
[56] Juan-Carlos Fernandez-Molina and Fernando Esteban de la Rosa 'Copyright and Text and Data Mining: Is the Current Legislation Sufficient and Adequate?' (2024) 24(3) Johns Hopkins University Press <https://digibug.ugr.es/bitstream/handle/10481/92504/Portal-2024-preprint.pdf?sequence=1&isAllowed=y> accessed 17 August 2024, p. 664.

can request the removal of technological barriers but cannot legally circumvent them. Recital 16 of the Directive may be making a limited effort to address this by hinting at some protection for TDM activities.[57] However, while it acknowledges the need for rightsholders to apply technological measures to protect the "security and integrity of [their] systems",[58] it does not provide strong safeguards in practice for the beneficiaries of the TDM exception. This lack of clear protection can leave stakeholders in a difficult position, where their ability to benefit fully from TDM exceptions is undermined by technological restrictions. In light of the above, the process has been labelled "convoluted at best" [59] and heavily burdens the beneficiaries to reclaim their rights. Therefore, and as has been alluded to, this framework arguably limits the practical existence of TDM exceptions when technological measures are involved.

2.1.4. Concluding Remarks

As illustrated above, the DSM Directive encompasses limitations within its structured framework on TDM, with potentially stifling effects on innovation. The narrow scope of Article 3 limiting TDM activities to specific entities engaged in scientific research, alongside the possibility of rightsholders opting out under Article 4, restrict the broader application of TDM. Moreover, the requirement of lawful access, while intended to balance rightsholders' interests, could inhibit the use of valuable data for innovation, particularly in commercial settings. The exceptions for TDM activities are further undermined by the presence of technological and contractual overrides. As such, the EU's regulation of TDM can be labelled a more 'restrictive' approach.

While this restrictive position demonstrates the EU's emphasis on safeguarding intellectual property rights, it also raises questions about its long-term effect on Europe's global competitiveness in data-driven innovation. It has been reported that several research projects based in Europe have already transferred their TDM activities to jurisdictions which are perceived as being more

[57] Fernandez-Molina and de la Rosa (n 56).
[58] DSM Directive (n 19), rec. 16.
[59] Margoni and Kretschmer (n 25), p. 695.

innovation-friendly, such as the US.[60] The following subsection will therefore explore the US framework to assess whether its approach is indeed more open.

2.2. The US Approach to Regulating TDM activities

In the US, copyright holders have exclusive rights to their works, including the right to reproduction.[61] Since TDM activities often involve the copying of high quantities of copyrighted material to analyse patterns or extract data, such copying, even where it is done for analytical purposes, could infringe the reproduction right. Within the US framework, no explicit exceptions to exclusive rights exist that could allow TDM activities. Rather, as a common law system, the US has developed its permitting of TDM through its case law. Specifically, TDM has been interpreted in the context of a doctrine, which permits the 'fair use' of copyright protected works without the owner's permission under certain circumstances.[62]

2.2.1. Applying TDM to the Four Factor Fair Use Test

In the US, the determination of fair use is based on a case-by-case analysis of four factors: (1) purpose and character of the use, (2) nature of the copyrighted work, (3) amount and substantiality of the portion used and, (4) effect of the use on the market.[63]

Regarding the first factor, this considers whether the nature of the use is "transformative"[64] by adding new expression, meaning, or message to the original work - or if it is merely a substitute for the original.[65] It should be noted that even where there has not been substantial alterations to the works, if the reproduction serves a different function, this is sufficient for it to be deemed transformative.[66] The purposes for which TDM activities may be excluded from infringing

[60] Liber, 'Text and Data Mining: The need for change in Europe' (LiberEurope), p. 2 <www.europarl.europa.eu/cmsdata/115984/juri-hearing-copyright-exceptions-rehbinder-handout.pdf> accessed 25 January 2024.
[61] 17 U.S. Code (n 21), § 106.
[62] ibid para. 107.
[63] 17 U.S. Code (n 21), § 107.
[64] Joshua Love and Lucile Bouhanna, 'Text and data mining in US', (*ReedSmith*, 2024) <https://www.reedsmith.com/en/perspectives/ai-in-entertainment-and-media/2024/02/text-and-data-mining-in-us> accessed 8 June 2024.
[65] Campbell v. Acuff-Rose Music, Inc., (6th Cir. 1994), para. 579.
[66] A.V. ex rel. Vanderhye v. iParadigms LLC, (4th Cir. 2009), para. 639.

reproduction rights have typically included research, criticism, and commentary.[67] In general, TDM has been recognised as a permissible non-expressive use within the US legal system, as it does not seek to replicate the works in their original form and subsequently "does not communicate the original expression of the author to the public".[68] Instead, it transforms them into new distinguishable data, thereby repurposing the work for reasons of research or analysis.

Two landmark cases are especially important here - *Authors Guild v HathiTrust*,[69] and *Authors Guild v Google*.[70] In *HathiTrust*, the Second Circuit held that the digitisation of books to create a full-text searchable database constituted fair use.[71] The court emphasised the highly transformative nature of the use, as digital copies were not intended to be read but to merely facilitate search functions.[72] Similarly, in *Authors Guild v Google*, the court ruled that Google's scanning of books to create a searchable database also qualified as fair use - despite Google not having been granted consent by the authors. The Google Books Service was thought to "augment public knowledge" by allowing users to discover and learn about books;[73] it did so without providing access to the full text, as only limited snippets were displayed. Thus, the court ruled there was no significant harm to the copyright holders as the market for original works was unaffected - since readers would have to purchase the works in order to be able to read them in full.[74] Precedents concerning TDM and copyright law thus arguably illustrate that US courts have a tendency to favour TDM activities - so long as they serve a purpose distinct from the original work's market function and contribute to some sort of research, education, or technological development.

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[67] Maxime Barnwell, 'Balancing the benefits of TDM against copyright protection' (Tilburg University LL.M. Thesis, 2018) <https://arno.uvt.nl/show.cgi?fid=146392> accessed 9 June 2024, p. 14.
[68] Fernandez-Molina and de la Rosa (n 56), p. 659.
[69] Authors Guild, Inc. v HathiTrust, (2nd Cir. 2014).
[70] Authors Guild v. Google, Inc., (2nd Cir. 2015).
[71] *HathiTrust* (n 69).
[72] ibid para. 101.
[73] *Google* (n 70), p. 4.
[74] *Google* (n 70), p. 12; Authors Alliance, 'Fair Use Week 2023: Looking Back at Google Books Eight Years Later' (*Authors Alliance Resource Library*, February 2023) <www.authorsalliance.org/2023/02/24/fair-use-week-2023-looking-back-at-google-books-eight-years-later/> accessed 4 August 2024.

With respect to the second factor, this examines whether the work is factual or creative.[75] While this factor does not hold much weight,[76] it is factual works that are more likely to be considered fair use.[77] Therefore, the second factor is likely not determinative, or "not dispositive",[78] for TDM since it often involves large scale analyses of factual datasets. This factor therefore favours fair use where it is transformative, providing valuable information about the original work without replicating its protected expression or serving as a substitute.[79]

The third factor assesses the quantity and quality of the material used in relation to the whole work.[80] In TDM, using entire works or substantial portions might still be fair use if the purpose justifies it, which is the case where it is transformative.[81] In any case, the extent of use must be proportionate to the purpose, ensuring that the reproduction is necessary for the intended analysis.[82] In *Authors Guild v Google*, while copies of entire books were made without authors' authorisation, they were not released to the public. Rather, they served the purpose of enabling "search functions to reveal limited, important information about the books".[83] As such, with TDM, the copying of a work in its entirety may be deemed reasonable for identifying patterns.[84]

Finally, the fourth factor considers whether the TDM negatively impacts the market for the original work.[85] Where non-commercial uses are at stake, the rightsholder would have to show that potential future harm is highly likely.[86] Where commercial uses are considered, if the TDM does not "usurp the original's

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[75] 17 U.S. Code (n 21), § 107(2).
[76] *Google* (n 70), p. 27.
[77] Singapore Academy of Law, 'Understanding the Text and Data Mining Exception to Copyright Laws: Implications for Training Large Language Models' (*LawNet*, 2024) <www.store.lawnet.com/blog/post/understanding-the-text-and-data-mining-exception-to-copyright-laws-implications-for-training-large-language-models.html> accessed 14 July 2024.
[78] *HathiTrust* (n 69), para. 98.
[79] *Google* (n 70), p. 28.
[80] 17 U.S. Code (n 21), § 107(3).
[81] *Google* (n 70), p. 29.
[82] Kelly v. Arriba Soft Corp., (9th Cir. 2003), para. 821.
[83] *Google* (n 70), p. 30.
[84] David Tan and Thomas Lee Chee Seng, 'Fair Use, Computational Data Analysis and the Personal Data Protection Act' 33 SAcLJ 1032 (30 September 2021) <https://journalsonline.academypublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal/Current-Issue/ctl/eFirstSALPDFJournalView/mid/494/ArticleId/1682/Citation/JournalsOnlinePDF> accessed 14 July 2024, p. 1053.
[85] 17 U.S. Code (n 21), § 107(4).
[86] Sony Corporation of America et al. v. Universal City Studios, Inc., et al (U.S.1984), para. 451.

rightful market"[87] - by serving as a market substitute or diminishing the market value of the original - it is more likely to be deemed fair use.[88] The fourth factor often interacts closely with the first factor, as transformative uses are less likely to affect the market for the original work.[89]

When weighing these four factors, courts have upheld TDM as highly transformative uses that do not substitute for the original works, even in situations of full verbatim copying of protected works. As such, while the US may not have an express TDM exception, its fair use doctrine can be seen as sufficiently flexible to accommodate the advancement of technology and TDM uses.[90] The courts themselves have also recognised this through "not[ing] the importance of analysing fair use flexibly in light of new circumstances".[91]

2.2.2. Considering the Scope of the US's Regulation of TDM

a) Beneficiaries and Purpose

The US TDM framework does not prescribe a limitation on who can benefit from §107. Thus, it applies to anyone in commercial and non-commercial contexts, illustrating a rather open nature in its scope. Furthermore, TDM activities are permitted for any purposes deemed fair use; what is most relevant to mention here is the first factor of the test, requiring the TDM to be transformative. As fair use is assessed on an individual basis, settled case law highlights the flexibility in the jurisdiction's approach.

b) Lawful Access

The fair use doctrine in the US does not explicitly require that works be accessed legally for potentially infringing purposes, reinforcing its flexibility in permitting TDM activities. Nonetheless, lawful access can still have an indirect influence, as will be subsequently discussed.

[87] Nxivm Corporation v. The Ross Institute (2nd Cir. 2004), para. 485.
[88] Fox News Network, LLC v. TVEyes, Inc., (2nd Cir. 2018), para. 179.
[89] *Campbell* (n 65).
[90] Krista L. Cox, 'Text and Data Mining and Fair Use in the United States' (*Association of Research Libraries*, 2015) <www.arl.org/wp-content/uploads/2015/06/TDM-5JUNE2015.pdf> accessed 5 August 2024, pp. 2-3.
[91] Perfect 10, Inc. v. Amazon.com, Inc., (9th Cir. 2007), para. 12.

c) Contractual and Technological Overrides

While the US broadly allows TDM under fair use, it is not always freely permitted. Since there is no specific law prohibiting contractual clauses which prohibit TDM, rightsholders can restrict such activities through binding agreements like licences.[92] It should be noted that any breach of these contractual terms is considered a violation of contract law - which is governed at state level - rather than constituting a copyright infringement under federal law. As a result of the potential tension between copyright and contract law here, the fact that federal law generally supersedes state law does not inherently mean that all provisions limiting fair use are unenforceable. Rather, this is assessed on a case-by-case basis which balances the interests.[93] As such, rightsholders can impose limitations on the use of their work for TDM purposes, even where it could be deemed fair use under §107. Where a user has agreed to "clear[ly] and unmistakabl[y]" waive their right to rely on fair use in an agreement, they have been legally prevented from engaging in TDM.[94]

Furthermore, the circumvention of technological measures which protect access to copyrighted works is prohibited without authorisation.[95] Circumventing is "to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner".[96] According to the Digital Millennium Copyright Act (DMCA) §1201, activities of text and data miners can be legally exempted in specific instances; researchers may bypass technical measures which protect literary works and motion pictures. This exemption is permitted where there is adherence to strict conditions - namely that the researcher is associated with an institution of higher education, such as a university, and the institution owns the materials used for TDM, meaning that materials obtained through subscription services are mostly excluded. Moreover, the institution is expected to implement stringent security measures. This exemption is specifically tailored for research purposes and includes both staff and students if they are part of a research

[92] Christina Bohannan, 'Copyright Preemption of Contracts' (2008) 67(3) Maryland Law Review <www.digitalcommons.law.umaryland.edu/mlr/vol67/iss3/5> accessed 6 August 2024, p. 649.
[93] ibid p. 652.
[94] Uforma/Shelby Bus. Forms, Inc. v. NLRB, 111 (6th Cir. 1997), para. 1289.
[95] Digital Millennium Copyright Act 1998, § 1201.
[96] ibid, §1201(a)(3)(A).

team or involved in teaching. However, the use of personal collections is generally restricted unless these materials are considered university property (e.g., purchased with grant or university funds).[97]

In the US, there is a mechanism managed by the US Copyright Office and the Library of Congress that allows the public to request temporary exemptions for a particular use and class of work to be exempted from §1201;[98] this occurs every three years.[99] Petitions are reviewed and where such a requested use seems to be lawful and a TPM hinders the ability to engage such lawful use, it could be exempt in the next triennial publication of the rules.[100] During the most recent petitioning, a long comment on the proposed exemption was submitted,[101] advocating for its expansion.[102]

The DMCA §1201 is a barrier to TDM activities that has largely impacted researchers within the US who are unable to legally access corpora necessary for their projects. In turn, some have argued for broader exemptions to allow for the circumvention of TPMs when the purpose is non-infringing and serves the public interest, such as in the case of TDM for research or educational purposes. Specifically, the requested changes would permit researchers at different non-profit institutions to share datasets for independent research and teaching.[103] This is necessary because under the current restrictions, especially the unclear definition of "collaboration", valuable research which would benefit from TDM uses is hindered.[104] Moreover, the long comment highlighted how smaller institutions are particularly affected by the current restrictions because they often lack the resources to repeatedly prepare datasets for TDM research.[105] The

[97] Quinn Dombrowski and Lauren Tilton, 'Digital Studies/Le champ numérique' (2024) 13(3) Digital Studies/Le champ numérique, p. 12 <www.digitalstudies.org/article/9658/galley/23811/view/> accessed 6 August 2024.
[98] DMCA (n 95), §1201(a)(1)(B).
[99] Federal Register, 'Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies' (2024) <www.federalregister.gov/documents/2024/10/28/2024-24563/exemption-to-prohibition-on-circumvention-of-copyright-protection-systems-for-access-control> accessed 24 December 2024.
[100] Federal Register (n 99).
[101] The Long Comment was co-petitioned by the Authors Alliance, the American Association of University Professors, and the Library Copyright Alliance.
[102] U.S. Copyright Office, 'Long Comment Regarding a Proposed Exemption Under 17 U.S.C. § 1201' (2023), p. 26<www.copyright.gov/1201/2024/comments/Class%203a-and-3b-Initial-Comments-Authors-Alliance-Library-Copyright-Alliance-and-Am-A.pdf> accessed 6 August 2024.
[103] ibid p. 5.
[104] ibid pp. 8-9.
[105] U.S. Copyright Office (n 102), pp. 11-14.

proponents for the changes further argued for permitting the circumvention of TPMs when needed to access these datasets, emphasising that this is crucial for advancing research.[106]

In October 2024, the Ninth Triennial Proceedings occurred. The outcome revealed that as per the recommendation of the Register of Copyright, the Librarian expanded the exemption for audiovisual and literary works. TDM activities are permitted for scholarly research and teaching purposes. As such, researchers affiliated with non-profit educational institutions are permitted to access corpora for independent research. This access involves providing secure credentials for use but does not allow downloading, copying, or distributing the corpus or its copyrighted contents. The change enables independent research, peer review, teaching, and continued access for researchers transitioning between institutions, provided the corpus remains hosted by the original institution.[107]

2.2.3. Concluding

As illustrated above, no single factor is determinative under fair use, demonstrating the adaptability of the US approach to evolving technologies - such as generative AI. This technology has continued testing the boundaries of fair use, as seen in the recent "deluge" of copyright lawsuits seen in the US.[108] These cases raise significant questions about the extent to which unauthorised TDM processes, particularly those that involve the systematic ingestion of large amounts of copyrighted material in training datasets, can be considered fair use.[109] The outcomes of these cases will have implications for how TDM continues to be regulated in the context of fair use.

[106] U.S. Copyright Office (n 102), p. 18.
[107] U.S. Copyright Office, 'Ninth Triennial Section 1201 Proceeding' (2024) <www.copyright.gov/1201/2024/2024_Section_1201_Registers_Recommendation.pdf> accessed 24 December 2024; U.S. Copyright Office, 'Section 1201 Rulemaking: Ninth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention recommendation of the register of copyrights' (2024) <www.copyright.gov/1201/2024/2024_Section_1201_Registers_Recommendation.pdf> accessed 24 December 2024.
[108] Kalpana Tyagi, 'Copyright, text & data mining and the innovation dimension of generative AI' (2024) 19(7) Journal of Intellectual Property Law & Practice, p. 564 <https://academic.oup.com/jiplp/article/19/7/557/7624901> accessed 15 July 2024.
[109] ibid p. 565.

Overall, the flexibility in the US approach to TDM grants it a "technological advantage,"[110] which is reflective of the "innovation-friendly"[111] nature of its copyright framework. As such, the US has been lauded for the rather open nature of its TDM approach "because it applies to any use, of any work, by any user, for any purpose subject to a four-part proportionality test".[112] This classification of openness is somewhat tempered, however, by the potential restrictions imposed through contractual and technological measures that could override a transformative TDM use. Nonetheless, the adaptability inherent to the framework still renders the US a jurisdiction that is fairly accommodating to TDM activities.

While the US has been addressing TDM without the introduction of explicit TDM provisions, the same has not been observed in other jurisdictions. One such example is Singapore, which has recently introduced a specific exception for TDM activities. The following subsection considers whether this new framework is as restrictive as the EU's express exceptions to TDM, or if it aligns more closely with the attitude found in the US.

2.3. The Singaporean Approach to Regulating TDM activities

The Intellectual Property Office in Singapore considers TDM applications "crucial to fuelling economic growth and supporting [its] drive to catalyse innovation in the digital economy."[113] It was therefore deemed necessary to have explicit provisions addressing TDM activities. Found under Part 5, Division 8 of Singapore's Copyright Act (SCA), these rules were thought to be a beneficial introduction which offered more legal certainty than the previous five-factor 'fair

[110] Matthew Sag, 'Copyright Law's Impact on Machine Intelligence in the United States and the European Union' (2020) Loyola University Chicago Law Faculty Publications, p. 297. <https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1687&context=facpubs> accessed 5 August 2024.
[111] Andrew Szamosszegi and Mary Ann McCleary, *Fair Use in the U.S. Economy* (CCIA, 2017), p. 5 <https://ccianet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf> accessed 5 August 2024.
[112] Flynn et al (n 22), p. 6.
[113] Intellectual Property Office of Singapore (n 23), p. 33.

dealing' regime.[114] Singapore's inclination to accommodate technological advancements in its legislation is demonstrated in its parliamentary debates, where the importance of strengthening Singapore's position as a global IP hub was emphasised - resulting in support for the new 2021 Copyright Act.[115] Equally, the Ministry of Law has stressed that alongside its favouring of innovation, the new Bill has also taken rightsholders' interests into account.[116]

Under the SCA, Section 243 provides a broad definition of CDA, encompassing the use of a computer program to identify, extract, and analyse information or data from copyrighted works and recordings of protected performances. CDA is thereby "synonymous" to that of TDM,[117] and the use of this exception in machine learning contexts is recognised.[118] The CDA exception is a "purpose-specific" provision, targeting such TDM activities under Section 244 SCA.[119]

2.3.1 The CDA Exception

Where a protected work has been "converted into... a digital or other electronic machine-readable form," it has been reproduced and is a "copy".[120] Section 244 SCA imposes conditions under which it is permissible for such a protected copy to be reproduced. The copy must be made for CDA purposes, or to prepare works for the analysis.[121] Where it is made for any other purpose, the exception does not apply.[122] Furthermore, the copies cannot be distributed or supplied to others unless strictly for purposes of verifying results of the CDA or for collaborative research

[114] Gavin Foo and Trina Ha, 'Sustaining Innovation and AI in a Data-Driven Climate: Industry and Critical Reception to Singapore's Computational Data Analysis Exception' (2023) 28 SAL Prac, para. 28 <https://journalsonline.academypublishing.org.sg/Journals/SALPractitioner/Fintech/ctl/eFirstSALPDFJournalView/mid/595/ArticleId/1925/Citation/JournalsOnlinePDF> accessed 20 January 2024.
[115] Singapore Parliamentary Debates, Vol 95 Sitting No 37 (13 September 2021).
[116] Intellectual Property Office of Singapore (n 23), p. 33.
[117] Tan and Lee (n 84), p. 1035.
[118] Trina Ha, 'Computational data analysis exception in Singapore's Copyright Act 2021 a game changer' (*AsiaIP*, 2021) <https://asiaiplaw.com/section/news-analysis/computational-data-analysis-exception-in-singapores-copyright-act-2021-a-game-changer> accessed 15 July 2024.
[119] Eleonora Rosati, 'No Step-Free Copyright Exceptions: The Role of the Three-step in Defining Permitted Uses of Protected Content (including TDM for AI-Training Purposes)' (2024) 46(5) European Intellectual Property Review, p. 13 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4629528> accessed 5 August 2024.
[120] Singapore Copyright Act 2021, s. 41.
[121] ibid s. 244(2)(a).
[122] ibid s. 244(2)(b).

directly related to the CDA.[123] Another important condition is that the 'first copy' (the original source material) was lawfully accessed.[124] Finally the status of the first copy cannot be infringing; where it is, the party engaging in TDM activities must not have been aware of its infringing status, and it should not have been obtained from a flagrantly infringing source. The provision also stipulates that even where the first copy is infringing, the reproduction may still be permissible if the use of such copies is necessary for a prescribed purpose and the party does not use it for any other analysis purposes.[125]

Singapore's mandatory CDA exception is thus inclusive of all subject matter protected under copyright; it facilitates both commercial and non-commercial TDM activities and includes a broad lawful access requirement to safeguard against unauthorised access to copyrighted materials.[126] What has ultimately been found is that the specificity of the CDA exception provides legal certainty and clarity, when compared to the general fair use doctrine - and that its introduction was indeed necessary.[127]

2.3.2. Fair Use

Alongside its CDA exception, and other fair dealings provisions, the new SCA also establishes a framework for determining whether a use of a copyrighted work or protected performance constitutes fair use, which is a permitted use under the Act.[128] Highly context dependent, it is analysed on a case-by case basis.[129] It is established in Part 5, Division 2 SCA; therein, Section 190 explicitly allows for fair use of both works and protected performances. Moreover, under Section 191, four non-exclusive factors are listed - namely: "(a) the purpose and character of use, (b) the nature of the work or performance, (c) the amount and substantiality of the portion used in relation to the entire work, and (d) the effect of the use on

[123] Singapore Copyright Act 2021, s. 244(2)(c).
[124] ibid s. 244(2)(d).
[125] SCA (n 120), s. 244(2)(e).
[126] Pin-Ping Oh, 'Potential Expansion of Singapore's TDM Exception?' (Bird&Bird, 26 April 2024) <https://www.twobirds.com/en/insights/2024/singapore/potential-expansion-to-singapores-tdm-exception> accessed 15 July 2024.
[127] Foo and Ha (n 114), pp. 11-13.
[128] SCA (n 120), s. 190.
[129] Pin-Ping Oh, 'Coming Up in Singapore: New Copyright Exception for Text and Data Mining' (Bird&Bird, 19 September 2021) </www.twobirds.com/en/insights/2021/singapore/coming-up-in-singapore-new-copyright-exception-for-text-and-data-mining> accessed 20 January 2024.

the potential market or value of the original work".[130] This new four-factor test represents a shift from the previous five-factor doctrine, removing the requirement under which the courts could consider whether the defendant could have reasonably obtained the work at an ordinary commercial price.[131]

Interestingly, Section 184 SCA stipulates that a permitted use is independent of the application of any other permitted use, even when both uses arise from the same factual circumstances. As a result, Singapore has a "hybrid regime" which allows TDM activities to fall under both the CDA exception and the fair use provision, offering two options of protection.[132] As discussed in the methodology,[133] the present thesis places less emphasis on this doctrine, as it is largely based on what is seen in the US -[134] and is one which, while existing as a potential avenue of safeguarding rights, is no longer the primary provision intended for regulating TDM.

2.3.3. Considering the Scope of Singapore's Regulation of TDM

a) Beneficiaries and Purposes

Singapore's regulation of TDM is rather open-ended.[135] This is a result of its beneficiaries being anyone engaging in TDM activities, as per the conditions set forth under the SCA. Moreover, the purposes for which the TDM provision applies are broad "CDA" purposes. Such a wide scope has led to the conclusion that the CDA exception "accommodates new and more intricate [mining] methods".[136]

b) Lawful Access

According to the illustrations which accompany the lawful access requirement, accessing material by bypassing paywalls or violating terms of service would

[130] SCA (n 120), s. 191.
[131] ibid s. 35.
[132] Trina Ha et al, *When Code Creates: A Landscape Report on Issues at the Intersection of Artificial Intelligence and Intellectual Property Law* (Intellectual Property Office of Singapore, February 2024) <https://www.ipos.gov.sg/docs/default-source/resources-library/when-code-creates-landscape-report-on-ip-issues-in-ai.pdf> accessed 15 July 2024, p. 79.
[133] See Chapter 1.2.
[134] There has only been one case concerning fair use in Singapore, see *Global Yellow Pages Limited v Promedia Directories Pte* Ltd (2017) SGCA 28; therein, it was noted that case law in the US "would be helpful in shaping [the] law" in Singapore.
[135] Ha et al (n 132), p. 79.
[136] Tan and Lee (n 84), p. 1069.

disqualify the reproduction from protection under Section 244 SCA.[137] Prior to the SCA's introduction, concerns were raised that the new exception is rather ambiguous as to what lawful access entails, beyond the two illustrations mentioned. Section 244 is now in force, but concerns remain that requiring users to ensure lawful access to data can be complex and cumbersome, especially given the lack of clear guidelines on what the requirement constitutes.[138] As such, the requirement appears to have a rather broad scope.

c) Contractual and Technological Overrides

In Singapore, rightsholders cannot contractually override the CDA exception, as Section 187 SCA voids any contractual terms that attempt to do so - ensuring that contracts or terms of service cannot limit the CDA exception. This does not imply that the terms of service are irrelevant. For instance, if a user accesses materials in a manner that contravenes the terms of service of a database, such as bypassing a paywall or using the materials in a way that is explicitly forbidden by the service's terms, this access would not be considered lawful under Section 244. Nonetheless, the lack of contractual opt-out has resulted in a view that the exception's mandatory nature could pose business risks to rightsholders, who would rather prefer the option of concluding licensing agreements.[139]

The legal framework also addresses the potential for rightsholders to use technological means to override TDM activities - with the circumvention of such TPMs being prohibited. Rightsholders can prevent their works from being subject to the TDM exception by implementing access control measures, which are technologies that "effectively control access to a protected copy".[140] Similarly to the US, [141] circumventing includes bypassing, removing, descrambling a scrambled copy, decrypting an encrypted copy, or otherwise impairing TPMs.[142] It is generally understood that circumventing such TPMs (i.e., digital locks) would render access unlawful, thereby negating the TDM exception. [143] Thus, the requirement that CDA activities must involve non-infringing copies reflects the

[137] SCA (n 120), s. 244(2)(d) Illustrations.
[138] Tan and Lee (n 84), p. 1055.
[139] Foo and Ha (n 114), pp. 7-10.
[140] SCA (n 120), s. 423.
[141] See Chapter 2.2.2.3.
[142] SCA (n 120), s. 422.
[143] Oh (n 126).

Act's consideration of TPMs that could be employed to prevent the lawful use of copyrighted materials. While there are exceptions to the prohibition on circumventing TPMs, these do not extend to TDM purposes.[144]

Recently, there has been discussion on the prohibitions on circumventing access control measures that potentially hinder the effective use of works for TDM purposes. As such, a public consultation was initiated in April 2024,[145] to evaluate the impact of circumventing access control measures on permitted uses and whether there should be an exception to this for TDM.[146] In response, strong opposition has been seen by rightsholders, such as the International Federation of Reproduction Rights Organisations, to such a proposal. Advocating for millions of rightsholders, the Organisation has submitted a draft in which it has expressed concerns that introducing an exemption to the prohibition of circumventing TPMs in the context of TDM would dilute any safeguards rightsholders have under the CDA framework.[147] Moreover, it was emphasised that the evidence for the introduction of such an exemption posing significant harm to rightsholders was far more compelling than evidence of the current approach hindering legitimate use of works.[148] The feedback received from the consultation will determine to what extent the current restrictions on bypassing TPMs should be relaxed for TDM purposes. If it occurs, this could skew the current balance between safeguarding copyright and innovation in TDM activities, in the latter's favour.

2.3.4. Concluding Remarks

Ultimately, the very broad and permissive nature of Singapore's current TDM approach distinguishes it from other jurisdictions, where equivalent exceptions are typically more limited.[149] It is for this reason that it has been labelled as one of the

[144] See SCA (n 120), ss. 428-435.
[145] The consultation was initiated by the Singapore Ministry of Law and the Intellectual Property Office of Singapore.
[146] MinLaw and IPSOS, *2024 Public Consultation on Prescribed Exceptions in Part 6, Division 1 of the Copyright Regulations 2021* (22 April 2024).
[147] iffro, 'Submission to Singapore Ministry of Law (Intellectual Property Policy Division): 2024 Public Consultation on Prescribed Exceptions in Part 6, Division 1 of the Copyright Regulations 2021' (2024), p. 2 <https://ifrro.org/resources/documents/General/IFRRO_Submission_SINGAPORE_TDM_Prescribed_Exceptions_Consultation_May2024.pdf> accessed 8 August 2024.
[148] ibid p. 3.
[149] iffro (n 147), p. 1.

most 'open' TDM exceptions.[150] Alongside being open, it has still been deemed quite a "balanced" approach to TDM, in which rightsholders' interests and the wider public interest to accommodate innovation are simultaneously considered.[151]

2.4. Comparative Remarks

In light of the separate analyses of the jurisdictional approaches to TDM that provide an answer to the first subquestion, the extent to which the regimes align or differ in their approaches will now be examined, providing an answer to the second subquestion of the thesis. The aim is to understand whether, comparatively speaking, these countries have a more open or closed exception to TDM activities, in light of the parameters discussed above.

The EU, US, and Singapore take distinct approaches to regulating TDM, reflecting different balances between innovation and intellectual property protection. Firstly, the purposes and intended beneficiaries of the TDM exceptions in the jurisdictions show their stance on *who* should have the right to engage, and in *what* type of activities. The EU's DSM Directive provides a structured but rather narrow framework. Article 3 specifically targets TDM for scientific research by research organisations and cultural heritage institutions. This focus on non-commercial research illustrates the EU's prioritisation of academic and cultural objectives over commercial innovation. However, Article 4 allows broader applications of TDM, including commercial uses. This, nonetheless, is still limited by the opt-out mechanism available to rightsholders, which can restrict the scope of TDM.

In comparison, TDM activities, including for commercial purposes, can be justified in the US should they meet the four-factor fair use test. This doctrine (that applies to anyone) has an inherent flexibility which is arguably demonstrative of its inclination to prioritise supporting innovation - even at the potential expense of stricter copyright regulations. Regarding the Singaporean approach, its introduction of the CDA exception reflects its commitment to fostering

[150] Flynn et al (n 22), p. 30.
[151] European Alliance for Research Excellence, 'Singapore's new Text and Data Mining exception will support innovation in the digital economy' (*EARE,* 2021) <https://eare.eu/hello-world-11/> accessed 8 August 2024.

innovation, particularly in its "efforts to grow [the nation's] Artificial Intelligence and technology sectors".[152] This can be seen in the open nature of its TDM exception, with it covering both commercial and non-commercial mining activities. As a result, a broad spectrum of stakeholders can benefit from the provision.

Secondly, the requirement of having lawfully accessed works differs across the jurisdictions. The EU's DSM Directive mandates quite a stringent lawful access requirement under both Articles 3 and 4. Only legally accessed materials can be mined, ensuring rightsholders retain control over how their works are used. This requirement is particularly rigorous for commercial uses, where the lawful access condition is found alongside an opt-out clause, allowing rightsholders to prevent TDM even if the content is lawfully accessed. In the US, lawful access is generally more flexible - in that it becomes relevant where there has been a violation of a contractual or licence agreement, as well as where there are attempts in circumventing TPMs. This is clearly more open than what is found in the EU, since in the sole examination of TDM, meeting the fair use criteria is sufficient, without a direct requirement to have lawfully accessed the works. This differs from Singapore, where a lawful access requirement within the CDA exception does exist, albeit broadly. However, as Singapore does not allow for contractual overrides, once lawful access is established, TDM activities are protected without further restriction. Such a broad provision further reinforces how, while upholding copyright protections, Singapore's framework maintains a strong inclination toward supporting innovation.

Thirdly, the ability to contractually or technologically override TDM exceptions varies significantly across the jurisdictions. In the EU, beneficiaries of Articles 3 and 4 of the DSM Directive face both means of overriding the exceptions. On the one hand, Article 3 is more open for researchers than the US TDM landscape, where DMCA §1201 imposes technological barriers that can severely restrict the effectiveness of the fair use defence. However, under Article 4 of the DSM Directive, the opt-out mechanism has placed non-academic researchers in the EU at a "clear competitive disadvantage",[153] when compared to

[152] Singapore Parliamentary Debate (n 115).
[153] Fernandez-Molina and de la Rosa (n 56), p. 664.

stakeholders in the US and Singapore, who can perform TDM in commercial contexts with fewer restrictions. Moreover, while fair use broadly allows for TDM in the US, it is not always freely permitted. Contractual clauses can prohibit TDM activities, and rightsholders can enforce these restrictions through binding agreements. Additionally, the DMCA's §1201 prohibits the circumvention of technological measures, further acting as a barrier to TDM activities. In contrast, Singapore's framework is much more open; rightsholders are explicitly prevented from contractually overriding the CDA exception under Section 187 SCA. This means that contracts or terms of service cannot be used to limit the CDA exception. While the circumvention of TPMs is prohibited, the mandatory nature of the CDA exception and the absence of contractual and technological barriers arguably make Singapore's TDM framework particularly supportive of technological advancement.

Considering the above, we can note that Singapore has amongst the more open TDM frameworks globally,[154] with its approach to TDM showing a strong legislative intent to facilitate TDM activity.[155] In the present comparison with the EU and US, by allowing broad use of TDM in both commercial and non-commercial contexts, without the possibility of contractual opt-out, Singapore is the most open and innovation-friendly framework. In the case of the US, its framework is inherently adaptable which has meant that the fair use doctrine has been able to sufficiently accommodate new and emerging technologies within its existing laws. At this stage, the US's flexibility has meant that unlike in other jurisdictions, introducing an express TDM provision has not been necessary. Nonetheless, it is somewhat limited by the inability to circumvent TPMs, as well as the potential for contractual agreements to prohibit TDM activities, in situations that would otherwise be considered fair use. As such, the framework is rather open - but not quite to the same extent as what can be found in Singapore. Comparatively speaking, the EU is the most restrictive,[156] with narrowly defined exceptions, a stringent lawful access requirement, and the potential for rightsholders to limit TDM through contractual and technological means.

[154] Flynn et al (n 22), p. 30.
[155] Singapore Parliamentary Debate (n 115).
[156] Flynn et al (n 22), p. 36.

The answer to the second subquestion is therefore that, while the jurisdictions do somewhat align in the requirements for the TDM exception to be invoked, there are nonetheless differences in how restrictive they are, as well as the impact of the conditions on both the copyright holders, and text and data miners. To move beyond a normative comparison, it will be crucial to see how these three approaches apply to the same legal case, as explored in Chapter 3.

3. RULING ON THE NYT V OPENAI MATTER

3.1. THE CASE

Having compared the regulatory approaches to TDM activities in the EU, the US, and Singapore, this section will apply the jurisdictional analyses to the recent lawsuit filed by The NYT against OpenAI. This will help determine whether jurisdictions with more open TDM exceptions truly foster more pro-innovation outcomes, as might be expected - thereby revealing how each jurisdiction's balance of interests could potentially influence judicial decisions in the same case.

In the legal dispute between The NYT and OpenAI, the former has alleged the latter's unauthorised use of NYT articles to train its LLMs – including ChatGPT and Microsoft's Bing Chat. As previously mentioned, The NYT claims the models have learned its works without the appropriate licences – subsequently resulting in almost direct reproductions of the original articles in the output stage.[157] Furthermore, The NYT argues that such unlicensed uses for which OpenAI is to be held responsible have resulted in economic harm; in providing AI-generated summaries and copies of its articles, OpenAI's LLMs have enabled users to bypass The NYT's paywall. This has allegedly contributed to a potential loss in subscriptions, advertising revenue, as well as affiliate income, that The NYT would have otherwise obtained.[158] Moreover, The NYT has provided examples of instances where OpenAI's LLMs have generated false or misleading information which has been subsequently attributed to the newspaper. It asserts that these "hallucinations" could damage The NYT's reputation and mislead its readers.[159] The NYT further claims that the outputs of the GPT models

[157] *The New York Times Company* (n 7), para. 57.
[158] ibid paras. 156-157.
[159] ibid paras. 136-137.

"intentionally removed copyright-management information from The Times's works" as a result of its training process failing to preserve such information.[160] Alongside the suit brought against OpenAI, The NYT had claimed that Microsoft is to be held vicariously liable for OpenAI's infringement due to its significant role in developing and deploying the GPT models. In light of this, Microsoft is additionally accused of contributory infringement by providing infrastructure and support for OpenAI's operations.[161] Given the severity of the alleged copyright infringement, one of the more drastic remedies sought is the destruction of training sets that incorporate its copyrighted content.[162]

As the purpose of this Chapter is to highlight how the more open or restrictive natures of the three jurisdictions' TDM approaches in copyright law could signify how they would rule in a case, any claims which go beyond this scope, such as the contributory infringement accusations, will be excluded from the present discussion. Thus, the issues related to TDM are that: (1) There was unauthorised use of copyrighted materials in TDM activities in their training stage, as it involved making infringing copies of protected content; (2) Even where such access to the materials could be allowed, there was copyright infringement because in the output stage, the LLMs generated content which resembled original works, as seen in the claims of verbatim reproductions of original materials.[163] The second issue tied to TDM largely pertains to the reproduction right and how jurisdictions may consider LLM outputs in relation to it. As the respective reproduction rights frameworks are not the focus of this thesis, this second issue will be excluded from the comparison in this Chapter. What is, however, crucial for evaluation under the exception to TDM activities is the first legal issue identified - and this is what will be evaluated in the comparison below.

3.2. Solving the TDM Exception Issue: Unauthorised Use of Protected Materials

It was alleged by The NYT that copyrighted materials were used in TDM activities without authorisation, as the training of OpenAI's LLMs involved the making of

[160] *The New York Times Company* (n 7), para. 187.
[161] ibid paras. 174-177.
[162] ibid pp. 67-68.
[163] ibid, para. 130.

infringing copies of protected content.[164] It is thus important to first establish that The NYT articles are, in fact, protected works. As original literary subject matter, which are the author's own intellectual creations,[165] The NYT publications warrant copyright protection in all three jurisdictions - and as such are entitled to the right of reproduction.[166] In light of this, the claimed breach of this right in the training process will be examined.

It should be noted that for a model to function in general, it is "the extraction of accumulated information" that holds value as opposed to "any individual work".[167] The accumulated information is gathered during the training process, where an LLM processes and learns from a dataset. To achieve this, the LLM must have access to millions of individual works in the dataset.[168] In light of the way LLMs function, reproducing and replicating works during data training is standard practice - provided that access to the works is appropriately authorised. In the present case, there seems to be no indication that OpenAI intends to refute the claim that it accessed The NYT' publications, implying that these works were indeed part of the GPT model's training datasets.[169] As such, the following subchapters will examine how this information would fit within its TDM frameworks.

3.2.1. Considering the Case Under the EU Framework

Given the EU's approach to regulating TDM, the case would be assessed under a more restrictive framework than what will be hypothesised under the other jurisdictions. Under the DSM, OpenAI, as an entity which operates commercially,[170] cannot benefit from the research exception to TDM provided in Article 3. As Article 4 extends the TDM exception to any purpose, including

[164] *The New York Times Company* (n 7), paras. 83-92.
[165] Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECLI:EU:C:2009:465, para. 39.
[166] Infosoc Directive (n 33), art. 2; SCA (n 120), ss. 9, 13, 41-42; 17 U.S. Code (n 21), §§ 101-102, 106.
[167] Andres Guadamuz, 'A Scanner Darkly: Copyright Liability and Exceptions in Artificial Intelligence Inputs and Outputs' (2024) 73(2) GRUR International <https://doi.org/10.1093/grurint/ikad140> accessed 9 August 2024, p. 117.
[168] ibid p. 124.
[169] Rachel Reed, 'Does ChatGPT violate New York Times' copyrights?' (*HLT*, 2024) <www.hls.harvard.edu/today/does-chatgpt-violate-new-york-times-copyrights> accessed 9 August 2024.
[170] OpenAI, 'Our Structure' <www.openai.com/our-structure> accessed 24 December 2024.

commercial uses, this provision would theoretically cover OpenAI's activities. Within Article 4, the court would examine whether OpenAI had lawful access to The NYT's content. Lawful access requires OpenAI to have obtained The NYT articles through a legitimate subscription or licensing agreement.[171] If OpenAI accessed the content by bypassing paywalls or violating terms of service, the lawful access requirement would not be met; this would, in turn, prevent OpenAI from invoking the TDM exception. If the claims of NYT suggesting this is indeed the case are proven, the publication has a strong argument here in their favour.

Furthermore, the rights reservation mechanism is relevant to consider. In connection to this, clause 4.1(8) of The NYT's Terms of Service is crucial; it stipulates that without prior written consent, The NYT prohibits the performance of TDM activities under the scope of Article 4 DSM. Furthermore, clause 4.1(4) prohibits any attempts to circumvent, reverse engineer, or interfere with the services or NYT's content.[172] This clause thus points to NYT using TPMs, the overriding of which has been banned. Considering this opting out, an EU court would be expected to assess the validity and enforceability of these opt-out measures. In the EU, a reservation can include a "digital statement without computer protection mechanisms, such as the exclusion protocols contained in robots.txt files."[173] This suggests that activities like TDM could potentially be restricted by mere notice. The NYT's terms of service specify that users must follow rules like the Robots Exclusion Protocol, which limits automated access to websites to prevent bypassing security features or access controls. It also explicitly states that "NYT's robots.txt notice does not constitute NYT's prior written consent under these Terms of Service."[174] Thus, despite The NYT's emphasis that any circumvention measures (in the form of digital statements or TPMs) would constitute a breach of the terms of service, the DSM Directive's approach could find grounds in relying on just the statement itself. The most likely conclusion

[171] See Ch. 2.1.3.2.
[172] NY Times Policies, 'Terms of Service' (last updated May 2024) <www.help.nytimes.com/hc/en-us/articles/115014893428-Terms-of-Service> accessed 9 August 2024.
[173] Elena Varese, 'Can generative AI rely on the text and data mining (TDM) exception for its training?' (*DLA Piper*, 2023) <www.lexology.com/library/detail.aspx?g=a04a436f-3225-4f77-9bce-ee0f2a608ad0> accessed 24 July 2024.
[174] NY Times Policies (n 172).

would, therefore, point to The NYT having successfully reserved its rights and OpenAI having been prohibited from using its content for TDM purposes.

As such, unless OpenAI could unequivocally defend that it had both lawful access to The NYT's content, and that The NYT had not opted out of the TDM exception, the court would likely find that OpenAI's use of The NYT articles for training purposes infringed on the latter's rights. Thus, in response to the alleged unauthorised use of copyrighted materials in TDM activities, an EU court would likely find this to be the case in the LLMs' data training. This siding with The NYT is arguably illustrative of the EU's restrictive framework which, as discussed in Chapter 2.1., has been designed to protect rightsholders, particularly from any unauthorised access or circumventions for TDM purposes.

3.2.2. Considering the Case Under the US Framework

A US court would consider the four factors in the fair use test and as the actual case was brought in this jurisdiction, the majority of its allegations would be addressed under this doctrine. However, given the scope of this Chapter, the fair use test will only be used to analyse the claims tied to the data training. LLMs, such as ChatGPT, utilise TDM for analysis and then to generate predictive text and other outputs. The court would need to determine whether this use qualifies as transformative; to do so, it would consider whether OpenAI's models contribute new insights distinct from the original NYT articles. Since generative AI like GPT creates new content by recombining the abstracted features, their use in training data should be considered transformative.[175] As illustrated in Chapter 3.2., LLMs are trained on data; they do not simply copy or replicate the original works. Rather, the original materials are processed into a statistical model that does not retain or store the expressive elements of the original content - but serves the function of predicting text sequences.[176] As such, training an LLM can likely be deemed non-expressive. Should the court agree that OpenAI's use of the publications for

[175] Matthew Sag, 'Copyright Safety for Generative AI' (2023) 61(2) HLR <https://houstonlawreview.org/article/92126-copyright-safety-for-generative-ai> 4 August 2024, p. 306.
[176] Stephen Wolfram, 'What Is ChatGPT Doing … and Why Does It Work?' (2023) <www.writings.stephenwolfram.com/2023/02/what-is-chatgpt-doing-and-why-does-it-work/?fbclid=IwAR13pTPLTEPFem8g71AnUZb7xRHAp69b027lbPt8DVdka1uTX07MhDkvyqU> accessed 24 July 2024.

training purposes significantly differs from the original purpose of the content, this factor could weigh in OpenAI's favour.

Regarding the second and third factors, these are not as decisive to the overall determination of fair use.[177] Nonetheless, the nature of The NYT articles as factual reporting and the use of entire articles being necessary for TDM purposes and to have a functional AI model, could support OpenAI's position.

Moving to the final factor, The NYT would need to demonstrate how OpenAI's activities caused significant economic harm - keeping in mind the interconnected nature of this and the first factor. In scraping its materials to train its LLMs without the appropriate licences, OpenAI can avoid the payment of subscriptions - thereby undermining The NYT's business model.[178] As such, the revenue that the publication could have generated is missed out on - causing direct commercial harm towards The NYT.[179] On the other hand, OpenAI could stress the argument that ingestion of protected works is to be considered a fair and transformative use that does not displace The NYT's market.

It should be noted that even if OpenAI successfully argues fair use, liability could still arise due to the claim that OpenAI circumvented The NYT's TPMs. If The NYT proves OpenAI bypassed its paywalls, a ruling in favour of the former seems likely since OpenAI is not engaging in TDM as a research institution to whom an exemption under DMCA §1201 could apply.

As such, the present discussion demonstrates how the general trend favouring TDM as a transformative use would likely be upheld here. The inherent flexibility in the US approach means the framework can be adapted to permit newer innovative uses where the primary function is not to replicate original materials but rather extract data for a different purpose. This indicates the relatively open approach to TDM seen in the US. However, given the other legal rules at play here, particularly §1201, the fact that courts "continue to have choices" will be of great importance,[180] since it could result in a ruling in favour of the rightsholders. Such a finding would set this case apart from the series of

[177] See Chapter 2.2.1.
[178] *The New York Times Company* (n 7), para. 144.
[179] ibid para. 156.
[180] Mira T. Sundara Rajan, 'Is Generative AI Fair Use of Copyright Works? NYT v. OpenAI' (*Kluwer Copyright Blog*, 2024) <https://copyrightblog.kluweriplaw.com/2024/02/29/is-generative-ai-fair-use-of-copyright-works-nyt-v-openai> accessed 9 August 2024.

"not… particularly pro-plaintiff decision[s]"[181] that have been seen in recent generative AI lawsuits in the US.

3.2.3. Considering the Case Under the Singaporean Framework

In Singapore, the first question to be assessed is whether OpenAI's alleged infringing use of NYT articles qualifies for the CDA exception under the SCA. Regarding the purposes, GPT models are designed to analyse large datasets to generate predictive text. Thus, if OpenAI argues that any copies made of The NYT's were solely to train its language models, this falls within the broad scope of CDA provision. Furthermore, regarding lawful access, the source material itself is unlikely to be infringing given The NYT's standards for ethical journalism.[182] On this basis, we can note that the openness of Singapore's approach to TDM permits training LLMs.

With that said, this is a "fact-intensive inquiry,"[183] and according to The NYT, ChatGPT accessed content from its website without consent and by circumventing its paywalls. In having such access and scraping the data, its web crawlers may have violated The NYT's rights as the reproduction of its text constitutes a copyright infringement. Furthermore, while The NYT cannot rely on contractual terms to override the CDA exception in Singapore, it can rely on its TPMs. In circumstances where the rightsholder has made no effort to technologically protect their work, it is argued that implicit consent is given to miners. Where paywalls and subscriptions are in place, this indicates a withdrawal of consent for the data to be freely used for training purposes.[184] As such, should The NYT be correct in their allegations that OpenAI bypassed its paywalls, the latter's access is unlawful.

While Singapore's CDA exception is intended to facilitate innovation and is notably a rather open framework, it still upholds significant protections for rightsholders, particularly through the lawful access requirement. In this case, while the broad scope of the CDA exception might have otherwise favoured

[181] Tyagi (n 108), p. 565.
[182] NY Times, 'Ethical Journalism: A Handbook of Values and Practices for the News and Opinion Departments' (2024) <www.nytimes.com/editorial-standards/ethical-journalism.html> accessed 9 August 2024.
[183] Tan (n 24), para. 16.
[184] See Tan and Lee (n 84), p. 1073.

OpenAI, their alleged circumvention of The NYT's paywalls seemingly constitutes unlawful access. As a result, OpenAI's actions would fall outside the protections of the CDA exception, which reflects how despite its openness, Singapore's approach does indeed balance innovation with respect for the rights of creators.

3.2.4. Comparative Remarks

In the context of *The NYT v OpenAI* case, a comparative analysis of the EU, US, and Singaporean approaches to TDM shows similarities and differences in how the jurisdictions would approach the allegations of copyright infringement during the training of OpenAI's models. While Chapter 2 of the thesis concluded that in terms of openness, Singapore is in first place, followed by the US, and then the EU, the robustness of the lawful access requirement in both Singapore and the EU provides strong protection for rightsholders. In Singapore and the EU, OpenAI's alleged bypassing of The NYT's paywalls would likely result in a finding of unlawful access, excluding OpenAI from the TDM exception and leading to a ruling in favour of The NYT. This highlights how, despite Singapore's openness, rightsholders' protection is nonetheless considered in its laws. Furthermore, the discussion in Chapter 3 has arguably shown that the approach in the US is marked by the flexibility in its doctrine permitting transformative uses of copyrighted material in the context of training - even where access was not lawful. However, the outcome in the US would be impacted by factors such as the circumvention of TPMs, that would still sway the courts, despite a potential fair use finding. As such, the outcome there would not be all that different from what was hypothesised in the EU and Singapore.

To answer the third subquestion, given the setup of the frameworks, it is more likely that the judiciary would favour the rightsholders in this case - particularly in the EU and Singapore, where lawful access conditions exist. While the US does not explicitly require this, the alleged circumvention of TPMs by OpenAI would still influence a court in favour of The NYT. These findings can be deemed mostly reflective of the answers found to the first two subquestions on the jurisdictional approaches and their subsequent natures. Regarding the EU, as the most restrictive framework, prioritising the protection of creators can be an expected outcome. Similarly, given the flexibility of the US framework, and the

fact that rulings are made on a case-by-case basis, it is expected that TDM activities would constitute fair use, but that a subsequent violation of §1201 could affect the outcome for OpenAI. What is interesting here is that, while Singapore has the most open TDM exception as a result of its breadth, the emphasis placed on lawful access has meant that it too would have a likely result in a ruling favouring The NYT - if unauthorised access by OpenAI is demonstrated. This shows how even the more innovation-friendly jurisdictions have still considered the protection of rightsholders when designing their provisions.

4. CONCLUSION

In conclusion, the comparative analysis of the EU, US, and Singapore has illustrated the varying degrees of openness and restrictiveness in their respective TDM approaches. This analysis provided an answer to the overarching research question posed by this paper: "How do the EU, US, and Singaporean Copyright Regimes address Text and Data Mining?"

Chapter 2 of this essay first considered the EU's regulatory framework, governed by Articles 3 and 4 DSM Directive, which has emphasised safeguarding the interests of rightsholders. This is evident in the stringent lawful access requirements and the opt-out mechanism available to rightsholders, particularly in non-research contexts. While Articles 3 and 4 are explicit provisions allowing TDM activities, the possibility for rightsholders to override these exceptions through contractual and technological means complicates their practical application. As a result, its jurisdictional approach to TDM was deemed to be of a restrictive nature.

Next, the US framework under the four-factor fair use doctrine was explored. US courts have generally favoured transformative uses of copyright works, especially where they contribute to research, education, or technological innovation. This led to the finding that the US framework has an inherent flexibility enabling it to adapt its doctrine to technological advancements, thereby rendering a broader range of activities and uses lawful. Consequently, the US approach to TDM is less restrictive and more open - especially when compared to the EU. With that said, the potential for contracts and TPMs to restrict TDM activities still exists, signifying it does not have *the* most open TDM framework.

In contrast, Singapore's framework, which incorporates elements from both the EU and US systems, is marked by the introduction of the broad CDA exception. This reflects a clear move towards supporting TDM activities, leading to the conclusion that Singapore has a very open and innovation-oriented approach to regulating TDM. However, the paper also noted that Singapore's emphasis on lawful access and the prohibition against circumventing TPMs still ensures protections for rightsholders.

In light of the above analysis, the first two subquestions - explaining the frameworks in the three jurisdictions and highlighting where they diverge in their approaches - have been addressed. In turn, this paper has demonstrated that the three jurisdictions' approaches to TDM can be classified as follows: Singapore has the most open regulation of TDM activities, followed by the US, while the EU has a more restrictive framework.

Regarding the third subquestion, which considered *The NYT v OpenAI* case as a means of demonstrating the alignment and differences in the three frameworks, the analysis shed light on how these jurisdictions might prioritise and balance the interests of copyright holders against those of the beneficiaries of the TDM exception. It was found that despite the US and Singapore having more open frameworks for TDM, the potential influence of TPM circumvention in the US, along with the lawful access requirement in Singapore, suggested that both would likely ultimately side with the rightsholders in the case. This outcome aligned with what was hypothesised under the restrictive framework in the EU.

An answer to the overarching research question has thus emerged: while the EU, US, and Singaporean copyright regimes all aim to balance copyright protection with the need for innovation, they do so in distinct ways. The EU’s approach is the most restrictive, prioritising the rights of copyright holders, particularly in commercial contexts. This has been criticised due to its potentially adverse impact on innovation. In comparison, the US framework offers the most flexibility, emphasising transformative use and innovation - while still having some restrictive aspects beyond the fair use notion (such as DMCA §1201). Singapore, however, appears to strike a balance, offering a broad and open TDM exception that supports technological advancements while still upholding certain protections for rightsholders. As emphasised throughout the paper, its openness is

reinforced by the lack of an overriding option to the TDM exception, making it a particularly innovation-friendly jurisdiction.

Looking forward, it is important to recognise that the present classifications of a legal framework's openness or restrictiveness in regulating TDM are not set in stone. As innovation continues to push boundaries, we can expect these systems to evolve and adapt in response to ever-changing and emerging technologies. In the case against OpenAI, the NYT stressed that "[p]roducing Times journalism is a creative and deeply human endeavour".[185] As LLMs like ChatGPT continue learning from a vast array of knowledge, it is vital that the evolution of legal systems both welcomes innovation and protects the rights of the individuals behind such human endeavours.

[185] *The New York Times Company* (n 7), para. 31.

Mitigating Transatlantic Political Tensions between the US and the EU: A Holistic Analysis of European Merger Control of US Companies

Gabriel Sielaff[1]

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TABLE OF ABBREVIATIONS

ATF	French Competition Authority
DOJ	Department of Justice
EC	European Community
EU	European Union
EUMR	European Union Merger Regulation
FTC	Federal Trade Commission
GC	General Court
HHI	Herfindahl Hirschman Index
HSR Act	Hart-Scott-Rodino Antitrust Improvements Act of 1976
ICN	International Competition Network
OECD	Organisation for Economic Co-operation and Development
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
US	United States of America

1. INTRODUCTION

1.1. THE ISSUE AND BACKGROUND

It is axiomatic that merger control is an integral part of competition law. Independent economic entities combining into one can result in the bigger entity gaining a dominant position, able to control prices, exclude competitors, and create market entry barriers among other anti-competitive practices. This is recognised globally, with 135 different jurisdictions having implemented laws requiring and empowering competition authorities review, permit and deny transactions, such as acquisitions by one company of another, as of 2021. This number is on the rise.[2]

While states have jurisdiction over their territory, able to regulate the conduct of market participants within their borders, it is also accepted that they can extend their regulatory jurisdiction in this field past their borders, thereby requiring pre-merger notification[3] to their competition authorities by foreign companies.[4] The US has even recognised the necessity of extra-territoriality since 1890 when it applied anti-trust laws to foreign commerce.[5] When it comes to large multinational corporations which do business in many states, requiring pre-merger notification in and by those states is uncontroversial.

However, under international law, the ability to regulate foreign-based actors is not absolute and a state illegitimately extending their jurisdiction can interfere with the sovereignty of others.[6] Only when the conduct has effects within the sovereign's territory can it regulate extraterritorially. This "effects doctrine" is accepted in international law and implemented (albeit with differences) in national legal regimes, such as the EU and the US. Problems occur when the notion of

[2] White & Case LLP, 'Shining a Light on the Massive Global Surge in Merger Control Filings' (10 January 2022) <https://www.whitecase.com/insight-our-thinking/shining-light-massive-global-surge-merger-control-filings> accessed 28 February 2024.
[3] Pre-merger notification is a process whereby firms request permission for a transaction from the competent competition authority before it is performed.
[4] *The Case of the SS Lotus* (France v Turkey) (Judgement) 1927] PCIJ Rep Series A No 10, 19. In this case, the International Court of Justice stated: "every state remains free to adopt principles of extraterritorial jurisdiction that it regards as best and most suitable, provided such jurisdiction does not overstep the limits of international law."
[5] Laura E Keegan, 'The 1991 U.S./EC Competition Agreement: A Glimpse of the Future through the United States v. Microsoft Corp. Window Comment' (1996) 2 Journal of International Legal Studies 149, p.1.
[6] *The Case of the S.S. Lotus* (n 4). In this case, the International Court of Justice stated: "every state remains free to adopt principles of extraterritorial jurisdiction that it regards as best and most suitable, provided such jurisdiction does not overstep the limits of international law."

"effects" is interpreted differently and increasingly vaguely, leading to the growing reach of a legal regime and possible intrusions on other jurisdictions sovereignty. In this regard, the EU has come under fire in the past decades for seemingly overstepping its competence, particularly in relation to US companies. Many US-based companies have not only had to notify their intent to merge, but have even been denied by the EU, despite the US, where the companies have much stronger ties to, granting permission. In such cases, the stricter merger regime prevails. If one jurisdiction prevents the merger from happening it cannot go through, irrespective of permission having been granted by the other one. Failure to adhere to the denial will result in negative consequences imposed by the jurisdiction that denied the merger. This has resulted in undeniable political issues between the EU and the US in which the EU has been accused of protectionism or otherwise exceeding their jurisdiction.

One of the most well-known examples of this is the 2001 attempted merger between General Electric and Honeywell, two American companies. In a nutshell, the US Department of Justice had permitted the merger (conditioned on minor structural changes), but the European Commission denied it,[7] claiming that there would be the creation or strengthening of a dominant position for aircraft engines.[8] On appeal, the General Court (GC) criticized parts of the Commission's analysis[9] but ultimately sided with the Commission.[10]

The Commission decision prompted US Treasury Secretary O'Neill to describe the Commission as "autocratic" and called the decision "off the wall".[11] A Department of Justice (DOJ) chief antitrust enforcement official, John Wilke, stated that the Commission had diverged from the principle that "the antitrust laws

[7] Commission Decision 2004/134/EC of 3 July 2001 declaring a concentration to be incompatible with the common market and the EEA Agreement (Case COMP/M.2220 — General Electric/Honeywell) [2004] OJ L48/1 para. 1.
[8] ibid para. 567.
[9] Philipp Schumacher, 'GE/Honeywell' in Alain Marciano and Giovanni Battista Ramello (eds), Encyclopedia of Law and Economics (Springer 2018) <https://doi.org/10.1007/978-1-4614-7883-6_186-1> accessed 23 January 2024.
[10] Case T-209/01 *Honeywell International*, *Inc* v *Commission of the European Communities* [2005] ECLI:EU:T:2005:455.
[11] William Drozdiak, 'European Union Kills GE Deal' (Washington Post 4 July 2001) <https://www.washingtonpost.com/archive/politics/2001/07/04/european-union-kills-ge-deal/6df4380a-d272-4642-aced-1cf53fbb9c87/> accessed 23 January 2024.

protect competition, not competitors".[12] US congress members also accused the Commission of "using the merger-review process as a tool to protect and promote European industry at the expense of US competitors". Economists, equally criticized the move, with statements such as: "When evaluating a merger, United States antitrust officials tend to focus on the benefits to consumers, while European regulators give substantial weight to the impact on competitors, especially if they are 'national champions'."[13] This case was not an isolated one and there have been many cases in which the EU has denied merger permission for US companies and caused outrage in the US.[14] Most recently, the EU Commission decided on the *Illumina/Grail* merger case in September 2022.[15] Both Illumina Inc. and Grail LLC are American companies, with Grail not active whatsoever in the EU.[16] They did not notify the European Commission or any of the EU Member States, as the relevant financial thresholds for notification relating to turnover were not exceeded. This, however, did not stop the European Commission from seizing jurisdiction with the help of France, which itself did not have jurisdiction over the company's merger deal either, and not only denying the merger between the two US firms with no EU activity whatsoever, but also imposing a fine of $476 million on Illumina for closing the deal with Grail without prior notification.[17] This decision was heavily criticized, for instance, by the US Chamber of Commerce, for purportedly going against international law, particularly the effects doctrine, as well as principles of legal certainty and good administration.[18] An appeal to the GC (the EU court of first instance) did not yield

[12] John R Wilke, 'U.S. Antitrust Chief Chides EU For Rejecting Merger Proposal' Wall Street Journal (5 July 2001) <https://www.wsj.com/articles/SB994828227597056929> accessed 5 February 2024.
[13] Hal R Varian, 'Economic Scene; In Europe, G.E. and Honeywell Ran Afoul of 19th-Century Thinking.' (*The New York Times*, 28 June 2001) <https://www.nytimes.com/2001/06/28/business/economic-scene-in-europe-ge-and-honeywell-ran-afoul-of-19thcentury.html> accessed 5 February 2024.
[14] These are examined in section 4.2
[15] Commission Press Release, 'Mergers: Commission Prohibits Acquisition of GRAIL by Illumina' <https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_22_5364/IP_22_5364_EN.pdf> accessed 5 March 2024.
[16] U.S. Chamber of Commerce and others, 'The EU's Significant Extraterritorial Expansion of Its Merger Control Regime Threatens Harm to National Governments, Consumers, and Businesses Both in and Outside of Europe' <https://www.uschamber.com/assets/documents/Article-22-Paper-FINAL-2-10-23.pdf> accessed 19 November 2024.
[17] Foo Yun Chee, 'Illumina Hit with Record $476 Million EU Antitrust Fine over Grail Deal' *Reuters* (14 July 2023) <https://www.reuters.com/markets/deals/eu-regulators-fine-illumina-476-mln-closing-grail-deal-without-green-light-2023-07-12/> accessed 5 March 2024.
[18] U.S. Chamber of Commerce and others (n 16).

success for Illumina.[19] This latest case joins the already existing ones and can be seen as going even further, considering the EU exercised jurisdiction over two companies that seemingly had no connecting factors within the EU and did not affect the EU internal market.

1.2. Research Question

This question remains on what can be done to solve or mitigate this issue of political tensions resulting largely from overstepping jurisdictional competence. Therefore, this paper will answer the research question: *"How can the supposed political tensions that exist between the EU and the US resulting from the alleged competence creep[20] by the EU on issues related to mergers and acquisitions be mitigated through alternative legal design and the application of a more holistic understanding of their current situation?"*

1.3. Structure and Methodology

In order to answer the research question, Section 2 will examine the EU legal framework on mergers to showcase the Union's reach and decision making in merger control. Section 3 will subsequently analyse the federal US merger framework to illustrate the differences between the systems. This is necessary to show how diverging decisions can be reached and provides a frame of reference for the exercise of competences by the jurisdictions. Section 4 will examine the various legal and political issues that arise and lead to tensions. Section 5 will assess four possible solutions that can possibly be employed to mitigate the issue. Section 6 will conclude the paper.

This paper takes an interdisciplinary approach, combining legal elements, such as the legal merger frameworks with political science elements, due to the political nature of merger control[21] and US-EU relations. There are various

[19] Shearman & Sterling, 'General Court Decision in Illumina / Grail Vindicates Commission's Article 22 Referral Policy' *Shearman & Sterling LLP* <https://www.shearman.com/en/perspectives/2022/07/general-court-decision-in-illumina--grail-vindicates-commission-article-22-referral-policy> accessed 20 February 2024.

[20] The term "competence creep" in this context means the slow increase of jurisdiction on merger regulation competence.

[21] David J Gerber, 'Competition Law and Antitrust: A Global Guide' (Oxford University Press 2020) 79 <https://academic.oup.com/book/33439> accessed 8 January 2024; Brian Ikejiaku and

methodological approaches which will be employed to answer the research question, these being doctrinal, comparative, and normative in nature. First, a doctrinal overview will be provided in Sections 2 and 3 comprising the EU and US merger frameworks. It will also be used in Section 5 when examining the current merger treaty framework between the US and EU. Doctrinal research is the most common methodology, which focuses on the specific state of the law, asking the question of what the law is.[22] The sources used will therefore mostly be statutes,[23] treaties, case law and guidelines. The doctrinal approach is necessary to provide the foundations for the other methodologies as they build on the doctrinal research. Secondly, the comparative element will be used, mainly in Section 3, in which the EU and US merger frameworks are compared to each other. This allows for an understanding of how conflicts between the two legal systems can arise, both through reaching different decisions, as well as through the conceptions of competence in the field of merger control. Thirdly, the normative element will be applied. The normative approach entails the evaluation of a law and can allow for solutions to be proposed.[24] This especially can be seen in Section 5 in which the possible solutions will be examined. Statistical evidence, newspaper articles and other sources will be used throughout the paper, where necessary.

2. EU SYSTEM FOR M&A

2.1. INTRODUCTION

The topic of mergers in the EU has been rife with controversy and jurisdictional disputes since before the Commission formally had the competence to regulate mergers. The Member States in drafting the EU treaties sought to retain this competence and did not allow the EU to govern this area, as there were disagreements on the border between EU and national merger control, as well as

Cornelia Dayao, 'Competition Law as an Instrument of Protectionist Policy: Comparative Analysis of the EU and the US' (2021) 36(1) Utrecht Journal of International and European Law pp.75-94, p. 76.

[22] Jack Fox-Williams, 'Doctrinal Legal Research: What Does It Entail and Is It Still Relevant to Law?' (Social Science Research Network, 2 January 2016) p. 1 <https://papers.ssrn.com/abstract=3309266> accessed 12 November 2024.

[23] Statutes examined are the EU Merger Regulation (EUMR), the Sherman Antitrust Act 1890, The Federal Trade Commission Act 1914 and others.

[24] Sanne Taekema, 'Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice' (*Social Science Research Network*, 14 February 2018) p. 2 <https://papers.ssrn.com/abstract=3123667> accessed 12 November 2024.

the precise form EU merger control should take.[25] Differing national interests in this highly politicized area of the law made any consensus difficult.[26] For these reasons, there is no article in *Treaty on the European Union* (TEU),[27] or the *Treaty on the Functioning of the European Union* (TFEU)[28] on mergers, unlike for the rest of EU competition law found in Articles 101-109 TFEU. However, as early as 1973 the Commission sought to acquire this competence though a proposal,[29] and further began to apply other tools of competition law to merger situations, such as Article 102 TFEU on abuse of a dominant market position in *Continental Can*.[30] Later on Article 101 TFEU on agreements, decisions and concerted practices was used to this effect in the *BAT* case.[31] After the CJEU strongly implied that Article 101 TFEU could be used in this way by the Commission in *BAT*, the control of mergers by the Commission on this basis commenced, leading to mergers being prohibited despite competition authorities of Member States allowing the merger to occur. This led to the need for clarification on the Commission's and Member State's jurisdiction, leading to negotiations in 1988[32] and finally the adoption of *Regulation 4064/89*[33] in 1989, the first EU merger instrument. *Regulation 4064/89* has gone through changes, and the current regime since 2004 that applies to mergers is *Regulation 139/2004* (EUMR).[34] At face value, it would therefore seem as though the EU forced the hand of the Member States to create a merger instrument despite their desire to keep mergers matters of national law.

[25] Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (Seventh edition, Oxford University Press 2020) p. 1122.
[26] Ethan Schwartz, 'Politics as Usual: The History of European Community Merger Control' (1993) 18 Yale Journal of International Law 607, p. 625.
[27] Consolidated version of the Treaty on European Union 2016.
[28] Consolidated version of the Treaty on the Functioning of the European Union 2016.
[29] Commission 'Proposal for a Regulation (EEC) of the Council of Ministers on the Control of Concentrations Between Undertakings' COM (73) 1210.
[30] Case 6-72 *Europemballage Corporation and Continental Can Company Inc v Commission of the European Communities* [1973] ECLI:EU:C:1973:22.
[31] Joined cases 142 and 156/84 *British-American Tobacco Company Ltd and R J Reynolds Industries Inc v Commission of the European Communities* [1987] ECLI:EU:C:1987:490.
[32] Schwartz (n 25) pp. 642–643.
[33] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings 1989 (OJ L 395/1).
[34] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) 2004 (OJ L 24/1).

2.2. BASIC FRAMEWORK

2.2.1. Concentrations

The aforementioned EUMR applies to concentrations. Article 3 (1) defines a concentration as a change of control on a lasting basis resulting from either the merger of independent undertakings or parts of undertakings (complete merger)[35] or the acquisition of control of whole or parts of one or more undertakings (change of control).[36] Control can be achieved in a number of ways. The possibility of exercising decisive influence is paramount in this regard.[37] Control has been established even where the number of shares purchased was below 40%.[38]

Concentrations can also take the form of a joint venture, if they perform, on a lasting basis, all functions of an autonomous economic entity (Full Function Joint Ventures).[39] Joint ventures are undertakings jointly controlled by two or more other undertakings. They are used in a variety of operations, such as for research, distribution or merger-like operations.[40]As cooperation of competitive undertakings can cause problems and is viewed as a cartel agreement,[41] joint ventures that have as their object or effect the coordination of competitive behaviour of independent undertakings, the joint venture is assessed by the Commission on the basis of the treaty articles on cartel agreements (art. 101 TFEU).[42] The Commission will assess whether the parent companies are active on the same markets, or related ones, as well as whether joint venture can enable the undertakings to eliminate competition.[43] If they deem that the joint venture is anti-

[35] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) 2004 (OJ L 24/1), art. 3 (1)(a); Craig and de Búrca (n 25) p. 1125.
[36] ibid p. 1125.
[37] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24/1) art. 3 (2).
[38] Case IV/M25 *Arjomari-Prioux SA / Wiggins Teape Appleton plc* [1991] 4 CMLR 854.
[39] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24/1) art. 3 (4).
[40] Commission 'Notice on the concept of full-function joint ventures under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings' [1998] OJ C66/1, para. 3; Craig and de Búrca (n 25) p. 1126.
[41] Cartel agreements are broadly speaking agreements between competitors that aim to fix prices, restrict output, rig bids or share markets.
[42] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24/1) art. 2 (4).
[43] ibid art. 2 (5).

competitive, it will be declared incompatible with the internal market and the joint venture cannot be undertaken.

2.2.2. EU Jurisdiction

Another element aside from concentration that must be considered for the EU Merger framework to apply is that the concentration must have "Community Dimension".[44] This is the case where the combined aggregate world-wide turnover of all undertakings concerned is over 5000 million euros and the aggregate EU-wide turnover is more than 250 million, unless each undertaking achieves more than two thirds of its EU-wide turnover in the same Member State.[45] Failing this, the community dimension is still deemed to exist where a) the aggregate world-wide turnover is more than 2500 million euros, b) in each of at least three Member States, the combined aggregate turnover of all undertakings is more than 100 million euros, c) in each of these Member States the aggregate turnover of at least two undertakings concerned is more than 25 million euros, and d) the aggregate EU-wide turnover of at least two of the undertakings is more than 100 million euros.[46] Smaller mergers can often fall to the competition authorities of the Member States. Larger mergers that do have community dimension are generally ones for which the EU lacks jurisdiction, due to the companies operating abroad outside of the EU or in individual Member States. The community dimension requirement is therefore instrumental in constraining the EU's jurisdiction to act, as a link between the undertakings wishing to merge and the EU must be established. Even with the community dimension lacking, Member States or the parties can request to refer the case to the Commission.[47] This is prescribed by Article 22 EUMR and often referred to as the "*Dutch Clause".* It can be beneficial to use this procedure, due to the one-stop-shop mechanism, allowing the EU to assess the merger as opposed to various national authorities.[48] The opposite exists

[44] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24/1), art. 1 (1).
[45] ibid art. 1 (2).
[46] ibid art. 1 (3).
[47] ibid art. 22, 4 (5).
[48] Commission Notice on Case Referral in respect of concentrations 2005 (OJ C56/02) paras. 11–12.

as well, whereby the case is referred to a Member State by the Commission (the *German Clause*).[49]

2.2.3. Notification and Investigation

If these requirements are met, the concentration must be notified to the Commission prior to implementation.[50] The concentration cannot be completed until after the investigation by the Commission as well as a positive outcome as a conclusion; the Commission declaring the concentration compatible with the internal market.[51] Failure to adhere to these waiting requirements can lead to hefty fines.[52]

The Commission investigation is split into two stages. For the first stage under Article 6 (1) EUMR, the Commission has 25 days under normal circumstances.[53] In this stage, the Commission can decide that the concentration does not fall within the scope of the regulation, that it is not incompatible with the internal market or that there are serious doubts as to compatibility.

The second stage is one of further investigation into concentrations where there are serious doubts about their compatibility with the internal market. These doubts arise in situations where the Commission believes that the merger is likely to adversely affect competition, for instance through the creation or strengthening of a dominant position or where a joint venture would not contribute to improving efficiency, distribution, production or research while allowing consumers to have a fair share of the resulting benefit, as required under Article 101 (3) TFEU in order for the agreement to not be incompatible with the internal market.[54] For this second stage, the Commission generally has 90 working days from initiation of proceedings.[55]

The substantive test performed to determine if the merger can occur is one of market dominance. For joint ventures, an assessment based on Article 101

[49] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24/1) arts 9, 4(4).
[50] ibid art. 4 (1).
[51] ibid art. 6 (1) (b), 7 (1).
[52] ibid art. 14.
[53] ibid art. 10 (1).
[54] ibid art. 8 (3); Craig and de Búrca (n 25) p. 1132.
[55] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24/1) art. 10 (3).

TFEU on cartels is used instead of one of dominance.[56] A full test in this regard is carried out, except for situations in which the simplified procedure can be used. The simplified procedure is envisioned for cases in which the concentration is generally not likely to raise competition concerns.[57]

For the standard investigation procedure for mergers, however, a market test on dominance is performed to assess the possible effects the merger would have. This includes many factors similar to Article 102 TFEU, such as defining relevant geographic and product markets. The Commission therefore refers to decisions taken under Article 102 TFEU as well as the notice on definition of the relevant market.[58] However, based on the wording of Article 2 (3) EUMR, it is apparent that a concentration can be found to significantly impede effective competition and thus be declared incompatible without creating or strengthening a dominant position. The factors included in such an assessment differ between horizontal and vertical mergers, with horizontal mergers seen as creating a greater risk to competition.[59] For horizontal mergers, factors included by the Commission in their binding[60] guideline on the assessment of horizontal mergers[61] are as follows: market share size of the merging undertakings, competitive relationship between them, ease of customers in switching to other suppliers, ability of the merged entity to hinder competitors' expansion, and whether the merger eliminated an important competitive force.[62]

One factor that the Commission can use to determine concentration level on the market is the Herfindahl-Hirschman Index (HHI), calculated by squaring the individual market shares of all firms in the market and adding these values together.[63] If the HHI is below 1000, there is generally no issue and no extensive

[56] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24/1) art. 2 (4).
[57] Commission Notice on a simplified treatment for certain concentrations under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings 2023/C 160/01, para 1.
[58] Craig and de Búrca (n 25) p. 1133.
[59] This is due to the fact that they are between actors on the same level, such as competitors. On the other hand, horizontal mergers, that are between actors on different levels, such as between a distributor and supplier, meaning that the actors are not directly in competition with each other.
[60] Case T-282/06 *Sun Chemical Group and Others v Commission of the European Communities* [2007] ECLI:EU:T:2007:203.
[61] Commission 'Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings' 2004/C 31/03.
[62] ibid pp. 27–38.
[63] ibid p. 16.

analysis is performed.[64] Up to 2000 in combination with a change in HHI values (delta) of under 250 is also usually not an issue, unless the merger has certain listed characteristics, such as a merging party having a pre-merger market share of 50% or more, or there were indications of coordination between the undertakings.[65]

These factors are used to assess whether one of the two possibilities of significantly impeding effective competition will arise. The first is whether important competitive constraints would be eliminated leading to increased market power, but without resorting to coordinated behaviour (*non-coordinated effects).* This essentially means creating or strengthening a dominant position.[66] The second is whether by changing the nature of competition through the merger a higher risk of coordination of competitive behaviour would arise (*coordinated effects*).[67]

2.2.4. Defences and Conclusion

Undertakings that would not be allowed to have a concentration due to these factors can still invoke various defences as to why the concentration should still be allowed. One of these is the efficiency defence. If the concentration results in efficiencies that counteract the effects on competition, in particular the potential harm that consumers would suffer, the concentration does not significantly impede effective competition.[68] For this to be applicable, the efficiency claims must be verifiable by the commission to a reasonably certain extent, efficiencies should arise directly as a result of the merger, and they should benefit consumers where anti-competitive effects could otherwise arise.[69] The second possible defence is the failing firm defence. If one of the merging parties is a failing firm, meaning that in absence of the merger, the competitive structure of the market would deteriorate to at least the same extent as if the merger were to occur, it can

[64] Commission 'Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings' 2004/C 31/03, p. 19.
[65] ibid para 20.
[66] ibid arts. 24, 25.
[67] ibid art. 22.
[68] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) ((OJ L 24/1) No. 29 (preamble).
[69] Commission 'Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings' 2004/C 31/03, paras. 76–88.

nevertheless be allowed.[70] Lastly, if entry to the market is sufficiently easy a merger will likely not pose a significant anti-competitive risk.[71]

To conclude this section, the EUMR requires a concentration to be notified to the Commission when it is of a certain size and the EU has jurisdiction. The EU generally has jurisdiction, when the "community dimension" financial thresholds are fulfilled. After notification, the Commission examines the proposed merger for compatibility with the internal market and reaches a decision.

3. US SYSTEM FOR M&A

3.1. INTRODUCTION TO THE US M&A SYSTEM

The United States was the first country to institute competition laws, with the *Sherman Act*[72] in 1890.[73] *The Sherman Act* was however aimed at cartels, seemingly leaving mergers out of its scope. Unlike the CJEU, the US Supreme Court did not allow the provisions meant for cartels to be used in situations of mergers.[74] This stance shifted somewhat in the political and of great public interest *Northern Securities* case,[75] in which a 5-4 decision in the Supreme Court held the merger for unlawful and thereby brought down a holding company of the three major US railroad companies.

While initially *Northern Securities*' efficacy was questioned due to further cases being lost by the United States, the US managed to secure three further victories against enormous industrial consolidations in 1911, one of these being the *American Tobacco* case,[76] in which one company controlled 95% of the cigarette market and subsequently severely abused their dominant position to demolish small competitors. Shortly after this, in 1914, the Clayton Act[77] was passed, Section 7 of which was an anti-merger provision, forbidding mergers with

[70] Commission 'Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings' 2004/C 31/03, para. 89.
[71] ibid para. 68.
[72] Sherman Antitrust Act 1890 (15, USC §§ 1-7).
[73] C Paul Rogers III, 'A Concise History of Corporate Mergers and the Antitrust Laws in the United States' (2012) 24 National Law School of India Review 10, p. 10.
[74] United States v. E.C. Knight & Co. 156 U.S. 1 (1895).
[75] Northern Securities Co v United States 193 U.S. 197 (1904).
[76] American Tobacco Co v United States [1946] 328 U.S. 781 (1946)
[77] Clayton Antitrust Act 1914 (15 USC §§ 12-27, 29, 52-53).

a substantial likelihood of decreasing competition. Simultaneously, the Federal Trade Commission (FTC) Act,[78] creating the FTC,[79] was also passed.

Similar to the EU therefore, it can be seen that a specific merger competence emerged shortly after the highest court interpreted existing anti-cartel powers broadly. The difference is, however, that the US Supreme Court was much more reserved, adopting the rule of reason standard,[80] thereby arising concern that US authorities could only challenge mergers that resulted in actual anti-competitive practices. In the *U.S. Steel* case[81] in 1920, the Supreme Court decided that the defendant, with a market share of 50% (previously between 80 and 90%) at the time the suit was brought, had not violated the rule of reason, as they had not engaged in anti-competitive practices. Similar to the EU's initial regulation on mergers, Section 7 of the *Clayton Act* has been amended.[82]

3.2. Basic Framework

3.2.1. Merger Framework

The substantive part of the US legal framework on mergers essentially consists of the legislation mentioned in the previous section, including the *Sherman Act* (amended) Section 7 of the Clayton Act, the FTC Act, as well as the DOJ and FTC merger guidelines and joint venture guideline. In particular instances, other statutes, such as when other federal agencies have a say in the merger, and importantly case law on the interpretation of Section 7 of the Clayton Act, which is binding due to the stare decisis principle applicable in common law jurisdictions. In essence, Section 7 of the *Clayton Act* (15 U.S. Code § 18) forbids any person engaged in commerce or in any activity affecting commerce from acquiring stock, other share capital or assets of another also engaged in commerce or an activity affecting commerce, where the effect may be "to substantially lessen competition or to tend to create a monopoly." While the term "concentration" is not used, as it is under EU mergers law, the same types of activities are targeted, including

[78] Federal Trade Commission Act 1914 (15 USC 41 et seq).
[79] The Federal Trade Commission (FTC) is an agency of the U.S. government entrusted with the enforcement of antitrust law.
[80] The rule of reason standard requires a finding of illegality to be based on reasonableness, taking all relevant factors affecting competition into account. See 15 USC 4302.
[81] United States v United States Steel Corporation 251 US 417 (1920).
[82] Amended by the Celler-Kefauver Act 1950.

vertical, horizontal or conglomerate mergers, joint ventures and acquisitions. An assessment of which of these activities can substantially lessen competition or create a monopoly starts with the DOJ and FTC merger Guidelines. Unlike the Guidelines published by the EU Commission, these are not (even de facto) legally binding themselves,[83] still they shed light on administrative practice and are based on law. For this reason, litigated merger challenges utilise precedent, as opposed to the merger guidelines.[84]

3.2.2. US Jurisdiction

When it comes to foreign persons, US law uses the "effects doctrine" to assess the jurisdiction it can exercise.[85] This doctrine is much less straightforward and clear than the EU's approach of simply setting down certain size thresholds, even to courts, legislators and scholars when it comes to the actual application.[86] Based originally on the *Sherman Act*, the case law in this regard stems from the 1945 *United States v. Aluminium Co. of America* case and allowed the US to have jurisdiction over the conduct of companies abroad if they were intended to affect imports and affected them. This resulted in excessive jurisdiction which seemed to exceed the constraints under international law.[87] This was later refined into a three-step test in *Timberlane Lumber Co. v. Bank of America*.[88] Firstly, did the alleged act result in some effect on American foreign commerce, secondly, was the effect large enough to present a cognizable injury to the plaintiff and, thirdly, are the interests of the US sufficiently strong to justify an assertion of extraterritorial authority? Ultimately, this test was not fulfilled in *Timberlane*.

In 1982, the *Foreign Trade Antitrust Improvement Act* attempted to clarify this by granting the US jurisdiction where a conduct has direct, substantial and

[83] United States Department of Justice Office of Public Affairs, 'Justice Department and Federal Trade Commission Release 2023 Merger Guidelines' (18 December 2023) <https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-2023-merger-guidelines> accessed 16 January 2024.
[84] Douglas Broder, 'U.S. Antitrust Law and Enforcement: A Practice Introduction' (Oxford University Press 2010) p. 124 <https://mu.idm.oclc.org/login?url=https://search.ebscohost.com/login.aspx?direct=true&db=nlebk&AN=330630&site=ehost-live&scope=site> accessed 8 January 2024.
[85] The Effects Doctrine under US law and international law are not identical.
[86] Zia Akhtar, 'Mergers, Extraterritorial Jurisdiction and Convergence of EU and US Law' (2019) 27 European Review of Private Law 59, p. 68.
[87] ibid p. 65.
[88] Timberlane Lumber Co v Bank of America T.2d 597 (1977).

reasonably foreseeable effects on exports (not including imports).[89] Later in 1987, the US Restatement stressed the importance of comity, clarifying that where foreign interests outweigh US interests, the US should not have jurisdiction.[90] This marks an important difference between EU extraterritorial and US extraterritorial jurisdiction, as the EU will claim jurisdiction irrespective of foreign interests or stronger ties to foreign systems than its own.

3.2.3. Market Investigation

Two separate market components exist, product and geographic markets.[91] This stems from the *Brown Shoe* case.[92] Regarding the product market, the guidelines incorporate many of the clarifications of the *Brown Shoe* case, but also expand on them, such as by prescribing a SSNIP test: whether hypothetical profit-maximizing firm would undertake a small but significant and non-transitory increase in price (SSNIP) for at least one of their products.[93] Other factors can be used as well, such as direct evidence of substantial competition between merging parties, evidence of exercise of market power, and practical indicia such as public perception. This is similar to the EU's analysis, in that the same test and considerations are used. As for the geographic market, both *Brown Shoe* and the merger guidelines indicate that factors such as shipping costs and normal shipping distances can be used to determine this. Assessing market participants includes looking to firms very likely to enter the market in a short amount of time. This can often include identifying firms active in the relevant market, meaning those that currently supply products on the market and those that would those that are active in the relevant product market, but not (yet) in the geographic market.[94]

As in the EU, the HHI index is subsequently employed to determine the effect of the proposed merger on concentration in the market. However, the values are different under the FTC and DOJ's Guidelines *vis-à-vis* those of the European Commission. An HHI of more than 1,800 of the post-merged firm is highly

[89] Zia Akhtar (n 86) p. 67.
[90] Akhtar (n 86) p. 68.
[91] 'Merger Guidelines U.S. Department of Justice and the Federal Trade Commission' p. 40 <https://www.ftc.gov/system/files/ftc_gov/pdf/P234000-NEW-MERGER-GUIDELINES.pdf> accessed 16 January 2024.
[92] *B*rown Shoe Co, Inc v United States 370 U.S. 294 (1962).
[93] 'Merger Guidelines U.S. Department of Justice and the Federal Trade Commission' (n 91) pp. 41-43.
[94] 'Merger Guidelines U.S. Department of Justice and the Federal Trade Commission' (n 91) p. 49.

concentrated with a delta of over 100 points being considered significant.[95] The same is the case when the market share is greater than 30% and the HHI delta is over 100. This being the case does not automatically mean that the merger will substantially lessen competition or create a monopoly, however it means that there is an indication of illegality which can be rebutted.[96] Despite a proposed merger "failing" the HHI test, various mitigating factors can be invoked to escape agency challenge. These include ease of entry into the market, efficiency, likely business failure of a party, customer bargaining power, and so forth.

3.2.4. Notification, Procedure and Conclusion

As in the EU, proposed mergers must often be reported. This is due to the *Hart-Scott-Rodino Antitrust Improvements Act of 1976* (*HSR Act*).[97] Parties to a proposed merger are prohibited from completing mergers, acquisitions or securities of assets until they have filed this with the FTC and DOJ. The agencies will assess whether the proposed transaction will negatively impact US commerce under the applicable antitrust laws (the *Sherman Act*). The waiting period for parties is generally 30 days. Not all proposed transactions are, however, under this reporting requirement, as small transactions are unlikely to affect commerce. Therefore, for the *HSR Act* to apply, three tests must be satisfied. These are the commerce test,[98] the size of transaction test, and the size of person test.[99] The commerce test is fulfilled as long as either party is engaged in commerce or in an activity affecting commerce.

The size of transaction test is fulfilled insofar as the transaction is valued at more than $50 million (as adjusted, now 111.4 million as of 27 February 2023).[100] If this test is fulfilled, but the transaction is equal to or less than $200

[95] 'Merger Guidelines U.S. Department of Justice and the Federal Trade Commission' p. 5.
[96] ibid pp. 5–6.
[97] Hart-Scott-Rodino Antitrust Improvements Act 1976 (15 U.S.C. § 18a).
[98] FTC Premerger Notification Office, Introductory Guide II: To File or Not to File When You Must File a Premerger Notification Report Form (2008) p. 2 <https://www.ftc.gov/sites/default/files/attachments/premerger-introductory-guides/guide2.pdf>.; See 15 U.S.C § 18a (a) (1).
[99] FTC Premerger Notification Office, Introductory Guide II: To File or Not to File When You Must File a Premerger Notification Report Form (2008) p. 2 <https://www.ftc.gov/sites/default/files/attachments/premerger-introductory-guides/guide2.pdf>.; See 15 U.S.C § 18a (a) (2).
[100] Federal Trade Commission, 'Revised Jurisdictional Thresholds' (*Federal Register,* 26 January 2023) <https://www.federalregister.gov/documents/2023/01/26/2023-01533/revised-jurisdictional-thresholds> accessed 18 January 2024.

million (as adjusted, now 445.5 million.), only transactions that also meet the size of person test require a filing. Transactions over this threshold must be filed irrespective of the size of person test. The size of person test is met when at least one of the persons involved has $100 million (as adjusted, now 222.7 million) in annual net sales or total assets, and the other has $10 million or more (as adjusted, now 22.3). If the acquired person is not engaged in manufacturing, only the total assets are considered for this test. Exemptions to filing requirements also apply, meaning that even if these tests are met no filing is needed. These relate to transactions unlikely to violate antitrust law, such as stock splits that do not increase percentages owned by any person, acquisitions in the ordinary course of business or acquisitions of additional voting securities by persons already holding 50% of the voting shares. To conclude this section, the US authorities, in particular the FTC and DOJ assess mergers in a similar manner as the European Commission, using the same market distinctions and index to measure concentration. Notification is required when specific tests are fulfilled, mainly relating to the size of the transaction and person. As for jurisdiction over foreign persons, the US uses the somewhat unclear "effects doctrine" which encompasses the principle of comity, in contrast to the EU.

4. General Differences, Tensions, Criticism, and the EU Exceeding Competence

4.1. General Differences

The previous section has shown that there are many similarities shared by the EU and US systems, such as the use of the HHI index and the division of markets. Similar defences, such as efficiencies can also be invoked. As well as similarities, there are also various differences between the systems as seen as well in the previous section. There are also less apparent differences. One difference that can lead to divergence between the two systems is the focus that they have when doing their analyses. The DOJ and FTC focus mainly on the actual effects that a merger will have on consumers, while the EU focuses more on the effects the merger will

have on competition itself[101] and their analysis is often more abstract and speculative, leading ultimately to a stricter system than in the US.

Another fundamental difference between US and EU merger law is its nature. US law follows a more bottom-up approach, as cases are derived from litigants' arguments (generally US antitrust agencies and private firms). The statutes, such as Section 7 of the *Clayton Act* are brief and open-ended (especially compared with the EUMR), and the interpretative guidelines on practice are not binding law. The EU, on the other hand, is more centralized,[102] as the European Commission's Directorate General for Competition has much de facto discretion over enforcement, and the guidelines created by the Commission are binding. In litigation, the Court will generally assess whether the Commission has followed its own guidelines. The European approach can, therefore, be seen as more political due to this more consolidated power.[103] This has facilitated tensions related to alleged protectionism.

4.2. Tensions and Protectionism

In view of the Commission discretion and political element of merger control under EU law, it is worth noting that the Commission has repeatedly been accused of using their discretion for protectionism, most notably by US critics. Protectionism in this case entails using merger control powers to put domestic firms at an advantage as compared to foreign firms than would occur on a level regulatory playing field. This protectionism critique partly stems from the fact that the Commission has often prohibited high-profile mergers involving non-EU undertakings, that were allowed by the competition authority in the place where the undertakings were registered and incorporated.

In one of the first of these decisions, the 1991 *de Havilland* decision,[104] an acquisition by an Italian/French aerospace engineering company of a Canadian

[101] Dirk Auer, Geoffrey A Manne and Sam Bowman, 'Should Asean Antitrust Laws Emulate European Competition Policy?' (2022) 67 Singapore Economic Review 1637, p. 1650; Sam Bowman, Geoffrey Manne, Dirk Auer, 'How US and EU Competition Law Differ' (*Truth on the Market*, 9 August 2021) <https://truthonthemarket.com/2021/08/09/how-us-and-eu-competition-law-differ/> accessed 8 January 2024.
[102] Auer, Manne and Bowman 2022 (n 101) 1690.
[103] Bowman, Manne, Dirk Auer 2021 (n 101).
[104] Commission Decision 91/619/EEC of 2 October 1991 declaring the incompatibility with the common market of a concentration (Case No IV/M.053 - Aerospatiale- Alenia/de Havilland) [1991] (OJ L 334/59).

subsidy of Boeing was denied based on the consideration that the company would attain an advantage in managing currency fluctuations over its European competitors, which would result in them being driven from the market.[105] Despite the clear protection of two particular European rivals over Canadian interests (with the Canadian government pushing for merger approval), this decision is not one of the most controversial ones regarding protectionism. The better known and more controversial decision, *Boeing/McDonnell Douglas*, from 1997 involved two US companies active in aircraft markets, both for commercial and defence purposes.[106] The EU voiced concerns, stating that the concentration was anti-competitive due partly to a large market share acquisition.[107] This involvement of the EU caused protest from US officials and members of the general public, with US senator Slade Gorton stating: "I am outraged that Europeans are asserting anti-trust authority in an extraterritorial manner where there is no relevance other than the fact that we sell airplanes on their market".[108] After pressure from the US related to American national interests, especially regarding defence,[109] and after securing a large number of commitments on *inter alia* licensing patent rights and refraining from a range of certain actions that could lead to damage to competitors, the EU finally gave in, approving the merger.[110] Probably the best known and most controversial of these cases is the 2001 attempted merger between General Electric and Honeywell,[111] two American companies.[112] As mentioned in Section 1, this Commission decision resulted in notable high ranking US government officials calling the Commission "autocratic", the decision "off the wall,"[113] as well as

[105] Commission Decision 91/619/EEC of 2 October 1991 declaring the incompatibility with the common market of a concentration (Case No IV/M.053 - Aerospatiale- Alenia/de Havilland) [1991] (OJ L 334/59), paras. 6-69, 72.
[106] Brian Peck, 'Extraterritorial Application of Antitrust Laws and the U.S.-EU Dispute over the Boeing and McDonnell Douglas Merger: From Comity to Conflict--An Argument for a Binding International Agreement on Antitrust Enforcement and Dispute Resolution Comments' (1998) 35 San Diego Law Review 1163, p. 1167.
[107] 'EU Objects to Boeing Deal' (*CNN Money,* 22 May 1997) <https://money.cnn.com/1997/05/22/deals/eu_boeing/> accessed 6 February 2024.
[108] Peck (n 106) p. 1166.
[109] *Case No IV/M877 - Boeing/McDonnel Douglass* [1997] European Commission C(97) 2598 final [12].
[110] *Case No IV/M.877 - Boeing/McDonnel Douglass* (n 109).
[111] Commission Decision 2004/134/EC of 3 July 2001 declaring a concentration to be incompatible with the common market and the EEA Agreement (Case COMP/M.2220 — General Electric/Honeywell) [2001] OJ L 48/1.
[112] *2004/134/EC* (n 7) para. 1.
[113] Drozdiak (n 11).

stating that the Commission was "using the merger-review process as a tool to protect and promote European industry at the expense of US competitors."

Decisions such as the aforementioned three, in which tensions were created between the EU and other states, most notably the US, have occurred often. Further examples of either prohibited mergers between US companies or ones requiring major restructuring are MCI WorldCom, Time Warner and UPS.[114] Criticisms of unfair EU protectionism in the field of merger competence do not always derive from particular cases either. An example is specific authors putting forward the idea that Commission President Ursula von der Leyen implicitly requested that Commissioner for Competition, Margrethe Vestager, change "EU merger control rules to facilitate the creation of 'European champions'".[115] This line of argumentation, however, does not seem to be convincing and there is no real evidence that this was the case.

It is worth noting that despite undeniable transatlantic tensions occurring in cases where the EU denies merger approval for primarily US companies, empirical studies generally point to a lack of (at least systemic) protectionist tendencies in EU merger control, despite some mixed results. A 2018 study encompassing more than 5,000 mergers between 1990 and 2014 found no evidence of systematic use of authority for protectionist ends.[116]

4.3. Tensions and Overstepping Competence

While protectionism may or may not exist in specific cases, this is not the only criticism or point of contention between the EU and other stakeholders such as the US regarding mergers. Recently, there has been major controversy regarding the EU's merger control jurisdiction, in particular relating to the "*Dutch clause*" in the EUMR (Article 22), which allows for the national competition authorities of the Member States to refer a case to the Commission to assess, despite the "community dimension" threshold not being fulfilled.

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[114] Anu Bradford, Robert J Jackson Jr, and Jonathon Zytnick, 'Is EU Merger Control Used for Protectionism? An Empirical Analysis' [2018] 15 Journal of Empirical Legal Studies.
[115] Kyriakos Fountoukakos, Fafni Katrana, Agathe Célarié, 'European Union: Merger Control' (Europe, Middle East and Africa Antitrust Review 2021, 8 July 2020) <https://globalcompetitionreview.com/review/the-european-middle-east-and-african-antitrust-review/2021/article/european-union-merger-control> accessed 6 February 2024.
[116] Anu Bradford, Robert J Jackson Jr, and Jonathon Zytnick, 'Is EU Merger Control Used for Protectionism? An Empirical Analysis' [2018] 15 Journal of Empirical Legal Studies, p. 165.

This controversy surrounds the *Illumina/Grail* merger case. Illumina Inc. is an American company specializing in genomic sequencing which develops, markets, and manufactures integrated systems for genetic analysis. This includes sequencers used for cancer screening tests. Grail LLC is also an American company, and it relies on genomic sequencing for development of cancer screening tests.[117] Illumina held a 14.5% of the shares in Grail and on the 20 September 2020, the two companies agreed that Illumina would acquire sole control of Grail. This decision was published in a press release the next day.[118] In late March 2021, the FTC decided to challenge the proposed merger, stating that the deal would diminish innovation, increase price, and decrease choice and quality in the market for multi-cancer early detection tests.[119]

There was no specific pre-merger notification on the other side of the Atlantic, as both companies did not generate sufficient revenue in any EU Member State, with Grail in particular not generating any revenue whatsoever within the EU, meaning that the community dimension was not fulfilled.[120] The scopes of national merger control rules were also not fulfilled, so no notification took place in any EU Member State either.[121]

Despite this being a wholly US affair, with neither of the merging parties having any connecting factors to the EU, the Commission invited Member States to submit a referral request in accordance with Article 22 (1) EUMR. This entailed explaining why the Member State thought that the concentration satisfied the conditions of that Article, these being that it affects trade between Member States and threatens significantly to affect competition in the territory of the Member State concerned. Acting on this, the French Competition Authority (*Autorité de la concurrence française*/ ATF) referred the matter to the Commission on 9 March 2021.[122]

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[117] Court of Justice of the European Union, 'The General Court Upholds the Decisions of the Commission Accepting a Referral Request from France, as Joined by Other Member States, Asking It to Assess the Proposed Acquisition of Grail by Illumina' (Luxembourg, 13 July 2022) <https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-07/cp220123en.pdf>.
[118] Case T-227/21 '*Illumina*, *Inc* v *European Commission* [2022] ECLI:EU:T:2022:447, paras. 6-8.
[119] Federal Trade Commission, 'Statement Regarding Illumina's Decision to Divest Grail' (18 December 2023) <https://www.ftc.gov/news-events/news/press-releases/2023/12/statement-regarding-illuminas-decision-divest-grail> accessed 16 February 2024.
[120] Case T-227/21 *Illumina*, *Inc* v *European Commission* [2022] ECLI:EU:T:2022:447, para. 9.
[121] ibid para. 10.
[122] ibid para. 14.

The Commission subsequently considered that the referral request made by the ATF fell within the time limit of 15 days set down by Article 22 (1) as the merger was not notified to it by the merging parties, therefore meaning that it has been brought to the ATF's attention by the Commission itself in its invitation letter on the 19 February 2021.[123] Further, the Commission concluded that concentration was capable of affecting trade between Member States and that the referral conditions were satisfied as the importance of the acquisition for competition is not reflected in its turnover.[124] The Commission believed that Member States can refer cases over which they themselves have no authority, as Article 22 EUMR does not explicitly require that the Member State must have jurisdiction itself to refer a case. Further, it argued that the objective was to enable the assessment of concentrations that could bring anti-competitive harm to the internal market, and a strict interpretation of the article would defeat its purpose.[125]

As for the principles of subsidiarity, proportionality, and legitimate expectations, the Commission argued that these were not infringed, and as for legal certainty, the potential adverse effects on the undertakings and the time elapsed between the announcement of the concentration and the Commission's action were overshadowed by the possible adverse effects on competition.[126] Further, the merger process could not yet be implemented anyway due to litigation in US courts, mitigating the effects of the Commission decision.[127]

Grail disagreed and brought an action for annulment against the decision, which was dismissed by the GC, which stated that the Commission was correct in its interpretation of the Article 22, marking the first time the Court ruled on the referral mechanism to a transaction that did not have to be notified to the state that made the referral.[128] In coming to the decision, the GC relied on the wording of the provision, particularly "any concentration", which it stated made clear that the Member State can refer any concentration irrespective of the scope of national merger control rules as long as it satisfies the conditions in the article itself. As for

[123] Case T-227/21 *Illumina*, *Inc* v *European Commission* [2022] ECLI:EU:T:2022:447, para. 12.
[124] ibid para. 25.
[125] ibid paras. 28–29, 34.
[126] ibid paras. 30–32.
[127] ibid paras. 33.
[128] 'The General Court Upholds the Decisions of the Commission Accepting a Referral Request from France, as Joined by Other Member States, Asking It to Assess the Proposed Acquisition of Grail by Illumina' (n 117).

the origin of the provision, while it was meant for states without their own merger control regime, it was never limited to those Member States.

As for the time limit of 15 working days, "making known" refers to the active transmission of information to the Member State. The invitation letter was in the present case "making known" meaning that the time limit was satisfied. As for the principles of legal certainty and good administration, the fact that the commission took 47 days between receiving the complaint and sending the invitation letter was deemed to be unreasonable; however, Illumina's argument on this part was still rejected as the failure on part of the Commission to comply with a reasonable time limit did not affect the ability of the undertakings concerned to effectively defend themselves.

4.3.1. Illumina/Grail Criticism

This decision has been heavily criticized by many national business associations. On February 10, 2023, the US Chamber of Commerce, as well as Czech, Danish, Estonian, Polish, and German counterparts jointly published a paper attacking the decision and claiming that it would lead to possible harm to national governments, consumers and businesses all over the world.[129]

Firstly, the decision creates jurisdiction where none previously existed. In the case at hand, the EU did not have jurisdiction per se, due to the fact that the community dimension thresholds were not met, as Illumina and Grail had no European presence. France, under its own national law also had no jurisdiction, but was somehow still able to grant the EU jurisdiction. Under international law, it is not possible to transfer jurisdiction where none exists. In relation to the decision, it is worth noting that the president of the German competition authority called the interpretation "incredibly unusual" and not easy to understand.

The reason for the lack of jurisdiction was the absence of connecting factors of the merger to Europe. States should refrain from granting themselves jurisdiction over the affairs of other states, due to equal sovereignty unless the conduct abroad effects the states territory. In general, the US effects doctrine and the EU monetary thresholds follow this doctrine by providing jurisdiction only when there is sufficient link between the concentration and state or entity in

[129] U.S. Chamber of Commerce and others (n 15).

question. By departing from this, the EU departed from international standards which are an important safeguard of legal certainty for businesses [130] and seemingly unjustly interfered in the affairs of another sovereign entity.

In the EU itself, it is also worth noting that the monetary thresholds for community dimension have even been further constrained by the effects doctrine of international law. In *Gencor Ltd. v Commission*, the court, despite the community dimension thresholds being fulfilled assessed whether the merger had immediate, substantial, and foreseeable effect on the common market.[131] This was even confirmed in 2017 in the *intel* case.[132]

Secondly, the interpretation regarding the timeframe was also criticised. The short timeframes in Article 22 serve as an important protection for parties involved. The ability for Member States to potentially indefinitely extend this time period past the envisioned 15 days seems to run counter to the purpose of the provision. Under this interpretation, parties would potentially be required to notify their merger to all 27 Member States, irrespective of whether they are actually required to do so under that state's law, in order to activate the strict time limit. Failure to notify everywhere could lead to the case being referred to the Commission by any individual Member State months or years after the transaction and a hefty fine. This certainly contravenes the one-stop-shop mechanism originally envisioned. In the *Illumina/Grail* case, the Commission invited referrals from Member States five months after the public announcement by the parties and two months after receiving the first complaint by competitors.

Thirdly, this uncertainty on notification and notification thresholds contravenes the best practices put forward by the International Competition Network (ICN), a competition authority network comprised of 141 competition authorities. The ICN and other international standards call for objective and clear thresholds and time limits. Departing from this can deter beneficial pro-competitive mergers and investments through higher risk and greater uncertainty. This decision also distances the interpretation of the article from its legislative history. Article 22 was originally intended to allow for the review of transactions

[130] U.S. Chamber of Commerce and others (n 16).
[131] Case T-102/96 *Gencor Ltd v Commission of the European Communities* [1999] ECLI:EU:T:1999:65.
[132] Case C-413/14 *Intel Corp v European Commission* [2017] ECLI:EU:C:2017:632, paras. 32–35.

affecting multiple Member States where the requesting Member State did not have a merger review system. While not limited to this, it was not meant to create jurisdiction where the requesting Member State had a merger regime but the thresholds for notification were not fulfilled. ECJ Advocate General, Nicholas Emiliou also criticized the Commission's decision to review the acquisition citing many of these criticisms and recommended that the ECJ overturn the GC's decision.[133] To conclude this section, there are various controversial cases that have been taken over the years regarding merger control. These essentially relate to cases in which the EU has declared mergers between American companies as incompatible with the internal market, despite FTC approval. This has resulted in undeniable tensions and accusations of protectionism. While the newest case, *Illumina/Grail*, also involves EU denial of a merger between US companies, it goes much further when it comes to jurisdiction and causes multiple legal issues, as well as heavy criticism from the private sector.

5. SOLUTIONS

5.1. OPTION A: DOING NOTHING AT ALL

The first option to mitigate these tensions could possibly be doing nothing at all, as it could be the case that the issue itself no longer actually exists, despite the outward appearance. While this paper included multiple quotes outlining the outrage US officials voiced regarding EU merger competence over US companies, such as during the *GE/Honeywell* and *Boeing/McDonnell Douglas* affairs, the US declined to voice discontent regarding the recent *Illumina/Grail* case. Despite the re-interpretation of Article 22 EUMR granting the EU competence to review a merger between two US companies (or any other companies in the world) being out of line with international law and practice, while also severely intruding on US affairs, far more so than the previous cases. While it can be argued that this is due to the FTC also challenging the merger with a view to prohibiting it, historically, the US still would have pushed back on procedural grounds when the EU exercised

[133] DLA Piper-Joost Haans, 'Merger Control - European Commission's Power to Review Transactions under Article 22 at Risk' (*Lexology*, 22 March 2024) <https://www.lexology.com/library/detail.aspx?g=1b25d130-439a-48b1-9a09-cba6e7a46bcc> accessed 26 March 2024.

this level of competence.[134] The question therefore arises on why the US opted for silence.

In February 2022, a *Freedom of Information Act* request was issued, with a view of ascertaining the level of cooperation between the FTC and foreign competition authorities in the *Illumina/Grail* case. While, at first, the FTC claimed that it did not have to release any documents, aside from its already-public administrative trail transcripts, a lawsuit ensued, and the FTC was compelled to publish its communications. The result was a document of over 600 pages, consisting mostly of heavily redacted emails between the FTC and EU Commission. The only information that could be gathered were some dates, pleasantries between employees, the mention of further meetings, documents and communications, and some names of FTC staff.[135] While there was not much to go on, there was still enough to draw some conclusions. The documents showed extensive correspondence with competition officials of the EU, but also the UK, Austria and France. It could also be seen that the FTC sought them out first, with no communications being initiated by the foreign counterparts. Strikingly a lot of communications took place around certain key dates, namely those at which these jurisdictions began raising questions about the merger or taking action. For instance, the Commission invited the EU Member States to refer the case on the 19th of February 2021, 3 days after the FTC had contacted the Austrian authority. The request was accepted by the Commission on April 19th, 2021, a couple of weeks after the FTC had first reached out to the ATF.[136] It is also worth noting, that the FTC deviated from standard practice of obtaining an injunction, instead using its internal administrative processes once the EU announced its intention to review the transaction, withdrawing its complaint in court.[137] This information, coupled with the failures on part of the FTC, to stop the merger from going through, lead to the conclusion that the US actively sought out the aid of foreign governments, in particular the EU, to stop the *Illumina/Grail* merger on their

[134] U.S. Chamber of Commerce, 'The FTC, Europe, and Illumina-Grail: When Cooperation Crosses the Line' 3 <https://www.uschamber.com/finance/antitrust/ftc-records-for-illumina-grail-transaction>.
[135] The Editorial Board, 'Opinion | The FTC's Antitrust Collusion' (*Wall Street Journal*, 23 February 2023) <https://www.wsj.com/articles/federal-trade-commission-antitrust-europe-emails-foia-illumina-grail-acquisition-a78e03d0> accessed 20 February 2024; 'FTC Records-Illumina-Grail' <https://www.uschamber.com/assets/documents/FTC-Records-Illumina-Grail.pdf>.
[136] 'FTC Records-Illumina-Grail' (n 135); U.S. Chamber of Commerce (n 134).
[137] U.S. Chamber of Commerce (n 134) p. 2.

behalf and in doing so denied the companies their legal rights under US law, in a manner that the US Chamber of Commerce Senior Vice President for International Regulatory Affairs and Antitrust, Sean Heather, describes as Kafkaesque.[138]

While this may signal the existence of other issues, the problem of US-EU tensions does not seem to exist at this time, as there is not only simple cooperation but even collusion. However, it is questionable whether the EU would agree to sacrifice various procedural principles and significantly expand their merger control scope, simply to help the US stop a singular merger. Neither the US, nor the EU has acknowledged any illicit collusion and there does not seem to be hard evidence, despite the criticisms of the US. Chamber of Commerce and the Editorial board of the Wall Street Journal. For this reason, the rest of this paper will assume that there was no illicit collusion, but merely regulatory cooperation in line with the previously illustrated cooperation agreements and practices. The transatlantic tensions that have been pre-supposed in this text continue to persist.

5.2. Option B: Diplomatic Option and Further Cooperation

In light of the political and legal issues regarding extraterritorial regulation, it becomes apparent how important regulatory state cooperation can be. After the *GE/Honeywell* affair, Deborah Platt Majoras, Deputy Assistant Attorney General in the DOJ antitrust division, remarked on US-EU cooperation, underlining its absolute necessity.[139] The US-EU Merger Working Group affirmed in their best practices paper, the importance of cooperation between US and EU competition agencies and its mutually beneficial nature.[140] Increasing diplomatic cooperation can therefore be a paramount, comparably less intrusive measure capable of mitigating tensions *vis-à-vis* other possibilities. This can occur through an expansion or reform of the US-EU best practices in merger affairs.

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[138] Sean Heather, 'Inside the FTC's Ploy to Quash A BioTech Merger' (10 September 2021) <https://www.uschamber.com/international/inside-the-ftc-s-ploy-quash-biotech-merger> accessed 19 March 2024.

[139] Antitrust Division U.S. Department of Justice, 'GE-Honeywell: The U.S. Decision' (United States Department of Justice 25 June 2015) <https://www.justice.gov/atr/speech/ge-honeywell-us-decision> accessed 13 March 2024.

[140] US-EU Merger Working Group, 'US-EU Merger Working Group BEST PRACTICES ON COOPERATION IN MERGER INVESTIGATIONS' <https://competition-policy.ec.europa.eu/system/files/2021-06/US-EU_cooperation-in-mergers_best_practices_2011_en.pdf>.

The current best practices have been brought to paper in the 2011 "US-EU Merger Working Group, Best Practices on Cooperation in Merger Investigations" document.[141] This text builds on the 2002 best practices document to more accurately reflect the current practices (at least at the time of drafting and publishing). It also states under which conditions US-EU cooperation in merger investigations should be conducted. The document is merely declaratory, and "Nothing in [the best practices] document is intended to modify or create any enforceable rights."[142]According to the document, a main goal in cooperation is "reaching, insofar as possible, consistent, or at least non-conflicting outcomes" for situations in which the FTC, DOJ, and the European Commission are reviewing the same merger. To reach this goal, the best practices document outlines various procedures to follow in four distinct areas: 1) Substantive communication between agencies, 2) Coordination on timing, 3) Collection and evaluation of evidence, and 4) Remedies and Settlements. These extensive cooperation practices and procedures have certainly greatly improved transatlantic merger investigations and led to fewer cases in which tensions arose.

Expanding on the procedures in this diplomatic framework alone will likely not be sufficient to mitigate tensions resulting from the EU exercising merger control on US companies. This is due to the fact that regulatory cooperation is already very close and there is not much that can be done to increase it. An example of this extensive cooperation can be seen in the documents released on communications between the FTC and Commission regarding the *Illumina/Grail* merger comprising over 600 pages and containing further references to other files and meetings. However, as it stands, while the best practices document mentions the substantive goal of achieving the same end result for merger procedures, it only sets out procedural elements. Additionally granting substantive decision-making power in certain situations to either the DOJ and FTC or the European Commission could allow the goal of reaching the same decision and thereby reducing tensions to be better achieved. This will be discussed more in depth in Section 5.4. The advantage of reforming the best practices as opposed

[141] US-EU Merger Working Group, 'US-EU Merger Working Group BEST PRACTICES ON COOPERATION IN MERGER INVESTIGATIONS' <https://competition-policy.ec.europa.eu/system/files/2021-06/US-EU_cooperation-in-mergers_best_practices_2011_en.pdf>.
[142] ibid p. 2.

to creating a binding treaty delineating competence is that it would be easier to achieve with greater political willingness, due to the formally non-binding nature of the best practices document. Violating this written document by illegitimately seizing jurisdiction where the US has preferential decision-making power would constitute an additional political hurdle and possibly prevent the EU from engaging in merger control where it can be argued that it should not. However, given that controversial cases have become increasingly rare, it is uncertain whether this approach would have a significant impact.

5.3. Option C: Further Convergence of Laws

Another option could be the further convergence of US and EU merger laws. The logic behind this approach is that if the two systems are similar enough, non-conflicting outcomes should be reached the majority of the time, resulting in the EU not prohibiting US merger of US companies when the competent US authorities had allowed them to occur. The process of legal convergence in fact seems to be happening, rapidly in the late 1990s and now much slower. In 2000, Robert Pitofsky, chairman of the FTC, commented on the introduction of the 1989 *European Community (EC) Merger Regulation* and stated that since then, there had been "substantial convergence in the method and content of merger enforcement" as well as "a remarkable improvement in coordination and cooperation". [143] This trend continued into the new century. After the *Boeing/McDonnel Douglas*, *GE/Honeywell* cases, and other controversial cases from the early 2000s and 1990s, EU policy was rethought, resulting in most mergers being evaluated similarly between the two jurisdictions.[144] These cases had been decided under the 1989 *EC Merger Regulation*, which had only had a limited role related to efficiency. The newer and current regulation emphasises a merger's possible contribution to efficiency as do the guidelines.[145] This is more in line with the US emphasis on efficiency and has likely resulted in fewer controversial cases. A 2001 green paper on merger reform in the EU also examined

[143] Federal Trade Commission, 'EU and U.S. Approaches to International Mergers--Views from the U.S. Federal Trade Commission' (Federal Trade Commission, 18 July 2013) <https://www.ftc.gov/news-events/news/speeches/eu-us-approaches-international-mergers-views-us-federal-trade-commission> accessed 13 March 2024.
[144] Daniel J Gifford and Robert T Kudrle, 'The Atlantic Divide in Antitrust: An Examination of US and EU Competition Policy' (University of Chicago Press 2015) p. 40.
[145] ibid p. 56.

whether to use US-style language of "substantially lessening of competition" in the new regulation.[146] This was however not adopted, with the main reasons being that the linguistic change was not necessary for a policy change, and it was desirable to retain a lot of the more basic language for the purposes of continuity.[147] The US Merger Guidelines have also been changed. The 2023 guidelines, updating the 2010 document, are more similar to EU law and a more aggressive stance is taken.[148] An example is the lowering of the HHI threshold to levels closer to those used by the EU.

The extent to which this process will continue remains to be seen. While the gap between EU and US merger control has lessened, resulting in fewer controversial cases as time progresses, this has not solved the transatlantic tensions, especially with a view to the *Illumina/Grail* case. It is also not possible to require full harmonization of the competition laws, due to differing demographics, leaders, societal priorities, processes, and needs.

The next section will therefore examine whether there can be a harmonization of the rules regarding competence for mergers.

5.4. Option D: Strict Treaty Requirements

5.4.1. The Current Cooperation Treaty Framework

The importance of regulatory cooperation has long been evident, and the first binding agreement on competition law cooperation between the US and the EU (then EC) was formed in 1991. Terms in the 1991 agreement were further elaborated and extended in 1998 to provide additional clarity on the terms and improve efficiency.[149] The original push to have the agreement concluded came from the EC, which approached the US authorities, interested in drawing up a legally binding document as opposed to following non-binding recommendations, such as those created by the Organisation for Economic Co-operation and Development (OECD) in 1986 which the two jurisdictions had

[146] European Commission, 'Green Paper on Mergers COM(2001)745 Final - Not Published in the Official Journal' <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l26076> accessed 8 April 2024.
[147] Gifford and Kudrle (n 144) p. 57.
[148] 'Merger Guidelines U.S. Department of Justice and the Federal Trade Commission' (n 91) p. 5.
[149] Agreement Between United States and European Communities On The Application of Positive Comity Principles In the Enforcement of Anti-trust Laws 1998.

previously followed.[150] The purpose of the treaty set out in Article I was to "promote cooperation and coordination and lessen the possibility or impact of differences between the Parties in application of their competition laws."[151] While the US and EU authorities routinely consulted with each other on antitrust enforcement beforehand, the agreement formalised this practice and introduced a new level of coordination in information sharing and enforcement activities.[152]

The treaty included provisions on notification (Article II), exchange of information (Article III), and a negative comity article (Article VI) which required the parties to take each other's interests into account. These articles were more traditional in nature, being based on previous non-binding instruments.[153] The truly innovative core of the agreement was a positive comity clause (Article V), providing that the parties notify the other whenever its competition authorities become aware that their enforcement activities may affect important interests of the other party and allows for the party to request that the other party's competition authorities take action.[154] It also provides for parties to meet for information exchanging on activities and priorities on a bi-annual basis. The agreement did not only empower cooperation, but also drew some limits, such as providing that the parties do not need to exchange information when it would be prohibited by the law of the party possessing the information or would be incompatible with its important interests (Article VII).

While these 1990s agreements were important milestones in the improvement of cooperation for mergers between the US and EU, it is evident from the merger cases giving rise to tensions which occurred, such as *Boeing*, *Honeywell* and *Illumina/Grail*, that they were not enough to yield a satisfactory result and major transatlantic tensions resulting from merger cases continued.

[150] Keegan (n 5).
[151] Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws - Exchange of interpretative letters with the Government of the United States of America 1991 (OJ L 95/47) art. I.
[152] Keegan (n 5) p. 162.
[153] Such as the OECD Recommendation and the Declaration on U.S./EC Relations.
[154] Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws - Exchange of interpretative letters with the Government of the United States of America art. V (2).

5.4.2. Treaty Revision

As it currently stands, the US restricts its extraterritorial reach for merger control through the comity principle and various criteria developed in case law. In contrast, the EU employs specific objective thresholds enshrined in the EUMR relating to aggregate turnover within the EU. This allows for a test of whether a proposed consolidation has "community dimension" and thus whether the EU is sufficiently affected and has jurisdiction. Since *Illumina/Grail* however, it seems as though the EU can review potentially any merger in the world so long as the Commission can argue a future potential impact on the internal market, irrespective of ties to other jurisdictions.

The EU reviewing mergers of US companies in situations in which they are not perceived to legitimately have jurisdiction, especially where the EU decisions deviate from the US ones, has resulted in criticisms of protectionism and other tensions. The last solution possibly capable of mitigating transatlantic merger tensions would, therefore, be to tackle the issue at the root and target the jurisdiction of the states directly, ensuring that states only review mergers where they have a legitimate claim to do so. This can be achieved through clearly delineating competence in a new treaty between the EU and US or amending the existing framework. In particular, Article V on positive comity of the current treaty would be strengthened substantially. A new comity article could lay down specific requirements for jurisdiction, immediately granting the competence to review mergers in certain situations.

Examples where a party has jurisdiction can be when at least one of the merging entities is incorporated under their law or laws, or when there is a specific level of market activity by the merging entities within their market. This will lead to an overlap in many cases, in which case both parties will be competent to review the proposed consolidation. This is not problematic, as even if there are differing conclusions on whether to permit the merger, both will be seen as legitimate for two reasons. First, the international jurisdictional principles (i.e. the effects doctrine) will be respected, and secondly, both parties would have explicitly agreed on the jurisdiction of the other. A comity provision to this effect would be beneficial to both state parties, as well as businesses looking to merge, in that it will provide legal certainty. The uncertain US legal doctrines and conflicting case

law can be done away with, at least with a view to the EU. While the EU jurisdictional thresholds do provide legal certainty, a treaty reform will prevent negative effects related to legal uncertainty resulting from the criticized *Illumina/Grail* ruling. The US would no longer need to worry about the EU illegitimately interfering with American business interests and the EU could set allegations of protectionism, overstepping competence, and going against international law aside. It could also be beneficial to include a section allowing for competence to be conferred between the parties when one party wishes to assess a particular merger but does not fulfil the requirements to directly have jurisdiction themselves, similar to Article 22 of the EUMR. This would allow for closer cooperation between the two jurisdictions. To this effect, it should be borne in mind that the US authorities have not only criticized the EU's merger competence and general competition regulation but have also benefited from it. If one attributes weight to the allegations of collusion between the FTC and EU Commission in the *Illumina/Grail* case, this becomes apparent.

A further example is the struggle between Microsoft and US and EU competition authorities in the 1990s and 2000s. Microsoft was accused of various anti-competitive actions, however, actions in the US courts did not result in much change. While a US district court judge did find Microsoft guilty and ordered a breakup of the company into 2 separate entities, this was appealed, and the order was overturned. The EU subsequently stepped in with its own investigations and complaints, ultimately resulting in huge, unprecedented fines and various orders to halt anti-competitive practices.

With the increasing power of giant US based tech companies, and US regulation initiatives falling short, such as the *American Innovation and Choice Online Act* (proposed bill), while the EU counterpart, the *Digital Markets Act* is flourishing by comparison, it may be increasingly desirable for US authorities lay down particular systems on jurisdiction to more easily confer cases to EU authorities and thereby also grant them more legitimacy, just as it can be beneficial for the EU to receive it. It is worth noting that putting in place legally binding solutions offer reduced flexibility regarding jurisdiction and practices; however, it has historically been what the EU has pushed for in merger cooperation with the

US, as opposed to, or at least in combination with other solutions.[155] Establishing a clearly defined, binding framework for merger control seems like the best solution for reducing transatlantic tensions and legal disputes. Such reforms would benefit businesses and improve legal certainty for cross-jurisdictional mergers.

6. CONCLUSION

This paper has examined the research question of: *"How can the supposed political tensions that exist between the EU and the US resulting from the alleged competence creep by the EU on issues related to mergers and acquisitions be mitigated through alternative legal design and the application of a more holistic understanding of their current situation?"* In doing so, it has compared the merger control frameworks of the US and EU with a view to determining where the differences lie and how this can lead to different outcomes for merger control cases. While there are many similarities, there are also quite a few differences between the systems, such as their sources of law, their centralisation and their focus when analysing the permissibility of transactions. It has subsequently examined the tensions that exist between the two systems, and the types of allegations EU merger control faces. In particular, this paper has identified two possibly related, but distinct categories: firstly, the EU has been accused of protectionism, favouring its own businesses in regulation over those of US businesses. Statistical studies do not seem to conclude that this occurs on a systematic basis. Secondly and more interestingly for this paper, the EU has been accused of overstepping its jurisdictional competence under international law when it comes to regulation. This second criticism is particularly contemporary due to the *Illumina/Grail* case, in which the European Commission has seemingly claimed jurisdiction to review mergers between entities which are not domiciled in the EU and also do not conduct any business in any EU Member State, meaning that they do not surpass the required notification thresholds used within the EU. After examining these tensions, this paper has assessed the current cooperation framework in place between the EU and the US. Firstly, in 1991, a treaty was adopted, which was revised in 1998. The purpose of the treaty was to promote cooperation and coordination and lessen the possibility or impact of differences between the parties

[155] Keegan (n 5) 162.

in the application of their competition laws. The treaty contains articles on information sharing, notification, as well as comity.

Finally, the paper examined four possible methods of solving the issue of political tensions. The first proposal was to do nothing, as contrary to appearance, the possibility exists that there is no current issue of political tensions. This is based primarily on the extensive communications between the EU and US authorities indicating possible collusion on the Illumina/Grail merger, as well as the uncharacteristic American neglect to condemn the EU power grab. However, there is no full confirmation that occurred. The second possible solution was diplomatic in nature and increasing cooperation by building on the best practices. However, this solution was discarded, due to the already very close regulatory cooperation. Thirdly, the possibility of further convergence of merger regimes to limit conflicting outcomes was examined. This is a process that already seems to be occurring and while it has limited controversial cases, it does not seem to go far enough to address the issue. Finally, this paper examined the possibility of reforming the current treaty framework to clearly delineate competence and illustrated the benefits for both parties. For various reasons, related to legitimacy, legal certainty, and increasing cooperation, this approach is the most apt at solving or mitigating the issue of transatlantic political tensions.

Mutual Trust, Fair Trial Rights, and the EU Accession to the ECHR: Is the Trust Still Blind?

Sophia Muts[1]

A study on the solution proposed by the New Draft Accession Agreement with regards to the issue of mutual trust in the context of the European Union's accession to the ECHR

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TABLE OF ABBREVIATIONS

AFSJ	Area of Freedom, Security, and Justice
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
Convention/ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
DAA	Draft Accession Agreement
EAW	European Arrest Warrant
ECtHR	European Court of Human Rights
EU	European Union
FD EAW/D	Council Framework Decision 2002/584 of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States [2002] OJ L190
MS/MSs	Member State/Member States of the European Union
NDAA	New Draft Accession Agreement
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

1. INTRODUCTION

"Mutual trust must not be confused with blind trust". These were the words of Koen Lenaerts, President of the Court of Justice of the European Union ('CJEU'), when addressing criticisms of *Opinion 2/13,* concerning the European Union's ('EU') accession to the European Convention of Human Rights ('ECHR').[2] This statement resonates as the EU seeks to accede to the ECHR[3] after a first failed attempt, calling for an examination of whether mutual trust among Member States ('MS') is, contrary to the words of the President, to be equated with blind trust.

The EU's accession to the ECHR has been a lengthy and complex journey. After it became a legal obligation under Article 6(2) Treaty on the European Union ('TEU'),[4] it faced an unsuccessful attempt in 2014 due to the CJEU's *Opinion 2/13*. Among the various issues identified in *Opinion 2/13,* the CJEU contended that accession conflicted with the cornerstone principle of mutual trust.[5] Originating from the jurisprudence of the internal market,[6] mutual trust requires MSs to recognise judicial orders issued by another MS without further scrutiny. In the context of fundamental rights, this implies that they must presume that other MSs respect fundamental rights and must abstain from checking potential breaches.[7] In *Opinion 2/13*, the CJEU argued that while EU law demands this trust from MSs,[8] the ECHR would contrarily mandate human rights checks, and, as the Draft Accession Agreement ('DAA') did not address the issue, the autonomy of EU law would be undermined.[9]

Years after the setback of *Opinion 2/13*, negotiations resumed, renewing hopes for a successful accession with the approval of a New Draft Accession Agreement ('NDAA') aimed at resolving past contentions. However, upon closer

[2] Koen Lenaerts, 'La Vie Après l'Avis: Exploring the Principle of Mutual (Yet Not Blind) Trust' (2017) 54 Common Market Law Review 805, p. 806.
[3] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5.
[4] Consolidated Version of the Treaty on European Union [2012] OJ C326/15 (TEU).
[5] Opinion 2/13 of the Court pursuant to Article 218(11) TFEU - Draft international agreement - Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms - Compatibility of the draft agreement with the EU and FEU Treaties. [2014] para. 194.
[6] Case 120/78 *Rewe-Zentral AG* v. *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, para. 14.
[7] Opinion 2/13 (n 5), para. 193.
[8] ibid.
[9] *Rewe-Zentral* (n 6), para. 194.

examination, a fundamental doubt arises: Has the issue of mutual trust truly been addressed this time, or merely bypassed? Article 6 NDAA now claims to resolve the tension between ECHR obligations and mutual trust by assuming case law convergence between the CJEU and the European Court of Human Rights ('ECtHR'). Yet, while some alignment exists regarding Article 3 ECHR violations,[10] namely violations of the rights not to be subject to inhumane and degrading treatment, this conclusion is less clear-cut for Article 6 ECHR,[11] suggesting that the NDAA may defer rather than resolve the issue, potentially threatening accession once again.

In order to investigate this doubt, this research will attempt to answer the following research question: "*Does the proposed Article 6 NDAA resolve the issue of mutual trust in the context of the EU's accession to the ECHR?"*

This will be achieved by focusing on the European Arrest Warrant ('EAW') mechanism, which actively depends on mutual trust, and vividly demonstrates how this principle impacts human rights protection, highlighting the differing approaches of the two courts. Furthermore, this paper will limit itself on the implications for fair trial rights, rather than on Article 3 ECHR, as the latter has seen significantly more convergence in jurisprudence and has been extensively discussed.

To address the research question, the paper will employ a doctrinal legal methodology, by making use of the old DAA, meeting reports, the NDAA, alongside CJEU and ECtHR jurisprudence to examine the differing standards used to scrutinise fair trial rights violations. EU law and Council of Europe documents will be utilised. Scholarly articles will furthermore provide critiques of the courts' approaches and anticipate future implications for accession.

The structure of this paper is divided into three chapters. Chapter II outlines the problem statement, by first defining mutual trust and identifying how it came to halt accession in 2014. Subsequently, a brief overview of the relationship and trust between the two courts is given, using the landmark cases *Bosphorus* and *Avotinš*. Section 2.3 then presents Article 6 DAA's proposed solution, setting the stage for evaluating its rationale.

[10] ECHR (n 3) art. 3, prohibition of torture.
[11] ECHR (n 3) art. 6, right to a fair trial.

With Chapter III, the focus shifts on mutual trust in the context of EAW, emphasising its pro-enforcement bias as evidenced by the lack of a general human rights ground for refusal. Next, the CJEU's case law on fair trial rights violations as grounds for refusal is examined, along with the two-step test that causes the quasi-automatic application of mutual trust. This is then contrasted with the more human-rights-focused test of the ECtHR through an overview of its jurisprudence.

Lastly, Chapter IV compares the standards of the two courts, underscoring the undeniable divergence in their approaches; to then centre on the implications that this poses on accession, including the risk of another halt. It then considers other possible solutions, such as amendment of Article 6 NDAA.

The conclusion finally argues whether, in light of the divergence in the Courts' approaches analysed in the previous chapters, the proposed Article 6 NDAA fully resolves the mutual trust issue in the context of the EU's accession to the ECHR, particularly concerning fair trial rights under Article 6 ECHR.

2. The Mutual Trust Objection and the New Draft Accession Agreement: A Solution to the Problem or a Subversion of It?

2.1. What is the origin of the problem?

On 18 December 2014, following the publication of the DAA by the Council of Europe, the CJEU delivered its *Opinion 2/13,* concerning the EU's potential accession to the ECHR.[12] In this opinion, the CJEU ultimately deemed the agreement as incompatible with Article 6(2) of the TEU and Protocol No. 8 to Article 6(2) TEU.[13] A primary concern of the CJEU was that accession would compromise the principle of mutual trust,[14] under which MSs are obliged to presume that other MSs uphold fundamental rights.[15] This clashed with the ECHR regime, which instead mandates MSs to conduct independent human rights checks,[16] generally prohibited under EU law. In the view of the CJEU, this implied that accession would require MSs to act against EU law, thereby undermining its

[12] Opinion 2/13 (n 5).
[13] Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms [2012] OJ C 326.
[14] Opinion 2/13 (n 5), para. 191.
[15] Opinion 2/13 (n 5), paras. 191, 194.
[16] ibid.

autonomy. Due to this concern, the CJEU rejected the accession agreement, fearing that it would disrupt the balance and autonomy of EU law.[17]

To gain a deeper insight of the Court's reasoning and of the rationale behind this research, the principle of mutual trust must be further explored. This principle implies that, when implementing EU law, MS must consider that fundamental rights have been observed by other MSs, and, as such, they may not verify whether another State is breaching fundamental rights in individual cases.[18] Mutual trust originates in the area of the internal market, with the landmark case *Cassis de Dijon,*[19] which formalised the principle of mutual recognition,[20] under which MSs must recognise goods placed on the market by other MSs. Over the years, this principle has evolved and expanded beyond the mere movement of goods, gaining increasing importance in the European legal framework, until it was declared to be a cornerstone principle of EU law with the Council of Tampere in 1999.[21]

Nonetheless, despite its fundamental value, the notion of mutual trust never appears in the constitutive treaties, the TEU or the TFEU. However, an abundance of case law, as well as *Opinion 2/13*,[22] testifies to its importance. To name only a few, in *NS*,[23] the Court identified mutual trust as the *raison d'être* of the EU and of the area of freedom, security, and justice ('AFSJ'). Indeed, the principle of mutual trust finds its principal application within the domain of the AFSJ, and it is particularly this field of EU law that has largely contributed to its development through case law. In *Poltorak*, the principle was then affirmed as fundamentally crucial to the EU, as it enables the creation of an area without internal borders.[24]

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[17] Opinion 2/13 (n 5), para. 94.
[18] Opinion 2/13 (n 5), para. 191; Joined cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* [2016] ECLI:EU:C:2016:198, para. 78; Jose M. Cortes-Martin, 'The Long Road to Strasbourg: The Apparent Controversy Surrounding the Principle of Mutual Trust' (2018) 11 Review of European Administrative Law 5, p. 6.
[19] *Rewe-Zentral* (n 6), para. 14.
[20] Mutual recognition is highly relevant in areas such as the recognition of diplomas, or drivers licences. See also Directive 2006/126 of the European Parliament and of the Council of 20 December 2005 on Driving Licences [2006] OJ L 403/18.
[21] Resolution on the extraordinary European Council meeting on the area of freedom, security and justice, Tampere European Council of 15 and 16 October 1999 Conclusions of the Presidency [1999] OJ *C* 54.
[22] Opinion 2/13 (n 5), paras. 191, 194, 258.
[23] Joined cases C-411/10 and C-493/10 *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] ECLI:EU:C:2011:865, para. 83.
[24] Case C-452/16 *Openbaar Ministerie v Krzysztof Marek Poltorak* [2016] ECLI:EU:C:2016:858, para. 26.

Additionally, beyond *Poltorak*, the Court's consistent language in its jurisprudence underlines that the principle of mutual trust is a fundamental component of the EU legal framework. However, if the EU actively relies on mutual trust, the ECtHR ('Strasbourg Court') operates on a stance of "mutual distrust". This is because the Court does not dismiss cases based solely on the presumption that the State is respecting fundamental rights. On the contrary, if serious doubts about the protection of a Convention right arise,[25] the case will be thoroughly scrutinised, and any alleged violation will be investigated. This stems from the principle under which contracting states must respect their Convention obligations for all acts within their entire jurisdiction,[26] creating a framework reliant on human rights oversight that suggests a system of mutual distrust, rather than trust.

Considering the contrast between the value that the principle of mutual trust enjoys within the Union framework, and the "mutual distrust" regime of the ECHR, it then comes as no surprise that this very concept became a core issue in *Opinion 2/13*. In essence, accession aims at finding compatibility between two fundamentally incompatible systems: one grounded on the presumption that human rights are being respected and criticised for prioritising the primacy of EU law over human rights development,[27] the other one highly reliant on scrutinising potential human rights violations. Because of this, the issue of mutual trust has been considered to be one of the most complex challenges to the EU accession, as it originates from divergences in how the two courts operate.[28] While these differences do not hinder accession *per se*, they underscore the difficulty in reconciling the human rights standard of protection between these two courts. This challenge is further highlighted when considering the broader context of trust between the two courts, which is addressed in the following section.

[25] *Avotiņš v Latvia* App no 17502/07 (ECtHR, 23 May 2016), para. 109.
[26] ECHR (n 3) art. 1; *Matthews v The United Kingdom* App no 24833/94 (ECtHR, 18 February 1999), para. 29; *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v Ireland* App no 45036/98 (ECtHR, 30 June 2005), para. 153.
[27] Jason Coppel, Aidan O'Neill, 'The European Court of Justice: Taking Rights Seriously?' (1992) 29 Common Market Law Review 669, p. 669.
[28] Jose M. Cortes-Martin, 'The Long Road to Strasbourg: The Apparent Controversy Surrounding the Principle of Mutual Trust' (2018) 11 Review of European Administrative Law 5, p. 6.

2.2. "MUTUAL TRUST" BETWEEN THE TWO COURTS: ADVANCING OR HINDERING HUMAN RIGHTS?

To better comprehend the context in which the challenge of mutual trust arose, it is beneficial to briefly explore the broader relationship between the two courts in the realm of human rights and the trust between them, as illustrated by two ECtHR judgements.

One such landmark case is *Bosporhus v Ireland*,[29] which established a principle later known as the "Bosphorus Doctrine". Here, the Court acknowledged the right of Contracting Parties to transfer sovereign powers to an international organisation,[30] the EU in this case, while stressing that Parties remain responsible for their acts in violation of the ECHR, regardless of whether they stem from compliance with international obligations.[31] To reconcile the two, the Court ruled that actions taken in such compliance are justified if the EU offers human rights protection equivalent to that of the Convention.[32] This presumption applies if first, the MS enjoys no margin of discretion and second, if it has made use of the preliminary ruling mechanism.[33] The implications are that when the *Bosphorus* rebuttable presumption applies, the mutual trust between the MSs is not under threat, and that actions which would in principle be in breach of the ECHR are justified. This judgement established a form of mutual trust between the EU and the ECtHR, or, as some have argued, a step behind on the path of fundamental rights protection,[34] as the ECtHR has somewhat yielded to the EU's more lenient stance on human rights.

After *Opinion 2/13*, the Strasbourg Court ruled again on the *Bosphorus* doctrine. It did so in *Avotiņš*, which dealt with an alleged breach of Article 6 ECHR due to Latvia's enforcement of a Cypriot judgement under the Brussels I Regulation, a judgement which was given in the absence of the debtor, Mr. Avotiņš.[35] This case marked the Court's first ruling on a potential violation of

[29] *Bosphorus v Ireland* (n 26).
[30] ibid para. 152.
[31] ibid para. 153.
[32] ibid para. 155.
[33] *Michaud v France* App no 12323/11 (ECtHR, 6 December 2012), paras. 113-15.
[34] Joseph Phelps, 'Reflections on Bosphorus and Human Rights in Europe' (2006) 81 Tulane Law Review 251, p. 275.
[35] *Avotiņš v Latvia* (n 25).

Article 6(1) ECHR in a context in which mutual trust was applicable.[36] Here, the ECtHR highlighted the paradox of a twofold limitation on the scrutiny of human rights caused by the combined effect of the *Bosphorus* presumption and the principle of mutual trust:[37] Mutual trust requires MSs to refrain from scrutinising human rights protection in other MSs, leaving them no discretion, which triggers the *Bosphorus* presumption.[38] This constituted the first time the Strasbourg Court applied the presumption of equivalent protection since *Opinion 2/13*,[39] and in fact, it can be viewed as a defiant response to the latter, as the Court explicitly stated that mutual trust cannot be applied automatically.[40]

This twofold limitation materialises in cases of EAWs. This is because, as detailed in section 3.1 focusing on the EAW, this cooperation framework is significantly dependent on mutual trust. Due to this dependence and to the lack of discretion thereof, the *Bosphorus* presumption applies, leading to EAW cases being theoretically hindered from human rights scrutiny from both the EU and ECHR front, further complicating the issue of mutual trust.

The *Avotiņš* judgement is therefore yet another piece in the complex mosaic of the relationship between the two Courts. Mutual trust remains an issue: the jurisprudence of the CJEU mandates MSs to rely on each other's respect of fundamental rights without performing individual checks, while the jurisprudence of the ECtHR requires MSs to set aside mutual trust and scrutinise an alleged violation of an ECHR right.[41] The NDAA claims to resolve this clash. Yet has it truly achieved this?

2.3. The (apparent) Solution to the Problem: The New EU Draft Accession Agreement

After 2014, accession appeared as a crushed dream in the eyes of many. However, the rejection by the CJEU did not halt this process permanently; in October 2020,

[36] *Avotiņš v Latvia* (n 25) para. 98.
[37] ibid para. 115.
[38] ibid paras. 114, 115.
[39] Gragl P, 'An Olive Branch from Strasbourg? Interpreting the European Court of Human Rights' Resurrection of Bosphorus and Reaction to Opinion 2/13 in the Avotiņš Case: ECtHR 23 May 2016, Case No. 17502/07, Avotiņš v Latvia' (2017) 13 European Constitutional Law Review 551, p. 561.
[40] *Avotiņš v Latvia* (n 25), para. 116.
[41] Opinion 2/13 (n 5), paras. 191-194.

negotiations resumed,[42] with mutual trust remaining a sensitive issue. During the numerous meeting reports, the versions of the article proposed to tackle mutual trust were numerous. The first text read that accession of the EU to the Convention "*shall not affect the principle of mutual trust [...] provided that such application is not automatic and mechanical to the detriment of human rights*".[43] Under this version, MSs would be allowed to abide by mutual trust, unless a serious and substantiated complaint of a Convention right arose.[44] This version struck a balance between conferring value to the principle and respecting the Convention system, also in light of the ECtHR's precedent jurisprudence stipulating the non-automaticity of the principle.[45] Nonetheless, with knowledge of the Court's previous approach to the accession, this version was unsurprisingly refused, and substituted with a more lenient formulation, that is now Article 6 NDAA.

Article 6 reads: "Accession of the European Union to the Convention shall not affect the application of the principle of mutual trust within the European Union. In this context, the protection of human rights guaranteed by the Convention shall be ensured."[46] What remains of the previous text is the clear value attached to the principle of mutual trust, while the obligations under the Convention only shyly emerge from the last sentence. Furthermore, this version does not anymore provide any guidance on how to address a possible conflict between the application of the EU principle and Convention obligations.[47]

Upon a first review of this article, one might assume that the drafters entirely yielded to EU principles, at the expense of ECHR obligations. Nonetheless, the meeting reports clarify that the rationale of this article hinges on the observed case law convergence between the CJEU and the ECtHR regarding instances under which mutual trust can be set aside.[48] Nevertheless, while there

[42] Council of Europe, 'Meeting Report of the 6th meeting of the CDDH ad hoc negotiation group ("47+1") on the accession of the European Union to the European Convention on Human Rights' (47+1(2020) R6, 2020).
[43] Council of Europe, 'Proposals by the Secretariat for the discussion on Basket 3 ("The principle of mutual trust between the EU member states")' (47+1(2021)8, 2021), para. 4.
[44] Proposals by the Secretariat for the discussion on Basket (n 43), para. 5.
[45] *Avotiņš v Latvia* (n 25), para. 116.
[46] Council of Europe, 'Meeting Report of the 18th meeting of the CDDH ad hoc negotiation group ("46+1") on the accession of the European Union to the European Convention on Human Rights' (46+1(2023)35FINAL, 2023), art. 6.
[47] Eleonora Di Franco, Mateus Correia de Carvalho 'Mutual Trust and EU Accession to the ECHR: Are We Over the Opinion 2/13 Hurdle?' (2023) 8 European Papers 1221, p. 1225.
[48] Meeting Report of the 18th meeting of the CDDH (n 46), para. 87; Meeting Report of the 6th meeting of the CDDH (n 42), para. 33.

has been noticeable alignment in the Courts' approaches, the question remains whether this convergence applies to all fields and resolves all conflicts in the approaches of the Courts. The draft explanatory report on the NDAA specifically refers to case law convergence regarding mutual recognition in potential violations of Article 3 ECHR.[49] This is because, indeed, the jurisprudence of the two Courts has seen a level of convergence,[50] partially due to the absolute nature of Article 3 rights. However, when it comes to the realm of the EAW and violations of the right to fair trial under Article 6 ECHR, the same conclusion is not so easily reachable.

3. Has Case Law Convergence Been Truly Reached? Fair Trial Rights in European Arrest Warrant Cases

As shown, the conclusion regarding case law convergence is supported by several judgements from both Courts, which confirm this alignment. Nonetheless, there remain areas of CJEU jurisprudence which show a quasi-automatic application of the principle of mutual trust and have not experienced the same process of convergence since 2014. This is particularly evident in the context of judicial cooperation, specifically in cases relating to the EAW. This stems from the very nature of the instrument, which significantly relies on, if not depends on, mutual recognition and mutual trust. Additionally, the EAW is covered by autonomy of EU law against the Convention. As such, it is in theory not subject to Convention standards,[51] which makes it a problematic area of EU law in the context of accession, considering that the refusal in *Opinion 2/13* was precisely based on the grounds that accession would undermine the autonomy of EU law.[52]

To comprehend the quasi-automatic application of the principle in such cases, and the subsequent setback it represents for accession, it is essential to explore the nature of the EAW mechanism.

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[49] ibid para. 87.
[50] C-578/16 PPU *C.K. and others v Republika Slovenija* [2017], paras. 91-96; *Tarakhel v Switzerland* App n. 29217/12 (ECtHR, 4 November 2014); see also Jose M. Cortes-Martin, 'The Long Road to Strasbourg: The Apparent Controversy Surrounding the Principle of Mutual Trust' (2018) 11 Review of European Administrative Law 5, p. 20.
[51] Johan Callewaert, 'The European arrest warrant under the European Convention on Human Rights:A matter of Cooperation, Trust, Complementarity, Autonomy and Responsibility' (2021) Europarechtliche Studien (ZEuS) 105, p. 106.
[52] Opinion 2/13 (n 5), para. 194.

3.1. The European Arrest Warrant and its Relationship with Mutual Trust

The Framework Decision ('FD') 584/2002 regulates the issuance of EAW by competent MSs, enabling one MS, the issuing MS, to request the arrest and surrender of an individual by another MS, the executing MS, for the purpose of prosecution or execution of a sentence.[53] The enforcement of obligations under this instrument inevitably leads to situations where fundamental rights are at stake. For instance, individuals may be deprived of their liberty and be subject to trials in countries having inadequate detention conditions or compromised judicial independence, thereby endangering their rights against inhumane treatment or the right to a fair trial.

Given this context, it is striking to note that the grounds for refusal laid down in the FD do not mention violations of human rights. The grounds, governed by Article 3 and 4 FD,[54] include amnesties in the executing Member State,[55] the principle of *ne bis in idem*,[56] as well as a lack of double criminality,[57] but a general ground for violations of fundamental rights does not appear among them. These statutory grounds of refusal are rather limited, intended as an exception to enforcement that must be strictly interpreted.[58] This limitation reflects the essential role that mutual recognition and mutual trust play in the execution of EAWs,[59] and in the broader context of AFSJ.[60] In fact, the EAW is the first EU instrument openly giving effect to the principle of mutual trust.[61] The importance of the principle in this framework has been extensively stressed by judgements of

[53] Council Framework Decision 2002/584 of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States [2002] OJ L190, art. 1(1).
[54] ibid art. 3 and art. 4. It provides the mandatory grounds of non-execution of the EAW by the executing MS, while art. 4 provides the grounds for optional non-execution.
[55] ibid art. 3(1).
[56] ibid art. 3(2).
[57] ibid art. 4(1). Double criminality requires the act for which the EAW is issued to be an offence under the law of both MS. The exclusion of double criminality as a requirement for the execution of an arrest warrant was one of the groundbreaking differences with the extradition agreements preceding FD 584/2002. See also Leandro Mancano, 'The Right to Liberty in European Union Law and Mutual Recognition in Criminal Matters' (2016) 18 Cambridge Yearbook of European Legal Studies 215, p. 2018.
[58] C-270/17 *Tupikas* [2017] EU:C:2017:628, paras. 49, 50; C-579/15 *Popławski* [2017] EU:C:2017:503, para. 19; C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* [2016] EU:C:2016:198, paras. 80, 82.
[59] Framework Decision 2002/584 (n 53) art. 1(2).
[60] Opinion 2/13 (n 5), para. 191.
[61] Framework Decision 2002/584 (n 53), recital 6.

the CJEU,[62] and leads to one conclusion: the framework governing EAW was not designed towards refusal, but with a proper pro-enforcement bias.

Although, as highlighted, human rights are not formally a ground for refusal, the jurisprudence of the CJEU has evolved to recognise a fundamental rights clause under Article 1(3) FD.[63] However, because of the central role played by mutual trust and the instrument's pro-enforcement bias, the instances under which human rights violations can constitute a ground for refusal, and therefore under which mutual trust can be set aside, are extremely restricted, leading to a quasi-automatic application of the principle.[64] This automaticity lies at the very bottom of the divergence between the two Courts, rendering the EAW one of the most controversial areas of EU law when it comes to the evaluation of whether Article 6 NDAA is a suitable solution to the issue of mutual trust. In order to respond to this inquiry, a further evaluation of the jurisprudence of the two Courts has to be carried out.

3.2. Right to a Fair Trial Through the Jurisprudence of the Court of Justice of the European Union

To better understand the evolution of the jurisprudence regarding the refusal of the execution of an EAW due to potential fair trial violations, it is beneficial to first briefly examine case law prior to *Opinion 2/13*. In 2013, the CJEU dealt with this matter in its *Radu* judgement,[65] where the question referred was whether the executing state could refuse a request for surrender on the basis of a potential breach of Article 6(2) ECHR.[66] After reiterating that Member States may only refuse execution on the basis of the grounds laid down in the FD, and that a potential breach of the right to fair trial does not feature among them,[67] the Court concluded that observance with Article 47 CFR,[68] which protects the right to a fair

[62] C-192/12 *West*, para. 5; C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013], para. 36; C-168/13 *Jeremy F. v Premier ministre* [2013], para. 34; C-237/15 PPU *Lanigan* [2015], para. 27.
[63] The first case being C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*, paras. 83, 88.
[64] Leandro Mancano, 'The Right to Liberty in European Union Law and Mutual Recognition in Criminal Matters' (2016) 18 Cambridge Yearbook of European Legal Studies 215, p. 218. See also S Miettinen, 'Onward Transfer under the European Arrest Warrant: Is the EU Moving Towards the Free Movement of Prisoners?' (2013) 5 (1) New Journal of European Criminal Law 99.
[65] C-396/11 *Ciprian Vasile Radu Request for a preliminary ruling from the Curtea de Apel Constanţa* [2013].
[66] ibid paras. 20, 23, 31.
[67] ibid paras. 36, 38.
[68] Charter of Fundamental Rights of the European Union [2000] OJ C364.

trial within the EU legal framework, could not lead to a refusal of the EAW.[69] The position of the Court was unequivocal, leaving no room for interpretation, although ample space was left for criticism by academics.[70]

Nonetheless, from this pre-*Opinion 2/13* approach, the Court shifted towards a more human rights-friendly approach. In fact, in 2016 a milestone moment was marked with the issuance of the *Aranyosi and Căldăraru* judgement.[71] With this judgement, the Court opened a leeway for human rights violations to constitute a ground for refusal for the execution of EAW, as anticipated in the section above. This implies that under limited instances, mutual trust can be set aside, and therefore the executing MS is not under the obligation to presume that equivalent protection is offered by the issuing MS. To determine these instances, the Court established a two-step test, which will be soon addressed.

In the context of the accession negotiations, this judgement has been cited to testify as to the alleged case law convergence that resulted in the final Article 6 NDAA.[72] On the contrary, in the context of this research, the conditions stemming from this judgement are seen as lying at the core of the remaining discrepancies between the two Courts when dealing with the right to a fair trial.[73] In fact, although this case dealt with violations of the rights under Article 3 ECHR or Article 4 CFR, the same two-step test has been extended to instances concerning the right to a fair trial.[74] Hence, a short overview of this landmark case is relevant to the purposes of this paper.

The case concerned the surrender of two individuals both for the purposes of prosecution, in the case of *Aranyosi*, and execution of the sentence, with *Căldăraru*. The Court ruled that, in the context of the execution of a EAW, mutual trust could be set aside only if the executing state could demonstrate, first, the existence of systemic or generalised deficiencies able to create a real risk of

[69] *Radu* (n 65), paras. 39-40, 43, 44.
[70] M. Ventrella, 'European Integration or Democracy Disintegration in Measures Concerning Police and Judicial Cooperation?' (2013) 4 New Journal of European Criminal Law 290, p. 300; Tomasz Ostropolsky, 'The CJEU as a Defender of Mutual Trust' (2015) 6 New Journal of European Criminal Law 166, pp. 174-175.
[71] Joined Cases C-404/15 and C-659/15 *Aranyosi and Căldăraru* [2016].
[72] Council of Europe, 'Revised compilation of cases in the area of Basket 3 ("The principle of mutual trust between the EU member states")' (47+1(2020)4rev, 2021), pp. 8-9.
[73] Charter of Fundamental Rights of the European Union (n 68), art. 47.
[74] C-216/18 *Minister of Justice and Equalities (Deficiencies in the system of justice)* [2018], paras. 68-69; C-158/21 *Puig Gordi and Others* [2021], paras. 97-98; Charter of Fundamental Rights of the European Union (n 68), art. 47.

fundamental rights violation in the issuing MS; and second, the existence of substantial ground to believe that, in the specific case, the individual would be subject to those violations if they were to be surrendered.[75] This judgement revealed that the presumption of protection established between MS is not an impenetrable black-box as it appeared before,[76] which facilitates comprehending the rationale behind the NDAA.

As anticipated, this case dealt with a potential violation of the right not to be subject to inhumane or degrading treatment, which is an absolute right.[77] Nonetheless, subsequently, the Court expanded this test to another area: the right to a fair trial.[78] In 2018, the *LM* case marked the first time in which this non-recognition was extended to encompass a non-absolute right.[79] As discussed in Chapter four, which compares the standards of the two Courts and their implications for accession, the case law set by *LM* contributes to the scepticism surrounding Article 6 NDAA.

The case dealt with an EAW issued by Polish authorities to prosecute the requested individual for a drug-related crime.[80] The referring court of the issuing state, Ireland, stressed the lack of legitimate constitutional review and the lack of independence of the judiciary in Poland,[81] acknowledging that the justice system in Poland was inconsistent with the rule of law.[82] Considering these deficiencies, the court maintained that surrender of the individual would result in a breach of his fair trial rights under Article 6(1) ECHR and 47(2) CFR.[83] To this regard, it referred to the CJEU the question of whether the existence of systemic deficiencies in the rule of law of Poland suffices to determine that the individual would be subject to a real risk of his right to be violated.[84] In other words, the Court required

[75] *Aranyosi and Căldăraru* (n 71), paras. 91-94.
[76] Koen Bovend'Eerdt, 'The Joined Cases Aranyosi and Caldararu: A New Limit to the Mutual Trust Presumption in the Area of Freedom, Security, and Justice' (2016) 32 Utrecht Journal of International and European Law 112, p. 117.
[77] Jacobs FG and others, *The European Convention on Human Rights* (Oxford University Press 2021), p. 183.
[78] Framework Decision 2002/584 (n 53).
[79] Thomas Wahl, 'Refusal of European Arrest Warrants Due to Fair Trial Infringements, Review of the CJEU's Judgment in "LM" by National Courts in Europe' (2020) 4 Eucrim 321, p. 323; Minister of Justice and Equalities (n 74).
[80] *Minister of Justice and Equalities* (n 74), para. 16.
[81] *Minister of Justice and Equalities* (n 74), para. 18.
[82] ibid para. 22.
[83] ibid.
[84] ibid para. 24.

clarification as to whether the second step of the *Aranyosi and Căldăraru* test needed to be carried out.

In responding to this enquiry, the CJEU emphasised the importance of judicial independence as an integral part of the right to a fair trial,[85] and then highlighted that the mutual trust among MSs rests on the very premise that the other MS meet the required effective judicial protection,[86] pointing at the idea that if such effective judicial protection is lacking, mutual trust can be set aside. Indeed, that is what it ruled: the existence of a real risk that an individual may face a violation of the fundamental right to an independent tribunal if surrendered to the issuing Member State can constitute, as an exception, a ground to refute the execution of the EAW.[87] The Court reached this conclusion by analogously applying *Aranyosi*.[88] Nonetheless, the existence of systemic deficiencies, namely the first step of the *Aranyosi* test, was deemed insufficient to disregard mutual trust on its own: the second step must also be carried out.[89]

The result is a two-step test: in the first *in abstracto* step, the court must evaluate, based on reliable and objective evidence, whether systemic or generalised deficiencies causing a lack of independence of the judiciary, generate a real risk of the fair trial right being breached.[90] The second *in concreto* step requires the court of the executing state to determine whether, specifically, precisely, and in the individual case, there are substantial grounds to believe that the requested person will be subject to the breach of the essence of his right.[91]

Although the *LM* test is virtually equivalent to the *Aranyosi* test, two separate sub-steps can be singled out from the second *in concreto* step, marking a slightly different standard to disregard mutual trust when it comes to non-absolute rights.[92] In the first sub-step, the court of the executing state must evaluate whether the systemic deficiencies affecting judicial independence, established in the *in abstracto* step, could affect the courts having jurisdiction over

[85] *Minister of Justice and Equalities* (n 74), paras. 48-54.
[86] ibid para. 58.
[87] ibid para. 59.
[88] ibid para. 60.
[89] ibid para. 61.
[90] ibid.
[91] *Minister of Justice and Equalities* (n 74), para. 68.
[92] Adriano Martufi, Daila Gigengack 'Exploring mutual trust through the lens of an executing authority: The practice of the Court of Amsterdam in EAW proceedings' (2020) 11 New Journal of European Criminal Law 282, p. 288.

the individual's proceedings.[93] This, however, does not suffice to refuse the execution of the EAW: in the second sub-step the court must assess whether the lack of independence, considering the circumstances of the case such as the nature of the offence, is likely to affect the outcome of the case, and ultimately lead to a breach of Article 47 CFR.[94]

These two sub-steps differentiate the test to refuse a EAW in case of non-absolute rights: if the *Aranyosi* test only requires the presence of an individual risk, with *LM* much importance is placed on all individual circumstances.[95] The threshold to override mutual trust is set even higher than for Article 4 CFR rights, as in case of fair trial rights courts must go beyond the individual risk, and evaluate specific elements such as the personal circumstances and the factual context, which makes the assessment more rigorous and lengthy, potentially obstructing a successful application.

Alongside *LM*, *Openbaar Ministerie* features among the case law identified as demonstrating convergence between the two Courts with regards to fair trial rights.[96] In this case, the question referred to the CJEU by the Dutch court was once again whether evidence of systemic deficiencies relating to the judicial independence in Poland precluded the execution of the EAW,[97] namely whether the first step of the test would suffice. The Court reiterated its landmark *LM* judgement, thereby upholding the two-steps test.[98] Once again, in theory, a potential breach of Article 47 CFR can serve as a ground to refuse execution of an EAW.[99]

In 2023, with *Puig Gordi*,[100] the CJEU further clarified the test, reinforcing the perspective that although the Article 47 CFR exception exists, the test is so strict that this exception will rarely be applicable in practice.[101] This case is,

[93] *Minister of Justice and Equalities* (n 74), para. 74.
[94] ibid para. 75.
[95] Marco Antonio Simonelli, "... And Justice for All?" The right to an independent tribunal after the ruling of the Court of Justice in LM' 10 New Journal of European Criminal Law 329, p. 335.
[96] Revised compilation of cases in the area of Basket 3 (n 72).
[97] Joined cases C-354/20 PPU and C-412/20 PPU *Openbaar Ministerie*, para. 16.
[98] *Openbaar Ministerie* (n 97), paras. 52-55.
[99] The same stance was adopted in several subsequent cases, such as Joined Cases C-562/21 PPU and C-563/21 PPU *Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)* [2022] *OJ C 165.*
[100] *Puig Gordi* (n 74).
[101] Thomas Wahl 'ECJ Upholds Restrictive Fundamental Rights Jurisprudence on the EAW in Catalan Surrender Cases' (2023) 1 Eucrim 41, p. 43.

therefore, relevant to ultimately assess whether Article 6 NDAA resolves the mutual trust obstacle, or is a mere illusion. *Puig Gordi* involved a refusal by Belgian courts to execute a EAW issued by the Spanish Supreme Court for Catalan separatists, due to an alleged lack of jurisdiction.[102] In this judgement, the Court once again reiterated the *LM* two-step test, and went beyond by clarifying the approach for cases where the existence of systemic deficiencies is less evident.[103] This includes situations involving states that, unlike Poland, are not experiencing an established rule of law crisis, such as in the case at hand.[104] The Court ruled that even if the second step is fulfilled, but the executing authority does not have objective, reliable and specific evidence demonstrating the existence of a systemic or generalised deficiency in the Member State, the execution of the EAW cannot be refused.[105] The Court here strengthened once again its much criticised position: the EAW is more about effective judicial cooperation and the establishment of an area without borders than it is about the individual.[106]

As anticipated, and as discussed in Chapter four, this starkly contrasts the approach of the ECtHR, which has the protection of the individual at the centre of its analysis. To reinforce this argument, and ultimately address the research question guiding this paper, a parallel analysis of ECtHR's jurisprudence in the ambit of fair trial rights and EAW is essential.

3.3. Right to a Fair Trial Through the Jurisprudence of the European Court of Human Rights

Before embarking on an analysis of ECtHR case law, it is relevant to stress the principles upon which the treaty was founded. Case law of the Strasbourg Court emphasises that the purpose of the Contracting Parties in joining the Convention is the fulfilment of the aims of the Council of Europe,[107] such as the realisation of fundamental rights and their freedoms.[108] The Convention was therefore founded on the protection of fundamental rights. This origin differs from that of the EU, which was initially created with a focus on the establishment of an area free of

[102] *Puig Gordi* (n 74), paras. 10-14.
[103] Thomas Wahl (n 101), p. 41.
[104] ibid.
[105] *Puig Gordi* (n 74), para. 111.
[106] Thomas Wahl (n 101), p. 43.
[107] *Austria v. Italy* App no 788/60 (ECtHR, 11 January 1961), para 18.
[108] ECHR (n 3), preamble.

internal borders, and this divergence must be borne in mind when ultimately comparing the two jurisprudences, as it can facilitate the understanding as to why their approaches to human rights and mutual trust continue to differ, emphasising their fundamental incompatibility.

Regarding mutual trust, the ECtHR has acknowledged the fundamental role and the legitimacy of mutual recognition in the EU framework, while consistently holding that mutual trust mechanisms should not be applied automatically to the detriment of fundamental rights.[109] Its attention to human rights, as underscored by the founding principles above-mentioned, is reflected in its jurisprudence, which in fact establishes a framework far less automatic than the CJEU's. The general approach of the ECtHR is that evidence of individual risk to be subject to a violation of a human right is sufficient in order to determine a possible violation of a right, regardless of the existence of systemic deficiencies. As later discussed, jurisprudence regarding Article 6 ECHR has developed to diverge slightly. Nonetheless, one constant remains: the standard is set lower than that upheld by the CJEU.

In fact, the Court's case law demonstrates an approach of non-automaticity, as famously held in its above-mentioned *Avotiņš* judgement.[110] This stance was then evident in *Pirozzi v Belgium,*[111] where the ECtHR reiterated that extradition requests may be refused when the individual faces the risk of being subject to a fragrant denial of justice,[112] a principle first established in the *Soering* judgement,[113] and consistently upheld since.[114] In *Pirozzi*, the ECtHR explained that if the executing authorities are faced with a complaint of a manifest insufficiency in the protection of a Convention right, they cannot dismiss such complaint merely on the basis that EU law applies to the matter.[115] It is noteworthy that the Court referred to "a Convention right",[116] rather than specifically to

[109] *Avotiņš v Latvia* (n 25), para. 62.
[110] ibid para. 116.
[111] App no 21055/11 (ECtHR, 17 April 2018), para. 62.
[112] *Pirozzi v Belgium* (n 111), para. 53.
[113] *Soering v United Kingdom* App no 14038/88 (ECtHR, 7 July 1989), para. 113.
[114] *Mamatkoulov and Askarov v Turquie* App no 46827/99 and 46951/99 (ECtHR, 4 February 2005), paras. 90-91; *Al-Saadoon and Mufdhi v United Kingdom* App no 61498/08 (ECtHR, 2 March 2010), para. 149; *Othman (Abu Qatada) v United Kingdom* App no 8139/09 (ECtHR, 9 May 2012), para. 258.
[115] *Pirozzi v Belgium* (n 111), para. 64.
[116] ibid.

Article 3 or Article 6 rights. This, indeed, reflects its approach, which, unlike that of the CJEU, applies the same standard to all Convention rights. Eventually, in *Pirozzi*, no violation of Article 6 ECHR was found.[117]

Following *Pirozzi*, in 2020 the Strasbourg Court went a step forward in the protection of fair trial rights, yet a step back from aligning its jurisprudence with the approach of the CJEU. It did so with its landmark *Guðmundur* judgement, which marked a ground-breaking position. This case arose from an individual's complaint that one of the judges adjudicating their case had been appointed in breach of Iceland's domestic procedures. To determine whether such irregularities amounted to a breach of Article 6 ECHR, the ECtHR generally relied on its "flagrant denial of justice" standard, mentioned before, yet developed it further. The Court elaborated a three-step test.[118] First, it required a manifest breach of national law relating to the appointment of the judges;[119] second, this breach must impact the concept of a "tribunal established by law",[120] such as laws concerning the independence of the judge;[121] and lastly, the breach must undergo review of national courts.[122] While acknowledging the margin of appreciation of states in assessing the irregularities in judicial appointment, the Court firmly stated that when these above-mentioned criteria are cumulatively met, there is a solid basis to determine whether a breach of Article 6 ECHR has taken place.[123]

When contextualising this three-step approach alongside the two-step test of the CJEU, one notable realisation emerges: none of these three steps align with the *in concreto* aspect of the CJEU's test; instead, they all pertain to "systemic deficiencies". Thus, the Strasbourg Court took a ground-breaking stance with this judgement: the existence of systemic deficiencies alone is sufficient to constitute a breach of Article 6 ECHR and, consequently, suffices to undermine mutual trust. This case, although not directly related to EAW, undeniably introduces a new layer of complexity to the relationship between the two Courts and mutual trust.

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[117] *Pirozzi v Belgium* (n 111), para. 72.
[118] *Guðmundur Andri Ástráðsson v Iceland* App no 26374/18 (ECtHR, December 2020), paras. 243-252.
[119] ibid paras. 244, 245.
[120] To be understood as relying on any national provision, specifically those relating to the independence and impartiality of the judges, that in case of a breach would render the participation of the judges in the proceedings irregular; *Guðmundur v Iceland* (n 118), paras. 231-232.
[121] ibid para. 246.
[122] ibid paras. 248-252.
[123] ibid para. 243.

The implications of this position are profound: it suggests that, if systemic deficiencies are established, violations of Article 6 ECHR could occur even in cases where a specific judge has neither been appointed in contravention of his impartiality nor independence, potentially paralysing the entire justice system of a state. This scenario is particularly relevant in countries like Poland, which deal with significant rule of law issues.[124]

Indeed, following *Guðmundur,* the Strasbourg Court ruled on a landmark case involving Polish courts, namely *Xero Flor v Poland*.[125] This judgement, the first addressing the post-2015 rule of law crisis in Poland,[126] originated from a civil action by the company Xero Flor seeking compensation for damages by the state.[127] Following the ruling of the Polish Constitutional Court, the applicant ultimately filed a complaint with the ECtHR, alleging irregularities in the appointment of a judge who had adjudicated the case.[128]

Thus, in examining the alleged violation, the Court upheld its previously developed three-step test.[129] Regarding the first step, it identified a manifest breach of national law with the appointment of the judges, citing past Constitutional judgements.[130] Secondly, the breach concerned a fundamental rule of election procedure,[131] and lastly, the ECtHR noted that Polish law lacked any procedure allowing the applicant to challenge the election of constitutional judges.[132] Unsurprisingly, the Court found that the appointment of the three judges violated the right to a fair trial, specifically of the right to a tribunal established by

[124] Miroslaw Wyrzykowski, 'Experiencing the Unimaginable: The Collapse of the Rule of Law in Poland' 11 Hague Journal on the Rule of Law 417; Anna Adamska-Gallant, 'Backsliding of the Rule of Law in Poland - A Systemic Problem with the Independence of Courts' (2022) 13(3) International Journal for Court Administration 2.
[125] *Xero Flor w Polsce sp. z o.o. v Poland* App no 4907/18 (ECtHR, 7 May 2021).
[126] Barbara Grabowska-Moroz 'Strasbourg Court entered the rule of law battlefield - *Xero Flor v Poland'* (*Strasbourg Observers,* 15 September 2021) <www.strasbourgobservers.com/2021/09/15/strasbourg-court-entered-the-rule-of-law-battlefield-xero-flor-v-poland/> accessed 1 July 2024, p. 2.
[127] Martina Coli, 'The judgment of the Strasbourg Court in *Xero Flor v. Poland:* The capture of the Polish Constitutional Court condemned by a European court, at last!' (*Diritti Comparati,* 1 July 2021) <www.diritticomparati.it/the-judgment-of-the-strasbourg-court-in-xero-flor-v-poland-the-capture-of-the-polish-constitutional-court-condemned-by-a-european-court-at-last/> accessed 1 July 2024.
[128] *Xero v Poland* (n 125), para. 1.
[129] *Xero v Poland* (n 125), paras. 248-251.
[130] ibid paras. 273-275.
[131] Specifically art. 194(1) of the Polish Constitution; *Xero v Poland* (n 125), para. 277.
[132] *Xero v Poland* (n 125), para. 288.

law under Article 6(1) ECHR.[133] Considering *LM*, it is noteworthy that the Court, in reaching this conclusion, once again confined its assessment to the abstract step, thereby confirming its divergence from the CJEU's approach.

Following *Xero*, some scholars anticipated that the Luxembourg Court would build upon this line of case law.[134] However, as seen previously, this has yet to occur.

This judgement was not the last of its kind, as after 7 May 2021, many followed: by the established ECHR standards, the majority of candidates in Poland failed to meet the requirements of "tribunal established by law".[135] Thus, the apprehension that an entire justice system could be theoretically incapacitated due to the jurisprudential standards of the ECHR begins to materialise.

As the fourth chapter providing critiques to the two tests demonstrates, determining which standard to uphold is challenging. However, one conclusion emerges: the alleged convergence of case law mentioned in the draft explanatory report appears absent. This absence raises questions about the efficacy of the solution proposed by Article 6 NDAA. In fact, if this assessment holds true, Article 6 appears to circumnavigate the issue of mutual trust rather than resolving it. Whether this conclusion can be reached is analysed in the last chapter.

4. The Two Approaches Compared: Is Case Law Convergence Still an Illusion?

4.1. Contrasting the Standards: Comparison and Critique

The previous chapter reviewed how the two Courts scrutinise potential breaches of fair trial rights and, consequently, under which instances EU mutual trust can be set aside due to human rights violations. The selected cases all relate to the period following the failed 2014 accession and thus fall within the jurisprudence intended to show convergence between the Strasbourg and Luxembourg Court. This detailed examination establishes a foundation for the comparison of the two

[133] *Xero v Poland* (n 125), paras. 290-291.
[134] Martina Coli (n 127).
[135] *Dolinska - Ficek and Ozimek v.Poland* App no 49868/19 and 57511/19 (ECtHR, 8 February 2022); *Reczkowicz v. Poland* App no. 43447/19 (ECtHR, 22 November 2022); *Advance Pharma sp. z o.o. v. Poland* App no 1469/20 (ECtHR, 3 February 2022).

approaches, enabling a thorough analysis to determine whether Article 6 NDAA resolves the mutual trust obstacle or blatantly ignores it.

Firstly, unlike the CJEU, the ECtHR does not differentiate standards based on whether a right is absolute or non-absolute.[136] Strictly speaking, this does not alter the focus of this paper, which primarily addresses the right to a fair trial, a non-absolute right. However, this aspect further demonstrates the differing approaches of the two Courts within the broader context of mutual trust.

Secondly, as anticipated, the approach of the CJEU, affirmed in *LM*, provides for a highly automatic application of mutual trust, a characteristic explicitly disfavoured by the ECtHR.[137] The question arises: why can it be concluded that the application of mutual trust is virtually automatic? Firstly, the CJEU limited the suspension of the application of the FD EAW as a whole to the competence of European Council,[138] ultimately halting the possibility to politically suspend the FD EAW in a state that violates the rule of law.[139] Therefore, the only mechanism left to set aside mutual trust is that of *ad-hoc* refusals. However, despite the Court's development of the *LM* test, which theoretically permits MSs to suspend mutual trust to protect fair trial rights on a case-by-case basis, the practical application differs. In fact, the two-step test, requiring fulfilment of both cumulative requirements, sets the standard unrealistically high.[140]

As already provided, the test requires firstly, evidence of systemic deficiencies and second, evidence raising substantial grounds to believe that the individual will be subject to the violation of his fair trial rights. This second step imposes a significantly high bar, and it does so even after the presence of systemic deficiencies in the issuing State has already been established. It is not a surprise that scholars criticise it as being unnecessary and disproportionately burdensome

[136] Eleonora Di Franco, Mateus Correia de Carvalho (n 47), p. 1227.
[137] *Avotiņš v Latvia* (n 25), para. 116.
[138] *Minister of Justice and Equalities* (n 74), paras. 71-72.
[139] W van Ballegooij, P Bárd, 'The CJEU in the Celmer case: One Step Forward, Two Steps Back for Upholding the Rule of Law Within the EU' (*Verfassungsblog*,2019) <www.verfassungsblog.de/the-cjeu-in-the-celmer-case-one-step-forward-two-steps-back-for-upholding-the-rule-of-law-within-the-eu/> accessed 15 June 2024, p. 2.); Patricia Popelier, Giulia Gentile & Esther van Zimmeren, 'Bridging the Gap between Facts and Norms: Mutual Trust, the European Arrest Warrant and the Rule of Law in an Interdisciplinary Context' (2021) 27 European Law Journal 167, p. 172.
[140] W van Ballegooij, P Bárd (n 139), p. 3.

on the individual,[141] and as fundamentally undermining one of the core principles inherent to the right to a fair trial: equality of arms.[142]

Furthermore, as the test requires the executing authority to request more information from the issuing authority regarding the possible violations, a dialogue between the two is required. This contributes to the unworkability of the test: it is argued that this practically requires the issuing Court to admit its lack of independence, which is implausible as it would destroy the Court's reputation and have severe implications in the justice system.[143] Additionally, the second sub-step of the test, namely assessing the individual circumstances such as the nature of the offence and the factual context,[144] has been criticised to undermine the very notion of the right to an independent tribunal, which is to be assessed through institutional safeguards,[145] and not through individual circumstances.[146] Ultimately, the test has drawn criticism for potentially fragmenting EU law and leading to differential treatment of EU citizens. Indeed, due to its burdensome nature, it may be applied selectively by certain MSs, but not by others, materialising these concerns.[147] This can be influenced by factors such as the financial resources available to the justice systems of each country, as well as their workload and consequently, the amount of time that can be dedicated to each case. Also, the stance of the MSs, inferred from the questions referred to the CJEU, appears to contrast with the second *LM* step. In both the *LM* and *Openbaar* cases, MSs questioned whether mutual trust could be disregarded if systemic deficiencies in judicial impartiality are established, without the necessity of examining individual circumstances,[148] underscoring their belief that meeting the first step alone might suffice.

Additionally, alongside the theoretical criticism offered by scholars, the test did not delay in confirming its problematic nature in practice. In an Irish case issued just a few months after *LM*, the judge was not able to halt the surrender despite clear evidence, already referred to above, of a lack of independence of the

[141] Marco Antonio Simonelli (n 95), p. 3
[142] ibid p. 4
[143] ibid.
[144] Minister of Justice and Equalities (n 74), para. 75.
[145] C-64/16 Associação Sindical dos Juízes Portugueses v Tribunal de Contas [2018], paras. 44-45.
[146] Marco Antonio Simonelli (n 95), p. 3.
[147] W van Ballegooij, P Bárd (n 139).
[148] Minister of Justice and Equalities (n 74), para. 24; *Openbaar Ministerie* (n 98), para. 87.

court in Poland.[149] Based on this, one critical conclusion can be drawn: the *LM*-test once again underscores the predominance of the principle of mutual recognition over the protection of fundamental rights, by applying mutual recognition quasi-automatically.

Having already provided the ECtHR approach to the matter, it follows logically to conclude that this position stands in stark contrast to that of the Strasbourg Court. Indeed, as highlighted, with its *Guðmundur* jurisprudence, the ECtHR has developed a test where the mere existence of systemic deficiencies is sufficient to establish a violation of Article 6 ECHR, henceforth to disregard mutual trust.

The bar is set considerably lower: in practice, the ECtHR test would lead to disregarding mutual trust in significantly more cases than the *LM* test. However, this approach has also faced criticism: as already anticipated in Section 3.3, such a low threshold risks paralysing entire justice systems facing rule of law issues.[150] Indeed, scholars argue that the individual assessment is necessary to prevent national judges from consistently refusing EAW execution whenever states facing issues with the judiciary, such as Poland, are issuing the EAW.[151]

Having knowledge of the differences between the two approaches, this conclusion follows logically: every case of the CJEU assessing a breach of a fair trial through a two-step test that does not stop at the assessment of systemic deficiencies in the justice system, is automatically to be considered in contravention to the jurisprudence of the ECtHR. The answer to the inquiry guiding this paper is then apparent: when it comes to fair trial rights, true case law convergence has not been achieved, contrary to what Article 6 DAA leads to believe. Consequently, one question arises: what are the implications of this for accession?

[149] High Court of Ireland, *Minister for Justice v. Celmer,* [2018] IEHC 639, 19 November 2018.
[150] Mathieu Leloup 'Guðmundur Andri Ástrádsson: the right to a tribunal established by law expanded to the appointment of judges' (Strasbourg Observer, 18 December 2020) <https://strasbourgobservers.com/2020/12/18/gudmundur-andri-astradsson-the-right-to-a-tribunal-established-by-law-expanded-to-the-appointment-of-judges/> accessed 15 June 2024.
[151] Marco Antonio Simonelli (n 95), p. 3.

4.2. Implications for Accession and Approaches to Resolving the Mutual Trust Issue

As demonstrated, resolving the issue of mutual trust was a *conditio sine qua non* for the CJEU to accept EU accession to the ECHR.[152] Consequently, if the NDAA fails to address the irreconcilability between mutual trust and accession, it will likely be a ground for refusal by the CJEU once again. Currently, the NDAA's solution is entirely dependent on the convergence of case law between the CJEU and the ECtHR. However, as shown, this convergence has not yet been achieved when fair trial rights are concerned: the criteria for setting aside mutual trust still diverge between the two Courts, potentially requiring MSs to contravene EU law in order to fulfil their Convention obligations.

The viable solution that would be reconcilable with the text of Article 6 NDAA is an alignment of the CJEU's standards with those of the ECtHR, which would imply the abandonment of the *in concreto LM* step, and the development of a new line of case law regarding fair trial rights. Nonetheless, it cannot be denied that the adoption of the *Guðmundur* standard would have severe implications on mutual trust as the EU has known it, as well as on the very nature of the FD EAW due to its dependence on the principle.[153] In fact, adapting to the ECtHR standard would increase the instances under which mutual trust can be set aside, thereby rendering the application of the principle less automatic. As a result, judicial scrutiny among MSs would intensify, potentially delaying the execution of EAWs.

However, this it would also positively lead to a higher pressure on MSs to uphold the rule of law. Furthermore, as this paper has demonstrated, the EU has seen a recent trend of expanding the instances under which mutual trust can be set aside, notably with its *Aranyosi* judgement which opened the doors for human rights to be grounds of refusal of EAW,[154] as well as with cases dealing with asylum seekers.[155] In fact, it is not uncommon for a party to the ECHR to have to adjust its own justice system in order to join the Convention.[156]

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[152] Opinion 2/13 (n 5), paras. 191-194.
[153] Framework Decision 2002/584 (n 53), recital 6.
[154] *Aranyosi and Căldăraru* (n 71), paras. 91-94.
[155] C-578/16 PPU *C.K. and others v Republika Slovenija* [2017], [91-96].
[156] For more see: Andrea Caligiuri, Nicola Napoletano 'The application of the ECHR in domestic systems' (2010) The Italian Yearbook of International Law Online 125; Marco Tabarelli, 'The Influence of the EU and the ECHR on 'Parliamentary Sovereignty Regimes': Assessing the Impact of European Integration on the British and Swedish Judiciaries' (2013) 19 Eur Law Journal 340.

That being said, contrary to what the CJEU sustained, it could also be concluded that such loosening of mutual trust and adaptation to the ECtHR's standards would not impinge on autonomy of EU law, which can be understood as a set of principles arising from the nature of EU law.[157] Instead, the Union would be furthering the nature of EU law and its own values: in the whole process of accession, it must always be recalled that the Union is founded on principles such as the respect of human rights, democracy, and the rule of law, values which are considered common to all MSs.[158] Therefore, by furthering human rights the EU would be upholding the very values of EU law.

Additionally, under Article 52(3) CFR, the EU recognises that the standard offered by the ECHR is the only minimum protection level that MSs cannot fall below.[159] With the *LM* approach to fair trial rights, the EU is instead adopting a lower level of protection, acting against Article 52(3) CFR. Therefore, by adopting a more human-rights-friendly stance, regardless of any adjustments necessary in the FD, the Union would be acting in furtherance of its own core values and its CFR obligations. Furthermore, a step towards the ECtHR approach seems the only viable solution, as another step back by the ECtHR would lead to undermining human rights protection: the ECtHR has already given up on the reiteration of the non-automaticity of mutual trust in the formulation of Article 6 NDAA,[160] and has already shown trust in the EU legal system with its previous jurisprudence.[161]

Nonetheless, even if the CJEU were to build its case law on the basis of *Guðmundur,* Article 6 DNAA, as it stands now, would still not address the mutual trust issue, as it presupposes an already existing case law convergence which, as demonstrated, is absent. Therefore, a proposed solution is for Article 6 NDAA to feature a promise on the side of the CJEU ensuring continued case law convergence when it comes to fair trial rights.

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[157] Opinion 2/13 (n 5), para. 166; Niamh Nic Shuibhne, 'What Is the Autonomy of EU Law, and Why Does That Matter' (2019) 88 Nordic Journal for International Law 9, p. 19
[158] Treaty on the European Union (n 4) art. 2.
[159] Johan Callewaert 'Do we still need Article 6(2) TEU? Considerations on the absence of EU accession to the ECHR and its consequences' (2018) 55 Common Market Law Review 1675, p. 1692.
[160] Eleonora Di Franco, Mateus Correia de Carvalho (n 47), p. 1233.
[161] *Bosphorus v Ireland* (n 26), para. 155; Johan Callewaert (n 51), p. 108.

5. CONCLUSION

The EU's accession to the ECHR has been a longstanding issue. Following the setback of *Opinion 2/13*, the NDAA has renewed hopes by aiming to resolve past hurdles. This paper has examined Article 6 NDAA concerning mutual trust, to answer to the following research question: *Does the proposed Article 6 NDAA resolve the issue of mutual trust in the context of the EU's accession to the ECHR?* To achieve this, the underlying rationale to the Article was analysed in light of the jurisprudence of the CJEU and the ECtHR establishing the tests for setting aside mutual trust in case of potential violations of Article 6 ECHR.

In the second chapter, the origin of the issue of mutual trust in the context of accession was examined. Under EU law, mutual trust requires MSs to presume that other MSs are respecting fundamental rights, while, on the contrary, the ECHR regime requires states to carry out human rights checks, operating on a system of "mutual distrust". This divergent approach hindered accession with *Opinion 2/13*. In addition to *Opinion 2/13*, the relationship between the two Courts is fundamentally shaped by two landmark ECtHR judgements, *Bosphorus* and *Avotinš*, each adding a new layer of complexity and tension to their relationship, emphasising the need for human rights scrutiny even within a framework governed by apparent trust.

The NDAA attempts to reconcile this EU principle with the approach of the ECHR through Article 6. It does so by asserting that such tension no longer exists, due to convergence in the case law of two Courts determining when mutual trust can be overridden. Nonetheless, while convergence of the approaches can be observed regarding Article 3 ECHR, significant divergence remains regarding Article 6 ECHR, in the context of which Article 6 NDAA does not provide clear guidance for resolving potential conflicts, suggesting that the mutual trust issue may not be fully resolved.

The third chapter examines mutual trust in the context of the EAW, stressing its quasi-automatic application by contrasting it with the ECtHR's approach. The EAW significantly relies on mutual trust, emphasising enforcement over the protection of fundamental rights, as evidenced by the limited grounds for refusal, which lack a general human rights clause. Despite developments like the *LM* judgement, which established criteria for fair trial rights violations as grounds

for EAW refusal, the stringent two-step test sets a high bar to the point that the mutual trust is applied quasi-automatically. In fact, the test first assesses systemic deficiencies in the judicial independence of a MS, to then cumulatively evaluate the individual case, assessing numerous specific individual conditions. The chapter contrasts this strict test with the ECtHR's more human rights-centric approach in *Gudmundur,* under which the mere existence of systemic deficiencies suffices to set mutual trust aside. This disparity questions whether the case law convergence cited in Article 6 NDAA is illusory when it comes to fair trial rights, raising doubts about its efficacy in addressing mutual trust issues.

In the fourth chapter, the CJEU and ECtHR's approaches to set aside mutual trust for fair trial rights violations were compared, and several critiques were provided, in order to assess whether the standards are, as Article 6 NDAA purports, converging. The CJEU's *LM* test is critiqued for setting an impossibly high bar leading to automaticity of mutual trust and selective enforcement among MSs. Conversely, the ECtHR's *Guðmundur* test, which triggers the setting aside of mutual trust based solely on systemic deficiencies, faces criticism for potentially paralysing justice systems struggling with the rule of law, such as Poland. The conclusion is that any CJEU case which also assesses the individual risk, is in contravention of the ECtHR's approach. Case law convergence has therefore not been achieved. The implications for accession are that, as Article 6 NDAA depends on a case law convergence that is inexistent for fair trial rights, the issue of mutual trust has not been addressed by the NDAA. Being it a *conditio sine qua non* for accession, the formulation of this article as it stands risks of halting accession. To avoid this, the EU would have to align with the ECtHR's standards, though this would impact the EAW and mutual trust significantly. A solution proposed involves amending Article 6 NDAA to feature commitment of the CJEU to aligning with the ECtHR.

In conclusion, this research has shown that Article 6 NDAA, assuming convergence between the approach of the CJEU and the ECtHR on setting aside mutual trust, fails to address fair trial rights and thus the mutual trust issue in EU accession to the ECHR. If the EU does not adopt ECtHR's jurisprudential standards, the NDAA will be liable to halt accession once again, unless the ECtHR aligns with the CJEU. Nonetheless, a further step back from the ECtHR would

lead to weakened oversight of human rights violations across Europe. Would this be worth it to ensure accession?

Waxing and Waning: The Fading Pressure of Extradition and Trial of Kaiser Wilhelm under Article 227 of the Treaty of Versailles

Rosa Weihrauch[1]

A legal-historical analysis of the circumstances in Germany.

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TABLE OF ABBREVIATIONS

OHL	Oberste Heeresleitung
Reichsverfassung	Verfassungs des Deutschen Reichs (1871)
StGB	Strasgesetzbuch
Weimarer Verfassung	Die Verfassung des Deutschen Reichs (1919)
1875 Extradition Act	Wet van 6 april 1875 tot regeling der algemeene voorwaarden op welke, ten aanzien van de uitlevering van vreemdelingen, verdragen met vreemde Mogendheden kunnen worden gesloten

1. INTRODUCTION

"Hang the Kaiser" – This slogan dominated the British election campaign in 1918/19.[2] The German Emperor, Wilhelm II, was to be prosecuted for the atrocities committed in World War I. However, shortly before the signature of the armistice on 11 November 1918, the Kaiser abdicated on 9 November 1918 and sought exile in the Netherlands the day after.[3] Nevertheless, the call for a trial of the Kaiser was realised in the peace negotiations during the Paris Peace Conference. Dominated by the most powerful Allied Powers, namely France, the United Kingdom, the United States, and Italy, the Treaty of Versailles (ToV) was drafted, including Art. 227 ToV.[4] Art. 227 ToV called for the establishment of an international criminal tribunal composed by the Allies to prosecute the former German Emperor for "a supreme offense against international morality and the sanctity of treaties".[5] For the first time in history and thus unprecedented in international law, a head of state was to incur individual responsibility under international law and be tried in front of an international criminal tribunal. Additionally, the provision foresaw that an extradition request would be addressed to the Netherlands by the Allies and Associated Powers. However, neither the extradition nor the trial of the Kaiser ever occurred. To gain a better understanding of the failure of Art. 227 ToV, it must be assessed in light of its legal, historical, and political context.[6]

The primary objectives of the Treaty of Versailles were to ensure a lasting peace and stability in Europe by preventing the resurgence of German militarism and holding Germany accountable for the war.[7] The consultations during the Paris Peace Conference were heavily influenced by the differing national agendas of the Allies, most prominently France, the United Kingdom, and the United States. While the latter opposed a trial of the Kaiser, France and the United Kingdom saw the prosecution of the Kaiser as an absolute necessity to further their political interests.[8] Therefore, some scholars argue that Art. 227 ToV was not created as

[2] William Schabas, *The trial of the Kaiser* (OUP 2018) p. 16.
[3] ibid pp. 25-27.
[4] Ruth Henig, *Versailles and after, 1919-33* (Routledge 1995) p. 13.
[5] Michael Scoot Neiberg, *The Treaty of Versailles: a concise history* (OUP 2017) p. 59.
[6] For a discussion on the approach of contextualising law through an interdisciplinary law, see William Twinning, *Law in Context: Enlarging a Discipline* (OUP 1997).
[7] Henig (n 4) pp. 1-3, 48.
[8] Schabas (n 2) p. 63.

a natural evolution of international law, but rather the result of political compromise.[9]

While the Treaty of Versailles was negotiated, Germany underwent a revolution, changing from a hereditary monarchy to a parliamentary democracy. After consistent and ever-growing calls for the end of the monarchy, on 9 November 1918, the popular social democrats proclaimed the Republic. However, the Weimar Republic was facing both opposition from the far-left and far-right and struggled to maintain political stability. This internal struggle was intensified by external pressure in the form of the Treaty of Versailles.

The ramifications of the Treaty of Versailles were profound and far-reaching, and the psychological trauma inflicted by the Treaty dominated the Weimar Republic. The agreement was perceived as a *Schandfrieden*, or a shameful peace, engendering widespread resentment and a sense of humiliation among the German population.[10] The narrative of the *Dolchstoßlegende* (stab-in-the-back myth), which blamed Germany's defeat on internal betrayal by leftist politicians rather than military failure, undermined the legitimacy of the young Republic which saw itself forced to sign the Treaty. In particular, Art. 231 ToV, known as the "war guilt clause", placed full responsibility for the war on Germany, and was seen as entailing a charge of collective guilt on the population. The resulting collective indignation over the peace agreement guided the politics of the Weimar Republic, and the revision of the Treaty of Versailles became an exceptional point of consensus in the fractured political landscape.[11]

In Germany, Art. 227 ToV triggered public outrage and solidarity avowals towards the Kaiser throughout the public. The provision was not regarded as a legitimate development of international law, but mainly as a political instrument for vengeance and arbitrary restitution. The Ministry of Foreign Affairs drafted two guiding legal reports, which were sent to the German Peace Delegation in Paris and guided the latter in their opposition to Art. 227 ToV. Germany saw the provision as completely legally unfounded; the Kaiser was protected both under

[9] James Brown Scott, 'The Trial of the Kaiser' in Edward Mandell House and Charles Seymour (eds) *What really happened at Paris: the story of the Peace Conference, 1918-1919* (C.Scribner's Sons 1921) p. 238.
[10] Gerd Krumerich, *Die unbewältigte Niederlage: das Trauma des Ersten Weltkriegs und die Weimarer Republik* (Herder Verlag 2018) p. 176.
[11] Gottfried Niedhart, *Die Aussenpolitik der Weimarer Republik* (3rd edn, Oldenburg Verlag 2014) p. 5.

national, foreign, and international law. This was mainly based on the classification of his acts as "political crimes" which could not be sanctioned by law.[12] On this issue, the guiding legal report issued to the Dutch Government seems to adopt a different stance. Nevertheless, both extradition requests sent by the Entente to the Netherlands were not granted. After the denial of the second request, the Allies informed the Netherlands that the responsibility for the Kaiser now rested fully on the country.[13] The strong desire to prosecute the Kaiser seemed to have faded away.

In the meantime, the Treaty's punitive measures and the call for the Kaiser's extradition from the Netherlands fuelled nationalist and antirepublican sentiments in Germany, further destabilising the new parliamentary republic.[14] The delicate political situation in Germany did not escape the Entente nor the Netherlands and was a driving factor in handling the enforcement of Art. 227 ToV. Although operating against the same background of a volatile Germany, it seems that all involved actors adopted different mechanisms to address this instability when confronted with the issue of the Kaiser in the Netherlands.

In exile, the Kaiser maintained a defiant stance towards Art. 227 ToV. While he seemed to be convinced of his own inviolability, his stance appears opportunistic and reactionary at times, reflected in constantly changing emotional proclamations. As such, the German Ambassador to the Netherlands, Friedrich Rosen, and the Netherlands kept a close eye on him. Rosen was in regular contact with the Kaiser as well as the Government in Berlin. The general diplomatic strategy seemed to have been to minimise the public discussion surrounding the *Kaiserfrage* (question on the Kaiser) and avoid any attention on the issue.[15] However, the intricacies of the German position have not been subject to a comprehensive analysis but only highlighted marginally. The multitude of factors contributing to the German foreign policy, and how these potentially influenced the Netherlands and Entente in the diminishing pressure to extradite and try the Kaiser under Art. 227 ToV, have not been part of a wider research.

[12] PA AA RZ 254/26032, IMG_0896-999.
[13] PA AA RAV 69/65, IMG_0622.
[14] Andreas Hillgruber, 'Unter dem Schatten von Versailles – Die außenpolitische Belastung der Weimarer Republik: Realität und Perzeption bei den Deutschen' in Karl Dietrich Erdmann and Hagen Schulze (eds), *Weimar: Selbstpreisgabe einer Demokratie* (Droste Verlag 1980) p. 66.
[15] PA AA RZ 407/48436C, IMG_0466-70.

Therefore, this paper will explore the following question: "*Under which circumstances in Germany did the pressure to extradite and try the Kaiser under Art. 227 ToV fade away?"*

To answer this question, this essay first lays out the historical context of the Treaty of Versailles (Section 2.1) and then describes how the instrument was perceived in Germany (Section 2.2). Against this background, the novelty and context of Art. 227 ToV is explained (Section 3.1), with a specific focus on Germany's position on the penal provisions (Section 3.2). Germany's stance towards Art. 227 ToV was mainly based on two legal opinions issued by the Ministry of Foreign Affairs and complementary notes. These are analysed in light of the body of international law existing at the time and compared with the guiding legal report issued to the Dutch Government (Section 3.3). Afterwards, the attempts by the Entente to enforce Art. 227 ToV are recounted, as well as Germany's reaction thereto (Section 4). Focusing on the Kaiser himself, the next section explores his arrival in the Netherlands and his stance towards Art. 227 ToV (Section 5). Lastly, this behaviour and the presence of the Kaiser in the Netherlands is contextualised by the political situation of the young Weimar Republic, with a focus on antirepublican conspiracies and arising concerns by both the Allies and the Netherlands (Section 6). On the basis of these findings, final conclusions are drawn (Section 7).

This paper employs a legal-historical and legal-political methodology to analyse the different circumstances surrounding the failure of Art. 227 ToV. At the core of this interdisciplinary approach is archival research in the form of finding, collecting, and examining relevant primary sources. As this essay focuses on Germany, the most significant German archives were consulted, namely the *Politisches Archiv des Auswärtigen Amtes,* the *Bundesarchiv,* and the *Geheimes Staatsarchiv Preußischer Kulturbesitz.* After a preliminary inspection of the available archive material via the online registers, the relevant files were either ordered to be inspected in person or asked to be digitalised. Some material was already digitalised and could be accessed immediately. Most of the files, however, were inspected in the mentioned archives in Berlin. The material was photographed and carefully organised. To retrace the sources, the relevant file number of the photograph is included after the reference as prescribed by the respective archive. This paper attempts to synthesise these primary sources and

resulting findings to reveal the particularities of the fading pressure of realising Art. 227 ToV. In order to understand the broader framework and origin of the archive material, this essay furthers the primary sources by legal, historical and political background as found in academic literature and results of already analysed primary data.

This research paper is intended to highlight the German perspective on Art. 227 ToV and thereby contribute to the understanding of the creation and failure of the first international criminal tribunal. It must be noted that the analysis of the conditions in Germany does not allow for a conclusive answer to the contributing factors surrounding the diminished attention of Art. 227 ToV. The circumstances contributing to the fading pressure to try and extradite the Kaiser were diverse and complex and can therefore not be encompassed by the research of a single country. Moreover, there is most certainly information missing from the archives themselves. However, by focusing on the circumstances in Germany, this research paper explores the interplay between legal interpretations and political pragmatism, shedding light on the complexities of enforcing international criminal law in the aftermath of a global conflict. Understanding Germany's perspective and the internal consequences of Art. 227 ToV provides essential insights into the broader implications of enforcing international criminal law and achieving lasting peace through punitive measures.

2. The Treaty of Versailles

2.1. Historical Background and Contextualisation

The Treaty of Versailles, signed on 28 June 1919, marked the official end of World War I between the Germany and the Allied Powers. Trying to establish a lasting peace and prevent future conflicts, the Treaty of Versailles imposed far-reaching sanctions on Germany as the vindicated power. By determining the specific conditions of the peace, the Treaty of Versailles moreover set out the relationship between the main global powers for the years to come.[16] Meanwhile, the war had a profound effect on Germany. By 1918, after four years of intense conflict, Germany was not only economically and military exhausted, but socially fractured

[16] Neiberg (n 5), p. 51.

and politically unstable. At that time, Germany, officially called *Deutsches Kaiserreich,* was a federal, constitutional monarchy. At the top of the hierarchy stood the Kaiser as monarch and head of state. He appointed the *Reichskanzler*, the chancellor, who is the main executive power on a federal level. The legislative branch was composed of a bicameral system, consisting of the *Bundesrat,* representing the different federal entities of the *Kaiserreich,* and the *Reichstag,* the parliament elected by the people.[17] Frustrated and disappointed by the futile progression of the war, the German population was increasingly discontent with the representatives of the *Kaiserreich.* As a result, the parliament gained more attention and importance in the political debate. With the outbreak of naval mutinies on 3 November 1918, a wave of uprisings and the formation of workers' and soldiers' councils across Germany was triggered. Demands regarding the abdication of the Kaiser became louder and louder, propagated especially by the social democrats.[18] Finally, on 9 November 1918, *Reichskanzler* Prince Max von Baden, publicly proclaimed the abdication of the Kaiser, without first obtaining its authorisation. Von Baden gave his office to the social democrat Friedrich Ebert, whose partisan Phillip Scheidemann famously proclaimed the "German Republic" from a balcony of the *Reichstag.*[19] A day later, on 10 November 1918, Wilhelm II sought exile and crossed the border to the Netherlands, formally affirming his abdication with a written statement on 28 November 1918.[20] While the Weimar Republic tried to gain footing as a parliamentary democracy, the so-called Big Four, namely the heads of state of France, Italy, the United States and the United Kingdom, started negotiating the terms of the peace during the Paris Peace Conference.

The Treaty of Versailles did not only lay down the peace conditions but caused both a psychological and material shock that reverberated throughout Germany. Until May 1919, Germany had held hopes for a peace treaty based on Wilson's Fourteen Points, a lenient vision for a post-war order envisaged by US President Woodrow Wilson. As such, the Fourteen Points largely aligned with

[17] Ruth Henig, *The Weimar Republic 1919-33* (Routledge 2002) p. 25.
[18] Eberhard Kolb, *The Weimar Republic* (Routledge 2005) pp. 6-9.
[19] ibid pp. 7-8.
[20] 'Vor 95 Jahren: Kaiser Wilhelm II. dankt ab' (*Bundeszentrale für politische Bildung*, 27 November 2013) <https://www.bpb.de/kurz-knapp/hintergrund-aktuell/173925/vor-95-jahren-kaiser-wilhelm-ii-dankt-ab/> accessed 24 November 2024.

Germany's own ideas about achieving peace in Europe.[21] In fact, in a letter sent to the German Government in November 1918, the Allies communicated, through US-American Secretary of State Robert Lansing, their consent to negotiating a peace agreement on the basis of Wilson's Fourteen Points.[22] Given its new order as a parliamentary republic, Germany considered itself entitled to such a moderate armistice.[23] As the German democracy unfolded, the liberal democrat Ernst Troeltsch vividly described the young Weimar Republic as a "dreamland of the ceasefire period".[24] However, the German hopes were crushed when Ulrich Graf von Brockdorff-Rantzau, the first foreign minister of the Weimar Republic, received the draft of the peace agreement on 7 May 1919. Not only were the terms much harsher than Wilson's Fourteen Points, Germany was not allowed to participate in the negotiations on the treaty but could merely submit observations. The so-called German "dreamland" came to a sudden end with a nightmare – the Treaty of Versailles.[25] After an ultimatum set by the Allies, Germany saw itself forced to agree to the Treaty of Versailles as envisaged by the Entente. On 28 June 1919, the peace agreement was signed by foreign minister, Hermann Müller, and minister of transport, Johannes Bell on behalf of Germany.

What is more, on 22 September 1919, Germany, further pressured by the Entente, signed a protocol establishing that all provisions of the constitution, the *Weimarer Verfassung* in conflict with the Treaty of Versailles were null and void.[26] Actually, a similar notion was already foreseen by Article 178 *Weimarer Verfassung,* which repealed both the former constitution as well as the provisional law governing the Weimar Republic until a new constitution was adopted. In

[21] Hillgruber (n 14) p. 57. For a detailed comparison of American and German peace politics, see: Klaus Schwabe, *Deutsche Revolution und Wilson-Frieden: Die amerikanische und die deutsche Friedensstrategie zwischen Ideologie und Machtpolitik, 1918-19* (Düsseldorf 1971).
[22] Klaus Schwabe, 'Germany's Peace Aims and the Domestic and International Constraints' in Manfred Franz Boemke, Gerald D Feldman and Elisabeth Glaser (eds), *The Treaty of Versailles: A Reassessment after 75 Years* (German Historical Institute and Cambridge University Press 1998) pp. 41-2.
[23] ibid p. 43.
[24] Jörn Leonhard, 'Das "Traumland in der Waffenstillstandsperiode": Verfassunggebung und Friedenssuche in der belagerten deutschen Republik 1918/19' in Horst Dreier and Christian Waldhorff (eds), *Weimars Verfassung: eine Bilanz nach 100 Jahren* (Wallstein Verlag 2020) 57.
[25] Fritz Klein, 'Between Compiègne and Versailles: The Germans on the Way from a Misunderstood Defeat to an Unwanted Peace' in Manfred Franz Boemke, Gerald D Feldman and Elisabeth Glaser (eds), *The Treaty of Versailles: A Reassessment after 75 Years* (German Historical Institute and Cambridge University Press 1998) p. 219.
[26] Walter Schwengler, *Völkerrecht, Versailler Vertrag und Auslieferungsfrage: die Strafverfolgung wegen Kriegsverbrechen als Problem des Friedensschlusses 1919/20* (Deutsche Verlags-Anstalt 1982) p. 252.

particular, the second sentence of Art. 178 *Weimarer Verfassung* addressed a potential conflict between the new constitution and the Treaty of Versailles: "The provisions of the peace treaty signed at Versailles on 28 June 1919 are not affected by the Constitution".[27] The protocol was regarded as a necessary additional safeguard and accountability mechanism, enforceable by the Allies.[28] Interestingly, although the protocol gained the necessary approval by the German legislature, it was never published in the *Reichsgesetzblatt,*[29] and could as such not enter into force in Germany.[30] Nevertheless, Germany was bound by its obligations under the Treaty of Versailles. Having signed the latter, the new government of the Republic was blamed for agreeing to its terms and thereby admitting Germany's guilt for World War I.[31]

At the basis of the German "dreamland" was the reluctance to recognise that Germany had faced military defeat, grounded in and purported by the *Dolchstoßlegende.* The *Dolchstoßlegende* was a widespread conspiracy in post-war Germany, according to which the German army was undefeated in WWI and actually about to win the war. However, the peace policy of the political left, mainly the social democrats, allegedly led to the end of the war, causing Germany's defeat. The General Paul von Hindenburg, who later advised the Kaiser to seek political asylum in the Netherlands,[32] coined the terminology in a speech in front of the *Untersuchungsausschuss für die Schuldfragen des Weltkrieges* (the Reichstag inquiry into guilt for World War I) on 19 November 1919, falsely reporting of the following statement, allegedly made by an English

[27] „Die Bestimmungen des am 28. Juni 1919 in Versailles unterzeichneten Friedensvertrags werden durch die Verfassung nicht berührt." Translation retrieved from <https://www.reverso.net/Text%C3%BCbersetzung#sl=ger&tl=eng&text=Die%2520Bestimmungen%2520des%2520am%252028.%2520Juni%25201919%2520in%2520Versailles%2520unterzeichneten%2520Friedensvertrags%2520werden%2520durch%2520die%2520Verfassung%2520nicht%2520ber%25C3%25BChrt.%2520> accessed 23 November 2024.

[28] Nevertheless, the Allies found that art. 61 paragraph 2 *Weimarer Verfassung* on German-Austria was in conflict with the Treaty of Versailles, a circumstance that could only be intentional, given that the constitution was adopted after the signature of the peace agreement.

[29] 'Die Verfassung des Deutschen Reiches' <https://www.verfassungen.de/de19-33/verf19-i.htm> accessed 02 June 2024. Also noted by Gerhard Anschütz, *Die Verfassung des Deutschen Reichs vom 11. August 1919: Ein Kommentar für Wissenschaft und Praxis* (14th edn, Scientia 1987) p. 340 ff.

[30] Art. 71 *Weimarer Verfassung.*

[31] Hillgruber (n 14) pp. 58-59.

[32] Boris Barth, *Dolchstoßlegenden und politische Desintegration: das Trauma der deutschen Niederlage im Ersten Weltkrieg 1914-1933* (Droste 2003) p. 143.

officer: "The German Army was stabbed in the back".[33] Since the war propaganda was successful until the very end, the German population was shocked by the armistice of 11 November 1918, creating fertile ground for the conspiracy theory to be welcomed with open arms.[34] The reality, that the *Oberste Heeresleitung* (OHL), the Supreme Army Command of Germany, initiated the negotiations about the armistice by announcing its hopeless military situation, was denied and the burden of defeat was instead imposed on the new democratic Government.[35] What is more, the *Dolchstoßlegende* was not only supported and spread by military and right-wing political voices, but indirectly fuelled also by social democrats themselves.[36] For example, Friedrich Ebert, the first *Reichspräsident* of the Weimar Republic, welcomed the returning German soldiers by claiming that they had stayed undefeated.[37] Pointedly, the *Dolchstoßlegende* is thereby said to have "filled an entirely understandably social psychological void" in the desperate search for a guilty party to shift the blame away from itself and instead manifest its own victim status.[38] As a result, apart from the tangible impacts of the Treaty of Versailles, such as its economic and demilitarizing provisions, the peace agreement as *Gewaltfrieden* (violent peace) weighed as a heavy psychological burden on the Weimar Republic.[39] The revision of the Treaty of Versailles was thus on the political agenda of all parties along the spectrum and as such one of the few constancies in the diverse and volatile political landscape of the Weimar Republic.[40] This shows how, at the mere outset, the Treaty of Versailles stood no chance of being accepted in Germany, where it was viewed purely as a consolidation of the lie of Germany's defeat. Hence, in Germany, from the beginning, there was no intrinsic motivation to comply with the Treaty of

[33] Own translation of „Die deutsche Armee ist von hinten erdolcht worden". 'Dolchstoßlegende als "Fake News" in der Weimarer Republik' (*Bundesarchiv*) <https://www.bundesarchiv.de/DE/Content/Dokumente-zur-Zeitgeschichte/19191118_hindenburg-dolchstosslegende.html> accessed 8 June 2024. For more background on the role of Hindenburg, see George S Vascik and Mark R Sadler (eds), *The stab-in-the-back myth and the fall of the Weimar Republic: a history in documents and visual sources* (Bloomsbury Academic 2016) pp. 109-127.
[34] Richard J Evans, *Das Dritte Reich und seine Verschwörungstheorien. Wer sie in die Welt gesetzt hat und wem sie nutzen* (DVA 2021) pp. 90-94.
[35] Henig (n 17) p. 21.
[36] George S Vascik and Mark R Sadler (n 33) pp. 203-206.
[37] Henig (n 17) p. 31.
[38] Vascik and Sadler (n 33) p. 207.
[39] Hillgruber (n 14) p. 54 ff.
[40] Niedhart pointedly calls the revision of the Treaty of Versailles the „negative consensus" of the Weimar Republic. Niedhart (n 11) p. 5.

Versailles and hence no pressure to extradite and try the Kaiser emanating from *within* the country. Instead, its compliance and enforcement were perceived to be the result of *external* powers and therefore Germany's aim rather lied with the relief of pressure.

2.2. *SCHANDFRIEDEN* – THE GENERAL PERCEPTION OF THE TREATY OF VERSAILLES IN GERMANY

In Germany, the Treaty of Versailles was regarded as a far-reaching violation of national honour and a heinous means of vengeance for the Entente, consolidating the German defeat in the form of a so-called *Schandfrieden*, a shameful peace.[41] Of particular gravity was Art. 231 ToV, which reads as follows:

> "The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence to the war imposed upon them by the aggression of Germany and her allies."

As the first Article in the chapter on reparations in the Treaty of Versailles, it was intended to constitute the legal basis for the latter.[42] However, in German public debate, this provision was generally referred to as the *Kriegsschuldartikel* (war guilt provision). The use of the term *Schuld* (guilt) further reveals the German narrative surrounding the Treaty of Versailles. In fact, none of the different language versions of the Treaty of Versailles accuse Germany of being *guilty* of the war but rather speak of *responsibility*.[43] Nevertheless, it is argued that reparations can only be demanded from the party who has caused the damage in question.[44] In the context of international law, causation demands the existence of a direct link between the actions of the party and the harm suffered, otherwise said

[41] Krumerich (n 10) p. 176.
[42] Stefan T Possony, *Zur Bewältigung der Kriegsschuldfrage: Völkerrecht und Strategie bei der Auslösung zweier Weltkriege* (Westdeutscher Verlag 1968) p. 17.
[43] Lena Mörike, *Nationale Geschichtspolitik: Der Versailler Friedensvertrag in der 100-jährigen Erinnerung in Schulbüchern aus vier Nationen* (Transcript 2022) p. 180.
[44] Luke Moffett, *Reparations and war: finding balance in repairing the past* (OUP 2023) pp. 82-83.

party does not bear legal responsibility for the damage.[45] Thereby, by asking for reparations from Germany, the Allies attribute guilt, in the form of causality.[46] Moreover, it is brought forward that Art. 231 ToV would be superfluous for the assessment of damages when assessed in light of Art. 232 ToV. By limiting the amount of damages possible under Art. 231 ToV, Art. 232 ToV shows that the former's primary aim lies in the prescription of guilt. Therefore, it is argued that Art. 232 ToV would have been sufficient to oblige Germany to pay reparations for their war conduct.[47] This suggests that Art. 231 ToV was not only the legal basis for damages, but allowed the Allied Powers to emphasise the moral and political culpability of Germany for initiating and perpetuating World War I. Whatever the role the Allies intended Art. 231 ToV to play, Germany saw it as carrying a powerful moral component by condemning it as the sole party guilty of the war.[48] In contrast to Arts. 227 and 228 ToV, Art. 231 ToV entailed a charge of *collective* guilt, extending blameworthiness to the German state and, implicitly, to its entire population. As such, it became the main subject of national propaganda against the peace agreement and Entente.[49] Philipp Scheidemann, the social democrat who proclaimed the German Republic from the balcony of the *Reichstag* and later became the first *Reichsministerpräsident* of this new Republic, famously condemned the Treaty of Versailles in his parliamentary speech on 12 May 1919. After referring to Art. 231 ToV as a "a high level of enthrallment and humiliation and rapture",[50] Scheidemann addresses the parliament directly:

> "[I] ask you: who can, as an honest man, I don't even want to say, as a German, only as an honest man faithful to the treaty, enter into such conditions? *What hand*

[45] Alexander Orakhelashvili, *Causation in international law* (Edward Elgar Publishing Limited 2022) p. 68.
[46] Kolb (n 18) p. 30.
[47] Philip Mason Burnett, *Reparation at the Paris Peace Conference from the Standpoint of the American Delegation* (New York 1940) pp. 145-157; and Possony (n 42) p. 17.
[48] PA AA NL 43/2, IMG_1089; See also Christian Daniel Kreuz, *Das Konzept »Schuld« im Ersten Weltkrieg und in der Weimarer Republik: Linguistische Untersuchungen zu einem brisanten Thema* (Buske 2018) p. 188.
[49] Schwengler (n 26) pp. 116-17.
[50] Own translation of „tiefes Maß von Fesselung und Demütigung und Ausraubung". 'Nationalversammlung – 39. Sitzung, Montag, den 12. Mai 1919' (Reichstagsprotokolle, 1919/20, 2) <http://www.reichstagsprotokolle.de/Blatt2_wv_bsb00000011_00355.html> accessed 17 June 2024.

> *should not wither, which puts itself and us in these fetters?* (...) This Treaty is unacceptable in the opinion of the imperial government!"[51]

According to parliamentary reports, this was followed by thunderous applause, lasting several minutes.[52] Yet, many social democrats pressed for the signing of the Treaty, conscious of the significant pressure exercised by the Allied Powers. In the end, this fundamental disagreement caused Scheidemann to resign, followed by Foreign Minister von Brockendorff-Rantzau and Minister of Justice Otto Landsberg, leading to the end of Scheidemann's cabinet.[53] These were certainly not the last politicians of the Weimar Republic whose fate was burdened by the Peace Treaty.

The weight of the Treaty of Versailles was particularly heavy due to its penal provisions. By charging Germany with the responsibility of the war, Article 231 ToV was seen by Germany as the basis and justification for the penal provisions.[54] As such the question of who bore responsibility for the outbreak of the war dominated public debate. Already in 1918, before the negotiations of the peace treaty had even started, the German Ministry for Foreign Affairs created a special unit dedicated to the question of war guilt (the so-called *Kriegsschuldfrage*) led by Bernhard Wilhelm von Bülow.[55] Additionally, the *Nationalversammlung,* the constituent parliament of the Weimar Republic, established a parliamentary committee to collect all evidence to determine the extent of Germany's fault with regard to the outbreak and course of the war, and whether this amounted to a violation of international law.[56] Similarly, the social democrat Karl Kautsky was designated undersecretary in the Ministry of Foreign Affairs under the *Rat der Volksbeauftragten,* the provisional interim government before the first official elections, and tasked with analysing the role of the

[51] Own translation of „[I]ch frage Sie: wer kann als ehrlicher Mann, ich will gar nicht sagen als Deutscher, nur als ehrlicher vertragstreuer Mann solche Bedingungen eingehen? *Welche Hand müßte nicht verdorren, die sich und uns in diese Fesseln legt?* (…) Dieser Vertrag ist nach Auffassung der Reichsregierung unannehmbar!", emphasis added. ibid.
[52] 'Nationalversammlung – 39. Sitzung, Montag, den 12. Mai 1919' (Reichstagsprotokolle, 1919/20, 2) <http://www.reichstagsprotokolle.de/Blatt2_wv_bsb00000011_00355.html> accessed 17 June 2024.
[53] Henig (n 17) p. 28.
[54] Mörike (n 43) p. 182.
[55] PA RZ 250/25842, IMG_ 0358. Bernhard Wilhelm von Bülow is another politician who resigned after the signature of the Treaty of Versailles.
[56] Schwengler (n 26) p. 276.

Kaiserreich in the outbreak of the war.[57] The belief at the time appeared to have been that if the responsibility, and hence the guilt, of Germany was to be disproven, not only would the penal provisions lose their legal ground, but also the German people would be freed of the humiliation that the Treaty of Versailles embodied as a whole.

Kautsky indeed succeeded in compiling a comprehensive collection of documents revealing the circumstances of the outbreak of the war. Remarkably, however, the publication of the Kautsky documents was hindered while peace negotiations were still ongoing.[58] Instead, the files were only published towards the end of 1919. Apparently, the material did not exonerate Germany as unequivocally as hoped.[59] As such, the Kautsky documents faced some resistance in Germany, also from government circles. For example, Bernhard Wilhelm von Bülow, part of the German Peace Delegation and mainly concerned with the question of war guilt, commended and coordinated public criticism of the Kautsky files.[60] In contrast, according to the official government position, the files were symbolic of the "good and pure will of the responsible new Germany, which does not want to hide its share of responsibility for the war".[61] Portraying itself as morally superior, Germany claimed that a peaceful world order can only be based on truth and justice, which was said to be contingent upon all other parties involved publishing reports on the outbreak and conduct of the war as well:[62] the complete story could only be told if it was composed of chapters written by all characters. Yet, the conflict surrounding the Kautsky files shows how the question of war guilt and its resolution was more a matter of political tactic than factual evidence.[63]

[57] See, for example PA AA NL 259/121, IMG_3387.
[58] See the advice thereto: PA AA RZ 210/26618G, IMG_3401. Also discussed in Possony (n 42) pp. 156-158.
[59] PA AA RZ 210/26618G, IMG_3403.
[60] PA AA RZ 210/26375, IMG_3450.
[61] Own translation of „guten und reinen Willens des verantwortlichen neuen Deutschlands, das seinen Anteil an der Verantwortlichkeit am Kriege nicht verschleiern will". PA AA RZ 210/26378, IMG_3418.
[62] PA AA RZ 210/26378, IMG_3418-19.
[63] Karl Dietrich Bracher und Manfred Funke, *Die Weimarer Republik, 1918-1933: Politik, Wirtschaft, Gesellschaft* (3rd edn, Bundeszentrale für politische Bildung) p. 290.

Viewed in this light, Art. 231 ToV can be seen as the perfect canvas for propaganda against the *Schandfrieden* and the Allies.[64] German public opinion on the Treaty of Versailles was deliberately shaped to foster an even deeper rejection of the Peace Treaty. This propaganda found fertile ground among the German population, underlining how the rejection of the Treaty of Versailles was actively pursued and became one of the founding stones of Weimar. Moreover, the profound sense of injustice on the side of Germany, created by the Treaty of Versailles, resulted in a deep division between the new emerging international community, led by the Allies, and the defeated Germany. As such, the Treaty of Versailles, while establishing military peace in Europe, continued, if not enforced, the hostility between Germany and the Entente. It was against this wall of outright rejection of the peace agreement, that both the Allies as well as the German Government had to navigate the compliance with the Treaty of Versailles. Being the basis for the penal provisions, the strong opposition of Article 231 ToV naturally extended also to Article 227 ToV and shaped its reception in Germany.[65]

3. Article 227 of the Treaty of Versailles - The Kaiser before an International Criminal Tribunal

3.1. Historical Background and Novelty

After World War I, as the first global war, Art. 227 ToV was the first time that an international criminal tribunal assessing a perpetrator's individual responsibility was foreseen in an international agreement.[66] The principal allegations that the Entente brought against the Kaiser were threefold. He was charged with breaching neutrality agreements, engaging in aggressive war and conducting the war itself in an unlawful way.[67] However, individual responsibility for such offences was not a part of existing international law.[68] In a meeting on 8 April 1919 between the Big

[64] Sally Marks, 'Smoke and Mirrors: In Smoke-Filled Rooms and the Galerie des Glaces' in Manfred Franz Boemke, Gerald D Feldman and Elisabeth Glaser (eds), *The Treaty of Versailles: A Reassessment after 75 Years* (German Historical Institute and Cambridge University Press 1998) p. 358.
[65] Wolfgang J Mommsen, 'Max Weber and the Treaty of Versailles' in Manfred Franz Boemke, Gerald D Feldman and Elisabeth Glaser (eds), *The Treaty of Versailles: A Reassessment after 75 Years* (German Historical Institute and Cambridge University Press 1998) p. 536.
[66] Schabas (n 2) p. 3.
[67] ibid p. 43.
[68] Possony (n 42) pp. 76-78; Schwengler (n 26) pp. 21-70.

Four, Clemenceau strikingly points out the post-war momentum and its potential implications for international law: "We now have the perfect opportunity to take the principle of responsibility, which is at the basis of national law, and transpose it into international law".[69] This development was seen as a necessity resulting from the atrocities committed by Germany during the war and served as a justification for the penal provisions of the Treaty of Versailles: "To these precedents, we reply with the precedent of justice".[70] As such, Art. 227 ToV was framed as inevitable, as a natural consequence of Germany's conduct in World War I.

Apart from the aspiration to set a legal precedent for the future, the wish to personally punish the Kaiser was the prevailing public opinion in the Allied states. Especially in the United Kingdom, there was a flaming desire for justice and revenge against Germany, picked up and reinforced by electoral campaigns. As such, the case against the Kaiser was a crucial, and, above all, successful, part of Lloyd George's political program, culminating in the slogan "Hang the Kaiser". [71] The idea to prosecute the Kaiser was equally popular in France. The so-called *Erbfeindschaft* between France and Germany, a product of centuries of war and conflict, provided fruitful soil for further antagonism. However, the United States and Japan opposed an international criminal tribunal for the Kaiser's prosecution and punishment, and instead viewed only States as adequate to adopt political sanctions against the Kaiser. A compromise had to be found. And indeed, it was.[72] In fact, it was US-President Wilson himself who drafted the first version of Article 227 ToV. Without many changes to the original wording,[73] the final wording of the provision was agreed upon:

[69] Meeting of the Council of Four, 8 April 1919, 3 pm, Mantoux I, pp. 184–92; WWP 57, pp. 121–30; Deliberations I, pp. 187–95. Found in Schabas (n 2) p. 190.
[70] ibid.
[71] This did of course not escape attention in Germany, see for example: BArch, R 3001/4475, IMG_1283, where it is reported that the part on the trial of the Kaiser received the most applause by the audience in a speech by Lloyd George.
[72] Gerd Hankel, *Die Leipziger Prozesse: Deutsche Kriegsverbrechen und ihre strafrechtliche Verfolgung nach dem Ersten Weltkrieg* (Hamburger Edition 2003) pp. 78-80.
[73] For a detailed account on the drafting history behind art. 227 ToV, see Schabas (n 2) ch. 12, pp. 174-197.

> "The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.
>
> A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan.
>
> In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed.
>
> The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial."

The ultimate phrasing of Art. 227 ToV is evidently the result of a compromise between the different Allied powers, reflecting the ambiguity and disagreement on the stance and role of international law in holding individuals accountable in front of an international criminal tribunal. As such, instead of accusing the Kaiser of having committed specific crimes, he was to be prosecuted "for a supreme offence against international morality and the sanctity of treaties". The Kaiser was not accused of having committed specific crimes or breaches of international law as laid down in treaties, custom or general principles. While the term "sanctity of treaties" might have been intended to relate to international agreements, no specific treaties are listed. Additionally, the Kaiser was charged with a violation of "morality", showing how the indictment foreseen in Art. 227 ToV was not, because it could not be, based on legal grounds. Hankel describes the ambiguous terminology of Art. 227 ToV well, calling it the result "diplomatic description of a missing offence".[74] The wording of the provision demonstrates how Art. 227 ToV connected moral obligations to political action, highlighting that ethical violations such as breaches of "morality" and treaty "sanctity" were part of a larger political undertaking rather than purely legal ones. The normative character of the choice of words furthermore reflects the vengeful thinking among the Allied

[74] Own translation of „diplomatischer Umschreibung eines fehlenden Straftatbestands". Hankel (n 71) p. 29.

Parties and the desire to present themselves as *morally* superior, through the creation of a legal precedent. This reveals a core issue of Art. 227 ToV, namely that the trial and prosecution of the Kaiser was flawed in so far as it was a political undertaking in the costume of a legal provision.

Notwithstanding the aim of establishing the precedent of individual responsibility under international law, Art. 227 ToV was mainly motivated by non-legal considerations. The Committee on Responsibilities, composed of one member each of the Big Four and Japan, articulated further on the nature of Art. 227 ToV. It was said to not have "a juridical character as regards its substance, but only in its form".[75] This was reiterated by Robert Lansing in front of the American Bar Association in September 1919, where he stated that the tribunal foreseen by Art. 227 ToV "is not a court of legal justice, but rather an instrument of political power".[76] The emphasis on the political nature of Art. 227 ToV underscores the fact that its primary function seemed to have been addressing the Allies' political and moral objectives rather than delivering impartial legal justice. This approach furthermore reflected the broader strategy to leverage the Treaty of Versailles as a means of reinforcing post-war geopolitical interests and ensuring long-term dominance, or at least control, over Germany. As such, Art. 227 ToV was motivated by and created in a political environment, guided by national interests rather than legal reality. While international law certainly can progress and precedents form part of this development, this can only be done by taking into consideration existing and recognised principles of law as well as state practice.[77] Naturally, the initial pressure to enforce Art. 227 ToV and extradite and try the Kaiser faced these difficulties inherent in the provision itself. In Germany, Art. 227 ToV was perceived as exactly what it seemed to have been: a political undertaking, disguised in the costume of a legal provision. From the German perspective, international law at the time did not permit the establishment of an international criminal tribunal competent to assess the individual responsibility of

[75] Memorandum Submitted to the Council of Principal Allied and Associated Powers by the Committee on Responsibilities in order to justify the articles of Conditions of Peace, CP 62, Appendix VIII, USNA 180.03401/62 and USNA185.118/89; Memorandum présenté au Conseil des principales puissances alliées et associées par le Comité des responsabilités pour justifier les articles des conditions de paix, Scott Papers, Box 23.35b. Found in Schabas (n 2) pp. 206-207.
[76] Robert Lansing, 'Some Legal Questions of the Peace Conference' (Washington, DC: Government Printing Office, 1919), p. 18. Schabas (n 2), p. 209.
[77] Benedetto Conforti and Angelo Labellapp, *An Introduction to International Law* (BRILL 2012) pp. 31-33.

a head of state. And revenge could not be justified by simply being put in an article in a peace agreement. Consequently, the creation of Art. 227 ToV as a legal instrument was outrightly rejected by Germany.

3.2. Germany's Role in Drafting the Treaty of Versailles and its Position on the Penal Provisions

The German Peace Delegation was determined to change both Arts. 227 and 228 ToV and prevent a signature of these provisions as formulated by the Entente.[78] In a meeting of the Peace Committee of the national assembly on 19 May 1919, the state secretary Matthias Erzberger rejected the Allied demand of the extradition of the Kaiser.[79] In the written submissions of the German Peace Delegation to the Paris Peace Conference, Arts. 227 and 228 ToV were considered as *rechtlich unhaltbar und [ein Verstoß] gegen die deutsche Ehr*e.[80] Agreeing to Art. 227 ToV as proposed by the Allies would mean agreeing to the criminal prosecution of the Kaiser, the jurisdiction of the international tribunal, and the admissibility of his extradition, consequences all deemed unacceptable by Germany.[81]

The German Peace Delegation viewed the foreseen criminal prosecution as lacking any legal ground. Existing international law did not foresee any criminal sanction for a breach of custom or treaties. It follows that there could not be an international tribunal to hear such claims. Given these circumstances, the Treaty of Versailles needed to create an extraordinary court with an extraordinary criminal law with retroactive applicability as its basis. Thus, as per the position of the German Peace Delegation, Art. 227 ToV was not based on the supreme principles of law but was politically motivated. By supreme principles of law, the report most likely refers to concepts such as *nulla poena sine lege* and its link with the principle of non-retroactivity.[82] Accordingly, no one can be punished for conduct unless this was established by law beforehand. Instead, in view of the German Peace Delegation, Art. 227 ToV would place a German before a foreign court of exceptional nature based on an exceptional law created only for this

[78] PA AA RZ 250/25823, IMG_0535.
[79] BArch, RM 9/94, S. 72, 88.
[80] Own translation of "legally untenable and [a violation of] the German honour". PA AA RZ 250/25812, IMG_0511; PA AA RZ 254/26030, IMG_1021.
[81] PA AA RZ 250/25823, IMG_0535.
[82] Explicitly referred to in PA RZ 250/25823, IMG_ 0521.

person by foreign powers. Art. 227 ToV was thus classified as a political act, falling far short of a legally justifiable procedure. The Delegation ruled that it would consequently also be impossible for the German Government to accept a request to the Netherlands to extradite the Kaiser to the Entente.[83] Interestingly, when looking at the wording of Art. 227 ToV, Germany did not have any direct obligations under the provision. Merely the design of the tribunal and the planned extradition request are laid out, as tasks for the Allied Powers. While Art. 227 ToV of course impacted Germany, as it foresaw the prosecution of its former Emperor, the country technically had no direct obligations under Art. 227 ToV. Yet, Germany considered the mere inclusion of the provision as an affront to national dignity and a violation of all standing principles of both national and international law. It was between these two positions, one being the lack of international obligations under Art. 227 ToV, and the other one being the vivid opposition to the provision, that Germany had to find its place.

The German Peace Delegation found it important to stress that the opposition to the Treaty of Versailles did not mean that Germany principally denied sanctions for breaches of international law. Instead, it saw states as the principal and sole subject of international law, and therefore as the only actors which can be held responsible for a violation thereof, also where this incurs by individuals.[84] By this line of reasoning, Germany was willing to submit to a neutral international tribunal, the question of whether an act committed in war can constitute a violation of the law and customs of war, subject to three conditions: Firstly, the accusations of violations of international law of the Entente also had to be brought before the tribunal. Secondly, Germany must be allowed to participate in the formation of the tribunal on an equal standing with the other powers. Thirdly, the jurisdiction of the tribunal shall be limited to establishing answering the question of a potential breach of international law. A potential punishment thereof must be left to national courts.[85]

Interestingly, Germany proposed the insertion of a general impunity clause for all crimes committed during the war, with the addition of Art. 230a ToV. According to the proposal of the German Peace Delegation, any person who

[83] PA AA RZ 250/25823, IMG_0535-36.
[84] PA AA RZ 250/25823, IMG_0537-38.
[85] PA AA RZ 250/25812, IMG_0511; PA AA RZ 250/25823, IMG_0538-39.

committed crimes for the benefit of their state shall be granted impunity, so long as these acts do not constitute violations of the laws and custom of war. The same shall extend to the political and military behaviour of inhabitants of occupied territory. Lastly, where impunity is accorded under this provision, all criminal proceedings are to come to a halt, pending proceedings shall be discontinued, and any penalties already imposed shall not be enforced; in short, those affected by the provision would have to be reinstated in their status prior to proceedings.[86] Such provisions, tellingly called amnesty or oblivion clauses, were indeed the norm up until the Treaty of Versailles. Generally, these clauses covered all hostilities committed during war by all parties involved in the conflict and excluded the rights of these states and their subjects to bring forward any claims in relation to these actions.[87] At the latest since the early modern period, amnesty clauses formed part of peace treaties. By the start of the 19th century, it became custom that amnesty clauses were implicitly entailed in all peace agreements, and there was no longer the need to expressly include them.[88] The Treaty of Versailles stood in stark contrast to this tradition. Therefore, the proposal of the German Peace Delegation of introducing an amnesty clause is not surprising or particularly extraordinary. However, in the view of the Entente, the extraordinary nature of the atrocities and extent of World War I seemingly called for new legal tools to restore justice and peace. In combination with the strong desire for revenge, a general impunity clause was not within the scope of consideration for the Allied Powers.[89] Instead, they sought to establish individual accountability and prosecution. Given this underlying doctrine of the system of Treaty of Versailles, it should have not surprised Germany that the proposal of inserting Art. 230a ToV was rejected.

By returning to the just-war doctrine, the Treaty of Versailles marked a break in the custom of peace treaties in Europe. The just-war doctrine entails two main principles, namely *ius ad bellum* (right to war) and *ius in bello* (right conduct in war). The former sets out the conditions under which states are allowed to go to war, while the latter governs the conduct of war, prescribing limitations on the

[86] PA AA RZ 254/26030, IMG_1016.
[87] Randall Lesaffer, 'Wiping the slate clean… for now: Amnesty in early-modern peace treaties' (*Oxford Public International Law)* <https://opil.ouplaw.com/page/amnesty-peace-treatieshttps://opil.ouplaw.com/page/amnesty-peace-treaties> accessed 14 May 2024.
[88] Bardo Fassbender and Anne Peters (eds) *Oxford Handbook of the History of International Law* (OUP 2012) p. 89.
[89] Schabas (n 2) pp. 184-190.

brutality of war.[90] Some interpretations also include a third component, *ius post bellum,* which focuses on justice after war.[91] This means that even though going to war might be protected under the *ius ad bellum* and *ius in bello,* this does not exonerate the belligerent of all responsibility under international law. Therefore, the *ius post bellum* foresees the possibility of holding high-ranking military and political figures accountable. As such, the aims of the *ius post bellum* are argued to be broad, encompassing a general post-conflict resolution mechanism.[92] However, up until the early 20th century, European peace treaties refrained from an evaluation on the legality and fairness of the war and assignment of blame. Both Art. 231 ToV as well as the penal provisions of the Treaty of Versailles stand in contrast to this. These clearly reflect how the Treaty of Versailles implemented the *ius post bellum,* both by attributing guilt and attempting to restore justice.[93] Yet, Germany did not regard the specific implementation of the *ius post bellum* doctrine as constructive. In fact, the German Peace Delegation found that the Treaty of Versailles as envisaged by the Entente would counterfeit the purpose of the Treaty itself.[94] According to Germany, one of the main tasks of the peace agreement should be the appeasement of the numerous allegations of violations of international law. As such, it should only be limited to try the violations that actually constitute a breach. However, this goal could not possibly be achieved with a treaty such as that brought forward by the Allies:

> "This goal cannot be achieved if (...) the demand for atonement for wrongdoings committed for political purposes is mixed with branding and ostracizing of the opponent, if the victor is assigned the role of judge, and thus replaces the law with power."[95]

[90] James Turner Johnson, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry.* (Princeton University Press 2014) p. xxiii.
[91] Fassbender and Peters (n 88) p. 72.
[92] Martin Frank, 'Das *ius post bellum* und die Theorie des gerechten Krieges' (2009) 50 Politische Vierteljahresschrift pp. 736-737.
[93] Fassbender and Peters (n 88) pp. 88, 91.
[94] PA AA RZ 250/25823, IMG_0537.
[95] Own translation of „Dies Ziel kann nicht erreicht werden, wenn man (…) die Forderung nach Sühne begangenen Unrechts zu politischen Zwecken mit Brandmarkung und Ächtung des Gegners verquickt, dem Sieger die Rolle des Richters überträgt und damit Gewalt an Stelle des Rechtes setzt." PA AA RZ 250/25823, IMG_0537.

Germany therefore opposed the penal provisions as foreseen by the Entente. Unsurprisingly, the demands made by the German Peace Delegation were not accepted in Paris. Merely the request to deliver the final list of people demanded for extradition under Art. 228 ToV within a month after entry into force was granted.[96] This section shows that even the underlying principles and doctrines of the Treaty of Versailles were not accepted in Germany, concerns which the German Peace Delegation already voiced during the negotiations of the Peace Agreement. Unsurprisingly, this did not result in a change of the wording of Art. 227 ToV or the general character of the Treaty, its primary purpose of consolidating the defeat of Germany being the minimal consensus between the Allied Powers. While this aim was arguably achieved, the realistic prospects and possibilities of the enforcement of the Peace Agreement seem to have been neglected, bearing far-reaching consequences for the trial of the Kaiser.

3.3. "A Threefold Wall of Law" – Germany's Legal Assessment of Art. 227 ToV

The position of the German Peace Delegation during the Paris Peace Conference seems to have been based on two principal legal opinions drawn up by the legal department of the Ministry of Foreign Affairs. Both assessments were transmitted to the German Peace Delegation by the Ministry of Foreign Affairs, as *Geheimrat,* privy councillor, Bruno Wedding informs the Ministry of Justice on 30 April 1919.[97] Therefore, at the moment in time when these opinions were drawn up, the Kaiser had already fled to the Netherlands. The first opinion concerns the question to what extent the Kaiser could be held responsible, while the second examines the question of the admissibility of the extradition of the Emperor from the Netherlands to the Entente. By answering both questions in the negative, the reports reveal the German legal perspective on Art. 227 ToV. What is more, the Netherlands too sought legal advice, albeit much earlier. Already on 9 December 1918, the Dutch Government received an advisory report on the presence of the Kaiser in the Netherlands.[98] When compared, these assessments shed light on the

[96] PA AA RZ 250/25812, IMG_0511.
[97] BArch, R 901/27242, Image 1338.
[98] Advies van mrs. B.C.J. Loder, A. Struycken en A.E. Bles uitgebracht aan de minister van Justitie Heemskerk 9 december 1918. Nationaal Archief, Wetrkarchief van karnebeek, 2.05.25, Nr. 144.

different national perceptions of the role of international law. All in all, their analysis allows for a better understanding of the underlying principles guiding Germany's policy in manoeuvring the *Kaiserfrage* and its international relations.

3.3.1. The Responsibility of the Kaiser

The first opinion on the responsibility of the Kaiser addresses the question by four main points, namely the assessment of responsibility under German law, the examination of exterritoriality, the doctrine of political acts and the issue of jurisdiction. Before analysing the criminal responsibility of the Kaiser under German law, the report defines crimes as "acts of war directed against persons and property which, at the same time, constitute consequences of orders contrary to international law".[99] Notwithstanding this definition, barely any specific conduct by the Kaiser is assessed. Instead, it is argued that there cannot be any criminal responsibility of the Kaiser due to his inviolability under German law. Both reports were drawn up pre-revolution and were as such based on the constitution, the *Verfassung des Deutschen Reichs (Reichsverfassung),* of the German Empire of 1871. According to Art. 17 of the *Reichsverfassung,* the *Reichskanzler,* by his countersignature, assumes responsibility for all acts of the Kaiser. Following the German legal assessment, this holds especially true for the declaration of war, which Art. 11 of the *Reichsverfassung* assigns to the exclusive competence of the Kaiser, subject to approval of the *Bundesrat,* the Federal Council. It follows, that for this reason alone, the Kaiser cannot be guilty of the outbreak of the war. Notwithstanding*,* the Kaiser enjoys immunity. As the King of Prussia, he is inviolable, as set out by Art. 43 of the Prussian Constitution.[100] Seeing these grounds as sufficient, the opinion does not entail any further analysis of the potential criminal responsibility of the Kaiser. Interestingly, the report nevertheless addresses one criminal charge directly, namely the accusation that the Kaiser's military commands violate principles of international law. In the opinion of the report, an assessment of the Kaiser's military commands would trigger the application of Art. 47 of the German Military Criminal Code, which attributes sole

[99] Own translation of „Kriegshandlungen, die sich gegen Personen und Eigentum gerichtet haben und sich zugleich als Folgen völkerrechtswidriger Befehle darstellen" PA AA RZ 250/25823, IMG_0515.

[100] The *Kaiserreich* was constituted of different parts of various characters, among them kingdoms, grand duchies, and principalities. Prussia was the biggest part and kingdom of the *Kaiserreich.*

responsibility to the ordering superior where the execution of an order violates criminal law. International law was therefore to be seen as forming part of German criminal law. Under Art. 47 of the German Military Criminal Code, the obedient subordinates are merely punishable as *Teilnehmer* (participant) subject to certain conditions.[101] The Kaiser would then incur criminal responsibility either as the direct perpetrator, indirect perpetrator, or instigator.[102] However, once again, this was judged as irrelevant due to the several constitutional safeguards awarded to the person of the Kaiser.[103]

Interestingly, the report does not perceive the principle of extraterritoriality as an obstacle for the jurisdiction of foreign courts over the allegations against the Kaiser.[104] In international law, the principle of extraterritoriality generally precludes the exercise of jurisdiction over another state and their official representatives by the country in which they are present.[105] However, according to the German assessment, this principle cannot be invoked between belligerent states. Therefore, the report concludes that it is prima facie possible for hostile courts to rule upon those actions of the Kaiser which fulfil the definition of a crime under their respective national laws. This assessment is confirmed by the recordings of the speaker of the German Ministry of Justice which state that "extraterritoriality does not mean impunity, but only the protection from prosecution".[106] Going even further, the recordings say that this protection ends with the termination of official state functions and, from then onwards, a former sovereign can be prosecuted in a foreign state, also for crimes committed during their rule.[107] What is more, the advisory report to the Dutch Government argues in a similar manner. The Dutch Commission asserts that the raison d'être of the principles of *onschendbaarheid* (immunity) and *exterritorialiteit* (extraterritoriality) is directly linked to the dignity of the state function the sovereign holds. With the end of this function, these principles cease to apply and no longer protect the sovereign from jurisdiction, rendering it possible for foreign

[101] PA AA RZ 250/25823, IMG_0515-16.
[102] PA AA RZ 250/26030, IMG_1041-42.
[103] PA AA RZ 250/25823, IMG_0515-16.
[104] PA AA RZ 250/25823, IMG_0515-0521.
[105] 'Extraterritoriality' (*Britannica*) <https://www.britannica.com/topic/extraterritorialityhttps://www.britannica.com/topic/extraterritoriality> accessed 16 May 2024.
[106] PA AA RZ 254/26030, IMG_1037.
[107] PA AA RZ 254/26030, IMG_1037.

courts to assess the conduct of a former sovereign.[108] Interestingly, neither the German nor the Dutch report distinguish between acts performed in the official capacity as sovereign and unofficial acts. This would be in line with the current status of international law, where certain state officials, such as the Head of State, enjoy immunity *rationae personae,* i.e. immunity inextricably linked with the status as state official.[109] The Dutch and German opinions concur in finding that criminal conduct, however, can under no circumstances consist of a declaration of war. The Dutch report bases this on the finding that international law does not differentiate between just and unjust war, and hence a declaration of war cannot be unjust as such.[110] Germany argues that a declaration of war by a state sovereign is legitimised on constitutional and international law. Thus, according to the German report, whether a declaration of war is justified can never be subject to a legal assessment but only discussed politically.[111]

In the same vein, the German outline argues that orders given by a military commander in war can merely be judged militarily and politically and be subject to criminal judgement only to the extent that they constitute a direct violation of principles of international law. This is in line with the assessment of Art. 47 of the German Military Criminal Code. Even in times of war, Germany sees the outer boundaries of lawful conduct to be drawn by international law. The report continues that international law, however, does not allow for these limitations to be discussed by invoking a unilateral criminal law on which there is no international consent. Should a state nevertheless subject these questions to their jurisdiction, this would amount to a violation of the general principle of international law, according to which no state may claim jurisdiction over another independent state. Therefore, the conduct by the Kaiser as supreme commander can only be discussed politically.[112] A complementary document to the legal opinions furthers this argumentation: in response to the argument that the orders by the Kaiser do not have a political character since his role as supreme

[108] Advies van mrs. B.C.J. Loder, A. Struycken en A.E. Bles uitgebracht aan de minister van Justitie Heemskerk 9 december 1918. Nationaal Archief, Wetrkarchief van karnebeek, 2.05.25, Nr. 144.
[109] Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21(4) European Journal of International Law 815, 818.
[110] ibid.
[111] PA AA RZ 250/25823, IMG_0516-17.
[112] PA AA RZ 250/25823, IMG_0518-19.

commander is separate to his role as Emperor, Arts. 53 and 63 of the *Reichsverfassung* are referenced. These provisions state that both the marine and entire land power of the empire are uniform and under the supreme command of the Emperor. Therefore, it is concluded that the Kaiser necessarily is Emperor and supreme commander at the same instance, and his acts as the latter cannot be artificially separated from his role as sovereign. Accordingly, the military orders of the Kaiser, if they are to be seen as punishable acts, can only be regarded as political crimes.[113] The definition of political crimes was subject to much debate. The main question concerned whether only internal acts, directed against the own state, or also conduct against foreign states were protected by this doctrine. The German legal opinion concluded that the term must be construed broadly: If extradition is not allowed for internal political crimes, this must a fortiori hold for political crimes against other states as well. Since everything the Kaiser did was directly linked to the political aim of conducting war, all his actions were held to be political.[114]

In any case, the German report continues, the Kaiser cannot be held personally responsible for the execution of his orders.[115] It was considered impossible to bring forward evidence that would conclusively demonstrate that acts committed in the course of war against enemy troops or inhabitants of an enemy country, and which violate that country's civil or military criminal law, were committed at the direct order of the Kaiser. In particular, three specific allegations against the Kaiser were discussed. First, in January 1919 an alleged letter between the Kaiser and Franz Joseph, the Emperor of Austria, was discovered and published in France. The letter is said to contain the following sentence: "My soul is torn, but it must be put into fire and blood, men, women, children and old people strangled, no tree, no house left standing."[116] Understandably, this caused some commotion throughout the Entente. In his notification about the publication of the letter to the Ministry of Foreign Affairs, the legation councillor in Spa, Oskar Trautmann, characterises the correspondence

[113] PA AA RZ 254/26032, IMG_0896-999.
[114] PA AA RZ 254/26032, IMG_0906.
[115] PA AA RZ 250/25823, IMG_0519.
[116] Own translation of „Meine Seele ist zerrissen, aber man muß alles in Feuer und Blut setzen, Männer, Frauen, Kinder und Greise erdrosseln, keinen Baum, kein Haus aufrecht stehen lassen." BArch, R 901/27242, Image 1315.

as a "clumsy forgery" which was used by the Entente to justify their prosecution of the Kaiser.[117] Indeed, in France, the letter was used as primary evidence as Wilhelm's admission of guilt for the atrocities of the war.[118] The German report deals with these allegations in two ways. Firstly, the existence of the letter is denied. Secondly, and alternatively, it is argued that even if the letter would exist, it does not contain any order by the Kaiser to his troops but is merely a private message to a befriended Emperor.[119] The other two concrete allegations briefly discussed by the report concern Edith Cavell and Charles Fryatt. Edith Cavell was a British nurse who assisted Allied soldiers in escaping from German-occupied Belgium and sentenced to death under German military law.[120] Charles Fryatt, a British merchant navy captain, was executed by a firing squad, for attacking a German U-boat.[121] Since both were prosecuted by German courts and the Kaiser is not allowed to interfere with the judiciary branch, the report argues that he bears no criminal responsibility for their execution. Moreover, the decision not to use the power to pardon can never constitute a crime. As a last remark, reference is made to the *Schücking-Kommission* established by the democratic Government,[122] which confirmed Fryatt's sentence and did not find it to violate international law.[123] The reference to Cavall and Fryatt is not surprising. Both cases had widely attracted media attention abroad and contributed considerably to the growing sentiment of holding Germany responsible for its conduct during the war.[124] In explicitly addressing these two cases, the report seemingly aims at precluding any claims trying to establish a connection between the controversial judgements and any responsibility of the Kaiser. Matters surrounding the Kaiser should be as unagitated as possible.

Lastly, the report concludes that neither German nor foreign courts can rule upon the allegations against the Kaiser, and moreover excludes the ability of an

[117] Own translation of „plumpe Fälschung". BArch, R 901/27242, Image 1315.
[118] BArch, R 901/27242, Image 1319.
[119] PA AA RZ 250/25823, IMG_0519-20.
[120] §90 paragraph 1, third sentence *Strafgesetzbuch für das Deutsche Reich* (1876), Gesetz v. 06.03.1876, RGBl. Nr. 6, S. 39–120.
[121] Schabas (n 2) p. 11.
[122] *Verordnung über Zusammensetzung und Geschäftsgang der Kommission zur Untersuchung der Auflagen wegen völkerrechtswidriger Behandlung der Kriegsgefangenen in Deutschland*, Verordnung v. 30.11.1918, RGBl. Nr. 169, S. 1388.
[123] PA AA RZ 250/25823, IMG_0521.
[124] Schabas (n 2) p. 11.

international tribunal to do so. Under German law, the Kaiser enjoys constitutional immunity. As such, his conduct does not fulfil the *Tatbestand,* the requirements of an offence, of any crime found in German law. While foreign courts could base their jurisdictional claims on their respective criminal codes for crimes conducted within their own territory, this is limited by the generally accepted principle *nulla poena sine lege,* according to which there can be no punishment without law. Thirdly, albeit an international tribunal might be created by an international agreement, its functioning would require a priorly agreed upon criminal law. Even if created, this cannot have retroactive effect and thus the report excludes the jurisdiction of such an international tribunal for trying the Kaiser.[125]

Interestingly, the Dutch Commission report comes to the opposite conclusion. On the question whether the Kaiser can incur criminal responsibility under German law for the acts committed by his troops, the Dutch Commission refers to Art. 64 of the *Reichsverfassung,* according to which all troops are under an oath to follow the orders of the Kaiser. The Commission reasons that this renders the Kaisers a *middellijk of intellectueel dader,* as indirect or intellectual perpetrator, of the crimes committed by German soldiers, for whom he bore personal responsibility.[126] As seen in the German report, the ordering superior is already attributed sole responsibility for the actions of his subordinates under Art. 47 of the German Military Criminal Code. Thus, there seems to be no need for the Dutch construction under Art. 64 of the *Reichsverfassung*. Regardless, the Dutch and German assessments appear to concur on the possibility of the Kaiser as an indirect or intellectual perpetrator. However, as analysed above, under German law, the Kaiser was held to lack the necessary unlawful intent as he merely exercised the supreme command to which he was entitled.[127]

The key difference between the reports lies in the Dutch understanding of the nature of political crimes. Whereas the German perspective classifies all acts of the Kaiser as political by his nature as a sovereign, the Dutch Commission report arrives at a novel finding to the contrary. In trying to define political crimes, it is said that although these were never limited to acts against the internal state order

[125] PA AA RZ 250/25823, IMG_0521.
[126] Advies van mrs. B.C.J. Loder, A. Struycken en A.E. Bles uitgebracht aan de minister van Justitie Heemskerk 9 December 1918. Nationaal Archief, Wetrkarchief van karnebeek, 2.05.25, Nr. 144.
[127] PA AA RZ 254/26030, IMG_1042.

and power, they do not extend to war conduct. On the contrary, warful conduct violating international law is directly perpetrated against civilisation and can therefore not be protected by civil states though the notion of political crimes. This reiterates the position adopted by the *Institut de Droit International* in 1892, which foresaw the extradition for political crimes if they constituted the most serious crimes from the view of morality and common laws of countries *notammenent ceux, qui sont sommis à main armée et avec violences*.[128] The German report held that this could under no circumstances be seen as constituting positive international law since it provoked full-throated opposition within the international community.[129] Evidently, the Dutch thought otherwise. They did not accept any protection of the Kaiser under neither international nor German constitutional law. Hence, it was held that the Kaiser could be guilty of ordinary offences violating international law, which would allow for an extradition of the Kaiser under Art. 7 of the 1875 Extradition Act.[130] This is striking insofar as it can be read as the Netherlands having been the only actor not classifying the Kaiser's conduct during the war as political charges. Instead, in view of the Dutch report, the Kaiser could be charged with ordinary criminal offences. The Netherlands therefore saw no need to construct the conduct by the Kaiser as a "supreme offence against international morality and the sanctity of treaties", as demanded by the wording of Art. 22 ToV, to find individual responsibility, albeit only under ordinary national law. Moreover, this allows for the assumption that an extradition request for a codified crime would have had much higher chances of success.

The legal assessment of Germany as well as the Netherlands on the responsibility of the Kaiser furthermore demonstrate how a legal response to a political undertaking is not satisfactory, in the sense that it misses the core aim of the provision. However, not responding to Art. 227 ToV in a legal sense would have been absurd; if a legal precedent is to be created, this must be done on legal grounds. And legal provisions are to be analysed legally. As shown, Germany did not find legal grounds for the responsibility of the Kaiser and thus did not act in

[128] Own translation of „especially those who are subjected to the use of arms and violence". PA AA RZ 254/26030, IMG_1046.
[129] PA AA RZ 254/26030, IMG_1047.
[130] Wet van 6 april 1875 tot regeling der algemeene voorwaarden op welke, ten aanzien van de uitlevering van vreemdelingen, verdragen met vreemde Mogendheden kunnen worden gesloten, Stb. 1875, 66.

any manner which would foster the realisation of Art. 227 ToV. This shows once more how the ambiguous wording of Art. 227 ToV, as a result of political compromise, does not translate well into legal consequences.

3.3.2. The Extradition of the Kaiser

The second legal report issued by the Ministry of Foreign Affairs answers the question of admissibility of extradition of the Kaiser from the Netherlands to the Entente, arriving at a negative conclusion. Building up on the first opinion, it argues that the only way of starting criminal proceedings against the Kaiser would require that the Entente seizes his person.[131] Two possible paths are foreseen: Firstly, an extradition request by the Entente to the Netherlands and, in case of denial, secondly, the pursuit of his expulsion. While the report sees no ground for an extradition, an expulsion would theoretically be possible. In the view of the report, extradition can only take place if this is in line with international law. However, the latter, as reflected in all extradition treaties between the Netherlands and other states, excludes extradition for political crimes.[132] More specifically, Art. 4 of the Dutch Constitution and the 1875 Extradition Law are interpreted as allowing extradition of foreigners resident in the Netherlands for grounds foreseen in extradition treaties. Here, the second report reiterates the first: the Kaiser did not act as a private person in declaring or conducting the war but only in his capacity as a representative of the *Kaiserreich* and constitutionally appointed supreme head of war. It is said that the purpose of his actions was never to harm life, health, or property of others, but to ensure Germany's integrity and reputation, and defeat its enemies. The fact that after his abdication, the Kaiser was to be regarded as a private person who no longer enjoys any privileges under international law, such as the principle of extraterritoriality, does not affect this.[133] Therefore, in accordance with the first legal report, the Kaiser's actions were characterised as "political crimes" which could not be sanctioned by law.[134] Again, this stands in stark contrast with the Dutch opinion, which does not seem to

[131] PA AA RZ 250/25823, IMG_0523.
[132] PA AA RZ 250/25823, IMG_0523-25.
[133] ibid.
[134] PA AA RZ 254/26032, IMG_0896-999.

distinguish between "political" and "private" action.[135] Instead, the Dutch report asserts that the Kaiser could be extradited under Art. 7 of the 1875 Extradition Act if he was charged with ordinary offences in violation of international law.[136] However, since Art. 227 ToV charged the Kaiser with a "supreme offence against international morality and the sanctity of treaties", the 1875 Extradition Act could not be used as an extradition basis.

Nevertheless, according to the German assessment, this does not exclude that the Netherlands may decide to extradite a person without a treaty basis. However, this was deemed unlikely since the Netherlands would thereby violate their duties as a neutral power.[137] Art. 11 of the V. Hague Convention of 1907 relative to the Rights and Duties of Neutral Powers and Persons in case of War on Land only allows for a limitation of the freedom of movement of a person belonging to a belligerent army, but not extradition.[138] While the Dutch Commission advice concurs insofar as neutral powers must prevent individuals from belligerent parties from participating in the war, it ultimately holds that all obligations connected to their neutrality cease upon the end of the war.[139] This important aspect was seemingly disregarded by the German legal opinions; its assessment is based on the legal obligations during wartime and neglects how these change upon enactment of a peace treaty. Regardless, the German report is convinced of the soundness of their reasoning, seeing no other way but for the Netherlands to follow their argumentation. If not, the country would violate their national and international law, as well as relinquishing their independence.[140] Therefore, an extradition of the Kaiser to the Entente was regarded as profoundly unrealistic.

[135] Advies van mrs. B.C.J. Loder, A. Struycken en A.E. Bles uitgebracht aan de minister van Justitie Heemskerk 9 december 1918. Nationaal Archief, Werkarchief van Karnebeek, 2.05.25, Nr. 144.
[136] Wet van 6 april 1875 tot regeling der algemeene voorwaarden op welke, ten aanzien van de uitlevering van vreemdelingen, verdragen met vreemde Mogendheden kunnen worden gesloten, Stb. 1875, 66.
[137] PA AA RZ 254/26032, IMG_1047.
[138] PA AA RZ 254/26030.
[139] Advies van mrs. B.C.J. Loder, A. Struycken en A.E. Bles uitgebracht aan de minister van Justitie Heemskerk 9 december 1918. Nationaal Archief, Werkarchief van Karnebeek, 2.05.25, Nr. 144.
[140] PA AA RZ 250/25823, IMG_0525.

According to the second legal opinion and notes of a speaker of the Ministry of Justice, an expulsion of the Kaiser would theoretically be possible.[141] The Netherlands could expel the Kaiser if this is regarded as necessary for the protection of public order, as foreseen by Art. 2 of the German-Dutch residence agreement of 17 December 1914.[142] An expulsion to any other country than Germany would be an extradition in disguise and therefore inadmissible due to the reasons analysed above. This is in line with Art. 12 of the Act on Aliens from 1849, as examined by Dutch legal scholars in the *Nieuwe Courant,* which had been reported by Rosen to Ebert on 01 December 1918.[143] The German report further continues that an expulsion of the Kaiser to Germany would seriously endanger the Kaiser due to the political state in the country and therefore deprive him of his right of asylum. Additionally, it is considered that, should the Kaiser, be it voluntarily or due to the failure of Dutch hospitality, return to Germany, his extradition would be barred. According to §9 StGB and the extradition treaties concluded by Germany, a German national can never be extradited to a foreign government for purposes of prosecution or punishment. Moreover, the legal report pictorially depicts such a situation as an "egregious humiliation in front of the hostile foreign countries, basically hitting the honour and dignity of the nation in the face".[144] Apart from the extradition being considered as legally unfounded, this demonstrates how Art. 227 ToV in particular contributed to the general reception of the Peace Treaty as a means of revenge and humiliation of Germany. Taken together, this influenced the widespread rejection of the provision. An article published in the *Neue Preussische Kreuz-Zeitung* on 26 July 1919 summarises the German perspective on the legal feasibility of extradition and trial of the Kaiser accurately: "We therefore see the Kaiser protected by a threefold wall of law, by our own, even by that of our enemies and the Dutch [law].".[145] Due to this threefold wall of law, supported furthermore by notions of national dignity and honour, Germany saw Art. 227 ToV as legally unfounded, and hence found its

[141] PA AA RZ 254/26030, IMG_1037.
[142] PA AA RZ 254/26030, IMG_1036.
[143] BArch, R 901/27242, Image 1310.
[144] Own translation of „unerhörte Erniedrigung vor dem feindlichen Ausland, der Ehre und der Würde der Nation geradezu ins Gesicht schlagen". PA AA RZ 250/25823, IMG_0527.
[145] Own translation of „Wir sehen also den Kaiser geschützt durch eine dreifache Mauer von Recht, durch unser eigenes, durch das der Feinde sogar und durch das Holländische.". BArch, R 3001/4475, Image 1285.

execution similarly unfeasible. Legal arguments aside, the reports did not address the possibility that the Netherlands would extradite or expel the Kaiser as a result of the pressure of the Entente. This could be due to their nature as legal assessments, limiting themselves to the judicial consequences of Art. 227 ToV. The neglect of potential political influences can moreover be attributed to the time of the opinions' drafting. The Treaty of Versailles was not yet signed, hopes for a more lenient peace were still dominating in Germany, and the political pressure which would be exerted on the Netherlands was not foreseen.

The only political context in which the possibility of extradition by the Netherlands was discussed openly seemed to be the League of Nations. As noted above, Erzberger generally denied the extradition of the Kaiser due to its legal unfeasibility during the session of the Peace Committee of the National Assembly on 19 May 1919. Interestingly, however, Erzberger makes a peculiar remark about the accession of the Netherlands to the League of Nations. As a member of the latter, the Netherlands was held to then be under the obligation to extradite the Emperor "insofar the Kaiser does something which endangers the world peace.".[146] The protocol of the meeting does not note any reactions to this comment by Erzberger.[147] The remark by Erzberger comes out of the blue, not being embedded in any context or connected to the general discussion of the meeting. Most importantly, the Netherlands only became a member of the League of Nations in 1920. In spring 1919, the time of the session of the Peace Commission, the accession of the Netherlands was actually still blocked. Erzberger's comment is therefore rather bizarre. While it is not clear to which international obligations he specifically refers, Arts. 10 and 11 of the Covenant of the League of Nations oblige its members to take all necessary measures to guarantee the peace of nations and their sovereign independence. This does not seem to differ much from the possibility of expulsion under national law as assessed by the Netherlands and the German-Dutch Residence Agreement, allowing for an expulsion or even extradition if the Kaiser endangers the public order of the Netherlands and can no longer be regarded as a private person. Yet, the obligations under the Covenant of the League of Nations are more far-reaching

[146] Own translation of „sofern der Kaiser etwas unternimmt, was den Weltfrieden gefährdet.". BArch, RM 9/94, S. 88.
[147] ibid.

by encompassing the peace and integrity of all members, not only referring to the situation in the Netherlands. Moreover, the League of Nations stood as a symbol for the new international community from which Germany was excluded, and thereby constituted a forum in which the Netherlands was confronted directly with the external politics and pressure by the Allies, being legally obliged to act in accordance with the Covenant. Maybe it was the potential power of this hostile new community which led Erzberger to foresee extensive obligations of the Netherlands upon accession. Nevertheless, it does not appear that leading politicians in Germany seriously discussed the possibility of the Netherlands extraditing the Kaiser because of pressure exerted by the Entente, or at least, this discussion did not take place publicly. In light of the precarious situation of post-war Germany, a complete political neglect of the possibility of the Netherlands giving in to the Allies' pressure seems negligent. However, rather than addressing this threat directly, the Weimar Republic seemed to have taken a more discrete, hidden path.

It must be underlined that the German legal opinions were issued before the signature and entry into force of the Treaty of Versailles, therefore not taking into account the factual and legal situation post war. Instead, the reports were intended as guidance for the German Peace Delegation at the Paris Peace Conference and were a first legal assessment of the allegations under Art. 227 ToV. As such, this led to the remarks about the Netherlands' obligation as a neutral power, which ceased to exist with the armistice and were therefore no longer valid when the Treaty of Versailles was adopted. Moreover, it is not clear what role art. 178 *Weimarer Verfassung* played, by declaring that the Treaty of Versailles could not be touched or contradicted by the constitution. If followed diligently, one could argue that Art. 178 *Weimarer Verfassung* invalidates most of the arguments made in the context of the individual responsibility of the Kaiser that are based constitutional grounds since these would contradict Art. 227 ToV. On the other hand, the constitution referred to in the legal opinions is the *Reichsverfassung* of the former *Kaiserreich* and not the new *Weimarer Verfassung.* It is doubtful that Art. 178 *Weimarer Verfassung* would apply ex post to the former constitution.

Peculiarly, Germany refrained from reassessing the legal situation after the signature of the Treaty of Versailles. This might be for several reasons, one being the political nature of the charge against the Kaiser. A legal response to a political

question might not have seemed constructive. Furthermore, the Weimar Republic was facing several internal challenges, and the resources to address an additional external issue were maybe simply not available. In addition, any official government conduct concerning the Kaiser, including reopening the legal debate on Art. 227 ToV, could raise unwanted attention to the situation. Above all, it appears that the belief that the extradition and trial of the Kaiser were not possible, stood firm. This was also confirmed by the denied extradition requests by the Allies.

4. Entente Demands and Dutch Denial – The Extradition Requests

On 16 January 1920, the Supreme Council of the Peace Conference sent a request to the Government of the Netherlands. Reflecting the exact wording of Art. 227 ToV, it provided for "the surrender to the Allies of William of Hohenzollern, ex-Emperor of Germany, in order that he may be put on trial".[148] However, instead of the ambiguous accusation of a "supreme offence against international morality and the sanctity of treaties" as contained in Art. 227 ToV, the demand specifies the charges against the Kaiser in more detail. Among others, the accusations included violations of neutrality, and breaches of customs of war, such as inhumane hostage practices, unjustified devastation of territories, and the abduction of young women.[149] The note did not accuse the Kaiser for having started the war. Interestingly, this request comes closer to realizing the original aim of the European victorious powers, namely of prosecuting the Kaiser for violations of the custom of war.[150] Even if the Kaiser may not have directly caused these offences, at the very least he bore moral responsibility for them.

In any case, following the note by the Allies, Germany would have been under the obligation to extradite the Kaiser under Art. 228 ToV if the Kaiser had stayed in Germany. As such, the request additionally appeals to the Dutch respect for law and justice, suggesting that failure to comply would mean shielding violations of fundamental international principles. Furthermore, the note once

[148] Schabas (n 2) p. 213.
[149] Draft Note to the Queen of Holland demanding the Delivery of the Kaiser for Trial, 15 January 1920, DBFP II, pp. 912–13. Found in Schabas (n 2) pp. 267-8.
[150] Schwengler (n 26) p. 301.

more highlights the non-juridical character of Art. 227 ToV: "[I]t does not fall within the lines of a public accusation of a fundamentally legal nature, but is an act of high international policy, imposed by the conscience of the universe."[151] The note of the Supreme Council thereby equally invokes arguments of morality alongside legal points. However, neither were convincing.

Unsurprisingly, the Dutch refusal, formulated by Dutch Foreign Minister Jonkheer Herman Adriaan van Karnebeek followed swiftly on 21 January 1920. As expected, the Netherlands based their negative answer on the following points: Firstly, it was not a party to the Treaty of Versailles and, as such, it was not bound by its provisions. Secondly, in fact, there was no obligation under international law at all which imposed on them the duty to surrender the Kaiser nor would the extradition be allowed under Dutch law. The Dutch refusal emphasised the stance of the country as a neutral power during the war, highlighting its distinction from the "high international policy" aims pursued by the Allies and referencing its duty to "right and national honour".[152] Consequently, both the legal and moral arguments by the Entente were unsuccessful.

However, this did not stop the Council of Ambassadors, as the successor of the Supreme Council, to send a second request to the Netherlands on 14 February 1920. In essence, this was a summarised version of the first note. The lack of new arguments shows not only the difficulty of finding legal grounds for the extradition of the Kaiser from the Netherlands, but can also be seen as a sign of the Allies' acceptance of the unlikeliness of a successful execution of Art. 227 ToV. Moreover, the Allies expressed their surprise about the lack of any denunciation of Germany's conduct during the war by the Dutch refusal.[153] In the absence of a concession of the Netherlands on legal grounds, the minimum reaction expected by the Entente was a public moral disapproval of the German war conduct.[154] Evidently, there was little room for a further development of the legal reality, as well as a growing frustration and possibly fatigue on the question of the Kaiser. Foreseeing that the Dutch would not extradite the Kaiser, the request set out that, in such a case, the Netherlands must guarantee the peace in Europe by

[151] Draft Note to the Queen of Holland demanding the Delivery of the Kaiser for Trial, 15 January 1920, DBFP II, pp. 912–13. Found in Schabas (n 2) pp. 267-68.
[152] PA AA RAV 69/65, IMG_0056-57.
[153] Scott (n 9) p. 244.
[154] ibid.

adopting measures which prevent the Kaiser to engage in political or military intrigue. In early March 1920, the Netherlands sent a refusal yet again, mirroring their arguments of the first answer. In summary, the extradition

> "[was] not a question of a public accusation with juridical character as regards its basis, but an act of high international policy imposed by the universal conscience, in which legal forms have been provided solely to assure to the accused such guarantees as were never before recognised in public law."[155]

The Netherlands did, however, recognise their duty to ensure that the Kaiser would not interfere with international security. Furthermore, it was stressed that the Netherlands was not indifferent to the heinous acts by Germany during the war. Yet, Van Karnebeek made it clear that it was definite that the Kaiser would not be extradited to the Entente upon the requests sent thereto. As such, Lloyd George, in the name of the Entente, sent a last note to the Dutch Government on 30 March 1920, allocating all responsibility for the Kaiser and possible consequences of his residence in the Netherlands to the latter. This has been commented as "the attempt of an honourable retreat, as much as possible" by the Entente,[156] as an attempt to find a dignified end to the seeming impossibility of trying the Kaiser. The diplomatic manoeuvre of the request allowed the Entente to shift focus from the contentious issue without appearing to concede defeat or show leniency towards Germany's wartime actions, thereby saving face on the international stage. They created the narrative that, in essence, it was only the Netherlands who stood in the way of enforcing Art. 227 ToV. The German Ambassador to the Netherlands, Rosen, saw in this last letter by Llyod George the end of Art. 227 ToV: "With this note, the question on the Kaiser, insofar as it was the object of diplomatic negotiations, finds it end".[157] Interestingly, Rosen characterises Art. 227 ToV as the object of diplomatic affairs, instead of referring to it as an international obligation. Indeed, as mentioned above, Art. 227 ToV did not address Germany. The lack of international obligations with regards to the trial and extradition of the Kaiser under Art. 227 ToV arguably allowed Germany to create a diplomatic

[155] Scott (n 9) p. 242.
[156] Own translation of „der Versuch eines möglichst ehrbaren Rückzuges". Hankel (n 72) p. 87.
[157] Own translation of „Mit dieser Note gewinnt die ganze Kaiser-Frage, soweit sie den Gegenstand diplomatischer Behandlung bildete, ihren Abschluß.". PA AA RZ 407/48436C, IMG_0466.

strategy which catered towards their interests, namely the non-enforcement of Art. 227 ToV and the continuing residence of the Kaiser in the Netherlands, without violating their duties under the Treaty of Versailles. According to Rosen, the way in which the attempts to enforce Art. 227 ToV played out constitute the best possible outcome in light of the circumstances present at the time.[158] These circumstances, including the arrival of Wilhelm in the Netherlands on 10 November 1918, his personal views regarding Art. 227 ToV, as well as the political situation in Germany, are analysed in the sections below.

5. The Kaiser in the Netherlands

5.1. The Mystery Surrounding the Kaiser's Arrival in the Netherlands

The circumstances and background of the arrival of Wilhelm on 10 November 1918 in the Netherlands are nebulous and some questions are left unanswered. In particular, a visit by the Dutch General Joannes Benedicius van Heutsz on 8 November 1918 in the German headquarters in Spa gave rise to the suspicion that the Kaiser's plan to flee to the country was conducted in collaboration with the Netherlands.[159] Both Germany and the Netherlands strongly objected to such allegations. In a letter to *Reichskanzler* Ebert dated 17 November 1918, the German Ambassador in the Hague, Friedrich Rosen, recalled the arrival of the Kaiser in detail.[160] According to the letter, Rosen was awoken in the night of 10 to 11 November at three in the morning and told that the Kaiser would cross the Dutch border the same morning.[161] Another telegram by the German Foreign Minister, Paul von Hintze, disclosed that the Dutch diplomats in Brussels had been asked to request the Dutch Government and Queen to grant residence and protection to the Kaiser.[162] Upon contacting Van Karnebeek, Rosen was informed that the Queen would be willing to welcome the Kaiser. Apparently, the Dutch Council of Ministers had some concerns with regards to the Queen providing the

[158] PA AA RZ 407/48436C, IMG_0466-67.
[159] Nigel J Ashton and Duco Hellema, 'Hanging the Kaiser: Anglo-Dutch relations and the fate of Wilhelm II, 1918–20' (2007) Diplomacy & Statecraft 11(2) 53.
[160] PA AA RAV 69/65, IMG_0575-82.
[161] PA AA RAV 69/65, IMG_0575.
[162] ibid.

Kaiser with one of her palaces, "given the difficult internal and external situation of Holland".[163]

Similarly, worried about the reaction of the Dutch public and the plans of the Kaiser, Rosen travelled down to Eijsden the same night and was received in the Kaiser's saloon carriage. According to Rosen, the Kaiser appeared composed but visibly affected by the events of the past days. In response to allegations that this visit to the Kaiser was a sign of endorsing the old regime, Rosen avowed himself to only act in the best interests of Germany. A resurrection of monarchy would be "a big misfortune",[164] and in any case a losing game. He said that his trip to Eijsden was merely a duty of decency and reflected the pity and woefulness expressed by the Dutch Government in response to the Kaiser's flight.[165] Van Karnebeek was equally indignant about the allegations regarding the visit by van Heutsz, emphasising that the Netherlands only learned about the arrival of the Kaiser after he had already crossed the border.[166] Dutch Prime Minister Ruijs de Beerenbrouck affirmed this in an interview reported in February 1919 in the newspaper *De Telegraaf:* The message by the diplomats in Brussels first reached Van Karnebeek who immediately informed the Government, which then contacted the Queen. Only shortly after did military authorities report of the presence of the Kaiser in Eijsden.[167] Both Van Karnebeek and De Beerenbrouck therefore framed the Emperor's arrival as a *fait accompli,* denying any prior arrangements between Germany and the Netherlands.[168] These resolute statements by both countries are not surprising. Any suspicion of collaboration between the Netherlands and Germany would jeopardise their respective position with the Entente. Therefore, the diplomatic strategy concerning Art. 227 ToV actively tried to relieve some of the pressure to try and extradite the Kaiser. By emphasising the sudden nature of the Kaiser's flight to the Netherlands and welcoming his lack of interest in reestablishing the monarchy or returning to Germany, Rosen attempted to pour oil on troubled water. Germany did not want to provide any grounds which could justify an extradition or trial, nor should there be any discussion about a potential

[163] Own translation of „angesichts der schwierigen inneren und aeußeren Lage Hollands". PA AA RAV 69/65, IMG_0567.
[164] Own translation of „ein großes Unglück". PA AA RAV 69/65, IMG_0581.
[165] PA AA RAV 69/65, IMG_0581-82.
[166] PA AA RZ 201/3472, 295.
[167] PA AA RZ 201/3472, 299.
[168] PA AA RZ 201/3472, 295 and 299.

conspiracy with the Netherlands. Luckily for the Weimar Republic, these points were reflected in the Dutch position. The Netherlands wanted to prevent suspicion of collusion with Germany whilst the war was still ongoing, as this would have potentially violated its obligations as a neutral power. This neutrality served as one of the grounds for the denial of the Kaiser's extradition, as the Netherlands were not party to the Treaty of Versailles. At the same time, the Netherlands had to carefully navigate the pressure exerted by the Allied Powers. In this context, the Kaiser's presence therefore served as both a challenge and an assertion of Dutch sovereignty and can thus be seen as a crucial part of the Netherlands' post-war diplomatic relations in the newly forming international order. In the end, the attempts of both countries to overcoming speculations of German-Dutch complicity seemed to have been successful. Neither the extradition requests nor other forms of diplomatic pressure by the Entente accused the Netherlands of collusion. In any case, whether the Kaiser's journey to the Netherlands was arranged or not, once in the Netherlands, the Emperor seemed to be safe.

5.2. Defiance and Dignity – The Kaiser's Response to Art. 227 ToV

In the same line as the legal opinions and reports drawn up by the German ministries, the Kaiser was deeply convinced of his inviolability. As he reported to the Queen of the Netherlands during his journey to Eijsden, the premise of this feeling was his status in the Netherlands as a purely private person. In the conversation with Rosen upon his arrival, he supposedly affirmed his intention of not returning to Germany as Emperor, viewing his rule as definitely terminated.[169]

In response to a letter from Cologne's archbishop Cardinal Hartmann, the Kaiser denied the concerns by the former regarding the safety of the Emperor in the Netherlands. In this correspondence, dated 28 May 1919, Wilhelm wrote that both the Dutch Government and the people strongly opposed an extradition since this would be in contradiction with national and international law as well as violate the honour, dignity, and independence of the Netherlands. The Kaiser equally excluded the possibility of the Entente using force against the Netherlands in order to get hold of him. Indeed, the use of force, let alone a war, against the Netherlands, was unimaginable for the Allied Forces, seeming to be a manifestly

[169] PA AA RAV 69/65, IMG_0579.

disproportionate means of obtaining the Kaiser.[170] Furthermore, the Kaiser condemned the design of the trial: only subjecting one head of state of one of the belligerent states to a criminal prosecution stripped that country of its sovereign equality and dignity. If the question of guilt for the war were to be answered, all conduct by all involved states, not only single individuals, would have to be examined by an international and impartial tribunal.[171] This reflects the general disposition in Germany towards the establishment of an international tribunal, namely that of tending towards support of the tribunal strictly on the condition that it was truly objective and equitable.

In any case, the only judge that the Kaiser saw himself at the mercy of was God, "who knows that I did not want this war, but that it was imposed".[172] As a hereditary monarch, the Kaiser believed his ruling power to be granted by divine will, meaning he consequently considered himself accountable only to God's judgement.[173] However, in the margins of an earlier letter to a colonel general, his notes appear less composed than in the answer to the archbishop. Here, the Kaiser snappishly condemned the entire idea of a trial and denied any guilt: "I have no fault and do not recognise the court as having jurisdiction over me! I must always act as a victim for everything! I am not even thinking about it!".[174] Apart from revealing the Kaiser's strong and reactionary personality, it appears that he unsurprisingly denied any subjection to any trial.

An innovative suggestion put forth by different parties was the voluntary appearance of the Kaiser before a tribunal. Such self-surrender was proposed both by the Dutch Ambassador to London, Reneke de Marees van Swinderen, as well as German monarchists.[175] The latter seemed to believe this would provide the Kaiser with a chance to present the truth and appease the Allied hostile stance

[170] See for example a newspaper article published in England from November 1920 where Llyod George is reported to have said: "One can hardly expect that England, to stay true to their promise, declare war on Holland.". Own translation of „Man könne wohl kaum erwarten, dass England, um das Versprechen einzulösen, Holland mit Krieg überziehen werde.". BArch, R 3001/4475, Image 1294.
[171] PA AA RZ 254/26032, IMG_0868.
[172] PA AA RZ 254/26032, IMG_0871.
[173] The same is reiterated in a letter to Hindenburg, dated 5th April 1921, see Thomas Russell Ybarra (tr) *The Kaiser's Memoirs* (Harper & Brother Publishers 1922) p. 303.
[174] Own translation of „Ich habe keine Schuld und erkenne keinen Gerichtshof als zuständig über mich an! Ich soll immer als Opfer für alles auftreten! Ich denke garnicht [sic] daran!". GStA PK, BPH, Rep. 53 Kaiser Wilhelm II., Nr. 616: Auslieferung bzw. Vorgerichtstellung des ehem. Kaisers Wilhelm II., 1919, Bl. 18.
[175] Schabas (n 2) p. 220.

against Germany by showing the "good will" of the Kaiser.[176] Considering the above, it is not surprising that the Kaiser strongly opposed the idea of turning himself in "since there is no Areopagus, to which His Majesty [is subject]".[177]

However, after the first extradition request had reached the Netherlands, the Kaiser announced his return to Germany. In his view, the extradition request confronted the Netherlands with serious difficulties.[178] The Kaiser wanted to prevent any such difficulties and regarded it as his duty to return to Germany. Even stronger was the duty to protect his *Vaterland* and its people, which he always sought to fulfil, "in the awareness of my responsibility before God".[179] As such, he argued that he could not submit himself to the judgement of the enemies – "If I would act otherwise, I would violate the national dignity of my people and thus the highest good that a nation in distress has to protect".[180] The Kaiser framed his return to Germany as necessary for this reason alone. It does not seem that he aimed to reclaim any ruling position. Moreover, he underlined that the German Government was under no obligation to extradite him.[181] Indeed, neither Art. 227 nor Art. 228 ToV obliged Germany to hand over the Kaiser to the Entente. Art. 227 ToV merely specifies that a "request for the surrender" would be addressed to the Netherlands, without any mention of Germany. Moreover, Art. 228 ToV was purported as the basis to prosecute all other German war criminals. However, the lists sent to Germany by the Allies in this regard do not include the Kaiser. Nevertheless, the Allies would have had more than enough leverage at their disposal to pressure the German Government into extraditing the Kaiser should he return to the country. However, the idea of returning to Germany quickly disseminated into thin air, given the Netherlands' unequivocal denial of extradition. Most likely, the Kaiser's offer was an impulsive action, prompted by his fear that the Netherlands might acquiesce to the request. At the same time, it

[176] See the letter of Admiral von Müller, former chief of the marine cabinet, who urged the Kaiser to surrender himself: Walter Görlitz (ed), *Der Kaiser. Aufzeichnungen des Chefs des Marinekabinetts Admiral Georg Alexander v. Müller über die Ära Wilhelms II.* (Musterschmidt 1965) pp. 209-212. Found in Possony (n 42) p. 86.
[177] Own translation of „da es keinen Areopag gebe, dem Seine Majestät [untersteht]". Answer to the letter of Admiral von Müller 26 July 1919, in which Count Eulenburg, on behalf of the Kaiser, denied the request of voluntary surrender. Found in Stefan T Possony (n 42) p. 87.
[178] BArch, N 512/21, 2.
[179] Own translation of „im Bewußtsein meiner Verantwortung vor Gott" ibid.
[180] Own translation of „Wollte ich anders handeln, so würde ich die nationale Würde meines Volks und damit das höchste Gut verletzen, das ein Volk im Unglück zu wahren hat. ". ibid.
[181] ibid.

shows how the Kaiser still profoundly believed in his service towards his people – to the extent his sense of self-preservation allowed it. As long as his own safety was guaranteed, the Kaiser seemed to welcome any opportunity to show his lasting connection to and importance for the faith of Germany. Art. 227 ToV thus provided the Kaiser with a platform to reaffirm, to the outside world but also to himself, his continuing importance.

Framing Art. 227 ToV as an interplay between defiance and self-affirmation by the Kaiser might help in understanding the circumstances and risks surrounding its lack of enforcement. By being singled out as the only head of state accused of having incurred international responsibility, the spotlight on the Kaiser within the peace agreement provided a perverse form of validation. Albeit a punitive measure, the provision paradoxically underscored his significance on the world stage, notwithstanding his abdication and exile. While stating that the Kaiser derives a sense of satisfaction from the attention around Art. 227 might be too far-reaching, this perspective demonstrates how a politically motivated attempt to hold individuals responsible under international law does not only pose legal questions but naturally also bears political consequences. Art. 227 ToV triggered numerous demonstrations of solidarity and support of the Kaiser across the world, thereby reviving voices that otherwise would probably have stayed silent. If the role of Art. 227 ToV in acknowledging the Kaiser's role and triggering widespread loyalty contributed to the diminished pressure to extradite and try the Kaiser, then this highlights a significant challenge in the intersection of international law and politics, where legal principles may be compromised by political considerations, ultimately weakening the foundation and authority of international law. Moreover, since Art. 227 ToV was an opportunity for the Kaiser to regain importance in international politics, it posed a potential threat for the young Weimar Republic.

Some voices were concerned with the failure of Dutch hospitality and its consequences for both the Kaiser and the Weimar Republic. Especially those loyal to the Kaiser attended to the scenario and considered potential reactions, issuing an advisory opinion to the Kaiser. Although undated, this can be retraced to have been written before 16 January 1920, as it mentions an extradition request by the Entente as a mere possibility and not an occurred event.[182] It must be noted, that

[182] BArch, N 512/21, 37.

this a private communication issued to the Kaiser, and not official opinion of the German Government. As mentioned above, the latter seemed to refrain from public discussion of the possibility of extradition and its potential consequences. In contrast, the private communication sets out four pathways should the Kaiser no longer be able to stay on Dutch territory. First, the Kaiser is strongly urged to leave the Netherlands only in the "event of extreme necessity" since the other three options would expose him to dangers that "must be prevented at all costs".[183] Events of extreme necessity exist, on the one hand, if the Netherlands approached the Kaiser with the serious perspective of his extradition or expulsion. On the other hand, the Kaiser would need to leave the Netherlands if the latter would agree to an extradition request by the Entente. Since the Netherlands would thereby jeopardise its national honour and dignity, both scenarios were deemed unlikely, and their materialisation would be provoked only by immense pressure from the Entente.[184] In any case, it was suggested to contact a Dutch lawyer with exceptional expertise and some political leverage. Should the Kaiser need to leave the Netherlands, the possibility of him turning himself in was dismissed out of hand since this would most probably result in his prosecution and possibly banishment: "The Kaiser would have to avoid all these possibilities, least of all to maintain the honour and dignity of the German people.".[185] Judged as equally impossible was the third option, namely the flight to another neutral country. Simply put, no country was deemed strong enough to withstand the influence of the Entente. The fourth and last option was found in the Kaiser's return to Germany. Similarly to Rosen's assessment analysed earlier, this advice concluded that this would expose the Kaiser to a dual danger: internally, the threat of violence of the extreme left and externally, the extradition to the Entente by the "powerless and weak" German Government.[186] The extradition was said to have the further risk of mobilizing civil unrest, not only among monarchist circles:

[183] BArch, N 512/21, 36.
[184] Similar concerns were raised in the files of the legal department of the Ministry of Foreign Affairs, see for example: BArch, R 901/27244, Image 1384-86.
[185] Own translation of „Alle diese Möglichkeiten würde der Kaiser schon zur Wahrung der Ehre und Würde des deutschen Volkes vermeiden müssen.". BArch, N 512/21, 38.
[186] BArch, N 512/21, 39.

> "(…) even large circles of the population no longer thinking monarchically would consider a rape of the emperor as an attack on the dignity of the nation and therefore they would also not take it lightly towards the new rulers."[187]

This concern was not only expressed in Germany. For example, the German Consulate in the Netherlands informed the Ministry of Foreign Affairs in Berlin of an article published in the Dutch newspaper *De Amsterdammer* in July 1919 which warned of the potential consequences of a trial against the Kaiser. According to the article, which was rumoured to have been written by the Dutch Minister of Finance himself, a trial would make the Kaiser into a martyr, "who will win back the forfeited compassion of millions".[188] Even the German ambassador in Vienna, Graf Carl von Wedel, warned Ebert of an extradition of the Kaiser to Germany. The old conservative and national liberal circles "would not tolerate it if Germany demands the Emperor from Holland, in order to relinquish him to the revenge of its opponents".[189] Taken together with the advice issued to the Kaiser, this underlines the tense societal and political atmosphere of the Weimar Republic. Additionally, this section's findings support the argument that the extradition of the Kaiser was not a question subject to political affiliation but a matter of national honour and, as such, not open to debate in German politics. One could even say that the inner political consequences of the Kaiser's behaviour were more feared in Germany than a realisation of Art. 227 ToV, given the latter's lack of legal grounds. It was not only the pressure to try and extradite the Kaiser which Germany sought to relieve, but moreover any pressure which could result in a shift of the Kaiser's (legal) position and thereby provoke uprisings. Simply put, the Kaiser appeared to have been a thorn in the side of the Weimar Republic – A thorn which stinged less when things surrounding the Kaiser were quiet and remained unchanged.

[187] Own translation of „(…) auch weite Kreise der nicht mehr monarchisch denkenden Bevölkerung würden eine Vergewaltigung des Kaisers als ein Attentat auf die Würde der Nation ansehen und sie daher auch den neuen Machthabern gegenüber nicht ruhig hinnehmen". BArch, N 512/21, 40.
[188] Own translation of „der das verscherzte Mitgefühl von Millionen zurückgewinnen wird". PA AA RZ 254/26008, IMG_ 0951-52.
[189] Own translation of „würden es nicht vertragen, daß Deutschland den Kaiser von Holland verlangt, um ihn der Rache der Gegner preiszugeben". BArch, R 901/2724, Image 1393.

6. The Weimar Republic and the Kaiser – Political Dynamics in Germany

From the moment of the Kaiser's arrival in the Netherlands, political voices in Germany showed concern for the consequences the flight would have for the newly democratic state, Germany having been declared a republic a mere day before his flight. Already in his report on visiting the Kaiser in Eijsden, Rosen pointedly wrote that a return of the Kaiser to Germany would be dangerous, both for internal and external politics. Internally, it could encourage movements of a counterrevolution, or at least provoke turmoil. Externally, even a potential consideration of a return would be perceived as a political conspiracy by both the Netherlands and the Entente. Rosen therefore recommended keeping an eye on the Kaiser and his close circle, asking *Reichskanzler* Ebert for permission to visit Amerongen from time to time.[190]

As Rosen pointed out, indeed, the Weimar Republic was struggling with the remains of the monarchy and political radicalisations. In light of the delicate situation post-revolution, for the Weimar Republic, caught between war and peace, between hereditary monarchy and parliamentary republic, inner stability and order were the main aims of the new government. During the days of the revolution in November 1919, two strands of future state forms were competing. On the one hand, the far left propagated a council republic, based on the Bolshevik Revolution of February 1917 in Russia. On the other hand, the more moderate social democrats were in favour of a parliamentary republic. Due to the more widespread support amongst workers and consolidation with the imperial bureaucracy, the social democrats gained the upper hand in the end. However, the radical left and communist circles never conceded to the parliamentary republic. At the same time, the far right and monarchists naturally did not support the new government as well. In particular, Ebert wanted to avoid at all costs the outbreak of a social revolution along the lines of the Russian Revolution and instead maintain state order to guarantee a smooth and peaceful transition to a parliamentary republic. This necessitated the continuance of some societal structures of the old *Kaiserreich,* including the organisation of the administration and military.[191]

[190] PA AA RAV 69/65, IMG_0580.
[191] Hillgruber (n 14) pp. 178-79.

Emblematic of the cooperation between the new political powers of Germany and the former *Kaiserreich* was the Ebert-Groener pact. The Ebert-Groener pact was an agreement concluded between *Reichskanzler* Ebert and Wilhelm Groener, Quartermaster General of the German Army, on 10 November 1918, only a day after the revolution. The pact foresaw the mutual support by the OHL, the military high command, and the democratic government. Ebert agreed to uphold the existing military command structure and oppose any subversive activities from the left, in exchange for the loyalty of the OHL and its intervention against further revolutionary uprisings. The pact was concluded in a crucial moment of political vacuum after the abdication of the Kaiser, where multiple stakeholders sought to rise to power in Germany. As such, it is often said to have been the pragmatic result of a compromise between stability and revolutionary aims.[192] Indeed, the political landscape of the Weimar Republic was anything but homogenous, and uprisings both from the left and right put the newly proclaimed Republic in jeopardy.

It was against this background, that the self-proclaimed German Government needed to carefully balance the explosive question of Art. 227 ToV. The Kaiser's presence in the Netherlands was therefore likely welcomed by the government, as it avoided further destabilisation. The asylum provided to the Kaiser served as a political buffer, allowing the Weimar Republic to navigate the tumultuous post-war period without the added burden of the former Emperor's potential influence and symbolic power.

The trial of the Kaiser faced strong widespread opposition from the German public, triggering multiple initiatives showing this disdain. For example, there were multiple telegrams by private citizens sent to *Reichspräsident* Ebert expressing strong opposition to an extradition and trial of the Kaiser.[193] Inter alia, Art. 227 ToV was denoted as one of "the most shameful conditions of our enemies", as "the deepest humiliating insult for Germany's honour", and "the most outrageous insolence"[194] by different stakeholders, among them civil servants,

[192] See, for example: Eberhard Kolb und Dirk Schumann, *Die Weimarer Republik* (8th edn, Oldenburg Verlag 2013) pp. 13-14.
[193] BArch, R 901/27243, Image 1348-57.
[194] Own translation of „schmaehlichsten bedingungen unserer feinde [sic]", as „tiefste demuetigende beleidigung fuer deutschlands ehre [sic]", and „empoerende frechheit [sic]". BArch, R 901/27243 Image 1354.

students and a group of more than 1200 men and women from Hamburg.[195] Furthermore, it is reported that 238.000 women eligible to vote expressed their protest against the extradition of the Kaiser through a collection of their signatures and demanded his safe return to Germany.[196] Gottfried Traub, a member of the *Deutschnationale Volkspartei (DNVP)* in the *Nationalversammlung,* transmitted this initiative to Ebert with the comment that this was not a political act but motivated by the "sentiments of the heart of German women" and constituted a "cry for help" to be heard and listened to.[197] Similar collections of signatures were also sent directly to the Dutch Government.[198] There were even associations created solely for the protection of the Kaiser. A letter of one of these associations, the so-called *Bund Deutscher Männer und Frauen zum Schutze und zur persönlichen Freiheit Kaiser Wilhelms II* (Federation of German Men and Women for the Protection and Personal Freedom of Emperor Wilhelm II) to the Ministry of Foreign Affairs encapsulates the prevailing public sentiment on the extradition: "The surrender of the Emperor to our enemies would make us (...) dishonourable, but without honour our people cannot live in the long run.".[199] These reactions reflect the deep sense of national pride and hostility towards the Entente invoked by Art. 227 ToV. Therefore, the German Government had no room to navigate the question of Art. 227 ToV other than along this overwhelming public opinion.

For the Netherlands to manage the Kaiser's presence in its territory in a manner consistent with German wishes, things surrounding the Kaiser were to be kept quiet. On 15 July 1919, the *Nieuwe Courant* published an article stating that public requests by Germany to the Netherlands to not extradite the Kaiser rendered the position of the Dutch Government more difficult, rather than strengthening it. The Dutch Government was firm in its position to not extradite the Kaiser. However, this stance had to be sustained on legal grounds exclusively and there could be no impression that the Netherlands was catering towards German interests.[200] In fact, the ambassador Rosen wrote in a letter of 31 August

[195] BArch, R 901/27243, Image 1353, 1349, 1354, respectively.
[196] BArch, R 901/27243, Image 1358.
[197] Own translation of „Herzensempfinden deutscher Frauen" and „Notschrei". BArch, R 901/27243, Image 1359.
[198] BArch, R 901/27244, Image 1398-1400.
[199] Own translation of „Die Auslieferung des Kaisers an unsere Feinde würde uns (…) ehrlos machen. Ohne Ehre aber kann unser Volk auf die Dauer nicht leben.". BArch, R 901/27243, Image 1371.
[200] PA AA RZ 254/26008, IMG_0944.

1919 that "different leading Dutch statesmen" had assured him that the Dutch Government would only be able to solve the *Kaiserfrage* in line with German interests, "if the German public opinion would be completely calm during these critical moments".[201] Rosen thus strongly advised privy councillor Wedding in the German Ministry of Foreign Affairs to stifle any public debate on the question of the Kaiser.[202] While Rosen seemed mostly preoccupied with the safety of the Kaiser himself,[203] his report allows the drawing of inferences with regards to the political situation in Germany as well. The political climate was judged as flammable, and a return of the Kaiser to Germany could lead to unpredictable unrest, both in monarchist and republican circles. After the Netherlands had refused the extradition for a second time, Rosen reflected on the consequences that would arise from an extradition or a trial and affirmed his earlier assessment in a note. To Rosen, an extradition to the Entente would have provoked movements endangering the very existence of the Weimar Republic. A detainment in a further Dutch colony would have equally made the Kaiser into a martyr, resulting in anti-republican sentiments. The most dangerous scenario, however, would have been an extradition to Germany itself. According to Rosen, Germany would have not been able to withstand the pressure of the Entente and would have surrendered the Kaiser. Consequently, Rosen viewed the course of events as the best outcome possible in light of the circumstances and praised both the adroit manoeuvring of Van Karnebeek as well as the calm conduct of the Kaiser himself. The note ends with Rosen expressing the wish for the continuance of this silence surrounding the Kaiser and thereby avoiding a new discussion around his person, triggering difficulties for Germany.[204]

In the same note, Rosen also reflects on the events of the winter 1918/19 and remembers how Van Karnebeek asked him whether he could urge Wilhelm to return to Germany voluntarily. Rosen decisively declined to do so due to the unimaginable the consequences for the German Government and the Kaiser himself. In the same discussion, Rosen recalls having mentioned to Van Karnebeek that the German Government had not given him any instruction in the

[201] PA AA RZ 407/48436C, IMG_0445.
[202] ibid.
[203] PA AA RZ 254/26022, IMG_0765.
[204] PA AA RZ 407/48436C, IMG_0466-70.

Kaiserfrage and, therefore, he could not officially engage with it.[205] It is indeed possible that Rosen did not receive much guidance on how to address the presence of the Kaiser in the Netherlands. The German government was preoccupied with establishing and organizing a new republic and dealing with the post-war consequences. It is conceivable that there were not many resources dedicated to the Kaiser, once it was clear that Art. 227 ToV held little legal ground and that the Netherlands would not extradite him. However, this was not yet the case in the winter of 1918/19, when the conversation between Rosen and Van Karnebeek apparently took place. What is more likely is that Rosen denied any instructions given by the German Government. Any direct occupation by the Government with the issue could have led to a revival of the question, not only in political but also societal circles. In any case, Rosen reports to have been personally kept up to date by Van Karnebeek. Indeed, after he was convinced that the Netherlands would not agree to an extradition, he avoided any conduct that might have created the impression that he wanted to influence the Dutch Government.[206] This is in line with the impressions created by Germany's actions with regard to the Kaiser, already deducible from the moment of his arrival. Once more, this shows that the general approach, not only by Germany but also the Netherlands, was to quiet the discussion surrounding the Kaiser and work towards a stable political environment. Indeed, the anxiety surrounding the Kaiser was justified in light of the delicate political situation in Germany.

6.1. Conspiracies and Upheaval – Tensions in the Weimar Republic

The conspiracies of the former military elite and the Kapp Putsch, as a failed coup d'état against the democratic Government, exemplify the volatile condition of the new Republic and offer an explanatory framework for Germany's conduct with regards to Art. 227 ToV as well as the fading pressure by the Entente concerning its enforcement.

The *Reichswehr,* suffering the loss of their supreme commander, were particularly offended by Art. 227 ToV and amongst the most active voices in claiming the return of the Kaiser to Germany. In an article published in the *Neue*

[205] R PA AA Z 407/48436C, IMG_0468.
[206] PA AA RZ 407/48436C, IMG_0468-69.

Preußische Zeitung on 23 June 1919, Colonel Eberhard von Selasen-Selasinsky passionately called upon all former military officers of 1914 to defend the Kaiser. More specifically, Selasen-Selasinsky incited everyone to individually write to the Queen of the Netherlands to inform her of their intention to come to the Netherlands and protect the Kaiser as soon as the Entente would send an extradition request.[207] Among many positive reactions to the article, is the answer by the officer corps of the Prussian Army and Germany Navy, who directly addressed the Queen of the Netherlands and the Dutch parliament. Appealing to the "centuries-old, never clouded friendship between the upright Dutch people and the former German people" and the connection of bloodlines between the royal dynasties of *Oranje-Nassau* and *Hohenzollern,* the corps asked to reject any interference by the Entente with the Kaiser's presence in the Netherlands.[208] Blaming the democratic Government for the Treaty of Versailles and Art. 227 thereof, former military powers saw it upon themselves to safeguard the Kaiser and national dignity and honour.[209] The influence of the article can also be seen from the fact that Rosen personally wrote to Selasen-Selasinsky to react. In his letter, Rosen apologises for not being able to transmit Selasen-Selasinsky's request to the Dutch Government. In his view, this would, if implemented, violate the territorial sovereignty of the Netherlands and merely offend the Dutch Government, possibly leading to consequences contrary to the aim of the request itself.[210] Although no group of military officers ended up entering the Netherlands to rescue the Kaiser, Selasen-Selasinsky's call to action is emblematic of the profound feeling of injustice amongst the German population, the general apprehension against the Government, and how these sentiments led to perilous conspiracies within monarchist circles. The Kaiser, although abdicated and in exile in the Netherlands, was still of considerable importance for the German public, and therefore able to incite powerful movements endangering the new German state order.

The anti-republican atmosphere among military groups culminated in the Kapp-Putsch on 13 March 1920, demonstrating the explosive atmosphere in the

[207] BArch, N 432/9, 271 ff.
[208] Own translation of „Jahrhunderte alten, nie getrübten Freundschaft zwischen dem aufrechten holländischen Volke und dem früheren deutschen Volke". BArch, N 432/9, 275, 245.
[209] BArch, N 432/9, 275, 245.
[210] BArch, N 432/9, 187.

Weimar Republic under the pressure of the Treaty of Versailles. The Kapp-Putsch was a failed coup d'état against the democratic Government, led principally by old military elites and conservative forces, among them Wolfgang Kapp and his antirepublican association *Nationale Vereinigung.* While no clear aims were agreed upon by the counterrevolutionary groups, the main trigger point is deemed to have been measures implementing Arts. 160 in conjunction with 163 ToV, which relate to the reduction of the German military. Accordingly, the army was allowed a maximum of 100.000 men and the marine a maximum of 15.000. However, even the transitional post-war *Reichswehr* was supposed to consist of around 400.000 men.[211] As such, military officials and the so-called Free Coprs, paramilitary groups composed of World War I veterans, feared losing their position and power.

In the night of 12 March 1920, between 2000-6000 men of the Free Corps *Brigade Ehrhardt* marched to Berlin.[212] The cabinet under the social democrat Gustav Bauer saw itself forced to flee to Dresden, leaving the government district ten minutes before the soldiers walked through the Brandenburg Gate.[213] Kapp was declared *Reichskanzler* by the putschists. However, Kapp and his co-conspirators had to abandon their plans due to widespread civil resistance, including the biggest general strike in the history of Germany with more than 12 million participants, essentially paralyzing the country.[214] After 100 hours of occupying main government buildings, on 17 March 1920, the legitimate Government returned to power. Yet, not without concessions made to the putschists. The new elections, planned for autumn were rescheduled to June 1920. The social democratic Weimar Coalition lost its majority, and parties on the political fringes, both left and right, won a significant number of seats. A centre-right minority Government was formed. Moreover, on 2 August 1920, the *Reichstag* passed the *Gesetz über die Gewährung von Straffreiheit,* granting most

[211] §1 Gesetz über die Bildung einer vorläufigen Reichswehr vom 06. März 1919; 'Das deutsche Militärwesen (4) – Deutsches Reich 1919-1932' (*Bundesarchiv*) <https://www.bundesarchiv.de/DE/Content/Virtuelle-Ausstellungen/Das-Deutsche-Militaerwesen-4-Deutsches-Reich-1919-1932/das-deutsche-militaerwesen-4-deutsches-reich-1919-1932.html> accessed 27 May 2024.
[212] Manfred Vasold, 'Ehrhardt, Hermann, Freikorpsführer' in Wolfgang Benz und Hermann Graml (eds), *Biographisches Lexikon zur Weimarer Republik* (C.H. Beck 1988) p. 71.
[213] Sebastian Haffner, *Die verratene Revolution 1918/1919* (Stern-Buch 1969) p. 201.
[214] Colin Storer, *A short history of the Weimar Republic* (I.B. Tauris, 2013) pp. 47-48.

participants in the coup amnesty.[215] Only crimes conducted without a political aim and those of particular gravity, as well as persons considered *Urheber* (author) or *Führer* (leader), were subject to criminal proceedings.[216] Yet, even these charges were largely dropped, and only one military official was actually prosecuted. Traugott von Jagow, former president of the police in Berlin, major of the *Reichswehr,* and one of the main forces behind the Kapp-Putsch, [217] was prosecuted for high treason under §81 Para. 1 Nr. 2 StGB. In its judgement, the *Reichsgericht* found mitigating circumstances, given that von Jagow was acting under a spell of "self-less love for the fatherland".[218] He was punished with five years *Festungshaft,* a lenient form of imprisonment intended to ensure the dignity of the perpetrator.[219] As such, his conduct just missed the threshold of being classified as a *Verbrechen,* and instead counted as a *Vergehen.*[220] While this soft approach adopted by the parliament and courts of Weimar might be explained as an attempt to alleviate some pressure of the otherwise very tense state of the Republic, [221] it also demonstrated the limitations of the Government and its precarious position in the face of internal perils.

Meanwhile, in the Netherlands, the Kaiser was excited about the news of the uproar. However, there is no ground to believe that he was involved in the putsch itself. His adjutant Sigurd von Ilsemann tellingly described his reaction: "The emperor was completely surprised and shook my hands with excitement and joy. As in war, when a victory message arrived, he said: "Tonight, there is champagne!".[222] Upon failure of the coup, the Kaiser seemed disappointed but still

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[215] *Gesetz über die Gewährung von Straffreiheit*, Gesetz v. 04.08.1920, RGBl. Nr. 163, S. 1487.
[216] §1 *Gesetz über die Gewährung von Straffreiheit*, Gesetz v. 04.08.1920, RGBl. Nr. 163, S. 1487.
[217] Elke Kimmel, '100 Jahre politischer Mord: Putschisten vor Gericht' (*Deutschlandfunk Kultur* 22 December 2021) <https://www.deutschlandfunkkultur.de/100-jahre-politischer-mord-prozess-kapp-putsch-100.html> accessed 30 May 2024.
[218] Own translation of „selbstloser Vaterlandsliebe". RG, 21.12.1921 – 11/20, found <https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=RG&Datum=21.12.1921&Aktenzeichen=11%2F20> accessed 31 May 2024.
[219] §17 *Strafgesetzbuch für das Deutsche Reich* (1876), Gesetz v. 06.03.1876, RGBl. Nr. 6, S. 39–120. Actually, von Jagow ended up being pardoned and allowed to leave prison already in 1924.
[220] §1 *Strafgesetzbuch für das Deutsche Reich* (1876), Gesetz v. 06.03.1876, RGBl. Nr. 6, S. 39–120.
[221] See for example on the influence of the Ruhraufstand and a more detailed discussion of the Kapp-Putsch: Harold Griffith Daniels, *Rise of the German Republic* (Scribner 1928) ch. 9, pp. 132-147.
[222] Own translation of „Der Kaiser war völlig überrascht und drückte mir vor Erregung und Freude die Hand. Wie im Kriege, wenn eine Siegesnachricht eintraf, sagte er: 'Heute abend [sic] gibt es Champagner!'". Harald von Koenigswald (ed), *Sigurd von Ilsemann: Der Kaiser in Holland. Aufzeichnungen des letzten Flügeladjutanten Kaiser Wilhelms II.*, vol 1 (Biederstein 1967) p. 149.

saw the uprise as evidence of the weak democratic Government and the prospect of resurrecting the "old order".[223] Yet, no plans to return to Germany emerged. Nevertheless, the Kapp-Putsch underscored the fragility of the Weimar Republic and the strong monarchist structures that remained in place even after the proclamation of the Republic. Above all, it highlighted the threat coming from anti-democratic forces within Germany. One can only imagine the consequences that an extradition or trial of the Kaiser would have had for Germany. Possibly, the Weimar Republic would have found a much earlier end. At least, an extradition or trial would have added much fuel to the fire and disrupted the attempt to create a stable and peaceful Germany and thereby allow for safety as well as economic growth within Europe. Naturally, the power of the anti-democratic forces in Germany did not escape the attention of the Entente with regards to the Kaiser in exile.

6.2. Allied Concerns and Dutch Measures in Response to German Instability

Both the Allies and the Netherlands responded to the unrest in Germany with concern and heightened precaution about the Kaiser in the Netherlands. As reported by the German Delegation in The Hague on 16 March 1920, France did not seem surprised by the Kapp-Putsch, since it always suspected that the Weimar Republic was only a "camouflage" and that there was no real democratic spirit among the people.[224] The English press demanded the surveillance surrounding the Kaiser to be intensified.[225] The Netherlands obliged by tightening security measures, increasing the number of personnel at Amerongen.[226]

The reaction by the Entente to the Kapp-Putsch was observed with some worry by the German Embassy in The Hague, fearing that it would revive a more hostile stance towards Germany.[227] Already in January 1919, after the first Kaiser's birthday in exile, German newspapers warned about the possible effect of the many congratulation letters sent to Amerongen and celebrations at political

[223] Harald von Koenigswald (ed), *Sigurd von Ilsemann: Der Kaiser in Holland. Aufzeichnungen des letzten Flügeladjutanten Kaiser Wilhelms II*., vol 1 (Biederstein 1967) p. 149.
[224] PA AA RZ 214/98488, 13.
[225] ibid.
[226] FN 106 Graham to Curzon, 15 March 1920, DBFP IX, pp. 711–12, found in Schabas (n 2) p. 287.
[227] PA AA RZ 214/98488, 13.

events. According to the articles, these public compliments would only heighten the suspicion amongst the Entente and thereby be a disservice to the Kaiser.[228] More tellingly, in February 1919, the *Vollzugsrat,* as the executive council of the workers' and soldiers' councils, alerted the Ministry of Foreign Affairs about the strong anti-republican and militaristic elements deeply rooted in society. They expressed concern that these circles were creating the impression that the revolution was merely a facade to attain a more lenient (enforcement of the) peace agreement, and that the resurrection of the monarchy posed a genuine threat.[229] In an attempt to defeat such an impression, the Ministry for Foreign Affairs ordered all diplomatic missions abroad to fulfil their duties diligently and unaffected by national incidents as soon as the coup began on 13 March 1920. Only then could negative consequences for the status of Germany on the international stage be prevented.[230] The Ministry for Foreign Affairs believed the trust of other states in German politics to be the first condition for successful external affairs and proudly reported to not have been affected by the antirepublican sentiments.[231] A week later, *Reichskanzler* Bauer remarked in a soothing tone that the widespread public opposition against the coup d'état showed that the Entente had no reason to be troubled by the militaristic forces in Germany. Alongside this, Bauer demanded that Germany needs military forces exactly for the reason of being able to subdue any such movements.[232] However, the fact that the Government did not dare to employ the *Reichswehr* against the Kapp-Putsch was taken to prove quite the contrary and confirmed the need to demilitarise Germany. Although the coup d'état was not successful, it ultimately weakened the Government's authority and deepened political polarisation. Therefore, Germany was concerned with proving itself as a reliable, durable and resistant democracy. This was not uniquely aimed to distract from Art. 227 ToV of course, but rather to create an environment of trust in which the enforcement of the Treaty of Versailles would be lenient. This should also contribute to a diminished pressure on the attempts to realise Art. 227 ToV. Yet, the general anguish that the militaristic and in part monarchist

[228] BArch, R 901/27242, Image 1314.
[229] PA AA RZ 201/3472, 308.
[230] PA AA NL 259/121, IMG_3388.
[231] PA AA NL 259/121, IMG_3389.
[232] PA AA RZ 214/98488, 15-16.

movements would reinforce the distrust by foreign powers towards Germany seemed to have been well founded.

From the beginning, the Netherlands was apprehensive of the Kaiser's presence in Amerongen, both related to its internal situation as well as external relations. As such, from the moment that the Kaiser had crossed the border, the Dutch Government tried to ensure that Wilhelm resided in the Netherlands as a purely private person and refrained from any political activities.[233] Only if there should be plans which originated in and were coordinated from the Netherlands to re-erect the monarchy in Germany, could the Dutch Government no longer regard the Kaiser as a private person and reconsider the question of extradition.[234] To guarantee that the Kaiser acted within these boundaries, different security and surveillance measures were implemented by the Netherlands. The mayor with authority over Amerongen, Rudolf Everhard Willem van Weede, carefully screened every person seeking to visit the Kaiser, only granting approval if he was convinced of the non-political nature of the visit.[235] Nevertheless, Wilhelm regularly received prominent guests, such as Baron von der Lancken, the German Ambassador to Belgium when the Kaiser fled to the Netherlands, and Prince Max Egon II Fürstenberg, one of the closest friends of the Kaiser.[236] Moreover, Rosen kept paying regular visits to the Kaiser.[237] It is plausible that these served his aim formulated in late 1918, namely, to keep a close eye on the Emperor and his inner circle. At the same time, the personal sympathy of Rosen towards Wilhelm might have very well played a part in the regular visits as well. As such, Van Karnebeek was concerned about the regular visits by close associates of the Kaiser from Germany.[238] Naturally, the Dutch Government did not want to create the impression that they were acting in any way in the interest of Germany. Indeed, upon publication of the Kautsky documents at the end of 1920, the *Nieuwe Courant* reported on discussions in the Dutch parliament demanding a reassessment of the extradition question in light of the newly available evidence. However, this did not seem to bear fruits, as even the author of the article disagreed

[233] PA AA RAV 69/65, IMG_0579.
[234] PA AA RZ 254/26022, IMG_0781-82.
[235] Graham to Curzon, 17 December 1919, DBFP V, pp. 924–9, at p. 926; TNA FO 371/4272. Found in Schabas (n 2) p. 249.
[236] Schabas (n 2) p. 249. Karina Urbach, *Go-betweens for Hitler* (OUP 2015) p. 114.
[237] Graham to Curzon, 9 March 1920, DBFP IX, pp. 702–4. Found in Schabas (n 2) p. 284.
[238] PA AA RZ 407/48436C, IMG_0470.

with the demand for reassessment and repeated the common opinion that only an attempt to resurrect the monarchy in Germany would allow a change in the position of the Dutch Government since the Kaiser would then no longer be a purely private person.[239] While it never came to this, the Netherlands reacted to the political instability in Germany in connection with the Kaiser. This shows how the internal political situation in Germany and the position of the Kaiser in exile were still deeply interwoven.

Only ten days after the Kapp-Putsch and the resulting pressure of the Entente, on 27 March 1920, the Netherlands issued a Royal Decree limiting the freedom of movement of the Kaiser. The Decree set out that the Kaiser was only allowed to reside in and move within the province of Utrecht.[240] Additionally, the Emperor himself guaranteed in writing that he would comply with the Decree and not resist similar other measures deemed necessary by the Netherlands.[241] According to Van Karnebeek, the Kaiser did not do so without resistance but ultimately complied.[242] Before the enactment of the Decree, Graham approached Van Karnebeek with a warning of the radicalisation occurring in Germany, especially mentioning that pictures of the Kaiser, alongside portraits of Hindenburg and Ludendorff, were being displayed in schools once more.[243] Naturally, this served as indirect pressure on the Netherlands concerning their responsibility over the Kaiser. Further, Lloyd George wrote the Dutch Prime Minister, Ruys de Beerenbrouck, on the 24 March 1920 about the Royal Decree in question, solidifying the shift of this responsibility to the Netherlands. The Kaiser's residence in Amerongen is described as a "very serious danger," a "potential centre of reactionary propaganda and a constant menace to the peace of Europe".[244] With this Decree, the Netherlands "assumes complete responsibility for the custody of the ex-Emperor, and the control of his correspondence and relations with the outside world.".[245] It is likely that the Entente were indeed worried about the proximity of the Kaiser to Germany and

[239] PA AA RZ 254/26022, IMG_0781-82.
[240] Schabas (n 2) p. 289.
[241] Telegram en clair from Sir R. Graham, 17 March 1920, DBFP VII, p. 552. Found in Schabas (n 2) p. 289.
[242] Graham to Curzon, 12 March 1920, DBFP IX, pp. 706–10. Found in Schabas (n 2) p. 284.
[243] Graham to Curzon, 9 March 1920, DBFP IX, pp. 702–4. Found in Schabas (n 2) p. 284.
[244] PA AA RAV 69/65, IMG_0621-22.
[245] PA AA RAV 69/65, IMG_0621.

his potential involvement in antirepublican and militaristic movements. However, the poignant choice of words and formulation of the letter indicates that the letter primarily served as a public show of disdain of the lack of cooperation by the Netherlands. Similarly to the answer of the Allies to the Dutch refusal of the second extradition request, Lloyd George pre-emptively excluded any blame or accountability on the side of the Entente for any actions of the Kaiser and their potentially detrimental consequences, "which [the Netherlands] have (…) deliberately chosen to assume."[246] The thought seemed to have been that this would allow the Entente to escape any responsibility for the lack of enforcement of Art. 227 ToV. By the letter, the Entente, in contrast to the Netherlands and Germany, recognised the threat constituted by the Kaiser and, as rational and enlightened enforcers of international justice, did their very best to implement Art. 227 ToV. Following this line of argumentation, their lack of success is not attributable to them but a result of Dutch politics. As such, Graham stated that the Royal Decree had established a "*fait accompli*".[247] Meanwhile, in Germany, the stricter surveillance caused indignation. In an article from the 6 September 1921 on the measures that the Kaiser was not allowed to be in direct contact with his supporters in Germany and that all his correspondence was subject to censure, it is written that such "cruelties" only intensify the sympathy for the Emperor.[248] Once more, the portrayal of the Kaiser as a martyr resurfaced effortlessly, spurred by new measures and the ensuing public discussion. Once more, "keeping things quiet" would have probably been the most effective approach.

An interesting analogy can be drawn between the conduct of the Allied and German Governments. Both consistently pointed out the threat of counterrevolutionary unrest in connection with the Kaiser in the Netherlands. However, whilst the argument was used by both parties, opposite conclusions were reached. On the one hand, according to Germany, an extradition to the Entente or to Germany would have caused an unpredictable uproar in the national political landscape. Thus, Germany relied on its internal situation as a reason *not to extradite* the Kaiser. On the other hand, the Allies argued that the instability of the Weimar Republic was one of the main reasons *to extradite* the Kaiser. The

[246] PA AA RAV 69/65, IMG_0622.
[247] Graham to Curzon, 20 March 1920, DBFP IX, pp. 718–20. Found in Schabas (n 2) p. 290.
[248] PA AA RAV 69/65, IMG_0588.

Netherlands' geographical proximity to Germany gave rise to concern and suspicion of the Kaiser's continuing connection with former military elites. An extradition to the Entente and subsequent trial would have ended such anxiety, they argued. However, it appears that these diametrically opposed conclusions moved more and more towards each other with the progression of time. After the unsuccessful extradition requests and the continuing instability and tension in the Weimar Republic, an enforcement of Art. 227 ToV not only became increasingly unrealistic, but it also lost political support. The wish for a trial and prosecution of the Kaiser was always rooted in political aspirations. Once these changed, it is only natural that Art. 227 ToV also lost importance. The strong disdain and rejection of Art. 227 ToV in Germany and resulting uprisings only deepened the instability of the Weimar Republic. As shown, this did not go unnoticed by the Entente and the Netherlands, and the negative consequences of Art. 227 ToV on a political and societal scale outweighed the aspiration for revenge. Therefore, once it seemed clear the prosecution of the Kaiser was not only legally unfeasible but also politically unwished for, the aim of stability persevered. Since Art. 227 ToV was never intended as a legal instrument, the clause eventually became more of a symbolic gesture rather than a practical measure. This shift in perception led to its gradual abandonment as both the international community and Germany focused on more immediate and pragmatic concerns. As such, the opposing conclusions of the Allies and Germany were reconciled by the drive for political stability in a post-war Europe, overshadowing the earlier vengeful vigour encapsulated in the provisions.

7. CONCLUSION

Art. 227 ToV marks a departing point in international criminal law as the first attempt to hold a head of state responsible in front of an international criminal tribunal. Yet, the former Emperor of Germany, Wilhelm II, sought exile in the Netherlands and never faced extradition or prosecution, despite various attempts by the Entente. Albeit originally being a dominating subject of public debate, the attention on Art. 227 ToV seemed to slowly fade away. This seems to have been in line with the approach adopted by German foreign politics, namely, to keep things surrounding the Kaiser quiet. Germany, as the vindicated power and

a newborn parliamentary democracy facing the far-reaching sanctions of the Treaty of Versailles, was at the centre of global post-war politics. As such, both the Netherlands and Allied Powers carefully observed the internal situation in Germany as well as its connection with the Kaiser in exile. Therefore, this paper has sought to answer the following question: Under which circumstances in Germany did the pressure to extradite and try the Kaiser under Art. 227 ToV fade away?

In Germany, the Treaty of Versailles was generally rejected. From the outset, the Treaty of Versailles was a peace agreement steeped in the revolutionary and uncertain socio-political climate of its time. In particular, it caused a psychological trauma in Germany, burdened with a collective guilt charge under Art. 231 ToV. This charge, coupled with the penal provisions, framed Germany as the sole responsible power for the war. Together with the *Dolchstoßlegende,* this fostered a pervasive sense of injustice and humiliation in Germany. As such, the revision of the Treaty of Versailles became the cornerstone of the politics of the Weimar Republic, across the otherwise deeply divided political spectrum. It was against this background that Art. 227 ToV attempted to hold a trial against the former Kaiser.

From the German perspective, Art. 227 ToV lacked any legal ground and was purely politically motivated. By aiming to create an international criminal tribunal for holding the Kaiser accountable "for a supreme offense against international morality and the sanctity of treaties", the provision was unprecedented in international law. Its primary function was political, intended to address the Allies' moral and political objectives rather than being founded on legal grounds. This is highlighted in the ambiguous wording and lack of specific charges in Art. 227 ToV, which moreover reflects the novelty and lack of consent as to its specific aim among the Entente. Notwithstanding the political aim of Art. 227 ToV, the provision generated legal responses. Germany viewed Art. 227 ToV as legally unviable. During the negotiations of the Treaty of Versailles, the German Peace Delegation contended that the Treaty of Versailles would only further the antagonism between the international community and Germany, instead of reconciling differences and assuring peace. The legal assessment of Art. 227 ToV by German authorities arrived at the conclusion that existing international law did not support criminal sanctions for breaches of custom or

treaties, and the principle of *nulla poena sine lege* did not allow for an ex-post erection of international criminal law and tribunal. Moreover, Germany argued that the Kaiser's actions were inherently political and thus beyond the scope of criminal law. In any case, the criminal responsibility of the Kaiser was irrelevant due to constitutional safeguards under German law. It was contended that, consequently, there was no ground for the Netherlands to extradite the Kaiser. Conversely, Dutch legal opinion singularly held that war conduct violating international law was not protected as a political crime. As a consequence, the Kaiser could be charged with ordinary offenses, which in turn could justify extradition under the 1875 Extradition Act. However, in the German view, the charge against the Kaiser was devoid of legal ground and the prevailing opinion therefore seemed to regard the Kaiser as safe in the Netherlands. Thus, in the eyes of Germany, the extradition and trial of the Kaiser were unlikely, if not impossible, to be realised.

The legal impossibility of Art. 227 ToV could also be seen in the failure of the two extradition requests by the Entente to the Netherlands. The Allies' attempts to extradite the Kaiser met with strong resistance from the Netherlands, who, like Germany, found no legal ground to meet the demand of the Allies. The Netherlands, as a neutral power during the war and not a signatory to the Treaty of Versailles, was not bound by its provisions. The charge against the Kaiser and the extradition requests attached to it did not fulfil the scope of any bilateral extradition treaties with the Entente. As such, both extradition requests by the Entente were denied and it became clear that the Kaiser would remain in the Netherlands. When the Entente used this as an opportunity to transfer all responsibility for the Kaiser to the Netherlands, the *Kaiserfrage* was deemed to have found its end. However, the slowly diminishing importance given to enforcing Art. 227 ToV was not only attributable to its legal impossibility.

At the same time, the foreign policy adopted by Germany in handling the Emperor's presence in the Netherlands was characterised by delicate and discrete actions, trying to avoid attracting any attention to the question of extradition. At first, the indignation of Art. 227 ToV was publicly proclaimed throughout Germany. In light of the general perception of the Treaty of Versailles in Germany as *Schandfrieden*, it is not surprising that especially Art. 227 ToV provoked strong disdain among the German public. Numerous initiatives expressing their

resistance to a prosecution, trial, or extradition of the Kaiser emanated across society, showing that the protests against Art. 227 ToV and proclamations of solidarity with the Kaiser were not only a phenomenon among far right and monarchist circles, but the general consensus. In German political and diplomatic circles however, a new approach quickly crystallised upon the Kaiser's presence in the Netherlands. It became clear that the presence of the Kaiser in the Netherlands was contingent on his status as a private person. Any suspicion of political or military conspiracy on his behalf could change this and thereby allow a reassessment of his legal status. The German Ambassador to the Netherlands, Rosen, therefore advised, in accordance with Dutch public opinion, to keep things surrounding the Kaiser quiet. There should be no suspicion of any collaboration between Germany and the Netherlands, yet alone between the Kaiser and old monarchist forces in Germany.

The German stance towards Art. 227 ToV was further influenced by the Kaiser himself. Wilhelm was outraged by the charge brought against him and confident of his inviolability, seeing himself subject only to the judgement of God. At the same time, Art. 227 ToV provided the former Emperor with a platform to publicly reassert his moral righteousness, using the allegations as a means to galvanise support and strengthen his legacy among his supporters. This was only possible due to the Kaiser's own conviction of his safety. The lack of enforceability of Art. 227 ToV was therefore not only a legal defeat but turned out to have actually strengthened the Kaiser's position. In turn, this was carefully observed, both by Germany and the Netherlands, as well as the Allies.

Meanwhile, the political circumstances in the Weimar Republic were volatile, embedding the fading pressure of the enforcement of Art. 227 ToV with an explanatory framework. The lasting influence of the Kaiser became even more worrisome in light of the political instability of the Weimar Republic. The charge against the Kaiser and his presence to the Netherlands confirmed the feelings of injustice and mistreatment in Germany, especially among anti-republic circles. Any measure against the Kaiser reinforced this feeling and thereby deepened the trenches, not only between Germany and the Allies, but also within the German population by triggering further political radicalisations. As a response to the materialisation of these radicalisations, namely the conspiracy by Selasen-Selasinsky and the failed Kapp Putsch, security measures in the Netherlands were

tightened. These events seemed to have confirmed the growing inclination of the Allies to let the Kaiser stay in the Netherlands and distance themselves from the matter. The post-war situation was simply too delicate to try the former head of state of one of the main powers in Europe. It appears that the strategies of Germany and the Entente gradually overlapped. Or, at least, their aims did: avoiding anti-republican uprisings and thereby achieving and maintaining social, political, and economic stability in Germany became the predominant goal amongst all actors. If viewed in this light, the fading pressure by the Entente, culminating in the last note by Clemenceau to the Netherlands, can be explained by the prevailing goal of security and steadiness. One can only imagine the domestic consequences in Germany had the Kaiser been extradited or even tried. As feared by many different parties, this might have very well led to political or even revolutionary uprisings and triggered, or contributed to, an even earlier end of the Weimar Republic. While the danger emanating from the Kaiser in exile was first used as a reason to extradite the Kaiser, it slowly became a reason to *not extradite* the Kaiser and leave the matter untouched. The German strategy of "keeping things quiet" and avoiding any attention on the issue proved fruitful and, what is more, constituted a welcome compromise between the Entente's initial aim to try and prosecute the Kaiser, and the outright denial of Art. 227 ToV by Germany. It follows, that the political circumstances in Germany very likely played a determining role in the fading pressure to realise Art. 227 ToV.

It must be mentioned that this perspective is only a fragment of the complete story behind Art. 227 ToV. The legal-historical analysis with a focus on Germany allows understanding of one point of view of the diminishing pressure to extradite and try the Kaiser. However, there were a multitude of actors and events involved in the creation and attempt to enforce Art. 227 ToV. As such, there are many opportunities for research. For example, the fading pressure could be examined in the context of broader international developments, such as the creation of the League of Nations. Arguably, the ideal of the League of Nations, created to ensure cooperation on the basis of equality between states, added another layer of appeasement, with which an insistence on Art. 227 ToV and Germany's war guilt would be irreconcilable. A preliminary research of Germany's accession to the League of Nations in 1926 already revealed that the

question of war guilt indeed resurfaced in the accession negotiations.[249] Moreover, certain information is still missing to further explore the circumstances surrounding Art. 227 ToV. For example, how did the Kaiser decide to flee to the Netherlands? This could have been a typical reactionary response to the rising democratic powers in Germany and military defeat – however, it is almost unimaginable that there was no prior contact with the Netherlands which assured the (long-term) safety of the Kaiser. Here, a cross-border research combining findings from multiple countries, such as the Netherlands, France, Belgium, and Germany would help in drawing a complete picture.

The circumstances in Germany nevertheless show how Art. 227 ToV, while a legal instrument pro forma, ultimately lived up to its nature as a means for furthering political aims. The provision's initial punitive ambitions were overshadowed by more pressing issues of internal and external politics, namely stability within the Weimar Republic and its conciliation with the international community. The gradual abandonment of the enforcement of Art. 227 ToV was therefore not only due to the seeming impossibility to do so, but also aligned with the emerging political *Zeitgeist* of the early 1920s, namely, to ensure political cohesion, social consolidation, and economic prosperity. As such, the legacy of Art. 227 ToV serves as a reminder of the limitations of international law when confronted with the realities of political aspirations and the quest for stability in a fractured world. To find acceptance and be enforceable, the law must prove itself to be based on firm legal foundations. Invoking the international responsibility of individuals cannot be framed as a purely political or moral goal. Instead, international criminal law and a corresponding court must be developed and framed as a legal necessity. Otherwise, political aspirations based on restitution and vengeful thinking pre-empt any chance of general acceptance of a trial. What is more, it simply denies legal reality. A glimmer of the possible detrimental consequences of such an undertaking can be seen in the failure of Art. 227 ToV.

[249] See for example PA AA NL 306/16, 130 and PA AA NL 306/17, 51.

The Use of Proportionality in the PSPP Decision: Considerate Critique for Some, a Flawed Construction for Others

Dorian Wygand[1]

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TABLE OF ABBREVIATIONS

BVerfG	Bundesverfassungsgericht
CJEU	Court of Justice of the European Union
ECB	European Central Bank
EU	European Union
PSPP	Public Sector Purchase Programme
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

1. INTRODUCTION

For a long time, the German Constitutional Court, the *Bundesverfassungsgericht* (BVerfG), was known as a dog that barks but does not bite.[2] However, this perception changed in 2020 with the Public Sector Purchase Programme (PSPP) decision of the BVerfG, which is widely recognised as one of the most important judgements in recent years. Some scholars even argue that it stands as the most significant judgement ever issued by the BVerfG.[3]

The issue before the Court was whether the European Central Bank (ECB), with its PSPP, complied with the ECB's mandate under EU law. More specifically, the PSPP is a programme that buys government bonds and bonds of other European and national institutions to steer its monetary policy and control inflation.[4] This question was first referred to the Court of Justice of the European Union (CJEU) through a preliminary question.[5] The resulting answer by the CJEU in *Weiss*[6] confirmed the compatibility of the PSPP with European Union (EU) law.[7] Subsequently, the BVerfG declared that both the ECB and the CJEU went *ultra vires*, meaning beyond their competences, as the CJEU allegedly overstepped its mandate by not correctly applying a proportionality test to the ECB's programme.[8] This judgement marked a crucial moment in the ongoing conflict between the CJEU and the BVerfG regarding the primacy of EU law, a conflict which even led to an infringement procedure against Germany, although it later discontinued.[9]

This was the first instance where the BVerfG not only threatened such measures but went as far as using the *ultra vires* doctrine, declaring two EU

[2] Heiko Sauer, 'Substantive EU law review beyond the veil of democracy: the German Federal Constitutional Court ultimately acts as Supreme Court of the EU' (2020) 16 EU Law Live 2, p. 2.
[3] Daniel Sarmiento, 'Requiem for Judicial Dialogue – The German Federal Constitutional Court's judgment in the Weiss case and its European implications' (2020) 16 EU Law Live 9, p. 9.
[4] For a concise overview of the PSPP's exact working please see ECB, 'FAQ on the public sector purchase programme' (ECB, 09 August 2023) <https://www.ecb.europa.eu/mopo/implement/app/html/ecb.faq_pspp.en.html> accessed 08 November 2024.
[5] BVerfG, *Order of the Second Senate of 18 July 2017,* 2 BvR 859/15.
[6] Case C-493/17 *Weiss and Others* [2018] EU:C:2018:1000.
[7] ibid para. 168.
[8] BVerfG, *Judgment of the Second Senate of 05 May 2020,* 2 BvR 859/15, para. 119.
[9] European Commission, 'December infringement package: key decisions' (European Commission 2021) <https://ec.europa.eu/commission/presscorner/api/files/document/print/en/inf_21_6201/INF_21_6201_EN.pdf> accessed 18 November 2024.

institutions to have acted beyond their competences. This brought both fame and infamy to the judgement in the world of legal scholarship. Reactions to the judgement varied widely, with some agreeing and praising its argumentation,[10] while others harshly criticised it.[11] This diversity makes it particularly interesting to analyse the judgement and understand how scholars arrive at such different conclusions, especially concerning the main point of the BVerfG which is the inadequate proportionality test conducted by the CJEU.

This paper aims to analyse the different conceptions of the proportionality test by the BVerfG and the CJEU to evaluate the German judgement in light of that research. Such an analysis is crucial for understanding the proportionality conflict, which is important because different methodological conceptions of EU law can significantly impact the functioning of the Union.

Therefore, the following question must be raised: "*Considering the divergent proportionality assessments conducted by the Bundesverfassungsgericht (BVerfG) and the Court of Justice of the European Union (CJEU) in the PSPP and Weiss cases, how can the assessment of Weiss by the BVerfG's PSPP decision be evaluated?"*

To answer this question a legal doctrinal methodology will be used, as the object is to analyse the existing law and case law and critically reflect on it. Therefore, the paper will mostly use the two respective judgements as well as legal academic articles as sources. In the second chapter, the paper is, first, going to explain the proportionality test used by the CJEU in *Weiss*, then, it will do the same regarding the test by the BVerfG and also highlight what the BVerfG criticised about the *Weiss* test. In the third chapter, the universality of the BVerfG's test is going to be discussed, as this is an important and necessary claim of the German Court to justify its assessment. In the fourth chapter, the paper addresses

[10] Ulrich Haltern, 'Ultra-vires-Kontrolle im Dienst europäischer Demokratie' [2020] Neue Zeitschrift für Verwaltungsrecht 817; Martin Höpfner, 'Proportionality in the PSPP Saga: Why Constitutional Pluralism Is Here to Stay and Why the Federal Constitutional Court Did not Violate the Rules of Loyal Conduct' (2021) 6 European Papers 1527; Karsten Schneider, 'Gauging 'Ultra-Vires': The Good Parts' (2020) 21 German Law Journal 968; Sven Simon and Hannes Rathke, ''Simply not comprehensible.' Why?' (2020) 21 German Law Journal 950.

[11] Toni Marzal, 'Making sense of the use of proportionality in the Bunderverfassunsgericht's PSPP decision' (the article was originally published in (2020) 2 Revue des Affaires Européennes 441, but there was no access to the original document, University of Glasgow 2020); Sauer (n 2); Mattias Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception' (2020) 21 German Law Journal 979.

the relationship between the principles of proportionality and conferral as the two courts show fundamentally different understandings regarding that relationship. The last substantive chapter is going to address the alleged double standards of both courts. This will allow for a deeper understanding of the background of the conflict and the different proportionality tests.

2. THE TWO PROPORTIONALITY TESTS

The main issue the BVerfG had with the *Weiss* decision was how the CJEU tested the proportionality of the PSPP in its judgement. Because the conflict is dealing with proportionality, it is in principle of a methodological nature.[12] Thus, perhaps unsurprisingly, one of the main points of criticism that was directed against the BVerfG's PSPP decision was its use of methodology. Therefore, it is of utmost importance to analyse the conceptions of proportionality of the two courts.

2.1. THE *WEISS* TEST

In the *Weiss* case, the CJEU defined the proportionality principle as follows: "the principle of proportionality requires that acts of the EU institutions 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".[13] This definition was not very surprising, since it was also used in other cases, even in similar cases and preliminary questions to the CJEU by the BVerfG.[14]

From that statement, one can infer the stages of the test applied by the CJEU to evaluate the PSPP's conformity with the proportionality requirement. The first stage is the suitability of the measure, this is interpreted by the CJEU to being passed when there is no "manifest error of assessment".[15] In this case the CJEU analysed the decision that the PSPP is based upon on factors like the economic state,[16] the actual effects that it had on inflation,[17] and the practice of other central banks.[18] The second stage focuses on the necessity of the measure. This is interpreted to mean that a measure is necessary when it "does not go

[12] Sarmiento (n 3) p. 11.
[13] *Weiss and Others* (n 6) para. 72.
[14] Case C-62/14 *Gauweiler and Others* [2015] EU:C:2015:400, para. 67.
[15] *Weiss and Others* (n 6) para. 78.
[16] ibid para. 74.
[17] ibid para. 75.
[18] ibid para. 77.

manifestly beyond what is necessary to achieve [the] objective".[19] Here, reference was made to a variety of limiting factors of the programme, such as aspects like the implementing procedures,[20] eligibility criteria,[21] temporal scope,[22] asset purchase caps,[23] and loss prevention measures.[24] There is no distinct stage of proportionality *stricto sensu* in this test and the CJEU did no balancing itself, but reference was made to the Advocate General's opinion that the interests involved were weighed up to prevent manifestly disproportionate disadvantages.[25]

As should already be evident from the interpretation by the Court, this test is not strict and allows for a considerable discretion. Therefore, at least in regard to that test, the CJEU gives the ECB "broad discretion",[26] leading to the PSPP passing the proportionality stage.[27]

2.2. THE BVERFG'S CRITIQUE

Upon a first reading of the German judgement, it becomes very clear that the BVerfG is not satisfied with the application of the proportionality test in the *Weiss* case by the CJEU. For instance, the BVerfG stated that the principle of proportionality is rendered "meaningless"[28] by the application of the CJEU, that the "interpretation of the Treaties is simply not comprehensible and thus objectively arbitrary"[29] and from a methodological perspective "not tenable".[30]

That the language used is harsh is indisputable and acknowledged by nearly every scholar.[31] However, to evaluate the assessment, one has to look at the reason as to why the Court used these specific formulations. Before the actual use of the *ultra vires* doctrine in the PSPP judgement, the BVerfG already developed it in earlier case law. Most notably, it set out the criteria in its *Honeywell*

[19] *Weiss and Others* (n 6) para. 79.
[20] ibid para. 82.
[21] ibid para. 83.
[22] ibid para. 84.
[23] ibid para. 89.
[24] ibid para. 97.
[25] *Weiss and Others* (n 6) para. 93.
[26] ibid para. 73.
[27] ibid para. 100.
[28] *Judgment of the Second Senate of 05 May 2020* (n 8), para. 127.
[29] ibid para. 118.
[30] ibid para. 141.
[31] Haltern (n 10) p. 821; Friedemann Kainer, 'Aus der nationalen Brille: Das PSPP-Urteil des BVerfG' [2020] Europäische Zeitschrift für Wirtschaftsrecht 533, p. 536; Martin Nettesheim, 'Das PSPP-Urteil des BVerfG – ein Angriff auf die EU?' [2020] Neue Juristische Wochenschrift 1631, p. 1632.

decision.[32] At that time, the Court gave very strict limitations to the use of the *ultra vires* doctrine, reserving it for a "manifest […] transgression of competences",[33] leading to a "structurally significant shift in the structure of competences".[34] Thus, even to just formally stick to its own case law, the Court had to use this harsh language.[35] Testing this should be done in a manner that is "*Europafreundlich*",[36] meaning friendly towards Europe and is described by the Court as openness to European integration. To assess whether the Court did not just formally, but also materially stick to its own requirements, it is necessary to evaluate the proportionality assessment. But what exactly is the issue with the proportionality test in *Weiss*?

The BVerfG defines a proportionality test as a three-stage test, these being "suitability, necessity and appropriateness".[37] This is justified by the Court with reference to German doctrine, as well as to the practices of courts in other countries and case law of the CJEU.[38]

As previously highlighted, the CJEU, in its decision, did not adopt such a test but relied on a two-stage test of suitability and necessity.[39] Consequently, the BVerfG concluded that the last stage is missing, namely the "appropriateness" stage,[40] also called proportionality in the strict sense.[41] In this stage costs and benefits of the measure are balanced against each other,[42] therefore, it is also called the balancing stage. By stating what the CJEU has done, namely not using a separate balancing stage, the BVerfG is objectively correct. The contention arises over whether the CJEU's proportionality test is genuinely exceptional, and if the three-stage test is universal in its application.

[32] *BVerfG, Order of the Second Senate of 6 July 2010*, 2 BvR 2661/06.
[33] ibid para. 102.
[34] *Order of the Second Senate of 6 July 2010* (n 32) para. 102.
[35] Christian Calliess, 'Konfrontation statt Kooperation zwischen BVerfG und EuGH?' [2020] Neue Zeitschrift für Verwaltungsrecht 897, p. 901.
[36] *Judgment of the Second Senate of 05 May 2020* (n 8) para. 112.
[37] *Judgment of the Second Senate of 05 May 2020* (n 8) para. 125.
[38] ibid.
[39] *Weiss and Others* (n 6) para. 72.
[40] *Judgment of the Second Senate of 05 May 2020* (n 8) para. 126.
[41] ibid.
[42] Höpfner (n 10) p. 1540.

3. ARE THE THREE STAGES REALLY UNIVERSAL?

The universality of the German proportionality test constitutes one of the foundational elements of the judgement. The reason for that is because a German court can hardly justify using just its own principles to adjudicate EU law, as it would go against their duty of sincere cooperation [43] and would ultimately jeopardise the legitimacy of all the arguments. That it cannot just use its own standards of interpretation is also acknowledged by the BVerfG in its PSPP decision[44] and that an *ultra vires* act cannot be based on German principles was always stressed.[45] Consequently, it makes the argument that the "methodological standards recognised by the CJEU […] are based on the (constitutional) legal traditions common to the Member States",[46] referencing Article 6(3) of the Treaty on European Union (TEU) and Article 340(2) of the Treaty on the Functioning of the European Union (TFEU). It goes on with concluding that this means that the CJEU has overstepped its mandate in Article 19(1) TEU when it manifestly disregards "the traditional European methods of interpretation or, more broadly, the general legal principles that are common to the laws of Member States".[47] This construction alone has met some criticism, with some even calling it a "new Solange", [48] in reference to the infamous *Solange* case where the BVerfG questioned the primacy of EU law.

As the argument of the Court is that not using the third stage results in exceeding traditional European methods, there has to be a near universal use of the three-stage test across all Member States, as Member States applying the same test as the CJEU would mean that it falls within the scope of traditional European methods. To prove its universality, the BVerfG stipulates that the CJEU's assessment goes against the tradition of not just the German Constitutional Court, but also against the French, Spanish, Swedish, and Italian constitutional and supreme courts, and that furthermore, the three-step approach can be found in the

[43] Höpfner (n 10) p. 1545.
[44] *Judgment of the Second Senate of 05 May 2020* (n 8) para. 112.
[45] Claus Dieter Classen, 'Der nationale Rechtsanwendungsbefehl für das Unionsrecht – eine dogmatisch verfehlte Konstruktion mit praktisch verfehlten Konsequenzen' [2023] EuR 4, p. 14.
[46] *Judgment of the Second Senate of 05 May 2020* (n 8) para. 112.
[47] ibid.
[48] Georgios Anagnostaras, 'Activating Ultra Vires Review: The German Federal Constitutional Court Decides Weiss' (2021) 6 European Papers 801, p. 811.

legal traditions of Austria, Poland, Hungary, and the United Kingdom as well.[49] Thus leading to the question, whether this stage is really universal.

The Court shows with its assessment that there is a considerable number of Member States that use a three-stage test, but some scholars point out how inherently German this test really is.[50] It is argued that this principle is not to be seen as universal, but just as a German principle that gained popularity in other Member States through the EU,[51] precluding it from being seen as self-evident. This seems to be a valid point and was most prominently the case with the UK, which still sees the three-stage test and proportionality as a whole as foreign,[52] which stands in sharp contrast to the BVerfG having used the UK as an example to prove its point. Therefore, although some Member States use the same test, it is not self-evident for them to use it. Nevertheless, it has to be acknowledged that currently, the three-stage test is at least widely used, but is still not universal, since often, for example in France, the third stage is only limited to the most manifest breaches of proportionality in the strict sense.[53]

The precise use of the proportionality test is, therefore, not uncontroversial and not just subject to differences between legal systems, but also subject to legal debate whether the balancing stage should be followed at all.[54] Exactly in that controversiality of the principle, a fallacy of the German Court could potentially be seen since this would mean that the three stages are not universal. Moreover, Article 5(4) TEU only states that "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties", which is what was tested by the CJEU. The treaties never mention adding a balancing stage regarding monetary policy.

Furthermore, in the judgement the BVerfG acknowledges that the CJEU never used the proportionality test in a German manner but points out a trend of the CJEU to lighten the proportionality requirements and merge them together.[55] Therefore, the assertion that the test would have to be carried out in the way that

[49] *Judgment of the Second Senate of 05 May 2020* (n 8) para. 125.
[50] Isabel Feichtner, 'The German Constitutional Court's PSPP Judgment: Impediment and Impetus for the Democratization of Europe' (2020) 21 German Law Journal 1090, p. 1097.
[51] Marzal (n 11) p. 3.
[52] Leonard Hoffmann, 'A Sense of Proportion' (1997) 32 Irish Jurist 49, p. 54.
[53] Marzal (n 11) p. 4.
[54] Höpfner (n 10) p. 1542.
[55] *Judgment of the Second Senate of 05 May 2020* (n 8) para. 126.

the German court suggested is highly dubious, but even when accepting the necessity for a balancing stage, one has to ask what factors the CJEU is supposed to balance. This question will be addressed in the next chapter.

4. Proportionality as an Element of Conferral

Even beyond the debate on whether the three-stage test is universal or not, the BVerfG perplexed a lot of scholars with its reasoning that the applied two-stage test "renders that principle meaningless".[56] It contends that it is "meaningless for the purposes of distinguishing, in relation to the PSPP, between monetary policy and economic policy".[57] In other words, the Court wants to use the proportionality test to assess whether the principle of conferral is met, since it assigns proportionality a "corrective function for the purposes of safeguarding the competences of the Member States",[58] as monetary policy is an exclusive competence of the Union, pursuant to Article 3(1)(c) TFEU, while economic policy is not. The scholars arguing in favour of that perspective mostly use a practical approach and argue that, because the mandate of the ECB is already interpreted broadly, the proportionality principle is to be used for limiting it.[59] This is of course an understandable assessment coming from a perspective that the conferred powers have to be controlled more effectively. Nevertheless, it appears that this is just a minority opinion, with most asserting that these are simply two separate principles with a connection being non-existent.[60]

The first major point of criticism is that the statement of the German Constitutional Court implies that the CJEU is using the proportionality principle to distinguish between monetary and economic policy, ergo for the delineation of competences, but that this is done incorrectly due to a wrong proportionality assessment. Some even argue that the CJEU did so in earlier, similar cases, for example in the *Gauweiler* judgement.[61] But does the Court really use the test in this way? In *Weiss*, by answering the BVerfG's third question, which is whether

[56] *Judgment of the Second Senate of 05 May 2020* (n 8) para. 127.
[57] ibid.
[58] ibid para. 133.
[59] Haltern (n 10) p. 822; Simon and Rathke (n 10) p. 953.
[60] Jan Fleischmann, 'EZB und EuGH im Ultra-vires-Netz des BVerfG. Die weitreichenden Folgen des Urteils des BVerfG zum Public Sector Purchase Programme der EZB' (2020) 5 Anglo German Law Journal 30, p. 44.
[61] Simon and Rathke (n 10) p. 952.

the PSPP "exceeds the monetary policy mandate of the ECB",[62] the CJEU did not use a proportionality test, but only referred to the objectives of the measure.[63] By doing so, the CJEU explicitly referred to both economic and monetary policy effects.[64] This stands in stark contrast to the statement from the BVerfG that the CJEU is "completely disregarding the economic policy effects of the PSPP".[65]

In the subsequent section of *Weiss*, the CJEU went on to test proportionality, but only for the objective of monetary policy, since it was already made clear before that the objective did not fall within economic policy.[66] Hence, the perspective of the CJEU is that these principles are not there to be mixed. This means that the question of why the CJEU should have used a proportionality test that is not "meaningless for the purposes of distinguishing […] between monetary policy and economic policy",[67] remains open. Especially given that the TEU is very clear in Article 5(1) that the "limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality". Thus, it can be seen here that there is a very clear distinction made in the treaties, without any place for a hybrid test. Furthermore, the BVerfG itself only started to connect the principles in its judgement and not already in its preliminary questions.[68]

The BVerfG assumes here that "a generous interpretation of the specific competence conferred may, to a certain extent, be compensated by a sound proportionality assessment".[69] However, this is a notion that is completely new and without any support in CJEU case law[70] and nor is it supported in the judgement with any reference.

At the end of the last chapter, the question of what the German Court wants the CJEU to balance was raised. To answer this question, it can be seen here what the BVerfG really thinks the object of the balancing stage should be, namely the

[62] *Weiss and Others* (n 6) para. 16.
[63] ibid paras. 53-70.
[64] ibid para. 59.
[65] *Judgment of the Second Senate of 05 May 2020* (n 8) para. 146.
[66] *Weiss and Others* (n 6) para. 70.
[67] *Judgment of the Second Senate of 05 May 2020* (n 8) para. 127.
[68] Wendel (n 11) p. 987.
[69] *Judgment of the Second Senate of 05 May 2020* (n 8), para. 128.
[70] Jürgen Basedow and others, 'European integration: Quo vadis? A critical commentary on the PSPP judgment of the German Federal Constitutional Court of May 5, 2020' (2021) 19 International Journal of Constitutional Law 188, p. 199.

economic and monetary policy effects.[71] This means that the BVerfG wants the CJEU to conflate the principles of proportionality and conferral, by constructing a proportionality test that does not weigh up interests as its last step, but policy effects. When the effect of the programme then "tilts towards monetary policy, the ECB is competent to enact the bond purchase programme, if it tilts towards economic policy, the ECB lacks competence".[72] This makes the third stage of the proportionality test even more controversial, since balancing fundamental freedoms and rights is comparably simple, but weighing policy effects is not as clear-cut.[73]

In arguing that the third step is universal the Court also specifically refers to Italy "balancing […] constitutional values".[74] Taking that seriously, it would also mean that an Italian court would not balance policy effects, since they are hardly fundamental values. And even when just looking at the differences between economic and monetary policy aside from the methodological conflict, it must be said that this difference itself is not clear at all,[75] and monetary policy measures necessarily have an effect on economic policy.[76]

5. Alleged Double Standards

Although the German Court did not hold that the three-stage test was used in comparable situations, it nevertheless contends that "completely disregarding the economic policy effects of the PSPP contradicts the methodological approach taken by the CJEU in virtually all other areas of EU law".[77] This shows us that the BVerfG alleges the CJEU to have double standards regarding this area and every other area of law, a claim that becomes more apparent when this statement is considered in the context of other parts of the judgement. For instance, the Court also held that the ECB and the CJEU's use of proportionality "encroaches upon

[71] Phedon Nicolaides, 'An Assessment of the Judgment of the Federal Constitutional Court of Germany On the Public Sector Asset Purchase Programme of the European Central Bank' (2020) 47 Legal Issues of Economic Integration 267, p. 281.
[72] Wendel (n 11) p. 985.
[73] Feichtner (n 50) p. 1097.
[74] *Judgment of the Second Senate of 05 May 2020* (n 8) para. 125.
[75] Sara Poli and Roberto Cisotta, 'The German Federal Constitutional Court's Exercise of Ultra Vires Review and the Possibility to Open an Infringement Action for the Commission' (2020) 21 German Law Journal 1078, p. 1084.
[76] *Weiss and Others* (n 6) para. 59.
[77] *Judgment of the Second Senate of 05 May 2020* (n 8) para. 146.

the competences of the Member States",[78] which it emphasises at multiple points of the judgement.[79]

5.1. THE CJEU'S DOUBLE STANDARDS

Thus, double standards of the Court and the "continual erosion of Member States competences"[80] through proportionality are a main concern in the PSPP decision. In order to evaluate these concerns, it has to be examined whether the CJEU did completely disregard economic policy effects. The simple answer to that is no. The CJEU clearly had regard to economic policy effects and did a comprehensive assessment of them.[81] Nevertheless, it is largely acknowledged that it is justified to come to different conclusions than the CJEU, and many economists support the German decision.[82] The BVerfG can disagree with the outcome and the assessment, but it should be of no doubt, even for someone without any form of economic background, that there was regard for economic policy effects just by looking at the judgement's part over the delimitation of monetary policy.[83]

Even accepting the argument that there was no regard for economic policy, it must be assessed whether the CJEU acted differently in other areas of EU law. Here, it has to be looked at not only other policy fields, but at the actors at play, because this is a main point of criticism of not only *Weiss*, but also of the CJEU itself. More specifically, it is alleged to apply harder standards to the Member States than to Union institutions.[84] This behaviour is in particular criticised with regard to the ECB, since some believe that the ECB already is given a very broad mandate.[85] Critics of that alleged practice see the competences of the Member States at stake, as well as a possible misuse of the ECB to achieve political aims.[86] This is of course a valid consideration, but the question is whether this different

[78] *Judgment of the Second Senate of 05 May 2020* (n 8) para. 163.
[79] ibid para. 133.
[80] ibid para. 156.
[81] Filippo Annunziata, 'Cannons over the EU legal order: The decision of the BVerfG (5 May 2020) in the *Weiss* case' (2021) 28 Maastricht Journal of European and Comparative Law 123, pp. 138-139.
[82] Bodo Herzog, 'Judgment of the German Federal Constitutional Court (2 BvR 859/15) on the Public Sector Purchase Programme of the ECB: An Interdisciplinary Analysis' (2021) 27 European Public Law 653, p. 666.
[83] *Weiss and Others* (n 6) paras. 53-70.
[84] Höpfner (n 10) p. 1547.
[85] Haltern (n 10) p. 822.
[86] ibid.

proportionality assessment alone can constitute a reasoning that is "objectively arbitrary",[87] especially because the Court did not give any concrete reasons for this.

It is important to keep in mind the underlying rationale of that argument. That is, that the CJEU is a Union organ and, thus, not impartial and naturally more on the side of other Union organs.[88] This raises the question of who could be more impartial than the CJEU in deciding conflicts between Union organs and Member States, as the CJEU is a body composed of judges that are, according to Article 253 TFEU, appointed by the Member States. On the other hand, the German Constitutional Court is a lot less close to the *Länder*, the German states, than the CJEU is to the Member States, and the BVerfG is the organ that decides conflicts between federal level and state level.[89] This of course does not prove that one of these courts is not impartial, but this fact makes it very odd to hear that arguments that question the impartiality of the CJEU are raised by the BVerfG.

Another inconsistency with the German legal order is the fact that the aforementioned point about the mixing between the principle of conferral and principle of proportionality is unknown in EU law, is inasmuch applicable to the domestic German system. This is the case as the proportionality principle and the delimitation of competences between the federal level and state level are also not mixed.[90] Therefore, the German Court applies a test in a form that would never be used in a domestic situation and the CJEU did not use double standards. This leaves the question behind of why the German Constitutional Court acts differently regarding the EU, since it does not give any reason why. Here one can indeed start to speak of the German Court having double standards.

5.2. THE BVERFG'S DOUBLE STANDARDS

In order to assess the validity of this impression, the BVerfG's own *Honeywell* criteria have to be looked at again, since not aligning the judgement with their own criteria is certainly a form of double standards. It would mean that the German Court applies two different tests and the choice between the tests depends solely

[87] *Judgment of the Second Senate of 05 May 2020* (n 8) para. 118.
[88] Höpfner (n 10) p. 1546.
[89] Classen (n 45) p. 22.
[90] Basedow and others (n 70) p. 199.

on the will of the court. It has to be asked, whether the act of the CJEU was a "manifest […] transgression of competences",[91] leading to a "structurally significant shift in the structure of competences".[92] It should be clear at this point that this is not the case, but even if accepting the whole argumentation of the Court, this would arguably be unlikely and there are some other inconsistencies worth discussing.

The first one is that the BVerfG gave the ECB three months to further explain why the PSPP complies with the ECB's mandate.[93] This perhaps implies that a better explanation could solve the issue, which is inherently inconsistent with the requirement of a "structurally significant shift in the structure of competences".[94] How can a shift be that significant for the whole structure of the Union, if it can be repaired in only three months?[95] Moreover, even when accepting that it could be repaired in this period, the German Constitutional Court just asked for a further explanation, and the question remains, how can a simple reformulation do any repair?[96]

Also, it should not be forgotten that the BVerfG had another possibility than either accepting or rejecting the *Weiss* judgement. It could have asked the CJEU a follow up preliminary question on the same case, asking for further clarification and drawing attention to the aspects that it considers as problematic. This would be possible under EU law.[97]

For example, this was carried out in the *Taricco* saga. In that case, there was a conflict between the CJEU and the Italian *Corte Costituzionale* and after receiving a first answer, the Italian Court went on and asked the CJEU again in *Taricco II*.[98] This gave the CJEU the opportunity to refine its answer, with special

[91] *Order of the Second Senate of 6 July 2010* (n 32) para. 102.
[92] ibid.
[93] *Judgment of the Second Senate of 05 May 2020* (n 8) para. 235.
[94] *Order of the Second Senate of 6 July 2010* (n 32) para. 102.
[95] Franz C. Mayer, 'The Ultra Vires Ruling: Deconstructing the German Federal Constitutional Court's PSPP decision of 5 May 2020' (2020) 16 European Constitutional Law Review 733, p. 755.
[96] Hoai-Thu Nguyen and Merijn Chamon, 'The ultra vires decision of the German Constitutional Court' (Policy Paper, Jacques Delors Centre 2020) p. 6.
[97] Case C-377/89 *Cotter and Others v Minister for Social Welfare* [2018] ECLI:EU:C:1991:116, para. 12.
[98] Cases C-105/14 *Criminal proceedings against Ivo Taricco and Others* [2015] ECLI:EU:C:2015:555 and C-42/17 *Criminal proceedings against M.A.S. and M.B.* [2017] ECLI:EU:C:2017:936.

regard to the constitutional issues underlying the raised questions.[99] This serves as an example of how the German Court could have acted, especially because a second preliminary question could have included the questions about the potential problematic proportionality assessment in *Weiss*.[100] Also, the BVerfG previously acknowledged the duty to refer a matter back to the CJEU in its *Kloppenburg* decision.[101]

Nevertheless, the Court decided not to do so, which is controversial. Some try to differentiate the *Taricco* and *PSPP* sagas. The main arguments are that the BVerfG has already brought about a very similar request in the *OMT* case, and that also the second preliminary question of the Italian Court could be seen as threatening and thus as breaching sincere cooperation.[102] These are valid arguments, but nevertheless, a second request would surely have made it clear that the Court is at least willing to follow its duty of sincere cooperation before using the *ultra vires* doctrine.[103] This was not done here and, therefore, this is at least an indication that the Court did not attempt to do so, which is another sign for it having used double standards.

6. CONCLUSION

In conclusion, the PSPP decision stands as a landmark judgement and the clash between the courts reveal fundamentally different understandings of proportionality. To give an answer on how one can evaluate the BVerfG's PSPP decision in light of its and the CJEU's proportionality assessments in the PSPP and *Weiss* cases, one has to respond in light of the former case law of the courts.

The CJEU simply followed their earlier judgements and used almost the same method as in *Gauweiler*. Even the alleged double standards, which can be validly criticised, are not a particularity of *Weiss*.

The examination of the perspective of the BVerfG is more intriguing. It is unmistakable that this ruling not only is not in compliance with EU law and the case law of the CJEU, but more importantly, with its own case law. Notably, the PSPP decision does not show, at any point, other than just barely mentioning it,

[99] Nguyen and Chamon (n 96) pp. 6-7.
[100] Calliess (n 35) pp. 901-902.
[101] Basedow and others (n 70) p. 205.
[102] Höpfner (n 10) p. 1549.
[103] Herzog (n 82) p. 662.

any signs of an examination that could be described as "*Europafreundlich*".[104] There is no usage of the CJEU's own standards to evaluate the *Weiss* judgement. The BVerfG tries to argue that the third stage of the proportionality test is universally accepted, and that any departure is "objectively arbitrary".[105] This approach can be highly criticised, not because using a third step is novel, but because it can hardly be proven that it is universal. Thus, the act of declaring an EU institution to have acted *ultra vires* based on that argument could itself even be described as "objectively arbitrary".[106]

Also, in contrast to having a third step in a proportionality test, the interpretation of proportionality as an element of conferral is novel and the notion that a rigid proportionality assessment can somehow counterbalance a broad interpretation of the ECB's mandate, is unknown. Therefore, using a mix of the principles of proportionality and conferral in an *ultra vires* control is not known in EU law and thus "simply not comprehensible".[107] And with using different standards for CJEU and PSPP, than between *Bund* and *Länder* and ignoring the possibility to refer the question a second time to the CJEU, the BVerfG renders the notion of sincere cooperation "meaningless".[108]

This means that the CJEU would have never been declared to have acted *ultra vires* if the BVerfG had adhered to its own criteria, which makes it obvious that not *Weiss*, but the PSPP decision is "not tenable".[109]

[104] *Judgment of the Second Senate of 05 May 2020* (n 8) para. 112.
[105] ibid para. 118.
[106] ibid.
[107] ibid.
[108] ibid para. 127.
[109] ibid para. 141.

My Body, Our Choice? Mandatory Counselling for Abortion and Women's Reproductive Rights in Germany

Charlotte Zehrer[1]

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TABLE OF ABBREVIATIONS

CEDAW	UN Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	UN Committee on Economic, Social and Cultural Right
GG	*Grundgesetz*, German Constitution
HRC	UN Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
SchKG	*Schwangerschaftskonfliktgesetz*, Pregnancy Conflict Law
StGB	*Strafgesetzbuch*, German Criminal Code

1. INTRODUCTION

Women's reproductive rights are without a doubt one of the most contested matters of the decade. Whether we look at reforms in Northern Ireland with its new Abortion Regulations[2] or the United States with its overturn of *Roe v Wade,*[3] reproductive rights are under reform and have captured the general public's attention. Arguments ranging from women's bodily autonomy to the protection of unborn life have dominated this discourse. However, there is one aspect that seems to be at times overlooked: namely, the fact that States have committed themselves to international standards in the form of human rights treaties, and that those treaties may well be a source for women's reproductive rights. International human rights law thus introduces a new question to the debate: does a fundamental right to abortion exist? And if so, to what extent may this right be restricted? This paper will clarify the current content of international human rights law, particularly the UN Convention on the Eliminations of All Forms of Discrimination against Women (CEDAW)[4] and the International Covenant on Economic, Social and Cultural Rights (ICESCR),[5] and then use its findings as a standard for assessment of the national law and practice that surrounds women's reproductive rights.

Germany is an interesting candidate for such an assessment. It is one of the few countries in Europe that requires a mandatory counselling procedure before an abortion can be legally obtained, but where such counselling is not carried out by a healthcare professional at the doctor's office, but by a third party representing the interest of the State.[6] This gives rise to the research question: *"To what extent does the mandatory counselling required to lawfully obtain an abortion under*

[2] Jennifer Bray and Pat Leahy, 'Abortion review to recommend sweeping changes to existing law' (*The Irish Times* 21 April 2023) <https://www.irishtimes.com/health/2023/04/21/abortion-review-to-recommend-sweeping-changes-to-existing-law/> accessed 31 March 2024.
[3] Dobbs v Jackson Women's Health organization, 597 US 215 (2022); Nina Totenberg and Sarah McCammon, 'Supreme Court overturns Roe v. Wade, ending right to abortion upheld for decades' (*npr* 24 June 2022) <https://www.npr.org/2022/06/24/1102305878/supreme-court-abortion-roe-v-wade-decision-overturn> accessed 31 March 2024.
[4] Convention on the Elimination of all Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).
[5] International Covenant on Economic Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).
[6] Criminal Code in the version published on 13 November 1998 (Federal Law Gazette I, p. 3322), as last amended by Article 2 of the Act of 22 November 2021 (Federal Law Gazette I, p. 4906) (StGB), §218a, §219.

German law comply with women's reproductive rights under international human rights law?" To answer this question, a legal doctrinal and evaluative methodology will be used.[7] Particularly this will entail a detailed analysis of the current state of the law as well as an assessment of the situation at hand according to the standards set by law. The standard of assessment here will be the current state of international human rights law and the obligations that flow from it.[8] To identify relevant rights and obligations, this paper will use both the textual interpretation of the relevant human rights treaties, as well as authoritative interpretations issued by the respective treaty bodies, which additionally implore a teleological method of treaty interpretation by having regard to their object and purpose.[9] For the evaluation, recourse will be had to quantitative research in the field of abortion, but also more importantly to qualitative research in the form of studies on individual experiences and quality of mandatory counselling. This will help in understanding and weighing the different interests involved, and thereby in answering the research question in the most comprehensive way possible. Worth noting here, is that any research on mandatory counselling in Germany, especially from an international human rights perspective, is very limited and that this paper thus also seeks to fill an existing gap. Importantly, this research is limited to what the law is, rather than what the law ought to be.[10] This research does not wish to engage in philosophical, ethical discussions or wishful thinking; instead it is meant to avoid the pitfall of human rights activism, of arguing for a moral standpoint, by attempting the most objective, legal assessment possible.[11] Therefore, it is strictly limited to the current state of international human rights law and whether German law and practice comply with the standards it sets.

Chapter 2 explains women's reproductive rights under international human rights law regarding abortion. Specifically, it looks at the normative content of the

[7] Terry Hutchinson and Nigel Duncan, 'Defining and describing what we do: doctrinal legal research' (2012) 17(1) Deakin Law Review 83; Suzann Egan, 'The Doctrinal Approach in International Human Rights Scholarship'. (2017) UCD Working Papers in Law, Criminology and Socio-Legal Studies Research Paper 19/17 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3082194 > accessed 10 June 2024, p. 2 f.
[8] Suzann Egan (n 7), p. 8 f.
[9] Maya Kirilova Eriksson, *Reproductive Freedom* (International Studies in Human Rights Volume 60, Brill 1999), p. 303; Suzann Egan (n 7), p. 12.
[10] Fons Coomans et al, 'Methods of Human Rights Research: A Primer' (2010) 32 Human Rights Quarterly 179, p. 185.
[11] ibid pp. 180-183.

rights to health and healthcare and at the obligations that flow from them, thus establishing the standard of assessment. Chapter 3 will cover the regulation of abortion in Germany. It looks at the criminal and Pregnancy Conflict Law as well as at current practice with a focus on the mandatory counselling procedure, remaining purely descriptive in establishing the situation that is to be assessed. Chapter 4 connects the two previous chapters: it evaluates the situation described in Chapter 3 based on the standard set out in Chapter 2. It particularly evaluates whether there is a restriction on women's rights in Germany and whether such a restriction could be justified. Chapter 5 concludes this paper.

2. Women's Reproductive Rights under International Human Rights Law

This chapter will give an extensive overview of women's reproductive rights under international human rights law – most prominently under the CEDAW and the ICESCR – to which Germany has been a state party since 1985 and 1973 respectively. It will first establish the normative content of reproductive rights, particularly as regards abortion, and then explain the relevant State obligations that flow from such rights. Importantly, this chapter focuses on the state of the law as it is, rather than what it ought to be, and will provide a standard of assessment that is based on current legal reality. This standard of assessment is necessary to answer the research question, since it is used later to evaluate to what extent state practice complies with international human rights law.

2.1. Normative Content – A Right to Abortion?

When assessing women's reproductive rights under international human rights law, CEDAW is a natural starting point as the women-specific human rights document under the United Nations treaty system.[12] According to Article 2, CEDAW's purpose is to condemn and eliminate discrimination against women in all its forms, Such discrimination is defined as "any distinction, exclusion or restriction made based on sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, on a basis of equality of men and

[12] Carlota Bustelo, 'Reproductive Health and CEDAW' (1995) 44 The American University Law Review 1145, p. 1145.

women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field".[13] It follows a substantive, de facto equality approach,[14] meaning that it not only seeks to achieve formal de jure equality through equal treatment by law, but also recognises that actual, effective equality requires (1) that women's differences with men and their different lived experiences be taken into account, and (2) the active fighting of gender stereotypes.[15] This understanding of equality is further evidenced by the temporary special measure mechanism under CEDAW designed to accelerate de facto equality.[16] Importantly, the substantive equality approach entails that both direct and indirect discrimination, where indirect discrimination refers to a law or policy which appears neutral but has discriminatory effects on women in practice, are covered by the Convention.[17] The underlying idea of this approach has been concisely summarised by Ngwena: "Unless human rights can be enjoyed equally between women and men, then they will do little to disturb the patriarchal power that produces and reinforces gender inequality through structural inequality."[18]

Reproductive rights, including abortion, can fall under various rights protected by CEDAW. The most obvious is perhaps Article 12: the freedom from discrimination in healthcare.[19] This right is not a right to health as such as under ICESCR,[20] but rather a right to non-discriminatory healthcare,[21] as well as a right to services in connection with pregnancy.[22] It reads: "States Parties shall take all appropriate measures to eliminate discrimination against women in the field of healthcare to ensure, on a basis of equality of men and women, access to healthcare services, including those related to family planning."[23]

[13] CEDAW (n 4), art 1.
[14] See for example UN Committee on the Elimination of All Forms of Discrimination against Women, 'General Recommendation No 28' (16 December 2010) CEDAW/C/GC/28, para. 16.
[15] Marsha A Freeman, Christine Chinkin, Beate Rudolf, *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (Oxford Commentaries on International Law, OUP, 1 January 2012), p. 324 f.
[16] CEDAW (n 4), art 4.
[17] General Recommendation no 28 (n 14), para. 16.
[18] Charles G Ngwena, 'A Commentary on LC v Peru: The CEDAW Committee's First Decision on Abortion' (2013) 57 2 Journal of African Law 310, p. 316.
[19] CEDAW, (n 4) art 12.
[20] Marsha Freeman (n 15), p. 317.
[21] CEDAW (n 4), art 12(1).
[22] ibid art 12(2).
[23] ibid art 12(1).

The CEDAW Committee, the monitoring treaty body established under CEDAW,[24] has clarified the content of the right to healthcare in its General Recommendation 24, in particular regarding sexual and reproductive healthcare, which includes abortion services. It has made clear that a failure of the State Parties to remove barriers to women's effective access to reproductive and sexual health services constitutes discrimination against them, given that it denies access to services that only women need. [25] By this reasoning, since abortion disproportionately affects women, denying them access to it amounts to gender-based discrimination.[26] Under the right to healthcare, women thus enjoy a right to effective access to reproductive and sexual health services; such as abortion. Furthermore, Article 12 CEDAW includes a right to be fully informed by properly trained personnel of options in agreeing to treatment, including benefits, adverse effects, and alternatives,[27] a right to timely and affordable access to services,[28] which must be acceptable to the woman,[29] as well as to services that are related to family planning.[30] As regards abortion specifically, the Committee has stated that there should be no mandatory waiting periods or requirement for third party consent.[31] In addition to their rights under Article 12, women also enjoy the right to educational information and advice on family planning under Article 10(h)[32] and the right to decide freely and responsibly on the number, spacing, and timing of children under Article 16(1)(e).[33] Both rights are inextricably intertwined with the right to healthcare.[34]

That abortion constitutes a healthcare service for the purpose of CEDAW, and that its restriction can become a human rights issue was first confirmed by the CEDAW Committee in its views on *LC v Peru* in 2011.[35] It found that the refusal

[24] CEDAW (n4), art 17.
[25] UN Committee on the Elimination of All Forms of Discrimination against Women, 'General Recommendation no 24' (1999) A/54/38/Rev.1, paras. 11, 14 and 17.
[26] Kate Hunt and Mike Gruszczynski, 'The Ratification of CEDAW and the Liberalization of Abortion Laws' (2019) 15(4) Politics and Gender 722, p. 731.
[27] General Recommendation no 24 (n 25), para. 20.
[28] ibid para. 21.
[29] ibid para. 22.
[30] ibid para. 23.
[31] UN Committee on the Elimination of All Forms of Discrimination against Women, 'General Recommendation no 34' (7 March 2016) CEDAW/C/GC/34.
[32] CEDAW (n 4), art 10(h).
[33] ibid art 16(1)(e).
[34] General Recommendation no 24 (n 25), para. 28; Maya Kirilova Eriksson (n 9), p. 302.
[35] *L.C. v Peru* (4 November 2011) Communication No. 22/2009 CEDAW/C/50/D/22/2009.

of a therapeutic abortion after sexual assault constituted a violation of Article 12 CEDAW,[36] in particular in light of its General Recommendation 24.[37] It further took the view that, when abortion is legalised, a State must also provide a regulatory framework that allows women to realise their rights effectively.[38] A more detailed account of abortion was given by the Committee in an inquiry procedure against Great Britain and Northern Ireland in 2018. Through its investigation of the state of abortion rights in Northern Ireland, the Committee found de facto limitations on access to legal abortions,[39] the criminalisation of abortion,[40] and the inadequacy of family planning support[41] to violate Articles 12, 10(h), and 16(1)(e) CEDAW.[42] The result of de facto unavailability of abortion due to restrictive interpretation, intimidation, and ambiguity contributed to the violation.[43] The legitimate interest of the State in the potential life of the unborn could not justify the restriction, as international human rights treaties on the right to life do not extend to foetuses and the criminalisation of abortion has been deemed unsuitable to protect unborn life.[44] The Committee even went so far as to classify Northern Ireland's violations as grave and systemic.[45] It issued several recommendations, calling for the decriminalisation of abortion in all cases,[46] the legalisation of abortion at least in cases of rape, incest, threats to life and/or health of the woman, and severe foetal impairment,[47] the provision of non-biased, scientifically sound, and rights-based counselling and information on health services including abortion, the protection of the accessibility and affordability of

[36] *L.C. v Peru* (n35), para. 8.15.
[37] ibid para. 8.11.
[38] ibid para. 8.17.
[39] UN Committee on the Elimination of All Forms of Discrimination against Women, 'Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women' (23 February 2018) CEDAW/C/OP.8/GBR/1, para. V.A.I.
[40] ibid para. V.B.
[41] ibid para. V.C.
[42] ibid paras. 72 and 76.
[43] ibid para. 67.
[44] ibid para. 68.
[45] ibid para. 83.
[46] Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (n39), para. 58.
[47] ibid paras. 60 and 85.

such services, and the provision of women with high-quality abortion care in all public health facilities.[48]

The Committee's concern with the provision of abortion care and of non-biased counselling showcases CEDAW's substantive equality approach – the choice for an abortion is something that is inherent to the lived experience of women as the bearers of children, lacking a comparative choice to be made by men. To ensure women's equal enjoyment of their right to health, healthcare, information and family planning, this biological and social difference thus needs to be taken into account by guaranteeing women's right to make a free and informed choice. At the same time, restrictive laws on abortion are often based on gender-stereotypes, such as those pertaining to women and their role as mothers as well as negative stereotypes regarding female reproduction,[49] rendering them discriminatory.[50] In this vein, the CEDAW Committee has requested the abolition of mandatory counselling for abortion in two concluding observations.[51] That abortion constitutes a matter of substantive equality is further also supported by scholastic opinion.[52] In particular, it has been argued that a law based on sex-selective sympathy or indifference amounts to a failure to extend to women the same recognition of humanity as to men, hence violating their right to substantive equality.[53]

The CEDAW Committee's 1999 General Recommendation 24 thus already gives some preliminary insight into women's reproductive rights under international human rights law. A more recent and extensive addition can be found under ICESCR, which also includes some rights and freedoms that are specific to

[48] Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (n39), para. 86.
[49] ibid para. 73.
[50] Payal K Shah and Jihan Jacob, 'Beyond abortion decriminalization: human rights perspectives on the role of law in creating enabling environments for abortion access' in Mary Ziegler (ed), *Research handbook on international abortion law* (Edward Elgar Publishing Limited 2023), p. 356f.
[51] UN Committee on the Elimination of All Forms of Discrimination against Women, 'Concluding Observations on the ninth periodic report of the Russian Federation' (30 November 2011) CEDAW/C/RUS/CO/9, para. 40(a); UN Committee on the Elimination of All Forms of Discrimination against Women, 'Concluding Observations on the seventh periodic report of Slovakia' (31 May 2023) CEDAW/C/SVK/CO/7, paras. 36(c) and 37(c).
[52] Sandra Fredman, *Comparative Human Rights Law* (OUP 2018), p. 188; Carlota Bustelo (n 12), p. 1150; Kate Hunt and Mike Gruszczynski (n 26), p. 731.
[53] Michael Perry, *Interrogating the morality of human rights* (Edward Elgar Publishing 2023), p. 78.

women and their right to sexual and reproductive health. Of particular importance here is Article 12 ICESCR which recognises the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.[54] It should be borne in mind that this right is not a right to be healthy, rather a right to the highest standard of health that is attainable for the individual in question.[55] The full realisation of the right necessitates inter alia the reduction of the still-birth rate and infant mortality,[56] which already foreshadows an implied right to sexual and reproductive healthcare of the mother. The Committee on Economic, Social and Cultural Rights (CESCR) as the competent treaty body has since issued its General Comment 22 on the right to sexual and reproductive health in 2016;[57] which gives an extensive overview.

According to CESCR, the right to sexual and reproductive health forms an integral part of the right to health under Article 12,[58] and is comprised of several freedoms and entitlements.[59] Sexual health is defined in line with the World Health Organisation (WHO) as a state of physical, emotional, mental, and social well-being concerning sexuality, and reproductive health as the capability to reproduce and the freedom to make informed, free, and responsible decisions on reproduction.[60] This right importantly extends to the underlying social determinants of health.[61] To address such determinants, the right to sexual and reproductive health adheres to the AAAQ framework for its normative content: availability, accessibility, acceptability, and quality. Availability entails the existence of an adequate number of healthcare facilities, services, etc.,[62] as well as the availability of trained medical and professional personnel.[63] Accessibility requires that facilities, goods, information, and services should be accessible to all without discrimination or barriers.[64] It is comprised of physical accessibility,[65]

[54] ICESCR (n 5), art 12(1).
[55] UN Committee on Economic, Social and Cultural Rights, 'General Comment no 14' (11 August 2000) E/C.12/2000/4, para. 9.
[56] ICESCR (n 5), art 12(2)(a).
[57] UN Committee on Economic, Social and Cultural Rights, 'General Comment no 22' (2 May 2016) E/C.12/GC/22.
[58] ibid para. 1.
[59] ibid para. 5.
[60] ibid para. 6.
[61] ibid para. 7.
[62] ibid para. 12.
[63] ibid para. 13.
[64] ibid para. 15.
[65] ibid para. 16.

affordability,[66] as well as informational accessibility, which comprises a right to seek, receive and disseminate information,[67] and the right that information be provided consistent with the needs of the individual.[68] Acceptability requires that all facilities, goods, information, and services must be culturally acceptable for individuals or specific groups. [69] Lastly, quality entails that they must be of adequate quality, and as such be evidence-based, scientifically and medically appropriate, and up-to-date. [70] Similarly to CEDAW, the right to sexual and reproductive health under ICESCR follows a substantive equality approach, which requires that distinct health needs and barriers faced by particular groups must be addressed.[71] This specifically includes gender equality and the recognition that the needs of women may be different from those of men,[72] and thus entails the alleviation of the inherent disadvantage that women experience. Unlike the CEDAW Committee's comments thus far, General Comment 22 explicitly refers to abortion as a covered right under the ICESCR: it includes in the right to sexual and reproductive health a right to access to safe abortion care without discrimination,[73] as well as a right to evidence-based information on safe abortion and post-abortion care.[74] This authoritative interpretation by CESCR carries, due to the interdependence and indivisibility of human rights, also great significance for the right to non-discriminatory healthcare under Article 12 CEDAW.

A last treaty of relevance from the UN system is the International Covenant on Civil and Political Rights (ICCPR). Also here, the relevant treaty body, the Human Rights Committee (HRC), has contributed to clarifying women's reproductive rights found within/outlined by the ICCPR. In its General Comment 36, the HRC has emphasised that restrictions on abortion must not jeopardise women's right to life as protected under article 6 ICCPR.[75] In its view on *KL v Peru,*[76] it further found that the refusal of a therapeutic abortion, which is not a

[66] General Comment no 22 (n 57), para. 17.
[67] ibid para. 18.
[68] ibid para. 19.
[69] ibid para. 20.
[70] ibid para. 21.
[71] ibid para. 24; Carlota Bustelo (n 12), p. 1145.
[72] ibid para. 25.
[73] ibid paras. 24 and 28.
[74] ibid para. 18.
[75] UN Human Rights Committee, 'General Comment 36' (3 September 2019) CCPR/C/GC/35, para. 8.
[76] *K.L. v Peru* (22 November 2005) Communication No. 1153/2003 CCPR/C/85/D/1153/2003.

punishable offense and for which express provision has been made in the law, can amount to a violation of Article 7 ICCPR and hence constitute cruel, inhuman or degrading treatment,[77] a violation of privacy under Article 17,[78] and a violation of the freedom from discrimination of children under Article 24 in the case of minors.[79] It confirmed this view in *LMR v Argentina*,[80] where a refusal of legal abortion was found to be a violation of articles 7 and 17 ICCPR.[81] In the two cases of *Mellet v Ireland* and *Whelan v Ireland*,[82] in addition to finding a violation of Article 7,[83] it was established by the Committee that State Parties must ensure the availability of accurate information about abortion,[84] and that the balance struck between the protection of the foetus and the rights of women could not be justified and hence there had been an unreasonable interference in the complainant's decision.[85]

It can thus be said that women enjoy many specific rights related to sexual and reproductive health under international human rights law, such as a right to non-discriminatory healthcare, a right to available, accessible, acceptable, and quality health facilities, goods, information, and services, as well as various information rights. As regards abortion specifically, women have a right to non-discriminatory access to safe abortion and abortion care, information, and non-biased counselling, according to the relevant treaty bodies and scholastic opinion.[86]

[77] *KL v Peru* (n 76), para. 6.3.
[78] ibid para. 6.4.
[79] ibid para. 6.5.
[80] *L.M.R v Argentina* (28 April 2011) Communication No. 1608/2007 CCPR/C/101/D/1608/2007.
[81] ibid paras. 9.2-9.4.
[82] *Mellet v Ireland* (31 March 2016) Communication No. 2324/2013 CCPR/C/116/D/2324/2013; *Whelan v Ireland* (17 March 2017) Communication No. 2425/2014 CCPR/C/119/D/2425/2014.
[83] *Mellet v Ireland* (31 March 2016) Communication No. 2324/2013 CCPR/C/116/D/2324/2013, para. 7.6 and *Whelan v Ireland* (17 March 2017) Communication No. 2425/2014 CCPR/C/119/D/2425/2014, para. 7.7.
[84] *Mellet v Ireland*, para. 7.5 and *Whelan v Ireland*, para. 7.6.
[85] *Whelan v Ireland*, para. 7.9.
[86] cf Eszter Kismödi et al, 'Human rights accountability for maternal death and failure to provide safe, legal abortion: the significance of two ground-breaking CEDAW decisions' (2012) 20(39) Reproductive Health Matters 9; Kate Hunt and Mike Gruszczynski (n 26), p. 730.

2.2. OBLIGATIONS

To ensure that rights can be exercised effectively, State Parties to human rights treaties are placed under the tripartite framework of obligations: to respect, protect, and fulfil.

The obligation to respect is a negative obligation that requires State Parties to not interfere with the enjoyment and exercise of human rights.[87] In particular, they are to refrain from making laws and policies that directly or indirectly result in the denial of the (equal) enjoyment of rights.[88] CEDAW in Article 2(d), specifically lays down this obligation of States to refrain from any discrimination through their organs.[89] With regard to the rights to health and healthcare, the obligation to respect implies that State Parties should not restrict women's access to health services.[90] This obligation also implies that they should repeal and refrain from enacting laws that create barriers to their access to sexual and reproductive health services, including biased counselling requirements and mandatory waiting periods for access to abortion.[91] Additionally to the removal of all barriers, the obligation requires State Parties to liberalise restrictive abortion laws and respect the right of women to make autonomous decisions.[92] The decriminalisation of abortion also forms part of this negative obligation,[93] given that criminalisation is considered a form of gender-based violence.[94] The HRC has added that States should further not impose criminal sanctions on abortion providers.[95] Where discriminatory laws are already in place, State Parties are under an obligation to abolish or amend them; this is given expression in Articles 2(a), (f), and (g) CEDAW.[96]

The obligation to protect is a positive obligation to protect individuals from human rights violations by third parties, particularly non-State actors.[97] It is an

[87] General Recommendation no 24 (n 25), para. 14.
[88] General Recommendation no 28 (n 14), para. 9.
[89] ibid para. 35.
[90] General Recommendation no 24 (n 25), para. 14.
[91] General Comment no 22 (n 57), paras. 28 and 41.
[92] ibid para. 28.
[93] General Recommendation no 24 (n 25), para. 31(c).
[94] CEDAW (n4), art 2(g); General Comment no 22 (n 57), paras. 28 and 49(a) and General Recommendation no 24 (n 25), paras. 14, 26 and 31(c).
[95] General Comment no 36 (n 75), para. 8.
[96] General Recommendation no 28 (n 14), para. 31.
[97] CEDAW (n4), art 2(e) and General Recommendation no 24 (n 25), para. 15.

obligation of due diligence, meaning that State Parties are only under an obligation to protect to the extent that they reasonably knew or ought to have known about the violation occurring.[98] Under CEDAW, the obligation further entails that practices that prejudice and perpetuate stereotypes and ideas of inferiority of the female sex need to be eliminated.[99] As regards abortion in particular, State Parties are under an obligation to protect women from the risks that flow from unsafe abortions.[100] Since this obligation concerns violations by non-State actors, it bears little importance for this research question, which rather concerns the obligations to respect and fulfil.

The obligation to fulfil encompasses at least three different aspects: to facilitate access, to provide, and to promote. It is a broad, positive obligation that requires State Parties to take a variety of steps to ensure the equal enjoyment, de jure and de facto, of human rights.[101] This can include any measure, whether legislative or other, that ensures the realisation of human rights, such as women's right to healthcare.[102] Regarding sexual and reproductive health, this obligation includes several specific requirements. For example, State Parties should guarantee access to safe abortion services,[103] prevent the stigmatisation of women seeking abortion,[104] and even provide legal and effective access where the life and/or health of the woman is at risk or where carrying out the pregnancy would cause her substantial pain or suffering.[105] They must also ensure that health services are consistent with other human rights of women and with the principles of autonomy, privacy, confidentiality, informed consent, and choice.[106] Importantly, the obligation to fulfil is an obligation to take appropriate measures to the maximum extent of a State Party's available resources, and is thus more limited in terms of resources required than the obligation to respect.[107]

This tripartite system of obligations is subject to two additional considerations. Under Article 2 CEDAW, State Parties are placed under the

[98] General Recommendation no 28 (n 14), para. 13.
[99] ibid para. 9.
[100] General Comment no 36 (n 75), para. 8 and General Comment no 22 (n 57), para. 28.
[101] General Recommendation no 28 (n 14), para. 9.
[102] General Recommendation no 24 (n 25), para. 17.
[103] General Comment no 22 (n 57), para. 28.
[104] General Comment no 36 (n 75), para. 8.
[105] ibid para. 8.
[106] General Recommendation no 24 (n 25), para. 31(e).
[107] ibid para. 17.

general obligation to take all appropriate measures to eliminate discrimination against women,[108] which appears to be a slightly ambiguous term. To determine what exactly constitutes an appropriate measure concerning the right to healthcare, the use of so-called health indicators is required.[109] Yet, what is appropriate will in the end be left to be determined on a case-by-case basis. In a similar vein, under Article 2(1) ICESCR, State Parties are placed under an obligation to take steps, to the maximum of their available resources, to achieve progressively the full realisation of the rights set out in the Covenant.[110] The obligations thus seem limited by resources on one hand and the principle of progressive realisation on the other. CESCR has however made clear that such considerations do not absolve States Partie from their obligations.[111] On the contrary, several immediate obligations exist, such as the obligation to take steps of non-discrimination,[112] the prohibition of retrogressive measures,[113] and, in the case of CEDAW, the obligation to condemn discrimination.[114]

It can therefore be concluded that States Partie to CEDAW and ICESCR are under the obligation to respect, protect, and fulfil the right to access to abortion as a healthcare service and as an aspect of the right to sexual and reproductive health. These rights and obligations will serve as a standard of assessment for the situation in Germany, which will be presented in detail in the next chapter.

3. Regulation of Abortion under German Law

This chapter will provide a detailed overview of the regulation of abortion under German law, with a particular focus on the mandatory counselling procedure. It will also highlight the specific practices of counselling agencies that have developed from the statutory requirements. An evaluation of the law and practice will take place in Chapter 4.

[108] General Recommendation no 28 (n 14), para. 23.
[109] General Recommendation no 24 (n 25), paras. 29 and 31(d).
[110] ICESCR (n 5), art 2(1).
[111] General Comment no 14 (n 55), para. 31.
[112] ibid para. 30.
[113] ibid para. 32.
[114] General Recommendation no 28 (n 14), para. 15.

3.1. Criminal Law and Pregnancy Conflict Law

In Germany, abortion is mainly regulated under the criminal law, namely the *Strafgesetzbuch* (StGB).[115] Under its Division 16 – which is titled "Offenses Against Life" – several paragraphs deal with the legality of abortion, as well as mandatory counselling.

First, §218 StGB provides that a termination of pregnancy constitutes a criminal offense punishable with up to three years of imprisonment, while acts before nidation are not to be considered a termination of pregnancy.[116] German law thus starts from the premise that performing an abortion in general is illegal. In especially serious cases where the offender acts against the will of the pregnant woman or recklessly places her in danger of death or at risk of serious damage to health, the term of imprisonment is up to five years.[117] If the offense is committed by the pregnant woman herself, the term of imprisonment shall not exceed one year.[118] The attempt of a termination of pregnancy is punishable, except for the pregnant woman.[119] Departing from this general prohibition, §218a StGB provides three exemptions. Under §218a (3) StGB, where an abortion is performed by a physician with the consent of the pregnant woman and there is a medical opinion that holds that an offense such as rape or sexual abuse, including of a child, has taken place, the termination of the pregnancy is justified. Similarly, under §218a (2) StGB, where an abortion is performed by a physician with the consent of the pregnant woman and such an abortion is deemed medically necessary to avert a risk to the life or physical or mental health of the woman, the termination is likewise justified. The third exemption under §218a StGB does not constitute a justification, but merely an exemption. This means that, while in the first two cases, the act is lawful, under the third option the act remains unlawful but merely exempt from punishment when three cumulative conditions are met.

According to §218a (1) StGB this is the case where the pregnant woman requests the termination of pregnancy and demonstrates to the physician through

[115] Criminal Code in the version published on 13 November 1998 (Federal Law Gazette I, p. 3322), as last amended by Article 2 of the Act of 22 November 2021 (Federal Law Gazette I, p. 4906) (StGB).
[116] StGB §218(1).
[117] StGB §218(2).
[118] StGB §218(3).
[119] StGB §218(4).

the certificate referred to in §219 (2) that she obtained counselling for at least three days before the procedure, the abortion is performed by a physician, and it has been no more than 12 weeks since conception.[120] A request here is more than mere consent; it rather calls for an express wish of the pregnant woman. Such a wish can be expressed if the woman possesses the capacity of insight and judgement, which is not equated with the higher threshold of legal capacity and the existence of which is generally presumed at the age of 16 or older but not before the age of 14.[121] To minimise the risk, the performing doctor must be a physician but does not strictly have to be a gynaecologist, although abortions are in reality almost exclusively performed by gynaecologists due to insurance regulations.[122] The point in time of conception is determined by the performing physician, and is as a general rule set two weeks after the last menstruation.[123] Where there is neither a case of rape or sexual abuse and thus criminological necessity, nor medical necessity for termination, the self-determined abortion under §218a (1) StGB is thus the only way to be exempt from the general prohibition under §218 StGB.

The counselling referred to in §218a (1) StGB is elaborated in §219 StGB.[124] It establishes that "counselling serves to protect the unborn life. It must be guided by efforts to encourage the woman to carry the child to term and to open her up to the prospects of a life with the child; it is intended to help her make a responsible and conscientious decision. The woman must thereby be aware that at every stage of the pregnancy, the unborn child has a right to life in relation to her as well, and that therefore, according to the law, the termination of the pregnancy can only be considered in exceptional situations if carrying the child to term would impose a burden on the woman which is so serious and exceptional that it exceeds the reasonable limits of sacrifice. By providing advice and assistance, the counselling is intended to contribute to overcoming the conflict situation which exists in connection with the pregnancy and to remedying an emergency situation." [125] The counselling, which is a mandatory prerequisite for the exemption under §218a (1) StGB, is further regulated under the Pregnancy

[120] StGB §218a (1).
[121] Emilie Kuschinski, 'Die Schwangerschaftskonfliktberatung als Erfordernis für eine straffreie Abtreibung nach § 218 a StGB' (Phd thesis, FH Sachsen 2021), p. 8.
[122] ibid p. 9.
[123] ibid.
[124] StGB §218a(1), §219.
[125] StGB §219(1).

Conflict Law, the *Schwangerschaftskonfliktgesetz* (SchKG).[126] Under §219 (2) StGB, counselling must be provided by a recognised counselling agency, which will issue a certificate serving as proof of counselling as foreseen by §218a (1) StGB. [127] Importantly, the physician carrying out the abortion may not simultaneously provide the counselling.[128] It is essential to distinguish mandatory counselling from the duty of the physician who performs the abortion to give medical advice such as information on risks and side effects to their patient, which is ensured under §218c (1) StGB. Mandatory counselling is aimed at resolving the conflict situation, while the provision of medical information is left mostly to the physician. What exactly constitutes a pregnancy conflict is not defined in law, an attempt has however been made by the Constitutional Court as will be seen below.

§219 StGB is substituted by more detailed provisions under the Pregnancy Conflict Law. It provides that the counselling must be open-ended, meaning that the outcome in the form of a decision for or against an abortion may not be pre-determined, and that it should not serve to instruct or patronise the pregnant woman.[129] At the same time, it is clear from both §219 StGB and §5 SchKG that counselling serves to protect unborn life, and is thus aimed at convincing the pregnant woman of a decision in favour of the unborn life.[130] While its open-ended nature means that a decision in favour of termination is tolerated, the right to life of the unborn takes precedence as far as the counselling service must be concerned.[131] The Pregnancy Conflict Law further lays down that, during the counselling, the woman should give reasons as to why she considers terminating the pregnancy while the counselling agency should provide all necessary medical, social, and legal information, including the woman's rights and those of her unborn child, and available assistance she can access to ensure the continuation of the pregnancy (i.e. finding accommodation, childcare, aftercare, assistance in continuing higher education, etc.).[132] The aim is thus to overcome the pregnancy conflict and to offer help so that indecisive women can be convinced that they can

[126] Pregnancy Conflict Law in the version published on 27 July 1992 (Federal Law Gazette I, p.1398), as last amended by Article 3 of the Act of 11 July 2022 (Federal Law Gazette I, p. 1082) (SchKG).
[127] StGB §219(2).
[128] StGB §219(2).
[129] SchKG §5(1).
[130] StGB §219; SchKG §5; Emilie Kuschinski (n 121), p. 13; Sandra Fredman (n 52), p. 193.
[131] 2 BverfG 88/203; Emilie Kuschisnki (n 121), p. 16.
[132] SchKG §5(2).

cope with life with a child.[133] The medical information provided should be limited to what is directly relevant to the individual conflict, given that comprehensive information is to be provided by the performing physician under §218c StGB.[134] The counselling must take place immediately,[135] be free of charge,[136] allow the woman to remain anonymous, [137] and allow for the consultation of other specialists and professionals, the father of the unborn child, and other close relatives upon request of the woman.[138] At the end of the counselling, the agency will provide a certificate, and it is only with this certificate that the termination of the pregnancy will remain exempt from punishment under §218a StGB.[139]

Regarding counselling agencies, §8 SchKG provides that they require special state recognition by the federal states whose responsibility is to ensure a sufficient availability and range of agencies. Generally, there should be one counselling agency for every 40,000 inhabitants.[140] The agencies do not have to be provided by the federal states directly, as pre-existing facilities run by independent third-party providers can be recognised as official counselling agencies[141] subject to four cumulative conditions. Firstly, it is necessary that the facility has personally and professionally, sufficiently qualified staff in sufficient numbers. Trained specialists such as psychologists, social workers, or legal experts who are either medically, psychologically, or legally trained are also necessary. [142] They must be available to be called in at short notice, the facility must cooperate with all agencies that provide public and private assistance for mother and child, and it may not be linked to any institution in which abortions are performed in a way that would constitute an economic interest in the performance of abortions.[143] Once a facility is recognised as a counselling agency, it has to file a yearly written report on its activities, which the federal states use as a basis to carry out a three-year review as to whether the requirements for

[133] Emilie Kuschinski (n 121), p. 14.
[134] ibid p. 16.
[135] SchKG §6(1).
[136] SchKG §6(4).
[137] SchKG §6(2).
[138] SchKG §6(3).
[139] SchKG §7(1).
[140] SchKG §4(1).
[141] SchKG §8.
[142] SchKG §9.
[143] SchKG §9.

recognition are still met and whether revocation of recognition is necessary.[144] The rationale behind the counselling being carried out by a third party instead of the performing physician is,[145] next to the protection of unborn life mentioned in §219 StGB and §5 SchKG, that the latter is presumed to have an economic interest in the performance of abortions, rendering a state or state mandated institution more neutral.[146] Importantly, facilities run by religious institutions are not prohibited from becoming a counselling agency, even though *Caritas,* which is run by the Catholic Church, has been denied recognition due to instructions given by church officials that exclude the possibility of open-ended counselling.[147]

The law as it currently stands is not as much a result of parliamentary processes as it is a result of requirements from the German Constitutional Court.[148] In two judgements it ruled on the compatibility of the criminal law on abortion with the German constitution, the *Grundgesetz* (GG) – in both cases, the Court laid down requirements for the legislature and explained the underlying rationale of the law as it stands today. In its first judgement from 1975, it had to rule on the compatibility of a reform act with the *Grundgesetz*. Here, the Constitutional Court held that life developing in the womb is protected by the Constitution as an independent legal right under Article 2(2) in combination with Article 1(1) GG, and that the State has a duty to protect such unborn life.[149] This duty to protect also applies vis-a-vis the carrying mother.[150] The Court also established that the protection of the life of the foetus takes precedence over the woman's right to self-determination for the entire duration of the pregnancy.[151] Thus, the reawakening of the maternal will to protect where it has been lost should be the foremost goal of the State's effort.[152] It went on to find that, if the protection required by the Constitution cannot be achieved in any other way, the legislator is obliged to use the means of criminal law.[153] Termination of pregnancy is only justifiable where

[144] SchKG §10.
[145] Edith Palmer, 'German Abortion Law After the 1993 Constitutional Decision' (Law Library of Congress 1993).
[146] AG Giessen 507 Ds 501 Js 15031/15, para. 37.
[147] Emilie Kuschinski (n 121), p. 21.
[148] Vera Schürmann, 'Kompromiss auf Zeit' (*verfassungsblog*, 18 November 2020) <https://verfassungsblog.de/kompromiss-auf-zeit/> accessed 31 March 2024.
[149] BVerfG 39/1, paras. 108-122.
[150] ibid para. 125.
[151] ibid paras. 126-127.
[152] ibid para. 129.
[153] ibid paras. 130-134.

its continuation is deemed unreasonable – that is if the termination is necessary to avert a danger to the pregnant woman's life, or of a serious impairment of her health.[154] This justification, as required by the Court, is now codified in §218a (2) StGB.[155] Since the envisaged reform act was to allow for abortion under more liberal conditions, it was struck down as unconstitutional.[156]

In its second judgement from 1993, the Constitutional Court was again asked to rule on the compatibility of a reformed §218a StGB, which foresaw self-determined abortion as a justification for the criminal act of terminating the pregnancy. Here the Court reiterated the State's duty to protect unborn life under Articles 2(2) and 1(1) GG.[157] It further noted that the duty to protect relates to the individual life, not human life in general,[158] and that the unborn child is also entitled to legal protection from its mother, which is only possible if the legislator prohibits her from terminating the pregnancy in principle and thus imposes on her the fundamental legal obligation to carry the child to term.[159] Abortion, according to the Court, must in principle be regarded as wrong for the entire duration of the pregnancy and must accordingly be prohibited by law.[160] Sufficient measures to protect unborn life will have to be made up of both preventive and repressive measures.[161] At the same time, it recognised the existence of conflicting legal interests, namely the unborn child's right to life on one hand and the woman's right to human dignity, life, and physical integrity on the other.[162] Nonetheless, the Court ruled out that she could claim a position protected by the freedom of thought and conscience for the killing of the unborn child.[163] Likewise, it found that, as a general rule, the woman will find herself in a dilemma: she will want to keep the child and is aware of its need for protection but is also worried that she will not be able to cope with the impending situation and put her ideas about life on hold.[164] However, in the eyes of the Court, the fundamental rights of women do not go so

[154] BVerfG 39/1, para. 137.
[155] StGB, §218a (2).
[156] ibid para. 140.
[157] 2 BVerfG 88/203, para. 150.
[158] ibid para. 153.
[159] ibid para. 154.
[160] ibid para. 161.
[161] ibid para. 180.
[162] ibid paras. 158 f.
[163] ibid paras. 158 f.
[164] ibid para. 224.

far that the legal obligation to carry the child to term is generally abolished.[165] Conversely, they do suggest that it can be permissible not to impose such an obligation according to the criterion of unreasonableness.[166] Again, this refers to the justification under §218a (2) StGB. With regards to the State's duty to protect unborn life, it also established that it includes dangers to unborn human life arising from influences of the family, from the wider social environment of the pregnant woman, or from living conditions which counteract the willingness to carry the child to term.[167] This obliges the State to maintain the right to life of the unborn in the general societal consciousness.[168] None of this precludes the legislator to adopt a concept of protection which emphasises counselling the pregnant woman to persuade her to carry the child to term.[169] Such counselling then requires a framework that creates positive conditions for the woman to act in favour of the unborn child.[170] The doctor's involvement must also be aimed at protecting the unborn life.[171] Furthermore, to qualify the existence of a child as a source of harm is out of question since, according to the Court, it is forbidden to understand the obligation to support a child as damage.[172] Taking into account these considerations, the Constitutional Court ultimately concluded that self-determined abortion can never be lawful and can therefore not be a justification for the criminal act of terminating a pregnancy, rendering the reformed §218a StGB unconstitutional.[173]

The requirements posed by the Constitutional Court are incorporated in the most recent versions of §218a and §219 StGB, as seen above.[174] Self-determined abortion remains unlawful but is merely exempt from punishment, while medically or criminologically necessary abortions are justified. Meanwhile, §219 StGB standardises the aim of the mandatory counselling procedure following the State's duty to protect unborn life.[175] The theory of mandatory counselling is thus

[165] 2 BVerfG 88/203, paras. 162 f.
[166] ibid paras. 162 f.
[167] ibid para. 172.
[168] ibid para. 179.
[169] ibid para. 184.
[170] ibid para. 197.
[171] ibid para. 199.
[172] ibid para. 264.
[173] ibid para. 272.
[174] StGB §§218a and 219.
[175] Vera Schürmann (n 148).

that it constitutes a prerequisite for a self-determined abortion to avoid punishment and that, while it also aims to resolve a possible pregnancy conflict, it primarily exists to protect unborn life.[176]

3.2. PRACTICE

In practice, the mandatory counselling will take place in person and last around 90 minutes.[177] The counselling advisor and the pregnant woman will discuss her concerns to identify the specifics of her so-called "pregnancy conflict". They will sketch an overview of the social and financial situation of the woman, while the advisor always strives for a neutral reaction and abstains from any judgement. The woman should reflect on herself and what she wants, independently from the opinions or expectations of others. The process of the counselling itself is thus highly individualistic.[178] All counselling aims to draw the woman into discussion, for which different psychological tactics may be employed.[179] The advisor further always tries to offer suitable measures so that the woman will decide in favour of life with a child.[180] The *AWO*, an independent institution whose facilities have been recognised as authorised counselling agencies all over Germany, describes its counselling procedure as follows: it emphasises that women can decide for themselves what they want to talk about and that its advisors are under a duty of confidentiality. There is always room for questions and concerns of the pregnant woman, in which case necessary information will be provided. If she wishes, advisors will advise on support offers for families to facilitate life with a child. The woman can talk about her motives for an abortion but does not have to justify or defend her perspective. The counselling strives to support the woman's decision-making and inform her adequately of the different options available to her.[181]

A study by the Federal Centre for Health and Education has further investigated mandatory counselling. It found that one-third of women in Germany

[176] Cf Clare Feikert-Ahalt et al, 'Laws on Abortion, Genetic Consultation, and Assisted Reproduction' (Law Library of Congress 2022).
[177] Emilie Kuschisnki (n 121), p. 27.
[178] ibid pp. 27-28.
[179] Emilie Kuschisnki (n 121), p. 29.
[180] ibid p. 38.
[181] AWO Bundesverband e.V., 'Schwangerschaftskonfliktberatung' (2024) <.https://awo-schwanger.de/schwangerschaftsabbruch/schwangerschaftskonfliktberatung/ > accessed 31 March 2024.

between the ages of 20 and 44 have had an unintended pregnancy, and one-fifth of them an unwanted pregnancy.[182] The main reasons they stated in favour of termination were a difficult or non-existent relationship with their partner, financial or professional insecurity, health concerns, the fact that they were too young or immature, or that they were still pursuing an education.[183] For women who had already had children a completed family planning was listed as an additional reason.[184] Among women under 20, 50.5% of pregnancies were unwanted, for women between 20 and 24 22.7%, and for women over 35 19.5% of pregnancies were considered unwanted.[185] For all age groups, out of all unwanted pregnancies, a little more than 40% were ultimately terminated.[186] Another important institution that has multiple recognised counselling agencies across the country is *profamilia*. In a statement from 2017, taking into account the Centre for Health and Education study, it noted that hidden numbers for statistics regarding abortion are presumably quite high, especially amongst younger women, given the societal stigmatisation of the topic.[187] It further found that one-third of unintended pregnancies in Germany occur despite the use of protection and that the overall number of abortions has been declining since 2005.[188] While in 2005 around 130,000 pregnancies were terminated, by 2016 the number had decreased to 98,721, out of which 96% were abortions carried out under the self-determined abortion exemption.[189] *Profamilia* states that its counselling aims to further sexual and reproductive health and to support women in their sexual and reproductive rights.[190] In its understanding, the counselling is open-ended, non-judgemental, not patronizing, and it gives room for conversation with qualified counsellors. It is meant to support women to find their own solutions while resting on a relationship of trust and voluntariness.[191] From its practice, *profamilia* found that more than two-thirds of women who underwent mandatory counselling stated that

[182] Bundeszentrale für gesundheitliche Aufklärung (BzGA), 'frauen leben 3 – Familienplanung im Lebenslauf'(BzGA 2013), p. 10.
[183] ibid p. 13.
[184] ibid p. 14.
[185] ibid p. 17.
[186] ibid p. 18.
[187] Profamilia Bundesverband, 'Schwangerschaftsabbruch – Fakten und Hintergründe' (profamilia hintergründe, 2017), p. 16.
[188] ibid pp. 21-22.
[189] ibid.
[190] ibid p. 32.
[191] ibid.

it had no influence on their decision, and that only a third of women said that they had received new information.[192]

Similar data has been shown by a study on how women perceive mandatory counselling under §219 StGB from 2000. During this study, 100% of women stated that their decision to have an abortion had not been changed by the counselling; 61.9% of women said that they were more secure in their decision while 39.1% were less secure.[193] The two aspects that women perceived as most helpful during the counselling were the acceptance of their decision by the counsellor and the feeling of being able to talk freely about anything they wanted.[194] 15% of women found something explicitly disturbing during their counselling, on the other hand, another 15% mentioned something specifically positive. Importantly, the majority of the women were content with the counselling they had received.[195] It can thus be seen that, in practice, mandatory counselling has a highly individualistic character and is primarily aimed at leaving room for questions and doubts of the pregnant women and at supporting an autonomous decision. Importantly, it does not seem to have much influence on decisions in favour of an abortion that have been made before the counselling.

4. Compliance with International Human Rights Law

After having laid down the standard of assessment in the form of international human rights law and the situation under German law to be assessed, this chapter will evaluate to what extent the standard set under CEDAW and ICESCR concerning women's sexual and reproductive rights are complied with by the mandatory counselling requirement under §218a StGB. It will first be discussed whether mandatory counselling constitutes a restriction of women's sexual and reproductive rights and then whether such a restriction could be justified.

4.1. A Restriction of Women's Right to Health and Healthcare?

Whether regarding the right to healthcare under CEDAW or the right to health under ICESCR, it was seen above that both treaties employ a substantive, de facto

[192] Profamilia hintergründe (n187), p. 34.
[193] Taija Schmidt, 'Wie erleben Frauen die Beratung nach §219 Strafgesetzbuch (StGB)? - Eine Evaluation' (Phd thesis, University of Konstanz 2000), p. 71.
[194] ibid pp. 132-133.
[195] ibid p. 143.

equality approach and that States are under an obligation to respect, protect, and fulfil the respective rights. Under Article 12 CEDAW, it was established that women's right to non-discriminatory healthcare includes abortion as a healthcare service. In particular, the right includes the freedom from barriers to effective access and the right to be fully informed, which extends to situations where legal abortion is provided for by domestic law. As regards abortion, the CEDAW Committee has elaborated that the right to healthcare includes the provision of non-biased, scientifically sound, and rights-based counselling.[196] It has also called on State parties to decriminalise abortion.[197] Under Article 12 ICESCR, there further exists a right to sexual and reproductive health. Generally, this entails accessibility to information and services for all without discrimination or barriers, as well as the quality of sexual and reproductive health services which should be evidence-based and scientifically and medically appropriate.[198] The CESCR has interpreted this right to include a right to access to safe abortion care and evidence-based information, to whose extent State parties are obliged to ensure the availability of accurate information.[199]

Under German law, abortion is regulated under the criminal and Pregnancy Conflict Law. These provide that, where an abortion is not medically or criminologically necessary, and the termination of the pregnancy hence self-determined, the person seeking the abortion must undergo mandatory counselling at least three days prior, for the termination to be exempt from punishment.[200] While this counselling is to be carried out open-ended, it is at the same time made clear that it serves the protection of unborn life, which is a constitutional duty of the State according to the Constitutional Court.[201] The aim of mandatory counselling is thus to convince the pregnant person to continue the pregnancy and carry the child to term.

Looking at the normative content of women's right to sexual and reproductive health and non-discriminatory healthcare, it is clear that both rights

[196] UN Committee on the Elimination of All Forms of Discrimination against Women, 'Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women' (23 February 2018) CEDAW/C/OP.8/GBR/1, para. 86.
[197] ibid para. 58; Payal K Shah and Jihan Jacob (n 50).
[198] ICESCR (n 5), art 12; General Comment no 22 (n 57), para. 21.
[199] ibid paras. 18 and 24.
[200] StGB §218a (1).
[201] BVerfG 39/1, paras 108-122; Clare Feikhert-Ahalt et al (n 176), p. 6.

require accessibility to abortion in the form of the absence of barriers. While mandatory counselling does not make access impossible, it still creates a barrier for those wanting a self-determined abortion.[202] It is only at the mandatory counselling that the woman can obtain the necessary certificate that has to be taken to the performing doctor for the termination to be exempt from punishment. In other words, without undergoing counselling, an abortion may not take place and incurs the criminal liability of both the pregnant person and the doctor. Thus, as long as the abortion is not medically or criminologically necessary, there exists no option for women to make an appointment immediately upon discovering the pregnancy or upon consulting a doctor, or even after several days, to terminate the unwanted pregnancy. In terms of accessibility to abortion, both the right to health and healthcare are thus restricted.

Furthermore, the right to be fully informed and to receive non-biased counselling is restricted by the imposition of the mandatory counselling requirement: the mandatory character in cases of self-determined abortion and the partiality resulting from the State's duty to protect unborn life restricts the availability of information during the counselling and can hardly be said to present a non-biased and rights-based approach. Particularly the aim of the counselling to convince the woman to carry the child to term resulting in the outweighing of her rights by those of the foetus constitutes a clear bias of the proclaimed open-ended counselling in favour of a decision to keep the child, hence creating a clear informational bias in favour of carrying the pregnancy to term.[203] The biased nature of the counselling will be explored in further detail in the following section. Also here, with regards to information accessibility, the rights to health and healthcare are therefore restricted. This analysis is supported by the perception of women who have undergone mandatory counselling and, especially where they had already firmly made their decision before attending the counselling, have stated that they perceived it as an unreasonable imposition and a barrier causing delay.[204]

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[202] Marsha Freeman (n 15), p. 319.
[203] SchKG, §5(2); Emilie Kuschinski (n 121), p. 14.
[204] Eva Hoffmann, 'Die Pflichtberatung bei Abtreibungen in Deutschland verzögert das Prozedere' *Süddeutsche Zeitung Jetzt* (Munich, 14 November 2017) <https://www.jetzt.de/gesundheit/die-pflichtberatung-bei-abtreibungen-in-deutschland-verzoegert-das-prozedere> last accessed 14 May 2024.

Lastly, the principles of choice and autonomy are fundamental for the interpretation of sexual and reproductive health rights, as can be seen from the interpretation of the CESCR which includes the freedom to make informed decisions as an important aspect of the right to sexual and reproductive health.[205] The German counselling provider *profamilia* has accurately concluded from this that sexual and reproductive health is not to be understood only as the absence of sickness but also the freedom to choose between alternatives.[206] Mandatory counselling with its aim of influencing the decision of the pregnant person in favour of carrying to term is therefore also a restriction of women's right to health in that it seeks to influence and thereby minimise the freedom to make an informed decision. It thus essentially transforms what would otherwise be a personal choice into a collective choice in which the State has to be involved and that the woman cannot be trusted with making alone.

It can thus be concluded that the mandatory counselling under German law constitutes a restriction of women's right to healthcare under CEDAW, as well as their right to sexual and reproductive health under ICESCR. What remains to be seen is whether such a restriction can be justified, that is, whether the German legislator and Constitutional Court have a legitimate aim in restricting these rights, and whether the mandatory counselling requirement imposed is a necessary and proportionate means to achieve such legitimate aim.

4.2. Could such a Restriction be Justified?

To analyse whether a restriction of Articles 12 CEDAW and ICESCR could potentially be justified, the first consideration must be the aim or interest that is sought to be pursued by restricting the rights to health and healthcare, and if such aim or interest is legitimate. It must then be assessed whether the mandatory counselling requirement as the restriction in question is necessary and proportionate in light of the legitimate interest. Particularly the latter requires the weighing of the different rights and interests at stake.

[205] General Comment no 22 (n 57), para. 66; Payal K Shah and Jihan Jacob (n 50), p. 358 f; Maya Kirilova Eriksson (n 9), p. 303 f.
[206] Profamilia Bundesverband, 'Standpunkt Schwangerschaftsabbruch' (profamilia, 2001), p. 10.

4.2.1. Legitimate Interest and Necessity

The interest that is sought to be protected by the requirement of mandatory counselling in cases of self-determined abortion has been laid down by the Constitutional Court. According to its two judgements discussed above, the State is under a duty to protect unborn life which follows from Articles 1(1) and 2(2) of the German constitution.[207] Such a duty to protect relates to the individual life and is also applicable vis-à-vis the mother.[208] This interest, as it is derived from the constitutional protection of human dignity and the right to life and bodily integrity, is in itself legitimate.[209] The fact that a foetus enjoys no right to life under international human rights law does not preclude a national constitution from laying down certain protections for unborn life, as was seen in the Ireland cases in front of the HRC.[210] The German State's interest in the protection of unborn life as part of a demographic or health policy can therefore be considered legitimate.

The question then remains whether mandatory counselling is necessary and proportionate as a means for the protection of unborn life. Necessity will be assessed first. It is certainly the case that unrestricted access to abortion would counteract the State's duty to protect unborn life, which could point to the necessity of such a restriction. It does, however, seem clear from available data that the criminalisation of abortion and the associated mandatory counselling requirement for self-determined abortions do little in preventing abortion – this especially becomes apparent looking at the number of abortions that are still taking place[211] and when considering the risk of an increase in unsafe abortions.[212] The argument that criminalisation is not effective in preventing abortion and hence not effective in fulfilling a duty to protect unborn life is thus reasonable, calling into question the necessity of the mandatory counselling requirement and criminalisation in general.[213] Of note here is that many human rights treaty bodies such as the CEDAW Committee have openly called for a decriminalisation of

[207] BVerfG 39/1, paras. 108-122.
[208] ibid para. 125.
[209] Michael Perry (n 53), p. 76.
[210] *Mellet v Ireland* (31 March 2016) Communication No. 2324/2013 CCPR/C/116/D/2324/2013; *Whelan v Ireland* (17 March 2017) Communication No. 2425/2014 CCPR/C/119/D/2425/2014.
[211] Eszter Kismödi et al (n 86); Sandra Fredman (n 52), p. 193.
[212] Payal K Shah and Jihan Jacob (n 50), p. 347.
[213] Anja Karnein, *A Theory of Unborn Life: From Abortion to Genetic Manipulation* (OUP 2012), p. 46; Vera Schürmann (n 148).

abortion,[214] a request that has certainly not been followed by the German legislator. Additionally, the lack of a right to life for foetuses on the international human rights level is an indication of global consensus,[215] making the necessity of a serious restriction of women's rights to health and healthcare even more doubtable.

Also medically, there appears to be no necessity for mandatory counselling preceding an abortion. Given that medical advice is to be provided by the doctor,[216] and the medical information during the counselling is to be restricted,[217] it becomes obvious that the counselling is in no way necessary as regards the health concerns of women but is merely intended to provide information that is in favour of the continuation of a pregnancy. Another consideration should be that a foetus is not viable outside of the uterus until roughly the 22nd week of pregnancy.[218] The question thus poses itself whether there exists a need to restrict access to abortion as a means to protect unborn life before the 22nd week of pregnancy when there exists no viable life to be protected. Lastly, the Constitutional Court recognised in its judgements that the reasons underlying a decision in favour of an abortion are diverse and have often to do with the living conditions of women, an assumption that is supported by the Federal Centre for Health and Education's study.[219] The tackling of underlying conditions not favourable to either women or children may thus present a more effective means of lowering abortion rates and hence protecting unborn life than the mandatory counselling procedure. That the mandatory counselling is not effective at its aim of convincing women to carry children to term, and thus not at its proclaimed aim of protecting unborn life, is further supported by the fact that between 2/3 and 100% of women undergoing counselling state that it did not influence their decision.[220] All of these considerations constitute a reasonable argument against the necessity of mandatory counselling for the protection of unborn life.

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[214] UN Committee on the Elimination of All Forms of Discrimination against Women, 'Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women' (23 February 2018) CEDAW/C/OP.8/GBR/1, para. 58.
[215] Sandra Fredman (n 52), p. 207-210.
[216] StGB §218c.
[217] StGB §218(c); Emilie Kuschinski (n 121), p. 16.
[218] World Health Organization, 'International Statistical Classification of Diseases and Related Health Problems – 10th Revision' (ICD-10 vol 2, 2010), p. 152 following.
[219] BzGA (n 182), p. 13.
[220] Profamilia hintergründe (n 187), p. 34 ; Taija Schmidt (n 193), p. 71.

4.2.2. Proportionality

Even if one were to argue that despite mandatory counselling not lowering abortion rates it protects unborn life by making women aware of the rights of the foetus they are carrying,[221] there remains the question of proportionality. In the Ireland cases, the HRC found that the balance struck between the protection of the foetus and the rights of women could not justify the restriction of the latter's rights and thus found a violation.[222] It is therefore important to consider the balance struck by Germany in the case of the mandatory counselling procedure.

The rationale behind mandatory counselling, according to German courts, is that doctors have an economic interest in performing abortions and are thus not fit to neutrally inform women about the procedure, its risks, and alternatives.[223] The State on the other hand possesses no such economic interest, making it better placed to inform and counsel through its institutions or the agencies that are mandated following §9 SchKG.[224] If the rationale behind the counselling is thus a need for neutrality there appears to be a fundamental problem: the counselling serves first and foremost to protect unborn life, and is guided by efforts to convince the pregnant woman to carry the child to term. While it is also formally open-ended, the aim of convincing the woman and influencing her to make a particular decision is hardly reconcilable with the rationale of neutrality. The State may not have an economic interest in abortions, yet it still has an interest in the form of a constitutional duty to protect unborn life, calling into question whether it is better fit to inform and counsel. This is especially so considering that generally foetuses are only inconsistently protected under German law, as they can regularly be destroyed in other criminal contexts, and the constitutional duty only seems to hold when the conflicting interests are those of a pregnant woman.[225] The interest of the State therefore seems to outweigh considerations of free and informed choice. Moreover, the assumption that a doctor would let their economic interest in the performance of an abortion make them exercise influence on a pregnant person rather than basing any advice on medical expertise is far from reality. Any

[221] Cf Michael Perry (n 53), p. 77.
[222] *Mellet v Ireland* (31 March 2016) Communication No. 2324/2013 CCPR/C/116/D/2324/2013; *Whelan v Ireland* (17 March 2017) Communication No. 2425/2014 CCPR/C/119/D/2425/2014.
[223] AG Giessen 507 Ds 501 Js 15031/15, para. 37.
[224] AG Giessen 507 Ds 501 Js 15031/15, para. 37.
[225] Anja Karnein (n 213), p. 42 f.

practicing doctor in Germany is subjected to the Hippocratic oath which inter alia provides: "The health and well-being of my patient will be my first consideration. I will respect the autonomy and dignity of my patient. I will maintain the highest respect for human life."[226] To let economic interest influence a doctor to inform subjectively in the hopes of a decision for an abortion would thus be a violation of their highest oath. As this presents first and foremost a strong ethical commitment of doctors to do no harm and prioritise the well-being of their patients but also their autonomy, a breach of this oath is not only unlikely to occur, but to insinuate that doctors are guided by economic gain even goes against the very core of the medical profession.

The right of women to information is an important aspect of their rights to sexual and reproductive health and healthcare. Since any abortion information is restricted because neutral medical professionals are limited to carrying out the procedure itself and because counselling is predicated on the State's bias against abortion, it already appears that the balance is struck heavily in favour of the protection of unborn life. This is even explicitly admitted by the Constitutional Court in stating that the woman needs to be made aware that the unborn has a right to life at any point of the pregnancy and that it can only be outweighed in exceptional circumstances.[227] The principles of self-determination, autonomy, and free choice are thus completely disregarded by the Court. Instead, the Court assumes a dilemma to exist in any woman which consists of wanting the child and being aware of its need for protection on the one hand, and the worry of not being able to cope with the situation on the other. This dilemma does not only assume an idea of natural maternal instinct present in every woman and thereby reduces them to a child bearer first and a person second, but also patronizing, given that a court of eight men and two women decided on a generalised moral sentiment shared by all women without including women in the debate.[228] Here, the contrast to §219 StGB and 5(1) SchKG, which explicitly prescribe that mandatory consultation should not instruct or patronise,[229] is striking. The Court's reasoning

[226] World Medical Association 'The Declaration of Geneva – The Physician's Pledge' (WMA General Assembly 1948).
[227] StGB §219(1); BVerfG 39/1, paras. 126-127.
[228] Lynn Kamenitsa, 'Abortion Debates in Germany' in Dorothy McBride Stetson (ed), *Abortion Politics, Women's Movements, and the Democratic State: A Comparative Study of State Feminism* (OUP 2001), p. 127.
[229] StGB §219; SchKG §5(1).

and thus the law as it stands today seems to be deeply rooted in gender stereotypes as regards the role of women in society, particularly by reducing them to child bearers as their ultimate purpose first and members of society second. Thereby, the law diminishes their humanity in comparison to men, rendering it discriminatory and highly problematic from the perspective of achieving substantive equality.

Overall, the reasoning of the Constitutional Court regarding the balancing of women's rights and the State's duty to protect unborn life is heavily tipped in favour of the latter. It is explicitly stated that the foetus' right to life always *per se* takes precedence over the woman's right to self-determination.[230] The Court even goes so far as to impose on women the fundamental legal obligation to carry a child term.[231] Following such an obligation, only in exceptional circumstances, where carrying to term would be unreasonable, should termination of the pregnancy be allowed.[232] Principles such as autonomy and choice, but also any considerations as to the accessibility of abortion as a healthcare service and as a sexual and reproductive right seem to be entirely discarded by the Court. It also fails to consider that carrying a pregnancy to term can always be an unreasonable burden, whether physical or mental, not just in exceptional circumstances. That women's choice is of little value is further shown by the fact that self-determined abortion merely remains exempt from punishment but does not constitute a justification for what will still be considered the wrongful act of terminating a pregnancy, indicating that a woman's choice is less capable of justifying an abortion than a crime or harm done to her.

The Court demonstrates an astonishing lack of knowledge and understanding of women's lived reality concerning unwanted pregnancies by refusing to acknowledge gender-specific implications and instead considering the issue one of family rather than of women's rights.[233] Not only does it assume that a pregnancy conflict will arise because every woman inherently wants to keep a child, but it also deems women incapable of making informed decisions taking into account the potential life of the unborn [234] without the intervention of the State

[230] BVerfG 39/1, paras. 126-127.
[231] 2 BVerfG 88/203, para. 154.
[232] ibid para. 162.
[233] Lynn Kamenitsa (n 228), p. 120.
[234] Anja Karnein (n 213), p. 47f.

as a third party that enforces an obligation to carry an unwanted pregnancy to term. The counselling provider *profamilia* shares this understanding of the Constitutional Court judgement, finding that it assumes that women are unable to make autonomous decisions without help and are incapable of being self-responsible.[235] That mandatory counselling is aimed at convincing the woman in favour of the unborn child only supports this highly patronising intention. It is very unlikely that, even where a pregnancy is unwanted, considerations about the potential unborn life would not be made in a decision-making process out of the pregnant person's motion, but this does not seem an option for the Court. Instead, it seeks to impose ethical views and goes beyond legal argumentation in stating that abortion must in principle be regarded as wrong and calling it the killing of the unborn child.[236] Such phrasing is medically inaccurate, since abortion refers to the termination of a pregnancy and a foetus, but it conveys a strong ethical stance that, according to the Court, must be kept in the general consciousness.[237]

Interestingly, although the Court does not consider any fundamental rights of women, it holds that they do not go so far as that the legal obligation to carry the child to term is generally abolished.[238] A detailed look into Articles 12 CEDAW and ICESCR, however, suggests that this reading is flawed. As part of their right to sexual and reproductive health and non-discriminatory healthcare, women are given a right to access to abortion, information, and non-biased counselling. None of these rights seem to be recognised by the Court, in violation of its duty to respect them under international human rights law. An obligation to carry a pregnancy to term is however not reconcilable with these rights, especially under a substantive equality approach. Given that no comparable obligation exists for men, who always have the option of refusing paternity and who do not have to carry a child, the realisation of substantive equality and equal opportunities would require the same free choice on whether to become a parent and whether to be pregnant for women.[239] Furthermore, the reasoning rooted in stereotypes and indifference towards the rights and lived experiences of women indicate an utter disregard for substantive equality. The Court does not recognise sexual and

[235] Profamilia hintergründe (n 187), p. 14.
[236] 2 BVerfG 88-203, para. 161.
[237] ibid para. 179.
[238] ibid para. 162.
[239] Cf Maya Kirilova Eriksson (n 9), p. 308.

reproductive health rights of women at all and instead tilts the balance entirely in favour of the protection of unborn life. It bears notice here that the number of women affected by the Court-mandated bias of mandatory counselling is grave. One in five women in Germany experience an unwanted pregnancy throughout their lives, of which 40% are terminated.[240] Of these unwanted pregnancies, an entire 96% fall under the mandatory counselling exemption.[241]

These observations have also been made by the independent provider of counselling agencies, *profamilia*. In multiple statements, the organisation has pointed out that women's right to sexual and reproductive self-determination is subordinate to the right to life of the foetus when the former should have priority.[242] It openly calls out the contradiction between the proclaimed open-endedness of the counselling and the legally required aims of convincing women and protecting unborn life.[243] This contradictory nature even undermines the potential of the counselling, according to *profamilia*.[244] It also finds that the quality and accessibility of its services suffer from the criminalisation and stigmatisation of the law.[245] The organisation takes a clear stance against forcing individual moral convictions upon others and therefore calls for the abolishment of §218 and 219 StGB due to its prevailing patronisation and double standards.[246] Its counselling is based on an understanding of voluntariness which stands in direct conflict with the mandatory character under §219 StGB.[247] Further, *profamilia* argues that mandatory counselling increases the stigmatisation of abortion, not least due to its placement close to murder in the StGB, and that it does not make the decision easier on women but instead causes medically unnecessary delay and additional stress.[248] It also highlights that most terminations are proven not to be traumatising and that the existence of post-abortion syndrome has been scientifically refuted.[249] Furthermore, the mandatory character seems to create the expectation in women that they have to explain and justify themselves or admit to

[240] BzGA (n 182), p. 10 and 18.
[241] Profamilia hintergründe (n 187), p. 2-22.
[242] ibid p. 4.
[243] ibid pp. 14-15.
[244] ibid p. 33.
[245] Profamilia Standpunkt (n 206), pp. 15-16.
[246] Profamilia hintergründe (n 187), p. 4.
[247] ibid p. 32-33.
[248] ibid p. 14.
[249] ibid pp. 19-20.

being guilty, while they are also aware that the counselling aims to convince them, which hinders actual productive counselling.[250] *Profamilia* recognises that access is a key component of the right to sexual and reproductive healthcare and that it is severely restricted,[251] as well as any autonomous decision is discouraged and discredited.[252] While it finds the aim of the German legislature to protect unborn life legitimate, it finds that it is not legitimate for such demographic policies to be used as a reason to intervene in and influence the personal decisions connected to unwanted pregnancies.[253]

The practice concerning mandatory counselling, like the reasoning of the Court, also suggests a rather latent disregard for women's autonomy and rights. While the counselling provided by *profamilia* seems to be more in line with women's sexual and reproductive rights, its understanding differs much from that of the Pregnancy Conflict Law. Aspects such as the acceptance of the decision made by the pregnant person, which are perceived as helpful by many women, are not foreseen by the law which calls for the protection of unborn life and ensuring the continuation of the pregnancy.[254] The fact that studies show that a majority of women state to be content with the counselling received, is thus only owing to the counselling agencies who explicitly act against the instructions under the Pregnancy Conflict Law. Those agencies who act according to instructions have a more problematic record, such as the Christian organisation *Donum Vitae* ("gift of life") which runs over 1400 agencies. In an interview with two women and two doctors, a woman described the counselling as worse than the actual termination.[255] Both doctors further described it as degrading chicanery, and that the women who come to them as patients feel humiliated in their vulnerable position. They also mentioned that the counselling agencies are rarely substantively reviewed and criticised a lack of information.[256] On the other hand, the women described the situation as partial and biased, and they reported feeling humiliated and pressured. Particularly, they highlighted guilt-tripping and the

[250] Profamilia hintergründe (n187), pp. 33-34.
[251] ibid p. 38.
[252] ibid p. 34.
[253] Profamilia Standpunkt (n 206), p. 11.
[254] SchKG, §5(1) and (2); Edith Palmer (n 145).
[255] Juliane Löffler, 'Druck in der Beratung zu Abtreibungen: „Nach dem Gespräch ging es mir noch beschissener"' (*edition f*, 2019) < https://editionf.com/schwangerschaftskonfliktberatung-abtreibung-donum-vitae-219a> accessed 18 May 2024.
[256] ibid.

intention of counsellors to influence their conscience by forcing the women to imagine the face of the child and telling them that they will regret their decisions to kill the child their entire life and be broken women.[257] Such reports from a Christian organisation whose leader has compared abortion to contract killing comes as no surprise.[258] But also from other agencies, women report being subject to accusatory questions, as well as having felt the need to give a good explanation or justification.[259] It is easily imaginable that a procedure aimed at getting women to talk about this sensitive matter may cause significant emotional stress. Furthermore, such stress is only aggravated by the three-day waiting period after the counselling, which many describe as inhumane.[260]

The conclusion is that the complete disregard for women's sexual and reproductive rights, in balancing with the State's duty to protect unborn life, renders mandatory counselling a disproportionate restriction of women's right to access to abortion, contrary to substantive equality. It has been called a bad compromise by various scholars and has also been addressed by the CEDAW Committee in its last concluding observations on Germany. It does not respect women's self-determination and in practice leads to a supply shortage of adequate medical services,[261] because of its outdated understanding of bodily autonomy and human dignity and its negative effects on the quality of all pregnancy-related healthcare services.[262] Given the disproportionate nature of mandatory counselling, the CEDAW Committee has demanded in its most recent observations that Germany ensure access to safe abortion without subjecting women to mandatory counselling and a three-day waiting period, which the WHO has declared to be medically unnecessary.[263]

Specifically, Germany violates its obligation to respect and fulfil women's right to access to abortion: The mandatory counselling unjustifiably interferes with

[257] Juliane Löffler (n255).
[258] ibid.
[259] Eva Hoffmann (n 203).
[260] ibid.
[261] Nina Monecke, 'Schwangerschatfsabbruch: Das war kein guter Kompromiss' *zeit online* (Berlin, 24 March 2023) <https://www.zeit.de/politik/deutschland/2023-03/schwangerschaftsabbruch-paragraf-218-abtreibung-entkriminalisieren-5vor8> accessed 18 May 2024.
[262] Vera Schürmann (n 148).
[263] UN Committee for the Elimination of all Forms of Discrimination Against Women, 'Concluding Observations on the combined seventh and eight periodic reports of Germany' (9 March 2017) UN Doc CEDAW/C/DEU/CO/7-8, para. 38(b).

the enjoyment of the right in that it creates a barrier to access and does not respect the right of women to make autonomous decisions. Moreover, the provision of effective access to abortion, the prevention of stigmatisation, and the principles of autonomy, choice, and informed consent which form part of the obligation to fulfil are not being observed.

It should be mentioned here that the option of free, practical assistance in deciding on terminating a pregnancy is without a doubt desirable and may even be required of the German State under its obligation to fulfil. However, such assistance should be non-biased and voluntary. Germany would therefore do well to amend the criminal and pregnancy conflict law to abolish the mandatory counselling requirement, although it may keep the option of voluntary counselling open. Currently, a special commission is looking into decriminalising abortion in Germany entirely, focusing on free contraceptives, family planning, and sex education, yet keeping a right to counselling.[264] Given the analysis above, such an alternative is to be welcomed and would be in much greater conformity with women's rights under international human rights law.

5. CONCLUSION

This paper set out to answer the research question to what extent the mandatory counselling to lawfully obtain an abortion under German law complies with women's reproductive rights under international human rights law. It was first seen in Chapter 2 that under Articles 12 CEDAW and ICESCR, women have a right to non-discriminatory access to safe abortion care, information, and non-biased counselling following recent treaty body jurisprudence and interpretation, and that States are under an obligation to respect, protect and fulfil such a right. Chapter 3 then analysed the mandatory counselling requirement under German law. To obtain a self-determined abortion that will remain exempt from punishment, women are obliged to receive counselling by a State or State-mandated agency at least three days before terminating an unwanted pregnancy. Such counselling is first and foremost aimed at the protection of unborn life and at convincing the pregnant person to decide to continue the pregnancy. Formally, the necessity of such an intervention by the State is found in the economic interest

[264] Nina Monecke (n 261).

of doctors in the performance of abortion, making the State more neutral and thus more fit to inform and educate about abortion. The current state of the law is mandated by the Constitutional Court which imposes on the State a constitutional duty to protect unborn life and on women the fundamental obligation to carry children to term. Chapter 4 then assessed to what extent the mandatory counselling requirement complied with women's right to access to abortion and non-biased counselling. It was found that the requirement constitutes a clear restriction of the right that could not be justified. While the constitutional duty to protect unborn life can serve as a legitimate aim, the mandatory counselling requirement fails at both necessity and proportionality. Particularly, its highly biased and patronising character, as well as disregard for women's reproductive rights and the principles of self-determination, autonomy, and choice render the counselling contradictory and disproportionate. This analysis is supported both by the experience of women who have undergone the procedure and those of gynaecologists. Therefore, the answer to the research question is that through its imposition of the mandatory counselling requirement to obtain an abortion exempt from punishment, Germany violates its duty to respect and fulfil women's right to access to abortion and non-biased counselling under international human rights law. Given this conclusion, an overturning of the mandatory counselling requirement is certainly welcomed, while retaining counselling in a non-biased and voluntary version remains desirable, specifically with regards to an obligation to fulfil the right to access to abortion.

Enforcement of Trademark Rights in a Circular Economy: The Impact of Trademark Law on Second-Hand and Refurbished Goods and the Promise of Blockchain

Tale Medias[1]

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TABLE OF ABBREVIATIONS

CJEU	Court of Justice of the European Union
EEA	European Economic Area
EU	European Union
EUTM	European Union Trademark
EUTMR	European Union Trademark Regulation
IP	Intellectual Property
POW	Proof of Work
UCT	Coordinated Universal Time
USD	US Dollars

1. INTRODUCTION

1.1. BACKGROUND

In the field of intellectual property rights, trademarks serve as badges of origin, and have the potential to become a business's most valuable asset.[2] As consumers are increasingly drawn to refurbished or second-hand goods due to sustainability and affordability, the legal framework governing these goods has become a point of contention.[3] At the heart of this discussion lies the importance of reconciling trademark proprietors' rights with the interests of consumers.

Refurbished goods are those which have undergone restoration to a certain condition after being returned or used, whereas second-hand goods have been previously owned by someone else.[4] The sale of refurbished and second-hand goods is supported by sustainability considerations and may promote a market in which product circularity is emphasised.[5] Whilst a trademark law framework where such considerations are taken into account is desirable, conflict of interest may arise. For instance, if trademarked goods are refurbished by independent repairers, the right-holders might claim their rights are infringed due to a lack of control of the quality of the refurbished goods, sparking concerns regarding the brand's reputation.[6] Moreover, regarding concerning second-hand goods, difficulties may arise when determining whether a good has been exhausted, or whether the trademark proprietor has legitimate reasons for opposing its further commercialisation.[7]

Importantly, the European Union (EU) provides for the opportunity to have a trademark registered for the entire Union through its European Union Trademark (EUTM). Moreover, the EU has already addressed considerations for determining

[2] European Commission, 'Trade mark protection in the EU' (*European Commission*) <https://single-market-economy.ec.europa.eu/industry/strategy/intellectual-property/trade-mark-protection-eu_en> accessed 12 December 2023.
[3] Simon Geiregat, 'Trading Repaired and Refurbished Goods: How Sustainable is EU Exhaustion of Trade Marks?' (2024) 73 GRUR International 287.
[4] Carla Ferraro, Sean Sands, and Jan Brace-Govan 'The role of fashionability in second-hand shopping motivations' (2016) 32 Journal of Retailing and Consumers Services 262; Annette Kur, ''As Good as New' – Sale of Repaired or Refurbished Goods: Commendable Practice or Trade Mark Infringement?' (2021) 70 GRUR International 228.
[5] Geiregat, 'Trading Repaired and Refurbished Goods' (n 3).
[6] See *Nitro Leisure Products, LLC v Acushnet Company* (*CAFC, 2003*) 341 F.3d 1356.
[7] Geiregat, 'Trading Repaired and Refurbished Goods' (n 3); Regulation (EU) 2017/1001 of the European Parliament and the Council of 14 June 2017 on the European Union trade mark (codification) [2017] OJ L 154, art 1.

the rights of trademark owners in relation to refurbished and second-hand goods through the EUTM Regulation (EUTMR). Firstly, in discussing such trademark concerns, the exhaustion doctrine is relevant. This doctrine refers to the point at which a trademark owner's exclusive rights over a product are deemed to be exhausted upon its initial sale or placement on the market with their consent.[8] Secondly, the Regulation includes exceptions to the exhaustion doctrine, which come into effect if the owner has legitimate reasons to oppose further commercialisation of the goods in question.[9]

However, despite these provisions, important issues persist. For one, the distinction between lawful refurbishing activities and fashioning deceitful impressions of association is not an easy one to make. The increase of refurbishing and second-hand practices[10] raises questions about how trademark proprietors' rights should be balanced with the need to promote environmentally friendly practices.

This thesis will shed light on the ambiguities that persist regarding trademark considerations arising from refurbished and second-hand goods. Research has already been dedicated to the application of the exhaustion doctrine in relation to such goods. This thesis aims to add to previous research by investigating whether blockchain technology can be a viable tool to reduce the above-mentioned uncertainties. While it is probable that the world is still years away from blockchain technology being an integral part of the law, certain aspects of the technology may make it a great candidate for being applied to the field.[11] Blockchain could potentially make it easier to monitor trademarked goods and related transactions and thereby strengthen enforcement.

Those who support the use of blockchain in trademark law find various positive features of the technology, mainly concerning the level of security, the broad access and low operation costs, its ease of settling transactions and disputes, as well as its decentralization.[12] Jurisprudence has in recent years discussed the

[8] Regulation (EU) 2017/1001 of the European Parliament and the Council of 14 June 2017 on the European Union trade mark (codification) [2017] OJ L 154.
[9] ibid art 15 (2).
[10] Lili, 'The rise of refurbished products in e-Commerce' (*Globaleyez,* 6 February 2024) <https://www.globaleyez.net/en/the-rise-of-refurbished-products-in-e-commerce> accessed 21 April 2024.
[11] Michael DeBlis, 'Blockchain and Trademark Law: So Perfect Together?' (2018) 1 The Journal of Robotics, Artificial Intelligence & Law 375.
[12] ibid.

promising role of blockchain in intellectual property law in general.[13] Moreover, research has been devoted to the potential role of the technology in the registration process of trademarks.[14] Yet, there is a gap in the jurisprudence regarding the possible role of blockchain as a tool to strengthen enforcement against second-hand and refurbished goods. This thesis aims to contribute to addressing this gap. In doing so, two main potential use areas will be discussed: blockchain as a tool to determine the precise moment a good was lawfully placed on the market, and blockchain as a tool to reduce uncertainties surrounding the lawfulness of refurbishment activities. Therefore, the thesis will answer the following question: *"How do trademark proprietors enforce their rights against the sale of second-hand and refurbished goods under the EUTMR in light of sustainability efforts and how can blockchain technology strengthen such enforcement?"*

Aiming to promote both clarity and a comprehensive exploration of the subject matter, the structure is as follows. Section 2 will provide an understanding of the current EU trademark law framework and its existing challenges. Section 3 will discuss three main issues. First, blockchain technology will be introduced and its potential role in EU trademark law will be examined. Second, the potential applications of the technology in relation to trademark enforcement against second-hand and refurbished goods will be analysed, specifically regarding the above-mentioned use areas. Third, the sustainability implications of using blockchain to enforce trademark rights in this context will be investigated. Lastly, Section 4 will conclude the thesis, where the findings will be summarised and the research question answered.

1.2. Methodology and Scope

To answer the research question, a doctrinal and analytical methodology will be employed. The doctrinal method will be of importance to provide a sufficient

[13] See Gönec Gürkaynak and others, 'Intellectual property law and practice in the blockchain realm' (2018) 34 Computer Law & Security Review 847.
[14] See for example Girish J. Showkatramani and others, 'A Secure Permissioned Blockchain Based System for Trademarks' (International Conference on Decentralized Applications and Infrastructures, Newark US, 2019) <https://ieeexplore.ieee.org/document/8782913> accessed 5 April 2024; Alia Al Sadawi, Malick Ndiaye and Israa Falah Mahdi Al Khaffaf, 'A Trademarks Application, Payment, Objection, Registration and Reporting System Using Blockchain Smart Contract' (International Conference on Electrical, Computer, Communications and Mechatronics Engineering, Tenerife Canary Islands Spain, 19-21 July 2023) <https://ieeexplore.ieee.org/stamp/stamp.jsp?tp=&arnumber=10253314> accessed 5 April 2024.

understanding of the existing law to subsequently investigate the trademark-related challenges arising from refurbished and second-hand goods. The EUTMR[15] is the main piece of legislation that will be examined, with a particular focus on Article 15 relating to the exhaustion doctrine. This Regulation has been chosen due to its centrality in governing trademark rights within the EU and its specific provisions regarding the exhaustion doctrine. In addition to the EUTMR, legal scholarship on trademarks in refurbished and second-hand goods, and the use of blockchain in intellectual property law settings will be gathered. They will be important for comprehending how the topic is currently dealt with and identifying the issues that remain to be addressed. Furthermore, non-legal sources will be encompassed to offer explanations of the technology behind blockchain and its key features.

Moreover, an analytical method will be employed to analyse the relevant materials. More specifically, a secondary analysis will be performed; the gathered sources and information will be inspected with the new purpose of examining the potential applications and sustainability impacts of using blockchain in enforcement against second-hand and refurbished goods. The combination of these sources will allow for drawing inferences between them and using critical thinking to reach conclusions. As such, given the absence of sources that directly address the research questions, the materials will not be looked at in isolation. Rather, a comprehensive approach will be taken to assess how these sources collectively contribute to addressing the research questions.

The scope of the thesis has been limited to addressing the EUTM rather than trademarks in general. This choice has been made to provide a more precise analysis by investigating the trademark law implications concerning refurbished and second-hand goods within the EUTMR, while also assessing the potential role of blockchain technology in alignment with this Regulation. Moreover, regarding the trademark considerations that arise with second-hand and refurbished goods, the scope has been narrowed down to address the rights that the EUTMR confers on the trademark proprietor, the exhaustion doctrine, and the uncertainties concerning the extent to which refurbishing activities are lawful. Other issues with

[15] Regulation (EU) 2017/1001 of the European Parliament and the Council of 14 June 2017 on the European Union trademark (codification) [2017] OJ L 154.

such goods, such as counterfeit goods circulating the second-hand market, will not be discussed. This has been excluded to allow for a more detailed analysis of the topics that have been included.

2. EU Trademark Law and Refurbished and Second-Hand Goods

2.1. Rights Conferred on a Trademark Proprietor by the EUTMR

The EUTMR provides the current legal framework for the EUTM, a trademark with equal effect throughout the Union.[16] The Regulation addresses some of the trademark considerations arising from refurbished and second-hand goods, mainly through providing mechanisms for trademark proprietors to take action against unauthorised use of their trademarks on such goods, as well as through the exhaustion doctrine. This section will first provide an overview of the rights the Regulation confers upon trademark proprietors. Then, the exhaustion doctrine and its exceptions will be examined.

2.1.1. Definition of Refurbished and Second-Hand Goods

While refurbished and second-hand goods lack definition in legislation, refurbished goods can be defined as goods which have been repaired or restored to a certain condition after being returned or used.[17] These goods can encompass a wide range of products. Often, but not always, refurbished goods will undergo quality assurance processes ensuring they meet certain standards.[18]

Second-hand goods are goods that have been owned or used by another person before. Such goods are often sold in their original conditions, without having been repaired or altered. Second-hand goods are generally more affordable than new goods, which makes them desirable for consumers. Additionally, they contribute to a circular economy and are perceived to be environmentally

[16] Regulation (EU) 2017/1001 of the European Parliament and the Council of 14 June 2017 on the European Union trade mark (codification) [2017] OJ L 154, art 1 (1).
[17] Kur (n 4).
[18] ibid.

friendly.[19] While most goods can be sold second-hand, electronics and fashion items are prominent categories.[20]

Consumers increasingly report that they consider the environmental implications of purchasing a certain good or from a certain company. This, combined with the lower price of refurbished and second-hand goods, has resulted in a large increase in interest in such products.[21] The worldwide market for refurbished goods in 2024 is worth approximately USD 107 billion.[22] By 2026, the market is expected to have doubled in size and be worth around USD 262 billion.[23] This is a positive development in light of sustainability, as these markets reduce waste by preventing used goods from going to landfills.[24] This development in the average consumer's mindset sparks questions regarding how sustainability considerations are dealt with in the EU trademark law framework.

2.1.2. The Rights Conferred by an EU Trademark – Article 9 EUTMR

a) Exclusive Rights of Trademark Proprietors and Enforcement

Article 9 EUTMR sets out the rights of a trademark proprietor by registering an EUTM.[25] Article 9 (1) stipulates that trademark proprietors enjoy exclusive rights regarding their mark. Consequently, trademark proprietors have the exclusive right to use or license the trademark and may prevent other unauthorised parties from using the mark or a confusingly similar one.[26] From this, one may argue that this provision puts the trademark proprietor in an initially strong position as it is granted authority to control the commercial use of its trademark.

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[19] Kur (n 4).
[20] Osborne Clarke, 'Shaky bridge between exhaustion of intellectual property rights and the refurbishing of electronic products' (*Osborne Clarke,* 23 November 2021) <https://www.osborneclarke.com/insights/shaky-bridge-between-exhaustion-intellectual-property-rights-and-refurbishing-electronic> accessed 20 April; Martin Senftleben, 'Developing Defences for Fashion Upcycling in EU Trademark Law' (2024) 73 GRUR International 99.
[21] Katherine White, David J. Hardisty, and Rishad Habib, 'The Elusive Green Consumer' (*Harvard Business Review,* July 2019) <https://hbr.org/2019/07/the-elusive-green-consumer> accessed 21 April 2024.
[22] Lili (n 10).
[23] Statista, 'Estimated revenue of the refurbished consumer goods market in 2022 and 2026 worldwide, by category' (*Statista,* October 22) <https://www.statista.com/statistics/1337509/refurbished-goods-market-revenue-by-category/> accessed 21 April 2024.
[24] Franka Martinovic, 'How Does Second-Hand Shopping Help the Environment? A Comprehensive Guide' (*Faircado,* 22 May 2023) <https://faircado.com/mag/how-does-second-hand-shopping-help-the-environment-a-comprehensive-guide/> accessed 10 May 2024.
[25] ibid art 9 (1).
[26] WIPO, 'Trademarks' (*WIPO*) <https://www.wipo.int/trademarks/en/> accessed 14 May 2024.

Of special relevance to refurbished and second-hand goods is Article 9 (2) EUTMR; addressing requirements for infringement and applied to situations where the trademark applied to or removed from a product initially marketed under that mark remains relevant.[27] In the context of refurbished goods, where original trademarks may endure throughout the refurbishment process, this provision provides guidance for assessing infringements.

Firstly, Article 9 (2)(a) introduces the concept of 'double identity'.[28] To establish whether an infringement has occurred, the 'test of double identity' regarding the signs and the goods or services at issue is employed.[29] The CJEU has explained that this test entails that a double identity exists when differences between goods are so insignificant they may be overlooked by the average consumer.[30] Additionally, the CJEU has developed the general requirement that the activity in question must have an adverse effect on the traditional function of origin or one of the secondary trademark functions concerning quality, communication, investment or advertising.[31] Therefore, it is not enough that the use impacts one of the functions, but it must have a detrimental effect which causes harm.[32] In the context of second-hand and refurbished goods, if the resale involves an identical mark on identical goods without noticeable change, which is normally the case with second-hand goods, the proprietor must demonstrate this use adversely affects one of the trademark functions.

Secondly, under Article 9 (2)(b), trademark proprietors can invoke their rights if they can show that there is a likelihood of confusion due to the use of identical or similar signs for identical or similar goods.[33] A likelihood of confusion exists if the average consumer believes that the goods or services bearing the

[27] Regulation (EU) 2017/1001 of the European Parliament and the Council of 14 June 2017 on the European Union trade mark (codification) [2017] OJ L 154, art 9 (2)(a).
[28] ibid art 9 (2).
[29] Annette Kur and Martin Senftleben, *European Trade Mark Law – A commentary* (Oxford University Press 2017) ch. 5.
[30] Case C-291/00 *LTJ Diffusion SA v Sadas Vertbaudet SA* [2003] ECR I-2799, ECLI:EU:C:2003:169, para. 53.
[31] Kur (n 4).
[32] Kur and Senftleben (n 29), ch. 5.
[33] Regulation (EU) 2017/1001 of the European Parliament and the Council of 14 June 2017 on the European Union trade mark (codification) [2017] OJ L 154, art 9 (2)(b).

marks come from the same or economically linked undertakings.[34] The CJEU requires a global assessment, that considers all relevant factors.[35] This includes the overall impression of the marks, focusing on their distinctive and dominant components, based on their visual, aural, or conceptual similarities.[36] Second-hand and refurbished goods often retain the original trademarks, and their resale may result in situations where consumers could be confused about the origin of the goods. For instance, a refurbished good retaining the original trademark may lead to consumer confusion regarding whether the good is authorised by the original trademark proprietor, especially if the refurbishing is done by independent parties.

Thirdly, Article 9 (2)(c) covers the use of identical or similar signs for similar and non-similar goods if the trademark has a reputation and the use takes unfair advantage of or harms the trademark's distinctive character or reputation.[37] For second-hand and refurbished goods, this will, for example, apply if they are marketed to capitalise on a well-known trademark's reputation, even if the goods are not similar to those for which the trademark is registered. To invoke this right, the trademark proprietor must show that such use tarnishes the trademark's reputation or dilutes its distinctiveness.[38] An interesting example is the lawsuit involving Lil Nas X and Nike.[39] In 2021, Lil Nas X released, together with Brooklyn art collective MSCHF, a refurbished version of Nike sneakers, without authorisation from Nike.[40] The shoes featured a pentagram, an inverted cross, and referenced Luke 10:18, which describes the downfall of Satan. Moreover, the red ink on the soles included a drop of human blood.[41] Not only did Nike claim that

[34] EUIPO, 'Double Identity and Likelihood of Confusion – EUIPO' (*EUIPO,* 1 February 2015) <https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/law_and_practice/trade_marks_practice_manual/WP/Part-C/02-part_c_opposition_section_2/part_c_opposition_section_2_chapter_8_global_assessment/track_change/part_c_opposition_section_2_chapter_8_global_assessment_tc_en.pdf> accessed 14 May 2024.
[35] Case C-251/95 *SABEL BV v Puma AG, Rudolf Dassler Sport* [1997] ECLI:EU:C:1997:528, para. 22.
[36] ibid paras. 22-23.
[37] Regulation (EU) 2017/1001 of the European Parliament and the Council of 14 June 2017 on the European Union trade mark (codification) [2017] OJ L 154, art 9 (2)(c).
[38] Kur and Senftleben (n 29) ch. 5.
[39] *Nike Inc v MSCHF Product Studio Inc* (EDNY, 2021) 1:21-cv-01679.
[40] Paul Smith, 'The Devil Wears Nike: The implications of Nike's Lawsuit Against MSCHF for its "Satan Shoes"' (*Cardazo Arts & Entertainment Law Journal Blog,* 2021) <https://larc.cardozo.yu.edu/aelj-blog/285/?utm_source=larc.cardozo.yu.edu%2Faelj-blog%2F285&utm_medium=PDF&utm_campaign=PDFCoverPages> accessed 24 May 2024.
[41] ibid.

the unauthorised use of their trademark caused a likelihood of confusion, but also that its goodwill had been tarnished.[42] There was a rather clear damage to Nike's reputation, as consumers began boycotting the brand out of the belief that it was endorsing satanism.[43] After an out-of-court settlement, MSCHF agreed to recall the shoes.[44] While the lawsuit fell under US jurisdiction, the sneakers still portray a noteworthy example of refurbishing activities liable to tarnish a trademark's reputation.

b) *Implications for Second-Hand and Refurbished Goods*

Taken as a whole, Article 9 (2) EUTMR provides three mechanisms for which trademark proprietors may enforce their rights. The provision becomes important when refurbished goods and second-hand goods retain the original trademark, as it protects trademark proprietors from having goods bearing their mark circulate the market in a damaging manner.

However, this implication poses an interesting question as to whether traders may remove the trademark from the good to avoid infringement. The answer to this is found in the CJEU's case law. In a recent case concerning Audi, a third party manufactured and sold radiator grilles for 1980 and 1990 Audi models, which had a hole in the form of the Audi logo, resulting in the possibility of the consumer affixing the original logo onto the grill.[45] The CJEU found that such use of a sign is likely to affect one or more of the functions of that trademark, despite the fact that the trademark itself is not affixed on the good by the manufacturer.[46] The Court pointed out that the manufacturer, who was acting in the course of trade, was not authorised by Audi, the grill contained an element designed for the attachment of the logo representing Audi's trademark, and the shape of the hole was identical to the mark.[47] Moreover, in *Portakabin,* the defendant sold mobile buildings that were first placed on the market by Portakabin.[48] However, they

[42] *Nike Inc v MSCHF Product Studio Inc (EDNY, 2021) 1:21-cv-01679.*
[43] Smith (n 39).
[44] Neil Vigdor, 'Company Will Offer Refunds to Buyers of 'Satan Shoes' to Settle Lawsuit by Nike' (*New York Times*, 8 April 2021) <https://www.nytimes.com/2021/04/08/style/satan-shoe-settlement-nike.html> accessed 24 May 2024.
[45] Case C-334/22 *Audi (Emblem support on a radiator grille))* [2024] ECLI:EU:C:2024:76, para. 9.
[46] ibid para. 49.
[47] ibid paras. 37-49.
[48] Case C-558/08 *Portakabin* [2010] ECLI:EU:C:2010:416, paras. 11-12.

removed the trademark and affixed their own mark 'Primakabin.'[49] The Court held that the use of the 'Primakabin' mark in advertising goods sold under that mark was liable to have a negative effect on the origin function of trademarks.[50] These cases illustrate that infringement may be found even if the trademark is removed from the good before re-sale.

All in all, the enforcement mechanisms inherent in Article 9 EUTMR can be said to further strengthen the position of trademark proprietors. Subsequently it becomes important to examine how their rights are limited; here, the exhaustion doctrine comes into play.

2.1.3. The Exhaustion Doctrine

a) Introduction and Requirements

Due to the exclusive nature of the rights conferred upon the owner of an IP right, IP rights can be said to constitute legal monopolies.[51] The exhaustion doctrine arose from the desire to 'release' goods from the constraints of IP rights and enable their unrestricted movement within the common market once the right holder had obtained fair compensation. As such, the exhaustion doctrine functions as one of the ways to limit IP rights and its resulting monopoly.[52] In relation to trademarks, the exhaustion doctrine ensures that trademark proprietors do not have unrestricted control over the distribution and resale of their products. Without exhaustion, proprietors would theoretically be able to create separate markets within the European Economic Area (EEA), conflicting with the interest of a common market.[53]

The doctrine is now enshrined in the EUTMR and is a key cornerstone of EU trademark law. In essence, exhaustion entails that once a trademarked product has been legitimately placed on the market within the EEA by the trademark proprietor or with their consent, their exclusive rights to control further distribution of that product are exhausted.[54] As a result, they cannot use their

[49] Case C-558/08 *Portakabin* [2010] ECLI:EU:C:2010:416, paras. 13-18.
[50] ibid para. 94.
[51] Simon Geiregat, *Supplying and Reselling Digital Content* (Edward Elgar Publishing 2022) 1.
[52] Geiregat, 'Trading Repaired and Refurbished Goods' (n 3).
[53] Geiregat, *Supplying and Reselling Digital Content* (n 51).
[54] Regulation (EU) 2017/1001 of the European Parliament and the Council of 14 June 2017 on the European Union trade mark (codification) [2017] OJ L 154, art 15 (1).

trademark rights to prevent the subsequent resale or distribution of those goods within the EEA. This presents a substantial limitation to the owner's rights but can be seen as promoting the free movement of goods.[55]

For exhaustion to occur, three cumulative requirements must be fulfilled.[56] Firstly, there must initially have been the marketing of a good containing IP-protected content. Secondly, this initial marketing must have occurred either by the right holder or with their authorisation. Lastly, the marketing must have taken place within a specific geographical jurisdiction.[57] To illustrate, if a trademark proprietor initially markets their goods in Germany, either directly or through authorised distributors, those goods can subsequently be freely sold and distributed within the entire EEA without requiring further consent from the trademark proprietor. Additionally, regarding this geographical scope, the EU has, through its harmonisation efforts, opted for Community-wide exhaustion (Regional Exhaustion) and has, thus, decided against international exhaustion.[58] As a result, third parties cannot legally import trademarked goods from outside the EEA with the intention of reselling them or using them in trade without the consent of the trademark owner.[59]

b) Implications for Refurbished and Second-Hand Goods

The exhaustion doctrine at first seems to allow for the potential lawful resale and redistribution of refurbished and second-hand goods within the EEA. This aspect of the doctrine can be claimed to encourage product circularity and contribute to a more sustainable economy by extending the useful life of products.[60] In relation to second-hand goods, the application of the exhaustion doctrine is straightforward: once trademarked goods have been legitimately placed on the market, subsequent traders can freely resell those goods without infringing on the trademark proprietor's rights.[61] However, when it comes to refurbished goods, the

[55] Geiregat, *Supplying and Reselling Digital Content* (n 51).
[56] Case C-16/03 *Peak Holding AB v Axolin-Elinor AB* [2004] ECLI:EU:C:2004:759; Case C-324/09 *L´Oreal SA and Others v eBay International AG and Others* [2011] ECLI:EU:C:2011:474; Case C-379/99 *Pharmacia & Upjohn SA v Paranova AS* [1999] ECLI:EU:C:1999:494.
[57] Geiregat, 'Trading Repaired and Refurbished Goods' (n 3).
[58] Irene Calboli, 'Trademark Exhaustion in the European Union: Community-Wide or International? The Saga Continues' (2002) 6 Marquette Intellectual Property Law Review 4.
[59] Geiregat, 'Trading Repaired and Refurbished Goods' (n 3).
[60] Martinovic (n 24).
[61] Regulation (EU) 2017/1001 of the European Parliament and the Council of 14 June 2017 on the European Union trade mark (codification) [2017] OJ L 154, art 15 (1).

application is more complicated. Considering that refurbished goods often involve changes or repairs to the original good but retain the trademark, trademark rights might still be infringed, for example, due to a change in the quality or that the good is resold in a condition that was not initially authorised by the trademark proprietor. In any case, due to the indispensable functions of trademarks, such as serving as a badge of origin, the exhaustion doctrine is not without limits.[62]

2.1.4. Exceptions to the Exhaustion Doctrine: Legitimate Reasons

EU law recognises exceptions to the exhaustion doctrine, to safeguard the legitimate interests of trademark owners. Simplified, the doctrine does not apply if there are legitimate reasons for the owner to object to additional commercialisation of the goods, particularly where significant changes to a good have been made.[63] While the exception is broad and courts have a high margin of discretion in deciding what constitutes 'legitimate reasons',[64] certain dealings will normally trigger the exception.

Activities that significantly alter the original condition of a trademarked good generally result in infringement.[65] The CJEU has explained that both clear instances of blatant tampering with a product's condition,[66] and cases in which the product's condition could be indirectly affected,[67] can warrant exceptions to the exhaustion doctrine. However, in the latter case, the exception only applies if there is a serious risk of reputational harm.[68] The rationale for allowing for such an exception is the recognition that trademark owners may suffer reputational harm when goods they have previously put on the market are tampered with, continue to circulate, and are still associated with them in commerce.[69] Similarly, this

[62] Regulation (EU) 2017/1001 of the European Parliament and the Council of 14 June 2017 on the European Union trade mark (codification) [2017] OJ L 154, recs. 11 and 23.
[63] ibid art 15 (2).
[64] Geiregat, 'Trading Repaired and Refurbished Goods' (n 3).
[65] Apostolos Chronopoulos, 'Exceptions to Trade Mark Exhaustion: Inalienability Rules for the Protection of Reputational Economic Value' (2021) 43 European Intellectual Property Review 352.
[66] Case C-102/77 *Hoffmann-La Roche & Co AG v Centrafarm* [1978] ECLI:EU:C:1978:108, para. 14.
[67] Case C-427/93 *Bristol-Myers Squibb and Others v Paranova* [1996] ECLI:EU:C:1996:282, para. 65.
[68] ibid paras. 60-63.
[69] Chronopoulos (n 65).

exception allows trademark proprietors to shield themselves from possible false attributions of quality.[70]

For instance, a trademarked designer purse is painted with non-original colours and patterns by a third party and then sold. In this scenario, albeit up to the Court to decide, it seems the law suggests the exhaustion doctrine would not apply. For one, the changes to the purse's appearance compromise its authenticity and likely constitute a significant change to the good. Moreover, the changes may result in a change of quality, if for example, the paint would damage the leather of the purse. This might also pose a risk of reputational harm to the trademark proprietor since the purse is still associated with the brand but has undergone changes that may diverge from the brand's standards.

Another established legitimate reason for proprietors to object to continued commercialisation pertains to preserving the brand image.[71] This is particularly relevant in relation to luxury brands. The CJEU has confirmed that trademark owners are entitled to object to the continued commercialisation of goods known for their prestigious image when the circumstances of their sale and advertising are likely to tarnish the reputation they have built.[72] As an important limitation, this only holds true if it is established that further commercialisation has caused, or is likely to cause, serious reputational damage to the brand.[73]

In relation to the example of the painted designer purse, this exception could apply if the painting depicts inappropriate or offensive imagery. Painting something that is generally thought of as inappropriate or offensive would likely deter consumers who associate the brand with elegance and high class, thereby causing serious reputational damage.

The legitimate reasons exception entails that activities which alter a product's condition and/or pose a threat to a brand's image will generally constitute legitimate reasons for the proprietor to oppose the continued commercialisation of the product.[74] This exception is particularly relevant in the

[70] Chronopoulos (n 65).
[71] Gabriela da Costa and Georgina Rigg, 'Could you be using your trade marks to stop unauthorised resellers in the EU?' < https://www.iplawwatch.com/2021/04/30/could-you-be-using-your-trade-marks-to-stop-unauthorised-resellers-in-the-eu/;> accessed 18 November 2024; Case C-337/95 *Parfums Christian Dior v Evora* [1997] ECLI:EU:C:1997:517, para. 43.
[72] Case C-337/95 *Parfums Christian Dior v Evora* [1997] ECLI:EU:C:1997:517, para. 43.
[73] ibid paras. 44-49.
[74] Chronopoulos (n 65).

context of refurbished goods, as alterations are fundamental to their nature. However, the broad and somewhat ambiguous nature of this exception complicates the situation for such goods, as EU legislation and case law do not provide a clear-cut distinction between lawful and infringing refurbishing activities.[75] On one hand, the exception safeguards trademark proprietors' rights and the integrity of trademarks' functions. Comparatively, the lack of a well-established point at which a refurbishing activity would prevent the application of the exhaustion doctrine, could deter traders from placing refurbished goods on the market in the first place.[76] As such, the legitimate reasons for exception might be argued to put the trademark proprietor back in its initial strong position and leave little room for creating a more circular economy.

In contrast, second-hand goods are typically less impacted by this exception. For these goods, the main concern is whether the product has been lawfully placed on the market,[77] as subsequent resales do not generally involve substantial changes that could confuse consumers or harm a trademark's reputation. However, if goods have deteriorated to a point where they no longer represent the quality expected under the trademark, there might exist a legitimate reason for the trademark proprietor to object to their further commercialisation.

Additionally, sustainability considerations play an important role in the resale and refurbishment of goods. Facilitating further commercialisation of such goods is in the interest of the environment as it promotes a circular economy.[78] This emphasis on sustainability can, however, conflict with the trademark proprietor's interest in maintaining control over their trademarked goods. This will further be discussed in the next subsection.

[75] Geiregat, 'Trading Repaired and Refurbished Goods' (n 3).
[76] ibid.
[77] Njegoslav Jovic, 'Trademark Exhaustion in European Union' (Thesis, University of Banja 2019).
[78] Katherine White, David J. Hardisty, and Rishad Habib, 'The Elusive Green Consumer' (*Harvard Business Review,* July 2019) <https://hbr.org/2019/07/the-elusive-green-consumer> accessed 21 April 2024.

2.2. Sustainability Considerations under the EU Trademark Framework

2.2.1. Second-Hand Goods

Given the growing desire and need for a circular economy, it can be argued that the law should contribute to facilitating such a development. As previously stated, the EU exhaustion doctrine provides a limit to the exclusive rights of trademark proprietors.[79] Once a good is lawfully placed on the market, the trademark proprietor's rights have been exhausted. Unless there are legitimate reasons for the proprietor to object to continued commercialisation of the goods, other traders may lawfully re-sell them.[80] In this context, the application of the exhaustion doctrine to second-hand goods aligns with sustainability goals, at least at first sight. By allowing lawful resale, the doctrine can be argued to facilitate a circular economy in which reuse is encouraged.

However, the sustainability of this aspect of EU trademark law can be challenged when considering the broad legitimate reasons for exceptions.[81] Trademark proprietors are generally granted wide discretion to object to the continued commercialisation of goods due to the wide wording of the exception.[82] This broad discretion can undermine the sustainability benefits of the exhaustion doctrine by allowing proprietors to restrict the resale and reuse of goods more frequently, potentially limiting the positive impact on the circular economy.

2.2.2. Refurbished Goods

Whilst the exhaustion doctrine could in theory encourage traders to refurbish goods for second-hand life, its application to such goods is more limited. This is due to the difficulty in distinguishing lawful refurbishing activities from making false impressions of association. Thereby, it may result in traders being deterred from engaging in such activities due to the uncertainty of potential trademark rights infringement.[83] In particular, trademark law issues tend to arise in the

[79] Regulation (EU) 2017/1001 of the European Parliament and the Council of 14 June 2017 on the European Union trade mark (codification) [2017] OJ L 154, art 15 (1).
[80] ibid art 15.
[81] Geiregat, 'Trading Repaired and Refurbished Goods' (n 3).
[82] ibid.
[83] ibid.

context of refurbishing activities such as recycling, activities that negatively impact a trademark's functions, and upcycling.

One issue that may arise concerning sustainability and trademarks is the potential infringement of a trademark holder's rights when products consist of parts bearing their trademark as raw materials.[84] An example is a company that collects and recycles parts from branded electronic devices and uses these parts to make new goods. If these new goods still display the original brand trademarks, it could potentially create consumer confusion about whether the new goods are authorised by the original brand.

Recycling cases may be covered by the exhaustion doctrine, but this is not always the case, leading to difficulties in recycling that product.[85] Moreover, for these goods, the enforcement mechanisms in Article 9 (2) EUTMR might be of relevance. If the goods bear a trademark owned by someone else, the trademark proprietor will typically have the right to prevent those goods from being used in trade settings.[86] This will at least be the case insofar as the right has not been exhausted.

In general, the exhaustion doctrine will not apply if the sale of the recycled goods involves material changes to the products or if the sale creates a likelihood of confusion among consumers, as this would undermine the rights of the trademark proprietor conferred by Article 9 EUTMR. This means that proprietors have a strong chance of enforcing their rights against such goods, which may be desirable for the proprietors themselves. However, from a sustainability perspective, this outcome is less favourable, as it poses a significant challenge to extending the lifecycle of goods through resale.[87]

Moreover, if refurbishing activities have a negative effect on the functions of a trademark, these activities might constitute an infringement under Article 9(2) EUTMR, provided the remainder of the conditions for infringement are fulfilled. This is particularly the case if the function of identifying the origin or the quality function of a trademark is negatively affected.[88] For instance, one may think of

[84] Fabio Panico, 'Intellectual Property and Sustainability in the EU' (Master Thesis in European and International Trade Law, Lund University 2022).
[85] ibid.
[86] Regulation (EU) 2017/1001 of the European Parliament and the Council of 14 June 2017 on the European Union trade mark (codification) [2017] OJ L 154, art 9 (2).
[87] Martinovic (n 24).
[88] Kur (n 4).

a good being refurbished in a way that does not maintain the integrity of the trademark, and as such could misrepresent the good as being endorsed by the trademark proprietor; resulting in an likely infringement of Article 9 (2)(a) EUTMR.

For one, if the signs and the goods are identical, but the refurbished product is clearly of lesser quality, this could have a detrimental effect on the trademark's functions. Moreover, consumers may mistakenly believe that the use of the good is authorised by the trademark proprietor, causing consumer confusion. When consumers are confused about the origin or endorsement of goods, it undermines the functions of a trademark. For trademark proprietors, this confusion can dilute the value of their brand and erode consumer trust in their products, challenging their ability to maintain control over their brand integrity.[89] Relatedly, refurbishing activities may alter the quality of a good, which could potentially diminish its alignment with the standards associated with the trademark. This poses a risk to the reputation of the brand in question and may constitute an infringement of Article 9 (2)(c) EUTMR.

Furthermore, uncertainties persist regarding potential trademark infringements in upcycled goods. Upcycling can be defined as "the creation of new goods from salvaged ones in a way that increases the value of the material".[90] Generally, such practices are not welcomed by the original brands, which tend to deem them as trademark infringements. Firstly, identifying the origin of a product permits consumers to differentiate between goods made by different brand*s*. If upcycling is done in a way where products are made by drawing inspiration from brands' motifs and marks and incorporating them into their designs, this could negatively affect the origin function of trademarks.[91] Moreover, brands have strong business incentives to protect their trademarks against misuse because consumers often have a personal relationship with brands.[92]

[89] Kur and Senftleben (n 29) ch. 5.
[90] Carl A Zimrig, 'Upcycling in History: Is the Past a Prologue to a Zero-Waste Future? The Case of Aluminum' in Christof Mauch (ed), *A Future without Waste? Zero Waste in Theory and Practice* (RCC Perspectives 2016).
[91] Jolie Brett Schenerman, 'One Consumer's Trash Is Another's Treasure: Upcycling's Place in Trademark Law' (2020) 38 Cardazo Arts & Entertainment Law Journal 745.
[92] Jolie Brett Schenerman, 'One Consumer's Trash Is Another's Treasure: Upcycling's Place in Trademark Law' (2020) 38 Cardazo Arts & Entertainment Law Journal 745.

Furthermore, concerning luxury brands, the CJEU has through its case law established strong protection of brand image regarding the exhaustion doctrine.[93] In *Copad,* SIL, a company in a licence agreement with Dior, sold to Copad, a discount seller, despite being under a contractual obligation to not sell to discount sellers.[94] The Court held that if such resale damages the reputation of the trademark, this constitutes a legitimate reason for the trademark proprietor to oppose the resale.[95] The Court pointed out that the aura of luxury goods is essential as it assists consumers to differentiate them from similar goods, and that damage to the aura of luxury is likely to impact the actual quality of those goods.[96]

This has been argued to diminish the weight given to sustainability arguments, as it seems that preservation of brand image is given priority over sustainability considerations in the context of trademark exhaustion.[97] If sustainability arguments carry less weight compared to brand image protection in legal proceedings, the advancement of sustainable practices such as upcycling is likely to be hindered.

3. BLOCKCHAIN: REFURBISHED AND SECOND-HAND GOODS

In the preceding section, the complexities surrounding the application of the exhaustion doctrine in the context of refurbished and second-hand goods within the framework of the EUTMR were examined. Now, attention will be given to addressing the potential role of blockchain technology within this framework. Blockchain has been envisaged to be one of the revolutionary technologies that will have an immense influence on our lives in the upcoming years and decades.[98] This section will examine, in light of sustainability, the desirability and feasibility of using blockchain as a means to enforce trademark rights against second-hand and refurbished goods. This will aid in answering the question of whether blockchain technology can be a tool in such enforcement.

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[93] See for example: Case C-59/08 *Copad SA v Christian Dior Couture SA & Vincent Gladel and Société industrielle lingerie* [2009] ECLI:EU:C:2009:260; Case C-337/95 *Parfums Christian Dior v Evora* [1997] ECLI:EU:C:1997:517.
[94] Case C-59/08 *Copad SA v Christian Dior Couture SA & Vincent Gladel and Société industrielle lingerie* [2009] ECLI:EU:C:2009:260, paras. 7-10.
[95] ibid para. 59.
[96] ibid para. 25-26.
[97] Panico (n 84).
[98] Gönec Gürkaynak and others, 'Intellectual property law and practice in the blockchain realm' (2018) 34 Computer Law & Security Review 847.

3.1. The Definition and Concept of Blockchain

At its core, blockchain technology is a decentralised and distributed ledger technology that enables secure and transparent record-keeping of information across a peer-to-peer online network, using cryptography for its transactions.[99] While attempting to conceptualise what blockchain is, one can imagine a literal chain of blocks. Each block in the chain comprises information related to a certain number of transactions. After each transaction in Block 1 is verified, it is included in the blockchain system and can no longer be altered in any way. This is the cryptographic feature of blockchain, whereby information on a blockchain is stored in cryptographic hashes. [100]

A hash is generated by a hash function, a computer program that converts any type of data into numbers and letters of a fixed size. Any change of data will result in a different hash value, which will make the subsequent hash values not compliant with the previous hash. Due to its unique representation, a hash value is compared to the digital fingerprint of the underlying digital information.[101] Block 2, which will consist of other transactions, will also contain a reference to Block 1.[102] The result is that Block 2 is bounded by Block 1. As a verified block cannot be altered without changing it across the entire network, blockchain forms a permanent and immutable public record where the integrity of the information on the content of the blockchain is collectively kept up to date.[103] The content of a blockchain is called the ledger. The ledger's purpose is to retain information on anything that is represented within the blockchain.[104]

3.1.1. Benefits and Challenges

The potential benefits of using blockchain in the field of IP law have been a topic of discussion in recent years.[105] Many see blockchain technology as a promising

[99] Hiroshi Sheraton and Birgit Clark, 'Blockchain and IP: crystal ball-gazing or real opportunity?' (2017) PLC Magazine 39.
[100] Gürkaynak and others (n 98).
[101] Julia Hugendubel, 'Blockchain Technology and Intellectual Property – A basic introduction' (2021) SSRN Electronic Journal <http://dx.doi.org/10.2139/ssrn.3917801> accessed 15 January 2023.
[102] Gürkaynak and others (n 98).
[103] Sheraton and Clark (n 99).
[104] Adam Hayes, Jefreda R. Brown and Suzanne Kvilhaug, 'Blockchain Facts: What Is It, How It works, and How It Can Be Used'(*Investopedia,* 15 December 2023) <https://www.investopedia.com/terms/b/blockchain.asp> accessed 26 April 2024.
[105] Gürkaynak and others (n 98).

solution to strengthen trademark enforcement by ensuring transparency, traceability, and authenticity in supply chains.[106] It is argued that due to the immutable feature of the technology, it can offer tamper-proof evidence of ownership and other transactions.[107] Furthermore, if information about a trademark or a good that authentically bears the trademark is stored in a blockchain, alterations to that information could be traced more easily. This paves the way for transparent transactions and makes the information pertaining to the trademark more accessible.[108]

Moreover, blockchain offers enforcement authorities a technology that can be used to monitor goods in the supply chain. In this regard, blockchain can be a tool in anti-counterfeiting and in strengthening trademark enforcement.[109] Any transactions pertaining to, or alterations made to second-hand or refurbished goods could thus be recorded and potentially used by enforcement authorities.

However, while the use of blockchain technology in the field of trademarks is welcomed by many, it also brings along challenges. For one, the complexity of the underlying technology entails that any authorities using it must undergo substantial training efforts.[110] Moreover, these complexities also spark suspicions and concerns amongst individuals, potentially leading to low market acceptance.[111] Implementing blockchain has high costs related to the initial setup, the development of the necessary infrastructure, and continuous maintenance.[112] Thus, whilst blockchain has been extensively researched, one has yet to see much implementation.

From a legal perspective, the main challenge in implementing blockchain in IP law relates to the regulation of the technology. The future of blockchain remains uncertain, which creates difficulties in terms of how the technology

[106] Sofia Lopes Barata, Paulo Rupino Cunha and Ricardo S- Viera-Pires, 'I Rest My Case! The Possibilities and Limitations of Blockchain-Based IP Protection' (*ISD2019 France,* 2019) <https://core.ac.uk/download/pdf/301385106.pdf> accessed 29 April 2024.
[107] ibid.
[108] Dolores Modic and others, 'Innovations in intellectual property rights management – their potential benefits and limitations' (2019) 28 European Journal of Management and Business Economics 189.
[109] Gürkaynak and others (n 98).
[110] ibid.
[111] Barata, Cunha and Viera-Pires (n 106).
[112] Marie-Francoise Mbaye, 'The Application of Blockchain for the Intellectual Property Protection' (Master Thesis in European Business Law, Lund University 2020).

should be regulated.[113] Moreover, the enforcement of trademark law using blockchain lacks legal support, necessitating fostering user trust and establishing the legal status of blockchain.[114]

Additionally, there are legal challenges in the sense of interoperability concerns regarding cross-border cooperation,[115] uncertainties regarding liability for incorrect data, and the need to elevate the legal status of blockchain records to serve as admissible evidence in legal proceedings.[116] With the rise of blockchain technology in refurbished and second-hand goods, more legal challenges and questions will inevitably arise that the law will have to address. In this regard, both the trademark proprietors' interests and the consumers' interests must be considered. Additionally, the environmental downsides of the technology should be given weight in the equation.

3.1.2. Blockchain and Sustainability

While blockchain holds the potential to disrupt and greatly enhance our societies, there are certain societal costs inherent in its implementation.[117] The technology behind blockchain comes with a substantial carbon footprint due to its energy-intensive processes for verifying transactions and creating new blocks on the blockchain, also called mining.[118] This energy consumption contributes significantly to greenhouse gas emissions, thereby exacerbating climate change.[119] For example, while not all blockchains are the same, one of the most common mechanisms for verifying transactions is the 'Proof of Work' (POW) mechanism. This verification process involves communicating the cryptographic problem to all computer nodes in the network, even though only one node will verify the transaction. The result is that all other computer nodes consumed electricity for no apparent reason. Consequently, POW needs a high level of energy to fuel the

[113] Gürkaynak and others (n 98).
[114] Barata, Cunha and Viera-Pires (n 106).
[115] Arthur C. Codex, 'The Challenge of Blockchain Interoperability' (*Reintech,* 14 December 2023) https://reintech.io/blog/blockchain-interoperability-challenges accessed 8 May 2024
[116] Goncalves Marchione Talita, 'Digital Exhaustion and the Implementation of Blockchain E-Books' (Master's Thesis, Munich Intellectual Property Law Center 2018).
[117] Christophe Schinckus, 'The good, the bad and the ugly: An overview of the sustainability of blockchain technology' (2020) 69 Energy Research & Social Science 1.
[118] Anthony Clarke, 'The Environmental Impact of Blockchain Technology' (*Nasdaq,* 30 May 2023) <https://www.nasdaq.com/articles/the-environmental-impact-of-blockchain-technology> accessed 1 May 2024.
[119] ibid.

computers dealing with the cryptographic problem.[120] Regardless, it should be noted that efforts are underway to address this issue and create a more sustainable framework for blockchain technology.[121] The use of renewable energy sources represents one viable approach to powering mining operations sustainably, which could substantially reduce the carbon footprint associated with blockchain.[122]

As seen, support has been given to using blockchain in the field of trademark law in general.[123] However, the societal costs of the technology should especially be taken into account when discussing refurbished and second-hand goods. These goods promote sustainability by extending the lifecycle of products, reducing waste, conserving resources, and minimising the environmental footprint associated with manufacturing and disposal.[124] As discussed in Section 2, the EUTMR puts trademark proprietors in a relatively strong position to enforce their rights. While the exhaustion doctrine is a notable exception to this, one may argue the trademark proprietor's strong position makes it difficult to engage in sustainable refurbishing and re-selling activities. Thus, while blockchain may be an asset in enforcing trademark rights, it should be considered whether its implementation into the EUTMR framework merely worsens the sustainability of EU trademark law by significantly increasing the carbon footprint.

3.2. Blockchain and the EUTMR

As explained in Section 2, the exhaustion doctrine dictates that once a trademarked good is lawfully placed on the market within the EEA by the trademark owner or with their consent, their rights are exhausted.[125] To assess whether an infringement has occurred, it is important for second-hand goods to determine the precise moment when the goods attained lawful placement in the market. In relation to refurbished goods, it is important to assess the lawfulness of the refurbishing activities.

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[120] Schinckus (n 117).
[121] Clarke (n 118).
[122] ibid.
[123] Anne Rose, 'Blockchain: Transforming the registration of IP rights and strengthening the protection of unregistered IP rights' (*WIPO*, July 2020) <https://www.wipo.int/wipo_magazine_digital/en/2020/article_0002.html> accessed 29 April 2024.
[124] Martinovic (n 24).
[125] Regulation (EU) 2017/1001 of the European Parliament and the Council of 14 June 2017 on the European Union trade mark (codification) [2017] OJ L 154, art 15 (1).

3.2.1. Initial Placement of a Good on the Market

The digital fingerprint of the blockchain, namely the hash value, is an important element in monitoring trademarked goods using blockchain.[126] If any transaction involving a trademarked good occurs, a hash of the work is incorporated into the transaction. Once this transaction is verified in line with blockchain protocol, namely mining the transaction into a block, it is timestamped, and its content is encoded onto the blockchain.[127] Consequently, details regarding transactions and any alterations, along with their respective timings, are integrated into the blockchain and cannot be changed. As such, the information pertaining to the trademarked good can be permanently recorded in the blockchain database, providing an easy verification method for any interested party.

From the abovementioned, one may envisage that blockchain could serve as a time stamp for transactions. EU law governing electronic transactions covers time stamping,[128] and stipulates that a qualified time stamp must meet the following conditions: (1) it connects the date and time to data in a way that prevents, to a reasonable extent, undetectable changes to the data, (2) it is based on an accurate time source synchronised with Coordinated Universal Time (UTC), and (3) it is signed using an advanced electronic signature or an equivalent method.[129]

Blockchain time stamps seem to be capable of fulfilling the requirements of a qualified time stamp, albeit with some considerations. Firstly, blockchain connects the date and time to data by incorporating them into each block of the blockchain, recording the exact time a block is added.[130] The cryptographic hash of each preceding block is included in the subsequent block, making it

[126] Tarun Kumar Agrawal and others, 'Blockchain-based framework for supply chain traceability: A case example of textile and clothing industry' (2021) 154 Computers & Industrial Engineering 1.
[127] Alexander Savelyev, 'Copyright in the blockchain era: Promises and challenges' (2018) 34 Computer Law & Security Review 550.
[128] Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC [2014] OJ L 257/73, art 1 (c).
[129] ibid art 42 (1).
[130] Saveen Abeyratne and Radmehr Monfared, 'Blockchain Ready Manfufacturing Supply Chain Using Distributed Ledger' (2016) 5 International Journal of Research in Engineering and Technology 1.

computationally infeasible to alter any previous block without it being detected.[131] This ensures data integrity. Secondly, blockchains are normally based on an accurate time source connected to UTC, standardising the time reference for all parties.[132] Thirdly, blockchain transactions are signed using cryptographic signatures using public and private key pairs.[133] Each party in the network has a unique private key used to sign transactions, while the corresponding public key is used to verify the signature's authenticity.[134] EU law has foreseen that innovative technologies may provide an equivalent security for time stamps. Thus, when using methods other than advanced electronic seals or signatures, the qualified trust service provider must prove that the security level is equivalent.[135]

If blockchain timestamping is deemed a qualified time stamp, the time stamp recorded would be legally recognised and verifiable. However, even if blockchain time stamps were to not be recognised as such, it would not necessarily diminish the underlying reliability and integrity of the technology. Specifically, the immutability inherent in blockchain still ensures a secure and tamper-proof record of the moment a good was lawfully placed on the market.[136] This could reduce uncertainties and disputes concerning whether trademark rights have been exhausted.

As a result, the use of blockchain could reduce uncertainties for re-sellers pertaining to the moment a right was exhausted and could provide invulnerable records that trademark proprietors may use to enforce their rights if an infringement has occurred. However, when dealing with exhaustion, it is also necessary to establish whether the legitimate reasons exception applies. Thus, blockchain can reduce uncertainties on whether exhaustion has occurred, but it cannot provide a definite answer.

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[131] Esthon Medeiros, 'Blocks, Chains, and Hashes' (*Medium* 30 November 2023) <https://medium.com/@esthon/blocks-chains-and-hashes-b3bc323b978e> accessed 2 May 2024.
[132] DexTools, 'UTC Time' (*DextTools*) https://info.dextools.io/crypto-glossary/utc-time/ accessed 2 May 2024.
[133] Julia Hugendubel, 'Blockchain Technology and Intellectual Property – A basic introduction' (2021) SSRN Electronic Journal <http://dx.doi.org/10.2139/ssrn.3917801> accessed 2 May 2024.
[134] ibid.
[135] Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC [2014] OJ L 257/73, recital 62.
[136] Goncalves Marchione Talita, 'Digital Exhaustion and the Implementation of Blockchain E-Books' (Master's Thesis, Munich Intellectual Property Law Center 2018).

3.2.2. Lawfulness of Refurbishing Activities

In relation to refurbished goods, the key issue concerns the extent to which de-branding, re-branding, and co-branding can mitigate infringement liability. If apprehensions regarding lawful refurbishment persist, traders may be discouraged from trading refurbished goods due to uncertainties surrounding potential trademark law infringements.[137] From a sustainability perspective, these uncertainties should be resolved with a view to facilitating a circular economy. Previously, removing all trademarked signs from a good would generally avoid any disputes of trademark infringement.[138]

However, in the 2018 *Mitsubishi* judgement, the CJEU held that trademark proprietors can object to a third party removing all the signs equal to their trademark and attaching other signs on the products with the intention of importing them or trading them in the EEA where they have not been marketed before.[139] More recently, in the *Audi* case, the CJEU stated that a car manufacturer can prevent the use of a sign that is identical or similar to its trademark for spare parts.[140] The Court , furthermore, clarified that the repair clause generally does not apply to trademark law and cannot restrict trademark protection, and that trademark law is applicable irrespective of the use's purpose.[141] These cases illustrate that refurbishing activities that have previously been thought of as perfectly legal may encounter a scenario in which they are not. This creates uncertainties regarding the extent to which refurbishing activities are lawful.

Nevertheless, blockchain does not seem to be a feasible solution to reduce these uncertainties. Firstly, the lawfulness of refurbishing activities will depend on the specific circumstances of each case. Blockchain can provide transparent and immutable records of transactions, including transactions related to refurbishing, but it does not possess the capability to assess the legality of such activities. Blockchain is a tool for recording and verifying transactions, not for interpreting and applying trademark laws. As such, providing clarity regarding the lawfulness of these activities falls more within the purview of the CJEU. The use

[137] Geiregat, 'Trading Repaired and Refurbished Goods' (n 3).
[138] ibid.
[139] Case C-129/17 *Mitsubishi* [2018] ECLI:EU:C:2018:594, para. 52.
[140] Case C-344/22 *Audi (Support d´emblème sur une calandre)* [2024] ECLI:EU:C:2024:76, para. 60.
[141] ibid paras. 13-14 and 59.

of blockchain in this context seems limited and would likely be confined to providing information about the transactions about the goods and the refurbishing.

Blockchain can be somewhat valuable for trademark proprietors. Due to the transparent and immutable features of blockchain, the technology offers a promising tool for enhancing market transparency.[142] In theory, when a product is refurbished, the blockchain can document the details of this process, including who performed the refurbishment, what specific changes were made, and when these changes occurred. This record could be a valuable tool for trademark proprietors seeking to enforce their rights, as it provides a detailed and verifiable history of the good's lifecycle.

The implementation of a system where all the above-mentioned details of a good are recorded does not, albeit, seem feasible in practice, at least not yet. Refurbishing activities encompass a wide range of processes, by a wide range of people.[143] For example, if an average consumer buys a designer purse, paints it, and re-sells it, they will need to record this modification on the blockchain. It does not seem realistic for the average consumer to engage with blockchain in this scenario. Not only do they not have any apparent incentives to do so, but the complex nature of the technology makes it seem like an unreasonable expectation.

In case the refurbishing is done by a professional repairer, the situation might be slightly more realistic, as they would perhaps have the incentive and resources to maintain accurate records for warranty, liability, and consumer trust purposes. However, even for professional repairers, implementing blockchain would likely require considerable investments in new technology and knowledge. This could be a significant challenge, especially for independent repairers or other small companies with smaller budgets.[144] Additionally, if the refurbishment activities were to infringe trademark laws, the repairers would be in a position where they would essentially be volunteering information that could make them liable. Moreover, while blockchain would ensure immutability, the writer is

[142] Abirami Raja Santhi and Padmakumar Muthuswamy, 'Influence of Blockchain Technology in Manufacturing Supply Chain and Logistics' (2022) 6 (1) Logistics <https://doi.org/10.3390/logistics6010015> accessed 19 May 2024.
[143] Conversation Wiki, 'Refurbishment' (*DesigningBuildings,* 3 August 2022) <https://www.designingbuildings.co.uk/wiki/Refurbishment> accessed 14 May 2024.
[144] Onkar Singh 'Blockchain in trademark and brand protection, explained' (*Cointelegraph,* 16 March 2024) <https://cointelegraph.com/explained/blockchain-in-trademark-and-brand-protection-explained> accessed 15 May 2024.

currently not aware of any obvious issues with traditional record-keeping of the information pertaining to the goods that warrant the implementation of blockchain in this respect.

4. CONCLUSION

This thesis has aimed to answer the following research question: "How do trademark proprietors enforce their rights against the sale of second-hand and refurbished goods under the EUTM in light of sustainability efforts and how can blockchain technology strengthen such enforcement?". In doing so, this thesis has examined the EUTMR. As has been seen, Article 9 EUTMR confers exclusive rights upon trademark proprietors that enable them to enforce their rights against unauthorised use of their mark. This thesis has argued that the exclusive rights of trademark proprietors put proprietors in an initially strong position as it empowers them to control the commercial distribution of their mark.

However, this strong position is somewhat mitigated by the exhaustion doctrine outlined in Article 15 EUTMR. The exhaustion doctrine seems to seek a balance between the rights of trademark proprietors and the need for tradable goods. In relation to second-hand goods, the doctrine generally seems to facilitate a circular economy with such goods typically sold without significant changes to the original condition. However, the broad wording of the legitimate reasons exception remains a challenge.

Moreover, in relation to refurbished goods, trademark proprietors seem to have better chances at enforcing their rights. When traders engage in substantive refurbishing activities, either as a repair service or by buying, renewing, and reselling goods, the lawfulness of their activities becomes more uncertain. The law seems to allow trademark proprietors to frequently challenge this lawfulness. This thesis argues that these uncertainties should be resolved to better facilitate sustainable refurbishing practices. Lastly, the broad nature of the legitimate reasons exception further undermines sustainability efforts. The lack of a clear division between lawful and infringing refurbishment activities exacerbates uncertainties and may deter traders from engaging in such activities, at the expense of sustainability considerations.

In answering the question as to whether blockchain technology can be a tool to strengthen trademark enforcement in the context of second-hand and refurbished goods, the technology's potential applications in this area have been discussed. In essence, this thesis argues that blockchain can enhance market transparency and provide immutable records of when a good has been placed on the market and record the rest of the good's life cycle, including any alterations the good has undergone. However, while blockchain could potentially be employed in the context of enforcing trademark rights against second-hand and refurbished goods, this use does not currently seem desirable or feasible.

Firstly, it does not address the legal ambiguities surrounding the legitimate reasons exception nor the uncertainties concerning lawful refurbishing activities. Secondly, blockchain involves a huge societal cost due to its substantial carbon footprint. As a result, the advantages of using blockchain in this context seem to be outweighed by the disadvantages. Trademark law already provides trademark proprietors with extensive powers to enforce their rights, which can be argued to undermine efforts to promote sustainability in the first place. Integrating blockchain into this framework thus seems to worsen the case for sustainability in EU trademark law.

Thus, this thesis concludes that blockchain is not a viable tool for enforcing trademark rights against second-hand and refurbished goods. Its current positive impacts seem limited and do not address the core legal uncertainties that remain with second-hand and refurbished goods. Therefore, the thesis suggests that instead of employing blockchain, a more balanced approach to EU trademark law should be developed. Guidance should be given regarding the limits of lawful refurbishing activities when it comes to refurbished goods. In the context of second-hand goods, the legitimate reasons exception should be clarified and perhaps narrowed down.

As such, there are several areas for future research to focus on. Firstly, the need for clearer guidelines on what constitutes lawful refurbishing activities should be given further attention. This includes elaborating on the existing legislation and case law that address the extent and type of alterations that can be lawfully made to goods while discussing how the law can promote more clarity on the matter. Secondly, research should further discuss the scope of the legitimate reasons exception and examine how this exception can be applied consistently to

support both the rights of trademark proprietors and sustainability goals. While researchers cannot replace the role of the CJEU in clarifying and interpreting the law, it can bring about valuable discussions on these matters. Finally, potential alternative technologies or methods that can enhance transparency and traceability in the market for second-hand and refurbished goods without the significant environmental impact associated with blockchain should be explored. Addressing these issues may help create a legal environment that better balances the protection of trademark rights with the promotion of sustainable practices.

Online Dispute Resolution Initiatives

Elif Aytekin[1]

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TABLE OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
AI	Artificial Intelligence
B2C	Business to Consumer
C2B	Consumer to Business
eADR	Online Alternative Dispute Resolution
EEA	Economic European Area
EU	European Union
ICODR	The International Council for Online Dispute Resolution
iDR	Internet Dispute Resolution
oADR	Online Alternative Dispute Resolution
ODR	Online Dispute Resolution

1. INTRODUCTION

Law, at its core, is intrinsically linked to the resolution of disputes.[2] However, traditional dispute resolution within the legal system is costly and time-consuming.[3] Therefore, there has been a significant increase in the usage of alternative dispute resolution (ADR) methods in recent years.[4] ADR encompasses various non-traditional ways to resolve disputes without a trial such as by arbitration, mediation, and neutral evaluation; hence, offering a more efficient and cost-effective approach to traditional dispute resolution.[5] In the sphere of ADR, online dispute resolution (ODR) has established itself as a prominent and promising means for resolving disputes. ODR initiatives have drawn a lot of interest as a potential alternative to traditional dispute resolution methods. However, there is no single definition that universally applies to all ODR. Some definitions emphasise its role in dispute resolution, defining ODR as a type of dispute resolution that makes use of technology to help parties settle their disputes.[6] Others highlight its self-help mechanisms, such as online tools, defining ODR as the use of technology to provide information, facilitate communication between parties, and enhance self-help.[7] In this study, both approaches are combined to define ODR comprehensively. Thus, ODR is defined as utilising technology to assist parties in dispute resolution, while encompassing self-help tools to provide information and facilitate communication between involved parties. The synonyms for ODR include electronic ADR (eADR), online ADR

[2] Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) p. 13.
[3] Bruno Deffains, Dominique Demougin and Claudine Desrieux, 'Choosing ADR or litigation' (2017) 49 International Review of Law and Economics 33 pp. 33-40.
[4] Hibah Alessa, 'The role of Artificial Intelligence in Online Dispute Resolution: A brief and critical overview' (2022) 31 Information & Communications Technology Law 319 pp. 319-342.
[5] 'What is ADR?' (New York State Unified Court System) <https://ww2.nycourts.gov/ip/adr/What_Is_ADR.shtml> accessed 3 February 2024.
[6] Karolina Mania, 'Online dispute resolution: The future of justice' (2015) 1 International Comparative Jurisprudence 76 pp. 76–86; Melissa Conley Tyler and Mark McPherson, 'Online Dispute Resolution and Family Disputes' (2006) 12 Journal of Family Studies 165 pp. 165-169; 'Online Dispute Resolution' (Resolution Systems Institute) <www.aboutrsi.org/special-topics/online-dispute-resolution> accessed 3 February 2024.
[7] Charlotte Austin, 'An introduction to online dispute resolution (ODR), and its benefits and drawbacks' (2017) Government Centre for Dispute Resolution 3 p. 3; David Allen Larson, 'The Future of Online Dispute Resolution (ODR): Definitions, Standards, Disability Accessibility, and Legislation' (2022) 8 City University of Hong Kong Law Review 73 pp. 73-99; Orna Rabinovich-Einy and Ethan Katsh, 'Digital Justice Reshaping Boundaries in an Online Dispute Resolution Environment' (2014) 1 International Journal of Online Dispute Resolution 5 p. 6.

(oADR) and Internet dispute resolution (iDR).[8] The main methods used in ODR are arbitration, mediation, and negotiation, which are facilitated through tools like artificial intelligence (AI) dispute resolution, online courts, and platforms providing online mediations and arbitrations. In addition to dispute resolution mechanisms, ODR systems can also include online forums and chat support services to assist users with inquiries and provide necessary information. These chat support services may be operated by human agents and AI-powered chatbots.[9]

Furthermore, previous approaches have varied in tier analysis of ODR initiatives. Some research emphasised the importance of having clear standards that apply to ODR platforms, such as accessibility, fairness, and transparency, while others discussed the history of ODR.[10] Moreover, several studies focused on identifying the advantages and disadvantages of ODR, as outlined in Section 2.1. Previous research has shown that having clear standards that apply to ODR platforms plays a vital role in ensuring consistency and fairness in the dispute resolution process.[11] The International Council for Online Dispute Resolution (ICODR) has developed a set of non-binding interdependent standards intended to be applied as a collective set of rules. Accordingly, ODR platforms must be accessible, accountable, competent, confidential, equal, fair, and impartial, legal, secure, and transparent.[12] By creating rules that support trustworthy dispute resolution procedures and international collaboration, the ICODR fosters ethical and efficient ODR.[13]

In addition, some research discussed that analysing the historical context of ODR is essential to comprehend the reasons behind the establishment of the ODR initiatives.[14] The origin of ODR is strongly linked to the history and evolution of digital interactions, notably within commercial transactions. ODR came into existence as the frequency of online interactions increased, resulting in

[8] Mania (n 6) pp. 165-169.
[9] 'When You Can't Meet in Court: Pros and Cons of Online Dispute Resolution' (Lexis Nexis) <www.lexisnexis.com.au/en/COVID19/blogs-and-articles/when-you-cant-meet-in-court-online-alternative-dispute-resolution-during-coronavirus-covid19> accessed 3 February 2024.
[10] Larson (n 7) pp. 73-99; Mania (n 6) pp. 165-169.
[11] ibid.
[12] 'Standards' (International Council for Online Dispute Resolution) <https://icodr.org/standards/> accessed 3 February 2024.
[13] 'About ICODR' (International Council for Online Dispute Resolution) <https://icodr.org/about-icodr/> accessed 19 December 2024.
[14] Mania (n 6) pp. 165-169.

a proportional rise in disputes. This escalated the need for resolving disputes in the online sphere, hence prompted the development of ODR mechanisms.[15] The evolution of ODR has gone through four main stages.[16] During the first stage, which lasted from 1990 to 1996, electronic solutions were being tested. The second stage, spanning from 1997 to 1998, witnessed rapid improvement of ODR and the establishment of the first commercial websites providing services in this field. During the third stage, between 1999 and 2000, due to the significant economic advancement, particularly in the IT services sector, numerous companies started electronic dispute resolution initiatives. Nevertheless, a significant portion of these enterprises have already ceased operations. The fourth stage, where the year was 2001, signalled the start of an institutional era. In this stage, ODR approaches were first implemented in institutions including administration authorities and courts.[17] It is also crucial to highlight that in this era, ODR has become critically important, particularly with the advancement of technology and AI.

Although ODR initiatives have drawn a lot of interest recently, there is still a lack of information about the underlying mechanisms of ODR and a lack of understanding of how to make a successful ODR platform. Therefore, it is highly relevant to analyse the development of the systemisation and efficiency of ODR systems. In this respect, this research paper will focus on ODR initiatives, more specifically the services offered and the motivation of the individuals behind it. It will also examine the factors that contribute to both their successes and challenges. Additionally, the paper will analyse several ODR initiatives and investigate what made them able to continue or not. It is also essential to mention that the paper will be limited to ODR initiatives within the European Economic Area (EEA).[18] In this light, this paper aims to answer the following question: *"What are the factors that influence the successes and challenges of online dispute resolution initiatives in the European Economic Area?"* In order to fully answer the research question of the paper, first, the background of ODR will be analysed by discussing

[15] Resolution Systems Institute (n 6).
[16] Mania (n 6) pp. 165-169.
[17] ibid.
[18] 'EU, EEA, EFTA and Schengen Area countries' (Government of the Netherlands) <www.government.nl/topics/european-union/eu-eea-efta-and-schengen-area-countries> accessed 3 February 2024.

ODR's advantages and disadvantages, and the European Union (EU) legal framework of ODR. Then, the method of the paper will be explained in detail. Afterwards, the obtained results will be evaluated. Subsequently, the discussion of the results will be made, and limitations of the paper and the interviews will be examined.

The methodology of this paper employs both doctrinal and empirical approaches. First, an overview of ODR providers within the EEA was created using the ODR providers listed on the European Commission's ODR Platform, which represents the doctrinal analysis component.[19] Second, based on this list, interviews were conducted with these ODR providers, and their responses were analysed anonymously to understand the factors influencing the successes and challenges of ODR, which constitutes the empirical component. Greater emphasis was placed on identifying the challenges that arise in ODR processes. This approach provides insights into the factors shaping the successes and challenges of ODR initiatives in the EEA, thereby addressing the research question of the paper. Hence, this paper offers a crucial understanding of the usefulness of ODR within the EEA context.

2. Online Dispute Resolution

In this particular section, the advantages and disadvantages of ODR will be explained in turn. This approach of analysing both the advantages and disadvantages of ODR aims to comprehensively explore the positive and negative aspects while highlighting the dynamics of ODR initiatives.

2.1. Advantages of Online Dispute Resolution

ODR offers a range of advantages compared to the traditional dispute resolution methods. One of the primary advantages of ODR lies in its cost-saving nature, which is an important aspect considering the high expenses of traditional dispute resolution mechanisms such as litigation.[20] In litigation, costs can arise from legal representation, court filing fees, administrative expenses, and expert witnesses.[21]

[19] 'Find a solution to your consumer problem' (European Commission) <https://ec.europa.eu/consumers/odr/main/?event=main.home2.show> accessed 3 February 2024.
[20] Deffains, Demougin and Desrieux (n 3) pp. 33-40.
[21] ibid.

In contrast, ODR is known to reduce these litigation costs since using an ODR service generally does not require legal representation, court filing fees, administrative expenses, and expert witnesses.[22] Another reason why ODR excels in the realm of cost management is that it typically entails the shared allocation of process costs among all parties.[23] This collaborative financial participation fosters a heightened sense of ownership and a mutual interest in achieving a favourable resolution.[24] Moreover, ODR emerges as an optimal choice, particularly in scenarios involving high-volume and low-cost transactions. In such cases, ODR provides a more cost-effective dispute resolution since the disputed amounts might not warrant the substantial expenses associated with traditional dispute resolution mechanisms.[25] Therefore, this makes ODR an accessible avenue for parties seeking to resolve their dispute without incurring financial burdens.

Furthermore, ODR offers the benefits of timesaving and flexibility, which are crucial components in dispute resolution. ODR services can be either synchronous or asynchronous.[26] Synchronous ODR systems function in real-time, similar to a virtual court hearing or live mediation session. In contrast, asynchronous ODR systems enable individuals to obtain the service at their leisure whenever it is suitable for them, such as through online messaging platform or email-based mediation.[27] Asynchronous ODR services, in particular, offer time-saving and flexibility since parties do not need to finish the dispute resolution procedure in its entirety in one sitting.[28] This flexibility further extends to eliminate the need for scheduling meetings. The parties can take part in dispute resolution when they are available without having to schedule the time and place of the meeting.[29] Ultimately, this makes ODR an attractive option for parties seeking efficient dispute resolution.

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[22] Austin (n 7) p. 3.
[23] 'Dispute Resolution Reference Guide' (Government of Canada, 25 August 2022) <www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/10.html#iv> accessed 3 February 2024.
[24] ibid.
[25] 'Advantages and Disadvantages of ODR' (VIA Mediation Centre) <https://viamediationcentre.org/readnews/OTE1/Advantages-and-Disadvantages-Of-ODR> accessed 3 February 2024.
[26] Resolution Systems Institute (n 6).
[27] Austin (n 7) p. 3.
[28] ibid.
[29] 'The WWW Main Street of the Future is Here Today' (Mediate) <https://mediate.com/the-www-main-street-of-the-future-is-here-today/> accessed 3 February 2024.

Moreover, ODR demonstrates remarkable utility in addressing situations concerning interpersonal sensitivities. This is particularly relevant in cases such as matrimonial issues, where the physical co-presence of the parties is undesirable.[30] In such cases, ODR allows parties to communicate remotely via video calls or online chat, hence reducing the emotional strain associated with in-person meetings. In this line, ODR effectively mitigates these sensitivities, thereby offering a viable and practical alternative for dispute resolution.

Another key advantage of ODR lies in its ability to overcome geographical barriers caused by transportation limitations, mobility issues, and disabilities.[31] This approach significantly enhances flexibility as well, since there is no need to travel long distances to resolve disputes. Hence, it enables the participation of parties who might otherwise face challenges attending in-person proceedings. This inclusivity extends to individuals struggling with face-to-face interactions, for instance, individuals with Autism Spectrum Disorder.[32] In this regard, ODR services provide a more accessible and fair dispute resolution mechanisms.

Overall, ODR also plays a significant role in increasing access to justice by raising the accessibility of dispute resolution. By removing barriers caused by economic status, interpersonal sensitivities, and geographical isolation, ODR services enhance access to justice.[33] Therefore, ODR platforms can offer a more accessible, effective, and convenient means of dispute resolution mechanism compared to the other types of dispute resolution methods.

2.2. Disadvantages of Online Dispute Resolution

While ODR presents numerous advantages, it is essential to acknowledge that, like any approach, it also has several disadvantages. One of the primary drawbacks of ODR is the need for having adequate technology to take part in the dispute resolution procedure.[34] Technology is used in ODR services by nature, nevertheless, for certain individuals, this can be problematic since they cannot

[30] VIA Mediation Centre (n 25).
[31] Lexis Nexis (n 9).
[32] Roland Troke-Barriault, 'Online Dispute Resolution and Autism Spectrum Disorder: Levelling the Playing Field in Disputes Involving Autistic Parties' (2015) 6 Western Journal of Legal Studies 1, p. 1.
[33] Tyler and McPherson (n 6) pp. 165-169.
[34] Government of Canada (n 23).

access or use the necessary technology. This digital divide is caused by numerous factors, such as educational level, disability, age, and socio-economic situation.[35]

Additionally, ODR can jeopardise the confidentiality of sensitive information, particularly when processing data through third-party applications.[36] Although traditional dispute resolution mechanisms do not produce a physical record of the litigation procedure, ODR generates an electronic one.[37] The electronic record might make it possible for one party to print and distribute the records of the other parties without their knowledge. Eventually, this could impede the growth of transparent interactions in ODR processes, particularly if the platform's security measures are insufficient or if third-party applications are involved.[38]

Moreover, ODR may also lead to the absence of accountability, regulation, and guidelines.[39] The advancement of ODR may outpace the legal frameworks, making it more difficult to set precise regulations and guidelines for accountability.[40] In this line, the deficiency in accountability is particularly significant due to the concept of open justice. This concept refers to the principle that judicial proceedings and outcomes must be transparent and accessible to the public.[41] Consequently, the courts and their judgements must be open to public scrutiny, and ODR poses a risk of loss of accountability since it may compromise transparency and public oversight.[42]

Furthermore, a prominent drawback of ODR is the absence of human insight. ODR services, especially AI-based ODR platforms, might fail to assess factors related to the abstract characteristics of negotiating parties or emotional

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[35] Eugene Clark, George Cho and Arthur Hoyle, 'Online Dispute Resolution: Present Realities, Pressing Problems and Future Prospects' (2003) 17 International Review of Law, Computers & Technology 7, pp. 7-21.
[36] Lexis Nexis (n 9).
[37] 'Privacy statement if I'm a consumer' (European Commission) <https://ec.europa.eu/consumers/odr/main/?event=main.privacyForConsumer2.show> accessed 3 February 2024.
[38] Ethan Katsh, 'Dispute Resolution in Cyberspace' (1996) 28 Connecticut Law Review 953, pp. 971-972.
[39] Lexis Nexis (n 9).
[40] 'AI and jurisdiction' (Digwatch) <https://dig.watch/topics/jurisdiction> accessed 3 February 2024.
[41] 'Open justice' (Australian Law Reform Commission, 31 July 2015) <www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-interim-report-127/10-fair-trial/open-justice/> accessed 19 December 2024.
[42] Keynote speech by Sir Ernest Ryder, Securing Open Justice, Max Planck Institute Luxembourg for Procedural Law & Saarland University, 2018.

reactions, which are pivotal elements that influence dispute resolution.[43] In this regard, the lack of personal presence in ODR systems may make it difficult for the parties in the dispute resolution process to express their emotions, especially when the ODR system is based on communication via text. In the legal sector, emotions, body language, and tone of voice are crucial for understanding nuances, assessing credibility, and facilitating empathy between parties. The absence of these elements in ODR may result in less emotional engagement or a limited understanding of the perspectives of the parties. Moreover, AI-based ODR platforms encounter limitations in handling complex situations and legal cases, where emotions are involved due to the deficiency in human insight.[44]

Another disadvantage is the lack of governance of ODR systems.[45] Accordingly, two primary issues arise from the lack of governance of ODR services. First, the individuals may lose trust in ODR systems since insufficient governance might lead ODR to be open for misappropriation and unethical behaviour. Second, there might be inadequate safeguards to guarantee that ODR providers are operating morally and responsibly. The latter is caused by the absence of proper regulation and governance in the ODR sector.[46] Consequently, ODR systems have the potential to detrimentally impact dispute resolution, given their current incapacity to navigate certain fundamental justice norms such as transparency, impartiality, and the right to a fair hearing.[47] It can be argued that if ODR platforms are not carefully designed, then various problems might arise pertaining to how users interact with them. Therefore, it is evident that while ODR presents innovative solutions, a judicious approach is necessary to mitigate the drawbacks of ODR and ensure an equitable dispute resolution framework.

3. Legal Framework

There are two main legal frameworks with regard to ODR, which are the Directive 2013/11/EU on ADR for Consumer Disputes and the Regulation No 524/2013 on

[43] Alessa (n 4) pp. 319-342.
[44] Austin (n 7) p. 3.
[45] Thomas Schultz, 'Does Online Dispute Resolution Need Governmental Intervention? The Case for Architectures of Control and Trust' (2004) 6 North Carolina Journal of Law & Technology 71, p. 71.
[46] Austin (n 7) p. 3.
[47] ibid.

ODR for Consumer Disputes. In this section, an analysis of these two frameworks will be made in order to explore their influence on ODR. By doing so, their relationship with the European Commission's ODR Platform and ODR initiatives in this platform will be examined, as this particular platform is based on these two legal frameworks.

3.1. Directive 2013/11/EU on ADR for Consumer Disputes

The Directive 2013/11/EU on ADR for Consumer Disputes was drafted in order to address the issues raised by consumers about the goods and services bought within the internal market of the EU. The Directive seeks to enhance dispute resolution processes by offering a system of alternative possibilities for resolution and online resources regarding out-of-court procedures.[48]

The scope of the Directive is outlined in Article 2. Accordingly, the Directive is applicable to processes concerning the out-of-court dispute resolution of domestic and cross-border conflicts. This involves contractual duties arising from sales or service agreements between a consumer and trader based in the EU. Additionally, the guiding principles regarding the procedures for resolving consumer disputes outside of court are the principles of impartiality, transparency, effectiveness, fairness, liberty, and legality as established in Articles 7-11 of the Directive. Accordingly, Member States of the EU must ensure that ADR bodies are not subject to any instructions from anyone, are publicly available on their websites, easily accessible, fair in decision-making, and in line with the rule of law. Furthermore, in accordance with the Directive, the consumers can file a complaint by using an electronic platform that is available in all official EU languages. [49] This electronic platform forms the basis of the European Commission's ODR Platform, which is established based on Article 20(2) of the Directive.[50]

[48] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) [2013] OJ L165/63.
[49] Mania (n 6) pp. 165-169.
[50] European Commission (n 19).

3.2. Regulation No 524/2013 on ODR for Consumer Disputes

Regulation No 524/2013 on ODR for Consumer Disputes was also created to deal with consumer problems that are related to the goods and services purchased within the internal market of the EU. Similar to Directive 2013/11/EU, this Regulation is also aimed at strengthening the process of dispute resolution by establishing a network of alternative methods of dispute resolution and online resources for out-of-court procedures.[51] Importantly, the Regulation must be considered in conjunction with the Directive 2013/11/EU as stated in the Recital 16 of the Regulation. This interconnectedness is fundamental to comprehending the framework designed for dispute resolution within the EU.

The scope of the Regulation lies in Recital 9 and Article 2 of the Regulation. Accordingly, this Regulation applies to the out-of-court resolution of disputes regarding the contractual obligations resulting from online sales or service agreements between a consumer and trader in the EU. In this line, the scope of the Regulation is directly linked to Article 20(2) of Directive 2013/11/EU with the exception of the conflicts between consumers and traders resulting from offline sales or service contracts as highlighted in Recital 15 of the Regulation.[52] Additionally, this Regulation in conjunction with the Directive 2013/11/EU forms the foundation for the European Commission's ODR Platform.[53]

3.3. European Commission's Online Dispute Resolution Platform

The European Commission has developed an ODR Platform in order to help consumers effectively solve their disputes. Consumers can use this platform in two main situations. First, the individuals can use the platform to communicate with the trader directly to settle the disputes, such as issues related to financial services or internet fraud. In this circumstance, they have 90 days to come to a decision. Second, individuals can choose to have their dispute resolved by a dispute resolution body, with a 30-day period to select which specific dispute resolution body to use. There are also three specific requirements to use this ODR platform.

[51] Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) [2013] OJ L165/1.
[52] Mania (n 6) pp. 165-169.
[53] European Commission (n 19).

First, the individual must live in one of the EEA countries, which are the EU countries, Norway, Iceland, and Liechtenstein. Second, the trader has to be based in the EEA. Third, the individual's complaint must be regarding a good or service that is bought online.[54]

Furthermore, within the European Commission's ODR Platform, there are 430 ADR bodies that offer out-of-court settlement procedures. These ADR bodies are either specialised exclusively in ADR or offer a combination of ADR and ODR services. Additionally, all of the bodies listed in the European Commission's ODR Platform have received approval for meeting quality requirements, including fairness, efficiency, and accessibility. Moreover, each dispute resolution body has its own policies, guidelines, and processes, which are typically more affordable and faster than court proceedings. The dispute resolution bodies differ based on the country that the trader based in and the nature of the complaint.[55]

In addition, the European Commission has incorporated a website within its ODR platform. This website assists individuals by posing several questions related to their consumer problem. These questions include the residence of the individual, the location of the trader, the way of purchasing the goods or services, whether online or not via shop, door-to-door, and mail order, previous attempts by the individual to contact the trader, usage of a dispute resolution body, legal actions taken, and the nature of the individuals' issue. Based on the responses of the individuals, the website leads them to relevant bodies to help with their consumer problem. This approach is generally more cost-effective and quicker than going to the court. Therefore, the European Commission's ODR Platform offers a more effective and efficient dispute resolution process compared to the traditional methods. In this line, the establishment of this ODR platform reflects the EU's dedication to protecting consumers by providing an accessible place to resolve disputes.[56]

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[54] 'Resolving your dispute on the ODR platform' (European Commission) <https://ec.europa.eu/consumers/odr/main/?event=main.complaints.screeningphase> accessed 3 February 2024.
[55] 'Dispute resolution bodies' (European Commission) <https://ec.europa.eu/consumers/odr/main/?event=main.adr.show2> accessed 3 February 2024.
[56] 'Tell us about your consumer problem' (European Commission) <https://ec.europa.eu/consumers/odr/main/?event=main.home.selfTest> accessed 3 February 2024.

Despite the numerous advantages of the European Commission's ODR Platform, it will be discontinued for several reasons.[57] One of the primary factors is the rise in cross-border e-commerce involving traders located outside the EU. It is estimated that 45.5 million EU citizens engage in cross-border e-commerce with sellers outside the EU.[58] However, the European Commission's ODR Platform can only be utilised when both the consumer and trader are based in one of the EEA countries. Consequently, the increased cross-border e-commerce hinders individuals from using this platform. Another contributing factor is the increased use of private ODR systems. A rising number of platform operators offer private ODR services, which are easy to use. Hence, individuals prefer submitting their claims via these ODR platforms rather than the European Commission's ODR Platform. As a result, there is a low number of cases submitted through the European Commission's ODR Platform.

Furthermore, a lack of awareness serves as another factor contributing to the discontinuity of the European Commission's ODR Platform. This lack of awareness prevents consumers and traders from participating in ODR procedures. 43% of traders in the EU are unaware that ADR exists as a way to settle issues with customers.[59] Overall, these reasons make it economically challenging for the European Commission to sustain this platform.

3.4. Online Dispute Resolution Initiatives

As discussed in **Section 3.3**, there are several ODR providers in accordance with the European Commission's ODR Platform. These ODR providers differ based on the country that the trader is located in and the complaint that relates to the sector. The ODR initiatives, accessible through the European Commission's ODR Platform, span diverse sectors, including consumer goods, education, energy and water, financial services, general consumer services, health leisure services, postal

[57] 'Council calls for the closure of the ODR platform and its replacement with a better tool' (Council of the European Union, 19 November 2024) <www.consilium.europa.eu/en/press/press-releases/2024/11/19/council-calls-for-the-closure-of-the-odr-platform-and-its-replacement-with-a-better-tool/> accessed 19 December 2024.
[58] European Commission, 'Commission Staff Working Document Impact Assessment Report Accompanying the document Proposal for a Directive of the European Parliament and of the Council Amending Directive 2013/11/EU on alternative dispute resolution for consumer disputes, as well as Directives (EU) 2015/2302, (EU) 2019/2161, and (EU) 2020/1828' COM (2023) 649 final.
[59] ibid.

services and electronic communications, and transport services.[60] These ODR providers are also competent for disputes initiated by consumer-to-business (C2B) or both C2B and business-to-consumer (B2C).[61]

In this section, an examination of various ODR initiatives in the EEA will be conducted. By analysing the focus and impact of these ODR initiatives, a thorough comprehension of ODR initiatives in the EEA will be given. In order to do so, the paper will delve into explanations of the selected ODR providers in the European Commission's ODR Platform. These providers have been carefully selected to represent the diverse regions across Europe, including Austria, Bulgaria, Croatia, Italy, Norway, and Spain.

Firstly, Mediation for Consumer Transactions is a non-profit, publicly funded body that offers ADR and ODR services in Austria, where 98% of its proceedings are done online via its own ODR platform.[62] The entity focuses on consumer law matters in the sectors concerning consumer goods, education, energy and water, financial services, general consumer services, leisure services, postal services and electronic communications, and transport services and is competent for disputes initiated by C2B.[63] According to the statistics on its website, in 2022, an agreement was reached in 64% of its legal cases.[64] Moreover, the 'NAIS' Alternative Dispute Resolution Centre of the National Association for Extrajudicial Settlements is a fully online-based ADR body which offers its services in Bulgaria. It uses its own ODR platform for local disputes and European Commission's ODR Platform for cross-border cases. It is competent for disputes in the sectors of consumer goods, education, energy and water, financial services, general consumer services, health, leisure services, postal services and electronic communications, and transport services and competent for disputes initiated by C2B.[65]

Another ODR initiative is the Conciliation Centre at the Croatian Association for Mediation in Croatia. It engages in ODR and ADR services in consumer conflicts concerning the sectors of consumer goods, education, energy

[60] European Commission (n 55).
[61] ibid.
[62] 'Verbraucherschlichtung' <www.verbraucherschlichtung.at> (Verbraucherschlichtung) accessed 3 February 2023.
[63] ibid.
[64] ibid.
[65] 'Nais' <https://nais.bg> (Nais) accessed 3 February 2024.

and water, financial services, general consumer services, health, leisure services, postal services and electronic communications, and transport services and is competent for disputes initiated by C2B. Its primary dispute-resolution method is mediation, accompanied by facilitation. The mediations are facilitated by an impartial mediator selected by the parties. In 2022, 90% of the conducted mediations ended in the first meeting, which lasted approximately 3 to 4 hours.[66] Additionally, the Arbitrator for Financial Disputes is an ADR body that offers ODR services in Italy. It specialises in investments, securities, investment funds, and non-life insurance, hence competent for disputes in the financial services sector and competent for disputes initiated by C2B.[67] Through the entity's own ODR platform, the consumers have the option to submit claims against financial intermediaries for any violations of their duties to exercise due diligence, behave fairly, and provide transparent information and investment services.[68]

In addition, Complaint Board Concerning Rental of Dwellings is an ODR body in Norway. It provides guidance on tenancy matters to landlords and tenants, thus competent for disputes in general consumer services and competent for disputes initiated by C2B and B2C. The entity resolves the disputes through mediation. Since 2021, the body has conducted 100% of the mediations remotely, with the clear majority happening in online meetings. In 2022, it was reported to have mediated 260 legal cases and settled 83.5% of these cases.[69] Furthermore, the European Consumer Section of the Catalan Consumer Agency is another ODR initiative in Spain that engages with ODR and ADR. Its main way to resolve domestic and cross-border consumer disputes is via mediation and arbitration procedures. In its ODR procedures, its IT tool is used to register public records, where it transfers the inquiry and complaint to the correct consumer office, who then deal with the complaint through its own IT tool. The entity is competent for disputes in the sectors of consumer goods, education, energy and water, financial services, general consumer services, leisure services, postal services and electronic

[66] 'Hum' <https://medijacija.hr> (Hum) accessed 3 February 2024.
[67] 'Arbitro per le Controversie Finanziarie' <www.acf.consob.it/> (Arbitro per le Controversie Finanziarie) accessed 3 February 2024.
[68] ibid.
[69] 'Husleietvistutvalget' <www.htu.no/> (Husleietvistutvalget) accessed 3 February 2024.

communications, and transport services and competent for disputes initiated by C2B.[70]

In addition to the European Commission's ODR Platform, there are also other ODR initiatives in the EEA. There are two important initiatives in the Netherlands, which are *Rechtwijzer uit elkaar* and *Magontslag*. First, *Rechtwijzer uit elkaar* is a Dutch ODR initiative that provides information regarding issues with separation, divorce, rental property, and employment contracts.[71] Its primary tools are online forms, chat functionality, calculation tools, and the capability to seek assistance from an expert.[72] Second, *Magontslag* provides guidance to employers and employees. Regarding the employers, it offers advice concerning dismissal, contract, and transition compensation. Concerning the employees, it assists with the dismissal, contract, rights, and obligations in case of illness, dismissal in case of bankruptcy, wages, and right to unemployment benefits.[73] For instance, an employee who is thinking about quitting can use a series of questions to estimate the impact of dismissal. In this line, *Magontslag*'s tool generates a summary of the reasons, which serve as the foundation for a letter of resignation to be delivered to the employer, as well as a letter to the Social Security agency and a court defence.[74]

Another ODR initiative is *Jur*. It initially started as a dispute resolution tool but has now expanded its mission to promote the development of online communities into thriving Startup Societies and Network States within its Web3 infrastructure. *Jur* is now a crypto-oriented blockchain which contains a series of protocols. In its updated mission, ODR continues to be an integral part of the new framework; however, it now encompasses a broader spectrum of tools, including the dispute resolution module, treasury module, community module, oracle module, and trade module.[75] Its dispute resolution platform is a digital platform that complies with the law, and therefore, the given judgement is enforceable.[76]

[70] 'Agència Catalana del Consum' <https://consum.gencat.cat/ca/inici> (Agència Catalana del Consum) accessed 3 February 2024.
[71] 'Rechtwijzer' <https://rechtwijzer.nl/> (Rechtwijzer) accessed 3 February 2024.
[72] Dory Reiling, 'Beyond Court Digitalization with Online Dispute Resolution' (2017) 8 International Journal for Court Administration 6 p. 8.
[73] 'Magontslag' <https://magontslag.nl/> (Magontslag) accessed 3 February 2024.
[74] Reiling (n 72) p. 8.
[75] 'Jur' <https://jur.io/> (Jur) accessed 3 February 2024.
[76] 'Jur' <https://jur.io/> (Jur) accessed 3 February 2024.

Consequently, there are a range of ODR initiatives in the EEA that focus on different sectors.

4. METHODS

In this section, the method of the following section will be explained. The initial step of this research involves identifying ODR providers within the EEA in order to examine the factors that influence the successes and challenges of ODR initiatives in the region. As stated in **Section 3.3**, the European Commission's ODR Platform encompasses 430 ADR bodies facilitating out-of-court settlement procedures. These bodies are either specialised solely in ADR or offer a mix of ADR and ODR services. Given the absence of a clear distinction on the European Commission's ODR Platform, identifying the ADR bodies that offer ODR services in the EEA is needed. To achieve this, all 430 ADR bodies were contacted via email to inquire whether they provide ODR, ADR or both. Subsequently, a selection process was undertaken based on the responses received to identify the bodies offering ODR services in the EEA.

In the second phase, the identified ODR providers were contacted via email again to ask whether they were willing to spare 30 minutes to 1 hour in order to share their insights regarding ODR in an online meeting. The meetings were conducted with the founder or the lawyer of the ODR providers via an electronic platform. The main focus of the interviews was on the factors that affect the successes and challenges of ODR initiatives in the EEA. Nevertheless, a deeper focus and analyses were given to challenges that arise in ODR processes. For those agreeing to an online meeting, a set of structured questions were asked regarding ODR. The topic list is included in **Appendix 1**. The questions include the main focus and activities of the body, the determinants of a successful ODR, the benefits received from ODR, the factors contributing to the failure of ODR, challenges encountered in ODR usage, and the strategies taken to effectively address these challenges. These questions are carefully chosen to gather extensive information about the experiences, successes, and challenges of ODR initiatives within the EEA. Each question has a distinct function in developing a comprehensive understanding of the effectiveness of ODR in the region.

It is also crucial to highlight that all responses received were treated as anonymous, with no disclosure of the names of the bodies involved. This approach ensures confidentiality and encourages open sharing of information.

5. RESULTS

This section will examine two main results of the research, which are the identified ODR initiatives in the EEA and the results obtained from the interviews conducted with them. First, as described in **Section 4**, the initial phase of the research involved contacting 430 bodies listed on the European Commission's ODR Platform to make a selection for ADR bodies offering ODR services in the EEA. Responses from 62 bodies were received. According to the answers received, there are 26 ODR providers. This indicates that 41% of the bodies are ODR providers. Furthermore, for the purposes of this paper, a table is created to specify these ODR providers. The table includes essential information regarding the country that the ODR provider is based in, the name of the provider, the sectors that the provider focuses on, and the website of the provider. The table is included in **Appendix 2**. Second, these 26 ODR providers were contacted again, and out of 26, a total of 11 providers participated in the interview process. First, the results regarding the determinants of success and benefits of ODR will be mentioned. Later, the failure factors and challenges of ODR will be explained.

With respect to success, each ODR provider was asked about the determinants of a successful ODR and the benefits received from ODR. During interview 1, it was mentioned that a crucial aspect of a successful ODR lies in understanding the needs of the clients in the dispute resolution process. This includes designing ODR platforms from the user perspective and building trust in the process. In interviews 2 and 3, it was highlighted that ODR platforms make the workflow of the bodies more efficient by eliminating the need to contact users via email or phone, contributing to the success of ODR. In addition, during interviews 4 and 5, it was stated that ODR removes the transportation issues for parties and mediators. This becomes particularly important in cross-border complaints since consumers and traders might be located in different places, forming a barrier for parties to solve their disputes. It was stated that mitigating issues pertaining to transportation ensures equality of opportunity by giving every

party the same possibility to solve their disputes, which makes ODR accessible to everyone.

In interview 6, it was mentioned that "90% of the cases that their body deals with relate to online transactions such as airline and hotel bookings, where the consumers and traders are usually located in different cities or countries. With ODR, it becomes easier to solve these issues in an online platform. This shows the benefits of digitalisation." Furthermore, during interviews 7 and 8, the bodies mentioned that the flexibility and time-saving nature of ODR contributes significantly to its success. Online environments enable users to make gradual progress at their own pace, empowering them to make improvements themselves, which are later reviewed by professionals. It was also noted that the flexibility of ODR is crucial because parties have the decision-making power, where they can independently decide on the mediator that they trust, the way proceedings are conducted, the time, and the place. Other types of dispute resolution methods lack this flexibility since they follow their own specific proceedings.

Moreover, in interview 9, it was highlighted that easy navigation of ODR platforms also contributes positively to their success. It was stated that, 'ODR has made it easier for consumers to access our services. Bringing a case to our entity through our online platform makes handling a case easier and faster. Our online platform also allows us to provide the parties more information and better direction on our procedure.' During interview 10, it was highlighted that storing the information in a digital file enhances efficiency for the providers, especially in asynchronous ODR. In this regard, it was also mentioned that this approach enables the providers to address a greater number of cases within the same timeframe and with the existing staff resources. In interview 11, it was emphasised that ODR serves to counteract the potential alienation caused by legal procedures, providing users with a sense of control over the dispute resolution process, which contributes to the success of ODR.

With respect to challenges, each ODR provider was asked about the factors that contribute to the challenges of ODR, challenges encountered in ODR usage, and the strategies taken to effectively address these challenges. In interview 1, it was said that customer acquisition cost is a crucial factor that contributes to the challenge of ODR since advertisement costs are too high to attract customers through online or offline advertising. In this line, it was stated, "the only way

making ODR work is to make the systems mandatory by law. Otherwise, one needs to convince the parties either to put a dispute resolution clause in the contract before the issue happens, or when the dispute arises, one needs to convince both parties to agree to go through ODR. From a business perspective, this reflects the high customer acquisition costs and a big delay due to the process of convincing the people to proceed with ODR. However, in the EU, no government can make ODR mandatory by law, as doing so may undermine access to justice and the right to be heard, despite potentially reducing the costs of the justice system."

Furthermore, during interview 2, an ODR provider mentioned that the challenge of contacting traders significantly impacts the effectiveness of ODR. It was stated that "the major challenge is that traders do respond to complaints submitted through our ODR centre. They do not believe that ODR benefits them. They do not face any kind of penalties because of that since our procedure is voluntary. It is free of charge for consumers, and it is payable by traders. However, whenever we tried to offer them free dispute resolution, just to have a direct impression of how the procedure works and the effect of it, they were not interested either." In interviews 3 and 4, it was mentioned that there is a distrust in ODR providers. When ODR providers contacted the traders, some of the traders suspected that these providers were not legitimate. It was also emphasised that this challenge can be eliminated by educating the consumers and traders about ODR.

In interview 5, it was stated that "it is very easy to attach documents and files to a case using an online portal, which has led to parties attaching more irrelevant material to their statements. This can make reviewing cases difficult and slow. We have addressed this issue by providing more accurate information on what documents are usually relevant in a case." Additionally, in interview 6, it was emphasised that ODR is not the solution for those who are not tech-savvy since these people may face technical difficulties during ODR processes. This particularly includes elderly people since most of them have no computer and no knowledge of how ODR platforms work. It was also noted that this challenge can be solved by educating elderly people about how to use ODR platforms. In addition, during interview 7, an ODR platform mentioned that there is a lack of information about ODR. "Consumers often lack awareness of their right to mediation, let alone online mediation. This is also because of the lack of legal

framework, which can be resolved by raising awareness and setting precise guidelines."

In interviews 8 and 9, it was touched upon that the market is not ready yet for ODR, as the culture of operators remains challenging to match with new digital platforms, and the ODR framework is not fully compatible with digitalisation. Additionally, during interview 10, it was highlighted that participants can easily exit online meetings by clicking the 'leave meeting' option in ODR in case of disagreement. This contrasts with offline procedures, where leaving may be more challenging due to psychological factors. In interview 11, it was stated, 'ODR fails due to credible threat of neutral intervention. There is a strong incentive to participate in court procedures, as the default method for resolving disputes involves seeking assistance from lawyers who are backed by state power. ODR also relies on voluntary participation, resembling the sound of one hand clapping.' Furthermore, in all the interviews, it was touched upon that ODR lacks the human presence that is found in face-to-face mediation, impacting the understanding of each other through tone of voice and body language.

6. Discussion

The primary aim of this research is to explore and understand the factors that influence the successes and challenges of ODR within the EEA. In this regard, 11 interviews were conducted with ODR providers through the European Commission's ODR Platform, focusing on the determinants of the successes and challenges of ODR.

Interpreting the key findings in light of existing literature, there are some success factors that can be mapped to the literature. Firstly, the elimination of transportation issues and the need for physical presence, particularly in cross-border complaints, contribute significantly to the success of ODR. These findings resonate with the literature emphasising the role of ODR in overcoming geographical barriers, especially within the realm of cross-border e-commerce. Moreover, the digital storage of information within an online platform enhances flexibility, aligning with the literature discussing the time-saving nature of ODR. Furthermore, eliminating the need to contact users via email or phone due to the usage of online platforms and the ease with which users can initiate cases through

online environments also resonate with the literature highlighting the time-saving benefit of ODR.

Additionally, online platforms empower users to progress gradually at their own pace, especially in asynchronous ODR. This finding correlates with the literature emphasising the flexibility of ODR. While several findings align closely with existing literature, there are also a few findings that cannot be linked to the literature. The success factors related to designing ODR platforms from a user perspective and offering a sense of control over the dispute resolution process are not explicitly addressed in current literature and highlight potential areas for future research.

In terms of challenges, there are also some factors that can be connected to the literature. The lack of governance and reliance on voluntary participation resonates with the literature discussing the absence of governance, accountability, regulation, and guidelines. These insights also align with the reasons for the discontinuity of the European Commission's ODR Platform. Similarly, the difficulties in contacting the traders due to distrust in ODR providers and lack of awareness about ODR correlate with the reasons for the discontinuity of the European Commission's ODR Platform. In addition, technical proficiency barriers resonate with the literature emphasising the digital divide in ODR usage, where it is indicated that ODR is not accessible to everyone.

Furthermore, the absence of human presence directly aligns with the literature highlighting the lack of human insight into ODR mechanisms. Nevertheless, there are also a few findings that cannot be mapped to the literature. Practical challenges such as customer acquisition costs, unpreparedness of the market for ODR, and document management issues are not extensively addressed in the current literature. Another finding that cannot be directly associated with existing literature includes the possibility for participants to easily exit online meetings, in contrast to offline proceedings. Even though these insights are not mentioned in the current literature, they might be essential factors that contribute to the challenges of ODR and suggest directions for future research.

Moreover, interpreting the main findings, a crucial question arises: Who will drive the evolution of ODR, private or public operators? An argument can be made against public operators leading the evolution of ODR. Public operators usually lack the capacity for innovation, as they are not as transformative as private

operators. Therefore, private operators are more likely to be the game changers for the evolution of ODR.

7. LIMITATIONS

While the research sheds light on the successes and challenges factors of ODR initiatives, it is crucial to acknowledge its limitations. There are four limitations of this research paper. Firstly, the paper is limited to ODR initiatives within the EEA. Therefore, the findings of this research paper may not be universally applicable to other jurisdictions or regions. Nonetheless, it is still essential and interesting to conduct the research specifically on the EEA since ODR initiatives in the EEA have not been thoroughly examined before. In this sense, the limitation provides an in-depth examination of the particular challenges and dynamics peculiar to the EEA.

Secondly, this paper exclusively focuses on examining and interviewing current ODR initiatives. Due to the unavailability of contact information, past ODR initiatives could not be interviewed. However, the interviews with present ODR initiatives still provide valuable insights into the numerous factors affecting the successes and challenges of ODR initiatives within the EEA.

Thirdly, there are 430 ADR bodies that offer out-of-court settlement processes within the European Commission's ODR Platform. Among these 430 bodies, 62 responded to the email inquiry, where 26 of them were ODR providers. Out of 26, a total of 11 of these ODR providers agreed to participate in the interview process, answering a range of questions. Consequently, the results of this research cannot be universally applicable to the entire EEA, as a substantial portion of the bodies on the European Commission's ODR Platform did not respond to the email inquiry and participate in the interview process. Hence, the findings of the research may not reflect the majority of the bodies within the EEA. Nevertheless, it is important to note that the research, comprising 11 interviews, still offers valuable insights into the factors that influence the successes and challenges of ODR initiatives in the EEA.

Lastly, the interviews conducted with ODR providers rely on self-reporting. This approach poses a risk, as ODR providers may have biased views on the factors that influence their successes and challenges, particularly regarding

challenges. To mitigate this risk, ODR providers are first given the chance to explain their successes before discussing challenges during the interviews. Additionally, the study conducted multiple interviews and ensured anonymity. Nevertheless, despite these precautions, it is essential to acknowledge that the potential biased views among ODR providers cannot be completely eliminated.

8. CONCLUSION

This paper has examined several ODR initiatives to give an answer to the research question on the factors that influence the successes and challenges of ODR initiatives in the EEA. In this paper, by analysing the advantages and disadvantages of ODR, it was shown that a judicious approach is required to address the downsides of ODR and establish a fair dispute resolution framework. Examining the legal framework of ODR provided valuable insight into the two legislations that form the European Commission's ODR Platform and the ODR providers within this platform. Additionally, the paper has identified 26 ODR providers in the European Commission's ODR Platform among 430 ADR providers, hence providing an overview of ODR providers in the EEA. Moreover, the paper provided crucial insight into several factors that affect the successes and challenges of ODR initiatives within the EEA. The research has shown the significance of flexibility and elimination of transportation barriers in determining the success of ODR platforms. Furthermore, the paper has highlighted crucial challenges regarding the lack of awareness and information about ODR.

In addition, the findings of this research could provide valuable insights for the current and future ODR initiatives. These insights emphasise the importance of flexibility, cost-efficiency, and reducing geographical barriers as factors contributing to ODR's success. They also illustrate challenges such as lack of awareness, distrust in ODR providers, and the absence of human insight. Accordingly, comprehending the factors that contribute to the successes and challenges of ODR can help ODR platforms to develop more efficient and effective systems. Additionally, it can also play an essential role in assisting designers and policymakers to identify which ODR initiatives to invest in and which not. Moreover, the challenge factors of ODR highlight the need for raising awareness of ODR and building trust in ODR processes among consumers and

traders. In this line, the interviews provided valuable information regarding the usefulness of ODR in the EEA context by offering nuanced insights into the specific factors of successes and challenges of ODR initiatives.

Furthermore, an essential recommendation for further research on this matter can be given here. The paper was particularly limited to ODR initiatives within the EEA. Therefore, it may also be interesting to examine ODR initiatives in other regions in order to understand the usefulness of ODR in other jurisdictions. Another suggestion would be to conduct further research with a broader set of ODR providers, as it would give a more comprehensive understanding of the effectiveness of ODR.

This research has provided valuable insights for current and future ODR initiatives. Therefore, the findings of this paper could potentially guide ODR providers to design and implement efficient, accessible, and user-friendly ODR platforms, acknowledging the ongoing influence of technology on dispute resolution procedures.

APPENDIX

APPENDIX 1: TOPIC LIST FOR INTERVIEWS WITH ODR PROVIDERS IN THE EEA

1. What is the main focus and activities of the firm?
2. What are the determinants of a successful ODR?
3. How did the firm benefit from ODR?
4. What are the factors contributing to the failure of ODR?
5. What challenges does the firm encounter regarding the usage of ODR?
6. How were these challenges effectively addressed?

APPENDIX 2: ODR PROVIDERS IN THE EEA

Country	Provider	Provides ODR/ADR	Sectors	Web Address
Austria	Agency for Passenger Rights	ODR and ADR	Transport services	www.apf.gv.at/
Austria	Mediation for Consumer Transactions	ODR and ADR	Consumer Goods, Education, Energy and Water, Financial Services, General Consumer Services, Leisure Services, Postal services and electronic communications, Transport services	www.verbraucherschlichtung.at/
Austria	Internet Ombudsman	ODR and ADR	Consumer Goods, General Consumer Services, Leisure Services, Postal services and electronic communications	www.ombudsstelle.at/
Bulgaria	'NAIS' Alternative Dispute Resolution Centre of the National Association for Extrajudicial Settlements	ODR and ADR	Consumer Goods, Education, Energy and Water, Financial Services, General Consumer Services, Health, Leisure Services, Postal services and electronic communications, Transport services	https://nais.bg/

Bulgaria	"Consensus" Alternative Dispute Resolution Centre	ODR and ADR	Consumer Goods, Energy and Water, Financial Services, General Consumer Services, Leisure Services, Postal services and electronic communications, Transport services	https://mediationcenter.bg/cacr/
Croatia	Mediation Centre of the Croatian Chamber of Trades and Crafts	ODR and ADR	Consumer Goods, Education, Energy and Water, Financial Services, General Consumer Services, Leisure Services, Postal services and electronic communications, Transport services	www.hok.hr/
Croatia	The Conciliation Centre at the Croatian Association for Mediation	ODR and ADR	Consumer Goods, Education, Energy and Water, Financial Services, General Consumer Services, Health, Leisure Services, Postal services and electronic communications, Transport services	https://medijacija.hr/
Czech Republic	Consumer Ombudsman	ODR and ADR	Consumer Goods, Education, Energy and Water, Financial Services, General Consumer Services, Health, Leisure Services, Transport services	https://onlinemediator.cz/
Denmark	Appeals Board for Finance Companies	ODR and ADR	Financial Services	https://fanke.dk/det-finansielle-ankenaevn/
Denmark	The Appeals Board for Holiday House Letters	ODR and ADR	Leisure Services	www.fbnet.dk/
Denmark	The Danish Maritime Authority	ODR and ADR	Transport services	www.soefartsstyrelsen.dk/
Denmark	Road Safety and Transport Agency	ODR and ADR	General Consumer Services	www.fstyr.dk/

Finland	The Consumer Disputes Board	ODR and ADR	Consumer Goods, Education, Energy and Water, Financial Services, Health, Postal services and electronic communications, Transport services	www.kuluttajariita.fi/
Germany	SNUB – The Local Transport Conciliation Committee	Mainly online ADR	Transport services	www.nahverkehr-snub.de/
Italy	Joint Conciliation Body, Netcomm Consortium - Consumers' Associations	ODR and ADR	Consumer Goods	www.consorzionetcomm.it/
Italy	Arbitrator for Financial Disputes	ODR and ADR	Financial Services	www.acf.consob.it/
Luxembourg	Luxembourg Regulatory Institute - ILR	ODR and ADR	Energy and Water, Postal services and electronic communications	www.ilr.lu/
Malta	Nohadon Ltd	ODR and ADR	Leisure Services	https://thepogg.com/
Netherlands	Rent Tribunal	Mainly ODR and ADR	Consumer Goods, Energy and Water, General Consumer Services	www.huurcommissie.nl/
Norway	Complaint Board Concerning Rental of Dwellings	ODR and ADR	General Consumer Services	www.htu.no/
Norway	The Consumer Authority	ODR and ADR	Consumer Goods, Education, General Consumer Services, Leisure Services, Transport services	www.forbrukertilsynet.no/
Poland	Łódzkie Provincial Inspector of the Trade Inspection Authority in Łódź	ODR and ADR	Consumer Goods, Education, Energy and Water, General Consumer Services, Leisure Services, Transport services	www.wiih.lodz.pl/

Poland	Lubelskie Provincial Inspector of the Trade Inspection Authority in Lublin	ODR and ADR	Consumer Goods, Education, Energy and Water, General Consumer Services, Leisure Services, Transport services	www.ihlublin.pl/
Spain	European Consumer Section of the Catalan Consumer Agency	ODR and ADR	Consumer Goods, Education, Energy and Water, Financial Services, General Consumer Services, Leisure Services, Postal services and electronic communications, Transport services	http://consum.gencat.cat/
Sweden	The National Board for Consumer Disputes	ODR and ADR	Consumer Goods, Education, Energy and Water, Financial Services, General Consumer Services, Leisure Services, Postal services and electronic communications, Transport services	www.arn.se/
Sweden	Property market complaints board (FRN)	Mainly ODR and ADR	Financial Services, General Consumer Services	www.frn.se/

A New Era of Democracy: Assessing and Enhancing the European Citizens' Initiative as a Participatory Tool

Lena Salewski[1]

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ANNEXES 331

[1] Lena Salewski recently graduated from the European Law School at Maastricht University, specialising in the EU's democratic framework. Her thesis focused on the functionality and future challenges of the EU's democratic mechanisms, with a particular emphasis on the European Citizens' Initiative. During an internship, she gained practical experience working with EU institutions and non-profit organisations on the implementation of this tool. She will continue her academic journey by pursuing an LL.M., with a focus on the intersection of technology and democracy and the implications of private power in the digital age.

TABLE OF ABBREVIATIONS

Charter	Charter of Fundamental Rights of the European Union
CoFoE	Conference on the Future of Europe 2021-22
ECI	European Citizens' Initiative
ECP	European Citizens' Panels
EP	European Parliament
EU	European Union
GoO	Group of Organisers
ICA	Irish Citizens' Assembly
NGO	Non-Governmental Organisation
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

1. INTRODUCTION

In its report on the application of the European Citizens Initiative (ECI), the European Commission characterised 2023 as "the most successful year in the lifespan of the ECI so far!", championing the answering of four out of the ten ECIs overall that year.[2] A more conflicting image emerges when this statement is contrasted with the continuous academic scrutiny and dissatisfaction of organisers about the minimal legislative impact of successful initiatives.[3] The discourse surrounding the European Union (EU) participatory mechanisms has persisted for the last twenty years since their introduction in Lisbon.[4] Recently, there seems to be a revived interest in making citizen participation work, as exemplified by the 2022 Conference on the Future of Europe,[5] the newly established European Citizens Panels,[6] and a reformed ECI Regulation.[7] However, while the new ECI Regulation addresses some selected aspects preventing citizens' participation, it disregards many concerns raised by ECI organisers, leaving numerous questions unanswered. In this context, it is essential to differentiate the existence of participatory tools from their practical impact.[8] It is against this backdrop that this paper aims to answer the following research question: "*To what extent does the ECI function as an effective tool of participatory democracy in the EU and how could its impact be improved?"*

To this end, Chapter 2 of the paper begins by outlining the concepts of democracy and the EU's participatory mechanisms, with a specific focus on the ECI. Chapters 3 and 4 explore the ECI's legal framework, its impact on EU

[2] European Commission, 'Report from the Commission to the European Parliament and the Council on the application of Regulation (EU) 2019/788 on the European citizens' initiative' COM(2023) 787 final.
[3] Antonia-Evangelia Christopoulou, 'Towards a Golden Age of the European Citizens' Initiative?' (*European Law Blog*, 30 January 2024) <https://europeanlawblog.eu/2024/01/30/towards-a-golden-age-of-the-european-citizens-initiative/> accessed 19 March 2024.
[4] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C 306.
[5] European Commission, 'Conference on the Future of Europe' (*Directorate General for Communication*) <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/new-push-european-democracy/confere nce-future-europe_en> accessed 14 May 2024.
[6] European Commission, 'Citizens Engagement Platform' (*Directorate General for Communication*, 2024) <https://citizens.ec.europa.eu/index_en> accessed 22 April 2024.
[7] Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European citizens' initiative [2019] OJ L 130/55.
[8] Elizabeth Monaghan, 'Assessing Participation and Democracy in the EU: The Case of the European Citizens' Initiative' (2012) 13(3) *Perspectives on European Politics and Society* 285, p. 285.

legislation, and the main issues hindering its effectiveness as a successful tool. Finally, Chapter 5 assesses the possibility of combining the ECI with European Citizens' Panels to enhance its effectiveness as a participatory tool, using the Irish Citizens' Assembly as a reference example. The analysis is concluded by considering the opportunities and obstacles of such a proposal.

This paper adopts a mixed doctrinal and empirical approach. A doctrinal analysis of EU regulations and academic literature was conducted to explore the democratic set-up of the EU and the ECI's legal framework. Next, an empirical, qualitative approach was chosen to systematise the persisting issues leading to the failure and limited impact of successful ECIs in the past. Last, a comparative assessment of available participatory tools within the EU was employed to identify a suitable exemplary system of participation within the EU. There is limited literature on combining the ECI with European Citizens' Panels, so a critical assessment of various designs was used to consider potential benefits for the ECI specifically.

2. Setting the Stage: A Brief Exploration of Democracy in the European Union

Since its conceptualisation in ancient Greece,[9] implementing democracy into governmental structures has been an ever-present topic of contention.[10] The primary variable of the different types of democracy remains how individuals engage in collective decision-making.

2.1. Understanding Selected Forms of Democracy

In this section, three key forms of democratic participation of citizens will be briefly explained, namely (1) direct democracy, (2) representative democracy, and (3) participatory democracy. These variants and their examples are not to be seen as absolutes, as democratic features often overlap. They were selected due to their relevance within the EU and to contextualise participatory democracy in light of the research question.

[9] Paul Cartledge, *Democracy: A Life* (Oxford University Press, 2016) p. 1.
[10] See the many democracy indices released each year, for example: Economist Intelligent Unit, 'Democracy Index 2023' (*Economist group,* London, 14 February 2023) <https://www.eiu.com/n/campaigns/democracy-index-2023/> accessed 11 November 2024.

As the name suggests, direct democracy involves direct and individual participation of citizens in the decision-making process.[11] A frequent mechanism is a referendum, which entails a question that can be approved or denied by a majority of votes.[12] A prominent example is the 2016 Brexit referendum, which resulted in the United Kingdom leaving the EU and led to lasting political and legal upheavals.[13]

Representative forms of democracy are often combined with a system of parliamentary democracy. They are most commonly characterised through elections, whereby eligible individuals vote for representatives to make decisions in their interest.[14] In a system of representative democracy, citizens are, therefore, only periodically and indirectly involved in the decision-making process through the election of representatives.[15]

Participatory forms of democracy, which are closely related to forums of citizens' deliberation, highlight the importance of citizens' direct involvement in the decision-making process.[16] Participatory democracy involves a large number of citizens being invited to share their viewpoints, resulting in the representation of a broader spectrum of opinions. The format in which this can take place varies, from establishing top-down citizens assemblies to bottom-up citizens initiatives.[17] Citizens panels, in particular, are usually aimed at facilitating intensive deliberation with fewer participants, selected randomly to reflect specific parameters of society and to form opinions about or develop legislative proposals on specific matters.[18]

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[11] Daniel Moeckli, Anna Forgács, and Henri Ibi, *The Legal Limits of Direct Democracy* (Edward Elgar Publishing, 2021), p. 262.
[12] Paul Blokker and Volkan Gül, 'Citizen Deliberation and Constitutional Change' in Min Reuchamps and Yanina Welp (eds), *Deliberative Constitution-Making: Opportunities and Challenges* (Routledge, 2023), p. 32.
[13] BBC News, 'Brexit: What You Need To Know About The UK Leaving the EU' (*BBC Online*, 30 December 2020) <https://www.bbc.com/news/uk-politics-32810887> accessed 11 November 2024.
[14] Wilfried Marxer and Zoltán Tibor Pállinger, *Direct Democracy in Europe – Developments and Prospects* (VS Verlag für Sozialwissenschaften, 2007), p. 14.
[15] Blokker and Gül (n 12) p. 32.
[16] Lyn Carson and Stephen Elstub, 'Comparing Participatory and Deliberative Democracy' (*newDEMOCRACY*, 2019) <https://www.newdemocracy.com.au/wp-content/uploads/2019/04/RD-Note-Comparing-Participatory-and-Deliberative-Democracy.pdf> accessed 22 February 2024.
[17] Jeffrey Rachlinski, 'Bottom-up versus Top-down Lawmaking' (2006) 73(3) The University of Chicago Law Review, p. 964.
[18] Carson and Elstub (n 16).

2.2. The Citizens' Participatory Toolbox of the European Union

The preceding forms of democracy will now be utilised to assess how participatory democracy has been translated into the EU context and to identify which citizens' tools currently exist.

2.2.1. The Road to Participation – From Rome to Today

In the EU framework, the extent of citizen participation has developed alongside the treaties. Participation was initially seen to be lacklustre when establishing the European Communities in 1957, reflected in the absence of participatory or direct democratic means in the Treaties of Rome.[19] The consensus was in favour of a more technocratic and removed governance, reflecting the initial focus on streamlining integration and stability in post-war Europe, prioritising efficiency over broad public involvement.[20] During this time, the Commission fostered dialogues with non-governmental civil society organisations (NGO) to include citizens in its decision-making,[21] a trend exemplified by the impact of NGOs in the area of environmental and animal rights policies.[22] However, through the increased political influence of the EU on a global stage, the influence of EU decisions on individuals and growing membership, the need for democratic participation of individual citizens grew, culminating in the establishment of the directly elected European Parliament (EP) in 1979.[23]

Later, the Treaty of Maastricht of 1992[24] formally established the EU and individuals' Union citizenship.[25] By drawing from the democratic rights of citizens in the Member States, the introduction of EU citizenship encouraged the idea of increased citizens´ participation at the EU level. Initially, many citizens' participatory opportunities post-Maastricht were non-binding, such as citizens'

[19] Treaty of Rome Establishing the European Community [1957].
[20] Monaghan (n 8) p. 289.
[21] Justin Greenwood, 'The European Citizens' Initiative: Bringing the EU Closer to Its Citizens?' (2019) 17(6) *Comparative European Politics* 940, p. 942.
[22] See for example the ban of importing seal pelts into the EEC: Paul Wapner, 'Politics Beyond the State: Environmental Activism and World Civic Politics' (1995) 47(3) *World Politics* 311, p. 325.
[23] Carson and Elstub (n 16).
[24] Treaty on European Union (Treaty of Maastricht) [1992] OJ C 191.
[25] Silvia Kotanidis and Micaela Del Monte, 'Strengthening Citizens' Participation: How the European Parliament is Responding to Citizens' Expectations' (*European Parliamentary Research Service*, April 2022) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729363/EPRS_BRI(2022)729363_EN.pdf> accessed 24 April 2024.

consultations having a limited impact on policy outcomes. In contrast, informal instruments catered towards NGOs persistently influenced legislation.[26] These issues continued to be discussed at the national and EU level, with the first Conference on the Future of Europe in 2002[27] calling for more participation of citizens in the EU.[28] This demand was acknowledged by the Commission as an issue requiring institutional solutions,[29] slowly moving the question of an 'if' into a 'how' such participation could be implemented in the EU to engage the evolving European political community.[30]

Consequently, the time preceding the Lisbon Treaty was marked by a struggle between those who sought direct means of participation and those who insisted on the representative nature of the EU.[31] The Treaty of Lisbon was eventually ratified in 2009, codifying the foundation for citizens' participation and dialogue,[32] and was championed as one of the most critical changes in EU governance to date.[33]

2.2.2. Current Participatory Tools of the EU

The EU functions primarily as a representative democracy and foresees only some direct or participatory tools for citizens.[34] First, based on EU citizenship under Articles 9 TEU and 20 TFEU, citizens of the Member States have the right to stand as and directly vote for members of the EP every five years, following Article 14(3) TEU. At the same time, citizens indirectly elect the members of the Council of the EU, consisting of Ministers from the Member States, Article 16(2) TEU. The EP and the Council are co-legislators of the EU, deliberating and voting on bills proposed by the Commission, Article 294 TFEU. Citizens thereby have a direct and indirect influence on the composition of the two legislative bodies of the EU through elections.

[26] Monaghan (n 8) p. 292.
[27] This Conference is not the same as the one in 2021 and referenced as 'CoFoE' in the remainder of this paper.
[28] See for example: European Commission, 'White Paper on a European Communication Policy' COM 35 final (2006), p. 5.
[29] ibid.
[30] Monaghan (n 8) p. 287.
[31] ibid, p. 285.
[32] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C 306, art 8A(3).
[33] Greenwood (n 21) p. 941.
[34] Consolidated version of the Treaty on European Union [2012] OJ C 326/13, art 10.

Second, petitions to the EP are codified under Article 227 TFEU. These can be submitted by EU citizens and any natural or legal persons residing in the EU and must be addressed by a parliamentary committee. The subject of a petition is limited to the extent that it affects petitioners directly.

Third, citizens' panels have been introduced in the EU since 2021, when the Commission, the Council, and the EP issued an inter-institutional declaration on the establishment of the Conference on the Future of Europe (CoFoE). Held from 2021 to 2022 to encourage citizens participation,[35] four citizens' panels comprising of 200 people from all Member States deliberated on migration, climate change, and European democracy.[36] The CoFoE was concluded by a final report with recommendations for the institutions, including the demand for more proactive forms of participation.[37] In response to this demand, the Commission established European Citizens Panels (ECP) as part of its Work Programme in 2023.[38]

Finally, the ECI is a tool of participatory democracy for citizens, which is the focus of this paper. It has been selected because of its evolution through recent overhauls of legislation, case law, and academic literature. The following section will elaborate on the development and embedment of the ECI in the EU.

2.2.3. Introducing the European Citizens' Initiative

The Treaty of Lisbon provided a foundation for citizen participation and the promise of an ECI.[39] Still, it was met with a struggle between those who sought direct means of participation and those insisting on the representative nature of the EU.[40] After five years, the ECI eventually became operational on the 1st April 2012 through Regulation 211/2011, setting out the substantive and procedural rules.[41]

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[35] Conference on the Future of Europe, 'Report on the Final Outcome', (May 2022) <https://www.europarl.europa.eu/resources/library/media/20220509RES29121/20220509RES29121.pdf> accessed 20 March 2024, pp. 6-9.
[36] European Commission (n 5).
[37] Conference on the Future of Europe (n 35) p. 41.
[38] European Commission, 'Commission work programme 2023 – A Union Standing Firm and United' COM (2022) 548 final, p. 4.
[39] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C 306, art 8A(3).
[40] Greenwood (n 21) p. 941.
[41] Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the Citizens' Initiative [2011] OJ L 65/1.

According to the European Commission, the objective of the ECI is to encourage citizens' participation and promote democratic dialogue.[42] In theory, it allows citizens to propose a specific legal act to the Commission, the only institution able to initiate new legislation,[43] through collecting one million signatures.[44] Upon successful collection, the Commission is required to respond, but not obliged to initiate the proposed legal act, safeguarding its role as the sole legislative initiator.[45] Thus, through the introduction of the ECI, elements of participatory democracy were implemented at the supranational level, a novel introduction in Europe and beyond.[46]

After three mostly fruitless years,[47] the Commission published a report on the application of the ECI Regulation in April of 2015, addressing several shortcomings.[48] Critique on the ECI voiced by the EP, the academics, and ECI organisers focused on the high administrative burdens for registrations, lack of support for organisers, and the limited impact successful ECIs had had on legislation.[49] In response to these flaws, the Commission proposed to revise the ECI Regulation on the 13th September 2017. Regulation 2019/788[50] was adopted on the 17th April 2019 and replaced its predecessor on the 1st January 2020. It aimed to make the ECI more accessible and user-friendly for organisers as well as supporters, and to strengthen the Commission's follow-ups. These revised Regulation has resulted, among other things, in the introduction of an online ECI Forum to help organisers ensure compliance with EU law and to partially register an initiative if the primary objectives, but not all, fall within the Commission's powers to act.[51] The Commission's obligation to issue regular reports to the EP

[42] Christopoulou (n 2).
[43] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/01, art 294 and Consolidated version of the Treaty on European Union [2012] OJ C 326/13, art 17(2).
[44] Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European citizens' initiative [2019] OJ L 130/55, art 3(1)a.
[45] Case T-561/14 *European Citizens' Initiative One of Us and Others v European Commission* [2018] ECLI:EU:T:2018:210, paras 109-111.
[46] Moeckli, Forgács, and Ibi (n 10) p. 4.
[47] Kotanidis and Del Monte (n 22).
[48] European Commission, 'Report from the Commission to the European Parliament and the Council on the application of Regulation (EU) No 211/2011 on the Citizens' Initiative' COM (2015) 0145 final.
[49] Christopoulou (n 2).
[50] Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European citizens' initiative [2019] OJ L 130/55.
[51] ibid rec 5.

and the Council every four years was already established under the previous Regulation and is now mentioned under Article 25 of the current ECI Regulation, with the latest version being published in December of 2023.[52] A yearly ECI day is held during the European Economic and Social Committee‘s Civil Society Week to further encourage the discourse between EU institutions, experts, and the public.[53]

Nevertheless, the ECI's success has remained limited, evidenced by the Commission's lack of legislative proposals directly resulting from ECIs. To explain this result, the next Chapter will analyse the ECI's legal and procedural requirements before exploring its flaws.

[52] Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European citizens' initiative [2019] OJ L 130/55, art 16.
[53] European Economic and Social Committee, ‘Civil Society Week’ (*European Economic and Social Committee*) <https://www.eesc.europa.eu/en/CivSocWeek2024> accessed 14 May 2024.

3. NAVIGATING THE LEGAL LANDSCAPE OF THE EUROPEAN CITIZENS' INITIATIVE

This Chapter will explain the legal framework of the ECI under Regulation 2019/788, providing a foundation for subsequent chapters exploring its faults, criticisms, and potential improvements moving forward. The chart below provides a simplified overview of the law, outlining the five steps necessary for a successful initiative.[54]

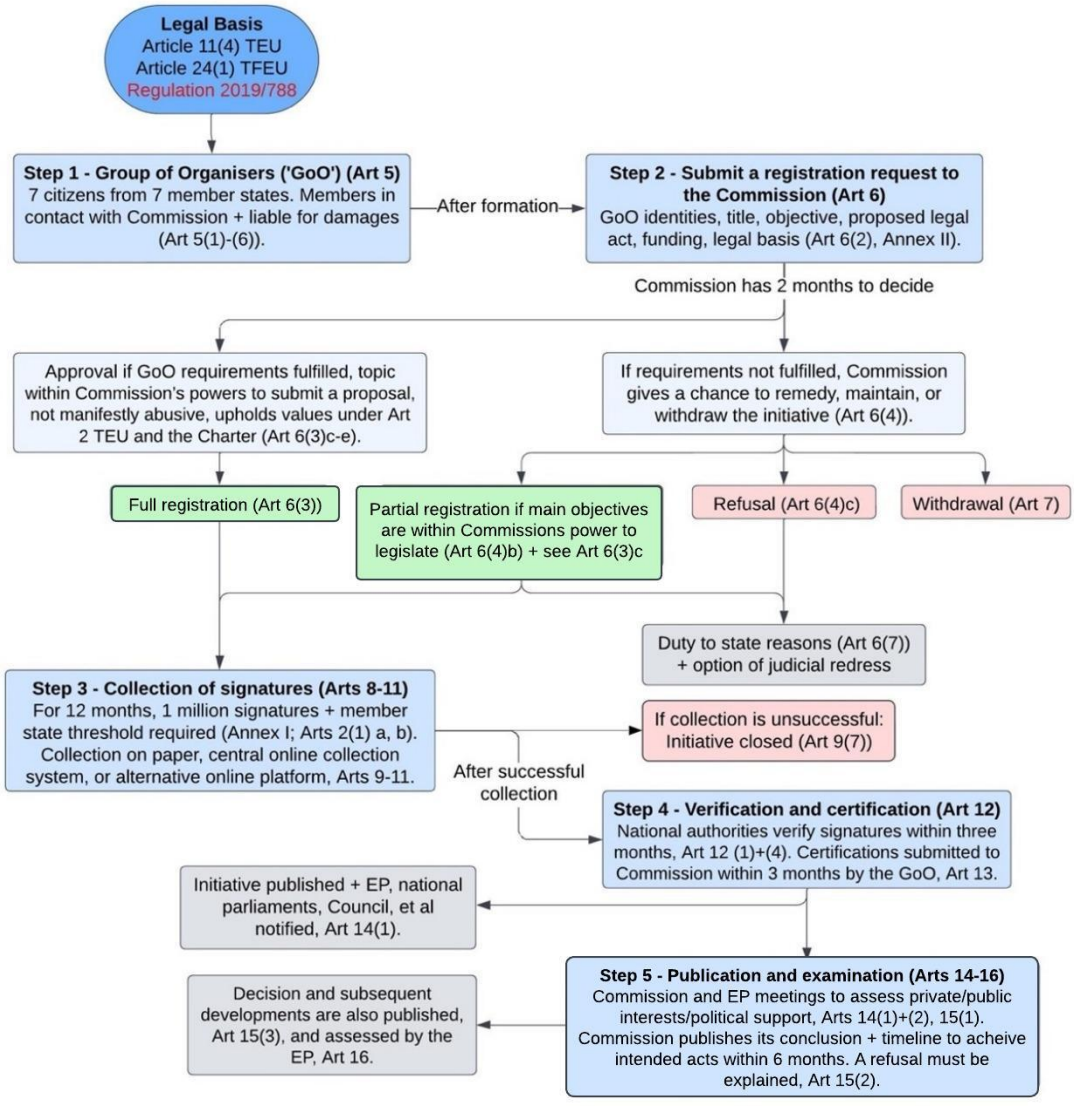

Figure 1: The five steps of a successful ECI.

[54] This chart is based on Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European citizens' initiative [2019] OJ L 130/55. It is the author's own work.

The ECI 'Fur Free Europe' was chosen to exemplify the legal framework in practice. It is the tenth ECI reaching the signature threshold and the most recent ECI answered by the Commission, receiving over 1.5 million signatures. The initiative aimed to ban fur farms and the selling of goods containing farmed fur on the EU market.[55]

The first step of the procedure required the formation of a Group of Organisers ('GoO') consisting of seven individuals from seven Member States, representing the initiative and being the point of contact for the Commission following Article 5(1)-(6). The second step, in accordance with Article 6(2) and Annex II of the Regulation, entailed the GoO requesting the Commission to register the initiative. This request has to contain the required legal and substantive information, based upon which the Commission decided, within two months, whether the initiative's objective fell within its powers to act and was not manifestly abusive or contrary to the EU's values. A full registration following Article 6(3) was ultimately granted on 16th March 2022, and the GoO started the signature collection on 18th May 2022.

While the initiative had a year to complete the third step for a successful ECI and collect the one million signatures necessary, see Articles 8 to 11, the collection was closed on 1st March 2023, after receiving overwhelming support.[56] The GoO set up an independent online collection platform, amassing over 1.9 million signatures, 1.5 million of which were verified by the competent Member State authorities by 14th June 2023, fulfilling the fourth step outlined in Article 12.[57] The GoO then referred the statements of validity to the Commission as required by Article 13. Afterwards, the final examination step commenced, starting with the publishing and notification of the relevant national and EU institutions, see Article 14(1), and a meeting with the EP and the Commission.[58] The meeting with a panel of Commissioners took place on 20th July 2023 per Article 15(1) and presented the opportunity for the GoO to further explain the legal ban of farmed fur in the EU sought by the initiative.[59] The initiative was then

[55] Secretariat-General, 'European Citizens' Initiative – Fur Free Europe' (*European Union*, 2024) <https://citizens-initiative.europa.eu/initiatives/details/2022/000002_en> accessed 05 May 2024.
[56] ibid.
[57] ibid.
[58] ibid.
[59] ibid.

presented in the EP on 10th October 2023, and a parliamentary debate followed on 19th October 2023, fulfilling the required steps laid out in Article 14(1)-(2).[60] The EP assessed the ECI´s political support and, under Article 16, was tasked with ensuring adequate follow-ups by the Commission. The communication required under Article 15(2)-(3) was published on 7th December 2023, in which the Commission detailed its plans to pursue the initiative's objectives by requesting further animal welfare studies by March 2025 and stating that appropriate actions will be communicated by March 2026. Any further developments must also be published by the Commissions as laid out in Article 15(3). So far, the Commission aimed to build upon its 'Farm to Fork Strategy',[61] included in the Green Deal, to further enhance the existing legal framework.[62]

This Chapter exemplified the process of an ECI, usually taking years until potential actions by the Commission follow, provided that the substantive and procedural conditions are fulfilled. However, since successful ECIs have been rare so far, it is essential to analyse the reasons behind the ECI's flaws and low effectiveness, including difficulties arising from the legal framework, obstacles within EU institutions and opportunities for improvement.

4. The European Citizens' Initiative as a Troubled Tool

This Chapter briefly reviews the legislative impact of past initiatives. This analysis provides the background to systemise the main challenges for launching an ECI, and the institutional barriers affecting its effectiveness as a tool of participatory democracy today.

4.1. Assessing the Impact of Past ECIs

Most ECIs aim to raise awareness of a topic that has yet to be dealt with by legislation or to improve existing legislation.[63] However, as the chart below

[60] Secretariat-General, 'European Citizens' Initiative – Fur Free Europe' (*European Union*, 2024) <https://citizens-initiative.europa.eu/initiatives/details/2022/000002_en> accessed 05 May 2024.
[61] European Commission, 'Farm to Fork Strategy' (*European Union*, 2020) <https://food.ec.europa.eu/horizontal-topics/farm-fork-strategy_en#F2F-Publications> accessed 28 November 2024.
[62] Secretariat-General (n 50).
[63] This conclusion has been drawn from the majority of past successful ECIs. For an overview, see Annex II.

illustrates, [64] over three-quarters of all initiates have either been withdrawn or have not gathered the necessary signatures. These ECIs, therefore, do not require an answer from the Commission and exert no direct impact on EU policies.[65]

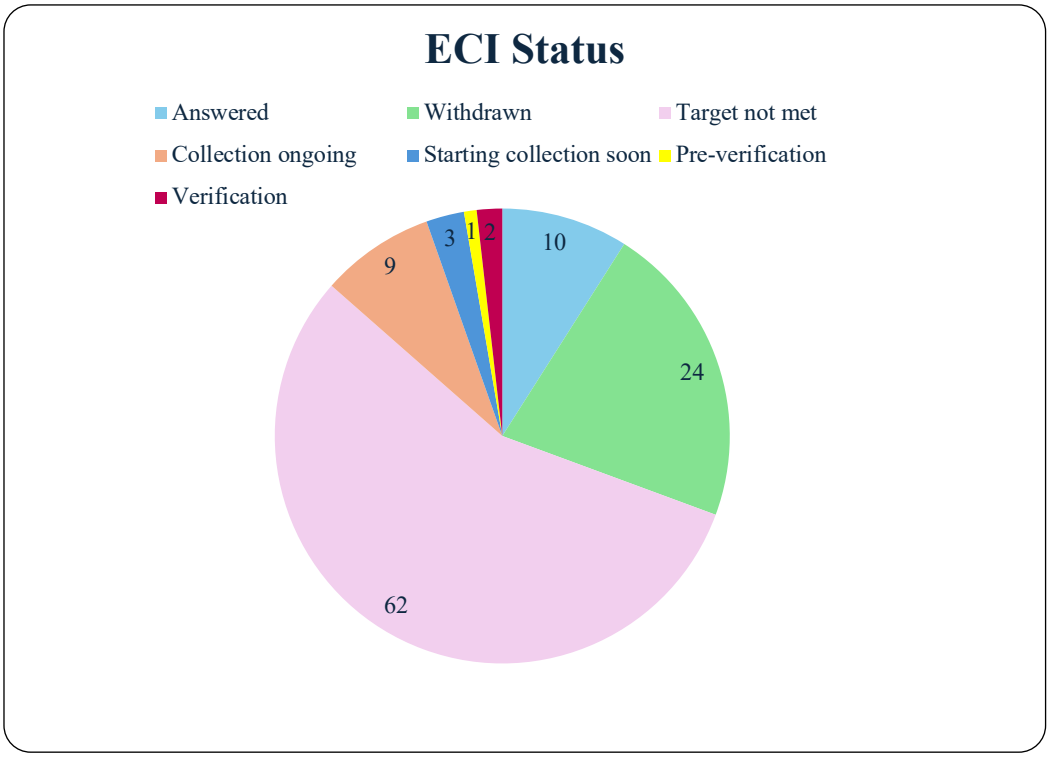

Figure 2: Distribution of ECI Status (date: 26 April 2024)

The category of 'withdrawn' ECIs euphemistically also includes those that were refused registration, usually for falling outside the Commission's powers to initiate legislation, having an abusive nature, or being contrary to EU values. Annex I provides an overview of past unsuccessful ECIs, specifically detailing those refused registration. The reasoning for this will be further explored in section 4.2.

Shifting the focus to successful ECIs, the Commission's responses differ in the extent to which it is willing to answer initiatives. Successful ECIs mentioned here are, according to the Commission's standards, those that received one million signatures.[66] In total, ten have been answered by the Commission, while two are

[64] This graph is based on data from: Secretariat-General, 'European Citizens' Initiative' (*European Union*, 2024) <https://citizens-initiative.europa.eu/find-initiative_en> accessed 05 May 2024. It is the author's own work.
[65] Laurie Boussaguet, 'Participatory Mechanisms as Symbolic Policy Instruments?' (2015) 14(1) Comparative European Politics pp. 107, p. 109.
[66] See the choice of filters used: Secretariat-General (n 55).

currently awaiting verification (see Figure 2). Most answers by the Commission can be categorised as (1) refusal, (2) use of non-legal measures, (3) referral to existing legislation, or (4) adoption of new legislation. This section will not provide details of all past successful initiatives, but an overview can be found in Annex II.

One of the first successful initiatives, 'One of Us', called for judicial protection of a foetus's right to life.[67] In its answer, the Commission explained that the aim was against EU policies, presenting the only example of an answered initiative where the Commission refused to take any legal or non-legal actions to accommodate an initiative's goals.[68]

In other replies, the Commission relied on non-legal and external measures to answer ECIs, therefore usually indirectly refusing legislative measures. This approach can be seen in the ECI 'Stop finning – Stop the trade', which aimed to ban domestic and international practices of finning sharks and the trade of fins.[69] The Commission requested an impact assessment of the proposed policy and more statistical information.[70] It was committed to enforcing EU traceability standards internationally but did not take any further legislative measures.[71] Similar non-legislative measures were taken in response to 'Save cruelty-free cosmetics', where the Commission committed to increasing funds to support alternatives to animal testing in research and education, responding to the request for the modernisation of science and the EU chemicals Regulation,[72] but leaving the call for legislation to ban animal testing in cosmetics unanswered.[73]

Most commonly, the Commission refers to or sets out plans for revising existing legislation. This approach is exemplified by 'Fur Free Europe,' [74] which

[67] European Commission, 'Communication from the Commission on the European Citizens' Initiative "One of Us"' COM(2014) 355 final, p. 19.
[68] ibid.
[69] European Commission, 'Communication from the Commission on the European Citizens' Initiative (ECI) "Stop Finning - Stop the Trade"' C(2023) 4489 final.
[70] ibid.
[71] ibid pp. 13-14.
[72] Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency [2006] OJ L 396/1.
[73] European Commission, 'Communication from the Commission on the European Citizens' Initiative (ECI) "Save Cruelty-Free Cosmetics – Commit to a Europe Without Animal Testing"' C(2023) 5041 final, pp. 18-20.
[74] European Commission, 'Communication from the Commission on the European Citizens' Initiative (ECI) "Fur Free Europe"' C(2023) 8362 final, pp. 13-14.

was outlined in Chapter 3. While not resulting in a proposal for new legislation, it entailed the commitment to building on the existing European Green Deal.[75] The 2013 initiative 'Right2Water' presents another example where the Commission used the ECI as an opportunity to revise existing legislation.[76] A modernised Directive on Drinking Water entered into force in January 2021,[77] which did not directly answer the ECI's original aim of ensuring free and equal access to clean drinking water in the Member States.

Most ECI organisers register an initiative with the aim of a legislative proposal resulting from the process. In the case of 'End the Cage Age', the Commission, for the first time, committed to adopting a new legislative proposal by the end of 2023, aiming to phase out the use of cage systems for animal farming.[78] This reply was welcomed in light of the dissatisfaction with follow-ups to previous successful initiatives. However, in its 2023 ECI report, the Commission announced that the deadline would not be upheld, owing to a more extensive dialogue necessary to balance animal welfare and the socio-economic impact.[79] This decision has been heavily criticised, especially given the extensive lobbying allegations against the meat industry.[80]

4.2. The Limited Nature of the ECI

From 2020 to 2023, after the new ECI Regulation entered into force, a total of 40 registration requests were submitted, 37 were registered, while the remaining three were under legal assessment at the time of the Commission's Report.[81] Six of the 37 registered ECIs were answered, only one was refused, whereas the rest failed

[75] European Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions "European Green Deal" COM(2019) 640 final.
[76] European Commission, 'Drinking Water to Become Safer Thanks to New EU-Wide Hygiene Standards for Materials and Products in Contact with Water' (23 January 2024) <https://ec.europa.eu/commission/presscorner/ detail/en/ip_24_350> accessed 20 March 2024.
[77] Directive (EU) 2020/2184 of the European Parliament and of the Council of 16 December 2020 on the quality of water intended for human consumption [2020] OJ L 435/1.
[78] European Commission, 'Communication from the Commission on the European Citizens' Initiative (ECI) "End the Cage Age"' C(2021) 4747 final, pp. 14-15.
[79] European Commission (2) p. 17.
[80] Arthur Nelson, 'Lobby Groups Fought "Hard and Dirty" Against EU Ban on Caged Farmed Animals' *The Guardian* (London, 23 October 2023) <https://www.theguardian.com/environment/2023/oct/23/lobby-groups-fought-hard-and-dirty-against-eu-ban-on-caged-farm-animals> accessed 20 March 2024.
[81] European Commission (n 2) pp. 2-5.

to meet the required signature threshold.[82] This number presents an increase in answered initiatives compared to 2012-2020, with 99 registration requests, 76 of which were registered, with only four collecting the required signatures. However, many shortcomings have not been remedied so far.[83] The following sections will, in light of the aim of the paper, focus on the shortcomings which continue to hinder the ECI as an effective tool of participatory democracy.

4.2.1. Institutional Limitations

As will be discussed in this section, when assessing institutional limitations, the notions of impartiality, accountability, and responsibility are key themes for explaining the institutions' roles and actions in the context of the ECI.[84]

a) The Commission's Role

As shown in Chapter 3, the Commission is the most relevant institution for the ECI.[85] However, this heavy involvement has been criticised, questioning the Commission's role as the sole addressor and decision-maker regarding the ECI.[86]

Both the decision not to register an ECI and the Commission's answers have been subject to persisting scrutiny. An action for annulment, based on Article 263 TFEU, is available against all measures having binding legal effects adopted by EU institutions capable of affecting the applicant's legal position. Though the Commission has argued that its communications do not have a binding effect, the General Court has rejected this view as the communications represent its final position on an ECI and its intended acts, thereby completing the ECI procedure under Regulation 2019/788.[87] Hence, the communications have been

[82] European Commission (n 2) pp. 2-5.
[83] Christopoulou (n 3).
[84] Moeckli, Forgács, and Ibi (n 11) p. 270.
[85] See: Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European citizens' initiative [2019] OJ L 130/55.
[86] Jale Tosun, Daniel Béland, and Yannis Papadopoulos, 'The Impact of Direct Democracy on Policy Change: Insights From European Citizens' Initiatives' (2022) 50(3) *Policy & Politics* 323, p. 335.
[87] Case T-789/19 *Tom Moerenhout v European Commission* [2021] ECLI:EU:T:2021:260, paras. 69 and 77.

contested in the past,[88] usually regarding the extent to which the Commission must respond to a successful ECI.

Following the second successful ECI, 'One of Us', the Commission did not propose a legislative act, resulting in a long-lasting judicial dispute. In case T-561/14, the Court established that there is no obligation for the Commission to issue a legislative proposal purely based on the collection of one million signatures.[89] Rather, the Court limited the requirements for the Commission to provide reasons for any decisions taken. The extent of the required reasoning varies in each case, depending on the action sought and the interests at stake.[90]

The Court's case law developed further when the GoO of 'Ensuring Common Commercial Policy conformity with EU Treaties and compliance with international law,' which requested adopting measures to regulate trade with occupied territories, sought an annulment action against the corresponding Commission communication.[91] Here, the Court decided that the communication was insufficient, thereby extending the requirements of the Regulation, which merely refers to the duty to state reasons but does not set out any further conditions.[92] The Commission did not explain why the proposed Article 207(2) TFEU did not constitute an appropriate legal basis,[93] solely relying on its inability to submit a legislative proposal under Article 215 TFEU.[94] While the Commission did not have to address every legal issue, its disregard of the legal basis resulted in the ineffectiveness of the ECI's aim.[95] The Court highlighted that, without a reasoned response, the Commission could undermine citizens' rights to submit an initiative and the objectives set out under Articles 11(4) TEU and 24(1) TFEU and the ECI Regulation.[96] This issue refers back to questioning the Commission as an impartial decision-maker. It has been argued that the Commission initially

[88] See for a selection of cases: Case C-26/23 P *Citizens' Committee of the European Citizens' Initiative "Minority SafePack – one million signatures for diversity in Europe" v European Commission* [2023] ECR I-616; Case T-789/19 *Tom Moerenhout v European Commission* [2021] ECLI:EU:T:2021:260.
[89] Case T-561/14 *European Citizens' Initiative One of Us and Others v European Commission* [2018] ECLI:EU:T:2018:210, paras. 109-111.
[90] ibid para. 144.
[91] Case T-789/19 *Tom Moerenhout v European Commission* [2021] ECLI:EU:T:2021:260.
[92] Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European citizens' initiative [2019] OJ L 130/55, art 15.
[93] ibid para. 45.
[94] ibid para. 33.
[95] ibid para. 29.
[96] ibid para. 47.

refused the registration not because it fell outside its competences to initiate legislation but because it would not be in the Commission's political interest to act.[97] While the Commission remains the only institution capable of initiating legislative proposals, it is worth considering whether a separate, impartial body without a set political agenda might be better suited to assess the feasible consequences of successful ECIs. This idea will be further elaborated on in Chapter 5.

In its 2023 ECI report,[98] the Commission responded to the low direct legislative impact of ECIs. There, it was argued that the success of an ECI can also entail raising awareness, fostering debates, and advancing the topic for policymakers.[99] This position has been criticised and questioned, leading to doubts about whether the Commission duly considers the efforts and aims of successful ECIs when responding to them.[100] While research confirms that ECIs have indirectly impacted national and supranational policies,[101] the necessity of this participatory tool can be challenged if its success relies on indirect policy effects rather than the desired direct legislative changes.

b) Limited Powers of the European Parliament

The EP's involvement in the ECI process has evolved from initially only holding a hearing of the GoO upon collection of signatures to the new Regulation adding increased responsibilities. Now, the EP also assesses ECIs' political support by balancing public and private interests and has an observatory function regarding the Commission's answers to successful ECIs.[102]

In a June 2023 report,[103] the EP criticised the limited visibility and awareness of citizens of ECIs as democratic tools, their financial burdens, and

[97] Jed Odermatt, 'European Citizens' Initiative on Trade in Goods Originating in Occupied Territories' (*City Law Forum*, 17 May 2021) <https://blogs.city.ac.uk/citylawforum/2021/05/17/european-citizens-initiative-on-trade-in-goods-originating-in-occupied-territories/> accessed 5 May 2024.
[98] European Commission (n 2).
[99] European Commission Secretariat-General, 'Myth and reality – Take the initiative – European Citizens' Initiative' (*Publications Office*, 2019) <https://op.europa.eu/en/publication-detail/-/publication/ffb28883-075b-11ea-8c1f-01aa75ed71a1> accessed 15 February 2024.
[100] ibid.
[101] Tosun, Béland, and Papadopoulos (n 86) p. 335.
[102] Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European citizens' initiative [2019] OJ L 130/55, arts 14 and 16.
[103] European Parliament, 'Resolution of 13 June 2023 on the Implementation of the Regulations on the European Citizens Initiative' [2023] P9 TA(2023)0230.

missing legal and political impact.[104] The EP has previously endorsed a strong ECI as a tool for citizens' agenda-setting but considers that, currently, it is not an effective bottom-up tool able to initiate legislation.[105] While the EP welcomed further improvements introduced by the new Regulation, it expressed the need for more actions following a successful ECI beyond parliamentary debates and meetings with the Commission. In theory, including another EU institution in the ECI should have increased the Commission's accountability for following up on successful ECIs; however, the impact of the EP's involvement remains limited in practice. Critically, while it retains an observatory function for the follow-ups to ECIs, no rules set out the extent to which the Commission must reply to successful ECIs.[106] Hence, there are no standards by which the EP could measure whether the Commission is fulfilling its obligations under the Regulation.

4.2.2. Substantive Limitations

Article 6(3)(e) of Regulation 2019/788 requires the subject matter of an ECI to be within the Commission's competencies to act and not be manifestly abusive or contrary to EU values set out in Article 2 TEU and the Charter.[107] Substantive limitations are, therefore, closely related to the Commission's role discussed previously and usually become relevant when the Commission refuses to take action after the verification of signatures.

It has been argued that an initiative's success does not rely on its compliance with the Regulations' substantive limitations and citizens' support but on whether it is following the Commission's policy agenda, keeping in mind the Commission's prominent role discussed previously.[108] Two noteworthy examples where substantive limitations have become apparent are case T-789/19 and that of 'End the Cage Age'. In the former, the Commission failed to assess all proposed legal bases to avoid registering an ECI calling for regulating the trade with occupied territories, contrary to the Commission's current policies.[109] In the latter

[104] European Parliament, 'Resolution of 13 June 2023 on the Implementation of the Regulations on the European Citizens Initiative' [2023] P9_TA(2023)0230, pt. M.
[105] European Parliament (n 103) pt. c and d.
[106] Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European citizens' initiative [2019] OJ L 130/55, art 15(2).
[107] Charter of Fundamental Rights of the European Union [2012] OJ C 326/02.
[108] Christopoulou (n 3).
[109] Case T-561/14 *European Citizens' Initiative One of Us and Others v European Commission* [2018] ECLI:EU:T:2018:210, para. 71.

case, the Commission promised a legislative proposal by the end of 2023 in response to the initiative's success but withdrew that timeline without indicating when and if a legislative proposal would follow.[110] The European Ombudsman became involved, putting forward a claim of heavy lobbying by the meat industry, and launching an investigation into the matter.[111]

These cases raise the question of how effective a democratic participatory tool can be if the topics are not limited purely by the rule of law and principles set out in Article 2 TEU and the Charter, but also by the Commission's willingness to interact with the topics.[112] Substantive limitations indeed are essential for safeguarding the rule of law and ensuring that it does not become a tool abused by populist movements.[113] But, as the subjects of an ECI are generally quite sensitive, its agenda-setting function plays a vital role by showcasing widespread support for the cause, meaning that a delicate balance must be struck.

4.2.3. Financial Limitations

A matter which should be briefly addressed is the financial aspect of running a successful ECI. Considering that eight out of ten answered initiatives reported funding of over €100.000, financial support appears to be a contributing factor to the success of an initiative.[114]

Gathering signatures can be a cost- and time-intensive effort, difficult to maintain without established organisational and financial structures.[115] This concern was already voiced before the first ECI Regulation came into effect, questioning how to ensure that the ECI would not simply turn into a new path for lobbies to further their interests.[116] Though the legislators stressed that the ECI would be a tool specifically aimed at encouraging citizen participation,[117] almost all successful initiatives in the past have been funded by well-established groups

[110] European Ombudsman, 'How the European Commission responded to the European Citizens' Initiative "End the Cage Age"' (Case Opened) 2287/2023/EIS.
[111] ibid.
[112] Moeckli, Forgács, and Ibi (n 11) p. 270.
[113] ibid.
[114] See Annex II.
[115] European Parliament (n 103) pt. 10.
[116] Greenwood (n 21) p. 944.
[117] EurActiv, 'Experts Strive to Make Citizens' Initiative Work' (*EurActiv*, 21 March 2011) <http://www.euractiv.com/future-eu/experts-strive-citizens-initiative-work-news-503261> accessed 05 May 2024.

such as the Catholic Church in the case of 'One of Us'.[118] On average, a successful initiative received €215,000,[119] with some ECIs being exclusively funded by one source, as in the case of 'End the Cage Age', totalling more than €300.000 in funding.[120]

Initiatives targeting lesser-known topics without the backing of larger organisations have mostly failed to meet the signature threshold, rendering the tool unattainable without external support.[121] The Ombudsman has been vocal in this context, stating that it is often the 'loudest voices' that are heard, again highlighting the financial disparities that ECIs without a large backing face, particularly in response to politically sensitive issues creating intense industry reactions.[122] As the promotion, both through digital and in-person campaigns, is not feasible without financial means, more funding for organisers has been demanded to enable successful ECIs without the support from larger groups to enhance democratic participation.[123]

4.2.4. Administrative Limitations

The final category of issues is the administrative burden placed on ECI organisers. These limitations are centred around the low citizen participation in the EU and the fragmented system of EU participatory tools.[124]

In its 2023 ECI report, detailing the developments since Regulation 2019/288 entered into force,[125] the Commission asked ECI organisers and citizens about their experiences under the new Regulation. In particular, the Commission highlighted the increase in registrations caused by the introduction of partial

[118] Greenwood (n 21) p. 944.
[119] Democracy International, 'Taking stock: Ten Years of the European Citizens' Initiative – More Citizens' Influence in the EU?' (*Democracy International*, 06 April 2022) <https://www.democracy-international.org/ taking-stock-ten-years-european-citizens-initiative-more-citizens-influence-eu> accessed 21 May 2024.
[120] European Commission (n 69) p. 3.
[121] Greenwood (n 21) p. 944.
[122] European Economic and Social Committee, 'The ECI at a Crossroads - An Opportunity to Take a Step Forward' (05 March 2024) <https://www.youtube.com/watch?v=-Sl0wwpDaW4&t=5s> accessed 06 March 2024.
[123] European Parliament (n 103) pt. 11.
[124] Alberto Alemanno, 'Towards a Permanent Citizens' Participatory Mechanism in the EU' (*Policy Department for Citizens' Rights and Constitutional Affairs*, September 2022) <https://www.europarl.europa.eu/RegData/ etudes/STUD/2022/735927/IPOL_STU(2022)735927_EN.pdf> accessed 5 May 2024, p. 48.
[125] European Commission (n 2).

registration, ensuring compliance of ECIs with the legal framework.[126] However, the new Regulation has not remedied all structural issues, exemplified by 13 out of 37 registered initiatives from 2020 to 2023 receiving less than 10,000 signatures.[127] ECI organisers have partially attributed the low signatories to the lack of support from larger organisations[128] and citizens' limited awareness of the ECI.[129] Responding to these concerns, the Commission only referred to changes possible within the existing legal framework,[130] by increasing visibility and support for organisers, enhancing the online collection system, and more visible follow-ups.[131]

Nevertheless, the lack of awareness can be traced back not only to the EU's perceived democratic deficit,[132] but also the limited impact the few successful examples of citizen participation have had in the past. Instead of meeting the demand for participatory tools that allow citizens to directly influence policy and legislation, there appears to be an ever-growing pool of participatory mechanisms in the EU, such as the ECP being introduced in 2022, which fall short of fulfilling these expectations.[133] Such disparities only further the lack of a common European public sphere, limiting the dialogue across borders.[134]

Regarding the missing follow-ups and their discouragement of citizen participation, the Ombudsman has been especially critical of the issue in the past.[135] During the ECI days, she addressed the contrast between the time- and labour-intensive efforts of organisers and the lacklustre and non-transparent responses of the Commission.[136] Similarly critical, the General Court declared that the Commission could not refuse to take action in response to a successful ECI just because the GoO referred to a legal basis in its application, which does not

[126] See: Secretariat-General, 'European Citizens' Initiative Forum' (*European Union*, 2024) <https://citizens-initiative-forum.europa.eu/_en> accessed 05 May 2024.
[127] European Commission (n 2).
[128] ibid p. 6.
[129] European Commission (n 2) p. 7.
[130] ibid p. 26.
[131] ibid pp. 26-29.
[132] European Commission, 'Citizenship and Democracy' (*Eurobarometer*, December 2023) <https://europa.eu/eurobarometer/surveys/detail/2971> accessed 21 March 2024.
[133] Alemanno (n 124).
[134] Monaghan (n 8) p. 292.
[135] See: European Economic and Social Committee, 'Expert Panel: More Deliberation, More Impact? Connecting the ECI and European Citizens' Panels' (05 March 2024) <https://www.youtube.com/watch?v=QQeLPl8QbJo> accessed 06 March 2024.
[136] European Parliament (n 103).

empower the Commission to propose a legal act. Hence, the Court implied that the Commission must take a holistic approach when responding to ECIs, putting pressure on a more accountable and comprehensive approach to the ECI and setting a legal precedent that may influence future ECIs.[137]

It has become apparent that the ECI has persisting flaws as a tool of participatory democracy rooted in its legal framework and implementation by the Commission. As this paper aims to assess how the ECI can be enhanced as a participatory tool, the final Chapter evaluates the potential of integrating a deliberative citizens panel into the ECI by combining it with the ECP.

5. A Call for Change: Combining the European Citizens' Initiative with European Citizens' Panels

This paper will conclude by utilising the insights from the current ECI's flaws to explore whether and how the integration of the ECP into the ECI could help create a more citizens-focused participatory mechanism.

To this end, this Chapter will briefly outline the ECP purpose and functioning and highlight its current insufficiencies as a tool for citizens' deliberation. Next, the Irish Citizens Assembly is introduced as inspiration for the EU to reimagine the ECP by presenting a cross-section between direct, deliberative, and participatory democracy. Finally, ideas for integrating a revised ECP into the ECI are proposed, and opportunities and obstacles of the model are addressed. While much academic literature has discussed different variations of EU citizen panels, conceptualising the combination of the ECP and ECI two has not yet been a matter of extensive discussion.

5.1. The ECP as a Deliberative Tool

This section will explore how to further involve citizens in the ECI process. Past proposals have introduced the idea of 'European Citizens Assemblies' to strengthen citizens' voices in the EU's decision-making, a version which will be elaborated in the following section.[138] The call for more participation was

[137] Case T-646/13 *Minority SafePack – One Million Signatures for Diversity in Europe v European Commission* [2022] ECLI:EU:T:2017:59, para. 34.
[138] See: Carsten Berg and others, 'The European Citizens' Assembly: Designing the Missing Branch of the EU' (*European University Institute and DemocracyNext*, September 2023).

superficially answered in 2022 when the Commission introduced ECP in response to recommendations by the CoFoE.[139] However, the ECP are not connected to the ECI and differ substantially from what has been proposed in the past.

5.1.1. The Functioning and Purpose of the ECP

The current ECP were established under the Commission's Work Programmes[140] and have operated since 2022 to supplement public consultations on proposed legislation.[141] They are not functioning as a standing body but are re-established with new participants for each topic. The 150 participants are selected randomly to reflect the EU's population. By May 2024, five panels have been concluded, each consisting of three meetings.[142] During these meetings, citizens are confronted with the Commission's legislative proposals and called upon to make recommendations for the Commission to implement its policy aims.[143] To encourage broader discourse on the topics, the ECP is accompanied by an online platform open for all citizens to submit their ideas and concerns.[144] However, the tool has been largely unknown and has not gathered widespread input from citizens. And whilst experts selected by the Commission guide the participants on substantive questions, the meetings remain closed to interest groups to advocate for their perspectives.[145] This exclusive selection process can limit diverse viewpoints and introduce biases, undermining the credibility of the deliberative process. The ECP concludes with non-binding recommendations for the proposals, but it is up to the Commission to implement or disregard these contributions.[146]

[139] 39th proposition in: Conference on the Future of Europe (n 35) p. 79.
[140] See the most recent version: European Commission, 'Commission Work Programme 2024 – Delivering Today and Preparing for Tomorrow' COM (2023) 638 final, p. 13.
[141] Andrey Demidov, Johannes Greubel and Perle Petit, 'Assessing the European Citizens' Panels: Greater Ambition Needed' (*EU Democracy Reform Observatory*, 6 September 2023), p. 6.
[142] European Commission (n 6).
[143] European Commission (n 38) p. 4.
[144] European Commission (n 6).
[145] Citizens Take Over Europe, 'Statement on the European Citizens' Panels' (*CTOE*, 15 February 2023) <https://citizenstakeover.eu/blog/statement-on-the-european-citizens-panels/> accessed 17 May 2024.
[146] ibid.

5.1.2. The Flawed Nature of the ECP

Three key flaws of the ECP shall be addressed here to conceptualise a possible inclusion of the ECP into the ECI. They were selected because they are relevant to restructuring and integrating the ECP into the ECI further on.

The first issue relates to the ECP dependency on the Commission.[147] Currently, there is no regulation or primary law detailing the powers of the ECP, the impact of its recommendations, or ways of initiating Panels independently from the Commission.[148] This structure thus prohibits the usage of ECP as a citizens-initiated tool and highlights its restricted nature as a mechanism for the Commission to claim the inclusion of citizens during the consultation stage of proposed legislation. Additionally, the ECP past recommendations have had a limited impact on the Commission proposals, mainly because they were involved too late rather than being engaged in the legislative process from the start.[149]

This leads to the second issue, the selection of topics. As mentioned, the ECP relies on a top-down approach of being initiated by the Commission.[150] Topics in the past have included, *inter alia*, food waste, learning mobility, and virtual worlds.[151] While it is important to note that the EU's competence to act is limited by Articles 3-5 TEU, it has been argued that these topics are not the pressing concerns citizens have but coincide with already existing Commission proposals.[152] A comparison with the follow-ups to past successful ECIs raises similar concerns regarding the Commission's willingness to interact with citizens' demands, ultimately determining their impact.[153]

The third issue is the lack of participation of citizens in the panels. This point may seem contrary to the purpose of the ECP, however, as with the ECI, its existence remains widely unknown.[154] While the ECP does have an online platform to gather input from the general public,[155] the impact of its contributions is limited as there is no awareness of such tools. Furthermore, there is a lack of

[147] Demidov, Greubel and Petit (n 141) p. 6.
[148] European Commission (n 38) p. 4.
[149] Citizens Take Over Europe (n 145).
[150] ibid.
[151] European Commission (n 6).
[152] Jake White, 'EU Citizens' Panel Inspired by Irish Process Advocates for Expansion of Learning Abroad' *Irish Examiner* (Dublin, 30 April 2023).
[153] Citizens Take Over Europe (n 145).
[154] Demidov, Greubel and Petit (n 141) p. 9.
[155] European Commission (n 6).

information available to the citizens participating in the ECP. As noted previously, interest groups cannot present their views on the topics during the panel meetings, and the experts tasked with advising the participants on factual matters are selected by the Commission. It has been argued that in past panels, these experts aligned with the aims of the Commission's existing proposals and insufficiently outlined the advantages and disadvantages of different policies, limiting participants' opportunities to make informed decisions.[156] Hence, its set-up and functioning would have to be revised to transform the ECP into a deliberative tool enhancing the ECI process, as will be conceptualised in section 5.3.

5.2. Drawing Inspiration from the Irish Citizens' Assembly

Whilst, in general, the ECP do suffer from the flaws described above, some well-functioning, similar models exist at the national levels. The Irish Citizens Assembly ('ICA') is an example of a citizens' panel that functions as a tool of deliberation and has resulted in lasting legislative changes. Therefore, it will be used to draw inspiration for a reimagined ECP. The ICA was chosen based on a comparative assessment of participatory mechanisms in the EU Member States (see Annex III), mainly considering the existence of citizens' participatory tools and their integration into the legislative process. Additionally, the Assembly's combination of direct, representative, and deliberative democratic elements presented a strong example for the Commission when establishing the current ECP.[157]

To begin with, the idea originated from a project titled 'We the Citizens', advocating for deliberative forums and involving citizens in core constitutional and political questions,[158] and led to Irelands' 2015 referendum on marriage equality. [159] Following the referendum's success, the 2016 Government established the ICA as an independent, deliberative mechanism for citizens, particularly focussing on constitutional questions.[160]

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[156] Citizens Take Over Europe (n 145).
[157] White (n 152).
[158] Jane Suiter and David Farrell, 'The Irish Citizens' Assembly Project' (*Citizens Assembly*, 2019) <http://www.citizenassembly.ie/about/#the-irish-citizens-assembly-project> accessed 04 May 2024.
[159] ibid.
[160] Blokker and Gül (n 12) p. 35.

The ICA comprises 100 randomly selected citizens, reflecting the Irish demographic by region, age, sex, and income.[161] The ICA is not a standing body but established by the Irish Parliament through a Resolution.[162] During the deliberative stage, members of the public and stakeholders can submit ideas, and an Expert Advisory Group supports the Assembly discussions. The ICA drafts and votes on its recommendations before a final report is forwarded to the Parliament and government. The Parliament debates the recommendations and may pursue further actions. For example, the Parliament and Government can call for a referendum based on the recommendations, in which case the Prime Minister's office organises the referendum under Article 47 of the Constitution. However, this is not a mandatory consequence as the ICA final report is non-binding.[163] Through this structure, three forms of democracy work together in practice, thereby enhancing its democratic legitimacy. Representative democracy through the elected Parliament establishing and assessing the ICA's results; participatory and deliberative democracy through the citizens' discussions; and direct democracy through possible referendums.

Over the last eight years, the ICA's recommendations have resulted in four referendums, most recently on 8th March 2024, entitled the 'Family Amendment' and the 'Care Amendment'.[164] They were rejected by the majority of voters,[165] presenting the first defeat in the ICA's history. Two reasons mentioned for this were the lacklustre campaigning by the Government,[166] and the Government's deviations from the ICA recommendations by changing the wording and content

[161] The Citizens Assembly, 'Selection of Members' (*Citizens' Assembly*, 2024) <https://citizensassembly.ie/ assembly-on-drugs-use/selection-of-members/> accessed 21 March 2024.
[162] Suiter and Farrell (n 158).
[163] Jaskiran Gakhal, 'The Irish Citizens' Assembly' (*Participedia*, 15 March 2021) <https://participedia.net/ case/5316> accessed 13 April 2024.
[164] Irish Government, 'Referendums on Family and Care' (*Citizens Information*, 11 March 2024) <https://www.citizensinformation.ie/en/government-in-ireland/elections-and-referenda/types-of-elections-and-referendums/referendum-on-family-and-care/> accessed 21 March 2024.
[165] Referendum Returning Officer, 'Referendum Results' (*Referendum Ireland*, 09 March 2024) <https://www.referendum.ie/> accessed 21 March 2024.
[166] Jennifer Bray, 'Five Reasons Why the Yes Side Failed And The No Campaign Won the Day' (*The Irish Times*, 9 March 2024) <https://www.irishtimes.com/politics/2024/03/09/how-the-government-lost-and-the-no-side-won-the-care-and-family-referendums/> accessed 21 March 2024.

of the referendum, undermining the citizen's proposals.[167] For this paper, however, the ICA´s success as a direct democratic tool is only of limited importance. Instead, the inclusion of the ICA into the core legislation and the lessons arising from the failed referendum will be considered in the following sections when discussing integrating a deliberative system into the ECI.

5.3. The Possibility of Integrating a Revised ECP into the ECI

This section will explore the options for integrating a revised ECP into the ECI, as a complementary mechanism rather than an alternative, to increase its impact as a participatory tool. By considering the lessons from the ICA and the challenges of the current ECP and ECI, this section will be divided into the aspects of (a) institutionalising ECIs and ECP, (b) the possible stage of integrating ECP into the ECI, and (c) the impact of citizens' voices.

5.3.1. How: Institutionalising ECIs and ECP

The core obstacle of both participatory tools is their dependency on the Commission.[168] Therefore, this section will explore the ways of restructuring and institutionalising them to enhance their impact on the EU's decision-making process.

The ECP is currently an internal procedure during the Commission's consultation process, while the ECI depends on the Commission for registration and follow-ups.[169] In the process of institutionalisation, an agreement could be formed to decrease citizens' dependency on the Commission by creating a legal framework defining the functioning and the outcome of the combination of ECIs and ECP. A first step could be making the ECP the subject of an inter-institutional agreement between the Commission, the EP, and the Council,[170] similar to the

[167] Sortition, 'Ireland Referendum Embarrassment for Politicians Shows What Happens If You Don't Listen to Citizens' (*Sortition*, 14 March 2024) <https://www.sortitionfoundation.org/embarrassment_for_irish_politicians> accessed 22 May 2022.
[168] Berg and others (n 138) p. 26.
[169] Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European citizens' initiative [2019] OJ L 130/55, arts 6 and 15.
[170] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/01, art 295.

establishment of the CoFoE.[171] Through such a binding agreement, the institutions could decide to re-establish the ECP under a new framework and separate it from the exclusive competence of the Commission, all acting as institutions responsible for, and overseeing the success of, citizen participation.[172] The second step would then entail the integration of the ECP into the ECI by revising Regulation 2019/788. Establishing a legally binding framework to integrate the ECP into the ECI could create a more robust participatory structure and ensure citizens' voices in the EU's decision-making.

While the foregoing considered reframing the ECP/ECI tool through secondary law, citizens' participation is explicitly mentioned in the Treaties; see Articles 10 and 11 TEU. However, the treaties do not codify how this should be implemented in practice. It is, therefore, worth considering whether an integration into the Treaties should be desirable.[173] While a secure manifestation of citizens' participation in primary law might be an enticing end goal, especially to solidify its existence against fluctuating political circumstances, any such changes following Article 48 TEU bear risks.[174] Amending the Treaties requires unanimity of all Member States,[175] which, depending on the political climate, is associated with long and complex negotiations.[176] Considering that ECP are not guaranteed to be employed by the upcoming Commission, it appears to be more sensible to advocate for a Regulation and inter-institutional agreement under secondary law. These appear to be better suited here as they present quicker implementation and lower political barriers, constituting a faster solution to ensure the continued existence of the ECP and its feasible inclusion into the ECI.[177]

[171] Joint Declaration of the European Parliament, the Council and the European Commission on the Conference on the Future of Europe Engaging with Citizens for Democracy – Building a More Resilient Europe [2021] CI 91/01.
[172] Gabriele Abels and others, 'Next Level Citizens Participation in the EU: Institutionalising European Citizens' (Bertelsmann Stiftung, June 2022), p. 22.
[173] Berg and others (n 138) p. 29.
[174] Paul Blokker, 'Experimenting with European Democracy' (*Verfassungsblog*, 21 June 2022) <https://verfassungsblog.de/experimenting-with-european-democracy/> accessed 05 May 2024.
[175] Consolidated version of the Treaty on European Union [2012] OJ C 326/13, art 48(7).
[176] Berg and others (n 138) p. 29.
[177] Berg and others (n 138) p. 29.

5.3.2. When: Stages of Integrating the ECP into the ECI

Having considered the legal framework for a possible connection between the ECI and the ECP, this section discusses at which stage of the process could the ECP best contribute to the ECI's functioning.

The first version foresees the work of the ECP at the beginning of the ECI process, drafting ECIs based on recommendations submitted by citizens.[178] This model's strength lies in assessing ECIs´ potential citizen support by filtering topics in the deliberative process. While this approach could potentially mobilise more citizen support, as the ECI would pass through a deliberative process and multiple viewpoints would be considered during the drafting of the initiative,[179] it could eliminate the bottom-up approach defining the ECI as a participatory tool. As the integration of the ECP is aimed at furthering the impact of citizens' interests, it is not desirable that an ECI's content would depend on another body's approval. Such limitations could, for example, hinder initiatives advocating for minority issues.[180]

The second version entails the involvement of the ECP once an ECI has collected the required signatures.[181] Similar to the ICA, the ECP would provide an *ad hoc* mechanism to further deliberate on the ECI topics and the possible actions following its success. To sufficiently inform and support members of the panels, the experts would be selected independently, and interest groups allowed to present their views, while retaining the online platform to gather citizens' input.[182] This way, the members of the ECP would be presented with a comprehensive overview of all arguments in favour and against certain policy measures.[183] In view of the ICA, providing citizens with a spectrum of arguments and the guidance of experts can lead to a productive deliberative process, resulting in high-quality outcomes considering different interests at stake.[184]

[178] James Mackay and Kalypso Nicolaïdis, 'Participatory Democracy in the EU Should be Strengthened With a Standing Citizens' Assembly' (*CEPS*, 29 February 2024) <https://www.ceps.eu/participatory-democracy-in-the-eu-should-be-strengthened-with-a-standing-citizens-assembly/> accessed 04 May 2024.
[179] Berg and others (n 138).
[180] Abels and others (n 172) p. 30.
[181] Berg and others (n 138) p. 23.
[182] Citizens Take Over Europe (n 145).
[183] Mackay and Nicolaïdis (n 178).
[184] White (n 152).

All in all, the EU institutions have acknowledged the need for more bottom-up policy-making but have not followed through with this promise.[185] Hence, the second proposed model could enable the ECP to discuss and advance topics at the core of citizens' concerns, making it the more favourable approach when seeking a greater influence of bottom-up initiatives.

5.3.3. Why: Making Citizens' Voices Matter

Originally, the ECI and the ECP aimed to increase citizens' participation in the EU's legislative and policy decisions.[186] However, the impact of both tools appears to be limited to the Commission acknowledging the demands of ECIs or recognising recommendations by the ECP without acting on them.[187] Relying on the previously discussed model, where the ECP deliberates on the topics of successful ECIs, raises an important question: what impact will the ECP recommendations ultimately have?

A non-binding option could be forwarding recommendations to the Commission in a similar manner as is currently in practice. The ECP would provide more nuanced recommendations on how to respond to ECIs, incentivising the Commission to act upon a proposal as it has not just received the support of one million citizens, but has also passed through a deliberative process.[188] In practice, a voting threshold could be introduced, after which the recommendations would be forwarded to the EP and the Commission for a discussion and vote, leaving the implementation up to the institutions, similar to the ICA.[189] However, such a system would most likely bear the risk of lacking follow-ups by the Commission as there would be no set procedure following an ECP recommendation, and is therefore not desirable.

A more promising outcome could be the issuance of a binding legislative proposal to strengthen the impact of the ECIs and the ECP. As the Treaties foresee

[185] Joint Declaration of the European Parliament, the Council and the European Commission on the Conference on the Future of Europe Engaging with Citizens for Democracy – Building a More Resilient Europe [2021] CI 91/01.
[186] See for example: ibid.
[187] See for the ECI the assessment under section 4.1 of this paper and for the ECP: Demidov, Greubel and Petit (n 141) p. 8.
[188] Berg and others (n 138) p. 18.
[189] Kotanidis and Del Monte (n 25).

the Commission's exclusive right to initiate legislation,[190] this proposal would entail a revision of the Treaties. This is an extensive procedure bearing high political risks, as mentioned in part (a) of this section. Hence, it is worth considering whether a binding outcome could be construed differently.

The last Irish referendum showed that letting the government reformulate or repurpose citizens' recommendations can severely distort their aim and make the deliberative process obsolete.[191] The ECI has had similar hurdles, as there are no guidelines regulating how the Commission must respond to successful ECIs, currently only requiring a 'reasoned response'. [192] Therefore, a desirable conclusion could be reached by empowering the ECP to issue binding proposals to the Commission via secondary law with concrete steps the Commission would need to follow in its reasoned responses to the ECIs. Thereby, the Commission's lack of willingness to actively respond to initiatives could be overcome.[193] To warrant their effectiveness, these proposals would be accompanied by a regulation that sets out the rules on how the institutions ought to react to these proposals. For example, in light of the potential inter-institutional agreement, the proposals by the ECP based on the ECI could entail that, within a set time frame, the Commission, together with the EP and Council, would have to present an action plan accommodating the recommendations.[194] This way, the benefits of a binding proposal could be combined with the issuance of a Regulation or an inter-institutional agreement to ensure that citizens' voices are not only heard but have a tangible chance of creating a lasting impact on EU legislation and policies.

5.4. Opportunities and Obstacles of Integrating the ECP within the ECI

This final section revisits the challenges of the ECI discussed in section 4.2, examining the potential opportunities and obstacles that could arise from integrating the ECP into the ECI framework. As the aim of this paper is to assess

[190] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/01, art 294.
[191] Sortition (n 167).
[192] Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European citizens' initiative [2019] OJ L 130/55, art 15.
[193] See in contrast the Commission's limited requirements to answer ECIs: Case T-789/19 *Tom Moerenhout v European Commission* [2021] ECLI:EU:T:2021:260, para. 47.
[194] Abels and others (n 172) p. 18.

the ECI as a participatory tool for citizens, an integration of the ECP should bring about critical improvements to the ECI's functioning.

5.4.1. An Opportunity to Enhance the ECI

The first issue under section 4.2.1 referred to the Commission's lack of proactive responses to successful ECIs. The extent to which this issue would be solved by introducing the ECP in the ECI system would depend on the weight attributed to the ECP proposals. The outcome favoured in the previous section, binding recommendations, and introducing standards by which these would have to be answered, could significantly enhance the legislative impact of successful ECIs. This model could counteract the Commission's current trend of responding proactively only to topics favourable to its policy aims. While it may appear that this result could also be reached by introducing more standards for the Commission in its ECI follow-ups under Regulation 2019/788, the added deliberative phase could consider more perspectives from citizens in its proposals, supported by the guidance of independent experts.[195] Additionally, considering the ICA, recommendations made by citizens based on a deliberative model have been characterised as consistently producing high-quality legislative recommendations.[196]

Section 4.2.2 addressed the limited power attributed to the EP when overseeing the follow-ups to successful ECIs. The function of overseeing the implementation of recommendations from the ECP could be enhanced by the envisioned standards for how institutions will have to react to ECP proposals.[197] As the current requirements for responding to successful ECIs are vague and, therefore, difficult to enforce,[198] a concrete set of rules could empower the EP to oversee the implementation of policy proposals from the ECP. Additionally, if the ECP is established through an inter-institutional agreement, this agreement could restructure the dynamics of the institutions regarding the implementation of

[195] Berg and others (n 138) p. 18.
[196] Suiter and Farrell (n 158).
[197] Demidov, Greubel and Petit (n 141) p. 9.
[198] See for example the various cases brought before the General Court and CJEU by GoO claiming an insufficient response to a successful ECI: Case C-26/23 P *Citizens' Committee of the European Citizens' Initiative "Minority SafePack – one million signatures for diversity in Europe" v European Commission* [2023] ECR I-616 or Case T-789/19 *Tom Moerenhout v European Commission* [2021] ECLI:EU:T:2021:260.

citizens' proposals. For example, the EP could be attributed more power in developing a joint action plan with the Commission to implement the proposals.[199]

Considering administrative hurdles described in section 4.2.5, a significant obstacle to the ECI is citizens' limited awareness of it.[200] Similarly, the ECP online platform is also not being used as actively as initially envisioned.[201] However, combining the two tools has a promising outlook in raising awareness. The lack of interest in the ECP has been attributed to the selection of topics that are not considered significant policy questions for most citizens.[202] If the ECP were to discuss the topics of successful ECIs, having already gathered one million signatures and commonly dealing with more pressing social or political issues,[203] the ECP binding recommendations and possible legislative changes could encourage more citizens to start an initiative. This way, the synergy of the two tools could enhance citizens' participation, as the legislative or policy changes would be tangible, compelling the EU institutions to react proactively to citizens´ demands. Furthermore, the transparency of the reasoning for decisions taken in response to an ECI would be improved, allowing citizens to monitor and understand EU decision-making. The result would not be a Commission communication detailing intended acts, but rather the outcome of a deliberative process including members of the ECP, experts, stakeholders, and interested citizens through the engagement platform.[204]

5.4.2. Addressing Obstacles to the Proposal

While including the ECP in the ECI procedure could significantly enhance the institutional and administrative issues highlighted, some administrative, financial, and substantive issues do not have a clear answer.

To begin with, not all administrative hurdles find a solution in the ECP/ECI model. Any plans to integrate the ECP into the ECI depend not only on the Commission's willingness to continue the ECP project, but also on its openness to substantially revise its approach to handling concrete legislative proposals by

[199] Abels and others (n 172) p. 18.
[200] European Commission (n 132).
[201] Demidov, Greubel and Petit (n 141) p. 7.
[202] White (n 152).
[203] See the assessment of successful ECIs in section 4.1 of this paper.
[204] European Commission (n 6).

citizens.[205] The current Commission's initiative to establish an ECP in response to the recommendations made by the CoFoE, however tame the current version may be, is a positive development. However, considering that the answers and follow-ups to successful ECIs have generally been lacklustre, it is questionable whether the next Commission would be open to revising the ECI Regulation. By empowering the ECP to make binding recommendations, it would, in turn, require the Commission, and possibly the EP and the Council,[206] to implement in some form, rather than just giving a 'reasoned response'.

Placing the ECP as a deliberative forum after a successful ECI does not solve the issue of substantive and financial limitations inhibiting an initiative's success. It would most likely still depend on its funding and backing of established groups. A mechanism to level the playing field for initiatives dealing with issues of minority groups or those otherwise independent of established groups would have to be implemented in the possible ECI/ECP model. This consideration is essential to ensure that the topics discussed in the ECP would not be limited to those with the proper budget to fund an ECI and, therefore, contrast its purpose as a bottom-up tool for citizens.[207] Furthermore, regarding the substantive limitations, it must be acknowledged that, while the ICA entrusts the assemblies to discuss core constitutional problems such as same-sex marriage and the right to abortion,[208] the scope of ECI/ECA topics remains limited to the extent that they fall within the EU's competence to act.

Considering all the above, the ECP could substantially improve the ECI in various ways, though some obstacles remain to be addressed. Most notably, integrating citizens into the legislative and policy-making process with realistic prospects of making lasting changes could revive citizens' participation in the EU. In any case, all proposals remain theoretical for now, as the approach of the next elected Commission will determine how and to what extent citizens' participation will be dealt with moving forward.

[205] Demidov, Greubel and Petit (n 141) p. 4.
[206] Abels and others (n 172) p. 18.
[207] European Parliament (n 103) pt. 10.
[208] Suiter and Farrell (n 158).

6. CONCLUSION

Throughout its history, the EU has always been a project constantly adapting to external and internal changing circumstances. During the last decade, participatory opportunities have emerged in the EU to meet the increasing demand for more impact of citizens' voices on top-level policies and legislation, but their qualitative effect remains limited.

Therefore, when referring to the initial research question of this paper, addressing the extent to which the ECI functions as an effective tool of participatory democracy in the EU and how it could be improved, it must be concluded that, while being operational, the ECI is currently not functional. The aim of the ECI was, as defined by the Commission, to encourage citizens' participation and promote the democratic dialogue.[209] However, the ECI has persisting legal and substantive hurdles, making it difficult for organisers to register and gather support for an initiative. The problems are exacerbated by the Commission's pursuit of set policy aims and a lack of rules setting out how the Commission must respond to successful ECIs, vastly limiting the impact of ECIs over the last 12 years.

In response to these faults, Chapter 5 of this paper concluded by proposing the integration of the ECP, as a deliberative tool to enhance the ECI's functionality, within the ECI´s framework. While introducing a deliberative tool for the ECI has been discussed in the past, academic literature has not extensively dealt with the concrete combination of the ECP and ECI. The Panels could make binding proposals for the EU institutions as to how the aims of successful ECIs could be implemented, thereby creating a citizens' participatory tool which not only starts with citizens' commitment to supporting an initiative but also concludes by citizens' proposing concrete steps to reach these goals. Such a mechanism could aid not only the enhanced impact of the ECI, but also to encourage more institutional cooperation and responsibility for ensuring citizens participation in the EU.

[209] Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative [2011] OJ L 65/1, 2.

Strengthening the EU's democratic tools is a pressing issue considering the continuous rise of populist parties that do not believe in the European project,[210] presenting a new challenge to which the EU must adapt. While establishing meaningful citizen participation might appear to be a Sisyphean task, more innovative and ambitious democratic projects are necessary. The ECI provides a framework that can be enhanced through accompanying tools like the ECP. In light of the recent re-election of the European Parliament and its subsequent reconfiguration, it might finally be the time to shift the question of 'whether' there should be a strong citizens' participatory tool into the dialogue of 'when' and 'how' precisely this will happen.

[210] Giovanna Coy, 'Mapped: Europe's rapidly rising right' (*Politico*, 24 May 2024) <https://www.politico.eu/article/mapped-europe-far-right-government-power-politics-eu-italy-finalnd-hungary-parties-elections-polling/> accessed 29 May 2024.

ANNEXES

ANNEX I

This overview does not contain ECIs with the statuses 'Collection closed', 'Unsuccessful collection', or 'Withdrawn', as the European Commission did not consider these due to the lack of sufficient signatures. This overview only contains ECIs that were refused registration.

Name & Date	Topic	Commission Decision	Reason for refusal	Notes
Iniciativa Eve para la creacion del derecho de decision **Refusal: 14.12.2021**	Propose any act or legislation to implement the (human) 'right to decide' to establish a system of direct democracy at the level of the Union institutions. This may imply changes in the Treaties, imply that Regulation 2019/788 allows ECI's to ask the Commission to make such proposals.	The proposed citizens' initiative falls manifestly outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties within the meaning of Article 6(4), third subparagraph, point (c), of Regulation (EU) 2019/788.	- Article 11 (4), first subparagraph TEU - Article 1 of Regulation (EU) 2019/788 - Article 6(3), first subparagraph, point (c) of Regulation (EU) 2019/788 - Case T-611/19 (GC): 'legal act' refers to regulations, directives, decisions, recommendations and opinions adopted by the Institutions (see also Article 288 TFEU). Regulation (EU) 2019/788 does not allow citizens' initiatives to ask the Commission to propose changes to the Treaties, but only, within the framework of its powers, acts of secondary law to implement the Treaties. - Initiative would have to be achieved through modifications of the Treaties and could not be achieved by legal acts referred to in Article 288 TFEU.	Before the refusal, the Commission sent a letter which set out that the Organisers did not fulfil requirements under Article 6(3), first subparagraph, point (c), of Regulation 2019/788; Commission mentioned that Regulation 2019/788 did not allow ECI's to make proposals to revise the Treaties; Organisers failed to indicate which legal act was sought. Organisers failed to implement these remarks in their resubmission of the ECI.
Derecho de la Unión, derechos de las minorías y democratización de las instituciones Españolas **Refusal: 03.07.2019**	Raise awareness of the current situation in Spain which entails a disregard of basic EU law rights and principles, especially with regard to minority rights (referring to the independence movement in the Catalan region) and democratic standards.	The proposed citizens' initiative falls manifestly outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.	They invited the Commissi to examine the situation in Spain and to take steps in that context. It failed to mention which legal act was sought from the Commission.	
Stopping trade with Israeli settlements operating in the Occupied Palestinian Territory **Refusal: 30.04.2019**	Invite the Commission to stop trade with Israeli settlements colonising Occupied Palestinian Territory. As the Commission has exclusive competence over trade, the initiative seeks the following actions: - Recognize that trade with Israeli settlements is prohibited for the EU and all Member States - A regulation which ensures that goods and services originating in settlements will not enter the European market.	The proposed citizens' initiative falls manifestly outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.	A legal act sought by means of the initiative falls under Article 215 TFEU in form of a decision adopted in accordance with Chapter 2, Title V TEU for the interruption or reduction of trade with a third country. The Commission does not have the power to submit a proposal for such a decision.	Seems like a good point to bring up when discussing the bureaucratic hurdles and the issue of the Commission as the sole addressee of an ECI.

EU wide referendum whether the European Citizens want the United Kingdom to remain or to leave! **Refused: 28.11.2018**	Invite the Commission to not a binding plebiscite but a public opinion poll to express their wish whether Brexit should happen or not.	The proposed citizens' initiative falls manifestly outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.	There is no legal basis in the Treaties which would allow for the adoption of a legal act related to the decision-making process and the notification of a Member State expressing the wish to leave the Union under Article 50(1) TEU.	Repeat answer from the previous ECI, good to reference when talking about the extent to which the Commission has to reply (or give reason when refusing).
British friends-stay with us in EU **Refusal: 21.03.2018**	Aim to recognise that the Brexit referendum was not a binding plebiscite, but only a public referendum to judge the opinion of the British populations at that moment and to reach a majority of British Citizens and thereby giving an opportunity to voice their opinion to all British citizens.	The proposed citizens' initiative falls manifestly outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.	There is no legal basis in the Treaties which would allow for the adoption of a legal act related to the decision-making process and the notification of a Member State expressing the wish to leave the Union under Article 50(1) TEU.	
Stop Brexit **Refusal: 22.03.2017**	Organisers wish to express that the process of Brexit is doing enormous damage to the United Kingdom and that the damage will continue to fracture British society. Consequently, the UK should stay inside European Union.	The proposed citizens' initiative falls manifestly outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.	There is no legal basis in the Treaties which would allow for the adoption of a legal act to prevent a Member State from leaving the Union under Article 50(1) TEU.	Principally the same reply as the two following ECIs. See the notes above for relevance.
Vite l'Europe sociale ! Pour un nouveau critère européen contre la pauvreté **Refusal: 06.08.2014**	Ask the Commission to establish a European criterion against poverty by means of Articles 4(2)(b) and 151 TFEU and Articles 2 and 3 TEU.	The proposed citizens' initiative falls manifestly outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.	The Articles proposed by the organisers as well as others examined by the Commission do not serve as a legal basis for the adoption of a legal act. Upon its own initiative, the Commission also consulted Article 153(1)(j) TFEU which aims to fight against social exclusion. However, only the Parliament and the Council are able to adopt measures to encourage cooperation to that end but does not provide the legal basis for a harmonising legal act sought by the initiative.	One can definitely see a shift in the detail of the response and the extent of the Commission's proactive work to seek different possible legal basis. Also, the response mentions different remedies, i.e. an appeal with the Court in line with Article 263 TFEU or a complaint of maladministration with the European Ombudsman under Article 228 TFEU.

Ethics for Animals and Kids **Refusal: 27.03.2014**	A legal act protecting the welfare of animals without an owner and living on the street within the European Union.	The proposed citizens' initiative falls manifestly outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.	Under the proposed Articles by the organisers (Article 2 TEU, Article 11, 13, 168 TFEU and Articles 21, 45, 49, 151/156 of the Charta) no discernible legal basis for such an act could be found. Animal rights are limited to Article 43(2), 114 and 192 TFEU as well as the Common Agricultural Policy (CAP). The environmental aims are exhaustively listed under Article 191 TFEU (as well as Articles 11 TFEU and Article 37 of the Charta) which does not include animal welfare. Social policies under Article 156 and 151 TFEU are not applicable. Animal welfare remains within the exclusive competences of the Member States.	Very exhaustive answer and the same remedies listed as in the subsequent decision.
A new EU legal norm, self-abolition of the European Parliament and its structures, must be immediately adopted. **Refusal: 27.01.2014**	Introduce a legal basis for the self-abolition of the European Parliament if it does not fulfil key EU Treaty regulations.	The proposed citizens' initiative falls manifestly outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.	The organisers did not provide a legal basis or any Article to achieve that aim. Also, the proposed initiative would imply a revision of the Treaties.	See above and mentions remedies.
The Supreme Legislative & Executive Power in the EU must be the EU Referendum as an expression of direct democracy. **Refusal: 27.01.2014**	Introduce a legal basis for the self-abolition of the European Parliament if it does not fulfil key EU Treaty regulations.	The proposed citizens' initiative falls manifestly outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.	The organisers did not provide a legal basis or any Article to achieve that aim. Also, the proposed initiative would imply a revision of the Treaties.	This is the exact same initiative as the one above. (Same description of the objective partially the same organisers)
Our concern for insufficient help to pet and stray animals in the European Union **Refusal: 07.11.2013**	Propose legislation to establish a common regulatory framework that harmonises Member States welfare and protection of pet and stray animals, in order to provide the necessary legal basis for pet animal welfare and protection in Member States.	The proposed citizens' initiative falls manifestly outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.	Organisers proposed Articles 18-25, 45-55, 67-89, 168, 195, 119-144, 325 TFEU. Animal welfare policy areas are limited to the exhaustive list under Article 13 TFEU. Referring to the decision in Case of C-189/01 *Jippes* the Court considered that animal welfare did not form part of the objectives of the Treaty under Article 2 TEC, and that no such requirement is mentioned in Article 33 TEC, which sets out the objectives of the Common Agricultural Policy.	Mentions under which Articles animal welfare has been advanced so far but that the proposed legislation would not contribute to any of the objectives of these policies as set out in the Treaties. Also mentioned remedies.

Right to Lifelong Care: Leading a life of dignity and independence is a fundamental right! **Refusal: 05.11.2013**	Long term care should not be subject to internal market rules but classified as public services deserving of universal access. The EU shall adopt legislation obliging MS to supply such services and increase its efforts to assist in providing universal access to long-term care beyond health care to ensure the fundamental right to human dignity.	The proposed citizens' initiative falls manifestly outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.	The legal basis provided by the organisers as well as the ones considered by the Commission independently are inadequate. The proposed act would classify long-term health care as services of general economic interest (SGEI). The proposed Article 153 TFEU is an unsuitable basis as it only foresees the adoption of minimum requirements for workers. Article 14 TFEU is also not a valid legal basis. The Union legislator has no competence to impose that Member States provide an SGEI but only to define the principles and conditions that the Member States must then respect in case they decide to provide a specific SGEI.	Provision of remedies and an autonomous consideration of other legal basis as well as an extensive explanation of the reasons why the proposed legal basis are not suitable.
To hold an immediate EU Referendum on public confidence in European Government's (EG) competence. **Refusal: 30.10.2013**	An EU referendum with the question: "Should the current failing form of EG be replaced by one without democratic deficit?"	The proposed citizens' initiative falls manifestly outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.	The proposed Article 11(4) TEU which only provides a legal basis for the European Citizens Initiative itself, but not a referendum for which no legal basis is envisioned within the Treaties.	This initiative has partially the same organisers as the initiatives "A new EU legal norm, self-abolition of the European Parliament and its structures, must be immediately adopted." and "The Supreme Legislative & Executive Power in the EU must be the EU Referendum as an expression of direct democracy.". Also refers to remedies.
Stop cruelty for animals **Refusal: 26.07.2013**	Ask for a Directive or law to obtain uniform treatment of pets and introducing their subjective rights.	The proposed citizens' initiative falls manifestly outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.	Article 13 TFEU and the European Convention for the Protection of Companion Animals, as proposed by the organisers, cannot serve a legal basis for this aim. Referring to the decision in Case of C-189/01 *Jippes* the Court considered that animal welfare did not form part of the objectives of the Treaty under Article 2 TEC, and that no such requirement is mentioned in Article 33 TEC, which sets out the objectives of the Common Agricultural Policy. Animal welfare policies have so far been adopted by means of Articles 43(2), 114, and 192 TFEU. Neither would be suitable for the objective of the present initiative.	Similar to "Our concern for insufficient help to pet and stray animals in the European Union" and "Ethics for Animals and Kids" and referred to remedies.

Ensemble pour une Europe sans prostitution légalisée **Refusal: 23.07.2013**	The elimination of the legalisation of prostitution. In that regard, this shall serve the aim to reduce the modern slave trade and mafia circuits, curb the use of drugs and the transmission of diseases, restore egalitarian relations between genders, combat direct violence against women, and defend human dignity because the body is not an object or a commodity.	The proposed citizens' initiative falls manifestly outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.	The legal basis provided by the organisers are unsuitable for the aim of the initiative. Article 83 TFEU mentioned the minimum standards of definitions of crimes. While some of the objectives mentioned by the initiative fall under these aims (Article 83(2) TFEU), prostitution itself does not form part of the list and remains within the competences of the Member States. Article 84 TFEU does not entail the harmonisation of laws envisioned by the initiative. No other legal basis considered by the Commission was suitable.	Again, considered other legal basis upon its own initiative and referred to remedies.
Enforcing selfdetermination Human Right in the EU **Refusal: 01.02.2013**	To accommodate the self-determination of human rights according to the Charter of the UN, the Covenants of 1966, the Final Act of the Conference for Security and Cooperation in Europe (Helsinki 1975), and the ICJ Advisory opinion on Kosovo, 22.07.2010.	The proposed citizens' initiative falls manifestly outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.	The Treaty Articles 1, 2, 3(1), 3(5), 3(6), 11(1), 21, 48(2) TEU as well as all other possible Articles are not suitable for the aim of the initiative. Amending the Treaties in line with Article 48(2) TEU falls outside the scope of a European Citizens Initiative.	Mentions remedies and would be interesting to explicitly contrast against the Irish Citizens Assembly.
Unconditional Basic Income **Refusal: 06.09.2012**	The Commission is requested to speed up the introduction of an Unconditional Basic Income within all Member States of the EU.	The proposed citizens' initiative falls manifestly outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.	The aims listed under Article 153(1)j TFEU and the legal basis under Article 153(2)a TFEU do pursue the aims of the initiative but are not suitable as they do not envision harmonising laws but only to enhance cooperation within the Member States or minimum standards. Similar reasoning can be applied to Articles 5, 151, and 156 TFEU, Articles 2 and 3 TEU as well as Articles 1, 2, 5, 6, 8, 15, and 34 of the Charta.	Remedies are listed. Unsure about the response of the Commission. This could be a good starting point to analyse its response when a certain legal act is requested but only a different one is possible under the Treaties. Would entail more cooperation between the organs and would again question the Commission as the sole addressee of the ECI.
Création d'une Banque publique européenne axée sur le développement social, écologique et solidaire **Refusal: 06.09.2012**	Create a bank allowing Member States to borrow money cheaply for investments aimed at creating jobs, developing public services and reducing imbalances without having to pay profitable loan rates.	The proposed citizens' initiative falls manifestly outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.	The legal act was proposed on basis of Article 3(3) TEU which does not imply any powers of the institutions to adopt legal acts. No other legal basis could be found upon which the aim of such an initiative and creation of such a new body could be realised.	Mentions the remedies.
One Million Signatures For "A Europe Of Solidarity" **Refusal: 06.09.2012**	Establish the principle of the "state of necessity" for cases in which the financial and the political existence of a State is in danger. There, a refusal of debt payment is necessary and justifiable.	The proposed citizens' initiative falls manifestly outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.	The Articles 119-144 TFEU as well as all other possible legal basis are unsuitable for the aims of the initiative. Article 136(1) TFEU is aimed at strengthening fiscal discipline of Member States and does not authorise the Union to substitute Member States in their fiscal sovereignty.	Mentions the remedies.

Abolición en Europa de la tauromaquia y la utilización de toros en fiestas de crueldad y tortura por diversión. **Refusal: 19.07.2012**	Prepare an act that specifies and develops the scope of article 13 TFEU for an effective achievement of the well-being of animals as sentient beings without prevailing "legal or administrative provisions" and/or "customs of the Member States relating, in particular, to religious rites, cultural traditions and regional heritage".	The proposed citizens' initiative falls manifestly outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.	Initiative organisers proposed Articles 7, 13, 38, 114 TFEU, Articles 2 and 6 TEU as well as Article 3 of the Charter. The Commission refers back to the case of C-189/01 *Jippes* which declared that animal welfare was not part of the Union objectives, the interpretation of which having relevance for Article 13 TFEU in its current version. Legislation including the objectives of animal welfare have been based on Articles 43(2), 114, and 192 TFEU. Article 43(2) refers to the objectives listed under Article 39 TFEU, none of which being applicable to the initiative at hand. On similar grounds, Articles 114, 192, and 352 TFEU are also not suitable.	Mentions the remedies. Very extensive interpretation and reasoning for the unsuitability of the legal basis in the Treaties. This is the first time Article 352 TFEU is being considered a decision which could be interesting for an analysis of the legal basis by the Commission.
My voice against nuclear power **Refusal: 30.05.2012**	Shut down all high risk nuclear power plants and make mandatory phase-out plans for all nuclear power plants in the EU. Operators should pay for decommissioning, waste storage, liability and uranium mining. Renewable energy sources and energy efficiency measures sufficient to substitute the use of nuclear material and fossil fuels should be supported.	The proposed citizens' initiative falls manifestly outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.	The initiative has two aspects, both of which are intrinsically linked to each other. The claims are based on the Euratom Treaty which does not permit citizens initiatives. There is no suitable legal basis in the Treaties as the objective of the initiative goes manifestly against the objectives of the Euratom Treaties. The Commission states that none of the Articles within the Treaties could be interpreted as giving any possibility to propose a legal act that would have the effect of modifying or repealing any provisions of primary law as this would have to be subject to the agreement of all contracting parties.	Mentions the rem eddies. Very interesting example of the interpretation of the Commission's powers to propose legal acts (especially with regard to primary law) and could be a good contrast to the Irish Citizens Assembly.
Recommend singing the European Anthem in Esperanto **Refusal: 30.05.2012**	Issue a recommendation that the European Anthem be sung using the neutral pan-European language, Esperanto, to strengthen a common identity and increase citizen participation. This would ensure that diversity is not emphasised at the expense of unity.	The proposed citizens' initiative falls manifestly outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.	There is no legal basis that would permit the proposal of a legal act to establish and sing the European anthem in Esperanto. It cannot be regarded as enhancing Member States cultures because Esperanto is not promoted by any, nor can it be said to be part of a common cultural heritage.	Remedies are listed and answers are quite brief.

Fortalecimiento de la participación ciudadana en la toma de decisiones sobre la soberanía colectiva **Refusal: 30.05.2012**	Guarantee the sovereignty of European citizens in the acts of recognition of a new state that emerged from the democratic secession of another Member State. Special emphasis shall be laid on a guarantee of principles established in the Treaties, the sovereignty of citizens in the processes of democratic secession within the territory of the Union and the maintenance of European citizenship.	The proposed citizens' initiative falls manifestly outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.	There is no legal basis in the EU Treaties to allow secondary legislation to address the consequences of a secession of part of a Member State. According to Article 20 TFEU, only persons who have nationality of a Member State are EU citizens. EU citizenship is complementary to, not a substitute for, national citizenship. In the event of secession of part of a Member State, the solution would have to be negotiated within the international legal order.	Mentions the remedies.

This table was created in accordance with European Commission Decisions and communications available at:

Secretariat-General, 'Refused requests for registration' (*European Union*, 2024) <https://citizens-initiative.europa.eu/find-refused-requests-for-registration_en> accessed 05 May 2024

ANNEX II

Initiatives which have reached the threshold but not been answered by the European Commission

Name and Representative	Topic	Timeline	Notes (e.g. signatures and funding)
Cohesion policy for the equality of the regions and sustainability of the regional cultures Balázs Árpád Izsák	- A demand for the EU to take particular note of regions with cultural regions that differ from the dominant or surrounding regions with regard to administrative and economic practices and access to EU funds to preserve and develop these regions.	Registered: 07.05.2019 Collection started: 07.05.2019 Collection closed: 07.05.2021 Verification closed: 16.07.2021	Signatures: 1,414,175 Funding: €11,933.00
Stop Extremism Ludwig Friedrich Spänle	- The European Commission should take action to prevent extremism within the Single Market.	Registered: 12.06.2017 Collection started: 12.06.2017 Collection closed: 12.06.2018 Verification closed: 17.04.2020	Signatures: 1,068,793 Funding: €241,989.00

Initiatives which have been answered by the European Commission

Name and Representative	Topic	Timeline	Direct/Indirect Impact	Notes (e.g. signatures and funding)
Fur Free Europe Elise Fleury	- Initiate a law to prohibit the keeping and killing of animals for the purpose of fur production - Initiate a law to prohibit the selling of farmed animal fur, and products containing such fur, on the EU market	Registered: 16.03.2022 Collection started: 18.05.2022 Collection closed: 01.03.2023 Submitted: 14.06.2023 Answered: 07.12.2023 - Organisers met with the European Commission on 20 July 2023 - Public hearing at the European Parliament on 10 October 2023 - Commission adopted a Communication on 7 December 2023	- Commission requested the European Food Safety Authority to issue a scientific opinion on the animal welfare of animals kept for fur farming (to be issued by March 2025) - Will issue further action plans when this opinion has been issued alongside economic and social impact assessments of such laws by March 2026 - Also mentions 'several actions' which will be taken; including law regulating animal transport and traceability of animals	Signatures: 1,502,319 Funding: €1,904,595.00
"SAVE CRUELTY FREE COSMETICS - COMMIT TO A EUROPE WITHOUT ANIMAL TESTING" Sabrina Engel (PETA)	- Protect and strengthen the cosmetics animal testing ban - Transform EU chemicals regulation - Modernise science in the EU Only non-animal methods for safety assessment of cosmetics ingredients	Registered: 30.06.2021 Collection started: 31.08.2021 Collection closed: 31.08.2022 Submitted: 25.01.2023 Answered: 25.07.2023 - Organisers met with the Commission on 17 March 2023 - Public hearing at the European Parliament on 25 May 2023 - Initiative debated at the European Parliament's plenary session on 10 July 2023	Communication sets out current legislation and past investments but does not mention fundamental changes as a result of the ECI	Signatures: 1,217,916 Funding: €2,160,614.83

"Stop Finning – Stop the trade" Nils Kluger	- Stop the trade of fins in the EU, including the import, export and transit - Extend REGULATION (EU) No 605/2013 to the trade of fins and therefore ask the Commission to develop a new regulation, extending it to "fins naturally attached" for all trading of sharks	Registered: 02.01.2020 Collection started: 31.01.2020 Collection closed: 31.01.2022 Submitted: 11.01.2023 Answered: 05.07.2023 - Organisers met with the European Commission on 6 February 2023 - Public hearing at the European Parliament on 27 March 2023 - Initiative debated at the European Parliament's plenary session on 11 May 2023	Communication mentions launching an impact assessment by the end of 2023 on the environmental, social and economic consequences of applying the "fins naturally attached" policy; by the end of 2024 more detailed import and export information to improve statistics on EU trade in shark products; better enforce the EU's traceability measures; advocate for a worldwide ban of shark finning and strengthen the effective implementation of conservation and management measures for sharks' species, encourage the reduction of demand for shark fins, fight against shark fins trafficking	Signatures: 1,119,996 Funding: €17,360.00
"Save bees and farmers ! Towards a bee-friendly agriculture for a healthy environment" Martin Dermine	- Phase out synthetic pesticides by 2035 - Restore biodiversity in agriculture - Support farmers in the transition - Phase out synthetic pesticides in EU agriculture by 80% by 2030, starting with the most hazardous, to become free of synthetic by 2035 - Restore natural ecosystems in agricultural areas for biodiversity recovery - Prioritising small scale, sustainable farming	Registered: 30.09.2019 Collection started: 30.09.2019 Collection closed: 30.09.2021 Submitted: 07.10.2022 Answered: 05.04.2023 - Organisers met with the European Commission on 25 November 2022 - Public hearing at the European Parliament on 24 January 2023 - Initiative debated at the European Parliament's plenary session on 16 March 2023	- Working towards adoption of the legislative proposals by the Commission and the Common Agriculture Policy (CAP) under the European Green Deal - Mentions in particular: Revised EU Pollinator Initiative with 42 actions as a response to the ECI; Proposal for a Nature Restoration Law; EU Common Agricultural Policy 2023-2027; EU Farm to Fork Strategy & the Biodiversity Strategy; Proposal for a 'Sustainable Use of Pesticides' Regulation; EU global commitments	Signatures: 1,054,973 Funding: €282,858.84
"End the Cage Age" Léopoldine Charbonneaux	Legislation to prohibit the use of: - Cages for laying hens, rabbits, pullets, broiler breeders, layer breeders, quail, ducks and geese; - Farrowing crates for sows; - Sow stalls, where not already prohibited - Individual calf pens, where not already prohibited	Registered: 11.09.2018 Collection started: 11.09.2018 Collection closed: 11.09.2019 Submitted: 02.10.2020 Answered: 30.06.2021 - Organisers met with the European Commission on 30 October 2020 - Public hearing at the European Parliament on 15 April 2021 - Initiative debated at the European Parliament's plenary session on 10 June 2021	- Put forward a legislative proposal by the end of 2023 to phase out, and finally prohibit, the use of cage systems for cages for hens, mother pigs, calves, rabbits, ducks, geese and other farmed animals - Phase out the use of cages for farmed animals across Europe by 2027 Ensure that all imported products in the EU comply with future cage-free standards - Implement systems for incentives and financial support to European farmers during the transition to cage-free farming (reference to the new Common Agricultural Policy) - Commission has already committed to propose a revision of the animal welfare legislation, including on transport and rearing as part of the 'Farm to Fork Strategy'	Signatures: 1,397,113 Funding: €392,000.00 (all from 'Compassion in World Farming')

"Ban glyphosate and protect people and the environment from toxic pestecides" Mika Theis Leandro	- Propose to member states a ban on glyphosate, to reform the pesticide approval procedure, and to set EU-wide mandatory reduction targets for pesticide use - Ensure the scientific evaluation of pesticides for EU regulatory approval is based on published studies, which are commissioned by competent public - Set EU-wide mandatory reduction targets for pesticide use, with a view to achieving a pesticide-free future	Registered: 25.01.201 Collection started: 25.01.2017 Collection closed: 02.07.2017 Submitted: 06.10.2017 Answered: 12.12.2017 - Organisers met with the European Commission on 23 October 2017 - Public hearing at the European Parliament on 20 November 201	(First aim:) Commission concluded that there are neither scientific nor legal grounds to justify a ban of glyphosate, and it will not make a legislative proposal to that effect (Second aim:) Commission committed to a legislative proposal by May 2018 to strengthen the transparency of the EU risk assessment in the food chain and enhance the governance for the conduct of industry studies submitted to the European Food Safety Authority (EFSA) for risk assessment (Third aim:) Commission intends to focus on the implementation of the Sustainable Use Directive and will re-evaluate the situation in a report to Council Parliament on the implementation of the Directive in 2019. The Commission committed also to establishing harmonised risk indicators to enable the monitoring of trends at EU level and to use the resulting data as a basis for determining future policy options FOLLOW UP - Re aim 2: adoption of a Regulation on the transparency and sustainability of the EU risk assessment in the food chain on 11 April 2018 – covered the whole food chain rather than just plant protection products as mentioned in the ECI (ensuring more transparency, increasing the independence of studies, strengthening the governance and the scientific cooperation, developing comprehensive risk communication) - Re aim 3: Pesticides reduction as a key priority for the Farm to Fork Strategy published in May 2020, sets ambitious targets for pesticides, notably a reduction by 50% of the use and risk of chemical and most hazardous pesticides	Signatures: 1,070,865 Funding: €328,399.00

"Minority SafePack – one million signatures for diversity in Europe" Hans Heinrich Hansen	- Improve protection of persons belonging to national and linguistic minorities and strengthen cultural and linguistic diversity in the Union through legal acts (policy actions in the areas of regional and minority languages, education and culture, regional policy, participation, equality, audio-visual and other media content, and also regional (state) support)	Registration refused: 16.09.2013 Registered: 03.04.2017 Collection started: 03.04.2017 Collection closed: 03.04.2018 Submitted: 10.01.2020 Answered: 14.01.2021 - Organisers met with the European Commission on 05 February 2020 - Public hearing at the European Parliament on 15 October 2020 - Initiative debated at the European Parliament's plenary session on 14 December 2020	Inclusion and respect for cultural diversity is a priority and objective of the European Commission Wide range of measures addressing aspects of the initiative been taken since the initiative was originally presented in 2013 Commissions Communication assesses each of the nine proposals on its merits, taking into account the principles of subsidiarity and proportionality No further legal acts are proposed, the implementation of legislation and policies already in place provides measures to support the initiative's goals Follow up on EU initiatives related to the ECI - Funding programmes in area of culture and education (notably Erasmus+) are accessible for small regional or minority language communities - Common Provisions Regulation setting out rules for the 2021-2027 budget contains an 'enabling condition' requiring Member States to comply with the Charter of Fundamental Rights and the non-discrimination principle when disbursing EU funds - 'Horizon Europe' (current Framework Programme for Research and Innovation (2021-2027)) offers research opportunities in relation to cultural and linguistic diversity in Europe - Commission organised, in 2021 and 2022, a dialogue with the audio-visual sector to agree on steps to improve availability of and access to audio-visual content across the EU - Commission is developing its cooperation on linguistic diversity with the European Centre for Modern Languages. A colloquium on Regional and minority languages is planned in the second half of 2023	Signatures: 1,123,422 Funding: €348,500.00 The General Court of the Court of Justice of the European Union dismissed the request of the organisers of 'Minority SafePack' to annul the Commission Communication C(2021) 171 in the judgement of 9 November 2022 (case T-158/21). The court held that the Commission has not erred in law nor infringed its obligations to state sufficient reasons in its communication, in which the Commission stated that no further legislation was necessary at this stage to achieve the objectives sought by the ECI

"Stop vivisection" André Menache	- Proposing an European legislative framework aimed at phasing out animal experiments - Abrogate Directive 2010/63/EU on the protection of animals used for scientific purposes and to present a new proposal that does away with animal experimentation and instead makes compulsory the use - in biomedical and toxicological research - of data directly relevant for the human species	Registered: 22.06.2012 Collection started: 22.06.2012 Collection closed: 01.11.2013 Submitted: 03.03.2015 Answered: 03.06.2015 - Organisers met with the European Commission on 11 May 2015 - Public hearing at the European Parliament on 11 May 2015	Commission shares the conviction that animal testing should be phased out in Europe, its approach for achieving that objective differs from the one proposed in this Citizens' Initiative Commission considers that the Directive on the protection of animals used for scientific purposes (Directive 2010/63/EU), which the Initiative seeks to repeal, is the right legislation to achieve the objectives of the Initiative and no repeal of the legislation was proposed by the Commission Commissions Communication sets out four further actions towards phasing out animal testing (includes a conference engaging the scientific community and relevant stakeholders in a debate on how to exploit the advances in science for the development of scientifically valid non-animal approaches) FOLLOW UP Commission organised a scientific conference in Brussels on 6-7 December 2016 Commission published a review report of the Directive 2010/63/EU in 2017 and published a report on implementation of this Directive in February 2020	Signatures: 1,173,130 Funding: €23,651.00 On 18 April 2017, the European Ombudsman issued a decision concerning the initiative 'Stop Vivisection'. The Ombudsman concluded that there was no maladministration by the Commission.

"Water and sanitation are a human right! Water is a public good, not a commodity!" Anne-Marie Perret	- Oblige the EU institutions and Member States to ensure that all inhabitants enjoy the right to water and sanitation - Water supply and management should not be subjected to internal market rules and excluded from liberalisation - Increase efforts to achieve universal access to water and sanitation	Registered: 10.05.2012 Collection started: 10.05.2012 Collection closed: 01.11.2013 Submitted: 20.12.2013 Answered: 19.03.2014 - Organisers met with the European Commission on 17 February 2014 - Public hearing at the European Parliament on 17 February 2014	Commission committed to: Reinforcing implementation of EU water quality legislation, building on the Environment Action Programme and the Water Blueprint; launching an EU-wide public consultation on the Drinking Water Directive in view of improving access to quality water in the EU; improving transparency for water data management and explore the idea of benchmarking water quality; a more structured dialogue on transparency in the water sector; cooperating with existing initiatives to provide a wider set of benchmarks for water services; stimulating innovative approaches for development assistance; promoting sharing of best practices between Member States and identifying opportunities for cooperation; advocating universal access to safe drinking water and sanitation as a priority area for SDG's FOLLOW UP Legislative action: A proposal for the revision of the Directive on drinking water was adopted by the Commission on 01/02/2018, entered into force on 12 January 2021; A proposal for a regulation on minimum requirements for water reuse was adopted by the Commission in May 2018, entered into force in June 2020; An amendment to the Drinking Water Directive aimed at improving the monitoring of drinking water across Europe came into force on 28/10/2015 Implementation and review of existing EU legislation: implementation reports on the Water Framework Directive and Floods Directive were published in 2015, 2019 and 2021; Commission prepares a review of the Water Framework Directive Stakeholder meetings on benchmarking of water quality and services took place on 09/09/2014 and 12/10/2015 in Brussels Development cooperation and sustainable development: EU efforts have substantially contributed to maintaining the universal access to water and sanitation in the list of SDGs; Commission is also working with different partners to stimulate innovative approaches for development assistance	Signatures: 1,659,543 First ECI to pass the required number of signatories. - The European Parliament adopted an own-initiative report on the follow up to Right2Water on 08 September 2015 - The European Economic and Social Committee adopted its opinion on the Commission's Communication in reply to the Right2Water initiative
"One of us" Patrick Gregor Puppinck	- Juridical protection of the dignity, right to life and integrity of every human being from conception in the areas of EU competences	Registered: 11.05.2012 Collection started: 11.05.2012 Collection closed: 01.11.2013 Submitted: 28.02.2014 Answered: 28.05.2014 - Organisers met with the European Commission on 09 April 2017 - Public hearing at the European Parliament on 10 April 2014	Commission Communication explains that it has been decided not to submit a legislative proposal, given that Member States and the European Parliament had recently discussed and decided EU policy in this regard (existing funding framework, which had been recently debated and agreed by EU Member States and the European Parliament, is the appropriate one)	Signatures: 1,721,626 Funding: €159,219.00

Theses tables were created in accordance with European Commission decisions and communications available at:

> Secretariat-General, 'Answered European Citizens' Initiatives' (*European Union*, 2024) <https://citizens-initiative.europa.eu/findinitiative_en?CATEGORY%5B0%5D=any&STATUS% 5B0%5D=ANSWERED&SECTION=ALL> accessed 05 May 2024
>
> Secretariat-General, 'Verified European Citizens' Initiatives' (*European Union*, 2024) <https://citizens-initiative.europa.eu/find-initiative_en?STATUS%5B0%5D=VERIFICATIO N&CATEGORY%5B0%5D=any&SECTION=ALL> accessed 05 May 2024

ANNEX III

This table provides a comparative overview of participatory mechanisms within the EU Member States. The selection criteria were the availability of documents in English or German, the participatory means, and their relevance in the context of the ECI and ECI.[1]

Country	Means of direct democracy available? (Successful/unsuccessful mechanisms; old or new)	Availability of English/German literature	Relevancy	Other notes
Germany	Primarily available in the Länder (Volksbegehren/ Volksentscheid);[1] on the federal level only available for the restructuring of the Länder.[2]	Yes	There is little relevance for a comparison with ECIs at the EU level; restructuring of the Member States is outside the competencies of the EU.	It could be interesting for the historical aspect regarding the decision to explicitly exclude means of direct democracy in the basic law; especially with regard to the lessons from the 'Weimarer Republik'.
Austria	Have the 'Volksbegehren' as a citizens' initiative to propose a bill to parliament. Only regarding topics which fall within the scope of the federal lawmaker.[3] Need to collect the signatures of at least 1% of the citizens living in Austria to initiate the proceedings; 100,000 signatures of eligible voters or of one-sixth of three Länder to be discussed in parliament.[4] Initiatives are not binding.	Yes	It could be relevant for comparison. Different requirements to initiate proceedings are addressed to a different institution (parliament rather than government/Commission).	
Ireland	'Citizens Assembly' has had successful campaigns in the past. All adults are eligible (also non-residents or people not on the electoral register). Invitations sent to randomly selected households. From those who agree, members are selected to reflect Irish society (age, gender, social class and regional spread). Assemblies establish their own rules (while following 6 key principles) and can accept input on the topics they set out from the public. Assembly develops draft recommendations and votes on them and then reports it to Parliament. Government then provides a response to each recommendation and arranges for a debate in Parliament. If the Government accepts a recommendation that the Constitution should be amended, its response in the Parliament will include a timeframe for a referendum.[5]	Yes	Most interesting about the Irish Citizens Assembly is its success in the past (see for example: 'Repeal the 8th Campaign'), specifically relating to issues which have led to a change in the constitution. Its system is quite different as it does not build upon a framework of submission of topics to the government upon own initiative, but rather the discussion of selected topics within a randomly selected group of residents for a limited time with the potential to change the constitution. These people widely replaced Irish society. Citizens are able to participate, in the term from 2016, approximately 15,000 submissions were received on the topics discussed by the Assembly.[6]	

[1] Rainer Bovermann, 'Direkte Demokratie' (*Bundeszentrale für politische* Bildung) available at <https://www.bpb.de/kurz-knapp/lexika/handwoerterbuch-politisches-system/202013/direk te-demokratie/> accessed 26 October 2023.
[2] Gerd Schneider, Christiane Toyka-Seid, 'Volksentscheid / Volksbegehren' (*Bundeszentrale für politische Bildung*) available at < https://www.bpb.de/kurz-knapp/lexika/das-junge-politik-lexikon/321355/volksentscheid-volksbegehren/> accessed 26 October 2023.
[3] Bundesministerium für Inneres, 'Allgemeines zu Volksbegehren' (*oesterreich.gv.at*, 7 März 2023) available at <https://www.oesterreich.gv.at/themen/leben_in_oesterreich/buergerbeteiligungdirektedemokratie/2/Seite.32047 1.html> accessed 26 October 2023.
[4] §3 Volksbegehrengesetz 2018 – VoBeG
[5] Citizens Information, 'Citizens' Assembly' (*citizensinformation.ie*) available at <https://www.citizensinformation.ie/en/government-in-ireland/irish-constitution-1/citizens-assembly/> accessed 16 November 2023.
[6] Observatory of Public Sector Innovation, 'The Irish Citizens' Assembly' (*oecd-opsi.org*) available at <https://oecd-opsi.org/innovations/the-irish-citizens-assembly/> accessed 16 November 2023.

Netherlands	"Advisory Referendum Law" went into effect on July 1, 2015 and gives 300,000 citizens the right to trigger a referendum on most new laws and treaties adopted by Parliament. Usually this will take place after the law or treaty has been ratified but before it enters into law.	Yes, some literature available.	Likely most relevant for a negat comparison as it existed only for three years and was abolished in 2018 after, according to the Dutch government, it was unsuccessful in achieving its intended goals. It is also just based on initiatives which are related to newly passed laws or treaties, and hence not directly related to the ECI. But one can take it into consideration when talking about governments resistance and dismissal of the means of direct democracy, especially in recent years. Interesting in respect of who is using it, in the short lifespan of the it seemed like it was used as a tool by political groups to further their platform rather than pushing citizens' issues. Also interesting was its critique of the threshold as it was very easy to reach in the years of social media.[7]	The Dutch constitution is so hard to change, attempts to introduce a binding referendum into the Constitution have failed three times. Was inspired by the ECI but got abolished quickly after its introduction.[8]
Finland	Citizens' initiative to the Parliament introduced in 2012, a minimum of 50,000 signatures required with the object to promote free civic activity.[9]	Limited, but sufficient sources available.	Relevant through its success, over 1000 initiatives have been registered and more than 30 being successful (one initiative led to direct changes in legislation while others had an indirect influence on legislation).[10] It is a positive example through its widespread awareness and reception in the Finnish population.[11] The aim and process is similar to the ECI.	Positive example for comparison.
Latvia	Interesting regarding private initiatives in the digital space. (More information could be found in: Mārtiņš Birģelis, 'Chapter 13: Latvia' in Daniel Moeckli, Anna Forgács, Henri Ibi, *The Legal Limits of Direct Democracy* (Edward Elgar, 2021)	Very limited sources available.	Example for private, technologically advanced means of citizens participation. Has been quite successful with a lot of changes in the law brought forth through the platform.[12]	Could be interesting as a point of contrast in terms of accessibility of the platform and the widespread usage of it.
Denmark	Introduced in 2018, requirement of 50,000 signatures in order to put an item of interest onto the Danish parliaments' agenda.[13]	Limited availability.	Limited information on developments after its enactment in 2018 hence most likely not relevant for comparison.	Also interesting in regard to the accessibility through the platform which is managed by the Parliament in order to collect the signatures.

[7] Kristof Jacobs, T. W. G van der Meer, and C. C. L Wagenaar, 'The rise and fall of the Dutch referendum law (2015–2018): initiation, use, and abolition of the corrective, citizen-initiated, and non-binding referendum' (2022) 57 Acta Polit, 96.

[8] Kristof Jacobs, 'The stormy Dutch referendum experience: Social media, populists and post-materialists' (*The Constitution Unit*) available at https://www.democracy.community/stories/long-read-abolishing-referendum-how-and-why-netherlands-struggling-so-much-direct-democracy accessed 16 November 2023.

[9] Henrik Serup Christensen, 'Boosting Political Trust with Direct Democracy? The Case of the Finnish Citizens' Initiative' (2019) 7 Politics and Governance, 173.

[10] Council of Europe, 'Finland - Citizen's initiative to the Parliament' (*Council of Europe Portal*, 2012) available at <https://www.coe.int/en/web/bioethics/-/finland-citizen-s-initiative-to-the-parliament-2012-> accessed 16 November 2023.

[11] David Cord, 'Citizens' Initiatives Prove Popular in Finland as an Expression of Democracy' (*this is Finland*, March 2023) available at https://finland.fi/life-society/citizens-initiatives-prove-popular-in-finland-as-an-expression-of-democracy/ accessed 16 November 2023.

[12] Democracy International, 'The Citizens' Initiative Strat-Up Changing Latvian Politics' (*Democracy International Org*, 17.09.2018) available at <https://www.democracy-international.org/citizens-initiative-start-changing-latvian-politics> accessed 16 November 2023.

[13] The Danish Parliament, 'A new initiative from the Danish Parliament gives Danish citizens a direct role in the democratic process' (*Folketinget*, 01.02.2018) available at <https://www.thedanishparliament.dk/en/news/2018/02/citizens-initiative> accessed 16 November 2023.