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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 we aim to provide UM students with the opportunity to contribute to academic discourse and to develop their writing and editing skills to the highest standards.

It is our great pleasure to present the second issue of our first volume. This issue features seven submissions that fall under the umbrella of international, European, and comparative law. These include theses and articles that have been written by both undergraduate and graduate students, as well as alumni. We are pleased to showcase topical issues ranging from sustainability, feminism, and human rights to competition law and intellectual property law. We are continually inspired by our authors' unique perspectives, 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 would further like to thank the Maastricht University Faculty of Law, as well as our staff and alumni advisory boards. We also extend our gratitude to our partners at the London School of Economics Law Review, The Hague International, and the Esade Law Review. Additionally, we would like to extend special thanks to ELSA Maastricht for their continued support. ELSA Maastricht partners with MSLR in the publication of high quality and contemporary student submissions as part of their mission to contribute to legal education.

Beginning with this edition, a maximum of two submissions from members of our editorial team may be published, under the same conditions as any other submission, and remaining completely anonymous through the editorial process. Such submissions will always be placed at the end of the journal. For this issue, one such submission has been published.

We are delighted with the success of our first edition, and are excited to publish this issue, marking the end of MSLR's first year. We would like to congratulate and express our immense gratitude towards our Editorial Team for their commitment and dedication throughout the entire editorial process and indeed the entire year – this publication would not be possible without you. We wish every success to next year's editorial board.

Nicole Gibbs & Veronika Valizer
Co-Editors-in-Chief of the Maastricht Student Law Review
Maastricht, 5 July 2024

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Illuminating the Commission's Expanding Approach to Merger Control

Renata Stefan[1]

The views expressed in this publication are my own and do not reflect the views of my firm.

[1] Renata Stefan, a recent graduate of the European Law School at Maastricht University, dedicated her studies to exploring the influence of the digital revolution on competition law, assessing the system's ability to adapt to the shifting economic landscape. Following her successful graduation, she will begin an internship in the competition department of a global law firm in Brussels. Subsequently, she will pursue an LLM in competition law at University College London.

TABLE OF ABBREVIATIONS

Commission	European Commission
CJEU	Court of Justice of the European Union
DMA	Digital Markets Act
EEA	European Economic Area
EU	European Union
EUMR	European Union Merger Regulation
Guidelines	Commission Guideline on the Application of the Referral Mechanism set out in Article 22 of the EUMR
NCA	National Competition Authorities
NMC	National Merger Control
TFEU	Treaty on the Functioning of the European Union

1. INTRODUCTION

In the aftermath of the Covid-19 crisis, attention was sharply drawn to the challenges of a rapidly changing economy and the legal system's struggle to keep up. The European Commission (Commission) recognised that one way of keeping up was through creative interpretations of the existing competition legal framework.[2] This is because competition law encourages innovation while also ensuring an even playing field that allows smaller companies with innovative ideas to succeed without being abused by monopolies.[3] Competition law chiefly protects innovation through merger control by preventing, ex-ante, the creation of concentrations that have both the potential to undermine innovation due to their measurable market power, and the ability to raise the barriers to entry.[4]

However, the current legal framework for merger control does not seem up to the challenge of detecting new types of mergers with potentially anticompetitive effects, including "small but dangerous" takeovers.[5] These takeovers involve companies with modest profits that fall below standard thresholds (the thresholds are based on the concentration's aggregate turnover, either worldwide or in the European Union (EU)), but still pose a significant threat to competition by leading to market foreclosure.[6] Market foreclosure occurs when a vertically integrated company restricts or denies access to essential inputs or services to its downstream competitors, effectively preventing them from competing in the market. [7] In practice, technology start-ups are especially vulnerable to foreclosure, as they are acquired by larger companies, with the purpose of limiting the sale of the innovative product to other interested parties.[8]

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[2] Margrethe Vestager, EU Commissioner, 'The future of EU merger control' (Speech at the International Bar Association 24th Annual Competition Conference) <https://www.astrid-online.it/static/upload/vest/vestager-s-speech---the-future-of-eu-merger-control.pdf> accessed 12th February 2023.
[3] ibid.
[4] Alison Jones, Brenda Sufrin and Niamh Dunne, *EU Competition Law: Text, Cases, and Materials* (7th ed, OUP 2019) p. 1060.
[5] ibid.
[6] ibid.
[7] Raphaël De Coninck, 'Economic Analysis in Vertical Mergers, Opinions and Comments' (2008) 3 Competition Policy International 49.
[8] Václav Šmejkal, 'A New Era in Assessing Mergers and Takeovers? On the Illumina-Grail Case' (2023) Prague Law Working Papers Series, p. 2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4361673> accessed 26 June 2024.

The Illumina case perfectly exemplifies the foreclosure phenomenon.[9] This merger had the potential to restrict the distribution of Illumina's product to companies other than GRAIL, leading to a total foreclosure phenomenon. The merger was flagged by the Commission and prohibited.[10] The General Court of the European Union upheld the prohibition and the case is currently under appeal before the European Court of Justice (CJEU).[11] Even before a final decision is made, this case bears particular importance as it inaugurates the Commission's changing approach to merger control to encompass such small but dangerous takeovers by allowing concentrations that fall below national turnover thresholds (by consequence, they also fall below EU thresholds) to be notified to the Commission by the National Authorities.

These emerging issues in competition law give rise to the research question: How is the European Commission addressing emerging challenges in competition law posed by "small but dangerous" takeovers by reinterpreting the EU Merger Regulation, and to what extent is this new approach successful compared to the old approach?

To answer this question, this paper first presents the Commission's former approach to merger control, and then establishes emerging problems that have rendered the former approach ineffective. It then shines a light on the Commission's new policy, and finally analyses the first case in which the Commission implemented it, namely the Illumina case. The analysis draws upon the European Union Merger Regulation (EUMR), the Commission Guidelines on the application of the referral mechanism set out in Article 22 of the EUMR (Guidelines),[12] Commissioner Vestager's speech,[13] the Illumina case,[14] and additional relevant commentaries from legal and economic academics.[15]

[9] Case T-227/21 *Illumina, Inc. v European Commission* (2022) ECLI:EU:T:2022:447.

[10] ibid.

[11] ibid.

[12] Commission Guidelines, 'Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases' (Communication) COM 2021/C 113/01 (Commission Guidelines on Article 22).

[13] Vestager (n 2).

[14] *Illumina* (n 9).

[15] Kalpana Tyagi, *Promoting Competition in Innovation through Merger Control in the ICT Sector. A Comparative and Interdisciplinary Study* (Springer 2019); Nicholas Levy, Andris Rimsa & Bianca Buzatu, 'The European Commission's New Merger Referral Policy: A Creative Reform or

2. COMMISSION'S CURRENT APPROACH TO MERGER CONTROL

2.1. THE INCORPORATION OF JURISDICTIONAL THRESHOLDS

Creating a merger control system that can catch all transactions with the potential to affect competition is more of an ideal than a pragmatic goal. Due to the overwhelming number of controllable transactions, such a system would be deemed unworkable by competition authorities. As such, merger control legislation has incorporated jurisdictional thresholds that aim to flag transactions that are most likely to create anti-competitive effects.[16]

The European approach to such jurisdictional thresholds has been enshrined in the EUMR. This cornerstone approach of EU competition law creates clear and objective criteria that promote legal certainty and speed,[17] and ensure a clear division between the interventions made by the national and by the Community authorities.[18] Thus, Article 1 EUMR sets out thresholds to catch concentrations that are of an EU dimension, meaning that they fulfil certain turnover criteria.[19] A concentration refers to transactions that result in a lasting change in control of the undertaking involved as a result of a merger, acquisition or joint ventures.[20] Concentrations are deemed to have an EU dimension where (1) the combined worldwide turnover exceeds €5 billion, at least two of the parties have EU-wide turnover exceeding €250 million, and the parties do not achieve more than two-thirds of their EU turnover in the one Member State, or (2) the combined worldwide turnover exceeds €2.5 billion, the EU-wide turnover of at least two of the parties exceed €100 million, in each of the three Member States, the combined turnover of all parties exceeds €100 million, in each of those Member States, the turnover of at least two of the parties exceeds €25 million, and

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an Unnecessary End to 'Brightline 'Jurisdictional Rules?' (2021) 5 European Competition & Regulation Law Review 364; Šmejkal (n 8).

[16] OECD, 'Background Paper by the Secretariat, Local Nexus and Jurisdictional Thresholds in Merger Control' (OECD Paper on Jurisdictional Nexus in Merger Control Regimes, 2016) pp. 14-15, <www.oecd.org/competition/jurisdictional-nexus-in-merger-control-regimes.htm> accessed 12 February 2023.

[17] Case T-417/05 *Endesa, SA v Commission of the European Communities* (2006) ECR II-2533, para. 209.

[18] Case C-202/06 *Cementbouw Handel & Industrie BV v Commission of the European Communities* (2007) ECR II-00319, paras. 37-38.

[19] Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings (2004) *OJ L 24* (Merger Regulation), art. 1(2) and 1(3).

[20] ibid art. 3.

the parties do not achieve more than two-thirds of their individual EU-wide turnover in one Member State.[21]

Most notably, both undertakings must generate revenues in the European Economic Area (EEA).[22] The court has developed in a number of cases[23] that the purpose of the EUMR is to clearly divide the competence between national competition authorities (NCA) and the Commission by granting the Commission exclusive competence on cases with an EU dimension via the one-stop-shop principle.[24] The one-stop-shop principle is designed to ensure that mergers with an EU dimension are reviewed exclusively by the Commission rather than by NCAs, and vice versa, with mergers that have national dimensions to be reviewed solely by NCAs.[25] The outcome of this principle is that NCAs are prohibited from applying national merger control (NMC) rules in cases which are deemed to have an EU dimension; conversely, the Commission has no competence to review concentrations that lack an EU dimension. This decision goes back to the fundamental EU law principle of subsidiarity, where the EU shall only act when such action would be more effective than if it were taken at a national level.[26] It is more efficient for the Commission to review larger mergers due to their cross-border impact and the need for consistent, EU-wide decisions, while NCAs handle smaller, national mergers better due to their local market knowledge and specific focus, aligning with the principle of subsidiarity. This division ensures that significant mergers are effectively regulated at the EU level, while less complex transactions are managed locally. However, the traditional framework faces challenges from small but strategically significant mergers, often referred to as "killer acquisitions," especially in sectors like technology and pharmaceuticals.

[21] Merger Regulation (n 19) arts. 1(2) and 1(3).
[22] ibid art. 1.
[23] Case C-170/02 *Schlusselverlag J. S. Moser GmbH and others v Commission* (2003) ECLI:EU:C:2003:501, para. 32.
[24] Merger Regulation (n 19), recital 8; Laura McCaskill, 'The EU Merger Regulation: A One-Stop Shop or a Procedural Minefield?' (2013) SSRN Electronic Journal <www.researchgate.net/publication/315654316_The_EU_Merger_Regulation_A_One-Stop_Shop_or_a_Procedural_Minefield> accessed 18 January 2023.
[25] Laura McCaskill, 'The EU Merger Regulation: A One-Stop Shop or a Procedural Minefield?' (2013) SSRN Electronic Journal <www.researchgate.net/publication/315654316_The_EU_Merger_Regulation_A_One-Stop_Shop_or_a_Procedural_Minefield> accessed 18 January 2023.
[26] Communication from the Commission to the Council, Report on the Functioning of Regulation No 139/2004, Brussels, 18 June 2009, COM(2009) 281 final, para. 2.

These transactions may not meet the thresholds for the Commission's or the NCA's review but can still harm competition by eliminating emerging competitors.

2.2. Exceptions to Jurisdictional Division

The EUMR provides for three exceptions to this jurisdictional division, namely: (1) concentrations that impact one Member State because the undertaking is responsible for more than 2/3 of their EU revenue,[27] (2) concentrations that might be referred by the Commission back to national authorities in accordance with Article 9 or Article 4(5) of the EUMR, and (3) concentrations that lack an EU dimension but that can be referred from the national authorities to the Commission pursuant to Article 22 EUMR if they threaten to significantly affect competition or trade amongst Member States. In these cases, the jurisdiction initially lies with the Member States until the referral towards the Commission is complete. If the Commission decides to investigate the concentration, the jurisdiction shifts to the Commission. For the purposes of this paper, the third variant is pivotal for the Commission's new referral policy.

The exception enshrined in Article 22 EUMR provides that a Member State may ask the Commission to examine a concentration that deserves close scrutiny if two criteria are met, namely (1) the concentration "affects trade between Member States," (2) and "threatens to significantly affect competition" within that Member State.[28] The burden of proof lies with the Member State making the request to show that the transaction could influence intra-EU trade.[29] The second criteria is fulfilled where it can be preliminarily shown that the transaction can have a significant impact on competition.[30] Such factors include: elimination of an important competitor, potential for price increase, reduced innovation and higher barriers of entry.[31] These factors lead to diminished consumer choice and consequently, bear a negative impact on market dynamics.[32]

[27] Merger Regulation (n 19) art. 1(2) and 1(3).
[28] ibid art. 22.
[29] Levy, Rimsa and Buzatu (n 15).
[30] European Commission, 'Notice on Case Referral in respect of concentrations' (2005) OJ C56/3, paras. 43-44.
[31] Jones, Sufrin and Dunne (n 4) p. 1060.
[32] ibid.

The referral system set out in Article 22 was drafted to address situations where Member States lacked effective merger control systems.[33] Thus, the intention at the time of drafting the Article was to allow NCAs to refer concentrations to the Commission where they lacked power to review.[34] At the moment, only Luxembourg falls within such a category of a Member State which lacks a merger control system, rendering the original scope of the provision largely inconsequential.[35] The Article also permits for two or more Member States to make a joint request to refer a concentration to the Commission where they believe the Commission would be more suitable to review the transaction; this became the primary scope of the provision after most Member States adopted merger control systems.[36] However, as the Commission has discretion when applying this Article, it adopted a policy of discouraging such referrals.[37] The Commission argued that if a concentration falls short of NMC thresholds, then it would be of limited size and is generally not likely to have a significant impact on the internal market.[38]

As such, Article 22 referrals have been used scarcely; only forty-three cases using the Article 22 procedure have been brought since it was adopted, four of which occurred before the referring Member States had merger control systems.[39] The policy of the Commission of rendering transactions that fall short of the NMC threshold inconsequential is put to test by killer acquisitions. The economic landscape shifted with the emergence of highly innovative sectors like technology and biotechnology, where small firms often hold significant competitive potential despite low or null current revenues. This shift has given rise to "killer acquisitions," where large companies acquire smaller, innovative competitors to eliminate future competition, thereby suppressing innovation and maintaining market dominance. Traditional merger control thresholds based on turnover fail to capture these strategically important acquisitions, as these acquisitions usually fail to meet the thresholds, yet they pose a serious impediment on innovation. The Commission's reasoning used to be relevant, but as certain

[33] *Illumina* (n 9) para. 97.
[34] Levy, Rimsa & Buzatu (n 15).
[35] *Illumina* (n 9) para. 97.
[36] Levy, Rimsa & Buzatu (n 15).
[37] European Commission (n 30) para. 7; Commission Guidelines on Article 22 (n 12), para. 8.
[38] Levy, Rimsa & Buzatu (n 15).
[39] European Commission, 'Statistics on Merger cases' (2021) <https://competition-policy.ec.europa.eu/mergers/statistics_en> accessed 16 December 2022.

sectors of the economy become increasingly reliant on small but dangerous takeovers, its original approach to merger control is increasingly under strain.

3. Vertical Mergers and the Rise of the Total Foreclosure Phenomenon

3.1. Vertical Mergers

Vertical mergers refer to mergers concluded between companies that find themselves on different levels of the supply chain.[40] In contrast, horizontal mergers occur between companies that are on the same level.[41]

Typically, vertical mergers are less problematic from a competition standpoint[42] because they do not lead to direct increased market power.[43] The lack of increase in market power is a consequence of the fact that vertical mergers do not entail the loss of direct competition between the merging parties in the same relevant market.[44] This type of merger has been incredibly effective for companies, as they have the potential to generate efficiencies through lower transaction and inventory costs, and could lead to the elimination of double marginalisation.[45] Double marginalisation is a phenomenon that occurs in a vertical supply chain, when both the manufacturer and the retailer have monopoly power and each independently sets their profit-maximising prices.[46] This situation leads to a suboptimal for the consumer, where the final price of the product is higher, and the total quantity sold is lower, than it would be if the supply chain were fully integrated.[47] Moreover, companies are incentivised to take over promising start-ups with no turnover as they would have the chance to become dominant on a future market.[48] However, in the current economy, vertical mergers

[40] Robert M. Allan Jr., 'Expansion by Merger' in William W. Alberts and Joel E. Segall (eds), *The Corporate Merger* (Chicago and London: The University of Chicago Press, 1969) p. 101.
[41] ibid.
[42] Tyagi (n 15).
[43] ibid.
[44] Jones, Sufrin and Dunne (n 4) p. 1152.
[45] Tommy Staahl Gabrielsen, Johansen Bjørn Olav and Greg Shaffer, 'When is Double Marginalization a Problem?' (2018) 7/18 Working Papers in Economics University of Bergen; Tyagi (n 15).
[46] Géarard Gaudet, Ngo Van Long, 'Vertical Integration, Foreclosure, and Presence of Double Marginalization' (1996) 5 Journal of Economics & Management Strategy.
[47] ibid.
[48] Šmejkal (n 8).

have gained a tremendous power of raising the barriers of entry into a given market, creating a so called gatekeeper effect.[49]

3.2. Theory of Total Foreclosure

Theories of harm describe how a type of behaviour harms competition (and ultimately the consumer) by comparing the harm caused to the market conditions that would have existed if the behaviour in question had not occurred, thus creating a clear image of how the behaviour harmed competition.[50] Several theories of harm have been developed on the effects of vertical mergers, the most prominent one being that of total foreclosure.[51] Total foreclosure in vertical mergers entails that the integrated company would stop supplying its downstream competitors.[52] In such a case, the downstream competitors would be unable to acquire the given product, or at least face significant price increases in acquiring it from another source.[53] This consequence is particularly problematic when it occurs in vertically acquired companies that are the sole providers of a given product, especially when the company in question is engaged in innovative research.[54] As a consequence, the acquirer benefits from the exclusivity of its access to the research in question. This phenomenon impedes innovation and creates monopolies.[55]

A possible solution to this problem is to allow the vertical merger to avoid regulatory scrutiny and instead subsequently address the issues it poses for competition under Article 102 Treaty on the Functioning of the EU (TFEU) on the prohibition of abuse of dominance. Dominance of the undertaking will be established as a result of the total foreclosure, because completely foreclosing a market eliminates any competition by restricting access to the innovative product developed by the vertically acquired company. The given product is essential for any undertaking that wishes to participate on the relevant product market and, as such, total foreclosure leads to a *de facto* high degree of dominance or even a

[49] Šmejkal (n 8).
[50] Hans Zenger and Mike Walker, 'Theories of Harm in European Competition Law: A Progress Report' in Jacques Bourgeois and Denis Waelbroeck (eds), *Ten Years of Effects-Based Approach in EU Competition Law* (Bruylant, 2012) pp. 185-209 <https://ssrn.com/abstract=2009296> accessed on 26 June 2024.
[51] De Coninck (n 7).
[52] ibid.
[53] ibid.
[54] ibid.
[55] ibid.

monopoly. Thus, the merged company would be a dominant force on the future market and therefore fall within the scope of Article 102 TFEU. The practice of total foreclosure can also be directly caught by the second example in Article 102 TFEU which prohibits the limitation of "production, markets or technical development to the prejudice of consumers".[56] However, the proceedings conducted via Article 102 TFEU tend to be very lengthy and difficult to prove in practice.[57]

Moreover, if a company is vertically acquired when the market in question is underdeveloped - as is likely the case due to the innovative character of such companies - the acquisition can effectively impede the efforts of other competitors who do not have access to such a technology.[58] Innovations are the result of factors difficult to identify and quantify. Thus, the consequences of total foreclosure may lead to serious hindrance of innovation as it is impossible to ascertain which factor led to the given development. Consequently, there is an undeniable risk that without ex-ante intervention, the effects of vertical mergers on the pace of innovation in certain markets may be impossible to address effectively.[59] This renders the use of Article 102 TFEU ineffective to tackle the issue of foreclosure as it is an ex-post mechanism which may be inadequate to remedy the damage done to emerging companies that rely on rapid development

As a result of the complicated nature of Article 102 TFEU, competition authorities strive to find an effective ex-ante solution to the escalating problem of hindrance of innovation generated by the total foreclosure phenomenon. This has proven to be particularly challenging, as such companies do not generate enough turnover and fail to meet the regular review thresholds, hence the moniker small but dangerous mergers.

[56] Consolidated version of the Treaty on the Functioning of the European Union (2012) OJ 326, art. 102.
[57] Šmejkal (n 8).
[58] Šmejkal (n 8).
[59] ibid.

4. THE COMMISSION'S CHANGING APPROACH TO THE EUMR

4.1. COMMISSIONER VESTAGER AND THE NEW POLICY

In September 2020, Commissioner Vestager announced that the Commission will pursue changes to the EUMR's referral policy by abandoning its prior practice of discouraging NCAs from referring transactions that did not meet NMC thresholds via Article 22 EUMR.[60] The Commissioner announced that the new policy could be an "excellent way to see the mergers that matter at a European scale, but without bringing a lot of irrelevant cases into the net".[61] The new policy allows the Commission to inspect mergers that generate little to no revenue in the EU and would consequently fall short of the turnover thresholds from the EUMR and the national competition rules.[62] The targeted concentrations for the new referral policy are those that the turnover "does not reflect its actual or future competitive potential".[63] The test that determines the future competitive potential seems to delegate significant discretionary power to the Commission. This is in direct contrast to the previous merger control system, whereby the Commission had almost no discretionary power as it was obliged to adhere to objective turnover criteria. This added discretionary power could potentially undermine the principle of subsidiarity, as it allows the Commission a wider net in overseeing mergers, creating the possibility of reviewing mergers that would have been more efficiently reviewed at national level. Furthermore, the nature of the test also invites legal uncertainty. This is again in sharp contrast to the previous regime which could be characterised by a very high degree of legal certainty due to the objective turnover criteria. The rise of killer acquisitions necessitates a more flexible merger control system to avoid new and unconventional competitive hindrance. However, the test set out by the Commission could benefit from further clarification and potentially some form of reliable thresholds for companies to use when conducting such transactions. These added clarifications would serve to ensure the compliance of the principle of subsidiarity and legal certainty, and

[60] Vestager (n 2).
[61] ibid.
[62] ibid.
[63] Commission Guidelines on Article 22 (n 12) para. 19.

would counteract the business disincentive currently present by the new referral policy.

The Commission published Guidelines to this new approach in March of 2021,[64] stating that future cases which would fall under this new policy are not restricted to a particular industry, and giving examples of types of companies that are predisposed to the new referral policy.[65] Illustrative examples include start-ups with significant competition potential that are yet to generate significant revenue, companies conducting potentially important research, companies that represent actual or potential competitive force, companies with access to competitively significant assets and companies that provide products or services that are key for other industries.[66] The examples given seem to support the policy of granting the Commission a very wide net to catch any mergers in any sector that previously were not subject to review.

It can be deduced that the transactions primarily targeted by the Commission are those with the potential to engage in total foreclosure and thus lead to a significant impediment to innovation. The Guidelines further emphasise that the Commission will not restrict itself to certain sectors of the economy. Nonetheless, it can be inferred that there are certain sectors that will be specifically targeted, namely those that are closely intertwined with innovative research and can thus potentially be of massive public interest. The areas highlighted by the Guidelines are mainly the digital and pharmaceutical sectors, as well as others "where innovation is an important parameter of competition," or which involve companies having access to valuable assets.[67] A clear list of sectors that have innovation as an important parameter in their competitive process could enhance both the principles of subsidiarity and legal certainty. This clarification could represent the first steps in recreating the valuable business incentives ensured by the old objective review system that were lost in light of the new policy.

[64] Commission Guidelines on Article 22 (n 12).
[65] ibid para. 9.
[66] ibid.
[67] ibid para. 9.

4.2. The Digital and Pharmaceutical Sector

In the digital sector, the Commission will focus on concentrations that "launch with the aim of building up a significant user base or commercially valuable data inventories, before they seek to monetise the business".[68] The new policy regarding Article 22 EUMR will work side by side with the new Digital Markets Act (DMA) which obliges certain undertakings to inform the Commission of any intended acquisitions.[69] Through this mechanism, the Commission will be notified of dangerous transactions based on the Digital Markets Act, subsequently acquiring jurisdiction according to Article 22 EUMR. This framework created by the EUMR and the DMA, has the potential to catch all the relevant mergers without overflooding the system. A sector specific regulatory regime can go a long way in providing legal certainty whilst also ensuring an effective review system, fit to catch killer acquisitions.

In the pharmaceutical sector, the Commission stated that the new referral policy enshrined in Article 22 EUMR will include mergers that involve companies that conduct innovative research or development projects that have strong future competitive potential, even if these companies have not finalised the research or development projects and, as such, have not yet capitalised on their products or services.[70] The requirements set out by the Commission are easily fulfilled by most pharmaceutical acquisitions,[71] as most of the transactions concern small start-ups engaged in innovation. As there is currently no counterpart for the DMA in the pharmaceutical sector, there is a large degree of uncertainty regarding the application of the new referral system which will most likely lead to an increased volume of litigation in this sector. This sector could also benefit from sector specific legislation in order to counteract some of the abovementioned concerns brought up by the new referral policy. Furthermore, sector specific regulation could also avoid the overflooding of reviews the Commission ought to make. Having almost no "filter" for the reviewable transactions would render the merger

[68] Commission Guidelines on Article 22 (n 12) para 9.
[69] Council Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (2022) OJ L 265.
[70] Commission Guidelines on Article 22 (n 12) para. 9.
[71] Levy, Rimsa and Buzatu (n 15).

control system completely ineffective as there are simply not enough resources to handle such a case load.

The first test of the Commission's new referral policy based on Article 22 EUMR can be seen in the Illumina merger. The Commission acted on the request of a Member State, as the concentration failed to meet the minimum threshold of their respective national competition rules. This case will establish whether the Commission's attempt to change its policy on referral within the EUMR could be successful. Furthermore, the case is a perfect example of the Commission's desire to prevent total foreclosure and the dominance a company would acquire on a developing market.

5. First Test of the Commission's New Policy: The Illumina Merger Procedural Background of the Case

Illumina is a company that supplies sequencing solutions, known as "NGS," for genetic and genomic analysis, while Grail develops blood tests for early detection of cancers.[72] Although Illumina supplies the EU market, it does not have significant turnover within the EU, and Grail fails to generate any revenue within the EU.[73] Thus, the acquisition of Grail by Illumina falls short of the thresholds in the EUMR, as well as those from national competition rules. It is important to note that, given the acquisition fell short of the thresholds, Illumina was under no obligation to report the merger to any authority. The merger is characterised as a vertical one because the two companies are on different levels of the supply chain. However, it raises issues of competition as the NGS systems are pivotal in the development of blood tests for cancer research, and by vertically integrating the two companies there would be a serious risk of total foreclosure.[74]

In February 2019, before publishing the Guidelines on the new referral system, the Commission invited Member States to make use of Article 22 EUMR and refer the acquisition of Grail.[75] The French competition authority made use of Article 22 EUMR and referred the case. In April 2021, the Commission asked Illumina to notify its acquisition, as it held that the merger fulfilled the

[72] *Illumina* (n 9) para. 6.
[73] ibid.
[74] Šmejkal (n 8).
[75] *Illumina* (n 9) para. 12.

requirements set out in Article 22 EUMR.[76] The Commission's reasoning was based on Illumina's potential to restrict the access of NGS technology, thereby stifling innovation in cancer detection research.[77] Given the importance of the NGS technology and its application for healthcare innovation, the Commission argued that it has an EU dimension due to its potential Union wide effects on health research. Thus, the importance the Commission places on certain sectors that are of great public interest can be seen. In response to the Commission's request, Illumina filed an appeal to the Commission's decision, stating that it was contrary to legitimate expectations and legal certainty, since the decision of the Commission was filed before the publishing of the new Guidelines.[78] Illumina notified the merger, and the appeal was rejected by the General Court.[79]

5.1. The Judgement of the General Court

In the appeal brought by Illumina against the Commission's decision, the focus was on the competence the Commission had to accept referrals based on Article 22 EUMR, the principle of legal certainty and legitimate expectations, and the time limits imposed by Article 22 EUMR.[80] This paper only concentrates on the first three grounds of appeal, as they hold the most relevance in the context of the Commission's new referral policy.

Regarding the competence of the Commission, the issue was whether Article 22 EUMR could be used by Member States that had NMC laws but that could not review the merger as it lacked jurisdiction.[81] Illumina argued that Article 22 EUMR could only be used if Member States lacked merger control laws, or if the merger fell within the jurisdiction of the given Member State.[82] Consequently, this would limit the application of the Article only to Luxembourg, as it is the only Member State that lacks merger control laws.[83] The General Court held that, because the Article specifically states that any concentration could be subject to merger control, the lawmakers did not intend to confine the scope of application

[76] *Illumina* (n 9) para. 13.
[77] ibid.
[78] Levy, Rimsa & Buzatu (n 15).
[79] *Illumina* (n 9) para. 17.
[80] ibid.
[81] ibid para. 84.
[82] ibid para. 186.
[83] ibid.

only to Member States that lacked merger control laws.[84] Hence, the Court stated that Article 22 is an "effective corrective mechanism" complementing the threshold set out in the EUMR and concluded that the referral was lawful.[85] The Court seemed to take a literal approach of the provision, rather than referring to the intention of the lawmakers at the time the provision was drafted. Illumina correctly emphasised the intent of the lawmakers: that of using the provision for Member States that lack merger control systems. This interpretation is in line with trias politica. However, it is often difficult to ascertain the exact intention of the lawmakers. This is why the Court chose to set the argument aside and focus on the literal interpretation of the Article.

Furthermore, Illumina argued that the Commission's decision breached the principles of legitimate expectation and legal certainty.[86] As the Guidelines on Article 22 had not yet been published, the only glimpse into the Commission's changing policy came from Commissioner Vestager's speech in this regard.[87] She emphasised the changes in the Commission's policy, but also stated that the shift in policy would not "happen overnight," as it would require time for adjustment.[88] This was not the case for the Illumina merger, as the Commission decided to issue an invitation to the Member States to refer the merger in accordance with Article 22 EUMR in February, approximately six months after the Commissioner's speech.[89] Before her speech, it was generally accepted that Article 22 EUMR was not commonly used for mergers that fall outside the jurisdiction of Member States. Thus, Illumina argued that the only reference they had to this changing policy was the Commissioner's speech. The General Court held that the right of legitimate expectation presupposes precise, unconditional, and consistent assurances originating from authorised sources.[90] Therefore, Illumina could not invoke the said principle, as no such sources existed at the time and the Commissioner's speech was intended to apply to merger control policy in general and no rights can be derived from it.[91] The same rationale applied to the principle of legal certainty,

[84] *Illumina* (n 9) para. 84.
[85] ibid para. 116.
[86] ibid para. 254.
[87] Vestager (n 2).
[88] ibid.
[89] Šmejkal (n 8).
[90] *Illumina* (n 9) para. 254.
[91] ibid para. 254.

in which the Court held that the simple adherence to the terms of Article 22 EUMR was enough to ensure this principle.[92] By its judgement, the General Court created a precedent which ascertained that the Commission's statements have only internal policy effects, despite their public delivery. This can have the potential to create legal uncertainty, as the Commission could publicly state a certain policy whilst undertaking another. It seems that for legal certainty, the Commission's public statements should have some external effects as, oftentimes, the public statements are used as guidelines by a myriad of companies in the EU. This is a point that could be mentioned in the appeal on Illumina's behalf. Sector specific regulation could also solve this issue, as companies will have more objective guidelines to follow, rather than just public statements of the Commission.

The case is currently in the process of being appealed to the Court of Justice. The subsequent decision will be decisive regarding whether the Commission will be able to use the referral mechanism enshrined in the EUMR. If the Court allows the appeal and overturns the decision based on the interpretation of Article 22 EUMR, the Commission might be compelled to create a similar piece of legislation to the DMA for every problematic sector of the economy. The advantages have been clearly outlined: increase in legal certainty and establishing a filter for reviewable transactions. However, formulating specific regulations for every "problematic" sector may prove ineffective due to the increasing number of sectors that face this issue. The growing number of sectors which suffer similar problems as the companies in the Illumina case is driven by factors as unpredictable and rapidly evolving as worldwide sustainability goals and the rise of artificial intelligence. These factors serve as incentives for start-up companies to develop new solutions and practices in a variety of sectors. Should the start-ups be successful in their endeavours, the ability to foreclose the new market will be very similar to the Illumina case due to the innovative nature the relevant companies seek.

Furthermore, the decision will shed light on the Commission's jurisdictional powers because, according to the wording of Article 22 EUMR, the jurisdictional power of the Commission could potentially be endless, which would have significant ramifications on legal certainty for companies and NCAs. Thus,

[92] *Illumina* (n 9) paras.175-178.

the Court's judgement is of paramount importance in determining the new system of merger control.

6. Conclusion

Having considered the past, present, and future of EU merger control, and Commission policies towards takeovers, some conclusions can be drawn about the effectiveness of the Commission's emerging policy under Article 22 EUMR for addressing new challenges posed by small but dangerous takeovers.

The Commission, by implementing the new policy regarding the referral system, shifts away from turnover requirements towards more flexible factors. This is achieved by the elimination of mandatory turnovers in assessing whether a merger could impact competition, and instead relying on Article 22 EUMR to review concentrations where a turnover does not reflect its actual or future competitive potential. It thus seeks to catch small but dangerous takeovers. This new policy is based on the emergence of the total foreclosure phenomenon primarily seen in the digital and pharmaceutical sectors. The new policy could be potentially problematic from a legal certainty standpoint. It could also interfere with one of the hallmark principles of the EU, the subsidiarity principle. These issues could be resolved by implementing sector specific regulations, such as the DMA, in order to provide much needed clarifications. More specific regulations would bring more objectivity to the assessment, which ultimately would result in fostering a more certain business environment for the undertakings that wish to conduct transactions in the EU. Ultimately, a balance between the old completely objective system and the new highly discretionary system ought to be struck. This approach would foster business transactions within the EU, whilst making sure that small but dangerous takeovers can be subject to review.

The pending decision of the CJEU in the Illumina case will be essential in determining whether the Commission will rely on this new policy of referral. Furthermore, the final judgement of the case will serve as a pivotal instrument in determining the limits of the Commission's jurisdictional powers, which some argue could be unlimited under the Commission's new policy as regards Article 22 EUMR referrals.

Therefore, the issue of small but dangerous takeovers is a significant threat to EU competition law, requiring ongoing attention and adaptation from bodies such as the Commission. The Commission's change of policy represents a step towards addressing the issue. However, the Illumina case will be critical in determining the effectiveness and the limits of the new referral mechanism. Ultimately, continued research and analysis are necessary to ensure that EU competition rules remain relevant tools to protect innovation and a level playing field in the context of a rapidly evolving marketplace.

Feminism in Tort Law: The Harm Principle and its Failure to Account for the Tort Needs of Women

Jessica Gabriyel Jassan[1]

[1] Jessica Gabriyel graduated from Maastricht University with a Bachelor of Law in European Law, specialising in Business and Law, and Human and Legal Decision-Making. Her thesis, "Feminism in Tort Law: The Harm Principle and its Failure to Account for the Tort Needs of Women," received the Dies Natalis Student Prize 2023. In her thesis, she explores the intersections of feminist legal theory and tort law, focusing on the inadequacies of the harm principle in addressing gender-specific harms. She is currently exploring both academic and professional opportunities in the international legal field.

Table of Abbreviations

BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGH	Federal Court of Justice (Germany)
ECHR	European Convention on Human Rights
EU	European Union
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
HRA	Human Rights Act (English Law)
UKHL	United Kingdom House of Lords

ABSTRACT

This paper investigates the application and limitations of the harm principle within tort law, with a specific focus on its implications for women's experiences. Employing a doctrinal methodology supplemented by feminist legal theory, the study examines case law, statutes, and judicial interpretations to understand how the harm principle is applied and where it fails to address harms typically experienced by women. The research highlights the gender biases embedded in tort law, emphasising the undervaluation of dignitary, relational, and emotional harms compared to physical and property damages. Through a comparative analysis of English common law and German civil law, the paper illustrates the systemic shortcomings in both legal traditions regarding gender-specific harms. By integrating feminist perspectives, the study aims to propose more inclusive legal standards that better recognise and address these harms, ultimately advocating for a legal framework that is more responsive to the lived experiences of women.

1. INTRODUCTION

Feminist legal scholars have directed little attention to tort law, which is unfortunate as it is a very important part of our lives. Feminist legal critiques help shape the law into one that is more just, where women are not more vulnerable to a law created by men for men, and where the law does not fail women when presented with their experiences. According to Chamallas and Kerber, the legal system frequently neglects to compensate women for recurring harms, which, despite being significant in women's lives, lack precise male counterparts.[2] Tort law is the area of the law that provides rules for assigning legal responsibility for personal injuries and conferring remedies, usually in the form of monetary damages.[3] Prosser and Keeton once stated, "perhaps more than any other branch of law, the law of torts is a battleground for social theory."[4] The harm principle, a fundamental principle of tort law, establishes that the state can exercise coercion over an individual only when it can prevent harm to others.[5] However, the law often fails to adequately recognise and address the harms regularly experienced by women, including dignitary, relational, and emotional harm. Additionally, it often excludes harms related to sexual relationships, privacy, or reproduction from its scope.[6] Therefore, the research question of this paper is: Does the harm principle fail to account for the full range of civil wrongs regularly experienced by women?

The structure of the paper begins with Section 2, where the harm principle is presented and defined, with Section 2.2 critically assessing its limitations. Following this, Section 3 shifts to the feminist perspective on the harm principle, analysing how gender biases affect its application within the legal system. Sections 4 and 5 investigate privacy and sexual privacy, respectively, with Section 5.1 focusing on revenge porn. Lastly, Section 6 navigates through the complexities of sexual autonomy, consent, and harassment within tort law. Section 6.1 focuses

[2] Martha Chamallas and Linda K Kerber, 'Women, Mothers, and the Law of Fright: A History' (1990) 88 MICH L REV 814, p. 814.
[3] Leslie Bender, 'Overview of Feminist Torts Scholarship' (1993) 78 Cornell L Rev 575.
[4] W Page Keeton and William L. Prosser, *Prosser and Keeton on the law of torts* (5th ed, St Paul 1884) p. 140.
[5] Nils Holtug, 'The Harm Principle' (2002) 5 Ethical Theory and Moral Practice, 357.
[6] Sarah Lynnda Swan, 'Tort Law and Feminism' in Deborah L. Brake, Martha Chamallas and Verna Williams (eds), *Forthcoming in Oxford Handbook on Feminism and the Law in the U.S.* (Oxford Academic 2021) p. 11.

specifically on sexual harassment as a gendered harm, highlighting the systemic inequalities perpetuated at the workplace.

The methodology of this paper is primarily doctrinal and supplemented by feminist legal theory. This combined approach is essential for a comprehensive analysis of how the harm principle operates within tort law and its implications for women's experiences. The doctrinal analysis involves a thorough examination of case law, statutes, and judicial interpretations to understand how the harm principle is applied in practice. This includes clarifying the existing framework and identifying areas where it fails to address adequately the harms experienced by women. Complementing this, the feminist legal theory analysis focuses on critiquing the gender biases embedded in tort law, emphasising how these biases influence the recognition and valuation of harms predominantly affecting women. By incorporating feminist perspectives, this paper aims to reveal the law's inadequacies in addressing gender-specific harms and propose more inclusive legal standards. Additionally, a comparative analysis of common law and civil law systems is conducted, focusing on English law and German law, respectively. English law, representing the common law system, provides a rich body of case law illustrating the interpretation and application of the harm principle, highlighting inherent gender biases. German law, as a representative of the civil law tradition, offers a contrasting perspective with different legal structures and principles, allowing for an analysis of how another major legal system addresses gender-specific harms. This methodology fits the aim to systematically address the research question, by providing a comprehensive critique of the harm principle from a feminist perspective and proposing ways to make tort law more inclusive and responsive to gender-specific harms.

2. The Harm Principle

2.1. The Origins of the Harm Principle

The harm principle has its origins in philosophical views, such as the classical liberal work of John Stuart Mill and Joel Feinberg's work on harm in criminal law. John Stuart Mill believed that the pursuit of pleasure and avoidance of pain are the only motives for human behaviour. He defined utilitarianism as a system of ethics where actions are considered right if they promote happiness and wrong if they

result in the opposite.[7] Therefore, acts that promote overall pleasure and minimise overall pain are considered the most desirable. In On Liberty, Mill established that causing harm to another is a sufficient justification for state intervention to prevent such harm from occurring. He stated that "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others".[8] Mill differentiated between harm and mere offense.[9] In this view, only harm, an action that causes injuries or sets back important interests to someone, can be a justification for restricting liberty. In contrast, a mere offence is comparatively minor and fleeting, only provoking disapproval, discomfort, or emotional distress in others. With this distinction, Mill aimed at protecting freedom and individual autonomy by limiting state intervention to cases where actual harm is present. Additionally, Mill focused on non-consensual harm, stating that if someone has willingly and knowingly risked something harmful, they cannot legitimately complain when that harm comes about.[10]

Since Mill, a lot of literature has arisen on whether harm to others should be the basis for state compulsion. In Harm to Others, Feinberg sought to establish the limits of the harm principle, ie, which conduct the state can "rightly make criminal".[11] He established harm as an intrusion into the interest that someone has, where an interest is something a person has a stake in, ie, something that has been or is the person's own.[12] Another advocate for this principle is Joseph Raz, who established harm as a setback to autonomy instead of a setback to interests. He defined autonomy as the ability to choose between an adequate range of valuable options, while in possession of the required capacities, and while being sufficiently independent from others.[13] According to Raz, harm occurs when one person's actions detrimentally affect another's well-being in a manner that impacts their future prospects, making him "worse off than he was or is entitled to be". [14]

[7] John Stuart Mill, *Utilitarianism* (Andrews UK Limited 1863) p. 11.
[8] John Stuart Mill, *On Liberty* (Batoche Books Limited 1859) p.13.
[9] ibid pp. 73-75.
[10] David Brink, 'Mill's Moral and Political Philosophy', *The Stanford Encyclopedia of Philosophy* (Fall edn, 2022) <https://plato.stanford.edu/archives/fall2022/entries/mill-moral-political/> accessed 10 January 2023, s. 3.1.
[11] Joel Feinberg, *Harm to Others* (Oxford University Press 1984) p. 3.
[12] ibid pp. 31-36.
[13] Joseph Raz, *The Morality of Freedom* (Oxford University Press 1986) pp. 412-419.
[14] ibid p. 414.

2.2. Limitations to the Harm Principle

Nowadays, in any legal system, the harm principle requires a clear definition of what constitutes harm. Generally, harm is understood as a setback to someone else's interest, measured against a baseline. This principle justifies prohibiting certain conduct based on the harm it prevents.[15] However, the harm principle has its limitations, and many authors have expressed opposition to it. One of the main arguments against the principle is that there are harms that are not wrongful as well as wrongs that do no harm.[16] Ripstein provides examples of harms that are not wrongful, such as the potential loss of customers due to a competitor building a better product, the negative impact on neighbouring businesses when a hotel closes or, of a person arriving before you and getting the last product you needed from the store.[17] Such acts are not wrongful; however, they cause genuine harm. Moreover, an example of a wrong that does no harm is given by Gardner and Shute, where a rape occurred while the victim was unconscious, and the perpetrator used a condom. There is no direct harm since the victim does not have a memory of the act, no resulting physical injury, was not impregnated as a result and therefore, there is no setback to any of her interests.[18] However, this action is clearly wrong as the perpetrator violated the victim's right to decide what to do with her body, thereby violating her sexual autonomy. Nonetheless, one could still argue that in this case, despite the lack of memories and physical harm, the person has the psychological harm of disgust and shame from the pure knowledge that it happened to her. Hence, exploring this idea of a "harmless rape" further, consider a case where the woman, instead of being unconscious, was in a vegetative coma and would never find out what happened to her. This is still clearly wrong; however, according to views like those of Gardner and Shute, it is not harmful. Consequently, we encounter the limitations of the harm principle in addressing and recognising harms that extend beyond physical and psychological dimensions. The current understanding of harm poses difficulties in capturing and defining the harm suffered by the victim in such a case, raising questions about whether she

[15] Arthur Ripstein, 'Beyond the Harm Principle' (2006) 34 Philosophy & Public Affairs 215, pp. 222-223.
[16] ibid pp. 222-229.
[17] ibid p. 228.
[18] John Gardner and Stephen Shute, 'The Wrongness of Rape' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence* (Fourth series, Oxford: Clarendon Press 2000) p. 6.

would still have a viable claim in tort against the perpetrator. Should the harm principle then be replaced by another, such as the sovereignty principle as Ripstein suggests?[19] Or is there another alternative?

In the famous French case of *Baget c. Rosenweigh*,[20] a pharmacist intervened in a criminal proceeding against unlicensed individuals unlawfully practicing the pharmacist profession. The defendants were retail vendors of secret, unauthorised remedies who infringed the pharmacists' moral interests and damaged the honour of the profession. The Court of Cassation ruled that the damage sustained by the pharmacists was of moral nature and compensable. Despite the Parisian pharmacists' inability to establish quantifiable material damage as required for delictual actions under French law, and even with some defendants operating in neighbourhoods without licensed pharmacists who could claim business losses, the court did not dismiss the claims due to the lack of such evidence. Therefore, a moral damage was recovered, and the civil code alone served as the foundation for such recovery.[21] It should be mentioned that the concept of moral damage brought forth by French courts raises some issues. In *Baget c. Rosenweigh*, the court initially assumes that a right to recover exists only if the plaintiff has suffered harm. It then finds that harm has been suffered in the form of moral damage, but ultimately rules the defendants liable for a civil wrong based on the illegal practice causing harm to the pharmacists, as it constitutes a "usurpation of the rights guaranteed to them by law."[22] This raises questions about whether the foundation for the concept is based on harm or legal rights.

Following this case, French courts developed a more coherent concept of moral damage, which consisted of any suffering, grief, or contrariety experienced in relation to corporeal, material, and sentimental interests.[23] Returning to the example of a comatose woman being raped, it can be argued that she suffered moral damage even if she did not experience physical or psychological harm. Despite not being aware of the harm or having her interests worsened, the act of using her body without her consent while she is powerless to prevent it clearly

[19] Ripstein (n 15).
[20] Cass. (Ch. Réunies) 15 June 1833, Sirey 1833.I.458 (*Baget c. Rosenweigh*).
[21] Vernon Valentine Palmer, 'Moral Damages: The French Awakening in the Nineteenth Century' (2021) 36 Tulane European and Civil Law Forum 45, pp. 50-51.
[22] *Baget c. Rosenweigh* (n 20) p. 462.
[23] Palmer (n 21) p. 60.

goes against her interests, constituting moral damage. Therefore, this paper argues that while harm should remain the organising principle of tort law, what is considered to be harm should be expanded. Case law emphasises physical harm and undervalues emotional, psychical, as well as moral varieties of harm. It considers the rape of an unconscious woman harmless, relying on an alternative justification for its criminalisation. This narrow definition of harm makes it difficult for plaintiffs to recover damages, despite this being clearly harmful to the victim, be it physical, psychological, or moral.

In common law torts, the distinction between actions that cause harm to another and those that do not is crucial. If an individual's actions cause no harm to others, then the conduct is considered an expression of individual liberty and does not generate liability under civil or criminal law. If an individual's actions cause harm to others, then some remedy is required for the wrong, unless it falls under a justification or excuse.[24] In contrast, civil law systems like German law, place greater emphasis on establishing whether offensive conduct infringes on the rights of others. Thus, the act must be established as incompatible with the right of others.[25]

3. THE FEMINIST VIEW OF THE HARM PRINCIPLE

Legal feminist writers have been slowly progressing in tort law, compared to other areas such as criminal law, family law, and constitutional law.[26] Yet, the importance of incorporating feminist perspectives into tort law cannot be overstated, particularly because the field is centred around the concept of harm. Given that law focuses on harm, it is crucial to include female perspectives, as harms experienced regularly by women are often judged and measured with a male bias. This bias is evident in the use of the reasonable men legal standard, which judges the harms sustained by women, through a masculine perspective, even when the name of the standard is changed to reasonable person.[27] For instance, in

[24] Ripstein (n 15) p. 369.
[25] Tatjana Hörnle, 'Offensive Behavior and German Penal Law' (2001) 5 Buffalo Criminal Law Review 255.
[26] Jennifer Wriggins, 'Toward a Feminist Revision of Torts' (2010) 13 Am UJ Gender Soc Pol'y & L 139.
[27] Naomi R. Cahn, 'Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice' (1992) 77 Cornell L Rev 1398.

cases of workplace harassment, the severity of emotional distress experienced by women is often downplayed when evaluated through a male lens, which tends to prioritise physical over emotional harm. Hence, courts tend to dismiss claims of, eg, persistent verbal harassment as trivial, whereas a similar claim involving physical aggression would be taken more seriously.[28] Moreover, this bias also affects men when they experience harms that are not deemed to be masculine, such as those of an emotional nature, as these are often disregarded as genuinely harmful. Considering that tort law is mostly made by judges in response to specific cases, it is flexible enough to respond to feminist critiques. These critiques highlight the need for a legal framework that accurately reflects women's experiences, challenges the male-biased standards, and recognises emotional and relational harms as valid and significant. It is imperative to challenge these biases and incorporate feminist perspectives in order to reshape the law and establish a framework that evaluates women's experiences through a lens constructed by and for them.

Although tort law may appear to be gender-neutral on the surface, gender inequalities are embedded in its deep structures, which can make it more difficult for women to prove their claims and can devalue injuries that are often associated with women, such as emotional and relational harm.[29] In the past, as pointed out by Chamallas and Kerber, women's health issues such as miscarriage, premature birth, and what were historically and unjustly referred to as hysterical disorders, described women's injuries.[30] These were often dismissed by courts as abnormal and hypersensitive, and the dominant standard for determining normal responses to fright was male. Courts created a distinction between physical harms caused by impact and emotional harms caused by fright. However, this distinction is inappropriate since in cases such as miscarriages or premature births, it is the emotional harms that interfere with physical integrity. As a result, cases where a woman miscarried due to being frightened or a mother who suffered a nervous shock due to watching her child's injury or death, are often classified as emotional

[28] Thomas v National Union of Mineworkers (South Wales Area) (1986) Ch 20; Insitu Cleaning Co Ltd v Heads (1995) IRLR 4; Waters v Commissioner of Police of the Metropolis (2000) 1 WLR 1607; Majrowski v Guy's and St Thomas' NHS Trust (2006) UKHL 34.

[29] Martha Chamallas, 'Feminist Legal Theory and Tort Law' (2018) Ohio State Public Law Working Paper No 448, 1 <https://ssrn.com/abstract=3198115> accessed 4 February 2023, pp. 2-3.

[30] Chamallas and Kerber (n 2) p. 832.

harms, neglecting the physical consequences they entail, this classification occasioning many obstacles to recovering damages.[31] The current hierarchy of harms in tort law prioritises property damage and physical injuries above dignitary, relational, and emotional harm, frequently placing harms that involve privacy, sexuality, or reproduction outside its sphere.[32] For instance, the general duty of care is only applied to property damage and physical injury, ignoring emotional harm or relational loss. As a result, victims have to rely on elements of negligent infliction of emotional distress (which are notoriously narrow) or intentional infliction of emotional distress (which is limited, by definition, to the most "extreme and outrageous" cases).[33] When the law ignores gender, it minimises the harm suffered. The legal system, while striving for equity, fails to recognise or value women's claims and interests.[34] Fundamental aspects of life, such as reproductive health and autonomy, should concern both men and women. However, tort law dismisses them as women's issues despite the two being interconnected.[35] As Swan suggests, feminist tort law should eliminate the prioritisation of physical harm over emotional harm, instead centring both tangible and intangible harms equally to ensure gendered harms are recognised.[36] Therefore, the following sections demonstrate the law's inadequacies by focusing on harm claims related to privacy, sexual autonomy, and harassment. The injustice suffered by numerous women because of the law's inability to comprehend them is examined. Stressing – with these feminist critiques of the law – the importance of taking women's experiences seriously and enhancing their representation within the legal system, highlighting the need to make women's perspectives more visible and influential in legal contexts.[37]

4. PRIVACY

[31] Chamallas and Kerber (n 2) p. 814; Bender (n 3) p. 578.
[32] Swan (n 6) pp. 11-12.
[33] ibid; Restatement (Second) of Torts (American Law Institute 1965) para. 46.
[34] Chamallas and Kerber (n 2) pp. 862-863.
[35] Lucinda M Finley, 'A Break in the Silence: Including Women's Issues in a Torts Course' (1989) 1 Yale Journal of Law and Feminism 41, p. 73.
[36] Swan (n 6) p. 12.
[37] Finley (n 35) p. 73.

Privacy rights are, as noted by Florence, a "vehicle of . . . people's safety, emotional wellbeing, and substantive equality".[38] The actual meaning of privacy has been debated, but Tavani categorised theories of privacy into four types. First, there is non-intrusion, which refers to the right to be left alone and is similar to negative liberty. Second, there is seclusion, which refers to the right to be inaccessible to others and is similar to solitude. Third, there is limitation, which refers to the right to restrict areas of knowledge about oneself and is similar to secrecy. Finally, there is control, which refers to the right to control the distribution of information about oneself and is similar to autonomy.[39] For feminist legal scholars, privacy has been a predominant focus. Some of the common feminist critiques centre on the fact that privacy can imply seclusion and subordination, which leads to women's under-participation in society and vulnerability to violence in the home. Its emphasis on negative liberty also stops any conception of affirmative governmental obligations.[40] This is seen in how privacy was used in the past to justify not criminalising domestic violence since this would "throw open the bedroom to the gaze of the public".[41] This resulted in men being exempt from consequences at the expense of women's bodily integrity, sexual autonomy, and their physical and mental health in the name of family privacy. Additionally, this was reinforced by the idea that a woman's body belonged to her husband. It was not until the landmark case of *R v. R* in 1991 that the marital exception to rape was overturned in England and Wales.[42]

English courts continue to reject the creation of a general tort of invasion of privacy, even after the introduction of the Human Rights Act 1998 (HRA),[43] which obliges courts to take into account the European Convention on Human Rights (ECHR) when interpreting common law. Instead, the protection of the right to privacy in English law has been approached through the concept of an equitable

[38] Ashley Florence, 'Genderfucking Non-Disclosure: Sexual Fraud, Transgender Bodies, and Messy Identities' (2018) 41 Dal LJ 339, p. 356.
[39] Herman T Tavani, 'Philosophical Theories of Privacy: Implications for an Adequate Online Privacy Policy' (2007) 38 Metaphilosophy 1, pp. 3-7.
[40] Anita L Allen, 'Coercing Privacy' (1999) 40 Wm & Mary L Rev 723, pp. 743-744; Linda C McClain, 'Reconstructive Tasks for a Liberal Feminist Conception of Privacy' (1999) 40 Wm & Mary L Rev 759, pp. 762-763.
[41] *State v. Hussey*, 44 NC 123, pp. 126-27 (1852).
[42] Regina Respondent v R. Appellant (1991) 3 W.L.R. 767.
[43] Cees van Dam, *European tort law* (2nd edn, Oxford University Press 2013) p. 143.

wrong.[44] The House of Lords implemented the right to respect for private life, which did not develop a right to privacy but was re-interpreted as the equitable wrong of breach of confidence to align with Article 8 ECHR.[45] In the case of *Wainwright v Home Office*,[46] Lord Hoffman stated that any perceived gaps in the law should be addressed through the careful development of existing causes of action, such as breach of confidence or with claims under the HRA for a breach of Article 8 ECHR (right to a private life). In his view, it was unnecessary to "require that the courts should provide an alternative remedy which distorts the principles of the common law."[47] In the Campbell case, the House of Lords confirmed the significant shift in English law's approach to the action for breach of confidence when used as a remedy for the unjustified publication of personal information.[48] The case involved a newspaper publishing details about the model Naomi Campbell's drug addiction treatment. Campbell argued that while they were entitled to publish the fact that she was addicted and undergoing treatment, the details of such treatment were private. The House of Lords recognised that English law indeed safeguards privacy. It was acknowledged that the law should be interpreted to ensure compliance with the State's positive obligations under the HRA, which mandates the protection of individual privacy. However, rather than establishing a new tort for privacy infringement, the House of Lords relied on the equitable action for breach of confidence as the basis for protection.[49] Consequently, no new tort was created, but the scope of the action for breach of confidence was expanded to not only encompass the divulgence of confidential information but to also include the unjustified publication of private information. This allowed individuals to pursue legal actions even in the absence of a pre-existing relationship of confidence with the party acquiring the information.[50] Furthermore, in this case, the court introduced a two-stage legal test for breaches of confidence. First, the court must ask whether someone in the position of the claimant would have a reasonable expectation of privacy. Second, if the first test

[44] van Dam (n 43) pp. 188-190.
[45] European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), art. 8.
[46] (2003) UKHL 53.
[47] ibid para. 52.
[48] Campbell v Mirror Group Newspapers Ltd (2004) UKHL 22, para. 51.
[49] ibid paras. 13 and 15; van Dam (n 43) pp.188-190.
[50] Paula Giliker, 'A common law tort of privacy? The challenges of developing a human rights tort' (2015) 27 Singapore Academy of Law Journal 761, pp. 764-765.

is affirmative, the claimant's privacy right is balanced against the public interest in free speech.[51] While compensation for breach of confidence is now well established, challenges persist when it comes to assessing loss. In cases involving confidential personal or private information, the plaintiff may experience not only economic loss, such as the cost of hiring a public relations consultant or loss of employment due to resultant publicity but also personal or psychiatric harm.[52] However, it is questionable whether such damages will be compensated.[53] It is important to recognise that a breach of privacy is more likely to cause psychological harm, including feelings of embarrassment, humiliation, shame, and guilt. Despite not being physical or financial in nature, these harms should not be regarded as insignificant due to the intrinsic connection between privacy and identity.[54]

In German law, §823(1) BGB is the central provision that enumerates the private law rights of citizens, including the right to life, physical integrity, health, personal liberty, and property. When deciding a claim for compensation, the courts primarily focus on these rights.[55] Moreover, following the *Schacht* case,[56] the BGH (Federal Court of Justice) established the general personality right, which is a protected right under the framework of §823(1) BGB. This right refers to Articles 1(1) and 2(1) of the Basic Law, safeguarding human dignity and the right to the free development of one's personality. Consequently, more specific rights such as the right to privacy, honour, and reputation were derived from this general personality right.[57] Significant legal developments have occurred in German courts, which bring to light the need to consider a broader dimension of harm beyond traditional financial harm, in response to cases involving violations of personality rights. One of such cases is the *Paul Dahlke* case,[58] where an actor posed for a photographer on a motorcycle, unaware that the photos would be used

[51] Janice Richardson, 'If I Cannot Have Her Everybody Can: Sexual Disclosure and Privacy Law' in Janice Richardson and Erika Rackley (eds), *Feminist Perspectives on Tort Law* (GlassHouse 2012) pp. 147-150.
[52] Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (ALRC Report 123, 2014) p. 264.
[53] Cornelius v de Taranto (2001) EMLR 12.
[54] Australian Law Reform Commission (n 52) p. 268.
[55] van Dam (n 43) p. 143.
[56] BGH NJW 1954, 1404 (*Dr Schacht*).
[57] van Dam (n 43) p. 186.
[58] BGH NJW 1956, 1554 (*Paul Dahlke*).

for an advertising campaign without his consent. The court determined that the defendant's actions provided two avenues for the actor's claim. Firstly, the court awarded damages based on a fictional agreement model, where the damages were assessed by considering the amount of money typically required to purchase publication rights from the claimant. Secondly, the court stated that the actor could have pursued a claim for unjust enrichment and restitution, seeking the amount that the claimant would have normally agreed upon for the publication of their image. [59] In this case, the compensation awarded was based on financial loss rather than an infringement of values like dignity or reputation.[60] The harm was determined based on the loss of bargaining power the actor could have had in such a contract, rather than compensating for reputational or even psychological harm. One could argue that, following the approach established in the *Baget c. Rosenweigh* case,[61] the harm could potentially be categorised as moral damage if the concept of harm were to be expanded. Nonetheless, the court provided damages to account for the profit wrongly obtained based on a contract that the actor never entered into. A few years later, a similar case involving the violation of personality rights occurred in the *Herrenreiter* case.[62] In this instance, a photographer took a picture of a brewery owner riding a horse during a show jumping contest. The photo was subsequently used in an advertisement for a sexual stimulant without the owner's consent. The court recognised that a fictional agreement, similar to the one applied in the *Paul Dahlke* case, was not applicable since the award required the victim to have suffered concrete pecuniary loss, indicating a loss of the opportunity to negotiate for one's own image.[63] As the court considered the use of the plaintiff's photos for the advertisement to be humiliating or immoral, it argued that claiming a reasonable license fee would imply that a person whose personality rights were violated would allow the humiliating exploitation of their personality for a fee. Conveying such an impression to the public would constitute a new infringement of the personality right.[64] Instead,

[59] Francesco Giglio, *The Foundations of Restitution for Wrongs* (Hart Publishing 2007) p. 111.
[60] Kerstin Schmitt, 'Chapter 6: Celebrities, advertisement and commercial exploitation "publicity rights" in German law' in Nari Lee and others (eds), *Intellectual Property, Unfair Competition and Publicity* (Edward Elgar Publishing 2014) p. 153.
[61] *Baget c. Rosenweigh* (n 20).
[62] BGH NJW 1958, 827 (*Herrenreiter*).
[63] Giglio (n 59) p. 111.
[64] Schmitt (n 60) p. 152.

damages were granted based on §847(1) BGB for the pain and suffering caused by the unauthorised use of the claimant's image. The court relied on the concept of deprivation of liberty and expanded it to encompass the "deprivation of the possibility of making decisions regarding one's own life."[65] However, it is important to note that this type of compensation is only applicable in exceptional circumstances. The courts have upheld this remedy only when a person's dignity is severely harmed. Therefore, license fees or compensation have not been granted in cases where the association of a person with a product is immoral or humiliating.[66]

These two cases established the framework for the response to violations of personality rights, both for well-known and lesser-known victims. However, a new approach was introduced in the *Caroline von Monaco* case[67] where Caroline, the Princess of Monaco, sought rectification of statements made in two magazines that falsely gave the impression she had granted an exclusive interview and quoted false statements about her private life. Additionally, she claimed delictual compensatory relief in the form of damages for non-pecuniary loss. The court granted rectification and damages for non-pecuniary loss, emphasising the violation of the victim's right to self-determination. The damages awarded were rooted in the protection of human dignity and the free development of personality, as guaranteed by the German Constitution.[68] By liberating this head of damages from the limitations imposed by §847(1) BGB, the court could go beyond mere compensation. This shift in approach highlighted the preventive function of damages and went beyond mere compensation, aiming to satisfy the victim and deter future violations. While debates exist regarding whether these damages can be classified as exemplary damages or purely compensatory, the Caroline case represents a significant development in German jurisprudence concerning the protection of personality rights. By recognising the constitutional basis for damages for non-pecuniary loss, the decision offered new possibilities for individuals seeking redress for violations of their privacy and dignity.[69]

[65] *Herrenreiter* (n 62) paras. 355-356.
[66] Schmitt (n 60) p. 153.
[67] BGH NJW 1995, 861 (*Caroline von Monaco I*).
[68] Paras. 1 and 2(1) GG (*Grundgesetz*).
[69] Giglio (n 59) pp. 113-115.

5. SEXUAL PRIVACY

More recently, feminist critiques focusing on cases of privacy and sexual autonomy have given great importance to what is often referred to as sexual privacy, as defined by Citron: "the behaviours, expectations, and choices that manage access to and information about the human body, sex, sexuality, gender, and intimate activities".[70] Whether the law protects privacy depends on the contexts, settings, and expectations where the established boundaries are. These may include the human body, intimate activities, personal information about sex, sexuality, gender, and personal choices about the body.[71]

In English law, case law has established the unlawfulness to kiss and tell,[72] disclosing secrets or other private information,[73] reading or publishing information contained in private records,[74] and distributing photographs or videos of intimate activities.[75] However, when it comes to the physical aspect of sexual privacy, English law only focuses on the acquisition and/or distribution of private information, failing to effectively take into account the whole concept of sexual privacy.[76] This is seen in *Wainwright v Home Office*, where the House of Lords denied the right to privacy that would extend to what was referred to as physical privacy. In this case, W and her son were both humiliatingly strip-searched for drugs before visiting another of her sons in prison and they claimed that there had been an invasion of privacy based on the tort established in Article 8 ECHR. However, the court held that, while privacy was a value underlying the common law of breach of confidence, this was not in itself a principle of law, that there was no tort of invasion of privacy, and no general right to privacy that would extend to physical privacy interferences.[77] Moreover, consider the case of a pregnant woman who sued her doctor because, during delivery, he invited a friend to watch under the pretence that he was also a doctor.[78] In this case, and in similar cases where,

[70] Danielle Keats Citron, 'Sexual Privacy' (2019) 128 Yale LJ 1870.
[71] ibid pp. 1874-1880.
[72] *Barrymore (Michael) v News Group Newspapers Ltd* (1997) FSR 600 (Ch).
[73] *McKennitt v Ash* (2006) EWCA Civ 1714.
[74] *HRH Prince of Wales v Associated Newspapers Ltd* (2006) EWCA Civ 1776.
[75] *Mosley v News Group Newspapers Ltd* (2008) EWHC 1777.
[76] NA Moreham, 'Beyond information: Physical privacy in English law' (2014) 73 The Cambridge Law Journal 350, pp. 353-355.
[77] *Wainwright v Home Office* (n 46) para. 18.
[78] *De May v. Roberts* 46 Mich 160; 9 NW 146 (1881).

for example, a video of childbirth is obtained without consent, the person watching the woman giving birth obtains medical information about her, sees intimate parts of her body, hears her crying, and generally insinuates himself into an intimate occasion.[79] All of this breaches the sexual privacy of the woman. If the law focuses only on the obtained information, it fails to fully comprehend the breach of rights the woman experienced.[80] For feminist legal scholars, sexual privacy goes beyond the private information acquired; It includes the expectation of privacy in physical spaces where individuals engage in sexual activities or undress, such as bedrooms, dressing rooms, and restrooms. It also involves the assumption that certain body parts, such as genitalia, buttocks, and female breasts, will be concealed in different settings, both public and private. It encompasses the expected confidentiality of intimate communications with partners about sex, sexual orientation, gender, sexual fantasies, or sexual experiences as well as the decision to reveal one's nude body to others.[81]

5.1. Revenge Porn

Due to the ever-changing technology of our current times, sexual privacy is becoming increasingly important. The invention of cameras has made the protection of privacy through physical barriers insufficient. Nowadays, private spaces can be infiltrated by cameras, and the faces and bodies of people can be taken away and spread among mass audiences.[82] As a result, sexual privacy invasions now include cases of digital voyeurism, up-skirt photos, sextortion, non-consensual pornography, and deep-fake sex videos.[83] As stated by Jessica Lake, women have stressed privacy for the objection to "the optical violation of their exposed bodies".[84] By further exploring these types of cases, the focus is now on situations where individuals, including ex-lovers, men, and women, share details of their sexual relationship, including graphic sexual material about the other party, also known as revenge porn.[85] The term revenge porn refers to the

[79] Moreham (n 76) p. 354.
[80] ibid p. 355.
[81] Citron (n 70) pp. 1880-1881.
[82] Jessica Lake, *The Face That Launched a Thousand Lawsuits: The American Women Who Forged a Right to Privacy* (Yale University Press 2016) p. 116.
[83] Citron (n 70) pp. 1908-1924.
[84] Lake (n 82) p. 116.
[85] Richardson (n 51) p. 145.

distribution of nude, intimate, and sexualised images of individuals, predominantly women, without their consent and against their desires.[86] It is important to note that although it is termed revenge porn, it is broadly used, as it is not always done by ex-lovers, but it also includes up-skirt photos and material that has been hacked or otherwise stolen before being publicised, and the motivation does not always need to be revenge. It can also be due to a desire for notoriety, sexual favours, or economic gains. Moreover, with advancements in technology, such as new social media platforms where images are shared, or cloud storage media which can be hacked, and new trends such as sexting, the opportunity for revenge porn to occur is higher.[87]

In English law, before the HRA (where the traditional remedy of breach of confidence was interpreted to give effect to Article 8 ECHR), cases of breach of confidence were initially a narrow range of facts since the focus was on the quality of the relationship itself (not on the content of the information). Thus, the claimant only needed to prove that a confidential relationship existed between the parties.[88] This can be seen in the 1967 case of *Duchess of Argyll v Duke of Argyll*,[89] where the Duchess was awarded an injunction to prevent her ex-husband from giving details of her pre-marital sex life to the press. This is an early case of what is now referred to as revenge porn, which encompasses using words (likely to be sexually graphic) as well as photographs or video recordings.[90] In this case, the court held the husband's intention to publicise what passed as confidential communications between husband and wife as a breach of confidence.[91] After the HRA and the establishment of the Campbell test, initially, cases of sexual disclosure were those of famous men, such as *Theakston v MGN*,[92] where a famous man had sex with a worker in a brothel, and *A v B Plc*,[93] where a famous man had sex with two women. In these cases, injunctions were refused to prevent women from publicising their stories. The courts distinguished these relationships,

[86] Majid Yar and Jacqueline Drew, 'Image-Based Abuse, Non-Consensual Pornography, Revenge Porn: A Study of Criminalization and Crime Prevention in Australia and England & Wales' (2019) 13 International Journal of Cyber Criminology 578, p. 579.
[87] ibid pp. 580-581.
[88] Richardson (n 51) pp. 147-150.
[89] (1967) Ch 302.
[90] Richardson (n 51) pp. 147-148.
[91] *Argyll v Argyll* (n 88).
[92] (2002) EWHC 137.
[93] (2002) EWCA Civ 337.

described as transitory, from those where there was a marriage. In such transitory sexual relationships, according to the court, there was no relationship of confidence on which to base the claim.[94] Even though these cases ended in favour of the women, it is not a feminist position to exploit and abuse the private information of someone's sex-life. In contrast, in later cases such as *Jagger v Darling*,[95] where a woman was recorded by the CCTV having sexual relations in the doorway of a nightclub, an injunction was allowed against a club worker to prevent the video from being publicised. In this case, the division of public and private spaces broke down, and the court recognised the difference between being seen by a few passers-by and being publicised more broadly. Furthermore, the Campbell test was also applied to the famous case of *Max Mosley*, where the court held that there was a reasonable expectation of privacy when it comes to sexual relationships between consenting adults on private property. Even when unconventional, exposure cannot be justified on grounds of public interest.[96]

Taking a closer look at the harm caused to individuals, particularly women, by publicising their private photos or videos, especially on the internet where it is challenging to remove them entirely, it can have significant psychological consequences. The psychological evidence in a rape case established that closure after a trial is important for rape survivors. In this case, the harm was extended to PTSD because of the disclosure of her name and her rapist's (her ex-husband) after the trial.[97] In the case of revenge porn, the inability to delete the information and the lack of closure can have acute psychological consequences. The victim may find it difficult to move past it and feel branded by something that will forever stay on the internet, visible to current and future friends, family, acquaintances, and employers.[98] The extent of the damage caused by revenge porn is difficult for the law to fully comprehend. Nonetheless, compensation generally does arise from successful claims of disclosure of private sexual photographs and films. The English courts also provide a super-injunction that not only prevents the material from being publicised but also prevents the publication of the injunction itself, including the identity of the victim.

[94] Richardson (n 51) pp. 147-150.
[95] (2005) EWHC 683.
[96] *Mosley v News Group Newspapers Ltd* (n 74).
[97] *Jane Doe v Australian Broadcasting Corporation & Others* (2007) VCC 281.
[98] Richardson (n 51) pp. 147-150.

In Germany, the right to ownership of one's own images is protected by §33 and §22 of the Artistic Copyright Act,[99] while the General Data Protection Regulation (GDPR)[100] provides additional protection at the European Union level. These regulations offer remedies, such as rectification and compensation, in cases where an individual's privacy rights are infringed.[101] However, what is most interesting in German law is seen in the 2015 case where the Federal Court of Justice (BGH) established that if one partner takes intimate photos or videos of the other, the person displayed in such material can request the deletion after the end of the relationship, even if consent has been given during the relationship for the creation and use of photographs and/or videos. In this case, the ex-partner was a photographer who had taken various intimate photos and made erotic videos of the claimant, with her consent, during their relationship. When the relationship ended, she wanted the pictures where she appeared to be deleted, and the court agreed, stating that consent to use and own privately recorded intimate photographs could be withdrawn.[102] The BGH assumes that in the case of intimate recordings, claims to delete them can be made under §1004 (which establishes the claim for elimination and injunctive relief) and §823(1) BGB due to the violation of the general right of personality. Thus, the court based its judgment on the violation of the general right of personality and its function of protecting the image and privacy of the person. The court stated that it did not matter that the photographer did not plan on making the material public, establishing that the woman's rights deserve stronger protection.[103] Some argue that this type of preventive deletion is part of the solution for revenge porn by taking away the manipulative power that can exist

[99] Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie (KunstUrhG) (*Artistic Copyright Act*).
[100] Council Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (2016) OJ L 119 (GDPR).
[101] Miha Šepec, 'Revenge Pornography or Non-Consensual Dissemination of Sexually Explicit Material as a Sexual Offence or as a Privacy Violation Offence' (2019) 13 International Journal of Cyber Criminology 418, p. 430.
[102] BGH NJW 2016, 1094 (*Intimate photos case*). See also: Thomas Stadler, 'Anspruch auf Löschung intimer Fotos nach dem Ende der Beziehung' (*Internet Law*, 22 December 2015) <http://www.internet-law.de/2015/12/anspruch-auf-loeschung-intimer-fotos-nach-dem-ende-der-beziehung.html> accessed 6 March 2023; BBC, 'Sex tape row: German court orders man to destroy naked images' (*BBC* News, 22 December 2015) <https://www.bbc.com/news/world-europe-35159187> accessed 29 January 2023.
[103] Intimate photos case (n 102).

when owning such intimate images.[104] However, the case still raises serious issues. Firstly, it is unclear how this will be enforced unless the government is willing to review all electronics of every man in every successful claim to ensure that the images are deleted, or whether the victim will need to go to court and request injunctive relief. Secondly, this all depends on the woman proactively seeking to delete her photographs and seeking court reinforcement if her ex-partner refuses to do so. Finally, and more importantly, this does nothing to help the victim once their intimate photographs have been publicised.[105]

6. Sexual Autonomy, Consent, and Harassment

Not surprisingly, when feminist legal scholars talk about privacy, usually they also talk about sexual autonomy as these two are intertwined. Sexual autonomy is defined as "a human right to protect and maintain an informed decision over one's body, one's sexuality, and one's sexual experience".[106] Consent is the primary indicator of whether an individual's sexual autonomy has been respected. When determining what valid consent is, individuals are typically presumed to be autonomous and responsible for their actions. Therefore, the focus is usually on three factors that invalidate consent: lack of competence or capacity, coercion, and deception. Even if someone appears to give consent, this is not morally or legally meaningful when one of these factors is present.[107] For instance, consider a case where a court ruled against a man who engaged in sexual intercourse with an underage girl who gave consent. The court deemed her a vulnerable person who had been groomed for sexual exploitation, thus lacking genuine consent.[108] Similarly, in another scenario, a victim agreed to engage in sexual activities with a person whose true gender was concealed. The court ruled that deception regarding one's gender can invalidate consent, highlighting the multifaceted nature of consent issues within the framework of sexual autonomy.[109]

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[104] Jason Haynes, 'Judicial approaches to combating "revenge porn": a multi-jurisdictional perspective' (2019) 44(3) Commonwealth Law Bulletin 1, p. 27.
[105] Katlyn M Brady, 'Revenge in Modern Times: The Necessity of a Federal Law Criminalizing Revenge Porn' (2017) 28 Hastings Women's LJ 3, pp. 21-22.
[106] Peter Memiah and others, 'Is sexual autonomy a protective factor for neonatal, child, and infant mortality? A multi-country analysis' (2019) 14 PLoS ONE 1, p. 2.
[107] Nora Scheidegger, 'Balancing Sexual Autonomy, Responsibility, and the Right to Privacy: Principles for Criminalizing Sex by Deception' (2021) 22 German Law Journal 769, p. 772.
[108] *R. v Robinson* (Sean) (2011) EWCA Crim 916.
[109] *R v McNally* (2013) EWCA Crim 1051.

To further explore the dynamics of consent in sexual relationships, particularly where there are power imbalances, the Canadian case of *Norberg v Wynrib* provides valuable insights. In this case, Laura Norberg, a 33-year-old woman, sought the painkillers she was addicted to from her 80-year-old doctor, Dr. Wynrib. The doctor suggested that she engaged in sexual activities with him as a condition for receiving the painkillers. After seeking alternative sources, Norberg returned to Dr. Wynrib and participated in sexual activities in exchange for the drugs. Subsequently, she sued Dr. Wynrib for sexual assault, negligence, breach of fiduciary duty, and breach of contract.[110] Initially, the claim was dismissed at trial and appeal, stating that she had given implied consent and willingly participated in the relationship. However, Norberg appealed further to the Supreme Court of Canada where the majority ruled that she should be allowed to recover damages. Although all members ruled in her favour, they approached the case from different legal grounds. The court acknowledged a "marked inequality in the respective powers of the parties."[111] For Justice LaForest, the marked inequality was sufficient to nullify the defence of consent on the basis of unconscionability,[112] concluding that Dr. Wynrib's conduct constituted sexual battery, rendering the sexual relationship non-consensual under tort law. He argued that consent could be invalidated not only by force, threats of force, fraud, or incapacity but also by a feeling of constraint that interfered with the freedom of a person's will. This feeling of constraint could arise in situations involving power imbalances and special power dependency relationships.[113] On the other hand, for Justice McLachlin, the marked inequality was determinative of the existence of a fiduciary relationship.[114] She recognised the sexual wrong committed by Dr. Wynrib and held him liable without denying Norberg's capacity for sexual agency. Justice McLachlin emphasised that Norberg's actions, such as trading sex for drugs, did not make her a wrongdoer but rather a sick person suffering from addiction. She rejected the relevance of moral assessments regarding Norberg's sexual conduct and focused on Dr. Wynrib's exploitation of her dependency as a

[110] *Norberg v Wynrib* (1992) 2 SCR 226.
[111] ibid para. 464.
[112] Jan Cowie, 'Difference, Dominance, Dilemma: A Critical Analysis of Norberg v Wynri' (1994) 58 Saskatchewan Law Review 357, p. 367.
[113] *Norberg v Wynrib* (n 109) para. 27.
[114] Cowie (n 112) p. 367.

breach of his fiduciary duty as a doctor.[115] The court's recognition of Dr. Wynrib's tortious liability for battery and the explicit finding that Norberg's consent was not voluntary holds significant implications: Firstly, it recognises new dimensions of culpability in sexual abuse cases by closely examining the nature and meaning of consent. This acknowledgment highlights the intricate nuances surrounding consent in cases of sexual abuse. Secondly, it emphasises the relevance of power and status in allegations of sexual abuse, shedding light on the influence of power dynamics and imbalances. Understanding power structures is paramount in addressing cases of sexual abuse effectively.[116]

It should be mentioned that, even though Justice LaForest's recognition of power dynamics and the consideration of consent authenticity is admirable, his reliance on contract law and community standards has been criticised. Critics argue that his approach oversimplifies the complexity of sexuality and disregards the affective element by analogising sexual relationships using contract law principles.[117] Additionally, it has been criticised for denying autonomy while attempting to recognise it by concluding non-consent in the sexual relationship and for relying on moralistic community standards to determine exploitation.[118] In contrast, Justice McLachlin's alternative approach, focusing on breach of fiduciary duty, has been praised for offering a more balanced perspective that rejects moral assessments and considers the defendant's violation of fiduciary obligations.[119] Furthermore, while the approaches taken in this case favour the victim, they unintentionally reinforce the systemic power dichotomy between women and men. The law, by assuming neutrality and normalcy in relationships, presumes equity between parties. However, in reality, women and men are perceived and treated differently. To fully comprehend the complexities of power relationships, particularly in cases of sexual assault and abuse where women are predominantly victimised, it becomes crucial to acknowledge and analyse gender differences.[120]

6.1. Sexual Harassment as a Gendered Harm

[115] *Norberg v Wynrib* (n 110) para. 90.
[116] Cowie (n 112) p. 358.
[117] *Norberg v Wynrib* (n 110) para. 50.
[118] Elaine Craig, 'Sex and the Supremes: Towards a Legal Theory of Sexuality' (JSD Dissertation, Dalhousie University Schulich School of Law 2010) pp. 295-303.
[119] ibid pp. 304-307.
[120] Cowie (n 112) pp. 367-369.

To delve deeper into the complexities of gendered harms and power relationships, it is essential to examine sexual harassment. Rooted in the structures and patterns of patriarchy, power, and discrimination,[121] sexual harassment can be described as conduct ranging from an accidental brushing against a woman's body or unwanted touching or kissing, to physical assault such as rape. Additionally, it can also take a verbal form, such as suggestive remarks, derogatory comments, or direct demands for sex.[122] Sexual harassment is a prevalent form of violence against women.[123] Take for instance sexual harassment in the workplace, where power imbalances are frequently exploited. Despite employees often leveraging their positions of power to coerce sexual favours from customers, clients, patients, and co-workers, such cases are often considered outside the scope of employment for vicarious liability purposes.[124] In these contexts, it becomes evident how harassment often serves as a tool to maintain gender-based power imbalances. Schultz presents a new perspective on harassment, suggesting it should be understood primarily as an expression of workplace sexism rather than mere sexual desire. According to Schultz, harassment serves to assert dominance by labelling women (and those perceived as "lesser" men) as inferior, thereby reinforcing an idealised masculine work status and identity.[125] Additionally, Mackinnon suggested that the reason harassment was introduced as an injury of the systematic abuse of power in hierarchies among men, is because this is "power men recognise"; they comprehend that something is above your head if you do not comply.[126]

Feminist legal scholars have sought to bring these issues to light and correct implicit male bias in tort law by advocating for routine compensation for such devastating wrongs that are so often inflicted disproportionately on women

[121] Nicolette Naylor, 'Villains and (S)Heroes in the Quest for Truth and Justice in Sexual Harassment Cases' (2020) 2020 Acta Juridica 27, pp. 27-28.
[122] Krista J Schoenheider, 'A Theory of Tort Liability for Sexual Harassment in the Workplace' (1986) 134 U Pa L Rev 1461, pp. 1461-1462.
[123] UN Women UK, 'Prevalence and reporting of sexual harassment in UK public spaces' (*APPG for UN Women*, 2021) <https://www.unwomenuk.org/site/wp-content/uploads/2021/03/APPG-UN-Women-Sexual-Harassment-Report_Updated.pdf> accessed 17 January 2023; Adam Green, '70% of Females Affected By Workplace Sexual Harassment' (*The Legists*, 2022) <https://www.thelegists.co.uk/70-of-females-affected-by-workplace-sexual-harassment> accessed 17 January 2023.
[124] Chamallas (n 29) p. 3.
[125] Vicki Schultz, 'Reconceptualizing Sexual Harassment, Again' (2018) 128 Yale LJ 22, 24.
[126] Catharine A Mackinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press 1987), p. 107.

as a group.[127] Consequently, it becomes essential to understand sexual harassment as a gendered harm. In the legal sense, for something to be based on gender, it means that it happened to a woman as a woman, not as an individual. This is seen in the case of *Barnes v Costle*, where the judge noted that the male supervisor would not have demanded sexual relations from a male employee as a condition for keeping his job.[128] While there are cases of sexual harassment towards men, this is an issue that often happens to women because they are women.[129] Therefore, tort law and the harm principle fail to address harassment as a systemic, gendered harm that it is, since they tend to focus only on individual harm. Moreover, in the judicial system, male decision-makers often fail to perceive such behaviour as sufficiently outrageous to warrant liability for intentional infliction of emotional distress. It was assumed that persons of ordinary sensibilities (which would be those of the male decision-makers) would not be offended by the conduct that is common in the workplace.[130] The law's primary focus on physical harm and its disregard for emotional and psychological harm resulting from harassment, which can be more severe and long-lasting, limits the recovery of damages for emotional distress. The tort of battery offers little recourse for women who have experienced harassment without physical touch or for those who engage in seemingly consensual intercourse due to fear of job loss or other consequences, which negates the requirement for an offensive contract.[131] Within this context, it becomes apparent why decisions such as *Norberg v. Wynrib*[132] are celebrated by feminists as victories.[133] The prevalence of sexual abuse and harassment, with most perpetrators being male and most victims being female,[134] emphasises the importance of gender in examining power relationships. Such evidence is fundamental to understanding cases like *Norberg v. Wynrib*. While men often view rape primarily as a violent crime rather than a sexual act, women perceive rape as

[127] Chamallas (n 29) p. 3.
[128] *Barnes v. Costle* 561 F.2d 983 (DC Cir 1977).
[129] Mackinnon (n 126) p. 107. See also Joanne Conaghan, 'Gendered Harms and the Law of Tort: Remedying (Sexual) Harassment' (1996) 16 Oxford Journal of Legal Studies 407.
[130] Finley (n 36) p. 55.
[131] ibid pp. 55-56.
[132] *Norberg v Wynrib* (n 108).
[133] Craig (n 118) p. 293.
[134] ComRes, 'BBC - Sexual Harassment in the workplace' (*BBC* 2017); Forsa, 'Bürgerbefragung "Öffentlicher Dienst" 2018: Einschätzungen, Erfahrungen und Erwartungen der Bürger' (*Gesellschaft für Sozialforschung und statistische Analysen mbH*, 2018); Lorna Adams and others, '2020 Sexual Harassment Survey' (*United Kingdom: Government Equalities Office*, 2020).

an act that inflicts physical, emotional, and psychological harm. Recognising Laura Norberg as a victim rather than a consenting party demonstrates a more perceptive understanding of the widespread nature and impact of sexual assault in society.[135] Furthermore, some feminist legal scholars argue that the reason why harassment, particularly in the workplace, remains a prevalent problem is due to gaps in legislation, such as the absence of codes of practice that employers must follow to protect their employees. When an employer receives a claim of sexual harassment, there is little structure for them to follow to adequately address the issue. As a result, many claims are not handled properly, and victims are often reluctant to report harassment due to fear of rejection.[136] This lack of adequate resources and consideration for the specific harms experienced by women in the workplace means that the existing legal framework does not fully safeguard their safety or address their grievances effectively.[137]

In English law, The Equality Act 2010 is the newest law that provides protection against harassment, discrimination, and victimisation in the workplace on the basis of a number of protected characteristics, including sex, race, disability, age, and sexual orientation.[138] To claim for compensation, claimants need to demonstrate that the behaviour in question amounted to harassment as defined by law and that it had the effect of violating their dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment for them.[139] However, this legislation does not seem to fully address the issue. As Gardner suggests, if the Equality Act 2010 included a minimum requirement for employers to take to properly address instances of harassment, this would be one step towards giving victims, who are usually women, the safety and dignity they deserve, instead of leaving them with a lack of power in their work environment. Not having this type of protection damages society's view on gender roles and normalises inappropriate behaviour.[140] Additionally, the issue also lies in the fact that the burden of proof in harassment cases is placed on the victims, which can exclude cases of harassment towards women who seemed to welcome the conduct for fear of losing

[135] Cowie (n 112) pp. 368-369.
[136] Jennifer Gardner, 'Equality for the few: A critical analysis of the Equality Act 2010 (UK) from the perspective of gender equality in the workplace' (Master thesis, Umeå University 2018) p. 21.
[137] ibid.
[138] Equality Act 2010, c 15.
[139] Ellen Pinkos Cobb, *Workplace Bullying and Harassment* (Routledge 2017) p. 136.
[140] Gardner (n 136) pp. 21-22.

their jobs.[141] Although case law shows that women's voices are increasingly being recognised in constructing definitions of sexual harassment, it is unfortunate that women often have to bear the responsibility of making it clear that certain conduct is unwelcome.[142]

Conversely, in Germany, the legal framework regarding sexual harassment in the workplace revolves around the concept of dignity as the interest at stake.[143] The primary objective of the law is to raise awareness of the problem rather than creating a new cause of action. Under German law, for a discrimination claim to be valid, it must be connected to the employment relationship. This poses challenges when it comes to understanding harassment as an inherent part of the employment relationship. Instead, German courts often view the harasser as misusing the increased social contact provided by the employment relationship.[144] Furthermore, workplace bullying or mobbing has received more attention than sexual harassment. Although the Federal Employee Protection Act of 1994 prohibits sexual harassment,[145] it is often treated as a breach of contract rather than a civil rights violation. Critics argue that the law lacks effective implementation and enforcement mechanisms, resulting in limited usage by sexual harassment victims. Labour courts primarily handle cases of unfair dismissal filed by men accused of sexual harassment. Consequently, employers have shifted their focus to implementing anti-mobbing policies, which are perceived as more effective in combating workplace harassment but are primarily seen as a form of sex discrimination.[146] Notably, the harm caused by mobbing, termed moral harassment, is not considered discrimination based on prohibited grounds but rather a violation of dignity. This raises concerns about whether the existing law adequately addresses the harm caused by workplace harassment and if a broader

[141] Finley (n 35) pp. 55-56.
[142] Harriet Samuels, 'Sexual harassment in the workplace: a feminist analysis of recent developments in the UK' (2003) 26 Women's Studies International Forum 467, p. 468.
[143] Zweites Gleichberechtigungsgesetz (2. GleiBG) (*Second Equality Act*) para. 10.
[144] Gabrielle S Friedman and James Q Whitman, 'The European Transformation of Harassment Law: Discrimination Versus Dignity' (2003) 9 Columbia Journal of European Law 241, p. 242.
[145] Gesetz zum Schutz der Beschäftigten vor sexueller Belästigung am Arbeitsplatz (BSchG) (*Employee Protection Act*) para. 2.
[146] Linda Clarke, 'Sexual Harassment Law in the United States, the United Kingdom and the European Union: Discriminatory Wrongs and Dignitary Harms' 36 Common Law World Review 79, p. 91.

definition of harm is necessary for effective prevention, intervention, and compensation. [147]

7. Conclusion

It is evident that tort law, despite being commonly perceived as gender-neutral, contains deep-rooted gender biases that make it challenging for women to prove their claims and receive justice. The harm principle, which serves as a central organising principle of tort law, often fails to account for the full spectrum of civil wrongs experienced by individuals, especially women, due to its foundation in a male perspective. This can be particularly detrimental when compensation is sought for non-traditional harm. The law's failure to comprehend the full range of harms related to privacy, sexual autonomy, consent, and harassment further contributes to the injustice experienced by many, especially women.

This brings us to the central research question of this paper: “Does the harm principle fail to account for the full range of civil wrongs regularly experienced by women?" In order to address these issues, it is necessary to expand the understanding of harm within the organising principle of tort law. While the harm principle should remain central, it should be broadened to encompass a wider range of harms, including emotional, psychic, and even moral varieties. Currently, case law often undervalues these forms of harm, limiting the recognition of their manifestations and hindering victims' ability to recover damages. By broadening the concept of harm, tort law can better address the civil wrongs experienced by individuals, especially women, and provide them with adequate remedies. Considering that the law was primarily created by men, it often fails to comprehend the unique issues and harms experienced by women or to value those harms that are not deemed as ‘masculine”. Therefore, feminist critiques of tort law are crucial in ensuring that gendered harms are acknowledged and individuals, especially women, are taken seriously within the legal system. By increasing the visibility of women's experiences and perspectives in tort law, we can create a legal framework that is better equipped to address the full range of civil wrongs experienced by women and provide them with the justice and protection they deserve. This is equally important so that the law can adequately address cases

[147] Clarke (146) pp. 91-96.

where, regardless of gender, harm is disregarded because it is not deemed as genuinely harmful or because it fails to meet the male standard. Ultimately, a law created by women and for women may be the best way forward.

On the Condition of the Rule of Law

Anne Sophie Boje[1]

EU rule of law conditionality mechanisms pre- and post-accession evaluated using the example of Hungary

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[1] Anne Sophie Boje is a graduate of the European Law School Bachelor, which she has completed with *cum laude* in 2023. She has absolved a semester at La Sapienza University in Rome and a semester in the USA. She is now studying law in Germany at the University of Hamburg, where she is also active in the university's Refugee Law Clinic. In her studies and research, she has focused especially on public international, European constitutional, and migration law. She also takes a keen interest in international politics, which she has pursued *inter alia* as an active member of UNSA Maastricht and as a passionate debater at various MUN conferences.

1. INTRODUCTION

The European Union's constitutional framework places the rule of law at the core of European integration. It is mentioned as prominently as in Article 2 of the Treaty on European Union (TEU),[2] which sets out the founding values of the EU. The notion originates from the meaning individual Member States have given it, but has developed to be an autonomous EU legal concept.[3] This concept has been clearly laid out by the Commission in its Rule of Law Framework in 2014, which defines six precise principles that are encapsulated by the rule of law: legality, understood as implying transparent, accountable, democratic and pluralistic processes; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review; and equality before the law.[4]

These values should therefore be common to the Member States. And still, in recent years, the rule of law faced a crisis regarding developments in some of the Union's Member States. Certain events taking place, especially in Hungary and Poland, have revealed "systemic threats" to the rule of law,[5] which has become a paramount example of missing EU competence.[6] Hungary specifically is now even classified as a "hybrid regime,"[7] short of being a true democracy. This begs the question what the often-praised union of values really signifies and how it is possible that, in recent years, a backsliding of the rule of law has taken place.

This context has prompted a debate on how the rule of law can be protected effectively. A tool playing an increasing role in rule of law protection is conditionality. A conditionality mechanism, generally speaking, is a mechanism

[2] Consolidated version of the Treaty on European Union [2012] OJ C326/13 (TEU), art. 2.
[3] Laurent Pech, 'The Rule of Law as a Constitutional Principle of the European Union' (Jean Monet Working Paper, The Jean Monet Center for International and regional Economic Law & Justice, April 2009) <https://jeanmonnetprogram.org/paper/the-rule-of-law-as-a-constitutional-principle-of-the-european-union/> accessed 28 October 2022.
[4] Commission, 'A new EU Framework to strengthen the Rule of Law' (Communication) COM (2014) 158 final, annex para. I.
[5] Commission, 'Rule of law framework' <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-framework_en> accessed 20 August 2022.
[6] Aleksejs Dimitrovs and Dimitry Vladimirovich Kochenov, 'Solving the Copenhagen Dilemma, The Repubblika Decision of the European Court of Justice' (*Verfassungsblog,* 28 April 2021) <https://verfassungsblog.de/solving-the-copenhagen-dilemma/> accessed 25 October 2022.
[7] 'Hungary' (*Freedom House,* 2022) <https://freedomhouse.org/country/hungary/nations-transit/2022> accessed 14 February 2023.

"linking […] benefits to the fulfilment of certain conditions or of a given behaviour".[8] This benefit could be, for example, EU spending, in which case "conditionality is a condition attached to EU financial benefits with the aim of advancing broader EU policy objectives at the Member State level".[9]

Such a conditionality mechanism promoting the rule of law already exists upon accession to the Union, where respect for it is a Treaty condition to be granted membership.[10] This is reiterated through the Copenhagen Criteria.[11]Thus, membership in the European Union itself, at least in principle, is conditional to the rule of law. Additionally, the reception of pre-accession assistance is conditional upon development concerning the rule of law.[12] While the EU can in principle dictate its conditions upon accession through the negotiations of the accession agreement and allocate pre-accession funds as it wishes,[13] the EU lacks the direct competence to regulate the judiciaries of its Member States, resulting in "the Copenhagen dilemma."[14]

This means that, after accession, the EU only has limited abilities to influence the political-legal developments in the Member States, as they lie beyond the material scope of EU law. Although there is a mechanism to safeguard the rule of law under the Article 7 TEU[15] procedure, it has proved unworkable.[16] The manifold reasons for this may lay beyond the scope of this research, but for the present purposes the recent developments in terms of the rule of law in certain Member States shall be emblematic of this option's shortcomings. The

[8] Matteo Bonelli and Antonia Baraggia, 'Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges' (2022) 23, 2 German Law Journal 131, para. C.
[9] Viorica Viță, 'Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality' (2017) 19 Cambridge Yearbook of European Legal Studies 116, p. 117.
[10] Consolidated version of the Treaty on European Union [2012] OJ C326/13 (TEU), art. 49.
[11] Commission, 'European Council in Copenhagen – 21-22 June 1993 – Conclusions of the Presidency' (DOC/93/3, Commission 1993) <https://ec.europa.eu/commission/presscorner/detail/en/DOC_93_3> accessed 19 August 2022, para. 7(A)(iii).
[12] Council Regulation (EC) 622/98 on assistance to the applicant States in the framework of the pre-accession strategy, and in particular on the establishment of Accession Partnerships (1998) OJ L85/1.
[13] Aleksejs Dimitrovs and Dimitry Vladimirovich Kochenov, 'Solving the Copenhagen Dilemma, The Republika Decision of the European Court of Justice' (Verfassungsblog, 28 April 2021) <https://verfassungsblog.de/solving-the-copenhagen-dilemma/> accessed 25 October 2022.
[14] ibid.
[15] Consolidated version of the Treaty on European Union [2012] OJ C326/13 (TEU), art. 7.
[16] Kim Lane Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016), para. I.

Commission has thus developed an entire toolbox,[17] considering the rule of law crisis, of which its latest addition, Regulation 2020/2029 (Conditionality Regulation)[18] again employs a mechanism that makes respect for the rule of law a condition for not losing certain benefits, in this case, EU funding.

While the accession conditionality could not prevent a rule of law backsliding, the hopes are that this new mechanism, employed more stringently and circumventing the constitutional constraints other rule of law protection tools face, will be effective in protecting this core value.

1.1. Research Question and Scope

Considering this recurrent use of conditionality mechanisms to safeguard the rule of law and against the backdrop of the failure of conditionality mechanisms upon accession, the guiding research question is: How effective are EU rule of law conditionality mechanisms in protecting the rule of law considering the case of Hungary? Hungary's accession and the subsequent backsliding in the rule of law eventually triggering the use of the Conditionality Regulation is thus used as an example.

Effectiveness in this context entails the mechanism's ability to protect the principles of the rule of law as defined subsequently. An effective mechanism is capable of compelling a State to remedy any potential shortcomings and breaches regarding these principles and install full and sustainable respect for the rule of law. Further, an effective mechanism needs to be able to ultimately prevent breaches. The goal must not only be to sanction violations of the rule of law, but also to install a viable respect for the rule of law. The most obvious way that it would do so would be by deterring Member States from breaching the rule of law in fear of the negative consequences.

In answering the research question, other issues surrounding conditionality mechanisms are consciously left aside, including the constitutional concerns of such a conditionality mechanism.[19] These concerns shall be satisfied for the

[17] Commission, '2022 Rule of Law Report The rule of law situation in the European Union' (Communication) COM (2022) 500 final.
[18] Council Regulation (EU, Euratom) 2020/2092/EC on a general regime of conditionality for the protection of the Union budget (2020) OJLI 433/1(Conditionality Regulation), recital 14.
[19] Matteo Bonelli and Antonia Baraggia, 'Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges' (2022) 23, 2 German Law Journal 131, para. E.

present purpose by the fact that the European Court of Justice has confirmed the legality of the Conditionality Regulation, dismissing challenges by Poland and Hungary.[20] Although Hungary is used to determine how effective the tools can be in practice, a detailed analysis of the rule of law situation there lies beyond the scope of this research.

1.2. Structural Outline

After having introduced the methodology employed, first, the notion rule of law is characterised in the European Union context to provide a standard to measure effectiveness. A short overview of the rule of law tools underlines the desirability of employing novel mechanisms. Subsequently, conditionality in the accession process is evaluated by generally sketching out the accession process, before providing an overview of the issues observed in Hungary upon accession and the use of the conditionality requirement in that case. After that, conditionality through the Conditionality Regulation is evaluated by examining the Regulation in detail and consecutively analysing its use against Hungary. Lastly, the effectiveness of the two conditionality mechanisms in protecting the rule of law is compared and conclusively evaluated.

1.3. Methodology

The methodology employed is legal doctrinal research. The question posed is an evaluative one, necessitating a normative framework.[21] This normative framework shall provide a set of standards against which the effectiveness of the conditionality mechanisms is measured. In order to work out these standards, it is nonetheless necessary to refer to the theoretical framework in which the rule of law is placed.[22] The starting point for the research must be a survey of what "is" the rule of law in the EU legal context to serve as the backdrop against which the "ought" to of an effective mechanism is measured.

[20] Case C-156/21 *Hungary v European Parliament and Council of the European Union* (2022) ECLI:EU:C:2022:97; Case C157/21 *Poland v European Parliament and Council of the European Union* (2022) ECLI:EU:C:2022:98.
[21] Taekema S, 'Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice' (2018) 18 Law and Method, p. 6.
[22] ibid p. 7.

Regarding the choice of sources, it is imperative in EU law to look beyond the mere provisions of the Treaties and also consider the institutional practices.[23] Understanding the European Union as a legal positivist system, primary sources of EU law inevitably pose the starting point for any evaluative question of EU law.[24] With that being said, it remains imperative to look beyond the mere written law and also take into account the informal but nonetheless permissible institutional practices of the EU institutions.[25] Therefore, the main sources employed are EU legislation and other documents of the European agencies, mostly the Commission as guardian of the treaties,[26] the main negotiator of the accession of new Member States,[27] initiator of the Conditionality Regulation mechanism,[28] as well as the main supervisor of rule of law developments in the Member States. These are complemented by scholarly articles and opinions intended to create a more nuanced, facetted, and holistic understanding of the topic at hand.

The two conditionality mechanisms are examined first individually and then comparatively, to work out if shortcomings of the one are inherent to the tool of conditionality as such or only to the specific instance. Comparing the two instances of conditionality allows for a more comprehensive and encompassing evaluation of conditionality as a tool to protect the rule of law.

Hungary serves as an example of a State that has formally been granted membership to the European Union, meeting the condition of respect for the rule of law. Nonetheless, this has not been able to prevent a backsliding regarding the rule of law,[29] so it is further the only State against which the Conditionality Regulation has been triggered to this date. In examining the effectiveness of the accession process, the regular Commission reports on Hungary's progress serves as the main source. The Conditionality Regulation is explained against the

[23] De Witte B, 'Legal Methods for the Study of EU Institutional Practice (2022) 18 European Constitutional Law Review 637, p. 649.
[24] ibid p. 638.
[25] ibid p. 649.
[26] Consolidated version of the Treaty on European Union [2012] OJ C326/13 (TEU), art. 17.
[27] Dimitry Kochenov 'EU Enlargement and the Failure of Conditionality: Pre-accession Conditionality in the Fields of Democracy and the Rule of Law' (European Monographs 59, Kluwer Law International 2008), p. 59.
[28] Conditionality Regulation, arts. 6(1) and 6(6).
[29] Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 Cambridge Yearbook of European Legal Studies 3, p. 6.

backdrop of the accompanying guidelines[30] and the Court's judgements on its legality.[31] In evaluating its use, the Commission's proposal, and explanatory memorandum[32] combined with the Council implementing decision[33] triggering this tool serve as the main sources**.**

The aim of this research is to show how conditionality tools work to protect the rule of law. It is meant to illustrate what sets these tools apart from other approaches to better understand the potential that lies in conditionality. What this research is also meant to work out, are the drawbacks and pitfalls of conditionality tools. This is necessary to understand how conditionality tools can be employed effectively in the future, avoiding these mistakes. Ultimately, the research aims to make a cautious prediction as to whether conditionality tools, if employed correctly, are a sustainable solution to the rule of law crisis.

2. THE RULE OF LAW IN THE EU LEGAL CONTEXT

It is firstly important to understand the notion of the rule of law and examine its position within the EU legal framework. While some of the Article 2 TEU[34] values are systematised through, *inter alia*, articles of the Charter of Fundamental Rights of the European Union,[35] there is no clear definition of the rule of law in EU primary law.[36] The definition provided by the Commission, as laid out above, ascribes both law-making and law-enforcing processes to the application of the rule of law.[37] Through the Conditionality Regulation, the notion has been codified in a legal instrument for the first time. It "provides a comprehensive all-

[30] Commission, 'Guidelines on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget' (Communication) COM (2022) 1382 final.
[31] Case C-156/21 (n 20); Case C-157/21 (n 20).
[32] Commission, 'Proposal for a Council implementing decision on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary' COM (2022) 485 final.
[33] Council Implementing Decision (EU) 2022/2506 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary (2022) OJ L325/94.
[34] Consolidated version of the Treaty on European Union [2012] OJ C326/13 (TEU), art. 2.
[35] Charter of Fundamental Rights of the European Union (2012) OJ C 326/02.
[36] Niall Coghlan, 'One fattened six starved? The Article 2 TEU values after the rule of law conditionality judgements' (*European Law Blog*, 2022) <https://europeanlawblog.eu/2022/03/15/one-fattened-six-starved-the-article-2-teu-values-after-the-rule-of-law-conditionality-judgments/> accessed 26 September 2022.
[37] Franco Peirone, *Croatian Yearbook of European Law* (The Rule of Law in the EU: Between Union and Unity, 15, CYELP 2019), p. 68.

encompassing definition of the rule of law".[38] Therein, the rule of law is defined in line with the Commission's framework as including:

> "the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law".[39]

Hence, this definition explicitly adds the separation of powers, while the reference to equality before the law or non-discrimination is to be found solely in the recital of the Regulation.[40] There, reference is also made to fundamental rights. Although these values should be common to the Member States, recent developments have proven the need to safeguard these principles.

2.1. Protecting the Rule of Law: The Rule of Law Toolbox

These various mechanisms aimed to safeguard the rule of law are sketched out in this section. The intention is to highlight the pitfalls and shortcomings of these tools, which makes a different approach, such as conditionality tools, necessary.

The original mechanism protecting the rule of law is the procedure set out under Article 7 TEU.[41] This mechanism, often labelled the "nuclear option,"[42] can be evoked based on a finding of a violation of Article 2 TEU.[43] It allows for the suspension of certain rights of the State in question, such as voting rights.[44] It is, however, subject to high procedural hurdles, especially unanimity in the Council.[45] Alternatively, the Council can also determine a risk of a breach by issuing recommendations.[46]

[38] Laurent Pech, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law' (2022) 14 Hague Journal on the Rule of Law 107, p. 114.
[39] Conditionality Regulation, art. 2(a).
[40] Conditionality Regulation, recital 3.
[41] Consolidated version of the Treaty on European Union [2012] OJ C326/13 (TEU), art. 7.
[42] Commission, 'José Manuel Durão Barroso; State of the Union 2012 Address' (speech by the president of the European Commission) Speech 12/596.
[43] Consolidated version of the Treaty on European Union [2012] OJ C326/13 (TEU), art. 7(2).
[44] ibid art. 7(3).
[45] ibid art. 7(2).
[46] ibid art. 7(1).

To remedy this insufficiency, the Union has employed and developed other mechanisms for rule of law protection, none of which have so far succeeded in effectively safeguarding it. The infringement procedure under Article 258 TFEU,[47] under which the Commission can bring a case to the Court of Justice for a Member State's failure to uphold a Treaty obligation,[48] has only been used to remedy breaches of "concrete, specific provisions."[49] The use of this option has evolved,[50] and a case pending before the Court is yet to show whether the Commission could successfully invoke an infringement of the rule of law under Article 2 TEU directly.[51] In any event, the remedies that the Court can offer are not designed in a way to sustainably install the rule of law.[52] Soft law mechanisms in place, such as the rule of law framework, consisting of a "structured dialogue"[53] between the Commission and the Member State,[54] have not been triggered against Hungary. The reason is that they cannot be applied retroactively.[55] The European Semester and the EU justice scoreboard[56] are mainly tools of dialogue and lack precise sanctioning and enforcement mechanisms, offering a wide margin of Commission discretion.[57]

Overall, these mechanisms emblematically express the underlying problem of the Union, lacking the direct competence to regulate the judiciaries of the Member States immediately, as a result of adhering to the concept of State sovereignty and the principle of conferral.[58] Many of the existing tools are of a

[47] Consolidated version of the Treaty on the Functioning of the European Union (2020) OJ C202/1 (TFEU), art. 258.
[48] ibid art. 258(2).
[49] Laurent Pech and Dimitry Vladimirovich Kochenov, 'Better Late than Never? On the European Commission's Rule of Law Framework and its First Activation' (2016) 54,5 Journal of Common Markets Studies 1062, p. 1065.
[50] Case C-286/12 *European Commission v Hungary (Age Discrimination of Judges)* (2012) ECLI:EU:C:2012:687; Case C-288/12 *European Commission v Hungary (Data protection)* (2014) ECLI:EU:C:2014:237; Case C-64/16, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* (2018) ECLI:EU:C:2018:117; Case C-619/18 *European Commission v Republic of Poland (Polish Supreme Court)* (2019) ECLI:EU:C:2019:531; Case C-78/18 *European Commission v Hungary (Transparency of Associations)* (2020) ECLI:EU:C:2020:476.
[51] Case C-769/22 *European Commission v Hungary* [action brought on 19 December 2022, judgement pending] OJ C54/16.
[52] Pech and Kochenov (n 49) p. 1065.
[53] ibid p. 1066.
[54] COM (2014) 158 final.
[55] Pech and Kochenov (n 49) p. 1069.
[56] COM (2022) 500 final.
[57] Pech and Kochenov (n 49) p. 1070.
[58] Consolidated version of the Treaty on European Union [2012] OJ C326/13 (TEU), arts. 4-5.

political nature, while legally binding mechanisms are rare and still require many of the Member States to cooperate.

This is, however, different for the conditionality mechanisms, where the Union can circumvent the competence problem by attaching conditions to the distribution of benefits and sanctioning non-compliance with those conditions by withholding benefits. Aside from the conditionality of accession itself,[59] the EU has developed a spending conditionality mechanism in the accession process through Regulation 622/98[60] and, recently, through the Conditionality Regulation.[61] The remaining question is how effective these conditionality tools are, which is subsequently examined using Hungary as an example.

3. Conditionality in the EU Accession of Hungary

As the first instance of when conditionality is used as a tool to protect the rule of law, the accession process is evaluated first by elaborating on the process itself, before analysing the effectiveness of the conditionality mechanisms employed.

3.1. The Accession Process

Accession is regulated through Article 49 TEU,[62] which explicitly mentions the values set out under Article 2 TEU,[63] and thus already makes accession theoretically conditional upon the rule of law.[64] However, the enlargement process, provided for in the Treaties, and the practice of enlargement bear a "striking"[65] difference. It is therefore imperative to look at the actual enlargement practice that has been established at the time Hungary applied for membership.

Hungary joined the EU with nine other States in the fifth (and biggest) enlargement on 1 May 2004. It was launched after the fall of the Berlin Wall and the collapse of the USSR in a European Council Meeting in December 1997. There

[59] Commission, 'European Council in Copenhagen – 21-22 June 1993 – Conclusions of the Presidency' (DOC/93/3, Commission 1993) <https://ec.europa.eu/commission/presscorner/detail/en/DOC_93_3> accessed 19 August 2022.
[60] Council Regulation (EC) 622/98.
[61] Justyna Łacny, 'The Rule of Law Conditionality Under Regulation No 2092/2020 – Is it all About the Money?' (2021) 13 Hague Journal on the Rule of Law 79, p. 82.
[62] Consolidated version of the Treaty on European Union [2012] OJ C326/13 (TEU), art. 49.
[63] Existing even before 2007, Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2007) OJ C306/1.
[64] Consolidated version of the Treaty on European Union [2012] OJ C326/13 (TEU), art. 49(1).
[65] Kochenov (n 27) p. 14.

was one general negotiation framework, but the negotiations were conducted with each State separately.[66]

This practice-driven[67] approach is regulated by several documents, both of a political and legal nature.[68] Regarding the accession criteria and, more particularly, the criterion of the rule of law, the so-called Copenhagen Criteria,[69] adopted by the European Council in Copenhagen in 1993, marked a change in the accession practice and enabled the Commission to direct reform processes in the candidate countries.[70] This Copenhagen conditionality, reiterating the TEU, makes accession itself conditional upon the fulfilment of certain criteria, including the rule of law.

Besides this conditionality of accession itself, there is a further mechanism of spending conditionality, governed through Regulation 622/98.[71] It stipulates that the financial assistance, paid by the Commission, is directly dependent upon the progress regarding the accession criteria; it is, moreover, marked the first time that a spending conditionality mechanism was directly employed to protect the rule of law.[72] It links the reception of EU funds directly to the condition of compliance with the prescribed progress regarding the accession criteria. Article 4 of the Regulation explicitly states: "When […] progress towards fulfilment of the Copenhagen criteria is insufficient, the Council, […] may take appropriate steps with regard to any pre-accession assistance granted to an applicant State."[73] This means that the reception and allocation of all funds for pre-accession assistance depend on the progress the State in question makes, in the fields covered by the Copenhagen Criteria, including the rule of law. This conditionality is not aimed at ensuring that certain minimum requirements are met but, rather, that the

[66] André De Munter, 'The Enlargement of the Union' (Fact Sheets on the European Union, European Parliament 2022) <https://www.europarl.europa.eu/factsheets/en/sheet/167/the-enlargement-of-the-union> accessed 8 February 2023.
[67] Kochenov (n 27) p. 14.
[68] ibid p. 21.
[69] Commission, 'European Council in Copenhagen – 21-22 June 1993 – Conclusions of the Presidency' (DOC/93/3, Commission 1993) <https://ec.europa.eu/commission/presscorner/detail/en/DOC_93_3> accessed 19 August 2022, para. 7(A)(iii).
[70] Kochenov (n 27) p. 34.
[71] Council Regulation (EC) 622/98.
[72] Kochenov (n 27) p. 50.
[73] Council Regulation (EC) 622/98, art. 4.

country implements the reforms stipulated by the Union.[74] This has been called "the dynamic nature of pre-accession conditionality."[75]

Practically, Hungary, as well as the other States, associated itself with the European Union for the first time through the Europe Agreement in 1993.[76] The Council decided unanimously to grant the country candidate status[77] and after a further recommendation by the Commission,[78] the Council opened negotiations on each of the chapters of the *acquis communitaire*. The framework for the negotiations was determined by the Accession Partnership,[79] which was revised twice.[80] The progress was monitored by the Commission in a series of reports.[81] After all chapters were closed, the Accession Treaty[82] was signed in 2003, with parliamentary consent[83] and a unanimous vote by the Council.[84] Accession was then affected on 1 May 2004.[85] In the following sub-section, the conditionality requirement, as it was used in the accession process of Hungary, is be analysed.

[74] Kochenov (n 27) p. 52.
[75] ibid.
[76] Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part (1993) OJ L347/2; approved through Decision of the Council and the Commission (Euratom, ECSC, EC) 742/93 on the conclusion of the Europe Agreement between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part (1993) OJ L347/1.
[77] European Council, 'Luxembourg European Council 12-13 December 1997. Presidency conclusions.' (Meeting document, European Parliament 1997) paras. 1-3.
[78] Commission, 'Commission Opinion on Hungary's Application for Membership of the European Union' COM (97) 2001 final, para. C.
[79] Commission, 'Hungary: Accession Partnership (98/C 202/04)' (Communication) (1998) OJ C202/33 (Accession Partnership).
[80] Council Decision 1999/850/EC on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with Hungary (1999) OJ L335/1; Council Decision 2002/87/EC on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with Hungary (2002) OJ L44/37.
[81] Commission, 'Regular Report from the Commission on Hungary's Progress towards Accession' COM (98) 700 final.
[82] Treaty concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union (2003) OJ L236/17 (Accession Treaty).
[83] European Parliament Legislative Resolution 2003/0901E(AVC) on the application by the Republic of Hungary to become a member of the European Union (2003) OJ L236/10.
[84] Council Decision on the admission of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union (2003) OJ L236/15.
[85] Accession Treaty, art. 2(2).

3.2. Rule of Law Conditionality in the Accession Process of Hungary

The starting point for this analysis is the Commission's initial opinion in 1997 to open the negotiations, on which the first Accession Partnership agreement is based. The Commission made several remarks regarding the rule of law and its shortcomings in Hungary. These points can be divided based on the criteria that make up the rule of law.

In terms of legality, the Commission remarked that the Hungarian Parliament, exercising legislative powers, functioned "satisfactorily",[86] with free and fair elections having taken place and the authorities being mindful of the limits of their powers.[87] Issues regarding legality could nonetheless arise in the context of the unsatisfactory exercise of judicial and executive power.[88] When it comes to legal certainty, however, the report stressed that judges lacked the professional qualifications to exercise their professions,[89] as well as an impairment of the rights of the Roma minority, which was subject to discriminatory measures.[90] Both of these aspects could lead to arbitrariness when it comes to the application of the law and thus endanger legal certainty. The functioning of the executive powers was criticised for its predisposition to corruption considering its low wages. Corruption also posed a threat to police effectiveness, especially in combatting organised crime.[91] Furthermore, the situation of the Roma minority, against which sociological resentments were attested,[92] could lead to arbitrariness in the exercise of executive powers. Moreover, the judiciary was criticised for its unsatisfactory functioning. Overloaded courts impaired effective judicial review, while the set-up of the Constitutional Court weakened independence and impartiality. Additionally, the functioning was impaired as the required two-thirds majority in Parliament to appoint judges was difficult to attain.[93] In terms of equality before the law, the Commission expressed its worries about the situation of the "gipsies (Roma)", which were "frequently subjected to attacks and discriminatory

[86] Commission, 'Commission Opinion on Hungary's Application for Membership of the European Union' COM (97) 2001 final, para. B.1.1.
[87] ibid para. B.1.3.
[88] ibid para. B.1.1.
[89] ibid para. B.1.1.
[90] ibid para. B.1.2.
[91] ibid para. B.1.1.
[92] ibid para. B.1.2.
[93] ibid.

measures"[94] with no view of improvement. Finally, however, the Commission concluded that "Hungary presents the characteristics of a democracy with stable institutions, which guarantee the rule of law, human rights and respect for, and the protection of, minorities."[95] Thus, the Commission recommended an opening of the accession negotiations with the only real hesitations being voiced over matters, such as corruption and the rights of the Roma.[96]

This process was accompanied by pre-accession assistance, which was mainly administered through the so-called "PHARE" programme. It is an acronym for "Poland and Hungary Assistance for the Restructuring of the Economy"[97] and was established by the now-replaced Regulation 3906/89.[98] It aimed to facilitate the structural and legal changes required of each candidate countries to be granted membership to the EU.[99] The funds were thus allocated to projects addressing the specific issues set out in the Accession partnership,[100] while its operations were coordinated with other pre-accession instruments.[101]

This Accession Partnership with Hungary,[102] which was concluded in 1998 and revised in 1999[103] and 2002,[104] determined Hungary's accession framework and priorities based on the Commission reports,[105] guiding the allocation of pre-accession assistance.[106] To implement the conditionality requirement of Regulation 622/98,[107] the Commission issued guidelines for the implementation of the PHARE programme through Decision 1596/99.[108] This expressly stressed

[94] Commission, 'Commission Opinion on Hungary's Application for Membership of the European Union' COM (97) 2001 final.
[95] ibid para. B.1.3.
[96] ibid para. C.1.
[97] European Parliament, 'Briefing No 33, The PHARE Programme and the enlargement of the European Union' (1998) (Briefing No 33) para. I.
[98] Council Regulation (EEC) 3906/89 on economic aid to the Republic of Hungary and the Polish People's Republic (1989) OJ L375/11.
[99] Briefing No 33 (n 97) para. I.
[100] Council Regulation (EEC) 3906/89 on economic aid to the Republic of Hungary and the Polish People's Republic (1989) OJ L375/11, art. 9(1).
[101] Council Regulation (EC) 1266/99 on coordinating aid to the applicant countries in the framework of the pre-accession strategy and amending Regulation (EEC) No 3906/89 (1999) OJ L161/68, art. 9(1).
[102] Accession Partnership (n 79).
[103] Council Decision 1999/850/EC.
[104] Council Decision 2002/87/EC.
[105] Council Decision 1999/850/EC; Council Decision 2002/87/EC.
[106] Accession Partnership (n 79) para. 1.
[107] Council Regulation (EC) 622/98, art. 4.
[108] Commission, 'Guidelines for PHARE programme implementation in candidate countries for the period 2000-2006 in application of article 8 of Regulation 3906/89' (Decision) SEC(1999)1596 final.

the importance of the regularly revised accession partnerships as a starting point for fund allocation; moreover, it reiterated that 30% of the funds would be allocated to "Institution Building"[109] purposes, designed to fulfil the requirements set out under the Copenhagen Criteria, such as the rule of law. Even the 2002 revision of the Accession Partnership reiterated the goal, to ensure that the State adheres to the rule of law,[110] as well as the conditionality of the receiving of EU funds.[111]

Regarding concrete areas of reform, the Accession Partnership set several priorities important for strengthening the rule of law,[112] included in the Annex in the form of a checklist.[113] Among the political criteria there were three objectives: improving the position of the Roma by offering justice and protection; the improvement of the judicial system both in terms of the training of judges, as well as the functioning of the Constitutional Court; and lastly anti-corruption measures.[114] The revisions of the Accession Partnership provided updates on these goals and objectives.[115] To improve the situation of the Roma an action programme was set as a short-term goal,[116] and the remaining issues were broken up into smaller tasks. Although the revisions made in 1999 mentioned several aspects related to the judicial system, there was no mention of improvements regarding the Constitutional Court.[117] This was not surprising as the Commission report, released a few months earlier in the same year, clearly stated that the only two issues remaining regarding the political criteria were the situation of the Roma as well as corruption.[118] The strengthening of the proper functioning of the Constitutional Court, however, reappeared in the last revision in 2002,[119] meaning that until the end, the three objectives (the improvement of the situation of Roma,

[109] Commission, 'Guidelines for PHARE programme implementation in candidate countries for the period 2000-2006 in application of article 8 of Regulation 3906/89' (n 108) para. 2.
[110] Council Decision 2002/87/EC, annex para. 3.
[111] ibid annex para. 4.
[112] Accession Partnership (n 79) para. 4.2.
[113] ibid annex.
[114] ibid annex para. 1.
[115] Council Decision 1999/850/EC, annex para. 3; Council Decision 2002/87/EC, annex para. 4.
[116] Council Decision 1999/850/EC, annex para. 3.1.
[117] ibid annex para. 3.
[118] Commission, '1999 Regular Report from the Commission on Hungary's Progress towards Accession' COM (99) 505, para. B.1.3.
[119] Council Decision 2002/87/EC, annex para. 4.

the efficiency of the judicial system, and the fight against corruption) remained goals to be achieved in the future.

To evaluate the progress made, the six Commission reports from 1998 until 2003 are crucial.[120] All reports contain a chapter specifically on the political criteria, except for the last one, which only makes statements regarding several of the sub-issues.[121] All the reports preliminarily conclude that Hungary already fulfils the Copenhagen political criteria and thus, apart from being a functioning democracy, adheres to the rule of law and respects fundamental rights.[122] As such, they reiterate what has already been observed in the Commission's opinion to open the negotiations in the first place.

To understand the issues raised and the improvements obtained, a further analysis of these reports is in order. As early as 1998, the Commission stressed that "additional efforts"[123] against corruption and "continuing attention"[124] to the situation of the Roma were needed, while pointing out progress in the improvement of the judicial system and the achievement of the constitutionally envisaged constellation of the Constitutional Court.[125] In the following report, in 1999, the functioning of the judicial system was criticised for its slowness,[126] which is an impairment to effective judicial review. Corruption was named a continuous problem, although the measures already taken were pointed out.[127] Likewise, the situation of the Roma was also mentioned as an area needing further attention.[128] Thus, in 1999 corruption and the situation of the Roma were named as the two most relevant areas for reform concerning the political criteria.[129] In 2000, the backlog of cases at the Supreme Court was highlighted,[130] leading to

[120] COM (97) 2001 final; COM (98) 700 final; COM (99) 505; Commission, '2000 Regular Report from the Commission on Hungary's Progress towards Accession' COM (2000) 705; Commission, '2001 Regular Report on Hungary's Progress towards Accession' SEC(2001) 1748; Commission, '2002 Regular Report on Hungary's Progress towards Accession' COM(2002) 700 final - SEC(2002) 1404; Commission, 'Comprehensive Monitoring Report on Hungary's Preparation for Membership' COM(2003) 675 final - SEC(2003) 1205.
[121] COM (2003) 675 final – SEC (2003) 1205.
[122] COM (98) 700 final, para. B.1.3; COM (99) 505, para. B.1.3; COM (2000) 705, para. B.1.3; SEC (2001) 1748, para. B.1.3; COM (2002) 700 final – SEC (2002) 1404, para. B.1.3.
[123] COM (98) 700 final, para. B.1.1.
[124] ibid para. B.1.3.
[125] ibid para. B.1.1.
[126] COM (99) 505, para. B.1.1.
[127] ibid.
[128] ibid para. B.1.2.
[129] ibid para. B.1.3.
[130] COM (2000) 705, para. B.1.1.

inconsistent jurisprudence through the impairment of the efforts of unifying court practices and thus hampering legal certainty.[131] Additionally, the modernisation of the public administration as well as overcrowded prisons required attention.[132] The general impression, therefore, is that instead of an improvement, a deterioration of the rule of law situation in Hungary was noticed. Despite continuous efforts, the original problems remained and new ones arose.

In the 2001 report, however, the improvements made in all these areas, through the objectives that have been achieved within the framework of the Accession Partnerships, were stressed, giving an overall positive impression.[133] The short- and medium-term priorities of the 1999 Accession Partnership for the political criteria were deemed to be implemented.[134] The praise for the "considerable progress"[135] continued the following year and Hungary was awarded a total amount of €246.5 million through the three main accession funds.[136] Nevertheless, the Roma action programme needed "sustained implementation,"[137] corruption remained a problem, the situation at the Constitutional Court led to inconsistent jurisprudence hampering legal certainty, and overcrowded prisons even posed a new issue.[138] In 2003, the regular report was replaced by a more concise overview focusing on the implementation of the *acquis*.[139] The judicial capacity was said to have improved especially in regards to resolving the backlog of cases, although the financial situation was said to still be problematic, leading to restricted legal aid and deficits in training.[140]Additionally, corruption continued to pose a problem.[141] Nevertheless, "sufficient conditions […] for the implementation of the *acquis*"[142] were attested. The Commission, therefore, seems to have been content with Hungary's development concerning the rule of law and the Copenhagen political criteria.

[131] COM (2000) 705, para. B.1.3.
[132] ibid.
[133] SEC (2001) 1748, para. B.1.3.
[134] ibid.
[135] COM (2002) 700 final – SEC (2002) 1404, para. B.1.3.
[136] Commission, 'General Report on Pre-Accession Assistance (PHARE -ISPA – SAPARD) in 2000' (Report) COM (2002) 781 final – SEC (2002) 1418, Annex.
[137] ibid para. B.1.3.
[138] ibid para. D.
[139] COM (2003) 675 final – SEC (2003) 1205.
[140] ibid para. C.1.2.
[141] ibid para. C.1.3.
[142] ibid para. D.

Comparing the Commission reports and the funds allocated through the different programmes now, it is not surprising that Article 4 of Regulation 622/98[143] has never come into use. The goals of the Accession partnership were continuously met and thus the conditionality requirement was satisfied: Hungary was able to implement the steps suggested by the Commission designed to further the rule of law and no doubts about the efforts made by Hungary were raised, despite apparent shortcomings in the overall field of the rule of law.

3.3. Effectiveness of the Conditionality Requirement in the Accession Process of Hungary

What can be seen from Hungary's accession process is, thus, that conditionality did not play a pivotal role in ensuring the rule of law. The framework of the Accession Partnerships in which the goals of the pre-accession assistance were mapped out and the desired improvements before accession were broken down into a checklist. The individual points were of such a detailed nature, that progress on an individual task could be attested without any actual improvement of the overall situation being observable. This is a sort of "losing sight of the bigger picture" issue, in which smaller tasks were focused on, while losing sight of the bigger whole. Allocating funds to Hungary to finance the projects was thus possible, as the minor milestones envisaged were achieved. The conditionality requirement became a principle that was, albeit constantly mentioned and referred to, rather an empty phrase. Instead of making the reception of funds conditional upon the actual situation and its improvement in Hungary, it became conditional only on the achievement of the tasks envisioned through the Accession Partnerships. Kochenov, a prominent author on EU rule of law issues, even goes as far as calling the pre-accession conditionality a "resounding failure,"[144] adding that different standards were applied to different countries.[145]

What can further be seen is that the threshold for meeting the Copenhagen political criteria was indeed very low.[146] Already when the Commission initially recommended opening the negotiations in 1997, the threshold was deemed to have

[143] Council Regulation (EC) 622/98, art. 4.
[144] Kochenov (n 27) p. 300.
[145] ibid.
[146] ibid.

been met. Thus, none of the following reports ever called into question whether the Copenhagen Criteria and the rule of law had ever been, or continued to have been, fulfilled. This is even more astonishing as there has not only been a dire situation of the Roma minority and a never-ending problem with corruption, but even a judicial system that has been far from functioning smoothly. Initially, the Constitutional Court did not consist of the constitutionally prescribed 11 judges.[147] Access to effective judicial review was impaired due to a huge backlog of cases and the ensuing slowness. Legal certainty could not be ensured because of diverse judicial practice, a lack of professional training and unification. Equality before the law was something that had not been achieved for the Roma until accession and independence, as well as the impartiality of the courts, has always been questionable. This low threshold was connected to obscure standards and analysis on the side of the Commission that had been far from consistent.[148] What had been a major problem in one year's report, barely received any attention in the next years and so forth. Lastly, a "complete lack of connection between the Commission's pre-accession monitoring and the candidate countries' progress towards accession"[149] is characteristic of the supposed use of conditionality in Hungary's accession process. While Hungary might have implemented certain short- and medium-term goals of the Accession Partnership, it is questionable whether it had fulfilled the Copenhagen Criteria in 1997 or at any point after.

In summary, despite the fact that the threat of withholding funds hung over negotiations like the sword of Damocles, the mechanism was altogether ineffective. The conditionality that was employed made the reception of pre-accession funds not conditional upon achieving and upholding the rule of law but, rather, on achieving minor milestones, bringing the State in question (Hungary) closer to a State governed by that principle. This progressive use of the tool, which may be justified by the nature of pre-accession assistance being designed to foster change in the receiving country, rendered the tool altogether ineffective. Reasons for why the tool was not used to its full potential can only be assumed and may altogether possibly be ascribed to a lack of political will. Further, the conceptualisation of the rule of law was too broad and lacked precise definitions,

147 COM (97) 2001 final.
148 Kochenov (n 27) p. 301.
149 ibid.

making the standards expected unclear. Ultimately, the accession itself, which should be conditional, not on a progressive improvement, but on an objective and static existence of the rule of law, was granted; although it is dubious whether the criteria were fulfilled. In any event, the accession conditionality could not prevent a severe rule of law backsliding and autocratic developments.[150] In 2022, Freedom House, a non-profit organisation annually accessing each country's degree of political freedom, considered Hungary a "hybrid regime" short of a full-fledged democracy.[151] A detriment of the rule of law over the last decade was especially pointed out.[152] Notwithstanding the fact that, during this period, Hungary has already been an EU Member State. Corruption is still a major problem.[153]

This leads one to the question of how the rule of law is protected in the current Member States of the European Union. The use of rule of law conditionality has been established for it to be used against current Member States with the Conditionality Regulation. In the following section, this new conditionality tool is examined. First, generally, and then also in its use against Hungary, allowing a comparative view on these two tools.

4. THE CONDITIONALITY REGULATION

The Conditionality Regulation, which was adopted in 2020 and is applicable since 1 January 2021,[154] is examined taking into consideration the Commission guidelines[155] on its application and the judgements on its legality,[156] followed by an analysis of its use against Hungary.

4.1. CONTENT OF THE CONDITIONALITY REGULATION

The original idea behind the Conditionality Regulation, as it was envisioned by the Commission, might have been the protection of the rule of law to remedy the

[150] Vanessa A Boese and others, 'Autocratization Changing Nature? Democracy Report 2022' (Varieties of Democracy Institute (V-Dem), March 2022) <https://v-dem.net/media/publications/dr_2022.pdf> accessed 14 February 2014.
[151] *Freedom House* (n 7).
[152] ibid.
[153] Corruption Research Center Budapest, 'Hungary: Corruption Risk in Public Procurement from 2005 To 2022' (9 December 2022) <www.crcb.eu/wp-content/uploads/2022/12/2022_crcb_korrupcioellenes_vilagnap_221209_1201.pdf> accessed 14 February 2023.
[154] Conditionality Regulation, art. 10.
[155] COM (2022) 1382 final.
[156] Case C-156/21 (n 20); Case C-157/21 (n 20).

insufficient sanctioning and enforcement mechanisms. The remains of this idea are still visible in recital 14 of the adopted text, calling the Conditionality Regulation an addition to the existing rule of law tools.[157] However, through the legislative procedure, a compromise (the first of several political compromises surrounding this legislative act) was reached between the Council and the Parliament.[158] This compromise watered down the new instrument, in terms of its rule of law protection by shifting its primary aim to protecting the budget instead of the rule of law,[159] but it was also "crucial for ensuring the legality of the final Regulation."[160]

Through the adopted Regulation, the importance of sound financial management of the European Union budget and the role of the Member States in ensuring it, is highlighted.[161] Specifically, the significance of public authorities acting in accordance with the law and effectively pursuing cases of fraud, tax evasion, corruption, and other breaches of the law is underlined.[162] Moreover, it is convincingly explained how the independence and impartiality of the judiciary and investigation and prosecution services must be guaranteed; including sufficient resources and procedures acting effectively, while respecting the right to a fair trial, to protect the financial interests of the Union against unlawful and arbitrary decisions of public authorities.[163] The preamble thus establishes a relationship between the respect for the rule of law and the sound financial management of the Union budget.[164] Ultimately, the reception of EU funding can conversely be made conditional upon upholding the rule of law principles and thereby protecting and enforcing the rule of law; this was confirmed by the Court.[165]

[157] Conditionality Regulation, recital 14.
[158] Bonelli and Baraggia (n 8) para. B(IV).
[159] Kim Lane Scheppele, Laurent Pech and Sébastien Platon, 'Compromising the Rule of Law while Compromising on the Rule of Law' (*Verfassungsblog,* 13 December 2020) <https://verfassungsblog.de/compromising-the-rule-of-law-while-compromising-on-the-rule-of-law/> accessed 14 February 2023, para. 1.
[160] Bonelli and Baraggia (n 8), para. F.
[161] Conditionality Regulation, recitals 7 and 8.
[162] ibid recital 8.
[163] ibid recitals 8 and 9.
[164] ibid recital 13.
[165] Case C-157/21 (n 20) paras. 151-152.

The conditions for activating the mechanism envisioned by the Regulation are set out under Article 4 thereof.[166] Measures for protecting the Union budget[167] can be taken when "breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the financial interests of the Union in a sufficiently direct way".[168] This includes two conditions: firstly, there must be a breach of the principles of the rule of law. This is defined for the first time in EU secondary legislation as encompassing "the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law."[169] This breach is further narrowed down through Article 4(2) which stipulates the kind of conduct that is captured by the Regulation and constitutes a closed list.[170] Secondly, there must be a sufficiently direct link between this breach of the rule of law constituting of one or several of the kinds of conduct under Article 4(2),[171] and the effect, or the serious risk of an effect, on the sound financial management of the Union's budget. The Commission can become active when it deems those conditions to be fulfilled and notify the Member State in question about its findings,[172] entering a "structured dialogue"[173] with the Parliament. While the Member State will be given the opportunity to address the issue and propose measures to remedy the situation,[174] the Commission may ultimately decide, considering all relevant information,[175] to propose an implementing decision to the Council.[176] Subsequently, the Council can adopt that decision with a qualified majority[177] to activate one or several of the measures. These measures

[166] Conditionality Regulation, art. 4.
[167] ibid art. 5.
[168] ibid art. 4(1).
[169] Conditionality Regulation, art 2(a) in conjunction with recital 3.
[170] Case C-156/21 (n 20) para. 255.
[171] Conditionality Regulation, art. 4(2).
[172] ibid art. 6(1).
[173] ibid art. 6(2).
[174] ibid art. 6(5).
[175] ibid arts. 6(1); 6(3); 6(6).
[176] ibid art. 6(9).
[177] ibid art. 6(11).

are mainly financial and can range from the suspension of payments[178] to prohibitions on entering into new loan agreements[179] or other legal commitments and affect both the areas where the Commission solely implements the Union budget,[180] as well as where it shares this management with the Member States.[181] The Regulation also provides for provisions on the lifting of measures.[182]

The main decision-making is carried out by the Council, which must take a decision suspending funds by a qualified majority,[183] while the Commission has the difficult task of demonstrating the two conditions to be fulfilled. Voting by qualified majority enables the Council to overrule the allies of a Member State in breach of the rule of law and sets a lower threshold than the unanimity required under Article 7(2) TEU. Peculiarly, no clause prevents the Member State concerned from casting its own vote concerning the implementing decision in the Council.[184] The implementation of any measures under this Regulation is further subject to the requirements of subsidiarity, meaning there is no other procedure to protect the budget more effectively[185] and proportionality of the measure regarding the breach.[186]

The Commission guidelines on the application, relying also on the Court's judgements,[187] additionally highlight the importance of establishing a link between the breach of the rule of law and the budget.[188] The Commission clarifies, *inter alia,* the meaning of "seriously risk affecting"[189] and "a sufficiently direct way."[190] Reiterating the Court's judgements, the Commission recognises the former as meaning "the risk has a high probability of occurring"[191] and the latter requiring a "'genuine" or "real "[192] link. Moreover, the Commission diligently sketches out

[178] Conditionality Regulation, art. 5(1)(a)(i).
[179] ibid art. 5(1)(a)(v).
[180] ibid art. 5(a).
[181] ibid art. 5(b).
[182] ibid art. 7.
[183] ibid art. 6(11).
[184] Philipp Leitner and Julia Zöchling, 'With or Without Hungary: The Rule of Law Conditionality Regulation and the Elephant in the Voting Rom' *Verfassungsblog,* 07 November 2022). <https://verfassungsblog.de/with-or-without-hungary/>accessed 9 March 2023.
[185] Conditionality Regulation, art. 6(1).
[186] ibid art. 6(7).
[187] Case C-156/21 (n 20); Case C-157/21 (n 20).
[188] COM (2022) 1382 final, paras. 8; 15-18.
[189] Conditionality Regulation, art. 4(1).
[190] ibid.
[191] COM (2022) 1382 final, para. 31.
[192] ibid para. 33.

criteria and elements for both the required subsidiarity to activate the Regulation,[193] as well as proportionality.[194] In addition, the Commission lays out some procedural matters by committing to an "objective, impartial, and fair"[195] assessment, elaborating on the types of sources that will be used,[196] including complaints,[197] stressing the importance of contact and dialogue with the Member State in question,[198] and lastly laying out how measures can be lifted.[199] The Commission has also incorporated a section clarifying how final recipients and beneficiaries and their legitimate aims can be protected.[200] Pre-existing obligations of Member States vis-à-vis their citizens cannot be impacted.[201] The annexes to the guidelines contain detailed and concrete examples of breaches of the rule of law,[202] requirements of complaints with a complaint form,[203] and a list of the information final recipients should provide when complaining about breaches of Article 5(2) of the Conditionality Regulation,[204] ie, the government failing to fulfil pre-existing obligations due to measures imposed on the State.

Overall, the guidelines must be evaluated as a mere interpretation of the standards, illustrating what the Regulation translates to in practice and confirming the sound financial management of the Union as the main aim and purpose of the Conditionality Regulation. The Commission only needed to reiterate the Court's interpretation when mapping out how the Conditionality Regulation shall be used. The Court clearly stated that the aim of the Regulation adopted based on Article 322(1)(a) TFEU,[205] a legal basis for financial rules concerning the budget, can only be aimed at protecting the budget if the rule of law is breached and cannot penalise rule of law breaches as such.[206] It is only logical that "the Court has […] emphasise[d] that the new Regulation is not a rule of law protection tool, but a

[193] COM (2022) 1382 final, paras. 42-43.
[194] ibid paras. 46-53.
[195] ibid para. 55.
[196] ibid paras. 62-65.
[197] ibid paras. 66-71.
[198] ibid paras. 72-79.
[199] ibid paras. 80-86.
[200] ibid paras. 87-91.
[201] ibid.
[202] ibid annex I.
[203] ibid annex II.
[204] Conditionality Regulation, art. 5(2).
[205] TFEU, art. 322(1).
[206] Case C-156/21 (n 18) para. 171.

budgetary one."[207] It is also important to keep in mind that the procedure was held to be sufficiently distinct from the Article 7 TEU rule of law protection tool not to be considered a circumvention of this cumbersome procedure.[208] "However, it is permissible […] to establish […] other procedures relating to the […] rule of law, provided that those procedures are different, in terms of both their aim and their subject matter, from the procedure laid down in Article 7 TEU."[209] This ruling thereby suggests that exactly this indirect rule of law protection, through the Union budget, makes any additional protection possible in the first place. Any mechanism outrightly and directly aimed at protecting the rule of law as such would not be sufficiently distinct from the already existing Article 7 TEU[210] procedure and, thus, not permissible as to not circumvent the Treaty provisions. This ruling shines a new light on conditionality as a Union tool, enabling indirect rule of law protection through tools not measured against Article 7 TEU.[211]

All the foregoing considerations are not to say that the instrument will prove inevitably useless in protecting the rule of law. Only because the officially expressed main aim has shifted from the rule of law protection to the protection of the budget, it does not necessarily render the entire tool useless in protecting the rule of law.[212] The higher hurdles have been "crucial for ensuring the legality."[213] The Regulation still has lower thresholds than the procedure in Article 7 TEU.[214] Moreover, it still targets broader breaches than the current rule of law protection via Article 258 TFEU[215] and has actual sanctions attached. Subsequently, this potential in protecting the rule of law is examined again, referring to the case study of Hungary, to assess whether Brussels has only reached a compromise "that makes everyone equally unhappy."[216]

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[207] Matteo Bonelli, 'Constitutional Language and Constitutional Limits: The Court of Justice Dismisses the Challenges to the Budgetary Conditionality Regulation' (2022) 7,2 European Papers 507, p 521.
[208] Case C-156/21 (n 18) paras. 166-182.
[209] ibid para. 168.
[210] TEU, art. 7.
[211] ibid para. 179.
[212] Conditionality Regulation, recital 14.
[213] Bonelli and Baraggia (n 8) para. F.
[214] TEU, art. 7.
[215] TFEU, art. 258.
[216] Aleksejs Dimitrovs and Hubertus Droste, 'Conditionality Mechanism: What's In It?' (*Verfassungsblog*, 30 December 2020) <https://verfassungsblog.de/conditionality-mechanism-whats-in-it/> accessed 14 February 2023, para. 4.

4.2. The Use of the Conditionality Regulation against Hungary

This recent use of the conditionality tool against Hungary are evaluated now, to make informed predictions on the likely effectiveness of the tool. The events surrounding the application of this Regulation are firstly summarised, underlining, and explaining the political difficulty of employing the tool.

A second compromise for the application of this legal instrument was brokered by the German Council's presidency: the application of the Regulation was suspended in exchange for approval of the EU budget and recovery fund, which was held "hostage"[217] by the Hungarian and Polish governments.[218] In exchange for a favourable vote in the Council for the EU budget the two governments thus ensured that the Conditionality Regulation was not employed against them. This suspension of application of the Conditionality Regulation was supposed to be effective until the final judgement on its legality. This marked also the first time "national governments have formally claimed that the EU would not be legally empowered to act in the face of breaches of the rule of law."[219] Further, application guidelines were demanded.[220] This deal was, to no surprise, heavily criticised, *inter alia,* for a possible overstepping of competences, as the Court has the sole power to suspend the application of a legal instrument.[221] The Parliament even threatened to bring an action for a failure to act under Article 265 TFEU[222] against the Commission that did not initiate proceeding under the Conditionality Regulation.[223] Finally, however, the Court confirmed the legality of the instrument in February 2022,[224] potentially strengthening the rule of law protection[225] and

[217] Scheppele, Pech and Platon (n 159) para. 0.
[218] European Council, 'European Council meeting (10 and 11 December 2020) – Conclusions' EUCO 22/20, para. 2(c).
[219] Laurent Pech, 'No More Excuses: The Court of Justice greenlights the rule of law conditionality mechanism' (*Verfassungsblog*, 16 February 2022) <https://verfassungsblog.de/no-more-excuses/> accessed 14 February 2023.
[220] ibid.
[221] Scheppele, Pech and Platon (n 159).
[222] TFEU, art. 265.
[223] European Parliament Resolution 2021/2711(RSP) on the rule of law situation in the European Union and the application of the Conditionality Regulation (EU, Euratom) 2020/2092 [2021] OJ C67/86; see also Merijn Chamon, 'A Hollow Threat: The European Parliament's plan to bring the Commission before the Court of Justice' (*Verfassungsblog*, 16 June 2021). <https://verfassungsblog.de/a-hollow-threat/> accessed 14 February 2023.
[224] Case C-156/21 (n 20); Case C-157/21 (n20).
[225] Jake Goodman-Palmer, 'Hungary, Poland and the "Community of Fate" – Constitutional Implications of the Budget Conditionality Ruling' (*Verfassungsblog,* 12 July 2022) <https://verfassungsblog.de/hungary-poland-and-the-community-of-fate/> accessed 28 October 2022; See also Matteo Bonelli (n 197).

prompting the hope for a "prompt and forceful use"[226] of the application. This nicely illustrates some of the most fundamental shortcomings of the EU, which is ultimately constraint by State sovereignty and its Member State's willingness to cooperate. This issue manifests itself over and over again in the protection of the rule of law.

The procedure against Hungary was officially initiated on 27 April 2022, duly following Article 6 of the Conditionality Regulation.[227] Hungary was able to submit its observations at various points. It submitted a list of seventeen "key implementation steps"[228] to remedy the shortcomings identified by the Commission. The Commission went ahead and sent a proposal for a Council implementing decision in September 2022,[229] pressing, however, for an extension of the one-month deadline for the Council to adopt the proposed decision.[230] This is possible under Article 6(10) of the Conditionality Regulation[231] and was needed to thoroughly assess the proposed measures. The results of that assessment were communicated to the Council on 30 November 2022. Although the Commission found the proposed measures in principle capable of addressing its initial findings,[232] it was concluded that the measures "taken as a whole, […] do not put an end to the identified breaches of the principles of the rule of law."[233] Alongside the Commission, scholars also argued that the proposed measures were "fake solutions to real problems"[234] and the proposed implementation timeframe amounted to a "game of stalling."[235] The Commission thus maintained its

[226] Pech (n 219).
[227] Council Implementing Decision (EU) 2022/2506, recital 1-10.
[228] COM (2022) 485 final, annex.
[229] COM (2022) 485 final.
[230] ibid explanatory memorandum para. 124.
[231] Conditionality Regulation, art. 6(10).
[232] COM (2022) 485 final, recital 38.
[233] Council Implementing Decision (EU) 2022/2506, recital 58; see also Commission, 'Communication from the Commission to the Council on the remedial measures notified by Hungary under Regulation (EU, Euratom) 2020/2092 for the protection of the Union budget' (Communication) COM (2022) 687 final, para. 155.
[234] Kim Lane Scheppele and Gábor Mészáros , 'Trusting Hungary with Billions of Euros: Still a Big Risk (Hungary's Anti-Corruption Program, Part IV)' (*Verfassungsblog,* 18 November 2022). <https://verfassungsblog.de/trusting-hungary-with-billions-of-euros/> accessed 1 March 2023.
[235] Tímea Drinóczi, 'Sham and Smokescreen: Hungary and the Rule of law conditionality mechanism' (*Verfassungsblog,* 5 October 2022) <https://verfassungsblog.de/sham-and-smokescreen/> accessed 16 February 2023.

proposal[236] and suggested an overall cut of 65% of the EU's economic commitments under three different programmes.[237]

The events took a curious turn: Hungary again struck a political deal. This time, the "hostage" of the negotiations was the €18 billion aid package for Ukraine,[238] whose approval required unanimity in the European Council.[239] In exchange for Hungary's approval of the aid package, the Council Implementing Decision lowered the percentage to 55% of suspended funds (roughly €6.3 billion).[240] Furthermore, the suspension of the veto was also coupled with the effective pay-out of €5.8 billion of pandemic recovery funds.[241] In essence, the deal thus reduced the suspended funds by €1.2 billion, plus securing a pay-out of €5.8 billion. Although this money is linked to a pandemic recovery plan and concrete projects contained therein, the gap that the EU leaves in Hungary's budget will only amount to €0.5 billion.

Looking at how this use of the Conditionality Regulation might prove effective in protecting the rule of law, it is firstly imperative to see how the Commission, in its proposal and explanatory memorandum, also reiterated in the Council Implementing Decision, justified the imposition of measures. As previously pointed out, the conditions for measures to be adopted are that there is a situation that amounts to a breach of the principles of the rule of law under the closed list of Article 4(2) of the Conditionality Regulation and that that breach bears a sufficiently direct link to the sound financial management of the Union budget.[242] This criterion, which was often criticised for hampering the protection

[236] COM (2022) 687 final, para. 156.
[237] COM (2022) 485 final, art. 2(1).
[238] Thu Nguyen, 'The Hungary Files: Untangling the political and economic knots' (Jaques Delors Centre, 8 December 2022) <www.delorscentre.eu/en/publication/the-hungary-files> accessed 16 February 2023.
[239] European Council, 'European Council meeting (15 December 2022) – Conclusions' EUCO 34/22, para 7.
[240] Council Implementing Decision (EU) 2022/2506, art. 2(1).
[241] Paola Tamma, 'EU strikes deal with Hungary, reducing funding freeze to get Ukraine aid approved' *POLITICO* (Brussels, 12 December 2022) <https://www.politico.eu/article/eu-deal-hungary-drop-vetoe-recovery-plan-approved-funding-freeze-ukraine-aid/> accessed 21 February 2023; Gabriela Baczynska and Jan Strupczewski, 'EU strikes deal with Hungary over Ukraine aid, tax plan, recovery funds' *Reuters* (London, 13 December 2022) <https://www.reuters.com/world/europe/eu-wrangles-with-hungary-over-ukraine-aid-tax-plan-billions-risk-2022-12-12/> accessed 21 February 2023; and
'EU strikes deal to lift Hungary's block on Ukraine aid' *DW* (Bonn, 13 December 2022). <https://www.dw.com/en/eu-strikes-deal-to-lift-hungarys-block-on-ukraine-aid/a-64077864> accessed 21 February 2023.
[242] Conditionality Regulation, art. 4(2).

offered by this tool, was very easy to establish. In the adopted decision it is simply stated that, the breaches are "of a systemic character, they largely affect the sound financial management of the budget of the Union […] in a sufficiently direct way."[243] Thus, it appears, that once one of the breaches captured by the Regulation is apparent, the direct link is intrinsic. This view is reiterated in the Communication of the Commission to the Council updating the assessment of the Key Implementation Steps and giving a "green light" for the adoption of measures.[244]

While it may appear that the scope of the Conditionality Regulation, in practice, exceeded expectations, it becomes apparent that it only captures a very limited amount of breaches.[245] The reasons stated in the Recital of the adopted decision, for measures to be taken, are limited to the defect of the public procurement system,[246] the effective investigation and prosecution of corruption cases, the organisation of the prosecution services as well as the absence of an effective anti-corruption framework.[247] In short, the rationale for implementing measures is corruption in Hungary. And where there is corruption, there is certainly no sound financial management.

The Commission wrote in its Communication that the measures proposed by Hungary "would in principle be capable of addressing the Commission's findings"[248] but that they were simply not "correctly and effectively implemented."[249] This is in stark contrast to assessments made by some scholars. The proposed remedial measures "cannot effectively reach the goal of the conditionality mechanism"[250] and "the spending of EU funds will [not] be any less corrupt under these reforms."[251] The Commission's view on the potential aptness of the remedial measures is very different from these expressed worries. This tendency, while for the moment irrelevant as measures were nonetheless adopted, could become problematic again when the Commission needs to reassess

[243] Council Implementing Decision (EU) 2022/2506, recital 58.
[244] COM (2022) 687 final.
[245] Case C-156/21 (n 20) paras. 253 and 254, read in conjunction with Conditionality Regulation, art 4(1).
[246] Council Implementing Decision (EU) 2022/2506, recital 11.
[247] ibid recital 12.
[248] COM (2022) 687 final, para. 148.
[249] ibid para. 155.
[250] Drinóczi (n 235).
[251] Scheppele and Mészáros (n 235).

Hungary's progress.[252] Then, it could hastily conclude that the seventeen measures were in the meantime implemented correctly and that the measures should thus be lifted.[253]

Another issue is obvious: regardless of whether the remedial measures will prove apt to justify the situations that the Union based the adoption of measures on, all the breaches of the principle of the rule of law beyond the corruption issue will remain. Due to the pandemic and the war in Ukraine, the Prime Minister rules by decree,[254] threatening legality; civil society and the media are crippled, and the judiciary is far from functioning smoothly and providing an independent and impartial judicial review.[255] Under the 2022 Rule of Law report,[256] only three of the eight recommendations, addressing the detected rule of law issues in Hungary, concerned the breaches of the rule of law that could be addressed via the Conditionality Regulation.[257] Amnesty International raises serious doubts about the freedom of the media, fundamental rights and equality, as well as the independence of the courts in Hungary.[258] Human Rights Watch questions whether there is transparent, accountable, democratic and pluralistic lawmaking, and access to justice, which includes fundamental rights, for the Roma and LGBT people.[259] When one looks at the rule of law in Hungary today, corruption almost seems like a minor issue in a State where something is going fundamentally wrong, while at the same time being a member of the "Community of values."[260]

It could be argued that, as established above, the Union is held back by its general difficulties in protecting these values and has used the opportunity to protect the rule of law through the area where it now has the actual competence to implement any measures. The Conditionality Regulation has so far not been employed against other possibly corrupt States. Maybe, the symbolic and political

[252] Conditionality Regulation, arts. 7(1) and 7(2); Council Implementing Decision (EU) 2022/2506, art. 3.
[253] Conditionality Regulation, art. 7(2).
[254] Scheppele and Mészáros (n 234).
[255] Drinóczi (n 235).
[256] COM (2022) 500 final.
[257] ibid annex p. 17.
[258] 'Defending Rule of Law in Hungary' (Amnesty International, 2023). <www.amnesty.org/en/latest/campaigns/2020/09/hungary-rule-of-law/> accessed 12 April 2023.
[259] 'World Report 2022 – Hungary' (Human Rights Watch, 2022) <www.hrw.org/world-report/2022/country-chapters/hungary> accessed 12 April 2023.
[260] TEU, art. 2.

value of imposing financial measures based on rule of law violations is greater than the literal impact.

Another point to consider is that the financial implications of the measures seem to show an effect. This can be deduced firstly from Hungary's behaviour, trying everything to prevent both the adoption of the Regulation and the application against itself. This leads one to believe that the financial measures are of such a nature, that they could incentivise Hungary to restore, or establish, the rule of law. The withholding has been labelled "a substantial loss"[261] as well as a "hefty fine."[262] The EU "was throwing punches where it hurts,"[263] especially given the current economic crisis. This demonstrates the potential of the Conditionality Regulation because the greater the impact on a Member State's budget, the higher the pressure to comply with the rule of law.

Ultimately, it is too early to be able to determine the actual effectiveness of this case study alone. It would be interesting to see how this case and Hungary will develop, as well as how the Conditionality Regulation may be employed against other States. However, some predictions can be made. The Commission had no problems in establishing the required link to the budget and triggering the impactful financial sanctions of the Conditionality Regulation, but the issues addressed concern only one area where Hungary has serious rule of law shortcomings. Although the financial repercussions ensuing from the adoption of measures were enough for Hungary to do everything in its power to halt the implementation of the Regulation, it – once again – only offered fake solutions. This time, at least for now, the Commission has not fallen for the achievement of minor "milestones," but instead assessed the situation as a whole. It will be interesting to see whether the Commission sticks to this analysis when the lifting of measures is concerned. That the Union could adopt measures in the first place could already be seen as a success. What the whole process of adopting and applying the Regulation has demonstrated, however, are other, more fundamental, and underlying problems of the EU. Hungary has repeatedly employed political

[261] Nguyen (n 238) p. 3.
[262] ibid.
[263] ibid p. 4.

pressure, exercised through its veto power in questions decided by unanimity, to prevent the repercussions it ought to face under the Regulation.

5. CONCLUSION

The foregoing considerations aimed to address how effective two different conditionality mechanisms were in protecting the rule of law in Hungary and beyond. Firstly, it can generally be observed that the use of conditionality mechanisms has become more popular, as evidenced by the recent adoption of the Conditionality Regulation. This also allows for questions such as the desirability of a "conditionality culture"[264] replacing the mutual trust and values between the Member States. On the other hand, conditionality seems like an intuitive tool, making benefits conditional upon adhering to common values.

Pragmatically, and looking at the current rule of law crisis, the protection of such fundamental core elements as the rule of law which, in theory, should bind the Member States together and not divide them, needs to be strengthened. While conditionality in the accession was rather an empty threat and a mental gambit, never actually employed in practice, the Conditionality Regulation has already been triggered once. This demonstrates the need to adopt more varied rule of law protection tools and the Union's willingness to employ those. The rule of law situation in Hungary, while it has surely digressed recently, has been far from ideal even upon accession.

Both tools have in common that they anticipate that the States responsible will be the ones to repair their systems. Moreover, in both instances, political difficulties and considerations have heavily hampered the employment of tools falling short of their possible effectiveness. Moreover, both tools have a symbolic character that may even be greater than their actual reach.

Nonetheless, there are also several improvements. Firstly, Regulation 622/98[265] employed a spending conditionality, while the Conditionality Regulation enables the EU to withhold funds that a Member State is entitled to under other, unrelated programmes. Further, while the phenomenon of political unwillingness rendered the accession conditionality almost ineffective, there is

[264] Bonelli and Baraggia (n 8) para. E.
[265] Council Regulation (EC) 622/98.

still the hope that the Conditionality Regulation will be used more effectively against Hungary, now and in the future. The Conditionality Regulation, for the first time, clearly defines the rule of law in an instrument of secondary legislation enabling review against precise standards. The fact that this is done not only in Article 2(1)[266] for the use of this Regulation but also in Recital 3[267] allows for this definition to be referred to in future instruments. By adding the Conditionality Regulation, financial repercussions in cases of non-compliance with the rule of law could truly incentivise rectifications. Moreover, the Commission assessed all remedial measures as a whole and did not satisfy itself with the implementation of minor improvements, while the situation overall remained far from ideal as it did in the accession process. The fact that the Commission found the proposed remedial measures insufficient was a sign that this time it did not settle "for appearance over reality."[268] The conditionality in the latest Regulation also does not have the dynamic character anymore. While the reception of funds in the accession process was conditional upon progress regarding the rule of law, the Conditionality Regulation demands a functioning rule of law, albeit only in matters related to the Union budget. Of course, the conditionality of membership itself has always been static but was, in practice, not employed.

However, conditionality also means that there must be a link to the benefits, whose reception is made conditional. In the case of the Conditionality Regulation, this means that the rule of law protection offered merely extends to the field of corruption and cannot address other, plausibly even more pressing rule of law issues. These on the other hand could be effectively enforced through accession conditionality, because upon accession the values of the Union should be common to all States.

Conditionality mechanisms in both instances could be in theory effective as they both withhold very desirable EU benefits, EU funding and membership, and potentially allow for a holistic assessment of the rule of law. In the case of Hungary, the focus of the Conditionality Regulation on rule of law breaches affecting the financial management did not pose an impediment to its effectiveness. Theoretically, it could however render the mechanism useless in

[266] Conditionality Regulation, art. 2(1).
[267] ibid recital 3.
[268] Scheppele and Mészáros (n 234).

dealing with other situations where rule of law impediments are not made up of corruption but for example of access to justice. The case of Hungary nevertheless suggests that, when a State systemically breaches the rule of law, a connection to the sound financial management of the Union budget can easily be established. A rule of law backsliding after accession could theoretically further be prevented through the deterring effect of the Conditionality Regulation. As they were and are currently used, this effectiveness is however questionable. Instead of demanding clear standards upon accession and pressuring Member States to rectify rule of law shortcomings, the mechanisms are paralysed by political considerations and the EU institutional framework, allowing States to exercise pressure. This suggests that not the lack of potential effectiveness of the mechanisms themselves is the problem, but how these mechanisms are used revealing deeper, more fundamental issues relating to the institutional set-up of the EU.

Ultimately, the two conditionality mechanisms may reveal just the same shortcoming as identified in Article 7 TEU:[269] they can be viable if the political will is there. Whether such a will exists, remains to be seen.

[269] TEU, art. 7.

The Road to Green Administrative Justice: EU's Battle Towards Compliance with the Aarhus Convention

Defne Halil and Raman Ojha[1]

[1] Defne Halil, a third-year bachelor's student in European Law at Maastricht University and a future LLM student there, directs her academic focus toward law and sustainability, and the rule of law. She believes that the EU's compliance with the Aarhus Convention is a particularly important topic, especially regarding its internal review procedure. Raman Ojha is a recent ELS graduate at Maastricht University. In his upcoming master's path, he will focus on questions of competition law relating to state aid and compliance with fundamental human rights. During his bachelor's studies, he focused on the analysis of EU institutional labour law and the interplay between European fundamental rights. He believes that achieving climate justice should be effectively integrated within such a framework of rights.

TABLE OF ABBREVIATIONS

ACCC	Aarhus Convention Compliance Committee
CJEU	Court of Justice of the European Union
ECB	European Central Bank
EDPB	European Data Protection Board
EU	European Union
MS	Member State
NGO	Non-Governmental Organisation
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UNECE	United Nations Economic Commission for Europe

1. INTRODUCTION

"The era of global warming has ended. The era of global boiling has arrived."- UN Secretary-General António Guterres[2]

In response to such pressing environmental degradation concerns, such as climate change, various communities have collaborated to create legal frameworks aimed at protecting green rights. A prominent example is the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (the Aarhus Convention or the Convention).[3] This Convention has revolutionised environmental governance by conferring rights to the public, including access to environmental information, public participation, and access to justice.[4]

The European Union (EU) is a party to the Aarhus Convention and has implemented its provisions into secondary EU law utilising directives and regulations.[5] This paper analyses the incorporation of the access to justice provisions of the Convention into EU law, with a focus on the internal review procedure. The objective of that mechanism within the EU is to provide members of the public with the opportunity to ask the EU bodies and institutions for reconsideration of their acts. This is done by recognising the practical difficulties both natural and legal persons face in pursuing direct litigation in front of the Court of Justice of the European Union (CJEU), due to the stringent conditions for standing rules in place.[6] Following a decision rendered after the internal review, members of the public would attain the legal standing necessary to go before the CJEU. Thus, the significance of such a procedure holds substantial value for democracy and the rule of law in the EU, as it is ostensibly the most prominent

[2] 'Hottest July ever signals 'era of global boiling has arrived' says UN chief' (*UN News*, 27 July 2023) <https://news.un.org/en/story/2023/07/1139162> accessed 10 October 2023.
[3] UNECE Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in environmental matters (adopted 25 June 1998, entered into force 30 October 2001) (the Aarhus Convention).
[4] ibid art. 1.
[5] Council Decision 2005/370/ EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on Access to information, public participation in decision-making and access to justice in environmental matters (2005) OJ L 124.
[6] Consolidated version of the Treaty on the Functioning of the European Union (2012) OJ C326/47 (TFEU), art. 263(4).

avenue through which persons can challenge environmental administrative actions of the EU before the CJEU.

Nevertheless, concerns by the Aarhus Convention Compliance Committee (ACCC) have arisen regarding the EU's application of the Convention, for access to administrative justice for members of the public.[7] Therefore, if environmental non-governmental organisations (NGOs) and members of the public cannot access justice in environmental matters, then who should? ACCC's criticism towards the EU has led to amendments to Regulation 1367/2006,[8] which incorporated the Convention's internal review mechanism into the EU legal order concerning its institutions and bodies. This paper assesses the effectiveness of the 2021 amendments to Regulation 1367/2006 in addressing its non-compliance with the Aarhus Convention,[9] but it also explores any remaining violations concerning the Convention regarding access to justice of Regulation 2021/1767 on the application of the provisions of the Aarhus Convention to Community institutions and bodies. Therefore, the research question of this paper is: What are the key remaining non-compliance violations of the internal review procedure of Regulation 1367/2006 after the amendments introduced to it by Regulation 2021/1767, as per the Aarhus Convention?

The methodology of this paper is the legal doctrinal research method, as to answer the research question, an analysis of the law must be done. This is needed for understanding concepts, such as the internal review procedure, amendments to it, and non-compliance. The primary sources used are the Aarhus Convention, the Aarhus Regulations,[10] and CJEU case law. The main secondary sources are ACCC reports,[11] legal articles, and books. The paper consists of four parts. Firstly, the Aarhus Convention's access to justice pillar is assessed in the context of EU law. Secondly, the violations found by the ACCC regarding Regulation 1367/3006 are

[7] Aarhus Convention Compliance Committee, ACCC/C/2008/32 (EU) Part II adopted on 17 March 2017 (ACCC/C/2008/32 (part II)).
[8] Council Regulation (EC) No 1367/2006 of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters to Community institutions and bodies (2006) OJ L 264 (Regulation 1367/2006).
[9] Council Regulation (EU) 2021/1767 of 6 October 2021 amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters to Community institutions and bodies (2021) OJ L 356 (Regulation 2021/1767).
[10] The term 'Aarhus Regulations' refers to both Regulation 1367/2006 and Regulation 2021/1767.
[11] ACCC/C/2008/32 (part II).

analysed and the effectiveness of the main amendments to that Regulation to this end is compared. Thirdly, it is assessed whether there are any remaining violations of the Aarhus Regulations with the Convention. Lastly, the research question is answered, and conclusions are drawn.

2. Introduction of the Aarhus Convention into the EU Legal Framework

This section aims to provide an understanding of the Aarhus Convention, and analyse its access to justice pillar, as those concepts are important for answering the research question. The objective of the Convention is to safeguard the right of every person to live in an environment adequate for their health and well-being.[12] It aims to achieve that by establishing its three pillars: granting members of the public, whether individuals or associations,[13] rights regarding access to information,[14] public participation,[15] and access to justice.[16]

Presently, there are 47 parties to the Aarhus Convention, including the EU, which ratified it through the adoption of Decision 2005/370.[17] The EU incorporated Convention provisions into its secondary law via regulations and directives.[18] Regulation 1367/2006 was created to implement the Convention about Union institutions and bodies, thereby safeguarding the right of access to justice in environmental matters to members of the public,[19] the access to environmental information,[20] and the right to public participation.[21] It is important to note that Regulation 1367/2006 has been modified by Regulation 2021/1767 (see Section 3). The Aarhus Directives, on the other hand, serve to address the Member States concerning these matters.[22] This research focuses only on the

[12] Aarhus Convention, art. 1.
[13] ibid art. 2(4).
[14] ibid arts. 4-5.
[15] ibid arts. 6-8.
[16] ibid art. 9.
[17] Council Decision 2005/370/ EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on Access to information, public participation in decision-making and access to justice in environmental matters (2005) OJ L 124, arts. 1-2.
[18] TFEU, art. 218.
[19] Regulation 2021/ 1767, arts. 10-12.
[20] Regulation 2021/ 1767, arts. 3-8.
[21] ibid art. 9.
[22] Council Directive 2003/4/EC of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (2003) OJ L 41. See also Council Directive

Aarhus Regulations, as only they concern Union bodies. Subsequently, it is prudent to assess the access to justice provisions of the Aarhus Convention in order to understand the nature of public participation in the reviewability of environmental decision-making.

2.1. Internal Review Procedure under the Aarhus Regulations for Access to Justice

Article 9 of the Convention establishes the access to justice pillar, encompassing various sub-topics related to challenges in this domain. It sets out different rules depending on whether the issue is related to access to information,[23] participation in decision-making,[24] or seeking justice in environmental matters.[25] According to Article 9(3) of the Aarhus Convention:

> *"*members of the public have access to administrative or judicial procedures to challenge acts and omissions by private parties and public authorities which contravene provisions of its national law relating to the environment*"*.[26]

Furthermore, Article 9(4) Aarhus Convention, places an obligation on parties to ensure that the procedures in the preceding paragraphs of Article 9 are: "fair, equitable, timely and prohibitively expensive".[27] Specifically, this paper analyses the incorporation of Articles 9(3)-(4) of the Convention into the Aarhus Regulations, focusing on the internal review which they implement. The review of administrative omissions is not assessed.

The internal review is an avenue through which natural and legal persons may, and sometimes must, approach administrative authorities to seek reconsideration of administrative decisions before resorting to judicial review.[28] This offers advantages, including enhanced efficiency by reducing the burden of

2003/35/EC of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (2003) OJ L 156.
[23] Aarhus Convention, art. 9(1).
[24] ibid art. 9(2).
[25] ibid art. 9(3).
[26] ibid.
[27] ibid art. 9(4).
[28] Chris Backes and Mariolina Eliantonio, *Cases, Materials and Text on Judicial Review of Administrative Action* (Oxford Hart Publishing 2019) p. 103.

courts and offering the administration an opportunity to re-evaluate their decisions.[29] However, this system has its drawbacks, including the impartiality of the administration where the reviewing body is the same entity responsible for the initial decision.[30] Within the EU legal framework, notwithstanding the absence of a general internal review, there exist procedures analogous to the inter-administrative objection at a national level. These procedures are set up through the instrumentality of secondary law.[31] One instance of such a procedure of internal review established by secondary EU law is found in Article 10 Regulation 1367/2006, which is analysed in Section 3.1.

The rationale behind internal reviews in environmental matters in the EU is given because members of the public lack an inherent right to challenge Union decisions that do not directly or individually concern them.[32] The *Plaumann* criteria do not create any exceptions for environmental matters, regardless of the interests of the applicants affected.[33] Following the internal review procedure, however, persons can challenge the decision made during the review (Article 263(4)TFEU). The objective of this review is to assess whether the Union institution would reconsider its decision, as affirmed by Advocate General Michal Bobek.[34] It is noteworthy to establish that the review procedure has faced challenges, including statements that the EU is breaching international law, specifically the Aarhus Convention, which subsequently necessitated the revision of Regulation 1367/2006.[35] It is important to assess the nature of the particular breaches at hand, and evaluate how the EU may have addressed them. Subsequently, the way in which the original Aarhus Regulation is analysed, followed by an evaluation of remaining non-compliances despite such amendments in section 4.

[29] Antonio Cassatella, Ligugnana Giovanna, Barbara Marchetti, *Administrative Remedies in the European Union: the Emergence of a Quasi-Judicial Administration* (G. Giappichelli Turin 2017) p. 1.
[30] Backes and Eliantonio (n 27) p.104.
[31] ibid p. 105.
[32] Case C-25/62 *Plaumann v Commission of the EEC* (1963) ECLI:EU:C: 1963:17.
[33] Case T-585/93 *Stichting Greenpeace Council (Greenpeace International) and others v Commission of the European Communities* (1995) ECR I-01651, para. 50.
[34] Case C-82/17 P T*estBioTech and Others v European Commission* (2019) EU:C: 2018:837, Opinion of AG Bobek, paras. 40-41.
[35] ACCC/C/2008/32 (part II), para. 121.

3. 2021 AMENDMENTS TO THE AARHUS REGULATION

Regulation 2021/1767 amended Regulation 1367/2006 due to the ACCC's findings that the EU breached the Convention's Articles 9(3)-(4) regarding access to justice.[36] The ACCC is established to fulfil a review of compliance with the Convention under the Compliance Review Mechanism.[37] It asserted that neither Aarhus Regulation 1367/2006 nor CJEU case law aligned with the obligations outlined in the aforementioned Convention paragraphs.[38]

After the ACCC findings, the Commission issued the Proposal for amendment of Regulation 1367/2006,[39] which culminated in Regulation 2021/1767. That Regulation introduced three main amendments concerning the internal review,[40] namely the opening up of the internal review procedure for members of the public, the expansion of the scope of administrative acts amenable to internal review, and the removal of legally binding prerequisites for environmental decisions (see section 3.1 and 3.2). The subsequent sections compare Regulation 1367/2006 with Regulation 2021/1767 and scrutinise which aspects of the Convention have been rectified.

3.1. OPENING THE INTERNAL REVIEW PROCEDURE TO THE MEMBERS OF THE PUBLIC

The internal review was outlined in Articles 10-12 Regulation 1367/2006, where Article 10 offered this procedure only to eligible environmental NGOs defined by Article 11. This internal review procedure is the implementation of Article 9(3) of the Aarhus Convention.

The main conditions established by Article 11 of Regulation 1367/2006 for NGOs to have standing to request internal review of a decision are that they are established as an independent non-profit legal entity within a Member State,[41] its

[36] ACCC/C/2008/32 (part II), para. 121.
[37] Aarhus Convention, art. 15.
[38] ibid para.122.
[39] Commission, Proposal for a Regulation of the European Parliament and of the Council on amending Regulation (EC) No 1367/2006 of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters to Community institutions and bodies COM (2020) 642 final.
[40] Regulation 2021/1767, art. 1(4)-(7).
[41] Regulation 1367/2006, art. 11(1)(a).

purpose is active environmental protection,[42] it has existed for over two years, and has actively pursued its objective,[43] and the subject matter of internal review covers the scope and activities of that NGO.[44] According to Article 12 Regulation 1367/2006, NGOs can request an internal review, which subsequently allows them to institute proceedings before the CJEU. This has to be done within six weeks.[45] The request must be sent to the same department responsible for the application *"*of the provision based on which the administrative act was adopted*"*, according to Article 3 Commission Decision 2008/401,[46] which decides if it should carry out the internal review. A positive or negative decision is given by that EU department within 12 weeks.[47] In case of a negative decision or a refusal to act, the NGO can institute proceedings before the CJEU.[48] This action for annulment specifically targets the decision made by the EU institution following the internal review, rather than challenging the original act itself.[49]

3.1.1. Regulation 1767/2021: Enhanced Public Access?

Initially, Article 10(1) Regulation 1367/2006 only allowed NGOs to request an internal review. Nevertheless, Article 9(3) Aarhus Convention requires access to administrative procedures for members of the public. The ACCC stated that the EU has failed to implement Article 9(3) of the Convention, as that provision includes all members of the public, but not exclusively NGOs.[50] Thus, one of the main amendments was opening up the internal review for members of the public.[51] For them to bring such a request they have to demonstrate that they are directly affected in comparison with the public at large and that they meet one of the two alternative criteria.[52]

[42] Regulation 1367/2006, art. 11(1)(b).
[43] ibid art. 11(1)(c).
[44] ibid art. 11 (1)(d).
[45] ibid art. 10 (2).
[46] Commission Decision 2008/401/EC of 30 April 2008 amending its Rules of Procedure as regards detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters to Community institution and bodies (2008) OJ L 140.
[47] Regulation 1367/2006, art. 10(2).
[48] TFEU, art. 263.
[49] C-458/19 P *ClientEarth v European Commission* (2021) ECLI:EU:C:2021:802, para. 50.
[50] ACCC/C/2008/32 (part II), paras. 92-93.
[51] Regulation 2021/1767, art. 1(2)(a).
[52] ibid, art. 1(3)(a).

The first alternative is that they must demonstrate an impairment of rights resulting from the contravention of EU environmental law and that the impact of the violation must be specific to them in comparison with the public at large.[53]

The second alternative for members of the public requires demonstrating sufficient public interest. This is met by persons who secure support from a minimum of 4000 members of the public residing or established in at least five different Member States, with at least 250 members of the public coming from each of those Member States.[54] Members of the public are required to demonstrate:

*"*the existence of a public interest in preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilisation of natural resources, or in combating climate change*"*.[55]

Furthermore, the time limit for making such a request has been amended from six weeks to eight weeks.[56] Subsequently, the new amendment, although still restrictive for members of the public, is compatible with the text of the Aarhus Convention, as that Convention does not provide for an absolute or unrestricted right for the public to seek an internal review and have access to justice.

3.2. The Amendment to the Definition of an Administrative Act

An internal review of an administrative act can be asked by an NGO to the EU in line with Article 10(1) Regulation 1367/2006. Article 2(1)(g) defines an administrative act as: *"*any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects".[57] As such, three conditions had to be fulfilled for the act to be reviewable. The measure had to be of individual scope, had to be taken by an EU body or institution (in a non-legislative or judicial capacity),[58] and had to generate external legally binding effects. Additionally, acts within specific fields were also not amenable to internal review.[59]

[53] Regulation 2021/1767recital 19.
[54] ibid art. 1(3)(a).
[55] ibid recital 20.
[56] ibid art. 1(2)(a).
[57] ibid, art.2(1)(g).
[58] ibid art. 2(1)(c).
[59] Ibid art. 2(2).

Firstly, Regulation 2021/1767 significantly expanded the scope of administrative acts amenable to internal review. Newly, any action that contravenes environmental law can now be challenged, rather than only actions that were adopted within specified Treaty policy fields on environmental law.[60] Secondly, Regulation 2021/1767 expanded the scope of administrative acts to include any non-legislative acts of general application.[61] On the other hand, Regulation 1367/2006 only allowed for the internal review of decisions of an individual scope. Lastly, the 2021 Regulation has removed the legally binding pre-requisite from the definition of an administrative act in the 2006 Regulation, potentially paving the way for non-binding measures to be amenable to review (discussed in section 4.2.3). In the following section, the reviewability of administrative acts under Regulation 1367/2006 is assessed, followed by an analysis of the changes introduced by the 2021 amendments.

3.2.1. Definition of Legislative & Non-Legislative Acts

The previous section mentioned the amendment to the definition of an administrative act, which now includes non-legislative acts of a general scope. Accordingly, it is prudent to analyse the distinction between legislative and non-legislative acts, and the interplay with the scope of internal review under the Aarhus Regulation.

Before the Lisbon Treaty entered into force in 2009, no formal distinction between legislative and non-legislative acts was made within the founding Treaties.[62] This is reflected in Regulation 1367/2006, which entered into force before the Lisbon Treaty, where no reference is made to legislative or non-legislative measures. However, Article 2(1)(c) provided that a Community institution or body does not include those that act in a legislative or judicial capacity. As such, whenever an EU body or institution acted in a legislative capacity, this act could not have been challenged under the review procedure.

[60] Luca De Lucia, 'The New Aarhus Regulation and the Defensive Behaviour of the European Legislator' (2022) 15 2 Review of European Administrative Law, p. 22 <https://doi.org/10.7590/187479822X16589299241736> accessed on 10 October 2023.
[61] Regulation 2021/1767, art. 1(1)(g).
[62] Jonas Bering Liisberg, 'The EU Constitutional Treaty and its distinction between legislative and non-legislative acts–Oranges into apples?' (2006) No. 1. Jean Monnet Chair, p. 5; See also Case T-9/19 *ClientEarth v European Investment Bank (EIB)* (2021) EU:T:2021:42, para. 121.

Specifically, under the definition of an administrative act under Article 2(1)(g) Regulation 1367/2006, the requesting NGO needed to allege that the measure for which the internal review is requested is of an individual scope, otherwise, the EU body will deem the request inadmissible.[63] Whereas the CJEU had not decided on a concrete test for assessing what an individual scope is defined as it undertook a case-by-case approach similar to that of *Plaumann* (although it had rejected the test *stricto sensu*).[64] Specifically, it had deemed that measures addressed to a single Member State are to be considered to be of general application,[65] and only measures such as individual permits,[66] or GMO authorisations fulfil the criteria of individual scope. [67]

Moreover, the Lisbon Treaty formally introduced a distinction between legislative,[68] and non-legislative acts.[69] This is reflected within Regulation 2021/1767, which had replaced the wording of Article 2(1)(g) with the following provision:

"administrative act" means *"*any non-legislative act adopted by a Union institution or body, which has legal and external effects and contains provisions that may contravene environmental law".

As such, any non-legislative act adopted by a Union body not acting within a legislative or judicial capacity can now be reviewed. Whereas the former wording of Regulation 1367/2006 referred to measures of individual scope, the broader reference to non-legislative acts now includes measures that have general application.[70]

[63] Angelika Krężel, 'Aarhus Regulation Administrative (self-) Review Mechanism: The Inevitable Failure to Contribute to Access to Justice in the EU?' (2023) European Energy and Environmental Law Review, p. 141.
[64] ibid p. 141; See also Case T-338/08 *Stichting Natuur en Milieu and Pesticide Action Network Europe v European Commission* (2012) ECLI:EU:T:2012:300, para. 47
[65] Case T-396/09 *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht v European Commission* (2012) ECLI:EU:T:2012:301, para. 36.
[66] Krężel (n 63) p. 139.
[67] Case T-12/17 *Mellifera eV, Vereinigung für wesensgemäße Bienenhaltung v. European Commission* (2018) ECLI:EU:T:2018:616, paras. 48 and 73.
[68] Acts adopted under the Ordinary, Special or Innominate Legislative Procedure (Articles 289 and 294 TFEU).
[69] Articles 290 and 291 of the TFEU. See also Case T-18/10 *Inuit Tapiriit Kanatami and Others v European Parliament and Counci*l [2011] EU:T:2011:419, para. 56.
[70] Krężel (n 63) p. 141.

The reform to non-legislative acts of general application had been sparked by the ACCC[71] and by CJEU case law,[72] who argued that access to justice under the Convention had been impaired by the requirement to demonstrate individual scope, as the vast majority of environmental acts are of general application.[73] The reform had allowed for a broader range of acts to be reviewed, such as a Council Regulation modifying fishing opportunities for certain fish,[74] and brought the EU a step closer to being compliant with the Convention. As such, the EU Commission had resolved one of the non-compliances with the Aarhus Convention as addressed by the ACCC, by amending the Aarhus Regulation.

3.2.2. Binding & External Legal Effects

Although regulatory acts of general application have been made open to review under the amendment, they must generate external and legal effects. Regulation 2021/1767 had slightly modified the wording under Article 2(1)(g) of Regulation 1367/2006 which now reads that the act has to produce external and legal effects instead of legally [binding] and external effects.[75] Although measures lacking external effect, such as opinions or preparatory material, cannot be internally reviewed,[76] non-binding decisions like soft law might be. However, this has not been made entirely clear,[77] as the 2021 Regulation does not elaborate on the determination of external legal effect outside of the aforementioned examples.[78] The requirement to maintain that administrative acts subject to review must produce external effects has been kept to streamline the Regulation with the scope of the competences of the CJEU under the TFEU, which can only review acts intended to produce external legal effects.[79]

This approach has remained a challenge, as the ACCC has stated that keeping an indiscriminate requirement of both, external and legally binding effects

[71] ACCC/C/2008/32 (part II), para. 103.
[72] Case T-396/09 *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht v European Commission* (2012) ECLI:EU:T:2012:301, para. 65.
[73] ibid.
[74] 'Requests for internal review under the Aarhus regulation' (*Consilium Europa*, 11 July 2023) <https://www.consilium.europa.eu/en/documents-publications/requests-for-internal-review-under-the-aarhus-regulation/> accessed 18 October 2023.
[75] Regulation 2021/1767, art. 1(1)(g).
[76] ibid recital 11.
[77] De Lucia (n 60) p. 22.
[78] Regulation 2021/1767, recital 11.
[79] TFEU, art. 263 (1).

on administrative review under Regulation 1367/2006 is not in line with the Convention.[80] This is later explained in section 4. As such, Regulation 2021/1767 had failed to address the challenge of external legal effect outlined by the ACCC.

3.2.3. Contravention of Environmental Law

Lastly, according to the definition outlined in Article 2(1)(f) Regulation 1367/2006, the given administrative measure had to be taken within a competence specifically set to contribute to Treaty policy objectives on the environment. The requirement for the reviewability of administrative acts to fall under specific Treaty provisions for environmental law has led to challenges regarding the EU's compliance with the Aarhus Convention, which according to the ACCC requires that any action that contravenes environmental law be subject to review, regardless of its scope within the EU Treaties.[81] For example, in *ClientEarth v EIB,* an NGO had filed a request for internal review to the European Investment Bank (EIB), which had committed to funding the Curtis Project meant to secure biomass energy conversion in Spain. The request had been dismissed by the EIB on grounds of inadmissibility, which claimed that their steps had not been taken under the notion of environmental law within the Treaty, and that although it affected environmental law, such a strenuous interpretation would exceed the scope of Regulation 1367/2006.[82]

In the aforementioned case, the CJEU ruled that the definition of environmental law must be given a broad interpretation, and with reference to Article 192(2) TFEU, does not preclude measures taken by bodies with a fiscal policy objective. As such, the CJEU had expanded the interpretation of the scope of measures taken within specific Treaty policy objectives on the environment and declared that in line with Article 9 of the Convention, any measures that run counter to environmental law should be open for challenge.[83] The ruling had come nearly 15 years after Regulation 1367/2006 had been put in place, during a time when the Commission was already reconsidering to modify it. As such, in cases where bodies such as the EIB had decided to reject requests for internal review

[80] ACCC/C/2008/32 (part II), paras. 103-104.
[81] ibid paras. 98-100.
[82] Case T-9/19 *ClientEarth v European Investment Bank (EIB)* (2021) EU:T:2021:42, paras. 60 and 62.
[83] ibid para.125.

based on the assumption that there had to be a clearly defined objective to pursue environmental matters, the only resort for NGOs was to seek judicial redress.[84] Nevertheless, the CJEU's interpretation in the case served as an inspiration for the proposal for Regulation 2021/1767.[85]

In line with that CJEU ruling and the ACCC's opinion on the aforementioned contravention of environmental law compliance,[86] the Commission had acknowledged that the interpretation given to environmental law within Regulation 1367/2006 is too narrow in its proposal, and as such, had broadened it in Regulation 2021/1767.[87] The definition under Article 2(1)(g) Regulation 2021/1767 now reads: *"*and contains provisions that may contravene environmental law within the meaning of point (f) of Article 2(1)*"*, thus allowing for the reviewability of any acts that are amenable to impair environmental law.[88] This change was also able to appease the shortcomings addressed by the ACCC, which deemed that any act that contravenes environmental law should be amenable to judicial review to ensure compliance with the Convention.[89]

4. Remaining Non-Compliance of Regulation 2021/1676 with the Aarhus Convention

The EU has committed to take strides to address the shortcomings in ensuring compliance with the Aarhus Convention.[90] However, the following section assesses three key persisting challenges as addressed by the ACCC,[91] and the academic sphere,[92] namely the issues of external legal effect, administrative impartiality, and the lack of state aid review.

4.1. Non-Compliance of External Legal Effect

[84] *ClientEarth v European Investment Bank,* para. 125.
[85] De Lucia (n 60) p. 21.
[86] ACCC/C/2008/32 (part II), paras. 98-100.
[87] 'EU implementation of the Aarhus Convention in the area of access to justice in environmental matters' (*European Commission,* 2018*)* <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1743-EU-implementation-of-the-Aarhus-Convention-in-the-area-of-access-to-justice-in-environmental-matters_en> accessed 18 October 2023.
[88] Regulation 2021/1767, art. 2(1)(g).
[89] ACCC/C/2008/32 (part II), paras. 98-100.
[90] Marjan Peeters and Mariolina Eliantonio, *Research handbook on EU environmental law* (Edward Elgar Publishing Limited: Cheltenham 2020) p. 159.
[91] ibid.
[92] De Lucia (n 60), p. 22

Despite the 2021 amendment, the Commission has not significantly altered the requirement for external legal effects of administrative measures under Regulation 1367/2006 (see section 3.2.2). Although the requirement for the acts to be formally binding had been removed in the amendment, the contested act still must intend to produce effects vis-a-vis third parties.[93]

In response to remarks made by the complainant ClientEarth, the ACCC referred to acts that do not provide external legal effects, but may still be amenable to review under the Convention.[94] Although the ACCC did not explicitly mention the specific scenarios that might fall under Article 9 of the Convention despite not producing external legal effect, it did provide that imposing a blanket ban on internal review of acts that do not produce external or legally [binding] effects is inconsistent with the obligations under the Convention.[95]

The CJEU had itself been hesitant to adopt a more inclusive interpretation of the justiciability of acts without external legal effect and dismisses from its scope acts that only legally affect the internal proceedings of an EU body or institution.[96] As such, the CJEU excludes the review of acts that might impair environmental law indirectly.[97] From the conclusions drawn by the ACCC, it is apparent that a blanket ban for internal review is unjustified. The Commission itself acknowledged that such a restriction is an issue for ensuring compliance with the Convention.[98] At the same time, however, there seems to be little room for remedying this particular defect, as the non-justiciability of acts without external legal effects seems to stem from primary EU law.[99]

[93] Regulation 2021/1767, recital 11.
[94] 'Communication ACCC/C/2008/32 (Part II) - Update on Court of Justice rulings in cases C-401/12 P to C- 405/12 P' (*UNECE*, 23 February 2015) <https://unece.org/DAM/env/pp/compliance/C2008-32/communication/frCommC32_23.02.2015/frCommC32_comments_on_CJEUs_ruling_of_15.01.15.pdf> accessed on 18 October 2023.
[95] ACCC/C/2008/32 (part II), paras. 103-104.
[96] Case T-9/19 *ClientEarth v European Investment Bank (EIB)* (2021) EU:T:2021:42, paras. 153 and 170.
[97] ibid para. 152.
[98] 'EU implementation of the Aarhus Convention in the area of access to justice in environmental matters' (*European Commission,* 2018*)* <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1743-EU-implementation-of-the-Aarhus-Convention-in-the-area-of-access-to-justice-in-environmental-matters_en> accessed 18 October 2023.
[99] Krężel (n 63) p. 141.

4.2. Lack of Impartiality of the Internal Review Procedure

In the context of non-compliance concerns, a significant issue centres on the question of impartiality within the internal review.[100] Article 9(4) of the Convention stipulates that access to justice in environmental matters must be facilitated through procedures that are adequate, effective, and fair.

A key point of contention arises from the fact that the EU institution responsible for issuing the contested act is the same institution responsible for deciding on the complaint for the internal review.[101] Furthermore, according to statistics, between 2007 and 2021 there were "48 requests submitted for internal review, with the majority being declared inadmissible, and those deemed admissible ultimately rejected".[102] Those circumstances raise legitimate concerns about the inherent bias of the body conducting the internal review.[103] According to the ACCC, however, there would be a lack of impartiality only if the internal review were the sole available remedy.[104] Therefore, the ACCC states that it would not be problematic if the public could challenge the administrative act through both the internal review process and if necessary, in front of the CJEU.[105]

Contrary to those statements, the CJEU ruled in the *ClientEarth v. Commission* T-108/17, that the scope of judicial review in such cases is limited to assessing the legality of the decision to reject the request for internal review, rather than the legality of the overarching act being initially contested.[106] This stance by the EU's judiciary has been reaffirmed in the *ClientEarth v. European Commission* C-458/19 P case.[107] Consequently, the administrative act itself cannot be challenged before the CJEU, leaving the internal review as the only remedy available for members of the public. Accordingly, this violates the requirement of impartiality as addressed by the ACCC.

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[100] De Lucia (n 60) p.22; See also ClientEarth, 'Pleading notes of ClientEarth to the Aarhus Convention Compliance committee in relation to communication ACCC/C/2008/32 Part II' (*UNECE*, 2015) <https://unece.org/DAM/env/pp/compliance/C2008-32/communication/frCommC32_opening_statement_CC49_01.07.2015.pdf> accessed on 10 October 2023.
[101] Commission Decision 2008/401, art. 3.
[102] De Lucia (n 60) p. 27.
[103] Case C-894/19 P *Parliament v UZ* [2021] EU:C:2021:863, para. 54.
[104] ACCC/C/2008/32 (part II), para.114.
[105] ibid paras. 114-116.
[106] Case T-108/17 *ClientEarth v Commission* [2019] EU:T:2019:215, para. 53.
[107] Case C-458/19 P *ClientEarth v Commission* [2021] EU:C:2021:802, para. 49.

4.3. NON-REVIEWABILITY OF STATE AID

Finally, the last key selected remaining non-compliance involves the ability for the state aid decisions to fall within the scope of internal review under the Aarhus Regulation. Article 2(2) of the Aarhus Regulation provides for the definition of acts that are subject to internal review (see section 3.2). However, that same provision excludes from its scope acts, which have been taken under Treaty provisions for competition rules.[108] Namely, Article 2(2)(a) refers to Article 87 of the TEC Treaty (now Article 107 of the TFEU), which governs the provision of state aid given by a Member State. As such, circumstances that fall within this category would be excluded from administrative acts subject to internal review.[109]

This has been further solidified by the European Commission's rejection of ClientEarth's request for an internal review of the Commission's statement regarding the GreenHouse Gas Emissions Directive.[110] The European Commission rejected the request for internal review under the explanation that "any measures taken by the Commission under Articles 86 and 87 of the EC Treaty … would not be a reviewable administrative act as it is excluded from the definition of Article 2 of the Aarhus Regulation".[111] As such, the Commission's statement, which relates to possible State aid to support the construction of new power plants, falls out of the scope of internal review of the Aarhus Regulation.[112]

Accordingly, the ACCC held that the EU is non-compliant with the provisions of the Aarhus Convention, as the option for internal review has to be granted to any provision that is claimed to contravene environmental law, regardless of whether it falls within the scope of competition State aid law.[113] Thus, the exclusion of decisions relating to State aid violates the Aarhus Convention.

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[108] Regulation 2021/1767, art. 2(2)(a).
[109] Ökobüro – Allianz der Umweltbewegung, 'Communication to the ACCC regarding the EU in state aid decision for Hinkley point' (*unece.org*, 2015) <https://unece.org/DAM/env/pp/compliance/C2015-128_European_Union/Communication> accessed on 9 June 2024, p. 16.
[110] ClientEarth, 'Commission reply to request SG-Greffe(2009) D2393' (*circabc.europa.eu*, 29 September 2022) <https://circabc.europa.eu/ui/group/3b48eff1-b955-423f-9086-0d85ad1c5879/library/003d62bd-eb92-4e4a-a7e5-dc38c1c5e468/details?download=true> accessed on 9 June 2024.
[111] ibid p. 3.
[112] ibid.
[113] Ökobüro – Allianz der Umweltbewegung, (n 109), pp. 16-18.

5. Options for Redress

Although the ACCC states that review must also be afforded to measures not having external legal effects, this interpretation has been rejected in practice, due to the limitations of judicial review imposed by Article 263 of the TFEU about external effect vis-à-vis third parties. As such ensuring full compliance with the Aarhus Convention would require the EU to modify the treaties to allow for a more comprehensive judicial review of access to information.

This same prohibition does not seem in place for the EU administration. Namely, the definition of acts subject to access to information could be expanded under the Aarhus Regulation to include those without external legal effect. As such, it would now be possible to include those acts under the internal review mechanism of EU institutions. Although parties may not enjoy the full protection of the EU review mechanism for the given acts, that is as the judicial review would be barred, it would still have brought the EU closer to ensuring full compliance with the Aarhus Regulation as it would be possible to at least request internal review of the acts without external legal effect. However, the internal review would raise concerns over impartiality (see section 4.2), specifically as the internal review for acts under the mechanism would now become the only remedy available. That is why another protective mechanism must be implemented to ensure that the ACCC's findings are consistently applied, which is why it is prudent to analyse how this deficiency can be remedied by the EU.

As outlined in the former section, the main point of contention about administrative impartiality is that the same EU body that issued a decision would now be the one to subsequently review it. However, such an issue would not arise if an independent and impartial review body were established to internally review the decision of an EU institution in its place. Although an independent body established separately from the Commission could challenge Commission decision-making exclusivity under Article 13(2) of the TEU, a body established within the institution that is given *de facto* independent status, would fulfil the requirements of the Treaty and of the Aarhus Convention. Such a system has already been established concerning the Single Supervisory Mechanism, which

established an administrative board of review within the ECB,[114] or the establishment of the EDPB,[115] which were both established under the Commission but given independent functioning status.

Lastly, to ensure full compliance with the Aarhus Convention, the exclusion of State aid decisions from the scope of administrative acts that are challengeable under the Aarhus Regulation needs to be removed. The European Commission has already identified this as an issue and is working on modifying the relevant provisions in the Aarhus Regulation to that effect.[116]

As such, the EU can take limited action that nevertheless addresses several of the non-compliance with the Aarhus Convention without resorting to changing the EU Treaties. Namely, it can allow for the internal review of administrative acts without external legal effects through the Aarhus Regulation, establish an independent body under the European Commission to internally review environmental administrative acts, and remove the non-reviewability of State aid decisions from the scope of internal review under the Regulation.

6. CONCLUSIONS

The issue of access to justice within administrative procedures for members of the public, particularly in the realm of environmental law, is of paramount importance in the context of 21st-century European environmental democracy. This paper aims to answer this research question: What are the key remaining non-compliance violations of the internal review procedure of Regulation 1367/2006 after the amendments introduced to it by Regulation 2021/1767, as per the Aarhus Convention?

Therefore, the answer to this research question is that notwithstanding the 2021 amendments made to Regulation 1367/2006, which successfully addressed specific non-compliances related to broadening access for members of the public,

[114] Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (2013) OJ L 287.
[115] Council Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (2016) OJ L 119, art. 68.
[116] European Commission, 'Aarhus Convention Compliance Committee case on State aid: implications/options' (*ec.europa.eu*, 2022) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13462-Aarhus-Convention-Compliance-Committee-case-on-State-aid-implications-options_en> accessed on 9 June 2024.

making acts of general scope amenable to judicial review, and refining the definition of environmental matters, there are crucial issues which remain unaddressed by the EU. Notably, there are concerns about lack of impartiality, as the EU body issuing an act is the same one responsible for reviewing it. This renders the internal review procedure the sole remedy for access to justice in environmental matters, a situation deemed in violation of the Aarhus Convention by the ACCC. Therefore, the Aarhus Regulations do not ensure a fair procedure within the meaning of Article 9(4) of the Convention, as even after the new amendments were introduced, the lack of impartiality issue was left unsolved. Additionally, the 2021 amendments fail to rectify the issue that measures without external effect remain immune to review, which is also a clear persistent violation of the Aarhus Convention. This non-compliance remains problematic, as the justiciability of acts that do not have external legal effects goes against EU primary law. Lastly, the non-reviewability of decisions relating to environmental State aid remains a further hurdle for attaining EU compliance with the Aarhus Convention, as any action that contravenes environmental law is required to be internally reviewable by the EU institutions.

The research mentions several options to address the EU's remaining non-compliance with the Aarhus Convention, however, these solutions may only partially resolve the remaining non-compliance without resorting to modifying the EU Treaties, which may ultimately be required to ensure full compliance with the Convention.

In conclusion, while the 2021 amendments have taken steps to address certain non-compliances with the Aarhus Convention, critical violations of Article 9 endure. This necessitates further amendments to EU law to align its practices closer with the Aarhus Convention's environmental justice.

European Administrative Law: Accountability at the European Border: A Critical Examination of Frontex's Internal Mechanisms in Migration Management

Charlotte Tamigneaux-Weerts, Canan Ersoy and Deirbhle Clarke

TABLE OF ABBREVIATIONS

CF	Consultative Forum
EBCG	European Border and Coast Guard Agency
ED	Executive Director
EU	European Union
FRO	Fundamental Rights Officer
MB	Management Board
NGO	Non-Governmental Organisation
SCIFA	Strategic Committee on Immigration, Frontiers, and Asylum
TFEU	Treaty on the Functioning of the European Union
UN	United Nations

1. INTRODUCTION

The European Union's (EU) Border and Coast Guard Agency, known as FRONTEX (or the Agency) plays a central role in coordinating and executing various activities aimed at safeguarding the EU's external borders. The Agency was originally set up in 2004, through Council Regulation (EC) 2007/2004.[1] Since then, its powers, competences and budget have tremendously been expanded. The Agency's mandate was first increased in 2016 through the adoption of Regulation (EU) 2016/1624 which came about as a response to 2015 refugee crisis.[2] With the adoption of this new regulation, the Agency's workforce was more than doubled, and it was given more access to staff and equipment provided by the Member States.[3] This regulation was then repealed in 2019 by Regulation (EU) 2019/1986.[4] However, with this expansional growth in FRONTEX's powers came a wave of controversies and criticism, particularly in relation to issues of accountability.

This paper delves into the complex network of international accountability mechanisms within FRONTEX, encompassing the individual complaint mechanism, the tasks responsibilities of the Fundamental Rights Officer (FRO) and the role of the Consultative Forum (CF), which are all internal mechanisms provided for by Regulation (EU) 2019/1986. The primary objective of this essay is to evaluate how these internal mechanisms contribute to ensuring accountability for FRONTEX's actions in the context of the EU's framework for border control and migration management. To this end, this paper aims to answer the following research question*:* To what extent should the internal accountability mechanisms of FRONTEX be altered to effectively ensure accountability for its actions in the context of border control and migration management within the European Union?

[1] Council Regulation (EC) 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (2004) OJ L 349/1.
[2] Council Regulation (EU) 2016/1624 of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 and repealing Regulation (EC) 863/2007, Council Regulation (EC) 2007/2004 and Council Decision 2005/267/EC (2016) OJ L 251/1.
[3] Mariana Gkliati and Jane Kilpatrick, 'Crying Wolf Too Many Times: The Impact of the Emergency Narrative on Transparency in FRONTEX Joint Operations' (2021) 17 Utrecht Law Review 174 p.60 <https://utrechtlawreview.org/articles/10.36633/ulr.770> accessed 6 May 2024.
[4] Council Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) 1052/2013 and (EU) 2016/1624 (2019) OJ L 295/1 (European Border and Coast Guard Regulation).

This paper is structured as follows: Chapter I provides an overview of FRONTEX's historical evolution, powers and legal framework within the EU, and introduces the principle of accountability. Chapter II details FRONTEX's international accountability mechanisms by examining the legal and institutional frameworks of three specific means to hold FRONTEX accountable internally: the complaint mechanism, the role of the Fundamental Rights Officer and the Consultative Forum. The choice to focus on FRONTEX's internal mechanisms follows from the fact that these have not been explored much by scholars, despite being an important part of the Agency's accountability system. Indeed, most of the academic literature focuses on FRONTEX's external accountability mechanisms, and thereby omits to shed light on the internal mechanisms. Next, Chapter III focuses on case studies, challenges and criticisms faced by the above-mentioned mechanisms. Chapter IV contains recommendations for improvement based on the analysis of the case studies, before being followed by a conclusion summarising the findings and arguments of this paper and answering the initial research question.

2. Chapter I: Setting the Stage: Understanding FRONTEX's Background, Context, and Accountability

2.1. Historical Evolution of FRONTEX and its Legal Framework

In 1999, the European Council on Justice and Home Affairs concentrated its efforts on further strengthening cooperation between the Member States in the areas of migration, asylum, and security. Consequently, an External Border Practitioners Common Unit was created, which was composed of members of the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA), as well as heads of national border control services.[5] For two years, this Common Unit was in charge of national projects of ad-hoc Centres on Border Controls and implemented common operations related to border management.[6] The European

[5] Frontex Official Website, 'Who We Are' (Frontex Official Website), <https://www.frontex.europa.eu/about-frontex/who-we-are/tasks-mission/> accessed 24 February 2024.

[6] Marta Pawelczyk, 'Frontex - the only organisation that fights for Europe against illegal immigrants' (2015) 8 Security and Defence Quarterly 3 p. 75 <https://securityanddefence.pl/-Frontex-the-only-organisation-that-fights-for-Europe-against-illegal-immigrants,103294,0,2.html> accessed 6 May 2024.

Council of the European Union – wanting to improve procedures and working methods of the Common Unit – eventually decided to go a step further with the adoption of Council Regulation (EC) 2007/2004 in October 2004, which led to the creation of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU (FRONTEX), based on Articles 77(2)(b)(d) and 79(2)(c) of the Treaty on the Functioning of the European Union (TFEU).[7]

In September 2016, this first regulation was replaced by Regulation (EU) 2016/1624 (the 'EBCG Regulation "), which set up a new FRONTEX, the European Border and Coast Guard Agency (EBCG). This new regulation amended the mandate of FRONTEX by announcing a fully-fledged integrated policy (thereby making it clear the FRONTEX was tasked with not only managing external borders, but also coordinating with other EU agencies and member states to address migration and security), a multilevel national-European Border Guard and reinforced FRONTEX's coordinating role towards the national authorities dealing with border protection that operate in the hotspots in search and rescue operations and in return of illegal migrants.[8] Although the regulation was praised by the Commission at the time it was published, it was also criticised by scholars arguing that the text had been proposed, negotiated and adopted in an extremely short time, and by Non-Governmental Organisations (NGOs), who argued that it would most likely have a negative impact on the fundamental rights of migrants and refugees coming to the EU territory.[9] The 2016 Regulation nevertheless introduced new important elements, such as the individual complaint mechanism (enshrined in Article 72 of the Regulation), which proved to be an essential – although not flawless – internal accountability mechanism.[10]

[7] Frontex (n 5); Consolidated version of the Treaty on European Union (2012) OJ C326/13.
[8] Emilio De Capitani and Francesca Ferraro, 'The new European border and coast guard: yet another "halfway" EU reform?' (2016) 17 Era Forum: Journal of the Academy of European Law, 3 pp. 386-387 <https://www.sipotra.it/wp-content/uploads/2017/02/The-new-European-Border-and-Coast-Guard-yet-another-"half-way"-EU-reform.pdf > accessed 27 February 2024.
[9] ibid; International Federation For Human Rights Official Website, 'A reinforced Frontex agency: EU turns a deaf ear to NGO's warnings' (International Federation for Human Rights) <https://www.fidh.org/en/issues/migrants-rights/a-reinforced-frontex-agency-eu-turns-a-deaf-ear-to-ngo-s-warnings> accessed 6 May 2024.
[10] Martina Previtello, 'Frontex actions beyond EU borders: Status agreements, immunities and the protection of fundamental rights' (2023) EUI, LAW, AEL, Working Paper, European Society of International Law (ESIL) Papers p. 6 <https://cadmus.eui.eu/handle/1814/75751> accessed 27 February 2024.

FRONTEX's mandate was once again updated in 2019 with the adoption of Regulation (EU) 2019/1986, which added combating terrorism to the Agency's objectives (Article 10(1)(q) of the Regulation).[11] Moreover, the Regulation gave FRONTEX powers to purchase and acquire its own equipment, directly employ its own "standing corps of border guards " with executive powers and increased its budget, making FRONTEX the biggest and fastest growing EU agency.[12] At present, this Regulation is still in force and regulates the Agency.

2.2. ACCOUNTABILITY WITHIN FRONTEX

As the largest EU agency, FRONTEX is subject to both internal and external accountability forums. The accountability principle, comprising an internal and external dimension, plays a crucial role in European administrative law. According to Mark Bovens, Dutch scholar of public administration, accountability is:

> "a relationship between an actor and a forum, in which the actor has the obligation to explain and justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences".[13]

The principle ensures that EU agencies, like FRONTEX, operate transparently, within the confines of the law, and with respect for fundamental rights. Under Article 6 Regulation 2019/1986, FRONTEX is subject to supervision by the European Parliament and the Council.[14] As a European agency, it is also subject to supervision by the European Ombudsman pursuant to Article 228 TFEU, the European Anti-Fraud Office as per Article 117 of Regulation 2019/1986, and the Court of Justice of the European Union based on Article 263 TFEU, including the Court of Auditors according to Article 116 of Regulation 2019/1986.

In addition to these external accountability mechanisms, internal mechanisms were also set up throughout the diverse regulations that regulate FRONTEX to allow the agency to self-monitor its actions and decisions. Presently, there are six internal mechanisms through which accountability is

[11] Gkliati and Kilpatrick (n 3), p. 60.
[12] ibid pp. 60-61.
[13] Mark Bovens, Robert Goodin, and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (online edition, Oxford Academic, 2014) p. 184 <https://doi.org/10.1093/oxfordhb/9780199641253.001.0001> accessed 26 February 2024.
[14] European Border and Coast Guard Regulation, art. 6.

currently controlled within FRONTEX. Three of them are explained in the next sections.

3. CHAPTER II: FRONTEX'S INTERNAL ACCOUNTABILITY MECHANISMS

FRONTEX's internal accountability mechanism includes the Fundamental Rights Officer, the individual complaint mechanism and the Consultative Forum. These mechanisms collectively uphold accountability within FRONTEX and have a defined legal basis established through the Regulation 2019/1896.

3.1. THE INDIVIDUAL COMPLAINT MECHANISM

In 2016, in response to the long-standing demands made by the European Ombudsman, FRONTEX established the individual complaint mechanism in Regulation 2016/1624.[15] The Regulation 2019/1986 improved the fundamental features of the individual complaint mechanism, including its position within FRONTEX's accountability structure. Article 110(6) of Regulation 2019/1896 allows any individual who believes their rights have been directly violated by FRONTEX staff or the Agency to lodge a complaint with the Fundamental Rights Officer.[16] Upon receiving a complaint, FRONTEX is obliged to acknowledge the receipt of the alleged violation in a timely manner under Article 110(3) of the Regulation.[17] Sub-section 7 of the same provision requires the Agency to establish clear procedures for handling complaints and provide feedback to complainants about the resolution.[18] This acknowledgement informs the complainant that their concerns are being addressed in line with the right to good administration and effective remedy.[19]

[15] Amélie Poméon, *FRONTEX and the EBCGA - A Question of Accountability* (1st edition, Wolf Legal Publishers, 2017), p. 134.
[16] European Border and Coast Guard Regulation, art. 110(6).
[17] ibid art. 110(3).
[18] ibid art. 110(7).
[19] David Fernandez Rojo, 'The Introduction of an Individual Complaint Mechanism within Fronted: Two Steps Forward, One Step Back' (2016) Tijdschrift voor Bestuurswetenschappen en Publiekrecht 4(5) p. 230 <https://www.researchgate.net/publication/299600516_The_Introduction_of_an_Individual_Complaint_Mechanism_within_Frontex_Two_Steps_Forward_One_Step_Back> accessed 6 May 2024.

In addition, in line with Article 111(4) of the Regulation, individual complaints are addressed by the Fundamental Rights Officer who may make recommendations based on findings after a thorough investigation.[20] Furthermore, it should be noted that the Charter of Fundamental Rights of the European Union serves as both the foundation for protecting individual fundamental rights and as guidance for the Fundamental Rights Officer in addressing alleged violations. This Mechanism is seen as a means for individuals to express their concerns and seek solutions compliant with EU regulatory requirements.

3.2. The Fundamental Rights Officer

The Fundamental Rights Officer (FRO) is responsible for developing and implementing FRONTEX's Fundamental Rights Strategy in accordance with Article 110(3) of Regulation 2019/1896.[21] This strategy sets forth the principles and actions necessary to uphold and promote fundamental rights within FRONTEX's procedures, making the FRO vital to FRONTEX's internal accountability mechanisms. The Fundamental Rights Officer's leading role is monitoring compliance with fundamental rights within FRONTEX as defined in Articles 109 and 110 of the Regulation.[22] This includes scrutinising border control and surveillance operations to assess compliance with EU fundamental rights standards.[23] Per Article 111(4), the FRO is mandated to coordinate the effort to ensure respect for fundamental rights — including addressing complaints — conduct investigations and develop recommendations based on the findings.[24]

The independence of the expert responsible for the monitoring and ensuring the respect of fundamental rights in FRONTEX's activities is enshrined in Article 110(1) of Regulation.[25] The FRO reviews the admissibility of complaints and forwards registered and admissible complaints to the Executive Director. The relevant authorities regarding fundamental rights within the Member

[20] European Border and Coast Guard Regulation, art. 111(4).
[21] ibid art. 110(3).
[22] ibid art. 109 and 110.
[23] Melanie Fink, 'Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU public liability law' (2017) The Meijers Research Institute and Graduate School of the Leiden Law School p. 43 <https://scholarlypublications.universiteitleiden.nl/handle/1887/58101> accessed 27 February 2024.
[24] European Border and Coast Guard Regulation, art. 111(4).
[25] ibid art. 110(1).

State concerned are informed during this procedure. FRO then monitors the further inquiries by the relevant authorities or the Member State.[26] In addition, the FRO is expected to report to the Management Board (MB) of FRONTEX on issues regarding fundamental rights and the Agency's compliance with these rights under Article 111(5).[27] This reporting is essential for accountability and transparency as it ensures that the Agency's governing body is aware of situations involving fundamental rights.

3.3. THE CONSULTATIVE FORUM

The Consultative Forum (CF) is an advisory panel for FRONTEX to acquire input from external stakeholders who have an interest in its actions. In accordance with Article 103 of Regulation 2019/1896, the Consultative Forum functions as a mechanism for dialogue and consultation between FRONTEX and external stakeholders, including NGOs and civil society organisations.[28] From 2020 to 2022, the CF had 13 members. These included United Nations (UN) organisations such as the UN High Commissioner for Refugees and the Office of the UN High Commissioner for Human Rights, EU agencies such as the European Asylum Support Office and the Fundamental Rights Agency as well as inter-governmental bodies such as the Council of Europe.[29] Non-governmental organisations were also occasionally involved.[30] Undeniably, taking into account external perspectives in the Agency's decision-making process aims to improve FRONTEX's accountability and transparency through the mechanisms in force. FRONTEX is required to provide the Consultative Forum with timely and effective access to information related to respect for fundamental rights. This requirement encompasses sharing data and reports, facilitating on-the-spot visits to its operation as well as sharing information about the follow-up actions taken in response to non-binding recommendations made by the CF in line with Article

[26] Frontex Official Website, 'Complaints Mechanism' (2020) <https://www.frontex.europa.eu/media-centre/multimedia/videos/complaints-mechanism-tKAj1m> accessed 6 May 2024.
[27] European Border and Coast Guard Regulation, art. 111(5).
[28] ibid art. 103.
[29] ECRE, 'Holding FRONTEX to Account: ECRE's Proposal for Strengthening Non-Judicial Mechanisms for Scrutiny of FRONTEX' (2021) <https://ecre.org/ecre-policy-paper-holding-frontex-to-account-ecres-proposal-for-enhancing-nonjudicial-scrutiny-mechanisms/> accessed 6 May 2024.
[30] ibid.

110(3) of the Regulation.[31] If the CF provides suggestions or advice, FRONTEX is obliged to report on how those recommendations have been addressed and whether any changes have been implemented.[32] All the contributions and insights taken by the Consultative Forum are documented and published annually in the form of a report.

4. Chapter III: Challenges and Criticism

Despite the wide array of accountability mechanisms offered by FRONTEX, concerns regarding the agency's actions in relation to human rights persist. It appears that the agency's activities have resulted in adverse effects on the fundamental rights of both asylum seekers and migrants.[33] Due to the fact that Frontex generally operates in remote areas (eg, maritime borders) with a restricted access to their internal documents, it is imperative to shed light on its activities and remain critical. In light of this, various criticisms that have emerged concerning their internal accountability mechanisms are analysed.

4.1. The Individual Complaint Mechanism

A case depicting the Agency's conduct regarding human rights violations and in turn the weaknesses to its internal accountability system arose in October 2020. Indeed, it was reported that human rights violations had taken place as a consequence of operations at the Greek Maritime border.[34] Diverse footages captured FRONTEX's complicity in the forced return of migrant boats to Turkey.

Following initial reluctance to investigate the matter, FRONTEX originally declared that their internal investigation had found no issues. However, following subsequent individual complaints, the European Ombudsman began investigating the functioning of FRONTEX's individual complaint mechanism

[31] European Border and Coast Guard Regulation, art. 110(3).
[32] Chiara Loschi and Peter Slominski, 'Frontex's Consultative Forum and Fundamental Rights Protection: Enhancing Accountability Through Dialogue?' (2022) 7 European Papers 1 p. 202 <https://www.europeanpapers.eu/en/e-journal/frontex-consultative-forum-and-fundamental-rights-protection-enhancing-accountability> accessed 6 May 2024.
[33] Annelise Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea' in *Extraterritorial Immigration Control* (Marinus Nijhof Publishers, 2010) p. 243.
[34] ECRE, 'Frontex Faces Another Investigation by the European Ombudsman and Legal Action for Not Suspending Operations on the Aegan' (2021) <https://ecre.org/frontex-faces-another-investigation-by-the-european-ombudsman-and-legal-action-for-not-suspending-operations-on-the-aegean/> accessed 6 May 2024.

and its involvement in the situation at hand.[35] This brought the primary focus to that of the complaint mechanism. Soon enough, it was found that the fact that complaints can only be passed by an individual with concern (as per Article 3 of the Agency Rules on the Complaint Mechanism) restricts other stakeholders with a legitimate interest from doing so.[36] The European Ombudsman also found that the lack of remedies and a lack of ability to prevent further abuses or to offer compensation were all rendering the individual complaint

Despite these findings, there are still shortcomings. For example, there is no possibility for orally submitting individual complaints.[37] Furthermore, the newest Regulation regulating FRONTEX's activities was unsuccessful in addressing the previous issues laid out, where the admissibility requirements are "unduly narrow" and the absence of independence and the ability to conduct effective follow ups at the national or European level persists.[38] Also, the success of complaints fulfilling the admissibility criteria is very low: between 2016 and 2020, only 22 out of 96 complaints were admissible.[39] Despite the positive aspect of the opportunity of an appeal before the FRO against such admissibility decisions, it is still limited as it is reserved to those situations where a complainant submits new evidence.

Another issue concerns complaints relating to national staff. Indeed, in December 2020, the majority of individual complaints were exclusively about them.[40] This involved forwarding complaints to the concerned Member State to await further domestic action, which was proven to not meet expectations.[41] The fact that a case can be disregarded as a result of the response of the domestic authorities underscores this.

A final issue lies in providing remedies to a complainant in the case of Boards of Appeal procedures. The possibilities are limited to a "follow up" which

[35] ibid.
[36] Management Board Decision 19/2022 of 16 March 2022 adopting the Agency's rules on the complaints mechanism, art. 3.
[37] Merijn Chamon, Annalisa Volpato, and Mariolina Eliantonio (eds), *Boards of Appeal of EU Agencies: Towards Judicialization of Administrative Review?* (Online edition, Oxford Academic, 2022) p. 32.
[38] ECRE (n 29) p. 13.
[39] ibid.
[40] ibid p.14.
[41] European Ombudsman, 'Report on the meeting of the European Ombudsman's inquiry team with FRONTEX representatives' (2022) <https://www.ombudsman.europa.eu/en/doc/inspection-report/en/139670> accessed 6 May 2024.

is merely related to the staff or national authorities rather than the individual themselves.

4.2. The Fundamental Rights Officer

Alongside the limitations already mentioned in the context of the individual complaint mechanism and the ones which transpire in the case of the functioning of the Consultative Forum, it is crucial to delineate which other limitations exist in the FRO mechanism. Although the aforementioned problem of a lack of independence has been delineated, it is important to mention an example of Article 46 of the Regulation 1168/2011 which limits the FRO from withdrawing financing or suspending/terminating activities as a result of fundamental rights violations until consultation has occurred with the Executive Director (ED). In addition, the primary issue is the ongoing challenge of understaffing that has consistently confronted the FRO office. An example can be seen through the anticipated employment of 40 Fundamental Rights monitors which did not occur, even after the date of expectation (end of 2020). The FRO also shows similar issues as that of the Consultative Forum in the realm of the effectiveness of its recommendations as these are not always followed.

Also included under Article 46 is the ability of the ED to ignore the recommendations of the FRO without giving reasons as to why; as it was observed in 2020 with the launching of the Rapid Border Intervention Teams in Greece.[42] This again calls to question the effectiveness of ensuring accountability through the FRO, especially as no justification is required.

4.3. The Consultative Forum

The powers of the Consultative Forum have proven to be more constrained than initially anticipated. Their intended role was to serve as an advisory board, overseeing FRONTEX's operations by means of access to information and the authority to suspend operations in cases of severe and persistent violations.[43] Issues pertaining to their access to information, their advisory role, including their

[42] ECRE (n 29).
[43] Human Rights Watch, 'The EU's Dirty Hands: Frontex Involvement in Ill-treatment of Migrant Detainees in Greece' (2011) <https://www.hrw.org/report/2011/09/21/eus-dirty-hands/frontex-involvement-ill-treatment-migrant-detainees-greece> accessed 6 May 2024.

duty of confidentiality, as well as other constraints associated with their status, such as shared legal responsibility, are explored to delineate how these factors limit the powers and, consequently, the effectiveness of this internal mechanism, rendering it less potent than originally envisioned.

To begin with, even though it was set up as an advisory body, it seems that the forum can be more accurately characterised as consultative. Their access to information was said to be importantly characterised as having "access, in a timely and effective manner, to all information concerning the respect for fundamental rights" (Article 108(5) Regulation 2019/1986).[44] However, in actuality, this power is constrained due to its duty of confidence by which FRONTEX must refrain from sharing sensitive or non-public information.[45] While this duty functions to safeguards certain interests it also requires the approval from the management board prior to sharing. Concerns come to light in this sense, as such control over information sharing may potentially hinder transparency and thereby accountability of the Agency, as it can lead to delays or reluctance in reporting issues. These issues undermine the importance of the fact that timely, complete and comprehensive information is a prerequisite for the Forum to successfully fulfil its mandate.[46]

Furthermore, the Forum lacks effective influence through recommendations, as investigation by the FRONTEX Scrutiny Working group of the European Parliament showed that the Agency infrequently considers the recommendation in practice.[47] This can be seen in many cases, for example in the Forum's recommendation of withdrawal from Hungary in 2018 as a result of human rights violations, which was not followed until The Court of Justice issued a decision on the matter.[48] Hence, the recommendations hold limited sway due to

[44] European Border and Coast Guard Regulation, art. 108(5).
[45] Working Methods of the Consultative Forum (2017) <https://www.frontex.europa.eu/assets/Partners/Consultative_Forum_files/Working_Methods.pdf > accessed 6 May 2024.
[46] Frontex Consultative Forum on Fundamental Rights, 2017.
[47] Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations (2021) p. 5 < https://www.europarl.europa.eu/cmsdata/238156/14072021%20Final%20Report%20FSWG_en.pdf> accessed 6 May 2024.
[48] Francesco Luigi Gatta, 'Between Rule of Law and Reputation' (Verfassungsblog, 8 February 2021) <https://verfassungsblog.de/between-rule-of-law-and-reputation/> accessed 6 May 2024; Jacopo Barigazzi 'EU border agency suspends operations in Hungary' (Politico, 27 January 2021) <https://www.politico.eu/article/eu-border-agency-frontex-suspends-operations-in-hungary-migration/> accessed 6 May 2024.

the lack of consideration given to them alongside the delayed action by FRONTEX, thus raising concerns about its overall effectiveness. This is evidently exacerbated by the fact the recommendations are not binding, thereby eliminating a requirement of legal compliance.[49] This confinement has been substantiated through an interview with a previous forum member who, despite the good quality of their reports, depicts the Forum's influence on the agency as constrained, primarily due to their uncertainty regarding how or if FRONTEX integrates these recommendations.[50]

Additionally, the lack of resources available to the Forum which would enable the governing of documents/operations of FRONTEX in its handling of fundamental rights violations contributes to the limitations on the Forum's powers. Lastly, a final constraint is the inability of individuals to submit complaints before a competent tribunal as FRONTEX does not bear sole responsibility in the case of violation, rather it is distributed amongst the relevant Member States.[51]

5. CHAPTER IV: RECOMMENDATIONS

A number of recommendations can be put forward to ensure that FRONTEX is held accountable for its actions. This could be done mainly by focusing on the roles and responsibilities of the Executive Director and the Fundamental Rights Officer. These recommendations attempt to strengthen the internal mechanisms for addressing complaints and safeguarding fundamental rights at FRONTEX.

Firstly, enhancing transparency in reporting is a crucial component for improving accountability. Providing that FRONTEX's annual reports are thorough, including records and statistics of complaints filed, the Agency would be held accountable for its actions during the process. Such a detailed reporting system would allow stakeholders, including the European Parliament, to assess

[49] Loschi and Slominski (n 32) p. 206.
[50] ibid.
[51] Melanie Fink, 'Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law' (EU Immigration and Asylum Law and Policy, 30 April 2020) <https://eumigrationlawblog.eu/frontex-human-rights-responsibility-and-access-to-justice/#:~:text=Human%20rights%20law%20places%20Frontex,knows%20or%20should%20know%20of.&text=If%20it%20fails%20to%20do%20so%2C%20it%20incurs%20human%20rights%20responsibility> accessed 6 May 2024.

FRONTEX's performance and ensure that the Agency is held accountable for its actions.[52]

Secondly, another critical aspect is the effective collaboration between the ED and the FRO. Considering the FRO is essential to ensure all actions of the Agency uphold fundamental rights, the ED could actively cooperate with the FRO in the decision-making procedures on complaints lodged against the FRONTEX staff. Such a collaboration would create a complaint procedure that follows a more comprehensive and rights-based approach. This would be another case where accountability is enhanced through transparency.

Thirdly, the Fundamental Rights Officer's focus on empowering individuals could ensure an effective complaint mechanism. If the FRO were to provide fundamental rights monitors with instructions to actively and continuously inform individuals about the existence and availability of the complaint mechanism, individuals would be aware of their rights and could use the complaint process more efficiently. Offering support during the process of filling in forms is recommended. When necessary, individuals could be directed to relevant legal assistance providers, allowing them to lodge a well-informed complaint. Furthermore, enhancing the transparency of the complaint mechanism would significantly contribute to holding the Agency accountable for its actions. The FRO could put forth in-depth information concerning the complaint mechanism in FRONTEX's annual reports. The report would include the status of ongoing complaint procedures as well as any delays in the follow-up procedures. Such a degree of transparency makes it possible to spot and address any inefficiencies in the resolution process, for which a solution can be sought immediately.

Finally, the FRO should reinforce a consistent reporting system to the European Parliament on their work and its outcome. This reporting system would also cover situations where the ED or the MB proceeded to not follow the FRO's recommendations. Regularly updating oversight bodies about the FRO's work will allow for a more structural and comprehensive accountability system.[53] By implementing these recommendations, FRONTEX could significantly improve

[52] Tineke Strik, 'European Oversight on Frontex: How to Strengthen Democratic Accountability' (Verfassungsblog, 8 September 2022) <https://verfassungsblog.de/european-oversight-on-frontex/> accessed 6 May 2024.
[53] ECRE (n 29).

accountability, transparency, and internal procedures. The Agency would enhance its overall effectiveness and accountability in border control and migration management inside the EU.

6. CONCLUSION

The Agency initially implemented accountability mechanisms in order to increase its levels of transparency and accountability all the while decreasing human rights violations related to its work and operations. Since the various internal accountability mechanisms have not been studied much by the academic community, the focus of this paper is on the three mechanisms that form FRONTEX's internal accountability system: the individual complaint mechanism, the Fundamental Rights Officer, and the Consultative Forum.

In sum, this paper sought to answer the following research question: To what extent should the internal accountability mechanisms of FRONTEX be altered to effectively ensure accountability for its actions in the context of border control and migration management within the European Union? It was established that the various internal accountability mechanisms within FRONTEX – the individual complaint mechanism, the FRO and the Consultative Forum – experience critical shortcomings when it comes to their effectiveness.

Firstly, the individual complaint mechanism provides a means for individuals to complain, the narrow characteristics for admissibility alongside its complexity and lack of transparency lowers the accessibility, preventing it from being as effective. Secondly, The Fundamental Rights Officer has demonstrated the importance and necessity of its role in monitoring FRONTEX's activities and their effect on human rights, while at the same time being limited in their powers and independence, which again prevents the mechanism to exercise its effect to the potential which would have been originally expected. Thirdly, the Consultative Forum offers external perspectives and means of oversight. The issues manifest through its seemingly advisory role, independence, accessibility, and ability to follow up effectively. The fact that such constraints are raised within the forum itself (e.g., the co-Chair of FRONTEX) by acknowledging that both the Consultative Forum and the Fundamental Rights Officer do not retain a position

to provide a solution to the structural issues pertaining to human rights highlights the need for change.

Although these three individual mechanisms are all distinct, it has been seen that some of their shortcomings are sometimes linked, which highlights that fixing one's issues could potentially help to improve the issues of another. As such, recommendations have been provided in an attempt to strengthen accountability within FRONTEX, which primarily address strengthening the position of the Executive Director and the Fundamental Rights Officer. By doing so, the Agency can enhance its transparency and accountability.

Overall, despite FRONTEX's steps in implementing internal accountability mechanisms and its means of accountability, shortcomings need to be addressed in order for the Agency to improve its effective functioning in the context of border control and migration management within the European Union.

The Louboutin Effect: Did the Red-Soled Shoes Walk the Distinction of EU Intermediary Liability for Third-Party Trademark Infringements?

Ana Lazić[1]

[1] Ana Lazić holds an LL.B. in European Law from Maastricht University and is currently completing an Advanced LL.M. in Intellectual Property and Knowledge Management. In her studies and research, she is particularly focused on how trademark and copyright regimes have addressed recent technological developments. With a great interest in the field, the present paper was written for the thesis component of her bachelor's.

1. INTRODUCTION

1.1. BACKGROUND

Over the last decade, the presence of online platforms such as social media, search engines and e-commerce websites has exponentially increased. These platforms are also known as internet intermediaries, a term attributed to a variety of service providers which have a facilitative role in transactions of third parties via the internet.[2] Their functions include hosting content and enabling the processing of data.[3] This has made them especially useful in the context of online marketplaces, as they constitute a large factor in the means through which goods are now digitally displayed and subsequently sold.[4] Online marketplaces play a crucial role in the exchange of goods, services and information,[5] making them gateways which grant sellers access to a global consumer base.

While access to vast amounts of information offers significant benefits to users - including convenient browsing and informed decision-making based on consumer reviews - [6] it also poses challenges. One major challenge is addressing the distribution of illegal content (such as counterfeit goods) on these platforms.[7] In an attempt to ensure a safer and more transparent online environment, lawmakers have stepped in to tackle this issue. At an EU-wide level, the rise of internet intermediaries has thus prompted regulatory responses aimed at reducing the dissemination of illegal content.[8] A key initiative in this regard is the Digital Services Act Package, which seeks to "create a safer digital space".[9] This package

[2] EUIPO, 'The liability and obligations of intermediary service providers in the European Union' (*Publications Office of the EU,* 2019) p. 121 <https://op.europa.eu/s/n6UP> accessed 21 May 2023.
[3] Council of Europe Recommendation CM/Rec/2018/2 of the Committee of Ministers to Member States on the Roles and Responsibilities of Internet Intermediaries (2018) paras. 4-5 <https://rm.coe.int/1680790e14#:~:text=Internet%20intermediaries%20should%20respect%20the,2.> accessed 21 May 2023.
[4] European Parliamentary Research Service, 'Liability of online platforms' (2021) Study Panel for the Future of Science and Technology p. 1.
[5] Bruno Basalisco, Martin Thelle, Eva Rytter Sunesen, et al., 'Online Intermediaries: Impact on the EU Economy' (2015) Copenhagen Economics p.7.
[6] ADA Asia, 'Understanding consumer behaviour in the digital era' <https://www.ada-asia.com/insights/consumer-behaviour-in-digital-era> accessed 3 June 2024.
[7] European Parliamentary Research Service (n 4) p.1.
[8] EuroCommerce, 'Europe E-Commerce Report 2022' [2022] <https://ecommerce-europe.eu/wp-content/uploads/2022/06/CMI2022_FullVersion_LIGHT_v2.pdf> accessed 3 June 2024.
[9] European Commission. 'The Digital Services Act package' <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package> accessed 3 June 2024.

includes the Digital Services Act (DSA),[10] a new regulation effective from February 2024, outlining rules for online platforms and intermediaries.

Within the EU, internet intermediaries are also known as an information society service providers (ISSPs), offering services "normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services".[11] The regulation of these ISSPs involves determining the degree of involvement in illegal activity on their platforms – namely, if they are directly responsible, or, if their connection is a more indirect enabling of the spread of illicit materials. Historically, the position of the EU was to regulate the liability of platforms with a secondary liability regime, wherein an intermediary would be "held responsible for the mere fact that its intermediation enabled the users' illegal and harmful activities";[12] this was done through the e-Commerce Directive (ECD).[13] This approach to platform liability is more easily applicable to purely consumer-to-consumer (C2C) based online platforms (such as eBay) where their role is to facilitate direct transactions between consumers.[14] With that said, the difficulty with establishing platform liability arises where a hybrid platform is concerned. This refers to platforms which conduct their own retail activities, while also acting as online marketplace operators. One such example is Amazon – a general merchandiser which, on top of enabling C2C interactions, also sells products to its consumers as a business.[15] Here, identifying the extent of a platform's involvement when illegal content has been shared makes matters more complex.

In the context of this shift away from bearing sole liability as a purely online platform, the liability to be borne by a hybrid platform warrants consideration. An interesting development to note in this regard is the December

[10] Council Regulation (EU) 2022/2065 of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (2022) OJ L 277.
[11] Council Directive (EU) 2015/1535 of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (2015) OJ L 241, art. 1(1)(b).
[12] European Parliamentary Research Service (n 4) p. 26.
[13] Council Directive 2000/31/EC of 8 June 2000 on Certain Legal Aspects of Information Society Services in Particular Electronic Commerce in the Internal Market (2000) OJ L 178.
[14] Kenneth Lauden and Carol Guercio Traver, *E-commerce 2020-2021* (16th edn, Pearson 2021) p. 60.
[15] ibid p. 63.

2022 *Louboutin* preliminary ruling.[16] This case, which went before the Court of Justice of the European Union (CJEU), involved a lawsuit filed against Amazon by the luxury shoe brand Louboutin for trademark infringement.[17] The case was referred to the CJEU by Belgian and Luxembourgish courts to consider whether Amazon could be viewed as using a sign identical to Louboutin's trademark in advertisements by third-party sellers on its platform.[18]

There has been a significant increase in the use of trademarks in the context of online marketplaces.[19] The EU approach has, as illustrated above, involved establishing liability for these marketplaces which illegally use trademarks on an indirect basis. This is beneficial to intellectual property right holders who view the engagement of intermediaries with trademarks as warranting liability, despite them not being the ones primarily and directly infringing on the trademark proprietor's rights.[20] Holding an intermediary indirectly liable for failing to adequately prevent infringing activities it has profited from is also easier, and less costly, when compared to pursuing legal actions against all individual third-party users that are primarily infringing on a right holder's trademark.[21] Thus, the EU has delineated a clear distinction regarding when circumstances of primary and secondary liability arise in relation to third-party infringements online. The European Commission has emphasised, however, that the rising amount of illegal content online must be addressed and has taken the position that, given the increased influence of online platforms in our society, a level of enhanced responsibility should accompany this.[22] Consequently, a platform like Amazon that is estimated to have over 180 million average monthly users across the EU,[23]

[16] Joined Cases C-148/21 and C-184/21 *Christian Louboutin v Amazon Europe Core Sàrl and Others* (2022) ECLI:EU:C:2022:1016.
[17] *Louboutin* (n 16) para. 2.
[18] ibid para. 23.
[19] Anna Pokrovskaya, 'Protection of Trademark Rights onE-commerce Platforms: AnUpdated Outlook' (2024) 10(10) Journal of Comprehensive Business Administration Research p. 1 <https://www.researchgate.net/publication/379063033_Protection_of_Trademark_Rights_on_E-commerce_Platforms_An_Updated_Outlook> accessed 3 June 2024.
[20] Stacey Dogan, 'Approaches to Secondary Liability for Trademark Infringement: Common Law Evolution' in Irene Calboli and Jane Ginsburg (eds.) *The Cambridge Handbook of International and Comparative Trademark Law* (Cambridge University Press 2020) p. 2.
[21] Daniel Seng, 'Comparative Analysis of the National Approaches to the Liability of Internet Intermediaries' (2010) World Intellectual Property Organisation p. 5.
[22] European Commission Communication, 'Tackling Illegal Content Online. Towards an Enhanced Responsibility of Online Platforms' COM/2017/555 final, para. 23.
[23] Amazon, 'EU Store Transparency Report' (2023) p. 4 <https://assets.aboutamazon.com/cd/28/4d02dd2e41ec8c6d1bc341e9d919/amazon-eu-store-transparency-report-jan-june-2023.pdf> accessed 3 June 2024.

is the type of platform the Commission's stance is targeting. The emergence of such platforms that incorporate their own sales offerings and an online marketplace for third parties, has led to the aforementioned preliminary ruling introducing ambiguity to the EU's traditional approach. This is due to Amazon's hybrid nature as a platform that actively engages in sales potentially bringing up different expectations from a platform that purely intermediates them.

In light of this noteworthy occurrence, the question addressed by this paper is: How has the development of the *Louboutin* ruling contributed to blurring the traditional distinctions of liability for third-party trademark infringements on internet intermediaries in the EU? The approach taken to answer this is outlined in the following subsection.

1.2. Methodology and Scope

This paper employs analytical research and a doctrinal methodology to consider relevant developments within EU law, with respect to its case law and existing legislation concerning the once distinguishable means of holding internet intermediaries directly (primarily) and indirectly (secondarily) liable. It is worth noting that the scope of this paper extends solely to how private law addresses trademark infringement against online intermediaries; thus, the focus is on civil liability, as opposed to issues which could further arise under criminal law. To answer the outlined research question, the paper has been divided into four sections. The introduction has laid out the relevant context to understanding the background to internet intermediary agents and their liability in trademark law. Section 2 considers how EU law presently allows for holding these agents liable. In this regard, the legal frameworks of the EU Regulation on Trademarks (EUTMR),[24] the previously applicable ECD, as well as the DSA – a recent Regulation which amends the ECD's approach to platform liability - are discussed. The description of these primary sources is further supplemented by the use of academic views found in secondary sources to allow for a comprehensive understanding of the online intermediary liability frameworks to emerge. Upon looking at this, section 3 considers a recent development in the world of intermediary liability – namely the *Louboutin* preliminary ruling. In outlining the

[24] Council Regulation (EU) 2017/1001 of 14 June 2017 on the European Union trade mark (2017) OJ L 154.

CJEU's considerations, the paper highlights its potential impact on the distinction between primary and secondary liability in the EU for online marketplace trademark infringements. This is followed by concluding remarks in section 4. The sections have been outlined in this way as it is important to understand the current context surrounding online intermediary liability, prior to noting how a recent ruling may indicate a development in the course of the EU framework.

2. The EU Legislative Framework for Holding Internet Intermediary Agents Liable for Trademark Infringements

To gain an understanding of the regime within the EU for establishing internet intermediary liability up until the *Louboutin* ruling, the present section is divided into four subsections. It delves into the legislation applicable to trademark law - namely the EUTMR (section 2.1.), the ECD (section 2.2.) and the DSA (section 2.3.). These sources are relevant as they contain the necessary provisions to claim liability of ISSPs in the context of the research question and are representative of how this liability has developed.[25] The role of the legislation in determining online platform responsibility is done in light of two landmark CJEU cases - *Google France*,[26] and *L'Oréal v eBay*.[27] The *Google France* cases involved Google and several companies, including Louis Vuitton Malletier, regarding the use of trademarks in Google's AdWords service by third parties. There, the central issues pertained to whether Google's actions constituted trademark infringement, and the extent of Google's liability as an intermediary service provider.[28] Similarly, in *L'Oréal*, the Court examined the sale of trademarked goods on eBay's marketplace, with the issues relevant to this paper concerning whether eBay's actions constituted trademark infringement, and the extent of eBay's liability as an intermediary service provider for the infringing activities of its users.[29] Finally, the

[25] Martin Husovec, 'Remedies First, Liability Second: Or Why We Fail to Agree on Optimal Design of Intermediary Liability' in Giancarlo Frosio (ed) O*xford Handbook of Online Intermediary Liability* (Oxford, 2020) p. 2.
[26] Joined cases C-236/08 to C-238/08 *Google France SARL and Google Inc. v Louis Vuitton Malletier SA* (C-236/08), *Google France SARL v Viaticum SA and Luteciel SARL* (C-237/08) and *Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others* (C-238/08) (2009) ECLI:EU:C:2009:569.
[27] Case C-324/09 *L'Oréal SA and Others v eBay International AG and Others* (2011) ECLI:EU:C:2011:474.
[28] *Google France* (n 26) para. 1-2.
[29] *L'Oréal* (n 27) para. 50.

present section provides an overview on the distinction between primary and secondary liability in EU trademark law with respect to user infringements on online platforms (section 2.4.).

2.1. The Role of the EUTMR for Establishing Liability for Trademark Infringements via Internet Intermediaries: The Direct "Use " Factor

Within the EU, there are two overarching regimes under which internet intermediary agents can be held liable. The first of these relates to EU trademarks and is governed by the EUTMR, and the second is that of national trademarks, the laws on which have been harmonised through the EU Trademark Directive (EUTMD).[30] The Directive and Regulation are highly similar with respect to their substance, and it is for this reason that the present paper does not delve further into the contents of the former – especially given the fact that the CJEU interprets the same rules in both in the same manner.[31] Having noted this, the role of the EUTMR in holding online intermediaries liable for trademark infringements can be examined.

The substantive rules for trademark infringement are outlined in Article 9 of the EUTMR and are demonstrative of the context-specific nature of analysing trademark infringements.[32] Based on Article 9(2) EUTMR, general conditions emerge for trademark infringement. Firstly, the use of the trademark must be without the consent of the trademark owner (i). Additionally, the use must occur in the course of trade (ii), as established in cases such as *Arsenal v Reed*. There, the court ruled that there must have been commercial activity with a view to economic advantage.[33] The infringement must also be in relation to goods and services (iii).[34] Lastly, the functions of the trademark, including its origin, advertising, investment, and communication aspects, must likely be affected by

[30] Council Directive (EU) 2015/2436 of 16 December 2015 to approximate the laws of the Member States relating to trade marks (recast) (2015) OJ L 336.
[31] David I Bainbridge, *Intellectual Property* (Pearson Education 2009) pp. 633-634.
[32] Martin Senftleben, 'Intermediary Liability and Trademark Infringement: Proliferation of Filter Obligations in Civil Law Jurisdictions?' in Giancarlo Frosio (ed.) O*xford Handbook of Online Intermediary Liability* (Oxford University Press 2020) p. 7.
[33] Case C-206/01 *Arsenal Football Club plc v Matthew Reed* (2002) ECLI:EU:C:2002:651, para. 40.
[34] Case C-408/01 *Adidas-Salomon AG and Adidas Benelux BV v Fitnessworld Trading Ltd.* (2003) ECLI:EU:C:2003:582, para. 15.

the infringement (iv).[35] After these general requirements have been met, the infringement of the trademark must fall under one of the situations of protection covered by Article 9 – namely that of double identity, likelihood of confusion and the infringement of a reputable trademark. This aligns with the provision in Article 10(2) EUTMD which equally deals with considerations of who can be held liable in the EU trademark infringement regime.

In the context of intermediary liability for third-party infringements, the four cumulative criteria for this direct use of a trademark have been considered as follows: firstly, use of the trademark without the proprietor's consent requires unauthorised use by third parties that was facilitated by the intermediaries.[36] Secondly, the use of a trademark in the course of trade occurs where an individual infringer has engaged in sufficient sales to constitute commercial activities.[37] From the perspective of ISSPs, the financial benefit that they may receive as intermediaries has no bearing on their direct use of a trademark, regardless of whether such remuneration is received from all users of a service,[38] or just from the end user.[39] Thirdly, infringement being in relation to goods and services is evident where intermediaries have enabled advertisements and sales directly linked to products for which the trademark itself is registered.[40] In *Google France*, the court determined that advertisers using trademarks as keywords for displaying ads could potentially infringe on trademark rights if these ads cause confusion about the origin of the goods or services. Specifically, if an advertisement using a trademark does not make it clear to reasonably well-informed and observant internet users whether the goods or services are from the trademark owner or a third party.[41] Lastly, the functions of the trademark - including origin, advertising, investment, and communication - must be likely to be affected; in both landmark cases, the misuse of trademarks leading to consumer confusion was highlighted, with consideration given to impairment of the trademark's ability to guarantee origin and the undermining of the trademark owner's advertising efforts.[42] In

[35] *Google France* (n 26) para. 49.
[36] ibid para. 42.
[37] *Google France* (n 26) paras. 50, 53.
[38] Case C-390/18 *Airbnb Ireland* (2019) ECLI:EU:C:2019:1112, para. 46.
[39] Case C-62/19 *Star Taxi App* (2020) ECLI:EU:C:2020:980, para. 45.
[40] *Google France* (n 26) para. 72.
[41] *L'Oréal* (n 27) para. 94.
[42] *Google France* (n 26) paras. 84, 97.

L'Oréal, the infringer had removed packaging and unboxed the goods, resulting in an absence of essential information such as the identity of the manufacturer, and in damage to the image of the product.[43]

In light of the factors that contribute to the four conditions being fulfilled, it is important to note that the court did not find use by the intermediaries in either of the landmark cases. In *Google France*, the platform was found to store keywords identical to trademarks and organise the display of ads based on those keywords. This display of advertisements could fulfil the condition of "in the course of trade " as it featured a sign identical to a trademark.[44] However, the court ruled that Google's role in merely creating the technical conditions for this use - namely, providing a service for customers to display the ads - and being compensated for the service does not constitute use of the trademarks by Google itself. For infringement to be established, the use must be part of the third party's own commercial communication.[45] Thus, the court found that Google allows its clients to use trademarks without using them itself, and that any potential liability for the platform would fall under national laws dealing with secondary liability, not direct infringement under the EUTMR or EUTMD.[46] Similarly, in *L'Oréal*, the CJEU found that eBay, as an operator of an online marketplace, does not use trademarks when it displays offers for sale that include the trademarks posted by its customer-sellers.[47] The court clarified that the relevant use for trademark infringement is carried out by the sellers, not the marketplace operator. This was also confirmed in *Coty*, where the CJEU established the cumulative criteria for when intermediaries were not in use of the trademark,[48] namely, when a service is rendered in connection to marketing goods, but the goods are not put up for sale. As with Google, eBay's role is passive in this context, merely providing a platform for the sellers. Therefore, the marketplace operator's activities should be evaluated

[43] *L'Oréal* (n 27) para. 81.
[44] *Google France* (n 26) para. 55.
[45] ibid para. 57.
[46] ibid para. 107.
[47] *L'Oréal* (n 27) para. 102.
[48] Case C-567/18 *Coty Germany GmbH v Amazon Services Europe Sàrl, Amazon FC Graben GmbH, Amazon Europe Core Sàrl and Amazon EU Sàrl* (2019) ECLI:EU:C:2019:1031, paras. 37-38.

under different legal frameworks, such as the safe harbour provisions in the E-Commerce Directive (ECD), rather than under direct trademark use provisions.[49]

Via the CJEU's interpretation of case law in the context of the EUTMR and EUTMD, it becomes clear how the role of this legislation was important to the current development of liability for online marketplaces, as this maintained a distinction between liability for a primary infringement and liability for a secondary infringement, with internet intermediaries not being found to qualify for the former. The aforementioned legislative instruments under which an online intermediary could also be liable includes the ECD and national law.[50] It is therefore of importance to consider the ECD's role in the development of liability of internet intermediaries for third-party trademark infringements in the EU.

2.2. The Role of the ECD for Establishing Liability for Trademark Infringements via Internet Intermediaries: Limiting Liability

The ECD, which applies to all forms of illegal activity, presents limits to the liability according to which EU Member States could hold internet intermediary agents liable for third-party trademark infringements.[51] It outlines three safe harbour provisions - namely, where the intermediary's actions are that of mere conduit, caching or hosting.[52] In principle, under the safe harbour regime in Articles 12-15 ECD, as long as internet intermediaries are passive and neutral – simply functioning to automatically process data – and acting expeditiously once knowledge or awareness of an infringement was obtained,[53] they cannot be held liable for primary infringements, and are only liable for secondary infringements.[54] Moreover, as established in *YouTube*, even general knowledge that trademark infringements occur on an operator's platform is not enough to result in primary

[49] Miquel Peguera, 'Two Approaches to Secondary Liability for Trademark Infringement. Part II: A Limited Harmonization under European Union Law' in Irene Calboli and Jane Ginsburg (ed.) *The Cambridge Handbook of International and Comparative Trademark Law* (Cambridge University Press 2020) p. 4.
[50] *L'Oréal* (n 27) para. 104.
[51] Katja Weckström, 'Liability for Trademark Infringement for Internet Service Providers' (2012) 16(1) Marquette Intellectual Property Law Review 16.
[52] ECD (n 13) arts. 12-14.
[53] ibid art.14(1)(b).
[54] *Google France* (n 26) para. 114; *L'Oréal* (n 26) para. 113.

liability.[55] These safe harbour provisions are horizontally applicable to all third-party online infringements.[56]

Where the ECD's passive requirement is fulfilled, it could be indicative of the intermediary's lack of awareness of the stored content on a platform. Interestingly, situations could arise where the awareness of the illicit materials exists, without the intermediary being active. In this regard, what was central to passivity was whether a "diligent economic operator "[57] would have found the infringement. This notion is still developing and is assessed on a case-by-case basis.[58] In the EU, there thus needs to be some evidence of wrongdoing to establish there was actual knowledge, so that the intermediary cannot benefit from the safe harbour.[59] It is crucial to note that the defences within the ECD's safe harbour provisions do not impede courts from issuing injunctive orders to prevent third-party infringements on online intermediaries. Furthermore, the provisions do not allow for immunity against secondary liability to arise. In this regime, it has been labelled oxymoronic that where a service provider fulfils the conditions for secondary liability, they cannot use the safe harbour provisions as a shield. In these instances, they are not deemed online intermediaries.[60]

As per the aforementioned landmark cases of *Google France* and *L'Oréal*, while Google and eBay were not primary infringers under the EUTMR, this did not in turn mean that as intermediaries their liability would be limited under the safe harbour provisions. This was something to be assessed in light of the ECD.[61] In *Google France*, the CJEU found that an ISSP (like Google) can only be held liable for the data it stores at the request of an advertiser if it plays an active role that grants it knowledge or control over the stored data. If the service provider

[55] Joined cases C-682/18 and C-683/18 *Frank Peterson v Google LLC, YouTube LLC and Others* (2020) ECLI:EU:C:2020:586, para. 85.
[56] Miquel Peguera, 'The DMCA Safe Harbors and Their European Counterparts: A Comparative Analysis of Some Common Problems' (2009) 32 The Columbia Journal of Law & the Arts pp. 481-482.
[57] *L'Oréal* (n 27) para. 20.
[58] Ben Allgrove and John Groom, 'Enforcement in a Digital Context: Intermediary Liability' in Tanya Aplin (ed.) *Research Handbook on Intellectual Property and Digital Technologies* (Edward Elgar Publishing 2020) p. 9.
[59] Christina Angelopoulos, 'European intermediary liability in copyright: A tort-based analysis' (2016) PhD thesis University of Amsterdam p. 113 <https://pure.uva.nl/ws/files/2738365/172299_Angelopoulos_thesis_complete.pdf> accessed 22 May 2023.
[60] Allgrove and Groom (n 58) p. 2.
[61] Peguera (n 49) p. 10.

does not play such a role, it cannot be held liable unless, upon obtaining knowledge of the unlawful nature of the data or advertiser's activities, it fails to act expeditiously to remove or disable access to the data.[62] The court emphasised that Google merely provided a platform for advertisers to use the keywords and did not engage in active promotion or endorsement of the products. Therefore, Google's activities were deemed to fall within the passive role envisaged by the safe harbour provisions, as Google did not actively engage in the commercial communication of the trademarks.[63] Moreover, in the *L'Oréal* case, the court examined whether eBay's role as an online marketplace operator fell within the safe harbour. It determined that eBay could benefit from the hosting safe harbour if its actions were limited to a passive role in storing information provided by sellers.[64] However, if eBay had active involvement in the transactions, such as optimising the presentation of offers or promoting the listings, it could be seen as going beyond mere technical and passive hosting, potentially affecting its eligibility for safe harbour protection.[65] It should be noted that in the *L'Oréal* case, the CJEU left it up to the referring English court to decide whether eBay had, in fact, fulfilled the conditions of Article 14 (stipulating that an intermediary was liable for hosting unless it had knowledge of the infringing activity or did not remove the content after having this knowledge) as this was not the issue at hand.[66]

Furthermore, the distinction between use and non-use of a trademark was thus separate from whether an internet intermediary was active or passive. Importantly, both the *Google France* and *L'Oréal* cases demonstrated that just because an intermediary went further than providing a neutral and merely technical service, and therefore may not qualify for the safe harbour provisions under the ECD, did not mean that such service providers were automatically infringers of trademark law.[67] This rather soft approach to liability of intermediaries makes sense in light of the nature of modern service providers and the broad range of activities they offer to their customers; regardless of how active

[62] *Google France* (n 26) para. 109.
[63] ibid para. 120.
[64] *L'Oréal* (n 27) paras. 111, 119.
[65] ibid para. 116.
[66] ibid para. 109.
[67] ibid para. 117; *Google France* (n 26) para. 116.

they are, they will never have full control over the acts of their third-party customers and their potential use of trademarked signs.[68]

Within the enforcement of liability under the ECD, trademark proprietors in the EU can notify online service providers, such as e-commerce websites and social media networks, of infringements. These notifications should include detailed information about the alleged infringing content and a formal request for appropriate action. Once service providers do become aware of such illegal activities or content, it is important they take necessary action and remove or restrict access to the infringing content, in order for them to benefit from the protection in the safe harbour provisions.[69] Additionally, service providers should implement measures to prevent the recurrence of similar infringing content through mechanisms like content filtering or technology that can identify and prevent uploads of trademark-infringing materials.[70]

Within the ECD, responsibility for trademark infringement on online platforms is determined by the level of involvement of the actor. Primary liability arises only when the actor plays an active role in the infringing activities, gaining knowledge or control over the illegal content. The landmark rulings demonstrate that even when intermediaries exceed a neutral and passive role, they are not automatically primary infringers.[71] Secondary liability, however, applies to passive intermediaries who fail to act expeditiously upon gaining knowledge of the infringement. Thus, it can ultimately be said that it maintains a clear distinction between primary and secondary liability for third-party trademark infringements on internet intermediaries.

Given the evolution of the internet since the Directive came into force in 2000, incompatibilities (or rather, lacunae) within the legislation have been identified, and arguments have been put forward that there should be more responsibility attributed to online platforms. An example of this is the criticism that the ECD does not impose obligations regarding transparency or due diligence, granting intermediary agents significant control and the ability to act as decision-

[68] Ansgar Ohly, 'Red Soles, a Marketplace and the Categories of Trade Mark Liability: Louboutin v Amazon Before the CJEU' (2022) 17(7) Journal of Intellectual Property Law & Practice p. 579.
[69] Denisa Avram, 'Towards an enhanced responsibility of online platforms: the EU Digital Services Act' (*Inline Policy* 2019) <https://www.inlinepolicy.com/blog/towards-an-enhanced-responsibility-of-online-platforms-the-eu-digital-services-act> accessed 10 July 2023.
[70] European Parliamentary Research Service (n 4) p. 3.
[71] *L'Oréal* (n 27) para. 120.

makers, since they can be left to their own evaluations.[72] In addition to this, the European Commission has communicated that internet intermediary agents must aim to conduct themselves in a way reflective of their determination to make efforts to ensure various illegal content is adequately addressed (ie, through effectively and quickly taking down the content, preventing its resurfacing etc.). While this stance is not strictly and exactly reflected in the ECD framework, it has signalled development in favour of a more enhanced liability of online platforms.[73] Evidence of this has been since seen in the development of a new piece of legislation which now governs ISSP liability in trademark infringements, namely the DSA.

2.3. The Role of the DSA for Establishing Liability for Trademark Infringements via Internet Intermediaries: The New Kid on the Block

Significant technological developments in the digital era have necessitated further EU legislative action, leading to the DSA Regulation which came into force in February 2024. The rationale behind the DSA seems to be one where intermediaries have been recognised as key players within the realm of third-party infringements, and as such the Regulation has sought to ensure the liability applicable to them is more indicative of this.[74] It should be borne in mind that the present subsection does not aim to outline every addition that has come with the introduction of the DSA but rather seeks to illustrate the most pertinent developments for trademark infringements on online platforms, especially when comparing this to the ECD.

The DSA has replaced the ECD to clarify legal uncertainties and lack of harmonisation in areas within the ECD, especially with respect to platform liability and notice mechanisms.[75] An example of this can be seen in the DSA specifically providing what information must be in the notices,[76] as well as justifying the reasons for taking content down.[77] Moreover, the difference in the legal nature of

[72] Berrak Genç-Gelgeç, 'Regulating Digital Platforms: Will the DSA Correct Its Predecessor's Deficiencies?' (2022) 18 Croatian Yearbook of European Law and Policy p. 35.
[73] European Commission Communication (n 22).
[74] Genç-Gelgeç (n 72) p. 28.
[75] Commission Staff Working Document Impact Assessment Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services and amending Directive 2000/31/EC, paras. 91-101.
[76] DSA (n 10) art. 16.
[77] ibid art. 17.

the legislations, with the ECD being a directive and the DSA being a regulation, has in and of itself already allowed for greater EU harmonisation in this context.

Within the DSA specifically, provisions added are not in conflict with the ECD, but rather provide more direct and specific requirements for intermediaries.[78] This is seen in intermediary services maintaining their categorisation under the three categories, namely mere conduit, caching and hosting services.[79] The DSA also maintains the safe harbour provisions, allowing intermediaries to avoid liability when they were unaware of the infringement taking place on their platform.[80] In addition to these retained provisions, the DSA has ensured harmonisation of due diligence obligations applicable to intermediaries, providing stricter rules in comparison to ECD. These are focused on transparency and accountability,[81] and further consider the capabilities of an ISSP, its size and the influence it can have. On this basis, an intermediary can be categorised, and thus subject to different rules. In doing so, the DSA seems to have created a more consistent legal framework by specifying the platforms' obligations as per the category it falls under.[82]

ISSPs under this framework are categorised as intermediaries, online platforms, very large online platforms (VLOPs) and very large online search engines (VLOSEs), with the latter two being online platforms with more than 45 million active users.[83] The DSA imposes stricter rules on VLOPs and VLOSEs compared to smaller-medium intermediaries; they are further subject to higher standards of transparency and accountability than other online platforms, due to their significant societal impact.[84] The differences in standards of obligation aim

[78] Joanne van Eennaam 'The New Platform Liability: from the e-Commerce Directive to the Digital Services Act Regulation ("DSA")' [2023] <https://www.wisemen.nl/en/news/the-new-platform-liability-from-the-e-commerce-directive-to-the-digital-services-act-regulation-dsa-/#:~:text=The%20new%20European%20regulation%20covers,from%20the%20e%2Dcommerce%20directive.> accessed 1 June 2024.
[79] DSA (n 10) arts. 4-6.
[80] ibid art. 5.
[81] Miriam Buiten, 'The Digital Services Act: From Intermediary Liability to Platform Regulation' (2021) 12(5) Journal of Intellectual Property, Information Technology and E-Commerce Law para. 12.
[82] Berrak Genç-Gelgeç, 'Regulating Digital Platforms: Will the DSA Correct Its Predecessor's Deficiencies?' (2022) 18 Croatian Yearbook of European Law and Policy p. 29.
[83] DSA (n 10) recital 76.
[84] ibid recitals 49, 100.

to preserve the balance between user's rights and freedoms while promoting innovation and competition within the digital sector.[85]

The DSA's tiered obligations recognise the dual role platforms play in operating as intermediaries and active content moderators. Platforms must design their interfaces to facilitate compliance with the DSA's requirements, such as making trader information accessible and providing clear processes for users to report illegal content.[86] In this regard, the DSA's introduction of "trusted flaggers" whose reporting platforms must prioritise aims to ensure a more efficient process for addressing harmful content.[87] Alongside clearly outlining their content moderation policies, ISSPs must also provide transparency reports and establish points of contact, with VLOPs having additional requirements, such as conducting annual risk assessments and independent audits.[88] They must further provide internal complaint-handling systems and cooperate with out-of-court dispute resolution bodies to resolve disputes related to moderation decisions.[89]

In light of this, the impact of the DSA has been such that it reduces ambiguities present in the ECD by delineating a clearer framework for content moderation. This is also achieved through its imposition of more stringent measures to ensure ISSPs cannot exploit their intermediary status to evade responsibility. By requiring detailed documentation and transparency in content moderation practices, the DSA ensures that hybrid platforms cannot hide behind vague policies or inadequate enforcement actions. This increased accountability fulfils the legislators' intent of fostering a safer digital environment.[90] Furthermore, the Regulation has enhanced user autonomy and informed decision-making by prohibiting deceptive practices designed to manipulate users, such as misleading pop-ups or default settings that are difficult to change.[91] The DSA has

[85] E-tailize, 'A Guide to the European Digital Services Act (DSA): What Online Companies Need to Know' <https://e-tailize.com/blog/a-guide-to-the-european-digital-services-act-dsa-what-online-companies-need-to-know/> accessed 3 June 2024.
[86] Buiten (n 81) para. 23.
[87] Taylor Wessing, 'Requirements for online marketplaces under the EU Digital Services Act (DSA)' (2023) <https://www.taylorwessing.com/en/insights-and-events/insights/2023/09/requirements-for-online-marketplaces> accessed 14 June 2024.
[88] DSA (n 10) arts. 26, 34.
[89] Buiten (n 81) para. 60.
[90] European Commission (n 9).
[91] mangopay, 'The impact of marketplace payment methods on customer experience' [2023] <https://blog.mangopay.com/en/home/the-impact-of-marketplace-payment-methods-on-customer-experience> accessed 3 June 2024.

also sought to strike a balance between encouraging proactive content moderation and maintaining liability exemptions through its "Good Samaritan" clause. This clause protects ISSPs from liability when they have taken voluntary actions (in good faith) to remove illegal content.[92]

Overall, the DSA has modernised the traditional distinctions of liability for third-party trademark infringements on internet intermediaries in the EU.[93] It goes beyond the ECD by introducing more direct and stringent rules on intermediaries and establishing a tiered system for transparency and due diligence obligations.[94] It harmonises notice and action procedures and imposes greater accountability, thereby addressing grey areas in the ECD that previously allowed intermediaries to evade responsibility. This shift reflects a broader trend towards holding intermediaries more accountable and responsible for the content on their platforms. Nevertheless, the distinction between primary and secondary liability for third-party trademark infringement remains.

2.4. Overview of the Distinction Between Primary and Secondary Liability in the EU for Internet Intermediaries' Trademark Infringements

As discussed in sections 2.1-2.3, distinguishing between primary and secondary liability is fundamental in trademark law infringements. Primary liability involves responsibility for one's own actions, while secondary liability pertains to assisting, encouraging, or having knowledge of third-party infringements.[95] This distinction is crucial for differentiating between a primary infringing user and an internet intermediary. A primary user directly uses a trademark and can be held directly liable, whereas secondary liability arises when an intermediary assists or enables a primary user's trademark infringement.[96] The CJEU has also clarified this

[92] DSA (n 10) art. 7; Aleksandra Kuczerawy, 'The Good Samaritan that wasn't: voluntary monitoring under the (draft) Digital Services Act' (2021) <https://verfassungsblog.de/good-samaritan-dsa/> accessed 5 June 2024.
[93] Valentine Moscon, 'Free Circulation of Information and Online Intermediaries – Replacing One ''Value Gap'' with Another' (2020) 51(8) International Review of Intellectual Property and Competition Law p. 981.
[94] Buiten (n 81) para. 22.
[95] Husovec (n 25).
[96] Ansgar Ohly, 'The Liability of Intermediaries for Trade Mark Infringement' in Graeme Dinwoodie and Mark Janis (ed.) *Research Handbook on Trademark Law Reform* (Edward Elgar Publishing 2021) p. 1.

distinction, particularly in the cases of *Google France* and *L'Oréal*, where it has been established that an intermediary can be held indirectly liable if it actively participates in the use of infringing materials, rather than merely processing data neutrally.[97]

Within the legislative framework of the EU, the EUTMR addresses liability of intermediaries by focusing on the use of a trademark in the course of trade; it restricts primary liability to those who have direct control over the use of the trademark, ensuring that intermediaries are protected unless they play an active role in the infringement. Moreover, the ECD limits intermediary liability through safe harbour provisions. It draws a clear line between passive intermediaries, who are protected from liability, and active intermediaries, who may be subject to secondary liability if they do not act expeditiously upon gaining knowledge of the infringement. The introduction of the DSA has then built on the delineation in the ECD by introducing more stringent transparency and accountability measures. Consequently, the current EU framework for regulating trademark infringements on online platforms can be described as one where the distinction between primary and secondary liability is maintained.

With that said, the evolution of the legislative framework has signalled the imposition of greater responsibility on intermediaries for third-party trademark infringement. It highlights that online intermediaries are not subject to primary liability but can be held liable if they assist or enable trademark infringements. Moreover, the liability of intermediaries is limited to instances where the ISSPs play an active role that provides them with knowledge or control over the infringing data. This establishes a clear boundary, protecting intermediaries that offer purely technical, automatic, and passive services from liability.[98]

[97] Ben Natter and Natalia Dulkowska, 'Intermediary Liability and Indirect Infringement for Marketplaces in Europe and the United States' (2020) <https://haugpartners.com/article/intermediary-liability-and-indirect-infringement-for-marketplaces-in-europe-and-the-united-states/> accessed 5 July 2023.
[98] *Google France* (n 26) paras. 113-114, 120.

3. The Latest Development to the Current EU Approach to Holding Internet Intermediary Agents Liable for Trademark Infringements: The *Louboutin* Preliminary Ruling

Having considered the progression within the EU from a stricter separation between primary and secondary liability, to one of more enhanced responsibility, there remains a crucial development to discuss in the context of holding online intermediaries responsible for trademark infringements. That is the CJEU's findings in the recent *Louboutin* preliminary ruling. In this case, the brand alleged that Amazon frequently displayed advertisements for counterfeit copies of its trademarked red-soled shoes on its platform.[99]

3.1. The Preliminary Questions in the *Louboutin* Judgement

Concerning the preliminary questions raised in the case, of note is that the first two concern whether trademark infringements could be attributable to operators of hybrid platforms[100] – specifically, whether the use of a trademark in an advertisement displayed on a website can be attributed to that website operator or to entities economically linked as a result of the incorporation of the displayed advertisements in the operator's or entity's commercial communication.[101] The court further inquires whether specific factors, such as the uniform presentation of advertisements, display of the operator's logo, comprehensive services offered to third-party sellers, and the design of the website, strengthen such attribution. The second question posed considers whether the use of a trademark in an advertisement which appears in an online marketplace can be attributed to its operator or economically linked entities. This question considers whether the operator's active role in preparing an advertisement or the perception that it belongs to the operator's own commercial communication influences such attribution. It additionally considers factors such as the operator's reputation as a distributor, the display of the operator's service mark, and the offering of services traditionally provided by goods distributors in the same category.[102] The questions

[99] *Louboutin* (n 16).
[100] ibid para. 1.
[101] ibid para. 14.
[102] ibid para. 17.

presented by the Luxembourg and Brussels courts overlap significantly, focusing on the determination of use of a trademark. For trademark right-holders, it appears advantageous to argue that internet intermediaries are indeed in use of the trademarks and are thus liable. As such, these questions challenge the previously clear distinction between primary and secondary liability in the EU.

It should be noted that the third question, posed by the Luxembourgish court, pertains to the shipment of goods bearing a sign identical to a trademark but as the answer to this was in line with established case law on the matter,[103] the CJEU's discussion here is omitted from this essay.

3.2. The Determination of the Objective "Use" of a Trademark in the *Louboutin* Ruling

According to established case law, and as illustrated in Section 2 of this paper, an intermediary must exhibit active behaviour or conduct,[104] have direct or indirect control over the use, and the use must be for the intermediary's "own commercial communication".[105] To be liable under Article 9(2) EUTMR, the prohibited acts must be carried out by a third party for themselves, rather than with aid of another third party.[106] Third-party operators cannot legally be obligated to "do the impossible", as it were, and control every sign on their platform.[107] Following this logic, in the *Louboutin v Amazon* case, where an issue was that some advertisements may redirect consumers to the Amazon marketplace, this should not have constituted a direct breach of trademark law by Amazon. However, the Court moved away from previous case law here in establishing the commercial link between the online operator and the product.

The CJEU highlighted that there is use of a sign when the operator uses it in such a way that it establishes a link between the sign and the services provided by that operator.[108] The court relied on the perception of a well-informed and reasonably observant internet user, and whether they would establish such a link

[103] *Louboutin* (n 16) para. 17.
[104] Case C-179/15 *Daimler AG v Együd Garage Gépjárműjavító és Értékesítő Kft* (2016) ECLI:EU:C:2016, paras. 39-40.
[105] *Google France* (n 26) para. 56.
[106] *Coty* (n 48) paras. 34-35.
[107] *Daimler* (n 104) paras. 39-41.
[108] *Louboutin* (n 16) para. 40.

between the operator's services and the sign in question.[109] It justified itself here by arguing that Article 9(2) EUTMR states that, in order to use a trademark, active conduct is necessary. So, provided that this commercial link between the online operator and the product can be established by consumers, the intermediary is liable under trademark law for a primary infringement.[110]

It was found that Amazon's display of both its own advertisements and those of third-party sellers was done in a uniform manner. Moreover, Amazon included its logo on all advertisements, whether they related to its own products or those of third-party sellers.[111] As a result of this presentation, the CJEU emphasised that a well-informed and reasonably observant user might perceive the advertisements as part of Amazon's own commercial communication.[112] If such a user could reasonably believe that Amazon was marketing the infringing goods in its own name and on its own behalf, this would establish a commercial link between Amazon and the products. The court also noted that Amazon provided comprehensive services to third-party sellers, including assistance in preparing advertisements and setting prices, stocking goods, and shipping them.[113] This level of involvement suggested that Amazon was more than just a neutral intermediary - strengthening the impression that Amazon was directly involved in the marketing and sale of the goods bearing the sign.[114] These factors combined led the Court to conclude that Amazon's role went beyond that of a mere host and established a commercial link with the products offered by third-party sellers on its platform. This marked a departure from previous rulings, with the court holding that the possibility of direct liability could exist for intermediaries.

3.3. The Opinion of Advocate General (AG) Spuznar in the *Louboutin* Ruling

In its decision, the CJEU deviated not only from previous case law, but also from the opinion of AG Spuznar, who emphasised the importance of maintaining a clear distinction between primary and secondary liability as per previous CJEU

[109] *Louboutin* (n 16) para. 43.
[110] ibid para. 48.
[111] ibid para. 35.
[112] ibid para. 51.
[113] ibid para. 27.
[114] ibid para. 51.

decisions. AG Szpunar emphasised that the established requirements for use of the trademark are essential, and asserted that Amazon was merely creating the technical conditions for this use of a trademark. As such, its conduct could not constitute direct use under Article 9(2) EUTMR for which it could be held primarily liable.[115]

According to AG Szpunar, the criteria for determining whether an intermediary is using a trademark involve evaluating whether the intermediary's behaviour and the context of the trademark use establish a link between the intermediary and the trademark. He found that Amazon's role as a marketplace operator, despite offering comprehensive services and presenting advertisements uniformly with its logo, did not integrate the trademark into its own commercial communication since such conduct "ensure[s] prompt and guaranteed delivery after a product is purchased".[116] AG Spuznar further argued that the perception of the internet user is crucial but must be evaluated objectively and not based on the mere presence of these factors.[117] Therefore, Amazon could not be held directly liable for primary trademark infringement. Instead, Szpunar acknowledged the possibility of secondary liability under national law, which could address the intermediary's role in enabling third-party infringements.[118]

The CJEU's ruling in the *Louboutin* case thus departed from AG Szpunar's opinion by blurring the lines between primary and secondary liability through its more flexible interpretation of use from the perception of a reasonably well-informed and observant internet user.

3.4. The Implications of the *Louboutin* Ruling on the EU Framework for Holding Hybrid Internet Intermediary Agents Liable for Trademark Infringements

The *Louboutin* ruling marks a crucial development in the understanding of liability for online marketplaces, with implications for the distinction between primary and secondary liability, particularly in light of the concept of use in trademark law.

[115] Joined Cases C-148/21 and C-184/21 *Christian Louboutin v Amazon Europe Core Sàrl and Others* (2022) ECLI:EU:C:2022:1016, Opinion AG Szpunar, para. 67.
[116] *Louboutin*, AG opinion (n 115) para. 92.
[117] ibid para. 72.
[118] ibid para. 79.

In its preliminary ruling, the CJEU outlines factors considered in establishing the liability of online marketplace operators for trademark infringements. These include the presentation of advertisements, potential consumer confusion, and whether the marketplace operator clearly distinguishes between its own services and the trademark used for commercial reasons.[119] The CJEU notes Amazon's use of its own logo in counterfeit shoe advertisements was potentially misleading consumers into believing Amazon was marketing these products for itself and by itself. It further discusses the additional services provided by the intermediary to third-party sellers which use its platform (ie, arranging returns) and how such support to sellers contributes to the perception that Amazon can be directly linked to the infringing products.[120] It is this, alongside its uniform presentation of advertisements, that led to the decision that Amazon could be held directly liable for trademark infringements. Primary liability is reserved for entities that directly use a trademark in their commercial activities, while secondary liability has been applied to those who facilitate such use by others. It can thus be argued that the court effectively expanded the scope of primary liability to include certain facilitating actions traditionally viewed as secondary. As such, the CJEU's ruling has blurred these lines by having a more inclusive understanding of use, in which the broader context of how trademarks are presented within an online marketplace is to be considered.

The focus on consumer perception plays a crucial role in this expanded interpretation. Since establishing trademark infringement involves examining if the trademark is used in trade and if such use negatively affects its functions, post-*Louboutin*, determining the perception of reasonably well-informed and observant internet users becomes imperative for the latter assessment. This perception is particularly relevant when the intermediary offers comprehensive services which could further integrate the trademark into the intermediary's commercial communication. The judgement in *Louboutin* thus illustrates a notable shift from previous opinions, establishing that if consumers can link the trademark to the online marketplace's services, the operator can be held directly liable for trademark infringement.

[119] *Louboutin* (n 16) para. 54.
[120] ibid paras. 52-53.

This significant departure from prior judgments highlights just how much the approach to internet intermediary liability has evolved within the EU framework for third-party trademark infringements. Furthermore, it highlights the importance of evaluating the role of intermediaries, with the implication they are to exercise greater diligence in monitoring and managing the content on their platforms to avoid being considered as primary users of the trademark. This requirement extends beyond merely providing a neutral platform and includes how they present and support third-party products. The decision therefore outlines the importance of hybrid platforms clearly differentiating between goods specifically sold by the operator, and those sold by third-party sellers, to enable customers to recognise the source of advertisements and the actual seller of the products.

4. CONCLUSION

In conclusion, the EU has seen some crucial progressions in holding ISSPs responsible for intermediating illicit materials on its platforms. The present paper highlights the importance of differentiating independent sellers who use trademarks for economic gain from hosting platform operators. While sellers clearly use trademarks, determining the operator's liability for sellers' unauthorised use involves distinguishing between primary (direct) and secondary (indirect) liability. With respect to content protected under trademark law, one can note that the CJEU historically saw a distinction between holding online intermediaries directly, and indirectly, liable for third-party infringements. This is something that is further reflected in the legislation it applied, namely the EUTMR, ECD and the DSA. Moreover, the CJEU has consistently ruled that ISSPs, including internet intermediaries, are not directly liable for trademark infringements by users, as seen in cases like *Google France*, *L'Oréal*, and *Coty*.

The question considered by this paper was: How has the development of the Louboutin ruling contributed to blurring the traditional distinctions of liability for third-party trademark infringements on internet intermediaries in the EU? In light of what has been considered, we can note that what once was a more easily delineated regime of primary and secondary liability, has become much more blurred in recent times. Under the EUTMR, online intermediaries are not subject to primary liability regimes; thus, claiming responsibility against internet

intermediary agents must be done within the framework of other legislation which permits secondary liability. Up until 2024, it was the ECD that would be consulted in this regard. Under the ECD, online intermediaries could not be held responsible for third-party infringements - unless their role in the intermediation was an active one in which they were aware of the illicit materials on their platform. This was, however, without any further due diligence requirements on the part of the intermediary agents. As such, the realm of trademark law liability within the EU saw calls for revisiting the ECD. This was followed by a modernisation of the rules through the DSA which still features safe harbour provisions, but also additionally categorises various types of internet intermediaries, assigning them duties and standards on the basis of their size and influence in the digital world. The introduction of this legislation had as its aim to keep up to date with the evolution of the online world, and thus responded to critiques of the ECD's failure to do so. Most relevantly, the introduction of the rules in the DSA signalled a step in the direction of heightened responsibility for ISSPs for third-party trademark infringements. Alongside these developments in the EU legislative framework, this paper also considered the *Louboutin* preliminary ruling, which further illustrates this shift. The *Louboutin* decision marked a positive step by the CJEU towards acknowledging that online platforms play more than a passive role, as had been previously suggested. By potentially signalling a trend towards greater accountability for marketplace operators, the ruling could be considered an indicator of development in favour of brand owners, who could expect to be in a stronger position when asserting their intellectual property rights against internet intermediary agents displaying infringing content.

As such, the answer to the research question is arguably that the EU has seen developments which suggest that its approach to intermediary liability for trademark infringements on their platforms is heading towards one of more enhanced liability than what was historically the case. In this regard, the *Louboutin* decision is a significant contributor to the blurring of the traditional distinctions between primary and secondary liability for third-party trademark infringements on internet intermediaries in the EU, particularly through the CJEU's expansion of the concept of use to include certain facilitating actions of intermediaries. This ruling may encourage trademark proprietors to pursue legal actions against online marketplaces more aggressively, knowing that the CJEU could be inclined to

adopt this liability approach against ISSPs. Equally, in encouraging more aggressive legal actions by trademark proprietors against online marketplaces, we could also see more robust enforcement of trademark rights by ISSPs and a subsequent reduction in counterfeit goods on their platforms. It should be borne in mind that the preliminary ruling answered questions to be referred back to local courts rather than being a clear finding of infringement. Following this preliminary ruling, it is up to the national courts in Luxembourg and Belgium to assess whether Amazon has ultimately infringed Louboutin's EU trademark based on the CJEU's interpretation. Since these decisions are pending, the exact extent of the blurring of liability distinctions the preliminary ruling seems to imply cannot yet be determined.

Although outside of the scope of this research, parallels may be drawn between copyright and trademark laws development in relation to intermediaries. Copyright law has already taken significant steps to ensure online platforms are held liable for any infringing content placed on their platforms, going as far as creating sector-specific legislation, and merging the distinction between primary and secondary legislation. Therefore, it remains to be seen how the courts will build upon the *Louboutin* case and whether the same trends will be followed. When looking to the future and to potential developments relating to further regulatory expansion on the concept of secondary liability, legislators must ensure that such innovation is balanced against the appropriate safeguarding of intellectual property rights. In any case, the ever-changing legal landscape in the field should be closely followed.

Mental Incapacity and Criminal Responsibility of Former Child Soldiers in International Criminal Law: An Exploration of the Challenges Presented, Crime, and Psychopathology

Leilani Radaideh [1]

[1] Leilani Radaideh is an LL.B. graduate from the European Law School and a current LL.M. candidate at Maastricht University, where she specialises in International Trade and Investment Law. In parallel to her academic pursuits, Leilani serves as the President of UNICEF Student Team Maastricht and holds the position of Associate Editor at the Maastricht Student Law Review. Her academic and professional interests are centered around the nexus of law with diverse domains including crime, children's rights, and international trade. Leilani is particularly drawn to human-centered legal approaches, advocating for the integration of empathetic and people-focused methodologies within the legal framework.

TABLE OF ABBREVIATIONS

CORC	Committee on the Rights of the Child
CRC	Convention on the Rights of the Child
DID	Dissociative Identity Disorder
DSM-5	American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
LRA	Lord's Resistance Army
MACR	Minimum Age of Criminal Responsibility
MPC	Model Penal Code
PTSD	Post-Traumatic Stress Disorder
Rome Statute	Rome Statute of the International Criminal Court
RPE	Rules of Procedure and Evidence
RSB	Rotten Social Background
SCSL	The Special Court for Sierra Leone or The Sierra Leone Tribunal
SRSG	Office of the Special Representative of the Secretary-General
UN	United Nations
UNICEF	United Nations Children's Fund
UPC/FPLC	Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo

1. INTRODUCTION

"Is there an end to this madness, and is there any future for him beyond the bushes?" - Ishmael Beah, A Long Way Gone: Memoirs of a Boy Soldier[2]

Porters, spies, human shields, suicide bombers, cooks, sexual slaves… the list goes on for the roles that child soldiers occupy, whether directly engaging in hostilities or indirectly supporting ongoing conflicts.[3] Regardless of the role they undertake, whether they are engaged in warfare or are undertaking ancillary roles, child soldiers endure profound atrocities, grappling with the incomprehensible complexities of armed conflict.[4] Testimonies from former child soldiers often depict harrowing experiences of extreme violence - including mutilation and amputation - perpetrated by their fellow combatants. Such accounts underscore the severe physical and psychological traumas endured by child soldiers in conflict zones.[5]

"I was in school. It was noon. A white van pulled up and took me and three friends. They tied my hands and legs and threw me in the truck. When we arrived at the camp, our training started with a beating. We were told if we tried to escape, we would be killed. We were forced to carry heavy supplies, and raid homes to get more. We were forced to steal. To kill. […] I was a boy of 12."

- Anonymous former child soldier.[6]

A child is defined by the Convention on the Rights of the Child (CRC) as "any person under the age of 18 ".[7] Child soldiers are those who are or who have:

[2] Ishmael Beah, *A Long Way Gone: Memoirs of a Boy Soldier* (Macmillan Publishers 2007) p. 45.
[3] Michael Wessells, *Child Soldiers: From Violence to Protection* (Harvard University Press 2006), p. 6.
[4] Erin Lafayette, 'The prosecution of child soldiers: Balancing accountability with justice' (2012) 63 Syracuse L Rev 297.
[5] *The Prosecutor v Taylor* (Transcript of Record) SCSL 2003-01 (2008) p. 699-700.
[6] International Criminal Court, "'I want to start my life again" – Using child soldiers is a crime' *(youtube.com,* 8 May 2019) <https://www.youtube.com/watch?v=wtRx5Pe5eiU> accessed 5 April 2023.
[7] Convention on the Rights of the Child (adopted 20 November 1951, entered into force 2 September 1990) 1577 UNTS 3 (Convention on the Rights of the Child), art. 1.

"been recruited or used by an armed force or armed group in any capacity, including, but not limited to, children, boys and girls…It does not only refer to a child who is taking or has taken a direct part in hostilities."[8]

Children are forcibly recruited through means such as kidnappings, threats, and/or manipulation.[9] In response, the international community has developed relevant laws prohibiting the use of these soldiers, evident in the Geneva Convention IV Article 50(2) and Article 38 of the CRC. The former stating that the occupying power cannot enlist children "in formations or organisations subordinate to it",[10] whereas the latter highlights the protection of children in armed conflicts, outlining specific obligations for States Parties under international humanitarian law (IHL).[11]

Child soldiers are deprived of many fundamental rights, [12] thus, leading to the ponderance as to whether there is any future beyond "the bushes".[13] Through suffering atrocities during one's developmental years, a key psychological phenomenon can develop: the victim-perpetrator complex. This is rooted in the understanding that these soldiers can be viewed as both the victims and the perpetrators of violence.[14] Spending one's childhood in such a position can have severe developmental impacts on individuals both physically and mentally: physical in the sense of bodily injuries, but also mentally, as disorders such as post-traumatic stress disorder (PTSD), major depression, dissociative identity disorder (DID), and anxiety may develop.[15] These children may also become desensitised to violence and later struggle to adjust to civilian life, increasing the likelihood that they may continue to use violence in their communities.[16]

[8] UNICEF, 'The Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups' (30 January 2007) p. 7.
[9] Alcinda Honwana, *Child soldiers in Africa* (University of Pennsylvania Press 2011), p. 49.
[10] Geneva Convention IV (adopted 12 August 1949, entered into force on 21 October 1950) 75 UNTS 287.
[11] Convention on the Rights of the Child (n 7) Art. 38.
[12] International Committee of the Red Cross 'Children associated with armed forces or armed groups' (*https://www.icrc.org*, September 2013) <https://www.icrc.org/en/doc/assets/files/publications/icrc-002-0824.pdf > accessed 27 May 2023.
[13] Beah (n 2) p. 45.
[14] Wessells (n 3) p. 45.
[15] Federica D'Alessandra, 'The Psychological Consequences of Becoming a Child Soldiers: Post-Traumatic Stress Disorder, Major Depression, and Other Forms of Impairment' (2014) p. 5.
[16] Divya Singh, 'When a Child is Not a Child: The Scourge of Child Soldiering in Africa' (2007) 7 Afr Hum Rts LJ 206.

Therefore, questions are raised regarding the culpability and blameworthiness of child soldiers that "blow out their eighteen candles" and can be tried as adults.[17]

This paper embarks on a comprehensive examination of international criminal law and criminal responsibility, providing a foundational understanding of key concepts such as *actus reus*, *mens rea*, and relevant defences to child soldiering. Central to this exploration are specific articles from the Rome Statute of the International Court (Rome Statute), highlighted to underscore their significance. Following this groundwork, the paper assesses the current landscape of international criminal law, emphasising the lack of uniform standards, particularly regarding the age threshold for childhood. An in-depth analysis of mental incapacity in international criminal law ensues, with a dedicated focus on Article 31(1)(a) of the Rome Statute. This chapter begins by defining pertinent terms and subsequently elaborates on defences under this article, offering a nuanced comparison of the International Criminal Court's (ICC) approach to mental incapacity with that of other tribunals. Concluding with potential solutions to enhance the handling of this issue within the framework of international criminal law, the paper presents thoughtful insights and concluding remarks, paving the way for further discourse and action in this crucial area.

As such, the research question explored is: To what extent is the legal framework for mental incapacity in place at the International Criminal Court as regards crime committed by individuals that were once child soldiers appropriate? This paper centres on the Rome Statute due to two factors: firstly, its status as a pivotal instrument of international criminal law which is utilised to prosecute those accountable for the gravest offences; and secondly, the frequent involvement of child soldiers in the execution of such crimes.

Although this focus may appear specific in its scope, this topic demands the international community's attention because child soldiers represent multifaceted political victims, being both victims and perpetrators. Neglecting them within the judicial sphere would engender an unsettling cycle of perpetuation, wherein the continuous emergence of new offenders could occur; and justice may continue to remain elusive for both the victims and the

[17] Tyler Fagan, William Hirstein, and Katrina Sifferd 'Child soldiers, executive functions, and culpability' (2016) 16(2) International Criminal Law Review 258.

international community.[18] It is important to note that this paper focuses solely on the legal aspects of child soldiering, excluding other contextual factors (such as political or socioeconomic conditions) and thus employs a doctrinal research methodology.

2. The Basics of International Criminal Law and the Rome Statute

This chapter delves into the core of international criminal responsibility, addressing fundamental concepts such as *actus reus, mens rea*, and the defences of mental incapacity and duress, which hold particular relevance in the context of child soldiering. These legal principles form the cornerstone upon which accountability for grave international crimes is constructed.

Internationally, criminal offences encompass genocide, crimes against humanity, war crimes, and crimes of aggression.[19] Establishing criminal liability in these cases requires two essential elements: the objective element (or *actus reu*s) referring to the doctrine of conduct, and *mens rea*, which pertains to the various forms of intention required depending on the offence.[20]

Article 25 of the Rome Statute addresses *actus reus*, the requirement that the perpetrator is held responsible for the crimes committed directly or as an accomplice.[21] This includes individuals that commit international crime through aiding, abetting, or contributing towards its planning, execution, and/or preparation. A notable feature is that it holds commanders and superiors responsible for the crimes that their subordinates commit, as well as for their failure to prevent or punish such transgressions when it is determined that they were aware of the crimes or should have been aware of them.[22] This idea of "control over the crime " was expanded upon in the case of *Katanga and Ngudjolo*, where the ICC Pre-Trial Chamber found that this control was equivalent to

[18] Jo Becker, 'Some Child Soldiers Get Rehabilitation, Others Get Prison' (*https://www.hrw.org*, 4 March 2019) <https://www.hrw.org/news/2019/03/04/some-child-soldiers-get-rehabilitation-others-get-prison> accessed 4 April 2024.
[19] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute), Preamble.
[20] ibid chapter 4.
[21] ibid art. 25 (3).
[22] ibid art. 25(3)(d).

"control over the organisation".[23] Consequently, the concept of indirect perpetration was introduced, involving the use of power to enable individuals to commit crimes indirectly. Thus, Katanga and Ngudjolo[24] were found guilty pursuant to Article 25(3)(a) of the Rome Statute.[25]

According to Article 30 of the Rome Statute, individual criminal responsibility is found when the "material elements are committed with intent and knowledge".[26] Acts are carried out with intent if perpetrators "mean to engage in the conduct" and "mean to cause that consequence or [are] aware that it will occur in the ordinary course of events".[27] Such intent can only be found when the agent is a "competent" and "practical reasoner".[28] An example of this application can be seen in the case of *Thomas Lubanga*.[29] Lubanga, a former warlord from the Democratic Republic of the Congo, was convicted by the ICC of various war crimes, including the use of child soldiers. Pursuant to Article 8(2)(e)(vii) of the Rome Statute, the defendant knew or should have known that the individual recruited to or used in the armed forces was under the age of 15. The defendant, however, did not need to know that his crime in this respect was part of a plan or policy or large-scale commission of the crime as required by Article 8(1) Rome Statute.

Here it is relevant to note that from the recruitment side, this is a war crime;[30] the Geneva Conventions of 1949 and other additional protocols dated 25th January 2013 prohibit the recruitment of children under the age of 15 or their

[23] *The Prosecutor v. Katanga and Ngudjolo* (Decision on the confirmation of charges) ICC-01/04-01/07-717 (2008), para. 500.
[24] Mathieu Ngudjolo Chui was later acquitted on the 18th of December 2012 by the Trial Chamber II of the charges of war crimes and crimes against humanity. As a result, his immediate release was ordered. The verdict was then appealed by the Prosecution on 20th of December 2012; however, nonetheless, on the 27th of February 2015, the verdict was upheld by the Appeals Chamber. Germain Katanga, on the other hand, on the 7th of March 2014, was convicted as an accessory to one count of a crime against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, destruction of property, and pillaging). The trial's judgment is final, as both the Defence and Prosecution withdrew their appeals on 25th of June 2014. He received a 12 year prison sentence, with credit given for the time he spent in detention at the ICC between 18th of September 2007 and 23rd of May 2014, which was deducted from his sentence.
[25] ibid para. 562.
[26] ibid art. 30.
[27] ibid art. 30 (2)(a) and (b).
[28] Robert F. Schopp, 'Multiple personality disorder, accountable agency, and criminal acts' (2000) 10 C. Cal. Interdisc. LJ 297.
[29] *The Prosecutor v Lubanga* (Trial Judgment) ICC-01/04-01/06 (14 March 2012).
[30] International Committee of the Red Cross (ICRC), 'Customary International Humanitarian Law' (*https://ihl-databases.icrc.org/en*) <https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule156> accessed 15 May 2023.

participation in hostilities, both by non-armed groups and national armed forces.[31] The defence attempted to argue that Lubanga lacked intent because he believed that the children he recruited were at least 15 years of age, due to a policy requiring age verification by the *Union des Patriotes Congolais*/*Forces Patriotiques pour la Libération du Congo* (UPC/FPLC).[32] According to the defence, Lubanga was against the conscription of children as relevant documents to this time showed that Lubanga had ordered his subordinates in the UPC to demobilise all those under the age of 18, proving that he knew the recruitment of children was prohibited.[33] The Judges, however, were not convinced. Although the orders of demobilisation were enacted, these were evidently not adhered to: their issuance in itself proves that Lubanga was aware that children were still being enlisted despite the prohibition.[34] Accordingly, the ICC rendered a judgment in line with Article 74 of the Rome Statute and citing Article 30,[35] stating that a mistake of fact regarding the legality of an act does not preclude criminal responsibility. A "should have known "standard is set out as a form of negligence, by which any gross deviation from a standard of care that a reasonable person would adhere to is regarded as a violation.[36] Lubanga was thus sentenced in 2012 for a total of 14 years of imprisonment.

However, according to Article 31, an individual may not be held criminally liable if, at the time of the crime, the actor lacked the capacity[37] to understand the nature and consequences of this act or was unable to control their conduct.[38] This is a very high threshold, as demonstrated by the *Dominic Ongwen* case.[39] This is further expanded upon in the chapter regarding mental incapacity, but to briefly summarise, the defence argued that Ongwen's experiences as a child soldier - including his abduction by the Lord's Resistance Army (LRA) - should be

[31] International Committee of the Red Cross, 'ICRC Treaties and State Parties to Such Treaties' (*icrc.org,* 3 April 2024*)* <https://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=SS> accessed 15 April 2024.
[32] ibid paras. 620-644.
[33] *Lubanga,* Judgment (n 29) 585-586, para. 1348.
[34] *The Prosecutor v. Lubanga* (Decision on the Confirmation of Charges) ICC-01/04-01/06-803-tEN (07 February 2007) supra note 16, 106- 108, paras. 313-316.
[35] ibid para. 960.
[36] Gus Waschefort, 'Justice for child soldiers? The RUF trial of the Special Court for Sierra Leone.' (2010) 1 Journal of International Humanitarian Legal Studies 189, p. 202.
[37] ibid.
[38] Rome Statute (n 19) art. 31 (1)(a).
[39] *The Prosecutor v Dominic Ongwen* (Trial Judgement) ICC-02/04-01/15 (4 February 2021).

considered when assessing his culpability. However, in light of Article 31, the Court decided that Ongwen did not meet this standard. This is further expanded upon in the chapter regarding mental incapacity.

Having explored the intricacies of international criminal responsibility, particularly in relation to *actus reus*, *mens rea*, and defences like duress and mental incapacity, this chapter has provided an analysis of the legal frameworks involved. The Rome Statute delineates the *actus reus* requirement, holding perpetrators accountable for crimes committed directly or as accomplices. Article 25 extends liability to commanders and superiors for crimes committed by their subordinates. Furthermore, Article 30 establishes individual criminal responsibility based on intent and knowledge. This was exemplified in the case of Thomas Lubanga, where knowledge of recruiting child soldiers led to a conviction despite claims of ignorance. However, Article 31 provides a defence for individuals lacking capacity due to mental illness or incapacity, as explored in the case of Dominic Ongwen. This paper follows with the existing landscape when assessing criminal responsibility, in particular the issue of uniform standards. A particular focus is then placed on Article 31 of the Rome Statute.

3. The Lack of Uniform Standards

This chapter exposes the absence of consistent criteria in evaluating the criminal responsibility of ex-child soldiers, exemplified by the *Ongwen* case. From contrasting perspectives of prosecutors and defence lawyers to discrepancies in international age standards, this section highlights the ambiguity surrounding the transition from innocence to guilt. With unreliable ex-child soldier witnesses further complicating proceedings, this chapter provokes discourse on the justiciability of individuals like Ongwen, prompting debate between stringent prosecution and considerations of immunity or substantial safeguards.

Thus far, navigating the terrain of evaluating the criminal responsibility of ex-child soldiers reveals a glaring issue: the absence of uniform standards. The *Ongwen* case exemplifies the paradoxical nature inherent in the perspectives of prosecutors and defence lawyers when it comes to the complex dynamics of child soldiers as both victims and perpetrators. By portraying Ongwen as an irredeemable killer, the prosecutors denied his contested mental illness which

caused during his perpetration of atrocities,[40] despite easily attaching such diagnoses to the "30.000 abducted children in Uganda between 1986 and 2007."[41] This contradicts the ICC's universal message that children are the most vulnerable and affected victims of atrocity crimes.[42]

In the Lubanga trial, the prosecutor emphasised that "children need mothers, not commanders."[43] However, Bensouda later took a more rigid stance in her prosecution of Ongwen, discrediting his claims of mental illness and duress as elements he tried to hide behind to evade responsibility.[44] This highlights the ICC's struggle to reconcile justice with the best interests of child soldiers,[45] which has resulted in unsatisfactory outcomes and a lack of consistent answers.[46]

Furthermore, a pertinent factor in assessing international criminal responsibility is age. Pursuant to Article 26 of the Rome Statute, the ICC shall not prosecute anyone under the age of 18. The Court's stance is not based on the belief that individuals under 18 should be exempt from legal action, but rather on the principle that the discretion to prosecute should be delegated to the respective

[40] *The Prosecutor v. Dominic Ongwen* (Decision on the Defense Request to Order a Medical Examination of Dominic Ongwen) ICC-02/04-01/15 (16 December 2016). It is vital to note that the reports produced regarding Ongwen's mental state are filled with many contradictions, with reports concerning his mental state stating he did in fact suffer from disease of the mind, whereas others state he did not. Nonetheless, Dominic Ongwen was deemed not suffer from a mental disease or defect, as according to the ICC judgement. This point was raised again when the prosecution attempted to raise the defence of diminished capacity to mitigate the sentence. Due to conflicting reports, this paper takes the stance that it is highly possible, given all the factors explored in this paper, that Dominic Ongwen suffered some defect of the mind.

[41] Thijs Bouwknegt and Barbora Holá,'Dominic Ongwen: ICC Poster and Problem Child' (*JusticeInfo.net,* 16 March 2020) <https://www.justiceinfo.net/en/44014-dominic-ongwen-icc-poster-and-problem-child.html> accessed 14 May 2023.

[42] International Criminal Court, 'Policy on Children' (*https://www.legal-tools.org*, 15 September 2016) <http://www.legal-tools.org/doc/c2652b/> accessed 14 April 2024.

[43] International Criminal Court, 'Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, on the International Day against the use of Child Soldiers: "Children are especially vulnerable. We must act to protect them"' (https://www.icc-cpi.int, 12 February 2020). <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-mrs-fatou-bensouda-international-day-against> accessed 1 May 2023.

[44] *The Prosecutor v. Dominic Ongwen* (Prosecution Closing Brief) ICC-02/04-01/15 (24 February 2020) p. 11.

[45] Tom Maliti, 'ICC Prosecutor Says Ongwen was a Pivotal Figure in LRA's Campaign of Terror' (*ijmonitot.org,* 4 March 2020) < https://www.ijmonitor.org/2020/03/icc-prosecutor-says-ongwen-was-a-pivotal-figure-in-lras-campaign-of-terror/> accessed 28 March 2023.

[46] Nini Els Pieters and Tonny Raymond Kiabira, 'The Ongwen Judgement at the ICC: A Missed Opportunity for Former Child Soldiers?' *(internationallaw.blog,* 22 June 2021) <https://internationallaw.blog/2021/06/22/the-ongwen-judgement-at-the-icc-a-missed-opportunity-for-former-child-soldiers/#_ftnref18> accessed 10 April 2023.

states, so as to avoid unnecessary conflict.[47] States may set this age of criminal responsibility as they please, with the bar having been set as low as seven years of age[48] but most commonly set at the age of 14.[49]

In contrast to this perspective, IHL treaties do not set a minimum age of criminal responsibility (MACR). Instead, the relevant age is seen in light of the protected interest, ranging from neonates to children under the age of 18.[50] Other sections dealing with minors only protect those under the age of 15, as there seemed to be consensus during the drafting of the Geneva Conventions that children reach a certain level of maturity at that age.[51] The CRC requires that member states themselves set their age for such criminal responsibility.[52] States are only encouraged by international laws to consider recommendations, by the CRC for instance, of ranges from 16 to 18, but are notably not required to do so.[53] Such recommended ranges thus imply a belief that, below this age, children "do not have the requisite mental, physical, or moral development to make a logical decision regarding his or her participation in [the] conflict",[54] and can consequently not be held accountable for crimes committed as child soldiers.

Other tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), did not cite specific MACRs. Nevertheless, no parties below the age of 18 appeared before the tribunals.[55] The Special Court for Sierra Leone or The Sierra Leone Tribunal (SCSL) outlined the fact that the court shall have jurisdiction over

[47] United Nations Office of the Special Representative of the Secretary-General (SRSG) for Children Affected by Armed Conflict, 'Working Paper Number 3: Children and Justice During and in the Aftermath of Armed Conflict' (*http://childrenandarmedconflict.un.org*, September 2011) <https://childrenandarmedconflict.un.org/publications/WorkingPaper-3_Children-and-Justice.pdf> accessed 14 April 2024.

[48] UNICEF, 'Minimum age for criminal responsibility' *(unicef.org,* 2019) <https://www.unicef.org/lac/media/2771/file/PDF%20Minimum%20age%20for%20criminal%20responsibility.pdf>accessed 17 May 2023.

[49] UN Committee on the Rights of the Child, 'General Comment No.10: Children's Rights and Juvenile Justice' (25 April 2007) UN Doc CRC/C/GC/10.

[50] Karine Helle, 'Optional Protocol on the Involvement of Children in Armed Conflict to the Convention on the Rights of the Child' (2000) International Review of the Red Cross p. 797.

[51] Barbara Fontana, 'Child Soldiers and International Law' (1997) 6(3) African Security Review 51, pp. 52–53.

[52] Convention on the Rights of the Child (n 7), art. 40(3)(a).

[53] UN Committee on the Rights of the Child (n 49).

[54] Lafayette (n 4) pp. 70–71.

[55] ReliefWeb, 'Analysis: Should Child Soldiers be Prosecuted for Their Crimes?' (*Reliefweb*.int, 6 October 2011) <https://reliefweb.int/report/world/analysis-should-child-soldiers-be-prosecuted-their-crimes> accessed 16 May 2023.

any person above the age of 15.[56] Nevertheless, not prosecuting minor children who have committed serious war crimes could create an incentive for their commanders to assign them the most reprehensible tasks in the hopes of evading punishment. The current regulatory landscape thus risks creating a sort of grey area for crimes committed by child soldiers as delegated by their superiors, effectively lessening their liability.[57]

Therefore, a particularly striking area that lacks clarity is the assessment of the transition from innocence to guilt (both legally and morally) as this lacks a clear delineation. Is it merely determined by reaching the age of 18. As seen above, the lack of consensus on this topic highlights how this answer is not evidently clear, and as such, this begs the question of whether it can be deemed to be correct. The complexity runs deep for these individuals who are both victims and perpetrators, often described as "tragic perpetrators".[58] As such, the guides by which international criminal law punishes and protects relevant parties can arguably be seen as both artificial and arbitrary.[59]

Moreover, former child soldiers often prove to be unreliable witnesses, susceptible to manipulation and occasionally retracting their testimonies. Research reveals that in over 71% of cases involving (ex-)child soldier witnesses at international criminal tribunals and the ICC, judges identified significant issues with their testimonies, such as reliability[60] and credibility.[61] Consequently, another realm of ambiguity comes to light, necessitating a meticulous case-by-case approach and crucially thereby perpetuating the existing lack of uniformity.

With such a plethora of areas that lack consensus, this area of international criminal law has inspired academic commentary on the responsibility, culpability, and justiciability of individuals like Ongwen. On one hand, it can be argued that

[56] International Committee of the Red Cross (ICRC), 'Agreement for and Statute of the Special Court for Sierra Leone' (*https://ihl-databases.icrc.org/en*, 16 January 2002) <https://ihl-databases.icrc.org/assets/treaties/605-IHL-98-EN.pdf > accessed 14 May 2023.
[57] Radhika Coomaraswamy, 'The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict – Towards Universal Ratification' (2010) 18(4) The International Journal of Children's Rights 535.
[58] Mark A Drumbl, 'Victims who victimise' (2016) 4(2) London Review of International Law 217, 243.
[59] ibid.
[60] Laura Marschner, 'Implications of Trauma on Testimonial Evidence in International Criminal Trials' in Philip Alston and Sarah Knuckey (eds.), *The transformation of human rights fact-finding* (OUP 2016) pp. 221-223.
[61] Tom Maliti (n 45).

any acknowledgement of prior kidnapping or recruitment cannot outweigh the gravity of the crimes allegedly committed as adults.[62] On the other hand, an argument could also be made in favour of granting ex-child soldier defendants' immunity or at least some substantial safeguards in the form of defences such as mental incapacity or diminished capacity from prosecution.[63]

4. Mental Incapacity in International Criminal Law

This third chapter dissects the complexities of excluding liability due to mental incapacity, contrasting it with diminished capacity. Using the *Ongwen* case as a lens, the chapter explores challenges in proving mental incapacity, particularly regarding severe conditions like PTSD. It also examines the influence of environmental factors on criminal behaviour, touching upon legal standards such as Article 31 of the Rome Statute and the M'Naghten rule. Ultimately, it prompts reflection on the balance between accountability and understanding in international criminal law, advocating for a nuanced approach to ensure justice.

Excluding liability on the basis of mental incapacity is based on the theory that perpetrators of crime should only be punished if they are rational agents.[64] This aligns with the core tenets of criminal law theory: if an individual fails to understand the nature of their conduct or is unable to govern their actions due to some mental deficit, punishment would not be just, nor would it deter the agent (hence not achieving the goal from a utilitarian perspective), nor would it actually punish the mentally incapacitated wrongdoer (thus failing to satisfy retributivist goals of criminal law).[65] According to Krug, mental incapacity could have a considerable impact on the overall fairness of trials and on holding individuals accountable for their actions.[66] Consequently, defining mental incapacity and its

[62] Sarah Kihika Kasande, and Virginie Ladisch, 'The Complex Reality Beyond the Trial of Dominic Ongwen.' (*https://www.ictj.org*, 5 December 2016) < https://www.ictj.org/news/complex-icc-ongwen> accessed 14 April 2024.
[63] Erin K. Baines, 'Complex political perpetrators: reflections on Dominic Ongwen' (2009) 47(2) The Journal of Modern African Studies 163.
[64] Massimo Scallioti, 'Defences before the International Criminal Court: Substantive Grounds for Excluding Criminal Responsibility—Part 2' (2002) 2(1) International Criminal Law Review 1, 16.
[65] Jacques Claessen, 'Theories of Punishment' in Johannes Keiler and David Roef (eds.), *Comparative Concepts of Criminal Law* (3rd edn, Intersentia 2019); Johannes Keiler and David Roef, 'Principles of Criminalisation and the Limits of Criminal Law' in Johannes Keiler and David Roef (eds.), *Comparative Concepts of Criminal Law* (3rd edn, Intersentia 2019).
[66] Peter Krug, 'The Emerging Mental Incapacity Defense in International Criminal Law: Some Initial Questions of Implementation'(2000) 94 American Journal of International Law 317, 319.

relation to culpability remains vital. Mental incapacity would lead an individual to lack any cognitive ability to understand or control their actions, impacting their capacity to form intent or engage in responsible decision-making.[67]

In addition to mental incapacity, another available defence is diminished capacity. In contrast to the former, this is a partial defence requiring that the individuals' mental faculties or cognitive abilities are significantly impaired, thereby impacting their capacity to develop the specific mental state required for liability. This defence does not fully relieve criminal liability, but rather reduces the seriousness of the charge.[68] In light of these considerations, profound inquiries arise as to whether individuals can perpetrate abhorrent crimes and evade legal consequences by malingering,[69] thus sneaking through a potential "loophole".[70] Such issues underscore the importance of defining the boundaries of mental capacity to ensure the maintenance of the legitimacy and justice of the legal system.

Illustrating this difficulty is the defence in the *Ongwen* case, where the defence claimed that the defendant's traumatic experiences - resulting in PTSD, depressive disorder, and dissociative disorder - rendered him incapable of having the required *mens rea* for the crimes he was accused of.[71] An individual with severe PTSD may experience symptoms that significantly impair their cognitive abilities, leading to compromised decision-making. However, it is rarely successful in proving insanity, as it is not usually so severe that it deprives the person from knowing his actions are wrong.[72] It is true that cases of PTSD, according to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-5), have the potential to influence dissociative

[67] Helen Silving, 'The criminal law of mental incapacity.' (1962) 53 J. Crim. L. Criminology & Police Sci. 129, 129.
[68] Stephen J. Morse, 'Diminished capacity: A moral and legal conundrum.' (1979) 2 International Journal of Law and Psychiatry 271.
[69] Tom Maliti, 'Defense Psychiatrist Says Ongwen Did Not Fake Mental Illness' *(ijmonitor.org,* 25 November 2019*)* <https://www.ijmonitor.org/2019/11/defense-psychiatrist-says-ongwen-did-not-fake-mental-illness/> accessed 21 May 2023.
[70] John Tobin, 'The Psychiatric Defence and International Criminal Law' (2007) 23(2) Medicine, Conflict and Survival 111, 112.
[71] *The Prosecutor v Dominic Ongwen* (Trial Judgement) ICC-02/04-01/15 (4 February 2021). In the assessment carried out during January 2017, Dr. de Jong diagnosed Dominic Ongwen with PTSD, depression, and unspecified dissociative disorder. Due to the scope of the examination being confined to the present mental state, the ICC tribunal did not incorporate this evidence within the context of the insanity case.
[72] Ira K. Packer, 'Post-traumatic stress disorder and the insanity defense: A critical analysis' (1983) 11(2) The Journal of Psychiatry & Law 125.

responses in which the person experiences depersonalisation and derealisation[73] (in which individuals experience sensations of feeling detached from their bodies and experiencing things as unreal), but such severity is rare.[74] The Court therefore decided that the application of Article 31 in this case was not successful and Ongwen did possess the necessary *mens rea*, and declared him guilty of 61 crimes against humanity and war crimes. The high threshold for establishing lack of criminal liability under Article 31 is exemplified by cases like that of Ongwen, where severe mental health issues may impair cognitive abilities, but the rarity of cases demonstrating complete unawareness of the wrongfulness of actions highlights the difficulty in meeting this standard.

In the cases of child soldiers - specifically applicable to *Ongwen* but also more generally - when they are tried as adults, their illegal conduct has often spanned a large period of time. This adds to the complexity of assessing the individual's mental state. Furthermore, depending on the role played by the individual, the likelihood that the insanity defence can apply varies. For instance, a high-ranking officer in a terrorist organisation or resistance army who can strategically plan attacks, hold a leadership position, and organise future attacks, will be less likely to successfully argue that they lacked the mental capacity to understand or control their actions.[75]

Furthermore, international courts, such as the ICC, do not have access to the supervision and treatment facilities for individuals found to lack the necessary mental capacity at the time of committing the crime, nor do they have an international preventive psychiatric detention scheme for cases where persons are found not guilty by reason of insanity. This is also the case for those found unfit to be tried.[76]

To help address these complexities that surround mental incapacity, one may first go back to a basic saying of criminal law: *actus me invito factus non est meus actus*, meaning "the act done by me against my will is not my act". As such,

[73] American Psychiatric Association, *American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders* (Fifth Edition, American Psychiatric Association 2013) pp. 271-280.
[74] Francesca L. Schiavone, Paul Frewen, Margaret McKinnon, and Ruth A. Lanius, 'The dissociative subtype of PTSD: an update of the literature.' (2018) 29(3) PTSD Research Quarterly 1.
[75] Justin Harder, 'A Future Perspective on the Disposition of the Insane and the Unfit to Stand Trial in the International Criminal Court' (2010) 8 New Zealand Yearbook of International Law 145.
[76] Ian Freckelton and Magda Karagiannakis, 'Fitness to Stand Trial under International Criminal Law: Current Challenges for Law and Policy' (2014) 12(4) Int J Crim Justice 705, 724–725.

according to this maxim, one should not be deemed to be guilty in cases such as those at the core of the issue this paper aims to address. This is because the extent of the influence of environmental adversities on criminal behaviour may be strong enough to create a predisposition to engage in criminal acts. This gives rise to the concept that an accused cannot be held responsible for their actions if they were caused by factors outside of their control. A key related factor is the Rotten Social Background (RSB), first raised in the case *United States v. Alexander*, in which Murdock (the defendant) shot and killed the victim who had called him a "black bastard".[77] According to expert testimony, Murdock's deplorable social background had conditioned him to react in a manner that would be deemed extremely inappropriate by most. Despite this evidence, the presiding judge disregarded the testimony leading to a conviction that ultimately resulted in a prison sentence of 20 years to life.[78]

Judge Bazelon dissented to this and later clarified his views on the RSB argument by stating that the "law's aims must be achieved by a moral process cognisant of the realities of social injustice".[79] Punishment is justified in that the individual has committed actions that are morally condemnable, and that the defendant's "mental, emotional, and behavioural" controls were "present and intact" at the time of offence.[80] Thus, due to the defendant's RSB, these requirements were not met and therefore, punishment should not be inflicted. However, this view is contested as others argue that the presence of environmental adversity may not inexorably abrogate an individual's agency.[81] Nonetheless, it cannot be ignored that such factors can aggravate the likelihood of crime being committed. Therefore, this discourse assumes particular significance within the broader context of comprehending mental incapacity and its mitigating factors, particularly given the limited jurisprudence from the ICC on this particular subject.

Professor Paul H. Robinson addresses this in depth and states that a defendant who would "not have committed the offence in question were he the 'old self' might claim that he should get a defence since he acted only because of

[77] *United States v. Alexander*, 471 F.2d, para. 929.
[78] ibid para. 927.
[79] David Bazelon, 'The Morality of the Criminal Law: A Rejoinder to Professor Morse' (1976) 49 S. Cal. L. Rev., p. 386.
[80] ibid pp. 388, 392.
[81] Stephen J. Morse, 'The Twilight of Welfare Criminology' (1977) Faculty Scholarship at Penn Carey Law 11, p. 19.

new beliefs and values, forcibly imposed on him, for which he ought not be held accountable."[82] This concept is linked to the concept of RSB as it underscores the argument that an individual cannot be held fully responsible for actions stemming from circumstances beyond their control. This notion is intertwined with the concept of RSB, which posits that an individual's background and environment can significantly influence their predisposition to engage in criminal behaviour. Applying this to the case of child soldiers, the coercive indoctrination that they go through whilst consistently in an environment of terror, means that they are brainwashed into "dreaming of war".[83] This is evident throughout the *Ongwen* defence's arguments in front of the Court, but particularly when they exclaimed to the judge:

> "[Y]our Honor, there is an interesting reasoning- the way the Prosecution reasons back and forth, back and forth about some of these is very laughable. They admit that Mr Ongwen went through hell in the bush, of course these are my- I'm paraphrasing, went through hell in the bush and was turned into a devil. But later, they turn around and say, 'Nevertheless he emerged from hell a complete saint. He is a saint and should be judged on the basis of a reasonable man'."[84]

With this in mind, Article 31(1)(a) of the Rome Statute reads:

> "A person shall not be criminally responsible if, at the time of that person's conduct, the person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law."

[82] Paul Robinson, 'Are We Responsible for Who We Are? The Challenge for Criminal Law Theory in the Defenses of Coercive Indoctrination and "Rotten Social Background"' (2012) Scholarship at Penn Law pp. 54-55.
[83] 'Each of us sin in words, deeds, and thoughts. Each of us sin in different ways. If I committed a crime through war, I am sorry. In my mind, I thought war was the best thing. Even up to now, I dream about war every night. But if they don't want to forgive me, I leave it in their hands. I have become like a lice, which you remove from your hair or waist and kill without any resistance' Moses Akena, 'Ongwen speaks out on why he quit LRA', (*The Daily Monitor*, 19 January 2015) <https://www.monitor.co.ug/News/National/Ongwen-speaks-out-on-why-he-quit-LRA/-/688334/2593818/- /5ox5ac/-/index.html> accessed 21 February 2023.
[84] *The Prosecutor v Ongwen* (Transcript of the Defense Closing Arguments) icc-02/04-01/15-T-258-Red-eng wt 12-03-2020 15/93 nb t (13 March 2020), paras. 15-16.

This serves as a supplement by defining the grounds for excluding criminal responsibility, but it is not the sole location where such grounds are found.[85] Moreover, Article 31 generally does not provide for a comprehensive list of all possible defences to an offence, as it focuses on incapacity (as seen above), intoxication, and duress.[86] However, this deficiency is remedied in the succeeding paragraphs, by which the Court may allow for the development of further grounds to exclude criminal responsibility by referring to other appropriate laws. Two conditions are found here: (i) the accused suffered of mental disease or defect at the time of the crime, and (ii) the consequence is of such severe nature by which the accused's capacity (to appreciate the nature of their conduct), or volition (ability to control their actions) was destroyed. The word destroyed holds the bar of capacity at a high standard, to the extent it may be criticised to as being unattainable, yet, given the heaviness of the crimes concerned, the bar should also not be too low either.[87]

As a result of the accused's capacity being destroyed, they are no longer able to "appreciate" the wrongfulness of their actions. This is different from the infamous M'Naghten defence. This test has generally been associated with schizophrenia and psychotic disorders,[88] became the standard for insanity in the UK and US and is still the accepted norm in almost half of the states.[89] The M'Naghten rule states:

> "At the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know what he was doing was wrong."[90]

Under this defence, two alternative conditions are presented; namely, that at the time of the act, due to a disease of the mind altering the workings of reason, a party

[85] See the following subsections of this article.
[86] Albin Eser, 'Grounds for excluding criminal responsibility' (2015) Nomos Verlagsgesellschaft mbH & Co. KG 1126.
[87] Harder (n 75) p. 153.
[88] Chinmoy Gulrajani, 'Difficult Defenses in the Courtroom.' (2017) 47(12) Psychiatric Annals 576.
[89] Legal Information Institute, 'M'Naghten Rule' (*https://www.law.cornell.edu,* August 2023) <https://www.law.cornell.edu/wex/mcnaghten_rule> accessed 14 April 2024.
[90] Queen v. M'Naghten [1843] 8 Eng. Rep. 718.

is not aware of the nature and quality of the act or, he did know it but was unaware it was wrong.[91] By deviating from the narrow focus seen in the M'Naghten rule, the Rome Statute shifts towards a broader perspective that considers the ability to appreciate the right or wrong of conduct. This enables the Court to delve into the nuanced details of what is deemed normal, particularly within the challenging context of continuous conflict. A child soldier who continues to commit crimes as an adult would see this as normal life, as these acts would be the norm in the context of their upbringing.

Applying this to the case of *Ongwen*, it may be said that because Ongwen was captured and raised in such deplorable circumstances, he was unable to appreciate the unlawfulness of his own conduct and therefore should be excluded from criminal responsibility. To separate the child that suffered such traumas and was indoctrinated with values that worship war, from the adult whose guilt is being assessed, would risk the strenuous efforts and continuous plight towards protecting the rights of the child.[92]

5. Comparison of the ICC's Treatment of Mental Incapacity with other Tribunals

Exploring the metrics used by the ICTY, ICTR, and ICC in the assessment of the defence of mental incapacity becomes critical. Although there is no direct precedence in international criminal law that comprehensively explores this defence, a basic rule set out regarding mental incapacity and diminished responsibility will be investigated.[93] The chapter delves into the burden of proof and legal parameters for diminished capacity, drawing inspiration from laws like the Homicide Act 1957. It also explores the ICC's incorporation of the duress defence and its implications. Through case analyses like *Celebići* and *Erdemović*, the chapter seeks to evaluate the adequacy of the legal framework, especially regarding former child soldiers' criminal responsibility.

The ICTY was created in order to investigate and punish war crimes perpetrated during the Yugoslav Wars. The ICTR on the other hand was founded

[91] Queen v. M'Naghten [1843] 8 Eng. Rep. 718.
[92] Bouwknegt and Holá (n 41).
[93] Allan Norrie, 'Insanity and diminished responsibility' in *Crime, Reason and History: A Critical Introduction to Criminal Law* (3rd ed., CUP 2014) pp. 237-273.

to bring high-ranking defendants to justice for widespread abuses of human rights in Africa. This court's mission is to bring cases against individuals who are thought to be behind the Rwandan Genocide of 1994.[94]

The groundwork on diminished capacity in this context originates in the ad hoc work conducted by the ICTY. However, no reference was made to mental incapacity. In a similar vein, the ICTR also makes no mention of mental incapacity. Nevertheless, when creating the ICTY, it was noted by the Security-General that the tribunal should involve such mental elements, as the

"International Tribunal itself will have to decide on various personal defences which may relieve a person of individual criminal responsibility - such as minimum age or mental incapacity - drawing upon general principles of law recognised by all nations."[95]

This is found in Rule 72(b)(i)(b) of The Rules of Procedure and Evidence (RPE).[96] The RPE are a means by which the Rome Statute, to which they are always subservient, may be applied, as well as other rules of tribunals. Rule 72(b)(i)(b) requires the defence to

"notify the prosecutor of its intent to offer…any special defence, including that of diminished or lack of mental responsibility; in which case the notification…intends to rely to establish the special defence".[97]

This was evidently applied in the case of *Celebići*.[98] The case involved allegations of serious crimes committed during the armed conflict in the former Yugoslavia. The defendants were charged with crimes including torture, inhumane treatment, and unlawful detention, arising from their roles in the operation of the Celebići

[94] UN Audiovisual Library of International Law, 'Statute of the International Criminal Tribunal for Rwanda' (https://www.un.org, 8 November 1994) <https://legal.un.org/avl/ha/ictr/ictr.html#:~:text=The%20International%20Criminal%20Tribunal%20for%20Rwanda%20(ICTR)%20is%20the%20first,for%20the%201994%20Rwandan%20Genocide.> accessed 15 April 2024.
[95] Human Rights Watch, 'Section F : General Principles Of Criminal Law'(https://www.hrw.org, June 1998) <https://www.hrw.org/legacy/reports98/icc/jitbwb-08.htm> accessed May 21 2023.
[96] International Criminal Court, 'Rules of Procedure and Evidence' (2019) ICC-PIOS-LT-03-004/19_Eng (Rules of Procedure and Evidence), Rule 72(b)(i)(b).
[97] ibid.
[98] *The Prosecutor v. Delalic et al.,* (Judgment, Trial Chamber II) IT-96-21-T (16 Nov 1998).

detention camp.[99] Esad Landzo, a guard at the Celebići prison camp, who was convicted for the inhumane treatment and murders of Bosnian Serbian and Croatian detainees, claimed the defence of diminished mental ability early on in response to the accusations made against him, and later submitted a request for clarification from the Trial Chamber regarding the specific legal basic rule of this defence.[100] The Trial Chamber decided that the burden of proof for a party asserting a unique defence of diminished or lacking mental responsibility "carries the burden of proving this defence on the balance of probabilities " but it failed to constitute a determination on what comprises diminished or lacking mental capability until the verdict was rendered.[101] The trial chamber was able to take this as an opportunity to define the conditions required. Much inspiration was taken from the laws of the Homicide Act 1957.[102] A successful application of diminished capacity results in a reduction of a charge[103] from murder to manslaughter.[104] This is in cases where the individual suffers from "abnormality of the mind" through which the individual's capacity was substantially impaired.[105] This does not extend to the point where this meets the requirements of insanity (as set out in M'Naghten).

Similarly, the ICC RPE Rule 145(2)(a)(i) also touches upon the fact that during sentencing the tribunal must consider mitigating evidence of "substantially diminished mental capacity".[106] Thus, the consequences of such interpretation before the ICTY is that it did not offer a complete or partial defence to murder. Rather it permitted the Court to examine situations where the accused experienced an impairment in their ability to control their actions due to an "abnormality of mind".[107]

The Rome Statute, pursuant to Article 31(1)(d), incorporates the duress defence in cases in which the conduct was "caused by duress resulting from a

[99] UNITED NATIONS International Residual Mechanism for Criminal Tribunals, 'Čelebići Crimes' (*https://www.irmct.org/en*) <https://www.irmct.org/en/mip/features/celebici#:~:text=During%20the%20eight%20months%20of,Esad%20Landžo%2C%20and%20Zdravko%20Mucić.> accessed 30 May 2024.
[100] *Delalić* (n 98), paras. 1185 and 1186.
[101] ibid para. 1172.
[102] Homicide Act 1957 of England and Wales.
[103] *Delalić* (n 98), para. 1166.
[104] ibid paras. 586 and 590.
[105] ibid.
[106] Rules of Procedure and Evidence (n 96), Rule 145(2)(a)(i).
[107] *Delalić* (n 98), para. 1166.

threat of imminent death or of continuing or imminent serious bodily harm against that person or another person", and the person acted necessarily and reasonably to avoid this threat without the intention to cause a greater harm than the one they were trying to avoid.[108] Therefore, the individual must be (i) acting under imminent threat, whilst (ii) undertaking the necessary and reasonable steps to avoid that threat, and (iii) does not intend to cause a greater harm than the one sought to be avoided. Regarding the ICTY's application of duress, in the *Erdemović* case[109] it was made clear that duress proved insufficient to constitute a comprehensive defence against specific war crimes.[110] While duress is not directly linked to mental health, it can still be considered by the Court when assessing an individual. This is because mental illness can affect various aspects of one's life, including the person's experience of duress, their understanding of immediate circumstances, their ability to explore alternative options, and their intention to cause harm. These considerations necessarily impact the conditions found in Article 31(1)(d).[111]

As such, it is important to note that the *Celebići* and *Erdemović* cases are assessed in light of the research question to evaluate the appropriateness of the legal framework for mental incapacity at the ICC regarding crimes committed by individuals who were once child soldiers. In comparing the ICC to other tribunals such as the ICTY and ICTR, notable distinctions arise in their treatment of mental incapacity defences. While the ad hoc tribunals laid some groundwork on diminished capacity, mental incapacity was not explicitly addressed. However, the ICC's RPE demonstrate a consideration for mental incapacity defences, as evidenced in cases like *Celebići*. Moreover, the ICC incorporates the duress defence, distinguishing itself from its predecessors. Through such comparisons, this chapter underscores the ICC's evolving legal framework and its efforts to address complexities in criminal responsibility, particularly concerning former child soldiers.

[108] Rome Statute, art 31 (1)(d).
[109] *The Prosecutor v. Dražen Erdemović* (Judgement) IT-96-22-A (7 October 1997).
[110] ibid para. 62.
[111] Lee Hiromoto and Landy F. Sparr, 'Ongwen and Mental Health Defenses at the International Criminal Court' (2023) 51(1) Journal of the American Academy of Psychiatry and the Law Online.

6. Recommendations Proposed

It is evident that there are areas of uncertainty and issues that must be remedied for future cases. Firstly, it is imperative for the international community to adopt a decisive position concerning the divergent viewpoints on age requirements. By conveying a unified message, this collective effort could effectively discourage the utilisation of child soldiers in times of war.

Moreover, given that Article 31(1)(a) necessitates a significant level of impairment that is unlikely to be caused by most mental illnesses, it is suggested that the term substantially impaired be employed in place of destroyed. This would lower the threshold and allow for a more inclusive consideration of individuals who could potentially be considered as having diminished mental capacity.

From the analysis undertaken regarding child soldiers and their position in conflict, it is clear that much is done under coercion from their commanders. However, in a similar way to mental incapacity, the threshold is set high, by demanding that the threat be imminent. While a threat may initially appear imminent, it is improbable that this persists throughout the entire enlistment period for child soldiers. Furthermore, the experience of duress during child soldiers' formative years can significantly impact their mental capacity to comprehend and grasp their circumstances, as well as their capacity to explore alternative courses of action and their intention regarding causing harm. A more suitable definition of duress which could be used to amend Article 31(1)(d) is found in the Model Penal Code (MPC),[112] stating that:

"the actor engaged in the conduct charged to constitute an offence because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist".[113]

[112] Paul H. Robinson and Markus D. Dubber, 'The American model penal code: A brief overview.' (2007) New criminal law review 10.3, pp. 319-341. Many states have based their criminal codes on the concepts of the Model Penal Code (MPC), which was created by the American Law Institute in 1962 and has had a significant impact on criminal law reforms in numerous states. The MPC, which is divided into four sections, outlines broad principles of culpability, identifies particular offences, and emphasizes elements analysis and standardising *mens rea* terminology to ascertain the mental states of defendants.

[113] American Law Institute 'Model Penal Code' (1962), Section 2.05.

As a result, because there is no imminent condition, proportionality requirement, or need that the subject take reasonable efforts to avoid the threat, a more appropriate use of the defence may arise.[114]

Moreover, considering the extreme severity of the crimes tried at the ICC, it may be argued that special facilities should be available for those deemed mentally incapacitated, as this ensures a more nuanced understanding of mental conditions and their impact, especially since disorders such as DID are relatively new and still being explored.[115] Additionally, considering the difficulties that may arise in preparing forensic mental health evaluations in the case of child soldiers that continue to commit crimes, it may be useful to employ a group of forensic mental health experts for the ICC specifically; this team could comprise professionals from various jurisdictions, each adhering to their distinct guidelines and best practices, potentially enhancing the overall effectiveness of such evaluations. Yet, this may just be a matter of time, as the ICC is still fairly "young" (as it was established in 2002),[116] further advancements and clarity are anticipated as mental health defences continue to be examined and tested.

A sufficient understanding and allowing for the RSB doctrine to influence the Court's decision making is vital in assessing culpability and blameworthiness. By recognising that the link between an individual and their environment can influence their propensity for criminal behaviour, courts (including the ICC) can enhance their understanding of such individuals and impose appropriate sentencing. Had the ICC taken this into sufficient account, the sentences it has imposed may have been different. This is especially relevant in the case of child soldiers that continue to commit crime as adults, as originally, they were merely "pawns in the adult game of war".[117]

Thus, to summarise, the recommendations include: adopting a unified stance on age requirements to discourage the use of child soldiers, revising Article 31(1)(a) for a broader consideration of diminished mental capacity, aligning

[114] Benjamin J. Risacher, 'No Excuse: The Failure of the ICC's Article 31 "Duress" Definition' (2014) 89 Notre Dame L. Rev. 1403.
[115] Graeme Galton and Adah Sachs (eds.), *Forensic aspects of dissociative identity disorder* (1st ed, Routledge 2018).
[116] International Criminal Court, 'Understanding the International Criminal Court' (International Criminal Court 2020) p. 6.
[117] UN, 'Integrated Disarmament, Demobilization and Reintegration Standards' (https://www.unddr.org, IDDR Standards, module 5.30 2006) <https://www.unddr.org/operational-guide-iddrs/> accessed 28 May 2023.

Article 31(1)(d) with the Model Penal Code's duress definition, providing specialised facilities and expert panels for mental health evaluations at the ICC, and recognising the influence of the RSB doctrine to enhance understanding of individual culpability, especially in cases involving child soldiers.

7. Concluding Remarks

The issue of child soldiers is a complex and deeply troubling phenomenon that requires attention from the international community. The culpability and blameworthiness of these victim-perpetrators that continue to commit crimes as adults is a challenging situation in which various contextual factors must be considered. Thus, this paper aimed to answer the question: To what extent is the legal framework for mental incapacity in place at the ICC as regards crime committed by individuals that were once child soldiers appropriate? International criminal law has evolved to address the issue of child soldiers, this development being made evident in the approaches by various international tribunals, by relevant laws prohibiting their use and holding armed groups accountable for war crimes, and the existence of various MACR (despite the apparent lack of consensus on them).

Possible solutions to address these complexities include considering the influence of environmental adversities on criminal behaviour and adopting a more nuanced approach to criminal responsibility. The concept of a RSB and the defence of mental incapacity provide insights into the factors that may mitigate criminal responsibility for child soldiers. Such background, as according to doctrine and legal theory, must be taken into serious consideration by institutions such as the ICC.

International criminal law, particularly Article 31(1)(a) of the Rome Statute, offers some guidance for excluding criminal responsibility based on mental disease or defect that destroys the capacity to appreciate the nature and unlawfulness of one's conduct, thus setting the standard extremely high. As such, this paper suggests that this word be changed to substantially impaired which could lead to a broader interpretation, thereby allowing individuals who truly warrant the classification of mental insanity to be rightfully recognised as such. Furthermore, the definition of duress should be amended to reflect the lasting

effects of duress experienced during formative years, as it significantly influences an individual's comprehension, decision-making, and intent.

This paper also suggests that specialised facilities and dedicated forensic mental health experts can aid in better understanding the mental conditions of the accused and facilitate fair trials at the ICC. Additionally, a decisive international stance on age requirements is necessary to deter the use of child soldiers in armed conflicts. By unifying efforts and conveying a clear message, the international community can contribute to justice and prevent the exploitation of children in times of war. This paper acknowledges the significance of this proposal and suggests its further exploration in future research.

Furthermore, in order to provide justice and support for former child soldiers, it is crucial to strike a balance between accountability and an awareness of the impact of trauma and indoctrination. The international community must continue to work together to prevent the recruitment and use of child soldiers, rehabilitate those affected, and provide them with opportunities for a future beyond the “bushes.”[118]

[118] Beah (n 2) p. 45.