Maastricht Student Law Review

Volume 1 | Issue 1
February 2024

International, European and Comparative Law

SLR
Maastricht Student Law Review

Maastricht University

MAASTRICHT STUDENT LAW REVIEW

VOLUME 1 | ISSUE 1

2024

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FROM THE EDITORIAL DESK

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

It is our great pleasure to present our very first issue. This issue features nine submissions that fall under the umbrella of international, European, and comparative law. These submissions include theses, articles, and case notes that have been written by both undergraduate and graduate students, as well as UM alumni. We are very pleased to showcase many topical issues on human rights, competition law, and EU 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. Their continuous support and effort have made the creation of MSLR possible. We also extend our gratitude to our partners at the London School of Economics Law Review, The Hague International, and the Esade Law Review.

MSLR was born of a merger between two student-run law journals: the Atlas Law Journal and the ELSA Maastricht (EMaas) Law Journal. It was through continuous collaboration and having one common goal in mind that both journals formed the foundations of this student law review. We aim to uphold their values and inspire many future readers, editors, authors, and students.

Finally, we would like to congratulate and express our immense gratitude towards our Editorial Team for their commitment and dedication through the entire editorial process – this publication would not be possible without you.

The editorial board hopes you enjoy reading our first issue of 2024.

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

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A NOTE FROM ELSA MAASTRICHT

The European Law Students' Association Maastricht is proud to partner with the Maastricht Student Law Review. As the largest independent, non-profit, and non-political law students' association in the world, ELSA Maastricht is committed to providing a just world in which there is respect for human dignity and cultural diversity. Through the publication of high quality and contemporary student submissions, ELSA Maastricht furthers its mission to contribute to legal education. ELSA Maastricht hereby congratulates the team at MSLR on their first publication and extends its congratulations to the many student authors published in this edition. We wish you a pleasant read!

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MAASTRICHT

EU Accession to the ECHR: Advisory Opinions in the New Draft Accession Agreement

Giulia Giardino[1]

Why relying on comity between the European courts might not ensure accession at its third attempt.

[1] Giulia Giardino is a graduate of the European Law School Master with a specialisation in EU Public Law and Governance at Maastricht University. In her studies and research, she has focused specifically on European Human Rights and the interplay between the legal systems of the Council of Europe and the European Union. After a successful graduation cum laude, she is currently a trainee at the Council of Europe Liaison Office to the European Union working predominantly on migration and rule of law issues and subsequently at the EU Delegation to the Council of Europe.

TABLE OF ABBREVIATIONS

CJEU	Court of Justice of the European Union
Convention / ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
DAA	Draft Accession Agreement
ECtHR	European Court of Human Rights
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
NDAA	New Draft Accession Agreement
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

1. INTRODUCTION

The accession of the EU to the ECHR[2] has been on the table for more than forty years. Quashed in *Opinion 2/94* by the CJEU for lack of competence,[3] the EU accession to the ECHR was codified by the Treaty of Lisbon in article 6(2) TEU,[4] which imposes an obligation on the EU to accede to the ECHR. Despite the numerous advantages that accession would bring to EU fundamental rights protection,[5] the process has been rather cumbersome and greatly hindered by the CJEU. In *Opinion 2/13*, the CJEU vetoed the EU's accession to the ECHR by pointing out that in various instances the DAA was not compatible with the "*specific characteristics and autonomy of EU law*". [6] Commentators have highlighted that the CJEU's opinion reflected the increasing concern of the Luxembourg court regarding the excessively far-reaching case law of the ECtHR. Consequently, the aftermath of *Opinion 2/13* has been allegedly characterised by the severing of a long-lasting comity relationship between the CJEU and the ECtHR.[7] The achievement of the NDAA, published on 17 March 2023, seems to restore faith that accession will occur, as well as in the appeasement of the ECtHR and CJEU relations.[8]

[2] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).
[3] *Opinion 2/94 of the Court* [1996] EU:C:1996:140.
[4] Consolidated Version of the Treaty on European Union [2012] OJ C326/15 (TEU).
[5] For extensive discussion on the advantages of the EU accession to the ECHR see Martin Kuijer, 'The Accession of the European Union to the ECHR: A Gift for the ECHR's 60th Anniversary or an Unwelcome Intruder at the Party?' [2011] 3/4 Amsterdam Law Forum 17; Noreen O'Meara, "A More Secure Europe of Rights?" The European Court of Human Rights, the Court of Justice of the European Union and EU Accession to the ECHR' [2011] 12/10 German Law Journal 1813; Jean Paul Jacqué, 'The Accession of the European Union to the European Convention of Human Rights and Fundamental Freedoms' [2011] 48 Common Market Law Review 995; Turkiler Isiksel, 'European Exceptionalism and the EU's Accession to the ECHR' [2016] 27/3 European Journal of International Law 565; Steve Peers, 'The CJEU and the EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection' (*EU Law Analysis*, 18 December 2014) <http://eulawanalysis.blogspot.com/2014/12/the-cjeu-and-eus-accession-to-echr.html> accessed 30 August 2023.
[6] *Opinion 2/13 of the Court* [2014] EU:C:2014:2454.
[7] Jasper Krommendijk, '*Opinion 2/13* as a Game Changer in the Dialogue Between the European Courts?' in Emmanuelle Bribosia and Isabelle Rorive (eds), *Human Rights Tectonics. Global Perspectives on Integration and Fragmentation* (Intersentia 2018) p. 243.
[8] Tobias Lock, 'Op-Ed: Third Time Lucky? The Revised Agreement on the EU's Accession to the ECHR' (*EU Law Live*, 19 April 2023) <https://eulawlive.com/op-ed-third-time-lucky-the-revised-agreement-on-the-eus-accession-to-the-echr-by-tobias-lock/#> accessed 30 August 2023; Jasper

Among the various issues pointed out in *Opinion 2/13*, the CJEU acknowledged that reference to Protocol 16 ECHR[9] establishing advisory opinions to the ECtHR was missing in the DDA.[10] At that time, none of the EU Member States had ratified the Protocol, which had not yet entered into force.[11] Nevertheless, the CJEU feared that the advisory opinion procedure established by Protocol 16 would interfere with the preliminary ruling procedure of article 267 of the Treaty on the Functioning of the European Union (TFEU)[12] and adversely affect its autonomy and effectiveness.[13] The NDAA has addressed the interplay between the advisory opinion mechanism and the preliminary ruling procedure;[14] article 5 NDAA states that a court or tribunal shall not be regarded as a court of last instance for the purpose of Protocol 16, if dealing with an issue "*within the field of application of European Union law*". This therefore precludes those courts which, under EU law, are subject to the obligation to request clarifications on the interpretation of EU law to the CJEU through the preliminary reference form from doing so, instead directing them to seek clarification from the ECtHR through advisory opinions. Despite, at first glance, this clause appearing to assuage worries about a possible interference with article 267 TFEU, it raises multiple questions. In anticipation of a very likely request from the EU institutions for a new opinion by the CJEU as per article 218(11) TFEU, it is to be expected that the CJEU will thoroughly assess the newly drafted article 5 NDAA. Since the DAA could not take into account how Protocol 16 could work in practice and given the significant attention that the CJEU has given to the possible threat posed by advisory opinions to the EU legal system in *Opinion 2/13*, article 5 NDAA could potentially cause a further halt in the accession process by the CJEU.

Krommendijk, 'EU Accession to the ECHR: Completing the Complete System of EU Remedies?' (*Social Science Research Network*, 14 April 2023) <https://ssrn.com/abstract=4418811> accessed 30 August 2023.

[9] 'Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms' [2013] Council of Europe Treaty Series No. 214.

[10] *Opinion 2/13 of the Court* [2014] EU:C:2014:2454 para. 197.

[11] Council of Europe, 'Chart of Signatures and Ratifications of Treaty 214' <www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=214> accessed 30 August 2023.

[12] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU).

[13] *Opinion 2/13 of the Court* [2014] EU:C:2014:2454, para. 199.

[14] Council of Europe 'Report to the CDDH. CDDH Ad Hoc Negotiation group ("46+1") on the Accession of the European Union to the European Convention on Human Rights', (46+1(2023)35PROV Meeting report, Council of Europe, 17 March 2023).

This paper aims at investigating those potential controversies by attempting to answer the following research question: *To what extent does article 5 NDAA respond to the concerns of the CJEU expressed in* Opinion 2/13 *with respect to Protocol 16?* To do so, it is fundamental to contextualise the process of the EU accession to the ECHR with the historical relationship of between the ECtHR and the CJEU. This relationship has played a role in two different aspects of the accession process. Firstly, *Opinion 2/13* has been deemed as an expression of the CJEU's mistrust of the ECtHR.[15] The anticipated new opinion by the CJEU, where the Luxembourg court will carefully review the agreed provision on advisory opinions, will either confirm such mistrust or, instead, will express closer comity towards the ECtHR. Secondly, many of the proposed mechanisms in the DDA and the NDAA rely on a close collaboration between the two courts and this might also be the case for Protocol 16. The importance of such a relationship in the accession process has also been acknowledged by EU Member States in Declaration n. 2 of the TFEU, where they acknowledge "*the existence of a regular dialogue*" between the two courts and call for a reinforced relationship upon accession.

Therefore, in section 2, the relationship between the ECtHR and the CJEU is explored. In particular, this relationship is analysed under the perspectives of both the ECHR and EU legal systems. Firstly, the two courts interact through their case law; therefore, the phenomenon of cross-fertilisation and the consequent mutual cross-citation of case law between the two European courts is investigated. Secondly, the two courts interact with the respective legal systems and the two courts have established, more or less clearly, how the ECHR and EU legal systems interrelate; therefore, the *Bosphorus* presumption and interconnection that these two legal systems have through the EU Charter[16] are taken into account. Both perspectives are analysed by considering the relationship and development pre- and post-*Opinion 2/13*. After having established the state of the relationship between the two courts, section 3 analyses advisory opinions under Protocol 16. Firstly, a brief overview of what constitutes an advisory opinion is given by comparing it to the preliminary ruling procedure of article 267 TFEU.

[15] Krommendijk, '*Opinion 2/13*' (n 7) para. 243.
[16] Charter of Fundamental Rights of the European Union [2000] OJ C364/1.

Subsequently, the CJEU concerns in *Opinion 2/13* over Protocol 16 and the scholarly response are thereto presented. Finally, the new agreement made during the recently concluded negotiations, which are found in article 5 NDAA, will be analysed. An overview of the various steps of the negotiations that have led to its agreement will be given. Such analysis will allow for a comprehensive understanding of the extent to which the CJEU's concerns have been taken into account, and whether the negotiations shared the same concerns. Finally, in section 4, article 5 NDAA will be evaluated by focusing on the implications of such a provision and how the relationship between the ECtHR and CJEU will play a role. Firstly, focus will be put on the unclear wording of article 5 NDAA, on its possible interpretation and what may trigger the invocation of article 5 NDAA. Here, the recent request for an advisory opinion sent by the Belgian *Conseil d'État* will be taken as an example of a situation where article 5 NDAA would play a role after accession, as well as whether the CJEU's concerns raised by *Opinion 2/13* have been effectively addressed in article 5 NDAA. Secondly, the influence that advisory opinions and article 5 NDAA may have on the Charter of Fundamental Rights of the EU will be analysed. Here, it will be stressed that due to the close connection between the ECHR and the EU Charter and the lack of clarity in the formulation of article 5 NDAA, the new agreement will not necessarily prevent the influence that advisory opinions will have on the EU Charter.

To address the research question, this thesis will employ a doctrinal legal methodology. Firstly, the grounds for analysis are laid by using extensive literature, EU legislation, the ECHR and case law of the two courts to establish the development and the *status quo* of the relationship between the ECtHR and the CJEU. Subsequently, advisory opinions are outlined by analysing Protocol 16 ECHR, as well as the CJEU's *opinion 2/13* and scholars' reactions to it. Next, article 5 NDAA is assessed by looking into an overview of the negotiation reports, revealing considerations that have led to its adoption. Lastly, to evaluate the effectiveness of article 5 NDAA, the latest request for an advisory opinion by the Belgian *Conseil d'État* is analysed. EU primary legislation is additionally consider to assess further the implications of article 5 NDAA.

2. RELATIONSHIP BETWEEN ECTHR AND CJEU: AN EVOLUTION PRE- AND POST-*OPINION 2/13*

The ECtHR and the CJEU have developed, throughout the years, a very close relationship. Even before the Treaty of Lisbon and the codification of article 6 TEU, which clearly established the connection between the two fundamental rights legal systems, the relationship between the ECtHR and the CJEU had been at the centre of observation. The relationship shall, however, not be mistaken with "*mere judicial diplomacy*":[17] by means of their case law, the relationship has been one of "*very real and mutual impact*"[18] on the development of their respective legal systems.

Two perspectives provide good grounds for analysing the relationship between the ECtHR and the CJEU. Firstly, both courts have determined how the ECHR and the EU legal system interact and what role their respective fundamental rights instruments (namely the European Convention of Human Rights and the EU Charter, plus respective jurisprudence) play in regards to each system.[19] Secondly, the relationship can be analysed via the cross-fertilisation phenomenon and by the resulting cross-reference of the two courts' case law.[20] It is important to note, however, that the closeness with which the ECtHR and the CJEU interact is based on comity, namely cooperation and mutual respect between the two courts.[21] This comity relationship will be discussed in later sections. The legal obligations that seem to regulate the relationship between the two courts are not very clear and leave room for interpretation. The closeness of such a relationship is therefore

[17] Extra judicial contact usually happens through meetings, speeches, academic engagement or joint statements of the Court's presidents where they discuss general questions of common interest. Christiaan Timmermans, 'Will the Accession of the EU to the European Convention on Human Rights Fundamentally Change the Relationship Between the Luxemburg and the Strasbourg Courts?' (Centre for Judicial Cooperation EUI Distinguished Lectures, 2014 1). See also O'Meara (n 5) p. 1813; Court of Justice of the European Union, 'Joint Communication From Presidents Costa and Skouris' (24 January 2011) <https://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf> accessed 30 August 2023.

[18] Timmermans ibid.

[19] See for instance Sionaidh Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis' [2006] 43 Common Market Law Review p. 629.

[20] See for instance Bruno De Witte, 'The Use of the ECHR and Convention Case Law by the European Court of Justice' in Patricia Popelier, Catherine Van De Heyning and Piet Van Nuffel (eds), *Law and Cosmopolitan Values 1* (Intersentia 2011) 17.

[21] Tobias Lock, 'The ECJ and the ECtHR: The Future Relationship Between the Two European Courts' [2009] 8/3 The Law & Practice of International Courts and Tribunals p. 375.

mainly based on the unilateral willingness of the Strasburg and Luxembourg courts. In this section, the relationship of the two European courts prior to *Opinion 2/13* is analysed; the changes that *Opinion 2/13* have brought to this relationship are presented and, finally, the potential relationship between the two courts after the EU's accession to the ECHR is discussed.

2.1. THE RELATIONSHIP BEFORE *OPINION 2/13*

2.1.1. Bosphorus Presumption and Article 52(3) and 53 of the EU Charter

The *Bosphorus* judgement has determined the special approach taken by the Strasbourg court towards EU Member States when implementing EU law. In this key judgement, the ECtHR has established the presumption that EU Member States are not failing to fulfil their duties under the ECHR when implementing EU law.[22] For this presumption to apply, two cumulative conditions have to be fulfilled: firstly, the EU Member States shall have no discretion in implementing the obligations set in EU law;[23] secondly, the fundamental rights supervisory machinery of the EU shall be put in place, both substantively as well as procedurally, allowing for fundamental rights protection equivalent to the one provided by the ECHR.[24] The presumption does not however apply if the fundamental rights protection is manifestly deficient.[25] Through the *Bosphorus* presumption, the ECtHR placed the EU in a privileged position - the ECtHR has committed to not scrutinizing EU law, without placing itself above the CJEU[26] and showing a desire for comity and co-operation with the CJEU.[27]

On the other side of the coin, the EU has codified the intrinsic link between fundamental rights protection in the EU and the ECHR in articles 52(3) and 53 of the EU Charter, relying on the ECHR as a source of binding law within the EU legal system as established in article 6 TEU.[28] Article 52(3) EU Charter establishes that the EU Charter rights must be interpreted in light of the ECHR when the two

[22] *Bosphorus v Ireland* App no 45036/98 (ECtHR, 30 June 2005) para. 156.
[23] ibid para. 157.
[24] ibid para. 160.
[25] ibid para. 157.
[26] Tobias Lock, *The European Court of Justice and International Courts* (Oxford University Press 2015) p. 219.
[27] Lize R. Glas and Jasper Krommendijk, 'From *Opinion 2/13* to *Avotiņš*: Recent Developments in the Relationship Between the Luxembourg and Strasbourg Court' [2017] 17/3 Human Rights Law Review p. 567.
[28] Timmermans (n 17) p. 1.

correspond, as established in the Explanations to the EU Charter.[29] Article 53 EU Charter established that the ECHR rights shall be deemed as the minimum level of protection in the EU, for which the latter can ensure a higher standard of protection. The connection between the ECHR and the EU Charter already poses a limit to the autonomy of EU law which, through article 52(3) EU Charter, has restricted its possibility to autonomously interpret its rights in their entirety; instead, they indirectly rely on the ECHR.[30] This unilateral commitment confers the ECHR, at least substantially, a higher status than any other treaties concluded by the EU under article 216(2) TFEU within the EU legal order, namely between primary and secondary law.[31]

The so established peculiar ranking attributed to the ECHR in EU law raises questions on the legal relevance of ECtHR case law in the interpretation of the EU Charter. Despite the unilateral incorporation of the ECHR into EU law through article 53(3) EU Charter, whether the EU is legally bound to comply with ECHR case law is under discussion.

Firstly, article 52(3) of the EU Charter refers only to the rights guaranteed by the Convention, "*the meaning and the scope of those rights shall be the same as those laid down by the said Convention*", failing to refer to the ECtHR's case law. However, this reference is made in the Explanations to article 52(3) EU Charter where "the meaning and scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case law of the European Court of Human Rights and by the Court of Justice of the European Union". This interpretation is also supported by the CJEU case law in *McB*,[32] in which it seems to suggest that where EU Charter rights correspond to ECHR rights, the case law of the ECtHR should be followed,[33] making itself unilaterally subject to the jurisdiction of the ECtHR.[34] The Explanations to the EU Charter are not legally binding but only to be given due regard according to article 52(7) ECHR.[35] Such

[29] 'Explanations Relating to the Charter of Fundamental Rights' [2007] OJ C303/17.
[30] Johan Callewaert, *The Accession of the European Union to the European Convention on Human Rights* (Council of Europe Publishing 2014).
[31] Timmermans (n 17) p. 1.
[32] Case C-400/10 *PPU J McB v LE* [2010] EU:C:2010:544, para. 53.
[33] Sionaidh Douglas-Scott, 'The Court of Justice of the European Union and the European Court of Human Rights After Lisbon' in Sybe De Vries, Ulf Bernitz and Stephen Weatherill (eds), *The Protection of Fundamental Rights in the EU After Lisbo*n (Hart Publishing 2013) p. 153.
[34] Timmermans (n 17) p. 1.
[35] Explanations Relating to the Charter of Fundamental Rights (n 29).

an interpretation is, however, in line with the idea that the ECHR is deemed to be a "living instrument" [36] requiring dynamic interpretation by the ECtHR. [37] Nevertheless, the lack of legal relevance of the Explanations seems to suggest that also the ECtHR's case law does not formally bind the EU but shall merely be taken into consideration.[38] Such an interpretation would also be the most welcomed in light of the preservation of the autonomy of EU law.[39] ECHR case law is under discussion.

Secondly, the case law of the CJEU has also not provided further clarification. As already implied in *Opinion 2/13*,[40] the CJEU has established in *Akerberg Frasson*[41] and *Kamberaj*[42] and later confirmed in *Inuit*[43] and *J.N.*,[44] that as long as the EU does not formally accede to the ECHR, the Convention does not constitute a legal instrument formally incorporated in EU law and, therefore, the ECtHR's interpretation of the ECHR will only be binding after accession. [45] Despite the unclear legal status of ECtHR case law in the EU legal system, in the next subsection it will be shown that it still plays an influential role.

2.1.2. The Cross-Fertilisation Phenomenon and Mutual Cross-Citation of Case-Law

One of the main features that characterises the relationship between the ECtHR and the CJEU is the phenomenon of cross-fertilisation, namely the interaction of laws and legal practices between courts and legal systems.[46] The ultimate reason for the emergence of the cross-fertilisation phenomenon in this context can be traced back to the peculiar nature of the CJEU.[47] Since the EU is not a federation but rather a supranational institution, the CJEU does not act as an appellate court for the Member States, but it instead has jurisdiction on the disputes between the

[36] *Tyrer v United Kingdom* App no 5856/72 (ECtHR, 25 April 1978), para. 31.
[37] Douglas-Scott, 'The Court of Justice' (n 33) p. 153.
[38] ibid.
[39] ibid.
[40] *Opinion 2/13 of the Court* [2014] EU:C:2014:2454, para. 185.
[41] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] EU:C:2013:105, para. 44.
[42] Case C-571/10 *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others* [2012] EU:C:2012:233, para. 60.
[43] Case C-398/13P *Inuit Tapiriit Kanatami and Others v European Commission* [2015] EU:C:2015:535, para. 45.
[44] Case C-601/15 *J.N. v Staatssecretaris van Veiligheid en Justitie* [2016] EU:C:2016:84, para. 45.
[45] Krommendijk, '*Opinion 2/13*' (n 7) para. 243.
[46] Ulf Linderfalk, 'Cross-Fertilisation in International Law' [2015] 84/3 Nordic Journal of International Law p. 428.
[47] Francis F. Jacobs, 'Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice' [2003] 38/3 Texas International Law Journal p. 547.

Member States and the EU institutions and, more importantly for this context, on preliminary references. It is intrinsic in its nature, therefore, that the CJEU relies extensively on its dialogue with other courts.[48] The intense dialogue with national courts is attributed to the principle of sincere cooperation, according to which national courts and the CJEU share jurisdiction on matters of EU law.[49] This phenomenon also applies to other European and international courts.[50] More specifically, the ECHR's case law is the body of foreign case law most cited in Luxembourg, further indicating the inter-connectedness of the ECtHR and CJEU.[51] The phenomenon of cross-fertilisation in the context of the relationship between both courts has mainly taken the shape of such mutual cross-referencing of case law.

While the nature of the CJEU fosters such a phenomenon, cross-fertilisation between the two courts is not a one-way street. In fact, there are instances that showcase both the influence from Strasbourg to Luxembourg and vice versa. On one hand, the ECHR has surely played a major role in the development of fundamental rights protection in the EU. Until the Treaty of Lisbon, the CJEU relied on the ECHR as an inspiration to create general principles of EU law and develop its case law on fundamental rights protection.[52] For instance, in *Roquette Frères,*[53] the CJEU has relied on the Strasbourg cases *Niemietz*[54] and *Colas Est*[55] to adapt its interpretation on the right to privacy. Even if the ECHR was not binding on the European Community, the CJEU has increasingly referred to the ECtHR case law. This reliance on the ECHR culminated the doctrine of parallel interpretation enshrined in article 52(3) EU Charter,[56] according to which the ECHR sets the minimum standards of protection

[48] Francis F. Jacobs, 'Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice' [2003] 38/3 Texas International Law Journal p. 547.
[49] TEU (n 4) article 4(2) and 19(1).
[50] Jacobs (n 47) p. 547.
[51] Sionaidh Douglas-Scott, 'The European Union and Human Rights After the Treaty of Lisbon' [2011] 11/4 Human Rights Law Review p. 645.
[52] Case 36/75 *Roland Rutili v Ministre de l'Intérieur* [1975] EU:C:1975:137; case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] EU:C:1979:290. See De Witte (n 19) p. 17.
[53] Case C-94/00 *Roquette Frères SA v Directeur Général de la Concurrence, de la Consommation et de la Répression des Fraudes, and Commission of the European Communities* [2002] EU:C:2002:603.
[54] *Niemietz v Germany* App no 13710/88 (ECtHR, 16 December 1992).
[55] *Société Colast Est and Others v France* App no 37971/97 (ECtHR, 16 April 2002).
[56] Court of Justice of the European Union 'Joint Communication From Presidents Costa and Skouris' (24 January 2011) <https://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf> accessed 30 August 2023.

for all those rights in the EU Charter that correspond to the ECHR.[57] After the Treaty of Lisbon and the entry into force of the EU Charter, the CJEU has heavy relied on the EU Charter in its judgements at the detriment of the reference to ECtHR case law.[58] However, the ECHR has still retained some relevance in the development of the EU fundamental rights legal system. The CJEU in certain instances has invoked the evolution of the ECtHR case law to adapt its own interpretation of the scope of fundamental rights protection set in the EU Charter.[59] This has been demonstrated in the *N.S.* case,[60] where the CJEU has relied on *M.S.S. v Belgium and Greece* on matters of asylum.[61] Lastly, the CJEU has acknowledged and borrowed certain legal concepts from the ECtHR. This is the case, for instance, in *WABE* on the Equality Directive where the CJEU has accepted the existence of the concept of margin of appreciation, clearly a feature of the Strasbourg court's judicial reasoning.[62]

On the other hand, the CJEU case law has exercised considerable influence on the ECtHR, which has referred and based itself on the Luxembourg rulings to adjudicate on its cases as well. For instance, the ECtHR has relied on *Kadi*[63] in its case *Nada*,[64] concerning instances of blacklists of presumed terrorists and in *Sufi*

[57] The EU Charter right corresponding to the ECHR rights are outlined in 'Explanations Relating to the Charter of Fundamental Rights' OJ C303/17. The phenomenon of parallel interpretation is also to be found in the constitutional traditions of the EU Member States. See Leonard F.M. Besselink, 'The Protection of Fundamental Rights Post-Lisbon: The Interaction Between the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and National Constitutions' (FIDE General Report, 2013).

[58] Jasper Krommendijk, 'The Use of ECtHR Case Law by the Court of Justice After Lisbon: The View of Luxembourg Insiders' [2015] 22 Maastricht Journal of European and Comparative Law 812.

[59] Timmermans (n 17) p. 1.

[60] Joined cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department* and *M.E., A.S.M. and Others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* [2011] EU:C:2011:865.

[61] *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011).

[62] Joined cases C-804/18 and C-341/19 *IX v WABE eV* and *MH Müller Handels GmbH v MJ* [2021] EU:C:2021:594. Para 86 reads: "as is apparent from its title, that directive establishes a general framework for equal treatment in employment and occupation, which leaves a margin of discretion to the Member States, taking into account the diversity of their approaches as regards the place accorded to religion and beliefs within their respective systems. The margin of discretion thus afforded to the Member States in the absence of a consensus at EU level must, however, go hand in hand with supervision, by the EU judicature, consisting in determining whether the measures taken at national level were justified in principle and proportionate".

[63] Joined cases C-402/05P and C-415/05P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] EU:C:2008:461.

[64] *Nada v Switzerland [GC]* App no 10593/08 (ECtHR, 12 September 2012).

and Elmi v UK,[65] it has relied on the CJEU's ruling in *Elgafaji*.[66] The ECtHR has also referred to the EU Charter as relevant interpretative material for a dynamic interpretation of the convention in *Goodwin v UK*.[67] The ECtHR's reliance on the EU Charter is particularly significant because the instrument, at that time, was not binding. Now, the ECtHR regularly refers to the EU Charter[68] and relies on it to further develop its interpretation of the ECHR as in *Scoppola*.[69] Moreover, the ECtHR has also taken inspiration from the CJEU's case law even outside of the field of EU law.[70] For instance, in *Marckx v Belgium*,[71] the ECtHR has ruled that the effects of the judgement were to be limited to the events after the judgement and not retroactively, citing the doctrine established by the CJEU in *Defrenne*.[72]

2.2. The Relationship Post-*Opinion 2/13*

The relationship between the CJEU and the ECtHR is, however, not only characterised by comity. What was deemed a relationship of harmony and co-operation[73] seems to have taken a turn towards one of divergence, uncertainty and difficulty by virtue of *Opinion 2/13*.[74] While Declaration No. 2, annexed to the Lisbon Treaty, called for a reinforced dialogue between the Strasbourg and Luxembourg courts in light of EU accession to the ECHR, *Opinion 2/13* exposes the CJEU's self-interested position,[75] seemingly contradicting the text of article 6(2) TFEU that poses an obligation on the EU to accede to the ECHR.[76] The crack in the relationship between the two European courts has been confirmed by the

[65] *Sufi and Elmi v The United Kingdom* App no 2700/10 (ECtHR, 28 June 2011).
[66] Case C-465/07 *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* [2009] EU:C:2009:94.
[67] *Christine Goodwin v The United Kingdom* App no 28957/95 (ECtHR, 11 July 2002).
[68] David Anderson and Cian Murphy, 'The Charter of Fundamental Rights' in Andrea Biondi, Piet Eeckhout and Stephanie Ripley (eds), *EU Law After Lisbon* (Oxford University Press 2012) p. 155.
[69] *Scoppola v Italy (No. 2)* App no 10249/03 (ECtHR, 17 September 2009), paras. 105-106.
[70] Jacobs (n 47) p. 547.
[71] *Marckx v Belgium* App no 6833/74 (ECtHR, 13 June 1979).
[72] Case 43/75 *Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena* [1976] EU:C:1976:56.
[73] O'Meara (n 5) p. 1813.
[74] Jasper Krommendijk and Guus De Vries, 'Do Luxembourg and Strasbourg Trust Each Other? The Interaction Between the Court of Justice and the European Court of Human Rights in Cases Concerning Mutual Trust' [2021] 4/5 European Journal of Human Rights 319; Krommendijk, '*Opinion 2/13*' (n 6) p. 243.
[75] Daniel Harlberstam, 'It's the Autonomy, Stupid!' A Modest Defence of *Opinion 2/13* on the EU Accession to the ECHR, and the Way Forward' [2015] 16/1 German Law Journal p. 105.
[76] Bruno De Witte and Šejla Imamović, '*Opinion 2/13* on Accession to the ECHR: Defending the EU Legal Order Against a Foreign Human Rights Court' [2015] 40/5 European Law Review p. 683.

reaction of the Former President of the ECtHR that referred to *Opinion 2/13* as a "great disappointment",[77] and by the fact that formal first official contacts since *Opinion 2/13* were resumed only in 2016.[78] It has been argued that the CJEU's position in *Opinion 2/13* reflects the increasing worries of the CJEU that the too far-reaching case law of the ECtHR threatens to hamper the effectiveness of EU law.[79] Some literature, however, has tried to analyse the relationship between the two courts in a more lenient manner and, while acknowledging some changes in the relationship, it has also highlighted that some of the differences might not be strictly related to the CJEU's opinion.[80]

With regards to the legal relevance of the ECtHR's case law for the EU, some differences from previous practice are to be found. Firstly, the discussion turned from quite an unequivocal position by the CJEU in *McB,* suggesting that the ECtHR's case shall be binding when the rights correspond, to a more nuanced interpretation of article 52(3) TFEU after *Opinion 2/13*.[81] Instead, the CJEU has found in *Tall* that the Luxembourg court shall only "*take into consideration*" the ECHR's case law.[82] Even though this position has been reiterated by both subsequent CJEU judgements and Advocate Generals opinions,[83] it has been also noted that, *de facto,* the CJEU does follow the ECHR's case law in light of the *McB* interpretation.[84]

The misalignment of the two courts and the subsequent divergent interpretation after *Opinion 2/13* is mainly found in two different areas;[85] firstly,

[77] European Court of Human Rights, 'Annual Report 2014' [2015] <www.echr.coe.int/documents/d/echr/annual_report_2014_eng> accessed 30 August 2023.
[78] 'A Delegation From the European Court of Human Rights Visits the Court of Justice of the European Union' Press Release No. 25/16 (Court of Justice of European Union, 7 March 2016) <https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-03/cp160025en.pdf> accessed 30 August 2023.
[79] Krommendijk, '*Opinion 2/13*' (n 7) p. 243.
[80] ibid.
[81] ibid.
[82] Case C-239/14 *Abdoulaye Amadou Tall v Centre Public d'Action Sociale de Huy* [2015] EU:C:2015:824, para. 54.
[83] Case C-601/15 *J.N. v Staatssecretaris van Veiligheid en Justitie* [2016] EU:C:2016:84, para. 44; case C-398/13P *Inuit Tapiriit Kanatami and Others v European Commission* [2015] EU:C:2015:5, para 61; case C-419/14 *WebMindLicenses Kft. v Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság* [2015], EU:C:2015:606, Opinion of AG Wathelet.
[84] Krommendijk, '*Opinion 2/13*' (n 7) p. 243; case C-205/15 *Direcția Generală Regională a Finanțelor Publice Brașov v Vasile Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci* [2016] EU:C:2016:499, para. 41; case C-419/14 *WebMindLicenses Kft. v Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság* [2015] EU:C:2015:832, para. 70.
[85] Krommendijk, '*Opinion 2/13*' (n 7) p. 243.

in the Area of Freedom, Security and Justice, both in cases regarding the European Arrest Warrant as well as those on the Dublin Regulation, where the Member States' coordination is based on the principle of mutual trust. The CJEU has elevated this principle to one of constitutional relevance in *Opinion 2/13*,[86] and this was cited to establish that the DAA was inconsistent with EU law.[87] The divergences in this area between the two courts can be traced back to the different concerns that the two European courts must account for. While the ECtHR focuses solely on the protection of fundamental rights, the CJEU must consider the uniformity, primacy, and effectiveness of EU law.[88]

The first ECtHR judgement after *Opinion 2/13* on mutual trust was given in *Avotiņš v Latvia*, where the Strasbourg court upheld the *Bosphorus* presumption but, at the same time, made sure to underline that the EU did not have a *carte blanche* with regards to the application of the principle of mutual trust.[89] The ECtHR stated that reliance on the principle was to be accepted but to be applied mindfully, ensuring that fundamental rights protection was still complied with,[90] thereby applying the *Bosphorus* presumption more strictly.[91] However, such a harsh approach has already been seen in *Michaud v France*,[92] when ECtHR held that the second condition of the presumption would not be met if national courts did not send a preliminary question to the CJEU.[93] This approach taken by the ECtHR seems to be confirmed by *Bivolaru and Moldovan*, where the ECtHR found for the first time that the presumption of equivalence was rebutted since both conditions were not met.[94] This reveals a more critical approach by the ECtHR towards the *Bosphorus* presumption, or at least a more assertive attitude.[95] The CJEU, on the other hand, has not taken the stricter approach of the ECtHR as an open conflict, but it has adopted in *Aranyosi and Căldăraru*[96] and *C.K. and*

[86] *Opinion 2/13 of the Court* [2014] EU:C:2014:2454, para. 168.
[87] ibid, para. 194.
[88] Krommendijk and De Vries (n 74) p. 319.
[89] *Avotiņš v Latvia* App no 17502/07 (ECtHR, 23 May 2016), paras. 143-165.
[90] ibid paras. 113-114.
[91] Glas and Krommendijk, 'From *Opinion 2/13*' (n 27) p. 567.
[92] *Michaud v France* App no 12323/11 (ECtHR, 6 December 2012), para. 110.
[93] Joana Gomes Beirão, 'The EU Accession to the ECHR and the Dublin Regulation: Is Accession Still Desirable?' [2022] 8/1 UNIO - EU Law Journal p. 80.
[94] *Bivolaru and Moldovan v France* App nos 40324/16 and 12623/17 (ECtHR, 25 March 2021).
[95] Krommendijk and De Vries (n 74) p. 319.
[96] Joined cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] EU:C:2016:198.

Others[97] a more ECtHR friendly approach to the principle of mutual trust. This is done so according to which it is not characterised by inherent automatism but still needs to comply with fundamental rights protection.[98]

The second alleged area of misalignment concerns article 6 ECHR protecting the right of fair trial. In the judgement of *Dhahbi v Italy,* and more recently in *Georgiou v Greece,*[99] the Strasbourg court has allegedly and intrusively ruled that there was a breach of the ECHR due to the failure of the highest Italian court to provide a statement of reasons for its refusal to send a preliminary question according to article 267 TEU.[100] However, also in this case, the CJEU has avoided an open contrast with the ECtHR and supplemented its *CILFIT* doctrine[101] in *Consorzio Italian Management* by imposing an obligation of last instance courts to justify their decisions not to refer questions to the CJEU.[102] The ECHR's position is, however, not necessarily to be seen as a sour reaction to *Opinion 2/13*. As it has been mentioned, the ECHR's objective is to ensure fundamental rights protection, and the *Dahibi* judgement can be seen as an expression of support towards the CJEU's objective to ensure the correct application of EU law.[103] Therefore, one might conclude that the two courts have been interpreting fundamental rights more independently; however, it is also evident that in both cases no open conflict has been set off.

More restrained relations between the European courts have not only resulted in a less "parallel interpretation", but also in a decreased dialogue through their case law, especially from the CJEU. It has been noted that the CJEU has referred quantitatively less to the ECHR case law in its judgements.[104] However, this tendency is not consistent – no uniform practice or methodology can be

[97] Case C-578/16 PPU *C.K. and Others v Republika Slovenija* [2017] EU:C:2017:127.
[98] Krommendijk and De Vries (n 74) p. 319.
[99] *Georgiou v Greece* App no 57378/18 (ECtHR, 14 March 2023).
[100] *Dhahbi v Italy* App no 17120/09 (ECtHR, 8 April 2014).
[101] Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] EU:C:1982:335.
[102] According to the CILFIT doctrine last instance courts have no obligation to refer a preliminary question to the CJEU when the same question has already been answered by the CJEU (acte éclairè doctrine) and when the application of EU law is so obvious that no other interpretation could reasonably be expected from the CJEU (acte clair doctrine). See case C-561/19 *Consorzio Italian Management and Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA* [2021] EU:C:2021:799, para. 21.
[103] Clelia Lacchi, 'Multilevel Judicial Protection in the EU and Preliminary References' [2016] 53/3 Common Market Law Review p. 679.
[104] Krommendijk, '*Opinion 2/13*' (n 7) p. 243.

identified; rather some more or less Strasbourg-friendly cases can be identified.[105] This tendency can be explained by a more "Charter-centric" approach of the CJEU according to which the CJEU prefers to establish an autonomous interpretation of a right basing itself exclusively on the EU Charter without relying on ECHR case law. This is especially the case with article 47 EU Charter according to which the Court has established that the EU Charter rights are sufficient to secure the protection afforded by article 6(1) ECHR and therefore reference is necessary solely to the EU Charter, rather than the ECHR.[106] This approach has, however, been extended to EU charter provisions such as articles 7, 10, 11 and 17.[107]

2.3. The Relationship After the EU Accession to the ECHR

The EU accession to the ECHR will, at least formally, bring a fundamental change to the relationship between the ECtHR and the EU.[108] Since the EU would become a High Contracting Party to the ECHR, the CJEU will be subject to the jurisdiction of the Strasbourg court, allowing it to have the final say on any fundamental rights matter. This is possible thanks to *Opinion 1/91* where the CJEU has accepted the possibility that the EU legal order can be subject to the jurisdiction of an international court.[109] This would allow the multilevel pluralism of fundamental rights protection to impose a hierarchical order between the two Courts.[110] Such a change in the fundamental rights landscape will not, however, alter the need of cooperation and comity between the two levels, as envisaged in Declaration No. 2.[111] This is also demanded by the new procedural formalities such as the co-respondent mechanism, which will require an unprecedented degree of co-operation.[112]

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[105] ibid.
[106] Case C-199/11 *Europese Gemeenschap v Otis and Others* [2012] EU:C:2012:684, para. 47; case C-396/11 *Radu* [2013] EU:C:2013:39, para. 32.
[107] Case C-398/13P *Inuit Tapiriit Kanatami and Others v European Commission* [2015] EU:C:2015:535, para. 46.
[108] Paul Gragl, 'A Giant Leap for European Human Rights? The Final Agreement on the European Union's Accession to the European Convention on Human Rights' [2014] 51/1 Common Market Law Review p. 13.
[109] *Opinion 1/91 of the Court* [1991] EU:C:1991:490, paras. 39-40.
[110] Timmermans (n 17) p. 1. For multilevel legal protecion see Koen Leanerts, 'Interlocking Legal Orders in the European Union and Comparative Law' [2003] 52/2 The International and Comparative Law Quarterly p. 873.
[111] Timmermans ibid.
[112] O'Meara (n 5) p. 1813.

Many commentators have argued that, upon accession, the *Bosphorus* presumption will be put aside.[113] Firstly, the *Bosphorus* presumption has been deemed as an invitation to the EU to become party to the ECHR and should, therefore, be set aside after accession.[114] Since the EU would become a High Contracting Party to the ECHR and would therefore be involved in ECtHR proceedings though the co-respondent mechanism, there would be no reason for the CJEU to be treated differently than any other Supreme Court.[115] This means that for the first time the CJEU will formally become part of a system in which its reasoning may be questioned.[116]

Some arguments supporting the retainment of the *Bosphorus* presumption have also been put forward, despite not being convincing. The entry into force of the EU Charter was a step towards improved fundamental rights protection in the EU. Therefore, acknowledging this development, it might seem logical that the presumption should be held.[117] It is also argued that a mitigated form of the *Bosphorus* presumption could be retained.[118] This argument is, however, flawed: since the level of protection of fundamental rights in the EU was not a determining factor for the adoption of the *Bosphorus* presumption, its improvement should not be a reason for the abandonment of the presumption of equivalence. The *Bosphorus* presumption was established as a sign of comity, with the ECtHR deciding not to step on the CJEU's feet and not to investigate the level of protection ensured by the EU Member States when implementing EU law, apart from where there are manifest deficiencies.

As for the EU side, the EU accession to the ECHR will not *de facto* bring a substantive change in the relationship between the EU Charter and the ECHR. As it has already been pointed out, the Convention through article 52(3) EU Charter has already been attributed substantially a high status within EU law. This results in limited autonomy for EU law to interpret the EU Charter rights that correspond to the ECHR rights.[119] With accession, according to the *Haegemen*

[113] Tobias Lock, 'EU Accession to the ECHR: Implications for Judicial Review in Strasbourg' [2010] 35/6 European Law Review 777; O'Meara (n 5) p. 1813.
[114] Besselink (n 57).
[115] Timmermans (n 17) p. 1.
[116] O'Meara (n 5) p. 1813.
[117] Lock, 'EU Accession' (n 113) p. 777; Besselink (n 57).
[118] Timmermans (n 17) p. 1.
[119] Callewaert, *The Accession* (n 30).

case law,[120] the ECHR will become an integral part of EU law and therefore binding on all actors and institutions of the EU.[121] This will thus mean that the CJEU will become an authoritative interpreter of the ECHR for those cases that fall within the scope of EU law.[122]

However, even after accession, the relevance of the ECtHR case law might be limited. Firstly, it may be limited at least formally, article 46(1) ECHR establishes that judgements are *inter partes* only and therefore *res judicata*, which goes along with their declaratory nature.[123] However, the interpretation given in an ECtHR judgement between two parties can be generalised as being the interpretation of the ECHR altogether and, therefore, to be applied on all State parties.[124] Moreover, as reported by the Advocate General in her views in *Opinion 2/13*, there has been extensive discussion on the possibility for the CJEU to disregard the ECHR's case law in case it went against the EU constitutional identity, or if it was *ultra vires*.[125]

3. Advisory Opinions and EU Accession to the ECHR: From *Opinion 2/13* to Article 5 New Draft Accession Agreement

In the next section, focus will be put on advisory opinions as established in Protocol 16 and their role in the EU accession to the ECHR. It will analyse how advisory opinions work, what role they have played in the EU accession to the ECHR so far, and which role they might play in the future steps of the accession process.

3.1. Advisory Opinions Under Protocol 16 ECHR: Heterozygous Twin of the Preliminary Ruling Procedure?

Advisory opinions are not new to the ECHR system. According to articles 47-49 ECHR, the Strasbourg court can deliver advisory opinions at the request of the Committee of Ministers. Protocol 16 to the ECHR expanded the advisory jurisdiction of the Strasbourg court allowing for the possibility for the ECtHR to

[120] Case C-181/73 *R. & V. Haegeman v The Belgian State* [1974] EU:C:1974:41, para. 5.
[121] *Opinion 2/13 of the Court* [2014] EU:C:2014:2454, para. 180.
[122] Harlberstam (n 75) p. 105; Paul Craig, 'EU Accession to the ECHR: Competence, Procedure and Substance' [2013] 36 Fordham International Law Journal p. 1114.
[123] *Opinion 2/13 of the Court* [2014] EU:C:2014:2454, Opinion of AG Kokott, paras. 78 and 123.
[124] Krommendijk, '*Opinion 2/13*' (n 7) p. 243.
[125] *Opinion 2/13 of the Court* [2014] EU:C:2014:2454, Opinion of AG Kokott, paras. 167-171.

deliver advisory opinions at the request of national courts.[126] The ECtHR, alongside Protocol 16, has adopted amendments to the Rules of Procedure[127] and non-binding guidelines on its implementation.[128]

The adoption of Protocol 16 has, as indicated in the preamble, two interconnected aims. Firstly, the protocol aims at enhancing the interaction between the ECtHR and the national judges, introducing a line of dialogue between the various institutions that interpret the ECHR. For this reason, Protocol 16 is also referred to as the "Protocol of Judicial Dialogue".[129] Secondly, this enhanced cooperation aims at supporting the principle of subsidiarity according to which the fundamental rights protection by the ECHR falls primarily within the High Contracting parties.[130] By providing assistance to national judges on how to interpret the ECHR, further violations are avoided.[131] This contributes to the reduction of the workload of the ECtHR, which is plagued by an unattainable number of individual applications and decreasing financial resources to deal with them.[132] Protocol 16 has, however, experienced a slow ratification process to be reconducted to the fears of multiple High Contracting Parties that advisory opinions could threaten their sovereignty and that they could undermine the role of their constitutional courts.[133]

According to article 1 Protocol 16, the "*highest courts or tribunals*" can send requests for advisory opinions to the ECtHR. These courts are specified according to article 10 by the High Contracting Parties. This allows for the

[126] 'Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms' [2013] Council of Europe Treaty Series No. 214, art. 1(1).
[127] Amendments to the Rules of the Court' [2016] <https://www.echr.coe.int/documents/d/echr/Rules_amended_P16_ENG> accessed 30 August 2023.
[128] 'Guidelines on the Implementation of the Advisory-Opinion Procedure Introduced by Protocol No. 16 to the Convention' [2017] <https://www.echr.coe.int/documents/d/echr/Guidelines_P16_ENG> accessed 30 August 2023.
[129] 'Meeting With the Supreme Court and the Supreme Administrative Court Address Dean Spielmann President of the European Court of Human Rights (Stockholm 19 May 2014)' <https://www.echr.coe.int/documents/d/echr/Speech_20140519_Spielmann_ENG> accessed 30 August 2023.
[130] Janneke Gerards, 'Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the European Convention of Human Rights. A Comparative and Critical Appraisal' [2014] 21/4 Maastricht Journal of European and Comparative Law p. 630.
[131] Síofra O'Leary and Tim Eicke, 'Some Reflections on Protocol No. 16' in *Strengthening Confidence in the Judiciary. Dialogue Between Judges 2019* (European Court of Human Rights 2020) p. 29.
[132] ibid.
[133] Lize R. Glas and Jasper Krommendijk, 'A Strasbourg Story of Swords and Shields' [2022] European Convention Human Rights Law Review p. 1.

accommodation of the particularities of national judicial systems[134] and to include those courts that, while still subordinate to the supreme or constitutional courts, are of special relevance in a specific area of the law.[135] The circumscription of Protocol 16 to the highest courts prevents a proliferation of requests, which would be counterproductive to the aims of Protocol 16.[136]

According to article 1, highest courts are not obliged to refer a question but may do so, making advisory opinions an optional mechanism that national courts can resort to. Requests can also be made merely in the context of a case pending before the national court or tribunal. Article 3 establishes that a request must be reasoned, and it shall contain the legal and factual background of that case it originates from.

Article 1 also establishes what kind of questions can be posed to the ECtHR. Advisory opinions can be requested on "*questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or in the Protocols thereto*". Article 2 Protocol 16 establishes that the Court has discretion in accepting the requests and, in case of refusal, it must reason its decision.

Article 5 Protocol 16 establishes that advisory opinions are "vertically" not binding.[137] It is upon the requesting court to establish, in fact, what effects such opinions have on the proceedings at hand. For this reason, an individual application under article 34 ECHR is, when all the judicial remedies have been exhausted, still possible. Nevertheless, advisory opinions are part of the ECtHR case law and are still of an authoritative nature.[138] Moreover, the ECtHR strives to be coherent in its interpretation of the ECHR, for which it is reasonable to believe that the ECtHR would follow its advisory opinions also in case of individual applications.[139] This makes the legal relevance of advisory opinions go beyond the

[134] 'Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms. Explanatory Report' [2013] <https://www.echr.coe.int/documents/d/echr/protocol_16_explanatory_report_eng> accessed 30 August 2023, para. 8.
[135] O'Leary and Eicke (n 131) p. 29.
[136] ibid.
[137] Enrico Albanesi, 'The European Court of Human Rights' Advisory Opinions Legally Affect Non-Ratifying States: A Good Reason (From a Perspective of Constitutional Law) to Ratify Protocol No. 16 to the ECHR' [2022] 28/1 European Public Law p. 1.
[138] O'Leary and Eicke (n 131) p. 29.
[139] ibid.

single question by a requesting court: the High Contracting Parties that have ratified the Protocol but also the other High Contracting Parties that have not will be subject to the interpretation given by the ECtHR through what has been called "*horizontal legal effect*".[140]

Advisory opinions are a clear example of cross-fertilisation from the EU to the Council of Europe's legal system.[141] The resemblance of advisory opinions under Protocol 16 to the preliminary ruling procedure according to article 267 TFEU is evident. It has been explicitly stated that Protocol 16 has been modelled after the preliminary ruling procedure.[142] However, an identical transposition was deemed unsuitable for the Council of Europe legal system because, in conjunction with the exhaustion rule in article 35(1) ECHR, it would have created "significant legal and practical problems"[143] and would have considerably increased the ECtHR's workload.[144]

The main difference between the two procedures lies in the optional character of advisory opinions.[145] Preliminary rulings are, on matters of interpretation, optional for lower courts but compulsory for last instance courts.[146] On validity issues, the obligation to send a preliminary ruling question to the CJEU is applicable to all courts.[147] Protocol 16, instead, does not make any distinction between interpretation and application but rather refers to question of principles that may relate to both.[148] Interestingly, Advocate General Kokott, in her view on *Opinion 2/13*, referred to advisory opinions by calling them "voluntary 'preliminary ruling procedure' in the ECHR system".[149] The other very significant difference is the legal effects of the two procedures: while preliminary rulings are

[140] Albanesi (n 137) p. 1.
[141] Paul Gragl, '(Judicial) Love is Not a One-Way Street: The EU Preliminary Reference Procedure as a Model for ECtHR Advisory Opinions Under Draft Protocol No. 16' [2013] 2 European Law Review p. 1.
[142] 'Report of the Group of Wise Persons to the Committee of Ministers' [2006] CM(2006)203, para. 80.
[143] ibid.
[144] Gragl, '(Judicial) Love' (n 141) p. 1.
[145] Christos Giannopopulos, 'Considerations on Protocol No. 16: Can the New Advisory Competence of the European Court of Human Rights Breathe New Life into the European Convention on Human Rights?' [2015] 16/2 German Law Journal p. 337.
[146] Case 166/73 *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] EU:C:1974:3, para. 4.
[147] Case C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] EU:C:1987:452.
[148] Marija Daka, 'Advisory Opinion and the Preliminary Ruling Procedure – A Comparative and Contextual Note' [2020] 36/3-4 Pravni Vjesnik p. 289.
[149] *Opinion 2/13 of the Court* [2014] EU:C:2014:2454, Opinion of AG Kokott, para. 137.

de facto binding, advisory opinions are, at least in theory, not.[150] Finally, the ECtHR, when presented with an advisory opinion request, is granted discretion to accept it according to article 2 of Protocol 16. The CJEU, instead, lacks such discretion to ensure harmonised and uniform interpretation of EU law.[151]

The following two subsections analyse the role of advisory opinions within the context of EU accession to the ECHR.

3.2. *Opinion 2/13*: Protocol 16 Affects the Autonomy and Effectiveness of the EU Legal Order

Advisory opinions in Protocol 16 not only are the product of cross-fertilisation with the EU legal order, but they have also come to play a role within the process of EU accession to the ECHR. More specifically, Protocol 16 featured in *Opinion 2/13* as problematic for the autonomy and effectiveness of the EU legal order.

Opinion *2/13* given by the CJEU on 18 December 2014 has put a halt to the EU accession process to the ECHR, stating that the accession agreement under scrutiny was likely to adversely affect the specific characteristics of EU law and its autonomy. On over 258 paragraphs, the CJEU dedicated five paragraphs to what has been called "*ex ante* attack" on Protocol 16.[152] When *Opinion 2/13* was delivered, in fact, no EU Member States had ratified the protocol. Not only, the Protocol was not even in force at that time since only nine High Contracting Parties had signed the agreement.[153] Moreover, there was, and there is still, no express intention for the EU to become a party to it.[154]

The CJEU mainly criticised the lack of a provision within the DAA that would preclude Protocol 16 from interfering with the autonomy and the effectiveness of the EU legal order, and more specifically to the preliminary ruling procedure in article 267 TFEU.[155] The CJEU's criticism is twofold: Protocol 16 seemed problematic because it allows for the circumvention of the obligations

[150] Daka (n 148) p. 289.
[151] Gerards (n 130) p. 630.
[152] Adam Łazowski and Ramses Wessel, 'When Caveats Turn into Locks: *Opinion 2/13* on Accession of the European Union to the ECHR' [2015] 16/1 German Law Journal p. 179.
[153] Estonia, Finland, France, Italy, Lithuania, the Netherlands, Romania, Slovakia, and Slovenia.
[154] Harlberstam (n 75) p. 105.
[155] *Opinion 2/13 of the Court* [2014] EU:C:2014:2454, para. 197.

enshrined in article 267 TFEU and for triggering the prior involvement mechanism.[156]

Firstly, the CJEU feared the circumvention of the preliminary ruling procedure, in case of a question by an EU last instance court on the compatibility of EU law with the Convention. Instead of complying with article 267 TFEU, EU last instance courts were feared to instead ask for an advisory opinion under Protocol 16 to the ECtHR.[157] Preferring the advisory opinion to the preliminary reference would impair the effectiveness of the latter. The CJEU seemed to fear that when a national court would first ask for an advisory opinion to the ECtHR and the Strasbourg court would find a violation of the ECHR, no preliminary question would be lodged to the CJEU in a second instance. Since advisory opinions are not binding on the national courts,[158] the preference for advisory opinions could be explained by the preference of last instance courts to enter a non-binding and flexible dialogue with the Strasbourg court, rather than into a rule-based and constraining one with the Luxembourg one.[159] However, this does not mean that the national courts are not obliged under EU law to refer to the CJEU in case of questions on the interpretation and validity of EU law.[160] It could also be argued that the *Melki and Abdeli* case law would also be applicable, in which the CJEU established that in case of conflict between the preliminary ruling procedure with, in this case, a constitutionality question to the national court responsible, nothing must prevent a national judge to send a preliminary question to the CJEU.[161] However, that case dealt with an internal situation regulated by EU law, while here it would be an external court, namely the ECtHR, to be approached due to the circumvention of the EU legal proceedings.[162] Nevertheless,

[156] Tobias Lock, 'The Future of the European Union's Accession to the European Convention on Human Rights After *Opinion 2/13*: Is It Still Possible and Is It Still Desirable?' [2015] 11/2 European Constitutional Law Review p. 239.
[157] Implied in *Opinion 2/13 of the Court* [2014] EU:C:2014:2454, para. 198; more clearly to be found in Stian Øby Johansen, 'Some Thoughts on the ECJ Hearing on the Draft EU-ECHR Accession Agreement' (*Øby-kanalen*, 6-7 May 2014) <https://obykanalen.wordpress.com/2014/05/06/some-thoughts-on-the-ecj-hearing-on-the-draft-eu-echr-accession-agreement-part-1-of-2/> accessed 30 August 2022.
[158] 'Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms' [2013] Council of Europe Treaty Series No. 214, art. 5.
[159] De Witte and Imamović (n 76) p. 683; Harlberstam (n 75) p. 105.
[160] *Opinion 2/13 of the Court* [2014] EU:C:2014:2454, Opinion of AG Kokott, para. 141.
[161] Joined Cases C-188/10 and C-189/10 *Aziz Melki and Sélim Abdeli* [2010] EU:C:2010:363, para. 57.
[162] Jean Paul Jacqué, *What Next After* Opinion 2/13 *of the Court of Justice on the Accession of the EU to the ECHR?* (European Parliament-Publications Office 2016).

the possibility of forum shopping would still be present.[163] This is especially true in the scenario raised by President Skouris in the CJEU hearing, in which a lower court sends a preliminary question to the CJEU:[164] EU law would not prevent the last instance courts from resorting to Strasbourg for a second opinion.[165] This could indeed happen occasionally in validity disputes rather than in cases of consistent interpretation.[166] This hypothetical scenario is, however, not substantially different than if Protocol 16 was out of the picture since there is always the possibility, after a preliminary ruling, for an individual to lodge a complaint to the ECtHR.[167] The only remaining instance in which Protocol 16 was deemed to still be relevant were those situations in which article 267 TFEU would not apply, and that the Strasbourg court could give an advisory opinion. This is a rather theoretical scenario, since in most instances such a situation would indicate that the issue at hand is outside the scope of EU law,[168] especially after *Rosneft,* where the CJEU established that preliminary questions are also possible for CFSP issues.[169] In any case, the scope of requests for advisory opinions would still be limited to questions of principle.[170] More drastically, it could also be argued that according to the view that the EU judicial system is a complete system of legal remedies and procedures, no intermediate decisions other than the preliminary rulings under article 267 TFEU are allowed. Therefore, even if they are non-binding, there would be no possibility for the national courts to ask for advisory

[163] Thomas Streinz, 'Forum Shopping Between Luxembourg and Strasbourg?' (*Verfassungsblog on Matters Constitutional*, 17 June 2014) <https://verfassungsblog.de/forum-shopping-zwischen-luxemburg-und-strassburg/> accessed 30 August 2023.
[164] Johansen (n 157).
[165] Christoph Krenn, 'Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After *Opinion 2/13*' [2015] 16/1 German Law Journal p. 147.
[166] Daniel Thym, 'A Trojan Horse? Challenges to the Primacy of EU Law in the Draft Agreement on Accession to the ECHR' (*Verfassungsblog on Matters Constitutional*, 11 September 2013) <https://verfassungsblog.de/a-trojan-horse-challenges-to-the-primacy-of-eu-law-in-the-draft-agreement-on-accession-to-the-echr/> accessed 30 August 2023.
[167] Johansen (n 157).
[168] Johan Callewaert, 'Protocol 16 and the Autonomy of EU Law: Who is Threatening Whom?' (*European Law Blog*, 3 October 2014) <https://europeanlawblog.eu/2014/10/03/protocol-16-and-the-autonomy-of-eu-law-who-is-threatening-whom/> accessed 30 August 2023.
[169] Case C-72/15 *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* [2017] EU:C:2017:236, para. 71.
[170] Jörg Polakiewicz and Lucia Brieskova, 'It's About Human Rights, Stupid!' (*Verfassungsblog on Matters Constitutional*, 12 March 2015) <https://verfassungsblog.de/its-about-human-rights-stupid/> accessed 30 August 2023. For a deeper understanding of the abstraction of advisory opinions see Toon Moonen and Lauren Lavrysen, 'Abstract but Concrete, or Concrete but Abstract? A Guide to the Nature of Advisory Opinions Under Protocol No. 16 to the ECHR' [2021] 21/3 Human Rights Law Review p. 752.

opinions in the first place.[171] This would also be in line with the principle of sincere cooperation under article 4(3) TEU and the reasoning behind article 344 TFEU, which prohibits inter-state applications under article 33 ECHR by EU Member States in matters of EU law.[172] While such reasoning is quite extreme, it shows the sensitivity of finding a proper agreement on the matter.

Secondly, the CJEU feared that the advisory opinion mechanism would trigger the prior involvement of the CJEU. This would have meant that national courts could have requested an advisory opinion on an EU law matter to the ECtHR and, according to the prior involvement mechanism, the CJEU would have been called to participate in the proceeding. This situation was feared by the CJEU because, while the CJEU would have been involved, the question would have only been posed to the ECtHR directly and to the CJEU indirectly, allowing for the circumvention of the preliminary reference procedure in article 267 TFEU.[173] This would impair the autonomy of the EU legal order, which finds in the preliminary reference procedure the most important procedural venue of the EU legal system.[174] Despite the wording of article 3(2) DAA referring to "application" as the situation triggering the prior-involvement mechanism, the CJEU has taken a broad interpretation and has deemed it to include the request for advisory opinions by a national court.[175] This reasoning has been deemed, however, unsound as article 3(6) DAA clarifies that the prior involvement mechanism is triggered only when the EU is a co-respondent: in case of advisory opinions there is no respondent; therefore, no prior involvement mechanism can be triggered.[176]

After *Opinion 2/13*, scholars have appraised the issue in various ways. From the reports of the CJEU's hearings, a heated discussion took place among the parties on the issue of forum shopping. The "aggressive line of reasoning"[177] of the CJEU's judges suggested that the Luxembourg court would have used the concerns with Protocol 16 as a scapegoat to find the DAA incompatible with EU law.[178] The CJEU addressed the concerns related to Protocol 16 and established

[171] Streinz (n 163).
[172] ibid; Callewaert, 'Protocol 16' (n 168).
[173] *Opinion 2/13 of the Court* [2014] EU:C:2014:2454, para. 198.
[174] Krenn (n 165) p. 147.
[175] Johansen (n 157).
[176] Lock, 'The Future' (n 156) p. 239.
[177] Johansen (n 157).
[178] ibid.

that in light of those issues, accession to the ECHR according to the DAA would have adversely affected the specific characteristics of EU law and its autonomy.[179] However, the reactions to *Opinion 2/13* denied such great relevance of Protocol 16, establishing it was "no suitable scapegoat to stop the EU from acceding to the ECHR".[180] What has been noted already by the Advocate General in his opinion and subsequently supported by various authors is that the alleged threat of Protocol 16 ECHR to the EU legal order is unrelated to the DAA.[181] In fact, accession could not be deemed unlawful as a result of the lack of clarification on the relationship between Protocol 16 and article 267 TFEU.[182] Instead, the CJEU has merely expressed mistrust towards the loyalty of the last instance courts to comply with article 267 TFEU.[183] Even if the CJEU has put the blame on the drafters of the accession agreement, it did not express mistrust towards the Strasbourg court nor the Council of Europe. Therefore, since the issue is internal to the EU legal system, the drafters should have not been expected to deal with an issue unrelated to the EU accession to the ECHR.[184]

Scholars have hypothesized solutions to solve or at least alleviate the CJEU's concerns. The first option envisages not taking any action of any nature: the CJEU's mistrust of the Member States' last instance courts is an EU internal problem and the CJEU has mistakenly addressed its concerns to wrong targets.[185]

Secondly, the internal issue could have been solved by introducing internal rules complementing the DAA. This would impose legally binding restrictions on the application of Protocol 16 on last instance courts to ensure the triumph of the preliminary ruling procedure over the advisory opinions.[186] Such clarifications would have been of a technical nature,[187] even if rather unnecessary in light of the already existing EU law rules.[188] Moreover, the Commission can enforce article 267 TFEU and the respective case law through infringement proceedings,[189]

[179] *Opinion 2/13 of the Court* [2014] EU:C:2014:2454, para. 200.
[180] Streinz (n 163).
[181] *Opinion 2/13 of the Court* [2014] EU:C:2014:2454, Opinion of AG Kokott, para. 138; see also De Witte and Imamović (n 76) p. 683.
[182] Harlberstam (n 75) p. 105.
[183] De Witte and Imamović (n 76) p. 683.
[184] ibid.
[185] ibid.
[186] Streinz (n 163).
[187] Polakiewicz and Brieskova (n 170).
[188] Callewaert, *The Accession* (n 30).
[189] Streinz (n 163).

whose effectiveness has been shown in *Commission v France*[190] and supported indirectly by the Strasbourg court in its case law.[191]

Thirdly, it has been pointed out that, instead of focusing on the possible preference of the Member State's courts for the advisory opinion procedure, the CJEU could have made it clear that in its opinion it would have not been possible for an EU Member States to be party to Protocol 16.[192] Such prohibition would be based on the duty of sincere cooperation in article 4(3) TEU and article 344 TFEU according to which the Member States should refrain from ratifying an international agreement. It would protect the autonomy of the EU legal order[193] and, in case of non-compliance, the Commission could start infringement proceedings against the Member States at hand.[194] Such incompatibility between the preliminary ruling procedure and the accession to Protocol 16 has led scholars to suggest that EU Member States were supposed to be precluded from acceding to Protocol 16 in the first place. This could have been done through a binding unilateral declaration of the Member States as suggested by the Advocate General[195] by which the Member States enters into an obligation to refrain from acceding to Protocol 16.[196] The same objective could have also been achieved by a statement of the CJEU in its case law, which would have had the additional advantage to protect the autonomy of the EU legal order from any future ECHR protocol.[197] However, such a solution would have been disproportionate since it would have prevented EU Member States from enjoying enhanced dialogue with the ECtHR in instances not governed by EU law.[198]

The fourth and last option proposed was to amend the DAA as to preclude the EU national courts to request advisory opinions to the ECtHR.[199] Despite

[190] Case C-416/17 *European Commission v French Republic* [2018] EU:C:2018:811.
[191] Síofra O'Leary, 'Advisory Opinions and Judicial Dialogue Strasbourg-Style' [2022] 59 (Special Issue) Common Market Law Review 87; see *Michaud v France* App no 12323/11 (ECtHR, 6 December 2012); *Sanofi Pasteur v France* App no 25137/16 (ECtHR, 13 February 2020); *Georgiou v Greece* App no 57378/18 (ECtHR, 14 March 2023).
[192] Lock, 'The Future' (n 156) p. 239.
[193] *Opinion 2/13 of the Court* [2014] EU:C:2014:2454, para. 201.
[194] Johansen (n 157).
[195] *Opinion 2/13 of the Court* [2014] EU:C:2014:2454, Opinion of AG Kokott, para. 219.
[196] Harlberstam (n 75) p.105.
[197] Johansen (n 157).
[198] Callewaert, 'Protocol 16' (n 168).
[199] Lock, 'The Future' (n 156) p. 239; Jacqué, *What Next* (n 162).

various scholars having deemed this option "extreme"[200] and an "overreaction",[201] the New Draft Accession Agreement (NDAA) published on 23 April 2023 features a provision dealing with Protocol 16. In the next subsection, the provision of the NDAA dealing with advisory opinions will be analysed.

3.3. Article 5 New Draft Accession Agreement

Negotiations to amend the DAA resumed in 2020 after a long halt due to *Opinion 2/13.* At that time 22 High Contracting Parties signed the protocol, 15 ratified it. Of the latter, nine were EU Member States. Clearly, the situation was significantly different than the first round of negotiations, in which the Protocol was neither signed by any EU Member States nor did the Protocol enter into force. The *modus operandi* suggested by the Commission to tackle the new negotiations was to "maintain the original draft accession instrument as much as possible, while fully addressing the concerns expressed by the Court of Justice of the European Union (CJEU) in *Opinion 2/13* and remaining to the greatest extent possible in line with the joint statement made by the Council of Europe member states which are not EU members".[202]

Already in the first informal meeting of the new round of negotiations in 2020, the Commission stressed that advisory opinions under Protocol 16 were on the agenda of the amendments sought by the EU negotiators.[203] While presenting its position, the Commission stressed that they were not aiming at preventing EU Member States' highest courts from activating Protocol 16 altogether. This therefore excluded the option of prohibiting the EU Member States from acceding to Protocol 16, forcing the ones that had become Party to withdraw from it. Instead, the EU negotiator expressed willingness to tackle the relationship between Protocol 16 and article 267 TFEU insofar as the potential jeopardization of EU

[200] Łazowski and Wessel (n 152) p. 179.
[201] Lock, 'The Future' (n 156) p. 239.
[202] Meeting Report at 7th Meeting of the CDDH Ad Hoc Negotiation Group ("47+1") on the Accession of the European Union to the European Convention on Human Rights (24-26 November 2020)', (47+1(2020)R7 Council of Europe Document, 26 November 2020) (Report at 7th Meeting).
[203] 'Meeting Report at Virtual Informal Meeting of the CDDH Ad Hoc Negotiation Group ("47+1") on the Accession of the European Union to the European Convention on Human Rights (22 June 2020)', (47+1(2020)Rinf Council of Europe Document, 22 June 2020).

internal rules was triggered, stating that "since the problem is related to procedures, the solutions might also be mainly of a procedural nature".[204]

During the second round of negotiations, the discussions around Protocol 16 went alongside the ones of article 33 ECHR regarding inter-party applications and were paired under the so called "Basket 2"[205] as both issues, under particular factual circumstances, could be used by the EU Member States to violate EU law provisions.[206] The Commission also envisaged a proposal to amend the DAA that would deal with both issues at the same time.[207] However, from the subsequent meetings the two issues were dealt with separately.[208] This can also be explained by the fact that, as pointed out by the EU negotiators, the CJEU's concerns in *Opinion 2/13* relating to Protocol 16 were "less strongly formulated" than those regarding article 33 ECHR.[209]

Three main proposals were presented during the negotiations. The first one, as mentioned above, aimed at tackling both issues with article 33 ECHR and Protocol 16 at the same time. For the 6th Negotiation Meeting, the Commission introduced a provision in the NDAA providing for a procedure in which the EU would be informed of any application under article 33 ECHR or of any reference under Protocol 16. Subsequently, the EU would inform the ECtHR whether infringement proceedings have been brought in respect to such applications and eventually ask the Strasbourg court to suspend such proceedings. Pending internal EU proceedings, the procedures would be discontinued.[210] The main criticism of this proposal was that article 33 ECHR and Protocol 16 were dealt with separately,

[204] 'Meeting Report at Virtual Informal Meeting of the CDDH Ad Hoc Negotiation Group ("47+1") on the Accession of the European Union to the European Convention on Human Rights (22 June 2020)', (47+1(2020)Rinf Council of Europe Document, 22 June 2020).
[205] Report at 7th Meeting (n 202).
[206] 'Meeting Report at 6th Meeting of the CDDH Ad Hoc Negotiation Group ("47+1") on the Accession of the European Union to the European Convention on Human Rights (29 September-1 October 2020)', (47+1(2020)R6 Council of Europe Document, 22 October 2020) (Report at 6th Meeting).
[207] Report at 7th Meeting (n 202).
[208] See as pointed out in 'Meeting Report at 13th Meeting of the CDDH Ad Hoc Negotiation Group ("46+1") on the Accession of the European Union to the European Convention on Human Rights (10-13 May 2022)', (46+1(2022)R13 Council of Europe Document 13 May 2022) (Report at 13th Meeting).
[209] Report at 6th Meeting (n 206); see also Report at 13th Meeting (n 208).
[210] 'Document by Secretariat on the State of Play of the Proposals for Basket 2 at 13th Meeting of the CDDH Ad Hoc Negotiation Group on the Accession of the European Union to the European Convention on Human Rights (10-13 May 2022)', (47+1(2022)19 Council of Europe Document 10 February 2022).

since, unlike in the case of inter-party applications, the ECtHR has discretion on whether to accept an advisory opinion request.

In the 7th Negotiation Meeting, a second proposal was presented, which consisted of inserting a provision into the NDAA that would add a paragraph to article 1 Protocol 16. This proposal was meant to deal with Protocol 16 concerns only, leaving aside article 33 ECHR. Differently from the first proposal, here it was explicitly mentioned that the EU would have been given the opportunity to establish whether there was a circumvention of article 267 TFEU. Moreover, the new proposal mentioned that the ECtHR, in case of a positive determination from the EU that the request does indeed fall within EU law, would have availed itself of its discretion under article 2(1) Protocol 16 to reject the request for an advisory opinion.[211] Three main points of criticism were presented to this proposal from different delegations. Firstly, it was pointed out that EU law issues do not come within the scope of Protocol 16 and, therefore, amending the text of Protocol 16 was not the right approach. Secondly, stressing on the fact that the CJEU's concerns on Protocol 16 were less stringent than those for inter-party applications, it was highlighted that such a proposal was more severe than the one regarding article 33 ECHR. The previous proposal did not put emphasis on the consequences of the circumvention of EU law. Thirdly, the mechanism envisaged in the proposal was deemed to be creating substantial delay in the process.[212] In the 13th Negotiation Meeting, it was also suggested that the previous proposals could have been substituted by a statement made by the EU Member States party to Protocol 16. In doing so, they could avail their prerogatives to request advisory opinions under the Protocol in compliance with their obligations under EU law. However, the Representative of the Registry of the ECtHR pointed out that the ECtHR could not be expected to check the compliance of the requests of an advisory opinion with the obligations under EU law.[213] This suggestion was never further discussed in subsequent meetings.

In the 14th Negotiation Meeting, the following final proposal was presented: "Where a court or tribunal of a member State of the European Union that has ratified Protocol No. 16 to the Convention, in the context of a case pending

[211] ibid.
[212] Report at 13th Meeting (n 208).
[213] Report at 13th Meeting (n 208).

before it, encounters a question relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto, that court or tribunal shall not be considered as a highest court or tribunal of a High Contracting Party for the purposes of article 1, paragraph 1, of Protocol No. 16 to the Convention if the question falls within the field of application of European Union law". [214] The EU negotiators stated that this proposal had various advantages. Firstly, differently from the second proposal, it did not require an amendment of Protocol 16, which would maintain its readability.[215] Secondly, this final proposal did not preclude EU Member States party to the Protocol from requesting an advisory opinion on matters falling outside of the field of application of EU law.[216] Thirdly, differently from the first version proposed, the proposal did not establish a mechanism for assessing whether the request for an advisory opinion falls within the scope of EU law, therefore avoiding any delays in the process.[217] Finally, the EU negotiation noted that such a clause in the NDAA would not preclude the EU from becoming a party to Protocol 16.[218] The other negotiations noted that such a provision would give "temporary monopoly" on human rights issues to the CJEU; this, however, did not preclude the possibility from lodging an individual application, which would allow for the ECtHR to have the final say on the application of the ECHR.[219] Moreover, this proposal did not limit the jurisdiction of the ECtHR and, therefore, did not focus on the consequences of a misguided request from an EU Member State. In conjunction with the proposal, a new paragraph to the Explanatory Report was also presented, in which the rationale of avoiding misguided advisory opinion requests in

[214] 'Proposal by the EU Delegation on "Requests for an Advisory Opinion Pursuant to Protocol No. 16" at the 14th Meeting of the CDDH Ad Hoc Negotiation Group on the Accession of the European Union to the European Convention on Human Rights (5-7 July 2022)', (46+1(2022)23 Council of Europe Document 20 June 2022) (Proposal by the EU Delegation); 'Report to the CDDH. CDDH Ad Hoc Negotiation group ("46+1") on the Accession of the European Union to the European Convention on Human Rights', (46+1(2023)35PROV Council of Europe Document 17 March 2023), art. 5 (Report to the CDDH).
[215] Proposal by the EU Delegation (n 214) para. 7.
[216] ibid para. 7.
[217] ibid para. 8.
[218] ibid; 'Meeting Report at 9th Meeting of the CDDH Ad Hoc Negotiation Group ("47+1") on the Accession of the European Union to the European Convention on Human Rights (23-25 March 2021), (47+1(2021)R9 Council of Europe Document 25 March 2021).
[219] 'Meeting Report at 14th Meeting of the CDDH Ad Hoc Negotiation Group ("46+1") on the Accession of the European Union to the European Convention on Human Rights (5-7 July 2022)', (46+1(2022)R14 Council of Europe Document 7 July 2022).

contravention to article 267 TFEU was made explicit.[220] Such a proposal and its attached explanatory memorandum were approved in the 15th Negotiation Meeting.[221]

Looking back at *Opinion 2/13*, it can be established that the two concerns put forward by the CJEU have indeed been considered by the negotiators. The first concern was that the national courts could prefer the advisory opinion procedure over the preliminary ruling one. By declaring the EU Member States last instance courts not to fall within the definition of "highest courts" according to Protocol 16, within the field of application of European Union law, those courts are clearly prohibited from circumventing article 267 TFEU by taking a deviation to Strasbourg. With regards to the second issue regarding the prior-involvement procedure, article 5 does not tackle the issue directly. However, in the 6th Negotiation Meeting, the negotiators have agreed that the prior involvement procedure is not triggered by a request for an advisory opinion under Protocol 16.[222] As a result, paragraph 66 of the Explanatory Report has been amended, clarifying that the prior-involvement procedure presupposes the application for which the co-respondent mechanism applies.[223]

Article 5 NDAA is, looking back to the solutions presented by commentators of *Opinion 2/13*, indeed the most extreme solution that could have been adopted. However, as pointed out also by the EU negotiators, such an amendment did not impose severe restrictions with disproportionate consequences on the overall applicability of Protocol 16 in the EU. Noteworthy is that, because the CJEU's concerns were mainly internal to the EU, the final proposal focuses on how to treat advisory opinions from an EU perspective, rather than the consequences resulting from the circumvention of article 267 TFEU through advisory opinions.[224]

[220] Proposal by the EU Delegation (n 214); Report to the CDDH (n 214), Explanatory Report (n 134) para. 86.
[221] 'Meeting Report at 15th Meeting of the CDDH Ad Hoc Negotiation Group ("46+1") on the Accession of the European Union to the European Convention on Human Rights (5-7 October 2022)', (46+1(2022)R15 Council of Europe Document 7 October 2022).
[222] ibid.
[223] Report to the CDDH (n 214) para. 66.
[224] Report at 13th Meeting (n 208).

In the next section, the implications of article 5 NDAA on the relationship between the ECtHR and the CJEU and, therefore on the EU accession to the ECHR, will be analysed.

4. Implications of Article 5 New Draft Agreement on the Relationship Between the ECtHR and the CJEU

With the adoption of the NDAA, it is almost certain that the EU institutions will request another opinion to the CJEU according to article 218(11) TFEU. As mentioned above, the CJEU's concerns have been the centre of a heated discussion in the hearings of the first CJEU's opinion on the DAA, and since such concerns have been feared as to be used as scapegoats by the CJEU to find the DAA not in conformity with EU law, it is relevant to assess the implications that article 5 NDAA might have in the third attempt for the EU to accede the ECHR. Firstly, the wording of article 5 will be analysed. Secondly, the implications of article 5 on the EU Charter of Fundamental Rights will be analysed.

4.1. "Within the Field of Application of European Union Law": The Potential Strasbourg and the Luxembourg Court Assessments

To assess the impact of article 5 NDAA, one shall look at the wording agreed upon. While the negotiators have agreed on a "rather elegant solution",[225] the wording "*within the field of application of European Union law*" of article 5 NDAA may still cause some issues in its application.

What falls within the field of application of EU law and who decides upon it? Unfortunately, neither the NDAA, nor the Explanatory Report, nor the negotiation reports give a clear answer to these questions. By reading the Explanatory Report, one could think that some indication on how to establish whether a question falls within the field of application of EU law is given. Paragraph 86 of the Explanatory Report to the NDAA clarifies that the desired effect of article 5 is to preclude recourse to Protocol 16 when EU law establishes that the court or tribunal in question is required to ask a preliminary question to the CJEU. Here, it is stated that this situation may occur when an EU national court shall make use of article 267 TFEU as to be "interpreted by the CJEU".[226] It

[225] Lock, 'Op-Ed' (n 8).
[226] Report to the CDDH (n 214), Explanatory Report (n 134), para. 86.

is unclear from paragraph 86 whether the CJEU shall have exclusive jurisdiction in the interpretation of article 5 NDAA. Looking back at the negotiations report, it needs to be recalled that the proposal in which the CJEU was involved to make a determination of whether and to what extent a request for an advisory opinion is a circumvention of article 267 TFEU was struck down – with the justification that it would have delayed the whole mechanism.[227] In the same instance, however, the Representative of the Registry of the ECtHR warned the other parties that the Strasbourg court could not be expected to check the compliance of any request for an advisory opinion from an EU Member States court with EU law.[228]

Such lack of clarification could be derived from the fact that, as noted before, the negotiators have preferred to focus on a procedural solution that could guide the EU national courts better in avoiding misguided requests rather than the consequences of a circumvention of article 267 TFEU. This was supported by the fact that, considering the overall reaction of the CJEU to the DAA in *Opinion 2/13*, the concerns addressed to Protocol 16 were less resounding. When analysing the introduction to EU negotiators' final proposals on article 5, it seems that faith has been put on the fact that "the requesting court and the European Court of Human Rights will each have a responsibility to make certain that the mechanism established under Protocol No 16 is not used to obtain advisory opinions in circumstances where EU law, as interpreted by the Court of Justice, requires the requesting court to refer the question to the Court of Justice for a preliminary ruling under article 267 TFEU".[229] Such a relaxed approach could have been supported by the critical response of the scholars to the CJEU's concerns, which wondered "how realistic it is to assume that the panel of the ECtHR in charge of selecting the requests for an advisory opinion would accept a request from a "forum shopping court" in the first place, if it appeared that it raised an issue of EU law".[230] Whether this is the case, the paper will address the point in the further sections.

[227] Report at 13th Meeting (n 208) para. 24.
[228] ibid.
[229] Proposal by the EU Delegation (n 214) para. 8.
[230] Callewaert, 'Protocol 16' (n 167).

At the time of writing, seven advisory opinions have been accepted as admissible and given by the ECtHR.[231] They concern a wide range of topics. None of them are within the scope of EU law. However, it has been pointed out earlier, it might not always be clear what constitutes a case of EU law to be brought to the CJEU. This may leave room for national judges to decide whether to resort to article 267 or to Protocol 16.[232]

This is exactly what may have happened to the judge of the Belgian *Conseil d'État* on the 13 April 2023. The ECtHR received a request for an advisory opinion in the context of a case of a security guard, whose identity card allowing him to work as a security guard was withdrawn on the grounds that he was allegedly associated with the "scientific" strand of Salafism and that he allegedly was a supporter of such ideology.[233] The question lodged concerns the interpretation of article 9 ECHR on the right to freedom of thought, conscience and religion and reads as follows: "Does the mere fact of closeness to or membership of a religious movement that is considered by the competent administrative authorities, in view of its attributes, to present a medium- or long-term threat to the country, amount under article 9 § 2 (freedom of thought, conscience and religion) of the Convention to sufficient grounds for taking an unfavourable measure against an individual, such as a ban on working as a security or surveillance guard?". It is beyond doubt

[231] *Advisory Opinion Concerning the Recognition in Domestic Law of a Legal Parent-Child Relationship Between a Child Born Through a Gestational Surrogacy Arrangement Abroad and the Intended Mother. Requested by the French Court of Cassation* Request No. P16-2018-001 (ECtHR, 10 April 2019); *Advisory Opinion Concerning the Use of the "Blanket Reference" or "Legislation by Reference" Technique in the Definition of an Offence and the Standards of Comparison Between the Criminal Law in Force at the Time of the Commission of the Offence and the Amended Criminal Law. Requested by the Armenian Constitutional Court* Request No. P16-2019-001 (ECtHR, 29 May 2020); *Advisory Opinion on the Assessment, Under article 3 of Protocol No. 1 to the Convention, of the Proportionality of a General Prohibition on Standing for Election After Removal From Office in Impeachment Proceedings. Requested by the Lithuanian Supreme Administrative Court* Request No. P16-2020-002 (ECtHR, 8 April 2022); *Advisory Opinion on the Applicability of Statutes of Limitation to Prosecution, Conviction and Punishment in Respect of an Offence Constituting, in Substance, an Act of Torture. Requested by the Armenian Court of Cassation* Request No. P16-2021-001 (ECtHR, 26 April 2022); *Advisory Opinion on the Difference in Treatment Between Landowners' Associations "Having a Recognised Existence on the Date of the Creation of an Approved Municipal Hunters' Association" and Landowners' Associations Set Up After That Date. Requested by French Council of State* Request No. P16-2021-002 (ECtHR, 13 July 2022); *Advisory Opinion on the Procedural Status and Rights of a Biological Parent in Proceedings for the Adoption of an Adult. Requested by Finnish Supreme Court* Request No. P16-2022-001 (ECtHR, 13 April 2023).

[232] O'Leary (n 191) p. 87.

[233] 'The Court Has Accepted a Request for an Advisory Opinion From the Belgian *Conseil d'État*' Press Release ECHR 148 (2023) (European Court of Human Rights, 16 May 2023) <www.echr.coe.int/w/request-for-advisory-opinion-accepted-1> accessed 30 August 2023.

that this case may fall within the field of application of EU law, more specifically within the application of Directive 2000/78/EC on equal treatment in employment and occupation. This means that, since the Belgian *Conseil d'État* is a last instance court within the meaning of article 267 TFEU, the national court should have sent a preliminary question to the CJEU. Such an investigation would concern whether the withdrawal of the identity card from the security guard shall be interpreted as sufficient to fall within the scope of article 2(5) Directive 2000/78/EC. This could be due to his ties or membership of a religious movement that is considered to present a medium- or long-term threat to the public security of the Member State. At the time of writing, no preliminary question has been lodged by the Belgian *Conseil d'État* to the CJEU on the same case.

The request was accepted and declared admissible, according to article 2 Protocol 16, by the Grand Chamber panel on 10 May 2023, only several weeks after the agreement on the NDAA. Indeed, the EU has not acceded to the ECHR yet and therefore the agreement is not yet applicable. In this instance, the situation seems therefore problematic only from an EU law perspective, according to which the Belgian *Conseil d'État* should have sent a preliminary question to the CJEU according to article 267 TFEU. Since the NDAA is not applicable yet and since Belgium has ratified Protocol 16, the Belgian *Conseil d'État* request seems, on the other hand, from an ECHR perspective unproblematic in its admissibility to the Strasburg court. In fact, outside article 5 NDAA the Belgian *Conseil d'État* is still the highest court under Protocol 16. Moreover, this situation further confirms what had been pointed out both in *Opinion 2/13* and in the new round of negotiations, namely that the conflict between article 267 TFEU and Protocol 16 transcends the accession due to the obligation to send preliminary questions under the conditions defined under EU law. With the entering into force of article 5 NDAA, the Belgian *Conseil d'État* will be regarded differently under Protocol 16 depending on the situation at hand: In case the request falls within the field of application of EU law, it will be classified as a lower instance court, therefore not falling under those courts able to send advisory opinions; in case the request is on a non-EU law issue, the Belgian *Conseil d'État* will be considered as a highest court and therefore able to request an advisory opinion. Therefore, this request for an advisory opinion from the Belgian *Conseil d'État* and the lack of request of a preliminary reference to the CJEU shows that the CJEU's concerns that EU last instance courts would

deviate from their obligation to request a preliminary question was well founded. From an EU law perspective, in fact, a circumvention has indeed taken place since the Belgian *Conseil d'État* was under the obligation of article 267 TFEU. Indeed, it is still a possibility that the Belgian *Conseil d'État* will send a preliminary question to the CJEU in compliance with the CILFIT doctrine; however, if the advisory opinion of the ECtHR will satisfy the Belgian judge providing the clarification needed to rule on the matter, it is unlikely that a preliminary question will be sent to Luxembourg. It is unknown why the Belgian *Conseil d'État* has chosen, among the reasons outlined above on why preferring an advisory opinion to the preliminary reference would be advantageous, the Strasburg court. However, if it is assumed that it was not clear to the Belgian court whether the case would have fallen within the scope of EU law, instead of mistakenly choosing the ECtHR, the Belgian court should have sent a preliminary question to the CJEU to establish whether it was an issue of EU law and therefore subject to article 267 TFEU.

If this assumption is to be held true, the Belgian advisory opinion request shows that article 5 NDAA would not solve the issue after accession. The vagueness in the phrasing of article 5 NDAA might imply that both the CJEU as well as the ECtHR would have to define and clarify what falls "*within the field of application of European Union law*".[234] It has been analysed that the wording used does not reflect the language used by the CJEU in *Opinion 2/13* and does not borrow from the wording "*within the scope of EU law*" as in article 51(1) EU Charter nor from "*within the fields of EU law*" in article 19(1) TEU. Instead, it recalls the language of the CJEU when dealing with preliminary references under article 267 TFEU, in line with the cross-fertilisation phenomenon previously discussed.[235] However, whatever formulation one might want to base itself on, the interpretation of the wording of article 5 NDAA and, therefore, of the *rationae materiae* of the newly agreed provision, must be given by the CJEU. Such clarification could be given in an opinion on the NDAA or upon a preliminary question by an EU high instance court. In accordance with article 344 TFEU, as

[234] O'Leary (n 191) p. 87.
[235] ibid.

pointed out in article 3 Protocol 8 TFEU[236] and stressed by the CJEU in *Opinion 2/13*,[237] it would be up to the Luxembourg court to establish what substantively falls within the field of application of EU law in the same way it has been ruling on what falls "*within the scope of EU law*" or "*in the fields covered by EU law*".

From the ECtHR perspective, the Strasburg court would have the sole role of establishing whether an advisory opinion request is admissible. There would be no role, however, for the Strasbourg court to rule on the scope of what "*in the field of application of EU law*" found in article 5 NDAA means. It is a common-sense rule that the ECtHR relies on the interpretation of domestic law provided by the national courts of the respondent state, without imposing its own interpretation.[238] In *Bosphorus*, the ECtHR has clarified that it is also for the EU judicial actors to interpret and apply EU law while the ECtHR's role is restricted to assessing whether EU law is incompatible with the ECHR and its protocols.[239] This concerns both the CJEU in its capacity under article 267 TFEU as well as the EU national courts as part of the EU judicial system.[240] Following this line of reasoning, it is, therefore, not up to the ECtHR to establish what is EU law in light of article 5 NDAA but it can only establish whether, based on the interpretation of article 5 NDAA given by the CJEU, a request for an advisory opinion is admissible. One could argue that article 5 NDAA would call for an EU national court to explain, in its request, why it considers the issue not in the field of EU law and, therefore, why the last instance court at hand shall be deemed the highest court in light of Protocol 16 and why it is not subject to the obligation imposed by article 267 TFEU. This would allow for the ECtHR to rule on the correct application of article 5 NDAA and eventually, if the request does fall within the CJEU's interpretation of article 5 NDAA, to declare the request inadmissible. One might think that the ECtHR should come up with a new *Bosphorus*-like test to be applied when establishing the admissibility for a request under Protocol 16, by ensuring that the ECtHR accepts advisory opinion requests that fall within the field of EU law only when a preliminary question was not referred to the CJEU and, therefore, the

[236] 'Protocol No. 8 Relating to article 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms' [2012] OJ C326/1.
[237] *Opinion 2/13 of the Court* [2014] EU:C:2014:2454, para. 204.
[238] Callewaert, *The Accession* (n 30).
[239] *Bosphorus v Ireland* App no 45036/98 (ECtHR, 30 June 2005), para. 143.
[240] *Avotiņš v Latvia* App no 17502/07 (ECtHR, 23 May 2016), para. 100.

presumption of equivalence is rebutted. This would, however, not be appropriate: firstly, article 5 NDAA regulates only the issue of admissibility, while the *Bosphorus* presumption is applied when the ECtHR is called to assess a breach of the Convention by EU Member States when implementing EU law. Secondly, as in the case of the Belgian *Conseil d'État* just analysed, the EU national courts must always still send a preliminary question to the CJEU after having received an advisory opinion by the ECtHR. Thirdly, the Strasbourg court has discretion on whether to accept opinions and, regardless of whether an advisory opinion is given or not, an individual application is always possible. This gives plenty of opportunity for the ECtHR to ensure the correct application of the Convention.

Looking back at the negotiations of article 5 NDAA, it can be established that the right concerns were considered when discussing the issue involving Protocol 16. To be recalled is the remark of the Representative of the Registry of the ECtHR, who pointed out that the ECtHR could not be expected to check the compliance of the requests of advisory opinions with the obligations under EU law.[241] However, this remark has not been given the appropriate weight in the negotiations and neither the final version of article 5 NDAA nor the Explanatory Report addresses this concern in a careful and comprehensive manner. It can be argued, therefore, that a procedure like the one envisaged for inter-party cases under article 33 ECHR should have also been established for Protocol 16 as envisaged in the first proposal during the negotiations. Article 4(4) NDAA establishes that the ECtHR shall provide the EU sufficient time to establish whether the dispute concerns the interpretation or application of EU law.[242] Consequently, also for advisory opinions, the ECtHR should require the EU Member States at hand to seek clearance from the CJEU on whether each request at hand does not fall within the field of application of EU law. This mechanism would, as pointed out during the negotiations, lengthen the process but also ensure that the CJEU's exclusive jurisdiction according to article 344 is ensured. Alternatively, the CJEU could give clarification on the *rationae materiae* of article 5 NDAA only and trust the ECtHR to only admit requests that are in line with such interpretation.

[241] Report at 13th Meeting (n 208).
[242] Solution already proposed in Jacqué, *What Next* (n 162).

4.2. Effects on the EU Charter of Fundamental Rights

As it has been pointed out in previous sections, there is a strong connection between the ECHR and the EU Charter. Therefore, when analysing the implication of article 5 NDAA one shall also consider which consequences the unclear wording of article 5 NCAA might have on the EU Charter and on its interpretation.

It is inevitable that some requests for advisory opinions may carry consequences on the interpretation of the corresponding provisions of the EU Charter. According to article 52(3) EU Charter, in addition, the EU Charter is rooted in the ECHR by defining the Convention level of protection as the minimum one. Despite advisory opinions not being binding, it has been pointed out that they are still declaratory judgements from the ECtHR, binding on all High Contracting Parties and therefore reflective of the correct interpretation of the ECHR. In addition, even non-binding advisory opinions, if not followed, are likely to become individual complaints. Therefore, it is inevitable that the interpretation given by the ECtHR in advisory opinions has effect on the interpretation of the EU Charter. This applies both on the interpretation of EU Charter rights that correspond to ECHR ones as well as the minimum level of protection of every EU Charter right.

The knock-on effect described should not, per se, impose a threat to the effectiveness of the EU judicial order or the CJEU's exclusive competence to interpret the EU Charter since the limitation to the EU's autonomy to interpret the EU Charter has been already enshrined in article 52(3) EU Charter.[243] However, in case of a wrong application of article 5 NDAA and in case the ECtHR declares an advisory opinion request on an EU law issue admissible, the Strasbourg court has to consider and respect that there might be two different standards under the ECHR and the EU Charter in accordance with article 53 EU Charter. The ECtHR would, therefore, give its opinion on the EU law at hand, potentially going beyond the Convention's minimum level of protection.[244] If such difference is not respected, the exclusive competence of the CJEU to the interpret the EU Charter would be compromised.

[243] O'Leary (n 191) p. 87.
[244] Polakiewicz and Brieskova (n 170).

5. CONCLUSION

The EU accession to the ECHR has been on the table for decades now, and the publication of the NDAA has brought some hope that after the halt caused by *Opinion 2/13*, accession might actually take place. In this paper, the NDAA and, more specifically, article 5 on advisory opinions as in Protocol 16, were analysed to assess to what extent the NDAA responds to the concerns expressed in *Opinion 2/13* and therefore, establish whether it could constitute a threat to a new halt by the CJEU. In order to do so, article 5 NDAA and its corresponding Explanatory paragraph were analysed through the lens of the relationship between the European Court of Human Rights and the Court of Justice of the European Union.

In the second section, it was established that the two European courts have a well-established interrelationship. Not only have they established how their respective legal systems interact, but they have a well-established practice of cross-fertilisation and cross-citation of case law. This relationship, based on comity, has been deemed to have deteriorated after the clear declaration of mistrust by the CJEU towards the ECtHR in *Opinion 2/13*. However, literature shows that even if the two courts have been diverging, an open conflict has always been avoided.

In the third section, advisory opinions under Protocol 16 were analysed. They are the product of the cross-fertilisation phenomenon between the two courts, but they diverge from the preliminary ruling procedure in many aspects; in particular, Protocol 16 envisages them being non-binding. However, due to their declaratory nature and the phenomenon of horizontal legal effect, advisory opinions are more far-reaching than expected. Advisory opinions have not only been subject to widespread criticism by the ECHR High Contracting Parties, but they have also been subject to criticism by the CJEU in *Opinion 2/13*. The DDA, in fact, did not contain any reference to Protocol 16, and the CJEU feared that advisory opinions would have impaired the effectiveness and autonomy of the EU legal system by allowing for forum shopping to the detriment of the preliminary ruling procedure in article 267 TFEU. Despite the literature having widely disregarded such concerns, it seemed that the CJEU had attributed great significance to this potential issue, to the extent that advisory opinions were deemed to be framed as scapegoats for the CJEU to halt the EU accession to the

ECHR. The new round of negotiations for the NDAA appear to have considered the CJEU's concern, since extensive discussions took place between the delegations. At present, the NDAA features a provision establishing that last instance courts, which are usually allowed to ask for advisory opinions under Protocol 16, are not deemed to have this capacity when dealing with issues "*within the field of application of EU law*".

In the fourth section, article 5 NDAA was analysed in order to establish the implications of this provision. Firstly, it was established that article 5 NDAA was not carefully drafted since no indication is given on what falls within "the field of application of EU law". It has been established that, due to article 344 TFEU, only the CJEU may rule on the *ratione materiae* of article 5 NDAA, while the ECtHR is supposed to abide by the CJEU's interpretation and rule on admissibility of advisory opinion requests accordingly. Such reliance on the comity between the two courts is also to be found in the negotiation documents, where the EU negotiator seems to trust the ECtHR not to accept advisory opinion requests falling under EU law and consequently circumventing the obligations imposed on last instance courts by article 267 TFEU. However, as has been found by analysing the latest request for an advisory opinion by the Belgian *Conseil d'État*, such responsibility cannot be unflinchingly expected of the ECtHR, since in the instance analysed, the ECtHR did not refrain from accepting the request. This clearly fell under the scope of EU law, for which the Belgian court did not refer a preliminary question to the CJEU. Indeed, the NDAA has not entered in force yet, therefore making the Belgian *Conseil d'État* still compliant with both ECHR and EU law if it had subsequently referred the matter to the CJEU. This case raises suspicion on whether there is sufficient willingness of comity between the two European courts for the CJEU to accept article 5 NDAA as it is. Moreover, due to the close connection between the ECHR and the EU Charter, careless application of article 5 NDAA can lead to indirect effects to the interpretation of the EU Charter.

In conclusion, this research has shown that article 5 NDAA might be at the centre of discussion for a possible future opinion of the CJEU on the NDAA due to its imprecise wording and the possible implications stemming from this. Whether article 5 NDAA will be a scapegoat in the CJEU's third opinion on the EU's accession to the ECHR will determine the CJEU's comity relationship with

the ECtHR. The alleged divergences in their case law and the acceptance of the Belgian request for an advisory opinion by the ECtHR calls for an explicit stance on the CJEU's relationship with the ECtHR after *Opinion 2/13*.

The Future of Freedom of Expression on Social Media in the European Union Under the Digital Services Act

Margot Robins[1]

What is the impact of the Digital Services Act on the right to freedom of expression on social media platforms, in the EU, in comparison to the Directive 2000/31/EC on Electronic Commerce, through the example of Twitter?

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TABLE OF ABBREVIATIONS

EU Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
COVID-19	Coronavirus Disease of 2019
DSA	Digital Services Act
ECD	Directive 2000/31/EC on Electronic Commerce (E-Commerce Directive)
EU	European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GDPR	General Data Protection Regulation
ISP	Internet Service Provider
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
VLOP	Very Large Online Platform

1. INTRODUCTION

On November 30, 2022, the European Union (EU) commissioner for digital policy, Thierry Breton, addressed a tweet to Elon Musk. The commissioner warned the new owner of Twitter that 'huge work' was still ahead to 'get ready for the DSA (Digital Services Act)', pointing to content moderation and disinformation.[2] This tweet follows many recent changes actioned by Elon Musk, including the abandonment of the Coronavirus Disease of 2019 (COVID-19) misinformation policy and the laying-off of content moderation contractors.[3] These changes align with Musk's opinions, self-describing himself as a 'free speech absolutist'.[4] However, Twitter is not the only organisation undergoing major developments. Fourteen days before Breton's tweet, the Digital Services Act (DSA) entered into force in the EU.[5] This new regulation builds on the Directive 2000/31/EC on Electronic Commerce (ECD).[6] Amongst other goals, it aims at protecting the fundamental rights of online digital services users, including the freedom of expression.[7]

The Internet has grown at a rapid speed since the launching of the World Wide Web in 1991. This tool enhanced freedom of expression, especially with the recent rise of social media platforms. Simultaneously, risks and challenges for this fundamental right also increased.[8] EU legislators must keep up with this fast

[2] Tweet from Thierry Breton (30 November 2022) <https://twitter.com/ThierryBreton/status/1598015892457426944?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1598015892457426944%7Ctwgr%5E898bbf64a6036ae92c84c6ffa0cedd3d7f133e03%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.euronews.com%2Fnext%2F2022%2F12%2F01%2Feu-warns-elon-musk-that-twitter-could-face-fines-or-even-a-ban-over-content-moderation-rul> accessed 12 February 2023.

[3] Euronews, 'EU warns Elon Musk that Twitter could face fines or even a ban over content moderation rules' (*Euronews. Next*, 1 December 2022) <www.euronews.com/next/> accessed 12 February 2023.

[4] Dan Milmo, "How 'free speech absolutist' Elon Musk would transform Twitter" (*The Guardian*, 15 April 2022) <www.theguardian.com/technology/2022/apr/14/how-free-speech-absolutist-elon-musk-would-transform-twitter> accessed 12 February 2023.

[5] Regulation (EU) 2022/2065 of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/100, art 93; European Commission, 'The Digital Services Act Package', <https://digitalstrategy.ec.europa.eu/en/policies/digital-services-act-package> accessed 1 March 2023.

[6] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on Electronic Commerce) [2000] OJ L178/1; Digital Services Act (n 5), arts 2(3) and 89.

[7] Digital Services Act (n 5) art 1(1) rec 3.

[8] Joris van Hoboken and Daphne Keller, 'Design Principles for Intermediary Liability Laws' (2019) Algorithms 3.

evolution of technologies to protect citizens from any undue interference with their rights. Indeed, the right to freedom of expression is protected at an international and European level in the International Covenant on Civil and Political Rights, the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union (EU Charter).[9] In this context, this paper attempts to analyse the impact of the Digital Services Act on the right to freedom of expression on social media platforms in the EU. It compares the DSA to the Directive 2000/31/EC on Electronic Commerce, through the example of Twitter.

This comparison is relevant given the recent adoption of the new legislation and the potential impact on European citizens' lives. Moreover, freedom of expression is at the core of many current debates around social media. This is demonstrated through Elon Musk's attempts to allow open dialogue online, and the divided reactions to those initiatives.[10] Additionally, the EU legislators aspire to export the DSA's high standards beyond EU borders.[11] For example, businesses outside the EU would have to comply with those standards as well without being legally bound to do so, due to their participation in the internal market. This so-called 'Brussels Effect' has been witnessed in several fields. It is particularly prevalent in the digital domain, with the prime example of the General Data Protection Regulation (GDPR).[12] This essay will focus on the impact of the DSA on social media platforms. This recent development of technology has taken a more central role in everyday life of many EU citizens. For the sake of clarity, this research defines a social medium as a website allowing its users to interact with each other through the creation of a profile and the generation of content for a personal, professional or commercial purpose.[13] A platform is a website providing an interface which allows reprogramming. Thereby, other websites can

[9] International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 19(2); European Convention on Human Rights (ECHR) (opened for signature 4 November 1950) 213 UNTS 221, art 10; Charter of Fundamental Rights of the European Union [2012] OJ C 326 art 11.
[10] Milmo (n 4).
[11] European Commission, 'Question and Answers: Digital Services Act' (25 April 2023) <https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2348> accessed 23 May 2023.
[12] Anu Bradford, 'The Brussels Effect' (2012) 107 Northwestern University Law Review p. 1, p. 3; Thomas Streinz, 'The Evolution of European Data Law' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (3rd edn Oxford University Press 2021), ch 29.
[13] Thomas Aichner and others, 'Twenty-Five Years of Social Media: A Review of Social Media Applications and Definitions from 1994 to 2019' (2021) 24(4) Cyberpsychology, Behavior, and Social Networking pp. 215-222.

be integrated with the platform's data and functionality to build new services on top of it. This creates a multi-sided market where value increases for all parties as more people use the platform.[14] Therefore, the combination of those definitions includes websites such as Facebook, Instagram and YouTube. The choice of Twitter for this essay is based on two main reasons. It stands as one of the main social media platforms currently used, with 368 million monthly active users worldwide.[15] Furthermore, its recent take-over by a self-proclaimed free speech absolutist billionaire and the following controversies illustrates the challenges of protecting freedom of expression on social media.

The research question that this essay will address is: w*hat is the impact of the Digital Services Act on the right to freedom of expression on social media platforms, in the EU, in comparison to the Directive 2000/31/EC on Electronic Commerce, through the example of Twitter?* In order to answer the main question, this research uses a doctrinal method. It analyses primary sources of case law and legislations. It focuses on the DSA and on the ECD, particularly provisions on intermediaries' liability, replaced by the DSA.[16] Case law from the Court of Justice of the European Union (CJEU) will complement this legislation. The ECHR and its interpretation by the ECtHR will further the comprehension of freedom of expression. Furthermore, secondary sources will supplement this analysis. These mainly consist of articles, textbooks and Twitter's terms and conditions. This paper will begin by addressing the contextual setting, which is crucial to understand the impact of a piece of legislation. This necessitates some background on Internet and social media governance and on freedom of expression online. Then, the two pieces of legislation will be compared on several levels: their scope, the exemption liability, the due diligence obligations, and their enforcement. Finally, this essay will conclude with an overview of the impact of each of those texts on freedom of expression.

2. PART I: CONTEXTUAL SETTING

[14] Anne Helmond, 'The Platformization of the Web: Making Web Data Platform Ready' (2015) 1(2) Social Media + Society p. 2, p. 4.
[15] Stacy Dixon, 'Number of X (Formerly Twitter) Users Worldwide from 2019 to 2024' (Statista, December 2022) <www.statista.com/statistics/303681/twitter-users-worldwide/> accessed 10 April 2023.
[16] Digital Services Act (n 5) arts 2(3), 89; Directive on Electronic Commerce (n 6) arts 12-15.

2.1. The Road Towards the Adoption of the DSA

The evolution of law is tied to political, economic, and historical factors.[17] Therefore, it is important to understand the context surrounding the adoption of the DSA and the ECD in order to compare them and comprehend their full impact. Both those instruments are part of the evolution of Internet governance and regulation. The latter is influenced by different actors and their participation in technological innovations. The evolution of Internet governance and the regulation of social media platforms can be divided into three main phases: from 1960s to 1990s, from 1990s to 2010s, and from 2010s on.

2.1.1. 1960s to 1990s: Self-Regulation, Market Regulation and Cyberlibertarianism

The Internet's conception can be traced back to the invention of the packet switching technology.[18] This led to creation of different isolated computer networks in the beginning of the 1970s. A few years later, they were interconnected through a network of networks, the Internet.[19] The US funded most of these technological developments and the infrastructure for research purposes. Thus, a closed circle of researchers and engineers were the first to use the Internet. Their shared values and knowledge avoided the need for control over users' behaviour and concerns for abuses.[20] Their governance was technical in nature. They harmonised technology standards through network management.[21] In the 1970s, online virtual communities based on common interests arose when hobbyists joined the Internet.[22] They tackled anti-social behaviour through community governance such as moderators, who were able to ban or approve users, or the netiquette, which were guidelines for respectful communications.[23] They resemble the notice-and-action and terms and conditions mechanisms. In these two examples, governance is established by the regulated actors themselves. This self-regulation prevailed in the Internet's early stage or "market-regulation

[17] For a discussion of the effect of these factors on the evolution of internet regulation, see Malte Ziewitz and Ian Brown, 'A Prehistory of Internet Governance' in Ian Brown (ed), *Research Handbook on Governance of the Internet* (Edward Elgar 2013) p. 1.
[18] ibid Ziewitz and Brown p. 2-7.
[19] ibid p. 2.
[20] ibid p. 11.
[21] ibid p. 24.
[22] ibid p. 12.
[23] ibid p. 25.

phase".[24] It is supported by the cyberlibertarian movement. They argued that states were not suited to govern the "cyberspace" because they lacked legitimacy and power over this borderless space.[25] Thus, freedom of expression standards, if any, were created by the users themselves.

2.1.2. 1990s to 2010s: Cyber-Realism, Privatisation and the ECD

In the 1990s, many developments contributed to changes in Internet governance. On an economic and political level, the Internet was privatised. Until then, non-academic users did not have access to the government-funded backbone.[26] Consequently, private Internet Service Providers (ISP) developed their own infrastructure to offer services to private users.[27] In 1995, the State defunded its backbone. ISPs took over the demand with their private infrastructure.[28] On a technological level, Tim Berners-Lee invented the World Wide Web.[29] This system, followed by other protocols, rendered the information present on the Internet easily retrievable in a user-friendly manner.[30] These two developments enhanced access to the Internet for commercial actors and regular consumers. Social networks and search engines emerged, such as Google in 1998, Facebook in 2004 or Twitter in 2006.[31] Thus, while Internet popularity increased, the average user's skills decreased. Regular consumers new to the Internet tool do not necessarily hold the same knowledge and competences as the early (mainly academic) Internet user base, as referred to in section 2.1.1. This renders them more vulnerable to manipulation and scams from more experienced malicious users,[32] highlighting the weaknesses of the previously successful self-regulation. Although providing flexible and efficient rules in a constantly evolving field, it also lacks legitimacy and accountability in the regulation process, bindingness,

[24] Julia Black and Andrew D Murray, 'Regulating AI and Machine Learning: Setting the Regulatory Agenda' (2019) 10 (3) European Journal of Law and Technology, p. 2.
[25] ibid p. 5; Elettra Bietti, 'A Genealogy of Digital Platform Regulation' (2023) 7 Georgetown Law Technology Review p. 1.
[26] Ziewitz and Brown (n 17) p. 9.
[27] ibid p.16.
[28] ibid p. 9.
[29] World Wide Web Consortium, 'W3C - World Wide Web Consortium Summary' (*w3.org*) <www.w3.org/Summary.html> accessed 6 April 2023.
[30] World Wide Web Consortium, 'Naming and Addressing: URIs, URLs, ...' (*w3.org)* <www.w3.org/Addressing/#background> accessed 6 April 2023.
[31] Bietti (n 25) p. 27.
[32] Jonathan Zittrain, 'Law and Technology: The End of the Generative Internet' (2009) 52(1) Communications of the ACM p. 18; Black and Murray (n 24) p. 6.

enforcement procedures, stability, and the potential differentiation of standards in different sectors.[33]

In response to the cyberlibertarian movement, the cyber-realists considered the ability of the State to enhance freedom on the Internet, instead of threatening it.[34] They argued that its regulation should focus on the access point of the Internet, to protect individuals. Otherwise, those access points would control Internet governance through contractualism.[35] They advocated for a division of labour between engineer and politicians in the form of co-regulation, a compromise between state command-and-control and self-regulation.[36] Applied in the EU settings, this concept entails entrusting the attainment of legislative objectives to parties which are recognised in their field, under the oversight of the Commission.[37] The ECD was enacted in 2000 in this context. It sets out the main principles of intermediary liability and leaves the details to be determined by ISPs in codes of conduct.[38] This regulation period also features a prominence of economic rationale over right-based goals.[39] The ECD clearly illustrates this dominance, with its aim being "to contribute to the proper functioning of the internal market",[40] whereas freedom of expression is only mentioned on two occasions in the preambles.[41]

2.1.3. From 2010s on: Platformisation, Human Rights and the DSA

In the last decade, the world witnessed a rising phenomenon of "platformisation". The previously emerging social networks evolved into dominant Big Techs. Their control over the Internet rendered it less open and decentralised, two aspects which had enabled such control in the first place.[42] Their oligopolistic position was

[33] Rolf H Weber, 'Introduction', in William J Drake (ed) *Shaping Internet Governance: Regulatory Challenges* (Springer, Berlin, Heidelberg 2010) p. 21.
[34] Black and Murray (n 24) p. 6; Bietti (n 25) p. 15.
[35] Black and Murray (n 24) p. 6.
[36] Jan Gerlach, 'Part One: Net Neutrality and Regulation' in Jan Gerlach *The Informational Ecosystem of Net Neutrality: A Comparison of Regulatory Discourses in the U.S. and the E.U* (2016) p. 69; Bietti (n 25) p. 17
[37] Inter-Institutional Agreement on Better Law-Making, Official Journal of the European Union, December 2003, 2003/C 321/01, [2003] OJ C321/1, paras 18-20; Christopher T. Marsden, 'Internet Co-Regulation and Constitutionalism: Towards European Judicial Review' (2012) 26(2-3) International Review of Law, Computers & Technology p. 211, p. 214.
[38] Directive on Electronic Commerce, arts 1(2), 16 and rec 32, 49; Marsden (n 37) p. 218.
[39] Gerlach (n 36) p. 61.
[40] Directive on Electronic Commerce (n 6), art 1(1).
[41] ibid rec 9.
[42] Bietti (n 25) p. 24.

enhanced by two main factors: their business model and the rise of the information society. On an economic level, platforms developed via the commodification of data through target advertising and behavioural profiling, later coined platform capitalism.[43] This was facilitated by technological advancements, such as the development of algorithms and machine learning.[44] In addition to this new business model, in the so-called information society, knowledge became the centre of economic and social life.[45] Information and communication technologies, such as platforms, rendered such knowledge accessible beyond the elite.[46] It bestows on them a vital role in the economic, cultural and social society.[47]

The governance debate now focuses on how to regulate those gatekeepers, whose business models' power and prevalence ensured their oligopolistic position. As predicted by the cyber-realists, this same lack of regulation allowed them to acquire such power.[48] Bietti identifies four conceptions of platform regulation – whose aim to foster users' and entrepreneurs' choices in a competitive market, she argues, characterises them as (neo)liberal –[49] currently used in this regard. Firstly, platforms use self-regulation, in the form of platform content moderation, for example.[50] Linked to this, the fiduciary approach considers that 'governance should be entrusted to actors with power and control over infrastructure'.[51] Secondly, following the concept of co-regulation, as referred to in section 2.1.2., courts and dispute resolution mechanisms become the main actors of oversight.[52] This is well-reflected in the DSA which leaves content moderation mostly in the hands of platforms coupled with a strong transparency mechanism (as will be addressed in chapter 0). As a core feature, as mentioned in section 2.1.2, co-regulation affords a degree of discretion to regulated actors.[53] If these actors are gatekeepers, this can further strengthen their influence over standards.

[43] Bietti (n 25) p. 30; Helmond (n 14) p. 8.
[44] Brent D Mittelstadt and others, 'The Ethics of Algorithms: Mapping the Debate' (2016) 3(2) Big Data & Society p. 2.
[45] Weber (n 33) p. 9.
[46] ibid.
[47] van Hoboken and Keller (n 8) p. 3.
[48] Black and Murray (n 24) p. 6; Bietti (n 25) p. 29.
[49] Bietti (n 25) p. 36.
[50] ibid p. 43.
[51] ibid p. 48.
[52] ibid p. 50.
[53] Inter-Institutional Agreement on Better Law-Making (n 36) paras 18-20; Marsden (n 37) p. 214.

Third, platforms are also regulated by competition.[54] Together with the Digital Markets Act, the DSA intends to regulate the gatekeepers threatening market entry, by imposing more obligations on them.[55] This adds to the fostering of EU-based innovation by regulating US-based Big Techs.[56] Although competition still promotes economic goals (as mentioned in section 2.1.2) right-based incentives became more influential. This is linked to the development of EU fundamental rights law (as discussed in section 2.2.2).[57] Bietti's fourth conception, namely platform regulation through data protection law, exemplifies this evolution. The protection of personal data itself is framed as a fundamental right.[58] The DSA reflects this development as well. Its aim cites the protection of fundamental rights next to the proper functioning of the internal market.[59]

In brief, the ECD and the DSA both result from the continuous evolution of Internet governance, influenced by historical, economic, technical, and political developments. First, the cyberlibertarians advocated for a self-regulated Internet. Then, commercial entities and consumers gained access to the Internet. This prompted the cyber-realist to call for a more supervised self-regulation. An economic-centred co-regulation framework emerged, exemplified by the ECD. Finally, due to the platformisation phenomenon, Big Techs increased their power over Internet governance. The DSA is part of a (neo)liberal response to regulate these gatekeepers. It still makes use of the co-regulation model, in a more right-oriented fashion.

2.2. Freedom of Expression on Social Media Platforms

In addition to the context of their adoption, the impact of the ECD and the DSA on freedom of expression must be understood in light of the evolution of this right itself. This part will provide some insight into the concept of freedom of expression online in the European legal landscape. First, article 10 of the ECHR

[54] Bietti (n 25) p. 51.
[55] ibid p. 61; European Commission, 'The Digital Services Act Package' (*europa.eu)* <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package> accessed 1 March 2023.
[56] Bietti (n 25) p. 61.
[57] Folkert Wilman, 'The EU's System of Knowledge-Based Liability for Hosting Services Providers in Respect of Illegal User Content - Between the e-Commerce Directive and the Digital Services Act' (2021) 12 J Intell Prop Info Tech & Elec Com L p. 317, p. 326.
[58] Bietti (n 25) p. 45.
[59] Digital Services Act (n 5) art 1(1).

and its interpretation from the ECtHR are of importance, in light of its influence on Member States and the EU. Then, the evolution of the EU fundamental right framework, including the EU Charter, is to be considered.

2.2.1. ECHR and ECtHR

Under article 10(1) ECHR, the right to freedom of expression is defined as 'the freedom to hold opinion and to receive and impart information without interference by public authority'.[60] The ECtHR developed a broad definition of interference, such as penalties, restrictions, conditions, formalities or other measures having a chilling effect on future expression.[61] An interference can be justified if it is prescribed by law, necessary in a democratic society and pursuing one of the listed aims, such as the protection of the rights of others.[62] This involves a proportionality assessment.[63] The law must be accessible, and its effect must be foreseeable.[64] The Court considers this right an "essential foundation of democratic society".[65] This society requires pluralism of ideas. Thus, article 10 also protects information or ideas "that offend, shock or disturb the State".[66] In its proportionality test, the Court takes into account the nature and the context of the expression. High public interest information, and especially political speech and satire, will benefit from a wider protection.[67] Overall, this illustrates a broad protection of freedom of expression.[68]

[60] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 10(1).
[61] ECHR art 10(2); Bernadette Rainey, Pamela McCormick and Clare Ovey, '18: Freedom of Expression' in *Jacobs, White, and Ovey: The European Convention on Human Rights* (8th edn, OUP 2020) p. 490.
[62] ECHR art 10(2); Rainey, McCormick and Ovey (n 61) p. 491; European Court of Human Rights, 'Guide on article 10 of the European Convention on Human Rights, Freedom of expression' (2021), <www.echr.coe.int/Documents/Guide_Art_10_ENG.pdf> accessed 16 March 2023, p. 19.
[63] *Handyside v The United Kingdom* [1976] CE:ECHR:1976:1207JUD000549372, para 48; Rainey, McCormick and Ovey (n 61) p. 492.
[64] *VgT Verein gegen Tierfabriken v. Switzerland* [2001] CE:ECHR:2001:0628JUD002469994, para. 52.
[65] *Handyside* (n 63) para 49; Rainey, McCormick and Ovey (n 61) p. 488; Guide on article 10 of the ECHR (n 62) p. 11.
[66] *Handyside* (n 63) para 49; Rainey, McCormick and Ovey (n 61) p. 489; Oreste Pollicino, 'Judicial protection of fundamental rights in the transition from the world of atoms to the word of bits: The case of freedom of speech', (2019) 25 European Law Journal p. 155, p. 158.
[67] *Akdeniz v Turkey* [2014] CE:ECHR:2014:0311DEC002087710, para 28; *Eon v France* [2014] CE:ECHR:2013:0314JUD002611810; Giancarlo Frosio and Christophe Geiger, 'Taking Fundamental Rights Seriously in the Digital Services Act's Platform Liability Regime' (2022) European Law Journal (forthcoming), p. 19.
[68] Rainey, McCormick and Ovey (n 61) p. 488; Pollicino (n 66) p. 158.

The ECHR, including its article 10, was drafted in response to World War II. It aimed to avoid such serious human rights violations in the future.[69] Back then, the virtual world was non-existent. The ECtHR had to adjust those non-virtual parameters to the online setting.[70] While the safeguards of article 10 apply to expression on the Internet and social media, the Court has acknowledged the specific features of those two technologies.[71] On one hand, it recognised their capability to enhance freedom of expression due to "their accessibility and capacity to store and communicate vast amounts of information".[72] It does so to the point of assimilating the function of popular social media users to that of public watchdogs of democracy.[73] Despite emphasising the lack of European consensus due to the rapidly changing nature of the Internet, the Court considers websites as means of dissemination of information. Thus, restrictions imposed on them can be considered an interference with article 10.[74]

On the other hand, the Court also pointed out the potential of the internet and its media to cause grave damage. More restrictive measures can remain justified, especially for the protection of minors and other vulnerable persons.[75] In the Internet context, the Court often balances the right of freedom of expression against another fundamental right, such as the right to private life.[76] Rulings on the liability of ISPs for their users' content are examples of this balancing exercise. In *Delfi AS*, fines imposed to a news portal for defamatory comments, in order to protect the victim's reputation and private life, were ruled compatible with article 10.[77] The comments qualified as a form of hate speech and incitement to acts of violence. Moreover, the measures taken by the portal, namely, a system of notify-

[69] Bernadette Rainey, Pamela McCormick and Clare Ovey, '1: Context, Background and Institutions' in *Jacobs, White, and Ovey: The European Convention on Human Rights* (8th edn, OUP 2020) p. 3.
[70] Pollicino (n 66) p. 161.
[71] *Perrin v United Kingdom* [2005] CE:ECHR:2005:1018DEC000544603; *Cengiz and Others v Turkey* [2015] CE:ECHR:2015:1201JUD004822610; Rainey, McCormick and Ovey (n 61) p. 489
[72] *Delfi AS v Estonia* [2015] CE:ECHR:2015:0616JUD006456909, para 110; *Magyar Helsinki Bizottság v Hungary* [2016] CE:ECHR:2016:1108JUD001803011, para 168; Rainey, McCormick and Ovey (n 61) p. 493; Guide on article 10 of the ECHR (n 62) pp. 51, 99.
[73] *Delfi AS* (n 72) para. 110; *Magyar Helsinki Bizottság* (n 72) para. 168; Rainey, McCormick and Ovey (n 61) p. 493; Guide on article 10 of the ECHR (n 62) p. 51, 99.
[74] *Ahmet Yıldırım v Turkey* [2012] CE:ECHR:2012:1218JUD000311110, para. 50; *Cengiz and Others*, (n 71) para. 56; Frosio and Geiger (n 67) p. 17.
[75] *Delfi AS* (n 72) para. 110; *Murphy v Ireland* [2004] 40 ECHR 1 para. 74; Rainey, McCormick and Ovey (n 61) p. 492; Guide on article 10 of the ECHR (n 62) pp. 100, 103; Pollicino (n 66) pp. 102, 160.
[76] ECHR art 8.
[77] *Delfi AS* (n 72) paras. 137, 162.

and-take-down and one of automatic deletion of comment, were not sufficient to avoid liability. Indeed, the comments remained visible for six weeks.[78] The Court distinguished this case from *MTE v Hungary*, also concerning the liability of a news portal for users' defamatory comments.[79] In this case, the content at stake was not manifestly unlawful and did not require immediate removal from the provider. The notice-and-action system would have been a sufficient tool to protect the reputation of the victims. Thus, the liability of the portal was held to be a step too far and a violation of article 10.[80] Therefore, in order to determine the proportionality of the interference, the ECtHR takes into account the content of the expression, its lawfulness and its importance to public interest.

2.2.2. EU Fundamental Rights Law

Moving on to EU law, most of the freedom of expression-related challenges created by the digital world have been tackled through the ECD and its interpretation by the CJEU (as will be elaborated on in chapter 3).[81] However, the general development of EU fundamental rights law also constitutes an important contextual element for this analysis. At the time of the ECD enactment, fundamental rights were considered unwritten general principles of EU law.[82] They would mainly limit acts of EU institutions.[83] They could also apply to Member States when they act in the scope of EU law, for example, when they implement the ECD.[84]

Since then, the EU fundamental rights legal framework developed through five relevant points.

Firstly, the Charter of Fundamental Rights acquired the status of primary law in 2007.[85] Article 11 protects the right to freedom of expression, which

[78] ibid paras. 142, 162; Rainey, McCormick and Ovey (n 61) p. 510; Guide on article 10 of the ECHR (n 62) p. 103; Pollicino (n 66) p. 160.
[79] *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* [2016] CE:ECHR:2016:0202JUD002294713.
[80] *MTE v Hungary*, para 91; Rainey, McCormick and Ovey (n 61) p. 511; Guide on article 10 of the ECHR (n 62) p. 103; Pollicino (n 66) p. 160.
[81] Pollicino (n 66) p. 161.
[82] Case 29/69 *Erich Stauder v. City of Ulm* [1969] ECR 419 para. 7; Eleanor Spaventa, 'Fundamental Rights in the European Union' in Catherine Barnard and Steve Peers (eds), *European Union Law* (3rd edn Oxford University Press, 2020) ch 9, p. 246.
[83] Spaventa (n 82) p. 247.
[84] Case C-368/95 *Familiapress Ltd v. Bundesrepublik Deutschland* [1997] ECR I-3689; Spaventa (n 82) p. 249.
[85] Consolidated Version of the Treaty on European Union (TEU) [2012] OJ C326/13 (TEU) art 6(1); Spaventa (n 82) p. 258; Wilman (n 57) p. 327.

includes the freedom to hold opinion and to receive and impart information. The Charter also introduces new rights, such as the freedom to conduct a business or consumer protection, also referred to in the DSA.[86] They underline the importance of the EU economic dimension.[87] Limitations on Charter rights are possible if they are provided by law, respect their essence, and are proportional and necessary to protect the rights and freedom of others or other EU general interests.[88]

Secondly, the CJEU clearly set out the requirement to strike a fair balance in case of conflicting fundamental rights in its ruling *Promusicae*, in 2008.[89] The definition of "balancing conflicting interests" in the ECD expanded to encompass fundamental rights in addition to economic interests.[90] These rights include users' freedom of expression and information, right to privacy, data protection, intellectual property and ISPs' freedom to conduct a business.[91] However, the CJEU tends to consider interferences with freedom of expression online as residual when rights of an economic nature are also concerned. This point was illustrated in a recent case where Poland challenged the compatibility of Article 17 of the Copyright Directive with freedom of expression.[92] This article creates a general obligation of best effort to remove copyright infringing content.[93] Notwithstanding the risks of such a provision, the CJEU dismissed the action, considering a fair balance was struck with intellectual property.[94] The three remaining developments are still emerging, and clarification as to their practical consequences is needed.[95]

[86] Charter of Fundamental Rights of the European Union arts 16, 38; Digital Services Act (n 5) art 1(1) rec 3; Wilman (n 57) p. 327.
[87] Pollicino (n 66) p. 162.
[88] Charter of Fundamental Rights of the European Union art 52(1).
[89] Case C-275/06, *Promusicae v Telefónica de España SAU* [2008] ECR I-271 para 68; Wilman (n 57) p. 327.
[90] Directive on Electronic Commerce (n 6) rec 41; Wilman (n 57) p. 327.
[91] Charter of Fundamental Rights of the European Union arts 11, 7, 8, 17(2) and 16, respectively; Frosio and Geiger (n 67) p. 14.
[92] Case C-401/19 *Poland v European Parliament and Council* [2021] EU:C:2021:413; Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Text with EEA relevance) (Copyright Directive) [2019] OJ L 130/92.
[93] Copyright Directive (n 92) art 17(4).
[94] *Poland v European Parliament and Council* (n 92) para. 99; Wilman (n 57) p. 338; Frosio and Geiger (n 67) p. 12.
[95] Wilman (n 57) p. 327.

Thirdly, the CJEU has recognised the possibility that certain measures could cause a chilling effect on future expression online, and that this would interfere with article 11.[96]

Fourthly, the CJEU has acknowledged the existence of positive obligations for certain fundamental rights, such as the right to non-discrimination.[97]

Finally, Charter's scope has been further clarified in terms of horizontal application. The Charter applies when Member States implement EU law.[98] Horizontal application is not problematic in case of Regulations, equally binding on individuals.[99] However, the CJEU has, in several instances,[100] granted horizontal direct effect to specific Charter articles in order to indirectly give such effect to Directives.[101] The CJEU has not yet been called upon to rule on the horizontal effect of article 11, but the possibility could still present itself in a later case. Indeed, the Court has already found positive obligations for ISPs in relation to freedom of expression, referring to the ECtHR case law. In *GC v CNIL*,[102] it found that search engines had the obligation to strike a fair balance between the freedom to receive information and the private lives of individuals, in upholding the right of erasure from the Data Protection Directive (replaced by the GDPR).[103]

2.2.3. Interactions Between EU Law and the ECHR

EU legislation requires accounting for EU fundamental rights, the ECHR, and their case law. The EU Charter is applicable to EU institutions and Member States applying EU law.[104] Thus, it must be considered when drafting and applying the ECD or the DSA. All EU Member States are also Contracting States to the ECHR.[105] The fundamental rights it contains are considered general principles of EU law.[106] According to the doctrine of equivalent protection, when the Charter

[96] Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources* [2014] ECR I-238 para. 28; Wilman (n 57) p. 327.
[97] Charter of Fundamental Rights of the European Union art 21; Wilman (n 57) p. 328.
[98] Charter of Fundamental Rights of the European Union art 52(1).
[99] Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2008] OJ C115/47 (TFEU) art 288; Spaventa (n 82) p. 266.
[100] Case C-144/04 *Mangold v Helm* [2005] ECR I-9981; Case C-569/16 *Bauer v Maroš Šefčovič* [2018] ECR I-6215.
[101] Spaventa (n 82) p. 266; Wilman (n 57) p. 327.
[102] Case C-136/17 *GC v CNIL* [2019] ECR I-9693.
[103] ibid para. 79; Wilman (n 56) p. 327.
[104] Charter of Fundamental Rights of the European Union art 52(1).
[105] Rainey, McCormick and Ovey (n 69) p. 13.
[106] TEU art 6(3).

and the Convention cover the same right, its scope and meaning should be similar. The EU protection can still be more extensive.[107] On one hand, Member States are responsible under the ECHR when they have discretion in implementing EU law. On the other hand, when the EU alone is responsible, this is more problematic because it is not part of the ECHR.[108] Although article 6(2) TFEU mandates its accession to the Convention, the negotiations are still ongoing.[109] In light of those interactions, it is unsurprising to find similar requirements to limit or justify interferences with fundamental rights. They both require lawfulness, necessity, and proportionality to a goal, such as protecting other fundamental rights. Notwithstanding those parallels, the two European legal frameworks differ in their interpretation of those criteria. While the ECtHR applies more abstract criteria to determine justified interferences, the CJEU uses more precise and economic-centred standards. This is linked to the function they fulfil. The former acts as a constitutional court for the Council of Europe, based on complaints from individuals.[110] ECHR obligations solely bind Contracting States,[111] but can indirectly have a limited effect on private persons when the State does not comply with its positive obligation under the Convention. This is the obligation to ensure the protected rights are not breached under their jurisdiction, through adequate laws and remedies.[112] The latter mainly rules through preliminary proceedings, dependent on referral from domestic courts.[113] Through the horizontal effect of its legislation, EU obligations can also directly bind private persons.[114]

3. Part II: Comparison of the Impact on Freedom of Expression

3.1. Comparison of the Scope

The scope of an instrument is fundamental in understanding its impact, as it delimits the extent of its application. A legal text with a larger scope will apply to

[107] Charter of Fundamental Rights of the European Union art 52(3); Frosio and Geiger (n 67) p. 15; Spaventa (n 82) p. 270.
[108] ibid pp. 272, 276.
[109] ibid p. 276.
[110] Pollicino (n 66) p. 161.
[111] ECHR art 1.
[112] Bernadette Rainey, Pamela McCormick and Clare Ovey, "The Scope of the Convention" in Jacobs, White, and Ovey: The European Convention on Human Rights (8th edn, OUP 2020) ch 5.
[113] Pollicino (n 66) p. 161.
[114] TFEU (n 99) art 288; Michal Bobek, 'The effect of EU law in the national legal systems' in Catherine Barnard and Steve Peers (eds), European Union Law (3rd edn Oxford University Press, 2020) ch 6, p. 165.

a larger number of situations and, thus, have a larger positive or negative impact on freedom of expression. The reach of ECD and the DSA is determined by the type of legal act used to adopt it, their material scope, and their territorial scope. Importantly, the DSA only replaces the ECD provisions on intermediary liability. The remaining articles are still in application but lie outside the scope of this research.[115]

3.1.1. Type of Instrument

The first significant difference between the ECD and the DSA is the type of legal act used for their adoption. The latter is a regulation, whereas the former is a directive. Directives are to be implemented by Member States with a certain degree of discretion.[116] Therefore, they do not have a direct effect, except in very specific and exceptional circumstances.[117] Ireland, where Twitter's European headquarters are located,[118] transposed the ECD into national law by implementing the E-Commerce Regulations in 2003.[119] This discretion can lead to different national implementations and interpretations of the EU rules. In the case of the ECD, those differences were judged too wide, triggering adverse consequences. They contributed to a regulatory competition among Member States and legal uncertainty.[120] Therefore, the DSA takes the next step towards harmonisation. As a regulation, it is directly, vertically, and horizontally binding.[121] This should improve the foreseeability and accessibility of the law.

3.1.2. Material

[115] Digital Services Act (n 5) arts 2(3), p. 89; Directive on Electronic Commerce (n 6) arts 12-15; Wilman (n 57) p. 319; Folkert Wilman 'The Digital Services Act (DSA): An Overview' (2022) SSRN, <https://ssrn.com/abstract=4304586> accessed on 12 April 2023, p. 2.
[116] TFEU (n 99) art 288(3); Kieran Bradley, 'Legislating in the European Union' in Catherine Barnard and Steve Peers (eds), *European Union Law* (3rd edn Oxford University Press, 2020) ch 5, p. 105.
[117] Bobek (n 114) p. 165.
[118] Twitter, 'Twitter Terms of Service' (effective on 18 May 2023) <https://twitter.com/en/tos> accessed 1 May 2023, p. 19; Jennifer Rankin, 'Twitter Faces EU Questions Over Role in Spreading Misinformation' (The Guardian, 24 November 2022) <www.theguardian.com/technology/2022/nov/24/twitter-brussels-office-elon-musk-eu-questions> accessed on 10 April 2023.
[119] S.I. No. 68/2003 European Communities (Directive 2000/31/EC) Regulations 2003 (E-Commerce Regulations).
[120] Tambiama Madiega, 'EU Legislation in Progress: digital services act' European Parliamentary Research Service (EPRS), PE 689.357, March 2021, p. 2; Aina Turillazzi and others, 'The Digital Services Act: an analysis of its ethical, legal, and social implications' (2022) SSRN, p. 9.
[121] Bobek (n 114) p. 163.

On a material level, the ECD applies to information society services, or any service provided through electronic means.[122] The DSA only applies to intermediary services, a category of information society services which comprises mere conduit service, caching services and hosting services.[123] Those three categories were already defined in the ECD.[124] Hosting, "the storage of information provided by, and at the request of, a recipient of the service",[125] comprises services provided by online (social media) platforms, such as Twitter. They are subject to additional and stricter obligations. which will be elaborated on in section 3.3.1.[126]

3.1.3. Territorial

On a territorial level, the ECD applies the "country of origin principle". The provider of information society services is subject to the national law of its Member States of establishment. Therefore, it must be established in the EU.[127] According to the CJEU, it is determined by the location of the business operations rather than the IT infrastructure.[128] Twitter would likely fall under the Irish jurisdiction as it is the location of their headquarters.[129] In contrast, the DSA focuses on the recipient of services instead of the provider. They must be either established or located in the EU.[130] This broader territorial scope enables extraterritoriality. The CJEU already took a step in this direction in 2019 when it ruled that the ECD did not preclude an injunction requesting to disable content worldwide.[131]

[122] Directive on Electronic Commerce (n 6) arts 1(2), 2(a); Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification) (Text with EEA relevance) [2015] OJ L 241 art 1(1)(b); E-Commerce Regulation 2003 (n 119) s. 3(1); Wilman (n 115) p. 2.
[123] Digital Services Act (n 6) arts 2(1), 3(g); Wilman (n 115) p. 2.
[124] Directive on Electronic Commerce (n 6) arts 12-14; E-Commerce Regulation 2003 (n 119) s 16-18.
[125] Digital Services Act (n 5) art 3(g)(iii); Directive on Electronic Commerce (n 6) art 14; E-Commerce Regulation 2003 (n 119) s 18.
[126] Digital Services Act (n 5) art 3(i); Turillazzi and others (n 120) p. 3.
[127] Directive on Electronic Commerce (n 6) art 3(1); Wilman (n 115) p. 3; Paul Przemysław Polanski, 'Revisiting country of origin principle: Challenges related to regulating e-commerce in the European Union' (2018) 34 Computer Law & Security Review p. 564.
[128] Directive on Electronic Commerce (n 6) art 2(c), rec 19; E-Commerce Regulation 2003 (n 119) s 3(2) Polanski (n 127) p. 564.
[129] Twitter terms of service (n 118) p. 19; Rankin (n 118).
[130] Digital Services Act (n 5) art 2(1); Wilman (n 115) p. 3.
[131] Case C-18/18, *Eva Glawischnig-Piesczek v Facebook Ireland Limited [2019]* EU:C:2019:821, para. 55.

Briefly put, both instruments are meant to work in parallel to each other. The ECD generally applies to a wider range of services than the DSA, but their scope is similar in respect of liability. The DSA has a wider geographic reach. Although the ECD already applied to Twitter, the DSA further restricts its ability to escape EU obligations. Additionally, the latter decreases the possibility for diverging national application. Its horizontal approach is meant to be cross-sectoral, to the extent of creating coherence issues with some sector-specific legislation.[132]

3.2. Comparison of Liability of Hosting Services for Their Users' Content

The liability regime for hosting services touches upon several interests that must be balanced by the legislators. On one hand, high risks of liability for providers incentivises them to moderate their content. This aims at protecting users online from illegal content, which could affect their rights to private life, freedom from discrimination, data protection, intellectual property, and freedom to conduct a business. This liability regime also provides users with an effective remedy in cases where their rights are breached. On the other hand, too many obligations on platforms could affect users' freedom of expression, platforms' capacity to innovate and the potential for economic growth.[133]

3.2.1. Liability Under the ECD

The ECD followed a negligence-based model created by three main features. Firstly, due to knowledge-based liability, a hosting service provider was exempted of liability for its users' content if it was unaware of its presence.[134] In case of such knowledge, the provider could retain its exemption by expeditiously removing (access to) the content.[135] Secondly, Member States were not allowed to impose a general obligation on providers to monitor content.[136] Finally, in *Google France v Louis Vuitton* and *L'Oréal v eBay*, the CJEU articulated the neutrality

[132] Caroline Cauffman and Catalina Goanta, 'A New Order: The Digital Services Act and Consumer Protection' (2021) 12(4) European Journal of Risk Regulation pp. 758-760.
[133] van Hoboken and Keller (n 8) p. 2; Frosio and Geiger (n 67) p. 14.
[134] Directive on Electronic Commerce (n 6) art 14(1)(a); E-Commerce Regulation 2003 (n 119) s 18(1)(a); Turillazzi and others (n 120) p. 12.
[135] Directive on Electronic Commerce (n 6) art 14(1)(b); E-Commerce Regulation 2003 (n 119) s 18(1)(b); Turillazzi and others (n 120) pp. 12, 8.
[136] Directive on Electronic Commerce (n 6) art 15.

requirement.[137] In the situation where the provider would be so active as to acquire knowledge or control over the content, it would not benefit from the exemption.[138] Although the ECD recitals expressly include a passivity requirement, case law attempted to leave some room for providers' activity. It resulted in a somewhat unclear dividing line between passively making users' content available to other users and actively assisting them by, for example, promoting this content. A case-by-case assessment is necessary to determine the neutrality of a provider.[139] As the CJEU highlighted in *Louis Vuitton,*[140] the ECD is concerned with *exemption* of liability. The conditions for liability are contained in the existing national or EU law.[141]

From a fundamental rights' perspective, imposing liability on hosting services could be considered as an interference with the right to freedom of expression.[142] A penalty is imposed on ISPs for certain users' expressions. In turn, those ISPs must restrict such expressions to avoid the penalty. Concerning a potential justification for the interference, liability legitimately aims at protecting the rights mentioned above. Several mechanisms enhance the proportionality of the interference. Firstly, tailoring the risk of liability to the capacity to target removals is beneficial. For example, infrastructure providers can only take down a whole webpage whereas Twitter can only target a single comment.[143] Secondly, knowledge-based liability is also more proportionate than strict liability, as underlined by the Advocate General in *Louis Vuitton.*[144] It limits the risk of providers to be liable for the information and thereby limits their incentive to over-remove content. Over-removal directly harms individuals' freedom of expression, as it effectively censors content posted by individuals, without sufficient and proportionate reasons to do so. It also harms the freedom of information of other

[137] Case C-324/09*, L'Oréal SA and Others v eBay International AG and Others* [2011] EU:C:2011:474; Case C-236/08, *Google France SARL v Louis Vuitton Malletier SA* [2010] ECR I-2417.
[138] *L'Oréal v eBay* (n 135) para 113; *Google France v Louis Vuitton,* para 120; Cauffman and Goanta (n 132) p. 765; Wilman (n 57) p. 320.
[139] Directive on Electronic Commerce (n 6) rec 42; *L'Oréal v eBay* (n 136) para. 116; *Google France v Louis Vuitton* (n 136) para. 121; Wilman (n 57) p. 320.
[140] *Google France v Louis Vuitton*, para. 107.
[141] Wilman (n 57) p. 321.
[142] *Delfi AS* (n 72) paras. 118-119.
[143] van Hoboken and Keller (n 8) p. 8.
[144] Case C-236/08, *Google France SARL v Louis Vuitton Malletier SA* [2010] ECR I-2417, Advocate General's Opinion para 123; Frosio and Geiger (n 67) p. 23.

users to access that content, and moreover can indirectly intensify the chilling effect recognised as detrimental by the ECtHR and the CJEU (as discussed in section 2.2). Users might not feel free to express themselves fully on a platform after having had their content removed, and thus, abstain from doing so in the future.[145] Thirdly, prohibiting any obligation to monitor content avoids inducing a "better-safe-than-sorry" behaviour from social media.[146] The CJEU emphasised the balance struck by this provision between freedom of expression and the other interests at stake.[147] Fourthly, the neutrality requirement deters service providers from being too active in their content moderation.[148] On the downside, the expeditious removal obligation incentivises ISPs to remove the content timely rather than carefully, which increases the risk of over-removal.[149] This is amplified by the uncertainties over the definition of knowledge and illegal activity, over the fragmented conditions for liability, and over the grey areas of the neutrality requirement and the general obligation prohibition.[150] These uncertainties affect the quality and foreseeability of the law providing for the interference.

3.2.2. Liability Under the DSA

The DSA replaces the ECD articles 12 to 15, the provisions concerning intermediary liability. It largely reproduces the knowledge-based system while incorporating the case law of the CJEU:[151] the exemption of liability for hosting services,[152] the prohibition on monitoring obligation,[153] the neutrality requirement and the absence of conditions on attribution of liability.[154] Nonetheless, some changes have been introduced. Firstly, the threshold to fulfil the neutrality requirement appears to be lower. Indeed, passivity is no longer mentioned. Recital 18 considers a provider as active when it provides the information itself. This

[145] Wilman (n 57) p. 322; Wilman (n 115) p. 5.
[146] Wilman (n 113) p. 7; van Hoboken and Keller (n 8) p. 8.
[147] Cases C-682/18 and C-683/18, *Google LLC, YouTube LLC v. Constantin Film Verleih GmbH* [2021] ECR I-0000 para. 113.
[148] Cauffman and Goanta (n 132) p. 765; Wilman (n 57) p. 320; Wilman (n 115) p. 7.
[149] Turillazzi and others (n 120) p. 12; article 19, 'Digital Services Act package: open public consultation' (2020) <www.article19.org/resources/eu-protect-freedom-of-expression-in-digital-services-act/> accessed 20 May 2023, p. 44.
[150] van Hoboken and Keller (n 8) p. 8.
[151] Wilman (n 57) p. 318; Wilman (n 115) p. 7.
[152] Digital Services Act (n 5) art 6.
[153] ibid art 8, rec 30.
[154] ibid rec 17, 18; Cauffman and Goanta (n 132) p. 766; Wilman (n 57) p. 335; Wilman (n 115) p. 5.

could hint to a narrower definition of being active than under the ECD, which also included assisting the users when they provide content (as discussed in the previous section).[155] Secondly, a good Samaritan provision has been introduced. A provider will not automatically be ineligible for the exemption of liability for the sole fact that it takes voluntary actions to tackle illegal content or comply with EU obligations.[156] These EU obligations include those present in the DSA concerning the implementation of providers' terms and conditions.[157] In any case, they must act in good faith and in a diligent manner, with objectivity, proportionality and non-discrimination.[158] The practical implications of this article still need some clarification.[159] Both changes soften the neutrality requirement, granting providers more freedom to moderate content without losing their immunity. Finally, article 3 provides some insight into the concept of "illegal content". It is defined as any information not in compliance with EU or Member States law.[160]

Concerning the freedom of expression analysis, the neutrality requirement was an important proportional element of the ECD. Weakening it incentivises social media to moderate their content privately. Thereby, the previous *ex post* filtering system established by the ECD is leaning towards a more *ex ante* moderation.[161] Without oversight, this has the potential to harm freedom of expression.[162] The CJEU ruling in *Eva Glawischnig-Piesczek* encouraged this shift. It ruled that the prohibition of general obligation to monitor content does not apply to a specific case, allowing for injunction over content *equivalent* to content declared illegal.[163] It referred to the use of automated tools to track this equivalent content.[164] Scholars criticised this decrease in social media neutrality and its impact on freedom of expression.[165] In addition to supporting platforms' actions

[155] Cauffman and Goanta (n 132) p. 765; Wilman (n 57) p. 335; Wilman (n 113) p. 5.
[156] Digital Services Act (n 5) art 7.
[157] ibid rec 26.
[158] ibid art 7, rec 26.
[159] Wilman (n 57) p. 335; Wilman (n 115) p. 6.
[160] Digital Services Act (n 5) art 3(h).
[161] Frosio and Geiger (n 67) p. 23.
[162] van Hoboken and Keller (n 8) p. 8.
[163] *Eva Glawischnig-Piesczek* (n 130) para. 55.
[164] ibid para. 46.
[165] Elda Brogi and Marta Maroni, 'Eva Glawischnig-Piesczek V Facebook Ireland Limited: a new layer of neutrality' (Centre for Media Pluralism and Media Freedom, 17 October 2019) <https://cmpf.eui.eu/eva-glawischnig-piesczek-v-facebook-ireland-limited-a-new-layer-of-neutrality/#_ftnref1> accessed 22 May 2023.

to comply with legal obligation, the DSA encourages *ex ante* moderation for the implementation of platforms' terms and conditions. As further discussed in section 3.3.3, this private rule-setting can also be detrimental to freedom of expression.[166] Finally, terms such as "illegal content" or "in a diligent manner" are still unclear or fragmented over national and EU law. This fragmentation undermines the foreseeability and accessibility of the law, and incentivises over-removal due to fears of losing immunity, or in order to avoid the costs of untangling the legal complexities.[167]

Under either instrument, Twitter will not be liable for the tweets or comments of its users as long as it is not aware of the existence of illegal content, and as it is not too active towards users' content in general. The DSA and the ECD both contain negligence-based liability systems with the same main features, displaying the continuity between them.[168] However, the DSA imposes on Twitter an obligation to provide for a notice-and-action mechanism, through which users can signal potentially illegal content to Twitter (as will be elaborated on in section 3.3.3).[169] Twitter has then become aware of the existence of such content and, thus, liable for it in case it is proven illegal and not removed expeditiously.[170] Therefore, Twitter cannot escape liability by not monitoring the content on the platform. On the other hand, Twitter has greater freedom to moderate the content itself before losing its immunity. It has a lot of discretion on which content to remove or not, although it is mitigated by further obligations, which will be discussed in section 3.3.3. Depending on the stringency of their moderation policy, this could lead to over-removal. In general, this liability model effectively fits the concept of co-regulation because service providers maintain their role in content removal (refer to section 2.1.2). Thus, service providers have the potential to interfere with freedom of expression, depending on the way they moderate their platform.[171]

3.3. The Due Diligence Obligations from the DSA

[166] Aleksandra Kuczerawy, 'The Good Samaritan that wasn't: voluntary monitoring under the (draft) Digital Services Act' (VerfassungBlog, 2021/1/12) <https://verfassungsblog.de/good-samaritan-dsa/> accessed 20 May 2023.
[167] Turillazzi and others (n 120) p. 13; Wilman (n 57) p. 332.
[168] Wilman (n 115) p. 5.
[169] Digital Services Act (n 5) art 16(1).
[170] Wilman (n 57) p. 322.
[171] Cauffman and Goanta (n 132) p. 767.

In terms of providers liability, the DSA appears to codify existing law with minor modifications, perhaps even favouring other interests to the detriment of freedom of expression. However, the DSA creates many new due diligence obligations under Chapter III. They are divided following a pyramid structure. For social media platforms, they can be classified into two main categories: the notice-and-action-related obligations and the transparency-related obligations.

3.3.1. Pyramid Structure

Intermediary services can be subject to different obligations, depending on their situation. These obligations follow a cumulative four-layered pyramid structure. As the amount of obligations increases, the category of services bound by them narrows.[172] The base layer encompasses all intermediary services.[173] The second scales down to hosting services.[174] The third focuses on online platforms, hosting services that store and disseminate users' information to the public.[175] This does not concern interpersonal communication services, such as private messaging or email, and groups accessed based on human decision.[176] It is unclear whether publications on private accounts with a definite and user-chosen list of "friends" are included.[177] Finally, the top layer isolates very large online platforms (VLOPs) and very large search engines, counting more than 45 million users or approximately 10% of the European population.[178] This designation is determined by the EU Commission.[179] The DSA and its extended obligations started to apply to VLOPs as of the 25th of August 2023,[180] almost seven months before the other providers.[181] With its 100.9 million average active users,[182] the Commission designated Twitter and 16 other providers as VLOPs.[183]

[172] Wilman (n 115) p. 3.
[173] Digital Services Act (n 5) chapter III s 1.
[174] ibid chapter III s 2.
[175] ibid chapter III s 3.
[176] Digital Services Act (n 5) art 3(k), rec 14.
[177] Cauffman and Goanta (n 132) p. 769.
[178] Digital Services Act (n 5) section 5, art 33(1); Wilman (n 115) p. 3.
[179] ibid arts 33(4), 24(2).
[180] Tweet from Thierry Breton (25 Avril 2023) <https://twitter.com/ThierryBreton/status/1650854765126107136> accessed 2 May 2023
[181] Digital Services Act (n 5) arts 92, 93; Wilman (n 115) p. 3.
[182] Twitter, 'AMARS in the EU' (*twitter.com)* <https://transparency.twitter.com/en/reports/amars-in-the-eu.html> accessed 13 April 2023.
[183] Tweet from Thierry Breton (*twitter.com*, 25 April 2023) <https://twitter.com/ThierryBreton/status/1650854765126107136> accessed 2 May 2023;

This design reflects the will to regulate the gatekeepers who have the most control and the highest potential to damage freedom of expression.[184] The second and third layers distinguish themselves by the type of service they offer. As for liability, scaling the obligations to the technical function of the intermediary services benefits the balance between freedom of expression and other interests.[185] The exclusion of private communication from the definition of online platforms displays the importance of a differential treatment between private and public speech, as emphasised by the ECtHR jurisprudence (as referred to in section 2.2.1).[186] However, the current provisions may be under-protective, as it only exempts private speech from obligations directed at online platforms. For example, providers must still provide for a notice-and-action mechanism but not for an internal complaint-handling system.[187] This is disadvantageous for the speaker in cases of wrongful content removal. They may also be over-inclusive and apply fewer obligations on private groups including a high number of users, where the speech tends to be more public than private. The last layer is differentiated based on the size. This could protect freedom of expression on the most important forums while not imposing unreachable standards for market entrants.[188]

3.3.2. The Notice-and-Action-Related Obligations

In addition to courts' injunctions, many social media platforms become aware of illegal content through a notice-and-action mechanism.[189] Providing for this mechanism is an obligation under the DSA.[190] Article 16 lays down minimum requirements for such notice by users.[191] Platforms are not obliged to remove the content unless, codifying previous case law,[192] the illegality is clear and the notice

European Commission, 'Digital Services Act: Commission designates first set of Very Large Online Platforms and Search Engines' [press release] (25 April 2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2413> accessed 2 May 2023.
[184] Turillazzi and others (n 120) p. 3.
[185] van Hoboken and Keller (n 8) p. 8.
[186] ibid p. 6.
[187] Digital Services Act (n 5) art 16(1).
[188] Digital Services Act (n 5) rec 73-74; van Hoboken and Keller (n 8) p. 8.
[189] Wilman (n 57) p. 322.
[190] Digital Services Act (n 5) art 16(1).
[191] ibid art 16(2)(a)(c).
[192] ibid art 16(2) and (3); *L'Oréal v eBay* (n 137) para. 113; *Google LLC, YouTube LLC v. Constantin Film Verleih GmbH* (n 147) para. 115-116; Wilman (n 115) p. 8.

is precise.[193] They must review it in "timely, diligent, non-arbitrary and objective manner".[194] Priority should be given to notices from trusted flaggers, a status awarded to independent entities with expertise by Digital Service Coordinators.[195] Moreover, extra-measures, such as content restriction, should be implemented to protect minors.[196] If a particular user is frequently posting manifestly illegal content or abuses the notice mechanism, the platform must suspend them for a reasonable period of time.[197] The DSA also covers the challenge of platforms' restriction decisions by users. First, it must state reasons for such restriction containing a number of minimum information including a user-friendly list of available redress.[198] Second, users must have access to a complaint-handling system.[199] Third, certified out-of-court settlement must be available and fulfil certain conditions.[200] Although the DSA does not cover this option, users also still have the right to bring an action before national courts.[201] Twitter now comports those features,[202] but more importantly, their presence became a legal obligation. Removing them would constitute a breach of EU law.

Although the ECtHR found it adequate to safeguard freedom of expression in certain cases,[203] the main issue of notice-and-action mechanisms is their fundamental characteristic of private rule setting. Content is flagged as manifestly illegal by users themselves and then actioned by platforms. They are *de facto* defining what content is allowed or not and, depending on their interest, could threaten freedom of expression.[204] In the second half of 2021, Twitter took down

[193] Digital Services Act (n 5) art 16(2) and (3).
[194] ibid art 16(6).
[195] ibid art 22.
[196] ibid art 28; Twitter, 'Notices on Twitter and what they mean' (*twitter.com)* <https://help.twitter.com/en/rules-and-policies/notices-on-twitter> accessed on 2 May 2023.
[197] Digital Services Act art 23.
[198] ibid art 17.
[199] ibid art 22.
[200] ibid art 21.
[201] Wilman (n 115) p. 12.
[202] Twitter, 'Report Violation' <https://help.twitter.com/en/rules-and-policies/twitter-report-violation#directly> accessed on 2 May 2023 (for notice-and-action); Twitter terms of service (n 117) 35; Twitter, 'Notices on Twitter and what they mean' <https://help.twitter.com/en/rules-and-policies/notices-on-twitter> accessed on 2 May 2023; (for minor protection); Twitter, 'Misuse of Reporting Features of Policy' <https://help.twitter.com/en/rules-and-policies/misuse-of-reporting-features> accessed on 2 May 2023 (for misuse of notice); Twitter, 'Our approach to policy development and enforcement philosophy' <https://help.twitter.com/en/rules-and-policies/enforcement-philosophy> accessed on 2 May 2023 (for assessment of notice).
[203] *MTE v Hungary* (n 80).
[204] Wilman (n 115) p. 12; van Hoboken and Keller (n 8) p. 5.

5,103,156 content items but only received 47,572 legal removal demands.[205] The DSA brings some external oversight into this process. First, the conditions on this mechanism set minimum standards for content review by platforms, limiting their discretion and affording procedural guarantees.[206] Second, the independence and expertise of trusted flaggers could improve the quality of the notices sent to platforms.[207] Third, as emphasised by the CJEU,[208] those safeguards would not be fully useful without access to redress in case of wrongful removal from the platform,[209] statement of reasons is crucial in this regard.[210] The complaint-handling system and out-of-court settlement facilitation also increase access to redress.

There is room for improvement. Although the DSA provides for safeguard against the notice-and-action mechanism, it remains inherently threatening to freedom of expression. According to the EU Charter and the ECHR, interferences to freedom of expression should be provided by law (as discussed in section 2.2). Logically, courts, not platforms or users, should ultimately be competent to decide what content is illegal.[211] However, the DSA now forces hosting services to make such judgements. The shortcomings of private rule-setting are exacerbated by other features. First, as stated in section 3.2.2, the lack of clear and consistent definition of (manifestly) illegal content and the dividing line with harmful content leads to over-removal. This predominantly impacts ambiguous cases, such as content that is controversial and shocking, or content that, despite being legal, is harmful.

However, these categories of expression are still protected from interferences under the ECHR. In relation to this point, there is no differentiation of procedure based on the content at stake. This appears to be contradicting ECtHR case law that distinguishing the means used to tackle content based on its legality

[205] Twitter, 'Removal request Report' <https://transparency.twitter.com/en/reports/removal-requests.html#2021-jul-dec> accessed 22 May 2023; Twitter, 'Rules enforcement Report' <https://transparency.twitter.com/en/reports/rules-enforcement.html#2021-jul-dec> accessed 22 May 2023.
[206] Frosio and Geiger (n 67) p. 40.
[207] van Hoboken and Keller (n 8) p. 5.
[208] *Poland v European Parliament and Council* (n 92) para. 94.
[209] van Hoboken and Keller (n 8) p. 5; Frosio and Geiger (n 67) p. 41.
[210] van Hoboken and Keller (n 8) p. 5; Frosio and Geiger (n 67) p. 41.
[211] Article 19 (n 149) p. 22; article 19, 'At a glance: Does the EU Digital Services Act protect freedom of expression?' (11 February 2021) <https://www.article19.org/resources/does-the-digital-services-act-protect-freedom-of-expression/> accessed 21 May 2023.

and its value for public interest (as discussed in section 2.2.1). A more tailored approach would avoid excessive action for content that is less harmful or not clearly illegal.[212] For example, the organisation "article 19" proposed a procedure of "notice-to-notice" in case of private disputes concerning defamation or copyright. Instead of immediately actioning problematic content, the platform would provide the speaker with the opportunity to defend the content or remove the content themselves.[213] Additionally, redress stays in the hands of platforms through the complaint-handling system. Finally, the extensive use of terms and conditions participates greatly in this private self-regulation, as will be addressed in section 3.3.3.[214] In addition to bypassing fundamental rights safeguards,[215] private rule-setting reinforces the influence of platforms and, thereby, their gatekeeper position.

The notice-and-action also fosters imbalances in the access to redress on the level of the accuser and the speaker. The latter does not have the opportunity to defend himself before the removal takes place. This opportunity is further decreased by the use of content moderation algorithms, such as Twitter Autoblock and Safety Mode system.[216] Although encouraged by the CJEU and the ECtHR in certain circumstances,[217] these tools are blind to context and tend remove unproblematic content as well.[218] This is amplified by the black box issue (which will be discussed in section 3.3.3), as the decision of those algorithms to remove or flag content remains opaque.[219] The ECtHR found them insufficient to deal with hate speech content.[220] The CJEU recognised their capacity to interfere with freedom of expression and the need for greater safeguards to satisfy the proportionality requirement.[221] It has recognised such filters incompatible with article 11 where they are incapable of adequately distinguishing unlawful from

[212] van Hoboken and Keller (n 8) p. 5; Frosio and Geiger (n 67) p. 39.
[213] Article 19 (n 149) p. 39.
[214] van Hoboken and Keller (n 8) p. 5; Frosio and Geiger (n 67) p. 39.
[215] Article 19 (n 149) p. 27.
[216] Twitter, 'About Safety Mode and autoblock by Twitter' <https://help.twitter.com/en/safety-and-security/autoblock> accessed 2 May 2023; van Hoboken and Keller (n 8) p. 5.
[217] *Eva Glawischnig-Piesczek* (n 130) para. 46; *Delfi AS* (n 72) para. 156.
[218] Robert Gorwa, Reuben Binns and Christian Katzenbach, 'Algorithmic content moderation: Technical and political challenges in the automation of platform governance' (2020) 7 Big Data & Society 1, 5; article 19 (n 149) p. 42.
[219] Mittelstadt and others (n 44) p. 6.
[220] *Delfi AS* (n 72) para. 156.
[221] *Poland v European Parliament and Council* (n 92) paras. 55, 67.

lawful content.[222] The DSA could force online platforms to address these shortcomings through risk mitigation obligations, which will be discussed in section 3.4.1. In addition, platforms are more likely to have access to quality legal advice, meaning users may be discouraged from seeking redress.[223]

3.3.3. Transparency and Other Obligations

In addition to the notice-and-action mechanism, the DSA creates transparency obligations. On a general level, social media must have a single point of contact for users and for authorities.[224] For its users, Twitter chose an electronic contact form.[225] VLOPs must produce biannual reports on their content moderation activities, including their use of automated means.[226] According to its website, Twitter has been doing so since 2012.[227] Its first DSA transparency report contains general information on its moderation policy, as well as the numbers of actions taken against illegal content by country.[228] Furthermore, article 25 prohibits the so-called dark patterns, which entail interface designs built to manipulate users, for example by way of giving more prominence to certain choices.[229] On a more specific level, the DSA addresses more precise tools used by platforms. Terms and conditions must be user-friendly, clearly written and must include any restrictions imposed on the use of their services.[230] Providers must act diligently and take into account the interests of parties involved when applying those restrictions, including freedom of expression.[231] Recommender systems, suggesting specific information to users,[232] and their parameters must be published. At least one of the

[222] Case C-70/10, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011] ECR I-11959, paras. 50-51; *Poland v European Parliament and Council* (n 92) para. 87.
[223] van Hoboken and Keller (n 8) p. 5.
[224] Digital Services Act (n 5) arts 11-12.
[225] ibid rec 43; Twitter, 'Contact Us' <https://help.twitter.com/en/forms> accessed 2 May 2023.
[226] Digital Services Act (n 5) arts 15, 24, 42.
[227] Twitter, 'Transparency Reports' <https://transparency.twitter.com/en/reports.html> accessed 2 May 2023.
[228] Twitter, 'DSA Transparency Reports' <https://transparency.twitter.com/dsa-transparency-report.html> accessed 8 January 2024.
[229] Digital Services Act (n 5) art 25.
[230] ibid art 14.
[231] ibid art 14(4).
[232] ibid art 3(s).

parameter options must be free from profiling.[233] Twitter even went further and open-sourced some parts of its recommender system's code.[234]

Those tools had rather been left aside by EU legislators until the DSA. However, Social media terms and conditions tend to be stricter than the law regarding harmful content.[235] For instance, Twitter mentions taking actions against insults or profanity.[236] Platforms often prefer them to legislation to moderate content because they offer more discretion, particularly when the definition of illegal content is unclear.[237] As underlined by ECtHR, social media platforms are important fora of expression.[238] Therefore, higher restrictions on their terms and conditions translates into a higher risk to impair users' ability to express themselves. This risk further increases for controversial opinions.[239] Recommender systems strongly influence the information presented to each user. Extreme personalisation can decrease the content variety unbeknownst to the user, harming pluralism.[240]

However, transparency as a regulatory tool has downsides. Firstly, following the co-regulation model, it barely contains substantive requirements. It enhances the influence of gatekeepers in privately setting standards. Platforms still have the discretion to impose any restrictions in their terms and conditions and to offer a single option for their recommender system. The users are faced with the ultimatum of accepting them or not accessing the service.[241] Both alternatives impair their ability to express themselves. Additionally, the vague and broad

[233] Digital Services Act (n 5) arts 27, 42; Twitter, 'Personalization' <https://twitter.com/settings/account/personalization> accessed 2 May 2023.
[234] Twitter, 'A new era of transparency for Twitter' (31 March 2023) <https://blog.twitter.com/en_us/topics/company/2023/a-new-era-of-transparency-for-twitter> accessed 2 May 2023; Twitter, 'Twitter's Recommendation Algorithm' (31 March 2023) <https ://blog.twitter.com/engineering/en_us/topics/open-source/2023/twitter-recommendation-algorithm> accessed 2 May 2023.
[235] Wilman (n 115) p. 21.
[236] Twitter terms of service (n 118) p. 35; Twitter, 'Abuse and harassment' <https://help.twitter.com/en/rules-and-policies/abusive-behavior> accessed 2 May 2023.
[237] Aleksandra Kuczerawy A, 'The Good Samaritan that wasn't: voluntary monitoring under the (draft) Digital Services Act' (VerfassungBlog, 2021/1/12) <https://verfassungsblog.de/good-samaritan-dsa/> accessed 20 May 2023.
[238] *Delfi AS* (n 72) para. 110; *Magyar Helsinki Bizottság*, para 168; Rainey, McCormick and Ovey (n 61) p. 493; Guide on article 10 of the ECHR (n 62) p. 51, 99.
[239] van Hoboken and Keller (n 8) p. 5.
[240] van Hoboken and Keller (n 8) p. 9; Natali Helberger and others, 'Regulation of news recommenders in the Digital Services Act: empowering David against the Very Large Online Goliath' (2021) Journal of Intellectual Property Law & Practice, p. 1; article 19 (n 149) p. 50.
[241] Helberger and others (n 240) p. 1,3.

diligent application obligation from article 14 might remain useless without further guidance.[242] Secondly, the same set of transparency obligations are not adequate for every tool. Automatic machine learning algorithms, used for recommender systems, are subject to the "black box" issue, which occurs when engineers are unable to explain the algorithm's reasoning, let alone to inexperienced users.[243] In the case of the recommender system, one can doubt whether transparency over such complicated algorithm would truly empower the user to realize and influence the information presented to them. This shortcoming of transparency obligations is mitigated through the obligation to assess and take measures against systemic risks (as will be elaborated on in section 3.4.1). Thirdly, transparency requires active users, willing to read, understand and choose according to the given information. The risk of blind clicking still remains.[244] Finally, this mode of regulation also requires active authorities and strong enforcement in order to be efficient.

The DSA's due diligence obligations are an improvement from the ECD with regard to the freedom of expression because it addresses the strongest and most threatening gatekeepers. However, this co-regulation model still empowers those gatekeepers with much control, due to its focus on procedural and transparency requirements. A more proportional and legally feasible protection would require the enactment of more substantive standards, such as a precise definition of harmful and illegal content, linked to specific actions against such content tailored to its gravity.

3.4. Comparison of Enforcement

Enforcement is an essential component of any legislation. Without proper mechanisms, the previously mentioned obligations could be rendered useless.[245] The ECD mainly leaves enforcement to Member States. It contains a few general minimum requirements on sanctions and cooperation, as well as the obligation to

[242] Naomi Appelman, João Pedro Quintais, Ronan Fahy, 'article 12 DSA: Will platforms be required to apply EU fundamental rights in content moderation decisions?' (DSA observatory, 31 May 2021) <https://dsa-observatory.eu/2021/05/31/article-12-dsa-will-platforms-be-required-to-apply-eu-fundamental-rights-in-content-moderation-decisions/> accessed 20 May 2023.
[243] Mittelstadt and others (n 44) p. 6.
[244] Blind clicking occurs when the user of an online service blindly accepts the terms of services in order to get access that service, or web page, without reading and understanding them.
[245] Turillazzi and others (n 120) p. 8.

provide for out-of-court and court actions.[246] The Commission's role is confined to monitoring the implementation of the Directive. It can only act against Member States through infringement proceedings for wrong implementation.[247] The differences between national applications have reinforced the fragmentation of law on the subject, leading to an uneven protection of rights.[248] The DSA strengthened and harmonised the system of enforcement at three levels.

3.4.1. Private Enforcement at the Platform Level

Starting with social media platforms, the DSA contains several provisions facilitating their supervision and oversight. First, their reporting obligations on the different aspects of content moderation are used by supervisory authorities to assess compliance.[249] Second, they must appoint a single point of contact to communicate with those authorities.[250] VLOPs must also take measures to mitigate the internally assessed systemic risk posed by their services, including risks to freedom of expression.[251] The preambles specifically mention some examples, such as the designs of algorithms or the misuse of the notice-and-action mechanism to silence speech.[252] This obligation can be used to further addressed the risks linked to recommender system and content moderation algorithms. Third, they are subject to external oversight by independent audits at least once a year. In cases of negative reports from these audits, the platform must adopt measures based on their recommendation.[253] Fourth, the appointment of compliance officers within the platform organisation itself ensures internal oversight. They must cooperate with supervisory authorities.[254] Finally, codes of conduct are promoted to demonstrate compliance with DSA obligations.[255] For example, Twitter signed

[246] Directive on Electronic Commerce (n 6) arts 17-20.
[247] TFEU (n 99) art 258; Albertina Albors-Llorens, 'Judicial protection before the Court of Justice of the European Union' in Catherine Barnard and Steve Peers (eds), European Union Law (3rd edn Oxford University Press, 2020) ch10, p. 289.
[248] Madiega (n 120) p. 2.
[249] Wilman (n 115) p. 14.
[250] Digital Services Act (n 5) arts 11, 13; Wilman (n 115) p. 14.
[251] ibid arts 34(1)(b), 35.
[252] Digital Services Act (n 5) rec 81.
[253] ibid art 37; Wilman (n 115) p. 14.
[254] ibid art 41; Wilman (n 115) p. 14.
[255] ibid arts 45, 37, 75, rec 103.

the Code of Practice on Disinformation in June 2022.[256] Following Elon Musk's take-over, doubts arose as to its willingness and resources to comply with these new obligations. Indeed, 7500 persons have been laid off, including the whole Brussels office, fifty percent of the Dublin office and teams such as human rights, machine learning and algorithmic ethics.[257] Moreover, its report on the Code of Practice was shorter than other platforms'.[258] Breaching this code could also breach the DSA if it was a measure required after a negative audit report or taken to mitigate systemic risks.[259]

3.4.2. Public Enforcement at the National Level

At the national level, each Member States must designate competent authorities to enforce the DSA. First of all, the appointed "Digital Service Coordinator", must be completely independent, following the CJEU codified case law in relation to the GDPR.[260] They have investigatory (access to information), and enforcement powers (fines and interim measures) complemented by more extensive powers as a last resort in exceptional circumstances (restriction of access to the online interface).[261] They are competent to supervise providers having their main establishment on their territory. This is determined by the location of the head office exercising the "main financial functions and operational control".[262] For VLOPs, the Commission's competences greatly limit national Coordinators', as will be discussed in section 3.4.3. Therefore, Twitter will be monitored in priority by the Commission and by the Irish Media Commission to some extent, due to the

[256] European Commission, 'The 2022 Code of Practice on Disinformation' <https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation> accessed on 2 May 2023; European Commission, 'Signatories of the 2022 Strengthened Code of Practice on Disinformation' <https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation> accessed on 2 May 2023.
[257] Luca Bertuzzi, 'Musk's Twitter on collision course with Europe, with exit possible' (EURACTIV.com, 11 April 2023) <www.euractiv.com/section/platforms/news/musks-twitter-on-collision-course-with-europe-with-exit-possible/> accessed 2 May 2023.
[258] Molly Killeen, 'Twitter gets 'yellow card' as platforms report on content moderation' (*EURACTIV.com*, 9 February 2023) <www.euractiv.com/section/digital/news/twitter-gets-yellow-card-as-platforms-report-on-content-moderation/> accessed 2 May 2023.
[259] Digital Services Act (n 5) arts 37(6), 45(2).
[260] ibid arts 49, 50; Wilman (n 115) p. 15; Cauffman and Goanta (n 132) p. 772; European Union Agency for Fundamental Rights, 'Handbook on European Data Protection Law - 2018 Edition', (2018) <https://fra.europa.eu/en/publication/2018/handbook-european-data-protection-law-2018-edition> accessed 3 May 2023, pp.191-193.
[261] Digital Services Act (n 5) art 51; Wilman (n 115) p. 15; Cauffman and Goanta (n 132) p. 772.
[262] ibid art 56(1), rec 123; Wilman (n 115) p. 15; Cauffman and Goanta (n 132) p. 772.

location of its headquarters.[263] However, other Digital Service Coordinators could also participate in the oversight due to mutual assistance and cooperation obligations, as well as the possibility for joint investigations.[264]

3.4.3. Public Enforcement at the European Level

In comparison to the ECD, the DSA bestows upon the Commission extensive investigatory and enforcement powers, especially for VLOPs.[265] It has exclusive supervisory competence over obligations applicable to VLOPs only and priority over other obligations.[266] In terms of punishments, fines may not exceed 6% of the total worldwide annual turnover, or 1% in case of less serious infringements.[267] In some cases, such as non-compliance with interim measures from the Commission, periodic payment up to 5% of average daily income or worldwide annual turnover can be imposed.[268] These requirements are also applicable for national penalties.[269] Based on their 2022 reports, a fine of 6% of Twitter's total worldwide annual turnover could reach $300 million.[270] Finally, the DSA mandates the creation of the European Board for Digital Services, an independent advisory group composed of Digital Services Coordinators. It ensures a swift cooperation between the EU and the national supervisory authorities by issuing non-binding opinions.[271]

In terms of freedom of expression, the DSA's enforcement mechanism is an improvement compared to the ECD. The supervision does not lie solely on Member States and is more harmonised, enhancing legal certainty for providers. The extensive powers held by the Commission for VLOPs and the strengthened cooperation mechanisms between national and EU authority take into account the cross-border impact of online platforms.[272] This cross-border supervision is more

[263] The Digital Services Bill 2023, Heads of Bill, 20 February 2023, head 6.
[264] Digital Services Act (n 5) arts 57, 58, 60.
[265] ibid arts 65-78.
[266] ibid arts 56(2)(3)(4); Wilman (n 115) p. 15.
[267] ibid art 74.
[268] ibid art 76.
[269] ibid art 52.
[270] Twitter, 'Twitter Announces First Quarter 2022 Results' (28 April 2022) https://investor.twitterinc.com/news-and-events/press-releases/2022/04-28-2022-1200 accessed 2 May 2023; Twitter, 'Twitter Announces Second Quarter 2022 Results' (22 July 2022) https://investor.twitterinc.com/news-and-events/press-releases/2022/04-28-2022-1200 accessed 2 May 2023.
[271] Digital Services Act (n 5) arts 61-63.
[272] Wilman (n 115) p. 17; Cauffman and Goanta (n 132) p. 773.

likely to be efficient due to the cross-border reach of platforms and the Internet in general, although it has yet to be confirmed by practice. However, some aspects are potentially problematic. For example, enforcement remains heavily dependent on platforms' honesty and willingness to cooperate, reinforcing their control.[273] Another example could be the resources necessary to both the EU and national authorities, in order to exercise proper oversight. Considering the extensive scope and obligation of the DSA, the costs of its enforcement is likely to be high.[274] This is especially the case considering the technological gap in data analysis between private online platform and public authorities.[275] Finally, the high costs of non-compliance could incentivise over-removal to avoid repercussions.[276]

4. CONCLUSION

After having compared the impact of freedom of expression on social media platforms by the Directive on Electronic Commerce and by the recently adopted Digital Services Act, the latter can be seen as the adaptation of the former to the evolution of the digital world. They both legislate providers' liability for the content of their users. Under the ECHR and the EU fundamental rights frameworks, this liability could be considered as an interference with the right to freedom of expression. However, both jurisdictions allow for limitations under roughly similar criteria.

Firstly, it must pursue a legitimate aim, such as protecting other fundamental rights. Providers' liability strives to remove illegal content online. Thereby, it protects the rights to private life, freedom from discrimination, right to an effective remedy, data protection, intellectual property, and freedom to conduct a business.

Secondly, the interference must be provided by an accessible law with foreseeable effects. In comparison to the ECD, the DSA's scope and instrument type enhances harmonisation and, thus, legal certainty. However, neither instrument clearly defines illegal content nor the conditions for liability. Both crucial notions are scattered around national and EU laws. In addition, the few

[273] Cauffman and Goanta (n 132) p. 774.
[274] Wilman (n 115) p. 17.
[275] Cauffman and Goanta (n 132) p. 773.
[276] van Hoboken and Keller (n 8) p. 5; article 19 (n 149) p. 38.

substantive obligations under the DSA, such as the obligation to act in a "diligent, objective and proportionate manner" when applying restrictions contained in their terms and conditions,[277] are vague and broad, questioning their actual effect in practice. This reinforces platforms' private rule setting and their influence as gatekeepers. The DSA only regulates the notice-and-take-down mechanism and terms and conditions on the surface, where precise substantial provisions would be needed.

Thirdly, the interference must be necessary for a democratic society and to achieve its legitimate aim. This also involves being proportionate to the aim and, thus, not against the essence of freedom of expression. The ECD and the DSA both use a negligence-based model obtained by a combination of the knowledge-based exemption of liability, the general obligation prohibition, and the neutrality requirement. The proportionality of this system decreased under the DSA with the addition of a good Samaritan provision, encouraging platforms to moderate content more actively. This is somewhat balanced through the due diligence obligations from the DSA, which are proportionate to the abilities and size of the provider. They also address problematic tools for freedom of expression, such as terms and conditions, recommender systems or automatic filters. Nevertheless, those obligations are mainly procedural, treat all content equally and focus on transparency. Again, it is doubtful whether these provisions alone can properly tackle the private rule setting issue or the imbalances between speaker, accuser, and platforms. This is particularly problematic for pluralism, as controversial expression is the first victim of over-removal.

In conclusion, the DSA's advances regarding freedom of expression protection are minor. The lawfulness and the proportionality of its interference with this right could be improved. The advances in platform regulation must be seen in light of the evolution of Internet regulation in Europe. The co-regulation model empowers Twitter and other Big Techs with discretion, and thereby with control. Thus, its regulating effect on them is inherently limited. Furthermore, the weight given to freedom of expression in the DSA reflects the importance given by the EU to "economic-based" fundamental rights and to the prevention of harm online. The DSA is also influenced by other political and economic interests

[277] Digital Services Act (n 5) art 14(4)

beyond fundamental rights. Expecting it to be a radical break from past legislation is unrealistic and perhaps undesirable. Instead, the minor changes it introduces and their application in practice could be a step to further improvements in the future.

Arms for Ukraine

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The principle of transparency versus operations security in public procurement.

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TABLE OF ABBREVIATIONS

EU	European Union
TFEU	Treaty on the Functioning of the European Union
CJEU	Court of Justice of the European Union
VAT	Value added tax
CFSP	Common Foreign Security Policy
OLP	Ordinary Legislative Procedure
NATO	North Atlantic Treaty Organization
RUC	Royal Ulster Constabulary

1. INTRODUCTION

The war in Ukraine has dramatically changed the European political and economic landscape. Its implications are altering the lives of millions of people around the world. The legal landscape is undoubtedly a part of this shifting progress, as many fields are dealing with the need to adapt to the reality of war; human rights law, and migration law are the obvious examples.[2] Additionally, under these incredibly challenging circumstances, numerous economic sectors are dealing with new challenges. For instance, the reduction of energy supplies has driven a shift in the whole EU energy policy towards more sustainable sources of energy.[3]

The topic of this paper is EU public procurement law and the EU legal framework governing Member States' procurement, to provide defence aid to Ukraine. In this sense, it will be important to define the legal meaning of military goods. Preferably, Member States and Ukraine wish to hide their assets' detailed specifications because sharing this information could compromise not only human lives and key strategic information. This act of preserving the spread of sensitive information in times of war is called "operations security" and can also entail non-lethal (non-defence sector) goods.[4]

The procurement of expensive and/or large quantities of equipment combined with the need for discretion, begs the main question*: How are principle of transparency and operations security weighed off under EU Public Procurement Law in the supply of aid by the Member States to Ukraine?*

The main aim is to identify the boundaries of the procurement field for goods necessary on the battlefield, precisely on the principle of transparency and abilities to exempt goods. Therefore, an analysis of the legal basis and case law for exempting the procurement of clearly military goods outside of secondary law within the EU Treaty on the Functioning of the European Union (TFEU)[5] is performed. Then the provisions of the Defence Procurement Directive are laid out

[2] Sergei V. Jargin, 'Environmental and Social Aspects of the Conflict in Ukraine: an Update' (No gez25 Centre for Open Science, 2022) p. 2.
[3] Piotr Żuk and Paweł Żuk, 'National Energy Security or Acceleration of Transition? Energy Policy After the War in Ukraine' (2022) 6 (4) *Joule* p. 709.
[4] Adrian Bejar, 'Balancing Social Media with Operations Security (OPSEC) in the 21st Century' *NAVAL WAR COLL NEWPORT RI JOINT MILITARY OPERATIONS DEPT*, 2022 p. 3.
[5] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326 (TFEU).

to analyse how the scope set by the Treaty exemptions is narrowed down.[6] Finally, Directive 2014/24/EU is analysed to see whether it further narrows the scope of what goods provided to Ukraine can be exempt.[7]

This paper is categorised along the lines of perceived lethal nature of goods, i.e., the military character or use of the good subject of the procurement procedure. The first part will focus on the goods for which the highest degree is necessary, which are potentially eligible under the Treaty exemption of article 346 TFEU. The second part will focus on the Defence Procurement Directive,[8] its field of application and specific requirements. The final part will be on the procurement of non-lethal aid and its transparency requirements under Directive 2014/24/EU.[9]

2. ARTICLE 346 TFEU

In this section, focus lies on a rare but essential article of the Treaty on the Functioning of the European Union. Article 346 TFEU will be analysed starting with the wording found in the Treaty text, moving to the interpretation by the Court of Justice and the reviewability of its usage by Member States in procurement procedures.

2.1. THE WORDING OF THE ARTICLE

"1. The provisions of the Treaties shall not preclude the application of the following rules:

(a) no Member States shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;

(b) any Member States may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect

[6] Directive (EC) 2009/81/EC of the European Parliament and Council on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security [2009] OJ L 216.
[7] Directive (EU) 2014/24/EU of the European Parliament and Council on public procurement [2014] OJ L 94.
[8] Directive 2009/81/EC, 13 July 2009, [2009] OJ L 216.
[9] Directive 2014/24/EU, 26 February 2014, [2014] OJ L 94.

the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.

2. *The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply."*[10]

From the first glance at the wording of the article, its purpose becomes clear: to establish a legal basis for Member States to safeguard their strategic autonomy in security matters. Within the regulatory framework of the internal market, there are already provisions which grant exemptions to Member States for public safety and security.[11] However, the notion of public security as a justification for market restrictions has a different scope compared to applicability of article 346 TFEU.

In the first paragraph, two rules are introduced which illustrate the purpose of the article. Firstly, Member States are not obliged to supply information which, when published, would infringe on the essential interests of the Member State's security. Additionally, the second rule lays out that Member States are allowed to take such measures at their own discretion in a number of fields, relating mostly to defence and security products. Enshrined in this rule is also an obligation on Member States not to implement measures that affect the conditions of competition in the internal market regarding products that are not specifically intended for military purposes. This points towards differing treatment for military and non-military goods and services.

2.1.1. The Armaments Exemptions List

In article 346(2) TFEU, the Council is instructed to make a list of items it deems to be arms, munitions, and war material within the meaning of article 346(1)(b) TFEU. This list was originally established in 1958 and can be amended by the Council with unanimity.[12] For a long time, the contents of this list were unknown to the public. This made it easier for Member States to abusively apply article 346 TFEU because its full extent was not known. Regardless of the publication of the list, its interpretation is still purposely very narrow as laid out further in *Johnston*

[10] TFEU art 346.
[11] TFEU arts 45(3), 52(1) and 65(1).
[12] Council Decision (EU) 255/58 of 15 April 1958 drawing up a list of products to which article 223(I)b applies, 2007/0280 (COD).

further below, as the contrary would leave an open door in EU Public Procurement legislation.[13]

2.2. Interpretation by the Court of Justice

One of the first landmark cases on a security exemption is found in *Johnston*, where the Court gave a preliminary ruling on an employment dispute between the Royal Ulster Constabulary (RUG) and Mrs Johnston.[14] In this case, the Court held that the safeguard clauses, in the then EEC Treaty, that should only apply to exceptional and precisely defined cases. [15] With this judgment, the Court established that safeguard provisions within the Treaty are to be interpreted narrowly. This was confirmed again in *Military Exports,*[16] *Commission v Sweden*[17] and *Dory,*[18] where the Court held that, in case of derogations of human right based on article 346 TFEU, the derogation should be interpreted narrowly to counter "a real, specific and serious risk to the security interest concerned".[19]

However, not all case law points towards a narrow interpretation. In *Fiocchi Munizioni*, it was held that the derogations established in article 346 TFEU are there to facilitate a degree of autonomy for Member State, thereby giving a Member State-wide discretion to enact measures in the name of protection of security interests.[20]

Therefore, regarding the Court's interpretation of article 346 TFEU, it is evident that the scope of application is narrow but that a case-by-case analysis is necessary to assess its exact boundaries.

2.2.1. Different Types of Goods, Measures and Member States Discretion

[13] Case 222/84 *Johnston* [1986] ECR 01651, para. 26; Case 72/83 *Campus Oil* [1984] ECR 02727, paras. 32-37.
[14] Case 222/84 *Johnston* (n 10) para. 8.
[15] ibid para. 26.
[16] Case C-284/05 *Commission v Finland* [2009] ECR 11705; Case C-294/05 *Commission v Sweden* [2009] ECR 11777; Case C-372/05 *Commission v Germany* [2009] ECR 11801; Case C-38/06 *Commission v Portugal* [2010] 01569.
[17] Case C-294/05 *Commission v Sweden* (n 16) para. 43.
[18] Case C-186/01 *Dory* [2001] ECR 02479.
[19] Hanna Engstrom, 'article 346 TFEU: The Point of Intersection Between Legal Ambition and Political Will Regarding the Defence Procurement Directive' (209/81/EC) *Graduate Thesis. Lund University*, 2018, p. 13.
[20] Case T-26/01 *Fiocchi Munizioni v Commission* [2001] ECR I03951, para. 58; Dominik Eisenhut, 'The Defence, Military and Dual-Use Sector' *YSEC Yearbook of Socio-Economic Constitutions*, 2020, p. 12.

In some cases, the goods at the centre of debate do not have an obvious strictly military use. Because of the narrow interpretation of article 346 TFEU, if these goods are not included in the 1958 list, they cannot fall within the scope of the derogations of this article. However, a Member States could invoke other exemptions granted under EU law of the internal market as held in *Commission v Italy* due to the list not being exhaustive.[21]

An exemplary case was *Agusta*, in which Italy excluded the purchase of light helicopters for police and fire services from the procurement laws included in the then EC Treaty.[22] This would fall outside of the scope of article 346 TFEU[23] because the helicopters had no military use or purpose.[24] The Court held that to assess whether a good is exempted under the article, it needs to have a specific military purpose. This is a logical distinction to make, as the companies in the European defence industry also produce non-military goods in their factories. By extending the scope of the article to dual-use items, it would exempt these goods from the internal market rules.[25]

The meaning of military goods was also ruled on in *Finnish Turntables,* where a defence research centre of the Finnish government bought turntables without going through a procurement procedure.[26] The Court held that even if a good is on the 1958 list and it has an almost identical civilian counterpart, it can only fall within the derogations of article 346 TFEU if the contracting authority had an objective in mind when acquiring the good in addition which aligns with the purpose of the good also being present in the intrinsic characters of the good at the time of its acquisition.[27] This suggests that the item must be specifically developed or designed for military use. With regards to goods that are already on the 1958 list, and which do not have a sole military purpose, the Court held that these goods would still be exempt based on a "substantial modification" i.e.,

[21] Eisenhut (n 20) p. 12; Case C-157/06 *Commission v Italy* [2008] ECR 07313, paras. 22-34.
[22] Case C-337/05 *Agusta* [2008] ECR 02173, paras. 10-14.
[23] EC Treaty, art. 296(1)(b).
[24] Case C-337/05 *Agusta* (n. 22) para. 61.
[25] Engstrom (n 19) p.16; Eisenhut (n 20) p. 13.
[26] Case C-615/10 *Finnish Turntables* [2012] EU:C:2012:324, para. 40.
[27] Case C-615/10 *Finnish Turntables* (n 21); Engstrom (n 26) p. 18; Luke Butler, Michael Bowsher, and Christopher R. Yukins, 'No Man Is An Island In Defense Procurement: Developments In EU Defense Procurement Regulation And Its Implications For The US' (2022) 64 (43) George Washington Law Faculty Publication p. 2.

making the good more military than civilian.[28] This extends the meaning of military goods to modified goods.

With regards to the types of measures a Member States can take, the Court addressed in *Spanish Weapons*[29] the legality of a Spanish law that exempted export and EU-transfers of hard defence material from value-added tax (VAT) based on article 346(1)(b) TFEU.[30] Spain argued that the exemption from VAT was needed to ensure the effectiveness of its armed forces and to guarantee the achievement of essential objective of its overall strategic plan. However, exempting the defence industry from VAT, or part thereof, would give this industry a substantial advantage at the cost of revenue for the Union. Therefore, the Court ruled that Spain did not demonstrate that the VAT exemptions are necessary for the protection of essential interests of its security.[31]

2.3. Judicial Review of Article 346 TFEU Usage

The Court has brought up several procedural aspects that need to be complied with by the Member States when utilising article 346 TFEU as a derogation of the Treaty provisions.[32]

First, article 348 TFEU gives the Commission assessment scrutiny through a special procedure to determine whether the arguments of a Member States on the basis of article 346(1)(b) TFEU are sufficient. The Commission must assess whether the measures adopted by the Member States have the effect of distorting the conditions of internal market competition. Additionally, if there is a presumption that a Member States has given State Aid under article 346(2) TFEU through a derogation for dual-sue items, Commission special examination procedure is also invoked. Second, either the Commission or any Member States can take the matter directly to the CJEU if it deems that another Member States is misusing the article 346 TFEU derogations.[33] With regard to notification duties, Member States are not obliged to notify the Commission if they wish to use article 346(1)(b) TFEU for a derogation contrary to established State Aid provisions.[34]

[28] Case C-615/10 *Finnish Turntables* (n 26) para. 44.
[29] Case C-414/97 *Commission v Spain* [1999] ECR 05585.
[30] ibid para. 2.
[31] ibid para. 22; Butler et al, 2022 (n 27) p. 2.
[32] Engstrom (n 19) p. 24.
[33] ibid p. 25; Case T-26/01 *Fiocchi Munizioni v Commission* [2001] ECR 03951.
[34] Engstrom (n 19) p. 24.

To test the necessity of the measure used under article 346 TFEU, the Court performs a proportionality test that, in the Military Exports cases, balanced the measure of reducing the cost of military goods against the need to protect essential security interests. The performance of such test comes from the wording of article 346(1)(b) TFEU which refers to "… measures as it considers necessary for the protection of essential interests of its security…". If a Member States wished to enact such a measure, it can expect scrutiny of the CJEU, with a burden of proof on the Member States itself. Nevertheless, case law has shown that the intensity of scrutiny carries a wide margin of political discretion for the Member States, reflecting a degree of judicial restraint in specific situation in lieu of national security. As mentioned, a Member States who bases a measure on article 346 TFEU must be able to justify its choice to do so. This leaves the Member States with a possibility to derogate from the rules of the Treaty based on their essential security interests in the TFEU, which gives them flexibility to fulfil their defence responsibilities. Imposing a concrete burden of proof on the Member States limits this flexibility and would go against the purpose of the article.

The judicial review of the use of article 346 TFEU has mostly occurred under article 258 TFEU, especially when the Commission seeks a declaration of failure to fulfil provisions based on secondary law. This leaves the use of article 348(2) TFEU only in very select cases where there is no obligation within a secondary law instrument that has been infringed upon, exemplified by *FYROM*.[35]

2.3.1. Abuse and Scrutiny article 346(1)(a) TFEU

While there is broad discretion for the Member States to invoke article 346 TFEU, there is a possibility that it may be abused to exempt goods that are not within the scope of the article. This risk comes into being when the Court would like to scrutinise a Member State, but the Member States withholds the information on grounds of national security interests. This is contrary to the situation under article 346(1)(b) TFEU, where the Member States itself has the burden of proof.[36] It is important to note that non-disclosure by a Member States does not imply immunity from judicial review article 348(2) TFEU entails an in-

[35] Engstrom (n 19) p. 25; Case C-120/94 *FYROM* [1996] ECR 01513 para. 8.
[36] Engstrom (n 19) p. 21; Vincenzo Randazzo, 'article 346 and the Qualified Application of EU Law to Defence' (2014) *European Union Institute for Security Studies* p. 2.

camera procedure, which would allow the matter to be discussed behind closed doors.[37]

Additionally, the court has always maintained a narrow interpretation of the entire article. Having article 346(1)(a) TFEU function as a circumvention of this provision would be undermining to its initial interpretation. This illustrates a balancing act between encroaching on the wide discretion for reasons of secrecy and the Commission's challenge to come up with enough evidence to investigate a Member State.

The route to review under art 346(1)(a) TFEU has been laid out under *German Military Export*, where Germany argued that it had no obligation to provide transparency to the Commission under the infringement procedure of art. 258 TFEU.[38] The Court held that Member States are always obligated to make information available, since the Commission has to make sure that the transferring of the EU's own resources needs to be correct. Nevertheless, case-by-case exemption is still possible.[39]

2.3.2. Concluding Remarks: Procurement and Article 346 TFEU

When conducting an ad-hoc assessment in cases where the Member States relies on article 346 TFEU to bypass procurement procedures, the Court's decision will depend on variety of factors. Firstly, the nature of the goods or services procured has to fall within the scope of the article 346 TFEU jurisprudence. This means that when Member States wish to secretly procure "obvious" military-designed or modified goods, it is possible to do so within the scope of the exemption under article 346 TFEU.[40] As exemplified in *Agusta,* goods without a clear military character fall outside this material scope and would therefore not fall under article 346 TFEU. This is also in line with the aid patterns procured by Member States for Ukraine which mostly consists of lethal weapons.[41]

For the case of military goods, procurement procedures for service contracts without a clear, specific military purpose are a grey area. As held in

[37] Engstrom (n 19) p. 30.
[38] Case C-372/05, *Commission v Germany* [2009] ECR 11801 para. 75; Engstrom (n 19), p. 31.
[39] Engstrom (n 19) p. 31.
[40] Council Decision 255/58 of 15 April 1958, 2007/0280 (COD).
[41] Pietro Bomprezzi and others, 'A Database of Military, Financial and Humanitarian Aid to Ukraine' (*Kiel Institute for the World Economy*, 2022-2023) <www.ifw-kiel.de/topics/war-against-ukraine/ukraine-support-tracker/> accessed 31 May.

Commission v Austria, the outcome depends on whether the wished derogation could not have otherwise been obtained by a competitive procurement procedure provided for by the relevant procurement rules.[42]

With services donated to Ukraine, for instance satellite communications, imagery, broadband connections, and training of troops by private contractors, the need to rely on the procurement Directives and its exemption provisions becomes less straightforward due to a lack of legal certainty.

3.MILITARY GOODS UNDER DIRECTIVE 2009/81/EC

3.1. RELEVANCE

In the case of defence procurement, it is established that Directive 2014/24/EU is not applicable in the case of certain military goods and services.[43] The importance of Directive 2014/24/EU will be discussed in Section 4 of this essay, due to its applicability in regulating public contract. Conversely, defence procurement is accorded special status due to its unique nature, closely linked to national security.[44] In response to this context, Directive 2009/81/EC was introduced to deal with the better integration of the European defence market and to promote competition to economic operators from all Member States.[45] Primarily, it is necessary to understand what falls under the scope of Directive 2009/81/EC, which will be thoroughly explored in Section 3.3. Its primary purpose is to deal with the award of contracts in certain fields of defence and security[46] – albeit, not all defence and security contracts, as discussed earlier in this paper.

3.2. EFFORTS BY EU, MEMBER STATES AND ALLIES

[42] Case C-187/16 *Commission v Austria* [2018] EU:C:2018:194 para. 79.
[43] Directive (EU) 2014/24/EU of the European Parliament and Council on public procurement [2014] OJ L 94.
[44] Aris Georgopoulosm, 'The New Defence Procurement Directive Enters into Force' (2010) *Public Procurement Law Review* p. 3.
[45] Baudouin Heuninckx, 'Security of supply and offsets in defence procurement: what's new in the EU?' (2014) *Public Procurement Law Review* p. 33.
[46] Directive (EC) 2009/81/EC of the European Parliament and Council on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security [2009] OJ L 216.

While the EU continues supplying Ukraine with both military and non-military aid in its war efforts against the Russian invasion,[47] this section will clarify which public procurement procedures ought to be applied and their relationship with transparency. Following Ukraine's urgent request for assistance after the commencement of the conflict,[48] the EU has championed the provision of military aid both through Member States individuals supporting measures and particularly through the recently established CFSP European Peace Facility.[49] The European Peace Facility is governed by EU procurement rules[50] and established joint procurement goals as recently as 5th May 2023.[51]

The rise of EU-wide joint defence procurement as a direct consequence of the Russian invasion of Ukraine led to the proposal of legislation by the Commission. These legislative efforts aim to reinforce common defence spending and procurement, including the European Defence Industry Reinforcement through Common Procedures Act[52] and the Act in Support of Ammunition Production.[53] Therefore, it is crucial to understand the distinction between the utilisation of Directive 2014/24/EU and Directive 2009/81/EC in order to properly conduct public procurement in line with EU law and its principles. This is essential due to the different procedural rules that apply to the public procurement of goods and services under Directive 2009/81/EC as opposed to Directive 2014/24/EU.

Within defence procurement, particularly in such a sensitive situation as the current conflict in Ukraine, there are numerous shortcomings regarding the principle of transparency. Although the Directive 2009/81/EC was introduced in part to address issues of transparency, the nature of defence procurement presents its own set of challenges. These include limited competition, lack of public

[47] European Council Press Release. EU joint procurement of ammunition and missiles for Ukraine: Council agrees €1 billion support under the European Peace Facility 2023, <www.consilium.europa.eu/en/press/press-releases/2023/05/05/eu-joint-procurement-of-ammunition-and-missiles-for-ukraine-council-agrees-1-billion-support-under-the-european-peace-facility/> accessed 31 May 2023.
[48] ibid.
[49] Council Decision (CFSP) 2021/509 establishing a European Peace Facility [2021] ST/5212/2021/INIT.
[50] ibid arts 35 and 67.
[51] Council Decision (CFSP) 2023/927 arts 1-4.
[52] Proposal for a Regulation establishing the European defence industry Reinforcement through common Procurement Act 2022.
[53] Proposal for a Regulation establishing the European defence industry reinforcement through common procurement Act 2023.

scrutiny, lack of open procedures and invocation of exemptions *inter alia* that all contributing to transparency issues.

3.3. Scope of Directive 2009/81/EC

Article 2 Directive 2009/81/EC outlines the material scope, encompassing:[54]

a) the supply of military equipment, including any parts, components and/or subassemblies thereof;

b) the supply of sensitive equipment, including any parts, components and/or subassemblies thereof;

c) works, supplies and services directly related to the equipment referred to in points (a) and (b), for any and all elements of its life cycle;

d) works and services for specifically military purposes or sensitive works and sensitive services.

It is evident from the Directive that its primary purpose is to deal with goods and services concerning specific military purposes. Nevertheless, the question arises as to the interpretation of the material scope, as there exists a wide margin in defining what is covered by article 2 of the Directive.

In the case of article 2(a) regarding military equipment, recital 10 of the Directive[55] appears to refer to the list of arms created by the Council in a 1958 Decision[56] which also appears in article 346(2) TFEU.[57] It is emphasised that this list is not exhaustive and therefore includes a wider definition, essentially stating that it is a generic list which ought to be broadly interpreted. Furthermore, recital 10 also adds that military equipment may cover goods originally designed for civilian use but later adapted for military purposes, leading to an element of confusion regarding the interpretation of the scope. In the case of *Fiocchi Munizioni,*[58] the CJEU concluded that the 1958 list is to be interpreted as widely as possible as suitable to the national security needs of a Member State. Hence, the

[54] Directive (EC) 2009/81/EC, art 2.
[55] ibid recital 10.
[56] ibid.
[57] TFEU art 346(2).
[58] Case T-26/01 Fiocchi Munizioni v. Commission [2003] ECR 03951 para. 58.

scope is extensive and may apply to numerous goods which may be used for military purposes.

3.3.1. Exceptions to the Applicability of the Directive

After establishing the scope of Directive 2009/81/EC, it is necessary to consider that there are also exceptions under which the Directive may not be applicable in the procurement of military goods and services. Article 8 states that the Directive does not apply to contracts under: a) €431 000 for supply and service contracts, and b) €382 000 for works contracts.

In addition, article 346 TFEU provides a general exception related to secrecy in the essential interests in security. The exception has been dealt with by the Court of Justice of the EU ('CJEU') in a number of cases, most notably in *Johnston*,[59] where the Court stated that this exception is to be interpreted narrowly, and only in exceptional and clearly defined cases, as broad interpretations could undermine the primacy of EU law. This was confirmed by the CJEU,[60] where the Court stated that "dual use" products, intended for both military and civilian purposes, are not to fall within the scope of this exception and therefore it follows that Directive 2009/81/EC ought to apply.[61] It should be noted that Directive 2009/81/EC was introduced to deal with the Member States too commonly invoking article 346 TFEU and that it attempted to harmonise this matter. This may cause certain questions regarding the borderline of transparency and secrecy – the main assumption being that the principle of transparency, when being applied in the European defence market, has certain limitations as to its application and therefore there is a difficulty of imposing the Directive upon Member States procuring their weapons.

Within the application of the Directive to the case of Member States procuring weapons in order to assist Ukraine, there must be an understanding of whether Member States may invoke article 346 TFEU or whether they should rely on the Directive during the procurement procedure. It may be argued that the

[59] Case 222/84 Johnston [1986] ECR 01651 para. 11.
[60] Case C-337/05 Commission v. Italy [2008] ECR 07313 para. 55; Case C-615/10 Finnish Turntables [2012] EU:C:2012:324 para. 40.
[61] Agnieszka Chwialkowska and Jerzy Masztalerz, "Defence Procurement: The ECJ Keeps its Ground on 'Dual Use' Products: Case C-61 5/10, Insindaritoimisto InsTiimi Oy. Judgment of the Court (4th Chamber) of 7 June 2012" (2012) 7 (14) *European Procurement and Public Private Partnership Law Review* 289, p. 291.

weapons procured by the Member States are not essential for the security of individual Member States – rather, they are aid measures which assist a country at war. It is the exception that led to the harmonisation, with the idea that the use of article 346 TFEU will decrease overtime.[62] This has been relatively successful, as the majority of defence procurement has been conducted in line with the Directive since its introduction.[63]

Further exemptions are governed by articles 12 and 13 of the Directive, concerning contracts awarded according to international rules and specific exclusions.

In the case of supplying weapons to Ukraine, article 13(f) excludes from the Directive contracts awarded by a government to another government relating to the supply of military or sensitive equipment, works and services directly related to such equipment or works and services specifically for military purposes, or sensitive works and sensitive services.[64]

Additionally, it must be noted that article 12(a) Directive 2009/81/EC and recital 26 state that where there are international agreements between third countries (in this case, Ukraine) and one or more EU Member States, the Directive does not apply.[65] However, there appears to be no specific international agreement concluded between Ukraine and the EU or its Member States on the sale, purchase, donation or receipt of weapons.

Furthermore, pursuant to article 13(f), there are no contracts between the governments of Ukraine or Member States for the procurement of weapons.[66] Rather, Member States are procuring the weapons *prima facie* for their own use, after which they donate them to Ukraine. Therefore, it may be argued that this exception ought not to be applied, and Directive 2009/81/EC ought to be fully applicable. It also follows that the lack of mention within the Directive of

[62] Georgopoulos (n 44) p. 1; Baudouin Heuninckx, '346, the Number of the Beast? A Blueprint for the Protection of Essential Security Interests in EU Defence Procurement' (2018) *Public Procurement Law Review* p. 53.
[63] Commission Staff Working Document on Directive 2009/81/EC. Evaluation of Directive 2009/81/EC on public procurement in the fields of defence and security Accompanying the document Report from the Commission to the European Parliament and the Council on the implementation of Directive 2009/81/EC on public procurement in the fields of defence and security, to comply with article 73(2) of that Directive <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016SC0407>, Accessed 3 June 2023.
[64] Heuninckx (n 62) p. 53.
[65] Directive (EC) 2009/81/EC art 12 and recital 26.
[66] Directive (EC) 2009/81/EC art 13(f).

situations in which a Member States procures weapons in order to export them to a third country, indicates no intended exception to its application in such circumstances. Hence, regular defence procurement rules should apply, and the Directive would presumably be applicable.[67]

3.3.2. Procedural Differences

The compromised transparency of defence procurement is certainly evident within the procedures available under it, as prescribed by article 25. One of the most noticeable elements seen in the Directive is the lack of open procedure. The default procedures appear to be the negotiated procedure with publication of a notice.[68] The fact that the procedure is not freely open to all competitors is likely a consequence of there being only a limited number of suppliers in the European defence market.[69] Certainly, the lack of open procedure raises questions –it leads to an exclusion of a large segment of the internal market and limits competition. Yet, this must be balanced with the idea that the open procedure potentially jeopardises security of information – one of the crucial additional elements of the Directive.[70]

The Directive also stipulates the usage of the restricted procedure, which provides that tender specifications be finalised prior to the contract being published in the Official Journal of the EU. Economic operators may within 37 days from notice send a request to participate, after which a minimum of three operators will be invited to submit the tender within 40 days of selection[71]. This procedure accounted for 29% of contract award notices[72] and is characterised by a generally straightforward and transparent procedure due to allowing anyone to express interest. However, the fact that only three companies may participate can be seen as problematic – particularly in times of urgency such as the current geo-political situation, there may be issues regarding the selection procedure and open room for corruption.

[67] Martin Trybus, *Buying Defence and Security in Europe: The EU Defence and Security Procurement Directive in Context* (Cambridge University Press 2014) p. 318.
[68] Baudouin Heuninckx, 'The EU Defence and Security Procurement Directive: Trick or Treat?' (2011) Public Procurement Law Review p. 14.
[69] ibid p. 15.
[70] Trybus (n 67) p. 316.
[71] Directive (EC) 2009/81/EC, art 33(2); Trybus (n 67) p. 318.
[72] Commission Staff Working Document on Directive 2009/81/ EC (n 63) point 5.3.1.3.

Another procedural form prescribed by the Directive is the negotiated procedure with publication of notice.[73] The contracting authority may freely choose between this procedure and the restricted procedure.[74] Because there are less detailed rules on how the procedure is run, it allows for more flexibility for the contracting authorities in determining the requirements and is particularly guided by national rules – hence, it provides a balance for states to estimate the requirements of national security more precisely and therefore apply the appropriate procedures.

The Directive also stipulates the usage of competitive dialogue in article 27 and negotiated procedure without publication of a notice in article 28 when certain requirements are met.[75] While the latter is unlikely to be justifiably used in the context of procurement of weapons for Ukraine due to it not falling under any of the requirements listed in the article, the former may have some application. It regulates particularly complex contracts and allows for the procedure to be run in several stages outlining all the necessities the contracting authority may have to deal with. In times of conflict, competitive dialogue, albeit providing significant discretion to the Member States in running the procedure, may be used given the political and military context– despite there being an obvious lack of transparency.

3.3.3. Security of Supply and Security of Information

Articles 22 and 23 deal with security of information and supply respectively,[76] integrating them into the entire process of defence procurement and hence providing general guidelines which therefore affect the procedures. These are listed as conditions for performance of the contract, once obtained, under article 20 Directive 2009/81/EC.

Regarding security of information, article 22 provides a list of obligations that the contracting authority may impose on the tenderer, i.e., the economic operator which has submitted a tender under a restricted or negotiated competitive procedure.[77] The list primarily deals with confidentiality of information and ensures its enforcement onto potential subcontractors. It must be noted that the

[73] Directive (EC) 2009/81/EC art 26.
[74] Heuninckx (n 68) p. 13.
[75] Directive (EC) 2009/81/EC arts 27 and 28.
[76] ibid arts 22 and 23.
[77] ibid art 1(16).

Directive explicitly states that the list is not exhaustive and not cumulative – the contracting authority has a wide discretion to impose such requirements. While this may not seem too problematic *prima facie,* it must be noted that the Directive states that what is considered as confidential and classified information is not harmonised.[78] Defining this is a matter for Member States and their national jurisdiction, consequentially allowing a large margin of discretion in the Member States' implementation. Problems may be raised regarding transparency of this provision given that national rules vary, subsequently affecting the Directive's uniform application. Different states will have various rules on how to govern this matter, leading to different outcomes. This may lead to various administrative barriers,[79] although there is a mutual recognition of security clearances.[80]

This certainly makes transparency more difficult to monitor and particularly enshrines a provision which limits information available to the public. However, it must be understood that without the Directive, there would be a significantly higher dependence on the security exemptions in article 346 TFEU and therefore less EU-wide governance on the matter. In the context of the war in Ukraine primarily, the fact that Member States are procuring and sending military assistance means that sensitive information ought to be sufficiently guided in order to prevent potential logistic, but also political, economic and military disruptions.

Security of supply, identified in article 23, refers to ensuring an adequate and dependable provision of goods and services that enables a Member States to meet its defence and security commitments in line with its foreign and security policy needs.[81] Like article 22, it provides a non-exhaustive list of measures[82] a Contracting Authority, i.e. the State, regional or local authorities and bodies governed by public law which awards the contract,[83] may request from tenderers in order to safeguard the supply of goods and service and is not found in the Public Contracts Directive. Security of supply may be present throughout the entire tender procedure and can therefore affect which companies may be eligible or not. There could be concerns that it may lead to contracting authorities *de facto* preferring

[78] Heuninckx (n 68) p. 21.
[79] ibid.
[80] ibid p. 22.
[81] Commission Staff Working Document on Directive 2009/81/EC, point. 6.1.3.
[82] Directive (EC) 2009/81/EC arts 23 (a)-(h).
[83] Directive (EC) 2009/81/EC art 1(18).

certain operators due to simpler and more secure logistics, with potential violations of equal treatment and non-discrimination.[84] Transparency also certainly plays a role, considering that these requirements may largely be *sui generis* and could lead towards discrepancies – however, national rules will often provide specific instructions to prevent such outcomes. Therefore, the weighing of transparency with the requirements regarding security of supply and information is often difficult. The Directive stipulates them as essential elements, which certainly provides an effective safeguard. This is crucial due to the specific nature of the procurement and potential interferences of outside factors, which may affect the entire process. The fact that some transparency may be compromised is necessary for the effective enforcement of the Directive and subsequently for Member States to comply with its provisions.

3.4. Transparency – General Application Throughout the Directive

Similar to Directive 2014/24/EU, Directive 2009/81/EC was introduced to reduce the lack of transparency found in defence procurement. It has led to significant developments, the reduction of and certainly more limited usage of the exceptions and regulated defence procurement, while ensuring as far as possible the application of the principles of non-discrimination, equal treatment, and transparency. Given the nature of the industry and certain limitations which come with it, there certainly are issues found in the application of transparency. While the principle is explicitly mentioned numerous times within the Directive, the procedures available, discretions conferred upon the contracting authorities and additional requirements are not as open as the other public procurement Directives.

In the case of providing lethal aid for Ukraine, it is imperative that the Directive should apply. Given the urgency of the situation and the application of transparency, it is likely that certain provisions may be hastily concluded and may lead to certain issues in this field. Hence – the Directive provides a fine, but concrete and necessary balance between safeguarding and regulating the procurement process in the attempt to better integrate the internal defence market while also protecting the interests of Member States and allowing them to sufficiently conduct the processes in times of geo-political crises.

[84] Heuninckx (n 45) p. 46.

4. EU PUBLIC PROCUREMENT LAW AND NON-LETHAL AID

Non-lethal aid is one of the main means of aid provided by a State to another geo-politically allied State that is at war or in a conflict situation. The reality has not changed much in the current event of Russian Invasion in Ukraine. A lot of states, often under international organisations (like the EU or the NATO)[85] have provided non-lethal assistance to support Ukraine against the Russian invasion. In this sense, it is fruitful to analyse what non-lethal aid means, which goods it contains, and, when it comes to the procurement procedures of those goods, which EU legislation applies (if any) and how EU procurement principles affect the whole process.

4.1. NON-LETHAL AID AND PUBLIC PROCUREMENT RULES

4.1.1. What is Considered "Non- Lethal" Aid?

It is critical, in the very beginning, to attempt to define what kind of aid is considered non-lethal. Essentially, non-lethal aid encompasses any kind of supplies that are not designed to kill someone.[86] While there is no EU definition of non-lethal aid, the US Code defines "non-lethal supplies" as anything that "is not a weapon, ammunition, or other equipment or material that is designed to inflict serious bodily injury or death.[87] For NATO, "Non-Lethal Weapons are weapons which are explicitly designed and developed to incapacitate or repel personnel, with a low probability of fatality or permanent injury, or to disable equipment, with minimal undesired damage or impact on the environment".[88] In this sense, it would be possible to define non-lethal aid as aid provided by means of supplies that are not intending to kill. Their primary purpose does not aim to kill a person, and examples include vehicles, electronic equipment pieces, safety equipment and military-grade drones among others.[89]

In this context, it is notable that there are questions raised about grey areas in this definition. Most notably, the fact that non-lethal supplies are not intended

[85] Alexandra Brzozowski, 'NATO, EU to Step up Non-Lethal Aid to Ukraine Over Winter Woes' (*Euractiv*, 25 November 2022) <www.euractiv.com/section/europe-s-east/news/nato-eu-to-step-up-non-lethal-aid-to-ukraine-over-winter-woes/> accessed 17 January 2024.
[86] Joshua Keating, "What Exactly is 'Non-Lethal' Aid?" (*Foreign Policy*, 2 August 2012) <https://foreignpolicy.com/2012/08/02/what-exactly-is-non-lethal-aid/> accessed 17 January 2024.
[87] 10 USC § 2557 (2018).
[88] NATO, 'NATO policy on non-lethal weapons' (NATO Official Texts 1999).
[89] Maple Hope Foundation, '2022 Report on Non-Lethal Military Aid to Ukraine' May 2023.

to kill does not mean by itself that they cannot be accessory to the act. There are voices supporting that non-lethal aid is an indirect way to contribute to the ability of someone to fight, without providing them with a full gun.[90] Despite the moral concerns on this topic, the legal processes around the procurement of non-lethal aid are quite differentiated in the context of EU law than those concerning the procurement of defence and security material.

4.1.2. What Set of EU Procurement Law Rules Apply on Non-Lethal Aid?

The EU does not have specific procurement rules for non-lethal aid, applying just to this class of items. Instead, the same general EU procurement directives and procedures that apply to the purchase of other products and services also apply to the acquisition of non-lethal aid. The guidelines for public procurement of goods, services and works in the EU are outlined in Directive 2014/24/EU.[91] In contrast, the EU legal framework provides special rules for the procurement of military equipment (*lethal aid*), according to the rules laid down on the Directive 2009/81/EC. This Directive refer to any award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security (the field of application of Directive 2009/81/EC was addressed earlier in this essay).[92]

The idea behind Directive 2009/81/EC lies in its Preamble, where the stated aim was the establishment of a genuinely European and open defence equipment market that will create a level playing field at European and global levels.[93] The mechanism works as follows: with the exception of contracts covered by Directive 2009/81/EC and contracts to which Directive 2014/24/EU does not apply due to one of its exclusions, Directive 2014/24/EU applies to the awarding of public contracts in the fields of defence and security. Therefore, it is necessary to first determine if Directive 2009/81/EC is applicable to a particular purchase transaction.

Directive 2014/24/EU does not apply if the procurement falls under the material scope of Directive 2009/81/EC. This is significant because it indicates that the procurement's subject determines which directive applies, and that the

[90] Brzozowski (n 85).
[91] Directive (EU) 2014/24/EU art 1.
[92] Directive (EC) 2009/81/EC art 1.
[93] ibid recital 3.

contracting authority's role (such as the ministry of defence or police force) is not directly pertinent.[94] A point of caution is Recital 10 of Directive 2009/81/EC, according to which "for the purposes of this Directive, military equipment should also cover products which, although initially designed for civilian use, are later adapted to military purposes to be used as arms, munitions or war material".[95] This may cause problems due to the difficulties in determining the application of the relevant directive, as it blurs the line between military and civilian use.

Furthermore, in this mechanism, there is one basic exemption: article 346 TFEU may be used by a contracting authority to be excluded from the scope of both Directives, given that it outlines possible exclusions from the application of the Treaties as a whole. This may happen, according to article 346(1) (a) when the application of the rules of the Treaty would involve the disclosure of information which the Member States considers would be contrary to the essential interests of its security, or (b) when the Member States considers that it is necessary to exclude the application of the Treaty for the protection of the essential interests of its security in relation to the production of or trade in arms, munitions and war material.[96]

This exclusion illustrates the conflict between, on the one side, the application of the EU principles that characterise the procurement law, for instance, the principle of transparency, and on the other side, the requirements of confidentiality when it comes to national security topics. It also indicates a struggle witnessed by EU institutions during the implementation of Directive 2009/81/EC. In order to apply its rules thoroughly, the European Commission has to deal with the national defence-industrial perfectionism that most Member States have facilitated through the use of the abovementioned article.[97] The idea behind it lies again in between the core principles of the European Union. Military equipment

[94] Procurement and Defence Procurement Directives. Under article 2, which defines the scope of the Directive, we read that it applies to: (a) the supply of military equipment, including any parts, components and/or subassemblies thereof;(b) the supply of sensitive equipment, including any parts, components and/or subassemblies thereof; (c) works, supplies and services directly related to the equipment referred to in points (a) and (b) for any and all elements of its life cycle; (d) works and services for specifically military purposes or sensitive works and sensitive service.
[95] Directive (EC) 2009/81/EC, recital 10.
[96] Ciara Kennedy Loest and Nicolas Pourbaix, 'The New EU Defense Procurement Directive' (2010) 11 ERA FORUM 399, p. 402.
[97] Jay Edwards, 'The EU Defence and Security Procurement Directive: A Step Towards Affordability?' (International Security Programme Paper 2011) p. 2.

industry should be exempted from the common market vision and the common principles that apply towards it. The European Commission made it clear in 2006, by means of an interpretation Communication, that Member States must evaluate each procurement contract to determine if an exemption from the EU rules is appropriate and necessary.[98] It is the Member States' responsibility to define and protect their security interests, but article 346 is only in place to "handle exceptional and clearly defined cases".[99]

4.1.3. When Does Aid Fall into the Material Scope of Directive 2014/24/EU?

In order to address this question, identifying the material scope of the Directive 2014/24/EU is paramount. Procurement within the meaning of this Directive is the acquisition, by means of a public contract, of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose.[100]

According to this definition, an economic operator is any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market.[101] The notion of an economic operator must be interpreted in a broad manner so as to include any person and/or entity which offers works, products or services on the market, irrespective of the legal form under which they have chosen to operate, and whether or not they are "legal persons" in all circumstances.[102]

Additionally, the term "contracting authority" refers to the state, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law.[103]

[98] Commission of the EU Communities. Interpretive Communication on the application of article 296 of the Treaty in the field of defence procurement, 7 December 2006, p. 3.
[99] ibid p. 5
[100] Directive 2014/24/EU art 1.
[101] ibid art 2(1).
[102] ibid recital 14.
[103] Christopher Bovis (ed), *Research handbook on EU Public Procurement Law* (Elgar Online, 2016) <www.elgaronline.com/edcollbook/edcoll/9781781953259/9781781953259.xml>, accessed 1 June 2023, p. 5; Case C-31/87 *Gebroeders Beentjes BV v State of the Netherlands* [1988] ECR 04635 paras. 9-10; Directive 2014/24/EU, art 2(1).

"Bodies governed by public law"[104] means bodies that have all of the following characteristics: (a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; (b) they have legal personality; and (c) they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.[105] According to the CJEU, the decision concerning if an authority should be considered as a body covered by public law, should be based on a case-by-case analysis.[106]

After identifying what a contracting authority is, the focus shifts to the threshold that the Directive sets, under which the EU Procurement law does not apply. The relevant threshold for the supply of goods is €134.000 when the contracting authority is the central government and €207.000 when the contracting authority is a sub-central public body.[107] Nevertheless, in the procurement procedures concerning the field of defence, special rules apply, if the goods still fall into the scope of the Directive 2014/24/EU:

1. If the goods on stake are included on Annex III[108] of the Directive, the threshold that applies is €140.000.
2. If it concerns other products than the referred to the Annex III, the threshold that applies is €215.000.[109]

The final step is to consider if the current procurement procedure falls under the exceptions of the articles 7-17 of Directive 2014/24/EU.[110] According to article 15, the relevant exclusions refer to the abovementioned Defence

[104] ibid Annex III.
[105] ibid.
[106] Case C-283/00 *SIEPSA* [2008] ECR 11697 para. 77; Case C-373/00 *Truley* [2003] ECR 01931 para. 44.
[107] Directive (EC) 2014/24/EU arts 4b and 4c.
[108] Directive (EC) 2014/24/EU Annex III.
[109] European Commission, 'Thresholds according to type of procurement under the 2014 directives on concessions, general procurement and utilities' <https://single-market-economy.ec.europa.eu/single-market/public-procurement/legal-rules-and-implementation/thresholds_en> accessed 1 June 2023.
[110] Directive (EC) 2014/24/EU arts 7-17.

Procurement Directive, as well as the exclusions that are justified under article 346 TFEU.[111]

According to the framework that the EU procurement Directives establish, any kind of non-lethal aid procurement contracts, that contains goods and supplies (like the ones mentioned in Section 1) which do not fall under the scope of Directive 2009/81/EC and fulfil the conditions of the material scope and thresholds of Directive 2014/24/EU should be awarded through the procedure established by Directive 2014/24/EU. It is notable that, according to the relevant field analysis, although the Ministries of Defence and the competent defence procurement agencies of the Member States are undoubtedly considered contracting authorities, this is not so clear when it comes to international organisations. This is because they, while being public bodies, are not necessarily governed by the states themselves and their status is much less straightforward.[112]

4.2. The EU Public Procurement Law Principles

An interesting conversation arises from these questions: Why is it important, if hypothetically a non-lethal number of supplies that a Member States procures, falls under the scope of the Procurement Directive? What are the main principles that run through the EU Public Procurement law? How do these principles conflict with the concepts of sensitivity and confidentiality but also with the idea of national sovereignty, that are dominating the field of national defence issues, and how is this conflict resolved under the current regime? Finally: are these principles compromised in favour of national security and sensitivity when it comes to the procurement of non-lethal aid? The main principles that are required to be respected under EU public procurement law, in respect of the Directives of 2014, are the principle of transparency, the principle of equal treatment and the principle of non-discrimination. In this joint research paper, the focus lies on the principle of transparency, in the sense that it is the most controversial one regarding the conflict with the national interests of security and confidentiality that arise under defence procurement procedures. The next section will consider the principles of

[111] Directive (EC) 2014/24/EU arts 15(1) and (2).
[112] ibid Annex I.

non-discrimination and equal treatment, alongside transparency, due to their added value in providing a complete analysis of the research topic.

4.2.1. The Principles of Non-Discrimination and Principle of Equal Treatment

In general, discrimination on grounds of racial or ethnic origin in the provision of goods and services - including inter alia public procurement - is prohibited in the Directive on ethnic equality.[113] Discrimination on grounds of sex in the provision of goods and services is prohibited in the Directive on equal treatment between men and women in the provision of goods and services.[114] More specifically, the non-discrimination principle is one of the main principles in the field of EU public procurement law. Contracting authorities must treat all candidates in the same way. Furthermore, operators are required to comply with the principle of non-discrimination on the basis of nationality.[115]

The aim of the principle of equal treatment between tenderers is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure. All tenderers must be afforded equality of opportunity when formulating their tenders. For those reasons, the tenders of all competitors must be subject to the same conditions.[116] Non-discrimination and equal treatment run through the foundation of EU public procurement law, such as the award of the contract, the negotiations, the prior involvement of the candidates etc.[117]

The principles of equal treatment and non-discrimination hence apply when acting in the scope of Directive 2014/24/EU. The situation does not differ when the Member States procure non-lethal supplies that fall under its scope. Following from this analysis, there is no evidence that those fundamental principles are compromised in the relevant procedures. To be more precise, there is no justification for such compromise, as non-lethal aid should be treated as any

[113] Directive (EC) 2000/43/EC.
[114] Directive (EC) 2004/113/EC; Ruth Nielsen, 'Discrimination and equality in public procurement' 2005 EU & Arbetsrätt, p. 14.
[115] Directive (EC) 2004/18/EC on the Coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. [2004] *OJ L 134;* Andres Alvarez-Fernandez and Peter Brandstrup, 'The Access of Third Countries to the European Union's Public Procurement Market' (IER 4014, 2013) p. 2.
[116] Case T-717/20 LENOVO v EuroHPC [2022] EU:T:2022:640; Directive (EU) 2014/24/EU Recital 1.
[117] Directive (EU) 2014/24 Recital 90 and art. 31, 41.

other goods procured through this legal framework, being subject to the same principles and underpinnings.

4.2.2. The Principle of Transparency

One of the key goals of the Directive 2014/24/EU is to increase openness and transparency.[118] It provided Member States with instruments to combat corruption and malpractice, such as tougher rules for identifying, preventing, and dealing with conflicts of interest.[119] Expanding the list of bidders who are excluded from consideration is also a possibility. Additionally, the implementation of mandated e-Procurement by 2018 ought to significantly boost transparency.[120]

Recital 1 of Directive 2014/24/EU refers to the principle of transparency, that among others, runs through the whole foundation of EU Public Procurement law.[121] Transparency generally refers to the availability and accessibility of procurement information. Due to this, bidders are given an equal opportunity to compete when submitting an offer, and the general public is allowed to identify any contractors or businesses that may be dishonest. This should encourage adherence to rules and, in turn, result in reduced corruption in public procurement.[122]

How is the principle of transparency related to the procurement of non-lethal goods? From the perspective of applying Directive 2014/24/EU to the goods that do not fall in the scope of Directive 2009/81/EC, it can be concluded that the transparency requirements are the same as any other goods falling under the scope of Directive 2014/24/EU. The threshold seems to remain the same in our case. This is due to the case of goods that are not considered primarily military equipment, like gloves or winter jackets, the threshold of confidentiality and sensitivity is not high enough to require a compromise of the main principles of EU procurement law. From this it can be derived that, according to the thought of EU legislator, information regarding the procurement of these goods is not that sensitive to harm

[118] OECD, Checklist for Supporting the Implementation of OECD Recommendation of the Council on Public Procurement: Transparency, (Public Procurement Toolbox, 2016)
[119] Directive (EU) 2014/24/EU art 24.
[120] European Commission, 'Efficient and Professional Public Procurement' (European Commission 2017) <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_17_3544> accessed 4 June 2023.
[121] Directive (EU) 2014/24/EU Recital 1.
[122] Koen Oosthoek, 'Public Procurement In the European Union: Transparent and Fair?' (ERCAS Working Paper, 2022) p. 1.

the national security if publicised for the purposes of a procurement procedure. In other words, the underpinnings of national security, are at stake in that case, and common market rules prevail due to the apparent lack of national security requirements which are evident in Directive 2009/81/EC.

5. CONCLUSION

In order to withstand the threat posed by the Russian Federation, Member States have a large toolbox to procure aid for Ukraine. The question at the centre of this issue was: How are the principle of transparency and operations security weighed off under EU Public Procurement Law in the supply of aid by the Member States to Ukraine?

The initial part of the essay extended to article 346 TFEU, which allows for exemption from transparency obligations present in EU public procurement law. The manner in which transparency and operation security are weighed up under the Treaty provisions will depend greatly on the characteristics of the good or service that is at the centre of the exemption, and the necessity of the measure in place to adhere to operations security over transparency. Moreover, the same provision that grants a basis for the Member States to stay silent could potentially be used to refuse disclosure when a Member States opts for an article 346 TFEU exemption and is challenged for this. The special review procedure under article 348 TFEU counterbalances this lack of transparency, but this is rarely used, creating a potential loophole – especially knowing that most of the costly, lethal aid is exempt under article 346 TFEU in conjunction with the armaments exemption list.

Where article 346 TFEU has a degree of legal uncertainty, Directive 2009/81/EC provides more legal clarity. It provides more concrete rules on how the principle of transparency should be weighed off against the need for a Member States to maintain operations security. However, it still allows for broad discretion on the part of contracting authorities to procure in a less transparent way compared to other EU procurement legislation. Additionally, there is uncertainty when an international organisation wishes to procure military equipment.

Finally, procurements under Directive 2014/24/EU usually do not carry the same amount of sensitivity towards operations security compared to Directive 2009/81/EC and article 346 TFEU. Therefore, most of the non-lethal goods

procured under this directive follow the conventional procedures. This in turn ensures that the aid granted under this directive will be least vulnerable to corruption. In the case of non-lethal services that fit under Directive 2014/24/EU which are sensitive to operations security, these could potentially enjoy an exemption under article 346 TFEU.

In conclusion, Member States have multiple ways to procure goods to donate to Ukraine transparently and secretly. Where under normal circumstances the transaction of these goods and services in the current volume would be a rare occurrence, it has become part of the new reality. Coincidentally, this new reality is not without vulnerabilities, i.e., an opening within the process for the provision of goods to be misused or wrongly appropriated. This weakness, often found in the procurement of military goods, should be scrutinised closely to avoid doing harm not only to Member States' own finances but also to the sole beneficiary of the donations: Ukraine.

The Relationship Between Sports and EU Competition Law

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The European Super League Proposal and a possible abuse of dominant position by UEFA and FIFA.

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TABLE OF ABBREVIATIONS

UEFA	Union of European Football Associations
FIFA	Fédération Internationale de Football Association
TFEU	Treaty on the Functioning of the European Union
ESL	European Super League
ISU	International Skating Union

1. INTRODUCTION

One of the fundamental objectives of the European Union is establishing an internal market where persons, goods, services, and capital can freely move. To achieve this goal, the European Union focuses on the elimination of obstacles hindering free movement and the maintenance of fair competition. The Union has developed rules in the field of competition law aimed at preventing market participants from distorting the competitive balance and disrupting the goal behind the establishment of an internal market.

A core part of European Union Competition law is expressed in articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), developing the European Union antitrust policy.[2] The former article prohibits any kind of agreement between market participants that may result in the distortion of competition. The latter, which will be the focus of this paper, prohibits market participants holding a dominant market position from behaving in a way that would amount to an abuse of their dominance. A dominant position is seen when an undertaking holds a significant share of a specific market, allowing them to behave in a more independent manner from their competitors, and ultimately influence market dynamics.[3]

EU Competition law also comprises Regulation 139/2004 (Merger Control Regulation), which provides for a review system of mergers and acquisitions between companies to guarantee that this will not lead to a strengthening of market power, consequently weakening competition.[4] The involvement of the State by distributing aid that may end up distorting competition is also prohibited under article 107 TFEU, unless exemptions apply. The Commission is the primary actor in the enforcement of competition rules as laid down in Council Regulation (EC) No 1/2003.[5]

For a long time, the relationship between EU law and the sports field was filled with legal uncertainty. The CJEU performed a major role in introducing and

[2] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU).
[3] Case C-27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities.* [1978], para. 65. ECLI:EU:C:1978:22 (United Brands).
[4] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L 024/1.
[5] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in arts 81 and 82 EC [2003] OJ L1/1.

applying EU law in cases involving sports, more specifically by applying EU competition norms and rules concerning freedom of movement. The *Bosman* case was a cornerstone in the establishment of the relationship of sports and EU law because it confirmed the status of sports activities as an economic activity,[6] thus triggering the application of EU competition law.[7] Since the EU strives to prevent anti-competitive practices between businesses, it can significantly influence the organisation of sports competitions and the relationships among key stakeholders in the sports arena, such as players and clubs.[8] The development of jurisprudence by the Court of Justice of the European Union (CJEU) on sports fostered the inclusion of this field in the list of supporting competences of the EU.[9] Recently, in 2009, the competence to support and supplement actions of the Member States to promote cooperation and fairness in sport competitions was conferred to the Union through articles 6(e) and 165 TFEU.[10] Due to this development, EU competition rules may be applicable to disputes relating to sports, such as football.[11]

As of late, a proposal for a new football competition was announced and received negative reactions, especially from the football governing bodies. The European Super League (ESL) proposal, introduced in April 2021, aimed to establish a closed competition featuring twenty prominent European football teams.[12] While some teams would secure a permanent spot, others qualified based on their annual performance. However, the proposal faced immediate backlash, with players, supporters, and football authorities voicing strong objections. As a response, UEFA and FIFA threatened to impose sanctions against any clubs and players considering participation in the ESL.[13] FIFA and UEFA are important figures in the sports field, being the international and European organisations of

[6] Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995] ECLI:EU:C::1995:463.
[7] Richard Parrish, *Sports law and policy in the European Union* (Manchester University Press 2003) p. 117.
[8] ibid p. 5.
[9] ibid pp. 117-120.
[10] Floris de Witte and Jan Zglinski, 'The Idea of Europe in Football' [2022] 1 European Law Open p. 286.
[11] Case C-415/93 Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman [1995] ECLI:EU:C:1995:463.
[12] Jan Zglinski, 'The rise and fall of the European Super League' [2021] 55 EU Law Live, p. 2.
[13] ibid p. 3.

football, respectively; hence, their reactions have an immense impact on the form and development of tournaments as well as competitions. The sanctions included, most notably, the banning of the participating clubs and players from taking part in the competitions organised by these two governing bodies, namely the Champions League, the Europa League, and the World Cup.[14]

The focus of this paper lies with the analysis of article 102 TFEU and its application to the situation of the ESL creation and UEFA and FIFA's responses. The Spanish Courts referred a preliminary question to the Court of Justice of the European Union (CJEU) in order to establish whether the responses of these bodies can be considered an abuse of a dominant position under 102 TFEU. An abuse of a dominant position refers to the situation in which the undertaking representing a powerful entity in the market uses this position to harm competition and take advantage of it, for example, fixing prices and denying access of competitors to the market.[15]

Rooted in the fact that the preliminary question concerning the ESL scenario was referred to the CJEU, this paper is guided by the research question: *To what extent should FIFA's and UEFA's response to the European Super League proposal by imposing sanctions on clubs and players be deemed an abuse of dominant position violating article 102 TFEU?* The question allows for an analysis of the relationship between the sports sector and EU competition law by exploring how article 102 TFEU is applied in cases involving sports. This exploration will consider the legal doctrine on the field and relevant case-law of the CJEU. The aim of the paper is to conclude to what extent, considering the past cases before the CJEU and the usual application of the antitrust policy on sport, the bans imposed on clubs and players by UEFA and FIFA should be categorised as an abuse. Since a preliminary question was referred to the CJEU, the focus of the paper is to discuss, independently of the actual ruling of the Court, whether the practices should be considered an abuse of dominance.

To answer the question, a doctrinal and socio-legal methodology is followed. The doctrinal method will explore the EU competition law rules and

[14] Floris de Witte and Jan Zglinski, 'The Idea of Europe in Football' [2022] 1 European Law Open p. 286.
[15] Case 322/81 Nederlandsche Banden-Industrie-Michelinn v Commission ECLI:EU:C:1983:313 para. 57.

their scope of applicability and requirements; guided by the legal norms themselves. The socio-legal method will analyse EU competition rules, taking into consideration the scenario at hand, the specificities of the sports field, and the social functions of sports, thereby putting the norms and rules into a context to explore their relationship.

2. The Relationship Between Sports and EU Competition Law

2.1. The Strengthening of this Relationship

The applicability of EU competition rules governing the sports field was mainly determined by the Court of Justice of the European Union (CJEU), in a series of judgements that covered disputes related to sports. It is important to note that the CJEU only started ruling on sports cases due to the overlap with issues such as the free movement of workers and anti-competitive practices in the field, impacting the internal market.[16] EU competition rules apply to undertakings, which are in turn defined in *Höfner* as actors exercising economic activity, in turn defined as the offer of goods and services in a market.[17] This means that EU competition rules are applicable to sports whenever the latter is practiced as an economic activity, which was established in the *Walrave*[18] and *Donà*[19] cases. Notwithstanding the ruling in these judgements, the link between competition law and the sports field was still unclear, and the Commission disinclined to enforce these rulings.[20] *Bosman*, later on, confirmed the status of certain sports activities as economic activities for the purpose of EU competition law.[21]

In 2006, for the first time, the CJEU applied articles 101 and 102 TFEU in a sports dispute in the landmark case *Meca-Medina.*[22] This case rejected the existence of a category of pure sporting rules that would not be covered by the

[16] Parrish (n 7) pp. 117-120.
[17] Case C-41/90 *Klaus Höfner and Fritz Elser v Macroton Gmbh* [1991] ECLI:EU:C:1991:161 (Höfner).
[18] Case C-36/74 B.N.O. *Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* [1974] ECLI:EU:C:1974:140 (Walrave).
[19] Case 13-76 *Gaetano Donà v Mario Mantero* [1976] ECLI:EU:C:1976:115.
[20] Parrish (n 7) pp. 105, 120.
[21] Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995] ECLI:EU:C:1995:463.
[22] Case C-519/04 *David Meca-Medina and Igor Majcen v Commission of the European Communities* [2006] ECLI:EU:C:2006:492.

antitrust articles due to its nature; instead, it established that the court must decide whether the sports dispute concerns an economic activity or not on a case-by-case basis, thus leading to the application of EU antitrust policy.[23] Additionally, the Court established that the analysis of a possible infringement of competition law by sporting rules must be done considering the particularities of sports,[24] which will be briefly explained in the next section.

The relationship between sports and EU competition law has been strengthened especially by the increased commercialisation and economic importance of sports, and, in particular, football.[25] To safeguard the internal market and the competitive balance between business entities, it has become important to ensure that the field of sports is developed respecting EU competition law.[26] For a long time, soft law instruments guided the approach taken in sports cases, until a legal basis was inserted into the Treaties.[27] In the list of competences, sports were added in article 6(e) TFEU as a supporting competence of the Union.[28] The legal basis for action in this field is seen in article 165 TFEU, which stresses that the specificities of the field of sport must be taken into account when acting in the field.

The EU's competence in sport is relatively new and its implications are still being explored. On 23 November 2021, the European Parliament (EP) adopted a resolution on EU sports policy.[29] It is worth highlighting the existence of paragraph 13 for the purpose of this paper, which states that the EP is opposed to breakaway competitions.[30] This stipulation can have implications on the current

[23] Phillip Kienapfel and Andreas Stein, '*The application of articles 81 and 82 EC in the sport sector*' 2007 p.7.
[24] ibid.
[25] Ivana Katsarova and Vivienne Halleux, 'EU sports policy: Going faster, aiming higher, reaching further' (European Parliamentary Research Service, 2019).
[26] Parrish (n 7) pp. 5-22.
[27] ibid.
[28] 'The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be: … (e) education, vocational training, youth and sport;'
[29] European Parliament Resolution of 23 November 2021 on EU sports policy: assessment and possible ways forward (2021/2058(INI)), *OJ C 224*, 8 June 2022.
[30] Paragraph 13: "and accordingly strongly opposes breakaway competitions that undermine such principles and endanger the stability of the overall sports ecosystem".

exploration of the ESL proposal, as a breakaway competition from the existing competitions organised by UEFA.[31]

2.2. Specificities of the Sports Field and Football Particular Features

Article 165(1) TFEU establishes that sporting issues must be pursued while "taking account of the specific nature of sport."[32] The Commission and the courts, when applying competition rules, must consider the particularities of the field, such as, most notably, the features of the European Sports Model.[33] This model is organised in a hierarchical pyramidal structure, with the national associations on the bottom, responding to a single European federation, in turn responding to a single worldwide federation.[34] In football, there is one national association per Member State, which operates under the realm of the European association, UEFA (The Union of European Football Associations); which in turn operates under the realm of the worldwide governing body, FIFA (International Federation of Football Associations).[35]

As seen above, for the well-functioning of football competitions as they stand currently, a quasi-monopolistic approach should be in place – also known as the 'one federation' principle, reflected in the pyramid structure.[36] At the top of the pyramid there are powerful regulatory bodies establishing the rules governing the other governing bodies below it.[37] This delineates some boundaries to the application of EU competition rules, in its *stricto sensu,* to the football sector, since the EU antitrust policy condemns the behaviour of monopolistic actors when restraining competition and in the football sector, FIFA needs to guarantee its sovereign character for the maintenance of football as known today.

Additionally, football in Europe is organised in an open competition manner. In principle, there are no guaranteed spots for any teams in the competitions and their participation therein will depend on the performance of the

[31] Pablo Ibáñez Colomo, 'Competition Law and Sports Governance: Disentangling a Complex Relationship' [2022] World Competition 45, no. 3.
[32] "The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function."
[33] Commission, 'White Paper on Sport' COM(2007) 391 final.
[34] Kienapfel and Stein (n 23) p.7.
[35] Jay Meliëzer, 'The European Super League, Super Anti-Competitive?' (2019), pp. 9-11.
[36] Jacob Kornbeck, 'EU Antitrust Law and Sport Governance, The Next Frontier?' (2023), p. 15.
[37] Arnout Geeraert et al, 'The Historic Treble in Football: the legal, political and economic driving forces behind football's transformation' 2012 Katolieke Universiteit Leuven pp. 41-43.

teams in the preliminary phases. While in theory this gives a chance for all clubs to participate in the competitions, in practice there is a group of stronger teams that are always present due to their good performances. However, this character of openness leads to another particularity of football, which reflects the necessity of having actual competitors for the clubs, with good financial means and the potential to win.[38] This competitive balance is necessary for the unpredictability of football, fomenting the interest of the public in watching the competitions and supporting their teams.

The last feature which must be highlighted is the financial solidarity in the field. The solidarity framework establishes a system of distribution of revenue that includes the lower levels of the sport. By operating in this framework, a certain amount of revenue generated at the elite level through events and competitions will be redirected and applied at the lower levels of the sport.[39] This generates a good competitive balance since it provides resources to smaller clubs, allowing them to also be engaged in competitions.[40]

FIFA and UEFA, in their statutes, have the sole power of authorising new competitions involving the representative teams, leagues, and clubs associated with them.[41] The area of influence of these bodies differs, and UEFA is the one responsible for the organisation of football in Europe, however abiding by the rules and regulations stipulated by FIFA.[42] These two bodies, besides having the regulatory power and establishing the rules within which the competitions and the clubs must operate, simultaneously organise competitions themselves and have economic interests attached to them. The difficulty lies in establishing whether the obstacles imposed by UEFA and FIFA to the new competitions are products of their regulatory powers aiming at maintaining the current structure of football or aiming at restricting competition due to their economic interests behind it.

[38] Case C-333/21 *European Superleague Company SL v Unión de Federaciones Europeas de Fútbol Profesional (UEFA) and Fédération internationale de football associations (FIFA)* [2022] Opinion of AG Rantos, para. 41.
[39] Jakub Laskowski, 'Solidarity compensation framework in football revisited' (2018) 18 The International Sports Law Journal 150.
[40] Floris de Witte and Jan Zglinski, 'The Idea of Europe in Football' [2022] 1 European Law Open 286, pp. 288, 289.
[41] See art 70(1) and (4) FIFA Statutes May 2022 version; art 49 UEFA Statutes 2021 Edition.
[42] Stefaan van den Bogaert, 'The rise and fall of the European Super League: A case for better governance in sport' [2022] Common Market Law Review 59, pp. 25-40.

2.3. The European Super League Proposal and its Repercussion

In April 2021, the first ESL proposal was introduced. This project aimed at creating a new competition involving twenty European teams, the main figures in football.[43] The competition would count on fifteen permanent members, being the major teams in Europe - the ones with the most economic power and attracting the most spectators to their matches. In addition to these permanent members, there would be five spots to other clubs alternating; the teams would be chosen by a qualifying mechanism based on their performances.[44]

At first sight, some problems with this project can already be identified, since this proposal challenges the pyramidal structure of football.[45] Indeed, this would be a rival competition to the Champions League, organised by UEFA. Also, this proposed a model of quasi-closed competition, since fifteen members would be permanent and only five spots would be subject to open competition.

The general response to this proposal was negative. Most fans did not like the idea of having an alternative competition with a closed character.[46] The reaction from fans was mainly rooted on the emotional attachment to their team and to what football represents, and the central critique came from the lack of representation in this quasi-closed ESL competition.[47] Aside from a few major clubs, such as Real Madrid, Liverpool and Barcelona, that would enjoy increased revenue due to their permanent position in the competition, most clubs disliked this idea; due to the non-guaranteed and rotating position with few spots.[48] UEFA and FIFA also did not react positively and threatened to impose sanctions on clubs and players that would participate in the ESL.[49] These sanctions would have included the banning of clubs and players from competing in events organised by them, namely Champions League and the World Cup.[50] As a consequence of these obstructive reactions, the majority of the clubs started to back down and withdraw

[43] Jan Zglinski, 'The rise and fall of the European Super League' [2021] 55 EU Law Live, p. 2.
[44] ibid pp. 2, 3.
[45] Manthan Dalwai, 'The European Super League: Examining the Validity of UEFA's bans from the Player's Perspective' (2021) 2(1) Global Sports Policy Review p. 2.
[46] Floris de Witte and Jan Zglinski, 'The Idea of Europe in Football' [2022] 1 European Law Open 286, pp. 288 and 289.
[47] ibid p. 289.
[48] Dalwai (n 45).
[49] Jan Zglinski, 'The rise and fall of the European Super League' [2021] 55 EU Law Live, p. 3.
[50] Communications Directorate, 'Advocate General Rantos: The FIFA-UEFA rules under which any new competition is subject to prior approval are compatible with EU competition law' (2022) <https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-12/cp220205en.pdf>.

their support for the ESL competition; henceforth, the proposal was quickly withdrawn.

As seen before, UEFA and FIFA are extremely important governing bodies in the field of football, and because of their statutes conferring them the sole power for the authorisation of events, they have an immense influence on the shaping and emergence of new competitions. They represent a principal figure in the market, and therefore their reactions are important for the success of a proposal. Beyond the immediate reactions, from a legal standpoint, an essential point of analysis is to determine whether UEFA and FIFA's response to, *inter alia*, impose bans on clubs and players, should be considered an abuse of a dominant position. This paper will analyse the question of whether the conduct could be qualified as abuse independently of the assessment of the Court of Justice following the preliminary question of interpretation. This will be relevant to determine whether a competition like ESL should be able to emerge, and if so, this would be revolutionary, considering the drastic departure from the current European Sports Model principles.

3. The Establishment of a Dominant Position in Light of EU Competition Law

3.1. Scope of Article 102 TFEU

The first part of article 102 TFEU states that "*Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States"*. The question as to whether UEFA and FIFA have abused their dominant position is crucial to determine the fate of the ESL competition. To determine the applicability of this article to the situation at hand, the personal, material, and geographical scopes of the provision must be analysed.

The first aspect to consider is the personal scope of article 102 TFEU. In order to trigger its applicability, the conduct must be carried out by one of more undertakings.

Undertakings are defined in *Höfner* as "every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which

it is financed".[51] The offer of goods and services on a determined market is considered an economic activity,[52] which also applies to entities connected to sports.[53] UEFA and FIFA organise competitions and concomitantly enter into sponsorship, advertising, and insurance contracts.[54] Both governing bodies aim at guaranteeing the commercial success of football as well as of their own football competitions; therefore, they are engaged in an economic activity, fulfilling the personal scope.[55] Besides being undertakings themselves, UEFA and FIFA are the collective of its member clubs and national associations, which in turn are undertakings;[56] consequently, these two governing bodies are associations of undertakings, as mentioned in the article itself.

Second, the material scope relates to areas of the economy to which competition law is applicable. Generally, every area of the economy falls within the scope of the competition law articles, except when expressly exempted in the Treaties. There is no exclusion of the sports field from the competition law umbrella in the Treaties, and the CJEU further ruled that competition rules apply to the sports field when engaging in economic activities.[57] Therefore, the material scope is also fulfilled.

Third and last, the geographical scope of this provision is one of extraterritorial jurisdiction that applies even if the undertaking is established outside the European Union, as long as the economic activity is implemented in the European Union, as defined in *Woodpulp*.[58] UEFA and FIFA exercise their economic activity in the European Union, through for example, the Champions League; as well as FIFA with the World Cup. Since both UEFA and FIFA exercise

[51] Case C-41/90 *Klaus Höfner and Fritz Elser v Macroton GmbH* [1991] ECLI:EU:C:1991:161, para. 21.
[52] Case C-35/96 *Commision v Italy* [1998] ECLI:EU:C:1998:303, para. 36.
[53] Case 36/74 B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo [ECLI:EU:C:1974:140], para. 4.
[54] Pablo Ibáñez Colomo, '*Competition Law and Sports Governance: Disentangling a Complex Relationship'*. [2022] World Competition 45, no. 3, p. 7.
[55] Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* [2008] ECLI:EU:C:2008:376.
[56] Case C-519/04 *David Meca-Medina and Igor Majcen v Commission of the European Communities* [2006] ECLI:EU:C:2006:492, para. 38.
[57] Case 36/74, B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo [ECLI:EU:C:1974:140] (Walrave).
[58] Cases 89, 104, 114, 116, 117 and 125 to 129/85 *A. Ahlström Osakeyhtiö and others v Commission of the European Communities* [1988] ECLI:EU:C:1988:447 (Woodpulp).

economic activities within the European Union, the geographical scope is also fulfilled. Therefore, as all three scopes are fulfilled, UEFA and FIFA must abide by EU competition law, thus article 102 is applicable.

3.2. Defining the Relevant Market

Article 102 TFEU concerns the prohibition of the abuse of a dominant market position. To define whether there is an abuse of a dominant position, it is necessary to determine whether there is a dominant position in the first place. The term "dominant position" was defined in *United Brands*, which relates to an undertaking that, to an appreciable extent, can behave independently of its competitors, and in this way, prevents effective competition in the relevant market.[59] Therefore, it is imperative to delineate the relevant market in which the undertaking is acting according to the relevant aspects, namely the product market and the geographical market.

To guide the establishment of the relevant market for the purposes of EU competition law, the Commission formulated a Notice on the definition of a relevant market.[60] The product dimension is analysed based on the cross-price elasticity defining whether the product has its own product market or if it belongs to another broader relevant market. In conducting this analysis, the Commission applies the " Small but Significant and Non-Transitory Increase in Price" (SSNIP) test, which aims at identifying if, by increasing the price of the product, the consumers would switch to another product;[61] in case the consumers switch products, those products are in competition and belong to the same market.[62] In a simplistic and hypothetical scenario, if UEFA increased price tickets for their matches, and consequently fans started watching an event from another organising body instead, then the competitions would be in the same market.

[59] Case C-27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [1978] ECLI:EU:C:1978:22 (United Brands).
[60] Commission Notice on the definition of relevant market for the purposes of Community competition law 97/C 372/03; *OJ C 372*, pp. 5–13.
[61] By an amount which is not negligible for the customers, but also not too high to make it unreasonable for customers to keep buying the same product.
[62] 'A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use': Andrea Amelio and Daniel Donath, 'Market definition in recent EC merger investigations: The role of empirical analysis' [2009] Law&Economics, concurrences, n. 3.

In the case of sports, there are usually three types of product markets recognised. The first relates to the exploitation of secondary features of the performances, such as broadcasting rights, marketing and ticket sales.[63] The second relates to the actual product, which is the sports contest per se; in the football scenario, this would be the market of organisation, regulation, and economic exploitation of the competitions.[64] The third product market relates to the system of transfers of players, the supply market.[65] In the case at hand relating to UEFA and FIFA, the product market can be defined as the market of organisation, regulation, and economic exploitation of international competitions between football clubs, corresponding to the second scenario described above.[66] It is very likely that football fans would follow the matches between their clubs, independently of the governing body organising it, showing that events of the organising bodies are in competition[67]. Fans have the emotional tie and loyalty with their teams, and not necessarily with the governing bodies organising the competitions.

Moving to the geographical market, the ESL would take place among the clubs in Europe, in the same way that UEFA's powers cover Europe.[68] FIFA also engage with European teams in their competitions, however it organises events worldwide, not confined to European territory. Therefore, the geographical market would be Europe since it is the place where UEFA and ESL exhaustively exercise power and is also involved by FIFA's broad sphere of influence. In conclusion, the relevant market is defined as the market for organisation, regulation, and the economic exploitation of competitions between football clubs in Europe.[69]

3.3 Analysis of a Dominant Position in the Relevant Market

Having regard to the relevant market in question, the market for organisation, regulation, and economic exploitation of international competitions, the existence

[63] Parrish (n 7) p. 119.
[64] ibid pp. 119-120.
[65] ibid.
[66] Case C-333/21 *European Superleague Company SL v Unión de Federaciones Europeas de Fútbol Profesional (UEFA) and Fédération internationale de football associations (FIFA)* [2022] Opinion of AG Rantos, para. 129.
[67] Parrish (n 7) Chapter 5.
[68] ibid.
[69] Parrish (n 7) Chapter 5.

of a dominant position must be analysed. Dominant position, as mentioned earlier, is a position enabling the undertaking to prevent effective competition from being maintained and behaving considerably independently from its competitors.[70]

It was added in *MOTOE* that an undertaking can be put into a position of dominance when possessing the rights to determine whether and in what conditions other undertakings may access the relevant market in question and pursue activities within that market.[71] UEFA and FIFA indeed have the power to authorise new bodies from entering into the market of organising competitions and regulating them. As seen in their statutes, both bodies contain provisions providing for pre-authorisation schemes in case of new competitions emerging, and only those duly authorised by these bodies can occur involving the clubs, representative teams and players associated with them.[72] Related to the national territories of the countries in Europe, the national football associations would have a dominant position; however, when it comes to the European territory, their influence is lessened. Therefore, UEFA and FIFA are presumed to hold a dominant position in the market of organising, regulating and economically exploiting competitions between football clubs in Europe.

Several factors related to particularities of the sports sector make it more susceptible to finding a dominant position flowing from the position held by FIFA and UEFA in the relevant market. Firstly, related to the pyramidal structure on which the European sports model is based, there are international federations that exercise control over the other members, by describing the rules to be followed, organising the events in which they can take part, and delineating the transfer system to be used and the rights emerging from the competitions. In the case of football, UEFA, as the official governing body in Europe, almost has a monopoly in relation to the European territory because it organises the vast majority of football competitions in that region and delineates its rules. UEFA, in turn, only responds and follows the rules imposed by FIFA. Therefore, the market share held by UEFA in Europe is enormous and almost represents a monopolistic figure.[73]

[70] Case C-27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [1978] ECLI:EU:C:1978:22, para. 65 (United Brands).
[71] Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* [2008] ECLI:EU:C:2008:376, para. 38.
[72] See art 70(1) and (4) FIFA Statutes May 2022 version; art 49 UEFA Statutes 2021 Edition.
[73] Parrish (n 7) p. 119.

FIFA, sequentially, is the governing body at the top of the pyramid, establishing the rules that the other governing bodies must follow, being responsible for worldwide competitions, thus also occupying a dominant position in the market.

Additionally, in sports, the supply-side substitutability is very low, since there are not many competitors in the market nor many institutions that can start providing similar services, in a manner that would be interchangeable with the UEFA's and FIFA's services.[74] Supply-side substitutability relates to the quantity of actors supplying or able to supply the consumers with the same goods or services in the market.[75] This low supply-side substitutability is seen in the football situation: there are few to no suppliers besides UEFA in Europe.

Due to the above-mentioned reasons, UEFA and FIFA can be considered to hold a dominant position in the relevant market, which is the market of organisation, regulation, and commercial exploitation of competition between football clubs in Europe. However, it must be noted that the fact of having a dominant position is not prohibited, only the abuse of this dominance.[76] To that note, abuse of dominance is seen with imposing unfair prices, limiting production, or imposing obstacles to the establishment of new competitors in the market.[77] The question of whether UEFA and FIFA abused their dominant position through the sanctions imposed on clubs and players will be dealt with in the next section.

4. The Question on the Abuse of Dominant Position by UEFA and FIFA

The preceding section established that UEFA and FIFA indeed have a dominant position in the market. However, as also mentioned before, article 102 TFEU does not prohibit the existence of dominant positions, but instead, it prohibits the abuse of this dominance. The provision imposes a special responsibility on the dominant undertaking not to abuse its dominant position by negating access of other competitors to the market, thereby distorting competition.[78]

[74] Enrique Andreu et al, Comments for the European Commission's evaluation of the 1997 Market Definition Notice, 2020, p. 3.
[75] ibid.
[76] TFEU art 102.
[77] Case 322/81 *Nederlandsche Banden-Industrie-Michelinn v Commission* ECLI:EU:C:1983:313 para. 57.
[78] Case 322/81 *Nederlandsche Banden-Industrie-Michelinn v Commission* ECLI:EU:C:1983:313 para. 57.

UEFA and FIFA, have under their statutes, the power to authorise who may organise events and establish the conditions that must be followed for this to happen; at the same time, they organise competitions themselves.[79] Since both governing bodies have economic interests attached to promoting their own competitions, this may lead them to restrict others from entering into the market for the sole reason of guaranteeing their profits. UEFA's and FIFA's power of authorisation of new competitions and imposition of disciplinary measures on participants is not subject to clear and objective criteria, nor are they subjected to limitations, but rather the imposition depends on their discretion.[80] Due to their dominant position in the market and their extensive powers based on their discretion, there is a conflict of interest at hand which may lead to an abuse of dominance.[81]

In a landmark case involving the Fédération International d'Automobile (FIA), which represents the global authority in motor racing competitions, the Commission considered that the FIA prima facie abused its dominant position in the market due to the obstacles imposed for competitors to enter the market.[82] FIA had the dual role, organising competitions and delineating the framework in which competitions should operate. The Commission reached a settlement with FIA in 2001. The latter would abstain from the regulatory field to avoid conflict of interests and it would allow other competitors to access the market of organising competitions as long as the safety requirements were met.[83] This case provided a clear direction for the separation between regulatory functions and the economical exploitation of competitions. Additionally, the rules established by FIA prohibiting drivers and race teams to take part in competitions organised by other

[79] See art 70(1) and (4) FIFA Statutes May 2022 version; art 49 UEFA Statutes 2021 Edition.
[80] Guilherme Oliva Guimarães, *Ligas de Futebol, Superliga Europeia e Direito da Concorrência*, 2020, p. 25.
[81] Recurso 150/2021 *European Super League Company S.L. v Unión de Federaciones Europeas de Fútbol Profesional (UEFA) and Fédération internationale de football associations (FIFA)*, [2021] Juzgado de lo Mercantil n. 17 de Madrid, AJM M 747/2021 – ECLI:ES:JMM:2021:747ª; Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* [2008], ECLI:EU:C:2008:376, para. 52.
[82] European Commission Press Release, *Commission opens formal proceedings into Formula One and other international motor racing series* [1999] <https://ec.europa.eu/commission/presscorner/detail/en/IP_99_434>
[83] Arnout Geeraert, 'Limits to the autonomy of sport: EU law' HIVA-Research Institute for Work and Society KU Leuven, pp. 22-24.

bodies were considered rules shielding sports associations from competition and therefore not lawful.[84]

Similarly, UEFA and FIFA have a dual role in the sports market: both have regulatory powers while organising football competitions themselves. [85] Differently from *FIA*, *MOTOE* established that the sole fact of an undertaking having the dual role of regulating but also organising competitions, is not considered an abuse of dominant position. [86] However, when the power of authorisation of new competitions is conferred to an undertaking that organises competitions itself, the latter has an advantageous position in regard to its competitors.[87] UEFA, being the operator and regulator, must ensure that when exercising its roles, it is not unduly depriving competitors of the possibility of accessing the market, distorting competition.[88] Thus, if the governing body would employ this authority to unjustifiably bar new competitions from emerging, it would be categorised as an abuse of power.[89]

UEFA and FIFA, by imposing bans on the players and clubs that were involved in the ESL proposal, imposed obstacles to the insertion of a competitor in the market. The deprivation did not only regard the insertion of new competition on the market, but UEFA and FIFA restricted access to resources in the market, which in football are the clubs and the players. The two governing bodies restricted access to the necessary resources for the ELS to be competitive in the market. Closing off the market to a potential competitor could lead to the presumption of abuse of dominant position, as the two bodies have the sole powers of authorising any new competition.

The system of bans is not based on objective criteria and raises questions regarding their proportionality in face of the aim to be achieved. The sanctions

[84] Arnout Geeraert, 'Limits to the autonomy of sport: EU law' HIVA-Research Institute for Work and Society KU Leuven, pp. 22-24.
[85] Case C-333/21 *European Superleague Company SL v Unión de Federaciones Europeas de Fútbol Profesional (UEFA) and Fédération internationale de football associations (FIFA)* [2022] Opinion of AG Rantos, para. 129.
[85] Parrish (n 7) p. 46.
[86] Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* [2008], ECLI:EU:C:2008:376, para. 48.
[87] Case T-93/18 *International Skating Union v European Commission* [2020], para. 70.
[88] ibid para. 75.
[89] Katarina Pijetlovic, 'A Summary of the Advocate General Opinion in the European Super League' (*lawinsport.com*, 17 December 2022) <www.lawinsport.com/topics/item/a-summary-of-the-advocate-general-opinion-in-the-european-super-league-case-2>.

would not allow the clubs participating in the ESL project to participate in the competitions organised by UEFA and FIFA; additionally, the bans extended to the participating players, prohibiting them from taking part in the big competitions as well. The latter ban also indirectly affected the national teams, which would have players banned from participating in the competitions.

Practices by dominant undertakings that restrict competition will be considered an abuse unless there are objective justifications.[90] From a purely EU competition law point of view, these sanctions would more easily be considered an abuse of dominance; however, the particularities of sports as described above must be considered in the analysis.[91] It can be said that the sports field enjoys a certain kind of 'conditional autonomy' under EU law, allowing deviations from the EU competition rules if proven that they are inherent in the pursuit of the sporting activity.[92] Nevertheless, the Commission rejected the notion of a block exemption for the sports field, and the justifications must be analysed on a case-by-case basis.[93] To justify a deviation, it must be proven that the conduct pursues a legitimate aim, which cannot be achieved in any other way, and that the conduct respects the principle of proportionality.[94]

4.1. The Existence of Legitimate Aims Behind the Imposition of Bans

The ESL company argued that the bans on the clubs and players lacked a clear legitimate aim.[95] The Advocate General mentioned in its opinion, however, that even though the aims were not clearly identified, justifications may still apply.[96] The measures must be interpreted taking into consideration the context behind

[90] Case C-333/21 *European Superleague Company SL v Unión de Federaciones Europeas de Fútbol Profesional (UEFA) and Fédération internationale de football associations (FIFA)* [2022] Opinion of AG Rantos, para. 129.
[90] Parrish (n 7).
[91] Moritz Lorenz and Maike Herrlein, 'The European Sports Model as a vindication for UEFA? Why the ECJ is likely to deviate from Advocate's General Opinion in the European Super League case' (*lawinsport.com*) <www.lawinsport.com> accessed 18 June 2023.
[92] Stephen Weatherill, *Principles and Practice in EU Sports Law* (OUP 2017), p. 358.
[93] Parrish (n 7) p. 150.
[94] Arnout Geeraert '*Limits to the autonomy of sport: EU law*', HIVA- Research institute for work and society, KU Leuven, p. 21.
[95] Recurso 150/2021 *European Super League Company S.L. v Unión de Federaciones Europeas de Fútbol Profesional (UEFA) and Fédération internationale de football associations (FIFA),* [2021] Juzgado de lo Mercantil n. 17 de Madrid, AJM M 747/2021 – ECLI:ES:JMM:2021:747ª;
[96] Case C-333/21 *European Superleague Company SL v Unión de Federaciones Europeas de Fútbol Profesional (UEFA) and Fédération internationale de football associations (FIFA)* [2022] Opinion of AG Rantos, para. 68.

their adoption.[97] The opinions from the advocate general are not binding on the CJEU, however the court usually does follow their opinions.[98]

As established in section 3.3 above, UEFA has a dominant position in the market and has an advantage in the face of the competitors due to its dual role as organizer and regulator of football competitions in Europe. Therefore, the governing body has a duty not to prohibit other competitions from emerging simply to favour its own.[99] Regarding this aspect, it must be considered that, in the existing legal framework, UEFA's and FIFA's non-approval of the new competitions does not preclude their creation. The approval is only required if the new competitions desire to have access to and engage the clubs and players that are affiliated with UEFA and FIFA. In this sense, UEFA's and FIFA's conducts are not prohibiting the access of competitors to the market of organising and exploiting competitions; they only deny access to the resources (players and clubs) which are associated with them.[100]

Considering the scenario mentioned, the ESL would have no legal impediment if creating a competition involving only new clubs and players, clubs that are not associated with FIFA and UEFA. Therefore, the restriction does not relate to access and insertion into the market, but merely to competitiveness in the market. The disciplinary measures are only directed to players and clubs that want to participate in the ESL competition and, at the same time, keep engaged in the competitions organised by UEFA and FIFA.

4.1.1. The Maintenance of the Current Football Structure

A legitimate aim behind the imposition of restrictions on the creation of new competitions is the maintenance of the current football structure. The European Union aims at preserving the European Sports Model, organised in a pyramidal

[97] Case C-333/21 *European Superleague Company SL v Unión de Federaciones Europeas de Fútbol Profesional (UEFA) and Fédération internationale de football associations (FIFA)* [2022] Opinion of AG Rantos, para. 129.
[97] Parrish (n 7) pp. 68-69.
[98] Moritz Lorenz and Maike Herrlein, 'The European Sports Model as a vindication for UEFA? Why the ECJ is likely to deviate from Advocate's General Opinion in the European Super League case' (*lawinsport.com*) <www.lawinsport.com> accessed 18 June 2023.
[99] Case T-93/18 *International Skating Union v European Commission* [2020], para. 75.
[100] Case C-333/21 *European Superleague Company SL v Unión de Federaciones Europeas de Fútbol Profesional (UEFA) and Fédération internationale de football associations (FIFA)* [2022] Opinion of AG Rantos, para. 74.

model.[101] The insertion of a new competition in the market, involving the same clubs and teams would pose a challenge to the maintenance of this structure. In *Wouters*, the prohibition of partnerships, although restricting competition, was considered lawful to maintain the organisational structure of the legal profession in the member state in question, as long as the restrictions were necessary and proportional to this objective.[102] The Wouters test was also applied to the sports sector in the *Meca-Medina* case.[103]

The Advocate General emphasised the importance of the European Sports Model for the football sector, and the maintenance of the pyramidal structure to guarantee the promotion of the sports' values, such as solidarity and open competition guided by sporting merit.[104] Through a pyramidal structure, there is a guarantee that the rules governing the competitions will be uniform, without big discrepancies, as all athletes know the regulatory framework they are operating in.[105] Additionally, this organisation guarantees that all safety requirements are met.[106] The relevance of this feature is seen in the wording of article 165 TFEU, which aims at promoting the European Sports Model.[107] This provision further elucidates that Union action must aim at preserving the physical and moral integrity of sportsmen, which would be safeguarded with the maintenance of this pyramidal model.

4.1.2. The Principle of Solidarity and the Competitive Balance

The current structure of football is rooted in historic values, such as solidarity. Currently, the revenue generated by the competitions is redistributed across all sports levels, from professional to amateur, and among all clubs within the same

[101] Katarina Pijetlovic, *European model of sport: alternative structures*, Research handbook on EU sports law and policy (Edward Elgar Publishing 2018), pp. 330-332.
[102] Case C-309/99 *J.C.J. Wouters, J.W. Savelbergh, Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten* [2002], 110. ECLI:EU:C:2002:98.
[103] Case C-519/04P *David Meca-Medina and Igor Majcen v Commission of the European Communities* [2006] ECLI:EU:C:2006:492.
[104] Case C-333/21 *European Superleague Company SL v Unión de Federaciones Europeas de Fútbol Profesional (UEFA) and Fédération internationale de football associations (FIFA)* [2022] Opinion of AG Rantos, para. 30.
[105] Katarina Pijetlovic, *European model of sport: alternative structures*, Research handbook on EU sports law and policy (Edward Elgar Publishing 2018), p. 328.
[106] Katarina Pijetlovic, *European model of sport: alternative structures*, Research handbook on EU sports law and policy (Edward Elgar Publishing 2018), p. 336.
[107] Katarina Pijetlovic, 'A Summary of the Advocate General Opinion in the European Super League' (*lawinsport.com*, 17 December 2022) <www.lawinsport.com/topics/item/a-summary-of-the-advocate-general-opinion-in-the-european-super-league-case-2> accessed 18 June 2023.

level.[108] This redistribution aims at helping clubs to invest in their youth development and local community programmes.[109] It can be argued that the solidarity principle enhances the competitive balance, since it helps the smaller clubs to have access to more resources than they would have on their own.[110] The solidarity framework establishes a system of distribution of revenue that includes the lower level of the sport.[111] The ESL competition would, on the other hand, challenge this principle and undermine its effect.[112] The ESL would attract supporters as it concentrates some of the major clubs in Europe, with many interesting matches between these strong clubs. Accordingly, this would reduce the appeal and profitability of the UEFA's competitions, since many spectators will be attracted to the ESL matches. In this way, the total revenue generated by UEFA's competitions would be reduced, consequently reducing the amount shared at the lower levels of sport.[113] The importance of the redistribution of revenue is seen due to its focus on encouraging clubs to adopt important policies regarding health, the youth and social inclusion; the beneficial effects coming from these policies have been largely recognised, including by the European Parliament.[114]

Additionally, this solidarity scheme is very important to the football field, since it is necessary to maintain a certain competitive balance and guarantee that the clubs have potential competitors with real chances of winning.[115] Part of the success of football comes from the uncertainty behind the results of competitions.[116] This uncertainty can only be achieved if the clubs have resources to compete with each other and ensuring the uncertainty of the results is one aim

[108] Floris de Witte and Jan Zglinski, 'The Idea of Europe in Football' [2022] 1 European Law Open 286, p. 300.
[109] UEFA, 'UEFA solidarity payments: how they work' (2019) <www.uefa.com>.
[110] Francisco Javier Lopez Frias et al, 'Whose interests? Which solidarity? Challenges of developing a European Super League' [2023] Soccer & Society, vol. 24, no. 4, p. 467, 468.
[111] Jakub Laskowski, 'Solidarity compensation framework in football revisited', The International Sports Law Journal, 2018.
[112] Parrish (n 7) p. 212.
[113] Rebecka Nordblad, 'European Super League: kicking-off the match against FIFA and UEFA' (2022) <https://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=9084587&fileOId=9084589> p. 41.
[114] Katarina Pijetlovic, *European model of sport: alternative structures* (Edward Elgar Publishing 2018).
[115] Floris de Witte and Jan Zglinski, 'The Idea of Europe in Football' [2022] 1 European Law Open 286, p. 469.
[116] Parrish (n 7) p. 248.

recognized as legitimate by the CJEU.[117] Additionally, football counts on a limited supply of new talents, who usually start at the lower levels of sport (amateur) until joining bigger clubs.[118] Therefore, a substantial interest behind distributing revenue to the lower levels exist, since they develop the future players for the higher levels.

On a related note, not only would the insertion of the ESL into the market undermine the solidarity element, but also its creation was partially motivated to undermine this principle.[119] Some major clubs and stakeholders behind the proposal were unsatisfied with sharing revenue with smaller clubs, which contributed less profit to competitions due to fewer supporters and investors. They intended to create a competition between the most profitable teams to distribute the revenue only between themselves. Thus, the solidarity principle upon which the current football framework heavily relies on would be undermined.

In light of the considerations above, it must be added that not only the revenue to redistribute would be reduced, but the major clubs would have access to even more resources. By participating in the ESL, these clubs would have an extra source of revenue in addition to the resources generated by UEFA's and FIFA's competitions. The revenue originating in the ESL would be concentrated among the high-performing teams, which are already strong in face of the competitors.[120] A projection on the potential revenue of the ESL, solely from media and sponsorship contracts, shows that the league revenue would be around 4 billion euros, and the member club revenue would be around 264 million euros.[121] This is comparable to UEFA's total earnings, so some clubs would have a doubled revenue with the creation of ESL. This additional revenue could represent a big impairment on the competitive balance, since only certain clubs

[117] European Commission, Accompanying document to the White Paper on Sport COM(2007) 391 final.
[118] Floris de Witte and Jan Zglinski, 'The Idea of Europe in Football' [2022] 1 European Law Open 286, p. 288.
[119] ibid.
[120] Floris de Witte and Jan Zglinski, 'The Idea of Europe in Football' [2022] 1 European Law Open 286, p. 302.
[121] Statista, 'Potential revenue from media and sponsorship deals 133 for the European Super League as of April 2021' (Statista, April 2021) <www.statista.com/statistics/1230111/european-super-league-sponsorship-revenue/> accessed 2 December 2023.

would have access to this new source of income, without any solidarity redistribution: the ESL would only make the strong teams even stronger.[122]

4.1.3. The Maintenance of the Open Competition Model

Another justification is to guarantee the openness of competitions, based on sporting merit.[123] This rationale centers on ensuring that competitions remain open and merit-based. UEFA's and FIFA's events exemplify this, as they do not have permanent teams. Instead, teams earn their spots based on their seasonal or past performances. Essentially, continuous performance determines a team's participation, with none having a guaranteed spot.

The proposed ESL would not be based on this model of open competition and sporting merit. Instead, the majority of the spots would be occupied by permanent members, and only five spots would be available to other teams qualifying based on their performance.[124] This project reflects the self-interest of few clubs on earning a higher revenue, instead of opening doors to an open competition where all clubs could participate in.[125] Therefore, the ESL does not follow those crucial values intrinsic to the European Sports Model. According to Pijetlovic, the European Sports Model emphasizes open competition; thus, closed competitions inherently conflict with this mode.[126]

4.1.4. Economic Interests

Lastly, departing from the purely sporting justifications, UEFA and FIFA imposed the sanctions to protect their own economic interests.[127] It is not anti-competitive per se for an undertaking to impose measures attempting at protecting its own economic interests, as seen in *Cartes Bancaires*.[128] An undertaking should be able

[122] Katarina Pijetlovic, *European model of sport: alternative structures* (Edward Elgar Publishing 2018), p. 338.
[123] Floris de Witte and Jan Zglinski, 'The Idea of Europe in Football' [2022] 1 European Law Open 286, p. 287.
[124] Jan Zglinski, 'The rise and fall of the European Super League' [2021] 55 EU Law Live, p. 2.
[125] Stefaan van den Bogaert, *The rise and fall of the European Super League: A case for better governance in sport* [2022] Common Market Law Review 59, p. 28.
[126] Katarina Pijetlovic, *European model of sport: alternative structures*, Research handbook on EU sports law and policy (Edward Elgar Publishing 2018), p. 331.
[127] Case C-333/21 *European Superleague Company SL v Unión de Federaciones Europeas de Fútbol Profesional (UEFA) and Fédération internationale de football associations (FIFA)* [2022] Opinion of AG Rantos, para. 106.
[128] Case C-67/13 P, *Groupement des cartes bancaires v. Commission* [2014] EU:C:2014:2204.

to prevent the risk of suffering from free-riding by other members.[129] If the ESL was inserted in the market, it would use the resources currently used by UEFA and FIFA — the clubs and players affiliated with them, without sharing the costs nor abiding by their rules.[130] Since competition law applies to undertakings – entities engaged in economic activities – these undertakings are naturally expected to safeguard their economic interests.[131] It was considered by the Advocate General that the position of FIFA and UEFA would be weakened if the ESL was inserted in the market, and therefore the reactions by these bodies was required.[132] In this way, the sanctions have objective justifications ranging from sporting terms to economic considerations.[133]

From the exploration in section 4.1, it can be said that there are legitimate aims behind the imposition of the bans by UEFA and FIFA.

4.2. Necessity and Proportionality

The last step of the analysis is to define whether the conduct of the bodies, which imposed sanctions on clubs and players, was necessary and proportional. The *Meca-Medina* case defined that, to guarantee that the rules of the governing body are respected, a system of sanctions must be available.[134] It was found that sanctions are inherent to the system to ensure compliance with the regulatory norms of the sport.[135] In the case at hand, other measures would not be efficient in attaining the objectives of protecting the structure of football: by imposing fines,

[129] Pablo Ibáñez Colomo, '*Competition Law and Sports Governance: Disentangling a Complex Relationship'*. [2022] World Competition 45, no. 3, p. 338.
[130] Case C-333/21 *European Superleague Company SL v Unión de Federaciones Europeas de Fútbol Profesional (UEFA) and Fédération internationale de football associations (FIFA)* [2022] Opinion of AG Rantos, para. 106.
[131] Pablo Ibáñez Colomo, '*Competition Law and Sports Governance: Disentangling a Complex Relationship'*. [2022] World Competition 45, no. 3, p. 341.
[132] Case C-333/21 *European Superleague Company SL v Unión de Federaciones Europeas de Fútbol Profesional (UEFA) and Fédération internationale de football associations (FIFA)* [2022] Opinion of AG Rantos, para. 108.
[133] ibid para. 143.
[134] Katarina Pijetlovic, 'A Summary of the Advocate General Opinion in the European Super League' (*lawinsport.com*, 17 December 2022) <www.lawinsport.com/topics/item/a-summary-of-the-advocate-general-opinion-in-the-european-super-league-case-2> accessed 17 June 2023.
[135] Rebecka Nordblad, 'European Super League: kicking-off the match against FIFA and UEFA' (2022) <https://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=9084587&fileOId=9084589> accessed 17 June 2023, p. 42.

for example, the new league could pay the required amount and proceed with the project.[136]

The proportionality aspect is more complex. Firstly, the threat of sanctions imposed on clubs and imposed on players must be analysed separately. UEFA and FIFA threatened to ban the ELS participating clubs and athletes from taking part in the World Cup as well as in the European Championship.[137] On the one hand, clubs are the ones associated with FIFA and UEFA and wish to remain affiliated with these bodies to participate in their competitions; therefore, in turn, they must abide by their rules. Some of the affiliated clubs were also behind the formation of the breakaway competition and supported the project. Therefore, the sanctions on clubs appear more proportionate because they target entities that seek to be associated with UEFA and FIFA, and simultaneously create a new league, undermining the sport's pyramidal structure and values with an added revenue stream.[138]

On the other hand, the bans imposed on individual players raise concerns regarding their compatibility with EU competition law. The players were not the ones directly involved in the project of creation of the ESL. They are associated with clubs, having to respect the decisions taken by the latter. The bans imposed on players not only affect the competition aspect, but also restrict the free movement of workers.[139] The ban would restrict the ability of the players themselves to participate in the matches around Europe and prevent them from taking part in independent competitions.[140] Therefore, any bans targeted at individual players cannot be considered proportional.

Additionally, by imposing bans on players, there is an indirect sanction on national teams that did not participate in the proposal. Because of the bans, some players would not be able to represent their national teams in the World Cup, the

[136] Katarina Pijetlovic, 'A Summary of the Advocate General Opinion in the European Super League' (*lawinsport.com*, 17 December 2022) <www.lawinsport.com/topics/item/a-summary-of-the-advocate-general-opinion-in-the-european-super-league-case-2> accessed 17 June 2023.
[137] Floris de Witte and Jan Zglinski, 'The Idea of Europe in Football' [2022] 1 European Law Open 286, p. 306.
[138] Katarina Pijetlovic, 'A Summary of the Advocate General Opinion in the European Super League' (*lawinsport.com*, 17 December 2022) <www.lawinsport.com/topics/item/a-summary-of-the-advocate-general-opinion-in-the-european-super-league-case-2> accessed 17 June 2023.
[139] Arnout Geeraert, 'Limits to the autonomy of sport: EU law' HIVA- Research institute for work and society, KU Leuven, pp. 20-21.
[140] ibid p. 9.

major FIFA competition, and thus indirectly punishing these teams. This view of disproportionality is supported by the *International Skating Union* case, in which the sanctions imposed on players were considered disproportionate and violating EU competition law.[141] The ISU rules on approval of new competitions banned skaters from skating events that were not approved by ISU, which could be up to a life-time ban.[142]

Therefore, it can be said that the ban imposed on clubs, due to their active involvement in the creation and support of the ESL, is proportional; while the ban imposed on the individual players exceeds the limits of proportionality.

All these justifications, even though valid reasons, could still be put forward due to UEFA's and FIFA's interest in the promotion of their competitions, safeguarding their own interests – which could lead to an abuse of dominance. However, another important consideration is that the ESL project concerns a closed-competition league, being anti-competitive itself.[143]

Therefore, it is in the interest of the European Union and in the interest of the sport itself to not allow the breakaway competition to emerge since it poses risks to the basis and values of the sport nowadays.[144] Even if UEFA and FIFA did not react by imposing the sanctions, the ESL would still require the Commission's approval to operate. However, it is unlikely that a competition that challenges the pillars of the European Sports Model would pass through the Commission's scrutiny; due to its closed character and lack of solidarity, representing a potential disruption of the competitive balance and a challenge to the current organisational pyramid.[145]

The justifications presented above are suitable for the specific situation regarding the ESL proposal. In this scenario, the justifications can be accepted to preserve the European Sports Model values; however, it will not justify every sanction imposed by these two governing bodies on future competitors. The reasons why these are successful in the present case is mainly due to the anti-

[141] Pablo Ibáñez Colomo, 'Competition Law and Sports Governance: Disentangling a Complex Relationship' [2022] World Competition 45, no. 3, p. 342.
[142] European Commission, 'Commission sends Statement of Objections to International Skating Union on its eligibility rules' (European Commission press release, Antitrust, 2016) <https://ec.europa.eu/commission/presscorner/detail/es/IP_16_3201>.
[143] Jay Meliëzer, 'The European Super League, Super Anti-Competitive?' (2019) pp. 24-25.
[144] Katarina Pijetlovic, *European model of sport: alternative structures*, Research handbook on EU sports law and policy (Edward Elgar Publishing 2018), p. 328.
[145] Parrish (n 7) p.133.

competitive nature of the new competition itself. The ESL goes against the values preserved and desired in the sports field at the present moment, therefore the sanctions can be justified.

In any event, if a new competition were to emerge, respecting these values of open competition with sporting merits and solidarity, it would be hard to say that the imposition of sanctions is justified. This consideration comes from the fact that the legitimate aims would largely focus on UEFA's and FIFA's economic interests, which are intertwined with their dual roles and their efforts to maintain dominant market positions through football's pyramidal structure. As a result, any future cases would necessitate a fresh analysis and a re-evaluation of these interests.

However, it is still uncertain whether the sanctions are proportional in the present case. It is more likely to be found that proportionality is met in the case of sanctions on clubs, due to their support and level of involvement in the proposed breakaway league. On the other hand, the bans imposed on players are not proportional, and therefore unlawful.[146]

5. CONCLUSION

To conclude, EU competition rules do apply to the sports field when dealing with undertakings. UEFA and FIFA's conduct by imposing sanctions on clubs and players fall under the scope of application of article 102 TFEU. The bans imposed on clubs and players have anti-competitive effects and prevent the insertion of competitors in the market. Concomitantly, these two governing bodies hold a dominant position in the market of organisation, regulation, and commercial exploitation of football competitions. Therefore, the bans imposed could be considered an abuse of dominance unless objectively justified. The justifications must contain a legitimate aim, which makes the conduct necessary and proportional for its achievement.

Justifications such as the preservation of the European Sports Model, maintaining the pyramidal structure and the solidarity scheme are valid. Also valid are the justifications of guaranteeing that all competitions abide by the same rules,

[146] Case C-333/21 *European Superleague Company SL v Unión de Federaciones Europeas de Fútbol Profesional (UEFA) and Fédération internationale de football associations (FIFA)* [2022] Opinion of AG Rantos, para. 121.

thus providing the same safety level for players. The protection of UEFA's and FIFA's own economic position in the market is also plausible. However, all conduct aiming to achieve these goals must respect the necessity and proportionality principles.

As a conclusion for the European Super League case, the Advocate General's opinion on the European Super League scenario is far-reaching and allows for an extremely limited application of EU competition law principles to the sports field. Although the conclusion can be considered desirable in the case at hand, the reasoning behind it may be challenged. From the opinion, it seemed like any attempt of new competition could be barred by the governing bodies, namely UEFA and FIFA.

The most apparent reason, which is elucidated in this paper, for the restriction on the emergence of this new competition, is the fact that the European Super League proposes a closed competition with the biggest teams in Europe. The proposal in itself is anti-competitive and restricts competition. This represents a departure from the current structure of football: the biggest teams, which already have better economic conditions, will become richer due to their alternative source of income. The imbalance between the big clubs and smaller clubs will increase, seriously distorting competition. From the viewpoint of EU competition law, the ESL can represent a strengthening of the already quasi-dominant teams in European football.

At the same time, one must recognise the importance of the maintenance of the current values guiding football, such as solidarity and open competitions. These could be aims to justify possible measures against emerging competitions. In light of this, if a new competition were to emerge and to respect these principles, as well as the safety requirements, UEFA and FIFA would not be able to impose vast restrictions on this creation. The new competition should focus on promoting an open competition, qualifying teams based on sporting merit. The only justification would be the maintenance of their figure in the market and based on economic reasons, which makes the issue delicate, since a conflict of interests is in the picture.

Therefore, the sanctions imposed on clubs do not amount to an abuse of dominant position. Although it restricts competition and prohibits the insertion of a competitor in the market, there are objective justifications showing that the

sanctions are necessary and proportional to achieve the legitimate aim desired. On the other hand, the sanctions imposed on players do not meet the standards of proportionality, since these are targeted measures compromising not only competition, but free movement of workers within the internal market of the European Union.

Climate Change Litigation in the Netherlands and the ECHR: The Missing Piece of the Puzzle

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TABLE OF ABBREVIATIONS

ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
IPCC	IPCC United Nations' Intergovernmental Panel on Climate Change

1. INTRODUCTION

Climate change is a complex problem that carries great importance for the global population and still awaits its solution. Protesters have been trying to attract national governments' attention in different ways for years. It has been their mission to spread awareness of the frightful statistics concerning the environmental destruction.[2] However, all this effort has been restrained by the bureaucratic systems of most States. Convincing an entire parliament on the importance of this subject matter can be very difficult. However, convincing a court that its government is failing to ensure a healthy environment for its citizens might be easier. Hence, in recent years, a novel class of actions has been born: climate change litigation.[3]

Different types of claims and actions are used in such lawsuits. They can be combined into two broad categories: public and private law actions.[4] Some examples of those categories are human rights claims,[5] shareholder activism,[6] fraud and consumer protection.[7] Nevertheless, this paper, the focus will be on human rights, which are one of the most frequently invoked claims in climate change lawsuits against governments, showcasing their efficiency and emphasizing the vital relationship between persons and the environment.[8] Notably, some of the world's most successful climate change cases have emerged within the Dutch legal system.[9] The most famous example is the *Urgenda* case, in which the Supreme Court of the Netherlands ruled its landmark decision that the Dutch government must reduce its greenhouse gas emissions by a minimum of 25

[2] NASA, 'Global climate change' (*nasa.gov*, 27 October 2023) <https://climate.nasa.gov> accessed 28 October 2023.
[3] Mark Clarke, Tallat Hussain, 'Climate change litigation: A new class of action' (*White & Case*, 13 November 2018) <www.whitecase.com/insight-our-thinking/climate-change-litigation-new-class-action> accessed 11 December 2022: Definition of climate change litigation: This is a term used for different proceedings connected to different climate change matters.
[4] ibid.
[5] HR 20 December 2019, ECLI:NL:HR:2019:2007, 19/00135 m.nt. Stichting Urgenda v. De Staat der Nederlanden, (hereafter, Urgenda, SC Judgment), para. 6.1.
[6] Clarke, Hussain (n 3).
[7] ibid.
[8] Global Climate Change Litigation Database, 'Global Climate Change Litigation' (*Climatecasechart.com*), <https://climatecasechart.com/non-us-climate-change-litigation/> accessed 10 November 2023.
[9] Urgenda, 'Climate litigation network' (*Urgenda.nl*), <www.urgenda.nl/en/themas/climate-case/global-climate-litigation/> accessed 11 December 2022.

percent before 2020.[10] The legal bases of Urgenda's claim were mainly articles 2 and 8 of the European Convention on Human Rights.[11]

Hence, the research question of this paper is: *What is the impact of the European Convention on Human Rights on Dutch climate change legislation and policy after the judgment in the Urgenda case?*

The methodology that will be used in this paper is the legal doctrinal research method, as this paper will analyse the role of the ECHR in the *Urgenda* cases, as well as the subsequent impact of these cases on Dutch climate change legislation and policy. The main primary sources used for this purpose are: The ECHR, The ECtHR's case law, the *Urgenda* case, the Dutch Civil Code, the Dutch Constitution, and the Climate Act 2019. The main secondary sources are the guides of the ECHR, law journals, and books.[12]

The structure of this paper consists of five parts. The first part, after the introduction, introduces an analysis of the ECHR and three of its relevant articles, namely, the right to life (article 2 ECHR), the right to respect for private and family life (article 8 ECHR), and the right to an effective remedy (article 13 ECHR). These articles will be explained in light of environmental cases. Secondly, the concept of monism will be introduced together with the relevance of the three court instances of the *Urgenda* case. Thirdly, Dutch climate change legislation and policy after the judgments given in the *Urgenda* case will be portrayed. Lastly, some general conclusions will be made, and the research question will be answered.

2. The European Convention on the Protection of Human Rights and Fundamental Freedoms

The Council of Europe is an international organisation which defends human rights, democracy, and the rule of law in Europe.[13] The European Convention on

[10] Urgenda, SC judgment (n 5) para. 9.
[11] ibid paras. 5.2.2 - 5.2.3.
[12] Ivano Alogna, Christine Bakker, and Jean-Pierre Gauci, *Climate Change Litigation: Global Perspectives* (1st edn, BRILL 2021). See also Aalt Willem Heringa, *Constitutions Compared: An Introduction to Comparative Constitutional Law* (6th edn, Eleven International Publishing 2021).
[13] Council of Europe, 'Do not get confused' (*coe.int*) <www.coe.int/en/web/about-us/do-not-get-confused> accessed 11 December 2022.

Human Rights is an international treaty drafted by the Council of Europe.[14] The ECHR consists of basic human rights, which must be interpreted as a *"*living instrument*"*, or in other words, *"*interpreted in the light of present-day conditions*"*.[15] Moreover, the Member States which have ratified the ECHR are bound to protect the rights and obligations enshrined in that Convention.[16] It is the ECtHR that interprets the ECHR primarily based on the *"*living instrument principle*"*.[17]

As the focus of this paper is climate change litigation, only relevant articles from the Convention will be considered. In the ECHR, there is no specific right to live in a healthy environment.[18] However, the ECtHR has interpreted other articles which provide protection for fundamental rights in relation to the environment.[19] Two of those rights are the right to life under article 2 ECHR, and the right to respect for private and family life under article 8 ECHR.

2.1. The Right to Life (Article 2 ECHR)

L.C.B. v The United Kingdom is a landmark ECtHR case, specifically addressing the right to life.[20] In this case, LCB who was diagnosed with leukaemia in 1970, argued that her illness was a result of her father's exposure to radiation from the nuclear testing conducted by the UK in the Christmas Islands in 1958.[21] LCB argued that the UK government had failed to monitor the radiation to which her father was exposed to, and, consequently, her right to life. The significance of this case lies in the ECtHR's interpretation of article 2 ECHR. For the first time, the court determined that article 2 ECHR not only obliges States to refrain from the intentional and unlawful taking of life, but it also creates positive obligations towards States to safeguard the lives of people living within their jurisdiction.[22] Positive obligations are distinct from negative obligations in the sense that they

[14] Bernadette Rainey, Pamela McCormick, and Clare Ovey, *The European Convention on Human Rights* (8th edn, OUP 2021), p. 7.
[15] *Tyrer v The United Kingdom* App no 5856/72 (ECtHR, 25 April 1978), para. 31.
[16] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 1.
[17] *Tyrer v The United Kingdom* (n 14) para. 31.
[18] *Kyrtatos v. Greece,* ECHR 2003-VI, para. 52.
[19] European Court of Human Rights, 'Guide on the case-law of the European Court of Human Rights, Environment' (*echr.coe.int*, 31 August 2022) <www.echr.coe.int/documents/d/echr/Guide_Environment_ENG> accessed 28 October 2023.
[20] App no 23413/94 (ECtHR, 9 September 1998), para. 1.
[21] ibid paras. 10-16.
[22] App no 23413/94 (ECtHR, 9 September 1998), para. 36.

impose on Member States the duty to proactively take steps to uphold ECHR rights.[23] Hence, those positive obligations of States have two aspects: the duty to provide a regulatory framework and the obligation to take preventive operational measures to safeguard the lives of individuals.[24] Positive obligations, under article 2 ECHR, can emerge in a variety of situations,[25] including cases involving environmental disasters.[26]

The role of the Member States of the Convention is, therefore, to take the appropriate steps in cases when there is a *"*real and immediate risk*"* to one's life.[27] This is only if the risk is known to the State concerned.[28] This function of the States creates the connection between the rights guaranteed by article 2 ECHR and the dangers posed by climate change. The *"*real and immediate risk*"* criterion has not been elaborated by the ECtHR, thereby rendering the exact stringency of this condition challenging to ascertain.[29] Nevertheless, certain legal scholars have interpreted the meaning of this requirement. In their analysis, *"*real risk*"* is construed as a risk that is objectively substantiated, while *"*immediate risk*"* is characterised as a risk which is "present and continuing".[30] Moreover, the ECtHR has considered a *"*collective dimension*"* in environmental cases,[31] as a result article 2 ECHR safeguards not only particular individuals but society as a whole.[32] This means that the State must protect larger group of persons or the population of a geographical area when there is a potential threat which threatens their lives.

2.2. The Right to Respect for Private and Family Life (Article 8 ECHR)

[23] Laurens Lavrysen, *Human rights in a positive state: rethinking the relationship between positive and negative obligations under the European Convention on Human Rights* (Cambridge: Intersentia 2016), p.1.
[24] European Court of Human Rights, 'Guide on article 2 of the European Convention on Human Rights' (*echr.coe.int*, 31 August 2022) <www.echr.coe.int/documents/d/echr/Guide_Art_2_ENG> accessed 28 October 2023, p. 8.
[25] ibid.
[26] *Öneryıldız v. Turkey,* ECHR 2004-XII, para. 71.
[27] Cees van Dam, *European Tort Law* (2nd edn, OUP 2013), p. 574.
[28] *Brincat and Others v Malta* App nos 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11 (ECtHR, 24 July 2014), paras. 105-106.
[29] Vladislava Stoyanova, 'Fault, knowledge and risk within the framework of positive obligations under the European Convention on Human Rights' (2020) Leiden Journal of International Law <doi:10.1017/S0922156520000163> accessed 10 November 2023, p. 612.
[30] ibid p. 612.
[31] Alogna, Bakker, Gauci (n 12), p. 209.
[32] *Gorovenky and Bugara v Ukraine* App no 36146/05 and 42418/05 (ECtHR, 12 January 2012), para. 32.

Article 8 of the ECHR identifies four distinct elements safeguarded by this right, namely, the sphere of private life, family life, home, and correspondence.[33] Referred to as *"*the most elastic provision*",* article 8's broad scope offers comprehensive protection to individuals. [34] Article 8 ECHR, similarly to article 2, also gives citizens the right to be protected against harm caused by pollution.[35] According to the ECtHR case *López Ostra v. Spain, "*severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely*"*.[36] For instance, one's home might be ruined by severe floods, which can be avoided if the State takes measures in time.

The applicability of article 8 of the ECHR to environmental issues depends on two conditions: firstly, an actual interference with private life must be established in an environmental scenario,[37] and secondly, the interference must meet a minimum level of severity.[38] In such cases, article 8 ECHR creates positive obligations for States to take reasonable and appropriate measures to protect individuals against possible serious damage to their environment.[39] Therefore, the positive obligations stemming from article 8 ECHR require States to take the same measures as in the context of the positive obligations under article 2 ECHR.[40] More specifically, in the *Tătar v. Romania* case,[41] the ECtHR held that States must adopt legislative frameworks to effectively prevent damage to the environment and human health. Article 8 ECHR protects society as a whole,[42] meaning that when climate change presents a hazard in a particular region, the entirety of that area must be safeguarded.

[33] European Court of Human Rights, 'Guide on article 8 of the European Convention on Human Rights', (*echr.coe.int*, 31 August 2022) <www.echr.coe.int/documents/d/echr/guide_art_8_eng> accessed 28 October 2023, p. 7.
[34] Luzius Wildhaber, 'The European Court of Human Rights in Action*'* in Ritsumeikan Law Review [2004] p. 84.
[35] *Cordella and Others v. Italy* App nos 54414/13 and 54264/15 (ECtHR, 24 January 2019), paras. 157-160.
[36] *López Ostra v. Spain* App no 16798/90 (ECtHR, 9 December 1994), para. 51.
[37] *Çiçek and Others v. Turkey* App nos 74069/01,74703/01, 76380/01, 16809/02, 25710/02, 25714/02 and 30383/02 (ECtHR, 3 May 2007), para. 29.
[38] *Fadeyeva v. Russia*, ECHR 2005-IV, paras. 68-69.
[39] ibid para. 89.
[40] *Kolyadenko and Others v. Russia* App nos 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05 (ECtHR, 28 February 2012), paras. 212 and 216.
[41] App no 67021/01 (ECtHR, 27 January 2009), para. 88.
[42] *Stoicescu v Romania* App no 31551/96 (ECtHR, 21 September 2004), para. 59.

2.3. The Right to an Effective Remedy (Article 13 ECHR)

Article 1 of the ECHR places the responsibility for implementing and enforcing the Convention rights and freedoms on national authorities, thus establishing the ECtHR as subsidiary to the national human rights safeguarding systems. In light of this, article 13 of the Convention provides for the right to an effective remedy, ensuring that individuals can seek redress domestically before resorting to the ECtHR.[43] This system serves not only to reduce the caseload of the ECtHR, but also enhances its effectiveness in addressing more serious cases.[44] The ambit of article 13 ECHR extends to any individual whose ECHR rights and freedoms have been infringed, entitling them pursue an effective remedy.[45] The notion of an *"*arguable grievance*"* is central in the interpretation of article 13 ECHR.[46] While the ECtHR does not precisely define that term, it adopts a case-by-case approach to determine whether a complaint is arguable.[47] The court specifies that the complaint only *"*needs to raise a Convention issue which merits further examination*"*.[48] This right is particularly significant in the interpretation of articles 2 and 8 of the ECHR, as violations of these rights necessitate the existence of an effective remedy before national authorities,[49] which can be a judicial or non-judicial bodies.[50] Furthermore, for a remedy to be effective, it must prevent or end the violation and provide adequate redress for an already committed unlawful act.[51] It must be *"*effective*"* in practice and in law.[52]

In the context of climate change litigation cases, such as the *Urgenda* cases, articles 2, 8, and 13 of the ECHR assume particular relevance.

[43] *Kudła v. Poland*, ECHR 2000-XI, para. 152.
[44] Rainey, McCormick, and Ovey (n 14) p. 135.
[45] European Court of Human Rights, 'Guide on article 13 of the European Convention on Human Rights' (echr.coe.int, 31 August 2022) <www.echr.coe.int/documents/d/echr/guide_art_13_eng> accessed 28 October 2023, p. 8.
[46] *Boyle and Rice v. The United Kingdom* (1988) Series A no.131, para. 52.
[47] ibid para. 55.
[48] ibid para. 53.
[49] Urgenda, SC Judgment (n 5) para. 551.
[50] European Court of Human Rights, 'Guide on article 13 of the European Convention on Human Rights', (echr.coe.int, 31 August 2022) <https://www.echr.coe.int/documents/d/echr/guide_art_13_eng> accessed 28 October 2023, p. 12.
[51] *Kudła v. Poland* (n 43) para. 158.
[52] *Menteş and Others v. Turkey* App no 23186/94 (ECtHR, 24 July 1998), para. 89.

3. Climate Change Litigation in the Netherlands and the European Convention on Human Rights

The Kingdom of the Netherlands is a Member State of the Council of Europe.[53] Even if the ECHR itself does not provide for a right to live in a healthy environment,[54] Dutch environmental activists and courts were one of the first to interpret articles 2 and 8 of the ECHR to protect their fundamental rights. Before analyzing how this was done, it is crucial to understand the interplay between international and Dutch law.

3.1. Monism or Dualism

The Netherlands, as a Member State to international treaties, such as the ECHR, operates within a legal framework that emphasizes the importance of the relationship between international treaties and national law. The difference between the legal concepts of monism and dualism plays a crucial role in determining the correlation between international and national legal systems.[55] The term monism refers to the fact that international treaties automatically become an enforceable part of national law.[56] Additionally, those treaties take precedence over national laws.[57]

Instead, in dualist systems, international treaties have a domestic effect only after national implementation.[58] Accordingly, the Netherlands is a monist country with respect to international treaties, such as the ECHR. Moreover, that country is subject to the jurisdiction of the ECHR,[59] and it must follow the interpretations of the ECtHR.[60] Due to the Dutch monist culture and the absence of constitutional judicial review,[61] courts in the Netherlands often turn to treaties, such as the ECHR, when a human rights issue arises.[62] A notorious example is the

[53] Council of Europe, 'Map and Members' (*coe.int*) <www.coe.int/en/web/tbilisi/the-coe/objectives-and-missions> accessed 11 December 2022.
[54] *Kyrtatos v. Greece* (n 19) para. 52.
[55] Heringa (n 12) p. 309.
[56] ibid p. 399.
[57] ibid p. 309.
[58] Heringa (n 12) p. 396.
[59] ECHR, art 32.
[60] HR 16 December 2016, ECLI:EN:HR:2016:2888, Nederlandse Federatie van Edelpelsdierehouders v. De Staat der Nederlanden, para. 3.3.3.
[61] Gw. [Constitution], art 120.
[62] Heringa (n 12) p. 349.

landmark case *State of the Netherlands v. Urgenda Foundation*.[63] Individuals in the Netherlands may rely on treaty provisions that their country has ratified in court,[64] and those provisions take precedence over any conflicting domestic statutes.[65] However, only self-executing provisions are binding.[66]

3.2. STATE OF THE NETHERLANDS V. URGENDA FOUNDATION (THE HAGUE DISTRICT COURT)

A landmark case which exemplifies Dutch monism and the intersection between international and national legal systems is the *Urgenda* case. The Urgenda Foundation (short for Urgent Agenda),[67] along with 886 Dutch citizens opened a case against the government of the Netherlands in 2013.[68] This was because in 2007 the United Nations' Intergovernmental Panel on Climate Change (IPCC) issued its fourth assessment report on climate change, where it was stated that developed countries, including the Netherlands, must reduce its greenhouse gas emissions reduction target of 25-40 percent by 2020 compared to 1990 levels.[69] In that report it was described that a global warming of more than 2º C would be dangerous and would cause irreversible climate change, and it was stated that in order to have a chance of not exceeding those 2º C, it is crucial for developed countries to reach the reduction target mentioned above.[70]

Nevertheless, the Dutch government announced that it will deviate from this target, as it was expected to reach only a 14-17 percent reduction in 2020.[71] Therefore, the primary contention of the *Urgenda* case revolves around the assertion that the government's efforts to mitigate the risks associated with climate

[63] Heringa (n 12) p. 349.
[64] Gw. [Constitution] art 93.
[65] ibid art 94.
[66] Heringa (n 12) p. 348.
[67] Urgenda, 'Mission and method'*(Urgenda.nl)* <www.urgenda.nl/over-urgenda/missie-en-werkwijze/> accessed on 11 December 2022.
[68] Alogna, Bakker, Gauci (n 11) p. 209
[69] Intergovernmental Panel on Climate Change, 'Climate Change 2007' (*ipcc.ch*, 2007) <www.ipcc.ch/site/assets/uploads/2018/02/ar4_syr_full_report.pdf> accessed on 11 November 2023.
[70] Intergovernmental Panel on Climate Change, 'Climate Change 2007' (*ipcc.ch*, 2007) <www.ipcc.ch/site/assets/uploads/2018/02/ar4_syr_full_report.pdf> accessed on 11 November 2023.
[71] Rb. Den Haag 24 juni 2015, ECLI:NL:RBDHA:2015:7145, C/09/456689 / HA ZA 13-1396 m.nt. Stichting Urgenda v. De Staat der Nederlanden, (hereafter, Urgenda DC Judgment), para. 4.26.

change have been inadequate.[72] In the final ruling of the *Urgenda* case in 2019, it was upheld that the Dutch State must reduce its greenhouse gas emissions by at least 25 percent by the end of 2020 compared to 1990.[73] It was also upheld that the Dutch State failed to comply with its positive obligations as enshrined in articles 2 and 8 of the ECHR.[74] To understand how articles 2 and 8 of the ECHR were "incorporated" into the *Urgenda* proceedings, an analysis of the three court instances must be made. The Hague District Court (hereinafter, the District Court) was first requested by Urgenda Foundation to order the Dutch State to reduce greenhouse gases in the Netherlands by 40 percent, or minimum by 25 percent compared to 1990 levels by the end of 2020.[75] Dutch tort law was the main legal basis of Urgenda when the case was initially launched against the Dutch government.[76] This was because, according to the District Court, neither Urgenda nor the other plaintiffs could invoke the ECHR, as they did not fulfil the requirements for admissibility under article 34 of the ECHR. In other words, they did not provide evidence of being *"*actual or potential victims*"* of human rights violations.[77]

Instead, the District Court interpreted the ECHR rights to determine whether the Netherlands had complied with its duty of care to its citizens under Dutch tort law.[78] The standard of care was the 25-40 percent target recognized by the IPCC report. The District Court, in its 2015 ruling, held that the State must reduce its greenhouse gases by 25 percent until 2020.[79] The judgment was declared provisionally enforceable,[80] meaning that, the ruling was to be made directly executable, notwithstanding an appeal or other legal remedy sought by the party against who the judgment was given.[81]

3.3. State of the Netherlands v. Urgenda Foundation (The Hague Court of Appeal)

[72] ibid para. 4.1.
[73] Urgenda, SC Judgment (n 5) paras. 8.3.4- 8.3.5.
[74] Alogna, Bakker, Gauci (n 11) p. 208.
[75] Urgenda, DC Judgment (n 71) para. 4.104.
[76] ibid para. 4.3.5.
[77] ibid para. 4.45.
[78] Urgenda, DC Judgment (n 71) para. 4.46.
[79] ibid para. 5.1.
[80] ibid para. 5.3.
[81] Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) 1838, art 233.

The State of the Netherlands appealed the judgment of the District Court,[82] and Urgenda introduced a cross-appeal,[83] which objected to the decision of the District Court in relation to the fact that it could not rely directly on the ECHR.[84] The former appeal was rejected,[85] and the latter cross-appeal was upheld.[86]

The Hague Court of Appeal (hereafter, the Court of Appeal) decided that Urgenda could invoke the ECHR against the Netherlands, based on article 3:305a of the Dutch Civil Code,[87] which allows for class actions by interest groups. Notably, the Court of Appeal asserted that the admissibility criteria of article 34 ECHR only apply to the ECtHR and not to Dutch courts, thus it did not affect Urgenda's claims which were based on the ECHR.[88] The Court of Appeal affirmed the standing of Urgenda to rely on human rights stemming from the Convention by stating that it has sufficient interest in its claim.[89] The alteration in the legal basis of Urgenda's claim has a substantial impact on the case, given that the ECHR rights acquired "direct effect" and create positive obligations for the State. Consequently, the ECtHR jurisprudence was used instead of the margin of appreciation jurisprudence. The latter confers upon States a degree of flexibility in implementing ECHR obligations, thereby introducing a complexity in the application of positive duties in environmental cases. Hence, this consequential shift in Urgenda's claim during the proceedings before the second instance court assumes paramount importance in shaping the judgments of the aforementioned court.[90]

More concretely, the right to life and the right to respect for private and family life were analyzed by the Court of Appeal. It was stated that positive obligations, often referred to as the "duty of care" of States, could be derived from these rights.[91] For these obligations under article 8 of the ECHR to arise certain criteria must be fulfilled, namely that the infringement of the right must meet a

[82] HoF Den Haag 9 oktober 2018, ECLI:NL:GHDHA:2018:2591, 200.178.245/01 m.nt. Stichting Urgenda v. De Staat der Nederlanden, (hereafter, Urgenda, CoA Judgment), para.31.
[83] ibid para. 32.
[84] ibid para. 35.
[85] ibid para. 71.
[86] ibid para. 36.
[87] ibid para. 36.
[88] ibid para. 35.
[89] ibid paras. 38 - 39.
[90] Suryapratim Roy, 'Urgenda II and its Discontents' (2019) 13(2) Carbon & Climate Law Review <10.21552/cclr/2019/2/8> accessed on 12 November 2023.
[91] Urgenda, CoA Judgment (n 82) para. 41.

"minimum level of severity".[92] The condition of "real and immediate risk" to one's life must also be fulfilled for the positive obligations under article 2 ECHR to arise.[93] The duty of care of the State "applies to all activities, public and non-public, which could endanger the rights protected in these articles, and certainly in the face of industrial activities which by their very nature are dangerous".[94] The State's imperative requirement to take precautionary measures to prevent infringement, based on a "real and immediate" risk,[95] was primarily determined through the assessment of climate science, making it the predominate factor in safeguarding the lives of society as a whole in the case at hand.[96]

Moreover, it has been stated that there is a real threat of dangerous climate change, which would result in serious loss of life and interference with family life.[97] The Court of Appeal upheld the decision of the District Court and declared it provisionally enforceable.[98] However, the appellate court substantiated its judgment on a different legal basis, namely, European human rights.[99] Consequently, an appeal of cassation[100] was brought by the Netherlands before the Supreme Court of the Netherlands.[101]

3.4. STATE OF THE NETHERLANDS V. URGENDA FOUNDATION (SUPREME COURT OF THE NETHERLANDS)

The Dutch Supreme Court upheld the decision of the Court of Appeal.[102] Moreover, the rights under articles 2 and 8 of the ECHR, were upheld to create positive obligations on States,[103] which must protect everyone within their jurisdiction,[104] even in relation to environmental disasters.[105] The Supreme Court

[92] ibid para. 40.
[93] Dam (n 24) p. 574.
[94] Urgenda, CoA Judgment (n 82) para. 43.
[95] ibid para. 42.
[96] Benoit Mayer, 'The State of the Netherlands v. Urgenda Foundation: Ruling of the Court of Appeal of The Hague' [2018] Transnational Environmental Law, p. 167-192.
[97] Urgenda, CoA Judgment (n 82) para. 45.
[98] ibid.
[99] Urgenda, CoA Judgment (n 82) para. 76.
[100] Alogna, Bakker, Gauci (n 12) p. 208: Definition of appeal of cassation: In Dutch law, cassation serves as a check on the quality of judgements given by the courts of appeal regarding the application of the law and the reasoning behind it.
[101] Urgenda, SC Judgment (n 5) para. 1.
[102] ibid para. 9.
[103] Urgenda, SC Judgment (n 5), paras. 5.2.2- 5.2.3.
[104] ibid para. 5.2.1.
[105] ibid paras. 5.2.2- 5.2.3.

also confirmed that dangerous climate change constitutes a *"*real and immediate risk*"*, thus underlying that if actions were not taken by the State, the rights of individuals in the Netherlands could be seriously endangered. Those conclusions were substantiated by the examination of climate science, to which the Supreme Court referred.[106] It was confirmed that climate change constitutes a "real and immediate risk", thus fulfilling the requirement of article 2 ECHR. [107] Furthermore, it was affirmed that this risk possesses the potential to jeopardize the life and welfare of Dutch residents.[108] The Supreme Court decided that, based on the climate science in the 5th IPCC Assessment Report, the Paris Agreement, Conference of the Parties decisions, and United Nations Environment Programme reports,[109] all of which state that if measures are not taken in time by States to reduce greenhouse gas emissions, the damage from climate change will be irreversible.[110] The court relied on these aforementioned reports, abstaining from additional scrutiny into the manner in which climate change meets the criterions of "real and immediate risk" as specified in article 2 and the severity test in article 8 ECHR.

The sole reliance on those reports by the Supreme Court is indicative of the importance of climate science in determining responsibility of States for infringing upon their human rights obligations. Furthermore, according to the interpretation of the case *Urgenda* it becomes evident that the Netherlands must continue reducing its greenhouse gases after 2020. This is because clearly the State will not suddenly stop having a duty of care after that year.

That judgment, however, did not remain uncontroversial, since the Dutch State criticised the ruling for displaying excessive judicial assertiveness and infringing upon the separation of powers.[111] Nevertheless, one must also point out that others have affirmed that the Supreme Court had only fulfilled its institutional

[106] ibid paras. 4.1- 4.8.
[107] Urgenda, SC Judgment (n 5) paras. 4.2-4.7.
[108] ibid.
[109] ibid paras. 4.1-4.8.
[110] ibid.
[111] Urgenda, SC Judgment (n 5) para. 8.1.

mandate. This was done by interpreting the ECHR and applying it to the case at hand.[112]

4. Dutch Climate Change Legislation and Policy After the Judgments in the Urgenda Case

4.1. Trias Politica and the Urgenda case

The State of the Netherlands argued that the order given by the District Court in the *Urgenda* case was impermissible for two reasons.[113] Firstly, according to the State, the issuance of an order to create legislation is fundamentally prohibited under the jurisprudence of the Supreme Court.[114] Secondly, it was argued that courts cannot make political considerations in connection with greenhouse gases.[115] Those arguments are linked to the notion of *Trias Politica*, which concerns the delineation of powers within a State. According to that doctrine, the authority is segregated into three branches: the legislative, executive, and judicial branches.[116] Each branch in turn is assigned a specific power: the legislative branch creates legislation, law enforcement falls under the responsibility of the executive, and the interpretation and application of the laws is a task of the judiciary.[117] Therefore, in the *Urgenda* case, the State contends that a court's role is to apply the law, rather than create it.[118]

Nevertheless, according to article 3:296 of the Dutch Civil Code, courts can order the government to act, if the latter is obliged to do so. This was found to be in line with the right to an effective remedy as set out in the ECHR.[119] According to article 13 of the ECHR, it was stated in the case that *"*the courts must examine whether it is possible to grant effective legal protection by examining whether there are sufficient objective grounds from which a concrete standard can

[112] Sjoerd Lopik, 'The Second Anniversary of the Urgenda climate ruling: a day to celebrate?' (*Strasbourg observers*, 28 December 2021) <https://strasbourgobservers.com/2021/12/28/the-second-anniversary-of-the-urgenda-climate-ruling-a-day-to-celebrate/> accessed on 11 December 2022.
[113] Urgenda, SC Judgment (n 5) para. 8.1.
[114] ibid.
[115] ibid.
[116] Heringa (n 12) p. 57.
[117] ibid.
[118] Urgenda, SC Judgment (n 5) para. 2.2.3.
[119] Urgenda, SC Judgment (n 5) para. 8.2.1.

be derived in the case in question".[120] The orders, given by all three court instances in the *Urgenda* case, did not give any guide to specific legislative measures to the Dutch government.[121] This left discretion to the State to decide on the specific measures, according to article 3:296 of the Dutch Civil Code.[122] In relation to the State's second argument, asserting that courts cannot make political considerations with regards to greenhouse gasses, the Supreme Court of the Netherlands has pronounced its judgment. The court maintained that although the Dutch constitutional system delegated decision-making powers on the reduction of greenhouse gas emissions to the parliament and government, the Dutch judiciary retains the competence to ascertain whether in their discretion these entities have adhered to their legal boundaries.[123] The Supreme Court of the Netherlands ruled that such limitations encompass obligations of the State stemming from the ECHR.[124]

The State of the Netherlands, however, did not comply with the rulings of the *Urgenda* cases until 2019,[125] even if the judgments were provisionally enforceable.[126] The State created its legislative and policy framework for climate action a few months before the Supreme Court's judgment in *Urgenda*. Such a long delay of non-compliance with the court's order can lead to severe consequences, including the undermining the rule of law and judicial authority in the Netherlands, raising human rights implications, and jeopardizing environmental protection.

4.2. Legislative Framework on Climate Change in the Netherlands

In May 2019, a few months before the final judgment of the Supreme Court in the *Urgenda* case, the Climate Act was adopted. That act is legally binding, and it mandates a 49 percent emissions reduction by 2030,[127] and a 95 percent reduction

[120] ibid para. 6.4.
[121] ibid para. 9. See also Leghari v. Federation of Pakistan, (2015) W.P. No. 25501/201 (LHC) (Pak.) where the court also exercised its authority to issue orders regarding human rights and the environment.
[122] Urgenda, SC Judgment (n 5) para. 8.2.7.
[123] ibid paras. 8.3.1 - 8.3.5.
[124] ibid.
[125] Benoit Mayer, 'The Contribution of Urgenda to the Mitigation of Climate Change' (2022) 35 Journal of Environmental Law 167, p. 172.
[126] Urgenda, DC Judgment (n 71) para. 5.3.; See also Urgenda, CoA Judgment (n 82).
[127] Climate Act (*Klimaatwet*) 2019, art 2(2).

by 2050.[128] These prescribed emission reduction percentages align with both the decisions rendered in the *Urgenda* case but also with the international and European commitments of the Netherlands.[129] The Climate Act also states that the Dutch government must draw up climate plans, which must be revised at least once every five years.[130] Additionally, the emission targets specified in preamble the Climate Act are explicitly related to the Paris Agreement.[131] This is because the Paris Agreement was used in the *Urgenda* case, as there it was stated, that if the State does not reduce its greenhouse gas emissions it would be impossible to reach the temperature target of set by the international community in the Paris Agreement.[132]

In addition to this, in November 2019, the First Climate Plan was adopted on the basis of the Climate Act,[133] in which specific measures until 2030 were defined. This plan includes a target of a 49 per cent reduction in greenhouse gases by 2030.[134] Furthermore, the National Climate Agreement was reached between the Dutch government and NGOs, [135] organizations, and businesses on the 28th of June 2019. That agreement was comprised of objectives in relation to what the parties will do to help achieve climate goals. [136] More specifically, the participating sectors in the settlement are electricity, industry, built environment, traffic and transport, and agriculture.[137]

4.3. Policies on Climate Change in the Netherlands

In 2019, the Urgenda Foundation proposed a plan called "54 Climate Solutions Plan".[138] The predominant impetus behind the formulation of the plan was to assist the Dutch government in creating policies to combat dangerous climate change.[139] On the 24th of April 2020, with a four-month delay after the last judgment, the

[128] ibid art 2(1).
[129] Urgenda, SC Judgment (n 5) paras. 7.4.1 - 7.5.3.
[130] Climate Act (*Klimaatwet*) 2019, art 4.
[131] ibid.
[132] Urgenda, SC Judgment (n 5) para. 4.6.
[133] Climate Act (*Klimaatwet*) 2019, art 4.
[134] First Climate Plan (*Eerste Klimaatplan)* 2019.
[135] National Climate Agreement (*Klimaatakkoord)* 2019.
[136] Government of the Netherlands, 'Climate change' (*Government of the Netherlands*) <www.government.nl/topics/climate-change/climate-policyacce> accessed on 11 December 2022.
[137] ibid.
[138] Government of the Netherlands, 'Climate change' (*Government of the Netherlands*) <www.government.nl/topics/climate-change/climate-policyacce> accessed on 11 December 2022.
[139] ibid.

Dutch government launched its plan to comply with the Supreme Court's ruling in the *Urgenda* case.[140] The biggest measure opted for by the government was reducing coal-fired power stations' capacity (roughly by 75 percent) and the implementation of 30 solutions proposed by Urgenda.[141] For example, the Hemweg coal-power plant was closed by the end of 2019, instead of in 2024 as it was planned.[142]

Conversely, the law which prohibits coal in electricity production came into effect only on the 1st of January 2022, and will remain in force until the conclusion of 2024.[143] Nonetheless, a reduction in the capacity of coal-fired electricity is foreseen. In addition to this, for the 30 solutions which were proposed by Urgenda, the government allocated more than three billion euros. This included two billion euros to be spent on solar projects in 2020.[144] According to data calculated by Statistics Netherlands there was a reduction of 24.5 percent in greenhouse gases in 2020 compared to 1990.[145] The reduction, which is very close to the Urgenda target, was mainly due to external factors.[146] One of those external factors was the COVID-19 pandemic, which led to lockdowns that urged many people not to leave their homes, resulting in the reduced travel compared to their usual habits. According to that statistic agency, this led to an 11 percent reduction in emissions relative to 2019.[147] Additionally, one of the biggest coal-power plants "Riverstone" was stationary for a large part of 2020 due to a technical issue.[148] Those two factors led to significantly lower greenhouse gases.

[140] Urgenda, 'Climate verdict leads to 75% reduction in use of coal-fired plants + €3 billion for Urgenda's '54 climate solutions' plan' (*news.pressmailings.com*) <https://news.pressmailings.com/urgenda/dutch-climate-verdict-measures> accessed on 11 December 2022.
[141] ibid.
[142] Benoit Mayer, 'The Contribution of Urgenda to the Mitigation of Climate Change' (2022) 35 Journal of Environmental Law 167, p.173.
[143] Coal Prohibition Act in Electricity Production (*Wet verbod op kolen bij elektriciteitsproductie)* 2022.
[144] 'Climate verdict leads to 75% reduction in use of coal-fired plants + €3 billion for Urgenda's 54 climate solutions' plan' (n 140).
[145] Statistics Netherlands, 'Greenhouse gas emissions 8 percent down in 2020' (Centraal Bureau voor de Statistiek, 15 March 2021).
<www.cbs.nl/en-gb/news/2021/10/greenhouse-gas-emissions-8-percent-down-in-2020> accessed on 11 December 2022.
[146] ibid.
[147] Statistics Netherlands (n 145).
[148] ibid.

5. CONCLUSION

The solution to dangerous climate change is a fight against the clock and bureaucracy. This paper aimed to answer the research question: What is the impact of the European Convention on Human Rights on Dutch climate change legislation and policy after the judgments in the *Urgenda* case?

The paper had three main emphases: to analyse articles 2, 8 and 13 of the ECHR in environmental cases, to research how the ECHR was applied in all three court instances of the *Urgenda* case, and to outline climate change legislation and policy after the decisions in the *Urgenda* case. Hence, the answer to the research question is that the ECHR had a significant impact on Dutch climate change legislation and policy after the judgments in the *Urgenda* case. This is evidenced by the fact that after the judgment of the Court of Appeal, the current climate change legislative framework was enacted: namely, the Climate Act of 2019. That legislative instrument mandates for a 49 percent emissions reduction by 2030 and a 95 percent reduction by 2050, in line with climate science. The reason why this act was created was due to the positive obligations stemming from articles 2 and 8 of the Convention, which oblige States to protect their citizens in relation to the environment. Furthermore, another rationale stems from the national authorities' obligation to provide an effective remedy for violations of ECHR rights under article 13 of the Convention.

Furthermore, policies such as those for coal-power plant capacity reductions were enacted in the Netherlands after the provisionally enforceable rulings in the *Urgenda* case. These policies also represent the impact of the ECHR on legislation and policy in the Netherlands. The Urgenda target was almost fulfilled by the end of 2020, as already mentioned in section 4.3. This is due to the legislation and policies which were enacted by the Netherlands, but also due to external factors, such as the Covid 19 Pandemic and the malfunction of the biggest coal power plant in the Netherlands in the year 2020. Nevertheless, the Convention will continue to have a big impact on domestic climate change legislation and policy after 2020, as the positive obligation of the State to protect its citizens will not cease after that year. Therefore, the use of human rights in climate change litigation set the pace in the Netherlands and other States must remain alert.

Let's Talk About Money

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The right to equal remuneration – to what extent are the measures taken by Germany sufficient to ensure that the value of work is evaluated objectively and free from stereotypes?

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TABLE OF ABBREVIATIONS

EU	The European Union
NGO	Non-governmental organization
ILO	International Labour Organization
ICESCE	International Covenant on Economic, Social and Cultural Rights
TFEU	Treaty on the Functioning of the European Union
CEDAW	Convention for the Elimination of all kinds of Discrimination against Women
GG	German Constitution
AGG	General Equal Treatment Act
EntgTranspG	Pay Transparency Act
BAG	Federal Labour Court

1. INTRODUCTION

It is a German saying that one should not talk about money.[2] However, avoiding this issue leaves some crucial findings in the dark.

As of 30 January 2023 a woman in Germany earns 18% less per hour than a man – this number is generally referred to as gender pay gap.[3] Germany has one of the highest gender pay gaps in Europe.[4] One might argue that this number is not accurate, given the fact that women often work in part-time or lower-paid occupational fields.[5] Whether these circumstances are based on a woman's individual free choice or are also deeply rooted in societal gender stereotypes is difficult to assess. Nevertheless, even if circumstances such as part-time or lower-paid occupational fields are considered, the 'adjusted gender pay gap' still amounts to 7%.[6] The German Labour Agency's database shows that even with the same qualifications, men still earn significantly more than equally qualified women.[7]

Indeed, gender discrimination starts already at the earliest stage of entering the labour market: the salary negotiations in a job interview. In 2018, the German NGO Terre des Femmes[8] conducted an experiment sending transgender persons to job interviews. One time the person would appear as a man and one time as a woman, however with the same skillset and qualifications. All applicants were offered a significantly higher salary and sometimes even bonuses when appearing as a man in contrast to appearing as a woman.[9] This experiment shows that the

[2] Sabine Oelze, 'How Germans (don't) Talk About Money' (*Deutsche Welle*, 3 June 2019) <www.dw.com/en/how-germans-dont-talk-about-money/a-47742712> accessed 24 October 2023.
[3] Statistisches Bundesamt, 'Press release Nr. 036' (*destatis.de*, 30 January 2023), <www.destatis.de/DE/Presse/Pressemitteilungen/2023/01/PD23_036_621.html> accessed 24 October 2023.
[4] European Commission, The average gender pay gap in the EU rests with 13%, 'The gender pay gap situation in the EU' (European Commission official website) <https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/gender-equality/equal-pay/gender-pay-gap-situation-eu_en> accessed 24 October 2023.
[5] This fact by itself can indicate a disbalance between men and women on the labour market, but this shall not be the focus of this paper.
[6] Statistisches Bundesamt (n 3).
[7] You might want to test this yourself under: Agentur für Arbeit, 'Entgeltatlas' (*web.arbeitsargentur.de*, October 2023), <https://web.arbeitsagentur.de/entgeltatlas/beruf/58785> accessed 24 October 2023.
[8] Terre des Femmes, 'Menschenrechte für die Frau e.V.' (*frauenrechte.de*) <www.frauenrechte.de> accessed 24 October 2023.
[9] Terre des Femmes, 'The Gender Salary experiment' (*gender-salary-experiment.de*) <www.gender-salary-experiment.de> accessed 24 October 2023.

decision on salary, from the beginning, is not solely linked to objective criteria but largely depends on stereotypes and gender prejudices as well.

The disadvantage in pay negotiations is even more severe when gender intersects with another discrimination ground, such as race.[10] A deeper assessment of such intersectional discrimination however goes beyond the scope of this paper which focuses solely on discrimination based on gender.

A woman's right to be paid equally to a man for work of equal value is enshrined in international human rights law. But what is the scope of such a right? What are the criteria to calculate the value of work accordingly? And what obligations does this impose on Germany? These questions will be addressed in Part I of the paper, whereas Part II will take a closer look at the current legal framework and the measures taken by Germany to fulfil its obligations to reach legal and de facto equality.

Thus, to what extent are the measures taken by Germany sufficient to ensure that the value of work is evaluated objectively and free from stereotypes? By comparing the international obligations of states under the existing legal human rights framework with the political and legal measures taken by Germany and taking into account legal as well as non-legal arguments, the paper concludes that there are already encouraging signs of progress to combat the gender pay gap, however, it is far from time to lean back.

2. Analysis of Germany's Implementation of the Right to Equal Remuneration

2.1. The Right of Equal Remuneration Under International Human Rights Law

2.1.1. Legal Basis

The right to equal remuneration can already be found in the Universal Declaration of Human Rights,[11] noting that 'everyone, without any discrimination, has the

[10] Negin Toosi et al 'Who can lean in? The intersecting role of race and gender in negotiations' (2018) Psychology of Women Quarterly Vol 43 no 1, pp. 7-21.

[11] Universal Declaration of Human Rights (UDHR) [1948] UNGA Res 217 A (III)Although legally non-binding as such, the UDHR has high authority for the promotion and development of international human rights law, Fleur van Leeuwen, 'The United Nations and the promotion and protection of women's human rights: a work in progress', in Ingrid Westendorp (ed.), '*The women's convention turned 30*' (Intersentia Publishing 2012), p. 13.

right to equal pay for equal work'. [12] It is more specifically dealt with in one of the ILO's fundamental conventions, the Convention on Equal Remuneration (ILO Convention No 100)[13] from 1951.[14] Furthermore, such right has been read into article 3 together with article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)[15] from 1966.[16]

The European Union (EU) legal framework, although not primarily dealing with human rights, also includes the right to equal remuneration.[17] In fact, the EU is competent to take action to combat sex discrimination.[18] Article 157 of the Treaty on the Functioning of the European Union (TFEU) obliges EU Member States to ensure the principle of equal pay for work of equal value for men and women. On a European level, the implementation of this right has been driven forward through EU case law[19] and Directives,[20] which the Member States are obliged to implement.[21]

With the adoption of the Convention for the Elimination of all kinds of Discrimination against Women (CEDAW Convention) in 1979,[22] however, the right to equal remuneration was *explicitly* included in a binding UN human rights treaty, focusing especially on the right of women for equal pay. Article 11 (1) lit. d CEDAW Convention requires states to take appropriate measures to guarantee the right to equal remuneration 'including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation

[12] UDHR (n 11) art 23(2).
[13] International Labour Organisation, Equal Remuneration Convention (ILO Convention) [1951] 99 UNTS 327 (entered into force on 23 May 1953).
[14] Anja Wiesbrock, 'Equal Employment Opportunities and Equal Pay: Measuring EU Law Against the Standards of the Women's Convention' in Ingrid Westendorp (ed.), '*The women's convention turned 30*' (Intersentia Publishing 2012), p. 231.
[15] International Covenant on Economic, Social and Cultural Rights (ICESCR), opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
[16] Committee on Economic, Social and Cultural Rights, *General Comment no 16* (2005) UN doc E/C.12/2005/4 paras. 23-25.
[17] More information on that, see, Wiesbrock (n 14) p. 231ff.
[18] Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2008] C 326/47, art 19.
[19] Already in 1976, the ECJ found that equal treatment on women and men was a fundamental principle of EU law, Court of Justice of the EU, *C-43/74 Defrenne II* [1976] ECR 547.
[20] Especially Directive (EU) 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation [2006] OJ L204/23, let to the AGG later referred to in this paper.
[21] TFEU (n 18) art 288(3).
[22] Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Convention) [1979] 1249 UNTS 13 (entered into force 3 September 1981).

of the quality of work'. In the Convention's drafting process, it was agreed that 'remuneration' should be linked to the ILO Convention No 100's wide definition of 'pay' in article 1(a), namely 'the ordinary, basic or minimum wage or salary and any additional emoluments, whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment.[23] Accordingly, the scope of the right to equal remuneration is very broad and the following analysis will focus only on the right to equal remuneration in the salary negotiation process.

2.1.2. State Obligations

The CEDAW Committee has shaped and clarified the obligations that states have under the CEDAW Convention via its general recommendations, but also through its concluding observations on individual state reports. Although such observations are not legally binding, the views expressed by highly qualified publicists in the committees/bodies can be used as subsidiary means for the interpretation of international law sources,[24] such as the CEDAW Convention.

Generally, article 2 CEDAW Convention requires states to respect, protect and fulfil[25] the rights under the CEDAW Convention. The obligation to respect requires state parties to refrain from any practice resulting in the direct or indirect denial of the equal enjoyment of women's civil, political, economic, social and cultural rights.[26] The obligation to protect requires states to protect women from discrimination by third parties, namely private actors.[27] Article 2(e) CEDAW Convention clarifies that the obligation to grant equal remuneration applies also to the private sector, which is crucial given the important role that private employers

[23] Frances Raday, 'article 11', in Marsha A. Freeman et.al. (eds.) '*The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary*' (OUP Oxford 2012), p. 292.
[24] Statute of the International Court of Justice [1945] 3 UNTS 993 (entered into force 24 October 1945), art 38 (I) lit. d. In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 110, the International Court of Justice declared that the Human Rights Committee's views are highly authoritative, this reasoning can be applied equally to the other human rights treaty bodies.
[25] The basis of this triad was developed in Henry Shue 'Basic Rights – Subsistence, Affluence and US Foreign Policy' (1980 Princeton University Press) but are now also referred to by several human rights academics, courts and institutions, in example see Committee on Economic, Social and Cultural Rights, *General Comment no 24* (2017), UN doc. E/C.12/GC/24, paras. 29-37.
[26] Committee on the Elimination of Discrimination against Women, *General Recommendation no 28* (2010), UN doc. CEDAW/C/GC/28, para. 9.
[27] CEDAW GR no 28 (n 27), para. 9.

play in the realm of employment policies.[28] Finally, the obligation to fulfil requires states to take positive steps to ensure women's equal rights before the law (*de jure*) but also within society (*de facto*).[29] In this regard, article 5 CEDAW Convention requires states to take actions that counteract stereotypes and other cultural roots of the causes of gender inequalities.[30]

Pursuant to article 11(1) lit. d of the CEDAW Convention in particular, the CEDAW Committee emphasised the connection between the wage gap and occupational segregation [31] and some specific state obligations. Firstly, it recommends states to ratify the ILO convention No 100.[32] Secondly, states should study, develop and adopt gender-neutral job evaluation systems.[33] In this regard, the CEDAW Commmittee has called on states to collect relevant data and promote measures to evaluate the value of work through all occupations in order to eliminate women's discrimination for pay,[34] as well as increase the wages in working sectors that are dominated by women.[35] The right to equal remuneration requires that the evaluation of the quality of work is based on objective gender-neutral criteria[36] and the burden of proof must rest with the employer.[37] The CEDAW has also encouraged states to establish sanctions in the private and public sector in this regard.[38] Also, the ICESCR Committee has called on states to monitor the activities of private actors regarding their equal pay regulation and

[28] Raday (n 23) p. 284.
[29] CEDAW GR no 28 (n 27) para. 9.
[30] Wiesbrock (n 14) p. 241.
[31] Committee on the Elimination of Discrimination against Women, *General Recommendation no 13* (1986), UN doc. A/44/38; Raday (n 24) p. 293.
[32] CEDAW GR 13 (n 31) para 1.
[33] CEDAW GR 13 (n 32) para 2; Committee on the Elimination of Discrimination against Women, *Report, 28th Session* (2003), UN doc. A/58/38 (Part I), CO Switzerland, para 131; Committee on the Elimination of Discrimination against Women, *Report, 25th Session* (2001), UN doc. A/56/38, CO Finland, para. 283.
[34] Committee on the Elimination of Discrimination against Women, *Report, 27th Session* (2002), UN doc. A/57/38, CO Denmark, para 326; Committee on the Elimination of Discrimination against Women, *Report, Exceptional Session* (2002), UN doc. A/57/38, CO Hungary, para. 328; Committee on the Elimination of Discrimination against Women, *Report, 28th Session* (2003), UN doc. A/58/38 (Part I), CO Luxembourg, para. 315; Committee on the Elimination of Discrimination against Women, *Report, 28th Session* (2003), UN doc. A/58/38 (Part I), CO Norway, para. 430.
[35] Committee on the Elimination of Discrimination against Women, *Report, 26th Session* (2002), UN doc. A/57/38, CO Estonia, para. 108.
[36] ILO Convention (n 13) art 3.
[37] Raday (n 24) p. 293.
[38] Committee on the Elimination of Discrimination against Women, *Concluding comments: Cambodia* (2006), UN doc. CEDAW/C/KHM/CO/3, para. 28; see also Martin Oelz et al (eds) *Equal pay: An introductory guide* (*ilo.ord*) <www.ilo.org/global/publications/WCMS_216695/lang--en/index.htm> accessed 24 October 2023, p. 84ff.

install effective labour inspectorates.[39] Likewise, the ILO guide on Convention No 100 recommends states design monitoring and enforcement methods, including job evaluation methods.[40] Thirdly, states shall support the creation of implementation machinery and encourage the efforts of the parties to collective agreements, where applicable, to ensure the application of the right to equal remuneration.[41] The ILO guide emphasises the important role of collective bargaining towards the elimination of gender pay gaps which has already proven successful in some states.[42]

To conclude, the right to equal remuneration requires a state not only to refrain from discriminatory action regarding the legal framework or other authority behavior (respect), but also to monitor and regulate activities in the public and private sphere (protect), as well as to take positive action towards the fulfilment of de facto equality (fulfil).

2.2. Implementation in the German Legal System

Germany has ratified the CEDAW Convention in 1985[43] and its optional protocol in 2002.[44] Furthermore, it is party to the ILO Convention No 100[45] and the ICESCR.[46] This part will analyse what measures Germany has already taken to ensure *de jure* and *de facto* equality of women's right to equal remuneration.

2.2.1. Measures Concerning de jure Equality

Equality between men and women has constitutional status in Germany and is prominently enshrined in article 3 of the German constitution (GG).[47] Article 3(2) GG obliges the German state to implement equal rights for women and men and

[39] CESCR GC no 16 (n 16) para. 24.
[40] Martin Oelz et al. (n 39) p. 102.
[41] CEDAW GR 13 (n 32) para. 3.
[42] Martin Oelz et al (n 39) p. 54ff.
[43] Gesetz zu dem Übereinkommen vom 18 Dezember 1979, zur Beseitigung jeder Form von Diskriminierung der Frau, BGBI Vol II (1985), p. 647.
[44] Gesetz zu dem Fakultativprotokoll vom 6. Oktober 1999 zum Übereinkommen vom 18. Dezember 1979 zur Beseitigung jeder Form von Diskriminierung der Frau, BGBl Vol II (2001), p. 1237.
[45] Gesetz zum Übereinkommen Nr. 100 der Internationalen Arbeitsorganisation vom 29. Juni 1951 über die Gleichheit des Entgelts männlicher und weiblicher Arbeitskräfte für gleichwertige Arbeit BGBl Vol II (1956), p. 23, this complies with the obligation stated in CEDAW GR 13 (n 32) para. 1.
[46] Gesetz zum Internationalen Pakt vom 19. Dezember 1966 über wirtschaftliche, soziale und kulturelle Rechte, BGBl Vol II (1973), p. 1569.
[47] Grundgesetz für die Bundesrepublik Deutschland vom 23 Mai 1949, BGBl Vol 1 (1949) p. 1.

work towards the elimination of existing disadvantages. Furthermore, article 3(3) GG prohibits discrimination based on characteristics such as gender. These obligations are directly binding for all public actors and can radiate into the private sector. In fact, the Hannover Labour Court has stated as early as 1954, that the principle of equal pay according to article 3 GG also applies to the field of collective labour law.[48]

Based on article 3 GG, Germany has issued the General Equal Treatment Act (AGG)[49] and the Pay Transparency Act (EntgTranspG),[50] which include rights and obligations in the private sphere, specifically in relation to the employer-employee relationship. The AGG has been in force since 2006 and prohibits unequal treatment of employees based on the criteria listed in § 1 AGG including sex.[51] §2(1) no 2 AGG regulates the employment and working conditions, including remuneration. According to §15(1, 2) AGG, the employer is obliged to pay damages and monetary compensation in the event of gender-based wage discrimination, and §22 AGG includes a refutable presumption in this regard.

This shows that gender pay equality formally (de jure) already exists in Germany. However, in reality (de facto), there is still a significant difference in the treatment of men and women when it comes to salary, as was outlined in the introduction of this paper. It is thus not enough that women *should* be paid equally. In order to achieve de facto equality, societal thinking must also be changed. But how to achieve this? This links to the state obligations to protect and fulfil gender equality. In Germany's latest state report, which is as old as from 2017, the CEDAW has highlighted the important role of the German legislator in this regard[52] and recommended (1) special training for the German jurisprudence[53] as well as (2) stronger awareness raising to eliminate existing gender stereotypes.[54]

[48] Landesarbeitsgericht Hannover, judgment of 12.4.1954, 2 Sa 566/53.
[49] Gesetz zur Umsetzung europäischer Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung vom 14 August 2006 (AGG) BGBl Vol 1 p. 1897.
[50] Gesetz zur Förderung der Transparenz von Entgeltstrukturen vom 30 Juni 2017 (EntgTranspG) BGBl Vol 1 p. 2152.
[51] AGG (n 50) arts 2, 7, 'sex' in this regard is assessed purely biologically, see Monika Schlachter-Voll 'Allgemeines Gleichbehandlungsgesetz (AGG)', in Rudi Müller-Glöge et al. (eds.) *Erfurter Kommentar zum Arbeitsrecht*, (23th ed. CH Beck 2023), § 2 Rn. 10.
[52] Committee on the Elimination of Discrimination against Women, *Concluding observations on the 7th and 8th periodic report of Germany (2017)*, UN doc. CEDAW/C/DEU/CO/7-8, para. 8.
[53] CEDAW CO Germany (n 53) para. 10.
[54] ibid para. 22.

2.2.2. Measures Concerning de facto Equality

2.2.2.1. German Legislator Towards de facto Pay Equality

An important step in this direction was the adoption of the Pay Transparency Act (EntgTranspG), which entered into force in 2017 and aims to enforce equal pay for equal work or work of equal value. [55] This law grants the employee the right to information about salaries of other employees from the employer.[56] This however only applies to enterprises with more than 200 employers [57] and does not automatically give the right to wage adjustments either. Whether it is because of this high threshold or because the right to information is rarely used in the labour dependency relationship, a study by the Hans Böckler Stiftung shows that one year after the EntgTranspG came into force, only 19% of the German enterprises had taken measures to ensure fairer pay.[58] This suggests that the law had only a minor impact.[59] While transparency can serve as important tool for reaching gender pay equality, the problem has deeper roots.

One layer is the legal framework, another are stereotypes. [60] Why are women the ones required to take action to enforce their own right? And what if the disadvantage starts even before entering the employment relationship? Gender stereotypes have a major influence on the negotiation behaviour of women. Scientific research shows that women that try to negotiate higher salaries are socially penalised and perceived as less hireable and likeable.[61] Recently, such prejudices are being combated by the German jurisprudence.

2.2.2.2. German Jurisprudence Towards de facto Pay Equality

[55] See also Germany's national report for periodic review to the UN Human Rights Council, *Report of the Office of the United Nations High Commissioner on Human Rights, Compilation Germany*, (2018), HRC/WG.6/30/DE/1, para. 46.
[56] EntgTranspG (n 51) art 10.
[57] ibid art 12.
[58] Hans-Böckler-Stiftung 'Entgeltgleichheit von Frauen und Männern' (*boeckler.de,* 2019) <www.boeckler.de/pdf/p_wsi_report_45_2019.pdf> accessed 24 October 2023.
[59] Die Zeit, 'Gesetz zur Lohngleichheit zeigt keine spürbaren Effekte' (*Zeit.de,* 11 January 2019) <www.zeit.de/arbeit/2019-01/gleichberechtigung-lohngleichheit-frauen-maenner-unternehmen-wsi> accessed 24 October 2023.
[60] Wiesbrock (n 14) p. 238.
[61] Hannah Riley Bowles/Linda Babcock 'How can women escape the compensation negotiation dilemma? Relational accounts are one answer', (2013), Psychology of Women Quarterly Vol 37 no 1, 80, 80. This impact is even more severe when intersecting with racial stereotypes, see Negin Toosi et al (eds) (n 10) pp. 7-21.

On 21st January 2021 the Federal Labour Court (BAG) found that § 22 AGG read in the light of article 157 TFEU, requires that an employer, who cannot refute the presumption of discrimination by unequal payment, must adjust the monthly salary.[62] On 16th February 2023, the BAG went even further.[63] The plaintiff, a woman from Dresden, filed a complaint against her employer based on article 157 TFEU and §§3(1), 7 EntgTranspG. She claimed to have been violated in her right to equal remuneration for equal work and requested a compensation according to § 15(2) AGG.[64] The plaintiff had discovered that her male colleague, doing the same sales job in the company as her, was paid a 1000 euros higher monthly salary during the probation period. Even after the introduction of a collective agreement, the difference in their salary was still about €500. Against the claim of gender discrimination, the employer argued that the man had negotiated his salary better.[65] The BAG held that better negotiation skills was a subjective criterium, which could not refute the presumption from §22 AGG of discrimination due to a woman's lower pay,[66] and awarded the plaintiff a pay back of €14 500 and €2 000 compensation.[67]

The plaintiff's lawyers spoke of a 'milestone' towards more pay equality in Germany.[68] Likewise, legal academia acknowledged the 'explosive power' of the ruling, as follow-up proceedings in salary discrimination could not be ruled out any longer,[69] and that Germany had implemented EU law.[70] However, the judgment has also raised some concerns that individual remuneration negotiations will become more difficult.[71] Indeed, the ruling could even lead to generally lower salaries, as employers in the future will be more careful to agree to a high salary, as they would have to grant it to everyone. But this is what equal payment means:

[62] Bundesarbeitsgericht, judgment from 21.01.2021, 8 AZR 488/19, para. 75.
[63] Bundesarbeitsgericht, judgment from 16.02.2023, 8 AZR 450/21.
[64] ibid para. 11.
[65] ibid paras. 2-13; Anonym, 'Benachteiligung wegen des Geschlechts' (2023) in Neue Zeitschrift für Arbeitsrecht Vol 15, 958, 958ff.
[66] Bundesarbeitsgericht (n 64) para. 57.
[67] Bundesarbeitsgericht (n 64).
[68] Die Zeit 'Bundesarbeitsgericht stärkt Lohngerechtigkeit für Frauen' (*Zeit.de*, 16 February 2023) <www.zeit.de/arbeit/2023-02/lohngleichheit-bundesarbeitsgericht-frauen-urteil-diskriminierung> accessed 24 October 2023.
[69] Florian Christ 'Bundesarbeitsgericht: Urteil gegen den Gender-Pay Gap' (2023), Deutsches Steuerrecht-Aktuell Vol. 8, 38, 38.
[70] Stella Dörenbach, '*Endlich gleicher Lohn für alle?: Das Equal-Pay-Urteil des Bundesarbeitsgerichts' (Verfassungsblog.de*, 28 February 2023), <https://verfassungsblog.de/endlich-gleicher-lohn-fur-alle/> accessed 24 October 2023.
[71] Christ (n 70) p. 38.

equal payment for equal work independent from gender. This judgment certainly leads into this direction. As outlined above, international human rights law only requires an equal salary between men and women, not a particularly high one.

2.2.2.3. Important Input by EU Law

Yet, the question remains, why do women first need to become active, request the relevant information from their employer in order to have their right to equal remuneration enforced before a court? For the work-climate and the general message that equal pay is not only an enforceable right, but in the first place a necessity that should be self-evident, it would be desirable to have a transparency regime in place that is not only 'on demand'. In this regard, the EU Council has adopted a new EU Directive[72] for Union-wide wage transparency.[73] This Directive imposes concrete and far-reaching obligations on Germany and all other EU Member States, which must be implemented within three years.[74] Amongst others, there is an obligation to implement a transparency system where the employer must priorly indicate the initial pay range to the future employee, based on objective and gender-neutral criteria.[75] The new Directive also requires a publicly available gender pay reporting system for employers with at least 250 employees[76] and takes intersectional discrimination into account.[77] This is indeed a big step towards more transparency. Implementation of this Directive can help in particular the enforcement of gender equality already at the stage of job-negotiation. Therefore, there is hope for a swift implementation of the Directive into German national law.

2.2.2.4. Other Measures Combatting Gender Stereotypes

Concerning the elimination of gender stereotypes in the labour landscape, Germany has adopted some measures to promote gender equality. One of them is

[72] Directive (EU) 2023/970 of the European Parliament and of the Council to Strengthen the Application of the Principle of Equal pay for Equal Work or Work of Equal Value Between Men and Women Through Pay Transparency and Enforcement Mechanisms [2023] OJ L132/21.
[73] Council of the European Union 'Gender pay gap: Council adopts new rules on pay transparency' (*consilium.europa.eu*, 24 April 2023) <www.consilium.europa.eu/en/press/press-releases/2023/04/24/gender-pay-gap-council-adopts-new-rules-on-pay-transparency/> accessed 24 October 2023.
[74] Directive (n 73) art 34(1).
[75] ibid art 5.
[76] ibid art 9(3).
[77] ibid art 3(2e).

the Equal Pay Day,[78] which symbolically marks the day of the year until which women work for free, while men have been paid for their work since the beginning of the year. This year Equal Pay Day was on 7th March 2023. Other campaigns such as *Girls' Day*[79] and *Boys' Day*[80] and *Klischeefrei - Nationale Kooperationen zur Berufs- und Studienwahl*[81] are meant to provide support for stereotype-free career choices for young people and a framework for networking, exchange, and information. The German government also offers tools for enterprises to self-assess their equal-pay status[82] and offers lists to check the individual job evaluation procedures for gender neutrality.[83] As an overall promotional measure for the importance of women's rights one should also consider the German governance commitment to a feminist foreign policy, which was announced on 1st March 2023[84] and received much attention in the media landscape.[85]

3. CONCLUSION

As was demonstrated in this paper, gender discrimination already starts with the salary negotiation in a job interview. The right to equal pay for equal work requires Germany not only to ensure equality in law, but also in practice. In 2009, Germany's unadjusted gender pay gap was 23% and its adjusted pay gap was

[78] This is an initiative by the Business and Professional Women association Germany e.V. (BPW Germany), which is sponsored by the German Federal Ministry for Family Affairs – Landeszentrale für politische Bidlung 'Equal Pay Day' (*lpb-be.de*) <www.lpb-bw.de/equalpayday> accessed 24 October 2023.

[79] Bundesministerium für Familie, Senioren, Frauen und Jugend, 'Girls Day' (*girls-day.de*) <www.girls-day.de> accessed 24 October 2023.

[80] Bundesministerium für Familie, Senioren, Frauen und Jugend, 'Boys Day' (*bmfsfj.de*, 31 January 2022) <www.bmfsfj.de/bmfsfj/themen/gleichstellung/jungen-und-maenner/boys-day/boys-day-jungen-zukunftstag-80476> accessed 24 October 2023.

[81] More information see Bundesministerium für Familie, Senioren, Frauen und Jugend, 'Gleichstellungsorientierte Berufs-und Studienwahl' (*bmfsfj.de*, 10 March 2021) <www.bmfsfj.de/bmfsfj/themen/gleichstellung/jungen-und-maenner/gleichstellungsorientierte-berufs-und-studienwahl/gleichstellungsorientierte-berufs-und-studienwahl--117694> accessed 24 October 2023.

[82] ibid.

[83] Bundesministerium für Familie, Senioren, Frauen und Jugend, 'Die Entgeltgleichheit ein Schritt näher – die EVA-Liste zur Evaluierung von Arbeitsbewertungsverfahren und Beispielanalysen'(*bmfsfj.de*, 7 May 2019) <www.bmfsfj.de/bmfsfj/service/publikationen/der-entgeltgleichheit-einen-schritt-naeher-80406> accessed 24 October 2023.

[84] Auswärtiges Amt, 'Guidelines for a Feminist Foreign Policy: a foreign policy for all' (*auswaertiges-amt.de*, 01 March 2023) <www.auswaertiges-amt.de/en/aussenpolitik/themen/ffp-guidelines/2585074> accessed 24 October 2023.

[85] Deutsche Welle, 'Feministisch: Neue Strategie für Deutschlands Hilfe' (*dw.com*, 01 March 2023) <www.dw.com/de/feministisch-neue-strategie-für-deutschlands-hilfe/a-64850113> accessed 24 October 2023.

8%.[86] While these numbers have decreased to 18% and 7% today, the gender pay situation is still far from being *de facto* equal. This is because gender discrimination has many layers, not only the obvious ones before the law, but its practical implementation also highly depends on societal stereotypes and gender prejudices. The measures taken by the German legislator in the past show good will but have been insufficient to reach de facto gender equality. Unfortunately, the EntgTranspG still requires a high threshold in order to apply, and it would be desirable to also have more transparency obligations for enterprises with less than 200 employees. More promising are the newest developments in the German jurisprudence and developments on the level of the European Union.

The BAG's ruling is a welcome step into the right direction, but its actual effects in practice remain to be seen. So far, the enforcement of equal remuneration is only 'on demand' and requires action by women themselves. Given, however, that equal remuneration should be a self-evident necessity, it would be desirable to have legislation in place that provides for automatic transparency. Major progress in this regard could be achieved by the implementation of the new EU Directive which requires Germany to implement a transparency system and a publicly available gender pay reporting system for employers. There is hope that such measures, in the long term, will encourage German employers to be more transparent in pay negotiations and thus actively work towards combatting gender discrimination from inside the system. Generally, EU law could be one of the driving forces in Germany's process to eradicate the gender pay gap, as women can rely not only on German national legislation, but also on article 157 TFEU concerning their right to equal remuneration.

To answer the research question, it must be stated that Germany fulfils its de jure obligations for gender pay equality, however, this is not enough. To reach de facto equality, gender discrimination needs to be made transparent and addressed. Furthermore, societal gender stereotypes must be eliminated.

Combatting the stereotypes that are the root of gender discrimination means adopting a holistic approach. This requires gender sensibility in all areas of German society, including education, language, jurisprudence, media, culture, and

[86] Committee on the Elimination of Discrimination against Women, *Response to the follow-up recommendations in the CEDAW's concluding observations on the 6th periodic report of Germany (2009)*, UN doc. CEDAW/C/DEU/CO/6/Add.1, p. 4.

even foreign policy. While Germany has been celebrated by many for its progressive feminist foreign policy, this should not be the time to lean back. Instead, it should lead to more dialogue and awareness on gender (in)equality in Germany. Countering the common stereotype that Germans do not like to talk about money, the gender pay gap cannot be tabooed any longer but needs to be addressed. The human right to equal remuneration requires Germany to eliminate the gender pay gap and as shown above, and although promising steps are being made, there is still a lot of work to be done.

The Accession of the EU to the ECHR: The CFSP Hurdle, Will the EU Be Able to Jump It?

Victoria Weil[1]

A delineation of the issue posed by the CJEU's limited jurisdiction concerning CFSP decisions and a conceivable path towards an internal solution for the EU.

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TABLE OF ABBREVIATIONS

EU	The European Union
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
TEU	Treaty on the European Union
CJEU	Court of Justice of the European Union
CFSP	Common Foreign and Security Policy
TFEU	Treaty on the Functioning of the European Union
ICC	International Criminal Court
ATT	Arms Trade Treaty
AG	Advocate General

1. INTRODUCTION

As the European Union (EU) navigates its way towards accession to the European Convention on Human Rights (ECHR), the Common Foreign and Security Policy (CFSP) has proven to be a formidable roadblock.[2] The accession of the EU to the ECHR has been a pressing issue since the late 70s.[3] In 2009, the Treaty of Lisbon amended the Treaty on European Union (TEU) and added article 6(2), giving rise to the EU's legal obligation to join the ECHR.[4] The ECHR is an international agreement promulgated by the Council of Europe with an extensive jurisdiction. Its purpose is to ensure the homogenous protection of a minimum standard of Human Rights amongst European citizen.[5] Currently, 46 states are high contracting parties to the ECHR, including all 27 EU Member States (MS).[6] Therefore, they are legally bound by the ECHR and accountable in front of the European Court of Human Rights (ECtHR) in instances where an individual claims their human rights have been violated and no adequate remedy has been awarded for such a violation by national courts.[7] Additionally, the 27 Member States are bound by EU law which not only includes treaties, directives and regulations, but also CFSP decisions.[8] Nevertheless, the decision maker in that regard, the EU, is not accountable to the European Court of Human Rights (ECtHR), since it is not a party to the ECHR.[9] This is problematic because, when

[2] Council of Europe '17th Meeting of the CDDH Ad hoc Negotiations Group ("46+1") on the Accession of the European Union to the European Convention on Human rights' (Meeting report, Council of Europe, 2 February 2023) para. 22.

[3] Council of Europe, 'EU accession to the ECHR ("46+1" Group)' (Human Rights Intergovernmental Cooperation, Council of Europe, 2023) <www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights> accessed 31st May 2023.

[4] Consolidated Version of the Treaty on European Union [2008] OJ C115/13 (TEU), Art 6.

[5] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), preamble.

[6] European Union, 'Easy to read - The European Union' (*european-union.europa.eu*, European Union 2023) <https://european-union.europa.eu/easy-read_en#:~:text=The%20European%20Union%20is%20a%20group%20of%2027%20countries%20in%20Europe.&text=to%20make%20things%20better%2C%20easier%20and%20safer%20for%20people> accessed 31st May 2023; Council of Europe 'The European Convention on Human Rights - how does it work?' (*coe.int*, 2023) <www.coe.int/en/web/impact-convention-human-rights/how-it works#:~:text=The%20Convention%20protects%20the%20rights,human%20rights%20and%20basic%20freedoms> accessed 31st May 2023.

[7] European Convention on Human Rights, arts. 1, 35 and 41.

[8] Official website of the European Union, European Commission, "Implementing EU law" <https://commission.europa.eu/law/application-eu-law/implementing-eu-law_en> last accessed 31st May 2023.

[9] European Convention on Human Rights, art 1.

an individual claims an EU decision violates their human rights, the EU cannot be brought in front of the ECtHR and the contested EU decision can only be indirectly challenged through proceedings against a Member State. This entails that, currently, there is a legal gap in the protection of human rights as individuals cannot hold the EU directly accountable and bring claims against it before the ECtHR. The 'simple' solution to this legal void would be the EU's accession to the ECHR, which can allow the EU to be brought before the Strasbourg court if it allegedly violates the ECHR.[10] This 'simple' solution revealed itself to be highly complex when the Court of Justice of the European Union (CJEU) gave its opinion on the draft Accession Agreement act in 2014.[11] One of the four main obstacles to accession was found in relation to the CFSP, which is, in principle, outside of the CJEU's jurisdiction, despite there being some exceptions.[12] An adequate solution was not found in relation to the CFSP issue, thus the CJEU could not agree to an Accession Agreement that would grant the ECtHR, a non-EU body, the power to review decisions taken under the CFSP. This is especially the case when these could be decisions that the ECtHR does not have the competence to review.[13] Nevertheless, the context of this problem has evolved since, and, in light of the new draft Accession Agreement, this paper aims to uncover: how can the EU overcome the challenge imposed by the CFSP in the accession to the ECHR?

The present paper utilises a doctrinal research method. In doing so, key CJEU case law, relevant meeting reports of the Ad Hoc Negotiation group of the European Committee on Democracy and Governance on the accession of the EU to the ECHR, and supporting secondary sources are delved into. In doing so, the expansion of the unique characteristics of the CFSP are drawn up and specifically, its problematic trait of being partially outside the jurisdictional scope of the CJEU is analysed. Furthermore, this investigation delves into the post-Lisbon case law that has shaped and clarified the CJEU's scope of jurisdiction in CFSP related matters. Finally, the paper explores solutions proposed to overcome the roadblock

[10] Council of Europe, 'Human Rights Intergovernmental Cooperation' (*coe.int*) <www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights> last accessed 31st May 2023.
[11] Case Opinion 2/13 *Opinion pursuant to article 218(11) TFEU* [2014] EU:C:2014:2454.
[12] Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47 (TFEU), art 275.
[13] Case Opinion 2/13 *Opinion pursuant to article 218(11) TFEU* (2014) EU:C:2014:2454, paras. 254-256.

posed by the CFSP, as well as formulate alternative ones. This is in line with considering the revised draft Accession Agreement which voiced the EU's new goal to solve this issue internally.

2. The Unique Characteristics of the CFSP

2.1. Defining the CFSP

The CFSP is a branch of EU law which has always been peculiar due to its scope - it is as close to high politics as an area can be. Already from a preliminary standpoint, this is the only policy area whose rules are set out in the TEU, as opposed to the TFEU.[14] As defined in article 24(1) TEU, it corresponds to all areas of foreign policy and all questions relating to the Union's security. The process and power to make decisions under the CFSP is shared among the European Council, the Council, and the High representatives of the Union for Foreign Affairs.[15] The following are three types of decisions that can be used to carry out CFSP. First, there can be decisions of operational character which are used to define an action to be undertaken by the EU.[16] An example of this would be the outreach activities in support of the implementation of the Arms Trade Treaty (ATT).[17] This consists of, for instance, assisting beneficiary countries in drafting, updating and implementing as appropriate, relevant legislative and administrative measures aimed at establishing and developing an effective system of arms transfer control in line with the requirements of the ATT.[18] Second, there can be decisions of non-operational character which define the EU position on a specific issue. An example of this is the EU taking a supportive and promoting stance towards the International Criminal Court (ICC) by declaring its aim to advance universal support of the Rome Statute.[19] Lastly, there can be decisions regarding the details and necessary arrangements to enact decisions of non-operational

[14] Panos Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy' (2018) 67 International & Comparative Law Quarterly 1, p. 3.
[15] TFEU (n 12) art 26.
[16] ibid art 28.
[17] Council Decision (CFSP) 2017/915/CFSP Union outreach activities in support of the implementation of the Arms Trade Treaty (2017) OJ 139/38.
[18] Council Decision 2017/915/CFSP Union outreach activities in support of the implementation of the Arms Trade Treaty (2017) OJ 139/38, art 1(2)(a).
[19] Council Decision 2011/168/CFSP International Criminal Court and the repealing Common Position (2011) L 76/56, art 1(2).

character which define the EU's stance on a certain issue, which were previously described.[20]

2.2. The Functioning of the CFSP

The CFSP is not only the sole policy domain outlined in the TEU instead of the TFEU, but also the sole area in which the EU's competences are specifically distinguished from other competences.[21] The adoption of legislative acts within this area is excluded,[22] meaning decisions taken under the CFSP are not adopted by the ordinary legislative procedure nor the special legislative procedure.[23] In this regard, it is worth noting that this straightforward interpretation of the TFEU has been argued to counter the principle of effective Treaty interpretation. This is, in light of the TEU, indicating that the Parliament is not involved in making CFSP decisions, which de facto excludes CFSP decisions from the realm of legislative acts. Regardless, CFSP decisions have a binding effect, which gives rise to the issue of judicial review.[24] For the enactment of these decisions, the Council, in principle, acts unanimously.[25] The right of initiative lies with the high representatives of the Union for Foreign Affairs and Security Policy and Member State.[26] However, the European parliament does not participate in decision making and has a very limited role.[27] It should also be noted that the position of the CFSP within the EU's constitutional structure is particular due to the Lisbon treaty's restructuring of the EU and abolition of the tripartite pillar structure, which led to the establishment of overarching principles that govern EU external policies.[28] This gave rise to a need for a delimitation of the CFSP from other external policies with which it closely coexists, as the exercise of CFSP competences must not

[20] Council Decision (CFSP) 2020/1515 establishing a European Security and Defence College, and repealing Decision (CFSP) 2016/2382 (2020) L348/1.
[21] TEU (n 4) art 2(4).
[22] ibid art 24(1) and art 31(1).
[23] Thomas Ramopoulos, 'article 24 TEU' in Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (online edn, Oxford Academics 2019) p. 214.
[24] Case C-455/14 P *H v Council and Commission* [2016] EU:C:2016:212, Opinion of AG Wahl, para. 37.
[25] TEU (n 4) art 24 (1)(2) and art 31.
[26] ibid art 31(1).
[27] ibid art 36.
[28] Joris Larik, *Foreign Policy Objectives in European Constitutional Law* (online edn, Oxford Academic, 2016) <https://doi.org/10.1093/acprof:oso/9780198736394.001.0001> accessed 31st May 2023.

impede the exercise of competences related to other areas laid out in articles 3 to 6 TEU.[29] The Lisbon treaty also introduced two exceptions to the CFSP exclusion of article 24 (1) TEU.[30]

2.3. The CJEU's Jurisdiction for the CFSP

The most notable characteristic of the CFSP is the limited jurisdiction of the CJEU in matters related to this area.[31] The general rule, stipulated in article 19 (3) TEU, lays down the court's general jurisdiction. Article 24 TEU constitutes an exception to article 19 (3) TEU, as it limits the court's jurisdiction in CFSP related matters, therefore, according to the court's case law, it should be interpreted narrowly.[32] Within the treaties, there are two exceptions to the exclusion of the CJEU's jurisdiction for CFSP related matters.

The first exception, established in article 275 (2) TFEU, states the CJEU's jurisdiction to monitor compliance with reciprocal non encroachment between CFSP decisions and non CFSP decisions.[33] This ensures that the CFSP does not conflict other areas of EU law and the principle of conferral, and that its functioning, as laid out in articles 3 to 6 TFEU, is respected. This does not grant a new competence to the court as it is the CJEU's role to ensure a measure is adopted under appropriate rules. The rationale behind this is also to ensure that CFSP decisions are not adopted pursuant to non-CFSP provisions and vice versa. This can be linked with article 24(2) TEU which protects the distinct legal features of the CFSP, other external policies and the powers conferred by primary law to the EU institutions.[34]

The second exception to the exclusion of the court's jurisdiction can also be found in article 275 TFEU. It concerns the review of the legality of decisions imposing measures against natural or legal persons adopted pursuant to a CFSP

[29] TEU (n 4) art 40.
[30] Christophe Hillion, 'A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy' (2014) University of Oslo Department of Public and International Law <https://dx.doi.org/10.2139/ssrn.2388165> last accessed 31st May 2023, p. 3.
[31] TEU (n 4) art 24(1); TFEU (n 12) art 275.
[32] C-455/14 P *H v Council and Commission* (2016) EU:C:2016:569, paras 39 and 40; C-658/11 *Parliament v Council* (2014) EU:C:2014:2025, para. 70; C-439/13 P *Elitaliana v Eulex Kosovo* (2015) EU:C:2015:753, para. 42.
[33] TEU (n 4) art 40.
[34] Paloma Plaza Garcia 'Accession of the EU to the ECHR: issues raised with regard to EU acts on CFSP matters' (2016) ERA Forum 481, p. 489.

legal basis, in accordance with article 263 (4) TFEU.[35] This refers to the protection of fundamental rights and, more specifically, is there to ensure that the principle of effective judicial protection is respected. In practice, this relates to sanctions under the CFSP, which were introduced by the Lisbon treaty. In cases where sanctions of an economic nature are imposed, the CJEU may review their legality.[36]

The court, in its case law, has further expanded and clarified its own jurisprudence. In that regard, two threads are identifiable: the judicial procedures on the basis of which the CJEU has jurisdiction, and the *ratione materiae* of the court.[37] With respect to the former, the ECJ has established that it has the competence to review CFSP measures where one of the aforementioned exceptions to the exclusion of jurisdiction apply, in preliminary ruling proceedings, in annulment proceedings and in actions for damages.[38] Regarding the *ratione materiae* of the court, it does not have jurisdiction where two cumulative conditions are fulfilled. First, the contested decisions are made pursuant to a CFSP legal basis. Regarding this condition, there is an exception, namely where the decision contains measures of individual nature.[39] This is in accordance with the exception to the CJEU's jurisdiction exclusion enshrined in article 275(2) TFEU.[40] The second condition is that the substantive content must fall within the sphere of CFSP implementation.[41] This has been illustrated in numerous cases, where the court concluded it had jurisdiction based on the fact

[35] TFEU (n 12) art 275(2).
[36] Bernhard Schima and others, *The EU Treaties and the Charter of Fundamental Rights: A Commentary (online edn, Oxford Academics, 2019) 'article 275 TFEU'* https://doi.org/10.1093/oso/9780198759393.003.415 accessed 31st May 2023, p. 1862.
[37] Thomas Ramopoulos and others, *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (online edn, Oxford Academics, 2019) 'article 24 TEU', https://doi.org/10.1093/oso/9780198759393.003.34 accessed 31st May 2023, p. 216.
[38] C-72/15 *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* (2017) EU:C:2017:236, para. 62-81 – C-134/19 P *Bank Refah Kargaran v Council of the European Union* (2020) EU:C:2020:793, para. 49.
[39] C-478-482/11 P, *Joined Cases C-478/11 P to C-482/11 P (2013)* EU:C:2013:258, para. 57; C-72/15 *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* (2017) EU:C:2017:236, paras. 96-99 and 103.
[40] Christina Eckes, 'EU restrictive measures against natural and legal persons: from counterterrorist to third country sanctions' (2014) 51 Common Market Law Review 868, p. 882.
[41] Case C-72/15 *Opinion of AG Wathelet PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* (2016) EU:C:2016:381, paras. 47-49.

that, despite the case emanating from a CFSP decision, the substantive content of the case remained outside the ambit of the CFSP.[42]

There remains a specific circumstance where the CJEU has jurisdiction, expressly, where a dispute pertains to the single procedural legal basis of article 218 TFEU, which concerns EU treaty making. This holds true even if the contested act has a substantive CFSP legal basis. It effectively established a clear distinction between its limited jurisdiction concerning instruments with substantive legal bases and its jurisdiction, in principle, to decide on conflicts arising from the interpretation and application of article 218 TFEU.[43] However, it remains uncertain whether the CJEU can interpret the compatibility of the CFSP content of an envisaged agreement with the EU treaties.[44]

3. The Ever-Evolving Scope of the CJEU in CFSP Related Matters

As stated above, one of the CFSP's unique characteristics is that it is explicitly excluded from the jurisdictional scope of the CJEU.[45] Although some exceptions exist and the scope of these exceptions has gradually been expanded, at the time of opinion 2/13, the extremely limited jurisdiction of the CJEU still constituted a problem. As the treaties stand now, there will always be an element of CFSP decisions that are excluded from the CJEU's jurisdiction. This was the precise reason for which the Accession Agreement was deemed incompatible with EU law. The court found that granting the ECtHR the competence to adjudicate on matters relating to the CFSP, on which the CJEU itself has no jurisdiction, would be contrary to EU law. This is due to the fact that EU acts, actions or omissions cannot be exclusively entrusted to be reviewed by a non-EU body.[46] In order to further understand how the complexity and sensitivity of the CFSP hinders and

[42] C-439/13 P *Elitaliana v Eulex Kosovo* (2015) EU:C:2015:753, paras. 43-50; C-455/14 P *H v Council and Commission* (2016) EU:C:2016:569, paras. 42-59.
[43] C-658/11 *European Parliament v Council of the European Union (Mauritius)* (2014) EU:C:2014:2025, paras. 69–74.
[44] Christophe Hillion, 'A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy' (2014) University of Oslo Department of Public and International Law <https://dx.doi.org/10.2139/ssrn.2388165> accessed 31st May 2023, p. 13.
[45] TEU (n 4) art 24(1).
[46] Opinion 1/09 *Opinion pursuant to article 300(6) EC* (2011) EU:C:2011:123, paras. 78, 80 and 89.

affects the EU's compliance with article 6 (2) TEU, the exact scope of the CJEU's jurisdiction must be delineated according to key case law.

3.1. KEY CASE LAW

The aforementioned exceptions correspond to what has been implemented in the treaties in 2009.[47] Furthermore, case law has been instrumental in defining the scope of the CJEU's power and is thus necessary to shed light on why the CFSP is potentially problematic for the accession.

The Mauritius case is a good starting point. This case demonstrates the CJEU's perspective on its own jurisdiction in CFSP matters regarding international agreements between the EU and third parties.[48] In this case, the court first set out its general jurisdiction for matters relating to the interpretation of the treaties as provided for in article 19 TEU. The reasoning of the court was that, because articles 24 TEU and 275 TFEU are derogations to the general jurisdictional rule, these should be interpreted narrowly.[49] In this case, the decision was adopted under a CFSP legal basis but, the issue at hand was of a non-CFSP character, namely the procedure of article 218 TFEU.[50] The fact that the exception to the court's jurisdiction is to be interpreted narrowly, in turn, meant that the court had the competence to review the compatibility of an act regarding the procedural rule of article 218 TFEU. This is the case despite the fact that the procedure was in relation to a decision taken under the CFSP.[51] Here, the court granted itself jurisdiction without giving itself a new competence based on its interpretation of the treaty, this was further accepted by the other EU institutions.[52] This jurisdictional competence is also reflected in the Tanzania case, which was materially the same.[53] In this interinstitutional case, the court did not address the issue of jurisdiction and the institutions concerned did not object, meaning jurisdiction has indeed been accepted for matters relating to the procedure laid out

[47] TEU (n 4) art 24; TFEU (n 12) art 275.
[48] C-658/11 *European Parliament v Council of the European Union (Mauritius)* (2014) EU:C:2014:2025.
[49] ibid para. 70.
[50] ibid paras. 13-22.
[51] ibid para. 73.
[52] Graham Butler, 'The Coming of Age of the Court's Jurisdiction in the Common Foreign and Security Policy' (2017) 13 European Constitutional Law Review 673, p. 677.
[53] C-263/14 *European Parliament* v *Council of the European Union (Tanzania)* (2016) EU:C:2016:435.

in article 218 TFEU, even if it is within the context of a decision taken under the CFSP.[54]

The Elitaliana case is also relevant to define the scope of the CJEU's jurisdiction.[55] In this public procurement contract case, the court reiterated that the exception of article 24 TEU and 275 TFEU to article 19 TEU is to be interpreted narrowly. [56] For this reason, the case which substantially dealt with the interpretation of Regulation no 1605/2002, could not be excluded from the court's jurisdiction.[57] This is especially relevant considering that the Council and the Commission did not object to the court's jurisdiction in the first place, demonstrating the already existing shift in the extent of the latter's jurisdiction.[58]

The H v Council case was more sensitive as the Council argued against the CJEU's jurisdiction.[59] This judgment concerned a contested decision taken within the context of the CFSP and more specifically, via an EU body set up by the CFSP. The court, after admitting it should in principle not have jurisdiction, pointed out that decisions taken under the CFSP do not necessarily mean an exclusion of the court's jurisdiction. This was supported by the *Elitaliana* case in which the contested decision was based on a CFSP measure but found to be reviewable due to its non-CFSP related substance.[60] The court further reiterated the importance of an effective judicial review designed to ensure compliance with provisions of EU law as it is inherent in the existence of the rule of law principle.[61] The court then went on to lay out the reasoning as to why the General Court erred in law when ruling on the EU judiciary's lack of jurisdiction. In essence, the court pointed out that the contested decision concerned EU staff members, who, according to EU law, should be granted judicial protection in front of the CJEU.[62] For this reason, the court concluded that, while the contested decision is within the area of the CFSP, the subject matter of the dispute does not relate to the exercise of CFSP

[54] Butler (n 52) p. 677.
[55] C-439/13 P *Elitaliana v Eulex Kosovo* (2015) EU:C:2015:753.
[56] ibid para. 42.
[57] ibid para. 49.
[58] Graham Butler, 'The Coming of Age of the Court's Jurisdiction in the Common Foreign and Security Policy' (2017) 13 European Constitutional Law Review 673, p. 678.
[59] C-455/14 P *H v Council and Commission* (2016) EU:C:2016:569, paras. 34-38.
[60] C-439/13 P *Elitaliana v Eulex Kosovo* (2015) EU:C:2015:753, paras. 48-50.
[61] C-362/14 *Maximillian Schrems v Data Protection Commissioner* (2015) EU:C:2015:650, para. 95.
[62] C-455/14 P *H v Council and Commission* (2016) EU:C:2016:569, para. 55.

competences.[63] This entails a situation where there is a CFSP act, action or omission taken under a CFSP legal basis, but the act in question is in substance a non CFSP act.[64] Therefore, following a teleological interpretation, acts that are substantially of a non-CFSP nature, adopted in accordance with a CFSP legal basis can nonetheless fall within the CJEU'S jurisdiction, as it does not contradict the drafters of the treaties intentions to exclude this area of high politics from judicial review by the CJEU.[65] This signifies that the CJEU has jurisdiction where the matter concerns a non-CFSP issue which emanated from a decision taken under CFSP, as the CFSP aspect is purely procedural.[66] It therefore follows that the court has jurisdiction according to the general rules set out in article 263 TFEU without this having to be established explicitly.[67] This case considerably broadened the scope of the CJEU's jurisdiction as decisions that are taken according to a CFSP legal basis but do not substantially relate to the area of the CFSP, can now fall under the jurisdiction of the court.[68]

Another case concerning the development of the CJEU's scope of jurisdiction in CFSP matters is the Rosneft case. This case is of key importance as it broadened the CJEU's jurisdiction for the review of the validity of a CFSP decision amounting to a restrictive measure on a person via the preliminary reference procedure.[69] This case specifically regarded a restrictive measure, meaning there was a decision adopted on the basis of article 29 TEU, a CFSP provision. However, it was coupled with a non CFSP regulation adopted on the basis of article 215 TFEU. When the High Court of England referred this case to the CJEU, both the decision and regulation were challenged.[70] The Grand Chamber, on appeal, went on to affirm it should have jurisdiction despite the decision being under the CFSP. This, once again, was justified on the ground that

[63] C-455/14 P *H v Council and Commission* (2016) EU:C:2016:569, 59.
[64] Christian Breitler 'Jurisdiction in CFSP Matters – Conquering the Gallic Village One Case at a Time?' (European Law Blog, 13 October 2022) <https://europeanlawblog.eu/2022/10/13/jurisdiction-in-cfsp-matters-conquering-the-gallic-village-one-case-at-a-time/> accessed 1st June 2023.
[65] As argued by the Commission in C-455/14 P *H v Council and Commission* (2016) EU:C:2016:569, para. 32.
[66] C-455/14 P *H v Council and Commission* (2016) EU:C:2016:569, para. 59.
[67] ibid para. 58.
[68] ibid paras. 55-60.
[69] C-72/15 *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* (2017) EU:C:2017:236, paras. 48-57.
[70] ibid paras. 26-38.

the exception in article 24(1) TEU to the court's jurisdiction established in article 19 TEU, should be interpreted restrictively. The court's reasoning followed with the reiteration of article 40 TEU, which mandates that the exclusion of its jurisdiction be limited and does not prevent the court from ensuring that the CFSP complies with core principles of the EU. Specifically, it should be granted jurisdiction for a preliminary ruling because of the importance of a coherent system within the EU. The court took a holistic approach by taking into account articles 19, 24 and 40 TEU, article 275 TFEU and article 47 of the Charter, which enshrines the right to an effective remedy and fair trial. It justified its jurisdiction by deeming it necessary for an adequate protection of the EU's legal order.[71] This effectively expanded the court's jurisdiction to preliminary rulings on the validity of CFSP decisions pertaining to restrictive measures against natural or legal persons, thereby expanding article 275 TFEU. This case clearly demonstrates the CJEU's deliberate goal to broaden its jurisdiction, especially considering it could have sidestepped the question of its jurisdiction by alternatively allowing for a direct action before the General Court.[72] It is also worth noting, that there currently is a case pending before the CJEU which could potentially broaden the court's jurisdiction to preliminary rulings on the interpretation of CFSP decisions that impose a restrictive measure on persons.[73] It is entirely possible that the CJEU will grant itself jurisdiction with regard to interpretative preliminary questions. In the Rosneft case, AG Wathelet cogently argued *a fortiori* that if the court can rule on the validity of a CFSP decision, which amounts to a wider competence than ruling on its interpretation, it should also be granted jurisdiction to interpret decisions.[74]

The last and most recent case relevant to the expansion and crystallisation of the CJEU's jurisdiction in CFSP matters is the Bank Refah Kargaran case.[75] Here, again, the case regarded a restrictive measure and an action for damages, as per article 268 TFEU. This case arises from restrictive measures introduced to pressure Iran to stop nuclear proliferation. The appellant, an Iranian bank, was

[71] C-72/15 *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* (2017) EU:C:2017:236, para. 81.
[72] Graham Butler, 'The Coming of Age of the Court's Jurisdiction in the Common Foreign and Security Policy' (2017) 13 European Constitutional Law Review 673, p. 685.
[73] C-351/22 *Neves 77 Solutions SRL v Agenția Națională de Administrare Fiscală* (2022) OJ C 368.
[74] Case C-72/15 *Opinion of* AG Wathelet in *Rosneft Oil Company v Her Majesty's Treasury and Others* (2016) EU:C:2016:381, paras. 73-76.
[75] C-134/19 P *Bank Refah Kargaran v Council of the European Union* (2020) EU:C:2020:793.

included in the list of entities involved in nuclear proliferation in Annex II to Council Decision 2010/413/CFSP of 26 July 2010, and as a result, its name was added to the list for the same reason in Annex V to Council Regulation (EC) No 423/2007.[76] The court once again stated it does not have jurisdiction, in principle, for CFSP-related matters. Nevertheless, it went on to reflect on its jurisdiction to hear cases that aim at monitoring compliance with article 40 TEU, as provided by article 275 TFEU. On this basis, the court established that its jurisdiction should procedurally be extended to actions for damages, on the basis of article 268 TFEU, where a legal entity's or individual's interest is affected by a restrictive measure taken under the CFSP, as enshrined in article 275 TFEU.[77] Therefore, according to this case, the CJEU does not only have jurisdiction for actions of annulment where a legal entity or individual's interest are allegedly infringed by a CFSP restrictive measure, but also in relation to actions for damages, regulated by article 268 TFEU.[78] As in Rosneft,[79] the court expanded its jurisdiction to review restrictive measures against natural or legal persons,[80] via a different procedure than the one explicitly mentioned in article 275 TFEU.

3.2. THE CJEU'S WIDENED JURISDICTION

These cases demonstrate how the court has expanded and clarified its jurisdiction in CFSP related matters to prevent legal gaps and interpretative disparities. Essentially, as delineated in section II, the court extended its jurisdiction procedurally and *ratione materiae*. Procedurally, insofar as the court extended its jurisdiction to preliminary rulings on the validity of CFSP decisions[81] and actions for damages,[82] where there is a restrictive measure against a natural or legal person. There currently is a case pending before the CJEU which could potentially further broaden the court's jurisdiction to preliminary rulings on the interpretation

[76] C-134/19 P *Bank Refah Kargaran v Council of the European Union* (2020) EU:C:2020:793, para. 2.
[77] ibid paras. 26-49.
[78] ibid para. 49.
[79] C-72/15 *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* (2017) EU:C:2017:236.
[80] TFEU (n 12) art 275(2).
[81] C-72/15 *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* (2017) EU:C:2017:236.
[82] C-134/19 P *Bank Refah Kargaran v Council of the European Union* (2020) EU:C:2020:793.

of CFSP decisions that impose a restrictive measure on persons.[83] Regarding its *ratione materiae,* the court expanded its jurisdiction by way of establishing instances where the substantive issue of the case was of a non-CFSP nature despite the contested decision being based on a CFSP measure.[84] In each of these judgments, the court has made it clear that its jurisdiction is the rule[85] and that the limitation to its jurisdiction[86] is to be interpreted narrowly, also referring to the importance of effective judicial protection within the EU legal order.

Going back to the EU's accession to the ECHR, it is worth recalling that the CJEU held in Opinion 2/13 that the initial Accession Agreement was incompatible with EU law as it currently stood and that the CJEU has not yet had the chance to delineate its jurisdiction in CFSP matters. However, the situation today appears different. The court, through its case law, appears to be striving to address one of its concerns in opinion 2/13,[87] namely the CFSP's constitutional position within the EU, without amending the treaties and, at times, by making the deliberate choice to extend its own jurisdiction.[88] The Lisbon treaty's dismantling of the pillar structure, resulted in the integration of the former second pillar into the current body of Union law, which is specifically relevant for this issue.[89] It is in this context that the aforementioned cases were ruled upon, accordingly, it seems that the CJEU is driven by a conceptualisation of the CFSP area as part of the EU and therefore, despite its structural particularities, must be guided by the EU's overarching core principles. In the court's opinion, these doctrinal considerations are of greater importance than the limitation to its jurisdiction in article 24 TFEU and 275 TFEU, which must be interpreted narrowly. These cases systematically demonstrated the court's aim to provide a comprehensive system

[83] C-351/22 *Neves 77 Solutions SRL v Agenția Națională de Administrare Fiscală* (2022) *OJ C 368.*
[84] C-455/14 P *H v Council and Commission* (2016) EU:C:2016:569 – C-439/13 P *Elitaliana v Eulex Kosovo* (2015) EU:C:2015:753; C-658/11 *European Parliament v Council of the European Union (Mauritius)* (2014) EU:C:2014:2025.
[85] TEU (n 4) art 19.
[86] TEU (n 4) art 24; TFEU (n 12) art 275.
[87] Lorin-Johannes 'A Deconstruction of the Jurisdiction of the CJEU in CFSP Matters – Enlightenment at the End of the Tunnel?' (2020) 08-2020 REWI 1, p. 3.
[88] C-72/15 *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* (2017) EU:C:2017:236, para. 77.
[89] Christian Breitler 'Jurisdiction in CFSP Matters – Conquering the Gallic Village One Case at a Time?' (European Law Blog, 13 October 2022) <https://europeanlawblog.eu/2022/10/13/jurisdiction-in-cfsp-matters-conquering-the-gallic-village-one-case-at-a-time/> accessed 1st June 2023.

of legal remedies and procedures[90] in accordance with foundational principles, such as equality and the rule of law.[91] In essence the CJEU has provided for an extension of its jurisdiction in CFSP related matters that touches upon what is reviewable under article 275(2) TFEU, namely restrictive measures against natural or legal persons, via other procedures than what is specifically mentioned in the aforementioned article.[92] Additionally, the CJEU has clarified it should be granted jurisdiction for cases which emerge in a CFSP context but that substantively relate to other realms of EU law.[93]

However, there remains due to the CFSP's standing within the EU's constitutional order and the structure of the court's powers, a core of CFSP's acts, actions or omissions that fall outside the court's jurisdiction.[94] There currently is a case pending before the CJEU: C-29/22 *KS and KD v Council and others*, which could have great implications for the extent of the CJEU's jurisdiction in CFSP matters, as it is at the heart of this complex issue.[95] In this potentially ground-breaking case, both the English High Court[96] and the General Court rejected the case for lack of jurisdiction,[97] meaning the parties, currently waiting for the appeal before the Grand Chamber, are in a legal limbo where, if the Grand Chamber deems it should not have jurisdiction, no judicial review is possible.[98] The General Court held that the CFSP measure does not amount to a restrictive measure in the sense of article 275 TFEU, it does not concern compliance with article 40 TEU

[90] Lorin-Johannes, 'A Deconstruction of the Jurisdiction of the CJEU in CFSP Matters – Enlightenment at the End of the Tunnel?' (2020) 08-2020 REWI 1, p. 2.
[91] For example: C-455/14 P *H v Council and Commission* (2016) EU:C:2016:569, para. 41.
[92] C-72/15 *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* (2017) EU:C:2017:236; C-134/19 P *Bank Refah Kargaran v Council of the European Union* (2020) EU:C:2020:793.
[93] C-658/11 *European Parliament v Council of the European Union (Mauritius)* (2014) EU:C:2014:2025 – C-439/13 P *Elitaliana v Eulex Kosovo* (2015) EU:C:2015:753; C-455/14 P *H v Council and Commission* (2016) EU:C:2016:569.
[94] Case Opinion 2/13 *Opinion pursuant to article 218(11) TFEU* (2014) EU:C:2014:2454, paras. 252 and 253.
[95] Christian Breitler, 'Jurisdiction in CFSP Matters – Conquering the Gallic Village One Case at a Time?' (European Law Blog, 13 October 2022) <https://europeanlawblog.eu/2022/10/13/jurisdiction-in-cfsp-matters-conquering-the-gallic-village-one-case-at-a-time/> accessed 1st June 2023.
[96] Tom*anović et.al. v. the European Union et.al.* [2019] (Ch) EWHC 263 (QB).
[97] T-771/20 *KS and KD v Council and others* (2021) EU:T:2021:798, paras. 27-36.
[98] Breitler (n 95).

and its content does not substantially relate to the CFSP.[99] However, in appeal, [100] the Commission argued that the General court erred in law, claiming it did not have sufficient regard for the limited application of the exceptions[101] to article 19 TEU. The Commission also stated that the General Court incorrectly interpreted the *Elitaliana* and *H v. Council* cases. However, it is uncertain what the CJEU will decide on this matter. Nonetheless, it is evident that the CJEU's current jurisdictional standing has evolved in CFSP matters and can keep on evolving. However, due to the structure of the court's jurisdiction and the position of the CFSP in the EU's legal order, a core of CFSP decisions will remain outside the scope of the CJEU's jurisdiction.[102]

4. Negotiated Solution

In hopes of achieving an effective solution to the jurisdictional issue caused by the CFSP, the Ad Hoc Negotiation group of the European Committee on Democracy and Governance on the accession of the EU to the ECHR, has explored throughout the past three years a possible solution to the jurisdictional problem posed by the CFSP. However, this endeavour has not been successful. In fact, a potential solution was found for every single objection except for the one relating to the CFSP. This paper will now explore the proposed solutions and why these were unsuccessful leading to the negotiation group's decision of giving the burden of finding an adequate decision to this hurdle to the EU internally.[103]

4.1. Attribution Clause

The EU first voiced a possibility to accommodate the CFSP jurisdictional issue in the 6th negotiation meeting. The 1st meeting of the new negotiation cycle referred to adjusting the already existing attribution clause in the draft Accession Agreement. The attribution clause would amount to enabling the EU to allocate, for the purpose of the convention, responsibility for a CFSP act, action, or

[99] T-771/20 *KS and KD v Council and others (2021)* EU:T:2021:798, paras. 33-36.
[100] C-29/22 *P KS and KD v Council and Others* (2022) Appeal brought on 12 January 2022 by KS and KD against the order of the General Court (Ninth Chamber) delivered on 10 November 2021 in Case T-771/20.
[101] TEU (n 4) art 24; TFEU (n 12) art 275.
[102] Breitler (n 95).
[103] Council of Europe '18th Meeting of the CDDH Ad hoc Negotiations Group ("46+1") on the Accession of the European Union to the European Convention on Human rights' (Meeting report, Council of Europe, 17 March 2023) para. 7.

omission to an EU Member State, if such an act is excluded from judicial review by the CJEU. This would grant the CJEU the opportunity to rule on its jurisdiction beforehand, namely when deciding on the need to attribute and attribution as mandated by the principle of autonomy in EU law. As it stands, this proposition would give a solution to the CFSP issue as an attribution clause. In theory, this would assure that all CFSP acts, actions or omissions could be reviewed by a court and the applicant could claim just satisfaction.[104] However, this possible solution has the defect of potentially putting the applicant at a disadvantage given it entails changing the respondent party during ongoing proceedings. It could also create another issue by mandating an excessive double exhaustion of domestic remedies for applicants, considering the outset goal not to change the convention.[105]

In light of these issues, several ideas were put forward for consideration by the EU. These were looking into the requirement of exhausting domestic remedies; effective remedies according to the ECtHR, a possible pre-designation of which Member States are responsible for CFSP decisions and having a complementary function of third-party intervention by the EU under article 36 ECHR if a CFSP act is attributed to a Member State.[106] It is with these considerations that the EU drafted the attribution clause: article 1(4a) of the draft Accession Agreement. Accordingly, the attribution clause stated that, after the EU had been given sufficient time to adjudicate on its jurisdiction, and if it had not previously had the chance, it would designate a Member States responsible for the relevant CFSP act, action or omission in front of the ECtHR.[107] This concrete proposal for a solution had the advantages of not carving out the Court's jurisdiction with regard to CFSP matters, confirming that there would always be a respondent party to any complaint lodged before the court regarding a CFSP act, action or omission.[108]

4.2. An Unfeasible Solution

[104] Council of Europe '9th Meeting of the CDDH Ad hoc Negotiations Group ("46+1") on the Accession of the European Union to the European Convention on Human rights' (Meeting report, Council of Europe, 25 March 2021) para. 11.
[105] ibid para. 13.
[106] ibid para. 14.
[107] Council of Europe '12th Meeting of the CDDH Ad hoc Negotiations Group ("46+1") on the Accession of the European Union to the European Convention on Human rights' (Meeting report, Council of Europe, 10 December 2021) para. 11.
[108] ibid para 12.

This proposed solution was, in the end, not implemented into the draft Accession Agreement due to many procedural issues. First, this solution would entail attributing an EU act, action, or omission to Member States.[109] This does not necessarily entail that responsibility for the act, action or omission's alleged infringement is taken upon by the Member State, since the act is merely attributed for the purposes of the Convention. In turn, this does not equate to the Member States assuming responsibility to remedy an infringing situation. Second, the retribution mechanism would open a pandora's box of exhaustion of remedies. According to article 35(1) ECHR, the ECtHR will only deal with cases for which the domestic remedies have been exhausted. This leaves unclear how to deal with such requirement where a CFSP related act, action or omission has been attributed to a Member State where the applicant would not have had the opportunity to exhaust all available domestic remedies, as the attribution of the Member State takes place at a later date.[110] On one hand, this requirement could be an unreasonable burden, but on the other hand, circumventing such a requirement would go against the Convention itself and is for that reason, undesirable.[111] As previously mentioned, the EU was also asked to consider whether an act could be attributed *ex ante* to a Member State, meaning attributing a CFSP measure before an applicant claims a violation of their human rights.[112] This would solve the double domestic remedies exhaustion problem, but, in turn, it would require the establishment of an agreement and specific mechanisms within the EU. This possibility raises questions relating to what the criteria for attribution should be and how these criteria would ensure a factual link between the EU Member States and the CFSP's act, action, or omission.[113]

[109] Council of Europe '9th Meeting of the CDDH Ad hoc Negotiations Group ("46+1") on the Accession of the European Union to the European Convention on Human rights' (Meeting report, Council of Europe, 25 March 2023) para. 11.
[110] Council of Europe '12th Meeting of the CDDH Ad hoc Negotiations Group ("46+1") on the Accession of the European Union to the European Convention on Human rights' (Meeting report, Council of Europe, 10 December 2021) para. 12.
[111] European Convention on Human Rights, art 35(1).
[112] Council of Europe '9th Meeting of the CDDH Ad hoc Negotiations Group ("46+1") on the Accession of the European Union to the European Convention on Human rights' (Meeting report, Council of Europe, 25 March 2023) para. 14.
[113] Council of Europe '12th Meeting of the CDDH Ad hoc Negotiations Group ("46+1") on the Accession of the European Union to the European Convention on Human rights' (Meeting report, Council of Europe, 10 December 2021), para. 12.

Other procedural issues were raised, such as whether a preliminary ruling under article 267 TFEU would be considered as a domestic remedy. This is especially relevant as applicants do not have a say regarding whether domestic courts issue a request for a preliminary ruling. Another consideration regarding the domestic remedy requirement is whether, in instances where no domestic remedy could have been pursued by the applicant as a Member States had not yet been attributed the CFSP decision, the question of domestic remedies could be linked to the moment of designation of a respondent. A further issue arises in relation to the exact subject matter that would be reviewable before the court of the attributed Member State. Additionally, another issue relates to the fact that the EU would not be a respondent and thus raises questions in relation to what such a ruling performed by a Member States court would look like. This would entail that the state to which the CFSP act is attributed is not competent to alter the decision taken at the EU level. The attribution clause is also in need of further clarification as to how it would work in practice for a situation where no specific Member States can be attributed to the act.[114]

In essence, the attribution clause is, in theory, a viable solution to the hurdle that the CFSP represents, but, in practice as well as procedurally, it raises many issues. Most importantly, the problem would be the implications of having the EU attribute an act to a Member States and thereby excluding the possibility of the EU itself to be responsible for the act.[115] This negative aspect in correlation with the procedural burden of additional proceedings in the CJEU, which could potentially put applicants at a disadvantaged position, and the uncertainty regarding domestic remedies, as an attributed Member States would not necessarily be in a position to remedy a breach, creates a high risk which significantly reduces the court's agency, the protection of applicants and the efficiency of procedure before the court.[116] It is in light of all these complications deemed insurmountable by the EU, that the considered solution was dropped. In the following negotiations meetings, the issue revolving around the CJEU's jurisdiction in CFSP matters was not addressed through the angle of this

[114] Council of Europe '12th Meeting of the CDDH Ad hoc Negotiations Group ("46+1") on the Accession of the European Union to the European Convention on Human rights' (Meeting report, Council of Europe, 10 December 2021), para. 12.
[115] ibid.
[116] ibid.

proposition.[117] Ultimately, the EU announced it will look for an agreement internally[118] and the new draft Accession Agreement does not include the proposed attribution clause.[119]

5. The Role of National Courts

5.1. National Courts as EU Courts

As established in the previous section of this paper, the court has widened its jurisdictional scope in CFSP matters, but, the fact of the matter remains, that there are still possible instances where the CJEU does not have jurisdiction, or at least did not have the opportunity to consider whether it should have jurisdiction.[120] As the CFSP remains the last of the four issues found by the CJEU in its opinion 2/13 for accession to be possible, the EU must now find an internal solution to this procedural hurdle.[121]

It appears the only avenue left for the EU to solve this issue, without amending the treaties or excluding CFSP matters from the ECtHR's review, which would lead to a gap in human rights protection, is to allocate the judicial review of CFSP matters to Member States of the Union. In theory, this should be possible, as their courts are considered union courts.[122] This seemingly simple solution would be in line with the CJEU's argument that a non-EU body cannot be the sole institution to have the power to review decisions taken by the EU.[123] Nevertheless, *Opinion 2/13* can also be interpreted as meaning Member States courts would not be competent to be the sole adjudicators in these matters, as it was argued that the

[117] Council of Europe '13th Meeting of the CDDH Ad hoc Negotiations Group ("46+1") on the Accession of the European Union to the European Convention on Human rights' (Meeting report, Council of Europe, 13 May 2022) para. 37.
[118] Council of Europe '18th Meeting of the CDDH Ad hoc Negotiations Group ("46+1") on the Accession of the European Union to the European Convention on Human rights' (Meeting report, Council of Europe, 17 March 2023) para. 7.
[119] ibid Draft revised Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, p. 2.
[120] Steve Peers 'Negotiations for EU accession to the ECHR relaunched - overview and analysis' (EU Law Analysis, 30 January 2021) <http://eulawanalysis.blogspot.com/2021/01/negotiations-for-eu-accession-to-echr.html> accessed 1st June 2023.
[121] Case Opinion 2/13 *Opinion pursuant to article 218(11) TFEU* (2014) EU:C:2014:2454, para. 258.
[122] TEU (n 4) art 19 (1).
[123] Christian Breitler, 'Jurisdiction in CFSP Matters – Conquering the Gallic Village One Case at a Time?' (European Law Blog, 13 October 2022) <https ://europeanlawblog.eu/2022/10/13/jurisdiction-in-cfsp-matters-conquering-the-gallic-village-one-case-at-a-time/> accessed 1st June 2023.

Accession Agreement did not take into account the specific characteristic of EU law[124] and was strongly linked to the CJEU's lack of jurisdiction.[125] This is also supported by the CJEU's case law, since so far it has proven to be reluctant in that regard.[126] Nevertheless, this reluctance to mention the role of domestic courts could also be to avoid redundancy.[127] However, this does not change the fact that the role of the Member States could not only be extremely helpful in solving the hurdle posed by the CFSP area but would also be significant for the functioning of the CFSP, especially given the central role of the Member States in implementing CFSP measures.[128]

First, it must be asserted that the rule of law and fundamental rights apply to the CFSP as enshrined in article 2 TFEU. This is true as article 2 applies to all policy areas. Furthermore, since the charter of fundamental rights has primary law status, it is binding upon CFSP measures.[129] In the pre-Lisbon case, Segi, the CJEU established that the applicability of the rule of law to the CFSP suggests that the institutions are subject to review of the conformity of their acts with the treaties and the general principles of law, just like the Member States when they implement the law of the Union.[130] This was a judgment by the grand chamber when the three-pillar structure still existed, and the court did not have unlimited jurisdiction. Nonetheless, this case law remains relevant as it has also been supported by post Lisbon case law such as *Ledra Advertising Ltd* and others.[131] Accordingly, the EU Charter binds EU institutions even when acting beyond the EU's legal framework. This entails that the CFSP area is governed by the EU's judicial protection and fundamental rights legal framework under the current constitutional structure. Therefore, the question regarding enforcement remains in

[124] Case Opinion 2/13 *Opinion pursuant to article 218(11) TFEU* (2014) EU:C:2014:2454, para. 257.
[125] Christian Breitler, 'Jurisdiction in CFSP Matters – Conquering the Gallic Village One Case at a Time?' (European Law Blog, 13 October 2022) <https://europeanlawblog.eu/2022/10/13/jurisdiction-in-cfsp-matters-conquering-the-gallic-village-one-case-at-a-time/> accessed 1st June 2023.
[126] C-72/15 *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* (2017) EU:C:2017:236, paras. 77-79.
[127] Panos Koutrakos, "Judicial Review in the EU's Common Foreign and Security Policy" (2018) 67 International & Comparative Law Quarterly 1, page 27.
[128] Koutrakos (n 127) p. 22.
[129] TEU (n 4) art 6(1); Charter of Fundamental Rights of the European Union (2000) OJ C 364/1, art 51.
[130] Case C-355/04 P *Segi and Others v Council* (2007) EU:C:2007:116, para. 51.
[131] C-8/15 P to C-10/15 P *Ledra Advertising Ltd and others* (2017) EU:C:2016:701, para. 67.

instances where the court does not have jurisdiction.[132] This is where it is relevant to consider the role of national courts.

So far, the CJEU has been expanding its jurisdiction by arguing a core principle of EU law: the need for a complete system of remedies and procedures provided for by the EU legal order.[133] This underpinned the principle concerns the CJEU as well also domestic courts, as established by article 19(1) TEU, according to which Member States have the duty to provide sufficient remedies and effective judicial protection in fields covered by Union law. This has also been stressed in case law, for instance, in the *P* case.[134] In this regard, as "field covered by EU law" has not been further defined and therefore does not exclude the CFSP, this policy area cannot be said to be excluded from the scope of article 19 TEU.[135] This has also been ascertained by Advocate General (herein after: AG) Kokott in *Opinion 2/13*, arguing that in CFSP matters, effective judicial protection for individuals is to be ensured partially by the CJEU and partially by Member States.[136] Member States are, therefore, not merely allowed to, but obliged to ensure adequate remedies and procedures are provided for individuals, including in the area of the CFSP. This is also established in article 4(3) TEU.[137] Additionally, this line of reasoning is also supported by the fact that article 24 TEU and 275 TFEU limit the CJEU's jurisdiction but not the Member State's courts, thus meaning that jurisdiction remains with the national courts, this is also supported by the principle of conferral.[138] This view is shared by AG Kokott, asserting that there is no reason to apply the principle of conferral differently for jurisdiction.[139] It is at the basis of the EU's legal order that the CJEU does not have jurisdiction just because the substance of an issue regards union law, there must be a specific legal basis stemming from the treaties.[140] Thus, anything falling out of what is conferred to

[132] Koutrakos (n 127) pp. 22 and 23.
[133] For example: C-72/15 *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* (2017) EU:C:2017:236, paras. 66 and 67.
[134] C-50/00 P *UPA* (2002) EU:C:2002:462, para. 41.
[135]Panos Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy' (2018) 67 International & Comparative Law Quarterly 1, p. 29.
[136] Case Opinion 2/13 *Opinion pursuant to article 218(11) TFEU* (2014) EU:C:2014:2454, para. 103.
[137] Opinion 1/09 *Opinion pursuant to article 300(6) EC* (2011) EU:C:2011:123, paras. 66, 68 and 85 – C-583/11 P *Innuit* (2013) EU:C:2013:625, para. 91.
[138] TEU (n 4) art 4(1).
[139] Case Opinion 2/13 *Opinion pursuant to article 218(11) TFEU* (2014) EU:C:2014:2454, para. 96.
[140] TEU (n 4) arts 4(1) and 5(1).

the CJEU is part of the national courts' residual competences. This has also been argued by AG Kokott and AG Wahl.[141]

The foregoing seems to suggest the approach taken by the CJEU this far was perhaps redundant. This is because the CJEU's lack of jurisdiction does not necessarily entail a lack of judicial review, considering the national court's possible role. In essence, the EU legal order provides for the possibility of courts reviewing CFSP measures, whether that is directly, as provided for by article 274 TFEU, or, indirectly, according to which a natural or legal person would bring an action against national authorities for their implementation of CFSP measures. In doing so, human rights may be assessed in light of article 51(1) of the Charter, which addresses Member States when implementing EU law and has been construed in such a manner as to include any action by a Member States within the scope of EU law.[142]

It has thus been established that the Member States could theoretically ensure judicial review for CFSP decisions, therefore acting as union courts. Nonetheless, there are a number of practical issues that must be addressed.[143] The two central issues regard the effectiveness of the review Member States would be allowed to provide and the fragmentation a decentralised system might entail.[144]

5.2. Effectiveness of the National Courts' Judicial Review

The first issue regards the Foto-Frost principle, according to which national courts may not declare EU measures invalid.[145] According to AG Kokott, national courts should be able to display CFSP measures without running counter to the *Foto-Frost* principle, as this principle emerged in relation to issues where the CJEU had full jurisdiction, and therefore should not apply to the CFSP.[146] Indeed, as the CJEU noted in opinion 2/13, and as the treaties currently stand, despite the recent developments in the court's jurisdiction, there will always be certain CFSP

[141] View of AG Kokott *Opinion procedure 2/13 initiated following a request made by the European Commission* (2014) EU:C:2014:2475, para. 99; C-455/14 P *Opinion of Advocate General Wahl on H v Council of the European Union and Others* (2016) EU:C:2016:212, para. 99.
[142] C-617/10 *Åkerberg Fransson* (2013) EU:C:2013:105, paras. 21–22.
[143] Case Opinion 2/13 *Opinion pursuant to article 218(11) TFEU* (2014) EU:C:2014:2454, para 254-256.
[144] Panos Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy' (2018) 67 International & Comparative Law Quarterly 1, pp. 33 and 34.
[145] C-314/85 *Foto-Frost v Hauptzoliamt Lübeck-Ost* (1987) EU:C:1987:452, para. 20.
[146] Case Opinion 2/13 *Opinion pursuant to article 218(11) TFEU* (2014) EU:C:2014:2454, para. 100.

measures that do not fall under the court's jurisdiction.[147] In light of the foregoing, Doctor Panos Koutrakos suggested the *Foto-Frost* principal's scope could be adjusted.[148] This would be done by decoupling it from the review of CFSP measure due to the difference of circumstances pursuant to article 24 TEU and 275 TFEU and the non-applicability of the preliminary reference procedure.[149] Indeed, the Rosneft case opened the possibility for preliminary reference procedures on the validity of an act adopted on the basis of provisions relating to the CFSP.[150] This does not change the fact that there exists a core of measures falling outside the court's jurisdiction, as acknowledged in its *Opinion 2/13.*[151] The Foto-Frost case ruled that courts of Member States can review the legality of EU law but not declare it invalid on the basis that the preliminary reference procedure exists to ensure the uniform application of EU law. This procedure exists as part of a complete system of legal remedies and procedures designed to allow the CJEU to review the legality of measures adopted by the institutions.[152] According to this premise it should logically follow that, where the CJEU does not have jurisdiction and therefore lacks the power to assess validity via a preliminary reference procedure, the Foto-Frost principle is not applicable, Member States should thus be granted the power to invalidate EU law. As previously mentioned, this would also be in accordance with the foundational principle of conferral.[153]

According to the line of reasoning laid out so far, it seems two complementary paths can be followed in order to provide for a complete and coherent system of juridical protection. This all lies on the premise, as previously mentioned in this section, that the courts of Member States, as EU courts, should always be able to exercise judicial review of CFSP decisions, and, in instances where the court has no jurisdiction, declare CFSP measures invalid. [154]

[147] Case Opinion 2/13 *Opinion pursuant to article 218(11) TFEU* (2014) EU:C:2014:2454, para. 252.
[148] Dr. Koutrakos is a professor of European Union law at the university of London, is a graduate of the University of Athens and London, completed a stage at the European Commission and holds a PhD from the University of Brimingham.
[149] Koutrakos (n 144) p. 32.
[150] C-72/15 *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* (2017) EU:C:2017:236, para. 81.
[151] Case Opinion 2/13 *Opinion pursuant to article 218(11) TFEU* (2014) EU:C:2014:2454, para. 254.
[152] C-314/85 *Foto-Frost v Hauptzoliamt Lübeck-Ost* (1987) EU:C:1987:452, paras. 15 and 16.
[153] TEU (n 4) art 4(1).
[154] TEU (n 4) arts 19(1) and 4(1).

Subsequently, where a Member State's court finds a CFSP measure to be infringing upon a fundamental right or EU law, a preliminary reference should be made to the CJEU, pursuant to article 267 TFEU. Then, two possibilities may occur. First, the court could deem the preliminary question inadmissible due to a lack of jurisdiction.[155] In this instance, the court of the Member States should be able to invalidate the law seeing as the rationale behind the Foto-Frost judgment cannot be applied to such circumstances.[156] Second, the court could deem it has jurisdiction, meaning the preliminary question is admissible. This would, in turn entail the *Foto-Frost* principle is applicable and that the CJEU therefore will rule upon the validity of the contested CFSP measure. In both of these instances, the objection made by the court in opinion 2/13 is remedied since, should a case where a person contests a CFSP measure be brought in front of the ECtHR, the measure will have already been reviewed by an EU court.[157] This construction appears to provide a coherent system of judicial protection, nonetheless, some practical considerations seem to still stand in the way, the main one being the possible effects on legal certainty.

5.3. Interpretative Fragmentation

This section ties in to the second issue regarding an inevitable outcome of Member States being responsible for the judicial review of CFSP measures: an uncontrolled proliferation of conflicting interpretations.[158] If national courts were to indeed act as judicial reviewers of CFSP measures, disparities in the interpretations, reasoning and judgments of these courts would be inevitable. This degree of uncertainty, however, is a risk caused by the functioning of the EU legal order itself. The principle of supremacy, according to which EU law takes precedence over national law in cases where a conflict between the two arise, can be deemed to be applied somewhat conditionally.[159] For instance, in the German "*Solange*"

[155] ibid art 25; TFEU (n 12) art 275.
[156] C-314/85 *Foto-Frost v Hauptzoliamt Lübeck-Ost* (1987) EU:C:1987:452, paras. 15 and 16; Panos Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy' (2018) 67 International & Comparative Law Quarterly 1, p. 33.
[157] Case Opinion 2/13 *Opinion pursuant to article 218(11) TFEU* (2014) EU:C:2014:2454, para. 256.
[158] Panos Koutrakos 'The CFSP under the EU Constitutional Treaty: Issues of Depillarization' (2005) 42 CMLRev 325, p. 327.
[159] Panos Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy' (2018) 67 International & Comparative Law Quarterly 1, p. 33.

judgments, German courts made it clear that they will not apply EU law over national law systematically, instead they will take other factors into consideration.[160] This stems from the constitutional qualification in Germany regarding the protection of fundamental human rights. According to this standard, the German courts will evaluate the EU law in order to then decide if it can supersede national law.[161] This therefore also entails that the acceptance by national legislatures of the EU supremacy plays a central role in its application, as they have an influence on whether or not EU law is to be considered supreme.[162] The German example also serves to display the fact that, even if the EU itself might be reluctant to have the national courts take on the judicial review of CFSP related measures, national courts could assume that role themselves regardless. Indeed, in line with the German Constitutional Court in Solange, an area of EU law that is not protected by judicial review would be deemed intolerable.

6. CONCLUSION

After having delved into the specific characteristics of the CFSP and the hurdle it represents regarding the EU's accession to the ECHR, it was explored how the EU can overcome this challenge in an alternative and more definitive fashion. The specific characteristic of the CFSP that is relevant to this issue is its being an exception to CJEU's power to review the legality of decisions taken by the EU. This characteristic is due to its nature, as CFSP decisions regard highly sensitive political issues and, therefore, member states are reluctant to grant the CJEU full jurisdiction. This reluctancy relates to the fear that the CJEU, which has shown itself to be praetorian in other areas of EU law, would influence decisions that should be solely political in nature. This lack of jurisdiction is one of the reasons why the CJEU, in its *Opinion 2/13,* deemed the former draft Accession Agreement incompatible with EU law.

Since this harsh turn down, the CJEU has had the opportunity to further explore its jurisdiction in relation to CFSP decisions, which has been expanded by case law. Firstly, with the *Mauritius* case, the jurisdictional scope was expanded

[160] BVerfGE 37, 271 2 BvL 52/71, 29 May 1974, 'Solange I-decision'; BVerfGE, 22 October 1986, 73, 339 2 BvR 197/83, 29 May 1974, 'Solange II-decision'.
[161] Bruno de Witte *Direct Effect, Primacy, and the Nature of the Legal Order* (3rd edn, Oxford Academic, 2021), p. 222.
[162] ibid p. 225.

to review decisions that, whilst being adopted according to a CFSP legal basis, can be substantially considered of non-CFSP character as they regard a non-CFSP procedure. Secondly, the *Elitaliana* case, as well as the *H v. Council case*, expanded the court's jurisdiction to instances where, despite the decision being of CFSP nature, its contestation entails substantially non-CFSP considerations, and the dispute therefore does not regard CFSP competences. Lastly, the *Rosneft* case and the *Bank Refah Kargaran* case procedurally extend the CJEU's jurisdiction to preliminary questions and actions for damages. Nevertheless, due to the CFSP's place within the legal order and its politicised nature, certain CFSP decisions which cannot be reviewed by the CJEU still remain. This is displayed by the *Neves 77 Solutions* and *KS and KD* cases, which are still ongoing. This will always occur due to the reason behind the CFSP jurisdictional restriction: ensuring institutional balance.

The Ad Hoc Negotiation group of the European Committee on Democracy and Governance on the accession of the EU to the ECHR has attempted to implement a new provision within the new draft Accession Agreement in order to remedy this jurisdictional gap: the attribution clause. Nevertheless, this was unsuccessful. The attribution clause had the unsurmountable defects of causing an excessive procedural burden on the applicants and the impossibility for the EU to be held directly accountable. Consequently, to this day, the three other obstacles to the EU's accession to the ECHR found in *Opinion 2/13* have presumably been resolved and are addressed in the revised draft Accession Agreement. In lack of an adequate solution to implement in the agreement, the EU has now asserted it will surpass the roadblock posed by the CFSP area internally.

This paper uncovered, using the logic of the EU's legal order, that the CFSP roadblock could be surpassed by perceiving jurisdiction in this highly complex policy area differently and, therefore, relying on national courts. Indeed, article 2 TEU applies to the CFSP area, which is therefore subject by the EU's juridical protection and fundamental rights legal framework. Furthermore, Member States have the duty to provide effective and sufficient judicial review and remedies in fields covered by EU law, which does not exclude the CFSP area. Additionally, following the principle of conferral, article 24 TEU and article 275 TFEU entail that where the CJEU has no jurisdiction, Member States retain such competence. Finally, this solution can be effective without risking fragmentation,

as the Rosneft case paved the way to preliminary references in this area. This in turn grants the possibility for Member States judges to make use of this procedure where a contested CFSP decision is found to be *contra legem*. In the event the CJEU finds it substantially incompetent, pursuant to the proposed hypothetical scenario, the national court could then itself invalidate the CFSP decision. *The Foto-Frost* principle, in fact, should not apply to cases emanating from CFSP decisions due to their contextual differences. This, however, must be refined in consideration of the fact that, so far, the CJEU has shown reluctance to follow this path, and seems to prefer expanding its jurisdiction, another viable solution to this hurdle. To conclude, it is unclear how or indeed whether the EU will overcome the roadblock posed by the CFSP, but relying on national courts where the CJEU is not able to expand its jurisdiction is a viable option. In my opinion, having recourse to Member States will eventually be necessary as, despite the powerful strides the CJEU has taken in addressing this jurisdictional void, there will always exist a core of decisions that remain within the exception due to the nature of that aforementioned exception: ensuring the CJEU is deprived of political decisional power in this highly sensitive field.

The Neglected Atrocity

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The Emerging Jurisprudence on Genocidal Rape in International Criminal Law.

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TABLE OF ABBREVIATIONS

ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
ICC	International Criminal Court
DRC	Democratic Republic of the Congo

1. INTRODUCTION

Throughout history, sexual violence has been present throughout conflict situations. The occurrence of rape has long been considered an "unavoidable aspect of conflict"[2] and was not addressed in international law. During the Rwandan Genocide and the Bosnian War in the 1990s, sexual violence was taken further. Mass rape was carried out systematically, with the intent of bringing destruction upon a specific ethnic group.[3] In this context, reference is often made to the notion of "genocidal rape". As genocide encompasses certain acts committed with the intent to destroy a particular group, the notion of genocidal rape entails using rape to systematically destroy another group of people.[4]

In response to such atrocities, the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) recognised the importance of adequately addressing such crimes. Both tribunals were tasked with filling the gaps in international criminal law jurisprudence when prosecuting sexual violence in conflict settings, especially regarding the specific offence of genocidal rape.[5] Indeed, ground-breaking precedents were set, which seemingly "advanced the development of international justice in the realm of gender crimes by enabling the prosecution of sexual violence as a war crime, a crime against humanity and genocide".[6]

Although this jurisprudence was already established several decades ago, it remains relevant in the sense that sexual violence and allegations of genocidal rape have not subsided. Claims of genocidal rape have emerged from conflicts in the Democratic Republic of Congo, Darfur, Iraq, and Ethiopia.[7] Nowadays, the

[2] Sherrie L. Russell-Brown, 'Rape as an Act of Genocide' (2005) 21(2) Berkeley Journal of International Law 350, p. 351.
[3] Sandra Fabijanić Gagro, 'The Crime of Rape in the ICTY's and the ICTR's Case-Law' (2010) 60 Collected Papers of Zagreb Law Faculty 1309, p. 1314.
[4] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, art. 2; Beverly Allen, 'Rape Warfare in Bosnia-Herzegovina: The Policy and the Law' (1996) 3 The Brown Journal of World Affairs 313.
[5] Gagro (n 3) p. 1318.
[6] International Criminal Tribunal for the former Yugoslavia (ICTY), 'Landmark Cases' (n.d.) <www.icty.org/en/features/crimes-sexual-violence/landmark-cases> last accessed 12 April 2023.
[7] Carly Brown, 'Rape as a weapon of war in the Democratic Republic of the Congo' (2012) 22 (1) Torture: Quarterly Journal on Rehabilitation of Torture Victims and Prevention of Torture; Joshua Kaiser and John Hagan, 'Gendered Genocide: The Socially Destructive Process of Genocidal Rape, Killing, and Displacement in Darfur' (2015) 49 (1) Law & Society Review 69; Jehan Mohamed, 'The Role of Rape in the Yazidi Genocide' (2021) 8 (1) Liberated Arts: A Journal for Undergraduate Research; Mengistu Welday Gebremichael and others, 'Rape survivors' experience in Tigray: a qualitative study' [2023] BMC Women's Health.

permanent International Criminal Court (ICC) is responsible for prosecuting such crimes based on its Rome Statute established in 2002.[8] This emphasises the ICC as a pivotal starting point for understanding the development of the crime of genocidal rape under international law since the era of the tribunals.

This research paper aims to address the overarching question: 'To what extent has the jurisprudence of the International Criminal Tribunals for the former Yugoslavia and for Rwanda been adopted by the International Criminal Court in its approach to prosecuting genocidal rape?' To that end, the study delves into two specific sub-questions: (i) how has the notion of genocidal rape been developed by the ICTR and the ICTY's jurisprudence, and (ii) the extent to which the ICC's approach in prosecuting genocidal rape reflects these developments?

To begin with, this paper will cover the evolution of international law on sexual violence, including rape, in conflict. Then, an explanation of how rape was used within a genocidal framework in the Rwandan Genocide and the Bosnian War will also be provided. Building upon that, the contributions by both tribunals on sexual violence, as well as genocidal rape as a distinct crime, will be explored. Following this, the subsequent degree of prosecution of genocidal rape will be investigated. Next, an overview of the ICC's prosecution strategy and legal framework governing genocidal rape will be presented, reflecting on the jurisprudence of the tribunals previously discussed. Finally, a conclusion will be drawn in answering the above.

This study employs a doctrinal research design approach involving a descriptive analysis of legal instruments, scholarly articles, and case law to clarify the development of the jurisprudence on genocidal rape by the ICTY and ICTR and its adoption by the ICC. The choice in these institutions is motivated by the idea that the tribunals are considered to have produced ground-breaking jurisprudence on prosecuting sexual violence under international criminal law, whilst the ICC has been the responsible institution for such cases since 2002. This makes the analysis interesting in the sense that it determines whether the ICC has incorporated the novelty of the tribunals.

Most data will be collected from case law and legal instruments governing the ICTR, the ICTY and the ICC. Some sources in the form of reputable academic

[8] Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, art 5 (a).

discourse will also be utilised. The collected data will be analysed thematically, focusing on identifying critical legal principles and concepts developed by the ICTY and ICTR jurisprudence on genocidal rape and subsequent adoptions by the ICC. Although the focus lies on examining legal instruments and case law, certain non-legal factors (broader social and political elements) that may have influenced the prosecution of genocidal rape will be touched upon. Therefore, the research takes on a socio-legal approach.

2. Historical Development of Genocidal Rape

Sexual violence is not an unfamiliar element of conflict situations. Evidence of sexual violence can be traced back to the classical age, for example, by the Roman army, and continues to persist in modern instances.[9] The prevalence of sexual violence was seen during the Russian occupation of Germany following World War II, during the Rwandan Genocide and the Bosnian War, or the current developments regarding the conflict in Darfur, Sudan.[10]

The idea that sexual violence was an 'accepted' part of conflict is mirrored in the fact that it was only in the 20th century that it achieved somewhat of a foothold in international law, and only in the ICTR and the ICTY was sexual violence extensively addressed and prosecuted in an international criminal tribunal.[11] Some legal instruments prohibiting sexual violence as a capital crime can be found dating back to as early as the military codes of Henry V in the 15th century, as well as the Lieber Code of 1863 governing the conduct of soldiers in the American Civil War.[12] Such prohibitions were futile, however, as they were not translated into practice; the *de facto* situation was that sexual violence in conflict proved rampant.[13] While these offences were subject to prosecution in national courts, this was confined to violations by individual soldiers, overlooking

[9] Elisabeth Vikman, 'Ancient origins: Sexual Violence in Warfare, Part I' (2005) 12 (1) Anthropology & Medicine 21.
[10] Russel-Brown (n 2) p. 351.
[11] Madeline, Brashear, '"Don't Worry. These Girls Have Been Raped Once." Analyzing Sexual Violence in the Bosnian Genocide and the Response of the International Criminal Tribunal for the Former Yugoslavia' (2018) 9 (5) Voces Novae: Chapman Journal of Law and Policy, p. 1.
[12] Gagro (n 3) p. 1311.
[13] Patricia Viseur Sellers, 'The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation' (n.d.) Office of the High Commissioner for Human rights <www2.ohchr.org/english/issues/women/docs/paper_prosecution_of_sexual_violence.pdf> accessed 12 April 2023, pp. 5-7.

instances where sexual violence may have been a deliberate policy or carried out with the encouragement of higher-ranking authorities.[14]

A turning point was seen in the international criminal tribunals following World War II. The London Charter, establishing the International Military Tribunal for the trial of Nazi war criminals (Nuremberg Trials),[15] provided for the indirect possibility of rape and other forms of sexual violence to be prosecuted as war crimes and crimes against humanity.[16] Whereas war crimes involve violations of the laws and customs of war during armed conflicts, crimes against humanity encompass widespread or systematic acts committed against civilian populations, irrespective of the presence of armed conflict.[17] Ultimately, however, the Nuremberg Trials did not see any prosecutions for rape or sexual violence, despite evidence of such violations.[18] The Charter of the International Military Tribunal for the Far East also contained no explicit mention of rape or sexual violence as a crime. However, unlike the Nuremberg Trials, rape and forced prostitution were prosecuted as conventional war crimes in response to Japanese soldiers' treatment of Chinese women.[19] Essentially, this was the first case where rape was concretely seen as a violation of international law.[20] Nevertheless, such rapes were not considered an act of genocide by the Military Tribunal.[21]

Looking specifically at the Bosnian War and Rwandan Genocide, rape and sexual violence were taken further and carried out in an "organized [sic], systematic and massive" manner to facilitate genocide.[22] One of the methods that can be identified by Serbian forces against the Bosniak (Muslim Bosnian ethnic group) population involved the enslavement and rape of female victims in concentration camps until a pregnancy was established past the point of safe abortion. At this point, the victims were released. This is referred to as genocide

[14] Theodor Meron, 'Rape as a Crime Under International Humanitarian Law' (1993) 87 (3) The American Journal of International Law 424, p. 425.
[15] International Military Tribunal 'Charter of the International Military Tribunal (London Charter), 8 August 1945.
[16] ibid art. 6 (c).
[17] ibid art. 6.
[18] Fraciah Muringi Njoroge, 'Evolution of Rape As a War Crime and a Crime Against Humanity' (2016) <https://ssrn.com/abstract=2813970> accessed 12 April 2023, p. 4.
[19] ibid.
[20] Cassie Powell, '"You Have No God": An Analysis of the Prosecution of Genocidal Rape in International Criminal Law' (2016) 20 Richmond Public Interest Law Review 25, p. 29.
[21] ibid p. 29.
[22] Gagro (n 3) p. 1314.

by means of reproduction or even "a military occupation of the womb".[23] In Beverly Allen's *Rape Warfare*, she describes that in Bosnia, the cultural/national identity is inherited paternally: "From a sexist perspective, the children are Serb only and bear nothing of the mother's genetic or cultural identity".[24] Forced impregnation thus meant that the Serbian population would expand whilst eradicating the Bosniak population, as the children born as a result of rape were Serbs. In addition, it was seen as a way to affirm a newly reclaimed Serbian nationalist masculinity.[25] The motivation for sexual violence here was thus complex, implicating both gender and ethnicity.[26]

On the other hand, in Rwanda, women of the Tutsi ethnic group were raped by Hutu militias with the intent of destroying their reproductive capabilities. In Rwanda, women were valued for the number of children they could produce. Thus, as a result of rape, their societal value became marginal.[27] Sometimes, the rape of women was coupled with explicit threats of death.[28] Rape was also used to strip humanity from larger ethnic and community groups to which the victims belonged.[29] In patriarchal societies, women often derive their status from their virginity – once raped, society no longer deems her socially viable, and the victim becomes an outcast.[30] In this regard, the shame of victimisation even transcended the shame towards perpetrators.[31] This created a need to address such instances of rape in a different light in the ICTR and the ICTY, specifically under the umbrella of genocide.

3. Establishing Genocidal Rape as an International Crime in the ICTY and the ICTR

[23] Siobhán K. Fisher, 'Occupation of the Womb: Forced Impregnation as Genocide' (1996) 46 Duke Law Journal 91, p. 124.
[24] Allen (n 4) p. 315.
[25] Tatjana Takševa, 'Genocidal Rape, Enforced Impregnation, and the Discourse of Serbian National Identity' (2015) CLCWeb: Comparative Literature and Culture <https://docs.lib.purdue.edu/cgi/viewcontent.cgi?article=2638&context=clcweb> accessed 12 April 2023, p. 7.
[26] Powell (n 20) p. 39.
[27] Patricia A. Weitsman, 'The Politics of Identity and Sexual Violence: A Review of Bosnia and Rwanda' (2008) 30 Human Rights Quarterly 561, p. 564.
[28] *Prosecutor v. Jean-Paul Akayesu* (Judgement) ICTR-96-4-T (2 September 1998), p. 169.
[29] Nowrojee Binaifer,'Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath' (Human Rights Watch, September 1996) <www.hrw.org/legacy/reports/1996/Rwanda.htm> accessed 12 April 2023.
[30] Weitsman (n 27) p. 564.
[31] ibid.

3.1. General Contributions on Acts of Sexual Violence and Rape

The ICTY and ICTR established many precedents in terms of prosecuting sexual violence and rape in conflict settings. Breakthroughs were made in confirming the responsibility for direct and indirect perpetrators. Whilst holding individuals who had directly and physically committed crimes of sexual violence was not in itself particularly challenging, the tribunals also established responsibility for indirect, non-physical perpetrators.[32] This included leaders and commanders who influenced and encouraged subordinates to commit crimes of sexual violence.[33]

The ICTY also made a significant advancement through the establishment of Rule 96 in its Rules of Procedure and Evidence, which outlines how to deal with evidence in cases of sexual assault.[34] The rule excluded the requirement of the corroboration of victim testimony and rejected the defence of consent of the victim in certain (coercive) circumstances.[35]

What remained ambiguous due to conflicting case law was which instances of sexual violence can be classified as rape. The tribunals struggled to come up with a coherent definition of the offence of rape – tensions surround the interpretation and application of the element of non-consent of victims. The *Akayesu* case, a landmark trial before the ICTR, was significant for establishing a precedent in international law by convicting Jean-Paul Akayesu, former mayor of the Taba commune, for genocidal rape.[36] It was also the first case from both tribunals to extensively deal with the issue of defining rape under international law.[37] In *Akayesu*, the ICTR tribunal defined rape as "a physical invasion of a

[32] Patricia Viseur Sellers, 'The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation' (n.d.) Office of the High Commissioner for Human rights <www2.ohchr.org/english/issues/women/docs/paper_prosecution_of_sexual_violence.pdf> accessed 12 April 2023, pp. 13-17.
[33] *Prosecutor v. Dusko Tadić* (Appeal Judgement) IT-94-1-A (15 July 1999); *Prosecutor v. Anto Furundzija* (Judgement) IT-95-17/1-T (10 December 1998); *Prosecutor v. Radislav Krstić* (Judgement) IT-98-33 (2 August 2001).
[34] International Criminal Tribunal for the former Yugoslavia (ICTY) 'Rules of Procedure and Evidence', 14 March 1994.
[35] ibid Rule 96. In cases of sexual assault: (i) no corroboration of the victim's testimony shall be required; (ii) consent shall not be allowed as a defence if the victim (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear; (Amended 3 May 1995) (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible; (Amended 30 Jan 1995) (iv) prior sexual conduct of the victim shall not be admitted in evidence.
[36] *Prosecutor v. Jean-Paul Akayesu* (Judgement), ICTR-96-4-T (2 September 1998).
[37] ibid para. 686.

sexual nature, committed on a person under circumstances which are coercive".[38] Non-consent could be proven beyond reasonable doubt by proving the existence of coercive circumstances.[39] Coercive circumstances may include situations where the victim faces threats, intimidation, physical force, or other forms of duress that undermine the voluntary and informed nature of consent.[40] This vitiated the element of consent for rapes taking place in the context of genocide (and, by extension, also for crimes against humanity and armed conflict). Negating the possibility of consent under coercive circumstances makes the *Akayesu* definition well suited to address rapes committed on a mass scale: "Its focus on real world external rather than subjective realities also make it more susceptible to standard forms of legal proof".[41] In subsequent case law from both tribunals, however, there was a shift towards more traditional criteria for establishing rape as a crime. Specifically, in *Furundzija* and *Kunarac et al.,* the ICTY held that the victim's non-consent and the perpetrator's knowledge of this non-consent needed to be proven beyond reasonable doubt, increasing the burden of proof.[42] The focus on non-consent rather than on coercive circumstances was then also confirmed by the ICTR in *Semanza*[43]. This undermined the key finding from the *Akayesu* judgement, which allowed lack of consent to be inferred from proven coercive circumstances. As a result, it also limited the ability of the prosecutor to indict perpetrators for rape crimes due to the higher standard of proof required.[44]

The discrepancies in defining rape under international law may create several human rights risks.[45] This raises a critical question about the potential impact on victims' access to justice and prompts consideration of whether certain victims might have received greater protection than others due to discrepancies

[38] *Prosecutor v. Jean-Paul Akayesu* (Judgement), ICTR-96-4-T (2 September 1998), paras. 687-688.
[39] ibid para. 688.
[40] ibid.
[41] Catharine A. MacKinnon, 'Defining Rape Internationally: A Comment on Akayesu' (2006) 44 Colum J Transnat'l L 940, p. 956.
[42] *Prosecutor v. Anto Furundzija* (Judgement) IT-95-17/1-T (10 December 1998), para. 185; *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Judgment), IT-96-23-T & IT-96-23/1-T (22 February 2001), pp. 152-57.
[43] *Prosecutor v. Laurent Semanza* (Judgement and Sentence), ICTR-97-20-T (15 May 2003), paras. 344-46.
[44] Powell (n 20) p. 36.
[45] Patricia Viseur Sellers, 'The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation' (n.d.) Office of the High Commissioner for Human rights <www2.ohchr.org/english/issues/women/docs/paper_prosecution_of_sexual_violence.pdf> accessed 12 April 2023, p. 27.

between the tribunals' interpretations. For example, could this suggest that a victim of the Rwandan Genocide was more protected against rape in conflict than a victim of the Bosnian War?

3.2. Specific Contributions on Genocidal Rape

Both tribunals concluded that certain acts of rape and sexual violence formed an integral part of the process of destruction of another ethnic group and could thus constitute genocide.[46] However, convictions within this line of reasoning only took place in the ICTR.

According to the ICTR[47] and ICTY[48] Statutes, "Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:

a) killing members of the group;
b) causing serious bodily or mental harm to members of the group;
c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
d) imposing measures intended to prevent births within the group and
e) forcibly transferring children of the group to another group."

The mens rea is the *dolus specialis* (special intent) to commit genocide (destroying, in whole or in part, a national, ethnic, racial, or religious group).[49] This specific intent distinguishes genocide from other types of crimes against humanity.[50] The actus reus constitutes the five acts enumerated above. Thus, to prove the existence of an act of genocide, the prosecutor has to establish (i) the *dolus specialis* to commit genocide, and (ii) that the perpetrator's actions fit into one of the 'genocidal acts' categories.

Genocidal intent can be inferred from perpetrators' "deeds and utterances" considered together, as well as from the general context.[51] The critical and novel

[46] Gagro (n 3) p. 1318.
[47] UNSC 'Statute of the International Criminal Tribunal for Rwanda' (as amended on 13 October 2006), 8 November 1994, art. 2.
[48] UNSC 'Statute of the International Criminal Tribunal for the Former Yugoslavia' (as amended on 17 May 2002), 25 May 1993, art. 4.
[49] *Prosecutor v. Jean-Paul Akayesu* (Judgement) ICTR-96-4-T (2 September 1998), para. 498.
[50] *Prosecutor v. Clément Kayishema and Obed Ruzindana* (Judgement), ICTR-95-1-T (21 May 1999), para. 89.
[51] *Prosecutor v. Sylvestre Gacumbitsi* (Judgement), ICTR-2001-64-T (17 June 2004), para. 252.

issue the tribunals had to deal with was to connect rape to one of the genocidal acts.

Category B (causing serious bodily or mental harm to members of the group) was held to include rape in *Gacumbitsi*.[52] Like in *Akayesu*, the ICTR also here established that the accused committed genocide based on the physical harm of the victims as the result of the rapes they endured.[53] Similarly, in *Akayesu*, the resulting physical and psychological destruction of Tutsi women, their families and their communities constituted acts causing serious mental harm to members of the group.[54] The tribunal in *Ruzindana* further established that serious harm might include handicaps that render the individual unable to be a socially useful unit or a socially existent unit of the group.[55] Therefore, acts intended to destroy a woman's status under patriarchal societies fall within the purview of Category B (ie, acts intended to trigger stigma and marginalise women).

Category C (deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part) was seen to be fulfilled in *Akayesu*, the former mayor of the Taba commune in Rwanda. Whilst seeking refuge at the *bureau communal*, displaced female civilians were regularly subjected to sexual violence on or near the premises. Since acts of rape were committed solely against Tutsi women, many of whom were also subjected to public humiliation and mutilation, this made rape an integral part of destruction,[56] thereby fulfilling the requirements for Category C.

Category D (preventing births within the group) was held to include sexual mutilation, sterilisation and forced births.[57] Mass rapes and forced impregnation carried out systematically to bring about the destruction of the Tutsi ethnic group could fall within the scope of the definition of genocide in this sense.

3.3. Prosecuting Genocidal Rape in Practice

[52] ibid para. 291.
[53] ibid.
[54] *Prosecutor v. Jean-Paul Akayesu* (Judgement) ICTR-96-4-T (2 September 1998), para. 705.
[55] *Prosecutor v. Clément Kayishema and Obed Ruzindana* (Judgement), ICTR-95-1-T (21 May 1999), para. 107.
[56] *Prosecutor v. Jean-Paul Akayesu* (Judgement), ICTR-96-4-T (2 September 1998), paras. 731-34.
[57] *Prosecutor v. Jean-Paul Akayesu* (Judgement), ICTR-96-4-T (2 September 1998), paras. 507-8.

Looking at statistics on rape as a whole, five instances of rape convictions have been successful: as a crime against humanity, as a form of genocide or as a violation of the Geneva Conventions.[58] The ICTR saw 25% of rape cases resulting in successful convictions, whilst ICTY saw 92% of rape cases resulting in successful convictions.[59] This is a stark contrast when looking at statistics of rapes reported – the Rwandan genocide is estimated to have resulted in 10 times more rapes than the Bosnian War.[60] Due to the issue that rape and sexual violence did not have existing independent legal frameworks in international criminal law, substantial motivation was needed to enact changes. The role of transnational advocacy groups was critical in promoting this will, which did not mobilise equally.[61] Women's rights groups consistently pressured the ICTY regarding prosecutions of sexual violence.[62] However, there was limited pressure on the ICTR until two years after its establishment.[63] As a result, consistent pressure did not force the ICTR to change its approach of side-lining sexual violence prosecution.[64]

The ICTR had no comprehensive prosecutorial strategy to deal with sexual violence crimes, leading to inconsistencies and sporadic prosecutions. This is exemplified by *Akayesu*, as the tribunal chose only to amend the indictment to include rape as a criminal charge after witness testimony essentially left no other option, demonstrating a lack of prioritisation.[65] In *Nyriamasuhoko et al.,* the tribunal faced a similar situation. Pauline Nyriamasuhoko was the first woman to be convicted of rape as a war crime and crime against humanity by an international criminal tribunal and the first to be convicted of genocide.[66] Indeed, the court concluded that genocidal rape had occurred, but since this was not pled in the indictment by the prosecutor nor was it subsequently amended, Nyriamasuhoko

[58] Heidi Nichols Haddad, 'Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals' (2011) 12 Human Rights Review 109, p. 117.
[59] ibid.
[60] ibid.
[61] ibid p. 120-124.
[62] ibid p. 120.
[63] ibid p. 123.
[64] ibid.
[65] International Residual Mechanism for Criminal Tribunals, 'New charges against Akayesu: sexual violence' (20 October 1997) <https://unictr.irmct.org/en/news/new-charges-against-akayesu-sexual-violence> last accessed 12 April 2023.
[66] Nicole Hogg and Mark Drumbl, 'Women as Perpetrators: Agency and Authority on Genocidal Rwanda' in Amy E. Randall (ed), *Genocide and Gender in the Twentieth Century: A Comparative Survey* (Bloomsbury, 2015).

was not convicted accordingly.[67] This again reflects the lack of prosecutorial will regarding genocidal rape and the paramount importance of such a will.

On the other hand, in the ICTY, prosecuting sexual violence was a consistent element of the prosecutorial strategy, and the tribunal included gender-sensitive procedures[68], such as Rule 96 of Evidence and Procedure. While there was emphasis on prosecuting sexual violence, the ICTY did not lead to a single genocidal rape conviction. The tactics of forced impregnation used by the Serb forces against Bosniak women should have been used to fulfil the criteria of Category D (imposing measures intended to prevent births within the group) and Category C (deliberately inflicting on the group conditions to bring about its physical destruction) to thus be prosecuted as genocidal rape.[69] In fact, in *Kunarac*, it was determined that the defendant expressed his view that the rapes of Bosniak women were a way to assert Serb superiority and victory over the Muslims, implying the Bosniak ethnic group as such.[70] Literature exists that ascribes this to the fact that there were already existing international law instruments on genocide and war crimes, which pushed the incentive to turn to prosecuting crimes against humanity.[71]

4. The ICC's Approach to Genocidal Rape

A response to cases of sexual violence seems to have tentatively begun. This is exemplified by UNSC Resolutions 1325[72] and 1820[73] in 2000 and 2008, respectively, calling for special measures to protect women and girls, as well as the cessation of sexual violence against civilians in armed conflicts. The ICC also shows reflections on the developments of the tribunals in its legal instruments. Richard Goldstone, the former prosecutor of the ICTR and the ICTY, claims that "[with the ICC's establishment], gender crimes are now given the recognition they were denied for so many years".[74]

[67] *Prosecutor v Nyiramasuhuko et al. (Butare*) (Summary of judgement and sentence), ICTR-98-42-T (24 June 2011), para. 25.
[68] Haddad (n 58) p. 110.
[69] Gagro (n 3) pp. 1329-33.
[70] *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Judgment), IT-96-23-T & IT-96-23/1-T (22 February 2001), para. 584.
[71] Powell (n 20) p. 33.
[72] UNSC Res 1325 'on women and peace and security' (31 October 2000).
[73] UNSC Res 1820 'on acts of sexual violence against civilians in armed conflicts' (9 June 2008).
[74] Tanja Altunjan, 'The International Criminal Court and Sexual Violence: Between Aspirations and Reality' (2021) 22 German Law Journal 878, p. 878.

For example, the results of Rule 96 of the ICTY Rules of Evidence and Procedure have been translated into the ICC Rules of Procedure and Evidence.[75] Rules 70[76] and 71[77] reiterate and expand on the idea of rejecting the defence of consent of the victim in certain (coercive) circumstances. Furthermore, Rule 63(4) [78] reinforces that corroboration of victim testimony is not required, particularly in cases of sexual violence. The ICC also seems to have leaned towards the broader definition of rape determined in *Akayesu*, as the relevant provisions of the Rome Statute[79] and the ICC Elements of Crime, which assist in interpreting and applying the Rome Statute, also do not contain the element of consent,[80] pointing to it being irrelevant in circumstances constituting coercion.[81] However, returning to the evidentiary code, some elements are more in line with case law conflicting with *Akayesu*, as the rules again make room for the issue of consent instead of focusing on force and coercion.[82]

[75] International Criminal Court (ICC) 'Rules of Procedure and Evidence', 10 September 2002.
[76] ibid Rule 70. In cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles: (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent; (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent; (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence; (d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.
[77] ibid Rule 71. In the light of the definition and nature of the crimes within the jurisdiction of the Court, and subject to article 69, paragraph 4, a Chamber shall not admit evidence of the prior or subsequent sexual conduct of a victim or witness.
[78] ibid Rule 63 (4). Without prejudice to article 66, paragraph 3, a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence.
[79] Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, art. 7 (1) (g).
[80] International Criminal Court (ICC) 'Elements of Crimes', 11 June 2010, art. 7 (1) (g) -1. 1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body; 2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent; 3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population; 4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.
[81] MacKinnon (n 41) pp. 956-57.
[82] International Criminal Court (ICC) 'Rules of Procedure and Evidence', 10 September 2002, Rules 63 (4), 70, and 71; MacKinnon (n 41) pp. 956-58.

In terms of genocide, article 6 of the Rome Statute[83] is almost a mirror of the ICTY and ICTR statutes. The most significant reflection from the tribunals can be seen in article 6(b) of the ICC Elements of Crimes,[84] concerning genocide by deliberately inflicting conditions of life calculated to bring about physical destruction. Footnote 3 of the article explains that such conditions may include rape and sexual violence, concretising the link between rape and genocide.[85] The ICC Rome Statute thus reflects some progress in a legal framework for genocidal rape. It facilitates the link between rape and genocide in the Elements of Crime, but this is not explicit, which is essential as "the ability to eliminate a wrong is contingent on it first being 'named'.[86]

However, the ICC's practice in prosecuting sexual crimes does not live up to its progressive legal framework. Since the establishment of the ICC, thirteen out of thirty-one cases involve crimes relating to rape.[87] Only one relates specifically to genocidal rape.[88] The twelve others focus on rape as a war crime, with some further establishing rape as a crime against humanity.[89] This is in the face of the allegations of ethnic-based acts of violence, for example, in the Democratic Republic of Congo.[90] Since 1996, the country has been plagued by conflict, resulting in millions of deaths.[91] According to a study by the Harvard Humanitarian Initiative on the use of sexual violence in the DRC, the nature of the rapes indicate that these crimes are "intended to prohibit recovery and re-integration into society, and to thereby destroy the victims' families and communities".[92] Nevertheless, none of the six defendants brought to the ICC in

[83] Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, art. 6.
[84] International Criminal Court (ICC) 'Elements of Crimes', 11 June 2010, art. 6 (b).
[85] ibid art. 6 (b) n.3. This conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment.
[86] Altunjan (n 74) p. 881.
[87] International Criminal Court (ICC) 'Cases' (n.d.) <www.icc-cpi.int/cases> accessed 12 April 2023; ie, *Prosecutor v. Dominic Ongwen* (Judgement) ICC-02/04-01/15 (February 2021).
[88] *Prosecutor v. Omar Hassan Ahmad Al Bashir* (Second Decision on the Prosecutor's Application for a Warrant of Arrest) ICC-02/05-01/09 International Criminal Court (ICC) 12 July 2010.
[89] International Criminal Court (ICC) 'Cases' (n.d.) <www.icc-cpi.int/cases> accessed 12 April 2023; ie, *Prosecutor v. Dominic Ongwen* (Judgement) ICC-02/04-01/15 (4 February 2021).
[90] Brown (n 7) p. 24.
[91] ibid.
[92] Harvard Humanitarian Initiative, '"Now, The World Is Without Me": An Investigation of Sexual Violence in Eastern Democratic Republic of Congo'(Harvard Humanitarian Initiative, April 2010), p. 36.

relation to the conflict in the DRC since 2002 have been charged with genocide, although they could have been.[93]

Similarly, regarding the situation in Darfur, Sudan, since 2003, mass rapes were perpetrated by Arab *Janjaweed* forces as a means to ethnically cleanse, displace – and destroy black African groups.[94] In 2009, the prosecutor for the ICC issued an arrest warrant for the Sudanese President Omar Al Bashir for the crime of genocide.[95] This was only later amended to include the allegation that Al Bashir orchestrated the rapes of thousands of civilian women as an act of genocidal rape.[96] However, this single result is in the face of widespread allegations of genocidal rape.

Similar allegations have emerged from the Tigray War in Ethiopia, where from 2020 to 2022, thousands of Tigrayan women reported being raped based on their ethnicity – as a means to "destroy Tigray as a society and as an entity".[97] Another illustrative case is the treatment of Yazidi women by the Islamic State in Northern Iraq from 2014 to 2017, where they were subjected to sexual slavery and rape, leading to displacement and intentional interference with reproductive capabilities, ultimately aiming at the destruction of the Yazidi population".[98] Still, no further prosecutions based on alleged genocidal rape have taken place. Although one should take note of limitations regarding the ICC's jurisdiction in these cases, since neither Ethiopia nor Iraq are party to the Rome Statute, similar obstacles were overcome in issuing the arrest warrant against Al Bashir, despite Sudan also not being a state party to the ICC.[99]

The critical role of prosecutorial will has already been clarified relating to the ICTR and the ICTR case law, such as the non-conviction of Nyriamasuhoko of genocidal rape. Due to limited case law, the link between genocide and rape remains abstract, creating a barrier for prosecutors.[100] Furthermore, proving the

[93] Powell (n 20) p. 37.
[94] Kaiser and Hagan (n 7).
[95] *Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar Al Bashir")* (Warrant of Arrest) ICC-02/05-01/09 (4 March 2009).
[96] *Prosecutor v. Omar Hassan Ahmad Al Bashir* (Second Decision on the Prosecutor's Application for a Warrant of Arrest) ICC-02/05-01/09 (12 July 2010).
[97] Gebremichael (n 7) p. 8.
[98] Mohamed (n 7) p. 9.
[99] Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, art 13; UNSC Res 1593 'on reffering the situation in Darfur since 1 July 2002 to the Prosecutor of the Interntional Criminal Court' (31 March 2005).
[100] Powell (n 20) pp. 27-8.

dolus specialis of genocide makes it more challenging to prosecute rape as genocide rather than prosecuting it as a crime against humanity.[101] However, this is no reason to classify the crimes inadequately– it would equally be unacceptable to classify a crime against humanity as a war crime or, on a more relatable note, to classify murder as unintentional manslaughter. Prosecuting genocidal rape as a crime against humanity ignores the difference in the severity of the crimes. Justice may not truly be realised if victims do not see their perpetrators being held accountable for the crimes that were committed against them.

As ground-breaking as the jurisprudence of the ICTR and the ICTY is claimed to be, this has not translated into the ICC's *practice* in prosecuting genocidal rape.[102] Newer approaches suggest that even the novel findings of the tribunals are by now outdated and unable to address crimes of genocidal rape. One recent issue that has come to light is the concentration on female-only narratives. Looking at the situation in Darfur, only a limited amount of cases of rape are actually being classified as genocide.[103] Many cases of rape, which are claimed to be linked to a genocidal aim, are being perpetrated against men and boys.[104] Those that the ICC is trying to hold accountable, however, are men who raped women, even though there is evidence supporting the claim that rape of men and boys as a form of emasculation and humiliation aims at the destruction of ethnic groups.[105] It was already confirmed in *Ruzinanda* and *Akayesu* that such instances could constitute genocidal rape for women. Viewing men as the victims departs from the typical narrative and "forces the international community to recognize [sic] that their rigid definitions of genocidal crimes do not hold up to the realities of genocide".[106] Based on this, the international legal community should be shifting its focus from the idea that there are existing legal instruments but a lack of

[101] ibid pp. 45-46.
[102] Gagro (n 3); Powell (n 20); Bailey Fairbanks, 'Rape as an Act of Genocide: Definitions and Prosecutions as Established in Bosnia and Rwanda' (2018) 23 Historical Perspectives: Santa Clara University Undergraduate Journal of History 109.
[103] Bailey Fairbanks, 'Rape as an Act of Genocide: Definitions and Prosecutions as Established in Bosnia and Rwanda' (2018) 23 Historical Perspectives: Santa Clara University Undergraduate Journal of History 109, p. 118.
[104] ibid.
[105] Gabrielle Ferrales, Hollie Nyseth Brehm, and Suzy Mcelrath, 'Gender-Based Violence Against Men and Boys in Darfur: The Gender-Genocide Nexus' (2016) 30 (4) Gender and Society 565, pp. 572-573.
[106] Bailey Fairbanks, 'Rape as an Act of Genocide: Definitions and Prosecutions as Established in Bosnia and Rwanda' (2018) 23 Historical Perspectives: Santa Clara University Undergraduate Journal of History 109, p. 120.

prosecution of genocidal rape and that the existing legal instruments are inadequate.

5. Conclusion

In conclusion, the ICTY and the ICTR did indeed produce ground-breaking jurisprudence. Besides development in other realms of prosecuting sexual violence, which naturally aids in prosecuting rape as genocide, the tribunals essentially 'created' the offence of genocidal rape and prosecuted this for the first time in *Akayesu*. In practice, however, the successful conviction rate of genocidal rape cases was low, with only a few cases resulting in convictions in the ICTR and none in the ICTY. Nevertheless, the tribunals did succeed in concretely bringing the offence within the domain of international criminal law for the first time.

When assessing the extent to which the ICC has adopted the jurisprudence of the ICTY and ICTR in prosecuting genocidal rape, it becomes apparent that whilst some reflections of this jurisprudence can be found in the ICC's legal instruments, the ICC has fallen short in effectively prosecuting such crimes. Reflections of the tribunals' jurisprudence can be found within the legal instruments of the ICC. This is seen in the ICC's approach to defining the crime of rape, its evidentiary code, and, more concretely, footnote 3 of article 6(b) of the Elements of Crimes, all of which facilitates the link between rape and genocide. Nevertheless, the ICC remains hesitant to prosecute genocidal rape and falls behind in holding perpetrators accountable for it, with only one indictment specifically addressing the crime so far. Indeed, it seems that the ICC has fallen behind in this regard. The low prosecutorial rates for genocidal rape are further compounded by the argument that the existing framework for the offence is no longer sufficient to address current instances of genocidal rape, particularly those cases involving male victims.

In summary, whilst the ICTY and ICTR have made crucial advancements in addressing genocidal rape and contributed to the development of legal principles, the ICC has not effectively built upon this foundation. The ICC's limited success in prosecuting genocidal rape and its failure to adapt to evolving challenges suggest the need for a more comprehensive and updated approach to address this heinous crime.

A Right of Withdrawal Until the Council *Last* Acted?

Jakob Piep[1]

The remaining ambiguity surrounding the temporal limitation of the Commission's right of withdrawal after Case C-409/13 (*Macro Financial Assistance*).

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TABLE OF ABBREVIATIONS

AG	Advocate General
COREPER	Committee of Permanent Representatives of the EU
CJEU	Court of Justice of the European Union
EP	European Parliament
MFA	Macro Financial Assistance
OLP	Ordinary Legislative Procedure
RoP	Rules of Procedure
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union

1. INTRODUCTION

The Commission fulfils, in line with article 17(1) of the Treaty of the European Union (TEU), the role of the promoter of the Union's general interest. This role manifests itself during the Ordinary Legislative Procedure (OLP) through, *inter alia*, the "quasi-monopoly" to propose legislative acts,[2] the power to alter proposals as long as the Council has not acted, and the possibility to express negative opinions on amendments undertaken by the co-legislators.[3] This case brief focuses on the Commission's right to alter its legislative proposals, which is enshrined in article 293(2) of the Treaty on the Functioning of the European Union (TFEU). The rather ambiguous formulation of the article resulted in uncertainty concerning the limitations of this right. More specifically, it was unclear whether this article implies that the Commission is able to withdraw a legislative proposal if it disagrees with amendments undertaken by the European Parliament (EP) and/or the Council. This question was finally brought before the Court of Justice of the European Union (CJEU) in *Council v Commission (Macro Financial Assistance or MFA)*.[4] In this case, the Council was essentially claiming that neither article 17 TEU nor article 293 TFEU confer a general right to withdraw legislative proposals to the Commission.[5] While the Court ultimately sided with the Commission and indeed granted such a right of withdrawal, this right remains limited by four conditions.

Unfortunately, however, the Court did not elaborate on the temporal element of the Commission's right of withdrawal (i.e., the meaning of when the Council has 'acted'). The precise meaning behind this formulation is of fundamental importance since it sets a temporal constraint on the Commission's power to withdraw a legislative proposal. As already pointed out by Advocate General (AG) Jääskinen in his opinion to the case, this simultaneously raises questions of a constitutional nature since it inevitably affects the position of the

[2] Theodore Konstadinides, *Division of Powers in European Union Law: The Delimitation of Internal Competence Between the EU and the Member States* (Kluwer 2009), p. 63; Edward Best, 'The European Parliament and the right of initiative: Change practice, not powers' (2021) EIPA Paper, p. 4.
[3] See in particular, arts 293 and 294 TFEU.
[4] Case C-409/13 *Council of the European Union v European Commission* [2015] EU:C:2015:217.
[5] ibid paras. 31-35.

Commission in the legislative procedure.[6] The Court's reluctance on this issue could, therefore, be partly due to the political sensitivity of the question. Indeed, an interpretation of the temporal element of the Commission's right of withdrawal, which places the moment at which the Council has acted for the first time very early in the legislative procedure, could perhaps overly restrict the Commission's role in the OLP and, thereby, its role to promote the European Union's (EU) general interests.

It must be acknowledged that *MFA* dates back to 2015 and the jurisprudence of the CJEU on the Commission's right of withdrawal has not evolved since then. However, apart from the CJEU's silence on the temporal element of the Commission's right of withdrawal, there seems to be a lack of academic publications focusing on this element and its intertwined implications of constitutional nature. The current understanding of the moment the Council has acted seems to be reflected in the AG's opinion to *MFA*. Consequently, the formulation in article 293(2) TFEU probably means that the Council is assumed to have acted, taking into account article 294(4) and (5) TFEU, when it formally approves, or disapproves, the first position of the European Parliament.[7] This understanding, however, seems to neglect current institutional practice and thus has a negative impact on the institutional balance, as it vests substantial power in the Commission. Furthermore, in light of ongoing discussions around institutional reforms and the strengthening of democratic legitimacy within the EU, which should be undertaken before the EU undertakes further enlargement, [8] consideration should also be given to the Commission's role within the OLP. Thus, it is certainly valuable to revisit *MFA* and closer examine the temporal element of the Commission's right to withdraw its legislative proposals throughout the following sections.

The first section of this case brief focuses on the argumentation of the Court and Advocate General Jääskinen in *MFA*. Subsequently, the second section heads

[6] Case C-409/13 *Council of the European Union v European Commission* [2014] EU:C:2014:2470, Opinion of AG Jääskinen, para. 1. See also Matteo Bonelli & Merijn Chamon 'Withdrawing legislative proposals at a whim? - The case of the CAP reform' *(EU Law Live*, 2020) <https://eulawlive.com/op-ed-withdrawing-legislative-proposals-at-a-whim-the-case-of-the-cap-reform-by-matteo-bonelli-and-merijn-chamon/> accessed 10th October 2023.

[7] Case C-409/13 *Council of the European Union v European Commission* [2014] EU:C:2014:2470, Opinion of AG Jääskinen, para. 60.

[8] See for example, Franco-German Working Group on EU Institutional Reform, 'Sailing on High Seas: Reforming and Enlarging the EU for the 21st Century' (2023).

to what the Court did not touch upon in its judgment and where parts of the ambiguity surrounding the Commission's right of withdrawal remain. Consequently, the section contrasts the current interpretation of the temporal element of article 293(2) TFEU, which seems to be based on a more theoretical understanding of the OLP, with current institutional practices, such as the culture of trilogues. In the last section, a glimpse in the future is cast and proposed how the current temporal restrictions on the Commission's right of withdrawal might be amended to benefit, *inter alia*, the institutional balance and democratic legitimacy of the EU. In addition to arguing in favour of an alternative point in time when the Council would presumably have acted, it is also suggested how this reform could be implemented via an amendment of secondary EU legislation.

2. THE COMMISSION'S RIGHT OF WITHDRAWAL IN CASE C-409/13 (*MFA*)

Before the case of *MFA* was ruled upon, there were already three generally recognised scenarios in academic literature which allow the Commission to withdraw a legislative proposal. First, the Commission is able to withdraw proposals out of administrative reasons, namely when proposals become obsolete or superfluous.[9] Second, the principle of political discontinuity could allow the Commission to withdraw proposals stemming from the previous Commission in office.[10] Third, the Commission might withdraw its legislative proposal after it receives a yellow card or orange card under article 7(2) or (3) of Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality.

The case of *MFA*, however, represented a novel scenario, in which the Commission withdrew a legislative proposal contrary to the interests of the European Parliament and Council (the co-legislators).[11] The dispute in the case at hand related to the procedure for granting Macro Financial Assistance. On the one

[9] Eva Poptcheva, 'The European Commission's right to withdraw a legislative proposal' (*European Parliamentary Research Service*, 2015) <https://epthinktank.eu/2015/04/23/the-european-commissions-right-to-withdraw-a-legislative-proposal/> accessed 12th October 2023.
[10] See for example, Framework Agreement on relations between the European Parliament and the European Commission (2010) OJ L 304, art 39.
[11] Matteo Bonelli & Merijn Chamon 'Withdrawing legislative proposals at a whim? - The case of the CAP reform' *(EU Law Live*, 2020) <https://eulawlive.com/op-ed-withdrawing-legislative-proposals-at-a-whim-the-case-of-the-cap-reform-by-matteo-bonelli-and-merijn-chamon/> accessed 10th October 2023.

hand, the Commission proposed that such grants should be issued via an implementing decision.[12] On the other hand, the European Parliament and Council seemed to have found an understanding that such grants should be issued via the OLP.[13] Shortly before a provisional agreement could have been reached, the Commission withdrew its proposal since it considered the adoption of the OLP as an "alteration which would distort the proposal and give rise to significant constitutional problems".[14] Subsequently, the Council brought an action for annulment before the CJEU essentially asking the Court whether the Commission enjoys such a right even after an informal agreement has been reached on a particular part of a legislative proposal. However, the question referred to the Court is more fundamental and constitutional in nature since it generally concerns the institutional position of the Commission during the legislative procedure. The CJEU was confronted with the choice between either reducing the role of the Commission to an "honest broker" between Parliament and Council or giving it much more power by mirroring the right of withdrawal to the right of initiative.[15]

The CJEU ultimately confirmed the existence of the Commission's right to withdraw its legislative proposal. However, it made this right subject to four cumulative conditions. First, this power can only be exercised until the Council has acted.[16] Unfortunately, the Court did not elaborate on the exact point in time when the Council can be considered to have acted. AG Jääskinen, on the other hand, provided some guidance on this, claiming that the relevant moment coincides with the time when the Council formally adopts its position at the first reading within the meaning of article 294(4) or (5) TFEU.[17] Second, the Commission must provide reasons for the withdrawal.[18] Third, concerning the substantive aspect of the duty to provide reasons, the Commission must be able to

[12] Case C-409/13 *Council of the European Union v European Commission* [2015] EU:C:2015:217, paras. 18-26.
[13] ibid.
[14] ibid para. 24.
[15] Matteo Bonelli & Merijn Chamon 'Withdrawing legislative proposals at a whim? - The case of the CAP reform' *(EU Law Live*, 2020) <https://eulawlive.com/op-ed-withdrawing-legislative-proposals-at-a-whim-the-case-of-the-cap-reform-by-matteo-bonelli-and-merijn-chamon/> accessed 10th October 2023.
[16] Case C-409/13 *Council of the European Union v European Commission* [2015] EU:C:2015:217, para. 74.
[17] Case C-409/13 *Council of the European Union v European Commission* [2014] EU:C:2014:2470, Opinion of AG Jääskinen, para. 60.
[18] Case C-409/13 *Council of the European Union v European Commission* [2015] EU:C:2015:217, para. 76.

demonstrate cogent evidence or arguments for its decision.[19] Fourth, the Commission must act in line with the principle of sincere cooperation.[20] In *MFA*, the Commission claimed during trilogue meetings that it could envisage withdrawing the proposal on the ground that the adoption of OLP would distort the proposal's *raison d'être*. Applying the previously established conditions to the case facts, the Court found that the Commission's statements had brought "sufficiently to the attention" the reasons for the withdrawal to the co-legislators.[21] The judgement, subsequently, resulted in a revision of the Interinstitutional Agreement on Better Law-Making in 2016, incorporating the revised duties flowing from the principles of sincere cooperation and institutional balance.[22]

Thus, the CJEU added in *MFA* another scenario under which the Commission is able to withdraw its legislative proposal, namely when the co-legislators fundamentally change the sense of its proposal or remove the proposal's *raison d'être*. However, it is also evident from the Court's reasoning that the Commission, given its duty to represent the general interest of the EU, is allowed discretion in deciding which amendments are likely to fundamentally alter the meaning of the proposal. Naturally, this judgement also affects the political dimension of the principle of institutional balance, which describes the way the relationships between the institutions are organised.[23] By confirming this additional, more far-reaching, ground for withdrawing a legislative proposal, and *de facto* leaving open until which moment this right can be exercised, the Commission has gained an even stronger role in the legislative procedure. The subsequent section further elaborates on the legal consequences of these developments in the CJEU's jurisprudence around the Commission's right of withdrawal, focusing particularly on current institutional practices.

3. A Temporally Unrestricted Right? The Difference Between Theory and Practice

[19] Case C-409/13 *Council of the European Union v European Commission* [2015] EU:C:2015:217, para. 76.
[20] ibid para. 83.
[21] ibid paras. 80 and 81.
[22] Interinstitutional Agreement of 13 April 2016 between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making [2016] OJ L 123/1.
[23] Jean-Paul Jacqué, 'The principle of institutional balance' (2004) 41(1) Common Market Law Review 383.

The result of *MFA* is that the Commission has, in principle, a right of withdrawal if it considers the legislative proposal's *raison d'être* to be lost. However, it remains unclear until which moment the Commission is able to exercise this right. The AG opinion and voices in academia seem to suggest that the Commission enjoys this right until the Council formally adopts its first position.[24] The formal adoption of the Council's first position simultaneously ends the first reading of the OLP. This, in itself, could seem ordinary to the reader. However, it should be noted that during the Juncker Commission (2014-2019), 89% of legislative acts were adopted in the first reading.[25] Moreover, one can equally observe a rising tendency throughout the last years since the second Barroso Commission (2009-2014) adopted 'only' 85% of the legislative acts in the first reading.[26] This high percentage can partly be explained by the culture of trilogues during the OLP. The general occurrence of trilogues means that the neatly explained ordinary legislative procedure in article 294 TFEU takes on a completely different form in practice.

Trilogues can be defined as inter-institutional negotiations between the Commission, the European Parliament and the Council that take place behind closed doors and are, therefore, often characterised as a trade-off between efficiency and accountability.[27] In the context of trilogue negotiations as part of the OLP, a distinction can be drawn between a first-reading agreement and an early second-reading agreement. On the one hand, a first reading agreement describes the situation in which the co-legislators agree on a compromise text before the European Parliament's first reading vote.[28] If an agreement is reached at this stage, it will be adopted by the European Parliament and Council as their first reading positions. On the other hand, an early second reading agreement describes the situation where the co-legislators agree on a text after Parliament's first reading position has already been adopted, but before the Council has adopted its first

[24] Case C-409/13 *Council of the European Union v European Commission* [2014] EU:C:2014:2470, Opinion of AG Jääskinen. See also Nicola Lupo, 'The Commission's Power to Withdraw Legislative Proposals and its 'Parliamentarisation', Between Technical and Political Grounds' (2018) 14(1) European Constitutional Law Review 311, p. 323.
[25] European Parliament, 'Mid-Term Activity Report – Developments and Trends of the Ordinary Legislative Procedure' (2021), p. 12.
[26] ibid.
[27] Christilla Roederer-Rynning & Justin Greenwood, 'The culture of trilogues' (2015) 22(8) Journal of European Public Policy 1148, pp. 1149-1151.
[28] Neill Nugent, *The Government and Politics of the European* Union (Palgrave 2017), p. 341.

position.[29] If an agreement is reached at this stage, it is adopted as the Council's first reading position and as Parliament's second reading position. These different sub-categories in trilogue negotiations during the OLP are not purely political and are formally recognised, for example, in the Mid-Term Activity Report of the European Parliament. [30] It is decisive to take note of both the first-reading agreement and the early second-reading agreement since the Council adopts its first position at the end of both stages. Consequently, between 2014 and 2019, 89% of the legislative acts might have been reached as a first-reading agreement, but an additional 10% have been adopted as early second-reading agreements. [31] It follows logically that 99% of the legislative acts were adopted by means of a Council's first position between 2014 and 2019.

Thus, by interpreting article 293(2) TFEU as meaning that the Council has acted when it formally adopts its first position, and, thereby, giving the Commission the power to withdraw its proposal until this moment, the Commission is *de facto* given a power of withdrawal until the very last moment before the legislative act is finally adopted. The current understanding of the temporal dimension of the Commission's right to withdraw its proposal until the Council has acted, therefore, comes closer to a right of withdrawal until the Council acted *last*, rather than *first*.

AG Jääskinen was, at least in part, aware of the above implications in his Opinion to the case *MFA*. To begin with, he acknowledged that there are two dimensions to the legislative procedure, the legal and political dimension.[32] While the AG recognized the decisiveness of the political dimension to reach a consensus, he sees a need for legal discipline emanating from the constitutional principle of representative democracy and requiring transparent procedures in the adoption of a legislative act.[33] Thus, the AG is aware of the culture of trilogues during the legislative procedure but of the firm opinion that the political dimension cannot prevail over the legal dimension.[34] On this point, it is crucial to remember

[29] Neill Nugent, *The Government and Politics of the European* Union (Palgrave 2017), p. 341.
[30] European Parliament, 'Mid-Term Activity Report – Developments and Trends of the Ordinary Legislative Procedure' (2021), p. 12.
[31] ibid.
[32] Case C-409/13 *Council of the European Union v European Commission* [2014] EU:C:2014:2470, Opinion of AG Jääskinen, para. 64.
[33] Case C-409/13 *Council of the European Union v European Commission* [2014] EU:C:2014:2470, Opinion of AG Jääskinen, para. 64.
[34] ibid para. 101.

the AG's sharp distinction between the political nature and legal nature of the OLP and his qualification of trilogues as purely political.

While there is indeed no reference in the Treaties to the occurrence of trilogues, they have been increasingly made subject to regulation and institutionalisation throughout the last years.[35] In the remainder of this section, this recent tendency is illustrated by means of two examples.

To begin with, trilogue negotiations always take place on a negotiation mandate. This mandate stems, from the perspective of the European Parliament, from the Plenary or the relevant Committee, from the perspective of the Council, from the Council itself or Committee of Permanent Representatives of the EU (COREPER), and from the perspective of the Commission, from the College of Commissioner.[36] As the name already suggests, these mandates form the starting point of each institution's negotiating position and are publicly available. It can take months and even years until this mandate is adopted in the institution and trilogue negotiations are able to commence.[37] For the European Parliament, this is, for example, enshrined in Rules 70-72 of the European Parliament's Rules of Procedure (RoP), which outline that trilogues can only take place upon a mandate delivered by the Plenary of the European Parliament. [38] Furthermore, Parliamentarians are under constant obligations to report back to the European Parliament throughout the trilogue negotiations.[39] At the end of the trilogues, a provisional agreement might be adopted, which then has to be approved first in the Parliamentary Committee and COREPER respectively before being put to a vote in the European Parliament and Council.[40]

[35] Gijs Jan Brandsma et al., 'Trilogues in Council: Disrupting the Diplomatic Culture?' (2021) 28(1) Journal of European Public Policy 10, pp. 10-12.
[36] Directorate for Legislative and Committee Coordination Legislative Affairs Unit (LEGI), *Handbook on the Ordinary Legislative Procedure* (European Parliament 2020), pp. 16-34. See also, European Parliament, 'Interinstitutional negotiations' (European Parliament, 2017) <www.europarl.europa.eu/olp/en/interinstitutional-negotiations> accessed 25th October 2023.
[37] See for example, the negotiations around the proposal for a revised Directive on liability for defective products (Procedure 2022/0302/COD). The Commission proposal has been adopted in September 2022. However, the Council only adopted a negotiation mandate in June 2023 and the Committee on Legal Affairs and Internal Market & Consumer Protection of the European Parliament only adopted its position in October 2023.
[38] Christilla Roederer-Rynning & Justin Greenwood, 'The culture of trilogues' (2015) 22(8) Journal of European Public Policy 1148, p. 1150.
[39] ibid.
[40] Directorate for Legislative and Committee Coordination Legislative Affairs Unit (LEGI), *Handbook on the Ordinary Legislative Procedure* (European Parliament 2020), pp. 16-34. See also, European Parliament, 'Interinstitutional negotiations' (European Parliament, 2017) <www.europarl.europa.eu/olp/en/interinstitutional-negotiations> accessed 25th October 2023.

Next to these negotiation mandates, one should also take account of the four-column document. In this document one can publicly acquire information about the initial positions of each institution and, by means of the fourth column, the compromise text.[41] Two actors played a decisive role in creating this document and enhancing the transparency of trilogues. First, the European Ombudsman highlighted the importance of this document, being the "tracking" of the trilogue procedure, and called for the publication of these tables at the latest after negotiations are concluded.[42] Second, the General Court held in *De Capitani* that, firstly, trilogue tables form part of the legislative procedure,[43] and, secondly, that there exists no general presumption of non-disclosure concerning these tables in an ongoing legislative procedure.[44] The Court based this decision on the reasoning that the effectiveness and integrity of the legislative procedure cannot undermine the principles of publicity and transparency which underlie that procedure.[45]

Thus, to qualify trilogues as purely political seems outdated, since they are increasingly regulated, subject to reporting obligations in the institutions and information about ongoing trilogues are publicly available.[46] Furthermore, they have become a daily practice between the EU institutions and completely changed the functioning of the OLP. This new understanding of the practice of trilogues can be contrasted with the old understanding, according to which the Commission proposals disappeared in informal politics, only to reappear in the formal legislative procedure as EP proposals including invisible elements of Council positions.[47] AG Jääskinen seems to be closer to this old understanding of trilogues in his opinion to *MFA*, which is perfectly reasonable since this opinion dates back to 2014.

It seems logical that the interpretation of when the Council acts first should correspond to current institutional practices, especially considering that the formal adoption of the Council's first position marked the end of the OLP in 99% of the

[41] European Ombudsman, 'Decision of the European Ombudsman setting out proposals following her strategic inquiry OI/8/2015/JAS concerning the transparency of Trilogues' OI/8/2015/JAS, para. 49.
[42] ibid paras. 50-56.
[43] Case T-540/15 *Emilio De Capitani v European Parliament* [2018] EU:T:2018:167, para. 75.
[44] ibid para. 83.
[45] ibid.
[46] Christilla Roederer-Rynning & Justin Greenwood, 'The culture of trilogues' (2015) 22(8) Journal of European Public Policy 1148, p. 1160.
[47] ibid p. 1159.

cases between 2014-2019. This vests a lot of power in the Commission since it could theoretically withdraw legislative proposals until the very last moment before the act is adopted, and even after a provisional agreement has been reached at the end of trilogue negotiations. Professor Lupo previously reasoned, by means of comparing the EU to national systems, that the power of withdrawal stays well away from a veto power on the final legislative text.[48] While it is not argued that the power of withdrawal amounts to a veto power for the Commission, which would be in violation of the principle of institutional balance,[49] it can also not be stated that it stays well away from such a power, since the Commission could, in principle, withdraw a proposal that has already been subject to a provisional agreement between the co-legislators. In this regard, one must consider that in nearly all the cases, the Council adopts the substantive content of a provisional agreement as its first position, which simultaneously ends the legislative procedure. While there has not yet been a case where the Commission actually withdrew a legislative proposal that was subject to a provisional agreement at the end of trilogue negotiations, the theoretical possibility exists at this moment, which can already be used as a tool to exercise political pressure on the co-legislators during negotiations. Furthermore, a right of withdrawal until the very last moment before a legislative act is adopted seems to be contrary to the *effet utile* of article 293 (2) TFEU, which explicitly states that a legislative proposal might only be altered (and withdrawn) by the Commission "as long as the Council has not acted".[50]

4. The Way Forward

In the last section of this case brief, two alternative understandings of when the Council acted are advanced. First, this could already be the moment when COREPER or the Council adopt the negotiation mandate. This would be a rather literal interpretation of article 293 (2) TFEU since, even though this can take

[48] Nicola Lupo, 'The Commission's Power to Withdraw Legislative Proposals and its 'Parliamentarisation', Between Technical and Political Grounds' (2018) 14(1) European Constitutional Law Review 311, p. 323.
[49] Case C-409/13 *Council of the European Union v European Commission* [2015] EU:C:2015:217, para. 75.
[50] As was seen in the first section, the Court held in *MFA* that it flows from article 17(2) TEU in conjunction with articles 289 TFEU and 293 TFEU that the Commission, if need be and under the conditions established in the case, withdraw a legislative proposal. See, Case C-409/13 *Council of the European Union v European Commission* [2015] EU:C:2015:217, para. 74.

months, it really marks the first moment the Council adopts a position in a file. However, it must be acknowledged that it would be rather difficult for the Commission to already determine that the proposal's *raison d'être* has been distorted before COREPER adopts its negotiation mandate. Second, and perhaps more realistically, this could be the moment when the Council and European Parliament adopt a provisional agreement at the end of the trilogue procedure. This is the point in time when both legislators reach an understanding about the substantive content of the legislative act, which is, in theory, subsequently approved by both institutions. As was, however, seen in the previous section, an agreement reached during trilogue negotiations is of provisional nature and has to be approved by a Parliamentary Committee and COREPER respectively.[51] It is, therefore, questionable whether it is desirable to attach legal consequences to the reaching of a provisional agreement during trilogue negotiations. However, one could consider attaching these consequences to the moment in time when the provisional agreement is formally adopted by COREPER.

This case brief advances the argument that the latter situation should constitute the moment when the Council has acted and when it is, consequently, no longer possible for the Commission to withdraw its legislative proposal. This would still be desirable since, firstly, substantial time can pass between the adoption of a COREPER position and a Council position, and secondly, it would ultimately establish a concrete temporal restriction on the Commission's right to withdraw its legislative proposal. While the CJEU did not yet have a second chance to rule on this issue and to clarify points left unaddressed in *MFA*, the Court would perhaps, with an increased institutionalisation and regulation of trilogues, acknowledge the constitutional significance of the right of withdrawal and provide further guidance on its temporal dimension. There is no better way of exploring the CJEU's current stance than to bring an annulment action via article 263 TFEU, under which the Council and Parliament have automatic standing. Naturally, the Court cannot rule on *in abstracto* actions and there must be a concrete case in which the Commission withdrew its proposal after the co-legislators already

[51] Directorate for Legislative and Committee Coordination Legislative Affairs Unit (LEGI), *Handbook on the Ordinary Legislative Procedure* (European Parliament 2020), pp. 16-34. See also, European Parliament, 'Interinstitutional negotiations' (European Parliament, 2017) <www.europarl.europa.eu/olp/en/interinstitutional-negotiations> accessed 25th October 2023.

reached a provisional agreement at the end of trilogue negotiation. In *MFA*, on the other hand, a provisional agreement on the whole text only appeared very close and was not reached yet.[52] Alternatively, and to avoid the common call for a Treaty amendment under article 48 TFEU, the European Parliament and Council could also exercise political pressure on the Commission to adopt a revised version of the Interinstitutional Agreement on Better Law-Making from 2016. This revised version should then provide guidance on the different conditions of the right of withdrawal, not only on the principles of sincere cooperation and institutional balance but also on the temporal element of this right. This would have the advantage that the institutions would not have to wait for a ruling from the CJEU and are themselves responsible for the substantive elements of each institution's obligations.

5. CONCLUSION

It should have become evident throughout this case brief that a narrow question about a temporal restriction on the Commission's right of withdrawal inevitably leads to broader questions about the democratic legitimacy of the EU, such as whether it is desirable to give this much power to a purely supranational institution or whether the importance of (in)directly democratic legitimate actors should be emphasised in the OLP. Furthermore, considerations concerning the institutional balance between the different EU institutions emerged. One could generally criticise the way the Court applied its criteria to the case facts of *MFA*, but the aim of this case brief was to focus on the lack of guidance concerning the temporal restrictions on the Commission's right to withdraw its legislative proposals.

While there has not yet been a case where the Commission withdrew a legislative proposal that was already subject to a provisional agreement at the end of trilogue negotiations, the theoretical possibility exists at this moment, which can be used as a tool to exercise political pressure on the co-legislators during negotiations. Thus, the omission to further address the temporal dimension of the Commission's right to withdraw legislative proposals, consequently, vested considerable power in the supranational institution and shifted the institutional balance in its favour. Moreover, this case brief argued against Advocate General

[52] Case C-409/13 *Council of the European Union v European Commission* [2015] EU:C:2015:217, para. 25.

Jääskinen's interpretation of the moment in which the Council first acted, which is equally shared by several voices in academia, since it does not sufficiently take into account current institutional practices. In this regard, it is worth recalling the frequency of trilogue negotiations during the OLP, and, perhaps most notably, that the adoption of the Council's first position generally marks the end of the OLP. Thus, placing the moment, when the Council is assumed to have acted, in the adoption of the Council's first position leads *de facto* to the situation in which the Commission enjoys a right of withdrawal until the very last moment of the OLP. Instead, it was advanced that the Council should be assumed to have acted when COREPER confirms the provisional agreement reached during trilogue negotiations. This would be desirable since, firstly, substantial time can pass between the adoption of a COREPER position and a Council position, and secondly, it would ultimately establish a concrete temporal restriction on the Commission's right to withdraw its legislative proposal.

This author believes that concerns relating to democratic legitimacy have been sufficiently addressed throughout the case brief by finally advocating for an interpretation of article 293(2) TFEU that benefits the Council. This interpretation also benefits the European Parliament, as it implies that the Commission can no longer withdraw its legislative proposal if both institutions reach a provisional agreement that has been subsequently adopted by COREPER. Consequently, this equally influences the principle of institutional balance since a narrower interpretation of the right of withdrawal's temporal dimension seems to take away extensive powers from the Commission, and thereby, re-shift the balance between the institutions. However, this would equally further formalise the occurrence of trilogues during the OLP, which could reinforce general considerations around the democratic legitimacy of trilogues, such as the 'trade-off between efficiency and accountability' argument. While the scope of this case brief was narrower, it could be the subject of future research to further explore the relationship between the informal dimension of the OLP, which increasingly becomes more institutionalised and regulated, and the formal dimension, and its implications on the democratic legitimacy of the European Union.