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TABLE OF CONTENTS

THE EDITORIAL TEAM.....	III
FROM THE EDITORIAL DESK.....	IV
BOARD OF ADVISORS	V
“ALL ROADS LEAD TO ROME”: ECOCIDE AND CORPORATE ACCOUNTABILITY UNDER THE ROME STATUTE <i>NICOLE RUSSO</i>	1
DARK PATTERNS: THE PROTECTION OF CHILDREN UNDER THE GDPR <i>LORENA ELSÄSSER BRIONES</i>	32
HUMANITARIAN JUSTIFICATION AND RESPONSIBILITY MECHANISMS IN INTERNATIONAL LAW: A CASE STUDY OF THE SAUDI-LED INTERVENTION IN YEMEN <i>JULIUS FRANK</i>	69
REASSESSING THE ESSENTIAL FACILITIES DOCTRINE IN THE DIGITAL ECONOMY: ACCESS TO DATA UNDER ARTICLE 102 TFEU <i>AYDIN BENGISU</i>	113
INDIVIDUAL DATA SOVEREIGNTY AND THE GDPR: A CASE STUDY OF <i>CRYPTEX</i> <i>ALEXANDRIA BALLY-STANFORD</i>	164
TO DEROGATE OR TO ACT IN THE SPIRIT OF SOLIDARITY? FRAMING MEMBER STATES’ ACTION IN TIMES OF EMERGENCY UNDER ARTICLE 347 TFEU AND ARTICLE 222 TFEU <i>CECILIA DURANTE</i>	211
REINTERPRETING DOMINANCE? A CRITICAL ANALYSIS OF THE DRAFT GUIDELINES ON ARTICLE 102 TFEU IN LIGHT OF CJEU CASE LAW <i>EMILY KAUTTO</i>	242
BRANDED BUT REBORN: LEGAL PERSPECTIVES ON US NOMINATIVE FAIR USE AND EU REFERENTIAL USE IN UPCYCLED FASHION <i>AYDIN BENGISU</i>	270

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FROM THE EDITORIAL DESK

The Maastricht Student Law Review (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 work, 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.

We are pleased to publish the first issue of the third volume. This issue features eight submissions that fall under the umbrella of international, European, and comparative law. These submissions include theses and articles that have been written by graduate students and UM alumni. We are very pleased to showcase many topical issues on human rights, data protection, and EU law. We are continually inspired by our authors' unique perspectives, and we hope they inspire you, our readers, in turn.

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

As the Editor-in-Chief, I would first and foremost like to thank the editorial team for their hard work in reviewing all the papers submitted to us and carefully editing these final selected papers. Your persistent efforts, continuous dedication, and enthusiasm have brought this issue to life. It has been a pleasure working with you. I would also like to thank everyone who submitted their work to us; it has been a pleasure to read and edit each paper. Finally, a special thank you to the authors of this issue's papers, without whose commitment this publication would not have been possible.

The editorial team hopes you enjoy reading our first issue of 2026.

Ilona Toivonen

Editor-in-Chief of the Maastricht Student Law Review

Maastricht, 4 February 2026

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“All Roads Lead to Rome”: Ecocide and Corporate Accountability under the Rome Statute

*Nicole Russo*¹

1. INTRODUCTION	3
2. THE PROPOSED LEGAL DEFINITIONS OF ECOCIDE	6
3. THE PROBLEM OF MENS REA AND THE APPLICABILITY OF ECOCIDE TO LEGAL PERSONS UNDER THE ROME STATUTE	15
4. CONCLUSION.....	29

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TABLE OF ABBREVIATIONS

AP I	Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflict (Protocol I)
ENMOD	Convention on the Prohibition of Military or Army Other Hostile Use of Environmental Modification Techniques
ICC	International Criminal Court
IEP	Independent Expert Panel
UCLA	University of California in Los Angeles
The Group	UCLA Promise Institute for Human Rights

1. INTRODUCTION

International criminal law has increasingly become one of the chosen avenues to combat environmental harm and destruction.² This development is especially evident today, as some states have taken a stand in favour of the creation of a crime of “ecocide”.³ In a statement dated 3rd December 2024, Vanuatu, together with the states of Fiji and Samoa, urged all state parties to the Rome Statute and the International Criminal Court (ICC) to consider the inclusion of a fifth crime against peace.⁴

Since the introduction of the term by Arthur Galston in the 1970s, the concept of “ecocide” has been at the centre of many legal discussions and has gained momentum.⁵ The term “ecocide” is built in the same manner as “genocide”; it consists of the prefix “eco” and suffix “cide”. “Eco” derives from *oikos*, an ancient Greek word which means “home” and it represents the ecosystem, while “cide” comes from the Latin term *caedere*, which stands for “to kill”. The literal translation of the term would, therefore, roughly correspond to “killing home”, referring to the devastation of the environment and the corresponding ecosystems.⁶ As Darryl Robinson points out in his article “Ecocide - Puzzles and Possibilities”, “the rapid, ongoing, anthropogenic destruction of our environment is one of the greatest global threats to human life and health”.⁷ While the term “genocide” presents a legal definition which is widely recognised under international law, the term “ecocide” is still in the process of being developed. Its definition appears to be more complicated given the inner complexities related to environmental law; most environmental harm comes from the cumulative effect of billions of small actors, rather than a singular cause. Moreover, an increasing interest in the protection of the environment started growing only recently, given

² Liana Georgieva Minkova, ‘The Fifth International Crime: Reflections on the Definition of “Ecocide”’ (2023) 25 *Journal of Genocide Research*, p. 62.

³ Darryl Robinson, ‘Ecocide - Puzzles and Possibilities’ (2022) 20 *Journal of International Criminal Justice*, p. 313.

⁴ ‘Republic of Vanuatu, Statement to the Assembly of States Parties 23rd Session’ (*International Criminal Court*, 4 December 2024) <https://asp.icc-cpi.int/sites/default/files/asp_docs/ASP23-GD-VUT-3-12-ENG.pdf> accessed 29 May 2025.

⁵ Daniel Bertram, ‘Towards an International Crime of Ecocide’ (2024) 157 *Policy Brief Series* 1, p. 1.

⁶ Alexandria M. Hanna, ‘Killing Our Home: The Case for Creating an International Crime of Ecocide’ (2023) 6 *Social Justice and Equity Law Journal*, p. 2.

⁷ Robinson (n 3), p. 317.

the threat posed to humans' and other species' existence due to global warming and the growing climate emergency.⁸ The choice of drawing inspiration from “genocide” to coin this new concept is not coincidental; it is appropriate both in its literal meaning and in the seriousness of the crime to be conveyed.⁹

Environmental protection is placed in the context of international law, given its transboundary character.¹⁰ Ecocide shares key characteristics with other international crimes as it causes devastating harm, its impact crosses borders, and national regulation has been proved inadequate to address such concerns.¹¹ Some definitions of “ecocide” have been proposed in the last decade to try and capture the complex identity of the crime, and there still are ongoing discussions on which of the proposals would be the most adequate to place the crime in the international legal context. Enabling the prosecution of crimes against the environment in the International Criminal Court would be an important step in doing so. However, the specific character of the Court and the requirements imposed by the Rome Statute on both its amendment and the characteristics that the provision needs to present, have made it challenging to find a common ground among experts. In most situations a single natural person cannot be identified as the sole perpetrator of such crimes. It is often corporations that engage in harmful conduct posing an unprecedented challenge in the hands of the International Criminal Court.¹²

1.1. PURPOSE, RESEARCH QUESTION AND METHODOLOGY

This thesis aims to explore how a crime of ecocide would need to be defined and structured for its inclusion in the Rome Statute, with a particular emphasis on its applicability to legal persons. To do so, it evaluates whether the most prominent definitions proposed for the crime of ecocide over the past decade, specifically those advanced by Polly Higgins,¹³ the University of California at Los Angeles

⁸ Maud Sarliève, ‘Ecocide: Past, Present and Future Challenges’ in Walter Leal Filho and others (eds) *Life on Land. Encyclopedia of the UN Sustainable Development Goals* (Springer, 2021) pp. 233-234.

⁹ Robinson (n 3), p. 319.

¹⁰ Sarliève (n 8), p. 233.

¹¹ Robinson (n 3), p. 317.

¹² Vanessa Schwegler, ‘The Disposable Nature: The Case of Ecocide and Corporate Accountability’ (2017) 9 *Amsterdam Law Forum*, p. 93.

¹³ Polly Higgins, *Eradicating Ecocide: Laws and Governance to Prevent the Destruction of Our Planet* (2nd edition, Shephard-Walwyn Publishers Ltd, 2015); ‘Ecocide Crime’ (*Ecocide law*) <<https://ecocidelaw.com/polly-higgins-ecocide-crime/>> accessed 29 May 2025.

(UCLA) Promise Institute for Human Rights¹⁴ and the Independent Expert Panel (IEP),¹⁵ can address existing gaps in international criminal law. Furthermore, it considers whether the inclusion of ecocide as a fifth core crime under the Rome Statute would enable prosecution of corporations for the extensive destruction of the environment. The analysis begins with a detailed assessment and comparison of the proposed definitions. It then examines the relevant provisions in the Rome Statute concerning corporate liability. Lastly, it applies the concept corporate responsibility to the crime of ecocide. Accordingly, this thesis will answer the following research question: *Can, and if so, in what way, corporations be held criminally accountable under the different proposed definitions of ecocide, if one of them were to be adopted as a fifth crime in the Rome Statute?*

This thesis adopts a legal doctrinal methodology. This approach entails a critical and conceptual analysis of all relevant legislation to reveal the current state of the law in relation to the matter to be investigated.¹⁶ In this instance, this analysis is based upon the three most prominent definition proposals developed for the criminalisation of ecocide, as well as on the Rome Statute, which is considered to be the primary legal framework through which ecocide should be criminalised.¹⁷ Throughout the thesis, these legal rules will be examined using principles of legal reasoning and interpretation. Secondary sources will also be used to clarify the chosen relevant provisions of the Rome Statute and to offer critical insights into how these articles are understood and implemented in the practice of the International Criminal Court. This analysis will be instrumental in answering the research question and developing suggestions for improving corporate accountability under the Rome Statute, specifically in relation to the proposed crime of ecocide.

¹⁴ The Promise Institute for Human Rights, 'Proposed Definition of Ecocide' (9th April 2021) <<https://ecocidelaw.com/wp-content/uploads/2022/02/Proposed-Definition-of-Ecocide-Promise-Group-April-9-2021-final.pdf>> accessed 29 May 2025.

¹⁵ 'Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text' (2021) <<https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/67f539d588e9544792700921/1744124385734/SE%2BFoundation%2BCommentary%2Band%2Bcore%2Btext%2B2025.pdf>> accessed 29 May 2025.

¹⁶ Terry Christine M. Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2016) 8 Erasmus Law Review, p. 131.

¹⁷ Polly Higgins, Damien Short and Nigel South, 'Protecting the planet: a proposal for a law of ecocide' (2013) 59 Crime Law Soc Change, p. 257.

While various definition proposals for criminalising ecocide have emerged in the last decade, academic debate has largely focused on whether such a crime is necessary at all, and which legal framework, national or international, would be most appropriate to address it.¹⁸ Previous research has paid limited attention to how criminalisation might apply to corporations engaged in serious environmental crimes, particularly if prosecuted by the International Criminal Court. This thesis, therefore, seeks to contribute to existing efforts in the field, by focusing specifically on the possibility of corporate criminal liability under the Rome Statute.

2. THE PROPOSED LEGAL DEFINITIONS OF ECOCIDE

This chapter will delve into the different definitions that have been proposed for the criminalisation of ecocide throughout the years. Each legal definition will be presented, taking into account the rationale behind it, its strengths and weaknesses and the implications of incorporating it into the International Criminal Court. Moreover, the definitions will be compared to highlight key differences and provide a suggestion for a way forward in criminalising ecocide and keeping corporations accountable under the law of the International Criminal Court.

2.1. POLLY HIGGINS' DEFINITION

Polly Higgins, a UK based lawyer, was one of the first to propose that ecocide should be criminalised under international law in the 21st century. In April 2010, she presented a proposal to the United Nations Law Commission containing an amendment to the Rome Statute.¹⁹ Her idea is that ecocide is “the antithesis of life”,²⁰ and adopting the ecocide as a fifth crime against peace would create a “duty of care for Earth”.²¹ It would be applicable erga omnes, namely an obligation that is owed to the international community as a whole and binding on individuals, corporations and States.²² The main goal would be the prevention of future harm,

¹⁸ For example, see also Alexandria M. Hanna, ‘Killing Our Home: The Case for Creating an International Crime of Ecocide’ (2023) 6 Social Justice and Equity Law Journal, p 1; Matthew Gillett, ‘Ecocide, environmental harm and framework integration at the International Criminal Court’ (2024) The International Journal of Human Rights, p. 1.

¹⁹ Higgins, Short and South (n 17), p. 257.

²⁰ Higgins (n 13), p. 78.

²¹ Higgins, Short and South (n 17), p. 257.

²² Higgins (n 13), p. 86.

based on a principle of “superior responsibility” applicable to both businesses and nations.²³ Incorporating ecocide into the Rome Statute, therefore recognising it as one of the most serious crimes, would create a binding legal duty for the global community to prevent and prosecute acts of ecocide. As such, it should also serve as a way to pressure states in proactively implementing national legislation on the matter.²⁴

Higgins’ first definition for the concept of ecocide, proposed in 2010 as an amendment to the Rome Statute, was the following: “*The extensive destruction, damage to or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that the peaceful enjoyment by the inhabitants of that territory has been severely diminished*”.²⁵ In this general definition of the concept, Higgins identifies two types of ecocide: (a) man-made caused and (b) naturally occurring. While both types ultimately fall within the responsibility of governments, Higgins argues that naturally occurring ecocide also creates specific responsibilities for businesses, particularly where corporate activity contributes to the scale or impact of the harm. Moreover, Higgins clearly distinguishes between two other main categories of ecocide, namely (a) non-ascertainable and (b) ascertainable ecocide. The first refers to situations where the consequence, real or potential, is destruction, damage or loss to the territory *per se*. Thus, a clear identification of the specific human activities responsible for it is, therefore, not possible. The second refers to cases where there is a clear and identifiable legal person responsible for the destruction, damage, or loss to the territory.²⁶ This distinction highlights the different ways in which environmental devastation can occur leading to the destruction of the planet’s resources. However, according to Higgins, the situation that should be criminalised is the one concerning the man-made ascertainable ecocide, as it is the only one that permits the liability of identifiable legal persons.²⁷ Her reflections led her to the proposal of a legal definition, which is the following:

²³ Higgins, Short and South (n 17), p. 257.

²⁴ Higgins (n 13), pp. 86-87.

²⁵ Higgins, Short and South (n 17), p. 257; Higgins (n 13), p. 79.

²⁶ Higgins (n 13), p. 79.

²⁷ *ibid.*

“Ecocide is: (1) acts or commissions committed in times of peace or conflict by any senior person within the course of State, corporate or any other entity’s activity, which cause, contribute to, or may be expected to cause or contribute to serious ecological, climate or cultural loss or damage to or destruction of ecosystem(s) of a given territory(ies), such as peaceful enjoyment by the inhabitants has been or will be severely diminished. (2) To establish seriousness, impact(s) must be widespread, long-term or severe”.²⁸

Each of the terms (e.g. widespread, long-term, severe) is further defined. Higgins also clarifies the aim of the proposed law, which is the creation of an erga omnes duty of care for the environment. This duty of care encapsulates multiple objectives. It seeks to establish superior responsibility and to create an obligation to protect the environment for businesses’ directors and governments. It also aims to prevent such crimes from being financed.²⁹ With this proposal, Higgins attempted to create an encompassing definition that would not be connected to war crimes and that could effectively target the issue.

Higgins’ proposal is based on two important legal concepts: superior responsibility and strict liability. To understand how the definition was built, it is important to refer to them and how the definition came to life. Higgins’ starting point was the definition of environmental damage that can be found within the Rome Statute concerning war crimes, Article 8(2)(b)(iv).³⁰ She supported the idea that the concept of environmental harm should be extended and not only applied during conflicts, namely that ecocide should be explicitly mentioned within a provision.³¹

The proposal is construed around the concept of strict liability, which she derived from “superior responsibility”. The latter applies in international law cases to military commanders and others in high positions, which are considered to have superior responsibility in decision-making. According to it, duties and obligations should raise proportionately with ranks, counterbalancing the rights granted to

²⁸ ‘Ecocide Crime’ (*Ecocide Law*) <<https://ecocidelaw.com/polly-higgins-ecocide-crime/>> accessed 29 May 2025.

²⁹ *ibid.*

³⁰ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art. 8(2)(b)(iv).

³¹ Higgins (n 13), pp. 86-87.

those in command.³² Higgins sustains that the concept of “superior responsibility” is not only limited to conflicts, but applies such logic to heads of corporations; a person in such a position “knows, or should know, of the consequences arising of any business activity”.³³ The crime of ecocide, therefore, should be, in her opinion, one of strict liability, in which knowledge is irrelevant for a company; all that is required is evidence of damage and a causal link, between that damage and the company itself, to establish guilt.³⁴ Her arguments in supporting this form of strict liability, which is currently absent in the core crimes of the Rome Statute, revolve around the idea that without the ability to impose criminal liability upon corporations, such responsibilities towards the environment can be easily neglected.³⁵ The necessity of criminalising ecocide would therefore be paramount in fostering a shift in the mindset of both corporations and governments.³⁶ Taken together, the principles of superior responsibility, strict liability and an erga omnes obligation to safeguard the environment, illustrate how Higgins worked to shape her definition. This way, the actors involved would not be able to escape accountability, while the scale of environmental harm she aimed to criminalise would still be captured.

2.2. UCLA PROMISE INSTITUTE FOR HUMAN RIGHTS DEFINITION

The second definition that will be addressed was developed in the course of 2020, by the Promise Institute for Human Rights at UCLA School of Law. This comprised of a group of experts (the Group), similar to the IEP, which researched and created a legal definition and specific parameters to address the crime of ecocide. The Group included individuals coming from the private sector, the United Nations, with academic and non-profit experience. The Group’s findings and the report were afterwards submitted to the IEP, as a basis for their proposal.³⁷ It will, therefore, not be surprising that both definitions share some similarities, both in the structure and language used. However, both definitions will be

³² *ibid* p. 122.

³³ *ibid* p. 124.

³⁴ *ibid* p. 125.

³⁵ *ibid* p. 27.

³⁶ *ibid* pp. 86-87.

³⁷ The Promise Institute for Human Rights (n 14), p. 1.

presented in order to highlight different approaches and thought processes used in developing the legislative proposals. The definition proposed is the following:

1. “For the purpose of this Statute, ‘ecocide’ means any of the following acts, committed with the knowledge that they are likely to cause widespread, long-term and severe damage to the natural environment:
 - a. [Substantial] destruction or despoliation of natural habitats, ecosystems, or natural heritage;
 - b. Destruction or despoliation of biological resources, in a manner likely to have adverse effects on biological diversity;
 - c. Introducing harmful quantities of substances or energy into the air, water, or soil;
 - d. Illegal traffic in hazardous waste;
 - e. Production, import, export, sale, or use of ozone-depleting substances or of persistent organic pollutants;
 - f. Killing, destruction, or taking of specimens of protected wild fauna or flora species, on a scale likely to impact the survival of the species;
 - g. Significantly contributing to dangerous anthropogenic interference with the climate system, including through large scale emissions of greenhouse gases or destruction of sinks and reservoirs of greenhouse gases;
 - h. Any other acts of a similar character likely to cause an ecological disaster.
2. For the purpose of paragraph 1, conduct is not ecocide if it is (a) lawful under national law, (b) lawful under international law, and (c) employs appropriate available measures to prevent, mitigate, and abate harms.
3. For the purpose of paragraph 1:
 - a. ‘Widespread’ means having effects that extend beyond a limited geographic area, cross state boundaries, or adversely affect a large number of human beings;
 - b. ‘Long-term’ means lasting for at least a decade;

- c. ‘Severe’ means involving serious or significant disruption or harm to ecosystems, human life, natural and economic resources, or other assets.
 - d. The terms in paragraphs (a) to (h) shall be interpreted in accordance with international law, particularly international environmental law.
4. Paragraph 1(g) applies after the expiration of the transition period. The transition period shall be [X] years”.³⁸

The structure of the definition replicates the same of other crimes in the Rome Statute, with a list of underlying acts.³⁹ In its report, the Group explains its rationale for proposing such a definition. The Group decided that a threshold was needed and deemed it appropriate to include a *chapeau* requirement, which would ensure that the conduct is grave enough to distinguish it from other “ordinary” environmental crimes. In its analysis, the Group considered international humanitarian law (IHL), international criminal law, international environmental law, international human rights law and national law. In the end, however, the “widespread, long-term, severe” test, which is part of IHL, was chosen.⁴⁰ Contrary to Higgins’ proposal, the Group favoured a conjunctive approach which, in the opinion of the experts, would ensure the clarity and accessibility of the test.⁴¹

The mens rea opted for in the proposal is that of “knowledge of likelihood”, not intent; the subject should, then, “have knowledge that the requisite threshold of environmental harm is likely to be caused by their conduct”.⁴² According to the Group, the notion of intent would be too restrictive and unreachable, especially since it has been interpreted in a restrictive manner by International Criminal Court judges in the past.⁴³ The requirement of “knowing the impact” would avoid such an issue, and it is also considered to be consistent with similar crimes, such as for example Article 8(2)(b)(iv) of the Rome Statute, which requires “knowledge of the harms” as well.⁴⁴ This proposal leaves little

³⁸ The Promise Institute for Human Rights (n 14), p. 2.

³⁹ *ibid* p. 3.

⁴⁰ *ibid*.

⁴¹ *ibid* p. 4.

⁴² *ibid* p. 5.

⁴³ *ibid*.

⁴⁴ *ibid* p. 5; Rome Statute of the International Criminal Court (n 30), art. 8(2)(b)(iv).

room for interpretation, which was one of the main aims of the Group. The adopted strict standards reflect the requirement for the crime of ecocide to be grievous enough as to warrant its prosecution by the International Criminal Court.⁴⁵ The criminal conduct ending in environmental harm, that would not be prohibited by such a law, could still be deemed criminal under other national or international laws, respecting the clarification set out in Article 10 of the Rome Statute.⁴⁶

The third paragraph delves into the different terms and explains their extension and applicability to the crime. Drawing from different sources and past instruments, such as the Convention on the Prohibition of Military and Any Other Hostile Use of Environmental Modification Techniques (ENMOD)⁴⁷ and the Protocol Additional to Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (AP I),⁴⁸ the Group aimed to define the terms and adapt their interpretations to make them fit environmental crimes better. Their explanations are justified extensively in the Commentary of the Panel and will not be analysed extensively in this thesis.⁴⁹

Differently from the other definition considered so far, paragraph 2 presents a cumulative test, which was deemed to be necessary. Indeed, a key characteristic of environmental law is that it needs to balance social and economic benefits with environmental harms, through the principle of sustainable development. As a result, environmental crimes differ from other crimes as certain impacts on the environment, while still harmful, could not be considered criminal as such.⁵⁰ Such a cumulative requirement allows high-impact projects or industries, such as commercial forestry operations that clear large areas of land but comply with legal standards and implement reforestation, to be excluded from the scope of ecocide. This exclusion applies, provided they are lawful and operated responsibly with the aim of mitigating harm.⁵¹

⁴⁵ *ibid.*

⁴⁶ Rome Statute of the International Criminal Court (n 30), art. 10.

⁴⁷ Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (adopted 10 December 1976, entered into force 5 October 1978) 1108 UNTS 151.

⁴⁸ Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Protocol 1).

⁴⁹ The Promise Institute for Human Rights (n 14), pp. 5-6.

⁵⁰ *ibid* pp. 6-7.

⁵¹ *ibid* p. 7.

2.3. THE INDEPENDENT EXPERT PANEL DEFINITION

Thanks to Higgins's efforts in reviving the concept of ecocide, the Stop Ecocide Foundation instituted an expert panel, the Independent Expert Panel for the Legal Definition of Ecocide (IEP), which comprised of twelve lawyers "from all around the world."⁵² Their expertise ranged from international to environmental and climate law, and their task was to work together to create a "practical and effective definition" for the crime of ecocide.⁵³ Although there had been other attempts in trying to define ecocide, the IEP's definition became one of the most discussed topics in international law, and represents the end product of years of work that had been happening "behind the scenes" in the fight to protect the environment.⁵⁴ After several months of discussion, in June 2021, the following definition was presented:

"Article 8 ter

Ecocide

1. For this Statute, 'ecocide' means unlawful or unwanted acts committed with the knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts,
2. For the purpose of paragraph 1:
 - a. 'wanton' means with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefit anticipated;
 - b. 'severe' means damage which involves very serious adverse changes, disruption or harm to any element of the environment, including grave impacts on human life or natural, cultural or economic resources;
 - c. 'widespread' means damage which is irreversible or which cannot be redressed through natural recovery within a reasonable period of time;

⁵² 'Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text' (n 15), p. 2.

⁵³ *ibid.*

⁵⁴ Minkova (n 2), p. 64.

- d. ‘environment’ means the earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space.”⁵⁵

As can be evinced from the proposed definition, the IEP’s aim was to create a definition which would be suitable to be considered as an amendment to the Rome Statute. According to the IEP’s Commentary, the definition was built on the existing crime of severe damage to the environment during an armed conflict, taking into account the fact that most environmental crimes nowadays happen during times of peace.⁵⁶

The proposed definition creates two thresholds for conduct that is prohibited; the first is that there must be a “substantial likelihood” that the conduct will cause “severe and either widespread or long-term damage” to the environment. This includes both acts and omissions. While the IEP recognises that this threshold might be overly inclusive, it acknowledges the fact that there are human activities needed by society that, even when operated to minimise impacts, could still be detrimental to the environment. The necessity for the harm to be “severe” stems from the particular requirements of the International Criminal Court’s mandate, which focuses only on the gravest crimes.⁵⁷ Less severe forms of environmental harm, such as a localised pollution incident that damages a river but is quickly contained, could still be prosecuted at the national level or through other international bodies.⁵⁸ This conjunctive/disjunctive test is justified, since a standalone conjunctive test would be “unnecessarily high” and therefore, exclude acts which are severe and long-term, but not widespread, and vice versa.⁵⁹

Second, there needs to be proof that the acts are “unlawful” or “wanton”. This requires balancing environmental harms against social and economic benefits, that the IEP based on the concept of sustainable development, which is central to environmental law practice, as previously mentioned.⁶⁰ Similarly to the rationale followed by the Group, the IEP deemed this clarification to be necessary,

⁵⁵ ‘Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text’ (n 15), p. 5.

⁵⁶ *ibid* p. 3.

⁵⁷ Rome Statute of the International Criminal Court (n 30), preamble.

⁵⁸ Minkova (n 2), p. 72.

⁵⁹ ‘Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text’ (n 15), p. 8.

⁶⁰ *ibid* p. 7.

as not all acts causing damage to the environment are illegal. There must be permission to carry on legitimate development, as that would be contrary to the principles of criminal law, which punishes only unlawful conduct.⁶¹

In its Commentary, the IEP clarifies and explains the terms included in the definition, and according to scholars, this can be recognized as a great contribution to the conceptualization of ecocide and its prosecution. Vagueness would constitute an additional challenge for the ICC to start criminal proceedings.⁶² The IEP emphasised that they tried to make use of legal terminology that already existed in the international legal framework, so that it would increase its chances of compatibility and states' support in its incorporation in the Rome Statute.⁶³

The mens rea proposed with this definition is recklessness or *dolus eventualis*, which is currently not mentioned under Article 30 of the Rome Statute. This Article recognises only intent and knowledge as thresholds.⁶⁴ This choice was based on the fact that the current mens rea set out in the Rome Statute for the most serious crimes would not have captured the required conduct adequately. The proposed mental element, as interpreted by the IEP, requires awareness of a substantial likelihood of severe and either widespread or long-term damage.⁶⁵ Despite its critiques, the IEP's proposal represents an important milestone in the debate about the criminalization of ecocide and its recognition at the international level.

3. THE PROBLEM OF MENS REA AND THE APPLICABILITY OF ECOCIDE TO LEGAL PERSONS UNDER THE ROME STATUTE

The analysis of the proposed definitions shed light on some of the intricacies and difficulties that such a crime would encounter when entering the International Criminal Court legal framework. Specifically, the aspects of the mens rea of the crime, as well as the possibility of keeping corporations accountable for such a violation, deserve further attention. The next chapter will consider the different types of mens rea currently accepted in other provisions of the Rome Statute and

⁶¹ *ibid* p. 10.

⁶² Minkova (n 2), p. 72.

⁶³ 'Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text' (n 15), p. 2.

⁶⁴ Rome Statute of the International Criminal Court (n 30), art. 30.

⁶⁵ 'Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text' (n 15), p. 11.

the feasibility of their applicability to corporations and legal persons. Such an analysis will be instrumental in determining which of the current definition proposals would better fit the International Criminal Court legal framework and, if not, in elaborating applicable changes that would lead to achieve such an aim.

3.1. THE ISSUE OF CORPORATIONS' ACCOUNTABILITY UNDER THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

Corporations are not currently subject to criminal liability under the jurisdiction of the International Criminal Court. The International Criminal Court only has jurisdiction over international crimes committed by individuals, as stated under Article 25(1) of the Rome Statute.⁶⁶ However, corporate agents have frequently contributed to conflicts and international crimes, for example, by funding wars through the trade of "blood diamonds". This term refers to diamonds extracted in conflict zones and sold to armed groups responsible for grave human rights violations. In such situations, corporate actors, such as trading companies or intermediaries purchasing, processing or distributing these diamonds, may be held responsible when they knowingly facilitate or profit from this illicit trade.⁶⁷ Corporate complicity in the commission of international crimes is undeniable and, for this reason, the Office of the Prosecutor of the International Criminal Court has repeatedly expressed its intention to investigate corporate links to crime. In 2003, the then-chief Prosecutor Luis Moreno Ocampo announced plans to collect information from national prosecutors regarding the purchase of blood diamonds. Companies involved in trading these diamonds from the Democratic Republic of Congo risked charges of complicity in war crimes and genocide.⁶⁸ More recently, the Prosecutor indicated that corporate agents contributing to environmental crimes are at risk of investigation and prosecution before the ICC.⁶⁹ Nevertheless, it is evident that, even though the harm caused by corporate activity has been

⁶⁶ Rome Statute of the International Criminal Court (n 30), art. 25(1).

⁶⁷ Lydia Leeuw, 'Corporate Agents and Individual Criminal Liability under the Rome Statute' (2016) 5 State Crime Journal 242, p. 243.

⁶⁸ Rapaport News, 'Court to Probe Conflict Diamond Buyers' (Rapaport, 24 September 2003) <<https://rapaportfairtrade.com/2003/09/24/court-to-probe-conflict-diamond-buyers/>> accessed 29 May 2025.

⁶⁹ ICC Office of the Prosecutor, 'Policy Paper on Case Selection and Prioritisation' (2016) <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf> accessed 29 May, para. 41.

recognised by Chief Prosecutors, their well-meant efforts to prosecute and hold such behaviour accountable have been impeded by the lack of a legal basis.⁷⁰

Despite growing attention, particularly concerning environmental crimes, corporate accountability under the International Criminal Court was already debated and ultimately rejected at the Rome Conference of 1998.⁷¹ The initial draft of the Rome Statute contained a proposal in Article 23 to extend the International Criminal Court's jurisdiction to legal persons.⁷² The primary reason for this decision was the lack of a uniform standard for corporate criminal responsibility across states, which posed a challenge to the International Criminal Court's principle of complementarity.⁷³ At that time, legal liability of corporations for crimes was not always present in national laws. Thus, since the International Criminal Court's jurisdiction needs to be complementary to states' national criminal jurisdictions, the absence of such legislation would undermine this principle.⁷⁴ However, this landscape has evolved, with the concept of corporate criminal liability now recognised in many European countries and States Parties to the Rome Statute, including but not limited to Belgium, France, Italy, the Netherlands and Spain.⁷⁵ As a result, many argue that extending such liability at the international level is the "next logical step".⁷⁶ Commentators sustain that the original reasons for excluding legal persons from the International Criminal Court's jurisdiction are no longer valid in light of these developments.⁷⁷ As Pereira

⁷⁰ Rome Statute of the International Criminal Court (n 30), art. 5; Anastacia Greene, 'The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?' (2019) 30 *Fordham Environmental Law Review* 1, p. 25.

⁷¹ David Scheffer, 'Corporate Liability Under the Rome Statute' (2016) 57 *Harvard International Law Journal Online Symposium*, p. 38.

⁷² Kathryn Haigh, 'Extending the International Criminal Court's jurisdiction to corporations: overcoming complementarity concerns' (2008) 14(1) *Australian Journal of Human Rights* 199, p. 202.

⁷³ William A. Schabas, *An Introduction to the International Criminal Court* (2nd edition, Cambridge University Press, 2004), pp. 85-89; Scheffer (n 71), p. 38; Marie Davoise, 'All Roads Lead to Rome: Strengthening Domestic Prosecutions of Businesses throughout the Inclusion of Corporate Liability in the Rome Statute' (*OpinioJuris*, 25th July 2019) <<https://opiniojuris.org/2019/07/25/all-roads-lead-to-rome-strengthening-domestic-prosecutions-of-businesses-through-the-inclusion-of-corporate-liability-in-the-rome-statute/>> accessed 29 May 2025, p. 2.

⁷⁴ Haigh (n 72), p. 204.

⁷⁵ Scheffer (n 71).

⁷⁶ James G. Stewart, 'The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute' (2014) 47 *NYU Journal of International Law & Politics*, p. 121; Alexandra Garcia, 'Corporate Liability for International Crimes: A Matter of Legal Policy since Nuremberg' (2015) 24 *Tulane Journal of International & Comparative Law*, p. 97; Davoise, (n 73), p. 3.

⁷⁷ *ibid*; Scheffer (n 71).

suggests, it is anticipated that the lack of jurisdiction over corporate crimes “will represent a considerable barrier to the effective prosecution of ecocide by the International Criminal Court”.⁷⁸ Today, corporations significantly influence global economic and social development, yet often disregarding human rights and environmental concerns in pursuit of profit.⁷⁹ Although amending the Rome Statute in a way that would extend the International Criminal Court’s jurisdiction over juridical persons would be extremely difficult to achieve, there is still value in contemplating such an option,⁸⁰ as it could offer a path to end the “de facto immunity” that multinational corporations currently enjoy by hiding themselves behind the corporate veil.⁸¹

Even though the Rome Statute does not allow for the prosecution of legal entities, scholarly discussion on the feasibility of holding corporate agents accountable before the International Criminal Court has mostly focused on two provisions: Article 25(3) Rome Statute concerning contribution liability⁸² and aiding, abetting or accomplice liability,⁸³ and Article 28(b) Rome Statute, which addresses superior responsibility.⁸⁴ Both of them will be examined in the following sections to provide an overview on how the International Criminal Court has handled corporate involvement in international crimes so far and if they would be applicable in the prosecution of environmental crimes.

3.1.1. Article 25 paragraph 3 of the Rome Statute

Given that the International Criminal Court legal regime does not allow for the prosecution of corporations, literature has focused instead on the feasibility of holding individual corporate agents accountable through existing provisions;⁸⁵ one of these is Article 25(3) of the Rome Statute.⁸⁶ This article offers a potential legal basis for prosecuting corporate actors for crimes committed by others. Specifically, Article 25(3)(c) addresses individual responsibility through aiding,

⁷⁸ Ricardo Pereira, ‘After the ICC office of the Prosecutor’s 2016 policy paper on case selection and prioritisation: towards an International Crime of Ecocide?’ (2020) 31 *Criminal Law Forum* 179, p. 219.

⁷⁹ Schwegler (n 12), p. 81.

⁸⁰ Scheffer (n 71).

⁸¹ Pereira (n 78), p. 221.

⁸² Rome Statute of the International Criminal Court (n 30), art. 25(3)(d).

⁸³ *ibid* art. 25(3)(c).

⁸⁴ *ibid* art. 28(b).

⁸⁵ Leeuw (n 67), p. 244.

⁸⁶ Rome Statute of the International Criminal Court (n 30), art. 25(3).

abetting and accomplice liability, which has been extensively commented by Vest in relation to business leaders.⁸⁷ Aiding and abetting usually require a tripartite test to be fulfilled. First, a crime needs to be committed by a primary party, second, there needs to be a material act of contribution, and third, such an act must be committed knowingly.⁸⁸ The International Criminal Court distinguishes the two forms of assistance: “aiding” involves “giving physical or material assistance to a crime”,⁸⁹ whereas “abetting” refers to facilitating a crime through psychological or moral support.⁹⁰

Vest notes that the International Criminal Court retains discretion in interpreting whether an act qualifies as an assistance “of substantial character”. This is a qualitative assessment, meaning the contribution must facilitate the crime rather than reach any particular quantitative threshold.⁹¹ Additionally, the Court has further clarified this requirement by stating that the accessory’s contribution needs to have “an effect on the commission of the offence with the purpose of facilitating such commission”.⁹² Moreover, there must be indirect causality for the conduct of the perpetrator to fall under such a provision. The Court clarified that there must be some causal connection between the assistance and the crime, but it does not have to amount to direct causation.⁹³ This purpose-based interpretation of the article creates challenges in its application to environmental crimes. The International Criminal Court requires proof of intent regarding the principal offence,⁹⁴ meaning that while the aider and abettor’s motive is irrelevant,⁹⁵ there must be awareness that the crime would likely result “in the ordinary course of events”.⁹⁶ Leeuw argues that this high threshold of intent is a major obstacle to prosecuting corporate agents, especially for environmental crimes, where such intent is usually lacking.⁹⁷ Their involvement is typically “neutral” and harmful

⁸⁷ Hans Vest, ‘Business Leaders and the Modes of Individual Criminal Responsibility under International Law (2010) 8 Journal of International Criminal Justice, p. 851.

⁸⁸ *ibid* p. 856.

⁸⁹ *ibid*.

⁹⁰ *ibid*.

⁹¹ *ibid* p. 860.

⁹² *Prosecutor v Jean Pierre Bemba Gombo and Others (Judgement) ICC-01/05-01/13 (Trial Chamber VII, 19 October 2016)*, para. 92.

⁹³ *ibid* para. 94.

⁹⁴ *ibid* para. 97.

⁹⁵ William A. Schabas, *An Introduction to the International Criminal Court* (2nd edition, Cambridge University Press, 2004), p. 307.

⁹⁶ Vest (n 87), p. 862.

⁹⁷ Leeuw (n 67), p. 244.

consequences often arise indirectly from profit-driven activities rather than from deliberate intent to cause environmental harm.⁹⁸ As such, the mental element required for accessory liability often proves to be difficult to establish in these cases.⁹⁹

In light of the challenges associated with Article 25(3)(c) of the Rome Statute,¹⁰⁰ Leeuw suggests that Article 25(3)(d),¹⁰¹ which addresses contribution liability, may provide a more suitable framework to hold corporate agents criminally accountable.¹⁰² This provision applies when a person contributes to the commission or attempted commission of a crime by a group of persons acting with a common purpose.¹⁰³ For example, this could encompass situations where multiple senior managers within a corporation collectively approve a project that they know will violate environmental laws. Unlike the crime of aiding and abetting, assisting one person “in any other way” would not suffice for criminal responsibility, as the group needs to consist of at least three persons who share the same criminal objective.¹⁰⁴ On the one hand, subsection (d)(i)¹⁰⁵ demands proof that the group intended to commit the crime, posing difficulties for prosecuting environmental crimes, where such intent is often absent. In cases where there is large-scale pollution resulting from business activities, such as repeated dumping of toxic waste into a river, corporate officers may not deliberately aim to cause environmental destruction. In this example, they might only want to reduce disposal costs rather than intentionally destroy ecosystems. Hence, the challenge in proving that environmental harm was their primary intention. Subsection (d)(ii),¹⁰⁶ on the other hand, imposes a lower threshold by requiring only that the corporate officer knew of the group’s intention to commit the crime, rather than personally sharing it.

⁹⁸ Schwegler (n 12), p. 81; Luigi Prospero & Jerome de Hemptinne, ‘Prosecuting Ecocide Before The International Criminal Court: Concrete Possibility or Long-Term Aspiration?’ (Utrecht University News, 25th May 2024) <<https://www.uu.nl/en/news/prosecuting-ecocide-before-the-international-criminal-court-concrete-possibility-or-long-term-0>> accessed 29 May 2025.

⁹⁹ Leeuw (n 67), p. 244.

¹⁰⁰ Rome Statute of the International Criminal Court (n 30), art. 25(3)(c).

¹⁰¹ *ibid* art. 25(3)(d).

¹⁰² Leeuw (n 67), p. 246.

¹⁰³ Rome Statute of the International Criminal Court (n 30), art. 25(3)(d).

¹⁰⁴ Vest (n 87), p. 865.

¹⁰⁵ Rome Statute of the International Criminal Court (n 30), art. 25(3)(d)(i).

¹⁰⁶ Rome Statute of the International Criminal Court (n 30), art. 25(3)(d)(ii).

This would be the case, for example, if a board member was aware that the executive team planned to proceed with an industrial activity that would knowingly cause harm to the environment. In this case, the criminal liability of a corporate agent is assessed using a twofold test. First, whether their contribution to the group's commission of the international crime was significant, for example, authorizing funding or approving operations essential to the harmful activity. Second, whether this contribution was made willingly, which may be inferred from the deliberate disregard of known the environmental risks. This means the corporate agent must either know their action would contribute to the commission of international crimes by a group or be aware that it will contribute to the commission in the ordinary course of events. Leeuw argues that under Article 25(3)(d)(ii) of the Rome Statute, it is sufficient for the intention to be directed only towards the act of contribution.¹⁰⁷ The knowledge of the contribution must relate to the specific crime as opposed to the overall purpose of the group.¹⁰⁸ The key distinction between subsection (c)¹⁰⁹ and (d)¹¹⁰ lies in the mental element required. Article 25(3)(d)¹¹¹ demands a lower level of awareness. For instance, contributing funds to an organisation with the knowledge that it engages in criminal activities could meet the threshold.¹¹² Nevertheless, attributing this level of knowledge to individual corporate agents remains challenging. The often complex and multilayered structure of corporations within which the individual operates can obscure responsibility; even when there are clear links between certain corporate activities and international crimes, these complexities can make it challenging to hold one specific corporate agent criminally liable and subject to the ICC prosecution.¹¹³

3.1.2. Article 28, sub-paragraph b of the Rome Statute

Another potential basis for holding corporate actors liable for international crimes is the doctrine of superior responsibility, set out in Article 28 of the Rome

¹⁰⁷ Leeuw (n 67), p. 247.

¹⁰⁸ *ibid.*

¹⁰⁹ Rome Statute of the International Criminal Court (n 30), art. 25(3)(c).

¹¹⁰ *ibid* art. 25(3)(d).

¹¹¹ *ibid.*

¹¹² Leeuw (n 67), p. 247.

¹¹³ *ibid* pp. 247-248.

Statute.¹¹⁴ This provision distinguishes between military commanders, under paragraph (a),¹¹⁵ and other superiors, under paragraph (b).¹¹⁶ According to this distinction, individuals who hold the position of a military commander or act as such, fall under the first paragraph, leaving all other superior-subordinate relationships to fall under the second paragraph.¹¹⁷ Although the Statute does not explicitly define a “civilian” superior,¹¹⁸ some authors have interpreted “political leaders, business leaders, and senior civil servants”¹¹⁹ as falling within the scope of Article 28(b).¹²⁰ For the purpose of establishing liability for the crime of ecocide, only paragraph (b) is therefore relevant.

International tribunals’ jurisprudence has already recognised the application of this doctrine to corporate managers, as seen in the *Musema* case.¹²¹ The prerequisite is that there needs to be a de facto superior-subordinate relationship, which needs to be assessed on a case-by-case basis. To establish accountability, the superior must possess real powers “to control and intervene”.¹²² This is typically easier to demonstrate in military contexts with clear hierarchies, whereas proving such authority in corporate structures remains more challenging.¹²³ A superior may be held responsible if they fail to take all the necessary and reasonable measures to prevent or suppress international crimes committed by subordinates.¹²⁴ The required degree of authority has been defined as “a material ability to prevent or punish criminal conduct;”¹²⁵ mere influence is therefore not sufficient to prove such a requirement.¹²⁶ According to Leeuw,

¹¹⁴ Rome Statute of the International Criminal Court (n 30), art. 28.

¹¹⁵ *ibid* art. 28(a).

¹¹⁶ *ibid* art. 28(b).

¹¹⁷ *ibid* art. 28.

¹¹⁸ *ibid*.

¹¹⁹ Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edition, C.H. Beck/Hart/Nomos 2016), p. 1102; William Fenrick, ‘Article 28’ in Otto Triffterer (ed), *Commentary on the Rome Statute* (Nomos 1999), pp. 515, 521.

¹²⁰ Rome Statute of the International Criminal Court (n 30), art. 28(b).

¹²¹ *Prosecutor v Musema* (Judgement) ICTR-96-13-A (Trial Chamber, 27 January 2000), para. 880. The Trial Chamber held that the accused, the director of an important tea factory, through his power to appoint and remove his employees, had exercised legal and financial control over them. *Musema* was, thus, found guilty under the doctrine of command responsibility for having failed to discharge his supervisory duty over them and having allowed them to commit crimes within the context of their work.

¹²² Triffterer and Ambos (n 119), p. 1086.

¹²³ *ibid* p. 1085.

¹²⁴ Vest (n 87), p. 870.

¹²⁵ *Prosecutor v Delalić and Others* (Judgement) IT-96-21-T (ICTY, 16 November 1998), paras. 192, 256.

¹²⁶ Leeuw (n 67), p. 249.

superior responsibility in the context of corporate entities can arise when a senior corporate agent fails to act to prevent or report criminal conduct by his subordinates.¹²⁷ However, Article 28(b) clarifies superiors are not liable for acts of subordinates that are not related to their work or professional duties.¹²⁸

Regarding the mens rea element of the crime, it must be proven that the superior “had available information clearly indicating a significant risk that subordinates were committing or were about to commit offences”.¹²⁹ International tribunals have identified various types of evidence to establish such knowledge in jurisprudence.¹³⁰ This criterion in particular is challenging to demonstrate, especially because of how responsibility is decentralised in the structure of corporations. Criminal liability under this provision arises from a superior’s omission that leads to the commission of a crime; the Rome Statute requires a causal link between the superior’s failure to act and the commission of the crime by his subordinates. Determining this link involves a case-by-case factual assessment, which makes it difficult to establish a uniform standard.¹³¹ Although this Article may offer a seemingly legally plausible basis for liability in cases where corporate agents possess a degree of knowledge and control in relation to the commission of an international crime, demonstrating that such control was effective and causally linked to the crime remains a significant challenge in practice. For the reasons outlined in the precedent section, it is highly improbable that a single individual can be clearly identified and held liable for a crime against the environment under this provision.

3.1.3. Article 30 of the Rome Statute and the Mens Rea Standard for Corporations

Any discussion on the liability of legal persons or corporations under the Rome Statute must take into account the implications that such prosecutions have on establishing the mens rea element of a crime. As demonstrated by the proposed legal definitions of ecocide introduced earlier in this thesis, the mental element required for the commission of environmental crimes has long been, and remains, a subject of debate among scholars and legal experts. This issue becomes even

¹²⁷ *ibid.*

¹²⁸ Triffterer and Ambos (n 119), p. 1102.

¹²⁹ *ibid.*

¹³⁰ Leeuw (n 67), p. 250.

¹³¹ *ibid.*

more complex when applied to corporate entities, which, by their nature, cannot act autonomously and do not possess a mind of their own.¹³²

Corporations are often considered as “abstract entities”¹³³ and it is difficult to ascribe them as guilty, since criminal guilt is usually seen as an “essential personal notion”.¹³⁴ The Rome Statute sets a particularly high threshold for mens rea, limiting it to intent and knowledge, unless “otherwise provided”.¹³⁵ This reflects the idea that criminal liability before the ICC should only be imposed on individuals who are sufficiently aware of their conduct and its consequences.¹³⁶

Article 30 of the Rome Statute has attempted and successfully established a uniform standard for the mental element requirement applicable to all crimes under its jurisdiction.¹³⁷ Despite its efforts, in its application, this provision raises a number of inconsistencies and problems, especially in relation to environmental crimes. The Article is divided into three subsections, a general principle in the first paragraph, and further elaborations in the second and third paragraph, which define “intent” and “knowledge”.¹³⁸ According to Article 30(1),¹³⁹ not every material element of the crime must be committed with intent and knowledge, only the consequence of the conduct must be covered by both. Moreover, the meanings of “intent” and “knowledge” vary depending on whether they relate to the conduct, its consequences or any other circumstances.¹⁴⁰

Most international crimes, including the ones under the ICC jurisdiction, require not only an incriminating action, but also that such action has a specific consequence.¹⁴¹ This standard is applicable unless other provisions envisage another mens rea requirement, as the provision allows for differing or supplementary rules.¹⁴² This specification is particularly important in relation to a

¹³² Harmen van der Wilt, ‘Mental Blockades in the Recognition of Mens Rea in Corporations’ in Grietje Baars and Andre Spicer (eds), *The Corporation: A Critical, Multi-Disciplinary Handbook* (Cambridge University Press 2017) 399, p. 399.

¹³³ *ibid.*

¹³⁴ *ibid.*

¹³⁵ Rome Statute of the International Criminal Court (n 30), art. 30.

¹³⁶ Gerhard Werle and Florian Jessberger, ‘Unless Otherwise Provided: Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law’ (2005) 3 *Journal of International Criminal Justice* 35, p. 36.

¹³⁷ *ibid.* p. 37.

¹³⁸ Rome Statute of the International Criminal Court (n 30), art. 30.

¹³⁹ *ibid.* art. 30(1).

¹⁴⁰ Werle and Jessberger (n 136), p. 39.

¹⁴¹ *ibid.* p. 40.

¹⁴² *ibid.*

possible inclusion of the crime of ecocide in the Rome Statute. The three proposed definitions for ecocide analysed in this thesis present three different thresholds for mens rea, none of which align with the current standard under Article 30 of the Rome Statute.¹⁴³ While Polly Higgins proposes a strict liability model,¹⁴⁴ the UCLA definition introduces a “knowledge of likelihood” threshold,¹⁴⁵ and the IEP’s adopts recklessness as the appropriate standard.¹⁴⁶ This deviation from intent is needed in relation to environmental crimes, as the intention to destroy the environment is rarely the direct intention of corporate actors, but rather a mere consequence of disregarding human and environmental aspects in pursuit of profit.¹⁴⁷

With respect to corporations, their potential criminal responsibility relies on the assumption that they are capable of possessing mens rea in some form or capacity.¹⁴⁸ Two approaches have been developed to conceptualise this: the nominalist approach and the concept of constructive corporate fault. The nominalist approach attributes both the actus reus and mens rea of the natural persons covering important roles in the corporation, such as managers, to the corporation itself.¹⁴⁹ Provisions stemming from this presumption, usually require that the natural persons have “acted on behalf of the corporation” and “within the course of its activities”.¹⁵⁰ In contrast, the corporate fault approach, ascribes action and intent directly to the corporation, recognising that, in many cases, responsibility in a corporate environment cannot be attributed to a single individual; therefore, no one can be considered fully responsible, if not the corporation itself.¹⁵¹ The second approach appears more suitable for addressing crimes such as ecocide. Multinational corporations, operating in the environmental and natural resources sectors, are often able to hide behind the corporate veil, making it difficult to assign responsibility to singular

¹⁴³ Rome Statute of the International Criminal Court (n 30), art. 30.

¹⁴⁴ Ecocide Law (n 28).

¹⁴⁵ The Promise Institute for Human Rights (n 14), p. 2.

¹⁴⁶ ‘Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text’ (n 15), p. 5.

¹⁴⁷ Schwegler (n 12), p. 81.

¹⁴⁸ van der Wilt (n 132), p. 401.

¹⁴⁹ *ibid* p. 402.

¹⁵⁰ *ibid*.

¹⁵¹ *ibid*.

individuals.¹⁵² Recognising the corporation itself as the liable entity allows for a more comprehensive form of accountability, ensuring that all actors involved in environmental harm are subject to prosecution, rather than solely targeting singular individuals.

Returning to the mens rea standard proposed in the definitions examined in this thesis, only Higgins' proposed definition mentions that the crime needs to be committed by "any senior person",¹⁵³ while the UCLA's¹⁵⁴ and the IEP's¹⁵⁵ proposals do not explicitly state whether the crime of ecocide would apply to corporations; though, importantly, corporate liability is not excluded either. The main difficulty concerning the crime of ecocide lies in selecting the appropriate level of fault in relation to the impact threshold. Robinson, in his analysis, rejects the viability of a strict liability approach;¹⁵⁶ this argument is also supported by Minkova, who states that such a standard "would be hard to reconcile with the nature of the ICC as a criminal court".¹⁵⁷ Nonetheless, there is a spectrum of possibilities between the high threshold of intent and knowledge required by Article 30 of the Rome Statute¹⁵⁸ and the low standard of strict liability. The "knowledge of a likely risk of harm" standard, adopted by both the UCLA's¹⁵⁹ and IEP's¹⁶⁰ definitions, may offer a more realistic and appropriate alternative.¹⁶¹ This is supported by the view that ecocide differs substantially from existing international crimes, as it is more likely to only constitute a disregarded risk.¹⁶²

In conclusion, although Article 30¹⁶³ functions as a default mens rea provision, applicable where no specific mental element is defined, it does not preclude the adoption of a lower mens rea threshold in a future definition of ecocide. Such a lower standard could be chosen to accommodate the realities of

¹⁵² Pereira (n 78), p. 219.

¹⁵³ Ecocide Law (n 28).

¹⁵⁴ The Promise Institute for Human Rights (n 14), p. 2.

¹⁵⁵ 'Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text' (n 15), p. 5.

¹⁵⁶ Robinson (n 3), p. 330.

¹⁵⁷ Minkova (n 2), p. 79.

¹⁵⁸ Rome Statute of the International Criminal Court (n 30), art. 30.

¹⁵⁹ The Promise Institute for Human Rights (n 14), p. 2.

¹⁶⁰ 'Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text' (n 15), p. 5.

¹⁶¹ Robinson (n 3), p. 330.

¹⁶² Minkova (n 2), p. 80.

¹⁶³ Rome Statute of the International Criminal Court (n 30), art. 30.

environmental harm and could plausibly extend to the criminal liability of corporate entities.

3.2. REFLECTIONS TOWARDS CORPORATE ACCOUNTABILITY FOR ECOCIDE

The previous chapters of this thesis examined the most prominent proposals for defining ecocide as a potential fifth core crime under the Rome Statute of the International Criminal Court, alongside existing provisions and mechanisms that could hold corporations accountable for its commission. This section turns to the central research question: whether, and under what conditions, corporations can be held criminally liable for the crime of ecocide before the International Criminal Court. The analysis and conclusions draw on the presented legal framework, doctrinal debates and definitional proposals explored in the earlier sections.

Among the three definitional proposals considered in this thesis, the one put forward by the IEP¹⁶⁴ appears most consistent with the structure and language of existing crimes under the Rome Statute. Specifically, the IEP includes precise definitions of the terms “severe”, “widespread” and “long-term”, concepts that remained undefined in Higgins’ proposal¹⁶⁵ and are only briefly addressed in UCLA’s.¹⁶⁶ This detailed approach better captures the complex nature of ecocide as a crime.¹⁶⁷ According to Minkova, IEP’s definitions of these terms provided are flexible enough to “reflect the complexity of environmental harm and its consequences”.¹⁶⁸ However, as Heller and other commentators have pointed out, the IEP’s proposal still presents important areas for improvement, particularly concerning the mental element.¹⁶⁹ The IEP uses the standard of “knowledge of substantial likelihood”, which departs from the Rome Statute’s default requirement “intent” and “knowledge”.¹⁷⁰ This choice of terminology suggests a probability, rather than a certainty, of the outcome. As explained in the

¹⁶⁴ Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text’ (n 15), p. 5.

¹⁶⁵ Ecocide Law (n 28).

¹⁶⁶ The Promise Institute for Human Rights (n 14), p. 2.

¹⁶⁷ Minkova (n 2), p. 77.

¹⁶⁸ *ibid* p. 73.

¹⁶⁹ Kevin Jon Heller, ‘Skeptical Thoughts on the Proposed Crime of “Ecocide” (That Isn’t)’ (*OpinioJuris*, 23rd June 2021) <<https://opiniojuris.org/2021/06/23/skeptical-thoughts-on-the-proposed-crime-of-ecocide-that-isnt/>> accessed 29 May 2025; Minkova (n 2), pp. 77-81.

¹⁷⁰ Rome Statute of the International Criminal Court (n 30), art. 30.

Commentary,¹⁷¹ the mens rea standard applied in practice by the IEP would be lower than what the definition suggests, namely “recklessness”. This discrepancy introduces interpretative uncertainty, as the term “knowledge” in the IEP’s proposal¹⁷² differs from its established meaning in International Criminal Court jurisprudence and the Rome Statute itself.¹⁷³ To solve this ambiguity, it would be advisable to discard the term “knowledge” and instead adopt the more accurate formulation, “awareness of a substantial likelihood,” as already mentioned in IEP’s Commentary.¹⁷⁴ This change would enhance clarity and legal coherence.¹⁷⁵ While environmental crimes might, in theory, be better addressed under a strict liability regime,¹⁷⁶ the International Criminal Court’s legal framework does not accommodate such a low threshold of culpability, supporting recklessness as the best-suited avenue.

As previously noted, the IEP’s definition of ecocide does not limit its applicability to natural persons, thereby leaving open the possibility of extending the International Criminal Court’s jurisdiction to legal persons. Pereira emphasises that the International Criminal Court’s current lack of jurisdiction over corporate entities constitutes a significant barrier to the effective prosecution of ecocide.¹⁷⁷ While the existing legal provisions discussed in this thesis could, theoretically, be applied to ecocide, they fall short by attributing responsibility solely to individuals, without addressing the corporate entity as a whole. This is especially problematic for environmental crimes, as it is usually corporate culture that fosters criminal behaviour.¹⁷⁸ Once individuals are separated from the corporate entity, they often no longer possess the same financial means or institutional power to engage in large-scale environmental harm. Consequently, the “true nature of corporate participation is not effectively captured”¹⁷⁹ through prosecutions that target individuals alone. Addressing this gap would require amending Article

¹⁷¹ Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text’ (n 15), p. 11.

¹⁷² *ibid* p. 2.

¹⁷³ Rome Statute of the International Criminal Court (n 30), art. 30; Werle and Jessberger (n 136), p. 39.

¹⁷⁴ Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text (n 15), p. 11.

¹⁷⁵ Minkova (n 2), p. 81.

¹⁷⁶ Higgins (n 13), p. 122.

¹⁷⁷ Pereira (n 78), p. 219.

¹⁷⁸ Schwegler (n 12), p. 93.

¹⁷⁹ *ibid*.

25(1) of the Rome Statute,¹⁸⁰ to expressly include legal persons within the jurisdiction of the Court. Prominent scholars support this expansion, arguing that, given the evolving recognition of corporate criminal liability in national legal systems, the inclusion of legal persons would likely receive more acceptance than in the past.¹⁸¹

Moreover, the proposal to introduce a fifth crime into the Rome Statute and expand the current jurisdiction of the International Criminal Court, faces additional challenges, due to the complexity of the amendment process. This process is outlined in Article 121 of the Statute¹⁸² and it envisages a four-step procedure, with each stage being accompanied by considerable diplomatic and political obstacles.¹⁸³ Despite these difficulties, as Scheffer states, “there is value in contemplating an amendment”.¹⁸⁴

4. CONCLUSION

This thesis has critically examined whether, and under what circumstances, corporations can be held criminally accountable for the crime of ecocide, should one of the proposed definitions be adopted as a fifth core crime under the Rome Statute of the International Criminal Court. Through an analysis of the definitions proposed by Polly Higgins,¹⁸⁵ the UCLA Promise Institute and the Independent Expert Panel, alongside the International Criminal Court’s legal framework, it becomes clear that while theoretical pathways exist, significant legal and structural limitations remain.

Among the definitions considered, the IEP’s proposal emerges as the most coherent and practically aligned with the structure and language of existing International Criminal Court crimes. It offers a comprehensive and clear framework with definitions for key thresholds, such as “widespread”, “long-term” and “severe”, which are essential for a correct interpretation and application of the crime at the international level. Its incorporation of recklessness as the mental element required, which was articulated as “knowledge of a substantial

¹⁸⁰ see also Scheffer (n 71), p. 38.

¹⁸¹ *ibid*; Pereira (n 78), p. 221; Stewart (n 76); Garcia (n 76); Davoise (n 73).

¹⁸² Rome Statute of the International Criminal Court (n 30), art. 121.

¹⁸³ Sarliève (n 8), p. 7.

¹⁸⁴ Scheffer (n 71), p. 38.

¹⁸⁵ Ecocide Law (n 28).

likelihood”,¹⁸⁶ seems to be better suited than the stringent “intent” and “knowledge” standard set out in Article 30 of the Rome Statute.¹⁸⁷ However, the use of the term “knowledge” within the IEP’s definition risks misinterpretation, as it does not correspond to the established interpretation accepted by the International Criminal Court’s jurisprudence.¹⁸⁸ Replacing it with “awareness of a substantial likelihood” would be a viable solution to enhance legal clarity.¹⁸⁹

Critically, the IEP’s definition¹⁹⁰ does not explicitly exclude corporations from its scope. This absence arguably permits the interpretation that corporate criminal liability could be encompassed. Nevertheless, under the current legal framework of the Rome Statute, the International Criminal Court retains jurisdiction only over natural persons, as stipulated in Article 25(1) of the Rome Statute.¹⁹¹ This limitation significantly restricts the Court’s capacity to hold corporations accountable, despite their documented role in causing widespread environmental harm.¹⁹² While existing provisions, such as Articles 25(3)¹⁹³ and 28(b) of the Rome Statute,¹⁹⁴ would theoretically allow for the prosecution of corporate agents, these are inadequate for addressing the systemic nature of corporate environmental wrongdoing.¹⁹⁵ Responsibility tends to be diffused across complex hierarchies and hidden behind the corporate veil, making it difficult to isolate individual intent or control,¹⁹⁶ particularly under the high thresholds imposed by the International Criminal Court. Accordingly, an amendment to Article 25(1) of the Rome Statute¹⁹⁷ would be necessary to extend the International Criminal Court’s jurisdiction to include legal persons. Although politically and diplomatically challenging, such a reform is necessary given the growing acceptance of corporate criminal liability in national legal systems.¹⁹⁸

¹⁸⁶ The Promise Institute for Human Rights (n 14), p. 2.

¹⁸⁷ Rome Statute of the International Criminal Court (n 30), art. 30.

¹⁸⁸ *ibid*; Werle and Jessberger (n 136), p. 39.

¹⁸⁹ Minkova (n 2), p. 81.

¹⁹⁰ The Promise Institute for Human Rights (n 14), p. 2.

¹⁹¹ Rome Statute of the International Criminal Court (n 30), art. 25(1).

¹⁹² Schwegler (n 12), p. 81.

¹⁹³ Rome Statute of the International Criminal Court (n 30), art. 25(3).

¹⁹⁴ *ibid* art. 28(b).

¹⁹⁵ Schwegler (n 12), p. 93.

¹⁹⁶ Leeuw (n 67), pp. 247-248.

¹⁹⁷ Rome Statute of the International Criminal Court (n 30), art. 25(1).

¹⁹⁸ Scheffer (n 71), p. 38.

In conclusion, corporations could be held criminally accountable for the crime of ecocide if the IEP's definition was to be adopted in the Rome Statute, but only indirectly and insufficiently. This is because liability would continue to operate only through individual corporate agents, rather than the corporate entity itself. Meaningful accountability requires not only the adoption of a well-crafted definition, but also a reform of the International Criminal Court's jurisdiction to include corporate entities as subjects of international criminal law. Only then can the true nature of corporate complicity in environmental crimes be effectively addressed by the International Criminal Court. Establishing the crime of ecocide is a necessary first step, which would then need to be followed by an amendment of the Rome Statute extending the Court's jurisdiction to corporations. More broadly, State Parties must acknowledge the growing need for an international criminal response to environmental harm and to consider how the International Criminal Court can be adapted to meet that need.

Dark Patterns: The Protection of Children Under The GDPR

*Lorena Elsässer-Briones*¹

1. INTRODUCTION	33
2. DARK PATTERNS AND CHILDREN	37
3. GENERAL DATA PROTECTION REGULATION FRAMEWORK	50
5. CONCLUSION	66

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1. INTRODUCTION

1.1 WHY ARE DARK PATTERNS RELEVANT TO THE PROTECTION OF CHILDREN?

Imagine a teddy bear that sweetly asks children for their favourite colour, name, and age and then shares that data with large companies that gain profit based on those profiles. No parent would allow their kid to own such an intrusive toy, yet, according to the 5Rights Foundation,² many of the apps used daily by children incorporate these and similar features in their design. Through a thought-provoking project, the 5Rights Foundation applies modern manipulative design to traditional toys, exposing the double standard that permits harmful design practices to be perceived as standard online, when they would never be accepted offline.³ These elements are design choices build to purposely deceive users. More often than not, these deceptive design elements, called dark patterns, blur the line between persuasion and overt manipulation, especially when the target audience is children.⁴

According to article 1 of the United Nations Convention on the Rights of the Child (UNCRC)⁵ anyone under the age of 18 is considered a child and is thus protected by law from the infringement of specific rights, such as the right to privacy or the right to be free from economic exploitation.⁶ This framework is ratified by all EU Member States, making it binding on every EU country. In addition, it is used in this research because it provides the most comprehensive and globally accepted international tool for the recognition of children's vulnerabilities and thus their specific need to be protected through State's positive and negative obligations. The same institution published in 2021 the *General Comment No. 25 on children's rights in relation to the digital environment*.⁷ This

² 5Rights Foundation, 'Twisted Toys – Toying with Children's Lives' (2021) <<https://twistedtoys.5rightsfoundation.com/>> accessed 14 May 2025.

³ *ibid.*

⁴ Mario Martini and Christian Drews, 'Making Choice Meaningful – Tackling Dark Patterns in Cookie and Consent Banners through European Data Privacy Law' (2022) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4257979> 229.

⁵ United Nations General Assembly, 'United Nations Convention on the Rights of the Child' <https://downloads.unicef.org.uk/wpcontent/uploads/2010/05/UNCRC_united_nations_convention_on_the_rights_of_the_child.pdf> accessed 19 May 2025.

⁶ *ibid* arts 1, 16 and 32.

⁷ UN Committee on the Rights of the Child, 'General Comment No. 25 (2021) on Children's Rights in Relation to the Digital Environment' (2021) CRC/C/GC/25 <<https://www.ohchr.org/en/documents/general-comments-and->

legislation, although non-binding, is considered to be the most influential international framework to date, emphasising the pressing need to put children's rights at the forefront of an increasingly technological society.⁸ This is a key notion, as the use of dark patterns may not only infringe on children's right to privacy but also corrupt their cognitive development and their right to be free from economic exploitation.⁹

Dark patterns thrive within what is known as the 'attention economy,'¹⁰ a context in which greater user engagement leads to increased data collection, more advertisements opportunities and ultimately higher revenue for companies. Thus, in a free market economy, businesses compete for the attention of customers to gain profit. This economic reasoning explains why deceptive design is deliberately built into digital platforms to capture and hold users' attention. However, this economic model becomes problematic when it preys on children who's still developing cognitive faculties make them the ideal target.¹¹ Evidence from the recent 2020 EU Kids Online report shows an increase from 2010 in the time that children spend online (for example, from two to three-and-a-half hours a day in Norway). The reasons attributed to this increase in screen time are broad, but it shows that children are spending more time online, thus being prone to surrendering their attention to screens.¹² They often lack the tools and meta-awareness to recognise or resist manipulative techniques that aim to keep them engaged or spend money through hidden advertisements or gamified education

recommendations/generalcomment-no-25-2021-childrens-rights-relation> accessed 14 May 2025.

⁸ Steve Wood, 'Impact of Regulation on Children's Digital Lives' (2024) Digital Futures for Children Centre, London School of Economics and Political Science (LSE) and 5Rights Foundation.

⁹ 5Rights Foundation, 'Disrupted Childhood: The Cost of Persuasive Design' (2023) 6 <https://5rightsfoundation.com/wpcontent/uploads/2024/08/5rights_DisruptedChildhood_G.pdf> accessed 13 May 2025.

¹⁰ Tommaso Crepax and Jan Tobias Mühlberg, 'Upgrading the Protection of Children from Manipulative and Addictive Strategies in Online Games: Legal and Technical Solutions beyond Privacy Regulation' (2022) 31 The International Review of Information Ethics 3 <<https://informationethics.ca/index.php/irrie/article/view/480>> accessed 7 May 2025.

¹¹ Lorena Sanchez Chamorro, Carine Lallemand and Colin M Gray, "'My Mother Told Me These Things Are Always Fake'" - Understanding Teenagers' Experiences with Manipulative Designs', Designing Interactive Systems Conference (ACM 2024), p. 1469. <<https://dl.acm.org/doi/10.1145/3643834.3660704>> accessed 29 November 2024.

¹² David Smahel and others, 'EU Kids Online 2020: Survey Results from 19 Countries' (EU Kids Online 2020) 23 <<https://www.eukidsonline.ch/files/Eu-kids-online-2020international-report.pdf>> accessed 10 April 2025.

tools.¹³ For the most part, children do not see through the skewed intentions of the designer.¹⁴ As dark patterns fly under the radar as a part of children's education, the issue becomes harder to ignore. By 2022, an estimated 97% of children aged 3-17 went online regularly, 63% of whom used social media platforms like Snapchat or TikTok, known to be flooded with dark patterns.¹⁵ Moreover, technology has become an integral part of contemporary education systems.¹⁶ When attention is commodified even in educational environments, the ethical and legal frameworks drafted to protect minors come into consideration.

From an ethical lens, one may ponder the implications of parental responsibility in protecting children from exposure to manipulative online techniques. Although kid-adjusted alternatives exist (for example, YouTube Kids or National Geographic Kids), adults often lack the knowledge to use these protection tools effectively.¹⁷ This exposes the issue to a double standard paradox: children are both over-exposed to dark patterns and under-protected. On the other hand, from a legislative perspective, a comprehensive range of frameworks has arisen in the last few years to target dark patterns.¹⁸

In the EU, four legislative instruments stand out in this regard. In the first place, the Unfair Commercial Practices Directive¹⁹(UCPD) aims to broadly protect consumers from practices deemed as misleading or aggressive. Secondly, the Digital Services Act²⁰ (DSA) holds large platforms accountable for deceptive

¹³ Caroline Stockman and Emma Nottingham, 'Dark Patterns of Cuteness: Popular Learning App Design as a Risk to Children's Autonomy' in Emily Setty, Faith Gordon and Emma Nottingham (eds), *Children, Young People and Online Harms: Conceptualisations, Experiences and Responses* (Springer International Publishing 2024).

¹⁴ Sonia Livingstone and Kruakae Pothong, 'The Problem and the Potential of Children's Education Data' (5Rights Foundation 2022). <https://cms.educationdatafutures.5rightsfoundation.com/wpcontent/uploads/2022/09/Education-Data-Futures_Essay-02.pdf> accessed 20 May 2025.

¹⁵ Thomas Mildner and others, 'Defending Against the Dark Arts: Recognising Dark Patterns in Social Media', Proceedings of the 2023 ACM Designing Interactive Systems Conference (2023) <<http://arxiv.org/abs/2305.13154>> accessed 20 May 2025.

¹⁶ Stockman and Nottingham (n 13), p. 126.

¹⁷ 5Rights Foundation, 'Twisted Toys' (n 2).

¹⁸ Johanna Herman, 'Dark Patterns: EU's Regulatory Efforts' (2024) 7 Security and Privacy e441, p. 7 <<https://onlinelibrary.wiley.com/doi/10.1002/spy2.441>> accessed 7 January 2025.

¹⁹ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market <<https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32005L0029>> accessed 20 May 2025.

²⁰ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and Amending Directive 2000/31/EC (Digital Services Act) <<https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32022R2065>> accessed 20 May 2025.

practices. Thirdly, the General Data Protection Regulation²¹ (GDPR) and lastly, the newer AI Act.²² The latter stands out in that it includes specific considerations when implementing high-risk AI that will likely be used in online education tools and thus used by children.²³ The legislation recognises minors as vulnerable users and offers more protection to them. However, because it has not yet been fully applied, this paper focuses for now on the analysis and enforcement of the GDPR instead. The GDPR, enforced since 2018, governs lawful data processing and offers additional safeguards for children as vulnerable users, as stated in Recital 38.²⁴

This paper decides to specifically analyse the GDPR, because of its relevance in aiming to set uniform standards for the protection of data and privacy in a global scale in recent years.²⁵ In addition, the GDPR is the most adequate framework to address dark patterns affecting children in educational context because of the prohibition on manipulative design that corrupts valid consent, the strong emphasis on data subject rights at the core of legislation, and lastly, within that realm, the framing of children as an especially vulnerable group that merits strict child-specific data protection enforcement.

Thus, this dissertation aims to answer the question of whether the GDPR offers effective safeguarding mechanisms to protect children from the risks associated with dark patterns in the context of educational platforms. The methodology used in the literature review is mainly a conceptual analysis of the existing typologies of dark patterns applied to educational technologies. The legal analysis uses a doctrinal and normative method to interpret and systematically assess the legislation and its principles, with the aim of ultimately evaluating its adequacy in protecting children.

²¹ Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1.

²² Regulation (EU) 2024/1689 of 13 June 2024 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) [2024] OJ L168/1.

²³ Hay M M Kyaw, Lin Zou, Junnan Yu and Yixun Li, 'AI-empowered social robots in early childhood classrooms: roles, challenges, and opportunities' (2025) *AI, Brain and Child* 1.

²⁴ GDPR, Recital 38.

²⁵ Jennifer Wu and Martin Hayward, 'International impact of the GDPR felt five years on' (Out-Law Analysis, 25 May 2023) <<https://www.pinsentmasons.com/out-law/analysis/international-impact-of-the-gdpr-felt-five-years-on>> accessed 21 October 2025.

The study is divided into four chapters, each assessing a specific issue to answer the final research question. Chapter 2 provides a general overview of the definition of dark patterns in the context of educational tools for children. The second part of Chapter 2 exposes three commonly encountered types of dark patterns and the corresponding UNCRC fundamental rights that are at stake through the proliferation of these kinds of malicious practices. Chapter 3 is a thorough legal analysis focusing on the GDPR, first clarifying the key concepts and principles that serve to address deceptive design, and subsequently diving into the operational safeguards that can protect children. Chapter 4 consists of a systematic evaluation and application of the aforementioned mechanisms enshrined in the legislation. Lastly, Chapter 5 offers a summary and concluding ideas of the paper, as well as scope limitations of the paper and future research avenues. Within the framework given, only those concepts that can apply to children will be analysed in depth.

2. DARK PATTERNS AND CHILDREN

2.1 INTRODUCING DARK PATTERNS

With the advent of technology gaining territory in various areas of our lives, the topic of dark patterns has become increasingly important for regulators and policymakers globally.²⁶ While the term itself may not be in everyone's daily lexicon, almost any internet user comes across them regularly.²⁷ A familiar example includes exploiting users' excitement of signing up for a 'free' service, only to be faced with hidden costs during the proceeding.²⁸ These design practices are so common that they are viewed as ordinary steps in the Internet experience.²⁹ A study reveals that 97% of technologies across industries involve the use of dark patterns, among which 70% are found to make privacy settings unnecessarily complex in order to discourage people from accessing them, leading users to give

²⁶ Herman (n 18), p. 1.

²⁷ *ibid.*

²⁸ Than Htut Soe and others, 'Circumvention by Design - Dark Patterns in Cookie Consent for Online News Outlets', *Proceedings of the 11th Nordic Conference on Human-Computer Interaction: Shaping Experiences, Shaping Society* (ACM 2020) 1 <<https://dl.acm.org/doi/10.1145/3419249.3420132>> accessed 7 May 2025.

²⁹ Herman (n 18), p. 2.

up or miss the chance to properly protect their data rights.³⁰ An alarming trend is the refined sophistication of dark patterns, as designers are becoming increasingly ‘creative’ in deploying them.³¹ Kolmer and Eckhardt identify over 100 distinct manifestations of dark patterns, a number which continues to grow.³² Thus, addressing the issue of dark patterns is becoming increasingly as challenging as it is urgent.

The prevalence of these manipulative techniques has caught the attention of academics and researchers globally, yet there seems to be little focus on dark patterns aimed at children and the effects thereof.³³ To date, there is still no binding law specifically protecting children from dark patterns on all platforms.³⁴ At the same time, ‘Educational Technology’ (EdTech) is becoming popular in schools.³⁵ This is a sector that blends innovative technological tools into traditional learning contexts. For example, teachers will use apps to send homework that children can practice at home, be it mathematical exercises or vocabulary revision flashcards. This has become increasingly popular in schools within the last decade. This trend sheds light on the paramount importance of analysing children's rights in relation to dark patterns to address a regulatory blind spot in digital environments targeting minors. These technologies are embedded in children’s everyday lives, yet they are not equipped to protect themselves from the consequences this entails.³⁶

³⁰ Global Privacy Enforcement Network, ‘2024 GPEN Sweep on Deceptive Design Patterns’ (9 July 2024); UN Committee on the Rights of the Child (n 5) p. 328 accessed 15 January 2025.

³¹ Center for Democracy & Technology, *AI-Powered Deception: A Deeper Dimension of Dark Design Patterns in Conversational AI Tools and Platforms* (CDT, 15 September 2025) <<https://cdt.org/insights/ai-powered-deception-a-deeper-dimension-of-dark-design-patterns-in-conversational-ai-tools-and-platforms/>> accessed 13 January 2025.

³² Tim Kollmer and Andreas Eckhardt, ‘Dark Patterns: Conceptualization and Future Research Directions’ (2023) 65(3) *Business & Information Systems Engineering*, p. 201. <<https://link.springer.com/10.1007/s12599-022-00783-7>> accessed 7 January 2025.

³³ Crepax and Mühlberg (n 10), p. 31.

³⁴ As mentioned, the DSA prohibits the use of dark patterns but its scope is limited to online platforms (article 25). However, there are growing EU initiatives, see Étienne Bassot, ‘Ten Issues to Watch in 2025’ (Briefing, European Parliamentary Research Service, PE 767.186 January 2025).

<[https://www.europarl.europa.eu/RegData/etudes/IDAN/2025./767186/EPRS_IDA\(2025.\)767186_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2025./767186/EPRS_IDA(2025.)767186_EN.pdf)> accessed 31 October 2025.

³⁵ Livingstone and Pothong (n 14), p. 20.

³⁶ Marie Potel-Saville and Elisabeth Talbourdet, ‘Empowering Children to Understand and Exercise Their Personal Data Rights’, *Legal Design Perspectives: Theoretical and Practical Insights from the Field* (Ledizioni) <<https://zenodo.org/record/5710846>>.

2.2 DEFINING DARK PATTERNS IN THE CONTEXT OF EDTECH

The term *dark pattern* was first coined by Harry Brignull,³⁷ and its use was specific to the design ethics community. However, since their growth in the last decade, computer scientists, regulators and legal scholars have shown increasing interest and concern in them.³⁸ The concept is associated with different nomenclatures, e.g. deceptive design patterns,³⁹ or manipulative online choice architecture.⁴⁰ The term ‘dark pattern’ has been officially adopted by the European Data Protection Board (hereafter EDPB)⁴¹ and national data protection authorities,⁴² and as mentioned earlier, it is explicitly prohibited under certain legislative instruments.⁴³ The various definitions of dark patterns⁴⁴ that have arisen in the last years can be grouped into design patterns that share four key common characteristics: a) dark patterns appear in interfaces that mislead or confuse users b) this sense of disorientation is created by manipulating their preferences or undermining their freedom of choice and autonomy, c) it is often through the deliberate use of coercive or overbearing design architectures (such as the use of intense colours, or confusing layout of buttons) d) to a large extent there is an underlying specific economic goal, largely benefitting the online service at the user's expense, for example by preventing informed choices (through confusing language for instance) or pressuring them into specific actions.⁴⁵ All in all, dark patterns are design practices that exploit people's

³⁷ Dr. Harry Brignull, ‘Deceptive Patterns (Aka Dark Patterns)’ Deceptive Design <<https://www.deceptive.design/>> accessed 10 January 2025.

³⁸ Colin M Gray and others, ‘Mapping the Landscape of Dark Patterns Scholarship: A Systematic Literature Review’, *Designing Interactive Systems Conference (ACM 2023)* 1 <<https://dl.acm.org/doi/10.1145/3563703.3596635>> accessed 27 September 2024.

³⁹ Brignull (n 37).

⁴⁰ Arunesh Mathur, Mihir Kshirsagar and Jonathan Mayer, ‘What Makes a Dark Pattern... Dark?: Design Attributes, Normative Considerations, and Measurement Methods’, *Proceedings of the 2021 CHI Conference on Human Factors in Computing Systems (ACM 2021)* 2. <<https://dl.acm.org/doi/10.1145/3411764.3445610>> accessed 14 January 2025.

⁴¹ European Data Protection Board, ‘Guidelines 03/2022 on Deceptive Design Patterns in Social Media Platform Interfaces: How to Recognise and Avoid Them’ <https://www.edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-032022deceptive-design-patterns-social-media_en> accessed 10 January 2025.

⁴² Cristiana Santos and Arianna Rossi, ‘The Emergence of Dark Patterns as a Legal Concept in Case Law’ (2023) 12 Internet Policy Review <<https://policyreview.info/articles/news/emergence-of-dark-patterns-as-a-legal-concept>> accessed 20 May 2025.

⁴³ DSA, art. 25.

⁴⁴ Mathur, Kshirsagar and Mayer (n 40).

⁴⁵ Kollmer and Eckhardt (n 28).

cognitive biases to entice users into making decisions that they would otherwise not make, as most of the time these actions are not in their best interests.

The interdisciplinary nature of dark patterns research, as indicated in the studies conducted by Gray, Santos and Bielova,⁴⁶ reveal that their harms extend across various fields (from design to consumer protection and psychology) which poses a risk as the lack of consensus over terms and definitions makes enforcing rules on dark patterns progressively challenging.⁴⁷ The added difficulty stems from the fact that several forms of dark patterns can be found across different types of media, inevitably leading to an abundance of siloed classifications. Some of them, such as the one created by the digital ethics researcher Zagal et al,⁴⁸ distinguish dark patterns based on where they are applied, for example, in gaming platforms. Other classifications such as the one used in the Guidelines published in 2023 by the EDPB, *Deceptive design patterns in social media platform interfaces: how to recognise and avoid them*,⁴⁹ focus on classifying them according to their effects on users' behaviours. For this paper, the study conducted by the Radesky, a key researcher in the field connecting dark patterns and their effects on children⁵⁰ is of particular interest to frame the issue. The author's analysis uses terminology specific to children based on their interaction with the design pattern. One such example is the term 'lures', which denotes drawing children's attention to certain objects, for instance, a colourful 'click here' icon, to distract them from the initial intention to learn or play.⁵¹

This paper will mostly use the terminology from the EDPB Guidelines and Radesky's study to elaborate a framework of examples that can be understood in conjunction with the legal protection mechanisms further on. The examples are

⁴⁶ Colin M Gray, Cristiana Santos and Nataliia Bielova, 'Towards a Preliminary Ontology of Dark Patterns Knowledge' (2023) in *Extended Abstracts of the 2023 CHI Conference on Human Factors in Computing Systems (CHI EA '23)* (ACM Press) <<https://doi.org/10.1145/3544549.3585676>> accessed 10 January 2026.

⁴⁷ Gray and others (n 38), p. 5.

⁴⁸ José P Zagal, Staffan Björk and Chris Lewis, 'Dark Patterns in the Design of Games' p. 8.

⁴⁹ European Data Protection Board, 'Guidelines 03/2022 on Dark Patterns in Social Media Platform Interfaces: How to Recognise and Avoid Them' (adopted 14 March 2022, public consultation reference 03/2022) <https://www.edpb.europa.eu/our-work-tools/documents/public-consultations/2022/guidelines-32022-dark-patterns-social-media_en> accessed 20 May 2025.

⁵⁰ Jenny Radesky and others, 'Prevalence and Characteristics of Manipulative Design in Mobile Applications Used by Children' (2022) *JAMA Network Open* <<https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2793493>> accessed 15 January 2025.

⁵¹ Jenny Radesky and others (n 50).

collected from websites and apps labelled as “educational” whose users are predominantly children. It is worth noting that there is no EU standardisation for an online platform to be considered “educational.”⁵² Consequently, many apps are marketed as such despite lacking defined learning objectives. Many educational platforms targeting preschoolers are saturated with dark patterns, yet they are amongst the most popular apps to date, boasting over 100 million downloads globally as parents are increasingly allowing children to have their own iPad or tablet for learning purposes.⁵³ This paper will sometimes use terminology related to games for simplicity, as most educational apps adopt game-like interfaces. The following section focuses on three commonly encountered types of dark patterns across EdTech platforms. EdTech companies such as Microsoft 365 Education have been the centre of attention of many privacy related cases in recent years, and experts suggest that there is a serious lack of transparency with what happens to children’s data,⁵⁴ which is why identifying the dark patterns used in these platforms is paramount. These examples were chosen specifically because they appear across various typologies of dark patterns, they are increasingly prevalent in children’s platforms and are considered highly likely to infringe on children’s rights.⁵⁵

2.3 COMMON TYPES OF DARK PATTERNS IN EDTECH PLATFORMS

The three main dark patterns this analysis focuses on are based on three EDPB classification groups, namely: *Stirring*, *Obstruction* and *Overloading*. These terms are capitalised throughout the text to indicate that they belong to defined typologies of dark patterns. This typology is established by the EDPB under ‘content-based’ patterns, meaning the deceptive element is found in the text or in the informational content itself. Within these broad categories, there are multiple

⁵² Google for Education, ‘Guidelines | Google for Education’ (Google for Developers, 23 July 2024) <<https://developers.google.com/edu/guidelines>> accessed 20 May 2025.

⁵³ Marisa Meyer and others, ‘How Educational Are “Educational” Apps for Young Children? App Store Content Analysis Using the Four Pillars of Learning Framework’ (2021) 15 *Journal of Children and Media* pp. 526, 529.

⁵⁴ Noyb, ‘Microsoft violates children’s privacy – but blames your local school’ (4 June 2024) <<https://noyb.eu/en/microsoft-violates-childrens-privacy-blames-your-local-school>> accessed 23 October 2025.

⁵⁵ Simone Van Der Hof and others, “Don’t Gamble With Children’s Rights” – How Behavioral Design Impacts the Right of Children to a Playful and Healthy Game Environment’ (2022) 4 *Frontiers in Digital Health* <<https://www.frontiersin.org/articles/10.3389/fdgth.2022.822933/full>> accessed 14 January 2025.

specific examples of dark patterns that will be analysed below, including emotional steering, misleading action and continuous prompting. These forms of dark patterns and their consequences are not mutually exclusive; they tend to appear intertwined, and as will be observed, when used in combination, they often reinforce each other.⁵⁶

2.3.1 Stirring: Emotional Steering

Emotional steering is a type of dark pattern within the broader category of Stirring.⁵⁷ It involves framing specific information using language or colours to directly lead users in a specific direction, specifically through appealing to their emotional reactions.⁵⁸ This practice is closely linked to the wider notion of “cute design”, which is applied across industries.⁵⁹ A cute design can appear through a smiling avatar that guides the user through the app, or more broadly and common to many, home robots designed to be “part of the family”.⁶⁰ Nevertheless, it can also appear in more subtle design features like vibrant colours, curved lines and shapes, catchy background music or a reassuring voice-over narrator.⁶¹ Radesky’s study calls this “parasocial relationship pressure”, as when applied to children, it can be the use of familiar cartoons or animal figures that prompt the child to prolong their screen time.⁶² For instance, this occurs by pressuring them to keep advancing levels or by expressing disapproval when they stop using the app.⁶³ These types of dark patterns appeared in a total of 85 applications analysed, and it was concluded that the main goal behind the dark pattern was mostly to prolong gameplay or to make purchases.⁶⁴

⁵⁶ Simone Van Der Hof and others (n 55).

⁵⁷ EDPB, ‘Guidelines 03/2022 on Dark Patterns in Social Media Platform Interfaces: How to Recognise and Avoid Them’, p. 67.

⁵⁸ Stockman and Nottingham (n 13), p. 126.

⁵⁹ Clara Caudwell and Cheri Lacey, ‘What Do Home Robots Want? The Ambivalent Power of Cuteness in Robotic Relationships’ (2020) 26(4) *Convergence: The International Journal of Research into New Media Technologies*, pp. 956, art. 968.

⁶⁰ Leilei Guo and others, ‘The Impact of the Cuteness of Service Robots on Consumers’ Interaction Willingness’ (2024) 43 *Current Psychology*, p. 12402 <<https://doi.org/10.1007/s12144-023-05365-8>> accessed 20 May 2025.

⁶¹ Stockman and Nottingham (n 13), p. 123.

⁶² Radesky and others (n 50), p. 8.

⁶³ *ibid* p. 6.

⁶⁴ *ibid*.

Specific examples include the app *Todo Math*,⁶⁵ a tool used by children to learn mathematical operations. The app uses a tearful character to sign up for a free trial, directly appealing to children’s emotions. In addition, the narrator in the app *ABC Animals*⁶⁶ announces, “*You can play with cute animals for a tiny fee! Just ask your parents!*”—the language is used to convey an emotional attachment to interact with animals while downplaying the financial aspect (“tiny fee”) and at the same time using the imperative form to motivate the child to consider the action as mandatory (“ask your parents”).⁶⁷ The use of language can also nudge children to overshare. For instance, animal pop-ups that state “*Press the social network button to claim the award—tell the world about your achievements!*” aim to praise the children and encourage them to disclose contacts or usernames, ultimately increasing the app’s data collection.⁶⁸ A different popular example can be found in the language learning app *Duolingo*, largely used by children in schools, which introduces an amicable green owl that guides users in the app. However, it shows negative emotions when the user fails to engage with the app in a streak.⁶⁹ The example shown in Figure 1 illustrates this, as the owl appears in bright red with text aiming to make them feel ashamed and guilty if they do not advance levels often enough.

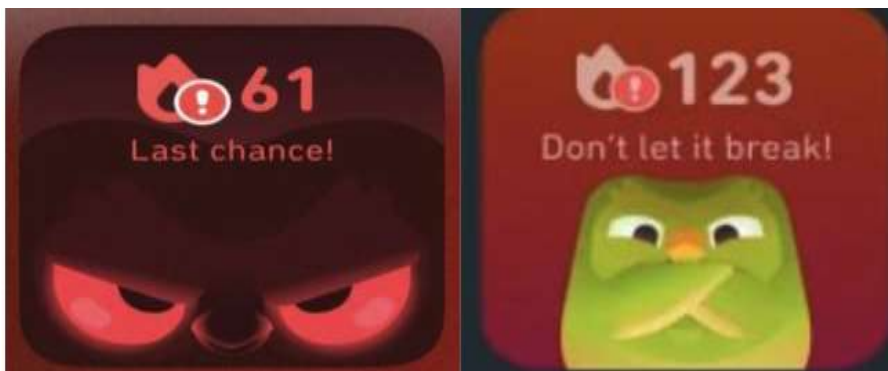


Figure 1: *Duolingo* cartoon shows negative emotions through red colours if the user does not repeatedly engage with the app.

⁶⁵ Enuma, Incl. ‘*Todo Math*’ <<https://todoschool.com/en/math>> Educational math app for Pre-K to 2nd grade; includes over 2,000 interactive activities, accessed 28 May 2025.

⁶⁶ J Stuck Garrett, ‘*ABC Animals*’ (*App Store*, 10 August 2022) <<https://apps.apple.com/us/app/abc-animals/id292402752>> accessed 28 May 2025.

⁶⁷ EDPB (n 57), p. 77, para. 4.3.

⁶⁸ Meyer and others (n 53), p. 36.

⁶⁹ Stockman and Nottingham (n 13), p. 130.

⁶⁹ Tiina Golub, ‘The Good, the Bad and the Ugly of Duolingo Gamification’ (*Medium*, 16 January 2025.) <<https://uxdesign.cc/the-good-the-bad-and-the-ugly-of-duolingo-gamification3a12f0e80dc7>> accessed 29 May 2025.

The emotional response here is critical, as cuteness is related to vulnerability and tenderness; it has a powerful effect in sparking trust and intimacy, making the child more susceptible to engaging with the characters without even thinking they could harm them.⁷⁰ This practice has serious repercussions on children's psychosocial development; for example, by not learning to be critical of whom to trust, which plays a role in that children inherently have less understanding of data collection and privacy risks.⁷¹ Hence, emotional steering can pose a significant threat to children's privacy rights,⁷² as it can prompt users through misleading consent interfaces to share vast amounts of data such as their live location, which raises concerns over informed consent and thus lawful data collection. This issue will be analysed further in Subsection 3.4.1 during the discussion on the legal basis for processing data.

2.3.2 Obstruction: Misleading Action

The next type of dark pattern, misleading action, falls within the umbrella of Obstruction, also called Navigation Constraints across other classifications.⁷³ This design aims to mislead users into choices by using visual tactics that obscure key information or complicate alternative options.⁷⁴

An illustration of misleading action through tunnelling can be the use of disguised advertisements. For example, when a child enters an educational website, there may be promotional content disguised as part of the game that incites the child to click without realising it is an advertisement.⁷⁵ Even if they do realise it, the 'close' icon is designed to be so small⁷⁶ that even when attempting to click it they are automatically redirected to another service, such as shopping

⁷⁰ Kaiwen Sun and others, "'They See You're a Girl If You Pick a Pink Robot with a Skirt': A Qualitative Study of How Children Conceptualize Data Processing and Digital Privacy Risks", *Proceedings of the 2021 CHI Conference on Human Factors in Computing Systems* (ACM 2021) <<https://dl.acm.org/doi/10.1145/3411764.3445333>> accessed 8 April 2025.

⁷¹ *ibid.*

⁷² United Nations Convention on the Rights of the Child (UNCRC) art. 16.

⁷³ Radesky and others (n 50), p. 6.

⁷⁴ EDPB (n 57), p. 38, para. 104.

⁷⁵ Xiaomei Cai and Xiaoquan Zhao, 'Online Advertising on Popular Children's Websites: Structural Features and Privacy Issues' (2013) 29 *Computers in Human Behavior* pp. 1510, 1512.

⁷⁶ Dan Fitton and Janet C Read, *Creating a Framework to Support the Critical Consideration of Dark Design Aspects in Free-to-Play Apps* (18th ACM International Conference on Interaction Design and Children (IDC '19), 12 art. 15 June 2019, Boise, ID, USA) 407 art. 18, ACM <<https://doi.org/10.1145/3311927.3323136>>. <<https://dl.acm.org/doi/10.1145/3311927.3323136>> accessed 22 January 2025.

apps (for example the shopping app *Wish*).⁷⁷ In other cases, the user must wait and watch the advertisement before the “X” appears to close the pop-up (an example of auto-advancing) or to gain in-app rewards.⁷⁸ Figure 2 is an example of advertisements on an educational maths website⁷⁹ that are disguised as part of the game and thus difficult to avoid.

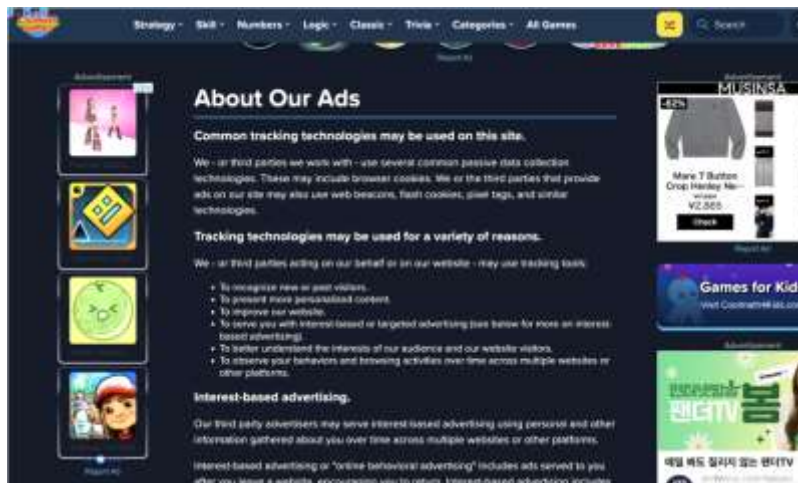


Figure 2: Difficult to avoid advertisements shown on both sides of the children's website "Cool Math Games".

One of the most highlighted consequences derived from these dark patterns is economic exploitation. This occurs not only through the constant request to purchase products through advertisements, but also through in-app purchases. It has been shown that when advertisements and game rewards are mixed, both cognitive and emotional processes respond to persuasion.⁸⁰ Moreover, when the children's attention is geared towards one direction, they automatically have less cognitive space to be critical of their online engagement, often selecting the easiest or fastest option.⁸¹ This means that instead of having time to ponder ideas and think of the next action, they are pushed to keep their brain engaged and entertained at all times.

⁷⁷ Meyer and others (n 53), p. 36.

⁷⁸ *ibid* p. 35.

⁷⁹ Cool Math Games, *Homepage* <<https://www.coolmathgames.com/>> accessed 30 April 2025.

⁸⁰ Meyer and others (n 53) 38.

⁸¹ Cai and Zhao (n 75), p. 1515; Stockman and Nottingham (n 13), p. 120.

2.3.3 Overloading: Continuous Prompting

The following dark pattern belongs to the group of Overloading,⁸² also associated with the term Nagging.⁸³ It means essentially overwhelming the user with information, lengthy requests or visual cues that incite fragmented attention and can lead to decision fatigue.⁸⁴ In the case of continuous prompting, it can be pressuring people into giving consent to finally complete the registration for a service. When analysed in children-targeted scenarios, Radesky classifies these as ‘lures’.⁸⁵ These include shiny items, bright colours, and persistent motivational language that aim to distract children from reaching a well-reasoned decision by constantly needing to respond to other stimuli.⁸⁶

Perhaps one of the most discussed platforms in this sense has been Prodigy,⁸⁷ a tool designed to help elementary school students learn Math or English. Despite having over 100 million registered users worldwide,⁸⁸ Prodigy is known to be fraught with dark patterns. The web offers an ‘in-school’ setting as well as a ‘home’ option; however, some games can only be unlocked at home through a paid membership. Thus, children are constantly encouraged to purchase a membership with messages such as “Play at home and ask your parent how to unlock this”, as shown in Figure 3.⁸⁹ Otherwise, students playing the ‘in-school’ version receive messages prompting them to “Come back after 4 PM to spin this prize wheel ”, which at its core aims to prologue screen time and create a use pattern that leads to a habit. In addition, the platform includes more lures in the form of distracting pop-ups and advertisements than the learning content itself. A recent study shows that children were exposed four times more to advertisements than to learning activities during the game.⁹⁰

⁸² EDPB (n 57), p. 65, para. 4.1.

⁸³ ‘Deceptive Patterns - Types - Nagging’ <<https://www.deceptive.design/types/nagging>> accessed 30 May 2025.

⁸⁴ EDPB (n 57), p. 65, para. 4.1.1.

⁸⁵ Radesky and others (n 50), p. 7.

⁸⁶ *ibid.*

⁸⁷ Prodigy, *Homepage* <<https://play.prodigygame.com/>> accessed 15 May 2025.

⁸⁸ Prodigy Education, ‘Prodigy Education Raises One of the Largest Series B Rounds in Global EdTech History’ <<https://www.prnewswire.com/news-releases/prodigy-education-raises-one-of-the-largest-series-b-rounds-in-global-edtech-history-301205869.html>> accessed 15 May 2025.

⁸⁹ ‘Prodigy Complaint February 2021’ 6. <https://fairplayforkids.org/wp-content/uploads/2021/02/Prodigy_Complaint_Feb21.pdf> accessed 10 May 2025.

⁹⁰ *ibid.*



Figure 3: Prodigy dialogue that prompts re-engagement and pressure to become a paid member.

The most significant harm stemming from the use of these dark patterns is their effect on children's development. The strain they impose on cognitive overload has been shown to directly affect their long-term learning capabilities and thinking skills.⁹¹ Moreover, the repeated request for actions taps into habit-forming behaviours, where children adopt a surrender attitude towards online interactions. What this means is that repeated nagging creates addiction loops encouraged by re-engagement, which ultimately block children's rational thinking and their ability to learn new information and foster their creativity.⁹²

Above all else, when children enter a Math website, their intention is to learn or do homework; instead, they are constantly persuaded to consume or to play other games, ultimately devoting additional attention to their screens and compromising their ability to focus. Scholars have denounced that patterns that rely on re-engagement and compulsion loops contribute to children losing their sense of time control and promote feelings of regret and guilt.⁹³ The broader consequence of all this is that children's ability to make independent and critical choices in a digital context is ultimately corrupted.⁹⁴ The moment they enter the

⁹¹ Stockman and Nottingham (n 13), p. 121.

⁹² Meyer and others (n 53), p. 36.

⁹³ Alberto Monge Roffarello, Kai Lukoff and Luigi De Russis, 'Defining and Identifying Attention Capture Deceptive Designs in Digital Interfaces', *Proceedings of the 2023 CHI Conference on Human Factors in Computing Systems* (ACM 2023) 4 <<https://dl.acm.org/doi/10.1145/3544548.3580729>> accessed 15 January 2025.

⁹⁴ Stockman and Nottingham (n 13), p. 117.

digital world, they are prompted to put their guards down and abandon their critical thinking skills.

2.4 THREE KEY CHILDREN'S RIGHTS UNDERMINED BY DARK PATTERNS

In light of the context above, it can be seen that research strongly indicates that dark patterns have an effect on children's development and the way they learn to engage with the digital world. It has been demonstrated that these patterns systematically infringe on the rights of children as enshrined in the legislation.⁹⁵ However, enforcing legislation that tries to minimise these infringements has been challenging for multiple reasons.⁹⁶ One of the reasons is the difficulty in correlating the harm, such as delayed cognitive functions, with the specific dark pattern, as these are often so prevalent and intertwined that it is easy for them to go unnoticed most of the time. To break down the problem, this paper focuses specifically on the three UNCRC rights that are most compromised by dark patterns.

Firstly, the right most directly affected is the right to privacy as per article 16 of UNCRC.⁹⁷ It highlights the obligation of State Parties to protect children legally from interference or attacks on their privacy. Recently, the European Parliament has stressed the importance of this right specifically with regards to Artificial Intelligence, as more incidents have arisen concerning the use of children's data.⁹⁸ With regards to educational platforms, the mass collection of children's data is not new.⁹⁹ For instance, Google's Apps for Education have long raised questions in the US over how the tools tracked students' internet browsing history.¹⁰⁰

Secondly, under article 32,¹⁰¹ children enjoy the right to be free from economic exploitation and hazardous activities, that is, from any practice harmful

⁹⁵ United Nations Convention on the Rights of the Child (UNCRC).

⁹⁶ Herman (n 18), p. 1.

⁹⁷ United Nations Convention on the Rights of the Child (UNCRC) art. 16.

⁹⁸ 5Rights Foundation, 'European Parliament resolution reaffirms commitment to children's rights online' (28 November 2025.) <<https://5rightsfoundation.com/european-parliament-resolution-reaffirms-commitment-to-childrens-rights-online/>> accessed 9 December 2025.

⁹⁹ Deborah Lupton and Ben Williamson, 'The Databified Child: The Dataveillance of Children and Implications for Their Rights' (2017) 19 *New Media & Society* 780, p. 92.

¹⁰⁰ Electronic Frontier Foundation, 'FTC Complaint - Google for Education' (*Electronic Frontier Foundation*, 12 January 2015). <<https://www.eff.org/press/releases/google-deceptively-tracksstudents-internet-browsing-eff-says-complaint-federal-trade>> accessed 21 May 2025.

¹⁰¹ United Nations Convention on the Rights of the Child (UNCRC) art. 32.

to their development, or education, including manipulative commercial practices.¹⁰² This overlaps with the intention behind some dark patterns seen above, such as the intention to deceive children into spending money, shown in Figure 3.

Lastly, children's rights to development in article 6(2)¹⁰³ and the freedom of thought in article 14 from the UNCRC¹⁰⁴ are two fundamental protections clearly undermined by dark patterns. These provisions are analysed together because they aim to protect children's evolving autonomy and capacity to develop cognitive skills which allow them to think freely.¹⁰⁵ The right to develop denotes that children do not grow up with conditions that have a direct negative impact on their physical and mental wellbeing.

Nottingham and Stockman, two scholars at the intersection between ethics of education and technology, frame this concern concisely, as they argue that "the harm of dark patterns lies in the underlying formative effect on a child's autonomy, meaning their ability to freely and independently make choices".¹⁰⁶ Over time, the design practices that repeatedly steer children into pre-selected outcomes deprive them from learning the skill to stop and take the time they need to reflect whether or not to continue with an automated behaviour. Instead, they are encouraged to adopt a more passive role that is characterised by automatic procedural compliance rather than independent and creative judgement.¹⁰⁷

The table below summarises the dark patterns explained and their respective harm to children's rights. Based on this knowledge, the next chapter will present the specific tools enshrined in the GDPR that aim to prevent these deceptive design practices and their harms.

¹⁰² UN Committee on the Rights of the Child (n 7), p. 328.

¹⁰³ United Nations Convention on the Rights of the Child (UNCRC) art. 6(1).

¹⁰⁴ *ibid* art. 14.

¹⁰⁵ UN Committee on the Rights of the Child, 'General Comment No. 1 (2001), Article 29(1): The Aims of Education' (2001) CRC/GC/2001/1 4 <<https://www.refworld.org/legal/general/crc/2001/en/39221>> accessed 21 May 2025.

¹⁰⁶ Nottingham and Stockman (n 13).

¹⁰⁷ M.R. Leiser, *Protecting Children from Dark Patterns and Deceptive Design* (VU Amsterdam, Amsterdam Law & Technology Center 2024) 24.

2.5 SUMMARY TABLE: COMMONLY ENCOUNTERED DARK PATTERNS AND UNCRC RIGHTS

Type of dark pattern	Specific design choices used	Specific example	Concrete harms	Affected UNCRC Rights
<i>Emotional Steering (Steering)</i>	Cute design, smiling avatars, narrator-voices, emotional prompts, vibrant colours, curved lines, background music.	Todo Math ABC Animals DuoLingo	Emotional attachment, prolonged screen time, data disclosure, and in-app purchases.	Article 32, Article 16, Article 6(2) & Article 14
<i>Misleading Action (Obstruction)</i>	Disguised ads, tiny or delayed close buttons, tunnelling, auto-advance, re-direction to external platforms	Cool Math Game	Visual trickery that leads to excessive in-app purchases, compromised privacy	Article 32, Article 16
<i>Continuous Prompting (Overloading)</i>	Repeated consent prompts, re-engagement notifications,	Prodigy	Decision fatigue, habit-formation, impaired learning, compulsive behaviour	Article 6(2) & 14, Article 32

Table 1: Summary of prevalent dark patterns in EdTech and affected UNCRC Rights

3. GENERAL DATA PROTECTION REGULATION FRAMEWORK

3.1 KEY CONCEPTS UNDER THE GDPR

This section aims to provide the reader with a conceptual framework of specific GDPR terms. Before analysing the scopes and content of the GDPR, it is paramount to understand its use of specific terminology. The terms: data subjects, personal data and data processing, have been selected as they serve as a basis to understand other concepts that will be used throughout the legal analysis.

In the first place, data subject, according to the EDPB, means “the individual the personal data relates to”. In this case it is children, considered as those under the age of 18. Moreover, they are “identified or identifiable natural persons”.¹⁰⁸ This is virtually any person who can be identified through data collection. The goal behind this broad interpretation is to enhance the protection of data subjects at all costs.

Secondly, the GPDR applies specifically when a situation involves the processing of personal data. Article 4(1)¹⁰⁹ defines ‘personal data’ as “any information relating to a particular data subject”, meaning data which alone or

¹⁰⁸ GDPR art. 4(1).

¹⁰⁹ *ibid.*

combined with other factors can identify a person. It should be noted that the GDPR remains unclear on the implications of processing anonymous data, as Recital 26 mentions that if data is collected for statistical purposes, it does not fall within the scope. Meanwhile, there are special categories of data that are initially banned from being processed. These are encapsulated in article 9,¹¹⁰ which provides an exhaustive list, including racial origin or biometric data. Article 9(2), however, constitutes a derogation from the overarching prohibition, allowing for limited exceptions such as processing based on substantial public interest in subsection 9(2)(g). Regarding children, the mere fact that the information pertains to a child does not classify it as sensitive. However, if for example, a school or an educational app is collecting biometric data¹¹¹ (for instance fingerprints) or data concerning health¹¹² (for example, an app that drafts a report of the psychological evaluation of children's school performance), the legal basis for processing needs to be additionally justified, and specific measures have to be implemented to safeguard the data subject's fundamental rights. Such tools are, for example, tools such as data minimisation and pseudonymization.¹¹³

Lastly, the concept of data processing is used largely in the context of data protection tools. It is defined in article 4(2)¹¹⁴ as any set of operations, automated or not, on personal data, which can be as simple as obtaining and recording the data manually to filing it algorithmically. Even if it is not done by automated means, so long as it intends to be part of a filing system, it falls within the scope as mentioned in article 2(2).¹¹⁵ It should be noted that a filing system under article 4(6)¹¹⁶ is any set of organised personal data that can be accessed through various means. With regards to children, even when schools request the names and ages of students, it falls under data processing.

¹¹⁰ *ibid* art. 9 (1).

¹¹¹ *ibid* art. 4 (14).

¹¹² *ibid* Recital 35.

¹¹³ GDPR, art. 5 (1) (c) and art. 6(4)(e).

¹¹⁴ *ibid* art. 4(2).

¹¹⁵ Christopher Kuner and others, 'The EU General Data Protection Regulation: A Commentary/Update of Selected Articles' (2021) Maastricht Faculty of Law Working Paper <<https://www.ssrn.com/abstract=3839645>> accessed 7 December 2024.

¹¹⁶ GDPR, art. 4(6).

3.2. INTRODUCTION TO THE GDPR FRAMEWORK

The GDPR came into force in May 2018, replacing the previous 1995 Data Protection Directive (DPD).¹¹⁷ The foremost idea of the GDPR is to allow individuals to regain control of their data.¹¹⁸ The material scope applies throughout the ‘processing of personal data’ according to article 2.¹¹⁹ However, when the data is processed by an individual solely for “personal or household purposes”, the regulation is inapplicable as per article 2(2)(c).¹²⁰ For instance, a private contact list with personal information, or camera security systems to monitor one’s private property, fall outside the scope of application of the GDPR. With regards to the territorial scope, it applies to any EU entity, regardless of where the processing takes place, as per article 3.¹²¹ This scope does not come without challenges. For example, for a body based outside the EU, the GDPR takes effect if it targets citizens either in relation to the offering of goods or services or the monitoring of the behaviour of such individuals within the EU.¹²² If a website in Australia offers goods in euros, it is deemed to be targeting EU citizens and therefore must comply with the GDPR requirements.¹²³ However, in countries with authoritarian regimes, this long-arm approach has proved difficult to enforce in practice.¹²⁴

The GDPR introduces a clear attempt to update children’s right to privacy in the digital age. Through specific mechanisms, it aims to protect their data and empower children to use their rights as data subjects.¹²⁵ Recital 38 was introduced

¹¹⁷ Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.

¹¹⁸ IT Governance Privacy Team, ‘EU General Data Protection Regulation (GDPR) – An Implementation and Compliance Guide’, 4th edition, (ITGP 2020) <<https://mu.idm.oclc.org/login?url=https://search.ebscohost.com/login.aspx?direct=true&db=nlebk&AN=2641163&site=ehost-live&scope=site>>.

¹¹⁹ GDPR, art. (2).

¹²⁰ *ibid* art. 2(2)(c).

¹²¹ GDPR art. (3).

¹²² C-212/13, *Ryneš* [2014] Court of Justice of the European Union C-212/13, ECLI:EU:C:2014:2428 para. 29.

¹²³ IT Governance Publishing, ‘Chapter 2: Data Processing Principles’ in: *EU General Data Protection Regulation (GDPR) – An Implementation and Compliance Guide* 4th edition (IT Governance Publishing, 2020) p. 27.

¹²⁴ Milieu Consulting SRL, ‘Study on the Enforcement of GDPR Obligations Against Entities Established Outside the EEA but Falling Under Article 3(2) GDPR’ (European Data Protection Board (EDPB, 2021) 30 <https://www.edpb.europa.eu/system/files/2023/04/call_9_final_report_04112021_en_0.pdf> accessed 29 May 2025.

¹²⁵ J. C. Buitelaar, ‘Child’s Best Interest and Informational Self-Determination: What the GDPR Can Learn from Children’s Rights’ (2018) 4(8) *International Data Privacy Law* pp. 293, 299.

as an overarching protection framework in line with the best interests of the child.¹²⁶ It notes that: “Children merit specific protection with regard to their personal data, as they may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data (...)”.¹²⁷ The remark clarifies that particular attention should be paid in the context of advertisements, and collecting data to assemble a profile especially when the services are offered directly to a child. Hence, data processing systems for children must include the necessary safeguards so that their rights and freedoms are respected consistently, without limiting their ability to learn, develop and explore.¹²⁸

The GDPR does not directly address the problem of dark patterns. Nevertheless, the main aim of the legislation is to offer robust protection to data subjects through core principles such as the requirement for transparency for processing personal data. For instance, infringing on the rule of transparency set out in article 5¹²⁹ can lead to administrative fines of up to 20 million EUR, according to article 83(5)(a).¹³⁰ This helps illustrate how compliance with the principles of data protection is central to the GDPR framework. In addition, the specific rights of data subjects are outlined in Chapter III of the GDPR. It is important to note that though children enjoy the same rights, and they need to be clearly instructed on how to use them.¹³¹

The following segment outlines essential concepts embedded in the legislation. This will assist the reader in understanding the factors to consider when analysing dark patterns under this legal framework.

3.3 CORE PRINCIPLES UNDER THE GDPR

This section introduces the core principles under the GDPR to safeguard data subjects’ rights during the processing of personal data. The subsections will

¹²⁶ *ibid* p. 300.

¹²⁷ GDPR, Recital 38.

¹²⁸ Personal Data Protection Service (Georgia), ‘A Guide to Protecting Minors’ Personal Data: Theory and Practice’, p. 56 <https://pdps.ge/files/content/A%20Guide%20to%20Protecting%20Minors%27%20Personal%20Data%20Theory%20and%20Practice_en_1719214180.pdf> accessed 10 May 2025.

¹²⁹ GDPR, art. 5.

¹³⁰ *ibid* art. 83(5)(a).

¹³¹ Potel-Saville and Talbourdet (n 36), p. 27.

discuss in detail only those principles for processing enshrined in article 5¹³² that are most relevant to addressing dark patterns.

3.3.1 Principle of Lawfulness, Fairness and Transparency: Article 5(1)(a)

Article 5(1)(a) establishes the principle of lawfulness, fairness and transparency, by emphasising that data subjects must understand what will happen to their personal data,¹³³ such as how it will be processed and how much data will be collected, so that they can be in a rightful position to protect their data rights. The principle paves the way to empower data subjects, allowing them to make informed decisions about their data.

Within this principle, the dimension of transparency will be developed in detail as it proves to be the most essential in addressing dark patterns,¹³⁴ given the goal behind them is often to mislead and deceive users.¹³⁵ The legislation states that information provided to data subjects must be easily accessible and understandable. To further support this argument, the first data subject right mentioned in the third chapter is contained in article 12,¹³⁶ complemented by Recital 58.¹³⁷ The article lays down the right to have information presented “in a concise, transparent, intelligible and easily accessible form, using clear and plain language, in particular for any information addressed specifically to a child”. This obligation, with regard to children, has been reinforced by Article 29 Working Party’s Guidelines on Transparency under GDPR,¹³⁸ which specifies that any service that is known to be particularly utilised by children, even if they are not the exclusive target, needs to use language that is appropriate and simple enough for the child to resonate with.¹³⁹ As will be discussed in the following section, there are situations in which the information concerns the child but is not actually

¹³² GDPR, art. 5.

¹³³ IT Governance Publishing (n 123), p. 43.

¹³⁴ EDPB (n 57), p. 72.

¹³⁵ Marie Potel-Saville and Mathilde Da Rocha, ‘From Dark Patterns to Fair Patterns? Usable Taxonomy to Contribute Solving the Issue with Countermeasures’ in Kai Rannenber, Prokopios Drogkaris and Cédric Lauradoux (eds), *Privacy Technologies and Policy* (Springer Nature Switzerland 2024) p. 15.

¹³⁶ GDPR, art. 12

¹³⁷ *ibid* Recital 58.

¹³⁸ Article 29 Data Protection Working Party, Guidelines on Transparency under Regulation 2016/679 (WP260 Rev.01) (2018) <<https://ec.europa.eu/newsroom/article29/items/622227>>.

¹³⁹ Ingrida Milkaite and Eva Lievens, ‘Child-Friendly Transparency of Data Processing in the EU: From Legal Requirements to Platform Policies’ (2020) 14 *Journal of Children and Media* 5, p. 9.

addressed to them, for instance, when the child is too young to give valid consent under article 8 and instead the information is meant to be validated by an adult.¹⁴⁰

The Guidelines clarify that even in those scenarios where consent is given by a holder of parental responsibility, the child has an ongoing right to transparency throughout their engagement with the platform.¹⁴¹ This means information still needs to be presented in simple terms to make sure children understand the implications of temporarily giving up their right to give consent. To illustrate how this can be done, the Guidelines mention the “UN Convention on the Rights of the Child in Child-Friendly Language”¹⁴² as an example of a child-centric language to be used as an alternative to complex legal jargon. Moreover, a research project¹⁴³ conducted by the French Data Protection Authority (CNIL)¹⁴⁴ together with Amurabi¹⁴⁵—a legal innovation by design agency—concluded that for the principle of transparency to be real and effective, child-centric terms need to be put at the forefront of design. Specific examples of this would be using concrete notions that the child is comfortable with, such as school and family, rather than complex legal terms.

Transparency and the principle’s second dimension, fairness, are intrinsically linked.¹⁴⁶ The overall principle goes beyond providing information to the data subject in a clear manner; it dictates that companies should not take unjust advantage of their position to undermine users’ rights.¹⁴⁷ That is, in terms of fairness, it is required that there is a balance of power, and the criteria include that the processing of data is not overly unjust, detrimental or in any way discriminatory towards the data subject.¹⁴⁸ Lastly, the conditions for lawfulness will be further developed in the next section, which establishes the requirement

¹⁴⁰ GDPR, art. 8.

¹⁴¹ Article 29 Data Protection Working Party Guidelines (n 138), para. 15, 1.

¹⁴² Child Rights Connect and UNICEF, *The United Nations Convention on the Rights of the Child: The Children’s Version* (2019) <<https://www.unicef.org/child-rights-convention/convention-text-childrens-version>> accessed 22 May 2025.

¹⁴³ Potel-Saville and Talbourdet (n 36), p. 272.

¹⁴⁴ ‘Commission Nationale de l’Informatique et Des Libertés (CNIL)’ <<https://www.cnil.fr/fr>> accessed 22 May 2025.

¹⁴⁵ ‘Amurabi – Legal Design Agency’ (*Amurabi*) <<https://amurabi.eu/en/>> accessed 22 October 2025.

¹⁴⁶ Van Der Hof and others (n 55), p. 4.

¹⁴⁷ *ibid* p. 10.

¹⁴⁸ Kuner and others (n 115), p. 69.

to have a lawful legal basis for processing, as enshrined in Article 6,¹⁴⁹ such as consent.

3.3.2 Principles of Purpose Limitation and Data Minimisation: Article 5(1)(b)(c)

The principle of purpose limitation (article 5(1)(b))¹⁵⁰ refers to the obligation of clearly identifying and stating the rationale and scope for processing, and to strictly stay within those boundaries. This further applies to sharing data with third parties, which should be indicated at the outset of processing.¹⁵¹ The principle of data minimisation (article 5(1)(c))¹⁵² holds that the collection or processing of such data ought to be “adequate, relevant and limited to what is necessary in relation to the purposes for which they are”, meaning no data should be collected beyond the strictly essential. For example, a website for children to learn geography may request the users’ age to comply with consent verification mechanisms. Nevertheless, asking for an email or school name, solely for analytical purposes, may pose a risk to personal privacy, as it is beyond the necessary scope.

3.4 CORE RULES UNDER THE GDPR

This section discusses the mechanisms within the legal framework that enable the protection of children’s rights through firstly, the use of a lawful consent legal basis, secondly, the implementation of privacy by design elements and thirdly, control over profiling.

3.4.1 Lawfulness of Processing based on Consent: Article 6(1) and Article 8

One of the most encountered legal bases for processing is consent, based on article 6(1)(a), read in conjunction with the definition in article 4(11).¹⁵³ According to GDPR standards, consent must be freely given, specific, informed and unambiguous.¹⁵⁴ The first condition implies the user should have a real choice and not feel simply compelled to consent just to make use of the service.

¹⁴⁹ GDPR, art. 6.

¹⁵⁰ Supported as well by Recital 50 on processing for purposes other than the initially mentioned.

¹⁵¹ IT Governance Publishing (n 123), p. 51.

¹⁵² GDPR, art. 5(1)(c).

¹⁵³ *ibid* art. 6(1)(a) and art. 4 (11).

¹⁵⁴ EDPB, ‘Guidelines 05/2020 on Consent under Regulation 2016/679’ (2020)

<https://www.edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_202005_consent_en.pdf> accessed 31 May 2025.

Moreover, that consent needs to be specific enough for each data request.¹⁵⁵ Informed consent aims to ensure that individuals are sufficiently aware of their privacy rights and what it means to give those up in certain measure. Finally, unambiguous consent seeks to ensure that consent is given through the active behaviour of the user, meaning silence, pre-checked boxes and inactivity do not constitute lawful consent.¹⁵⁶

The aforementioned is true to any form of consent given within the GDPR. However, for children, a specific framework of consent applies, enshrined in Article 8 which states that “where a controller bases the processing of data on consent, in relation to the offer of information society services directly to a child, consent should be lawful only where the child is at least 16 years old”. On the other hand, when the data subject is below the age of 16, the holder of parental responsibility shall give consent. The onus is on the controller to make “reasonable efforts”¹⁵⁷ to verify in such cases that consent is given lawfully. Within this provision, some terms need to be clarified. Firstly, the article applies to the offer of “information society services” directed to a child. This term is interpreted in light of Article 1(1)(b) of Directive 2015/1535.¹⁵⁸ This legislation aims to inform the EU and other Member States of national technical regulations before they are adopted. It specifies on the requirements of an online education app or a free search engine, so long it offers an online service.¹⁵⁹ Especially in the cases analysed in this research, the websites and apps are preliminarily labelled as educational, and they offer a service targeting children.

In addition, parental responsibility plays a crucial role when the data subjects have not attained the age to give legal consent which, as mentioned before, can vary from Member State to Member State. When referring to parental consent it means someone who according to the national law of the child’s

¹⁵⁵ GDPR, Recital 32.

¹⁵⁶ Johanna Gunawan, Cristiana Santos and Irene Kamara, ‘Redress for Dark Patterns Privacy Harms? A Case Study on Consent Interactions’, *Proceedings of the 2022 Symposium on Computer Science and Law (ACM 2022)* 13 <<https://dl.acm.org/doi/10.1145/3511265.3550448>> accessed 7 January 2025.

¹⁵⁷ GDPR, art. 8.

¹⁵⁸ Directive (EU) 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification) (17 September 2015) OJ L 241/1.

¹⁵⁹ EDPB ‘Guidelines 05/2020 on Consent under Regulation 2016/679’ (n 154), p. 27, para. 7.1.2.

country of residence, has the legal responsibility over the minor.¹⁶⁰ However, as mentioned earlier, Article 29 of the Working Party Guidelines¹⁶¹ emphasised that giving up their right to consent temporarily does not mean they lose their rights as data subjects. In line with the principles of fairness and transparency, they keep their right to revoke that consent according to article 7(3).¹⁶² In practice, this means that the service platform needs to ask for age verification in order to request consent, and they need to explain that the same consent which is given by legal guardians on behalf of the children can also be withdrawn once they reach the legal age to consent themselves.¹⁶³ An example of age verification systems would be requesting a picture and comparing it with a national identification document (through systems like AgeChecker.net and Jumio) or alternatively verifying age by using bank account information linked to a mobile device (through software such as VeriMe).¹⁶⁴

Lastly, the term “reasonable efforts” could be contested, in that it is not always clear how much information should be collected from the data subject for age-verification purposes. The EDPB recommends a proportionality approach in line with the principle of data minimisation and consent, to balance the risk inherent in the processing as well as the available technology.¹⁶⁵ For instance, if only an email address is requested to subscribe to a newsletter (National Geographic Kids), a tick-box consent is enough, whereas if the service allows individuals to post personal data via a chatroom (for instance Discord) where the risks to privacy are heightened, more resources should be allocated towards verifying that consent is given lawfully.¹⁶⁶ Nevertheless, compliance seems so complicated that in practice it has been advised to simply stop collecting data from minors and to stress websites with a significant share of child users to

¹⁶⁰ Information Commissioner’s Office, ‘Children and the GDPR guidance’ (Draft consultation guidance, December 2017) <<https://ico.org.uk/media/about-the-ico/consultations/2172913/children-and-the-gdpr-consultation-guidance-20171221.pdf>> accessed 22 May 2025.

¹⁶¹ Article 29 Data Protection Working Party Guidelines (n 138).

¹⁶² GDPR, art. 7(3).

¹⁶³ EDPB ‘Guidelines 05/2020 on Consent under Regulation 2016/679’ (n 154), p. 29, para. 7.1.4.

¹⁶⁴ Chelsea Jarvie and Karen Renaud, ‘Online Age Verification: Government Legislation, Supplier Responsibilization, and Public Perceptions’ (2024) *Children* 11(9) p. 1068 <<https://doi.org/10.3390/children11091068>> accessed 10 January 2026.

¹⁶⁵ EDPB ‘Guidelines 05/2020 on Consent under Regulation 2016/679’ (n 154), p. 24.

¹⁶⁶ Information Commissioner’s Office ‘Children and the GDPR guidance’ (n 160), p. 26.

radically adapt consent dialogues to comply with article 8.¹⁶⁷ CBC Kids News, a Canadian website, illustrates how plain language (“ask your parents”) and child-friendly fonts (bigger and bolder) could be adapted to children’s consent dialogues. This can be observed in the following Figure 4.



Figure 4: Contrasting cookie dialogues of two cba.com news websites

To highlight the importance of this requirement, in January 2021 the Italian supervisory authority adopted an urgent interim measure against TikTok being the first case to enforce article 8.¹⁶⁸ The case confirmed that there was no lawful processing of data because there were no adequate mechanisms to verify the age of users, thus resulting in wrongful consent.

3.4.2 Privacy by Design and by Default: Article 25

Privacy-by-design-and-by-default (PBDD) is the idea that online platforms or services should be designed from the beginning with the notion of protecting personal data, through using settings that minimise data collection and sharing by default. In the context of the GDPR, it is encapsulated in article 25,¹⁶⁹ with scholars such as Lievens suggesting this concept holds opportunities to mitigate the gaps left open by the consent mechanism analysed above. The rule declares

¹⁶⁷ Suvi Lehtosalo and Daniel W. Woods, ‘Deceptive Patterns in Consent Dialogs on Children’s Websites’ in Maike Klein, Daniel Krupka, Cornelia Winter and Volker Wohlgemuth (eds), *INFORMATIK 2023 – Designing Futures: Zukünfte gestalten* (Gesellschaft für Informatik (GI) 2023) pp. 537 art. 548, 9 <https://doi.org/10.18420/inf2023_65> accessed 15 April 2025.

¹⁶⁸ EDPB, ‘Italian DPA Imposes Limitation on Processing on TikTok after the Death of a Girl from Palermo | European Data Protection Board’ EDPB News <https://www.edpb.europa.eu/news/national-news/2021/italian-dpa-imposes-limitationprocessing-tiktok-after-death-girl-palermo_en> accessed 31 May 2025.

¹⁶⁹ GDPR, art. 25.

that the entity which decides the means for processing is responsible¹⁷⁰ for determining the appropriate technical and organisational measures designed to implement data protection principles. In addition, Recital 78¹⁷¹ specifies the principles of data minimization and transparency should be applied through the PBDD scheme. Even though the wording of the article itself has been condemned as “nebulous”, there is an agreement that the provision aims to build a bridge between the theoretical drafting of the principles mentioned above and their effectiveness in application.¹⁷² Most significantly, in the context of safeguarding children, PBDD presents the prospect of creating a more robust protection framework by placing the best interests of the child and their rights at the core of design.¹⁷³ The PBDD suggests a digital architecture that does not require data subjects to fully understand their risks to be protected from them.¹⁷⁴ The most obvious implementation of this is the “by default” dimension of article 25(2).¹⁷⁵ This involves making active choices in the design of the processing system, for instance, that already implement limits to the personal data that can be collected.¹⁷⁶ An example of this is the privacy setting “not to share” by default in children’s applications, or not setting data collection identifiers such as cookies on websites that are specific for children, like the case of Guinness World Record kids.¹⁷⁷

3.4.3 Profiling: Article 22

The GDPR defines profiling in article 4(4)¹⁷⁸ as “any form of automatic processing” composed of three elements: (1) an automated form of processing (2) carried out on personal data (3) with the goal of evaluating personal aspects about a natural person. The first element involves systems that have no human

¹⁷⁰ Simone van der Hof and Eva Lievens, ‘The Importance of Privacy by Design and Data Protection Impact Assessments in Strengthening Protection of Children’s Personal Data under the GDPR’ (2018) 23(1) *Communications Law* 33.

¹⁷¹ GDPR, Recital 78.

¹⁷² Kuner and others (n 115), p. 118.

¹⁷³ Van Der Hof and Lievens (n 170), p. 10.

¹⁷⁴ Information Commissioner’s Office, *Data protection by design and default* (UK GDPR guidance, updated 19 May 2023) <<https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/accountability-and-governance/guide-to-accountability-and-governance/data-protection-by-design-and-default/>> accessed 13 January 2025.

¹⁷⁵ GDPR, art. 25.

¹⁷⁶ Lehtosalo and Woods (n 167), p. 19.

¹⁷⁷ *ibid.*

¹⁷⁸ GDPR, art. 4(4).

input,¹⁷⁹ and the second element explains that it must relate to data that can identify a person, as seen earlier on the definition of personal data (see section 3.1). The last element means profiling is intended to produce statistical deductions that can help analyse and predict a user's behaviour and is thus not a simple way to classify information.¹⁸⁰

Moreover, article 22¹⁸¹ has data subject's rights at its core, hence it establishes the right not to be subjected to decisions made '*solely*' based on automated processing (including profiling) which: a) produce a legal effect concerning him or her or, b) have a similarly significant effect on the data subject, as producing legal effect. If this is the case, the controller must satisfy all principles, have a lawful basis for processing and apply additional safeguards and restrictions. The wording of the provision does not differentiate between adults or minors, but Recital 71¹⁸² clarifies that "*such measure should not concern a child*". Given the wording is not reflected in the provision itself, the Working Party Guidelines¹⁸³ do not consider it an absolute prohibition, which gives leeway to entities who aim to profile bigger sets of data including that of children.¹⁸⁴ The Guidelines further specify that influencing the behaviour of children, for example by ranking their academic performance and offering only tailored exercises, an educational website could be considered to have a '*similarly significant effect*' as having legal effect on the data subject and thus would fall under the prohibition of article 22.¹⁸⁵ All in all, this means that an educational platform that uses children's academic performance data to collect information and categorise them into "performance boxes", without any human intervention (say the input of a teacher or parent) would be violating section 22(1) even if these "performance boxes" do not formally have a direct legal effect on the children. So long as the profiling affects the child's educational experience, for example by shaping their

¹⁷⁹ GDPR, Recital 71.

¹⁸⁰ Article 29 Data Protection Working Party, 'Guidelines on Automated Individual Decision-Making and Profiling for the Purposes of Regulation 2016/679' (WP 251rev.01, European Commission, 6 February 2018) <<https://ec.europa.eu/newsroom/article29/items/612053/en>> accessed 20 May 2025.

¹⁸¹ GDPR, art. 22.

¹⁸² *ibid* Recital 71.

¹⁸³ Article 29 Data Protection Working Party (n 138).

¹⁸⁴ *ibid* p. 28.

¹⁸⁵ GDPR, art. 22.

learning outcomes and opportunities, the website is infringing their obligation by making a decision that influences children based merely on automated profiling.

To conclude, the rule is to refrain from profiling vulnerable groups, but in cases where it is necessary (for example, for the protection of welfare), the derogations in article 22(2)(a)(b) and (c) apply. These subsections lay out the rightful justifications for profiling. The first one is a) it is necessary for the performance of a contract, b) it is authorised by Union law or c) it is based on the data subject's explicit consent. The latter should be applied only within the framework of Recital 38, which ensures the protection of minors in all contexts in which their personal data is processed and thus subject to risk.

3.5. SUMMARY TABLE: DARK PATTERNS AND RELEVANT GDPR PROVISIONS

Type of Dark Pattern	Specific Design Choices	UNCRC Articles	GDPR Articles
<i>Emotional Steering (Steering)</i>	Cute design, avatars, emotional prompts, colours, sounds	Article 16, Article 32, Article 6(2), Article 14	Article 5(1)(a) (lawfulness, fairness, transparency), Recital 58 (clear and plain language for children), Article 6(1) and Article 8 (lawful consent), Article 25 (privacy by design and by default), Recital 78 (transparency) Recital 38 (children's special protection)
<i>Misleading Action (Obstruction)</i>	Disguised ads, tiny/delayed close buttons, tunnelling, auto-advance	Article 16, Article 32	Articles 5(1)(a)(b)(c) (lawfulness, fairness, purpose limitation, data minimization), Article 6(1) (lawful basis), Article 25 (privacy by design), Recital 78 (transparency) Recital 38 (children's special protection)
<i>Continuous Prompting (Overloading)</i>	Repeated consent prompts, re-engagement notifications	Article 6(2), Article 14, Article 32	Article 5(a)(c), Article 5(a)(c), Article 8 Recital 38 (children's special protection)

Table 2: Summary of dark patterns, UNCRC rights and GDPR provisions

4. HOW THE GDPR APPLIES TO THE USE OF DARK PATTERNS

4.1 INTRODUCTION

After exploring how common types of dark patterns work on educational platforms to undermine children's rights (Chapter 2) and explaining what

requirements the GDPR provides to protect data subjects, especially children (Chapter 3), the current Chapter attempts to apply the GDPR rules to three fictional cases to illustrate the extent to which the GDPR can protect children from the harms of dark patterns, addressing the main research question raised by this paper. The platforms mentioned in these case studies are exemplary and inspired by a combination of the apps and platforms presented above.

4.2 TRICKED INTO CLICKING ‘ACCEPT’: A CASE STUDY ON CHILDREN’S CONSENT

Consider Lucia, a six-year-old elementary school student who has homework to practice simple math on a website recommended by her teacher. Upon visiting that site, a pop-up immediately appears, requesting consent for data collection. The platform uses bright colours and a cute math figure saying, “Let’s become smarter together, just click ‘accept’ here to continue”. This design relies on an amicable character and language that seamlessly urges the child to click the simplest option. The aim behind this is to get an emotional reaction to her ambition of “becoming smarter” thus nudging Lucia into clicking ‘accept’ without much thought. This consent mechanism raises concerns regarding article 6(1)(a)¹⁸⁶ and article 8,¹⁸⁷ as children aged 13 or less should be told in simple terms to allow their legal guardians to use the right to consent on their behalf. This is true when asking for consent as well as withdrawing it as per article 7(3), which states the conditions for consent withdrawal must be as easy as it is to give that consent.¹⁸⁸ However, in practice, studies show that child-adapted requests for consent appear in only around 7% of gaming websites and even less in those that are specifically educational, one of the reasons being that it is sometimes difficult to assess the user’s age without infringing the principle of data minimisation.¹⁸⁹ Hence, scholars have criticised the practical implications of applying article 8, and academics are wary that the consent mechanism results in a large burden on users.¹⁹⁰ Children are not aware of the consequences of agreeing to vast amounts

¹⁸⁶ GDPR, art. 6(1)(a).

¹⁸⁷ *ibid* art. 8.

¹⁸⁸ *ibid* art. 7(3).

¹⁸⁹ Lehtosalo and Woods (n 167), p. 15.

¹⁹⁰ Claire Bessant and others, ‘Exploring Parents’ Knowledge of Dark Design and Its Impact on Children’s Digital Well-Being’, AoIR Selected Papers of Internet Research (Association of

of data processing, but parents are not always aware of the repercussions either. The routine habit of parents freely giving consent would help explain how, by the time a child turns 13, online advertising firms may hold approximately 72 million data points about them.¹⁹¹ This case study helps illustrate how dark patterns often infringe the specific GDPR requirements of consent.

4.3 DROWNING IN POP-UPS: A CASE STUDY ON OVERLOADING

Imagine Alex, an eleven-year-old who struggles learning English. The academy he attends has suggested he start using a kids' version of a language learning app at home to practice. When he downloads the app, he is bombarded with pop-ups, one for consent, then a request to enable notifications, followed by "practice English daily to earn rewards!" Although each pop-up offers a "manage settings" link, clicking on it opens multiple tabs and setting menus.¹⁹² After several confusing attempts, Alex feels overwhelmed and clicks "accept all" repeatedly just to start the exercises. After practising, he decides to do other homework and leaves the phone on the desk; however, he is constantly distracted¹⁹³ by a notification sound from the app that tells him "come back, finish this level to earn rewards!".¹⁹⁴

This is a clear case of overloading through Continuous Prompting, where the platform does not include child-specific settings. This interface design would violate article 25 (PBDD),¹⁹⁵ which requires designers to prioritise data minimisation and privacy-enhancing features. Instead of empowering children to be aware of their rights and privacy, this design encourages passive clicking that stems from a feeling of being overwhelmed, which then inevitably also undermines transparency in data processing under article 5.¹⁹⁶

Internet Researchers 2023) <<https://spir.aoir.org/ojs/index.php/spir/article/view/13395>> accessed 14 January 2025.

¹⁹¹ Geoffrey A. Fowler, 'Your kids' apps are spying on them' (9 June 2022) The Washington Post <<https://www.washingtonpost.com/technology/2022/06/09/apps-kids-privacy/>> accessed 3 May 2025.

¹⁹² Than Htut Soe and others (n 28).

¹⁹³ Van Der Hof and others (n 55), p. 2.

¹⁹⁴ Rosie Hoggmascall, '20 Days of Emotional Blackmail from Duolingo — Is the Owl Really as Evil as They Say?' (UX Collective, 27 September 2024). <<https://uxdesign.cc/20-days-of-emotional-blackmail-from-duolingo4f566523e3c5>> accessed 20 May 2025.

¹⁹⁵ GDPR, art. 25.

¹⁹⁶ *ibid* art. 5.

4.4 LABELS IN THE CLASSROOM: A CASE STUDY ON PROFILING CHILDREN

Lastly, imagine that Geography Fun for All is an app used in schools for children from ages six to eight to memorise countries and cities. Upon first use, children are shown a bright globe cartoon that asks users questions about themselves to create games adapted to their level, as well as learning rankings. While creating a profile, the child must write their name and age. Then, the cartoon prompts them to “Click accept to share your contact list and screen time to show your classmates your improvement!”, or alternatively “Click accept if you want to see where in the globe other schools are playing!”. These questions are framed within a large "Let's Go!" button and a small, greyed-out "Skip for now" button almost invisibly tucked into the corner. Once these are accepted, the system collects behavioural data, such as time spent on quizzes, errors, and location¹⁹⁷ in order to generate tailored content. Teachers can even access their profiles and use them to adapt their classes or flag students who are scoring low in the platform. Although the app claims to support student success, it provides no clear explanation on how profiling works or the impact of automated adjustments on performance metrics like learning objectives (for instance, certain students being tasked with easier problems than others).

This design is an example of the emotional steering that leads to children disclosing vast amounts of data that are then used to make automated decisions, potentially violating article 22(1) on profiling.¹⁹⁸ This data is automatically collected and analysed to create specific categories or boxes that are then likely sold to third parties, for instance, to create personalised advertisements that will appear on the game depending on their age or academic interests or performance. These automated decisions can shape a child’s educational path or learning opportunities, thus having a similarly significant effect on the children as a formally legal effect. The use of emotional steering exploits children’s developmental vulnerability to influence consent, undermining the freely given and informed nature required by GDPR. While profiling may be permitted under certain exceptions in article 22(2), if there is a lack of explicit consent in a

¹⁹⁷ Marisa K McConnell, ‘Geolocation Data in AI: Lessons from Niantic’s “Pokémon Go”’ (Varnum LLP, 31 January 2025). <<https://www.varnumlaw.com/insights/geolocation-data-in-ai-lessons-from-niantics-pokemon-go/>> accessed 20 May 2025.

¹⁹⁸ GDPR, art. 22.

platform especially aimed to be used by students, it would strongly suggest non-compliance with the established rule. This practice also conflicts with Recital 71¹⁹⁹ which cautions against automated decision-making concerning children, and Recital 38,²⁰⁰ which reinforces their need for heightened protection.

5. CONCLUSION

This paper has examined the emergence of dark patterns in educational platforms and the extent to which the GDPR offers principles and mechanisms that respond to the consequences of this development. Growing trends in EdTech have made it clear that children are increasingly exposed to technology, and inevitably, also to dark patterns. This paper addresses how some educational platforms have fallen into the trends of deceptive design, and how this can have an enormous influence on children's privacy, their autonomy and the development of their critical thinking skills.

On the one hand, three key UNCRC protections were highlighted as being especially undermined by dark patterns. These included the rights to privacy, the freedom from economic exploitation, the freedom of thought, and development. Manipulative practices infringe on these by exploiting cognitive biases, such as children's vulnerability to giving their attention away, thus interfering with their autonomy and cognitive growth. To understand how dark patterns operate, this paper incorporated a comprehensive analysis of the background and definition of dark patterns, as well as a clear overview of the most common types of dark patterns present in platforms known to be used by children. The types of deceptive design were explained, namely emotional steering, misleading action, and continuous prompting, chosen based on their prevalence across classifications and their direct impact on children's rights.

The evaluation of the legal framework revealed the principles and safeguards in the GDPR that can ensure the lawful processing of children's data. While no provision mentions the term explicitly, the core principles of transparency, fairness, data minimisation, and purpose limitation provide a foundation to mitigate the prevalence of dark patterns. Moreover, practical

¹⁹⁹ *ibid* Recital 71.

²⁰⁰ *ibid* Recital 38.

safeguards enshrined in the legislation, such as article 8 (on child consent) article 25 (on privacy-by-design and default), and article 22 (on profiling), offer legal tools to protect minors. However, enforcement challenges persist due to the complexity of applying these rules in certain scenarios. For example, in terms of age verification, there is an ongoing debate on how implementing certain mechanisms to identify user's age might infringe upon other principles, such as data minimisation. It could for example also contribute to increasing the risk of security breaches, which would be especially concerning when it comes to illegally gaining access to children's data. For the GDPR to effectively fulfil its protection tools, the mechanisms must be consistently checked and applied, keeping children's best interests in sight.

The case studies introduced illustrated how deceptive design in educational platforms is reflected in practice. Whether through interface overloading or by shaping consent dialogues and emotionally persuading children, the analysis revealed that such design often fails to comply with GDPR standards. All in all, dark patterns may be subtle and widely accepted as part of using online services; however, the harms and consequences on children's rights are serious and far-reaching. This paper, through different examples, aims to shed light on the wider problem, which goes beyond the infringement of the rights mentioned. The underlying issue is that children grow up used to an internet experience in which they are taught that they have no voice over their rights, be it privacy, development, or freedom of thought. Instead, they learn to grow with the internet as a source of truth they cannot contest. The solutions for this ever-growing problem must be implemented by a coordination of responsible bodies, from government policies to design industries and families, adopting a series of principles and a rigorous system to teach children a new way in which to engage with technology that must start with critical thinking. For instance, in terms of policies, regulators should be able to enforce age-appropriate design codes to be followed by the design community, followed by transparency audits. In terms of schools, they should carefully consider what platforms are included in the curriculum and use only those that safeguard all of children's rights. Lastly, families should ensure that children have a more holistic understanding of digital literacy beyond being able to use new technologies. Children should be encouraged through open discussion, supervision and reflection at home to pause

and reflect before engaging with technology and be more aware of their rights as individuals.

This research tries to contribute to the existing literature's gap in understanding the complex relationship between dark patterns and their impact on children's rights, particularly in educational contexts. By empowering children to use their digital rights and raising awareness of the impact of dark patterns, it is possible to mitigate the effects they will have on the future development and education of children. However, especially since many of these EdTech platforms are used by very young children who, as seen, can be easily influenced, the responsibility to protect their privacy cannot rest solely on the individual children and their families. Regulators and enforcement agencies are fundamental to establish a robust legal framework that meaningfully constrains the design choices of platforms used directly by children in the educational space. Other key actors in this effort are ethical design communities, who bear the responsibility to embed child-centred values into interface design, following the principles laid out in legislation. Without coordinated action across enforcement, regulators, tech and design spheres children's rights will be undermined by systemic design practices such as dark patterns. Due to the limited scope of this research paper, there are issues that have not been discussed, such as the areas in which the GDPR falls short that can be mitigated through complementary legislation. With regards to the specific regulation of dark patterns, frameworks such as the Digital Services Act (DSA) and the Unfair Commercial Practices Directive (UCPD) target the use of deceptive design; however, the notion of children's privacy is not as prevalent as in the GDPR.

Humanitarian Justification and Responsibility Mechanisms in International Law: A Case Study of the Saudi-led Intervention in Yemen

*Julius Frank*¹

1. INTRODUCTION	71
2. A RIGHT TO UNILATERAL HUMANITARIAN INTERVENTION?	79
3. DIFFERENCE PATHWAYS TO STATE RESPONSIBILITY	89
4. HUMANITARIAN INTERVENTION: FROM LEGALITY TO LEGITIMACY	96
5. CASE STUDY: THE SAUDI-LED INTERVENTION IN YEMEN.....	99
6. DISCUSSION: THE NEXUS BETWEEN HUMANITARIAN JUSTIFICATION AND RESPONSIBILITY MECHANISM AND THE SAUDI-LED INTERVENTION	103
7. CONCLUSION.....	111

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TABLE OF ABBREVIATIONS

ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
Coalition	Multinational Coalition
Coalition Intervention	Military Intervention led by Saudi Arabia
ECOWAS	Economic Community of West African States
GCC	Gulf Cooperation Council
ICJ	International Court of Justice
ILC	International Law Commission
NATO	North Atlantic Treaty Organisation
NDC	Conference for National Dialogue
P5	Permanent Five Members (of the UNSC)
TWAIL	Third World Approach to International Law
UN	United Nations
UN Charter	United Nations Charter
UNSC	United Nations Security Council

1. INTRODUCTION

Following the launch of “Operation Decisive Storm” on 25th of March 2015, the multinational coalition (hereinafter Coalition) intervention led by Saudi Arabia complicated the political and humanitarian situation in Yemen.² With reference to the high number of fatalities and the escalating humanitarian crisis in the war-torn country, the United Nations (UN) labelled the humanitarian situation in Yemen in 2019 as the gravest human crisis in the world.³ The military intervention led by Saudi Arabia (hereinafter Coalition Intervention) plays an undeniable role in worsening the humanitarian situation in Yemen, conducting indiscriminate airstrikes against civilians and further destabilising the country.⁴ Since the launch of the operation until 2022, the Coalition has conducted over 25.000 air raids,⁵ which significantly outnumbered the airstrikes carried out by the Houthi rebels.⁶ This has resulted in several devastating events, such as the bombing of a school bus in August 2018, claiming the lives of numerous innocent children.⁷

While the Coalition’s military operation on the sovereign territory of the Republic of Yemen is widely supported by the international community, the legal justifications for the intervention are questionable at best. In their joint statement to the United Nations Security Council (UNSC), the members of the Coalition: Saudi Arabia, The United Arab Emirates, Qatar, and Bahrain presented the following justification for their use of force in the military intervention. First, the doctrines of self-defence and intervention by invitation were cited as primary justification, and second, humanitarian objectives were put forward as a

² Elinor Buys and Andrew Garwood-Gowers, ‘The (Ir)Relevance of Human Suffering: Humanitarian Intervention and Saudi Arabia’s Operation Decisive Storm in Yemen’ (2019) 24 *Journal of Conflict and Security Law*, pp. 1-2.

³ UN News, ‘Humanitarian crisis in Yemen remains the worst in the world, warns UN’ (UN News, 14 February 2019) <<https://news.un.org/en/story/2019/02/1032811>> accessed 1 March 2024.

⁴ Haseenah Huurieyah Wan Rosli, ‘The Forsaken War in Yemen: R2P as Mere Rhetoric?’ in Pinar Gözen Ercan (ed), *The Responsibility to Protect Twenty Years On: Rhetoric and Implementation* (Springer International Publishing 2022), p. 171.

⁵ The Yemen Data Project defines an “air raid” as “includ[ing] all airstrikes on a single location within approximately one hour and therefore may comprise multiple airstrikes” (Yemen Data Project, n.d.) <<https://yemendataproject.org/data/>> accessed 18 April 2024.

⁶ Anelle Sheline, ‘The Yemen War in Numbers: Saudi Escalation and U.S. Complicity’ (2022) Quincy Brief No. 22, p. 9.

⁷ Human Rights Watch, ‘Yemen: Coalition Bus Bombing Apparent War Crime’ (Human Rights Watch, 2 September 2018) <<https://www.hrw.org/news/2018/09/02/yemen-coalition-bus-bombing-apparent-war-crime>> accessed 24 April 2024.

supplementary justification.⁸ The question of the legality of these justifications centres on whether the context of the intervention sufficiently justifies the invocation of these legal justifications as an exception to the prohibition of the use of force, enshrined in Article 2(4) of the UN Charter.⁹

The applicability of both individual and collective self-defence is highly doubtful, as neither the conditions for an armed attack¹⁰ nor the requirements of necessity and proportionality are convincingly met in the Yemeni context.¹¹ Similarly, the doctrine of intervention by invitation provides no solid legal basis. Although the Hadi government retained international recognition, it lacked effective territorial control,¹² and international law remains unsettled regarding the permissibility of invitations issued during civil war.¹³

Interestingly, despite the questionable application of these two primary justifications in the Yemeni context, the international community failed to properly scrutinise the intervention and reacted rather positively,¹⁴ with two major powers, the United States (US) and the United Kingdom (UK), supporting the Coalition with military assistance.¹⁵ To make sense of this seemingly contradictory matter, a conceptual distinction between legality and legitimacy is helpful.¹⁶ The distinction shows that while the legal justification for the intervention may lack validity, its legitimacy is determined by the judgements of

⁸ Permanent Missions of Saudi Arabia, the United Arab Emirates, the Kingdom of Bahrain, the State of Qatar and the State of Kuwait, 'Identical letters dated 26 March 2015 from the Permanent Representative of Qatar to the United Nations addressed to the Secretary-General and the President of the Security Council' (Joint Statement submitted to the UNSC, 27 March 2015) UN Doc S/2015/217, pp. 4-5; Buys and Garwood-Gowers (n 2), p. 2.

⁹ United Nations Charter (signed 26 June 1945) 1 UNTS XVI Chapter I, art. 2(4).

¹⁰ Tom Ruys and Luca Ferro, 'Weathering the Storm: Legality and Legal Implications of the Saudi-Led Military Intervention in Yemen' (2016) 65 *International & Comparative Law Quarterly* 61, p. 66.; Vita Upeniece, 'Conditions for the lawful exercise of the right of self-defence in international law' (2018) 40 *SHS Web of Conferences*, p. 4; Laura Visser, 'May the Force Be with You: The Legal Classification of Intervention by Invitation' (2019) 66 *Netherlands International Law Review*, p. 29.

¹¹ Elisa Al-Enezy and Nada Al-Duaij, 'The Right to Intervention in an Internal Conflict of States: The Case in Yemen Fighting in the Law's Gaps' (2020) 26(2) *Southwestern Journal of International Law*, p. 343.

¹² Ruys and Ferro (n 10), pp. 81, 85.

¹³ *ibid*; Jeremy I Levitt, 'Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of Ecomas in Liberia and Sierra Leone' (1998) 12 *Temple International and Comparative Law Journal*, p. 349.

¹⁴ Buys and Garwood-Gowers (n 2), p. 26.

¹⁵ John Hursh, 'International humanitarian law violations, legal responsibility, and US military support to the Saudi coalition in Yemen: a cautionary tale' (2020) 7 *Journal on the Use of Force and International Law* 1, p. 123.

¹⁶ John Hardy, 'Legitimacy in the use of force: *Opinio* or *Juris*?' in *Sixth Oceanic Conference on International Studies OCIS*, p. 4.

actors in the international community, often based on normative, extra-legal factors.¹⁷ Here, normative refers to the evaluation of a legal phenomenon against certain standards or values and considering how the law ought to develop in response.¹⁸

In this context, the Coalition's reference to humanitarian grounds for the intervention within their Joint Statement is relevant, citing the Coalition's responsibility to "protect Yemen and its people from the ongoing Houthi aggression".¹⁹ The repeated reference to humanitarian justification allows for the assumption that the Coalition employs the doctrine of humanitarian intervention as supplementary justification for the use of force on Yemen's territory.²⁰ Against this background, the question arises whether this part of the joint statement is legally sound, and if not, what the appropriate legal mechanisms are to hold the Coalition intervention responsible for the breach of the prohibition to use force.²¹

This paper analyses the often-overlooked aspect of humanitarian justification, submitted in the joint statement of the Coalition, and seeks to shed light on the interaction between the deployment of humanitarian motives and the international community's response to the intervention. To this end, the paper answers the following legal research question: *How does the use of humanitarian justification interact with existing responsibility mechanisms within the framework of international law in the context of the Saudi-led coalition intervention in Yemen?* Through an in-depth analysis of the legal implications of the intervention, this paper aims to illuminate the foundation of the Coalition's contribution to the escalation of the situation in Yemen. In the course of this analysis, the dynamic between Saudi Arabia and the international community is examined, and a crisis is highlighted, which has been marginalised amidst recent conflict in Ukraine and Gaza. In this endeavour, the analysis will embrace the Third World Approach to International Law²² (TWAIL) to address the power imbalances that continue to underpin relations in the international community.

¹⁷ *ibid* p. 3 art. 4.

¹⁸ Sanne Taekema, 'Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice' (2018) *Law and Method*, pp. 6-7.

¹⁹ Joint Statement (n 8), p. 5.

²⁰ Buys and Garwood-Gowers (n 2), p. 3.

²¹ UN Charter (n 9).

²² Elif Çağla Yıldız, 'Postcolonial Approaches to International Human Rights Law: The TWAIL Case' (2023) 43 *Public and Private International Law Bulletin* 1.

This undertaking gains particular significance as the focus of the paper lies in scrutinising the Coalition's possible accountability for a violation of the prohibition of the use of force, potentially prompting the international community to pursue responsibility for the Coalition's actions. Furthermore, beyond its social relevance, this work is academically significant for addressing the largely understudied humanitarian dimension of the Coalition's justification and for offering a novel analysis of how this justification interacts with existing responsibility mechanisms.²³ This paper, therefore, addresses this gap in the academic literature to contribute to the debate on state accountability in the context of interventions and to serve as a reminder to the international community to embrace the true spirit of humanitarian interventions and to hold states that violate it accountable.

Henceforth, the paper proceeds as follows. The first chapter sets out the methodology and the theoretical approach underlying the analysis. The second chapter undertakes a legal doctrinal analysis of the applicability of the right to unilateral humanitarian intervention. To this end, the UN Charter is analysed with a focus on the prohibition of the use of force enshrined in Article 2(4) and the question of whether humanitarian objectives are legally sufficient to justify the use of force in the context of interventions is addressed.²⁴ Furthermore, the inquiry of whether an alternative interpretation of Article 2(4) permitting unilateral humanitarian intervention is valid will be examined, and the state of international customary law on this matter will be considered. Chapters three, four and five examine applicable responsibility mechanisms, focusing on whether States other than Yemen can invoke responsibility for the Coalition's actions.

The analysis commences from a legal positivist standpoint by examining the International Law Commission's (ICL) Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), which constitute the principal framework for determining and allocating state responsibility, under customary international law, with a focus on their applicability in cases with similar contextual circumstances. Subsequently, the potential of *erga omnes* obligations, arising owed to the international community collectively, is analysed. Moving

²³ See Buys and Garwood-Gowers (n 2).

²⁴ UN Charter (n 9), art. 2(4).

beyond a purely legal perspective on state responsibility, the analysis turns to the role of the UNSC in determining the accountability of states.

While the legal doctrinal analysis is focused on formal, established legal texts, the second part of the paper examines the norm-based implications of the research question, highlighting the shift in the international community's focus from strict legal considerations to the perceived legitimacy of the intervention.²⁵ Building on this, the applicability of the TWAIL perspective is explained, highlighting the power of international law to shape perceptions. The analytical part of this paper closes with an analysis of the Coalition intervention in Yemen, particularly highlighting the joint statement containing its legal justification and the contextual background of the intervention.

Based on the analysis, a discussion of the findings is carried out, focusing on the interaction of the use of humanitarian justification and the resulting responsibility of a state that has violated international law. The discussion section employs the TWAIL perspective most extensively to explain the interplay between humanitarian justification, the power of the UNSC to determine legality and legitimacy in military interventions and the resulting implications for the responsibility of the Coalition. Finally, the conclusion synthesises the work carried out in this paper.

1.1 METHODOLOGY AND THEORETICAL APPROACH

Having established the objective of analysis of the paper, this chapter elaborates on the methodology, the research follows, and the theoretical approach is used to answer the posed research question. With regard to the methodology, the underlying methodological framework is explained, and the legal sources relied upon are outlined, while the theoretical approach introduces the TWAIL perspective as the guiding framework and addresses its suitability for assessing the normative dimensions of the research question.

1.1.1 Methodology

The methodological framework underlying this paper is grounded in a legal doctrinal research approach. This method is most appropriate for the present

²⁵ Anthea Roberts, 'Legality vs. Legitimacy: Can Uses of Force be Illegal but Justified?' (2010) Oxford University Press, pp. 182-183.

analysis because it enables a systematic, critical examination of the legal rules relevant to the legality of humanitarian justifications for interventions and the responsibility mechanisms applicable to unlawful uses of force. Through doctrinal analysis, the paper identifies the applicable legal standards, assesses their meaning and scope, and evaluates their application to the case at hand.²⁶

In selecting the legal sources that inform the doctrinal analysis, this paper is guided by Article 38(1) of the Statute of the International Court of Justice (ICJ), which specifies the sources the Court may use to adjudicate international disputes.²⁷ Consistent with Article 38(1a), the primary materials consulted are international conventions, foremost the UN Charter.²⁸ The research in this paper exclusively focuses on legal texts concerning issues of *jus ad bellum* (right to war), meaning whether the Coalition was allowed to intervene lawfully, and does not deal with issues of *jus in bello*, such as investigating the Coalition's conduct during the intervention under humanitarian law.²⁹ Further primary materials include UNSC resolutions and statements by Member States, which provide insight into *opinio juris* and state practice and, in the case of resolutions, may impose binding obligations. Customary international law is also consulted to determine the legality of actions where treaty provisions are silent or contested.³⁰ To clarify and interpret these primary sources, the paper additionally relies on ICJ case law and existing legal literature as subsidiary means recognised under Article 38(1), both of which enrich the legal argumentation.³¹

Given the complexity of the research question, which concerns the interaction between the invocation of humanitarian justification and the reaction of the international community in ways that extend beyond strictly legal doctrine, the analysis also acknowledges the evolving character of the doctrinal method. In this context, and drawing on Hutchinson's observation of this methodological transition, the paper adopts a constructivist perspective to the extent that it recognises that state behaviour and interpretations of legality are shaped by

²⁶ Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 8(3) *Erasmus Law Review* 130, p. 131.

²⁷ Statute of the International Court of Justice (adopted 26 June 1945 United Nations) art. 38(1).

²⁸ *ibid.* art. 38(1a); UN Charter (n 9).

²⁹ Carsten Stahn, 'Jus ad bellum', 'jus in bello' . . . 'jus post bellum'? –Rethinking the Conception of the Law of Armed Force' (2006) 17(5) *European Journal of International Law* 921, pp. 925-928.

³⁰ ICJ Statute (n 27), art. 38(1b).

³¹ *ibid.*

subjective perceptions.³² Consequently, the interpretation of legal texts in this analysis proceeds on the understanding that law is, to some degree, influenced by the perceptions of its interpreters.³³ This stands in contrast to the traditional view of law as entirely objective and independent of interpretive context.³⁴

Overall, the methodology of this thesis is doctrinal at its core, while allowing for the consideration of normative implications that emerge from the legal analysis. This requires a theoretical framing capable of guiding the broader normative discussion arising from the legal findings.

1.1.2 Theoretical Approach

In the realm of legal scholarship, theoretical approaches often occupy a different level of prominence compared to its counterparts in the social sciences.³⁵ It is not uncommon for many legal scholars to either overlook their significance entirely or solely mention them briefly within the methodological section.³⁶ However, employing a theoretical approach can also prove to be beneficial for legal analysis. In applying an interpretative approach, the focus of legal scholars in legal doctrinal research differs from the empirical focus in the social sciences.³⁷ As legal research often engages not only with descriptive or explanatory questions but also with evaluative and prescriptive ones, many legal questions acquire a normative character, requiring a framework that provides standards against which the law can be assessed.³⁸ Thus, the function of a theoretical background in legal research is to provide the basis for assessing the state of the law and the resulting solution. It is therefore important to include the normative aspect within this paper to establish standards of judgement, against which the law can be measured.³⁹

The normative implications arising from the doctrinal analysis of the research question are discussed from the critical perspective of TWAIL. Drawing on post-colonial theory, TWAIL was established in 1966 at Harvard Law School to provide a response to an evolving intellectual struggle.⁴⁰ Scholars urged to find

³² Taekema (n 18), p. 4.

³³ Svenja Behrendt, 'A Constructivist Discourse Theory of Law' (2020) *Rechtstheorie*, p. 173.

³⁴ *ibid.*

³⁵ Hutchinson (n 26), p. 131.

³⁶ Behrendt (n 33), pp. 7-8.

³⁷ Hutchinson (n 26), p. 131.

³⁸ Taekema (n 18), pp. 6-7.

³⁹ *ibid.*

⁴⁰ Yıldız (n 22), p. 354.

a way to expose and mitigate structures of the international legal system that have contributed to the establishment or perpetuation of an inequitable global structure.⁴¹ Focusing on the North-South divide, the TWAIL perspective assumes that international law plays a central role in reinforcing unequal structures.⁴² Scholars adopting this perspective understand international law as the primary language in which the domination that sustains this divide is expressed.⁴³

At its core, TWAIL assumes that international law has historically been employed by powerful states as an instrument to assert their dominance, yet also recognises its potential for the emancipation of Third World States,⁴⁴ through the formation of alliances and resistance to oppressive structures.⁴⁵ TWAIL, therefore provides an invaluable analytical approach, allowing for the critique of current structures, while simultaneously suggesting practical pathways to address them. Thus, this enables a balanced and constructive analysis of the respective issue. While the critical dimension of TWAIL underpins an analysis of how the law, particularly through the UNSC, has been used to legitimise the Coalition's intervention in Yemen, its constructive dimension highlights how Coalitions of affected states can strategically invoke legal principles, such as *erga omnes* obligations, to advance their interests.⁴⁶

The legal background sets the premise for the above-mentioned critical and constructive aspects, which is discussed in the following chapters. The legal analysis commences with an evaluation of the current state of the law concerning humanitarian justification on which unilateral humanitarian interventions are based.

⁴¹ *ibid.* p. 355.

⁴² Bhupinder Chimni, 'Third World Approach to International Law - A Manifesto' (2018) 15 *Brazilian Journal of International Law* 1, pp. 48-49.

⁴³ *ibid.* p. 47.

⁴⁴ It is acknowledged that there is a certain controversy about using the term "Third World", due to the oversimplifying nature and stigmatisation entailed in the term. However, it is submitted that due to the uniformity international law aims to impose, the term "Third World" is appropriate to use in this context. This is because neglecting the diversity and differences within the international community, especially with regards to differences in patterns of economies, fails to highlight the resulting unique needs of less developed countries international law also must accommodate for. Chimni (n 42), p. 49.

⁴⁵ Chimni (n 42), p. 49.

⁴⁶ *ibid.*

2. A RIGHT TO UNILATERAL HUMANITARIAN INTERVENTION?

The concept of unilateral humanitarian intervention is highly contentious in the academic debate.⁴⁷ This Chapter focuses on the question of whether there is a right to unilateral humanitarian intervention under international law.⁴⁸ Against this background, the analysis is situated within the legal realm by concentrating on the term ‘right’ and does not digress into the sphere of ethics by using the term ‘duty’.⁴⁹ The focus on the term ‘right’ provides a clear framework for the analysis, as it refers to legally recognised entitlements held by states or actors under international law, and aligns with a legal positivist approach. By contrast, the term ‘duty’, as invoked in the context of the ‘Responsibility to Protect’, concerns obligations that states or the international community may have to act, which are often more diffuse and less clearly codified.⁵⁰

The complexity inherent to the concept of unilateral humanitarian intervention becomes more comprehensible when each aspect is explained separately. In the most general terms, intervention in international law refers to the interference of one state in the internal affairs of another state, including military operations on the territory of the other state, affecting the sovereignty of the state over its own population and territory.⁵¹ It is submitted that the term “intervention” refers exclusively to military and not to economic or diplomatic action.⁵² The humanitarian aspect of the concept implies the intention to stop grave violations of fundamental human rights as a basis for justifying the interference.⁵³ The term ‘unilateral’ completes it by implying that the intervention was neither authorised by the UNSC nor by the state in which the intervention takes place.⁵⁴ It results in the commonly cited definition of unilateral humanitarian intervention as “use of force across state borders by a state (or group of states) aimed at preventing (...) grave violations of the fundamental human rights of individuals

⁴⁷ Buys and Garwood-Gowers (n 2), p. 11.

⁴⁸ Olivier Corten, *The Law Against War: The prohibition on the use of force in contemporary international law* (London: Hart Publishing 2010), p. 495.

⁴⁹ *ibid.* p. 496.

⁵⁰ *ibid.*

⁵¹ Al-Enezy and Al-Duaij (n 11), p. 326.

⁵² Corten (n 48), p. 496.

⁵³ Vitus Mazi Udegbulem, ‘The United Nations Charter and Use of Force in International Law: An inquiry into the Legality of NATO’s Intervention in Kosovo’ (2020) 2 *International Review of Law and Jurisprudence*, p. 110.

⁵⁴ Buys and Garwood-Gowers (n 2), p. 11; Udegbulem (n 53), p. 109.

other than its own citizens, without the permission of the state within whose territory force is applied”.⁵⁵

The strong contestation of the concept arises through its conflict with the fundamental principles of state sovereignty, non-interference and the prohibition of the use of force.⁵⁶ Codified in the UN Charter in 1945,⁵⁷ the fundamental nature of these principles and the narrow definition of “international peace and security” was subject to scholarly scrutiny in view of the increasing importance attributed to human rights in the aftermath of the Cold War.⁵⁸ This conceptual shift is underpinned by the adoption of several resolutions by the UNSC⁵⁹ in which the definition of a threat to “international peace and security” is extended to include grave human rights violations.⁶⁰

This Chapter analyses the implications of this development with regard to the question of whether a right to unilateral humanitarian intervention exists under international law, forming the basis for the later discussion of whether the invocation of this concept can justify the violation of the prohibition of the use of force.⁶¹ For this purpose, the analysis points to the prohibition of the use of force enshrined in Article 2(4) of the UN Charter and its implications for unilateral humanitarian intervention. Furthermore, it scrutinises a potential alternative interpretation of Article 2(4), asserting the existence of such a right and assesses the state of customary law concerning unilateral humanitarian intervention.

2.1 THE UN CHARTER AND THE PROHIBITION OF THE USE OF FORCE

Following from the definition of unilateral humanitarian intervention, the concept essentially involves the use of force across state borders.⁶² The UN Charter, as the guiding document in international law is legally binding for all the parties to it,⁶³ and prohibits the use of force in international relations under Article 2(4).⁶⁴ It is

⁵⁵ John Holzgrefe and Robert Keohane, *Humanitarian intervention: ethical, legal and political dilemmas* (Cambridge University Press 2003), p. 18.

⁵⁶ UN Charter (n 9), art. 2(1), art. 2(4), art. 2(7); Al-Enezy and Al-Duaij (n 11), p. 327.

⁵⁷ *ibid.*

⁵⁸ Udegbulem (n 53), p. 109.

⁵⁹ See for example resolution 1973 adopted by the UNSC in 2011 to protect the civilian population in Libya.

⁶⁰ Udegbulem (n 53), p. 109.

⁶¹ Corten (n 48), p. 497.

⁶² Holzgrefe and Keohane (n 55), p. 18.

⁶³ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art. 26.

⁶⁴ UN Charter (n 9), art. 2(4).

thus the key legal provision of *jus ad bellum*. However, there are two exceptions provided to this general prohibition. The first exception empowers the UNSC to authorise the use of force under Chapter VII,⁶⁵ to maintain or restore international peace and security, thus fulfilling the responsibilities assigned to it by UN Member States.⁶⁶ More specifically, the UNSC may authorise the use of armed force by air, sea or land forces in cases of a breach of peace or an act of aggression, to restore international peace and security.⁶⁷ The second exception is provided in Article 51, which states that “nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations”.⁶⁸

In the specific context of interventions, the prohibition of the use of force and its exceptions were confirmed by the ICJ in the Case Concerning Military and Paramilitary Activities in Nicaragua.⁶⁹ Here, the ICJ dealt with Nicaragua’s allegations that the US had breached international law by intervening militarily in Nicaragua’s domestic affairs. The ICJ’s ruling in favour of Nicaragua reaffirms the principle that states are prohibited from interfering in the internal affairs of other states, including through the use of force or the support of armed groups, unless their intervention is justified by individual or collective self-defence or the authorisation of the UNSC.⁷⁰ Based on the above analysis of the UN Charter, it is argued that in purely legal terms, humanitarian intervention requires the authorisation of the UNSC, leading to the conclusion that intervention without such authorisation must be considered unlawful.⁷¹ However, to obtain a comprehensive picture of this issue, more recent and subjective interpretations of Article 2(4) must be taken into account.

2.2 ALTERNATIVE INTERPRETATION OF ARTICLE 2(4)

Beyond the interpretation outlined above, scholars in favour of a right to humanitarian intervention argue that this doctrine may be implicitly connoted in

⁶⁵ *ibid.* Chapter VII.

⁶⁶ *ibid.* art. 24.

⁶⁷ *ibid.* art. 42.

⁶⁸ *ibid.* art. 51.

⁶⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14.

⁷⁰ *ibid.*

⁷¹ Udegbulem (n 53), p. 110.

the last part of Article 2(4) of the UN Charter.⁷² Based on an *a contrario* interpretation,⁷³ this argumentation asserts that the phrasing of the “use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations”,⁷⁴ does not directly refer to a right to humanitarian intervention, but allegedly does not preclude it either.⁷⁵ The argument particularly emphasises the context in which the use of force occurred, and implies that the prohibition solely applies to the use of force carried out with specific objectives. Broadly, this argument derives from a school of thought on the legality of humanitarian interventions that considers the individual to be the centre of international law, from which the state derives its legitimacy.⁷⁶ Sovereignty is therefore not an inherent right of states but is rather obtained from the rights of the individual. It follows that in the event of a conflict between sovereignty and human rights, the latter take precedence.⁷⁷

Considering the argumentation outlined above, the paper submits that the argument in favour of humanitarian intervention is incompatible with the established principles of treaty interpretation, since an *a contrario* reading of Article 2(4) of the UN Charter contradicts the interpretation of the terms in their “ordinary meaning”.⁷⁸ Additionally, the argument focusing on the specific context in which the use of force occurs is substantively flawed for the following three reasons.

Firstly, by referring to the importance of distinguishing humanitarian objectives and aims directed against the territorial integrity and political independence in interventions, the argumentation adopts a narrow interpretation of a violation of territorial integrity and ultimately tends to separate the two concepts.⁷⁹ According to this interpretation, a violation of the territorial integrity of a state is based on the objective of annexing a part or all of its territory.⁸⁰ It

⁷² Fernando Tesón, *Humanitarian Intervention: An Inquiry Into Law and Morality* (3rd edition, Brill | Nijhoff, 2005) p. 189; Corten (n 48), p. 497.

⁷³ Corten (n 48), p. 497.

⁷⁴ UN Charter (n 9), art. 2(4).

⁷⁵ Louis LeBel, ‘Aspects of International Law: From Interpretation to Law Making’ (2017) 3 Canadian Journal of Comparative and Contemporary Law, p. 2; Corten (n 48), p. 498.

⁷⁶ See Penelope Simons, ‘Humanitarian Intervention: A Review of Literature’ (2000) 21(4) The Ploughshares Monitor; Tesón (n 72).

⁷⁷ Udegbulem (n 53), p. 110.

⁷⁸ Vienna Convention on the Law of Treaties (n 63), art. 31(1).

⁷⁹ Corten (n 48), pp. 498-499.

⁸⁰ Tesón (n 72), p. 192.

follows from this logic that humanitarian interventions which are not intended to change internationally recognised borders do not constitute a violation of the territorial integrity of a state.⁸¹ This argument isolates territorial integrity from political independence, contradicting the meaning of Article 2(4), which directly links them.⁸² However, the use of force on the sovereign territory of a state without its consent ultimately constitutes a violation of its political independence, as the attacked state cannot exercise full executive power on its territory without interference.⁸³ Consequently, humanitarian intervention is incompatible with the concept of independence, even if it is not aimed at overthrowing the government of a state or changing international borders.⁸⁴

Secondly, the argument relating to specific “objectives” pursued by the use of force is flawed from the outset.⁸⁵ It rests on the claim that the right to humanitarian intervention can be reconciled with Article 2(4) of the UN Charter if the intervention serves the protection of human rights, a recognised objective of the UN.⁸⁶ However, since Article 2(4) of the UN Charter does not concern “objectives” but refers to a general prohibition on the use of force in “any manner”,⁸⁷ this argument is incompatible with an “ordinary” interpretation of Article 2(4).⁸⁸ Thirdly, the assertion that humanitarian intervention is justified by the pursuit of the United Nations objective of protecting human rights and therefore constitutes an exception to the prohibition on the use of force falls short.⁸⁹ The reading of Article 2(4) of the UN Charter in its ordinary meaning does not provide for authorisation to violate any of the United Nations’ objectives.⁹⁰ The argumentation that balances the objective of human rights protection against the maintenance of international peace and security implies that the pursuit of one objective can override the other. Such an approach is not consistent with a good-faith interpretation of Article 2(4) of the UN Charter.

⁸¹ *ibid.* p. 193.

⁸² Corten (n 48), p. 499.

⁸³ *ibid.*

⁸⁴ *ibid.*

⁸⁵ Tesón (n 72), p. 192.

⁸⁶ Corten (n 48), p. 498.

⁸⁷ UN Charter (n 9), art. 2(4).

⁸⁸ Corten (n 48), p. 499.

⁸⁹ Tesón (n 72), p. 193.

⁹⁰ Corten (n 48), p. 500.

The analysis of the legal situation concerning a right to unilateral humanitarian intervention concludes that the deriving of a right from an *a contrario* interpretation of Article 2(4) of the UN Charter should be rejected. The interpretation of Article 2(4) in its “ordinary meaning” excludes a right to unilateral humanitarian intervention and should not be moulded to suit certain political interests.

2.3 CUSTOMARY LAW

Considering the rejection of the *a contrario* interpretation of Article 2(4) of the UN Charter, and the lack of a right to unilateral humanitarian intervention present in the UN Charter, an examination of customary law is required.⁹¹ This can be historically contextualised, as reference is made to the post-Cold War conceptual shift in the international community towards a prioritisation of human rights over the principles of sovereignty and non-intervention mentioned in the introduction of this Chapter.⁹² As this shift is often described as the beginning of a ‘New World Order’,⁹³ and because claims to a right of humanitarian intervention are generally considered to have gained prominence only thereafter, the analysis of customary law will focus on state practice after 1990.⁹⁴ Notably, this analysis will not provide a complete summary of all the precedents that have contributed to the discussion but rather highlights the most important ones that contain all the crucial points to determine whether a rule of customary law can be established.

Before addressing the debate on the key events in chronological order, it is important to establish the standard used in analysing the status and content of the rules of customary international law. Overall, international customary law is an unwritten source of international law that contains a set of rules that must meet the following criteria. At the most basic level, the objective element, manifested in state practice, and the subjective element, expressed in *opinio juris*, must be present for customary international law to emerge.⁹⁵ The decisive factor for the establishment of a modification of customary law is the discourse in the international community, which expresses the acceptance of the new rule in the

⁹¹ Buys and Garwood-Gowers (n 2), p. 12.

⁹² Udegbulem (n 53), p. 109.

⁹³ Corten (n 48), p. 527.

⁹⁴ *ibid.* p. 537.

⁹⁵ Anders Henriksen, *International Law* (3rd edition, Oxford University Press 2021), pp. 24-27.

entire international community.⁹⁶ In the context of the right to humanitarian intervention, the examination of a possible rule of customary law is of particular importance, considering the striking discrepancy between the prohibition of the use of force of the UN Charter and the practice of the use of force by states.⁹⁷

The evaluation of the key events in establishing a potential customary rule to the right of unilateral humanitarian intervention leads to the preliminary finding that there is a widespread invocation of this right as justification for interventions after 1990, due to the repeated reference to humanitarian motives.⁹⁸ However, upon closer examination, it becomes evident that only a small number of states invoke such a right as a legal basis.⁹⁹

The first precedent for the possible emergence of the right to humanitarian intervention under customary international law after the proclamation of the ‘New World Order’ is the action of the Economic Community of West African States (ECOWAS) in Liberia.¹⁰⁰ In response to the emerging conflict between then-President Samuel Doe and rebel forces, ECOWAS, at Doe’s request, established a military observer group to monitor the turmoil and act as a peacekeeping force in the conflict-ridden Liberia.¹⁰¹ While this military operation was not authorised by the UNSC at the time of its launch,¹⁰² in subsequent resolutions from 1992 onwards, the UNSC “commend(ed) ECOWAS for its efforts to restore peace, security and stability in Liberia”¹⁰³ and thus expressed its approval of the operation retrospectively.¹⁰⁴ Based on that retroactive approval of the military operation, some scholars argue that this precedent supports the emergence of the right of humanitarian intervention as an international customary rule.¹⁰⁵

⁹⁶ Buys and Garwood-Gowers (n 2), p. 13.

⁹⁷ Christine Gray, *International Law and the Use of Force* (1st edition, Oxford University Press 2003), p. 27.

⁹⁸ See for example the ECOWAS action in Liberia, “Operation Provide Comfort” by French, US, UK, Dutch, Spanish, Australian and Italian forces, NATO’s intervention in Kosovo, The US’s invasion in Iraq etc.

⁹⁹ Holzgrefe and Keohane (n 55), p. 48.

¹⁰⁰ Corten (n 48), p. 371.

¹⁰¹ Buys and Garwood-Gowers (n 2), p. 14.

¹⁰² Corten (n 48), p. 371.

¹⁰³ UNSC Res 856 (9 August 1993) UN Doc S/RES/856, para. 6.

¹⁰⁴ Corten (n 48), p. 371.

¹⁰⁵ See Levitt (n 13), p. 613; David Wippman, ‘Enforcing the Peace: ECOWAS and the Liberian Civil War’ in Lori Fisler Damrosch (ed), *Enforcing Restraint: Collective Intervention in Internal Conflicts* (Council on Foreign Relations 1993).

This argument overlooks that there is no evidence that the international community perceived the ECOWAS operation as a paradigm of humanitarian intervention at the time.¹⁰⁶ Rather, the operation was perceived as a neutral, non-coercive peacekeeping operation that did not require UNSC authorisation and thus cannot be seen as a precedent for the emergence of a customary rule of humanitarian intervention.¹⁰⁷ The argument that the intervention was carried out with Doe's consent and can therefore be justified as an intervention by invitation also falls short, as ECOWAS did not refer to Doe's letter in any decisions or resolutions concerning the intervention.¹⁰⁸ Furthermore, as established in the Introduction with regard to the illegality of invoking intervention by invitation in times of civil war, the same argument can be applied for the ECOWAS intervention in Liberia.¹⁰⁹ This parallel illustrates the importance of this precedent, as it underlines the illegality of intervention by invitation in times of civil war, and shows how the interplay of multiple justifications can distort the international communities perception, with humanitarian justification being the most persuasive in that regard.

Arguably, the most hotly debated precedent is the NATO intervention in Kosovo in 1999.¹¹⁰ The 'Operation Allied Force' was launched in response to the alleged ethnic cleansing of Kosovar Albans by Serbian Forces under the command of Slobodan Milosevic¹¹¹ and, according to then-NATO Secretary-General Dr Javier Solana, aimed to "avert a humanitarian catastrophe".¹¹² It was further stated that the objective of the coalition was "to prevent more human suffering and more repression and violence against the civilian population of Kosovo".¹¹³ This wording in the official NATO statement on its intervention in Kosovo implies that the alliance invoked the right of humanitarian intervention as justification for their intervention.¹¹⁴ This impression is reinforced by individual statements on

¹⁰⁶ Ian Brownlie and Charlotte Apperley, 'Kosovo Crisis Inquiry: Further Memorandum on the International Law Aspects' (2000) 49 *International and Comparative Quarterly*, p. 907.

¹⁰⁷ *ibid.* p. 908; Buys and Garwood-Gowers (n 2), p. 14.

¹⁰⁸ Levitt (n 13), p. 350.

¹⁰⁹ *ibid.* p. 349.

¹¹⁰ Udegbulem (n 53), p. 111.

¹¹¹ *ibid.* p. 106.

¹¹² NATO, 'Press Statement by Dr. Javier Solana, Secretary General of NATO' (1999), <https://www.nato.int/cps/en/natolive/opinions_27615.htm> accessed 9 May 2024.

¹¹³ *ibid.*

¹¹⁴ Buys and Garwood-Gowers (n 2), p. 16.

intervention by some coalition members. The UK justified the intervention on the grounds of preventing an “overwhelming humanitarian catastrophe”¹¹⁵ and Belgium argued before the ICJ in favour of a “right to humanitarian interference”¹¹⁶ in the Kosovo intervention.¹¹⁷

Although the intervention appears to be based on a right to unilateral humanitarian intervention and the above statements seem to imply state practice as evidence for *opinio juris*, the examination of the broader picture of unilateral humanitarian intervention paints a more ambiguous picture. Apart from the above-mentioned statements, some of the coalition members have explicitly rejected such a right from the start and referred to the exceptionality of this case¹¹⁸ and emphasised that the case of Kosovo should not be interpreted as a precedent for the right to unilateral humanitarian intervention.¹¹⁹ This argumentation led to the intervention being labelled as ‘illegal but justified’.¹²⁰ Moreover, the majority of states in the international community have condemned the intervention,¹²¹ and the ICJ voiced its concern “with the use of force in Yugoslavia which, under the present circumstances, raises very serious issues of international law”.¹²² This finding suggests that the NATO intervention cannot be seen as a precedent for the creation of a customary rule for unilateral humanitarian intervention, but rather serves as a precedent for reiterating the importance of prior authorisation of interventions by the UNSC.¹²³ The importance of considering this precedent lies in the apparent invocation of humanitarian objectives for the intervention despite the recognised lack of legal validity. This shows how humanitarian justification is used to influence the perception of the intervention to shift the attention from the lack of legality to the alleged legitimacy of the intervention.

¹¹⁵ UNSC Res 3988 (24 March 1999) UN Doc S/PV/3988 12.

¹¹⁶ Case Concerning Legality of Use of Force (*Yugoslavia v Belgium*) [2000] ICP Rep 124.

¹¹⁷ For a more elaborate discussion see Corten (n 48), pp. 540-544.

¹¹⁸ See Germany’s Written Statement to the ICJ referring to the importance of authorisation by the Security Council for the use of force and justifying the intervention in Kosovo with the deadlock in the UN Security Council and the extraordinary urgency of the situation; Germany, Written Statement of the Federal Republic of Germany (ICJ, Case Concerning the Legality of the Use of Force (Yugoslavia) (Kosovo) 1999), para. 5.

¹¹⁹ See discussion in Corten (n 48), pp. 542-543.

¹²⁰ Roberts (n 25), pp. 182-183.

¹²¹ Corten (n 48), p. 543.

¹²² *Yugoslavia v Belgium* (n 116); Buys and Garwood-Gowers (n 2), p. 16.

¹²³ Corten (n 48), p. 544; Udegblem (n 53), p. 109.

In more recent years, Russia's intervention in Georgia, in 2008, has sparked debates about a customary rule on the right to unilateral humanitarian intervention, as humanitarian objectives have been repeatedly cited as justification for the intervention.¹²⁴ Although Russia presented the intervention as necessary to protect the human rights of its citizens living in South Ossetia, allegedly suffering from systematic human rights violations by the Georgian government,¹²⁵ the official justification is based on the right to self-defence enshrined in Article 51 of the UN Charter.¹²⁶ This precedent, therefore, does not indicate support for a customary rule in favour of unilateral humanitarian interventions, as a different legal justification was employed. However, regarding the interaction between humanitarian justification and responsibility mechanism examined in this paper, the precedent is highly relevant as it represents a case where humanitarian justification is used in addition to the primary justification of self-defence in an attempt to increase the perceived legitimacy of the intervention.

Most recently, the UK, one of the most vehement supporters of the right to unilateral humanitarian intervention, claimed that its airstrikes¹²⁷ on a suspected chemical weapons facility in Douma, Syria, were justified by humanitarian intervention.¹²⁸ This claim is consistent with the UK's general policy of recognising the right to humanitarian intervention as reflected in international law. Yet, the UK's coalition partners, France and the US, as well as the international community, refused to accept this justification as a legal basis. This reflects once again the absence of *opinio juris* in the international community, allowing the conclusion that the right to unilateral humanitarian intervention cannot be regarded as customary international law.¹²⁹

The legal analysis carried out above indicates that unilateral humanitarian interventions have no legal basis in the primary document governing international

¹²⁴ Buys and Garwood-Gowers (n 2), p. 17.

¹²⁵ Roy Allison, 'The Russian case for military intervention in Georgia: international law, norms and political calculation' (2009) 18 *European Security*, pp. 178-179.

¹²⁶ Permanent Mission of the Russian Federation, 'Letter from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council' (11 August 2008) UN Doc S/2008/545.

¹²⁷ In partnership with the US and France.

¹²⁸ Syria: UK Government Legal Position (GOV.UK, 14 April 2018) <<https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position>> accessed 18 November 2025; Buys and Garwood-Gowers (n 2), p. 17.

¹²⁹ *ibid.*

relations of States, the UN Charter or in customary international law. This conclusion allows to reject humanitarian arguments invoked to justify interventions and to assume that they are used for other, not truly humanitarian motives.

3. DIFFERENCE PATHWAYS TO STATE RESPONSIBILITY

The conclusion of the analysis of the existence of a right to unilateral humanitarian intervention subsequently poses the following question: how can the states that have violated the prohibition on the use of force under the guise of humanitarian intervention be held responsible under international law? From a purely legal perspective, the term international responsibility refers to liability that arises from the internationally wrongful act of one state in relation to another state.¹³⁰ In such cases, the responsibility of states is governed by the ILC's ARSIWA provisions. In the present paper, the concept of state responsibility is defined more broadly and includes the accountability of a state for an internationally wrongful act expressed by authoritative international organisations.¹³¹ In this context, the UNSC's power to act under Chapter VII of the UN Charter in the form of adopting recommendations and resolutions or even to authorise the use of force is relevant.

To provide an overview of the different legal pathways to hold states responsible, this chapter starts with conducting a legal positivist analysis of the ILC's ARSIWA. Relatedly, the responsibilities arising from *erga omnes* obligations owed to the international community as a whole are analysed.¹³² Lastly, to account for the broader definition of state responsibility adopted in this paper, the UNSC's role in determining a state's responsibility is examined. Based on the conclusion that states cannot rely on humanitarian justification in justifying interventions reached in the previous chapter, this chapter is intended to provide

¹³⁰ "An internationally wrongful act is an action or omission that breaches international law" (International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (adopted November 2001) Supplement No. 10 (A/56/10).

¹³¹ Junxiang Mao and Ammar Ahmad Ahmad Gady, 'The Legitimacy of Military Intervention in Yemen and its Impacts' (2021) 12 Beijing Law Review, p. 580.

¹³² Given the question posed in this paper, the analysis will only focus on obligations *erga omnes* and will disregard obligations *erga omnes partes*. Obligations *erga omnes* are owed to the international community as a whole, whereas obligations *erga omnes partes* are owed collectively among the parties to a multilateral treaty. See Priya Urs, 'The Articulation of Obligations Erga Omnes and Erga Omnes Partes by the International Court of Justice: Coherence or Confusion?' (2025) 74(2) International and Comparative Law Quarterly, p. 257.

the analytical basis for determining how a state can be held responsible for breaches of international law committed under the guise of humanitarian justification.

3.1 ARTICLES ON THE RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS AND OBLIGATIONS ERGA OMNES ARTICLES ON THE RESPONSIBILITY OF STATES

The examination of state responsibility naturally begins with the examination of the ILC's ARSIWA, as it is the primary legal source governing international responsibility.¹³³ While the articles are not *per se* legally binding,¹³⁴ they are established as customary international law through state practice and *opinio juris*.¹³⁵

Article 1 of ARSIWA states that “every internationally wrongful act of a State entails the international responsibility of that State”.¹³⁶ An “internationally wrongful act” occurs when a state breaches its obligations under international law towards other states¹³⁷ and when this breach “is attributable to the state”.¹³⁸ In the context of the Coalition intervention in Yemen, the “international obligation” that is “breached” is the “act” of unilateral use of force by a state in course of an intervention without UNSC authorisation and in absence of valid exceptions.¹³⁹ Supposing that the exceptions of self-defence and intervention by invitation brought forward by the Coalition are invalid and that there is demonstrably no right to unilateral humanitarian intervention, the question arises who can and who should hold the intervening party responsible for breaching the prohibition of the use of force.

¹³³ International Law Commission, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (adopted November 2001) Supplement No. 10 (A/56/10).

¹³⁴ The ARSIWA provisions were adopted as Resolution 2002 by the General Assembly and are thus not legally binding.

¹³⁵ Henriksen (n 95), p. 117.

¹³⁶ International Law Commission (1) (n 133), art. 1.

¹³⁷ James Crawford, ‘The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries’ (2002) Cambridge University Press, p. 77.

¹³⁸ International Law Commission (1) (n 133), art. 2(b).

¹³⁹ *ibid.* art. 12; Chapter V of ARSIWA provides for circumstances that preclude wrongfulness, including “valid consent” (International Law Commission (1) (n 133), art. 20) and acts carried out in “a lawful measure of self-defence” (International Law Commission (1) (n 133), art. 21).

In order to assert the responsibility of a state by another state, the latter must prove its specific right to do so.¹⁴⁰ In this context, the right of standing in front of the ICJ is the decisive factor in being able to assert responsibility.¹⁴¹ Such a right is usually given if it can be derived from a multilateral treaty or if the state can prove that it has been directly injured.¹⁴² It follows that state responsibility in the traditional sense can only be invoked in bilateral relations between two states,¹⁴³ or between one state and a group of states, including the injured one.¹⁴⁴

This raises the issue that invalid consent renders an intervention unlawful, thereby placing the intervening state under an obligation to account for its conduct and raising the question of who may invoke that responsibility. However, due to the lack of political will of the injured state, in most cases, this responsibility will not be invoked, leaving a vacuum of unaccountability for the conduct of the intervening state. Here, the international legal order permits the invocation of certain obligations owed to the international community as a whole.¹⁴⁵ In the event of a violation of these certain obligations, states that cannot derive a right of standing from the above-mentioned classical criteria are also entitled to make claims in order to assert the responsibility of the violating state. In international law, the obligations that give rise to this right are referred to as obligations *erga omnes*.¹⁴⁶

Consistent with the interpretation of the *Institut de droit internationale* in Article 1(a) of the 2005 Resolution, obligations *erga omnes* are defined as “an obligation under general international law that a State owes in any given case to the international community, in view of its common values and its concern for compliance, so that a breach of that obligation enables all states to take action”.¹⁴⁷ Obligations *erga omnes* can thus be considered a key concept for the protection of

¹⁴⁰ Priya Urs, ‘Obligations *erga omnes* and the question of standing before the International Court of Justice’ (2021) 34 *Leiden Journal of International Law*, p. 506.

¹⁴¹ *ibid.*

¹⁴² *ibid.*

¹⁴³ International Law Commission (1) (n 133), art. 42 (a); Crawford (n 137), para. 3.

¹⁴⁴ International Law Commission (1) (n 133), art. 42 (b).

¹⁴⁵ Crawford (n 137), para. 4.

¹⁴⁶ Urs (n 140), pp. 505-506.

¹⁴⁷ Founded in 1873, the *Institut de droit international* has long been recognised as a leading institution in international law and is regarded as one of the world’s distinguished professional organisations for international legal scholars and practitioners. Julia Emtseva, ‘Unveiling the “Legal Conscience of the Civilized World”: a Critical Look at the Institut de Droit International’ (2023) 117 *AJIL Unbound*, pp. 221 art. 225; Institut de droit international, ‘Resolution: Obligation *Erga Omnes* in International Law’ (Krakow Session 2005) art. 1.

the fundamental values of international law.¹⁴⁸ The perception of obligations *erga omnes* as falling under binding “general international law”¹⁴⁹ leads to the conclusion that they constitute customary international law.¹⁵⁰

Obligations *erga omnes* are also reflected in ARSIWA, with Article 33(1) extending the scope of the “obligations of the responsible State”¹⁵¹ to “the international community as a whole”.¹⁵² Article 42 confirms this extension by broadening the interpretation of an “injured state” to include “the international community as a whole”,¹⁵³ thereby granting all states a right of standing in cases of a violation of obligations *erga omnes*.¹⁵⁴ This interpretation is reiterated by Article 48(1), stating that “any other state than an injured state is entitled to invoke the responsibility of another state”.¹⁵⁵ Section (b) clarifies that this entitlement exists upon the condition that “the obligation breached is owed to the international community as a whole”,¹⁵⁶ thus addressing a violation of *erga omnes* obligations¹⁵⁷ and granting the right to invoke responsibility in the shared common interest.¹⁵⁸ Furthermore, Article 48(2)(a) and (b) set out the claims that the entitled state may assert against the state in breach of the obligation.¹⁵⁹ Section (a) provides the claim of “cessation of the internationally wrongful act”¹⁶⁰ and section (b) the claim to reparations in the interest of the directly injured state.¹⁶¹ As Urs notes, the intention behind including Article 48 in ARSIWA was to address *erga omnes* obligations in cases where there is no injured state that could invoke responsibility.¹⁶² Furthermore, the ILC itself considered it “highly desirable” that states other than the injured one can invoke responsibility to protect the common interest of the international community.¹⁶³

¹⁴⁸ Yoshifumi Tanaka, ‘The Legal Consequences of Obligations *Erga Omnes* in International Law’ (2021) 68 *Netherlands International Law Review* 2.

¹⁴⁹ Institut de droit international (n 147), art. 1(a).

¹⁵⁰ Tanaka (n 148).

¹⁵¹ International Law Commission (1) (n 133), art. 33.

¹⁵² *ibid.*

¹⁵³ *ibid.* art. 42(b).

¹⁵⁴ International Law Commission (2), ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ (2001) UN Doc A/56/10 art. 42, para. 11; Urs (n 140), p. 508.

¹⁵⁵ International Law Commission (1) (n 133), art. 48(1).

¹⁵⁶ *ibid.* art. 48(1b).

¹⁵⁷ Urs (n 140), p. 508.

¹⁵⁸ International Law Commission (2) (n 154), art. 48 para. 8.

¹⁵⁹ International Law Commission (1) (n 133), art. 48(2)(a) and (b).

¹⁶⁰ *ibid.* art. 48(2a).

¹⁶¹ *ibid.* art. 48(2b).

¹⁶² Urs (n 140), p. 508.

¹⁶³ International Law Commission (2) (n 154), art. 1, para. 4; Urs (n 140), p. 508.

As can be seen from the above analysis, ARSIWA outlines the general conditions under which state's responsibility may arise and what conditions must be met to invoke that responsibility, with Article 48 allowing states other than the injured state to invoke responsibility in the event of a breach of erga omnes obligations. What is not defined in ARSIWA, however, are the primary obligations that qualify as erga omnes obligations.¹⁶⁴ The ICJ determines these obligations, as well as the right of standing to invoke them.¹⁶⁵ Particularly noteworthy in the context of this paper is the Court's decision on the 1970 *Barcelona Traction* case, in which it sets out its interpretation of acts of aggression as constituting a breach of erga omnes obligations.¹⁶⁶ Furthermore, in its decision in the Nicaragua case, the ICJ confirmed the prohibition of the use of force as an international rule with prevailing character.¹⁶⁷

It can be concluded that holding a state responsible in cases where the injured state is unwilling to assert it can be a strenuous matter. Nonetheless, it should be in the common interest of the international community to hold states that breach international law responsible. This is where obligation erga omnes becomes relevant, allowing other states than the injured party to invoke responsibility and thus press for compliance with international law.

3.2 THE ROLE OF THE UN SECURITY COUNCIL

Beyond the purely legal realm, the UNSC plays a crucial role in determining the responsibility of states for breaches of international law. While its contribution may not have direct legal implications, the unique position that the UNSC occupies in the international legal order makes it a powerful actor in determining responsibility with more political implications.

The UNSC is the only institution that can authorise the use of force,¹⁶⁸ and its decisions are legally binding on the Members of the UN,¹⁶⁹ taking precedence over all their other "obligations under any international agreements".¹⁷⁰ The broad

¹⁶⁴ *ibid.* p. 509.

¹⁶⁵ *ibid.*

¹⁶⁶ Case Concerning Barcelona Traction, Light and Power Company, Limited (*Belgium v Spain*) ICJ Rep 3, p. 32, para. 34; Tanaka (n 148), p. 4.

¹⁶⁷ *Nicaragua v United States* (n 69), p. 190.

¹⁶⁸ UN Charter (n 9), art. 42.

¹⁶⁹ *ibid.* art. 25.

¹⁷⁰ *ibid.* art. 103.

powers “confer(red) on the Security Council”¹⁷¹ by its Members are considered necessary to take “prompt and effective action”¹⁷² in order to fulfil its responsibility to “maintain international peace and security”.¹⁷³ This supreme position the UNSC finds itself in¹⁷⁴ allows it to “make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security”.¹⁷⁵ Thus, the peacekeeping mandate of the UNSC includes both non-coercive and coercive measures under Chapter VII of the UN Charter.¹⁷⁶ Regarding the UNSC’s role in determining a state’s responsibility, its authority to make recommendations¹⁷⁷ to adopt sanctions of economic or diplomatic nature,¹⁷⁸ and to take forcible measures, including the use of armed force, are particularly interesting to examine in the context of this paper.¹⁷⁹

The UNSC’s authority to make recommendations under Article 39 has been used extensively in the past in connection with the unilateral use of force in the context of interventions.¹⁸⁰ The resolutions making recommendations under Article 39 adopted by the UNSC are not binding, but may become so if they are adopted by the parties concerned.¹⁸¹ The primary function of recommendations made under Article 39 is to provide guidance to the international community and the parties involved on measures they should take to address threats to peace and security, particularly ones of diplomatic nature.¹⁸² Moreover, they provide an important insight into the question of who the UNSC considers responsible for a situation threatening international peace and security. Following the broader

¹⁷¹ *ibid.* p. 24(1).

¹⁷² *ibid.*

¹⁷³ *ibid.*

¹⁷⁴ Devon Whittle, ‘The Limits of Legality and the United Nations Security Council: Applying the Extra- Legal Measures Model to Chapter VII Action’ (2015) 26(3) *European Journal of International Law*, p. 674.

¹⁷⁵ UN Charter (n 9), art. 39.

¹⁷⁶ Michael Bothe, ‘The Charter of the United Nations: A Commentary’ (2012) 3rd edition, *Oxford Commentaries on International Law*, p. 22-23.

¹⁷⁷ UN Charter (n 9), art. 39.

¹⁷⁸ *ibid.* art. 41.

¹⁷⁹ *ibid.* art. 42.

¹⁸⁰ In the context of the Syrian civil war see most notably UNSC Res 2401 (24 February 2018) UN Doc S/RES/2401 demanding a ceasefire throughout Syria and the adherence to international law regarding the protection of civilians.

¹⁸¹ Bothe (n 176), para. 22.

¹⁸² Christian Henderson, ‘The centrality of the United Nations Security Council in the legal regime governing the use of force’ (2013) *Research handbook on international conflict and security law*, Edward Elgar Publishing, p. 125.

definition of state responsibility adopted in this paper, the recommendations made by the UNSC under Article 39 can be used to recognise a state as responsible for a breach of international law and to express its disapproval. Additionally, the measures proposed in these recommendations impact the responsible state's international relations and reinforce the community's disapproval of the action.¹⁸³ However, as Mahapatra notes, the content of such recommendations and the question of which party to the conflict they favour is strongly influenced by the geopolitical interests of the permanent five members (P5).¹⁸⁴ He therefore notes a gap "between the mandate and the working of the international body".¹⁸⁵

Article 41 of the UN Charter provides the legal basis for the authority of the UNSC to take enforcement measures in form of sanctions.¹⁸⁶ Measures under Article 41 "not involving the use of armed force"¹⁸⁷ include the "complete or partial interruption of economic relations, (...) means of communication, and the severance of diplomatic relations".¹⁸⁸ In the context of the unilateral use of force within interventions, the UNSC utilised this power, most notably, in response to the Iraqi invasion in Kuwait 1990.¹⁸⁹ In "an unprecedented show of cooperation",¹⁹⁰ the P5 adopted Resolution 660,¹⁹¹ calling for comprehensive economic sanctions against the aggressor, Iraq.¹⁹² The adoption of Resolution 660 and subsequent Resolutions concerning Iraq's invasion of Kuwait¹⁹³ targeted the aggressor state directly¹⁹⁴ and "condemn(ed) the Iraqi invasion of Kuwait", effectively holding Iraq responsible for the violation of international law.¹⁹⁵

¹⁸³ Mao and Gady (n 131), p. 580.

¹⁸⁴ Debidatta Aurobinda Mahapatra, 'The Mandate and the (In)Effectiveness of the United Nations Security Council and International Peace and Security: The Contexts of Syria and Mali' (2016) 21 *Geopolitics*, p. 44; Monica Hakimi, 'The Jus Ad Bellum's Regulatory Form' (2018) 112(2) *American Journal of International Law*, pp. 174-175.

¹⁸⁵ *ibid*; See for example Russia's veto for Resolutions concerning Russia's invasion in Crimea (UNSC Draft Res 189 (15 March 2014) UN Doc S/2014/189).

¹⁸⁶ Bothe (n 176), para. 23.

¹⁸⁷ UN Charter (n 9), art. 41.

¹⁸⁸ *ibid*.

¹⁸⁹ UNSC Res 660 (2 August 1990) UN Doc S/RES/660; UNSC Res 661 (6 August 1990) UN Doc S/RES/661.

¹⁹⁰ Ved Nanda, 'The Iraqi Invasion of Kuwait: The U.N. Response' (1991) 15(3) *Southern Illinois University Law Journal*, pp. 434.

¹⁹¹ UNSC Res 660 (n 189).

¹⁹² Nanda (n 190), p. 435.

¹⁹³ Also see UNSC RES 661 (6 August 1990) UN Doc S/RES/661; UNSC Res 665 (of 25 August 1990) UN Doc S/RES/665; UNSC RES 666 (13 September 1990) UN Doc S/RES/666.

¹⁹⁴ See arms and trade ban implemented in UNSC Resolution 661 (n 193), para. 3.

¹⁹⁵ UNSC Resolution 660 (n 189), para. 2.

In cases where the UNSC considers the measures taken pursuant to Article 41 to be insufficient or prove inadequate,¹⁹⁶ Article 42 provides the UNSC with the power to authorise such action by air, sea or land forces as may be necessary to maintain or restore international peace and security”.¹⁹⁷ The authorisation of the use of force by the UNSC in context of responding to a unilateral use of force within interventions is rather rare due to disagreements within the UNSC. However, the Iraqi invasion of Kuwait again provides the case for the application of Article 41. In Resolution 678, the UNSC “authorises (...) all necessary means to uphold and implement resolution 660.”¹⁹⁸ The link to state responsibility in this context follows the same pattern as in the previous paragraphs. By authorising forcible measures, the UNSC clearly positions itself in this matter and expresses its disapproval of the Iraqi aggression against Kuwait. By identifying Iraq as the aggressor and enforcing this interpretation through the adoption of forcible measures, the UNSC holds Iraq accountable on behalf of the international community for its breach of international law.

The role of the UNSC in holding states responsible should therefore be seen more as an indirect pathway, as it is less a legal mechanism than one with political implications. The power of the UNSC to assert state responsibility, therefore, consists of determining the state responsible for the threat to international peace and security and adopting measures to ensure its political accountability. However, the effectiveness of the UNSC in responding to interventions depends heavily on the willingness of the P5 and is strongly influenced by geopolitical considerations of its members.¹⁹⁹ Recent events have shown that geopolitical interests paralyse the decision-making process and compromise the institution’s neutrality.²⁰⁰

4. HUMANITARIAN INTERVENTION: FROM LEGALITY TO LEGITIMACY

The legal analysis presented above demonstrates that there is no right to unilateral humanitarian intervention and underscores the existence of accountability mechanisms in international law. However, recent history shows that humanitarian

¹⁹⁶ UN Charter (n 9), art. 42.

¹⁹⁷ *ibid.*

¹⁹⁸ Referring to the immediate withdrawal of all Iraqi troops from Kuwait’s territory.

¹⁹⁹ Mahapatra (n 184), p. 44.

²⁰⁰ Mao and Gady (n 131), p. 580.

interventions, despite their questionable legal character, are supported to a considerable extent by a large number of actors in the international community.²⁰¹ The present chapter is aimed at investigating this observation, to provide a basis for the normative assessment of how humanitarian justification influences the perception of the intervention and thus the invocation of potential responsibility. To this end, the analysis considers the relationship between the legality and legitimacy of justifications, the resulting implications for the international community's response to such interventions, and the role of the UNSC.

The dominant legal debate on unilateral humanitarian interventions tends to use the terms legality and legitimacy interchangeably, which undermines the exploration of normative implications of the assessment of interventions. As Hardy argues, the two concepts should not be conflated as they are conceptually distinct, as there is a risk that the significance of normativity to the international community's perception of interventions is overlooked.²⁰² With reference to the striking discrepancy between the prohibition of the use of force and state practice of it mentioned in Chapter 2,²⁰³ the perception of legitimacy based on an actor's normative judgements about the circumstances is becoming increasingly important in the evaluation of interventions.²⁰⁴ The central role of norms can be explained by the authority which legitimacy confers upon an actor. This is based on the subjective assessment of both the desirability and appropriateness of the action, in accordance with collectively agreed norms.²⁰⁵ To provide for precedents of the tension between legality and legitimacy in the context of interventions, reference is made to the evaluation of customary law in Section 2.3. The most notable example of this tension is the NATO Intervention in Kosovo. Given the weak legal basis of the intervention, but the overwhelming support in the international community, the NATO action in Kosovo was described as illegal but justified.²⁰⁶ Based on the theoretical considerations outlined above and the application to a historical precedent, it can thus be stated that the lack of legal

²⁰¹ Reference is made to Chapter 2. See ECOWAS intervention in Liberia, NATO intervention in Kosovo.

²⁰² Hardy (n 16), pp. 3 art. 4.

²⁰³ Gray (n 97), p. 27.

²⁰⁴ Hardy (n 16), p. 3.

²⁰⁵ *ibid.* p. 4.

²⁰⁶ Roberts (n 25), pp. 182 art. 183; Hardy (n 16), p. 3; Buys and Garwood-Gowers (n 2), p. 16.

validity of an intervention justification can be overlaid by issue-specific normative judgments that determine its legitimacy.²⁰⁷

Whether or not an intervention with a weak legal basis is considered legitimate by the international community appears to depend on two factors: firstly, on the use and subsequent acceptance of humanitarian objectives as motivation to intervene²⁰⁸ and secondly, on the UNSC's perception of the situation and its resulting attitude towards it.²⁰⁹ Regarding the first point, previous interventions where humanitarian narratives were employed as justification indicate that the reference to humanitarian objectives can serve as a strategy to bridge the gap between the operation's weak legal basis and its perceived legitimacy in the international community.²¹⁰ The underlying strategy is the use of normative language, usually associated with generally accepted humanitarian values, to influence states' perceptions and subsequent actions towards the intervention.²¹¹ The international community's perception of legitimacy is therefore determined by normative, extra-legal factors that are aimed at securing political support for the intervention.²¹² On the second point, previous interventions reveal the enormous power the UNSC possesses in establishing the legitimacy and even legality of interventions. In adopting resolutions, releasing presidential or press statements, the UNSC has the power to actively steer the perception of the intervention into a certain, politically desired direction and even to enforce its legality.²¹³ In this context, the P5 have a particularly powerful position due to their veto power, as they can direct the UNSC response to interventions according to their geopolitical interest.²¹⁴ It is therefore apparent that the most influential states in the international community are able to determine what is legitimate and what is illegitimate, or even what is legal and what is illegal.

The discussion on the normative nature of the research question hinted at above, leads to the application of the theoretical approach in this paper. With regards to the first point raised above, an interesting focus within the TWAIL

²⁰⁷ Hardy (n 16), p. 3.

²⁰⁸ Buys and Garwood-Gowers (n 2), pp. 27-28.

²⁰⁹ Hakimi (n 184), p. 170.

²¹⁰ Buys and Garwood-Gowers (n 2), pp. 27-28.

²¹¹ *ibid.*

²¹² Hardy (n 16), p. 4; Buys and Garwood-Gowers (n 2), pp. 27-28.

²¹³ Hakimi (n 184), pp. 170-171.

²¹⁴ Mahapatra (n 184), p. 44.

perspective is the emphasis on the importance of the language used in international law to actively frame certain issues. This ideological legitimisation of certain dominant worldviews through the language of law is actively used by powerful states to align the normative framework with their interests.²¹⁵ The power of the language of law, almost exclusively owned by dominant geopolitical actors, lies in its ability to selectively set the agenda of international law to maintain and reinforce existing power structures.²¹⁶ Specifically with reference to the international human rights discourse, TWAIL points out how the discourse is manipulated to advance and validate neoliberal objectives and thus legitimise dominant ideas.²¹⁷ This becomes especially relevant against the background of the use of humanitarian justification for interventions. In this context, TWAIL highlights the problem that the international human rights discourse prevents discussion of accountability.²¹⁸ With regard to the research question, which examines how the use of humanitarian justification interacts with existing accountability mechanisms, TWAIL provides a valuable framework to critically assess the normative implications of the link between the intervention's illegality and its perceived legitimacy in the international community. With its focus on the role of international law in maintaining an inequitable global structure and advancing dominant ideas, TWAIL is also a useful theoretical approach to assess the implications of the second point about the powerful role of the UNSC and the P5 in particular.

The analysis in this chapter has shown how extra-legal aspects, influenced by the dominant normative framework of international law, gain increasing importance in the perception and subsequent judgment of interventions. This reflects the power of the UNSC to use legal language to shape perceptions and determine the legitimacy of actions is highlighted and identified as a crucial factor in determining the legitimacy of interventions.

5. CASE STUDY: THE SAUDI-LED INTERVENTION IN YEMEN

The Coalition Intervention, initiated in the form of "Operation Decisive Storm", anchors its legal justification primarily in the joint statement submitted by the

²¹⁵ i.e. what is considered legitimate and the right thing to do.

²¹⁶ Chimni (n 42), p. 61.

²¹⁷ *ibid.* pp. 47-48.

²¹⁸ *ibid.* p. 62.

coalition to the UNSC.²¹⁹ The statement was formulated in response to a letter from the then Yemeni President Abed Rabbo Mansur Hadi, in which he outlined the devastating security situation in his country.²²⁰ Building on a brief contextual background of the intervention in Yemen, this Chapter analyses the joint statement, focusing on the humanitarian aspect and the Coalition's legitimisation strategy. This analysis forms the foundation for the case-specific application of the TWAIL perspective in the discussion to understand the underlying motivation of the use of humanitarian justification by the Coalition.

“Operation Decisive Storm” was preceded by several years of violent conflict in Yemen, which was triggered by the brutal suppression of peaceful protests in 2011 in the course of the “Arab Spring”.²²¹ The regime of then-President Ali Saleh responded to the peaceful protests by killing over 50 protesters, triggering the emergence of an anti-regime group under the command of the Houthi family, which had already engaged in violent clashes with the Saleh government between 2004 and 2010.²²² The Huthis are a Zaydi Shiite movement in northern Yemen, rooted in religious revivalism and anti-Western sentiment, which has expanded territorial control and political influence, acting as a state within a state while participating in national politics.²²³ The regime's brutal response to the protests and the subsequent engagement of the Houthis in the conflict transformed the peaceful popular demonstrations into a complex, violent conflict between armed militias and government troops.²²⁴ The subsequent peace-building efforts of the UN and the European Union in response to the violent conflict centred on a two-stage transition process that resulted in the Gulf Cooperation Council (GCC) Initiative for Yemen and a series of complementary implementation mechanisms.²²⁵ The transition process included the handover of power to the mutually accepted Vice President Hadi and, in a second step, a Conference for National Dialogue (NDC) and the holding of democratic elections

²¹⁹ Joint Statement (n 8).

²²⁰ See Abed Rabbo Mansur Hadi, Letter to GCC States quoted in Joint Statement (n 8); Ruys and Ferro (n 10), p. 66.

²²¹ Buys and Garwood-Gowers (n 2), p. 4; Ruys and Ferro (n 10), pp. 63-64.

²²² Buys and Garwood-Gowers (n 2), p. 4.

²²³ International Crisis Group, ‘The Huthis: From Saada to Sanaa’, Middle East Report No 154 (2014) 1.

²²⁴ Ruys and Ferro (n 10), pp. 63-64.

²²⁵ *ibid.*

in 2014.²²⁶ The NDC, established to reconcile political division and integrate key actors into Yemen's national decision-making, produced a considerable number of nearly 1.800 recommendations²²⁷ to address the instability of Yemen's political structure and the "Houthi issue".²²⁸ Shortly after the conclusion of the NDC, President Hadi selected a constitution-drafting committee that proposed the division of Yemen into a federal structure with six regions, which was fiercely opposed by the Houthis and seen as a violation of previous agreements under the "Peace and Partnership Agreement".²²⁹ The violent reaction by the Houthis that followed culminated in a move on the capital of Sanaa, the subsequent control of the capital, and the order to place cabinet members, including Hadi, under house arrest. After his successful escape, Hadi declared Aden the provisional capital of Yemen and asked for military support in the form of a letter addressed to the GCC in the face of advancing Houthi troops.²³⁰

The requested military support was provided by Saudi Arabia and its Coalition partners and justified by a joint statement that responded to Hadi's letter. In his letter, Hadi emphasised the threat to peace, security and stability posed by "the heinous, criminal attacks being committed by the Houthis against our people".²³¹ He repeatedly refers to the tragedy that these attacks cause for the Yemeni people and the "heavy price" the "brave Yemeni people" have paid, leaving "deep wounds in every Yemeni home".²³² Building on this, he emphasises the urgency of "protect(ing) (the Yemeni) people from the fire and chaos of destruction",²³³ caused by the "ongoing Houthi aggression".²³⁴ The letter concludes with a repeated reference to "The Yemeni people",²³⁵ giving the impression that an intervention would be carried out solely in the interest of the people.²³⁶ The Coalition's response underlines their "responsibility towards the Yemeni people"²³⁷ and notes the request by President Hadi "for immediate support

²²⁶ *ibid.*

²²⁷ *ibid.* p. 63.

²²⁸ Buys and Garwood-Gowers (n 2), p. 5.

²²⁹ *ibid.*

²³⁰ Ruys and Ferro (n 10), p. 65.

²³¹ Joint Statement (n 8), pp. 3-4.

²³² *ibid.*

²³³ *ibid.*

²³⁴ *ibid.*

²³⁵ *ibid.* p. 5.

²³⁶ Buys and Garwood-Gowers (n 2), p. 9.

²³⁷ Joint Statement (n 8), p. 5.

in every form (...) to protect Yemen and its people”.²³⁸ Besides citing intervention by invitation and individual and collective self-defence²³⁹ as justifications for the intervention, the response in the joint statement clearly reflects and refers to the humanitarian objectives outlined in Hadi’s letter.²⁴⁰

The reaction of the international community, particularly the UNSC, to the crisis in Yemen was characterised by support for what it considered the legitimate government of Hadi and a further condemnation of the Houthi actions. This attitude is reflected in several resolutions adopted by the UNSC between 2014 and 2017, such as Resolution 2140 (2014),²⁴¹ Resolution 2201 (2015),²⁴² Resolution 2216 (2015)²⁴³ and Resolution 2342 (2017).²⁴⁴ Resolutions 2140 and 2342²⁴⁵ can be considered together as they both enforce a sanctions regime, including asset freezes²⁴⁶ and travel bans²⁴⁷ against “individuals or entities (...) engaging in (...) acts that threaten the peace, security or stability of Yemen”.²⁴⁸ Resolutions 2201 and 2216, however, must be assessed separately to acquire a nuanced understanding of the UNSC’s attitude towards the conflict. Resolution 2201 is significant in that it reflects the UNSC’s view and approach to the Houthis, calling for the immediate and unconditional engagement of the Houthis in good faith negotiations²⁴⁹ and withdrawal of all their forces from government institutions.²⁵⁰ Moreover, it called upon all State Parties to refrain from external interference that is aimed at fuelling conflict and instability.²⁵¹ Following the launch of “Operation Decisive Storm”, the UNSC adopted Resolution 2216, in which it reaffirmed its view of Hadi and its government as the legitimate representatives of the Yemeni

²³⁸ *ibid.*

²³⁹ In terms of individual self-defence, the joint statement refers to the “bare-faced and unjustified attack” on the territory of Saudi Arabia in 2009. With regard to the claim of collective self-defence, the coalition partners refer to the presence of heavy weapons and short- and long-range missiles that are beyond the control of legitimate authorities and pose a serious threat to their countries (Joint Statement (n 8)).

²⁴⁰ Buys and Garwood-Gowers (n 2), pp. 3, 9.

²⁴¹ UNSC Res 2140 (26 February 2014) UN Doc S/RES/2140.

²⁴² UNSC Res 2201 (15 February 2015) UN Doc S/RES/2201.

²⁴³ UNSC Res 2216 (14 April 2015) UN Doc S/RES/2216.

²⁴⁴ UNSC Res 2342 (23 February 2017) UN Doc S/RES/2342.

²⁴⁵ Resolution 2342 renewed sanctions imposed by Resolution 2140.

²⁴⁶ UNSC Res 2140 (n 241) para. 11.

²⁴⁷ *ibid.* para. 15.

²⁴⁸ *ibid.* para. 17.

²⁴⁹ UNSC Res 2201 (2015) para. 7(a).

²⁵⁰ *ibid.* para. 7(b).

²⁵¹ *ibid.* para. 9.

people,²⁵² and reiterated its support for the Coalition's intervention.²⁵³ It can be concluded from these resolutions that the UNSC acts in favour of the intervening countries and actively supports them by imposing sanctions against their opposition.²⁵⁴

6. DISCUSSION: THE NEXUS BETWEEN HUMANITARIAN JUSTIFICATION AND RESPONSIBILITY MECHANISM AND THE SAUDI-LED INTERVENTION

The legal analysis in the previous chapters provide the necessary foundation for answering the research question of *how does the use of humanitarian justification interact with existing responsibility mechanisms within the framework of international law in the context of the Saudi-led Coalition intervention in Yemen?* This chapter aims at summarising the major findings and applying them to the case study. Moreover, the interpretations of the findings are presented using the TWAIL approach and the implications derived from these interpretations are discussed. The TWAIL perspective will be used as the guiding theoretical approach to, first, assess the Coalition's motivation behind employing humanitarian justification and, second, illustrate how the Coalition has managed to bridge the gap between the supposed illegality of the intervention and its perceived legitimacy. Thirdly, TWAIL will be employed to outline how the Coalition can be held responsible and how likely this is.

6.1 DID THE COALITION'S RIGHT INTERVENE?

Chapter 5 outlines the Coalition's invocation of humanitarian objectives to justify the intervention and its attempt to present the intervention as being in the sole interest of the Yemeni people. The legal question that arises is whether the specific context of the intervention allows the Coalition to justify its use of force on humanitarian grounds. This inquiry draws onto Chapter 2, as the findings in Section 2.1 suggest that the right to unilateral humanitarian intervention without UNSC approval finds no legal basis in the text of the UN Charter, regardless of any specific contextual circumstances. Furthermore, as outlined in Section 2.2, the argument of an *a contrario* interpretation of the prohibition of the use of force

²⁵² UNSC Res 2216 (n 243) p. 2.

²⁵³ *ibid.* p. 1.

²⁵⁴ Mao and Gady (n 131), pp. 580-581.

enshrined in Article 2(4) should be rejected.²⁵⁵ Irrespective of the specific context, such an argument is based on an inaccurate interpretation of the UN Charter and thus contradicts the interpretation of the terms of the UN Charter in their ordinary meaning. The question of whether the Coalition can base its intervention on a rule of customary law that establishes the right to unilateral humanitarian intervention requires a more context-specific interpretation of the findings.

On a more general level, the analysis in Section 2.3 of the ECOWAS intervention in Liberia and the NATO intervention in Kosovo, both commonly cited in the broader discussion on whether a customary rule has emerged, shows that these cases cannot be regarded as precedents for such a rule. Accordingly, they do not support the existence of a customary right to unilateral intervention in another state. On a more specific level, the Russian intervention in Georgia is similar to the Coalition's intervention in Yemen, in the sense that both are justified with humanitarian objectives.²⁵⁶ Yet, altering justifications are cited, such as self-defence, as the primary justification for the intervention.²⁵⁷ This finding suggests that there are different intentions behind justifying the intervention in humanitarian terms.

Concluding from the findings in Chapter 2 and applying them to the contextual circumstances of the intervention, it can be stated that the Coalition can neither rely on the UN Charter, nor on international customary law in their humanitarian justification for the intervention.²⁵⁸ Thus, the humanitarian objectives put forward serve less a legal than a normative purpose in influencing the international community's perception of the legitimacy of the intervention. The question arises as to how exactly the Coalition, by humanitarian justification, has managed to bridge the gap between the supposed illegality of the intervention and its perceived legitimacy in the international community.

6.2 THE INTERACTION BETWEEN HUMANITARIAN JUSTIFICATION AND THE COALITION'S RESPONSIBILITY

Chapter 5 showed how the Coalition used humanitarian objectives in its narrative to justify the intervention. The repeated reference to the Coalition's "responsibility

²⁵⁵ UN Charter (n 9), art. 2(4).

²⁵⁶ Buys and Garwood-Gowers (n 2), p. 17.

²⁵⁷ Allison (n 125), pp. 178-179; Joint Statement (n 8).

²⁵⁸ See Chapter 5.

towards the Yemeni people”, together with the conclusion in Chapter 2 that the Coalition cannot rely on a right to unilateral humanitarian intervention, suggests that the humanitarian rhetoric is used strategically.²⁵⁹ It is aimed at persuading the international community of the intervention’s legitimacy and, subsequently, at advancing the Coalition’s geopolitical objectives.²⁶⁰ A situation therefore, arises in which a state with a concerning human rights record employs a rhetoric that highlights humanitarian objectives for strategic political purposes.²⁶¹ This observation explains how exactly the Coalition managed to bridge the gap between illegality and legitimacy and thus, to answer the research question of how humanitarian justification interacts with responsibility mechanisms. Here, the assumption made in Chapter 4 is reiterated that the perceived legitimacy of an intervention with weak legal basis seems to depend on the two factors: first, the utilisation and consequent acceptance of humanitarian objectives as an incentive for intervention, and second, the apprehension and demeanour of the UNSC. The following two sections detail the aspects and affirm their relation to the research question and TWAIL.

6.2.1 Factor One: The Use and Subsequent Acceptance of Normative Language

The normative language, typically employed in the context of western human rights discourse, can be seen as a deliberate attempt by the Coalition to colour its intervention in Yemen in generally accepted norms and thus to gain support in the international community.²⁶² The subsequent broad support for the intervention, particularly within the UNSC and the P5, allows for the conclusion that this attempt was successful.²⁶³ It can therefore be assumed that the Coalition succeeded in influencing the international community’s perception of the intervention by making it appear appropriate through the use of humanitarian rhetoric. This portrayal of the intervention as normatively desirable and “the right thing to do” can therefore be seen as a crucial component of the Coalition’s success in situating its interventionist goals along generally accepted humanitarian norms to gain

²⁵⁹ Joint Statement (n 8), p. 5.

²⁶⁰ Buys and Garwood-Gowers (n 2), p. 27.

²⁶¹ *ibid.*

²⁶² Alex Reichwein and Justus Liebig, ‘Rethinking Responsibility: Towards a New Authoritarian Interventionism?’ (2016) European Workshop in International Studies, p. 12; Buys and Garwood-Gowers (n 2), p. 27.

²⁶³ See Chapter 5.

support within the international community.²⁶⁴ Evidently, an international community and particularly the UNSC that supports an intervention, will not claim the intervening state's responsibility for violating the prohibition of the use of force.²⁶⁵ This suggests that the Coalition has indeed succeeded in instrumentalising the human rights discourse to legitimise its intervention, motivated by geopolitical goals, and consequently to evade responsibility.

The discussion of the Coalition's strategic use of humanitarian rhetoric highlights the importance of the conceptual distinction between legality and legitimacy, outlined in Chapter 3. While the contextual circumstances of the intervention arguably preclude legality, its legitimacy is determined by extra-legal factors that can be traced back to the use of normative language. It follows that the Coalition has managed to construct an image of the intervention that attaches more importance to the legitimacy of the intervention than the legality. Thus, in this situation, "the importance of legitimacy in the use of force (...) surpass(es) legality".²⁶⁶ Hence, the use of humanitarian justification was arguably aimed at increasing the perceived legitimacy of the operation and thus served less as a legal than a normative purpose to gain support within the international community.

The TWAIL perspective is applicable to both the deliberate use of humanitarian rhetoric and its acceptance and brings them together. Concerning the manipulative use of normative humanitarian rhetoric, Chapter 3 focuses on TWAIL's emphasis on the framing power of language in international law. TWAIL scholars point out that the language of law has always been used to legitimise dominant ideas.²⁶⁷ This practice is particularly successful, because the international law discourse is commonly associated with rational, neutral and objective reasoning aimed at establishing justice.²⁶⁸ However, TWAIL views this discourse more as a tool that can be strategically used by the powerful to maintain their domination and enforce dominant world views that further their geopolitical goals.²⁶⁹ Taking the contextual circumstances of the Yemen case into account, the TWAIL perspective explains that the international human rights discourse is

²⁶⁴ Buys and Garwood-Gowers (n 2), p. 28.

²⁶⁵ UN Charter (n 9), art. 2(4).

²⁶⁶ *ibid.* p. 12.

²⁶⁷ Chimni (n 42), p. 60.

²⁶⁸ *ibid.*

²⁶⁹ *ibid.*

occupied and actively shaped by dominant states to promote neo-liberal and geopolitical objectives.²⁷⁰ In this context, the human rights discourse can also be seen as an attempt by dominant states to "rehabilitate the idea of imperialism".²⁷¹

Nonetheless, with regards to the Coalition intervention in Yemen, it would be going too far to presume neo-colonial tendencies. However, the presence of the Iranian-backed Houthis on the Arab Peninsula actively challenged Saudi Arabia's hegemonic position in the region and thus can be seen as one trigger for the intervention. Using the language of law to present the intervention in generally accepted and desired normative values helped to distract the international community from its arguable illegality and the true objective of the intervention, namely, to gain geopolitical advantages. It henceforth increased the perceived legitimacy of the intervention.

6.2.2 Factor Two: UN Security Councils Perception and Subsequent Attitude Towards the Situation and the Coalition's Responsibility

Building upon the finding that the Coalition strategically used humanitarian rhetoric, and the premise that the primary justifications of self-defence and intervention by invitation lack of legality,²⁷² Chapter 2 investigated the different pathways to hold the Coalition responsible for the breach of the prohibition of the use of force.²⁷³ Taking the contextual circumstances of the Coalition intervention into account, it is submitted that the effectiveness of the UNSC in appropriately responding to the intervention is severely inhibited, due to the active role of two of the P5 Members in the conflict. As both the US and the UK are actively supporting the Coalition with military aid, the decision-making process is shaped by dominant geopolitical interests.²⁷⁴ It can thus be observed that geopolitical considerations, coupled with the enormous power the veto right confers on the P5,²⁷⁵ impairs the UNSC's mandate to ensure the maintenance of international peace and security.²⁷⁶

²⁷⁰ Balakrishnan Rajagopal, 'International Law from Below: Development, Social Movements and Third World Resistance' (2003) Massachusetts Institute of Technology, p. 209; Chimni (n 42), p. 62.

²⁷¹ Chimni (n 42), p. 61.

²⁷² Ruys and Ferro (n 10).

²⁷³ UN Charter (n 9), art. 2(4).

²⁷⁴ Mahapatra (n 184), p. 48.

²⁷⁵ *ibid.*

²⁷⁶ UN Charter (n 9), art. 24(1).

The TWAIL perspective convincingly explains this observation by assuming that international law plays a central role in legitimising and maintaining unequal structures in the international community.²⁷⁷ It is pointed out that international institutions, of which the UNSC was created as the most powerful one,²⁷⁸ are key actors in enforcing a world order that corresponds to their ideology, hence pursuing policies that are in line with the interest of the dominant states.²⁷⁹ The powers of the UNSC go so far that it can determine the legitimacy of actions by issuing an opinion, and even their legality by adopting binding resolutions.²⁸⁰ This dynamic can be observed in the UNSC's approach to the crisis in Yemen, described in Chapter 4.

While Resolutions 2140 and 2342, adopted in the early stage of the intervention, can still be interpreted as an attempt of the UNSC to fulfil its mandate,²⁸¹ Resolutions 2201 and 2216 reflect the TWAIL notion that powerful actors use international law as an instrument to impose their desired vision of the world order.²⁸² By establishing the legitimacy of the Hadi government in Resolution 2216 and effectively portraying the Houthis as the actor posing a threat to peace, security and stability in Yemen in Resolution 2201, the UNSC used the language of law to legitimise its dominant vision.²⁸³ Resolution 2216 in particular can be seen as a key document in providing political and legal cover for the Coalition rather than condemning it for its interference in contradiction to Resolution 2001²⁸⁴ and its breach of the UN Charter.²⁸⁵ Returning to the TWAIL perspective, the UNSC thus acted as a key actor in the Yemen crisis in “legitimis(ing) and translat(ing) a certain set of dominant ideas into rules”,²⁸⁶ allowing Saudi Arabia and a part of the P5 to pursue their geopolitical goals.²⁸⁷

The structural causes of this dynamic can be found in the creation of the UNSC, which can also be explained through the TWAIL lens. The introduction of

²⁷⁷ Chimni (n 42), pp. 48-49.

²⁷⁸ Mahapatra (n 184), p. 48.

²⁷⁹ Chimni (n 42), p. 61.

²⁸⁰ *ibid* p. 60; UN Charter (n 9), art. 24.

²⁸¹ “to maintain international peace and security” (UN Charter (n 9), art. 24(1)).

²⁸² *ibid*.

²⁸³ *ibid*. p. 60.

²⁸⁴ Reference is made to Chapter 4: Resolution 2201 called upon all Member States to “refrain from external interference” UNSC Res 2201 (n 242).

²⁸⁵ UN Charter (n 8), art. 2(4); Mao and Gady (n 131), p. 580.

²⁸⁶ Chimni (n 42), p. 60.

²⁸⁷ Mahapatra (n 184), p. 44; Mao and Gady (n 131), p. 580.

the P5 and its veto power closely connected the states making decisions on world peace and those entrusted with enforcing them.²⁸⁸ Thus, through this structural arrangement, the victorious powers of World War 2 created a world order that gives more influence to the powerful states and perpetuates the unequal international system that essentially favours them.²⁸⁹ It follows that when there is an agreement, the UNSC becomes extremely powerful.²⁹⁰

Furthermore, the UNSC's position on the Coalition intervention in Yemen reflects agreement, not in the spirit of preserving international peace and security but guided by the geopolitical interests of several members of the P5. As far as the possible responsibility of the Coalition for the violation of the prohibition of the use of force is concerned, not much can be expected from the UNSC, since the assertion of this responsibility through the adoption of resolutions depends on the willingness of the P5. The attitude of the UNSC was influenced by several factors: first, the Coalition's successful construction of a normative portrayal of the intervention as pursuing humanitarian objectives,²⁹¹ second, Saudi Arabia's role as an important strategic and economic partner in the region and third, the self-centred interests of the P5. Returning to the research question, this indicates that the use of humanitarian justification has an influence on the Coalition's responsibility in the sense that it legitimises the intervention and thus precludes responsibility.

6.3 ARSIWA AND OBLIGATIONS ERGA OMNES: A DIFFERENT PATH TO HOLD THE COALITION RESPONSE

As the UNSC is unlikely to hold the Coalition accountable, the focus must shift to other states in the international community. The legal analysis of ARSIWA conducted in Section 3.2 revealed that state responsibility in the classical sense can only be invoked in bilateral relations between states.²⁹² Given the factual circumstances of the present case study, it is therefore not reasonable to rely on this pathway, as it is very unlikely that the Hadi government, which issued the invitation to intervene, will hold the Coalition responsible. However, the analysis

²⁸⁸ Mahapatra (n 184), p. 48.

²⁸⁹ Mahapatra (n 184), p. 56; Yıldız (n 22), p. 355.

²⁹⁰ Mahapatra (n 184), p. 49.

²⁹¹ Buys and Garwood-Gowers (n 2), p. 27.

²⁹² Urs (n 140), p. 506.

has also shown that ARSIWA contains the provision of obligations *erga omnes* that are owed to the international community as a whole and can therefore also be invoked by parties other than the injured state.²⁹³ The launch of “Operation Decisive Storm” on the sovereign territory of Yemen constitutes a breach of the prohibition on the use of force and thus a breach of an *erga omnes* obligation.²⁹⁴ It therefore offers states other than those in the UNSC the opportunity to hold the Coalition responsible, which emphasises the emancipatory potential of *erga omnes* obligations.

The emancipatory potential of *erga omnes* is captured by the TWAIL’s emphasis on the transformative potential within international law to support decolonisation and the interests of the Global South.²⁹⁵ As outlined in the description of the theoretical approach, TWAIL scholars do not reject international law, but rather emphasise the need to challenge its status quo and provide alternative approaches to redress injustices and power imbalances.²⁹⁶ In this context, resistance plays a key role in challenging hegemonic practices and catalyse change.²⁹⁷ The argument put forward by TWAIL is that states of the Global South must claim their agency to initiate strategic alliances to reconstruct international law and better meet the needs and concerns of people from the Global South.²⁹⁸ Therefore the invocation of *erga omnes* obligations in the context of the present case study can serve as tool to claim such agency.²⁹⁹ Given the limitations on the effectiveness of *erga omnes* obligations inherent in the current architecture of international law, such as the requirement of consent to jurisdiction, it is acknowledged that an invocation might not lead directly to holding the Coalition responsible.³⁰⁰ However, it can assist in the formation of an alliance against hegemonic practices and thus become a reconstructing force to the architecture of international law.³⁰¹

²⁹³ International Law Commission (1) (n 133), art. 48(1); Crawford (n 137), para. 4.

²⁹⁴ See discussion on the Nicaragua judgement in context of *erga omnes* obligations in Section 3.2.

²⁹⁵ Yıldız (n 22), pp. 364-365.

²⁹⁶ *ibid.* p. 357.

²⁹⁷ Rajagopal (n 270), p. 236.

²⁹⁸ *ibid.*; Chimni (n 42), pp. 65, 67, 68.

²⁹⁹ Rajagopal (n 270), p. 208; Yıldız (n 22), pp. 364-365.

³⁰⁰ See discussion in Urs (n 140), pp. 517-524.

³⁰¹ Rajagopal (n 270), p. 208; Yıldız (n 22), p. 357; Chimni (n 42), pp. 65, 67.

7. CONCLUSION

The analysis of the legal implications of “Operation Decisive Storm” regarding the significance of humanitarian justification in justifying the intervention aimed at answering the research question of *how does the use of humanitarian justification interact with existing responsibility mechanisms within the framework of international law in the context of the Saudi-led Coalition intervention in Yemen?* By analysing the applicable legal sources and the interpretation of the intervention in the broader international community, the present paper found that the Coalition cannot rely on a humanitarian justification for their intervention in Yemen. Additionally, the arguable illegality of the other justifications of self-defence and intervention by invitation illustrates that the Coalition can be held accountable for a breach of an erga omnes obligation by any member of the international community. At its core, this analysis shows that the Coalition deployed humanitarian rhetoric strategically to avoid legal responsibility, revealing how such claims can be misused to advance interventionist objectives. In addressing the central aspect of the research question, how humanitarian justification interacts with existing responsibility mechanisms, the findings show that such rhetoric enabled the Coalition to avoid accountability for violating the prohibition on the use of force and exacerbating the crisis in Yemen. The case thus illustrates a broader shift within the international community from prioritising legality to prioritising perceived legitimacy, often aligned with geopolitical interests, a dynamic that the TWAIL perspective made particularly visible.

Based on these findings, States of the Global South are encouraged to form an alliance and challenge the prevailing interpretation of international law and the imposed dominance of powerful states. Through the application of the TWAIL perspective, this research clearly illustrated the power that the dominant states possess in shaping international law in their favour. While the application of the TWAIL perspective was expected to reveal power-dynamics in international law that favour dominant states, the scope of their influence in determining the legitimacy and even legality of an intervention revealed surprising results. Although the generalisability of the findings is limited by the fact that each intervention has its own circumstances shaping its legal justification and

accountability mechanisms, applying a TWAIL perspective proved valuable for analysing power relations in the Security Council's handling of interventions and in the international community more broadly.

Overall, this work intends to serve as a thought-provoking impulse in two ways. At the individual level, it aims to highlight the power structures that continue to marginalise the interests of the majority world population and to encourage critical engagement with these realities. At the state level, it seeks to underscore the need to attend to marginalised perspectives in international law, as they reveal the power dynamics that shape legal and political outcomes. In doing so, it reminds states of their responsibilities under international law, while acknowledging that the enforcement of these obligations is often influenced by the interests of dominant powers rather than through an application of international law guided by its foundational objectives.

Reassessing the Essential Facilities Doctrine in the Digital Economy: Access to Data under Article 102 TFEU

*Bengisu Aydın*¹

1.INTRODUCTION	115
2.BIG DATA AND DIGITAL MARKET DYNAMICS	122
3.THE ESSENTIAL FACILITIES DOCTRINE AND THE BOUNDARIES OF ARTICLE 102 TFEU	133
4. CONDITIONS OF ESSENTIAL FACILITIES AND APPLICATION TO DATA.....	151
5. CONCLUSION.....	161

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TABLE OF ABBREVIATIONS

ADLC	The French Autorité de la concurrence (French Competition Authority)
AG	Advocate General
AGCM	Autorità Garante della Concorrenza e del Mercato (Italian Competition Authority)
AI	Artificial Intelligence
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
DMA	Digital Markets Act
EFD	Essential Facilities Doctrine
EU	European Union
GC	General Court
GDPR	General Data Protection Regulation
LLMs	Large Language Models
ML	Machine Learning
IP	Intellectual Property
IPRs	Intellectual Property Right(s)
TFEU	Treaty on the Functioning of the European Union

1. INTRODUCTION

In the digital economy, data has become a key driver of innovation, market power, and competitive advantage. “Big Data,” as defined by De Mauro and others, is “the information asset characterised by such a high volume, velocity and variety to require specific technology and analytical methods for its transformation into value”.² A company’s competitiveness often hinges on its ability to swiftly extract this value from massive datasets.³ Nevertheless, assessing the competitive significance of data is complex. On the one hand, data is non-rivalrous, often described as widely available, and quickly loses relevance.⁴ On the other hand, in digital markets, data concentration may threaten competition through network effects, feedback loops, and lock-in effects.⁵ This tension has created a scholarly divide as to whether data constitutes a barrier to entry and whether it can, in practice, be monopolised.

The rule of thumb under EU law is that undertakings, regardless of their dominance, generally enjoy the freedom to select their trading partners and to dispose of their property rights that are safeguarded as fundamental freedoms under Articles 16 and 17 of the Charter of Fundamental Rights of the European Union (CFR).⁶ However, this freedom is not absolute. Where a vertically integrated undertaking, dominant in an upstream market, refuses to supply competitors operating in the downstream, such conduct may constitute an abuse of dominance under Article 102 of the Treaty on the Functioning of the European Union (TFEU).⁷ The structural relationship between these market levels is illustrated in Figure 1.

² Andrea De Mauro, Marco Greco and Michele Grimaldi, ‘A formal definition of Big Data based on its essential features’ (2016) 65 *Library Review*, p. 130.

³ Christophe Samuel Hutchinson, ‘Potential abuses of dominance by big tech through their use of Big Data and AI’ (2022) 10 *Journal of Antitrust Enforcement*, p. 444.

⁴ Megan Case, ‘Google, Big Data, & Antitrust’ (2022) 46 *Del J Corp L*, p. 198. See also Nils-Peter Schepp and Achim Wambach, ‘On Big Data and Its Relevance for Market Power Assessment’ (2016) 7 *Journal of European Competition Law & Practice*, p. 121.

⁵ Case (n 4), p. 199.

⁶ Charter of Fundamental Rights of the European Union [2012] OJ C326/391 (CFR), arts. 16, 17.

⁷ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU), art. 102; Alison Jones, Brenda Sufrin and Niamh Dunne, *Jones & Sufrin’s EU Competition Law: Text, Cases & Materials* (8th edition, Oxford University Press 2023) p. 508.

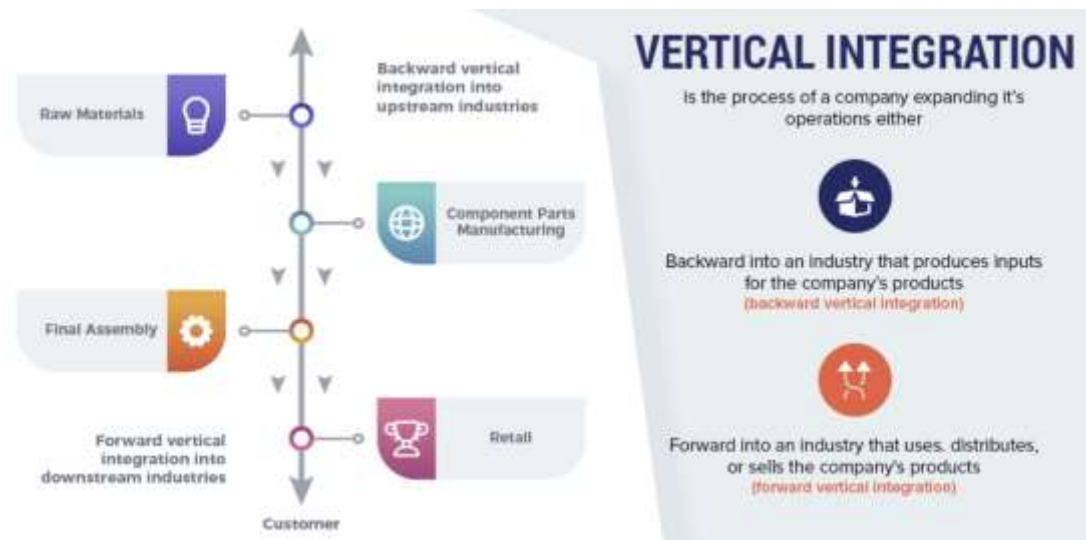


Figure 1: Explanation of vertical integration and the supply chain hierarchy, from upstream to downstream.⁸

To demonstrate, consider a vertically integrated firm, ‘Company A’. This undertaking controls the upstream level by producing a specialised fabric, a key raw material, while also competing downstream by manufacturing high-performance sportswear. If Company A holds a dominant position upstream and refuses to supply this fabric to independent rivals, those competitors may be foreclosed from the downstream market. Just as Company A’s fabric is a prerequisite for manufacturing sportswear, specific datasets can act as the “raw material” necessary for developing competitive digital services downstream. This so-called ‘refusal to supply’ is regarded as an exceptional abuse, requiring a careful balance between preserving incentives to innovate and preventing anti-competitive foreclosure.⁹

The framework governing refusal to supply has been shaped by case law through the development of the essential facilities doctrine (EFD). The ‘lynchpin’ is the indispensability criterion,¹⁰ under which an input is deemed indispensable

⁸ ReDefine, ‘Wait! These jaw-dropping vertical integration and horizontal integration strategies and insights can take your business to the next level’ (*ReDefine*) <<https://www.redefinesolutions.com/Stories/jaw-dropping-vertical-and-horizontal-integration-strategy-for-business.html>> accessed 27 December 2025.

⁹ OECD, ‘Abuse of dominance in Digital Markets’ (OECD Roundtables on Competition Policy Papers No 256, OECD Publishing 2021) p. 26 <<https://doi.org/10.1787/4c36b455-en>> accessed 29 May 2025.

¹⁰ Niamh Dunne, ‘Dispensing with Indispensability’ (2020) 16 *Journal of Competition Law & Economics*, p. 78.

only where access is necessary for rivals to compete and no realistic alternatives exist.¹¹ What sets an indispensable input apart from markets where the defendant merely holds a high market share lies in the downstream consequences of a refusal to supply.¹² Denying access to such an input effectively forecloses downstream competition and, for a vertically integrated firm, enables it to extend market power downstream.¹³

Originally, *Bronner* set strict conditions for indispensability, requiring that the refusal be likely to eliminate all competition, lack objective justification, and involve an input that is genuinely essential to operating in the downstream market, with no actual or potential substitute.¹⁴ Subsequent case law, however, has gradually revised the application of these strict criteria, narrowing them primarily to outright refusals to supply.¹⁵ By creating a distinction between outright refusals and constructive refusals, such as unfair terms or technical barriers, courts have lowered the bar for the latter under a more flexible abuse analysis.¹⁶

This shift is particularly visible in digital markets. Notably, in the *Android Auto* preliminary ruling, the Court of Justice of the European Union (CJEU) was asked to clarify the scope of *Bronner* in digital settings.¹⁷ The Court's approach in this case reflects a growing recognition that new forms of infrastructure, especially algorithmic or data-driven ones, may warrant a rethinking of competition law standards. *Android Auto* ruling is even interpreted as “effectively signalling the end of the EFD in its traditional form within EU law”.¹⁸

Furthermore, as dominant platforms increasingly accumulate large volumes of data, concerns have intensified that their control over key datasets may

¹¹ Case C-7/97 *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co KG and Mediaprint Anzeigengesellschaft mbH & Co KG* [1998] ECLI:EU:C:1998:569 ECR I-07791, para. 41.

¹² Dunne (n 10), p. 79.

¹³ *ibid.*

¹⁴ *Oscar Bronner* (n 11), para. 41.

¹⁵ Jones, Sufrin and Dunne (n 7), p. 513.

¹⁶ Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECLI:EU:C:2011:83, paras. 55-59; Case C-165/19 P *Slovak Telekom as v European Commission* [2021] ECLI:EU:C:2021:239, paras. 46, 50 and 59.

¹⁷ Case C-233/23 *Alphabet Inc and Others v Autorità Garante della Concorrenza e del Mercato (AGCM)* [2025] ECLI:EU:C:2025:110.

¹⁸ Giuseppe Colangelo, ‘The EU Essential Facilities Doctrine after Android Auto: A Wild Card without Limiting Principles?’ (2025) SSRN, p. 14 <<https://ssrn.com/abstract=5176785>> accessed 1 August 2025.

lead to exclusionary conduct and the creation of digital bottlenecks.¹⁹ Thus, in such cases, providing access to these ‘essential facilities’ is considered a potential remedy to counteract this potential market failure.²⁰ Still, applying EFD to data raises conceptual and practical challenges. Traditionally, assets such as physical infrastructure (e.g., airports, railways) and certain intangible assets like intellectual property rights (IPRs) have been recognised as indispensable, justifying mandatory access under Article 102 TFEU.²¹ This raises the contested question of whether data’s indispensability is possible or inevitable.

Finally, it is important to clarify the terminology used in the refusal to supply theory of harm, as there is a discrepancy in how these terms are used.²² The Commission²³ and the General Court (GC)²⁴ have used both ‘essential facility’ and ‘indispensability’, while the CJEU²⁵ has preferred the latter. The Commission’s Guidance Paper refers instead to ‘objective necessity’.²⁶ Thereby, these terms are treated interchangeably.²⁷

1.1 RESEARCH QUESTION

Against this background, this thesis paper aims to answer the following question:

To what extent can the refusal to supply doctrine, particularly the essential facilities doctrine, be applied to data under Article 102 TFEU?

¹⁹ Edouard Bruc, ‘Data as an Essential Facility in European Law: How to Define the "Target" Market and Divert the Data Pipeline?’ (2019) 15 Eur Competition J, p. 180.

²⁰ *ibid.*

²¹ Richard Whish and David Bailey, *Competition Law* (11th edition, Oxford University Press 2024) pp. 789-790.

²² Bruc (n 19), p. 184.

²³ *Sealink/B&I Holyhead: Interim Measures* (Case IV/34.174) Commission Decision of 11 June 1992 [1992], para. 42.

²⁴ Joined Cases T-374/94, 375/94, 384/94 and 388/94 *European Night Services and others v Commission of the European Communities* [1998] ECLI:EU:T:1998:198 ECR II-03141, para. 191; Case T-52/00 *Coe Clerici Logistics SpA v Commission of the European Communities* [2003] ECLI:EU:T:2003:168 ECR II-02123, para. 62.

²⁵ Joined Cases C-241/91 P and 242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities* [1995] ECLI:EU:C:1995:98 ECR I-00743, paras. 53, 56; *Oscar Bronner* (n 11), paras. 25, 38, 40; Case C-418/01 *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* [2004] ECLI:EU:C:2004:257 ECR I-05039, paras. 2ff.

²⁶ Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7, as amended, Amendments to the Communication from the Commission Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2023] OJ C116/1 (the Guidance Paper), paras. 82-83.

²⁷ Whish and Bailey (n 21), pp. 786-787.

To address the main research question, the following sub-questions have been developed:

- (i) *What features of data and digital markets contribute to barriers to entry and potential foreclosure of competition?*
- (ii) *How has case law shaped the development of the refusal to supply and the essential facilities doctrine?*
- (iii) *How relevant is the indispensability criterion in assessing refusal to supply in data-related cases?*
- (iv) *How should competition law balance exclusionary risks with property rights and investment incentives in refusal-to-supply cases related to digital markets?*

1.2 METHODOLOGY

To answer the research question and its sub-questions, this paper will employ both doctrinal and normative methodologies. This combined approach is particularly appropriate given the technical complexity of Article 102 TFEU and the evolving nature of the CJEU's case law on refusals to supply abuses.

A doctrinal methodology involves the systematic analysis of legal rules and doctrines as applied by the courts.²⁸ It proceeds on the assumption that the legal system is a relatively autonomous and coherent normative order, capable of being examined through its own internal sources and reasoning.²⁹ In this research, the refusal to supply abuse of dominance under Article 102 TFEU will be analysed through a detailed examination of relevant EU treaties, case law, and soft law instruments, such as the Guidance Paper.

Given the dynamic nature of EU competition law, an essential task of this research is to 'map the current legal landscape'.³⁰ The analysis, therefore, focuses on clarifying the meaning, scope, and internal coherence of the legal standards governing refusal-to-supply theories of harm and the EFD. This is achieved by systematically deconstructing complex refusal-to-supply concepts, such as the

²⁸ Laura Lammasniemi, *Law Dissertations: A Step-by-Step Guide* (2nd edition, Routledge 2021) p. 66.

²⁹ *ibid.*

³⁰ Lina Kestemont, *Handbook on Legal Methodology: From Objective to Method* (online edition, Intersentia 2022) p. 10 <<https://doi.org/10.1017/9781839702389>> accessed 1 January 2026.

‘indispensability criterion’ and the notion of ‘constructive refusal’, into their constituent components in order to present them in a coherent and orderly manner.

Although describing existing legislation and case law is a foundational step, this method involves more than merely stating legal rules.³¹ It typically aims to uncover the underlying legal principles that inform and support judicial decisions.³² In this paper, the analysis focuses on the tension between freedom of contract and the prohibition of abuse of dominance from the specific perspective of refusals to supply data. Accordingly, this assessment is conducted through the lens of the EFD and its evolving applicability to data-related access disputes.

This doctrinal analysis is complemented by a normative dimension, which evaluates whether the doctrinal developments identified can be justified in light of the objectives of EU competition law. While doctrinal analysis asks what the law *is*, the normative inquiry addresses how conflicts between freedom of contract, innovation incentives, and the prevention of anti-competitive foreclosure *ought* to be resolved. This evaluation is primarily based on the consumer welfare standard, which serves as a central benchmark for assessing the legitimacy of intervention under Article 102 TFEU, particularly in complex and innovation-driven markets.

1.3 RESEARCH STRUCTURE

This paper is divided into three main chapters, each systematically addressing specific sub-questions to answer the overarching inquiry into the applicability of the EFD to data.

Chapter 2 explores the unique characteristics of big data and their implications for digital markets. To address *sub-question (i)*, the analysis focuses specifically on network effects, innovation dynamics, and the formation of digital bottlenecks, demonstrating how competitive advantage stems from the control and use of data.

Chapter 3 traces the judicial evolution of the EFD, beginning with *Bronner* and early refusal-to-deal cases before extending to intellectual property (IP) and digital markets.³³ By incorporating recent developments such as *Google*

³¹ Lammasniemi (n 28), p. 66; Kestemont (n 30), pp. 9-10.

³² Lammasniemi (n 28), p. 66.

³³ *Oscar Bronner* (n 11).

*Shopping*³⁴ and *Android Auto*,³⁵ which signal a shift from strict indispensability toward a ‘fair access’ standard, this chapter addresses *sub-question (ii)*.

Furthermore, the shift identified here provides the legal framework necessary to evaluate the balancing act between exclusionary risks and investment incentives required by *sub-question (iv)*. This constitutes the first stage of that inquiry, focusing on the legal theory underpinning the balancing act.

Chapter 4 applies these findings to the data context, analysing how the specific EFD criteria (indispensability, elimination of effective competition, the emergence of a new product, and objective justifications) operate in practice. In doing so, it evaluates the contemporary relevance of the indispensability criterion to resolve *sub-question (iii)*.

As this chapter represents the practical core of the analysis, it completes the answer to *sub-question (iv)* by applying the legal framework from Chapter 3 to the unique technical and regulatory constraints of data, such as the General Data Protection Regulation (GDPR).³⁶ This second stage is essential to understanding how the balance between competition and investment functions within the digital economy.

1.4 RESEARCH LIMITATIONS

This paper is confined to the application of Article 102 TFEU to refusal-to-supply scenarios, with a particular focus on the EFD in the context of data. While the analysis touches upon the interplay with data protection law, this is considered only insofar as the GDPR may serve as an objective justification for refusing to share personal data, thereby influencing the scope of competition law intervention. A comprehensive analysis of data protection law and the GDPR as autonomous legal regimes falls outside the scope of this work.

³⁴ *Google Search (Shopping)* (Case AT.39740) Commission Decision C(2017)4444 [2017] OJ C9/11; Case T-612/17 *Google LLC formerly Google Inc and Alphabet Inc v European Commission* [2021] ECLI:EU:T:2021:763; Case C-48/22 P *Google LLC and Alphabet Inc v European Commission* [2024] ECLI:EU:C:2024:726.

³⁵ *Android Auto* (n 17).

³⁶ Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L119/1 (GDPR).

In certain circumstances, data may be protected by IPRs; however, their application will not be examined here.³⁷ Similarly, the thesis paper does not consider the potential application of the Digital Markets Act (DMA),³⁸ including its provisions on gatekeepers, which could otherwise be relevant to cases of refusal to supply data.³⁹

Finally, the analysis is limited to EU law and case law, without engaging in a comparative study with other jurisdictions. The objective is not to propose legislative reform but rather to assess whether the existing framework on refusal to supply and the EFD can adequately address competition concerns in data-driven markets.

2. BIG DATA AND DIGITAL MARKET DYNAMICS

This chapter examines the role of data in the digital economy and its implications for competition law, addressing sub-question (i) by analysing which features of data and digital markets contribute to barriers to entry and potential competitive foreclosure. To this end, it explores the definition and unique characteristics of big data, as well as its impact on digital markets through network effects, innovation, and scale advantages. These dynamics challenge the traditional competition law concepts, raising the question of whether data can ultimately function as a bottleneck monopoly. Accordingly, this chapter investigates the circumstances in which a duty to supply may arise, examining when data can be considered essential.

2.1 DEFINING BIG DATA

Data is raw, digitally representable information that includes both useful and irrelevant or redundant information, and must be processed to be meaningful.⁴⁰ The central point of the debate regarding competition law and the digital economy,

³⁷ Bruc (n 19), pp. 210-219; Rok Dacar, 'The Essential Facilities Doctrine, Intellectual Property Rights, and Access to Big Data' (2023) 54 IIC 1487.

³⁸ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 [2022] OJ L265/1 (DMA).

³⁹ Colangelo (n 18), pp. 19-21.

⁴⁰ 'data, n' (*Merriam-Webster.com Dictionary*) <<https://www.merriam-webster.com/dictionary/data>> accessed 3 June 2025.

however, is rather about ‘big data’.⁴¹ Defining the term ‘big data’ is a challenging task, as its meaning continues to evolve, and the EU does not have a single, uniform legal definition understanding of it. De Mauro and others give a comprehensive definition of big data and explain it as “the information asset characterised by such a high volume, velocity and variety to require specific technology and analytical methods for its transformation into value”.⁴² In other words, big data refers to the rapid algorithmic processing of large data volumes from diverse sources and formats.⁴³ While acknowledging the technical distinction between these concepts, this paper hereafter uses the term ‘data’ interchangeably with ‘big data’.

Furthermore, big data significantly impact companies, as they have to reconsider their business processes in light of the availability of new information that could be transformed into a competitive advantage in a data-driven market.⁴⁴ Hence, it is a key factor in how companies compete. Consequently, data is often compared to capital as a new raw material of the economy.⁴⁵ The analysis goes even beyond that, as Clive Humby coined the phrase "data is the new oil" at a 2006 Association of National Advertisers conference.⁴⁶ He highlights parallels with the industrial revolution, stressing that, like oil, data must be refined, processed, and transformed into by-products before it becomes valuable for driving business innovation. Subsequently, the value of data not only comes from collection but also from analytics. As Google’s chief economist, Hal Varian points out, “Data is widely available; what is scarce is the ability to extract wisdom from it.”⁴⁷

⁴¹ Autorité de la concurrence and Bundeskartellamt, ‘Competition Law and Data’ (10 May 2016), p. 4 <https://www.bundeskartellamt.de/SharedDocs/Meldung/impactsimpactsactsimpactsimpacts/ress-emitteilungen/2016/10_05_2016_Big%20Data%20Papier.html> accessed 27 July 2025 (Competition Law and Data Report).

⁴² De Mauro, Greco and Grimaldi (n 2), p. 130.

⁴³ Schepp and Wambach (n 4), p. 120. See also European Commission, ‘Big data’ (*European Commission*, 10 October 2024) <<https://digital-strategy.ec.europa.eu/en/policies/big-data>> accessed 5 June 2025.

⁴⁴ De Mauro, Greco and Grimaldi (n 2), p. 127.

⁴⁵ The Economist, ‘Data, data everywhere’ (February 2010), p. 5 <<https://www.economist.com/special-report/2010/02/27/data-data-everywhere>> accessed 23 June 2025. See also Elettra Bietti, ‘Data is Infrastructure’ (2025) 26 *Theoretical Inquiries in Law*, pp. 59-61.

⁴⁶ Quoted in ICO, ‘Data as a commodity’ (*ICO*) <<https://ico.org.uk/for-the-public/ico-40/data-as-a-commodity/>> accessed 29 December 2025. See also University of Sheffield, ‘Clive Humby’ (*University of Sheffield*) <<https://sheffield.ac.uk/cs/people/academic-visitors/clive-humby>> accessed 17 June 2025.

⁴⁷ The Economist (n 45), p. 5.

Therefore, the relationship between assets and data is not straightforward. According to Bietti, unlike oil or other tangible commodities, data is not a physical substance that exists independently of context.⁴⁸ It cannot be treated as a tradable or alienable object in its raw form; instead, data functions as an intangible connective tissue that underpins and integrates the infrastructures of modern society.

Hoffmann argues that the enablers of this extraction, separation technologies such as general search and recommender algorithms, have themselves become commodities in the digital economy.⁴⁹ He further points out that the separation of valuable information from noise constitutes a market, characterised by demand from users and supply by platforms such as search engines and recommender systems, resulting in either monetary or personal data exploitation transactions.⁵⁰

Moreover, Bietti advocates that data can act as an infrastructure.⁵¹ She explains, while recognising its collective functions, data should be understood at once as an essential input and as inherently interconnected with other digital resources such as protocols, algorithms, semiconductors, and platform interfaces.⁵² This view holds important implications regarding artificial intelligence (AI) markets. She asserts that since generative AI models depend on massive datasets and compute power, this creates risks of an inevitable market concentration, which only 'Big Tech' can sustain at scale.⁵³ In particular, training large language models (LLMs) demands significant upfront investment. Similarly, Lina Khan, the former chair of the Federal Trade Commission, noted in a speech at Stanford that the Commission is scrutinising Big Tech's control over essential inputs, such as cloud infrastructure and data processing units, on which AI startups and developers depend.⁵⁴ Therefore, Bietti advocates a shift in legal thinking from

⁴⁸ Bietti (n 45), p. 58.

⁴⁹ Linus J Hoffmann, 'Commodification beyond Data: Regulating the Separation of Information from Noise' (2023) 2 Eur L Open, p. 425.

⁵⁰ *ibid* p. 427.

⁵¹ Bietti (n 45), pp. 65-67.

⁵² *ibid* p. 55.

⁵³ *ibid* pp. 80-81.

⁵⁴ Krysten Crawford, 'FTC's Lina Khan warns Big Tech over AI' (*Stanford Institute for Economic Policy Research*, 3 November 2023) <<https://siepr.stanford.edu/news/ftcs-lina-khan-warns-big-tech-over-ai>> accessed 19 June 2025.

commodities to an infrastructure framework, emphasising the need for public-interest regulation in technology markets.⁵⁵

The opposite view is that competition law already has the tools and flexibility to address challenges of the digital economy, although authorities should update their skills, data-gathering powers, and enforcement speed to remain effective.⁵⁶ In the EU, the Commission has actively enforced existing competition rules in several high-profile cases, some of which will be discussed later in this thesis paper, creatively applying Article 102 TFEU to online platforms and advancing new theories of harm that the EU Courts have upheld.⁵⁷

Finally, data can be classified in numerous ways, and different approaches to categorisation exist. The following sections outline the distinctions most relevant for this thesis paper.

2.1.1 Types of Information

Data may be categorised according to the type of information they convey. At the outset, personal data, as defined in Article 4(1) GDPR, means any information that directly or indirectly identifies a natural person, for example, through a name, ID number, location, online identifier, or factors linked to their physical, genetic, economic, or social identity.⁵⁸ The debate on data in competition law has primarily centred around personal data.⁵⁹

By contrast, non-personal data refers to information not linked to an individual, either because it has been anonymised or because it originates from sources not tied to identifiable users.⁶⁰ While anonymisation enables large-scale data sharing by reducing privacy concerns, it also diminishes the competitive value of the data compared to raw, user-level information retained by platforms.⁶¹ To demonstrate the differentiation, an IP address linked to a user's browsing

⁵⁵ Bietti (n 45), p. 87.

⁵⁶ G7 Competition Authorities, 'Common Understanding of G7 Competition Authorities on "Competition and the Digital Economy"' (Paris, 5 June 2019) <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/G7_Erklaerung.html?nn=55030> accessed 25 June 2025.

⁵⁷ Jones, Sufrin and Dunne (n 7), pp. 71-72.

⁵⁸ GDPR, art. 4(1).

⁵⁹ Competition Law and Data Report (n 41), p. 5.

⁶⁰ Richard Feasey and Alexandre de Streel, 'Data sharing for digital markets contestability: towards a governance framework' (CERRE, 30 September 2020) p. 17 <<https://cerre.eu/publications/data-sharing-digital-markets-competition-governance/>> accessed 21 July 2025 (Data Sharing for Contestability Report).

⁶¹ *ibid.*

history constitutes personal data, whereas weather forecast information exemplifies non-personal data.

2.1.2 *The Source of Data*

The manner in which data is acquired provides another way of categorising it. Firstly, data is actively ‘volunteered’ by persons when using a product.⁶² For instance, music streaming services such as Spotify often ask users to provide personal information such as their name, date of birth, and payment details when creating an account. In addition, users voluntarily generate data by creating playlists, liking songs, or writing reviews.

Secondly, ‘observed’ data refers to information automatically generated through a user’s or machine’s interaction with digital platforms, devices, or services, which includes behavioural traces such as clicks, browsing history, location data from mobile phones, telematics from vehicles, or sensor outputs from Internet of Things devices.⁶³ According to the Data Sharing for Contestability Report, observed data is usually the most important source of competitive advantage in digital markets.⁶⁴ Additionally, it is often difficult to replicate, as it depends on large volumes of long-term interactions.

Lastly, ‘inferred’ data creates new information by analysing already existing data without requiring further interaction from the user.⁶⁵ For example, building on the previous Spotify example, a music streaming platform could analyse the playlists a user frequently listens to and infer their mood patterns. It might assume the user is stressed if they often stream calming or instrumental music in the evening. Thus, inferred data can be a key source of competitive differentiation, as it reflects the platform’s analytical capacity and innovation.⁶⁶ Data Sharing for Contestability Report further points out that while such data is often difficult to replicate, competitors may still compete effectively if they gain

⁶² Competition Law and Data Report (n 41), p. 6; Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition policy for the digital era* (Publications Office of the European Union 2019) p. 24 <<https://data.europa.eu/doi/10.2763/407537>> accessed 23 July 2025 (Commission Digital Report); Data Sharing for Contestability Report (n 60), p. 16.

⁶³ Competition Law and Data Report (n 41), p. 7; Commission Digital Report (n 62), p. 24; Data Sharing for Contestability Report (n 60), p. 16.

⁶⁴ Data Sharing for Contestability Report (n 60), p. 16.

⁶⁵ Competition Law and Data Report (n 41), p. 7; Commission Digital Report (n 62), p. 25; Data Sharing for Contestability Report (n 60), p. 17.

⁶⁶ Data Sharing for Contestability Report (n 60), p.17.

access to the underlying volunteered or observed data from which these inferences are drawn.⁶⁷

2.2 DATA AND ITS COMPETITIVE VALUE

Former Commissioner for Competition Margrethe Vestager famously described big data as the “new currency of the internet”.⁶⁸ Yet, its competitive relevance does not easily fit within traditional competition analysis. Data has several distinctive features that complicate its assessment under Article 102 TFEU.⁶⁹

To begin with, data is non-rivalrous, which means it can be reused indefinitely as an input without being depleted, even for different purposes by multiple firms at the same time. More specifically, one company’s collection of data does not typically prevent another from independently gathering the same information.⁷⁰ Therefore, analogies between data and traditional commodities can be misleading. Unlike money, data is inexhaustible and lacks inherent scarcity.⁷¹ While it may be theoretically possible for a single provider to control all of the world’s oil resources, no entity can ever monopolise all data.⁷² Consequently, this feature of data sets it apart from other key inputs.⁷³

Next, data is often labelled as widely available and inexpensive. Although companies could theoretically purchase third-party data for competition purposes, this is often impractical due to the larger volume and higher quality of the incumbent’s existing datasets.⁷⁴ This is especially relevant in sectors like search engines or social networks; incumbents attract vast user bases through free services, generating unique and extensive data streams that competitors cannot easily replicate.⁷⁵ If data really were as abundant as ‘sunshine’, companies would

⁶⁷ *ibid.*

⁶⁸ Laura C Atlee and Agapi Patsa, ‘Margrethe Vestager appointed as next EU Competition Commissioner’ (*Lexology*, 22 October 2014) <<https://www.lexology.com/library/detail.aspx?g=48c4e7b4-15f8-4015-8c96-37ceb6e485dd>> accessed 10 June 2025.

⁶⁹ Case (n 4), p. 198.

⁷⁰ Schepp and Wambach (n 4), p. 121.

⁷¹ David A Balto and Matthew Lane, ‘Monopolizing Water in a Tsunami: Finding Sensible Antitrust Rules for Big Data’ (2016) SSRN, p. 2 <<https://ssrn.com/abstract=2753249>> accessed 5 June 2025.

⁷² Daniel Sokol and Roisin Comerford, ‘Does Antitrust Have a Role to Play in Regulating Big Data?’ in Roger D Blair and Daniel Sokol (eds), *The Cambridge Handbook of Antitrust, Intellectual Property, and High Tech* (Cambridge University Press 2017), p. 299.

⁷³ *ibid.*

⁷⁴ *ibid.* p. 298; cf Competition Law and Data Report (n 41), p. 12.

⁷⁵ Inge Graef, ‘Market Definition and Market Power in Data: The Case of Online Platforms’ (2015) 38 *World Competition*, p. 483; Competition Law and Data Report (n 41), p. 12.

not invest heavily in providing free services designed to collect and process user data for competitive leverage.⁷⁶ At a conceptual level, however, it is important to distinguish between the mere collection of raw data and a company's 'secret sauce', creating its value, which is the analytical processing applied to it.⁷⁷

Finally, data quickly loses relevance as it becomes quickly outdated.⁷⁸ The competitive edge of data-rich firms often depends less on dataset size than on timeliness, since rivals can compete effectively by gathering accurate, up-to-date information rather than replicating incumbents' vast troves.⁷⁹

These features of data make its role as a key input somewhat contentious, as attempts to monopolise personal data are compared to "trying to monopolise water during a rainstorm".⁸⁰ However, before drawing firm conclusions, it is important to take into account the specific characteristics of digital markets, which will be discussed in the following section.

2.3 DIGITAL MARKETS, INNOVATION AND COMPETITION

The digital economy encompasses global economic activities and transactions enabled by information and communication technologies.⁸¹ It functions as an umbrella term covering diverse digital activities⁸² and has fundamentally reshaped market dynamics.⁸³ This transformation has given rise to dominant platforms, multi-sided markets,⁸⁴ and ecosystems where competition concerns are particularly acute when platforms act as both intermediaries and competitors.⁸⁵ Amazon runs a marketplace (intermediary) and sells its own products (competitor to independent sellers). Similarly, Google runs a search engine (intermediary) but also promotes its own services like Shopping or Maps.⁸⁶ This dual role is

⁷⁶ Maurice E Stucke and Allen P Grunes, 'No Mistake About It: The Important Role of Antitrust in the Era of Big Data' (2015) University of Tennessee Legal Studies Research Paper No 269, p. 7.

⁷⁷ Sokol and Comerford (n 72), pp. 298-299.

⁷⁸ Case (n 4), p. 198.

⁷⁹ Schepp and Wambach (n 4), p. 122.

⁸⁰ Balto and Lane (n 71), p. 7.

⁸¹ Jones, Sufrin and Dunne (n 7), p. 69.

⁸² *ibid* p. 1209.

⁸³ Ariel Ezrachi, 'EU Competition Law Goals and the Digital Economy' (2018) Oxford Legal Studies Research Paper No 17/2018, p. 1 <<http://dx.doi.org/10.2139/ssrn.3191766>> accessed 20 July 2025.

⁸⁴ OECD, 'Rethinking Antitrust Tools for Multi-Sided Platforms' (OECD Publishing 2018), pp. 10, 37 <<https://doi.org/10.1787/a013f740-en>> accessed 29 May 2025.

⁸⁵ Jan Krämer and Daniel Schnurr, 'Big Data and Digital Markets Contestability: Theory of Harm and Data Access Remedies' (2022) 18 *Journal of Competition Law & Economics*, p. 264.

⁸⁶ *ibid* pp. 264-65.

fundamentally enabled by data. As intermediaries, platforms sit at a digital bottleneck, allowing them to monitor the transactions, pricing, and consumer preferences of their third-party rivals.⁸⁷ In such cases, network effects may prevent more efficient rivals from displacing less efficient incumbents.⁸⁸

Lancieri and Morita-Sakowski review several reports written by competition authorities and expert committees, observing that digital markets are typically characterised by strong network effects, substantial economies of scale and scope driven by data, and very low marginal costs.⁸⁹ These features often cause markets to “tip”, concentrating activity around a single dominant provider.⁹⁰

Firstly, scale plays a crucial role; production costs rise more slowly than the number of users, incentivising “zero-price” strategies.⁹¹ Although services may appear free, users pay through data, advertising exposure, and attention.⁹² Secondly, network effects further reinforce concentration, as the value of a platform increases with the number of users, whether directly (benefits from more users in the same group) or indirectly (value created across interdependent groups such as consumers and advertisers).⁹³ These dynamics are reinforced by switching costs and restrictions on multi-homing,⁹⁴ which incumbents strengthen through tactics like limiting data portability and interoperability.⁹⁵

Lastly, data is the medium facilitating this broad digital transformation.⁹⁶ The ability to collect and analyse vast user data provides key inputs for personalisation, targeted advertising, and product innovation.⁹⁷ At the same time,

⁸⁷ *ibid* p. 265.

⁸⁸ Commission Digital Report (n 62), p. 23.

⁸⁹ Filippo Lancieri and Patricia Morita Sakowski, ‘Competition in Digital Markets: A Review of Expert Reports’ (2021) 26 *Stanford Journal of Law, Business & Finance*, pp. 69-74.

⁹⁰ *ibid* p. 75.

⁹¹ Commission Digital Report (n 62), p. 20.

⁹² Lancieri and Morita Sakowski (n 89), pp. 88-89; Case (n 4), p. 202.

⁹³ Competition Law and Data Report (n 41), pp. 27-28; Commission Digital Report (n 62), pp. 20-23; Case (n 4), pp. 192-193.

⁹⁴ Competition Law and Data Report (n 41), pp. 28-29.

⁹⁵ OECD, ‘Rethinking Antitrust Tools’ (n 84), pp. 114-115; Lancieri and Morita Sakowski (n 89), pp. 78-79.

⁹⁶ WEF, ‘Data Policy in the Fourth Industrial Revolution: Insights on personal data’ (11 November 2018), p. 7 <<https://www.weforum.org/publications/data-policy-in-the-fourth-industrial-revolution-insights-on-personal-data/#:~:text=but%20few%20anticipated-,Data%20Policy%20in%20the%20Fourth%20Industrial%20Revolution%3A%20Insights%20on%20personal,values%20and%20social%20norms%20This>> accessed 29 June 2025; Commission Digital Report (n 62), pp. 23-24. See also Stucke and Grunes (n 76), pp. 2-4.

⁹⁷ Competition Law and Data Report (n 41), pp. 10-11; Commission Digital Report (n 62), p. 24; Case (n 4), p. 196.

benefiting from these digital interactions, platforms produce new data as an output, creating a self-reinforcing feedback loop that further strengthens their position.⁹⁸

The European Commission in *Google Shopping* acknowledged that building a general search engine requires substantial investment in algorithms, crawling, and indexing,⁹⁹ as well as large query volumes to ensure relevance.¹⁰⁰ This is particularly important for rare “tail” queries, as users expect consistent quality across both common and uncommon searches.¹⁰¹ In this context, larger datasets are especially useful because the probability of having previously encountered a similar search grows with scale, allowing the engine to return more precise results.¹⁰² Consequently, since users judge search engines holistically, large-scale data collection becomes a key competitive factor for both frequent and rare queries.¹⁰³ Hence, a combination of these characteristics can create barriers to entry.¹⁰⁴

However, data is subject to diminishing returns to scale.¹⁰⁵ At first, additional queries improve relevance, advertising, and algorithmic learning, but beyond a certain threshold, extra data adds little value.¹⁰⁶ To demonstrate, the difference between 10 million and 100 million queries may be significant, but going from 10 billion to 20 billion queries adds relatively little. This dynamic means that incumbents holding very large datasets may enjoy durable advantages, while new entrants face barriers if the marginal benefits of data diminish only at extremely high volumes.¹⁰⁷

Not all scholars agree on the strength of these barriers. Sokol and Comerford argue that the role of network effects and feedback loops is frequently overstated.¹⁰⁸ They confront the previous position by stating that innovation can disrupt entrenched incumbents, advertisers often multi-home due to low costs, and access to third-party data can support competition.¹⁰⁹ In social networking,

⁹⁸ Schepp and Wambach (n 4), p. 121.

⁹⁹ *Google Shopping* (AT.39740) (n 33), para. 185.

¹⁰⁰ *ibid* para. 287.

¹⁰¹ *ibid* para. 288.

¹⁰² Graef (n 75), pp. 486-487.

¹⁰³ *Google Shopping* (AT.39740) (n 33), para. 288.

¹⁰⁴ *ibid* paras. 285-296. See also Graef (n 75), p. 484; Hutchinson (n 3), pp. 455-456.

¹⁰⁵ Graef (n 75), p. 486.

¹⁰⁶ *ibid*.

¹⁰⁷ *ibid*.

¹⁰⁸ Sokol and Comerford (n 72), pp. 305-306.

¹⁰⁹ *ibid* pp. 306-307.

Friendster, once the market leader, was rapidly overtaken by Myspace, which itself was later displaced by Facebook, demonstrating that superior products can overcome existing network effects.¹¹⁰ Similarly, they liken data advantages to brick-and-mortar retail, where a newcomer with a smaller showroom can still compete against established stores with more customer data.¹¹¹

Alternatively, the Competition Law and Data Report suggests past examples of successful entrants like Google or Facebook do not necessarily reflect current entry conditions, as market dynamics may have evolved since their emergence.¹¹² Even in 2016, the Report established that it must be examined to what extent the importance of data in developing new services is higher today than a few years ago.¹¹³ Furthermore, there are opposing views that digital markets are qualitatively different because the scale, precision, and speed of data collection online far exceed anything in traditional brick-and-mortar.¹¹⁴ In practice, a firm may be unable to acquire the kind of data needed to build a successful online platform without already operating in that market, creating a ‘chicken-and-egg’ dilemma that could render access to consumer data indispensable.¹¹⁵

On the efficiency side, the same characteristics of data-driven platforms generate significant consumer and producer benefits.¹¹⁶ For consumers, welfare is enhanced by new forms of connectivity, access to marketplaces, and the low-cost distribution of cultural content.¹¹⁷ Social media platforms, such as LinkedIn, enable individuals to maintain professional networks globally at no cost. For firms, efficiencies arise from large-scale data collection, sharing, and integration into supply chains.¹¹⁸ For example, Zara uses real-time customer purchase and browsing data to adjust production and inventory, reducing waste and improving responsiveness.¹¹⁹

¹¹⁰ *ibid* p. 306.

¹¹¹ *ibid* p. 298.

¹¹² Competition Law and Data Report (n 41), p. 30.

¹¹³ *ibid*.

¹¹⁴ Graef (n 75), p. 475; Case (n 4), pp. 220-221.

¹¹⁵ Jones, Sufrin and Dunne (n 7), p. 1226.

¹¹⁶ Commission Digital Report (n 62), p. 35.

¹¹⁷ *ibid*.

¹¹⁸ *ibid*.

¹¹⁹ Stephanie Nikolopoulos and Melissa Epifano, ‘H&M, Zara, Fast Fashion Turn to Artificial Intelligence to Transform the Supply Chain’ (*Thomas*, 25 October 2023) <<https://www.thomasnet.com/insights/zara-h-m-fast-fashion-ai-supply-chain/>> accessed 17 July 2025.

Innovation in digital markets further distinguishes them from other sectors. As the Commission Digital Report highlights, digital innovation is continuous rather than discrete, less structured, often developed and tested simultaneously, and relies less on formal IP protections.¹²⁰ Competitive advantage often stems from being first to market and building a strong user base, rather than from patents or copyrights.¹²¹ Therefore, this dynamic nature creates prominent global market power for digital platforms¹²² and unique challenges for competition policy, particularly about their potential to create barriers to entry for other competitors.¹²³

Moreover, innovation can act both as a sword and as a shield for competition.¹²⁴ On the one hand, it can drive healthy competition on the merits by fostering vigorous rivalry between companies. On the other hand, dominant firms may use innovation strategically to safeguard their positions, limit rivals' opportunities, and reduce consumer choice.¹²⁵ The CJEU in *Google Shopping* confirmed this duality, finding that dominance stemming from superior innovation and quality is not prohibited under Article 102 TFEU,¹²⁶ but conduct becomes abusive where it restricts competition to the detriment of consumers by suppressing product development or innovation.¹²⁷

This dual role makes the assessment particularly complex, as competition authorities must weigh efficiency gains generated by third-party entry and innovation against those derived from economies of scale and scope enjoyed by incumbents.¹²⁸ The mere existence of a “data-opoly” is not inherently anti-competitive, as such an undertaking might lack the incentive or ability to abuse its

¹²⁰ Commission Digital Report (n 62), p. 35.

¹²¹ *ibid.*

¹²² Jones, Sufrin and Dunne (n 7), p. 70.

¹²³ David S Evans, 'The Antitrust Economics of Multi-Sided Platform Markets' (2003) 20 *Yale Journal on Regulation* 325, pp. 362-66; Bill Batchelor and Caroline Janssens, 'Big Data: Understanding and Analysing Its Competitive Effects' (2020) 4 *Eur Competition & Reg L Rev* XIII, pp. XV-XVII; Hutchinson (n 3), pp. 455-56.

¹²⁴ Juliane Kokott and Mariya Serafimova, 'Balancing Innovation and Competition in Dynamic Industries' (2025) 3 *WUW1470785*, p. 124 <<https://research.owlit.de/document/b05c2a62-7129-3b2d-98c8-99d178ddf17d>> accessed 26 June 2025.

¹²⁵ *ibid.*

¹²⁶ C-48/22 P *Google Shopping* (n 34), para. 164.

¹²⁷ *ibid.* para. 167.

¹²⁸ Krämer and Schnurr (n 85), p. 268.

position.¹²⁹ Nonetheless, it is important to recognise the potential risks they pose in the absence of vigilant competition enforcement.¹³⁰

Finally, where network effects or switching costs create lock-in, and incumbents have maintained stable dominance over time, intervention under Article 102 TFEU may be reasonable through the imposition of a duty to deal. Although intervention is ultimately a policy choice, it can serve to reopen competition in concentrated digital markets, and given the specific features of the digital economy, such scenarios are likely to become increasingly common.¹³¹

3. THE ESSENTIAL FACILITIES DOCTRINE AND THE BOUNDARIES OF ARTICLE 102 TFEU

In essence, the EFD provides that a dominant undertaking controlling a resource or infrastructure that is ‘essential’ for operating in a related market may be obliged to grant access to that facility to its competitors. The doctrine serves as an exception to the general principle of freedom of contract, aimed at preventing a dominant firm from using its control over an ‘upstream’ input to monopolise a ‘downstream’ market.¹³² For a facility to be deemed ‘essential’ under EU law, it must typically satisfy a cumulative test: the facility must be indispensable to the rival's business, the refusal must be likely to eliminate all competition in the downstream market, and the refusal must be incapable of objective justification.¹³³

This chapter aims to demonstrate through case law when Article 102 TFEU might oblige a dominant firm to grant access to an essential facility. In addressing sub-question (ii), it examines the judicial refinement of the refusal to supply doctrine and the EFD. While earlier judgments, such as *Bronner*, prioritised the indispensability criterion, more recent cases like *Android Auto* highlight a transition toward the principle of fair access. Building on this judicial evolution, the chapter begins to address sub-question (iv) by examining the way authorities and courts balance competition, innovation, and investment incentives.

¹²⁹ Maurice E Stucke, ‘Should We Be Concerned About Data-opolies?’ (2018) 2 *Georgetown Law Technology Review*, p. 280.

¹³⁰ *ibid.*

¹³¹ Inge Graef, ‘Rethinking the Essential Facilities Doctrine for the EU Digital Economy’ (2019) 53 *RJTUM* 33, pp. 55-56.

¹³² Jones, Sufrin and Dunne (n 7), p. 508.

¹³³ Whish and Bailey (n 21), p. 784.

3.1 FOUNDATIONS AND THE BRONNER FRAMEWORK

As a fundamental right, companies cannot be forced to do business, as they remain free to choose their trading partners and to dispose of their property, including IP.¹³⁴ Only in the public interest, deprivation of possessions may be permitted with fair and timely compensation.¹³⁵ As such, mere dominance does not amount to an infringement of EU competition law; liability arises only when a dominant undertaking abuses its position under Article 102 TFEU.¹³⁶

Due to interference with the fundamental rights and the concerns about the potential negative effects of such intervention, the courts have established strict conditions, commonly known as the EFD, to impose a duty to supply.¹³⁷ According to Hovenkamp, this mandatory access is akin to the hypothetical concept of “no-fault monopolisation”, where a firm would face liability simply for holding monopoly power, even without engaging in anticompetitive conduct.¹³⁸ Thus, it is needless to say that the concept is highly controversial. Expanding on this, this section of the thesis paper discusses outright refusals by a dominant undertaking to contract with third parties, whether by ceasing an existing supply or declining to supply a new customer.¹³⁹

The *Commercial Solvents*¹⁴⁰ introduces refusal to supply as an abuse that could infringe Article 102 TFEU.¹⁴¹ The Court found that Commercial Solvents, dominant in the market for the input aminobutanol, abused its position by cutting off supply to Zoja, a downstream competitor, to reserve the market for its own

¹³⁴ CFR, art. 16 and art. 17.

¹³⁵ *ibid* art. 17(1) and art. 52(1); Case C-7/97 *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co KG and Mediaprint Anzeigengesellschaft mbH & Co KG* [1998] ECLI:EU:C:1998:569 ECR I-07791, Opinion of AG Jacobs [1998] ECLI:EU:C:1998:264, para. 56.

¹³⁶ TFEU, art. 102.

¹³⁷ Ofcom, ‘Data, Digital Markets and Refusal to Supply’ (Economic discussion paper series No 6, 7 December 2022), p. 7, para. 1.11 <<https://www.ofcom.org.uk/internet-based-services/technology/data-digital-markets-and-refusal-to-supply>> accessed 6 July 2025.

¹³⁸ Erik Hovenkamp, ‘The Antitrust Duty to Deal in the Age of Big Tech’ (2022) 131 *The Yale Law Journal*, p. 1491.

¹³⁹ OECD, ‘Abuse of dominance in Digital Markets’ (n 9), p. 25; Jones, Sufrin and Dunne (n 7), p. 516.

¹⁴⁰ *Joined Cases 6 and 7-73 Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v Commission of the European Communities* [1974] ECLI:EU:C:1974:18 ECR 00223, para. 25.

¹⁴¹ Graef, ‘Rethinking the Essential Facilities Doctrine’ (n 131), pp. 41-42.

subsidiary.¹⁴² This establishes the principle that vertically integrated firms cannot use upstream dominance to foreclose downstream competitors.

However, CJEU's *Bronner*¹⁴³ is the benchmark and the usual starting point for EFD analysis.¹⁴⁴ Mediaprint, with a 46% share of the Austrian daily newspaper market, operated the country's only nationwide home-delivery scheme and refused to distribute Oscar Bronner's smaller newspaper, *Der Standard*.¹⁴⁵ The CJEU rejected Bronner's claim, noting that alternatives such as kiosks and postal delivery are viable, even if less advantageous.¹⁴⁶ Crucially, the Court stressed that Bronner has to show not only that its own entry is unprofitable, but also that it is economically unviable for any competitor to replicate Mediaprint's system on the same scale.¹⁴⁷ The Court established three cumulative conditions for abuse: (i) the refusal must eliminate all downstream competition from the requesting party, (ii) lack objective justification, and (iii) access must be indispensable for the person's business in the downstream market, meaning no actual or potential substitute exists.¹⁴⁸

According to Doherty, *Bronner* does not establish an essential facility; instead, it is a high bar to demonstrate the necessity of the requested product or service.¹⁴⁹ Dacar further argues that the *Bronner* criteria reflect the Court's strong preference for competition *for* the market over competition *in* the market, while adopting a restrictive approach that sets high thresholds for compulsory access.¹⁵⁰ The former involves rivalry aimed at displacing the incumbent through innovation that reshapes market structures, whereas the latter refers to concurrent rivalry within an existing market, typically based on price or output.¹⁵¹

Furthermore, *Magill*¹⁵² and *IMS Health*¹⁵³ are the blueprint cases that extend the EFD to IPRs. In *Magill*, broadcasters holding copyright over weekly

¹⁴² Jones, Sufrin and Dunne (n 7), pp. 508-509.

¹⁴³ *Oscar Bronner* (n 11).

¹⁴⁴ Dacar (n 37), p. 1490.

¹⁴⁵ *Oscar Bronner* (n 11), paras. 4-6.

¹⁴⁶ *ibid* para. 43.

¹⁴⁷ *ibid* paras. 44-46.

¹⁴⁸ *ibid* para. 41.

¹⁴⁹ Barry Doherty, 'Just what are essential facilities?' (2001) 38 *Common Market Law Review*, pp. 435-36.

¹⁵⁰ Dacar (n 37), p. 1491.

¹⁵¹ Graef, 'Rethinking the Essential Facilities Doctrine' (n 131), pp. 49-50.

¹⁵² *Magill* (n 25).

¹⁵³ *IMS Health* (n 25).

TV listings refused to license them to Magill, which intended to publish a comprehensive TV guide covering all channels.¹⁵⁴ Magill argued that the information is indispensable raw material to be able to publish, and there is no substitute.¹⁵⁵ The alleged essential facility was the copyrighted 1860 brick structure in *IMS Health*, an industry standard for presenting pharmaceutical sales data in Germany.¹⁵⁶ Competitors argued that they could not compete without access to the structure, as customers demand data in that format.¹⁵⁷ These cases illustrate that the doctrine can be applied to IPRs with an additional condition to *Bronner*. The refusal must prevent the emergence of a new product for which there is clear potential consumer demand.¹⁵⁸

On the one hand, *IMS Health* requires the elimination of all downstream competition, not just that of the access seeker; hence, it restricts *Bronner*.¹⁵⁹ On the other hand, even if it has never been marketed separately, when a potential or hypothetical upstream market is identified, the Court stressed that an input can be considered essential.¹⁶⁰ According to Venit, this implies it is sufficient to identify two stages of production, an upstream input and a downstream product, where the input is indispensable for operating in the downstream stage.¹⁶¹ Consequently, a fully developed upstream market is not required, which makes it easier to argue indispensability since there is no need to prove a structured upstream market. This broad reading could have made compulsory licensing automatic whenever access to an IPR is needed.¹⁶² To counterbalance this, he argues that the Court retained *Magill*'s new product condition. Thereby, refusal is abusive only if it prevents the emergence of a genuinely new product with real or potential consumer demand, not where a rival merely seeks to duplicate what already exists.¹⁶³

¹⁵⁴ Magill (n 25), paras. 6-10.

¹⁵⁵ *ibid* para. 53.

¹⁵⁶ *IMS Health* (n 25), paras. 3-6, 29.

¹⁵⁷ *ibid* para. 7.

¹⁵⁸ Magill (n 25), paras. 52-56; *IMS Health* (n 25), para. 52.

¹⁵⁹ *IMS Health* (n 25), para. 47; Jones, Sufrin and Dunne (n 131), p. 534.

¹⁶⁰ *IMS Health* (n 25), para. 44; Graef, 'Rethinking the Essential Facilities Doctrine' (n 131), p. 44; Giuseppe Colangelo, 'Antitrust Unchained: The EU's Case Against Self-Preferencing' (2023) 72 GRUR International, p. 542.

¹⁶¹ James S Venit, 'Article 82 EC: Exceptional Circumstances The IP/Antitrust Interface After *IMS Health*' in Claus-Dieter Ehlermann and Isabela Atanasiu (eds), *European Competition Law Annual 2005: The Interaction between Competition Law and Intellectual Property Law* (Hart Publishing, 2007) p. 625.

¹⁶² *ibid*.

¹⁶³ *ibid* pp. 625-26.

Microsoft marks a turning point by expanding the doctrine in the digital context.¹⁶⁴ Microsoft, with a 90% share of the PC operating system market, refused to disclose interoperability information needed for competitors to compete in the work group server market, which was the “de facto standard” for those systems.¹⁶⁵ The Commission¹⁶⁶ and the GC found Microsoft’s refusal abusive; while doing so, they assumed the information had IPR protection, and subjected it to the strictest legal test.¹⁶⁷ Nonetheless, established criteria were relaxed here in two key ways.¹⁶⁸

Firstly, the elimination of all competition turned into the elimination of all effective competition.¹⁶⁹ As Dacar notes, some competitors in the downstream market, such as Linux, required only limited interoperability with Windows, so not all competition would disappear.¹⁷⁰ However, the GC held that competitors could not compete on “an equal footing” with Microsoft’s servers unless they achieved full interoperability with Windows; otherwise, customers would always prefer Microsoft’s system.¹⁷¹ Therefore, they could not exert effective competitive pressure. Secondly, the GC decided that consumer harm under Article 102(b) TFEU is not limited to preventing new products but may also result from restricting production, markets, or technical development.¹⁷² In Colangelo’s understanding, the new product condition was substantially dismantled by this.¹⁷³

Taken together, these cases trace the evolution of the refusal to supply doctrine. In Bruc’s opinion, the boundaries of the concept remain fluid since the debate over its impact on competition, innovation, and investment is ongoing, and the inconsistency in the case law further fuels this.¹⁷⁴

¹⁶⁴ An important caveat here is that the refusal was not outright. Microsoft argued its existing disclosures sufficed; ergo, some interpret this as constructive refusal. Nevertheless, the Court applied the *Bronner* criteria to the case. Therefore, it is discussed here with the outright refusal cases. See further, Dunne (n 10), p. 96.

¹⁶⁵ Case T-201/04 *Microsoft Corp v Commission of the European Communities* [2007] ECLI:EU:T:2007:289 ECR II-03601, paras. 30-33, 392; Graef, ‘Rethinking the Essential Facilities Doctrine’ (n 131), p. 45.

¹⁶⁶ *Microsoft* (Case COMP/C-3/37.792) Commission Decision of 21 March 2004 C(2004)900 [2004].

¹⁶⁷ T-201/04 *Microsoft* (n 165), paras. 283-90. See also Whish and Bailey (n 21), p. 896.

¹⁶⁸ Dacar (n 37), p. 1493.

¹⁶⁹ T-201/04 *Microsoft* (n 165), para. 563.

¹⁷⁰ Dacar (n 37), p. 1494, n 38. See also Dunne (n 10), p. 81.

¹⁷¹ T-201/04 *Microsoft* (n 165), para. 421.

¹⁷² *ibid* paras. 647, 665.

¹⁷³ Colangelo, ‘Antitrust Unchained’ (n 160), p. 542.

¹⁷⁴ Bruc (n 19), p. 185.

Having examined outright refusals in this section, the following part analyses constructive refusals.

3.2 CASE LAW DEVELOPMENT BEYOND BRONNER

Traditionally, the refusal to deal concept has applied the *Bronner* indispensability test to both outright and constructive refusals.¹⁷⁵ The latter occurs when a dominant firm appears willing to supply but imposes unfair terms, delays, or degrades access so that the purchaser cannot compete effectively.¹⁷⁶

Such practices raise competition concerns comparable to those posed by outright refusals, particularly in terms of efficiency.¹⁷⁷ Nevertheless, the application of *Bronner's* indispensability to constructive refusals has been gradually circumscribed through case law.¹⁷⁸ The Guidance Paper reflects these changes in approach in its 2023 amendment.¹⁷⁹ Not only have constructive refusals been removed from the refusal to supply section (paragraph 79), but margin squeeze has also been moved into a category distinct from refusal to supply.¹⁸⁰

To begin with, the indispensability criterion has been abandoned in margin squeezes,¹⁸¹ which are a distinct category of constructive refusals.¹⁸² A demonstration of margin squeeze can be found in Figure 2.

¹⁷⁵ Damien Geradin, 'Refusal to supply and margin squeeze: A discussion of why the "*Telefonica* exceptions" are wrong' (2011) TILEC Discussion Paper No 2011-009, p. 2 <<https://ssrn.com/abstract=1762687>> accessed 27 May 2025; Jones, Sufrin and Dunne (n 7), p. 517.

¹⁷⁶ OECD, 'Abuse of dominance in Digital Markets' (n 9), pp. 25-26; Jones, Sufrin and Dunne (n 7), pp. 516-17.

¹⁷⁷ Dunne (n 10), p. 92.

¹⁷⁸ *ibid*; Colangelo, 'Antitrust Unchained' (n 160), pp. 542-43; Colangelo, 'The EU Essential Facilities Doctrine after Android Auto' (n 18), pp. 9-11; Quirijn Mohr and Pauline Kuipers, 'Bronner revis(it)ed? Recent Takeaways on application of the Bronner doctrine from the CJEU and the Dutch court' (*Bird & Bird*, 20 May 2025) <<https://competitionlawinsights.twobirds.com/post/102k7j5/bronner-revisited-recent-takeaways-on-application-of-the-bronner-doctrine-from>> accessed 3 June 2025.

¹⁷⁹ The Guidance Paper (n 26).

¹⁸⁰ Before the amendment margin squeeze was in para. 80, and in principle, subjected to the same indispensability criterion as outright refusals. Currently, margin squeeze moved to para. 90, which is a separate category of abuse.

¹⁸¹ Case C-280/08 P *Deutsche Telekom AG v European Commission* [2010] ECLI:EU:C:2010:603 ECR I-09555, para. 167; *TeliaSonera* (n 16), paras. 55-58; Case C-295/12 P *Telefónica SA and Telefónica de España SAU v European Commission* [2014] ECLI:EU:C:2014:2062, paras. 75, 96; Case C-42/21 P *Lietuvos geležinkeliai AB v European Commission* [2023] ECLI:EU:C:2023:12, para. 50.

¹⁸² *TeliaSonera* (n 16), para. 32; Geradin (n 175) p. 3; Pablo Ibáñez Colomo, 'Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping' (2019) 10 *Journal of European Competition Law & Practice*, p. 535; Dunne (n 10), p. 93.

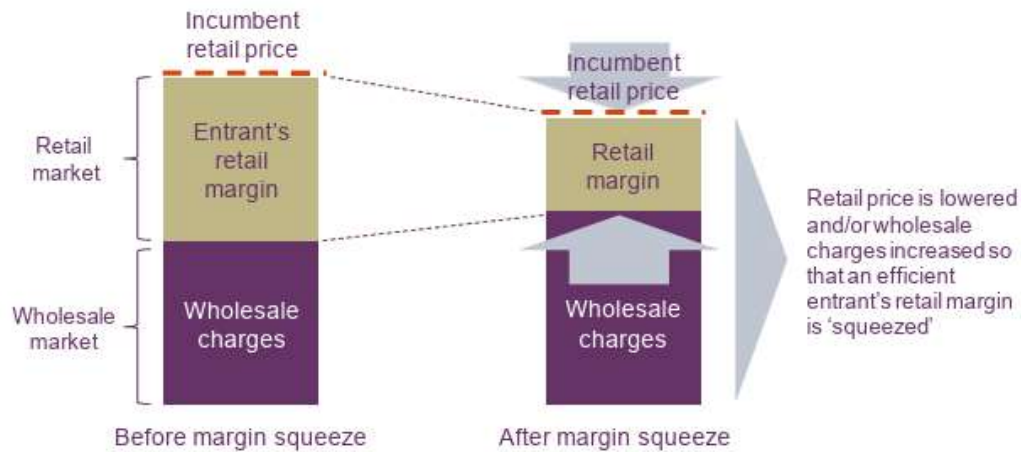


Figure 2: Margin squeeze mechanics.¹⁸³

A landmark example is the *Telefónica* decision, which concerned a margin squeeze in the Spanish broadband internet access scene.¹⁸⁴ At the time, the primary technology for high-speed internet relied on the existing copper telephone lines as a prerequisite for service.¹⁸⁵ In this case, the Commission examined the conduct of Telefónica, a vertically integrated operator that controlled the only nationwide fixed telephone network and held a dominant position in wholesale broadband access.¹⁸⁶ The Commission found that Telefónica had set wholesale prices so high relative to its retail prices that an equally efficient competitor could not operate profitably downstream, thereby engaging in a margin squeeze.¹⁸⁷

The significance of this decision lies in the Commission's departure from the high threshold of indispensability to establish a margin squeeze, which rested on two key justifications. First, since a Community Regulation already imposed a duty to supply on Telefónica, the Commission found that this regulatory balance made promoting downstream competition outweigh preserving Telefónica's investment incentives.¹⁸⁸ Second, Telefónica had made its original investments under monopoly protection, benefiting from special or exclusive rights that

¹⁸³ Oxera Agenda, 'No margin for error: the challenges of assessing margin squeeze in practice' (oxera, 15 November 2009), p. 1 <<https://www.oxera.com/insights/agenda/articles/no-margin-for-error-the-challenges-of-assessing-margin-squeeze-in-practice/>> accessed 5 August 2025.

¹⁸⁴ *Wanadoo España vs Telefónica* (Case COMP/38.784) Commission Decision of 4 July 2007 [2007], para. 1.

¹⁸⁵ *ibid.*

¹⁸⁶ *ibid* para. 6.

¹⁸⁷ *ibid* para. 7.

¹⁸⁸ *ibid* para. 303.

shielded it from competition.¹⁸⁹ Consequently, those investments would have occurred even in the presence of a duty to supply.¹⁹⁰ Thus, the Commission concluded that the circumstances differed fundamentally from *Bronner*.¹⁹¹

This reasoning has been criticised for taking a procedural shortcut rather than applying the *Bronner* conditions, which were likely met given the lack of serious alternatives to Telefónica.¹⁹² If applied broadly, this approach risks creating false positives by incorrectly assuming that access to a dominant firm's infrastructure is essential for downstream competition.¹⁹³

A further critique is that national regulatory law and EU competition law pursue different objectives, and *Bronner*'s indispensability test not only protects investment incentives but also balances consumer welfare with the fundamental property rights.¹⁹⁴ Additionally, competition law can impose far harsher penalties than sectoral regulation.¹⁹⁵ An example of this is *Telekomunikacja Polska*, the Commission imposed a €127 million fine under Article 102 TFEU for refusal to supply, far exceeding the €8 million regulatory fine.¹⁹⁶ Nevertheless, a similar approach to regulatory obligations has been applied in *Slovak Telekom*¹⁹⁷ and *Lithuanian Railways*.¹⁹⁸ The Guidance Paper also endorses this in paragraph 81.¹⁹⁹

Another important margin squeeze case is *TeliaSonera*, which, according to Dunne, renders the concept of constructive refusals illogical.²⁰⁰ TeliaSonera was a vertically integrated telephone network operator holding a dominant position in the Swedish upstream broadband market.²⁰¹ As such, the company sold network access to competing operators while simultaneously operating downstream in the retail market for internet access to consumers.²⁰² The Swedish

¹⁸⁹ *ibid* para. 304.

¹⁹⁰ *ibid*.

¹⁹¹ *ibid* paras. 302, 309.

¹⁹² *ibid* paras. 3, 45-50; Geradin (n 175) pp. 4-5; cf *Telefónica* (COMP/38.784) (n 184), para. 301.

¹⁹³ Geradin (n 175), p. 5.

¹⁹⁴ *ibid* pp. 8-9. See also Case T-271/03 *Deutsche Telekom AG v Commission of the European Communities* [2008] ECLI:EU:T:2008:101 ECR II-00477, para. 113.

¹⁹⁵ Dunne (n 10), pp. 87, 93. See also Geradin (n 175), p. 9.

¹⁹⁶ *Telekomunikacja Polska* (Case COMP/39.525) Commission Decision of 22 June 2011 [2011], paras. 917-21.

¹⁹⁷ C-165/19 P *Slovak Telekom* (n 16), para. 51; Case C-165/19 P *Slovak Telekom as v European Commission* [2021] ECLI:EU:C:2021:239, Opinion of AG ØE [2020] ECLI:EU:C:2020:678, para. 68.

¹⁹⁸ *Lithuanian Railways* (n 180) paras. 88-89.

¹⁹⁹ The Guidance Paper (n 26), para. 81.

²⁰⁰ Dunne (n 10), p. 93.

²⁰¹ C-52/09 *TeliaSonera* (n 16), paras. 3-4.

²⁰² *ibid* paras. 5-7.

Competition Authority alleged that *TeliaSonera* squeezed the margin between its wholesale charges and retail prices, creating a gap so narrow that even efficient competitors could not remain profitable.²⁰³

Unlike previous cases, *TeliaSonera* was not subject to a regulatory obligation to supply wholesale access to competitors.²⁰⁴ Furthermore, there was no indication that such access was "indispensable" for downstream competition in the *Bronner* sense.²⁰⁵ Given these diverging facts, the Stockholm District Court sought a preliminary ruling questioning the appropriate assessment of alleged margin squeezes.²⁰⁶

The CJEU established that disadvantageous supply conditions can constitute an independent abuse and that the strict refusal-to-supply criteria do not automatically apply to such conduct.²⁰⁷ Consequently, the Court clarified that margin squeezing is an independent form of abuse, distinct from a refusal to supply.²⁰⁸ By doing so, the Court removed the indispensability from constructive refusals in the form of a margin squeeze.

Advocate General (The AG) Mazák's position was different from the Court's. According to him, a margin squeeze should only be abusive where the input is indispensable or subject to a regulatory duty to supply.²⁰⁹ Removing the indispensability test risks creating a rule that punishes dominant firms simply for not ensuring their rivals' profitability. Hence, it reduces incentives to invest, discourages voluntary dealings with competitors, and pressures firms to raise retail prices artificially, ultimately harming consumers.²¹⁰ Moreover, public funding or exclusive rights cannot alone justify stricter standards, since post-privatisation infrastructure is often mixed and costly to maintain, making case-by-case analysis essential.²¹¹

²⁰³ *ibid* para. 8.

²⁰⁴ *cf* *Telefónica* (COMP/38.784) (n 184), para. 303; C-280/08 P *Deutsche Telekom* (n 181), para. 167.

²⁰⁵ Dunne (n 10), p. 94.

²⁰⁶ C-52/09 *TeliaSonera* (n 16), para. 12.

²⁰⁷ *ibid* paras. 55-56.

²⁰⁸ *ibid* paras. 57-59.

²⁰⁹ Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECLI:EU:C:2011:83, Opinion of AG Mazák [2010] ECLI:EU:C:2010:483, para. 16.

²¹⁰ *ibid* para. 21.

²¹¹ *ibid* paras. 27-28.

Lastly, as Ibáñez-Colomo named it, *Slovak Telekom* sits in a “grey area”.²¹² The Commission found that, besides the margin squeeze,²¹³ the conduct excluded rivals by imposing unfair trading conditions,²¹⁴ withholding essential network information,²¹⁵ and narrowing regulatory obligations,²¹⁶ thereby constituting refusal to deal. According to him, based on the previous case law, the indispensability test should have been applied to refusals to deal, but not to margin squeeze.²¹⁷ Instead, the Commission assessed both under the same conditions.²¹⁸

Slovak Telekom argued that non-price refusals also require the *Bronner* test, as less restrictive conduct should not face a lower standard than outright refusal.²¹⁹ However, following *TeliaSonera*, the Commission,²²⁰ the GC,²²¹ and later the CJEU²²² held that *Bronner* does not apply where access is already provided on unfair terms or where a regulatory duty to supply exists. The CJEU reasoned that disadvantageous conditions are less intrusive to property rights than forcing a contract, so indispensability is only required when the input is fully reserved by the dominant firm.²²³

3.3 RETHINKING INDISPENSABILITY IN THE DIGITAL CONTEXT

While the previous sections established the traditional boundaries of the EFD, the following analysis considers how recent digital cases have begun to rethink these limits.

3.3.1 Impact of Google Shopping

In *Google Shopping*, the Commission found that Google abused its dominance by favouring its own shopping service in search results, displaying it prominently in

²¹² Ibáñez Colomo, ‘Indispensability and Abuse of Dominance’ (n 182), p. 540.

²¹³ *Slovak Telekom* (Case AT.39523) Commission Decision of 15 October 2014 C(2014)7465 [2014], paras. 822-1045.

²¹⁴ *ibid* paras. 535-651.

²¹⁵ *ibid* paras. 431-534.

²¹⁶ *ibid* paras. 655-819.

²¹⁷ Ibáñez Colomo, ‘Indispensability and Abuse of Dominance’ (n 182), p. 540.

²¹⁸ *Slovak Telekom* (AT.39523) (n 213), paras. 364-365.

²¹⁹ Katarzyna Czapracka, ‘The Essential Facilities Doctrine and the *Bronner* Judgment Clarified: Case C-165/19 P *Slovak Telekom v Commission*’ (2022) 13 *Journal of European Competition Law & Practice*, pp. 278-79.

²²⁰ *Slovak Telekom* (AT.39523) (n 213), paras. 363, 370.

²²¹ Case T-851/14 *Slovak Telekom as v European Commission* [2018] ECLI:EU:T:2018:929, paras. 123-127.

²²² C-165/19 P *Slovak Telekom* (n 16), paras. 46, 50, 59.

²²³ *ibid* paras. 48-49, 51.

rich format and exempting it from demotion algorithms, while subjecting competitors to generic listings and penalties.²²⁴ Furthermore, the Commission framed Google's behaviour as active conduct rather than a passive refusal to grant rival comparison services visibility in its search results.²²⁵

Rejecting Google's claim that the *Bronner* criteria should have been applied,²²⁶ the Commission argued that *Bronner* is irrelevant where ending the infringement does not require the transfer of assets or entering contracts with unwilling parties.²²⁷ Thus, the applicability of *Bronner* is determined by the nature of the remedy, rather than the characteristics of the alleged abuse.²²⁸

This approach remains controversial. Firstly, *Bronner's* indispensability²²⁹ is part of defining abuse under Article 102 TFEU, not remedies, and since *Commercial Solvents*, EU law has separated findings of abuse from remedial choices.²³⁰ Secondly, although the imposed remedy on Google was 'implementation of an equal treatment',²³¹ in practice, Google had to redesign its algorithms and search display, introducing an auction mechanism and altering result formats, illustrating that compliance involved proactive, complex, and ongoing obligations.²³²

The Commission relied on *Van den Bergh Foods* for its argument, and this is leading to a broader debate about independence and the nature of the remedies.²³³ Some interpret this judgment in the same vein as the Commission.²³⁴ In contrast, this is criticised by pointing out that *Van den Bergh Foods* simply shows that to establish an abuse, a refusal to supply a test is irrelevant in an exclusive dealing case.²³⁵

²²⁴ *Google Shopping* (AT.39740) (n 34), paras. 341-344, 379-381.

²²⁵ *ibid* para. 650.

²²⁶ *ibid* para. 645.

²²⁷ *ibid* para. 65.

²²⁸ Dunne (n 10), p. 109.

²²⁹ *Oscar Bronner* (n 11), para. 41.

²³⁰ Dunne (n 10), pp. 109-110.

²³¹ *Google Shopping* (AT.39740) (n 34), para. 671.

²³² Ibáñez Colomo, 'Indispensability and Abuse of Dominance' (n 182), p. 544; Pablo Ibáñez Colomo, 'Self-Preferencing: Yet Another Epithet in Need of Limiting Principles' (2020) 43 *World Competition Law and Economics Review* 417, p. 438; Dunne (n 10), p. 111.

²³³ *Google Shopping* (AT.39740) (n 34), para. 651. The Commission cited, Case T-65/98 *Van den Bergh Foods Ltd v Commission of the European Communities* [2003] ECLI:EU:T:2003:281 ECR II-04653, para. 161; Case C-552/03 P *Unilever Bestfoods (Ireland) Ltd v Commission of the European Communities* [2006] ECLI:EU:C:2006:607 ECR I-09091, paras. 113, 137.

²³⁴ Ibáñez Colomo, 'Self-Preferencing' (n 232) pp. 438-39; Colangelo, 'The EU Essential Facilities Doctrine after Android Auto' (n 18), p. 9.

²³⁵ Dunne (n 10), p. 110.

Moreover, Graef argues that *Google Shopping* could be viewed as a refusal to deal, since demoting rivals resembled a constructive refusal to supply, similar to a margin squeeze where access is degraded rather than denied.²³⁶ The remedy also mirrored what the EFD would have required, but by framing the case as leveraging,²³⁷ the Commission sidestepped *Bronner*'s stricter test. According to her, since competition law protects the process of effective competition, not equal treatment among all firms, clear limiting principles are needed.²³⁸

On appeal, the GC rejected the Commission's remedy-based approach, clarifying that *Bronner* defines when an abuse exists and that there is "no automatic link" between the legal classification of abuse and corrective measures.²³⁹ While not fully embracing *Bronner*, the GC found that Google's search engine had "characteristics akin to an essential facility", with entry barriers from high investment, scale, and network effects, leaving rivals with no viable alternatives and creating a quasi-monopoly.²⁴⁰ However, the Court stressed that Google's search engine differs from traditional essential facilities because its value lies in being open to third-party results.²⁴¹ Ultimately, the Court held that Google's conduct was an active behaviour of favouring its own services, rather than a passive refusal to deal with a competitor, and confined *Bronner*'s criteria to outright refusals to supply.²⁴²

Finally, the CJEU confirmed that *Bronner* applies only to passive refusals where a dominant firm reserves infrastructure for its own use.²⁴³ Although indispensability may still matter in assessing effects, in *Google Shopping*, the abuse lay in discriminatory access, not outright refusal, so *Bronner*'s criteria did not apply.²⁴⁴ The Court's relaxation of *Bronner* in *Google Shopping* has been criticised for blurring the line between discriminatory access and refusal to supply,

²³⁶ Graef, 'Rethinking the Essential Facilities Doctrine' (n 131), p. 59.

²³⁷ *Google Shopping* (AT.39740) (n 34), paras. 334, 649.

²³⁸ *ibid* p. 60.

²³⁹ T-612/17 *Google Shopping* (n 34), para. 244. See also Jones, Sufirin and Dunne (n 7), pp. 550-51.

²⁴⁰ T-612/17 *Google Shopping* (n 34), paras. 224-226, 230.

²⁴¹ *ibid* paras. 177-178.

²⁴² *ibid* paras. 240, 247. See also Richard Bunworth, 'In the Market for a New Form of Abuse? Google Shopping and the law on Self-Preferencing in the EU' (2022) 21 *Hibernian LJ* 121, pp. 125-126, 131-132.

²⁴³ C-48/22 P *Google Shopping* (n 34), paras. 89, 117-118.

²⁴⁴ *ibid* para. 111.

while neglecting *Bronner*'s core rationale of protecting innovation incentives and dynamic competition.²⁴⁵

3.3.2 Impact of Android Auto

The case concerned Enel's JuicePass app, designed to let drivers locate, book, and manage electric vehicle charging stations and then transfer the search to Google Maps for navigation. Enel sought to make JuicePass compatible with Android Auto, Google's in-car platform that enables apps to be used via a vehicle's infotainment system.²⁴⁶ However, Google refused Enel's request to develop a template for such apps, citing security concerns, resource allocation, and the fact that only media and messaging apps were interoperable with Android Auto.²⁴⁷

According to the AGCM, Android Auto is a unique competitive space where apps compete for visibility against Google's own services. It was further classified as an essential facility since, for app developers targeting drivers, no equally safe or convenient alternatives existed.²⁴⁸ Although JuicePass was available on smartphones via Google Play and the App Store, this was not a substitute for integration into a car's dashboard, which is both safer and more practical. Android Auto was therefore deemed indispensable.²⁴⁹

Google acted both as a platform owner and competitor through Google Maps, creating a conflict of interest. By blocking JuicePass, it unfairly favoured Google Maps, which offered overlapping charging functions.²⁵⁰ To ensure a "level playing field", the AGCM required Google to design and maintain a standardised template to allow third-party recharge apps to interoperate with Android Auto.²⁵¹

²⁴⁵ Ken Daly and others, 'Google Shopping: EU Court Judgment Signals Stricter Enforcement of Abuses of Dominance' (*Sidley*, 2 September 2024) <<https://www.sidley.com/en/insights/newsupdates/2024/09/google-shopping-eu-court-judgment-signals-stricter-enforcement-of-abuses-of-dominance>> accessed 30 July 2025; Christian Ahlborn, Bethan Lukey and María Micolau Martí, 'ECJ's Google Shopping Judgment: The End of a Long Saga' (*Covington Competition*, 24 September 2024) <<https://www.covcompetition.com/2024/09/ecjs-google-shopping-judgment-the-end-of-a-long-saga/>> accessed 30 July 2025.

²⁴⁶ Jens Peter Schmidt and others, 'Easier access to (non-)essential digital platforms and other facilities under EU antitrust rules?' (*NOERR*, 26 March 2025) <https://www.noerr.com/en/insights/easier-access-to-non-essential-digital-platforms-and-other-facilities-under-eu-antitrust-rules> accessed 12 May 2025.

²⁴⁷ *ibid.*

²⁴⁸ Colangelo 'The EU Essential Facilities Doctrine after Android Auto' (n 18), p. 12.

²⁴⁹ *ibid.*

²⁵⁰ *ibid.*

²⁵¹ *ibid.*

Subsequently, AGCM ruled that Google's refusal constituted an abuse of dominance,²⁵² and on further appeal, the Italian Council of State referred questions to the CJEU for clarification on the applicability of the *Bronner* essential facilities test in digital markets.²⁵³

In AG Medina's opinion, Android Auto is a platform designed to host and encourage third-party apps within a broader digital ecosystem.²⁵⁴ Because it is created to be open to external developers, granting access would not discourage Google's investment, as in *Bronner*.²⁵⁵ Thus, the *Bronner* criteria of indispensability and elimination of competition need not apply, and a refusal to grant access may still amount to abuse under Article 102 TFEU.²⁵⁶

The CJEU adopted her approach and clarified that *Bronner* applies only when a dominant firm withholds infrastructure built solely for its own use. Since Android Auto was designed to be open to third-party apps, it was not created exclusively for Google's needs, and therefore, the *Bronner* indispensability test did not apply to Google's refusal to make JuicePass interoperable.²⁵⁷ The Court ruled that a refusal to ensure interoperability may still constitute an abuse even if the platform is not indispensable for the app's operation, so long as access makes the app more attractive to consumers.²⁵⁸

According to Colangelo, instead of redefining what indispensability means under *Bronner*, the Court focused only on whether the *Bronner* test was relevant to the case at hand.²⁵⁹ Another key criticism from lawyers²⁶⁰ is that the CJEU required proof that Google was at least a potential competitor to Enel for refusal

²⁵² Autorità Garante della Concorrenza e del Mercato, Decision No 29645, *Google/Enel X* (27 April 2021).

²⁵³ Daniel Dohrn and Simon Spangler, 'ECJ affirms access claims to digital platforms: Refinement of the essential facilities doctrine' (*Oppenhoff*, 24 April 2025) <<https://www.oppenhoff.eu/en/news/detail/ecj-affirms-access-claims-to-digital-platforms-refinement-of-the-essential-facilities-doctrine/>> accessed 12 May 2025.

²⁵⁴ Case C-233/23 *Alphabet Inc and Others v Autorità Garante della Concorrenza e del Mercato (AGCM)*, Opinion of AG Medina [2024] ECLI:EU:C:2024:694, para. 37.

²⁵⁵ *ibid* paras. 38-39.

²⁵⁶ *ibid* para. 45.

²⁵⁷ *Android Auto* (n 17), paras. 48-49.

²⁵⁸ *ibid* para. 52.

²⁵⁹ *Android Auto* (n 17), para. 40; Colangelo 'The EU Essential Facilities Doctrine after Android Auto' (n 18), p. 13.

²⁶⁰ Denis Fosselard, Jessica Bracker and Fiona Garside, 'Does the Essential Facilities Doctrine stand after the Android Auto ruling?' (*Ashurst*, 17 April 2025) <<https://www.ashurst.com/en/insights/does-the-essential-facilities-doctrine-stand-after-the-android-auto-ruling/>> accessed 1 June 2025.

to interoperate to be abusive, yet it did not assess this itself and simply relied on the AGCM's view that Google Maps competed with JuicePass.²⁶¹

Indispensability still applies where infrastructure was built for a dominant firm's exclusive use. For instance, a private company's proprietary dataset, developed for its own business purposes, would require *Bronner* to force access.²⁶² However, Colangelo contends that by confining *Bronner* to very limited cases, *Android Auto* signals the effective end of the EFD in its traditional form.²⁶³

3.4 THE GOALS OF COMPETITION LAW: FROM INDISPENSABILITY TO FAIR ACCESS

According to Dunne, indispensability is the 'lynchpin' of refusal to deal, which sets the threshold that turns competition law into duties for dominant firms and effectively serves as a quasi-safe harbour.²⁶⁴ Therefore, the criterion strictly justifies limiting freedom of contract and property rights²⁶⁵ by evaluating both substitutability and replicability.²⁶⁶

While easy access may increase competition in the short term, it can weaken investment incentives for both the dominant firm and its rivals, ultimately harming long-term competition, dynamic efficiency, and overall welfare.²⁶⁷ For example, consider a dominant platform that invests heavily in developing a proprietary satellite mapping system. If required to share this data with rivals at low cost, new competitors may enter the market quickly, increasing choice and lowering prices in the short term. However, rivals may remain dependent on the platform's data rather than developing alternative technologies. Simultaneously, the platform, unable to reap the rewards from future investments, may scale back innovation. Thus, short-term gains in price and choice may come at the expense of long-term innovation and dynamic efficiency.

Underpinning this analysis is the concept of welfare, which in economic terms consists of both producer and consumer welfare, together forming total welfare.²⁶⁸ Depending on the weight given to each side, a total welfare approach

²⁶¹ *Android Auto* (n 17), paras. 17, 51.

²⁶² Fosselard, Bracker and Garside (n 260).

²⁶³ Colangelo 'The EU Essential Facilities Doctrine after *Android Auto*' (n 18), p. 14.

²⁶⁴ Dunne (n 10), p. 78.

²⁶⁵ Case C-7/97 *Oscar Bronner* Opinion of AG Jacobs (n 134), paras. 64-65.

²⁶⁶ *Magill* (n 25), para. 52; *Oscar Bronner* (n 11), paras. 41-44.

²⁶⁷ Case C-7/97 *Oscar Bronner* Opinion of AG Jacobs (n 134), para. 57; C-165/19 P *Slovak Telekom* (n 16), para. 47; Jones, Sufrin and Dunne (n 7), p. 508; Whish and Bailey (n 21), pp. 782-83.

²⁶⁸ Whish and Bailey (n 21), p. 19.

may produce different outcomes.²⁶⁹ European competition law pursues broad objectives, such as maintaining an effective competitive structure²⁷⁰ and fairness.²⁷¹ The overarching goal, however, is to prevent distortions of competition, with an emphasis on protecting consumer interests²⁷² rather than individual competitors.²⁷³

By themselves, these goals are vague, and it is the role of competition authorities to determine how competition law should be applied, with the courts ultimately assessing whether those decisions comply with the law.²⁷⁴ As Whish and Bailey point out, both authorities and courts inevitably adapt their interpretation of competition law over time, as it evolves in response to shifts in economic theory, practical experience, and political priorities.²⁷⁵ An example of this presented itself in 2024 in a speech by Margrethe Vestager at the Global Competition Law Centre.²⁷⁶ She states that the consumer welfare standard under Article 102 TFEU goes beyond price, encompassing quality, diversity, choice, and innovation, protecting all customers and the competitive process, with enforcement adapting to digitalisation and new theories of harm.²⁷⁷

Further evidence stems from the Guidance Paper.²⁷⁸ The amendments to consumer harm in paragraph 19 broaden the focus from price effects to the adverse impact of a dominant firm's conduct on the overall competitive structure, innovation, variety, quality, and choice.²⁷⁹ Additionally, according to the

²⁶⁹ *ibid.*

²⁷⁰ Case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECLI:EU:C:2009:343 ECR I-04529, paras. 31, 36, 38-39.

²⁷¹ Ezrachi (n 83), pp. 2-3.

²⁷² The Guidance Paper (n 26), paras. 5-7.

²⁷³ Ezrachi (n 83), p. 4; Colangelo 'The EU Essential Facilities Doctrine after Android Auto' (n 18), pp. 3-4.

²⁷⁴ Whish and Bailey (n 21), p. 18.

²⁷⁵ *ibid.*

²⁷⁶ European Commission, 'Speech by EVP Margrethe Vestager at the Global Competition Law Centre, College of Europe - Article 102: The beating heart of antitrust in the EU' (1 March 2024) <https://ec.europa.eu/commission/presscorner/detail/en/speech_24_1247> accessed 17 May 2025.

²⁷⁷ *ibid.*

²⁷⁸ The Guidance Paper (n 26).

²⁷⁹ *ibid.* para. 19 prior to the amendment: [E]ffective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers.

Guidance Paper, a refusal to deal becomes an enforcement priority where it causes consumer harm, such as preventing rivals from offering improved or innovative products or stifling their ability to bring such goods to market.²⁸⁰

In August 2024, the Commission published the first Guidelines on exclusionary abuses.²⁸¹ The draft distinguishes between ‘refusal to supply’²⁸² and ‘access restrictions’²⁸³. The former applies where a dominant undertaking develops an input mainly for its own use and denies access; such conduct remains subject to the *Bronner* criteria.²⁸⁴ In contrast, ‘access restrictions’ do not require indispensability to be found abusive.²⁸⁵ Here, the dominant firm is already supplying or has decided to open access. The draft gives examples from the findings of the previous case law, such as failing to comply with a regulatory obligation or imposing unfair access conditions as a constructive refusal to supply.²⁸⁶

In Kokott and Serafimova’s understanding, the *Bronner* criteria are an outdated benchmark for dynamic industries.²⁸⁷ From their point, in digital markets, since platforms are already open to third parties, the issue is less about outright refusal to grant access as in *Bronner*; and the real question concerns the terms of access. Therefore, enforcement is about degrading interoperability, imposing discriminatory terms, or engaging in self-preferencing, forms of constructive refusal where the *Bronner* indispensability test is bypassed.²⁸⁸

para. 19 after the amendment: [T]he conduct of the dominant undertaking adversely impacts an effective competitive structure thus allowing the dominant undertaking to negatively influence, to its own advantage and to the detriment of consumers, the various parameters of competition, such as price, production, innovation, variety or quality of goods or services.

²⁸⁰ *ibid* paras. 80, 85-86.

²⁸¹ The draft Guidelines can be accessed here; European Commission, ‘Application of Article 102 TFEU’ (*European Commission*) <https://competition-policy.ec.europa.eu/antitrust-and-cartels/legislation/application-article-102-tfeu_en#ref-1-the-102-package-of-march-2023> accessed 29 May 2025. See also Robbert Snelders and others, ‘Commission Revamps its Article 102 Guidance and Will Adopt new Guidelines in 2025’ (*Cleary Antitrust Watch*, 30 March 2023) <<https://www.clearyantitrustwatch.com/2023/03/commission-revamps-its-article-102-guidance-and-will-adopt-new-guidelines-in-2025/>> accessed 15 June 2025.

²⁸² The draft Guidelines (n 281) Section 4.2.3.

²⁸³ *ibid* Section 4.3.4.

²⁸⁴ *ibid* paras. 99-101.

²⁸⁵ *ibid* para. 165.

²⁸⁶ *ibid* para. 166. See also William Turtle, James Wells and Alice Steele, ‘Reflections on the draft Article 102 guidelines: Bringing clarity or creating room to manoeuvre?’ (*Slaughter and May*, 7 October 2024) <<https://www.slaughterandmay.com/insights/new-insights/reflections-on-the-draft-article-102-guidelines-bringing-clarity-or-creating-room-to-manoeuvre/>> accessed 19 June 2025.

²⁸⁷ Kokott and Serafimova (n 124), p. 127.

²⁸⁸ *ibid* p. 128.

The underlying logic of differentiating two situations is that a company's contractual freedom and its incentive to invest are not implicated to the same degree as in cases of outright refusal to supply, and the more essential the input is for the requesting party, the greater the risk that access restrictions will produce exclusionary effects.²⁸⁹ However, others argue that, in terms of exclusionary effects, there is little difference between an outright refusal to supply and making access effectively impossible through excessive pricing, delays, or degraded interoperability.²⁹⁰

Mandrescu points out that courts must distinguish between the access itself, which is presumed to be open on platforms designed for third parties, and the conditions under which that access is granted.²⁹¹ These conditions, including fairness, timing, and security, remain subject to competition law.²⁹² As such, not all platforms should automatically be treated as open, as this would strip *Bronner* of meaning and impose constant access obligations that could harm innovation incentives.²⁹³ Instead, courts should assess openness case-by-case, based on a platform's business model and purpose.

For instance, the Android Auto ecosystem was designed as an open platform for specific categories of car-related apps, such as navigation, music streaming, and charging services. Since openness formed part of the platform's original design, Google's refusal to host apps such as Waze or Spotify would be treated as an 'access restriction' rather than a total refusal to supply. Therefore, *Bronner* does not apply to refusals in such cases. In other words, rivals are only required to demonstrate that the access terms are unfair, not to prove that access is indispensable.

In contrast, for apps entirely unrelated to the driving experience, such as video streaming, online retail, or hotel booking, openness was never part of the business model. If Netflix, Zalando, or Booking.com demand access to the car dashboard, the stricter *Bronner* criteria should apply, preserving Google's freedom

²⁸⁹ The draft Guidelines (n 281), para. 165.

²⁹⁰ Colangelo 'The EU Essential Facilities Doctrine after Android Auto' (n 18), p. 17.

²⁹¹ Daniel Mandrescu, 'The Essential Facility Doctrine and Google Android Auto Case C-233/23: the Good, the Bad and the Ugly' (*lexxion*, 8 January 2025) <<https://www.lexxion.eu/en/coreblogpost/the-essential-facility-doctrine-and-google-android-auto-case-c-233-23-the-good-the-bad-and-the-ugly/>> accessed 11 May 2025.

²⁹² *ibid.*

²⁹³ *ibid.*

to determine the scope of its platform and to invest in its development. For these categories, the platform remains “closed”. As platforms evolve, this openness test must also adapt over time.²⁹⁴

The shift from indispensability to fair access identified in this chapter provides the legal framework for the balancing act required by sub-question (iv). However, to fully understand how this balance functions in the digital economy, one must apply these principles to the unique technical constraints of data, which is the focus of Chapter 4.

4.CONDITIONS OF ESSENTIAL FACILITIES AND APPLICATION TO DATA

Building on the evolution of the EFD traced in the previous chapter, this chapter applies the relevant legal tests to refusal-to-supply scenarios involving data, with particular attention to the data-driven bottlenecks identified in Chapter 2. To address sub-question (iii), it examines how the indispensability criterion operates in data-related cases and assesses when, if at all, access to data may be considered essential under Article 102 TFEU.

Furthermore, this chapter completes the analysis of sub-question (iv) by evaluating how the emerging fair access standard operates in practice. In this context, it examines how specific justifications, such as privacy constraints under the GDPR, can operate as a counterweight to the duty to supply data.

4.1 WHEN AND WHY A DUTY TO SUPPLY MAY BE IMPOSED REGARDING DATA UNDER ARTICLE 102 TFEU?

Unlike infrastructures or IPRs, which have clearly defined functions and more standardised access conditions, data is heterogeneous and can serve a wide variety of purposes.²⁹⁵ Hence, whereas traditional assets are typically safeguarded by property rights, data lacks such protection and is instead governed by weaker forms of control or possession, with only limited scope for IP protection.²⁹⁶ This introduces additional factors into the balancing exercise and makes antitrust intervention in data cases less intrusive than in cases involving strong property rights, thereby potentially lowering the threshold for intervention.²⁹⁷

²⁹⁴ *ibid.*

²⁹⁵ Commission Digital Report (n 62), p. 100.

²⁹⁶ *ibid.* p. 99; Ofcom (n 137), p. 14, n 35.

²⁹⁷ *ibid.*

As discussed in Chapter 2, the characteristics of data and the digital economy have created a dichotomy among scholars as to whether data can constitute a bottleneck monopoly. On one side, it is argued that data cannot be monopolised because it is non-rivalrous, widely replicable, and in theory abundantly available.²⁹⁸ On the other side, scholars emphasise that in practice incumbents gain a decisive advantage by accumulating vast, high-quality, and timely datasets, reinforced by strong network effects, economies of scale, and feedback loops that generate ever more data.²⁹⁹ These dynamics can lead to market tipping, lock-in, and significant entry barriers; thus, they can justify intervention, as they may foreclose secondary markets and reduce competition in primary markets.³⁰⁰ In this context, the refusal to supply doctrine under Article 102 TFEU becomes highly relevant. However, applying its criteria to data presents several challenges, which will be discussed further.

4.2 INDISPENSABILITY OF DATA

As discussed in Chapter 3, the evolution of case law shows that assessing indispensability is a multi-faceted process. First, it is necessary to distinguish outright refusals from constructive refusals, as the applicable criteria differ. Second, the nature of the dominant undertaking's infrastructure also matters: is it a closed system or an open platform, such as Android Auto or Google's search engine? These contextual details are crucial for the analysis.

In the case of outright refusals, a dominant undertaking may exclusively collect and control a dataset for its own business use and refuse to share it with rivals. Under the *Bronner* standard, where the data is essential for the downstream activity, the requesting undertaking must demonstrate the absence of any actual or potential substitute.³⁰¹ This entails showing that any available alternatives, even if technically feasible, would be prohibitively costly or commercially unviable. It is insufficient that an alternative is merely less advantageous.³⁰² The threshold is particularly demanding, as it requires showing not only that replacing the data

²⁹⁸ For instance, Balto and Lane (n 71); Sokol and Comeford (n 72).

²⁹⁹ For example, Stucke and Grunes (n 76); Graef, 'Market Definition and Market Power in Data' (n 75); Stucke (n 129).

³⁰⁰ Ofcom (n 137), p. 14, n 35.

³⁰¹ *Oscar Bronner* (n 11), para. 41.

³⁰² *ibid* para. 43.

would be unprofitable for the access seeker but also that replication would be unfeasible for any competitor operating at the dominant undertaking's scale.³⁰³

An unsuccessful example is the *Cegedim* case.³⁰⁴ Cegedim, a dominant company in the French market for medical information databases, provided both the 'OneKey' database and its own customer relationship management (CRM) software.³⁰⁵ Cegedim refused to license OneKey to laboratories using a specific competing CRM called NetReps, produced by Euris, while continuing to license the database to laboratories using other rival software. The ADLC examined whether OneKey constituted an essential facility and concluded that access was not indispensable for Euris or other CRM providers.³⁰⁶ Although it was not possible to fully replicate an equivalent database given OneKey's recognised reference value and widespread use among laboratories, the ADLC found that the existence of alternatives was sufficient to establish that OneKey was not an essential facility.³⁰⁷ Nevertheless, the ADLC established an abuse of dominance on a different ground, discrimination, since the exclusion targeted only one rival, Euris.

Another focal point is that the wide availability and the non-rivalry of data often do not make them indispensable, as the Commission has decided in several merger cases.³⁰⁸ For instance, the Commission concluded in 2018 that the *Apple/Shazam* merger was unlikely to significantly hinder effective competition for rival digital music streaming providers through input foreclosure.³⁰⁹ By finding that Shazam's user data was not a key element for success in digital music streaming apps, and neither unique nor a key asset, noting that the most valuable data in the music industry comes from actual music consumption, which is primarily held by streaming providers themselves.³¹⁰ To reach this conclusion, the Commission evaluated Shazam's data set against the four V's of big data, which are variety, velocity, volume, and value.³¹¹

³⁰³ *ibid* paras. 44-46.

³⁰⁴ Autorité de la concurrence, Decision No 14-D-06, *Cegedim* (8 July 2014).

³⁰⁵ OECD, 'Abuse of dominance in Digital Markets' (n 9), pp. 27-28; Hutchinson (n 3), p. 458.

³⁰⁶ *ibid*.

³⁰⁷ *ibid*.

³⁰⁸ Data Sharing for Contestability Report (n 60), p. 36.

³⁰⁹ *Apple/Shazam* (Case M.8788) Commission Decision of 6 September 2018 C(2018)5748 [2018], para. 329. See also Data Sharing for Contestability Report (n 60), p. 40.

³¹⁰ *Apple/Shazam* (M.8788) (n 309), paras. 324-26.

³¹¹ *ibid* paras. 317-24.

Furthermore, the assessment of data as an essential facility depends both on the information it conveys, whether it is personal or non-personal, and on its source. Volunteered and observed data can be considered raw inputs, whereas inferred data represents the incumbent's value-adding 'secret sauce'.³¹² This 'sauce' refers to the analytical processing of raw data to extract value, reflecting the undertaking's core innovation efforts and competitive advantage. Hence, the indispensability of data varies widely by purpose and market.³¹³ Additionally, even if data has never been traded before, access may still be mandated, provided a potential upstream market can be identified, as confirmed in *IMS Health*.³¹⁴

Starting from volunteered data, since it is directly provided by users, in principle, they can supply the same information to competing services. Hence, it is replicable.³¹⁵ However, when large amounts of data have accumulated over time, or when the platform itself functions as a storage tool, replication becomes more difficult.³¹⁶ Additionally, it may be costly and impractical to repeat the process, such as moving years of calendar entries, medical records, or address books.³¹⁷ In an outright refusal case, this argument is not enough on its own; it should be demonstrated that the cost is high even for a dominant company on the same scale.

Observed data is often the most competitively significant type of data since rivals cannot just recollect it from users.³¹⁸ Hence, it is hard to replicate because it requires scale, time, and ongoing interaction.³¹⁹ For example, a rival social network cannot easily recreate years of browsing history or real-time click data without already having millions of users. This is why access requests often focus on observed data, making it the strongest candidate for indispensability.³²⁰

In contrast, inferred data generally falls outside the scope of access requests, as it reflects the company's own innovative processes and is generated through the analysis of other data rather than direct user interaction.³²¹ Such data

³¹² Sokol and Comeford (n 72), pp. 298-99.

³¹³ Commission Digital Report (n 62), pp. 100-101.

³¹⁴ *IMS Health* (n 25), para. 44.

³¹⁵ Data Sharing for Contestability Report (n 60), p. 16.

³¹⁶ *ibid.*

³¹⁷ Commission Digital Report (n 62), p. 101.

³¹⁸ Graef, 'Market Definition and Market Power in Data' (n 75), p. 475.

³¹⁹ Data Sharing for Contestability Report (n 60), p. 16.

³²⁰ Commission Digital Report (n 62), p. 101.

³²¹ *ibid.*; Data Sharing for Contestability Report (n 60), p. 17.

typically results from proprietary algorithms and machine learning (ML) systems that transform raw data into predictions, rankings, or behavioural profiles.³²² To illustrate, while a user's purchase history is a raw fact, a 'credit-risk score' is a synthetic insight produced by applying a proprietary algorithm to that history. Similarly, an 'interest profile' that predicts a user's likelihood of buying a car is not data the user provided but a sophisticated guess created by the platform's own technology. Several scholars have therefore stressed the importance of distinguishing inferred data from other types.³²³

When it comes to the type of information data carries, personal data may affect the indispensability. Article 20 GDPR provides data portability for individuals, which means data subjects may receive their personal data in a portable format and transfer it to another controller.³¹⁰ Personal data is essentially volunteered data, and since observed data is co-created by users and platforms, portability rights may also apply to it.³²⁴ Therefore, volunteered data is often obtainable directly from users, and Article 20 GDPR enables portability of volunteered and observed data, so access via a dominant firm is not indispensable, where these options are sufficient to serve the data subject.³²⁵ However, under Article 20(4) GDPR, data portability may be restricted where it would affect the rights of others, for example, in phone logs or shared photographs.³²⁶

Moreover, in AI and ML markets, data can become indispensable.³²⁷ Without sufficient training data, competitors cannot develop effective algorithms, regardless of the quality of their code or hardware.³²⁸ In certain situations, third-party alternatives, such as inferred data from analytics providers, might be available. However, when no viable substitute exists, access to the specific dataset can become indispensable.³²⁹

Lastly, data that has become an industry standard is more likely to be considered indispensable. This was evident in *Microsoft*, where interoperability information served as the *de facto* industry standard,³³⁰ and in *IMS Health*, where

³²² Competition Law and Data Report (n 41), p. 7; Commission Digital Report (n 62), p. 25.

³²³ Sokol and Comeford (n 72), pp. 298-99.

³²⁴ Commission Digital Report (n 62), p. 81; Data Sharing for Contestability Report (n 60), p. 16.

³²⁵ Commission Digital Report (n 62), p. 102.

³²⁶ GDPR, art. 20(4); Commission Digital Report (n 62), p. 81.

³²⁷ Bruc (n 19), pp. 200-201.

³²⁸ Commission Digital Report (n 62), pp. 102-104.

³²⁹ *ibid.*

³³⁰ T-201/04 *Microsoft* (n 165), paras. 32, 392.

the copyrighted 1860 brick structure had become standard in the industry.³³¹ In both cases, competitors could not compete effectively without access because they could not meet customer expectations.³³² On this point, one could say that the indispensability criterion closely overlaps with the requirement of eliminating effective competition.

4.3 ELIMINATION OF ALL EFFECTIVE COMPETITION

In the Guidance Paper, this criterion requires assessing the elimination of effective competition in the downstream market due to refusing to supply.³³³ Additionally, in *Microsoft*, the GC emphasised that the refusal “is liable, or is likely to, eliminate all effective competition on the market”.³³⁴ This means the focus lies on harm to competition as a whole, not on the disadvantage suffered by an individual competitor denied access.³³⁵ However, regarding data, the assessment of this criterion is very complex.

In *Magill*³³⁶ and *IMS Health*,³³⁷ the phrase “reserved to themselves the secondary market” indicates that the test applies when a dominant firm is already active downstream and refuses access to retain that market.³³⁸ However, data owners are often not yet active in downstream markets, since data collected for one purpose can later prove valuable for entirely different uses in other sectors.³³⁹ Therefore, in digital markets, a data holder may refuse to share data with a company that is not yet a competitor, either to preserve the option of entering the downstream market itself (offensive leverage) or to prevent the requester from disrupting its position (defensive leverage).³⁴⁰ Consequently, even without current downstream activity, refusal to share data can amount to anti-competitive exclusion.³⁴¹ In Graef’s understanding, preventing the creation of a new market by refusal can be even more harmful to innovation and consumer welfare than

³³¹ *IMS Health* (n 25), para. 29.

³³² *ibid* para. 12; T-201/04 *Microsoft* (n 165), para. 421.

³³³ The Guidance Paper (n 26), para. 80.

³³⁴ T-201/04 *Microsoft* (n 165), para. 563.

³³⁵ Ofcom (n 137), p. 18, para. 2.33.

³³⁶ *Magill* (n 25), para. 56.

³³⁷ *IMS Health* (n 25), para. 52.

³³⁸ Graef, ‘Rethinking the Essential Facilities Doctrine’ (n 131), pp. 66-67.

³³⁹ Data Sharing for Contestability Report (n 60), p. 36.

³⁴⁰ Graef, ‘Rethinking the Essential Facilities Doctrine’ (n 131), pp. 67-68; Data Sharing for Contestability Report (n 60), pp. 36-37; Colangelo, ‘Antitrust Unchained’ (n 160), p. 538.

³⁴¹ Data Sharing for Contestability Report (n 60), p. 37.

leveraging, especially in the digital economy, where complementary services depend on such access.³⁴²

Digital platforms have distinctive features, such as strong network effects, single-homing, and tipping, which may justify a different application of the criteria. In practice, even where small competitors exist, they may not significantly constrain a dominant platform, as seen in *Microsoft*.³⁴³ Likewise, the GC in *Google Shopping* noted that Google's search engine faced no effective competition despite the presence of rival search engines.³⁴⁴ This could justify a more flexible interpretation of the "elimination of competition on a second market" requirement, where imposing a duty to deal is needed to safeguard effective competition.³⁴⁵

4.4 EMERGENCE OF A NEW PRODUCT AND CONSUMER HARM

In case law, when the refusal concerns an IPR, it has to be shown that it prevents the emergence of a new product for which there is consumer demand.³⁴⁶ In certain cases, data may be protected by IPRs.³⁴⁷ Therefore, it should have been established whether the requested data benefits from such protection.

In the Guidance Paper, the Commission does not distinguish between IPRs and physical infrastructure, applying instead a general consumer harm criterion.³⁴⁸ This occurs where rivals are blocked from bringing innovative goods or services, particularly when the access seeker aims to create new products that meet consumer demand or advance technical progress rather than duplicate the dominant firm's offerings.³⁴⁹

According to the Data Sharing for Contestability Report, the Commission's broader consumer harm approach better suits the data economy, weighing the long-term consumer harm of refusing access against the potential downsides of mandating data sharing.³⁵⁰ Similar concerns arise when assessing the elimination of downstream competition. For instance, the requesting

³⁴² Graef, 'Rethinking the Essential Facilities Doctrine' (n 131), p. 68.

³⁴³ T-201/04 *Microsoft* (n 165). See also Chapter 3, Section 3.1 of this paper.

³⁴⁴ T-612/17 *Google Shopping* (n 34), paras. 226.

³⁴⁵ Ofcom (n 137), p. 8, n 17.

³⁴⁶ Bruc (n 19), p. 185. See also Chapter 3, Section 3.1 of this paper.

³⁴⁷ For a related discussion see Bruc (n 19), pp. 210-19; Dacar (n 37).

³⁴⁸ The Guidance Paper (n 26), para. 80.

³⁴⁹ *ibid* para. 86.

³⁵⁰ Data Sharing for Contestability Report (n 60), p. 37.

company's product is often unknown, and the data owner may not yet be active downstream.³⁵¹

Graef suggests that the new product test should not hinge on IP protection but rather on the presence of external market failures, such as network effects and switching costs.³⁵² Where these failures exist, incumbents can lock in consumers and exclude rivals. Hence, the new product requirement should be abandoned; even competitors offering similar products should gain access to ensure competition *in* the market.³⁵³ In contrast, if no such market failures exist, the new product requirement should remain strict to protect innovation incentives.³⁵⁴ Since competition *for* the market cannot be created through intervention, it is better preserved by limiting intervention and leaving room for new entrants to gain dominance.

4.5 OBJECTIVE JUSTIFICATIONS FOR REFUSING TO SUPPLY DATA

Even where the criteria for an essential facility are met, the analysis is incomplete without considering the “objective justifications” that protect an undertaking's right to refuse.

According to Bruc, objective justifications and efficiencies show no specific features in relation to data.³⁵⁵ He further argues efficiency claims are unlikely to succeed, as the tests of indispensability, elimination of effective competition, and the limitation of technical development already impose similarly strict standards.³⁵⁶ Since the criteria are indeed stringent, in practice, most efficiency arguments in data-access cases will collapse into the same stringent scrutiny applied under these core conditions. Additionally, the Commission and courts have generally been reluctant to accept claims of objective justification, making it unlikely that such arguments would pose a serious barrier to establishing an abusive refusal to supply.³⁵⁷

³⁵¹ *ibid.*

³⁵² Graef, ‘Rethinking the Essential Facilities Doctrine’ (n 131), p. 69.

³⁵³ *ibid* pp. 69-70.

³⁵⁴ *ibid* p. 70.

³⁵⁵ Bruc (n 19), p. 181.

³⁵⁶ *ibid.*

³⁵⁷ Jones, Sufrin and Dunne (n 7), p. 529.

For physical assets, a dominant firm might assert capacity constraints, claiming it cannot reasonably provide access due to limited or no spare capacity.³⁵⁸ This reasoning does not apply to data, which is inherently non-rivalrous³⁵⁹ and has a very low marginal cost of sharing.³⁶⁰ Data sharing can, therefore, generate substantial efficiencies and broader societal benefits, especially when the data can be reused or combined for different purposes.³⁶¹ However, in multi-sided markets, the assessment becomes more complex because authorities must balance the efficiency benefits of third-party entry and innovation with the advantages incumbents gain from economies of scale and scope.³⁶²

In *Google Shopping*, Google's argument that its conduct was technically unavoidable and necessary to improve search quality was rejected, as any efficiency gains were insufficient to outweigh the significant harm to competition and consumer welfare.³⁶³ The Court further reiterated that the burden of proof rests with the dominant undertaking to demonstrate "convincingly" the existence and relevance of such justifications, rather than on the Commission to disprove them.³⁶⁴ Thus, in practice, the burden is heavy, especially in digital markets.

In the EU, the protection of personal data is recognised as a fundamental right under Articles 8 CFR³⁶⁵ and 16 TFEU,³⁶⁶ and is operationalised through the GDPR framework.³⁶⁷ Accordingly, if the information in question constitutes personal data, a dominant firm may argue that sharing it with third parties is problematic without user consent.³⁶⁸ Since personal data falls under the GDPR,

³⁵⁸ *Commercial Solvents* (n 140), paras. 27-28; *FAG - Flughafen Frankfurt/Main AG* (Case IV/34.801) Commission Decision 98/190/EC [1998] OJ L72/30, paras. 74-88.

³⁵⁹ Ofcom (n 137), p. 20, para. 2.41.

³⁶⁰ CMA and ICO, 'Competition and data protection in digital markets: a joint statement between the CMA and the ICO' (19 May 2021), para. 72 <<https://www.gov.uk/government/publications/cma-ico-joint-statement-on-competition-and-data-protection-law>> accessed 2 August 2025.

³⁶¹ *ibid.*

³⁶² Krämer and Schnurr (n 85), p. 268.

³⁶³ *Google Shopping* (n 34), para. 572.

³⁶⁴ *ibid.* para. 577.

³⁶⁵ CFR, art. 8.

³⁶⁶ *ibid.* art. 16.

³⁶⁷ Erika Douglas, 'Digital Crossroads: The Intersection of Competition Law and Data Privacy' (2021) Temple University Legal Studies Research Paper No 2021-40, p. 31 <<https://ssrn.com/abstract=3880737>> accessed 3 May 2025.

³⁶⁸ Ofcom (n 137), p. 20, para. 2.42; Rok Dacar, 'Is the Essential Facilities Doctrine Fit for Access to Data Cases? The Data Protection Aspect' (2022) 18 CYELP 61, p. 72.

supplying it to rivals may either be impossible or conditional upon obtaining such consent.³⁶⁹ Article 6 GDPR sets out the legal bases for lawful data processing.³⁷⁰

Mandatory sharing of personal data under the EFD is difficult, as most of the Article 6 grounds are impractical.³⁷¹ The most viable options are Article 6(1)(c), regarding a legal obligation such as a Commission decision or court judgment, and Article 6(1)(f), which pertains to a legitimate interest. However, both require a strict balancing test to ensure that the competition benefits of access outweigh the privacy rights and expectations of data subjects.³⁷²

This test entails, first, establishing a legitimate interest pursued by either the data owner or a third party.³⁷³ While the GDPR does not precisely define what constitutes a legitimate interest, a company's commercial interest in accessing data to compete in a downstream market may be recognised as such.³⁷⁴ By contrast, the data owner will not normally have a "legitimate interest" in sharing data that weakens its market position. Hence, the legal justification will typically rest on the access seeker's interests.³⁷⁵ Moreover, processing the data must be strictly necessary to achieve the identified interest, meaning there are no other, less intrusive possibilities.³⁷⁶

Even where access is considered 'necessary', it must, second, be weighed against the data subject's fundamental rights. This assessment depends on the nature of the data.³⁷⁷ Where data subjects reasonably expect their personal data not to be shared, or where the data is highly sensitive, such as health records, the access seeker's legitimate interest will usually be overridden by the data subjects' rights.³⁷⁸ Conversely, if further processing is reasonably expected or the data is non-sensitive, such as information on education level, the commercial interests of the access seeker may outweigh the data subject's interest in protection.³⁷⁹

³⁶⁹ GDPR, Recital 32, art. 4(1) and 4(2).

³⁷⁰ *ibid* art. 6.

³⁷¹ *ibid* art. 6(1)(a), (b), (d), (e).

³⁷² Dacar, 'Is the Essential Facilities Doctrine Fit for Access to Data Cases?' (n 368) pp. 72-76.

³⁷³ GDPR, art. 6(1)(f).

³⁷⁴ Dacar, 'Is the Essential Facilities Doctrine Fit for Access to Data Cases?' (n 368) p. 75.

³⁷⁵ *ibid*.

³⁷⁶ *ibid* pp. 75-76.

³⁷⁷ *ibid*.

³⁷⁸ GDPR, Recital 47; Dacar, 'Is the Essential Facilities Doctrine Fit for Access to Data Cases?' (n 368) p. 75.

³⁷⁹ *ibid*.

Therefore, where the request concerns personal data, Article 6(1)(f) of the GDPR might provide an objective justification for the dominant undertaking.

5. CONCLUSION

The main objective of this research was to determine the extent to which the refusal to supply doctrine, particularly EFD, can be applied to data under Article 102 TFEU.

To answer the question, it first examined the unique features of data and digital markets. As shown in Chapter 2, data is inherently different from traditional inputs. It is non-rivalrous, rapidly loses relevance, and is theoretically replicable, albeit in practice, network effects, feedback loops, and economies of scale may turn data into a strategic bottleneck. These characteristics create both opportunities for efficiency and risks of foreclosure. Sub-question (i) was therefore addressed here by highlighting that while data does not fit neatly into the scarcity logic of traditional essential facilities, its concentration in the hands of dominant platforms can still generate significant entry barriers and competitive concerns.

Chapter 3 analysed the development of the refusal to supply doctrine in case law and attempted to determine the boundaries of the doctrine. From *Commercial Solvents* and *Bronner* to *Magill*, *IMS Health*, and *Microsoft*, the doctrine evolved from strict indispensability towards a more flexible balancing of fair access and consumer harm. More recent cases, such as *Google Shopping* and *Android Auto*, illustrate this transition. The former clarified that *Bronner*'s indispensability test applies only to outright refusals, while discriminatory access may be abusive without meeting *Bronner*'s strict criteria. The latter further confined *Bronner* to facilities created exclusively for internal use, signalling that where platforms are designed to host third parties, the focus shifts from indispensability to the fairness of access conditions. Crucially for constructive refusals, *TeliaSonera* held that a margin squeeze may be abusive without proving *Bronner*-style indispensability, even in the absence of a regulatory duty to supply, and *Slovak Telekom* confirmed that where access is already provided, albeit on unfair terms, or stems from sectoral obligations, *Bronner* does not apply. Sub-question (ii) was thus answered by showing that the case law has progressively narrowed *Bronner*'s scope, while broadening the tools available to address exclusionary conduct in digital markets.

Turning to indispensability, Chapter 4 explored its application to data. In practice, indispensability is highly context-specific and depends on the type and source of data. Volunteered and observed data may be replicable or portable under GDPR, reducing indispensability, whereas observed data accumulated at scale or data that has become an industry standard may satisfy *Bronner's* high threshold. By contrast, inferred data, reflecting a company's own innovative processes, is generally excluded. Sub-question (iii) was therefore addressed by demonstrating that indispensability remains a central criterion, but its relevance in data cases is diminished, and courts increasingly look instead at whether refusal eliminates effective competition or prevents innovation.

Finally, this thesis paper examined the balancing act between exclusionary risks and investment incentives. Sub-question (iv) was addressed by showing that EU competition law balances property rights and freedom of contract against the need to protect consumer welfare and the competitive process. Recent developments, including the 2023 amendments to the Guidance Paper and the 2024 Draft Guidelines on exclusionary abuses, reflect this shift; refusals to supply inputs developed solely for internal use remain subject to *Bronner*, while access restrictions where platforms are already open are judged under a broader fairness standard. Moreover, GDPR introduces an additional layer of complexity, where personal data is concerned, sharing may be legally impossible or require user consent, providing a potential objective justification for refusal.

In conclusion, the findings of this paper suggest that the classical EFD, as shaped in *Bronner*, no longer captures the realities of data-driven markets. Although indispensability remains relevant, it is too rigid to address the nuanced forms of foreclosure in digital ecosystems. Instead, EU competition law is moving toward a fair access standard, where the conditions of access, rather than access itself, are decisive. This evolution reflects the broader goals of EU competition law: safeguarding consumer welfare, preserving dynamic efficiency, and ensuring innovation, while respecting fundamental rights and legitimate incentives to invest.

Accordingly, the refusal to supply doctrine can apply to data, but only in limited circumstances where access to specific datasets is truly indispensable and cannot be replicated, or where denial of access eliminates effective competition or stifles innovation. In most cases, intervention will not rest solely on *Bronner's*

rigid framework, but on a more flexible and context-sensitive analysis that integrates competition, innovation, and data protection considerations.

Individual Data Sovereignty and the GDPR: A Case Study of *CrypTex*

Alexandria Baly-Stanford¹

1. INTRODUCTION	168
2. <i>CRYPTEX</i>	179
3. <i>CRYPTEX</i> & GDPR	185
4. RECONCILIATION OF <i>CRYPTEX</i> WITH THE GDPR.....	200
5. CONCLUSION.....	208

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TABLE OF ABBREVIATIONS

ABC	Attribute-Based Credential
CJEU	Court of Justice of the European Union
DPA	Data Processing Agreement
DPO	Data Protection Officer
DPD	Data Protection Directive
DRP	Data Refresh Protocol
EDPB	European Data Protection Board
GDPR	General Data Protection Regulation
IdP	Identity Provider
IRMA	I Reveal My Attributes
PDP	Policy Decision Point
PhTL	Post-Hoc Transparency Logger
PET	Privacy-Enhancing Technology
PEP	Policy Enforcement Point
RP	Relying Party
VIAR	Vital Interest Access Request
WAC	Web Access Control

GLOSSARY

Term	Definition
Architecture	the structural design and arrangement of a system's components, data flows, and enforcement mechanisms.
B2C Entities	businesses that sell products or services directly to individual consumers for personal use.
Control	the data subject's ability to determine and influence how their personal data is processed, including what data is shared, under which conditions, and with whom.
Cognitive Load	the mental effort needed to understand information and make decisions; excessive cognitive load can hinder users' ability to engage with privacy controls or consent requests.
<i>CrypTex</i>	a theoretical ecosystem developed by combining the Solid Project and PRIMELife architectures.
Ecosystem	the dynamic relationships between the interconnected set of components, rules, and actors that work together to shape how personal data is accessed, transferred, and governed.
Essential Service	a service that individuals must use for basic societal participation, where refusal is not a realistic option.
Granular Control	the ability of a data subject to make highly specific, fine-grained decisions about how their personal data is processed, including which data items are shared, with whom, for what purposes, under what conditions, and for how long.
Granularity of Control	the degree of precision and specificity with which a data subject can configure or restrict data processing operations. Higher granularity allows users to set detailed, context-dependent rules rather than broad, general permissions.
Imbalance of Power	when one party has substantially more control, knowledge, or bargaining ability than the other, it limits the weaker party's ability to make free and informed choices about data processing.
Dominant Controller	a data controller with substantial market power that limits users' ability to choose alternative services, enabling the controller to set data-processing terms unilaterally.
Notice Fatigue	a state in which users become desensitised to frequent

	privacy or consent notices, leading them to ignore or accept terms without proper consideration.
PRIMELife Policy Language	a family of machine-readable policy languages from the EU PRIME and PRIMELife projects that encode user privacy preferences and usage rules, enabling automated enforcement through sticky policies as personal data moves across different controllers and processors.
Policy	a set of normative rules that specify conditions, restrictions, and obligations for processing personal data.
Privacy Cynicism (<i>nihilism</i>)	a state of resignation in which individuals believe they cannot meaningfully protect their privacy and therefore stop engaging with privacy controls or protective behaviours.
Privacy- Enhancing Technology (also known as ‘PET’)	“a collection of digital technologies and approaches that permit the collection, processing, analysis, and sharing of information while protecting the confidentiality of personal data”, as defined by the OECD in their 2023 publication, “Emerging privacy-enhancing technologies: Current regulatory and policy approaches”. PETs can be categorised into four main areas: <i>data obfuscation</i> , <i>encrypted data processing</i> , <i>federated and distributed analytics</i> , and <i>data accountability tools</i> .
Privacy Paradox	when users say they care about privacy but behave in ways that undermine their privacy, for example, accepting intrusive data practices for convenience or due to fatigue.
Protocol	technical procedure or sequence of operations that defines how a process is carried out in a system.
Sticky Policy	machine-readable privacy and usage policies that are cryptographically bound to the personal data they govern. As the data moves between systems, organisations, or jurisdictions, the attached policy “sticks” to it, ensuring that any party accessing or processing the data must comply with the specified rules (e.g., purpose limitations, retention periods, disclosure restrictions). Sticky policies facilitate end-to-end enforcement of a data subject’s privacy preferences and legal requirements by allowing Policy Decision Points (PDPs) and Policy Enforcement Points (PEPs) to automatically assess and enforce these requirements wherever the data is transferred.

1. INTRODUCTION

1.1 BACKGROUND

“Free” data services provided by data controllers are the result of a combination of technological and commercial development that has led to various aspects of human lives, activities and social interaction being transformed into data that can be measured and analysed so services can become more personalised to the data subject.² The rise of “free” digital services is due to the technological advancements in information technology from the 1980s onwards and the processing of personal data transferred to them by their data subjects.³ Based on the personal data collected, data controllers can match advertisements to the “right” data subject to ensure maximum engagement.⁴ The success of this “matching” led to the expansion of the categories of personal data processed to “better” personalise the experiences of users.⁵ This practice has led to an exponential increase in data collection over the years, resulting in human lives being transformed into a permanent digital record.⁶

In the European Union (EU), the protection of personal data is a fundamental right, and the processing of such data is only justified when it complies with the rules governing the lawful processing of personal data.⁷ The

² Tuukka Lehtiniemi, ‘Personal Data Spaces: An Intervention in Surveillance Capitalism?’ (2017) 15 *Surveillance & Society* 626; Isabel Hahn, ‘Purpose Limitation in the Time of Data Power: Is There a Way Forward?’ (2021) 7 *European Data Protection Law Review* 31.

³ Mike de Roode, ‘Privacy Enhancing Technologies: A Software Engineering Approach to Design PETs’ (2016) ResearchGate, p. 2.; Ronald Leenes, *The REALbook: Text and Materials on Regulating Technology* (Draft, 1 September 2024) ch. 2; CNIL & Autorité de la concurrence, ‘Competition and Personal Data: A Common Ambition’ (2023) 1, <https://www.cnil.fr/sites/cnil/files/2023-12/competition_and_personal_data_a_common_ambition_joint_declaration_by_the_cnil_and_the_adlc.pdf> accessed 26 January 2025.

⁴ Lehtiniemi (n 2); Heleen Janssen and others ‘Decentralized Data Processing: Personal Data Stores and the GDPR’ (2020) 10 *Int'l Data Priv L* 357; Donell Holloway, ‘Surveillance Capitalism and Children’s Data: The Internet of Toys and Things for Children’ (2019) 170 *Media International Australia* 27, <https://www.researchgate.net/publication/331381139_Surveillance_capitalism_and_childrens_data_the_Internet_of_toys_and_things_for_children> accessed 29 October 2024; Shoshana Zuboff, ‘The Discovery of Behavioural Surplus’, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (US Public Affairs 2019).

⁵ *ibid*; Case C-252/21 *Meta Platforms Inc and Others v Bundeskartellamt* [2023] ECLI:EU:C:2023:537.

⁶ Hahn (n 2); de Roode (n 3), Leenes (n 3), CNIL & Autorité de la concurrence (n 3), Lehtiniemi (n 2); Mohammed Saqr, ‘Is GDPR failing? A Tale of the Many Challenges in Interpretations, Applications, and Enforcement’ (2022) 16 *International Journal of Health Sciences* 1.

⁷ Charter of Fundamental Rights of the European Union [2012] OJ C326/02, art. 8.

Data Protection Directive (DPD)⁸ and its successor, the General Data Protection Regulation (GDPR),⁹ were adopted to ensure that its data subjects' personal data remains protected when processed by data controllers and processors. The GDPR not only guarantees the protection of personal data by strengthening and expanding data subjects' control over their data,¹⁰ but also the free flow of personal data within the internal market.¹¹ Unfortunately, the widespread adoption and normalisation of "free" digital services in recent years has posed significant challenges to the effectiveness of the GDPR and to the simultaneous achievement of its dual objectives.¹²

There are two predominant points of contention between the controllers and data subjects. First, there is a lack of proper transparency between the controller and the data subject regarding data processing practices, and second, there are concerns about the lawful processing of personal data.¹³ Data controllers must process personal data in a lawful, transparent, and fair manner.¹⁴ Therefore, data controllers must be transparent regarding their data processing operations, which must be based on one of the six legal grounds listed under Article 6(1) GDPR, and the processing operation must be performed ethically.¹⁵ In short, controllers must not only have legal grounds to process personal data but also ensure that data subjects understand the associated risks, rules, protections, rights, and how to exercise their rights.¹⁶

⁸ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals in regard to the processing of personal data and on the free movement of such data (Data Protection Directive (DPD)) [1995] OJ L 281/31.

⁹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons regarding the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation (GDPR)) [2016] OJ L119/01.

¹⁰ COM/2020/66 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (Strategy for data) [2020], pp. 8, 10; GDPR, arts. 5-50.

¹¹ Christopher Kuner and others, *The EU General Data Protection Regulation (GDPR): A Commentary* (Oxford University Press 2020) ch. 1; Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C 326/01, art. 16; GDPR, art. 1(3).

¹² Saqr (n 6), pp.1-2.

¹³ Alexandria Stanford, 'The Failure of Privacy Policies' (LLB European Law School, Maastricht University, 2024).

¹⁴ GDPR, art. 5.

¹⁵ European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Data Protection Law* (FRA, Publications Office of the European Union, 2018), pp. 117-119, <<https://fra.europa.eu/en/publication/2018/handbook-european-data-protection-law-2018-edition>> accessed 26 January 2024.

¹⁶ GDPR, rec. 39.

However, the mechanisms for transparent information disclosure, including privacy policies and cookie banners, are flawed,¹⁷ which has led to data controllers processing personal data in a manner that does not meet the expectations of the data subject.¹⁸ Moreover, in specific circumstances (e.g. profiling), where consent is the only valid legal basis, the mechanisms used to obtain consent were found to be invalid.¹⁹ This includes cases such as the pay-or-okay business model (pay or accept processing as is) and the binary consent model (consent to processing or be denied service).²⁰ In response to users' concerns, privacy-enhancing technologies (PETs) are being developed to provide data subjects with transparency regarding the processing of their personal data and to enable data controllers and processors to obtain valid consent from data subjects.²¹ The goal is to reduce the growing volume of data collected by data controllers and ensure that processing better aligns with the data subjects' expectations.²²

PET developers aim to promote 'individual data sovereignty' that enables data subjects to reclaim authority over their personal data by restricting access, storage, sharing, and usage of that information. This would shift the power

¹⁷ Stanford (n 13), pp. 7-8; Midas Nouwens and others, 'Dark Patterns after the GDPR: Scraping Consent Pop-Ups and Demonstrating Their Influence' (2020) Proceedings of the 2020 CHI Conference on Human Factors in Computing Systems <<https://people.csail.mit.edu/ilaria/papers/Midas-MITCHI2020.pdf>> accessed 3 November 2025.

¹⁸ *ibid.*

¹⁹ Binding Decision 4/2022 on the dispute submitted by the Irish SA on Meta Platforms Ireland Limited and its Instagram service (Art. 65 GDPR) (2022) <https://www.edpb.europa.eu/system/files/2023-01/edpb_binding_decision_202204_ie_sa_meta_instagramservice_redacted_en.pdf> accessed 26 January 2025; noyb, 'BREAKING: Meta Prohibited From Use of Personal Data for Advertising' (noyb.eu, 04 January 2023) <<https://noyb.eu/en/breaking-meta-prohibited-use-personal-data-advertising>> accessed 26 January 2025.

²⁰ *META* Case (n 5), European Data Protection Board, 'EDPB: 'Consent or Pay' Models Should Offer Real Choice' (EDPB, 17 April 2024) <https://www.edpb.europa.eu/news/news/2024/edpb-consent-or-pay-models-should-offer-real-choice_en> accessed 7 October 2025; Stanford (n 13); Strategy for data (n 10), pp. 8, 10.

²¹ Privacy by Design Foundation, 'What is IRMA?', IRMA docs <<https://irma.app/docs/what-is-irma/>> accessed 15 November 2024; Jan Camenisch, Ronald Leenes and Dieter Sommer, *Digital Privacy: PRIME - Privacy and Identity Management for Europe*, (Springer 2011) pp. 3-5; Ronald Leenes, Jan Schallaböck, Marit Hansen, "PRIME White Paper", (2008) PRIME 1; Solid, 'Solid: Your Data, Your Choice' <<https://solidproject.org/>> accessed 3 January 2025; Viivi Lähteenoja, 'What Are "Personal Data Spaces"?' (2023) Companion Proceedings of the ACM Web Conference (WWW' 23) 1458; Antti Poikola and others, 'MyData – An Introduction to Human-Centric Use of Personal Data 3rd Revision' (Viivi Lähteenoja ed, MyData, 2020) <<https://mydata.org/wp-content/uploads/2020/08/mydata-white-paper-english-2020.pdf>> accessed 27 October 2024; Matthew Crain, 'The Limits of Transparency: Data Brokers and Commodification' (2016) 20 *New Media & Society* p. 88; Michèle Finck and Asia Biega, 'Reviving Purpose Limitation and Data Minimisation in Personalisation, Profiling and Decision-Making Systems' (2021) *SSRN Electronic Journal*, pp. 60-61.

²² Camenisch (n 21), p.3-5; Leenes (n 21), p.1; Solid (n 20).

dynamic in the data economy from one controlled by the controllers to one controlled by data subjects.²³ This shift in the paradigm means that data processing is performed on the authority of the data subject and to the benefit of the data subject.²⁴ Controllers, nevertheless, remain responsible for determining and implementing the processing operations.

Data controllers, however, may view PETs as an infringement on their right to process personal data even if their data processing practices comply with the GDPR. Consequently, the development of PETs has raised an open question on their impact on the GDPR's dual purposes. As a result, this study examines whether PETs undermine the rights of controllers to process personal data under the GDPR, and impact one of the GDPR purposes: the free flow of personal data within the internal market.²⁵

1.2 LITERATURE REVIEW

Although the GDPR does not provide an explicit definition of 'individual data sovereignty', privacy researchers have identified several core components of the concept, namely 'transparency', 'consent', 'data access', and 'data portability'. There is consensus among privacy researchers that transparency must exist between the data subject and the data controller.²⁶ Being transparent means providing information before, during processing, and at the 'request for access'.²⁷ Information must be in a "concise, transparent, intelligible and easily accessible format, using clear and plain language".²⁸ This is particularly important for any information addressed specifically to children.²⁹ Furthermore, this information must apprise the data subject of the "risks, rules, safeguards and rights in relation to the processing of personal data and how to exercise their rights in relation to such processing".³⁰ The key details that should be provided to the data subject include the controller's identity and contacts, purpose and legal grounds for data

²³ Lehtiniemi (n 2); Viivi Lähteenoja (n 21); Crain (n 21), Finck and Biega (n 21).

²⁴ Lehtiniemi (n 2); Viivi Lähteenoja (n 21); Crain (n 21), Finck and Biega (n 21).

²⁵ GDPR, art. 1(3).

²⁶ Stanford (n 13); Strategy for data (n 10), pp. 8, 10.

²⁷ GDPR Handbook (n 15), pp.183-185.

²⁸ GDPR, art. 12.

²⁹ *ibid.*

³⁰ *ibid* rec. 39.

processing, data categories, recipients of the data, storage period, data subject rights and sources (if not from the subject).³¹

Often, information disclosures are too lengthy and complex.³² Legal and computer engineering researchers have sought to facilitate information disclosure³³ through user-centric approaches such as privacy labels,³⁴ contextual privacy policies,³⁵ personalised privacy assistants,³⁶ and policy languages.³⁷ Some privacy researchers have observed that providing transparent information to data subjects alone is insufficient and must be complemented with the data subject's ability to exercise control over their personal data.³⁸ In other words, "transparency and having control are two sides of the same coin".³⁹

As mentioned above, there are six legal grounds for processing personal data: *contractual obligation*, *legal obligation*, *vital interest*, *public interest*, *legitimate interest*, and *consent*.⁴⁰ For a data subject to exercise effective control, they must have the ability to consent to a data processing activity and withdraw that consent. Consent is the only legal basis by which a data subject can authorise the processing of their data.⁴¹ In this instance, the burden of proof is on the controller to demonstrate that the data subject's consent was freely given,

³¹ *ibid* arts. 13-14.

³² Stanford (n 13), pp. 7-8.

³³ Aurelia Tam ò -Larrieux and others, 'Right to Customization: Conceptualizing the Right to Repair for Informational Privacy' (2021) *Privacy Technologies and Policy*, pp. 2-3; Sophia Kununka, 'User Centric Privacy Policy Modelling' (DPhil University of Manchester 2019) p. 20 <https://pure.manchester.ac.uk/ws/portalfiles/portal/102606682/FULL_TEXT.PDF> accessed 29 October 2024.

³⁴ Paolo Balboni and Kate Francis, *Data Protection as a Corporate Social Responsibility* (Edward Elgar Publishing Limited 2023), p. 95; Grace Fox, Theo Lynn, and Pierangelo Rosati, 'Enhancing consumer perceptions of Privacy and Trust: A GDPR Label Perspective' (2022) 35 *Information Technology & People* 8 <<https://www.emerald.com/insight/content/doi/10.1108/itp-09-2021-0706/full/html>> accessed 26 January 2025.

³⁵ Maximiliane Windl and others, 'Automating Contextual Privacy Policies: Design and Evaluation of a Production Tool for Digital Consumer Privacy Awareness' (2022) Article No: 34 CHI Conference on Human Factors in Computing Systems, p. 3 <<https://dl.acm.org/doi/pdf/10.1145/3491102.3517688>> accessed 29 October 2024.

³⁶ Norman Sadeh, 'Personalized Privacy Assistants for Big Data & the Internet of Things' (2021) rep 9 <<https://apps.dtic.mil/sti/trecms/pdf/AD1140163.pdf>> accessed 26 January 2025; Carnegie Mellon University, 'The Internet of Things (IoT) Privacy Infrastructure' (Privacy Assistant.org, 2019) <<https://privacyassistant.org/iot/>> accessed 15 November 2024.

³⁷ Camenisch (n 21); Leenes (n 21); Solid (n 21).

³⁸ Elias Storms, Oscar Alvarado and Luciana Monteiro-Krebs, "'Transparency Is Meant for Control" and Vice Versa: Learning from Co-Designing and Evaluating Algorithmic News Recommenders' (2022) 6 *Proceedings of the ACM on Human-Computer Interaction* 19; Stanford (n 13).

³⁹ *ibid*.

⁴⁰ GDPR, art. 6.

⁴¹ *ibid*, art. 7 and rec. 32 and 42

informed, specific, and unambiguous.⁴² Consent under the GDPR also allows the data subject the right to withdraw consent at any time.⁴³ Under these conditions, if consent is withdrawn, the data being processed must be erased, and the data processing operation cancelled.⁴⁴

Due to the strict legal restrictions associated with consent, data controllers are advised to use consent as a last resort and rely on other legal grounds for processing [i.e., based on Articles 6(b)–(f) GDPR].⁴⁵ For data subjects, on the other hand, consent is the most important legal basis when exercising control over their data. Some privacy researchers have broadened their approach to include mechanisms that facilitate the data subject's rights to data access and data portability into their PET technical architecture, which provides data subjects with greater operational control over the processing of their personal data.⁴⁶

Data subjects have the right to “obtain from the controller confirmation as to whether or not personal data concerning him or her is being processed, and, where that is the case, access to the personal data and information concerning its processing.”⁴⁷ Furthermore, the data subject has “the right to 1) receive (without hindrance from the controller) the data subject's data which he/she has provided (§1); 2) the right to transmit (without hindrance from the controller) those data to another controller (§1); and 3) the right to have the personal data transmitted directly from one controller to another (§2)”.⁴⁸ Therefore, in addition to having transparent information and the ability to consent to the processing of their data, the data subject can also access their personal data at any time and transmit it to any controller of their choice.⁴⁹ This is intended to prevent the monopolisation of data by data controllers and permit data subjects to use any digital service that suits their data protection expectations⁵⁰ - fostering ‘individual data sovereignty’.

⁴² *ibid* art. 7 and rec. 32 and 42.

⁴³ *ibid*, art. 7.

⁴⁴ *ibid*.

⁴⁵ Eleni Kosta ‘Capita Selecta Privacy and Data Protection’ (CSPDP Lecture Series 2024).

⁴⁶ Solid (n 21).

⁴⁷ GDPR, art. 15.

⁴⁸ Paul De Hert and others, ‘The Right to Data Portability in the GDPR: Towards User-Centric Interoperability of Digital Services’ (2018) 34 *Computer Law & Security Review*, p. 197.

⁴⁹ *ibid*; Directive 2013/37/EU of the European Parliament and of the Council of 26 June 2013 amending Directive 2003/98/EC on the re-use of public sector information [2013] OJ L 175/1, rec. 21.

⁵⁰ GDPR, art. 15-21; Janssen (n 4), p. 357; Leenes (n 21), p. 1.

PETs that embody ‘individual data sovereignty’ are classified as data accountability tools.⁵¹ One such tool is decentralised data storage/personal data storage that enables users to store their data independently, separate from a corporate database.⁵² This tool gives the data subject granular control over how their data is used and shared.⁵³ This concept was developed by the Solid Project (hereafter called Solid), and its abilities are described in the W3C Community Group Draft Report of May 2024, also known as the ‘Solid Protocol’ (hereafter called the Protocol).⁵⁴ Solid’s decentralised storage is known as a ‘data pod’, and the data subject has granular control over data sharing through Web Access Control (WAC).⁵⁵ A review of the Protocol determined that Solid only works if the digital service utilised by the user is tailored specifically for Solid’s ecosystem.⁵⁶ This is important to note because in Solid, all data is stored and remains in the data pod, the user controls access via WAC, and the controller does not have exclusive control.⁵⁷ This means that Solid prevents personal data from being transferred, stored, or modified outside of the data pod by the controller without the data subject’s consent.

This raises compatibility concerns with the GDPR’s controller-centric framework, where data controllers determine the means and purposes of processing based on a valid legal basis and therefore exercise operational control over the personal data stored in their systems. Solid instead reallocates this control to the data subject, transforming the data subject into a data controller and the data controller into a data processor. This contradiction reveals a limitation in Solid’s architecture, particularly in its approach to managing data access to the data pod.

⁵¹ OECD Digital Economy Papers, ‘Emerging Privacy Enhancing Technologies; Current Regulatory and Policy Approaches’ (2023) p. 5.

⁵² Max Van Kleek and Kieron O’Hara, ‘The Future of Social is Personal: The Potential of the Personal Data Store’ in Daniele Miorandi, Vincenzo Maltese, Michael Rovatsos, Anton Nijholt, James Stewart (eds) *Social Collective Intelligence* (Computational Social Sciences, Springer, 2014), p. 125.

⁵³ *ibid*; OECD (n 51).

⁵⁴ W3C Community Group Draft Report, ‘Solid Protocol’ (Unofficial draft, 12 May 2024) <<https://solidproject.org/TR/protocol#webid>> accessed 24 January 2025.

⁵⁵ Solid Protocol, sec.1; W3C Wiki, ‘WebAccessControl’ (W3C 5 October 2022) <https://www.w3.org/wiki/WebAccessControl#Modes_of_Access> accessed 8 May 2025; W3C Community Group Draft Report, ‘Web Access Control’ (Unofficial draft 12 May 2024) <<https://solidproject.org/TR/2024/wac-20240512#introduction>> accessed 8 May 2025; Laurens Debackere and others, ‘A Policy-Oriented Architecture for Enforcing Consent in Solid’ Companion Proceedings of the Web Conference 2022 (WWW ’22), p. 517 <<https://dl.acm.org/doi/epdf/10.1145/3487553.3524630>> accessed 8 May 2025.

⁵⁶ *ibid*.

⁵⁷ *ibid*.

To address this problem, this study will replace Solid's rigid method for controlling the data exchange, WAC, with a mechanism that enables the data subject to determine the terms for processing the data in their 'pod' (i.e., data subject's privacy policy) in a structured machine-readable language, allowing the system to interpret the policy automatically.⁵⁸ This policy is then compared to the controller's privacy policy, and the data processing only occurs if both policies align. The agreed-upon policy is then automatically enforced by the system. This would allow the data subject to exercise more meaningful control over their data by permitting specific data to be used for a precise purpose, while allowing the controller to determine the means and purposes of processing based on a valid legal basis. This forms the foundation of PRIMELife's 'policy languages' (hereafter called PRIMELife), which allows the data subject and the controller to interact (negotiate) and determine the terms for data processing, ensuring that the controller adheres to the principles of the GDPR while respecting the data subject's preferences.⁵⁹ Solid and PRIMELife are thus combined to create a more sophisticated PET, in which a data controller will only be granted access to a data pod under the right terms (i.e., policy). This new PET will be called *CrypTex*.⁶⁰

The GDPR not only protects data subjects in the context of the processing of their personal data but also regulates the free movement of personal data in the internal market.⁶¹ In the current economy, the dual purpose of the GDPR is achieved through the centralisation of personal data by data controllers, allowing them to determine the means and purpose of processing.⁶² The introduction of *CrypTex*, will mean that data subjects will have stronger, operational forms of control over the processing of their personal data. Although this does not legally eliminate other bases for processing under Article 6(1) GDPR, it creates an environment where data controllers must rely on authorisation from the data subject (i.e., consent) to obtain access to data. This means that the data subject's personal interests will regulate the flow of personal data in the EU. This could cause several issues since using consent as the sole legal basis for data processing and providing transparency through data access and data portability (i.e.,

⁵⁸ Camenisch (n 21), chs.1 and 20; Leenes (n 21), p. 17

⁵⁹ *ibid.*

⁶⁰ Dan Brown, *The Da Vinci Code* (The Mathematical Intelligencer 2003).

⁶¹ GDPR, art. 1(1); Janssen (n 4); Holloway (n 4); Zuboff (n 4); OECD (n 51).

⁶² GDPR, art. 4(7); OECD (n 51), p.26.

individual data sovereignty), may subvert the free flow of personal data within the internal market (Article 1(1) of the GDPR) and is at odds with Article 1(3) of the GDPR.

This perspective has remained unexamined in the existing literature. This study aims to fill this gap by conducting a case study on *CrypTex* to answer the question: *Does CrypTex subvert the rights of controllers to process personal data under the GDPR?* The following sub-questions will also be examined:

- (a) *What are the key components of CrypTex, and how do they relate to individual data sovereignty?*
- (b) *To what extent is CrypTex compatible with the GDPR?*

If *CrypTex* is not compatible with the GDPR, then a third and final sub-question will be explored:

- (c) *How can CrypTex be reconciled with the GDPR?*

1.3 METHODOLOGY

1.3.1 Overview of the Study

This study utilises a doctrinal research methodology to examine the compatibility of *CrypTex*'s ecosystem with the GDPR. The analysis is predominantly based on primary sources, including technical documentation—such as conceptual and architectural documentation—to identify the principal components of *CrypTex*, as well as legal references encompassing legislation, and relevant case law and regulatory guidance. This methodological framework enables a thorough assessment of the significant legal ramifications that *CrypTex*'s technical architecture may pose for data controllers' ability to lawfully process personal data under the GDPR, potentially impacting the free flow of personal data within the European Union.

The analysis of *CrypTex* begins, in Chapter Two, with a doctrinal examination of the technical documentation underpinning *CrypTex*'s ecosystem. Conceptual and architectural documentation such as the W3C Community Group Draft Report called the 'Solid Protocol', the PRIMELife Book, and the Privacy by Design Foundation's IRMA Docs, are examined to identify the main components of Solid's ecosystem,⁶³ and the access controls of PRIMELife's policy

⁶³ Solid Protocol (n 54).

languages.⁶⁴ This is essential to understand how data is stored in the data pod, accessed by data controllers, and processed outside of the data pod in accordance with the data subject's privacy preferences. These findings are then applied to the definition of individual data sovereignty to explain how CrypTex operationalises this concept in practice. This analysis directly addresses the first sub-question by clarifying the mechanisms of decentralised data storage, data access, policy enforcement, and their role in enabling individual data sovereignty.

Next, a doctrinal analysis of CrypTex is conducted in Chapter Three, by interpreting and applying Article 5 GDPR (GDPR Principles) and Article 6 GDPR (Legal basis), Article 7 GDPR (Conditions for Consent), Article 8 GDPR (Conditions applicable to child's consent), and Article 9 GDPR (Processing of special categories of personal data) to the data exchanges occurring between data subjects and data controllers within CrypTex's ecosystem. Examining these legal provisions is essential for assessing whether CrypTex aligns with the GDPR, since its implementation will influence who determines the purposes and means of processing, and which legal grounds allow data controllers to access personal data. In this scenario, Articles 5 and 6 GDPR are the provisions most directly impacted by the shift toward data-subject-controlled architectures, as they govern the foundational conditions for lawful processing. While other GDPR provisions, such as data subject rights and data controller obligations remain relevant, they depend on the prior question of whether processing is lawful. Therefore, an analysis focused on Articles 5 and 6 GDPR, in conjunction with Articles 7, 8, and 9 GDPR, is sufficient to assess whether CrypTex structurally alters the conditions under which data controllers may process personal data in the EU. This analysis is completed using regulatory guidance from the European Data Protection Board (EDPB), academic commentaries, journal articles, and CJEU case law, where relevant, to evaluate the compatibility of CrypTex with the GDPR and identify points of friction between CrypTex's architecture and the GDPR, thereby answering the second sub-question: *To what extent is CrypTex compatible with the GDPR?*

Based on the points of conflict found in Chapter Three, technical and legal mechanisms are proposed in Chapter Four. Drawing from guidance from the

⁶⁴ Camenisch (n 21); Leenes (n 21).

European Data Protection Board (EDPB), academic commentaries, and CJEU case law, where relevant, these mechanisms are designed to resolve incompatibilities between the CrypTex and the GDPR, ensuring that the system supports the dual purposes of the GDPR, protecting personal data and facilitating the free flow of personal data within the internal market. This analysis answers the final sub-question: *To what extent can CrypTex and GDPR be reconciled?* Finally, the findings of Chapters Two, Three, and Four are consolidated into a conclusion that connects the technical findings with legal reasoning to provide a comprehensive answer to the overarching research question: *Does CrypTex subvert the rights of controllers to process personal data under the GDPR?*

1.3.2 Limitations of the Study

The scope of this case study is limited to personal data processing conducted by B2C entities, and it does not examine the data processing activities carried out by public authorities or entities that fall within the scope of the e-Privacy Directive.⁶⁵ Consequently, this study does not examine CrypTex's compatibility of CrypTex in the context of data processing activities undertaken for the purposes essential to safeguarding democratic society such as national security (i.e., State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences,⁶⁶ or the processing of personal data and the protection of privacy in the electronic communications sector.⁶⁷

Furthermore, this study focuses specifically on CrypTex; therefore, its findings are not intended to be generalised for other decentralised storage systems or accountability mechanisms. Moreover, the integration of Solid and PRIMELife into a more sophisticated PET is purely theoretical. Therefore, any conclusions drawn about CrypTex should not be interpreted as reflective of real-world applications.

⁶⁵ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] OJ L 201/37.

⁶⁶ e-Privacy Directive (n 66); GDPR, art. 23.

⁶⁷ e-Privacy Directive.

2. CRYPTeX

This chapter will address the question: *What are the key components of CrypTex, and how do they relate to individual data sovereignty?* Section 2.1, The Solid Project will first describe the main Solid components and how they work together. Secondly, Section 2.2, PRIMELife, will explore the mechanism by which a data subject can control how data controllers and processors process their personal data. Finally, Section 2.3, CrypTex & Individual Data Sovereignty, will explain how the merging of Solid and PRIMELife achieves ‘individual data sovereignty’.

2.1. THE SOLID PROJECT

In the Protocol,⁶⁸ the W3C Community Group explained that Solid’s technical architecture is composed of three main components: the ‘data pod’, which stores the data subject’s data; the ‘server’; and the ‘client’, which manages data access to the data pod.⁶⁹ The data pod is a decentralised data repository that stores the data subject’s personal data⁷⁰ and special categories of personal data.⁷¹ The data subject can manually add the data or transfer it from a data controller after a data access request (i.e., data generated via a digital service).⁷² Data in the data pod can also be tagged by the data subject (e.g., “mbox” to indicate email address).⁷³

The data pod is protected by Solid’s access control mechanism, Web Access Control, which is enforced by the ‘server’ and executed by the ‘client’. The server hosts the data pod and determines who can access the data in the pod by evaluating and administering the access control policy.⁷⁴ The client then regulates how the data is processed by executing the access control policy.⁷⁵ However, since the access to Solid’s, WAC control mechanism only works if personal data is processed in the data pod (see section 1.2, Literature Review), the access control mechanism will be replaced by PRIMELife’s policy languages that allows personal data to leave the data pod and be stored by the controller, while

⁶⁸ Solid Protocol (n 54).

⁶⁹ *ibid* sec. 1.3.4 and 4.

⁷⁰ GDPR, art. 4(1).

⁷¹ *ibid*, art. 9(1).

⁷² Solid Protocol, sec. 4.2.1; GDPR, art. 15.

⁷³ Solid Protocol, sec. 11 and 4.

⁷⁴ *ibid* sec. 2.1.

⁷⁵ *ibid* sec. 1.3.4 and 2.

ensuring that the data subject's personal data is being processed in a manner in line with their privacy preferences.

2.2. PRIMELIFE

PRIMELife developed a 'policy language' to increase transparency between the data subject and the data controller,⁷⁶ through mechanisms that facilitate the GDPR's Principles and Data Subject Rights.⁷⁷ With PRIMELife, the data subject can create a 'policy' (i.e., access control mechanism) that determines which data controller or processor can access what personal data and for how long the data can be stored by the controller/processor.⁷⁸ This effectively allows a user to create their own privacy policy (i.e., personalised policy) for a specific data point.

To do this, the data subject can define how the controller utilises the 'data minimisation principle' by selecting which type of personal data or special category of personal data is shared with data controllers (e.g., email address or physical address), medical records, or fitness/nutrition data. Through transparent communication with data controllers, the data subject can arrange for personal data generated using the service (e.g., health data) to be transferred into their data pod using their 'right to data portability'. PRIMELife also takes compliance with the data minimisation principle a step further by allowing the data subject to disclose only an attribute (e.g., age) to a data controller rather than the data itself, keeping this data confidential.⁷⁹ This data exchange occurs when the controller (Relying Party, RP) redirects the data subject to an Identity Provider (IdP) to authenticate the information required to gain access to the service. The IdP can ensure that the attribute provided by the user has not expired or been tampered with. A real-world implementation of this privacy-preserving identity management system is IRMA (I Reveal My Attributes).⁸⁰ Using IRMA, an issuer (e.g., a university) assigns the data subject an Attributes-Based-Credential (ABC), using an Idemix private key, which can then be stored in the data pod.⁸¹ When a data subject needs to exchange such data to access a service, the data pod can

⁷⁶ Camenisch (n 21), ch. 1

⁷⁷ GDPR, arts. 5, 12-20.

⁷⁸ Camenisch (n 21), chs. 1 and 20.

⁷⁹ *ibid*, ch. 5.

⁸⁰ IRMA (n 21).

⁸¹ IRMA, IRMA session flow and IRMA terminology: Cryptographic entities.

provide one of the requested Attribute-Based-Credentials (hereafter referred to as ABCs) to the controller (RP), who then verifies the credential using the issuer's Idemix public key that confirms the ABC was created using the issuer's Idemix private key.⁸² If the ABC is valid, the controller can grant the data subject access to the service; if it is not valid, access is denied. This form of disclosure (i.e., disclosure proof) ensures that the data subject can prove that personal information about themselves is true to the controller without revealing any personal data (i.e., zero-knowledge proof). It also confirms to the controller that the ABC comes from a trusted source, is unchanged, and remains valid.

Second, the data subject demonstrates compliance with the 'purpose limitation principle' by restricting a particular data point from being used for a specific purpose (e.g., location data can only be used for navigation services and not social media services).⁸³

Third, the data subject can determine how the controller complies with the 'storage limitation principle' by limiting the duration data from the data pod can be stored by the controller (e.g., 30 days) or until access is revoked.⁸⁴ The data subject can set a rule that prevents the policy from being changed permanently. This means that the data controller cannot cancel or amend the policy without the data subject's approval, ensuring long-term enforcement.⁸⁵ Once the agreed retention period has ended, the data stored by the controller will be deleted. Fourth, the data subject can also restrict data transfers by configuring settings based on the type of organisation (e.g., only a certain university or department), roles (e.g., doctors but not nurses), and geographic location (e.g., only in the EU).⁸⁶ Fifth, the policy can also outline prohibitions or restrictions on the transfer of the data to third parties based on the data subject's consent.⁸⁷

Finally, the data subject can demand transparency from the service via the audit mechanism, requiring all data accesses to be logged and made visible to them, or they receive notifications whenever their data is accessed.⁸⁸ This means that every exchange of data from the data pod to the controller is logged, as well

⁸² IRMA, IRMA terminology: Cryptographic entities.

⁸³ Camenisch (n 21), chs.1 and 20.

⁸⁴ *ibid.*

⁸⁵ *ibid.*

⁸⁶ *ibid.*

⁸⁷ *ibid.*

⁸⁸ *ibid.*, ch.6.

as every exchange of data from the controller to a third-party (processor or separate data controller) can be reviewed by the user, ensuring transparency between the data subject and the controller.

Once a ‘personalised policy’ (hereafter referred to as policy) has been created for the data pod, when the data subject engages with a potential data controller, the controller’s privacy policy is evaluated against the data subject’s policy using a technical component called Policy Decision Point (PDP).⁸⁹ In other words, the PDP matches the data subject’s preferences with the data controller’s privacy policy, which should explain how personal data is processed by the controller in accordance with GDPR’s legal requirements. In other words, a GDPR compliance check occurs when the controller submits its privacy policy.

Once the PDP is prompted to evaluate the controller’s privacy policy against the data subject’s policy, it then determines whether the two policies are compatible.⁹⁰ This process is possible because the policy terms are expressed in a formal language that allows the terms defined by the data subject to be machine-readable.⁹¹ This language is less expressive than natural language used by humans because it has a limited syntax and a predefined vocabulary that eliminates ambiguity, ensuring the PDP can effectively compare the two policies. The comparison between the two policies enables the PDP to assess whether the controller’s data processing practices are consistent with the data subject’s policy. If the PDP determines that the two policies are compatible, then the exchange occurs without the data subject’s intervention.⁹² However, if a conflict arises, then a negotiation process is initiated.⁹³ The data subject and/or the controller can review the areas of conflict and adjust their policy to match each other’s policy or reject the data exchange.⁹⁴ The decision to allow the data exchange rests with the data subject because the approved policy for the exchange either occurs when the controller changes their policy to match the data subject’s policy or the data subject changes their policy to match the controller’s privacy policy. No personal data is exchanged without the data subject’s authorisation.

⁸⁹ *ibid*, ch. 17 and 20.

⁹⁰ *ibid*.

⁹¹ *ibid*, sec. 6.2, 6.3.3, 6.4.2 and 6.4.3.

⁹² *ibid*.

⁹³ *ibid*.

⁹⁴ *ibid*.

Once the data exchange between the data subject and data controller is approved, the actual transfer of data from the data pod to the controller is secured using cryptographic techniques, ensuring integrity and confidentiality. The Policy Enforcement Point (PEP) guarantees that the approved policy is upheld and discloses data from the data pod to the controller in compliance with the accepted terms.⁹⁵ In other words, the PEP enforces a unified policy that reflects the controller's legal responsibilities under the GDPR alongside supplementary restrictions arising from the data subject's privacy preferences. This policy then governs the processing of the data throughout its lifecycle according to the agreed-upon terms (i.e., sticky policy).⁹⁶ This ensures that even when data leaves the pod and is transferred to the controller, the data subject's preferences are adhered to. Once the policy governing the data retention period ends or is cancelled by the data subject, the processing operation ends, and the data stored by the controller is deleted.

2.3 CRYPTEX & INDIVIDUAL DATA SOVEREIGNTY

CrypTex, the combination of the Solid Project's data pod and PRIMELife's policy languages provides the architecture to give a user the means to enforce their 'individual data sovereignty' as defined in Chapter One.

Transparency is operationalised through three technical processes that provide the data subject with transparent information regarding the processing of the personal data. The system allows the data subject to create a policy for each data point or set of data in the data pod or produced by a service. This ensures that the data is processed in accordance with the data subject's preferences, respecting the data minimisation principle, purpose limitation principle, storage limitation principle, and data transfer preferences. In addition, it permits the data subject to enforce their privacy preference via "sticky policies", guaranteeing that their preferences are upheld when the data is shared with/by the controller. Finally, PRIMELife facilitates the data subject's tracking of how their data is processed by auditing the controller's data access and data transfers to third parties. This level of transparency regarding data processing activities allows the data subject to provide informed consent.

⁹⁵ *ibid* chs. 17 and 20.

⁹⁶ *ibid* chs. 17 and 20.

Second, consent under this structure is facilitated through PRIMELife's policy languages, which create a personalised policy. By defining the terms and conditions of data use, the PDP, according to the data subject's wishes, grants permission to services that align with their preferences. In cases where conflict happens, the PDP will prompt the data subject to revise their preferences to match the controller's policy or reject the data exchange. Furthermore, the PEP ensures that the controller complies with the data subject's wishes, as listed in the policy. The PEP can also limit the controller's control and storage of personal data according to the data subject's wishes by enforcing the data retention conditions that facilitate consent withdrawal.

Third, CrypTex facilitates the data subject's rights of data portability and access. Firstly, the data subject knows what data point is being shared with the controller and under what conditions it can be processed. Secondly, the data subject can follow the data's processing through the audit mechanism (logging data access and exchanges). Finally, the data subject can control the sharing of data to and from the data controller and the sharing between data controllers and third parties by limiting or prohibiting further processing. When data access is revoked (i.e., consent withdrawn), the data subject can ensure that their personal data is removed from the controller's authority and storage through the PEP, which also facilitates the right to erasure ("right to be forgotten"). CrypTex also ensures compliance with the right to rectification, allowing corrections to personal data to be made by sending a new policy with the corrected data.

2.4 CONCLUSION

In summary, this chapter discussed how CrypTex can provide data subjects with the tools to control the data controller's processing activities and protect their personal data. These technological systems permit data subjects to preserve their privacy and allow them to store their data independently of the controller. CrypTex also permits them to select the data they want to share, for a specific purpose and for a certain period. In addition, the mechanism ensures that all controllers and processors honour the terms and conditions set by the data subject. Now that CrypTex's architecture has been explored and its relationship to 'individual data sovereignty' explained, the next chapter will assess whether CrypTex facilitates

the GDPR's second purpose, the free movement of personal data within the Union.⁹⁷

3. CRYPTeX & GDPR

This chapter aims to answer the question: *To what extent is CrypTex compatible with the GDPR?* A doctrinal analysis of Articles 5, 6, 7, 8, and 9 of the GDPR to evaluate of the feasibility of implementing CrypTex within the EU, will be conducted to address this question. These legal provisions are necessary to evaluate CrypTex's compatibility with GDPR, because its introduction will primarily affect who determines the purposes and means of processing and under which legal basis controllers may access data. Section 3.1, Articles 5(1)(a) and 6(1) GDPR & CrypTex, will assess the compatibility of CrypTex with the GDPR by discussing whether the combination of a data pod and policy languages facilitates lawful processing under the GDPR. Furthermore, the chapter will also assess the compatibility of CrypTex with the GDPR by discussing whether the combination of a data pod and policy languages facilitates the GDPR's core principles (Section 3.2, Articles 5(1)(b-f) and 5(2) GDPR & CrypTex).

3.1 ARTICLES 5(1)(A) AND 6(1) GDPR & CRYPTeX

3.1.1 Consent & Contract

According to Article 6(1)(a) GDPR, consent is achieved when data controllers can demonstrate that the data subject has agreed to the processing of their personal data for specific purposes and that this consent is freely given, informed, specific, and unambiguous.⁹⁸

CrypTex aligns with this legal basis by providing data subjects with the means to manage 'permissions' for processing of their personal data and transparency in data processing activities. This system enforces the formalised aspects of consent (i.e., machine-readable components), such as access permissions and retention periods, by following a limited syntax and predefined vocabulary that eliminates ambiguity. CrypTex cannot, however, enforce non-formal aspects of consent (i.e., non-machine-readable components) such as whether consent was freely given, sufficiently informed, specific or unambiguous.

⁹⁷ GDPR, art. 1(3).

⁹⁸ *ibid* rec. 32.

These aspects depend on a legal assessment due to their ambiguity and therefore, cannot be understood or enforced by CrypTex. Nevertheless, these legal requirements can be implied by CrypTex.

Data subjects are kept informed about how their data is processed through the agreed-upon policy and remain informed via the audit mechanism (see Section 2.2). These components work together to authorise and keep track of data between the data subject's pod and the controller. Policies enforced by the PDP and PEP ensure that data is processed in accordance with the data subject expectations (*specific* and *unambiguous*). When the data subject wishes to update or terminate the processing of their data, the policy can be updated or revoked within a specified period or at any time as defined by the policy. However, whether the data is freely given depends on contextual factors such as the relationship between the data controller and the data subject, since the controller determines the purposes and means of processing the personal data - unless this is determined by law.⁹⁹ Inequalities in the level of control over the processing activity create a power imbalance between the data subject and the data controller, especially in the case of dominant or essential digital services, even when the data subject can determine the terms of their personal data processing.

Data controllers typically possess greater technical expertise and deeper knowledge of data collection practices, including the interactions (sharing arrangements) and potential negative consequences.¹⁰⁰ Even when the transparency requirements are fulfilled, many data subjects lack the technical knowledge to understand the controller's activities.¹⁰¹ Therefore, controllers - especially those who hold market dominance -¹⁰² maintain structural control over data processing and thus limit the data subject's ability to influence the controller's operations.¹⁰³ Although data subjects can withhold consent, this limitation undermines their capacity to configure or restrict processing, making them susceptible to manipulation. Controllers may, as a result, request more personal data, broaden sharing arrangements, and have longer retention periods than the

⁹⁹ *ibid* art. 4(7).

¹⁰⁰ Tobias Matzner and others, 'Do-It-Yourself Data Protection— Empowerment or Burden?' in Serge Gutwirth, Ronald E. Leenes, Paul De Hert (eds) *Data Protection on the Move* (Law, Governance and Technology Series, vol 24. Springer 2016), p. 280.

¹⁰¹ GDPR, arts. 12-14.

¹⁰² *META* case (n 5).

¹⁰³ Stanford (n 13).

data subject initially intended, leading to an imbalance of power that perpetuates the binary consent model (see Section 1.1).¹⁰⁴

CrypTex, despite providing user-defined constraints, cannot facilitate consent under Article 6(1)(a) GDPR, when the data subject is providing consent to a dominant controller, because CrypTex does not remove the controller's discretion over processing arrangements unless genuine freedom of choice is provided, as required by law.¹⁰⁵

Unlike Article 6(1)(a) GDPR, which permits the data subject to set the terms of the processing of their personal data, Article 6(1)(b) GDPR mediates the relationship between the controller and the data subject with a contractual agreement. In this scenario, the processing of personal data is necessary for the performance of the contract, such as providing a physical address to receive a package. Determining whether personal data is “necessary for performance” is evaluated based on three elements: the perspective of the controller, what is “reasonable to the data subject when entering into the contract, and whether the contract can still be “performed” without the processing of the personal data in question.¹⁰⁶ These factors should be evaluated on a case-by-case basis and reflect the specifics of the contract.¹⁰⁷ Additionally, this assessment must be done before the commencement of data processing, unless the personal data is necessary for pre-contractual obligations.¹⁰⁸ Consequently, the controller determines and demonstrates which personal data is “necessary for the performance of a contract” under Article 6(1)(b) GDPR, and the data subject must agree to the controller's terms before their personal data is handed over. Any data other than that requested by the controller that is not necessary to the processing activity must be based on either legitimate interest, Article 6(1)(f) GDPR, or consent, Article 6(1)(a) GDPR.

¹⁰⁴ *ibid.*

¹⁰⁵ *META* case (n 5); EDPB (n 20).

¹⁰⁶ Martin Nettesheim, ‘Data Protection in Contractual Relationships (Art. 6 (1) (b) GDPR)’ (2023) sec. 4, pg. 90-91 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4427134> accessed 15 June 2025; EDPB, ‘Guidelines 2/2019 on the Processing of Personal Data Under Article 6(1)(b) GDPR in the Context of the Provision of Online Services to Data Subjects’ (Version 2.0, 8 October 2019) <https://www.edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines-art_6-1-b-adopted_after_public_consultation_en.pdf> accessed 16 April 2025; GDPRhub, ‘Article 6 GDPR’ (gdprhub.eu, 16 January 2025) <[https://gdprhub.eu/Article_6_GDPR#\(d\)_Vital_interest](https://gdprhub.eu/Article_6_GDPR#(d)_Vital_interest)> accessed 16 April 2025.

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

CrypTex can facilitate this process by allowing the controller to present a policy detailing how the personal data will be processed (see Section 2.2). If this policy aligns with the data subject's policy, then the data will be exchanged and the contract executed. If not, three scenarios are possible: the data subjects may amend their policy to match the controller's policy, the controller can amend their policy, or the data subject sees the terms as "unreasonable" and rejects the policy, preventing the contract's execution.

When the controller holds market dominance, the data subject may feel compelled to amend their policy so that they can access the controller's "essential" service,¹⁰⁹ which enables the controller to define a broad set of terms as "necessary" for the execution of the contract. This can result in the data subject being unable to conclude a "good" contract that meets their "reasonable expectations";¹¹⁰ and facilitates a take-it-or-leave-it situation (see Section 1.1) that contradicts Art. 6(1)(b) GDPR because the data processing terms generated by the controller are unilaterally imposed on the data subject.¹¹¹ PETs like CrypTex aim to prevent this; however, this imbalance will persist unless the controller offers the data subject meaningful alternatives that meet their "reasonable expectations".¹¹²

If the controller amends their policy to match the data subject's, the data subject can conclude a "good" contract that meets their "reasonable expectations".¹¹³ On the other hand, if the data subject rejects what they consider "unreasonable" terms,¹¹⁴ this demonstrates a misalignment with the subject's privacy preference.

Once the terms are agreed to, the data can be processed to fulfil the contract, and the PEP guarantees that the agreed-upon conditions are technically enforced. Upon expiration or revocation of the terms, the controller is required to erase the data, indicating the completion or termination of the contract.

¹⁰⁹ Stanford (n 13); *META* case (n 5).

¹¹⁰ Nettesheim (n 106), p. 91.

¹¹¹ Nettesheim (n 106), pp. 90-91; EDPB (n 106), p. 9.

¹¹² *ibid.*

¹¹³ Nettesheim (n 106), p. 91.

¹¹⁴ *ibid.*

3.1.2 Legal Obligation and Public Interest

Under Articles 6(1)(c) and (e) GDPR, the conditions for the processing of personal data are determined by the legislator. As stated under Article 4(7) GDPR, EU and Member State laws can determine what the means and purpose of processing is that must be followed by controllers. Data controllers who are “subject to a legal obligation or are processing data necessary for the performance of a task carried out in the public interest or in the exercise of official authority”,¹¹⁵ follow the law that outlines the legal basis for processing. The rule sets the requirements for who can process personal data, the type of personal data that can be collected, the entities to which the personal data may be disclosed, the purpose for processing, the data retention period, and other specifications to ensure lawful and fair processing.¹¹⁶ Data processing based on a law can also include special categories of personal data, which can be used for purposes listed under Articles 9 (1)(b) to (j) GDPR.

In CrypTex, the controller has three categories of data to choose from depending on the purpose for processing. They are personal data in the data pod, ABCs in the data pod, and personal data generated by the data subject’s use of their service. The willingness of the data subject to grant access to their data in the data pod depends on the category of personal data required to carry out the data processing activity.

ABCs, as discussed in Section 2.2, are privacy-preserving mechanisms that do not share personal data with the controller. Since this data does not reveal new information relating to an identified individual, the data subject can allow data controllers to use this type of data for processing activities based on Articles 6(1)(c) and (e) GDPR. Data controllers can also employ ABCs to ensure compliance with Article 8 GDPR, to verify the ages of their users.¹¹⁷

However, the controller must obtain the data subject’s consent when it is necessary to use personal data from the data pod or personal data generated using the service. Therefore, data exchanges may only take place when the processing aligns with the data subject’s specified privacy preferences. The data subject may not be aware of the processing of their personal data for legal claims or in the

¹¹⁵ GDPR, rec. 45 and arts. 6(1)(c) and (e).

¹¹⁶ *ibid.*

¹¹⁷ *ibid.*, art. 8(1) and (2).

public interest (in their best interests) and can refuse to grant access to their data. However, pursuant to Articles 6(1)(c) and (e) GDPR, all parties involved in the processing activity must follow the applicable legal requirements upon which the processing is based.¹¹⁸ Therefore, the data subject's consent must be able to be overridden for processing activities falling under Articles 6(1)(c) and (e) GDPR, which is currently not possible with CrypTex.

3.1.3 Vital Interest and Legitimate Interest

Articles 6(1)(d) and (f) GDPR - which respectively address vital interest and legitimate interest - are as restrictive as Articles 6(1)(c) and (e) GDPR because the data subject does not have control over the means and purposes of processing. Under these provisions, the terms of processing are determined by the controller or a third party - not by law - even if the processing benefits the data subject.

On one hand, processing based on vital interest is only permitted when it is necessary to protect the interest of the data subject or another person,¹¹⁹ according to Article 9 GDPR (e.g., health data). The underlying assumption is that the right to life overrides the right to data protection.¹²⁰ Unlike Article 6(1)(b) GDPR, which requires mutual agreement,¹²¹ the controller alone decides the means and purposes of processing to protect vital interests.¹²² This legal basis should only be used when no other legal basis applies,¹²³ and only in cases where there is a real and imminent danger.¹²⁴ Additionally, a mere effort in protecting a vital interest is sufficient.¹²⁵ Therefore, the wishes of the data subject (or other person) on whether they want their vital interests to be protected are unimportant.¹²⁶

In the context of CrypTex, if vital interests apply, the controller or a third-party can access data from the data pod, ABCs, and personal data in their possession, only in compliance with the data subject's policy.

¹¹⁸ *ibid.*, rec. 45.

¹¹⁹ GDPR, arts. 6(1)(d) and 9(2)(c).

¹²⁰ Kuner (n 11), pp. 333-334; GDPRhub (n 106); GDPR, rec. 46.

¹²¹ Nettesheim (n 106), pp. 90-91.

¹²² Kuner (n 11), pp. 333-334; GDPRhub (n 106); GDPR, rec. 46.

¹²³ *ibid.*

¹²⁴ *ibid.*

¹²⁵ *ibid.*

¹²⁶ *ibid.*

ABCs can confirm certain medical information, but not all lifesaving data can be exchanged this way. If a different type of data is needed (e.g., data from the data pod or personal data in their possession), and the data subject is unable to provide consent (due to refusal, unconsciousness, or the device's unavailability), vital interest overrides the data subject's ability to protect their personal data (i.e., CrypTex's user-defined constraints) and grants unrestricted access to data which bypasses CrypTex's privacy safeguards. This "break the glass" access falls outside of CrypTex's architecture, so there is no record of what personal data is retrieved, who it is shared with, and for how long it is being stored, which violates the GDPR principle of transparency, unless the data access to the pod can be logged without an agreed-upon policy.

Once the "glass" is broken, the data subject's privacy is at risk, especially if third parties such as first responders or service providers have access to all their personal data. Healthcare providers follow a code of conduct, but not all data controllers or third parties (such as social media platforms) processing personal data under Articles 6(1)(d) and 9(2)(c) of the GDPR do. Once the "glass" around CrypTex is "broken", the data subject has no safeguards to rely on, unless there is a protocol that would allow the data subject to review the data processing activity after it has concluded.

On the other hand, processing based on legitimate interests, Article 6(1)(f) GDPR, is only allowed if the controller's interests "override the interests or other fundamental rights and freedoms of the data subject, which require protection of personal data, in particular where the data subject is a child."¹²⁷ Unlike vital interests, personal data can only be processed under legitimate interests if the interest meets the three-step test.¹²⁸

Firstly, the processing activity must serve a legitimate interest.¹²⁹ In the KNLTB case, the CJEU held that legitimate interests do not have to be determined by law and that the commercial interests of the controller and those of a third party

¹²⁷ GDPR, art. 6(1)(f).

¹²⁸ *ibid*; EDPB, 'Guidelines 1/2024 on Processing of Personal Data based on Article 6(1)(f) GDPR' (Version 1.0, 8 October 2024) <https://www.edpb.europa.eu/system/files/2024-10/edpb_guidelines_202401_legitimateinterest_en.pdf> accessed 16 April 2025.

¹²⁹ *ibid*.

can be considered as legitimate interests.¹³⁰ The EDPB, in their guidelines, stated that the legitimate interests must be lawful (not illegal); clearly and precisely identified; and must be real and present (not hypothetical).¹³¹ Secondly, the processing activity must be necessary to achieve the legitimate interest (proportionality test).¹³² In other words, the personal data used must be “adequate, relevant and limited to what is necessary in relation to the purpose for which they are processed”.¹³³ If the personal data is not “necessary”, then it should not be used.¹³⁴ Finally, the legitimate interests and the fundamental rights of the data subject should not take precedence over the legitimate interests of the controller.¹³⁵ Under these conditions, the controller should identify and describe the data subject’s interests, fundamental rights and freedoms;¹³⁶ the impact of the processing on the data subject; and the reasonable expectations of the data subject.¹³⁷

Data controllers and third parties use this legal basis to process personal data for direct marketing fraud prevention.¹³⁸ If data from the data pod is needed, the controller must obtain the data subject’s consent. If the conditions surrounding the processing do not meet the data subject’s expectations, they may refuse access and prevent processing based on legitimate interest. This conflicts with the GDPR, since the regulations allow data controllers to process personal data in pursuit of their own legitimate interests or those of a third party, provided the conditions of the three-step test are met.¹³⁹ CrypTex technically enforces the data-subject’s authorisation as a precondition to allow access to personal data, unless the controller’s policy overrides the data subject’s policy.

¹³⁰ Case C-62/ 122 *Koninklijke Nederlandse Lawn Tennisbond v Autoriteit Persoonsgegevens* [2024] ECLI:EU:C:2024:858; GDPRhub, ‘CJEU - C-621/22 - Koninklijke Nederlandse Lawn Tennisbond’ (gdprhub.eu, 19 October 2024) <[https://gdprhub.eu/index.php?title=CJEU - C%E2%80%91621/22 - Koninklijke Nederlandse Lawn Tennisbond](https://gdprhub.eu/index.php?title=CJEU_-_C%E2%80%91621/22_-_Koninklijke_Nederlandse_Lawn_Tennisbond)> accessed 8 May 2025.

¹³¹ EDPB (n 128).

¹³² *ibid.*

¹³³ GDPR, art. 5(1)(c).

¹³⁴ EDPB (n 128); GDPR, art. 6(1)(f).

¹³⁵ *ibid.*

¹³⁶ GDPR, rec. 47; EDPB (n 128).

¹³⁷ *ibid.*

¹³⁸ *ibid.*

¹³⁹ GDPR, art. 6(1)(f) and rec. 47.

3.1.4 Conclusion

This doctrinal analysis of Articles 5(1)(a) and 6(1) GDPR in conjunction with Articles 7, 8, and 9 GDPR has demonstrated that requiring consent from the data subject to process data can cause conflict with the GDPR when personal data is processed for a legal obligation (Article 6(1)(c) GDPR), in the public interest Article 6(1)(e) GDPR and for a legitimate interest (Article 6(1)(f) GDPR) because the data subject can prevent their personal data from being processed for these purposes. However, there are areas of abuse caused by data controllers when data is processed based on consent (Article 6(1)(a) GDPR), for the performance of a contract (Article 6(1)(b) GDPR) because of the imbalance of power between the data subject and the controller; and data protection measure being overridden to protect a vital interest (Article 6(1)(d) GDPR).

3.2 ARTICLES 5(1) (B-F) AND 5(2) GDPR & *CRYPTTEX*

3.2.1 Articles 5(1)(b), (c), and (e) GDPR

Compliance with the GDPR Principles of ‘purpose limitation’, ‘data minimisation’, and ‘storage limitation’ depends on which legal basis was used to process the personal data. Under Article 6(1)(a) GDPR, CrypTex’s compliance with Articles 5(1)(b), (c), and (e) GDPR is determined by the data subject through the generation of a policy that is enforced by the PDP and PEP. (See Section 2.2) However, the imbalance of power caused by the controller’s monopoly over the means and purposes of processing means that the data subject can be manipulated into agreeing to a privacy policy that does not represent their privacy preferences. (See Section 3.1) This issue also prevents compliance with Articles 5(1)(b)(c) and (e) GDPR, when processing is based on Article 6(1)(b) GDPR since compliance is determined on whether the data is necessary for the performance of the contract and if the data subject “reasonably expected” the data used to be processed for that purpose.¹⁴⁰ The controller and the data subject may disagree on what category of data should be used (ABCs or personal data), which data processor should have access to their data (further processing), and a designated storage period for data stored by the controller. If the controller has a dominant position in the market and provides an essential service, the data subject will have no choice but to comply

¹⁴⁰ Nettesheim (n 106), pp. 90-91.

with the controller's terms of processing, preventing the "reasonable expectation" of the data subject from being met when entering a contract with such a controller.

Under Articles 6(1)(c) and (e) GDPR, compliance with the principles is determined by legislation. As discussed in Section 3.1, the controller's ability to comply with these principles will depend on what type of data is needed from the data subject. If a data controller requires data from the data pod, or data in their possession is necessary for the processing activity, they will have to rely on the consent of the data subject - which may not align with the law. Depending on the type of data required, it may be challenging for the controller to demonstrate compliance with the legislation.

Under the legal basis of vital interest, Articles 6(1)(d) and 9(2)(c) GDPR, the 'purpose limitation principle' is quite strict because it can only be used if "a situation of concrete and imminent danger exists for the data subject or third party".¹⁴¹ This means that the purpose will always be to save a life. However, determining what data is necessary (data minimisation principle) is not easily determined until it is needed.¹⁴² The controller's ability to process personal data for the purpose of saving a life will depend on what personal data is required from the data subject. (See Section 3.1) As discussed in Section 3.1, if the data subject is unable to provide consent, the controller or third party will "break the glass" and retrieve and store the personal data necessary to "save a life". This process offers no transparency to the data subject regarding which data is used and how it is processed, as the access to the data subject's personal data is not governed by a policy and is outside of CrypTex's architecture.

Finally, processing taking place under the legal basis of legitimate interest (Article 6(1)(f) GDPR) is highly regulated. On one hand, compliance with the purpose limitation principle is rigorously monitored and enforced by both national and supranational regulators, as well as judicial authorities. For instance, in the *META* case, the CJEU held that the controller could not rely on legitimate interest for the processing of personal data for personalised advertising, which finances its activity.¹⁴³ On the other hand, compliance with the principles of *data minimisation*

¹⁴¹ GDPRhub (n 106).

¹⁴² GDPR, art. 6(1)(d) and 9(2)(c).

¹⁴³ *META* case (n 5); GDPRhub, 'CJEU - C-252/21 - Meta Platforms and Others (General terms of use of a social network)' (gdprhub.eu, 8 November 2024)

and ‘storage limitation’ is not clear-cut because the controller decides what is necessary for data processing. If the controller requires personal data from the data pod, they will have to rely on the consent of the data subject (see Section 3.1), which can hamper compliance with these principles. The data subject can prevent the controller from receiving all the necessary data for the legitimate interest, as well as prevent the storage of data for said legitimate interest. In such a case, the controller would have to rely on the data subject’s consent. Accordingly, if the controller requires consent from the data subject, compliance with the GDPR principles of data minimisation and storage limitation cannot be guaranteed. The assessment of whether the processing operation complies with the principles of data minimisation and storage limitation no longer relies solely on an objective evaluation of necessity for legitimate interest; it also requires the controller to take the data subject’s interest into account.

3.2.2 *The Data Accuracy Principle*

Article 5(1)(d) GDPR, ‘the data accuracy principle’, states that personal data must be accurate, and where necessary, kept up to date,¹⁴⁴ meaning that the controller must take “every reasonable step to ensure that inaccuracies are rectified or deleted”.¹⁴⁵ Compliance with this principle depends on the data requested by the controller and the length of the storage period.

ABCs (as defined in Section 2.2) are verifiable through IdPs, so the accuracy of the data retrieved from an ABC can be relied upon. Furthermore, personal data generated from the use of the service can be quickly verified by the controller. In contrast, data stored in the pod may not always be accurate because the data subject can freely modify it. This does not pose a compliance concern under the GDPR, since the obligation to ensure accuracy applies only to data that the controller processes. When a data exchange is required for legal purposes, the data subject is required to provide the data controller with accurate data; otherwise, their actions could be construed as fraudulent. However, this concern arises when the data is stored outside of the data pod by the controller.

<[https://gdprhub.eu/index.php?title=CJEU_-_C-252/21_-_Meta_Platforms_and_Others_\(General_terms_of_use_of_a_social_network\)](https://gdprhub.eu/index.php?title=CJEU_-_C-252/21_-_Meta_Platforms_and_Others_(General_terms_of_use_of_a_social_network))> accessed 8 May 2025.

¹⁴⁴ GDPR, art. 5(1)(d)

¹⁴⁵ *ibid* rec. 39.

Accuracy is not only about data being objectively correct but also about it being up to date. The process for exchanging personal data via CrypTex is through a one-time information disclosure event. Once data is sent via an approved policy, the data remains unchanged when stored outside the data pod until the agreed-upon data retention period has expired. This can be mitigated by allowing shorter retention periods, thereby reducing the window during which outdated data remains accessible. However, data transferred using CrypTex remains tied to the *original* sticky policy. This means that when a data exchange happens between the data subject and the data controller, the sticky policy - which governs the data processing - is attached to that one-time information disclosure at that specific point in time. Any subsequent changes made to the data in the data pod would not be reflected in the data stored by the controller. If the change needs to be reflected, a new data exchange must be initiated in CrypTex, and a new policy (sticky policy) created. For this reason, CrypTex does not support a dynamic transaction between the data controller and the data subject's pod that would allow changes in the data pod to be reflected in the data stored by the data controller.

However, re-authorising each update risks causing 'notice fatigue' (excessive interaction burdens) in the data subject,¹⁴⁶ making continuous updates unrealistic and burdensome. So, despite CrypTex having temporal control by limiting the retention period, it also limits the usability of CrypTex. Therefore, a more effective approach allows the agreed-upon policy to be "refreshed" to account for changes made to the data while the processing operation is ongoing. However, deleting outdated personal data can create roadblocks for processing activities that require such data for archiving purposes in the public interest, scientific, historical research, or statistical purposes.¹⁴⁷ This issue can be avoided if the data required for these purposes can be stored separately, to ensure that the changes in the data can be observed.

3.2.3 The Data Security Principle

Article 5(1)(f) GDPR, 'the data security principle', requires data controllers to employ suitable technical and organisational safeguards to keep stored data secure

¹⁴⁶ Sarah E Carter, 'A Value-Centred Exploration of Data Privacy and Personalized Privacy Assistants' (2022) 1 Digital Society.

¹⁴⁷ GDPR, art. 5(1)(b).

and avoid breaches.¹⁴⁸ The controller must guarantee confidentiality, integrity, and availability through a risk-based approach.¹⁴⁹

Data controllers assess the risks to the rights and freedoms of their data subjects by conducting a data protection impact assessment to determine whether their processing operations can be considered as high risk.¹⁵⁰ With the assistance of CrypTex, the controller can mitigate risks by using an ABC instead of personal data, a personalised privacy policy to vet and approve specific parties, or a PEP to ensure that authorised parties process and erase the personal data in accordance with the policy. These mechanisms, in addition to providing an encrypted connection between the data pod and the controller (see Section 2.2), will ensure that there is no data breach.¹⁵¹ However, the functioning of CrypTex and the evident contradictions to the GDPR, as discussed above, raise concerns regarding the availability of personal data for data processing.

If the controller requires personal data from the data pod, the controller relies on the consent of the data subject. Under Articles 6(1)(a) and (b) GDPR, a data subject can lawfully refuse to share their data by refusing to consent or refusing to engage in a contractual agreement that processes data that is not in line with their preferences. In contrast, where processing is based on 6(1)(c) to (f) GDPR, for example, where processing is either mandated by law or overrides their right to data protection (e.g., to protect a vital interest), CrypTex's technical enforcement of user-defined restrictions may prevent the controller from accessing data that they are legally entitled to, or in some cases legally required, to process.

This tension is not unique to CrypTex because in any system, a data subject may refuse to provide information that a controller is legally entitled to obtain, however, CrypTex makes this refusal technically enforceable by default which might be considered illegal unless the data subject's consent can be overridden when the processing of personal data is based on 6(1)(c) to (f) GDPR. To the controller, implementing CrypTex may be viewed as inappropriate for securing data and making it available for processing Article 32 GDPR, thereby creating a

¹⁴⁸ *ibid* art. 5(1)(f); art. 24(1).

¹⁴⁹ *ibid* art. 32 (1).

¹⁵⁰ *ibid* art. 35.

¹⁵¹ *ibid* art. 32(2).

data breach—the accidental loss or access to personal data due to the controller implementing CrypTex.¹⁵²

3.2.4 *The Accountability Principle*

Article 5(2) GDPR, ‘the accountability principle’, ensures that the controller can demonstrate compliance with the other GDPR principles.¹⁵³ One way to demonstrate compliance with the principles is to respect the GDPR concept of Data Protection by Design and by Default. Data controllers, either during processing activities or when establishing processing methods, are required to implement measures that effectively demonstrate adherence to data protection principles. They “integrate the necessary safeguards to meet the requirements of the GDPR and protect the rights of data subjects” (data protection by design).¹⁵⁴ Furthermore, when the controller processes personal data, “they should implement appropriate measures to ensure that only personal data which is necessary for the purposes will be processed by default” (data protection by default).¹⁵⁵ This means that privacy and data protection considerations must be embedded into the processing lifecycle. CrypTex aimed to embody this principle; however, due to several technical matters, CrypTex is not compliant with Articles 5(1) and 6(1) GDPR.

First, by using CrypTex, the controller is unable to demonstrate compliance with the GDPR principles of lawful processing, purpose limitation, data minimisation, and storage limitation in most cases.¹⁵⁶ As discussed in Sections 3.1 and 3.2, dominant controllers hold a monopoly over the means and purposes of processing, creating an imbalance of power that results in a take-it-or-leave-it situation. The take it or leave it scenario occurs when consent is required for the performance of a contract and a data subject is pressured into agreeing to a policy that does not represent their privacy preferences and undermines their “reasonable expectations”. This situation can only be addressed through technical and legal measures that provide the data subject with genuine choices and enable joint determination of the processing means. Additionally, due to CrypTex solely

¹⁵² GDPR, art. 32(1) and (2).

¹⁵³ *ibid.*, art. 5(2).

¹⁵⁴ GDPR Handbook (n 15), pp. 183-185.

¹⁵⁵ *ibid.*

¹⁵⁶ GDPR, arts. 5(1)(a), (b), (c), and (e).

relying on the consent of the data subject, data processing activities based on legal obligations, public interest, and legitimate interest cannot be transacted without the data subject's approval, unless a technical solution allows the data subject's consent to be overridden in specific cases. Furthermore, in cases where a vital interest needs to be protected, a data controller or a third party can completely bypass the data subject and "break the glass" of control, security, and privacy provided by CrypTex - leading to abuse because there are no safeguards. This is, unless a technical solution allows a privacy policy to be automatically generated to monitor all personal data processed by a data controller or third party.

Second, the controller is unable to demonstrate compliance with Article 5(1)(d) GDPR depending on what type of data is being collected and for how long (as discussed in Section 3.2), unless a technical solution can "refresh" a privacy policy periodically to take into account any changes made to the data stored in the data pod, notify the data subject, delete the old information from the storage of the controller, and save the outdated personal data separately for archiving purposes in the public interest, scientific, historical research or statistical purposes.

Finally, in CrypTex, as discussed in Section 3.2, the data subject can deny the controller access to the necessary data for processing based on legal obligations, public interests, and legitimate interests with which they might disagree. The data subject can unlawfully withhold data using CrypTex, causing a data breach, unless a technical solution can be implemented to override the data subject's consent (as discussed above), enabling data to be available for data processing based on Articles 6(1)(c), (e), and (f) GDPR.

Therefore, unless these issues are reconciled, the controllers will not be able to demonstrate compliance with Article 5(2) GDPR.

3.3 CONCLUSION

In conclusion, this chapter examined CrypTex's compatibility with Articles 5 and 6 GDPR and identified conflicts between CrypTex's design assumptions and the GDPR. The following chapter will address strategies for ensuring CrypTex complies with GDPR requirements, utilizing both technical and legal solutions to support data controllers in maintaining the regulation's dual objectives: facilitating the free flow of personal data while safeguarding its protection.

4. RECONCILIATION OF CRYPTeX WITH THE GDPR

This concluding chapter will answer the question: *How can CrypTex be reconciled with GDPR?* Several legal and technical strategies have been put forward to address the structural conflicts identified in Chapter Three. Section 4.1, Freedom of Choice, will propose technical and legal mechanisms to resolve the dilemmas that arise when the data controller has total control over data processing arrangements, so that the data controller can comply with Articles 6(1)(a) and (b) GDPR. Section 4.2, State Policies and Default Policies, will propose two technical options that can be used to resolve the conflict between competing privacy policies proposed by the data subject and the data controller based on Articles 6(1)(c)(e) and (f) GDPR. These technical options will also ensure that data is made available for processing activities. Section 4.3, The Emergency Protocol, will introduce technical and legal solutions that will automatically create a privacy policy during emergencies pursuant to Articles 6(1)(d) and 9(2)(c) GDPR. At the same time, the *Protocol* permits transparency between the data controller and third parties, and safeguards are maintained. This allows the data subject to seek legal remedies if a data controller or third-party “overstepped”. In Section 4.4, The Periodic Refresh, is a technical component that ensures the imposed privacy policy is refreshed periodically and that the data used in the data processing activity is current and correct. It allows outdated data to be stored separately for archiving purposes in the public interest, scientific, or historical research, and statistical purposes. Finally, in Section 4.5, Concerns Regarding the Impact on Data Subjects, addresses the potential psychological effects on data subjects and the increased legal burdens for data controllers, introduced by the proposed amendments.

4.1 FREEDOM OF CHOICE

Both the CJEU and the EDPB agree that data subjects must be offered alternatives and genuine freedom of choice for Article 6(1)(a) GDPR to serve as a valid legal basis for processing personal data.¹⁵⁷ Data subjects must be able to refuse processing without negative consequences or have access to alternative options that correspond with their preferences (“freedom of choice”).¹⁵⁸ This concept of

¹⁵⁷ *META* case (n 5); EDPB (n 20).

¹⁵⁸ *ibid.*

“freedom of choice” is also reflected in Article 6(1)(b) GDPR, which enables agreements between the controller and data subject regarding the processing of personal data for a specific purpose, allowing the data subjects’ “reasonable expectations” to be met.¹⁵⁹ Achieving “freedom of choice” requires narrowing the technological literacy gap between the controllers and the data subjects. To accomplish this, the data subject must have a more granular perspective on the data controller’s data processing arrangements. Consequently, the policy should shift from the data subject uniquely managing each personal data point via “sticky policies” (see Section 2.2), to also fine-tuning data arrangements for each controller they engage with.

Data processing arrangements can be carried out either internally by the controller or in partnership with external processors. In an internal data processing arrangement, the controller must be flexible in accommodating the data subject’s terms.¹⁶⁰ If the controller declines to accommodate the data subject’s requests, the legal mechanisms provided by GDPR can be invoked for further recourse. One such mechanism is an appeal to the Data Protection Officer (DPO), who can intervene by reviewing the controller’s processing arrangements, present a reasoned argument for compromise or rejection of the data subject’s terms, or agree with the data subject’s demand, without undue delay.¹⁶¹ This would accommodate the “freedom of choice”, pursuant to Articles 6(1)(a) and (b) GDPR. If the data subject disagrees with the decision, they can complain to the national data protection authority or national courts.¹⁶²

When data processing involves third-party processors, the controller has limited flexibility in accommodating the data subject’s terms. Under Article 28 GDPR, the data processor is governed by a contract [i.e., data processing agreement (DPA)], and the controller is the decisive party that instructs and controls the data processors.¹⁶³ However, in practice, “it is usually the data

¹⁵⁹ Nettesheim (n 106), pp. 90-91.

¹⁶⁰ Case C-446/21 *Maximilian Schrems v Meta Platforms Ireland Limited, anciennement Facebook Ireland Limited*. [2024] ECLI:EU: C:2024:834; noyb, ‘Meta Must “Minimise” Use of Personal Data for Ads’ (noyb.eu, 4 October 2024) <<https://noyb.eu/en/cjeu-meta-must-minimise-use-personal-data-ads-0>> accessed 7 October 2025.

¹⁶¹ GDPR, art. 39(1)(b) and rec. 97.

¹⁶² *ibid* art. 77.

¹⁶³ Jenna Lindqvist, ‘New Challenges to Personal Data Processing Agreements: Is the GDPR Fit to Deal with Contract, Accountability and Liability in a World of the Internet of Things?’ (2018) 26, pp. 54-55 <<https://sci-hub.se/10.1093/ijlit/eax024>> accessed 19 November 2025.

processor that is offering a service, and it is the processor who in reality decides the rules of the processing, usually through standard agreements (...).¹⁶⁴ This means that the controller has little influence on the processor's operations, and that currently the data subject's privacy preference cannot be taken into consideration. With CrypTex, ensuring the data subject's privacy preferences depends on which type of third-party processor the controller uses.

Third-party processors can be classified into two categories: 'common' (i.e., several third parties offer the same service) or 'critical' (i.e., only one party proposes the service). For 'common' third-party processors, the PDP can offer various processor options, enabling the data subject to select a preferred party based on transparent information that meets their reasonable expectations. If the third-party processor is 'critical', then its data processing must comply with the GDPR principles, which is verified by an independent third-party certification body familiar with the data processing activity. This body audits the processor's quality of service with a DPIA,¹⁶⁵ assesses the impact of the data processing activity on personal data protection and reports the findings publicly to data subjects for review via the PDP. This makes it easier for data subjects to compare their *policy* to the third-party processor's policy via CrypTex, and make informed decisions, even where DPAs alone may not provide effective protection.

This level of granular control enables data subjects to interact effectively with data controllers and arrange data processing activities that align with both their preferences and requirements of Articles 6(1)(a) and (b) GDPR, while also enhancing transparency regarding data controllers' operations. However, the data subject's involvement in configuring the data processing arrangement may shift some of the burden of choosing an appropriate processor onto the data subject. This, in practice, can create inequality since the range of processors available to the data subject will depend on their financial means. In other words, the more money invested, the higher the quality of the processing options. In this scenario, the controller is also burdened with creating DPAs for each unique processing activity. This level of granularity is unrealistic on a large scale and would overwhelm both the data subject and the data controller.

¹⁶⁴ *ibid* pp. 62.

¹⁶⁵ GDPR, art. 35.

4.2 STATE POLICIES AND DEFAULT POLICIES

The GDPR allows data controllers to process personal data without consent to fulfil legal obligations, act in the public interest, safeguard vital interests, or for the legitimate interests of the controller or third parties (see Chapter Three). Nevertheless, controllers are still obligated to maintain transparency, uphold the GDPR's principles, and respect the enforceable rights of the data subject.

From a technical perspective, one of the core functions of CrypTex is to provide transparency to the data subject (see Section 2.3). Therefore, for processing based on Articles 6(1)(c) and (e) GDPR, CrypTex can facilitate the creation of 'state policies' based on EU or Member State law, which are legally mandated standardised policies issued by public authorities, for situations where consent from the data subject is not applicable.

Concerning processing activities justified under Article 6(1)(f) GDPR, where legitimate interests provide the legal basis, the controller's own privacy policy becomes the default policy. Here, once the three-step test is met, the data subject's consent is not required. Consequently, upon initiation of data processing, the PDP will accept only the state policy or the default policy by default when Articles 6(1)(c), (e), and (f) GDPR are invoked as the legal basis. This requires the PDP to recognise three types of privacy policies: 1) the 'personalised policy' generated by the data subject for processing under Articles 6(1)(a) and (b); 2) the 'state policy' developed by the public entities for Articles 6(1)(c) and (e) GDPR; and 3) the 'default policy' prepared by the controller for processing under Article 6(1)(f) GDPR.

Even when consent is bypassed, CrypTex ensures legal transparency by notifying the data subject and providing access to the relevant policy for review. This guarantees that the data subject is informed about the nature of processing before it commences (transparency and fair processing). The PEP ensures that the controller complies with the relevant policy and that when changes are made, the PDP notifies the data subject. This means that any revisions made by the public entity must also be promptly reflected in the policy used by the controller. Furthermore, if any changes are made to the processing activity, the audit mechanism will inform the data subject without undue delay (see Section 2.2).¹⁶⁶

¹⁶⁶ *ibid* art. 12.

Establishing a ‘state policy’ and ‘default policy’ ensures that the controller’s data processing activities remain transparent in all circumstances where processing is based on legal obligations, public interests, and legitimate interests.

If, after reviewing the default policy or the state policy, the data subject disagrees with the terms and conditions of processing based on Articles 6(1)(e) and (f), they can object to the data processing activity,¹⁶⁷ and the controller must facilitate their objection.¹⁶⁸ The controller may choose to either offer this functionality through CrypTex by enabling an objection mechanism within the software or through their own internal procedures.¹⁶⁹

Adding these additional features to CrypTex will allow the data subject to monitor the processing of their data by a data controller or third parties. This also ensures that personal data is available under Article 32 GDPR for processing under Articles 6(1)(c), (e), and (f) GDPR, since the data subject is, technically, restricted by CrypTex and cannot refuse to provide this data.

4.3 THE EMERGENCY PROTOCOL

During emergencies, a specific protocol should be invoked to manage data processing based on Articles 6(1)(d) and 9(2)(c) GDPR, to mitigate any violations associated with “breaking the glass” of CrypTex (see Chapter Three).

When an emergency arises, to protect the vital interests of the data subject/third-party, only ‘trusted’ data controllers or third parties should be allowed to use this protocol. ‘Trusted’ data controllers and third parties are required to have a code of conduct that complies with Article 40 GDPR. Codes of conduct are “rulebooks”, approved by the supervisory authority, for data controllers and third parties, ensuring their actions comply with the rules laid down in the GDPR.¹⁷⁰ Data controllers and third parties that adhere to an approved code of conduct under Article 40 GDPR could be issued an ABC by an IdP (see Section 2.2). In the CrypTex architecture, this ABC would serve as verifiable proof to the PDP that the requesting entity is compliant and a trusted party eligible to invoke the emergency protocol.

¹⁶⁷ *ibid.*

¹⁶⁸ *ibid.*

¹⁶⁹ *ibid.*

¹⁷⁰ *ibid.* art. 40.

This ABC authenticates a Vital Interest Access Request (VIAR). A VIAR is a simplified privacy policy designated for ‘trusted’ data controllers or third parties. In the VIAR, the controller provides their identity, organisation, role, request date, legal basis for the data processing activity (e.g., Article 6(1)(d) and/or Article 9(2)(c) GDPR), and the processing purpose (e.g., humanitarian relief after the 2025 Earthquake, looking for survivors in the rubble). Access to the data pod is granted after the PDP authenticates the request via a valid ABC, and the data subject receives a notification with the VIAR details.

In some instances, the necessary personal data for the processing activity cannot be identified by the data controller; therefore, in the VIAR, this is optional. Once a VIAR is approved by the PDP, the PDP and PEP will generate a privacy policy that records all accessed personal data, transfer activities, and retention periods for the data retrieved from the data pod. This process, known as Post-Hoc Transparency Logger (PhTL), means the PEP will automatically generate a ‘transparency log’ (see Section 2.2), when the VIAR is used. Data subjects can then review these logs to verify compliance with GDPR principles.

Suppose a post-incident review reveals that the GDPR’s principles were violated during the data processing activity, the data subject then has the right to complain to the controller’s DPO,¹⁷¹ or the national data protection authority.¹⁷² Furthermore, the data subject has the right to “an effective judicial remedy when he or she considers that his or her rights under this Regulation have been infringed as a result of the processing of his or her personal data in non-compliance with this Regulation.”¹⁷³

Incorporating this procedure would institute safeguards in CrypTex when Articles 6(1)(d), and 9(2)(c) GDPR are used as a legal basis for processing, as well as provide the data subject with transparency during and after data processing. This is an important factor since it allows the data subject to seek legal remedies after data processing is completed.

¹⁷¹ *ibid* art. 39(1)(b).

¹⁷² *ibid* art. 77.

¹⁷³ *ibid* art. 79.

4.4 THE PERIODIC REFRESH

The one-time data exchange between the controller/third-party and the data subject raised concerns regarding compliance with the ‘data accuracy principle’ (see Section 3.2). To ensure that ABCs and personal data from the data pod used by the controller are accurate and, when necessary, up to date, it is recommended that a technical protocol be integrated into CrypTex requiring the PDP to refresh the policy according to the controller’s preferences (e.g., every 30 days). Accordingly, the PDP will “refresh” the ‘personalised policy’, the ‘state policy’, or the ‘default policy’ (see Section 4.3), periodically. It should be emphasised that in this process, the VIAR does not require refreshing, since the controller/third-party possesses temporary and unrestricted access to the data subject’s personal data (see Section 4.2). The Data Refresh Protocol (DRP) will be triggered periodically, provided the data processing activity remains active; if the data retention period expires, the protocol will cease operations. This process is automated and does not require any intervention from either the data subject or the controller. However, both parties will be notified upon execution of the protocol.

If an ABC was used during the data exchange, then a new request will be sent to the IdP (see Section 2.2) during the refresh. If the DRP detects an outdated ABC, the PDP will send a notification to the data subject requiring them to update the ABC in their data pod. If this happens, a refresh will be declared unsuccessful, triggering the PEP to halt data processing, and a notification will be sent to the controller explaining the situation.

If personal data was used in the data exchange, the DRP protocol enables the PDP to verify whether the personal data processed by the controller (e.g., address or contact details) remains accurate by comparing the previously accepted personal data (used in the sticky policy) with the version in the data pod. If a discrepancy is detected, the PDP will transfer the updated version to the controller and instruct the PEP to replace the outdated version accordingly.

Once the DRP is completed, the PEP will also be prompted to delete the previous data used, ensuring that only accurate data is used during the processing activity. However, this might be a concern for processing activities whose purpose includes archiving in the public interest, scientific, historical research, or for

statistical purposes.¹⁷⁴ To ensure that personal data for these purposes is not deleted, policies geared specifically towards the preservation and archiving of this type of data will be implemented. For instance, with each update, the data is automatically saved as a file, allowing the controller to monitor the changes in the data. Instituting these protocols in CrypTex would ensure that the controller is complying with Article 5(1)(d) GDPR.

4.5 CONCERNS REGARDING THE IMPACT ON DATA SUBJECTS

As the adage says, *with great power comes great responsibility*. The enhanced granularity of policies and protocols increases the number of notifications and decisions the data subject will have to manage. As a result, the increase in the data subject's cognitive load could lead to 'notice fatigue', a phenomenon observed after the introduction of the cookie banners and privacy policies.¹⁷⁵ Notice fatigue resulted in the *privacy paradox* because overwhelmed data subjects ignored privacy concerns and accepted the data controller's processing arrangements to access online services.¹⁷⁶ The introduction of CrypTex aimed to mitigate these issues; however, by augmenting the degree of granularity of control and transparency, these same issues may resurface. Therefore, greater control leads to increased responsibility, however the exercise of this responsibility may be rejected by data subjects, resulting in *privacy cynicism* (nihilism).¹⁷⁷ This privacy cynicism is not the result of a perceived powerlessness to change the situation,¹⁷⁸ but because of the increased burden placed on the data subject. Some decisions can be automated through persistent and reusable privacy preferences, such as globally rejecting non-essential cookies, or by using privacy tools such as ad-blockers or Virtual Private Network to limit the number of processing operations the data subject must configure. Many decisions, however, depend on context, specific purposes, or the involvement of new third-party actors joining the processing chain. These factors make for a level of unpredictability in the data requirements for processing. The data subjects may find themselves in a potentially vulnerable situation, where their failure to protect their data and

¹⁷⁴ *ibid* art. 5(1)(b).

¹⁷⁵ Carter (n 146).

¹⁷⁶ Stanford (n 13), p.8

¹⁷⁷ Stanford (n 13), pp. 29-31

¹⁷⁸ *ibid*.

privacy could result in controllers acting on their behalf in ways that may not align with their preferences.

4.6 CONCLUSION

Taking all these new protocols, privacy policies, and legal mechanisms into consideration, the controller would be able to comply with GDPR's principles and demonstrate compliance with the 'accountability principle'.¹⁷⁹ With these changes, CrypTex will be reconciled with the GDPR, enabling the Ecosystem to facilitate the dual purpose of the GDPR: the free flow of data and the protection of personal data. However, the increased granularity may have a negative impact on data subjects.

5. CONCLUSION

The study aimed to answer the question: *Does CrypTex subvert the rights of controllers to process personal data under the GDPR?* To answer that question, the analysis began with a doctrinal review of the technical documentation underlying CrypTex's ecosystem, which enabled CrypTex to be analysed in relation to the concept of 'individual data sovereignty' under the GDPR. Subsequently, a doctrinal analysis of CrypTex was conducted by interpreting and applying Articles 5, 6, 7, 8, and 9 GDPR to the data exchanges occurring between data subjects and data controllers within the CrypTex ecosystem, to reveal conflicts between CrypTex's technical architecture and data controllers' ability to process personal data under the GDPR. Among the areas of incompatibility identified, there were important matters such as power imbalances, reliance on data subjects' consent leading to the unavailability of personal data, intrusive data processing, and inadequate protocols to ensure data is accurate and/or up to date for data processing. Several technical and legal mechanisms are proposed in this study.

The power imbalance between data subjects and controllers was addressed by proposing a more granular form of control. This form of control goes beyond enforcement through "sticky policies", enabling the data subject to fine-tune how their personal data is processed by controllers, processors, and third parties—

¹⁷⁹ GDPR, art. 5(2).

whether internally or externally—when relying on Articles 6(1)(a) and (b) GDPR. Equality is offered by providing more transparent processing operations and, in some cases, allowing for the operation to be arranged by the data subject. This ensures that the data subject’s privacy preferences are respected across the entire processing chain, permitting compliance with Articles 5(1)(a), (b), (c), and (e) GDPR.

Over-reliance on consent, which can result in the unavailability of personal data in situations where the controller was required to process personal data, was also addressed. New technical mechanisms were introduced to override consent under certain circumstances. For instance, standardised policies based on EU and Member State Law when processing is based on Articles 6(1)(c) and (e) GDPR, and the data controller’s policy set as default when processing is based on Articles 6(1)(f) GDPR—ensuring data access and compliance with Article 5(1)(d) GDPR when CrypTex is implemented by the controller.

To address intrusive data processing based on Article 6(1)(d) GDPR, a special protocol was introduced outside of CrypTex’s user-defined policies for controllers and third parties protecting a vital interest to provide transparency to the data subject. This allows data subjects to pursue administrative or judicial remedies provided by the GDPR.

These new protocols, policies, and legal mechanisms enable the controller to comply with data protection principles, demonstrate compliance with the accountability principle, and fulfil the dual purposes of the GDPR. Therefore, in answer to the main research question, PETs like CrypTex were initially not compatible with the GDPR, because the data controller’s legitimate ability to process personal data under the GDPR was restricted. However, with additional modifications that allowed for the data subject’s consent to be overridden, the dual purposes of the GDPR can be fulfilled.

Amendments to CrypTex also resolved several existing challenges in the take-it-or-leave-it situation created by market-dominant controllers. These amendments create a two-tier access model, where CrypTex releases personal data from the data pod without prior authorisation if a non-consensual legal basis is used, while still allowing the data subject to exercise granular control over all remaining data exchanges. This model limits the scope of *individual data sovereignty*, since some access controls are not initiated or authorised by the data

subject. Nevertheless, since the GDPR principle of transparency is retained when consent is not required, the data subject can take advantage of existing administrative and judicial remedies offered by the GDPR. CrypTex transforms the data subject from a passive benefactor in a controller-centric paradigm to an active one in the two-tier access model.

This case study demonstrates that accountability PETs, such as CrypTex, can operationalise the GDPR and provide the necessary mechanisms to build trust among data subjects in the EU by increasing transparency and control. However, given the issues raised in this study concerning the compatibility of CrypTex with the GDPR, it is evident that improper legal vetting can result in a PET that is unlawful and undermines the dual purposes of the GDPR.

Amendments proposed in this study, such as the two-tiered access model, verification mechanisms for non-consensual legal bases, such as using ABCs in conjunction with the Vital Interest Access Request (VIAR), the use of different types of policies and protocols, and processor-selection and inspection frameworks, are some examples that illustrate how technical architectural design and legal requirements can be aligned in practice. There is a need for collaboration between computer science and legal professionals to provide a sustainable architecture that enables users to have more transparency and control over the processing of their personal data. At the same time, appropriate consideration should be given to the psychological effects of such an architecture on the data subject.

**To Derogate or to Act in the Spirit of Solidarity? Framing
Member States' Action in Times of Emergency under Article 347
TFEU and Article 222 TFEU**

*Cecilia Durante*¹

1. INTRODUCTION	213
2. ARTICLE 347 TFEU	216
3. ARTICLE 222 TFEU	225
4. TO DEROGATE OR TO ACT IN THE SPIRIT OF SOLIDARITY?	234
5. CONCLUSION.....	239

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TABLE OF ABBREVIATIONS

AG	Advocate General
CJEU	Court of Justice of the European Union
Decision 2014/415	Council Decision 2014/415/EU of 24 June 2014 on the arrangements for the implementation by the Union of the Solidarity Clause [2014] OJ L 192/53
Declaration No 37	Declarations Concerning Provisions of the Treaties (No 37) Declaration on Article 222 of the Treaty on the Functioning of the European Union OJ C 202/349
EU	European Union
Para	Paragraph
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

1. INTRODUCTION

EU emergency law has been defined as the body of “rules of primary and secondary EU law that serve to address sudden threats to the core values and structures of the Union and its Member States”.² As such, it is not a homogeneous nor clearly defined emergency regime but rather functions as a legal framework constituted of several and different ad hoc instruments.³ Whenever unforeseen circumstances materialise, EU institutions and the Member States will adapt their response accordingly to the emergency faced. However, whilst according to the principle of conferral, EU action requires a specific legal basis, Member States’ action does not necessarily do so.⁴

Against the backdrop of recent crises, such as the COVID-19 pandemic, the EU has increased the centralisation of emergency responses, therefore shifting the debate towards EU emergency action and its legality.⁵ However, this should not mean that Member States’ emergency action based on EU law provisions has become irrelevant. Specifically, when faced with serious emergencies, Member States may resort to Treaty-based mechanisms of an exceptional nature.⁶ On the one hand, Article 347 TFEU specifically governs the possibility for Member States to escape and derogate from EU law obligations.⁷ On the other hand, Article 222 TFEU enshrines the duty of the Union and the Member States to act in the spirit of solidarity if another Member State is facing an emergency situation.⁸

² Bruno De Witte, ‘Guest Editorial: EU Emergency Law and Its Impact on the EU Legal Order’ (2022) 59 *Common Market Law Review*, pp. 3, 4.

³ *ibid* pp. 3-5.

⁴ Consolidated Version of the Treaty on European Union [2016] OJ C202/13, art. 5.

⁵ De Witte (n 2), pp. 4-5; see also Tom Binder, Argyro Karagianni and Miroslava Scholten, ‘Emergency! But What about Legal Protection in the EU?’ (2018) 9 *European Journal of Risk Regulation* 99; see also Matthias Ruffert and Päivi Leino-Sandberg, ‘Next Generation EU and Its Constitutional Ramifications: A Critical Assessment’ (2022) 59 *Common Market Law Review*, p. 433.

⁶ Panos Koutrakos, ‘The Notion of Necessity in the Law of the European Union’ in IF Dekker and E Hey (eds), *Netherlands Yearbook of International Law Volume 41* (TMC Asser Press 2010), pp. 1-2.

⁷ De Witte (n 2); Koutrakos, ‘The Notion of Necessity’ (n 6), p. 8.

⁸ Friedrich Erlbacher, ‘Article 222 TFEU’ in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) p. 1691.

Article 347 TFEU is a general derogation clause that requires extremely serious circumstances to materialise in order to be triggered.⁹ Although it carries great potential for Member States to respond to situations of emergency, it has rarely been invoked. Recently, however, AG Emiliou has touched upon the interpretation of the provision in two of his Opinions. His analysis has revived the importance of Article 347 TFEU in times of emergency and identified the possibility for Member States to invoke it in the context of serious health crises, such as the Covid-19 pandemic.¹⁰ Unlike other escape clauses, Article 347 TFEU has not disappeared after the Lisbon codification.¹¹ The role it plays within the EU legal order lies at the core of the concept of Member States' sovereignty and is closely linked to the underlying understanding of the national identity clause codified in Article 4(2) TEU.¹²

Additionally, Article 222 TFEU requires the Member States to act in the spirit of solidarity when another Member State is facing an emergency situation, specifically a terrorist attack or a natural or man-made disaster. Codified with the Lisbon Treaty, it embodies the values enshrined in Article 4(3) TEU.¹³ To this day, Article 222 TFEU has never been resorted to.¹⁴ When confronted with a terrorist attack in 2015, France resorted to the mutual assistance clause of Article 42(7) TEU instead.¹⁵ In the context of the recent COVID-19 emergency, it has been argued that the pandemic has been a missed chance to invoke the solidarity clause.¹⁶

⁹ Case C-120/94 *Commission of the European Communities v Hellenic Republic (FYROM)* [1995] ECLI:EU:C:1995:109, Opinion of AG Jacobs, paras. 44-47; Case C-128/22 *BV NORDIC INFO v Belgische Staat (BV NORDIC INFO)* [2023] ECLI:EU:C:2023:645, Opinion of AG Emiliou, para. 53.

¹⁰ *BV NORDIC INFO*, Opinion of AG Emiliou (n 9), para. 53.

¹¹ De Witte (n 2), p. 5.

¹² Panos Koutrakos, 'Public security exceptions and EU free movement law' in Panos Koutrakos, Niamh N Shuibhne and Phil Syrpis (eds), *Exceptions from EU Free Movement Law* (Hart Publishing 2016), pp. 17-18; see also Panos Koutrakos, 'Is Article 297 EC a 'Reserve of Sovereignty'?' (2000) 37 *Common Market Law Review*, pp. 1339-1340.

¹³ Case C-848/19 P *Federal Republic of Germany v European Commission* [2021] ECLI:EU:C:2021:598, para. 41.

¹⁴ Susanna Villani, 'Perspectives of Solidarity within the EU Legal Order in the Time of the Covid-19 Pandemic' (2023) 4 *Yearbook of International Disaster Law Online*, p. 75.

¹⁵ Roderick Parkes, 'Migration and terrorism: the new frontiers for European solidarity' (2015) 37 *European Union Institute for Security Studies* 1, 1; see also Bob Deen, Dick Zandee and Adája Stoetman, 'Uncharted and Uncomfortable in European Defence: The EU's mutual assistance clause of Article 42(7)' (Clingendael 2022), pp. 10-11.

¹⁶ Villani (n 14), pp. 88-91.

However, if Article 347 TFEU provides for a general derogation available to the Member States in times of emergency, what role is left to play for the duty of solidarity under Article 222 TFEU? This paper will focus on these two provisions and their relationship, which so far has been ignored in the literature. Against the backdrop of the economic, migration, and health crises the EU has faced in the past decade, understanding the exceptional nature of Article 347 TFEU and Article 222 TFEU is of crucial importance. An in-depth analysis of these provisions allows us to frame Member States' action in the context of EU emergency law, to foster a deeper understanding of the EU constitutional order by shedding light on the interplay between EU law obligations and Member States' sovereignty. Hence, this paper seeks to fill this gap by analysing the content, scope, and potential overlap between Article 347 TFEU and Article 222 TFEU in times of emergency. It further seeks to clarify their relationship with the national identity clause of Article 4(2) TEU and with the duty of sincere cooperation enshrined in Article 4(3) TEU. It seeks to answer the following research question: *How do the derogation clause of Article 347 TFEU and the solidarity clause of Article 222 TFEU overlap in their scope of application, and what is the systematic relationship between the two provisions?*

The essay will analyse Article 347 TFEU in all its essential features (Section 2) and then proceed in the same manner to examine Article 222 TFEU (Section 3). Then, it will draw a comparison between the two provisions and explore the systematic relationship between Article 347 TFEU and Article 222 TFEU (Section 4). Based on these findings, it will present the concluding remarks (Section 5).

The paper employs a legal doctrinal methodology to analyse the content, scope, and relationship between Article 347 TFEU and Article 222 TFEU within the EU legal framework. The research question will be assessed through a combination of descriptive and interpretative approaches. The primary focus will be on the analysis of different sources, ranging from EU primary and secondary law, the CJEU case law, advisory opinions, to secondary sources such as books and academic legal papers. As the CJEU has never ruled on the conditions of its application of Article 347 TFEU,¹⁷ its content and scope will be examined mainly

¹⁷ *BV NORDIC INFO*, Opinion of AG Emiliou (n 9), para. 53.

through the Opinions delivered by AGs, which provide an authoritative source of interpretation.¹⁸ While not legally binding, such Opinions carry significant persuasive authority, as they offer an independent and reasoned legal analysis expressly intended to assist the CJEU's interpretation and to safeguard the internal coherence of the EU legal order. Article 222 TFEU will be analysed mainly through Decision 2014/415.¹⁹ This instrument provides guidance for the implementation of the solidarity clause and has both clarified and defined several aspects of the provision.²⁰ Both analyses will be supplemented by a review of commentaries.

As to the limitations, the escape clause of Article 346 TFEU will not be analysed since it allows for specific derogations in the context of trade and production of arms but is not an emergency legal basis. The mutual assistance clause of Article 42(7) TEU will be addressed, but only in the context of the analysis of Article 222 TFEU. The provision only provides bilateral obligations between the Member States in the context of foreign policy and cannot be considered a general solidarity clause.²¹ Finally, it must be noted that the terms "crisis" and "emergency" will be used interchangeably throughout this paper.²²

2. ARTICLE 347 TFEU

The following Section will be divided into four parts. It will contextualise Article 347 TFEU (Section 2.1) and analyse the scope and requirements (Section 2.2). It will delve into the Member States' resort to the provision (Section 2.3) and clarify

¹⁸ Rafał Mańko, 'Role of Advocates General at the Court of Justice' (European Parliamentary Research Service, 2019) 5 <[https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2019\)642237](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2019)642237)> accessed 17 May 2024.

¹⁹ Council Decision 2014/415/EU of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause [2014] OJ L 192/53 (Decision 2014/415).

²⁰ For a critical account on the instrument, see Peter Hilpold, 'Filling a Buzzword with Life: The Implementation of the Solidarity Clause in Article 222 TFEU' (2015) 42 *Legal Issues of Economic Integration*, pp. 220-231.

²¹ De Witte (n 2), p. 6.

²² While an argument could be made as to the terms "crisis" and "emergency" having different meanings, delving into these definitional exercises is beyond the purpose of this research, which focuses on the Treaty-based mechanisms that may be employed in exceptional and urgent situations.

certain aspects surrounding the "wholly exceptional"²³ nature of the clause (Section 2.4).

2.1 CONTEXTUALISING ARTICLE 347 TFEU

Positioned at the end of the TFEU, Article 347 TFEU stands within the general and final provisions. It can be understood as a security exemption of exceptional nature, which may justify a derogation from EU law obligations when the national security interests of a Member State are at stake.²⁴ The provision was originally laid down in Article 224 EEC Treaty and later in Article 297 EC Treaty. Since its first codification, the wording has remained almost unchanged.²⁵ It reads as follows:

“Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the internal market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security”.

Accordingly, instances of necessity provide a Member State with the possibility to escape its obligations under EU law.²⁶ Although Article 347 TFEU does appear in the CJEU’s case law, the CJEU has never provided a direct or detailed interpretation of its conditions in any of its final judgments. Substantive guidance

²³ The expression “wholly exceptional” will be used throughout the text and is originally attributed to AG Jacobs in his Opinion in *FYROM*, Opinion of AG Jacobs (n 9), paras. 44, 46. It has been used by many AGs to refer to the provision, including AG Darmon, AG La Pergola, AG Cosmas, AG Emilou. In the literature, the term ‘wholly exceptional character’ is attributed to Koutrakos in Panos Koutrakos, ‘Is Article 297 EC a ‘Reserve of Sovereignty?’ (2000) 37 *Common Market Law Review*, p. 1339.

²⁴ Manuel Kellerbauer, ‘Article 347 TFEU’ in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) p. 2054; see also Martin Trybus, ‘The EC Treaty as an instrument of European defence integration’ (2020) 22 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3716156> accessed 29 April 2024; Martin Trybus, ‘The Finest Balance: Article 297 EC and Community Law in Times of Crisis and War’ in Martin Trybus (ed) *European Union Law and Defence Integration* (Hart Publishing 2005), p. 168.

²⁵ Treaty Establishing the European Economic Community [1957] OJ C 1; Consolidated Version of the Treaty establishing the European Community [2002] OJ C 325/33.

²⁶ For a critical account, see Koutrakos ‘The Notion of Necessity’ (n 6).

on the interpretation of the provision stems instead from the Opinions of AGs, which, although highly influential, do not offer a binding reading of the provision. Given the article's broad phrasing, this interpretative gap has allowed Member States to regard the clause as a "reserve of sovereignty", potentially enabling them to disregard otherwise applicable EU law obligations.²⁷ Read together with Article 4(2) TEU, the provision reflects a classical idea of sovereignty, where matters of public security that lie at the core of a State's vital interests remain in the sphere of competence of the relevant Member State.²⁸

It must be noted that Article 347 TFEU is a last resort mechanism and, as such, it can only be applied in the absence of ordinary applicable rules and exceptions under national and EU law.²⁹ Similarly, to other derogation clauses, it must be construed strictly.³⁰ However, according to the Opinion of AG Jacobs in the *Commission v Greece (FYROM)* case, in light of the exceptional and extreme circumstances that may trigger the provision, Article 347 TFEU should be distinguished from the other Treaty rules allowing Member States to derogate from their obligations.³¹ In his view, whilst derogation clauses, such as Article 36 TFEU, are more commonly resorted to, Article 347 TFEU covers "wholly exceptional" situations.³² Moreover, it differs from other escape clauses as, instead of limiting the scope of derogations to a specific area, it permits a general derogation from the rules of the internal market.³³

²⁷ Kellerbauer (n 24), p. 2054; see also Koutrakos, 'Is Article 297 EC a 'Reserve of Sovereignty'?' (n 12).

²⁸ Case C-423/98 *Alfredo Albore* [2000] ECLI:EU:C:2000:158, Opinion of AG Cosmas, paras. 29, 31.

²⁹ Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary (Johnston)* [1986] ECLI:EU:C:1986:44, Opinion of AG Darmon, para. 5; *BV NORDIC INFO*, Opinion of AG Emiliou (n 9), para. 54. The last resort nature of the provision raises several issues within the EU legal order and will be analysed in depth in Section 4.1 and 4.2 of the paper.

³⁰ Case C-273/97 *Angela Maria Sirdar v The Army Board and Secretary of State for Defence (Sirdar)* [1999] ECLI:EU:C:1999:246, Opinion of AG La Pergola, para. 21; *Johnston*, Opinion of AG Darmon (n 29), para. 5; see also *Albore*, Opinion of AG Cosmas (n 28), para. 23.

³¹ *FYROM*, Opinion of AG Jacobs (n 9), para. 46.

³² *ibid* paras. 44-46.

³³ *ibid* para. 44. While his analysis mostly focuses on the distinction between Article 36 and Article 347 TFEU, the other Treaty rules that allow for derogation should be intended as including Articles 36, 45, 52, 65 and 72 TFEU.

2.2 SCOPE AND REQUIREMENTS

Article 347 TFEU is a "safeguard clause".³⁴ The wording of the provision recognises the possibility for a Member State to take measures it considers necessary when faced with exceptionally serious public threats.³⁵ This means that it does not confer a right upon the Member State in question but rather acknowledges the already existing right of a Member State to act.³⁶ Hence, in those instances, Member States act as fully independent subjects of international law.³⁷ There is no indication or textual limitation as to the type of measure that may be adopted.³⁸ However, the Article lays down a substantive and a procedural requirement, which will be analysed in the following subsections.

2.2.1 *The Circumstances Capable of Triggering the Provision*

The application of the article may only be triggered in three circumstances listed in the text of the provision.³⁹ They all represent exceptionally serious public security threats that endanger the core functions of a State and, hence, touch upon issues of sovereignty.⁴⁰

The first ground is fulfilled in "the event of serious disturbances affecting the maintenance of law and order".⁴¹ However, the definition of what may constitute a serious internal disturbance is not necessarily straightforward and requires an assessment on a case-by-case basis.⁴² According to AG Jacobs' Opinion, it must amount to a "risk of total collapse of international security and a total breakdown of public order".⁴³ While the possibility of war may be a

³⁴ Case C-72/22 *M.A. v Valstybės sienos apsaugos tarnyba (PPU)* [2022] ECLI:EU:C:2022:431, Opinion of AG Emiliou, para. 112; *Johnston*, Opinion of AG Darmon (n 29), para. 3.

³⁵ *BV NORDIC INFO*, Opinion of AG Emiliou (n 9), para. 53.

³⁶ Koutrakos 'Is Article 297 EC a 'Reserve of Sovereignty'?' (n 12), p. 1340.

³⁷ Jukka Snell and Erkki Aalto 'Security and Integration in the Context of the Internal Market', in Fabian Amtenbrink, Gareth Davies, Dimitry Kochenov D, Justin Lindeboom (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (Cambridge University Press, 2019) p. 569; see also Koutrakos, 'Public security exceptions' (n 12), p. 17.

³⁸ Koutrakos 'Is Article 297 EC a 'Reserve of Sovereignty'?' (n 12), p. 1340; Koutrakos, 'Public security exceptions' (n 12), p. 17.

³⁹ *FYROM*, Opinion of AG Jacobs (n 9), para. 44; see also Kellerbauer (n 24), p. 2054.

⁴⁰ Koutrakos 'Is Article 297 EC a 'Reserve of Sovereignty'?' (n 12), pp. 1339-1340.

⁴¹ Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C 326/47 art. 347.

⁴² *PPU*, Opinion of AG Emiliou (n 34), para. 113.

⁴³ *FYROM*, Opinion of AG Jacobs (n 9), paras. 47, 49.

sufficiently serious threat, civil unrest is not.⁴⁴ As such, this ground is usually associated with the field of national security and defence. Recently, AG Emiliou has interpreted the notion in two of his Opinions.⁴⁵ Given that the CJEU has never ruled directly on the specific interpretation of any of the conditions triggering Article 347 TFEU, he has developed his interpretation by referring back to AG La Pergola's Opinion in the *Sirdar* case.⁴⁶ First, he has suggested that the requirement of serious internal disturbances should meet the threshold of "genuine crises, verging on total collapse of internal security, the occurrence of which represents a grave danger for the very existence of the State".⁴⁷ Secondly, in his Opinion in the *BV NORDIC INFO v Belgische Staat* case, he identified that the first wave of the pandemic and its repercussions could be regarded as having caused circumstances serious enough to justify a resort to Article 347 TFEU in some Member States.⁴⁸ His views clarified the possibility of invoking the provision in the context of serious health crises, such as the COVID-19 pandemic.⁴⁹ At the same time, his analysis has revived the importance of Article 347 TFEU in times of emergency. Although Opinions of AGs have set a high threshold for this ground to be fulfilled, the assessment of the circumstances leaves a margin of appreciation to the Member State that might invoke the provision.⁵⁰ Public security and the maintenance of law and order are prerogatives of the sovereign powers of a State, and hence, whether or not an emergency situation is serious enough to qualify as a "serious internal disturbance" is ultimately left to the State to determine.⁵¹ It is in this subjective assessment that lies the margin of appreciation.

The second circumstance under Article 347 TFEU covers "war or serious international tensions constituting the threat of war". In order to be fulfilled, war requires an actual and visible outbreak of hostilities between two or more States, whilst the threat of war covers extremely serious circumstances falling below the

⁴⁴ *ibid* para. 47; see also Kellerbauer (n 24), pp. 2054-2055.

⁴⁵ *PPU*, Opinion of AG Emiliou (n 34); *BV NORDIC INFO*, Opinion of AG Emiliou (n 9).

⁴⁶ *Sirdar*, Opinion of AG La Pergola (n 30), para. 21.

⁴⁷ *PPU*, Opinion of AG Emiliou (n 34), para. 113.

⁴⁸ *BV NORDIC INFO*, Opinion of AG Emiliou (n 9), para. 53.

⁴⁹ *ibid* paras. 51, 53.

⁵⁰ Martin Trybus, 'At the Borderline between Community and Member States' Competence: The Triple-Exceptional Character of Article 297 EC' in Takis Tridimas and Paolisa Nebbia (eds), *European Law for the Twenty-First Century: Rethinking the New Legal Order Volume 2* (Hart Publishing 2004), p. 154.

⁵¹ *Albore*, Opinion of AG Cosmas (n 28), para. 29.

threshold of war.⁵² It follows that in this scenario, Member States enjoy a wide margin of discretion when assessing the existence of a threat.⁵³ According to AG Jacobs, the assessment must be made from the point of view of the Member State invoking the provision.⁵⁴ Since security is a relative notion and a matter of public perception, the Member State in question is in a better position to establish the presence of a public emergency in its own territory, taking all the circumstances into account.⁵⁵

The third circumstance entails measures that a Member State may take in order to comply with the obligations it has accepted for “maintaining peace and *international* security”.⁵⁶ This category is more easily identifiable and covers obligations to which a State may be bound under international law, such as in the context of the United Nations.⁵⁷

2.2.2 *The Obligations on the Member States*

The procedural requirement of Article 347 TFEU is laid down in the first sentence of the provision. Once a Member State has invoked the Article, all the Member States must consult each other in order to prevent distortions in the functioning of the internal market. This duty serves as a counterbalance to the resulting derogation measures, and the consultation must take place *ex ante*.⁵⁸ If the Member State invoking Article 347 TFEU is empowered to take measures to respond to the emergency, the other Member States are compelled to develop a common strategy aimed at mitigating the effects of such measures on the functioning of the EU internal market.⁵⁹

2.2.3 *Judicial Review*

According to the judicial review mechanism provided for in Article 348 TFEU, a challenge to a measure taken under Article 347 TFEU can be brought by the Commission or by any Member State directly to the CJEU, and eventually, the

⁵² Trybus ‘The Triple-Exceptional Character of Article 297 EC’ (n 50), pp. 153-154.

⁵³ *ibid.*

⁵⁴ *FYROM*, Opinion of AG Jacobs (n 9), paras. 54, 56.

⁵⁵ *ibid* para. 55; see also *Albore*, Opinion of AG Cosmas (n 28), para. 29.

⁵⁶ TFEU, art. 347.

⁵⁷ Trybus ‘The Triple-Exceptional Character of Article 297 EC’ (n 50), p. 153.

⁵⁸ *ibid* p. 148; Koutrakos ‘Is Article 297 EC a ‘Reserve of Sovereignty’?’ (n 12), pp. 1357-1358.

⁵⁹ Koutrakos, ‘Public security exceptions’ (n 12), p. 17. For a critical account, see also Koutrakos ‘Is Article 297 EC a ‘Reserve of Sovereignty’?’ (n 12), pp. 1356-1361.

ruling will be made in camera. However, the Commission or the other Member States are usually reluctant to question the applicability of the ground of public security used by the Member State invoking the provision.⁶⁰ This is also due to the high threshold of review, which is limited to abuses of power or manifest errors of assessment.⁶¹ So far, the procedure has only been used once by the Commission in the *FYROM* case.⁶² The Commission maintained that Greece's resort to the provision was ill-founded because the requirements for its application were not met, and further argued that Greece had made improper use of the powers it conferred, requesting interim measures to prevent such abuse.⁶³ However, this attempt was not successful as the CJEU dismissed the claim on the ground that the conditions of urgency required for granting interim measures had not been met, thus refraining from assessing whether Greece had improperly relied on Article 347 TFEU.⁶⁴ Moreover, as AG Jacobs has noted in his Opinion, there is a "paucity of judicially applicable criteria" that would permit a CJEU to determine whether a serious international tension exists and whether it does constitute a threat.⁶⁵ Once again, this is based on the assumption that it is the Member State invoking the provision which is in the best position to make the assessment, in accordance with the exercise of its full sovereign powers.⁶⁶

2.3 THE MEMBER STATES AND THE RESORT TO THE PROVISION

Member States have, for a long time, relied on a wide interpretation of the provision and viewed Article 347 TFEU as a "reserve of sovereignty".⁶⁷ This understanding is strengthened by a literal interpretation of the values that are now enshrined in Article 4(2) TEU, which acknowledges that matters of national security remain within the domain of competence of the Member States.⁶⁸ For instance, in the *Ugliola* case, the German Government supported the view that

⁶⁰ Koutrakos, 'The Notion of Necessity' (n 6), p. 11.

⁶¹ TFEU, art. 347; see also, Koutrakos 'Is Article 297 EC a 'Reserve of Sovereignty'?' (n 12), p. 1342; Koutrakos, 'The Notion of Necessity' (n 6), p. 11.

⁶² Case C-120/94 R. *Commission of the European Communities v Hellenic Republic (FYROM)* [1994] ECLI:EU:C:1994:275.

⁶³ *ibid* paras. 46, 52.

⁶⁴ *ibid* paras. 92, 93, 101.

⁶⁵ *FYROM*, Opinion of AG Jacobs (n 9), para. 50.

⁶⁶ *ibid* paras. 54, 57; see also *Albore*, Opinion of AG Cosmas (n 28), para. 29.

⁶⁷ Koutrakos 'Is Article 297 EC a 'Reserve of Sovereignty'?' (n 12), p. 1339; see also, Kellerbauer (n 24), p. 2054.

⁶⁸ TEU, art. 4(2).

Article 347 TFEU reserved the field of defence matters to the exclusive competence of each Member State.⁶⁹ Hence, national military laws were a result of the use of sovereign powers of the State and, as such, fell outside of the scope of the Treaty.⁷⁰ Similarly, in the *Sirdar* case, the Governments of France, Portugal, and the United Kingdom argued that national decisions relating to the organisation of armed forces were sovereign acts and therefore fell outside the scope of their EU law obligations.⁷¹ In both instances, the CJEU disregarded the relevance of these arguments and set aside the applicability of the provision in the specific case.⁷² Lastly, in *FYROM*, the Greek Government invoked Article 347 TFEU to justify a ban on the trade of products imported and exported to the former Yugoslav Republic of Macedonia.⁷³ Greece claimed that it imposed a policy that constituted a threat to its own security, and hence unilaterally imposed trade sanctions.⁷⁴ In Greece's view, Article 347 TFEU provided a general safeguard clause empowering Member States to deviate from Treaty obligations by taking unilateral measures.⁷⁵

Although Member States have invoked Article 347 TFEU in an attempt to justify broader derogations from EU law obligations, the CJEU's jurisprudence shows that the interpretation of Article 347 TFEU as a "reserve of sovereignty" does not align with its purpose. First, following the *Johnston* judgment, all the

⁶⁹ Case 15-69 *Württembergische Milchverwertung-Südmilch AG v Salvatore Ugliola (Ugliola)* [1969] ECLI:EU:C:1969:46, 367.

⁷⁰ Martin Trybus, 'The Finest Balance: Article 297 EC and Community Law in Times of Crisis and War' in Martin Trybus (ed), *European Union Law and Defence Integration* (Hart Publishing 2005), pp. 174-175; Koutrakos 'Is Article 297 EC a 'Reserve of Sovereignty'?' (n 12), pp. 1342-1343.

⁷¹ Case C-273/97 *Angela Maria Sirdar v The Army Board and Secretary of State for Defence (Sirdar)* [1999] ECLI:EU:C:1999:523, para. 13.

⁷² *Ugliola* (n 69) 369; *Sirdar* (n 71), para. 16.

⁷³ In certain instances, Member States relied on Article 297 EC to justify sanctions on third countries. Read in conjunction with Article 207 TFEU (ex 133 EC), Article 347 TFEU (ex 297 EC) had been used to justify sanctions against third countries. Trade sanctions were seen as a matter directly linked to the right of Member States to define their foreign policy. In turn, Article 347 TFEU (ex 297 EC) was hence used as a means to exercise pressure on a third State to end a violation of international law or maintain peace and security; see also Koutrakos 'Is Article 297 EC a 'Reserve of Sovereignty'?' (n 12), pp. 1343-1345, pp. 1347-1348.

⁷⁴ *FYROM* (n 62), paras. 1, 27, 31; see also Dominik Eisenhut, 'Sovereignty, National Security and International Treaty Law. The Standard of Review of International Courts and Tribunals with regard to 'Security Exceptions'' (2010) 4 *Archiv des Völkerrechts*, p. 452.

⁷⁵ *ibid.*

public security exemptions must be construed narrowly.⁷⁶ In the *Sirdar* case, and later in *Kreil*, the CJEU confirmed this view.⁷⁷ It also held that:

It is not possible to infer [from Article 347 TFEU] that there is inherent in the Treaty a general exception excluding from the scope of Community law all measures taken for reasons of public security. To recognise the existence of such an exception, regardless of the specific requirements laid down by the Treaty, might impair the binding nature of Community law and its uniform application.⁷⁸

It follows that Article 347 TFEU must be construed strictly and only includes the exceptional public security situations listed in the provision.⁷⁹ Finally, in the *Kadi* judgement, the CJEU acknowledged that even measures falling within the scope of Article 347 TFEU may not “be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms”.⁸⁰ Hence, the provision finds its inherent limit in the non-derogable fundamental rights, on which the Union’s constitutional order is based.⁸¹

These instances show that, while Article 347 TFEU is a general derogation clause which aims to confer on the Member States the greatest possible capability to deal with exceptional emergency situations,⁸² it cannot be understood as an absolute “reserve of sovereignty”.⁸³

2.4 A “WHOLLY EXCEPTIONAL” CLAUSE

AG Jacobs first recognised the “wholly exceptional” nature of the clause.⁸⁴ AG Cosmas has defined Article 347 TFEU as a “safety valve”, which introduces the possibility for Member States to derogate from the obligations that are normally

⁷⁶ Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary (Johnston)* [1986] ECLI:EU:C:1986:206 para. 26.

⁷⁷ Case C-285/98 *Tanja Kreil v Bundesrepublik Deutschland (Kreil)* [2000] ECLI:EU:C:2000:2 para. 16; *Sirdar* (n 71), para. 16.

⁷⁸ *Sirdar* (n 71), para. 16.

⁷⁹ *Sirdar*, Opinion of AG La Pergola (n 30); *Albore*, Opinion of AG Cosmas (n 28), para. 23; see also Martin Trybus, *Buying Defence and Security in Europe: The EU Defence and Security Procurement Directive in Context* (Cambridge University Press 2014), p. 76.

⁸⁰ Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities (Kadi)* [2008] ECLI:EU:C:2008:461, para. 303.

⁸¹ *PPU*, Opinion of AG Emiliou (n 34), para. 113; see also Snell and Aalto (n 37), p. 9.

⁸² *Albore*, Opinion of AG Cosmas (n 28), para. 31.

⁸³ Koutrakos ‘Is Article 297 EC a ‘Reserve of Sovereignty?’ (n 12), pp. 1342-1343, 1361.

⁸⁴ *FYROM*, Opinion of AG Jacobs (n 9), para. 46.

incumbent on them in order to protect their sovereignty.⁸⁵ In his view, Article 347 TFEU constitutes the demarcation line between the normal functioning of the EU legal order and the rules that govern Member States' action in times of crisis.⁸⁶ Notwithstanding the need for a strict interpretation of public security exceptions and the limits set by the *Kadi* judgment,⁸⁷ Article 347 TFEU still grants Member States a certain degree of discretion, but its concrete boundaries are difficult to identify.

To clarify the outer limits of the provision, this contribution purports that Article 347 TFEU could be understood through the lens of sovereignty. As a legal concept, sovereignty defines the State as the protector against threats both inside and outside its borders.⁸⁸ In a similar manner, the scope of Article 347 TFEU can be visualised along two dimensions: an 'internal' and an 'external' one. Internally, a Member State enjoys a margin of discretion when assessing whether a situation is sufficiently serious to trigger the provision. Externally, once invoked, the State retains discretion over the measures it may adopt, including potential derogations from EU law. Because the internal assessment is difficult to challenge, the consultation requirement and the judicial review act as safeguards to limit the application of this otherwise blurry and potentially disruptive provision.⁸⁹ This internal–external distinction mirrors the dual dimensions of sovereignty: protecting against threats both within and beyond the State's borders. Framing Article 347 TFEU through the lens of sovereignty thus clarifies its *in abstracto* scope and can foster a deeper understanding of this unused and “wholly exceptional” clause.

3. ARTICLE 222 TFEU

If Article 347 TFEU allows for a general derogation available to Member States in times of emergency, the role of the duty of solidarity under Article 222 TFEU is questioned. The following section will contextualise Article 222 TFEU (Section 3.1) and analyse its scope and requirements (Section 3.2). It will underline the lack

⁸⁵ *Albore*, Opinion of AG Cosmas (n 28), para. 23.

⁸⁶ *Albore*, Opinion of AG Cosmas (n 28), para. 27.

⁸⁷ *Johnston* (n 76), para. 26; see also *Kreil* (n 77), para. 16; *Kadi* (n 80), para. 303.

⁸⁸ *Eisenhut* (n 74), pp. 431-433.

⁸⁹ TFEU, arts 347, 348.

of use of the clause by the Member States (Section 3.3) and finally propose solutions to clarify certain aspects linked to its interpretation (Section 3.4).

3.1 CONTEXTUALISING ARTICLE 222 TFEU

Referred to as the solidarity clause, Article 222 TFEU has been introduced by the Treaty of Lisbon. The provision codifies a duty of solidarity amongst the Member States and the Union whenever another Member State finds itself in a situation of emergency. Its first two paragraphs read as follows:

“(1) The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to:

- (a) - prevent the terrorist threat in the territory of the Member States;
 - protect democratic institutions and the civilian population from any terrorist attack;
 - assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack;
- (b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.

(2) Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council”.

Unlike Article 347 TFEU, instances of necessity allow the affected Member State to rely on a collective effort by the other Member States, and on action by the Union in order to overcome a situation of crisis. The clause can be directly linked to the duty of sincere cooperation laid down in Article 4(3) TEU.⁹⁰ The *raison d'être* of the rule stems from the events that took place in the early 2000s: it was deeply influenced by 9/11 and the two terrorist attacks which shook the EU, namely in Madrid in 2004 and in London in 2005.⁹¹ The stronger need for protection against serious public security threats translated into a mechanism

⁹⁰ *Federal Republic of Germany v European Commission* (n 13), para. 41.

⁹¹ Hilpold (n 20), p. 215; Erlbacher (n 8), p. 1691.

providing for cooperation at the EU level and establishing obligations both on the Union itself and on the Member States.⁹² It reflects the ideal of pooled sovereignty, meaning that the Member States are willing to transfer part of their sovereign powers when faced with extremely serious threats.⁹³

3.2 SCOPE AND REQUIREMENTS

The broad formulation of Article 222 TFEU leaves many grey areas as to its interpretation.⁹⁴ However, the content of the solidarity clause must be read in conjunction with Decision 2014/415. The instrument provides guidance on the implementation of the provision in accordance with Article 222(3) TFEU.⁹⁵ To a certain extent, it has also clarified some of the substantive conditions and specified the relevant obligations arising on the Union and the Member States under Article 222 TFEU.⁹⁶

3.2.1 *The Circumstances Capable of Triggering the Provision*

According to its first sentence, Article 222 TFEU may be resorted to when a Member State faces a terrorist attack or a natural or man-made disaster. Natural and man-made disasters are not defined directly by Article 222 TFEU; however, the term is specified under Article 3(a) Decision 2014/415. Disasters entail any situation that has or is likely to have a “severe impact on people, the environment or property, including cultural heritage”.⁹⁷ The definition is broad and certainly encompasses storms, floods, and earthquakes.⁹⁸ However, in the context of disaster prevention, the Commission has published an overview document which further specifies the list of circumstances that may fall under the scope of natural

⁹² Claudia Berchtold, ‘Solidarity in the EU: Wishful Thinking or Status Quo?: Analysing the Paradox of EU Solidarity and National Sovereignty in Civil Protection in the Context of Art. 222 TFEU (Solidarity Clause)’ (Institutionelles Repositorium der Leibniz Universität Hannover 2020) pp. 94-98 <<https://www.repo.uni-hannover.de/handle/123456789/9298>> accessed 25 April 2024.

⁹³ *ibid* p. 95.

⁹⁴ Hilpold (n 20), p. 209; see also Jacques Keller-Noëllet, ‘The Solidarity Clause of the Lisbon Treaty’s’ in Elvire Fabry (ed), *Think Global—Act European: The Contribution of 16 European Think Tanks to the Polish, Danish and Cypriot Trio Presidency of the European Union* (2011) p. 328.

⁹⁵ Decision 2014/415 (n 19), preamble.

⁹⁶ For a critical account on the instrument, see Hilpold (n 20), pp. 220-231.

⁹⁷ Decision 2014/415 (n 19), art. 3(a).

⁹⁸ Erlbacher (n 8), p. 1695.

and man-made disasters or the risk thereof.⁹⁹ Amongst others, this includes epidemics, pandemics, and severe weather hazards.¹⁰⁰

In the same vein, terrorist attacks are not defined by the text of the Article. Instead, the notion is specified under Article 3(b) Decision 2014/415 and by reference to the list provided for in Article 1(1) of Council Framework Decision 2002/475/JHA. Accordingly, they must be intentional acts which are considered as offences under national law, and that may seriously endanger the State that is the object of the attack.¹⁰¹ They must also be aimed at “seriously intimidating a population, or unduly compelling a Government or international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation”.¹⁰² It must be noted that neither EU primary law nor international law provides for a standardised definition of a terrorist attack.¹⁰³ It has been argued that although the core concept of terrorism can be identified under EU law, certain criteria leave room for interpretation.¹⁰⁴ Terrorist threats are also covered by the solidarity clause, and must be assessed regularly by the European Council in accordance with Article 222(4) TFEU.

Seen under this light, the circumstances capable of triggering Article 222 TFEU allow a certain degree of flexibility.¹⁰⁵ It has been argued that due to the broad formulation of its substantive requirements, the clause may cover situations of emergency and eventualities that go beyond those listed in the provision.¹⁰⁶

⁹⁹ Commission Staff Working Document *Overview of natural and man-made disaster risks in the EU*, Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: The post-2015 Hyogo Framework for Action: Managing risks to achieve resilience [2014] SWD/134, 7.

¹⁰⁰ *ibid.*

¹⁰¹ Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism [2002] OJ L 164/3 (Framework Decision) art. 1(1).

¹⁰² *ibid.*

¹⁰³ Hilpold (n 20), p. 225; Erlbacher (n 8), p. 1693; see also Office of the United Nations High Commissioner for Human Rights, ‘OHCHR and terrorism and violent extremism’ (OHCHR) <<https://www.ohchr.org/en/terrorism>> accessed 20 May 2024.

¹⁰⁴ Hilpold (n 20), p. 225.

¹⁰⁵ Steven Blockmans, ‘L’union fait la force: Making the most of the solidarity clause (Article 222 TFEU)’ in Inge Govaere and Sara Poli (eds), *EU management of global emergencies: legal framework for combating threats and crises* (Brill Nijhoff 2014), p. 115.

¹⁰⁶ *ibid.*; see also Viktor Szép, Ramses A. Wessel, Ester Sabatino, Carmen Gebhard and Edouard Simon, ‘The Current Legal Basis and Governance Structures of the EU’s Defence Activities’ (2021) 4 ENGAGE Working Paper Series, pp. 4, 10.

However, the territorial scope of Article 222 TFEU is limited.¹⁰⁷ Although the relevant emergency situation triggering the provision may also originate from outside the territory of the Member States, the solidarity clause only applies within their territory unless specific exceptions apply.¹⁰⁸

3.2.2 *The Obligations on the Union and the Member States*

Article 222 TFEU provides two sets of obligations. Its first paragraph explicitly lays down an obligation on the Union and the Member States to act “jointly in a spirit of solidarity”. This general duty of solidarity translates into the need for the Union, intended as the ensemble of its bodies and institutions, to mobilise all the instruments at its disposal.¹⁰⁹ The relevant instruments are specified in Recital 5 Decision 2014/415, and include the European Union Internal Security Strategy, the European Union Civil Protection Mechanism, and the structures of the Common Security and Defence Policy.¹¹⁰ As such, the Union should aim to build upon already existing tools that relate to specific policy areas and increase coordination at the EU level to assist the Member State facing the relevant emergency situation.¹¹¹ These instruments must be activated in the scenarios listed by the provision.¹¹² They shall be employed to provide assistance in the event of a terrorist attack or a natural or man-made disaster, but only at the request of the political authorities of the affected Member State.¹¹³ By contrast, when used to prevent or protect its democratic institutions and population from a concrete terrorist threat, Article 222(1)(a) TFEU does not mention the need for a request by the political authorities of the affected Member State before the activation of the

¹⁰⁷ Decision 2014/415 (n 19), art. 2(2); see also Hilpold (n 20), p. 222; Szép and others (n 106), p. 11; Parkes (n 15).

¹⁰⁸ Decision 2014/415 (n 19), art. 2(1)(a). The duty may apply extraterritorially in instances affecting the infrastructure such as oil or gas installations under Decision 2014/415 (n 19), art. 2(1)(b); see also Hilpold (n 20), pp. 219-220.

¹⁰⁹ Blocksman (n 105), pp. 115-116.

¹¹⁰ See also Decision 2014/415 (n 19), art. 1. To ensure cooperation between the Union and the Member States, the Council will respond to the invocation of the clause by using the Integrated Political Crisis Response (IPCR). Whilst the Council coordinates the political response after the clause is triggered, support will be provided by the General Secretariat of the Council, the Commission and European External Action Service (EEAS) to overcome situations of crisis; see also Parkes (n 15), p. 3.

¹¹¹ Decision 2014/415 (n 19), recital 4.

¹¹² TFEU, art. 222(1). More specifically, to 1) prevent a terrorist threat 2) protect democratic institutions and the civilians from any terrorist attack; 3) assist a Member State in the event of a terrorist attack or 4) in the event of a natural or man-made disaster.

¹¹³ TFEU, arts 222(1)(a), 222(1)(b).

duty of solidarity. This raises doubts as to the possibility of the Union automatically intervening in those two instances.¹¹⁴ However, it has been argued that all the circumstances listed in the provision should be understood as requiring a form of consent.¹¹⁵ This follows from the fact that even for measures taken to prevent or to protect the Member State in its territory, consent to act is required under public international law.¹¹⁶

In addition, Article 222(1) TFEU includes, amongst the instruments, also the military resources that are made available by the Member States. In turn, these should be employed to address the threats and enhance assistance of the affected Member State.¹¹⁷ Since defence implications are explicitly excluded under Article 2(2) and Recital 13 Decision 2014/415, the military resources mentioned in the provision should be understood as, for instance, military assets for civil protection or equipment to recover from large-scale natural disasters of large scale.¹¹⁸ This aspect of the solidarity clause underlines the need for joint action of the Union and the Member States, and links back to the duty of sincere cooperation enshrined in Article 4(3) TEU.¹¹⁹

The second para of Article 222 TFEU establishes an obligation on each of the Member States to assist the affected Member State if specifically requested to do so.¹²⁰ Assistance should be achieved by coordinating action in the Council.¹²¹ However, this duty is significantly reduced by Declaration No 37, which provides that the Member States may “choose the most appropriate means to comply with [their] own solidarity obligation towards [the affected] Member State”.¹²² It has

¹¹⁴ Theodore Konstadinides, ‘Civil Protection in Europe and the Lisbon ‘solidarity clause’: A genuine legal concept or a paper exercise’ (2011) 3 Working Paper 4, pp. 12-13.

¹¹⁵ Blocksman (n 105), p. 117.

¹¹⁶ *ibid.*

¹¹⁷ Konstadinides ‘A genuine legal concept or a paper exercise’ (n 114), pp. 12-13.

¹¹⁸ Sara Myrdal and Mark Rhinard ‘The European Union’s Solidarity Clause: Empty Letter or Effective Tool? An Analysis of Article 222 of the Treaty on the Functioning of the European Union’ (2010) 2 UI Occasional Papers 6; Blocksman (n 105), p.116; Hilpold (n 20), p. 217; see also Decision 2014/415 (n 19), recital 12 which provides that: ‘This Decision will have no defence implications. In the event that a crisis requires CFSP or CSDP action, a decision should be taken by the Council in accordance with the relevant provisions of the Treaties’.

¹¹⁹ Villani (n 14), p. 89.

¹²⁰ Erlbacher (n 8), p. 1693; Hilpold (n 20), pp. 218-219.

¹²¹ TFEU, art. 222(2); see also Myrdal and Rhinard (n 118), p. 6.

¹²² The text of Declaration No 37 in full reads as follows: “Without prejudice to the measures adopted by the Union to comply with its solidarity obligation towards a Member State which is the object of a terrorist attack or the victim of natural or man-made disaster, none of the provisions of Article 222 is intended to affect the right of another Member State to choose the most appropriate means to comply with its own solidarity obligation towards that Member State.”

been argued that in this way, the obligations on the single Member States by Article 222(2) TFEU are less extensive than those provided on the Union under Article 222(1) TFEU. While Declaration No. 37 allows Member States to independently choose how and to what extent they will fulfil their solidarity obligations, the Union is instead required to act collectively and deploy all the instruments at its disposal.¹²³ This imbalance leaves a significant margin of discretion on the non-affected Member States and, therefore, potentially undermines the effectiveness of the solidarity mechanisms laid down by the clause itself.

3.3 THE MEMBER STATES AND THE RESORT TO THE PROVISION

Although promising in its envisaged effects, Article 222 TFEU has never been invoked since its codification.¹²⁴ From a purely procedural perspective, what may stand in the way of a more frequent invocation of the provision in times of emergency is the fact that the solidarity clause is a last resort mechanism.¹²⁵ Article 4 Decision 2014/415 provides that to resort to Article 222 TFEU, a Member State must have exploited all the possibilities under national and EU law. The State must consider that the crisis situation in which it finds itself overwhelms its response capabilities, and must formally address its request to the Presidency of the Council and the Emergency Response Coordination Centre.¹²⁶ However, there is no indication in Decision 2014/415 as to the threshold required to determine what may be “overwhelming” for a State, and the lack of state practice makes the interpretation of those requirements uncertain.¹²⁷ They can be understood as emergencies that are so wide-ranging that they do not allow for a Member State on its own to react,¹²⁸ or to cope with the scale of the disaster.¹²⁹

Lastly, it has been argued that a recourse to Article 222 TFEU is a potentially intrusive mechanism, which may undermine the status of the Member

¹²³ Konstadinides ‘A genuine legal concept or a paper exercise’ (n 114), p. 15.

¹²⁴ Villani (n 14), p. 75.

¹²⁵ Decision 2014/415 (n 19), art. 4(1); on this point, see also Villani (n 14), p. 89; Erlbacher (n 8), p. 1694.

¹²⁶ Decision 2014/415 (n 19), art. 4(1).

¹²⁷ Berchtold (n 92), pp. 76-77.

¹²⁸ Hilpold (n 20), p. 216.

¹²⁹ Villani (n 14), p. 89.

State invoking it as a fully independent subject of international law.¹³⁰ This follows from the fact that once invoked, the Union will mobilise all the means at its disposal and employ them in the territory of the affected Member State, rendering it less independent in its action.¹³¹

3.3.1 “Paper Tiger”?

The lack of use of Article 222 TFEU has caused the clause to be defined as a “paper tiger”, rather than a concrete duty.¹³² The doubts as to the effectiveness of Article 222 TFEU in practice can be exemplified by two recent crises faced by the Member States, namely the Paris Bataclan attacks and the COVID-19 emergency.

In 2015, France was the object of the terrorist attacks that took place at the Bataclan in Paris.¹³³ Although the emergency faced by France seemed to fall under the scope of the provision and call for a resort to Article 222 TFEU, the mutual assistance clause of Article 42(7) TEU was invoked instead.¹³⁴ Article 42(7) TEU provides that, in the event of an armed attack, the affected Member State may resort to the provision and, in turn, the other Member States have a duty to aid and assist with “all the means in their power”. It has been argued that France eventually relied on the mutual assistance clause rather than on Article 222 TFEU, as, after the attacks, it sought assistance and intervention outside the EU.¹³⁵ While extraterritorial action is covered by Article 42(7) TEU, the solidarity clause instead only applies within the territory of the Member States.¹³⁶

In a similar manner, although Article 222 TFEU may be triggered by natural disasters, no Member State has resorted to the solidarity clause during the COVID-19 emergency.¹³⁷ The pandemic would have fulfilled the criteria of Article 3(a) Decision 2014/415, since the instrument defines the notion of disaster as including situations that have a severe impact on people, and the Commission

¹³⁰ Jacques Keller-Noëllet, ‘The Solidarity Clause of the Lisbon Treaty’s’ in E Fabry (ed), *Think Global—Act European: The Contribution of 16 European Think Tanks to the Polish, Danish and Cypriot Trio Presidency of the European Union* (2011), p. 329.

¹³¹ *ibid.*

¹³² Theodore Konstadinides, ‘Civil Protection Cooperation in EU Law: Is There Room for Solidarity to Wriggle Past?’ (2013) 19 *European Law Journal*, p. 282. In this context, the term “paper tiger” is attributed to T. Konstadinides and as employed in this paper, refers to a rule or provision that while appearing strong or effective on paper, is weak or unused in practice.

¹³³ TFEU, art. 347.

¹³⁴ Szép and others (n 106), p. 10.

¹³⁵ Parkes (n 15), p. 3; Szép and others (n 106), p. 10.

¹³⁶ Parkes (n 15), p. 3.

¹³⁷ Decision 2014/415 (n 19), art. 2(1)(a).

Overview Document includes pandemics within the list of natural disasters. Clearly, COVID-19 has severely impacted every EU and non-EU citizen and led to restrictions of movement, quarantines, and national lockdowns.¹³⁸ It has been argued that the pandemic was a lost opportunity to invoke Article 222 TFEU and to assert its relevance in the EU legal order.¹³⁹ However, it seems that the ancillary nature of the provision and the uncertainties as to the extent of duties that lie on the non-affected Member States after it is invoked might have discouraged a resort to Article 222 TFEU.¹⁴⁰ These two examples show how the unexplored potential of Article 222 TFEU in emergency circumstances seems to stem both from the inherent limits of the provision as well as from the uncertainties that may arise from its interpretation.

3.4 ANOTHER “WHOLLY EXCEPTIONAL” CLAUSE

Against the background of the previous analysis of Article 347 TFEU, it is clear that, although Article 222 TFEU and Article 347 TFEU are different in their effects, they both stand as Treaty mechanisms of an extraordinary nature. Borrowing the term from AG Jacobs’ definition of Article 347 TFEU, this paper purports that the solidarity clause must be understood as another “wholly exceptional” clause.¹⁴¹ Article 222 TFEU requires exceptionally serious circumstances in order to be triggered and, if invoked, it endows the Union and its Member States with extraordinary powers.

By analogy with Article 347 TFEU, the assessment of an emergency under Article 222 TFEU could be made through a subjective test, and hence from the point of view of the Member State invoking the provision. Similarly, in the event of natural or man-made disasters, the existence of a clearly overwhelming emergency could be set by reference to the threshold identified by AG Emiliou in its Opinion in the *BV NORDIC INFO*.¹⁴² Specifically in the context of pandemics, circumstances, such as those that materialised during the first wave of COVID-19,

¹³⁸ Joelle Grogan, ‘Impact of COVID-19 Measures on Democracy and Fundamental Rights’ (Publications Office of the European Union 2022) 10 <<https://data.europa.eu/doi/10.2861/795862>> accessed 15 May 2024.

¹³⁹ Villani (n 14), p. 91.

¹⁴⁰ *ibid*, pp. 88-90.

¹⁴¹ *FYROM*, Opinion of AG Jacobs (n 9), para. 46.

¹⁴² Using, by analogy, the definition given in *BV NORDIC INFO*, Opinion of AG Emiliou (n 9), para. 53.

could be considered as the concrete triggering threshold for a Member State to determine the existence of a clearly overwhelming natural disaster. Although recognising that the textual limitations of Article 222 TFEU are only one of the factors causing uncertainties as to its interpretation, recognising its “wholly exceptional” character may perhaps lead to a better understanding of the nature of the clause.

4. TO DEROGATE OR TO ACT IN THE SPIRIT OF SOLIDARITY?

This section will compare the scopes of application and identify the areas of overlap between Article 347 TFEU and Article 222 TFEU (Section 4.1). Then, it will explore the systematic relationship between the two provisions (Section 4.2) by analysing the link with Article 4(2) TEU and Article 4(3) TEU (Section 4.2.1) and examining whether Article 347 TFEU could allow a derogation from Article 222 TFEU (Section 4.2.2).

4.1 COMPARISON AND AREAS OF OVERLAP

Although both provisions address extreme emergencies, Article 347 TFEU and Article 222 TFEU impose obligations on Member States that are almost diametrically opposed in their effects. Building upon the analysis purported in the previous Sections, a comparison of the scopes of application leads to identifying areas of overlap between the two provisions.

In the context of Article 347 TFEU, it can be observed that the Opinion of AG Emiliou has interpreted the notion of serious internal disturbances under Article 347 TFEU to include circumstances, such as those faced by certain Member States during the first wave of the pandemic.¹⁴³ Instead, Article 222 TFEU may be triggered in the event of natural disasters, including pandemics. Hence, it follows that circumstances of emergency, such as those that materialised during the first wave of COVID-19, may fall both under the scope of application of Article 347 TFEU and Article 222 TFEU.

Moreover, recalling the words of AG Jacobs in his Opinion in the *FYROM* case, serious internal disturbances under 347 TFEU amount to the “risk of total collapse of international security and a total breakdown of public order”.¹⁴⁴ As

¹⁴³ *BV NORDIC INFO*, Opinion of AG Emiliou (n 9), para. 53

¹⁴⁴ *FYROM*, Opinion of AG Jacobs (n 9), paras. 47, 49.

identified by the analyses of AG La Pergola and AG Emiliou, disturbances must amount to “genuine crises, which endanger the internal security and the vital interests of the State”.¹⁴⁵ However, the existence of those circumstances is established by a subjective test made from the point of view of the affected Member State.¹⁴⁶ As it relies on public perception, the assessment allows a certain degree of flexibility.¹⁴⁷ In the same vein, Article 222 TFEU establishes that the provision may be activated in the event of a terrorist attack which clearly overwhelms the response capabilities of the State in question.¹⁴⁸ In the absence of a standardised definition under primary EU law, the notion of terrorist attack or threat leaves room for interpretation.¹⁴⁹ By reference to the list in Council Framework Decision 2002/475/JHA, it includes, *inter alia*, intentional acts that - by their nature or context - may cause serious damage to a country and are aimed at seriously destabilising or destroying its fundamental structures.¹⁵⁰ It follows that the notions of serious internal disturbances under 347 TFEU and terrorist attacks under 222 TFEU entail very similar, and equally serious situations of emergency threatening the core functions of a State. This paper purports that the existence of an “overwhelming” terrorist attack or natural or man-made disaster under Article 222 TFEU could be equated to the notion of serious internal disturbances under Article 347 TFEU. For instances of terrorism, the threshold to determine an overwhelming crisis could be set to amount to a “risk of total collapse of international security and a total breakdown of public order” as identified under Article 347 TFEU.¹⁵¹ Serious terrorist attacks, such as those that happened in Paris in 2015, may therefore activate Article 222 TFEU and are also capable of triggering the scope of application of Article 347 TFEU.

¹⁴⁵ *Sirdar*, Opinion of AG La Pergola (n 30), para. 21; *PPU*, Opinion of AG Emiliou (n 34), para. 113.

¹⁴⁶ *FYROM*, Opinion of AG Jacobs (n 9), para. 55.

¹⁴⁷ *ibid.*

¹⁴⁸ Decision 2014/415 (n 19), art. 4(1).

¹⁴⁹ Hilpold (n 20), p. 225; Erlbacher (n 8), p. 1691, p. 1694.

¹⁵⁰ Framework Decision (n 101), art. 1(1).

¹⁵¹ Using, by analogy, the definition given in *FYROM*, Opinion of AG Jacobs (n 9), paras. 47, 49.

4.2 THE SYSTEMATIC RELATIONSHIP BETWEEN ARTICLE 347 TFEU AND ARTICLE 222 TFEU

After having identified the intersection between the scopes of application of two provisions, it is crucial to understand their systematic relationship. Since both Article 347 TFEU and Article 222 TFEU are general clauses and instruments of last resort, it is necessary to examine whether one may prevail over the other in the event of an overlap. To ensure internal coherence and consistency, the two articles must be placed in context with the other provisions of the Treaties and their hierarchy, interpreted in light of the EU legal order.¹⁵²

4.2.1 *The Relationship with Article 4 TEU*

On the one hand, Article 347 TFEU is closely linked to the principle of national identity enshrined in Article 4(2) TEU. It is a general derogation clause, which empowers Member States to take the measures they consider necessary when the “wholly exceptional” circumstances listed by the provision materialise.¹⁵³ This implies that the Member States reserve for themselves a safeguard for the protection of certain interests that lie at the core of their sovereignty.¹⁵⁴ Similarly, Article 4(2) TEU provides that national security remains the responsibility of the Member State and the Union must respect the essential functions aimed at protecting the territorial integrity and the maintenance of law and order within a State. However, this analogy should not be taken too far. Article 4(2) TEU cannot be seen as allowing every matter of public security to fall outside of the scope of EU law.¹⁵⁵ In the same way, the analysis of Article 347 TFEU purported in this paper has shown how the provision cannot be invoked in order to escape also from the values upon which the Union is based.¹⁵⁶ Moreover, it is worth noting that although Article 347 TFEU is predominantly linked to national identity issues, it

¹⁵² On the systematic interpretation as a recognised tool of interpretation, see Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECLI:EU:C:1982:335 para. 20.

¹⁵³ TFEU, art. 347.

¹⁵⁴ *Albore*, Opinion of AG Cosmas (n 28), para. 23.

¹⁵⁵ Marcus Klamert, ‘Article 4 TEU’ in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 45; see also *Johnston* (n 76), para. 26; *Sirdar* (n 71), para. 16; *Kreil* (n 77), para. 16.

¹⁵⁶ *Kadi* (n 80), para. 303.

has been argued that its procedural requirement implicitly recalls the duty of cooperation now codified under Article 4(3) TEU.¹⁵⁷

On the other hand, Article 222 TFEU is a general solidarity clause, which can be directly associated with the duty of sincere cooperation under Article 4(3) TEU.¹⁵⁸ Once invoked, Article 222 TFEU requires that the Union and the Member States act in the spirit of solidarity with the Member State that has activated the provision and assist it at the request of its political authorities. As such, the provision mirrors the obligation on the Union and the Member States laid down in Article 4(3) TEU, which obliges both the Union and the Member States to assist each other in full and mutual respect. When framed in this manner, the two provisions pursue almost identical aims and should be interpreted as mutually strengthening each other.¹⁵⁹

4.2.2 Could Article 347 TFEU Permit a Derogation from Article 222 TFEU?

When linking Article 347 TFEU to the principle of national identity under 4(2) TEU, and Article 222 TFEU to Article 4(3) TEU, their systematic relationship in case of conflict becomes clearer. The potential overlap between the scopes of application raises the question of whether an internal hierarchy between the two norms should be identified. Specifically, if a Member State were to face another pandemic or a serious terrorist attack, it could activate the procedure under Article 222 TFEU. In turn, this begs the question of whether any other Member State could invoke Article 347 TFEU and escape its obligations to act in the spirit of solidarity. It must be noted that the lack of enforcement of either provision renders the answer far from straightforward. However, a trend in the jurisprudence of the CJEU can be identified, given the role Article 4(3) TEU and Article 4(2) TEU play in the legal order since the Treaty of Lisbon.

In recent case law, the CJEU has laid down that the principle of solidarity underpins the whole constitutional order and is related to the principle of sincere cooperation.¹⁶⁰ According to AG Emiliou, the latter is the general principle which

¹⁵⁷ Koutrakos, 'Public security exceptions' (n 12), p. 17.

¹⁵⁸ *Federal Republic of Germany v European Commission* (n 13), para. 41.

¹⁵⁹ Hilpold (n 20), p. 219, p. 232.

¹⁶⁰ *Federal Republic of Germany v European Commission* (n 13), para. 41.

constitutes the “backbone of the legal system created under the EU Treaties”.¹⁶¹ In literature, some authors have defined Article 4(3) TEU as the “most important principle” within the EU legal order.¹⁶² It follows that, when interpreting Article 4(3) TEU and Article 4(2) TEU, the national identity interests laid down in the latter should be considered while taking the obligations enshrined in Article 4(3) TEU into account. In the view of AG Wathelet, arguments of national identity cannot be construed independently of the obligation of sincere cooperation set out in Article 4(3) TEU.¹⁶³ Following this line of reasoning, it has been suggested that a systematic understanding of Article 4(2) TEU should be preferred to an isolated analysis of the provision.¹⁶⁴ When looking at Article 4 TEU as a whole, national identity should not overshadow the other duties enshrined in the provision.¹⁶⁵ Moreover, it has been argued that the obligation to respect national identities under Article 4(2) TEU can be seen as subordinate to the obligations enshrined in Article 4(3) TEU.¹⁶⁶ Hence, Article 4(3) TEU cannot prevail when balanced against the duty of sincere cooperation.

By analogy, it follows that if a Member State were to invoke Article 222 TFEU, another Member State may not invoke Article 347 TFEU in order to escape its obligations. As AG Emiliou has observed in his Opinion in the *PPU* case, when taking the principle of sincere cooperation into account, a Member State cannot adopt exceptional derogation measures, such as those provided for in Article 347 TEU, unilaterally and without first consulting with the Union and the other Member States.¹⁶⁷ On the basis of *Kadi*, even if Article 347 TFEU is a “safety

¹⁶¹ Case C-516/22 *European Commission v United Kingdom of Great Britain and Northern Ireland (Commission v UK)* [2023] ECLI:EU:C:2023:857, Opinion of AG Emiliou para. 58.

¹⁶² Klamert (n 155), p. 46; see also John Temple Lang, ‘Article 10 EC - The Most Important ‘General Principle’ of Community Law’ in Ulf Bernitz, Joakim Nergelius and Cecilia Cardner (eds), *General Principles of EC Law in a Process of Development* (Kluwer Law International 2008).

¹⁶³ Case C-673/16 *Relu Adrian Coman, Robert Clabourn Hamilton, Asociația Accept v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne, Consiliul Național pentru Combaterea Discriminării (Coman and Others)* [2018] ECLI:EU:C:2018:2, Opinion of AG Wathelet para. 40.

¹⁶⁴ Giuseppe Martinico, ‘Taming National Identity: A Systematic Understanding of Article 4.2 TEU’ (2021) 27 *European Public Law* 447, 453; for an account on the evolution of the clause see also Pietro Faraguna, ‘On the Identity Clause and Its Abuses: ‘Back to the Treaty’ (2021) 27 *European Public Law*, p. 427.

¹⁶⁵ *ibid* pp. 455-456, 461-462.

¹⁶⁶ Marcus Klamert, *The Principle of Loyalty in EU law* (Oxford University Press 2014), pp. 19, 21, 84.

¹⁶⁷ *PPU*, Opinion of AG Emiliou (n 34), para. 119.

valve” which may allow for a general derogation,¹⁶⁸ it does not authorise a Member State to undertake measures which go against the fundamental principles of EU law.¹⁶⁹ Since the Lisbon codification, the principles of sincere cooperation and solidarity are fundamental principles that play a pivotal role in the EU constitutional order.¹⁷⁰ Therefore, the role left to play for the safeguard clause in instances of overlap with Article 222 TFEU is rather symbolic, and Article 347 cannot permit a derogation from the duties enshrined in Article 222 TFEU.

5. CONCLUSION

Albeit rarely or never invoked, Article 347 TFEU and Article 222 TFEU carry great potential in the EU legal order. Both clauses represent extraordinary tools to overcome situations of crisis. At the same time, their exceptional nature allows for a better understanding of the interplay between EU law obligations and Member States’ sovereignty. This paper has sought to answer the following question: how do the derogation clause of Article 347 TFEU and the solidarity clause of Article 222 TFEU overlap in their scope of application, and what is the systematic relationship between the two provisions?

The second section focused on Article 347 TFEU, which provides for a “safety valve” granting the possibility for Member States to escape their obligations in order to safeguard their own interests. Since the provision has been overlooked in the literature for a long time, this essay aimed to revive the academic discussion around it in the context of EU Emergency law. By building upon the recent advisory opinions of AG Emiliou, it clarified the interpretation of the requirement of “serious internal disturbances”. Moreover, it has shown that by building upon the case law of the CJEU, the inherent limits of the Article can be identified in the non-derogable fundamental rights on which the Union is based. To foster a better understanding of the “wholly exceptional” nature of the clause, this contribution purported to frame the discretion allowed to Member States by Article 347 TFEU through the prism of sovereignty.

¹⁶⁸ *Albore*, Opinion of AG Cosmas (n 28), para. 23; *BV NORDIC INFO*, Opinion of AG Emiliou (n 9), para. 53.

¹⁶⁹ *Kadi* (n 80), para. 303.

¹⁷⁰ *Federal Republic of Germany v European Commission* (n 13), para. 41.

The third section turned to Article 222 TFEU, which instead calls upon the Union and the Member States to act in the spirit of solidarity when a Member State is faced with a terrorist attack or a natural or man-made disaster. By focusing on the interpretation of the provision and its requirements, it underlined how the obligations laid down by the clause differ in their extent. Whilst under Article 222(1) TFEU the Union is bound to mobilise all the instruments at its disposal once the provision is triggered, the non-affected Member States may independently choose the means to comply with their solidarity obligations according to Article 222(2) TFEU and Declaration No 37. To further provide clarity on the interpretation of the solidarity clause, this paper suggests that since Article 222 TFEU covers extremely serious situations of emergency, it represents another “wholly exceptional” clause. In turn, the notion of what may be considered “overwhelming” for a State could be interpreted by reference to the threshold identified by the advisory opinions on Article 347 TFEU.

The fourth section compared Article 347 TFEU and Article 222 TFEU. It established that certain emergency situations create an area of overlap between the scopes of application of the derogation clause of Article 347 TFEU and the solidarity clause of Article 222 TFEU. Specifically, events such as the first wave of the COVID-19 pandemic may fall both under the definition of serious internal disturbances as outlined by AG Emiliou, and under the requirement of natural disasters of Article 222 TFEU. In the same vein, serious terrorist attacks are capable of triggering both Article 222 TFEU and Article 347 TFEU. This section further examined the relationship between the two provisions and explored the possibility for a Member State to invoke Article 347 TFEU to generally derogate from its solidarity obligations under Article 222 TFEU. By identifying the escape clause of Article 347 TFEU, and the solidarity clause of Article 222 TFEU, with the values enshrined in Article 4 TEU, their systematic relationship becomes clear. While the former is inherently linked to the understanding of the national identity clause codified in Article 4(2) TEU, the latter embodies the duty of sincere cooperation enshrined in Article 4(3) TEU. In the balancing act between Article 4(2) TEU and Article 4(3) TEU, the jurisprudence surrounding the interpretation of the two provisions shows that Article 4(3) TEU prevails over national identity interests. Moreover, the *Kadi* judgment established that certain fundamental values on which the Union is based cannot be set aside by Article 347 TFEU. After

the Lisbon codification, sincere cooperation is understood as the “backbone” principle of the EU Treaties, and solidarity as the fundamental value that underpins the whole constitutional system. Hence, it follows that, when faced with the possibility of derogating from EU law or acting in solidarity, a Member State may not invoke Article 347 TFEU in order to derogate from its duty of solidarity under Article 222 TFEU.

Despite being unused, Article 347 TFEU and Article 222 TFEU are rules of fundamental importance. This paper has demonstrated how the two provisions overlap in their scopes of application and shed light on their systematic relationship. As Bruno De Witte has suggested, the Union's constitutional order should be seen as the result of changing practice under constant rules. A systematic interpretation of Article 347 TFEU and Article 222 TFEU, read in conjunction with Article 4 TEU, supports such a dynamic approach. Hence, further research could aim to explore the relationship of these two clauses with other provisions of EU law, and specifically with other emergency legal bases. Clarifying the role that Treaty-based mechanisms of exceptional nature and Member States' obligations play in times of crisis is crucial to understanding the dynamic nature of EU emergency law

Reinterpreting Dominance? A Critical Analysis of the Draft Guidelines on Article 102 TFEU in Light of CJEU Case Law

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1. INTRODUCTION	243
2. THE DRAFT GUIDELINES ON THE APPLICATION OF ARTICLE 102 TFEU	246
3. THE COMMISSION’S APPROACH TO THE ENFORCEMENT OF COMPETITION LAW	253
4. THE SHIFT FROM THE ‘TRADITIONAL’ TO THE ‘MODERN’ ERA IN CJEU JURISPRUDENCE.....	255
5. POINTS OF TENSION BETWEEN THE DRAFT GUIDELINES AND THE CASE LAW	258
6. POSSIBLE IMPLICATIONS OF THE COMMISSION ADOPTING THE DRAFT GUIDELINES	265
7. CONCLUSION.....	267

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1. INTRODUCTION

The European Union's (EU) competition rules aim to protect genuine and undistorted competition in the internal market.² One of the ways to achieve this is through Article 102 TFEU, which specifically prohibits the abuse of a dominant position within the Union. This prohibition does not imply that achieving a dominant position in the internal market is in itself unlawful, but rather aims to prohibit undertakings, meaning businesses, from engaging in conduct that distorts or impairs effective competition, as this is harmful for consumers and other market players.³ It is the European Commission (the Commission), alongside the national competition authorities, that is charged with the enforcement of this prohibition, as well as with the enforcement of EU competition law in general.⁴ The Commission adopts soft law with the aim of clarifying its own decisional practice and the existing competition law.⁵ As it is adopted by the Commission, soft law is devoid of legally binding force.⁶ However, in the domain of competition law, soft law instruments are increasingly used as self-standing rather than auxiliary, and the Court of Justice of the European Union (CJEU) has recognised that these instruments are capable of producing indirect legal effects.⁷ One important soft law instrument regarding Article 102 TFEU is the Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive

² European Commission, 'Draft Commission Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings' (2024), para. 1.

³ Case 322/81 *NV Nederlandsche Banden-Industrie Michelin v Commission of the European Communities* [1983] ECR 3461, para. 57; Commission, 'Draft Guidelines on Article 102' (n 2), para. 2; Robert O'Donoghue and Jorge Padilla, *The Law and Economics of Article 102 TFEU* (3rd edition, Hart Publishing 2020) p. 185.

⁴ James S Venit, 'EU Competition Law - Enforcement and Compliance: An Overview' (1996) 65 *Antitrust LJ* 81, p. 85; Kati Cseres, 'Comparing Laws in the Enforcement of EU and National Competition Laws' (2010) 3(1) *European Journal of Legal Studies* 7 <<https://hdl.handle.net/1814/16114>> accessed 4 April 2025.

⁵ Zlatina Georgieva, 'Soft Law in EU Competition Law and its Judicial Reception in Member States: A Theoretical Perspective' (2015) 16(2) *German Law Journal* 223, 227; Pablo Ibáñez Colomo, 'Beyond the "More Economics-Based Approach": A Legal Perspective on Article 102 TFEU Case Law' (2016) 53(3) *Common Market Law Review* 2.

⁶ Oana Andreea Stefan, 'European Competition Soft Law in European Courts: A Matter of Hard Principles?' (2008) 14 *European Law Journal*, p. 753; Georgieva (n 5), p. 226.

⁷ *ibid*; Georgieva (n 5), p. 227.

exclusionary conduct by dominant undertakings, also known as the Guidance Paper.⁸

Since 2009, this Guidance Paper has directed the Commission on the enforcement of Article 102 TFEU.⁹ The Guidance Paper contributed to moving to an effects-based approach, where the enforcement priorities are set considering a given conduct's potential effects on the market, rather than a formalistic approach where certain behaviour is presumptively anticompetitive.¹⁰ After 16 years of the Guidance Paper, in August 2024, the Commission published its draft Guidelines on the application of Article 102 of the TFEU to abusive exclusionary conduct by dominant undertakings (draft Guidelines), which set out the principles used to assess whether the conduct by undertakings with a dominant market position qualifies as an exclusionary abuse under Article 102 TFEU.¹¹ These draft Guidelines aim to enhance legal certainty by giving guidance to national courts and competition authorities of the Member States in their application of this prohibition, as well as by helping undertakings self-assess whether their conduct falls within the scope of Article 102 TFEU.¹² The draft Guidelines arguably reverse the effects-based approach by using formalistic categorisations of conduct, such as introducing presumptions that certain categories of conduct are anticompetitive.¹³ The establishment of presumptions is one of the ways in which these draft Guidelines have been argued to depart from and even contradict existing case law from the CJEU on Article 102 TFEU.¹⁴ This paper will analyse

⁸ European Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' (2009) OJ C45/7.

⁹ *ibid* pp. 1, 2.

¹⁰ Linsey McCallum and others, 'A Dynamic and Workable Effects-Based Approach to Abuse of Dominance' (Competition Policy Brief 1, 2023) 2; Lazar Radic and Dirk Auer, 'The Commission's Art. 102 TFEU Guidelines: Consolidation or Creation?' (12 February 2025) <<http://dx.doi.org/10.2139/ssrn.5134897>> accessed 5 April 2025.

¹¹ Commission, 'Draft Guidelines on Article 102' (n 2), para. 7.

¹² *ibid* para. 8.

¹³ Pınar Akman, Massimo Motta and Chiara Fumagalli, 'Reflections on the European Commission's Draft Guidelines on Exclusionary Abuses' (30 October 2024), p. 15 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5004907 accessed 20 April 2025; Radic and Auer (n 10), p. 3; Miroslava Marinova, 'The European Commission's Draft Article 102 Guidelines Under Fire: Examining the Substance and the Roots of the Criticism' (2025) GW Competition & Innovation Lab Working Paper Series 1 3 <<https://competitionlab.gwu.edu/sites/g/files/zaxdzs6711/files/2024-12/32.pdf>> accessed 5 April 2025.

¹⁴ Akman, Motta and Fumagalli 'Reflections on the European Commission's Draft Guidelines' (n 13), pp. 5, 6; Radic and Auer (n 10), p. 5.

whether this is the case by answering the research question ‘*To what extent do the draft Guidelines on the Application of Article 102 of the TFEU to Abusive Exclusionary Conduct by Dominant Undertakings depart from the case law of the Court of Justice of the European Union in their assessment of competition on the merits and capability to produce exclusionary effects?*’.

The doctrinal law methodology will be used to this end, in order to analyse and interpret both existing case law and the new draft Guidelines, as well as academic literature in this field. This doctrinal approach has been chosen because it enables a focused and critical assessment of the draft Guidelines on Article 102 TFEU and the case law of the CJEU. Particularly, how they might contradict in their approach to the assessment of competition on the merits and the capability to produce exclusionary effects. This paper analyses both earlier case law of the CJEU as well as more recent case law to examine how the CJEU has shifted its approach to the prohibition under Article 102 TFEU. The draft Guidelines will be specifically examined by reference to the more recent case law, as this reflects the CJEU’s current approach to the abuse of dominance.

The paper will start by introducing the draft Guidelines and will then move on to discussing the current approach of the Commission, followed by the approach of the CJEU, to abusive conduct by dominant undertakings. Subsequently, the focus will shift to how the draft Guidelines depart from case law¹⁵. More specifically, the key tensions lie in how presumptions about exclusionary effects are set and rebutted, and in how the As-Efficient Competitor (AEC) test is used to judge competition on the merits.¹⁶ These points will be analysed by reference to the case law in order to see whether, and if so, how they depart from the case law of the CJEU in their assessment of competition on the merits and capability to produce exclusionary effects. The paper will conclude by answering the research question and discussing some possible implications of the approach the Commission will follow if these draft Guidelines are ultimately adopted.

¹⁵ Radic and Auer (n 10), p. 3; Akman, Motta and Fumagalli, ‘Reflections on the European Commission’s Draft Guidelines’ (n 13), p. 15.

¹⁶ Radic and Auer (n 10), pp. 6, 18; Akman, Motta and Fumagalli, ‘Reflections on the European Commission’s Draft Guidelines’ (n 13), p. 9.

2. THE DRAFT GUIDELINES ON THE APPLICATION OF ARTICLE 102 TFEU

Abusive conduct by dominant undertakings may harm the consumer in various forms, such as the deterioration of the quality of goods and services, reduced innovation, and increased prices.¹⁷ These forms of harm arise from the recourse, by dominant undertakings, to means other than those governing normal competition.¹⁸ Article 102 TFEU seeks to avoid the various forms of competitive harm by prohibiting dominant undertakings from abusing their position in the market.¹⁹ Under Article 19(1) TEU and Article 267 TFEU, it is the Court of Justice of the European Union that ensures the ultimate authoritative interpretation of Article 102 TFEU. Therefore, it is the CJEU that defines the conditions under which certain practices constitute an exclusionary abuse of dominance.²⁰ Article 105(1) TFEU clarifies that it is the Commission that ensures that Article 102 TFEU is applied, thereby entrusting it with its role as the main enforcer of EU competition law.²¹ The draft Guidelines seek to set out the principles used to evaluate whether certain conduct constitutes an exclusionary abuse under Article 102 TFEU, thereby clarifying how the Commission will enforce this prohibition.²² Although these draft Guidelines are not ‘hard law’, meaning they have no binding legal force, do not produce general and external effects, and are not adopted according to the EU’s legislative procedure, similar types of Commission soft law have been recognised by the CJEU as being capable of producing indirect legal

¹⁷ Akman, Motta and Fumagalli ‘Reflections on the European Commission’s Draft Guidelines’ (n 13), p. 3; Commission, ‘Draft Guidelines on Article 102’ (n 2); Radic and Auer (n 10), p. 4; Ioannis Lianos, ‘The Emergence of an Epithet in EU Competition Law: “Naked Restrictions” and Article 102 TFEU’ (2025) 1 *CLES Research Paper Series* 2 11<https://www.ucl.ac.uk/cles/sites/cles/files/cles-2025_naked_restrictions_rise_of_an_epithet_final.pdf> accessed 6 April 2025.

¹⁸ Commission, ‘Draft Guidelines on Article 102’ (n 2), para. 6; Lianos, (n 17), p. 11; Akman, Motta and Fumagalli ‘Reflections on the European Commission’s Draft Guidelines’ (n 13), p. 3; O’Donoghue and Padilla (n 3), p. 86.

¹⁹ O’Donoghue and Padilla (n 3), pp. 3, 318; Commission, ‘Draft Guidelines on Article 102’ (n 2).

²⁰ Pablo Ibáñez Colomo, ‘Legal Tests in EU Competition Law: Taxonomy and Operation’ (27 May 2019) <<http://dx.doi.org/10.2139/ssrn.3394889>> accessed 12 April 2025; Pinar Akman, ‘A Critical Inquiry into “Abuse” in EU Competition Law’ (2024) 44(2) *Oxford Journal of Legal Studies*, p. 407.

²¹ Cseres, ‘Comparing Laws’ (n 4), p. 7.

²² Commission, ‘Draft Guidelines on Article 102’ (n 2), para. 7; Radic and Auer (n 10), p. 2.

effects.²³ Such effects arise from the CJEU's reliance on these instruments when applying general principles such as legal certainty, equality, and legitimate expectations.²⁴

Whether these particular draft Guidelines will be recognised as capable of producing such effects ultimately depends on the CJEU's endorsement.²⁵ As the CJEU holds the exclusive competence on the ultimate interpretation of EU law, including Article 102 TFEU, the Commission is not empowered to issue Guidelines that would depart from the case law of the CJEU.²⁶ This is because its role is confined to the enforcement, and not the interpretation, of EU competition law.²⁷ The Commission's task is to ensure the application of EU law, but it does so under the control of the CJEU, whose interpretation of the Treaties is binding upon the Commission.²⁸ Before examining whether the draft Guidelines depart from the case law, the next section will focus on analysing the draft Guidelines by examining their substance and approach to the enforcement of Article 102 TFEU. Firstly, the draft Guidelines' structure for the enforcement of Article 102 TFEU will be examined, followed by their treatment of competition on the merits and the capability of a conduct to produce exclusionary effects.

2.1 STRUCTURE OF THE DRAFT GUIDELINES

The draft Guidelines set out the structure used by the Commission to assess whether Article 102 TFEU has been infringed by an undertaking.²⁹ Firstly, the Commission will define, guided by the Market Definition Notice, the relevant

²³ Stefan, 'European Competition Soft Law' (n 5); Petra L Láncoš, Napoleon Xanthoulis and Luis Arroyo (eds), *The Legal Effects of EU Soft Law: Theory, Language and Sectoral Insights* (Edward Elgar Publishing 2023); Francis Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56(1) *The Modern Law Review* 19, p. 32; Linda Senden, *Soft Law in European Community Law* (Hart Publishing 2004), p. 401.

²⁴ Senden, *Soft Law in European Community Law* (n 23), p. 322; Stefan, 'European Competition Soft Law' (n 5); Georgieva (n 5), pp. 229, 233, 238.

²⁵ Stefan, 'European Competition Soft Law' (n 5), p. 753; Georgieva (n 5), pp. 229, 233, 238; Láncoš, Xanthoulis and Arroyo (n 23).

²⁶ Stefan, 'European Competition Soft Law' (n 5), p. 753.

²⁷ *ibid.*, p. 765; Cseres (n 4), p. 7; Venit (n 4), p. 85.

²⁸ Wouter PJ Wils, 'The Judgment of the EU General Court in *Intel* and the So-Called "More Economic Approach" to Abuse of Dominance' (2014) 37(4) *World Competition: Law and Economics Review* pp. 405, 419; Ibáñez Colomo, 'Legal Tests in EU Competition Law' (n 20), p. 2; Akman, 'Critical Inquiry into Abuse' (n 20), p. 407.

²⁹ Commission, 'Draft Guidelines on Article 102' (n 2), para. 40.

product and geographic market.³⁰ Following this, it will determine whether the undertaking holds a dominant position in this market.³¹ Thirdly, the Commission will assess whether the conduct of the undertaking departs from competition on the merits.³² The Commission will then assess whether this conduct is capable of having exclusionary effects on the market.³³ The last step is to evaluate whether there is an objective justification applicable to the specific case.³⁴ In case where the conduct by a dominant undertaking in a specific market is seen to depart from competition on the merits and of being capable of having exclusionary effects, and in the absence of an objective justification, this will constitute a breach of Article 102 TFEU and the Commission will issue a decision to that effect.³⁵

The way in which the draft Guidelines explain how the Commission will address the first two steps, namely how it will determine the market and define dominance, is in line with the case law from the EU Courts, more specifically with the *United Brands* case.³⁶ The two next steps, however, regarding both the assessment of whether the conduct falls within competition on the merits and whether it is capable of having exclusionary effects, have been argued to depart from the case law of the CJEU.³⁷ Requiring both a departure from competition on the merits and the capability of producing exclusionary effects to establish an abuse of dominance is, in itself, a new requirement. This two-step analysis is not found in the case law, which instead demands that the conduct *has the actual or potential effect of restricting competition* without dividing this condition into two

³⁰ Commission Notice on the definition of the relevant market for the purposes of Community competition law [1997] OJ C 372/03; Commission, ‘Draft Guidelines on Article 102’ (n 2), para. 14.

³¹ Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207, para. 65; Case 85/76 *Hoffmann-La Roche & Co. AG v Commission* [1979] ECR 461, para. 39; Commission, ‘Draft Guidelines on Article 102’ (n 2), para. 14.

³² Commission, ‘Draft Guidelines on Article 102’ (n 2), para. 14; Lianos (n 17), p. 16.

³³ *ibid.*

³⁴ Commission, ‘Draft Guidelines on Article 102’ (n 2), para. 14.

³⁵ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, arts. 7, 9; Akman, Motta and Fumagalli ‘Reflections on the European Commission’s Draft Guidelines’ (n 13), p. 2.

³⁶ Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207, para. 65.

³⁷ Radic and Auer (n 10); Pinar Akman, Chiara Fumagalli and Massimo Motta, ‘The European Commission’s Draft Guidelines on Exclusionary Abuses: A Law and Economics Critique and Recommendations’ (2025) *Journal of European Competition Law & Practice*, p. 10 <<https://doi.org/10.1093/jeclap/lpaf020>> accessed 10 May 2025; Jorge Padilla, ‘In Defence of Rebuttable Presumptions in Abuse of Dominance Cases’ (SSRN, 5 February 2025) 2 <<https://ssrn.com/abstract=5126726>> accessed 10 May 2025.

separate steps.³⁸ The following sections will concentrate on the two steps of this proposed test, firstly by addressing how the Commission is to assess whether conduct departs from competition on the merits according to the draft Guidelines, and secondly, how it is to evaluate whether that conduct is capable of producing exclusionary effects.

2.2 DEPARTURE FROM COMPETITION ON THE MERITS

According to the draft Guidelines, the concept of competition on the merits “covers all conduct within the scope of normal competition on the basis of the performance of economic operators”, which relates to competitive situations in which customers benefit from wider choice, lower prices, and better quality.³⁹ The draft Guidelines, to assess whether the conduct of the dominant undertaking departs from competition on the merits, first divide all conduct into three distinct categories.⁴⁰ The category into which the conduct at issue falls will determine what is required to establish that there is a departure from competition on the merits.

The first category established by the Guidelines is called naked restrictions, which refers to conduct that is held to have no economic attraction for the undertaking except that of restricting competition.⁴¹ Naked restrictions will be deemed to fall outside the scope of competition on the merits automatically.⁴² The second category establishes that if a particular conduct fulfils a specified legal test, which will be different depending on the type of conduct at issue, it will also be regarded as falling outside the scope of competition on the merits.⁴³ These legal tests apply only to certain types of conduct, specifically to exclusive dealing,

³⁸ Case C-377/20 *Servizio Elettrico Nazionale and Others* [2022] ECLI:EU:C:2022:379, para. 68; Case C-280/08 *Deutsche Telekom AG v Commission* [2010] ECLI:EU:C:2010:603, para. 246; Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] ECLI:EU:C:2012:172, para. 26.

³⁹ Case C-377/20 *Servizio Elettrico Nazionale and Others* [2022] ECLI:EU:C:2022:379, para. 61; Commission, ‘Draft Guidelines on Article 102’ (n 2), para. 51; Akman, Fumagalli and Motta, ‘Draft Guidelines on Exclusionary Abuses’ (n 37), p. 4.

⁴⁰ Akman, Fumagalli and Motta, ‘Draft Guidelines on Exclusionary Abuses’ (n 37), p. 2; Marinova, ‘Draft Article 102 Guidelines Under Fire’ (n 13), p. 14; Rupperecht Podszun and others, ‘Making Article 102 TFEU Future-Proof – The Way Ahead’ (SSRN, 31 October 2024) 11 <<https://ssrn.com/abstract=5006791>> accessed 12 May 2025.

⁴¹ Commission, ‘Draft Guidelines on Article 102’ (n 2), para. 54; Lianos (n 17), pp. 16-18; Akman, Fumagalli and Motta, ‘Draft Guidelines on Exclusionary Abuses’ (n 37), pp. 2, 3, 19.

⁴² Commission, ‘Draft Guidelines on Article 102’ (n 2), para. 54; Akman, Fumagalli and Motta, ‘Draft Guidelines on Exclusionary Abuses’ (n 37), p. 19.

⁴³ Commission, ‘Draft Guidelines on Article 102’ (n 2), para. 55; Akman, Fumagalli and Motta, ‘Draft Guidelines on Exclusionary Abuses’ (n 37), p. 17; Radic and Auer (n 10), 20, 21; Lianos (n 17), pp. 16-18; Akman, Fumagalli and Motta, ‘Draft Guidelines on Exclusionary Abuses’ (n 37), pp. 22, 23.

refusal to supply, margin squeeze, predatory pricing, and to tying and bundling.⁴⁴ All other types of conduct liable to be prohibited by Article 102 TFEU fall within the third category, for which the Commission needs to show that the conduct, on the specific circumstances of the case, departs from competition on the merits.⁴⁵

The factors that need to be taken into consideration by the Commission for the assessment of whether the conduct departs from competition on the merits include whether the conduct enables discriminatory treatment that favours the dominant undertaking over its competitors, whether the dominant undertaking prevents consumers from exercising their choice based on the merits of the products and whether the dominant undertaking breaches laws in other areas, for example, data protection laws.⁴⁶ Other factors that are relevant for this assessment include whether the dominant undertaking changes its behaviour in an unreasonable way, considering the market circumstances, and whether it provides misleading information to authorities.⁴⁷ The last factor that can be considered for this assessment is whether a hypothetical as-efficient competitor would be able to adopt the same conduct, notably because the conduct relies on the use of resources inherent to the holding of the position of dominance, particularly to strengthen that position in the market.⁴⁸ The draft Guidelines state that, to analyse this factor, a price-cost test, known as the As-Efficient Competitor (AEC) test, can be used to determine whether a hypothetical as-efficient competitor would be able to adopt the same conduct.⁴⁹ The AEC test assesses whether the dominant undertaking's prices and costs would force an equally efficient competitor to operate at a loss, thereby foreclosing competition.⁵⁰ For some specific pricing practices, the AEC

⁴⁴ Commission, 'Draft Guidelines on Article 102' (n 2), para. 53; Lianos (n 17), p. 23; Marinova, 'Draft Article 102 Guidelines Under Fire' (n 13), 17.

⁴⁵ Commission, 'Draft Guidelines on Article 102' (n 2), para. 55; Lianos (n 17), p. 18; Akman, Fumagalli and Motta, 'Draft Guidelines on Exclusionary Abuses' (n 37), p. 15.

⁴⁶ Commission, 'Draft Guidelines on Article 102' (n 2), para. 55; Lianos, 'Naked Restrictions and Article 102 TFEU' (n 17), p. 23; Marinova, 'Draft Article 102 Guidelines Under Fire' (n 13), p. 18.

⁴⁷ Commission, 'Draft Guidelines on Article 102' (n 2), para. 55; Lianos (n 17), p. 18.

⁴⁸ Commission, 'Draft Guidelines on Article 102' (n 2), para. 55; Akman, Fumagalli and Motta, 'Draft Guidelines on Exclusionary Abuses' (n 37), p. 6.

⁴⁹ Case C-377/20 *Servizio Elettrico Nazionale and Others* [2022] ECLI:EU:C:2022:379, para. 78; Akman, 'A Critical Inquiry into Abuse' (n 20), pp. 405-433, 427; Marinova, 'The as Efficient Competitor Test: A Cornerstone or a Controversy in EU competition law?' (Research Gate, December 2024) p. 3. <www.researchgate.net/publication/386496620_The_As-Efficient_Competitor_Test_A_Cornerstone_or_a_Controversy_in_EU_Competition_Law> accessed 12 May 2025

⁵⁰ *ibid.*

test is required, namely for margin squeeze and predatory pricing.⁵¹ For non-pricing conduct, the draft Guidelines state that the AEC test is generally inappropriate and therefore should not be considered when determining whether the conduct departs from competition on the merits.⁵²

Under the draft Guidelines, it is therefore required to first decide into which category the specific conduct falls, and then, based on this category, the Commission's assessment of whether the conduct departs from competition on the merits in the particular case will vary. If the conduct is categorised as a naked restriction, the Commission does not need to show departure from competition on the merits, as this will be assumed. If the conduct falls into the second category, the fulfilment of a specified legal test will lead it to be considered to depart from competition on the merits. For all other conduct, the Commission will be required to take various factors into consideration in order to show that, in those circumstances, the conduct in question falls outside competition on the merits. After the Commission has assessed whether the conduct departs from competition on the merits, it will be required to analyse whether the conduct is capable of producing exclusionary effects. How the Commission is to examine this under the draft Guidelines is explored in the following section.

2.3 PRESUMPTIONS OF CAPABILITY TO PRODUCE EXCLUSIONARY EFFECTS

Exclusionary effects refer to the harm that dominant undertakings can cause by impeding the maintenance of the degree of competition existing in a market or the growth of that competition.⁵³ These exclusionary effects include the marginalisation or exclusion of competitors, the increase in barriers to expansion or entry, the hindering of access to markets, and the imposition of restrictions on the potential growth of competitors.⁵⁴

The first category concerns naked restrictions.⁵⁵ When conduct is deemed to be a naked restriction, there is a presumption that it is capable of having

⁵¹ Commission, 'Draft Guidelines on Article 102' (n 2), para. 56.

⁵² *ibid.*

⁵³ *ibid.* para. 6.

⁵⁴ Case C-377/20 *Servizio Elettrico Nazionale and Others* [2022] ECLI:EU:C:2022:379, paras. 44-47; Commission, 'Draft Guidelines on Article 102' (n 2); SEN paras. 44-47; Akman, Fumagalli and Motta, 'Draft Guidelines on Exclusionary Abuses' (n 37), 4.

⁵⁵ Commission, 'Draft Guidelines on Article 102' (n 2), para. 60; Lianos (n 17), p. 17; Akman, Fumagalli and Motta, 'Draft Guidelines on Exclusionary Abuses' (n 37), p. 23.

exclusionary effects, and “only in exceptional cases” will a dominant undertaking be able to rebut this presumption.⁵⁶ Conduct falling within the second category will also be presumed to lead to exclusionary effects, but this presumption can be rebutted if the undertaking submits that the conduct is not capable of having, in the specific case and on the basis of supporting evidence, exclusionary effects.⁵⁷ The types of conduct that fall within this second category are exclusive supply or purchasing agreements, rebates conditional upon exclusivity, predatory pricing, margin squeeze in the presence of negative spreads, and certain forms of tying.⁵⁸

The third category applies to all other conduct. For this category, the Commission will need to demonstrate, on the basis of “specific, tangible points of analysis and evidence”, that the conduct is capable of having exclusionary effects.⁵⁹ The Commission carries out this assessment based on the circumstances and facts existing at the time when the conduct was implemented.⁶⁰ It does not need to prove that the conduct has actually produced exclusionary effects, but that it is *at least capable* of producing them.⁶¹ The relevant circumstances and facts that the Commission can consider include the extent of the dominant position of the undertaking, the conditions of entry and expansion in the market, and the position of competitors, as well as their importance for the maintenance of effective competition.⁶² Other relevant factors include the extent of the allegedly abusive conduct, the position of the customers, the evidence of an exclusionary strategy, and evidence relating to actual market developments.⁶³ The draft Guidelines specifically establish that there is no need to show actual harm to competitors or consumers, nor that the conduct is profitable or enabled by the dominant position.⁶⁴

⁵⁶ Commission, ‘Draft Guidelines on Article 102’ (n 2), para. 60; Akman, Fumagalli and Motta, ‘Draft Guidelines on Exclusionary Abuses’ (n 37), pp. 3, 23; Lianos (n 17), p. 17.

⁵⁷ Commission, ‘Draft Guidelines on Article 102’ (n 2), para. 60; Akman, Fumagalli and Motta, ‘Draft Guidelines on Exclusionary Abuses’ (n 37), p. 3; Lianos (n 17), p. 17.

⁵⁸ Commission, ‘Draft Guidelines on Article 102’ (n 2); Marinova, ‘Draft Article 102 Guidelines Under Fire’ (n 13), p. 17.

⁵⁹ Commission, ‘Draft Guidelines on Article 102’ (n 2), para. 60; Akman, Fumagalli and Motta, ‘Draft Guidelines on Exclusionary Abuses’ (n 37), p. 5; Lianos (n 17), p. 17; Marinova, ‘Draft Article 102 Guidelines Under Fire’ (n 13), p. 25.

⁶⁰ Commission, ‘Draft Guidelines on Article 102’ (n 2), para. 62.

⁶¹ Commission, ‘Draft Guidelines on Article 102’ (n 2), para. 61.

⁶² Commission, ‘Draft Guidelines on Article 102’ (n 2), para. 70; Marinova, ‘Draft Article 102 Guidelines Under Fire’ (n 13), p. 15.

⁶³ *ibid.*

⁶⁴ Commission, ‘Draft Guidelines on Article 102’ (n 2), para. 71.

The division of conduct into three distinct categories for both the assessment of whether the conduct falls within competition on the merits and whether it is capable of producing exclusionary effects seems to suggest that the focus is on the form of the conduct rather than on its effects when establishing whether it constitutes an abuse of dominance.⁶⁵ The establishment of presumptions and the treatment of the AEC test are some of the aspects that have been argued to contradict the case law of the CJEU.⁶⁶ Before examining whether this is the case, the following section will focus on explaining the approach that the Commission has adopted to its enforcement of cases on the abuse of dominance, and will then be followed by the CJEU's jurisprudence on Article 102 TFEU.

3. THE COMMISSION'S APPROACH TO THE ENFORCEMENT OF COMPETITION LAW

In the early years of EU competition law, the approach adopted was seen to be more focused on the form of the conduct rather than on its effects.⁶⁷ This formalistic approach was criticised because it was argued to lead to the protection of competitors rather than of competition.⁶⁸ The Commission was also criticised for considering the exclusion of competitors sufficient for determining that a certain conduct is anticompetitive.⁶⁹ This, and complaints of being too reliant on presumptions of illegality, led the Commission to adopt a reformed approach.⁷⁰ The formalistic approach was disregarded in favour of "the more economic approach".⁷¹ One of the premises of this approach is the idea that presumptions of illegality should be used sparingly and that, therefore, conduct by undertakings

⁶⁵ Radic and Auer (n 10), 3; Akman, Fumagalli and Motta, 'Draft Guidelines on Exclusionary Abuses' (n 37), p. 6.

⁶⁶ Radic and Auer (n 10), 18; Akman, Fumagalli and Motta, 'Draft Guidelines on Exclusionary Abuses' (n 37), p. 5.

⁶⁷ Anne C Witt, 'The European Court of Justice and the More Economic Approach to EU Competition Law – Is the Tide Turning?' (2019) 64(2) *Antitrust Bulletin*, pp. 172-213, University of Leicester School of Law Research Paper No 18-10, pp. 405-433 <<https://ssrn.com/abstract=3300114>> accessed 30 May 2025; Pablo Ibáñez Colomo and Andriani Kalintiri, 'The Evolution of EU Antitrust Policy: 1966–2017' (2020) 83(2) *Modern Law Review*, p. 334.

⁶⁸ Eleanor M Fox, 'Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness' (1986) 61 *Notre Dame Law Review* 981, p. 1004; Akman, 'Critical Inquiry into Abuse' (n 20), p. 409.

⁶⁹ Witt (n 67), p. 176.

⁷⁰ Witt (n 67), p. 176; Akman, 'Critical Inquiry into Abuse' (n 20), pp. 409-411.

⁷¹ Witt (n 67), p. 174; Akman, 'Critical Inquiry into Abuse' (n 20), pp. 409-412.

should not be regarded as anticompetitive without a prior economic assessment of the effects of the conduct on competition.⁷² With this reformed approach, the Commission can be seen to have adopted consumer welfare as the aim of competition law in the EU.⁷³

The ‘more economic approach’ relies on the post-Chicago welfarist theory, which is a type of economic approach to competition law.⁷⁴ According to this theory, competition is mainly valued for its ability to improve consumer welfare, and competition rules are applied on a case-by-case assessment of how a specific behaviour would impact this welfare.⁷⁵ It has been argued that this approach to competition law, by considering only consumer welfare, neglects the values of undistorted competition, such as the right to compete on the merits and the equality of opportunity between economic operators.⁷⁶ Equality of opportunity and the right to compete on the merits are both important for undertakings within the EU as they reflect the fundamental idea that every economic operator has equal and undistorted access to any market.⁷⁷ While it is generally accepted that the Commission aims to protect consumer welfare through its enforcement of competition law, it is not undisputed that this should be the ultimate aim.⁷⁸ Wouter Wils argues that, as is stated in Protocol No 27 annexed to the Treaty of Lisbon, the objective of EU competition law is to create a system of undistorted competition as part of the EU internal market.⁷⁹ He argues that in protecting the competitive process as such, the positive effects on consumer welfare are achieved, but that they are not the ultimate objective.⁸⁰ Therefore, although the reformed approach taken by the Commission aimed at protecting consumer welfare has been welcomed by many, others believe that a more formalistic

⁷² Witt (n 67), pp. 174, 180.

⁷³ *ibid*; Lianos (n 17), p. 17; Marinova, ‘Draft Article 102 Guidelines Under Fire’ (n 13), pp. 4, 21, 27.

⁷⁴ Wils (n 28), p. 11; Maurice E. Stucke, ‘Reconsidering Antitrust Goals’ (2012) 53 Boston College Law Review, p. 551.

⁷⁵ Wils (n 28), p. 12; Heike Schweitzer, ‘The Role of Consumer Welfare in EU Competition Law’ in Josef Drexler and Reto M Hilty (eds), *Technology and Competition: Contributions in Honour of Hanns Ullrich* (Larcier 2009) pp. 511, 520 and 521.

⁷⁶ Wils (n 28), pp. 12, 13.

⁷⁷ *ibid* p. 17.

⁷⁸ Witt (n 67), p. 174; Wils (n 28), p. 16; Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECLI:EU:C:2011:83, ECR I-527; Case C-496/09 *European Commission v Italian Republic* [2011] ECLI:EU:C:2011:740, ECR I-11483.

⁷⁹ Wils (n 28), p. 16.

⁸⁰ *ibid*.

approach is what the Treaties prescribe and what the approach therefore should ultimately be.⁸¹

This reformed approach was adopted by the Commission with the issuing of the Guidance Paper in 2009, where it announced that it would focus its resources on cases that caused harm to consumers, and would no longer pursue infringements of Article 102 TFEU that did not.⁸² This evolution can also be seen in case law, which can be divided into the “traditional” and the “modern” era of the Court’s jurisprudence, the latter one being characterised by the CJEU embracing this “more economic approach”.⁸³ This shift in the CJEU’s case law will be examined in the next section.

4. THE SHIFT FROM THE ‘TRADITIONAL’ TO THE ‘MODERN’ ERA IN CJEU JURISPRUDENCE

The CJEU’s approach in the traditional era can be characterised by the absence of the adoption of economic methods to any significant degree and by being based rather on formalistic reasoning.⁸⁴ An example of this is the cases of *Hoffmann-La Roche* and *Michelin I*, where the CJEU held that exclusivity rebates can be found to be abusive in character, thereby adopting a formalistic rather than an effects-based approach, as the focus was on the nature of the conduct rather than on its impact on competition.⁸⁵ Another example is the *AKZO* case, in which the CJEU held that a dominant company charging prices below average variable costs, with the aim of eliminating a competitor, must be regarded as abusive.⁸⁶ In such cases, there is no need to prove that this had a negative impact on consumer welfare or on competition as a whole.⁸⁷ This formalistic approach has been gradually rejected

⁸¹ Wils (n 28), p. 16; Patrick Rey, ‘An Effects-Based Approach to Article 102: A Response to Wouter Wils’ (2015) 38(1) *World Competition* pp. 3, 4-5, 16-18.

⁸² Commission, ‘Guidance on Article 82 Enforcement Priorities’ (n 8), para. 19; Witt (n 67), p. 178.

⁸³ Akman, ‘Critical Inquiry into Abuse’ (n 20), pp. 410-416.

⁸⁴ *ibid* p. 411.

⁸⁵ Case C-95/04 P *British Airways plc v Commission* [2007] ECLI:EU:C:2007:166, para. 61; Akman, ‘Critical Inquiry into Abuse’ (n 20), p. 412.

⁸⁶ Case C-62/86 *AKZO Chemie BV v Commission* [1991] ECLI:EU:C:1991:286, para. 71; Case C-202/07 P *France Telecom SA v Commission* [2009] ECLI:EU:C:2009:214, paras. 109-114; Akman, ‘Critical Inquiry into Abuse’ (n 20), p. 414.

⁸⁷ *ibid*.

by the CJEU, which has embraced a more economics-oriented approach in a line of cases starting with *Post Danmark I*.⁸⁸

In *Post Danmark I*, the CJEU recognised that competition on the merits can lead to the elimination of a less efficient competitor and that Article 102 TFEU prohibits practices that have an exclusionary effect on competitors considered to be as efficient as the dominant undertaking itself.⁸⁹ In subsequent judgments, the CJEU promulgated the position adopted in *Post Danmark I* and established the necessity of showing at least potential anti-competitive effects in order to declare the specific conduct to constitute an abuse of dominance.⁹⁰ By embracing an economic, effects-based approach, the CJEU has adopted the As-Efficient Competitor standard, which declares the exclusion of competitors to be anticompetitive only if these competitors are at least as efficient as the dominant undertaking.⁹¹ This position has been reiterated by the CJEU in the case of *Intel*, where it explained that Article 102 TFEU does not seek to ensure that less efficient competitors remain on the market.⁹² The case of *Intel* was also used by the CJEU to clarify what it had previously held in *Hoffmann-La Roche*, namely that exclusivity rebates are by their very nature prohibited by Article 102 TFEU, but that when the dominant undertaking concerned submits evidence alleging the conduct lacks exclusionary effects, the Commission is bound to assess the foreclosure capability of the scheme of rebates.⁹³

The ‘more economic approach’ is also evident in *Generics*, where the CJEU held that abusive conduct must be capable of restricting competition and

⁸⁸ Case C-209/10, *Post Danmark A/S v Konkurrencerådet* [2012] ECLI:EU:C:2012:172, paras. 41-42; Akman, ‘Critical Inquiry into Abuse’ (n 20), p. 416; Ekaterina Rousseva and Mel Marquis, ‘Hell Freezes Over: A Climate Change for Assessing Exclusionary Conduct under Article 102 TFEU’ (2013) 4(1) *Journal of European Competition Law & Practice*, p. 32.

⁸⁹ Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] ECLI:EU:C:2012:172, paras. 22-25; Akman, ‘Critical Inquiry into Abuse’ (n 20), pp. 416-417.

⁹⁰ Case C-280/08 *Deutsche Telekom AG v Commission* [2010] ECLI:EU:C:2010:603, para. 177; Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECLI:EU:C:2011:83, [2011] ECR I-527, paras. 31-33; Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] ECLI:EU:C:2012:172, paras. 21-25; Case C-373/17 *Google LLC v European Commission* [2017] ECLI:EU:C:2017:981, para. 457; Akman, ‘Critical Inquiry into Abuse’ (n 20), p. 417.

⁹¹ Case C-413/14 *Intel v Commission* [2017] ECLI:EU:C:2017:632, para. 138; Damien Geradin and Stijn Huijts, ‘Abuse of Dominance: Has the Effects-Based Analysis Gone Too Far?’ (2024) 40(4) *Oxford Review of Economic Policy*, pp. 776, 777.

⁹² Case C-413/14 *Intel v Commission* [2017] ECLI:EU:C:2017:632, paras. 133-134; Akman, ‘Critical Inquiry into Abuse’ (n 20), pp. 405-433; Geradin and Huijts (n 91), pp. 417-418.

⁹³ Ibáñez Colomo, ‘Legal Tests in EU Competition Law’ (n 20), p. 15; Case C-413/14 *Intel v Commission* [2017] ECLI:EU:C:2017:632, para. 139; Geradin and Huijts (n 91), p. 777; Akman, ‘Critical Inquiry into Abuse’ (n 20), p. 418.

producing exclusionary effects, which must be assessed having regard to all the relevant facts surrounding that conduct.⁹⁴ The form-based approach was also expressly rejected in *ENEL* when the CJEU stated that the abusive nature of a practice depends on whether it is capable of restricting competition by having exclusionary effects and does not depend ‘on the form it takes or took’.⁹⁵ The CJEU also clarified that it is the Commission that bears the burden of proof in exclusionary abuse cases.⁹⁶ In *Google Shopping*, the CJEU explained that to find that a conduct is prohibited under Article 102 TFEU, it is required to demonstrate that the conduct, which departs from competition on the merits, has the actual or potential effect of restricting that competition by excluding equally efficient competing undertakings from the market, or by hindering their growth.⁹⁷ It also clarified that it is the Commission’s task to produce evidence that is capable of showing the existence of these circumstances.⁹⁸ In addition to establishing an effects-based approach, *Google Shopping*, *Generics*, and *ENEL* are cases that promulgate a uniform approach to all types of exclusionary abuse under Article 102 TFEU since these cases involved both pricing and non-pricing conduct and they all adopted the same principles.⁹⁹

The current jurisprudence, therefore, indicates and confirms that, in general, no conduct would be presumptively unlawful under Article 102 TFEU, and therefore all practices must be assessed for their effects before they can be regarded as abuses of dominance.¹⁰⁰ The exception to this would be cases of exclusivity and loyalty rebates, as held in *Intel*, which could be capable of creating a presumption of illegality based on their form.¹⁰¹ However, this is only a soft

⁹⁴ Case C-307/18 *Generics (UK) Ltd and Others* [2020] ECLI:EU:C:2020:52, paras. 154-157; Akman, ‘Critical Inquiry into Abuse’ (n 20), pp. 420, 421; Radic and Auer (n 10), pp. 9-10.

⁹⁵ Case C-377/20 *Servizio Elettrico Nazionale and Others* [2022] ECLI:EU:C:2022:379, para. 72; Akman, ‘Critical Inquiry into Abuse’ (n 20), p. 421.

⁹⁶ Radic and Auer (n 10), pp. 7-8; Case C-373/17 *Google LLC v European Commission* [2017] ECLI:EU:C:2017:981, paras. 132, 165.

⁹⁷ *ibid.*

⁹⁸ *ibid.*

⁹⁹ Akman, ‘Critical Inquiry into Abuse’ (n 20), p. 425.

¹⁰⁰ *ibid.* p. 426; Case C-307/18 *Generics (UK) Ltd and Others* [2020] ECLI:EU:C:2020:52, para. 154; Case T-371/17 *Qualcomm and Qualcomm Europe v Commission* [2019] ECLI:EU:T:2019:232 para. 355; Case C-377/20 *Servizio Elettrico Nazionale and Others* [2022] ECLI:EU:C:2022:379, para. 72; Case C-373/17 *Google LLC v European Commission* [2017] ECLI:EU:C:2017:981, para. 441.

¹⁰¹ Case C-413/14 *Intel v Commission* [2017] ECLI:EU:C:2017:632; Akman, ‘Critical Inquiry into Abuse’ (n 20), p. 418; Radic and Auer (n 10), p. 7; Ibáñez Colomo, ‘Legal Tests in EU Competition Law’ (n 20), p. 15; Geradin and Huijts (n 91), p. 777; Akman, ‘Critical Inquiry into Abuse’ (n 20), p. 777; Akman, Fumagalli and Motta, ‘Draft Guidelines on Exclusionary Abuses’ (n 37), p. 7.

presumption, as the Commission will be required to assess whether the exclusivity and loyalty rebates in question are capable of producing exclusionary effects if the dominant undertaking alleges that they are not.¹⁰² Regarding all other types of conduct liable to be abusive, the CJEU seems to require the Commission to show that there is a departure from competition on the merits and the capability to produce exclusionary effects.¹⁰³

The draft Guidelines have been argued to depart from this ‘more economic approach’ in favour of a more formalistic one by creating presumptions and downplaying the role of the AEC test and principle.¹⁰⁴ The following section will focus on analysing the draft Guidelines in view of the current state of the CJEU’s case law in order to see whether the Commission is returning to its previous formalistic approach.

5. POINTS OF TENSION BETWEEN THE DRAFT GUIDELINES AND THE CASE LAW

The draft Guidelines have been understood as an attempt to revert to the form-based approach, according to which certain categories of conduct are presumed to be anticompetitive, and depending on the category into which the conduct falls, subject to different thresholds for the rebutting of these presumptions.¹⁰⁵ Such an approach has been refused by the CJEU, especially in the cases of *ENEL* and *Google Shopping*.¹⁰⁶

This shift is evidenced by the introduction of various changes regarding both the assessment of whether the conduct departs from competition on the merits and whether it is capable of producing exclusionary effects. Regarding the assessment of whether conduct departs from competition on the merits, the main

¹⁰² *ibid.*

¹⁰³ Akman, ‘Critical Inquiry into Abuse’ (n 20), p. 433; Akman, Fumagalli and Motta, ‘Draft Guidelines on Exclusionary Abuses’ (n 37), p. 4.

¹⁰⁴ Radic and Auer (n 10), p. 3; Akman, Fumagalli and Motta, ‘Draft Guidelines on Exclusionary Abuses’ (n 37), pp. 6, 15.

¹⁰⁵ *ibid.*

¹⁰⁶ Radic and Auer (n 10), p. 5; Case C-377/20 *Servizio Elettrico Nazionale and Others* [2022] ECLI:EU:C:2022:379, para. 72; Akman, ‘Critical Inquiry into Abuse’ (n 20), p. 421; Case C-280/08 *Deutsche Telekom AG v Commission* [2010] ECLI:EU:C:2010:603 ECR I-9555, para. 177; Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECLI:EU:C:2011:83, [2011] ECR I-527, paras. 31-33; Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] ECLI:EU:C:2012:172, paras. 21-25; Case C-373/17 *Google LLC v European Commission* [2017] ECLI:EU:C:2017:981, para. 457.

change concerns the applicability and treatment of the AEC test. For the assessment of whether the conduct is capable of producing exclusionary effects, the most notable change relates to the introduction of presumptions with varying thresholds for their rebuttal. The next section will focus on assessing the departure from the case law by the draft Guidelines concerning the assessment of whether the conduct departs from competition on the merits. Subsequently, this departure will be examined in the context of the analysis of whether a conduct is capable of producing exclusionary effects.

5.1 ASSESSING COMPETITION ON THE MERITS

The draft Guidelines explain that competition on the merits covers conduct within the scope of normal competition on the basis of performance of economic operators, and which in principle relates to a competitive situation in which consumers benefit from lower prices, better quality and a wider choice of new or improved goods or services.¹⁰⁷ This concept is in line with the one established by the CJEU in *Hoffmann La Roche*, whereby conduct that includes recourse to different methods from those governing normal competition is liable to be abusive.¹⁰⁸ The explanation provided by the draft Guidelines, by associating competition on the merits with consumer welfare, also seems to find support in the case law, as the CJEU has made it explicit that Article 102 TFEU is concerned with preventing behaviour that harms and is of detriment to consumers.¹⁰⁹

The Commission introduces, through its draft Guidelines, the division of all conduct into three categories. Two categories of conduct which are presumed to fall outside the scope of competition on the merits, namely, naked restrictions and restrictions that fulfil a specified legal test, and conduct falling into the third category, for which the Commission is required to show that the conduct falls

¹⁰⁷ Commission, 'Draft Guidelines on Article 102' (n 2), para. 51; Akman, Fumagalli and Motta, 'Draft Guidelines on Exclusionary Abuses' (n 37), p. 4; Lianos (n 17), p. 22.

¹⁰⁸ Andrea Pera, 'Fairness, Competition on the Merits and Article 102' (2022) 18(2) European Competition Journal, p. 234 <<https://doi.org/10.1080/17441056.2022.2056347>> accessed 15 May 2025; Case C-377/20 *Servizio Elettrico Nazionale and Others* [2022] ECLI:EU:C:2022:379, para. 44; Case 85/76 *Hoffmann-La Roche & Co. AG v Commission* [1979] ECR 461, paras. 6, 91.

¹⁰⁹ Case C-377/20 *Servizio Elettrico Nazionale and Others* [2022] ECLI:EU:C:2022:379, paras. 44-47; Akman, Fumagalli and Motta, 'Draft Guidelines on Exclusionary Abuses' (n 37), p. 4; Lianos (n 17), p. 231; Witt (n 67) pp. 2, 8; Marinova, 'Draft Article 102 Guidelines Under Fire' (n 13), pp. 4, 21.

outside the scope of competition on the merits.¹¹⁰ Although the CJEU case law has not adopted this categorical distinction nor established specific legal tests, the fulfilment of which would lead a certain conduct to be deemed to fall outside competition on the merits, any possible practical effects of these changes are likely to be limited because the Commission still has to assess whether the conduct is capable of producing exclusionary effects.¹¹¹

Regarding the conduct for which the Commission must show a departure from competition on the merits, the AEC test is listed as one of the factors to be considered in this assessment.¹¹² The draft Guidelines state that for margin squeeze and for predatory pricing, this AEC test is required, whilst for non-pricing conduct, it is inappropriate.¹¹³ Whilst CJEU case law indicates that pricing practices must, as a general rule, be assessed under the AEC test, the case of *Servizio ENEL* clarified that the AEC test can also be used for non-pricing practices.¹¹⁴ The draft Guidelines, therefore, seem to depart from and contradict CJEU case law by stating that the AEC test is inappropriate for non-pricing conduct, as the case law suggests the Commission might choose to conduct an AEC test even when it is not required to do so.¹¹⁵

The main points of tension between the case law and the draft Guidelines, therefore, seem to lie in the division of conduct into distinct categories and the use of the AEC test regarding the assessment of whether conduct departs from competition on the merits. The next section will focus on comparing the case law and the draft Guidelines with regard to their treatment of the evaluation of a conduct's capability to produce anticompetitive effects. More specifically, the introduction of presumptions will be analysed, as this aspect of the draft Guidelines has been subject to the most criticism.¹¹⁶

¹¹⁰ Commission, 'Draft Guidelines on Article 102' (n 2), paras. 53-55; Akman, Fumagalli and Motta, 'Draft Guidelines on Exclusionary Abuses' (n 37), p. 4; Marinova, 'Draft Article 102 Guidelines Under Fire' (n 13), p. 14; Podszun and others, 'Making Article 102 TFEU Future-Proof' (n 40), p. 11.

¹¹¹ Radic and Auer (n 10), pp. 20, 21.

¹¹² Commission, 'Draft Guidelines on Article 102' (n 2), para. 55; Radic and Auer (n 10), p. 18.

¹¹³ Commission, 'Draft Guidelines on Article 102' (n 2), para. 56.

¹¹⁴ Radic and Auer (n 10), p. 19; Geradin and Huijts (n 91), p.777.

¹¹⁵ Radic and Auer (n 10), pp. 18, 19; Geradin and Huijts (n 91), p. 777; Akman, Fumagalli and Motta, 'Draft Guidelines on Exclusionary Abuses' (n 37), p. 7.

¹¹⁶ Radic and Auer (n 10), p. 5; Akman, Fumagalli and Motta, 'Draft Guidelines on Exclusionary Abuses' (n 37), pp. 5, 6.

5.2 ASSESSING THE CAPABILITY TO PRODUCE EXCLUSIONARY EFFECTS

The types of practices falling into the second category of conduct established by the draft Guidelines include exclusive supply or purchasing agreements, rebates conditional upon exclusivity, predatory pricing, margin squeeze in the presence of negative spreads, and certain forms of tying.¹¹⁷ These types of conduct are also presumed to lead to exclusionary effects, but this presumption can be rebutted if the undertaking shows that, in the specific case, the conduct is not capable of having exclusionary effects.¹¹⁸ For all other types of conduct, the Commission is required to show the capability of having exclusionary effects.¹¹⁹

The introduction of such presumptions has been argued to shift the burden of proof to undertakings, which now need to demonstrate that their conduct is not anti-competitive.¹²⁰ Under Article 2 of Regulation 1/2003, which deals with the implementation of EU competition law rules under Articles 101 and 102 TFEU, it is the Commission, as the authority alleging an infringement, that bears the burden of proof.¹²¹ This means that it is the Commission that must demonstrate the existence of an infringement, a principle confirmed by the CJEU in the case of *Google Shopping*, which has clarified that where there is a dispute as to the existence of an infringement of competition law, the Commission must adduce evidence capable of proving it.¹²² In addition to contradicting the case law, this introduction of presumptions without clear guidance on how undertakings can rebut them makes the self-assessment by undertakings of whether their conduct is lawful more difficult and, in this way, undermines legal certainty.¹²³

For the case of loyalty and exclusivity rebates, the Commission is correct to claim that they are presumed to be anticompetitive by nature, as this is what the

¹¹⁷ Commission, 'Draft Guidelines on Article 102' (n 2), para. 60; Marinova, 'Draft Article 102 Guidelines Under Fire' (n 13), p. 17.

¹¹⁸ Commission, 'Draft Guidelines on Article 102' (n 2), para. 60; Lianos (n 17), 24; Akman, Fumagalli and Motta, 'Draft Guidelines on Exclusionary Abuses' (n 37), 3.

¹¹⁹ Commission, 'Draft Guidelines on Article 102' (n 2), para. 60; Akman, Fumagalli and Motta, 'Draft Guidelines on Exclusionary Abuses' (n 37), p. 5; Lianos (n 17), p. 25.

¹²⁰ Marinova, 'Draft Article 102 Guidelines Under Fire' (n 13), pp. 2, 14.

¹²¹ Cani Fernández, 'Presumptions and Burden of Proof in EU Competition Law: The Intel Judgment' (2019) 10(7) *Journal of European Competition Law & Practice*, p. 448; Akman, Fumagalli and Motta, 'Draft Guidelines on Exclusionary Abuses' (n 13), pp.1-4.

¹²² Fernández, (n 121), pp. 448-449.

¹²³ Marinova, 'Draft Article 102 Guidelines Under Fire' (n 13), pp. 2, 14.

CJEU confirmed in the case of *Intel Renvoi*.¹²⁴ However, the CJEU then clarified that this presumption is not a per se prohibition that would have the effect of relieving the Commission of its obligation to examine whether the conduct gives rise, in the specific case, to anticompetitive effects.¹²⁵ The CJEU clarified that if the undertaking submits evidence alleging that its conduct is not capable of producing such effects, the Commission must assess this.¹²⁶ The draft Guidelines depart from this by stating that if the evidence submitted by the undertaking is insufficient to call into question the presumption, the conduct will be automatically assumed to be capable of producing anticompetitive effects.¹²⁷ The departure lies in the fact that under the draft Guidelines, the capability to foreclose is established if the Commission shows that the evidence submitted by the dominant undertaking is not sufficient to call into question the presumption.¹²⁸ *Intel* and *ENEL* established a different method to deal with such a case by requiring the Commission to examine whether the conduct in question is capable of producing these effects when the undertaking submits evidence that its conduct is not anticompetitive.¹²⁹ The contradiction of the case law, therefore, arises from the draft Guidelines' insistence that even when the undertaking submits evidence alleging its conduct is not capable of producing exclusionary effects, the Commission, instead of having to show the capability of the conduct to produce such effects, is only required to assess whether the evidence is sufficient to call into question the presumption.¹³⁰

It has been argued that the draft Guidelines also depart from the case law in another way when dealing with exclusivity rebates.¹³¹ The draft Guidelines state that exclusivity rebates are presumed to lead to exclusionary effects, but that if the

¹²⁴ Radic and Auer (n 10), 12; Ibáñez Colomo, 'Beyond the More Economics-Based Approach' (n 5), p. 714.

¹²⁵ Case T-286/09 RENV- *Intel Corporation v Commission* [2022] ECLI:EU:T:2022:19, para. 522; Ibáñez Colomo, 'Beyond the More Economics-Based Approach' (n 5), pp. 714, 715.

¹²⁶ Ibáñez Colomo, 'Legal Tests in EU Competition Law' (n 20), p. 15; Case C-413/14 *Intel v Commission* [2017] ECLI:EU:C:2017:632, para. 139; Geradin and Huijts (n 91), p. 777; Akman, 'Critical Inquiry into Abuse' (n 20), p. 418.

¹²⁷ Commission, 'Draft Guidelines on Article 102' (n 2), para. 60; Radic and Auer (n 10), p. 7.

¹²⁸ *ibid.*

¹²⁹ Case C-377/20 *Servizio Elettrico Nazionale and Others* [2022] ECLI:EU:C:2022:379, paras. 138-140; Ibáñez Colomo, 'Legal Tests in EU Competition Law' (n 20), p. 15; Case C-413/14 *Intel v Commission* [2017] ECLI:EU:C:2017:632, para. 139; Geradin and Huijts (n 91), p. 777; Akman, 'Critical Inquiry into Abuse' (n 20), p. 418.

¹³⁰ Case C-377/20 *Servizio Elettrico Nazionale and Others* [2022] ECLI:EU:C:2022:379, paras. 138-140; Commission, 'Draft Guidelines on Article 102' (n 2); Radic and Auer (n 10), pp. 8, 9.

¹³¹ Radic and Auer (n 10), pp. 12, 13.

dominant undertaking submits evidence to the contrary and the Commission would evaluate this evidence and then come to the conclusion that it is required to assess, in this specific case and with reference to the specific circumstances, whether the conduct is capable of having such effects, one of the factors to be considered is the possible existence of a strategy aimed at excluding actual or potential competitors of the dominant undertaking.¹³² In support of this, the draft Guidelines cite the cases of *Intel* and *Unilever*.¹³³ However, both of these cases refer to the possible existence of a strategy aiming to exclude competitors that are *at least as efficient as the dominant undertaking*.¹³⁴ The draft Guidelines omit the latter part and instead refer to the exclusion of any actual or potential competitors, which contradicts the longstanding principle in EU competition law that it is not the purpose of Article 102 TFEU to ensure that less efficient competitors than the dominant undertaking remain on the market.¹³⁵

The AEC principle, namely the idea that not every exclusion of every competitor is anticompetitive, has been instrumental in the case law's adoption of an effects-based approach.¹³⁶ The AEC principle guides the assessment of exclusionary practices to ensure that the Commission targets only conduct that harms competition and consumer welfare rather than conduct merely putting less efficient competitors in an unfavourable position.¹³⁷ This omission seems to suggest that the draft Guidelines adopt a stance seeking to change the effects-based approach established by the CJEU in favour of a form-based approach.¹³⁸ It moreover helps to protect the dynamic competitive process in which firms that can innovate and reduce costs are also gaining the most benefits.¹³⁹ The choice not to refer to as-efficient competitors also greatly expands the application of Article 102 TFEU in a way that shows inconsistency with the case law, as it could potentially

¹³² Commission, 'Draft Guidelines on Article 102' (n 2), para. 83; Radic and Auer (n 10), pp. 12, 13.

¹³³ Case C-680/20 *Unilever Italia Mkt. Operations Srl v Autorità Garante Della Concorrenza e del Mercato* [2023] ECLI:EU:C:2023:33, paras. 50-52, 60; Commission, 'Draft Guidelines on Article 102' (n 2), para. 83.

¹³⁴ Case C-680/20 *Unilever Italia Mkt. Operations Srl v Autorità Garante Della Concorrenza e del Mercato* [2023] ECLI:EU:C:2023:33, paras. 48-50; Case C-413/14 *Intel v Commission* [2017] ECLI:EU:C:2017:632, para. 139; Radic and Auer (n 10), p. 13.

¹³⁵ Radic and Auer (n 10), p. 13; Case C-209/10 *Post Danmark A/S v Konkurrencerådet* ECLI:EU:C:2012:172, paras. 22-25; Akman, 'Critical Inquiry into Abuse' (n 20), pp. 416, 417.

¹³⁶ Akman, Fumagalli and Motta, 'Draft Guidelines on Exclusionary Abuses' (n 37), p. 6.

¹³⁷ Akman, 'Critical Inquiry into Abuse' (n 20), p. 6.

¹³⁸ Akman, Fumagalli and Motta, 'Draft Guidelines on Exclusionary Abuses' (n 37), p. 7.

¹³⁹ *ibid* pp. 582, 583.

lead to declaring conduct that only harms less efficient undertakings to be anticompetitive.¹⁴⁰

Certain forms of tying are also types of behaviour that the draft Guidelines place under the second category and are therefore presumed to lead to exclusionary effects.¹⁴¹ In contrast with the case of exclusivity arrangements under *Intel*, the CJEU has not attributed presumed anticompetitive effects to tying.¹⁴² The draft Guidelines cite the case of *Hilti* to support this presumption.¹⁴³ However, in *Hilti*, the CJEU found tying to be abusive due to the specific circumstances and facts surrounding the implementation of that conduct.¹⁴⁴ This presumption is therefore introduced by the draft Guidelines without having a basis in CJEU case law.¹⁴⁵ It can be seen to contradict the case of *Hilti* specifically, which has been interpreted to have established that the exclusionary effects of tying depend on the particular context of the case, including market conditions and the position of the dominant undertaking.¹⁴⁶

For other types of conduct, the CJEU has held that the Commission is required to show the capability of the conduct to produce exclusionary effects.¹⁴⁷ For example, in the case of *Deutsche Telekom*, the CJEU confirmed that conduct constituting a margin squeeze is only abusive insofar as it is capable of having an anticompetitive effect.¹⁴⁸ The fact that the Commission is introducing presumptions that conduct constituting a margin squeeze or tying is capable of having exclusionary effects without requiring an assessment of the specific case contradicts the case law of the CJEU.¹⁴⁹ This approach can also give rise to a high

¹⁴⁰ Radic and Auer (n 10), pp. 13, 14.

¹⁴¹ Commission, 'Draft Guidelines on Article 102' (n 2), para. 95; Lianos (n 17), p. 24; Akman, Fumagalli and Motta, 'Draft Guidelines on Exclusionary Abuses' (n 37), p. 3.

¹⁴² Radic and Auer (n 10), p. 16.

¹⁴³ Case T-30/89 *Hilti AG v Commission* [1991] ECLI:EU:T:1991:70 ECR I-1439; Commission, 'Draft Guidelines on Article 102' (n 2), para. 95; Radic and Auer (n 10), p. 16.

¹⁴⁴ Case T-30/89 *Hilti AG v Commission* [1991] ECLI:EU:T:1991:70 ECR I-1439, paras. 114-115; Radic and Auer (n 10), pp. 16, 17.

¹⁴⁵ Case T-30/89 *Hilti AG v Commission* [1991] ECLI:EU:T:1991:70 ECR I-1439, paras. 8, 90; Radic and Auer (n 10), p. 16; Commission, 'Draft Guidelines on Article 102' (n 2), para. 95.

¹⁴⁶ *ibid.*

¹⁴⁷ Case C-280/08 *Deutsche Telekom AG v Commission* [2010] ECLI:EU:C:2010:603, paras. 250-251; Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-527, para. 61; Ibáñez Colomo, 'Beyond the More Economics-Based Approach' (n 5), p. 712.

¹⁴⁸ *ibid.*

¹⁴⁹ Case T-30/89 *Hilti AG v Commission* [1991] ECLI:EU:T:1991:70 ECR I-1439, paras. 8, 90; Marinova, 'Draft Article 102 Guidelines Under Fire' (n 13), p. 2; Radic and Auer (n 10), pp. 24-26.

risk of over-enforcement.¹⁵⁰ One possible consequence of this is that companies may not engage in pro-competitive conduct that could benefit consumers due to the fear of being subject to a Commission investigation and possibly lengthy and costly litigation.¹⁵¹ The fact that their conduct could ultimately be justified on efficiency grounds may not deter undertakings from avoiding this problem, as they would nevertheless have to submit evidence to this effect and be involved in a dispute with the Commission.¹⁵² This and other possible implications of the Commission ultimately adopting these draft Guidelines will be the subject of the next section.

6. POSSIBLE IMPLICATIONS OF THE COMMISSION ADOPTING THE DRAFT GUIDELINES

The Commission expressed concerns that an “overly rigid implementation of the effects-based approach” could render the enforcement of the prohibition on abuse of dominance “unduly burdensome or even impossible”.¹⁵³ The reversal to a formalistic approach can have various consequences for the Commission as the enforcer of EU competition law, for the dominant undertakings whose conduct may fall under the prohibition of Article 102 TFEU, and for consumers.

At the level of the Commission, this can make the enforcement of Article 102 TFEU more manageable and shorten the duration of proceedings, as the Commission can rely on presumptions of exclusionary effects rather than having to make in-depth economic effects analyses of specific conduct.¹⁵⁴ This could substantially decrease the resources and time required for the adoption of a decision by the Commission, which has been a focal point of criticism of the effects-based approach.¹⁵⁵ The ‘more economic approach’ has contributed to making the investigatory and decision-making process of the Commission more complex, which in turn has caused delays in resolving cases.¹⁵⁶ An example of this

¹⁵⁰ *ibid.*

¹⁵¹ Marinova, ‘Draft Article 102 Guidelines Under Fire’ (n 13), p. 20.

¹⁵² *ibid.*

¹⁵³ Geradin and Huijts (n 91), p. 778.

¹⁵⁴ Nada Ina Pauer, ‘From *Intel & Qualcomm* to the New Art. 102 TFEU-Guidelines – Streamlining the Form- & Effects Based Approach’ (2024) 22 *Zeitschrift für Wettbewerbsrecht* pp. 115, 116; Podszun and others, ‘Making Article 102 TFEU Future-Proof’ (n 40), pp. 3, 4, 11.

¹⁵⁵ Pauer, ‘From *Intel & Qualcomm*’ (n 154), p. 161; Geradin and Huijts (n 91), pp. 782, 783.

¹⁵⁶ Geradin and Huijts (n 91), p. 778.

is *Intel*, where the AEC analysis is over 150 pages long, and it took nine years for the Commission to adopt its decision.¹⁵⁷ This combination of complexity and slowness also gave rise to the risk of justice being delayed or even denied.¹⁵⁸ Therefore, by adopting a more formalistic approach, the Commission could reduce the resources spent on each individual case and be able to adopt decisions faster.¹⁵⁹

However, the introduction of such presumptions can also have negative effects, which will be felt both by the undertakings against whom the Commission will enforce this prohibition and by consumers.¹⁶⁰ As mentioned previously, prohibiting a conduct without evaluating its economic effects can give rise to a risk of over-enforcement, which can decrease the incentives of undertakings to engage in efficiency-oriented conduct that can benefit consumers, as they may fear having to be involved in costly and lengthy litigations.¹⁶¹ The introduction of presumptions and formalistic legal tests without clear explanation and guidance on how to rebut them can increase legal uncertainty for undertakings as they are unable to predict enforcement outcomes.¹⁶² This can increase litigation costs and undermine legal certainty, which would in turn run counter to the objective of issuing draft Guidelines in the first place.¹⁶³ Moreover, by introducing such presumptions, the burden of proof may be unfairly shifted to undertakings who will need to show their conduct is not anti-competitive and can therefore not only contradict the CJEU case law, but also Article 2 of Regulation 1/2003.¹⁶⁴ This shift from an effects-based approach to one based on formalistic presumptions can lead to a decreased analysis of economic effects and potentially the disregard of the conduct's impact on consumer welfare.¹⁶⁵

Therefore, the effects of the Commission adopting a more formalistic approach to its enforcement of Article 102 TFEU can be both positive, in the form of faster decisions and a reduction in resources used on enforcement, but also negative, as they can decrease legal certainty and lead to over-enforcement. The

¹⁵⁷ Commission Decision of 13 May 2009 in Case COMP/C-3/37.990 *Intel*; Geradin and Huijts (n 91), p. 778.

¹⁵⁸ Geradin and Huijts (n 91), p. 782.

¹⁵⁹ Podszun and others, 'Making Article 102 TFEU Future-Proof' (n 40), p. 3.

¹⁶⁰ Marinova, 'Draft Article 102 Guidelines Under Fire' (n 13), p. 5.

¹⁶¹ *ibid.*, pp. 2, 14, 20.

¹⁶² *ibid.*, p. 14.

¹⁶³ *ibid.*

¹⁶⁴ *ibid.*, pp. 2 and 14.

¹⁶⁵ Radic and Auer (n 10), pp. 22-24.

decrease in legal certainty can also jeopardise the uniform application of EU law, as some national courts and national competition authorities might follow the effects-based approach adopted by the CJEU, and others the form-based approach that the Commission expresses in the draft Guidelines.¹⁶⁶ This outcome can threaten the coherence of the law and would give rise to a further lack of legal certainty.¹⁶⁷

7. CONCLUSION

The CJEU is tasked with determining the conditions for the application of EU competition law under Articles 19 TEU and 267 TFEU. Therefore, it is important that the draft Guidelines do not depart from its case law, as this departure would decrease the likelihood of them being endorsed by the CJEU. To find whether this is the case, the research question this paper has addressed is ‘*To what extent do the draft Guidelines on the Application of Article 102 of the TFEU to Abusive Exclusionary Conduct by Dominant Undertakings depart from the case law of the Court of Justice of the European Union in their assessment of competition on the merits and capability to produce exclusionary effects?*’. The analysis done throughout this paper has shown that the draft Guidelines depart from the case law by stepping away from the effects-based and ‘more economic approach’ endorsed by the CJEU in favour of a formalistic approach. This shift is evidenced by the creation of presumptions regarding a conduct’s capability to produce exclusionary effects, the rebuttal of these presumptions, which can be argued to shift the burden of proof, and the treatment of the AEC principle and test under the draft Guidelines. The answer to this research is therefore that the draft Guidelines can be seen to depart from the case law of the CJEU in their assessment of competition on the merits and capability to produce exclusionary effects. The departure arises from the rejection of the effects-based approach in favour of a formalistic method to the enforcement of Article 102 TFEU through the creation of presumptions regarding a conduct’s capability to produce exclusionary effects, the shifting of the burden of proof for their rebuttal to undertakings and the undermining of the

¹⁶⁶Akman, Fumagalli and Motta, ‘Draft Guidelines on Exclusionary Abuses’ (n 37), p. 7.

¹⁶⁷ *ibid.*

as-efficient competitor test for the assessment of whether a conduct departs from competition on the merits.

Firstly, the draft Guidelines create presumptions regarding the capability of certain types of conduct to have exclusionary effects. For conduct in the form of tying and margin squeeze, these presumptions find no support in the case law and even contradict the CJEU's approach, which is focused on finding such effects in the specific circumstances of the case. The presumption established for exclusivity and loyalty rebates finds support in the case of *Hoffmann-La Roche*, later confirmed in *Intel*, where the CJEU held that such conduct could be presumed to be capable of having exclusionary effects due to its form. However, it clarified in *Intel* that this is not a per se prohibition, as the Commission does have to analyse whether the conduct, in the specific case, is capable of giving rise to anticompetitive effects if the dominant undertaking submits evidence to the contrary. The draft Guidelines contradict the case law by stating that if the undertaking submits evidence aiming to rebut this presumption, the Commission is required to assess whether that evidence is capable of calling into question the presumptions, but not that it would be required to analyse the conduct's possible anticompetitive effects in the specific case. They therefore not only depart from the case law by establishing presumptions, but they also can be understood to shift the burden of proof from the Commission to the undertakings who will now have to prove their conduct is not capable of having exclusionary effects, whereas the CJEU has established that it is the Commission's task to produce evidence to find a breach of Article 102 TFEU.

Another point of departure is the applicability of the AEC test. Whereas under the cases of *Intel* and *Post Danmark I* the CJEU has emphasised the importance of the AEC test for evaluating whether a dominant undertaking's conduct results in the exclusion of competitors as efficient as the dominant undertaking, the draft Guidelines omit the latter part and instead refer to '*any actual or potential competitors*', thereby expanding the reach of Article 102 TFEU. This can lead to over-enforcement of EU competition law and the risk that incentives to innovate and become more efficient for undertakings are decreased.

Were the Commission to adopt these draft Guidelines without amending them, the results would range from faster decisions and lower litigation costs to decreased legal certainty and the jeopardising of the uniformity of EU law. The

Commission will have to implement some of the criticism and comments it received during the consultation period if it wishes to avoid the drawbacks of the approach put forward by the current draft Guidelines, as this criticism can lead to the Guidelines not being endorsed by the CJEU and therefore not being followed by national competition authorities and courts.

Branded but Reborn: Legal Perspectives on US Nominative Fair Use and EU Referential Use in Upcycled Fashion

*Aydin Bengisu*¹

1.INTRODUCTION	272
2.THE REFERENTIAL USE DEFENCE IN THE EU	278
3.NOMINATIVE FAIR USE DOCTRINE IN THE US	290
4.COMPARATIVE ANALYSIS AND REFORM PROPOSALS	302
5.CONCLUSION	311

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TABLE OF ABBREVIATIONS

CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
EU	European Union
ECJ	European Court of Justice
EUTMR	EU Trademark Regulation (Regulation 2017/1001)
IP	Intellectual Property
IPR/IPRs	Intellectual Property Right(s)
SDGs	Sustainable Development Goals
NGO	Non-governmental, Nonprofit organisation
TMD	EU Trademark Directive (Directive 2015/2436)
UN	United Nations
US	United States of America

1. INTRODUCTION

Sustainability and the circular economy are two terms that capture the current Zeitgeist. Our planet is running out of resources to sustain the livelihoods of current and future generations; hence, we need to shift our energy supplies to more sustainable alternatives.² To put the discussion into context, the circular economy involves utilising existing materials and products in a way that extends their life cycle.³ As incorporated into the UN SDGs, ‘Goal 12’ aims to ensure sustainable consumption and production patterns.⁴ To implement the UN’s 2030 Agenda, Europe’s ‘man on the moon’ moment came from the Commission,⁵ which introduced the European Green Deal in December 2019.⁶

As a part of the Green Deal, the Commission adopted the new Circular Economy Action Plan (CEAP) in March 2020 to achieve these goals.⁷ The proposals include an expansion of the scope of ecodesign rules,⁸ a strategy on sustainable textiles,⁹ as well as empowering consumers for the green

² United Nations Sustainable Development Goals, ‘Goal 12: Ensure sustainable consumption and production patterns’ (*United Nations*) <<https://www.un.org/sustainabledevelopment/sustainable-consumption-production/>> accessed 10 May 2025; Provided that “If the global population reaches 9.8 billion by 2050, the equivalent of almost three planets will be required to provide the natural resources needed to sustain current lifestyles”.

³ European Parliament, ‘Circular economy: definition, importance and benefits’ (*European Parliament*, 24 May 2023) <[⁴ UNGA Res 70/1, ‘Transforming our world: the 2030 Agenda for Sustainable Development’ \(25 September 2015\) UN Doc A/RES/70/1, pp. 22-23.](https://www.europarl.europa.eu/topics/en/article/20151201STO05603/circular-economy-definition-importance-and-benefits#:~:text=What%20is%20the%20circular%20economy,cycle%20of%20products%20is%20extended.> accessed 19 May 2025.</p>
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⁵ European Commission, ‘Press remarks by President von der Leyen on the occasion of the adoption of the European Green Deal Communication’ (*European Commission*, 11 December 2019) <https://ec.europa.eu/commission/presscorner/detail/cs/speech_19_6749> accessed 3 May 2025.

⁶ Commission, ‘The European Green Deal’ (Communication) COM (2019) 640 final, p. 3.

⁷ Commission, ‘A new Circular Economy Action Plan For a cleaner and more competitive Europe’ (Communication) COM (2020) 98 final.

⁸ Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products [2009] OJ L285/10.

⁹ Commission, ‘EU Strategy for Sustainable and Circular Textiles’ (Communication) COM (2022) 141 final; European Commission, ‘EU strategy for sustainable and circular textiles’ (*European Commission*) <https://environment.ec.europa.eu/strategy/textiles-strategy_en> accessed 17 May 2025. See also European Parliament, ‘How the EU wants to achieve a circular economy by 2050’ (*European Parliament*, 3 February 2021) <<https://www.europarl.europa.eu/topics/en/article/20210128STO96607/how-the-eu-wants-to-achieve-a-circular-economy-by-2050#the-eu-circular-economy-action-plan-1>> accessed 17 May 2025.

transition.¹⁰ The new ecodesign Regulation¹¹ focuses on the sectors that use the most resources and where the potential for circularity is high, such as textiles, in particular garments and footwear.¹² About 5.8 million tonnes of textiles are discarded every year in the EU, which is approximately 11kg per person.¹³ At the EU level, clothing makes up the largest share of EU textile consumption by 81%, and overall, the consumption of textiles accounts, on average, for the fourth-highest negative impact on the environment.¹⁴ The aim is to make textiles more durable, repairable, reusable and recyclable.¹⁵

To this end, most consumers want to actively contribute to the green transition, which requires greater participation in the circular economy.¹⁶ The proposal on empowering consumers for the green transition supports informed purchasing decisions by improving pre-contractual information on product durability and reparability and strengthening protection against unfair practices, such as misleading environmental claims and non-transparent sustainability labels.¹⁷

One of the biggest obstacles to achieving a circular economy is the current linear fashion industry. Such a system encourages mass production and consumption of clothing that is mostly made from fossil fuel-based synthetics that are not designed to be reused or recycled.¹⁸ In contrast, the Ellen MacArthur Foundation, an independent NGO dedicated to promoting and accelerating the transition to a circular economy, highlights that a key focus area for applying

¹⁰ Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information' COM (2022) 143 final. See also Commission, 'On making sustainable products the norm' (Communication) COM (2022) 140 final.

¹¹ Regulation (EU) 2024/1781 of the European Parliament and of the Council of 13 June 2024 establishing a framework for the setting of ecodesign requirements for sustainable products, amending Directive (EU) 2020/1828 and Regulation (EU) 2023/1542 and repealing Directive 2009/125/EC [2024] OJ L2024/1781 (ESPR).

¹² *ibid* Recital 49 and art. 18(5)(c). See also European Commission, 'Circular economy action plan' (*European Commission*) <https://environment.ec.europa.eu/strategy/circular-economy-action-plan_en> accessed 17 May 2025.

¹³ COM (2022) 141 final (n 9), p. 1.

¹⁴ *ibid*.

¹⁵ ESPR, Recitals 8 and 23, and art. 5(1).

¹⁶ COM (2022) 140 final (n 10), pp. 11-12.

¹⁷ COM (2022) 143 final (n 10), pp. 1-2.

¹⁸ The Sustainable Fashion Forum, 'What is Circular Fashion?' (*The Sustainable Fashion Forum*, 12 January 2024) <<https://www.thesustainablefashionforum.com/pages/what-is-circular-fashion>> accessed 22 May 2025.

circular economy principles to the fashion industry is developing ‘solutions so used clothes are turned into new’ items.¹⁹

A popular solution is upcycling, which the Oxford Dictionary defines as repurposing old or unwanted items into products of higher quality or value, thereby reducing the need for new raw materials.²⁰ It typically takes two forms: transforming existing products through customisation, or reusing usable parts of discarded items by altering or repurposing materials.²¹ To better demonstrate, examples can be found in Figure 1.



Figure 1: Types of Upcycling²²

The modification or integration of the garment into a new product can involve the inclusion of a trademarked logo of another fashion brand.²³ By doing so, it can trigger all types of infringement claims, such as consumer confusion, brand

¹⁹ Ellen MacArthur Foundation, ‘Fashion and the circular economy – deep dive’ (*Ellen MacArthur Foundation*, 16 September 2019) <<https://www.ellenmacarthurfoundation.org/fashion-and-the-circular-economy-deep-dive>> accessed 22 May 2025.

²⁰ ‘upcycle, v’ (*OED Online*, Oxford University Press July 2023) <<https://doi.org/10.1093/OED/1052659502>> accessed 22 May 2025.

²¹ Karen Kreider Gaunt, ‘The Upcycle Conundrum’ (*Best Lawyers*, 7 June 2022) <<https://www.bestlawyers.com/article/repurposed-products-copyright-infringement/4546>> accessed 22 May 2025; Irene Calboli, ‘Pushing a Square Pin into a Round Hole? Intellectual Property Challenges to a Sustainable and Circular Economy, and What to Do About It’ (2024) 55 *IC* 237, p. 243.

²² Alterist, ‘Types of Upcycling’ (*alterist*, 3 May 2022) <<https://alterist.com/blog/editorial/types-of-upcycling>> accessed 22 May 2025.

²³ Maria Elena Aldescu and Fernanda Donaire Passoni, ‘Fashion, intellectual property (IP) & Sustainability – Best practices, interactions, and strategies’ (*4iP Council*, 30 October 2023), p. 1 <<https://www.4ipcouncil.com/research/fashion-intellectual-property-ip-and-sustainability-best-practices-interactions-and-strategies>> accessed 17 June 2025.

dilution and free-riding.²⁴ For example, adding Chanel's iconic interlocking-C logo to an upcycled jacket may confuse consumers into believing that the item originates from, or is authorised by, Chanel. If the jacket is made from inferior quality, this could undermine Chanel's brand identity and reputation, resulting in dilution. Moreover, by benefiting from Chanel's strong reputation, the upcycler may be viewed as free-riding on the brand's established recognition.

Although upcycling has existed for many years, the latest flurry of cases has turned upcycling into an emerging legal battleground.²⁵ Since upcycling has seen a major boom and has attracted more attention from the consumer side, trademark infringement complaints targeting upcyclers from brands, such as Louis Vuitton and Chanel have increased.²⁶

The trademark protection of brand insignia displayed on upcycled clothes can significantly hinder achieving sustainability.²⁷ While the EU has demonstrated a clear commitment to circular fashion and places particular emphasis on textiles,²⁸ IP law remains largely absent from this policy framework.²⁹

Admittedly, the CEAP recognises that the IP regime 'needs to be fit for the digital age and the green transition and support EU businesses' competitiveness'.³⁰ However, IP laws often fail to align with sustainability objectives.³¹ Although in theory, mechanisms such as IP exhaustion and exceptions could facilitate more sustainable practices, they are frequently interpreted by courts in a manner that

²⁴ Tamar Duvdevani, Staci Trager and Maegan Stanley, 'Upcycling and Infringement: Cut From the Same Cloth?' *New York Law Journal* (New York, 26 August 2024) <<https://www.law.com/newyorklawjournal/2024/08/26/upcycling-and-infringement-cut-from-the-same-cloth/?slreturn=20250108171548>> accessed 22 May 2025.

²⁵ Irene Calboli and Siroos Tanner, 'Does Intellectual Property Promote or Hinder Sustainability? The Case of Upcycling' in Jacques De Werra (ed), *Intellectual Property & Sustainable Development* (Schulthess Romandes Editions 2024) pp. 59-70; Sarah Kent, 'Why are luxury brands waging war on the 'upcycled' clothing market?' (*CNN Style*, 13 May 2024) <<https://edition.cnn.com/2024/05/13/style/upcycled-clothes-fashion-brands-lawsuits/index.html>> accessed 22 May 2025.

²⁶ *ibid.*

²⁷ Martin Senftleben, 'Developing Defences for Fashion Upcycling in EU Trademark Law' (2024) 73 *GRUR International*, p. 100.

²⁸ COM (2020) 98 final (n 7), p. 10; COM (2022) 141 final (n 9), pp. 1-8.

²⁹ Ahmed Abdel-Latif and Pedro Roffe, 'The Interface Between Intellectual Property and Sustainable Development' in Irene Calboli and Maria Lilla Montagnani (eds), *Handbook of Intellectual Property Research: Lenses, Methods, and Perspectives* (online edition, Oxford University Press 2021) p. 617 <<https://doi.org/10.1093/oso/9780198826743.003.0040>> accessed 16 May 2025.

³⁰ COM (2020) 98 final (n 7), p. 17.

³¹ Elena Izyumenko, 'Intellectual Property in the Age of the Environmental Crisis: How Trademarks and Copyright Challenge the Human Right to a Healthy Environment' (2024) 55 *IIC* 864, p. 865.

prioritises strong protection for IP holders, creating, at most, conflicting outcomes.³²

This brings us to the main topic of this thesis: the ‘referential use’ defence under Articles 14(1)(c) EUTMR³³ and TMD³⁴, which could potentially protect upcyclers against trademark infringement claims. Referential use enables third parties to use a trademark to identify or refer to the trademark owner’s goods or services.³⁵ Its application, however, is limited by the ‘honest use’ proviso in Articles 14(2) EUTMR and TMD, and the absence of case law on upcycling creates uncertainty regarding its interpretation in this context.³⁶

1.1 RESEARCH QUESTION AND METHODOLOGY:

Against this background, this thesis aims to connect the referential use defence under Articles 14(1)(c) EUTMR and TMD and trademark rights with fashion upcycling, demonstrating that these concepts can coexist. This thesis, therefore, addresses the following question: *How can the referential use defence in the EU be interpreted and applied to strike a fair balance between trademark protection and sustainability in the context of fashion upcycling?* To address the research question, this dissertation adopts the following sub-questions and an empirical-normative methodology with three components.³⁷

Firstly, a doctrinal analysis will examine the referential use defence under EU trademark law, particularly Articles 14(1)(c) EUTMR and TMD, together with relevant legal doctrines, case law, and secondary legislation, to assess how these frameworks apply to alleged instances of trademark infringement in the context of fashion upcycling.

Secondly, to identify best practices and potential improvements to the EU framework, this thesis will conduct a comparative analysis between the referential

³² *ibid.*

³³ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1 (EUTMR).

³⁴ Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks [2015] OJ L336/1 (TMD).

³⁵ Krystyna Szczepanowska-Kozłowska, ‘Referential Use – A Limitation or Expansion of the Right to a Trademark’ (2025) 56 IIC 771, p 771.

³⁶ For an explanation of honest use proviso see Annette Kur and Martin Senftleben, ‘Limitations, Defences, and Genuine Use’ *European Trade Mark Law* (Oxford University Press 2017), pp. 431-433.

³⁷ Jan Smits, *The Mind and Method of the Legal Academic* (Edward Elgar Publishing 2012), pp. 74-99.

use defence in the EU and the nominative fair use defence in the US. The analysis will, then, evaluate their respective similarities and differences in the context of fashion upcycling.

The reason for choosing the US as an example jurisdiction is due to the rise in upcycling-related trademark litigation and its distinctive doctrines on *referential use*.³⁸ This analysis focuses on nominative fair use as the most pertinent doctrine, as upcyclers must reference the original trademark to accurately describe the branded materials they transform.³⁹ Unlike parody or other fair use categories, which hold little relevance in this setting, nominative fair use safeguards the truthful and necessary identification of the original trademark, provided that such reference does not imply endorsement or affiliation.⁴⁰ Accordingly, the conceptual overlap between referential use and nominative fair use further justifies the comparison. These methods thereby aim to answer sub-questions:

- (i) *To what extent do the current scope and interpretation of the referential use defence in the EU and the nominative fair use defence in the US protect upcyclers in the fashion industry from trademark infringement claims, respectively?*
- (ii) *What are the key interests of trademark proprietors in the context of fashion upcycling?*

Lastly, drawing on findings from doctrinal and comparative analyses, this thesis proposes recommendations and improvements to the application of the EU referential use defence in the context of fashion upcycling, with particular attention to balancing trademark proprietors' exclusive rights and broader sustainability objectives. Thereby aiming to answer the sub-question:

- (iii) *What adjustments can be made to the referential use defence to ensure that the EU's commitment to a circular economy in the context of upcycling is balanced with trademark owners' rights?*

³⁸ See for example *Hamilton Int'l Ltd v Vortic LLC*, 13 F.4th 264 (2d Cir 2021); *Chanel, Inc v Shiver and Duke, LLC*, No 1:21-cv-01277-MKV (SDNY November 29, 2022); *Louis Vuitton Malletier SAS v Sandra Ling Designs, Inc* No 4:21-CV-00352 (SD Tex December 1, 2022). For a discussion of these cases see Calboli and Tanner (n 25), pp. 59-70.

³⁹ Daniel R Cahoy, 'Trademark's Grip over Sustainability' (2023) 94 U Colo L Rev, pp. 1078-1079; Calboli and Tanner (n 25), p. 58.

⁴⁰ *ibid.*

1.2 RESEARCH STRUCTURE AND OUTLINE:

Following this introduction, this thesis is divided into three main chapters. Chapter 2 outlines the referential use defence under Articles 14(1)(c) EUTMR and TMD, focusing on its key features and relevance to fashion upcycling, and assessing the protection it affords to upcyclers. This is followed by Chapter 3, which examines the US nominative fair use doctrine and its application to fashion upcycling, mirroring the analytical framework used in Chapter 2. Building on these foundations, Chapter 4 compares the two frameworks, identifies best practices, and offers recommendations for improving the EU approach based on insights from US law, followed by a conclusion.

1.3 RESEARCH LIMITATIONS

A primary limitation of this research is the lack of specific case law concerning upcycled fashion. Consequently, the analysis relies on analogies and extrapolation from related areas of IP case law. While these frameworks provide essential guidance, they may not perfectly align with upcycling as a distinct practice. Recognising these constraints is vital, as they highlight the need for further empirical and doctrinal research once more targeted jurisprudence on upcycling emerges.

2. THE REFERENTIAL USE DEFENCE IN THE EU

While fashion upcycling may give rise to trademark infringement, it can be potentially justified under the referential use defence. This chapter aims to assess the scope and application of the referential use defence under Article 14(1)(c) EUTMR,⁴¹ with particular attention to the honest practices proviso in Article 14(2)⁴² and the relevant case law. While doing this, the analysis also considers the implications of this approach in the context of fashion upcycling.

2.1 THE NATURE OF REFERENTIAL USE UNDER ARTICLE 14(1)(C) EUTMR:

Article 14(1)(c) of the EUTMR defines referential use as follows:

⁴¹ EUTMR, art. 14(1)(c); TMD, art. 14(1)(c).

⁴² *ibid*, art. 14(2); TMD, art. 14(2).

“[T]he EU trade mark for the purpose of identifying or referring to goods or services as those of the proprietor of that trade mark, in particular, where the use of that trade mark is necessary to indicate the intended purpose of a product or service, in particular as accessories or spare parts”.⁴³

Referential use covers situations in which a third party uses a registered trademark solely to identify or refer to the trademark proprietor’s goods or services, rather than to indicate the commercial origin of its own products. Based on this definition, it is not clear whether such use constitutes ‘use of the trademark’ as interpreted by the CJEU jurisprudence or whether referential use is encompassed by the exclusivity granted by registration.⁴⁴ Depending on whether the ‘referential use’ is the use of someone else’s trademark within the meaning of Article 9(2) EUTMR,⁴⁵ the outcome of trademark infringement cases, including who bears the burden of proof, may vary significantly.⁴⁶ The bottom line is that if referential use falls within the scope of the trademark owner’s exclusive rights, its permissibility must be assessed under this provision. Conversely, if it lies entirely outside those exclusive rights, it will not constitute trademark infringement.⁴⁷

One important component of trademark use is ‘use in relation to goods or services’, as embedded in Article 9 of the EUTMR.⁴⁸ The CJEU jurisprudence indicates a broad application of this criterion.⁴⁹ The Court consistently opted for interpreting references to the goods or services of the trademark proprietor as trademark use, rather than necessitating the use of another’s mark as an identifier of the user’s own commercial source.⁵⁰ In *BMW v. Deenik*, the Court decided that without the proprietor’s authorisation, using a trademark to inform the public about repair and maintenance services offered outside the proprietor’s official dealer network constitutes trademark use.⁵¹ In *Gillette*, regarding the indication of

⁴³ *ibid*, art. 14(1)(c).

⁴⁴ Szczepanowska-Kozłowska (n 35), p. 771.

⁴⁵ EUTMR, art. 9(2); TMD, art. 10(2).

⁴⁶ Szczepanowska-Kozłowska (n 35), p. 778.

⁴⁷ *ibid* p. 777.

⁴⁸ EUTMR, art. 9(2); TMD, art. 10(2).

⁴⁹ Annette Kur and Martin Senftleben, ‘Rights Conferred’ *European Trade Mark Law* (Oxford University Press 2017), pp. 287-91.

⁵⁰ Izyumenko (n 31), p. 869.

⁵¹ Case C-63/97 *Bayerische Motorenwerke AG (BMW) and BMW Nederland BV v Ronald Karel Deenik* [1999] ECLI:EU:C:1999:82 ECR I-00905, para. 42.

compatibility, defendant LA-Laboratories sold their blades under the mark Parason Flexor, and their packaging has affixed to it a sticker with the words ‘All Parason Flexor and Gillette Sensor handles are compatible with this blade’.⁵² The Court brought that use into the scope of Gillette’s exclusive rights.⁵³ The *Adam Opel* case involved defendant Autec marketing reduced-scale toy cars that closely replicated original Opel cars, including Opel’s well-known lightning logo on the grille.⁵⁴ The Court found that the use at issue is made ‘in relation to goods’ and constitutes use as a trademark.⁵⁵

The current status quo is in favour of treating referential use as a ‘trademark use’ and, hence, the third-party trademarked brand insignia displayed on the upcycled fashion items are likely to qualify as prima facie trademark infringement from the outset.⁵⁶ This application is attracting criticism from scholars, including Professor Martin Senftleben, Director of the Institute for Information Law at the University of Amsterdam and a leading IP scholar on trademark limitations and sustainability.⁵⁷ According to Senftleben, the CJEU’s broad reading means the threshold requirement of ‘use as a trademark’ loses its gatekeeping function.⁵⁸ He proposes a new take on defining use as a trademark.⁵⁹ By utilising the requirement of ‘use in relation to goods or services’ in EU trademark law,⁶⁰ a narrow interpretation of trademark use, meaning using a sign specifically to indicate the commercial origin of one’s own goods or services, can be adopted.⁶¹ Consequently, if someone uses a trademark merely to refer to the trademark owner’s goods and not to identify their products, this would fall outside the concept of ‘use as a trademark’ and thus not constitute infringement.

⁵² Case C-228/03 *The Gillette Company and Gillette Group Finland Oy v LA-Laboratories Ltd Oy* [2005] ECLI:EU:C:2005:177 ECR I-02337, para. 14.

⁵³ *ibid* para. 28.

⁵⁴ Case C-48/05 *Adam Opel AG v Autec AG* [2007] ECLI:EU:C:2007:55 ECR I-01017, paras. 5-7.

⁵⁵ *ibid* para. 20.

⁵⁶ Izyumenko (n 31), p. 868.

⁵⁷ University of Amsterdam, ‘Prof dr MRF (Martin) Senftleben’ (*University of Amsterdam*) <<https://www.uva.nl/en/profile/s/e/m.r.f.senftleben/m.r.f.senftleben.html#Ancillary-activities>> accessed 10 December 2025; Senftleben, ‘Developing Defences’ (n 27), p. 101; Izyumenko (n 31), pp. 868-869.

⁵⁸ Senftleben, ‘Developing Defences’ (n 27), p. 101.

⁵⁹ Martin Senftleben, ‘Robustness Check: Evaluating and Strengthening Artistic Use Defences in EU Trademark Law’ (2022) 53 IIC, p. 573.

⁶⁰ EUTMR, art. 9; TMD, art. 10.

⁶¹ Senftleben, ‘Robustness Check’ (n 59), p. 573.

Altering is inherent to upcycling, and due to this, the issue becomes even more intricate. There is a dichotomy among scholars on whether upcycled products fall within the scope of referential use. In other words, the debate concerns whether the trademark displayed on upcycled products serves as a reference to the trademark owner's original product or the upcycler's own product. Only the former constitutes permissible referential use. Although agreeing with Senftleben's proposal for a narrower interpretation of trademark use and recognising the need to place referential use outside the scope of trademark use,⁶² Krystyna Szczepanowska-Kozłowska, Head of IP and Commercial Litigation in Poland and a leading expert in trademark and patent disputes, holds the opposite view regarding upcycled products.⁶³ She believes that since upcycling alters goods, they no longer originate from the trademark proprietor; thus, using the original mark can no longer be seen as referential use since it fails to guarantee origin and quality.⁶⁴ Then, alteration also gives rise to the application of Article 15(2) EUTMR⁶⁵ and is acknowledged as a 'legitimate reason' for the trademark owner to oppose the circulation of goods.⁶⁶ Hence, a systemic interpretation prevents the legitimisation of the continued marketing of altered upcycled clothes when the principle of exhaustion is excluded. She argues for legislative change or a nuanced reading of 'legitimate reasons' under Article 15(2)⁶⁷ to accommodate environmental needs, rather than stretching the concept of referential use.⁶⁸

2.2 NECESSITY REQUIREMENT AND ITS INTERPRETATION

The necessity requirement is built into the definition of referential use, making it important to examine when trademark use is deemed necessary by courts and how this interpretation affects upcyclers.⁶⁹

Based on the CJEU's *Gillette*, the meaning of necessity is understood as the only practical way to provide consumers with clear and complete information

⁶² Szczepanowska-Kozłowska (n 35), pp. 775-76, 787, 790.

⁶³ A&O Shearman, 'Krystyna Szczepanowska-Kozłowska' (*A&O Shearman*) <<https://www.aoshearman.com/en/people/krystyna-szczepanowska-kozłowska>> accessed 11 December 2025.

⁶⁴ Szczepanowska-Kozłowska (n 35), pp. 775-776.

⁶⁵ EUTMR, art. 15(2); TMD, art. 15(2).

⁶⁶ Szczepanowska-Kozłowska (n 35), p. 775.

⁶⁷ EUTMR, art. 15(2); TMD, art. 15(2).

⁶⁸ Szczepanowska-Kozłowska (n 35), pp. 775-776.

⁶⁹ EUTMR, art. 14(1)(c); TMD, art. 14(1)(c).

about the ‘intended purpose’ of the goods or services.⁷⁰ Accordingly, the use of trademark elements is *unnecessary* where the public can be adequately informed without them, reflecting a notably narrow interpretation of necessity.⁷¹ In practice, this means that while word marks may be used for descriptive purposes, the use of logos or pictorial elements is generally regarded as infringing, particularly where it suggests a commercial relationship with the trademark owner.⁷²

However, the 2015 trademark law reform significantly expanded the strict interpretation of necessity tied specifically to showing the ‘intended purpose’ of a product or service.⁷³ Currently, this interpretation does not extend to other kinds of referential use, such as informing consumers about the resale of genuine goods after the exhaustion of rights, parody and artistic expression.⁷⁴

Inditex clarifies the scope of the referential use defence and provides evidence that the scope of referential use defence is indeed broadened.⁷⁵ The CJEU confirmed that the broader language in Article 14(1)(c) TMD was a real expansion, not just a clarification.⁷⁶ This means in practice the 2015 Directive now allows wider referential use, such as using a brand to identify or refer to another’s product, even outside the ‘intended purpose’ context.⁷⁷ The old directive can be interpreted as covering only the ‘use of the trademark which is strictly necessary to indicate the purpose of a product’, and now the new 2015 Directive covers ‘any use of the trademark for the purpose of identifying goods or services of the trademark proprietor’.⁷⁸ The implications of this judgment are important for upcyclers. Necessity is no longer a strict gatekeeper criterion, and a business can use a trademark referentially even if there might be alternative ways to explain the product. What matters more is whether the use violates honest practices; that is,

⁷⁰ *Gillette* (n 52), paras. 35-36.

⁷¹ Kur and Senftleben, ‘Limitations, Defences, and Genuine Use’ (n 36), p. 419.

⁷² *ibid.*

⁷³ *ibid.* p. 420; Anna Tischner and Katarzyna Stasiuk, ‘Spare Parts, Repairs, Trade Marks and Consumer Understanding’ (2023) 54 IIC 26, p. 56.

⁷⁴ Kur and Senftleben, ‘Limitations, Defences, and Genuine Use’ (n 36), p. 421; Tischner and Stasiuk (n 73), p. 56.

⁷⁵ Case C-361/22 *Industria de Diseño Textil SA (Inditex) v Buongiorno Myalert SA* [2024] ECLI:EU:C:2024:17, para. 52.

⁷⁶ *ibid.* para. 54.

⁷⁷ *ibid.* para. 55.

⁷⁸ European Innovation Council and SMEs Executive Agency, ‘CJEU rules on Trade Mark Referential Use Exception in ZARA and AUDI cases’ (*European Commission*, 9 February 2024) <https://intellectual-property-helpdesk.ec.europa.eu/news-events/news/cjeu-rules-trade-mark-referential-use-exception-zara-and-audi-cases-2024-02-09_en> accessed 15 July 2025.

whether it deceives or takes unfair advantage. Additionally, the necessity does not influence the interpretation of ‘honest practices’.⁷⁹

Following *Inditex*, however, the CJEU takes a stricter view again in *Audi*.⁸⁰ This case was about whether a non-original radiator grille designed with a fitting for the Audi logo that was virtually identical to the original could legally be marketed.⁸¹ By referring to its recent *Inditex* judgment, the Court held that, although the wording of Article 14(1)(c) TMD has been broadened by the EU trademark reform, the former narrower wording was retained as an example in the provision, and it covers situations where the use of the trademark is necessary to indicate the ‘intended purpose’ of a product or service, in particular as an accessory or spare part.⁸² On the one hand, merely using the trademark to indicate the spare part’s compatibility with the goods of the trademark owner, for instance, referencing a car brand descriptively, may be permitted to specify compatibility if no alternative exists.⁸³ On the other hand, affixing the logo to the spare part does not fall within any of the situations covered by referential use.⁸⁴ The Court also found that it is irrelevant whether the logo-shaped mounting element is technically required; the use is not necessary in the legal sense.⁸⁵ The shape creates a material link between the product and the trademark owner and can mislead consumers into believing the product is approved or endorsed by Audi.⁸⁶

Many upcycling businesses repurpose or alter branded items, and the trademark often remains visible on the final product. Under the *Audi* reasoning, if the upcycled product retains or reuses the original logo, it could be seen as trademark use beyond necessity. Thus, it creates a notable obstacle for upcyclers seeking to rely on the referential use defence.⁸⁷

⁷⁹ Lotte Anemaet, ‘Which Honesty Test for Trademark Law? Why Traders’ Efforts to Avoid Trademark Harm Should Matter When Assessing Honest Business Practices’ (2021) 70 GRUR International, p. 1036.

⁸⁰ Case C-334/22 *Audi AG v GQ* [2024] ECLI:EU:C:2024:76.

⁸¹ *ibid* paras. 7-11.

⁸² *ibid* paras. 53-54.

⁸³ *ibid* para. 57.

⁸⁴ *ibid*.

⁸⁵ *ibid* para. 60.

⁸⁶ *ibid* para. 40.

⁸⁷ Izyumenko (n 31), pp. 873-74.

2.3 HONEST *PRACTICES PROVISIO*

The applicability of the referential use defence under Article 14(1)(c) EUTMR⁸⁸ depends on an ‘honest practices’ proviso under Article 14(2) EUTMR⁸⁹. After establishing that referential use is generally considered ‘trademark use’, it becomes essential, under this proviso, to balance the trademark owner’s rights with sustainable practices. The alleged infringers should be able to defend themselves and have a chance to escape from liability by demonstrating that their action remains in accordance with honest practices in industry and commerce.⁹⁰

Admittedly, defining honest practices is not a straightforward matter. Firstly, Recital 21 of the EUTMR ties honest practices to fairness.⁹¹ EU trademark law borrowed this concept from Article 10*bis* of the Paris Convention⁹² regarding unfair competition.⁹³ Nevertheless, since there is not yet a universally accepted, cross-border standard for it, it is a normative requirement influenced by the norms of the protecting country in question.⁹⁴ Secondly, the CJEU has developed its independent interpretation of honest practices in industrial or commercial matters, which has drawn criticism from scholars concerning the parallel application of trademark infringement criteria.⁹⁵

BMW v. Deenik was the first case in which the ECJ interpreted the meaning of honest practices,⁹⁶ defining it as ‘the expression of a duty to act fairly in relation to the legitimate interests of the trademark owner’.⁹⁷ This definition evokes the exhaustion doctrine.⁹⁸ In this case, Mr. Deenik was unable to invoke the exhaustion of rights defence for his BMW repair services, since this defence applies solely when the trademark has been used on goods, not when it is used in

⁸⁸ EUTMR, art. 14(1)(c); TMD, art. 14(1)(c).

⁸⁹ EUTMR, art. 14(2); TMD, art. 14(2).

⁹⁰ Łukasz Żelechowski, ‘Trade Mark Limitations and the ‘Honest Practices’ Proviso: Mapping the Road Towards a Flexible Approach’ in Ilanah Fhima and Anke Moerland (eds), *Research Agendas in Trade Mark Law* (Edward Elgar Publishing, forthcoming), author’s original manuscript available at SSRN, pp. 17-18 <<http://dx.doi.org/10.2139/ssrn.5153033>> accessed 7 July 2025.

⁹¹ EUTMR, Recital 21; TMD, Recital 27.

⁹² Paris Convention for the Protection of Industrial Property (adopted 20 March 1883, amended on 28 September 1979) 828 UNTS 305 (Paris Convention).

⁹³ Anemaet (n 79), p. 1027; Żelechowski (n 90), p. 4.

⁹⁴ Anemaet (n 79), p. 1028.

⁹⁵ *ibid* p. 1027; Senfleben, ‘Developing Defences’ (n 27), p. 100; Izyumenko (n 31), p. 874; Szczepanowska-Kozłowska (n 36), p. 788; Żelechowski (n 90), pp. 4, 11.

⁹⁶ Ilanah Simon, ‘Nominative Use and Honest Practices in Industrial and Commercial Matters: A Very European History’ (2007) *Intellectual Property Quarterly*, p. 16.

⁹⁷ *BMW v Deenik* (n 51), para. 61.

⁹⁸ Simon (n 96), pp. 17-18; Żelechowski (n 90), p. 10.

connection with services.⁹⁹ Therefore, a defence under Article 6¹⁰⁰ was considered, which brought the honest practices proviso into play.¹⁰¹ Then, the Court lifted the definition of the legitimate interests of a trademark owner from the exhaustion defence.¹⁰²

In *Gillette*, the CJEU found that use would fail to comply with honest practices in industrial and commercial matters:

- if it is done in such a manner as to give the impression that there is a commercial connection between the third party and the trademark owner;
- it affects the value of the trademark by taking unfair advantage of its distinctive character or repute;
- it entails the discrediting or denigration of that mark;
- or where the third party presents its product as an imitation or replica of the product bearing the trademark of which it is not the owner.¹⁰³

Some of these criteria directly correspond with trademark infringement analyses under confusion and dilution.¹⁰⁴ According to Senftleben, by replicating the very standards used to establish infringement, the CJEU effectively subjects defences to the same criteria that justified the trademark owner's claim in the first place.¹⁰⁵

In the upcycling context, this interpretation poses significant hurdles. Defining the honest practices proviso by reference to exhaustion and infringement criteria makes the referential use defence futile for upcyclers to rely on. Given that the current IP framework primarily depends on exceptions and limitations to balance protection with societal interests,¹⁰⁶ the honest practices proviso should be interpreted more independently, rather than simply mirroring the infringement analysis.¹⁰⁷

⁹⁹ *BMW v Deenik* (n 51), para. 57.

¹⁰⁰ Previously applicable Directive, Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks [1989] OJ L40.

¹⁰¹ *BMW v Deenik* (n 51), para. 58.

¹⁰² *ibid* paras. 62-63.

¹⁰³ *Gillette* (n 52), para. 49.

¹⁰⁴ EUTMR, art. 9(2)(b) and (c); TMD, art. 10(2)(b) and (c).

¹⁰⁵ Senftleben, 'Developing Defences' (n 27), p. 104.

¹⁰⁶ Taina Pihlajarinne and Rosa Maria Ballardini, 'Paving the way for the Environment: Channelling 'Strong' Sustainability into the European IP System' (2020) 42 European Intellectual Property Review, p. 239.

¹⁰⁷ *Anemaet* (n 79), p. 1027.

If honesty is defined through the trademark system lens, it would be more appropriate to align it with the ‘essential function’ of a trademark rather than ‘specific subject matter’.¹⁰⁸ While the former takes a broader perspective, considering the trademark’s role in the market, the latter concentrates on the trademark owner’s relationship with their mark and outlines the core rights they require.¹⁰⁹ Accordingly, this broader approach offers a more suitable framework for balancing the interests of trademark holders with those of the public. However, an important caveat should be noted: although the CJEU frequently emphasises the origin function as the core purpose of a trademark, in practice, the advertising and goodwill functions often hold greater economic significance.¹¹⁰ This enables trademark owners to invoke consumer protection linked to the origin function as a facade, while their actual aim is to protect their marketing investments. Broadening the interpretation of the honest practices proviso to encompass functions beyond origin would only serve to strengthen this tendency.¹¹¹ This dynamic is especially detrimental in the context of upcycling, where upcyclers may be penalised for referencing trademarks to accurately describe their products, even when there is no risk of consumer confusion.

Audi is a useful example in this respect. The CJEU stated that all the relevant factors should be taken into account when assessing a likelihood of confusion, which includes ‘the conditions under which the goods are marketed’ and ‘the perception of the average consumer of the relevant public’.¹¹² However, the Court further pointed out that consumer perception is not a deciding factor and is irrelevant in the context of dilution.¹¹³ A more appropriate approach would involve adopting an empirical perspective, which focuses on the steps competitors take to minimise harm to trademarks and how consumers interpret or respond to those efforts.¹¹⁴

In upcycling, the original mark still identifies the source of the original item, for instance, a Chanel bag or Nike shoes, even if the item has been

¹⁰⁸ Simon (n 96), p. 24.

¹⁰⁹ *ibid.*

¹¹⁰ Anemaet (n 79), p. 1034.

¹¹¹ *ibid.*

¹¹² *Audi* (n 80), para. 47.

¹¹³ *ibid.* para. 48.

¹¹⁴ Anemaet (n 79), pp. 1031-32. See also *Gillette* (n 52), para. 46; *Żelechowski* (n 90), pp. 12-13.

repurposed.¹¹⁵ Consumers generally understand that these items have been creatively reworked by third parties.¹¹⁶ Therefore, as long as the trademark is used only to indicate origin, there is no suggestion of sponsorship or endorsement, and the upcycler acts in good faith, then the use aligns with the essential function of the trademark system.¹¹⁷

If this approach is adopted, the legitimate interests of trademark owners must still be safeguarded against bad-faith practices, including counterfeiting and trademark misappropriation. From their perspective, counterfeiting is already a significant problem due to the exploitation of ubiquitous e-commerce channels.¹¹⁸ As fashion companies shift toward more sustainable retail models, safeguarding IPRs is essential, and upcycled products must not serve as a loophole for counterfeiters to exploit the creative efforts and investments of fashion brands.¹¹⁹ French luxury powerhouse Chanel acknowledged upcycling as a positive trend worth exploring; nevertheless, it warned that the unauthorised use of its logo can amount to trademark misappropriation, prompting the brand to take necessary action to defend its rights.¹²⁰

Furthermore, we must acknowledge that not all upcyclers engage in this practice for genuine environmental reasons; some pose ‘greenwashing’ risks, which has become a significant concern in the fashion industry.¹²¹ Greenwashing occurs when companies present their products as green, eco-friendly, or sustainable, even though these claims are unsubstantiated, exaggerated, or misleading.¹²² Although there is no case law yet on whether upcycling-related messages qualify as environmental claims, it cannot be ruled out that such messages will be perceived as indirectly communicating sustainability.¹²³

¹¹⁵ Taina Pihljarinne, ‘Repairing and re-using from an exclusive rights perspective: towards sustainable lifespan as part of a new normal?’ in Ole-Andreas Rognstad and Inger B Ørstavik (eds), *Intellectual Property and Sustainable Markets* (Edward Elgar Publishing 2021) pp. 92-93.

¹¹⁶ *ibid*; Tischner and Stasiuk (n 73), p. 35.

¹¹⁷ Pihljarinne (n 115), pp. 94-96.

¹¹⁸ Aldescu and Passoni (n 23), pp. 10-11.

¹¹⁹ *ibid*.

¹²⁰ Kent (n 25).

¹²¹ Meghann Principe, ‘Dressed to Kill: How the Lack of Environmental Regulations Tailored to the Fashion Industry is Destroying Our Planet’ (2022) 10 *Joule: Duq Energy & Env’t LJ* 79, pp. 98-99; Kolja Staunstrup, ‘Upcycling from a trademark and marketing law perspective’ (*Kromann Reumert*, 14 December 2023) <<https://kromannreumert.com/en/knowledge/articles/upcycling-from-a-trademark-and-marketing-law-perspective>> accessed 22 June 2025.

¹²² *ibid*.

¹²³ Staunstrup (n 121).

2.4 THE ROLE OF LABELLING AND DISCLOSURE

Balancing the trademark owners, consumers, and societal interests (like sustainability) requires a context-sensitive evaluation of infringement, exhaustion and limitations.¹²⁴ This involves taking into account the accompanying information given by upcyclers, along with broader factors like the societal objective of conserving resources.¹²⁵

A middle-ground solution entails that if additional labelling or product information clearly indicates how and by whom the original product was altered, the use of the original trademark may not constitute infringement.¹²⁶ This is either because the mark's functions remain unaffected under a contextual analysis or because the use falls under Article 9(2) EUTMR¹²⁷ and is permitted by exceptions such as referential use.¹²⁸

For developing appropriate labelling guidelines, the *Viking Gas*¹²⁹ and *Soda-Club*¹³⁰ cases can be put to good use.¹³¹ In *Viking Gas*, Kosan Gas held an exclusive licence over the composite gas bottle shape and trademarks. Viking Gas refilled these bottles without removing Kosan's branding, adding its own labels while leaving the original marks visible.¹³² The CJEU evaluated whether such activity is trademark infringement and whether factors like labelling, consumer perception, and direct consumer interaction affect the analysis.¹³³ The Court found that the bottles have an independent economic value since they are intended for reuse, and further emphasised a need to balance Kosan's interest in profiting from its trademark rights with consumers' property rights and the broader interest in maintaining healthy competition.¹³⁴

¹²⁴ Annette Kur, 'As Good as New' – Sale of Repaired or Refurbished Goods: Commendable Practice or Trade Mark Infringement?' (2021) 70 GRUR International, pp. 235-236.

¹²⁵ *ibid* p. 236; Żelechowski (n 90), p. 6.

¹²⁶ Kur (n 124), pp. 234-35. See also Senftleben, 'Developing Defences' (n 27), p. 108.

¹²⁷ EUTMR, art. 9(2); TMD, art. 10(2).

¹²⁸ Kur (n 124), pp. 234-235.

¹²⁹ Case C-46/10 *Viking Gas A/S v Kosan Gas A/S, previously BP Gas A/S* [2011] ECLI:EU:C:2011:485 ECR I-06161.

¹³⁰ Case C-197/21 *Soda-Club (CO2) SA and SodaStream International BV v MySoda Oy* [2022] ECLI:EU:C:2022:834.

¹³¹ Martin Senftleben, 'Fashion Upcycling and Trademark Infringement – A Circular Economy/Freedom of the Arts Approach' (2023) SSRN, p. 17 <<https://dx.doi.org/10.2139/ssrn.4470873>> accessed 23 April 2025.

¹³² *Viking Gas* (n 129), paras. 8-13.

¹³³ *ibid* para. 14.

¹³⁴ *ibid* paras. 30-34.

The CJEU held that trademark rights are exhausted upon the sale of the bottles.¹³⁵ However, the trademark owner can still object if the condition of the goods is impaired, the reputation of the trademark is harmed, or it misleads consumers into thinking a commercial link exists between the trademark owner and the third-party using the mark.¹³⁶ Since the Court refers broadly to ‘a third party’ engaging in further commercialisation, this naturally includes resellers and upcyclers, depending on the factual context. To assess whether a false link is implied, the CJEU emphasised that labelling practices, sector norms, circumstances of exchange, and whether consumers are accustomed to third-party refills need to be considered.¹³⁷ Lastly, Viking Gas left Kosan Gas’s marks visible, which, according to the Court, visible original branding and clear refill labels reduced the risk of confusion.¹³⁸

These guidelines were followed by the CJEU in the *Soda-Club*.¹³⁹ The Court confirmed that key criteria to assess whether misleading economic links are implied by the defendant, MySoda, include considering the clarity of labelling, industry practices, and the average consumer’s understanding.¹⁴⁰ Further, the Court emphasised that labels clearly show both the reseller’s and the original trademark owner’s identities so that a reasonably informed consumer will not be misled.¹⁴¹

In the upcycling context, these principles can be applied to assess whether an upcycler has taken sufficient steps, such as labelling and disclosure, to avoid suggesting a commercial connection with the original trademark holder. The behaviour of the upcycler, particularly their effort to avoid consumer confusion and to indicate the true commercial origin of the upcycled product, is central to assessing compliance with honest practices under Article 14(2) EUTMR.¹⁴² On the one hand, affixing the upcycler’s logo and offering product information can be considered proper labelling and potentially prevent confusion, dispel claims of blurring or free-riding, and ensure that visible third-party marks are perceived

¹³⁵ *ibid* para. 35.

¹³⁶ *ibid* paras. 36-37.

¹³⁷ *ibid* paras. 39-40.

¹³⁸ *ibid* para. 41.

¹³⁹ *Soda-Club* (n 130), para. 54. See also Aldescu and Passoni (n 23), p. 24; Senftleben, ‘Fashion Upcycling and Trademark Infringement’ (n 131), p. 18.

¹⁴⁰ *Soda-Club* (n 130), paras. 45-48.

¹⁴¹ *ibid* para. 53.

¹⁴² Senftleben, ‘Fashion Upcycling and Trademark Infringement’ (n 131), p. 18; Staunstrup (n 121).

merely as references to the original goods.¹⁴³ On the other hand, industry practices are dynamic and evolving. As sustainability becomes a key competitive factor, upcycling practices, even though potentially confusing to consumers and affecting brand image, may gain wider recognition and become industry norms, including the use of clear disclaimers of affiliation. Consequently, luxury brands will not risk having their reputations tarnished.¹⁴⁴

Consumer awareness thus becomes the decisive point in the analysis. The CJEU recognised in *Portakabin* that today's consumers understand that a trademark affixed to the product guarantees that the product originated from the trademark holder; nevertheless, it does not guarantee its current condition in second-hand markets.¹⁴⁵ However, in the upcycled goods market, making similar assumptions is not that straightforward, because depending on how much the product has been changed, consumer perceptions may vary.¹⁴⁶ Therefore, using aspects like disclosure or labelling as proof that the use complies with the 'honest practices' standard may not always be reliable.¹⁴⁷ Thus, given the potential uncertainty surrounding empirical evidence, a more effective approach is to balance this with more normative frameworks connected to circular economy goals, which could help achieve a fair balance with traditional trademark protection.¹⁴⁸

3. NOMINATIVE FAIR USE DOCTRINE IN THE US

In general, fair use is a legal doctrine that permits the limited use of a trademark owner's mark without prior authorisation under certain criteria. The purpose is to strike a balance between protecting the rights of trademark owners and preserving the ability of third parties to use marks for legitimate communicative purposes.¹⁴⁹ This chapter discusses the nominative fair use doctrine in US trademark law. It

¹⁴³ Anemaet (n 79), p. 1037; Tischner and Stasiuk (n 72), p. 36; Senftleben, 'Fashion Upcycling and Trademark Infringement' (n 131), pp. 18-19.

¹⁴⁴ Aldescu and Passoni (n 23), pp. 25-26.

¹⁴⁵ Case C-558/08 *Portakabin Ltd and Portakabin BV v Primakabin BV* [2010] ECLI:EU:C:2010:416 ECR I-06963, para. 84.

¹⁴⁶ Kur (n 124), p. 230; Nina Dorenbosch, 'Upcycling: the interface between sustainability and IP' (*Bird & Bird*, 22 November 2022) <<https://brandwrites.twobirds.com/post/102itsj/upcycling-the-interface-between-sustainability-and-ip>> accessed 20 June 2025.

¹⁴⁷ Żelechowski (n 90), p. 15.

¹⁴⁸ *ibid* pp. 15-16.

¹⁴⁹ Calboli and Tanner (n 25), p. 58.

outlines the doctrine's origins and purpose, its relationship with the likelihood of confusion analysis, the three-part test developed by the Ninth Circuit (one of the thirteen US federal Courts of Appeals) and the role of labelling and disclosure in avoiding consumer deception. Accordingly, it provides a framework for understanding the doctrine's development and its relevance to upcycled fashion cases.

3.1 THE ORIGINS AND PURPOSE OF NOMINATIVE FAIR USE:

Nominative fair use is a judicially developed doctrine, which was created in a 1992 case, *New Kids on the Block v. News America Publishing, Inc.*, decided by the US Court of Appeals for the Ninth Circuit.¹⁵⁰ It occurs when the alleged infringer uses the trademark holder's mark to describe the trademark holder's product. In other words, it permits the use of another's mark solely for the purpose of identifying that party's products or services.¹⁵¹

The case was between a famous boy band in the early 1990s, New Kids on the Block, and two newspapers, USA Today and The Star. The newspapers ran polls asking readers which member of the New Kids was most popular. In turn, readers could vote by calling a 900 number, which is a paid phone line, generating revenue. To describe the polls, the newspapers used the band's trademarked name. Thereafter, the New Kids sued, claiming trademark infringement.¹⁵²

Firstly, the district court found that a mere suggestion of endorsement was not enough to establish trademark infringement, and the newspapers' First Amendment rights outweighed any potential harm caused by an implied association.¹⁵³ On appeal, the Ninth Circuit affirmed the outcome but used different legal reasoning. The Court created the nominative fair use doctrine instead of relying directly on the First Amendment.¹⁵⁴ Ergo, there is a strong connection between nominative fair use and the First Amendment, and the use of the trademark in this case is considered classic protected speech.¹⁵⁵

¹⁵⁰ *New Kids on the Block v New Am Publ'g, Inc.*, 971 F.2d 302 (9th Cir 1992).

¹⁵¹ Matthew D Bunker, 'Mired in Confusion: Nominative Fair Use in Trademark Law and Freedom of Expression' (2015) 20 *Communication Law and Policy*, p. 195.

¹⁵² *ibid*; Graeme W Austin, 'Tolerating confusion about confusion: trademark policies and fair use' in Graeme B Dinwoodie and Mark D Janis (eds), *Trademark Law and Theory* (Edward Elgar Publishing 2008), p. 392.

¹⁵³ Austin (n 152), p. 392.

¹⁵⁴ *ibid*.

¹⁵⁵ Bunker (n 151), p. 195. Similar arguments made by Austin (n 152), p. 394.

Concerning dilution, nominative fair use has been given statutory recognition through the Trademark Dilution Revision Act of 2006, which amended the ‘Lanham Act’ to include an explicit exclusion for ‘any fair use, including a nominative or descriptive fair use’.¹⁵⁶

From one perspective, US courts could consider trademark fair use and the First Amendment to justify the unauthorised upcycling of branded products.¹⁵⁷ Upcycling may be regarded as a form of protected expression, as it transforms old goods into new products that promote circularity and sustainability.¹⁵⁸ Through nominative fair use, the mark merely identifies the original product without implying endorsement, aligning the practice with broader environmental goals. However, upcycling branded items without the consent of trademark holders remains legally risky.¹⁵⁹ Even when framed as unique artistic works, such practices are seen as potentially infringing because the original brand owners have not authorised their products to be altered or repurposed. From this perspective, upcyclers are exposed to liability for what could be viewed as commercial free-riding rather than protected speech.

Furthermore, the fair use doctrine is based on a three-step test developed by the Ninth Circuit in *New Kids*, which requires the defendant to demonstrate that first, the product or service in question is not readily identifiable without using the trademark; second, only so much of the mark as is reasonably necessary to identify the product or service is used; and third, the user has done nothing, in connection with the mark, to suggest sponsorship or endorsement by the trademark holder.¹⁶⁰ This test then replaces the likelihood of confusion analysis in the Ninth Circuit cases, where found applicable.¹⁶¹

Although often described as a defence, the nominative fair use doctrine functions primarily to prevent a finding of infringement when a mark is used solely

¹⁵⁶ Trademark Act of 1946 (Lanham Act), 15 USC § 1125(c)(3)(A).

¹⁵⁷ Irene Calboli, ‘Upcycling, the Ongoing Battle: A (Hopeful) United States Perspective’ (*VerfBlog*, 17 April 2025) <<https://verfassungsblog.de/upcycling-the-ongoing-battle/>> accessed 19 May 2025. See also Austin (n 152), p. 390.

¹⁵⁸ Calboli, ‘Upcycling, the Ongoing Battle’ (n 157).

¹⁵⁹ Anthony M Keats, ‘Trendy Product Upcycling: Permissible Recycling or Impermissible Commercial Hitchhiking?’ (2020) 110 *The Trademark Reporter*, pp. 712-713.

¹⁶⁰ *New Kids* (n 150), p. 308.

¹⁶¹ *ibid.* See also Austin (n 152), p. 392; Samuel M Duncan, ‘Protecting Nominative Fair Use, Parody, and Other Speech-Interests by Reforming the Inconsistent Exemptions from Trademark Liability’ (2010) 44 *U Mich JL Reform*, p. 231.

to refer to the rights holder's goods or services.¹⁶² Furthermore, due to the referencing of 'a non-trademark use of a mark' in the *New Kids* judgment,¹⁶³ some scholars reasonably interpret this as a version of the trademark use theory, to which infringement laws do not apply.¹⁶⁴ The implication of this for upcyclers is that this could serve as a gatekeeper, preventing infringement from being found in the first place.

An important caveat regarding the nominative fair use doctrine is that there is a divergence among Circuit Courts. Hence, some apply the doctrine differently, while others have rejected it altogether.¹⁶⁵ This thesis focuses on the doctrine developed by the Ninth Circuit.

3.2 LIKELIHOOD OF CONFUSION AND FAIR USE:

It is not clear whether the nominative fair use defence can function in the presence of a likelihood of confusion, namely, where consumers are likely to believe that the goods or services originate from, or are associated with, another undertaking.¹⁶⁶ From a certain viewpoint, nominative fair use is not a true affirmative defence, which would allow a defendant to escape liability even if there is some likelihood of confusion.¹⁶⁷ This view arises from the fact that the *New Kids* test is simply a way of determining trademark infringement by assessing whether the defendant's use causes confusion and whether it infringes the trademark holder's rights.¹⁶⁸ The second and third parts of the test, which ask whether the defendant used more of the mark than necessary and whether the use suggested sponsorship or endorsement by the mark holder, implicitly reflect a likelihood of confusion analysis.¹⁶⁹

Furthermore, the test lost its practical value, turning into another detailed confusion analysis, instead of an early gatekeeping tool for dismissing fair uses.¹⁷⁰ Rather than balancing multiple factors, the *New Kids* test functions as a strict

¹⁶² Simon (n 96), pp. 3, 6.

¹⁶³ *New Kids* (n 150), p. 307.

¹⁶⁴ William McGeeveran, 'Rethinking Trademark Fair Use' (2008) 94 Iowa Law Review 49, p. 91.

¹⁶⁵ *ibid* p. 89; Duncan (n 161), pp. 231-36; Xiyin Tang, 'Against Fair Use: The Case for a Genericness Defense in Expressive Trademark Uses' (2016) 101 Iowa L Rev, p. 2035.

¹⁶⁶ Uche U Ewelukwa, 'Comparative Trademark Law: Fair Use Defense in the United States and Europe - The Changing Landscape of Trademark Law' (2006) 13 Widener L Rev, p. 107.

¹⁶⁷ Bunker (n 151), p. 199.

¹⁶⁸ *ibid*.

¹⁶⁹ *ibid*.

¹⁷⁰ McGeeveran (n 164), p. 91.

checklist, with each requirement needing to be met independently. This checklist creates an unfair shift in the burden of proof, allowing a plaintiff in the Ninth Circuit to prevail without proving likelihood of confusion merely by demonstrating that the use was unnecessary, excessive, or implied.¹⁷¹

However, another perspective holds that the Ninth Circuit's nominative fair use test differs from the traditional likelihood of confusion analysis.¹⁷² Unlike the traditional likelihood of confusion test, the *New Kids* test places less emphasis on detailed consumer perception, making it simpler, less fact-intensive, and potentially more accurate in nominative fair use cases.¹⁷³ In addition, the test for confusion in the nominative use doctrine requires more active efforts to confuse than trademark law otherwise would.¹⁷⁴

From the upcycler's perspective, these differing interpretations of the nominative fair use doctrine illustrate the legal uncertainty upcyclers face when reusing trademarked elements in upcycled garments. On the one hand, nominative fair use offers little protection where there is any likelihood of consumer confusion.¹⁷⁵ This means that upcyclers who retain original branding on upcycled garments could still be liable if a court deems the branding use unnecessary, excessive, or suggestive of endorsement, regardless of any sustainability motives. On the other hand, a simpler, less fact-intensive approach that focuses on the practical necessity of using the mark, rather than deeply probing consumer perception, may better accommodate cases where the trademark is used purely to identify the source without implying affiliation, aligning with the environmental and creative aims of upcycling.¹⁷⁶

In the *New Kids*, the Court found that nominative use is not considered infringement because it does not implicate the origin function that is the purpose of the trademark.¹⁷⁷ Instead of focusing strictly on whether consumers might be

¹⁷¹ *ibid* pp. 91-92; Tang (n 165), p. 2036.

¹⁷² Duncan (n 161), pp. 232-33.

¹⁷³ *ibid* p. 233. For a discussion of the likelihood of confusion test see Ewelukwa (n 166), pp. 107-109; Bunker (n 151), pp. 193-194; Daryl Lim, 'Trademark Confusion Revealed: An Empirical Analysis' (2024) 114 Trademark Reporter, p. 799.

¹⁷⁴ Mark A Lemley and Sari Mazzurco, 'The Exclusive Right to Customize?' (2023) 103 BU L Rev, p. 449.

¹⁷⁵ McGeveran (n 164), pp. 91-92; Bunker (n 151), p. 199.

¹⁷⁶ Duncan (n 161), pp. 232-233; Lemley and Mazzurco (n 174), p. 449.

¹⁷⁷ *New Kids* (n 150), p. 308.

confused, the Court found that consumers were *not* confused.¹⁷⁸ By doing so, the Court could also align its ruling with other policy goals, such as safeguarding freedom of expression and First Amendment values. Thus, this decision is not purely about consumer confusion but is also about creating legal space to promote broader values and policy objectives beyond the immediate scope of trademark law.¹⁷⁹

Another important point is that understanding nominative fair use also requires mentioning ‘classic’ fair use, since the Ninth Circuit makes a distinction between them.¹⁸⁰ In *Cairns v. Franklin Mint*, the Ninth Circuit stressed the importance of distinguishing between nominative and classic fair use.¹⁸¹ The Court stated that the *New Kids’* nominative fair use analysis should be used in cases where the defendant has used the plaintiff’s mark to describe the plaintiff’s product. By contrast, the classic fair use analysis should be used in cases where the defendant has used the plaintiff’s mark only to describe his own product and not at all to describe the plaintiff’s product.¹⁸² For nominative fair use, the analysis replaces the likelihood of confusion test, whereas in classic fair use, likelihood of confusion must still be assessed because the defence only complements, rather than replaces, that analysis.¹⁸³

This distinction can be illustrated by contrasting two upcycling scenarios. In the first, an upcycler sells an altered garment as an ‘Upcycled Levi’s Jacket – altered by [Name]’. Here, the mark identifies the ‘ingredient’ or original source, rather than the upcycler’s own brand. This falls under nominative fair use, where the *New Kids* test replaces the standard likelihood of confusion analysis. Conversely, consider an upcycler who describes a cream-colored garment as an ‘off-white patchwork dress’. Even though ‘Off-White’ is a registered trademark, the term is used here in its primary, descriptive sense to characterise the upcycler’s own product rather than to reference the brand. This scenario constitutes classic fair use, where likelihood of confusion must still be assessed.

¹⁷⁸ Austin (n 152), p. 395.

¹⁷⁹ *ibid.*

¹⁸⁰ Lanham Act, 15 USC § 1115(b)(4).

¹⁸¹ *Cairns et al v Franklin Mint Co*, 292 F.3d 1139, 1151 (9th Cir 2002).

¹⁸² *ibid* p. 1152.

¹⁸³ Ewelukwa (n 166), pp. 122-123.

Making this distinction is very difficult in practice, as *Brother Records, Inc. v. Jardine* illustrates.¹⁸⁴ A former Beach Boys member used the name ‘Beach Boys’ to describe himself because he had been in the band. That simultaneously referenced both the plaintiff, the band, and the defendant, his solo act relying on his past fame.¹⁸⁵ This is significant for upcyclers since the classification of the type of fair use influences which legal test will apply.

For example, an upcycler who makes corsets exclusively from vintage Nike duffel bags and prominently features the Swoosh logo uses the Nike mark to identify the source material. However, where the upcycler’s brand identity is built around a distinct ‘Nike look’, the mark also promotes the upcycler’s own creative output. When consumers refer to the product as a ‘Nike corset’, the reference simultaneously evokes Nike as the trademark owner and enhances the appeal of the upcycled design. This dual function blurs the line between describing the original product and branding the new one, complicating classification and potentially triggering classic fair use, where the ‘likelihood of confusion’ analysis remains central.

In the *KP Permanent Make-Up*, the Supreme Court discussed whether the classic fair use defence can be applied where the likelihood of confusion is proven.¹⁸⁶ The Court clarified that some possibility of consumer confusion is compatible with fair use, and it made no sense to require a defendant to prove the absence of likelihood of confusion when proving such confusion is the plaintiff’s burden under the Lanham Act.¹⁸⁷ However, the extent of likely confusion remains relevant in assessing whether the defendant’s use is objectively fair.¹⁸⁸ Therefore, even if a case were classified as ‘classic’ fair use in the Ninth Circuit and subject to the likelihood of confusion test, a certain level of confusion could still coexist with the defence.¹⁸⁹

¹⁸⁴ *Brother Records, Inc v Jardine*, 318 F.3d 900 (9th Cir 2003); McGeeveran (n 164), pp. 93-94.

¹⁸⁵ *Brother Records* (n 184), p. 905.

¹⁸⁶ *KP Permanent Make-up, Inc v Lasting Impression I, Inc*, 543 US 111 (2004).

¹⁸⁷ *ibid* pp. 120-22.

¹⁸⁸ *ibid* p. 123.

¹⁸⁹ Cahoy (n 39), p. 1079; Calboli, ‘Pushing a Square Pin into a Round Hole?’ (n 21), p. 256.

3.3 THE NOMINATIVE FAIR USE TEST

The *New Kids* test is a three-step cumulative criteria that needs to be met to assert nominative fair use. Thus, there is a need to evaluate the test in the upcycling context.

The first two factors of *the New Kids* test, namely, the necessity of using the mark and the requirement to limit its use, primarily determine whether the alternative nominative use framework applies, rather than whether consumer confusion exists.¹⁹⁰ By contrast, most cases ultimately hinge on the third factor, which is whether the defendant's actions suggest sponsorship or endorsement by the trademark holder. This essentially turns on whether consumers are likely to be confused about such an association.¹⁹¹ In the context of upcycling, however, the first two factors are themselves frequently contested, since both the necessity of referring to the mark and the extent of its use are often disputed.

In *Brother Records, Inc. v. Jardine*, the Ninth Circuit upheld a summary judgment against Al Jardine, a founding member of The Beach Boys, who had been performing under various names incorporating the band's trademark, such as 'Beach Boys Family and Friends' and 'Al Jardine of the Beach Boys and Family and Friends'.¹⁹² The trademark owner objected, arguing that these names created confusion about which act would be performing.¹⁹³

The Court held that the first two elements of the nominative fair use test were fulfilled by the defendant, Jardine. Using the name 'The Beach Boys' was necessary to identify the group, and Jardine, to identify his act, did not use unnecessary elements of the trademark, like logos.¹⁹⁴ However the third element, as his promotional materials displayed 'The Beach Boys' more prominently than 'Family and Friends', was not fulfilled; thus, implied sponsorship in the Court's view.¹⁹⁵ Specifically, there was evidence that Jardine's management had encouraged use of the trademark to increase its promotional appeal and that there

¹⁹⁰ McGeveran (n 164), p. 95.

¹⁹¹ *ibid* p. 96.

¹⁹² *Brother Records* (n 184), p. 902.

¹⁹³ *ibid* pp. 902-03.

¹⁹⁴ *ibid* p. 908.

¹⁹⁵ *ibid*.

had been actual confusion among promoters and fans as to which band would perform.¹⁹⁶

Although *Brother Records v. Jardine* concerned a musical band rather than product modification, the case is doctrinally relevant. It illustrates how the nominative fair use test operates when a trademark is used to identify origin without implying endorsement, a question that similarly arises in upcycled fashion.

Evaluating this case in the upcycling context, the first step, whether the product is difficult to identify without using the trademark, arguably favours upcyclers, as the appeal frequently lies in the product's origin. Naming the brand can be necessary to convey the source of the repurposed material.¹⁹⁷ For instance, a bag made from a Chanel jacket could reasonably warrant mentioning the Chanel brand to inform consumers that the material was repurposed from an authentic Chanel product.

The second step, using only what is necessary, may be more challenging. While in *Brother Records v. Jardine*, the defendant avoided unnecessary elements such as logos; upcyclers who leave prominent logos visible may struggle. For example, a discreet label stating 'made from an authentic Burberry scarf' is more defensible than prominently displaying the Burberry check and logo.

The third step, avoiding suggestions of sponsorship or endorsement, is typically the most difficult. In *Brother Records v. Jardine*, the Court took into account that there had been actual confusion among promoters and fans as to which band would perform. This is particularly risky for upcyclers when the original logo is on the outside of the product. Prominent display of the original mark can lead consumers to assume affiliation, especially if accompanied by advertising implying approval. However, the Court also considered the evidence that there was an active effort to confuse, and it was deliberately done by the defendant. Therefore, if upcyclers do not deliberately try to confuse consumers, it may still be possible to defend themselves.

In another Ninth Circuit case, *Cairns v. Franklin Mint Co.*, the nominative fair use defence prevailed.¹⁹⁸ The dispute was about the use of Princess Diana's

¹⁹⁶ *ibid.*

¹⁹⁷ Lemley and Mazzurco (n 174), p. 449.

¹⁹⁸ *Cairn v Franklin Mint Co* (n 181).

name and likeness by the Franklin Mint on plates, dolls, and other merchandise. Trustees of a charity linked to Princess Diana, along with representatives of her estate, brought various claims, including Lanham Act false endorsement.

In this case, the Court found no suggestion of endorsement by the defendant.¹⁹⁹ Franklin Mint did not claim that Diana's estate authorised the merchandise, and it often did advertise when celebrity items were officially authorised, making the lack of such a claim here meaningful. In the upcycling context, if the upcycler clearly disclaims any connection, such as 'not affiliated with Chanel', and does not market it as official merchandise, then it is less likely to suggest endorsement. Hence, upcyclers will have a chance to defend themselves and avoid infringement.

The defence failed in *Brother Records* due to prominent use of the mark, evidence of actual confusion, and an intent to capitalise on goodwill. By contrast, in *Cairns*, the defence succeeded because the defendant clearly avoided any suggestion of authorisation and did not market the products as official merchandise. This distinction is directly relevant to upcycling, where restrained trademark use with clear disclaimers is more likely to fall within nominative fair use, while prominent branding risks implying endorsement.

Furthermore, the Ninth Circuit emphasised in *Tabari* that even where a defendant used the trademark more than necessary or misled consumers, the appropriate remedy is to limit the scope of the use rather than prohibit it entirely.²⁰⁰

3.4 THE ROLE OF LABELLING AND DISCLOSURE

There is a legal rebuttal for artists and mechanics who modify purchased goods, which involves using disclosures informing about the nature of the alteration and the lack of sponsorship by the trademark owner.²⁰¹ The same argument can be made for upcyclers. When done appropriately, using disclaimers and labels can help prevent trademark infringement by clearly informing consumers of a product's upcycled nature and lack of affiliation with the original brand.²⁰²

¹⁹⁹ *ibid* p. 1155.

²⁰⁰ *Toyota Motor Sales, USA, Inc v Tabari*, 610 F.3d 1171, 1176-77, 1185 (9th Cir 2010). See also Lemley and Mazzurco (n 174), pp. 448-449.

²⁰¹ Cahoy (n 39), p. 1075.

²⁰² Calboli, 'Pushing a Square Pin into a Round Hole?' (n 21), pp. 245-46; Calboli, 'Upcycling, the Ongoing Battle' (n 157).

However, with the case-by-case assessment of what level of disclosure is required, or whether any disclosure can be sufficient, it can be very difficult for an upcycler to conclude with confidence that it is safe from liability.²⁰³

In *Champion Spark Plug Co. v. Sanders*, the Supreme Court decided that ‘full disclosure’ gives the manufacturer all the protection which he is entitled to.²⁰⁴ The case concerned a company selling reconditioned Champion spark plugs labelled as repaired. The Court emphasised that clear labelling on both packaging and products prevented consumers from attributing any defects to Champion.²⁰⁵ Nevertheless, the Court added that some modifications can be ‘so extensive or so basic that it would be a misnomer to call the article by its original name’; thus, no disclosure will be adequate to avoid consumer confusion.²⁰⁶

For upcyclers, the Supreme Court's *Champion* decision provides a base that modifications are acceptable if there is a ‘full disclosure’. However, when upcyclers create a new product by altering and repurposing, there are still uncertainties about whether consumer confusion can be effectively dispelled. There are inconsistencies in case law, and no clear standard tells upcyclers what counts as ‘too much modification’ for disclosure to be effective. Hence, it results in legal uncertainty.

In *Rolex Watch, USA, Inc. v. Michel Co.*, the defendant, Micha Mottale, reconditioned used Rolex watches using parts not provided or authorised by Rolex.²⁰⁷ Although he retained the original Rolex movement, casing, and trademarks, he replaced the bezel and band and added diamonds before selling the watches to jewellers.²⁰⁸ The Ninth Circuit decided that these alterations were so basic and integral to the watches that they created a different product, making it misleading to continue calling them Rolex watches, even with disclosures.²⁰⁹ By contrast, in *Nitro Leisure Products, LLC v. Acushnet Co.*, the Federal Circuit found that refurbishing used golf balls by removing the base coat of paint, clear coat, trademark, and model was consistent with what consumers would expect.²¹⁰ The

²⁰³ Cahoy (n 39), p. 1088.

²⁰⁴ *Champion Spark Plug Co v Sanders*, 331 US 125, 129-30 (1947).

²⁰⁵ *ibid* pp. 129-30.

²⁰⁶ *ibid* p. 129. See also Cahoy (n 39), p. 1088.

²⁰⁷ *Rolex Watch, USA, Inc v Michel Co.*, 179 F.3d 704, 706-707 (9th Cir 1999).

²⁰⁸ *ibid* p. 707.

²⁰⁹ *ibid* p. 710.

²¹⁰ *Nitro Leisure Prods LLC v Acushnet Co.*, 341 F.3d 1356, 1362-63 (Fed Cir 2003); Cahoy (n 39), p. 1089.

Court held that repainting the balls and reapplying the trademark did not result in a new product.²¹¹

In the context of upcycling, these judicial precedents create a difficult threshold. Modifications may be *so extensive* that the original product is repurposed into an article with a different form or function, such as altering a Versace handbag into a jacket while retaining the trademark. Modifications may be *so basic* that essential components responsible for the product's core characteristics are removed or replaced, for example, by substituting the original fabric panels of a Celine blazer with generic materials while preserving the label. Under the *Rolux* reasoning, such transformations risk being classified as 'new products' where no amount of disclosure is legally sufficient.

Additionally, even without initial point-of-sale confusion, small firms risk litigation if third-party observers could be misled. Post-sale confusion occurs when third-party observers see a product bearing a trademark and wrongly assume it is sponsored or made by the trademark owner.²¹² This risk discourages sustainable practices like upcycling. A relevant case about post-sale confusion without counterfeiting is the Ninth Circuit's *Au-Tomotive Gold, Inc. v. Volkswagen of America, Inc.*²¹³ A small business bought authentic Volkswagen badges, gold-plated them, and used them on decorative plates.²¹⁴ Even with clear disclaimers, the Court ruled that the use could mislead onlookers into thinking Volkswagen sponsored the products; thus, constituting trademark infringement.²¹⁵

In a relatively recent upcycling case, *Hamilton International Ltd. v. Vortic LLC*, the Second Circuit reached a different outcome.²¹⁶ In this case, defendant Vortic refurbished old Hamilton pocket watches into wristwatches and kept the original branding.²¹⁷ Hamilton sued Vortic for trademark infringement and argued consumer confusion.²¹⁸ Eventually, the Court found no confusion among consumers²¹⁹ and relied on the Supreme Court's *Champion* judgment.²²⁰ They

²¹¹ *ibid.*

²¹² Lemley and Mazzurco (n 174), pp. 427-428.

²¹³ *Au-Tomotive Gold v Volkswagen of Am*, 603 F.3d 1133 (9th Cir 2010).

²¹⁴ *ibid* pp. 1134-1135.

²¹⁵ *ibid* p. 1136.

²¹⁶ *Hamilton v Vortic* (n 38).

²¹⁷ *ibid* p. 268.

²¹⁸ *ibid* p. 269.

²¹⁹ *ibid* p. 279.

²²⁰ Calboli and Tanner (n 25), p. 60.

took into account that Vortic's clear marketing disclosures that the wristwatches incorporated original Hamilton pocket-watch components and prominent individual branding, reducing the likelihood of consumer confusion.²²¹ However, Vortic endured years of costly litigation, and 'definitely seven figures in lost revenue'.²²²

The case law provides insufficient guidelines for upcyclers, even though they use disclaimers, as they are not affiliated with the trademark owner's brand and the product is altered or modified; there is still a risk of infringement. In this context, upcyclers' intent not to deceive about the origin should also be considered.²²³ They often use prominent, repeated disclaimers, and these disclosures signal an intent to repurpose materials, not misrepresent origin. As a matter of fact, they actively seek to prevent confusion by expressly disclaiming any affiliation with luxury brands.²²⁴

There is a need to clarify the standard for determining when a modifier's disclosure will be adequate. Rather than focusing on the extent of alteration, the focus should be on whether the seller fully disclosed the nature of it to the purchaser.²²⁵ Clear labelling, such as 'upcycled' or 'repaired', then, should shift the burden to trademark owners to prove actual harm.²²⁶ This approach promotes transparency, protects resellers, and reduces consumer confusion. Also, from the brand's perspective, if there is a defect in the product resulting from the upcycling, it could harm consumer perception of the product or brand.²²⁷ Therefore, clear labelling would also benefit trademark owners.

4.COMPARATIVE ANALYSIS AND REFORM PROPOSALS

In the preceding chapters, the referential use and nominative fair use defences were examined in the context of upcycling. This chapter combines those findings,

²²¹ *ibid* p. 61.

²²² Christopher Wood, 'Fort Collins' Vortic Watch wins battle with Swatch unit Hamilton' (*Loveland Reporter-Herald*, 26 December 2021) <<https://www.reporterherald.com/2021/12/26/fort-collins-vortic-watch-wins-battle-with-swatch-unit-hamilton/>> accessed 10 August 2025.

²²³ Jolie Brett Schenerman, 'One Consumer's Trash Is Another's Treasure: Upcycling's Place in Trademark Law' (2020) 38 *Cardozo Arts & Ent LJ*, pp. 767-68.

²²⁴ *ibid*.

²²⁵ Cahoy (n 39), p. 1097.

²²⁶ *ibid* pp. 1097-98.

²²⁷ Keats (n 159), p. 718.

compares the two systems, and based on this analysis, offers recommendations for enhancing the EU's referential use defence to balance trademark protection with the interests of sustainability and creative reuse.

4.1 STRUCTURAL AND CONCEPTUAL SIMILARITIES AND DIFFERENCES

Both the EU and the US have complex trademark law systems. Although referential use and nominative fair use overlap in their definition, there are structural and conceptual differences between them.

To begin with, both are defences permitting the use of the trademark owner's mark to refer to its goods or services. Referential use is a statutory defence rooted in EUTMR.²²⁸ Nominative fair use, although developed as a judicial doctrine,²²⁹ is grounded in the First Amendment and has statutory recognition in US dilution law.²³⁰

Referential use is usually analysed after finding prima facie infringement, meaning, use within Article 9(2) EUTMR.²³¹ Therefore, it is treated as 'trademark use' within the trademark owner's exclusivity.²³² In contrast, nominative fair use is treated as 'non-trademark use', where no infringement arises if the criteria are met.²³³ Moreover, in the Ninth Circuit, it functions as a threshold test replacing the likelihood of confusion.²³⁴ In theory, nominative fair use serves as an early gatekeeper preventing a finding of infringement, but in practice, it has attracted criticism from scholars, as the *New Kids* test can collapse into a confusion analysis.²³⁵

In the EU, the gatekeeping role of 'use as a trademark' is largely absent in the CJEU case law. Instead, honest practices proviso becomes the real filter.²³⁶ The CJEU's interpretation of the proviso relies on infringement-like criteria that require the absence of any misleading commercial connection, unfair advantage,

²²⁸ EUTMR, art. 14(1)(c); TMD, art. 14(1)(c).

²²⁹ *New Kids* (n 150).

²³⁰ Lanham Act, 15 USC § 1125(c)(3)(A).

²³¹ EUTMR, art. 9(2); TMD, art. 10(2).

²³² *BMW v Deenik* (n 51); *Gillette* (n 52); *Adam Opel* (n 54). See also Kur and Senfleben, 'Rights Conferred' (n 49), pp. 287-291.

²³³ *New Kids* (n 150), p. 308; *Simon* (n 96), pp. 3, 6; *McGeveran* (n 164), p. 91.

²³⁴ *Cairns v Franklin Mint* (n 181), pp. 1151-1152.

²³⁵ *McGeveran* (n 164), pp. 91-92; *Bunker* (n 151), p. 199; *Tang* (n 165), p. 2036.

²³⁶ EUTMR, art. 14(2); TMD, art. 14(2).

or tarnishment.²³⁷ As a result, scholars have criticised its function.²³⁸ Similarly, in the US, the *New Kids* test also demands no suggestion of sponsorship or endorsement.²³⁹ However, it focuses specifically on avoiding endorsement signals, taking consumer perception into account, while the behaviour of the alleged infringer is also important.²⁴⁰

The honest practices framed via the trademark owner's legitimate interests, which broadly encompass origin and advertising functions of a trademark.²⁴¹ In dilution contexts, consumer perception may be deemed irrelevant, such as in the *Audi*.²⁴² Thus, in this respect, the US system provides greater flexibility than the EU, as nominative fair use, grounded in free speech under the First Amendment, allows for the balancing of different objectives.²⁴³

Furthermore, both require necessity and limited use of the mark.²⁴⁴ Historically, in the EU, necessity was a narrow gatekeeper tied specifically to showing the intended purpose,²⁴⁵ then broadened with the 2015 trademark law reform and with precedent case law.²⁴⁶ However, the recent *Audi* judgment interpreted necessity strictly again.²⁴⁷ The case concerned non-original radiator grilles featuring a logo-shaped fitting identical to Audi's, and the Court held that affixing the logo was not legally necessary and risked creating a misleading link with the trademark owner.²⁴⁸ By contrast, the *New Kids* test is generally more flexible than *Audi*.²⁴⁹ While the first two parts of the test, necessity of the mark and minimal use, are evaluated case by case, the Ninth Circuit prioritises limiting use over banning it entirely.²⁵⁰

²³⁷ *BMW v Deenik* (n 51), paras. 62-63; *Gillette* (n 52), para. 49.

²³⁸ *Anemaet* (n 79), p. 1027; *Senfleben*, 'Developing Defences' (n 27), p. 100; *Izyumenko* (n 31), p. 874; *Szczepanowska-Kozłowska* (n 35), p. 788; *Żelechowski* (n 90), p. 11.

²³⁹ *New Kids* (n 150), p. 308.

²⁴⁰ *Cairn v Franklin Mint* (n 181) p. 1155; *Duncan* (n 161), p. 233; *Lemley and Mazzurco* (n 174), p. 449.

²⁴¹ *Simon* (n 96), p. 24.

²⁴² *Audi* (n 80), para. 48.

²⁴³ *Austin* (n 152), p. 395.

²⁴⁴ In the context of referential use EUTMR, art. 14(1)(c); TMD, art. 14(1)(c). For nominative fair use *New Kids* (n 150), p. 308.

²⁴⁵ *Gillette* (n 52), paras. 35-36.

²⁴⁶ *Inditex* (n 75), para. 52; *Kur and Senfleben*, 'Limitations, Defences, and Genuine Use' (n 36), p. 420.

²⁴⁷ *Audi* (n 80), para. 57.

²⁴⁸ *ibid* paras. 40, 60.

²⁴⁹ *New Kids* (n 150), p. 308.

²⁵⁰ *Toyota Motor v Tabari* (n 200) pp. 1176-77, 1185; *Lemley and Mazzurco* (n 174), pp. 448-449.

Lastly, while labelling is not a legal requirement in either system, courts in both the EU and the US recognise the role of labelling in reducing confusion.²⁵¹ Scholarly commentary builds on this judicial practice by articulating labelling as a normative tool to reconcile trademark protection with broader policy goals, which can help dispel confusion and dilution claims.²⁵²

4.2 IMPLICATIONS FOR FASHION UPCYCLERS:

4.2.1 *Practical Outcomes for Upcyclers Under Each Regime*

In both systems, there is no case law that exactly covers these defences in the upcycling context.²⁵³ Consequently, there is legal ambiguity in both as to how they would be applied by the courts. Nevertheless, the following discussion evaluates the practical outcomes for upcyclers under each regime.

As a first point, both systems become restrictive when the original trademark remains prominently visible on altered goods, especially if the changes are substantial.²⁵⁴ Next, in the EU, due to broad definition of referential use as a ‘trademark use’, upcyclers almost always start from a presumption of infringement.²⁵⁵ Additionally, the honest practices proviso is hard to satisfy if alterations are considered impairments under Article 15(2) EUTMR.²⁵⁶ In turn, in the US, *New Kids’* third criterion, no sponsorship implication, is the main stumbling block for upcyclers, especially where upcycled garments retain visible marks.²⁵⁷ Besides, post-sale confusion claims can undermine even clear disclaimers.²⁵⁸

Although weighted differently, labelling, industry norms, and consumer perception are relevant in both systems. Introducing clear labelling guidelines is encouraged by scholars on both sides of the Atlantic.²⁵⁹ This academic consensus

²⁵¹ In the EU *Viking Gas* (n 129); *Soda-Club* (n 130). For the US *Champion* (n 204); *Hamilton v Vortic* (n 38).

²⁵² In the EU Kur (n 124), pp. 235-236; Senftleben, ‘Developing Defences’ (n 27), p. 108; Żelechowski (n 90), p. 6. For the US Cahoy (n 39), p. 1075; Calboli and Tanner (n 25), pp. 57-58.

²⁵³ In the context of EU see Dorenbosch (n 146). For the US see Calboli and Tanner (n 25), p. 59.

²⁵⁴ For example in the EU *Audi* (n 80), para. 57. In the US *Brother Records* (n 184), p. 908.

²⁵⁵ See Section 2.1 of this thesis.

²⁵⁶ EUTMR, art. 15(2); TMD, art. 15(2). See also Section 2.3 of this thesis.

²⁵⁷ See Section 3.3 of this thesis.

²⁵⁸ *Au-Tomotive Gold v Volkswagen* (n 213), p. 1136.

²⁵⁹ For instance in the EU Kur (n 124), pp. 235-36; Senftleben, ‘Developing Defences’ (n 27), p. 108; Żelechowski (n 90), p. 6. See for the US Cahoy (n 39), p. 1075; Calboli and Tanner (n 25), pp. 57-58.

emphasises that upcyclers' intent not to deceive about the origin should be taken into account, which is achieved by utilising clear labelling about the nature of the alteration.²⁶⁰

In conclusion, US nominative fair use offers relatively more flexibility for upcyclers who frame their work as commentary or artistic reinterpretation, whereas EU referential use, due to its prima facie infringement structure and the narrow honest practices proviso, leaves less space for unauthorised fashion upcycling.

4.2.2 Public Perception and Brand Value

Even if there is no consumer confusion, trademark owners are often eager to stop uses of their marks that could dilute the value of their famous logo or brand name.²⁶¹ However, an overly strict approach to expressive use cases, such as parody and commentary, can harm free speech and other public interests more than it benefits trademark protection.²⁶²

Evidence regarding research on brand extensions, which means selling unrelated products under the same brand, supports this position.²⁶³ The results showed that consumers rarely harm the brand in their minds just because they mistakenly associate it with unrelated products. Negative impressions tend to stay limited to the specific product and do not damage the whole brand's reputation.²⁶⁴ Furthermore, another study suggests that using the original trademark on or near spare parts does not necessarily harm the trademark's origin function or mislead consumers.²⁶⁵

An example of upcycling and dilution, from the US, is *PepsiCo Inc. v. #1 Wholesale, LLC*,²⁶⁶ which concerned a company that converted used PepsiCo bottles, cans, and canisters into devices with hidden compartments.²⁶⁷ The upcycled products not only resembled genuine PepsiCo items in appearance but

²⁶⁰ Schenerman (n 223), pp. 767-68; Kur (n 124), p. 236; Senftleben, 'Developing Defences' (n 27), p. 108.

²⁶¹ Lim (n 173), p. 855.

²⁶² *ibid* p. 856.

²⁶³ *ibid*.

²⁶⁴ *ibid*.

²⁶⁵ Tischner and Stasiuk (n 72), p. 52-54.

²⁶⁶ *PepsiCo, Inc v #1 Wholesale, LLC*, No. 07-CV-367, 2007 WL 2142294 (ND G July 20, 2007), p. 2.

²⁶⁷ Cahoy (n 39), p. 1087; Lemley and Mazzurco (n 174), pp. 417.

also contained a small amount of liquid capable of mimicking soda.²⁶⁸ However, the primary purpose of it was to serve as concealed storage for illicit substances, such as narcotics.²⁶⁹ Hence, the Court found that the sale of the altered containers amounted to dilution by tarnishment, as possibly both purchasers and onlookers were negatively associated the brand with drug use.²⁷⁰ The application of the previous arguments to this example means, PepsiCo's reputation in that specific context may be harmed, while the infringer could gain. Nevertheless, research indicates that PepsiCo's overall reputation for its original products would remain unaffected.²⁷¹

A more recent example from the US is between Nike and the art collective MSCHF.²⁷² In 2021, when rapper and singer Lil Nas X partnered with MSCHF to transform Nike Air Max 97 sneakers into a version dubbed 'Satan Shoes', featuring a drop of human blood in the heels.²⁷³ Notably, the shoes still displayed Nike's iconic swoosh trademark and were likely to cause confusion about Nike's role as a licensor or sponsor.²⁷⁴ Nike responded by taking legal action against Lil Nas X and MSCHF, resulting in an agreement between the parties.²⁷⁵ In this case, Nike seeks to control the appearance of its products to avoid negative associations with satanism, as well as to pursue profit and capitalise on the customisation trend. Moreover, its prior participation in the customisation market may foster consumer expectations that such customisations are typically authorised collaborations.²⁷⁶

The art collective MSCHF did not copy Nike's swoosh logo.²⁷⁷ Instead, the collaboration used authentic Nike Air Max 97 shoes, with the swoosh already attached by Nike, and subsequently customised them in a highly conspicuous and expressive manner. The legal issue is not one of counterfeiting; it involves a genuine Nike shoe that has been altered in ways Nike dislikes. Nike argued that the controversial design could harm its reputation if consumers believed Nike was

²⁶⁸ PepsiCo, 2007 WL 2142294 (n 266), p. 2.

²⁶⁹ *ibid* p. 4.

²⁷⁰ *ibid*.

²⁷¹ Cahoy (n 39), p. 1094.

²⁷² Calboli and Tanner (n 25), pp. 68-69.

²⁷³ Cahoy (n 39), pp. 1074-75.

²⁷⁴ Chauncey Alcorn, 'Nike sues the maker of Lil Nas X 'Satan Shoes' for trademark infringement' (*CNN Business*, 31 March 2021) <<https://edition.cnn.com/2021/03/29/business/satan-shoes-nike-lil-nas-x>> accessed 11 August 2025.

²⁷⁵ Lemley and Mazzurco (n 174), pp. 387-388.

²⁷⁶ *ibid* p. 419.

²⁷⁷ *ibid* p. 423.

behind the product. However, given the very unusual nature of the product and Lil Nas X's persona, it is unlikely consumers genuinely think Nike sells the 'Satan Shoes'.²⁷⁸

In terms of protecting a brand's exclusivity, particularly for luxury goods, consumers' perception may vary depending on the observer's socioeconomic status. Complementing this, when the markets are distinct, it is unlikely that any confusion would influence a purchaser's decision to buy the trademark owner's original goods.²⁷⁹ However, it is important to note that in the upcycled goods market, such assumptions are not easily made, as consumer perceptions can vary depending on the extent of the product's alteration.²⁸⁰

From the brand's perspective, if the upcycled clothes have a positive social goal like sustainability, they may even benefit from it.²⁸¹ A study examining consumer responses to upcycled and recycled luxury products found that upcycled luxury goods are viewed more positively than non-sustainable luxury products destined for disposal.²⁸² Furthermore, brands can take advantage of marketing narratives about transforming discarded materials due to the feeling of uniqueness among customers.²⁸³

A useful example of this can be derived from the recent past. A pioneer in the fashion world, Dapper Dan employed upcycling methods before the term was coined.²⁸⁴ In the 1980s, he began to incorporate the logos of luxury fashion houses such as Fendi, Louis Vuitton and Gucci in his products, and he would put his name on the tags.²⁸⁵ In 1992, Fendi sued Dan, claiming his use of their logo in his designs was trademark infringement.²⁸⁶ Dan lost the case and was forced to close

²⁷⁸ *ibid* pp. 423-424.

²⁷⁹ Cahoy (n 39), p. 1095.

²⁸⁰ Kur (n 124), p. 230.

²⁸¹ Cahoy (n 39), p. 1095.

²⁸² Feray Adıgüzel and Carmela Donato, 'Proud to be sustainable: Upcycled versus recycled luxury products' (2021) 130 *Journal of Business Research*, p. 143.

²⁸³ *ibid* p. 144.

²⁸⁴ Aldescu and Passoni (n 23), p. 8.

²⁸⁵ Doc Louallen, Nathan Smith and Linsey Davis, 'Dapper Dan expanding brand after being shut out of fashion industry 30 years ago' (*ABC News*, 4 May 2024) <<https://abcnews.go.com/Business/dapper-dan-expanding-brand-after-shut-fashion-industry/story?id=109866257>> accessed 22 May 2025.

²⁸⁶ David Marchese, 'Dapper Dan on creating style, logomania and working with Gucci' (*The New York Times Magazine*, 1 July 2019) <<https://www.nytimes.com/interactive/2019/07/01/magazine/dapper-dan-hip-hop-style.html>> accessed 22 May 2025.

his shop.²⁸⁷ However, in the long run, Dan became victorious.²⁸⁸ He even collaborated with Gucci, one of the world's leading luxury brands.²⁸⁹

4.3 RECOMMENDATIONS AND REFORM PROPOSALS

As the approach to infringement criteria becomes more rigid and owner-oriented, the role of limitations and the honest practices clause should correspondingly expand as balancing tools.²⁹⁰ The analysis in Chapter 2, Section 2.1, demonstrates that the current interpretation of trademark use or infringement is indeed 'owner-oriented'.²⁹¹ Therefore, the honest practices proviso should serve as the balancing mechanism to allow for competing interests, such as sustainability.

In reality, the honest practices proviso is defined similarly to infringement criteria. Thus, how can a defence be practically effective if its application relies on the same criteria used to establish infringement?²⁹² Accordingly, the challenge is to interpret the honest practices proviso in a way that does not simply replicate the infringement analysis.

As a response, it has been proposed to focus on the essential function of a trademark and to define the proviso from a broader perspective that takes into account the trademark's role in the market.²⁹³ Another suggestion is to adopt an empirical perspective that encompasses the behaviour of competitors. In other words, measures adopted by them to reduce harm to trademarks and how consumers perceive or react to those measures.²⁹⁴ A similar approach has already been adopted in the US. Nominative fair use test requires active efforts from the alleged infringer to deceive, a rather lenient test compared to a confusion analysis.²⁹⁵

As such, it is recommended that the concept of honest practices be redefined from a broader perspective, one that considers not only the legitimate

²⁸⁷ Aisha Playton, 'Dapper Dan: The King of Logomania Who Led a Trademark Law Rebellion' (*De Beer Attorneys*, 31 August 2024) <<https://www.debeerattorneys.com/post/dapper-dan-trademark-law-fashion>> accessed 22 May 2025.

²⁸⁸ Marchese (n 286).

²⁸⁹ *ibid*; Schenerman (n 223), pp. 756-758.

²⁹⁰ Żelechowski (n 90), p. 18.

²⁹¹ See also Izyumenko (n 31), pp. 887-888.

²⁹² Martin Senfleben and others, 'Recommendation on Measures to Safeguard Freedom of Expression and Undistorted Competition in EU Trade Mark Law' (2015) *European Intellectual Property Review*, p. 340.

²⁹³ Simon (n 96), p. 24.

²⁹⁴ Anemaet (n 79), pp. 1031-32.

²⁹⁵ Duncan (n 161), p. 233; Lemley and Mazzurco (n 174), p. 449.

interests of trademark holders but also other relevant concerns. In other words, sustainability-friendly practices, such as upcycling, should be accommodated so long as they do not intentionally seek to mislead consumers.²⁹⁶ The proposal for a context-sensitive evaluation is particularly pertinent in this context.²⁹⁷ This entails considering both the information provided by the upcycler and broader factors, such as sustainability initiatives.²⁹⁸ Similar to the approach in the US, it is preferable to restrict the use rather than prohibit it entirely.²⁹⁹

Introducing labelling standards is therefore recommended. These standards should clearly define the type of disclosure required from upcyclers, specify where it must be displayed, and outline the disclaimers necessary to dispel any suggestion of a commercial affiliation with the original trademark owner.³⁰⁰ *Viking Gas*³⁰¹ and *Soda-Club*³⁰² cases provide a sturdy basis for it. As suggested, clear labels like ‘upcycled’ should shift the burden to trademark owners to prove actual harm.³⁰³

Consideration should also be given to industry practices, particularly whether consumers are familiar with the upcycling methods in question.³⁰⁴ As demonstrated in this thesis in Chapter 4, Section 4.2.2, consumer perception varies with socioeconomic status and the extent of alteration; in distinct markets, confusion is less likely to impact purchasing decisions. Also, negative impressions usually stay product-specific. Sustainable upcycling can even benefit brands, with studies showing consumers prefer upcycled luxury goods over unsustainable ones.³⁰⁵

The empirical approach should be complemented with normative frameworks linked to circular economy objectives.³⁰⁶ Further support stems from Article 37 CFR, which requires the integration of environmental protection into EU policies in line with sustainable development, while Article 17(2) safeguards

²⁹⁶ Izyumenko (n 31), p. 892.

²⁹⁷ Kur (n 124), pp. 234-235.

²⁹⁸ *ibid* p. 236.

²⁹⁹ *Toyota Motor v Tabari* (n 200), pp. 1176-1177, 1185; Lemley and Mazzurco (n 174), pp. 448-449.

³⁰⁰ Staunstrup (n 121).

³⁰¹ *Viking Gas* (n 129).

³⁰² *Soda-Club* (n 130).

³⁰³ Cahoy (n 39), pp. 1097-98.

³⁰⁴ *Viking Gas* (n 129), para. 40; *Soda-Club* (n 130), para. 48.

³⁰⁵ Adıgüzel and Donato (n 282), p. 143.

³⁰⁶ Żelechowski (n 90), pp. 15-16, 18.

IPRs.³⁰⁷ Under Article 52(1), any limitation of a trademark proprietor's property rights must comply with the principle of proportionality.³⁰⁸ Therefore, Article 37 does not provide an unrestricted basis for overriding trademark rules but instead calls for a balanced approach between environmental objectives and IPR protection.³⁰⁹

Expanding on this, the EU's effort to make textiles and the fashion industry as a whole should be supported by the IP law.³¹⁰ The CJEU previously took a stance and applied the 'exhaustion-plus' principle to prioritising the free movement of goods over the prohibition of reselling items with material changes, such as through the repackaging of pharmaceuticals.³¹¹ Given this precedent, one could ask why courts today should not take a comparable approach to support environmental goals. Shouldn't the promotion of sustainability and the circular economy be accorded equal importance to the historical emphasis on free trade and economic integration?³¹²

5. CONCLUSION

This thesis set out to explore how the referential use defence under Articles 14(1)(c) and 14(2) of the EUTMR and TMD can be interpreted and applied to strike a fair balance between trademark protection and sustainability objectives in the context of fashion upcycling. To reach an objective answer, the research has taken trademark owners' and upcyclers' perspectives into account. As well as sustainability and circular economy initiatives of the EU, such as the Green Deal and CEAP.

As explained, the relevance of upcycling, repurposing old or unwanted goods into products of higher quality or value, is a promising approach to extending product life cycles. However, the legal risks upcyclers face, particularly when the brand insignia remain on altered, repurposed or customised garments, are also highlighted. These risks arise because such uses can be alleged to cause consumer confusion, free-riding and dilution.

³⁰⁷ Charter of Fundamental Rights of the European Union [2012] OJ C326/391 (CFR), arts 17(2) and 37.

³⁰⁸ *ibid* art. 52(1).

³⁰⁹ Senftleben, 'Developing Defences' (n 27), p. 102. See also Izyumenko (n 31), pp. 888-889.

³¹⁰ COM (2022) 141 final (n 9); Principe (n 121), p. 103.

³¹¹ Calboli, 'Pushing a Square Pin into a Round Hole?' (n 21), p. 245.

³¹² *ibid*.

The US has been chosen as the example jurisdiction, with a specific focus on the Ninth Circuit's nominative fair use for comparison. The results of this comparison showed that, despite having legal ambiguities on its own, it is more flexible than the referential use defence. Unlike the EU, nominative fair use in the Ninth Circuit is treated as 'non-trademark use' and, when applicable, replaces the likelihood of confusion test.

The EU's referential use defence is analysed in depth, identifying three main components: the nature of the defence and its relationship to 'use as a trademark' under Article 9 EUTMR and Article 10 TMD, the necessity requirement, and the honest practices proviso. The analysis revealed that, under CJEU case law, referential use is generally treated as 'trademark use', meaning it falls within the trademark owner's exclusive rights. The scope of the necessity requirement is broadened, but *Audi* marked a return to a stricter interpretation. The honest practices proviso, intended as a balancing mechanism, is often interpreted using trademark infringement criteria, leading to a risk of circular reasoning. This makes it difficult for upcyclers to benefit from the defence, as the same standards used to establish infringement are applied to reject the exception.

The US nominative fair use doctrine, as developed in *New Kids on the Block v. News America Publishing, Inc.*, is a three-step test. The third step, the user has done nothing, in connection with the mark, to suggest sponsorship or endorsement by the trademark holder, is the main impediment to benefiting from nominative fair use. This prong shows similarities to the honest practices defined by the CJEU; however, as demonstrated in the thesis, it requires 'active efforts' from the alleged infringer to confuse. Another important difference is that the Ninth Circuit opted for limiting the trademark use, even if the alleged infringer used the trademark more than necessary or misled consumers, rather than prohibiting it entirely. Therefore, drawing inspiration from the US practice, adopting a similar approach to redefine 'honest practices' was recommended to the EU.

The thesis also explored the role of labelling and disclosure in both legal systems. In both of them, the importance of it to mitigate confusion and other infringement risks, reiterated. Hence, standardising clear disclaimers of affiliation was recommended. For upcycling, such transparency could help satisfy honest practices.

This led to the discussion of consumer perception and balancing rights. Noting that consumer perception may still vary depending on the extent of alterations, empirical studies suggest that negative associations are often product-specific. Therefore, even though strict enforcement is often justified on grounds of dilution, sustainable upcycling can enhance a brand's image, as seen in luxury collaborations with upcyclers like Dapper Dan.

In conclusion, the central challenge lies in protecting the economic and reputational interests of trademark owners while enabling creative, sustainable practices that support the circular economy. The current state of the referential use defence disproportionately protects the interests of trademark owners and, in its present form, is insufficient to shield upcyclers from trademark infringement claims. A more flexible, context-driven interpretation of the honest practices proviso, combined with clear labelling standards and informed by insights from US nominative fair use, would move EU trademark law closer to achieving this balance. A key limitation of this research is the lack of specific case law on upcycled fashion. Acknowledging this gap is important, as it underscores the need for further empirical and doctrinal study as more targeted jurisprudence emerges. As for future research, it would be of interest to further explore empirical studies on consumer perception of upcycled branded goods and the feasibility of EU-wide labelling schemes for upcycled fashion.