Standing Up for the Voiceless?

Exploring the EU's Capacity for Rights Protection

Denis Duez & Cecilia Rizcallah (eds.)

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Under the direction of Denis Duez and Cecilia Rizcallah

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ABSTRACT

In an era marked by a crisis of liberal values—notably within Europe—and mounting challenges to fundamental rights, *Standing Up for the Voiceless?* explores the European Union's evolving role in fostering political inclusion. At its core, the volume seeks to engage with a pressing question: does the EU truly amplify the voices of the marginalized—or, more pointedly, the voiceless? Emerging from the Jean Monnet Centre of Excellence "Un-Muting Europe," this collection brings together fresh perspectives from early-career scholars across disciplines and borders. Through a diverse set of case studies—ranging from environmental justice and migration to democratic backsliding and digital rights—it critically examines how EU institutions interact with those historically silenced, including stateless individuals, minority groups, future generations, and even non-human entities. Adopting a sharp interdisciplinary lens, the book moves beyond institutional rhetoric to question whether the EU's discourse of participation and protection translates into tangible outcomes. Does the European Union function as a genuine platform for empowerment due to its unique institutional architecture—or does it, paradoxically, contribute to the very silencing it seeks to prevent? Timely and thought-provoking, this volume is essential reading for anyone interested in the legitimacy of European governance, the politics of voice and silence, and the future of rights protection in the EU.

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Standing Up for the Voiceless?

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Standing up for the voiceless? Exploring the EU's capacity for rights protection. An introduction

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Introduction

The question of political representation and the ability of institutions to amplify marginalized voices has long been central to democratic debates. Within the European Union (EU), this issue takes on particular significance, as the EU not only governs but also positions itself as a supranational entity committed to protecting fundamental rights and freedoms. The concept of *unmuting* – giving a voice to those traditionally excluded or underrepresented – has increasingly shaped EU narratives, policy discourses, and institutional frameworks.

This book is the result of a collaborative academic initiative led by the Jean Monnet Centre of Excellence "Un-Muting Europe" (EUNMUTE) at the Institute for European Studies, UCLouvain Saint-Louis Bruxelles[1]. Through this project, the team sought to critically assess the EU's role in fostering political inclusion, examining how effectively it serves as an alternative platform for those who might otherwise go unheard. A

[1] Project number 101047658 – EUNMUTE – ERASMUS-JMO-2021-HEI-TCH-RSCH.

key aspect of this initiative was its strong focus on emerging research and the next generation of scholars. To highlight this, an early-career researcher workshop was organized in Brussels on the 10th and 11th of June 2024, bringing together young international scholars from diverse backgrounds and disciplines. Their fresh perspectives and innovative contributions directly shaped the development of this volume, reinforcing the Centre of Excellence's commitment to amplifying new voices in European studies.

The issue of political inclusion is not new – throughout its history, the EU has launched numerous initiatives to promote participatory governance, from digital platforms and consultation mechanisms to broader advocacy for human rights. However, in the current climate of growing contestation over European integration, these efforts face increasing scrutiny. Critics argue that the EU remains distant from its citizens, reinforcing perceptions of a democratic deficit. Yet, could *Brussels* – often seen as remote – actually function as a platform for the voiceless? In this context, the EUNMUTE project was designed to critically examine the EU's claim of amplifying marginalized voices. To what extent does the EU genuinely provide a space for those who are politically, socially, or legally disenfranchised? How is this ambition reflected in concrete policies and institutional commitments? More broadly, does the EU's self-proclaimed role as a defender of the voiceless reinforce its own legitimacy and authority? These key questions have guided the research presented in this volume.

By addressing these issues, this book seeks more precisely to deepen our understanding of the EU's evolving role as both a protector of rights and an enabler of political voice. Through an interdisciplinary lens, the chapters that follow critically assess whether the EU's rhetoric of inclusion aligns with its institutional practices and whether its frameworks effectively safeguard representation and rights for those historically unheard. In doing so, this volume aims to provide both scholars and practitioners with valuable insights into the EU's capacity – and its limitations – in standing up for the voiceless.

Following an overview of the project's theoretical background, we will briefly introduce the contributions that make up this volume.

1. Standing up for the voiceless: an analytical framework

The concept of the "voiceless" has emerged as a critical area of inquiry in the social sciences and humanities. Often intertwined with discussions of marginalization, disenfranchisement, inequality or social exclusion, the concept refers to individuals, groups or non-human beings who lack the capacity to articulate their concerns, needs, or preferences within the political sphere. Analyzing voicelessness requires a critical examination of how contemporary representative democracy function and its limitations. It also calls for greater attention to the most vulnerable, questioning the legitimacy and inclusivity of political institutions, and envisioning more equitable political mechanisms that genuinely serve the needs of all.

1.1. The classical democratic model and its limitations

Contemporary democratic regimes, whether at the national or EU level, are characterized by a delicate balance – specific to each regime – between the logic of political representation and that of political participation. Both logics presuppose the existence of political actors – citizens – capable of making their voice heard. Democracy may metaphorically be compared to a choir, an organized group of singers.

In the 17th century, Thomas Hobbes broke with Christian cosmology that based the legitimacy of political authority on the divine will. In so doing he became one of the first thinkers to address the modern idea of political representation. At the heart of his political theory lies the question of how a plural and disunited multitude of human beings can become a unified state. To answer this, Hobbes elaborates a theory of representation in his major opus, *Leviathan*, in which the sovereign is seen as a representative (*actor*) of the citizens (*author*)[2]. The *Leviathan* speaks *on behalf* of the citizens.

Hanna Pitkin pointed out that Hobbes's theory of representation "is both temptingly plausible and peculiarly deficient[3]". In other words, Hobbes's theory may be viewed as anti-democratic or proto-democratic depending

[2] T. Hobbes, *Leviathan*, T. Richard (ed.) (Cambridge University Press, 1996 [1651]), chapter 16.

[3] H. Pitkin, *The Concept of Representation* (University of California Press, 1967), p. 14-37.

on the perspective adopted[4]. Indeed, compared with the standards of contemporary politics, his theory suffers from major flaws. On the one hand, through the concept of "authorization," Hobbes was the first to associate political representation with a form of "acting for" rather than merely "standing for". But, on the other hand, Hobbes's theory of representation lacks an analysis of the accountability of political authorities, and of its relationship to representation.

For centuries, political thinkers – starting with John Locke, Montesquieu and the liberal thinkers of the 18th and 19th centuries – sought to overcome this initial flaw in representation theory. These developments, which cannot be retraced here, led, three centuries after Hobbes's initial intuitions, to the contemporary model of democracy. This model is based on substantive and formal criteria commonly accepted as constituting the liberal conception of representative democracy. In this conception, the appointment of leaders through electoral processes is regarded as the fundamental common denominator to all democracies. Thus, democracy could be defined as an "institutional arrangement for arriving at political decisions which realizes the common good by making the people itself decide issues through the election of individuals who are to assemble in order to carry out its will"[5].

In his famous and controversial book, *Capitalism, Socialism, and Democracy*, Joseph Schumpeter takes this procedural approach to democracy even further[6]. He challenges the "classical doctrine of democracy[7]" which asserts that democratic procedures aim to identify a "common good". Rather, he argues that identifying common good is unrealistic due to citizens' limited knowledge and education, as well as the manipulation of public opinions by politicians. Schumpeter therefore advocates a minimalist model of democracy, in which democracy is defined solely by mechanisms organizing competition between leaders. In his view, apart from periodic elections aimed at legitimizing governments and keeping them accountable, the formulation

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[4] D. Runciman, "Hobbes's theory of representation: anti-democratic or proto-democratic?", in Shapiro, Stokes, Wood and Kirshner (eds.), *Political Representation* (Cambridge University Press, 2010), p. 15-34.

[5] J. Schumpeter, *Capitalism, Socialism, and Democracy* (Routledge, 1993 [1943]), p. 250.

[6] *Ibid*.

[7] J. Schumpeter, *op. cit.*, p. 250-268.

and implementation of public policies can largely remain insulated from public oversight.

Amid growing dissatisfaction with traditional representative democracy mechanisms, the political assumption that legitimacy through elections remains valid throughout an entire term of office – what Pierre Rosanvallon call "the popular anointment of those in power[8]" – has been increasingly challenged. One of Schumpeter's main critics, Robert Dahl, argues that Schumpeter's vision of democracy places too much emphasis on competition and procedures, reducing citizens to mere voters rather than active participants in government[9]. Inspired by a Tocquevillian approach to democracy[10], Dahl opposes Schumpeter's "elitist" vision of democracy with a "pluralist" one, which conceives democracy as a political system in which citizens, through groups and associations, play a more active and direct role in policymaking.

As the limitations of classical political representation have become more apparent, political participation has reemerged as the new benchmark for measuring democratic legitimacy[11].

Efforts to promote and strengthen political participation – whether at the local, national or European level – reflect a broader desire to move beyond a purely procedural understanding of representative democracy. However, participatory democracy does not replace political representation; rather, it complements it by enhancing the quality of democracy. Both models – participatory and representative democracy should work in tandem[12].

Yet, even this hybrid model of democracy remains incomplete. Research in political science, political psychology and sociology consistently shows that limited socioeconomic capital or a weak sense of political

8 P. Rosanvallon, *La légitimité démocratique. Impartialité, réflexivité, proximité* (Seuil, 2008), p. 9 (our translation).

9 R. Dahl, *Who governs? Democracy and Power in an American City* (Yale University Press, 1961).

10 R. Dahl, *op. cit.*, p. 1-8.

11 L. Blondiaux, *Le nouvel esprit de la démocratie* (Seuil/La République des idées, 2008), p. 5-11.

12 D. Duez, "La démocratie participative européenne. Du citoyen à la société civile organisée", in Chenevière and Duchenne (eds.), *Les modes d'expression de la citoyenneté européenne* (Academia Bruylant, 2011), p. 87-86.

competence[13] can hinder the political participation of marginalized individuals[14]. Moreover, both political representation and participation rest on a citizen-centered premise, which fails to fully account for the complexity of democratic inclusion. What about non-citizens, young people, future generations, or non-human beings who lack the ability to voice their interests or engage in public debates? Who speaks for them, and how can their interests be effectively represented?

1.2. Giving a voice to the voiceless: the rise of the EU unmuting narrative

Whether analyzed through the lens of political representation or political participation, the exercise of democratic rights is inherently tied to the notion of "voice" and its antonyms: voicelessness, silencing, muting, etc. Participating in democratic life, whether through voting or engaging in civil society organizations, fundamentally involves expressing a voice. Being politically active, or simply being recognized as a rights-bearing person or an entity, entails striving to be heard and overcoming social and systemic silencing mechanisms.

Given this relationship between voice and politics, it is unsurprising that many languages use the same word to describe the sound produced by a person larynx and the act of voting – such as *stem* in Dutch, *voix* in French or *stim* in German. While English distinguishes between "vote" (the political act) and "voice" (the ability to speak), "voice" itself is polysemous. According to the Merriam-Webster Dictionary, "voice" refers both to "the sound that comes out of your mouth when you speak or sing" and a "wish, choice, or opinion openly or formally expressed". In essence, regardless of the language used, politics is fundamentally about expressing divergent political preferences – or at the very least, having one's voice heard by a given political authority.

As early as in the Greek and Roman assemblies, whose legacy has been crucial in the development of modern democracies, the *viva voce* procedure ("by live voice") was a voting method in which a group or a person's vote was taken by acclamation, meaning vocally responding to

[13] L. Blondiaux, "Faut-il se débarrasser de la notion de compétence politique ? Retour critique sur un concept classique de la science politique", *Revue française de science politique*, vol. 57, n°6 (2007), p. 759-774.

[14] S. Verba, K. L. Schlozman and H. Brady, *Voice and equality: Civic voluntarism in American politics* (Harvard University Press, 1995).

a question[15]. This practice persists today in the parliamentary procedures of many states. In the British House of Commons, for example, MPs are still invited by the Speaker to express their support or opposition to a motion by shouting "Aye" and "No".

Returning to the EU and to what has been coined as its democratic participatory turn[16], the European Commission somehow echoes the *viva voce* procedure by frequently employing the semantic field of voice. For instance, in 2022, the Commission launched a digital platform supporting the Year of the Youth with a hashtag emphasizing the need to amplify the voice of young people, such as #TimeToUnmute. The rationale for this initiative was explicitly to give a voice to young people, recognizing that their voices are often insufficiently heard at the national level. The news announcement for this initiative made it clear: "Raise your voice and have your say on the new Voice Platform![17]". Interestingly, the very same expression, "have your say", was also used to name the single portal for citizens and stakeholders to give their views on the Commission's initiatives and contribute to the decision-making process. The "Have Your Say" platform as now been replaced by a more neutral "Public Consultations and feedback" platform. It has been previously named the "Your Voice" platform. While the name of the platform has changed multiple times, its purpose remains: to give voice to the public, particularly those traditionally voiceless.

The rise of the unmuting narrative is not limited to the Commission. Since the Maastricht Treaty's entry into force and the establishment of EU citizenship, any citizen or resident of an EU Member State may submit, individually or in association with others, a petition to the European Parliament. These petitions take the form of complaints or requests

[15] S. Hornblower, A. Spawforth and E. Eidinow (eds.), *The Oxford Companion to Classical Civilization* (Oxford University Press, 2014), p. 267.

[16] S. Saurugger, "The social construction of participatory turn: The emergence of a norm in the European Union", *European Journal of Political Research*, vol. 49, n°4 (2010), p. 471-495. See also P. Magnette, "Democracy in the EU: Why and how to combine representation and participation?", in Smisman (ed.), *Civil society and legitimate European governance* (Edward Elgar, 2006); D. Duez, "La démocratie participative européenne. Du citoyen à la société civile organisée", *op. cit.*

[17] Directorate-General for Communication, "Raise your voice and have your say on the new Voice Platform!", News announcement, 13 June 2022, URL: https://learning-corner.learning.europa.eu/news-and-competitions/raise-your-voice-and-have-your-say-new-voice-platform-2022-06-13_en (last accessed on 20 March 2025).

on an issue that falls within the European Union's fields of activity[18]. The Maastricht Treaty also established the European Ombudsman, tasked with promoting good administration and investigating citizens' complaints regarding the actions of all EU institutions and bodies. Over its thirty years of existence, the European Ombudsman has played a key role in shaping the EU's supranational democracy by giving voice to EU citizens and civil society actors[19].

Finally, since the Lisbon Treaty, the right to submit a European Citizens' Initiative (ECI) is enshrined under Title II of the TEU (provisions on democratic principles). Presented as an ambitious empowerment mechanism for EU citizens, allowing them to suggest legislative proposals at the EU level, the initial promise of ECIs has not yet been held. Since its inception in 2012, only ten ECIs campaigns out of more than a hundred were validly registered after having collected the one million necessary signatures to trigger a response to the Commission[20]. Yet, none of the successful ECIs was eventually transformed into a legislative proposal fully capturing the campaigns' demands. However, when examined closely, the most successful ECIs are often connected to voicelessness. The issues triggering the launch or an ECI are for instance a call for an EU-wide ban on glyphosate-based herbicides, a campaign to protect life from the point of conception, a ban on animal testing, a ban on cosmetics tests on animals. Plants, animals or embryos are all non-citizens or non-human beings unable to have a voice for themselves.

Parallel to the growing investment of the theme of "giving a voice to" by political institutions, an increasing number of academic studies also focused on the issue of voicelessness. In recent years, researchers coming from different disciplinary backgrounds such as law, political science, political sociology or political philosophy have explored the many dimensions and implications of this phenomenon. These scholars have underlined the need for identifying and understanding its

[18] Articles 20, 24 and 227 of the Treaty on the Functioning of the European Union (TFEU); Article 44 of the Charter of Fundamental Rights of the European Union.

[19] D. Curtin, T. Ehnert, Tanja, A. Morandini and S. Tas (eds.), *The European Ombudsman Investigated. From Old Battles to New Challenges* (Hart, 2025).

[20] "Are European Citizens Initiatives worth the effort?", *The Good Lobby*, 10 April 2024, URL: https://www.thegoodlobby.eu/are-european-citizens-initiatives-worth-the-effort/ (last accessed on 22 March 2025).

manifestations across different social settings, political contexts, and relational dynamics. In a way, this book also aims to meet this need.

1.3. Voicelessness: a new research agenda

We have identified at least four bodies of literature that form the conceptual background of this volume. These four strands do not constitute a unified theoretical framework, but they were discussed with the authors to help them to enrich their analysis on the concepts of voicelessness and unmuting. They served as sources of inspiration.

Firstly, contemporary theories of justice and of democracy highlight how modern democracies have failed to protect the rights of the most vulnerable. Despite their significant differences, the works of Charles Taylor[21] and Axel Honneth's on recognition[22], Joan Tronto's on care[23] or Catherine Colliot-Thélène's on "democracy without *demos*[24]" share the same premise: in advanced capitalist societies, justice and democracy cannot be achieved solely through formal equality and procedural representation. Justice and democracy require special attention to the voiceless, whether through recognition practices, care policies, or regimes of rights. The work of Taylor and Honneth on the politics of recognition has generated the most extensive literature, focusing on the relationship between freedom and intersubjectivity. Building on their insight, researchers have developed numerous empirical studies on topics such as multiculturalism, language policies, indigenous rights, LGBTQI+ rights, racism or homelessness[25].

Theories of radical democracy and Marxist-inspired critiques of democracy also focus on the "*sans-parts*" – those excluded from political representation – though they reach different conclusions. For Jacques Rancière, the "*sans-parts*" are voiceless not because they are

21 C. Taylor, "The politics of recognition", in Gutmann (ed.), *Multiculturalism: Examining the Politics of recognition* (Princeton University Press, 1994), p. 24-73.

22 A. Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (MIT Press, 1996).

23 J. C. Tronto, *Caring Democracy: Markets, Equality, and Justice* (New York University Press, 2013).

24 C. Colliot-Thélène, *La démocratie sans* "*demos*" (Presses Universitaire de France, 2011).

25 P. Markell, "Recognition and redistribution", in Dryzek, Hong and Philips (eds.), *The Oxford Handbook of Political Theory* (Oxford University Press, 2008), p. 450-469.

incapable of speaking for themselves, but because their voices are rendered inaudible by division between those who are legitimized to express themselves and those whose voice, status, visibility and right to be heard are denied[26]. However, in Rancière's view, the *sans-parts* are not mere "victims". The "*sans-parts*" are distinct from the "dominated", who are essentially defined by their social and legal status and the existence of their opposite, the dominant. Rather than being the victims of the system, they challenge power relations by rejecting their assigned status. They come to life in their fight for emancipation, in a desire to overturn the rules of redistribution in the name of equality. This raises a crucial question: what are the effective channels for marginalized communities to voice their grievances?

Secondly, in a different perspective, scholars have examined the role of autonomous institutions in defending the rights of the voiceless, the common good, or broader public interests. In *Regulating Europe*, Giandomenico Majone explores why European regulatory mechanisms developed, arguing that Member States delegated regulatory powers to the European Commission to distance themselves from unpopular actions. He also shows that the Commission is seen by market actors as a more credible regulator, being more distant from vested interests than governments[27]. Similarly, Coen[28] or Thatcher and Stone Sweet[29] analyze the delegation of powers from governments directly elected by citizens to "non-majoritarian institutions" (NMIs) – bodies neither directly elected nor directly managed by elected politicians. These studies highlight that the delegation to the NMIs is centered on the idea that the outcomes that these unelected bodies are expected to deliver are better than the outcomes to be expected from elected institutions. These outcomes include, for example, providing credible long-term commitments, enhancing the efficiency of policymaking, and better dealing with highly technical areas[30].

[26] J. Rancière, *Aux bords du politique* (Gallimard, Folio, 2004).

[27] G. Majone, *Regulating Europe* (Routledge, 1996).

[28] D. Coen, M. Thatcher, "The New Governance of Markets and Non-Majoritarian Regulators", *Governance*, vol. 18, n°3 (2005), p. 329-346.

[29] M. Thatcher, A. Stone Sweet, "Theory and Practice of Delegation to Non-Majoritarian Institutions", *West European Politics*, vol. 25, n°1 (2002), p. 1-22.

[30] B. Levy, P. T. Spiller, "The Institutional Foundations of Regulatory Commitment: A Comparative Analysis of Telecommunications Regulation", *The Journal of Law, Economics, and Organization*, vol. 10, n°2 (1994), p. 201-246.

Political scientists and lawyers have discussed at length the added value, as well as the limitations, of these regulatory mechanisms and non-majoritarian institutions. Critics, including François and Vauchez, warned that the logic of "political independence" can itself become a technology of power, raising concerns about accountability and legitimacy[31]. Numerous single-case studies also analyzed the role of bodies and institutions such as courts[32], central banks[33] or independent administrative authorities such as the European Commission or European Agencies[34] in safeguarding minority rights[35], protecting the environment[36] or protecting migrants fundamental rights[37]. These studies have underlined the potential contribution of the non-majoritarian institutions to protect the voiceless. However, they have also stressed that because NMIs have increasingly taken political decisions with distributive effects creating both winners and losers, there is a necessity to keep them in check. Against this background, Thatcher, Stone Sweet and Rangoni recently showed how "far from having resolved the balance between political control and governing competence or removed certain issues from political debate, NMIs have faced challenges to their legitimacy by

[31] B. François, A. Vauchez (dir.), *Politique de l'indépendance. Formes et usages d'une technologie de gouvernement* (Presse universitaires du Septentrion, 2020) ; A. Vauchez, "Statesmen of Independence: The International Fabric of Europe's Way of Political Legitimacy", *Contemporary European History*, vol. 27, n°2 (2018), p. 183-201.

[32] A. Bickel, *The Least Dangerous Branch* (Yale University Press, 1962).

[33] K. McNamara, "Rational Fictions: Central Bank Independence and the Social Logic of Delegation", *West European Politics*, vol. 25, n°1 (2002), p. 47-76.

[34] M. Thatcher, "Delegation to Independent Regulatory Agencies: Pressures, Functions and Contextual Mediation", *West European Politics*, vol. 25 n°1 (2002), p. 125-147; M. Egeberg, J. Trondal, "Researching European Union Agencies: What Have We Learnt (and Where Do We Go from Here)?", *Journal of Common Market Studies*, vol. 55, n°4 (2017), p. 675-690.

[35] E. Thielemann, N. Zaun, "Escaping Populism: Safeguarding Minority Rights: Non-majoritarian Dynamics in European Policy-making", *Journal of Common market Studies*, vol. 56, n°4 (2018), p. 906-922.

[36] H. Schoukens, F. Bouquelle (eds.), *The Right to a Healthy Environment in and Beyond the Anthropocene: a European Perspective* (Edward Elgar Publishing, 2024).

[37] M. Mouzourakis, C. Costello, "Effective judicial protection of migrants and refugees? The role of Europe's supranational courts in protecting and generating rights" in Tsourdi and de Bruycker (eds.), *Research Handbook on EU Migration and Asylum Law* (Edward Elgar Publishing, 2022), p. 79-97.

elected officials and sometimes attempts to reverse delegation through 'de-delegation'"[38].

Thirdly, the analysis of the EU's alleged "legitimacy deficit" has been extensively studied in political science, political theory and law over the last thirty years. The scholarship on the legitimacy deficit implicitly raises the question of the place of the voiceless in the European integration process. As in the literature on regulatory powers and NMIs, one can find in this literature a focus on the role of non-directly elected institutions, the lack of a European *demos*, or the "absence of a unified public sphere[39]" as usual lines of argument that fuel the charge of an "undemocratic" Europe[40]. These critiques have prompted certain scholars to think afresh about the conditions of democratic legitimacy beyond the State. For instance, Habermas, Ferry and Lacroix explored the potential of post-national theories of democracy[41] while others have conceptualized alternative forms of legitimacy not only focused on democratic inputs[42].

The concept of output legitimacy, developed by Fritz Scharpf in the late nineties, is directly linked to the capacity of the EU to produce public policies which protect the interests of actors who are neglected at other levels of governance[43]. In *Governing Europe*, Scharpf makes his famous distinction between *output legitimacy*, where political choices are legitimized because they effectively promote the collective well-being of the community (government *for* the people), and *input legitimacy*,

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38 M. Thatcher, A. Stone Sweet and B. Rangoni, "Reversing delegation? Politicization, de-delegation, and non-majoritarian institutions", *Governance*, vol. 36, n°1 (2023), p. 5-22.

39 J. DeBardeleben, A. Hurrelmann, "Introduction" in DeBardeleben and Hurrelmann (eds.), *Democratic Dilemmas of Multilevel Governance: Legitimacy, Representation and Accountability in the European Union* (Palgrave Macmillan, 2007), p. 6.

40 S. Hix, *What's Wrong with the European Union and How to Fix It* (Polity Press, 2008).

41 J. Habermas, *Après l'État-nation : Une nouvelle constellation politique* (Fayard, 2000) ; J.-M. Ferry, *La question de l'État européen* (Gallimard, 2000) ; J. Lacroix, "For a European Constitutional Patriotism", *Political Studies*, vol. 50, n°5 (2002), p. 944-958.

42 G. Majone, "Europe's 'Democratic Deficit': The Question of Standards", *European Law Journal*, vol. 4, n°1 (1998), p. 5-28; G.A. Martinez, "Philosophical Considerations and the Use of Narrative in Law", *Rutgers Law Journal*, vol. 30 (1999), p. 683-706; A. Moravcsik, "In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union, *Journal of Common Market Studies*, vol. 40, n°4 (2002), p. 603-624.

43 F. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press, 1999).

which assumes that political choices are legitimized because they derive from the "will of the people", i.e. from preferences expressed by the community through elections (government *by* the people). He shows that while the EU still has limited channels for direct participation and representation of individual citizens, it has better ability to produce policy outcomes that meet the interest of the community. This capacity to provide solutions to common problems is, however, counterbalanced by reduced accountability on the input side. There is a trade-off "in which core values of democratic government are traded for accommodation, consensus, and the purported increased efficiency in governance[44]".

Fourthly, the issue of the voiceless and their representation has been widely addressed in the literature on mobilization, collective action and social movements. Sociologists generally seek to explain why social mobilization occurs, or the forms under which it manifests. As mentioned above, they analyze the potential social, cultural, political, and economic variables explaining the existence or the absence of social movements, as well as the reasons behind their success or failure. This body of literature is particularly large and presenting it would exceed the perimeter of this introduction. However, narrowing down the focus to EU Studies, one can say that, after a long-lasting eclipse, sociology has finally made a "return" in EU Studies[45]. For more than twenty years now, sociologists have developed new EU-oriented research agendas inspired by different sociological traditions[46]. They have, among other things, focused on the social bases of political integration. Fligstein has notably explored the emergence of a "transnational-European-society" and its relationship to the creation of a European identity. He pointed out that the "Euroclash" – the political conflict around European integration – can be explained by the question [47]who is and who is not involved in European society.

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[44] G. Peters, H. Pierre, "Multi-level Governance and Democracy: A Faustian Bargain?", in Bache and Flinders (eds.), *Multi-level Governance* (Oxford University Press, 2004), p. 75-89.

[45] A. Favell, V. Guiraudon, *Sociology of the European Union* (Palgrave MacMillan, 2011), p. 1-24.

[46] C. Bonnamy, H. Canihac, "Sociology and the European Union", in Faure and Lequesne (eds.), *The Elgar Companion to the European Union* (Edward Elgar Publishing, 2023), p. 93-107.

[47] N. Fligstein, *Euroclash. The EU, European Identity, and the Future of Europe* (Oxford University Press, 2009).

Drawing on sociological literature on social mobilization, other researchers have analyzed the role and place of public interest groups and of NGOs in carrying the voice of the voiceless. This scholarship connects with the one on transnational mobilization capacities of the so-called "weak" actors at the European level[48]. To name a few, Jacquot and Vitale have examined the legal mobilization of transnational interest groups at the European level, focusing on the cases of the European Women's Lobby (EWL) and the European Roma and Travellers Forum (ERTF)[49]. Kohler-Koch has analyzed how the emergence of a European polity has contributed to the transformation of the interest representation of weak actors in Europe by giving rise to new coalitions between the European Parliament and environmental or human rights groups[50]. Finally, Guiraudon has analyzed transnational mobilization around migration. Often, the question addressed by these studies relates to the impact of the "EU level" on the structure of political opportunities for representatives of voiceless interests.

Adopting a different perspective, other researchers question the singularity of the European level compared with the national or local one. Van Ingelgom points out a widely shared but socially differentiated indifference towards the EU which should be taken seriously[51]. For Delmotte, Mercenier and Van Ingelgom, this enduring Euro-indifference or apathy is linked to a weak sense of belonging to the EU on the part of its citizens[52] and, even more so, to a profound feeling of political powerlessness. Such a feeling is particularly felt regarding the European political level, even by those who could theoretically make their voices

[48] V. Guiraudon, "Weak Weapons of the Weak? Transnational Mobilization around Migration in the European Union", in Imig and Tarrow (eds.), *Contentious Europeans* (Rowman & Littlefield, 2001), p. 163-186.

[49] S. Jacquot, T. Vitale, "Law as weapon of the weak? A comparative analysis of legal mobilization by Roma and women's groups at the European level", *Journal of European Public Policy*, vol. 21, n°4 (2004), p. 587-604.

[50] B. Kohler-Koch, "Organized Interests in the EC and the European Parliament", *EIoP*, vol. 1, n°9 (1997), URL: http://eiop.or.at/eiop/texte/1997-009a.htm.

[51] V. Van Ingelgom, "When Ambivalence Meets Indifference", in Duchesne, Frazer, Haegel and Van Ingelgom (eds.) *Overlooking Europe. Citizens' Reactions to European Integration Compared* (Palgrave MacMillan, 2013), p. 96-123.

[52] F. Delmotte, "La légitimité de l'Union européenne, une affaire de bons sentiments?", *Revue Internationale de Politique Comparée*, vol. 15, n°4 (2008), p. 541-554.

heard[53]. One may derive from their analysis that indifference or apathy towards European integration reduces interactions between citizens and European institutions, as well as the inclination or ability of some individuals to voice concerns at the EU level.

These four bodies of relevant literature are just a few conceptual avenues for studying voicelessness. However, these four bodies make up the substantive background of the research undertaken in the framework of the "Un-Muting Europe" Jean Monnet Centre of Excellence.

2. Structure of the book

Structured into four thematic parts, this volume examines various domains where the EU seeks – sometimes successfully, sometimes not – to bring forward voices and interests that have been historically overlooked. These domains range from environmental protection to democracy and the rule of law, human rights in the digital age, and migration and asylum policies.

The first part delves into the unmuting process in environmental matters, featuring four contributions. Norman Vander Putten explores the EU's ability to unmute environmental concerns and future generations' interests through the adoption of taxonomy rules that classify economic activities based on their environmental sustainability. While initially designed as a market tool to provide reliable information for financial actors, he argues that the taxonomy unexpectedly influences public authorities' governance strategies, particularly regarding environmental spending, thereby "unmuting" the environment. Tom Buytaert examines whether the EU's competition policy can contribute to unmuting environmental concerns by broadening the notion of a "fair share to consumers" under Article 101 TFEU when assessing sustainable cooperation initiatives. Arnaud Gane's chapter explores the tensions between conservation goals and socio-economic interests in European wildlife policy, using the reclassification of the wolf and the *Vercors Vie Sauvage* rewilding project as case studies. It argues that while rewilding offers a de-anthropocentric approach, it risks marginalizing the voice of rural communities, calling for more inclusive policies that

53 F. Delmotte, H. Mercenier, V. Van Ingelgom, "Belonging and Indifference to Europe: A Study of Young People in Brussels", *Historical Social Research*, vol.42 (2017), p. 227-249.

balance ecological restoration with traditional agriculture. Amanda Kron focuses on the protection of environmental defenders, analyzing how this issue is addressed by UN and EU human rights mechanisms and the potential conflicts that may arise with the European Green Deal. She specifically questions whether the Taxonomy Regulation and the Corporate Sustainability Due Diligence Directive can play a role in unmuting power dynamics and strengthening environmental defenders' rights within the EU framework.

The second part addresses the protection of the EU's foundational values, particularly democracy and the rule of law, in the face of rising autocratic tendencies in Europe. Anita Kovacs investigates electoral distortions in Hungary, where Hungarian nationals living abroad can acquire citizenship without residency or proof of descent – an approach reminiscent of the Maltese "golden passport" cases. She argues that this strategy, "unmuting" Hungarians beyond the borders, actually reinforces the Fidesz party's electorate. However, the EU's ability to counteract this distortion is constrained, as citizenship policies fall under the exclusive competence of individual Member States. Timothée Ceurremans and Elisabeth Davis further explore the EU's capacity to safeguard democracy within its Member States, focusing on Article 10(3) TEU. They analyze whether strategic legal mobilization and transformative constitutionalism can help citizens reinforce their democratic rights and uphold the EU's core values.

The third part shifts the focus to inclusion, human rights protection, and the fight against discrimination in the digital era. Tiphaine Maloigne examines patients' digital rights in the European e-health space, particularly in the context of sensitive health data. She shows how the European patient is gradually regaining a voice, influencing digital health policies and securing stronger protection of their rights in the digital environment. Valentina Golunova explores the phenomenon of gendered disinformation in Europe, questioning whether the EU's emerging anti-disinformation framework adequately addresses gender-based threats. She argues that explicitly recognizing gendered disinformation and implementing targeted countermeasures are essential steps toward unmuting the voices of those affected and reinforcing the EU's commitment to democracy and fair public discourse. Stevie Kitsou's chapter examines the EU's regulatory framework on hate speech, assessing its effectiveness in protecting marginalized groups while upholding fundamental values like human dignity, democracy, and equality. It explores the alignment of EU measures with broader European human rights standards and considers potential improvements for more comprehensive and equal protection.

The final part of this book is dedicated to migration and asylum policies, featuring two chapters. Zoé Briard examines planned relocation in the context of climate change and natural disasters. As these relocations become more frequent, she highlights that affected individuals often remain "muted" in the decision-making process. She questions whether EU law provides solutions to ensure their voices are heard, concluding that while EU human rights law may not be the most effective tool, the Water Framework Directive and the European Flood Directive offer promising perspectives. Caroline Leclercq, in turn, focuses on resettlement as a key solution proposed by the New Pact on Migration and Asylum. Resettlement involves transferring refugees from a host country – where they have been granted asylum but remain in precarious conditions – to another country offering permanent residency. She critically assesses whether the new regulatory framework improves refugees' ability to voice their concerns during the selection process and enhances the protection of their fundamental rights, particularly through the EU Charter of Fundamental Rights.

By bringing together these diverse and emerging voices, this book sheds light on the multiple ways in which the EU attempts to unmute voiceless actors. Whether in environmental policy, democratic governance, digital rights, or migration, it examines the successes, limitations, and challenges of making all voices heard and accounted for in the European legal and political landscape.

Defining the green to make environmental concerns heard in the EU? The legal consequences of the (unexpected) uses of the taxonomy

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Abstract: The European Union (EU) has recently adopted different legislative acts that classify economic activities as being environmentally sustainable or not. Implicitly, they aim at making visible elements that are deeply linked to intergenerational justice and future generations' interests. They may contribute not only to relevant environmental policy-making, but also to unmute NGOs or interested citizens, as those actors may rely on environmental categories to hold public authorities or private companies to account in political and judicial arenas in a seemingly objective manner. A prominent example of such acts is Regulation 2020/852 establishing a taxonomy for sustainable investments. While the taxonomy has been understood as a market tool that would help ensuring that financial actors have trustworthy information, this chapter highlights that it serves to frame not only private actors' decisions, but also, less expectedly, public authority's rising (environmental) governance through spending, which increasingly dwells on the European taxonomy to allow future generations' interests to be (allegedly) considered. This has a decisive impact on both the legitimacy and legal validity of using delegated acts to define the content of the taxonomy, considering that delegations must, under EU law, only cover non-essential aspects of an area. This chapter therefore argues that efforts to amplify future generations' interests through taxonomies are, to some extent, being pursued at the cost of the greater democratic legitimacy that should have accompanied regulation through standard legislative acts.

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Introduction

The European Union (EU) has recently adopted different legislative acts that, either primarily or incidentally, classify economic activities as being environmentally sustainable or not. Implicitly, they aim at visibilizing elements that are deeply linked to intergenerational justice and the interests of future generations. They may therefore contribute not only to relevant environmental policy-making, but also to unmuting NGOs or interested citizens, in that the latter may rely on environmental categories to hold public authorities or private companies accountable for their (non-)compliance with EU law, or more generally for their level of support for environmental protection in a seemingly objective manner.

A prominent example of such acts is Regulation 2020/852 establishing a taxonomy for sustainable investments (hereafter the "Taxonomy Regulation")[1] that is interrelated with many corporate sustainability reporting duties derived from other pieces of EU legislation. Other less well-known examples include (i) the Recovery and Resilience Facility (hereafter the "RRF") Regulation[2] with its green tagging mechanism, (ii) the Green Bonds Regulation with its identification of activities that may be financed under that framework[3] and, less recently, (iii) the successive Common Agricultural Policy regulations with their environmental conditionalities and eco-schemes tied to EU funds. This environmental taxonomy turn is accompanied by the provision of guidance incentivising Member States to generate their own green classifications, such as the green budgeting initiative. On top of this, at national levels, many Members States are greening their export or growth grants to companies[4], which necessitates defining environmentally virtuous practices that qualify for subsidies.

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[1] Regulation 2020/852 on the establishment of a framework to facilitate sustainable investment, *O.J.* 2020, L 198/13.

[2] Regulation 2021/241 establishing the Recovery and Resilience Facility, *O.J.* 2021, L 57/17. On environmental mainstreaming in EU funds more generally, see Z. Darvas and K. Sekut, "Greening the EU budget: why climate mainstreaming needs reform", *Bruegel Analysis* (2025).

[3] Regulation 2023/2631 on European Green Bonds and optional disclosures for bonds marketed as environmentally sustainable and for sustainability-linked bonds, *O.J.* 2023, L 30.11.2023.

[4] M. Mazzucato and D. Rodrik, "Industrial Policy with Conditionalities", *Working Paper – Institute for Innovation and Public Purpose* (2023).

These instruments vary in precision and scope. Yet, they are all creating an environmental taxonomy of socio-economic activities. Within the remaining of this chapter, an environmental taxonomy may be defined as a classification of socio-economic activities based on their environmental (positive or negative) impact with a certain systematicity. Although taxonomizing efforts are often presented as science-based technical endeavours, many authors have shown that they inevitably entail a great part of socially constructed choices that may, consciously or unconsciously, be politically motivated[5]. This is particularly true for environmental objectives. In Cahen-Fouro and Monserand's words: "whether or not a given investment is green depends very much on the socio-economic context in which it takes place. For example, an electric car may be a green investment if it replaces one or more internal combustion cars. It is not if it replaces public transport or cycling"[6]. It may therefore be argued that a sufficient democratic legitimacy should underpin those choices.

For policy-makers, taxonomies are a way to "see like a State"[7]: they allow to render facts legible for the legal order, which in turn enables a precise, granular action on politically relevant situations. Legal systems have therefore progressively adopted taxonomies in legal acts over the years both as a signal to anchor scientific and/or political discussions in long-term democratically legitimate instruments, and to provide legal certainty and trust to the categories that have been developed[8].

This is the case in the European legal system. The European Systems of Accounts Regulation dictates what constitutes an economic activity or not and creates rules to classify debt as being public or private, or classify spending as being an investment or consumption, for instance[9].

[5] A. Desrosières, *Prouver et Gouverner. Une Analyse Politique Des Statistiques Publiques* (La Découverte, 2014) ; S. Müller-Wille, I. Charmantier, "Lists as Research Technologies", *Isis* (2012), p. 743-752.

[6] L. Cahen-Fourot and A. Monserand, "La macroéconomie de la post-croissance", *L'Économie politique* (2023), p. 20, translation is ours.

[7] J. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press, 1999).

[8] See N. Vander Putten, *Indicateurs institutionnels et gouvernance par les nombres. Repenser l'au-delà du PIB par le droit de la quantification* (Presses universitaires Saint-Louis, 2024), part III, Chapter 1.

[9] Regulation 549/2013 on the European system of national and regional accounts in the European Union, *O.J.* 2013, L 174/1.

Similarly, the classification of products by activity (CPA) codes defines product categories, the statistical classification of economic activities (NACE for *nomenclature statistique des ativités économiques*) delineates different types of economic activities, and the Nomenclature of Territorial Units for Statistics (NUTS) codes set a common language to determine the level of a sub-state entity[10]. To a certain extent, it may be argued that by their very nature, legal rules inevitably rely on scope of applications, conditions, thresholds and ceilings, which require sufficiently authoritative components comprising, among other things, pre-established categories and definitions. In short, the creation of taxonomies is the indispensable complement to relevant policy making.

The institutionalisation of taxonomies is progressively reaching the realm of environmental matters. Most notably, with the rise of (binding) climate commitments, targets and projections, the methodologies to generate inventories of greenhouse gas emissions (GHGs) are increasingly controlled and harmonised: questions such as how to make GHGs with different warming potential and lifespans commensurate, and how to account for carbon capture and utilisation (CCU) and carbon capture and storage (CCS) have recently been regulated by EU institutions[11]. Beyond enhancing precision in environmental regulation, these categories also serve as tools that NGOs and citizens can appropriate to demand compliance with environmental legislation or advocate for stronger environmental protections[12].

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[10] Regulation 451/2008 establishing a new statistical classification of products by activity (CPA), *O.J.* 2008, L 145/65 ; Regulation 1893/2006 establishing the statistical classification of economic activities NACE, *O.J.* 2006, L 393/1 ; Regulation 1059/2003 on the establishment of a common classification of territorial units for statistics, O.J. 2003, L 154/1.

[11] See L. Yona, B. Cashore and M. Bradford, "Factors Influencing the Development and Implementation of National Greenhouse Gas Inventory Methodologies", *Policy Design and Practice* (2022), p. 197-225 ; M. Petel, N. Vander Putten, "Vers une bataille de chiffres institutionnels dans les procès climatiques ? Analyse critique à l'aune de l'affaire Klimaatzaak", in Cournil (dir.), *Expertises et argumentaires juridiques. Contribution à l'étude des procès climatiques* (DICE editions, 2024), p. 151-172 ; K. Talus, R. Maddahi, "Carbon Capture and Utilization under EU Law: Impermanent Storage of CO2 in Products and Pre-Combustion Carbon Capture", *The Journal of World Energy Law & Business* (2024), p. 1-14.

[12] On activism with official statistics, see for instance E. Didier, "Globalization of Quantitative Policing: Between Management and Statactivism", *Annual Review of Sociology*, vol. 44 (2018), p. 515–534.

In this context, this chapter aims at examining the recent endeavours to taxonomise economic activities as being environmentally contributive or detrimental. It argues that while the Taxonomy Regulation has been understood as a market tool that would help ensuring that financial actors have trustworthy information, this is only the tip of the iceberg. Environmental taxonomies – of which *the* EU taxonomy (referred to as *the* taxonomy below) is progressively becoming the cornerstone – are also used directly by the EU to intervene in the economy in a more selective manner to advance an environmental agenda through funding. In other words, this chapter does not purport to offer a detailed presentation of the Taxonomy Regulation's legal and political intricacies[13], nor does it intend to evaluate its contested environmental adequacy or transformational potential[14]. It rather highlights how these taxonomising efforts serve to frame not only private actors' decisions, but also, less expectedly, public authority's rising (environmental) governance through spending, which increasingly dwells on *the* taxonomy to allow future generations' interests to be allegedly considered[15].

This has, in turn, important legal and democratic consequences. Legally, as in European law delegated acts may only cover "non-essential" aspects of an area, the legal validity of the reliance upon them to define the content of *the* taxonomy should be re-assessed. Democratically, this chapter argues that efforts to amplify future generations' interests through taxonomies are, to some extent, currently being pursued at the cost of the greater democratic legitimacy that should have accompanied classification endeavours through standard legislative acts. While, admittedly, the number of academic publications on the EU green taxonomy is rapidly multiplying, much less attention is paid to its uses by public authorities[16].

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[13] See for instance S. Eckert, "Business and private finance: their role in the EU's climate transition", in Rayner *et al.* (eds.), *Handbook on European Union Climate Change Policy and Politics* (Edward Elgar, 2023), p. 83-97.

[14] C.-A. Papari *et al.*, "Can the EU taxonomy for sustainable activities help upscale investments into urban nature-based solutions?", *Environmental Science & Policy* (2024), p. 1-16.

[15] On governance through spending in the EU more generally, see C. Kilpatrick, J. Scott (eds.), *New Frontiers of EU Funding: Law, Policy, Politics* (Oxford University Press, 2024).

[16] P. Tettamanzi, R. Gotti Tedeschi and M. Murgolo, "The European Union (EU) green taxonomy: codifying sustainability to provide certainty to the markets", *Environment, Development and Sustainability* (2024), p. 27129-27130.

The remainder of this chapter is structured as follows. Section 1 presents the main instruments referred to in this introduction containing environmental taxonomies: the Taxonomy Regulation, the RRF Regulation, the Green Bonds Regulation as well as the Green Budgeting Framework. Section 2 then argues that these instruments highlight relatively unexpected uses of taxonomies in general, and of *the* taxonomy, in particular: The latter is progressively becoming the essential component of a rising (supposedly) green selective industrial policy, which has legal implications on the admissibility of the technique of delegated acts. By doing so, this chapter adopts a "law in context" approach, first outlining the applicable legal framework doctrinally, and then evaluating it not only through legal principles but also in relation to its historical emergence and political significance[17]. The chapter furthermore fully endorses the methodological view according to which legal systems are not "external" to "the economy", but are constitutive of it, also through the establishment of seemingly descriptive components of public economic action[18].

1. Taxonomising the contribution or harm to environmental protection in the European Union

There are currently at least 33 green taxonomies that have been published or that are being developed worldwide, mainly originating from the work of States or international organisations[19]. Among them, the European taxonomy established by the Taxonomy Regulation, which is briefly described below, is arguably one of the most influential (1.1)[20]. Next to this, other EU instruments have had the same implicit effect of creating partly overlapping taxonomies, which rely to a great extent on *the*

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[17] S. Taekema, W. van der Burg, *Contextualising Legal Research* (Edward Elgar, 2024), Chapter 5.

[18] S. Eriksson, "The Centrality of Law for EU Sustainable Finance Markets: Outlining a Research Agenda", *Review of European, Comparative & International Environmental Law* (2024), p. 57-69, at p. 58.

[19] O. Azoulay, C. Merle and L. de Souza, *The New Geography of Taxonomies. A Global Standard-Setting Race* (Natixis, 2023), p. 4 and 9.

[20] O. Azoulay, C. Merle and L. de Souza, *op. cit.*, p. 11. The authors note that "Several Taxonomies are based (or being inspired) on the EU taxonomy such as ISO 14030 or the UK & South Africa's Taxonomies under development" (at p. 33).

taxonomy: the RRF Regulation, the Green Bonds Regulation and the Green budgeting initiative (1.2)[21].

1.1. The Taxonomy Regulation unpacked

In 2020, the EU adopted the aforementioned Regulation 2020/852 on the establishment of a framework to facilitate sustainable investment. This regulation defines what sustainable economic activities are "for the purposes of establishing the degree to which an investment is environmentally sustainable" (Article 1(1)). Under Article 3, an activity is considered to be sustainable ("taxonomy aligned") if four conditions are met.

First, it needs to contribute substantially to one of the following six environmental objectives: (i) climate change mitigation, (ii) climate change adaptation, (iii) sustainable use and protection of water and marine resources, (iv) transition to a circular economy, (v) pollution prevention and (vi) control and protection and restoration of biodiversity and ecosystems. Those environmental objectives are defined with a few lines in the regulation[22]. Climate change mitigation is the only objective that is defined through a hard target: It refers to "the process of holding the increase in the global average temperature to well below 2 °C and pursuing efforts to limit it to 1,5 °C above pre-industrial levels, as laid down in the Paris Agreement" (Article 2 (5)). It may entail measures linked to renewable energy, energy efficiency, climate neutral mobility and carbon capture and utilisation (CCU) or storage (CCS) with net reduction in GHGs under Article 10. So-called "transitional activities" and activities that directly "enable" substantially contributing activities may also be included under certain conditions (see Article 16 and 10 (2)).

Second, the activity as well as the products and services provided must not significantly harm one of the previously mentioned six environmental objectives. The regulation explicits what the "do no significant harm" (DNSH) principle implies regarding each of the six objectives (Article 17).

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21 Classifications such as those used for sectoral instruments (such as the common agricultural policy or LIFE funds) or for banking macro or micro-prudential tools (which focuses on environmental *risks* rather than environmental contributions) are excluded from the analysis.

22 See, for instance, Article 2 (5)(6) and (9) of Regulation 2020/852.

Third, minimum (social) human rights safeguards should be guaranteed through the implementation by the relevant financial actor of a procedure ensuring the alignment with the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights (Article 18 of the Taxonomy Regulation).

Fourth, the activity must comply with technical screening criteria. This condition may be understood as a sub-condition of the first and second ones exposed above: the regulation tasks the Commission to "supplement" with delegated acts the "substantial contribution" condition as well as the DNSH principle for each of the six environmental objectives (Article 19). The Taxonomy Regulation establishes minimal requirements for these delegated acts: the technical screening criteria should be quantitative "to the extent possible", "cover all relevant economic activities within a specific sector", "be based on conclusive scientific evidence and the precautionary principle" and be adopted after consultation of a Member State expert group, for instance (Articles 19 and 23). The Commission also relies for this task on the advice of a body of experts coming from EU institutions, private stakeholders, civil society and academia, i.e. the Platform on Sustainable Finance (Article 20).

To date, three main delegated acts have been adopted. The first delegated act adopted in June 2021[23] details the screening criteria related to climate change adaptation and mitigation in sectors such as energy, forestry, human health, chemicals, and waste. Annexes I and II of the climate delegated act determine the criteria to classify an economic activity as contributing substantially to climate mitigation (Annex I) and adaptation (Annex II) while complying with the DNSH principle[24]. A second delegated act amending the climate delegated act was infamously adopted in March 2022 to include, under certain conditions, nuclear

[23] Commission Delegated Regulation 2021/2139 supplementing Regulation (EU) 2020/852 by establishing the technical screening criteria for determining the conditions under which an economic activity qualifies as contributing substantially to climate change mitigation or climate change adaptation and for determining whether that economic activity causes no significant harm to any of the other environmental objectives, *O.J.* 2021, L 442/1.

[24] For an overview of the climate delegated act's content, see C. Gortsos and D. Kyriazis, "The Taxonomy Regulation and Its Implementation", in Busch, Ferrarini and Grünewald (Eds.), *Sustainable Finance in Europe: Corporate Governance, Financial Stability and Financial Markets* (Springer International Publishing, 2024), p. 505-561, at p. 538.

energy and natural gas as "transitional technologies"[25]. This shows how the adoption of those delegated acts, which may at first sight look technical and politically neutral, may be environmentally decisive and heavily contested[26]. A third delegated act containing the technical screening criteria relating to the four remaining (non-climate) criteria was adopted in June 2023[27].

In general, these technical screening criteria are based either on the *nature* of the technology being used (*e.g.* manufacturing renewable *versus* coal-based energy technologies), on the *environmental performance* of the activity (*e.g.* renewing a water supply system leading to at least 20% improvement in energy consumption) or on the *compliance with certain pre-existing norms or standards* (*e.g.* operating vehicles that are compliant with the EURO VI standard)[28]. Because of the length and of the complexity of these delegated acts – the Climate Delegate Act alone is 349-page long[29] – the Commission published in June 2023 a 56-page long user guide to "navigate the EU taxonomy for sustainable activities"[30].

[25] See Commission Delegated Regulation 2022/1214 amending Delegated Regulation (EU) 2021/2139 as regards economic activities in certain energy sectors and Delegated Regulation (EU) 2021/2178 as regards specific public disclosures for those economic activities, *O.J.* 2022, L 188/1. See also the Commission Delegated Regulation 2023/2485, *O.J.* 2023, L 21.11.2023, which amends marginally the Climate Delegated Act). Some of these acts are legally contested, see below, section II, B.

[26] On the political causes and consequences of this, see C. Fontan "The EU Taxonomy as a battleground: Puzzling, powering and institutionnal trajectory, draft manuscript" (forthcoming, 2025), noting that some members of the Platform on Sustainable Finance wrote an open letter to complain about this inclusion and resigned.

[27] Commission Delegated Regulation 2023/2486 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by establishing the technical screening criteria for determining the conditions under which an economic activity qualifies as contributing substantially to the sustainable use and protection of water and marine resources, to the transition to a circular economy, to pollution prevention and control, or to the protection and restoration of biodiversity and ecosystems and for determining whether that economic activity causes no significant harm to any of the other environmental objectives, *O.J.* 2023, L 21.11.2023.

[28] O. Azoulay, C. Merle and L. de Souza, *op. cit.*, p. 17-18.

[29] On the complexity of the taxonomy, see S. Kooths, "EU Taxonomy: Mission Impossible", *The Economists' Voice* (2022), p. 243-249, at p. 244.

[30] European Commission, *A User Guide to Navigate the EU Taxonomy for Sustainable activities* (European Commission, 2023).

1.2. Incidental taxonomies in the Recovery and Resilience Facility, the Green Bonds Regulation and the Green Budgeting Framework

Next to the Taxonomy Regulation, which has as main aim to set a classification of economic activities, other EU instruments create *incidental* taxonomies: they classify economic activities as being environmental or detrimental for the direct purpose of forming a component of the legal regime that they establish. Three instruments of this type may be identified: the Recovery and Resilience Facility Regulation, the Green Bonds Regulation and the Green Budgeting Framework. Those instruments are briefly exposed below by highlighting their link with the Taxonomy Regulation. A table listing them in chronological order may be found in the annex of this chapter.

1.2.1. The Recovery and Resilience Facility

As part of NextGenerationEU, the EU's economic response to the Covid-19 crisis, the EU adopted Regulation 2021/241 establishing the RRF. It provides for the distribution of 672.5 billion euros (at 2018 values) borrowed on the financial markets by the Union. These amounts are allocated in the form of grants and loans to support national plans drawn up by the Member States, which set out reforms and investments to be implemented by 2026 at the latest. Legal scholars have highlighted how the combination of both the scale of the sums involved and the Facility's institutional architecture make it a key instrument for the future of the Union[31].

The national plans financed by the Facility must serve six "pillars", one of them being the green transition. The green pillar benefits from a specific earmarking guarantee: Member States must devote a minimum of 37% of their expenditure to climate mitigation or adaptation objectives. Furthermore, the regulation states that, in accordance with the "do no significant harm" principle, reforms or investments may not support economic activities that cause significant harm to the Union's environmental ambitions[32]. Although there are legal loopholes and

[31] Among many others, see S. Cafaro, "The Evolving Economic Constitution of the European Union: Eulogy to Stability?", in G. Grégoire and X. Miny (eds.), *The Idea of Economic Constitution in Europe* (Brill Nijhoff, 2022), p. 487-506 and B. De Witte, "The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift", *Common Market Law Review* (2021), p. 635-682.

[32] See Articles 5 (2) and 18 (4)(e) and 19 (3)(e) of the RRF Regulation. The DNSH principle is not applicable as such to the RepowerEU chapters of the national recovery

insufficiencies regarding these requirements[33], the latter may be conceived as an indirect environmental conditionality: the granting of European funds whose primary agenda is post-Covid 19 recovery is conditional on the pursuit of a secondary agenda – in this case environmental[34].

The RRF Regulation indicates which investments or reforms are considered to contribute to the greening (in practice, climate-centric) objective. Annex VI (to which the relevant provisions refer) contains 181 "areas of intervention" for which it is specified if and to what extent they contribute to climate or environmental objectives. This green tagging may be understood as a less elaborated form of pre-taxonomy: it precedes the Commission's climate delegated act adopted in June 2021 (compared with February 2021 for the RRF Regulation). Yet, there was a political will to align both instruments to the greatest extent possible[35]. The very nature of both instruments, however, generates inevitable differences: *the* taxonomy aims at classifying investments in economic activities, while the facility finances not only investment projects, but also political reforms.

Regarding the DNSH principle, Article 5 of the RRF Regulation refers to Article 17 of the Taxonomy Regulation to define it. Again, in a context where the relevant delegated acts were not adopted yet, the RRF Regulation stated that the Commission "shall provide technical guidance to the Member States" to make their assessment of the fulfilment of the DNSH principle (Article 19(3) and Recital 25), which it did through a communication[36]. In this technical guidance, the Commission does not set much red lines (with the exception of reforms leading to a rise of fossil fuel financing or subsidies, and of fossil fuel-based electricity or

plans that Member States had to include in their updated plans following the amending of the RRF regulation aimed at reducing dependence on Russian fossil fuels (see Article 21*quater*, § 3 of the RRF Regulation).

33 For a discussion, see P. Dermine, N. Vander Putten, "Governing EU's environmental transition through spending? Loopholes and governance concerns in the recovery funds", in M. Eliantonio *et al.* (eds.)*, Greening Europe and the Rule of Law: Opportunities for and limits to EU's legal power* (Edward Elgar, forthcoming).

34 For a classification of conditionnalities, see Viorica Vita, *The Rise of Spending Conditionality in the European Union* (European University Institute, 2018).

35 European Commission, "NextGenerationEU Green Bonds Allocation Report", (Commission Staff Working Document SWD(2022) 442 final, 16 December 2022).

36 Commission Notice Technical guidance on the application of "do no significant harm" under the Recovery and Resilience Facility Regulation, *O.J.* 2021, C 58/1.

heating system-related projects)[37], but rather provides a non-exhaustive list of factors that can be taken into account as part of national authorities' assessments, such as compliance with environmental legislation or the application of certain environmental (ISO) standards. Alignment with *the* taxonomy's technical screening criteria may nonetheless also be used to show compliance with the principle[38].

This type of environmental guarantee attached to EU money does not only concern the one-off RRF. Similar DNSH requirements, for instance, apply for other EU funds such as the European Regional Development Fund, the Cohesion Fund, the Just Transition Fund, InvestEU, the Social Climate Fund, the Innovation Fund or the Modernisation fund, with small variations each time. Many of them refer to the Taxonomy Regulation to define the DNSH principle and its specific conditions[39].

1.2.2. The Green Bonds Regulation

Regulation 2023/2631 on European Green Bonds is another regulation that incidentally establishes a classification that partly overlaps with *the* taxonomy. The core idea underpinning green bonds is that, contrarily to traditional bonds, the proceeds collected through their issuance will be dedicated to "green" activities only. They mostly serve to finance "renewable energy, real estate, green transport, and sustainable water management"[40].

Green bonds may in principle be issued by private or public actors. In practice, however, public authorities are the main emitters: The quantity of green bonds emitted by the Commission until 2023 makes it, according to its website, the largest emitter in the world, and thirty percent of all NextGenerationEU funds will have originated from European Union green bonds (approximately 250 billion euros). By way

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[37] See the aforementionned Commission Notice Technical guidance, point 2.1.

[38] See the aforementionned Commission Notice Technical guidance, point 2.5.

[39] For an extended discussion and comparison, see M Beltrán Miralles et al., *The Implementation of the 'Do No Significant Harm' Principle in Selected EU Instruments: A Comparative Analysis*, (European Commission Joint Research Center, 2023).

[40] N. Maragopoulos, "Toward a European Green Bond Standard: A European Initiative to Promote Sustainable Finance", in Muñoz and Smoleńska (eds.), *Greening the Bond Market, A European Perspective* (Palgrave, 2023), p. 21-50, at p. 25.

of comparison, it is estimated that the global issue volume until 2021 is 270 billion USD[41].

The Green Bonds Regulation sets a voluntary standard for private or public actors (including States or sub-state authorities) wanting to emit bonds tagged as “green”. The standard includes disclosing a series of pre- or post-issuance elements provided for by the regulation, most notably an ex-post annual allocation report and impact assessment, as well as a mandatory review by third-party verifiers subjected to certain requirements and controls[42]. It should be understood, however, that the regulation appears in a competitive environment for green bonds standards: the Green Bonds Principles established by the International Capital Market Association, for instance, have been used by many green bonds’ emitters before, including Member States and the European Union. It did not, however, provide a precise content of what could or could not be financed with the proceeds collected from their issuance[43].

Under Article 4 of the Green Bonds Regulation, proceeds from EU green bonds should only finance (directly or indirectly) taxonomy-aligned activities. Yet, to allow for a certain flexibility, issuers may allocate up to 15% of the proceeds to activities that do not comply with the technical screening criteria when they have not entered into force yet, or when they are not considered as directly applicable, in cases of activities reported as official development assistance and international climate financing. Those activities must, however, comply with the DNSH principle as set out in the climate delegated act (Article 5).

1.2.3. The Green Budgeting Initiative

Green budgeting practices aim at tagging (and highlighting) green expenditures within the (proposed) budgets and at systematising environmental impact assessments within the budgetary process. In its “Green Deal” communication, the Commission noted that “A greater use of green budgeting tools will help to redirect public investment, consumption and taxation to green priorities and away from harmful subsidies. The Commission will work with the Member States to

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[41] See V. Brühl, “Green Finance in Europe – Strategy, Regulation and Instruments”, *CFS Working Paper Series* (2021), p. 9.

[42] For an extensive study of green bonds in the EU, see Muñoz and Smoleńska (eds.), *op. cit.*

[43] V. Brühl, *op. cit.*, p. 9.

screen and benchmark green budgeting practices".[44] In line with this agenda, the Commission published several documents to incentivise Member States to adopt green budgeting practices and provide training for national authorities wishing to go in that direction. The recently reformed directive for budgetary frameworks does not require Member States to do so, yet its Recital 18 provides that

> Green budgeting tools can help redirect public revenue and expenditure to green priorities. In that respect, the regular reporting of relevant information improves budget deliberations. Member States could publish information on how the relevant elements of their budgets contribute to achieving climate-related and environmental commitments at national and international level and the methodology used. Member States should publish data and descriptive information separately for expenditure, tax expenditure and revenue items […][45].

In January 2022, the Commission published its five pages-long EU Green Budgeting Reference Framework[46]. The document does not favour a specific green tagging methodology, but the European taxonomy is used in some Member States[47] and is considered by the Institute for Climate Economics, the organisation providing EU-funded training to Member States, as one of the easiest ways to proceed with the green tagging[48]. In a context where the EU committed to allocate 30% of its 2021-2027 spending to climate action[49], these climate tagging within budgetary documents should multiply in the future.

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44 European Commission Communication, "The European Green Deal" (COM(2019)640final, 11 December 2019), at 2.2.2.

45 Directive 2024/1265 amending Directive 2011/85/EU on requirements for budgetary frameworks of the Member States, *O.J.* 2024, L 30.4.2024.

46 European Commission, "European Union Green Budgeting Reference Framework" (20 January 2022), available at https://economy-finance.ec.europa.eu/economic-and-fiscal-governance/green-budgeting-eu_en.

47 OECD, *Green Budget Tagging: Introductory Guidance & Principles* (OECD Publishing, 2021).

48 C. Boutron, *Greener, better, stronger: Factors for the successful implementation of green budgeting in EU Member States*, (I4CE, 2023).

49 See Recital 28 of Regulation establishing the framework for achieving climate neutrality, *O.J.* 2021, L 243/1.

2. Taxonomies as the relatively unexpected component of rising selective industrial action

In the light of the instruments exposed above, this section argues that although the European taxonomy for sustainable investments derives from a capital market union agenda more than an environmental agenda – and was therefore mainly intended to serve as an informational tool for the market – it is progressively used as a central tool within instruments that may be characterised as belonging to a rising selective industrial policy (2.1). This has consequences on the legal validity of the breadth of the delegated acts, which may, in light of these elements, cover "essential" aspects (2.2).

2.1. The Taxonomy confronted with a rising environmental governance through spending

Many political scientists, legal scholars and think tanks are readings current trends in EU regulation as the rise of a selective state-led industrial policy. State-led selective industrial policy may be understood as a set of targeted policies aimed at strengthening certain (type of) economic actors or sectors through public finance. This contrasts with an industry- or investor-led horizontal industrial policy with a more market-neutral (or technology-neutral)[50] industrialisation policy, in which it is the functioning of "the economy" in general that must be supported[51]. While both dimensions have always been present to a certain extent, the latter was arguably prevailing at the EU level until recent years[52].

The orientation of spending towards green activities through instruments such as the Recovery and Resilience Facility, sovereign green bonds

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[50] S. Eriksson, *op. cit.*, p. 60.

[51] Among many others, see CMLR Editorial Board, "The EU's Integrated Policy Approach towards Competitiveness: The Interplay between State Aid Control and Industrial Policies", *Common Market Law Review* (2024), p. 1-12 ; R. Veugelers, S. Tagliapietra and C. Trasi, "Green Industrial Policy in Europe: Past, Present, and Prospects", *Journal of Industry, Competition and Trade* (2024), p. 1-22 ; D. Kleimann *et al.*, *How Europe Should Answer the US Inflation Reduction Act*, (Bruegel Policy Contribution Issue, 2023) and O. Fontana, S. Vannuccini, *How to Institutionnalise European Industrial Policy (For Strategic Autonomy and the Green Transition* (Centro Studi Sul Federalismo, 2024).

[52] O. Fontana, S. Vannuccini, *op. cit.*, p. 6 and M. Bartl, *Reimagining Prosperity: Toward a New Imaginary of Law and Political Economy in the EU* (Cambridge University Press, 2024), p. 141.

or green budgeting practices may be seen as one of the ways in which this takes place.[53] Such a shift happens, however, within a wide array of adaptations in areas such state aid, EU single market, climate policy, research and innovation, macroeconomic frameworks and public investment instruments[54].

The rise of a (partly green) publicly funded industrial policy is the consequence, among others, of two overlapping political agendas. First, the ecological agenda of the EU gained importance in the years following the adoption of the Green Deal. The presence of public funds is considered by many as being key to channel investments towards sustainable economic activities[55] and "de-risk" them[56]. Environmental earmarking and spending conditionalities – necessarily relying on classifying criteria – are, in this sense, "essential elements in the art of governing through budgets"[57]. Second, externally, the geopolitical context enticed the EU to orient its agenda towards an open strategic autonomy[58]. Open strategic autonomy may be defined in economic terms as a manner for the EU "to continue to build on (and benefit from) openness – consistent with its commitment to open and fair trade with diversified and sustainable global value chains while assertively defending its interests, protecting the EU's economy from unfair trade practices and ensuring a level playing field both internally and globally"[59]. It is, in other words, a way to "equip the EU to manage interdependence in

[53] M. Panascì, "Unravelling Next Generation EU As A Transformative Moment: From Market Integration To Redistribution", *Common Market Law Review* (2024), p. 13-54.

[54] R. Veugelers, S. Tagliapietra and C. Trasi, *op. cit.*, p. 7.

[55] M. Bartl, *op. cit.* p. 165 and C. Gortsos and D. Kyriazis, *op. cit.*, p. 11.

[56] D. Gabor, "The (European) derisking state", *Stato e mercato, Rivista quadrimestrale* (2023), p. 53-84.

[57] V. Vita, "Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality", *Cambridge Yearbook of European Legal Studies* (2017), p. 1-18, at p. 11.

[58] I. Alami, A. Dixon (*The Spectre of State Capitalism* (Oxford University Press, 2024)) mention, among the causes of the new state capitalism the "competitive emulation" in the context of geoeconomics and geopolitical rivalry (at p. 19). See also A. Petti, "EU COVID-19 purchase and export mechanism: A framework for EU operational autonomy", *Common Market Law Review* (2022) p. 1333-1370.

[59] CMLR Editorial Board, *op. cit.*, p. 2. See also A. Steinbach, "The EU's Turn to 'Strategic Autonomy': Leeway for Policy Action and Points of Conflict", *European Journal of International Law* (2023), p. 973-1006, at p. 978.

line with its interests and values"[60], one of them being the green transition. Although both agendas may be clashing to a certain extent (geopolitical concerns may override environmental interests, for instance), they have in common that they imply a departure from market neutrality according to which "the market" should be supported independently from its content[61].

Simply put, systematically categorising economic activities (i.e. taxonomizing) as being (environmentally) worthy of public intervention is an essential feature of conditioning the granting of funds, which itself is part of a State-led selective (partly green) industrial policy toolbox. Multiplying such uses of *the* taxonomy was not, however, the intention behind the adoption of the Taxonomy Regulation. Indeed, the European taxonomy was first and foremost designed as a way to advance a capital market union through the establishment of an informational tool to be disseminated openly. As many authors argue, *the* taxonomy was indeed conceived as a tool that may be appropriated by shareholders, clients or other stakeholders in a form of informational market governance. Colaert, for instance, highlights that, just as any financial regulation, the main substantive policy objectives of *the* taxonomy is stability, market integrity (i.e. the creation of a market with a level playing field) and consumer protection[62].

Indeed, the Sustainable Finance Action Plan – the strategic document from which the Taxonomy Regulation derives – was adopted in 2018, that is before the Green Deal, the Covid-19 pandemic and the recent geopolitical events[63]. This plan served mainly a

> markedly hands-off market-based approach to address the negative impact connected to financial markets, which is focused on providing transparency to consumers about the sustainability attributes of financial

[60] See European Commission Communication, "Trade policy review – An open, sustainable and assertive trade policy" (COM(2021)66 final, 18 February 2021).

[61] P. Charbonnier, "War Ecology: A New Paradigm", *Green* (2022), p. 70-76.

[62] V. Colaert, "The Changing Nature of Financial Regulation: Sustainable Finance as a New EU Policy Objective", *Common Market Law Review* (2022), p. 1669-1710, at p. 1672-1673. See also O. Azoulay, C. Merle and L. de Souza, *op. cit.*, p. 13.

[63] European Commission communication "Action Plan: Financing Sustainable Growth" (Com(2018)97final, 8 March 2018).

> products and fighting greenwashing. This approach leaves to market participants the decision of 'how green', if at all, their activities should be[64].

The taxonomy emerges within that framing, accompanied by a system of information disclosure legislative acts such as the Corporate Sustainability Reporting Directive – a chapter of the reporting made by companies under that directive should be dedicated to the undertakings' alignments with *the* taxonomy[65] – and the recently adopted Corporate Sustainability Due Diligence Directive requiring big companies to, among other things, establish transition plans[66].

This view is confirmed by the legal basis of the Taxonomy Regulation, which is Article 114 TFEU, i.e. the clause enabling the co-legislators to adopt measures for the approximation of provisions which have as their object the establishment and functioning of the internal market. Recitals of the regulation also contain indications that the act is mainly framed as a way to tear down "obstacles to the functioning of the internal market and to prevent the emergence of such obstacles in the future" [67], in a context where many actors are trying to impose their taxonomy standard globally[68]. After all, the title of the regulation makes it clear: it is a regulation establishing a "framework to *facilitate* sustainable investment" (emphasis added) and not to *make* sustainable investments. The fostering of green financing is supposed to happen by the mere earmarking of it[69]. This means that a high level of environmental

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64 Legal Issues of Economic Integration Board, "From the Board: Finalising the Sustainable Finance Regulatory Agenda", *Legal Issues of Economic Integration* (2022), p. 1-6, at p. 1.

65 Directive 2022/2464 amending Regulation 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, *O.J.* 2022, L 322/15.

66 Directive 2024/1760 on corporate sustainability due diligence, *O.J.* 2024, L 5.7.2024. See, more generally A Steinbach, "The Greening of the Economic and Monetary Union", *Common Market Law Review* (2022), p. 329-362, at p. 335 and S. Eriksson, *op. cit.*, p. 60. See also Articles 5 et 7 of the Taxonomy Regulation related to Regulation 2019/2088 on sustainability-related disclosures in the financial services sector, *O.J.* 2019, L 317/1. For an overview see Jean-Baptiste Poulle *et al.*, *EU Banking and Financial Regulation* (Edward Elgar, 2024), Chapter 70.

67 Recital 14 of the Taxonomy Regulation. See also Recital 12.

68 O. Azoulay, C. Merle and L. de Souza, *op. cit.* and S. Eriksson, *op. cit.*, p. 59.

69 S. Kooths, *op. cit.*, p. 243.

protection (Articles 191-192 TFEU) through reorienting financial flows to sustainable activities is arguably only a "sub-objective" of the act[70].

The link with sustainable public investments was admittedly not entirely absent from the regulation, however: Recital 17 of the Taxonomy Regulation mentions the public-private European Fund for Strategic Investments organised by Regulation 2015/1017[71] and its 40% climate investment target for infrastructure and innovation:

> Common criteria for determining whether economic activities qualify as sustainable, including their impact on the environment, could underpin future similar initiatives of the Union to mobilise investment that pursues climate-related or other environmental objectives.

Nonetheless, the scale of (in-)direct use of the taxonomy within state-led selective instruments such as the ones presented in the previous section was relatively unexpected, and adds to the idea that the taxonomy is progressively becoming *the* institutional common language to determine what is *green* and what is not. This, in turn, reinforces the importance of the apparently technical, yet to a great extent political, choices behind the adoption of the delegated acts defining what "substantial contributions" to the six EU's environmental objectives are, and what the DNSH principle entails.

2.2. Rethinking the legitimacy and legality of delegated acts considering the taxonomy's uses

The preceding should lead legal scholars to consider anew not only the sufficient democratic legitimacy of delegating the definition of the taxonomy's content, but also the legal validity of the process. Under Article 290 TFEU, "A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act", provided that "The objectives, content, scope and duration of the delegation of power" are "explicitly defined in the legislative acts". The provision states that "The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power".

[70] V. Colaert, *op. cit.*, p. 1679.

[71] Regulation 2015/1017 on the European Fund for Strategic Investments, the European Investment Advisory Hub and the European Investment Project Portal, *O.J.* 2015, L 169/1.

This provision sets two conditions for the delegation mechanism to be valid: the delegation must be sufficiently specific and may not cover "essential elements of an area"[72]. Regarding the latter condition, and without entering in too much detail, the European Court of Justice stated that "which elements of a matter must be categorised as essential must be based on objective factors amenable to judicial review"[73]. The Court seems to favour a case-by-case analysis: it did not identify an exhaustive list of what these "objective factors" would be, and indicated that they depend on "the characteristics and particularities of the domain concerned"[74]. It even uses a relatively tautological reasoning, by considering that essential elements are those which "require political choices falling within the responsibilities of the European Union legislature". In Merijn Chamon's terms: "What is essential is political and what is political is essential"[75]. Additional guidance may be provided by cases in which the ECJ had to evaluate the adequacy of a legal basis for a given act – which also requires to determine what the "essential elements of an area" are. The Grand Chamber of the Court held in such a Case in 2015 that "measures which entail a policy choice reserved to the EU legislature because the measure are *necessary* for the pursuit of the objectives" of the considered policy area (in this case, the common policies for agriculture and fisheries)[76].

Elements such as the importance of the interference with fundamental rights or third countries sovereignty seem to be relevant[77]. It should also be noted that, in a case concerning the establishment by a Commission's delegated act of a given methodology to define Euro emission standards of cars, the General Court found that the essentiality requirement was not met[78], given the breadth of the delegation.

[72] For an overview, see M. Chamon, "The Legal Framework for Delegated and Implementing Powers Ten Years after the Entry into Force of the Lisbon Treaty", *ERA Forum* (2021), p. 21-38, at p. 21-22.

[73] See Case C-355/10, *Parliament v. Council*, EU:C:2012:516, paras 45-46.

[74] M. Chamon, *op. cit.*, p. 26.

[75] *Ibid*.

[76] Joined Cases C-124/13 and C-125/13, *Parliament & Commission v. Council*, EU:C:2015:790, para. 50 (emphasis added).

[77] M. Chamon, *op. cit.*, p. 26.

[78] M. Chamon, *op. cit.*, p. 28. See Joined Cases T-339/16, T-352/16 and T-391/16, *Paris/Bruxelles/Madrid v. Commission*, EU:T:2018:927. The Court of Justice did not examine that point on appeal.

Arguably, the essentiality requirement must be assessed, for the European taxonomy, not only in the light of its diffusion as a market-based informational tool, but also considering the fact that it serves to allocate, *de jure* or *de facto*, public funds. This means that elements such as the inclusion of certain gas or nuclear related activities in the taxonomy, already political *in se*, is even more essential because of the many appropriations by public authorities of the taxonomy. The mere heated political debates surrounding the updates of the taxonomy should suffice to convince of the political hence essential character of its contents. While it is evident that the taxonomy should remain a flexible instrument so as to allow a regular update depending on technological changes, I argue that the regulation should go further than defining the considered environmental objectives in a few lines.

The Court should provide clarity on that point in the near future. The delegated acts are currently contested in pending cases brought before the EU's General Court. A first one is brought by the NGO Client Earth. Client Earth argues among other things that the Commission did not comply with the minimal requirements set forth in the Taxonomy Regulation by not taking into account the best scientific evidence regarding combustion of forest biomass for energy or the bioplastic manufacturing industry and by classifying of fossil gas-based activities as transitional (violation of the specificity requirement). It also argues more generally that "The Commission disregarded a number of essential elements of the Taxonomy Regulation when making the Delegated Regulation"[79]. A second one is brought by Austria. One of the pleas concerns the violation of Article 290 TFEU, considering that the legislature already excluded the classification of nuclear energy as environmentally sustainable[80]. A third one is brought by Greenpeace and others, and also contains grounds on non-compliance with Article 290 TFEU[81].

Behind these seemingly technical questions lie fundamental democratic guarantees: the Parliament and the Council may only accept or refuse, not amend, the proposed act. In this case, the delegations of powers referred to in the taxonomy "may be revoked at any time by

[79] Case T-579/22, *ClientEarth v Commission*, pending and W. Van Gaal, "EU faces twin legal challenges over weak climate goals and greenwashing", *EU Observer* (28 August 2024).

[80] Case T-625/22, *Austria v Commission*, pending.

[81] Case T-214/23, *Greenpeace and Others v Commission*, pending.

the European Parliament or by the Council" (Article 23 (3) of the Taxonomy Regulation). The delegated acts do only enter into force "if no objection has been expressed either by the European Parliament or by the Council within a period of four months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object" (Article 23 (6) of the Taxonomy Regulation). In practice, however, according to Merijn Chamon, "neither the Council or the Parliament has ever revoked a delegation", while, until 2021, drafts had merely been objected to fifteen times in total[82]. In sum, defining the green through delegated acts may not only be legally contestable, it also leads to a lower democratic legitimacy of the technical yet political choices underpinning classifications.

Conclusion

The Green Deal is presented as a strategic instrument that "supports the transition of the EU to a fair and prosperous society that responds to the challenges posed by climate change and environmental degradation, improving the quality of life of current and future generations"[83]. To implement that vision, the EU has adopted various top-down legislative acts with guiding objectives and standards that both the EU and Member States should reach, such as the EU Climate Law or the Nature Restoration Law. However, as this chapter has shown, next to these definitions of sustainability "from above" through targets and regulations that authorise or forbid in a traditional regulatory fashion, a definition of sustainability in a granular manner "from below" is also emerging, through principal or incidental environmental categorisations. If one accepts that the legal system constitutes a central tool "for instituting imaginaries into institutions and practices in modernity"[84], the Taxonomy Regulation is progressively becoming the cornerstone of that bottom-up vision of sustainability and to, supposedly, unmute environmental protection in the financial realm. It was intended as a market-based tool to make environmental concerns visible – and, behind them, the interests of future generations. Yet, less expectedly, it is also being

[82] M. Chamon, *op. cit.*, p. 30.

[83] European Commission Communication, "The European Green Deal" (COM(2019)640final, 11 December 2019), at point 4.

[84] M. Bartl, *op. cit.*, p. 43.

used more directly by public authorities to orient a governance through spending. This takes place in a context of an emerging consensus on the growing role of public spending in the ecological transition. In short: “taxonomies are rarely standalone documents, but the linchpin of entire ecosystems of laws & incentives”[85].

This, however, has legal consequences on the validity of delegating the adoption of a (too) vast number of choices regarding the technical screening criteria to the Commission. Furthermore, while the unmuting potential of these instruments for NGOs and citizens to hold governments and corporations accountable is evident, they nonetheless are contained in delegated acts, i.e. acts with a democratic legitimacy that is inferior to that of traditional legislative acts.

More generally, the taxonomy’s relatively unintended applications further intensify the question of whether there is coherence between the top-down environmental objectives and the bottom-up categorisation of economic activities as environmentally beneficial or harmful. While sceptics argue that “the Taxonomy runs the risk of politicising economic activity in an unwarranted manner”[86]; others see the taxonomy as depoliticising fundamentally democratic choices on sustainability. If public authorities are to be the guardians of intergenerational justice, the way future generations’ interests are being rendered legible within sustainability-related taxonomies are of an even greater importance compared to the situation in which the latter would be a mere market-based certification mechanism. In that sense, this chapter highlights the pitfall of one of the taxonomy’s core characteristics: the fact that it is conceived within a partly outdated horizontal market policy mindset.

[85] O. Azoulay, C. Merle and L. de Souza, *op. cit.*. p. 15.

[86] S. Kooths, *op. cit.*, p. 247.

Annex

Instruments establishing principal or incidental environmental taxonomies of socio-economic activities in the EU by chronological order[87]

Instrument	**Adoption date**
Regulation 2020/852 on the establishment of a framework to facilitate sustainable investment	18 June 2020
Regulation 2021/241 establishing the Recovery and Resilience Facility	18 February 2021
Commission Delegated Regulation 2021/2139 (Climate delegated act)	4 June 2021
European Union Green Budgeting Reference Framework	20 January 2022
Commission Delegated Regulation 2022/1214 amending the Climate delegated act	9 March 2022
Commission Delegated Regulation 2023/2486 (Non-climate environmental objectives delegated act)	27 June 2023
Regulation 2023/2631 on European Green Bonds and optional disclosures for bonds marketed as environmentally sustainable and for sustainability-linked bonds	22 November 2023

[87] This list excludes regulations governing EU funds that, similarly to the RRF, contain green spending targets, or requirements to comply with the DNSH principle.

Unmuting the environment in EU competition law – Broadening the notion of "fair share to consumers" when assessing sustainable cooperation initiatives

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Abstract: Competition policy may in some instances hinder positive cooperation initiatives between competitors in the context of climate change. This "antitrust issue", i.e. the Commission's strict application of the "fair share to consumers" condition under Article 101 TFEU, arguably results in "muting" the environment or future generations as well as stakeholders of global value chains, who are not always the direct consumers of the products concerned. The Commission under the Green Deal revised its applicable guidelines, adding a new chapter on "sustainability agreements", which marks a positive but modest development, as this new instrument does not fully consider collective environmental benefits of such agreements. The paper also analyses national, more ambitious solutions found in the Netherlands, Austria and the United Kingdom as possible alternatives or sources of inspiration. Such broader approach regarding environmental issues is not precluded by the CJEU case-law and may even be required in light of the EU "constitutional" context. Further change might also prove necessary to enable companies to comply with their new obligations to cooperate under the CSDDD.

Introduction

The European Green Deal also impacted EU competition policy. The public debate and consultation process launched by the European Commission ("Commission") in 2019 on how competition policy could best contribute to delivering the Green Deal's objectives resulted in significant changes. One of them is, as one could imagine, the adjustment of the State aid control policies (both limiting access to State aid funding for fossil fuel producers and allowing for greater aid intensity in green investments)[1]. But the greening of EU competition policy does not stop there, as not only public but also private parties should play their part a.o. through implementing "sustainable cooperations"[2], which may mandate an adjustment of antitrust policies.

This consultation process led, in particular, to the 2023 revision by the Commission of its guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements ("Guidelines")[3]. The importance of this instrument for stakeholders and practitioners should not be underestimated. In a field where the separation line between prohibited concerted practices and authorised cooperations – concepts generally defined by "abstract" CJEU case-law – is often very thin and greatly depends on the discretion bestowed upon competition enforcers, the Guidelines often have almost biblical value for (the counsels) of companies that consider collaborating with the authorities.

The Guidelines now contain a specific chapter concerning "sustainability agreements" between competitors, broadly understood as agreements that pursue (environmental, social or economic) sustainability objectives[4]. This evolution is aimed at responding to critical voices claiming that EU competition law is (or was) not equipped with the right tools to tackle such sustainable cooperation initiatives, notably due to the classical – arguably, "narrow-minded" – interpretation of the condition that cooperations between competitors may only be exempted from the cartel prohibition where they result in a "fair share of the resulting benefits" being passed on to "consumers".

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[1] For a summary overview of the State aid-related reforms launched by the Commission in the context of the Green Deal, see in particular European Commission, "Competition Policy in Support of Europe's Green Ambition", *Competition policy brief*, (September 2021), p. 3-5.

[2] European Commission, "Competition Policy in Support of Europe's Green Ambition", *op. cit.*, p. 1.

[3] See the Communication from the Commission of 21 July 2023, "Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements", 2023/C 259/01.

[4] Hence, "sustainability agreements" may be concerned with addressing climate change (for instance through the reduction of greenhouse gas emissions) and reducing pollution, but also with upholding human rights, facilitating a shift to healthy and nutritious food or ensuring animal welfare: *ibid.*, paras 515-517.

The "antitrust issue" which the Guidelines attempted to solve can be summarised and illustrated as follows.

Sustainability agreements between competitors are sometimes necessary to accommodate the so-called "first-mover disadvantage". Without possible coordination, there is a risk that companies will not undertake a sustainable initiative at all, as the adoption of higher standards of sustainability generally leads to higher costs, which puts proactive companies at a competitive disadvantage compared to their rivals who, for example, continue to use cheaper non-renewable energies. Entering into (individual or sector-wide) agreements with competitors therefore appears necessary, in some instances, to reduce commercial risks and, hence, convince companies willing to act more sustainably to make the leap.

Yet, companies have for long been complaining that sustainable cooperation initiatives would be impeded by the prohibition of cartels and concerted practices under Art. 101 TFEU – in other words, that competition law may sometimes stand in the way of sincere sustainable cooperation initiatives. Indeed, as a rule, agreements between competitors which are restrictive of competition are prohibited under Article 101(1) TFEU, unless they can be exempted under Article 101(3) TFEU. More precisely, the third paragraph of this provision states that Article 101(1) will be held inapplicable in relation to agreements which (i) contribute "to *improving the production or distribution of goods or to promoting technical or economic progress*, (ii) while *allowing consumers a fair share of the resulting benefit*", and without (iii) imposing "restrictions which are *not indispensable* to the attainment of these objectives" or (iv) affording the parties "the possibility of *eliminating competition* in respect of a substantial part of the products in question" (emphasis added)[5]. Competition authorities have a broad margin of appreciation when applying Article 101(3) TFEU and the CJEU appeared rather unwilling to interfere with this leeway[6].

[5] These four conditions are cumulative and the burden of proof rests on the undertakings arguing for an exemption of their agreement: see for instance cases C-43/82 and 63/82, *VBVB and VVVB v Commission*, EU:C:1984:9, para 61; case C-238/05, *Asnef-Equifax v Asociacion de Usuarios de Servicios Bancarios (Ausbanc)*, EU:C:2006:734, para 65.

[6] Case C-26/76, *Metro SB-Grossmärkte GmbH v Commission*, EU:C:1977:167, para. 45 and 50; Case T-7/93, *Langnese-Iglo GmbH v Commission*, EU:T:1995:98, para 178. See D. Bailey, R. Whish, *Competition Law* (Oxford, 2018), p. 173.

Mostly the application of the second condition ("*fair share* of benefits to *consumers*", or "*pass-on*" requirement) in the context of sustainability agreements has been subject to a lively debate in the competition law sphere. More specifically, many have argued that, since sustainable agreements are arguably beneficial to a larger group of consumers than the narrow category of directly impacted consumers of the products (for instance "consumers" located where the products are produced rather than consumed, more largely society as a whole, or even "future" (generations of) consumers), the notions of "consumer" and of "fair share" should be interpreted and applied more broadly than what has traditionally been the case (in the last two decades in particular).[7] Benefits of sustainability may arguably materialize elsewhere than where the "consumers" of the products live, and may do so only several decades later (i.e. impacting "future generations of consumers" rather than actual consumers of the products). In other words, the (classical) strict interpretation of this condition, which limits the relevant benefits to those occurring on the markets concerned, arguably creates a risk of competition law impeding necessary sustainable cooperation initiatives.

A famous example of such strict application in a sustainability context is the *Chicken of Tomorrow* case in the Netherlands (2015), which regarded an agreement between poultry producers to introduce a minimum standard of animal welfare protection across the industry (covering approximately 95% of the national market). Such coordinated practice was however not exempted by the Dutch Competition Authority ("Autoriteit Consument en Markt", hereafter "ACM") under the (Dutch equivalent of) Article 101(3) TFEU, as it resulted in a cost – and, hence, a price – increase for chickens as well as in a reduction of consumer choice (i.e. a restriction of competition). More specifically, and interestingly for the purpose of the present contribution, the ACM considered that the price increase and the choice reduction imposed on consumers were not (sufficiently) compensated by the environmental benefits – in other

[7] The Commission in the late 1990s adopted, under the growing influence of the US modern industrial organization theory, the so-called "more economic approach" for the EU competition policy. This evolution has been reflected in a more intensive use of economic theories in EU antitrust enforcement. The "neoclassical" theories conveyed by this (Chicago School-inspired) movement have profoundly influenced the competition policies adopted in Europe, resulting in a less interventionist approach: see D. Bartalevich, "The Influence of the Chicago School on the Commission's Guidelines, Notices and Block Exemption Regulations in EU Competition Policy", *Journal of Common Market Studies* (2016), p. 267-283.

terms, that no "*fair share*" of the (economic) benefits generated by the agreements would accrue to the consumers concerned. Indeed, those benefits were measured through a consumer willingness-to-pay survey, which concluded that the consumers of the chickens affected would only be willing to pay EUR 0.68 more for each sustainably produced kilogram of chicken, while the price increase induced by the agreement between producers would amount to EUR 1.46 per kilogram. Benefits were therefore outweighed by the estimated price increase and consumers, as a result, were not (sufficiently) compensated by the sustainability agreement, which was consequently not exempted by the ACM.

In other terms, the ACM relied on a "price-centric snapshot" of (a limited group of) consumers' (stated) preferences, without considering the possible broader benefits of those agreements on other possible (indirect and/or future) consumers, let alone on society as a whole. In this sense, through the recourse to price-centric economic tools focusing on a strict interpretation of the "consumers affected", the ultimate beneficiaries of (genuine) sustainability cooperation initiatives – that is, society as a whole – are "muted". This example therefore illustrates the "antitrust issue" – i.e. how the "strict" application of competition law (and the prohibition of concerted practices under Article 101 TFEU in particular) may create obstacles to sustainable cooperation initiatives between market players.

To express it in a wider sense, the restrictive – arguably, too "static"[8] – interpretation of the conditions of Art. 101(3) TFEU (and more specifically of the notion of "fair share" to "consumers") could, in the particular context of this publication, be described as "muting" a whole category of stakeholders. One thinks, in particular, of those whom the economic tools traditionally used in competition policy render invisible, because they are not the consumers directly affected and cannot therefore assert their interests by means of their 'willingness to pay', whether they be future consumers (citizens of the next generations), workers involved in supply chains across the world, or (following a very broad interpretation) even animal suffering. Against this background, the will to tackle the above-described "antitrust issue" resulted in July 2023 in the adoption of the (revised) Guidelines. The latter arguably constitute a real yet modest evolution which, as we show, only partially

[8] See in this sense I. Lianos, "Reorienting competition law", *Journal of Antitrust Enforcement*, vol. 10, n°1 (2022), p. 1-31.

"unmutes" the environment in EU competition law (part 1). Other policy initiatives at national level, in the Netherlands, in Austria and in the UK go further and could serve in turn as an inspiration for EU competition law enforcers, as such evolution is (arguably) not prevented by the CJEU case-law, and is possibly even needed in light of the broader EU (primary and secondary) law framework (part 2).

1. What the new EU Commission's guidelines on cooperation agreements foresee – A (modest) evolution

The Guidelines include an entirely new ninth chapter devoted to sustainability agreements. Many stakeholders consulted during the revision process argued for the inclusion of this specific new chapter. It should be noted, however, that this new feature is not a complete innovation, as such a section on sustainability already existed in the 2001 version of the Guidelines (the predecessor of the 2011 Guidelines that were replaced by the 2023 Guidelines). Thus, from a certain perspective, the new Guidelines mark a return to – but mainly a further development of – an approach that looks (more favourably) at the situation of sustainability agreements. In the present part, we highlight the main principles of this ninth chapter of the Guidelines (1.1) and have a closer look at the condition of "fair share to consumers" (1.2).

1.1. The main principles of the sustainability chapter of the Guidelines

The provisions in this particular chapter of the Guidelines dedicated to sustainability agreements are intended to strike a delicate balance between the Commission's two main concerns. On the one hand, the introduction of this chapter is a response to the (above-mentioned) often-heard issue that the framework provided by the previous version of the guidelines did not provide sufficient legal certainty for companies to dare to work together for better environmental protection[9]. In other terms, the aim was to address widely shared concerns that a potentially large number of "sustainable" cooperation initiatives would never be

[9] See a.o. S. Holmes, "Climate change, sustainability, and competition law", *Journal of Antitrust Enforcement*, (2020), p. 354-405; T. Fernando, "EU Competition Law and Sustainability in Food Systems: Addressing the Broken Links", *Fair Trade Advocacy Office – Briefing note* (2019); S. Kingston, *Greening EU Competition Law and Policy* (Cambridge, 2011).

implemented because of the fear that these practices would later be analysed by competition authorities as restrictions of competition.

On the other hand, the Commission intended to provide the necessary safeguards to prevent certain companies from using "greenwashing" to enter into anti-competitive agreements in the name of environmental protection, a risk that both critical academic voices and other stakeholders cautioned the Commission against[10]. Furthermore, the Commission always underscored (and also explicitly stated in the Guidelines) that cooperation agreements between competing players in the field of environmental protection should not replace classical market regulation. Such agreements are only necessary insofar as they allow the "remaining market failures" to be addressed, to compensate for the absence of government regulation, or when they complement such regulation, for example by going further[11].

On the substance of the reform, the question was not so much whether the Commission would allow more favourable scrutiny of sustainability agreements, but rather how and to what extent. In particular, the challenge for the Commission was how to integrate this desire to take more account of environmental benefits into the specific (economic) analytical framework of Article 101 TFEU. In summary, two possible avenues could be distinguished in the legal literature: i) those that recommended exempting sustainability agreements from the application of 101(1) TFEU altogether because they are not restrictive of competition, and ii) those that favoured the assessment of such agreements at a later stage under the exemption conditions of Article 101(3) TFEU. Ultimately, the Guidelines combine these two aspects, in particular by giving a series of examples of agreements that fall outside the scope of Article 101 TFEU, of agreements that are not restrictive within the meaning of Article 101(1) TFEU (in particular 'sustainability standards') and, finally, agreements that meet the conditions for exemption under Article

[10] For a sample of legal literature not favourable to adjusting the assessment framework of Article 101 TFEU in the context of sustainability agreements, see a.o. E. Loozen, "EU antitrust in support of the Green Deal. Why better is not good enough", *Journal of Antitrust Enforcement* (2024), p. 75-97; E. Loozen, "Strict Competition Enforcement and Welfare: A Constitutional Perspective Based on Article 101 TFEU and Sustainability", *Common Market Law Review* (2019), p. 1265-1302; P. Schinkel, L. Toth, "Compensatory Public Good Provision by a Private Cartel", *Tinbergen Institute Discussion Papers*, 19-086/VII (2019).

[11] Guidelines, paras 519-520.

101(3) TFEU. The present contribution focuses on this third category, looking closely at the strict interpretation of "consumer" retained by the Guidelines under Article 101(3) TFEU.

Regarding in particular the first condition under Article 101(3) TFEU (existence of benefits generated by the sustainability agreement), the Guidelines adopt a flexible interpretation of the concept of 'objective efficiencies', as sustainability efficiencies can also include qualitative efficiencies – for example, the assimilation of less polluting products into better-quality products –, innovation increases or cost savings. However, it is uncertain how companies should demonstrate the existence of such "sustainability efficiencies" in practice. After all, the Guidelines make it clear that these benefits should not be assumed but substantiated: they must be objective, concrete and verifiable. But no further guidance is given on the means by which companies can actually demonstrate such objective and verifiable benefits. The Commission therefore seems to leave some room for companies to determine for themselves how to provide such evidence, depending on the case. It can be expected that companies will often rely on the expertise of environmental economists in this regard[12].

1.2. Art. 101(3) TFEU – the "fair share to consumers" requirement in particular

The position of the Commission on the condition of "fair share to consumers" is (still) based on the so-called "consumer welfare standard", which has been widely accepted (and adopted by the Commission and EU courts) in the last decades as the prevailing standard in "mainstream antitrust".[13] Simply put, the Commission in the revised Guidelines does

[12] Regarding the application of environmental economics in this context, see in particular B. Baarsma, N. Rosenboom, "A veritable tower of Babel: on the confusion between the legal and economic interpretation of Article 101(3) of the Treaty on the Functioning of the European Union", *European Competition Journal* (2015), p. 402-425.

[13] The "consumer welfare" objective is traditionally reflected in concrete cases by the search for lower prices, higher levels of production and maximisation of the concept of "social surplus". It is therefore an approach that focuses almost exclusively on economic efficiency, based on empirical reasoning that uses scientific tools linked to complex econometric considerations.

not depart from the premise that "mainstream antitrust is sufficiently green as it is"[14].

The condition that consumers in the context of sustainability agreements should receive a fair share of the benefits achieved has been heavily debated. It is clear (and undisputed) that the benefits must outweigh the harm caused and that, except in cases where the harm to competition is clearly negligible compared to the potential benefits, this involves a delicate balancing of interests[15]. However, it was heavily debated whether affected consumers should be fully compensated and whether the fair share of benefits should be assessed only in relation to consumers located in the same market as the market affected by the restriction of competition, was heavily debated[16].

Ultimately, the Guidelines' approach constitutes a compromise between conservative and reformist voices: not only "individual benefits" for consumers, but also so-called "collective benefits" can be taken into account to some extent, yet this is limited by fairly strict rules[17].

On the one hand, there was little doubt that, in line with the Commission's classic decision-making practice, *individual consumer benefits* could be taken into account under Article 101(3) TFEU. Nevertheless, the Guidelines make an additional segmentation within individual benefits. While (i) *individual use value benefits* directly improve users' experience of the product in question (e.g. vegetables grown using organic fertilisers), (ii) *individual non-use value benefits* provide indirect qualitative benefits: they do not directly improve consumers' experience, but consumers are willing to pay more for the beneficial effect on others (e.g. fair trade coffee beans).

Thus, the central criterion for identifying relevant individual non-use value benefits remains the consumers' "willingness to pay". The Guidelines indicate that the latter, in line with classical competition economics tools, should be assessed through (carefully designed) customer surveys.

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[14] E. Loozen, "EU antitrust in support of the Green Deal. Why better is not good enough", *op. cit.*, p. 76.

[15] Guidelines, para. 570.

[16] See a.o. G. Monti, "Four Options for a Greener Competition Law", *Journal of European Competition Law & Practice* (2020), p. 124-132.

[17] Any combination of the above types of benefits is possible. Depending on the case, only one type of benefit can be invoked or a combination of both: Guidelines, para 590.

Interestingly, however, the Guidelines here highlight the importance of designing consumer surveys in a way that avoids behavioural bias. This is in response to several critics who (rightly) consider that customer surveys are less appropriate in the context of negative externalities such as greenhouse gas emissions, the consequences of which often seem abstract to the consumers surveyed. An illustrative example in the context of sustainability agreements is the *Chicken of Tomorrow* case (see *supra*).

On the other hand, the real debate was whether (and, if so, how) so-called "collective benefits", namely "out of market" efficiencies, could be taken into account in cases where individual production and consumption decisions have negative effects on third parties that are not properly addressed through public regulation, and where consumers are unwilling to pay a higher price for more sustainable products. The Commission proposes a positive response, at least on the principle, applying a clear (traditional) economics-based approach centered on the "internalisation of negative externalities"[18].

Hence, while the weighing of the positive and negative effects of the restrictive agreements "is normally done within the relevant market" to which the agreement relates, "where two markets are related, efficiencies generated on separate markets can be taken into account"[19].

However, the response of the Guidelines remains rather cautious: collective benefits may only be taken into account to the extent that the group of consumers that is affected by the restriction and that benefits from the efficiencies is *substantially the same*[20]. Moreover, by analogy with the *Mastercard* case-law[21], where consumers in the relevant market substantially overlap with, or form part of the group of beneficiaries outside the relevant market, the collective benefits to the consumers

18 Guidelines, para 582: "not all negative externalities can be cured through voluntary, individual consumer actions. As the sustainability impact from individual consumption accrues not necessarily to the consuming individual but to a larger group, a joint initiative, such as a cooperation agreement, may be needed to internalise negative externalities and bring about sustainability benefits for a wider section of society. […] These benefits are referred to as 'collective benefits', as they occur irrespective of the consumers' individual appreciation of the product and accrue to a wider section of society than just consumers in the relevant market".

19 Guidelines, para 583.

20 *Ibid.*

21 Case C-382/12 P, *MasterCard Inc*, EU:C:2014:2201, para. 242.

in the relevant market that occur *outside that market* can be taken into account if they are *significant enough* to compensate the consumers *in the relevant market* for the harm that they suffer[22]. This means that, in practice, sustainability improvements that also benefit consumers affected by the price increase may be taken into account (e.g. cleaner air inhaled by buyers of cleaner, more expensive fuel), but not those that benefit separate groups of product consumers (e.g. consumers of cotton clothing in Europe are not in the same group as African cotton producers who benefit from a production process that uses less water, etc.).

The Commission thereby makes a rather strict application of the principle that the overall impact on consumers in the relevant market must be "at least neutral"[23]. It opposes the position – adopted notably by the Dutch competition authority (see *infra*) – that the agreement can be exempted, even where some consumers may not be fully compensated, when the benefits to society as a whole are substantial.

It should also be noted that this interpretation finally adopted by the Commission seems to contradict to some extent its (old) decision-making practice, in particular its *CECED* case[24]. This case concerned an agreement between the major producers and importers of washing machines to eliminate the least energy-efficient products from this market. The Commission found – in this decision adopted in 1999 – that the agreement was likely to produce both individual and collective benefits for users, and that the environmental results for society would appropriately allow a fair share of the benefits to accrue to those users, even where individual purchasers of washing machines would end up paying a higher price and consequently would not be (fully) compensated[25]. This case is often relied upon by "competition reformists"

[22] Para 584, Guidelines.

[23] Para 570, Guidelines.

[24] See the EC Decision of 24 January 1999, *CECED*, L187/47, para. 48-56.

[25] *Ibid.*, in particular: "(45) Following full implementation of the agreement by the year 2001, 1718 models in energy classes G, F, E and D (i.e. just less than 63 %) would no longer be produced or imported […]. (51) CECED estimates the pollution avoided at 3,5 million tons of carbon dioxide, 17000 tons of sulphur dioxide and 6000 tons of nitrous oxide per year in 2010, working on the basis of average emission values. Although such emissions are more efficiently tackled at the stage of electricity generation, the agreement is likely to deliver both individual and collective benefits for users and consumers. […].
(56) The Commission reasonably estimates the saving in marginal damage from (avoided) carbon dioxide emissions (the so-called "external costs") at EUR 41 to 61

as an example of how the decisional practice of the Commission was more favourable to sustainability claims in the past (i.e. before the "new economic approach" was adopted in EU competition policy in the two last decades).

In addition, the parties to the sustainability agreement have a heavy burden of proof to the extent that they must be able to demonstrate – including on the basis of official or academic reports – that the benefits will (probably) materialise and that the collective benefits will benefit consumers who do effectively (significantly) overlap with consumers in the relevant market[26]. Where there is no available data that allows for a quantitative analysis of the benefits of the agreement, other evidence may be considered, provided that it shows a clearly identifiable positive impact on consumers in the relevant market, not a marginal one. As there is currently little experience with measuring and quantifying collective benefits, the Commission aims to provide more guidance on this issue when it has gained sufficient experience of dealing with concrete cases, which may enable it to develop methodologies of assessment[27].

Finally, it should be noted that the (final version of the) guidelines also (briefly) address the temporal aspect of the compensation debate. Namely, they indicate that environmental benefits that only occur after a certain period of time can also be taken into account, provided that the value of those future benefits is appropriately discounted: the greater the time difference, the greater the efficiencies must be to compensate[28].

2. What the EU guidelines could (or should) have foreseen

In parallel with the review process ongoing at European level, several individual (former) EU Member States made changes and innovations to their national competition policies to better take into account the issues

per ton of carbon dioxide. On a European scale, avoided damage from sulphur dioxide amounts to EUR 4000 to 7000 per ton and EUR 3000 to 5000 per ton of nitrous oxide. On the basis of reasonable assumptions, the benefits to society brought about by the CECED agreement appear to be more than seven times greater than the increased purchase costs of more energy-efficient washing machines. Such environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers of machines."

26 Guidelines, paras 587-588.

27 Guidelines, para 589.

28 Guidelines, para 591.

surrounding sustainability agreements[29]. Pursuant to the role allocation between the Commission and national competition authorities, these changes are limited to agreements whose impact is geographically restricted to the Member State concerned. However, they do have a significant impact on the European debate surrounding the revision of the Commission's Guidelines. The policy changes analysed below concern the Netherlands, Austria and the United Kingdom respectively (2.1). This more ambitious approach adopted in those countries could also inspire the Commission at EU level, as it arguably finds support – or at least is not contradicted – by the CJEU case-law and is (perhaps even more) consistent with the broader context of EU primary and secondary law (2.2).

2.1. More ambitious national approaches

2.1.1. The example of the Netherlands

First of all, the ACM published in January 2021 its own "Draft Guidelines on Sustainability agreements" (the "Dutch draft Guidelines")[30]. This pioneering role does not come as a surprise, as the ACM has been at the forefront in handling sustainability agreements for several years. The main difference between the Dutch draft Guidelines and the Commission's Guidelines is the broader assessment (in the Netherlands) of the concept of fair share of benefits in particular for certain types of sustainability agreements ("environmental damage agreements").

Most strikingly, the ACM favours a shift from the *consumer* welfare standard towards a *citizen* welfare standard, where *non-consumer benefits* (which are potentially larger than *collective consumer benefits* considered in the Commission's Guidelines) are relevant for the purpose of assessing whether the "fair share" condition under Article 101(3)

[29] It should be noted that, asides from "general guidelines", a number of national competition authorities also implemented innovative "informal guidance" tools, i.e. open-door policies or "sandboxes" enabling companies to submit discuss concrete sustainable cooperation initiatives (more) openly with competition enforcers. On these important developments occurring a.o. in the UK, the Netherlands, France, Belgium, Germany or Greece, see a.o. S. Holmes, "Sustainability and competition policy in Europe: recent developments", *Journal of European Competition Law & Practice* (2024), p. 1-9, p. 3-5.

[30] ACM, *Draft Guidelines on Sustainability agreements. Opportunities within competition law*, 26 January 2021, accessible at: https://www.acm.nl/en/publications/second-draft-version-guidelines-sustainability-agreements-opportunities-within-competition-law.

TFEU is met. Indeed, the ACM in the Dutch draft Guidelines had made a distinction between "environmental-damage agreements" and "other sustainability agreements"[31].

On the one hand, *environmental-damage agreements* (i) concern "damage to the environment in the production and consumption of goods or services" resulting, for instance, from the emission of harmful air pollutants and greenhouse gases, and from the waste of raw materials, and (ii) contribute (efficiently) "to the compliance with an international or national standard (to which undertakings are not bound) or to a concrete policy objective"[32]. According to the ACM, as this environmental damage manifests itself as atmospheric heating, reduced biodiversity, and/or less healthy livelihoods, the gains resulting from the agreement will not only benefit the users of the products in question, but also by society as a whole. Environmental-damage agreements may, according to the ACM, be exempted from the cartel prohibition even where users are *not* fully compensated themselves (i.e. non-consumer benefits may be taken into account). Indeed, according to the ACM, in such cases it may be fair that users are not fully compensated for the harms of the agreement because their demand for the products in question essentially causes the problem for which society needs to find solutions.

On the other hand, *other sustainability agreements* may concern social or other forms of sustainability, such as imposing certain minimum standards on production processes (this category covers the *Chicken of Tomorrow* example – i.e. the of setting minimum requirements for animal welfare in the production of meat (see *supra*)). This category also covers the agreements which do relate to the reduction of environmental damage, but which are not necessary for achieving a standard or a concrete policy objective (for instance, products standards or environmental standards that are more ambitious than the standard defined by the policy objective)[33]. For this type of agreements, users still need to be fully compensated for the harm they suffer from the restriction of competition.

[31] *Ibid.*, p. 14 and f.

[32] *Ibid.*, p. 6.

[33] *Ibid.*, p. 14-15.

Furthermore, the Dutch draft Guidelines – in sharp contrast with the Commission's Guidelines – interestingly provided that economic quantification (in monetary terms) of benefits was not always necessary in the context of sustainability agreements. More precisely, the ACM considered that it is possible to conclude that the fair share condition is met without quantifying the effects of an agreement where (i) the undertakings involved have a limited market share and (ii) the "harm to competition is, based on a rough estimate, evidently smaller than the benefits of the agreement"[34]. Further, where (the above conditions are not complied with and) economic quantification is needed, the benefits of environmental-damage agreements must be expressed in monetary terms using so-called "environmental prices" or "shadow prices" (i.e. not market prices), based on methods such as prevention costs (in cases related to a concrete policy objective) or damage costs (in cases related to the damage caused by a certain production or consumption).

However, no open conflict is to be expected between the ACM and the Commission regarding the assessment of sustainability agreements. Indeed, the Dutch draft Guidelines (of 2021) were clearly aimed at steering the Commission in taking a greener direction in the context of the revision of its own Guidelines. After the Commission's actual adoption of (the final version of) these Guidelines in 2023, it became clear that the ACM vision had (influenced but) not really convinced the Commission. As a result, the ACM announced it would – and effectively did – adjust its own Dutch draft Guidelines, resulting in the "ACM policy rule" of 4 October 2023 on the ACM's oversight of sustainability agreements ("ACM policy rule")[35]. The latter are now (broadly) in line with the Commission's Guidelines, providing watered-down wording, for instance, in relation to environmental damage agreements[36].

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[34] *Ibid.*, p. 15.

[35] ACM, *ACM's oversight of sustainability agreements. Competition and sustainability*, Policy rule, 4 October 2023, accessible at: https://www.acm.nl/en/publications/policy-rule-acms-oversight-sustainability-agreements.

[36] For instance, "ACM does not consider it expedient to continue investigating an environmental-damage agreement if the initial investigation shows that it is plausible that the agreement is necessary for achieving the environmental benefits and that such benefits sufficiently outweigh the potential competitive disadvantages. *It is important that consumers in the relevant market receive an appreciable and objective part of the advantages*" (emphasis added)*: Ibid.*, p. 7.

Yet, interestingly, according to the ACM policy rule, the national competition watchdog still has “discretionary freedom within certain boundaries on how it investigates potential violations or what sanctions it imposes”[37], notably where firms agree to comply with a binding sustainability rule or where “environmental-damage agreements […] help comply with an international or national standard or concrete policy goal to prevent or reduce such environmental damage”, with the environmental benefits outweighing the potential competitive disadvantages[38]. This comes together with an open-door policy, encouraging stakeholders to discuss sustainable cooperation initiatives openly with the ACM, and with a no-fine policy in certain cases. As Holmes summarises it, “in essence the ACM is being as progressive as it can within the constraints on it as a member of the EU—where the Commission is very much the lead competition authority”[39]. Furthermore, the ACM has not ruled out a “test case” (which could take the form of a preliminary referral to the CJEU) in order to settle the issue.

2.1.2. The example of Austria

Second, Austria adopted an amendment to its national competition rules in 2021 to explicitly include sustainability criteria. Interestingly, the law now provides for a presumption of fair share for users in the case of agreements with a significant contribution to achieving environmental sustainability goals. More precisely, the following subparagraph has been added to Article 2(1) of the Austrian Cartel Act (which so far was materially identical to Article 101(3) TFEU):

> Consumers shall also be deemed to enjoy a fair share of the benefits which result from improvements to the production or distribution of goods or the promotion of technical or economic progress if those benefits contribute substantially to an ecologically sustainable or climate-neutral economy.

Thus, in the same spirit as the Netherlands, but here incorporated in legislation rather than in a soft law instrument, Austria goes a step further than the Commission by also giving (more) consideration to

[37] *Ibid.*, para 7.

[38] *Ibid.*, paras 8-9.

[39] S. Holmes, “Sustainability and competition policy in Europe: recent developments”, *op. cit.,* p. 3.

out-of-market efficiencies when assessing the fair share condition. Yet, it avoids (direct) contradiction with the Commission's Guidelines by limiting the scope of the provisions to agreements that do not affect trade between Member States[40]. Furthermore, the scope of the Austrian amendment is limited to aspects of "ecological sustainability" and "climate-neutral economy", which includes "contributions to the protection of the climate, the sustainable use and protection of water resources, the transition to a circular economy and the protection and restoration of biodiversity and ecosystems", but excludes social standards or animal welfare for instance[41].

2.1.3. The example of the UK

Third, the United Kingdom's competition authority (Competition and Market Authority, "CMA") also adopted soft law guidance on "green agreements" ("UK Guidance") in 2023[42].

The UK Guidance takes a flexible approach on sustainability agreements which appears to resemble the Dutch draft Guidelines. A distinction is made between:

i. *Environmental sustainability agreements*: agreements between competitors which are aimed at preventing, reducing or mitigating the adverse impact that economic activities have on the environment or assist with the transition towards environmental sustainability (e.g., improving air or water quality, conserving biodiversity and natural habitats, or promoting the sustainable use of raw materials)[43]; and

ii. *Climate change agreements*, i.e. a sub-set of the previous category covering agreements which result in a reduction of greenhouse gases emissions or of other negative externalities which are typically global in nature and are realised over long time periods, with uncertainty

[40] See Kartell- und Wettbewerbsrechts-Änderungsgesetz 2021 – KaWeRÄG 2021 (951 d.B.).

[41] See OECD Competition Committee, Out-of-Market Efficiencies in Competition Enforcement – Note by Austria, 6 December 2023, accessible at: https://one.oecd.org/document/DAF/COMP/WD(2023)103/en/pdf.

[42] CMA, *Green Agreements Guidance: Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements*, CMA 185, 12 October 2023, accessible at https://www.gov.uk/government/publications/guidance-on-environmental-sustainability-agreements.

[43] However, agreements pursuing broader societal objectives than the protection of the environment fall outside the scope of the UK Guidance.

about their scale (e.g., an agreement between manufacturers to phase out a particular production process which involves the emission of carbon dioxide).

The exemption criteria (a.o. the fair share condition) are applied more broadly for climate change agreements than for other types of agreements[44]. As a result, while consumers of the relevant market still need to be fully compensated in the case of *environmental sustainability agreements* (benefits to consumers in other markets are generally not included in this assessment), a more permissive approach is deemed appropriate regarding *climate change agreements*. For this second type of agreements, "the totality of the climate change benefits to all UK consumers" should be taken into account, rather than "apportioning those climate change benefits between consumers within the market affected by the agreement and those in other markets"[45].

Hence, the CMA adopted an approach on climate change agreements that goes further than the Commission's Guidelines. This difference may hardly be explained by Brexit (only) – i.e. by the CMA not being bound anymore to apply Article 101 TFEU (as interpreted by the CJEU). Indeed, even though the CMA may now disregard the *Mastercard* case-law of the CJEU (heavily relied upon by the Commission's Guidelines to exclude consideration of non-consumer benefits)[46], there is similar case-law of the UK Supreme Court in a comparable case which, just like the (CJEU) *Mastercard* case, could appear to confirm the principle

[44] This is because "*climate change represents a special category of threat: the sheer magnitude of the risk that climate change represents (including the need for urgent action), the degree of public concern about it, and the binding national and international commitments that successive UK governments have entered into set it apart*": *ibid.*, at 1.11.

[45] *Ibid.,* at 6.4. This means concretely, for instance, that an agreement between delivery companies to switch to electric vehicles would benefit all UK consumers through a reduction in carbon dioxide emissions. As this is a climate change agreement, the different approach to the "fair share to consumers" condition means that the delivery companies will be able to take into account the totality of the carbon dioxide emissions reduction to compensate the harm to consumers of the relevant products that results from their agreement, without apportioning those benefits between consumers of the delivery service (inside the relevant market) and other UK consumers (i.e. the wider group of the consumers who benefit from the agreement, which is outside the relevant market) : *ibid.*, at 6.5.

[46] Indeed, the CMA and the UK Courts are not bound anymore by Articles 3 and 16 of Regulation 1/2003 which prevented them from exempting agreements that would have been prohibited by the Commission or the CJEU.

that the harm to one given set of consumers should not be offset against the benefits to a different set of consumers[47]. The CMA, however, interestingly noted the difference between cases such as those precedents and sustainability agreements: the *Mastercard* situation is one where the customers sustaining harm from the agreement were different from the customers benefiting from the agreement (retailers versus cardholders) – the two sets of customers were essentially separate from each other. By contrast, the benefits of mitigating the impact of climate change apply to society as a whole, a group of consumers which by definition includes, and is not wholly distinct from, the consumers of the agreement products who may be adversely affected by the restrictive effects of the agreement[48].

2.2. (Further) unmuting consumers (citizens) in the Commission's Guidelines

Not only does a further integration of sustainability interests through the consideration of non-consumer benefits under Article 101(3) TFEU appear to be possible in light of the CJEU case-law, but a more ambitious approach would also bring competition law (more) in line with the (EU constitutional and secondary law) context surrounding EU competition policy.

2.2.1. The CJEU case-law does not stand in the way of (further) greening EU competition policy

One of the main arguments that is usually put forward by opponents of further greening competition policy (but also by the Commission itself) is that considering non-consumer benefits (*citizen* welfare) under Article 101(3) TFEU would not be possible in light of the CJEU case-law[49]. More specifically, as is acknowledged by the Guidelines too (through references in footnotes), the Commission insists that cases like *GlaxoSmithKline*[50] or (most famously) *Mastercard*[51] would justify

[47] *Sainsbury's v Mastercard* [2020] UKSC 24, in particular paras 173-174.

[48] *UK Guidance*, see *supra*, footnote 83.

[49] See for instance E. Loozen, "EU antitrust in support of the Green Deal. Why better is not good enough", *op. cit.*, p. 82-85.

[50] Case T-168/01, *GlaxoSmithKline Services and Others v Commission*, EU:T:2006:265, paras 248 and 251.

[51] Case C-382/12 P, *MasterCard Inc*, EU:C:2014:2201, para 242.

that the effect on consumers directly affected in the relevant market should be at least neutral (i.e. that collective benefits to the consumers in the relevant market that occur outside that market could be taken into account only if they are significant enough to (fully) compensate the consumer in the relevant market)[52].

Other interpretations of the relevant CJEU case-law are possible. First of all, the context of all those cases (as well as other cases cited elsewhere in the Commission's relevant soft law instruments) was not anywhere close to the context of sustainability agreements. It is also striking, as the CMA rightly noted in relation to the comparable (UK Supreme Court's) *Mastercard* case (see above), that the benefits of mitigating the impact of climate change apply to society as a whole (i.e. by definition to overlapping groups of consumers or citizens), which is different from a situation where the two groups of consumers considered are two (fully separate) sets of customers (on a specific two-sided market). More fundamentally, none of the cases referred to by the Commission clearly provides that full compensation of the consumers on the relevant market is a generally applicable requirement for a fair share[53]. Lastly, the Commission's strict reading of the case-law seems to ignore other cases where it was found, notably, that regard should be had under Article 101(3) TFEU not only to benefits of agreements on "the relevant market", "but also, in appropriate cases, [on] every other market on which the agreement in question might have beneficial effects, and even, in a more general sense, for any [service or product] the quality or efficiency of which might be improved by the existence of that agreement"[54].

[52] Guidelines, para 584.

[53] See in particular ACM, "What is meant by a fair share for consumers in article 101(3) TFEU in a sustainability context?", *Legal Memo* (27 September 2021), p. 2-4; see also P. Jansen, S.J. Beeston and L. Van Acker, "The sustainability guidelines of the Netherlands Authority for Consumers and Markets: an impetus for a modern EU approach to sustainability and competition policy reflecting the principle that the polluter pays?", *European Competition Journal* (2022), p. 315.

[54] See case T-86/95, *Compagnie Générale Maritime a.o.*, EU:T:2002:50, para. 343. See also T-213/00, *CMA CGM a.o.*, EU:T:2003:76, para. 227.

2.2.2. The (constitutional) need to consider broad sustainability interests in the analysis framework under Article 101(3) TFEU

EU competition law cannot be considered in complete isolation from its (constitutional) context. In particular, systemic legal arguments exist for supporting a broader consideration of sustainability interests (for instance a broad notion of consumers) in EU competition law, which is part of the wider context of the 'European Economic Constitution'. EU law aims notably at achieving sustainable development in a social market economy (Article 3 TEU) and several provisions of the Treaties demand that environmental protection be taken into account in the other policies pursued by the Union. Crucially, Article 11 TFEU provides that environmental protection requirements "must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development". Similarly, Article 37 of the EU Charter of Fundamental Rights contains the principle that "[a] high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development".

This horizontal obligation of integration also applies to decisions taken by the Commission in competition law. Indeed, Article 11 TFEU's wording of "implementation" as well as the *effet utile* principle suggest that the scope of this provision extends further than the policy-making stage and also concerns the application of (competition) law in actual Commission decisions,[55] as supported by the case-law[56]. Moreover, as there would be no reason for competition law to derogate from the general rule that the obligation of environmental integration applies to all areas of EU law[57], Article 11 TFEU is equally applicable in competition law, which could hardly be given higher constitutional status than the protection of the environment[58].

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[55] J. Nowag, *Environmental Integration in Competition and Free-Movement Laws* (Oxford, 2016), p. 23-24.

[56] See a.o Case C-487/06 P, *British Aggregates v Commission*, EU:C:2008:757.

[57] J. Nowag, *op. cit.*, p. 27.

[58] See A. Gerbrandy, "Solving the Sustainability Deficit in European Competition Law", *World Competition* (2017), p. 137. See also the opinion of AG Geelhoed that Article 11 requires "to take due account of ecological interests in policy areas outside that of environmental protection stricto sensu": Opinion of AG Geelhoed in case C-161/04, *Austria v Parliament and Council*, EU:C:2006:66, para 59-60.

Admittedly, Article 11 TFEU does not deprive the Commission of its wide margin of discretion when environmental interests conflict with other EU objectives. It might therefore be argued that since Article 11 TFEU is only one of the thirteen horizontal clauses existing in the Treaties. Yet, this provision arguably does not have the same binding force as all the other clauses, as the Maastricht and Amsterdam Treaties considerably broadened this provision and reserved it a strong prescriptive wording which has not been used in any of the other horizontal clauses ('must be integrated')[59]. More fundamentally, it has been argued that the competition enforcers would lack the democratic legitimacy to make value judgments including environmental protection. The consideration of environmental concerns would be reserved to the legislator[60]. However, although it may indeed not be the role of competition enforcers to actively design environmental standards, the text of the Treaty as much as the jurisprudence of the Court arguably conferred on the Commission the legitimacy to balance different interests under Article 101 TFEU. Administrative authorities and courts arguably routinely conduct balancing exercises between competing values and interests, often involving issues of greater complexity than the more confined type of economic balancing needed in the context of competition law disputes[61]. There is no reason to consider that competition law (only) would be too technical or "objective" to take into account broader interests, all the more in a context where the text of the Treaty itself refers to the concept of "fairness" (i.e. a "fair share" of the benefits must be allowed to consumers).

Moreover, the polluter-pay principle enshrined in Article 191(2) is relevant too in this context. Indeed, these issues raise questions such as who the beneficiary of polluting consumption is, and who therefore should pay for this pollution. Is it not in some way logical that consumers of the polluting products would not be fully compensated and would incur (part of) the costs of measures designed to reduce pollution? Applying the polluter-pay principle here could mean that the costs of "negative externalities" should be paid by the direct beneficiaries of

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[59] For a comparison of the respective prescriptive ambits of the horizontal protection clauses in the Treaties, see J. Nowag, *op. cit.*, p. 4.

[60] See a.o. P. Schinkel en L. Toth, "Compensatory Public Good Provision by a Private Cartel", *op cit.,* p. 30.

[61] See I. Lianos, "Reorienting competition law", *op. cit.*, p. 4.

the pollution, while the benefits derived from the measures addressing those externalities could also accrue consumers other than those direct beneficiaries[62].

Of course, the point here is not to imply that Article 11 TFEU, (Article 37 of the Charter) or Article 191(2) TFEU would mandate to exempt from the cartel prohibition any allegedly sustainable agreement (and thereby give a blank cheque to any sustainable cooperation initiative). It is simply to suggest that, when several readings of notions such as the "fair share for consumers" under Article 101(3) TFEU are possible, in view of the discretion left to the Commission, the "constitutional argument" should at least be taken into account when considering interpretations more favourable to the protection of the environment.

2.2.3. The requirement for companies to "collaborate" in order to meet their corporate sustainability due diligence obligations

An additional question that arises is how a strict interpretation of the conditions of Article 101(3) TFEU can be reconciled with recent secondary European law and, in particular, the Directive on corporate sustainability due diligence ("CSDDD")[63]. The CSDDD, which entered into force in July 2024, aims at fostering sustainable and responsible corporate behaviour in companies' operations and across their global value chains[64]. Consequently, as the CSDDD itself states, "[i]n some instances, a collaboration with other entities could be the only realistic way of preventing potential adverse impacts being caused even by direct business partners if the influence of the company is not sufficient"[65].

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[62] See a.o. ACM, "What is meant by a fair share for consumers in article 101(3) TFEU in a sustainability context?", *op. cit.*, p. 4.

[63] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, PE/9/2024/REV/1, OJ L, 2024/1760.

[64] It should be noted that the von der Leyen II Commission announced the publication in early 2025 of a so-called "omnibus simplification package" aiming at "reducing regulatory overlap" (in particular between sustainability-oriented instruments such as the CSDDD, the Corporate Sustainability Reporting Directive ("CSRD") and the Taxonomy Regulation). The concrete impacts of such forthcoming "omnibus simplification package" on the substantial obligations imposed on companies by the CSDDD are yet unknown: see the Commission's press release of 29 January 2025, "An EU Compass to regain competitiveness and secure sustainable prosperity", accessible under https://ec.europa.eu/commission/presscorner/detail/en/ip_25_339 (last consulted on 7 February 2025).

[65] *Ibid.*, recital (49).

The CSDDD therefore imposes on companies, where relevant, a *duty to collaborate*. More precisely, according to Article 10(2), (f) and 11(3), (g) of the CSDDD concerning obligations to prevent, remedy or bring to an end potential and actual adverse impacts respectively, "[c]ompanies shall be required to take the following appropriate measures, where relevant: […] *in compliance with Union law, including competition law*, *collaborate with other entities*, including, where relevant, in order to increase the company's ability to prevent or mitigate the adverse impact, in particular *where no other measure is suitable or effective*" (emphasis added).

It is unclear how companies will be able to navigate these potentially conflicting obligations, as in some instances they will have no option but to collaborate under the CSDDD, while having to respect Article 101 TFEU and the related Commission's Guidelines. The Guidelines themselves do seem to have anticipated such hurdles, as they further indicate – as an example of agreements "unlikely to raise competition concerns" – that sustainable agreements "may be an appropriate measure to enable undertakings to *implement their sustainability due diligence obligations under national or EU law* and can also form part of wider industry cooperation schemes or multi-stakeholder initiatives to identify, mitigate and prevent adverse sustainability impacts in their value chains or their sector"[66].

However, this mention alone – although helpful – will probably not suffice to grant companies a sufficient level of legal certainty. It is indeed doubtful whether the above-quoted provisions of the CSDDD may constitute a valid application of the public compulsion doctrine or defence, according to which anti-competitive conduct resulting from undertakings' compliance with government measures and regulations

[66] Guidelines, para 528. It can be noted that, quite oddly, this indication is provided as an example of agreements that "aim solely to ensure compliance with sufficiently precise requirements or prohibitions in legally binding *international* treaties, agreements or conventions" (emphasis added), i.e. not explicitly EU secondary law such as the CSDDD. Interestingly, the ACM policy rule also foresees a similar "exemption" but itself explicitly covers other EU rules: "Under the EC Horizontal Guidelines, such agreements that relate to compliance with international rules fall, under certain conditions, outside the scope of the cartel prohibition of Article 101, paragraph 1, of the Treaty on the Functioning of the European Union (TFEU). ACM follows this line. Additionally, ACM will also in principle not further investigate agreements concerning compliance with binding sustainability standards based on other rules, like *national or European rules*" (ACM policy rule, *op. cit.*, para 8).

may, under certain conditions, escape the application of Article 101(1) TFEU[67]. In particular, the CJEU has been quite strict in its interpretation of this concept, categorically refusing to accept as an excuse for illegal collusion the existence of measures that merely *facilitate*, *encourage*, *support* or *approve* such conduct[68]. Thus, the CSDDD's wording that such collaboration be implemented only "where relevant", "in particular *where no other measure is suitable or effective",* may possibly not reach the rather high threshold defined for the application of the public compulsion defence.

Moreover, it should be noted that most agreements concluded in order to meet obligations under the CSDDD might be *vertical* in nature, i.e. between operators active at different levels of the value chain. Such vertical agreements are not subject to the *horizontal* Guidelines of the Commission, but rather to its Guidelines on *vertical* restraints, which do not contain specific guidance regarding compliance with EU due diligence obligations (let alone any specific chapter on vertical sustainability agreements)[69].

It therefore seems that, as anticipated by the CSDDD itself[70], further guidance from the Commission regarding the avenues available for companies to collaborate under the CSDDD while respecting competition rules would be needed. This, in light of the wording foreseen by the CSDDD, could in turn (at least marginally) imply a new evolution in the Commission's interpretation of Article 101 TFEU in the context of sustainability agreements.

Conclusion

Competition policy is at a crossroads. A solution needs to be found to the "antitrust issue", which arguably results in muting a range of

[67] See Van Bael & Bellis, *Competition Law of the European Union* (Kluwer, 2021), 2.7.

[68] *Ibid.* See for instance case C-136/86, *BNIC v. Aubert*, EU:C:1987:524, para. 13; case T-217/03, *FNCBV and Others v. Commission*, para 92.

[69] Communication from the Commission - Guidelines on vertical restraints 2022/C 248/01, C/2022/4238, OJ C 248. For (limited) indications as to the relevance of sustainability motives for the assessment of the legality of vertical agreements by the Commission, see paras (8), (9), (144), (235) and (316).

[70] See for instance CSDDD, recital (52): "The Commission, in collaboration with Member States, should issue guidance setting out fitness criteria and a methodology for companies to assess the fitness of industry and multi-stakeholder initiatives".

stakeholders who are not always the direct consumers of the products concerned by an agreement between competitors, and ultimately hinders important private initiatives in the context of climate change. Against this background, the Guidelines mark a positive but modest development in the Commission's application of the "fair share to consumers" condition in the context of sustainability agreements. They push the classical model of interpretation of Article 101 TFEU to its outer limits, without departing from its fundamentals: reference is made, for instance, to the continuous reliance on consumers' willingness to pay and to the refusal to fully consider collective environmental benefits, understood as "pure out-of-market" efficiencies. Hence, it is to be feared that the Guidelines will not allow for the implementation of some legitimate and important sustainability agreements, aimed in particular at reducing carbon emissions on a sector-wide scale, and could fail to effectively "unmute" affected consumers or citizens, in particular future generations or stakeholders of global value chains. In this respect, the national models studied in the Netherlands, Austria and the United Kingdom provide interesting alternatives which, arguably, take better account of environmental benefits, substituting the *consumer* welfare standard with a *citizen* welfare standard. A broader approach, and an (even) greater consideration of environmental issues, seems consistent with (or at least not precluded by) the applicable case-law of the CJEU and may even be required in light of the broader legal context. In particular, the "constitutional" framework arguably suggests that the Commission should use its margin of discretion under Article 101 TFEU in a way that is more favourable to sustainability agreements. Such an approach might also prove necessary to enable companies to comply, in certain circumstances, with their new obligations to cooperate under the CSDDD. Further guidance as to and evolution in the application of Article 101 TFEU in the context of sustainability agreements will therefore be needed to really unmute the environment in EU competition law.

Which voices are heard in European wildlife policy? The necessity to listen to the many voices of living beings affected by conservation project

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Abstract: This chapter examines the complex dynamics of European wildlife conservation policy, focusing on the tensions between human and non-human interests. Starting with the case of the reclassification of the wolf from "strictly protected" to "protected", the analysis highlights how European biodiversity policies often favour socio-economic interests over scientific evidence, leading to conflicts between conservation goals and agricultural practices. The chapter then explores the concept of silencing the voices of marginalized wildlife and human communities, particularly in rural areas affected by rewilding projects. Using a case study of the Vercors Vie Sauvage rewilding initiative in France, the chapter illustrates the challenges of balancing ecological restoration with the needs of local farming communities. It argues that while rewilding offers a de-anthropocentric approach to conservation, it risks further marginalizing rural populations. The chapter concludes by advocating for policies that support traditional agriculture and promote human-wildlife coexistence, emphasizing the need for an equitable and inclusive approach to biodiversity conservation in Europe.

Introduction

In September 2022, Dolly, the old family pony of Ursula von der Leyen, the President of the European Commission, re-elected for a second term in 2024, was killed by a wolf. After this event, she declared that wolves represented "a real danger to livestock and potentially to humans"[1]. In

[1] European Commission, "Wolves in Europe: Commission urges local authorities to make full use of existing derogations and collects data for conservation status review"

December 2023, in the broader context of concerns regarding the return of this predator in many EU member states, the Commission officially proposed to lower the wolf's legal protection[2]. In an unprecedented decision, the Standing Committee of the Bern Convention[3] responded favourably and decided in December to move the wolf from "strictly protected" to "protected"[4], whereas it had refused to do so at the time for the two other previous requests from other members, one of which also concerned the wolf. This decision will facilitate the use of lethal control against wolves, which until now has been limited to specific cases[5].

In a joint statement against this decision, the European Environmental Bureau (EEB), Europe's largest environmental NGO grouping together some EU Member States and other NGOs, oppose this reclassification and stress the lack of any scientific basis for it[6]. Indeed, a report published by the European Commission indicates that the wolf population in the EU is in an unfavourable or inadequate conservation status in six of the seven biogeographical regions where it can be fine. Moreover, there is a lack of consensus regarding the consequences of increased lethal control on wolves. Some studies suggest that this could even have a counter-productive effect on livestock predation, which is the main driver of protest against wolves[7], by disrupting the

[press release], 4 September 2023, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4330.

2 European Commission, "Commission proposes to change international status of wolves from 'strictly protected' to 'protected' based on new data on increased populations and impacts" [press release], 20 Decembre 2023, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6752.

3 Convention of the Council of Europe on the conservation of European wildlife and natural habitats, CETS 104, 19 September 1979.

4 Convention on the conservation of European wildlife and natural habitats, "44th Standing Committee of the Bern Convention on the Conservation of European Wildlife and Natural Habitats", T-PVS(2024)MISC, 6 December 2024. See in particular "4.2. Proposal for amendment: Downlisting of the wolf (Canis lupus)".

5 E.-F. Ostermann-Miyashita *et al.*, "Bridging the Gap between Science, Policy and Stakeholders: Towards Sustainable Wolf–Livestock Coexistence in Human-Dominated Landscapes", *People and Nature* (2025).

6 European Environmental Bureau, "Don't reverse conservation progress: EU must step up coexistence efforts and maintain strong wolf protection!", 19 September 2024. *Signed by 300 + Civil Society Organizations, including the World Wide Fund for Nature (WWF EU) or Birdlife international.*

7 S. Ceauşu *et al.*, "Governing Trade-Offs in Ecosystem Services and Disservices to Achieve Human–Wildlife Coexistence", *Conservation Biology*, vol. 33, n°3 (2019), p. 543-553.

social structures of packs and thus increasing the risk of individual predatory behaviour[8].

In this decision, the various European institutions involved, and even the Bern Convention – the entity responsible for "conserve wild flora and fauna and their natural habitats" as described in its charter[9] – did not therefore take a position based primarily on the scientific data available or on the interests of the wolf. Instead, they have primarily arbitrated between divergent positions in society, in accordance with the conclusions of social scientists such as Heise that the category of extinction is more socially constructed than objectifiable[10]. The objective of this chapter is to analyse how EU policies liberate or counteract the different agencies and modes of expression of the multiple lives affected by conservation. The term *agency* has been defined by the *Sociology of translation* as the ability of a living being (both humans and non-humans) to exert an unimpeded effect on other entities with which it interacts[11]. In the case of the wolf, it is possible to analyse these political choices between affected parties from the perspective of two main struggles for unmuting. These two struggles apply more generally to European biodiversity policy, and are each examined in one of the sections of this chapter.

On the one hand, wolves and their defenders can feel *muted* by the downgrade decision. Indeed, studies have demonstrated that some societal groups express appreciation for the reintroduction of wolves, citing both tourism-related benefits and intrinsic values, namely the appreciation of wildlife irrespective of the benefits that can be derived from it[12]. The absence of a robust scientific rationale for the down-listing

[8] A. Eklund *et al.*, "Limited Evidence on the Effectiveness of Interventions to Reduce Livestock Predation by Large Carnivores", *Scientific Reports*, vol. 7, n°1 (2017).

[9] Convention on the conservation of European wildlife and natural habitats. *See art. 1.*

[10] U. K. Heise, *Imagining Extinction: The Cultural Meanings of Endangered Species* (University of Chicago Press, 2016).

[11] For the definition from the "Sociology of Translation": M. Akrich, M.Callon, and B. Latour, *Sociologie de la traduction : Textes fondateurs* (Presses des Mines, 2013) ; for an analysis of the use of this concept in environmental studies: K. Wanneau, É. Fabri and V. Arantes, "Après la nature. Le tournant du vivant et ses conséquences politiques", *Politiques de communication*, no HS2 (2023), p. 147-176.

[12] E.-F. Ostermann-Miyashita *et al.*, *op. cit.* ; I. Kavčič *et al.*, "Non-Consumptive Use of Wolves in Tourism: Guidelines for Responsible Practices", report, Ljubljana, Biotechnical faculty, Biology Department ; LIFE WolfAlps EU ; Large Carnivore Initiative for Europe (2022).

of the wolf is consistent with the perception that the EU's conservation policies frequently favour extractive industries, including agriculture, forestry, and mining. The potential expansion of wildlife in Europe is likely to increase such conflicts of interest, thereby raising questions regarding the capacity of EU policies to accommodate an increase in non-human agency within the Union. The initial section of this chapter examines how EU public policies on biodiversity evolve to adopt an eco-centric, de-anthropized vision[13]. That is to say, a vision based on the interests of non-human beings for their own sake (Section 1).

On the other hand, farming-dependent communities in the most remote regions of Europe are disproportionately affected by the return of wolves and, more broadly, by conservation policies and the return of the wild to certain parts of Europe[14]. These communities are depopulated, dependent on land that is difficult to farm and geographically isolated from decision-making centres. These groups may perceive that their interests and voices are overshadowed, *muted*, by those of groups who prioritize environmental concerns, and would be more effectively represented, as evidenced by the expansion of EU environmental legislation. This phenomenon of inaudibility has precipitated radical electoral choices, which may have engendered a willingness to act against the wolf among national and European political representatives. A study undertaken in Germany and expanded to encompass several European countries, utilizing electoral data, have demonstrated a correlation between wolf attacks and the augmentation of the far-right vote, concomitant with the diminution of support for green parties[15]. The second part of this paper will present a case study of a rewilding project carried out in south-east France, in the Vercors, to illustrate the potential and effects of rewilding on the ground (Section 2).

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[13] De-anthropized means adopting an approach that prioritizes non-human interests over the traditional human-centric vision of nature as merely a resource for humans. M. Tanasescu, "Rethinking representation: The challenge of non-humans", Australian Journal of Political Science, vol. 49, n°1 (2014), p. 40-53; N. Hoek *et al.*, "Implementing Rights of Nature: An EU Natureship to Address Anthropocentrism in Environmental Law", *Utrecht Law Review*, vol. 19, n°1 (2023).

[14] On the case of the wolf in particular: E.-F. Ostermann-Miyashita *et al.*, *op. cit.* ; more broadly on the impact of rewilding depopulated areas: H. M. Pereira; L. M. Navarro (Eds.), *Rewilding European Landscapes*, (Springer, 2016).

[15] B. Clemm von Hohenberg, A. Hager, "Wolf attacks predict far-right voting", *Proceedings of the National Academy of Sciences*, vol. 119, n°30 (2022).

In order to ensure that conservation policies are effective in unmuting the voices and agency of wildlife, some academics and practitioners have been advocating a new approach called *rewilding* since the 1990s[16]. Rewilding proposes to rethink conservation from a simple and radical perspective: aiming to make ecosystems self-sufficient and encourage their return to a wild state[17]. Its aim is to minimize human intervention within designated protected areas, thereby enabling natural ecosystems to evolve without any anthropogenic influence. This case study offers a particularly pertinent context for the examination of the potential impact of conservation initiatives on marginalized and mute groups. It is situated in an isolated mountainous region, where it has encountered significant opposition from a local population that is advocating for the safeguarding of its long-standing agropastoral practices. The analysis will utilize this case study to interrogate the feasibility of just conservation, integrating social justice with considerations of more-than-human interests[18]. As Vucetich *et al.* contend, these principles are frequently incompatible[19], underscoring the responsibility of public policy to establish the regulatory framework and a forum for expression to manage these conflicts.

The methodology employed in the case study is outlined as follows: the data presented were collected during a field study conducted in 2021. The fieldwork was based on an ethnography, informed by the sociology of translation and the theory of pragmatic philosophy, with the objective of understanding stakeholder values. To ascertain the views of the relevant parties, non-direct interviews were conducted with members of the organization leading the rewilding project and with stakeholders, including local elected representatives, representatives of the farming community and local nature user associations.

16 R. Barraud *et al.*, "Ensauvagement et ré-ensauvagement de l'Europe : controverse et postures scientifiques", Géographies. *Bulletin de l'association de géographes français*, vol. 96, n°2 (2019), p. 301-318.

17 J. Prior, K. J. Ward, "Rethinking rewilding: A response to Jørgensen", Geoforum, vol. 69 (2016), p. 132-135; S. Carver *et al.*, "Guiding Principles for Rewilding", *Conservation Biology*, vol. 35, n°6 (2021), p. 1882-1893.

18 B. Buscher, R. Fletcher, *The Conservation Revolution: Radical Ideas for Saving Nature Beyond the Anthropocene* (Verso, 2020).

19 J. A. Vucetich, J. T. Bruskotter, M. P. Nelson, "Evaluating whether nature's intrinsic value is an axiom of or anathema to conservation", *Conservation Biology*, vol. 29, n°2 (2015), p. 321-332.

1. A legislation trying to unmute nature in the tension of environmental productivity interests

The EU's legal framework for biodiversity conservation seeks to de-anthropize land-use priorities through legislation. However, these efforts have failed to address the severity of Europe's biodiversity decline. According to the latest 2020 report from the *European Environment Agency* (EEA), an EU agency responsible for preserving and monitoring Europe's environment, 60% of the species and 77% of the ecosystems supposed to be protected by one of the EU's most ambitious legislative acts in the field of biodiversity, the 1992 Habitats Directive[20], are in an "unfavourable conservation status"[21]. The primary cause of this failure is the prioritization of economic interests over the implementation of these limited new environmental protections. Extractive interests, as represented by certain EU Member States, specific sectoral lobbies and certain companies, have frequently succeeded in diminishing the impact of European biodiversity legislation, as evidenced by the recent case of the Green Deal, which will be examined below. They almost succeeded in preventing the adoption of the *Nature Restoration Law* (NRL)[22], which was to be one of the symbols of the EU's green ambition, and they succeeded in preventing the *Farm-to-Fork initiative* from being transposed into legislation[23].

In the initial section, the historical underpinnings of this biodiversity legislation and its circumscribed efficacy in safeguarding and augmenting the agency of wild Europe over extractive interests will be delineated (1.1). The second section will build upon this observation by demonstrating how the political aspirations of the European legislative package known as the Green Deal were constrained in terms of their efficacy during the adoption process, in the face of challenges related to agricultural competitiveness (1.2). The final section will nevertheless delineate the substantial advances facilitated by the Green Deal, at least

[20] Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, *O.J.* L 206, 22 July 1992.

[21] European Environment Agency, "State of Nature in the EU", 19 October 2020, https://www.eea.europa.eu/publications/state-of-nature-in-the-eu-2020.

[22] Regulation 2024/1991 on nature restoration and amending Regulation (EU) 2022/869 [Nature Restoration Law], *O.J.* L, 29 July 2024.

[23] N. de Sadeleer, "The challenges of implementing the European Green Deal", Jean Monnet Working Paper, n°9 (2024).

in terms of symbols and the conceptualization of nature within the legal framework, towards de-anthropized legislation (1.3).

1.1. History of European legislation on biodiversity: ambitions thwarted by the primacy of economic interests

In 1979, the Council of Europe proposed a *Convention on the Conservation of European Wildlife and Natural Habitats*, also known as the Bern Convention[24]. The legislation has been ratified by all EU Member States, and is thus unique in its scope, as it is the only continental legislation of its kind in the world, and even intercontinental in its reach, given that it includes members from Africa and Asia. Subsequent to this, the EU has formulated a series of legislative instruments concerning the issue of biodiversity, thereby *unmuting* the challenges of biodiversity in Europe. However, these measures have not effectively led to the preservation of biodiversity.

The two main historic EU policies for preserving biodiversity are the Habitats Directive from 1992[25] and the Bird Directive from 2009[26]. Together, they established the Natura 2000 network, a Europe-wide system of protected sites, aims to conserve biodiversity by safeguarding key habitats and species while promoting sustainable land management. It covers 550,000 km^2, or 18.5% of Europe's land area and 10% of its marine area, making it the largest network of its kind in the world[27]. Whilst the Bird Directive focuses on avian populations, the Habitat Directive is concerned with the relationship between species and their habitat. This directive is the first European legislation to go beyond the species-centred approach[28]. This enables us to consider the *unmuting* of nature beyond the scope of quantifiable data on the relevance of a species and instead focus on the health of nature as the capacity of different species to interact freely in an environment known as a *habitat*. This is consistent with the concept of agency previously outlined.

[24] Convention on the conservation of European wildlife and natural habitats.

[25] Directive on the conservation of natural habitats and of wild fauna and flora.

[26] Directive 2009/147/EC on the conservation of wild birds, *O.J.* L 20, 36 January 2010.

[27] V. Hermoso *et al.*, "The EU Biodiversity Strategy for 2030: Opportunities and challenges on the path towards biodiversity recovery", *Environmental Science & Policy*, vol. 127 (2022), p. 263-271.

[28] G. Gorghiu *et al.*, "Rewilding as a Multifaceted Concept and Emerging Approach: The Romanian Experience", *Sustainability*, vol. 16, n°4 (2024).

These directives, in conjunction with other key legislation on marine biodiversity[29], have pursued the objective of preserving Europe's most precious biodiversity. However, these efforts have not been sufficient to halt its overall decline[30]. According to an analysis of 2007-2011 data from the Pan-European Common Bird Monitoring Scheme[31], "74% of ground-nesting bird species were in decline, compared with 41% for other species", despite the fact that the Birds Directive is considered to be an exemplary instrument for the EU's ambitions in terms of biodiversity[32]. With regard to the other objectives of European legislation, the EEA 2020 report reveals that a mere 15% of the habitats and 27% of the species enumerated in the Habitats Directive were not at risk of imminent extinction. This underperformance can be attributed to two primary factors[33].

Firstly, despite the establishment of these various legal provisions, their implementation by Member States has been found to be both uneven and somewhat inadequate[34]. In terms of coverage of protected areas, the target 11 of the Aichi of the *Convention on Biological Diversity* (CBD) was "by 2020, at least 17 per cent of terrestrial and inland water, and 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed"[35]. These targets have been ratified by all members of the United Nations, except for the United States, which is not a member of the CBD. Concerning to

[29] Directive 2000/60/EC establishing a framework for Community action in the field of water policy, *O.J.* L 327, 22 December 2000; Directive 2008/56/EC establishing a framework for community action in the field of marine environmental policy, *O.J.* L 164, 25 June 2008.

[30] D. Hering *et al.*, "Securing success for the Nature Restoration Law", *Science*, vol. 382, n°6676 (2023), p. 1248-1250.

[31] The European monitoring database for reference bird species supported by the European Commission: https://pecbms.info/trends-and-indicators/species-trends/, last accessed on 14.02.1015.

[32] B. J. McMahon *et al.*, "European Bird Declines: Do We Need to Rethink Approaches to the Management of Abundant Generalist Predators?", *Journal of Applied Ecology*, vol. 57, n°10 (2020), p. 1887.

[33] European Environment Agency, *op. cit.*

[34] V. Hermoso *et al.*, *op. cit.*

[35] Conference of the Parties of the Convention on Biological Diversity, "The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets", UNEP/CBD/COP/DEC/X/2, 29 October 2010, p. 9.

this objective, the EEA 2020 report indicated that certain EU Member States, including Slovenia, Croatia and Bulgaria, are achieving beyond the target, while others, such as Denmark, Latvia and Sweden, are failing to meet it[36]. Furthermore, the effectiveness of protected areas is also unequal. According to the same report, 30% of Natura 2000 sites did not have a management plan or equivalent instrument.

In addition to the inadequate implementation of obligations, the second key source of EU biodiversity legislation ineffectiveness is competition with socio-economic pressures[37]. The predominant challenge pertains to the integration of conservation measures within other policy frameworks. In this regard, agriculture continues to be a primary contributor to biodiversity loss, and the standards of the *Common Agricultural Policy* (CAP), the EU's framework for supporting farmers, food security, and rural development, frequently stand in opposition to biodiversity norms[38]. Research conducted in the Mediterranean regions of Europe has demonstrated a conflict between the Birds and Habitats Directives and CAP measures designed to enhance the productivity of agricultural land[39]. These findings can be extrapolated to the majority of bird species in protected agricultural areas[40]: farmland birds in the EU have declined by more than half since 1980[41].

The preponderance of research findings supports the assertion that intensive agriculture constitutes the principal contributing factor to the loss of biodiversity in Europe[42]. The impact of agricultural practices

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36 European Environment Agency, *op. cit.*

37 M. I. Batista, H. N. Cabral, "An overview of Marine Protected Areas in SW Europe: Factors contributing to their management effectiveness", *Ocean & Coastal Management*, vol. 132 (2016), p. 15-23.

38 F. L. Falco, E. Feitelson, T. Dayan, "Spatial Scale Mismatches in the EU Agri-Biodiversity Conservation Policy. The Case for a Shift to Landscape-Scale Design", *Land*, vol. 10, n°8 (2021).

39 C. Palacín, J. C. Alonso, "Failure of EU Biodiversity Strategy in Mediterranean farmland protected areas", *Journal for Nature Conservation*, vol. 42 (2018), p. 62-66.

40 C. Palacín, J. C. Alonso, *op. cit.*

41 S. Rigal *et al.*, "Farmland practices are driving bird population decline across Europe", *Proceedings of the National Academy of Sciences*, vol. 120, n°21 (2023).

42 N. Dudley, S. Alexander, "Agriculture and biodiversity: a review", Biodiversity, vol. 18, n°2-3 (2017), p. 45-49; L. Kehoe *et al.*, "Biodiversity at Risk under Future Cropland Expansion and Intensification", *Nature Ecology & Evolution*, vol. 1, N°8 (2017), p. 1129-1135; L. Macchi *et al.*, "Trade-Offs between Biodiversity and Agriculture Are Moving Targets in Dynamic Landscapes", *Journal of Applied Ecology*, vol. 57, n°10

on the environment is associated with two key factors: the intensity of land use and the homogenization of crops. The better strategy for mitigating these impacts is to diversify crops and reduce the size of fields, thereby fragmenting landscapes and increasing the biodiversity that an ecosystem can support[43]. The CAP has been identified as the primary driver for the intensification of agriculture, as evidenced by the findings of a comprehensive European survey[44]. The CAP, the world's largest public subsidy scheme, has resulted in the abandonment of hard-to-access farmland, primarily in mountainous regions, to the specialization of crops in different regions and to the expansion of fields for mechanization.

This tension between the desire to do more to achieve international and scientific objectives and socio-economic interests, particularly in agriculture, ran throughout the political process of building the Green Deal, presented as the most ambitious ecological public policy in the world.

1.2. The failure of the Green Deal to act on the major impact of agriculture on European nature symbolized by the destiny of the "Farm to Fork" legislation

Agriculture, which constitutes 38% of the EU's total surface area, of which approximately 70% is dedicated to the production of animal proteins, both directly and indirectly, is identified as a pivotal factor in ensuring the preservation of space for non-human entities[45]. The EEA 2020 report recommends the recovery of at least "10% of agricultural area as high-diversity landscape features" as a key factor to "provide space for wild animals"[46]. In addition to the non-human

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(2020), p. 2054-2063; T. Tscharntke *et al.*, "Beyond Organic Farming – Harnessing Biodiversity-Friendly Landscapes", *Trends in Ecology & Evolution*, vol. 36, n°10 (2021), p. 919-930.

[43] T. Tscharntke *et al.*, *op. cit.*; D. J. Gonthier *et al.*, "Biodiversity conservation in agriculture requires a multi-scale approach", *Proceedings of the Royal Society B: Biological Sciences*, vol. 281, n°1791 (2014).

[44] M. Emmerson *et al.*, "Chapter Two – How Agricultural Intensification Affects Biodiversity and Ecosystem Services", in Dumbrell, Kordas and Woodward (eds.) *Advances in Ecological Research*, vol. 55, Large-Scale Ecology: Model Systems to Global Perspectives (Academic Press, 2016), p. 43-97.

[45] European Union, "EU Agricultural Outlook 2023-2035", [report] 2023, https://agriculture.ec.europa.eu/data-and-analysis/markets/outlook/medium-term_en.

[46] European Environment Agency, *op. cit.*, p. 136.

interest, a change in agriculture is also needed to achieve our CO2 emission targets.

In accordance with the stipulations of the Land Use, Land-Use Change, and Forestry (LULUCF) EU regulation, it is imperative that shifts in land use and forestry result in the sequestration of 310 million tons of net CO2 from the atmosphere by 2030[47]. This commitment is integral to achieving the overarching objective of the EU to reducing its greenhouse gas emissions by a minimum of 55% by the same date.

The EU needed an ambitious political push to bring about this major change in our relationship with land use, which could have been the Green Deal. In an official communication from the EU's leading institution, it was described as "roadmap for Europe becoming a climate-neutral continent by 2050" aiming particularly to "protect, conserve and enhance the EU's natural capital" by "transform[ing] its economy and society"[48]. However, it appears that the Green Deal, despite including pertinent policies to accompany the transformation in the agricultural model, encountered complications due to the political situation following the substantial farmers' protests in spring 2024 and the recent surge in the influence of climate-sceptic or critics discourses in the European elections of June 2024.

The European Green Deal, unveiled in December 2019 by the Commission and delineated into multiple legislative texts, is built on several parts, one of which is *From Farm-to-Fork* (F2F). Adopted in October 2021, the F2F strategy proposed by the European Commission entire title is "for a fair, healthy and environmentally friendly food system"[49]. The initiative comprises 27 texts to be adopted, with key measures including a 50% reduction in the use of pesticides by 2030 and a 20% reduction in the use of chemical fertilizers. Furthermore, 4% of arable land is to be dedicated to non-productive purposes. The

[47] Regulation (EU) 2018/841 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, *O.J.* L 156.

[48] European Commission, "The European Green Deal", COM(2019) 640 final, 12 Novembre 2019.

[49] European Commission, "A Farm to Fork Strategy", COM(2020) 381 final, 20 May 2020.

initiative also aims to increase the proportion of land farmed organically from 9.1% to 25% by 2030[50].

As evidenced by the discourse surrounding the issue of wolves, the political environment underwent a shift at the conclusion of the previous mandate. Conservative groups within The European Parliament expressed concerns that the EU would forfeit its food sovereignty due to declining yields. These concerns were further substantiated by a study commissioned by CropLife Europe, a pro-pesticide lobby group, and realized by Wageningen University scholars, which has produced results that contradict the studies used by the EU as a basis for the Green Deal and served to validate their apprehensions[51].

The massive protests by farmers since December 2023 in Europe have also put pressure on political leaders. According to Finger *et al.*, "while farmer protests are not a new phenomenon, they gained considerable and exceptional momentum and intensity towards the end of 2023 and early 2024"[52]. In addition to diverse national motivations such as diesel taxes, farmers protested mainly against the impact of the Green Deals on their activity. This context has resulted in a general retreat from ambitions to change the European agricultural model, in contradiction with the strategic importance of this sector in the fight for biodiversity and the climate[53]. The F2F strategy's flagship measure on plant protection products has been completely abandoned. Of the 27 texts contained within the strategy, only a small number were adopted, and of those that were adopted, many were not binding. Furthermore, the EU has abandoned any further greening of the CAP for the 2023-2027 period.

It is imperative to consider and *unmute* the voices of farmers who have been adversely affected by the implementation of environmental policies. However, it is crucial to note that the substantial protest occurred prior to the implementation of any F2F rules, thereby suggesting that the prevailing discontent was pre-existing. As discussed by Finger *et al.*, while farmers may perceive the Green Deal as a potential threat to their

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[50] European Commission, *op. cit.*, 20 May 2020.

[51] J. Bremmer *et al.*, "Impact Assessment Study on EC 2030 Green Deal Targets for Sustainable Food Production [study commissioned by CropLife Europe]", 2021, https://edepot.wur.nl/555349.

[52] R. Finger *et al.*, "Farmer Protests in Europe 2023–2024", EuroChoices (2024).

[53] N. de Sadeleer, *op. cit.*

business, the predominant motivator behind these protests is the pursuit of a fair wage for their labour[54].

1.3. The Green Deal difficult attempts to change the legal perception of nature, represented by the complicated legislative process of the Nature Restoration Law

Despite the EU's decision to abandon the F2F strategy, the Green Deal, as a comprehensive set of measures, has yielded notable accomplishments. Alongside the EU's Biodiversity Strategy 2030, the NRL forms the core of the Green Deal biodiversity ambitions. It allows the EU to go further than simply setting ambitious but non-binding targets, as previous legislation generally did.

The biodiversity strategy for 2030 was adopted in 2020 and is entitled "Bringing nature back into our lives"[55]. The objective of the initiative is to attain a total annual budget of 20 billion euros, to be constituted by EU, national, and private funds. The Commission website presents this strategy as an "ambitious and long-term plan to protect nature and reverse the degradation of ecosystems"[56]. The strategy is founded on four pillars: the protection of nature and the expansion of protected areas, the facilitation of transformative change through enhanced research and knowledge of Europe's flora and fauna, the promotion of global action to mitigate the EU's impact on biodiversity, and, ultimately, the restoration of nature. The fourth pillar is a commitment to the rehabilitation and rejuvenation of ecosystems, which is a significant potential area for improvement. Currently, only 15% of EU habitats are in good condition, and a total of 81% of EU protected habitats are in poor condition, with considerable disparities between member states. Belgium has the worst performance in this regard[57].

The EU NRL was developed in this particular context. It was intended to serve as a symbol of the EU's Green Deal, which was referred to

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[54] R. Finger *et al.*, *op. cit.*

[55] European Commission, "EU Biodiversity Strategy for 2030: Bringing nature back into our lives", COM/2020/380 final, 20 May 2020.

[56] European Commission, *Biodiversity strategy for 2030*, https://environment.ec.europa.eu/strategy/biodiversity-strategy-2030_en (last accessed on 05.03.2024).

[57] European Environment Agency, *op. cit.*

by Ursula von der Leyen as its “flagship proposal”[58]. Ultimately, the chaotic approval process served as an indication of the challenges encountered by the Green Deal.

Following an extensive period of deliberation with the European Commission, the European Parliament formally endorsed the NRL on 27 February 2024, in accordance with the standard co-decision procedure. This process was initiated by the Commission in June 2022 with the proposal of a preliminary version[59]. This approval was intended to represent the culmination of an arduous process that had already been in progress for a considerable time. In Parliament, members of the right-wing majority, representing the EPP, have collaborated with the far right to discredit the NRL. Their primary concerns pertain to the implications of the legislation on agricultural activities and its purported inability to adapt to regional variations. The EPP Vice Chair Siegfried Mureșan articulated the sentiment that “the affected farmers and foresters would once again look to Brussels with resentment when the problem is homemade and lies with the respective national governments”[60].

Although her Commission was backing the text, Ursula von der Leyen did not officially take position in favour of the NRL until April 25, 2024[61]. Following extensive negotiations, several concessions were secured by recalcitrant countries, including the limitation of mandatory restoration measures to protected Natura 2000 areas until 2030. However, on March 25, 2024, the law failed to garner the requisite support from environmental ministers representing 65% of the EU population, a support which was necessary for its adoption. This outcome was unexpected, given the law’s sufficient support in the previous Council vote in June 2023. Following arduous negotiations and an

[58] In a letter sent to the members of the European Parliament, Ursula von der Leyen expressed her support for the NRL. According to several press articles that have had access to the letter, it has not been made public. Louise Guillot et Karl Mathiesen, “Von Der Leyen Finally Stands up for Nature Law – Just as It May Fall”, Politico (25 April 2024): https://www.politico.eu/article/eu-ursula-von-der-leyen-finally-support-nature-restoration-law-green-deal-as-it-may-fall/ (last accessed on 05.08.2024).

[59] Council of the EU, “Nature restoration: Council and Parliament reach agreement on new rules to restore and preserve degraded habitats in the EU [press release]”, 9 November 2023.

[60] EPP Group, “EPP Group will vote against Nature Restoration Law”, 26 February 2024, https://www.eppgroup.eu/newsroom/epp-group-will-vote-against-nature-restoration-law (last accessed on 18.02.2025).

[61] L. Guillot, K. Mathiesen, *op. cit.*

almost unparalleled reversal in the EU process, the NRL was ultimately adopted on 17 June 2024, during one of the last weeks of the previous assembly.

The NRL has been found to contribute to the advancement of innovation within the EU's biodiversity legislation, as evidenced by the introduction of quantitative targets and deadlines (Art. 4-5). Another major advance is the introduction of quantitative targets and deadlines (Art. 4-5): "to restore 20% of the EU's land and sea area by 2030" and all ecosystems in need of restoration by 2050[62]. However, as highlighted by the rapporteur of the NRL, the Spanish Socialists and Democrats (S&D) MP's César Luena, this target remains below the 30% objective adopted at the Conference of the Parties to the UN Convention on Biological Diversity in 2022.

In its preamble, the NRL asserts its objective to complement the Habitat Directive, a commitment exemplified by its delineation of criteria for defining a favourable condition and a favourable reference area in relation to a favourable conservation status. The connection with the Habitat Directive is significant because it represents a first step towards a holistic vision of nature, able to *unmute* the non-humans. Prior to the introduction of the Habitat Directive, the majority of biodiversity laws were centred on species rather than on nature itself and ecosystems[63]. The NRL and the Habitat Directive both share this decentring from the human perspective, reflecting the intention to move away from the traditional conception of environmental protection as social regulation towards a holistic vision[64]. This shift could potentially represent a transition away from a naturalist ontology, i.e. a worldview in which human beings dominate nature[65], thereby promoting the establishment of de-anthropized political spaces, although the feasibility of such a transition remains to be ascertained. This approach does not entail the pursuit of an ideal ecosystem state, as is the case in certain rewilding methodologies, but rather the restoration and maintenance of the existing

[62] Regulation on nature restoration.

[63] O. Clerc, "L'Union européenne face au défi de l'anthropocène : du droit du développement durable aux droits de la Nature ?", *Revue québécoise de droit international* (2018), p. 55-73.

[64] E. Chiti, "Ecosystem restoration and EU Law: an introduction to the symposium", European Law Open, vol. 3, n°1 (2024), p. 175-179.

[65] On the concept of naturalistic ontology see P. Descola, *Par-delà nature et culture* (Gallimard, 2005).

productivity of the ecosystem. This approach facilitates the continuation of unprofitable agricultural practices, such as agropastoralism, thereby preventing the encroachment of forests on the ecosystems they support. Allowing various ecosystems to regenerate to accommodate their respective species certainly means allowing these non-humans, in all their diversity, to be unmuted.

While the NRL represents a step toward de-anthropized conservation, rewilding pushes this vision further by prioritizing non-human autonomy, as explored in the following section. The next section will look at how rewilding can enable this de-anthropization, but also raise questions about how human voices can be heard in these post-naturalist projects.

2. Rewilding as the most de-anthropized conservation practice, but with a potential *muting* effect on the other human groups concerned

EU policies refer to restoration but never to rewilding, which is a growing practice in conservation. Rewilding, as a de-anthropized approach, facilitates the development of the autonomy of non-human beings. This autonomy aims at *unmuting* wild beings, allowing them to occupy more land, regaining a geographical and therefore political existence, as in the case of the wolf. The initial section will delineate the distinctions between rewilding and restoration, from the perspective of unmuting (1.1). The issue inherent in the practice of rewilding is that the creation of space for other beings necessitates the relinquishment of space that has been previously utilized by humans, an idea that is not readily accepted within the contemporary paradigm. Consequently, rewilding can give rise to tensions with neighbouring human groups. In order to illustrate how rewilding can enhance complex political conflicts involving issues of representation, the case study of VVS will be developed. The study will analyse the data collected during the fieldwork to provide a comprehensive understanding of the project's impact and the opposition it has faced (1.2).

2.1. Rewilding beyond restoration: the autonomy of wild nature as an ideal of the unmuting of nature

The restoration, practice mentioned in the previous section with the NRL, of an ecosystem that has been degraded, damaged, or destroyed is defined as the action of human assistance to recover it[66]. The question therefore arises as to the precise difference between this process and rewilding. Some scholars have suggested that rewilding is merely a particular form of restoration[67]. Furthermore, in a collective article, scholars are calling for the term *rewilding* to be abandoned in favour of *conservation*[68]. This question has been extensively debated in the field of rewilding in Europe, but surveys of practitioners have enabled the identification of a network of practices and conceptual frameworks that facilitate the definition of specific practices[69]. In a well-known article that defends the possibility of a unified and differentiate definition of rewilding, Prior and Ward state that "rewilding – *unlike other restoration practices* – foregrounds the self-sustaining qualities of non-human Nature"[70]. The authors propose a definition of the concept of rewilding, suggesting that it can be considered analogous to the de-domestication of an animal, in that it requires human intervention of varying duration to achieve autonomy. In the end, rewilding is an ecologically diverse concept, manifesting in a variety of practices[71]. A subset of these practices may be considered analogous to classical restoration, while others transcend the conventional boundaries of conservation and restoration. A prime example of this is spontaneous or passive rewilding, which involves avoiding any intervention in the considered area[72]. Nevertheless, all rewilding projects are concerned with the autonomy and respect of wild beings' agency, that can be found in the concept of de-domestication. Consequently, they have the potential to *unmute* non-human life forms, as they seek to enable their mode of existence to unfold in a more uninhibited and unanticipated manner.

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[66] G. D. Gann *et al.*, "International Principles and Standards for the Practice of Ecological Restoration. Second Edition", Restoration Ecology, vol. 27, noS1 (2019), p. 1-46 ; C. Mutillod *et al.*, "Ecological Restoration and Rewilding: Two Approaches with Complementary Goals?", *Biological Reviews* (2024).

[67] J. Prior, K. J. Ward, *op. cit.*

[68] M. W. Hayward *et al.*, "Reintroducing rewilding to restoration – Rejecting the search for novelty", *Biological Conservation 233* (2019), p. 255-259.

[69] S. Carver *et al.*, *op. cit.*

[70] J. Prior, K. J. Ward, *op. cit.*, p. 5. *I underline.*

[71] D. Jørgensen, "Rethinking rewilding", *Geoforum*, vol. 65 (2015), p. 482-488.

[72] M. Drenthen, "The return of the wild in the Anthropocene. Wolf resurgence in the Netherlands", Ethics, *Policy & Environment*, vol. 18, n°3 (2015), p. 318-337.

The only EU policy explicitly related to rewilding is a 2009 European Parliament's resolution calling on the Commission to set up a dedicated policy and expressing "its strong support for the strengthening of wilderness-related policies and measures"[73] . But apart from that, the EU main legislation on biodiversity never makes any direct reference to rewilding. One of the main reasons are that these laws prefer to promote coexistence between humans and nature, and tolerance of sustainable exploitation, which contradict the spirit of many historical interpretations of rewilding. The second key reason pertains to the history of rewilding in Europe, that has been accompanied by significant controversy. These controversies have the potential to give rise to considerable tensions with local populations, a phenomenon that will be further elucidated in the subsequent section.

But rewilding is growing on the field, exploiting a favourable context offered by the actual laws to set up experimentations[74]. Because most of the EU's environmental legislation is in the form of Directive, Member States could also use their room for interpretation to promote rewilding[75]. Local rewilding organizations have been able to use a wide range of policy tools to support their projects[76]. In the end, it's often actions on the ground that take precedence over national or EU policies. This network of associations has the capacity to innovate and take risks with structuring projects. Once these projects are fully developed, they can influence public policies[77]. Finally, some rewilding projects are funded by the EU. The LIFE program, the European Commission's financial instrument for innovative environmental projects, funds

73 European Parlement, "Resolution on wilderness areas in Europe", 2008/2210(INI) § (2009): https://www.europarl.europa.eu/doceo/document/TA-6-2009-0034_FR.html.

74 P. Jepson, "A Rewilding Agenda for Europe: Creating a Network of Experimental Reserves", *Ecography*, vol. 39, n°2 (2016), p. 117-124.

75 G. Testa, "Enhancing Recovery and Protection of European Large Carnivores: Integrating the Rewilding Approach in EU Law", Master's Thesis, University of Eastern Finland (2022): https://erepo.uef.fi/bitstream/handle/123456789/27628/urn_nbn_fi_uef-20220527.pdf?sequence=1.

76 J. Lorimer, C. Driessen, "Wild Experiments at the Oostvaardersplassen: Rethinking Environmentalism in the Anthropocene", *Transactions of the Institute of British Geographers*, vol. 39, n°2 (2014), p. 169-181.

77 P. Jepson, F. Schepers, W. Helmer, "Governing with nature: a European perspective on putting rewilding principles into practice", *Philosophical Transactions of the Royal Society B: Biological Sciences*, vol. 373, n°1761 (2018), 11 p.

projects to reintroduce large animals[78]. These reintroduction concerns for example bison and vultures, in partnership with the largest continental rewilding association *Rewilding Europe*[79].

Ultimately, the practices of rewilding and restoration are complementary, with restoration being more readily accepted within policy and institutional frameworks. Conversely, rewilding presents an appealing alternative in contexts where its implementation is feasible, leading to the establishment of robust and spontaneous ecosystems[80]. Restoration is often disappointing in terms of results, even though it already represents billions of dollars of investment spent worldwide[81]. It is challenging for restoration initiatives to attain their initial objectives due to the inherent limitations of compensating for the degradation of an altered ecosystem, whose biological continuity and complex equilibrium have been disrupted[82]. Rewilding is believed to be less costly because it relies on natural mechanisms to strengthen ecosystems rather than human intervention. And because it incorporates the idea of *accidental ecology*, accepting to be surprised by the biological outcome of a project[83], it would avoid the deceptive dimension of pre-established objectives. But its goal to give agency to non-human beings and stop human's control of nature is causing difficulties and conflicts with local communities, as this case study will show.

78 Regulation Concerning the Financial Instrument for the Environment (LIFE+), *O.J.* L 149, 9 June 2007.

79 A. Locquet, S. Héritier, "Interrogation autour de la nature et du sauvage à propos de l'établissement de wilderness areas en Europe", *Cybergeo: European Journal of Geography* (2020).

80 C. Mutillod *et al.*, *op. cit.*; N. Pettorelli, J. M. Bullock, "Restore or Rewild? Implementing Complementary Approaches to Bend the Curve on Biodiversity Loss, *Ecological Solutions and Evidence*, vol. 4, n°2 (2023); M. Tanasescu, "Field Notes on the Meaning of Rewilding", *Ethics, Policy & Environment*, vol. 20, n°33 (2017), p. 333-349.

81 B. Bodin *et al.*, "A Standard Framework for Assessing the Costs and Benefits of Restoration: Introducing The Economics of Ecosystem Restoration", *Restoration Ecology*, vol. 30, n°3 (2022).

82 D. A. Hemraj *et al.*, "Oyster reef restoration fails to recoup global historic ecosystem losses despite substantial biodiversity gain", *Science Advances*, vol. 8, n°47 (2022).

83 J. Lorimer, C. Driessen, *op. cit.*

2.2. Vercors Vie Sauvage case study: how a rewilding project can affect local communities and reinforce their feeling of being muted

This section presents the primary issues associated with a case study that was conducted in the field in the Vercors. The case study is particularly noteworthy as it resulted in an analysis of how diverse groups were *muted* by the project.

Firstly, a synopsis of the case study will be provided, drawing upon both my fieldwork observations and the official presentation given by the Reserve[84]. The VVS reserve is located in the south-eastern region of France, within the Drôme Province. It was designated as the fifth reserve of wildlife (Réserve de Vie Sauvage) by the French organization, *Association pour la Sauvegarde et la Préservation des Animaux Sauvage Animals* (ASPAS), which is the largest rewilding organization in the country. The reserve is subject to a limited number of permitted hikes; *all other human activities are prohibited*, including hunting, logging, and the harvesting of flowers or mushrooms. It features diverse forests, springs, a river, and lakes, and is home to species like deer, black vultures, and eagles. Prior to the rewilding initiative, the area was used as a hunting reserve where species such as the sika deer (Cervus nippon) were introduced. This complicates the administration of the park, necessitating the implementation of measures to prevent the mixing of imported deer with the local population.

The establishment of the park was met with significant opposition from the local population, leading to a demonstration in the nearest village in August 2020. This demonstration successfully united a diverse range of local actors, including elected representatives and prominent farming unions. Notably, the local branch of France's leading organic farmers' union, the *Confédération Paysanne*, pushed a motion adopted at national level to oppose land-grabbing practices for rewilding[85]. The dispute also gained media attention. From the project's inception in 2018 until 2021, a total of 31 articles concerning VVS were collected, of which approximately two thirds appeared in national publications and the

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[84] Aspas, "Vercors Vie Sauvage", ASPAS – Réserves Vie Sauvage® [blog], https://aspas-reserves-vie-sauvage.org/les-reserves-de-vie-sauvage/vercors-vie-sauvage/.

[85] Confédération Paysanne, "Congrès national de la confédération paysanne : Motion sur l'accaparement des terres pour le ré-ensauvagement", 19 April 2019, https://www.confederationpaysanne.fr/actu.php?id=8799&PHPSESSID=08c097sdmn4nricij17qf5apt6.

remaining third in local ones[86]. Prior to the demonstration, most articles were favourable. However, following the demonstration, articles began to address the case as a controversial issue with diverse viewpoints.

The subsequent analysis will examine the impact of the controversy surrounding the new rewilding area on the various groups involved. Firstly, it is important to note that it is not possible to speak on behalf of the animals. However, given the history of the area as a hunting park, where animals were killed, bred and introduced under human supervision, it can be argued that the rewilding of this area is consistent with a definition of unmuting in relation to increasing their agency, as suggested in the introduction.

Secondly, the mayor of the city where the territory of the reserve is located informed me in an interview that "the commune was opposed to the acquisition of the land but was unable to take any action in response". Furthermore, she stated: "All the local stakeholders are against the project, even the community of communes is against it". It would therefore appear that the project is opposed by local representatives. Furthermore, the mayor has declared that she is "unable to take any action in response", which suggests that local representatives feel *muted* and unable to make their voices heard in this decision. She even added "if we had been able to talk to them, it would surely have happened differently," suggesting that the lack of listening to their concerns was at the heart of their position[87].

Thirdly, the most active group of opponents was the farming community. The position of the organic farmer represents, the *Confédération Paysanne*, was already mentioned. The local farming community, predominantly composed of farmers who employ traditional practices in sheep rearing due to the mountainous nature of the region, also expressed strong opposition to the project. The opposition expressed by this community is not merely a reaction to the specific project under discussion; rather, it is a fundamental stance against the very concept of rewilding itself, which has the potential to create a profound divide between humanity and its natural environment. A local representative of the *Fédération Départementale Ovine*, which is the local sheep federation, told us: "the fact that this association can say it can buy

[86] In detail: 11 in regional press, 7 in "engaged" national press and 13 in national press.

[87] All the quote of this paragraph are from an interview with the Mayor.

nature and do nothing to preserve it means that mankind is necessarily destroying nature. […] I disagree with that"[88]. This perception is attributed to the belief that the project in question constitutes an assault on their traditional way of life, which is understood to be inextricably intertwined with their relationship to natural beings. Therefore, they feel *muted* by such a project. This feeling of *muting* is strongly expressed in the following statement, which was made by a local shepherd during an interview with a national newspaper *Le Monde*: "Today, society is doing the same thing to rural people, shepherds and mountain farmers as the settlers did [to the aborigines] in Australia"[89].

A final group that has been affected by this project is the supporters of rewilding. This group is more difficult to identify because it is a nationwide group, somewhat disconnected from the local situation. However, the project has certainly garnered some support, as evidenced by its success in crowdfunding the project's launch[90]. However, as this type of funding is anonymous, it is not possible to identify exactly who these funders are. However, it is possible to identify support from researchers and academics in ecology, whether from a philosophical[91] or biological background[92]. This lends further support to the notion of a divide that has previously been mentioned in the context of the wolf, between rural communities that are already facing social disadvantages and are opposed to conservation initiatives due to their proximity to these projects, and groups that are in favour of these projects for ecological reasons, who are identified as more urban and educated. This analysis is supported by a sociological survey of people who express a sensitivity to the concept of wilderness in France. Conducted by Dalgarrondo and Fournier, the enquiry concluded that this attraction to wilderness

[88] Interview with the coordinator of the Fédération Départementale Ovine (sheep federation).

[89] P. Mouterde, "'Ils arrivent avec leur pognon et disent : écartez-vous, c'est nous qui allons sauver la nature' : dans le Vercors, tensions autour d'une réserve de vie sauvage", Le Monde (8 October 2020).

[90] HelloAsso, Participatory funding from ASPAS, https://www.helloasso.com/associations/aspas-association-pour-la-protection-des-animaux-sauvages/collectes/vercors-vie-sauvage (last accessed on 19.02.2025).

[91] See the book of a French philosopher in defence of the project: B. Morizot, *Raviver les braises du vivant: Un front commun* (Actes Sud, 2020).

[92] See the couple formed by Béatrice and Gilbert Cochet, naturalists officially supporting the project. Gilbert Cochet is Vice-President and Béatrice is a member of the ASPAS Board: https://aspas-reserves-vie-sauvage.org/notre-histoire/.

is associated with a lack of contact with nature and is predominantly observed among educated urban communities[93].

These groups advocate for the *unmuting* of wild beings, a development that is likely to be significant for our legislation and policy. However, this advocacy serves to strengthen the voices and *agency* of these educated groups within the territories, potentially at the expense of other rural populations that already perceive that they receive less attention from public policy.

Conclusion

In conclusion, a network of multiple players, each linked to a vision of nature, is competing for *unmuting* in the context of conservation policies. Within the case study and the wolf controversy, a particular group is identified as being at the forefront: those engaged in traditional farming practices, who are most vulnerable to the resurgence of wild animals due to their residence in isolated regions. These groups have their own customary ways of interacting with and connecting to nature. Conversely, various groups, cognisant of ecological issues, and in a network with certain scientists who are aware of the grave situation facing European biodiversity, are coalescing and campaigning for the voice of non-humans to be heard, and for wild beings to have greater agency. In this respect, there appears to be a dichotomy between two forms of networked nature players seeking *unmuting* from the legislation: *agropastoral nature* versus *wild nature*.

However, while these groups tend to be the most directly involved, analysis of the EU's biodiversity policies offers us a different perspective on the political struggle. Conflict also arises between the interests of extractive lobbies and elected representatives, who are torn between scientific recommendations and their need for electoral support. As previously mentioned, the return of the wolf is linked to an increase in the far-right vote in exposed communities[94]. Moreover, opposition to the Green Deal and conservation policies has become a political marker for Europe's rising far-right parties. In this context, and despite the many scientific warnings referenced in the opening of section I, the de-anthropization of EU policies may not continue. From this

93 S. Dalgarrondo, T. Fournier, *L'Utopie sauvage* (Éditions des Arènes, 2020).

94 B. Clemm von Hohenberg, A. Hager, *op. cit.*

perspective, the extractive network supporting the vision of a *productive nature* tends to stay dominant.

It appears that to facilitate the expression of voiceless communities in biodiversity policy, it is necessary to address the issue of agriculture as a priority. A prerequisite for this is to provide support for traditional forms of agriculture and to encourage practices that facilitate the coexistence of wild beings with human activity, such as fallow land and maintaining hedges between fields. Where relevant, rewilding should be considered to complement restoration in European public biodiversity policies.

Calling for coherence: Analysing the protection of environmental defenders in the European Green Deal

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Abstract: This chapter analyses how the protection of environmental defenders is conceived by UN and EU human rights mechanisms and what conflicts may arise in relation to conceptualizations in the European Green Deal. In particular, the chapter analyses whether the Taxonomy Regulation and the Corporate Sustainability Due Diligence Directive could contribute to un-muting powers and rights protection for environmental defenders in and by the EU.

Introduction

As the needs for a green transition and ambitious action to mitigate and adapt to climate change are becoming ever apparent, an increased focus has also been directed towards those standing up for the environment. Environmental defenders – in this chapter referred to as individuals and groups who strive to protect and promote human rights relating to the environment – are also engaging with the European Green Deal, the EU's strategy to ensure a just transition to a low-carbon economy[1]. This chapter considers to what extent instruments under the European Green Deal could contribute to un-muting powers and rights protection for environmental defenders in and by the EU, rendering environmental defenders "producers of narratives" for environmental action across the Union[2]. The text engages in particular with the EUNMUTE focus

[1] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *The European Green Deal,* Brussels, 11.12.2019, COM/2019/640 final, p. 2.

[2] L. Bouza Garcia, "Introduction: A Narrative Turn in European studies", *Journal of Contemporary European Studies*, vol. 25, n°3 (2017), p. 285-290, at p. 287.

areas on "preserving climate and natural resources" and "strengthening environmental democracy"[3].

As documented by Global Witness and others, environmental defenders and land defenders make up a large proportion of human rights defenders who are attacked, threatened and harassed[4]. While environmental defenders in Latin America and South-East Asia are at a particularly high risk of such threats, the Aarhus Convention Compliance Committee has also identified numerous instances of threats, reprisals and attacks against environmental defenders in Europe[5]. In addition, as corporate structures are growing ever complex, environmental defenders across the value chain of companies targeted by EU legislation under the European Green Deal may be located in countries across the Global North as well as the Global South. Better understanding of corporate governance requirements for environmental defenders is particularly significant given that the revised OECD Guidelines for Multinational Enterprises (OECD MNE Guidelines) calls for companies to ensure enhanced due diligence for vulnerable or marginalized groups[6], including human rights defenders[7]. The new rapid response mechanism under the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) has generated interest and focus on the situation of environmental defenders in Europe specifically. There are also expectations from civil society, rightsholders and other actors to ensure

[3] See C. Rizcallah and D. Duez in the introductory chapter to this volume.

[4] See for instance United Nations Guidance Note, *Protection and Promotion of Civic Space*, September 2020: https://www.ohchr.org/sites/default/files/Documents/Issues/CivicSpace/UN_Guidance_Note.pdf, p. 8: "In 2019 alone, at least 357 human rights defenders were killed and 30 disappeared in 47 countries. These included journalists and trade unionists, half of whom were working with communities on land rights, environmental protection or the rights of minorities and indigenous peoples".

[5] See e.g. UN Doc ECE/MP.PP/C.1/2010/4/Add.2 (18 June 2010) and UN Doc ECE/MP.PP/C.1/2010/6/Add.1 (24 September 2010).

[6] OECD, *Guidelines for Multinational Enterprises on Responsible Business Conduct* (2023), p. 26, para. 45: "Enterprises should pay special attention to any particular adverse impacts on individuals, for example human rights defenders, who may be at heightened risk due to marginalisation, vulnerability or other circumstances, individually or as members of certain groups or populations, including Indigenous Peoples.[…] In the context of armed conflict or heightened risk of gross abuses, enterprises should conduct enhanced due diligence in relation to adverse impacts, including violations of international humanitarian law."

[7] OECD MNE Guidelines, *op. cit.*, p. 26, para. 45.

better protection of the rights of environmental defenders in relation to the sustainable investment and European Green Deal initiatives presented by the EU[8]. Thus, this chapter will focus on the situation of environmental defenders in the EU, particularly in relation to the framing and understanding of environmental defenders in the European Green Deal and two instruments created under the auspices of the Green Deal: the EU Corporate Sustainability Due Diligence Directive (EUCSDDD) and Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment (Taxonomy Regulation).

After this introductory section, the second section of the text will situate the discussion on environmental defenders in relation to the concept just transition in international law and the European Green Deal. In the third section, the text will explore definitions and understandings of environmental defenders by the UN human rights mechanisms and by EU human rights mechanisms. In the fourth section, the text will analyse situations of environmental defenders through two instruments adopted under the European Green Deal: the EU Taxonomy Regulation and the EUCSDDD. Finally, the text will provide a concluding analysis.

The overarching argument that this text seeks to make, is that if the European Green Deal is to contribute to rights protection for environmental defenders in and by the EU, the EU must ensure *internal* coherence (alignment via Article 21 of the of the Treaty on European Union (TEU), Article 7 of the Treaty on the Functioning of the European Union (TFEU), Article 37 of the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights, etc.) and *external* coherence (alignment with international standards with which the EU has committed to be bound by) in the interpretation and implementation of the Taxonomy Regulation as well as the EUCSDDD. If the demands in the two regulations regarding the rights of environmental defenders, and the associated rights of access to information, participation and justice in environmental matters, become diluted and stray from international standards, economic activities sanctioned by the regulations run the risk of undermining the overarching aims of environmental governance and human rights. In so doing, they

[8] Regarding expectations vis-à-vis the EU, see e.g. Global Witness, *Standing firm: The Land and Environmental Defenders on the frontlines of the climate crisis* (September 2023), p. 51 suggesting that the proposed EU Corporate Sustainability Due Diligence Directive could be a "potential gamechanger for corporate accountability".

also risk muting and undoing spaces for meaningful participation and access to justice for environmental defenders.

Before turning to just transition and the European Green Deal more broadly, a few delimitations are needed. This text will focus on rights of environmental defenders in the context of the European Green Deal and EU human rights mechanisms (while comparing with framings of these rights from the UN human rights mechanisms). At the same time, it should be noted that important developments regarding environmental defenders have been made in the Inter-American context. For instance, the Escazú Agreement adopted in 2018 includes a dedicated article on environmental defenders[9], and as part of the questions posed to the Inter-American Court on Human Rights for their upcoming Advisory Opinion on Climate Change, a full section focuses on environmental defenders[10]. There have also been important developments regarding environmental defenders at the global level[11].

1. Just transition in international law and the European Green Deal

1.1. Just transition

In the context of climate law and policy, Johansson has mapped how the term "just transition" has developed from a concept formed within the labour unions to becoming a more comprehensive concept closely related to the principles of justice, equity and common but differentiated responsibilities (CBDR) under the Paris Agreement[12]. As noted by

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[9] Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement, entered into force 22 April 2021), Article 9.

[10] Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile, January 9, 2023, https://www.corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf, Section E.

[11] See e.g. Global Initiative for Economic, Social and Cultural Rights (GI-ESCR), Submission before the International Court of Justice with regard to the Request for Advisory Opinion on the Obligations of States in respect of Climate Change (May 2024), https://gi-escr.org/en/our-work/on-the-ground/amicus-curiae-to-the-icj-protecting-environmental-defenders-under-human-rights-law, and UN Doc. CBD/COP/DEC/15/4, Target 22.

[12] V. Johansson, "Just Transition as an Evolving Concept in International Climate Law", *Journal of Environmental Law*, vol. 35, n°2 (2023), p. 229-249, at p. 247-248.

Bouzarovski, there is a risk that the concept just transition becomes removed from the sociopolitical and broader environmental context[13].

Among the UN human rights mechanisms, just transition has mainly been framed as a term relevant for "workers and communities". This is for instance the framing used by the Special Rapporteur on human rights and the environment[14], and the Special Rapporteur on toxics and human rights[15]. There is a risk that this focus on workers and communities ignores broader groups of environmental defenders, such as individual activists, indigenous peoples, etc. In addition, many environmental defenders may not define themselves as such and thereby may not be aware of the protection opportunities offered to them.

1.2. The European Green Deal

In December 2019, the European Commission presented the European Green Deal[16]. The aim of the European Green Deal is underpinned by a "commitment to tackling environment and climate-related challenges"[17]. The Communication introducing the Deal also notes that the EU "will continue to ensure that the Paris Agreement remains the indispensable multilateral framework for tackling climate change"[18]. The Deal also outlines the perils in case of failure to take action to address risks, including associated costs for business and society as well as the risk of disruptions and implications for financial stability[19].

It is clear from the Communication by the Commission which introduces the Deal that it is meant to serve as a European action plan for a just transition to a low-carbon economy, and the Commission also refers

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[13] S. Bouzarovski, "Just Transitions: A Political Ecology Critique", *Antipode*, vol. 54, n°4 (2022), p. 1003-1020, at p. 1005.

[14] UN Doc. A/HRC/43/53/ADD.2, para. 96.

[15] UN Doc. A/HRC/54/25/ADD.1, para. 93.

[16] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *The European Green Deal*, Brussels, 11.12.2019, COM(2019) 640 final.

[17] The European Green Deal, *op. cit.*, p. 2 and S. Bogojevic, "Legal Dilemmas of Climate Action", *Journal of Environmental Law*, vol. 35, n°1 (2023), p. 1-9, at p. 3.

[18] The European Green Deal, *op. cit.*, p. 20.

[19] European Commission, *A sustainable finance framework that works on the ground* (June 2023), p. 1.

to a “socially just transition” in the Communication[20]. As part of the European Green Deal, the Commission also launched a Just Transition Mechanism with an associated Just Transition Fund to support regions which “depend on fossil fuels or carbon-intensive processes”[21]. The Commission Communication on the European Green Deal also notes when outlining the Just Transition Mechanism that the “most vulnerable are the most exposed to the harmful effects of climate change and environmental degradation”[22]. Environmental defenders are both a) often among those exposed to the harmful effects of climate change and environmental degradation, and b) critical in ensuring that these harmful effects are identified and addressed.

Building on this situated understanding of just transition in general and the European Green Deal in particular, the next section will outline how environmental defenders have been defined, framed and understood by UN human rights mechanisms and EU human rights mechanisms.

2. Environmental defenders

While there is no general agreed upon definition of environmental defenders, Larsen and others suggest a definition as “individuals and groups who, in their personal or professional capacity and in a peaceful manner, strive to protect and promote human rights relating to the environment, including water, air, land, flora and fauna”, in relation to providing better protection of environmental defenders in conservation[23]. In relation to framing, the authors reflect on the risk of environmental defenders being seen as enemies of the public interest or progress more generally and note that “narratives of polarization tend

[20] The European Green Deal, *op. cit.*, p. 16.

[21] The European Green Deal, *op. cit.*, p. 16. See also C. Armeni, “What Justice? The Scope for Public Participation in the European Union Just Transition” *Common Market Law Review*, vol. 60, n°4 (2023), p. 1027-1054.

[22] The European Green Deal, *op. cit.*, p. 16: “As part of the Sustainable Europe Investment Plan, the Commission will propose a Just Transition Mechanism, including a Just Transition Fund, to leave no one behind. The transition can only succeed if it is conducted in a fair and inclusive way. The most vulnerable are the most exposed to the harmful effects of climate change and environmental degradation.”

[23] P. Bille Larsen *et al.*, “Understanding and responding to the environmental human rights defenders crisis: The case for conservation action”, *Conservation Letters*, vol. 14, n°3 (2021), p. 1-7, at p. 2.

to marginalize – and individualize – environmental defense as being against public interest"[24].

2.1. Framings by UN human rights mechanisms

The UN human rights mechanisms have increasingly engaged on the topic of environmental defenders. In 2016, the Special Rapporteur on human rights defenders issued a dedicated report focusing on the situation on environmental defenders. In the report, the Special Rapporteur notes that "protecting environmental defenders is crucial to the protection of the environment and the human rights that depend on it"[25].

In 2019, the Human Rights Council adopted resolution 40/11, which sees the Council recognizing "the positive, important and legitimate role played by human rights defenders in the promotion and protection of human rights as they relate to the enjoyment of a safe, clean, healthy and sustainable environment, and deeply concerned that human rights defenders working in environmental matters, referred to as environmental defenders, are among the human rights defenders most exposed and at risk"[26]. Environmental defenders were also explicitly referenced in Human Rights Council resolution 48/13 recognizing the right to a healthy environment in 2021[27]. In resolution 48/13, environmental defenders are referenced in the context of the UN Guiding Principles on Business and Human Rights (UNGPs). Interestingly, no such reference was included in the General Assembly resolution recognizing the right to a healthy

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[24] P. Larsen *et al.*, *op. cit.,* p. 3.

[25] UN Doc. A/71/281, para. 4.

[26] Human Rights Council Resolution 40/11, preamble. The definition of environmental human rights defenders used in Human Rights Council Resolution 40/11, *Recognizing the contribution of environmental human rights defenders to the enjoyment of human rights, environmental protection and sustainable development,* UN Doc. A/HRC/RES/40/11, 21 March 2019, is as follows: "human rights defenders working in environmental matters, referred to as environmental human rights defenders". For a similar definition, see Article 9 of the Escazú Agreement: "Each Party shall guarantee a safe and enabling environment for persons, groups and organizations that promote and defend human rights in environmental matters, so that they are able to act free from threat, restriction and insecurity".

[27] Human Rights Council Resolution 48/13, *The human right to a clean, healthy and sustainable environment,* UN Doc. A/HRC/RES/48/13, 8 October 2021, preamble: "Recalling the Guiding Principles on Business and Human Rights, which underscore the responsibility of all business enterprises to respect human rights, including the rights to life, liberty and security of human rights defenders working in environmental matters, referred to as environmental human rights defenders".

environment the following year (with several states expressing their concern about this lack of reference to environmental defenders as part of their explanation of vote)[28]. This removal signals the political tension that references to the rights of environmental defenders represent in the context of these negotiations.

Several UN Special Procedures have referred to environmental defenders in their concluding observations, including the Committee on the Elimination of Discrimination Against Women[29], the Committee on Enforced Disappearances[30], and the Human Rights Committee[31]. These recommendations often highlight the intimidation and threats against environmental defenders. Several recommendations provided as part of the Universal Periodic Review have also focused on the situation of environmental defenders[32].

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[28] E.g. Japan, New Zealand and EU statements in Official Records of the General Assembly, Seventy-sixth Session, UN Doc. A/76/PV.97, 28 July 2022, as referenced in A. Kron, "At the frontlines of implementing the right to a healthy environment: Understanding human rights and environmental due diligence in relation to armed conflicts", *International Review of the Red Cross*, n°924 (2023), p. 1623-1645, at footnote 7.

[29] UN Doc. CEDAW/C/PHL/CO/9 (CEDAW 2023), para 35: "intimidation, hate speech, threats, physical assault, harassment, arrest and detention of women human rights defenders, women journalists and activists, in particular those advocating for land rights, protection of the environment and the rights of Indigenous and Bangsamoro women, rural women and lesbian, bisexual, transgender and intersex women".

[30] UN Doc. CED/C/MEX/OAI/2 (CED 2023), para. 35: "Allegations received about threats, surveillance, reprisals, disappearances and murders affecting relatives of disappeared persons who carry out search and investigation activities, the persons accompanying them, human rights and environmental defenders and journalists".

[31] UN Doc. CCPR/C/BRA/CO/3 (CCPR 2023), para. 61: "The Committee is concerned about the continuing harassment, intimidation, defamation, illegal detention, torture and ill-treatment of human rights defenders, including environmental defenders, women human rights defenders and defenders of persons belonging to sexual or gender minorities".

[32] E.g. recommendations from Belgium to Cambodia UN Doc. A/HRC/57/17 (UPR 2024); from Pakistan to Mexico A/HRC/56/9 (UPR 2024); from Finland to Peru UN Doc. A/HRC/53/8 (UPR 2023); from the United States to Peru UN Doc. A/HRC/53/8 (UPR 2023); from Costa Rica to Poland A/HRC/52/15 (UPR 2022); from Spain to Brazil A/HRC/52/14 (UPR 2022); from Slovakia to Brazil UN Doc. A/HRC/52/14 (UPR 2022); from the United States to Brazil UN Doc. A/HRC/52/14 (UPR 2022); from Chile to Brazil UN Doc. A/HRC/52/14 (UPR 2022); from Germany to Philippines UN Doc. A/HRC/52/13 (UPR 2022); from Costa Rica to Indonesia UN Doc. A/HRC/52/8 (UPR 2022); from Sweden to Venezuela UN Doc. A/HRC/50/8 (UPR 2022); from Canada to Paraguay UN Doc. A/HRC/48/9 (UPR 2021); from Belgium to Bolivia UN Doc. A/

2.2. Aarhus Convention

The EU is a Party to the Aarhus Convention, which is often referred to as an "environmental democracy convention"[33], since 2005. Article 3(8) of the Aarhus Convention states that "Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement", and qualifies this requirement by noting that this provision "shall not affect the powers of national courts to award reasonable costs in judicial proceedings"[34]. Thus, State Parties have a duty to protect those engaging with the Convention and its three pillars of access to information, access to meaningful participation and access to justice in environmental matters. The rights outlined in the Convention also underpin the right to a clean, healthy and sustainable environment[35].

A number of cases that have been tried before the Aarhus Compliance Committee have focused on the situation of environmental defenders and activists[36]. In general, it has been noted that the Aarhus Compliance Committee has adopted a broad definition and understanding of environmental defenders in its work[37]. The Aarhus Convention Secretariat has also mapped the situation of environmental defenders in the Parties to the Aarhus Convention[38].

In 2020 and following discussions regarding how to improve the protection of environmental defenders during the twenty-third meeting of the Convention's Working Group of the Parties, the Bureau prepared

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HRC/43/7 (UPR 2019); from Iceland to Mexico UN Doc. A/HRC/40/8 (UPR 2018); and from Norway to Colombia UN Doc. A/HRC/39/6 (UPR 2018).

33 See e.g. E. Barritt, *The Foundations of the Aarhus Convention: Environmental Democracy, Rights and Stewardship* (Bloomsbury Publishing, 2022).

34 Weber has also noted that the conditional prohibition in Article 3(8) is similar to Article 14 of the ECHR, see T. Weber, "Are climate activists protected by the Aarhus Convention? A note on Article 3(8) Aarhus Convention and the new Rapid Response Mechanism for environmental defenders", *RECIEL*, (2023), p. 67-76, at p. 70.

35 See e.g. Á. Ryall, "A Brave New World: The Aarhus Convention in Tempestuous Times", *Journal of Environmental Law*, vol. 35, n°1 (2023), p. 161-166, at p. 161.

36 See e.g. UN Doc ECE/MP.PP/C.1/2010/4/Add.2 (18 June 2010) and UN Doc ECE/MP.PP/C.1/2010/6/Add.1 (24 September 2010).

37 See e.g. T. Weber, *op. cit.,* p. 76.

38 Information note on the situation regarding environmental defenders in the Parties to the Aarhus Convention from 2017 to date, UN Doc. AC/WGP-24/Inf.16 (1-3 July 2020).

a draft note on a possible rapid response mechanism to deal with cases related to Article 3 (8) of the Aarhus Convention[39]. The note suggested four potential options for moving forward: a) maintaining the current situation (i.e. no changes), b) incorporating a rapid response mechanism into the Compliance Committee, c) establishing a rapporteur on environmental defenders, or d) providing the Chair of the Bureau with additional powers to respond to alleged violations of Article 3 (8)[40].

In 2021, the Meeting of the Parties to the Aarhus Convention established the mandate of a Special Rapporteur on environmental defenders[41]. In 2022, Michel Forst (formerly the UN Special Rapporteur on the situation of human rights defenders from 2014-2020) was elected as Special Rapporteur[42].

In terms of actions following complaints from environmental defenders, the Special Rapporteur has the possibility of issuing protection measures[43]. It has nonetheless been noted that as a consultative mechanism, the effectiveness of the mandate of the Special Rapporteur ultimately depends on the willingness of national institutions to engage[44].

2.3. European Network on National Human Rights Institutions (ENNHRI)

National human rights and environmental institutions are explicitly listed as stakeholders in Article 3 of the EUCSDDD. This reference is interesting in the context of this chapter given that these institutions have been vocal on rights of environmental defenders and the right to a healthy environment. For instance, the Global Alliance of National Human Rights Institutions (GANHRI) adopted a statement at the Annual Conference in 2020 entitled "Climate Change: The role of National Human Rights

[39] UN Doc. ECE/MP.PP/WG.1/2020/13.

[40] UN Doc. ECE/MP.PP/WG.1/2020/13, para. 19.

[41] Decision VII/9 on a rapid response mechanism to deal with cases related to article 3 (8) of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, UN Doc. ECE/MP.PP/2021/19.

[42] UNECE, *World's first Special Rapporteur on environmental defenders elected under the Aarhus Convention*, (24 June 2022) https://unece.org/media/environment/Aarhus-Convention/press/368806.

[43] See UN Doc. ECE/MP.PP/2021/19, Annex, regarding the Mandate of the Special Rapporteur, as well as analysis by T. Weber, *op. cit.,* p. 75.

[44] T. Weber, *op. cit.,* p. 76.

Institutions", which refers to the right to a healthy environment[45]. GANHRI has also issued a "Practical Guidance for NHRIs on Addressing Human Rights and Climate Change"[46]. The European Network of National Human Rights Institutions (ENNHRI) has intervened in the climate-focused case *Duarte Agostinho and Others v. Portugal and Others* before the European Court of Human Rights (ECtHR) in 2023[47], and published a dedicated paper on Climate Change and Human Rights in the European Context[48]. In addition, ENNHRI has engaged with the Aarhus Convention Special Rapporteur on environmental defenders, including as part of a workshop in October 2023[49].

2.4. European Court of Justice

The European Court of Justice (ECJ) has on several occasions engaged on the protection of environmental defenders and associated organizations, with Advocate General Kokott noting that the "environment cannot defend itself before a court, but needs to be represented, for example by active citizens or non-governmental organisations"[50]. More recently, Regulation (EU) 2021/1767 increased the possibility for "internal review" under the Aarhus Convention[51]. Such internal review is a

[45] Global Alliance of National Human Rights Institutions (GANHRI), *Climate Change: The role of National Human Rights Institutions* (4 December 2020), https://ganhri.org/wp-content/uploads/2021/02/EN_AC_Statement_for_consultation.pdf.

[46] GANHRI and UN Environment Programme, *Practical Guidance for NHRIs on Addressing Human Rights and Climate Change*, https://ganhri.org/practical-guidance-for-nhris-on-hr-and-climate-change/, e.g. p. 21-22.

[47] ENNHRI, *History in the making: ENNHRI speaks before the Grand Chamber of the European Court of Human Rights in major climate case* (27 September 2023), https://ennhri.org/news-and-blog/history-in-the-making-ennhri-speaks-before-the-grand-chamber-of-the-european-court-of-human-rights-in-major-climate-case/.

[48] ENNHRI, *Climate Change and Human Rights in the European Context* (May 2021), https://ennhri.org/wp-content/uploads/2021/05/ENNHRI-Paper-Climate-Change-and-Human-Rights-in-the-European-Context_06.05.2020.pdf. See also The Danish Institute for Human Rights, *Workshop report: National human rights institutions engagement in the Corporate Sustainability Due Diligence Directive* (August 2023).

[49] European Network of National Human Rights Institutions (ENNHRI), *Workshop "Protection of environmental defenders and their freedoms of expression, peaceful assembly and association across Europe" – Outcomes report*, (10 October 2023).

[50] Case C-260/11, *Edwards and Pallikaropoulos*, EU:C:2012:645, Opinion of Advocate General Kokott, delivered on 18 October 2012, para. 42.

[51] Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021 amending Regulation (EC) n°1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation

critical tool for environmental defenders and associated organizations to request further information on EU environmental activities, and by extension potential impacts of such activities on environmental defenders in Europe and across the value chains of EU corporations. This increased possibility for internal review was echoed by the ECJ in *ClientEarth v. European Investment Bank,* in which the Court noted that the EIB financing decision was taken "under environmental law" and should be subject to internal review as per the Aarhus Convention[52]. In relation to the Taxonomy Regulation, requests for internal review in line with Regulation (EU) 2021/1767 have been submitted following the Commission's classification of forest biomass as "sustainable" in accordance with Taxonomy Regulation[53]. Thus, this extended opportunity for internal review could serve as an avenue for environmental defenders and related associations and organizations to participate in the implementation and interpretation of instruments developed under the umbrella of the European Green Deal.

2.5. European Court of Human Rights

The ECtHR has decided a large number of cases on environment and human rights more generally, primarily focused on Article 2 on the right to life (see e.g. *Oneryildiz v. Turkey*)[54], and Article 8 on the right to private and family life (see e.g. *Lopez Ostra*)[55].

In the last few years, the ECtHR has engaged with cases focused specifically on climate change and human rights. In the *KlimaSeniorinnen* case decided in 2024, the Court notes that legal actions by associations "must be seen in the light of their role as a means through which the Convention rights of those affected by climate change, including those at a distinct representational disadvantage, can be defended and through which they can seek to obtain an adequate corrective action for the

in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, *O.J.* 2021, L 356/1, p. 1.

52 Joined Cases C-212/21 P and C-223/21 P, *European Investment Bank v. ClientEarth*, EU:C:2023:546, paras. 87-89.

53 Repository of requests for internal review lodged with the European Commission pursuant to Article 10 of Regulation (EC) n°1367/2006 ("Aarhus Regulation"), requests 62 and 64, https://environment.ec.europa.eu/law-and-governance/aarhus/requests-internal-review_en.

54 ECtHR 30 November 2004, n°48939/99, *Oneryildiz v. Turkey*.

55 ECtHR 9 December 1994, n°16798/90, *López Ostra v. Spain*.

alleged failures and omissions on the part of the authorities in the field of climate change"[56]. Moreover, the Court notes that the association has demonstrated an "actual and sufficiently close connection to the matter complained of and to the individuals seeking protection against the adverse effects of climate change on their lives, health and quality of life"[57]. The verdict of the ECtHR in *KlimaSeniorinnen* is significant both in finding a violation of rights protected by the Convention in relation to climate change, and for environmental defenders to pursue access to justice in climate-related human rights violations through associations or organisations.

2.6. Other regulations, directives and EU policies

Increasingly, EU instruments and legislative initiatives specifically refer to environmental defenders, e.g. as part of the Strategic lawsuits against public participation (SLAPP) Directive[58], the Environmental Crimes Directive[59], and in reports and statements from the Commissioner for Human Rights at the Council of Europe[60].

The SLAPP Directive specifies that, considering "the Union's environmental and climate policies, attention should also be given to environmental rights defenders as they play an important role in European democracies"[61]. In the analytical study by the Commission

[56] ECtHR 9 April 2024, n°53600/20, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, para. 614.

[57] ECtHR 9 April 2024, n°53600/20, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, para. 621.

[58] Directive (EU) 2024/1069 of the European Parliament and of the Council of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation'), *O.J.* 2024, L 2024/1069, para. 11. The compromise text on the Directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ("Strategic lawsuits against public participation") from January 2024 refers to environmental rights defenders and includes environment and climate as 'matter of public interest' (Article 3) and adjusts the burden of proof from defendant to claimant (Article 12).

[59] References to "whistleblowers" in Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC, *O.J* 2024, L 2024/1203, para. 54.

[60] See e.g. Human Rights Comment, *Crackdowns on peaceful environmental protests should stop and give way to more social dialogue* (2 June 2023).

[61] Directive (EU) 2024/1069, *op. cit.*, preamble, para. 11.

which preceded the Directive, it is noted that the public consultation revealed that SLAPPs are on the rise in the EU, and that among the affected non-governmental organisations, "organisations of journalists, environmental organisations and human rights organisations were most prominent"[62]. The 2024 Environmental Crimes Directive has been called "a milestone in EU environmental criminal law"[63], and explicitly prohibits retaliations against whistleblowers or "persons who report environmental criminal offences as well as persons who cooperate with regard to the enforcement of such offences"[64].

Moreover, a number of EU decisions and instruments speak to the interlinkages between the environment and human rights more broadly[65]. The 2024 Council conclusions on Green Diplomacy notes that "human rights, democracy and the rule of law remain the EU's common compass and core values including in our green diplomacy" and states that access "to a clean, healthy and sustainable environment is a human right"[66]. In addition, as part of its conclusions the Council "stresses the importance of cooperation with and protection of civil society, environmental defenders, Indigenous Peoples, local communities, persons with disabilities, and their empowerment"[67].

[62] European Commission, Analytical supporting document accompanying a Proposal for a Directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation") and a Commission Recommendation on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation") Brussels, SWD(2022) 117 final, (27 April 2022), p. 41.

[63] M. G. Faure, "The EU Environmental Crime Directive 2024: A Revolution in EU Environmental Criminal Law?" *Journal of Environmental Law*, vol. 36, n°3 (2024) p. 323-342, at p. 341.

[64] Directive (EU) 2024/1203, preamble, *op. cit.*, paras. 54 and 55.

[65] See e.g. European External Action Service, *EU Action Plan on Human Rights and Democracy 2020 – 2024* (19 November 2020), para. 1.4.a and para. 1.4.d; Council of the European Union, *Council Conclusions on EU Priorities in UN Human Rights Fora in 2023* (20 February 2023) para. 15; Council of the European Union, *Council conclusions on Climate and Energy Diplomacy* (9 March 2023), paras. 41-42.

[66] Council of the European Union, *Council Conclusions on Green Diplomacy* (18 March 2024), para. 6.

[67] Ibid., para. 6.

2.7. Concluding analysis: International law and the EU

Why are then these interpretations and understanding of concepts in international law, including the right to a healthy environment and references to the rights of environmental defenders, relevant for the EU? The European Court of Human Rights has on several occasions expanded on the relationship between EU law, the European Convention on Human Rights and public international law. In *Loizidou v. Turkey*, the European Court of Human Rights references the Vienna Convention on the Law of Treaties and particularly the provision regarding "relevant rules of international law applicable in the relations between the parties" (Art. 31(3)(c) VCLT) informing the interpretation of the Convention[68]. In addition, in *Ivan Atanasov v. Bulgaria* the Court refers to recommendations on human rights and environment and the right to a healthy environment by the Parliamentary Assembly of the Council of Europe as "relevant international materials" which should inform the interpretation of duties under the Convention[69].

In addition, Article 193 of the Treaty of the Functioning of the European Union (TFEU) explicitly states that protective measures adopted under Article 192 TFEU to protect the environment should not "shall not prevent any Member State from maintaining or introducing more stringent protective measures", and Article 21 TEU seeks to promote cooperation and consistency. Thus, States in their national measures implementing the European Green Deal could (and should) go further than the minimum requirements set out in the Deal to ensure environmental protection and the protection of environmental defenders.

3. Environmental defenders and the European Green Deal

To further the objectives of the European Green Deal, the EU has adopted the Taxonomy Regulation and the EUCSDDD. The following sections will explore relevant aspects of the Taxonomy Regulation and the EUCSDDD for environmental defenders, and how their rights,

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[68] ECtHR 18 December 1996, n°15318/89, *Loizidou v. Turkey,* para. 43.

[69] ECtHR 11 April 2011, n°12853/03, *Ivan Atanasov v. Bulgaria*, paras. 56-57. See also discussion regarding the impact of these decisions for the right to a healthy environment in O. W. Pedersen, "The European Court of Human Rights and International Environmental Law" in Knox and Pejan (eds.), *The Human Right to a Healthy Environment* (Cambridge University Press, 2018), p. 92-93.

roles and opportunities for meaningful engagement are framed by the respective instrument.

3.1. Taxonomy Regulation

Article 18 of the Taxonomy Regulation stipulates that, in order to comply with the Regulation, economic activities must align with certain minimum safeguards[70]. As part of these minimum safeguards the Taxonomy Regulation refers to the International Bill of Rights, the UNGPs and the OECD MNE Guidelines.

One of the additions of the 2023 version of the OECD MNE Guidelines is to address specifically those at risk in relation to human rights violations and ensure enhanced due diligence for vulnerable or marginalized groups[71]. The groups identified as vulnerable or marginalized include human rights defenders[72], which would also include environmental defenders as per Human Rights Council resolution 40/11[73]. Defining individuals and/or groups at-risk of environmental harm as marginalized or in vulnerable situations due to their vulnerability to environmental risks could also be a way to make visible the "slow violence" of climate change and environmental degradation[74]. As noted above, the Guiding Principles on Business and Human Rights are also explicitly linked to

[70] Regulation 2020/852 of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/288, *O.J.* 2020, L 198/13.

[71] OECD MNE Guidelines, *op. cit.*, p. 26, para. 45.

[72] *Ibid*.

[73] The definition used in Human Rights Council Resolution 40/11, *Recognizing the contribution of environmental human rights defenders to the enjoyment of human rights, environmental protection and sustainable development*, UN Doc. A/HRC/RES/40/11, 21 March 2019, is as follows: "human rights defenders working in environmental matters, referred to as environmental human rights defenders". For a similar definition, see Article 9 of the Escazú Agreement: "Each Party shall guarantee a safe and enabling environment for persons, groups and organizations that promote and defend human rights in environmental matters, so that they are able to act free from threat, restriction and insecurity".

[74] See e.g. E. Cusato, *The Ecology of War and Peace: Marginalising Slow and Structural Violence in International Law* (Cambridge University Press, 2021), and J. Dehm, "Beyond Climate Due Diligence: Fossil Fuels, 'Red Lines' and Reparations", *Business and Human Rights Journal*, vol. 8, n°3 (2023), p. 151-179. Regarding the concept "slow violence" in an environmental context, see particularly R. Nixon, S*low Violence and the Environmentalism of the Poor* (Harvard University Press, 2013).

the reference to environmental defenders in Human Rights Council 48/13 recognizing the right to a healthy environment[75].

A general suggestion for future guidance documents for the implementation of the Taxonomy Regulation would be to change the formulation "vulnerable groups" to "groups or people in situations of vulnerability". This is the language now used by the Human Rights Council reports on climate change and human rights[76], to avoid essentializing vulnerability. This is critical since environmental defenders are not inherently vulnerable but find themselves in situations that *make* them vulnerable[77], that mute their voices and hinders them from effectively contributing to EU environmental action and narratives[78]. An analogy within the OECD can be made to the OECD States of Fragility report. The reports, which assesses fragility across six dimensions (including environmental) changed its name in 2015 from *Fragile States* to *States of Fragility* as part of its aim to use a method of "assessing fragility that is more comprehensive than the traditional single categorisation of 'fragile states' and recognises the diversity of risks and vulnerabilities that lead to fragility"[79].

3.2. EU Corporate Sustainability Due Diligence Directive

As part of the European Green Deal, a proposal for a Corporate Sustainability Due Diligence Directive was put forward by the

[75] See also Kron, *op. cit.*, for further discussion on the General Assembly negotiations versus the Human Rights Council negotiations on the resolutions recognizing the right to a clean, healthy and sustainable environment, as well as M. Limon, "United Nations recognition of the universal right to a clean, healthy and sustainable environment: An eyewitness account", *RECIEL* (2022), p. 155-170.

[76] See e.g. Report of the Secretary-General on the impact of climate change on rights of people in vulnerable situations, 2022, UN Doc. A/HRC/50/57.

[77] Cf. K. Tierney, *Disasters: A Sociological Approach* (Polity, 2019), p. 127-128 noting in the context of disaster risk reduction that "people are not born vulnerable, they are made vulnerable".

[78] See also Position Paper by Michel Forst, UN Special Rapporteur on Environmental Defenders under the Aarhus Convention, *State repression of environmental protest and civil disobedience: a major threat to human rights and democracy,* February 2024, highlighting risks of negative narratives around environmental defenders and calling on States to "counter narratives that portray environmental defenders and their movements as criminals".

[79] OECD, *States of Fragility 2015: Meeting Post-2015 Ambitions* (2015), https://read.oecd-ilibrary.org/development/states-of-fragility-2015_9789264227699-en#page15, p. 13.

Commission in 2022[80]. As several Member States had developed or were in the process of developing human rights and environmental due diligence legislation, the rationale for the Directive included avoiding fragmentation of the single market[81].

Following extensive discussions after the trilogues and concerns that the Directive may not be adopted at all[82], a revised text was issued by the Council of the European Union in mid-March 2024[83]. The text was subsequently approved by the JURI Committee and later by the European Parliament plenary in April 2024[84]. On 24 May, the text was approved by the Council[85], and on 5 July 2024 the EUCSDDD was published in the Official Journal[86]. While there are no specific

80 Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 COM/2022/71 (23 February 2022).

81 S. Spinaci, "Corporate sustainability due diligence: How to integrate human rights and environmental concerns in value chains", *European Parliamentary Research Service*, PE 729.424 (May 2023); A. Lafarre, "The Proposed Corporate Sustainability Due Diligence Directive: Corporate Liability Design for Social Harms", *European Business Law Review*, vol. 34, n°2 (2023), p. 213-240, at p. 222; Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 COM/2022/71 (23 February 2022), p. 10-11.

82 European Coalition for Corporate Justice *et al.*, *We say YES to the CSDDD. Joint Civil Society Statement reacting to lack of majority in COREPER* (28 February 2024), https://corporatejustice.org/news/reaction-we-say-yes-to-the-csddd-joint-civil-society-statement-reacting-to-lack-of-majority-in-coreper/.

83 European Parliament, *First green light to new bill on firms' impact on human rights and environment*, Press release, 19 March 2024, https://www.europarl.europa.eu/news/en/press-room/20240318IPR19415/first-green-light-to-new-bill-on-firms-impact-on-human-rights-and-environment.

84 European Parliament, *Due diligence: MEPs adopt rules for firms on human rights and environment,* Press release, 24 April 2024, https://www.europarl.europa.eu/news/en/press-room/20240419IPR20585/due-diligence-meps-adopt-rules-for-firms-on-human-rights-and-environment.

85 Council of the European Union, *Corporate sustainability due diligence: Council gives its final approval*, Press release (24 May 2024), https://www.consilium.europa.eu/en/press/press-releases/2024/05/24/corporate-sustainability-due-diligence-council-gives-its-final-approval/#:~:text=On%2023%20February%202022%2C%20the,agreement%20on%2014%20December%20202.3. See also Business and Human Rights Resource Centre, *BREAKING: EU Corporate Sustainability Due Diligence Directive finally & formally adopted* (24 May 2024), https://www.business-humanrights.org/en/latest-news/eu-csddd-political-agreement/.

86 Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 *O.J.* L 1760/1 (2024).

references to environmental defenders in the text, there are a few references to human rights defenders[87], and several references to stakeholder engagement. In particular, Article 13 of the text adopted by the European Parliament calls on companies to "identify and address barriers to engagement" and ensure that participants are not subject to retaliation or retribution (13(5)). In addition, Member States have a duty to ensure that "companies take appropriate measures to carry out effective engagement with stakeholders, in accordance with this article" (13(1)). Importantly, this duty is further qualified with the text stating that the "use of industry and multi-stakeholder initiatives shall not be sufficient to fulfil the obligation to consult the company's own employees and their representatives" (13(6)). However, as per Article 13(3) the stakeholder engagement is limited to "specified stages of the due diligence process, instead of throughout the whole process"[88].

It has been suggested that limited requirement of stakeholder consultation (such as qualifying consultation to be held "where relevant" in Article 8(3)(b)) in the original Directive proposal from the Commission, or limiting stakeholder consultation to only parts of the due diligence process as in the final adopted text) would not align with the Taxonomy Regulation, given the explicit linkage to the OECD MNE Guidelines and the UNGPs in Article 18 of the Taxonomy Regulation[89]. In so doing,

[87] See e.g. Preamble, para. 65: "vulnerable stakeholders, and to overlapping vulnerabilities and intersecting factors, including by taking into account potentially affected groupings or communities, for example those protected under the UN Declaration on the Rights of Indigenous People and those covered in the UN Declaration on Human Rights Defenders" and Article 14(2)(a): "Member States shall ensure that complaints may be submitted by: (a) natural or legal persons who are affected or have reasonable grounds to believe that they might be affected by an adverse impact, and the legitimate representatives of such persons on behalf of them, such as civil society organisations and human rights defenders".

[88] Danish Institute for Human Rights, *The EU Corporate Sustainability Due Diligence Directive: Maximising Impact through Transposition and Implementation* (2024), https://www.humanrights.dk/files/media/document/DIHR_The%20EU%20Corporate%20Sustainability%20Due%20Diligence%20Directive_0.pdf, p. 5.

[89] Platform on Sustainable Finance, *Final Report on Minimum Safeguards* (2022), p. 8. See also Global Justice Clinic at Erfurt University in cooperation with the German Institute for Human Rights and Luxembourg University, *Strengthening Stakeholder Engagement in the EU Corporate Sustainability Due Diligence Directive – Policy Briefing Paper* (2023), p. 13. See also UN Doc. A/HRC/50/40/Add.3, para. 21: "Business enterprises should: be able to demonstrate human rights due diligence and effective engagement with trade unions and other affected stakeholders as well as grievance management in just transition planning".

the EUCSDDD would fail to meet the requirement for coherence in Article 21 of the Treaty of the European Union (TEU).

Limited focus on meaningful engagement of stakeholders, such as in the proposal by the Commission has also been criticized for neglecting engagement with rightsholders in the Global South[90]. This is problematic given that the measures developed in the EUCSDDD will have impacts across the supply chain, including in countries outside the EU and in the Global South. For instance, scholars have outlined potential risks with extraterritorial application of supply chain due diligence provisions, including that without meaningful participation and access to justice for affected populations, such application could aggravate social, economic and environmental injustices[91].

Concluding analysis

The European Union is actively positioning itself as a champion of human rights and environmental protection[92]. At the same time, the economic activities sanctioned by the Taxonomy Regulation and by the EUCSDDD run the risk of undermining the aims of the regulations (to promote a just transition and to strengthen the protection of the environment and human rights) if the demands in the two regulations regarding the rights of environmental defenders, and the rights of access to information, participation and justice in environmental matters, become diluted and stray from international standards.

In order to ensure coherence as per Article 21 TEU, the interpretation and implementation of the Taxonomy Regulation and the EUCSDDD

[90] Global Justice Clinic at Erfurt University, German Institute for Human Rights and Luxembourg University, *op. cit.*, p. 2. See also C. Lichuma, “Centering Europe and Othering the Rest: Corporate Due Diligence Laws and Their Impacts on the Global South”, *Völkerrechtsblog* (16 January 2023). See also Y. Ngangjoh-Hodu, T. Gazzini, A. Kent, K. Siikavirta, P. Morris, *The proposed EU Corporate Sustainability Due Diligence Directive and its Impact on LDCs: A Legal Analysis*, Ministry for Foreign Affairs of Finland (2023), p. 48-51.

[91] See e.g. F. Dehbi, O. Martin-Ortega, “An integrated approach to corporate due diligence from a human rights, environmental, and TWAIL perspective”, *Regulation & Governance,* vol. 17 (2023), p. 927-943, at p. 932-934; P. Okowa, “The pitfalls of unilateral legislation in international law: lessons from conflict minerals legislation”, *ICLQ*, vol. 69, n°3 (2020), p. 685-717; E. Cusato, *op. cit.*

[92] See e.g. EEAS, *EU Action Plan on Human Rights and Democracy 2020 – 2024*, para. 1.4.a and para. 1.4.d, as referenced above.

must align with the European Union's commitments under international law. This is particularly critical for the rights of environmental defenders and activists to be respected and upheld across the Union.

In this context, it is unfortunate that the EUCSDDD text is limited to not include downstream due diligence (which is already part of the OECD MNE Guidelines approach to due diligence and thus needs to be respected in accordance with Article 18 of the Taxonomy Regulation).

Likewise, it is difficult to see how appropriate measures can be ensured to be "effective" as required by Art 3(1) of the EUCSDDD, if environmental defenders are not part of the stakeholder consultation following Article 13. It is also unclear how limiting the stakeholder consultation to only parts of the due diligence process would align with the aim outlined in the preamble of the EUCSDDD text; that in order for due diligence to be meaningful, "effective engagement" with stakeholders is needed[93].

The right to a healthy environment as referenced in the preamble to the EUCSDDD and the 2024 Council Conclusions on Green Diplomacy suggests an increased focus on bringing closer substantive elements of environmental democracy to the three procedural rights and pillars of the Aarhus Convention, and with it the protection of environmental defenders under the Convention. Access to information, participation and justice as protected by Aarhus Convention are closely linked with the substantive element and right to a healthy environment outlined in Article 1 of the Convention, with recent scholarship suggesting that the right to a healthy environment is "foundational to a full realisation of the Aarhus vision"[94].

To summarize, if the European Green Deal is to contribute to un-muting powers and rights protection for environmental defenders in and by the EU, the EU must ensure *internal* coherence (alignment via Article 21 TEU, Article 37 of the Charter, European Convention on Human Rights,

93 Council of the European Union, *Proposal for a directive on corporate sustainability due diligence: Analysis of the final compromise text with a view to agreement*, https://data.consilium.europa.eu/doc/document/ST-5893-2024-REV-2/en/pdf (26 February 2024), para 44(c). See also C. Ituarte-Lima, R. Mares, "Environmental democracy: Examining the interplay between Escazu Agreement's innovations and EU economic law", *Earth System Governance*, vol. 21 (2024), p. 1-13, at p. 8.

94 E. Barritt, "The Aarhus Convention and the Latent Right to a Healthy Environment", *Journal of Environmental Law*, vol. 36, n°1 (2024), p. 67-84, at p. 84.

etc.) and *external* coherence (alignment with international standards with which the EU has committed to be bound by) in the interpretation and implementation of the Taxonomy Regulation as well as the EUCSDDD.

Citizenship against democracy? Consequences of un-muting Hungarians beyond the borders on the EU's rule of law crisis

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Abstract: In the context of the EU's rule of law crisis, peripherical situations which barely fall within the scope of EU law despite their EU-sensitive impact cast a new light on the limits of EU action vis-à-vis Member State discretion. This discretion amounts to abuse in the case of the Hungarian electorate being shaped in a way to consolidate Fidesz's power through the un-muting of "Hungarians beyond the borders". According to Hungarian law, all Hungarians living in neighbouring states are entitled to preferential naturalisation without any requirement of residency in Hungary or proof of Hungarian descent, which entails the automatic granting of EU citizenship and its associated rights, creating circumstances comparable to those in the Maltese golden passport cases. Moreover, statistical analysis based on available data demonstrates that granting voting rights to "Hungarians beyond the borders" has influenced national election results in a favourable manner to Fidesz in the past decade and a half, leading to an even greater distortion of democratic representativeness. In addition, all travel, educational and cultural benefits that only "Hungarians beyond the borders" enjoy by law raise several discrimination concerns. Since this preferential regime is predominantly rooted in prerogatives reserved for Member States, the EU is left with very little room for action within the relevant fields of citizenship, democracy, fundamental rights or economic freedoms.

Forty people out of a hundred in orange from head to toe,
So two thirds of a hundred people in orange from head to toe.[1]

Introduction

Hungary has been an enthusiastic contributor to the EU's rule of law crisis. Its restructured constitutional order and various policies that weaken democracy and fundamental rights have been rattling core principles of the EU legal order such as mutual trust, mutual recognition, or effective judicial protection. The EU has been trying to address some of those situations through rule of law mechanisms with rather little success[2]. However, there are also peripherical situations which, although equally disruptive to the EU's political and legal development, do not or only with difficulty allow for an EU-level response. At this point, one might find it interesting to examine the EU's options for action in the face of Member State discretion within the framework of such a case where this discretion is predominant.

In that regard, the topic of Hungarians living beyond the borders does not at first sight seem to be linked to the EU's rule of law crisis at all. However, scattered legal instruments connected in the appropriate way reveal the skeletons carefully hidden in the closet. This reversed perspective helps unveil a preferential system disguised as rights' protection or positive action before investigating the EU's powers to mute such abusive use of prerogatives reserved for the MS and drawing lessons from this *status quo*.

1. The case of Hungarians beyond the borders: three pillars of electoral autocracy

The longevity of Fidesz's power is largely attributable to the sophisticated legal instruments implemented in various areas and legitimised within the framework of electoral autocracy. In that regard, a country's regime is classified as an electoral autocracy when *de facto* multiparty elections are held for the chief executive, but democratic standards are fallen short on due to significant irregularities, limitations on party competition or

1 Krúbi, "Orbán, verd ki a Ferinek", *Nehézlábérzés*, Universal Music Hungary (2018) (informal translation). Hungarian singer known for his naturalistic and political lyrics.

2 A. Kovacs, "Rule of Law Mechanisms: Remote Risk Prevention in a Disorganised Crisis Management", *European Journal of Risk Regulation* (2024), p. 1-14.

other violations of institutional requisites for democracies[3]. Instead of diving into such evolution's qualitative aspects[4], the following lines focus on the system in action, dedicated to demonstrating that preferential naturalisation (1.1), voting rights (1.2), and other benefits (1.3) granted to Hungarians beyond the borders unequivocally contribute to maintaining Fidesz in power.

1.1. Preferential naturalisation for a new category of supporters

The first pillar of the system equals the establishment of a constitutional status for Hungarians beyond the borders based on Fundamental Law provisions and cardinal acts[5]. Their being mentioned[6] in the FL even before "plain" Hungarian citizens[7] as well as other categories of persons such as foreign nationals who are EU citizens[8], refugees[9], permanent residents[10], and national minorities[11] is symbolic from the outset.

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[3] A. Lührmann, M. Tannenberg, S. I. Lindberg, "Regimes of the World (RoW): Opening New Avenues for the Comparative Study of Political Regimes", *Politics and Governance*, vol. 6, n°1 (2018), p. 60-77, at p. 61.

[4] On the achievements of Fidesz's parliamentary supermajority leading to continuous backsliding of democracy, see Freedom House, Country Report on Hungary from 2019 and onwards, available at https://freedomhouse.org/country/hungary/freedom-world/2019, V-Dem (ed. S. I. Lindberg), "Democracy Report 2024. Democracy Winning and Losing at the Ballot", p. 24-25 (Figure 14), available at https://v-dem.net/publications/democracy-reports/, and European Parliament resolution of 15 September 2022 on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2018/0902R(NLE)), P9_TA(2022)0324, which takes over the qualification of Hungary as a "hybrid regime of electoral autocracy".

[5] Cardinal acts complete the Fundamental Law's scope or regulate specific constitutional domains. To do so, only the votes of *two thirds* of NA Members *present* are required for adopting or amending cardinal acts (Art. T(4) FL), whereas the votes of two thirds of *all* NA Members are required in the case of the FL itself (Art. S(2) FL).

[6] Art. D.

[7] Art. G (citizenship), XIV(2) (right to not be expelled from the country and to return from abroad at any time), XXIII(1) (right to vote), XXVII(1) (right to move freely within the country), and XXVII(2) (right to consul protection).

[8] Art. XIV(1) (right to settle in Hungary), XXIII(2) (right to vote), and XXVII(1) (right to move freely within the country).

[9] Art. XIV(4) (right to asylum) and XXIII(3) (right to vote).

[10] Art. XIV(2) (right to be expelled only under a lawful decision), XXIII(3) (right to vote), and XXVII(1) (right to move freely within the country).

[11] Art. XXIX and 2.

Table 1. Categories of persons under Hungarian constitutional law

Status	Citizenship	Ethnicity	Résidence
Hungarian living in Hungary *(Magyarországon élő magyar)*	Hungarian	Hungarian	Hungary
National minority *(nemzetiség)*	Hungarian	Foreign	Hungary
Hungarian living beyond the borders *(határon túli magyar)*	Hungarian	Hungarian	Neighbouring EU country
	Hungarian	Hungarian	Neighbouring non-EU country
	EU	Hungarian	Neighbouring EU country
	Non-EU	Hungarian	Neighbouring non-EU country
Hungarian living abroad *(külföldön élő magyar)*	Hungarian	Hungarian	Non-neighbouring EU country
	Hungarian	Hungarian	Non-neighbouring non-EU country
Dual (multiple) citizen *(kettős (többes) állampolgár)*	Hungarian + EU	Hungarian + other	Any country
	Hungarian + Non-EU	Hungarian + other	Any country
EU citizen *(EU-s állampolgár)*	EU	Foreign	From non-neighbouring EU country to Hungary
Foreign national *(harmadik országbeli állampolgár)*	Non-EU	Foreign	From non-neighbouring non-EU country to Hungary
Refugee *(menekült)*	Non-EU	Foreign	From non-neighbouring non-EU country to Hungary
Stateless *(hontalan)*	None	Foreign	From any country to Hungary

Those persons who live in so-called "neighbouring states"[12] and identify as Hungarians enjoy special advantages under Act LXII/2001 on Hungarians living in neighbouring states, protection under Act XLV/2010 on National Unity, as well as facilitated access to Hungarian citizenship under Act LV/1993 on Hungarian citizenship. This means that HBB whose ancestors were Hungarian citizens, or whose ancestors were *most likely* – not *certainly* – of Hungarian origin, and who can prove their Hungarian language skills, are eligible for preferential naturalisation *without ever having lived in Hungary*[13]. This is an effective way for Fidesz to gain supporters within Hungarian communities in neighbouring countries.

It is important to note here that, while shared ethnicity constitutes the formal justification for this preferential regime, the rationale behind this purely political decision extends to a much broader concern, discussed in the following section. The ingenuity of this construction lies in the fact that granting rights to people, be it on ethnic grounds, results in a much less contestable dynamic than taking rights away from them. An example based on the difference between HBB and national minorities may prove illustrative here. If voting rights of both categories are derived from Hungarian citizenship, national minorities[14] participate in Hungary's political life because they "have been" Hungarian citizens of non-Hungarian ethnicity, whereas HBB are neighbouring states' citizens of Hungarian ethnicity who, on that sole basis, "have become" Hungarian citizens entitled to express their views. In that context, depriving Hungarian citizens of their right to vote on ethnic grounds is a severe case of discrimination, whereas granting non-Hungarian citizens the right to vote on ethnic grounds is a matter of sovereignty for the Hungarian state. This is the key to the whole system.

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[12] Croatia, Romania, Slovakia and Slovenia within the EU, as well as Serbia and Ukraine outside the EU. Though a bordering country, Austria is not covered by the term "neighbouring country" as it did not benefit from the annexation of territories from Hungary at the time of the 1920 Treaty of Trianon. This historic event is an important cornerstone of Fidesz's nationalist ideology and called upon to justify a great number of political and legal acts.

[13] Act LV/1993, Art. 4.

[14] Bulgarian, Greek, Croatian, Polish, German, Armenian, Roma, Romanian, Rusyn, Serbian, Slovak, Slovenian, Ukrainian are recognised as ethnic groups that have been residing in Hungary for at least a century still using their own language, culture and traditions, see Annex I of Act CLXXIX/2011 on the rights of national minorities.

On a more global note, HBB do have it much better when compared to the remaining categories of persons. On the one hand, the legal framework for persons outside the EU who are not from neighbouring states, established in accordance with Article XIV(1) and (5), is a much less welcoming one considering either the right of residence of foreign nationals under Act XC/2023 or the right to asylum of refugees and stateless persons under Act LXXX/2007[15]. On the other hand, despite their persisting link to Hungary by citizenship, the FL does not even mention[16] or consider the category of Hungarians living abroad, i.e. outside neighbouring states, as part of "national unity" the same way as ethnic Hungarians from neighbouring states who may not even be Hungarian citizens. Muting and un-muting activities of this sort anticipate Fidesz's priorities in regulating which persons' views may be expressed[17] and taken into consideration in the process of shaping the country by lawmaking.

1.2. Muted dissent and amplified consent within the electoral system

The second pillar for maintaining Hungary's electoral autocracy lies in electoral law itself. Based on Article XXIII FL, electoral law consists of Act CXIII/2003 on the election of Members of the European Parliament, Act L/2010 on the election of local government representatives and mayors, Act CCIII/2011 on the election of members of the National Assembly, and Act XXXVI/2013 on electoral procedure. These provisions reveal that non-Hungarians have the right to vote at local elections on account of residence in Hungary[18]; all EU citizens have

[15] See C-808/18, *European Commission v. Hungary*, EU:C:2020:1029, C-821/19, *European Commission v. Hungary*, EU:C:2021:930, and C-823/21, *European Commission v. Hungary*, EU:C:2023:504, as well as ECtHR Cases *Ilias and Ahmed v. Hungary* (Grand Chamber), 21 November 2019, paras 151-165, *H.M. and others v. Hungary*, 2 June 2022, paras 27-28, *Shahzad v. Hungary*, 5 October 2023, paras 71-80, and *S.S. and others v. Hungary*, 12 October 2023, paras 60-70.

[16] Even though Art. XIV(2) (right to return from abroad at any time), XXVII(2) (right to consul protection), and XXIII(1) (right to take part in *some* elections) do apply to them.

[17] For the sake of exhaustivity, national and local referendums can be assimilated to parliamentary elections regarding voting rights, except for persons with refugee status who have the right to participate in local referendums (see Art. 8 FL, Act LXXX/2007 on the right to asylum and Act CCXXXVIII/2013 on referendum initiative, European citizens' initiative and referendum procedure).

[18] Art. XXIII(3) and (5) FL; Act LXXX/2007, Art. 10(2)(a); see also Art. 20(2)(b) and 22(1) TFEU, Art. 40 of the Charter of Fundamental Rights of the European Union (hereinafter "CFR").

the right to vote at EU elections on account of EU citizenship[19]; and all Hungarians have the right to vote at parliamentary elections on account of Hungarian citizenship[20] as well as at local government elections upon residential address in Hungary and physical presence in Hungary on election day[21].

Table 2. Right to vote of persons at elections

Persons	Right to vote upon citizenship		Right to vote upon residence
	EU election	Parliamentary election	Local election
Hungarian living in Hungary	Yes	Yes, complete	Yes
National minority	Yes	Yes, complete with special rights	Yes
Hungarian living beyond the borders	Upon EU/ Hungarian citizenship	Upon Hungarian citizenship, incomplete	No
Hungarian living abroad	Yes	Yes, complete or incomplete	Upon permanent address in Hungary + physical presence on election day
Dual (multiple) citizen	Yes	Yes, complete or incomplete	Upon permanent address in Hungary + physical presence on election day
EU citizen	Yes	No	Yes
Foreign national	No	No	Yes
Refugee	No	No	Yes
Stateless	No	No	Yes

NA Members are re-elected every four years[22] in a single round[23]. Suffrage is universal, equal, direct, secret[24], and voting is not mandatory[25]. As shown by **Figure 1**, it is a mixed system in which a slightly greater emphasis is placed on the majoritarian component than

[19] Art. XXIII(1) and (2) FL; Act CXXIII/2003, Art. 2/A(1) and (1a) ; see also Art. 20(2)(b) and 22(2) TFEU, Art. 39(1) CFR.

[20] Art. XXIII(1) and (4) FL; Act CCIII/2011, Art. 12.

[21] Art. XXIII(1), (4) and (5) FL; Act L/2010, Art. 1(2) and 2.

[22] Art. 2(3) FL.

[23] Act CCIII/2011, Art. 11.

[24] Art. 2(1) FL. See also Art. 35(1) FL for local government elections.

[25] Act CCIII/2011, Art. 2.

on the proportional component[26]: among the 199 members, 106 are elected in single member districts (SMD) or individual constituencies where the candidate with the most votes wins[27], while 93 are elected from party lists (PL) or minority lists (ML) in the national constituency. Once SMD mandates are allocated, votes for lists that reach the threshold are distributed as shown by **Figure 2**, i.e. after transfer of surplus votes (SV) for the winning candidate and fractional votes (FV) for losing candidates in SMD to PL or to ML[28], with respect to minorities' preferential quota[29].

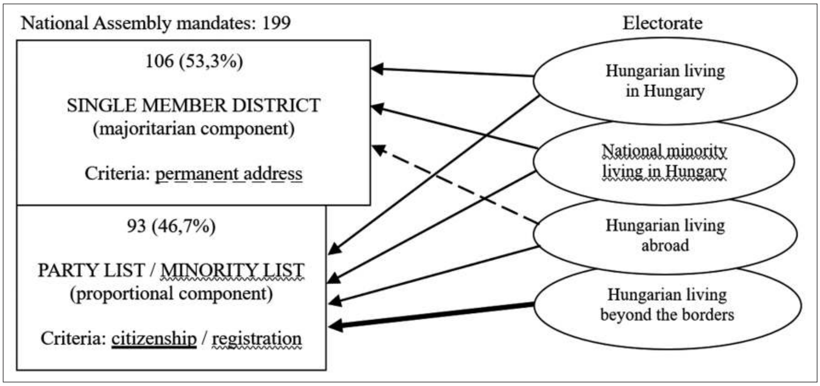

Figure 1. Parliamentary election: electorate and National Assembly mandates

[26] This is equivalent to 53,3% majoritarian against 46,7% proportionate. Before the 2011 reform, it was the other way around: among 386 NA Members (reduced by nearly half since then), 176 came from SMD and 210 from PL, amounting to 45,6% majoritarian against 54,5% proportionate; ML did not exist at the time. See Act XXIV/1989, Art. 4 (no longer in force).

[27] Act CCIII/2011, Art. 13.

[28] SV are votes of the winning candidate minus votes of the candidate who obtained the second highest number of votes plus one. FV are votes cast for candidates who did not win a mandate. Both are transferred from the (winning or losing) candidate in the SMD to the candidate's PL or ML. Even though Act CCIII/2011, Art. 15, refers to both as *töredékszavazat*, a terminological distinction in English might prove to be useful, even more so because the definitions used in Art. 15(1)(b) and (a) match those used above.

[29] According to Art. 16(c), (d), (e), all PL votes and ML votes are added together into a *total national list votes*; the total national list votes is divided by 93 and the result further divided by 4, the whole of the quotient so obtained is the *preferential quota*. Then, if the number of votes allocated to a ML is greater than or equal to the preferential quota, that ML shall be allocated one and *only one* preferential mandate. Afterwards, the number of seats to obtain via list votes shall be reduced by the number of preferential mandates allocated.

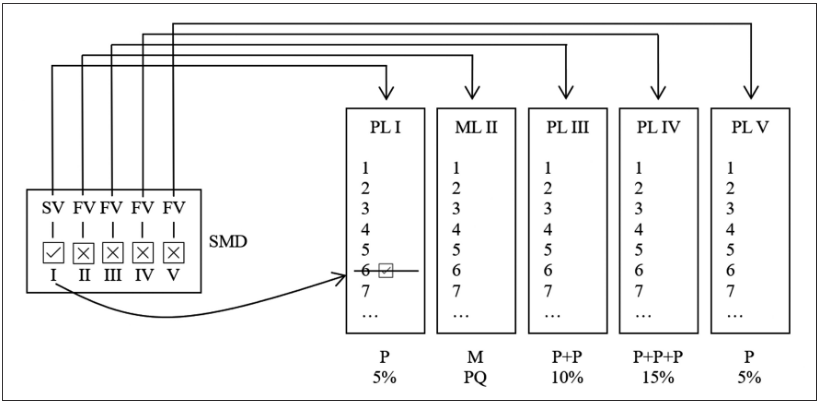

Figure 2. Parliamentary election: surplus votes and fractional votes transferred to lists

The electorate for parliamentary election is composed of citizens living in Hungary, citizens belonging to a national minority, citizens living abroad, and HBB granted citizenship by preferential naturalisation. However, differentiated exercise of the right to vote affects the value thereof, leading to differential treatment between those electors (1.2.1). In that regard, discrimination taking the forms of un-muting ethnic Hungarians and muting those who leave the country directly helps Fidesz win parliamentary elections (1.2.2). Consequently, popular representation also becomes distorted (1.2.3).

1.2.1. Differential treatment based on physical presence in the country, ethnic background, and country of residence

In the first case, only voters who have a permanent address in Hungary and are physically present in Hungary on election day may vote at local government elections. This means that Hungarian voters who have retained a permanent address in Hungary but are not physically present in Hungary on election day (part of Hungarian citizens living abroad), along with Hungarian voters who do not have a permanent address in Hungary (HBB and part of Hungarian citizens living abroad), may not vote at local representatives' elections. While the fact that permanent address in Hungary does not guarantee the right to vote to Hungarians living abroad might seem odd at first sight, it ensures that only persons who are *de facto* resident in Hungary should have a say in local affairs directly affecting their everyday life[30]. Thus, such differential treatment enjoys an acceptable justification.

In the second case, distinction between Hungarian voters living in Hungary lies in the possibility for Hungarian citizens belonging to a national minority to register as minority voters[31] in order to vote for the ML set up by the assembly of their national minority self-government instead of PL[32]. Indeed, "paying of an old debt"[33] in the form of participation of national minorities living in Hungary in the NA's work fits more or less the nationalist ideology of the party that has been in government for fifteen years. However, the execution of the idea may not be as factually beneficial as symbolically promising[34]. On the one hand, data show that only one minority out of thirteen has ever won a seat in the NA[35]. On the other hand, the combined effect of a preferential quota system, an absence of choice for national minority voters, and violation of the secrecy of vote, has been considered discriminatory by the European Court of Human Rights[36] – as opposed to the Hungarian Constitutional Court which did not declare this clear differentiation on the grounds of ethnicity contrary to the FL[37].

[30] This aligns with ECtHR case law on national elections: "Restrictions on expatriate voting rights based on the criterion of residence might be justified by several factors: (i) the presumption that non-resident citizens are less directly or less continually concerned with their country's day-to-day problems and have less knowledge of them; (ii) the fact that non-resident citizens have less influence on the selection of candidates or on the formulation of their electoral programmes; (iii) the close connection between the right to vote in parliamentary elections and the fact of being directly affected by the acts of the political bodies so elected; (iv) the legitimate concern the legislature may have to limit the influence of citizens living abroad in elections on issues which primarily affect persons living in the country" (see e.g. *Vámos and others v. Hungary* (dec.), 17 February 2015, para 13).

[31] Act XXXVI/2013, Art. 86.

[32] Act CCIII/2011, Art. 9 and 12.

[33] T. Sárközy, *Illiberális kormányzás a liberális Európai Unióban. Politikailag igen sikeres túlhajtott plebejus kormányzás. A harmadik Orbán-kormány 2014-2018* (Park, 2019), p. 103.

[34] On Fidesz's minority policy in general, see A. L. Pap, *Democratic Decline in Hungary. Law and Society in an Illiberal Democracy* (Routledge, 2019), p. 95-119.

[35] The German minority won a seat in 2018 and 2022, but not in 2014, when ML voting was introduced, and no minority won a single seat. The National Election Office's statistics are available at https://www.valasztas.hu/.

[36] ECtHR Case *Bakirdzi and E.C. v. Hungary*, 10 November 2022, paras 51-74.

[37] According to the HCC, "the application for registration ensures that the national minorities living in Hungary can exercise their right under Article XXIX (2) of the

In the third case, a distinction is made between Hungarian citizens living abroad depending on whether they have retained a permanent address in Hungary. If so, Hungarians living abroad may vote at foreign representations, not by post, for PL and for SMD candidates corresponding to that address[38]. If not, they may only vote for PL but may do so by post[39], similarly to HBB who have acquired Hungarian citizenship. In this context, traveling to a foreign representation – potentially several hundred kilometres away and without the costs being reimbursed – may make it impossible or at least substantially difficult for some Hungarian citizens living abroad to exercise their right to vote at parliamentary elections. Nonetheless, both the HCC[40] and the ECtHR[41] have ruled that this differential treatment is justified. Despite its obvious influence on election results, making the exercise of the right to vote materially easier for those who no longer have or have never had a permanent address in Hungary does not seem to have struck a chord.

Fundamental Law and can establish national minority representation in the National Assembly in the manner provided for by the Constitution", see Decision 1/2013 (I. 7.) AB establishing the unconstitutionality of certain provisions of the Electoral Procedure Act adopted by Parliament on 26 November 2012, III/7 *in fine* (request by the President of the Republic prior to promulgation).

38 As such, they may only request to be enrolled in the foreign representation electoral register (*külképviseleti névjegyzék*), see Act CCIII/2011, Art. 12(1), and Act XXXVI/2013, Art. 259(1) and 271(1).

39 As such, they may only request to be enrolled in the register of postal voters (*levélben szavazók névjegyzéke*), see Act CCIII/2011, Art. 12(3), and Act XXXVI/2013, Art. 266(2) and 274.

40 HCC, Decision 3086/2016 (IV. 26.) AB rejecting the constitutional complaint, paras 53-55: "voting by post for voters who are abroad on election day but who do not have a permanent address is ostensibly a procedural (technical) rule that is preferential (facilitating the exercise of the fundamental right), but […] it is accompanied by a restriction (lack of completeness) of the substance of the fundamental right", whereas "voters having a permanent address […] may cast their vote at a foreign representation or travel home and vote in Hungary, at their option[; their] right to vote […] is complete and is therefore not affected or restricted by the difference in the contested procedural rule".

41 ECtHR Case *Vámos and others v. Hungary,* paras 20-21: "the voting arrangements reflecting the distinction between the different situations of voters outside Hungary cannot be regarded as overstepping the State's margin of appreciation in this field. It is not for the Court to pass judgment on the efficiency of the organisation of a voting system. In these circumstances, the Court is satisfied that the impugned measure has an objective and reasonable justification for the purposes of Article 14".

1.2.2. Effects of discrimination favouring ethnic Hungarians against dissidents

Statistics on the number of naturalisations, coupled with parliamentary election results from 2014, 2018 and 2022, may shed light on the practical impact of the cases of differential treatment put forward in the previous paragraphs. Official statistics cover the period from 2011 to 2015[42], after which only cumulative numbers can be gathered from ministerial statements. This lack of data[43], besides being unacceptable in terms of transparency, might be a consequence of the effects of citizenship business conducted by Russian and Ukrainian criminal organisations[44] of which the Hungarian state was aware[45].

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[42] Központi Statisztikai Hivatal, *Új magyar állampolgárok. Változások az egyszerűsített honosítási eljárás bevezetése után* (2017), available at https://www.ksh.hu/apps/shop.kiadvany?p_kiadvany_id=955944&p_temakor_kod=KSH&p_lang=hu; A. Örkény and M. Székelyi, "Honosítás és aktív állampolgárság a harmadik országbeli bevándorlók körében" in K. András (ed), *Bevándorlás és integráció. Magyarországi adatok, európai indikátorok* (MTA Társadalomtudományi Kutatóközpont, Kisebbségkutató Intézet, 2013), p. 172-199, available at https://real.mtak.hu/10022/1/12_nyilv.pdf.

[43] Figures for the period after 2015 come from press articles referring to ad hoc ministerial statements mentioning these figures, see X., "Orbán bemutatta az egymilliomodik külhoni magyart", *HVG* (2017), available at https://hvg.hu/itthon/20171216_Orban_bemutatta_az_egymilliomodikat, M. Gál, "Az Orbán-kormány azt is titkolja, hány új állampolgárral bővült a magyar nemzet, de a voksokért bármit megtesz", *Népszava* (2022), available at https://nepszava.hu/3146590_kulhoni-szavazas-voks-valasztas-2022, X., "Elárulta a kormány, hányan kaptak magyar állampolgárságot 2011 óta", *HVG* (2024), available at https://hvg.hu/itthon/20240321_kormany-semjen-zsolt-magyar-allampolgarsag-egyszerusitett-honositas-visszaeles, and Zs. Semjén, Minister for National Politics, Church Politics and Church Diplomacy, written answer to MP Á. Vadai (DK) to question K/7670 "How many new citizens has Hungary acquired through the simplified naturalisation procedure?", PSÁT-PF/89/3 (2024), available at https://www.parlament.hu/irom42/07670/07670-0001.pdf.

[44] See the series of investigative journal articles exposing "corrupt officials, lawyers assisting fraud, doppelgangers" involved in the citizenship business, with the help of whom "at least eighty percent of applicants with forged ancestors have been granted Hungarian citizenship", as well as groups on social media sites and legal companies and law firms openly offering this service in B. Szalai, "Ukrán maffia osztja tízezrével a magyar állampolgárságot", *Index.hu* (2014), available at https://index.hu/gazdasag/2014/09/16/magyar_nyelven_szavaltak_szep_magyar_szoveget/.

[45] J. Lázár, Minister of the Prime Minister's Office [at the time], written answer to MP A. Mesterházy (MSZP) to questions K/14126 "How do you intend to eliminate the possibilities of abuse?", K/14127 "Is the Information Office aware of the possibility that Hungarian citizenship has been sold for money in other countries?", and K/14129 "Has the Information Office investigated the new chapter of the citizenship scandal?", PARLFMIN/ 66/3 (2017), available at https://www.parlament.hu/irom40/14127/14127-0001.pdf.

Table 3. Available statistics on naturalisations

\	**Naturalisations**				**Total naturalisations**		**Total preferential naturalisations**	
Year	Of persons living in Hungary	From Romania, Serbia, Slovakia, Ukraine	Of persons living outside Hungary	In Romania, Serbia, Slovakia, Ukraine	Year	Cumulative	Year	Cumulative
2011	20.600	**19.900 (97%)**	78.700	**73.000 (93%)**	99.300	99.300	**92.900 (94%)**	**92.900 (94%)**
2012	18.400	**17.800 (97%)**	163.600	**154.700 (95%)**	182.000	281.300	**172.500 (95%)**	**265.400 (94%)**
2013	9.200	**8.700 (95%)**	168.600	**159.200 (94%)**	177.800	459.100	**167.900 (94%)**	**433.300 (94%)**
2014	8.700	**7.800 (90%)**	155.900	**143.900 (92%)**	164.600	623.700	**151.700 (92%)**	**585.000 (94%)**
2015	4.000	**3.400 (85%)**	80.200	**70.600 (88%)**	84.200	707.900	**74.000 (88%)**	**659.000 (93%)**
2017						1.000.000		?
2022	?		?		?	1.100.000	?	**940.000 (85%)**
2024						1.175.934		?

At this point, data on citizenship becomes even more eloquent if cross-examined with data on parliamentary election results[46], on the number of *voters* (persons who exercise their right to vote) and *electors* (persons who are entitled to vote), on PL voting results, and on the final distribution of mandates.

On the one hand, positive discrimination reveals effective, as ethnic Hungarians do seem to favour Fidesz. By 2022, 85% of all naturalisations concern HBB, which means a total of 940.000 persons, and 48,52% of HBB, representing 456.129 persons, are registered postal voters who vote for PL only. Of the 5.624.225 valid PL votes received from all electors, only 54,42% are cast for Fidesz, while almost 94% of the 267.468 votes received by post are pro-Fidesz. Trends are similar in 2014 and 2018. Moreover, chronologically, the greater the number of postal voters (which includes both categories of Hungarian voters without a permanent address in Hungary), the more seats Fidesz wins by PL votes, either retaining 133 mandates in 2018 or even adding two more in 2022. This confirms a link between the granting of Hungarian

[46] Data related to elections are available at https://static.valasztas.hu/dyn/pv14/szavossz/hu/eredind.html, https://www.valasztas.hu/ogy2018 and https://www.valasztas.hu/ogy2022.

Table 4. Cross-sectional data: citizenship acquisitions and parliamentary election results since 2011

Parliamentary election year	**2014**	**2018**	**2022**
TOTAL ELECTORS (citizens)	8.241.562	8.312.173	8.215.304
Minimum number of emigrants	550.000	650.000	714.420
Minimum number of emigrants since 2011 (Hungarian living abroad with or without permanent address in Hungary)	46.957	167.576	254.336
Minimum number of preferentially naturalised Hungarians beyond the borders since 2011	433.300	Min. 659.000	940.000
TOTAL VOTERS (voted)	5.096.310	5.796.268	5.717.182
Foreign representation electoral register (Hungarian living abroad with permanent address in Hungary)	No data	58.310	65.480
Register of postal voters (Hungarian living abroad without permanent address in Hungary + Hungarian living beyond the borders)	193.793	378.449	456.129
TOTAL VOTES FOR PARTY LISTS before vote transfer	5.027.820	5.694.751	5.624.225
For Fidesz party list by all electors	2.264.780	2.824.551	3.060.706
Votes for party lists by voters at foreign representations	No data	No data	No data
Votes for party lists by postal voters	128.429	225.025	267.834
For Fidesz party list by postal voters	122.638	216.561	251.468
Surplus votes and fractional votes	3.327.395	3.515.209	3.216.469
SV and FV transferred from SMD Fidesz candidates to Fidesz party list	940.881	1.218.518	1.330.256
TOTAL VOTES FOR PARTY LISTS after vote transfer	8.172.871	8.827.857	8.556.993
For Fidesz party list	3.205.661	4.043.069	4.390.962
NATIONAL ASSEMBLY MANDATES	199	199	199
For Fidesz	133	133	135
Single member district mandates	106	106	106
For Fidesz	96	91	87
Party list mandates	93	92	92
For Fidesz after vote transfer	37	42	48
Minority list mandates	0	1	1

citizenship and the NA's final composition. As such, inviting HBB to participate in parliamentary elections seems to be more than an appeal to historical sentiments: a strategic decision to protect the party's two-thirds majority. This finding is not undermined even if we know that multiple categories of voters are mixed up in the register of postal voters, since the proactivity of HBB is evidently bound to outweigh the disconnection of emigrants who have renounced their Hungarian address.

Table 5. Cross-sectional data: positive discrimination of ethnic Hungarians

Parliamentary election year	**2014**	**2018**	**2022**
Minimum number of preferentially naturalised Hungarians beyond the borders since 2011	433.300 (100%)	Min. 659.000 (100%)	**940.000 (100%)**
Register of postal voters (Hungarian living abroad without permanent address in Hungary + Hungarian living beyond the borders)	193.793 (44,73%)	378.449 (57,43%)	**456.129 (48,52%)**
TOTAL VOTES FOR PARTY LISTS before vote transfer	5.027.820 (100%)	5.694.751 (100%)	**5.624.225 (100%)**
For Fidesz party list by all electors	2.264.780 (45,05%)	2.824.551 (49,27%)	**3.060.706 (54,42%)**
Votes for party lists by postal voters	128.429 (100%)	225.025 (100%)	**267.834 (100%)**
For Fidesz party list by postal voters	122.638 (95,49%)	216.561 (96,24%)	**251.468 (93,89%)**
NATIONAL ASSEMBLY MANDATES	**199 (100%)**	**199 (100%)**	**199 (100%)**
For Fidesz	**133 (66,83%)**	**133 (66,83%)**	**135 (67,84%)**

On the other hand, negative discrimination against Hungarians who have moved abroad, most likely for reasons related to unsatisfaction, does not disappoint either. The number of emigrating Hungarian citizens[47] between 2010 and 2022

[47] In the absence of reliable official statistics on emigration, data are based on statistics available at https://ourworldindata.org/migration and https://www.ksh.hu/stadat_files/nep/hu/nep0030.html. Emigrating Hungarian citizens (*kivándorló magyar állampolgár*) are "persons who leave Hungary with the intention of settling abroad, without planning

amounts to 714.420. The materially impeded exercise of the right to vote seems indeed to discourage electors to the point that only 65.480 emigrants who have decided to stay connected to their home country's political life by retaining a permanent address in Hungary registered to vote at foreign representations in 2022. This means that 90,83% of voices presumed unfavourable to Fidesz remain silent during parliamentary elections. As for the audible 9,17%, a symbolic addition to the picture is the absence of a separate record and explicit data of where votes of emigrant Hungarians are cast. Similarly, lack of proper statistics makes it impossible to trace the votes of those who renounce their permanent address in Hungary; in any case, it would not make a difference, since HBB have sufficient influence on PL votes by postal voters. In other words, moving abroad is tantamount, if not to losing the right to vote, then to giving it up in practice. This serves as an illustration to turning the volume up to hear one category of voters and turning it down to avoid listening to another category longer than democratic politeness requires so.

Table 6. Cross-sectional data: negative discrimination of Hungarians living abroad

Parliamentary election year	**2014**	**2018**	**2022**
Minimum number of emigrants	550.000	650.000 (100%)	**714.420 (100%)**
Minimum number of emigrants since 2011 (Hungarian living abroad with or without permanent address in Hungary)	46.957	167.576	**254.336**
Minimum number of preferentially naturalised Hungarians beyond the borders since 2011	433.300	Min. 659.000	940.000
Foreign representation electoral register (Hungarian living abroad with permanent address in Hungary)	No data	58.310 (8,97%)	**65.480 (9,17%)**
Register of postal voters (Hungarian living abroad without permanent address in Hungary + Hungarian living beyond the borders)	193.793	378.449	456.129
Votes for party lists by voters at foreign representations	No data	No data	**No data**
Votes for party lists by postal voters	128.429 (100%)	225.025 (100%)	267.834 (100%)
For Fidesz party list by postal voters	122.638 (95,49%)	216.561 (96,24%)	251.468 (93,89%)

to return (permanently) or planning to return but leaving Hungary on a long-term (temporary) basis and declare this" (see KSH Népességtudományi Kutatóintézet, https://demografia.hu/hu/tudastar/fogalomtar/9-kivandorlas). Minimum number of emigrants since 2011 and minimum number of preferentially naturalised Hungarians beyond the borders since 2011 are cumulative up to the year before election year.

1.2.3. Low representativity of the will of the people

In addition to the fact that not all voices are heard equally, the electoral system's configuration raises a representativity concern. The issue is rooted in a particular step of allocation of mandates which results in an advantage for larger, already popular parties. As mentioned above, SV and FV cast for SMD candidates are not lost but transferred to the PL and distributed among list candidates to gain additional seats for the party. In the case of the three consecutive parliamentary elections, the transfer of SV and FV from Fidesz's SMD candidates to Fidesz's PL adds 940.881 to 2.264.780 in 2014, 1.218.518 to 2.824.551 in 2018, and 1.330.256 to 3.060.706 in 2022, each time almost half as many votes and one third of the total votes for Fidesz's PL. This is relevant during the allocation of list mandates which happens according to the D'Hondt method: the more votes a party has, the more likely it is to win the next seat. Indeed, even though Fidesz loses first five and then four seats in SMD, it manages to keep 133 seats in 2018 and adds two more in 2022 thanks to list votes (*inter alia* by ethnic Hungarians). The so-called proportional component is not that obviously proportional after all.

Table 7. Cross-sectional data: distorted proportional component

Parliamentary election year	**2014**	**2018**	**2022**
TOTAL VOTES FOR PARTY LISTS before vote transfer	5.027.820	5.694.751	5.624.225
For Fidesz party list by all electors	**2.264.780 (70,65%)**	**2.824.551 (69,86%)**	**3.060.706 (69,7%)**
Surplus votes and fractional votes	3.327.395	3.515.209	3.216.469
SV and FV transferred from SMD Fidesz candidates to Fidesz party list	**940.881 (29,35%)**	**1.218.518 (30,14%)**	**1.330.256 (30,30%)**
TOTAL VOTES FOR PARTY LISTS after vote transfer	8.172.871	8.827.857	8.556.993
For Fidesz party list	**3.205.661 (100%)**	**4.043.069 (100%)**	**4.390.962 (100%)**

Parliamentary election year	**2014**	**2018**	**2022**
NATIONAL ASSEMBLY MANDATES	199 (100%)	199 (100%)	199 (100%)
For Fidesz	**133 (66,83%)**	**133 (66,83%)**	**135 (67,84%)**
Single member district mandates	106	106	106
For Fidesz	**96**	**91 (-5)**	**87 (-4)**
Party list mandates	93	92	92
For Fidesz after vote transfer	**37**	**42 (+5)**	**48 (+6)**
Minority list mandates	0	1	1

As a whole, Hungary's electoral system cannot be characterised as highly representative either. Again, data from 2022 show that the total population is 9.689.010[48], the number of electors is 8.215.304, of which 5.717.182, or 69,6%, participate in parliamentary elections. Regarding the so-called proportional component, 3.060.706 out of 5.624.225 valid votes are cast for Fidesz's PL, which makes up 54,42%. Yet, Fidesz gains a 67,84% (two-thirds) majority in the NA. This confirms the distortion of representativeness. Were the exercise of the right to vote mandatory, i.e. 100% of 8 million electors went to the polls and the same number of votes were cast for Fidesz, the party would have obtained only 37,25%; this is even farther from two-thirds. If the number of PL votes is projected onto the total population of 9 million, Fidesz has only 31,6% support; this is hardly even one third.

Table 8. Cross-sectional data: distorted representativity in the electoral system

Parliamentary election year	**2014**	**2018**	**2022**
TOTAL ELECTORS (citizens)	8.241.562	8.312.173	**8.215.304**
TOTAL VOTERS (voted)	5.096.310	5.796.268	**5.717.182 (69,6%)**
TOTAL VOTES FOR PARTY LISTS before vote transfer	5.027.820 (100%)	5.694.751 (100%)	**5.624.225 (100%)**
For Fidesz party list by all electors	2.264.780 (45,05%)	2.824.551 (49,27%)	**3.060.706 (54,42%)**

48 Available at https://www.ksh.hu/stadat_files/nep/hu/nep0001.html.

Parliamentary election year	2014	2018	2022
NATIONAL ASSEMBLY MANDATES	199 (100%)	199 (100%)	**199 (100%)**
For Fidesz	133 (66,83%)	133 (66,83%)	**135 (67,84%)**
Single member district mandates	106	106	106
For Fidesz	96	91	87
Party list mandates	93	92	92
For Fidesz after vote transfer	37	42	48
Minority list mandates	0	1	1

Therefore, a correction of the motto quoted at the beginning of the paper might be in order: "thirty-one out of a hundred in orange from head to toe". Although one-third representativity may lack democratic legitimacy, deciding to listen only to those who countersign plans and actions is perfectly sufficient to maintain Fidesz in power thanks to this framework of electoral autocracy.

1.3. Additional benefits as insurance for pocketing votes

The third pillar to this preferential regime slightly differs from the two previous ones. If rules on citizenship acquisition and means of exercising voting rights are classic elements of public law linked to a state's sovereign conception of its own mode of operation, favouring a certain category of persons for certain reasons rings a bit different. This is what happens in the case at hand: HBB also enjoy travel[49], educational[50] and cultural[51] benefits, which may not have as spectacular

[49] Act LXII/2001, Art. 8; Government Decree 39/2024 (II. 29.) on the different application of Act LXII/2001 on Hungarians living in neighbouring states during a state of danger, Art. 2 and 3.

[50] Act LXII/2001, Art. 9-12; Government Decree 206/2003 (XII. 10.) on the implementation of the provisions of Act LXII/2001 on Hungarians living in neighbouring states concerning teachers and academics; Government Decree 319/2001 (XII. 29.) on student benefits for persons subject to Act LXII/2001 on Hungarians living in neighbouring states; Government Decree 31/2004 (II. 28.) on the rules for grant of subsidies under Act LXII/2001 on Hungarians living in neighbouring states; Act CXC/2011 on national public education, Art. 9(4); Act CCIV/2011 on national higher education, Art. 39(1) (e), 48/B (3) and (5), 80 (4)-(7), 91(5).

[51] Act LXII/2001, Art. 4-5; Decree 18/2003 (XII. 10.) of the Ministry of National Cultural Heritage on cultural benefits for persons subject to Act LXII/2001 on Hungarians living in neighbouring states.

impact as the citizenship business but do help buy pro-Fidesz votes in the elections and therefore contribute to Fidesz's power's consolidation.

In that regard, it is not necessary to assess those benefits' full extent; an illustrative example of each type may suffice to emphasise the fact that the Hungarian state favours HBB over "plain" nationals to whom these benefits do not apply. Travel benefits include free rides on domestic local and intercity scheduled public transport[52]. Education benefits include the possibility to apply by tender for reimbursement of all or part of the costs of stay and studies in Hungary[53]. Cultural benefits include discounts for museum visits and library use[54], although concern feels less legitimate here, as the promotion of MS's cultural diversity is one of the EU's top priorities[55]. Eligibility for these benefits, i.e. belonging to this category of persons, is proven by the so-called Hungarian Card (*Magyar Igazolvány*) that solely HBB may apply for[56].

In this case, a Member State disadvantages "original" nationals by granting more advantageous treatment to foreigners becoming "new" nationals. This falls under the concept of discrimination, and possibly reverse discrimination, should granting of benefits qualify as a purely internal situation.

52 Government Decree 39/2024 (II. 29.), Art. 2 and 3.

53 Act CCIV/2011 on national higher education, Art. 80(6).

54 Decree 18/2003 (XII. 10.) of the Ministry of National Cultural Heritage on cultural benefits for persons subject to Act LXII/2001 on Hungarians living in neighbouring states.

55 Art. 3(3) TEU (objective); Art. 6(c) (support competence), 107(3)(d) (state aid considered to be compatible with the internal market), 165 (education), 167 (culture), 207(4)(a) (common commercial policy) TFEU; and Art. 22 CFR.

56 Act LXII/2001, Art. 19-22; Decree 318/2001 (XII. 29.) on the procedure for the issuance of Hungarian cards and Hungarian Relative Cards; Joint Decree 46/2004 (VIII. 11.) of the Ministry of Interior and the Ministry of Foreign Affairs amending Joint Decree 49/2001 (XII. 29.) of the Ministry of Interior and the Ministry of Foreign Affairs on the content and formal requirements for Hungarian Cards of persons subject to Act LXII/2001 on Hungarians living in neighbouring states; Decree 33/2010 (XII. 31.) of the Ministry of Culture and Innovation on the content and formal requirements for Hungarian Cards of persons subject to Act LXII/2001 on Hungarians living in neighbouring states.

2. The EU's limited capacity to interfere with prerogatives reserved for Member States

In the event of a conceptual disagreement between the EU and a Member State, which is the case for an electoral system being used to undermine supranational cooperation, any interaction must be based on the principle of conferral, national identity, and EU identity. The EU shall act only within the limits of the competences conferred upon it by MS, whereas competences not conferred upon the EU in the Treaties remain with the MS[57]. Also, the EU must respect national identities of MS even when the ball falls within its court, but not at the expense of its own identity[58].

The preferential regime outlined above reposes on those three pillars, i.e. citizenship, voting rights and other benefits, precisely because of MS' large margin of discretion therein. As this scheme aims to perpetuate situations fragilizing the EU all the while producing discriminatory effects, it lies within the EU's interest to intervene whenever its competences related to EU citizenship (2.1), democracy (2.2), and non-discrimination in the contexts of fundamental rights (2.3) and economic freedoms (2.4) allow so.

2.1. EU citizenship: no grip on acquisition rules

According to established case law, laying down the conditions for acquisition and loss of nationality – an expression of a genuine link between a MS and its nationals[59] – belongs within MS discretion[60]. However, a general obligation to have regard to EU law still applies even to purely internal situations[61] and interferes with MS' reserved prerogative in cases where national measures deprive of genuine enjoyment of the

[57] Art. 5(1) and (2) TEU.

[58] C-156/21, *Hungary v. European Parliament and Council* (Full Court), EU:C:2022:97, paras 232-234 and C-157/21, *Poland v. European Parliament and Council* (Full Court), EU:C:2022:98, paras 264-266.

[59] C-221/17, *M.G. Tjebbes and Others v. Minister van Buitenlandse Zaken* (Grand Chamber), EU:C:2019:189, para 35.

[60] C-135/08, *Janko Rottmann v. Freistaat Bayern* (Grand Chamber), EU:C:2010:104, para 39, C-369/90, *Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria*, EU:C:1992:295, para 10, and C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department* (Full Court), EU:C:2004:639, para 37.

[61] *Tjebbes*, para 30 and case law cited.

substance of rights conferred by virtue of EU citizenship[62], lead to loss of citizenship[63], or amount to commercialisation of MS nationality and, by extension, of EU citizenship[64].

In the case at hand, none of those exceptions apply: HBB's right to vote does not concern *exclusion from* but *inclusion in* the political life of Hungary[65], the preferential naturalisation regime leads to *acquisition* and not *loss* of Hungarian citizenship and, contrary to Malta's investor citizenship scheme[66], the authorities steer clear of any officialised commercialisation of Hungarian citizenship (i.e. promising HBB voting rights in exchange for investments). As long as this citizenship scheme successfully influences election results, Fidesz-led authorities do not seem to mind "private initiatives" with a "payment option" motivated by the benefits linked to EU citizenship. In that respect, it is likely that under Article 20(1) TFEU several hundreds of thousands of persons[67] have been granted EU citizenship and, on that account, the rights to free movement (Articles 20(2)(a) and 21 TFEU) and to vote in the European Parliament elections (Article 20(2)(b) TFEU). Yet, even with its refashioned approach to golden passports, the Court has a long way to go before being able to grasp the Hungarian citizenship business more substantially than through a tenuous link with potential negative externalities accompanying international conflicts (e.g. institutional espionage, propaganda, and corruption[68]) that could, to an unknown

[62] E.g. *Rottmann*, para 42, and C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)* (Grand Chamber), EU:C:2011:124, para 42.

[63] E.g. *Tjebbes*, para 32.

[64] See C-181/23, *European Commission v. Republic of Malta* (Grand Chamber), EU:C:2025:283, paras 100, 103, 113, 120, 121.

[65] This is why findings in C-808/21, *European Commission v. Czech Republic* (Grand Chamber), EU:C:2024:962, paras 98, 104, 154, 158-164, and C-814/21, *European Commission v. Republic of Poland* (Grand Chamber), EU:C:2024:963, paras 97, 153-161, are irrelevant here.

[66] See e.g. P. J. Spiro, "Investment Citizenship and the Long Leash of International Law" in Kochenov and Surak (eds.), *Citizenship and Residence Sales. Rethinking the Boundaries of Belonging* (Cambridge, 2023), p. 137-160, or D. A. Azzopardi, "Golden Passports and Pension Plans: Malta's Business of Aiding the Ultra-Wealthy", *Transnational Law & Contemporary Problems* (2022), p. 1-32.

[67] In the absence of official country-by-country statistics, the exact distribution between neighbouring EU and non-EU states of the 940.000 preferentially naturalised HBB who have been granted Hungarian citizenship cannot be determined.

[68] See e.g. V. Jakupec, *Dynamics of the Ukraine War. Diplomatic Challenges and Geopolitical Uncertainties* (Springer 2024).

extent, constitute risks for EP elections. Indeed, the current state of EU law would make it extremely difficult to develop a harmonisation project analogous to rule of law conditionality mechanisms all the while bringing something different to the table than Directive 2004/38[69], even if the political will existed and without stepping on MS' toes.

2.2. Democracy: no common conception despite the rule of law connection

As seen above, variable extents of suffrage and, in general, configuration of the electoral system to keep Fidesz in power, show an especially unique understanding of democracy. Enshrined in Article 10 TEU, democracy is also an Article 2 TEU value, meaning that MS are supposed to share the same understanding of it. At the moment, however, no such common concept of democracy binds the MS, whose national identities include "the organisation of national political life"[70].

It has also been established that the Hungarian electoral system contributes to maintaining rule of law breaches. Thus, a first step towards finding a way out of the woods could be to determine the nature of the relationship between the rule of law and democracy as values. There is still no consensus among EU institutions, Member States, or scholars as to whether the rule of law is to be understood as a meta-principle embodying other principles[71], or as a common value of the same hierarchical position as the others. It follows that democracy, i.e. the principle that "the peoples should take part in the exercise of power through the intermediary of a representative assembly"[72], can be understood as a "co-value" being one of the (only) two principles the Union is based on according to the Charter's preamble (horizontal or equal relationship) or as a component of the rule of law in the form of

[69] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance), OJ L 158, p. 77-123.

[70] C-808/21, para 154, and C-814/21, para 153.

[71] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, *O.J.* L 433I/1 (2020), Art. 2(a).

[72] 138/79, *SA Roquette Frères v. Council (Isoglucose)*, EU:C:1980:249, para 33.

"democratic and pluralistic law-making process" (vertical or subordinate relationship).

Considering democracy and the rule of law on the same level, both Article 2 TEU's justiciability and Article 10 TEU's operability come into play. If the Court were to recognise the autonomous justiciability of Article 2[73], it could constitute a legal basis for infringement proceedings under Article 258 TFEU for failure to respect any EU value. This would go beyond the current stage of mutual amplification between Articles 2 and 10[74], and allow to drop a plethora of ineffective rule-of-law mechanisms. Still, democracy must be defined. The Court would certainly not be able to impose an identical implementation of the Article 10 concept in each MS. Theoretically, however, it could set minimum standards of protection in the same way as in the context of fundamental rights[75]. Democratic legitimacy could be the standard below which the MS could not fall, with a basis on the right to vote and the equality of votes, stemming from the "right to influence the way state power is exercised"[76]. With this, the case at hand hits a wall again, as the problem is not the inexistence of such rights, but the fact that their exercise is made difficult in a way on which the EU cannot have an opinion.

Should democracy fall under the umbrella of the rule of law, concerns are limited to Article 2 TEU's justiciability, and further relieved thanks to direct applicability of Regulation 2020/2092. In addition to its residuary character, breaches of "transparent, accountable, democratic and pluralistic law-making process" (Art. 2) would still have to "affect or seriously risk affecting the sound financial management of the Union

[73] C-769/22, *Commission v. Hungary (Valeurs de l'Union)*, case in progress.

[74] Confirmed in C-502/19, Criminal proceedings against Oriol Junqueras Vies (Grand Chamber), EU:C:2019:1115, para 63, repeated in C-808/21, para 161 and C-814/21, para 158. On mutual amplification as a legal strategy, see L. D. Spieker, "Defending Union Values in Judicial Proceedings. On How to Turn Article 2 TEU into a Judicially Applicable Provision", in von Bogdandy, Bogdanowicz, Canor, Grabenwarter, Taborowski, Schmidt (eds.), *Defending Checks and Balances in EU Member States* (Springer, 2021), p. 250-260.

[75] See C-399/11, *Stefano Melloni v. Ministerio Fiscal* (Grand Chamber), EU:C:2013:107, para 60.

[76] P. Sonnevend, "How to Make Article 10 TEU Operational? The Right to Influence the Exercise of State Power and Cardinal Laws in Hungary" in Bobek, Bodnar, von Bogdandy, Sonnevend (eds.), *Transition 2.0: Re-establishing Constitutional Democracy in EU Member States* (Nomos, 2023), p. 575-579.

budget or the protection of the financial interests of the Union in a sufficiently direct way" (Art. 4); without going into an analysis of the other features, defining democracy is again a problem here. One way to overcome this conceptual obstacle is by empirically assessing whether the rule of law mechanisms applied vis-à-vis Hungary[77] address issues related to the electoral system in particular, or the state of democracy in general. This occurs in only two cases: on the one hand, the chapter on Hungary in the Commission's latest Rule of Law Report mentions "challenges [that] persist with regard to political party and campaign financing rules"[78]; on the other hand, the EP articulates erosion of democracy in Hungary in multiple resolutions adopted to trigger Article 7(1) TEU and to criticise the stagnation of proceedings ever since[79]. Therefore, rule of law mechanisms are not suitable either, or at least have not been applied so, to harmonise democracy as a concept or to determine its minimum standards of protection.

2.3. Non-discrimination in fundamental rights: lack of proper instruments

It makes sense to first approach the situations of differential treatment and discrimination developed above from a fundamental rights perspective. However, EU law in that context has little to offer regarding these specific inequalities within the electoral system and benefits advantaging HBB.

Non-discrimination is enshrined in Article 21 CFR as a principle, which means that it needs specific expression in other legal instruments by the EU and by MS only when implementing EU law[80]. Even though Directive 2000/43 provides that specific expression by remedying

[77] For a summary, see R. D. Kelemen, "Will the European Union escape its autocracy trap?", *Journal of European Public Policy*, vol. 32, n°2 (2025), p. 341-364.

[78] Commission, *2024 Rule of Law Report. Country Chapter on the rule of law situation in Hungary*, SWD(2024) 817 final, p. 24.

[79] Art. 7(1) TEU proceedings have been triggered by European Parliament Resolution of 17 May 2017 on the situation in Hungary (2017/2656(RSP)). In addition to resolutions on the state of after hearings, serious follow-up on the proceedings has been requested in European Parliament Resolution of 15 September 2022 on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2018/0902R(NLE)). For a recent positioning, see European Parliament Resolution of 24 April 2024 on ongoing hearings under Article 7(1) TEU regarding Hungary to strengthen the rule of law and its budgetary implications (2024/2683(RSP)).

[80] Explanations relating to the Charter of Fundamental Rights, *O.J.* C 303/24.

discriminatory situations on racial or ethnic grounds, it does not apply to voting rights, and the benefits at hand are also difficult to bring within its scope. Indeed, travel benefits (Art. 3(1)(f)) and educational benefits (Art. 3(1)(g)) *advantaging* HBB and *disadvantaging* "plain" nationals equal "one person being treated less favourably than another is" (Art. 2(2)(a)). However, for direct discrimination to take place, HBB must be recognised as one or – given six different countries of residence – multiple ethnicities[81] *distinct* from "plain" Hungarians, albeit the very reason for their preferential treatment is the *one same ethnicity* shared by *all* Hungarians condemned by history to neighbouring states or the homeland[82]. Could this obstacle be overcome, MS are still allowed to take positive action and "compensate for disadvantages linked to racial or ethnic origin" (Art. 5). Should such justification prove insufficient, as a last resort, the Commission could always bring an action against Hungary for failure to abide the directive's provisions in practice under Article 258 TFEU.

As far as the treaties go, non-discrimination as a value remains inoperable on its own as long as the current non-autonomous justiciability of Article 2 TEU persists. Upon ethnic recognition of HBB despite the odds, Article 19(1) TFEU could possibly provide legal basis for harmonisation initiatives targeting the situations at hand more directly. Until then, standing by.

2.4. Non-discrimination in economic freedoms: limited scope of EU law regarding travel benefits

Discrimination also has a disruptive effect on the internal market when MS measures differentiate between national and non-national "objects" (goods, capital) and "subjects" (service providers, workers, citizens) crossing intra-EU borders in a way that is prohibited in the context of economic freedoms. Given that voting rights have *a priori* no internal market dimension, only benefits creating differential treatment between persons are relevant here.

[81] "Societal [group] marked by common nationality, religious faith, language, cultural and traditional origins and backgrounds" in C-83/14, *"CHEZ Razpredelenie Bulgaria" AD v. Komisia za zashtita ot diskriminatsia* (Grand Chamber), EU:C:2015:480, para 46.

[82] Act LXII/2001, Art. 2(1).

As for educational benefits, EU citizenship in its equal treatment aspect could be considered regarding social assistance[83] allocated to HBB students. However, its application is limited from the outset to HBB from EU MS, namely Croatia, Romania, Slovakia and Slovenia. On the one hand, Hungarian citizens or not, HBB will have no interest in invoking EU law against Hungary since the national measure benefits them. On the other hand, even though they aim for equal treatment of all EU citizens, both Article 24 of Directive 2004/38 and Article 18 TFEU require cross-border movement by the foreign national using their freedom of movement, which does not allow "plain" Hungarians to invoke these provisions against their own MS (Hungary). This approach remains inconclusive.

As for travel benefits, Article 58 TFEU states that the freedom to provide services in the field of transport is governed not by Article 56 to 62 TFEU but by provisions of the Title relating to transport[84]. Indeed, "travel in Hungary on domestic local and intercity scheduled public transport"[85] qualifies as transport service. Based on Article 91(1) TFEU, the EU legislator has provided some guarantees similar to those envisaged by Article 56 TFEU by prohibiting any "direct or indirect discrimination on the basis of the passenger's nationality or of the place of establishment within the Union of the railway undertaking, ticket vendor or tour operator"[86]. Even though this provision only applies to rail travel, excluding all other public transportation means, it prohibits discrimination, by transport service providers established in the EU (in this case, the railway undertaking MÁV Magyar Államvasutak Zrt established in Hungary), between passengers on the basis of

[83] "All assistance introduced by the public authorities, whether at national, regional or local level, that can be claimed by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who, by reason of that fact, may become a burden on the public finances of the host Member State during his period of residence which could have consequences for the overall level of assistance which may be granted by that State", C-140/12, *Pensionsversicherungsanstalt v. Peter Brey*, EU:C:2013:565, para 61.

[84] See also C-338/09, *Yellow Cab Verkehrsbetriebs GmbH v. Landeshauptmann von Wien*, EU:C:2010:814, para 29, and C-434/15, *Asociación Profesional Elite Taxi v. Uber Systems Spain, SL* (Grand Chamber), EU:C:2017:981, para 44.

[85] Government Decree 39/2024.

[86] Regulation (EU) 2021/782 of the European Parliament and of the Council of 29 April 2021 on rail passengers' rights and obligations (recast) (Text with EEA relevance), *O.J.* L 172/1, (2021), Art. 5.

their nationality including, by virtue of Article 21 CFR, grounds of ethnic or social origin and membership of a national minority as well. Consequently, if a question in this matter was referred for preliminary ruling, these travel benefits granted to HBB would likely be contrary to the CJEU's interpretation of Article 5 of Regulation 2021/782 *juncto* Article 58 TFEU. Therefore, the Hungarian government would have to annul its Decree 39/2024. Nonetheless, the same discrimination would continue to apply to all other forms of public transport.

Concluding remarks

By exploring the way in which the right to vote resulting from preferential naturalisation of Hungarians beyond the borders influences electoral results in favour of Fidesz, on the one hand, and identifying cases of differential treatment created within the electoral system and by travel, educational and cultural benefits advantaging Hungarians beyond the borders, on the other hand, the extent Member State discretion can be stretched to becomes apparent. In this context, the EU has very limited options at its disposal, as the current state of the EU law on citizenship, democracy, or the principle of non-discrimination in terms of fundamental rights and economic freedoms, hardly proves adapted to conceive, address and tackle this specific preferential regime deepening the rule of law crisis.

Another perspective to adopt would be the support of candidates to elections either through inflows of foreign funds into Hungary or through state subsidies. If shortcomings of the Hungarian electoral system affecting the rule of law were to be approached from this point of view, rather than through the consequences of the preferential naturalisation of Hungarians beyond the borders, then EU law in the areas of free movement of capital and state aid would be of greater help in dismantling Fidesz's power. This also goes beyond the classic institutional approach to the rule of law crisis, not proving effective anyway apart from, perhaps, the money-related conditionality mechanism. Following on from that thought, instead of focusing on constitutional aspects of the rule of law crisis, another, maybe even more viable solution would be to identify its economic aspects covered by areas of EU law that have proven their efficiency since the beginning of the EU project. Then, perhaps, as matters affecting the internal market remain a shared competence (Art. 4(2)(a) TFEU), Member States would have a harder time stretching discretion that far.

Article 10(3) TEU: Unlocking untapped potential to safeguard muted citizens'democratic rights

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Abstract: This paper examines the role that Article 10(3) of the TEU could play as a judicial catalyser for EU citizens to combat democratic backsliding in their Member States. Amid rising populism and illiberalism, the paper proposes that citizens leverage Article 10(3) TEU through strategic legal mobilization and transformative constitutionalism to safeguard their democratic rights and reinforce the EU's foundational values. It argues that empowering citizens in this way not only counters undemocratic national actions but also strengthens participatory democracy at EU level. The analysis concludes that a coordinated grassroots approach, with strong national court support, could amplify the impact of Article 10(3) TEU as a democratic safeguard, thus fostering a resilient democratic structure within the EU.

> […] *the political process is liable to become overly responsive to immediate popular concerns, leading the authorities to allay the anxieties of the many at the expense of the rights of a few. This is precisely when courts ought to get involved, in order to ensure that the political necessities of today do not become the legal realities of tomorrow. Their responsibility is to guarantee that what may be politically expedient at a particular moment also complies with the rule of law without which, in the long run, no democratic society can truly prosper*[1].

[1] AG Poiares Maduro in Case C-402/05 P, *Kadi v. Council of the European Union,* EU:C:2008:11, para 45.

Introduction

Democracy in the European Union (hereafter the "EU") and its Member States is under increasing pressure. The rise of populism and illiberalism has placed the EU's foundational principles – democracy, the rule of law, and fundamental rights – at risk. As democratic backsliding intensifies, national institutions which should be protecting citizens' rights are often the very ones suppressing dissent. In this climate, many voices remain unheard: citizens struggling against democratic erosion, marginalized groups excluded from political decision-making, and individuals seeking to challenge undemocratic national actions.

The unmuting framework questions the extent to which the EU provides an alternative political arena for those who are traditionally silenced, outnumbered, outpowered, or marginalized in decision-making processes[2]. It further interrogates whether the EU's self-proclaimed role in amplifying the voices of the voiceless contributes to its own legitimacy. Against this backdrop, this article argues that Article 10(3) of the Treaty on European Union (hereafter the "TEU"), which provides that "every citizen shall have the right to participate in the democratic life of the Union", holds transformative potential as a tool for legal and political mobilization. By strategically invoking Article 10(3) TEU, citizens can assert their democratic rights, challenge national actions restricting their participation, and reinforce the Union's core values of democracy and the rule of law.

The concept of legal mobilization, which anchors this paper's argument, offers a pathway for citizens to unmute themselves through the law, to transform political claims in legal ones and thereby provide them with alternative avenues of political participation. In light of this, legal mobilization refers to the process by which individuals and groups use legal avenues to assert rights and drive political or social change. In situations where traditional political mechanisms fail – whether due to government suppression, institutional inaction, or structural exclusion – the law becomes a critical tool for amplifying citizen voices.

This paper situates Article 10(3) TEU as a legal loudspeaker, an instrument that citizens can use to reclaim their voice and participation

[2] See in this sense G. Itzcovich, "On the Legal Enforcement of Values. The Importance of the Institutional Context", in Jakab and Kochenov, *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press, 2017), p. 37.

in democratic processes. Through the operationalization of this provision, individuals and civil society actors may challenge national laws, policies, or practices that inhibit democratic engagement, thereby creating avenues of remedial participatory democracy. In doing so, Article 10(3) TEU has the potential to operate as a counterweight to democratic backsliding, enabling EU citizens to hold both national and EU institutions accountable to their democratic obligations.

The first part of the article focuses on the operationalization of Article 10(3) TEU and its potential direct effect[3]. It argues that for this provision to serve as an effective unmuting mechanism, two conditions must be met. Firstly, the explicit recognition of democracy as a legally enforceable value, ensuring that EU citizens can directly invoke Article 10(3) TEU before national courts and, secondly, the acknowledgment of Article 10(3)'s direct effect.

The second part of this paper examines the preliminary reference mechanism as a loudhailer for unmuting citizen voices within the EU. When national courts refer questions to the the Court of Justice of the EU (hereafter the "Court") regarding the interpretation of Article 10(3) TEU, the mechanism not only ensures uniform application of EU law but also amplifies citizen agency, reinforcing their role in democratic governance. Depending on the circumstances of each case, unmuted citizens could include opposition politicians, media outlets, citizens, minority groups (e.g. LGBTQIA+, refugees, religious groups etc), non-governmental organizations, trade unions or a combination of the aforementioned.

The proposal to operationalize the value of democracy is not devoid of challenges and socio-legal hurdles. The third part of this article examines how legal mobilization operates in the EU, focusing on the role and the limits of Article 10(3) TEU in enhancing citizen agency. Firstly, it explores the broader phenomenon of legal mobilization in the EU, assessing its effectiveness in enabling citizen participation and countering undemocratic national actions. Secondly, the role of transformative constitutionalism is addressed, analyzing how the Court has interpreted democratic participation rights and the extent to which

[3] Regarding the developments of this second part, the authors rely on the arguments they have made in their paper; T. Ceurremans, E. David, "Countering democratic backsliding in (future) EU Member States: Article 10(3) TEU unlocked", *European Law Journal*, vol. 30, n°4 (2024), p. 515-533.

Article 10(3) TEU can be leveraged to protect fundamental democratic values. Thirdly, this paper discusses the socio-legal challenges of citizen litigation, applying Marc Galanter's framework of "One-Shotters" and "Repeat Players" to evaluate the barriers faced by individuals seeking to invoke Article 10(3) TEU in court. The purpose of using this latter theoretical framework, originating in US legal scholarship, is to complement EU legal scholarship on values with cross-fertilising theoretical frameworks. In turn, this yields interesting insights expanding the informational basis of the EU's legal tradition, thus opposing "essentialist"[4] conceptions thereof.

This article ultimately situates Article 10(3) TEU within the broader unmuting narrative that has emerged in EU discourse, the EU having increasingly framed itself as a platform for amplifying the voices of those traditionally excluded from political processes. By critically examining Article 10(3) TEU as a legal tool for unmuting, this paper underscores the role of citizen-driven legal mobilization as a means of countering democratic erosion. As such, unmuting in the EU context goes beyond mere rhetorical commitments. It requires legal, institutional, and participatory mechanisms that empower citizens to reclaim their voice in democratic governance. By leveraging Article 10(3) TEU, EU citizens have the potential to shift from being passive subjects of democracy to active architects of its future.

1. Article 10(3) TEU: A remedy against illiberalism?

1.1. Operationalizing the value of democracy

The main argument in favour of operationalizing the value of democracy contained in Article 2 TEU through Article 10(3) TEU[5], in the same way as the Court proceeded with regards to the rule of law, can be found in the methodology of the Court's *Associacao Sindical dos*

4 H. Patrick Glenn, *Legal Traditions of the World* (Oxford, 2014), p. 34.

5 Regarding the operationalization of the value of the rule of law through Article 19(1)(2) TEU, see L.D. Spieker, "Beyond the Rule of Law: How the Court of Justice can Protect Conditions for Democratic Change in the Member States", in Södersten and Hercock (eds.), *The Rule of Law in the EU: Crisis and Solutions*, (SIEPS, 2023), p. 72-94, at p. 74; referring to Opinion of AG Pikamäe, Case C-457/18 *Slovenia v. Croatia* EU:C:2019:1067, paras 132 *et seq.* and Opinion of AG Tanchev, Case-C-824/18 *A.B. and others* EU:C:2020:1053, para 35.

Juizes Portugueses judgment[6]. In the latter case, Article 19(1)(2) TEU was used as an operationalizing provision giving concrete expression to the rule of law[7]. It has been argued by the authors[8] that the same approach could be developed in relation to the value of democracy and what could be the operationalizing provision giving it concrete expression, namely Article 10(3) TEU. As was argued by Schuler on the basis of recent case-law of the Court on Article 22 TFEU[9], the Court has been paving the way for the enforcement of democracy through Article 10 TEU.

This operationalization of the value of democracy, combined with the recognition of the direct effect of the latter provision, would enable citizens to challenge national measures impeding their participation in democratic processes and ensure that national courts take into account the EU's democratic standards when adjudicating such cases[10].

1.2. Why Article 10(3), first sentence, TEU?

Firstly, the authors argue that Articles 10(1) TEU and Article 10(2) TEU are too narrow in scope, as they relate almost exclusively to EU institutions and the mechanisms of (in)direct representation enshrined therein. Secondly, anchoring the EU's action against illiberalism on those paragraphs would contravene important constitutional principles such as respect for the fundamental political and constitutional structures of Member States, as provided for in Article 4(2) TEU. Imposing representative democracy on Member States with a more hybrid

[6] Case C-64/16 *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, EU:C:2018:117.

[7] See namely Case C-430/21, *RS*, EU:C:2022:99, para 58; Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociaţia 'Forumul Judecătorilor din România' and Others*, EU:C:2021:393, paras 249 and 250; Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro Box Promotion and Others*, EU:C:2021:1034, para 253.

[8] See T. Ceurremans, E. David, *op. cit.*

[9] C-808/21, *Commission v. Czechia*, ; C-814/21, *Commission v. Poland*; M. Schuler, "Paving the way for an enforcement of democracy under Article 10 TEU? The Court's judgments in Cases C-808/21 Commission v. Czechia and C-814/21 Commission v. Poland", *European Law Blog* (20 November 2024), https://www.europeanlawblog.eu/pub/fsca541k/release/2.

[10] L.D. Spieker, "Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis", *German Law Journal*, vol. 20, n°8 (2019), p. 1182-1213, at p. 1187.

system of representation, by including for instance elements of direct democracy, such as referenda, would run afoul well-established case-law[11]. According to this case-law, neither the Union, nor its Treaties, impose a constitutional or political model which the Member States are required to follow.

In addition, the authors argue that, Article 10(3) TEU represents the link between national and EU-level democracy. Through the provision's subject – the EU citizen, who is also a national of a Member State – Article 10(3) TEU relies on the premise that national democracy must properly function in certain aspects for citizen participation at EU-level democracy to be possible. As Schuler puts it, "European democracy requires Member State democracy"[12]. Given the inextricable relationship between national and EU democracy – which Article 10(2) TEU exemplifies well – EU citizens, being also nationals of the Member States, play a crucial role in safeguarding the latter. Without respect for their fundamental rights associated to democracy at national level, it is inconceivable that EU citizens can effectively indulge in the EU's democratic life. On this basis, it can be inferred that respect for democratic principles and fundamental rights relating to democracy at national level constitutes a pre-requisite for the ability of citizens to avail themselves of the right contained in Article 10(3) TEU. How could EU citizens effectively participate in the Union's democratic life if the elections at national level are not free and fair? How can they hold their governments or MEPs accountable if their electoral playing field is already uneven? How can they make informed choices in EU elections when media freedom isn't guaranteed at national level[13]?

[11] Case C-430/21 *RS*, EU:C:2022:99, para 43; C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro box promotion*, EU:C:2021:1034, para 229.

[12] M. Schuler, "Taking democracy seriously: The Commission's Infringement Action against Poland for violating EU law with the new law in Poland on the State Committee for the Examination of Russian influence", *European Law Blog* (16 June 2023), https://www.europeanlawblog.eu/pub/taking-democracy-seriously-the-commissions-infringement-action-against-poland-for-violating-eu-law-with-the-new-law-in-poland-on-the-state-committee-for-the-examination-of-russian-influence/release/1; See also A. von Bogdandy, "The Emergence and Democratization of European Society" (Oxford University Press, 2023); L.D. Spieker, "Beyond the Rule of Law: How the Court of Justice can Protect Conditions for Democratic Change in the Member States", in Södersten and E. Hercock (eds.), *The Rule of Law in the EU: Crisis and Solutions* (Stockholm, 2023), p. 87.

[13] For signs of a similar reflection in the Commission's Legal Service, see F. Erlbacher, K. Herrmann, "Fundamental values of the European Union: From principles to legal

1.3. Type and nature of obligations

By drawing a parallel with well-established case-law and applying it to Article 10(3) TEU, "observance of the principles of democracy constitutes an obligation as to the result to be achieved on the part of the Member States"[14]. The result that should be attained is that Member States are required to enable participation in the Union's democratic life and avoid taking measures effectively impeding such participation, be it through targeted measures or measures having an equivalent effect. As such, the authors argued that this Article encapsulates both a positive and negative obligation[15].

1.4. Direct effect of Article 10(3) TEU

Regarding the direct effect of Article 10(3) TEU, it would result in the possibility for EU citizens to rely on it directly before national courts without the need for further implementing measures[16]. As demonstrated by the authors[17], the provision is arguably clear, precise, and unconditional, thus meeting the criteria established by the Court for direct effect[18]. It is at the occasion of a preliminary reference that the Court could establish that Article 10(3) TEU has direct effect, the obligations stemming from that provision and how it should be interpreted in national legal orders.

By recognizing Article 10(3) TEU's direct effect, the Court would empower EU citizens by enabling them to enforce their democratic rights and hold Member States accountable when these rights are infringed[19]. This shifts the enforcement of democratic participation from a top-down process driven by EU institutions to a more citizen-driven, bottom-up

obligations", in European Commission Legal Service, *70 years of EU law: A Union for its citizens*, (Publications Office of the European Union, 2022), p. 38.

14 Case 156/21 *Hungary v. European Parliament and Council of the European Union*, ECLI:EU:C:2022:97, paras 231-233.

15 T. Ceurremans, E. David, *op. cit*.

16 S. Robin-Olivier, "The evolution of direct effect in the EU: Stocktaking, problems, projections", *International Journal of Constitutional Law*, vol. 12, n°1 (2014), p. 165-188, at p. 173.

17 See T. Ceurremans, E. David, *op. cit.*

18 Case C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, EU:C:1963:1.

19 S. Robin-Olivier, *op. cit.*, p. 173.

approach, giving citizens the tools to protect their right to participate in the EU's democratic life. It further strengthens the role of the citizen in monitoring the implementation of EU law, contributing as will be argued below to the overall democratic legitimacy of the EU[20]. With the recognition of direct effect, commentators have argued that the Court has endowed the EU citizen (as well as economic operators) with the role of a "legal vigilante" which empowers civil society to monitor the due implementation of EU law[21]. Consequently, "a collateral benefit […] is the shift of enforcement of the rule of law to a mixed market model of private and public resources"[22]. Similarly, endowing Article 10(3) TEU with direct effect would allow citizens, but also legal persons, to take upon themselves the task to judicially contest democratic backsliding through mobilization of Article 10(3), first sentence, TEU. In essence, Article 10(3) TEU could become a new tool for unmuting an abstract category of people, namely individuals or groups whose rights associated to democratic participation in the EU have been undermined. Depending on the circumstances of each case, this category could include opposition politicians, media outlets, citizens, minority groups (e.g. LGBTQIA+, refugees, religious groups etc), non-governmental organizations, trade unions or a combination of the aforementioned. Through legal mobilization and transformative constitutionalism, elaborated upon below, it is posited that the value of democracy should become the next candidate in the development of value-enforcement by the EU and its institutions.

1.5. Limits: Systemic deficiencies, national identity and the principle of conferral

The use of this provision must be limited to situations of systemic deficiencies which present a direct causal relationship with adverse effects on citizens' ability to indulge in the EU's democratic life. Indeed, such a threshold appears necessary due to the very wording of the provision which limits its scope to situations effectively preventing civic participation in Union-level democracy, and which are sufficiently

[20] *Ibid.*

[21] T.C. Hartley, "Direct Effect and National Remedies", in T.C. Hartley (ed.), *The Foundations of European Union Law* (Oxford University Press, 2010), p. 209–257, at p. 223.

[22] J.H.H. Weiler, *op. cit.*, p. 96.

serious, persistent and widespread to constitute a systemic threat to democratic governance.

Finally, the authors argued before that their proposal should not affect national identity and Member States' fundamental structures, be they political or constitutional, insofar the obligations read into Article 10(3) TEU do not prescribe a particular way of organizing their democratic structures. They solely prescribe a result, which can be attained through various ways. But, as the Court underlined in its conditionality judgments in relation to the rule of law, "it in no way follows that that obligation as to the result to be achieved may vary from one Member State to another"[23]. Similarly, the obligation enshrined in Article 10(3) TEU only seeks to preserve the very essence of democratic rights so as to ensure that there is a 'hard core',[24] based on the EU's common values, which no governing majority whatsoever can question, but for which it has the choice of implementing means.

With regards to the principle of conferral, it is longstanding case-law that "although the organisation of justice in the Member States falls within the competence of those Member States, they are nonetheless required, when exercising that competence, to comply with their obligations deriving from EU law"[25]. This holding can *a fortiori* be transposed to the organisation of democracy in a Member State, for which the Union is not competent.

2. The preliminary reference mechanism: Opportunities and challenges for strategic litigation on the basis of Article 10(3) TEU

2.1. Opportunities

The more concrete consequences flowing from the operationalization of the value of democracy and the recognition of Article 10(3) TEU's direct effect would ultimately materialize through preliminary references referred to the Court. Using Article 10(3) TEU would involve leveraging the opportunities provided by indirect access to the Court to equip it

[23] Case C-156/21 *Hungary v. European Parliament and Council of the European Union*, EU:C:2022:97, para 233.

[24] A. von Bogdandy, L.D. Spieker, *op. cit.*, p. 12 referring to Praesidium, Draft of Articles 1 to 16 of the Constitutional Treaty, CONV 528/03, 11.

[25] C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociaţia 'Forumul Judecătorilor din România' and Other*, EU:C:2021:292, para 111.

with “the means to clarify and construct new EU law rules that will […] grant access to new areas of litigation, ultimately broadening the scope of EU law”[26]. The object of such litigation would not be winning the case *per se* but rather to push for policy changes at national level or to open a new venue for future litigation with comparable legal claims[27]. In this vein, this litigation is “polycentric in character, meaning that third-party interests and wider societal interests are at stake”[28].

If endowed with direct effect, Article 10(3) TEU could be relied upon in front of national courts by natural or legal persons[29]. In particular, the provision could be invoked to measure the compatibility of any national measure adopted in violation of the rights it enshrines[30]. This latter function of the preliminary ruling mechanism – i.e. measuring the (in)compatibility of national measures with EU law – has been referred to an as “alternative use” of the procedure[31]. In other words, this use has been equated to judicial review, by the Court, of national laws and policies[32]. Today, this is one of the most frequent uses of the procedure[33].

In such cases, national courts will have to assess the compatibility of said measures with EU law, in particular with Article 2 TEU and its value of democracy taken in conjunction with Article 10(3) TEU and could, where necessary, rely on Article 267 TFEU and its preliminary reference mechanism in order to clarify, stone-by-stone[34], the requirements

26 M. Glavina, *op. cit.*, p. 91.

27 *Ibid.*

28 *Ibid.*

29 D. Chalmers, G. Davies, G. Monti, *European Union Law: Text and Materials*, 4th edition (Cambridge University Press, 2019), p. 309.

30 *Ibid.*

31 A. Tizzano, “La tutela dei privati nei confronti degli Stati membri dell’Unione europea”, *Il Foro italiano*, vol. 118, n°1 (1995), p. 13-32, at p. 17.

32 T. Tridimas, “Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction”, *International Journal of Constitutional Law*, vol. 9, n°3-4 (2011), p. 737-756, at p. 743.

33 M. Broberg, “Preliminary References as a Mean for Enforcing EU Law”, in Jakab and Kochenov (eds.), *The Enforcement of EU Law: Ensuring Member State’s Compliance* (Oxford University Press, 2017), p. 99-111, at p. 103.

34 K. Lenaerts, “EU citizenship and the European Court of Justice’s ‘stone-by-stone’ approach”, *International Comparative Jurisprudence*, vol. 1, n°1 (2015), p. 1-10, at p. 4.

stemming from these two provisions read in combination[35]. In light of these precisions, national courts would have to ultimately decide on the (in)compatibility of measures impeding the right to participate in the EU's democratic life[36].

2.2. Challenges

Despite its potential, several obstacles inherent to the preliminary reference mechanism can limit its accessibility and effectiveness for citizens. One of the main drawbacks is that EU citizens do not have direct access to the Court under Article 267 TFEU[37]. Instead, they must rely on a national court to make the referral[38]. The discretion of lower courts, which are not obliged to refer a question to the Court unless they are a court of last instance, further limits the accessibility of this mechanism[39]. In other words, the decision to ask for a preliminary reference rests with the national court. As highlighted by the Court, "it is solely for the national court […] to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of [EU] law, the Court is, in principle, bound to give a ruling […]"[40]. While in theory, the need for a preliminary ruling is indeed solely for the national court to determine, in practice, Tridimas and Tridimas have demonstrated that litigants, and not national courts, are the foremost source of demand for

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35 T. Tridimas, *The Foundations of European Union Law*, 9th edition (Oxford University Press, 2021), p. 283.

36 *Ibid.*

37 C. Lacchi, "Chapter 4 - The national courts' mandate as referring courts in light of the right to effective judicial protection", in Lacchi, *Preliminary References to the Court of Justice of the European Union and Effective Judicial Protection*, 1st edition (Larcier, 2020), p. 147-191, at p. 176.

38 M. Broberg, N. Fenger, "When Are National Courts Obliged to Refer Questions?", in Broberg and Fenger (eds.), *Broberg and Fenger on Preliminary References to the European Court of Justice*, 3rd edition (Oxford University Press, 2021), p. 201-248, at p. 212.

39 *Ibid.*

40 Case C-318/00 *Bacardi-Martini SAS and Cellier des Dauphins v. Newcastle United Football Company Ltd.*, EU:C:2003:41, para 41.

preliminary rulings by the Court[41]. In fact, Muir, Chalmers and Chaves even found that while it is the referring court which formally refers a question to the Court, references are often drafted by litigants themselves[42].

The margin of discretion incumbent upon national courts can additionally be perceived as inhibiting when it comes to enforcing rights such as those derived from Article 10(3) TEU. It can become problematic in politically sensitive cases where national courts might be the object of attacks resulting from democratic backsliding, under pressure to avoid engaging with EU law. One could think of national procedures involving Article 10(3) TEU as a means to contest national measures taken in violation of citizens' right to participate in the EU's democratic life.

The preliminary ruling mechanism is "becoming instrumental to flagging systemic deficiencies of the rule of law at Member State level"[43]. However, national reforms deterring courts from referring cases, such as the introduction of disciplinary measures against judges, highlight its limitations. Additionally, courts lacking independence may not qualify as "courts or tribunals" under Article 267 TFEU, creating admissibility barriers for citizens pursuing strategic litigation. This is evident in *Commission v. Poland* (C-791/19)[44], where the Court ruled that disciplinary regimes deter judges from referring cases, undermining judicial independence. *Miasto Łowicz*[45] further restricts referrals by reaffirming that only real disputes - not hypothetical or strategically constructed cases - are admissible in front of the Court. Since legal mobilization in those cases would often be seeking judicial recognition of

[41] G. Tridimas, T. Tridimas, "National courts and the European Court of Justice: a public choice analysis of the preliminary reference procedure", *International review of Law and Economics*, vol. 24, n°2 (2004), p. 125-145.

[42] D. Chalmers, M. Chaves, "The Reference Points of EU Judicial Politics", *Journal of European Public Policy*, vol. 19, n°1 (2012), p. 25-42, at p. 33; Similarly, see E. Muir, "Anti-Discrimination Law as a Laboratory for EU Governance of Fundamental Rights at the Domestic Level: Collective Actors as Bridging Devises", in Muir *et al.* (eds.), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (2017), p. 113-128, at p. 125.

[43] C. Saenz Perez, "Judicialising the Rule of Law Through the Preliminary Ruling", J.M. Castella Andreu and M. Simonelli (eds.), *Populism and Contemporary Democracy in Europe*: *Old Problems and New Challenges* (Palgrave Macmillan, 2022), p. 233-249, at p. 233.

[44] C-791/19, *Commission v. Poland (Régime disciplinaire des juges)*, EU:C:2021:596.

[45] Joined cases C-558/18 and C-563/18, *Miasto Lowicz*, EU:C:2020:234.

democratic backsliding rather than dispute resolution *per se*, admissibility of Article 10(3) TEU cases could represent a key challenge. Thus, preliminary references based on Article 10(3) TEU must arise from genuine litigation, not procedural devices designed only to bring to the fore abstract national constraints on democratic participation.

Notwithstanding these hurdles, the preliminary reference mechanism remains a crucial tool for voicing EU citizens' right to participate in the EU's democratic life[46]. By allowing national courts to seek guidance from the Court on the interpretation of Article 10(3) TEU, this mechanism ensures that citizens have access to judicial remedies when their democratic participation is undermined[47]. To maximize its potential, there must be efforts to raise awareness among national courts and citizens about the significance of Article 10(3) TEU and the preliminary reference process.

In conclusion, the operationalization of the value of democracy through Article 10(3) TEU combined with the preliminary reference mechanism provides a robust framework for protecting EU citizens' right to participate in the EU's democratic life. By encouraging national courts to make use of the preliminary reference mechanism and by empowering citizens to invoke Article 10(3) TEU in legal proceedings, the EU can ensure that democratic participation remains a tangible and enforceable right for all its citizens, thereby reinforcing its commitment to upholding its core democratic values. In this respect, commentators have argued that through the doctrines of primacy and direct effect, the preliminary reference mechanism has turned into a "citizens' infringement procedure"[48]. Now, it is time for citizens to use it as infringement procedure against democratically backsliding Member States undermining democratic rights.

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[46] C. Lacchi, "Chapter 1 - Effective judicial protection through preliminary references in the case law of the Court of Justice of the EU", in Lacchi, *op. cit.*, p. 33-77, at p. 51.

[47] *Ibid.*

[48] B. De Witte, "The Impact of Van Gend en Loos on Judicial Protection at European and National Level: Three Types of Preliminary Questions", Tizzano and Prechal (eds.) *50th Anniversary of the Judgment in Van Gend en Loos 1963-2013: Conference Proceedings* (Office des Publications de l'Union européenne, 2013), p. 93-101, at p. 95; P. Pescatore, "Van Gend en Loos, 3 February 1963 – A View from Within", in Poiares Maduro and Azoulai (eds.), *The Past and Future of EU law: The Classics of EU law Revisited on the 50th Anniversary of the Rome Treaty*, (Hart Publishing, 2010), p. 2-24, at p. 7.

3. Unmuting in the context of the EU: Legal mobilization, transformative constitutionalism and value-enforcement through the EU citizen

3.1. Legal mobilization by individuals or groups

Unmuting in the legal context can be seen as a type of legal mobilization which aims at vindicating rights of certain categories of people to bring about social, political, or legal change, thereby allowing underrepresented or otherwise discriminated groups to obtain a (legal) voice. Frances Kahn Zemans defined it as follows: "The law is mobilized when a desire or want is translated into a demand as an assertion of rights"[49]. In other words, the law is mobilized by individuals or a group as a strategic means for the advancement of their interests and causes[50]. This approach is generally perceived as being bottom-up rather than top-down insofar the legal claimants are central in the endeavor of turning law into a vector of social or political change[51]. Such an approach is often observed in particular institutional settings where courts are inclined to wield more purposive interpretational techniques[52]. In legal mobilization studies, the law is simultaneously a structuring factor for legal claimants, acting as a constraining instrument, and a malleable concept which can be shaped through legal mobilization[53]. In this latter sense, the law is assigned new meanings through the legal claimants' agency in the institutional system and their framing of rights claims[54].

Legal mobilization takes many forms and shapes but tends to start from individual and concrete situations which subsequently enable the judiciary to rule, in a general and abstract way, on the content of certain

[49] F.K. Zemans, "Legal mobilization: The neglected role of law in political systems", *American Political Science Review*, vol. 77, n°3 (1983), p. 690-703, at p. 700.

[50] L.A. Nader, "A User Theory of Law: Fourth Annual Alfred P. Murrah Lecture", *Southwestern Law Journal*, vol. 38 (1985), p. 951-963.

[51] M. McCann, "Law, Litigation and the Politics of Social Movements", *e-legal Revue de droit et de criminology de l'ULB* (2021), § 32.

[52] M. Bobek, "What Role for Courts in Transforming a Society? A Central European Cautionary Tale", in Bobek, Bodnar, von Bogdandy and Sonnevend (eds.), *Transition 2.0: Re-establishing Constitutional Democracy in EU Member States* (Nomos, 2023), p. 365.

[53] M. McCann, "Law, Litigation and the Politics of Social Movements", *e-legal Revue de droit et de criminology de l'ULB* (2021), § 34.

[54] A. Sarat, S.A. Scheingold, *The World Cause Lawyer Make: Structure and Agency in Legal Practice* (Stanford University Press, 2005).

rights or the legality of certain situations, and in doing so operates a mutation of positive law for the future[55].

Yet, to take Bobek's words on backsliding Member States, "'re-transition' back to constitutional, rule of law governed democracy […] can again be aided by courts, but hardly led by them, or even primarily carried out by them"[56]. Legal mobilization on the basis of Article 10(3) TEU is therefore a necessary tool, a show of resistance, that will contribute to offering redress to those who have already been affected by democratic backsliding. That said, mobilization can only be successful where the institutional setting is receptive.

3.2. The institutional condition for successful legal mobilization: Transformative constitutionalism in Kirchberg

In line with what has already been argued by Spieker and Von Bogdandy[57], transformative constitutionalism is the institutional condition for successful social, political, and legal change in backsliding EU Member States. As argued by these authors, transformative constitutionalism encompasses a thin and a broad notion[58]. The thin version, advanced by said authors, "denotes the judicial practice of interpreting and applying constitutional provisions with the goal of overcoming [systemic] deficiencies"[59]. The broader version encapsulates any progressive constitutional jurisprudence[60].

A transformative Court can be compared to H. de Bracton's *gubernaculum-jurisdictio* dialogical rule of law distinction[61]. *Gubernaculum* represents the free exercise of political functions resulting in the creation of law

55 O. De Schutter, "La cause significative et la Convention européenne des droits de l'homme", *Annales de Droit de Louvain : Revue trimestrielle,* n°4 (1994), p. 445-475, at p. 446.

56 M. Bobek, *op. cit.*, p. 365.

57 A. Von Bogdandy, L.D. Spieker, "Transformative constitutionalism in Luxembourg: How the Court can support democratic transitions", *Columbia Journal of European Law* (2023); see also A. von Bogdandy and L.D. Spieker, "EU Values as Constraints and Facilitators in Democratic Transitions", in Bobek *et al., op. cit.*, p. 133.

58 A. Von Bogdandy, L.D. Spieker, *op. cit.*

59 A. Von Bogdandy, L.D. Spieker, *op. cit.*, p. 67.

60 *Ibid.*

61 G. Palombella, "The Rule of Law at Home and Abroad", *Hague Journal on the Rule of Law* (2016), p. 11.

and *jurisdictio* represents the constitutional constraints on that law, which limit the power of the sovereign in its law-making functions[62]. In this sense, the law is more than a "mere directive force"[63] because "[…] there is a side of law upon which [the sovereign] cannot extend its will, and whose juridical force is not for the sovereign and his law to challenge"[64]. In the EU, the Court plays the role of the enforcer of the EU's *jurisdictio*, namely Article 2 TEU, against overly zealous illiberal governments wanting to use law as a tool for power. In this role, the Court's mandate can be instrumental for marginalized groups and institutions using legal mobilization to bring social, political and legal change in the dismantled democratic structures of some Member States.

This seems necessary insofar the rise of populism and illiberalism in several EU Member States threatens democracy, the rule of law, and fundamental rights, as governments in countries like Italy, Slovakia, Hungary, and the Netherlands increasingly undermine legal and democratic institutions in favor of a populist narrative that rejects liberal institutions.

Complementarily to the aforementioned authors, this paper argues that transformative constitutionalism is conditional upon well-strategized legal mobilization by concerned individuals and groups. It is the interaction of these actors with the Court which will enable the Court and the EU Commission to help reverse democratic backsliding in EU Member States. As Von Bogdandy and Spieker have put it, "Court decisions are only the tip of an iceberg of social practice"[65]. The Court, being a passive institution, is constrained by the submissions of the claimants and cannot *ex nihilo* decide on the interpretation of specific Treaty provisions without being seized[66]. As such, the EU citizen, whether individually or collectively, should be encouraged to mobilize the legal means at its disposal to bring about long-lasting and effective change.

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62 *Ibid.*

63 Ch. McIlwain, *Constitutionalism: ancient and modern* (Cornell University Press, 1940), p. 85.

64 G. Palombella, *op. cit.*, p. 12.

65 A. Von Bogdandy, L.D. Spieker, *op. cit.*, p. 141.

66 E. Muir, M. Dawson, B. De Witte, *Judicial Activism at the European Court of Justice* (Edward Elgar Publishing, 2013), p. 1.

Now, it remains to be seen if the Court is actually willing to go this far. Literature is quite divided on whether the Court is an appropriate and welcoming forum for collective and meta-individual causes. Commentators, on the one hand, observe a "general lack of openness"[67] towards collective interests and even labelled it "hostile to collective action"[68]. On the other hand, public interest litigation or legal mobilization has often been associated to "some of the most iconic rulings of the Court"[69]. In this regard, the Court has been branded an "ally" of civil society[70]. In the same vein, it has been argued that "litigants, whether in the form of individuals […] or pressure groups, have played a significant part in the development of substantive EU law"[71].

3.3. The EU citizen as central actor in the EU's composite democracy: Remedial participatory democracy

Since the Lisbon Treaty, the EU has developed a new pole of democratic legitimation by allowing direct participation of citizens in EU democracy[72]. As a result, a "participatory turn" has been recognized at EU level[73]. Through the advent of "a wide array of opportunities for its citizens to participate and engage with – and potentially influence – EU

[67] E. Fokas, "Comparative Susceptibility and Differential Effects on the Two European Courts: A Study of Grasstops Mobilizations around Religion", *Oxford Journal of Law and Religion*, vol. 5, n°3 (2016), p. 541-574, at p. 553.

[68] C. Harlow, R. Rawlings, *Pressure Through Law* (Taylor and Francis, 1992), p. 525.

[69] M. Glavina, "Private-Interests Actors as Catalysts for Actions under Public Law", *Erasmus Law Review*, vol. 2 (2023), p. 86-101, at p. 87 referring to cases like *Van Gend en Loos, Defrenne, Hofmann, Centrum voor gelijkheid van kansen en voor racismebestrijding.*

[70] M. Glavina, *op. cit.*, p. 87; W. Mattli, A.-M. Slaughter, "Law and Politics in the European Union: A Reply to Garrett", *International Organization*, vol. 49, n°1 (1995), p. 183-190, at p. 185.

[71] A.-M. Slaughter, A.S. Sweet and J.H.H. Weiler (eds.), *The European Court and National Courts: Doctrine and Jurisprudence: Legal Change in Its Social Context* (1998), p. 222.

[72] S. Saurugger, "The social construction of the participatory turn: The emergence of a norm in the European Union", *European Journal of Political Research*, vol. 49, n°4 (2010); S. Besson and A. Utzinger, "Introduction: Future challenges of European Citizenship", *European Law Journal*, vol. 13, n°5 (2007), p. 573; A. Schrauwen, "European Union Citizenship in the Treaty of Lisbon: Any Change at All?", *Maastricht Journal of European and Comparative Law*, vol. 15, n°1 (2008), p. 55-64, at p. 55.

[73] S. Saurugger, *op. cit.*

decision-making"[74], the EU citizen plays a legitimizing role in EU democracy beyond EU and national elections. Indeed, participatory democracy is about multiplying opportunities of citizens' participation beyond elections[75]. These opportunities translate today in the European Citizen Initiative (Article 11(4) TEU); petitions to the European Parliament; consultations on new legislative and policy initiatives; access to EU institutions' documents and complaints to the European Ombudsman[76]. As asserted by Lenaerts, "[…] EU citizens are seen as political actors. EU citizenship reflects the idea that the process of European integration must be not only in the hands of the Member States but also of the peoples of Europe. In that sense, it contributes to the democratization of the EU"[77]. However, all participatory instruments described in the literature tend to concentrate solely on the EU level. Similarly, most of these instruments (with the exception of the seizure of the Ombudsman) can be described as forming part of "functional participation". In other words, they provide for participation in the functioning of the EU. Nonetheless, to this day, it seems that no instruments of "remedial participation" in the EU's democratic fabric are available. As such, there are no tools available allowing citizens or categories of citizens to judicially contest their muting. As will be argued below, Article 10(3) TEU could provide for an instrument of remedial participative nature. Having such an instrument is paramount because "[l]iberal democracy cannot be externally imposed. Ultimately, it must emerge from within a society […]"[78].

On this basis, it is undisputable that the evolution of EU democracy has steadily strengthened EU citizens' involvement in its democratic fabric. Through an unmuting device like Article 10(3) TEU, EU democracy can further develop. In other words, the idea would be to use Article 10(3), first sentence, TEU as a tool of participatory democracy to safeguard the value of democracy, when citizen participation is being undermined. In

[74] A. Alemanno, "EU Citizen Participation 'in the Union's Democratic Life': A Policy and Legal Analysis", in Costa and Van Hecke (eds.), *The EU Political System After the 2019 European Elections* (Palgrave Macmillan, London, 2022), p. 28-29.

[75] D. Della Porta, *Can democracy be saved?* (Polity Press, 2012).

[76] Alemanno, *op. cit.*, p. 29.

[77] K. Lenaerts, "Linking EU citizenship and democracy", *Croatian Yearbook of European Law & Policy*, vol. 11, n°1 (2015), p. 7-18; at p. 15.

[78] A. Von Bogdandy and L.D. Spieker, *op. cit.*, p. 66.

this regard, national and EU democracy are two sides of the same coin[79]. If democracy at national level is eroding, so is EU-level democracy. For instance, in the absence of a well-functioning national democracy, where governments are elected through unfree and unfair electoral processes, the Council would fail to represent the indirect legitimizing pillar of EU democracy[80]. In turn, the Council slowly becomes itself prey to democratic erosion through negative spillover[81] especially in fields where unanimity is required. It is therefore essential that when such situations materialize, EU citizens whose democratic voice has been adversely affected at national level (e.g. by an uneven electoral playing field) can seek redress through a process of remedial participation. EU citizens, being also nationals of the Member States, represent the link between national and EU democracy. Therefore, they should be enabled to restore democracy from within, using as will be argued below, a combination of national and supranational legal remedies.

There is little doubt that such an expansive interpretation of Article 10(3) TEU would be challenged. The Court has often been criticized for judicial overreach or activism and a lot of ink has already been dedicated to this matter[82]. In this sense, the operationalization of the value of democracy through Article 10(3) TEU could be seen as yet another attempted power-grab by the Court. However, the present paper argues that judicialization of value-enforcement through a process of so-called

[79] A. Von Bogdandy, *The Emergence and Democratization of European Society* (Oxford University Press, 2023); L.D. Spieker, "Beyond the Rule of Law: How the Court of Justice can Protect Conditions for Democratic Change in the Member States", in Södersten and Hercock (eds.), *The Rule of Law in the EU: Crisis and Solutions* (Sieps, 2023), p. 87.

[80] For arguments in favour of using Article 10(1) and (2) TEU in cases of national breaches of democracy resulting in undemocratic representation at the Council see J. Cotter, "The Last Chance Saloon: Hungarian Representatives May be Excluded from the European Council and the Council", (*Verfassungsblog*, 2020), https://verfassungsblog.de/the-last-chance-saloon/ (last accessed on 20 May 2024); D. Krappitz, N. Kirst, "Chapter XII: An Infringement of Democracy in the EU Legal Order", in Utrilla, and Shabbir (eds.), *EU Law in Times of Pandemic: The EU's Legal Response to Covid-19* (EU Law Live Press, 2021).

[81] M. Blauberger, U. Sedelmeier, "Sanctioning democratic backsliding in the EU: Transnational salience, negative intergovernmental spillover, and policy change", *Journal of European Public Policy*, vol. 32, n°2 (2024), p. 365-391.

[82] E. Muir *et al.*, *op. cit.* ; S. Saurugger, F. Terpan, "Measuring Judicial Activism: Is the Court of Justice of the European Union an activist court?", *ECPR General Conference,* Montréal, 26-29 August 2015, https://ecpr.eu/Events/Event/PaperDetails/24440.

remedial participation can constitute a reinforcement of democracy by its citizens[83]. Borrowing Itzcovich's words, it would make public discourse more inclusive, insofar "social and political movements and civil society associations can make use of the language of rights not only as a means of political claims, but also as vehicle of legal claims: through public interest litigation, the legal process, and the system of courts can be channels of political participations"[84]. In this sense, it "opens policy-making to minority interests that otherwise would be excluded, corrects the legislative process when its outcomes are defective, and prevents the risk that liberticidal and tyrannical laws determine the self-destruction of democracy"[85].

In conclusion, remedial processes of participatory democracy such as the operationalization of Article 10(3) TEU would not only strengthen the EU's claim to democratic legitimacy but it would also constitute a new avenue for legal claims seeking to redress to EU citizens in particular national contexts.

3.4. The Haves and Have-nots: EU actors in a skewed system

In 1973, Marc Galanter wrote a well-known essay on the limits and opportunities in the American legal system for its use as a means for "redistributive" change[86]. His work forms part of socio-legal studies and is based on several premises, amongst which the fact that society is constituted by actors with different amounts of wealth and power, and with varying and sometimes opposed interests. These interests may clash in front of courts. He therefore proposes a typology of One-Shotters (OS) – who dispose of limited legal knowledge and resources – and Repeat Players (RP) – with considerably more legal knowledge and resources. This typology should be seen as a continuum rather than a dichotomy, meaning that any given unit can be situated anywhere in

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[83] A. Von Bogdandy, L.D. Spieker, *op. cit.*, p. 140; see also, G. Itzcovich, "On the Legal Enforcement of Values. The Importance of the Institutional Context", in Jakab and Kochenov (eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press, 2017), p. 37.

[84] *Ibid.*

[85] *Ibid.*

[86] M. Galanter, "Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change", *Law and Society Review*, vol. 9, n°1 (1974), p. 95-160.

between both ends of the spectrum[87]. Hence, given their status within the system, OSs have only occasional recourse to litigation, whereas RPs are regularly engaged in (similar) litigation over time.

Galanter derives a few consequences from belonging to one or the other group: RPs are generally larger units with considerably more power and wealth, which implies that the stakes of litigation are smaller compared to the unit's total worth. Conversely, OSs are relatively smaller units for which either the stakes of litigation are higher as a proportion of total worth or the claims are so comparatively small that the costs of litigation and the risks of loss outweigh any promise of gain. These parameters influence and determine the extent to which units can use and strategize litigation to secure long-run interests. Overall it shows that the nature of a unit (RP or OS) influences its agency in the legal system. In other words, Galanter's theory demonstrates that the legal system shows signs of being skewed towards Repeat Players, thereby disadvantaging One Shotters' agency in search for change.

Using the lens of Galanter's theoretical framework, this contribution proposes to analyse the potential use of Article 10(3) TEU as an operationalizing provision for the value of democracy and citizen's agency in the EU's system of legal remedies. This analysis allows us to shed light on the feasibility and the limits of such a proposal.

3.5. The EU citizen and the Member State on the OS-RP spectrum

EU citizens are natural persons who display the following characteristics in Galanter's theory:

- They have limited or no EU law-related expertise;
- Their resources are limited;
- They do not often have recourse to litigation to vindicate their rights;
- They do not have ready access to specialists of EU law;
- They face restrictive standing conditions in direct and indirect actions before the Court[88];
- They face high start-up costs for litigation;
- They often try to minimize losses and usually settle for single cases

[87] M. Galanter, *op. cit.*, p. 3.

[88] The Plaumann doctrine restricts their *locus standi* before the Court in actions for annulment and they play virtually no formal role in preliminary ruling procedures.

rather than engage in repeated litigation to achieve their goals;
- They have to bear the costs of the opponents in case of loss;
- They strive for individual vindication of rights and do not generally regard change as the desired outcome.

As a result, EU citizens can be assimilated to One-Shotters, on the low side of the spectrum, almost as an ideal type in Galanter's theory.

On the other hand, Member States are legal persons of public law which display the following characteristics:

- They have EU law-related knowledge through their administrations;
- Their resources, while limited, are significantly higher than that of citizens;
- They often engage in litigation, whether voluntarily or not, to secure judgments validating policy choices;
- They have ready access to EU law specialists, either in-house or counsel;
- They have relaxed standing conditions in direct or indirect actions before the Court;
- They face low start-up costs for litigation, benefitting from economies of scale;
- They do not necessarily try to minimize losses as repeat litigation and recourse to appeals can eventually secure gain;
- They use public money to bear the costs of the opponents in case of loss;
- They may regard change in "precedent" as desirable for their policy objectives and achievable through repeat litigation.

As a result, Member States can be regarded as Repeat Players, on the high side of the spectrum, roughly comparable to Galanter's ideal type.

Given that, on Galanter's spectrum, Member States can be assimilated to Repeat Players and EU citizens to One Shotters, the EU's system of legal remedies can be said to represent an uneven playing field for OSs. NGOs, public interest groups and organised civil society would be situated somewhere in between OSs and RPs depending on a number of characteristics such as their size, legal expertise, resources, willingness to engage in litigation for social and political change, etc. For instance, an organisation like the Belgian *Ligue des droits humains* could be considered closer to the RP ideal type inasmuch as it has regular recourse to litigation to promote social and political change and it has ready access to legal expertise and resources.

Conclusion

This paper has explored the potential of Article 10(3) TEU as a catalyst for fortifying democratic values within the EU's Member States, especially in contexts where these values are threatened by democratic backsliding. By operationalizing the value of democracy enshrined in Article 2 TEU, Article 10(3) TEU can provide EU citizens with a participatory tool for counteracting undemocratic actions taken at national level. This would empower citizens, including marginalized groups, to contest measures infringing on their right to participate in the EU's democratic life, not only to safeguard individual interests but to foster broader systemic change.

This paper has underscored the need for strategic legal mobilization to leverage Article 10(3) TEU effectively. Transformative constitutionalism, which enables courts to address social issues through a responsive interpretation of law, serves as the bedrock for legal mobilization efforts. The interplay between this concept and the legal activism of EU citizens could bridge the gap between EU and national democratic safeguards, creating an environment in which citizens can actively participate in reinforcing democratic integrity. Conversely, this contribution underlined the difficulties citizens may face in such endeavours, particularly due to their intrinsic characteristics in the EU legal system. By applying Galanter's theoretical framework, it appears that they can be assimilated to OSs, thus facing many sociological and legal disadvantages which Member States do not face.

While the recognition of Article 10(3) TEU's direct effect would face obstacles, including the inherent discretion of national courts in making preliminary references to the Court, a coordinated approach to raise awareness and encourage its invocation could mitigate these challenges. National courts, in particular, play an instrumental role in ensuring that citizens' claims are heard, thereby enabling judicial scrutiny of potentially anti-democratic measures taken within Member States. Given the constraints and potential resistance faced in politically sensitive cases, the support of national courts and the preliminary ruling mechanism remain vital in safeguarding EU democratic values through Article 10(3) TEU.

Overall, this paper advocates for a citizen-driven/grassroots approach to judicial enforcement of democratic participation, recognizing that EU institutions alone cannot safeguard democratic standards across Member States without the active involvement of the citizenry. Through Article 10(3) TEU, citizens can become both participants in and guardians of EU democratic life, fostering a resilient democratic framework that aligns with the EU's core values. As such, the operationalization of this provision represents not only an innovative avenue for democratic participation but also a necessary step towards reinforcing the EU's constitutional fabric in an era marked by rising illiberalism and democratic erosion.

From passivity to empowerment of the European patient in the light of new digital challenges

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Abstract: In a global world, where every piece of information circulates within and beyond the EU's borders, ensuring digital rights protection can be challenging. Sensitive data like health information, which falls under the expanding field of e-Health, is one paradigmatic example. In this area, European patients are prone to vulnerability. A sensitive situation, which underlines the importance of a reflection on the ethical considerations of preserving the voice of European patients in the protection of their data. This study will demonstrate how the European patient, as a citizen, is gradually gaining a voice to influence and manage his health data protection. A voice given back to the voiceless, through a narrative of the EU that places the European patient at the center of its considerations, whether through the increasing protection of their digital rights or through their involvement in the digital policy-making process.

Introduction. European patients and the protection of health data or the tale of David against Goliath

In a constantly evolving field, such as the digital one, the challenge of protecting European citizens and their sensitive data has become a major stake. European regulations must not only be adapted to a field that is by its very nature fluid and technical but must also respect the following watchword: if the protection afforded is insufficient, it leads to an infinite number of risks. These two preliminary points illustrate the importance of a reflection on the ethical considerations surrounding data processing, which will be addressed by the following question: can the European Union (EU) give a voice back to the voiceless in the digital area?

Addressing this issue means first and foremost determining who is most vulnerable when it comes to data processing. Due to the sensitivity of their data and their heightened vulnerability, the patients represent a paradigmatic example of the voiceless in the digital domain. Consequently, this study will focus on the place of the European patient when facing the protection of their health data.

The second imperative induced by this central questioning is to identify the risks, more specifically the actors originating them. Patients face a profusion of potential violations of their fundamental rights through their data, mainly because of the number of entities using and collecting it. In fact, a patient's data is processed daily, by both private and public actors. It is because of this profusion, to which we can add more or less laudable intentions, that these data-related risks of violation have multiplied, taking on a major role in our contemporary societies. To address this issue of protecting the health data of European patients, the article will focus not only on the analysis of what is said by European institutions but also on what is "perceived"[1] in this overall material. This approach will enable us to identify what appears to be a "parallel communication, which actually takes place, whether institutional players are aware of it or not, whether they intend to or not"[2]. In this sense, the place gradually given to the European patient, originally muted, enables us to see European digital legislation in a different light. The fact that the patient's voice is gaining ground is changing the way the EU "represents itself, tells its story"[3].

Therefore, the present paper will explore the potential narrative, the "enterprise of putting into words and assembling representations for the purpose of generalization"[4], progressively constructed by the EU in

[1] [Free translation] "percevoir", A. Bailleux *et al.*, "Diffusion, réception et circulation des récits judiciaires de l'Europe", in Bailleux, Bernard, S. Jacquot and Landenne, (dir.), *Les récits judiciaires de l'Europe. Diffusion, réception et coproduction*, collection Idées d'Europe (Bruylant, 2023), p. 7.

[2] [Free translation] "communication parallèle, qui s'opère effectivement, que les acteurs institutionnels en soient conscients ou pas, qu'ils en aient l'intention ou non", *Ibid.*, p. 7.

[3] [Free translation] "se représente, se raconte", A. Bailleux, "Introduction : Enjeux, jalons et esquisse d'une recherche sur les récits judiciaires de l'Europe", in Bailleux, Bernard and Jacquot (dir.), *Les récits judiciaires de l'Europe: concepts et typologie*, collection Idées d'Europe (Bruylant, 2019), p. 3.

[4] [Free translation] "entreprise de mise en mots et d'assemblage des représentations à des fins de généralisation", *Ibid.*, p. 14.

favor of these European patients, muted by the digital world. The tale of European patient empowerment, which is still at its beginning, seems to be constructed through the intermediary of several European narratives. It is intimately linked to the Europe of values[5], to the Europe of citizens[6] and the Europe of health[7]. It is through these cross-narratives, and by studying the "*latent* meaning"[8] of digital policies, that the European patient can be considered as unmuted. This emerging narrative, which gives the European patient a voice and consequently power, enables him to reduce his vulnerability and potentially win in this digital arena. This inversion of the individual's presumption of weakness in the face of digital giants is reminiscent of David's unequal battle against Goliath. Even more, in view of the accountability of these data processors, established by European legislation, requiring them to manage sensitive data fairly and ethically.

This tale reiterated in the digital age, has had its genesis in the rise of significant inequality. In this digital world, the European patient is significantly vulnerable and faces a multitude of actors involved in the processing of data, thus risking a large number of violations of fundamental rights (1). Looking at this new European narrative, it seems possible to consider that the patient loses vulnerability thanks to the benefit of increased protection of his digital rights, giving him the armor needed to protect his sensitive data (2). Furthermore, this narrative allows the patient to develop a voice, as an individual and as a member of European civil society. A voice that is now solicited and heard by EU institutions, involving patients in the policy-making process. An inclusive path that gives the European patient the tools and knowledge needed to reduce the initial inequality of the battle (3).

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5 A. Bailleux, "Les récits judiciaires de l'Europe", *Revue de l'Union européenne*, n°614 (2018), p. 5-17., p. 12.

6 *Ibid*., p. 13.

7 Which has been "narrated into existence", T. Hervey, "Telling stories about European Union Health Law: The emergence of a new field of law", *Comparative European Polit*ics, vol. 15, n°3 (2017), p. 3.

8 [Free translation] "sens latent", P. Muller, Y. Surel, *L'analyse des politiques publiques* (Montchrestien, 1998), p. 24.

1. The moderna tale of David against Goliath

With the rapidly expanding digital field, our society is facing new challenges. Bearing in mind the essence of the European project, being a political community "founded on the rule of law"[9], built around and for the European citizen, we conclude to the need of studying the place of the citizen in these transformations, in view of his presumed low weight in the digital world (1.1). This inequality of strength of the individual in relation to his digital world, especially if he wishes to retain some control over his sensitive data, is reinforced in the case of patients, justifying the need for a more protective legal framework (1.2).

1.1. Genesis of inequality: the inevitable struggle for data protection

Any individual living in our technological society produces an incalculable amount of data every day, whose processing is not always transparent. This opacity surrounding data gives rise to new risks, which European law has gradually come to regulate, with the aim of protecting citizens. In this sense, although data processing as such is not problematic, the massive development of data has opened the door to various violations of fundamental rights. Fears rekindled at the very heart of the EU by the revelations of the Snowden case.

The first creators of risks to be identified here are the GAFAMs (Google, Apple, Facebook, Amazon, and Microsoft). These large companies tend to collect certain data for economic purposes, giving rise to situations ranging from discrimination to the reinforcement of societal issues. For example, this data can be used for targeted advertising, with the knowledge that these algorithms[10] can be biased. Thus, it may lead to a reinforcement of inequalities by systematically favoring certain populations for medical and drug recommendations. As far as discrimination is concerned, these GAFAMs can also resell this sensitive personal information to other companies, reinforcing the intrusion into private life. Such was the case with Google, accused in 2019 of

[9] Judgment C-294/83, *Parti écologiste 'Les Verts' v. European Parliament*, EU:C:1986:166, para 23.

[10] See in this sense Z. Obermeyer *et al.*, "Dissecting racial bias in an algorithm used to manage the health of populations", *Science*, vol. 366, n°6464 (2019), p. 447-453.

collecting the health data of millions of American patients without consent to improve its artificial intelligence tools[11].

Private companies, such as banks and insurance companies, may also develop a tendency to discriminate on the basis of a patient's health problems or medical history. This is a risk that is not always easy to detect, as the data is not always collected directly and transparently. As an example, the insurance company Axa, with the consent of its customers, collects "a certain amount of data generated by [an activity tracker]"[12]. The most dynamic customers can obtain discounts and benefits. It should be noted here, however, that the collection of this data could hypothetically lead to a rate increase for less sporty customers. A scenario that raises ethical questions about the risks inherent in such practices.

Finally, some public institutions are also taking dangerous paths in the course of their services and missions. Whether directly or indirectly, they also increase the risks of discrimination against patients on the basis of their health data. For example, France's *Caisse Nationale des Allocations Familiales* (CNAF) uses an algorithm to identify files with a higher risk of fraud[13]. To do so, it collects data associated with health data, such as the fact of "declaring resources for the disabled adults' allowance"[14]. Finally, another common hypothesis in this institutional context is accidental data disclosure due to a cyber-attack[15]. In other words, it

[11] R. Copeland, "WSJ News Exclusive – Google's 'Project Nightingale' Gathers Personal Health Data on Millions of Americans", *Wall Street Journal* (11 nov. 2019).

[12] S. Arnulf, "Axa entrouvre la porte de l'utilisation des objets connectés dans l'assurance", *L'Usine Digitale*, (3 juin 2014).

[13] Faced with this risk, several associations have lodged an appeal with the French Council of State. Although the outcome of this appeal has yet to be determined, this action provides a glimpse of the contribution of civil society, and the voice of its citizens, in the protection of sensitive data. See in this sense Amnesty International, "L'algorithme de notation de la CNAF attaqué devant le Conseil d'État par 15 organisations", press release (16 June 2024).

[14] [Free translation] "déclarer ses ressources pour l'allocation aux adultes handicapés", A. Sénécat, "Algorithme de ciblage antifraude dans les CAF : des associations saisissent le Conseil d'Etat", *Le Monde* (16 October 2024), and G. Geirer, "Enquête sur les dérives de l'algorithme des caisses d'allocations familiales", *Le Monde* (4 December 2023).

[15] For example, the attack on the Corbeil-Essonnes hospital in 2022 or during the Paris Olympic Games where 548 cybersecurity events were avoided according to the French government.

is possible to observe the promotion of potentially discriminatory situations, using health data, even in the institutional frame.

Therefore, data processing inevitably creates new forms of violation of fundamental rights, which are more complex to detect, correct, and prevent. Not only does data processing make it difficult to protect fundamental rights, due to its changing characteristics, but it also creates an unequal battle. The individual, who is supposed to be able to protect his or her personal data, is up against a significant number of players who can misuse it, directly or indirectly. By extension, every European citizen is regularly confronted with potential data breaches. As a result, the development of digital technology and the proliferation of data have created an imbalance: every individual is faced with a profusion of risks if personal data is not properly protected.

This overview gives us a glimpse of the first major obstacle to data protection, namely the inherent inequality of the digital system and its interlocutors. This problem can quickly leave citizens at a loss, unable to grasp the technical nature of the tools at their disposal, and consequently unable to control, or even realize, the risks involved in data processing. Conversely, data controllers, if not regulated or legally supervised, can interfere by collecting, comparing, analyzing, transmitting, and storing data without always ensuring the necessary protection for all these operations. Moreover, this inequality is not only based on an organic criterion but also on a material one, stemming from the very nature of the data concerned. Health data is particularly sensitive, due to the specific and consequential risks it can generate. If this type of data were protected by a conventional regime, European citizens could face risks of violation of their fundamental rights such as discrimination in recruitment due to access to certain documents attesting to regular medical appointments, the commercialization of genetic data without real consent, the violation of privacy through the sharing of data concerning the use of medically assisted procreation, and many others. The possibilities are endless, and continue to expand, particularly with the rapid development of connected objects, which are constantly accompanying individuals, and constantly collecting data[16].

[16] See in this sense M. Lanna, *La protection des données à caractère personnel à l'épreuve de l'automesure connectée*, thèse de Doctorat, Université Paris II – Panthéon Assas (2019).

Therefore, it seems important to discuss the place of the voiceless, which are the European patients, and the EU's ability to unmute them in the protection of their health data. Within this framework, the EU has more weight and strength, enabling it to contribute to the construction of a narrative within which European patients benefit from a secure digital arena and are protected by effective rules. Progress that could, in time, lead patients to regain control over their digital environment. A voice in the healthcare field, which has become essential in the wake of the Covid-19 pandemic as it demonstrated the essentiality of data, as well as the public fears associated with it.

1.2. Reinforcement of inequality: the patient's vulnerability facing health data protection

One of the first fundamental points to clarify here is the vulnerability of the patient when trying to protect his data. A sensitivity explained by the very definition of a patient, who is: "a person receiving or (in later use) registered to receive medical treatment, esp. at a particular establishment or from a particular practitioner; a person staying in a hospital for medical treatment"[17]. A patient is, in this sense, a citizen who is currently a user of the healthcare system, or any citizen who is, has been, or will be a user of the healthcare system. Following this wide definition, EU patients are defined as: "people using healthcare systems, be they healthy or sick"[18]. More significantly, European institutions seem to grow around a more human-centered approach to the subject, as they almost systematically prefer to use the term *patient*, especially all-encompassing, rather than the qualification of *user*[19]. A preference which, without really creating a new legal category, creates a certain symbolism around the European patient[20].

[17] Oxford English Dictionary, s.v. "patient (n.), sense 1.a," (December 2023).

[18] Opinion 2008/C 10/18 of the European Economic and Social Committee on "Patients' rights", *O.J.* C 10/67 (2008), para 1.9.

[19] See for example directive 2011/24/EU of the European Parliament and of the council on the application of patients' rights in cross-border healthcare, *O.J.* L 88/45 (2011); to learn about the emerging legal category of patient see A. Dubuis, *Les droits du patient en droit de l'Union européenne*, coll. Droit de l'Union européenne (Bruylant, 2017).

[20] Or, apart from the political side of this choice, the preference of the terminology of "patient" could also be justified by translation difficulties, for example the word "administré" in French doesn't seem to find a real equivalent in English where the only translations would be citizen or people.

The second point to clarify here is yet another definitional effort pertaining to health data. If the concept of patient did not pose a significant obstacle, the concept of health data presents a significantly more challenging obstacle to overcome. Although essential to our problem, the notion of data seems condemned to elusiveness, as it is both a form of currency and a private possession intimately linked to the fundamental rights of the individual. In this sense, "in Europe, personal data is part of the individual's non-waivable personality rights (known as informational self-determination), in the United States personal data is an available and marketable commodity"[21].

In this prospect, the General Data Protection Regulation (GDPR)[22] embraces this ambivalence by retaining a two-sided and broad definition. Hence, article 4 paragraph 1 states that "personal data' means any information relating to an identified or identifiable natural person ('data subject')", and article 1 paragraph 3 states that "the free movement of personal data within the Union shall be neither restricted nor prohibited for reasons connected with the protection of natural persons with regard to the processing of personal data". Therefore, data remains ambivalent, being considered both as a possible product benefiting from free circulation and as an active part of each European citizen over which they should retain control.

In this context, qualifying health data seemed to be too ambitious a task, even more so when considering that this field of study includes hybrid and innovative areas. This is particularly true of e-health, which "describes the application of information and communications technologies across the whole range of functions that affect the health sector"[23]; or m-Health, which regroups the "health and medical services provided and accessed

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[21] [Free translation] "Tandis qu'en Europe, les données personnelles font partie des droits de la personnalité auxquels la personne ne peut renoncer (ce qu'on appelle l'autodétermination informationnelle), aux États-Unis, en revanche, les données personnelles sont une marchandise disponible et commercialisable", B. Fauvarque-Cosson and W. Maxwell, "Protection Des Données Personnelles", *Recueil Dalloz,* n°19 (2018), p. 1033.

[22] Regulation (EU) 2016/679 of the European Parliament and of the Council 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, *O.J.* L 119 (2016).

[23] European Commission, Communication on e-Health – Making Healthcare Better for European Citizens: An Action Plan for a European e-Health Area, COM (2004) 0356 final (2004).

primarily using smartphones and mobile devices"[24]. The European solution was then to define health data in terms close to a pleonasm: "'data concerning health' means personal data related to the physical or mental health of a natural person, including the provision of health care services, which reveal information about his or her health status"[25]. This turn of phrase, leaving doubt as to what health data encompasses in the EU regulation, has the advantage of allowing national authorities to act, through legislation or case law, on all the hybrid data.

For example, with this definition, there is no need to demonstrate the collection of actual health status data, the simple link between an EU citizen and an entity providing a health care service is considered by the GDPR as health data and is benefiting from the protection of a stricter legal regime. Thus, the GDPR is offering an alternative solution by focusing on more compelling criteria than the essence of the health data. In other words, the EU managed to grant health data a privileged status with which they will be "identified according to a primarily context-based definition […] the role of intent seems less important with regards to health data. This means that the collection of apparently innocuous data that may not intuitively relate to health can in certain context be considered as health data even where there is no intention to process data in such a way"[26]. As a consequence, any relevant or contextual element can help qualify health data, offering a very protective regime. By choosing an amenable approach, the EU recognized that data is both subjective and individualistic, as well as material and objective[27].

2. Reversing the tale of David against Goliath: A European patient granted with voice and rights

Having established the necessary definitional basis for this article, we can now study how the EU is trying to reverse this unequal battle.

[24] Oxford English Dictionary, s.v. "mobile health (*n.*)", (March 2024).

[25] Article 4 paragraph 15 of the GDPR.

[26] P. Quinn, G. Malgieri, "The Difficulty of Defining Sensitive Data - The Concept of Sensitive Data in the EU Data Protection Framework", *German Law Journal*, vol. 22, n°8 (2021), p. 1583-1612, and Judgment of October 4, 2024, C-21/23, ECLI:EU:C:2024:846.

[27] See in this sense M. Teller, "La régulation des données de santé : entre intérêt général et intérêts particuliers. Introduction au cahier spécial", *Revue internationale de droit économique*, vol. 36, n°3 (2022), p. 5-11.

Even if digital rights are part of the European constitutional bloc[28], EU citizens seemed to remain outpowered, outnumbered, and as a result, silenced by the deafening noise of our century's digital transformations. There was so little room theoretically left for patients that the EU is demonstrating a greater emphasis on promoting patients' rights and addressing their previous lack of influence with actions designed to educate and empower citizens (2.1) and a stronger application of the fundamental rights to protect them (2.2).

2.1. Premises of a voice: a diversity of actions in favor of the European patient

The will of the EU to enhance the European patient to regain control over his or her health data can be seen, as a beginning, in numerous political discourses[29]. Not only part of a welcomed trend, pertaining to the rising objective of health democracy, it also implies that the patient is now crucial when legislating. As an illustration, when shaping the future European Health Data Space (EHDS), one of the institution's objectives was to create a: "health-specific ecosystem […] that aims at empowering individuals through increased digital access to and control of their electronic personal health data"[30]. From a more general perspective, the lexical field chosen by the EU leaves no room for interpretation: when it comes to shaping the digital future of the EU, citizens are granted a prominent place in it. A will, hammered on each possible occasion, by way of example with the vast Digital Europe Programme of 2021 with objectives such as the will to: "make digital tools available for citizen empowerment and for person-centered care by supporting the exchange of innovative and best practices in digital health"[31]. And, giving itself

[28] Charter of Fundamental Rights of the European Union, article 7 and 8, *O.J.* C 202 (2016).

[29] European Parliament and Council, Proposal for a Regulation on harmonised rules on fair access to and use of data (Data Act), COM (2022) 68 final; Chapter 1 "Putting people at the centre of the digital transformation", European Declaration on Digital Rights and Principles for the Digital Decade, *O.J.* 2022, C 23 (2023).

[30] European Economic and Social Committee, Opinion on the Communication from the Commission to the European Parliament and the Council – A European Health Data Space: harnessing the power of health data for people, patients and innovation, COM (2022) 196 final, and European Parliament and Council, Proposal for a Regulation on the European Health Data Space COM (2022) 197 final, *O.J.* C 486/123 (2022).

[31] European Parliament and Council, Regulation establishing the Digital Europe Programme and repealing Decision (EU) 2015/2240, 29 April 2021, (EU) 2021/694, Annex 1, Specific objective n°5, para 2.1.

the means to achieve this empowerment, the EU is also granting funds to support: "actions to strengthen citizens' access to and control over their health data"[32], meaning that actions giving power back to citizens and consolidating their control over personal health data will benefit from the budget of the program EU4Health, from 2021 to 2027.

However, the assistance of European institutions can also be observed in the many palliative solutions found by the EU, when legislating over data processing seemed too much of a compromise for member states. The Court of Justice of the European Union (ECJ) has been the key player here by affirming, for example, the existence of a right to delisting[33] that was not yet part of any EU legislation. To offer this judge-made principle, the ECJ reasoned in an ambitious way and followed a: "liberal interpretation of the directive, bordering on a rewriting of the law"[34]. An interpretation, also used to rule an extended territorial scope of the directive 95/46[35] which was the legal basis in force. And, although not explicitly referring to the right to be forgotten, this ruling can be seen as laying down the first milestone of this guiding principle in the right to protection of one's personal data, enshrined by the GDPR.

One other side to the European will to empower its citizens regarding the protection of their health data can be observed with educational actions. There is a clear will for education and information reinforcement, observed with several campaigns destined to help the European patient protect their sensitive data. Hence, educational actions, which implies providing information and control over data, are a cornerstone of the EU's digital future. For example, it enables patients to give informed consent to take part in clinical trials, which is fundamental because an "informed patient consent is a crucial

[32] European Parliament and Council, Regulation establishing a Programme for the Union's action in the field of health ('EU4Health Programme') for the period 2021-2027 and repealing Regulation (EU) 2021-522, *O.J.* L 107 (2021).

[33] Judgment of May 13, 2014, *Google Spain*, C-131/12, EU:C:2014:317, para 88-89.

[34] [Free translation] "une interprétation libérale de la directive, à la limite de la réécriture normative", M. Polidori, "L'arrêt Google Spain de la CJUE du 13 mai 2014 et le droit à l'oubli", *Civitas Europa*, vol. 34, n°1 (2015), p. 243-266.

[35] Directive 95/46/EC of the European Parliament and of the Council 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, *O.J.* L 281/31 (1995).

element of medical ethics"[36]. An informed patient could also use any technology to strengthen, maintain, or even improve their health. Finally, in the artificial intelligence field, the EU considers that: "everyone should be empowered to benefit from the advantages of artificial intelligence by making their own, informed choices in the digital environment, while being protected against risks and harm to one's health, safety and fundamental rights"[37]. All these contributions, even if deprived of a binding character, contribute to building ambitious projects, such as the proposal for a European digital identity[38]. Hence, the EU is embracing the power of education and offering tools of comprehension to its citizens, encouraging them to seize their digital environment.

Nevertheless, these European actions cannot be seen as sufficient on their own. In fact, those who most need to benefit from this education will not necessarily be the privileged recipients of European measures. For example, elderly and isolated people may find it difficult to hear of the European tools and campaigns. Thus, educating patients about their health data will not resolve certain inequalities between patients, which are too deeply rooted. But, even if insufficient on its own, this new European storytelling centered around educating European patients remains fundamental as it at least attempts to reduce inequalities and help patients to comprehend their environment. As a result, these European evolutions contribute to institute a new narrative where the patient has a glimpse of a victory against digital Goliath's, as he is getting closer to becoming a confirmed netizen[39], aware of the risks and of its rights in the digital field.

[36] P. G. Casali, M. Vyas, "Data protection and research in the European Union: a major step forward, with a step back", *Annals of Oncology,* vol. 32, n°1 (2021), p. 15-19.

[37] European Commission, European Declaration on Digital Rights and Principles for the Digital Decade, COM (2022) 28 final (26 January 2022).

[38] European Commission, Proposal for a Regulation as regards establishing a framework for a European Digital Identity, COM (2021) 281 final (3 June 2021).

[39] "A person who uses the internet, esp. habitually", *Oxford English Dictionary*, s.v. "netizen (n.)" (July 2023).

2.2. A European patient empowered: a toolbox of digital fundamental rights

This unmuting narrative of the patients is also being developed through an expansion in the number of subjective rights granted to European citizens in the digital field. Whether fundamental, generated by secondary law, or even by guiding principles, EU citizens' now benefit from an extensive toolbox of rights to invoke when in need to protect their data, especially when it comes to data concerning health. Hence, European patients obtained a safer data space.

Firstly, European citizens see the protection of their personal data reinforced by fundamental rights listed in the EU's primary law and its constitutional bloc. The existence of these standalone digital rights is a demonstration of the importance and ambitious nature of the European data policy. In this sense, the EU legislates in the digital field on a first-class dual ground given by both the Treaty on the Functioning of the European Union (TFEU) and the Charter of Fundamental Rights. Indeed, article 16 paragraph 1 of the TFEU states that: "everyone has the right to the protection of personal data concerning them". And, to drive the point home, article 8 paragraph 1 of the Charter of Fundamental Rights states the exact same right, in the very same words. However, article 8 even if repetitive is not without value in the light of its paragraph 2, which adds obligations for enterprises and therefore grants more guarantees to EU citizens.

Moreover, the will to give EU citizens a voice back in the digital field was followed by every institution. The most striking example here is found with case laws produced by the ECJ. As an illustration, articles 7 and 8 of the Charter used to be read in conjunction by the judges, as if the right to data protection was insufficient on its own. However, in the case *Digital Rights Ireland*[40], the ECJ finally granted article 8 its value as a stand-alone principle[41]. Therefore, the fundamental right to data protection is now fully autonomous and will not be systematically read as a part of Article 7 and the right to private life. Another example of the progress instigated by the ECJ can be found in the effort to define the notion of "data concerning health". Even before the adoption

[40] Judgment of April 2014, *Digital Rights Ireland*, C-293/12, EU:C:2014:238.

[41] L. Pailler, "L'article 8 de la Charte des droits fondamentaux de l'Union européenne - Quel apport à la protection des données à caractère personnel ?", *Légipresse: l'actualité du droit des médias, de la communication et des réseaux sociaux*, n°332 (2015), p. 593.

of the GDPR, the ECJ adopted a teleological interpretation of the directive 95/46 to offer a protective definition of this notion by ruling that "the expression data concerning health […] must be given a wide interpretation so as to include information concerning all aspects, both physical and mental, of the health of an individual"[42]. A point of view since followed by institutions for the adoption of the GDPR, making it a legal principle of the EU. Thus, the feat of the ECJ and other European institutions in this field is major, as they "did not hesitate to create a quasi-constitutional right to data protection and which the judges did not cease interpreting in a bold way"[43]. Hence, the effort to build a protective legal system around the personal data of European citizens, especially in the field of health, is made by every European institution.

Secondly, this unmuting narrative of the European patients can be observed in the EU's secondary legislation. In this matter, the GDPR is fundamental not only because it benefits from an extraterritorial application, guaranteeing broader protection of European patients[44], but also because of its innovative mechanisms. In this sense, the GDPR states several principles that are now essential in a technologically advanced information society, such as the principles of compliance or the one of privacy by design. The GDPR also provides European citizens with various rights, listed in chapter III, that follows each step of data processing scenarios. From article 15 to article 21, EU citizens benefit from a right to access, a right to rectification, a right to erasure, a right to restriction of processing, a right to data portability, and finally a right to object. In other words: "the GDPR appears much more adequate to respond to challenges of personal health data protection in the digital health era. It provides patients with stronger rights and more power in health data control and ownership, and endeavors to clarify rights and protection of personal health data in digital healthcare exchanges"[45]. Consequently, this regulation represents a significant step forward in the construction of this narrative of a patient empowered, to effectively

[42] Judgment of November 2003, *Lindquist*, C-101/01, EU:C:2003:596, para 50.

[43] Y. Poullet, "Is the general data protection regulation the solution?", *Computer Law & Security Review*, vol. 34, n°4 (2018), p. 773-778.

[44] Article 3 GDPR.

[45] Y. Bocong, L. Jiannan, "The Policy Effect of the General Data Protection Regulation (GDPR) on the Digital Public Health Sector in the European Union: An Empirical Investigation", *International Journal of Environmental Research and Public Health*, vol. 16, n°6 (2019), p. 1070.

protect his health data. As an illustration, the GDPR lead to a fine imposed on the Doctissimo website by the *Commission Nationale de l'Informatique et des Libertés* (CNIL), "in cooperation with all its European counterparts"[46], or the fine imposed on the Barreiro hospital in Portugal, "for irregular access to patient data"[47].

Thirdly, even though these rights relate to personal data from a general perspective, the specificity of health data has not been ignored in the rest of the regulation, where they benefit from a more protective regime. In this respect, the GDPR prohibits their processing unless it is to pursue certain objectives[48] or if the data holder consents. Nonetheless, these exceptions do not diminish at all the protection offered by the GDPR. Indeed, the notion of consent is defined and interpreted cautiously, with the clear aim of strong protection, meaning that it must be explicit and cannot be inferred or presumed. Furthermore and in the vein of the work of the Article 29 Data Protection Working Party (WP29), the forerunner of the European Data Protection Board (EDPB), the GDPR stipulates that "'consent' of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her"[49]. And finally, the protection heights: the burden of proof falls on the controller; the request shall be intelligible, otherwise it might not be binding anymore, and the consent can be withdrawn at any time[50].

Thence, the EU seems to be gradually developing a wide range of safeguards, at every stage of data processing, particularly when health-related data is involved. Witnessing a real "accountability of all agents in the personal data processing chain […]. This approach puts the

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[46] The CNIL mentions failing, in particular with regard to data retention periods, the collection of health data via online tests, data security and the methods for depositing cookies on users' terminals, CNIL, "Données de santé et utilisation des cookies : DOCTISSIMO sanctionné par une amende de 380 000 euros" (17 May 2023).

[47] [Free translation] "por acesso irregular aos dados dos doentes, informou esta segunda-feira a administração", Lusa, "Hospital do Barreiro contesta judicialmente coima de 400 mil euros de Comissão de Dados", *Público* (22 October 2018).

[48] Article 9 GDPR.

[49] Article 4 paragraph 11 GDPR.

[50] Article 7 GDPR.

patient at the heart of the information process"[51]. That is to say that the EU gradually introduced subjective rights benefiting the European citizens and patients, reinforcing the place they occupy and progressively operating a paradigm shift leading Member States and Institutions to view them "as collaborators and giving them the tools to manage their own health"[52]. All in all, a very ambitious promise for the future of the EU in terms of data protection regulation and for the role that European patients will have to play in it by giving them a voice back, even if it starts with a whisper.

3. A patient prone to empowerment: a gradual inclusion in the legislative process

Institutional actions allow us to consider that there is a stammering narrative enabling European patients to be unmuted, by participating in the creation of the legislative framework in the digital area. European patients were first given a voice through fundamental rights and European actions. However, a voice loses all power if it is not heard and that is why the EU is now demonstrating its capacity to listen to its patients (3.1) and citizens (3.2). Even if this narrative in construction induces relative efficiency, these institutional actions still demonstrate a wish for a new method, slowly implemented in the EU.

3.1. A patient empowered and heard on a micro level

To offset accusations of a democratic deficit, the EU is increasingly including its citizens in the legislative process, sometimes according to their specific status, on a micro level. The topical example in the field of health data is the patients' consultations, which help to build more appropriate and rightful legislation. This tendency, slowly shifting into a new narrative, allows institutions to legislate while relying on the

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[51] [Free translation] "responsabilisation de tous les acteurs de la chaîne de traitement des données à caractère personnel […] aboutissant à l'émancipation du patient par rapport au personnel soignant. Cette démarche permet au patient de se situer au cœur du processus d'information", A.-T. Norodom, "La protection internationale et européenne des données de santé à caractère personnel", in Le Floch and Fleury Graff (eds.), *Santé et droit international: Colloque de Rennes [31 mai-1er juin 2018]* (Éditions Pedone, 2019), p. 297-299.

[52] C.-J. Haug, "Turning the Tables: The New European General Data Protection Regulation", *New England Journal of Medicine*, vol. 379, n°3 (2018), p. 207-209.

added value of the patient's perspective, guaranteeing a more ethical and respectful approach to their fundamental rights.

On this micro level, the EU has soon demonstrated its commitment to the inclusion of the patient: "the right to participate in the medical decision-making process must be seen as an important element in defining the notion of the citizen as a partner in the healthcare system"[53]. A position quite innovative in the 90's, justified mainly by the sensitivity of the health sector. Hence, there was an early desire for collaboration with the citizen-patient in the construction of the EU. This desire led the EU to state that patients had a right to be included in the medical decision-making process, with a scale ranging from individual decision-making for one's health pathway to a more extensive idea of involvement where the patient is influencing the EU's legislative framework.

This course of action, by giving European patients responsibilities and a say in the matter, is promoting the development of concepts that were previously intended on a national scope, such as participatory or collaborative medicine. Considering that this patient's inclusion continues to develop, participatory democracy and active citizenship in the field of public health are progressively reinforced. As an illustration, the EU Health Policy Platform was built as "an interactive tool to stimulate discussion about public health concerns and provide an easy way for stakeholders to share knowledge and good practices"[54]. This initiative of the European Commission, by reuniting more than 5,000 active participants, including European patients and civil society organizations, appears promising and could help to ensure a safe and democratic digital space for patients. Thus, this platform represents a significant step, or at least a quite revealing one, in the long road followed by the EU in which the European patient is given a new message: "let your voice be heard!"[55]. Even if this new voice may seem far from the legislative process, in its common sense, it is not insignificant. Considering otherwise would be a misunderstanding of the

[53] [Free translation] "Le droit de participer au processus de décision médicale doit être regardé comme un élément important de la définition de la notion de citoyen en tant que partenaire du système de santé" European Commission, Opinion n°13 of July 30, 1999: Ethical aspects of the use of personal health data in the information society, *International Journal of Bioethics*, vol. 12, n°3 (2001), p. 113-117.

[54] European Commission, EU Health Policy Platform.

[55] European Commission, User Guide of the EU Health Policy Platform.

nature of this construction and the way it operates, as the EU legislates by following an inverted pyramid process. In this sense, inclusion in the legislative process can only be found if the entire process is examined, which means including all the stages preceding the classical institutional procedures.

While this change of approach relies on a slow process, the gradual inclusion of the European patient in the legislative work cannot be denied and still constitutes an avenue to be explored. As such, this narrative remains relevant, even if it is not proof of an efficient and lasting European method. A path that is even more necessary to follow in the healthcare sector given the Covid-19 crisis and its lessons. In this sense, the pandemic played as an accelerator of the patient's lack of trust in institutions and doctors. Therefore, the pandemic accelerated the need to put aside medical paternalism and to develop new ways of legitimizing European legislation, such as with the inclusion of the patient. In this respect, the EU could draw inspiration, for example, from the Patients For Patient Safety programme (PFPS) of the World Health Organization. An ambitious project that "engages and empowers patients and families and facilitates their partnership with health professionals and policy-makers to make health care services safer worldwide. The patient is the only one person gone through his/her entire care process: Her/his and family voice should be heard fully"[56].

Finally, even if the EU is trying to reveal the first notes of the voices of European patients, any consultation process organized on this scale, like the educational campaigns we mentioned, does not reach all individuals and does not allow every European patient to be truly heard. Hence, there is still a long path ahead for the EU to establish a permanent system where the patients will have a voice, even if it is just through a simple consultation process. However, the hope of a new tradition in which every time health is concerned the patient is consulted remains.

3.2. A patient empowered and heard on a macro level

The second way the EU is including European patients in the legislative process is on a more global level, being the Union's citizens community. This inclusion is particularly observed in the digital field thanks to several projects developed by the EU over the last three years. For

[56] World Health Organization, Initiative "Patients for patient safety", official website.

example, and even if not meant only to shape the field of digital health, one of the most illustrative EU projects revealing this will of a citizen-actor is the Conference on the Future of Europe (CoFE). First exercise of this kind in the history of European integration, the CoFE was "a major pan-European democratic exercise, with citizen-led debates enabling people from across Europe to share their ideas and help shape our common future"[57]. An ambitious project possible thanks to a digital platform, demonstrating once again that technology can serve democracy and not always contravene fundamental rights. The report on the final outcome of the CoFE contains, for example, a proposal for data protection to "guarantee a more protective and citizen-oriented data treatment policy"[58]. Another proposition concerning the digital field transformation states that "Europe must become a world leader and standard setter in digital transformation and charter a European way to build an ethical, human-centered, transparent and safe digital society"[59]. Globally, the wishes expressed by EU citizens go towards a stronger inclusion of civil society in the functioning and in the legislative process of the EU. To sum up, citizens not only wish to be consulted on various scales and more often, but also specifically wish to be empowered and educated around the challenges composing the digital field. The most striking point here is the efficiency offered by this innovative exercise. In this sense, the European Commission claims to have "acted on close to 95% of those Conference measures that are within the Commission's competence and in accordance with the Treaties"[60].

The second project allowing the inclusion of EU citizens as a community is the construction of a European Health Data Space (EHDS). For its construction, the European Commission organized an open public consultation on the EHDS allowing the citizens to have a voice from a preliminary perspective. In parallel, a Joint Action Towards the European Health Data Space (TEHDAS)[61] has been organized by different partners in several member states and financed by the Health Programme of the European Union, allowing once again citizens to have a say. One

[57] European Commission, Conference on the Future of Europe, official website.

[58] Conference on the Future of Europe, Report on the final outcome (May 2022), p. 69.

[59] *Ibid.*, p. 73.

[60] European Commission, Conference on the Future of Europe, official website.

[61] A program of reflection on the design of the future European health data space which includes a "citizen" working group and an e-consultation in 2022.

last example can be found with the Data Act, for which another public consultation has been run, with a reminder of the fact that when shaping the legislative field of data, the EU is keen to include its citizens[62].

Finally, the inclusion of citizens can also be seen with group dynamics. For instance, civil society played an active role in determining the content of the right to be forgotten[63], "by enhancing privacy and data protection; maintaining freedom of expression; or, indeed, providing a platform through which industry (data controllers in particular in this case) can balance the necessary level of consent with growth and innovation"[64]. This influence of the civil society has partly been possible thanks to the growing importance of data protection in the wake of the Snowden affair[65], which has strongly politicized the issue[66]. Indeed, when an issue is raised in the public sphere, as was the case with the GDPR, "civil society groups, then, are given greater political voice in the policy process"[67]. Consequently, the very content of the right to be forgotten, and more generally the GDPR, is the result of a "substantial compromise with civil society advocates championing many of the final provisions"[68]. Besides, civil society has experienced under the GDPR a gain in power enabling it to stand up to industry lobbyists. In this sense, "the Snowden revelations thus fundamentally changed the political dynamics during the decision-making stage, and thereby 'saved' core elements of the Commission's original proposal, which were on the brink of being watered down by a concerted lobbying effort"[69].

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62 European Commission, Shaping Europe's digital future, A European strategy for data, official website.

63 G. Christou, I. Rashid, "Interest group lobbying in the European Union: privacy, data protection and the right to be forgotten", *Comparative European Politics*, vol. 19 (2021), p. 380-400.

64 *Ibid*., p. 391.

65 In this sense "our evidence demonstrates a noticeable shift in the negotiating dynamic after the Snowden revelations as well as the important role foreignness played in the civil society strategies", in N. Kalyanpur, A. L., Newman, "The MNC-Coalition Paradox: Issue Salience, Foreign Firms and the General Data Protection Regulation", *Journal of Common Market Studies*, vol. 57, n°3 (2019), p. 456.

66 G. Christou, I. Rashid, *op. cit*., p. 391.

67 N. Kalyanpur, A. L., Newman, *op. cit*., p. 449.

68 *Ibid*., p. 462.

69 M. Laurer, T. Seidl, "Regulating the European Data-Driven Economy: A Case Study on the General Data Protection Regulation", *Policy & Internet*, 13, n°2 (2021), p. 269.

As a result, the inclusion of the European citizen through digital legislation became, in a way, a new tradition of the European institutions. There seems to be a certain citizen-centered logic at work in the EU. An orientation intimately linked to the need for a democratic information society, particularly when it comes to sensitive data such as health information, and even more so because of an overall desire for a health democracy. Even if only through consultation, this inclusion of the European citizen in the legislative process, whether as an individual or as a member of civil society, offers greater legitimacy to the EU.

Concluding remarks

In light of these developments, it is possible to consider that the European patients are gradually gaining a voice in the protection of their health data. Based on our reading of European developments, combined with the growing role played by patients in the legislative process, there seems to be a new narrative emerging within the EU. And it is because "the stories we tell about law affect its very meaning"[70], that it seemed appropriate to choose this angle of study, in the hope that this process which seems to be emerging within the EU will continue, allowing the European patient to no longer be part of the muted. In other words, we're also counting on the "instituting power"[71] of narratives to reverse the patients' initial vulnerability.

However, we are aware that "the identification of a narrative [...] is intersubjective"[72]. Hence, it would be possible here for some to consider that there is no narrative placing European patients in a position of strength, by unmuting them. For this reason, the preceding developments only aim to explore the potential emergence of such a narrative in favor of the voiceless which are the patients, even if it is not yet a well-established narrative, or one determined by a definitive European political agenda. These developments are thus the fruit of a personal

70 T. Hervey, *op. cit.*, p. 12.

71 [Free translation] "puissance instituante", Q. Landenne, "Conclusion. Les récits judiciaires, entre dynamique intégratrice et conflits idéologiques", in Bailleux, Bernard, Jacquot and Landenne (dir.), *Les récits judiciaires de l'Europe – Dynamiques et conflits*, vol. 2, collection Idées d'Europe (Bruylant, 2021), p. 234.

72 [Free translation] "l'identification d'un récit […] est intersubjective", A. Bailleux, "Les récits judiciaires de l'Europe, Acte II. Formation, rôle et interactions des récits" in A. Bailleux, E. Bernard, S. Jacquot, Q. Landenne (dir.), *Les récits judiciaires de l'Europe. Dynamiques et conflits*, collection Idées d'Europe (Bruylant, 2021), p. 6.

stance, on a possible way of reading the EU. In our view, the symptoms observed point to the emergence of a new narrative, or at least a "sub-narrative"[73], at the crossroads of more established narratives such as the Europe of citizens, the Europe of values and the Europe of health. While it's not possible to assert the emergence of a narrative without fear, it is possible to consider that European patients occupy a growing place in the EU's digital future. Initially vulnerable, they have gone from silence to murmur, and from murmur to a voice that is heard and respected.

[73] S. Menzione, "The subnarrative of a complete system of legal remedies and the EU values' narrative: a dynamic relationship" in Bailleux, Bernard, Jacquot and Landenne (dir.), *op. cit. Les récits judiciaires de l'Europe. Dynamiques et conflits*, *op. cit.*, p. 37.

Silencing falsehoods: Enhancing the EU's unmuting power trough tackling gendered disinformation

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Abstract: Gendered disinformation is an acute threat to public discourse. Women and gender-diverse individuals who actively express their opinions in a public setting are systematically subjected to false or misleading allegations seeking to silence them or undermine their credibility. This chapter examines whether the EU's emergent anti-disinformation framework is capable of adequately addressing gender-related threats and how this framework could be further developed to "unmute" the voices of those affected by them. It contends that explicit recognition of the phenomenon of gendered disinformation and more targeted measures for countering it are instrumental in strengthening the EU's aspiration to protect democracy and ensure a level playing field for the robust exchange of information and ideas.

Introduction

In 2023, Sigrid Kaag, the then-Minister of Finance of the Netherlands and leader of the political party D66, announced her decision to quit politics, claiming her career posed a serious threat to her family life. The slew of maliciously distorted claims about her education, political views, and professional activities circulating on social media was a significant factor in her decision. The hateful and abusive behaviour online occasionally escalated into real-life intimidation, including an incident where Kaag was confronted by protestors carrying burning torches[1].

[1] P. Hotse Smit, "Wie wachtten Sigrid Kaag op met brandende fakkels in Diepenheim?" *de Volkskrant* (20 February 2023), https://www.volkskrant.nl/nieuws-achtergrond/wie-wachtten-sigrid-kaag-op-met-brandende-fakkels-in-diepenheim~b0935ea1/ (accessed on 7 November 2024).

Kaag's example vividly exposes the wicked phenomenon of gendered disinformation, which is increasingly polluting political discourse in the EU. As succinctly defined by Irene Khan, the Special Rapporteur of the United Nations on the promotion and protection of the right to freedom of opinion and expression, gendered disinformation constitutes "a strategy to silence women and gender-diverse voices" which "reinforces prejudices, bias and structural and systemic barriers that stand in the way of gender equality and gender justice[2]". Politicians, journalists, human rights activists and other individuals keenly engaging in public debate and holding strong standpoints on current issues are most common targets[3]. Gendered disinformation is often underpinned by harmful sex-based tropes and stereotypes. Kaag was widely labelled a "witch", a vilifying slur tied to her gender. In other instances, women are being trivialised through untruthful claims about their incompetence or weakness. Annalena Baerbock, who was the German Green Party candidate for chancellor in the 2021 federal elections, was unjustifiably accused of committing academic fraud while pursuing her university degree, thus assuming her unsuitability for the job[4]. In a similar vein, the environmental activist Greta Thunberg is often portrayed as mentally unstable manipulated by others to further some secret political agenda[5]. The phenomenon of online gendered disinformation also has a prominent intersectional dimension. Those who are non-white, queer, disabled or have other marginalised identities are often subject to even more forceful attacks[6]. Moreover, gendered disinformation is increasingly

[2] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan A/78/288 (2023), paras 10 and 12.

[3] "Best Practice Forum on Gender and Digital Rights: Exploring the Concept of Gendered Disinformation" (Internet Governance Forum, 2021) 4, https://intgovforum.org/en/filedepot_download/248/21181 (accessed on 5 November 2024).

[4] N. Kovalčíková, M. Weiser, "Targeting Baerbock: Gendered Disinformation in Germany's 2021 Federal Election" (*Alliance For Securing Democracy*, 30 August 2021), https://securingdemocracy.gmfus.org/targeting-baerbock-gendered-disinformation-in-germanys-2021-federal-election/ (accessed on 16 May 2024).

[5] A. Dave and others, "Targeting Greta Thunberg: A Case Study in Online Mis/Disinformation" (German Marshall Fund's Digital Innovation and Democracy Initiative, 2020), https://www.gmfus.org/news/targeting-greta-thunberg-case-study-online-mis-disinformation (accessed on 7 November 2024).

[6] N. Jankowicz and others, "Malign Creativity: How Gender, Sex, and Lies Are Weaponized Against Women Online" (Wilson Centre, 2021) 27, https://www.wilsoncenter.org/sites/default/files/media/uploads/documents/Report%20Malign%20

"supercharged" by generative AI, particularly through manipulated "deepfake" content designed to degrade or discredit women[7].

In times when abusive and misogynistic narratives are becoming more widespread in the online environment, it is crucial that the EU offers a strong counter-narrative to protect gender equality and ensure fair conditions for political participation. In recent years, the EU has demonstrated a strong commitment to combatting disinformation. Several newly adopted regulatory measures contain provisions aiming to address the spread of false or misleading information threatening the rule of law and democracy[8]. However, it remains uncertain whether these measures give voice to those most susceptible to vicious disinformation campaigns.

The problem of gendered disinformation has so far been subject to limited scholarly attention. While legal research on disinformation is steadily growing[9], only few writings look at it from a gender or intersectional lens[10]. This chapter makes a contribution to the existing literature by analysing whether the EU legal framework adequately addresses the issue of gendered disinformation. In doing so, it contends that the EU's current approach to disinformation largely overlooks the gendered aspects of the problem and falls short of empowering female and gender-diverse public figures to counter false and misleading claims.

Creativity%20How%20Gender%2C%20Sex%2C%20and%20Lies%20are%20Weaponized%20Against%20Women%20Online_0.pdf (accessed 16 May 2024).

[7] M. B Kugler, C. Pace, "Deepfake Privacy: Attitudes and Regulation", *Northwestern University Law Review*, vol. 116, n°3 (2021), p. 611-680, at p. 613-614.

[8] S. Eskens, "The Role of the Political Advertising Regulation and European Media Freedom Act in the EU's Anti-Disinformation Approach" (2024), https://papers.ssrn.com/abstract=4942648 (accessed on 7 November 2024).

[9] C. Marsden, T. Meyer, I. Brown, "Platform Values and Democratic Elections: How Can the Law Regulate Digital Disinformation?", *Computer Law & Security Review*, vol. 36 (2020), p. 1-18; R. Ó Fathaigh, N. Helberger, N. Appelman, "The Perils of Legally Defining Disinformation", *Internet Policy Review*, vol. 10, n°4 (2021), p. 1-25; A. Strowel and J. De Meyere, "The Digital Services Act: Transparency as an Efficient Tool to Curb the Spread of Disinformation on Online Platforms?", *Journal of Intellectual Property, Information Technology and E-Commerce Law*, vol. 14, n°1 (2023), p. 66-83.

[10] See, for example, A. Allen, "An Intersectional Lens on Online Gender Based Violence and the Digital Services Act" (*Verfassungsblog*, 1 November 2022), https://verfassungsblog.de/dsa-intersectional/ (accessed on 8 May 2023); E. Stringhi, "The Due Diligence Obligations of the Digital Services Act: A New Take on Tackling Cyber-Violence in the EU?", *International Review of Law, Computers & Technology*, vol. 38, n°2 (2024), p. 215-229.

The failure to explicitly acknowledge the vulnerability of women in the online information ecosystem could ultimately curtail the legitimacy of the EU's anti-disinformation policy.

In furthering its critique, the chapter focuses on testing a widespread narrative according to which EU law and European integration more broadly have the capacity to "unmute" the voices of individuals who have traditionally been neglected in decision-making processes. Despite an increasing emphasis on equality and inclusion in recent years, many scholars remain sceptical about the purported objectives or the effective execution of various measures taken by the EU[11]. Women and gender-diverse people who actively participate in public life present a particularly compelling case study for examining the EU's capacity to "unmute" marginalised groups of individuals. Admittedly, public figures enjoy a wide range of privileges, such as education and strong societal and professional influence. However, women and gender-diverse individuals who openly express their views and opinions systematically face vigorous forms of online abuse and harassment that often result in self-censorship and stigmatisation[12]. In addition to its detrimental impact on the individuals concerned, gendered disinformation poses severe threats to society as a whole since it can erode trust in democratic institutions and impact the outcome of elections[13]. Hence, there is a legitimate need for EU action to protect and elevate the voices of those particularly vulnerable to it.

The chapter proceeds in two parts. Section 1 begins by tracing the EU's "unmuting" narrative through the evolution of its legal framework addressing illegal and harmful content online. Section 2 then analyses whether EU law provides necessary mechanisms for combatting gendered disinformation. It notes that, despite many innovative measures recently adopted by the EU, the problem of gender-related attacks seems to be

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[11] See, for instance, I. Isailovic, "Gender Equality as Investment: EU Work-Life Balance Measures and the Neo-Liberal Shift", *Yale Journal of International Law*, vol. 46 (2021), p. 277-324; S. Steininger, "The CJEU's Feminist Turn?: Gender-Based Persecution as a Ground for Protection", *Verfassungsblog* (20 February 2024), https://verfassungsblog.de/the-cjeus-feminist-turn/ (accessed on 16 May 2024).

[12] K. Saris C. van de Ven, "Misogynie Als Politiek Wapen", *De Groene Amsterdammer* (3 March 2021), https://www.groene.nl/artikel/misogynie-als-politiek-wapen (accessed on 16 May 2024).

[13] S. Dovi, "On Political Misogyny", *American Political Science Review* (2024), p. 1-14.

largely neglected. Hence, the chapter outlines some possible directions for further regulatory intervention.

1. The "unmuting" narrative in the EU's digital policy

The advent of online platforms was initially hailed as a major step towards democratising public discourse[14]. By providing an alternative medium for political discussions free from constraints imposed by governments or traditional media, platforms were expected to empower all individuals to make their voices heard. In light of this optimistic vision, most regulators, including the EU, used to take a light-touch approach to regulating the newly emerged actors. When information society services began to shape on the cusp of the 20th century, the EU was reluctant to exercise any far-reaching regulatory interference. The e-Commerce Directive – the first legal instrument aimed at harmonising the internal market for information society services adopted in 2000 – primarily strived to foster innovation and competitiveness of EU-based enterprises[15]. For this reason, it did not provide any strong incentives for information society service providers to proactively combat illegal or harmful content posted by their users.

As online platforms became more entrenched in our private and professional lives, the EU set out to introduce major changes to its legal framework. In the Communication "A Digital Single Market Strategy for Europe" of 2015, the Commission revealed its intention to examine the need for new measures to tackle illegal content on the Internet while having due regard to freedom of expression[16]. The Commission placed a particularly strong emphasis on the fight against hate speech. In 2016, the Commission and prominent tech companies negotiated and agreed on the Code of Conduct on Illegal Hate Speech in 2016[17].

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[14] See, for instance, L. Dahlberg, "The Internet and Democratic Discourse: Exploring The Prospects of Online Deliberative Forums Extending the Public Sphere", *Information, Communication & Society*, vol. 4, n°1 (2001), p. 615-633.

[15] Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce") *O.J.* L178/1 (2000) ("e-Commerce Directive").

[16] Commission, "A Digital Single Market Strategy for Europe" (Communication) COM(2015) 192 final, p. 12.

[17] Code of Conduct on Countering Illegal Hate Speech Online, https://commission.europa.eu/document/download/551c44da-baae-4692-9e7d-52d20c04e0e2_en, (accessed on 22 August 2024).

This co-regulatory instrument seeks to contribute to the enforcement of Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law[18]. The signatories undertook to enhance their procedures for reviewing notifications regarding illegal hate speech and removing or disabling access to it where necessary. Notably, it was acknowledged that hate speech "not only negatively affects the groups or individuals that it targets, it also negatively impacts those who speak out for freedom, tolerance and non-discrimination in our open societies and has a chilling effect on the democratic discourse on online platforms[19]". Therefore, the Code was explicitly aimed at "unmuting" voices which may otherwise be silenced by hateful utterances online. At the same time, the Code is based on the narrow definition of hate speech enshrined in the Framework Decision 2008/913/JHA, which only includes conduct publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin. Hence, sexist or misogynistic hate speech falls outside the scope of the Code.

Further measures to counter hate speech in the digital sphere were later foreseen in the revised Audiovisual Media Services (AVMS) Directive. As it was initially adopted in 2010, the Directive did not apply to online platforms[20]. According to Article 28(b) introduced in 2018, Member States are required to ensure that video-sharing platform providers under their jurisdiction take measures to protect the general public from content containing incitement to violence or hatred directed against a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the Charter[21]. The latter provision prohibits discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth,

[18] Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, *O.J.* L 328/55 (2008).

[19] Code of Conduct on Countering Illegal Hate Speech Online, *op. cit.*, p. 1.

[20] Directive (EU) 2018/1808 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities ("AVMS Directive"), *O.J.* L 303/69 (2018).

[21] AVMS Directive, art. 28b(1)(b).

disability, age or sexual orientation. Hence, the revised AVMS Directive applies to a broader range of hate speech than the Code of Conduct on Illegal Hate Speech. The directive also envisioned a wider set of measures to be adopted by video-sharing platform providers to combat violent or hateful content[22]. This demonstrated the EU legislator's resolve to strengthen the protection of vulnerable groups.

While the amendment of the AVMS Directive was an important step towards combatting hateful or discriminatory behaviour in the digital sphere, it only addressed the conduct of a limited subset of online platforms, namely those whose services have the principal purpose to provide programmes or user-generated videos to the general public[23]. Consequently, the EU remained concerned about the outdated nature of the e-Commerce Directive, which continued to serve as the horizontal legal framework[24]. The Digital Services Act (DSA), proposed in 2020 and adopted less than two years later, aims to create a "safe, predictable, and trustworthy online environment[25]". The material scope of the DSA is rather broad. Apart from requiring providers of intermediary services to counter illegal content, it also introduced numerous mechanisms for enhancing transparency and accountability of providers of intermediary services. Most notably, very large online platforms (VLOPs) and very large search engines (VLOSEs), which have a number of average monthly active recipients of the service in the Union equal to or higher than 45 million and have been designated as such by the Commission, must diligently assess and mitigate systemic risks stemming from the design or functioning of their service[26]. Such risks include, inter alia, "any actual or foreseeable negative effects on civic discourse and electoral processes[27]" and "any actual or foreseeable negative effects in relation to gender-based violence[28]". Thus, the DSA became the first

[22] AVMS Directive, art. 28b(3).

[23] AVMS Directive, art. 1(1)(aa).

[24] Ursula von der Leyen, "A Union That Strives for More: My Agenda for Europe", https://op.europa.eu/en/publication-detail/-/publication/43a17056-ebf1-11e9-9c4e-01aa75ed71a1/language-en/format-PDF/source-search (accessed on 4 October 2024).

[25] Regulation (EU) 2022/2065 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) O.J. L 277/1 (2022) ("DSA"), recital 3.

[26] DSA, art. 34-35.

[27] DSA, art. 34(1)(c).

[28] DSA, art. 34(1)(d).

binding legal instrument that implicitly acknowledged the vulnerable status of women in the online environment.

The EU's "unmuting" narrative also came to the fore in the European Democracy Action Plan (EDAP) adopted in 2020[29]. The Commission undertook to "ensure the mainstreaming of equality in action at all levels to promote access to democratic participation", particularly in relation to women, LGBTIQ persons and minority groups[30]. In 2021, under the umbrella of the EDAP, the Commission adopted the Recommendation on ensuring the protection, safety and empowerment of journalists and other media professionals in the European Union[31]. The Recommendation explicitly acknowledged that female journalists are more susceptible to off- and online harassment, threats and incitement to hatred than their male counterparts which can lead to "self-censorship, withdrawal from online communities or even decisions to leave the profession[32]". In light of these concerns, it outlined specific measures to ensure online safety and digital empowerment of all journalists as well as strategies for empowering and protecting female journalists and those belonging to minority groups or reporting on equality[33]. Shortly thereafter, the Commission also adopted a Communication on "A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime", calling upon the Council to recognise the said offences under Article 83 of the Treaty on the Functioning of the European Union (TFEU[34]).

Another important milestone in the evolution of the EU's ambition to "unmute" the silenced voices was achieved in 2022 when the Commission tabled a proposal for a Directive on combatting violence against women

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[29] Commission, "On the European democracy action plan" ("EDAP") (Communication) COM(2020) 790 final.

[30] EDAP, *op. cit*., p. 10.

[31] Commission Recommendation (EU) 2021/1534 of 16 September 2021 on ensuring the protection, safety and empowerment of journalists and other media professionals in the European Union, C(2021) 6650 final.

[32] Recommendation on ensuring the protection, safety and empowerment of journalists and other media professionals in the European Union, *op. cit*., recital 25.

[33] Recommendation on ensuring the protection, safety and empowerment of journalists and other media professionals in the European Union, *op. cit*., paras 24-26.

[34] Commission, "A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime" (Communication) COM/2021/777 final.

and domestic violence[35]. The directive, which was eventually adopted in 2024, became a groundbreaking step towards enhancing the protection of women and girls from various forms of criminal conduct, including those committed in the digital environment[36]. It establishes minimum rules on the definitions of offences committed against women as well as the rights of victims in the context of criminal proceedings.

The EU shows a clear intention to continue working towards safeguarding women from different types of harm both off- and online. As part of the EU's Gender Equality Strategy 2020-2025, the Commission undertook to facilitate the development of a new framework for cooperation between online platforms to protect women's safety online[37]. More recently, Ursula von der Leyen also announced a Roadmap for Women's Rights which will further combat gender-based discrimination[38]. Hence, the EU's regulatory strategies for uplifting the voices of women in the digital sphere will be expanded in the coming years.

2. Critical appraisal of the EU's regulatory measures on gendered disinformation

As seen from the evolution of the EU's digital policy, the commitment to protecting marginalised groups in the online sphere is becoming increasingly prominent. This section investigates whether the EU legal framework is sensitive to the specific issue of gendered disinformation and offers the necessary mechanisms to address it. It first determines whether gendered disinformation falls within the scope of the existing legal instruments aimed at addressing various types of online threats (section 2.1). After that, it proceeds to examine the specific rules for preventing or mitigating the spread of gendered disinformation in the digital environment (section 2.2) as well as remedies available to those subjected to it (section 2.3).

35 Commission, "Proposal for a Directive on combating violence against women and domestic violence", COM(2022) 105 final.

36 Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence, *O.J.* L 2024/1385 (2024).

37 Commission, "A Union of Equality: Gender Equality Strategy 2020-2025" (Communication) COM/2020/152 final, p. 5.

38 "Statement at the European Parliament Plenary by President Ursula von Der Leyen, Candidate for a Second Mandate 2024-2029", *op. cit*.

2.1. Legal instruments applicable to gendered disinformation

The phenomenon of gendered disinformation lacks a precise definition under EU law. It does, however, fall within the ambit of several broader notions featured in various EU legal instruments. Above all, it is covered by the general definition of disinformation understood as "false or misleading content that is spread with an intention to deceive or secure economic or political gain and which may cause public harm[39]". Accordingly, all legal instruments which either explicitly or implicitly seek to tackle disinformation are relevant for its gender-specific forms.

Disinformation as such is not prohibited under EU law. However, some Member States prohibit the dissemination of disinformation under their domestic law[40]. In this case, gendered disinformation would fall within the scope of "illegal content" under Article 3(h) DSA. Gendered disinformation is, however, distinct from the notion of hate speech. While the former is fuelled by contempt towards women, it does not seek to incite violence based on gender but rather to undercut women's reputation, public image, or credibility. Hence, the legal instruments focused on countering hate speech, such as the Code of Conduct on Illegal Hate Speech and the revised AVMS Directive, do not apply to gendered disinformation, unless false and misleading information about a particular person is accompanied by explicit calls for hatred or discrimination of a group sharing a certain protected characteristic. In a similar vein, only the most heinous forms of gendered disinformation would fall within the scope of cybercrimes listed under the Directive on combatting violence against women and domestic violence. Article 5(1)(b) of the Directive harmonises the definition of non-consensual sharing of manipulated material, making it appear as though a person is engaged in sexually explicit activities. Additionally, gendered disinformation could be considered a form of cyber harassment under Article 7, but only if the conduct is repeated or carried out by multiple individuals, aims to threaten or insult the victim, and is likely to cause serious psychological harm[41]. Less grave falsehoods targeting women fall outside the scope of criminal offences harmonised by the Directive.

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39 EDAP, *op. cit.*, p. 18.

40 R. Fathaigh, N. Helberger, N. Appelman, *op. cit.*, p. 2.

41 Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence, art. 7(a)-(b).

Gendered disinformation may also fall within the ambit of gender-based violence within the meaning of Article 34(1)(d) DSA, which requires VLOPs and VLOSEs to assess related systemic risks. Although the DSA does not contain any definition of gender-based violence, some guidance on this term was offered by the Advisory Committee on Equal Opportunities for Women and Men, which defined it as "physical, sexual, psychological or economic harm, including threats of such acts[42]". Admittedly, not every false or misleading claim targeting a female or gender-diverse public figure causes them actual harm. Nonetheless, coordinated disinformation campaigns causing serious distress to the target arguably fall within the scope of gender-based violence. In any event, the spread of gendered disinformation could be seen to constitute a systemic risk to civic discourse and electoral processes under Article 34(1)(c) DSA.

2.2. Mechanisms for addressing gendered disinformation

The EU legal framework provides a wide array of measures aimed at tackling false or misleading information online. These measures were first set out under the Code of Practice of Disinformation – a co-regulatory legal instrument first adopted in 2018 and further strengthened in 2022[43]. The Code was signed by a broad range of stakeholders, including online platforms, fact-checking organisations, advertisers, and civil society. The commitments under the Code concern the scrutiny and transparency of advertisements, the integrity of services, and the empowerment of users as well as the research and fact-checking communities. Additionally, the signatories undertake to establish and maintain the Transparency Centre and a permanent Task-force aimed at updating the Code. Despite the ambitious nature of this instrument, it suffers from several shortcomings. Most importantly, the Code does not acknowledge the disparate impact of disinformation on different social groups. The importance of having due regard to vulnerable communities is only mentioned in the context of the need to enhance media literacy

[42] "Opinion on the Prevention of Gender-Based Violence and Domestic Violence", Advisory Committee on Equal Opportunities for Women and Men (2023), https://commission.europa.eu/system/files/2024-01/Opinion%20violence%20adopted.pdf (accessed on 11 November 2024).

[43] The Strengthened Code of Practice on Disinformation, https://ec.europa.eu/newsroom/dae/redirection/document/87585 (accessed on 14 November 2024).

and critical thinking[44]. As a result, the commitments it puts forward are not geared towards gender-specific forms of disinformation. Moreover, research shows that online platforms participating in the Code fail to provide relevant and comprehensive responses on the measures taken as well as illustrate them with sufficient quantitative data[45]. This issue can be attributed to the broad discretion granted to the signatories as well as the lack of effective and systematic compliance monitoring. Admittedly, the DSA formalises the role of codes of conduct in its application and enforcement[46]. As refusal to participate or comply with the Code could ultimately be considered an infringement of the DSA[47], this may encourage more diligent implementation of the Code. At the same time, some actors would likely continue to evade responsibility for addressing disinformation[48]. Therefore, the role of the Code in curbing gendered disinformation and thereby "unmuting" the voices of those who may be silenced by it is severely limited.

Another non-binding instrument relevant for tackling the spread of gendered disinformation is Commission Recommendation on ensuring the protection, safety and empowerment of journalists and other media professionals in the European Union[49]. It envisions that competent authorities of Member States establish working groups on the prevention of online attacks and threats to journalists[50]. However, such working groups are primarily meant to assess the effectiveness of national measures aimed at combatting the relevant threats and helping journalists improve their cyber-awareness and digital skills. Since many Member

[44] The Strengthened Code of Practice on Disinformation, Commitment 17.

[45] S. Mündges, K. Park, "But Did They Really? Platforms' Compliance with the Code of Practice on Disinformation in Review", *Internet Policy Review*, vol. 13, n°3 (2024), p. 1-21, https://policyreview.info/articles/analysis/platforms-compliance-code-of-practice-on-disinformation-review (accessed on 12 November 2024).

[46] DSA, arts 45-47.

[47] R. Griffin, "Codes of Conduct in the Digital Services Act: Functions, Benefits & Concerns" *Technology and Regulation* (2024) 167, p. 175-176.

[48] N. Lomas, "Elon Musk Takes Twitter out of the EU's Disinformation Code of Practice", *TechCrunch* (27 May 2023), https://techcrunch.com/2023/05/27/elon-musk-twitter-eu-disinformation-code/ (accessed on 12 November 2024).

[49] See section I.

[50] Recommendation on ensuring the protection, safety and empowerment of journalists and other media professionals in the European Union, *op. cit.*, para 24.

States lack effective safeguards for the protection of journalists[51], it is uncertain whether the establishment of working groups will encourage greater efforts on the part of those Member States. In addition, while self-protection measures are important, they cannot be the sole means of addressing disinformation, especially its gender-related forms, since this shifts the burden onto the victims. Additionally, the Recommendation encourages Member States to cooperate with online platforms to foster "a digital environment that prevents the use of online services to attack journalists, in particular by developing strategies to address orchestrated attacks[52]". It was left uncertain, however, what this cooperation should look like in practice, since many online platforms may be reluctant to take any additional steps to enhance the protection of journalists beyond their formal legal obligations. Once again, the voluntary nature of the Recommendation and its vague language can seriously undercut the EU's "unmuting" endeavour.

Provisions aimed at limiting the circulation of disinformation are also enshrined in several binding EU legal acts. The risk management framework under the DSA appears to be the most promising solution for addressing gendered disinformation[53]. There is a growing number of proposals on how this framework could meaningfully contribute to protecting marginalised groups. For instance, Allen highlights the benefits of the intersectional methodology for assessing and mitigating online gender-based violence[54]. At the same time, the first risk assessment reports which became available at the end of 2024 reveal that VLOPs and VLOSEs are not open to employing creative approaches elaborated by civil society and researchers for addressing complex and routinely overlooked systemic risks, such as gendered

[51] See, for instance, Annex to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "2024 Rule of Law Report: The rule of law situation in the European Union" COM(2024) 800 final (particularly recommendations for Greece, Italy, Malta, Slovenia and Slovakia).

[52] Recommendation on ensuring the protection, safety and empowerment of journalists and other media professionals in the European Union, *op. cit.*, para 25.

[53] P. Martins, "How Can Impact Assessments Improve Protection from TFGBV?", *Digital Policy Hub* (2024), https://www.cigionline.org/static/documents/DPH-paper-Martins.pdf (accessed on 15 May 2024).

[54] A. Allen, *op. cit*.

disinformation[55]. The DSA envisions that the Commission can steer this process by issuing guidelines on the mitigation of specific systemic risks to present best practices and recommend possible measures[56]. The Guidelines on the mitigation of systemic risks for electoral processes adopted in March 2024 in the run-up to the European Parliament election stressed the importance of tackling illegal content which "may inhibit or silence voices in the democratic debate, in particular those representing vulnerable groups or minorities[57]". At the same time, the Guidelines do not elaborate on the possible ways of addressing content which has or could have this effect. Therefore, the obligations to assess and mitigate systemic risks incumbent on VLOPs and VLOSEs may not be adequate for addressing the silencing impact of gendered disinformation on the voices of women and gender-diverse people unless these obligations are further concretised.

In addition to the DSA, some mechanisms for curbing disinformation are embedded in the Regulation on Political Advertising (PAR[58]) and the European Media Freedom Act (EMFA[59]) – two legal acts adopted under the umbrella of the EDAP. Again, neither of them recognises gendered disinformation as a special type of threat calling for appropriate intervention. While sexist or misogynistic narratives often form part of political campaigns[60], the PAR merely focuses on the transparency of political advertising services[61]. The EMFA aims to

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[55] T. Bernard, "Reading the Systemic Risk Assessments for Major Speech Platforms: Notes and Observations", *Tech Policy Press* (20 December 2024), https://techpolicy.press/reading-the-systemic-risk-assessments-for-major-speech-platforms-notes-and-observations (accessed on 3 February 2025).

[56] DSA, art. 35(3).

[57] Commission Guidelines for providers of Very Large Online Platforms and Very Large Online Search Engines on the mitigation of systemic risks for electoral processes pursuant to Article 35(3) of Regulation (EU) 2022/2065, *O.J.* C/2024/3014 (2024), point 34.

[58] Regulation (EU) 2024/900 on the transparency and targeting of political advertising, O.J. L1/44 (2024) ("PAR").

[59] Regulation (EU) 2024/1083 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act), *O.J.* L 2024/1083 (2024) ("EMFA").

[60] S. Udupa, L. Koch, "Tackling Online Misogyny in Political Campaigns: Promise and Limitations of Artificial Intelligence", *Feminist Media Studies* (2024), p. 1428-1434, at p. 1429-1430.

[61] PAR, arts 6-12.

address disinformation by supporting "quality media services" which are presumed to be "an antidote against disinformation and foreign information manipulation and interference[62]", while simultaneously protecting the EU information space from "rogue media service providers[63]". However, as rightly noted by Eskens, the EMFA provides a narrow definition of a "media service[64]". This notion is restricted to persons or entities whose principal purpose "consists in providing programmes or press publications, under the editorial responsibility of a media service provider, to the general public, by any means, in order to inform, entertain or educate[65]". Therefore, some of the crucial obligations incumbent on media service providers under the EMFA, such as an obligation to take appropriate measures to guarantee the independence of editorial decisions, do not apply to independent media personalities and conspiracy theorists, who often serve as vehicles of gendered disinformation[66]. Furthermore, Article 18 EMFA lays out a procedure for handling the content of media service providers by VLOPs (also known as the "media exemption[67]"). It provides that VLOPs must enable media service providers to declare their independence and compliance with the requirements of transparency editorial responsibility, as well as state that they do not provide content generated by AI[68]. When a VLOP intends to remove or limit the visibility of content posted by a media service provider due to the alleged breach of its terms and conditions, it must communicate to this provider a statement of reasons and allow it to respond to it within 24 hours (or a shorter timeframe in the case of a crisis[69]). If a VLOP decides to restrict the content in question, it must inform the media service provider without undue delay. Notably,

62 EMFA, recital 14.

63 EMFA, recitals 44 and 49.

64 S. Eskens, "The role of the Political Advertising Regulation and European Media Freedom Act in the EU's anti-disinformation approach", *SSRN Working Paper* (2024), p. 1-17, at p. 11.

65 EMFA, art. 2(1).

66 C. Borchers, "Alex Jones's Overtly Sexist Campaign to Discredit Megyn Kelly", *Washington Post* (16 June 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/06/16/alex-joness-overtly-sexist-campaign-to-discredit-megyn-kelly/ (accessed on 13 November 2024).

67 M. Monti, "The Missing Piece in the DSA Puzzle? Article 18 of the EMFA and the Media Privilege", *Rivista italiana di informatica e diritto* (2024), p. 1-18, at p. 10-15.

68 EMFA, art. 18(1).

69 EMFA, art. 18(4).

this procedure is not applicable in the context of the assessment and mitigation of systemic risks by VLOPs under the DSA. This exemption is commendable as it ensures that online platforms are not prevented from adopting expeditious measures against disinformation where necessary. Nevertheless, Article 18 EMFA could still contribute to the amplification of content by far-right media outlets which are currently on the rise in Europe and often disseminate untruthful allegations against female and gender-diverse individuals[70].

Finally, rules seeking to prevent the spread of disinformation are included in the Artificial Intelligence (AI) Act, which was adopted in June 2024 and will apply from August 2026[71]. Under Article 50, providers of AI systems generating deepfakes shall make sure that the outputs are masked in a machine-readable format and detectable as artificially generated or manipulated, while deployers shall disclose that the content has been artificially generated or manipulated[72]. At the same time, the scope of this obligation is restricted when the content forms part of "an evidently artistic, creative, satirical, fictional or analogous work or programme". In this case, the deployer of an AI system can indicate the existence of such generated or manipulated content without hampering its display or enjoyment. However, even if individuals are made aware of the satirical nature of such content, its broad dissemination can still fuel misogyny and challenge women's participation in public life. Since this exemption might be exploited by malign actors spreading gendered disinformation, it may come to interfere with the EU's "unmuting" aspiration.

2.3. Remedies available to victims of gendered disinformation

The EU legal framework provides only a limited set of substantive rules relevant for combatting gendered disinformation. In a similar vein,

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[70] See, for example, O. Bonnel, "Italian Far-Right MP Wants to Take over the Country's Second-Largest Press Agency", *Le Monde* (13 April 2024), https://www.lemonde.fr/en/international/article/2024/04/13/in-italy-a-far-right-mp-wants-to-take-over-the-country-s-second-largest-press-agency_6668293_4.html (accessed on 13 November 2024).

[71] Regulation (EU) 2024/1689 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), *O.J.* L 2024/1689 (2024) ("AI Act").

[72] AI Act, art. 50(2) and (4).

the range of remedies available to victims of gendered disinformation under EU law is scant. Defamation law constitutes the most evident avenue for challenging false or misleading information. While the right to reputation is recognised under the EU legal order, there is no harmonised regulation on defamation. Hence, substantive and procedural aspects of domestic defamation laws in Member States differ significantly. In any event, women and gender-diverse people seeking to bring lawsuits against false statements causing damage to their reputations are anticipated to face significant barriers. First, it may be challenging to prove the falsity of claims or establish a causal link between the claims in question and the harm that occurred[73]. This challenge came to the fore in the defamation proceedings brought by Nina Jankowicz, the US-based disinformation expert and former executive director of the disbanded Disinformation Governance Board, against Fox News[74]. Jankowicz alleged that the media outlet spread false information about her work, including unfounded allegations that she intended to curtail the free speech of American citizens. However, her lawsuit was dismissed by the US District Court in Delaware as it found that most of the statements cited referred to the Board rather than to Jankowicz personally and that the statement which directly concerned Jankowicz's role in policing information was not false[75].

What is more, only some individuals targeted by gendered disinformation have the resources and capacity needed to initiate court proceedings. For instance, Italian Prime Minister Giorgia Meloni is currently seeking €100,000 in damages from two men who had allegedly created pornographic deepfake videos featuring her face and uploaded them on an adult website in 2020[76]. During the trial, she claimed that her lawsuit was aimed at protecting women at large. However, while the wide coverage of this lawsuit might indeed deter some individuals from disseminating disinformation for fear of civil liability or criminal prosecution, women who do not have access to legal assistance or face

[73] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan, *op. cit.*, p. 7.

[74] Jankowicz *v.* Fox, Complaint, Delaware Superior Court, 10 May 2023.

[75] US District Court, District of Delaware, Civil Action No. 23-513-CFC, Memorandum signed by Judge Colm F. Connolly on 22 July 2024.

[76] T. Klington, "Meloni Sues Deepfake Porn Creator 'to Protect Women'", *The Times* (9 October 2024), https://www.thetimes.com/world/europe/article/meloni-sues-deepfake-porn-creator-to-protect-women-rxvjz08x7 (accessed on 8 November 2024).

financial constraints might not be able to protect their rights in court when confronted with gender-related information attacks themselves. Hence, harmonisation of legislation on defamation alone would not help achieve the desired "unmuting" effect unless accompanied by robust measures to tackle barriers to access to justice.

Another pathway available to victims of gendered disinformation is to report it to the platform hosting it. Non-judicial user redress mechanisms are meticulously outlined in the DSA. Under Article 16 DSA, all providers of hosting services must enable any individual or entity to notify them of the presence of allegedly illegal content on their service. Most online platforms also allow their users to flag content incompatible with their terms and conditions. If the platform fails to take action on this content, individuals and entities have access to internal complaint-handling systems foreseen under Article 20 DSA. Where a complaint contains sufficient grounds that the platform's decision not to act is unfounded, it shall reverse its decision without undue delay. Finally, if the complaint has not been resolved by means of the internal complaint-handling system, users of online platforms can submit a dispute to any certified out-of-court dispute settlement body (Article 21 DSA). However, while these bodies offer a "swift, efficient and cost-effective" alternative to judicial proceedings[77], they may not impose a binding settlement of the dispute on the parties[78]. Therefore, the platform could refrain from removing false or misleading information even if the out-of-court dispute settlement body establishes its incompatibility with this platform's terms and conditions.

This "three-tiered" approach to user redress realised in the DSA seeks to enhance the accessibility of remedies for affected individuals[79]. At the same time, there are serious doubts concerning the effectiveness of the provided mechanisms in combatting gendered disinformation. Apart from the fact that online platforms still have the final say in disputes with their users, research demonstrates that certain vulnerable groups are hesitant to confront platforms directly due to a lack of trust in the

[77] DSA, art. 21(3)(e).

[78] DSA, art. 21(2).

[79] A. Kuczerawy, "Remedying Overremoval", *Verfassungsblog* (3 November 2022), https://verfassungsblog.de/remedying-overremoval/ (accessed on 21 December 2022).

legitimacy and fairness of their internal redress processes[80]. Moreover, since gendered disinformation often occurs in coordinated forms, reporting every instance may simply be unfeasible for an individual[81]. Therefore, user redress mechanisms under the DSA appear to be ill-suited for tackling gendered disinformation, hampering the EU's commitment to amplifying the frequently silenced voices.

Conclusion

The phenomenon of gendered disinformation, which can discourage those actively participating in public life from speaking out, should be taken seriously in the effort to create a more trustworthy information environment. This chapter has demonstrated, however, that the mechanisms available under EU law are severely limited when it comes to addressing gender-related information threats. Although the regulatory measures against disinformation recently adopted by the EU reveal notable traces of the "unmuting" narrative, a more nuanced approach is vital for enhancing the EU's "unmuting" capacity. A greater focus on uplifting the voices which may be silenced by the spread of disinformation is imperative for ensuring the legitimacy of the EU's regulatory strategy in this area.

As a first step, the EU institutions should expressly acknowledge the distinct and pressing nature of threats posed by gendered disinformation. While several legislative instruments already address hate speech and cyber crimes, less grave threats – such as untruthful claims reinforcing gender bias – often fall outside the scope of these offences. Those provisions which seek to tackle not only illegal but also harmful content and could thus contribute to curbing gendered disinformation remain vague. In this respect, the Commission could draw attention to this problem by issuing guidelines on best practices and recommend measures for tackling gendered disinformation as a systemic risk in line with Article 35(3) DSA. This would help VLOPs and VLOSEs elaborate more focused strategies for addressing gender-related threats. The issue of gendered disinformation could also be addressed more broadly in a

[80] See, for example, K. Vaccaro *et al.*, "Contestability For Content Moderation", *Proceedings of the ACM on Human-Computer Interaction* (2021), p. 1-28, at p. 13-16.

[81] N. Eder, "Making Systemic Risk Assessments Work: How the DSA Creates a Virtuous Loop to Address the Societal Harms of Content Moderation", *German Law Journal* (2023), p. 1197-1218, at p. 1202-1203.

recommendation that could be adopted under Article 292 TFEU, which would also help stimulate action on the part of the Member States.

Furthermore, it is important that the EU ramps up its efforts to combat gendered disinformation. To that end, it can engage the already existing mechanisms, such as trusted flaggers under Article 22 DSA. Trusted flaggers are independent entities with expertise and competence in detecting, identifying and notifying illegal content[82]. While providers of online platforms are required to prioritise notices submitted by trusted flaggers, the latter are precluded from reporting harmful content. Nevertheless, online platforms could be encouraged to commit to reviewing notices concerning disinformation, including its gendered forms. The EU also needs to lay down additional mechanisms for combatting the spread of gendered disinformation driven by the rapid advancements of generative AI. For instance, in addition to obliging Member States to criminalise sexually explicit deepfakes, the EU could consider introducing further rules on political deepfakes, especially those targeting female and gender-diverse candidates. Finally, there is a strong need to enhance the effectiveness of user redress mechanisms. Online platforms could be urged to set up fast-track reporting mechanisms for public figures targeted by large-scale, malicious disinformation campaigns. More focused measures against gendered disinformation would help stimulate free, diverse, and inclusive public discourse in the online environment, thereby contributing to the EU's "unmuting" endeavour.

[82] DSA, art. 22(2).

From silence to empowerment: Rethinking the EU's legal response to hate speech

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Abstract: Hate speech, encompassing a range of racist and discriminatory expressions such as incitement to violence, harassment, and stereotyping, disproportionately targets marginalized groups, silencing their voices and undermining both individual rights and social cohesion. This paper critically examines the EU's current regulatory framework, assessing whether it effectively addresses the complex threats posed by hate speech while safeguarding the foundational values of human dignity, democracy, and equality. In line with the EU's commitment to these principles, the analysis explores the alignment of EU measures with broader European human rights standards, notably those established by the ECHR and the Council of Europe, and considers potential improvements to ensure comprehensive protection.

Introduction

> *Contrary to conventional wisdom, words can hurt. But can they amount to discrimination?*[1]

This was the question Advocate General (AG hereafter) Maduro posed at the outset of his Opinion in the well-known Feryn case[2] framing a

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[1] Opinion for Firma Feryn NV v Centrum voor gelijkheid van kansen en voor racismebestrijding, C-54/07 (2008) AG Maduro ECLI:EU:C:2008:155, 2008 I-05187.

[2] Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV (2008) ECJ Case C-54/07.

legal inquiry into the relationship between speech and discrimination. The Court of Justice of the European Union (CJEU hereafter) has engaged with this issue in a "trilogy[3]" of rulings concerning racist and homophobic statements in the context of employment, reaffirming their performative nature[4] in constituting direct discrimination. While these cases are firmly rooted in anti-discrimination law, the response to this inquiry, I believe, sheds light on the contours, legal complexities, and interpretative frameworks that shape what is broadly classified as "hate speech".

Hate speech lacks a universally accepted legal definition[5]. While all legal systems recognize its potentially harmful impact on individuals and society, legal responses vary, shaped by historical experiences and constitutional traditions[6]. In most cases, hate speech manifests as inflammatory, denigrating, or discriminatory expression, subject to the the constitutionallimitations on freedom of expression.

Minorities and historically oppressed groups are disproportionately affected, as hate speech perpetuates systemic inequalities and reinforces social hierarchies, rendering it a discourse of exclusion. Contrary to the liberal notion of the "marketplace of ideas[7]", which assumes that

[3] U. Belavusau, "The NH Case: On the 'Wings of Words' in EU Anti-Discrimination Law", *European Papers – A Journal on Law and Integration*, vol. 5, n°2 (2020), p. 1001. The case was followed by the Asociaţia Accept v Consiliul Naţional pentru Combaterea Discriminării (2013) ECJ Case C-81/12; NH v Associazione Avvocatura per i diritti LGBTI – Rete Lenford (2020) ECJ Case C-507/18. For a commentary on these cases see A. Tryfonidou, "Case C-507/18 NH v Associazione Avvocatura per i Diritti LGBTI – Rete Lenford : Homophobic Speech and EU Anti-Discrimination Law", Maastricht Journal of European and Comparative Law 27(4) (2020), p. 513; Uladzislau Belavusau, "A Penalty Card for Homophobia from EU Non-Discrimination Law: Comment on Asociaţia Accept (C-81/12)", Columbia Journal of European Law, vol. 21, n°2 (2015), p. 237-259.

[4] The AG makes a relevant reference to speech act theory, arguing that by expressing racist speech, the employer is, in effect, discriminating by excluding certain individuals from the application process. In this context, he draws on the work of J.L. Austin and J. Searle, who conceptualised speech as performative and capable of producing concrete effects. See Opinion for Firma Feryn NV v Centrum voor gelijkheid van kansen en voor racismebestrijding, C-54/07 footnote 14, I-5194.

[5] A. Weber, Manual on Hate Speech (Council of Europe Publ., 2009), p. 3.

[6] B. Parekh, "Is There a Case for Banning Hate Speech?", in Herz and Molnar (dds.), The Content and Context of Hate Speech, 1st edition (Cambridge University Press, 2012), p. 37.

[7] J. S. Mill, On Liberty (Gertrude Himmelfarb ed, Reprinted, Penguin Books, 1982).

harmful speech will be met with counterarguments, the reality often unfolds differently[8]. Hate speech frequently leads to withdrawal and silence, as those targeted disengage from public discussions to shield themselves from hostility, further marginalizing their voices. Research indicates that the pervasive fear induced by hate speech acts as a silencing mechanism, creating social barriers to free expression and impeding equal participation in public debate[9].

This "silencing effect[10]" is even more pronounced on social media, where marginalized users are not only muted by content moderation – especially when defending or reclaiming aspects of their identity – but also subjected to harassment based on those very characteristics[11]. This effect can take various forms in the context of hate speech, manifesting through acts of exclusion that hinder not only political activism[12] but also the realization of self-development and equal access to opportunities. As observed by AG Maduro in the Feryn case[13], racist speech by an employer discouraging certain racial or ethnic groups from applying has tangible consequences, creating a humiliating, discouraging, and ultimately silencing effect on those excluded[14].

Thus, hate speech can have a chilling effect on the freedom of expression of its targets, discouraging their participation in public discourse and undermining equal access to the public sphere-both essential to a democratic, pluralistic society. At the same time, it violates human dignity

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[8] N. Markard, E. M. Bredler, "Jeder Schweigt Für Sich Allein", Verfassungsblog (2021), https://verfassungsblog.de/alleine-schweigen/ (last accessed 17 February 2025).

[9] A. Fladmoe, M. Nadim, "Silenced by Hate? Hate Speech as a Social Boundary to Free Speech", in Midtbøen, Steen-Johnsen and Thorbjørnsrud (eds.), *Boundary Struggles: Contestations of Free Speech in the Norwegian Public Sphere* (Cappelen Damm Akademisk, 2017), p. 47 and 72.

[10] "Toxic Twitter – The Silencing Effect" (Amnesty International, 20 March 2018), https://www.amnesty.org/en/latest/news/2018/03/online-violence-against-women-chapter-5-5/ (last accessed 17 February 2025).

[11] R. Griffin, "Procedural Fetishism in the Digital Services Act", *European Journal of Legal Studies*, vol. 16, Special Issue (2025), p. 19; M. Lamensch, "When Women Are Silenced Online, Democracy Suffers" (Centre for International Governance Innovation), https://www.cigionline.org/articles/when-women-are-silenced-online-democracy-suffers/ (last accessed 19 February 2025).

[12] R. Griffin, *op. cit.*, p. 34.

[13] See above, Case C-54/07, *Opinion for Firma Feryn NV v Centrum voor gelijkheid van kansen en voor racismebestrijding*.

[14] *Ibid.*, I–5193.

by degrading individuals or groups, both in their own perception and in the view of others[15]. In its most extreme manifestations, hate speech incites violence, potentially leading to hate crimes and broader societal unrest. However, despite the wide-ranging harm it inflicts, legal responses tend to focus primarily on its gravest form – incitement to violence – addressing it through criminal law, which ultimately defines its "illegality".

Against this backdrop, this paper argues for a necessary shift in how we understand and legally respond to hate speech within the EU legal framework. While current legal responses predominantly focus on criminalizing the most extreme forms of hate speech, especially incitement to violence, this approach overlooks the broader spectrum of hate speech, which encompasses both discriminatory acts and exclusionary rhetoric that perpetuate social inequality. The first issue, therefore, lies in the over-reliance on criminal law, which, while addressing incitement to violence, fails to capture other harmful manifestations of hate speech that violate core human rights, such as human dignity, equality, and social cohesion. The second issue is the limited scope of protected characteristics under the Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law[16] (Framework Decision hereafter). By primarily focusing on race and ethnicity, the Framework Decision has led to inconsistencies in its transposition into national legislation, resulting in fragmented legal application across Member States.

To address these challenges, this paper proposes a more comprehensive EU-wide legal framework that moves beyond an exclusive reliance on criminal law and integrates anti-discrimination legislation. Recognizing hate speech as a continuum requiring differentiated legal responses ensures a more proportionate and effective approach. Aligning this broader understanding with European human rights standards would enhance legal coherence among Member States while reinforcing the EU's commitment to protecting its fundamental values.

The first part of this paper explores the conceptual and legal evolution of hate speech, examining its impact on fundamental rights, particularly

[15] J. Waldron, The Harm in Hate Speech (Harvard University Press 2012), p. 5.

[16] Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, *O.J.* L 328, 328 (6.12.2008), p. 55-58.

human dignity and equality. It traces the development of hate speech regulation in the European context, analysing how key human rights instruments, such as the European Convention on Human Rights (ECHR hereafter) and Council of Europe recommendations, have shaped legal safeguards that balance freedom of expression with the need to counter harmful speech. This section demonstrates the need for a broader legal framework, to sufficiently address the full range of harms caused by hate speech. The second part critically assesses the EU's existing framework, focusing on the limitations of the Framework Decision in defining protected characteristics and the legal fragmentation caused by its inconsistent national transposition. It also examines the challenges posed by digitalization, particularly in the regulation of online hate speech. The paper highlights how the EU Code of Conduct on Countering Illegal Hate Speech lacks clear and uniform guidelines on defining "illegality" across Member States, further exacerbating inconsistencies in the application of hate speech laws.

Finally, this paper advocates for a regulatory framework that integrates both criminal law and anti-discrimination measures, ensuring a more proportionate response to different forms of hate speech. Such an approach would provide legal clarity and consistency across Member States while enabling individuals and groups targeted by hate speech to seek redress even in cases where criminal law is not applicable. By adopting a more integrated legal approach, the EU can reinforce its role as a guardian of fundamental rights, ensuring that dignity, equality, and freedom of expression are upheld in a pluralistic society.

1. Understanding hate speech: Societal and legal perspectives

It is almost self-evident that any attempt to approach hate speech – whether in the conventional understanding of public sphere or within the digital environment – shall begin with an effort to define the term. However, the use of the word hatred to describe a specific social behaviour can lead to conceptual ambiguity. While the term suggests an "emotive concept[17]", hate speech does not necessarily require the presence or explicit expression of hatred in a narrow sense[18].

[17] Article 19, "'Hate Speech' Explained: A Toolkit" (2015), p. 9. https://www.article19.org/data/files/medialibrary/38231/'Hate-Speech'-Explained---A-Toolkit-%282015-Edition%29.pdf, accessed 8 November 2024.

[18] A. Brown, "What Is Hate Speech? Part 1: The Myth of Hate", *Law and Philosophy*, vol. 36 (2017) p. 439-441, at p. 419.

In other words, much like the terms "Islamophobia" and "xenophobia" extend beyond mere fear to encompass a broader set of oppressive practices, intolerance, and social exclusion – often indicative of systemic mechanisms that perpetuate inequality and normalize discrimination – the term "hate speech" should also be understood as an expression and manifestation of racism, xenophobia, homophobia, or other prejudices, irrespective of any emotional motivation. Besides, law, as a tool of normative regulation, remains detached from the subjectivity of emotions and moral judgments, focusing instead on the external manifestations of behaviour that necessitate legal intervention[19].

This approach aligns with the foundational principles of the rule of law, which is rooted in constitutional guarantees and ensures the equal protection of fundamental rights for all individuals, precisely by virtue of their equal status before the law. However, it cannot be overlooked that the concept of "hatred", with its inherently emotional connotations, has permeated legal discourse as a way to articulate the profound impact of speech that targets individuals or social groups. Indeed, the term conveys the intensity of aversion, hostility, and contempt that such speech embodies – elements that only hatred, as a core and intrinsic human emotion, can encapsulate. This notion becomes particularly significant within the legal framework, not as an emotion in itself, but as a defining characteristic of public expressions that justify institutional intervention and the adoption of restrictive measures to safeguard individual rights, fundamental values and social cohesion[20].

Accordingly, as Parekh notes, while hate speech embodies elements of exclusion and hostility, it primarily serves to reinforce and legitimize discrimination and it does not inherently lead to violence or public disorder. In some cases, the speaker or audience may choose not to act upon it, while those targeted may either refrain from responding or feel too fearful to resist. Consequently, it is a common misconception to define hate speech solely based on its potential to incite public disorder and to regulate it only when such a risk is evident. The primary

[19] This is evident, for instance, in the cases of racist and homophobic speech examined in the "trilogy" of CJEU cases above, where no strong emotion of hatred was identified against the particular social groups.

[20] P. Bárd, J. Bayer, "Hate Speech and Hate Crime in the EU and the Evaluation of Online Content Regulation Approaches" (EPRS: European Parliamentary Research Service, 2020), p. 20.

concern should be its substantive content – namely, how it characterizes individuals or groups – and its broader, long-term impact on both the affected community and society as a whole, rather than just its immediate repercussions in terms of public unrest[21].

Therefore, despite the absence of a clear and universally accepted definition of hate speech[22], and notwithstanding the inherent harm it inflicts on its victims, the degree and nature of this harm – whether through the impact on human dignity and equality or through the disruption of public order and incitement to violence – determine, respectively, the necessity of legal regulation or the possibility of addressing it through alternative, non-punitive measures[23]. While both dimensions constitute integral aspects of hate speech, only certain forms acquire legal significance and fall within the regulatory scope of what is commonly referred to as "illegal" hate speech[24].

These distinctions have shaped an understanding of the concept, which is also reflected in the European legal tradition and the relevant restrictions therein. Therefore, in legal terms, the central issue is no longer about distinguishing lawful from unlawful opinions or expressions, but rather

[21] B. Parekh, *op. cit.*, p. 41.

[22] A. Weber, *op. cit.*, p. 3.

[23] In grappling with these concepts, there is an extensive literature arguing for hate speech regulation based on the different rights and values that ought to be protected. Indicatively, Critical race theory, advanced by scholars such as Matsuda, Lawrence, Stefancic, and Delgado, has played a prominent role in this discourse, viewing hate speech as a tool of oppression that reinforces racial hierarchies and excludes marginalised voices from fair participation in public dialogue. Relatedly, Austin's "Speech Act Theory" considers hate speech as a performative act that 'wounds', framing it not just as offensive language but as an action that inflicts harm similar to physical assault. In Mill's harm principle, later adapted by Feinberg, speech can be restricted when it harms others, while Tsesis considers hate speech a "societal virus" that destabilises social harmony. Waldron and Scanlon focus on hate speech's broader impact on individual's human dignity and social security, viewing it as a force that reproduces fear and marginalisation. See further M. J. Matsuda (ed.), *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press, 1993); R. Delgado, J. Stefancic, *Critical Race Theory: An Introduction*, 3rd edition (New York University Press, 2017); J.L. Austin, *How to Do Things with Words* (Oxford University Press, 1962); J. S. Mill, *op. cit.*; J. Feinberg, *Harm to Others* (Oxford University Press, 1984); A. Tsesis, *Destructive Messages: How Hate Speech Paves the Way For Harmful Social Movements* (New York University Press, 2002); J. Waldron, *op. cit.*; T.M. Scanlon, *The Difficulty of Tolerance: Essays in Political Philosophy*, 1st edition (Cambridge University Press, 2003).

[24] P. Bárd, J. Bayer, *op. cit.*, p. 20.

about identifying which speech is compatible with democratic values and which is not. In this context, when hate speech occurs, it is regarded as an action, not merely an opinion[25].

2. Addressing hate speech speech within the Council of Europe

As indicated in the beginning of this chapter, hate speech, as a form of expressed discourse, falls within the scope of both constitutional protections and the limitations imposed on freedom of expression, as outlined in international and European human rights instruments. Therefore, while freedom of expression is a fundamental right, its exercise is subject to legal constraints aimed at safeguarding the rights of others and maintaining public order in a democratic society[26].

Within the European legal order, Article 10 of the ECHR guarantees freedom of expression, while paragraph 2 sets out the legitimate grounds for its restriction. The European Court of Human Rights (ECtHR hereafter) interprets these provisions in accordance with the principles of legality, necessity, and proportionality. In assessing the margin of appreciation afforded to States, the Court examines whether a given restriction is the least intrusive means of achieving a legitimate aim and whether it maintains a fair balance between competing rights and interests[27].

[25] F. Tulkens, *When to Say is to Do: Freedom of Expression and Hate Speech in the Case-Law of the European Court of Human Rights*, European Judicial Training Network Seminar on Human Rights for European Judicial Trainers (9 October 2012), p. 3.

[26] This is reflected in Article 29(2) of the Universal Declaration of Human Rights, which has influenced the European Convention on Human Rights, allowing restrictions on freedom of expression only when prescribed by law and necessary to protect the rights of others or serve the public interest. Similar provisions are found in Article 19(3) of the International Covenant on Civil and Political Rights. In the context of hate speech, international human rights treaties established in the post-war period impose specific obligations on states to criminalise certain forms of intolerant expression, including hate propaganda and assertions of racial superiority, which are recognised as particularly harmful. These legal prohibitions are rooted in the historical legacy of war and the acknowledgment of the dangers posed by such rhetoric to social cohesion and human rights. State obligations to intervene in this regard, are explicitly codified in key legal instruments, such as Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination and Article 20(2) of the International Covenant on Civil and Political Rights. See also "General Recommendation No. 35 (2013) on Combating Racist Hate Speech" (OHCHR).

[27] I.e. Perïnçek v Switzerland (2013) ECtHR 27510/08.

This legal framework is foundational to the functioning of a democratic society, where freedom of expression is essential for personal autonomy and public debate. As with minority rights, its legal protection is particularly relevant for expressions that challenge dominant views, including speech that may be provocative, radical, offensive, shocking, or otherwise unpopular – an interpretation consistently reaffirmed by ECtHR case law[28].

Nonetheless, the recognition of inherent limitations on freedom of expression is a deliberate policy decision enshrined in law, reflecting the commitment of States that, in the aftermath of World War II, established the Council of Europe to prevent the resurgence of propaganda and related rhetoric that could create conditions conducive to large-scale human rights violations. This commitment is explicitly embedded in Article 17 of the ECHR, which serves as a safeguard against the abuse of rights for purposes that undermine the very principles they are meant to uphold[29].

Notably, though, apart and beyond those guarantees, the full enjoyment of the right, entails a duty for states not only to avoid undue restrictions but also a positive obligation to create a safe and inclusive environment where all citizens can engage in public debate equally, without exclusion or harm, fear or coercion[30], as ECtHR case law has further confirmed[31]. This environment should facilitate the transformation of legally enshrined rights from mere declarations into lived realities, allowing for the unrestricted development of all aspects of individual identity within the broader, social fabric. It is precisely this unconditional imperative to safeguard human dignity and uphold equal participation in social and political life that is jeopardized by hate speech, which functions as a discriminatory, silencing rhetoric and perpetuates negative stereotypes. Put differently, such discourse undermines public trust in the State's

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[28] Handyside v the United Kingdom (1976) ECtHR 5493/72 para 49.

[29] Article 17 stipulates that "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

[30] On States' positive obligations see also C. Angelopoulos *et al.*, "Study of Fundamental Rights Limitations for Online Enforcement through Self-Regulation" (Institute for Information Law (IViR) 2015) p. 10-13.

[31] Dink c Turquie (2010) ECtHR 2668/07, 6102/08, 30079/08, 7072/09, 7124/09. See also J. Waldron, *op. cit.*, p. 30.

commitment to its role as the guarantor of a safe public and the guardian of rights and freedoms for all individuals – especially those most vulnerable, at the very core of their existence[32] – or, more precisely, *because* of their very existence and the characteristics that define their identity.

At the level of the Council of Europe, the approach to hate speech regulation has evolved over time, reflecting the changing nature of the phenomenon, which now extends beyond incitement to violence based on race or ethnicity. The recent Recommendation of the Committee of Ministers on combating hate speech[33], builds upon previous initiatives, including General Policy Recommendation No. 15 of the European Commission against Racism and Intolerance[34] (ECRI hereafter) and expands upon the earlier Recommendation Rec(97)21[35], offering a more comprehensive and inclusive definition of contemporary forms of intolerance.

In this revised approach, hate speech is perceived as

> all types of expression that incite, promote, spread, or justify violence, hatred, or discrimination against a person or group of persons, or that denigrates them, based on real or attributed personal characteristics or status, such as 'race,' color, language, religion, nationality, national or ethnic origin, age, disability, sex, gender identity, and sexual orientation[36]

This definition further clarifies that hate speech encompasses a spectrum of expressions that vary in severity, harm, and impact on specific groups in different contexts. Accordingly, States should adopt a range of carefully tailored measures to effectively prevent and address hate speech, distinguishing between expressions that necessitate criminal sanctions, those that warrant civil or administrative responses, and less

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32 B. Parekh, *op. cit.*, p. 44.

33 Council of Europe Committee of Ministers, "Recommendation CM/Rec(2022)16 of the Committee of Ministers to Member States on Combating Hate Speech" (Council of Europe 2022) CM/Rec(2022), p. 16.

34 European Commission against Racism and Intolerance (ECRI), "ECRI General Policy Recommendation No. 15 on Combating Hate Speech" (Council of Europe 2015).

35 Committee of Ministers, "Recommendation No. R (97)21 of the Committee of Ministers to Member States on the Media and the Promotion of a Culture of Tolerance" (Council of Europe, 1997).

36 Council of Europe Committee of Ministers, "Recommendation CM/Rec(2022)16 of the Committee of Ministers to Member States on Combating Hate Speech", *op. cit.*, Art. 1 para 2.

severe yet still harmful speech that does not meet either threshold and should, therefore, be addressed through policy rather than legal action[37].

The above delineations of hate speech are further reflected in the European Court of Human Rights (ECtHR hereafter) case law. While a comprehensive analysis of the Court's approach to hate speech is beyond the scope of this chapter[38], it is important to note that the Strasbourg Court, despite refraining from providing a precise definition of hate speech, has drawn on the framework established in the Council of Europe's Recommendation (97)21 to inform its case-by-case approach[39]. Within this context, two aspects merit particular attention.

First, even before the Committee of Ministers adopted its updated Recommendation, which expanded the scope of characteristics protected against hate speech, the ECtHR had already established a clear stance on hate speech targeting individuals based on sexual orientation, drawing parallels with its case law on racism and xenophobia. This was developed in the landmark case *Vejdeland and Others v. Sweden*, where the Court recognized sexual orientation, alongside race, ethnicity, and religion, as a fundamental aspect of personal identity and group affiliation, thus warranting equivalent protection under the Convention[40]. In this respect, Recommendation CM/Rec(2022)16 serves not only to reinforce but also to align with the Court's existing jurisprudence, illustrating the dynamic interplay between judicial precedent and policy guidance.

Second, the Court has held that speech which perpetuates stigmatization or harmful stereotypes – such as homophobic remarks – may be classified as hate speech due to its serious, severely harmful, and prejudicial nature, regardless of whether it directly incites violence, which is typically addressed through criminal law[41]. Notably, it has, in particular, held that speech perpetuating stigmatization or harmful stereotypes – such as homophobic remarks – can be classified as hate speech due to its "serious, severely hurtful and prejudicial" nature, therefore, recognizing

[37] *Ibid.* Art. 3 (a) (b).

[38] See indicatively S. Sottiaux, "Conflicting Conceptions of Hate Speech in the ECtHR's Case Law", *German Law Journal*, vol. 23 (2022), p. 1193.

[39] I.e Gunduz v Turkey (2003) ECtHR 35071/97.

[40] Vejdeland and Others v Sweden (2012) ECtHR 1813/07 paras 42, 44.

[41] *Ibid*. 55. See also concurring Opinion of judge Spielmann joined by judge Nussberger.

that incitement to violence is only one manifestation of hate speech[42]. In this regard, the Court aligns with the views and standards established by international and regional human rights bodies[43]. It further recognizes that hate speech poses a significant threat to democratic society as it fosters prejudice, which can lead to discrimination and, in some cases, escalate into violence against minority groups. Given these harmful consequences, it does not merit protection under the principles of free expression[44].

3. Combating hate speech in the EU

Based on the preceding analysis, it can be argued that the standards developed by the Council of Europe provide essential normative guidance for interpreting and addressing the harm of hate speech at both individual and collective levels within the EU. In this context, the relationship between the EU and the ECHR is not merely theoretical; it forms an integrated system for the protection of fundamental rights in Europe. This system, grounded in the rule of law, reflects the shared foundational values of both legal orders, which stem from a common European constitutional tradition.

The EU's commitment to fundamental rights, deeply rooted in the ECHR and the constitutional traditions of its Member States, has progressively strengthened through the EU Treaties and judicial interpretation. By identifying these shared traditions, which are incorporated in the ECHR to which all EU Member States are parties, the EU establishes a primary reference point for protecting rights. Over time, these rights have been further integrated into core EU legal texts, with the CFR consolidating many substantive protections derived from the ECHR, particularly in Article 21. Where overlaps between rights occur, Article 52(3) of the Charter ensures alignment with the ECHR while permitting higher levels of protection within the EU when implementing EU law. The Lisbon Treaty further reinforced this connection by recognizing ECHR principles as foundational to EU law (Article 6(3)) and mandating

[42] Lilliendahl v Iceland (déc) (2020) ECtHR 29297/18 para 38.

[43] European Commission against Racism and Intolerance (ECRI), *op. cit.*; United Nations High Commissioner, for Human Rights and reports of the Office of the, and High Commissioner and the Secretary-General, "Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred That Constitutes Incitement to Discrimination, Hostility or Violence" (2012) A/HRC/22/17/Add.4.

[44] *Ibid.* See concurring opinion of judge Yudkivska joined by judge Villiger.

EU accession to the ECHR (Article 6(2)). This structured interaction between the EU and Council of Europe human rights frameworks ensures a cohesive and unified European commitment to upholding fundamental rights.

The EU has long acknowledged the profound impact of hate speech, both at the individual level – particularly in relation to human dignity, equality, and freedom of expression, often leading to self-censorship and disengagement from public debate – and at the societal level, where it poses a direct challenge to the Union's fundamental values[45]. This recognition has necessitated EU-wide action to address hate speech in a consistent and effective manner, though often in a rather declaratory fashion by the Commission[46]. Moreover, the EU has identified various manifestations of hatred, including bullying, harassment, verbal abuse, disinformation, threats, incitement to violence, and even acts of physical violence, which, given its widespread presence across social and political spheres, necessitates a comprehensive and multifaceted legal response[47]. At the same time, hate speech has increasingly proliferated in the digital sphere, where the EU upholds the principle that "what is illegal offline is also illegal online[48]". However, since the regulatory framework governing digital platforms, particularly under the Digital Services Act (DSA), applies only to illegal content[49] – determined by pre-existing substantive legal provisions – the following assessment of the EU's approach to combating hate speech will necessarily focus on legally binding instruments addressing hate speech both online and offline. Against this backdrop, the analysis will examine the key legal frameworks in place, including the Framework Decision on combating certain forms of racism and xenophobia, the Audiovisual Media Services Directive, and the Commission's recent proposal to expand the list of

[45] "Communication from the Commission to the European Parliament and the Council: A More Inclusive and Protective Europe: Extending the List of EU Crimes to Hate Speech and Hate Crime" COM/2021/777 final 8 (2021).

[46] *Ibid.*

[47] European Commission, "Joint Communication to the European Parliament and the Council: No Place for Hate: A Europe United against Hatred" JOIN(2023) 51 final 2 (2023).

[48] European Commission, "Tackling Illegal Content Online: Towards an Enhanced Responsibility of Online Platforms" Communication COM/2017/0555 final 2 (2017).

[49] 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) 2022 (32022R2065) Recital 12.

EU crimes to include hate speech and hate crime. Additionally, reference will be made to the EU Code of Conduct on Countering Illegal Hate Speech, which, despite being a self-regulatory initiative, derives its legal basis from substantive provisions and serves as an essential tool for guiding social media platforms in addressing illegal hate speech online.

3.1. The Council Framework Decision 2008/913/JHA on combatting certain forms and expressions of racism and xenophobia by the means of criminal law

In the EU, hate speech has been addressed primarily as a manifestation of racism and xenophobia through the Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, introduced in response to the rise of far-right movements that posed a threat to the European integration project. Based on Article 29 TEU, the Framework Decision built upon the objectives of the 1996 Joint Action[50], which it replaced, aiming to resolve the divergence in Member States' legal approaches to racist and xenophobic offences. Consequently, it establishes minimum criminal requirements[51] across the Union to combat racism and xenophobia, by approximating laws[52] not only enhancing judicial cooperation but also setting consistent standards for addressing such crimes in national legislation[53]. This development marked a shift in EU policy from merely harmonizing legal systems to making the fight against racist offences a distinct EU objective, applying both to online and offline offences[54].

In essence, the Framework Decision targets two categories of offences: racist and xenophobic hate speech, and racist and xenophobic hate crime. However, the terms "hate speech" and "hate crime" do not

[50] Joint Action/96/443/JHA concerning action to combat racism and xenophobia, *O.J.* L185/5 (1996).

[51] Framework Decision Recital 13.

[52] F. Calderoni, *Organized Crime Legislation in the European Union: Harmonization and Approximation of Criminal Law, National Legislations and the EU Framework Decision on the Fight Against Organized Crime* (Springer, 2010) p. 8-10.

[53] E. Psychogiopoulou, "The Fight Against Digital Hate Speech: Disentangling the EU's Regulatory Approach and Hurdles", *German Law Journal*, vol. 25, n°7 (2024) p. 1182 and p. 1184.

[54] Art. 1(1)(b) refers to an act committed by "public dissemination or distribution of tracts, pictures or other material".

appear explicitly in the text[55]. Instead, the instrument refers to racism and xenophobia as direct violations of the principles upon which the Union is founded and are common to the Member States, namely liberty, democracy, respect for human rights and fundamental freedoms and the rule of law[56]. Despite the absence of specific terminology, it is evident that the Framework Decision aims to define and combat certain forms of hate speech as manifestations of racism and xenophobia, employing criminal. This intent is strongly supported by the preamble, which references the respect for fundamental rights enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms, particularly Articles 10 and 11, which concern freedom of expression and freedom of assembly and association[57]. Moreover, given that all Member States had already criminalized hate crimes in their national legislation[58], and that the Framework Decision's only contribution in this area is to establish racist or xenophobic motivations as aggravating factors in sentencing, it becomes clear that the initiative focuses specifically on hate speech as an act of racism, rather than on hate crimes in general.

Under the Framework Decision, hate speech is understood as an act of hatred linked to racism and xenophobia, requiring public incitement to violence or hatred against a group or individual based on race, colour, religion, descent, or national or ethnic origin. It also covers the public denial, condonation, or trivialization of the Holocaust and other crimes against humanity if such actions incite violence or hatred. Member States may extend these minimum protections by adding characteristics like sexual orientation or gender identity[59] or by limiting hate speech

[55] As it is noted also in the Report on the implementation of the Framework Decision, the terms "hate speech" and "hate crime" do not appear in the Framework Decision. See Commission, "Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law" (SWD (2014) 27 final) 1.

[56] Framework Decision Recital 1.

[57] *Ibid.* Recital 14.

[58] European Commission, Explanatory memorandum to the proposal for a Council Framework Decision on combating racism and xenophobia COM/2001/0664 final-CNS 2001/0270 (2001), p. 3.

[59] "Report from the Commission to the European Parliament and the Council on the Implementation of Council Framework Decision 2008/913/JHA on Combating

offences to those likely to disturb public order[60], leading to considerable inconsistencies in the transposition of these protections into national legislation across Member States. Thus, it appears that the Framework Decision was proposed to address certain manifestations of racism and xenophobia, when publicly expressed through any available means, by creating a common framework for punishable offences, provided that these expressions reach a level of severity capable of justifying the use of criminal law[61].

However, while the Framework Decision is consistently presented by the Commission as the primary instrument for addressing hate speech[62] – despite the term itself not appearing explicitly – it has faced criticism on multiple grounds. These critiques primarily focus on its heavy reliance on criminal law as the main tool for combating hate speech, as well as the inclusion of "memory laws" that criminalize the denial of historical events[63], the limited scope of protected characteristics[64], and its incompatibility with international legal standards, particularly due to its overly broad definition of "incitement to hatred[65]".

The adoption of the Framework Decision was marked by challenges, facing significant resistance from Member States and resulting in

Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law" (2014), p. 3.

60 *Ibid.*, p. 6.

61 The latter is clearly acknowledged in the guidance note on its practical application, issued 10 years after its adoption, stating that the Framework Decision "defines a common criminal law approach to racist and xenophobic hate speech and hate crimes, which are among the most severe manifestations of racism and xenophobia" (Guidance Note on the Practical Application of Council Framework Decision 2008/913/JHA on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law (European Commission) COM(2016) 383 final, p. 2.

62 "Communication from the Commission to the European Parliament and the Council: A More Inclusive and Protective Europe: Extending the List of EU Crimes to Hate Speech and Hate Crime", *op. cit.*; European Commission, "Joint Communication to the European Parliament and the Council: No Place for Hate: A Europe United against Hatred", *op. cit.*; European Commission, "Tackling Illegal Content Online: Towards an Enhanced Responsibility of Online Platforms", *op. cit.*

63 B. Bukovská, "The European Commission's Code of Conduct for Countering Illegal Hate Speech Online: An Analysis of Freedom of Expression Implications", p. 4.

64 N. Alkiviadou, "The Hierarchy of Hate: Mixed Signals in the Combat against Hate Speech" Verfassungsblog: On Matters Constitutional (2018).

65 Article 19, "EU: European Commission's Code of Conduct for Countering Illegal Hate Speech Online and the Framework Decision" (2016), p. 7.

protracted negotiations and multiple revisions[66]. These inevitably brought to the fore deeper tensions between member states concerning values, rights, policymaking, and their respective constitutional traditions[67]. It is telling that although the Commission first proposed it in November 2001, the final text was not adopted until November 2008[68]. The key points of contention revolved around the protected grounds under national laws[69] and the criminalization of specific acts, such as crimes against humanity – most notably, Holocaust denial.

Ultimately, the Framework Decision proved to represent a compromise; the minimum common denominator among member states, to achieve the EU's goal of combatting serious forms of racism and xenophobia through criminal law. The difficulty in its adoption, exacerbated by the requirement for unanimity in the Council, is officially acknowledged in the preamble of the final text, which notes that complete harmonization of criminal laws was impossible at the time due to cultural and legal differences[70]. In this respect, criminal law was considered only one of the measures needed to address racism and xenophobia, with the initiative focusing on the most severe forms. This was further emphasized in the European Parliament's second report during the re-consultation process, which stressed that the Framework Decision must be integrated into a broader set of measures addressing all forms of discrimination[71]. Therefore, a comprehensive Directive targeting all the grounds of discrimination outlined in Article 13 EC (now Article 19 TFEU)

[66] According to Art. 10(1), Member states were required to communicate the text of the national provisions implementing the obligations set forth in the Framework Decision by 28 November 2010.

[67] Council of the European Union, "Commission Staff Working Document: National Transposition Measures and Data on Application of the Framework Decision Submitted by the Member States", SWD (2014) 27 final, Brussels, 5784/14 ADD 1 (29 January 2014).

[68] Council of the European Union, "Framework Decision 2008/913/JHA on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law", 16351/1/08 REV 1 DROIPEN 94 (26 November 2008).

[69] EU Network of Independent Experts on Fundamental Rights, "Combating racism and xenophobia through criminal legislation: the situation in the EU Member States" Opinion 5-2005 (28 November 2005), p. 28-65.

[70] Framework Decision, recital 6.

[71] European Parliament, "Report on the proposal for a Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law", Session document A6-0444/2007 (14 November 2007) 14 (rapporteur's position).

was considered necessary to complement the Framework Decision's objectives[72].

3.2. The Audiovisual Media Services Directive

Next to the Framework Decision, the Commission has developed a series of legal and policy initiatives to combat manifestations of hatred where they appear across the Union undermining the values upon which the Union was founded. To this end, in the context of the "Digital Single Market Strategy for Europe"[73], the Directive 2018/1808[74] amended Directive 2010/13/EU[75] (Audiovisual Media Services Directive-AVMSD hereafter) to better address audiovisual content on video-sharing platforms in response to changing market realities. The AVMSD provides that the concept of "incitement to violence or hatred" should, where applicable, be interpreted in accordance with the Framework Decision to ensure coherence and legal certainty for businesses and Member States' authorities[76].

However, the Directive adopts a broader approach than the Framework Decision. It obliges service providers to take adequate measures to protect the public from content that incites violence or hatred against individuals or groups based on any of the grounds mentioned in Article 21 of the CFR[77], or from content that constitutes a criminal offence under EU law[78]. Similarly, with regard to human dignity, the Directive requires Member States to ensure that audiovisual media services under their

[72] *Ibid.*

[73] European Commission, "A Digital Single Market Strategy for Europe" COM (2015) 192 final.

[74] Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

[75] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services.

[76] *Ibid.*, Recital 17.

[77] Article 21(1) of the Charter outlines the prohibition of discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.

[78] Recital 47. See also Article 28b (1)(b).

jurisdiction do not feature any content that incites violence or hatred against individuals or groups based on the criteria outlined in Article 21 of the CFR. Therefore, the Directive regards “incitement to violence or hatred” as a violation of human dignity and it further calls on member states to apply the principles of the Framework Decision on illegal hate speech, while extending the scope of protected characteristics in line with the CFR.

3.3. The Code of Conduct on Countering illegal Hate speech Online under the e-Commerce Directive and the Digital Services Act

Alongside legislative reform efforts, the Commission has developed a series of policy initiatives aimed at curbing manifestations of hatred across the Union that threaten the fundamental values upon which the EU was founded[79]. Among these, the Code of Conduct on Countering Illegal Hate Speech Online[80] serves as a key example of a self-regulatory initiative designed to tackle hate speech in the digital sphere. Grounded in the aforementioned principle that what is illegal offline should also be illegal online “illegal” hate speech is treated as a form of illegal content, subject to legislative frameworks governing its removal.

Until recently, illegal online content was regulated primarily through the e-Commerce Directive[81], the main legal instrument for electronic commerce. However, the Directive did not define what constitutes illegal content but rather set out the framework for how online platforms should remove such content[82]. Similarly, the Digital Services Act (DSA hereafter)[83] building on core provisions of the e-Commerce Directive, such

[79] See below.

[80] European Commission, “Code of Conduct on Countering Illegal Hate Speech Online” (2016).

[81] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“Directive on electronic commerce”), *O.J.* L 178 (17 July 2000).

[82] The Directive established a key principle that digital intermediaries are not held liable as long as they do not have knowledge of illegal activity on their platforms. However, they are required to act swiftly to address infringements once they become aware or are informed of them (Article 14). Additionally, Member States are prohibited from imposing a general obligation on digital intermediaries to monitor the information they handle or actively search for facts or indications of illegal activity (Article 15).

[83] 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/

as liability exceptions and the prohibition of general monitoring, reaffirms that the definition of illegal content, including illegal hate speech, should align with existing offline regulations under Union or national law[84].

The Code of Conduct on Countering Illegal Hate Speech Online was introduced in 2016 by the Commission and was initially signed by Facebook, Microsoft, Twitter, and YouTube,[85] requiring these companies to identify and remove illegal hate speech from their platforms. For the purposes of this chapter, the analysis of this initiative will not extend to an examination of the Code's role under the DSA in relation to content moderation practices[86]. It suffices to note, however, that the Code derives its legal basis from the Framework Decision[87]. The Code was recently updated and renamed to the Code of Conduct on Countering Illegal Hate Speech Online+[88]" though this revision did not alter its legal foundation in the Framework Decision. Instead, it merely clarifies in a footnote that

> [i]llegal hate speech as defined by applicable laws, including the Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, as transposed in national jurisdictions, as well as possible forthcoming updates to this Framework Decision, where relevant[89].

EC (Digital Services Act) *O.J.* L277/1 (27 October 2022). As of 17 February 2024, the DSA rules apply to all platforms.

[84] *Ibid.* recital 12.

[85] Instagram, Snapchat and Dailymotion joined the Code of Conduct in 2018, euxvideo.com in January 2019, TikTok in September 2020 and LinkedIn in June 2021."The Code of Conduct on Countering Illegal Hate Speech Online + | Shaping Europe's Digital Future", https://digital-strategy.ec.europa.eu/en/library/code-conduct-countering-illegal-hate-speech-online (last accessed 19 February 2025).

[86] See indicatively Article 19; E. Psychogiopoulou, *op. cit.*; T. Quintel, C. Ullrich, "Self-Regulation of Fundamental Rights? The EU Code of Conduct on Hate Speech, Related Initiatives and Beyond", in Petkova and Ojanen (eds.), Fundamental Rights Protection Online: The Future Regulation of Intermediaries (Edward Elgar, 2020); R. Griffin, C. Vander Maelen, "Codes of Conduct in the Digital Services Act: Exploring the Opportunities and Challenges", SSRN Electronic Journal (2023), https://www.ssrn.com/abstract=4463874 (last accessed 29 November 2024).

[87] European Commission, "Code of Conduct on Countering Illegal Hate Speech Online", *op. cit.*, p. 1.

[88] "The Code of Conduct on Countering Illegal Hate Speech Online + | Shaping Europe's Digital Future", *op. cit.*

[89] *Ibid.* footnote n°4.

In light of the above, it is noteworthy that while the EU has thus far refrained from explicitly using the term "hate speech" in its only legally binding instrument that criminalizes such conduct at the EU level, the Code of Conduct on Countering Illegal Hate Speech Online not only explicitly names hate speech but also specifies its "illegal" form. This shift suggests that, although EU legislation does not adopt the Council of Europe's detailed categorization of hate speech by severity, the Code of Conduct's reference to "illegal hate speech" implies a tacit acknowledgment that forms of hate speech exist which do not meet the criteria for criminal restriction. Given that the Council Framework Decision is the only legally binding EU instrument addressing hate speech, and it does so through criminal law, it can be reasonably assumed that "illegality" of hate speech in the EU context is defined solely by criminal law and applies only to the most serious forms of racism and xenophobia.

However, inconsistent transposition of the Framework Decision into national legislation[90], along with additional national laws[91] criminalizing certain forms of hate speech[92] and varied platform-specific guidelines, creates considerable uncertainty around which forms of hate speech should be prohibited. In addition, the initiative's effectiveness is primarily evaluated based on the volume and speed of content removals rather than on whether the removed content was genuinely illegal[93].

As a result, the Code of Conduct reflects the fragmented approach to hate speech across the EU, with divergent national interpretations and applications of hate speech laws, a trend that continues under the DSA framework.

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[90] Council of the European Union, "Commission Staff Working Document: National Transposition Measures and Data on Application of the Framework Decision Submitted by the Member States" SWD (2014) 27 final, Brussels, 29 January 2014, 5784/14 ADD 1.

[91] German Network Enforcement Act (Netzwerkdurchsetzungsgesetz, NetzDG) (2017) BGBl I 2017, p. 3352.

[92] Greece criminalises incitement likely to lead to acts of hatred or violence; Estonia requires that incitement pose a danger to life, health, or property and Portugal demands an organisational element from the perpetrators. See further, European Commission, "Report from the Commission to the European Parliament and the Council on the Implementation of Council Framework Decision 2008/913/JHA on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law" COM (2014) 27 final, p. 3.

[93] T. Quintel, C. Ullrich, *op. cit.*

3.4. Extending the list of EU crimes in Article 83 TFEU to hate speech and hate crime

In December 2021 the Commission in an attempt to address these disparities identified in the transposition of the Framework Decision by the Member States[94] and statistics confirming a sharp rise and normalization of hate speech and hate crime in Europe[95] particularly targeting marginalized groups[96], proposed an expansion of the current list of crimes defined by the EU Treaties, inviting the Council to adopt a decision defining hate speech and hate crime as an area of crime under Article 83(1) TFEU[97].

This initiative was announced by the president of the EU Commission in her State of the Union address in 2020 as a political statement that "hate is hate-and no one should have to put up with it[98]". The initiative is based on Articles 19 and Article 67 (3) of the TFEU and was reflected in the Commission's working programme as an objective which promotes Union's commitment to fundamental values protection as outlined in

[94] Commission Staff Working Document, Countering racism and xenophobia in the EU: fostering a society where pluralism, tolerance and non-discrimination prevail, Brussels, 15 March 2019 SWD(2019) 110 final, p. 4.

[95] European Parliament, "Resolution on the Rise of Neo-Fascist Violence in Europe" (2018/2869(RSP)) P8_TA(2018)0428, 25 October 2018; ECRI annual reports 2019 and 2020 at: https://rm.coe.int/ecri-annual-report-2019/16809ca3e1 and https://rm.coe.int/annual-report-on-ecri-s-activities-for-2020/1680a1cd59. Also, it is reported that one in 10 (11%) LGBTIQ respondents to a survey by the EU Fundamental Rights Agency (FRA) indicated that they had been physically or sexually attacked because they were LGBTIQ (with trans and intersex respondents experiencing physical or sexual attacks at higher rates during this timeframe: 17% and 22%, respectively), and 51% of 15-17 years old respondents reported being harassment in school: FRA, EU LGBTI Survey II (2020).

[96] For instance, sexual orientation is constantly registered among the most reported grounds of hate speech. See: European Commission, *Code of Conduct on Countering Illegal Hate Speech Online – Results of the Fifth Monitoring Exercise* (June 2020); European Commission, *Code of Conduct on Countering Illegal Hate Speech Online – Results of the Sixth Monitoring Exercise* (October 2021); European Commission, *Code of Conduct on Countering Illegal Hate Speech Online – Results of the Seventh Monitoring Exercise* (November 2022).

[97] Communication from the Commission to the European Parliament and the Council, "A More Inclusive and Protective Europe: Extending the List of EU Crimes to Hate Speech and Hate Crime" COM (2021) 777 final (9 December 2021).

[98] U. von der Leyen, *State of the Union Address by President von der Leyen at the European Parliament Plenary* (16 September 2020) https://ec.europa.eu/commission/presscorner/detail/ov/SPEECH_20_1655 (last accessed 10 September 2024).

Article 2 TEU and to equality regardless of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation[99].

Within this framework, it was considered that hate crime and hate speech are issues that should be addressed at the EU level[100], as these matters may not be sufficiently addressed at the Member State level, especially given the scale and severity of the phenomenon[101], thus, aligning with the principle of subsidiarity as set out in Article 5(3) TEU[102]. Relevant to that, the Commission also stressed that minimum rules for combating online hate speech should not be confined to the digital environment as this would exclude other means of dissemination such as public gatherings, broadcasts, or printed materials and would lead to further legal fragmentation, ultimately undermining the Commission's goal of creating a unified and comprehensive strategy to effectively address hate speech and hate crime across the EU[103].

With regards to the protected characteristics against hate speech, the Union of Equality strategies had already highlighted the necessity of effectively addressing hate speech and hate crimes beyond those covered by the Framework Decision, particularly on the grounds of sex, sexual

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99 European Commission, "Commission Work Programme 2021: A Union of Vitality in a World of Fragility" COM(2020) 690 final (19 October 2020), p. 7. The initiative was already included in the Commision's President letter of intent: European Commission, "State of the Union 2020: Letter of Intent to President David Maria Sassoli and to Chancellor Angela Merkel" (16 September 2020).

100 Council Decision on adding hate speech and hate crime to the areas of crime laid down in Article 83(1) of the Treaty on the Functioning of the European Union COM(2021) 777 final, recital 13.

101 European Commission, *Study to support the preparation of the European Commission's initiative to extend the list of EU crimes in Article 83 of the Treaty on the Functioning of the EU to hate speech and hate crime* (Publications Office of the European Union, 2021), p. 20.

102 *Ibid.*, p. 127.

103 COM (2021) 777 final, p. 18-19. In this respect, the Meijers Committee suggests that the EU should harmonise its criminal justice rules for hate speech with online content moderation policies, ensuring future regulations address both criminalization and platform responsibilities comprehensively, and encourage state authorities to develop clear strategies for working with platforms to manage hate speech. Meijers Committee, "Note on the Communication from the Commission to the European Parliament and the Council – A More Inclusive and Protective Europe: Extending the List of EU Crimes to Hate Speech and Hate Crime" (November 2022), p. 3.

orientation, age, and disability[104], reflected further in the Gender Equality Strategy 2020-2025[105], the LGBTIQ Equality Strategy 2020-2025[106], and the Strategy for the Rights of Persons with Disabilities 2021-2030[107].

Assessing this initiative, the proposal to expand hate speech protections beyond race and ethnicity represents a significant policy development. However, it also raises important questions regarding whether hate speech and hate crime should be treated as a single offence – each contingent upon the other – or whether a more nuanced distinction is necessary to accurately reflect their differences and justify tailored legal responses. In this regard, a clear conceptual distinction is essential for understanding both phenomena, their underlying causes, and the specific harms they produce. Treating hate speech and hate crime under the same legal framework risks overlooking their distinct nature, particularly the fact that hate speech, as an independent offence, requires a more precise and context-sensitive regulatory approach rather than a uniform criminal response.

Undeniably, "hate speech" is indeed often linked with "hate crime", favouring the assumption that all expressions of "hate" are inherently and necessarily criminal. This, however, is not always the case and it might lead to a misconception[108]. Central to this issue is the recognition that human dignity and equality are the primary rights threatened by hate speech, regardless of its potential to incite physical violence, disrupt

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[104] Council Decision on adding hate speech and hate crime to the areas of crime laid down in Article 83(1) of the Treaty on the Functioning of the European Union COM(2021) 777 final, Recital 13.

[105] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Union of Equality: Gender Equality Strategy 2020-2025", of 5 March 2020, COM(2020)152; see also: European Parliament, "Opinion of the Committee on Women's Rights and Gender Equality on Extending the List of EU Crimes to Hate Speech and Hate Crime", 2023/2068(INI) (25 October 2023).

[106] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Union of Equality: LGBTIQ Equality Strategy 2020-2025", 12 November 2020, COM(2020) 698.

[107] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Union of Equality Strategy for the Rights of Persons with Disabilities 2021-2030", 3 March 2021, COM(2021) 101.

[108] Article 19, "'Hate Speech' Explained: A Toolkit" (2015), p. 26.

public order, or erode social cohesion, as previously outlined in the Framework Decision; legal interests that have been traditionally dealt with by State intervention through criminal law.

However, when it comes to hate speech, this specifically and primarily targets individuals or groups based on characteristics or attributes fundamental to their identity – in effect who they are – hereby violating the very essence of their human dignity and undermining their equal standing in society. This right is compromised when hate speech is expressed publicly, as it signals a denial of equality to individuals based on their identified characteristics, irrespective of any impact on public order, which remains a separate legal interest[109]. Therefore, equal treatment stands as an independent legal interest that the European legislator seeks to protect and the harm that hate speech victims' experience, occurs regardless of whether it is accompanied by incitement to violence.

On the other hand, hate crime often builds on the stigmatization of individuals and marginalized groups, with hate speech playing a role in the crime itself. In this case, hate speech effectively "legitimizes" the physical attack, as hateful expressions can progressively dehumanize the victim. In this scheme, it becomes evident that while any physical assault resulting from hate speech must certainly be addressed as a hate crime under criminal law, the harm of hate speech has already been inflicted on the victim through the speech itself, undermining the human dignity and equal standing of the targeted group in society, without requiring any further consequences, as was also affirmed in the relevant ECtHR case law[110].

Considering the above, hate speech, as a discriminatory act, is a standalone offence that may or may not be addressed through criminal law, as "incitement to violence" is not a necessary condition for it to occur. That is to say, while both hate crime and hate speech aim to undermine the dignity and worth of individuals within specific groups, hate speech, unlike hate crime, does not always constitute a conduct requiring the same legal responses[111].

[109] M. Kaiafa-Gbandi, "The Criminal repression against racist rhetoric, racist crimes, and racial discrimination: towards substantive protection of human dignity", *Criminal Justice*, vol. 2 (2016).

[110] *Vejdeland and Others v. Sweden*, *op. cit.*

[111] European Union Agency for Fundamental Rights, European Court of Human Rights, and Council of Europe (Strasbourg), Handbook on European Non-Discrimination Law:

Therefore, as the protection of human dignity and the promotion of equal treatment across the EU emerge as the central objectives of the Commission's efforts, also reflected in its recent initiative[112], appropriate approaches to effectively address hate speech should be developed accordingly.

4. Towards a coherent EU approach to regulating hate speech

From the preceding analysis, it becomes evident that under the current EU legal framework, only specific forms of hate speech are considered "illegal" and require prohibition through criminal law. This includes hate speech that incites to violence or hatred on grounds of race or ethnicity, as well as the denial of certain crimes against humanity directed at individuals or groups identified by these characteristics[113].

Consequently, while hate speech encompasses a wide range of racist and discriminatory expressions-ranging from incitement to violence to subtler acts like harassment, stigmatization, and the reinforcement of negative stereotypes across various protected characteristics-the EU regulatory framework only criminalizes the most severe forms. This narrow approach focuses on a limited set of protected characteristics, mainly addressing traditional forms of racism and xenophobia. As a result, many other forms of hate speech remain unaddressed, highlighting a gap between EU regulation and the broader European understanding of hate speech, as expressed by the Council of Europe human rights bodies.

Against this backdrop, two extremes seem to emerge: on one hand, the application of the most intrusive measure-criminal law-to address a narrow though severe subset of hate speech incidents; on the other, the lack of consistent EU-wide regulation for the broader range of hate speech that commonly targets various protected characteristics. This contrast is even more striking, given the EU's expressed position that

2018 Edition (Publications Office, 2018), p. 87.

112 See further J. Bayer, P. Bárd, *op. cit.*, p. 56.

113 The specific choices can be better understood if we try to contextualize the Framework Decision within the broader legislative framework of the early 2000s. Unlike the anti-discrimination legislation developed during that time, the Framework Decision was proposed under Article 29 TEU, which, following the Amsterdam Treaty, granted the EU the competence to legislate on racism and xenophobia through the approximation of criminal laws. This legal foundation necessitated a focused approach, targeting only the most severe forms of racism and xenophobia-namely, hate speech and hate crime-through the use of criminal law as a last resort, aligned with the Union's minimum standards.

hate speech is a shared issue requiring coordinated responses based on common EU standards[114]. In this context, the current approach is paradoxically maximal[115] in its severity, relying exclusively on criminal responses, yet minimal[116] in its protective scope, addressing only the most extreme manifestations of hate speech.

In envisioning such a regulatory approach, one might look to the framework developed to address discrimination in the EU, which could inform a renewed approach to hate speech, as indicated through the trilogy of cases dealing with racist and homophobic speech. To this end, the EU could apply civil or administrative measures, as suggested before[117], reserving criminal law as a last measure (*ultimum remedium*)[118], thus addressing the full spectrum of hate speech in a manner that is lawful, necessary, and proportionate.

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[114] Council Decision on adding hate speech and hate crime to the areas of crime laid down in Article 83(1) of the Treaty on the Functioning of the European Union COM(2021) 777 final, recital 13.

[115] In this context, I draw on the "maximum standard paradox" as presented by De Búrca. See further P. Craig, G. De Búrca, *EU Law: Text, Cases, and Materials*, 4th edition (OUP, 2007), p. 388. Reference is also made to U. Belavusau, "Fighting Hate Speech Through EU Law", *Amsterdam Law Forum*, vol. 4, n°1 (2012), p. 28.

[116] Distinction made by the AG Maduro in his opinion delivered for the "Feryn" case: "A minimum standard of protection is not the same as a minimal standard of protection". See Opinion of Advocate General Poiares Maduro, *Firma Feryn NV v Centrum voor gelijkheid van kansen en voor racismebestrijding*, Case C-54/07, delivered 12 March 2008, ECR I-5187, §14.

[117] J. Bayer, P. Bárd, *op. cit.*, p. 123.

[118] See also the minutes of the Council submitted towards the last stage of the adoption of the Framework Decision. In this, the Commission noted that the Framework Decision shall not be employed as an instrument to counter public incitement to discrimination by mandating member states to impose criminal sanctions in their national legislation, since this is competence conferred to the Commission under the third pillar. This distinction is particularly important for issues related to combating discrimination, as outlined in Article 13 of the Treaty. The Commission's position was reaffirmed in its Staff Working paper, which argued that Article 15 of Directive 2000/43/EC already mandates member states to impose criminal sanctions when necessary to effectively prevent discrimination based on racial or ethnic origin. Therefore, establishing a separate rule to criminalize discrimination under a different legal framework would be inappropriate and contrary to Article 47 of the EU Treaty, which asserts that the EC Treaty takes precedence over the EU Treaty. See, Council of the European Union, 'Proposal for a Council Framework Decision on combating racism and xenophobia' (8994/1/05 REV 1, LIMITE, DROIPEN 24, 27 May 2005) 18; Commission Staff Working Paper "Legal reasoning for not referring to the concept of 'public incitement to discrimination' in the Commission's proposal for a Council Framework Decision on combating racism and xenophobia", SEC(2002) 375 (3 April 2002), p. 5.

Under this framework, Member States would retain their discretion to define prohibited forms of hate speech, guided by a shared understanding of the protected characteristics outlined in Article 19 TFEU whilst enabling the EU to uphold its positive obligations in ensuring "equality for all, in all its senses[119]".

Alongside these considerations, the added value of a common EU approach to hate speech is supported by the limited legal remedies available outside the scope of criminal law. While civil remedies through tort law can sometimes supplement criminal prosecution under national legislations, they remain largely secondary. Even when defamation laws are applied in civil claims, they are ill suited to hate speech cases, as they primarily serve to protect individual reputation from false statements rather than addressing the broader societal harm caused by hate speech. Unlike hate speech provisions, defamation laws do not require proof of advocacy of hatred. Moreover, a significant limitation of defamation law is its inability to recognize groups as having collective legal standing, preventing them from filing claims as a unified entity. This legal gap is particularly concerning for victims who, in addition to being direct targets of hate speech, often experience systemic exclusion and marginalization. As demonstrated in the trilogy of cases referenced above, applying diverse legal responses to different manifestations of hate speech can empower affected communities to pursue collective claims, enhance political activism, and provide a voice to those who have been silenced in practice. This, in turn, would align the EU's efforts with European human rights standards while preventing further legal fragmentation across Member States.

An EU-wide approach towards hate speech is further apparent in combating hate speech on social media where the cross-border nature of digitalization relativizes the different interpretations of hate speech across Member States which though undermine the EU common foundational values which all Member State commit to safeguard and uphold. This understanding shall not be entrusted at the discretion of social media platforms, but rather the EU has to comprehensively delineate the so-called "illegality" of hate speech where both criminal and anti-discrimination legislation are already in place which will in turn inform procedural guarantees in the digital regulatory framework

[119] European Commission, *A Union of Equality: Gender Equality Strategy 2020-2025* COM(2020) 152 final (5 March 2020).

which alone are not enough to make it up for systemic inequalities. This is essential, as both the rationale underpinning the digital regulatory framework through the DSA and the self-regulation approaches such as the Code of Conduct on Countering illegal hate speech concern only illegal content, therefore substantive rules based on the principle of "what is illegal offline shall be illegal online". Thus, what is considered against the law of any form (criminal, civil or administrative) is of paramount importance on what type of speech is acceptable in the EU, both in line with its foundational values and in line with international and European human rights standards. Ultimately, an EU-wide approach on hate speech by applying the various legislative responses to the various performative acts of hate speech, can empower groups and individuals targeted by hate speech to litigate on collective claims where criminal law shall not be applied, as in the trilogy of cases referred to above, strengthening further collective action, political activism and giving voice to those who were previously silenced in practice, while aligning the EU's efforts with European human rights standards and avoid further legal fragmentation in combating hate speech across Member States.

The need for a coherent EU-wide response is further underscored by the challenges of digitalization, where the cross-border nature of online hate speech deepens legal fragmentation among Member States. Differing national interpretations of hate speech risk undermining the foundational values that all Member States are committed to upholding. This regulatory uncertainty should not be left to the discretion of social media platforms. Instead, the EU must clearly define the legal boundaries of "illegal" hate speech by drawing on both criminal and anti-discrimination legislation to ensure a consistent, rights-based approach.

While the DSA introduces procedural safeguards for content moderation, these alone cannot address the systemic inequalities that shape the prevalence and impact of hate speech. Since both the DSA and self-regulatory initiatives, such as the Code of Conduct on Countering Illegal Hate Speech, apply only to illegal content, it is essential that substantive legal rules governing hate speech are clearly defined. What is deemed unlawful – whether under criminal, civil, or administrative law – determines the limits of acceptable speech in the EU, aligning with both its foundational values and international human rights standards.

A coherent legal framework would not only reinforce the EU's commitment to substantive, binding protections for fundamental rights but also complement the procedural safeguards established in the DSA, enhancing legal certainty and ensuring a level playing field for platforms through a common, transparent, and consistent regulatory approach. In this context, where the principle that the same legal standards apply both online and offline prevails, it is essential that political responsibility for rule-making remains with state authorities, firmly rooted in fundamental rights and the rule of law[120].

Another argument supporting common EU framework addressing hate speech in the broader context of discrimination measures can be sought in the context of the Commission's long-standing commitment to mainstreaming equality. This commitment is already evident through various Action Plans, funding programs, and legal initiatives aimed at promoting EU objectives,[121] particularly in the context of better regulation[122], while actively engaging civil society[123].

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[120] Such an approach properly serves states' obligation to protect individuals' fundamental rights in relations between private parties, invoking the indirect horizontal effect of ECHR protection. See further A. Kuczerawy, "The Power of Positive Thinking: Intermediary Liability and the Effective Enjoyment of the Right to Freedom of Expression", *CiTiP Working Paper*, n°30 (2017), p. 8.

[121] M. Bell*, Racism and Equality in the European Union* (Oxford University Press, 2009), p. 176; see for instance funding initiatives through the "Europe for Citizens" Programme; "Asylum Migration and Integration Fund" and "Horizon 2020" project. These efforts have to be examined along the mainstreaming policies against racism, xenophobia and discrimination across EU member states. See also Commission Staff Working Document, "Countering racism and xenophobia in the EU: fostering a society where pluralism, tolerance and non-discrimination prevail", Brussels, 15 March 2019 SWD(2019) 110 final, p. 9-17.

[122] European Commission, "Extension of the List of EU Crimes to Hate Speech and Hate Crime", Roadmap, Ref. Ares(2021)1431474 (23 February 2021), p. 3.

[123] The Commission under the Citizens, Equality, Rights and Values Programme (CERV) dedicated a funding of 16 million Euros and announced on March 2024 a call for proposals to promote civil society organisations' awareness of, capacity building and implementation of the EU Charter of Fundamental Rights (CERV-2024-CHAR-LITI) including as a call priority "Protecting EU values and rights by combating hate speech and hate crime". See European Commission, "Call for proposals to promote civil society organisations' awareness of, capacity building and implementation of the EU Charter of Fundamental Rights" (CERV-2024-CHAR-LITI). The most recent funding programmes and raising awareness initiatives include "Erasmus+", the "European Solidarity Corps" and "Horizon Europe" see further, JOIN(2023) 51 final, p. 9-13.

As a final remark, it is indeed a common truth that political consensus in the broader field of anti-discrimination is challenging[124]. The prolonged stalemate surrounding the Equal Treatment Directive, unresolved for more than 16 years, attests to this difficulty and leaves limited room for optimism about progress on this or related initiatives[125]. Yet this pragmatic approach may also open the door to broader discussions, testing our shared perceptions of common values across member states – particularly in regard to minority protections as a core element of fundamental rights[126]. It may also encourage affected communities and civil society organizations to intensify advocacy efforts, drawing attention to the persistent legal gaps in protecting diverse groups with collective claims within the EU.

Conclusion

Hate speech is a complex phenomenon that challenges both individual rights and the foundational values of the European legal order. As this paper has demonstrated, it operates along a continuum, ranging from incitement to violence to more subtle but equally harmful forms of discrimination and exclusion. However, the EU's current framework remains limited, primarily addressing only the most severe forms of

[124] The unanimity requirement for legislative acts under Article 19(1) TFEU poses a significant barrier to reform. See also M. Bell, "EU Anti-Discrimination Law: Navigating Sameness and Difference" in Craig and de Búrca (eds.), *The Evolution of EU Law*, 3rd edition (Oxford University Press, 2021), p. 664.

[125] K. Avsec, "Joint Letter: Germany Urgently Needs to Finally Allow EU to Continue Closing Gaps on Anti-Discrimination with Racism, Xenophobia, LGBTI-Phobia and Sexism on the Rise", European Network Against Racism (26 June 2024), https://www.enar-eu.org/joint-letter-germany-urgently-needs-to-finally-allow-eu-to-continue-closing-gaps-on-anti-discrimination-with-racism-xenophobia-lgbti-phobia-and-sexism-on-the-rise/, (last accessed 20 February 2025). UPDATE: The Commission has announced the withdrawal of the proposal for the Equal Treatment Directive, citing "No foreseeable agreement – the proposal is blocked and further progress is unlikely." European Commission, Proposal for a Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation COM(2008) 426 final, 2008/0140 (CNS), Annex IV, point 26.

[126] As Bell notes, while the Race Equality Directive had benefited from favourable political circumstances, the 2008 proposal faced significant challenges. Shortly after its release, the financial crisis began, leading to a period of austerity marked by a general reduction in EU social policy and caution regarding perceived regulatory costs for businesses. Anti-discrimination law remains a politically sensitive issue, particularly clashing with certain populist political agendas. See, M. Bell, "EU Anti-Discrimination Law", *op. cit.*, p. 664.

hate speech and protecting a narrow set of characteristics, leading to legal fragmentation across Member States.

A more cohesive EU-wide approach is necessary – one that integrates criminal, civil, and anti-discrimination measures to ensure a proportionate and effective response. By broadening legal protections to reflect the full scope of hate speech, the EU can strengthen safeguards for human dignity and equality while fostering legal certainty across national systems. This would not only enhance individual protections but also provide collective avenues for redress, empowering targeted communities to challenge discriminatory practices more effectively.

Furthermore, addressing hate speech through a comprehensive legal framework would reinforce equal participation in public life, countering the exclusionary effects of discriminatory discourse. This is particularly relevant in the digital sphere, where the lack of harmonized legal standards has led to regulatory inconsistencies. Ensuring a uniform and rights-based legal framework in line with the European human rights standards would enable both individuals and communities to assert their rights, reinforcing the EU's commitment to democracy, equality, and social cohesion.

The identification of obligations under EU law: tools that can be used by relocated persons to voice their interests?

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Abstract: In the context of climate change and natural disasters, planned relocation refers to the planned process of moving a group of people from their place of origin to one or more new locations, with the intent for this move to be permanent. These relocations represent a form of adaptation to the consequences of climate change, and their frequency is expected to increase in the coming years. However, recognizing planned relocations within Europe remains challenging, resulting in muting these individuals relocated. This chapter examines whether obligations under EU law provide solutions for people relocated to voice their interests. It concludes that, given the internal character of planned relocations, EU human rights law does not appear as the most appropriate instrument in this context. On the contrary, the Water Framework Directive and the European Flood Directive offer some interesting perspectives.

Introduction

Since the 16th Conference of the Parties to the United Nations Framework Convention on Climate Change (COP), planned relocations have officially been recognized as an adaptation strategy to climate change[1]. In the context of climate change and natural disasters, planned relocations refer to "the planned, permanent movement of a group of people from identifiable origin(s) to identifiable destination(s), predominantly

[1] Decision 1/CP.16, FCCC/CP/2010/7/Add.1 (2010).

in association with one or more hydrometeorological, geophysical/ geological, or environmental hazard(s)"[2].

Because they are processes that profoundly affect the lives of the persons involved, planned relocations are commonly considered as an option of last resort. Yet, the Intergovernmental Panel on Climate Change (IPCC) foresees an increase in the need for planned relocations in the coming years[3]. Their impact combined with their rising numbers highlights the need and interest for research on the subject. Planned relocations constitute one of the three forms of climate mobility recognized in the Cancùn Agreement of 2010, the two other forms being migration and displacement. Even if this is evolving, today, planned relocations still constitute the most understudied of these three forms[4].

As demonstrated by Erica Bower and Sanjula Weerasinghe in the dataset they published in 2021[5], planned relocations in a context of hazards, disasters and climate change are taking place across the globe, even if not on the same scale[6]. In general, mobilities related to climate change in Europe are not always brought to the fore. Yet, academic literature on the subject recognizes that member states of the EU are already impacted, and some fall back on relocations to adapt to these consequences, as well as to natural disasters unrelated to climate change.

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[2] E. Bower, S. Weerasinghe, "Leaving Place, Restoring Home: Enhancing the Evidence Base on Planned Relocation Cases in the Context of Hazards, Disasters and Climate Change", (Platform on Disaster Displacement and Andrew & Renata Kaldor Centre for International Refugee Law, 2021), p. 8.

[3] IPCC, Climate Change 2022 – Impacts, Adaptation and Vulnerability. Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (Cambridge University Press, 2023).

[4] E. Ferris, E. Bower, "Planned Relocations: What We Know, Don't Know, and Need to Learn", Researching Internal Displacement (2023), p. 1-12, at p. 1; J. McAdam, E. Ferris, "Planned Relocations in the Context of Climate Change: Unpacking the Legal and Conceptual Issues", *Cambridge Journal of International and Comparative Law*, vol. 4, n°1 (2015), p. 137-166.

[5] This dataset has been published with the support of The Platform on Disaster Displacement, of the Kaldor Centre for International Refugee Law, the International Organization for Migration and the German Development Agency.

[6] E. Bower, S. Weerasinghe, D. Mockhnacheva "Leaving Place, Restoring Home: Global Dataset of Planned Relocation Cases", (2021). Link: https://docs.google.com/spreadsheets/d/1pDR-t1hVApqJiVk6E5DJ7TN0cOtXJiKvS1w8QIP149o/edit?pli=1&gid=1611800107#gid=1611800107 (accessed 4 February 2025).

Some scholars argue that planned relocations are inherently internal, meaning they do not involve crossing an international border[7]. Others, however, understand planned relocations as potentially either internal or international[8]. The latter perspective raises numerous additional questions, particularly regarding the legal status of relocated individuals. Despite these differing views, existing studies on planned relocations demonstrate that examples of such processes are almost always internal[9]. Given the near absence of international relocation cases, this chapter will consider planned relocations solely as internal processes.

This internal nature, combined with the lack of an international framework on the subject, results in the absence of a universal model for planned relocations. Each state is free to develop its own approach to planned relocations and to name it as it sees fit. In this context, persons (soon to be) relocated face challenges in voicing their interests. More precisely, this chapter argues that the EU fails to recognize people relocated as such, and that this lack of recognition results in an effect of muting these persons. These difficulties do not mean that relocated individuals are silent; rather, they are silenced. Here, "silenced" is used as a synonym for "muted", emphasizing the distinction between someone who remains silent and someone who speaks but is silenced (section 1).

Based on this observation, this article explores potential solutions in EU law that could overcome these challenges. If the internal character of these relocations precisely questions the role of the EU in these processes, it happens that EU law applies to internal situations. As it is recognized that planned relocations should be implemented while respecting the human rights of the persons involved in these processes, the article first focused on possible remedies into EU human rights law and, therefore, into the Charter of Fundamental Rights of the European

[7] E. Ferris, "Guidance for Protecting People from Disasters and Environmental Change through Planned Relocations" (UNHCR, Brookings and Georgetown University, 2015), p. 5.

[8] S. Weerasinghe, "Réinstallation planifiée, catastrophes et changement climatique: consolidation des bonnes pratiques et préparation de l'avenir" (UNHCR, 2014); E. Ferris, "Climate-Induced Resettlement: Environmental Change and the Planned Relocation of Communities", *The SAIS Review of International Affairs*, vol. 35, n°1 (2015), p. 109-117; J. McAdam, E. Ferris, *op. cit.*

[9] E. Ferris, E. Bower, *op. cit.*, p. 2-3. See also: J. McAdam, T. Wood. "Kaldor Centre Principles on Climate Mobility", *International Journal of Refugee Law*, vol. 35, n°4, (2024), p. 1-25, at p. 12.

Union (EU Charter)[10] more specifically. Keeping in mind that the EU Charter only applies to Member States when implementing EU law[11], the right to life, the freedom of movement, the right of property and the right of private life will be addressed in the context of planned relocations (section 2).

Nevertheless, due to its limited scope of application, the pertinence of EU human rights law as a tool to voice the interests of people relocated is questioned. This context prompts us to explore broader aspects of EU law in search of alternative remedies. The final section of this chapter intends to do so, with a particular focus on the Water Framework Directive[12] and the European Floods Directive[13] (section 3).

Regarding methodology, this chapter is based on a review of academic literature related to planned relocations in the context of climate change and natural disasters; climate mobilities in the European Union (EU) and the grey literature related to the position of the EU on these subjects. Processes of planned relocations in Europe are here analysed through the lens of EU law, with a few detours through the European Convention of Human Rights (ECHR)[14].

1. Relocated individuals in the EU: silenced by the lack of recognition

This section will begin by examining the existence of planned relocation processes linked to climate change in Europe, with a particular focus on two case studies: the Danube floodplains in Austria and the Simbach torrent in Germany (1.1). It will then explore the challenges individuals face in being recognized as relocated persons and the consequent muting effect of this situation (1.2). Finally, it will analyse the EU's position on planned relocations and climate mobility, assessing whether it mitigates or exacerbates the silencing of relocated individuals (1.3).

[10] Charter of Fundamental Rights of the European Union (2000/C 364/01), O.J. (2000).

[11] Charter of Fundamental Rights of the European Union, Art. 51, § 1.

[12] Directive 2000/60 establishing a framework for Community action in the field of water policy, *O.J.* (22 December 2000).

[13] Directive 2007/60 on the assessment and management of flood risks, *O.J.* (6 November 2007).

[14] Convention for the Protection of Human Rights and Fundamental Freedoms, Roma (4 November 1950).

1.1. The existence of processes of planned relocations related to climate change in Europe, the examples of the Danube floodplains in Austria and the Simbach torrent in Germany

Planned relocation processes in Europe are not immediately evident, as the continent is not typically perceived as one of the regions most affected by the impacts of climate change. This limited visibility is also related to the nature of the process in itself as large-scale relocations have rarely been implemented in this continent, in comparison to other parts of the world[15]. More broadly, until now, the scholarship on climate mobilities "has overwhelmingly been focused on people moving (or not moving, or even just potentially moving) within the Global South, or between it and the Global North"[16]. This chapter will differ from this practice as this section aims to shed light on the notion of planned relocations as an adaptation strategy to climate change or natural disasters unrelated to climate change in the EU.

Concrete examples of planned relocations in Europe include planned relocations from the Danube floodplains in Austria, and a small-scale relocation in Bavaria in Germany[17]. These cases demonstrate that planned

[15] B. Mayr, T. Thaler, J. Hübl, "Successful Small-Scale Household Relocation after a Millennial Flood Event in Simbach, Germany 2016", *Water*, vol. 12, n°1 (2020), p. 1-19, at p. 3.

[16] S. L. Nash, "6. The View from the Fortress: European Governance Perspectives on Climate Change and Migration", in Nicholson and Mayer (eds.), *Climate Migration. Critical Perspectives for Law, Policy and Research* (Oxford, 2023), p. 130-150, at p. 131. In that sense, see also: E. Guadagno, "Comment le phénomène du déplacement environnemental est-il perçu par les pays industrialisés ? Observations empiriques en Italie à partir des glissements de terrain à Sarno et à Cerzeto: Thèse soutenue le 20 juin 2014 à l'Université de Poitiers", *e-Migrinter* (2015), p. 1-6.

[17] Other cases include the Noordwaard project in the Netherlands, the relocation of Vias and of 14 households in Criel sur Mer in France, the Coala project in Sweden, the project of relocation of Letuš and Rečice ob Paki, two Slovenian localities. These cases are respectively documented by S. van Alphen, "Room for the River: Innovation, or Tradition? The Case of the Noordwaard", in Hein (ed.), *Adaptive Strategies for Water Heritage: Past, Present and Future* (Springer International Publishing, 2020) ; M. Courtoy, "'To Leave Is to Die': States' Use of Mobility in Anticipation of Land Uninhabitability", *German Law Journal*, vol. 23, n°7 (2022), p. 992-1011 ; H. Rey-Valette, B. Rulleau, "Gouvernance des politiques de relocalisation face au risque de montée du niveau de la mer", *Développement durable et territoires. Économie, géographie, politique, droit, sociologie*, vol. 7, n°1 (2016), p. 1-16; "Coastal Adaptation through Flexible Land-Use", website of the Swedish University of Agricultural Sciences, (28 March 2022), https://www.slu.se/en/departments/urban-rural-development/research/la-research/ongoing-projects/coala/ (accessed 22 May 2024); "Slovenian Residents to Relocate Amid Weather Threats", BNN Breaking (3 November 2023), https://

relocations are taking place in multiple countries within the EU, with various scales. Each of these two cases has been documented under the label of "relocation" by, at least, one scientific article in the context of climate change[18].

In Austria, multiple relocations have taken place in the Danube floodplains since the 1970s (southern Machland basin – northern Machland basin – Eferding basin). Relocations have been implemented there as a measure of managing flood risk. In terms of size, around 500 households "have been relocated over the past 50 years"[19]. Relocation was voluntary and households that decided to relocate "receive(d) an instalment-based compensation payment"[20].

In Germany, a small-scaled relocation of 11 households took place following the extreme flood event of June 2016 at the Simbach torrent[21]. This flood caused five casualties and the evacuation of thousands of people. Following this event, inhabitants near the river were relocated as their land was needed to implement "an adapted structural alleviation scheme at the riverside near the city center"[22]. Homeowners of the 11 households relocated received financial compensation.

As demonstrated by the German and the Austrian examples, the individuals involved in relocation processes are usually given different options. For instance, they can choose to either move into a house that the state has purchased in another location, receive money and leave the area, or (at least theoretically) decide to stay in the same location as before.

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bnn.network/breaking-news/climate-environment/slovenian-residents-face-relocation-due-to-extreme-weather-risk/ (accessed 22 May 2024). The purpose of the examples quoted in this chapter and its footnotes is not to be exhaustive.

[18] As often highlighted in the scientific literature, distinguishing planned relocations implemented in response to the impacts of climate change from those occurring in response to natural disasters unrelated to climate change is challenging. Nevertheless, studies agree that the number of planned relocations will increase in the coming years due to the adverse effects of climate change. In that sense, see: E. Bower, S. Weerasinghe, *op. cit.*

[19] A. Schindelegger, S. Seebauer, T. Thaler, "Planned Relocation from Danube Floodplains in Austria" (IDMC, 2021), p. 1-10, at p. 4.

[20] A. Schindelegger, S. Seebauer, and T. Thaler, *op. cit.*, p. 2.

[21] B. Mayr, T. Thaler, J. Hübl, *op. cit.*, p. 2.

[22] *Ibidem*.

Having options can influence the relocation process, leading to varied outcomes. As observed with the two examples enumerated, “planned relocations” encompass processes presenting numerous differences with one another notably in terms of size and reactions from the population involved. Some of these differences, notably the ones concerning their designation, can also impact how the people relocated can voice their interests, this is the focus of the second subsection.

1.2. The challenges faced to be recognized as relocated persons and the consequent muting effect of this situation

A person (soon to be) relocated faces challenges in voicing his or her interests. This section tries to present some of them, related to recognition.

To voice your interest regarding a process of planned relocation you need to be recognized as a person relocated. Still, there are doubts on this point in the EU. Sarah Louise Nash explains that: “migration within European nation-states is generally couched in very different terminology: as planned retreat rather than flight”[23]. Similarly, based on examples of hydrometeorological hazards taking place in Italy and on an analysis of their mediatic coverage, Eleonora Guadagno argues that the communication about these hazards took place in a specific political agenda which aims at minimizing the phenomenon of disaster displacements in the Global North[24].

These examples invite us to be cautious regarding the scope of our knowledge about processes of planned relocations in Europe. Indeed, other processes of planned relocations might be made invisible as labelled under different framings. This is especially pertinent in a context in which, as highlighted by Elizabeth Ferris and Erica Bower, there is no consensus on how to designate these processes that we call “planned relocation” in this chapter, “although generally it is a combination of an intention term (planned, strategic, managed) and a movement term (relocation, resettlement, retreat, realignment)”[25]. The existence of multiple terminologies increases the risk for planned relocations in Europe to be framed under other concepts and therefore, be less visible

[23] S. L. Nash, *op. cit.*, p. 138.

[24] E. Guadagno, *op. cit.*

[25] E. Ferris, E. Bower, *op. cit.*, p. 2.

as the literature on "planned relocations" only gives a partial account of the phenomenon.

This statement is exemplified by the two examples detailed in this chapter. They have been selected because precisely they were framed under the label of "relocation" in scientific articles which, as just described, is not always the case. It is worth noting that this political impetus was driven by the objective of risk reduction, as further technical flood mitigation measures were deemed unfeasible. Yet, for instance, the relocation in Simbach was part of a larger risk reduction scheme, in the context of Flood Risk Management, which included other actions such as the building of improved flood defense structures and buyouts[26]. Yet, thinking about flood risk management does not necessarily involve individuals leaving their home.

These difficulties do not imply that people relocated are silent. For instance, the relocation of the Eferding basin triggered "a bottom-up citizen protest initiative, conflicts with residents and a protest note by mayors, which caused delays to the implementation and conflicts between regional and local authorities and stakeholders"[27]. These reactions were caused by an absence of inclusion of local knowledge, needs and interests in the decision-making process[28]. Still, "the households in the relocation zone lacked political power to negotiate or amend the terms of the program. While the program was nominally voluntary, there was a strong informal political impetus to encourage all residents to move out of the relocation zone"[29]. It is important to mention that this political impetus was driven by the goal of risk reduction, as further technical flood mitigation measures were considered unfeasible. Yet, people were not silent here but their lack of political power silenced them.

Later, the question of potential solutions to voice the interests of people relocated would be addressed (sections 2 and 3) but before, the next subsection will look at the EU's position regarding climate mobilities and how it contributes or not to the current muting situation.

26 B. Mayr, T. Thaler, J. Hübl, *op. cit*.

27 T. Thaler, S. Seebauer, A. Schindelegger, *op. cit.*, p. 5.

28 *Ibidem*.

29 S. Seebauer, C. Winkler, "Should I Stay or Should I Go? Factors in Household Decisions for or against Relocation from a Flood Risk Area", *Global Environmental Change*, vol. 60 (2020), p. 1-14, at p. 3.

1.3. The EU's position regarding planned relocations and climate mobilities[30]

The EU lacks a coherent strategy both for climate mobilities happening on its territory and for planned relocations as a specific adaptation measure. The latter might be justified as the internal character of these relocations questions the role of the EU in these processes, each state being free to develop its own type of planned relocation. This question is also very important regarding the responsibility of the EU in muting these individuals.

The same is not true regarding climate mobilities in general, as the EU is interested in the subject. According to Helena Hahn and Melanie Fessler, increasing attention is paid to climate mobilities by the European Institutions[31]. The Commission mostly "is contributing to the problematization of climate change and migration, who the affected people are, and what role the EU could and should be playing"[32]. Yet the EU's position and action regarding climate mobilities seem disconnected from the ground reality on various levels.

The EU struggles to acknowledge the complex and non-linear relationship between climate and mobilities, *to recognize the prevalence of internal movement* and to picture climate mobilities as a form of adaptation and not as a problem[33]. The EU's policy on climate mobility is at the crossroads of multiple areas: migration, climate, development cooperation and humanitarian aid. Each of them possesses its own conception of the issue and develops its own policies[34]. This context leads to two interrelated challenges to EU's action on climate mobility, "policy (in)coherence and counterproductive narratives, and weak institutional coordination"[35].

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[30] This section refers to climate mobilities in the plural form to better grasp the diversity encompassed behind this term. On this matter see: I. Boas, "From Climate Migration to Climate Mobilities", MPC Blog, 9 December 2020.

[31] H. Hahn, M. Fessler, "The EU's Approach to Climate Mobility: Which Way Forward?" (European Policy Center, 2023), p. 1-32, at p. 6.

[32] S. L. Nash, *op. cit.*, p. 132.

[33] H. Hahn, M. Fessler, *op. cit.*, p. 14. These findings are consistent with those of Monika Mayrhofer and Margit Ammer, "People Moving in the Context of Environmental Change: The Cautious Approach of the European Union", *European Journal of Migration and Law*, vol. 16, n°3 (2014), p. 389-429.

[34] H. Hahn, M. Fessler, *op. cit.*, p. 14.

[35] *Ibid.*, p. 5.

Concretely, the Commission principally develops policies and programmes to address climate mobilities through external action[36]. This position is symptomatic of how the EU perceives climate mobilities as an external issue which does not take place inside its territory[37]. As resumed by Sarah Louise Nash: "The central mode of governing climate and migration in Europe is therefore as migration prevention, or better said prevention of migration *to* Europe. This leads to the deeply cynical combination of disavowing the relevance of climate change and migration for European nation-states until people actually begin to enter their territory, while at the same time actively constructing a migration regime that prevents migration linked to climate change, or contains it elsewhere, thus ensuring its continued irrelevance"[38].

This situation results in a lack of discussions regarding internal mobilities related to climate change within the EU and, therefore, to planned relocations. As it is difficult to voice your interests when your existence is unknown, this absence of recognition contributes to silencing persons relocated.

In this context, the following sections will explore potential solutions within EU law that could offer possibilities for silenced individuals to voice their interests. Other avenues may also be considered, including approaches from different disciplines, such as increasing media attention on relocated individuals or advocating for new legal developments, such as the recognition of a "relocated status" under EU environmental law. This chapter, however, focuses on identifying existing legal solutions. While relocations are decisions made at the national level, they must comply with EU law, including the EU's legal framework on human rights, when Member States are implementing EU legislation.

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[36] *Ibid.*, p. 6.

[37] In that sense: S. Klepp, J. Herbeck, "11. Politicising Climate Change Adaptation. Negotiating Environmental Migration in the European Union and the Pacific," in Manou *et al.* (eds), *Climate Change, Migration and Human Rights: Law and Policy Perspectives* (Routledge, 2017), p. 169-188, at p. 181.

[38] S. L. Nash, *op. cit.*, p. 147. In that sense see also : I. Boas *et al.*, "Climate Migration Myths", *Nature Climate Change*, vol. 9 (2019), p. 901-903, at p. 902.

2. Planned relocations and human rights: promising and yet unconvincing solutions at the EU level

At national level, "there is a dearth of regulation of climate change and migration by European nation-states"[39]. The same is true for regulations on planned relocations with only a few exceptions like Fiji which was the first State to adopt national Planned Relocation Guidelines in 2018[40]. However, as has already been highlighted, there are other legislations that, while not specifically focusing on planned relocations, could still be relevant in such contexts. This section examines one of them: the EU's legal framework on human rights.

Several scholars have developed the idea that planned relocations related to climate change should be framed by a human right-based approach[41]. Such framework tackles the "remedial character" of human rights law and therefore proposes a "pre-emptive approach"[42]. Yet, "human rights law allows one to shift the focus to obligations, and to concentrate on the fact that states are obliged to protect the rights of the people within their territory, and that they can be held accountable if they do not do so"[43]. This research is part of the latter.

Planned relocations can engage the respect of numerous human rights[44] and, among them, the freedom of movement (2.2), the right to property (2.3) and the right to respect private and family life (2.4). At the same time, if States do not relocate victims of natural disasters or persons at risk, the right to life of these individuals, living in potentially

[39] S. L. Nash, *op. cit.*, p. 144.

[40] E. Bower, S. Weerasinghe, *op. cit.*, p. 14.

[41] Among them: D. Petz, "Just Relocation? Planned Relocation from Climate Change, Human Rights and Justice," *in* Salomon *et al.* (eds.), *Blurring Boundaries: Human Security and Forced Migration* (Brill Nijhoff, 2017), p. 135-160; M. Gromilova, "Revisiting Planned Relocation as a Climate Change Adaptation Strategy: The Added Value of a Human Rights-Based Approach", *Utrecht Law Review* (2014), p. 76-95, at p. 38; J. McAdam, Climate Change, *Forced Migration, and International Law* (Oxford, 2012), p. 38.

[42] M. Gromilova, *op. cit.*, p. 90.

[43] M. Gromilova, *op. cit.*, p. 88.

[44] M. Gromilova, *op. cit.* Maryia Gromilova identifies (non-exhaustively) eight different rights that are threatened by planned relocations as an adaptation strategy to climate change: the right to life, the right to adequate food, the right to water, the right to adequate housing, the right to work and to education, the right to take part in cultural life, the right to self-determination and the right to development.

uninhabitable territories, might be endangered (2.1). In addition to that, human rights law includes State's obligations that may apply in case of planned relocations. These obligations could constitute a tool for persons relocated to voice their interests, within the limits of the Article 51 of the EU Charter which states that "the provisions of this Charter are addressed […] to the Member States only when they are implementing Union law"[45].

2.1. The right to life (Article 2 of the EU Charter and Article 2 of the ECHR)

Historically, planned relocations have mostly been carried out for development projects. The scientific literature on this type of relocation is generally critical and argues that these movements notably lead to a decline in the socio-economic status of the persons relocated[46]. Generally, planned relocations do not have a good image and are unpopular politically. Nonetheless, compared to development-induced programmes, planned relocations as an adaptation strategy to climate change are particular as the consequences of climate change may threaten the right to life of certain persons.

The right to life enshrined in the ECHR constitutes, to this date, the most developed guarantee of this fundamental right[47]. The Article 2 of the EU Charter has to be read in conjunction with the Article 52, § 3, of the EU Charter which provides that "in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention"[48]. It results from the Explanations relating to the Charter that the right to life is one of these rights[49]. We will therefore also refer to

[45] Charter of Fundamental Rights of the European Union, Art. 51, § 1.

[46] J. McAdam, E. Ferris, *op. cit.*, p. 140; M. M. Cernea, "Public Policy Responses to Development-Induced Population Displacements," *Economic and Political Weekly*, vol. 31, n°24 (1996), p. 1515-1523.

[47] Convention for the Protection of Human Rights and Fundamental Freedoms, Roma (4 November 1950), Art. 2.

[48] Charter of Fundamental Rights of the European Union, Art. 52, § 3.

[49] Explanations Relating to the Charter of Fundamental Rights, *O.J.*, 2007/C 302/02 § (2007), p. 17.

the ECHR and its case law in this section, keeping in mind the scope of application of the EU Charter related to the implementation of EU law.

It is generally acknowledged that "the right to life includes an obligation to take positive measures to protect it"[50]. This chapter will focus on this specific aspect of the right to life. In *Budayeva v. Russia*, the ECtHR had enlarged the scope of these positive obligations to the context of natural risks[51]. While not recognizing compulsory evacuation or permanent relocations measures as a form of positive obligation in this context, the Court leaves the door open for this recognition in certain circumstances[52].

Nevertheless, due to the limitation enshrined in Article 51 of the EU Charter, it has been argued that "the right to life is admittedly not the most relevant of fundamental rights within the context of EU law. In this context, given its broader scope of application, the ECHR appears as a more appropriate instrument for the recognition of planned relocations as one of the positive measures to protect the right to life. At the same time, as the EU expands its competencies and influence, it is important that this crucial right be adequately protected"[53].

In addition to that, admitting that positive measures to protect the right to life could take the form of planned relocation processes and admitting that Member States are doing so while implementing EU law, questions arise regarding the situation of people who decide not to relocate but to remain where they are. The next section will focus on the existence of a right to remain. Here, we are addressing the situation of people *de facto* remaining after a relocation. This scenario raises very important questions that have been framed by Marie Courtoy: "Should people be allowed to choose to continue pursuing an increasingly dangerous way of life, even at the expense of their safety? To what extent can one live

[50] J. McAdam, *op. cit.*, p. 57; F. Tulkens, S. Van Drooghenbroeck, "Article 2. – Droit à la vie", in Picod, Rizcallah and Van Drooghenbroeck (eds.), *Charte des droits fondamentaux de l'Union européenne: Commentaires article par article*, 3rd edition (Bruylant, 2023), p. 71-91.

[51] ECtHR 2 March 2008, Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, *Budayeva and others v. Russia*, § 137.

[52] R. McDermott, P. Gibbons, "Human Rights and Proactive Displacement: Determining the Appropriate Balance between the Duty to Protect and the Right to Remain", *Disasters*, vol. 41, n°3 (2016), p. 587-605, at p. 590.

[53] S. Peers *et al.*, *The EU Charter of Fundamental Rights: A Commentary*, 2nd edition (Hart, 2021), p. 38.

with risk? And how can the law accommodate this?"[54]. This chapter does not intend to answer these complicated questions but to illustrate the stakes of these concrete (soon-to-be more frequent) situations.

2.2. The freedom of movement (Article 45 of the EU Charter)

In EU law, freedom of movement is conceived as the freedom to move from one Member State to another[55]. In that sense, Article 45 of the EU Charter is a reminder of the competencies of the EU[56]. This formulation leads Jean-Yves Carlier to mention "purely internal situations" as a "modern limitation" of freedom of movement as enshrined in the EU Charter[57]. Planned relocation as an adaptation strategy to climate change constitute a "purely internal situation", focusing on freedom of movement within one country. Consequently, it appears that the EU Charter does not provide any right to remain for a person relocated in a Member State of the EU.

Yet, in other context, the freedom of movement could constitute a limit to measures of planned relocations taken. The freedom envisioned here is the one not to move but to stay in a certain place or, as framed by Ronan McDermott and Pat Gibbons, "a right to remain"[58]. As demonstrated by Caroline Zickgraf in the context of Pacific Islands, this freedom is of crucial importance as, "in these islands, as in other climate-impacted regions, there are those who prefer to die rather than leave"[59].

Freedom of movement should theoretically always be respected in processes of planned relocation as "there is widespread recognition that relocation should only occur with the free and informed consent of the communities concerned"[60]. Nevertheless, the reality might be more complex than that. For instance, for the relocation of Simbach, it was

[54] M. Courtoy, *op. cit.*, p. 1000.

[55] Charter of Fundamental Rights of the European Union, Art. 45. Given its specificity, we will not address the question of the right to stay of non-nationals (no matter if they are EU nationals or not).

[56] J.-Y. Carlier, "Article 45. - Liberté de circulation et de séjour," in Picod, Rizcallah and Van Drooghenbroeck (eds.), *op. cit.*, p. 1179-1200, at p. 1182.

[57] *Ibid.*, p. 1193.

[58] R. McDermott, P. Gibbons, *op. cit.*

[59] C. Zickgraf, "Where Are All the Climate Migrants? Explaining Immobility amid Environmental Change," Migration Information Source (3 October 2023).

[60] J. McAdam, E. Ferris, *op. cit.*, p. 146.

highlighted that: “relocation is voluntary by law; for some, however, no other option remained than moving away as rebuilding in the same zone was precluded”[61]. This notion of “free and informed consent” brings us to other debates, on the procedural safeguards put in place to respect it. With this statement in mind, the right to property is now going to be analysed.

2.3. The right to property (Article 17 of the EU Charter)

The right to property constitutes a distinctive feature of the EU Charter in comparison to other human rights conventions. Indeed, enshrined in Article 17 of the Charter, the inscription of this right in human rights texts is not commonplace. For instance, the right to property was not inscribed in the ECHR but in its 1st Additional Protocol[62]. Aside from this remark, as for the right to life, the right to property of the EU Charter corresponds to the right enshrined in Article 1 of the Additional Protocol but with a different scope of application.

As an accommodation is generally recognized as a form of possession, there is no doubt that the right to property might apply in the case of relocation, if within the scope of implementing EU law. In addition to that, planned relocations being normally voluntary, there should be no problem regarding propriety. For instance, for the relocation of Simbach, planned relocation is associated with buyouts. These processes are defined as “a form of property acquisition in which houses and lots are purchased from willing sellers with the land restored to natural open space in perpetuity”[63]. Buyouts differ from expropriation as they are both voluntary and have the purpose to restore land to natural open space infinitely.

In Germany, most of the accommodations included in the plan of relocation were almost or totally destroyed following the flood and it took only some days for the financial offer for compensation to be accepted[64]. Compensation payments were calculated by an independent

61 B. Mayr, T. Thaler, J. Hübl, *op. cit.*, p. 2.

62 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Paris (20 March 1952), Art. 1.

63 E. Ferris, “A Toolbox: Planning Relocations to Protect People from Disasters and Environmental Change” (UNHCR, Georgetown University, IOM, 2017), p. 1-71, at p. 61.

64 B. Mayr, T. Thaler, J. Hübl, *op. cit.*, p. 10-12.

expert, based on the market value before the damage and most people were satisfied with this offer[65]. Yet, in other cases, disagreements could emerge between a landowner and a tenant. Or a person soon-to-be relocated could not only see his or her home relocated but also his or her economic activities. In view of the economic origin of the EU, the Charter might be of help in such cases.

2.4. The right to respect for private and family life (Article 7 of the EU Charter and Article 8 of the ECHR)

This right covers four different aspects: private life, family life, home and communication[66]. This section will particularly focus on the aspects of private life and home. Similarly to the right to life and the right to property, this disposition corresponds to Article 8 of the ECHR[67].

Without forgetting Article 51 of the EU Charter, the right to respect private and family life could constitute a limit for planned relocations when implementing EU law. For instance, it is possible to imagine a person unhappy with the proposition to relocate who would advance that this proposal constitutes an infringement to his or her right to protect private life and home. Even if limitations are authorized under Article 52 of the EU Charter, they need to be necessary and to "meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others"[68].

As limitations need to be necessary, the Article 7 could represent a mean to insure that planned relocations are implemented, as they are supposed to be, as a measures of last resort, when other adaptation strategies are not possible.

Despite the frequent links drawn between planned relocations as a climate change adaptation strategy and human rights, EU human right law does not appear as the most appropriate response for relocated individuals to voice their interests. Interestingly, a similar statement might not apply to the ECHR, which, at first sight, seems to offer a

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65 *Ibid*., p. 11.

66 D. Mangan, "Article 7 (Private Life, Home and Communication) – Respect for Private and Family Life", in Peers *et al.* (eds), The EU Charter of Fundamental Rights (Hart, 2021), p. 151-194, at p. 151-52.

67 Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 8.

68 Charter of Fundamental Rights of the European Union, Art. 52.

more adequate response in this context. On several occasions, Article 51 of the EU Charter has been invoked to explain this limitation. Against this backdrop, the next section will examine potential applications of EU law in cases of planned relocations.

3. The Water Framework Directive and the EU Floods Directive, an invitation for a more in-depth analysis of EU law to voice the interests of persons relocated

Considering the identification of existing rights and obligations as a step towards a better possibility to voice your interests as a person relocated, this section will focus on EU law and more precisely on the Water Framework Directive or the European Floods Directive.

Both Directives apply in the event of floods. They respectively require Member States to submit River Basin Management Plans every six years and to carry out Preliminary Flood Risk Assessments (Article 13) and to identify and map flood risks and then provide measures to reduce risk in a Flood Risk Management Plan (Articles 4 and 5).

As a result of the latest, it is required for "Member States to consider which water courses and coastlines are at risk from flooding and map flooding extent, assets, and humans risk"[69]. The European Floods Directive also requires Member States "to take adequate and coordinated measures to reduce flood risk"[70]. This has concrete consequences as, for instance, "in 2015, Danube countries developed the first Danube Flood Risk Management Plan (DFRMP) in line with the EU Floods Directive to further promote harmonized Danube basin-wide flood risk management. DFRMP was updated in 2021"[71]. Therefore, the European Floods Directive seems to establish cooperation between Member States around natural disasters that can potentially lead to reactive planned relocations. According to Arthur Schindelegger, the establishment of a holistic perspective in flood hazard management promoted by the European Floods Directive would be the reason behind the integration of

[69] ICPDR IKSD. "Flood Risk Management", https://www.icpdr.org/tasks-topics/tasks/flood-risk-management (accessed 6 February 2024).

[70] ICPDR IKSD, *op. cit.*

[71] ICPDR IKSD, *op. cit.*

relocations schemes in Austria[72]. Therefore, even if not straightforward given the internal character of planned relocations, the EU has a role to play in regulating planned relocations, at least indirectly.

Indeed, even though planned relocations are not mentioned in either of these two Directives, both have been mobilized to develop the relocation scheme in Germany[73] and at least the European Floods Directive for Austria[74]. One interesting point in this directive relies in Article 10, § 2, which encourages active involvement of interested parties in the production, review and updating of the flood risk management plans[75]. Consequently, this “reinforces the rights of the public to access this information and have a say in the planning process”[76]. In this context, the EU Floods Directive might constitute a legal basis supporting the requirement of “free and informed consent” evoked previously (subsection 2.2.). Both in Austria and in Germany, communication over the measures and the participation of the persons involved in the relocations have been highlighted as important requirements for a more peaceful process.

Nonetheless, in order to be effective, these dispositions have to be implemented. Even if some forms of protestation were formulated during the relocation in Austria, none of the two cases leaded to legal proceedings. To our knowledge, there is no examples of legal proceedings including such type of planned relocations within the EU (yet). Nonetheless, once again, such processes might exist but be hard to find as framed under other labels than “planned relocations”.

Conclusion

In light of this chapter, it appears that the lack of recognition of persons relocated in the EU amounts to muting these persons. Even if the EU does not constitute the part of the world containing the highest number of planned relocations as an adaptation strategy to climate change,

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[72] A. Schindelegger, “Relocation for Flood Retention in Austria”, in Hepperle *et al.* (eds.), *Opportunities and Constraints of Land Management in Local and Regional Development* (Hochschulverlag, 2018), p. 111–120, at p. 112.

[73] B. Mayr, T. Thaler, J. Hübl, *op. cit.*

[74] A. Schindelegger, *op. cit.*

[75] Directive 2007/60 on the assessment and management of flood risks, *O.J.E.U.*, 6 November 2007, Art. 10, §2.

[76] ICPDR IKSD, *op. cit.*

similar processes are already taking place in this region. This has been demonstrated with the examples of planned relocations from the Danube floodplains in Austria and the small-scale relocation in Bavaria in Germany. As long as persons relocated are not recognized as such, their possibility to voice their interests will be undermined. This matter is of importance as these processes are very likely to become more common in the years to come.

This chapter represents a first step in defining the role, as well as its limitations, that the EU can play in the context of planned relocations. It takes on the challenge of focusing on EU human rights law, despite its limited scope of application, given that human rights are often cited both as being at risk during the implementation of planned relocations and as a valuable framework for guiding these processes. Far from painting an exhaustive picture of the human rights obligations applicable in the case of climate change induced planned relocations, this chapter has focused on the obligations prescribed by the right to life, the freedom of movement, the right to respect for private and family life and the right to property.

Yet, due to this limited scope of application, in the EU context, human rights law does not appear as the most promising already existing legal provisions to voice the interests of individuals relocated. Nevertheless, certain developments could be particularly relevant if Member States implement EU law while relocating parts of their populations. Conversely, some directives, most notably the Water Framework Directive and the European Floods Directive, offer more concrete opportunities in this regard.

Furthermore, as previously mentioned, other avenues, such as recognizing a "relocated status" under EU environmental law, may also be worth exploring. Ultimately, this chapter serves as an invitation to delve deeper into EU law in search of additional provisions to leverage as alternative solutions for relocated individuals to voice their interests when needed.

The refugee resettlement selection process: The new European framework as a gamechanger in giving voice to refugees

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Abstract: Resettlement is presented as a key solution in the New Pact on Migration and Asylum to address the current gaps in legal pathways for asylum seekers. It refers to the selection and transfer of refugees from a State where they have obtained asylum – but they are in a precarious or unsafe situation – to another State that has agreed to accept them as refugees with permanent residence status. It involves an identification by the UNHCR of the most vulnerable refugees, followed by a selection by the resettlement State. After two ad-hoc EU-sponsored resettlement schemes, the EU has adopted a resettlement framework under a regulation. This article questions the improvements this regulation could bring in taking refugees' voice into account during the resettlement selection. It will explore the protection of refugees' interests in terms of access to resettlement and their opportunity to express concerns during the selection process as well as the effective protection of their fundamental rights, especially through the potential application of the EU Charter of fundamental rights.

Introduction

Resettlement seems to be the main solution advanced in the New Pact on Migration and Asylum to fill the current gap of legal channels for asylum seekers. It is defined by the United Nations High Commissioner for Refugees (UNHCR) as the selection and transfer of refugees from a State of asylum where they are protected but in a precarious or unsafe situation, to another State that has agreed to accept them as refugees with permanent residence status[1]. It involves an identification by the

[1] For example, a refugee fleeing the war in the Democratic Republic of Congo may obtain protection in Rwanda and subsequently be resettled in Belgium due to the lack of long-term prospects in Rwanda and the impossibility of returning to their country

UNHCR of the most vulnerable refugees, followed by a selection by the resettlement State. It aims to show international solidarity with third countries that host the majority of the world's refugees, to ensure durable protection for the most vulnerable among them[2]. Indeed, very few refugees manage to reach the European territory to apply for asylum. Undertaking this dangerous and costly journey is becoming increasingly risky and pointless, as the European Union is strengthening obstacles to spontaneous asylum claims. Through agreements with third countries, the EU prevents many migrants from reaching its territory to seek protection[3]. Consequently, low-and middle-income countries currently host 75% of the world's refugees[4]. The number of people in need of resettlement is continually increasing. In 2025, UNHCR estimates this figure at 2.9 million[5].

The UNHCR plays a key role in identifying refugees in need of resettlement and making referrals to EU Member States since there is no possibility for refugees to apply for resettlement. This responsibility stems from its mandate to protect refugees and find durable solutions, including resettlement[6]. However, the status of this scheme under EU law remains somewhat ambiguous. While the UNHCR Resettlement Handbook defines the steps of the resettlement process and provides guidelines for UNHCR members and resettlement states, it is not legally binding. The EU relies on these guidelines but does not have a unified, binding framework that integrates UNHCR procedures into EU law. Instead, Member States retain discretion over whether to accept UNHCR

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of origin because of ongoing conflict. UNHCR, UNHCR Resettlement Handbook, Revised Edition (2011), p. 3.

2 UNHCR Resettlement Handbook.

3 See for instance: Memorandum of Understanding on a strategic and global partnership between the European Union and Tunisia, Tunis, 16 July 2023, press release 16 July 2023; Joint Declaration on the Strategic and Comprehensive Partnership between the Arab Republic of Egypt and the European Union, Cairo, 17 March 2024, press release 17 March 2024.

4 UNHCR, Refugee Data Finder, Key Facts for countries hosting the world's refugees, https://www.unhcr.org/refugee-statistics/insights/explainers/refugee-hosting-metrics.html#:~:text=Figure%201%20shows%20that%20at,in%20the%20least%20developed%20countries.

5 UNHCR, UNHCR Projected Global Resettlement Needs 2025, https://www.unhcr.org/sites/default/files/2024-05/projected-global-resettlement-needs-2025.pdf.

6 UN General Assembly, Resolution n°428 (V), Statute of the office of the United Nations High Commissioner for Refugees (14 December 1950).

referrals and how to select individuals for resettlement, with criteria defined at national level. Indeed, upon identification, the UNHCR forwards the files of the refugees to prospective resettlement states. The latter re-evaluate the referrals based on their own criteria and interviews are optional. The final selection decisions are not motivated nor subject to appeal; therefore, the selection process seems left at the complete discretion of the resettlement states, and refugees are voiceless.

Yet, since 2003, the EU Commission has increasingly prioritised resettlement to enhance legal entry of individuals in need of international protection and to reduce the need for asylum seekers to resort to dangerous journeys to reach the EU territory[7]. In 2015 two EU-wide resettlement programmes were established through a Commission recommendation[8]. While non-binding, these instruments provided guidance and encouraged cooperation among Member States. Implemented in collaboration with the UNHCR, the programmes relied on the agency to identify refugees eligible for resettlement. However, beyond this referral role, no mandatory quotas, or predetermined criteria for Member States were established. Participation remained voluntary, with States retaining full discretion to decide the number of refugees to resettle. The only consequence of unmet commitments was the loss of financial compensation. Those programmes were supported by significant financial resources allocated through the Asylum, Migration and Integration Fund (AMIF)[9] governed by regulation 516/2014. Institutional support from the European Asylum Support Office (now the European Union Asylum Agency) was also planned through regulation 439/2010[10]. 63,279 refugees were resettled to the EU between 2015 and 2019 (87% of the increased commitment)[11].

7 EU Commission, Communication on the common asylum policy and the Agenda for protection, COM (2003) 152 final 12.

8 Commission Recommendation 2015/914 of 8 June 2015 on a European resettlement scheme, COM (2015), 3560 final p. 32-35 (2015 Recommendation on a EU Resettlement Programme).

9 Regulation 516/2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions 573/2007/EC and 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC, *O.J.* L 150/168 (2007) (AMIF Regulation 2014-2020), art. 17.

10 Regulation 439/2010 establishing a European Asylum Support Office, *O.J.* L 132/11 (2010), p. 11, art. 7.

11 Commission Recommendation on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways, *O.J.* L 317/13 (2020), 2f, Recital 9.

While these programmes have made it possible to establish certain common principles for resettlement[12], they do not implement a common admission procedure with appropriate guarantees for refugees. This could change as the proposal for an EU resettlement framework under an EU regulation presented by the Commission in 2016[13] was finally adopted on 14 May 2024[14].

This article analyses this new EU resettlement framework, specifically assessing the extent to which it could enhance the consideration of refugees' voice in the selection process. Accordingly, issues related to the status granted to resettled persons and local integration will not be addressed and the focus will be on resettlement to the EU[15]. In the context of this article, "refugee's voice" refers to their access to resettlement – which includes their ability to engage in the process and meet EU priorities as well as eligibility criteria – and their opportunity to express concerns during the selection process – defined as the mechanisms enabling them to voice their opinions, preferences, or objections in compliance with procedural safeguards. It also pertains to the effective protection of their fundamental rights since the examination of access and expression of concerns will lead us to question the respect of refugees' rights.

The first part analyses the new EU resettlement framework with a focus on the selection process. The second part of this chapter will show that the new EU regulation does not significantly improve the inclusion of refugee voices. It fails to enhance refugees' access to resettlement or their ability to express concerns during selection procedures in compliance with procedural safeguards. However, the chapter will argue that the

[12] Quantitative objectives determined at EU level (with contribution freely established by Member States); binding definition of EU-funded resettlement; common amount of €6,000 per person resettled, increased to €10,000 when resettlement aligns with EU priorities; technical support from the EUAA in implementing resettlement programmes.

[13] See Commission Proposal for a Regulation establishing a Union Resettlement Admission Framework and amending Regulation 516/2014 (EU), COM (2016), 468 final (Commission Proposal for a Resettlement Framework).

[14] Regulation 2024/1350 establishing a Union Resettlement Admission Framework and amending Regulation 2021/1147, *O.J.* 2024, (Resettlement Framework).

[15] It is important to note that other countries such as USA, Canada, Australia have a well-established history of resettlement programmes however they are not the focus of this study.

adoption of this regulation has notable implications for the application of EU fundamental rights enshrined in the Charter.

1. The new EU resettlement framework: A "common procedure under an EU regulation"

In September 2020, as part of the new Pact on Migration and Asylum, the European Commission presented a proposal for a regulation establishing a European framework for resettlement providing "a common approach to the legal and safe arrival in the EU of persons in need of international protection"[16]. Political agreement between the Parliament and the Council on this proposal was reached in December 2022[17] and the framework was formally adopted on 14 May 2024[18]. This Regulation sets EU priorities by establishing a six-monthly plan drawn up by the Council (1.1). It further introduces a common admission procedure (1.2) addresses certain procedural aspects of the resettlement process (1.3) and involves new actors in its implementation (1.4).

1.1. EU priorities

The Commission has chosen to harmonise resettlement by means of a regulation, i.e. a legal instrument that is binding in its entirety and directly applicable in all Member States. At the same time, it refrains from making resettlement mandatory. The preamble to the Regulation states that "there is no subjective right to apply for admission or to be admitted by a Member State, nor any obligation on Member States to admit a person under this framework"[19], this statement is further recalled in Article 1 § 2 of the Regulation. It also adds that Member State shall contribute to the Union Resettlement Plan on a "voluntary basis"[20]. This could be explained by the fact that resettlement (contrary to the right of

[16] Commission Proposal for a Resettlement Framework, *op. cit.*

[17] Commission Proposal for a Regulation on the European Parliament and of the Council establishing a Union Resettlement Admission Framework and amending Regulation 2021/1147 – Amended mandate for negociations with the European Parliament, inter-institutional file 2016/0225 (COD), 16110/22 (16 December 2022).

[18] European Council, The Council adopts the EU's pact on migration and asylum, press release (14 May 2024), https://www.consilium.europa.eu/fr/policies/eu-migration-policy/eu-migration-asylum-reform-pact/#:~:text=Le%20Conseil%20a%20adopt%C3%A9%20le,des%20proc%C3%A9dures%20efficaces%20et%20uniformes.

[19] Resettlement Framework, preamble, recital 25; art. 1 § 2.

[20] Resettlement Framework, art. 1 § 4.

asylum or the principle of non-refoulement) is not a right enshrined in international law. Member States are therefore free to decide whether to take part in resettlement programmes. Rather than creating binding targets, the Regulation is limited to the establishment of common rules on admission and the type of status to be granted.

Based on a proposal from the Commission, the Council will adopt a two-year Union Resettlement Plan. The plan will set out the total number of persons to be admitted, as well as the contribution of each Member State – quotas sovereignly determined by the national authorities – a description of the specific groups of individuals targeted and geographical priorities[21]. The European Parliament holds only an informational role, being regularly updated on the progress of the Plan but lacking any direct decision-making power[22]. The regulation also specifies that the outcome of the meeting of the High-Level Resettlement and Humanitarian Admission Committee (see point 1.4) and of the UNHCR Global Resettlement Needs[23] – annual report produced by the UNHCR, outlining the projected resettlement needs of refugees around the world – should be considered when establishing the two-year Union Resettlement Plan[24].

Common rules on admission and the type of status to be granted are also put in place.

1.2. Admission procedure

The admission procedure is defined in Article 9 of the Regulation. It implies a referral from the UNHCR that will identify the most vulnerable refugees and submit their dossiers to the Member States according to eligibility criteria. The latter will then proceed to the selection by checking that eligibility criteria are met and that the persons do not fall under one of the grounds for refusing admission.

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21 Resettlement Framework, art. 8 § 3.

22 Resettlement Framework, art. 8 § 1.

23 This report provides a comprehensive overview of the number of refugees requiring resettlement in the following year, identifies the most vulnerable groups, provides an overview of the humanitarian and protection contexts that lead to those needs and describes how resettlement is linked to regional protection and solutions strategies, see UNHCR Projected Global Resettlement Needs 2025, *op. cit*., p. 5.

24 Resettlement Framework, art. 8 § 2.

The first step of the resettlement process is the referral from the UNHCR to the Member States. It consists of an identification of the most vulnerable refugees. This stage is detailed in the UNHCR Resettlement Handbook[25]. The new EU Regulation refers to it in some of its provisions.

Article 9 started by recalling that "for the purpose of implementing the Union Plan, Member States shall request the UNHCR to refer third-country nationals or stateless persons to them"[26]. In this regard, it is important to note that refugees are still unable to apply for resettlement. Dossiers are submitted by UNHCR[27].

In practice, at the preselection stage, the UNHCR verifies that some conditions are met. Firstly, the applicant must be officially recognised as a refugee either by the State of first asylum or by the UNHCR itself. The definition UNHCR employs covers refugees within the meaning of Article 1 A (2) of the 1951 Refugee Convention, but also people who meet the definition of subsidiary protection, as well as certain categories of stateless persons. Secondly, the refugee must be particularly "vulnerable". To identify those who are most in need, the UNHCR employs resettlement submission categories: legal and/or physical protection needs; survivors of torture and/or violence; medical needs; women and girls at risk; family reunification; children and adolescents at risk; and lack of foreseeable alternative durable solutions[28]. To determine whether the above criteria are met, the UNHCR conducts interviews.

At the end of the identification procedure, the UNHCR will submit the preselected dossiers to the Member States in accordance with the quotas and criteria established within the Union Plan[29].

The Member States will then assess whether the third-country nationals or the stateless persons in relation to whom they conduct an admission procedure meet the eligibility criteria set out in the Regulation and

25 UNHCR Resettlement Handbook, *op. cit.*, p. 171-383.

26 Resettlement Framework, art. 9 § 1.

27 UNHCR Resettlement Handbook, *op. cit.*, p. 122. In theory, refugees can approach these liaison points, but the UNHCR discourages this see for instance Leaflet of October 2015; see also the UNHCR leaflet addressed to Syrian refugees in various countries of asylum of 16 October 2018.

28 Resettlement Framework, art. 5 § 3a.

29 Resettlement Framework, art. 9 § 7a.

do not fall under the grounds for refusal[30]. Member States make that assessment based on documentary evidence, including information from the UNHCR or on the basis of a personal interview, or a combination of both[31]. They are therefore not obliged to interview potential resettled refugees since the selection can be based only on UNHCR dossiers.

According to the Regulation, Member States are supposed to use more or less the same criteria as those UNHCR employs while identifying. Namely these are refugees and those who meet the definition of subsidiary protection, while additionally falling within at least two of the seven UNHCR categories of vulnerability mentioned above. Some family members of persons considered for resettlement are also eligible for admission[32]. While the procedures appear redundant, this alignment ensures consistency between the UNHCR's identification process and Member States' final selection, while allowing Member States to exercise their discretion during the admission phase. Indeed, the Regulation authorises Member States to favour persons: 1) with family ties to persons legally residing in a Member State; 2) with demonstrated social links or other characteristics that can *facilitate their integration* in the Member State, including language skills or previous residence; and 3) with particular protection needs or vulnerabilities[33].

The proposal also outlines both optional and mandatory grounds for refusing admission, particularly security considerations[34]. If a person falls under one of these mandatory grounds, they are barred from participating in the resettlement process for a period of three years. In terms of optional refusal, individuals who have either *declined to participate in a resettlement or humanitarian admission programme, or withdrawn their consent*, may also be excluded[35].

The same applies to those refusing to engage in a pre-departure orientation program[36]. Lastly, "persons in relation to whom a Member State cannot provide the adequate support needed on the basis of those

[30] Resettlement Framework, art. 9 § 6.

[31] Resettlement Framework, art. 9 § 6.

[32] Resettlement Framework, art. 5.

[33] Resettlement Framework, art. 9 § 2.

[34] Resettlement Framework, art. 6 § 1.

[35] Resettlement Framework, art. 6 § 2a.

[36] Resettlement Framework, art. 6 § 2c.

persons' vulnerability" may be denied admission[37]. This last reason appears paradoxical, as resettlement is intended to prioritize the most vulnerable.

1.3. Procedural aspects

The Regulation imposes a duty on Member States to inform third country national in the resettlement process of the objectives and different stages of the procedure, as well as of the consequences of withdrawing their consent to be admitted and of refusing to participate in a pre-departure orientation programme[38]. In addition, it requires Member States to inform refugees in a language they understand of their rights under the General Data Protection Regulation (GDPR)[39]. Furthermore, Article 7 of the regulation specifies that where a third-country national or a stateless person fails to provide available data or information essential to the conduct of the selection process, that person may be considered to have implicitly withdrawn consent to be admitted[40]. However, the Regulation does not specify whether refugees are entitled to access all or part of their file during the procedure. In practice, Member States tend to deny refugees access to their files, citing the "sensitivity of the information they contain"[41].

Concerning deadlines, Member States shall reach a conclusion on the admission as soon as possible and in any event within seven months of the date of registration. They may extend that time limit by up to three months in the event of complex issues of fact or law[42]. In the case of an emergency admission – for persons with urgent legal or physical protection needs or with immediate medical needs – they should reach a conclusion as soon as possible and *endeavour to do so* within one month of the date of registration[43]. There are no penalties for exceeding processing times.

[37] Resettlement Framework, art. 6 § 2d.

[38] Resettlement Framework, art. 9 § 4.

[39] Resettlement Framework, art. 9 § 5.

[40] Resettlement Framework, art.7 § 2.

[41] Interview Member of the General Commissariat for Refugees and Stateless Persons in charge of resettlement, Brussels (3 May 2024).

[42] Resettlement Framework, art. 9 § 9.

[43] Resettlement Framework, art. 9 § 10.

It is also important to note that a Member State may discontinue an admission procedure notably where it has concluded that it is not able to comply with the time limits referred to in paragraph 9 for reasons beyond its control[44].

Regarding the final decision, the regulation states that "where a Member State's conclusion is negative, the third-country national or stateless person concerned shall not be admitted". The reason for a negative conclusion should be communicated to the UNHCR "where *necessary*, to enable it to carry out its tasks regarding referrals […] to Member States in accordance with the Regulation or with its mandate, unless there are overriding reasons of public interest for not doing so". In the event of non-selection by a Member State, the case may be submitted to another State unless the reasons for refusal are linked to considerations calling into question the UNHCR's determination of the need for resettlement and/or eligibility for international protection, or where the refusal relates to security concerns[45].

Article 9 § 17 precises that: "at all stages of the procedure, Member States shall not discriminate against persons on grounds of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation"[46].

Finally, Article 15 provides for a monitoring mechanism. The Commission shall submit a report to the European Parliament and to the Council on Member States' contributions to the implementation of the Union Framework, and on their efforts to scale up resettlement. For this purpose, Member States shall provide the Commission with the number of third-country nationals or stateless persons effectively admitted[47]. Nonetheless, there are no penalties for failure to comply with the agreed quotas.

[44] Resettlement Framework, art. 9 § 11.

[45] Resettlement Framework, art. 9 § 13.

[46] Resettlement Framework, art. 9 § 17.

[47] Resettlement Framework*, art.* 15.

1.4. Other actors

In addition to the Member States and the UNHCR, the Regulation provides for the involvement of a series of other actors in the resettlement selection process: the EUAA[48], some complementary partners[49], and the High-Level Resettlement and Humanitarian Admission Committee. The latter is established by the Regulation and shall be composed of representatives of the European Parliament, the Council, the Commission and the Member States. The EUAA, the UNHCR and the IOM shall be invited to attend the meetings of the Committee. Other relevant organisations, including civil society organisations, may also be invited in areas of their expertise. It must be chaired by the Commission and meet at least once a year and whenever necessary at the invitation of the Commission or at the request of a Member State or of the European Parliament[50]. The mission of the Committee is to advise the Commission on issues related to the implementation of the Union Framework, including on a recommended number of persons to be admitted and the regions or third countries from which such admission is to be undertaken, considering the UNHCR Projected Global Resettlement Needs. It may submit recommendations. The minutes of the meetings have to be published[51].

2. Does the new EU resettlement framework contribute to "unmute" refugees?

This analysis of the New EU Resettlement Regulation raises an important question: To what extent could this framework amplify the voice of refugees? This part will first examines how the new framework might facilitate refugees' access to resettlement and allow them to voice their concerns during the selection process in observance of procedural safeguards (2.1). This examination will lead to questionning the selection process established by the EU Regulation in terms of respect for the fundamental rights of refugees, which will require to examine the application and enforceability of the Charter of Fundamental Rights (2.2).

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[48] Resettlement Framework, art. 10 § 2.

[49] Resettlement Framework, art. 10 § 3.

[50] Resettlement Framework, art. 11 §§ 1-2.

[51] Resettlement Framework, art. 11 § 3.

2.1. Access to resettlement and expression of refugee's concerns: Content of the regulation

The regulatory nature of the new EU resettlement framework raises expectations of obligation for Member States, especially concerning the guarantees provided to refugees, in contrast to the previous Commission's non-binding recommendations. This part first analyses the improvements related to refugees' access to resettlement, particularly their ability to meet EU priorities and eligibility criteria. It then discuss the advancements regarding their capacity to express concerns – opinions, preferences, or objection – in compliance with procedural safeguards.

In terms of access to resettlement, refugees are still unable to apply for resettlement and are dependent on identification by the UNHCR. This dependency highlights the *muting* effect of the process, where refugees' voices and agency remain largely absent. Refugees are reliant on the initiative and decisions of intermediaries, leaving them unable to initiate or control their own resettlement process[52].

A more "democratic" procedure has nonetheless been established by the regulation regarding the determination of quotas and priority regions, as it involves the information of the European Parliament and the participation of the High-Level Resettlement and Humanitarian Admission Committee. Additionally, when adopting the Union Plan, the Council shall duly consider the outcomes of the meetings of the Committee that are published to enhance transparency. Some of this Committee's meetings include the participation of the EUAA, the UNHCR and the IOM, as well as NGOs in their areas of expertise[53]. These actors may advocate more actively for refugee interests in defining quotas and priority regions. The collaboration between various stakeholders can foster a more comprehensive understanding of the challenges refugees face, potentially resulting in policies more responsive to their needs, particularly regarding access to resettlement opportunities. For example, it can help prioritize the most vulnerable refugees, such as those from countries with insufficient protection or those living in overcrowded camps. By providing insights and data on the specific needs of refugees in the first asylum countries, these

[52] H. E. Schneider, "Intentions, Strategies, and Actions: How Refugees Exert Agency in the Resettlement and Humanitarian Admission Process from Jordan and Turkey to Germany", *Canada's Journal on Refugees*, vol. 40, n°2 (2024), p. 1-17

[53] See Resettlement Framework, art. 11.

stakeholders can ensure that resettlement decisions are more targeted and inclusive. The involvement of these actors could serve to amplify the voices of refugees, shedding light on perspectives that are too often overlooked in the decision-making process.

Despite these positive changes, the Member States remain free to decide whether or not to take part in the resettlement programmes, and sovereignly determine their participation at EU level. This discretion significantly limits the number of admissions; currently, only 1% of refugees in need are resettled[54]. Although a monitoring mechanism is in place regarding Member States' contributions to the implementation of the EU framework and their efforts to develop resettlement initiatives, it lacks enforceable accountability for Member States that fall short of their resettlement pledges[55].

A final factor that may limit access to resettlement is the option for Member States to use refugees' "integration potential" as a selection criterion. This may disproportionately affect vulnerable populations and could lead to discrimination since it is a broad concept that can be based on considerations such as language, ethnic or social features, disabilities, religion, etc. Resettlement then also becomes an instrument of migration management aimed at controlling who enters the EU territory[56]. This observation is accentuated by the possibility given to Member States not to resettle persons in respect of whom the Member State cannot provide the adequate support they need because of their *vulnerability*[57]. This exclusion underscores a troubling dynamic: vulnerability itself becomes a barrier to protection, amplifying the precariousness of those already at risk. This exemplifies the muting process, where those in greatest need are rendered invisible or unworthy of support.

Furthermore, the criteria remain opaque, as Member States are not required to disclose them publicly. This lack of transparency can mislead refugees, who may not understand what aspects to emphasise during their resettlement interview, thus limiting their ability to advocate

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[54] UNHCR Projected Global Resettlement Needs 2025, *op. cit.*

[55] *Ibid.*, p. 1.

[56] T. De Boer, and M. Zieck, "The Legal Abyss of Discretion in the Resettlement of Refugees Cherry-Picking and the Lack of Due Process in the EU", *International Journal of Refugee Law*, 2020, p. 73-74.

[57] Resettlement Framework, art. 6 § 2d.

effectively for their own cases[58]. This challenge leads to the next critical issue: ensuring that refugees have a voice to express their concerns in line with procedural safeguards.

In this regard, the UNHCR conducts interviews during the identification phase, ensuring that refugees are heard in the initial part of the process. These interviews are supposed to follow the guidelines provided in the UNHCR Handbook. At the selection stage, by contrast, the EU regulation does not require Member States to interview potential resettled refugees, as selections can be based solely on dossiers submitted by the UNHCR[59].

When interviews are conducted by Member States, there are almost no procedural guarantees provided to the refugees. The only obligation imposed on Member States is the duty to inform refugees involved in the selection process of the objectives and different stages of the procedure, as well as of the consequences of withdrawing their consent to be admitted[60] and of their rights under the GDPR. In this regard, the UNHCR acknowledges a significant power imbalance between refugees in need of resettlement and Member States, noting that refugees lack a genuine option to refuse the processing of their personal data during the resettlement procedure[61]. Indeed, if the person concerned does not provide the necessary data or information for the selection procedure, they may be deemed to have implicitly withdrawn their consent for admission[62].

Furthermore, refugees have no influence over which country they are resettled to. A prior refusal to participate in a resettlement or humanitarian admission program, or the withdrawal of consent, is

[58] However, this statement should be qualified, it could also be argued that disclosing such criteria might incentivise strategic behaviour among refugees, potentially leading to misuse of the system and undermining the integrity of the selection process. For more details on the topic see: S. Nakueira, "The Politics of Accusation amidst Conditions of Precarity in the Nakivale Resettlement Camp", *The Cambridge Journal of Anthropology*, vol. 37, n°2 (2019), p. 39-56.

[59] Resettlement Framework, art. 9 § 6.

[60] Resettlement Framework, art. 9 § 4.

[61] UNHCR Resettlement Handbook, 2023, Ch. 2.3 and M. Zieck, *Resettlement as protection: Integrating resettlement of refugees in international law* (Elgar Publishing, 2024), p. 184.

[62] Resettlement Framework, art. 7 § 2.

considered an optional ground for denying resettlement[63]. Therefore, it can be deduced that they do not have the opportunity to decline resettlement to a particular country without taking the risk of being denied resettlement elsewhere. Refugees can neither influenced when they are resettled[64]. Although some deadlines are provided for in the regulation, there are no penalties for exceeding processing times. A Member State is authorised to discontinue an admission procedure where it has concluded that it is not able to comply with the time limits for reasons beyond its control[65].

In addition, the current text does not impose any obligation to notify a decision to the refugees that are not selected nor to give reasons for refusal, and there is no right of appeal[66]. As a result, refugees find themselves unable to contest those decisions. Furthermore, refugees do not have full access to their files at any stage of the process, whether during identification by UNHCR or selection by Member States, which limits their ability to understand or challenge decisions.

In the end, the changes made by the regulation in terms of giving voice to refugees in the resettlement selection process are insignificant. While this framework has the merit of establishing a common procedure, it leaves a considerable margin of discretion to the Member States. This discretion is concerning as analysing the regulation in terms of access to resettlement and the opportunity for refugees to voice concerns during the selection process highlights dysfunctions that could lead to violations of refugees' fundamental rights. Therefore, it is necessary to consider applying the Charter of Fundamental Rights to the resettlement selection process.

2.2. Effective protection of refugees' fundamental right: EU Charter of fundamental rights

In the absence of an improvement in voicing refugees provided within the text of the EU resettlement framework, it is important to analyse whether the adoption of this regulation will nevertheless enable the Charter of Fundamental Rights to be applicable to the resettlement

[63] Resettlement Framework, art. 6 § 2a.

[64] H. E. Schneider, *op. cit.*, p. 15.

[65] Resettlement Framework, art. 9 § 11.

[66] See Resettlement Framework, art. 9 § 13.

selection process and the extent to which a violation of the Charter can be invoked by refugees.

Article 51 of the Charter defines its scope of application: the provisions of the Charter "are addressed to the institutions and bodies of the Union […] and to the Member States only when they are implementing Union law"[67].

Concerning the identification phase, the Charter doesn't apply to the UNHCR, but only to EU agencies and Member States when they are implementing EU law. With the adoption of the EU Resettlement Framework, there is no doubt that Member States will be implementing EU law when selecting refugees for resettlement. However, the difficulty lies in how to report a violation of a fundamental right. Since no right of appeal is provided for in the Regulation, it is necessary to identify whether Article 47 can be applied to this procedure.

This provision states that "everyone whose rights and freedoms *guaranteed by the law of the Union* are violated, has the right to an effective remedy before a tribunal"[68]. However, it expressly refers to "rights and freedoms guaranteed by EU law". According to the case law of the European Court of Justice (ECJ), this expression is a matter of interpretation of the particular EU law concerned. Although resettlement is not currently a right guaranteed by EU law, this provision could be useful with regard to potential violation of other rights during the resettlement selection process[69].

The preamble of the Regulation expressly imposes the obligation to respect fundamental rights enshrined in the Charter, particularly the rights of the child (Article 24), the right to respect for family life (Article 7) and the general principle of non-discrimination (Article 21)[70]. This means that, if any of these rights are violated during a procedure for selecting refugees for resettlement, an effective remedy must be provided. Article 21 of the EU Charter furnishes an autonomous prohibition against discrimination which is recalled in Article 9 § 17 of the EU

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67 Charter of Fundamental Rights of the European Union, *O.J.* 2012, C 326/391 (EU Charter), art. 51.

68 EU Charter, art. 47 § 1.

69 S. Peers, T. Hervey, J. Kenner, A. Ward, *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing, 2014), p. 1211.

70 Resettlement Framework, Preamble, recital 33.

resettlement framework regarding the admission procedure[71]. In the event of evident discriminatory practices within a resettlement selection process – disproportionately reducing access to resettlement – the refugee concerned is thereby entitled to invoke this safeguard, potentially in combination with Article 47[72].

Furthermore, although the EU Resettlement Framework contains very few obligations[73], failure to comply with them would enable an individual to challenge the outcome of the assessment on the grounds of a procedural defect (for example, the failure of the Member State to provide the necessary information in the required manner)[74].

Another relevant disposition of the EU Charter is Article 41 setting out procedural guarantees under the general heading of the "right to good administration". Its first paragraph states that: "Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by *the institutions, bodies, offices and agencies of the Union*"[75]. It also includes the rights of the defence (the right of every person to be heard before any individual measure which affect him or her adversely is taken, the right to every person to have access to his or her file, and the obligation for the administration to give reasons for its decisions)[76] and the right to obtain redress in the event of misconduct by an EU administration[77]. It reflects various general principles of Union law developed by the case law of the ECJ prior to the adoption of the Charter[78].

Article 41 refers to the "institutions, bodies, offices and agencies of the EU", so it seems that this article does not apply (unlike the other rights enshrined in the Charter) to Member States when implementing EU law. However, according to EU case law, the right to good administration is a general principle of EU law and therefore applies when Member

[71] EU Charter, art. 21.

[72] T. De Boer and M. Zieck, *op. cit.*, p. 82.

[73] See obligations of information contained in art. 9 §§ 4-5.

[74] E. Bratanova van Harten, "The new EU Resettlement Framework: the Ugly Duckling of the EU asylum acquis?", EU Law Analysis blog, 2023.

[75] EU Charter, art. 41 § 1.

[76] EU Charter, art. 41 § 2.

[77] EU Charter, art. 41 § 3.

[78] L. Leboeuf, *Le droit européen de l'asile au défi de la confiance mutuelle* (Anthemis, 2016), p. 363.

States implement EU law[79]. Consequently, this right could be relevant in the context of resettlement procedures, as they involve administrative acts and processes carried out by Member States under EU law[80]. The question is therefore whether the resettlement procedure is administrative under the national law of the Member States and which act could eventually be subject to the respect of those rights.

In terms of amplifying the voice of refugees, the application of Article 21 of the Charter could improve access to resettlement by preventing Member States from using discriminatory criteria. Articles 41 and 47 could enhance the ability of refugees to express their concerns during the selection process, as Article 41 mandates the respect of procedural safeguards – the right to be heard and the right to a written and reasoned decision within a reasonable time – and article 47 allows for the challenge of negative decisions made in violation of the aforementioned articles.

However, the problem lies in the materialisation of the decision being challenged. Indeed, the State's refusal to select a refugee presented by the UNHCR is not embodied in an administrative act. The absence of a material act with the reasons for not accepting a referred refugee for resettlement makes it difficult to contest it at the national level. Furthermore, the national measures setting out the criteria used for the selection are not formalised by Member States in a legislative text and the document outlining the selection criteria is not publicly available.

[79] Case C-277/11, *M. M. v. Minister for Jutice, Equality and Law Reforme*, EU:C:2012:744; Case C-46/16,*Valsts ieņēmumu dienests v. "LS Customs Services"*, EU:C:2017:839, para 39; The ECJ considers the right to be heard (art 41(2)(a)) also part of the general principles of observance of the rights of the defence and the right to fair proceedings, see Case C-249/13, *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, EU:C:2014:2431 paras 30-34; Case C-166/13, *Sophie Mukarubega v. Préfet de police, Préfet de la Seine-Saint-Denis*, EU:C:2014:2336 paras 41-55.

[80] According to the Tribunal, the right to good administration does not, in itself, confer subjective rights on individuals, except where it constitutes the expression of specific rights such as the right to have one's affairs dealt with impartially, fairly and within a reasonable time, the right to be heard, the right of access to the file and the right to be given reasons for decisions see Case T-475/14, *Prysmian SpA c. Commission,* aff., EU:T :2018 :448.

Conclusion

In conclusion, it can be stated that the EU Resettlement Framework does not remedy the lack of refugee voices in the resettlement selection process.

In terms of access to resettlement, while there have been a few positive developments – such as the creation of a High-Level Resettlement and Humanitarian Admission Committee involving, actors who are more likely to advocate for the interests of refugees when setting priorities – the highly selective process often leads to the marginalization of refugees. Many are unable to even access resettlement due to significant barriers both at entry and throughout the selection phase. Not only does the adopted regulation provide no possibility for refugees to apply for resettlement or no obligation for Member States to resettle refugees, but it also allows the addition of national criteria to vulnerability, such as integration potential. This detracts resettlement from its primary objective of protecting the most vulnerable. The Member States enjoy a great margin of appreciation during the selection procedure, which entails a risk of discriminatory practices in the selection of candidates for resettlement. Those criteria are not made public which complicates the possibility for refugees to challenge them.

Furthermore, refugees often find themselves unheard, with limited opportunities to express their needs and concerns. Member States are not obliged to interview refugees during the selection procedure and when they do, the EU resettlement framework – despite its regulatory nature – offers minimal procedural safeguards. Although refugees are theoretically asked to give consent for the use of their personal data and the resettlement to a specific country, in practice, they do not have the choice to refuse. Deadlines are optional and negative decisions are not notified to non-selected refugees, thereby preventing them from introducing an appeal. Refugees do not have full access to their file, whether at the identification stage conducted by UNHCR or during the selection procedure by Member States, further limiting their ability to understand or contest the process. The muting dynamic is therefore multifaceted, occurring at various stages of resettlement and sometimes very early, even before the resettlement procedure is engaged.

The growing importance of resettlement as the only legal pathway for people seeking protection should have led the EU to use its un-muting powers to protect the rights of refugees and amplify their voice in the resettlement selection process. Instead, the EU has preferred to favour Member States discretion allowing them to disregard the interests of these already marginalised and unheard groups. This level of discretion is concerning and the analysis of the Regulation regarding access to resettlement and the opportunity for refugees to express their concerns during the selection process reveals shortcomings that could result in violations of their fundamental rights.

While the Regulation does not enhance the consideration of refugees' voices based on its content, it at least deserves recognition for making the Charter of Fundamental Rights applicable to the refugee selection process. The preamble to the Regulation itself requires it. The implementation of Article 21 of the Charter could enhance access to resettlement by preventing Member States from applying discriminatory criteria. Additionally, Articles 41 and 47 could strengthen refugees' ability to voice their concerns during the selection process, as Article 41 requires adherence to procedural safeguards, including the right to be heard and the right to a written and reasoned decision within a reasonable timeframe. And Article 47 allows for the appeal of negative decisions made in violation of the aforementioned articles[81].

However, in order for those principles to be applicable, it is necessary not only for Member States to implement EU law, but also for the resettlement procedure to be classified as administrative under national law[82]. In practice, nevertheless, it is difficult to denounce a violation. Not only are the criteria used by the Member States to carry out the selection process not enshrined in any law or official document, but the Regulation does not impose any obligation to deliver a decision at the end of the selection procedure. In the absence of a formal record of the Member State's decisions, the denunciation of a violation of a fundamental right enshrined in the Charter seems compromised.

While it is difficult – due to the content of the new regulation – to legally argue that resettlement should be mandatory for all EU Member States with fixed quotas or that refugees should have the ability to choose

[81] T. De Boer, M. Zieck, *op. cit.*, p. 85.

[82] The ECJ made clear that art. 41 cannot be invoked directly against Member States, but only as a matter of general principles of EU law, Joined Cases C-141/12 and C-372/12, *YS v. Minister voor Immigratie, Integratie en Asiel*, and *Minister voor Immigratie, Integratie en Asiel v. M and S*, EU:C:2014:2081 paras 67-68.

where and when they are resettled – since resettlement is not a right in international law – there is a legitimate legal argument derived from the application of the Charter of Fundamental Rights for procedural guarantees to be applied to the selection process. While Member States are not obliged to take part in resettlement, where they choose to do so, they must at least respect fundamental rights and refugees should be able to avail themselves of the guarantees enshrined in the Charter.

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