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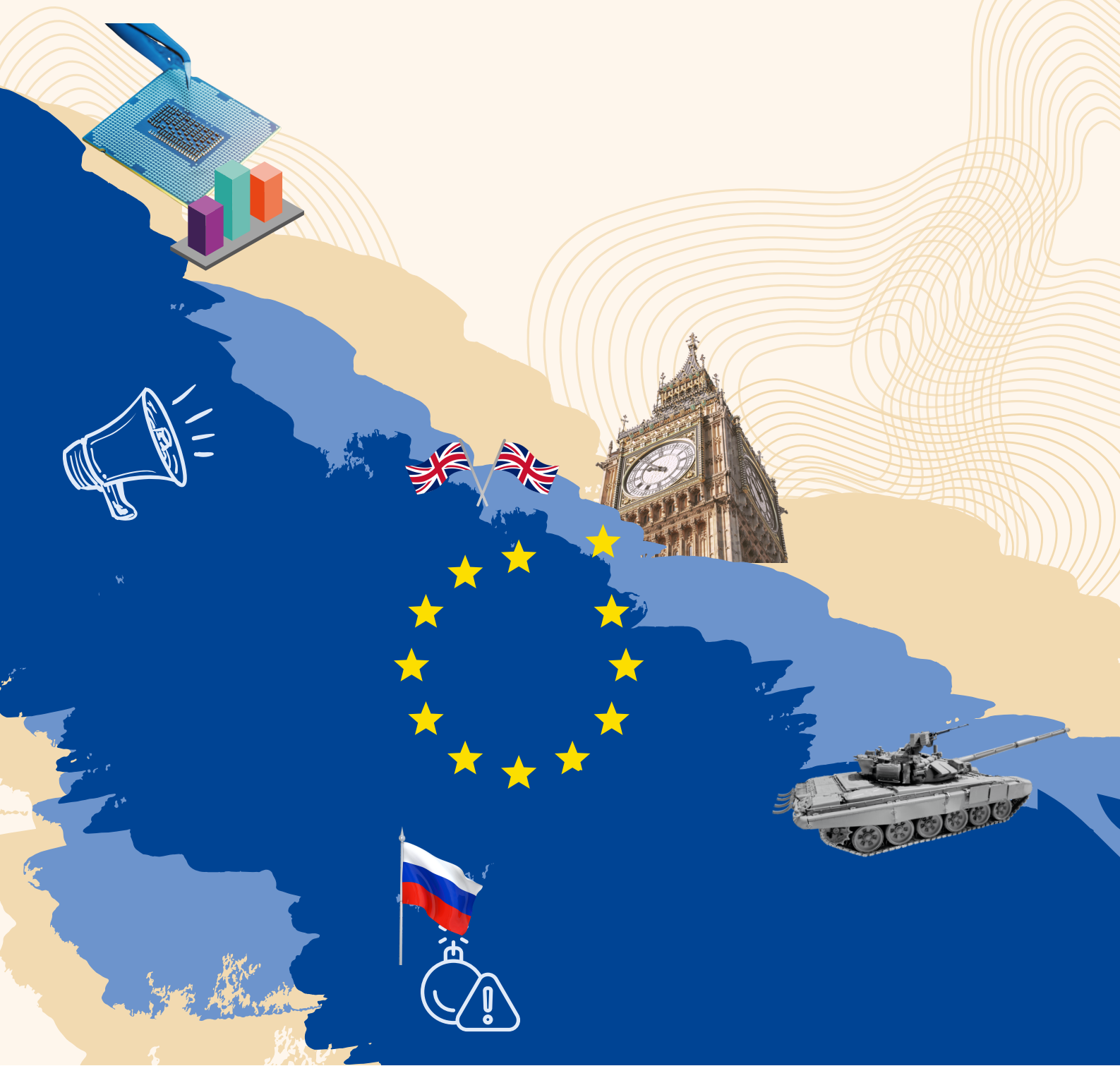
Edition n°17

European Studies Review

The Vertical Balance of Powers in the EU: The Common Foreign and Security Policy

The Legal Dimension of Hybrid Threats: A Systemic Vulnerability for Europe

Brexit Regret : The Obstacles for the UK to Rejoin



A NOTE FROM THE NEW BOARD

Almost three years ago, in the midst of the COVID-19 pandemic, a group of students from across Europe came together to publish the first edition of the European Studies Review. Since that time, the ESR has striven to give students and recent graduates from all over the world an opportunity to publish their articles, blog posts, and insights on European affairs. After 16 editions of our bimonthly journal, the original founding members have handed over to a new team composed of long-standing writers and editors from the previous board.

In this edition, we wish to thank all previous members of the board for their diligent efforts in bringing the European Studies Review to where it is today. We also wish to thank our writers, editors, social media team and external contributors for their work over the past three years.

The new team's goal will be to build upon the strong foundation laid by the previous board and to enhance the ESR's reputation as a leading peer-reviewed European affairs journal. As the EU heads into a pivotal election year faced with geopolitical, economic, and climate-related challenges and opportunities, there is certainly no shortage of topics to write about.

We are excited about the future, and we hope that you will join us on this journey!

With our sincere gratitude for your support,

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THE VERTICAL BALANCE OF POWERS IN THE EU : THE COMMON FOREIGN AND SECURITY POLICY

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Introduction

THE Common Foreign and Security Policy (CFSP) constitutes a central pillar of the EU's foreign policy and was a noteworthy development in the history of European integration. In 1993, the Maastricht Treaty –or the Treaty on European Union (TEU)– consolidated the CFSP as an intergovernmental pillar of EU policy, and the Member States remained the sole deciders regarding this traditionally protected policy area.² The CFSP is a clear example of the vertical balance of powers within the EU. This is a policy field where the Member States still prefer to have full control, which is also why this policy area can only implement decisions after they are unanimously accepted by the Member States. This entails that the Member States can block any proposal that they do not agree with, substantially hampering progress in this area.³

This paper takes a closer look at the EU's foreign policy and its decision-making, and how this undermines the potential of this policy area, and by extent, the EU's position on the global stage. The following section explores the CFSP and its vertical balance of powers, focusing on the differences between the CFSP and other EU policy areas. The third section brings this together through the concept

of the “*capabilities-expectations gap*” and discusses its consequences. Section four, in turn, details some possible pathways to increase efficiency in this policy area. The final section reflects back on the main arguments and concludes the article.

The CFSP and the Vertical Balance of Powers

The 1993 Maastricht Treaty led to the creation of the EU's Common Foreign and Security Policy as an intergovernmental policy area, firmly anchoring the Member States at the core of decision-making. The CFSP was established in the context of the collapse of Yugoslavia and a rapidly evolving international system and constituted the second of the three pillars that the Treaty introduced –Pillar 1 being the European Communities and Pillar 3 the field of Justice and Home Affairs. The Amsterdam Treaty of 1999 dealt with issues of coherence in the EU's foreign policy and established the High Representative of the European Union for Foreign Affairs and Security Policy (HR/VP), which can essentially be seen as an EU-level foreign minister.⁴ The 2009 Lisbon Treaty –or the Treaty on the Functioning of the EU (TFEU), in turn, formally created the European External Action Service (EEAS), constituting a diplomatic union within the EU and underpinning the CFSP. In addition, the Treaty abolished the pillar structure

1 Fiona De Cuyper is the Deputy Editor in Chief of the ESR Journal. She is a Research Intern at The Arctic Institute and previously interned at the Belgian Ministry of Foreign Affairs, the Permanent Representation of Belgium to the EU, and the Belgian Embassy in Moscow. She is about to start her third Master's degree in Diplomatic Studies at the University of Oxford.

2 Pierre Gerbet, “The Common Foreign and Security Policy,” *Centre Virtuel de la Connaissance sur l'Europe*, 2016, https://www.cvce.eu/en/recherche/unit-content/-/unit/02bb76df-d066-4c08-a58a-d4686a3e68ff/280511d5-b97d-4f51-b60d-7496ade168ea/Resourcess#a02ed085-03b9-4202-93d3-794363f699e8_en&overlay.

3 *Ibid.*

4 *Ibid.*

that was set out by the Maastricht Treaty, but kept the CFSP as an intergovernmental policy area, ensuring that the Member States maintained full control over all decisions.⁵ Essentially, the Member States are the central actors in the CFSP, and the EU institutions play a much more modest role here compared to other policy areas.

CFSP vs. Other EU Policy Areas

In terms of decision-making and governance, the CFSP is different from other policy areas within the EU. It is, in fact, the only policy area that is regulated by the TEU instead of the TFEU. *“Perhaps ironically, this would allude to a higher or more important status of CFSP norms as they seem to form part of the constitutional set-up of the Union. At the same time, we know that it owes this special position to fears by certain Member States that aligning CFSP with some former Community policies could make an end to what they perceive as the “intergovernmental” nature of CFSP”*.⁶ Substance-wise, the most significant differences constitute the right of initiative, the kind of decision-making in the Council, the weaker role of the Parliament and the Commission, and the legal supervision, which will be discussed in the sections below.

The Right of Initiative

Traditionally, the right of initiative is one of the key rights of the European Commission, which is the institution responsible for initiating policy proposals in the different policy areas. When it comes to the CFSP, however, it is not the Commission that has the right to initiate policy, but rather the EU HR/VP and the Member States.⁷ Nevertheless, according to Article 30(1) TEU, the Commission can

still issue joint proposals together with the High Representative, but no longer on its own terms. This is demonstrated by Article 30.1 TEU: *“Any Member State, the High Representative of the Union for Foreign Affairs and Security Policy, or the High Representative with the Commission’s support, may refer any question relating to the common foreign and security policy to the Council and may submit to it, respectively, initiatives or proposals”*.⁸ This Article clearly showcases the power of the Member States within this policy area, as they can submit proposals without the support of any of the EU institutions, in contrast to many other policy areas where the Commission is solely qualified to submit proposals.

Decision-making

As a general rule of thumb, all CFSP decisions are taken by unanimity, as demonstrated in Article 24(1) TEU: *“... The common foreign and security policy is subject to specific rules and procedures. It shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise”*.⁹ This implies that all Member States must agree to any given decision and if one of them decides that it does not like the proposal, it can bring the entire process to an end.

Nevertheless, there are some exceptions to this rule, which can be found in Article 31 TEU. Member States can decide to constructively abstain, meaning that they are not required to implement the decision taken, yet they allow the adoption of the decision. However, if the number of States abstaining constitutes one-third of all Member States, the decision will be rejected entirely.¹⁰ In addition, the

5 Peter Van Elswege and Femke Gremmelprez, “Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice,” *European Constitutional Law Review* 16, no. 1 (2020): 8-32.

6 Ramses A. Wessel, “Lex Imperfecta: Law and Integration in European Foreign and Security Policy,” *European Papers* 1, no. 2(2016): 439-468, 447.

7 Stephan Keukeleire and Tom Delreux, *The Foreign Policy of the European Union* (London: Bloomsbury Academic, 2022).

8 Consolidated version of the Treaty on European Union, OJ C 326, October 26, 2012, 13-390, Art. 30 §1.

9 Consolidated version of the Treaty on European Union, OJ C 326, October 26, 2012, 13-390, Art. 24 §1.

10 See Consolidated version of the Treaty on European Union, OJ C 326, October 26, 2012, 13-390, Art. 31 §1.

European Council can request qualified majority voting (QMV) for a decision, but this request must be taken by unanimity.¹¹ The Council is also allowed to act by QMV in instances laid out in Article 31(2) TEU. However, this can be opposed by any Member State. In this case, the High Representative tries to find an acceptable solution, and if they fail to do so, the Council can vote by QMV to refer the matter to the European Council, which will then vote on the matter unanimously.¹² However, it is noteworthy that, in 2019, none of these provisions had been used yet.¹³

The Role of the Commission and the Parliament

Concerning the CFSP, both the European Parliament and the European Commission have reduced powers when compared to other policy areas. As aforementioned, the Commission loses its right of initiative under the CFSP, but it still has some influence as the High Representative is simultaneously a Vice President of the Commission. Whereas the Commission traditionally holds important executive powers, the Member States and the High Representative are responsible for the execution of the CFSP as laid out in Article 26.3 TEU: *“The common foreign and security policy shall be put into effect by the High Representative and by the Member States, using national and Union resources”*.¹⁴

When it comes to the Parliament, it may ask questions and make recommendations to the High Representative and the Council, but these contain no explicit binding power.¹⁵ Next to its relatively broad

capabilities in supporting the CFSP, the only modest form of actual power the Parliament has over this policy area is through its control over the EU budget, as it has to approve the CFSP's annual budget.¹⁶

Legal Supervision

In contrast to other EU policy areas, there is no mechanism that allows the Commission to monitor the implementation of CFSP decisions by the Member States, and the Court of Justice of the EU (CJEU) does not possess the jurisdiction to condemn or impose sanctions on Member States in cases of non-implementation, as set out in Article 275 TFEU: *“The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions”*.¹⁷

In addition, when the Council ignores its rights and competences in the CFSP, neither the Commission nor the Parliament can initiate a procedure before the CJEU. Moreover, the CJEU has stated that *“as EU law now stands, certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice”*.¹⁸ This raised questions about the ambivalence and bounds of the CJEU's jurisdiction.¹⁹ Building on this lack of legal certainty and the limited powers of the EU institutions in this area, the Member States can act as they please since there is no formal oversight mechanism in place. This leads to the concrete problem with this policy area: it is ineffective and inefficient.²⁰

11 See Consolidated version of the Treaty on European Union, OJ C 326, October 26, 2012, 13–390, Art. 31 §2.

12 *Ibid.*

13 Nicholas Wright, *The EU's Common Foreign and Security Policy in Germany and the UK: Co-operation, Co-optation and Competition* (Cham: Palgrave Macmillan, 2019), 19.

14 See Consolidated version of the Treaty on European Union, OJ C 326, October 26, 2012, 13–390, Art. 26 §3.

15 European Parliament, “Foreign policy: aims, instruments and achievements,” April, 2023, https://www.europarl.europa.eu/erpl-app-public/factsheets/pdf/en/FTU_5.1.1.pdf.

16 *Ibid.*

17 Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, October 26, 2012, 47–390, Art. 275.

18 Court of Justice of the European Union, Opinion of the Court (Full Court) of 18 December 2014, ECLI:EU:C:2014:2454, 42.

19 Panos Koutrakos, “Judicial Review in the EU's Common Foreign and Security Policy,” *International and Comparative Law Quarterly* 67, no. 1(2018): 1-35.

20 Steven Blockmans, “Differentiation in CFSP: Potential and Limits,” *Instituto Affari Internazionali*, March 8, 2017, https://www.iai.it/sites/default/files/eu60_5.pdf; Asle Toje, “The Consensus-Expectations Gap: Explaining Europe's Ineffective Foreign Policy,” *Security Dialogue* 39, no. 1 (2008): 121-141.

The Capabilities-Expectations Gap and the Issue of Perceptions

This nature of decision-making in the CFSP is the principal reason for the phenomenon of the “capabilities-expectations gap”, as first conceptualised by Christopher Hill in 1993.²¹ This concept underlines the divergence between the aims of the CFSP that are described in Article 21 TEU and the concrete policy outcomes on the ground.²² However, the capabilities-expectations gap does not provide an explanation for the reasons why Member States support, oppose, or refrain from policy proposals, yet it constitutes a useful tool to illustrate the complexities of this policy area.²³

There are many expectations about what the EU could and should do in foreign policy, but there are few capabilities when it comes to the CFSP, as any Member State can block any proposal due to the unanimity requirement. This results in the EU’s actions not living up to its own expectations nor to external expectations.²⁴ This is not surprising given the fact that the CFSP must reconcile 27 individual perspectives on foreign policy, rooted in vastly different national interests, capabilities, resources, and differing levels and types of involvement in the international arena. This, however, also demonstrates that decision-making in this area has fallen victim to the fundamental differences between the Member States.²⁵ Getting all 27 Member States to agree to a CFSP decision takes time, and the

easiness with which States can block decisions significantly hampers progress and renders it an area characterised by ineffectiveness.

Importantly, the CFSP is not the only element of EU foreign policy. The EU still has other external relations policies which operate on a different legal basis than the CFSP.²⁶ This shows that EU foreign policy is not yet harmonised and is still fragmented, which again puts a brake on efficiency. Although multiple articles of the TEU state a binding obligation of coherence for EU external relations, this is hard to obtain when the CFSP has different legal underpinnings.²⁷ In addition, even though the TEU tries to integrate EU external relations, it still separates between the CFSP and general external action through its Title V: “General provisions on the Union’s external action and specific provisions on the Common Foreign and Security Policy”.²⁸

All this does not only have an internal effect on the Union, but also has external repercussions. This is reflected in the behaviour of third-party states *vis-à-vis* the EU. The EU is not yet perceived as a serious foreign policy actor as it cannot manage to consistently speak with one voice in this area.²⁹ But perceptions matter, and their importance will only continue to grow as the number of shared challenges increases.³⁰ In addition, perceptions can also influence and possibly undermine the nature of relations and cooperation: “the perception of internal EU developments by

21 Christopher Hill, “The Capability-Expectations Gap, or Conceptualizing Europe’s International Role,” *Journal of Common Market Studies* 31, no.3 (1993): 305-328; Toje, *The Consensus-Expectations Gap: Explaining Europe’s Ineffective Foreign Policy*; Wright, *The EU’s Common Foreign and Security Policy in Germany and the UK: Co-operation, Co-optation and Competition*, 19.

22 Consolidated version of the Treaty on European Union, OJ C 326, October 26, 2012, 13-390, Art. 21 §2; Wright, *The EU’s Common Foreign and Security Policy in Germany and the UK: Co-operation, Co-optation and Competition*, 19.

23 Wright, *The EU’s Common Foreign and Security Policy in Germany and the UK: Co-operation, Co-optation and Competition*, 20.

24 *Ibid.*

25 *Ibid.*

26 Wessel, *Lex Imperfecta: Law and Integration in European Foreign and Security Policy*.

27 *Ibid.*

28 *Ibid.*

29 Michito Tsuruoka, “Expectations deficit in EU-Japan relations: why the relationship cannot flourish,” *Current Politics and Economics of Asia* 17, no.1 (2008): 107-126.; Michito Tsuruoka, Interview on Japanese Perceptions of the EU. Conducted in the context of my Master thesis, July 2021.

30 Michito Tsuruoka, “The European Union as Seen by Japan in an Age of Uncertainty,” In *Shaping the EU Global Strategy*, ed. Natalia Chaban and Martin Holland (Cham: Palgrave Macmillan, 2019), 127-146.

third countries often plays a significant role in defining the limits of bilateral dialogue".³¹ It is, therefore, highly important that the EU tackles this ineffectiveness.

Pathways for the Future

As aforementioned, the capabilities-expectations gap leads to both internal and external repercussions. To counter this, some recommendations are formulated in this section. One of the solutions that could make the CFSP more effective and efficient is introducing QMV as a standard form of decision-making instead of unanimity. This would eliminate the political stalemate that one Member State can cause by blocking an entire proposal from ever entering into force. This way of voting has proved effective in many other EU policy areas and could therefore provide a relatively easy way of increasing the CFSP's effectiveness through legitimate means.

Secondly, another useful solution would be to attribute some more power to the EU institutions, especially when it comes to oversight and the monitoring of implementation. It would thus be important to grant the Commission this oversight capability like it has in many other policy areas. In addition, the role of the Court of Justice of the EU should also be reinforced. If certain Member States decide not to implement certain decisions, the Court should be able to impose sanctions as would be the case with any other breach of EU legislation.

Thirdly, it is of importance to harmonise the CFSP with the EU's other external policies. An important step towards achieving the stated coherence in EU external policy, as set out in the TEU, is to bring them on the same legal footing and no longer

distinguish between the CFSP and other EU external action areas. This would show the world that the EU is serious about becoming a global, and above all effective, foreign policy player and would enable it to take actions quickly and effectively, which is becoming more and more important in today's volatile international environment.

Conclusion

The EU's foreign policy is currently characterised by inefficiency and ineffectiveness as the Member States continue to exert too much power over the CFSP, and EU foreign policy is fragmented between the CFSP and other external action policies. The capabilities-expectations gap constitutes a useful tool to grasp the complexity and consequences of this phenomenon and highlights the urgency to tackle these shortcomings. There are different pathways to help close this gap, like introducing QMV into the CFSP decision-making process, allocating more powers to the EU institutions, and harmonising the CFSP with other EU external action policies. Although these measures are theoretically not that hard to implement as they would largely just be following the model of different EU policy areas, it would be considerably harder to convince the Member States to give up part of their powers in this area. This is the main pain point that remains and requires further research, as it is unclear whether and under what conditions the Member States would agree to such changes.

³¹ Julie Gilson, *Japan and the European Union: A Partnership for the Twenty-First Century* (Cham: Macmillan Press Ltd., 2000), 60.

SHANE GOODMAN

LEGAL DIMENSION OF HYBRID THREATS : A SYSTEMIC VULNERABILITY FOR EUROPE

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“In a world full of carnivores, vegetarians have a very tough time of it” - Sigmar Gabriel, German Foreign Minister 2017/18.²

Introduction

RESPECT for the rule of law is one of the underpinnings of any democratic society. However, it can also be exploited by hostile actors as a systemic vulnerability. The EU is a key supporter of a rules-based international order, with its own existence based on international treaties, and its Member States committed to respecting democracy and the rule of law under Article 2 of the Treaty on European Union. However, a system based on the rule of law also has inherent vulnerabilities, which can be exploited by hostile actors. In recent years, hostile actors have manipulated the laws of the EU and its Member States to legitimise their own actions, delegitimise the actions of others, exert control internally, and project influence externally. Moreover, the responses that the EU can take to the manipulation of its own laws and the international norms it promotes are rather limited, as it is constrained by the very legal system being used against it.

This article concerns the actions of one such hostile actor, Russia, and its hybrid threat activities in the legal domain. To analyse

such activities, this article will first outline the nexus between the law and hybrid threats using the conceptual framework of the European Commission’s Joint Research Centre, which, in collaboration with the European Centre of Excellence for Countering Hybrid Threats (Hybrid CoE), developed a novel mode of analysis for hybrid threats in 2021.³ The relevance, or lack thereof, of the term ‘lawfare’ will also be discussed, showing why this commonly used term is misleading in a hybrid threat context. The following section will discuss case studies where Russia utilised the law as an instrument and as a domain for strategic competition against the EU. Finally, the EU’s response will be analysed, and a recommendation will be given on how the EU can respond more effectively in the future by enhancing its legal resilience.

The Conceptual Framework and Relevance of Lawfare

Using the Joint Research Centre/Hybrid CoE framework, the law can be understood in two ways, both as a domain and as an instrument.⁴ The law should not be understood simply as a set of rules to be followed, but also as a dynamic process where norms are shaped, thus providing a domain for strategic competition. Conversely, the law can be used as an instrument to operate in other domains. The goals of Russia when using the law

1 Shane Goodman is Co-President of the European Studies Review. He is an MA graduate of the EU International Relations and Diplomacy department at the College of Europe, Bruges.

2 Klaus Brinkbäumer and Christiane Hoffman, “In einer Welt voller Fleischfresser haben es Vegetarier schwer [In a world full of carnivores, vegetarians have a hard time]”, *Der Spiegel*, January 4, 2018, <https://www.spiegel.de/spiegel/sigmar-gabriel-im-interview-ueber-europas-schwaeche-a-1186208.html>.

3 Georgios Giannopoulos, Hanna Smith and Marianthi Theocharidou, “The Landscape of Hybrid Threats: A Conceptual Model,” *Joint Research Centre, European Commission*, 2021.

4 Aurel Sari, “Hybrid threats and the law: Building legal resilience,” *Hybrid CoE Research Report 3* (2021), https://www.hybridcoe.fi/wp-content/uploads/2021/10/20211104_Hybrid_CoE_Research_Report_3_Hybrid_threats_and_the_law_WEB.pdf.

as an instrument can include legitimising its own actions or those of its targets or preventing internal dissent.⁵ An example of this would be Russia's 2015 law banning "undesirable organisations", which was used to prevent internal opposition to the regime.⁶

It would be useful to begin with an analysis of the relevant hostile actor. Firstly, Russia is a state actor. While non-state actors also engage in hybrid threat activities within the legal domain, State actors possess a more privileged position due to their rights under Article 2 of the UN Charter, i.e., sovereignty.⁷ Within the legal domain, Russia utilises several hybrid threat tools to prime and destabilise the target, such as exploiting gaps in domestic and international legal systems, leveraging compliance with regulations and the rule of law against the targeted state, circumventing its own legal obligations, and utilising the law and legal processes to create narratives and counter-narratives.⁸⁹ These will be discussed using case studies on Ukraine, Poland, the Baltic States, and finally, Interpol. Regarding the type of activity, Russia engages extensively with the legal domain during all phases, not just the final stage of warfare, and as a result, the term 'lawfare' must be discussed to clear up potential misconceptions.

When discussing the nexus between the law and hybrid threats, the term 'lawfare' is often used. First coined by Col. Charles Dunlap in 2001, it was originally defined as a "*method of warfare where law is used as a means of realising a military objective*".¹⁰ However, this original definition does not fit the hybrid threat conceptual framework, as it is too narrow and is focused on achieving military objectives. Other scholars have sought to expand this definition over the years. In 2014, Tiefenbrun defined lawfare as "*a weapon designed to destroy the enemy by using, misusing, and abusing the legal system and the media in order to raise a public outcry against that enemy*".¹¹ Tiefenbrun's recognition of the ambiguous nature of this definition is broader and fits Russian activities during the priming and destabilisation phases. Similar calls for a broader definition beyond the warfare phase have also been echoed by other academics.¹² Some also include disinformation as an element of lawfare, when legal justifications are given for the hybrid threat activity.¹³ What is clear is that there is no consensus definition of lawfare. Hence, this article avoids the term, albeit there is a significant overlap between the case studies using lawfare terminology and those that employ the EU approach of the Joint Research Centre.

5 *Ibid.*

6 *Ibid.*

7 Agata Kleczkowska, "States vs. Non-State Actors – A Public International Law Perspective," *Hybrid CoE Strategic Analysis* 20 (2020), <https://www.hybridcoe.fi/publications/hybrid-coe-strategic-analysis-20-states-vs-non-state-actors-a-public-international-law-perspective/>.

8 Giannopoulos, Smith and Theocharidou, *The Landscape of Hybrid Threats: A Conceptual Model*, 30.

9 Aurel Sari, "Legal resilience in an era of grey zone conflicts and hybrid threats," *Cambridge Review of International Affairs* 33, no. 6 (2020): 846-867.

10 Charles Dunlap, "Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts," *Carr Center for Human Rights*, November 29, 2001, <https://people.duke.edu/~pfeaver/dunlap.pdf>.

11 Susan Tiefenbrun, "Semiotic Definition of 'Lawfare'," *Case Western Reserve Journal of International Law* 43, no.1 (2010): 29-60.

12 Andres Munoz Mosquera, Sascha Dov Bachmann and Abraham Munoz Bravo, "Hybrid Warfare and the Legal Domain," *Terrorism and Political Violence* 31, no. 1 (2019):98-104, 98; David Hughes, "What Does Lawfare Mean?," *Fordham International Law Journal* 40, no. 1 (2016): 1-40.

13 Sascha Dov Bachmann and Andres Munoz Mosquera, "Hybrid Warfare as Lawfare: Towards a Comprehensive Legal Approach," in *A Civil-Military Response to Hybrid Threats*, eds. Eugenio Cusumano and Marian Corbe (The Hague: Palgrave Macmillan, 2018), 61-76.

Russian Uses of the Law as a Hybrid Threat Tool and as a Domain

The first case study that shows Russian usage of the law as a tool for hybrid threat activity can be found in Ukraine. In 2014, Russia sought to legitimise its own invasion of Crimea by using the law as part of its hybrid threat toolbox. In March 2014, Russia artificially constructed a new state in Crimea, before then entering an international treaty to annex the territory. This was done to give the annexation a semblance of legal legitimacy.¹⁴ Unfortunately, this was a pattern that would be repeated, with the recognition of *de facto* Russian proxy states of the Donetsk and Luhansk People's Republics also in 2014, followed by the annexation of these entities and two additional Ukrainian oblasts (Kherson and Zaporizhzhia) in 2022.¹⁵

Russia can also utilise the law as a hybrid threat tool through its proxies. The Hybrid CoE has identified how Russia utilises its proxy states, namely Belarus in this case, as a 'shield' for hybrid threat activities.¹⁶ During the 2021 Belarusian migrant crisis, both Russia and Belarus placed pressure on the EU and sought to delegitimise it and sow internal division using the law to reinforce their own arguments. For example, they encouraged the migrants they weaponised against the EU that had legal standing to take cases against Poland, Latvia, and Lithuania as a means of delegitimising the EU. These cases, which

ended up in the European Court of Human Rights, stated that Poland and Latvia had a positive obligation to help migrants, but that they did not have to enter Polish or Latvian territory.¹⁷ For Russia and Belarus, such a judgment was a success, as officials and volunteers from these countries could not enter Belarus to help migrants, and as such, it was impossible to fulfil their obligations, and the Member States were thus delegitimised in the eyes of some Western Member States and human rights organisations.¹⁸

Russia has also engaged with the law in a hybrid threat context through multilateral institutions. The most blatant example of this is the Russian weaponisation of Interpol. Interpol has a system whereby 'Red Notices' are issued for certain individuals. A Red Notice notifies a Member State that another country is seeking the arrest of someone on their territory, albeit Interpol's mandate does not allow for these Red Notices to be legally binding. Russia uses Interpol to put pressure on other Member States to arrest enemies of the Russian regime, often by branding them as terrorists or criminals.¹⁹ An example of this is the case of Pavel Zabelin, an associate of Kremlin critic Mikhail Khodorkovsky. If detained, he would have been deported to Russia. Interpol did not revoke his Red Notice until he was granted political asylum in Estonia.²⁰ This also shows how international criminal law is used to prevent internal dissent and delegitimise opponents of the regime.

14 Sari, Legal resilience in an era of grey zone conflicts and hybrid threats.

15 Pjotr Sauer and Luke Harding, "Putin annexes four regions of Ukraine in major escalation of Russia's war," *The Guardian*, September 30, 2022, <https://www.theguardian.com/world/2022/sep/30/putin-russia-war-annexes-ukraine-regions>.

16 Alia Fakhry, András Rácz and Roderick Parkes, "Migration instrumentalization: A taxonomy for an efficient response," *Hybrid Center for Excellence Working Paper 14*, March 8, 2022, <https://www.hybridcoe.fi/publications/hybrid-coe-working-paper-14-migration-instrumentalization-a-taxonomy-for-an-efficient-response/>.

17 European Court of Human Rights Press Office, "The European Court of Human Rights indicates interim measures in the cases *Amiri and Others v. Poland* (application no. 42120/21) and *Ahmed and Others v. Latvia*," August 25, 2021, <https://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=003-7100942-9612632&filename=Interim%0measures%20Poland-Latvia-Belarus%20border.pdf>.

18 Piotr Łubiński, "Hybrid Warfare or Hybrid Threat – The Weaponization of Migration as an Example of the Use of Lawfare – Case Study of Poland," *Polish Political Science Yearbook 51*, (2022), 43-55.

19 Rick Meessen, Bianca Torossian and Frank Bekkers, "A Horizon Scan of Trends and Developments in Hybrid Conflicts set to Shape 2020 and beyond," *TNO, The Hague Centre for Strategic Studies*, 2020, <https://mk0hcssnlsb22xc4fhr7.kinstacdn.com/wp-content/uploads/2021/01/Horizon-scan-Hybrid-Trends-and-Developments-2002-.pdf>.

20 European Parliament, "Misuse of Interpol's Red Notices and impact on human rights – recent developments," January 2019, PE 603.472, [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603472/EXPO_STU\(2019\)603472_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603472/EXPO_STU(2019)603472_EN.pdf).

Legal Resilience: A Robust Response?

Since the release of the 2016 EU Global Strategy, 'resilience' has become a buzzword in EU security circles.²¹ According to Sari, there are two modes of legal resilience: "*resilience through law and resilience of the law*".²² The Lisbon Treaty commits the EU to respecting the principles of public international law.²³ This, while underpinning the whole normative and legal nature of the EU, can also be a systematic vulnerability, as it invites hostile actors to test the limits of the mutual defence clause and to weaken the EU through a piecemeal approach to chipping away at its legal system. The EU has also shown an increased willingness to engage in "*lawful, though unfriendly, measures of international intercourse*".²⁴ While the EU cannot be seen to disregard its own founding principles, it could be argued that the establishment of a Strategic Communications task force to counter disinformation could itself be seen as another response to hybrid threat activity in the legal domain.²⁵ Alternatively, the EU's strength in the sphere of private international law could also be a solution, as by setting high standards for foreign laws, EU policies can be projected extraterritorially, and this can help counter hybrid threats outside the EU.²⁶ Some have taken a very broad definition and argued that sanctions adopted by the EU under Article 215 of the Treaty on the Functioning of the EU can be a simple way of countering hybrid legal threats, although this is broad and can fall into many categories.

Conclusion

In conclusion, respect for the rule of law is an inherent and unavoidable systematic vulnerability for any democratic society. In an EU context, Russia has been a hostile actor that, through its proxies or bilaterally, has utilised the law both as a tool in its hybrid threat arsenal and as a domain for strategic competition by seeking to delegitimise the norms so central to the EU. Legal resilience is only just developing as a concept, but it is already utilised by the EU in many ways. The EU needs to ensure legal preparedness, i.e., that its legal system and that of its Member States can withstand shocks to the system, and this should be achieved as part of a hybrid threat counter-strategy. The establishment of a legal threat register to cover gaps in the law and prevent exploitation by Russia or other actors, as seen in the Ukrainian war, Belarus, and Interpol case studies, would mark a significant advancement in ensuring a resilient and robust response to the weaponisation of our own legal system against us.

21 European External Action Service, "Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union's Foreign and Security Policy," 2016, https://www.eeas.europa.eu/eeas/global-strategy-european-unions-foreign-and-security-policy_en.

22 Aurel Sari, Legal resilience in an era of grey zone conflicts and hybrid threats.

23 European Union, Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union of 13 December 2007, OJ C 326, October 26, 2012, 47–390, Art. 3(5).

24 Aurel Sari, "The Mutual Assistance Clauses of the North Atlantic and EU Treaties: The Challenge of Hybrid Threats," *Harvard National Security Journal* 10, no. 1 (2019): 405-460, 405.

25 Luigi Lonardo, "EU Law Against Hybrid Threats: A First Assessment," *European Papers* 6, no. 2 (2021): 1075-1096.

26 *Ibid.*

JOSE FLOMESTA

*EUROPEAN DEFENCE FUND : A RESULT OF THE
COMBINED EFFECT OF EU INSTITUTIONAL ACTORS,
EXPERT GROUPS AND GEOPOLITICAL CONTEXT*

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Introduction

Anything characterises the European discourse, it is its aspiration to become a strategically autonomous actor in order to guarantee peace and security within and beyond its borders. To achieve this goal, various initiatives have been launched. Among them is the European Defence Fund (EDF), which allows the European Commission to have a greater margin of action in the sector of defence, which has traditionally been reserved for the decision of the states. However, the interest in including defence and security issues in European supranational decision-making processes is not something recent, but rather different actors have been defending the advantages of the European Union having a single voice *vis-à-vis* the world for decades.

The aim of this article, therefore, is to decipher the factors that have led to the success of this kind of initiative on the European agenda at this very moment, despite the fact that the advocacy for a common EU foreign, defence, and security policy dates back to 1976 with the well-known Tindemans Report.² Applying Kingdon's analytical model, typical of public policy theories, it is argued here that the convulsive geopolitical context of the last decade (*political stream*) combined with the narrative of institutional actors (*problem*

stream) and with the mobilisation of the European industrial lobby (*policy stream*), gave rise to a window of opportunity over the last decade that allowed the approval of the EDF as a way to advance in the path toward EU defence supranationalisation. It should be noted that although all three streams were influential, this paper makes a detailed analysis of the political stream.

Problem Stream: The EU's Narrative Regarding Security

One of the necessary ingredients for a given action to address an issue is the problematisation of a situation. Problematising an issue means recognising it as an affair of relevance that needs to be acted upon. In the adoption of the EDF, the problematisation of EU security was necessary, where the European Commission, the Council and other individual actors have played an indisputable role. On the one hand, the European Commission already published in the 1990s certain communiqués in which it hinted at the need to strengthen the European defence industry as a way of enhancing the security of the Union.³ This actor has thus become one of the important players in creating a narrative to highlight the importance to be given to security within the Union. Moreover, since the launch of the Lisbon Treaty,

1 José Flomesta is a Master's student in Geopolitics and Strategic Studies at the University Carlos III de Madrid, with a separate Dual Bachelor in International Studies and Political Sciences from the same university. He is a research assistant at the UC3M Department of Social Sciences, and has previously been an intern in the Office of Strategy and Foresight of the Spanish Ministry of Foreign Affairs.

2 Leo Tindemans, "Report by Mr. Leo Tindemans, Prime Minister of Belgium, to the European Council" (Supplement 1/76, Bulletin of the European Communities, 1976), 32, http://aei.pitt.edu/942/1/political_tindemans_report.pdf.

3 Bruno Oliveira and Jocelyn Mawdsley, "Sociotechnical Imaginaries of EU Defence: The Past and the Future in the European Defence Fund," *Journal of Common Market Studies* 59, no. 6 (2021): 1458-1474.

the Presidents of the Commission – especially Juncker – have used the State of the Union conference to construct a narrative on the need for the EU to become a security player.⁴ On the other hand, the Council has also contributed to problematising this issue, especially from 2013 onwards, when the *European Council Conclusions of 19-20 December* defended the need to strengthen the European defence industry as a way of increasing the strategic autonomy of the Union.⁵ Other documents that show how the European institutions have tried to frame the security discourse as an EU problem include the *Reflection paper on the Future of European Defence*, which proposes several scenarios to achieve a defence union, and the *EU Global Strategy*, launched in 2016, which advocates a greater coherence of European policies with the defence and security sectors.⁶

Policy Stream: Interest Groups Shaping EU Defence Research Policy

Once the problematisation of the phenomenon has taken place, a second condition for action to be taken is the formulation of solutions. In this process of policy formulation to address the security problem, the role of the European industrial lobby was highlighted, including the *Kangaroo Group*, the *Group of Personalities on Security Research*, and the *European Security Research Advisory Board*. These were some of the most prominent

actors calling for addressing the issue of EU security through supranational solutions at that time, leaving behind the classical state-centric perspective.⁷ More specifically, the *High-level Group of Personalities on Defence Research*, created in 2015, stands out, whose recommendations included integrating the European defence industry through joint defence research projects.⁸ This vision is shared by Csernaton, who reflects on the influence that this group had in setting agenda priorities for security and defence research policies at that time.⁹

Political Stream: The 2010s Geostrategic Challenges of the European Union

The problematisation of a phenomenon and the formulation of solutions to address it must be accompanied by a favourable political context that highlights the problem and justifies the implementation of the solutions. To explain the implementation of the EDF, the geopolitical context of Europe of this time is highly relevant, and is where most emphasis is placed in this article. In fact, the reason why more attention is being paid to this section is that the geopolitical context surrounding the European Union has long been decisive to determine its line of action. For example, the *European Security Strategy*, an unprecedented report identifying Europe's external threats and their implications for the continent and the Union that was published in 2003, and

4 Jean Claude Cachia and André P. DeBattista, "Political narrative, collective EU security and the State of the Union," *European Politics and Society*, (2022): 1-17.

5 European Council, "Conclusions of the European Council 19/20 December 2013" (EUCO 217/13, December 20, 2013), 26, https://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/140245.pdf.

6 European Commission, "Reflection paper on the future of European defence" (COM(2017) 315, June 6, 2017), 24, https://commission.europa.eu/system/files/2017-06/reflection-paper-defence_en.pdf; Council of the European Union, "A Global Strategy for the European Union's Foreign And Security Policy," Council of the European Union, 2016. https://www.eeas.europa.eu/eeas/global-strategy-european-unions-foreign-and-security-policy_en.

7 Raluca Csernaton, "The EU's Defence Ambitions: Understanding the Emergence of a European Defense Technological and Industrial Complex," *Carnegie Endowment for International Peace*, December 6, 2021, https://carnegieendowment.org/files/Csernaton_EU_Defense_v2.pdf.

8 European Defence Agency, "High-level Group of Personalities on defence research issues statement," *European Defence Agency*, last modified June 18, 2015, <https://eda.europa.eu/news-and-events/news/2015/06/18/high-level-group-of-personalities-on-defence-research-issues-statement>.

9 Csernaton, The EU's Defence Ambitions: Understanding the Emergence of a European Defense Technological and Industrial Complex.

the establishment of the *European Defence Agency* later in 2004, are considered to be reactions to the Iraq War.¹⁰ Likewise, this article argues that the EDF was a response motivated by three factors that characterised the geopolitical context of the preceding years.

One of the first factors pointed out here is the military dependence that European countries had, and still have today, on the United States. This factor was not exclusive to this era, but was inherited from the Cold War, in which the old continent entrusted its security to US protection, and continued to be present long after the fall of the Berlin Wall. Despite not being a novelty, depending almost exclusively on NATO and US protection had led to an almost complete submission to US geopolitical security interests.¹¹ In a situation of military dependence, alignment with the interests of the actor providing such security is practically obligatory if the objective is to preserve the defender-defendant relationship, even though it may be a situation of abuse of the former over the latter. This submission to US interests was not only shown in the 1990s Yugoslav Wars, but also in the conflicts in Afghanistan and Libya, where NATO intervention caused great controversy and conflicting positions within the continent, which were decisive for internal actors within the Union to opt for less dependence on the US in this matter.¹² In this regard, a larger European security industry could lead to a higher level of strategic

autonomy in the military field and this, in turn, would lead to a more independent and self-sufficient EU. Moreover, even if –currently– 22 out of the 27 EU member states have the guarantee of the *collective defence principle* recognised in Article 5 of the NATO Treaty, it cannot be taken for granted that this alliance will last forever and, in such a case, it is intuitive to think that the countries of the Union should have developed sufficiently autonomous military capabilities to defend themselves without depending on the US.

The second factor characterising the geopolitical context of the moment was the EU's aspiration to overcome the technological competitiveness crisis and position itself as a technological global leader, competing with China but especially with the US, already recognised in the 2010s as a consolidated technology global player in sectors such as aerospace, naval, and cyberspace defence innovation.¹³ A scarce tradition of investment in military technology research and innovation, the lower defence budget spending, the absence of economies of scale, and a fragmented technological industrial market are factors that –with respect to the EU– evidenced the transatlantic technology gap and the scarcity of European competitiveness in the global security market.¹⁴ Moreover, this gap was sometimes exacerbated by US regulations limiting the export of defence tools abroad, such as the *International Traffic in Arms Regulation*.¹⁵ In

10 Council of the European Union, "European Security Strategy: A Secure Europe in a Better World," *Council of the European Union*, 2003, <https://www.consilium.europa.eu/media/30823/qc7809568enc.pdf>; Csernaton, *The EU's Defense Ambitions: Understanding the Emergence of a European Defense Technological and Industrial Complex*.

11 José Luis Calvo Albero, "Capítulo 5. Autonomía estratégica europea y grandes potencias [Chapter 5. European strategic autonomy and great powers]," *Cuadernos de Estrategia*, no. 215 (2022): 185-206.

12 Sally Khalifa, "NATO's Intervention in Libya: Assessment and Implications," *Instituto Europeo del Mediterráneo IEMed*, last modified 2012, <https://www.iemed.org/publication/natos-intervention-in-libya-assessment-and-implications/?lang=es>.

13 The European Liberal Forum, "Solving the European Defence Market Puzzle," *The European Liberal Forum*, 2018, <https://liberalforum.eu/wp-content/uploads/2021/06/Solving-the-European-Defence-Market-Puzzle.pdf>.

14 Sven Smit, Magnus Tyreman, Jan Mischke, Philipp Ernst, Eric Hazan, Jurica Novak, Solveigh Hieronimus and Guillaume Dagorret, "Securing Europe's competitiveness: Addressing its technology gap," *McKinsey Global Institute*, last modified September 22, 2022, https://www.mckinsey.com/capabilities/strategy-and-corporate-finance/our-insights/securing-europes-competitiveness-addressing-its-technology-gap#.

15 Csernaton, *The EU's Defense Ambitions: Understanding the Emergence of a European Defense Technological and Industrial*

this context of EU-US rivalry in the defence technology sector, the EDF appeared as the solution to show the world the European leadership and commitment to defence technology innovation, thanks to which it could support the development of disruptive technologies (e.g., autonomous defence systems, AI defence, or defensive robotics) which are the ones that give their holder a strategic advantage over its rivals and which can turn the EU into a real competitor for the US in the global defence market.¹⁶

The third factor in the geopolitical context identified here as a cause of the implementation of the EDF is the blurring of the differences between external security and internal security due to the new forms of transnational conflict that were taking place with more prominence from the 2000s onwards.¹⁷ Some examples include the incidence of organised crime, especially the presence of mafias and drug and human trafficking organisations in the south of the EU, international terrorism –which shook the cities of Toulouse (2012), Brussels (2014) and Paris (2015)– and the 2015 Mediterranean migration crisis. These events, together with the annexation of the Crimean peninsula by Russia in 2014, are some of the geopolitical forces that contributed to create the perception within the EU institutions that guaranteeing the internal security of the Union was complicated without having a relevant role in the preservation of external security.¹⁸ The EDF, by its ability to increase coordination and coherence in defence research projects within the

EU, was presented as the way to establish that a common European technological industry would be capable of addressing the new external security challenges threatening internal security.¹⁹

Conclusion: A Window of Opportunity for the EDF

Applying the logic behind Kingdon's model of policy change, if the three streams coincide in time, a window of opportunity opens and there is a high probability that a specific policy will be approved.²⁰ This article is based on this model to explain the implementation of the EDF in this specific context.

The framing of security and defence as a problem of relevance for the Union begins to take place with greater insistence from the European institutions themselves, despite the reluctance of the member states, as this area of action has traditionally been reserved to the national sphere. The various communiqués, reports, and speeches of the presidents and members of the Commission –especially the Juncker Commission– and other actors contributed to setting the problem of security on the European agenda. This problematisation was accompanied by a strong insistence from European technology industry lobby groups and experts who, aware of the problems posed by the fragmentation of the European defence market and the low investment of member states in defence, began to mobilise and publish a series of recommendations to address the phenomenon, among which was to

Complex.

16 Raluca Csernatoni and Bruno Oliveira, "The European Defence Fund: Key Issues and Controversies," *Peace Research Institute Oslo*, no. 3 (2019): 1-4, [https://www.prio.org/download/publicationfile/1798/Csernatoni,%20Martins%20-%20The%20European%20Defence%20Fund%20Key%20Issues%20and%20Controversies,%20PRIO%20Policy%20Brief%203-2019%20\(1\).pdf](https://www.prio.org/download/publicationfile/1798/Csernatoni,%20Martins%20-%20The%20European%20Defence%20Fund%20Key%20Issues%20and%20Controversies,%20PRIO%20Policy%20Brief%203-2019%20(1).pdf).

17 Csernatoni, *The EU's Defense Ambitions: Understanding the Emergence of a European Defense Technological and Industrial Complex*.

18 EUROJUST, "Eurojust News Issue No. 3," *Eurojust's Press & PR Service*, last modified December 2010, https://www.eurojust.europa.eu/sites/default/files/Publications/EJNews/EurojustNews_Issue3_2010-12-EN.pdf.

19 Gianmarco Scortecchi, "The European Defense Industry: From Fragmentation to Innovation," Master Thesis, Libera Università Internazionale degli Studi Sociali, 2020, http://tesi.luiss.it/28498/1/637242_SCORTECCI_GIANMARCO.pdf.

20 John W. Kingdon, *Agendas, alternatives and public policies* (New York: Harper Collins, 1995).

increase the integration of the defence market through collaborative research projects. In turn, both the definition of external security as an internal problem of the Union and the consequent recommendations of the expert groups were justified by the convulsive geopolitical context of the late 2000s and early 2010s surrounding Europe that the Union could not shake off: specifically, the disadvantages of military dependence on the US and NATO, the EU-US technological rivalry and the evolution of new forms of transnational conflict that threatened the security of the Union.

The aim of this paper has been to try to find out the causes that led to the approval of a policy such as the European Defence Fund, taking into account the traditional refusal of member states to have security and defence matters dealt with by the European institutions. Alongside the

analysis, it has been argued that the coincidence of these three elements in time, specifically in the late 2000s and early 2010s, and the progressive change in the perception of the member states themselves about the advantages of the EU having a more relevant role in the coordination of European defence, gave rise to a window of opportunity in which the EDF was presented as the best alternative to address the security challenges of the moment. Far from representing a paradigm shift towards support of defence policies as exclusive competences of the EU, the implementation of the EDF is a first step in the supranationalisation process of this area by giving the European Commission more capacity for action when coordinating technological innovation projects in this domain, which will definitely contribute to achieving greater strategic autonomy.

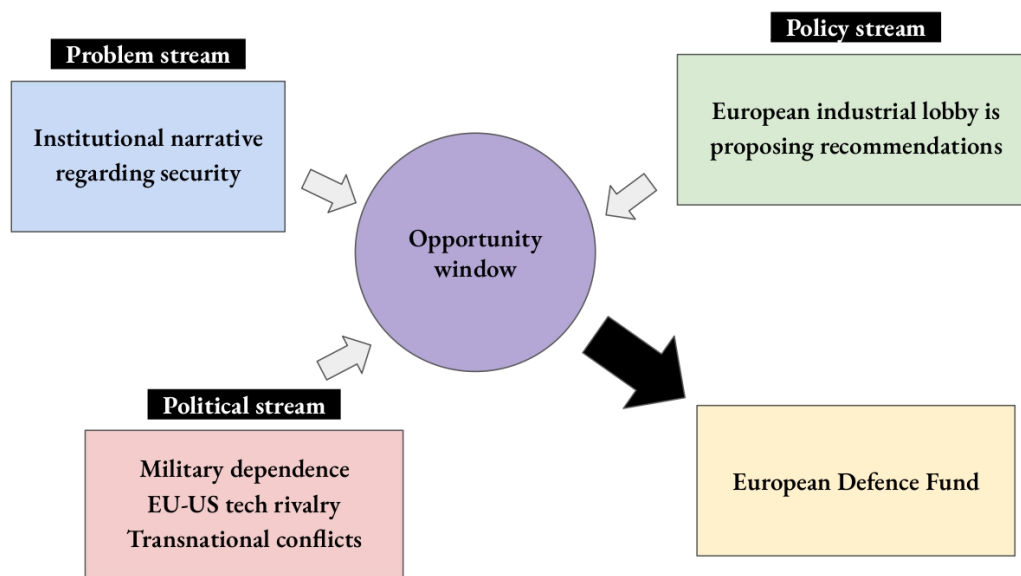


FIGURE
 Conceptual model on EDF approval based on Kingdon's theory (Source: Own creation)

LUCA DONATELLA

LEVELLING THE PLAYING FIELD : HOW THE FOREIGN SUBSIDIES REGULATION COULD RESHAPE SPORTS INVESTMENTS

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Introduction

THE Foreign Subsidies Regulation (FSR), which has been in force as of July 12, 2023, was adopted by the European Commission as an attempt to bridge the regulatory gap of foreign subsidies which distort the internal market of the European Union (EU).² In short, the FSR permits the European Commission to intervene when foreign subsidies from third countries distort the EU internal market. The FSR forms part of the EU's response to a potential subsidy war against Biden's landmark legislation, the Inflation Reduction Act, granting significant public support to US companies,³ and China's "Buy China" policy.⁴ This article, however, seeks to explore the perhaps unintended consequence of the FSR on sports investments and how this may precipitate the end of the "sportswashing" era of foreign governments investing heavily in individual clubs/sporting organisations.

The first part of this paper addresses the key aspects of the FSR and the relevance of the Regulation for the European sporting world. The second part, in turn, takes a closer look at the substantial investments made by the Gulf states in football clubs across the EU and the individual case of SK Lommel. The final part of this paper

comments on the areas that still need to be clarified regarding the application of the FSR and, crucially, the key question of whether the Commission will include sporting investments in its policy priorities or continue with a *laissez-faire* attitude.

The Foreign Subsidies Regulation Explained

Article 3(1) of the Regulation explains that a foreign subsidy is a direct or indirect financial contribution from a non-EU government towards undertaking(s) in the EU.⁵ Secondly, the notion of distortion in the EU internal market is defined under Article 4(1) as occurring when the subsidy improves the position of the undertaking in the market and as a result that subsidy actually or potentially negatively affects competition in the internal market.⁶

The FSR consists of three tools by which the Commission has the power to enforce the Regulation, two of which are *ex-ante* and one *ex-officio*. Firstly, the obligation for companies to notify concentrations involving a financial contribution by a non-EU government where (i) the acquired company, one of the merging parties or the joint venture generates an EU turnover of at least €500 million and (ii) the foreign financial contribution involved is more

1 Luca is a 2023 graduate of the LLM programme at the College of Europe, Bruges. He has a Bachelor's degree in Corporate Law at the University of Galway and holds a Diploma in EU Law from Université Toulouse Capitole.

2 Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 Dec. 2022 on foreign subsidies distorting the internal market, OJ L 3340, December 23, 2022, 1-45 (hereinafter "Foreign Subsidies Regulation").

3 Isabel Taylor, Niamh Kelly and Nele Dhondt, "The Green Subsidy Race," *Slaughter and May*, March 28, 2023, <https://my.slaughterandmay.com/insights/client-publications/the-green-subsidy-arms-race#:~:text=Could%20subsidy%20competition%20do%20more,scaling%20up%20the%20energy%20transition>.

4 Barbara Moens, Jakob Hanke Vela, Joshua Posaner, Hans Von Der Burchard, Giorgio Leali and Camille Gijs, "France presses EU to threaten trade war against China," *Politico*, June 15, 2023, <https://www.politico.eu/article/french-urge-eu-declare-trade-war-against-china/>.

5 Foreign Subsidies Regulation, Article 3(1).

6 *Ibid.*, Article 4(1).

than €50 million.⁷ Secondly, the obligation for companies to notify the Commission of their participation in public procurement procedures whereby (i) the estimated contract value is at least €250 million and (ii) the foreign financial contribution involved is at least €4 million per non-EU country; the Commission may then prohibit award of such contracts.⁸ Thirdly, the Commission has *ex-officio* powers to start investigations on its own initiative if it suspects distortive foreign subsidies may be involved. However this is limited to foreign subsidies granted no more than ten years from the moment of the start of the investigation -but no more than five years prior to the application of the FSR.⁹

The *ex-officio* tool has been in force since July 12, 2023 however the notification requirements will only be applicable as of October 12, 2023 to third country-based companies and EU-based companies.¹⁰

Relevance For Sport?

Most of the major football clubs meet the relevant thresholds in respect to EU turnover for the two *ex-ante* tools. Even during the 2019/2020 season, during which the finances of clubs were severely impacted due to the pandemic, the champions in France, Germany, and Spain each generated over €500 million.¹¹ Secondly, public procurement procedures

and infrastructure have seen heightened focus by the European Commission,¹² so one could expect that the financing of sports infrastructures, such as stadiums, by non-EU states will equally be subject to scrutiny. Finally, due to the *ex-officio* tool which lacks a financial threshold, the Commission almost has a *carte blanche* in deciding what to investigate and has a wide discretion in its application until the Courts give further clarity as to its judicial scope. This, for example, places almost any activity in a football club owned by a non-EU state subject to examination.

Major football clubs have, for the last decade, routinely been criticised for “*Financial Doping*”¹³ which can potentially distort football competition. Most recently, Manchester City has been charged with financial rule breaches,¹⁴ and documents disclosed in 2020 appeared to show that sponsorship deals from companies based in Abu Dhabi had been inflated with money channelled from the Gulf state to the club.¹⁵ Manchester City and its owners -the Abu Dhabi United Group for Development and Investment (ADUG)- routinely insist that they are separate from the Abu Dhabi government.¹⁶ However leaked documents suggest that the United Arab Emirates government manages the accounts belonging to the ADUG.¹⁷ The FSR provides that the “*financial contribution may be granted through public*

7 *Ibid.*, Chapter 3, Articles 19-26.

8 *Ibid.*, Chapter 4, Articles 27-33.

9 *Ibid.*, Chapter 2, Articles 9-18.

10 *Ibid.*, Article 54.

11 KPMG, “The European Champions Report 2021,” KPMG, January 2021, https://www.footballbenchmark.com/documents/files/public/The_European_Champions_Report_2021.pdf.

12 Nicola Pesaresi, Adinda Sinnaeve, Valérie Guigue-Koeppen, Joachim Wiemann and Madalina Radulescu, “The New State Aid Rules for Services of General Economic Interest (SGEI),” *European Commission*, [accessed August 6, 2023] https://competition-policy.ec.europa.eu/system/files/2021-04/SGEI_competition_policy_newsletter_2012_1_en.pdf; Sinziana Ianc and Tim Lichtenberg, “New rules for foreign subsidies – The European Commission’s approach to level the playing field,” *Linklaters*, November 11, 2021, <https://www.linklaters.com/en/insights/blogs/sportinglinks/2021/november/new-rules-for-foreign-subsidies>.

13 The Guardian, “MPs accuse Manchester United, Chelsea and Liverpool of ‘financial doping,’” April 20, 2009, <https://www.theguardian.com/football/2009/apr/20/manchester-united-liverpool-chelsea-financial-doping>.

14 Paul MacInnes, “Manchester City charged by Premier League over alleged financial rule breaches,” *The Guardian*, February 6, 2023, <https://www.theguardian.com/Football/2023/feb/06/manchester-city-charged-by-premier-league-over-alleged-financial-rule-breaches#:~:text=The%20six%20times%20Premier%20League,cooperate%20in%20a%20Premier%20League>.

15 *Ibid.*

16 Rafael Buschmann, Nicola Weber and Christoph Winterbach, “Sponsorship Money – Paid for by the State,” *Spiegel International*, April 7, 2022, <https://www.spiegel.de/international/europe/sponsorship-money-paid-for-by-the-state-a-2ad5b586-1d82-4a21-8065-f3c081cd91a4>.

17 *Ibid.*

or private entities",¹⁸ and the issue will be decided on a case-by-case basis. Due to Brexit, Manchester City is now a non-EU club. However the ADUG has stakes in numerous EU clubs including Lommel SK, Girona FC, and Palermo.¹⁹

A more prominent example is the ownership of Paris Saint-Germain (PSG), which is held by the Qatar Sports Investment -the state-run sovereign-wealth fund in Qatar- and is thus one of the only state-owned clubs in the world,²⁰ since its majority stake acquisition in 2011, followed by Qatar Sports Investment becoming the club's sole owner in 2012.²¹ PSG has spent over €1.3 billion on player transfers since 2011,²² which has directly contributed towards their position of dominance in French football.²³ The Spanish football league La Liga has most recently even filed a complaint with the European Commission that PSG breached EU Competition rules and cited the FSR as part of this.²⁴ Building on this context, the FSR will target, amongst many other types, subsidies that allow the tenderer to submit an unduly advantageous bid.²⁵ Transfer activity in the football market is thus likely to be caught under this.

This is relevant in other sports as well, and with the retroactive application of the FSR,²⁶ numerous ongoing deals may be scrutinised under the Regulation, notably the PGA Tour/LIV Golf Merger.²⁷ This Merger is backed by the Saudi Arabian sovereign wealth fund via the Public Investment Fund (PIF).²⁸ The almost unlimited funds of the PIF were severely threatening the PGA tour's ability to compete with LIV Golf,²⁹ and a merger would thus be a suitable option. However, if the FSR were to work properly, the Commission would increasingly scrutinise the ability to place unlimited subsidies into LIV Golf which, if it contributed towards the PGA tour's financial difficulties, could have led to a distortion in the internal market.

It can be argued that the Gulf States' investment in European sports has been primarily driven by non-profit motives, rather than profit-making reasons. Instead, these investments are often utilised as a means of "sportswashing" their domestic human rights concerns, a practice that has garnered significant criticism from both the EU and human rights organisations.³⁰ The lack of action on this from the EU and

18 Foreign Subsidies Regulation, Recital 12.

19 City Football Group, "Our Clubs," *City Football Group*, [accessed August 6, 2023] <https://www.cityfootballgroup.com/our-clubs/>.

20 Barney Ronay, "Sportswashing and the tangled web of Europe's biggest clubs," *The Guardian*, February 15, 2019, <https://www.theguardian.com/football/2019/feb/15/sportswashing-europes-biggest-clubs-champions-league-owners-sponsors-uefa>.

21 Reuters, "Qataris buy remaining 30 pct of Paris St Germain," March 6, 2012, <https://www.reuters.com/article/france-psg-qatar-idUSL5E8E69CP20120306>.

22 Statista Research Department, "Money spent on transfers by Paris Saint-Germain from 2011 to 2021/22, by season," *Statista*, March 6, 2023, <https://www.statista.com/statistics/1361418/psg-transfer-spending-since-takeover/#:~:text=Money%20spent%20on%20transfers%20by,takeover%202011%2D2022%2C%20by%20season&text=In%20the%20decade%20following%20PSG's,other%20soccer%20clubs%20in%20Europe>.

23 Since 2011 PSG have won the French Football league Ligue 1 eleven times, see: Paris Saint Germain, "Paris Saint-Germain crowned French champions for the 11th time," *Paris Saint Germain*, May 27, 2023, <https://en.psg.fr/teams/first-team/content/paris-saint-germain-crowned-french-champions-for-the-11th-time-psg-ligue-1-champion#:~:text=After%20winning%20the%20title%20in,the%20league%20on%20eleven%20occasions>.

24 La Liga, "La Liga files complaint against PSG with European Commission," August 12, 2023, <https://www.laliga.com/en-GB/news/laliga-files-complaint-against-psg-with-european-commission>; See also: Gian Volpicelli, "Spain's La Liga files EU complaint over Qatar funding of French club Paris St-Germain," *Politico*, August 13, 2023, <https://www.politico.eu/article/spain-football-laliga-file-eu-complaint-paris-st-germain-qatar-funding/amp/>.

25 Covington Competition, "The EU Foreign Subsidies Regulation starts to apply – what you need to know about the notification obligations," *Covington Competition*, July 12, 2023, <https://www.covcompetition.com/2023/07/the-eu-foreign-subsidies-regulation-starts-to-apply-what-you-need-to-know-about-the-notification-obligations/>.

26 Global Competition Review, "EU foreign subsidies notification rule may retroactively apply to certain deals," *Global Competition Review*, June 9, 2023, <https://globalcompetitionreview.com/article/eu-foreign-subsidies-notification-rule-may-apply-retroactively-certain-deals>.

27 For a more detailed explanation on the competition concerns in the merger see: Noerr, "Liv Golf v. the PGA," *Noerr*, August 5, 2023, <https://www.noerr.com/en/insights/liv-golf-v-the-pga>.

28 *Ibid.*

29 Ewan Murray, "PGA Tour feared it would be ruined by Liv Golf without unifying deal," *The Guardian*, July 11, 2023, <https://www.theguardian.com/sport/2023/jul/11/pga-tour-feared-ruin-liv-golf-without-unifying-deal>.

30 Jamie Doward, "Amnesty criticises Manchester City over 'sportswashing'," *The Guardian*, November 11, 2018, <https://www.theguardian.com/law/2018/nov/11/manchester-city-owners-accused-sportswashing-gulf-image>.

European Sports Authorities has been subject to significant criticism.³¹ However, with the FSR there may well be a new tool to simultaneously target these investments, which may distort the internal market and halt the “*sportswashing*” that has been so prolific.

The SK Lommel Case

It could be argued that had an EU Member State acquired and injected the same amount of capital into a club, as was done with Manchester City and PSG, this would have been scrutinised and possibly halted under EU State Aid rules. Certainly, one should not expect the same amount of scrutiny between subsidies/aid granted by non-EU and EU countries.

Within football, the issue arose with SK Lommel receiving a capital injection of €16.8 million from the City Football Group, which then allowed the club to obtain its professional licence.³² A competitor in the Belgian league, Royal Excelsior Virton, lodged a complaint against this and invited the Commission to use its new powers under the FSR to end foreign subsidies that distort the football market.³³ There is no obligation for the Commission to act on this complaint, and the FSR has no formal complaint process, but substantial steps could be taken by the Commission if it concludes that the foreign subsidy distorts the EU football market. As such, the Commission could impose redressive measures that remedy the distortion, which include ordering Lommel to refrain from certain investments, divesting certain assets, or repaying the subsidy. This would, however, require a decision as to whether the actions of the ADUG are attributable

to the United Arab Emirates government or whether it does indeed come from private funds whose actions cannot be imputed to a foreign government. If this is then considered a foreign subsidy, the Commission has a very broad discretion in its consideration of whether there has been a potential or actual negative distortion in the EU internal market. However, there is no case law on its application so far.

What Still Needs to be Clarified?

“*There may be a hiccup or two*” were Commissioner Margrethe Vestager’s words on the implementation of the FSR as it places the EU in uncharted territory.³⁴ Certainly, it has expanded the Commission’s scope of application in a way that grants it considerable power to define the enforcement of the Regulation on its own terms -that is until the EU Courts inevitably clarify certain aspects of the Regulation. One of the difficulties with interpreting the FSR is its hybrid nature, which includes traits of merger control, State Aid, trade defence, and public procurement review.

Regarding distortions in the market, scholar Morris Schonberg notes that a distortion is assessed on non-exhaustive indicators set out in the FSR. For instance, two of the subsidies considered effectively *per se* distortive, the rescue and restructuring subsidies to an undertaking in difficulty without a restructuring plan, and unlimited guarantees, would equally be regarded as always being incompatible with the internal market under State Aid law.³⁵ However, Schonberg also concludes that the general assessment of distortions appears to be *sui generis* as a whole, and

31 *Ibid.*

32 Global Compliance News, “Belgium: Belgian Football club Virton asks Commission to investigate competing club under the EU Foreign Subsidies Regulation,” *Global Compliance News*, May 9, 2023, <https://www.globalcompliancenews.com/2023/05/09/belgian-football-club-asks-commission-to-investigate-competitor-under-new-fsr-regulations050523/>.

33 *Ibid.*

34 Global Competition Review, “EU in “uncharted territory” with new foreign subsidy law, Vestager says,” *Global Competition Review*, March 6, 2023, <https://globalcompetitionreview.com/article/eu-in-unchartered-territory-new-foreign-subsidy-law-vestager-says>.

35 Morris Schonberg, “The EU Foreign Subsidies Regulation : Substantive Assessment Issues and Open Questions,” *ESTAL 2* (2022), 147.

one cannot derive a clear parallel in EU State Aid law or WTO subsidy law.³⁶

On a more general note, there is also an important determination to make whether distortion is pinned on the consumer welfare standard, thus focused on competition, or if it is fairness, which is determined on the interests of competitors who are worse endowed in the markets.³⁷ The actual anti-competitive effects are not required to be proven in State Aid law, and the question is rather where the beneficiary's position is strengthened *vis-à-vis* its competitors.³⁸ It is difficult to see why such an analysis would be needed in the FSR; firstly, due to the fact that this would require significant resources from the Commission that may be better spent elsewhere, and secondly, as the purpose of the FSR is to prevent foreign subsidised companies from depriving European companies of investment opportunities.³⁹

As with State Aid rules, however, the European Commission must ensure in its application that it does not hinder genuine sovereign investments by foreign nations. Sports teams are heavily reliant on investments, and the inability to attract foreign investments may negatively affect European sports.⁴⁰ There is also a strong argument to suggest that the FSR is not needed in sports such as football, where Financial Fair Play Rules have already been established.⁴¹ However, the existence of such rules is not an argument against the potential use of the FSR as the *ratio legis* is different.

Conclusion

The FSR may thus emerge as a crucial tool

in mitigating the impact of foreign states' abilities to invest significant funds in Sports and distort competition. This article has primarily focused on the influence these foreign subsidies have had on football clubs and the subsequent concerns in market dominance and exploitation of sports for political and reputational gains. Football clubs may have to avoid excessive reliance on foreign funding, thus fostering fair competition and preventing a single entity from gaining significant control over the market in a short space of time.

The predominant aim of the FSR is to level the playing field, and it can be argued that there have been distortions in certain sports markets as a result of the restrictions on clubs receiving EU government grants, and the almost unlimited ability for non-EU governments to intervene. The FSR has certain thresholds that only the top clubs would meet with respect to mergers and public procurement. However, Article 9 of the FSR grants it broad discretion via an *ex-officio* power of investigation, akin to Article 22 of the EU Merger Regulation. For the sake of legal certainty, it is, however, imperative that the Commission signals whether it will increasingly assess and potentially block foreign subsidies in sporting investments or whether the *status quo* is preserved and a *laissez-faire* attitude is taken.

The (un)intended consequences of the FSR may well be that the Commission has given itself a new tool to curb "*sportswashing*" on a larger scale, whilst also potentially allowing for more competition in European sport.

³⁶ *Ibid.*

³⁷ Xueji Su, "A Critical Analysis of the EU's Eclectic Foreign Subsidies Regulation: Can the Level Playing Field Be Achieved?," *Legal Issues of Economic Integration*, 50, no. 1 (2023): 67-92.

³⁸ Kelyn Bacon, *European Community Law of State Aid 77*, (OUP 2009).

³⁹ Su, A Critical Analysis of the EU's Eclectic Foreign Subsidies Regulation: Can the Level Playing Field Be Achieved?.

⁴⁰ For instance, in case *R (Sky Blue Sports and Leisure Ltd) & Ors v Coventry City Council & Ors* [2014] EWHC 2089, the English High Court was tasked with determining if a loan to build a Football stadium was illegal State Aid under EU rules, or whether the private investor test was satisfied. The Court assessed in this case that a public authority should be granted a wide margin of appreciation in such cases and thus the test was satisfied.

⁴¹ UEFA, "UEFA Club Licensing and Financial Fair Play Regulations," UEFA, June 1, 2018, <https://documents.uefa.com/v/u/MFxeqLNkelkYyh5Jsafuhg>.

RENE NEUMANN

MANAGING CULTURAL DIVERSITY WITHIN
MULTICULTURAL SOCIETIES : EXPLORING THE
COMPATIBILITY OF "COMMON" CITIZENSHIP RIGHTS IN
FRANCE AND SOUTH AFRICA

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Introduction

WHAT the “common” rights of universal citizenship ought to be has long constituted the subject of a heated debate surrounding the tension between universalism and cultural difference. Albeit revolutionary at its introduction in the 18th and 19th centuries, over the past decades, universal citizenship has been criticised for ignoring the reality of cultural differences and failing to address the particular needs and interests of different groups within contemporary Western multicultural societies. This paper will argue that “common” citizenship rights, as defined by the republican model of a unitary universal citizenship, are inherently incompatible with cultural diversity, given that universal “common” rights that have been moulded around a “partial” dominant generality cannot, by definition, accommodate particular differences.

After providing key definitions, the paper introduces the theoretical background of the debate. It then supports its argument by drawing on two case studies: France’s 2010 ban on face covering, and modern South Africa’s rejection of the *ubuntu* philosophy. It, furthermore, highlights how, in both of these cases, “common” rights of citizenship have not only proved to be insufficient to accommodate cultural differences, but also discriminatory

toward minorities. These case studies have been selected because of their complementarity: they simultaneously cover Marshall’s civil and political dimensions of citizenship, Kymlicka’s two definitions of the multicultural state (polyethnic and multinational), and account for two different types of migration (decolonial and colonial).²

Definition of Terms

In order to establish a solid groundwork for addressing the subject matter at hand, this section provides exact definitions of the pivotal terms that will be employed throughout the discussion.

Firstly, “common” is understood as the idea of shared universal rights that are extended to all citizens within Western multicultural societies, regardless of their cultural or ethnic background. However, as this paper will argue, the distinction of what ought to be “common” and what ought not to is profoundly subjective, and varies widely across different cultures. The idea of “common” rights of citizenship first became established in modern Western societies through the republican model of a unitary universal citizenship, according to which all citizens should share “*the identical set of common citizenship rights*”.³ Although this model has long become obsolete, as its origins can be traced back to times when political communities were

1 René Neumann has recently graduated from King’s College London in International Relations, having previously been an Erasmus+ exchange student at Sciences Po Paris. He is deeply passionate about European Affairs and is a member of the editing team at the European Studies Review.

2 Thomas Humphrey Marshall, “Citizenship and Social Class,” in *Citizenship and Social Class and Other Essays*, ed. Thomas Humphrey Marshall (London: Cambridge University Press, 1950), 1-85; Will Kymlicka, “The Politics of Multiculturalism,” in *Multicultural Citizenship*, ed. Will Kymlicka (New York, N.Y.: Oxford University Press, 1995), 10-33.

3 Will Kymlicka, “Introduction: An Emerging Consensus?,” *Ethical Theory and Moral Practice* 1, no. 2 (1998): 143-157, 149.

relatively more homogeneous, repeated attempts made by Western countries to assimilate ethnic minorities in recent times, and the ensuing tensions experienced within their increasingly heterogeneous societies, demonstrate that the model is far from disused.⁴

Secondly, the definition of “citizenship rights” largely depends on the dimension of citizenship that is examined. In this regard, one of the most widely known classifications is Marshall’s three-dimensional citizenship, according to which rights can be grouped into three “*elements*”: civil, political, and social. These broadly refer to the protection of rights, political participation, and social welfare provisions, respectively.⁵ Whilst still acknowledging that these three dimensions of citizenship are intrinsically interrelated, this paper shall focus, primarily, on the first two dimensions, as these are arguably most affected by cultural differences.⁶ Whilst the first case study concerns the civil dimension of citizenship and, in particular, Muslim women’s freedom of religion and expression in France, the second concerns its political dimension, namely the inclusion of *ubuntu* in South Africa’s political and legal systems.

Lastly, “multicultural” refers to a state whose members either have emigrated from different nations into the same polyethnic state or belong to different nations within the same multinational state. The states examined by the two case studies are France and South Africa, which are a polyethnic and a multinational state, respectively.⁷

Theoretical Background

This paper argues that “common” citizenship rights are inherently incompatible with cultural diversity. The word “common”, as defined in the previous section, refers to shared universal rights, which find their roots in the Western legal tradition. These derive from a variety of legal, political, and social developments that occurred with the rise of the modern nation-state in Europe in the 18th and 19th centuries.⁸

Legal traditions are, however, closely intertwined with and inseparable from the cultures of the civilisation in which they flourish. This interconnection was analysed by Lawrence Rosen in his book “*The Anthropology of Justice*”, in which he explored the relationship between legal systems and cultural norms in different societies.⁹ Drawing on his several case studies, he argued that law is not a separate or autonomous sphere, but rather an integral part of social life that is shaped by the values and practices characteristic of the dominant culture. As such, the rights that are presently regarded as “common” in Western societies were originally established according to the customs, practices, and needs of such societies, as conceived by their respective dominant groups prior to their contemporary large-scale diversification.¹⁰ Arjun Appadurai, meanwhile, argued that modern nation-states, no matter how invested in multiculturalist principles of inclusion, are fundamentally underpinned by the notion of a “national ethnos”, a predominant cultural doctrine that originated from the amalgamation of many cultures and identities, but that ultimately became

4 Assimilationism is the political ideology that aims to encourage ethnic minorities to conform to the dominant culture and national norms, Ralph Grillo, “An Excess of Alterity? Debating Difference in a Multicultural Society,” *Ethnic and Racial Studies* 30, no. 6 (2007): 979-998.

5 Marshall, *Citizenship and Social Class*, 10.

6 *Ibid.*

7 Kymlicka, *The Politics of Multiculturalism*.

8 Lawrence Rosen, “Law and Culture: The Appeal to Analogy,” in *The Anthropology of Justice: Law as Culture in Islamic Society*, ed. Lawrence Rosen (Cambridge: Cambridge University Press, 1989), 1-19.

9 *Ibid.*

10 *Ibid.*

established as it was understood by the dominant group.¹¹ “Common” rights were thus patterned after a culturally biased generality envisaged by dominant social groups.

For this reason, the inherent incompatibility between “common” citizenship rights and cultural diversity lies in the fact that “common” rights that have been moulded around a “partial” dominant generality cannot, by definition, accommodate particular differences, as argued by Iris Marion Young.¹² This generality fails to represent the entirety of society, and solely reflects the interests, demands, and needs of the dominant group. This appears particularly evident when looking at the history of Western societies: social minorities used to be overtly excluded prior to the universalisation of citizenship.¹³ Yet, once they were included, they were still “measured according to the norms derived from and defined by privileged groups”.¹⁴

In her stringent critique of the liberal ideal of universal citizenship, Young thus argued that citizenship in liberal societies is based on a misconception of the meaning of “universality”. Universality, she claimed, has been erroneously conceived as generality owing to the groundless, unrealistic assumption of a shared identity and common interests among citizens; a “*general will that transcends the particular differences of group affiliation, situation, and interest*”.¹⁵ A similar critique was later advanced by Lister, who refuted the universalist model by asserting that universal citizenship’s “*denial of difference*

has served to exclude those who do not fit the universalist template”.¹⁶

The following case studies point to intercultural tensions within two multicultural societies stemming from disagreements on the extent to which citizenship rights should accommodate cultural minorities. The multicultural nature of these societies derives from two different types of migration, as described by Achiume, namely “decolonial” and “colonial” migration, respectively.¹⁷ The latter type of migration refers to the colonial-era movement of people from colonising nations to the colonies established by these, and the subsequent exportation of their culture within the framework of the colonised nation’s unequal power relationship and dynamics of dominance with its coloniser. The former type, instead, refers to the contemporary movement of people from former colonies to former colonising nations as a result of economic and political subordination rooted in colonial and neo-colonial structures.¹⁸

Case Study I: France’s 2010 Ban on Face Covering

The cultural relativity of “common” rights is evidenced by France’s existing ban on face covering in public. In 2010, France passed a law banning face-covering veils in public spaces.¹⁹ The controversy sparked by the promulgation of the law, which has been criticised as discriminatory and Islamophobic, can be ascribed to a difference in the understanding of

11 Arjun Appadurai, “Fear of Small Numbers,” in *Fear of Small Numbers: An Essay on the Geography of Anger*, ed. Arjun Appadurai (Durham: Duke University Press, 2007), 49-86; Arjun Appadurai, “Life after Primordialism,” in *Modernity at Large: Cultural Dimensions of Globalization*, ed. Arjun Appadurai (Minneapolis, MN: The University of Minnesota Press, 1996), 139-157.

12 Iris Marion Young, “Polity and Group Difference: A Critique of the Ideal of Universal Citizenship,” in *Ethics* 99, no. 2 (1989): 250-274.

13 *Ibid.*

14 *Ibid.*, 255.

15 *Ibid.*, 251.

16 Ruth Lister, “Citizenship and Difference,” *European Journal of Social Theory* 1, no. 1 (1998): 71-90, 71.

17 Tendayi Achiume, “Migration as Decolonization,” *Stanford Law Review* 71, no. 1 (2019): 1509-1574.

18 *Ibid.*

19 Lizzy Davies, “France: Senate Votes for Muslim Face Veil Ban,” *The Guardian*, September 14, 2010, www.theguardian.com/world/2010/sep/14/france-senate-muslim-veil-ban.

secularism and, in particular, of the “common” right to freedom of religion.²⁰ The UN Charter of Human Rights posits this right as the “*freedom, either alone or in community with others and in public or private, to manifest [one’s] religion or belief in teaching, practice, worship and observance*”.²¹ However, whilst this understanding is accepted by nearly all Muslim countries (except for Iran and Afghanistan) and has been transcribed into the Arab Charter of Human Rights as Article 25, the French ban indicates a framing of this “common” right that is arguably closer to the freedom *from* religion, which panders to the non-religious or atheist 63% of the French population at the expense of the Muslim minority.²²

At the time of the ban, the French government justified the policy by stating that it came for identification purposes. However, France’s motivations behind this different understanding of the “common” right to the freedom of religion became apparent particularly after the outbreak of the COVID-19 pandemic; masks, which fall into the category of face covering, were made mandatory in public in an attempt to tackle the spread of the virus.²³ This marked discrepancy in French legislation unambiguously pointed to the Western cultural belief in the hierarchic superiority of the right to health (health, too, being based on a particular cultural conception) over the freedom of religion and expression. According to the “*offence to sensibilities argument*”, however, the

former should take precedence over the latter “*only in cases where profound and direct damage is inflicted upon the sensibilities of individuals, undermining their dignity*”, which is not the case for burqas and niqabs.²⁴

The reversal of this hierarchy and the legislative inconsistency of France’s policy thus exposed the real motivations behind the ban, which are arguably best explained by Al-Rawi, Chun, and Amer’s conception of intersectionality centred on Muslim women’s standing at the intersection of Islamophobia, sexism, and assimilationism.²⁵ Indeed, the policy was concurrently motivated by the Islamophobic desire to promote secularism amongst the Muslim population, the assimilationist intention to push Muslim immigrants to adopt the dominant French culture at the expense of their own cultural identity, and the sexist pursuit of liberal gender equality amongst Muslim communities.²⁶ The latter objective is encapsulated by Farris’ “*femonationalism*”, according to which feminist ideas are sometimes instrumentalised by nationalist, assimilationist, and anti-migrant political movements.²⁷ The ban can also be ascribed to the “*excess of alterity*” phenomenon described by Grillo, according to which several multicultural societies have experienced, as the by-product of the influx of migrants over the last decades, an assimilationist backlash for their increased social diversity, which has frequently been perceived as a threat

20 Ioanna Tourkochoriti, “The Burka Ban: Divergent Approaches to Freedom of Religion in France and in the U.S.A.,” *William & Mary Bill of Rights Journal* 20, no. 3 (2012): 791-852.

21 United Nations, *Universal Declaration of Human Rights* (1948), Art. 18, www.un.org/en/about-us/universal-declaration-of-human-rights.

22 Pierre Haski, “La Carte de l’Athéisme Dans Le Monde : La France Numéro 4 [The Map of Atheism in the World: France Number 4],” *L’Obs*, January 18, 2015, www.nouvelobs.com/rue89/rue89-monde/20150118.RUE7494/la-carte-de-l-atheisme-dans-le-monde-la-france-numero-4.html; United Nations, *Arab Charter on Human Rights* (2004), digitallibrary.un.org/record/551368?ln=en.

23 Rokhaya Diallo, “Coronavirus Exposed the Real Reasons behind France’s “Burqa Ban.”,” *Aljazeera*, May 15, 2020, www.aljazeera.com/opinions/2020/5/15/coronavirus-exposed-the-real-reasons-behind-frances-burqa-ban.

24 Raphael Cohen-Almagor, “Indivisibilité, Sécurité, Laïcité: The French Ban on the Burqa and the Niqab,” *French Politics* 20, no. 1 (2021): 3-24, 17.

25 Ahmed Al-Rawi, Wendy Hui Kyong Chun and Salma Amer, “Vocal, Visible and Vulnerable: Female Politicians at the Intersection of Islamophobia, Sexism and Liberal Multiculturalism,” *Feminist Media Studies* 22, no. 8 (2021): 1918-1935.

26 Al-Rawi et al., *Vocal, Visible and Vulnerable: Female Politicians at the Intersection of Islamophobia, Sexism and Liberal Multiculturalism*.

27 Sara R. Farris, “Femonationalism and the “Regular” Army of Labor Called Migrant Women,” *History of the Present* 2, no. 2 (2012): 184-199.

to social cohesion.²⁸

The consequences of this ban are far-reaching. Firstly, the policy hubristically trespasses Muslim communities' laboriously negotiated racial and cultural boundaries, as described by Ong *et al.*²⁹ This curtails the identity-shaping expression of their cultural citizenship, which Ong identifies as "*the cultural practices and beliefs produced out of negotiating the often ambivalent and contested relations with the state and its hegemonic forms that establish the criteria of belonging within a national population and territory*".³⁰ In the case study at hand, cultural citizenship is expressed by Muslim women's wearing of the burqa and niqab. Secondly, as members of diaspora communities defined by their connection to their homeland, Muslim women in France face a detrimental clash between the expectations held by the dominant culture of the host society and those held by the culture of the diaspora.³¹ In light of this, it appears evident that freedom of religion, as provided for by the "common" rights of French citizenship, has failed to accommodate the cultural differences between Muslim communities and the dominant culture. Moreover, such "common" rights have directly discriminated against Muslim women and undermined the fundamental expression of their identity.

Case Study II: Modern South Africa's Rejection of *Ubuntu*

The cultural relativity of "common" rights is also evidenced by South Africa's post-apartheid government's failure to

incorporate autochthonous South African values, embodied by the concept of *ubuntu*, into the country's legal and political systems.³² *Ubuntu* is a traditional African philosophy that originated in the Nguni-speaking peoples meaning "humanness" or "humanity toward others", and emphasises human interconnectedness and the importance of community.

The South African constitution adopted in 1996 is grounded in the principles of liberalism and individualism and emphasises individual rights and freedoms over collective rights and community values. Albeit mentioned in the postamble of the 1993 Constitution and vaguely alluded to through recurrent references to human dignity in the 1996 Constitution, *ubuntu* has never been adequately incorporated into South African jurisprudence.³³ This is due to the absence of a piece of legislation that formulates a univocal definition of the philosophy, which renders *ubuntu* "*a terribly opaque notion*" from a legal perspective.³⁴ Although the predominance of the principles of liberalism over the values of *ubuntu* may be accounted for by the broader framework of the contemporary globalisation process in recent years, Western liberal individualism first emerged in South Africa during the last decades of the colonial era.³⁵ Differently from the previous case study, in which the dominant French culture and its associated "common" rights were imposed on Muslim diaspora communities that immigrated into France as part of the phenomenon of decolonial migration described earlier, the Western culture became established as the dominant culture in South Africa

28 Grillo, *An Excess of Alterity? Debating Difference in a Multicultural Society*.

29 Aihwa Ong, Virginia R. Dominguez, Jonathan Friedman, Nina Glick Schiller, Verena Stolcke, David Y. H. Wu and Hu Ying, "Cultural Citizenship as Subject-Making: Immigrants Negotiate Racial and Cultural Boundaries in the United States," *Current Anthropology* 37, no. 5 (1996): 737-762.

30 *Ibid.*, 738.

31 Ritty A. Lukose, "The Difference That Diaspora Makes: Thinking through the Anthropology of Immigrant Education in the United States," *Anthropology & Education Quarterly* 38, no. 4 (2007): 405-418.

32 Thaddeus Metz, "Ubuntu as a Moral Theory and Human Rights in South Africa," *African Human Rights Law Journal* 11, no. 2 (2013): 532-559.

33 Sivhaga Netshitomboni, "Ubuntu: fundamental constitutional value and interpretative aid," in *Ubuntu: Fundamental Constitutional Value and Interpretative Aid*, ed. Sivhaga Netshitomboni (Pretoria: University of South Africa, 1998), 1-3.

34 *Ibid.*, 533.

35 *Ibid.*

as a consequence of the dynamics of dominance implicit in colonialism.³⁶

Although the newly established dominant Western culture initially did not aim to accommodate the cultural differences presented by local cultures, with the subsequent decolonisation process and the end of apartheid, citizenship, along with the “common” rights it provided for, acquired an increasingly universal character.³⁷ At present, citizenship in contemporary South Africa, which has been described as a multicultural “rainbow nation”, largely resembles the universal citizenship of other Western multicultural states. Yet, whilst the clash outlined in the previous case study may be ascribed to Grillo’s “*excess of alterity*”, the failure to accommodate cultural differences by South African “common” rights is, rather, the result of a protraction of “Othering” dynamics characteristic of the colonial era.³⁸

These appear remarkably similar to the dynamics analysed by Povinelli’s account of autochthonous Australians’ “*crisis of indigenous citizenship*”.³⁹ Analogously to Australia, whilst initially aimed at the integration of immigrant populations, South African multiculturalism has expanded, in the second half of the 20th century, to encompass a wider range of cultural identities, including those of autochthonous South Africans. However, as argued by Povinelli, this expansion has been problematic, as it has been based on a superficial understanding of local culture that attempts to minimise and erase the still ongoing effects of colonialism and dispossession.⁴⁰

In South Africa, this has meant an essentialised framing of *ubuntu* as a philosophy that is deficient compared to the philosophy of individualism characteristic of the dominant Western culture of former colonising states. This idea is reinforced by the pervasive stereotypes of *ubuntu* as “*vague*”, “*collectivist*” (allegedly “*incompatible with the value of individual freedom*”), and “*anachronistic*” (supposedly inadequate for a “*large-scale, industrialised, modern society*”).⁴¹ Therefore, not only have the “common” rights of citizenship in South Africa failed to accommodate the cultural differences between the “*new*” (dominant) and the “*traditional*” (eradicated) cultures of the country, but they have also framed the latter as primitive, inadequate and, *de facto*, inferior.⁴²

Conclusion

Liberal conceptions of universality as generality have led to negligence of cultural differences and to the establishment of “common” rights of citizenship that frequently fail to represent the entirety of society and solely reflect the interests of the dominant group. The first case study has shown how, due to the 2010 ban on face covering, the French understanding of freedom of religion has failed to accommodate cultural differences presented by Muslim communities and undermined the fundamental expression of their identity. The second case study has highlighted how the individualistic citizenship of modern South Africa has failed to accommodate cultural differences with *ubuntu* and, *de facto*, framed it as inferior.

36 Penny Enslin and Kai Horsthemke, “Can Ubuntu Provide a Model for Citizenship Education in African Democracies?,” *Comparative Education* 40, no. 4 (2004): 545-558.

37 *Ibid.*

38 Elizabeth A. Povinelli, “The State of Shame: Australian Multiculturalism and the Crisis of Indigenous Citizenship,” *Critical Inquiry* 24, no. 2 (1998): 575-610; Enslin and Horsthemke, *Can Ubuntu Provide a Model for Citizenship Education in African Democracies?*

39 Povinelli, *The State of Shame: Australian Multiculturalism and the Crisis of Indigenous Citizenship*.

40 *Ibid.*

41 Metz, *Ubuntu as a Moral Theory and Human Rights in South Africa*, 533-534.

42 *Ibid.*, 533.

In conclusion, “common” citizenship rights, as defined by the republican model of a unitary universal citizenship, are inherently incompatible with cultural diversity, given that universal “common” rights that have been moulded around a “partial” dominant generality cannot, by definition, accommodate cultural differences in multicultural societies. Furthermore, as shown by both of the case studies, “common” rights of citizenship have, in certain cases, even proved discriminatory toward minorities.

EDOARDO VEZZOLI

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Introduction

OVER the last 15 years, the European Union has been experiencing a crisis of democratic legitimacy. The bond between EU governance and its citizens has been damaged.² In order to mend it, the EU has added a new tool to its deliberative-participatory toolbox: the European Citizens Panels (ECPs). It is a practice that initially took place between 2021 and 2022, when, for the first time, *“the EU ... systematically tested ... methods of deliberative democracy in real-life at the transnational level in the context of the Conference of the Future of Europe”* (CoFoE).³ Four panels, comprising 800 randomly selected EU citizens, discussed and deliberated on several topics, from social justice to the EU’s role in the world, and drafted 178 recommendations.⁴ These have been and will be taken into account by the European Commission (EC) *“when defining its political goals and concrete policies”*.⁵ The enthusiasm for this democratic exercise led the Commission

to make ECPs a permanent and regular feature of the EU’s democratic life.

Although the decision to permanently adopt this deliberative practice has not produced any remarkable resonance within scholarly literature as yet, mainly due to its newness, this action deserves special attention. By offering citizens a new way to get more directly involved, thanks to the ECPs, the European Union may have taken a positive step forward to potentially address the 15-year-long legitimacy crisis. Therefore, this practice has the potential to be considered more than a mere addition to the EU’s already existing, yet lacking, deliberative-participatory toolbox.⁶

After having explored the relation between ECPs and the EU’s legitimacy crisis and offered a theoretical and practical view on them (outlining their creation, functioning, and theoretical foundations), the work will inquire on whether this new instrument is necessary or not for the EU arena, exposing its flaws.

1 Edoardo Vezzoli is a postgraduate student of *World Politics and International Relations* at the University of Pavia, Italy. Moreover, he also holds a Bachelor’s degree in International Relations and Languages from the Università Cattolica del Sacro Cuore, Milan. His main interests are EU politics, populism, and democratic innovations.

2 The several and most recent interviews and speeches given by citizens during the CoFoE also confirmed this direction. See Johannes Greubel, “A New Generation of European Citizens’ Panels – Making Citizens’ Voices a Regular Part of Policymaking,” *European Policy Centre*, October 21, 2022, 1-9. European Parliament and European Commission, “Future of Europe. Special Eurobarometer 500”, *European Commission and European Parliament*, 2021, 36, <https://www.europarl.europa.eu/at-your-service/files/be-heard/eurobarometer/2021/future-of-europe-2021/en-foe-special-eb-report.pdf>.

3 Some practices that contained deliberative features already existed within the EU arena. However, according to several scholars, such traits were flawed and therefore limited. See Dominik Hierlemann, Stefan Roch, Paul Butcher, Janis A. Emmanouilidis, Corina Stratulat and Maarten de Groot, *Under construction citizen participation in the European Union* (Gütersloh: Verlag Bertelsmann Stiftung, 2022);

Carsten Berg, “Citizens’ Panels Show the Way Ahead for Transnational Democracy,” *Berggruen Institute*, 2022, 2, <https://www.berggruen.org/work/the-future-of-democracy/citizens-panels-show-the-way-ahead-for-transnational-democracy/>; OECD, “Innovative citizen participation and New Democratic Institutions. Catching the deliberative wave,” *OECD Publications Centre*, 2020, 1-44, <https://www.oecd.org/gov/innovative-citizen-participation-and-new-democratic-institutions-339306da-en.htm>.

4 This practice then resulted in 49 proposals and about 300 ‘associated measures’, European Commission, “European Citizens’ Panel on Food Waste, Information Kit,” *European Commission*, December 16, 2022, 4, <https://citizens.ec.europa.eu/system/files/2023-02/Information%20kit%20Citizens%20Panel%20Food%20Waste%20final%20online%20version.pdf>.

5 *Ibid.*

6 The Citizens’ Dialogues, Public Consultations on specific legal and policy developments, and the European Citizens’ Consultations are part of this ‘toolbox’.

The EU Crisis of Democratic Legitimacy

The decision to first enact and then permanently adopt ECPs follows a very specific 15-year-long EU problem: a crisis of democratic legitimacy.

The crisis started as a “*relatively minor problem with the deficit of a rather small country*”, and subsequently deteriorated and took the shape of “*a full-blown crisis of sovereign debt*”, the so-called *Eurozone crisis*.⁷ Because of the EU leaders’ delayed response, this economic and financial crisis rapidly turned into a more general crisis of legitimacy, calling both local and EU governance into question.⁸

During the peak of the crisis, “*major decisions affecting millions of Europeans were taken behind closed doors by EU policymakers with little attempt to consult the people through the normal political channels*”.⁹ These decisions ultimately proved not to be very effective.¹⁰ Particularly, this failure stemmed partly from the choice of excluding citizens from the decision-making arena. “*Slow growth, high unemployment, rising inequality and poverty*” starkly affected the European Union, and “*politics became increasingly Eurosceptic and volatile*”.¹¹ Citizens lost confidence in the EU and national leadership. Recurrent turnover of aleatory governments, as well as the rise of populist, illiberal, and extremist political movements and parties, started taking more and more hold. Some of them, once

they had secured a position within the government, attempted -occasionally with success- to undermine the basis of liberal democracy, attacking its main pillars.¹²

Above all, as several scholars have argued, this democratic crisis also took the shape of a “*crisis of representativeness*”.¹³ The relation between citizens and their representatives was damaged. Increasingly more citizens started finding politicians incapable of dealing with current challenges. Citizens’ practices aimed at challenging several European democratic governments in active (alternative voting/protests) or passive (abstention) manners started arising. Therefore, revitalising democracy in Europe became urgent and necessary, as did finding a solution to “*rebuild societal consent around it*”.¹⁴

Such a challenge was acknowledged by the EU by proposing a *new participatory approach*, which had first been included within the *White paper of the future of Europe* and guaranteed by former President of the European Commission Juncker during a 2017 State of the Union address.¹⁵ In another occurrence, Macron asked for “*a more democratic daily functioning of tomorrow’s Europe*”.¹⁶ Although several years have passed, this approach seems not to have lost continuity. Current President of the EC Ursula von der Leyen has appeared to be largely in line with it: since her appointment, she has called for “*a new push for European democracy*”, as

7 Vivien A. Schmidt, *Europe’s crisis of legitimacy: Governing by rules and ruling by numbers in the eurozone* (Oxford: Oxford University Press, 2020), 27.

8 *Ibid.*

9 *Ibid.*, 28.

10 *Ibid.*

11 *Ibid.*

12 Wojciech Białożyty and Romain Le Quiniou, “Europe’s Deliberative Instruments: Has the EU Delivered,” in *Deliberative Democracy in the EU: Countering Populism with Participation and Debate*, ed. Steven Blockmans and Sophia Russack (London: Rowman & Littlefield International, 2020), 313-331; Schmidt, *Europe’s crisis of legitimacy: Governing by rules and ruling by numbers in the eurozone*.

13 Simon Tormey, *The end of representative politics* (Malden, MA: Polity Press, 2015), 15.

14 Białożyty and Le Quiniou, *Europe’s Deliberative Instruments: Has the EU Delivered*, 314.

15 European Commission, “President Jean-Claude Juncker’s State of the Union Address 2017,” *European Commission*, September 13, 2017; see also European Commission, “White paper on the future of Europe. Reflections and scenarios for the EU27 by 2025,” *European Commission*, 2018.

16 Élysée, “Discours Du Président de La République, Emmanuel Macron, à La Pnyx, Athènes Le Jeudi 7 Septembre 2017,” Élysée, September 11, 2017, <https://www.elysee.fr/emmanuel-macron/2017/09/11/discours-du-president-de-la-republique-emmanuel-macron-a-la-pnyx-athenes-le-jeudi-7-septembre-2017>.

well as the establishment of the CoFoE.¹⁷ Today, with the delivery of the CoFoE, as well as the decision to keep ECPs alive after the Conference, such continuity has been confirmed.

How Do ECPs Work?

Three *post-CoFoE* ECPs on food waste, learning mobility, and virtual worlds have taken place thus far. Overall, their structure is similar to the ones employed for the CoFoE. However, differently from the Conference, which hosted 800 panellists, these three ECPs only comprised 150 randomly selected EU citizens.¹⁸ Although the goal of the panels remains unchanged, namely drafting recommendations produced by participants' deliberations, citizens now have the opportunity to do this in more concrete policy areas.¹⁹

Alternating between small-group work (each group including about 12 citizens) and plenary work (involving all of the 150 citizens), the panels take place in three sessions (one of which is held virtually) and generally last three months. Each of them has specific goals: the first session aims to *generate ideas*, as well as setting the basis for subsequent deliberations, namely *"to build and group approaches that citizens find most promising for further discussion in subsequent sessions"*.²⁰ The second session involves *review and refinement*, in which, departing from the

basis set in the first session, the goal is to *"build on the approaches ... and draft initial citizen recommendations"*.²¹ Throughout this session, an *"iterative peer review process"* takes place. Panellists, divided into working groups, *"review and build on each other's work, adding to the ideas"*.²² Lastly, during the closing session, citizens *"submit the conclusions of debates, together with the panel's recommendations, to the European Commission, as part of the package accompanying the relevant proposals"*.²³ The drafted recommendations regarding a specific policy topic are *"made for the European Commission to take into consideration when defining its policy and legislative initiatives"*.²⁴ Throughout the entire process, panellists are supported by a *facilitation team*, which is a cluster of experts that makes the process more dynamic and fluid by providing *"citizens with a range of tools for collaborative work and collective decision-making"*.²⁵

ECPs within the Mini-Publics' Ecosystem

From a theoretical point of view, European Citizens' Panels belong to the ecosystem of mini-publics. These are democratic innovations that lay their theoretical foundations on the notions of deliberative democracy.²⁶ According to Elstub, mini-publics are *"the most advocated method to institutionalise deliberative democracy"*.²⁷ Deliberative democracy is a theory of political legitimacy: it generally posits

17 European Commission, "Opening Statement in the European Parliament Plenary Session by Ursula von Der Leyen, Candidate for President of the European Commission," *European Parliament*, July 16, 2019; Paul Butcher and Corina Stratulat, "The European Citizens' Consultations Deserve Pride of Place at von Der Leyen's Conference," *European Policy Centre*, May 5, 2019, [https://www.epc.eu/en/Publications/The-European-Citizens-Consultations-deserve-pride-of-place-at-von-der~21c488](https://www.epc.eu/en/Publications/The-European-Citizens-Consultations-deserve-pride-of-place-at-von-der-21c488).

18 1 out of 3 citizens are below 26 years old in order to "represent the future generations of Europe", European Commission, *European Citizens' Panel on Food Waste, Information Kit*, 5.

19 *Ibid.*

20 European Commission, "European Citizens' Panels: A new phase of citizen engagement," *European Commission*, May 19, 2023, https://citizens.ec.europa.eu/index_en.

21 *Ibid.*

22 *Ibid.*

23 *Ibid.*

24 European Commission, *European Citizens' Panel on Food Waste, Information Kit*, 4.

25 *Ibid.*

26 Globally, this practice is not new (and is not limited to the EU), as it is part of the toolbox that the scholarly literature has developed to address a global phenomenon that some scholars define as 'democratic malaise'. The feature that these practices have in common is *democratic innovations*, which are the enhancement of *"citizen participation in political decision making"*, Clodagh Harris, "Deliberative Mini-Publics: Defining and Designing," in *Handbook of Democratic Innovation and Governance*, eds. Stephen Elstub and Oliver Escobar (Cheltenham: Edward Elgar Publishing, 2019), 45-59, 45.

27 Stephen Elstub, "Mini-publics: Issues and cases in deliberative democracy," in *Deliberative Democracy: Issues and Cases*, eds. Stephen Elstub and Peter McLaverty (Edinburgh: Edinburgh University Press, 2014), 166-188, 166.

that “a more central role within the policymaking process must be granted to citizens”. According to this theory, a political decision is considered legitimate if those who will be affected by it justify it through deliberation. “Equal participation, mutual respect, and reasoned argument” are central deliberative features.²⁸ At the centre of this theory lies the process that leads individuals to the “right preferences”, namely deliberation.²⁹ On the other hand, mini-publics also share traits belonging to *participatory democracy*, a theory that promotes “citizen participation as the principal political practice”.³⁰

Despite being a contested practice, which has several, often incompatible definitions, mini-publics present some widely acknowledged core traits.³¹ “Information gathering, small group-facilitated deliberations, the public presentation of opinions or recommendations, and a random selection of participants” are indispensable characteristics.³² By taking these into account, a very general definition can be outlined: mini-publics are “forums where informed, independent, and facilitated group discussions” between randomly selected citizens on specific issues take place, whose “opinions and/or recommendations [will be presented] to their commissioning body and wider society”.³³ Citizens’ juries and panels, planning cells, consensus conferences, citizens’ assemblies, deliberative polls,

and G1000 are some of the most relevant practices belonging to the mini-publics’ category.³⁴ Among such practices, there are several differences, particularly with regard to “selection and numbers of citizens, days spent together and output”.³⁵ For example, although the most common output of such practices is the formulation of “consensual recommendation for public policy”, which ECPs have as their final output, mini-publics can also have other results, such as position reports or survey opinions.³⁶

The potential stemming from these practices is clear: mini-publics can contribute to an enhanced citizens’ “level of engagement at the agenda-setting, decision-making, and implementation stages of political processes”.³⁷ By allowing those who will be affected by the norm, namely citizens, to get more directly involved within the policy-making process, mini-publics can lead not only to “more innovative policy solutions”, but also, and more importantly, to “more legitimate politics”.³⁸ Moreover, such practices may bring other ‘minor’ advantages, such as the improvement of “political education” and “democratic skills”.³⁹

Are ECPs Necessary?

ECPs are not the first EU democratic instrument that provides for the

28 *Deliberation* is a dialogic and communicative process, where “ordinary citizens... consider the arguments of differently situated and opinionated others..., present reasons for their own preferences, weigh up the arguments... [and are] amenable to changing their minds and their preferences as a result of reflection induced by [such] deliberation”, Harris, *Deliberative Mini-Publics: Defining and Designing*, 48.

29 *Ibid.*

30 Stephen Elstub, “Deliberative and Participatory Democracy,” in *The Oxford Handbook of Deliberative Democracy*, eds. André Bächtiger, John S. Dryzek, Jane Jubb Mansbridge and Mark Warren (Oxford: Oxford University Press, 2018), 187-202, 189.

31 Some believe that such instruments are vital to renew democracy. Yet, other people find them useless, and sometimes even dangerous, for democracy itself, Berg, *Citizens’ Panels Show the Way Ahead for Transnational Democracy*, 2022.

32 Harris, *Deliberative Mini-Publics: Defining and Designing*.

33 *Ibid.*, 47; Graham Smith and Maija Setälä, “Mini-Publics and Deliberative Democracy,” in *The Oxford Handbook of Deliberative Democracy*, eds. André Bächtiger, John S. Dryzek, Jane Mansbridge and Mark Warren (Oxford: Oxford University Press, 2018), 300-314.

34 There is no universal agreement among the scholarly literature regarding which practice falls within the mini-publics’ category. The definition has indeed variable width and its traits may vary widely. Smith and Setälä, *Mini-Publics and Deliberative Democracy*.

35 *Ibid.*, 4.

36 The academia’s position on such practices is nonetheless quite polarised. Carsten Mann, Jan-Peter Voß, Nina Amelung, Arno Simons, Till Runge and Louisa Grabner, “Challenging Futures of Citizen Panels Critical Issues for Robust Forms of Public Participation,” *Technische Universität Berlin*, 2014, 1-60, 8.

37 Harris, *Deliberative Mini-Publics: Defining and Designing*, 45.

38 *Ibid.*

39 *Ibid.*

involvement of citizens. At the EU level, practices such as the *Citizens' Dialogues*, *Public Consultations* (on specific legal and policy developments), and the *European Citizens' Consultations* already existed.⁴⁰

Therefore, inquiring whether the adoption of new instruments, such as ECPs, may be of use or not is necessary. Among several reasons, two stand out. Firstly, there is a need to further *boost democracy*. Secondly, there is a necessity to *tackle the shortcomings of the tools previously developed*. Starting from the former, it is evident that citizens are asking for more direct involvement in EU politics.⁴¹ According to Hierlemann *et al.*, “78 percent of respondents believe that citizens should have a bigger say” and “71% percent [of them] find it difficult to participate in EU politics”.⁴² In a certain way, even experts share the same idea as citizens, as some have stated that the “variety [of such practices] is not enough in itself” and that “the EU is not successful in effectively facilitating citizen participation”.⁴³ This trend is confirmed by most recent inquiries: the 2021 Special Eurobarometer on the Future of Europe evidenced that about 92% of citizens desired “their voices to be better taken into account by decision-makers on the European level”.⁴⁴ The need to boost democracy therefore appears evident. In this respect, European Citizens' Panels may be of use to meet this demand by offering EU citizens the chance to play a more fundamental role within EU mechanisms, and more specifically within the EU policy-making process.

Secondly, the earlier practices experienced several shortcomings. Although some of these have been recognised and addressed by European Institutions,

others have not been properly dealt with.⁴⁵ Such flaws are often structural, being related to the very design of these tools, and are therefore difficult to tackle. Hierlemann *et al.* evaluated the already-existing participatory-deliberative EU practices through six criteria, namely visibility, accessibility, representativeness, transnationality, impact (on the policy-making process), and deliberativeness. The results of this inquiry, with few exceptions, confirmed the consistent and structural flaws in all of the previously listed dimensions.⁴⁶ Therefore, it firstly appears that there is a need, as well as an empty space, for ECPs within the EU arena. Secondly, these panels may be the ideal solution to overcome shortcomings of existing tools and ultimately offer EU citizens a well-functioning participatory-deliberative instrument. According to several scholars, ECPs have the potential to do this.⁴⁷

A 'Flawed Potential'

Although the practice, as mentioned previously, has the potential to offer EU citizens a well-functioning participatory-deliberative instrument, some defects to address must be considered, especially those that may affect the degree of impact that ECPs have on the EU policy-making path.

The first flaw is structural in its nature, since it emerges because of the consultative relationship that mini-publics generally have with decision-making stakeholders; in this specific case the European Commission. Indeed, within the scholarly literature on mini-publics, it is widely recognised that these

⁴⁰ *Ibid.*

⁴¹ Johannes Greubel, “A New Generation of European Citizens' Panels – Making Citizens' Voices a Regular Part of Policymaking,” *European Policy Centre*, October 21, 2022, 1-9, https://www.epc.eu/content/PDF/2022/NewGen_DP_v2.pdf.

⁴² Hierlemann *et al.*, *Under construction citizen participation in the European Union*, 28.

⁴³ *Ibid.*, 29-30.

⁴⁴ European Parliament, European Commission, *Future of Europe. Special Eurobarometer 500*, 36. See also Greubel, *A New Generation of European Citizens' Panels – Making Citizens' Voices a Regular Part of Policymaking*, 1-9.

⁴⁵ Greubel, *A New Generation of European Citizens' Panels – Making Citizens' Voices a Regular Part of Policymaking*.

⁴⁶ Hierlemann *et al.*, *Under construction citizen participation in the European Union*.

⁴⁷ Greubel, *A New Generation of European Citizens' Panels – Making Citizens' Voices a Regular Part of Policymaking*.

"do not have an extensive [and positive] record of effectively influencing decisions".⁴⁸ According to many scholars, this stems mainly from the ability and "the power that public authorities have to be selective (either strategically or inadvertently) in both establishing mini-publics and adopting their recommendations".⁴⁹ In doing so, the value and, therefore, the impact of ECPs would be drastically reduced. This feature acquires even more relevance if the impact that the adoption of recommendations has on public support is taken into account: as recent studies have shown, the degree of adoption of mini-publics' recommendations causes "variations in citizens' political support" towards the government.⁵⁰

"Drawing up a contract... requiring [the commissioning body]... to explain within a certain time frame how it has responded to the recommendations of the citizens" may be one of the possible solutions.⁵¹

Secondly, delving into a more logistical dimension, ECPs' impact risks being even more limited when considering the timeline of such practices. ECPs for the proposal of a Directive on food waste reduction -one of the EC 2023 main initiatives- are a good example of this. Firstly, although the ECP took place in early 2023, public consultations on the same topic, a different participatory "tool... [that] offers opportunity for citizens to provide online feedback on EU policy-making" to the European Commission (therefore different from ECPs), were terminated as early as August 24, 2022.⁵² Therefore, considering the timeline, the work based on the public consultations was already

overly advanced. Consequently, the possible benefits brought to this Directive by an ECP taking place at the beginning of 2023 are questionable. Furthermore, the deadline for the final proposal of the Directive was set by the EC in the second half of 2023, which further prevented the ECP from making an effective contribution.⁵³ Secondly, the stakeholders responsible for the draft of this Directive were not involved in time: for example, the Directives' designated section of the Directorate-General for Health and Food Safety "was involved very late in the plans to hold a Citizens' Panel on the file they have been working on for months".⁵⁴ Therefore, the work was developed following public consultations' feedback, without expecting any form of citizens' direct contribution to its content. On this occasion, the actual impact of ECPs on this topic, as well as of citizens' contribution, is definitely limited.⁵⁵ Therefore, better coordination and dialogue between the several EU stakeholders, as well as an enhanced alignment with the EU policy-making process, is crucial.

Conclusion

The EC's decision to make ECPs permanent and regular tools of EU policy-making can generally be evaluated as positive. Such innovative mini-publics practices, aligned with the *participatory* approach of the European Union, may be functional to address the problems of legitimacy that the EU has been experiencing within the last 15 years. Giving a more central role to EU citizens and offering them the chance to effectively draft recommendations on concrete policy topics that the EC will

⁴⁸ *Ibid.*

⁴⁹ Smith and Setälä, *Mini-Publics and Deliberative Democracy*, 9.

⁵⁰ Lisa Van Dijk and Jonas Lefevere, "Can the Use of Minipublics Backfire? Examining How Policy Adoption Shapes the Effect of Minipublics on Political Support among the General Public," *European Journal of Political Research* 62, no. 1 (2022): 135-155, 151.

⁵¹ Some deliberative democrats believe that the role of mini-publics should not go beyond the mere consultative function. This is the site where the deliberative dimension clashes with the participatory one. See Smith and Setälä, *Mini-Publics and Deliberative Democracy*; Graham Smith, "Deliberative democracy and mini-publics," in *Evaluating Democratic Innovations: curing the democratic malaise?*, eds. Brigitte Geisel and Kenneth Newton (London: Routledge, 2012), 90-111, 106.

⁵² Białożył and Le Quiniou, *Europe's Deliberative Instruments: Has the EU Delivered*, 315.

⁵³ Greubel, *A New Generation of European Citizens' Panels – Making Citizens' Voices a Regular Part of Policymaking*.

⁵⁴ *Ibid.*, 6.

⁵⁵ *Ibid.*

take into account during its policy-making process is certainly a remarkable attempt to address the need for a “*stronger basis of democratic input legitimacy*”.⁵⁶ Particularly, this gains even more relevance if the several flaws evidenced by the earlier developed tools are considered. However, if the aim is to make them capable of successfully and efficiently impacting the EC policy-making process, some improvements, and even new practices, to address the previously mentioned flaws would be required.⁵⁷

56 Julian Plottka and Manuel Müller, “Enhancing the EU’s Democratic Legitimacy. Short and Long-Term Avenues to Reinforce Parliamentary and Participative Democracy at the EU Level,” *Friedrich Ebeert Stiftung*, 2020, 16, <https://library.fes.de/pdf-files/bueros/bruessel/17203.pdf>.

57 See Peter Dienel and Ortwin Renn, “Planning Cells: A Gate to “Fractal” Mediation,” in *Fairness and Competence in Citizen Participation. Technology, Risk, and Society*, eds. Ortwin Renn, Thomas Weber and Peter Wiedemann (Dordrecht: Springer, 1995); Gabriele Abels, Ben Crum, Alberto Alemanno, Andrey Demidov, Dominik Hierlemann, Anna Renkamp and Alexander Trechsel, “Next level citizen participation in the EU: Institutionalising European Citizens’ Assemblies,” *Bertelsmann Stiftung*, 2022, next-level-citizen-participation-in-the-eu-institutionalising-eur; Jessy Bailly, “The democratic quality of European Citizens’ panels. Conference on the Future of Europe,” *CAIRN*, 2023, <https://www.cairn.info/revue-cevipol-working-papers-2023-1-page-2.htm>; Van Dijk and Lefevere, Can the Use of Minipublics Backfire? Examining How Policy Adoption Shapes the Effect of Minipublics on Political Support among the General Public.

CAROLINE BOUISSE

GLOBAL CHIP SHORTAGE : IMPACTS ON EUROPEAN AND AMERICAN INDUSTRIES

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Introduction

THE global chip shortage has become a serious problem that is affecting many different businesses globally. Scholars and industry professionals have examined its root causes, effects, and long-term ramifications, including Jordan De Bono and Jennifer Chandler.² Due to the shortage, there have been severe disruptions in both Europe and the United States, which have caused manufacturing delays, supply chain issues, and negative economic effects. As a consequence, numerous industries have been impacted, including the manufacturing of automobiles. Some chip shortages, according to JP Morgan Chase & Co., may extend well into 2023 and 2024.³ It is important to comprehend the ins and outs of this global concern in relation to Europe and the U.S. because this is a longstanding phenomenon that started around early- to mid-2020. Semiconductors, which have materials with intermediate electrical conductivity, are utilised in many commercial and domestic electronic devices.⁴ Semiconductors play a crucial role in daily life. The creation of

automobiles, smartphones, and other electronic gadgets is impossible without these electronic chips. This article provides an in-depth analysis of the effects and consequences of this phenomenon, sheds light on the causes and consequences of the chip shortage, and provides insights into its effects on European and American industries.

The Chip Shortage Crisis: Causes and Background

One of the largest supply chain, design, and manufacturing solution providers in the world, Jabil, has over 250,000 employees spread across 100 locations in 30 countries. According to Graham Scott, the company's global procurement manager, "of all the component shortages we've experienced in recent years, by far the most severe has been that of certain semiconductors, or chips".⁵ Due to a combination of these reasons, Gartner predicts a 3.6% reduction in global semiconductor sales in 2023.⁶ The worldwide chip shortage has primarily impacted the U.S. and Europe more than Asia, for example, due to a difference in the supply chain or in local production.⁷

- 1 Caroline is a former Bachelor's student in History and International Relations at King's College London and a current student in a Master of Public Policy at the University of Chicago. She mostly works on research related to US-EU relations.
- 2 Jennifer Chandler, "When the Supply Chain Breaks: Strategies for the Chip Shortage," *Journal of Business Strategy*, September 13, 2022, <https://doi.org/10.1108/jbs-02-2022-0029>; Jordan De Bono, "Sony PlayStation 5 Facing the Global Chip Shortage," *Overcoming Crisis*, January, 2023, 205–20.
- 3 J.P.Morgan, "Supply Chain Issues and Autos: When Will the Chip Shortage End?," *J.P.Morgan*, April 18, 2023, <https://www.jpmorgan.com/insights/current-events/supply-chain/supply-chain-chip-shortage>.
- 4 Oxford Learner's Dictionaries, "Semiconductor," *Oxford Learner's Dictionaries*, 2023, https://www.oxfordlearnersdictionaries.com/definition/american_english/semiconductor.
- 5 Jabil, "Supply Chain Management | Jabil," *Jabil*, [accessed August 25, 2023], <https://www.jabil.com/solutions/supply-chain-management.html>; Graham Scott, "Why the Chips Are Down: Explaining the Global Chip Shortage," *Jabil*, 2022, <https://www.jabil.com/blog/global-chip-shortages.html>.
- 6 Conn Stamford, "Gartner Says Worldwide Semiconductor Revenue Grew 1.1% in 2022," *Gartner*, 2023, <https://www.gartner.com/en/newsroom/press-releases/2023-01-17-gartner-says-worldwide-semiconductor-revenue-grew-one-percent-in-2022>.
- 7 Vinay Ramani, Debabrata Ghosh and ManMohan S. Sodhi, "Understanding Systemic Disruption from the Covid-19-Induced Semiconductor Shortage for the Auto Industry," *Omega* 113, no. 1 (December 2022): 102720, <https://doi.org/10.1016/j.omega.2022.102720>.

Also, it is due to the fact that some Asian countries, such as China, South Korea, and Taiwan, are world leaders in the manufacture of semiconductors.⁸ They have a higher production capacity, which can reduce the impact of the shortage on their local industries. Overall, it is a complicated issue brought on by a number of interrelated variables. It is crucial to look at a number of important factors that have contributed to this circumstance in order to comprehend the causes of this scarcity.

First is the rising demand for these chips. Due to the fact that many people worked and studied from home during the COVID-19 pandemic, there was a considerable surge in demand for electronic items.⁹ Second, the COVID-19 pandemic had a significant effect on international supply networks. Containment measures, travel restrictions, and industrial closures caused a delay in chip production and distribution.¹⁰ Additionally, waves of COVID-19 impacted certain important chip production regions, such as Asia, causing production outages and additional delays. Third, the manufacture of chips is an intricate process that calls for specialised machinery and advanced manufacturing facilities.

The factories that make chips are called foundries (or fabs), and there are only a few foundries in the world right now that can make the most advanced chips, located mostly in Asia in Taiwan, China, and South Korea.¹¹ Additionally, the

switch to more sophisticated circuits, such as 7 nm and 5 nm chips, involves a significant financial commitment and a lengthy period of time to set up suitable production capacity.¹² Fourth, chip scarcity has also been impacted by geopolitical tensions and trade conflicts between the U.S. and China. One of the biggest chip importers in the world, the Chinese firm Huawei, was subject to penalties in 2018 by the U.S., creating uncertainty in the chip market and leading to adjustments in global supply chains.¹³

Finally, the chip scarcity has also been impacted by natural calamities such as earthquakes and fires. For instance, in 2021, a fire started at a Japanese semiconductor manufacturing facility, interfering with production and lengthening delivery times.¹⁴ In fact, the incident at the Renesas plant in Japan may have had a domino effect on the auto sector, worsening the global semiconductor shortage.¹⁵ Due to Renesas' 30% market share of the microcontroller chips used in automobiles, the impact on automakers may have spread to other businesses in Europe and the U.S.¹⁶

Automobile Sector

According to Bjorn Rosengren, the CEO of the Swiss-Swedish engineering business ABB, there may be more semiconductors accessible in 2023 than there were in 2022 in the automobile industry.¹⁷ Given that it is now simpler than it was two years ago to get a PlayStation 5, this premise

⁸ *Ibid.*

⁹ Stamford, Gartner Says Worldwide Semiconductor Revenue Grew 1.1% in 2022.

¹⁰ Ramani, Ghosh and Sodhi, Understanding Systemic Disruption from the Covid-19-Induced Semiconductor Shortage for the Auto Industry.

¹¹ *Ibid.*

¹² Jeffrey Voas, Nir Kshetri and Joanna F. DeFranco, "Scarcity and Global Insecurity: The Semiconductor Shortage," *IT Professional* 23, no. 5 (2021): 78–82.

¹³ *Ibid.*

¹⁴ Aamirah Mohammed and Sardar Asif Khan, "Global Disruption of Semiconductor Supply Chains during COVID-19: An Evaluation of Leading Causal Factors," in Proceedings of the ASME 2022 17th International Manufacturing Science and Engineering Conference, Volume 2: Manufacturing Processes; Manufacturing Systems, <https://doi.org/10.1115/msec2022-85306>.

¹⁵ Voas, Kshetri and DeFranco, Scarcity and Global Insecurity: The Semiconductor Shortage.

¹⁶ *Ibid.*

¹⁷ Christopher Mouré, "Technological Change and Strategic Sabotage: A Capital as Power Analysis of the US Semiconductor Business," *Real-World Economics Review* 103, no. 1 (2023): 26–55.

is tenable.¹⁸ However, for the time being, according to information from forecasting company LMC Automotive, Ford was the manufacturer most negatively impacted in 2021, with almost 1.25 million vehicles not built.¹⁹ The production gap for the Volkswagen Group is estimated by LMC Automotive to be 1.15 million, compared to 1.1 million for General Motors, 1.1 million for Toyota, and 1 million for Stellantis.²⁰

United States President Joe Biden has also endorsed the CHIPS and Science Act, which commits billions of dollars to solving the semiconductor shortage. In addition, President Biden's administration introduced a new federal tax credit to reduce the cost of American-made electric vehicles.²¹

The global chip shortage is one of the reasons why production of Tesla's Cybertruck is taking longer than expected. Prices for new electric vehicles have also risen by over 10% in the last two years.²² Similarly, if you are thinking of buying a used electric vehicle, you're likely to spend 54% more than you did two years ago.²³

The automotive microcontroller market is highly concentrated. According to IHS Markit, 98% of the market is held by just six suppliers: Renesas Electronics (Japan), NXP (Netherlands), Infineon Technology (Germany, with Cypress Semiconductor), Texas Instruments (USA), Microchip Technology (USA) and STMicroelectronics (France/Italy).²⁴

Automakers are not direct customers of chip suppliers. They consume these components via automotive suppliers such as Valeo, Bosch, Faurecia, Continental, Delphi, Denso or ZF. This does not rule out direct collaborations, such as those between STMicroelectronics and Hyundai, the Renault-Nissan-Mitsubishi alliance, Tesla or BYD. But in general, carmakers and chip suppliers are not particularly acquainted with each other due to the supply chain complexity and also the Tier-1 (direct suppliers of the final product), Tier-2 (suppliers or subcontractors of Tier-1), and lower-Tier suppliers (suppliers of subcontractors of Tier-2), which partly explains the current problem.

Government responses

The scarcity of automotive semiconductors is quickly growing into a significant political issue. The major car-producing nations are pursuing chip diplomacy with Taiwan. Taipei is being urged to do everything in its power to enhance production capacity by Washington, Berlin, Paris, and Tokyo. Governments are putting pressure on Taiwan Semiconductor Manufacturing Company Ltd (TSMC), a business that makes conductors, says Jérémie Bouchaud, director of Automotive E/E and semiconductor at IHS Markit.²⁵

Several reasons explain this continuous pressure as it is the world's largest independent semiconductor foundry, meaning it produces chips for a wide range of companies, including those that do not have their own fabrication facilities.

18 Jordan De Bono, "Sony PlayStation 5 Facing the Global Chip Shortage," *Overcoming Crisis*, January 2023, 205–20, https://doi.org/10.1142/9789811259340_0014.

19 Yossi Sheffi, "What Everyone Gets Wrong about the Never-Ending COVID-19 Supply Chain Crisis," *MIT Sloan Management Review* 63, no. 1 (2021): 1–5.

20 *Ibid.*

21 The White House, "Fact Sheet: Chips and Science Act Will Lower Costs, Create Jobs, Strengthen Supply Chains, and Counter China," 2022, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/09/fact-sheet-chips-and-science-act-will-lower-costs-create-jobs-strengthen-supply-chains-and-counter-china/>.

22 Alex de Vries, Ulrich Gallersdörfer, Lena Klaußen and Christian Stoll, "The True Costs of Digital Currencies: Exploring Impact beyond Energy Use," *One Earth* 4, no. 6 (2021): 786–89.

23 Wassen Mohammad, Adel Elomri and Laoucine Kerbache, "The Global Semiconductor Chip Shortage: Causes, Implications, and Potential Remedies," *IFAC-PapersOnLine* 55, no. 10 (2022): 476–83.

24 Voas, Kshetri and DeFranco, Scarcity and Global Insecurity: The Semiconductor Shortage.

25 Basile Dekonink, "Pénurie Des Semi-Conducteurs : 'Le plus Dur Reste à Venir,' [Shortage Of Semiconductors: The Hardest Is Yet To Come]" *Les Echos*, February 17, 2021, <https://www.lesechos.fr/industrie-services/automobile/penurie-des-semi-conducteurs-le-plus-dur-reste-a-venir-1291024>.

This goes without saying that there is no guarantee that this will result in a rise in total production capacity.

Sovereignty issues have also been brought up by the crisis. A new large initiative of Important Projects of Common European Interest (IPCEI) in microelectronics is eager to get off the ground, according to Bruno Le Maire, France's Minister of the Economy, Finance, and Economic Recovery.²⁶ One of the goals is to establish a cutting-edge chip foundry in Europe, similar to what the U.S. has done with TSMC in Taiwan. But according to the IHS Markit expert, it would be challenging to attain semiconductor sovereignty through such a project.²⁷ According to him, a modern automobile contains fewer than 1,000 chips. In Europe, it is impossible to meet every requirement with a factory.²⁸ It is preferable to improve the supply chain and lessen reliance on TSMC.

This technological backwardness, or the lack of advanced technological capabilities or infrastructure that are necessary for the efficient and timely production of semiconductor chips, runs the risk of making the difficult geopolitical situation between China and Taiwan even worse. President Xi Jinping of China has never hidden his goal to conquer the neighbouring island, which China views as its own, even if it involves using force.²⁹ The United States and EU have agreed to record investments of several hundred billion dollars in semiconductors in order

to prevent the devastating economic and political implications (economic reliance, political sanctions, etc.) that the annexation of Taiwan would entail.³⁰

The production of semiconductors uses a significant quantity of water. Nearly 150,000 tonnes of water are used by TSMC every day for production purposes.³¹ In fact, it is possible that the drought that afflicted Taiwan in 2021 will restrict manufacturing and extend the lack of semiconductors. Additionally, carbon-rich fossil fuels are used in the manufacturing of silicon, a necessary raw ingredient for the most popular types of semiconductors.³² Finally, the use of hazardous materials is widespread in foundries, and the energy-intensive aspect of production methods is also a major issue. Because of this, the United States and Europe, which have made significant investments in the chip business, need to carefully examine the environmental concerns raised.

The EU has two plans to fight the impact of China and Asia. The first is to pass "sovereignist" legislation aimed at Asian producers at the expense of European foundries.³³ Berlin took a tough stance against Asian economic avarice at the beginning of February by preventing the sale of Siltronic, one of the last European silicon wafer producers, to a Taiwanese business, GlobalWafers. This exemplifies the protectionist approach taken by European governments on chip manufacturing. The second is a strategic

26 Francois Carrel, "2,9 Milliards d'Euros d'Aides Pour STMicroelectronics: L'Etat En Pince Pour Les Puces, [2.9 Billion Euros in Aid for STMicroelectronics: The State in Clamp for Chips]" *Libération*, 2023, https://www.liberation.fr/economie/economie-numerique/29-milliards-deuros-daides-pour-stmicroelectronics-letat-en-pince-pour-les-puces-20230605_RLSSM23J6RELTML37OY53ZY3NU/.

27 Voas, Kshetri and DeFranco, Scarcity and Global Insecurity: The Semiconductor Shortage.

28 Alexandre G. Verheyden, Geoffroy Van De Walle, Bernard Amory, Ryan C. Thomas, Craig A. Waldman and Yizhe Zhang, "The EU Commission Proposes a Chip Act to Confront Semiconductor Shortages and Strengthen Europe's Technological Leadership," *E-Competitions Bulletin*, February 8, 2022, <https://www.concurrences.com/en/bulletin/news-issues/february-2022/the-eu-commission-proposes-a-chip-act-to-confront-semiconductor-shortages-and>.

29 Yew Lun Tian and Ben Blanchard, "China Will Never Renounce Right to Use Force over Taiwan, Xi Says," *Reuters*, October 16, 2022, <https://www.reuters.com/world/china/xi-china-will-never-renounce-right-use-force-over-taiwan-2022-10-16/>.

30 Gary Clyde Hufbauer and Megan Hogan, "CHIPS Act Will Spur US Production but Not Foreclose China," *papers.ssrn.com* (Rochester, NY, October 16, 2022).

31 Mohammed and Khan, Global Disruption of Semiconductor Supply Chains during COVID-19: An Evaluation of Leading Causal Factors.

32 *Ibid.*

33 Voas, Kshetri and DeFranco, Scarcity and Global Insecurity: The Semiconductor Shortage.

reconciliation with the U.S., whose semiconductor industry leader Intel has announced a \$93 billion investment over ten years in Europe, including the building of three plants, most likely in Germany.³⁴ In other words, European flagships such as ST Microelectronics, Infineon, and Kalray can look forward to expanding their activities. On another note, it is worth mentioning that the performance is better than the expected results for ASML Holding. The Dutch manufacturer of equipment for the production of semiconductors recorded sales of 6.9 billion euros in the second quarter, and its gross margin stood at 51%. Net profit, for its part, increased by 35% over one year, to reach 1.9 billion euros over the period.³⁵

Conclusion

In conclusion, the challenges posed by COVID-19 and its impact, the consequences and stakes of the war in Ukraine and disputes with Taiwan, and the innovative technological solutions needed to deal with the climate crisis, have all been significant causes of the chip shortage and have had a knock-on effect on the geopolitical and economic situations in the United States and EU. Due to the importance of digitisation today, this shortage, which appears poised to last, is multi-sectoral and has a significant impact on the global economy. The United States and Europe have implemented record investments of hundreds of billions of dollars allocated to semiconductors in

order to combat the disastrous economic and political consequences (economic dependence, political sanctions, etc.) that the annexation of Taiwan would entail, particularly in this context of a shortage of microprocessors. In the intricate dance of technology, geopolitics, and economics, the chip shortage stands as a vivid testament to our interconnected world. As supply chains tangle amidst global challenges, the shortage not only exposes vulnerabilities but also fuels the furnace of innovation. The investment surge to safeguard against the spectre of dependency speaks volumes about the pivotal role these minuscule marvels play in shaping the future. In a time of uncertainty, it's a stark reminder that the micro can move mountains, and the fate of nations can rest on the tiniest of transistors.

34 Hannah Casper, Autumn Rexford, David Riegel, Amanda Robinson, Emily Martin and Mohamed Awwad, "The Impact of the Computer Chip Supply Shortage," in *The International Conference on Industrial Engineering and Operations Management Bangalore*, 2021, <https://www.ieomsociety.org/proceedings/2021india/72.pdf>.

35 Toby Sterling, "ASML Beats Earnings Forecasts, Sees 2023 Growth amid China Worries," *Reuters*, January 25, 2023, <https://www.reuters.com/technology/asml-reports-net-profit-198-billion-q4-sees-25-sales-growth-2023-2023-01-25/>.

JORDY BENOIT

BREXIT REGRET : THE OBSTACLES FOR THE UK TO REJOIN

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Introduction

ON December 30, 2020, then-UK Prime Minister (PM) Boris Johnson stood up in the House of Commons, stating “we got Brexit done, let’s keep Brexit done, and let’s keep Brexit done because I have always said that Brexit is not an end but a beginning”.² That day the EU-UK Trade and Cooperation Agreement was signed and provisionally applied two days later.³ Today, after three years, Brexit is still far from done. Setting aside the gradual implementations, the reason why Brexit is here to stay is political rather than practical. A polling by Redfield & Wilton Strategies published on July 17, 2023, found that over 55% of the UK public would vote to Rejoin the EU, with 36% in favour of remaining outside the Union and 9% unsure.⁴

These polls come at a turning point in the Brexit saga. As of April 18, 2023, a majority (55%) of Brits are in favour of a second referendum, this time on re-joining the EU, within the next five years.⁵ This, however, does not mean that the UK will Rejoin the EU anytime soon. As a recent EU member, the UK meets all of the Copenhagen criteria and would therefore be an ideal

candidate for EU membership, at least on paper.⁶ However, several events in the past seven years and the current political and economic climate have made a quick reversal of Brexit very unlikely. This article will walk through some of the main issues that would hinder the UK’s efforts to rejoin today.

Realignment

In order for the UK to join the European Union, it must also join the European single market. This would give the UK unfettered access (freedom of movement) in terms of goods, capital, services, and people. However, these freedoms are conditional and would require the UK to revise the trade deals it has struck with non-EU countries after Brexit. Trade outside the EU is a competence exclusive to the EU, making EU institutions responsible for all international trade agreements and legislation on international trade.⁷

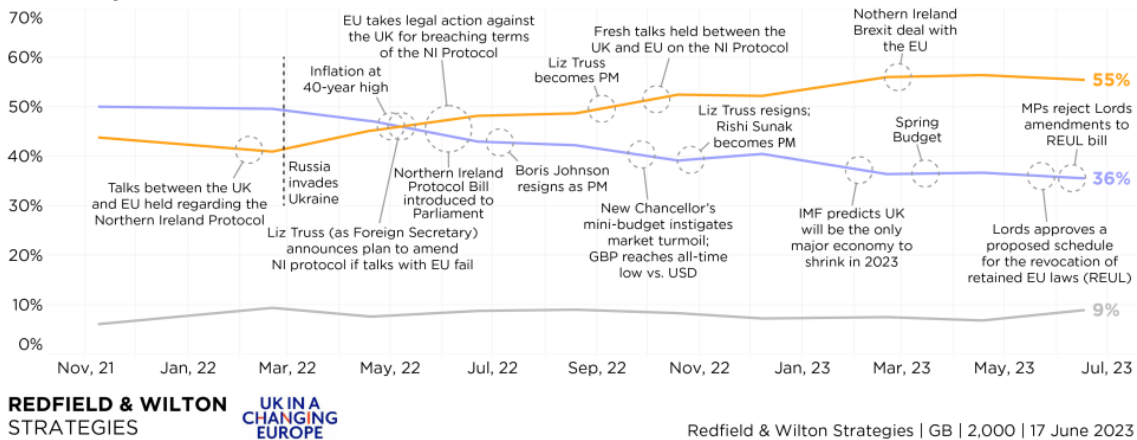
Since February 2020, the UK has signed a total of 71 post-Brexit trade agreements. However, 68 of these are so-called ‘rollover agreements’, meaning that they

- 1 Jordy Benoit is a recent graduate at Ghent University, where he obtained a BSc in Political Science and a MSc in EU-studies. With a keen interest in European integration and cooperation, he currently works for the office of the Permanent Representation of Belgium to the European Union. This is his first contribution to the European Studies Review Journal.
- 2 Prime Minister’s Office, “Prime Minister’s opening statement to the House of Commons on the UK-EU deal: 30 December 2020,” December 30, 2020, <https://www.gov.uk/government/speeches/prime-ministers-opening-statement-to-the-house-of-commons-on-the-uk-eu-deal-30-december-2020>.
- 3 European Commission, “The EU-UK Trade and Cooperation Agreement,” [Accessed May 18, 2023] https://commission.europa.eu/strategy-and-policy/relations-non-eu-countries/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement_en.
- 4 R&WS Research Team, “Joining Or Staying Out Of The EU Referendum Voting Intention (17 June 2023),” June 17, 2023, [Redfield & Wilton Strategies](https://redfieldandwiltonstrategies.com/joining-or-staying-out-of-the-eu-referendum-voting-intention-17-june-2023/), <https://redfieldandwiltonstrategies.com/joining-or-staying-out-of-the-eu-referendum-voting-intention-17-june-2023/>.
- 5 R&WS Research Team, “Joining Or Staying Out Of The EU Referendum Voting Intention (18 April 2023).”
- 6 Publications Office of the European Union, “Accession criteria (Copenhagen criteria),” EUR-Lex, August 16, 2021, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=LEGISSUM:accession_criteria_copenhagen.
- 7 Consolidated version of the Treaty on the Functioning of the European Union, C 326/47, October 26, 2012, 94-95.

Hypothetical EU Voting Intention

If there were a referendum tomorrow with the following question, how would you vote?

Should the United Kingdom join the European Union or stay out of the European Union?



Source: Redfield & Wilton Strategies, 2023⁸

are a continuation of the trade relations that the UK had with those countries as an EU member,⁹ and would, therefore, in principle not hinder the UK's accession to the Union. The three remaining trade agreements are those with Japan, Australia and New Zealand. Each has been criticised domestically in its own right. One main criticism is the minimal impact that they are predicted to have on the UK's long-term GDP growth, according to the UK government's own impact assessments.¹⁰ However, the lack of expected long-term GDP growth suggests that the UK government did not see it as a core objective during the negotiations.

Former Trade Secretary Liz Truss has stated on multiple occasions that these particular trade agreements are part of a larger strategy to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). She described the UK-Japan trade deal as having "*a much wider strategic significance*" as it provides a "*clear pathway to membership of the CPTPP*".¹¹ As of June 2023, the UK is set to join the block, which has the potential to keep the UK out of the single market for the foreseeable future. According to the UK government's own assessment, UK GDP is expected to grow by only 0.08% as a result of CPTPP membership,¹² compared

⁸ R&WS Research Team, *Joining Or Staying Out Of The EU Referendum Voting Intention* (17 June 2023).

⁹ Stephen Hunsaker and Tom Howe, "Trade tracker: UK trade deals," *UK in a Changing Europe*, March 16, 2023, <https://ukandeu.ac.uk/trade-tracker-uk-trade-deals/>.

¹⁰ Department for International Trade (UK government), "Impact assessment of the Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and Australia," May, 2022, 5-9, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1073969/impact-assessment-of-the-free-trade-agreement-between-the-united-kingdom-of-great-britain-and-northern-ireland-and-australia.pdf; Department for International Trade (UK government), "Impact assessment of the Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and New Zealand," February, 2022, 5-9, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1057311/uk-new-zealand-free-trade-agreement-impact-assessment.pdf; Department for International Trade (UK government), "Final Impact Assessment of the Agreement between the United Kingdom of Great Britain and Northern Ireland and Japan for a Comprehensive Economic Partnership," February, 2021, 5-8, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/965154/UK-japan-impact-assessment-comprehensive-economic-partnership.pdf.

¹¹ Graham Lanktree, "Cheese seals the deal as UK and Japan sign 'historic' trade pact," *Politico*, October 22, 2020, <https://www.politico.eu/article/uk-and-japan-sign-historic-trade-deal/>.

¹² Department of International Trade (UK government), "Final Impact Assessment of the Agreement between the United Kingdom of Great Britain and Northern Ireland and Japan for a Comprehensive Economic Partnership," February, 2021, 5-8,

to a 4% annual loss as a result of Brexit,¹³ making future economic ties with other CPTPP members an unlikely reason to hold off any Rejoin efforts.

Rather, the danger lies with the expected closer alignment with other CPTPP members, which would imply rolling back standards on goods.¹⁴ There are two main dynamics that would lead to lower standards on goods. Firstly, domestic competitiveness: once UK domestic producers face direct competition with goods imported from CPTPP members with lower production standards, UK companies will be incentivised to lower their own production standards, in order to maintain their competitiveness, and will lobby UK legislators to create a new legal basis to facilitate this.¹⁵ Secondly, regulatory alignment: the CPTPP incentivises regulatory alignment between its members, such as on pesticides and hormones. In order to secure increased access for foreign producers to the UK food market, UK legislators will need to lift the national ban on -sticking to the previous example- certain pesticides and hormone beef previously upheld under EU law.¹⁶ These deviations from EU standards would require a lengthy and costly process

of realigning the UK market during future accession negotiations. This added cost, and who would cover it, would most definitely be a sore point of contention in any future Rejoin debate.

Politics

As the UK has not had the chance to diverge significantly from the EU both economically and legally, the EU's main reason for objecting to the UK rejoining would be political. The Union is currently experiencing expansion fatigue, as some of its newer members seem reluctant to commit to its key principles and values.¹⁷ This has made both EU institutions and Member States question whether the EU is ready for new members.¹⁸ In the case of the UK, Brexit has highlighted certain UK characteristics that were not appreciated within the EU bubble and amongst EU leaders, from UK ministers' ignorance of the EU's workings, to prime ministers bashing the EU during post-summit press conferences for domestic gain.¹⁹ The UK has reestablished itself as Europe's "awkward partner", as the UK government showed little willingness to cooperate on matters of mutual interest at the end of the country's membership, which ultimately

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/965154/UK-Japan-impact-assessment-comprehensive-economic-partnership.pdf.

- 13 Office for Budget Responsibility, "Economic and fiscal outlook March 2023," March, 2023, CP 804, 46-47, https://obr.uk/docs/dlm_uploads/OBR-EFO-March-2023_Web_Accessible.pdf.
- 14 Brian Monteith, "New UK trade deal with Pacific countries may stop Britain from rejoining EU," *The Scotsman*, April 3, 2023, <https://www.scotsman.com/news/opinion/columnists/new-uk-trade-deal-with-pacific-countries-may-stop-britain-from-rejoining-eu-brian-monteith-4090828>.
- 15 Kerry Taylor-Smith, "New trade deal raises concerns over safety of UK food," *Chartered Institute for Environmental Health*, April 13, 2023, <https://www.cieh.org/ehn/food-safety-integrity/2023/april/new-trade-deal-raises-concerns-over-safety-of-uk-food/>; Department for International Trade, "UK Accession to CPTPP: The UK's Strategic Approach," April, 2021, 10-62, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1027860/dit-cptpp-uk-accession-strategic-approach.pdf.
- 16 Sustain, "UK joins Indo-Pacific trade bloc, raising concerns about food, farming and environment standards," *Sustain*, March 31, 2023, <https://www.sustainweb.org/news/mar23-uk-joins-indo-pacific-trade-bloc-cptpp/>; Emilio Casalicchio, "Canada probes UK over hormone beef ban," *POLITICO Pro*, February 3, 2022, <https://www.politico.eu/article/canada-probes-uk-over-hormone-beef-ban-as-london-eyes-trade-pact/>.
- 17 Anna Szolucha, "The EU and Enlargement Fatigue: Why has the European Union not been able to counter enlargement fatigue?," *Journal of Contemporary European Research* 6, no. 1 (2010): 2-8.
- 18 Spyros Economides, "From Fatigue to Resistance: EU Enlargement and the Western Balkans," *The Dahrendorf Forum* 4, no. 17 (2020): 1-17.
- 19 Dave Keating, "Would Europe want us back?," *The New European*, January 31, 2023, <https://www.theneweuropean.co.uk/would-europe-want-us-back-dave-keating/>; Rowena Mason, Peter Walker and Patrick Wintour, "Boris Johnson ridiculed by European ministers after prosecco claim," *The Guardian*, November 17, 2016, <https://www.theguardian.com/politics/2016/nov/16/european-ministers-boris-johnson-prosecco-claim-brexite>.

ended in strained UK-EU relations.²⁰

Although several Member States would be in favour of the UK rejoining, others would be more hesitant. France has a history of holding back UK accession, based on concerns that the UK would block efforts towards an ever-closer union. Quite interestingly, these concerns later became a reality.²¹ According to Anthony Salamone, managing director of European Merchants, Westminster politics have been “*thoroughly disconnected from the realities in the EU. Most people still don't know how the EU works*”. Salamone stated nonetheless that “*If France sees that the UK has gone through a realignment that would make it a more normal member state, they would be more likely to support rejoining*”.²² Progress has however been made in the opposite direction. Boris Johnson's premiership has damaged both UK-EU relations and the UK's democratic fabric.²³ In line with tradition, Johnson's premiership was riddled with EU bashing and inflammatory clashes. Even so,

Johnson's government instigated a new low point in UK-EU relations by repeatedly threatening to break off trade negotiations and break international law.²⁴

Although 55% of the UK public would now vote to rejoin the EU if a new referendum was held, no less than 73% of those who voted Leave would do so again, and no major political party made Rejoin a part of their manifesto.²⁵ A not-insignificant fraction of the UK's political class still believes in the possibilities of Brexit and denounces all of its negative consequences as being the result of global events and political mismanagement.²⁶ Given the disproportionate influence that this fraction has proven to wield, these politicians, in particular, would need to either reject Brexitism and become fully committed to European political integration on top of mere economic cooperation or make room for politicians that are. If not, the UK would fail to convince the Member States that seek further European integration that the UK

20 EURACTIV, “Britain and Europe going through gradual disengagement,” *EURACTIV*, September 3, 2012, <https://www.euractiv.com/section/uk-europe/opinion/britain-and-europe-going-through-gradual-disengagement/>; Ian Traynor, Nicholas Watt, David Gow and Patrick Wintour, “David Cameron blocks EU treaty with veto, casting Britain adrift in Europe,” *The Guardian*, December 9, 2011, <https://www.theguardian.com/world/2011/dec/09/david-cameron-blocks-eu-treaty>; Diplomat Magazine, “The Awkward Partner,” *Diplomat Magazine*, June 1, 2013, <https://diplomatmagazine.com/the-awkward-partner/>.

21 Helen Wallace, “The UK: 40 Years of EU Membership,” *Journal of Contemporary European Research* 8, no. 4 (2012): 540-546; Andrew Duff, “The case for an Associate Membership of the European Union,” *LSE European Politics and Policy (EUROPP) Blog*, March 6, 2013, <https://blogs.lse.ac.uk/europpblog/2013/03/06/associate-eu-membership/>; The Economic Voice, “Farage provokes Hollande to admit BREXIT is logical,” *The Economic Voice*, October 7, 2015, <https://www.economicvoice.com/farage-provokes-hollande-to-admit-brex-it-is-logical/>.

22 Keating, Would Europe want us back?.

23 Benjamin Ward, “Britain's Democratic Fabric is Being Eroded by Boris Johnson's Government,” *Human Rights Watch*, October 26, 2020, <https://www.hrw.org/news/2020/10/26/britains-democratic-fabric-being-eroded-boris-johnsons-government>; Alexander Hudson, David Towriss and Emily Bloom, “Boris Johnson finds the limit as the last hope of democratic accountability asserts itself,” *International IDEA*, July 8, 2022, <https://www.idea.int/blog/boris-johnson-finds-limit-last-hope-democratic-accountability-asserts-itself>; Fabian Zuleeg and Emily Fitzpatrick, “Time for a reset: Could a new prime minister repair the EU-UK relationship?,” *European Policy Centre*, July 29, 2022, <https://www.epc.eu/en/publications/Time-for-a-reset-Could-a-new-prime-minister-repair-the-EUUK-relation-49f598>.

24 George Parker, Sebastian Payne, Peter Foster and Jim Pickard, “UK government admits it will break international law over Brexit treaty,” *Financial Times*, September 8, 2020, <https://www.ft.com/content/a20e7822-468f-4671-8e82-9dc5b5f353d8>; George Parker and Robert Wright, “Boris Johnson to threaten to walk away from Brexit trade talks,” *Financial Times*, February 27, 2020, <https://www.ft.com/content/0d1645b6-5946-11ea-abe5-8e03987b7b20>; Jon Danzig, “David Davis doesn't understand negotiating or the EU,” *Ideas on Europe*, May 21, 2017, <https://eu-rope.ideason europe.eu/2017/05/21/david-davis-doesnt-understand/>.

25 R&WS Research Team, Joining Or Staying Out Of The EU Referendum Voting Intention (17 June 2023); Simon Usherwood, “Five reasons why rejoining the EU is a difficult path to follow,” *UK in a Changing Europe*, February 28, 2023, <https://ukandeu.ac.uk/five-reasons-why-rejoining-the-eu-is-a-difficult-path-to-follow/>.

26 Andrew McDonald, “Nigel Farage: ‘Brexit has failed’,” *Politico*, May 16, 2023, <https://www.politico.eu/article/nigel-farage-uk-eu-brex-it-has-failed/>; Toby Helm, “Secret British cross-party summit held to confront failings of Brexit,” *The Irish Times*, February 12, 2023, <https://www.irishtimes.com/world/uk/2023/02/12/secret-british-cross-party-summit-held-to-confront-failings-of-brex-it/>.

would not pick up its role as the “awkward partner” again.²⁷

Public opinion

Ultimately, the main obstacle for Rejoin would come from the British public. The UK would not be able to reclaim its membership under the conditions that it had when it left, and, in order to Rejoin, would be required to become a “normal” EU member. This would mean little to no opt-outs, as the Commission is actively trying to move away from the current opt-out culture.²⁸ While a majority of Brits may be in favour of EU membership today, what this means is still unclear. Although further research is needed, the public narrative appears to support a Rejoin sentiment that is mainly driven by the economic damages of Brexit, not necessarily because the UK population has suddenly adopted a more European identity. As was the case with Leave, the majority of Brits seem to be in favour of Rejoin based on what they do not want,²⁹ demonstrating little conviction on the importance of full EU membership and European political integration. Although the degree to which the UK government can concede during the accession negotiations would determine their success, the British

public would most definitely draw some red lines.

The most notable concessions that the UK gained were the budget rebate, special justice and home affairs arrangements, and opt-outs on the euro and the Schengen area, with the latter two being the more sensitive subjects amongst the British public.³⁰ There are many reasons why UK politicians are reluctant to join the euro, such as the importance of the City of London to the UK economy.³¹ As for the public, the British pound is a tangible symbol of national unity and identity.³² At the same time, the Brits have had a negative view of the euro since 1991, with the lowest support in 2012 during the euro crisis.³³ Yet, membership of the eurozone would be seen as a sign of the UK's commitment to full EU membership, monetary integration and, possibly, fiscal integration. Since Brexit, the EU has started to add common debt to its financial architecture with a Recovery Fund, which will possibly be expanded to general strategic investments in the future.³⁴ In that case, EU members in favour of a Fiscal Union would be especially wary of the return of a UK that is keen on blocking EU joint debt.

27 Anthony Salamone, “Membership 2.0: what the UK rejoining the EU would involve,” *LSE European Politics and Policy (EUROPP) Blog*, January 23, 2020, <https://blogs.lse.ac.uk/brexit/2020/01/23/membership-2-0-what-the-uk-rejoining-the-eu-would-involve/>

Keating, Would Europe want us back?; Usherwood, Five reasons why rejoining the EU is a difficult path to follow.

28 Salamone, Membership 2.0: what the UK rejoining the EU would involve.

29 Alan Wager and Paula Surridge, “Rejoin vs stay out: who has changed their mind about Brexit?” *UK in a Changing Europe*, November 23, 2022, <https://ukandeu.ac.uk/rejoin-vs-stay-out-who-has-changed-their-mind-about-brexit/>; Jonathan Freedland, “With even leavers regretting Brexit, there’s one path back to rejoining the EU,” *The Guardian*, June 23, 2023, <https://www.theguardian.com/commentisfree/2023/jun/23/leavers-regret-brexit-rejoining-eu-nigel-farage>; Derrick Wyatt, “Public support is on the rise but the road to re-joining the EU would not be smooth,” *LSE European Politics and Policy (EUROPP) Blog*, January 31, 2013, <https://blogs.lse.ac.uk/politicsandpolicy/public-support-is-on-the-rise-but-the-road-to-re-joining-the-eu-would-not-be-smooth/>.

30 Salamone, Membership 2.0: what the UK rejoining the EU would involve.

31 Troy Segal, “Why the U.K. Doesn’t Use the Euro,” *Investopedia*, June 6, 2023, <https://www.investopedia.com/ask/answers/100314/why-doesnt-england-use-euro.asp>.

32 David Routh and Carole Burgoyne, “Being in two minds about a single currency: A UK perspective on the euro,” *Journal of Economic Psychology* 19, (1998): 741-754; Martin Marcussen, Thomas Risse, Daniela Engelmann-Martin, Hans Joachim Knopf and Klaus Roscher, “Constructing Europe? The evolution of French, British and German nation state identities,” *Journal of European Public Policy* 6, no. 4 (1999): 614-633.

33 Felicitas Nowak-Lehmann, Felix Roth and Lars Jonung, “Public support for the euro,” *CEPR*, November 11, 2016, <https://cepr.org/voxeu/columns/public-support-euro>.

34 Wyatt, Public support is on the rise but the road to re-joining the EU would not be smooth; Salamone, Membership 2.0: what the UK rejoining the EU would involve.

The Schengen area does not come with a tangible symbol that the British public would notice in everyday life. It does, however, touch on a sore spot in UK politics, namely immigration control. Participating in the Schengen area means no more border checks, which is the next step towards the completion of a single market.³⁵ Often not understanding the difference between the single market, Schengen and the EU, the Brits saw EU membership as an open road from the Mediterranean to the UK's shores. Rather than fully participating, they cherry-picked the parts of Schengen that they liked, whilst opting out for the rest.³⁶ Under the slogan of "*take back control*", Brexiteers promised to halt immigration.³⁷ Showcasing that they did not understand the difference between Schengen and the single market, they intended to do so by ending Freedom of Movement and stepping out of the single market.³⁸ While this has put a damper on EU nationals coming into the UK, it has not stopped irregular migration from non-EU countries. In fact, net migration to the UK is at an all-time high,³⁹ and at the same time, the UK government can no longer transfer non-EU nationals to the first Dublin country of entry, as the UK is no longer part of the Dublin Regulation.⁴⁰ As Freedom of Movement is a cornerstone of European integration, Schengen has

become a core part of EU law.⁴¹ New EU members are therefore required to join the Schengen Area, including the UK, if it wishes to Rejoin.

Finally, before Rejoin could have a chance of succeeding, there needs to be a broad political and social consensus on the benefits of full EU membership. Without it, EU members would not even consider the UK's accession, as they would not commit extensive means to accession negotiations with a country that is at constant risk of breaking relations.⁴² As mentioned previously, a not-insignificant proportion of the UK's political class still believes in the possibilities of Brexit.⁴³ Their political success is often exacerbated due to their strategic position within the UK's Conservative Party. We have seen this during the period leading up to the Brexit Referendum: the Eurosceptic faction of the UK's Conservative Party rebelled and voted in favour of a motion calling for the Referendum, after a petition from the public was delivered to the Prime Minister's address.⁴⁴ It will be up to the pro-EU factions of UK society to convince the British electorate not only of the detriment of staying outside the EU, but also of the benefits associated with full EU membership. In doing so, they can starve the Eurosceptic political class of public

35 Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, October 26, 2012, 47–390.

36 Steve Peers, "The UK and the Schengen system," *UK in a Changing Europe*, December 3, 2015, <https://ukandeu.ac.uk/the-uk-and-the-schengen-system/>; Michael Emerson, "Britain, Ireland and Schengen: Time for a smarter bargain on visas," *Centre for European Policy Studies*, August, 2011, http://aei.pitt.edu/32245/1/PB249_ME_on_Schengen.pdf.

37 Kehinde Andrews, "'Take back control': how colonial nostalgia still informs political discourse," *Penguin Random House*, February 23, 2021, <https://www.penguin.co.uk/articles/2021/02/kehinde-andrews-brexiteer-uk-colonial-history-racism-politics>.

38 UKIP, "Believe in Britain UKIP Manifesto," 2015, <https://d3n8a8pro7vnm.cloudfront.net/ukipdev/pages/1103/attachments/original/1429295050/UKIPManifesto2015.pdf>; Felix Karstens, "How public discourse affects attitudes towards Freedom of Movement and Schengen," *European Union Politics* 21, no. 1 (2020), 43–63.

39 Rajeev Syal, "Rishi Sunak faces Tory backlash as net migration reaches record high," *The Guardian*, May 23, 2023, <https://www.theguardian.com/uk-news/2023/may/25/uk-net-migration-record-high-despite-tory-promises-cut-arrivals>.

40 Asylum Information Database, "Dublin United Kingdom," *European Council on Refugees and Exiles*, May 30, 2023, <https://asylumineurope.org/reports/country/united-kingdom/asylum-procedure/procedures/dublin/>.

41 Consolidated version of the Treaty on the Functioning of the European Union.

42 Justin Metz, "A realistic path to a better relationship between Britain and the EU," *The Economist*, January 5, 2023, <https://www.economist.com/leaders/2023/01/05/a-realistic-path-to-a-better-relationship-between-britain-and-the-eu>; Keating, "Would Europe want us back?"

43 McDonald, Nigel Farage: 'Brexit has failed'; Helm, Secret British cross-party summit held to confront failings of Brexit.

44 Nicholas Watt, "David Cameron rocked by record rebellion as Europe splits Tories again," *The Guardian*, October 25, 2011, <https://www.theguardian.com/politics/2011/oct/24/david-cameron-tory-rebellion-europe>; BBC News, "100,000 sign petition calling for EU referendum," *BBC News*, September 8, 2011, <https://www.bbc.com/news/uk-politics-14834871>.

support, removing them as an obstacle for Rejoin.

Conclusion

A majority of the British public in favour of EU membership does not guarantee a clear path for the UK to Rejoin. If accession negotiations took place today, they would be hindered by three main issues. Firstly, the UK has drifted from the EU single market. Trade deals with CPTPP members have been struck by the UK government in a tactical move towards future CPTPP membership,⁴⁵ which will push the UK towards closer alignment with other CPTPP members and rolling back standards on goods.⁴⁶ These deviations from EU standards would require a lengthy and costly process to realign the UK market, both for domestic consumers and producers.⁴⁷

Secondly, after 47 years of being the *"awkward member"*,⁴⁸ the end of the UK's membership was marked by strained UK-EU relations, as a result of little willingness from the UK government to cooperate on matters of mutual interest.⁴⁹ However, leading up to the UK's withdrawal from the EU, UK-EU relations deteriorated even further during Boris Johnson's premiership.⁵⁰ To obtain the unanimous approval of EU members, these relations will need to be repaired before the UK can Rejoin. This would require Brexitism to be rejected and full commitment to EU membership and European political

integration from the UK's political class.⁵¹

Finally, the main obstacle for the UK to Rejoin would be the British public opinion. It is unclear whether the Brits are convinced of the benefits of full EU membership.⁵² Reservations and outright refusal to participate fully have led to the UK being granted several opt-outs in the past. These reservations amongst the British public persist to this day, most notably regarding the euro and Schengen.⁵³ Although it is very unlikely that, as a new member, the UK would be granted the same special status as it did before, the British public would most definitely draw some red lines. Current members would, however, need to be convinced that the UK would not resume blocking further European integration, which would be difficult if the UK were to demand opt-outs during the accession negotiations.⁵⁴ Additionally, current members would look for a broad political and social consensus on the benefits of full EU membership amongst the British public, as this would indicate the removal of the Eurosceptic faction of the political class as an obstacle,⁵⁵ and with it, the risk of the UK exiting again in the near future.

45 Lanktree, Cheese seals the deal as UK and Japan sign 'historic' trade pact.

46 Taylor-Smith, New trade deal raises concerns over safety of UK food; Sustain, UK joins Indo-Pacific trade bloc, raising concerns about food, farming and environment standards.

47 Monteith, New UK trade deal with Pacific countries may stop Britain from rejoining EU.

48 Diplomat Magazine, The Awkward Partner.

49 Traynor et al., David Cameron blocks EU treaty with veto, casting Britain adrift in Europe; EURACTIV, Britain and Europe going through gradual disengagement.

50 Parker et al., UK government admits it will break international law over Brexit treaty; Parker and Wright, Boris Johnson to threaten to walk away from Brexit trade talks.

51 Usherwood, Five reasons why rejoining the EU is a difficult path to follow; Salamone, Membership 2.0: what the UK rejoining the EU would involve.

52 Wyatt, Public support is on the rise but the road to re-joining the EU would not be smooth.

53 Keating, Would Europe want us back?.

54 Salamone, Membership 2.0: what the UK rejoining the EU would involve; Keating, Would Europe want us back?.

55 Metz, A realistic path to a better relationship between Britain and the EU.

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