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The Rwanda Bill: Government Dictated Facts at the Expense of Human Rights

Caught Between Political Power Play and Legal Ambiguity: The Spitzenkandidaten Process Before the 2024 Election



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ELIOT REFFAIT

April 2024

IN THE SHADOW OF NATO'S ARTICLE 5, COULD ARTICLE 42(7) OF THE TREATY ON EUROPEAN UNION BE THE REAL SECURITY GUARANTEE FOR THE EU?

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Introduction

Since the large-scale invasion of Ukraine in 2022, Europe's security landscape has changed significantly. Abandoning a traditional position of seeking balance and a form of relative neutrality, Finland and Sweden applied for NATO membership, which was accepted. In February 2024, however, statements by the Republican candidate for President of the United States, Donald Trump, cast a pall over a Europe that had always considered NATO's Article 5 its strongest security guarantee.² In strategic terms, this perception stems from the fact that the United States has unrivalled military power. Its withdrawal from European security, combined with a lack of investment in defence by some EU member states, has raised concerns about the unity and security of European countries in the event of a high-intensity confrontation with the Russian Federation.³ In political and legal terms, however, the European Union has a Common Foreign and Security Policy (CFSP) framework, one branch of which is the Common Security and Defence Policy

(CSDP). The lifting of Denmark's CSDP opt-out has received less comment than the decisions by Finland and Sweden to join NATO, although Denmark's decision to join the CSDP is significant both politically and legally.

As regards the prospect of a conflict involving an EU Member State, the Union has its "mutual defence clause", i.e. Article 42(7) of the Treaty on European Union (TEU). It states: "[i]f a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power".⁴ Article 5 of the North Atlantic Treaty provides instead that in the event of armed aggression against a Member State of the NATO alliance, the other parties to the Treaty shall assist the attacked ally "by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary".⁵ This is a less binding wording than the one of Article 42(7) TEU. Both articles refer to Article 51 of the United Nations Charter. In addition, Article 42(7) refers to the provisions of the North Atlantic Treaty and provides that

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2 Meridith McGraw, "Trump reiterates to NATO allies: If you don't pay up, 'I'm not going to protect you'," *Politico*, 14 February 2024, <https://www.politico.com/news/2024/02/14/trump-nato-allies-00141590>.

3 According to the European Defence Agency's Defence Data report, despite an overall increase in defence investment, 22 out of 27 EU countries were investing less than 2% of their GDP in defence expenditures in 2022. The trend in 2022 and over previous years shows that the share of GDP invested in defence is on average much lower in EU Member States than in the USA or Russia. See: European Defence Agency, "EDA Defence Data 2022," *European Defence Agency*, November 30, 2023, 5, <https://eda.europa.eu/publications-and-data/brochures/eda-defence-data-2022>.

4 Article 42(7) of the Treaty on the European Union.

5 Article 5 of the North Atlantic Treaty.

*"[c]ommitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence".*⁶ Article 42(7), therefore, seems to have been created by the Europeans as a supplement to Article 5 of the North Atlantic Treaty but is not subordinate to it in its application.

The European Union, therefore, has a mutual assistance clause and a security cooperation architecture. What legal opportunities does Article 42(7) of the TEU offer? What would be the modalities and consequences of its activation in the event of any severe aggression against a Member State of the European Union? How would the specific nature of the European Union and its legal order affect the level of response by Member States to the triggering of Article 42(7)?

Article 42(7) Within the Architecture of the CFSP

In the early 1950s, the proposal for a Treaty establishing the European Defence Community already included a mutual defence clause.⁷ The failure of the project led, in the following decades, to several initiatives at the European level, which took up the mutual defence clause.⁸ After

the fall of the Berlin Wall, the European Communities' perspective towards Central and Eastern Europe changed, and discussions on the transformation of the European Communities into a political Union included debates on the development of a Common Foreign and Security Policy. The EU Member States, therefore, decided, in the Maastricht Treaty, to introduce a Common Foreign and Security Policy, with the aim of eventually defining a common defence policy within the EU.⁹ From the early 2000s, there began to be talk of incorporating European security and defence instruments into the EU Treaties. In 2004, in the draft treaty establishing a Constitution for Europe, the mutual defence clause already appeared.¹⁰ The wording of this article was taken up in full in 2007 in Article 42(7) of the Treaty of Lisbon. The TEU still mentions, however, the definition of a common defence as an objective to be reached.¹¹

Since the entry into force of the Treaty of Lisbon, the CFSP has been used to adopt restrictive measures against natural or legal persons or non-State entities.¹² As early as 2014, as part of the EU's response to Russia's destabilising actions against Ukraine, the Council of the EU adopted a CFSP Decision,¹³ and, on the basis thereof, two main regulations.¹⁴ The invasion of Ukraine in February 2022 led to successive

⁶ Article 42(7) of the Treaty on the European Union.

⁷ The European Defence Community project aimed to establish a European defence, with a common budget, centralised institutions and a European army. Signed by the six founding states of the European Communities, the Treaty never entered into force following the rejection of the text by the French National Assembly.

⁸ Bob Deen, Dick Zandee, and Adája Stoetman, "Uncharted and Uncomfortable in European Defence: The EU's Mutual Assistance Clause of Article 42(7)," *Clingendael Institute*, 2022, 6, <https://www.clingendael.org/pub/2022/uncharted-and-uncomfortable/>.

⁹ See the Maastricht Treaty on European Union, in particular the Preamble, Articles B and J.4, and the Declaration on Western Europe annexed to the Treaty.

¹⁰ Draft Treaty establishing a Constitution for Europe, article I-41(7).

¹¹ Article 24 TEU.

¹² Article 215 of the Treaty on the Functioning of the European Union.

¹³ Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L 78, March 17, 2014, p. 16–21.

¹⁴ Council regulation (EU), No 833/2014, concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 229, October 31, p. 1–11, as well as Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine,

amendments to these two texts. The current version of the two regulations is interesting to read, as it offers a complete range of measures that the EU can adopt, including freezing the funds of legal entities or natural persons, banning the export or import of certain goods, and banning entry to EU territory, as well as the list of individuals and legal entities targeted.¹⁵ The CSDP, on the other hand, is a part of the CFSP that deals with the operational security aspect in the strict sense of the term and provides for the possibility of using civilian and military means.¹⁶ In particular, the treaties describe the joint actions that Member States can take under the CSDP.¹⁷ In the context of the Russo-Ukrainian conflict, for example, the EU launched a military assistance mission to Ukraine with the aim of training Ukrainian soldiers.¹⁸

The special feature of this area of EU action is that the Court of Justice of the European Union does not, in principle, have jurisdiction to rule on measures taken under the CFSP.¹⁹ This principle

is mitigated by the fact that the Court has jurisdiction to examine the legality of restrictive measures adopted against natural or legal persons. This has led to a relatively large number of cases involving restrictive measures being brought before the Court of Justice and to an extension of the interpretation of this exception.²⁰ Still, most measures adopted under the CFSP are not subject to the Court's jurisdiction.

The specificity of European Union law also lies in the particularity of the instruments that enable it to be binding. If a Member State fails to fulfil its obligations under the Treaties, the Commission (and the Member States) can act regarding this alleged infringement and refer the matter to the Court of Justice.²¹ At the end of the procedure, the Court of Justice may deliver a judgement if the Member State has failed to fulfil its obligations. If the State at fault does not comply with the Court's ruling, the Court can issue a second ruling and order it to pay a lump sum or penalty charges.²² This and other measures of economic constraint can force a State

OJ L 78, March 17, 2014, p. 6–15.

15 See the current version of both regulations: Consolidated text: Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine. Version in force since February 24, 2024, <http://data.europa.eu/eli/reg/2014/833/2024-02-24>; Consolidated text: Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine. Version in force since February 23, 2024, <http://data.europa.eu/eli/reg/2014/269/2024-02-23>.

16 Article 42 TEU.

17 Article 43 TEU.

18 Council Decision (CFSP) 2022/1968 of 17 October 2022 on a European Union military assistance mission in support of Ukraine (EUMAM Ukraine), OJ L 270, October 18, 2022, p. 85–91; Council Decision (CFSP) 2022/2243 of 14 November 2022 launching the European Union military assistance mission in support of Ukraine (EUMAM Ukraine), OJ L 294, November 15, 2022, p. 21–21.

19 Articles 24 and 275 TFEU.

20 See for example Court of Justice (Grand Chamber), C-72/15, *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others*, March 28, 2017, ECLI:EU:C:2017:236. The Court, in the name of the principles of effective judicial protection and the guarantee of a complete system of legal remedies in the EU, has accepted jurisdiction to hear and determine questions referred for a preliminary ruling concerning the validity of an act adopted based on the CFSP, insofar as the question concerns measures adopted against natural or legal persons. See also the judgment of the Court (Grand Chamber), C-872/19, *Bolivarian Republic of Venezuela v. Council of the European Union*, June 22, 2021, ECLI:EU:C:2021:507 in which the Court of Justice ruled that in this case Venezuela could be regarded as a "legal person", and considered its application admissible, even though until now it had been understood that in the spirit of the Treaties, as far as the CFSP was concerned, States were not admissible to contest restrictive measures.

21 Articles 258 and 259 TFEU. On the same subject: Kim Lane Scheppele, Dmitry Vladimirovich Kochenov, and Barbara Gabrowska-Moroz, "EU Law Values are Law, After All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union," *38 Yearbook of European Law*, October 6, 2020, 3-121, <http://dx.doi.org/10.2139/ssrn.3706496>.

22 As part of the legal dispute over judicial reform in Poland, for example, the Court of Justice ordered Poland to pay a daily penalty of 1 million euros. See Order of the Vice-President of the Court of Justice, Case C-204/21 R, *Commission v Poland*, October 27, 2021, ECLI:EU:C:2021:878.

to comply with its obligations under the Treaties. However, in the hypothetical case of Article 42(7) being triggered by an EU Member State, the jurisdictional unavailability of the CFSP area, explicitly set out in Article 24 TFEU, seems to make it legally impossible to trigger such a procedure against a Member State that does not react, or reacts inadequately.

The Choice of Triggering the Mutual Defence Clause

As Article 42(7) is not subject to jurisdiction, the obligation to mutual defence that it contains is, in fact, more of a political obligation than a legal one. This political sensitivity is reflected by the fact that the vast majority of CSDP decisions are taken unanimously by the European Council.²³ However, it would be wrong to assume that, in wartime, the law is set aside. On 22 June 1940, General de Gaulle declared: *"(...) France has undertaken to lay down its arms only in agreement with its allies. As long as its allies continue the war, its government has no right to surrender to the enemy"*.²⁴ In this way, the leader of *La France Libre* established his legitimacy by relying on the legal commitments made by France to its allies through treaties while, at the same time, undermining the legitimacy of the French government, which had just surrendered to Nazi Germany. It is clear from international treaties, particularly the United Nations Charter, that war is a legal, regulated, and standardised subject. After the attacks of 11 September 2001,

the North Atlantic Council, noting that the operations had indeed been directed from abroad, established that this terrorist aggression fell within the scope of Article 5 of NATO, leading to the first activation of this article and the procedure it sets out. Article 5 of NATO refers to Article 51 of the UN Charter, which enshrines the principle of self-defence. This principle has been subject to numerous interpretations. Some States, for example, have argued that beyond the concept of anticipatory self-defence, preventive war was also part of legitimate self-defence. The UN High-level Panel on Threats, Challenges and Change, in a report published in 2004, considered that preventive war could form part of the right of self-defence but that this should be dealt with on a case-by-case basis and submitted to the UN Security Council.²⁵ So far from disappearing in times of war, the law is also becoming the terrain of a fierce legal battle.

It is interesting to note that the only invocation of Article 42(7) TEU came from France during the terrorist attacks committed by the Islamic State in Paris on 13 November 2015. France chose to invoke Article 42(7) TEU rather than Article 222 TFEU, which states that *"[t]he Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack (...)"* and that to this end, *"[t]he Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States"*.²⁶ Article 222 TFEU, therefore, seemed better

²³ Articles 24 and 31 TFEU.

²⁴ Translation from French to English by the author. To find the original text, see: Médiathèque de l'Institut national de l'audiovisuel, «Appel du 22 juin 1940 [Appeal of June 22, 1940]», *Institut national de l'audiovisuel*, accessed on March 3, 2024, <https://fresques.ina.fr/de-gaulle/fiche-media/Gaullle00300/appeal-du-22juin-1940.html>.

²⁵ United Nations, Secretary-General's High-Level Panel on Threats, Challenges and Change, "A more secure world: our shared responsibility," (Report [A/59/565]), December 03, 2004), 63, <https://unidir.org/files/conferences/pdfs/report-of-the-panel-eng-0-61.pdf>.

²⁶ Article 222(1) TFEU.

suited to the specific situation faced by France and implies a reaction by the Union, whereas Article 42(7) refers more to an individual reaction by States.²⁷ However, Thierry Tardy noted that Article 42(7) TEU was preferred to Article 222 TFEU, in particular, because France expected its European partners to show solidarity in the EU's external actions rather than the kind of solidarity described in Article 222, which seems to be internal to the EU.²⁸ We can also note that France has chosen to invoke the EU's mutual defence clause rather than NATO's. This is interesting since the activation of Article 5 of the NATO Treaty led to an intervention under NATO auspices in Afghanistan (although Article 5 itself was not the legal basis for the intervention).

In a similar way, following the terrorist attacks of November 2015, the United Kingdom and Germany reacted; the former by launching airstrikes in Syria, the latter by deploying its navy and by providing supply assets. However, Tardy notes that the European states would certainly have acted in the same way if France had not activated Article 42(7). The activation of Article 42(7) led to the adoption of a resolution by the European Parliament, which reviewed the progress to be made at the European level regarding the common defence and proposed several ways of improving the effectiveness of the CSDP and the triggering of Article 42(7).²⁹

Does the Specific Legal and Political Nature of the European Union Guarantee the Effectiveness of Article 47(2) TEU in the Event of A Significant Security Threat?

Both Article 5 of NATO and Article 42(7) of the TEU have been activated after murderous terrorist attacks. Neither has been invoked in the context of armed aggression. Over and above the ex-President's own ideas, Donald Trump's comments that, under his presidency, the United States would not come to the aid of a NATO member state not respecting the commitment to invest 2% of its GDP in defence reflect the principle of reciprocity in international treaty law. This principle means that states that have made mutual commitments in an international treaty no longer consider themselves bound by their obligations if the other states party to the treaty fail to honour them.³⁰

However, the reciprocity principle in European law is different from that in international law, and it is attenuated or even eclipsed within the European Union. As early as 1964, in a judgement following an infringement procedure, the Court of Justice affirmed a fundamental principle of non-reciprocity of obligations in Community law. The Court found that *"the Treaty is not limited to creating reciprocal obligations between the different natural and legal persons to whom it is applicable, but establishes a new legal order which governs the powers, rights and obligations of the said*

27 Henna Virkkunen, "The EU's mutual defence clause? Article 42(7) of the Treaty on European Union", *European View*, Volume 21, issue 1, 2022, 22-26. <https://journals.sagepub.com/doi/full/10.1177/17816858221089370>.

28 Thierry Tardy, "Mutual defence - one month on", *European Union Institute for Security Studies*, December 17, 2015. <https://www.iss.europa.eu/content/mutual-defence-%E2%80%93-one-month>.

29 European Parliament, Resolution of 21 January 2016 on the mutual defence clause (Article 42(7) TEU), (2015/3034(RSP)), Strasbourg, January 21, 2016. https://www.europarl.europa.eu/doceo/document/TA-8-2016-0019_EN.html.

30 For example, Article 55 of the French Constitution states that "[t]reaties or agreements that have been duly ratified or approved have, from the time of their publication, an authority superior to that of laws, subject, for each agreement or treaty, to its application by the other party". Translation from French to English by the author. To see the original: Constitution française du 4 octobre 1958, Texte intégral en vigueur à jour de la révision constitutionnelle du 8 mars 2024, article 55, <https://www.legifrance.gouv.fr/loda/id/LEGISCTA000042418213>.

persons", and that "(...) the basic concept of the Treaty requires that the Member States shall not take the law into their own hands".³¹ Thus, a Member State that has failed to fulfil its obligations cannot justify its non-compliance by relying on the failure of another Member State or an EU institution. Although Article 42(7) falls within a part of the treaties which is outside the jurisdiction of the Court of Justice, the CFSP cannot be completely disconnected from the overall logic and spirit of the Treaties, as shown by the development of judicial protection in disputes concerning restrictive measures before the CJEU.³² This can also be seen in Article 31 of the TFEU, which stipulates that a State may abstain from voting on CFSP issues, but "in a spirit of mutual solidarity, the Member State concerned shall refrain from any action likely to conflict with or impede Union action based on that decision and the other Member States shall respect its position". Thus, even the CFSP, and therefore the CSDP, are not exempt from the principles that form the fundamental basis of the EU.

The virtual absence of reciprocity in the European legal order reflects the specific nature of the European Union, as well as the degree of integration of the organisation. The existence of competences exercised exclusively by the Union, the abolition of internal controls in the Schengen area, and the degree of economic interdependence

between the EU member states have led to the creation of an integrated whole, the nature of which raises many questions. Armed aggression against an EU member state, beyond the disastrous consequences of war on the country, its population, and its close neighbours, would constitute an upheaval in the Schengen area and a crisis in the eurozone on a scale on which the EU could not remain passive.³³

Beyond the case of armed aggression, there are many grey areas, both legally and conceptually, such as cyber-attacks, which are increasingly tending to be recognised as threats that could lead to the invocation of self-defence under Article 5 of the North Atlantic Treaty.³⁴ In general, there is a growing debate on the applicability of Article 42(7) TEU in the case of hybrid threats,³⁵ as well as discussions on the application of this article to the territories of Member States located in the maritime domain which have a special status in EU law, or even in space.³⁶ The diversity of the Union's options and legal instruments, combined with the CSDP, have not yet led to the concretisation of a common European defence,³⁷ although, recently, some significant steps have been made, such as legislative proposals to encourage the emergence of a European defence industry.³⁸

31 Judgement of the CJEC, joined cases 90/63 and 91/63, *Commission v Grand Duchy of Luxembourg and Kingdom of Belgium*, November 13, 1964, ECLI:EU:C:1964:80, 631.

32 See, for example, judgement of the Court (Grand Chamber), Joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, September 3, 2008, ECLI:EU:C:2008:461, para 322.

33 Hilmar Þór Hilmarsson, *The Nordic, Baltic and Visegrád Small Powers in Europe: A Dance with Giants for Survival and Prosperity* (London: Taylor & Francis Group, 2023), 51.

34 Deen et al., *Uncharted and Uncomfortable in European Defence: The EU's Mutual Assistance Clause of Article 42(7)*, 15.

35 Deen et al., *Uncharted and Uncomfortable in European Defence: The EU's Mutual Assistance Clause of Article 42(7)*, 22.

36 Deen et al., *Uncharted and Uncomfortable in European Defence: The EU's Mutual Assistance Clause of Article 42(7)*, 16.

37 Luigi Scazzieri, "Can European defence take off?," *Centre for European Reform*, Policy brief, January 19, 2024, <https://www.cer.eu/publications/archive/policy-brief/2023/can-european-defence-take>.

38 European Commission, Joint communication to the European Parliament, the Council, the European economic and social committee and social committee and the committee of the regions *A new European Defence Industrial Strategy: Achieving EU*

Conclusion

Since the war in Ukraine, the EU has shown that it has an arsenal of legal instruments at its disposal to provide financial and military assistance to a state that is the victim of an armed invasion. However, no EU member state has gone to war against the Russian Federation. In the event of an invasion of an EU Member State, or large-scale military action against it, the latter would undoubtedly invoke Article 42(7) of the TEU. The degree of integration of the EU and the nature and wording of the Treaty provisions would leave little choice. Indeed, Article 42(7) TEU refers to the mutual assistance clause, specifying that Member States must help the aggressed Member State by all means in their power. It seems, therefore, that, in the event of an invasion such as the one in Ukraine, the logic of integration enshrined in treaties would mean all EU Member States going to war. On several occasions, EU Member States have gone through the European institutions to take actions that were not explicitly envisaged by the Treaties. Under Article 42(7), the Union is not the subject of the mutual defence clause but the Member States. However, in the event of a large-scale conflict, the response will have to be coordinated at the European level through a creative interpretation of the Treaties and, above all, by using all the collective and individual means available to the Member States. With the accession of Sweden and Finland to NATO, almost all EU Member States, apart from Ireland, Austria, Cyprus, and Malta, are bound by both Article 5 of NATO and Article 42(7) of the TEU. The interaction and complementarity of these two articles

and the legal frameworks of the two organisations should make it possible to organise a strong, joint response. The opposite would be synonymous with a breach of the principles of solidarity, mutual trust, and a substantial part of the values enshrined in the EU Treaties and would, therefore, mean a consequent disgregation of the EU.

readiness through a responsive and resilient European Defence Industry, JOIN(2024) 10 final, March 5, 2024.

LORENZO CORDA

April 2024

EASTERN AND SOUTHERN NEIGHBOURHOOD: NO ROOM FOR EU STRATEGIC AUTONOMY?

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Introduction

Western scholars and politicians often claim that the European Union (EU, the Union, the bloc, Brussels) is a *force for good*, established as a major peace project among European states in reaction to the atrocities the second world conflict brought about. That being said, it is less known how the Treaty on European Union (TEU) allows for the most advanced European international organisation (IO), as a part of its Common Security and Defence Policy (CSDP)² - integrated into the legal framework of the Common Foreign and Security Policy (CFSP) - to undertake *military* missions and operations,³ or to financially assist third states in their external military endeavours. On the one hand, anyone can not help but notice a policy field as sensitive as the latter has mostly been ring-fenced as *domaine réservé* of EU member states (as sovereign states *per se*) and, in some respects, as a prerogative of NATO.⁴ On the other hand, one might well wonder whether recent advances in the EU response to ongoing contingencies (the Russian aggression in Ukraine and

the Israeli invasion of the Gaza strip *in primis*, their spillovers *in secundis*) could build momentum for political and legal integrationist development. Yet, the risk looms that these evolutions will ultimately prove to be part of a cacophonous and uncoordinated EU policy and law-making, something we are all well too used to in times of global crises.

Context

Following the increased attacks by Houthi rebels on international shipping vessels, the EU has tried to pull its weight with a military operation of its own as of early February.⁵ The latter was launched with the intent to “(...) *safeguard freedom of navigation in relation to the Red Sea crisis*”⁶ by “*contribut[ing] to maritime security along the main sea lines of communication*”.⁷ And yet, the Houthi assaults –which, depending on their targets, qualify as either acts of piracy or part of a non-international armed conflict (NIAC)-⁸ have been a cause of great concern for other geopolitical players: a

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2 Consolidated version of the Treaty on European Union, OJ C 202, June 6, 2006, 1-366, art. 42(1). As for primary treaty law, the CSDP is entirely flashed out in the art. 41-46 TEU.

3 Art. 43 (1) TEU is the key legal basis to launch military missions or operations.

4 The TEU is careful in stressing the importance of the North Atlantic Treaty Organization (NATO) for some member states, as article 42(7) shows.

5 Council Decision (CFSP) 2024/583 of 8 February 2024 *on a European Union maritime security operation to safeguard freedom of navigation in relation to the Red Sea crisis (EUNAVFOR ASPIDES)*, OJ L2024/583, February 12. Hereinafter, EUNAVFOR ASPIDES Decision.

6 EUNAVFOR ASPIDES Decision, art. 1(1). According to art. 1 (3), the area is described by the “*Baab al-Mandab Strait and the Strait of Hormuz, as well as international waters in the Red Sea, the Gulf of Aden, the Arabian Sea, the Gulf of Oman and the Persian Gulf*”.

7 *Ibid.*

8 Efthymios Papastavridis, “Red Sea Attacks and the International Response: An International Law Insight,” *ELIAMEP*, January 30,

US-led “coalition of the willing”⁹ (1) predates the EU intervention, (2) comprises three Member States as we speak,¹⁰ and (3) strays substantially from the mandate of the EU operation, which is purely *defensive* in character. Although not a first, the question still arises: why such a manifest duplication of efforts? It is against this background that the core concept of *EU strategic autonomy* (ESA) comes into play.

The term owes its conceptualization to political science, and its inception to the military lexicon. ESA builds upon the core idea of pursuing shared European interests abroad, without the support of further (inter)national actors if necessary and without losing trace of the EU’s core values.¹¹ Moreover, ESA is inherent to the CSDP’s *raison d’être* and has been elevated to “*EU ambition*” by the 2016 EU Global Strategy,¹² whilst reaffirmed in the 2022 Strategic Compass.¹³ For present purposes, an ESA perspective will be used as a lens through which to deconstruct some

common actions adopted in response to the current above contingencies. An attempt at drawing a bridge between legal and (geo)political considerations will follow. That being said, will be given to the former, as key to set the contours of the concept, still nebulous nowadays.

Crisis Management à l’Européenne. The Case of EUNAVFOR Aspides

Just by looking at the official name of the CSDP action, EUNAVFOR *Aspides*,¹⁴ the strictly defensive mandate upon which it is legally grounded¹⁵ should not come as a surprise: the limited reactions to the unprecedentedly high drone and missile strikes targeting European forces are a testament to that,¹⁶ and point to a shared non-engagement military policy. Indeed, the TEU reiterates more than once how the EU is bound to adhere to the United Nations (UN) Charter¹⁷ and, *inter alia*, to its general prohibition on the use of force.¹⁸ Here is the key point: past European

2024, <https://www.eliamep.gr/en/publication/%CE%BF%CE%B9-%CE%B5%CF%80%CE%B9%CE%B8%CE%AD%CF%83%CE%B5%CE%B9%CF%82-%CF%83%CF%84%CE%B7%CE%BD-%CE%B5%CF%81%CF%85%CE%B8%CF%81%CE%AC-%CE%B8%CE%AC%CE%BB%CE%B1%CF%83%CF%83%CE%B1-%CE%BA%CE%B1%CE%B9-%CE%B7/>.

- 9 US Department of Defence, “Statement from Secretary of Defense Lloyd J. Austin III on Ensuring Freedom of Navigation in the Red Sea,” *US Department of Defence*, December 18, 2023, <https://www.defense.gov/News/Releases/Release/Article/3621110/statement-from-secretary-of-defense-loyd-j-austin-iii-on-ensuring-freedom-of-n/>. The name is Operation Prosperity Guardian.
- 10 Denmark, Finland, and Greece. Formerly, the number of European countries involved was six. This notwithstanding it should be stressed that an unclear number of states has not disclosed its participation in the US-led operation.
- 11 Frank Hoffmeister, “Strategic autonomy in the European Union’s external relations law,” *Common Market Law Review* 60, no. 3 (2023): 667–700, 673. “*Striving for multilateral solutions, while being able to take lawful action alone to safeguard the Union’s values, fundamental interests, security, independence and integrity!* [sic]”.
- 12 European External Action Service, *Shared vision, common action: A stronger Europe. A Global Strategy for the European Union’s Foreign and Security Policy*, Brussels, 2016, 4.
- 13 Member States, “A strategic compass for security and defence: For a European Union that protects its citizens, values and interests and contributes to international peace and security,” 2022, https://www.eeas.europa.eu/sites/default/files/documents/strategic_compass_en3_web.pdf.
- 14 Aspides is the Greek word for shields.
- 15 EUNAVFOR Aspides decision, recital 8, “[the operation] *should remain defensive in nature. Forces deployed for the operation should act in compliance with applicable international law, including customary international law, including self-defence where conditions are met, to defend against an imminent or ongoing attack on their own, or third-party, vessels*”, or art 1(5), “*protect[s] vessels against multi-domain attacks at sea, in full respect of international law, including the principles of necessity and proportionality (...)*”.
- 16 European External Action Service, “EUNAVFOR Operation ASPIDES”, accessed April, 24, 2024, https://www.eeas.europa.eu/eunavfor-aspiden_en?s=410381. As can be inferred from the official EU press releases describing the operational interventions, the actual military engagements of EU forces spanned from “*intercept[ing] missiles*” or “*repe[l]ing attacks*” to, at most, “*destroy[ing]*” the former or “*unmanned vehicles*”.
- 17 Apart from art. 3(5) TEU, the TEU’s references to the UN Charter are all enshrined in its Title V on the EU external action, CFSP and CSDP.
- 18 Art. 2(4) UN Charter.

practice has been to either authorise the use of force pursuant to a UN Security Council Resolution, or via invitation of the state where the CSDP action was bound to happen.¹⁹ On the one hand, lacking such an upstream clearance for the complex regional situation under consideration,²⁰ the result is apparently toothless.²¹ On the other hand, this allows the majority of EU member states to remain comfortable within a purely defensive stance.²² Also, it prevents them from destabilising further the war-torn Yemeni territory, keeping a lower profile while distancing themselves from the more assertive stance of the US (upon which allegations of unlawful use of force now hang).²³

Arguably, from a legal standpoint, the operation would have been an excellent opportunity for the bloc to test the never-used legal basis of art. 44 TEU.²⁴ Indeed, different sensitivities on the use of force and the participation in the above-mentioned US operation split the Council of the EU,²⁵ where shots are taken. Art. 44 could enable a group of member states

to better tailor their military means and political affiliations (i.e. Denmark, whose ships were targeted, is a long-time US “super-ally”²⁶) to the venue of their choice, and arguably²⁷ streamline the decision-making process, albeit revealing a division in the Council (present nonetheless).

From a political standpoint, instead, while some portray EUNAVFOR Aspides as a (bad) effort to gain ESA from a more interventionist Washington,²⁸ the action may still have resulted in a way à l’Européenne to manage a crisis, with pros and cons of such a timid action. Within the EU’s mandate, member states rest assured to be far more compliant with international law, even though the CSDP is notoriously outside the control of the Court of Justice of the EU and thus rests in national hands.²⁹ A criticism that can be levelled at the EU is it has not tapped into other elements of its integrated approach to conflicts and crises, of which the CSDP is only the spearhead.³⁰ As the incoming US presidential elections loom, this could also constitute a way for the EU states to set

19 Julia Schmidt, *The EU and the use of force* (Leiden: Brill Nijhoff, 2020), 222. “The EU has launched military CSDP operations either with the consent of the states involved and/or after having obtained UN Security Council authorisations”.

20 The current EU Military operation mentions S/RES/2722 (2024) as the reference international act.

21 Eugenio Carli, “La Missione EUNAVFOR ASPIDES Dell’Unione Europea e l’applicazione Ratione temporis del diritto di legittima difesa [The EUNAVFOR ASPIDES Mission of the European Union and the application Ratione temporis of the right of self-defense],” *SIDIBlog*, March 26, 2024, <http://www.sidiblog.org/2024/03/19/la-missione-eunavfor-aspides-dellunione-europea-e-lapplicazione-ratione-temporis-del-diritto-di-legittima-difesa/>.

22 Thus under art. 51 UN Charter.

23 Leonie Brassat, “The Lawfulness of military strikes against the Houthis in Yemen and the Red Sea,” *EJIL Talk! Blog of the European Journal of International Law*, March 25, 2024, <https://www.ejiltalk.org/the-lawfulness-of-military-strikes-against-the-houthis-in-yemen-and-the-red-sea/>.

24 Art. 44(1) TEU states that “(...) the Council may entrust the implementation of a task to a group of Member States which are willing and have the necessary capability for such a task”.

25 Angelo Amante, “Europe split over US, UK strikes on Houthis in Yemen,” *Reuters*, January 13, 2024, <https://www.reuters.com/world/middle-east/italy-declined-take-part-military-action-against-houthis-source-says-2024-01-12/>.

26 Heiko Biehl, Bastian Giegerich, and Alexandra Jonas, *Strategic Cultures in Europe, Security and Defence Policies Across the Continent: Security and Defence Policies across the continent* (Potsdam: SpringerVS, 2013), 91.

27 Thierry Tardy, “In groups we trust. Implementing Article 44 of the Lisbon Treaty,” *European Union for Security Studies*, 2014, 2. While “[a]rticle 44 is about granting greater flexibility and speeding up reaction time [and it] aims to facilitate the deployment of CSDP operations by creating a framework which allows willing member states to go ahead with an operation as efficiently and effectively as possible”, it must be reminded how “(...) an Article 44 operation would look like in reality is still unclear and (...) it will become evident only when such an operation is indeed established”.

28 Raluca Besliu, “EU Red Sea Mission: Strategic Autonomy Done Wrong,” *European Green Journal*, March 1, 2024, <https://www.greeneuropeanjournal.eu/eu-red-sea-mission-strategic-autonomy-done-wrong/>.

29 Art. 24(1) TEU.

30 EEAS, *Shared vision, common action*, 29-30. “The EU will therefore pursue a multi-phased approach, acting at all stages of the conflict cycle. We will invest in prevention, resolution and stabilisation, and avoid premature disengagement when a new crisis erupts elsewhere”.

the coordinates for the future relationship with a potentially isolationist anti-NATO second Trump administration from which to take distance.

The EU as Ukraine's Ace in the Hole or Defecting Military Sponsor? Modern Problems Ask for Modern Solutions

Moving on to a different front, the 2022 Russian aggression prompted the bloc to seriously deepen defence integration.³¹ Yet, reports suggest that the large-scale invasion has recently regained vigour.³² As a result, the EU finds itself in a tight spot. In fact, while a progressive US reappraisal on being the main replenisher of Ukraine's dwindling military stock -a lifeline for Kyiv so far- is finally playing out (despite a recent breakthrough in the US Congress, it still appears an established trend),³³ eyes are on the EU to take over and bear the financial brunt of military replenishment, temporarily at best and potentially alone.³⁴ Here, a distinction between the legal areas for defence, on the one hand, and (defence) industry initiatives, on the other

hand, is needed: apart from its Permanent Structured Cooperation (PeSCo)³⁵ and the European Peace Facility, the CSDP is not, *prima facie*, the field to look at for hypothetical ground-breaking financing or industrial initiatives pertaining to the industrial policy area covered by the Treaty on the Functioning of the EU (TFEU). Although the Orwellian-sounding EPF³⁶ has been maxed out and its budget tapped more than once to plug the gap of the Union's militarily tools to support third countries, the inadequacy of the latter echoes all throughout Brussels' corridors. However bold, neither the Act in Support of the Ammunitions Production (ASAP)³⁷ will supply Kiev properly, nor any EUMAM Ukraine³⁸ will ever train enough soldiers (as for November 2023 "just" 34.000,³⁹ a number that still pales in comparison to those Russia is able to conscript⁴⁰). Only legal developments bearing constitutional value will really make the difference -like the NEXT Generation EU (NGEU) did for the COVID-19-caused economic crisis- and may be the only real chance to play a part in the support of a neighbour that is

31 Federico Fabbrini, "European Defense Union ASAP: The Act in Support of Ammunition Production and the development of EU defence capabilities in response to the war in Ukraine," *European Foreign Affairs Review* 29, no. 1 (2024): 67-84, 70. "Since 24 February 2022 (...) the EU has responded in unprecedented ways - with European integration in security, defence and beyond advancing more in the months since 2022 than it had during the prior three decades".

32 Ben Barry, "What Russia's momentum in Ukraine means for the war in 2024," *International Institute for Strategic Studies*, March 12, 2024, <https://www.iiss.org/online-analysis/military-balance/2024/03/what-russias-momentum-in-ukraine-means-for-the-war-in-2024/>. "Russia's success in taking the city of Avdiivka, along with its territorial gains since, raises the question of whether the Ukrainian assessment in late 2023 that the war would stalemate in 2024 may have been optimistic."

33 Jamie Dettmer, "Uncle Sam finally coughs up weapons — but is it too late to save Ukraine from Putin?," *Politico*, April 24, 2024, <https://www.politico.eu/article/uncle-sam-united-states-coughs-up-weapons-late-save-ukraine-vladimir-putin/>.

34 Luke McGee, "Europe is trying to fill a US-shaped hole in funding for Ukraine," *CNN*, March 23, 2024, <https://edition.cnn.com/2024/03/23/europe/eu-ukraine-aid-us-defense-intl-cmd/index.html>.

35 Council Decision (CFSP) 2017/2315, of 11 December 2017, *establishing permanent structured cooperation (PESCO) and determining the list of participating Member States*, OJ L331, December 14, 2017, 57-77.

36 Council Decision (CFSP) 2021/509, of 22 March 2021, *establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528*, OJ L102, March 24, 2021, 14-62.

37 Regulation (EU) 2023/1525 of the European Parliament and of the Council, of 20 July 2023, *on supporting ammunition production (ASAP)*, OJ L185/7, July 24, 2023, 7-25.

38 Council Decision (CFSP) 2022/1968, of 17 October 2022, *on a European Union Military Assistance Mission in support of Ukraine (EUMAM Ukraine)*, OJ L270, October 18, 2022, 85-91.

39 Council of the EU, "European Peace Facility: Council greenlights further funding for training of the Ukrainian Armed Forces under EUMAM Ukraine," *Council of the EU*, March 28, 2023, <https://www.consilium.europa.eu/en/press/press-releases/2023/11/28/european-peace-facility-council-greenlights-further-funding-for-training-of-the-ukrainian-armed-forces-under-eumam-ukraine/>.

40 Georgi Gotev, "Putin signs decree calling up 150,000 citizens for statutory military service," *Euractiv*, January 24, 2024, <https://www.euractiv.com/section/global-europe/news/putin-signs-decree-calling-up-150000-citizens-for-statutory-military-service/>. Here is an example of how many soldiers (150.000) can be compulsorily enlisted in Russia by just shifting the maximum age for conscription by 3 years.

now a candidate state.

There is no shortage of ideas, however. There is growing interest in issuing so-called *Eurobonds* as a means to provide Kyiv with financial support by pooling money to cover joint EU military expenditures and, in particular, joint arms procurement projects.⁴¹ The precedent of the NGEU exists, yet back then news on long and tough negotiation rounds in the European Council filled newspapers, a predicament likely to occur this time too. An interinstitutional tug of war between the Parliament and the Commission on the partial unfreezing of the NGEU to Budapest does not help, as well as the one between states willing or not to support Ukraine in the Council. Moreover, one must remember that the EU is legally barred from assisting a third state through its ordinary budget and must tap into something more of a reimbursement mechanism, like the EPF, stripping most of the meaning of “*EU fund*” from the concept.⁴²

It may be the moment for the bloc to tap into imagination. Speaking of which, creativity may be getting a hold on EU bodies as the Commission has a plan in the works to commandeer and set the majority of proceeds of frozen Russian assets flow into the EPF instead of EU countries’ coffers, something that would clear the air in the Council at the price

of bearing the legal risk of breaching international law.⁴³

Conclusions

The two cases dealt with in this article were chosen for they represent telling illustrations of how ESA plays out differently in a spectrum of intensity according to the legal means at the EU’s disposal. The question of the title may have found a timid *yes* in the lines above, but reality calls for caution when pointing to an EU’s added value. A basic takeaway is that EU military actions writ large are influenced by both legal constraints inherent to the CFSP, such as the all-pervading unanimity requirement in the decision-making process, and multileveled political dynamics, including member states’ political inclinations and strategic cultures. Balancing these factors is hard but crucial in shaping the EU’s response to different crises and maintaining unity in pursuing a certain degree of ESA, the hardest challenge thereof being to bring together EU interests and values. ESA, the “*buzzword*”⁴⁴ of EU external action, asks for a similar alignment of political, strategic and legal planets. Still, the legal hiccups of the European project that arguably set the EU apart from other international actors represent a good starting point to observe via the ESA lens, for they are the few stable elements in the picture. The positive aspect of the unanimity requirement in

41 Raffaele Ricciardi, “Bilancio comune, Eurobond, Bei: così l’Europa prova a finanziare la sua difesa. Quali strumenti può attivare e perché se ne parla [Common budget, Eurobonds, EIB: this is how Europe tries to finance its defense. What tools can it activate and why are we talking about it],” *Repubblica*, March 22, 2024, https://www.repubblica.it/economia/2024/03/22/news/eurobond_cosa_sono_guerra-422358561/.

42 Art. 41(2) TEU.

43 Mared Gwyn Jones, “Ukraine may get €1 bn in revenues from frozen Russian assets by July, EU says,” *Euronews*, March 22, 2024, <https://www.euronews.com/my-europe/2024/03/22/ukraine-may-get-1-bn-in-revenues-from-frozen-russian-assets-by-july-eu-says>.

44 Pauli Järvenpää, Claudia Major, and Sven Sakkov, “European Strategic Autonomy: Operationalising a Buzzword,” *The International Centre for Defence and Security*, October 2019, https://icds.ee/wp-content/uploads/2019/10/ICDS_Report_European_Strategic_Autonomy_J%C3%A4rvenp%C3%A4%C3%A4_Major_Sakkov_October_2019.pdf.

the CFSP, for one thing, is the inherent political weight resulting from the backing of all member states: to give place to (more) qualified majority voting would mean partially losing this element.

JORDY BENOIT

April 2024

THE RWANDA BILL: GOVERNMENT DICTATED FACTS AT THE EXPENSE OF HUMAN RIGHTS

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Introduction

The Rwanda Bill is the emergency legislation of the UK's Conservative government aimed at saving its flagship offshore asylum processing scheme, better known as the Rwanda policy. Following the UK-Rwanda Agreement on an Asylum Partnership in April 2022, the UK government prepared for periodic deportation flights to the East African country,³ but these flights have yet to take place. What followed was a two-year legal saga over human rights and rule of law concerns, which is now reaching its final stages.

Fact By Law

On June 14, 2022, the European Court of Human Rights indicated to the UK Government that a 54-year-old Iraqi asylum seeker should not be removed to Rwanda until three weeks after the delivery of the final domestic decision in his ongoing judicial review proceedings.⁴ The UK's original Rwanda Scheme was subsequently blocked on November 15, 2023, by the UK's Supreme Court,

which argued that Rwanda could not be considered a safe country for asylum seekers because of a genuine risk of refoulement. The ruling of the Supreme Court prompted immediate calls from the right wing of the Conservative Party to leave the European Convention of Human Rights (ECHR).⁵

Instead, UK's Home Secretary James Cleverly introduced a bill to Parliament on December 6, 2023, titled the *Safety of Rwanda (Asylum and Immigration) Bill*, commonly referred to as the Rwanda Bill.⁶ The objective of the Rwanda Bill is to designate Rwanda as a safe country for asylum seekers by UK law, resolving the objections of the Supreme Court whilst also underlining the sovereignty of the UK Parliament. Once the Rwanda Bill proceeds to Royal Assent, UK courts will be excluded from challenging Rwanda's safe status, as well as largely prevented from delaying and/or preventing a person's deportation to Rwanda. It will also severely limit the exceptions in which individuals could challenge removal to Rwanda, specifically,

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2 This article covers the events leading up to the Bill taking Royal Assent on 25/04/2024.

3 Cristina Gallardo, "UK seals deal with Rwanda to offshore asylum seekers," *Politico*, April 14, 2024, <https://www.politico.eu/article/uk-seals-deal-with-rwanda-to-offshore-asylum-migrant-seekers/>.

4 European Court of Human Rights, "The European Court grants urgent interim measure in case concerning asylumseeker's imminent removal from the UK to Rwanda," *European Court of Human Rights*, 197 (2022), Strasbourg, June 14, 2022, 1-2, <https://hudoc.echr.coe.int/app/conversion/pdf/?library>.

5 Rob Picheta, "UK plan to send asylum seekers to Rwanda blocked by Supreme Court," *CNN*, November 15, 2023, <https://edition.cnn.com/2023/11/15/uk/uk-supreme-court-rwanda-ruling>.

6 Home Office, James Cleverly, Robert Jenrick and Rishi Sunak, "Bill to make clear Rwanda is a safe country and stop the boats," *GOV.UK*, December 6, 2023, <https://www.gov.uk/government/news/bill-to-make-clear-rwanda-is-a-safe-country-and-stop-the-boats>.

to disapply certain elements of the 1998 Human Rights Act.⁷

Tory Infighting

The introduction of the Bill sparked a rift within the Conservative Party between factions that wish to uphold and those that wish to dismiss the UK's obligations under the ECHR. One of the latter factions, the European Research Group (ERG), commissioned a "*star chamber of lawyers*"⁸ to analyse the Bill and held a meeting to present their findings to other groups on the right of the Party. They concluded that the Bill presented an incomplete solution to the problem of legal challenges in the UK courts being used as means to delay and/or prevent the removal of illegal migrants. Some, like former Home Secretary Suella Braverman, have gone so far as to argue that the UK must override human rights laws.⁹ At the same time, more centrist Conservatives argue that the Bill, as it was originally proposed, would already breach the UK's international legal obligations towards refugees.¹⁰

In an effort to sway both sides, UK Prime Minister (PM) Rishi Sunak defended the proposed Bill by stating that, in accordance with the UK-Rwanda Treaty,¹¹ the UK intends to uphold international

legal obligations by not ousting the courts entirely from the process and allowing individuals to still challenge their removal to Rwanda under very specific and personal circumstances.¹² The PM added that, although it gives ministers the powers to disregard sections of the Human Rights Act, the Bill explicitly falls short of allowing ministers to dismiss the ECHR and that doing so would prompt the Rwandan government to collapse the scheme in its entirety.¹³

A Word From Our Sponsor

Speaking on behalf of the Rwandan government, Rwanda's Minister of Foreign Affairs Vincent Biruta underlined his country's commitment to international law after the publication of the Rwanda Bill. He added that his government would not be able to continue with the Migration and Economic Development Partnership, on which the current UK-Rwanda Treaty is based, without a continued lawful behaviour from the UK.¹⁴ Rwandan President Paul Kagame has suggested that his government is growing impatient, stating that "*there are limits for how long this can drag on.*"¹⁵ When asked about the £240 million Rwanda had already received from the UK, President Kagame stated that "*the money is going to be used on those people*

⁷ *Ibid.*

⁸ Joshua Neveit, "Rishi Sunak's Rwanda law doesn't go far enough, Tory faction says," *BBC*, December 11, 2023, <https://www.bbc.com/news/uk-politics-67680136>.

⁹ *Ibid.*; Sam Francis, "Conservative splits emerge ahead of Rwanda migration law," *BBC*, December 6, 2023, <https://www.bbc.com/news/uk-politics-67634887>; Asher McShane, "Rwanda plan will succeed, Rishi Sunak insists at emergency press conference but denies new law is a vote of a confidence," *LBC*, December 7, 2023, <https://www.lbc.co.uk/news/rwanda-plan-must-succeed>.

¹⁰ *Ibid.*

¹¹ Home Office, "Policy paper UK-Rwanda treaty: provision of an asylum partnership (accessible)," *GOV.UK*, December 5, 2023, <https://www.gov.uk/government/publications/uk-rwanda-treaty>.

¹² Francis, *Conservative splits emerge ahead of Rwanda migration law*.

¹³ *Ibid.*

¹⁴ Home Office, "Policy paper Migration and Economic Development Partnership: factsheet," *GOV.UK*, November 15, 2023, <https://www.gov.uk/government/publications/migration-and-economic-development-partnership>; Caitlin Doherty, "Rwanda Wouldn't Agree To Migrant Deal 'Without Lawful Behaviour By The UK,'" *PoliticsHome*, December 6, 2023, <https://www.politicshome.com/news/article/government-publishes-new-rwanda-legislation-declaring-country-safe>.

¹⁵ Andrew McDonald, "Rwandan president: UK asylum plan efforts cannot 'drag on,'" *Politico*, January 17, 2024, <https://www.politico.eu/article/rwanda-united-kingdom-paul-kagame-rishi-sunak/>.

who will come," however "if they don't come, we can return the money."¹⁶

Political commentator and LBC radio host James O'Brien commented on the situation, saying: *"Rwanda, an administration that still tortures and kidnaps political opponents, and ordered the shooting to death of refugees protesting about food rations just 3 or 4 years ago. [...] Rwanda will call time on this deal. Rwanda will uphold international law, in the face of calls by the conservative backbenchers to abandon it".¹⁷* O'Brien remarked on an otherwise overlooked element of the debate on the UK's continued subscription to the ECHR, namely its relevance in the Good Friday Agreement (GFA).¹⁸ Although this is a valid argument, the complete relevance of the ECHR to the GFA is still a topic of legal debate. The more conservative view is that the GFA does not outright require the UK to be a signatory to the ECHR, instead that the provisions of the ECHR are merely not to be infringed upon in and by the Northern Ireland Assembly, nor any other public body within Northern Ireland specifically.¹⁹

Ping-Pong Finals, Seven To Ten

The Rwanda Bill passed its first vote in the House of Commons (HoC) on December 12, 2023, with a margin of forty-four votes. Thirty-eight Conservatives on the right of

the Party, including Suella Braverman, chose to abstain rather than vote against the scheme. These dormant Tory rebels warned PM Sunak that they expect the Bill to be tightened, threatening to vote against it at the third reading, if their amendments were not adopted.²⁰ However, these threats would prove themselves empty later on. The centrist factions, such as the One Nation group, warned that they would not support any amendments from the right that would risk the UK breaching its international obligations.²¹ Additionally, members of the UK government have repeatedly stated their inability and unwillingness to breach the country's international legal obligations, especially regarding the ECHR.²² The Bill proposal eventually made its way to the UK's House of Lords (HoL) with no significant amendments.

Upon arrival at the HoL, the Bill almost immediately faced severe pushback from peers across the aisle. In an effort to bypass the Rwanda Bill, the HoL's first act was to vote for a motion to delay the ratification of the UK-Rwanda Treaty and, by extension, the Rwanda Bill until the UK Government can provide proof that Rwanda is, in fact, a safe country. The motion indicates ten areas where both legal and practical steps must be taken before the UK Government can do so.²³ Further signalling the Lord's discontent with the Rwanda Bill, the cross-

¹⁶ *Ibid.*

¹⁷ London Broadcasting Company, "Sunak's Lost Jenrick | James O'Brien - The Whole Show," December 7, 2023, *Youtube*, <https://www.youtube.com/watch?v=bg194Tjxsc8&t=793s>.

¹⁸ *Ibid.*

¹⁹ Anurag Deb, "The Good Friday Agreement and the European Convention on Human Rights," *UK Human Rights Blog*, August 29, 2023, <https://ukhumanrightsblog.com/2023/08/29/the-good-friday-agreement-and-the-european-convention-on-human-rights/>.

²⁰ Pippa Crerar, Ben Quinn, and Peter Walker, "Relief for Rishi Sunak as Rwanda bill passes first vote in Commons," *The Guardian*, December 12, 2023, <https://www.theguardian.com/uk-news/2023/dec/12/rishi-sunak-survives-rwanda-bill-commons-vote>.

²¹ George Parker, Lucy Fisher, Anna Gross, and Rafe Uddin, "Rishi Sunak secures win in Rwanda asylum vote," *Financial Times*, December 12, 2023, <https://www.ft.com/content/17b70ab4-e68e-48fb-81cc-83e9dc8d5ef1>.

²² *Ibid*; Andrew McDonald, "Rishi Sunak squeaks through in key Rwanda vote despite Tory infighting," *Politico*, December 12, 2023, <https://www.politico.eu/article/rishi-sunak-uk-rwanda-vote-asylum-seekers-conservative-party-infighting/>.

²³ Rajeev Syal, "Sunak's plan to deport asylum seekers to Rwanda receives first parliamentary defeat," *The Guardian*, January 22,

party Joint Committee on Human Rights delivered a critical analysis of the Bill. Its report described the Rwanda Bill as fundamentally incompatible with Britain's human rights obligations, an erosion of the UK's Human Rights Act, and in breach of parts of the ECHR and international law.²⁴ These symbolic measures were incapable of strong-arming the HoC to abandon the Rwanda Scheme altogether, but held some political weight. At minimum, they were strong signals to the Government that the HoL would resist the Bill's Royal Assent.

Initially, forty-eight amendments were proposed by the HoL, most of which were attempts to reinforce the human rights provisions in the Bill.²⁵ A cross-party coalition in the HoL managed to force through ten amendments, generally focussing on correcting four issues that the Rwanda Bill presents. Firstly, the safe status of Rwanda is to be made conditional on the correct implementation of the Rwanda Treaty, and ministers ought to be required to provide evidence to support their claim that Rwanda is a safe country for refugees. Secondly, the Bill has to be compliant with the rule of law by ensuring the judicial function of the UK Courts.

Thirdly, the Bill ought to be in compliance with the UK's international obligations on refugee protection and human rights conventions. Finally, the HoL has taken the position that those who have helped Britain's armed forces or government in an exposed or meaningful manner, such as Afghani informants and their families, ought to be exempt from the Rwanda Scheme entirely.²⁶

At the time of writing, the HoC and the HoL have entered a ping-pong frenzy, where they continue voting amendments on and off the final version of the Rwanda Bill. With seven amendments still standing in the HoL, flights to Rwanda are unlikely to leave before June 2024, as the Home Office reckons it will take between six and ten weeks for flights to take off after the bill gains Royal Assent due to legal and logistical obstacles.²⁷

Leftie Lawyers and Other Naysayers

The red line throughout the objections to the Rwanda Bill can be brought down to two parts. First, the rule of law. As stated in the above mentioned report of the UK's cross-party Joint Committee on Human Rights, "*the bill's near total exclusion of*

2024, <https://www.theguardian.com/uk-news/2024/jan/22/sunaks-plan-to-deport-asylum-seekers-to-rwanda-receives-first-parliamentary-defeat>.

24 Diane Taylor, "UK's Rwanda bill 'incompatible with human rights obligations'," *The Guardian*, February 12, 2024, <https://www.theguardian.com/uk-news/2024/feb/12/uk-rwanda-bill-incompatible-with-human-rights-obligations>; Joint Committee on Human Rights, "Safety of Rwanda (Asylum and Immigration) Bill Second Report of Session 2023–24," *House of Commons & House of Lords*, February 12, 2024, <https://committees.parliament.uk/publications/43292/documents/215535/default/>.

25 House of Lords, "Safety of Rwanda (Asylum and Immigration) Bill Marshalled list of amendments to be moved on report," *House of Lords*, February 29, 2024, <https://bills.parliament.uk/publications/54486/documents/4508>.

26 House of Lords, "Safety of Rwanda (Asylum and Immigration) Bill LORDS AMENDMENTS," *House of Lords*, March 13, 2024, <https://publications.parliament.uk/pa/bills/cbill/58-04/0182/230182.pdf>; Nadeem Badshah, "Rwanda deportation bill set back again after House of Lords votes," *The Guardian*, March 6, 2024, <https://www.theguardian.com/uk-news/2024/mar/06/rwanda-deportation-bill-set-back-again-after-house-of-lords-votes>; Albert Toth, "The 4 reasons why the Rwanda Bill is being fought by Lords," *Independent*, March 7, 2024, <https://www.independent.co.uk/news/uk/politics/lords-rwanda-bill-uk-vote-explained-b2507278.html>.

27 Matt Dathan, "Rwanda bill: flights delayed until June as Sunak loses seven Lords votes," *The Times*, March 20, 2024, <https://www.thetimes.co.uk/article/rwanda-bill-flights-delay-house-lords-peers-defeat-00ww2c0qn>; Charles Hymas, Jack Maidment and Dominic Penna, "Government suffers clean sweep of seven Rwanda defeats in House of Lords," *The Telegraph*, March 20, 2024, <https://www.telegraph.co.uk/politics/2024/03/20/rishi-sunak-latest-news-jeremy-hunt-inflation-rwanda-bill/>; Rajeev Syal, "Rwanda bill likely to be stalled at least till April after seven defeats in the Lords," *The Guardian*, March 21, 2024, <https://www.theguardian.com/politics/2024/mar/20/rwanda-bill-likely-to-be-stalled-at-least-till-april-after-seven-defeats-in-the-lords>.

judicial scrutiny seeks to undermine the constitutional role of the domestic courts in holding the executive to account."²⁸ Further supporting this criticism, five of the forty-eight originally proposed amendments had the explicit objective of ensuring compliance with the rule of law.²⁹ The second and perhaps strongest objection is the potential incompatibility with international refugee law. Remember that the Rwanda Bill came about as a response to the UK's Supreme Court ruling that Rwanda could not be considered a safe country for asylum seekers as they would be in genuine risk of refoulement.³⁰ The Rwanda Bill does not actually solve Rwanda's safety issues, it would only prohibit UK Courts from challenging Rwanda's safe country status or delaying and/or preventing a person's deportation to Rwanda.³¹

Despite the tremendous amount of criticism, the UK government has stated multiple times that it intends to pass the Bill into law despite domestic and foreign opposition. The leader of the opposition, Keir Starmer, regularly attacks PM Sunak on his Rwanda policy, stating that the PM only pushes on with the policy to repress a Tory revolt while questioning his beliefs on its effectiveness.³² PM Sunak reasonably

retorted to these critiques by calling Starmer a "leftie lawyer with no plan".³³ So far, Labour's criticisms have been contained to the ineffectiveness and the expensive price tag of the Bill, suggesting that the Labour Party could maintain a hard stance on migration, if it were to win the next general election.³⁴

The United States, the UK's closest ally, has not criticised the Rwanda Scheme directly outside its implications for the Good Friday Agreement, but has criticised Rwanda for its human rights record. In its annual human rights assessment, the US State Department stated that "*Rwanda operated a system including harsh and life-threatening prison conditions, arbitrary detention, serious restrictions on free expression including the imprisonment of journalists, and no effective system of collective bargaining*".³⁵ Contrary to the US, EU officials have not refrained from directly criticising the Rwanda policy. After meeting with former Home Secretary Braverman, European Home Affairs Commissioner Ylva Johansson publicly stated that the Rwanda policy is, in her opinion, in violation of international law.³⁶

In this case or if the UK decided to withdraw from the ECHR, the EU would have the option of suspending certain parts of the

28 Joint Committee on Human Rights, *Safety of Rwanda (Asylum and Immigration) Bill Second Report of Session 2023–24*.

29 House of Lords, *Safety of Rwanda (Asylum and Immigration) Bill Marshallled list of amendments to be moved on report*.

30 Picheta, *UK plan to send asylum seekers to Rwanda blocked by Supreme Court*.

31 Home Office, Cleverly, Jenrick and Sunak, *Bill to make clear Rwanda is a safe country and stop the boats*.

32 Andrew McDonald, "PMQs scorecard: Rishi Sunak and Keir Starmer squabble about Rwanda," *Politico*, March 20, 2024, <https://www.politico.eu/article/rishi-sunak-keir-starmer-squabble-rwanda/>.

33 *Ibid.*; Alix Culbertson, "PMQs: Sunak accuses Starmer of being 'another leftie lawyer' trying to stop action against small boat crossings," *Sky News*, March 8, 2024, <https://news.sky.com/story/pmqs-sunak-accuses-starmer-of-being-another-leftie-lawyer-trying-to-stop-action-against-small-boat-crossings-12828746>.

34 *Ibid.*

35 Patrick Wintour, "US calls conditions in Rwanda's detention centres harsh to life-threatening," *The Guardian*, March 21, 2024, <https://www.theguardian.com/politics/2023/mar/21/us-describes-conditions-in-rwandas-detention-centres-as-harsh-to-life-threatening>; Alice Donald and Joelle Grogan, "What are the Rwanda Treaty and the Safety of Rwanda (Asylum and Immigration) Bill?," *UK in a Changing Europe*, March 21, 2024, <https://ukandeu.ac.uk/explainers/what-are-the-rwanda-treaty-and-the-safety-of-rwanda-asylum-and-immigration-bill/>.

36 Faye Brown, "EU warns UK immigration bill 'violates international law' as minister says 'thousands' of refugees could be sent to Rwanda," *Sky News*, March 9, 2024, <https://news.sky.com/story/eu-warns-uk-immigration-bill-violates-international-law-as-minister-says-thousands-of-refugees-could-be-sent-to-rwanda-12829167>.

Trade and Cooperation Agreement (TCA) with the United Kingdom, in particular Part Three covering law enforcement cooperation and judicial cooperation in criminal matters since it is “based on the Parties’ and Member States’ longstanding respect for democracy, the rule of law and the protection of fundamental rights and freedoms of individuals, including as set out in the Universal Declaration of Human Rights and in the European Convention on Human Rights”.³⁷ Whether the European Union will actually respond in such a manner is still speculative, but it has hinted in the past at its preparedness to do so.³⁸ Beyond the UK-EU TCA, the sustainability of the more recent UK-Frontex agreement might also be up for debate as it commits the UK, EU, and Frontex in “ensuring that the cooperation provided for in this working arrangement is implemented with regard to shared values and respect for human rights obligations which underpin their policies, including as set out in the respective international obligations under the European Convention on Human Rights”.³⁹

Eurocrats: Friends or Foes?

Despite the EU voicing its concerns about possible human rights violations in the Rwanda policy, EU Member States have been suspiciously quiet, which perhaps is not suspicious at all. Many EU Member States are currently struggling with large numbers of non-EU migrants crossing into their borders, putting pressure on national governments to take harder stances on migration and to search for innovative solutions.⁴⁰ The UK is not even the first European country to pass legislation to allow for the deportation of asylum seekers to Rwanda. In fact, Denmark adopted similar legislation in 2021, a year before the UK.⁴¹ The difference is that Denmark is still holding off from actually deporting refugees, hoping for a wide European approach.⁴²

Several EU Member States and European political parties are warming up to the idea of offshoring processing schemes for asylum seekers, meaning that migration policies that used to be unthinkable are slowly becoming optional.⁴³ Some Member

37 Official Journal of the European Union, *Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part*, L 149/10, Brussels, 2021, 680-878, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22021A0430\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22021A0430(01)).

38 Lisa O’Carroll, “Brexit trade treaty ‘could be terminated’ if UK quits ECHR over small boat crossings,” *The Guardian*, March 8, 2023, <https://www.theguardian.com/uk-news/2023/mar/08/eu-could-terminate-police-and-security-agreement-if-uk-quits-echr>; Steve Peers, “Analysis 3 of the Brexit deal: Human Rights and EU/UK Trade and Cooperation Agreement,” *EU Law Analysis*, January 4, 2021, <https://eulawanalysis.blogspot.com/2021/01/analysis-3-of-brexit-deal-human-rights.html>; Human Rights Consortium, “EU-UK Trade and Cooperation Agreement (TCA) and Rights,” *Human Rights Consortium*, March, 2021, <https://www.humanrightsconsortium.org/wp-content/uploads/2021/03/Trade-and-Cooperation-Agreement-TCA-and-Rights-HRC-Briefing-Paper.pdf>.

39 Home Office and Frontex, “Working Arrangement Establishing Operational Cooperation between the European Border and Coast Guard Agency and the Home Office of the United Kingdom of Great Britain and Northern Ireland,” *Home Office, Border Force & The Rt Hon James Cleverly MP*, February 23, 2024, https://assets.publishing.service.gov.uk/media/65d768b454f1e70011165897/Frontex-UK_WA_-_Final_version_2_.pdf; Bethany Dawson, “UK inks deal with EU’s Frontex on illegal migration,” *Politico*, February 23, 2024, <https://www.politico.eu/article/uk-deal-eu-frontex-illegal-migration/>.

40 The Irish Times, “The Irish Times view on EU migration: governments coming under pressure,” *The Irish Times DAC*, December 21, 2023, <https://www.irishtimes.com/opinion/editorials/2023/12/21/the-irish-times-view-on-eu-migration-governments-coming-under-pressure/>.

41 BBC, “Denmark asylum: Law passed to allow offshore asylum centres,” *BBC*, June 3, 2021, <https://www.bbc.com/news/world-europe-57343572>.

42 *Ibid.*; Euronews with EFE, “Denmark in talks with Rwanda over processing of asylum seekers,” *Euronews*, April 20, 2022, <https://www.euronews.com/2022/04/20/denmark-in-talks-with-rwanda-over-processing-of-asylum-seekers>; Joanna Gill, “Denmark’s ‘zero asylum’ policy reversed for Ukraine,” *Thomson Reuters Foundation*, May 22, 2023, <https://www.context.news/socioeconomic-inclusion/denmarks-zero-asylum-policy-reversed-for-ukraine>.

43 Lisa O’Carroll, “Von der Leyen’s EU group plans Rwanda-style asylum schemes,” *The Guardian*, March 6, 2024, <https://www.theguardian.com/world/2024/mar/06/eu-group-european-peoples-party-von-der-leyen-migration-reforms>; Lili Bayer,

States already have such an offshore asylum processing scheme in place as in the case of Italy with Albania,⁴⁴ or have their main political parties advocating for them, such as the Christian Democratic Union of Germany.⁴⁵ However, the difference between the EU Member States and the UK is that, although the EU as a whole is becoming increasingly more accepting of what used to be considered more extreme anti-immigration policies, it has not gone as far as to dictate to its national courts what is fact and to actively ignore international laws in favour of national policies. The sad thing is that it is no longer self-evident that EU Member States would hold the UK to account, if it decided to ignore and break international law.

Only one thing is certain: the opponents of the Rwanda Bill across civil society will challenge its legitimacy before every court they can. Only time will tell what the aftermath of the Rwanda policy and its set precedent will be.

What Happens Now?

The HoC is set to return from Easter recess on April 15, after which the ping-pong finals will resume.⁴⁶ The Lords will not be able to hold off the Rwanda Bill indefinitely, leaving only two possible outcomes. PM Sunak could call for a general election before the Bill takes Royal Assent, which is currently very likely to lead to a new Labour government, which will probably scrap the proposed Bill given the Party's above-mentioned critiques. Alternatively, the Bill takes Royal Assent under the current Conservative government, and the previously planned flights actually take off for Rwanda. In the latter case, a legally uncharted territory will be entered.

"Amnesty warns new EU deal on migration and asylum 'will lead to surge in suffering' – as it happened," *The Guardian*, December 20, 2023, https://www.theguardian.com/world/live/2023/dec/20/eu-reaches-deal-on-migration-and-asylum-pact-live?utm_source=ground.news&utm_medium=referral; Tarek Amara, "Tunisia and EU sign pact to stem migration," *Reuters*, July 16, 2023, <https://www.reuters.com/world/tunisia-eu-sign-pact-stem-migration-2023-07-16/>.

44 Laura Gozzi, "Europe migrant crisis: Albanian court greenlights migration deal with Italy," *BBC*, January 29, 2024, <https://www.bbc.com/news/world-europe-68132537>.

45 Peter Wilke, "German conservatives break with Merkel on migration," *Politico*, December 11, 2023, <https://www.politico.eu/article/germany-conservatives-angela-merkel-migration/>.

46 House of Commons, "Safety of Rwanda (Asylum and Immigration) Bill Government Bill," *UK Parliament*, accessed on March 30, 2024, <https://bills.parliament.uk/bills/3540/stages>.

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THE TRIALS AND TRIBULATIONS OF 3D TRADE MARK
REGISTRATION IN THE EU

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Introduction

The origins of a trade mark system can be traced all the way back to ancient China, where unique imprints were visible on gold coins to identify the manufacturer.² Nowadays, trade marks are an important sign for consumers to identify the commercial origin of a good and to establish a link between certain signs and certain goods as an indicator of origin and quality.³ Thus, in a world without trade marks, cola drinks sold at the supermarket would be stored in unmarked cans, where consumers would not be able to identify their favourite brand, and manufacturers would not be able to stand out from the market. It follows that we now experience a functioning trade mark system filled to the brim with numerous manufacturers trying to distinguish themselves from competitors. This system has placed focus on three-dimensional trade marks as an avenue to outsell each other.

EU Framework and Rationale

The rationale behind trade mark protection is that it lowers consumer search costs, all while ensuring that these goods and services are of a desirable and consistent quality which is maintained over time. On top of that, three-dimensional marks have the unique power of attracting customers in a way that transcends language, which

can be more effective for consumer engagement than their traditional counterparts. To balance against this, trade mark laws are indefinite in nature, which underlines a fear of the emergence of market monopolies that hurt consumer welfare and the competitive foundation of the market.

Without proper regulation, three-dimensional marks could be used as a sword to gain an edge over competitors rather than for the intended purpose of intellectual property law protection, which is a shield to protect and reward the creators of intellectual property. Another goal of trade mark law is to distinguish its protections from those of patent law, given that it serves a unique purpose separate from patents and should not be viewed as a lesser form of protection.⁴ Accordingly, trade mark law engaged itself with three-dimension signs in order to harmonise these rights up rather than down, with the EU following the progressive steps of some member nations to extend its protections.⁵

The EU framework governing trade mark protection consists of Directive 2015/2436 and Regulation 2017/1001 EU Trademark

¹ Simon Sun, LL.B Graduate at Trinity College Dublin, Judicial Assistant at the Superior Courts of Ireland.

² Upcounsel, "History of Trademarks: Everything You Need to Know," accessed April 24, 2024, <https://www.upcounsel.com/history-of-trademarks>.

³ Lionel Bently and Brad Sherman, *Intellectual Property Law* (6th edn, Oxford Press 2009), 712.

⁴ Felix Schulyok, "The exclusion from protection of functional shapes under the trade mark law of the EU," (2010) Lund University Master Thesis.

⁵ Robert Burrell, Huw Beverley Smith, and Allison Coleman, "Three Dimensional Trade Marks: Should The Directive Be

Regulation (EUTMR), which provide non-exhaustive ways for the shape of goods and their packaging to be registered as a trade mark. Whilst Article 4 expressly states that three-dimensional shapes are capable of being registered as trade marks and face the same assessment criteria for distinctiveness as traditional marks; three-dimensional marks are subject to the absolute grounds of refusal in Article 7(1)(e) EUTMR. These obstacles prevent registration of marks that (i) result from the nature of the goods themselves, (ii) are necessary to obtain a technical result, and (iii) give substantial value to the goods. Although only 0.23% or 305 three-dimensional trade marks were registered with the European Union Intellectual Property Office (EUIPO) in 2022, they overwhelmingly make up the largest part of the non-traditional mark (NTM) group, accounting for 81.89% of NTM applications from 1996 to 2016.⁶

In theory, the legal framework has been made more suitable for three-dimensional trade marks after the amendment to Article 4(b) EUTMR, which no longer requires the sign to be represented in a graphical way, but instead codifies the *Sieckmann*⁷ criteria of whether competent authorities can determine the clear and precise subject matter of the protection. In that sense, the goal of the amendment was to provide streamlined proceedings and increased legal certainty, to clearly define the EUIPO's practice with member states, and most importantly, to reform a framework that was too rigid and out of

date with three-dimensional trade marks.

Difficulty of Distinctiveness

As discussed, when registering a three-dimensional trade mark, you must establish a distinctive character and avoid the absolute grounds for refusal. What makes registration of three-dimensional marks more challenging than word or figurative marks is that they possess a lesser ability to individualise an anonymous economic origin, meaning that they are more prone to restrictions on the freedom of competition. Whilst the availability of such marks can promote efficiency in the development of unique and innovative designs, the overarching fear is that onerous protection of the shapes of products and packaging that do not stand out from the crowd will gravely distort market competition.

The case law based on Article 7(1)(b) EUTMR establishes a high threshold as shapes are usually not thought of as indicators of origin. On this, the Court in *Procter and Gamble*⁸ adopted a restrictive view, which determined that a shape can only be protected under trade mark law when it departs greatly from the norm. This appears to reflect the fact that the likelihood of confusion for the consumer is smaller when the trade mark is more distinct and that distinctiveness benefits customers by allowing them to separate products from each other to lower search costs. Despite the distinctiveness assessment for three-dimensional shapes

Reshaped?," in *Trade marks retrospective* (1st edn, Sweet and Maxwell 2000) 139, 156.

6 EUIPO, "EUIPO Statistics for European Union Trade Marks 1996-01 to 2022-11 Evolution," 2024, https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/about_euipo/the_office/statistics-of-european-union-trade-marks_en.pdf.

7 CJEU, C-273/00, *Ralf Sieckmann v Deutsches Patent- und Markenamt*, Judgment of the Court of 12 December 2002, ECLI:EU:C:2002:748.

8 CJEU, C-383/99 P, *Procter & Gamble v. OHIM*, Judgment of the Court of 20 September 2001, ECLI:EU:C:2001:461, paras 43-45.

being the same as traditional marks, it is established that the public is more acquainted with recognising word mark signs than three-dimensional shapes from products.⁹ This is significant because the *Henkel*¹⁰ test evaluates how unique a trade mark is based on the goods or services it covers before examining how easily consumers can tell it apart from other products. In other words, the more closely the shape for which registration is sought resembles the shape most likely to be taken by the product in question, the greater the likelihood of the shape being devoid of any distinctive character. Thus, the more common a shape is, the higher the threshold. Similarly, although it is possible to acquire distinctiveness over time through use under Article 7(3) EUTMR, it is more difficult for three-dimensional trade marks as the presence of a distinctive character cannot overcome the absolute grounds of refusal. This is especially relevant for ground three, which excludes shapes that give value to the product. Yet, the author's view is that when a shape achieves distinctiveness through being abnormal, one might say that it is inherently contributing to the value of the goods. The current framework is problematic and fails to settle this contradiction, and in that sense, there is much merit for the Court of Justice of the European Union (CJEU) to adopt a view that reflects the changing consumer presentation that is more likely to recognise a sign consisting of a shape as a badge of origin.

Negotiating With the Nature of Goods Themselves

*Hauck v Stokke*¹¹ and the "Tripp Trapp" chair case is one of the few cases applying the first absolute ground for refusal. Here, the CJEU established that assessment ought to be completed on a case-by-case basis where the overall impression should be taken into account, notwithstanding signs that contain a vital non-functional or decorative element.¹² Importantly, the CJEU focused this decision through the lens of public interest, that the absolute grounds should be interpreted to protect against indefinite monopolisation of functional shapes. Thus, the Court proposed an interpretation which would deny registration if the shape included essential characteristics which are inherent to the generic function of the goods. By placing value on the creativity of competitors, a monopolisation of these important characteristics would prevent companies from designing their products in a shape that is intertwined with the consumer perception of their goods.¹³

Any other interpretation would be unnecessarily narrow, which would be problematic as the provision would only apply to "natural products" without substitutes (say the shape of a lemon or banana) and "regulated products" bound by legal standards (say a soccer ball) which struggle to establish a distinctive characteristic in the first place.¹⁴ Perhaps

9 Atte Andersin, "Trade Marks and the Third Dimension Implications of 3D Printing in the Likelihood of Confusion of Three-Dimensional Trade Marks," (2017) University of Helsinki Master Thesis.

10 CJEU, C-218/01, *Henkel KGaA v. Deutsches Patent-und Markenamt*, Judgment of the Court (Sixth Chamber) of 12 February 2004, ECLI:EU:C:2004:88P.

11 CJEU, C-205/13, *Hauck GmbH & Co. KG v Stokke A/S and Others*, Judgment of the Court (Second Chamber), 18 September 2014, ECLI:EU:C:2014:2233.

12 *Ibid.*, paras 18–22.

13 *Ibid.*, paras 25–27.

14 Nicky Willemsen, "A study on the functional exclusions for shape marks under the CTMR and EUTMR," *Stockholm Intellectual Property Law Review* 4, no 2 (2021): 68-85.

more influential than these two categories is the interpretation of the essential characteristics that make up the generic function of the product within the first absolute ground of refusal. Yet, the challenge from the author's perspective arises as the Court did not establish guidelines as to what amounts to a generic function. Without elaboration, one would easily be mistaken into thinking all shapes have a generic function to some extent. Rather, the Court provided the example that chairs made up of legs and a horizontal level or flip flops consisting of a sole and V-shaped strap could be considered shapes inherent to the generic functions of goods. Hence, through aligning this first ground of refusal with the shared goal of preventing monopolisation, the Court has widened its scope of exclusion to overlap with the other two grounds under the nature of goods themselves.¹⁵ Yet, if breaching any of the grounds already results in an automatic refusal in a process which is not cumulative, one has to wonder if this is a futile development.

Gauging the Necessity of Obtaining a Technical Result

The seminal case of *Philips v Remington*¹⁶ and the three-headed rotary electric shaver was the first landmark decision in relation to the second absolute ground for the refusal of shapes necessary to obtain a technical result. Similarly to the rationale from *Stokke*, the CJEU here determined that the rationale behind the functionality prohibition ought to be

interpreted "*in light of the public interest*" and that these marks were not designed to inhibit competitors' freedom of choice by establishing a technical monopoly for the solution. Ultimately, the Court held that a sign cannot be registered if its essential features are necessary to obtain a technical result, which applies even if other shapes were available to achieve the same technical result. This would be supported in the later CJEU case of *Lego Juris*¹⁷ concerning the shape of the classic Lego brick with its two-row studs, which echoed the same pro-competition sentiment. It is self-explanatory that if the trade mark of a functional shape can prevent the use of a number of alternative technical shapes associated with the trade, this could lead to abuse where a proprietor may register several functional shapes to completely prevent the manufacturing by competitors. Thus, the objective being pursued revolves around a concern that trade mark protection can be prolonged for an indefinite period of time, meaning that infinite protection of a technical solution can hinder technological developments in society.

The Court held that all the essential shape elements of Legos were functional (the ability to attach to another) and that the red colour was not considered an important element of the shape. They noted that essential characteristics are the most important elements of the sign and that there is no hierarchy between these elements.¹⁸ However, the assessment of what constitutes essential is not through

¹⁵ *Ibid.*

¹⁶ CJEU, C-299/99, *Koninklijke Philips Electronics NV v Remington Consumer Products Ltd*, Judgment of the Court of 18 June 2002, EU:C:2002:377.

¹⁷ CJEU, C-48/09 P, *Lego Juris A/S v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Judgment of the Court (Grand Chamber) of 14 September 2010, ECLI:EU:C:2010:516.

¹⁸ Willemsen, *A study on the functional exclusions for shape marks under the CTMR and EUTMR*.

the eyes of the average consumer but by the authorities carrying out the assessment of the overall impression of the sign on a case-to-case basis.¹⁹

When assessing the functionality of a shape, previous patent documents may be taken into account, meaning that if a product was previously registered as a patent, there is a higher risk that its appearance will not be granted trade mark protection.²⁰ The test established in these two cases determines that a shape will be met with an absolute ground for refusal as long as all of its essential features fall within the exclusion. Yet if there are non-essential elements that fall outside this ambit, the shape will not be denied trade mark protection. One would suspect that this is because if there exists at least one important non-functional element in a shape, then competitors have the ability to introduce a different shape to do the same functional element with their own non-functional design.

In the *Nestle*²¹ case, the Court considered two main points. Firstly, it addressed the distinctiveness issue. Secondly, it examined the characteristics of the KitKat chocolate bar. The Court found that the rectangular shape of the KitKat chocolate bar was a result exclusively from the nature of the goods. The position and depth of the grooves, along with the number of grooves running between the four fingers, were determined by the technical effect of breaking the bar apart for easy consumption. Concerningly, the hearing

officer adopted an element-by-element approach by dividing the makeup of the bar into three sections, which appears to be conflicting with the test set in *Lego* and *Philips*. That is to say that by identifying the rectangular shape to be sufficient to take the sign outside the scope of technical in its function, the three broken-up elements of the bar would be covered by more than one ground for refusal.²² The more expansive approach taken by *Lego* and *Philips* would instead say that the presence of the grooves was to achieve a technical result of easy consumption and that this should be available to their competitors regardless of whether it was rectangular shaped.²³ The overall shape of the bar not only serves a technical purpose but also determines the length and placement of the grooves initially.

From the author's viewpoint, it follows that if the 2x4 structure of the Lego brick was deemed to be a non-essential element of a technical function by the CJEU, why would the same standard not apply to the rectangular shape of the KitKat bar? This test of functionality highlights an arduously restrictive framework for three-dimensional shapes but perhaps could be remedied through an assessment of functionality with distinctiveness in mind. I imagine this to be a backdoor way of allowing the registration of highly distinctive shapes in exceptional circumstances where flexibility against the fear of monopolies is warranted.

19 Eugene Lim, "How Chocolate Wars "shape" the law: KitKat, three-dimensional trade marks and the enigma of "technical function"," *Hong Kong Law Journal* 48, no 2 (2018): 533-554.

20 Ondřej Ekrť, "Trademark and Design Protection of Applied Art," (2018) Uppsala University Master Thesis.

21 CJEU, C-215/14, *Société des Produits Nestlé SA v Cadbury UK Ltd*, Judgment of the Court (First Chamber) of 16 September 2015, ECLI:EU:C:2015:395.

22 Lim, *How Chocolate Wars "shape" the law: KitKat, three-dimensional trade marks and the enigma of "technical function"*.

23 *Ibid.*

Surveying the Substantive Value Given to the Goods

Compared to the other two grounds, whilst the objective of this ground is also in part driven by competition law interests, it is unique in its attempt to distinguish between copyright and design rights on one side and trade marks on the other. For instance, *Bang & Olufsen*²⁴ was a case about an application filed for a distinct loudspeaker, with the Court determining that the sign exclusively consisted of a shape which gives substantial value to goods. The General Court stated that “*the shape is perceived as a kind of pure, slender, timeless sculpture for music reproduction which makes an important selling point*”, and was one which followed a marketing drive to make the product more attractive by placing the shape of the speaker as its headline selling point.²⁵ Moreover, the Court added that the third ground applies not only when the shape is adding value but also when it has essential technical characteristics that contribute to the value of the goods.²⁶ But in the author’s opinion, even if one could look past the fact that the assessment of whether the shape is adding value is subjective, why should there be a ban on attractive three-dimensional marks in the first place?

Although being attractive alone should not exclude registration, following *Salvatore*,²⁷ one must acknowledge that if this ground were applied strictly, it would be counterintuitive since an attractive design

is what all designers and companies strive for, to begin with.²⁸ As adding value in this context can be technical functions as well as aesthetic, the Court did not rule out the possibility that the grounds could be applied in combination. However, given that attractive designs are intrinsically brought about to provide substantial value to the product, would it not leave all shapes except for non-distinctive ones to be denied on this ground? In that sense, at best, this ground runs the risk of being irrelevant and ought to be interpreted differently than the other two grounds, and at worst, it perhaps should be abolished.²⁹

More Recent Cases – Grounds and Rationale in Action

So, what picture do the most recent three-dimensional trade mark cases paint? For instance, the moon boots in the *Zeitneu*³⁰ case were deemed by the EUIPO to not be of distinctive character as they did not depart significantly from other winter-type boots. What complicates this case is that the Court of Milan identified these boots to be a protected work under copyright law, which appears to be contrary to the discussed rationale of delimiting trade marks from other overlapping intellectual property rights protections. In the *Guerlain*³¹ case, on the other hand, their boat hull-shaped lipstick was deemed to be distinctive and departing from the norm. The Court determined that the distinctiveness of a three-dimensional shape is no different from any other

²⁴ CJEU, T-508/08, *Bang & Olufsen v. OHIM*, judgment of the General Court (Eighth Chamber) of 6 October 2011, ECLI:EU:T:2011:575.

²⁵ *Ibid.*, paras 72–75.

²⁶ Willemsen, *A study on the functional exclusions for shape marks under the CTMR and EUTMR*.

²⁷ Salvatore Ferragamo [1999] R 395/1999-3, para. 33.

²⁸ Ekrt, *Trademark and Design Protection of Applied Art*.

²⁹ Roland Knaak, Annette Kur, and Alexander von Mühlendahl, “Study on the Overall Functioning of the European Trade Mark System,” *MPI Research Paper* No. 14–17 (2012), 73.

³⁰ *Tecnica Group v EUIPO — Zeitneu* [2022] T-483/20.

³¹ *Guerlain v European Union Intellectual Property Office (EUIPO)* [2021] T-488/20, EU:T:2021:443.

mark and, following the fundamental core of trade mark protections, that this assessment is not based on originality but rather on its ability to indicate commercial origin to the consumer.

Regarding technical solutions, the Swiss Federal Tribunal ruled that the Nespresso³² coffee capsule could not be given trade mark protection as not only did it incorporate a technical solution but also that it had not established itself as a common three-dimensional shape through use. Similarly, in the *Gomboc*³³ case regarding a decorative object in the shape of a Hungarian food speciality, the technical function was said to be judged based on reliable sources rather than the perception of the public. Based on newspaper articles filed before the Hungarian Intellectual Property Office (IPO), they determined that the shape served the purpose of being a self-righting object or toy with only one point of equilibrium, which was necessary for a technical result.³⁴ Further, the case examined the ground of adding substantial value to the product, where the Court concluded that a consumer's decision to buy a Gomboc would be intertwined with the historic and symbolic value of its shape.

Conclusion

Despite amendments, the author suspects that the distinctiveness obstacle and functional exclusions embedded in the absolute grounds for refusal prevent three-dimensional trade marks from fulfilling their full potential. The issue at its

core is that these grounds are difficult to interpret and exacerbate the fact that the public more easily finds word marks to be distinctive than three-dimensional shapes. For the nature of goods ground, guidelines were not provided for what amounts to a generic function; for the technical function ground, the element-by-element approach in *Nestle* is problematic and blurs the lines between the grounds; and for the substantive value ground, restricting attractive designs is oblivious to what manufacturers strive to achieve. If proving distinctiveness fulfils the purpose of trade mark law by verifying the shape's ability to act as a badge of origin for consumers, this provision shows a reluctance to the registration of three-dimensional marks due to the inherent dangers of granting a potentially indefinite monopoly. Nonetheless, it would be fair to say that the framework can still be moulded by the CJEU in upcoming decisions in the coming years.

³² Nestlé Nespresso SA [2021] 4A_61/2021.

³³ CJEU, C-237/19, *Gömböc Kutató, Szolgáltató és Kereskedelmi Kft. v Szellemi Tulajdon Nemzeti Hivatala*, Judgment of the Court (Fifth Chamber) of 23 April 2020, ECLI:EU:C:2020:296.

³⁴ Aron Laszlo, "Gömböc, stand up for your rights: CJEU rules on trademarkability of shapes," *Kluwer Trademark Blog*, 2022, <http://trademarkblog.kluweriplaw.com/2021/12/06/gomboc-3-the-final-decision/>.

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TWO SIDES OF THE SAME COIN: CARE MIGRATION AND CARE DRAIN AS CONSEQUENCES OF FAMILY-BASED WELFARE SYSTEMS

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Introduction

The paper examines the phenomenon of care migration. It aims to clarify how familistic welfare systems allow for the appearance of care vacuums in both the destination and origin countries. The term care migrant encompasses any migrant who supplements the unpaid care work of non-migrants in higher-developed countries.² To address this connection, the study relies on quantitative research and doctrinal legal research of labour and social security laws in both the destination and origin country.

The German welfare system relies on families as the primary caregivers for the elderly population. Nevertheless, the combination of factors, such as an ageing population, an increase in one-person households, and the growing participation of women in the workforce, has brought about a noticeable vacuum in caregiving. Predominantly, women migrant care workers from Eastern Europe have filled the gap. They are generally paid lower wages due to a legal grey area and minimal law enforcement and control.

Contrarily, Romania's example shows

that the country of origin experiences a severe care drain. The term implies a lack of proper care for people needing it, especially the elderly. The Romanian welfare system also relies on the family to provide care. This factor, combined with certain modern developments, has made it increasingly difficult for elderly people to access necessary care.

The German Welfare System

A daughter lives far from her parents and works full time. Yolante met her and her very frail parents. "The daughter told me: wash, dress, go to the toilet, give pills, shop, clean." The old man was seriously ill with dementia. His 80-year-old wife was also in need of care. "She didn't want to leave her parents alone," says Yolante, "but she could only afford me".³

In Germany, the welfare system is of a familistic nature, according to Esping-Andersen.⁴ It mainly relies on the family to provide care, as the available data on care and the legal framework will show. According to the Federal Statistics Office, in 2021, there were 4.9 million elderly

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2 ILO, "The Social Construct of migrant care work," ILO, 2019, 1, https://www.ilo.org/global/topics/labour-migration/publications/WCMS_674622/lang-en/index.htm.

3 Silke Hoock, "24 Stunden, 7 Tage die Woche, 900 Euro Gehalt [24 hours, 7 days a week, salary 900 euros]," *Zeit Online*, May 15, 2016, <https://www.zeit.de/karriere/beruf/2016-05/pflege-pflegekraefte-osteuropa-arbeitsbedingungen-deutschland>.

4 Gösta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Cambridge: Polity Press, 1990), 27.

Germans registered as needing care. Four out of five of these people are cared for at home. More than half of these are cared for only by their relatives, while the rest are cared for by family members and nursing services. Residents in nursing homes only make up about one-fifth of the people in need of care.⁵ In 1995, Germany introduced long-term care insurance. The latter is compulsory insurance for all those with statutory health insurance.⁶ The third paragraph of the law on care insurance explicitly states that the goal of long-term care is for people to remain in their homes for as long as possible.⁷

The requirements for receiving care benefits depend on the duration of the need for care, the type of care and the care needs (washing, dressing, preparing food, etc.). Depending on the extent of the limitations of independence and abilities, there are five different degrees of care. These range from 1 (light impairment) to 5 (bound to bed). However, social long-term care insurance often only covers some costs of care. The remainder is covered by those needing care themselves, or, if necessary, by direct relatives or -in the case of financial need- by social assistance. Long-term care insurance is,

therefore, also referred to as a “*partial benefit system*”.⁸

People in need of care can receive a care allowance, which the care insurance fund transfers to the person in need of care. The person being cared for can freely dispose of the care allowance, which can be up to 947 euros monthly, and usually passes that care allowance to the person providing care for them as a token of appreciation. The care allowance can also be combined with outpatient care benefits in kind.⁹ In this case, the care allowance is reduced proportionally to the value of the outpatient benefits in kind claimed.¹⁰ In this context, it is crucial to consider how much care costs. In 2022, payment for a live-in care worker lay between 1.500 and 3.000 euros per month.¹¹ This sum would not cover “round-the-clock” care. For 24-hour care, four workers would need to work in 8-hour shifts. It would amount to a cost between 6.000 and 12.000 euros per month, a giant leap from the 947 euros from the care insurance fund.

At the same time, home care is provided mainly by women.¹² It confirms the German welfare system’s familistic character, where women in the family are

5 Federal Statistical Office of Germany “Pflegebedürftige nach Versorgungsart, Geschlecht und Pflegegrade [People in need of long term care],” *Federal Statistical Office of Germany*, December 21, 2022, <https://www.destatis.de/DE/Themen/Gesellschaft-Umwelt/Gesundheit/Pflege/Tabellen/pflegebeduerftige-pflegestufe.html?nn=210648>.

6 Federal Ministry of Health, “Die Pflegeversicherung [The Long-Term Care Insurance],” *Federal Ministry of Health*, September 19, 2023 <https://www.bundesgesundheitsministerium.de/themen/pflege/online-ratgeber-pflege/die-pflegeversicherung.html>.

7 “Long-term care insurance is primarily intended to support home care and the willingness of relatives and neighbours to provide care, so that those in need of care can remain in their home environment for as long as possible. Benefits for partial inpatient care and short-term care take precedence over benefits for full inpatient care” Sozialgesetzbuch [Social Security Law] (SGB) - Elftes Buch (XI) - Soziale Pflegeversicherung (Artikel 1 des Gesetzes vom 26. Mai 1994, BGBl. I S. 1014 [Article 1 of the Law from 26 May 1994]) § 3 Vorrang der häuslichen Pflege https://www.gesetze-im-internet.de/sgb_11/_3.html.

8 Federal Ministry of Health, *Die Pflegeversicherung [The Long-Term Care Insurance]*.

9 Federal Ministry of Health, “Pflegegeld [Care Allowance],” *Federal Ministry of Health*, September 19, 2023 <https://www.bundesgesundheitsministerium.de/pflegegeld.html>.

10 Federal Ministry of Health “Pflege zu Hause: Finanzielle Unterstützung und Leistungen für die ambulante Pflege [Care at home],” *Federal Ministry of Health*, September 19, 2023 <https://www.bundesgesundheitsministerium.de/pflege-zu-hause.html>.

11 Verbraucherzentrale NRW “Pflegeteileweiser für Pflegebedürftige und Angehörige: Ausländische Haushalts- und Betreuungskräfte in Privathaushalten [Guide for Care Recipients and Relatives],” *Verbraucherzentrale NRW*, 2021, <https://www.ratgeber-verbraucherzentrale.de/gesundheits-pflege/auslaendische-haushalts-und-betreuungskraefte-in-privathaushalten-46008893>.

12 Federal Statistical Office of Germany “Gleichstellungsindikatoren [Gender Equality Indicators],” *Federal Statistical Office of Germany*, April 12, 2023, https://www.destatis.de/DE/Themen/Querschnitt/Indikatoren/Inhalt_4.

particularly expected to care for the elderly. However, Germany no longer fulfils the necessary requirements for this system to work. Firstly, Germany would need to have a manageable number of people needing care, which is different from the case as German society is getting older. Every second person in Germany today is older than 45, and every fifth person is older than 66, leading to a greater need for carers.¹³ Secondly, multigenerational households would still have to be the norm. However, one-person households have been steadily growing since the 50s. In 2022, 40% of Germans lived alone, while in 1950 it was just 6%. Currently, over 70% of households consist of either one or two individuals, while the traditional extended family with five or more individuals is exceedingly uncommon.¹⁴ Lastly, for the familistic welfare system to operate effectively, it is imperative that caregivers, predominantly women, have the opportunity to remain at home and care for the older family members. However, an increasing number of women are gainfully employed. Statistics confirm that in 2022, the employment rate of women raised by 5% compared to 10 years ago.¹⁵

With its ageing population, small household sizes, and growing numbers of female employment, the question arises as to who cares for the more than two

million elderly who are cared for at home in Germany.¹⁶ The query is especially relevant since the care allowance (between 332 and 947 Euros per month) does not represent remuneration for care work and is insufficient for someone to give up their work. This is where the role of care migrants comes into play. Migrants are willing to do the work that many locals would not. On top of that, there are no explicit legal provisions for caring work, making it a wild west of intricate forms of employment that often do not respect the minimum wage, working hours or rest periods. These aspects, and others that are highlighted in the following section, render migrant care work affordable and keep the legally prescribed ideal of “*care at home*” alive.

Legal Framework for Care Migration

Between 300.000 and 600.000 care workers work in private German households.¹⁷ More precise figures are not available, and they are -according to the Federal Government- not to be recorded.¹⁸ Nevertheless, the growing number of placement agencies indicates the increasing relevance of migrant care work in the private sector. While Stiftung Warentest, a German consumer organisation, identified around 60 agencies in 2009, the number was already

13 Federal Statistical Office of Germany, “Demografischer Wandel [Demographic Change],” *Federal Statistical Office of Germany, 2022*, https://www.destatis.de/DE/Themen/Querschnitt/Demografischer-Wandel/_inhalt.html.

14 Federal Statistical Office of Germany, *Demografischer Wandel [Demographic Change]*.

15 Federal Statistical Office of Germany, *Gleichstellungsindikatoren [Gender Equality Indicators]*.

16 Federal Statistical Office of Germany, *Pflegebedürftige nach Versorgungsart, Geschlecht und Pflegegrade [People in need of long term care]*.

17 Deutsches Institut für Menschenrechte (DIMR), Nora Freitag, and Greta Schabram, “Harte Arbeit, wenig Schutz. Osteuropäische Arbeitskräfte in der häuslichen Betreuung in Deutschland [Hard work, little protection. Eastern European domestic care workers in Germany],” *DIMR*, 2022, 15, <https://www.institut-fuer-menschenrechte.de/publikationen/detail/harte-arbeit-wenig-schutz>; Jennifer Steiner, Veronika Prieler, Michael Leiblfinger, Aranka Benazha, “Völlig legal!? Rechtliche Rahmung und Legalitätsnarrative in der 24h-Betreuung in Deutschland, Österreich und der Schweiz [Truly legal!? Legal framing and legality narratives in 24-hour care in Germany, Austria, and Switzerland],” *Österreich Z Soziol* 44 (2019): 1–19, 5.

18 German Parliament, “Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Zaklin Nastic, Ali Al-Dailami, Andrej Hunko, weiterer Abgeordneter und der Fraktion DIE LINKE [Reply by the Federal Government to the minor interpellation by Zaklin Nastic, Ali Al-Dailami, Andrej Hunko, other MPs and the DIE LINKE parliamentary group],” (Drucksache 20/1670, May 4, 2022) 14, <https://dserver.bundestag.de/btd/20/016/2001670.pdf>.

266 seven years later.¹⁹ In February 2022, the online comparison portal “24h-Pflege-Check” listed 784 German providers.²⁰

An analysis of migrant social media networks also stresses the importance of the phenomenon. A study found more than 240 Social Media Spaces for Eastern European care workers in Germany.²¹ These were mainly Facebook Groups but also other social-media pages where migrant care workers from Eastern Europe exchange experiences about working in Germany.²²

Live-in care refers to employment models for the completion of domestic and basic care activities in private households. Live-ins are predominantly women from Eastern and Central European member states, mostly aged around 50 and without corresponding professional qualifications.²³ Most of them come from Poland, but a growing number also from Romania, Bulgaria, Hungary, the Czech Republic, Slovakia, and Croatia.²⁴ Usually, live-ins spend a few weeks or months in

Germany, then travel back to their home country only to return after a few weeks or months. In the meantime, the person to be cared for is looked after by another caregiver.

The development of home care markets was facilitated by the liberalisation of migration regimes within Europe, as citizens of Central and Eastern European countries gained access to the labour market.²⁵ This kind of migration is made possible by the economic and wealth gap between Western Europe on the one hand and Central and Eastern Europe on the other. It allows migrants to be recruited as caregivers under working conditions that fall short of the usual labour standards in Germany.²⁶

The working scheme for care workers is not regulated by law, leading to a grey area characterised by different forms of employment. Agencies most often recruit carers from their country of origin.²⁷ Usually, care workers are either posted workers or self-employed.²⁸ Very seldom

19 Stiftung Warentest “Trautes Heim, da will ich sein [Trusted Home, that’s where I want to be],” *Stiftung Warentest*, 2017, 88.

20 24h-Pflege-Check.de: “Branchenreport 2021 – Häusliche 24-Stunden-Pflege und -Betreuung [Industry Report 2021 – 24-hour home care and support]”, February 2022, 8. <https://www.24h-pflege-check.de/assets/downloads/Branchenreport-2021.pdf>.

21 Minor Kontor, Alexandra Adamescu, Nicola Bošković, Bogdana Dilova, Natalie Lizalová, Viara Misheva, and Agnieszka Skwarek, “Häusliche Betreuung in Deutschland als Schwerpunkt im Rahmen des Projektes” MB 4.0 – Gute Arbeit in Deutschland. Zusammenfassung und Ergebnisse [Domestic care in Germany as a focus of the Project MB4.0. Summary and results],” July, 2022, 6, <https://minor-kontor.de/haeusliche-betreuung-in-deutschland/>.

22 Minor Kontor, *Häusliche Betreuung in Deutschland als Schwerpunkt im Rahmen des Projektes “MB 4.0 – Gute Arbeit in Deutschland. Zusammenfassung und Ergebnisse [Domestic care in Germany as a focus of the Project MB4.0. Summary and results]*, 6.

23 DIMR, *Harte Arbeit, wenig Schutz. Osteuropäische Arbeitskräfte in der häuslichen Betreuung in Deutschland [Hard work, little protection. Eastern European care workers in Germany]*, 15; Minor Kontor, *Häusliche Betreuung in Deutschland als Schwerpunkt im Rahmen des Projektes „MB 4.0 – Gute Arbeit in Deutschland. Zusammenfassung und Ergebnisse [Domestic care in Germany as a focus of the Project MB4.0. Summary and results]*, 3.

24 Minor Kontor, Agnieszka Skwarek, Karolina Potocka, and Tomasz Wiciak, “Aktuelles aus der Beratung für 24-Stunden-Betreuungskräfte aus Polen [Latest advice for 24-hour carers from Poland],” *Minor Kontor*, May, 2021, 2, <https://minor-kontor.de/aktuelles-aus-der-beratung-fuer-sog-live-ins-aus-polen/>.

25 Steiner et al., “Völlig legal!? Rechtliche Rahmung und Legalitätsnarrative in der 24h-Betreuung in Deutschland, Österreich und der Schweiz [Truly legal!? Legal framing and legality narratives in 24-hour care in Germany, Austria, and Switzerland],” 3.

26 DIMR, *Harte Arbeit, wenig Schutz. Osteuropäische Arbeitskräfte in der häuslichen Betreuung in Deutschland [Hard work, little protection. Eastern European care workers in Germany]*, 16.

27 Alexandra Adamescu, “Exploatare și izolare. Ce înseamnă să fii îngrijitoare „24 din 24” în Germania? [Exploitation and isolation. What does it mean to be a 24h care worker in Germany?],” *Pressone*, August 22, 2022. <https://pressone.ro/exploatare-si-izolare-ce-inseamna-sa-fii-ingrijitoare-24-din-24-in-germania/>; DIMR, *Harte Arbeit, wenig Schutz. Osteuropäische Arbeitskräfte in der häuslichen Betreuung in Deutschland [Hard work, little protection. Eastern European care workers in Germany]*, 27.

28 DIMR, *Harte Arbeit, wenig Schutz. Osteuropäische Arbeitskräfte in der häuslichen Betreuung in Deutschland [Hard work, little protection. Eastern European care workers in Germany]*, 27.

do they work with an employment contract for the family.²⁹

Both types of employment bypass legal provisions designed to protect employees. If the live-in is self-employed, they are not entitled to the minimum wage, the employer does not pay contributions to health, pension, accident or unemployment insurance, nor do they receive paid sickness or vacation days. Neither the 8-hour working day nor the provisions for rest periods are respected.³⁰ But if you promise “24-hour” care -which almost all agencies do-³¹ these are precisely the provisions you want to avoid. Therefore, many carers end up working more than 8 or 10 hours a day. Additionally, there is the risk of “bogus self-employment”, meaning the relationship is actually one of employment. If it turns out that someone was actually employed, the employer has to retroactively pay the social contributions for their employee, with half of the contributions being deducted from the employee’s wage.³²

With posting contracts, there is an employment contract in the country of origin, and the person is posted to Germany for a certain period of time. In this case, the most critical provisions of German labour law apply, such as the

minimum wage or working hours. Yet, the person remains socially insured in the country of origin and must receive a certificate proving it. The certificate almost never surfaces, and the contributions paid are often much lower than they should be. Moreover, carers are often unable to get medical treatment in Germany because they do not receive a European Health Insurance Card from their employer.³³

A German employment contract is the best solution because it guarantees employees all their rights. But even here, there are pitfalls: Minijob or Midijob contracts. Midijob means that the working week cannot exceed 34 hours, and the employer pays less in social security contributions. In the case of a Minijob, working time cannot exceed 46 hours a month. Too little for any proper care work.³⁴

Carers can challenge the *status quo*, and they sometimes win, as is the case of Dobrina D. from Bulgaria.³⁵ She claimed overtime pay, went through all the courts, and won. In June 2021, the Federal Labour Court in Germany ruled that the period during which 24-hour caregivers remain at the disposal of the person under their care is working time and must be paid at the minimum wage.³⁶

²⁹ *Ibid.*

³⁰ Adamescu, *Exploatare și izolare. Ce înseamnă să fii îngrijitoare “24 din 24” în Germania?* [Exploitation and isolation. What does it mean to be a 24h care worker in Germany?]; DIMR, *Harte Arbeit, wenig Schutz. Osteuropäische Arbeitskräfte in der häuslichen Betreuung in Deutschland* [Hard work, little protection. Eastern European care workers in Germany], 29.

³¹ DIMR, *Harte Arbeit, wenig Schutz. Osteuropäische Arbeitskräfte in der häuslichen Betreuung in Deutschland* [Hard work, little protection. Eastern European care workers in Germany], 34.

³² Office for the Equal Treatment of EU Workers “FAQ Special forms of work,” *Office for the Equal Treatment of EU Workers*, 2023, <https://www.eu-gleichbehandlungsstelle.de/eugs-en/eu-citizens/frequently-asked-questions/faq-special-forms-of-work-1916802>.

³³ Adamescu, *Exploatare și izolare. Ce înseamnă să fii îngrijitoare “24 din 24” în Germania?* [Exploitation and isolation. What does it mean to be a 24h care worker in Germany?]; DIMR, *Harte Arbeit, wenig Schutz. Osteuropäische Arbeitskräfte in der häuslichen Betreuung in Deutschland* [Hard work, little protection. Eastern European care workers in Germany], 28.

³⁴ Adamescu, *Exploatare și izolare. Ce înseamnă să fii îngrijitoare “24 din 24” în Germania?* [Exploitation and isolation. What does it mean to be a 24h care worker in Germany?]; DIMR, *Harte Arbeit, wenig Schutz. Osteuropäische Arbeitskräfte in der häuslichen Betreuung in Deutschland* [Hard work, little protection. Eastern European care workers in Germany], 30-35.

³⁵ 1 BAG, 24.06.2021 - 5 AZR 505/20.

³⁶ 1 BAG, 24.06.2021 - 5 AZR 505/20.

However, two years after the Court's decision, home care is still in a legal grey area, presenting particular challenges in terms of control and law enforcement. Care workers live extremely isolated in the same home as the person in need of care, making it challenging for them to make social acquaintances or, if necessary, unionise.³⁷ Additionally, due to the inviolability of the home, almost no controls in private households can be performed.³⁸

Eastern European Workers can easily take up work in Germany due to free movement in the EU and often do so to earn more money. However, working conditions are dubious; they oftentimes work more hours than legally allowed, and controls are uncommon in private households. This type of work is compatible with the ideal of "care at home" in an ageing society that can no longer provide proper home care due to the increasing number of women in the labour force and the majority of households being one- or two-person households. In this way, Germany evades Baumol's cost disease, namely paying prices for care work that are too high for the average person to afford while still finding people willing to do the job.³⁹

Care Vacuum in the Country of Origin: Romania as a Case Study

This section considers the consequences of care migration in a country of origin with a familistic welfare system by taking a closer look at Romania. Romania has an ageing population as well, smaller household sizes, growing employment rates for women, and very little formal support when it comes to elderly care. Compared to Germany, the country has had high emigration percentages.

Romania's population is steadily declining and rapidly ageing.⁴⁰ Its population decline can be mainly attributed to four factors: more deaths than births; a large number of emigrants since 2001, when most EU visa requirements for Romanian citizens were liberalised; fertility rates of around 1.6 births per woman in the last two decades; and rising life expectancy.⁴¹

When considering household sizes, similarities to those found in Germany become apparent. The household size in Romania has decreased to 2.6 members.⁴² Women's employment is growing.⁴³ Additionally, the percentage of older people in the urban area is 16.4% of the population, while in the rural areas, they represent 20.2%.⁴⁴

37 Anita Heindlmaier and Carina Kobler, "Essential, lonely and exploited: why mobile EU workers' labour rights are not enforced," *Journal of Ethnic and Migration Studies* 49, no. 15 (2022): 3689–3708, 3700.

38 Heindlmaier and Kobler, *Essential, lonely and exploited: why mobile EU workers' labour rights are not enforced*, 3700.

39 Helma Lutz and Ewa Palenga-Möllnbeck, "Care Work Migration in Germany: Semi-Compliance and Complicity," *Social Policy & Society* 9, no 3 (2010): 419–430, 426; Giuseppe Sciortino, "Immigration in a Mediterranean Welfare State: The Italian Experience in Comparative Perspective," *Journal of Comparative Policy Analysis: Research and Practice* 6, no 2, (2004): 111-129.

40 WHO, Regional Office for Europe "Country case study on the integrated delivery of long-term care: Romania," WHO/EURO:2020-5261-45025-64131, World Health Organization. Regional Office for Europe, 2020, 9. <https://apps.who.int/iris/handle/10665/352848>.

41 WHO, *Country case study on the integrated delivery of long-term care: Romania*, 10.

42 *Ibid.*, 11.

43 Institute of Statistics Romania "Women and Men. Work and life Partnership," *Institute of Statistics Romania*, February 28, 2023, 38, <https://insse.ro/cms/ro/content/femeile-%C8%99i-barba%C8%9Bii-parteneriat-de-munc%C4%83-%C8%99i-via%C8%9B%C4%83-limba-englez%C4%83-0>

44 WHO, *Country case study on the integrated delivery of long-term care: Romania*, 10.

Romania's welfare system does not fit into one of the classical Esping-Andresen types (liberal, conservative-corporatist, or social democratic), having characteristics of all types.⁴⁵ Nevertheless, it is family-based, which is clear when one looks at the attitudes of the population towards elderly care, but also policies in this area. Almost 80% of respondents in a 2007 Eurobarometer survey believed that family members and unpaid carers were the best arrangements for caring for the elderly.⁴⁶ Conversely, only 5% of respondents considered care in residential institutions as a favourable option.⁴⁷

State policies back these attitudes. As of 2018, the government only employed 7,000 people as personal carers for older people, equivalent to less than 0.2% of the total population over 65.⁴⁸ On the other hand, out of 886,950 registered people with disabilities, their families took care of 98.2%.⁴⁹ The uneven geographical distribution of ageing in Romania makes providing health and social care services to the isolated elderly population difficult: the demographic dependency ratio, the ratio of the population aged 65+ to the working age population, can be as much as 2.5 times higher in the smallest communes compared to urban

settlements.⁵⁰ According to a study in 2021, informal care is one of the most important pillars of long-term care. Families and primarily middle-aged women are called upon to supplement formal care and the shortcomings of the system.⁵¹ However, the same group of caregivers often migrates abroad to care for the elderly, exacerbating the care drain within the country.

Two main challenges hinder access to specialised medical services and hospitalisation: financial constraints and limited availability of medical services, particularly in rural areas.⁵² The proximity of pharmacies and medical facilities is a problem, as they are usually located in larger nearby towns, making it practically impossible for dependent elderly individuals to travel to these services.⁵³ The lack of informal family support further aggravates the issue, as young people have often migrated away, leaving the elderly alone.⁵⁴ Additionally, the provision of elderly care services varies among local authorities in response to an ageing population, with decisions being based on the experience and priorities of the mayor and local council rather than community needs.⁵⁵ In the absence of family help, older individuals may rely on neighbours

45 Ileana Tache and Cristina Neesham, "The performance of welfare systems in post-communist Europe: the cases of Romania and Bulgaria," *Journal of economic research* 2, no 5 (2011): 90 - 107, 90, <https://www.semanticscholar.org/paper/The-performance-of-welfare-systems-in-Europe%3A-the-Tache-Neesham/Od39cc0158cc35feb2fa8b934c1bc401649eacbe>.

46 Eurobarometer "Health Care Service, Undeclared Work, EU Relations with its Neighbour Countries, and Development Aid," *Eurobarometer* 67.3 May-June 2007 ZA No. 4561.

47 *Ibid.*

48 Programul Operațional Capacitate Administrativă Competența face diferența (POCA), Elisabeta Brumă, Elena Moldoveanu, Adelina Rădulescu, and Valentin Vladu, "Studiu de Evaluare a nevoii de îngrijire pe termen lung în populația României [Long Term Care Needs Assessment Study in the Romanian Population]," CNAS, February 2021, 34, <https://cnas.ro/wp-content/uploads/2021/08/A7.1-Studiu-privind-nevoia-de-ingrijire-la-domiciliu-de-lunga-durata-8iulie.pdf>.

49 Ministry of Labour and Social Security Statistic Data 31.03.2023, <https://anpd.gov.ro/web/transparenta/statistici/>.

50 POCA, *Studiu de Evaluare a nevoii de îngrijire pe termen lung în populația României [Long Term Care Needs Assessment Study in the Romanian Population]*, 51.

51 *Ibid.*, 34.

52 *Ibid.*, 67.

53 *Ibid.*

54 *Ibid.*

55 *Ibid.*, 71.

or others in their immediate vicinity for support.⁵⁶

their daughters, nieces or even sons care for someone else abroad.

The Romanian welfare system strongly relies on families to provide care. Due to an ageing population, smaller household sizes, the emigration of working-age people, and underdeveloped care policies, elderly people, especially those living in rural areas, are often left to fend for themselves or forced to rely on informal care from neighbours.

Conclusion

This paper has shown how familistic welfare systems in modern societies create care vacuums in some Western European countries, like Germany. This is evident in societies mainly characterised by an ageing population, growing female labour participation, and decreasing numbers of multi-generational households.

The vacuum is filled mainly by migrant care workers from Eastern Europe, who, in search of higher wages, often accept jobs that fall short of the German legal standards, making their labour affordable for locals. While affordable, these migrants usually work longer hours than legally foreseen, are isolated, have difficulties unionising, and work in a legal grey area with contracts meant to exploit their work rather than protect it.

The paper also highlighted how care migration impacts elderly care in countries of origin with family-based welfare systems, such as Romania, where elderly living in rural areas are often left to manage on their own or rely on neighbours, while

⁵⁶ *Ibid.*

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CAUGHT BETWEEN POLITICAL POWER PLAY AND LEGAL AMBIGUITY: THE SPITZENKANDIDATEN PROCESS BEFORE THE 2024 ELECTION

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Introduction

Ursula von der Leyen will run again for European Commission Presidency² headlined the newspaper “The Brussels Times” this February. The Christian Democratic Union (CDU), the German conservative party, had just voted unanimously for her candidacy. A remarkable headline, considering that von der Leyen never actually “ran” for the position of President of the European Commission. In 2019, when she was elected by the European Parliament for the first time, she had appeared on no ballot paper and on election day few people outside Germany had ever heard her name. While her election as President of the Commission was legally unobjectionable, it had only been made possible through a political deal that bypassed the so-called Spitzenkandidaten (‘lead candidate’) process - a move considered to be undemocratic by many.³ Today, five years later, as von der Leyen has actually been declared to be the lead candidate of the European People’s Party (EPP)⁴ for the 2024 election and is seeking her second mandate, it is time to have a critical look at the relevance of the process

altogether and ask what would be needed to make it work this time.

This article examines the often-debated Spitzenkandidaten process. After explaining what the process is, its motives, and legalities, it discusses what happened in 2019 to the Spitzenkandidaten process and compares it to the situation in 2024. The article then identifies the core problem of the process and finally suggests ideas on how to revive the Spitzenkandidaten process within the current legal framework.

What is the Spitzenkandidaten Process?

The general concept of the Spitzenkandidaten process is as follows: each European political party nominates one person to be their lead candidate in the European Parliament election to become the next President of the European Commission.⁵ While the members of the European Parliament are elected on a national level, after the election, they form political groups within the European Parliament according to their ideological

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2 The Brussels Times, “Ursula von der Leyen will run again for European Commission presidency,” *The Brussels Time*, February 19, 2024, <https://www.brusselstimes.com/931065/ursula-von-der-leyen-candidate-for-second-mandate-as-european-commission-president-tbtb>.

3 See among others: Jon Stone, “This is not democracy: European parliament unites to condemn selection of new EU Commission president behind closed doors,” *Independent*, July 4, 2019, <https://www.independent.co.uk/news/world/europe/european-commission-president-ursula-von-der-leyen-juncker-eu-parliament-a8987841.html>.

4 FAZ, “EVP wählt von der Leyen zur Spitzenkandidatin [EPP elects von der Leyen as lead candidate],” *FAZ*, March 7, 2024, <https://www.faz.net/aktuell/politik/ausland/eu-kommission-ursula-von-der-leyen-von-evp-zur-spitzenkandidatin-gewaehlt-19569909.html>.

5 Andrew Gray, Jacopo Barigazzi, and Maia de la Baume, “Who killed the Spitzenkandidat?,” *Politico*, July 5, 2019, <https://www.politico.eu/article/who-killed-the-spitzenkandidat-european-parliament-election-2019-transition/>.

beliefs and regardless of their nationalities. According to the Rules of Procedure of the European Parliament, at least 23 members coming from at least one-quarter of the Member States are needed to form a political group.⁶ These political groups within the European Parliament broadly resemble the European political parties that nominated their lead candidates. In line with the Spitzenkandidaten process, the European Council then proposes to elect the lead candidate of the European political party that won the most seats and managed to form a majority in the Parliament to become President of the European Commission. Finally, the members of the European Parliament would then officially elect this candidate to become the next President of the European Commission.

The Legal Background

It is important to note that the Spitzenkandidaten process, as described above, is not a legal obligation laid down in the treaties of the European Union. Even more so, the provision that the President of the European Commission should be tied to the result of the European Parliament election is a recent one. This link was only introduced in 2009 with the Lisbon Treaty.⁷

Before the European Parliament -and thereby the political groups- can vote on a new president, it is up to the European Council to act. Article 17 paragraph 7 of the Treaty on the European Union (TEU) states

that: *“Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission”*. The wording here is crucial because, legally, the European Council only has to *“take the elections into account”*. This provision can be interpreted in various ways, leaving a certain wiggle room for the European Council on how to act. In principle, it cannot be deduced from the wording of Article 17 TEU that the European Council is obliged to select the candidate of the strongest political group.⁸ A provision like this was also rejected in the draft Treaty establishing a constitution for the European Union.⁹ Besides, the necessity to *“take into account”* the election result is difficult to litigate.¹⁰ Furthermore, the European Council must also consider other scenarios. For example, a political group could suffer significant losses but remain the biggest one in the Parliament. Another possible scenario that the European Council must consider is for a majority not comprising the biggest political group to be formed in the European Parliament.¹¹ Legally, the election of the Commission President is, therefore, an interlinked process between the two EU institutions, whereas the Spitzenkandidaten process tried to shift the power to the Parliament (and the electorate) without changing the underlying laws.

⁶ European Parliament, *Rules of Procedure*, Rule No. 33, November, 2023.

⁷ Silvia Kotanidis, *Spitzenkandidaten or the lead candidate process* (Brussels: European Parliamentary Research Service, 2023), 6.

⁸ Matthias Ruffert, “Art 17 EUV,” in *EUV/AEUV*, ed. Christian Calliess and Matthias Ruffert (Beck, 2022), Rz 46.

⁹ *Ibid.*

¹⁰ Paul Nemitz, “Art 17 EUV,” in *EU-Kommentar*, ed. Ulrich Becker, Armin Hatje, Johann Schoo and Jürgen Schwarze (Nomos, 2019), Rz 71.

¹¹ Hable, “Art 17 EUV,” in *EUV/AEUV*, ed. Thomas Jaeger and Karl Stöger (Manz, 2023), Rz 97.

The Motives Behind It

The EU follows a system of dual democracy in which political legitimacy is achieved through the elected governments on the one hand and the directly elected Members of the European Parliament on the other.¹² Given the long debate about the EU's alleged lack of democratic legitimacy, it is reasonable to think of new ways of achieving greater legitimacy. The Spitzenkandidaten process puts the established system of dual democracy into question.¹³ By tying the post of President of the European Commission to the election result it gives the electorate a say in the decision on who will be the next Commission President. Thereby, the Spitzenkandidaten process "*shifts the focus from the logic of dual legitimacy to a logic of direct and simple legitimacy*".¹⁴

Besides achieving greater legitimacy, the supporters of the Spitzenkandidaten process point out three additional purposes that it should serve. Firstly, making the nomination process of the President of the European Commission more transparent and comprehensible for the electorate by "*emancipating*" it from any "*behind-closed-door deals*".¹⁵ Secondly, increasing voter turnout by personalising the election.¹⁶ In the last European election,

overall voter turnout was roughly 50%, with some Member States like Slovakia scoring below 30%.¹⁷ The Spitzenkandidaten should engage the electorate deeper into EU affairs and thereby convince them to cast their vote.¹⁸ The third argument concerns European political parties and their role in the political process of the European Union. Unlike national parties, European political parties do not directly participate in elections, and their names, logos, and political programmes are seldom used in election campaigns.¹⁹ The Spitzenkandidaten process should therefore further "Europeanise" the electoral campaigns and streamline the national elections campaigns to better highlight European issues.²⁰

From 2019 to 2024

While the first implementation of the Spitzenkandidaten process in 2014 was generally considered a success because the lead candidate of the biggest political group in the Parliament, Jean-Claude Juncker, was elected President of the Commission, this can hardly be said of 2019. As mentioned earlier, Ursula von der Leyen ended up being elected despite not being not only a lead candidate, but also a candidate at all. The failure of the Spitzenkandidaten process in 2019 weakened the European

12 Armin von Bogdandy, "A Disputed Idea becomes Law: Remarks on European Democracy as a Legal Principle," in *Debating the Democratic Legitimacy of the European Union*, ed. Beate Kohler-Koch and Berthold Rittberger (Rowan & Littlefield, 2007), 33 – 44, 37; Eva G. Heidbreder, "Die Dilemmata des Spitzenkandidaten-Verfahrens: Erfolgreich gescheitert? [The dilemmas of the Spitzenkandidaten process: failed successfully?]," *Regierungsforschung.de*, 3.

13 Heidbreder, *Die Dilemmata des Spitzenkandidaten-Verfahrens: Erfolgreich gescheitert?*, 4.

14 *Ibid.*

15 Kotanidis, *Spitzenkandidaten or the lead candidate process*, 16.

16 *Ibid.*

17 European Parliament, "2019 European election results," October 22, 2019, <https://www.europarl.europa.eu/election-results-2019/en/turnout/>.

18 Kotanidis, *Spitzenkandidaten or the lead candidate process*, 16.

19 Klaus Poier, "Europeanisation of the Party Families in the Context of the 2019 EP Elections," in *Außen- und sicherheitspolitische Integration im Europäischen*, ed. Andreas Kumin, Kirsten Schmalenbach, Lorin-Johannes Wagner, Julia Schimpfhuber (Vienna: Jan Sramek, 2020), 519-525, 523.

20 *Ibid.*

Parliament and European political parties as a whole.²¹ Why the process failed and who was responsible for this has been a topic of debate ever since. In July 2019, the newspaper Politico published a long piece analysing the different key players' roles and positions from the EPP MEPs, over Viktor Orban, to Emmanuel Macron and others. By comparing the bargaining for top EU positions after the 2019 election to an Agatha Christie novel, Politico answered the question simply: all of them did it together.²²

Choosing the President of the European Commission is difficult. Following the election of the European Parliament, other positions such as the other 26 Commissioners and the President of the European Council must be filled. While deciding on this "*staff package*", the EU must find a difficult balance between the political groups in the European Parliament, big and small Member States, new and old ones, and ultimately also between women and men.

Since 2019, few European leaders have come out in support of the Spitzenkandidaten process. This is mainly due to the fact that, as explained earlier, the decision to appoint the next President of the Commission currently lies with the European Council, whose members are rarely willing to cede their power voluntarily to another EU institution. This points to the inter-institutional power struggle between the European Council and the European Parliament. While the

Parliament favours the Spitzenkandidaten system and thereby increases the chances for one of its members to become President, the European Council is naturally more reluctant. This is embedded in the larger question of the balance in the EU between an inter-governmental focused system where the Member States remain the highest authority and a more supranational approach where the Parliament emancipates itself from the Member States -a balance that characterises the EU's unique form of governance.

Albeit unenthusiastically, most of the political parties have again nominated a lead candidate for the 2024 European elections. Ursula von der Leyen was nominated at an EPP congress in Bucharest at the beginning of March.²³ The second biggest European political party, the European Socialists, nominated Nicolas Schmit, who is commonly seen as a low-profile candidate that few people outside Brussels have heard of.²⁴ Other parties have also nominated lead candidates or leading candidates teams, including, among others, the Alliance of Liberals and Democrats for Europe (ALDE), the European Green Party and the European Left.²⁵ Overall, however, aside from von der Leyen, there are no political heavyweights, such as former heads of government running; a sign that could be read as an indication that the Spitzenkandidaten process could meet the same fate as it did in 2019.

21 Poier, *Europeanisation of the Party Families in the Context of the 2019 EP Elections*, 6.

22 Gray et al., *Who killed the Spitzenkandidat?*

23 FAZ, *EVP wählt von der Leyen zur Spitzenkandidatin*.

24 Barbara Moens, Eddy Wax, Jacopo Barigazzi, and Aitor Hernández-Morales, "Europe's struggling Socialists play defense," *Politico*, March 1, 2024, <https://www.politico.eu/article/nicolas-schmit-eu-socialists-commission/>.

25 Manuel Müller, "The median EU lead candidate in 2024 is an MEP, male and from Germany," *Der (europäische) Föderalist*, March 27, 2024, <https://www.foederalist.eu/2024/03/lead-candidates-2024.html>.

How to Revive the Spitzenkandidaten Process

The first step to revive the Spitzenkandidaten process lies with the lead candidates themselves. Ideally, these would be people whose names are known and who have substantial political power in order to demonstrate that the parties nominating them genuinely support their candidates and take the process seriously. Secondly, the election campaigns would have to be organised and executed on a European level. Only if the lead candidates are the face of their party in all of the Member States can they convincingly claim to have a stronger democratic mandate. This would involve streamlining the election campaigns across Member States (for example, regarding the use of party logos, colours, promotional material), featuring the lead candidate on the election poster next to the national candidate and inviting them to speak at campaign rallies in the Member States. The third condition requires a broad consensus on the application of the Spitzenkandidaten process. All the political forces across party lines and across the EU institutions (i.e., the heads of government and state in the European Council, the leaders of the political parties and the members of the European Parliament) would have to publicly commit to the application of the Spitzenkandidaten process. Ultimately, Council leaders are members of the same parties that advocate at the European Parliament for the application of the process. Unless there is a commitment by all the key players, the risks that the

Spitzenkandidaten process could be abandoned in the aftermath of the election remains too high.

Nevertheless, even if these three conditions are met, the core problem abides: "... *the Spitzenkandidaten process remains of a political and not a legal nature*".²⁶ The process simply has no legal foundation and is, in essence, a political idea, the survival of which fully depends on the commitment of EU leaders. The gap between what is politically demanded (by at least some EU leaders) and what is legally necessary is too substantial. As long as the Spitzenkandidaten process is applied within the current legal framework of Article 17 TEU, it will remain a political idea to be tossed aside as soon as it becomes politically inconvenient. In her comprehensive paper on the Spitzenkandidaten process, policy analyst Kotanidis identifies several possible solutions: from turning it into a "*constitutional convention*" over formalising an interinstitutional agreement to ultimately amending the TEU.²⁷ However, all of these options would require a broad political consensus in the EU (including the EU institutions and the Member States) that has not (yet) emerged.

Conclusion

The 2019 election led to a deconcentration and pluralisation of the European party landscape.²⁸ According to surveys,²⁹ this trend will likely continue with the 2024 election. Even if von der Leyen's party gets the most seats in the European Parliament,

²⁶ Kotanidis, *Spitzenkandidaten or the lead candidate process*, 36.

²⁷ *Ibid.*, 36-59.

²⁸ Poier, *Europeanisation of the Party Families in the Context of the 2019 EP Elections*, 6.

²⁹ Europe Elects, "European Parliament Seat Projection," *Europe Elects*, February 29, 2024 <https://europeelects.eu/europeanunion/>.

her re-election is anything but certain as she faces opposition in her own ranks and will have to seek a majority in what will probably be a more decentralised, pluralised, right-wing European Parliament than ever. Considering these circumstances, it is not inconceivable that 2019 may repeat itself and that the next President of the Commission may again be someone who was not a lead candidate.

21st Century Fascist Warfare: Putin's Use of Nazi Doctrine in the Russo- Ukrainian War

by Matyas Goupil¹

Introduction

Vladimir Vladimirovich Putin proclaims, often and emphatically, that Russia invaded Ukraine in February 2022 to "demilitarise" and disband the "neo-Nazi" government of Kyiv.² He stipulates that 30,000 civilian casualties, 10.2 million displaced lives, and up to \$1 trillion in damages are prices paid for the defeat of an ideology that, as in 1939, threatens to destroy Europe.³ Putin claims his mission in Ukraine is to "protect people ... facing humiliation and genocide from the [neo-Nazi] Kyiv regime".⁴ Russia is safeguarding world security by pursuing this war;⁵ Putin's "denazification" project is, supposedly, benevolent.

Putin's anti-Nazi justification of war sparks fierce controversy. Hundreds of genocide, Nazism, and WWII scholars signed a statement "rejecting the Russian government's cynical abuse of ... the memory of WWII".⁶ The analyses condemning Putin's "Nazist Ukraine" narrative are extensive.⁷ Albeit beyond the scope of this

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² Vladimir Putin, "Address by the President of the Russian Federation," President of Russia, February 24, 2022, <http://en.kremlin.ru/events/president/news/67843>; Eduard Popov, "Ukrainian Nazism Today: Origin and Ideological and Political Typology," *The Ministry of Foreign Affairs of the Russian Federation*, December 11, 2023, https://mid.ru/en/foreign_policy/historical_materials/1920326/.

³ Jeff Merritt, "Even as the War Persists, Ukraine Is Rebuilding - Here's How," World Economic Forum, February 6, 2024, <https://www.weforum.org/agenda/2024/02/even-as-the-war-persists-ukraine-is-rebuilding-heres-how/>; Statista Research Department, "Topic: Russia-Ukraine War 2022-2024," *Statista*, February 23, 2024, <https://www.statista.com/topics/9087/russia-ukraine-war-2022/#topicOverview>; NB: statistics as of March 2024; NB: statistics are as of early 2024.

⁴ Putin, *Address by the President*.

⁵ *Ibid.*

⁶ Izabella Tabarovsky, "Statement on the War in Ukraine by Scholars of Genocide, Nazism and World War II," *Jewish Journal*, March 2, 2022, <https://jewishjournal.com/news/worldwide/345515/statement-on-the-war-in-ukraine-by-scholars-of-genocide-nazism-and-world-war-ii/>.

⁷ Anton Shekhovtsov, "The Spectre of Ukrainian 'Fascism': Information Wars, Political Manipulation, and Reality," *European Council on Foreign Relations*, April 26, 2014, 80-87; Vyacheslav Likhachev, "The 'Right Sector' and Others: The Behavior and Role of Radical Nationalists in the Ukrainian Political Crisis of Late 2013 — Early 2014," *Communist and Post-*

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article, it is safe to know that Ukraine's contemporary regime is not National Socialist, nor does it aim to be.⁸ Rather, this emphasis on consolidated Nazism in the Ukrainian state is Putinist propaganda: distorted truths needed to foster popular support for the war within Russia.⁹

Nonetheless, the Russo-Ukrainian War is not void of fascism; the opposite is true. The war sees the proactive employment of fascist, specifically Nazi, rhetoric. However, evidence suggests that Putin, rather than Ukraine, is the culprit.¹⁰ The Russian Federation's aggression in Ukraine engages with the international relations framework of Carl Schmitt: perhaps modern history's most controversial political philosopher.¹¹ As the "*self-appointed ideologue of the Nazis*", German legal theorist and "*crown jurist of the Third Reich*" Carl Schmitt represented the fascist perspective on the tumultuous geopolitical landscape of interwar Europe.¹² Beyond drafting the legal framework that allowed Hitler to assume power through the 1933 Enabling Act, Schmitt deliberated on concepts central to Nazism's legal and geopolitical worldview.¹³

However, it seems as if Hitler is not the only ruler to have been inspired by Schmitt. His influence stretches across modern geopolitics, retaining vestigial relevance throughout the globe. From the Kremlin, however, Schmittian doctrine looms over Russia's war and Putinist international relations like a spectre.¹⁴ Russia's *gosudár*' employs the theoretical framework of Nazi Germany's 'crown jurist' to a significant extent;¹⁵ The Kremlin devised the Russo-Ukrainian War through the eyes of Carl Schmitt.

Scholarship has deliberated on the Kremlin's Schmittian tendencies since Filippov's 2008 investigation on the matter.¹⁶ Auer and Kurylo connected these practices with the 2014- Ukraine crisis in 2015 and 2016 respectively, while Lewis took Schmitt as a basis for a new Russian authoritarianism.¹⁷ However, academic literature largely fails to recognise the significance of Schmitt's fascist doctrine to Russia's conduct in the Russo-Ukrainian War. Skordas and Wilson highlight the relevance of "*Großraum*" (one of Schmitt's central concepts explored in this article) to the war, but provide a more limited examination of other crucial aspects of

Communist Studies 48, no. 2-3 (2015): 257-71, <https://doi.org/10.1016/j.postcomstud.2015.07.003>.

- 8 Josh Cohen, "Commentary: Ukraine's Neo-Nazi Problem," *Reuters*, March 20, 2018, <https://www.reuters.com/article/idUSKBN1GV2TC/>.
- 9 Rachel Treisman, "Putin's Claim of Fighting against Ukraine 'neo-Nazis' Distorts History, Scholars Say," NPR, March 1, 2022, <https://www.npr.org/2022/03/01/1083677765/putin-denazify-ukraine-russia-history>.
- 10 Achilles Skordas, "Russia's Eurasian Großraum and Its Consequences," *Verfassungsblog*, March 31, 2022, <https://verfassungsblog.de/russias-eurasian-groraum-and-its-consequences/>; Andrew Wilson, "Inside the Russian Geopolitical Mind: Pseudo-Justifications behind the War in Ukraine," *ECFR*, February 21, 2023, <https://ecfr.eu/article/inside-the-russian-geopolitical-mind-pseudo-justifications-behind-the-war-in-ukraine/>; Stefan Auer, "Carl Schmitt in the Kremlin: The Ukraine Crisis and the Return of Geopolitics," *International Affairs* 91, no. 5 (2015): 953-68, <https://doi.org/10.1111/1468-2346.12392>; Timothy Snyder, "The Battle in Ukraine Means Everything," *The New Republic*, March 20, 2024, <https://newrepublic.com/article/117692/fascism-returns-ukraine>.
- 11 Peter C. Caldwell, "Controversies over Carl Schmitt: A Review of Recent Literature," *The Journal of Modern History* 77, no. 2 (2005): 357-87, <https://doi.org/10.1086/431819>.
- 12 George Schwab, "Introduction," in *The Concept of the Political*, ed. Carl Schmitt (Chicago, Illinois: University of Chicago Press, 2007), 3-17, 3.
- 13 *Ibid.*
- 14 Alexandr Filippov, "Ожиревший Левиафан [Obese Leviathan]," *Russian Journal* (2008): 50-57 <http://russ.ru/var/russ/storage/original/application/2c39c24ae1bc5f49f9b948957b926a1a.pdf>; Auer, "Carl Schmitt in the Kremlin".
- 15 "*Gosudar*' / *государь*": Russian word for sovereign/ruler of the state, refers to Vladimir Putin in this case.
- 16 Filippov, *Ожиревший Левиафан [Obese Leviathan]*.
- 17 Auer, *Carl Schmitt in the Kremlin*; Kurylo, *Russia and Carl Schmitt*; David Lewis, *Russia's New Authoritarianism: Putin and the Politics of Order* (Edinburgh: Edinburgh University Press, 2021).

the German's theories.¹⁸ It is, therefore, necessary to reconcile the rest of Schmitt's framework with Putin's war in order to understand the implicitly Nazi nature of this supposedly anti-Nazi special military operation.

This article conducts a comparative discourse analysis between Putinist primary sources, scholarly literature on Schmitt and the Russo-Ukrainian War, and Carl Schmitt's own writings. In doing so, it unveils the great extent to which Russia's war conforms to fascist rhetoric. The article focuses on three core concepts within Schmittianism - "*the concept of the political*", "*sovereignty*", and "*Großraum*"- and unearths the way the Russo-Ukrainian War employs them all. Through his engagement with Schmitt's three aforementioned theories in Ukraine, Vladimir Putin has reintroduced fascist warfare to Europe.

"The concept of the political": Putin's Schmittian War Against the West and Liberalism

Carl Schmitt posits the friend-enemy distinction as the cornerstone of political behaviour, as all "*political actions and motives*", according to the philosopher, "*can be reduced [to] friend and enemy*".¹⁹ "*The concept of the political*" refers to this dichotomy. This lens allows political entities -such as the Russian Federation- to

mould their identities against those they consider enemies. Schmitt underscores that "*enemies*" are more than mere competitors; they are "*in an intense way, existentially something different and alien*".²⁰ Enemies, therefore, often manifest as threats to sovereignty and survival. Because of the ideological differences between enemies and "*us vs. them*" identity formation, Schmittian enemies become natural opponents during conflict. Filippov assesses how the Kremlin pursues friend-enemy identification in a strikingly Schmittian manner.²¹ Since 2007, Putin has never been shy about outlining who his existentially alien enemy is: the liberal West.²² His natural opponent in geopolitical conflict is Atlanticism.

Schmitt's political philosophy has paved the path for Putin's affront on liberalism we see in Ukraine today, as the Nazi theorist proves significant to contemporary challenges to liberalism across the world.²³ Crucial to Schmitt's critique of the ideology is that liberalism neglects and ultimately abandons the binary friend-enemy concept of the political.²⁴ In doing so, liberalism seeks to depoliticise society, thus introducing a myriad of dysfunctional tendencies that threaten sociopolitical stability. Not only does the neglect of the political allow enemies to dissipate within and around liberal societies, but it also strips citizens of the agency to fight them. People under liberalism, therefore,

18 Skordas, *Russia's Eurasian Großraum*; Wilson, *Inside the Russian Geopolitical Mind*.

19 Carl Schmitt, *The Concept of the Political*, trans. George Schwab (Chicago: University of Chicago Press, 2007), 26.

20 *Ibid.*, 27.

21 Filippov, *Ожиревший Левиафан [Obese Leviathan]*.

22 Vladimir Putin, "*Speech and the Following Discussion at the Munich Conference on Security Policy*," President of Russia, February 10, 2007, <http://en.kremlin.ru/events/president/transcripts/24034>.

23 Ireneusz Paweł Karolewski, Xie Libin, Haig Patapan, Gábor Halmai, Acar Kutay, Petra Guasti, and William E. Scheuerman, "Correction to: Carl Schmitt and Democratic Backsliding," *Contemporary Political Theory*, April 28, 2023, 1-32, <https://doi.org/10.1057/s41296-023-00626-4>.

24 Schmitt, *The Concept of the Political*, 48.

become “*weak Volk*” subservient to the depoliticising nature of liberal doctrine.²⁵

Putin defaces liberalism on grounds that mimic Schmitt. In a 2019 interview with Financial Times, the *gosudar'* proclaimed that the West's liberal ideology allows enemies of the state to “*rape, plunder, and kill with impunity because their rights [under liberalism] are protected*”.²⁶ Furthermore, rational-legal supremacy within liberalism, according to Putin, has rendered citizens “*zombified by ... an open-mindedness to the [enemy]*”.²⁷ For Putin, as for Schmitt, liberalism is a vessel with which political enemies, including immigrants, sexual minorities, and “*foreign imperialists*” (humanitarian interventionists) seep their destructive tentacles throughout society.²⁸ The Russian President echoes the German scholar when surmising that liberalism's advocacy for individual rights endangers populations by protecting criminals.²⁹ However, Putin's anti-liberalism follows Schmitt beyond ideological opposition; the Kremlin concurs concretely with Schmitt's political opposition to liberalism too. Schmitt chastises the universal imposition of liberal values as oppressive and coercive, a notion that Putin is keen on restating, particularly in regard to the contemporary Ukrainian regime.³⁰

Thus, Ukraine is a battleground in which Putin fights the West's “*unacceptable*” liberal unipolarity.³¹ Beyond claiming a defensive posture against NATO expansion, the Russian leader regards contemporary Ukraine as a Western proxy that was criminally installed through a “*bloody, anti-state, and anti-constitutional coup*”.³² This “*coup*” is Russia's characterisation of Ukraine's popular anti-Russian and pro-democratic (albeit anti-constitutional) Maidan Revolution of 2014. Putin labels the post-Maidan Ukrainian government as oppression enforced by the imposition of liberal values, claiming that “*the people of Ukraine have become hostages of the Kyiv regime and its Western handlers*”.³³ Russia's primary objective in Ukraine is to neutralise Western dominance.³⁴

The ways in which Putin regards Ukraine are thus teeming with Schmitt's concept of the political. For the Kremlin, President Zelenskyy's government represents the two existential enemies of modern Russian history: both Nazism and the West from WWII and the Cold War respectively. Supposedly, the liberal “*Western authors of the anti-Russia project*” suppress the traditionalist Russian culture of Ukraine by establishing a neo-Nazi regime to antagonise Russia.³⁵ Russia's leadership thus espouses Schmitt's

25 *Ibid.*, 54.

26 Lionel Barber, Henry Foy, and Alex Barker, “Vladimir Putin Says Liberalism Has ‘Become Obsolete’,” *Financial Times*, June 28, 2019, <https://www.ft.com/content/670039ec-98f3-11e9-9573-ee5cbb98ed36>.

27 Michel Eltchaninoff, “Vladimir Putin's Quest to Build an Anti-Liberal Empire,” *New Statesman*, November 2, 2021, <https://newstatesman.com/politics/2019/07/vladimir-putins-quest-to-build-an-anti-liberal-empire-2>.

28 *Ibid.*

29 Barber et al., *Vladimir Putin Says Liberalism Has ‘Become Obsolete’*.

30 William E. Scheuerman, “Carl Schmitt's Critique of Liberal Constitutionalism,” *The Review of Politics* 58, no. 2 (1996): 299–322, 309; Putin, *Address by the President*.

31 Putin, *Speech and the Following Discussion*.

32 Vladimir Putin, “*Presidential Address to the Federal Assembly*,” President of Russia, February 21 2023, <http://en.kremlin.ru/events/president/news/70565>.

33 *Ibid.*

34 Centre for Eastern Studies (OSW), “Ukraine Was Just the Beginning. Russia's REAL Reason behind the War,” *YouTube*, February 5, 2024, 3:53, <https://www.youtube.com/watch?v=i21La3zW7Vg>.

35 Vladimir Putin, “*On the Historical Unity of Russians and Ukrainians*,” President of Russia, July 12 2021, <http://en.kremlin.ru/events/president/news/66181>.

ideological and geopolitical gripes with the liberal West. Putin's Atlanticist enemy marks a clear threat "to the very existence of [Russia] and its sovereignty", showing that the Kremlin ostensibly perceives its enemies through the eyes of Nazism's ideologue.³⁶ Meanwhile, Putin's view of the Westernisation of Ukraine as oppressive liberal encroachment corroborates the Schmittian framework through which he sees the war. It is the role of the political entity to identify its enemy; Putin has done so extraordinarily. Russia is mobilised not to fight Ukrainians, as Ukrainians are supposedly Russians too.³⁷ Rather, Russia is waging war on the West and on liberalism.

Sovereignty and the Making of Putin's Emergency "state of exception"

Both Vladimir Putin and Carl Schmitt revolve their geopolitical theories around the sanctity of sovereignty. Russia's *gosudár'* accentuates Schmitt's recognition of the head of state as the supreme authority in deciding their state's destiny. To Hitler's "crown jurist", the capacity and autonomy of decision-making is preeminent to defining sovereignty.³⁸ Schmitt extends this definition beyond the "monopoly to coerce or rule", placing it in the paramount "monopoly to decide".³⁹ Specifically, Schmitt emphasised the ability to decide on "the

exception": a case of extreme peril to the sovereignty or survival of the state.⁴⁰ When faced with these existential emergencies, a Schmittian sovereign should exercise his ability to act beyond established legal and moral frameworks.⁴¹ This is especially necessary if these frameworks diminish a sovereign's power to decide on an exception. Thus, true sovereignty cannot be bound by codified rules or legalities, whether domestic or international. Sovereignty, therefore, presupposes a "willingness and capacity to break the rules".⁴² The Russo-Ukrainian War demonstrates Putin's affinity to this Schmittianism.

Omelicheva and Zubytska recognise Russia's primary objective in international relations as to "reassert its sovereignty against the Atlanticist civilisation".⁴³ Putinist sovereignty, however, clearly malaligns with Max Weber's conventionally accepted definition; the proliferation of private military companies (still illegal under Russian law) displays Putin's apparent lack of monopoly on violence.⁴⁴ Rather, Putin espouses Schmitt's definition: monopoly to decide. In 2005, Putin established Russian sovereignty on the grounds of being able to "define for itself the timeframe and conditions of its progress".⁴⁵ Furthermore, the Kremlin states that true sovereignty is not possessed by all nominally "sovereign" states, as only a handful of states are

36 Putin, *Address by the President*.

37 Putin, *On the Historical Unity of Russians and Ukrainians*.

38 Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago: University of Chicago Press, 2007), 5.

39 *Ibid.*, 66.

40 *Ibid.*, 6.

41 Andrew Norris, "Sovereignty, Exception, and Norm," *Journal of Law and Society* 34, no. 1 (February 28, 2007): 31–45, <https://doi.org/10.1111/j.1467-6478.2007.00380.x>, 35.

42 Lewis, *Russia's New Authoritarianism*, 50.

43 Mariya Y. Omelicheva and Lidiya Zubytska, "An Unending Quest for Russia's Place in the World: The Discursive Co-Evolution of the Study and Practice of International Relations in Russia," *New Perspectives* 24, no. 1 (March 2016): 19–51, 38, <https://doi.org/10.1177/2336825x1602400102>.

44 Maxim Trudolyubov, "Putin Is Destroying the Russian State," *Wilson Center*, July 26, 2023, <https://www.wilsoncenter.org/blog-post/putin-destroying-russian-state>.

45 Vladimir Putin, "Annual Address to the Federal Assembly of the Russian Federation," President of Russia, April 25, 2005, <http://en.kremlin.ru/events/president/transcripts/22931>.

"able to exercise genuinely independent choice".⁴⁶ The Schmittian influence on this notion is readily apparent: "*ability to exercise independent choice*" practically paraphrases "*monopoly to decide*".

"Sovereign is he who decides on the exception";⁴⁷ Putin has done so toward Ukraine quite transparently. Russia responded to the 2014 Maidan Revolution by annexing Crimea and initiating a war in Eastern Ukraine.⁴⁸ This situation was exceptional on three levels: firstly, Putin felt ethnic Russians were under imminent threat from the new, supposedly illegal and illegitimate Kyiv regime.⁴⁹ Secondly, the Westernisation of the Ukrainian government signified liberal encroachment onto Russia, as previously discussed; the overthrow of the pro-Russia regime warranted Russia's state of exception.⁵⁰ Thirdly, as clearly recognised by Schmitt, "*internal political conflict ... can be neutralised by a political conflict directed to the outside world*".⁵¹ In the case of 2014, the Kremlin was neutralising years of anti-Putin protests that began in 2011.⁵² The 2022 invasion did not mark the creation of Putin's state of exception surrounding Ukraine, but rather, it increased its consolidation. Initiating the Russo-Ukrainian War was the method

through which Putin could signify to his citizens and to the world that Russia is in an existential conflict for the survival of its sovereignty: a Schmittian state of unadulterated exception.

Moreover, Schmitt's proclamation of sovereign decision-making over legality is central to Putin's actions in Ukraine. The 2022 invasion violated Article 2(4) of the UN Charter.⁵³ The annexations of Donetsk, Luhansk, Kherson, and Zaporizhia were categorically condemned as illegal.⁵⁴ The *gosudár'* recognises the rule-based international order institutionalised by liberalism and chooses on its pertinence in Russian geopolitics.⁵⁵ Putin, as the sovereign, decides when to abide by Atlanticism's hegemonic legal framework, because abstract notions of international law are insufficient to secure Russia's Schmittian sovereignty.⁵⁶ Putin sees the world through Schmitt's eyes when he berates liberalism's international institutions for undermining the sovereignty of states. He engages in Schmitt's political philosophy when enacting a state of exception to fight in Ukraine. Putin's war is implicitly Schmittian in its disregard of internationally codified laws and its framing as an existential war to defend Russian sovereignty.

46 Philip Remler, "Russia at the United Nations: Law, Sovereignty, and Legitimacy," *Carnegie Endowment for International Peace*, January 22, 2020, <https://carnegieendowment.org/2020/01/22/russia-at-united-nations-law-sovereignty-and-legitimacy-pub-80753>.

47 Schmitt, *Political Theology*, 5.

48 Alina Cherviatsova, "Hybrid War and Hybrid Law," *The War in Ukraine's Donbas*, December 21, 2021, 29–42, 30, <https://doi.org/10.7829/j.ctv26jp68t.6>.

49 Auer, *Carl Schmitt in the Kremlin*, 959.

50 Kurylo, *Russia and Carl Schmitt*.

51 Auer, *Carl Schmitt in the Kremlin*, 960.

52 Tom Parfitt, "Anti-Putin Protesters March through Moscow," *The Guardian*, February 4, 2012, <https://www.theguardian.com/world/2012/feb/04/anti-putin-protests-moscow-russia>.

53 John B. Bellinger, "How Russia's Invasion of Ukraine Violates International Law," *Council on Foreign Relations*, February 28, 2022, <https://www.cfr.org/article/how-russias-invasion-ukraine-violates-international-law>.

54 Marek Menkiszak, Maria Domańska, and Piotr Żochowski, "Russia Announces the Annexation of Four Regions of Ukraine," *OSW Centre for Eastern Studies*, October 5, 2022, <https://www.osw.waw.pl/en/publikacje/analyses/2022-10-03/russia-announces-annexation-four-regions-ukraine>.

55 Skordas, *Russia's Eurasian Großraum and Its Consequences*.

56 Serhii Plokhyy, *The Russo-Ukrainian War*, 2nd ed. (S.I.: Penguin, 2023), 143.

Großraum: Ukraine As a Part of Putin's Civilisational Sphere

Finally, Putin demonstrates the Russo-Ukrainian War's Schmittian nature through its alignment with the jurist's theory of *Großraum* (great space): a notion Schmitt specifically devised to displace the Western hegemonic agenda, something Putin is keen on realising.⁵⁷ Nazism's ideologue envisioned a world order of *Großräume* existing as a "pluriverse of continental empires".⁵⁸ Schmitt's great spaces are clusters of political entities governed by an authoritative state that determines the borders, identity, and political ideology of their respective territories.⁵⁹ In this multipolarity, space and political ideas are inseparable, for "there are neither spaceless political ideas, nor ... principles of space without ideas".⁶⁰ The world, therefore, becomes a patchwork of competing spaces characterised by the political and economic practises of their leading states. Schmitt applied this doctrine to characterise the German invasion of Poland and the Nazi-Soviet Molotov-Ribbentrop Pact that divided Eastern Europe into spheres of influence between the two totalitarian powers.⁶¹ *Großraum's* relevance did not end alongside the collapse of Nazism, though; the Kremlin's pursuit of this doctrine is both extensive

and well documented.

Rather than speaking of *Großräume*, Putin speaks of civilisations. However, there are few discerning features between the two. Director of the Russian Foreign Policy Planning Department Alexei Drobinin presents the structure of the Kremlin's envisioned civilisations: a core consisting of one or more leader states surrounded by a peripheral belt of states under the direction of their civilisational core.⁶² The leader states exercise strict suzerainty within their civilisational spheres, deciding on the common identities, political ideologies, and inter-state integration. This resembles Schmitt's great spaces precisely. The Kremlin labels its civilisation as *Russkii Mir*, translating to "Russian World".

Putin's civilisational exercise strives to integrate Eurasia -the Former Soviet Union (FSU)-under Russian political and economic leadership.⁶³ Russia's tandemocratic president Dmitry Medvedev proclaimed Eurasia as Russia's area of "privileged interests" back in 2008, displaying early regional hegemonic ambitions.⁶⁴ Economic communities, customs unions, and security alliances, all of which are headed by the Kremlin, envelop the FSU as Putin attempts to consolidate his

57 Roberto Orsi, "On the Relevance of Carl Schmitt's Concept of *Großraum* in Contemporary International Politics," *Journal of International Political Theory* 17, no. 3 (September 12, 2019): 295–315, <https://doi.org/10.1177/1755088219874431>, 297.

58 William Alexander Hooker, "The State in the International Theory of Carl Schmitt: Meaning and Failure of an Ordering Principle" (dissertation, UMI, 2008), 14.

59 Matthew Specter, "Grossraum and Geopolitics: Resituating Schmitt in an Atlantic Context," *History and Theory* 56, no. 3 (2017): 398–406, 399, <https://doi.org/10.1111/hith.12028>.

60 Carl Schmitt, *Voßkerrechtliche Großraumordnung: Mit Interventionsverbot Fußr Raumfremde Maßchte: Ein Beitrag zum Reichsbegriff im Voßkerrecht [Large-Scale Order under International Law: With a Ban on Intervention for Foreign Powers: A Contribution to the Concept of Empire in International Law]* (Berlin: Duncker und Humblot, 1941), 29.

61 Lewis, *Russia's New Authoritarianism*, 162.

62 Alexei Drobinin, "The Vision of a Multipolar World," *Russia in Global Affairs*, February 20, 2023, <https://eng.globalaffairs.ru/articles/the-vision-of-a-multipolar-world/>.

63 Richard Sakwa, "Eurasian Integration: A Project for the 21st Century?," *The Eurasian Project and Europe*, 2015, 53–71, 54, https://doi.org/10.1057/9781137472960_4.

64 Andrew E. Kramer, "Russia Claims Its Sphere of Influence in the World," *The New York Times*, September 1, 2008, <https://www.nytimes.com/2008/09/01/world/europe/01russia.html>.

Großraum.⁶⁵ Eurasian integration saw the Kremlin pursue bilateral agreements with states to strengthen Russia's position and to prevent smaller states from working together against Russia's interests.⁶⁶ This civilisational project, however, has categorically failed, causing Eurasian states to gain increased autonomy from Russia.⁶⁷ Smaller states like Kazakhstan evade Russian domination by engaging in multi-vector foreign policy, while Putin's integration directives failed to halt Atlanticist expansion into the region.⁶⁸ Eurasian integration has thus failed to serve its purpose for the Kremlin. Russian antagonism in Ukraine, therefore, shows angst; Putin is increasingly desperate to realise his great space.

Nothing displays Putin's Schmittianisms quite like his aggression regarding Ukraine. In accordance with *Großraum*, Putin systematically relegates the sovereignty of Ukraine below Russia's, especially after the democratic Maidan Revolution in 2014.⁶⁹ The outcome of Maidan was crushing to Putinist Eurasian influence, as Ukrainian democratisation "*limits [Russia's] ability to influence the Ukrainian public and intimidate [its] political elite*".⁷⁰ The annexation of Crimea and the Donbas War reflect Putin's

immediate attempts to mitigate Russia's waning control in its peripheral belt. Schmitt advocates for "*a clear spatial order based on the non-intervention of extra-regional powers*" within his *Großräume*.⁷¹ Ukraine's Westernisation thus proves intolerable to Putin, as it provides concerns to the Kremlin that the USA is attempting to break into Russia's space through NATO expansion.⁷² Since 2014, therefore, Putin's Ukrainian interventions have been a "*refusal to allow Ukraine to move outside of Russian suzerainty*", an assessment that directly corroborates Putin's *Großraum* ambitions.⁷³

When examining the war through a Schmittian framework, Russia's civilisational (*Großraum*) objectives in Ukraine illuminate themselves. Despite annexing four Ukrainian oblasts into the Russian Federation, Putin never intended on his special military operation to annex Ukraine.⁷⁴ Rather, Putin aimed for the "*removal*" of President Zelenskyy and the reestablishment of a pro-Russian government in Kyiv.⁷⁵ McFaul and Person thus recognise the reality of Putin's "*denazification*" rhetoric: it is a code-word for antidemocratic regime change in Ukraine.⁷⁶ The Kremlin

65 Irina Busygina and Mikhail Filippov, "Russia and the Eurasian Economic Union: Conflicting Incentives for an Institutional Compromise," *SSRN Electronic Journal*, 2018, 1–23, 2, <https://doi.org/10.2139/ssrn.3298743>.

66 André Gerrits, "Eurasian Integration and Cooperation," (Lecture, Leiden University, International Studies, Politics of Russia/Eurasia, November 28, 2023).

67 Busygina and Filippov, *Russia and the Eurasian Economic Union*, 17.

68 Gerrits, *Eurasian Integration and Cooperation*.

69 Putin, *On the Historical Unity of Russians and Ukrainians*; Putin, *Address by the President*.

70 Plokhy, *The Russo-Ukrainian War*, 141.

71 Carl Schmitt, "Großraum versus Universalism: The International Legal Struggle over the Monroe Doctrine," trans. Matthew Hannah, *Spatiality, Sovereignty and Carl Schmitt*, no. 1 (May 17, 2011): 58–66, 58, <https://doi.org/10.4324/9780203815823-10>.

72 OSW, *Ukraine Was Just the Beginning. Russia's REAL Reason behind the War*, 5:58.

73 Oscar Jonsson and Robert Seely, "Russian Full-Spectrum Conflict: An Appraisal after Ukraine," *The Journal of Slavic Military Studies* 28, no. 1 (January 2, 2015): 1–22, 21, <https://doi.org/10.1080/13518046.2015.998118>.

74 Gavin Wilde and Justin Sherman, "Targeting Ukraine through Washington: Russian Election Interference, Ukraine, and the 2024 US Election," *Atlantic Council*, July 25, 2022, <https://www.atlanticcouncil.org/in-depth-research-reports/issue-brief/targeting-ukraine-through-washington>; Elizabeth Truss, "Kremlin Plan to Install Pro-Russian Leadership in Ukraine Exposed," *GOV.UK*, January 22, 2022, <https://www.gov.uk/government/news/kremlin-plan-to-install-pro-russian-leadership-in-ukraine-exposed>.

75 Plokhy, *The Russo-Ukrainian War*, 143; Truss, *Kremlin Plan to Install Pro-Russian Leadership*.

76 Robert Person and Michael McFaul, "What Putin Fears Most," *Journal of Democracy* 33, no. 2 (April 2022): 18–27, <https://doi.org/10.1353/jod.2022.0015>.

considers a sovereign and democratic Ukraine emblematic of its compromised civilisational sphere of influence.⁷⁷ The Russo-Ukrainian War is not a conventional conflict of imperial conquest; Putin does not want to expand the borders of his country. Rather, he strives to tangibly institutionalise his *Großraum* by enforcing “severe political control” over a nominally independent Ukraine.⁷⁸

Through annexing the oblasts, Putin manufactured a frozen conflict within Ukraine that will likely outlast active military engagement.⁷⁹ Frozen conflicts are a common tactic of the Kremlin to guarantee the borders of its FSU *Großraum*, having been enacted in Georgia, Moldova, Azerbaijan, and Crimea.⁸⁰ Russia is able to halt Atlanticist expansion by barring the accession of states with disputed territories into NATO and the EU.⁸¹ A core criterion of joining NATO is having clearly defined borders with no territorial disputes.⁸² The annexations, therefore, are Putin’s long-term solution to creeping Westernisation into his *Großraum*. Even if fighting ceases and the Westernised Kyiv regime survives, the four annexed oblasts protect Russia from EU or NATO expansion into Ukraine.

Thus, the Russo-Ukrainian War is a desperate attempt to secure *Russkii Mir* from Westernisation. Andrew Wilson

discerns that Russia’s motives behind the war mirror Schmitt’s own justification behind the Nazi invasion of Poland; Putinist and Nazi visions of spheres of influence (civilisation and *Großraum*) go hand in hand.⁸³ The war yields newfound geopolitical significance, therefore, as Russia’s *gosudár* blatantly attempts to displace Atlanticist hegemony by fortifying his own great space that is impenetrable to Western universalism. Putin’s war, therefore, can be summarised as a “civilisational conflict” in which the “Kremlin is containing the West” and its influence in Russia’s *Großraum*.⁸⁴

Has Putin Reintroduced Fascism to Geopolitics?

Vladimir Putin propagates kaleidoscopic IR. Mark B. Smith assesses Russia’s history as a *medovík*: a traditional Russian honey cake consisting of many thin layers melded into one another and complementing each other.⁸⁵ Russian international relations can be approached in a similar fashion. The concept of the political, Schmittian sovereignty, and *Großraum* are just three layers of Putin’s *medovík*; Russia’s geopolitical worldview extends beyond the fascist lens explored within this article. Similarly, Putin neglects core facets of fascism, including palingenetic revolution and third-positionism. Despite

77 *Ibid.*, 33.

78 OSW, *Ukraine Was Just the Beginning. Russia’s REAL Reason behind the War*, 1:22.

79 Nahal Toosi, “Ukraine Could Join Ranks of ‘Frozen’ Conflicts, U.S. Officials ...,” *Politico*, May 18, 2023, <https://www.politico.com/news/2023/05/18/ukraine-russia-south-korea-00097563>.

80 Andrew Sprague, “Russian Meddling In Its Near Abroad. The Use of Frozen Conflicts as a Foreign Policy Tool” (dissertation, IBEI, 2016), 10.

81 Erik J. Grossman, “Russia’s Frozen Conflicts and the Donbas,” *The US Army War College Quarterly: Parameters* 48, no. 2 (June 1, 2018): 51–62, I’m 52, <https://doi.org/10.55540/0031-1723.2944>.

82 Eugen Tomiuć, “NATO: What Does It Take to Join?,” *RadioFreeEurope/RadioLiberty*, April 9, 2008, <https://www.rferl.org/a/1099020.html>.

83 Andrew Wilson, “Inside the Russian Geopolitical Mind: Pseudo-Justifications behind the War in Ukraine,” *ECFR*, February 21, 2023, <https://ecfr.eu/article/inside-the-russian-geopolitical-mind-pseudo-justifications-behind-the-war-in-ukraine/>.

84 Lilia Shevtsova, “Russia’s Political System: Imperialism and Decay,” *Journal of Democracy* 26, no. 1 (2015): 171–82, 173, <https://doi.org/10.1353/jod.2015.0015>.

85 Mark B. Smith, *The Russia Anxiety: And How History Can Resolve It*, 2nd ed. (Milton Keynes: Penguin Books, 2019), 63.

being central to Schmitt's framework, his philosophy spans past the three theories explored in this article too; Putin is not a pure manifestation of Schmittianism. This is to say that neither Putin nor Russia are concretely fascist. Nonetheless, the fascist framework presented by Hitler's "crown jurist" accurately characterises Putin's aggression in Ukraine.

The *medovik* of Russian geopolitics consists of more than fascist rhetoric, yes, but that does not negate the significance of fascism's role within Putin's foreign policy. Through his war, the Kremlin is not only embracing fascist doctrine, but actively applying it on the world stage. The complexity of Russian IR extending beyond Schmitt does not countermand the fact that Schmittian doctrine guides the Russo-Ukrainian War. Almost every major Russian foreign policy ambition being realised by the war is Schmittian, as detailed in Russia's current foreign policy concept. This includes "regionally centred power relations" (a world of *Großräume*), the illegitimacy of the current "rules-based world order" (sovereign exception), and the Western world posing as the biggest threat to Russia's multipolar future (the concept of the political).⁸⁶

This culmination of evidence suggests Vladimir Putin is waging a fascist war using a fascist framework. The Russo-Ukrainian War's geopolitical implications are enormous. Carl Schmitt devised his legal political philosophy in part to help Germany achieve rigid multipolarity in the face of British-American liberal universalism.⁸⁷ Putin employs the same

ideas for the same objective. Russia's *gosudár'* has revived fascism in geopolitics.

Conclusion

The 1945 defeat of the Axis did not entail the defeat of fascism, as Putin's invasion of Ukraine exists specifically within National Socialism's legal and geopolitical framework. By engineering the war as an existential conflict against Russia's two enemies -Nazism and the West-, Putin places his actions firmly within the friend-enemy dichotomy of Schmitt's concept of the political. Furthermore, Putin's pursuit of Schmittian sovereignty reveals itself through the Kremlin's definition of sovereignty, its disregard of established moral and legal frameworks, the relegation of Ukrainian sovereignty, and the creation of a state of exception surrounding the war. Finally, Russia's civilisational exercise reflects Schmittian *Großräume* by establishing a Kremlin-directed sphere of influence impermeable to extra-regional powers. A culmination of these three factors suggests that Russia has reintroduced fascist theories of warfare to 21st century Europe.

Through its actions in Ukraine, Russia emerges as a geopolitical player utilising concepts central to fascist warfare in order to antagonise the West and infringe on the sovereignties of Eurasian nation-states. It is unlikely that the Kremlin will cease its Schmittianisms beyond this war. Rather, it will pose a stark challenge to the post-WWII international order built on a foundational and holistic rejection of fascism. If Putin's strategies are indicative

⁸⁶ Permanent Mission of the Russian Federation to the European Union, "The Concept of the Foreign Policy of the Russian Federation," March 31, 2023, <https://russiaeu.ru/en/news/concept-foreign-policy-russian-federation>.

⁸⁷ Caldwell, *Controversies over Carl Schmitt*, 377.

of a broader tolerance or revival of fascist rhetoric under new new guises, aggressive nationalistic policies and the disregard of internationally institutionalised norms will be increasingly legitimised around the world. This potential shift could lead to an erosion of global governance structures and a more volatile international relations landscape.

Ukraine was a primary battleground in the fight against fascism during WWII. It apparently remains so today. Vladimir Vladimirovich's assertion that Russia wages war to denazify Ukraine invites critical scrutiny, as his presence in the country draws specific parallels to Nazi doctrine. If Putin wants to defeat neo-fascism, he should look inward to the Schmittianisms propagating from within his Kremlin. Until then, we have to reconcile the fact that through the Russo-Ukrainian War, "*fascism returns to the continent it once destroyed*".⁸⁸

88 Snyder, *The Battle in Ukraine Means Everything*.

Introduction

On January 31, 2024, a commemoration event was held at the European Commission's Berlaymont building to honour the life and legacy of former President Jacques Delors.² Among the attendees were many high-profile European politicians, including Ursula von der Leyen and Charles Michel. Notably, the new international cohort of the Erasmus+ orchestra performed at the event for the first time, symbolically marking both the achievement of the internationalisation of European higher music education and emphasising Jacques Delors' accomplishments in the field, as he is frequently credited for establishing the Erasmus+ programme in 1987.³

This article aims to examine the current processes in European higher music education through the analysis of EU programs, initiatives, and organisations working in the field. By discussing the

opportunities and challenges ahead, it explores how European higher music education is expanding its horizons and bringing global perspectives to a sector that is often perceived as resistant to changes.⁴ By incorporating the concept of *artistic citizenship* and viewing musicians as *"makers in society,"* this article frames the ongoing trends in higher music education.⁵

Background

Higher music education remains an under-researched field, and its impact on culture and society has yet to be the focus of academia. It holds a prominent position within the broader spectrum of music education, serving as a gateway to various professional music fields while also shaping research and innovation agendas.⁶ Naturally, higher music education as well as culture and creative sectors and industries (CCSI), are interrelated areas,

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2 European Commission, "Harmony Beyond Borders" – Stories from the Erasmus Orchestra," *Erasmus+ EU Programme for Education, Training, Youth and Sport*, Brussels, February 1, 2024, <https://erasmus-plus.ec.europa.eu/news/harmony-beyond-borders-stories-from-the-erasmus-orchestra>.

3 European Commission, "Jacques Delors (1925-2023)," *European Commission*, accessed March 29, 2024, https://commission.europa.eu/about-european-commission/jacques-delors_en.

4 Veronica Ski-Berg, *Pressures to change. Institutional politics in higher music education*, (Oslo: Norwegian Academy of Music, 2022), <https://nmh.brage.unit.no/nmh-xmlui/handle/11250/3058001>; Helen Julia Minors, Pamela Burnard, Charles Wiffen, Zaina Shihabi, and J. Simon van der Walt, "Mapping trends and framing issues in higher music education: Changing minds/ changing practices," *London Review of Education* 15, no. 3, (2017), <https://doi.org/10.18546/LRE.15.3.09>.

5 Leah Coutts and Julia Hill, "Tertiary music students' perspectives on activist-musicianship: Approaches, challenges, and perceived role of higher music education," *Research Studies in Music Education* 45, no.3 (2023): 616-633; David Elliott, Marissa Silverman, and Wayne Bowman, *Artistic Citizenship: Artistry, Social Responsibility, and Ethical Praxis* (Oxford: Oxford University Press, 2016).

6 Helena Gaunt, Celia Duffy, Anna Coric, Isabel R. González Delgado, Linda Messas, Oleksandr Pryimenko, and Henrik Sveidahl, "Musicians as "Makers in Society": A Conceptual Foundation for Contemporary Professional Higher Music Education," *Front. Psychol.*, 12, No. 3 (2021): 713648. <https://doi.org/10.3389/fpsyg.2021.713648>.

as many graduates from music education end up working within the CCSI.

European higher music education cannot be perceived as a unified sector; akin to higher education at large, it showcases significant diversity influenced by regional nuances, national traditions, and institutional dynamics. Changes within this realm do not occur automatically, and considering the current socio-political challenges, art institutions have also struggled to find a path forward.⁷

However, initiatives spearheaded by the European Union, the inception of the Bologna process,⁸ and the subsequent establishment of the European Higher Education Area (EHEA), have played a significant role. This, coupled with increased funding for the Erasmus+ programme and active promotion of culture and creativity, among other efforts, has fostered closer collaboration among music academies and diverse higher music education institutions through the harmonisation of educational practices.

While Erasmus+ is recognised worldwide for its flagship student and staff mobility schemes, a significant amount of programme funding is allocated to international capacity building, enshrined in the Key Action 2 (KA2) component. Consisting of three strands, capacity-building actions in higher education support institutions in third countries that

are not associated with the programme to develop their capabilities, enhance resilience, and promote EU priorities within their regions.⁹

In addition to the top-down approach, umbrella organisations like the European Association of Conservatoires (AEC) have significantly increased connectivity. With a seventy-year history of the Association as the central networking space for conservatoires, music academies and *Musikhochschulen* across Europe and beyond, the AEC has accelerated internationalisation and the development of ideas and projects through regular meetings and conferences. The work of organisations such as the European League of Institutes of the Arts (ELIA), Culture Action Europe, and the European Music Council alongside others also has remarkable implications for the field.¹⁰ Moreover, the emergence of the European Performing Arts Students Association and the Glomus network encourages the higher music education field to explore global partnerships and align with internationalisation priorities.¹¹

Framing Artistic Citizenship and Internationalisation

Elliot et al. introduce the concept of artistic citizenship in their book *Artistic Citizenship: Artistry, Social Responsibility, and Ethical Praxis*. Authors acknowledge that artistic citizenship may be perceived as an

⁷ *Ibid.*, 3.

⁸ European Commission, "The Bologna Process and the European Higher Education Area," accessed April 13, 2024, <https://education.ec.europa.eu/education-levels/higher-education/inclusive-and-connected-higher-education/bologna-process>.

⁹ European Commission, "Capacity Building in Higher Education," accessed April 13, 2024, <https://erasmus-plus.ec.europa.eu/programme-guide/part-b/key-action-2/capacity-building-higher-education>.

¹⁰ European League of Institutes of the Arts (ELIA), "An empowering force within higher arts education," accessed April 22, 2024, <https://elia-artschools.org/>; Culture Action Europe, accessed April 22, 2024, <https://cultureactioneurope.org/>; European Music Council, accessed April 22, 2024, <https://www.emc-imc.org/>.

¹¹ European Performing Arts Students' Association, accessed April 22, 2024, <https://www.epasa.eu/>; Glomus Network, accessed April 22, 2024, <https://www.glomus.net/>.

oxymoron. However, this perception can only hold if one sees artists simply being *free spirits*,¹² deprived of social status and political purpose. Higher music education institutions can act as a bridge between the artists they educate and society.

According to the authors, artistry involves social and humanistic responsibilities.¹³ This perspective views art as a pursuit of beauty or pleasure and a catalyst for meaningful social change. Some higher music education institutions employ the term *artistic citizenship* and develop study programmes and curricula accordingly, while others address the importance of civic engagement and view artists as agents of change within their music education systems without explicitly referring to the concept.¹⁴

Artistic citizenship serves as a catalyst for internationalisation as well.¹⁵ Marijk van der Wende defines internationalisation as a *systemic effort* to better address the complexities arising from the globalisation of societies.¹⁶ According to her, Europeanisation processes can be seen as a form of internationalisation at a *regional level*.¹⁷

More Opportunities Amid EU's Increased Funding for Education and Culture

Education and culture are not among direct EU competencies and the EU member states have more significant power in decision-making. Nevertheless, the European Commission's Directorate-General for Education and Culture and the European Education and Culture Executive Agency have still contributed to reshaping the landscape, despite limited influence in this area. In the field of culture and education, Article 6 of the Treaty on the Functioning of the European Union (TFEU) refers to the EU's competence to "*carry out actions to support, coordinate or supplement the actions of the Member States*".¹⁸

This support is enshrined in various EU programmes and initiatives. In March 2024, the Commission announced the creation of the blueprint for European Degrees, a significant milestone for the European Higher Education Area. This initiative should lead the process of obtaining a single degree awarded by universities from several European countries, which results in students earning an *European degree*.¹⁹

In 2023, a breakthrough was achieved

12 David Elliott, Marissa Silverman, and Wayne D. Bowman, *Artistic Citizenship: Artistry, Social Responsibility, and Ethical Praxis* (Oxford: Oxford Press, 2016), 8; Iveri Kekenadze Gustafsson, "A Renaissance Man" An Inquiry into a Musician's Unorthodox Career Choices and Navigating between Contrasting Fields, MA Thesis, Malmö Academy of Music, Lund University, 2024, 16.

13 *Ibid.*, 8.

14 The Royal Academy of Music, *Artistic Citizenship at Royal Danish Academy of Music Aarhus Aalborg*, October 13, 2023, https://issuu.com/musikkons/docs/a4folder_kunstneriskmedborgerskab_uk_finalweb.

15 *Ibid.*

16 Marijk C. Van der Wende, *Missing links: The relationship between national policies for internationalisation and those for higher education in general*, National policies for the Internationalisation of higher education in Europe, (National Agency for Higher Education, 1997): 10– 31, 19.

17 Anneke Luitjen-Lub, Marijk Van Der Wende, and Jeroen Huisman, "On Cooperation and Competition: A Comparative Analysis of National Policies for Internationalisation of Higher Education in Seven Western European Countries," *Journal of Studies in International Education* 9, no 2 (2005): 147-163.

18 Consolidated version of the Treaty on the Functioning of the European Union, Official Journal of the European Union, C 202/1, Article 6.

19 European Commission, "Commission Presents a Blueprint for a European Degree," *European Education Area*, March 27, 2024, <https://education.ec.europa.eu/news/commission-presents-a-blueprint-for-a-european-degree>.

in higher music education with the establishment of the *Innovative Universities in Music & Arts in Europe (IN.TUNE)*. This alliance became the first European University Alliance exclusively composed of a consortium of arts-specialised institutions, including the Norwegian Academy of Music, Royal Conservatoire The Hague, MDW – University of Music and Performing Arts in Vienna, University of Arts Helsinki, Conservatoire National Supérieur de Musique et de Danse de Paris (Paris Conservatoire), among others. Notably, at least half of the consortium members rank among the top 25 in the world for Performing Arts education according to QS Ranking.²⁰ European University Alliances (EUA) play a crucial role in enhancing internationalisation, mobility, and knowledge exchange among European higher education institutions. The Commission aims to expand to sixty alliances by mid-2024, encompassing over 500 higher education institutions from all eligible countries.²¹

The amplified global support for education, evidenced by allocating at least 10% of the EU's humanitarian aid budget to education, positions the EU as a major investor in the field.²² Additionally, the doubling of funding for the Erasmus+ programme in the current Multiannual Financial Framework (MFF) 2021-2027, compared to the previous seven-year period, from €14,7 billion

to €26.2 billion, complemented by €2.2 billion from the EU's external instruments, further underscores the prioritisation of education area.²³ Increased financing directly benefits smaller sectors, such as higher music education, as demonstrated by initiatives like the launch of the first European University Alliance in the field of music and arts.

Another EU initiative that benefited the Higher music education sector is Blended Intensive Programmes (BIPs), a relatively new addition to the Erasmus+ programme in the EU's current MFF. Blended Intensive Programmes encourage students to participate virtually and physically in the mobilities as a group. Considering the nature of ensemble performances and collaborations within music, this scheme emerged as one of the sought-after funding opportunities for project managers in the higher music education sector.²⁴

Internationalisation Gap

Challenges persist despite advancements and steps taken to foster international collaborations and partnerships. Participation and representation contribute to the internationalisation gap in higher music education.

To observe how this gap translates to concrete examples, one of the clear indicators is the Association of

20 IN.TUNE Alliance, accessed April 22, 2024, <https://intune-alliance.eu/>; QS Top Universities, "QS Ranking in Performing Arts 2023," accessed April 22, 2024, <https://www.topuniversities.com/university-subject-rankings/performing-arts>.

21 European Commission, "European University Alliance initiative," accessed April 22, 2024, <https://education.ec.europa.eu/education-levels/higher-education/european-universities-initiative>.

22 UNESCO, "10% Target for Education in Emergencies in EU-funded Humanitarian Aid Operations," accessed April 13, 2024, <https://www.unesco.org/sdg4education2030/en/knowledge-hub/10-target-education-emergencies-eu-funded-humanitarian-aid-operations>.

23 European Commission, "Erasmus+ 2021-2027," accessed April 13, 2024, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1326.

24 European Commission, "Erasmus+ EU programme for education, training, youth and sport," accessed April 23, 2024, <https://erasmus-plus.ec.europa.eu/erasmus-programme-guide>.

European Conservatoires membership and involvement in its activities. While it's understandable that Italian higher music education institutions are well-represented due to having over seventy conservatoires, the lack of representation of Central and Eastern European higher music education institutions is noticeable.²⁵ Prior to the 2022 War, only three music-specialised institutions from Ukraine, a country with a population of over 35 million, enjoyed full or associated membership in the organisation.²⁶ Simultaneously, participation from Eastern European and Western Balkan countries has also been low in AEC's two main events, such as the congress and international relations coordinators meetings.²⁷ This discrepancy may stem from various factors, including financial constraints, a greater prioritisation of networking events in Western European higher music education institutions, and less developed international profiles in Eastern European music academies and conservatoires. Participation in the AEC's events remains low among non-EU European countries, such as Moldova, Ukraine, and the South Caucasus, while Albania, North Macedonia, and Kosovo are the only European countries with no membership in the organisation.²⁸

The Italian Erasmus+ National Agency INDIRE initiated the Erasmus+ Orchestra, currently coordinating the project in

collaboration with the AEC and involving 300 Erasmus+ performing arts students from sixty different music academies and conservatoires.²⁹ It is not surprising that students from Italian institutions dominate the list of participants. However, the call for 2023 was open to all Erasmus+ eligible countries, even those not traditionally associated with the programme. This inclusive approach diversified the group of students involved, reaching out to countries and institutions that are typically underrepresented.³⁰

When it comes to the first European University Alliance in the field of music and arts, only some of the most prominent European universities were able to prepare the application and get selected due to the complexity of the application and the competition. Despite not being able to directly receive all the advantages that IN.TUNE European University Alliance will achieve, the entire European higher music education sector will indirectly benefit from its success as the alliance paves the way for other music and arts specialised institutions to solidly integrate A (Arts) in the STEAM framework.³¹

Where is European Higher Music Education Heading?

European higher music education reflects general trends in the European Higher

25 European Association of Conservatoires, "Our Members," accessed March 29, 2024, <https://aec-music.eu/members/our-members/search?type=all&country=FI>.

26 *Ibid.*

27 European Association of Conservatoires, "List of Participants," Congress 2022, IRC Meetings 2022, 2023; A document distributed to participants from Higher Music Education institutions.

28 European Association of Conservatoires, *Our Members*.

29 Erasmus+ Italian National Agency, "Erasmus Ochestra Initiative," accessed March 29, 2024, <https://www.erasmusplus.it/iniziativa/erasmus-orchestra-en/>.

30 Erasmus+ Italian National Agency, "Erasmus Orchestra, the European call for the new 2023/2025 staff," accessed March 29, 2024, <https://www.indire.it/en/2023/07/20/erasmus-orchestra-the-european-call-for-the-new-2023-2025-staff/>.

31 European Commission, "Relevant and high-quality higher education," *European Education Area*, accessed March 29, 2024, <https://education.ec.europa.eu/education-levels/higher-education/relevant-and-high-quality-higher-education>.

Education Area, benefiting from EU-funded programmes and building capacity through various initiatives. The creation of the Erasmus+ orchestra represents the symbolic benefits of the Erasmus+ programme, while the formation of the first European University Alliance in music and arts underscores recent advancements in the field.

This year, teachers, students and staff from various European higher music education institutions will be heading to and attending the 2024 edition of the Glomus Camp in Kathmandu, Nepal, where around 200 participants will gather to celebrate and discuss performing arts and higher-performing arts education.³² The Glomus Camp in Nepal will build on the experience of the 2022 Edition held in Aarhus, Denmark, where the concept of *artistic citizenship* dominated the discussions.³³ Internalising artistic citizenship as a core mission gives higher music education institutions a trajectory towards more inclusive and diversified approaches to education and study environments.

In the coming years, opening global perspectives will be the overarching topic. European Union educational and cultural programmes encourage the higher music education sector to reach global audiences and develop partnerships both within and outside Europe. Promoting *artistic citizenship* encourages institutions to seek new partnerships, and work on capacity building and quality enhancement with less experienced counterparts. Through examples of EU programmes and

priorities, umbrella organisations like AEC and initiatives such as the Erasmus+ orchestra, this article showcased the current tendencies, opportunities, achievements, and challenges in the internationalisation processes of European higher music education.

Obstacles such as the internationalisation gap between regions and institutions still persist. However, broader EU support indicates positive developments in the field, moving towards establishing new global partnerships and deepening existing ones.

³² Glomus Network, accessed March 29, 2024, <https://www.glomus.net/>.

³³ Det Jyske Musik konservatorium, The Royal Academy of Music, Denmark. *GLOMUS Camp 2022 in Aarhus*, accessed March 29, 2024, <https://musikkons.dk/en/what-else/cooperation/international-projects/glomus/glomus-camp-2022-in-aarhus/>.

An Introductory Background of the Single-Use Plastics Policy

Plastic is undoubtedly a pervasive material in the European Union's economy and the daily lives of its citizens, from transportation to construction, telecommunications to kitchen goods, and food packaging to healthcare equipment. Every year, Europeans consume around 25 million tonnes of disposable plastic, most of which is discarded as waste; less than 30% of such waste is collected for recycling.² This has significantly heightened the need to address the environmental problems caused by the production, utilisation, and consumption of plastics. At this juncture, the European Union has called for innovation and a shared vision to redirect these practices towards environmentally sustainable directions, aligning with the objectives outlined in the renewed EU Industrial Policy Strategy, the 2030 Sustainable Development Goals, and the Paris Agreement.³

In December 2015, the European Commission adopted an "EU Action Plan" requiring EU member states to reduce their consumption of lightweight plastic

bags for a circular economy as the pioneer policy. In this plan, the Commission identified plastics as a key priority and committed itself to preparing "a strategy addressing the challenges posed by plastics throughout the value chain and considering their entire life cycle".⁴ In 2017, the Commission confirmed its focus on plastics production, utilisation, and consumption. Furthermore, it is crucial to note that the environmental field is part of the shared competences stated in Article 4 of the Treaty on the Functioning of the European Union (TFEU).⁵ This underscores the need for collaborative actions among member states to address environmental issues stemming from plastics. More concretely, concerted efforts at the European level to tackle challenges caused by careless plastics production processes must be carried out across member states.

The European Union aimed to transition the current plastics economy towards a new, innovative model that prioritises the design and production of plastics in alignment with reuse, repair, and recycling needs. Additionally, it sought to develop

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2 European Commission, "A European Strategy for Plastics in a Circular Economy," *Europa.eu*, January 16, 2018, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018DC0028#footnote6>.

3 European Commission, "The EU Budget and the Sustainable Development Goals," *Commission.europa.eu*, accessed January 5, 2024, https://commission.europa.eu/strategy-and-policy/eu-budget/performance-and-reporting/horizontal-priorities/eu-budget-and-sustainable-development-goals_en.

4 Antonis Vlasopoulos, Jurgita Malinauskaite, Alina Żabnieńska-Góra, and Hussam Jouhara, "Life cycle assessment of plastic waste and energy recovery," *Energy* 277 (2023): 127576, 1.

5 Andrea Morell, "A European Strategy for Plastics in a Circular Economy," MA Thesis, Tilburg University, June 2019, <https://arno.uvt.nl/show.cgi?fid=149248>.

and promote more sustainable materials while addressing plastic pollution and its detrimental effects on citizens' daily lives and the environment. The European Commission, therefore, called on the European Parliament and the Council to endorse this strategy and its objectives. It also urged national and regional authorities, cities, the entire plastics value chain, and all relevant stakeholders to commit to concrete action in resolving these issues.⁶

The EU's strategy to transition towards a more sustainable plastics economy has been a clear and concrete step and a signal that it takes the 2030 Sustainable Development Goals seriously. However, beyond the particular EU action on plastics, this article normatively draws attention to and keeps the topic of sustainability on the agenda for innovation and a shared vision towards less harmful environmental practices as we approach 2030. It nonetheless explores an actor-based approach to understanding the policymaking process, highlighting the roles of institutional and non-institutional actors in shaping policies, particularly evident in the case of the single-use plastics ban/policy. This approach offers insights into the complex dynamics and power structures involved in policy making, emphasising the importance of considering diverse perspectives and interests for effective policy outcomes in the regulatory landscape.

The Policy Process of the Single-Use Plastics Policy

This section examines the policy cycle

of the EU's Single-Use Plastics Policy. It demonstrates the contention of this article, which is based on the dynamic character of policymaking. This dynamic takes the form of a complex trajectory in which institutional and non-institutional actors compete for influence. This turns into a battlefield where conflicting interests collide, each hoping to shape the final policy outcomes in accordance with their preferences. In the case of the Single-Use Plastics Policy, these interests range from environmental organisations pushing for strict rules to industry players trying to safeguard their economic interests.

Through a series of interactions between non-institutional actors like environmental NGOs and lobbyists, media campaigns, private industries and scientific experts, and institutional actors like the European Commission, the Council, and the European Parliament, this process becomes more evident. The comprehension of this dynamic process leads to the assertion that the complexity of environmental regulation in the European Union, or more broadly, any policy-making process, can only be unpacked by zooming in on the actors involved and their interactions.

Agenda Setting

The agenda-setting phase within the European Plastics Strategy was mainly influenced by several actors who sought to assert their voice and preferences in policymaking (see Figure 1 for a general illustration of the agenda-setting process). In this early phase, non-institutional actors outnumbered institutional actors,

⁶ European Commission, *A European Strategy for Plastics in a Circular Economy*.

with environmental organisations and lobbies playing a significant role. These actors typically shared common interests, beliefs, and knowledge aligned with the objective of environmental preservation. Chief among the non-institutional actors were environmental campaigns and organisations, notably the World Wildlife Fund (WWF), Greenpeace, and Ocean Rescue (Sky).⁷

More specifically, the WWF released the comprehensive study, “The Living Planet Report” in 2018, which examines global diversity trends and the health of the planet. The report underscores the urgent need for a new global deal for nature and people, complete with clear, ambitious goals, targets, and metrics, to reverse the devastating trend of biodiversity loss affecting our shared home.⁸ Similarly, Greenpeace has urged action through its “A Million Acts of Blue” campaign, inviting people worldwide to join in efforts for a plastic-free future. The campaign notably identifies several corporations, including Coca-Cola, PepsiCo, Nestlé, Unilever, Starbucks, Procter & Gamble, and McDonald’s, as major contributors to plastic pollution.⁹

Additionally, Sky launched a significant campaign, titled “Ocean Rescue”, in January 2017. The campaign revolved around three commitments aimed at transforming Sky’s business operations by

eliminating all single-use plastics from its operations, products, and supply chain by 2020. Sky pursued this goal in an innovative manner, with the intention of inspiring people to make changes in their everyday lives. A notable feature of the campaign was the creation and use of “Plasticus”, a giant whale made from a quarter of a tonne of plastic. This sculpture symbolised the staggering amount of plastic waste entering oceans every second.¹⁰ Sky and other actors aimed not only to make their voices heard but also to raise awareness about specific issues related to plastic waste, primarily targeting a global agenda for significant change.

Moreover, the agenda-setting phase was significantly influenced by the media. For instance, in August 2015, a research team led by marine biologist Christine Figgener filmed a notable video depicting the removal of a plastic straw stuck in a sea turtle’s nose. The video went viral, reaching more than 34 million people worldwide. It resonated with audiences globally and catalysed a larger movement, which now includes companies such as Starbucks and American Airlines, to eliminate plastic straws from everyday use. Starbucks, with over 28,000 stores worldwide, announced its plan to discontinue the use of disposable plastic straws by 2020 and instead use recyclable, strawless lids.¹¹

Lastly, another significant actor was the

7 It is important to clarify that Sky is not an NGO like WWF or Greenpeace, but rather an environmental campaign organised by a private corporation. While Sky is a major media corporation, it’s essential to recognize its engagement in some corporate social responsibility (CSR) measures, which may be seen as greenwashing. Therefore, readers should be aware of Sky’s role as an environmental advocate within the context of its business operations.

8 WWF, “Living Planet Report-2018: Aiming Higher,” eds. Monique Grooten and Rosamunde EA Almond, Gland, Switzerland (WWF, 2018).

9 Greenpeace, “A Million Acts of Blue Toolkit,” *Greenpeace*, accessed January 7, 2024, <https://www.greenpeace.org/usa/campaign-updates/a-million-acts-of-blue-toolkit/>.

10 Sky Group, “Ocean Protection - Sky Group,” *Climate Change the New Economy*, May 30, 2018, <https://climatechange-theneweconomy.com/ocean-protection-sky-group/>.

11 Sophia Rosenbaum, “She Recorded That Heartbreaking Turtle Video. Here’s What She Wants Companies like Starbucks to Know about Plastic Straws,” *Time*, July 17, 2018, <https://time.com/5339037/turtle-video-plastic-straw-ban/>.

United Nations (UN). The United Nations has declared the substantial “2030 Agenda for Sustainable Development”, which includes 17 Sustainable Development Goals (SDGs) and 169 global targets. Described as a transformative plan of action for people, planet, and prosperity, this agenda is particularly relevant to single-use plastics policy. Goals twelve and fourteen, in particular, are pivotal for environmental protection and marine pollution. Goal twelve ensures sustainable consumption and production patterns, while Goal fourteen aims to prevent and significantly reduce marine pollution by 2025, alongside other commitments for 2020 and 2030 such as conserving at least ten percent of coastal and marine areas and increasing economic benefits from the sustainable use of marine resources.¹²

occurred with the official involvement of the European Commission, which serves as the primary institutional actor initiating the formulation phase (see Figure 2 for a general illustration of actor interactions during the formulation phase).¹⁴ Commissioner Karmenu Vella, who headed the Directorate General for Environment and was specifically responsible for Environment, Maritime Affairs, and Fisheries, along with his three cabinet counsellors – Aurore Maillet, Andras Inotai, and Sebastien Paquot – held several meetings with relevant stakeholders and lobbyists, including both supporters and opponents.¹⁵ Another crucial aspect was the emphasis by the European Parliament, particularly by Frédérique Ries, the Rapporteur for the Committee on the Environment, Public Health, and

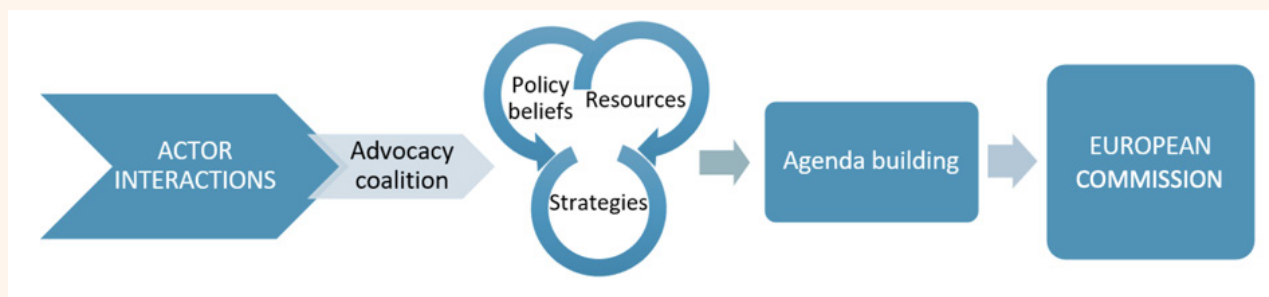


Figure 1. An Illustration of the Agenda Setting Process¹³

Policy Formulation

The transition of the single-use plastics policy process from the agenda-setting phase to the policy formulation phase

Food Safety, and the Council, through the Environment Council meetings dedicated to environmental protection, involving the environmental ministries of the member states.¹⁶

12 Kalerina Shulla and Walter Leal-Filho, “Achieving the UN Agenda 2030: Overall actions for the successful implementation of the Sustainable Development Goals before and after the 2030 deadline,” *European Parliamentary Research Service*, 2023.
 13 In the case of the European Union’s single-use plastics policy, actors such as WWF, Greenpeace, Sky, and the UN advocated for environmental preservation through various campaigns, further contributing to the agenda setting of the single-use plastics policy aimed at the European Commission.
 14 European Union, “European Commission – What It Does,” *European-Union.europa.eu*, accessed January 9, 2024, https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/european-commission_en.
 15 Obbyfacts, “European Recycling Industries’ Confederation,” *lobbyfacts.eu*, accessed January 9, 2024, <https://www.lobbyfacts.eu/datacard/european-recycling-industries-confederation?rid=764633015511-42>.
 16 European Parliament, “Reduction of the Impact of Certain Plastic Products on the Environment: Extracts from the Vote on the Report by Frédérique RIES (ALDE, BE) and Illustrative Shots,” *Multimedia Centre*, accessed January 9, 2024, <https://multimedia.europarl.europa.eu/en/video/reduction-of-the-impact-of-certain-plastic-products-on-the-environment-extracts-from-the>

With respect to non-institutional actors, lobbyists, comprising both supporters and opponents, were major driving forces during formulation. On one hand, various environmental NGOs, such as Sky partnered with WWF, pushed for regulating the use of plastics to address relevant environmental concerns.¹⁷ Similarly, the GREEN 10, a coalition of ten of the largest environmental organisations including WWF and Greenpeace, as well as networks active on the European level, were substantially significant actors in supporting the single-use plastics policy. They held numerous meetings with Commissioner Vella and his cabinet counsellors to influence the formulation of the policy advocating for the single-use plastics ban.¹⁸

One more important actor defending the single-use plastics ban was European Bioplastics, an association representing the interests of the thriving bioplastics industry in Europe, including firms that produce alternatives to plastic.¹⁹ However, on the other side, there were a number of plastic producers, manufacturers, and pan-European advocate associations, along with their lobbyists, working to stave off the single-use plastics ban.

More specifically, PlasticsEurope, a leading pan-European association representing plastics manufacturers active in the European plastics industry, BusinessEurope, the leading advocate for growth and competitiveness at the European level, standing up for companies across the continent, and the Converters Association (EuPC), where plastics converters manufacture plastic products, were among these entities that weighed against the single-use plastics ban.²⁰

Additionally, there were two more important actors from the scientific community: the Joint Research Centre (JRC) and EUNOMIA, both functioning as think tanks. Concerning the single-use plastics policy, the JRC played a more pivotal role as the European Commission's main science and knowledge service, employing scientists to conduct research and provide independent scientific advice supporting EU policies. The JRC has been monitoring marine litter on European beaches, with data based on a one-year sampling (2016), including outcomes from monitoring programs, clean-up campaigns, and research projects. The report published by JRC in 2017 provided information to develop and implement more efficient measures against marine litter.²¹

vote-on-the-report-by-frederique-ries-alde-be-and-illustrative-shots_1161345; European Parliament, "Plastic Oceans: MEPs back EU ban on throwaway plastics by 2021," *Europa.eu*, October 24, 2018, <https://www.europarl.europa.eu/news/en/press-room/20181018IPR16524/plastic-oceans-meps-back-eu-ban-on-throwaway-plastics-by-2021>.

17 WWF, "Sky Ocean Rescue & WWF Partner up," accessed January 10, 2024, <https://www.wwf.org.uk/ocean-heroes/sky-partnership#:~:text=Sky%20has%20eliminated%20all%20single>.

18 LobbyFacts, accessed January 10, 2024, <https://www.lobbyfacts.eu/>.

19 Katharina Hinse, "Implementation of the Single-Use Plastics Directive or How to Create a Legislative Hotchpotch," *European Bioplastics*, accessed January 10, 2024, <https://www.european-bioplastics.org/implementation-of-the-single-use-plastics-directive-or-how-to-create-a-legislative-hotchpotch/>.

20 BusinessEurope sent an official letter to the Rapporteur Ries on July 11, 2018, see https://www.buinessurope.eu/sites/buseur/files/media/public_letters/iaco/2018-07-11_mbe-f.ries_-_reduction_of_the_impact_of_certain_plastic_products_on_the_environment.pdf; PlasticsEurope, "Recommendations on the Packaging and Packaging Waste Regulation (PPWR)," accessed January 10, 2024, <https://plasticseurope.org/knowledge-hub/ppwr-recommendations/>; BusinessEurope, "EU's Single-Use Plastics Waste Should Be a Shared Responsibility," accessed January 10, 2024, <https://www.buinessurope.eu/publications/eus-single-use-plastics-waste-should-be-shared-responsibility>; Enora Regnier, "Bold Lobbying by the Plastics Industry in Times of Crisis," *Plastic Soup Foundation*, April 16, 2020, <https://www.plasticsoupfoundation.org/en/2020/04/customary-lobbying-by-the-plastics-industry-in-times-of-crisis/>.

21 Anna Maria Addamo, Perrine Laroche, and Georg Hanke, "Top marine beach litter items in Europe," *MSFD Technical group on*

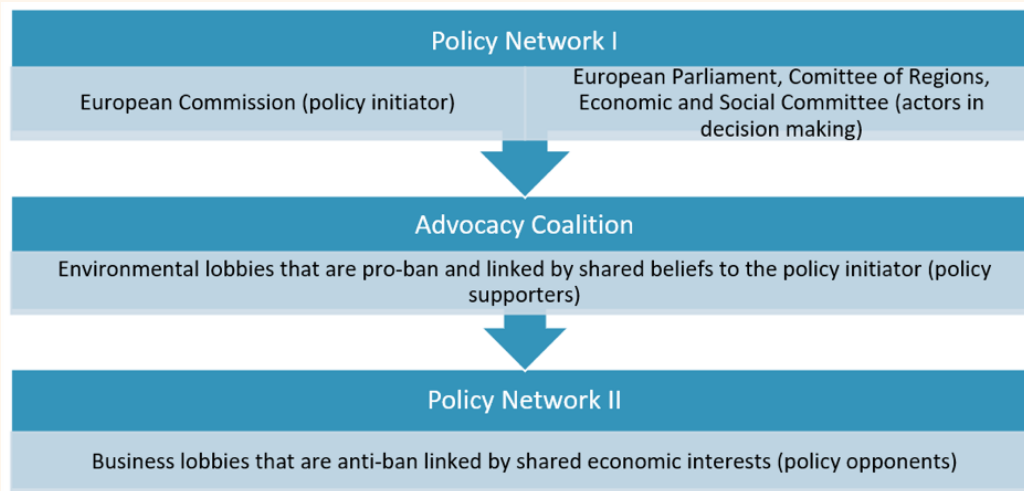


Figure 2. An Illustration of Interactions between Relevant Policy Networks

On the other hand, EUNOMIA provides expert advisors to various types of organisations in the private and public sectors, with clients including the European Commission and other European institutions. Thus, the European Commission tasked EUNOMIA with preparing a report focusing on microplastics pollution in Europe. EUNOMIA conducted research investigating litter from sea-based sources and microplastic litter from cosmetic products. It further provided recommendations concerning the microplastics issues, intensifying the policy content at the EU level, and advocating for the use of legal instruments for a ban.²²

Policy Adoption and Taking Effect

During the adoption phase, a limited number of actors are involved, primarily institutional ones. This phase is characterised by its official nature, marking

the point where one solution emerges as the legitimate course of action and becomes enshrined in law. Typically, only a handful of actors participate, notably the Council, as well as the EP.

The adoption of the single-use plastics policy followed an initial phase of early adoption, grounding its legal basis in Article 192 TFEU.²³ Specifically, the policy, set to be promulgated as a directive, underwent the ordinary legislative procedure, necessitating input from both the Economic and Social Committee and the Committee of the Regions, in line with the European Commission's proposal. Ultimately, the policy was adopted by the Council.²⁴

This process spanned nearly a year, commencing with the European Commission's proposal on May 28, 2018 (see Figure 3 for the progress of the proposal). On May 21, 2019, the Council

marine litter, Report No. EUR29249, (2017): 148335.

- 22 Publications Office of the European Union, "Assessment of Measures to Reduce Marine Litter from Single Use Plastics: Final Report and Annex," *Op.europa.eu*, August 31, 2018, <https://op.europa.eu/en/publication-detail/-/publication/a9c49259-af70-11e8-99ee-01aa75ed71a1/language-en>.
- 23 Sacha Garben, "Article 192 TFEU," in *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, eds. Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (New York: Oxford Academic, 2019).
- 24 Council of the EU, "Council adopts ban on single-use plastics," *Consilium.europa.eu*, May 21, 2019, <https://www.consilium.europa.eu/en/press/press-releases/2019/05/21/council-adopts-ban-on-single-use-plastics/#:~:text=Under%20the%20new%20rules%2C%20single,2025%20and%2030%25%20by%202030>.

formally adopted the comprehensive measures proposed by the Commission to address marine litter stemming from the ten most common single-use plastic products found on European beaches,

Deadlines for implementation differ, with bottle design requirements set for July 3, 2024. The directive is in line with the EU's plastic strategy, designed to promote the shift toward a circular economy.²⁷

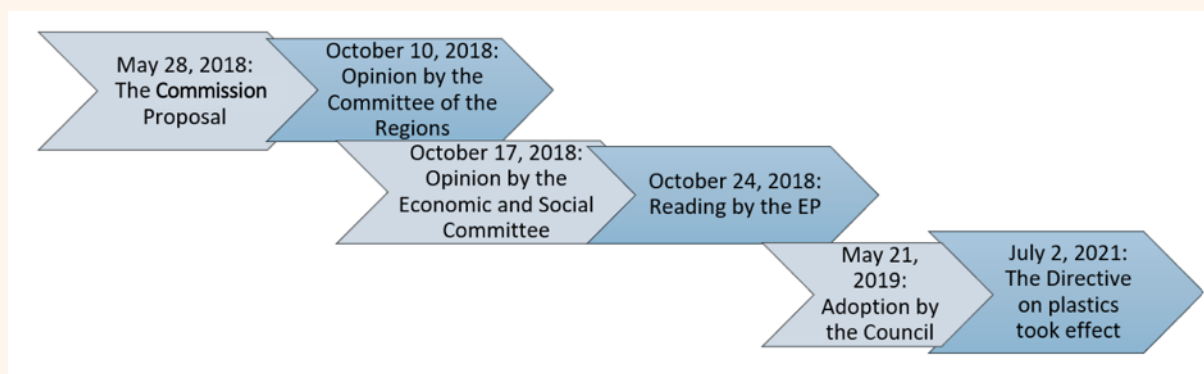


Figure 3. The Policymaking Timeline of the Single-Use Plastics Policy

as well as abandoned fishing gear and oxo-degradable plastics.²⁵ Following this, the Council issued a press release acknowledging the Commission's proposal regarding the new rules on single-use plastics aimed at curbing marine plastic pollution.²⁶

Since July 2, 2021, the Directive on Single-Use Plastics has been in effect, banning specific single-use plastic items that have alternatives, including cotton bud sticks, cutlery (forks, knives, spoons, chopsticks), plates, straws, and beverage stirrers. Member states are required to enact measures to decrease the use of such single-use plastics, set recycling goals for plastic bottles, enforce design standards and labelling, and broaden producer responsibility for waste management.

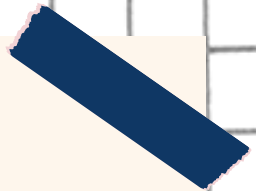
Conclusion

An actor-based approach to understanding the policymaking process, particularly applicable in the case of the European Union's single-use plastics ban/policy, proves highly useful for comprehending the intricate dynamics at play. Throughout the process, from agenda-setting to policy formulation and adoption, various actors, both institutional and non-institutional, exerted influence, shaping the direction and content of the policy. On the one hand, non-institutional actors, such as environmental organisations, lobbies, scientists, and media, as well as the United Nations as an international actor, played crucial roles in setting the agenda, advocating for specific measures, and pushing for relevant policy formulas.

25 *Ibid.*; see also European Commission, "Circular Economy: Commission welcomes European Parliament adoption of new rules on single-use plastics to reduce marine litter," *Ec.europa.eu*, March 27, 2019, https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_19_1873.

26 Council of the EU, *Council adopts ban on single-use plastics*.

27 Directive 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment, OJ L 155, June 6, 2019, 1-19.



On the other hand, institutional actors, including the European Commission, the European Parliament, and the Council, navigated through the complexities of policy formulation and adoption. The engagement of diverse actors underscores the multifaceted nature of policy making, highlighting the importance of considering the perspectives and interests of all stakeholders involved. Ultimately, the actor-based approach offers valuable insights into the policymaking process, elucidating the interactions and power dynamics that shape policy outcomes in a complex regulatory landscape.

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