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REVIEWS

DISPUTE SETTLEMENT MECHANISMS IN INTERNATIONAL AGREEMENTS OF THE EUROPEAN UNION

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This article attempts a systematisation of the types of dispute settlement mechanisms in EU international agreements, and it comments upon their most salient features from the perspective of EU law. All EU dispute settlement is peaceful dispute settlement. Within this type of dispute settlement, several categories can be distinguished: some EU international agreements contain no dispute settlement clause; some allow for the imposition of coercive measures such as sanctions; and most foresee the recourse to judicial or quasi-judicial avenues. In addition to judicial avenues in an independent court, EU international agreements in fact also include 'softer' mechanisms for consultation, mediation, or cooperation whereby the parties endeavour to reach a mutually agreed solution for solving any dispute before recurring to judicial avenues. This article suggests possible taxonomies of judicial or quasi-judicial mechanisms based on the body in charge of setting the dispute, on the procedure and on the subject matter, and it identifies common patterns in the inclusion of these forms of dispute settlement in EU international agreements.

1 INTRODUCTION

With its insistence on a rules-based international order,[1] in line with its constitutional objectives,[2] the European Union contributes to an international economic order based on multilateralism and on international law.[3]

International political actors, including the EU, have developed sophisticated legal tools to *avoid* and *settle* disputes.[4] Avoidance and settling of disputes is here understood as meaning the

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[1] See e.g. European External Action Service, 'A Strategic Compass for Security and Defence' (March 2023) 10 <https://www.eeas.europa.eu/sites/default/files/documents/strategic_compass_en3_web.pdf> accessed 01 September 2024.

[2] See especially Article 3(5) TEU and Article 21(2)(b) and (h) TEU.

[3] Opinion 1/17 *Free Trade Agreement with Canada* EU:C:2019:341 para 213: the CETA dispute settlement advanced the objective of free and fair trade laid down in Article 3(5) TFEU. See also Article 21(2)(e) TEU.

[4] For the purposes of international law, according to the often-quoted definition given by the Permanent Court of International Justice in *Mavrommatis*, a dispute is 'a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons' ((1923) PCIJ Ser A No 2,11). The European Court of Justice has developed a justiciability doctrine to decide when a genuine dispute exists in the context of a question referred by a national court for a preliminary ruling (see e.g. Case 104/79 *Foglia v Novello* EU:C:1980:73, para 11) but not, to the best of my knowledge, in the context of an international dispute. In the case of disputes between Member States, in proceedings brought under Article 259, 273, or relating to Article 344 TFEU, justiciability doctrines (lack of jurisdiction, locus standi, political question doctrines) are used, but the notion of 'dispute' is not defined (see e.g.

situation when a party to an agreement complies wholly or partially with another party's interests.[5] These legal tools for avoiding and settling disputes are usually designed with disputes involving economic interests in mind,[6] but since contention may arise in any area of international relations, this article will consider also settlement mechanisms when non-commercial interests are involved.[7] This article attempts a systematisation of the models of dispute settlement mechanisms in EU international agreements[8] and comments upon their most salient features from the perspective of EU law.

In its international agreements, the European Union has set in place dispute settlement mechanisms which vary significantly in nature. Although not all EU international agreements include a dispute settlement mechanism,[9] those which do are usually modelled on, or make explicit reference to, the mechanisms existing under WTO law. The standard model is that the agreements foresee that the parties shall enter into consultation, failing which one party can trigger arbitration, and the losing party of such arbitration shall comply with the arbitral decision lest the other lawfully retaliate by withdrawing benefits under the agreement. A distinctive arrangement of EU international agreements (as opposed to state agreements)[10] is the fact that the inclusion of a settlement mechanism for investor-state disputes may trigger the so called 'mixity',[11] i.e. the EU's international agreement in question may have, as one party, the EU and

Case C-364/10 *Hungary v Slovakia* EU:C:2012:630; in Case C-457/18 *Slovenia v Croatia* EU:C:2020:65, the Court did not have jurisdiction on the merits of the dispute but still invited the parties to submit the dispute to the Court as arbitrator).

[5] The aim of the WTO dispute settlement mechanisms 'is to secure a positive solution to a dispute' (Article 3.7 of the Understanding on rules and procedures governing the settlement of disputes, Annex 2 of the Agreement Establishing the World Trade Organization ('the DSU')). This is narrower than *avoiding* and settling disputes, which is, instead, the stated objective of dispute settlement chapters under many EU FTAs. E.g. Article 15.1 EU-Vietnam FTA; Article 21.1 EU-Japan FTA.

[6] Indeed, helping to solve (trade) controversies was originally the function of law in the international community, to borrow the phrase from Lauterpacht.

[7] Ingo Borchert et al, 'The Pursuit of Non-Trade Policy Objectives in EU Trade Policy' (2021) 20(5) World Trade Review 623. A useful counterpoint is to consider ways in which Courts decide not to engage in the resolution of certain disputes, on which see e.g. Thomas M Franck, *Political Questions Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* (Princeton University Press 1992); Jed Odermatt, 'Patterns of Avoidance: Political Questions before International Courts' (2018) 14(2) International Journal of Law in Context 221.

[8] In the interest of brevity, the phrase 'EU international agreements' will be used in this article to refer to the entire class of treaties concluded by the EU and by the EU and its Member States (see discussion on mixity below), even though this article mostly focuses on agreements with a strong component of trade involved, i.e. custom unions (CUs), association agreements (AA), free trade agreements (FTAs), and partnerships and cooperation agreements. Thus, the Article does not consider the case of agreements in which only Member States, but not the EU are a party; nor intra-Member States agreements.

[9] See Section 4.

[10] This is in turn due to the fact that the EU is an autonomous legal order with 'specific characteristics' that 'include those relating to the constitutional structure of the EU, which is seen in the principle of conferral of powers referred to in Articles 4(1) TEU and 5(1) and (2) TEU, and in the institutional framework established in Articles 13 TEU to 19 TEU' (Opinion 2/13 EU *Accession to ECHR* EU:C:2014:2454 para 165).

[11] This follows from the CJEU, Opinion 2/15 *Free Trade Agreement with Singapore* EU:C:2017:376 paras 292 and 305, where the Court held that, since not all forms of investment are EU's exclusive competence (Article 206 TFEU), the inclusion, in an international agreement, of provisions on investment dispute settlement and on portfolio investment triggers mixity.

its Member States.[12]

This variety is due to the fact that parties to an international treaty will typically enjoy a degree of discretion as to the choice of dispute settlement. This flexibility means that the resort to a mechanism often depends on the relative economic and political power of the parties. In other cases, the parties bind themselves to discharging a procedure for consultation, amicable settlement and mandatory mediation before escalating to judicial resolution and, only once that procedure is terminated, having recourse to unilateral remedies such as trade defence instruments. The choice of dispute settlement mechanism may also depend on the nature of the rules to be enforced. A distinction between symmetrical exchanges ('you can trade in my country with no tariffs and in return I can trade in your country with no tariffs') and asymmetrical ones ('you play the piano for me and in return I pay you') may be useful: in EU international agreements most of the rules are formulated symmetrically, but the reality is that the exchanges will often be asymmetrical (if, for example, it is the case that the EU invests in a third country disproportionately more than the other way around). Practice shows that asymmetrical exchanges tend to be enforced by non-judicial avenues (including the adoption of sanctions or trade defence instruments).[13]

In general, EU dispute settlement mechanisms vary among themselves depending on the substantive subject matter rather than on the form and depth of the international agreement. In other words, whether the EU wants to create a custom Union with Turkey, set up comprehensive trade agreement with Canada to reduce custom tariffs or simply establish a framework for bilateral economic relations with Kazakhstan, the difference in the scope and depth of commitments does not in itself influence the form of dispute settlement: most agreements foresee the same model of arbitration; and within one single agreement we can find, for example, arbitration for disputes arising out of one area and mediation for a dispute on a different matter.

As this article shows, some patterns may nonetheless be identified within this variety. First, a degree of geographical and political proximity usually results in greater involvement of EU institutions. Second, more recent agreements tend to be more formalised than previous ones.

2 A TAXONOMY OF DISPUTE SETTLEMENT MECHANISMS IN EU INTERNATIONAL AGREEMENTS

For a systematisation of the dispute settlement mechanisms of the EU, this article begins by drawing a qualitative distinction, central to international law and also found in the seminal work by Schelling *Arms and Influence*, between coercion and diplomacy. Needless to say, all dispute settlement of the EU is peaceful dispute settlement. But the distinction remains nonetheless. On the one hand there is coercion: historically (for the EU, this is of course not an option not even in theory), *use* of force or the *threat* thereof is a way to stimulate compliance (Section 3); coercion

[12] A recent contribution on this is Merijn Chamon and Inge Govaere (eds), *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity* (Brill 2020).

[13] For the concrete example of the EU-China photovoltaic dispute, see Tancrède Voituriez and Xin Wang, 'Real Challenges behind the EU–China PV Trade Dispute Settlement' (2015) 15(5) Climate Policy 670.

may also take place through measures not involving the use of force, such as sanctions or trade defence instruments (Section 4).[14] On the other hand, there is diplomacy, consisting either of delegation of decision-making to a third party, or of direct bargaining:[15] what these have in common is an attempt at respecting common interests of the parties to a dispute. The EU's international agreements foresee the recourse to judicial or quasi-judicial avenues (Sections 5 and 6). This article suggests possible taxonomies of these mechanisms based on the body in charge of setting the dispute, on the procedure, and on the subject matter. In addition to judicial avenues, EU international agreements also include 'softer' mechanisms for consultation, mediation or cooperation, whereby the parties endeavour to reach a mutually agreed solution for solving any dispute before recurring to judicial avenues.[16] In practice, these non-judicial actions are the most widely used category of dispute settlement mechanisms. It would, of course, be possible to classify each dispute settlement mechanism on a spectrum going from one extreme of formalisation to the other: for example, some memoranda of understanding on taxation have no dispute settlement clause at all, and on the other side of the spectrum agreements with European micro-states whose currency is the Euro foresee the exclusive jurisdiction of the CJEU. Similarly, it would be possible to provide a chart or table detailing the minute differences between the hundreds of EU international agreements. These exercises are not necessary for the purpose of the present inquiry. The distinction between coercive measures and diplomatic measures is the most useful in informing the article's structure, as it shows different attitudes of the EU, as elaborated in Section 3. Finally, it may be recalled that in their classic study on dispute settlement, Keohane, Moravcsik and Slaughter suggested another qualitative difference between international and transnational dispute resolution: in the latter,

> access to courts and tribunals and the subsequent enforcement of their decisions are legally insulated from the will of individual national government. The tribunals are therefore more open to individuals and group in civil society.[17]

All dispute settlement mechanisms of the EU are by constructions 'transnational' in the sense that those authors have identified: including, even for the UK, those in the Withdrawal

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[14] See the definition of coercion (by third countries) contained in EU secondary law: 'economic coercion exists where a third country applies or threatens to apply a third-country measure affecting trade or investment in order to prevent or obtain the cessation, modification or adoption of a particular act by the Union or a Member State, thereby interfering in the legitimate sovereign choices of the Union or a Member State', Article 2 Regulation (EU) 2023/2675 of the European Parliament and of the Council of 22 November 2023 on the protection of the Union and its Member States from economic coercion by third countries [2023] OJ L2023/2675 ('the anti-coercion instrument').

[15] For these two elements see the classic Robert O Keohane, Andrew Moravcsik, and Anne-Marie Slaughter, 'Legalized Dispute Resolution: Interstate and Transnational' (2000) 54(3) International Organization 457, defining international courts and tribunals as a 'key dimension of legalization', because 'instead of resolving disputes through institutionalized bargaining, states choose to delegate the task to third-party tribunals charged with applying general legal principles'.

[16] The article does not consider ways to terminate the agreement, because they are not ways to solve a dispute for the purposes of the definition given above.

[17] Keohane, Moravcsik, and Slaughter (n 15) 458.

Agreement (WA)[18].

3 STATES 'CONDEMN RECOURSE TO WAR FOR THE SOLUTION OF INTERNATIONAL CONTROVERSIES'

'Diplomacy' – wrote Schelling – 'is bargaining; it seeks outcomes that, though not ideal for either party, are better for both than some of the alternatives […] there must be some common interest, if only in the avoidance of mutual damage, and an awareness of the need to make the other party prefer an outcome acceptable to oneself'.[19] Force, instead, is when a country pursues its own interests '*forcibly*, accommodating only to opposing strength, skill, and ingenuity and without trying to appeal to an enemy's wishes'.[20]

From a historical perspective and for the sake of completion it bears mentioning at the outset that, traditionally, war has been a way to settle disputes involving commercial, border, ideological and other issues.[21] It is only less than a century ago that states formally started condemning 'recourse to war for the solution of international controversies'.[22] Obviously, recourse to *military* force (or a threat of it) is not an option for the EU – not even in theory, since it does not control military assets that can be deployed. It might instead have recourse to a third option, a mix between diplomacy and brute force, that Schelling called 'coercive diplomacy' (discussed in the next Section), a coercion by '*threat* of damage, or of more damage to come' which can make someone yield or comply.[23] Coercive diplomacy 'tries to structure someone's motives, while brute force tries to overcome its strength'.[24]

By and large, international politics now seeks to solve controversies by appealing to common interests. Law is an important tool to that end. As Lauterpacht stated, 'the function of law is to regulate the conduct of men with reference to rules whose formal […] source of validity lies, in the last resort, in a precept imposed from outside'.[25] This is possibly among the reason for the increased attention the EU has paid to the legal engineering of its dispute settlement mechanisms, implying that increased legalisation, if not downright judicialization, enhances their legitimacy. This is a shift both from older EU international agreements that preferred non-

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[18] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community2019/C 384 I/01 XT/21054/2019/INIT (OJ C 384I)

[19] Thomas C Schelling, *Arms and Influence* (2020 Yale University Press) 1.

[20] ibid

[21] Thus, a classic treatise of international law, James R Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxfor University Press 2012) 744, considers the use of force in the part on disputes, citing Grotius in De Iure Belli ac Pacis (1625, Tuck ed, 2005) I.i §1, in support of the statement that 'In the practice of states in nineteenth-century Europe, war was sometimes still represented as a last resort, that is, as a form of dispute settlement'.

[22] General Treaty for Renunciation of War as an Instrument of National Policy signed in Paris on 27 August 1928 by Germany, France, and the United States.

[23] Schelling (n 19) 3.

[24] ibid.

[25] Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford University Press 2011, 1st edn 1933) 3.

judicial, political dispute settlement mechanisms,[26] and from the trend toward a WTO-inspired legalisation starting in the early 2000s.[27]

4 MEASURES NOT INVOLVING THE USE OF FORCE: SANCTIONS AND TRADE DEFENCE INSTRUMENTS

EU restrictive measures – often referred to as 'sanctions' – consist among others of restrictions on trade and investment, of ban on travels or of asset freezes[28] and are a pivotal tool of the EU's foreign policy.[29] By adopting restrictive measures, the EU spreads its fundamental values and pursues its objectives in the international arena.[30]

Restrictive measures can be conceived of as tools for the settlement of dispute, in so far as they are used to affect the behaviour of an opponent. In particular, the literature has shown that sanctions have been used to coerce or constrain other actors, or to signal the EU's position on a particular issue, or a mix of those.[31] If sanctions are aimed at coercing or constraining a third country, if they are a threat 'of more damage to come', they constitute lawful means to coerce the other party to comply with EU's interests.[32]

Although there are no specific triggering conditions for sanctions in EU primary law,[33] the adoption of such measures is authorised, in certain circumstances, by international agreements concluded by the EU. An example is the EU-Russia partnership agreement, which states that

> nothing in this Agreement shall prevent a Party from taking any measures which it considers necessary for the protection of its essential security interests […] in the event of serious internal disturbances affecting the maintenance of law and order, in time of war or serious international tension constituting threat of war or in order to carry out

[26] See the examples discussed below of the AAs with Mediterranean countries.
[27] The trend was discussed, for the EU, by Ignacio Garcia Bercero, 'Dispute Settlement in European Union Free Trade Agreements: Lessons Learned?' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Areements and the WTO Legal System* (Oxford University Press 2006) 383; for international agreements in general, the trend was discussed in James McCall Smith, 'The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts' (2000) 54(1) International Organization 137.
[28] For the array of measures adopted since 2022 against Russia and Belarus, see Katharina Meissner and Chiara Graziani, 'The Transformation and Design of EU Restrictive Measures against Russia' (2023) 45(3) Journal of European Integration 377; and Luigi Lonardo, *Russia's 2022 War Against Ukraine and the Foreign Policy Reaction of the EU: Context, Diplomacy, and Law* (S.l.: Palgrave Macmillan 2023).
[29] Iana Dreyer and José Luengo-Cabrera, 'Introduction' in Iana Dreyer and José Luengo-Cabrera (eds), *On Target? EU Sanctions as Security Policy Tool* (EUISS Report 2015) 7.
[30] For a discussion of the EU objectives as related to EU sanctions, see Joris Larik, *Foreign Policy Objectives in European Constitutional Law* (Oxford University Press 2016) 169-171.
[31] See Francesco Giumelli, *Coercing, Constraining and Signalling: Explaining UN and EU Sanctions after the End of the Cold War* (ECPR Press 2011).
[32] They may be lawful under international law because what is not prohibited is allowed (the so-called *Lotus* principle). Although sanctions are coercive measures, economic coercion is not prohibited by Article 2(4) UN Charter because it does not amount to use of force, at least according to the prevailing view (see, to that effect, Oliver Dörr and Albrecht Randelzhofer, 'Purposes and Principles, Article 2(4)' in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (3rd edn, Oxford University Press 2012) 200, 210.
[33] See the discussion in Luigi Lonardo, 'Challenging EU Sanctions against Russia: The Role of the Court, Judicial Protection, and Common Foreign and Security Policy' [2023] Cambridge Yearbook of European Legal Studies 1.

> obligations it has accepted for the purpose of maintaining peace and international security.[34]

This is modelled on the security exceptions of Article XXI GATT. In *Rosneft*, the CJEU held that the provision of the EU-Russia agreement permitted the adoption of restrictive measures targeting the Russian energy sector,[35] which the EU adopted on two occasions in 2014, with a view to bring Russian action to a stop over the escalating conflict in Ukraine. The Court took the view that the 'war' or 'serious international tension' does not need to directly affect the territory of the EU for the measures to be authorised.[36] In a subsequent case involving the same set of issues, the Court also found that, even if GATT were directly applicable and could usefully be relied upon by Rosneft, the security exceptions of Article XXI as well as the EU-Russia agreement allowed discretion to each party in the adoptions of the restrictive measures.[37] In construing EU's action in this way, the Court firmly confirmed the compliance of EU with the international economic order even when its essentially security interests were at stake. Such conclusion was mostly based on an appraisal of EU law – rather than international economic law. It is worth stating that under GATT, the security exceptions were designed so as to not enable a party to enforce commercial interests under the pretence of security interests. The ECJ shied away from considering whether that might have been the case, simply referring to the broad discretion that the Council enjoys in the adoption of restrictive measures.[38]

A way to enforce commercial interests is through trade defence instruments. Here, the coercive element is less prominent, but trade defence instruments differ from diplomacy in so far as they do not try to 'structure someone's motives'. Even though trade defence instruments are traditionally not considered among the dispute settlement mechanisms, the opportunity to adopt them is a lawful way to prevent and settle disputes. EU trade defence instruments deal with anti-dumping measures, countervailing measures and safeguard measures, as well as measures under the Trade Barrier Regulation.[39] They are a standard presence in EU FTAs, with minor variations depending on the political priorities of the negotiating partner, as emphasis on procedural considerations in the EU-Korea FTA shows.[40]

In a nutshell, in the context of WTO, anti-dumping measures are applicable pursuant to

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[34] Article 99(1)(d) of the Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, on the one part, and the Russian Federation of the other part, signed in Corfu on 24 June 1994.
[35] Case C-72/15 *Rosneft* EU:C:2017:236 para 110.
[36] ibid para 112.
[37] Case C-732/18 P *Rosneft et al v Council* EU:C:2020:727 paras 132-136; Case T-715/14 *Rosneft et al v Council* paras 180-181.
[38] Case C-72/15 *Rosneft* (n 35) para 113.
[39] See Van Bael & Bellis, *EU Anti-dumping and Other Trade Defence Instruments* (5th edn, Kluwer Law International 2011).
[40] For a detailed analysis, see Dukgeun Ahn, 'Legal and Institutional Issues of Korea-EU FTA: New Model for Post-NAFTA FTAs?' (2010) Sciences Po/GEM policy brief 16 < https://ecipe.org/wp-content/uploads/2014/12/AHN_LEGALANDINSTUTITIONALKOREU_FTA_201010.pdf> accessed 01 September 2024.

the 'Anti-dumping agreement',[41] to which EU international agreements usually refer.[42] Building on Article VI GATT, the Anti-dumping agreement allows a Member to impose discriminatory trade restrictions against another Member 'when a foreign exporter sells its product at less than its "normal value", and this "dumping" causes or threatens to cause "material injury" to that Member's domestic industry'.[43] Under EU law, the legal basis for these is the anti-dumping Regulation,[44] which provides detailed procedural and substantive rules.[45]

Countervailing measures are essentially anti-subsidies proceedings. Much as the previous measures, the WTO allows the adoption of countervailing measures in the 'Agreement on Subsidies and Countervailing Measures' contained in Annex 1A of the WTO Agreement, to which EU international agreements usually refer.[46] The legal basis under EU law is the Regulation on protection against subsidised imports.[47] Measures on anti-dumping and anti-subsidy matters applicable following a WTO Dispute settlement body report are contained in a further Regulation.[48] In addition to anti-dumping and countervailing measures, import from some third countries are also subject to residual safeguard measures.[49]

The Trade Barrier Regulation (TBR)[50] allows industries and enterprises in the EU to bring complaints to the European Commission when illegal foreign trade measures or actions are taken by the EU's trading partners. Where the Commission finds that further action is needed in order to remove the injury and/or relevant trade obstacle, it may take specific actions, the first step being recourse to the procedure foreseen in the bilateral international agreement, first through non-judicial avenues such as finding a mutually acceptable solution and then through judicial avenues. Only once that procedure has terminated (Article 13(2) TBR), the Commission may consider suspending any trade concessions with the relevant countries, imposing or increasing customs duties on imports, or introducing restrictions on imports or exports from the third

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41 Agreement on implementation of Article VI of the GATT 1994.
42 E.g. Article 5-11 EU-Japan FTA; Article 3.1. EU-Vietnam FTA.
43 Laura Rovegno and Hylke Vandenbussche, 'A comparative analysis of EU Antidumping rules and application' in Sanford E Gaines, Birgitte Egelund Olsen, and Karsten Engsig Sørensen (eds), *Liberalising Trade in the EU and the WTO: Comparative Perspectives* (Cambridge University Press 2012).
44 Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union [2016] OJ L176/21 (TBR).
45 For a fully detailed exposition of the previous versions of the Regulation, see Van Bael & Bellis (n 39).
46 E.g. Article 5-11 EU-Japan FTA; Article 3.1. EU-Vietnam FTA.
47 Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union [2016] OJ L176/55.
48 Regulation (EU) 2015/476 of the European Parliament and of the Council of 11 March 2015 on the measures that the Union may take following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters [2015] OJ L83/6.
49 Regulation (EU) 2015/755 of the European Parliament and of the Council of 29 April 2015 on common rules for imports from certain third countries [2015] OJ L123/33; Regulation (EU) 2015/478 of the European Parliament and of the Council of 11 March 2015 on common rules for imports[2015] OJ L83/16; Regulation (EU) 2015/477 of the European Parliament and of the Council of 11 March 2015 on measures that the Union may take in relation to the combined effect of anti-dumping or anti-subsidy measures with safeguard measures [2015] OJ L83/11.
50 Regulation (EU) 2015/1843 of the European Parliament and of the Council of 6 October 2015 laying down Union procedures in the field of the common commercial policy in order to ensure the exercise of the Union's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (codification) [2015] OJ L272/1.

country concerned (Article 13(3) TBR).[51]

5 DISPUTE SETTLEMENT THROUGH JUDICIAL AVENUES

The EU includes a dispute settlement provision in nearly all its bilateral agreements.[52] In practice, recourse to dispute settlement tends to be the mandatory forum, and this excludes in particular, that parties have recourse to WTO dispute settlement procedures. Admittedly, the standard rule is that recourse to dispute settlement under its FTAs is without prejudice to any action in the WTO framework,[53] but the EU's FTAs state by way of (important) derogation that parties 'shall not, for a particular measure, seek redress for the breach of a substantially equivalent obligation under this Agreement and under the WTO Agreement or under any other international agreement to which both Parties are party in the relevant fora'.[54]

The mechanisms may be classified according to several criteria, all of which shed light on partially overlapping features. First, criteria concerning the characteristics of the body entrusted with solving the controversy (5.1); second, criteria concerning the degree of formality of the procedure (5.2); third, the mechanisms may be classified according to the subject matter of the controversies (5.3). In terms of access,[55] these are all bodies in which the EU or the other party may file suit against each other: individuals do not have standing, with the important exception of the investor-state dispute settlement discussed below. In practice, however, individuals or groups (such as industries) can and do lobby the relevant side to start litigation.[56]

5.1 THE BODY

The body may be dependent or independent, temporary or permanent; this creates four possible categories.

Dependent bodies (either temporary or permanent) are best construed as non-judicial,

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[51] The anti-coercion instrument (n 14) and the international procurement instrument (Regulation (EU) 2022/1031 of the European Parliament and of the Council of 23 June 2022 on the access of third-country economic operators, goods and services to the Union's public procurement and concession markets and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement and concession markets of third countries [2022] OJ L173/1) are also worthy of mention as measures aimed at *avoiding* disputes in the broad sense, but they are not contained in EU international agreements nor do the measures adopted pursuant to these two instruments need to have any connection with EU international agreements.

[52] Except certain memoranda of understanding, such as the Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments – Memorandum of Understanding [2004] OJ L385/30, and amending protocols.

[53] Article 15.24.1 EU-Vietnam FTA.

[54] Article 15.24.2 EU-Vietnam FTA. A derogation to that derogation is for disputes on breaches of the Agreement on Technical Barriers to Trade in Annex 1A to the WTO Agreement, in which case the complaining party shall select the dispute settlement mechanism under the WTO Agreement.

[55] The category is used as classification criterion in Keohane, Moravcsik, and Slaughter (n 15) 462.

[56] The literature is very vast indeed. See, for the case of the EU, Christina Fattore, 'Interest Group Influence on WTO Dispute Behaviour: A Test of State Commitment' (2012) 46(6) Journal of World Trade 1261; Dirk De Bièvre et al, 'International institutions and interest mobilization: The WTO and lobbying in EU and US trade policy' (2016) 50(2) Journal of World Trade 289.

because they lack by design the characteristic of impartiality (a characteristic which, as the CJEU has held,[57] is of the essence to ensure effective *judicial* protection). For this reason, they are discussed in the next Section (on non-judicial avenues).

5.1[a] Temporary (Or Ad Hoc) Independent Bodies

These are panels of experts or arbitration panels. For the parties, the advantages of these bodies lies in their lack of permanence and *ad hoc*, *ex post* nature as well as in the role of the parties in the appointment procedure.[58]

Panel of experts may be set up to solve specific controversies that arise in given subject matters. The experts are drawn from lists of individuals with specialised knowledge in a certain field who serve in their individual capacities and do not take instructions from the parties with regards to the matter at stake.[59] The lists are drafted by the relative specialised committees.

An arbitration panel may be set up by the parties after non-judicial mechanisms have been exhausted. Arbitrators are drawn from lists of individuals with specialised knowledge in a certain field[60] who serve in their individual capacities and do not take instructions from the parties with regards to the matter at stake.[61] As discussed in Section 5.2 below, the detailed rules on the appointment of arbitrators[62] are a strong guarantee that the arbitration panel will indeed come into existence where necessary so as to minimise procedural obstructions.

5.1[b] Permanent Independent Bodies

To this category belong the arbitral tribunal established by the Canada-EU Trade Agreement (CETA)[63] and the Court of Justice of the EU itself. This Section considers them in turn.

The CETA tribunal

For the investors-state dispute settlement (ISDS), by way of innovation from the traditional, 'ad hoc' ISDS, CETA foresees the establishment of Tribunal (with a possibility to appeal to an Appellate Tribunal) as well as, in the longer term, a multilateral investment tribunal (and appellate mechanism) which would bring to an end the functioning of the initial tribunals. The aim is thus to establish a system of 'independent, impartial and permanent' courts,[64] of which the CETA

[57] Case C-216/18 PPU *LM* para 48.
[58] See in similar terms Maria Fanou, 'The independence and impartiality of the hybrid CETA Investment Court System: Reflections in the aftermath of Opinion 1/17' (2020) 4(1) Europe and the world: A Law Review, 4.
[59] Article 13.17.4 EU-Vietnam FTA.
[60] The requirement for their expertise tends to be slightly more specialised than those foreseen in Article 8.1 DSU.
[61] Unlike the provision of Article 8.3 DSU, arbitrators usually are nationals of the parties.
[62] See, for example, those contained in Articles 21.8 and following EU-Japan FTA.
[63] In 2015, the Commission has developed a vision for a multilateral court system in investor-state disputes so that provisions on investment disputes may be read in light of that vision, as discussed below. See Commission Concept Paper of 5 May 2015, entitled 'Investment in TTIP and beyond — the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court' <https://www.tweedekamer.nl/downloads/document?id=2015D17383> accessed 01 September 2024.
[64] Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States [2017] OJ L11/3.

Tribunal would be merely a first stage.[65] As the CJEU has held in Opinion 1/17, the CETA tribunal differs from ad hoc bodies in two regards:[66] the composition and the dealing with cases.[67] Unlike traditional ad hoc tribunals, the composition of the divisions of CETA Tribunal that hear a given case will be 'random and unpredictable'.[68] As for the dealing with cases, the Court noted that CETA Tribunal has mandatory jurisdiction.[69]

It is worth mentioning that in Opinion 1/17, the CJEU found that the Member States are precluded from setting up a tribunal which, while being outside the EU judicial system, has the power to interpret or apply provisions of EU law (other than those of the agreement itself) or to make awards that might have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework. The pronouncement on the CETA tribunal, which essentially articulates a well-established line of case law on tribunals set up by EU's international agreements,[70] is worthy of closer scrutiny for its implications on the relationship between such tribunals and the CJEU and the requirements for their independence. This will be considered in turn.

The CETA tribunal was deemed to be outside the EU judicial system because 'it is separate from the domestic courts of Canada, the Union, and its Member States'.[71] While there is not an express provision in CETA where it would be stated that the Tribunal is separate from the domestic courts of the contracting parties, it is difficult to see how it could be otherwise. The establishment of an impartial – in the sense that it belongs to neither party – tribunal is one of the aims of CETA. The same rationale was adopted by AG Bot to reach the same conclusion.[72] The Tribunal is not empowered to refer preliminary questions (there are no provisions in CETA to this effect), but this fact is used by the Court to support the compatibility of CETA with EU law: the lack of power to issue preliminary references is a consequence, and not evidence, of the fact that the Tribunal is outside the EU judicial system.[73] There is a case to be made that the Court's reasoning is opaque on why CETA tribunal is outside the judicial system. In *Portuguese judges*,[74] the Tribunal de Contas was considered falling within the EU judicial system because it could apply EU law;[75] in Opinion 1/17, it was the other way around: since CETA tribunal is outside the judicial system, it cannot apply EU law.

As far as the independence of the tribunal is concerned,[76] the requirements of Article 47

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65 Opinion of AG Bot in Opinion 1/17 *Free Trade Agreement with Canada* EU:C:2019:72 para 7.
66 See for a detailed discussion Fanou (n 58) 10.
67 Opinion 1/17 *Free Trade Agreement with Canada* (n 3) para 194.
68 Opinion 1/17 *Free Trade Agreement with Canada* (n 3) para 195.
69 ibid para 198.
70 Opinion 1/91 *EEA* EU:C:1991:490 paras 33-36; CJEU, Opinion 2/13 *Accession to ECHR* (n 10).
71 Opinion 1/17 *Free Trade Agreement with Canada* (n 3) para 114
72 Opinion of AG Bot in Opinion 1/17 *Free Trade Agreement with Canada* (n 65) para 179.
73 Opinion 1/17 *Free Trade Agreement with Canada* (n 3) para 134.
74 In that case the Court sought to establish whether the Portuguese Tribunal de Contas was a court or tribunal for the purposes of Article 19 TEU.
75 Case C-64/16 *Portuguese judges* EU:C:2018:117 paras 37-40.
76 For a more detailed discussion see Fanou (n 58).

of the EU Charter of fundamental rights apply,[77] since CETA is an integral part of the EU legal order. In Opinion 1/17, the CJEU was satisfied that the CETA Tribunal was independent from external influence[78] and was impartial, i.e. equidistant from the parties.[79] This was the case in the light of the rules guaranteeing against the removal from office, the remuneration and the lack of instructions from third parties. In addition, the power of CETA joint committee to adopt interpretations of the agreement that are binding over the Tribunal did not affect the latter's independence. The Court added an important qualification to this finding, namely 'that interpretations determined by the CETA Joint Committee have no effect on the handling of disputes that have been resolved or brought prior to those interpretations'.[80] This approach finds the right balance between safeguarding the fundamental right to an independent court protected by the Charter and ensuring the functioning of any other (actual or potential) EU international agreements containing an ISDS.

Opinion 1/17 is an important pronouncement as its rationale is applicable to other arbitral tribunals, either ad hoc or permanent, established by current or future EU FTAs. Bodies thus established must either be capable to refer questions for preliminary rulings to the CJEU, or, absent this condition, they cannot bind EU institutions to any interpretation of EU law.[81]

The Court of Justice of the European Union

As hinted at in the introduction, agreements with states with whom the EU has a high degree of interdependence tend to have distinctive dispute settlement mechanisms. They usually foresee the involvement of the CJEU in one way or another. Three examples will illustrate this.

First, the Withdrawal Agreement (WA).[82] Dispute settlement under the WA has a strong symbolic and political relevance, since the agreement is the first legal instrument dealing with the concrete possibility of a dispute between the EU and a former Member State, and since it implicitly sets a model in case more of such agreements were needed in the future (i.e. if other Member States leave the EU). The WA foresees highly distinctive judicial avenues such as litigation before the CJEU,[83] an arbitration panel that shall refer questions of EU law to the

[77] 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. […]'.

[78] Opinion 1/17 *Free Trade Agreement with Canada* (n 3) para 223

[79] ibid para 203.

[80] ibid para 236.

[81] A point elaborated below, in the Section on procedure.

[82] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019/C 384 I/01) [2019] OJ C 384I/1 (WA). On this see Marise Cremona, 'The Withdrawal Agreement and the EU's international agreements' (2020) 45(2) European Law Review 237; Adam Łazowski, 'Court of Justice of the European Union and the United Kingdom after Brexit: Game Over?' (2022) 47(6) European Law Review 666; Steve Peers, 'The End – or a New Beginning? The EU/UK Withdrawal Agreement' [2020] Yearbook of European Law 122.

[83] For facts relevant to the obligations under the WA and happened during the transition period, the CJEU retains its ordinary jurisdiction (Article 131 WA). Idem for cases pending at the end of the transition period (Article 86 WA). This is also to be contrasted with the situation under UK law, where, in principle, there is no role for the CJEU even for the 'retained' EU law. See Marco Galimberti, 'Farewell to the EU Charter: Brexit and

CJEU, and, in the UK, an independent authority monitoring implementation and authorised to refer cases to UK courts, as well as non-judicial avenues for dispute settlement that are in line with those observed in other EU international agreements. Domestic courts of UK and other EU Member States are also involved in the process as they are entitled to refer preliminary questions to the CJEU.[84] For courts of EU Member States, the WA mandates that the UK is notified when they make a reference. For UK courts, the power to refer a question lasts for cases 'commenced at first instance within 8 years from the end of the transition period' when they concern citizens' rights.[85] As Peers notes, the March 2018 draft of the WA

> provided that cases pending in the UK courts at the end of the transition period which concerned EU law issues could still be sent to the CJEU for a preliminary ruling after that point. This prospect has disappeared entirely.[86]

Implementation in UK courts is helped by another body distinctive to the WA, the independent authority ('the Authority'). This shall have 'powers equivalent to those of the European Commission acting under the Treaties to conduct inquiries on its own initiative concerning alleged breaches' of citizens' rights by UK authorities.[87]

The WA is, in sum, firmly anchored to EU institutional structures, whereas the EU-UK Trade and Cooperation Agreement[88] is more international law oriented.[89] With such distinctive dispute settlement mechanisms, the WA crystallises the relative negotiating strength of the parties, as it places questions of EU law firmly under the jurisdictional monopoly of the CJEU. Indeed, the fact that the CJEU shall deliver rulings (not merely 'preliminary rulings') binding on the arbitration panel suggests that this body does not have any further discretion. But it is difficult to see how it could be otherwise: the case law on autonomy and independence recalled above made it so that, as a matter of EU law, the choices for institutional set up of such a tribunal were limited. The jurisdictional monopoly of the CJEU could under no circumstances be affected.

The Northern Ireland Protocol (which sets out arrangements necessary to address the

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Fundamental Rights Protection' (2021) 4(1) Nordic Journal of European Law 37, 38. The WA also provides that CJEU case law on the interpretation of the EU law referred to in the agreement will be binding upon the UK up until the end of the transition period, and 'due regard' shall be had for CJEU rulings after the end of the transition period: a provision destined to create interpretative problems for UK courts but whose interpretation is outside the scope of this article.

84 On this see Joris Larik, 'Decision-Making and Dispute Settlement' in Federico Fabbrini (ed), *The Law and Politics of Brexit. Volume 2: The Withdrawal Agreement* (Oxford University Press 2020).

85 Article 158.1 WA.

86 Steve Peers, 'Analysis 3 of the Revised Brexit Withdrawal Agreement: Dispute settlement' (*EU Law Analysis*, 18 October 2019) <http://eulawanalysis.blogspot.com/2019/10/analysis-3-of-revised-brexit-withdrawal.html> accessed 01 September 2024.

87 Article 159.1 WA.

88 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 [2020] OJ L 444/14.

89 On this see also Federico Casolari, 'I principi del diritto dell'Unione europea negli accordi commerciali: una visione di insieme' in Giovanna Adinolfi (ed), *Gli accordi di nuova generazione dell'Unione europea in materia di commercio ed investimenti* (Giappichelli 2021).

unique circumstances on the island of Ireland)[90] also deserves a mention in this context. Its Article 16 foresees a specific consultation and arbitration procedure to manage issues arising out of the Protocol itself. No sooner than ten days after it began to regulate some aspects of trade between the UK and EU, the House of Commons considered invoking Article 16 to address problems around the transit of goods between Northern Ireland and the rest of the UK. Since then, the EU came close to invoking Article 16,[91] and the UK has now notified the EU that unilateral steps will be taken to deal with issues arising as a result of its implementation. In the first instance, Article 16 may be invoked when the application of the Protocol 'leads to serious economic, societal or environmental difficulties that are likely to persist' or 'diversion of trade'. The procedures are then governed under Annex 7 to the Protocol: safeguarding measures may be adopted if, after having notified the Joint Committee, a consultation procedure has been concluded or one month after notification. In exceptional circumstances requiring immediate action, consultation may be done away with. Strictly necessary measures may be taken to remedy the situation. The measures thus taken shall be consulted on within Joint Committee every three months from the date of their adoption. Either party may at any time request the Joint Committee to review the measures. The dispute-settlement procedure of the Withdrawal Agreement was activated in March 2021 when the European Commission issued a written notice in response to the UK's unilateral decisions to extend 'grace periods' for certain provisions of the Protocol.[92] The European Commission urged the UK to engage in bilateral consultations within the Joint Committee in a spirit of cooperation, aiming to find a mutually acceptable solution by the end of the month. Despite no agreed solution being reached by the end of March 2021, bilateral consultations took place, and the European Commission refrained from formally initiating the dispute-settlement procedure outlined in the Withdrawal Agreement.

Second, the EEA Agreement.[93] It foresees the 'standard' dispute settlement mechanism of a Joint Committee, that is, the non-judicial body set up by the agreement,[94] but, failing resolution pursuant to this procedure, there is a highly distinctive mechanism.

> If a dispute concerns the interpretation of provisions of this Agreement, which are identical in substance to corresponding rules of the [EU Treaties] and if the dispute has not been settled within three months after it has been brought before the EEA Joint Committee, the Contracting Parties to the dispute may agree to request the Court of Justice of the European [Union] to give a ruling on the interpretation of the relevant rules.[95]

If the parties decide not to involve the CJEU, then the fallback provision of taking safeguards

[90] Protocol on Ireland/Northern Ireland ('the Northern Ireland protocol').
[91] John Campbell, 'Brexit: EU introduces controls on vaccines to NI' (*BBC*, 29 January 2021) <https://www.bbc.com/news/uk-northern-ireland-55864442> accessed 01 September 2024.
[92] European Commission Press Release, 'Withdrawal Agreement: Commission sends letter of formal notice to the United Kingdom for breach of its obligations under the Protocol on Ireland and Northern Ireland' (15 March 2021<https://ec.europa.eu/commission/presscorner/detail/en/IP_21_1132> accessed 01 September 2024.
[93] Agreement of the European Economic Area [1994] OJ L1/3 (and EFTA States' official gazettes).
[94] See Section 6.1[b] below.
[95] Article 111(3) EEA Agreement.

measures applies.

Third, monetary agreements with micro-states who adopt the Euro. These provide for the exclusive jurisdiction of the CJEU for settling any dispute that is not solved by the Joint Committee, that is, the non-judicial body set up by the agreement,[96] as is the case of the EU-Monaco monetary agreement.[97]

5.2 PROCEDURE

Independent bodies are subject to specific rules of procedures. These rules are mostly modelled on WTO Dispute Settlement Understanding (DSU), with the significant exception of the Association Agreements (AAs) with Mediterranean countries mentioned below. The procedures may be either contained in an annex to the agreement, or, for panels of experts, may be adopted by the relative specialised committee. The arbitral procedure has a standard but derogable timeframe for the delivery of the final report (six months from the beginning of the procedure);[98] it foresees the opportunity to require technical advice, as well as requirements for the statement of the reasons for its adoption. These three rules are equivalent to those in the DSU.[99]

The rules for appointment and decision-making of panels of experts and of the arbitrators are a strong guarantee that the body will in fact come into existence and will adopt a final report. The chances for failure are minimised by procedures designed to avoid stand-offs on the appointments: a timeframe is set, after which, if the composition of the body has not been agreed, the members are selected by lot from the list.[100] The agreements usually provide a default terms of reference for panels of experts[101] and arbitration panels,[102] but the parties are free to agree on different terms.[103] The panels of expert do not adopt binding decisions, but reports on which the parties discuss in order to find appropriate implementing measures.[104] The arbitration panel instead shall adopt a final report, with which parties shall comply promptly and in good faith.[105] The final deliberations are to be made publicly available (but may be redacted to protect sensitive information).[106] The bindingness of this final report is guaranteed by remedies in case of non-compliance,[107] which are essentially modelled on the WTO dispute settlement: if a party fails to comply with the report, the complaining party may suspend benefits under the agreement as form of proportionate and temporary retaliation. Much like the WTO dispute settlement, the first objective of judicial mechanisms in EU international agreements is 'to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of

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96 See Section 6.1[b] below.
97 Article 12 Monetary Agreement between the European Union and the Principality of Monaco.
98 Article 104.9.c EU-South Africa TDCA.
99 Article 12.7, 12.8 and 13.1 DSU.
100 Article 13.17.5 EU-Vietnam FTA.
101 Article 13.17.6 EU-Vietnam FTA.
102 Article 15.6 EU-Vietnam FTA; Article 21.13.1 EU-Japan FTA.
103 Exactly as in Article 7.1 DSU.
104 Article 13.17.9 EU-Vietnam FTA.
105 Article 15.12 EU-Vietnam FTA.
106 Article 21.10.4 EU-Japan FTA.
107 Article 15.15 EU-Vietnam FTA; Article 21.22.2 EU-Japan FTA.

the covered agreements', as opposed to, for example, merely obtaining compensation.[108] Unlike the WTO system, there is no appellate body that may review the decisions of the arbitral panel. Another meaningful alternative for the avoidance and settlement of dispute might be the enforcement obligations in the domestic courts of the parties. The two models – independent arbitration and enforcement in domestic courts – are sometimes seen as alternatives,[109] but EU international agreements do not exclude that both may take place, as some provisions of EU's international agreements may confer rights directly on individuals[110] (it is open to EU institutions, when concluding an international agreement with a third country, 'to agree with that country what effect the provisions of the agreement are to have in the internal legal order of the contracting parties').[111] The seven AAs concluded in the 90s and early 2000s with Mediterranean countries constitute an important exception to what was detailed in this paragraph.[112]

It is worth recalling that the EU international agreements surveyed so far are silent on whether bodies set up under them may apply or interpret provision of EU law other than those of the agreement. It is submitted, however, that in light of the ruling in Opinion 2/13 and in Opinion 1/17 EU institutions cannot be bound to an interpretation of EU law given by a court or tribunal sitting outside the EU judicial system. This has a consequence that if an arbitration panel established by an EU international agreement were to issue a final report declaring a provision of EU law invalid, that report could not be lawfully given effect under EU law.[113]

5.3 SUBJECT MATTER

It is not unusual that the forms of dispute settlement (or prevention) vary according to the subject matters – especially those requiring highly specialised expertise. The EU-Japan FTA, for

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[108] Article 3.7 DSU.

[109] Marco Bronckers, 'Is Investor-State Dispute Settlement (ISDS) Superior to Litigation before Domestic Courts? An EU View on Bilateral Trade Agreements' (2015) 18(3) Journal of International Economic Law 655.

[110] Francesca Martines, 'Direct Effect of International Agreements of the European Union' (2014) 25(1) European Journal of International Law 129. Christopher Vajda, 'The EU and Beyond: Dispute Resolution in International Economic Agreements' (2018) 29(1) European Journal of International Law 205, 206 discussing specific instances in which the existence of a dispute settlement procedure has not precluded the CJEU from holding that certain provisions have direct effect.

[111] Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* EU:C:1982:362 para 17.

[112] Unlike later agreements, the Mediterranean AAs do not contain any provisions regulating the amount of time available to the parties for appointing arbitrators, their background and their qualifications, or on the procedure they should follow, there is no timeframe for the adoption of the final report, and no provision allowing for temporary retaliation in case of non-compliance. See also Stefan Szepesi, 'Comparing EU free trade agreements Dispute Settlement' (2004) European Centre for Development Policy Management Brief No 6 July 2004 <https://ecdpm.org/application/files/1816/5547/2862/IB-6G-Comparing-EU-Free-Trade-Agreements-Dispute-Settlement-2004.pdf> accessed 01 September 2024.

[113] On commercial arbitral tribunals, in his opinion in Case C-567/14 *Genentech* EU:C:2016:177 AG Whatelet in para 59 wrote that 'the Court has held that arbitral tribunals "constituted pursuant to an agreement" [scil. between private parties] are not courts of the Member States within the meaning of Article 267 TFEU. Consequently, they cannot refer questions for a preliminary ruling. It is therefore for the courts of the Member States, within the meaning of Article 267 TFEU, to examine, if necessary by referring a question for a preliminary ruling, the compatibility of (international or domestic) arbitral awards with EU law where an action is brought before them for annulment or enforcement, or where any other form of action or review is sought under the relevant national legislation'.

example, mandates technical consultation with respect to sanitary and phytosanitary measures of significant concern before dispute settlement proceedings can be initiated. The EU-Vietnam FTA imposes an ad hoc procedure for the solution of controversies in the event of disagreement on provisions related to social and environmental sustainability.[114] In other cases, the distinctiveness is due to the political preferences of the parties.[115] By way of example, the EU-Japan FTA and the EU-Korea FTA foresee an accelerated dispute settlement specifically for motor vehicles.[116] The TDCA with South Africa and the FTA with Japan distinguish general issues (development, financial, other areas of cooperation) and trade-related disputes:[117] the former are tendentially excluded from quasi-judicial dispute settlement, whereas the latter can be decided through arbitration. Indeed, some matters are typically excluded from the dispute settlement provisions of an EU international agreement. This might be due to the specialised expertise required to solve dispute in the area (e.g. of phytosanitary products),[118] to political compromise[119] or, as is the case for anti-competitive conduct,[120] because other remedies are foreseen: it will be recalled that under EU law the trade defence instruments mentioned in Section 4 are essentially a last resort measure requiring the prior discharge of the procedure set out in a bilateral international agreement with the third country. For this reason, in EU's international agreements the provisions on trade defence instruments are usually not subject to dispute settlement.[121] As mentioned, recent agreements foresee a distinctive dispute settlement mechanism for investor states disputes (but not, for example, in the EU-Japan FTA, or the EU-Singapore FTA despite the presence of investment protections).

6 DISPUTE SETTLEMENT THROUGH NON-JUDICIAL AVENUES

Non judicial avenues such as consultation or mediation are the required first step of the dispute settlement procedure; they can, however, also be foreseen as the specific dispute-settlement mechanism for a given subject matter, such as the duty of consultation in case of objection to modifications to covered procurement in the EU-Vietnam FTA.[122] They can also be classified according to characteristics of the decision-making body, or the formality of their procedure.

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[114] Article 13.16 EU-Vietnam FTA.
[115] Michael Frenkel and Benedikt Walter, 'The EU-Japan Economic Partnership Agreement: Relevance, Content and Policy Implications' (2017) 52(6) Intereconomics 358, 360.
[116] See their respective motor vehicle annexes.
[117] This distinction bears relevance also as a matter of EU law, see Opinion of AG Sharpston in Opinion 2/15 *Singapore FTA* para 480.
[118] Article 6.16.1 EU-Japan FTA.
[119] The EU-Japan FTA excludes significant areas from the dispute settlement chapter: Article 14.55 excludes intellectual property cooperation; Article 15.7 excludes corporate governance; Article 18.19 excludes the areas of regulatory practices and cooperation; Article 19.8 excludes the field of cooperation in agriculture.
[120] Article 10.13 EU-Vietnam FTA; Article 11.9 EU-Japan FTA; Title VII EU-Chile AA.
[121] Article 3.5 EU-Vietnam FTA; Article 5.9 and 5.11 EU-Japan FTA; Article 3.7 CETA; Article 14 Global Agreement with Mexico etc. Exceptions are the Mediterranean AAs.
[122] Article 9.20.8 EU-Vietnam FTA.

6.1 BODY

6.1[a] Dependent Ad Hoc Bodies

By 'dependent' it is meant that the body in question comprises individuals who work for, and take instructions from, one of the parties. Examples of these are the working groups established by each party.

6.1[b] Dependent Permanent Bodies

It is usual that EU international agreements set up a joint committee[123] comprising representatives of both Parties. This is, by rule, a Commissioner for the European Union and a minister for the third country.[124] The body thus set up is conferred general powers as well as a residual task for dispute resolution. Typically, this committee ensures the proper operation of the FTA, inter alia by reviewing its implementation, supervising the work of the specialised committees, adopting procedural rules (including the procedure for mediation where the FTA does not already provide for one). As far as dispute settlement is concerned, these bodies seek to solve disputes that may arise under the agreement. In some cases, the agreement provide that the joint committee may adopt interpretations of the provisions of that agreement which are binding on all the bodies set up by the agreement, including tribunals and panels.[125] This power has been interpreted by the CJEU as having equivalent effect to a 'subsequent agreement' for the purposes of the Vienna Convention on the Law of Treaties.[126] Significantly, the binding interpretations were found not to be contrary to the independence of the tribunals.[127]

EU primary law (Article 218(9) TFEU) empowers the Council to adopt a decision 'establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects'. It is worth recalling that the choice for the procedural rules for the adoption of that decision (rules which depend, in turn, on the subject-matter of the position to be adopted by the EU) have proved controversial and have resulted in inter-institutional disputes before the CJEU.[128]

In addition, EU FTAs set up an array of specialised committees. They typically comprise senior officials from the relevant administrations of each Party or officials they designate.[129] The committees set up their own rule of procedures and play a role in the establishment of *ad hoc* panels of experts.

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123 This body goes by various names depending on the FTA but its powers are standard. It is called 'Joint Committee' in CETA, 'Cooperation Council' in the EU-Kazakhstan agreement; 'Partnership Council' in the EU-Armenia agreement, 'association council' in AAs with Mediterranean countries, etc.
124 Article 22.1.1 EU-Japan FTA; Article 268 EU-Kazakhstan agreement.
125 Article 22.1.5(e) EU-Japan FTA; Article 26.1.5(e) CETA.
126 Opinion 1/17 *Free Trade Agreement with Canada* (n 3) para 234.
127 On this point see more detailed discussion about CETA Tribunal, below Section 6.2 on procedure.
128 Case C-244/17 *Commission v Council (Kazakhstan)* EU:C:2018:662.
129 E.g. Article 13.15.2 EU-Vietnam FTA on the Committee on Trade and Sustainable Development.

6.2 PROCEDURE

Non judicial avenues also come on a spectrum of formality. On one end of this spectrum, a party may request consultations to which the other party is to accord 'sympathetic consideration';[130] on the other end there are forms of mediation by specialised bodies. It is usual for these procedures to contain a 'best endeavour clause', through which the parties agree to make an effort to eliminate or reduce the cause of the nuisance for the other party.

In slightly more detail, EU's FTAs usually subject to resolution though non-judicial avenues the areas that would otherwise be excluded from dispute settlement (see examples in Section 5.3). The same agreements foresee that the parties shall endeavour to resolve disputes that fall under the scope of dispute settlement by entering into consultations in good faith with the aim of reaching a mutually agreed solution,[131] failing which a party may trigger arbitration. There are usually rules for the place and timeframe of the consultations.[132] Parties are encouraged to enter into mediation at any time.[133] The mediation procedure may be detailed in the FTAs (or in an annex),[134] or it may be adopted by the Joint Committee.

Committees tend to enjoy a degree of autonomy and flexibilities in their procedure. Under the EU-Vietnam FTA, the parties may refer controversies to the Committee on Trade and Sustainable Development. The Committee may seek the advice of the domestic advisory group or groups of either Party or both Parties or other expert assistance. As the committees as made up of appointed – i.e. unelected – members, commentators have attracted attention to the lack of democratic legitimacy of these bodies.[135]

7 CONCLUSION

EU international agreements showcase a vast array of dispute settlement mechanisms. They go from containing no dispute settlement provision at all, to assigning exclusive jurisdiction of the CJEU, thus subjecting the contracting third state to the jurisdictional monopoly of the Court in the same way as it happens for the EU Member States. A discernible pattern is that more recent EU international agreements tend to have more formalised forms of dispute settlement than older ones.

The basic framework for judicial dispute settlement mechanisms is modelled on WTO dispute settlement, with consultations followed, if necessary, by arbitration (even though, unlike in the WTO design, there is no appellate body in EU international agreements).

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130 Article 10.8 EU-Vietnam FTA; Article 4.2 DSU.
131 Article 15.3.1 EU-Vietnam FTA; Article 21.5 EU-Japan FTA.
132 These are based on Article 4 DSU.
133 Article 15.4 EU-Vietnam FTA; Article 21.6.1 EU-Japan FTA ; Article 5.3 DSU.
134 Annex 15-C EU-Vietnam FTA.
135 Isabella Mancini, 'Fundamental Rights in the Institutional Architecture of EU Trade Agreements: A Tale of Omissions' (2020) EUTIP Working paper 04/2020 <http://epapers.bham.ac.uk/3295/1/IEL2020IMancini_IEL_WorkingPaper2002-03.pdf> accessed 01 September 2024; Wolfgang Weiss, 'Joint organs in EU free trade agreements as a threat to democracy' in Isabelle Bosse-Platière and Cécile Rapoport (eds), *The Conclusion and Implementation of EU Free Trade Agreements. Constitutional Challenges* (Edward Elgar 2019).

Some international agreements foresee distinctive mechanisms. Here another pattern can be identified: these mechanisms are foreseen either due to the pursuit of a policy agenda or to reflect the unique nature of the political relationship with the partner. An example of the first is investor-state dispute settlement, closer to a permanent court than to an arbitration panel, established pursuant to the EU's vision to set up in the future a permanent, multilateral court. Examples of the second include: the Withdrawal Agreement – highly distinctive in its judicial forms of dispute settlement because it stems from a highly distinctive circumstance[136] (even though it is inspired by international law, it is heavily anchored to EU law and EU institutions); and the EEA agreement – which foresees a role of the CJEU for provisions 'identical in substance' to those of the EU Treaties.

In practice, the EU has been reluctant to make recourse to these mechanisms, preferring instead non-judicial, political compromise. When the EU has used coercive measures such as restrictive measures, it has done so mostly in pursuit of non-commercial interests.

[136] It is well-established that dispute settlement procedures vary depending on the 'problem the institutions are trying to solve', Barbara Koremenos, 'If Only Half of International Agreements Have Dispute Resolution Provisions, Which Half Needs Explaining?' (2007) 36(1) Journal of Legal Studies 189, 192.

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THE SCREENING OF FOREIGN INVESTMENTS IN EU LAW: WHEN 'SECURITY AND PUBLIC ORDER' BECOME THE NEW BLACK IN INTERNAL MARKET LAWS AND POLICIES

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The screening of foreign investments is a hot topic within EU law and policy at this present time of poly-crisis and global geopolitical insecurity. The EU institutions are pushing very hard for adopting new legislation that will replace the Regulation 2019/452 on Foreign Direct Investment (FDI). The revised regulation, 'by stating that the principle that certain foreign investments need to undergo screening, regardless of which Member State is the location of the target', is aimed at ensuring a 'more consistent and efficient approach to risks to security and public order flowing from foreign investment into the EU'. Those four little magic words ('security and public order') have become the new black in providing a key rhetoric for ensuring the effective screening of foreign investment in the EU. Yet, 'security and public order' are complex, contextual and multidimensional concepts. As we shall see, the recent developments in EU foreign investments laws and policies confirm such an assertion. The aim of this article is to understand and clarify how the concepts of 'security and public order' operate within the screening of foreign investments and in relation to the protection of the EU internal market laws and policies.

1 INTRODUCTION

The screening of foreign investments is a hot topic within EU law and policy at this present time of poly-crisis and global geopolitical insecurity. The EU institutions are pushing very hard for adopting a new legislation that will replace the Regulation 2019/452 on Foreign Direct Investment (FDI).[1] The revised regulation, 'by stating that the principle that certain foreign investments need to undergo screening, regardless of which Member State is the location of the target', is aimed at ensuring a 'more consistent and efficient approach to risks to security and public order flowing from foreign investment into the EU'.[2] Those four little magic words ('security and public order') have become the new black in providing a key

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[1] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union [2019] OJ L791/1 (Regulation 2019/452 or FDI Regulation).

[2] See Hannah Ahamad Madatali with Lucia Torlai, 'Revision of the EU Foreign Direct Investment Screening Regulation' (2024) Briefing of the European Parliament, 22 July 2024, European Parliamentary Research Service (EPRS), 11 <https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/762844/EPRS_BRI(2024)762844_EN.pdf> accessed 01 September 2024.

rhetoric for ensuring the effective screening of foreign investment in the EU. Yet, 'security and public order'[3] are complex, contextual and multidimensional concepts. As we shall see, the recent developments in EU foreign investments laws and policies confirm such an assertion. The aim of this article is to understand and clarify how the concepts of 'security and public order' operate within the screening of foreign investments and in relation to the protection of the EU internal market laws and policies.[4] In this article, the concepts of 'security and public order' are also used to reveal the internal and external economic threats to the integrity of the EU internal market laws and policies, as illustrated respectively by the recent case law of the Court of Justice of the European Union (CJEU, or Court) in the *Xella* judgment[5] and the proposal for a new regulation replacing Regulation 2019/452, the so-called FDI Regulation.[6]

On the one hand, in *Xella*, an EU Member State (*in casu* Hungary) relied on national '(public) security and public order' to derogate from its obligations under the Treaties to ensure the free movement of foreign investments and to protect the functioning of the internal market. On the other hand, in the new proposal replacing Regulation 2019/452, the EU legislator relied on 'the risks to security and public order' to adopt legislation preserving the internal market from foreign investments that may endanger its integrity. Article 114 TFEU – the internal market harmonization clause[7] – constitutes here the crucial additional legal basis[8] for this new EU instrument.[9] In both examples, 'security and public order' are keys to ensuring the screening of foreign investments in the EU. Enhanced by the crises such as the Covid 19 crisis and the war in Ukraine, 'security and public order' are here to stay in the laws and policies of the EU and in a world where globalization is constantly and deeply challenged at different levels. As we shall see in more details later, the concepts of 'security and public order' as used specifically in foreign investments laws and policies are akin to a sort of 'economic public order' which can be relied on by the Member States or EU institutions to protect, respectively, the national or European markets and to ensure their own 'economic security'. The concepts of 'security and public order', as derogations to the free movement of foreign investments and as justifiers of EU internal market legislation, are thus understood in this contribution as economic, contextual and multidimensional, i.e. operating at both national and EU levels and in both national and EU economic markets.

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[3] See Catherine Kessedjian, 'Public Order in European Law' (2007) 1(1) Erasmus Law Review 25; and see also Xavier Groussot and Gunnar Thor Petursson, 'Public Security and Public Order in EU Law: The Evolution of the Methodological Framework in the Laws of the Internal and Digital Markets', European Papers (forthcoming, autumn 2024).

[4] See, in general, Xavier Groussot, Marja-Liisa Öberg, and Graham Butler (eds), *The EU Law of Investment: Past, Present, Future* (Hart Publishing, Bloomsbury, forthcoming).

[5] Case C-106/22 *Xella Magyarország Építőanyagipari Kft* EU:C:2023:568.

[6] See Commission, 'Proposal of the European Parliament and of the Council on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452 of the European Parliament and of the Council' COM (2024) 23 final ('Proposal').

[7] See in general Annegret Engel, *The Choice of Legal Basis for Acts of the European Union: Competence Overlaps, Institutional Preferences and Legal Basis Litigation* (Springer 2018).

[8] This is in complement to Article 207 TFEU if compared with the FDI Regulation. See section 4 of this article for more discussion.

[9] See Proposal on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452 (n 6).

This new 'economic public order' may certainly be perceived as being at odds with the liberal values and goals[10] traditionally associated with EU internal market laws and policies and where the ideal of economic globalization is also clearly present.[11] The realization of an 'economic public order', be it national or European, implies a strong strategic dimension that may lead to the creation of barriers to trade[12] and, *in fine*, to a more protectionist Europe. These recent developments are going against the very idea of globalization. Times have clearly changed; and this new European *zeitgeist* must be thoroughly studied in the laws and policies of the EU and its Member States. This article is divided into three main parts. In doing this analysis, we will first explore the political economy, nature and limits of Regulation 2019/452, i.e. the FDI Regulation. Due to both the rapid evolutions of the geopolitical situation in the world and its own nature, the FDI Regulation has proven to be rapidly obsolete as an effective tool for protecting the European Union and ensuring an effective screening of foreign investments (Section 2). Following this analysis, we will investigate in detail the *Xella* case which illustrates the limits of the screening of foreign investments in terms of laws and policies and shows the complexity of the EU context which is profoundly marked by the backsliding of the EU rule of law and an unstoppable increase of mistrust between the EU Member States (Section 3). Finally, we will discuss the key changes brought by the proposal replacing the FDI Regulation 2019/452 by looking, in particular, at the issue of definition of foreign investments and the issue of legal competence in light of the so-called internal market clause (Article 114 TFEU) (Section 4).

2 THE POLITICAL ECONOMY AND NATURE OF REGULATION 2019/452

With less than forty recitals and seventeen articles, Regulation 2019/452 appears quite blank and insipid compared to other sizable technical legislations or even the new proposal for a regulation replacing the FDI Regulation.[13] Yet, an extensive policy hides behind this brief text. Regulation 2019/452 creates a common EU framework for screening FDI from third countries on security and public order grounds. Again, considering its compressed content, the Regulation pursues two rather bold aims: to establish 'a framework for the screening by Member States of FDI into the Union on the grounds of security and public order'; and to set up a 'mechanism for cooperation between Member States, and between Member States and the European Commission, with regard to FDI likely to affect "security and public order"'. Regulation 2019/452 authorizes Member States to screen FDI on grounds of security and public order. It establishes a common framework of standards and procedures

[10] See Articles 2 and 3 TEU.
[11] See in particular Article 3(5) TEU.
[12] Economic justifications are, in principle, forbidden under the CJEU case law in free movement. However, some exceptions may arguably be found within the CJEU. See Sue Arrowsmith, 'Rethinking the Approach to Economic Justifications under the EU Free Movement Rules' (2015) 68(1) Current Legal Problems 307. See e.g. Case C-7/78 *Thomso*n EU:C:1978:209: invoking a justification to avoid the destruction of coin and invoking a right to mint coin. See also Case C-384/93 *Alpine Investment* EU:C:1995:126: invoking the good reputation of the financial sector.
[13] See Proposal on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452 (n 6).

that the national screening mechanisms of Member States willing to screen must comply with.

Regulation 2019/452 has thus established a framework for the optional screening of FDI by Member States on the grounds of 'security and public order' since 2020. In 2017 (on the same day of releasing the proposal for this Regulation), Juncker addressed his State of the Union speech, where he emphasized that 'Europe must always defend its strategic interests' and that 'we are not naïve free traders'.[14] The EU's attitude towards Member States subjecting FDI to some restrictions changed drastically over the past decade. One commentator of the FDI Regulation rhetorically wonders how Barroso's Commission would have reacted to Juncker's speech.[15] Indeed, the world has evolved in myriad ways since the end of the Barroso's Commission in 2014. At the time of its adoption, there was clearly a strong political will for an EU-wide instrument to screen FDI from several 'original' and influential Member States reflecting worries about foreign investors taking over strategic Union companies.[16]

Pursuant to Regulation 2019/452, Member States may introduce or maintain the existing national mechanisms to screen inward FDI based on public order and security protection. The final wording is much milder than what one may have expected considering Juncker's speech, managing to keep the Regulation as an instrument for the protection of 'security and public order' without touching upon the protection of the Union's economic interests.[17] Back in 2017, only twelve Member States had national screening mechanisms in place to address possible risks of FDI to 'security and public order'.[18] In 2022, the European Commission urged Member States to implement FDI screening mechanisms in their domestic systems.[19] As of spring 2024, the number increased to twenty-two with a new national legislation adopted in Sweden in December 2023, leaving only five Member States

[14] Commission, 'President Jean-Claude Juncker's State of the Union Address 2017' (*European Commission*, 13 September 2017) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_17_3165> accessed 01 September 2024.

[15] Régis Bismuth, 'Reading Between the Lines of the EU Regulation Establishing a Framework for Screening FDI into the Union' in Jacques Bourgeois (ed), *EU Framework for Foreign Direct Investment Control* (Kluwer Law International 2020) 104.

[16] Letter to DG Trade Commissioner Malmström from the German, French and Italian governments (February 2017) <https://www.bmwk.de/Redaktion/DE/Downloads/S-T/schreiben-de-fr-it-an-malmstroem.pdf?__blob=publicationFile&v=4> accessed 01 September 2024.

[17] Juncker continued in the following: 'We will not trade for the sake of it or compromise on our principles for a quick deal. I cannot accept that those who work hard to make ends meet suffer at the hands of those who dump, de-regulate or distort the market'. This suggested that perhaps, Regulation 2019/452 could become an instrument of economic protection – Jean-Claude Juncker's State of the Union Address (n 14). For protection of Union undertakings subject to State aid rules to compete in an undistorted competition in the internal market against foreign undertakings that received subsidies from third countries, there is a new legal instrument: Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market [2022] OJ L330/1.

[18] That was the situation in Austria, Denmark, Germany, Finland, France, Latvia, Lithuania, Italy, Poland, Portugal, Spain, and the United Kingdom. See European Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and Committee of Regions Welcoming Foreign Direct Investment While Protecting Essential Interests' COM (2017) final 494, 7.

[19] European Commission, 'Report from the Commission to the European Parliament and the Council: Third Annual Report on the screening of foreign direct investments into the Union' COM (2023) 590 final, 8.

without any mechanism.[20] Despite subjecting the existing national screening mechanisms to the framework created by Regulation 2019/452, these mechanisms still significantly differ in scope and process, leaving foreign investors in legal uncertainties and putting into jeopardy the cohesiveness and efficacy of the system of protection newly established.[21]

Hindelang and Moberg describe the adoption of Regulation 2019/452 as 'anything but uncontroversial', underlined by the challenge to find consensus in all aspects – whether to, how, and who should screen.[22] With the new Proposal on the way, legislators face the same dilemma.[23] Four years later, the concern about some foreign investors, notably state-owned enterprises (SOEs), taking over EU undertakings with critical technologies for strategic reasons has increased.[24] Logically, Member States push for maximum freedom in determining the criteria for sensitive industries and conditions affecting national security.[25] Moreover, measuring the impact of stringent control on FDI in sensitive sectors proves extremely difficult since they constitute only a small portion of investments, and investors in sensitive industries are used to enhanced checks.[26] While remaining vigilant to the security threats posed by certain takeovers, notably by the SOEs, subjecting foreign investors to incoherent controls due to the misalignment of the fundamental concepts, such as the definition of FDI can turn to the detriment of the EU in attracting the wanted foreign investors. Therefore, an effective FDI screening system is necessary to reduce the risk of foreign takeovers of companies in strategic sectors that threaten 'security and public order' while not deterring all foreign investors in a system where, in some Member States, their investment constitutes FDI and in others, not. This is particularly relevant when that investment concerns several Member States' jurisdictions.

The peculiar nature of Regulation 2019/452 is best described by AG Ćapeta in her opinion in *Xella* who referred to it as 'a kind of platypus, a strange creature' in comparing this Regulation to the conventional type of regulations. She noted that since the entry into force of the Lisbon Treaty, investments enabling effective participation of the foreign investor or control over the target are covered by two different types of competencies: one exclusive, on the one hand, that excludes unilateral action by the Member States, and on

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[20] Bulgaria, Croatia, Cyprus, Greece and Ireland do not have a national FDI screening mechanism in place. See European Commission, 'List of Screening Mechanisms Notified by Member States' (last updated on 5 August 2024) <https://policy.trade.ec.europa.eu/enforcement-and-protection/investment-screening_en> accessed 01 September 2024.

[21] We find three types of Member States: Some Member States adopt stricter criteria and screen EU investors controlled by third-country nationals. Other Member States do not regard nationals of certain third countries as 'foreign investors'. There are also Member States which do not screen investors at all. The national screening mechanisms differ from one another in the most fundamental aspect, i.e. the personal scope of FDI control.

[22] See Steffen Hindelang and Andreas Moberg, 'The Art of Casting Political Dissent in Law: The EU's Framework for Screening of Foreign Direct Investment' (2020) 57(5) Common Market Law Review 1428.

[23] See Section 4 of this article for development.

[24] ibid. See also Commission, 'Reflection Paper on Harnessing Globalization' COM (2017) 240 final, 15.

[25] See Article 4(2) TEU: 'It is the sole responsibility of Member States to safeguard their national security'; Article 346 TFEU: 'Member States are free to take measures they consider necessary for the protection of the essential interests of their security connected to defense and Member States are not obliged to supply information which they consider contrary to essential security interests'. See also in relation to digitalization, Groussot and Petursson (n 3).

[26] See Eva Rytter Sunesen and Jonas Juul Henriksen, 'The Economics of FDI Screening' in Jacques Bourgeois (ed), *EU Framework for Foreign Direct Investment Control, European Monographs* (Kluwer Law International 2020) 19.

another hand, a shared competence, allowing Member States to act as long as they are not preempted by measures adopted at the EU level.[27] AG Ćapeta, going further, observes that under Article 288 TFEU, through regulation, the Union enacts rules binding and directly applicable in all Member States. However, Regulation 2019/452 neither imposes binding rules nor introduces a common FDI screening mechanism. It authorizes, yet does not oblige, Member States to introduce legislation governing the FDI screening. A framework for common standards that such national mechanisms must comply with is, thus, conditional upon the choice of the Member State to establish such a mechanism. She concludes that the practical outcome of the legal context behind Regulation 2019/452 is as follows: in the area of exclusive competence, Member States may act only if empowered by the Union.[28] By authorizing the Member States to keep and continue introducing national screening mechanisms, Regulation 2019/452 must be viewed as the Union giving back the lost competence to the Member States.[29] In a similar vein, it is lucidly observed that 'the Regulation turns exclusive competence largely upside down, by handing a large chunk of the actual powers to regulate the screening of FDI back to the Member States'.[30] Regulation 2019/452 practically authorizes Member States to take matters into their own hands, but if they do so, they must remain within the framework of EU primary law.[31] The result of this very special set-up is that different criteria apply for who the 'foreign investor' is and whether it is necessary to screen foreign investors investing to pursue an economic activity via an EU entity. Regulation 2019/452 regards the 'foreign investor' as a third-country investor who intends to make or actually makes direct investment in the EU. It permits screening of EU investors controlled directly by third-country entities.

Interestingly, the European Court of Auditors (ECA) has produced a report on the state of FDI screening in the EU in December 2023 after an audit of one year.[32] This special report considers that, although the European Commission took appropriate steps for implementing the FDI framework, three years after the regulation entered into force, significant limitations remain in effectively addressing security and public order risks. This is so particularly because some of the Member States do not boast a national FDI system. The ECA underlines that approximately 42% of FDI stocks are located in Member States without a fully applicable screening mechanism. In addition, many differences persist in the scope and coverage defining critical sectors, leading to blind spots that compromise EU-wide protection. Therefore, the ECA has proposed the European Commission to clearly define the key concepts of the FDI framework to avoid the current inefficiencies; enhance the recommendations and reporting process; improve the cooperation mechanism through

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[27] See Opinion of AG Ćapeta in Case C-106/22 *Xella Magyarország Építőanyagipari Kft* EU:C:2023:267 paras 28-32.

[28] ibid para 33. See also Article 2(1) TFEU.

[29] See Marise Cremona, 'Regulating FDI in the EU Legal Framework' in Jacques Bourgeois (ed), *EU Framework for Foreign Direct Investment Control* (Kluwer Law International 2020) 33, 35 and Opinion of AG Ćapeta in *Xella* (n 27) para 33.

[30] See Hindelang and Moberg (n 22) 1446.

[31] This is confirmed explicitely by Article 1 of the Proposal on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452 (n 6).

[32] European Court of Auditors, 'Special Report, Screening foreign direct investments in the EU – First steps taken, but significant limitations remain in addressing security and public-order risks effectively' (Publications Office of the European Union 2023) 5 <https://www.eca.europa.eu/en/publications?ref=SR-2023-27> accessed 01 September 2024.

preliminary risk-assessment of notified cases and provide better justification of mitigating actions; and assess national screening mechanisms for compliance.

As we shall see in Section 4, these recommendations are largely taken on board by the new proposal of the European Commission replacing the FDI regulation.[33] Our next section discusses the judgment in *Xella*, which has given rise to the problems of the limited application of Regulation 2019/452, as applying strictly to third-country investors and to third-country investors directly investing in an EU entity.[34] The outcome of *Xella* judgment has undermined the effectiveness of national screening mechanisms and revealed the weakness of the FDI Regulation in terms of competences. The *Xella* case has thus created the perfect storm highlighting the many gaps of Regulation 2019/452 and has provided the 'last argumentative straw' in demonstrating the need of reforming the Regulation. Therefore, before looking specifically at the reform of Regulation 2019/452 in Section 4, we now need to have a look in detail to the *Xella* case and to the problematic of national economic security in the EU internal market and the crucial (but quite hidden) issue of EU competences.

3 NATIONAL ECONOMIC SECURITY AND THE *XELLA* CASE

3.1 INTRODUCTION TO *XELLA*

The case of *'Xella'* is a preliminary ruling on interpretation by the CJEU under Article 267 Treaty of the Functioning of the European Union (TFEU) of Xella Magyarország Építőanyagipari Kft v Innovációs és Technológiai Miniszter (Minister) – C-106/22. The case was referred to the CJEU upon request of the Fővárosi Törvényszék (Budapest High Court, Hungary) and heard by the Second Chamber, composing of five judges. They delivered their judgment on 13 July 2023. The Opinion was delivered by AG Ćapeta on 30 March 2023. The case relates to the proposed takeover of Janes és Társa (Janes), a company incorporated under Hungarian law, and owned by PAN3, another company incorporated under Hungarian law. The party intending to takeover was Xella, also a Hungarian company. Xella's composition and ownership is complex – it is directly 100% owned by a German company. However, it is also indirectly owned by a Luxembourg company (which owns 100% of the German company). Importantly, the Luxembourg company is indirectly owned by LSF10 XL, registered in Bermuda. LSF10 XL is a subsidiary of Lone Star, the ultimate parent group, which is a US private equity firm and owned by an Irish national.

Xella concluded a sale agreement for the purpose of acquiring 100% of the shares in Janes and sent the Hungarian Minister a notification of the takeover, as required under Hungarian law – a national foreign investment screening mechanism, known as the 'Vmtv'. However, the Minister blocked the transaction on the legal basis of the Vmtv, providing two justifications for this. Firstly, under the Vmtv, a Hungarian company (and member of a group of companies established in several Member States), over which an undertaking of a third

[33] ibid. See also Ahamad Madatali with Torlai (n 2). Certainty of investors v. Security. Security is the new black. The economy of the new proposal is based on the need to avoid the circumvention of the system. Lack of harmonization – endanger. Blind spots. Nevertheless, they also highlighted several shortcomings in the current framework, including the absence of national screening mechanisms in some Member States, the lack of EU-wide harmonization, and room for improvement in EU cooperation on FDI screening – Ahamad Madatali with Torlai (n 2) 11.

[34] See *Xella* (n 5).

country has decisive influence, may be prohibited from acquiring ownership of another Hungarian company. The Minister classified Xella as a 'foreign investor' who had decisive influence from a third country undertaking, within the meaning of Hungarian law, because it is indirectly owned by a company registered in Bermuda. Secondly, Janes' main activity is the extraction of gravel, sand and clay, the supply of which the Minister argued should be secured by restricting foreign companies having ownership of these 'strategic' companies (especially following the COVID-19 pandemic), in the 'national interest' as per the Vmtv.

Xella challenged the decision before the Budapest High Court, arguing that the Minister's decision was a restriction on the free movement of capital and freedom of establishment and stated that the only reason why the acquisition was prohibited was the 'non-national' nature of its ownership structure. Xella also argued that the unclear concept of 'national interest', within the meaning of the Hungarian law, was capable of breaching the fundamental principles of the rule of law. The Budapest High Court referred the issue to the CJEU, asking in essence whether the free movement of capital provision (Article 65 TFEU) must be interpreted as precluding national law which included a foreign investment screening mechanism and provides powers to a Minister to block acquisitions.[35] A key underlying issue in the case is whether indirect foreign investments can fall within the scope of Regulation 2019/452, which regulates foreign direct investment and which also brings the competence issue to the front.

3.2 THE APPLICABLE LAW AND THE HIDDEN COMPETENCE ISSUE IN *XELLA*

The first issue addressed by the CJEU concerns the applicable law in the *Xella* case. With regards the FDI Regulation, the important point of contention is that the Vmtv (the national screening mechanism) included within its scope not only investments made 'directly' by undertakings of a third country, but also 'indirectly', by undertakings registered in Hungary or in another Member State over which an undertaking registered in a third country has 'majority control'.[36] Thus, if a third country undertaking had 'majority control' over a Hungarian or EU company, and attempted to acquire a Hungarian company, it would be subject to the Vmtv – notably by imposing a notification to the Minister, who decides whether to authorize or prohibit the acquisition (based on the Vmtv justifications).[37] 'Majority control' is defined under Section 8.2 of the Hungarian Civil Code, as 'any link by which a natural or legal person ("influential entity") holds more than 50% of the voting rights or exercises decisive influence over a legal person'.[38]

The CJEU rejected the applicability of the FDI Regulation by considering that this second criterion relating to 'majority control' did not meet the definition of foreign investment or investor enshrined in the FDI Regulation, and thus that the Vmtv cannot be considered as a valid FDI screening mechanism.[39] It also followed that Xella was not

[35] See *Xella* (n 5)paras 15-26 and Opinion of AG Ćapeta in *Xella* (n 27) paras 7-16.
[36] The Vmtv, Law No LVIII of 2020 on transitional provisions relating to the end of the state of emergency and to the pandemic crisis, 17 June 2020, para 276 (2) (a).
[37] Vmtv, Paragraphs 277 and 283.
[38] Hungarian Civil Code, Section 8.2.
[39] See *Xella* (n 5) paras 29-39.

considered to be a foreign investor for the purposes of the FDI Regulation, but rather an EU company with a 'majority control' from a third country undertaking, and therefore Xella's proposed acquisition of Janes should not be considered as 'foreign investment', as per the Regulation.[40] This was consistent with the European Commission's argument that the Vmtv and acquisition was not caught by the FDI Regulation, for precisely the reason that indirect FDI was not covered by the Regulation.[41] To summarize, in CJEU's and Commission's view, FDI Regulation was only meant to cover FDI made directly by undertakings established in third countries.

Notably, in a more thorough analysis, AG Ćapeta took a different approach by considering that the Hungarian screening law did fall within the scope of the FDI Regulation, given the wording of Article 2(1), which 'encompasses any type of investment through which the foreign investor gains effective participation in or control over an EU undertaking'.[42] According to her, there seems no reason to exclude 'indirect' FDI from the Regulation's scope – i.e. where a third country undertaking gains control over an EU company, which then acquires another EU company.[43] There is no substantive difference between direct and indirect FDI – both involve a third country undertaking, in effect, taking over an EU company. As AG Ćapeta states, this would run counter to the intention of the Regulation. The FDI Regulation is described in her Opinion as 'bridging the gap'[44] between the shared competence of regulating FDI within the internal market[45] and the exclusive competence in common commercial policy (CCP)[46] creating a uniform screening of FDI. The Advocate General in *Xella* concluded that the FDI Regulation applied and thus authorized the Hungarian national screening mechanism. She stated that the mechanism was still subject to the Treaty rules on the fundamental economic freedoms given that FDI relates to overlapping competences, one of which is the internal market.[47] This is an important point, emphasized by some commentators, who state that this is one of the main reasons why *Xella* is significant – since the case confirms that even if a national screening measure is present (and valid according to the AG), fundamental economic freedoms remain fully applicable. Thus, these measures must still comply with the fundamental economic freedoms and be justified accordingly, which national courts can review given that the economic freedoms have direct effect.[48] Also, AG Ćapeta noted that, at the hearing of the case, there was

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[40] ibid.
[41] Opinion of AG Ćapeta in *Xella* (n 27) para 39.
[42] ibid para 42.
[43] See ibid, in particular para 43. Paragraph 43 is important in outlining her rationale, where she states that the FDI Regulation 'encapsulates all possible types of investment through which a foreign investor acquires control over an EU undertaking […] the investment process need not necessarily be conducted directly (such as where a foreign investor acquires control over an EU undertaking by directly buying its shares), but may be carried out indirectly (such as where a foreign investor acquires control over an EU undertaking by acquiring its shares through another EU undertaking). What matters is who ultimately acquires control over the EU undertaking in question'.
[44] ibid para 33.
[45] Article 3(1)(e) and Article 207 TFEU.
[46] See Article 4(2)(a) TFEU.
[47] See Opinion of AG Ćapeta in *Xella* (n 27) para 51.
[48] Alberto Perez, 'The Court of Justice draws a line in the sand for foreign investment screening: ruling in *Xella Magyarország* C-106/22' (*EU Law Live*, 26 July 2023) <https://eulawlive.com/op-ed-the-court-of-justice-draws-a-line-in-the-sand-for-foreign-investment-screening-ruling-in-xella-magyarorszag-c-106-22-by-alberto-perez/> accessed 01 September 2024.

discussion as to what makes a situation 'internal' and elements that may be taken into consideration to classify a transaction between two companies in the same Member State as a 'cross-border' transaction, given that there was a possibility of qualifying the Xella situation as 'internal'. This included discussion of the *Ullens de Schooten* case.[49] On this issue, she took the opinion that the FDI Regulation applied and thus that the CJEU had jurisdiction by providing detail on the possibility of a 'potential' cross border element. She stated that the Court has in the past gained jurisdiction based on a case having a 'potential' cross border impact, thus it is 'obvious' that this would apply in *Xella* given the German ownership of the parent company and 'potential' cross border implications of this.[50] This concept of a 'potential' cross border element relates to a line of case-law, including CJEU judgments of *Attanasio Group;*[51] *Libert and Others*;[52] and *Venturini and Others*.[53]

As already seen before, the CJEU moved instead straight to the Treaty rules on the fundamental economic freedoms and excluded indirect FDI from the scope of the Regulation 2019/452. In our view, the CJEU's decision on the FDI Regulation is a clear message to the Hungarian legislature that it has overstepped the powers granted to them in the FDI Regulation to create a national screening mechanism by including indirect FDI within their law that infringes the economic fundamental freedoms protected by EU primary law. It is interesting to note that, when Hungary passed the national FDI screening law initially, it notified the Commission in line with Article 3(7) of the Regulation, and the Commission had no issue in publishing the Hungarian law as part of the list of Member States' screening mechanisms in line with Article 3(8), as AG Ćapeta outlines in her Opinion.[54] Yet, it is difficult here to ignore the rule of law context of Hungary, given that this case is decided at the time of serious and systematic (and unfortunately still persisting) backsliding of the rule of law. The CJEU considered that whilst Janes and Xella are both Hungarian companies, Xella forms part of a group of companies established in different Member States (parent German and grandparent Luxembourg company), which qualifies as the relevant foreign element and cross-border ownership structure, to ensure that this case falls within the scope of the internal market.[55] The CJEU concluded that the FDI Regulation is not applicable (despite Xella being ultimately owned by a third country undertaking) as Xella is an EU company which is not falling within the definition of 'foreign investor'. Therefore, in deciding that Xella is not Hungarian (and thus this was not an internal situation), it viewed the ownership of Xella beyond the Hungarian company. And consequently, in deciding that Xella is an EU company (thus falling outside the FDI Regulation as a third-country undertaking), the Court is not in a position to recognize the Bermudan ownership.[56]

Xella confirms that the 'line of ownership' can be considered in determining that a case has a cross-border element and is thus not a purely internal situation. The fact that both

[49] See Case C-268/15 *Ullens de Schooten* EU:C:2016:87.
[50] Opinion of AG Ćapeta in *Xella* (n 27) para 62. AG Ćapeta, however, states that she is 'not an ardent supporter of that case-law' and this was not discussed further here.
[51] See Case C-384/08 *Attanasio Group* EU:C:2010:133 para 24.
[52] See Joined Cases C-197/11 and C-203/11 *Libert and Others* EU:C:2013:288 para 34.
[53] See Joined Cases C-159/12 to C-161/12 *Venturini and Others* EU:C:2013:791 para 25.
[54] Opinion of AG Ćapeta in *Xella* (n 27) para 40.
[55] *Xella* (n 5) paras 50-57.
[56] *Xella* (n 5) paras 55-65.

companies were Hungarian-based did not prevent both the CJEU and AG from deciding that this was not an internal situation, and this seems a sensible approach, given the complex and cross-border ownership structure of Xella. However, what if the parent company was Hungarian too? Would it be sufficient that the grandparent company was from Luxembourg, and thus an EU company? How far up the 'line of ownership' can be considered to determine that a company acquisition is cross-border and not internal? Since no answer was logically provided by the CJEU, there is thus no legal certainty on this issue.[57] But the issue of legal certainty was not the decisive factor in the eyes of the European judges. Instead, the risks to 'security and public order' on the internal market appeared to be the pivotal grounds for understanding the rationale of the Court in *Xella* in conjunction with the constitutional issue of competence. In our view, however, it is reasonable to understand the logic of the CJEU if put within the prism of EU competences and their constitutional limits – an issue which is unfortunately not discussed by the Court in *Xella* in contrast to the AG Opinion. By concluding that the FDI is not applicable, the CJEU adopted a narrow reading of the scope of application of Article 207 TFEU, which is the legal basis of Regulation 2019/429. The Court thus impliedly considered that the Regulation cannot be considered to include 'indirect' FDI. Indeed, this inclusion would necessitate a reform of the regulation and a new legal basis since the Regulation 2019/429 is directed towards Foreign Direct Investment and not indirect foreign investment. Seen in this light, it appears difficult in our view to disagree with the conclusion of the Court in *Xella*. The concept of 'indirect' FDI which is often used to expand the scope of the FDI regulation constitutes in fact an oxymoron that should not be used to extend the competence of the Union through judicial activism as argued for instance by the Advocate General. Traditionally, direct investment refers to an investment of any kind where the investor intends to control the target – pursue an economic activity.[58] Indirect investment, on the contrary, rather refers to portfolio investment – without the intention of participating in the management of the target.[59] FDI is a direct investment where the third-country foreign investor intends to control the target. However, the direct-indirect concept in the context of FDI Regulation actually refers to whether the FDI was made directly by an investor established under the laws of a third country, or indirectly, by an EU investor with a third-country control. A clear conceptual distinction should instead be established between direct foreign investment and indirect foreign investment. This distinction, as we shall see in Section 4, is adopted by the new proposal for replacing the FDI Regulation.

3.3 JUSTIFICATIONS, PROPORTIONALITY AND NATIONAL SECURITY

Since the case falls within the scope of the EU law, the next issue to be discussed is to determine which is the applicable economic freedom in *Xella*. Indeed, the national court

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[57] Alexia Crivoi, 'The ECJ's Judgment in Xella – Judicial Cherry Picking?' (*CELIS Institute Blog*, 18 October 2023) <https://www.celis.institute/celis-blog/the-ecjs-judgment-in-xella-judicial-cherry-picking/> accessed 01 September 2024. Furthermore, these contradictions have been emphasized by some scholars as an example of judicial 'cherry picking'.

[58] Annex I to the Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty [1988] OJ L178/5 (Directive 88/361); Case C-367/98 *Golden Shares I* EU:C:2002:326 para 38.

[59] Annex I to the Directive 88/361, Joined Cases C-282 and 283/04 *Commission v Netherlands* EU:C:2006:608 para 19.

referred the question to the CJEU as to whether the national FDI law (and its execution by the Hungarian Minister) constitutes a restriction on the free movement of capital enshrined in Article 63 TFEU, which states that 'all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited'.[60] The CJEU concluded that the freedom of establishment has been restricted under Article 49 TFEU.[61] There are two side questions to underline before analyzing the core issues of restriction, justification and proportionality.

Firstly, does the acquisition of Janes by Xella relate to a breach of the freedom establishment? On the surface, the acquisition of a company may be associated with the movement of capital – i.e. the use of capital by Xella to purchase shares in Janes. However, the CJEU referred to its case-law,[62] which stated that shareholdings which enable the holder to exert an influence on a company's decisions and determine its activities fall within the scope of freedom of establishment, not capital. In *Xella,* the Court stated that the acquisition of all shares in a company (and thus 'majority control') is sufficient to allow Xella to exert a definite influence on the management and control on Janes, thus falls within the scope of freedom of establishment.[63] The European Commission made this argument in the case too. AG Ćapeta tried to make a clearer distinction between these terms reiterating the existing case-law and nomenclature in Annex I of the Directive 88/361:

> shareholding in an undertaking that enables an investor to participate effectively in that undertaking's management and control, is governed by the rules on freedom of establishment. On the other hand, short-term or minority investments – that is to say, the acquisition of shares solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking in question – must be examined exclusively in the light of the free movement of capital.[64]

AG Ćapeta refers to relevant case-law, such as *FII Group Litigation* and *Baars* to emphasize this.[65] In this case, it seems fair to conclude that Xella's acquisition of Janes, given its aim of 100% ownership on a long-term basis, does indeed fit the definition of the economic freedom of establishment. The CJEU's judgment seems correct on this point.

The second question relates to the location and nature of the company, i.e. Xella. Indeed, the economic freedom of establishment is normally enjoyed by companies provided that they are formed in accordance with the law of a Member State and have their registered office, central administration or principal place of business within the EU (Article 54 TFEU).[66] The CJEU stated that whilst Xella is part of a group with a parent third party undertaking, it is connected to the legal system of a Member State and thus constitutes an EU company – the nationality or origin of Xella's shareholders is thus not important here. AG Ćapeta provides a helpful summary of Articles 49 TFEU and 63 TFEU, stating that if

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[60] See Article 63 TFEU.
[61] See Article 49 TFEU; *Xella* (n 5) paras 41-49.
[62] See Case C-563/17 *Associação Peço a Palavra and Others* EU:C:2019:144 para 44.
[63] See *Xella* (n 5) para 42.
[64] Opinion of AG Ćapeta in *Xella* (n 27) para 27 and footnotes 18-19.
[65] ibid.
[66] Article 54 TFEU.

investment crosses only EU internal borders, it may fall within the scope of either freedom of establishment or free movement of capital. However, if Xella is classified as a third country undertaking, it would only be able to fall within the scope of free movement of capital, as per the wording of Article 63 TFEU.[67] This relates back to the point made earlier regarding the inability to clearly trace where a 'line of ownership' should stop or where it should lie, since Xella has ownership in Hungary, Germany, Luxembourg and Bermuda. The CJEU concluded that this finding is consistent with its earlier conclusion, relating to the FDI Regulation, that Xella is solely an EU company. The CJEU outlined that the Hungarian national FDI law (Vmtv) prohibits an EU company from acquiring a shareholding (and influence on management and control) in another EU company and is thus a 'particularly serious restriction' on the economic freedom of establishment.[68] Subsequently, the CJEU considered the possible justifications and assessed whether there was an overriding reason of public interest justifying the restrictions imposed by the national measure. It appears from the facts of the case that the Minister classified Janes as a 'strategic company' by the Vmtv, since the security and foreseeability of the extraction and supply of raw materials were of strategic importance. Also, the Minister stated the COVID-19 pandemic showed that serious disruption to the functioning of global supply chains could occur in a short period of time, with negative repercussions that could harm the national economy. The Minister highlighted particularly that one of the problems affecting the construction sector in Hungary was the scarcity of sufficient quantities of building materials and the production of those raw materials for the construction sector was already dominated by foreign-owned Hungarian producers. Thus, if Janes were to be indirectly owned by a company registered in Bermuda, this would pose a longer-term risk to the security of supply of raw materials to the construction sector, particularly in the region where Janes is established, given that its market share in that region would be 20.77%. The acquisition by a foreign owner of a strategic company would reduce the proportion of domestic-owned companies, which could harm or risk harming the 'national interest' in ensuring the security of supply to the construction sector of basic raw materials such as gravel, sand and clay.[69] The CJEU stated that whilst Member States can determine the requirements of '(public) security and public order' considering national needs, those requirements must be interpreted strictly and may only be relied upon if there is a 'genuine and sufficiently serious threat to a fundamental interest of society'.[70]

Importantly, the CJEU established that the security of supply to the construction sector, specifically gravel, sand and clay, does not concern a fundamental interest of society (distinguishing from petroleum, telecommunications and energy sectors). Furthermore, the CJEU ruled that the acquisition of Janes by Xella was not a 'genuine and serious threat', given that *Xella* already purchased 90% of the production of basic raw materials from Janes prior

[67] Opinion of AG Ćapeta in *Xella* (n 27) para 28.
[68] See *Xella* (n 5) para 59. AG Ćapeta underlines that the Minister's decision to block Xella's acquisition makes the right to invest in an EU undertaking and right to establishment impossible (Opinion of AG Ćapeta in *Xella* (n 27) para 68).
[69] See *Xella* (n 5) paras 23-24 and Opinion of AG Ćapeta in *Xella* (n 27) para 13.
[70] *Xella* (n 5) paras 64-66. AG Ćapeta in her Opinion in *Xella* (n 27) para 74 helpfully emphasized that this is a two-part test – 'a Member State is required to explain, first, why the interest causing the restriction at issue is perceived as fundamental in its society; and, second, why the restricted activity represents a genuine and sufficiently serious threat to that fundamental interest'.

to the takeover. Also, these raw materials were unlikely to be exported out of Hungary anyway, given the transportation cost.[71] It is worth noting that AG Ćapeta takes here a slightly different approach in arguing that the security of supply of sand, gravel and clay may be viewed as a fundamental interest in society given that their supply may be scarce, particularly at times of crisis. However, on the second part of the test, she concluded that given Janes accounts for just 0.52% of Hungarian national production of sand, gravel and clay, Xella's takeover is not a genuine and sufficiently serious threat. She therefore rejected the Minister's argument that any foreign ownership of such a company represents a threat to the security of supply justifying the restriction on FDI.[72]

What can we learn from the *Xella* judgment regarding justifications based on '(public) security and public order' used to derogate from an EU economic freedom? The CJEU considered that sand, gravel and clay do not have the same status as petroleum, telecommunications and energy sectors, in that they are not capable of forming a 'fundamental interest in society'. The methodological approach adopted by the CJEU to assess the 'fundamental interest in society' is here not surprising and follows its longstanding jurisprudence on '(public) security and public order'.[73] In fact, the CJEU following a constant jurisprudence controls the existence and scope of the 'fundamental interest in society' invoked by a Member State as a justification since this issue cannot be unilaterally defined by a Member State.[74] In addition, the CJEU ignored the relevance of the COVID-19 pandemic crisis as a reason to justify an obstacle to the freedoms for '(public) security and public order'. Whilst it has been analyzed whether the Minister's rationale for prohibiting Xella's takeover could be justified, it is important to distinguish between the Hungarian national FDI law (Vmtv) and the Minister's decision blocking Xella's takeover – i.e. what was the cause of the Minister's incorrect decision?

The referred question from the Budapest High Court asked whether the Hungarian national FDI law (Vmtv) is permitted by EU law.[75] Crucially, the CJEU and AG came to two different conclusions on this specific question, despite their general agreement that the Minister's decision to block Xella's takeover of Janes constitutes a restriction to a fundamental economic freedom. In addressing this question, AG Ćapeta discussed the proportionality of the national legislation at length. For the Advocate General, the Vmtv should provide for the requirement that each Minister decision is 'appropriate and necessary' for the protection of a genuine and serious threat to a fundamental interest of society of a Member State.[76] Thus, she stated that the Vmtv should include an additional provision obligating the Minister to explain why an FDI represents a genuine and serious threat to the fundamental interest (and security of supply of Hungary), and why it is appropriate and necessary (proportionate). In these facts, AG Ćapeta suggested that the Minister should address whether blocking Xella's acquisition of Janes was proportionate, 'observing' that it

[71] See *Xella* (n 5) paras 68-73.
[72] Opinion of AG Ćapeta in *Xella* (n 27) paras 76-89. AG Ćapeta addresses also another point, which the CJEU does not confront – that Hungary seek to prevent speculative acquisitions in sectors deemed strategic to the Hungarian economy, given the COVID-19 pandemic. The AG rejects that this could be considered as a public policy exception, as such investments are part of economics, which cannot be a valid justification.
[73] See e.g. Case C-54/94 *Église de scientologie* EU:C:2000:124.
[74] See *Xella* (n 5) para 66.
[75] Opinion of AG Ćapeta in *Xella* (n 27) para 27.
[76] Opinion of AG Ćapeta in *Xella* (n 27) para 90-94.

is unclear how the prohibition of indirect foreign ownership of Janes secures the supply of sand, gravel and clay, and questioning why a less restrictive measure, such as a local distribution quota at market, could not have been used instead.[77] However, importantly, in answering the referred question, the Advocate General concluded that the Vmtv does not contravene EU law (and thus the Hungarian national FDI screening law is not precluded by EU law). The proportionality of the national measure was here carefully analyzed, and the AG considered that it is for the national court to decide the outcome of the case and whether specifically the national measure was appropriate and necessary.[78]

By contrast, the CJEU took no such cautious approach to defer to the national court. Instead, the CJEU provided a clear indication on the outcome of the case and underlined the disproportionality of the Ministry decision (thus going beyond the text of the referred question from the Hungarian court which only focused on the Vmtv). The CJEU ruled that the interpretation of the Hungarian national screening law on foreign direct investment, as applied in this case, is incompatible with EU law, specifically the freedom of establishment. As put by the CJEU,

> the provisions of the TFEU on freedom of establishment must be interpreted as precluding a foreign investment filtering mechanism provided for by the legislation of a Member State by means of which a resident company which is a member of a group of companies established in several Member States, over which an undertaking from a third country has decisive influence, may be prohibited from acquiring ownership of another resident company regarded as strategic, on the ground that the acquisition harms or risks harming the national interest in ensuring the security of supply to the construction sector, in particular at the local level, with respect to basic raw materials such as gravel, sand and clay.[79]

It should be underlined that this conclusion made by the CJEU needs obviously to be considered in the context of the political climate in Hungary and its known failure to comply with EU requirements more broadly. It is also worth noting that *Xella* is the second significant Hungarian case whereby the EU has censored a decision on FDI by the Hungarian authorities based on the Vmtv. The first case concerned the acquisition of AEGON Group's Hungarian subsidiary by Vienna Insurance Group and the EU Commission's finding that Hungary's veto over this acquisition breached Article 21 of the Merger Regulation.[80] *Xella* is another opportunity for the CJEU to highlight the Hungarian State's inability to adhere to EU law. From a general perspective, Hungary's numerous breaches of the rule of law in the free movement context[81] are also difficult to separate from the *Xella* case; and this particularly in a litigation that concern the use of '(public) security and public order' by Hungary to justify a restriction on the freedom of establishment. The backsliding context has probably played

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[77] ibid.
[78] ibid para 95.
[79] See *Xella* (n 5) para 74.
[80] See Commission Press Release, 'Mergers: Commission finds that Hungary's veto over the acquisition of AEGON's Hungarian subsidiaries by VIG breached Article 21 of the EU Merger Regulation' (21 February 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1258> accessed 01 October 2024.
[81] See Xavier Groussot, Niels Kirst, and Patrick Leisure, '*Segro* and Its Aftermath: Between Economic Freedoms, Property Rights and the "Essence of the Rule of Law"' (2019) 2(2) Nordic Journal of European Law 69.

a significant role in the judges' psyche when deciding upon this case which deals in essence with the national economic security of a rogue Member State. In this sense, *Xella* exemplifies a clash between the national economic security of a Member State and the economic integrity and security of the EU internal market, which constitutes a sort of European economic public order. The next section of this article looks particularly at the anatomy of this European economic public order and how it is used to reform the laws and policies of the EU in the field of screening of foreign investment.

4 THE REFORM OF REGULATION 2019/452 AND EUROPEAN ECONOMIC SECURITY

4.1 FROM THE EXCLUSION OF INTRA-EU INVESTMENT FROM THE SCOPE OF REGULATION 2019/452 TO ITS INCLUSION IN THE NEW PROPOSAL

Safeguarding national security is a sensitive matter, and the screening of FDI is, to a considerable extent, a highly political and discretionary decision.[82] Regulation 2019/452 does not harmonize the protection level of 'security and public order' at EU level, meaning that the Member States are, in principle, free to determine the requirements of '(public) security and public order' considering their national needs and then justify the restriction to the economic fundamental freedoms with reference to their own national 'security and public order' standards.[83] Even though Regulation 2019/452 puts FDI screening under the Common Commercial Policy (CCP), in practice, internal market rules have consequences for investors. The Regulation itself acknowledges that it is without prejudice to the Member States' right to derogate from the free movement of capital under Article 65(1)(b) TFEU.[84] Depending on their place of business, the EU or foreign investors rely on either freedom of establishment or the free movement of capital as the standard of protection of their direct investments.[85] While third-country (foreign) investors can only rely on free movement of capital in relation to their direct investments in an EU target,[86] EU-based investors

[82] Aldo Sandulli, 'The *Xella* Case: Screening FDI is a matter of proportionality' (*EU Law Live*, 20 November 2023) <https://eulawlive.com/op-ed-the-xella-case-screening-fdis-is-a-matter-of-proportionality-by-aldo-sandulli/> accessed 01 September 2024.

[83] ibid, see also Hindelang and Moberg (n 22) 1452; see also Recital 4 of Regulation 2019/452: 'This Regulation is without prejudice to the right of Member States to derogate from the free movement of capital as provided for in point (b) of Article 65(1) TFEU'.

[84] See Recital 4 of Regulation 2019/452.

[85] Trajan Shipley, 'Where Investment Screening and the Internal Market Meet – *Xella Magyarorszag* (C-106/22)' (*EU Law Live*, 22 September 2023) <https://eulawlive.com/op-ed-where-investment-screening-and-the-internal-market-meet-xella-magyarorszag-c-106-22-trajan-shipley/> accessed 01 September 2024.

[86] Commentators are still not aligned on whether free movement of capital should apply in relation to FDI, or whether 'direct investments' are exclusively covered by freedom of establishment, thus excluding the coverage of FDI by any of the internal market freedoms. See: Steffen Hindelang, 'The Influence of Competing Freedoms on the Scope of Application – Direct Investment between Free Movement of Capital and the Free Movement of Establishment' in Steffen Hindelang (ed), *Free Movement of Capital and Foreign Direct Investment* (Oxford University Press 2009) 90; Case C-35/98 *Verkooijen* EU:C:2000:294. For opposing view, see: Jukka Snell, 'EU Foreign Direct Investment Screening: Europe qui protège?' (2019) 44(2) European Law Review 137, 138; Case C-446/04 *Test Claimants in the FII Group Litigation* EU:C:2006:774 para. 98. In the Explanatory Memorandum of the Regulation 2019/452 the Commission simply stated that the instrument is consistent with Article 63 TFEU and disregarded the application Article 49 TFEU, providing that it does not apply to third country nationals in the EU.

traditionally relied on freedom of establishment in relation to investments that enabled them to control the target.[87]

Once the Court excluded the application of Regulation 2019/452 to the *Xella* case, it concluded that the case falls within the ambit of free movement rules and shall be settled under the EU freedom of establishment, given that Xella is an EU company.[88] On the merits, the Court found the national measure as constituting a restriction on the freedom of establishment, and in an extensive proportionality assessment, it concluded that security of supply in the construction sector justification does not constitute a public interest that could justify the restriction.[89] Peréz summarizes that the Court drew 'a line in the sand for [FDI]'. Indirect FDI falls exclusively under the freedom of establishment. In contrast, direct FDI falls under the scope of Regulation 2019/452.[90] Shipley argues that by bringing intra-EU investments exclusively into the internal market framework, the Court excluded the legitimacy of national FDI screening regimes for EU investors.[91] Andreotti warns that excluding the application of Regulation 2019/452 to indirect FDI can lead to a paradoxical effect, where national authorities can abuse their screening activities concerning EU investors because of their foreign shareholding.[92] After all, FDI Regulation established certain procedural safeguards for foreign investors to rely upon, EU investors are now left only to rely on the freedom of establishment.

The exclusion of intra-EU investment from the scope of Regulation 2019/452 does not preclude Member States from implementing such additional screening measures on indirect foreign investment to the extent that the restrictions comply with the Treaty rules on fundamental freedoms.[93] The Regulation establishes specific standards that protect investors against abuse of screening by Member States by imposing procedural rules on the national authorities. The Regulation excludes indirect foreign investment, so the procedural safeguards do not apply to EU investors with foreign control.[94] Therefore, as reasoned by AG Ćapeta, the market freedoms available to all EU entities could be disproportionately burdened simply because of foreign shareholding in those entities.[95] Interpreting the scope of Regulation 2019/452 to cover indirect foreign investment could have struck a balance between the rights of the EU investor and Member States' need to screen FDI.[96] There is no doubt that circumvention of national screening mechanisms is possible using EU freedom of establishment after setting up or taking control of a company in another Member state

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[87] See Case C-196/04 *Cadbury Schweppes* EU:C:2006:544 para 33; Case C-524/04 *Test Claimants in the Thin Cap Litigation* EU:C:2007:161 para 34.
[88] ibid. See *Xella* (n 5) paras 31, 41–44.
[89] ibid. See *Xella* (n 5) paras 59 and 69.
[90] See Perez (n 48).
[91] ibid; Shipley (n 85).
[92] See Nicolò Andreotti, 'Screening of foreign direct investment within the Union: protection of essential interests or abuse of rights? (C-106/22 *Xella Magyarország*)' (*EU Law Live*, 25 July 2023) <https://eulawlive.com/op-ed-screening-of-foreign-direct-investment-within-the-union-protection-of-essential-interests-or-abuse-of-rights-c-106-22-xella-magyarorszag-by-nicolo-andreotti/> accessed 01 September 2024.
[93] ibid; see also Perez (n 48).
[94] See Andreotti (n 92).
[95] ibid. See Opinion of AG Ćapeta in *Xella* (n 27) para 53.
[96] Andreotti (n 92); see also Perez (n 48).

that does not screen FDI.[97] However, Member States screening FDI are likely to screen EU investors. Negating the application of Regulation 2019/452 to the indirect foreign investment arguably leads to the opposite of what the legislator intended. This gives the possibility for national authorities to abuse the screening activities, leading to an increase in legal uncertainties for investors.[98] The new proposal extending the scope of the FDI Regulation is not only based on this economic rationale but also clearly takes into consideration the risks to 'security and public order' that the EU is facing in having a system of screening that resembles a Swiss cheese, i.e. a screening system that is full of holes/gaps since it only focuses on FDI and allows some Member States to keep their national system of screening through a minimum level of harmonization.

According to the new proposal of a Regulation replacing Regulation 2019/452, there is a need to include both direct and indirect foreign investments, and thus to extend the scope of the cooperation mechanism, in order to ensure that any investment creating a lasting link between the foreign investor and the Union target, whether it is carried out directly by a foreign investor or through an entity established in the Union and controlled by a foreign investor, is consistently captured and assessed.[99] Accordingly,

> This should foster the consistency and predictability of screening rules across Member States, which in turn will reduce compliance costs for foreign investors and limit incentives to target an investment in Member States where such transactions are out of scope.[100]

The key rationale for extending the scope of the FDI Regulation is based on the need to develop the legal certainty of screening rules based not only on the necessity to reduce the cost for foreign investors but also, more importantly it is argued, to reduce the 'risks to security and public order' in the EU.

4.2 THE SCOPE OF THE NEW PROPOSAL

On the 24th of January 2024, the European Commission published a Proposal for a new screening regulation that is supposed to repeal Regulation 2019/452. The accompanying documents of the Proposal admit that the institutions are aware of the need to address the shortcomings of Regulation 2019/452.[101] The European Commission notes that currently there is only little framing as to its scope.[102] Similarly, the European Court of Auditors warned that there are 'significant divergences across the screening mechanisms of Member States',

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[97] See Recital 10 of Regulation 2019/452; and Sophie Meunier, 'Divide and conquer? China and the cacophony of foreign investment rules in the EU' (2014) 21(7) Journal of European Public Policy 996, 1010-1011.
[98] See Andreotti (n 92).
[99] See Recital 10 of the Proposal (n 6).
[100] ibid.
[101] Commission, 'Commission Staff Working Document, Evaluation of Regulation (EU) 2019/452 of the European Parliament and the Council of 19 March establishing a framework for the screening of foreign direct investments into the Union' SWD (2024) 23 final, 37–38 ('Evaluation of Regulation (EU) 2019/452').
[102] Evaluation of Regulation (EU) 2019/452 (n 101).

causing legal uncertainty.[103] It remains unclear who should undergo screening and what needs to be screened but also what constitutes 'security' or 'essential security interests' concepts, for instance. Problems arise in cases where the foreign investment concerns several Member States' jurisdictions, causing regulatory nightmares to investors who must navigate in which Member States they must undergo screening in relation to their investment, ultimately decreasing EU's effectiveness to attract the wanted investment. With the European Commission's duty to evaluate the functioning and effectiveness of the Regulation no later than three years after its implementation,[104] the European Commission underlined that 'the chain is only as strong as its weakest link'[105] and found that a new legislative instrument is necessary to address the critical shortcomings in the effectiveness of FDI screening into the Union.[106]

As Regulation 2019/452, the planned regulation, pursues a double objective of establishing a Union framework for the screening by Member States of FDI in their territory on the public policy and security grounds and establishing a cooperation mechanism.[107] Screening will remain in the realm of Member States, which will be obliged to screen.[108] The shift to a compulsory nature intends to close the compliance gap in the remaining five Member States, which do not have any mechanism in place.[109] In need to address the shortcomings of the regime under Regulation 2019/452, the European Commission proposes extending the scope of the new regulation to cover indirect FDI, defined as 'foreign investment'.[110] This 'foreign investment' is made by an EU investor, ultimately controlled[111] by a foreign investor, and is intended to establish or maintain direct and lasting links between the foreign investor and the Union target.[112] The proposal does not define any thresholds. Therefore, the degree of control by the foreign investor over the EU subsidiary and the foreign investor and Union target will be assessed on a case-by-case basis.

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[103] European Court of Auditors, 'Special Report, Screening foreign direct investments in the EU – First steps taken, but significant limitations remain in addressing security and public-order risks effectively' (*Publications Office of the European Union*, 24 October 2023), 5 <https://www.eca.europa.eu/en/publications?ref=SR-2023-27> accessed 01 September 2024 ('European Court of Auditors, Special Report').

[104] Article 15(1) of Regulation 2019/452.

[105] ibid; Evaluation of Regulation (EU) 2019/452 (n 101) 2.

[106] Commission, 'Explanatory Memorandum to the Proposal' COM (2024) 23 final, 2 ('Explanatory Memorandum').

[107] Articles1(1) and 1(2) of the Proposal (n 6).

[108] Article 1(1) and 3(1) of the Proposal (n 6).

[109] Recital 7 of the Proposal (n 6). See Explanatory Memorandum (n 101) 1. Nearly 42% of FDI stocks are located in the Member States that do not screen. Almost 23% of FDI was in Member States that do not have a fully applicable FDI screening: ibid; European Court of Auditors, Special Report (n 103) 27.

[110] However, see Article 2 of the Proposal (n 6). The definitions of FDI and 'foreign investor' remain unchanged. The Proposal explicitly excludes investments through which the foreign investor does not intend to create or maintain lasting and direct economic links with the Union target, purely financial investments.

[111] In addition to the direct control, where the foreign investor exercises control over the EU subsidiary, the Proposal also includes indirect control. The national authorities examine the ultimate controller. In the case of *Xella*, it would be the Lone Star Group, not the German or Luxembourg entity. On the one hand, this new approach broadens the scope of screening mechanisms and provides national authorities with a greater understanding of the ownership structure of the foreign investor. On the other hand, it expands foreign investor's right to rely on the new regulation and market freedoms, in cases like *Xella*, by broadening the cross-border element necessary to invoke them. At the same time, the regulator will need to exercise a degree of caution not to subject FDI with only a remote link to the foreign investor to undergo screening procedures, as this could harm the functioning of the internal market and overly burden the EU investor.

[112] See Article 2(3) of the Proposal (n 6).

In reaction to increased security concerns over the past four years and the demand of the Member States that already screen indirect foreign investment, e.g. Austria, the European Commission proposes that the new regulation shall also cover indirect foreign investment.[113] Recital 8 of the Proposal explicitly reflects the uneven playing field for investors in a system that varies in scope, deterring investors due to higher compliance costs and unpredictability, negatively affecting the internal market. The Proposal explicitly excludes investments through which the foreign investor does not intend to create or maintain lasting and direct economic links with the Union target, purely financial investments. Article 2 of the Proposal, in addition to the FDI, defines 'foreign investment' in Article 2(1) as 'a foreign direct investment or an investment within the Union with foreign control, which enables effective participation in the management or control of a Union target'.[114] Thus, an EU investor as in the *Xella* case with foreign control intending to exercise influence over the Union target would be caught by the new legislation. In screening indirect FDI, the European Commission opts for an approach incorporating the control over an EU investor into the definition of the foreign investor. The proposal proposes differentiating between direct FDI and investment within the Union with foreign control (IUFC). Article 2(3) of the Proposal defines IUFC as:

> an investment of any kind carried out by a foreign investor through the foreign investor's subsidiary in the Union, that aims to establish or to maintain lasting and direct links between the foreign investor and a Union target that exists or is to be established, and to which target the foreign investor makes capital available in order to carry out an economic activity in a Member State.

An intra-EU investment, according to the Proposal, means an investment of any kind via the foreign investor's subsidiary in the Union.[115]

Other significant changes brought by the proposal include the compulsory nature of the planned regulation and a list of activities of particular importance and factors likely to affect public order and security. The proposed regulation is supposed to serve as a minimum harmonization tool, permitting Member States to screen direct and indirect FDI in activities not listed, if they comply with the justifications under the derogations from the free movement Treaty provisions. Articles 3 and 4 set out minimum requirements for screening mechanisms. Annex I lists projects, and Annex II lists activities of particular importance for the 'security and public order' of the Union. Member States will have to subject investments to targets active in one of the activities listed in Annex I and Annex II in their territory to prior authorization. Article 4 outlines procedural safeguards and minimum standards for national authorities and investors. Articles 5 to 12 establish rules for the cooperation mechanism, such as conditions for investment that must be notified, information that Member States must supply, procedures regarding comments from other Member States and opinion of the Commission, channels for information exchange, confidentiality safeguards, time limitations, and a possibility for Member State to open own initiative procedure concerning unnotified foreign investment in another Member State likely to affect the

[113] Explanatory Memorandum (n 106) 3; see also recitals 8–10 of the Proposal (n 6).
[114] See Article 2(1) of the Proposal (n 6).
[115] See Article 2(7) of the Proposal (n 6).

security and public order. Article 13 considers factors when determining whether foreign investment will likely negatively impact 'security and public order'. Article 14 allows the national authorities to either authorize foreign investment likely to affect public order or security subject to mitigating measures or prohibit it. The decision must be proportionate and consider all circumstances of the investment. National authorities may authorize foreign investment without conditions if they consider that other measures under EU or national law appropriately address its effect on 'security and public order'.

The Proposal is more concrete than Regulation 2019/452. It obliges the remaining Member States to establish screening mechanisms and imposes a higher degree of harmonization by listing the activities in which targets are active.[116] Subsequently, it imposes screening and notification requirements for the cooperation mechanisms on the Member States regarding foreign investment in those targets. At the same time, the Proposal indicates that the regulation is supposed to serve as a minimum harmonization tool, allowing Member States to adopt or maintain national provisions in fields not covered by the envisaged regulation.[117] The screening of foreign investments not covered by the proposed regulation shall nevertheless comply with the requirements of the regulation.[118] In addition to Article 207 TFEU, the new regulation is also supposed to be based on Article 114 TFEU. The European Commission justifies the additional legal basis by the need to approximate the laws of the Member States, which establish the internal market as their object, and the necessity to address the differences between the national screening mechanisms. Since the screening mechanisms restrict economic fundamental freedoms, they affect the functioning of the internal market. Moreover, Article 114 TFEU allows the inclusion of investments made via Union subsidiaries with foreign control in the scope of the new regulation.[119] This extends the coverage of Regulation 2019/452 solely based on Article 207(2) TFEU, as it only captured direct FDI falling within the ambit of CCP.[120] The non-exhaustive list of areas where the Union target is active[121] and factors to take into account when determining whether the foreign investment has an impact on security[122] and public order confirm that the new regulation is supposed to encapsulate the justifications for the fundamental freedoms derogations, similarly to the point made by AG Ćapeta in *Xella* in respect to Regulation 2019/452.[123] In this sense, Article 14(1) of the Proposal, together with Recital 12, also reflect that Member States, even though empowered to subject FDI to limitations under CCP, the regulation must not evade the requirements under fundamental freedoms. Moreover, Article 1(5) of the Proposal, together with the Recital 11, permit Member States to impose additional limitations beyond the criteria of the proposed regulation, provided they are consistent with the permitted justifications under derogations from the free

[116] See Recital 6 of the Proposal (n 6).
[117] See Article 1(3) of the Proposal (n 6).
[118] See Recital 11 of the Proposal (n 6).
[119] ibid. See also Explanatory Memorandum (n 106) 10: 'This constitutes an additional step by comparison with the concept of circumvention in the current Regulation, which only applies when the transaction is carried out within the EU by means of artificial arrangements that do not reflect economic reality. This extension requires the use of Article 114 TFEU as a legal basis to reflect the fact that investments within the EU would be covered by the proposed regulation'.
[120] Explanatory Memorandum (n 106) 11.
[121] See Annex I and Annex II of the Proposal (n 6).
[122] See Article 13 of the Proposal (n 6).
[123] ibid. See Opinion of AG Ćapeta in *Xella* (n 27) paras 50–51.

movement of capital and establishment.[124] In conclusion, the new regulation will correct the outcome of *Xella* by striking a balance between the economic and procedural rights of the foreign investor as well as EU investor with a foreign control and the Member States' need to screen FDI directly under the regulation. This will prevent the disproportionate burden on the economic freedom of establishment as the only available recourse for EU investors with foreign control.

5 CONCLUSION

With the new proposal, the legislator reflected on the inadequacy of the current regime and the need for a stricter and more coherent system of control of foreign investments in the EU to both fill the security threats caused by the possibility of circumvention of the screening mechanisms and the substantial gaps between the national laws causing unpredictability for the investors. Some of the major changes include the compulsory nature of the new regulation, extended scope by including indirect foreign investment, or a list of industries and activities considered sensitive. The final wording of the regulation will obviously depend on the outcome of the negotiations between the institutions in a legislative procedure.[125] The broad definition of foreign investments (including both FDI and IUFC) shows that the new regulation will require national authorities to determine who ultimately acquires control over the Union target. The definition sets out examples of criteria for the foreign parent's control over the EU subsidiary through which they intend to invest in the Union undertaking active in a sensitive sector. Subsequently, the wording of the degree of control by the foreign investor over the EU target remains unchanged in comparison with Regulation 2019/452 and case law in the field of freedom of establishment. It is therefore expected that when called to interpret the concept of foreign investment, the CJEU will endorse an assessment on a case-by-case basis, requiring the national court to consider the factual circumstances to establish whether the foreign parent exercises the control over the EU subsidiary and to what extent the foreign investor will then exercise control over the Union target. One of the major novelties with the new proposed regulation is the inclusion, as a legal basis, of Article 114 TFEU as a complement to Article 207 TFEU. This new legal basis will probably be challenged before the CJEU. However, considering the 'security and public order' rationale of this novel secondary legislation replacing the FDI Regulation, it will be very difficult to make the CJEU annul this legislation on the ground of the use of the wrong legal basis. This is also so since the CJEU is always very cautious in annulling EU legislation by granting a broad margin of discretion to the EU legislature in making EU regulations. Such

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[124] Proposal (n 6). See also Explanatory Memorandum (n 106) 4; Recital 9 of the Proposal (n 6).

[125] See Ahamad Madatali with Torlai (n 2). This briefing discusses the implementation of the current FDI Screening Regulation in EU Member States based on the Commission evaluation findings, other institutional reports, and expert analysis. See Conclusion at page 11: 'The January 2024 legislative proposal to update the EU FDI Screening Regulation aims at modernising and strengthening the existing legal framework. It addresses the differences between Member States' screening mechanisms that could hamper the smooth functioning of the internal market for investment, creating a level playing field among Member States. Moreover, it seeks to enhance the efficiency of the cooperation mechanism by extending the scope to incoming FDIs made by EU subsidiaries but ultimately controlled by third-country investors. Overall, by stating the principle that certain foreign investments need to undergo screening, regardless of which Member State is the location of the target, the revised regulation's stated aim is to ensure a more consistent and efficient approach to risks to security and public order flowing from foreign investment into the EU'.

a margin of discretion in our specific case is also certainly increased by the explicit 'security and public order' rationales of the new regulation. 'Security and public order' are clearly making their way in the harmonization of the internal market and the constitutional development of a new European economic public order, for better and for worse.

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CASTING VOTES INTO THE VOID: AN EMPIRICAL STUDY OF THE TWELVE YEARS OF THE EUROPEAN CITIZENS' INITIATIVE

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The European Citizens' Initiative (ECI) is a unique instrument promising to enable direct democracy, by enabling citizens to directly request the European Commission to propose legislation in areas where the Commission has the power to do so. The instrument is designed to promote democratic participation and increase the transparency of the EU decision-making processes. This article assesses the effectiveness of the ECI as an instrument to enhance citizen participation in the EU decision-making processes, with a particular focus on initiatives relating to environmental concerns and climate change. Despite the ECI's potential to empower citizens and facilitate their input in EU policymaking, the instrument has been criticized for its complexity, limited impact and inaccessibility. Additionally, there are concerns that the ECI process may not be an adequate tool for addressing complex issues such as environmental concerns or climate change. This article explores these weaknesses and evaluates the extent to which the ECI can be utilized as a tool for enhancing citizen participation in environmental policymaking, analysing case studies of past initiatives in this area and examining their outcomes to determine the ECI's ability to influence EU policies.

1 INTRODUCTION

During the last couple of decades, the promotion of citizens' participation has been one of the top political priorities of the European Union, oftentimes presented as tantamount to the ideal of participatory democracy.[1] Importantly, in 2012, the European Union made available to its citizens an instrument through which to participate in the decision-making process: the European Citizens' Initiative (ECI). The ECI is the only democratic tool the EU offers its citizens to call on the European Commission to propose legislation to address shortcomings in the EU and to develop Europe, provided that they have collected one million statements of support in at least seven Member States, and fulfilled a number of other technical requirements.[2] For example, before the collection of statements of support begins, the subject matter of the proposed initiative must fall under the competences of the Commission to make a legislative proposal to the EU's legislative institutions: the Council and the European Parliament. As the EU's legal and institutional structure 'makes it

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[1] See Andrea Fischer-Hotzel, 'Democratic Participation? The Involvement of Citizens in Policymaking at the European Commission' (2010) 6(3) Journal of Contemporary European Research 335.

[2] Under Article 11(4) of the Treaty on the European Union (TEU), not less than one million citizens who are nationals of a significant number of EU Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.

impossible for citizens to submit proposals directly before the legislatures',[3] the European Commission becomes itself the only judge of the suitability of the subject matter of an ECI.

As such, one of the core things that the ECI promises to achieve is a bottom-up integration of the EU polity.[4] In other words, a bottom-up policymaking. As such, the ECI is meant to allow each one of the four hundred million EU citizens to influence the political and legislative agenda of the Union.[5] Seen that way, the ECI 'represents a new generation of democracy instruments with a more direct and transnational value than any other participatory procedure before it and, possibly, a tool that meets the needs of e-participation and e-democracy in the 21st century'.[6]

All this has led many to see the ECI as 'the most important participatory democratic instrument in the EU',[7] as a rigid success for transnational participatory democracy, or even more so as 'a revolution in disguise'.[8] The ECI is certainly the only, if not the greatest, instrument of participatory democracy in the EU. But it has not been without flaws, and that is why the instrument's critics have been many, too. Having been criticised from its inception for its incapacity to yield formal powers to citizens[9] and its inability to mandate the political institutions,[10] the democratic value of the ECI has not been taken for granted by everyone.[11]

Especially at a time when climate change is considered by EU citizens to be the most serious global issue right now,[12] and whilst the European Green Deal emphasises that

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[3] Erik Longo, 'The European Citizens' Initiative: Too much democracy for the EU?' (2019) 20(2) German Law Journal 181, 191.

[4] ibid 182, where this is opposed to 'top down' EU integration, which 'has had a corrosive effect on European polity, delegitimizing the very idea of Europe's political unity, and at the same time contributing to the growing spread of anti-EU populist movements' (citations omitted).

[5] European Parliament, 'European Citizens' Initiative' (*European Parliament*, April 2024) <https://www.europarl.europa.eu/factsheets/en/sheet/149/iniziativa-dei-cittadini-europei> accessed 01 September 2024.

[6] Longo (n 3) 189.

[7] Antonia-Evangelia Christopoulou, 'Towards a Golden Age of the European Citizens Initiative?' (*European Law Blog*, Blogpost 7/2024, 30 January 2024) <https://europeanlawblog.eu/wp-content/uploads/2024/01/Blogpost-72024.pdf> accessed 01 September 2024. See also, Luis Bouza García and Justin Greenwood, 'The European Citizens' Initiative: A New Sphere of EU Politics?' (2014) 3 Interest Groups & Advocacy 246; Alex Warleigh, 'Civil Society and Legitimate Governance in a Flexible Europe: Critical Deliberativism as a Way Forward' in Stijn Smismans (ed), *Civil Society and Legitimate European Governance* (Edward Elgar 2006).

[8] See Dominik Hierlmann and Anna Wohlfarth, 'A Revolution in Disguise: The European Citizens' Initiative' (*Spot-light Europe*, August 2010) <https://www.bertelsmann-stiftung.de/fileadmin/files/user_upload/spotlight_07_2010_ENGL.pdf> accessed 01 September 2024.

[9] Justin Greenwood, 'The European Citizens' Initiative: bringing the EU closer to its citizens?' (2019) 17 Comparative European Politics 940.

[10] ibid; Anastasia Karatzia, 'The European Citizens' Initiative and the EU institutional balance: On realism and the possibilities of affecting EU lawmaking' (2017) 54(1) Common Market Law Review 177; Nikos Vogiatzis, 'Between discretion and control: Reflections on the institutional position of the Commission within the European citizens' initiative process' (2017) 23(3-4) European Law Journal 250.

[11] See Julia De Clerck-Sachsse, 'Civil Society and Democracy in the EU: The Paradox of the European Citizens' Initiative' (2012) 13(3) Perspectives on European Politics and Society 299; Andrew Glencross, 'The Absence of Political Constitutionalism in the EU: Three Models for Enhancing Constitutional Agency' (2014) 21(8) Journal of European Public Policy 1163; Pawel Glogowski and Andreas Mauer, 'The European Citizens' Initiative – Chances, Constraints and Limits' (2013) Institute for Advance Studies Vienna Political Science Series – Working Paper 134 <https://irihs.ihs.ac.at/id/eprint/2199/1/pw_134.pdf> accessed 01 September 2024.

[12] A study published by the European Commission in 2021 reports that climate change is increasingly considered not only a profoundly serious problem but the single most serious problem facing the world today. This was the first time that climate change ranked first in an EU-wide poll. On an average, at least a quarter of respondents in every country believe that climate change is the number one most serious problem

'citizens are and should remain a driving force of the transition to sustainability', there is an indisputable need for effective forms of public participation. Interestingly, however, most EU citizens feel that their voices are not adequately heard at the EU level and that they deserve a greater say about the future of the EU; yet knowledge of the ECI tool, when it would be of utmost urgency to use it, is limited.[13]

On several occasions, the EU has presented itself as a global leader against climate change,[14] and has announced its commitment to abide to its international obligations, such as those under the Paris Climate Agreement.[15] European leaders have even championed themselves as international climate heroes, and promised that '[i]n 2050, we live well' and 'within the planet's ecological limits'.[16] Yet, still, most EU citizens believe that their government is not concerned enough about climate change, and that it will not successfully fulfil its promise to reduce carbon emissions drastically by 2050.[17]

At the same time, and as it becomes clear that climate action is an intrinsically political matter, EU citizens demand to have a say in future climate policies.[18] But the avenues to do so are unknown to most; and where they are known, they are also limited. Although, in the context of climate change, the ECI could assume particular importance by enabling citizens to contribute to the development of effective climate policies that address the pressing needs of the planet, in reality the effectiveness of the ECI as a tool for giving EU citizens a direct voice on climate change remains somewhat constrained by the complexities of EU decision-making processes. With this in mind, ECIs relating to environmental concerns will be used in this article to analyse whether the European Commission is, as many predicted, the 'player that makes or breaks the rules' when it comes to which initiatives are

globally. For the report of the survey, see European Commission, 'Climate Change (*Special Eurobarometer*, March-April 2021) <https://climate.ec.europa.eu/system/files/2021-07/report_2021_en.pdf> accessed 01 September 2024.

[13] See European Union, 'Standard Eurobarometer 96 – Winter 2021-2022' <https://europa.eu/eurobarometer/surveys/detail/2553> accessed 01 September 2024. This was further acknowledged by the European Parliament in 2022. More recently, see Directorate-General for Communication, 'Flash Eurobarometer FL528: Citizenship and democracy' <https://data.europa.eu/data/datasets/s2971_fl528_eng?locale=en> accessed 01 September 2024.

[14] For example, Council of the European Union, 'Presidency Conclusions' (14 February 2008) 16616/1/07 REV 1; European Commission, 'State of the Union 2012 Address' (12 September 2012). See also, Bertil Kilian and Ole Elgström, 'Still a Green Leader? The European Union's role in international climate negotiations' (2010) 45(3) Cooperation and Conflict 255.

[15] Commission, 'A Roadmap for Moving to a Competitive Low Carbon Economy in 2050' COM (2011) 112 final.

[16] Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet' [2013] OJ L354/171.

[17] European Investment Bank, 'The EIB Climate Survey' (Fourth edition, 2021-2022), 14 <https://www.eib.org/attachments/publications/the_eib_climate_survey_2021_2022_en.pdf> accessed 01 September 2024.

[18] European Social Survey, 'European Attitudes to Climate Change and Energy: Topline Results from Round 8 of the European Social Survey' (*European Social Survey*, September 2018), 6 <https://www.europeansocialsurvey.org/sites/default/files/2023-06/TL9_Climate-Change-English.pdf> accessed 01 September 2024; Alessandro Follis, 'Climate change is citizens' main priority in EU reform agenda' (*EURACTIV*, 31 January 2022) <https://www.euractiv.com/section/future-eu/news/climate-change-is-citizens-main-priority-in-eu-reform-agenda/> accessed 01 September 2024.

put forward,[19] or whether the ECI is indeed the golden ticket to citizens' participation in the EU.

After providing a short background on the ECI in Section 2, this article examines the capacity of the instrument to fulfil its own objectives, which is to allow EU citizens a greater say in the policies that affect their lives by giving them a platform through which to propose legislation with a focus on initiatives that demand the EU to take action with regards to issues relating to climate change. It does so by studying three valid initiatives that have attempted to do that – namely, *Right2Water, Ban Glyphosate,* and *Save Bees and Farmers* – by looking, in Section 3, at the ways the European Commission responded to them. Finally, in Section 4, this article provides an overall evaluation of the ECI instrument against the backdrop of its recent review that was conducted by the European Commission in 2023 by engaging critically with the findings of Section 3.

2 PARTICIPATORY DEMOCRACY IN THE EU

2.1 THE DEMOCRATIC DEFICIT PROBLEMATIC

Since its inception, the European Union has been considered a 'transnational project' that ensures peace, security, and prosperity amongst the European peoples.[20] In the Treaty of the European Union, one finds principles such as democracy and the rule of law being highlighted as core values to which the EU abides to.[21] However, opinions and feelings vary as to what extent these principles are materialised in practice. Indeed, the EU seems to fulfil '*de jure* the most important criteria of representative democracy'.[22] And, indeed, many boxes are ticked: formal democratic cornerstones such as voting rights,[23] equality before the law,[24] consent of the governed, and values that the EU purports to abide to, such as the rule of law. It is no secret, however, that to many the European project has little to do with the values its treaties enshrine, with many EU is an intrinsically politico-economic project that 'is ailing' due to structural 'deficiencies' and democratic 'shortcomings' that threaten (and, at times, impede) 'transparency, popular control, accountability and direct involvement of citizens'.[25]

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[19] Manès Weisskircher, 'The European Citizens' Initiative: Mobilization Strategies and Consequences' (2020) 68(3) Political Studies 797, 798, citing Dorota Szeligowska and Elitsa Mincheva, 'The European Citizens' Initiative – Empowering European Citizens Within the Institutional Triangle: A Political and Legal Analysis' (2012) 13(3) Perspectives on European Politics and Society 270.

[20] Jan-Hendrik Kamlage and Patrizia Nanz, 'Crisis and participation in the European Union: Energy policy as a test bed for a new politics of citizen participation' (2017) 31(1) Global Society 65, 65.

[21] Articles 2 and 3 TEU.

[22] Kamlage and Nanz (n 20) 66, citing David Beetham, 'Liberal Democracy and the Limits of Democratisation' in David Held (ed), *Prospects for Democracy* (Polity Press 1993).

[23] Charter of Fundamental Rights of the European Union [2012] OJ C326/391, Articles 39 and 40.

[24] Article 20 of the Charter of Fundamental Rights of the European Union.

[25] ibid. See also, Mark E Warren, 'Citizen Participation and Democratic Deficits: Considerations from the Perspective of Democratic Theory' in Joan DeBardeleben and John H Pammett (eds), *Activating the Citizen* (Palgrave Macmillan 2009), where the author writes: 'The claim that the EU was in democratic deficit reflected not a democratic past that was eroding, but rather the growing democratic expectation that came with political integration, combined with institutions – the European Parliament in particular – that can and should be measured according to democratic norms'. More on the 'democratic deficit' see Gráinne De Búrca, 'The Quest for Legitimacy in the European Union' (1996) 59(3) Modern Law Review 349; Joseph H H Weiler, 'Why Should Europe be a Democracy: The corruption of Political Culture and the Principle of Constitutional Tolerance' in Francis Snyder (ed), *The Legal Effects of European Integration* (Hart Publishing 2000).

Although the promise is that the structure of the EU decision making system, however labyrinthine, allows for accountability, especially 'through the relationship between each institution and its constituency', it was identified a long time ago that 'the problem with the "democratic deficit" is whether these direct channels are effective in connecting the preferences of citizens to the outcome of EU decision making'.[26] In other words, the problem is not that there is a lack of a variety of channels of representations, but that these channels are designed to at best listen to and not honestly articulate the voice of the citizens of the EU.

Already in 1996, at the Inter-Governmental Conference (IGC), which met in Dublin at a time when the EU comprised fifteen Member States, the official position regarding this problematic was that the Union should strive to

> retain the trust, respect and active support of its citizens in each and every Member State. With the prospect of future enlargement, it will be necessary to make institutional changes which marry the desire for more efficient and effective decision-making with the need to ensure that the institutions are visibly democratic and firmly rooted in public acceptance.[27]

Again, the problem with this approach is that it is not focused on how to reform the EU so that it is truly democratic, that its foundations are democratic, but it is rather focused on how to make it appear democratic; a focus that rests less on institutional reform and more on the *phainesthai* (in Greek, φαίνεσθαι), on how things look, rather than on how things are.

If, from the perspective of the EU demos, the democratic deficit means a European Parliament that fails to give citizens their fair say in the affairs of the Union, from the perspective of the European Parliament itself the democratic deficit

> results from the fact that European elections are fought primarily on the basis of national political concerns, rather than on problems relevant to the European arena. It is true that the European Parliament lacks certain powers in comparison with modern-day national parliaments; but what it lacks most is not power but a mandate to use that power in any particular way.[28]

Whichever way one looks at it, at the heart of all perceptions of the democratic deficit lies the observation that EU decision making is not a bottom-up process, meaning that it does not incorporate or reflect the will of the people. This has raised questions about the EU's legitimacy,[29] and especially when it comes to 'input legitimacy', which reflects the lack

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[26] Pippa Norris, 'Representation and the democratic deficit' (1997) 32(2) European Journal of Political Research 273, 276.

[27] Presidency Conclusions, 'The European Union Today and Tomorrow' (5 December 1996) <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/032a0003.htm> accessed 01 September 2024.

[28] Cees Van der Eijk and Mark Franklin, *Choosing Europe? The European Electorate and National Politics in the Face of Union* (University of Michigan Press 1996) 55.

[29] On this, see Richard Bellamy and Dario Castiglione, 'The uses of democracy: Reflections on the European democratic deficit' in Erik Oddvar Eriksen and John Erik Fossum (eds), *Democracy in the European Union: Integration Through Deliberation* (Routledge 2002) 65.

of honest citizen participation in EU decision making, the democratic deficit and the EU's legitimacy become intimately connected issues.[30]

2.2 THE BIRTH OF THE EUROPEAN CITIZENS' INITIATIVE

With the introduction of the Treaty of Lisbon in 2009, the European Union tried – among other things – to address concerns regarding its 'democratic deficit' and fight the populist and Eurosceptic movements these concerns have produced. In many ways, the Treaty of Lisbon was introduced to challenge the view that the Union is 'structurally incompatible with democracy'.[31] The new treaty reinvented participatory democracy, giving it a new role and place within the European legal and political landscape by empowering citizens and enabling wide participation in the democratic life of the EU. Introducing into the treaties what was soon to become the cornerstone of the ECI, Article 10(3) TEU manifestly states that '[e]very citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen'.[32] This is reiterated in Article 11(4), which brings forth the idea of participatory democracy, where it remarks that

> [n]ot less than one million citizens who are nationals of the significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.[33]

Moreover, Article 24(1) of the Treaty on the Functioning of the European Union provides a legal basis for adopting the 'provisions for the procedures and conditions required for a citizens' initiative […] including the minimum number of Member States from which such citizens must come'.[34] To fulfil the democratising scope of the Lisbon Treaty, the Commission proposed the detailed legal framework for the European Citizens' Initiative (ECI) as a tool that enhances citizens' participation in the democratic life of the Union,[35] cemented in Regulation (EU) No 211/2011.[36] Finally acknowledging that democratic legitimacy is 'especially relevant for EU policymaking', the ECI instrument was adopted to counteract the EU's democratic deficit.[37]

It was anticipated that this new instrument would have a transformative impact, help create a European public sphere, and grant citizens the opportunity to participate in the

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[30] See Anne Elizabeth Stie, 'Crises and the EU's Response: Increasing the Democratic Deficit?' in Marianne Riddervold, Jarle Trondal, and Alasemi Newsome, *The Palgrave Handbook of EU Crises* (Palgrave Macmillan 2020) 725.
[31] Greenwood (n 9) 940. See also Jale Tosun and Simon Schaub, 'Constructing policy narratives for transnational mobilization: Insights from European Citizens' Initiatives' (2021) 7(S2) European Policy Analysis 344, 346.
[32] Article 10(3) TEU.
[33] Article 11(4) TEU.
[34] Article 24(1) TFEU.
[35] Commission, 'Commission Green Paper on a European Citizens' Initiative' COM (2009) 622 final. Previously, the instrument was discussed in the Convention on the Future of Europe in 2002-2003.
[36] Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative [2011] OJ L65/1. For a discussion on the role of the European Citizens' Initiative as an instrument that tackles eurocentrism and concerns over the democratic deficit, see Longo (n 3).
[37] Tosun and Schaub (n 31).

democratic life of the Union.[38] Ten years into the ECI, however, and the reality of the instrument is struggling to match the flamboyant initial ambitions and expectations. Officially commenced on 1 April 2012,[39] the ECI has stirred a variety of reactions over the last decade, proving time after time that it is struggling to create space for dialogue between political institutions and civil society and to 'translate the social realm […] into a political will'.[40]

Although hailed by some as the 'world's first transnational citizens' initiative',[41] as a true effort to create a pan-European public sphere,[42] and as a long-anticipated change to EU governance,[43] the ECI has been criticised by others yet another merely 'symbolic'[44] and bureaucratic instrument that gives the European Commission too much discretion and 'room for manoeuvre',[45] ending the life of initiatives prematurely. Some had 'correctly predicted that the Commission would be the player that makes or breaks the instrument'.[46] Or, as the Court ruled recently,

> […] the wording of Article 11(4) TEU is designated to 'invite' the Commission to submit an appropriate proposal for the purpose of implementing the Treaties, and not, as the applicant claims, to oblige that institution to take the action or actions envisaged by the ECI concerned.[47]

Indeed, too often, the Commission relies on its freedom to reject initiatives upon initial registration on the grounds that their subject matter falls outside its competences. Occasionally, depending on resources and public support, initiators have challenged in front of the Court the Commission's decision to not register an initiative or to not take any actions in response whatsoever.[48] But the Court's decision in 2018 was clear: 'the Commission must be allowed broad discretion in deciding whether or not to take an action following an ECI'.[49] This means that ECIs can only be used to propose legislative changes that fall within the Commission's areas of responsibility, which are defined by the EU treaties.

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[38] See Maximilian Conrad, Annette Knaut, and Katrin Böttger, *Bridging the gap? Opportunities and constraints of the European Citizens' Initiative* (Nomos Verlag 2016); Luis Bouza Garcia and Susana Del Río Villar, 'The ECI as a Democratic Innovation: Analysing its Ability to Promote Inclusion, Empowerment and Responsiveness in European Civil Society' (2012) 13(3) Perspectives on European Politics and Society 312.

[39] As amended initially by Commission Delegated Regulation (EU) No 268/2012 of 25 January 2012, published in [2012] OJ L89 of 27 March 2012; Council Regulation (EU) No 517/2013 of 13 May 2013, published in [2013] OJ L158 of 10 June 2013; and Commission Delegated Regulation (EU) No 887/2013 of 11 July 2013, published in [2013] OJ L247 of 18 September 2013.

[40] Mayte Peters, 'The Democratic Function of the Public Sphere in Europe' (2013) 14(5) German Law Journal 673, 678, 680.

[41] Greenwood (n 9) 940-941, and generally, 949-52.

[42] ibid.

[43] See Warleigh (n 7).

[44] Laurie Boussaguet, 'Participatory Mechanisms as Symbolic Policy Instruments?' (2016) 14 Comparative European Politics 107.

[45] Päivi Leino, 'Disruptive Democracy: Keeping EU Citizens in a Box' in Inge Govaere, Sacha Garben, and Paul Nemitz (eds), *Critical Reflections on Constitutional Democracy in the European Union* (Hart Publishing 2019) 309. See also De Clerck-Sachsse (n 11); Nikos Vogiatzis, 'Is the European Citizens' Initiative a Serious Threat for the Community Method?' (2013) 6(1) European Journal of Legal Studies 91; Michael Dougan, 'What Are We to Make of the Citizens' Initiative?' (2011) 48(6) Common Market Law Review 1807. See discussion in Karatzia, 'The European Citizens' Initiative and the EU institutional balance' (n 10).

[46] Weisskircher (n 19) 797.

[47] Case T-158/21 *European Citizens' Initiative Minority Safety Pack v Commission* EU:T:2022:696.

[48] For example, Case T-561/14 *European Citizens' Initiative One of Us and Others* v *European Commission* EU:T:2018:210.

[49] ibid para 169.

Many of the most pressing challenges facing Europe today, including climate change, are complex and interconnected issues that span multiple policy areas and require coordinated action from multiple actors. By limiting the scope of issues that can be addressed through the ECI process, the requirement that subject matter falls under the Commission's competences can make it difficult for citizens to effectively engage with these complex challenges and to push for meaningful change. Moreover, the requirement can also lead to confusion and uncertainty around what issues are eligible for an ECI. Because the scope of the Commission's competences is not always clear or well-defined, it can be difficult for citizens and civil society organizations to determine whether their proposed ECI falls within the Commission's remit. This can discourage participation in the ECI process and limit the potential impact of this important tool for citizen engagement and democratic participation.

Just a few years into its existence and it was already acknowledged that the reality of the European Citizens' Initiative did not match the initial hopes and promises. Although a hopeful idea, the ECI has proved to be a 'downward failure',[50] with one of its most troublesome qualities being that it 'operates under' the complete 'aegis of the Commission'.[51]

In 2013, the European Ombudsman launched an own-initiative inquiry into the functioning of the ECI and the Commission's role and responsibility in this regard.[52] The inquiry led to the decision in 2015 where the Ombudsman offered the Commission guidelines to further improve the ECI procedure, encouraging the Commission to *inter alia* provide more robust, consistent, and comprehensive reasoning for rejecting ECIs, and to do all in its power to ensure that the public debate ensuing from a registered ECI is as inclusive and transparent as possible.[53]

The same year, the European Economic and Social Committee organised a conference for the overall assessment of the legal framework regulating the ECI instrument.[54] The President of the Committee concluded at a later date that 'the European Citizens' Initiative has not achieved its full potential because of a regulation that should be revised'.[55] At the time, the general motif around the ECI was 'Review – Renew – Reset',[56] as it had been observed that less and less initiatives are being brought forward, let alone succeeding to bear fruit.

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[50] Leino (n 45) 310. See also De Clerck-Sachsse (n 11).
[51] Vogiatzis, 'Between discretion and control' (n 10) 251.
[52] European Ombudsman, 'Letter to the European Parliament opening own-initiative inquiry OI/9/2013/TN into the functioning of the European citizens' initiative (ECI) procedure' (18 December 2013) <https://www.ombudsman.europa.eu/en/doc/correspondence/en/53106> accessed 01 September 2024.
[53] European Ombudsman, 'Decision of the European Ombudsman closing her own-initiative inquiry OI/9/2013/TN concerning the European Commission' (4 March 2015) <https://www.ombudsman.europa.eu/en/decision/en/59205#hl1> accessed 01 September 2024.
[54] European Economic and Social Committee, 'European Citizens' Initiative Day 2015 – Review – Renew – Reset!' (13 April 2015) <https://www.eesc.europa.eu/en/agenda/our-events/events/european-citizens-initiative-day-2015-review-renew-reset> accessed 01 September 2024.
[55] Opinion of the European Economic and Social Committee on the European Citizens' Initiative (review) (2016/C 389/05) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016IE0889&from=PL> accessed 01 September 2024.
[56] ibid.

2.3 THE RE-BIRTH OF THE EUROPEAN CITIZENS' INITIATIVE

Under the presidency of Jean-Claude Juncker, increasing the democratic legitimacy in the EU through stronger citizen participation was one of the Commission's top priorities.[57] There were naturally high hopes that the ECI would finally deliver its promises, especially after President Juncker advocated for more effective involvement of civil society during a State of the Union address in 2017.[58] In 2017, the Commission finally initiated the reform of the ECI. During the public consultation stage of the process, the feedback given revolved around two central issues that need to be tackled: better political impact for the ECI and less hurdles for the organisers and signatories. Under the presidency of Jean-Claude Juncker, the European Commission promised to work more closely with organisers to ensure the eligibility of their registration requests to ensure higher registration rates, suggested to offer a free online data collection service for organisers, the possibility to use electronic IDs to support an Initiative, to lower the age for supporting an ECI from 18 to 16,[59] and to improve the follow-up process to promote a meaningful debate before the Commission gives its response (which, according to the preamble of the new regulation would materialise the ECI's 'full potential as a tool to foster debate').[60]

The European Citizens' Initiative was soon revised, and Regulation (EU) 211/2011 was replaced by Regulation (EU) 2019/788 that aims to make the ECI 'more accessible, less burdensome and easier to use for organisers and supporters'.[61] Some of the earlier suggestions made it into the new regulation. For example, the Commission is obliged to respond to the organisers of successful ECIs by setting out 'in a communication its legal and political conclusions on the initiative, the actions it intends to take, if any, and the reasons for taking or not taking action'.[62] Moreover, within three months of the submission of an ECI, the group of organisers is now given the opportunity to present the initiative at a public hearing held by the European Parliament.[63] The Commission is also obliged to set up and operate a central online collection system that would phase out individual collection systems after 2022,[64] and citizens may support an ECI regardless of where they reside.[65]

Despite these changes, the instrument has yet to prove that it is more effective than before. One may also question whether the changes brought by the new regulation made it indeed easier for EU citizens to organise and/or support ECIs in the first place, as none of

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[57] European Parliament, 'The Juncker Commission's ten priorities' (*EPRS*, May 2019), Priority 10, <https://www.europarl.europa.eu/RegData/etudes/IDAN/2019/637943/EPRS_IDA(2019)637943_EN.pdf> accessed 01 September 2024.

[58] See European Commission, 'President Jean-Claude Juncker's State of the Union Address 2017' (*European Commission*, 13 September 2017) <http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm> accessed 01 September 2024.

[59] Contrary to the Commission's and Parliament's proposals, the new ECI Regulation does not lower the minimum age for supporting an ECI to 16 years, but the Member States are allowed to set the minimum age to 16, should they choose to do so.

[60] European Commission, 'State of the Union 2017 – Democracy Package: Reform of Citizens' Initiative and Political Party funding' (*European Commission*, 15 September 2017) <https://ec.europa.eu/commission/presscorner/detail/en/IP_17_3187> accessed 01 September 2024.

[61] Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European citizens' initiative [2019] OJ L130 (Regulation (EU) 2019/788), recital 6 of the preamble.

[62] Regulation (EU) 2019/788, Article 14, para 2.

[63] ibid Article 15, para 1.

[64] ibid Article 10.

[65] ibid Article 2 and 9.

the initial structural problems have been addressed, with most of the battles still being lost during the admissibility stage.[66] The power vested in the Commission to control which initiatives would 'manifestly fall outside the framework of the Commission's powers to submit a proposal', allows for wide interpretative discrepancies, and is a major obstacle.[67]

3 THREE CASE STUDIES

In a number of occasions, EU citizens have used the ECI as an attempt to have a say in the EU's policies in matters that affect them directly and that are linked to climate change. However, no initiative related to climate change directly has reached the quorum of statements of support, and as a result none of them has been considered by the Commission.[68] Although this is telling of the practical difficulties of organising an ECI campaign, and would deserve a study dedicated on this issue alone, they fall outside the scope of the present article, which aims to evaluate the Commission's response to ECIs that have met all the formal prerequisites to be further considered by the Parliament and the Council. As a result, this article studies the content and policy outcomes of three past initiatives that address issues linked to climate change (such as biodiversity loss, soil degradation and pollution) and have collected more than one million statements of support and explores whether the ECI enables meaningful citizens' participation. The initiatives in question are *Right to Water*, *End Glyphosate*, and *Save Bees and Farmers*.

3.1 RIGHT TO WATER

Awareness of the intricate link between climate change, water, and sanitation has been ongoing for a while,[69] as vulnerable communities worldwide suffer from the intersecting climate and water emergency crises.[70] Changes in weather patterns and extreme weather events caused by climate change can affect the availability and quality of water resources, which in turn can impact access to safe drinking water and sanitation services. In the EU, however, little action has been taken to mitigate the adverse impacts climate change on the human right to water and sanitation, despite that being a priority aligned with the Paris

[66] See Natassa Athanasiadou, 'The European Citizens' Initiative: Lost in admissibility?' (2019) 26(2) Maastricht Journal of European and Comparative Law 251. However, the same author acknowledges a positive aspect of the admissibility control, namely that it 'prevents the organisers from investing time and effort in an inadmissible initiative', although it simultaneously limits 'the number of initiatives becoming the subject of a European debate'.

[67] Although the CJEU has ruled twice that the principle of participatory democracy is the normative yardstick against which the interpretation of the legal framework shall be measured, the Commission still has the last say during the admissibility stage. See, Case T-754/14 *Michael Efler and Others* v *European Commission* EU:T:2017:323 and Case T-646/13 *Bürgerausschuss für die Bürgerinitiative Minority SafePack – one million signatures for diversity in Europe v European Commission* EU:T:2017:59. For an example of an initiative that was denied registration, see Anastasia Karatzia, 'The European Citizens' Initiative and Greek debt relief: Anagnostakis' (2019) 56(4) Common Market Law Review 1069, discussing Case C-589/15 P *Anagnostakis* v *European Commission* EU:C:2017:663.

[68] Examples include, *Stop Climate Change*, *End Ecocide in Europe*, *People4Soil*, *Ban Fossil Fuel Advertising and Sponsorships*, *End the aviation tax exemption in Europe, A price for carbon to fight climate change*, *Actions on Climate Emergency*, and *Grow Scientific Progress: Crops Matter!*

[69] For example, UNGA Res A/74/161 (2019) UNGA 74th Session.

[70] Jerry van den Berge, Jeroen Vos, and Rutgerd Boelens, 'Water justice and Europe's Right2Water movement' (2021) 38(1) International Journal of Water Resources Development 173, 175.

Climate Agreement.[71] Although Thomas Croll-Knight, spokesperson for the UN Economic Commission for Europe, alerted recently that the '[c]limate change is already posing serious challenges to water and sanitation systems in countries around the world', there are no actual plans in Europe to make water access possible in the face of climate pressures according to the United Nations Economic Commission for Europe and the World Health Organisation.[72]

In 2012, citizens were keen to try out this brand new ECI instrument.[73] A coalition of EU citizens got together to make use of the tool, bringing into life the first ECI to have ever collected the signature quorum, the 'Water and sanitation are a human right! Water is a public good, not a commodity!' (*Right2Water*) initiative.[74] The initiative called for the recognition of water and sanitation as a human right and the implementation of universal access to clean water and sanitation in the EU. The *Right2Water* initiative was officially registered by the European Commission in December 2013, and it led to a public consultation and a policy communication on the implementation of the human right to water and sanitation in the EU.

Having collected an astonishing 1,659,543 signatures from a total of twenty-seven Member States *Right2Water* attracted a lot of attention. In a press release, the Vice-President of the Commission at the time, Maroš Šefčovič, celebrated that

> [t]oday is a good day for grassroot democracy. I am extremely happy to meet the organisers of this European Citizens' Initiative. Their presence here proves the success of our joint efforts to make this ambitious new instrument of participatory democracy work.[75]

The first successful ECI was indeed widely celebrated. Mr. Šefčovič said at the time that

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[71] United Nations, 'Paris Agreement to the United Nations Framework Convention on Climate Change' (12 December 2015) TIAS No 16-1104.

[72] N/A, 'Climate change threatening access to water and sanitation' (*United Nations News*, 20 May 2022) <https://news.un.org/en/story/2022/05/1118722> accessed 01 September 2024. However, the EU Water Framework Directive (WFD), which is the main EU legislation for the protection and management of water resources, including rivers, lakes, groundwater, and coastal waters, does provide a framework for the sustainable management of water resources, based on the principles of environmental protection, integration, participation, and cost recovery. The WFD aims to achieve a good ecological status of all EU water bodies by 2027, but its effectiveness is limited due to lack of enforcement, inadequate funding, limited stakeholder participation, limited scope, and inadequate provision of specific guidance or targets for adaptation to and mitigation measures against climate change.

[73] Irmgard Anglmayer, 'The European Citizens' Initiative: the experience of the first three years' (*European Parliamentary Research Service*, April 2015) 8 <https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/536343/EPRS_IDA(2015)536343_EN.pdf> accessed 01 September 2024.

[74] European Citizens' Initiative, 'Water and sanitation are a human right! Water is a public good, not a commodity!' (*European Union*, 10 May 2012) <https://europa.eu/citizens-initiative/initiatives/details/2012/000003_en> accessed 01 September 2024. The main organisers, Anne-Marie Perret and Jan Willem Goudriaan, were integral members of the European Federation of Public Service, which also exclusively funded the initiative in three instalments amounting to 140,000 €. Perret was President of the citizen's committee when the initiative was launched and just 4 years before that she was elected President of EPSU for a second term. Jan Willem Goudriaan is today EPSU's General Secretary.

[75] European Commission, 'Commission says yes to first successful European Citizens' Initiative' (*European Commission*, 19 March 2014) <https://ec.europa.eu/commission/presscorner/detail/en/IP_14_277> accessed 01 September 2024.

> Europe's citizens have spoken, and today the Commission gave a positive response. Water quality, infrastructure, sanitation, and transparency will all benefit – for people in Europe and in developing countries – as a direct result of this first ever exercise in pan-European, citizen-driven democracy. I congratulate the organisers on their achievement.[76]

The organisers had invited the European Commission to 'propose a legislation implementing the human right to water and sanitation as recognised by the United Nations, and promoting the provision of water and sanitation as essential public services for all',[77] urging all EU institutions and Member States to ensure that everyone inhabiting in the Union enjoys the right to water and sanitation, to not subject water supply and management of water resources to internal market rules and liberalisation and to try to achieve universal access to water and sanitation.[78]

In response to the ECI, the Commission 'committed itself' to *inter alia* step up its efforts towards the full implementation of existing EU water legislation by Member States, promote dialogue and transparency in the water sector, co-operate with existing initiatives, improve information for citizens by further developing streamlined and more transparent data management and dissemination for urban wastewater and drinking water and advocate universal access to safe drinking water and sanitation as a priority area for post-2015 Sustainable Development Goals.[79] In other words, the Commission did not initiate legislative action, but it merely promised to better implement the already existing legislation and management of water supply.

Speaking at a conference back in 2017, one of the initiators, Jan Goudriaan, reminded the Commission what the *Right2Water* initiative had demanded:

> Our first demand […] was that the European Commission should implement the right to water, and sanitation as laid down in the United Nations resolution of 2010 in EU legislation. That has not happened. We have seen that this is not a demand supported only by the organisers of the ECI. This has been a demand supported by almost two million people in the European Union. […] The second demand was that we did not want the water supply and management of water resources to be subject to internal market rules. […] And we said that we wanted water to be excluded from liberalisation. […] A third point, we asked the EU to increase its efforts to achieve universal access to water and sanitation, and also, in its development policy, to support public – *public* – partnerships.[80]

Mr. Goudriaan made it clear that himself and the rest of the organisers are not satisfied with the European Commission's response to their initiative, *Right2Water*, which does not

[76] European Commission, 'Commission says yes to first successful European Citizens' Initiative' (n 75).
[77] ibid.
[78] ibid.
[79] ibid.
[80] EPSU, 'Conference "Fighting for Water Democracy in the EU"' (11 January 2017, 00:00-05:15) <https://www.youtube.com/watch?v=3zsD3hZgR2k> (accessed 01 September 2024).

reflect their demands to have legislation on the right to water and sanitation – a matter that is as topical as ever amid the climate emergency.[81]

Following up on the initiative, the European Parliament, too, recognised in its resolution of 8 September 2015 that the Commission's communication in response to *Right2Water* 'lacks ambitions, does not meet the specific demands made in the ECI and limits itself to reiterate existing commitments' and is 'insufficient, as it does not make any fresh contribution and does not introduce all the measures that might help to achieve the goals'.[82] The resolution also stressed that, overall, 'the Commission's actions must better reflect the demands of the ECI when these are within its competence, and especially when they express human rights', stressing that water is not a commodity but a public good that is vital to human life and dignity, and further called on the Commission and the Member States to ensure a comprehensive water supply characterised by affordable prices, high quality, and fair working conditions and subject to democratic controls.[83]

The *Right2Water* campaign was one of the most successful and popular ECI initiatives, gathering over 1.8 million signatures from citizens in several EU countries. The (relative) success of the campaign can be attributed to the strong mobilisation and coordination of civil society organizations across Europe, who worked together to collect signatures and raise awareness of the issues. The campaign, which bore a clear and compelling message, was also able to generate momentum across multiple EU countries, demonstrating the potential for cross-border collaboration and solidarity on issues of common concern. It is worth noting, however, that the outcome of the campaign was largely dependent on the political context in which it took place, with many EU countries facing austerity measures and public service cuts, as the campaign's message resonated with citizens who were concerned about the impact of these policies on access to water. The success of *Right2Water* in gathering statements of support and generating public debate was countered by its limited impact on actual policy change. The European Commission did respond to the initiative with a communication on the importance of access to water, but it did not propose any legislative changes or take concrete action. Overall, the *Right2Water* campaign demonstrated the potential for ECIs to mobilise citizens, generate public debate and put pressure on EU institutions to respond to citizens' concerns. However, it also highlighted the limitations of the ECI as a tool for policy change, and the need for continued advocacy and mobilisation to achieve concrete results.

3.2 END GLYPHOSATE

In 2017, the *Ban Glyphosate* initiative, which was also intricately linked to the protection of the environment amidst the climate change crisis, successfully collected over one million signatures. Put together by Greenpeace and a large number of civil society organisations, *Ban Glyphosate* was the fourth successful ECI and the second to be promoting an environmental

[81] However, the initiators did acknowledge that the European Parliament, specifically its effort to pass legislation on the right to water, supported by the Economic and Social Committee, are much closer to what the organisers had hoped for when initiating *Right2Water*. EPSU, 'Conference "Fighting for Water Democracy in the EU"' (n 80) min 05:20 – 06:10.

[82] European Parliament resolution of 8 September 2015 on the follow-up to the European Citizens' Initiative Right2Water (2014/2239(INI).

[83] ibid.

cause, namely the protection of people and the environment from toxic pesticides. Specifically, the initiative called on the Commission 'to reform the herbicide approval procedure', to ban glyphosate progressively but altogether and to eventually set an 'EU-wide mandatory reduction target for herbicide use'.[84] The organisers also asked the Commission to ensure that the advice received from expert groups regarding the carcinogenicity of glyphosate is scientific and impartial.

The Commission was asked to 'ensure that the scientific evaluation of herbicides for EU regulatory approval is based only on published studies, which are commissioned by competent public authorities instead of the herbicide industry'.[85]

After gathering 1,070,865 signatures, *Ban Glyphosate* was submitted to the Commission. The First Vice-President, Frans Timmermans, publicly celebrated the success of the initiative:

> It's great that well over a million EU citizens have invested their time to engage directly on an issue that matters. The Commission has listened and will now act. We need more transparency about how decisions are made in this area. […] In sum, I am a strong supporter of the right of citizens to engage in this manner and am pressing the Parliament and Council to make speedy progress on our proposals to make it easier for European Citizens' Initiatives to be successful in the future.[86]

The Commission did eventually commit itself to come forward with a legislative proposal; but not the one *Ban Glyphosate* and the over one million EU citizens had requested.[87] The proposed legislation in question envisioned to make the risk assessment studies in the food chain transparent, especially the industry studies submitted to the European Food Safety Authority (EFSA).[88]

Indeed, a legislative proposal in response to the Commission did authorised the use of the herbicide for another five years after 'thoroughly' reviewing 'objective scientific evidence' showing no link between glyphosate and cancer in humans;[89] evidence that was never made

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[84] European Citizens' Initiative, 'Ban glyphosate and protect people and the environment from toxic pesticides' (2017) <https://citizens-initiative.europa.eu/initiatives/details/2017/000002/ban-glyphosate-and-protect-people-and-environment-toxic-pesticides_en> accessed 01 September 2024.
[85] ibid.
[86] European Commission, 'Glyphosate: Commission responds to European Citizens' Initiative and announces more transparency in scientific assessments' (European Commission, 12 December 2017) <https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5191> accessed 01 September 2024.
[87] European Commission Proposal of 11 April 2018 for a Regulation of the European Parliament and the Council on the transparency and sustainability of the EU risk assessment in the food chain amending Regulation (EC) No 178/2002 [on general food law], Directive 2001/18/EC [on the deliberate release into the environment of GMOs], Regulation (EC) No 1829/2003 [on GM food and feed], Regulation (EC) No 1831/2003 [on feed additives], Regulation (EC) No 2065/2003 [on smoke flavourings], Regulation (EC) No 1935/2004 [on food contact materials], Regulation (EC) No 1331/2008 [on the common authorisation procedure for food additives, food enzymes and food flavourings], Regulation (EC) No 1107/2009 [on plant protection products] and Regulation (EU) No 2015/2283 [on novel foods] [2018] COM(2018) 179 final.
[88] In June 2019, the proposed regulation on the transparency and sustainability of the EU risk assessment in the food chain passed under ordinary legislative procedure. See Regulation (EU) 2019/1381 of the European Parliament and of the Council of 20 June 2019 on the transparency and sustainability of the EU risk assessment in the food chain and amending Regulations (EC) No 178/2002, (EC) No 1829/2003, (EC) No 1831/2003, (EC) No 2065/2003, (EC) No 1935/2004, (EC) No 1331/2008, (EC) No 1107/2009, (EU) 2015/2283 and Directive 2001/18/EC.
[89] ibid.

public, irrespective of the requirements under the Aarhus Convention, a recent series of Court rulings mandating environmental information be disclosed,[90] and the Commission's promise in response to *Ban Glyphosate* to make risk assessment studies transparent.

Based on risk assessment studies conducted by EFSA and the European Chemicals Agency (ECHA), glyphosate was authorised once again disregarding warnings by the International Agency for Research on Cancer (IARC), a semi-autonomous unit of the World Health Organisation, classifying the herbicide as 'probably carcinogenic to humans' and noting strong mechanistic evidence and positive associations for cancer in certain epidemiologic studies conducted in 2015.[91]

Irrespective of the debate on the carcinogenicity of glyphosate that divides the scientific community,[92] it is less contested that the substance is a serious and toxic threat to aquatic life and biodiversity. The link of the herbicide to environmental degradation was one of the primary issues put forward by the *Ban Glyphosate* initiative, but it was never properly addressed by the Commission. During the public consultation of the initiative, Oliver Moore spoke on behalf of the *Ban Glyphosate*:

> We suggest that […] we should have a phase out of glyphosate, starting with

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[90] Case C-673/13 P *Commission* v *Stichting Greenpeace Nederland and PAN Europe* EU:C:2016:889. See Emilia Korkea-aho and Päivi Leino, 'Who owns the information held by EU agencies? Weed killers, commercially sensitive information and transparent and participatory governance' (2017) 54(4) Common Market Law Review 1059; Päivi Leino-Sandberg, *The Politics of Legal Expertise in EU Policy-Making* (Cambridge University Press 2021).

[91] World Health Organisation, International Agency for Research on Cancer, 'IARC Monograph Volume 112: evaluation of five organophosphate insecticides and herbicides' (20 March 2015) <https://www.iarc.who.int/wp-content/uploads/2018/07/MonographVolume112-1.pdf> accessed 01 September 2024, where it is argued that the results were based on 'limited' evidence of cancer in humans (observed in real-world exposures that actually occurred) and 'sufficient' evidence of cancer in experimental animals. See also Letter from IARC to the Congress of the United States (20 November 2017) <https://legacy-assets.eenews.net/open_files/assets/2018/02/07/document_gw_03.pdf> accessed 01 September 2024, where the WHO stresses that IARC studies are conducted by independent experts, who are 'free from vested interests', '[i]n the interest of transparency', and 'based on independent scientific review of published research and not on the basis of unpublished or "secret data", unavailable publicly'. To this day, the IARC study is the only one that has not used 'secret data', not confidential data from industry studies, in its scientific research on glyphosate. See, Charles M Benbrook, 'How did the US EPA and IARC reach diametrically opposed conclusions on the genotoxicity of glyphosate-based herbicides?' (2019) 31 Environmental Sciences Europe.

[92] See Benbrook (n 91); Charles Medardo et al, 'Association between Cancer and Environmental Exposure to Glyphosate' (2017) 8(2) International Journal of Clinical Medicine 73. Compare these to Gabriella Andreotti et al, 'Glyphosate Use and Cancer Incidence in the Agricultural Health Study' (2017) 110(5) Journal of the National Cancer Institute 509. See also, Christopher J Portier, 'Open Letter: Review of the Carcinogenicity of Glyphosate by EChA, EFSA and BfR' (28 May 2017) <https://www.nrdc.org/sites/default/files/open-letter-from-dr-christopher-portier.pdf> accessed 01 September 2024. See also, ECHA's Safer Chemicals Podcast, 'Glyphosate, lead and silver: Risk Assessment and Socio-Economic Analysis Committees Highlights (June 2022), at 08:11 <https://www.youtube.com/watch?v=QsHT2Y9RfBQ> accessed 01 September 2024. When asked why studies, like WHO's IARC study, that do not rely on industry data come to a different conclusion, Tim Bower, the Chairman of ECHA's Committee for Risk Assessment, replied:
'I mean, they are an international agency, working under the UN system and they have a very high reputation in cancer research, very well-known worldwide. I think the answer is quite simple. It is just that the methodology that IARC uses and that we use in classification and labelling is different. IARC uses, as far as I am aware, only studies which are in the public domain, so proprietary studies will not be considered, as far as I understand, whereas the database we look at is considerably larger and contains all of those industry studies which five years ago would have been probably confidential that I do not think they would be confidential any longer. So [there] is basically a difference in the databases and a different way in selecting which studies are reviewed'.

> integrated pest management, which would still use herbicides as the last resort, and that we will move carefully and methodically, with farmers' support, towards an agroecological system. [Fifteen taxonomic groups] have been shown to be suffering because of the use of glyphosate. It's defined as toxic to aquatic life. […] That *is* an effect; that is a real-world effect. And I worry personally that we get too focused on human health, and we are ignoring massive biodiversity loss on a planetary scale. It's the worst thing we're doing in terms of climate change. [It has been shown] irrevocably that biodiversity is what we are doing worst on. And if we can carefully introduce other techniques to manage pests, let's do that.[93]

The Commission has ignored both concerns over the damaging environmental impact of glyphosate in its response to the ECI, and the demand of 1,070,865 EU citizens to work towards a future that is free from harmful pesticides.

The *Ban Glyphosate* campaign was another significant ECI initiative that gathered over 1.3 million statements of support from citizens in several EU countries. The campaign tapped into strong public concern about the safety of glyphosate and the potential risks it posed to human health and the environment. This helped to mobilise significant public support for the initiative. But as the campaign highlighted the scientific controversy surrounding glyphosate, with some studies suggesting that it may be carcinogenic while others arguing that it is safe, it made it difficult to reach a clear consensus on the issue and contributed to ongoing debates about the risks of glyphosate. This also showed that resistance from industry and other stakeholders can have a detrimental impact for ECIs, as it made it challenging to build political support for a ban on glyphosate.[94] *Ban Glyphosate* had a similar fate to *Right2Water*. Once again, the campaign had limited impact on actual policy change, with the European Commission eventually proposing a five-year renewal of glyphosate's license and dismissing the campaign's request to ban glyphosate once and for all.

3.3 SAVE BEES AND FARMERS

In 2022, five years after the *Ban Glyphosate* campaign and three years after the revision of the ECI regulation, another initiative advocating for a pesticide-free future succeeded to collect more than one million signatures, drawing the Commission's attention: the 'Save bees and farmers! Towards a bee-friendly agriculture for a healthy environment' initiative (*Save Bees and Farmers*).[95] Protecting bees and other pollinators is an important part of efforts to promote sustainable agriculture and protect biodiversity. By promoting policies that support sustainable agriculture and protect pollinators, the *Save Bees and Farmers* campaign is

[93] Debate organised by the NAT section of the European Economic and Social Committee, 'ECI "Ban glyphosate" • ICE interdiction du glyphosate' (5 April 2017, 1:00:10-1:02:03) <https://www.youtube.com/watch?v=XshnG5AmyOc&t=789s> accessed 01 September 2024.

[94] See Jale Tosun, Herman Lelieveldt, and Trevelyan S Wing, 'A Case of Muddling Through'? The Politics of Renewing Glyphosate Authorization in the European Union' (2019) 11(2) Sustainability 440; Alessandra Arcuri and Yogi Hale Hendlin, 'Introduction to the Symposium on the Science and Politics of Glyphosate' (2020) 11(3) European Journal of Risk Regulation 411.

[95] European Citizens' Initiative, 'Save bees and farmers! Towards a bee-friendly agriculture for a healthy environment' (registered on 30 September 2019) <https://citizens-initiative.europa.eu/initiatives/details/2019/000016_en> accessed 01 September 2024.

contributing to broader efforts to promote sustainable development and reduce the impact of human activity on the natural world.

Moreover, the use of neonicotinoid pesticides, which the *Save Bees and Farmers* campaign sought to ban, can have broader environmental impacts beyond harming pollinators. These pesticides can also accumulate in soil and water and may have negative impacts on other organisms in the ecosystem. By promoting the use of sustainable farming practices and reducing the use of harmful chemicals, campaigns like *Save Bees and Farmers* can help to mitigate the impacts of human activity on the environment.

With a clear intent to protect the environment by restoring biodiversity, *Save Bees and Farmers* came at a moment when the European Parliament and Council are considering a revision of Directive 2009/128/EC, establishing a framework for Community action to achieve the sustainable use of pesticides,[96] and its possible replacement with a regulation that will bind Member States to prevent ecosystem collapse. Part of the Farm to Fork strategy and the European Green Deal,[97] the discussion on the future of pesticides is expected to bear fruit by the end of 2022.

The review of the current legislation has been long-anticipated, but some food and farming groups have received it with caution, stressing that '[b]inding EU and national targets is an important first step, but overall, the proposals put too much emphasis on corporate-controlled "precision farming" and other false solutions, and not enough emphasis on agroecological practices'.[98]

The *Save Bees and Farmers* initiative calls on the Commission to make a legislative proposal that would effectively help phase out synthetic pesticides by eighty per cent by 2035, to restore biodiversity, and to support farmers in the transition. It further demands the restoration of natural ecosystems in agricultural areas so that farming becomes a vector of biodiversity recovery and the reform of agriculture by prioritising small scale, diverse and sustainable farming. The organisers are hopeful that this time the Commission will have to take some positive action in response. As the one of the organisers, Martin Dermine, stated:

> This is the seventh successful ECI and already the second one against pesticides. It is a strong democratic signal to EU and national decision-makers to listen to citizens and move away from toxic pesticides. Farmers and science have shown that

[96] Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the sustainable use of plant protection products and amending Regulation (EU) 2021/2115' COM (2022) 305 final; Directive 2009/128/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for Community action to achieve the sustainable use of pesticides [2009] OJ L309/71. See also Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Commission work programme 2022 Making Europe stronger together' COM (2021) 645 final.

[97] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – The European Green Deal' COM (2019) 640 final.

[98] European Environmental Bureau, 'The new EU Pesticides Regulation receives cautious welcome by environmental groups' (*European Environmental Bureau*, 23 June 2022) <https://eeb.org/the-new-eu-pesticides-regulation-receives-cautious-welcome-by-environmental-groups/> accessed 01 September 2024.

> agroecology can feed the world without chemicals. It is high time our politicians stop listening to agribusiness and start to work for the future of our children.[99]

Mr. Dermine continues that

> [t]his debate can no longer be dominated by the chemical industry and its allies who lobby in favor of industrial farming. There can be no agriculture and food security without healthy soils, clean water, and biodiversity. Industrial chemical agriculture is on a dead-end road.[100]

Save Bees and Farmers is a clear demonstration that EU citizens demand a say in the discussion regarding a healthy environment for future generations. Amidst the current arduous food and energy crises facing Europe ever since the invasion of Ukraine in February 2022, coupled by the global climate emergency, it becomes more pertinent than ever to secure healthy soils, clean water and biodiversity to ensure food security and a sustainable agriculture.

In 2018, the Commission banned the use of neonicotinoid pesticides in all outdoor crops, with some limited exceptions.[101] The ban was based on scientific evidence that these pesticides harm bees and other pollinators and was widely seen as a victory for the *Save Bees and Farmers* campaign. However, the call for a complete ban on neonicotinoid pesticides and stronger policies to promote sustainable agriculture and protect biodiversity continues.[102]

The organisers of the initiative met with the European Commission Vice-President for Values and Transparency, Věra Jourová, and the Commissioner for Health and Food Safety, Stella Kyriakides, on 25 November 2022, and a public hearing took place at the European Parliament on 24 January 2023. The ECI was debated at the European Parliament's plenary session on 16 March 2023, but no resolution was adopted. In the end, the Commission adopted its official reply on 5 April 2023, which, although welcomed the ECI and acknowledged its importance 'in the context of the interlinked crises of climate change, pollution and biodiversity loss', announced that the Commission was not going to propose new legislative acts as a response.[103] The explanation given for this inaction was the already

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[99] Save Bees and Farmers, '1 million European valid signatures to Save Bees and Farmers: A historic step to stop the war against nature' (*Save Bees and Farmers*) <https://www.savebeesandfarmers.eu/w/files/other-docs/press-release-bees-eci-succes.docx.pdf> accessed 01 September 2024.

[100] Save Bees and Farmers, '1 Million EU citizens tell EU Commission: end the war against nature' (28 November 2022) <https://www.savebeesandfarmers.eu/w/files/other-docs/2022-11-28-pr-bees-eci-at-eu-commission.pdf> accessed 01 September 2024.

[101] Commission Implementing Regulation (EU) 2018/783 of 29 May 2018 amending Implementing Regulation (EU) No 540/2011 as regards the conditions of approval of the active substance imidacloprid [2018] OJ L132/31; Commission Implementing Regulation (EU) 2018/784 of 29 May 2018 amending Implementing Regulation (EU) No 540/2011 as regards the conditions of approval of the active substance clothianidin [2018] OJ L132/35; Commission Implementing Regulation (EU) 2018/785 of 29 May 2018 amending Implementing Regulation (EU) No 540/2011 as regards the conditions of approval of the active substance thiamethoxam [2018] OJ L132/40.

[102] Recently, it was revealed that the EU exports these banned chemicals to the global South. See, Crispin Dowler, 'Revealed: European and the UK's vast shipments of banned, bee-killing "neonics"' (*Unearthed*, 18 November 2021) <https://unearthed.greenpeace.org/2021/11/18/revealed-europe-and-the-uks-vast-shipments-of-banned-bee-killing-neonics/> accessed 01 September 2024.

[103] Communication from the Commission on the European Citizens' Initiative (ECI) 'Save bees and farmers! Towards a bee-friendly agriculture for a healthy environment' C(2023) 2320 final <https://ec.europa.eu/transparency/documents-register/detail?ref=C(2023)2320&lang=en> accessed 01 September 2024.

successful European Green Deal, as well as the fact that proposals tackling similar issues were already under way; hence, there was no need, according to the Commission, to put forth a new proposal.[104]

As such, despite gathering an impressive 1.4 million signatures, *Save Bees and Farmers* had limited impact on policy- or legislative change, with the Commission's response falling short of the campaign's demands. *Save Bees and Farmers* was another notable ECI initiative that further highlighted the limitations of the ECI tool and the need for continued advocacy and mobilisation to ensure that policymakers act on issues of public concern.

4 THE 2023 ECI REVIEW

Although the overall number of valid ECIs and the impact of the ECI instrument on EU decision-making remains very low, when a Commission-backed survey asked organisers why they chose the ECI as a tool to influence EU policy, respondents answered that the ECI was chosen because it has a more political impact than national or other tools ('as the Commission is forced to respond'), as a 'strong back-up for advocacy strategies, to give more legitimacy to the campaign', and for its EU-wide dimension.[105] However, 'respondents referred to the ECI as a "weak instrument"' and

> considered that large organisations, NGOs and multipliers are unwilling to invest time, money and resources in campaigning for ECIs. Additionally, some explicitly mentioned the threshold of 1 million statements of support as too high to reach. They pointed out that there is a risk that the ECI becomes a tool for civil society organisations only, as they are the actors that are able to campaign effectively to reach the required support.[106]

These results reflect those of my own engagement with leading environmental NGOs with transnational networks and active campaigning work at the EU level (in other words, actors with potential to gather the necessary signatures), it became apparent that, in their eyes, too, the ECI is a waste of time and resources that often disappoints those who trust the EU institutions.[107]

Dissatisfied with the limited effectiveness of the ECI as a participatory democracy mechanism, the European Parliament urged the Commission to address the instrument's inadequacies by, among other means, adopting 'clear and straightforward procedures', providing 'detailed answers and possible solutions when initiatives are declared partly or fully inadmissible, thus enabling organisers to amend and present them again', providing 'financial support for valid ECIs reaching the threshold of one million signatures', carrying out 'a thorough assessment of the proposals of each valid ECI', and complying 'fully with its legal

[104] Communication from the Commission on the ECI 'Save bees and farmers!' (n 103).
[105] European Commission, 'Organisers' assessment of the application of Regulation (EU) 2019/788 on the European Citizens' Initiative – Survey report', 1 <https://citizens-initiative.europa.eu/sites/default/files/2023-12/Consultations%20with%20ECI%20organisers.pdf> accessed 01 September 2024.
[106] ibid 2–3.
[107] Email communication with EEB and Client Earth (3 and 7 April 2023 respectively). In file with the author.

obligation to set out its reasons for taking or not taking action', in a clear, comprehensive, detailed and impartial manner.[108]

In other words, the Parliament has now officially asked the Commission to fully comply with its obligations under the revised ECI regulation. But when it came to the Parliament's request that the Commission must appropriately consider and respond to valid ECIs, the Commission claimed that it is already responding appropriately and that 'valid initiatives have generated substantive legal and/or political impact'.[109] What is more, the Commission referred to *Right2Water*, *Save Bees and Farmers*, and *Ban Glyphosate* as examples of initiatives that have brought about real legislative change. In the case of *Save Bees and Farmers*, the Commission argued that appropriate follow-up has taken the form 'of a commitment to keep the level of ambition on proposals already tabled and not yet adopted by the co-legislator', whereas it attributed 'longer term impacts' to the other two initiatives, which the Commission claims have led to the adoption of legislative acts.[110]

From the reply the Commission gave to the Parliament, it becomes clear that, for the Commission, *Right2Water*, *Save Bees and Farmers*, and *Ban Glyphosate* illustrated 'that successful initiatives have generated substantive legal and/or political impact'.[111] However, as discussed already, this sentiment does not reflect what really happened at the follow-up stage of those three ECIs.

At the end of 2023, in view of the European Parliament's assessment and in accordance with Article 25 of the ECI regulation, the European Commission published its first review of the ECI ('the 2023 ECI Review'). The 2023 ECI Review sheds light on the facts and figures of the first years of the ECI regulation and outlines the course of action the Commission intends to take in response to its shortcomings with regards to the implementation of the said regulation. Specifically, the Commission promises to (1) enhance ECI awareness and visibility, (2) strengthen support for ECI organisers, (3) improve the central online collection system, (4) strengthen ECI implementation at national level and cooperate with civil society, and (5) have a more visible follow-up of ECIs.

With regards to (5), which is, as the case studies above showed, the part the implementation of the ECI regulation falls short, the Commission promises to make follow-up meetings a standard practice for all successful and valid initiatives, which it further plans to systematically take into account when developing policy proposals and include their organisers in consultations. However, as discussed in light of the above case studies, the most obstructive problem at the follow-up stage of an ECI's life is that the political reality, as other analyses of the topic have also observed, 'may often hinder the potential' of democratic dialogue.[112] Indeed,

> while it appears that a successful initiative may have better chances to achieve a meaningful follow-up in case it corresponds to the already existing agenda and

[108] European Parliament resolution of 13 June 2023 on the implementation of the Regulations on the European Citizens' Initiative (2022/2206(INI)).
[109] European Commission, 'Follow-up to the European Parliament non-legislative resolution on the implementation of the Regulations on the European Citizens' Initiative', 2 <https://citizens-initiative.europa.eu/sites/default/files/2023-12/SP%282023%29412-0.pdf> accessed 01 September 2024.
[110] ibid.
[111] ibid.
[112] Christopoulou (n 7) 6.

> priorities set by the Commission, this cannot be taken for granted; the political priorities might change and, therefore, the promises given to citizens might not always be kept.[113]

This means that even in the post-2023 ECI Review world, it remains to be the case that the success of the ECI as a tool for participatory democracy depends largely on the Commission's political priorities and institutional practices. This is because the proposed action plan in the 2023 ECI Review, which outlines the steps to be taken to better respond to successful ECIs, is nothing but what the Commission is already obliged to do under the current ECI regulation. Besides, the Commission's promised action plan is to only better listen to but not necessarily to better articulate the demands of successful ECIs.

Have the reasons the Commission has not abide to its obligations so far disappeared? If the reasons are, as this article showcased, that the political reality does not allow for full, actual, and honest democratic dialogue between EU citizens and institutions, the likely answer is no. For as long as the Commission is the Cerberus of the ECI, controlling at all stages the success of initiatives, the instrument cannot be considered an honest effort from the part of the EU's executive body to create an avenue for citizens participation in policy-making.

5 REFLECTIONS

Although the ECI has been described as a tool that allows 'the territorial extension of a European political public sphere',[114] looking into successful initiatives that have gathered at least one million statements of support shows that abiding to the demands of the European demos is hindered by 'continuing politics', technical and legal obstacles, as well as socio-political struggles embedded in the EU structures.[115] This past decade has shown that the ECI is struggling to live up to its promises, as it cannot achieve many of the purposes it was expected to fulfil in the first place,[116] leaving a big question mark hovering over the ideal of transnational participatory democracy, and an even bigger question mark over the worthwhileness of using the ECI for any group of people wanting to participate in the EU decision-making process.

Today, when 'tolerance of a not-completely democratic Europe is at its lowest level since the beginning of the twenty-first century',[117] the ECI could be an attractive instrument through which citizens can participate in decision-making. However, reflecting on the preceding case studies, its worthwhileness is put on a test, especially when it comes to initiatives linked to a highly political and multi-stakeholder issue, such as climate change. This

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[113] Christopoulou (n 7) 6.
[114] Justin Greenwood and Katja Tuokko, 'The European Citizens' Initiative: the territorial extension of a European political public sphere?' (2017) 18(2) European Politics and Society 166. See also Conrad, Knaut, and Böttger (n 38). Note, however, the discussion in Weisskircher (n 19), where it is shown that the national state is the key political arena for mass politics.
[115] van den Berge, Vos, and Boelens (n 70).
[116] Sergiu Gherghina and Adriana Groh, 'A Poor Sales Pitch? The European citizens' initiative and attitudes toward the EU in Germany and the UK' (2016) 17(3) European Politics and Society 373, 375.
[117] Longo (n 3) 182, citing Mark Dawson, 'The Legal and Political Accountability Structure of 'Post-Crisis' EU Economic Governance' (2015) 53(5) Journal of Common Market Studies 976, 978; Michael A Wilkinson, 'Authoritarian Liberalism in the European Constitutional Imagination: Second Time as Farce?' (2015) 21(3) European Law Journal 313.

means that there is a variety of reasons behind the Commission's response pattern, including political resistance from within the institution and lack of support from key stakeholders, which does not mean that the ECI as a tool is inherently flawed, but that the political environment in which it operates does not allow it to live up to its promise: the ideal of participatory democracy.

None of these issues were addressed by Regulation (EU) 2019/788, which aimed to revise the ECI, although the entire reason behind its introduction was to improve what was already considered a failing instrument. Thus, the main problems remain, and the political priorities of the Commission hinder the effectiveness and threaten the long-lasting effect of the ECI mechanism. Naturally, this creates the – not utterly unlikely – impression that the ECI has not been taken seriously by the EU institutions, as the tool has not given citizens a meaningful voice.

The 2023 ECI Review not only brushed off a lot of issues concerning the implementation of the ECI regulation the Parliament had flagged to the Commission, but also provided, as a way forward, a course of action with regards to how the Commission responds to successful ECIs that does not introduce anything new, but simply reiterates existing obligations that were already in place when the Commission was deciding on how to respond to *Right2Water*, *Ban Glyphosate*, and *Save Bees and Farmers*.

Lastly, it should be noted that the collateral effects of an ECI can be many, even when the 'desired goal of EU policy change' is not fulfilled.[118] ECI organisers, for example, reported that reaching out to the public and spreading the message of their campaign was a rewarding experience.[119] Admittedly though this had little to do with the ECI as an instrument per se, as public outreach and awareness-raising could have been achieved anyway without needing to go through the ECI mechanism in the first place, which is exhausting in terms of energy and resources, which grassroot organisations do not possess an excess of. In this sense, the ECI could serve as a campaigning or communications tool to throw weight behind demands we are making – i.e. using an ECI not for its formal legal role of forcing the Commission's hand but rather as a political tool.[120] But if this is the intention, if the intention is for the ECI to be a campaigning or communications tool, then we may just call it that. There is no need to call it something it is not, a tool of participatory democracy, if citizens are not *participating* in anything.

On the flipside, an efficient ECI, while it could have the potential, if the Commission so allows, to enable EU citizens to directly influence EU policies by proposing legislation, would also carry certain risks. As we have seen, the process of organising a successful initiative requires a substantial amount of resources, knowledge, and strategic acumen. This can lead to a situation where well-funded and well-organised groups, often backed by powerful interest groups or elites, dominate the ECI process.

Moreover, because the ECI allows for proposals to be initiated by a relatively small number of citizens in the context of the entire EU population, there is a chance that niche or minority interests could disproportionately influence the legislative agenda. Would the ECI then be a tool for empowering the citizens or a tool of the elites? For the ECI to truly function as a tool for majority rule, it would certainly require broad participation and

[118] Longo (n 3) 182.
[119] In file with the author (interview with ECI 'end the plastics' – in Greek, translation mine).
[120] Email communication from EEB (3 April 2023), in file with the author.

engagement from a diverse cross-section of the EU population – something that does not exist currently. Be it due to lack of awareness, the complexity of organising an ECI campaign that often requires significant resources and expertise, and the discouraging treatment of 'successful' ECIs by the Commission, or a combination of these, there are several factors that can challenge the ECI's effectiveness as a tool for majority rule.

In this regard, in certain cases, these issues can lead to initiatives that, while achieving the necessary signatures, may not truly reflect the preferences of the majority of EU citizens but rather those of more organised or better-funded groups.

Furthermore, the requirement that signatures come from at least seven different Member States is designed to ensure cross-border support, but it does not guarantee that the initiative aligns with a majority view across the entire EU. It is possible for an initiative to gain the required signatures by mobilising intense support in a few Member States while having little or no support in others, thus not necessarily representing a majority perspective at the EU level.

While the ECI has the potential to be a tool for majority rule, its effectiveness in this regard depends on the extent to which it is able to mobilize broad, cross-border participation and reflect the true interests of a majority of EU citizens. Without such broad engagement, which could be achieved through honest reforms of the tool as the 2023 ECI Review also concluded, there is a risk that the ECI be monopolised by a minority of well-organised groups, thereby not fully serving as a mechanism for a participatory democracy model of majority rule.

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BOOK REVIEW

Dagmar Rita Myslinska, *Law, Migration and the Construction of Whiteness, Mobility within the European Union,* Routledge 2024, ISBN: 9781032007373

Alezini Loxa*

In European Union (EU) legal and political discourse all Member States and their nationals are equal. However, in the lived experience of many European people, some are more equal than others. Both the aspiration of equality and the reality of inequality lays behind Myslinska's book, which investigates how the complicated dynamics of whiteness appear in the context of east-west mobility in the European Union.

The main argument of the book is that an anti-CEE (Central and Eastern European) sentiment is historically embedded in the EU and that the way in which mobility is regulated under EU law further entrenches the vulnerability and peripheralization of CEE nationals. Methodologically the work uses a mix of doctrinal analysis, qualitative analysis of legal discourses and quantitative data on the inequalities experienced by CEE movers. Specifically, the author attempts to offer a holistic critique of EU law and legal discourses in relation to CEE nationals by examining the eastern enlargement pre-accession and accession policies, the EU mobility and equality framework and to the lived experience of CEE nationals in general and in the specific case of migration to the UK. With this analysis, the purpose of the book is to contribute to critical whiteness studies by exploring the historical and contemporary inferiorisation and othering of CEE nationals despite their skin colour. Ultimately the book aims to demonstrate that white privilege is not homogenous, but rather interrelated to various cultural, social, economic and political markers.

In terms of structure, the book is comprised of 5 chapters in total. After an introduction which sets the scene of CEE mobility in the EU and explains the analytical contribution of the book, chapter 2 goes on to provide a historical overview of the EU project and the relation to the CEE states. This chapter attempts to reconstruct both the historical evolution of the EU and the representation of the East in this historical evolution. In detail, the author discusses the rhetorical construction of the EU as a western endeavour with western values before going into the specific political and economic dynamics that characterised the CEE region and its relation to the EU. After a brief presentation of the history of the region prior to the fall of communism, the author maps the various agreements that regulated the relation of the EU to the CEE after the fall of the Berlin Wall all the way to the accession. This chapter highlights the economic core of the EU project, the lack of any effective bargaining power on the part of CEE states and the imperial characteristics of the legal, political and economic framework that regulated accession.

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Chapter 3 explores in more detail the EU framework on free movement and equality. The chapter begins with quantitative data on CEE mobility to Western European States. It discusses the lived experience of exploitation and discrimination of CEE, the EU institutional approach to such experiences and the impact of mobility in both the sending CEE region and the receiving western states. After doing so, the chapter presents the EU free movement framework and the Racial Equality framework and discusses their inherent ineffectiveness when it comes to the racialization of CEE migrants. Following this, the author traces the transitional mobility derogations that guided the EU enlargement before examining how CEE nationals' free movement rights operate in practice after the end of the transitional period prescribed in the Accession Treaties. The examination goes through more recent attempts to curtail access to social rights from the 2008 economic crisis onwards and culminating during Brexit.

Chapter 4 turns to the UK as a case study and investigates how CEE nationals were treated in the UK before Brexit. After a short historical recount of the racialization of CEE nationals in the UK since the beginning of the 20th century, the author provides an overview of various policies that served to create a hostile environment for CEE nationals after 2004. Moreover, the author explains the particularly disadvantaged position of CEE nationals in the UK labour market and engages in a detailed analysis of the Equality framework in the UK and its applications in various labour related disputes.

The final chapter concludes the book by weaving together the threads that can be drawn from the analysis of the ongoing racialisation of CEE nationals in western Europe. The author suggests that that anti-CEE racism is as an integral part of EU integration and that this is reflected in legal discourses and policies that further marginalize the CEE nationals.

In general, the book promises an exploration of the fractures of whiteness as they intersect with mobility, ethnicity and class and as they are embedded in the EU juridical, economic and political apparatus, but does it deliver? I agree with the author that the intersection of all these factors play into the lived experience of racism which CEE nationals experience, as well as that these factors are embedded in the EU framework, yet I find that the relevant investigation could be even more forceful and effective. In the remainder of the text, I will first discuss some interesting ideas which the book provoked before suggesting how the valuable message that Myslinska aims to convey could have been presented more effectively to an EU audience simply by restructuring it.

With this book, Myslinska aims to deliver two main messages: first, that the CEE region and the treatment of CEE nationals is positioned within a wider EU economic hierarchy that prioritizes western neoliberal states' interests, and second, that the European west has conceptualised the CEE region as ethnically inferior, not belonging to the EU and not properly white. While Chapter 2 sets the stage for the first message, and the author indeed demonstrates the wider economic hierarchies that have dictated the relationship between the CEE states and the EU, the analysis of free movement and its effects for the inferiorisation of CEE nationals is not as convincing for a series of reasons. First – and perhaps not as importantly – when reading chapters 2 and 3, I often asked myself 'who is the EU?' and how unitary any EU discourse can be. The author approaches this matter by taking some distance and qualifying extremely diverse material in what can be considered part of the EU legal and political discourse. While this is of value to the bigger story narrated by this work, and which

is set to be a contribution to critical whiteness and post-colonial studies, this prejudices the perception from an EU studies audience in general, and from an EU legal audience specifically. And this is because not all the discourses presented by Myslinska are of equal value as part of an EU legal discourse that allegedly constructs and consolidates identities.[1] In addition, Myslinska's analysis on the development of EU law and, especially on the evolution of the case-law would have been even stronger if it was contextualized against the vast amount of scholarship that examines why and how the relevant evolutions came about.[2] I am noting this first point because I believe that Myslinska's argument is valuable for both EU studies and EU law scholarship and that a more rigorous analysis in these chapters would make the argument more forceful.

A second point of criticism stems from Myslinska's assertion that CEE nationals' vulnerability is starkly absent from any discourse related to integration, discrimination and equality. She implicitly suggests that the EU should be protecting CEE nationals as well from xenophobia, discrimination and exploitation and that the relevant policies should not target exclusively undocumented migrants, ethnic minorities etc. And while the racialization of CEE nationals is aptly demonstrated by her presentation of their lived experiences, the same cannot be said of the analysis of the relevant legal framework. On this matter, Myslinska is not to be blamed, because an inherent problem of EU law and EU studies scholarship is the absence of a conceptual framework that could capture the interrelated problematic aspects in the regulation of migration and mobility in EU law. The racialisation of CEE nationals is hidden in the EU policy discourse because it does not fit how the EU positions itself in relation to the outside space. Specifically, throughout its historical trajectory, the EU has been and still is renegotiating the limits of who is 'us', the European citizens, the West which is so central to the EU imaginary.[3] This European 'us' is equal, united in our diversity, and homogenously white and it needs to be differentiated (or even self-created by juxtaposition) from the 'others' to whom we owe fair – but not equal – treatment and whose movement is subject to hard borders and security considerations. Producing and maintaining the 'us' vs 'them' divide in EU legal and political discourse is very much dependent on ignoring the hardships faced by EU migrants unless they belong to clearly circumscribed ethnic and religious minorities. On that specific matter, the analysis would benefit from closer

[1] For example, I found myself wondering to what extent the EUI Jean Monnet Lectures can be considered iterations of an EU political and legal discourse. The role of EUI as a core of European epistemic knowledge production is undisputed, but the place of the Jean Monnet Lectures for the construction of a representative EU discourse on the east-west relation would need more justification.

[2] The literature in the relevant area is so vast and has so many directions that it would be impossible to give representative examples without doing injustice to any scholar. In the relevant analysis, while some correlations hold true, others do not. For example, the change in Irish citizenship law in 2004 might have more to do with expansive judicial interpretations of the Court of Justice of the EU which conferred benefits for the EU's outsiders, rather than for the potential benefits it would create for CEE nationals. See the Case C-200/02 *Chen* EU:C:2004:639. Similarly, the judicial evolutions in the area of residence and social rights for EU migrants from the Judgment of the Court (Grand Chamber) of 11 November 2014 in Case C-333/13 *Dano* EU:C:2014:2358 to the more recent Judgment of the Court (Grand Chamber) of 6 October 2020 in Case C-181/19 *Jobcenter Krefeld* EU:C:2020:377 has been subject to many analysis on the limits of EU citizenship, the constant prioritisation of workers' rights and the lack of protection of precarious EU citizens in general which would significantly enrich Myslinska's examination.

[3] The fall of Berlin wall brought about a reconfiguration to include CEEs to the West as Myslinska rightly shows. The Russian attack to Ukraine reconfigured again the boundaries of Western belonging to include Ukraine, the Balkans, Georgia as suggested by Luuk van Middelaar in the Public Lecture 'Europe's new strategic map, one year after the 'Zeitenwende", 15 March 2023, Hertie School, Berlin.

engagement with interaction of 'eurowhiteness' and 'dirty whiteness' and their relation in shaping the western European identity.[4]

Another issue that would merit closer attention in the analysis is the central position of economic vulnerability in the structure of EU free movement law, which is not specific to CEE nationals. Myslinska criticizes the EU framework for being too vague, for not being properly monitored and enforced as transposed in the Member States and for the limitations it poses to the movement of more vulnerable CEE nationals. However, all the points of criticism she identifies hold true for all the precarious EU migrant workers that move between the Member States. The central position of class in the experience of mobility is acknowledged in the introduction and conclusions but concealed in the analysis of the EU legal framework. More emphasis on how class operates in the EU legal system and how it excludes from protection all the vulnerable and precarious EU migrant workers would have allowed for a more nuanced description. Such a nuance would also explain the fact that as regards EU migrant movement, the east vs west divide is perfectly complemented by the south vs north divide and that both these divisions serve to cater the interest of developed neoliberal Member States. Eventually, the EU free movement framework and the inequalities it produces overcome geographic divisions and operate under the labour vs capital division with clear prioritization of the latter.[5]

By this I don't mean to suggest that CEE nationals are not inferiorised in their mobility, but rather that in the EU legal framework it seems that their precarity is more central than their ethnicity. And such precarity is found across all the less developed economies of the EU which have been historically supplanting labour power to the western and norther economies. Relatedly, Myslinska's suggestion that the transitional periods in the South Enlargements could be seen as justified, whereas this is not the same for the transitional periods in the Eastern Enlargement could also be structured in a more convincing manner. It is not the transitional regimes in mobility that made the Eastern enlargement unique, but rather the discretion left to the EU Member States to unilaterally decide how they would apply them. And in my mind, it is this unprecedented unilateral discretion that is more closely tied to a populist rhetoric about the dangers CEE nationals could pose to EU economies. Similarly, it would be helpful to reflect on the differentiation of Eastern Enlargement and the accession negotiations in relation to the Maltese and Cypriot accessions which took place in parallel.

Moving to the second message of this book that that the (EU) west has conceptualised the CEE region as ethnically inferior, not belonging to the EU and not properly white. I would suggest that this shines through Myslinska's captivating analysis of the CEE nationals' treatment in the UK. The relevant chapter situates the CEE assumed inferiority in a longer historical context and eloquently weaves the past to the present equality framework and its application in labour related disputes. However, the reason why the UK is chosen as a case study is not clear. While Brexit brought to the foreground extreme racist discourses against EU migrants, and indeed the chapter does demonstrate the racialized othering that CEE

[4] József Böröcz, '"Eurowhite" Conceit, "Dirty White" Ressentment: "Race" in Europe' (2021) 36(4) Sociological Forum 1116. See also Hans Kundnani, *Eurowhiteness: Culture, Empire and Race in the European Project* (Hurst Publishers 2023).

[5] See Alexander Somek, 'From Workers to Migrants, from Distributive Justice to Inclusion: Exploring the Changing Social Democratic Imagination' (2012) 18(5) European Law Journal 711.

nationals experience in the UK, the author nowhere tells us why it is this (former) Member State and not another state that needed to be examined for the purposes of the specific investigation.[6]

In the concluding chapter, Myslinska suggests that her findings demonstrate that CEE migrants' experiences should be understood through the intersection of CEE nationals' position against the background of broader economic hierarchies in the EU and the historical conceptualisation of the CEE region as inferior. As a reader approaching the book from an EU law disciplinary lens, I am questioning the extent to which this was effectively demonstrated by the book. This is because Myslinska indeed shows that EU interests have historically been prioritised over CEE ones, and that the CEE is construed as equal partner when it fits Europeans aspirations but treated unequally when it doesn't. However, to show that the same applies when it comes to the specific case of mobility across EU borders, more engagement would have been necessary with the element of class. This would both nuance and enrich Myslinska's analysis by connecting the east vs west with the north vs south and ultimately with the labour vs capital division as they are produced and consolidated in EU free movement law. While I was left fascinated and astounded by Myslinska's analysis of the way in which CEE nationals are historically and contemporaneously racialised as inferior others in the context of the UK legal system, I was not equally convinced of how this appeared in the relevant analysis on the EU. Or to put it differently, while understanding that the racialization of CEE nationals is a lived reality across EU Member States, I am not entirely sure that the way in which the EU legal system structures it is so fundamentally different from the racialization of southern Europeans, especially after the economic crisis.

Overall, Myslinska's book aimed to deliver a powerful message about the position of CEE nationals in the EU legal, economic and political system, and position of othering and inferiorisation situated at the intersection of ethnicity, class and mobility. However, if one were to read Myslinska's book as it is, they would discover two separate stories: one about the economic imbalance ingrained in the EU and the vulnerabilities it produces, and a second story about labour exploitation of CEE nationals in the UK and the ways in which the legal system produces and perpetuates it. Both stories are equally powerful and valuable. In my opinion, the reason why it is hard to weave these two stories together is because there is no sufficiently developed theoretical and conceptual language that can explain how and why 'us', the European citizens presumably sitting at the centre of this legal order can simultaneously be 'us', the vulnerable migrants with precarious jobs, constantly racialized and inferiorised as Myslinska demonstrates. To understand these two stories as one, I would advise the reader to read Myslinska's book in reverse. The concluding chapter offers the most powerful introduction to the grave consequences of the racialisation of CEE nationals and to the simultaneous invisibility of this racialisation from the EU discourse. If the reader were to start from there and to then move to how law historically produces and consolidates this inferiorisation in the UK, before proceeding to the bigger pictures of the CEE region, its position to the west after the fall of communism and the pressure to liberalize national economies with practically no agency in the relevant negotiations, then the message would

[6] Dagmar Rita Myslinska, Law, *Migration and the Construction of Whiteness, Mobility within the European Union* (Routledge 2024) 160, in the introduction of the case study, the author mentions that the tensions experienced in the UK are in many ways comparable to other Member States.

come through more effectively. Reading the book in reverse has the potential of making the argument more convincing to an audience well beyond critical whiteness and post-colonial studies. Indeed, readers versed in EU law and EU studies in general would benefit from being exposed to Myslinska's argument.